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Something Rich and Strange: progressive land use regulation and the takings doctrine

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“The key difference between form based codes and conventional zoning is the relegation of regulation by use to a position ancillary and secondary to form. That is as it should be. The evidence over the centuries is overwhelming that as economies evolve, the shell of the world’s most desirable cities and their buildings remains relatively stable. It is the uses they accommodate that change continually. The disposable project is a passing aberration of the twentieth century. The wealth of all nations is embodied more than in any other way, in the constant investment, the lavishing of resources, upon their permanent buildings and cities.”

-Stefanos Polyzoides

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**Introduction**

In the next decade, land use law in America must suffer a sea change. All across the country, legislators are adopting new forms of land use regulation. Population growth, urbanization, global warming and failing infrastructure reinforce the need for a new regulatory approach to land development. This paper casts light on the constitutional hazards associated with the coming change. It is intended to help drafters of new land use law avoid dashing their craft onto uncharted rocky shoals.

Part I provides a summary of the ongoing shift in land use regulation from traditional Euclidean zoning to new approaches such as those embodied by form based codes (FBCs) and development agreements (DAs). Part II provides an overview of FBCs

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2 See Arthur C. Nelson, The Mass Market for Suburban Low-Density Development Is over, 44 Urb. Law. 811, 813 (2012);
and DAs as new types of regulation which exemplify the shift described in Part I. Part III then describes various constitutional challenges these new types of land use regulation may face as applied. Specifically, Part III explains how the application of FBCs may give rise to claims of physical takings, regulatory takings, exactions, and due process violations, and how DAs may give rise to claims of due process violations and exactions. Additionally, Part III suggests ways that the drafters of new land use laws might avoid conflicts with current takings and due process doctrine. Finally, Part IV points out several reasons why exactions doctrine should be modified in light of our present understanding of the challenges associated with land use.

I. A Shift in Land Use Objectives.

While land use regulation has historically been employed to separate incompatible land uses in an ever-expanding built environment, many of today’s challenges require municipalities to accommodate growth more efficiently within a smaller geographical footprint. New approaches to land use regulation are accordingly more systematic in purpose as compared to Euclidean zoning, primarily concerned with the compatibility of neighboring uses. That is, where the harms associated with land development have traditionally been thought of as local in nature, new approaches are aimed at managing the effects of the overall pattern of metropolitan development. This shift in approach is

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3 See generally Timothy Beatley & Richard Collins, Smart Growth and Beyond: Transitioning to a Sustainable Society, 19 Va. Envtl. L.J. 287, 289 (2000); See also Andres Duany, Jeff Speck, Mike Lydon, The Smart Growth Manual (2010);

fundamental to the public purpose of new land use regulation. A brief review of zoning
history in the United States will therefore provide helpful context for the discussion of
legal challenges to new land use approaches, which follows.

Historically, a defining characteristic of zoning in the United States has been the
segregation of low density residential housing from other land uses. Even before the
Supreme Court upheld zoning as a valid use of the police power, land use regulation was
being used to ban harmful and nuisance uses from residential areas. In 1916, the first
zoning ordinances to create exclusively single family zones, one in Berkley, CA and the
other in New York, were both supported by the rationale that certain land uses functioned
compatibly in proximity with one another and others did not. Specifically, multifamily
residential development was considered to be either inherently harmful or, as discussed in
the 1926 landmark case of Village of Euclid, Ohio v. Ambler Realty Co, harmful in the
setting of detached residential districts. The Standard Zoning Enabling Act (SZEA) first

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5 Id.

Los Angeles statute banning brick making from an area which had become primarily residential); See also
Mugler, etc.

7 Parolek at 7; See also Levy, J. Contemporary Urban Planning. Englewood Cliffs, NJ: Prentice-Hall
(1988);

8 Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 394, 47 S. Ct. 114, 120, 71 L. Ed. 303 (1926) at
394-395 (“With particular reference to apartment houses, it is pointed out that the development of detached
house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in
destroying the entire section for private house purposes; that in such sections very often the apartment
house is a mere parasite, constructed in order to take advantage of the open spaces and attractive
surroundings created by the residential character of the district. Moreover, the coming of one apartment
house is followed by others, interfering by their height and bulk with the free circulation of air and
monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their
necessary accompaniments, the disturbing noises incident to increased traffic and business, and the
occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting
from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those
in more favored localities-until, finally, the residential character of the neighborhood and its desirability as
a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which
published in final form by the Department of Commerce in the same year as Village of Euclid, was quickly adopted by a majority of states and utilized to institute widespread zoning policies which systematically segregated low density residential land use from other uses.⁹

Planning policy and zoning law designed to separate low density single family development from other uses including multifamily residential development has contributed significantly to the emergence of the development pattern known as “sprawl.”¹⁰ Generally speaking, “sprawl” refers to land development of relatively low density, which is oriented to automobile transportation and tends to restrict possible land uses to a single use.¹¹ Together with a growing dependance on the automobile, the low relative cost of land outside urban areas, and other factors, zoning intended to separate low density residential development from other uses has made sprawl the dominant form of development in America between World War Two and the present. Since the 1960s, a growing wealth of research has indicated the systematic inefficiency of sprawl development.¹² Specifically, sprawl has been linked to environmental harms such as water pollution and global warming, human health concerns such as childhood obesity, and economic concerns, including failing national infrastructure and the unavailability of affordable housing.¹³, ¹⁴

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⁹ Suburban Nation; Beatley and Collins

¹⁰ Id;
¹¹ Id;
¹² Id;
¹³ See generally, Beatley and Collins; Nelson; Suburban Nation.
In recognition of sprawl’s systematic inefficiency, various theories have been proposed for correcting the objectives of zoning and planning policy. Such theories offer solutions in the form of alternative development patterns and policy to foster such alternative patterns. “Smart growth” and “new urbanism” may be the most well-known of such theories. The two theories are based in similar principles and both have their roots in movements which began in the 1960’s and 1970s. The US EPA’s Smart Growth Office lists ten smart growth principles developed by the Smart Growth Network:

1. Mix land uses,
2. Take advantage of compact building design,
3. Create a range of housing opportunities and choices,
4. Create walkable neighborhoods,
5. Foster distinctive, attractive communities with a strong sense of place,
6. Preserve open space, farmland, natural beauty, and critical environmental areas,
7. Strengthen and direct development towards existing communities,
8. Provide a variety of transportation choices,
9. Make development decisions predictable, fair, and cost effective,
10. Encourage community and stakeholder collaboration in development decisions.

Similarly, the Congress for New Urbanism states in its Charter,

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15 http://www.cnu.org/charter


17 http://www.epa.gov/dced/about_sg.htm
We advocate the restructuring of public policy and development practices to support the following principles: neighborhoods should be diverse in use and population; communities should be designed for the pedestrian and transit as well as the car; cities and towns should be shaped by physically defined and universally accessible public spaces and community institutions; urban places should be framed by architecture and landscape design that celebrate local history, climate, ecology, and building practice.  

Rather than focusing on the localized impact of harmful land uses or the compatibility of land uses, both sets of principles refer to goals of a larger scale. Advocates of Smart Growth and New Urbanism argue that, by regulating development in accordance with such principles, larger populations can be accommodated more economically with lesser harm to the environment, and human health. (Examples of how smart growth reduces harm with regard to pop growth, urbanization, global warming and failing infrastructure.) These harms are not like those supposedly caused by an incompatible use such as a factory in a residential area. They are harms caused by a system of land use and transportation which does not permit efficiency.

To illustrate the essential difference in the harms historically addressed by planning and zoning and those addressed by newer theories like Smart Growth or New Urbanism, consider the following examples. A factory in a residential neighborhood could arguably cause harm by exposing residents to dangerous byproducts of the factory’s production. Or, a commercial strip comprised of many individual shops may arguably cause harm to a residential district by contributing to local traffic, pollution or crime. Each shop in that district could be said to contribute some portion of the traffic, pollution or crime to the total amount caused by the commercial strip as a whole. But it is in a

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18 CNU Charter at http://www.cnu.org/charter

19 See n. 14. (Need more cites for examples of smart growth benefit claims.)
fundamentally different sense that sprawl causes harm to the public. It is true that, just as each shop in the above example could be said to contribute to the overall harm created by the commercial strip as a whole, each housing unit in a system of low density residential land use may be said to contribute some amount of water pollution, traffic, or additional infrastructure cost created by the system. Unlike the example of the commercial strip, however, a system of low-density residential land-use also causes harm, in and of itself by effectively prohibiting necessary elements of effective growth patterns such as multimodal transportation, walkable neighborhoods. These elements of well-functioning manmade environments are also the solutions to the harms caused by sprawl. For example, where sprawl has created a host of problems related to traffic congestion, multimodal transportation is critical to alleviating those harms as well as preventing further harm. Multimodal transportation solutions, however, are not feasible within systems of low density, single use residential development. In this way, the harms of sprawl must be thought of as systematic rather than simply the sum of each unit of sprawl.

Further, traffic congestion itself is a problem which is systemic in nature, not capable of simply being reduced to an aggregate of static contributions from individual units. Within a given system of land use, the addition of one unit of low density residential development may increase traffic congestion more than one unit of multifamily housing in a mixed-use development (in terms of trips or vehicle miles

20 Susan Hanson and Genevieve Giuliano, The Geography of Urban Transportation, (2004); Anthony Downes, Stuck in Traffic (1992); Anthony Downes, Still Stuck in Traffic (2004); others

21 Id.
22 Downes.
travelled) but there is also a systematic effect.\textsuperscript{23} Traffic congestion is in part determined by the relative location of land uses and the mobility and accessibility of the associated transportation network.\textsuperscript{24} Each additional unit of low-density land use may reduce the potential for systematic efficiency with regard to these determinants of traffic congestion. In this sense, each unit of low density residential development causes harm, not only by adding trips and VMTs to the system’s total but also by reducing the overall system’s capacity to be efficient.\textsuperscript{25}

The shift toward policies that seek to prevent such systematic harm has been made more urgent in light of expected population growth, urbanization, the scarcity of affordable housing, failing infrastructure, global warming and other environmental concerns.\textsuperscript{26} For many of the same reasons that sprawl generates traffic congestion, water pollution, higher infrastructure costs and other harms, it also makes it difficult to respond to challenges like urbanization, global warming and failing infrastructure. Tools of Euclidean zoning, originally developed to segregate land uses are not well suited to adapt growth management policies to these new challenges.\textsuperscript{27} Local governments are therefore supplementing or replacing Euclidean zoning with newer kinds of land use regulation. These new progressive land use strategies include, among others, inclusionary zoning to address the scarcity of affordable housing, transit-oriented development (TOD)

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{23} Hanson and Giuliano
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Maryland, Massachusetts, California and others have adopted statewide legislation with the purpose of promoting smart growth principles. See Norman. This paper, however, is concerned primarily with the progressive zoning tools that local governments are using to address the systematic harms associated with sprawl development.
\item \textsuperscript{27} Suburban Nation
\end{itemize}
\end{footnotesize}
programs to provide a range of transportation choices, and planned unit development (PUD) processes to require a mix of uses, compact design and pedestrian access. The next section provides a brief description of two other such progressive approaches to land use regulation: FBCs and DAs.

II. Tools of Progressive Land Use Regulation: Form-based Codes and Development Agreements.

As discussed in Part I, local governments have legislated new types of land use regulation to supplement or replace Euclidean zoning, increasingly ill-suited to modern challenges of land development.28 Some of these legislative solutions primarily represent a shift in the object of land use regulation. For example, unlike Euclidean zoning, FBCs focus regulation on the physical form of land development, rather than the permissible uses for which land may be developed. Other solutions primarily represent shifts in regulatory process. For example, where zoning changes typically present a risk to large mixed use, planned development projects, DAs establish development rights outside of the usual entitlement process.29 Both FBCs and DAs can be used to encourage more efficient development in the face of growing traffic congestion, affordable housing shortages, costly infrastructure needs and other challenges of present day urban growth. This part of the note describes how FBCs and DAs are utilized to that end.


29 Acknowledge that while FBCs primarily represent shift in object of regulation and DAs represent a shift in the development process, FBCs also typically aim to simplify the entitlement process and DAs typically aim to allow for a mix of land uses.
II.A. Form Based Codes.

As considered in this note, FBCs are land use codes that aim to ensure well-functioning urban form throughout the area regulated by the code.\footnote{See generally Parolek.} To achieve this result, FBCs are based on spatial organizing principles, which primarily govern variations in the scale and intensity of development, rather than differences in land uses. That is, where Euclidean zoning primarily regulates the use that may be made of land, FBCs primarily regulate the physical form of development and only secondarily regulate use.\footnote{Id.} Because of this difference, a key characteristic of FBCs is that they allow for much greater flexibility in land use than Euclidean zoning. On the other hand, FBCs impose stricter requirements on the form of development permitted based on where land is located within an FBCs “regulating plan.” Regulating plans, in turn, are developed according to spatial organizing principles, as mentioned above.\footnote{Id.} After describing some characteristics commonly shared by FBCs, this section will provide some specific examples of the various ways FBCs utilize principles of spatial organization to apply form-based regulations to a given geographical area. The main purpose of this section is to convey an understanding of how this FBC approach to land-use addresses the systematic harms of urban sprawl.


While FBCs may govern urban form according to a variety of organizing principles and development standards, effective FBCs usually share certain characteristics. According to the Form-based Code Institute, a well-crafted form-base
code shapes pedestrian-scaled, mixed use development through adherence to the following basic characteristics: FBCs,

- focus primarily on regulating urban form and less on regulating permitted uses,
- are regulatory, rather than advisory,
- emphasize parameters for form with predictable physical outcomes (build-to lines, frontage type requirements, etc.) rather than relying on numerical parameters (FAR, density, etc.) whose outcomes are impossible to predict,
- shape the public space adjacent to development through building form standards with specific requirements for building placement,
- promote and/or conserve an interconnected street network and pedestrian-scaled blocks,
- key regulations and standards to specific locations on a regulating plan.\(^{33}\)

Additionally, the Form-based Codes Institute notes that FBCs commonly include the following elements:

- Regulating Plan. A plan or map of the regulated area designating the locations where different building form standards apply, based on clear community intentions regarding the physical character of the area being coded.
- Public Space Standards. Specifications for the elements within the public realm (e.g., sidewalks, travel lanes, on-street parking, street trees, street furniture, etc.).
- Building Form Standards. Regulations controlling the configuration, features, and functions of buildings that define and shape the public realm.
- Administration. A clearly defined application and project review process.
- Definitions. A glossary to ensure the precise use of technical terms.

The two bulleted lists above are included here to provide a more specific description of what is generally meant by "form-based code."\(^{34}\) The next two subsections, illustrate the way in which FBCs actually govern land development by explaining how FBCs employ regulating plans through organizing principles and specifying how FBCs regulate building form and public form.

Before continuing to an explanation of how FBCs apply form standards to the land, however, the administrative approach of FBCs should be emphasized. In addition

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\(^{33}\) [http://formbasedcodes.org/take-quiz](http://formbasedcodes.org/take-quiz)

to the flexibility afforded by focusing primarily on form rather than use, FBCs provide
great cost savings to developers by providing administrative approval for applications
which conform to FBC requirements.35 Because of the extremely high cost of typical
entitlement processes associated with urban development, administrative approval is a
compelling benefit to developers and landowners faced with a new type of regulation.36
As an example of how FBCs have reduced legal burdens in one major jurisdiction,
consider that applications for zoning designation changes have fallen in Denver from 55
projects in 2009 before the FBC was adopted to only 21 in 2012.37

II.A.2. Organizing Principles.

As noted above, FBCs employ spatially oriented “regulating plans” to designate
locations where different building form standards apply. The rural-to-urban transect
(“Transect”), originally developed for FBCs by Duany Plater-Zyberk & Company
embodies one organizing principle, according to which many FBC regulating plans are

35 See Lawlor at 847, (“As discussed by a wide range of observers of form-based codes and as touched upon
briefly above, regulatory discretion is supposed to be front-loaded at the time of adoption of the
archetypical form-based code. Thus, highly detailed and prescriptive regulations are acceptable to the
regulated because if they are followed by an applicant, there should be little to no discretionary review
when a project comes forward for final approval and permission to build,” citing, Mary E. Madden & Bill
Spikowski, Place Making with Form-Based Codes, Urb. Land Inst., Sept. 2006, at 174, 177.).

36 Id; See also, Peiser, Richard B., with Anne B. Freij. Professional Real Estate Development; The ULI
sources for general proposition that development approval is usually time consuming and expensive for
developers.

developed.\textsuperscript{38} The Transect provides a standardized method for differentiating between the physical intensity and complexity of built forms in the various zones which comprise the Transect. As illustrated by Figure 1, the Transect consists of six zones ranging from the “Urban Core” zone to the “Natural” zone, as well as a “Specialized District” zone for particularly specialized purposes. An FBC based on the Transect would establish urban form regulations for each of these zones.

![Figure 1](image)

By regulating the built form of each zone as it relates to the overall pattern of development, FBCs can holistically address land use issues like the viability of transportation networks, the availability of affordable housing, and the provision of infrastructure.\textsuperscript{39} Each of these issues is highly dependent on the location and density of development throughout a metropolitan area. While conventional zoning practices sometimes attempt to address such issues at a macro scale, FBCs also regulate the details of the built form at the level necessary to ensure adherence to the regulating principles.

\textsuperscript{38} Other organizing principles include street type (e.g., different standards for boulevards, neighborhood streets, or commercial streets), building type (different standards for institutional buildings or commercial buildings), and neighborhood type (identifying form characteristics for particular small geographical areas).

\textsuperscript{39} Parolek, et al.
In this way, FBCs connect systematic land planning goals to specific building requirements that determine the function of human habitat.\textsuperscript{40}

II.A.3. Form Standards.

An FBC based on the Transect would establish regulations for, \textit{inter alia}, building type, building placement, building height and the relationship of buildings to public space for each Transect zone.

\textsuperscript{40} Id.
Figure 2.
TABLE 8. BUILDING CONFIGURATION

<table>
<thead>
<tr>
<th>T2</th>
<th>T3</th>
<th>T4</th>
<th>T5</th>
<th>T6</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lot</td>
<td>Max. height</td>
<td>Lot</td>
<td>R.O.C.</td>
<td>Lot</td>
</tr>
<tr>
<td>1</td>
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<td>3</td>
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<td>4</td>
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<td>5</td>
</tr>
</tbody>
</table>

Figure 3.
Figure 4.
To illustrate the way these building form regulations govern development, consider typical FBC requirements for zones T4 - T6 of the Transect. To ensure the functionality of urban streets for pedestrian and transit uses, FBCs establish standards for sidewalks, bicycle lanes, planter strips, and street lighting. Additionally, typical building form standards for urban zones would regulate maximum allowable distance from buildings to property lines, as well as minimum setbacks, minimum and maximum lot widths, minimum and maximum building heights, ground floor finished level heights and ground floor ceiling heights, building widths and depths, floor to floor heights, the location of parking lots and fenestration coverage for building façades. Thus, instead of requiring a certain use and limiting the form which may be built for that use, FBCs require a certain form, and only secondarily limit the uses which may be made of that form. All of these requirements are designed to ensure desired densities and relationships with regard to buildings and public space that, in turn, determine the capacity for pedestrian access, multi-modal transportation and other goals of theories like Smart Growth and New Urbanism. Figure 2 below illustrates form SmartCode regulations for the T5 zone. Figure 3 illustrates building configuration regulation throughout the Smart Code. Figure 4 illustrates elements of form governed throughout Miami 21.

II.B.1. The Development Agreement Problem

DAs represent another solution municipalities are using to address the systemic harms of sprawl. Compact, mixed use development accommodates growth without the harmful effects of sprawl and allows for more efficient systems of transportation and land use that can help correct the inefficiency of sprawling development patterns. But, as
discussed above, typical single use Euclidean zoning schemes do not permit for this more efficient development. In response, municipalities have developed new more flexible zoning designations and associated entitlement processes to allow for higher density, mixed use development. For example, “planned-unit development” (PUD), allowing for approval of specific plans for integrated mixed-use development, might be made available to a developer in certain areas or zones within a jurisdiction. Often, however, the approval process associated with PUD type development is discretionary, involving somewhat subjective decision making criteria. The relatively high initial costs associated with higher density, mixed use development, in conjunction with the uncertainty of actual development creates significant difficulty for both municipalities and developers seeking to implement plans for large scale, mixed-use, projects. DAs provide a contractual solution to those difficulties.

For developers, inherent uncertainty in the approval process makes it risky to pursue projects which require significant initial investment before and during a lengthy approval processes. In many land use regimes, developers typically risk necessary investments before and during the approval process despite the risk that the municipality will decide not to grant discretionary approval. Additional risk stems from the possibility that the municipality will simply rezone property to a designation which does not allow for the planned development or introduce other regulations that effectively prohibit the plan in which the developer has invested.

For municipalities, present the risk that infrastructure and public services necessary for higher density development will not be delivered in step with the construction of the project. While such development offers long term cost efficiency, it
demands significant initial investment in infrastructure and public facilities, such as street improvements, sewerage or new schools. Developers may be reluctant to help foot the bill for these necessities where approval of the project is uncertain. Further, a project to be built in phases presents the municipality with the risk that key land uses, like a parking garage or an apartment building proposed for later phases will simply be left unbuilt by the developer if the market changes to make such uses less profitable. Conferring development rights for even parts of a larger project therefore involves the risk that infrastructure, public benefits or other elements of the project which the municipality considered when approving an initial plan may not be finished as expected by the municipality. Depending on the development and the circumstances, the negative results from a municipal perspective could include, *ergo gratis*, traffic congestion, insufficient stock of rental housing, a regional excess of retail commercial development, or the loss of community resources without the provision of benefits which made the loss acceptable to the community.

II.B.1 The Development Agreement Solution

Development Agreements, recognized as legal implements of the land development process beginning in the late 1970s, represent a contractual solution to the challenges facing both private developers and the local governments. California, Maryland, Hawaii and [Utah] are among the states to have enacted DA enabling

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41 Queen Anne’s Conservation, Inc. v. County Com’rs Of Queen Anne’s County, 382 Md. 306, 308, 855 A.2d 325, 326 (2004) at 308.

42 For the argument that DAs are regulatory in nature, see Douglas W. Kmiec and Katherine K. Turner, 2 Zoning & Plan. Deskbook § 11:13 (2d ed.) "Under this view, development agreements may "simply constitute a novel packaging of regulatory requirements."
legislation authorizing municipalities to enter into DAs with private landowners. As contracts between local governments and property owners, DAs are generally intended to provide greater certainty to developers faced with risky upfront investments in public infrastructure and to help local governments to ensure timely availability of resources needed to support the additional development.\textsuperscript{43} A contractual agreement helps to solve these problems by conferring vested development rights in exchange for public benefits, in accordance with certain conditions.\textsuperscript{44} Theoretically, such required benefits and conditions may include, among many others, the timely provision of affordable housing requirements, the construction of stormwater infrastructure, intersection improvements, the dedication of open space land, or the contribution of money towards other public improvements necessary to development of greater intensity.\textsuperscript{45}

As a land use tool, DAs essentially represent a change in the entitlement process. They may be executed in conjunction with the rezoning of land, or at a post-zoning stage of entitlement, such as subdivision, site plan review, or at the time of permit approval.\textsuperscript{46} Where informal negotiations are commonly involved with approval processes like planned-unit development applications, DAs formalize negotiations to create greater clarity and predictability for both municipalities and private developers. [\textit{Insert quotation explanation?}] By reducing the uncertainty associated with the entitlement process for


\textsuperscript{44} See generally, Schwartz.

\textsuperscript{45} See Action Apartment Ass'n, 166 Cal. App. 4th at 460; Callies & Tippendorf, citing Haw. Rev. Stat. § 46-121 (1993); Kmiec and Turner at § 11:13; Schwartz at 728.

\textsuperscript{46} John J. Delaney, Development Agreements: The Road from Prohibition to "Let's Make A Deal!", 25 Urb. Law. 49, 52 (1993)
large, high density, mixed-use projects, local governments are better able to foster the type of development that corrects the harms of sprawl.

In summary, DAs create a formalized negotiation process for local governments to ensure that externalities associated with (high density, mixed-use) development are absorbed by the private sector in coordination with the development process. From the real estate developer's perspective, DAs vest a right to develop according to an initial plan. That is, developers' obligations to the municipality are made in exchange for the regulating jurisdiction foregoing the right to change the rules of development, thereby vesting development rights. As discussed above, vested development rights are especially valuable to potential investors considering high density, mixed-use development. Replacing or supplementing the typical entitlement process with DAs allows municipalities that wish to enable such development to do so without undue risk.

**Part III. Takings Challenges.**

Having described the shift away from sprawl land use policies in Part I and provided descriptions of FBCs and DAs in Part II, Part III of this paper now explains a number of constitutional challenges facing FBCs and DAs. Beginning with regulatory takings, then discussing physical takings, due process challenges, and exactions the following explains the potential challenges and provides examples of how each may present a challenge to the application of FBCs or DAs. Additionally, in light of these potential challenges, each section offers guidance for the application of FBCs or DAs.

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47 23 U. Balt. L. Rev. 119, 178 at 124 and n. 18.

48 2 Subdivision Law and Growth Mgmt. § 10:17 (2d ed.).
Section IIIA provides a brief overview of two regulatory takings standards set forth in *Pennsylvania Central* and *Lucas*, then explains how each may be problematic for the application of FBCs. Section IIIB then gives a review of *Loretto v. Teleprompter* and explains how physical takings challenges could also create problems for some applications of FBCs. Finally, Section III.C.1 discusses the exactions standards developed in *Nollan* and *Dolan* and summarized in *Lingle*. A review of the current exactions debate in the lower courts and a brief discussion of the recent *Koontz* case are provided in III.C.2. Section III.C.3 then applies these standards to questions likely to arise regarding the application of FBCs and DAs. Finally, Part IV concludes this note arguing that *Nollan* (and therefore *Dolan*) should be overturned.

III.A. Regulatory Takings Claims

Regulatory takings claims are perhaps the most obvious way in which FBCs may face constitutional challenges. Figure 5 below shows the building standards for the rural...
Figure 5.
transect zone (T1) as established in the Land Development Code of Flagstaff, AZ.\textsuperscript{49} No buildings are allowed. As described below, such a zoning designation generally applied to private property would almost definitely trigger regulatory takings challenges. Other FBC regulations that effects significant downzoning are also likely to face regulatory takings challenges. This section provides an overview of the holdings in two key regulatory takings cases, then describes typical FBC goals that are likely to draw regulatory takings challenges.

In considering regulatory takings issues, as differentiated from physical takings issues or exactions issues, two Supreme Court cases provide the relevant “tests.” The first part of this section summarizes the holdings set forth in \textit{Penn Central Transportation Co. v. The City of New York} and \textit{Lucas v. South Carolina Coastal Council}.


text

III.A.1 Legal Standards

Decided in 1978, \textit{Penn Central} established what remains the default analysis for regulatory takings. In considering whether regulation preventing a 50-story office building over Grand Central Station effected a regulatory taking, the Court held that there was no formulaic test for determining regulatory exactions questions. Instead, Judge Brennan’s opinion identified several factors for making \textit{ad hoc} determinations of whether a particular land use regulation effects a taking. The three factors the Court noted as particularly significant are often referred to as forming \textit{Penn Central’s} “three-part test.” The three factors are 1) the regulation’s economic impact on the claimant, 2) the extent to

\textsuperscript{49} As discussed below, the T1 zone is established in Flagstaff’s LDC but not actually applied to any land. Additionally, the FBC components of Flagstaff’s LDC are not mandatory but rather function as an alternative to underlying zoning. This is to say, the T1 zone, as it currently exists in Flagstaff, is not actually likely to cause any legal disputes.
which it interferes with distinct investment-backed expectations, and 3) the character of the government action.

In addition to the general limitation imposed by *Penn Central*, the Court’s holding in *Lucas* creates a specific restriction on state authority to regulate land use. In *Lucas*, the Court established a categorical rule, making land use regulation that completely deprives an owner of “all economically beneficial or productive use of land” a *per se* regulatory taking. Where the South Carolina Beachfront Management Act (BMA), was found to bar David Lucas from erecting any permanent habitable structures on his land, the Court held that unless South Carolina could cite background principles of state law prohibiting the uses Lucas intended to make of his property, the state would have to compensate Lucas for a taking. In other words, South Carolina had to show that, regardless of the BMA, Lucas’s estate did not include the right to build habitable buildings because underlying principles of nuisance or property law would prohibit that use under the circumstances.

### III.A.2. FBC Applications and Challenges

The T1 zone of the Flagstaff, AZ code shown in Figure 5 is not unique to Flagstaff. The SmartCode, on which many transect-based codes are designed, similarly includes a T1 zone prohibiting buildings as one of two “rural transect zones.” The other rural transect zone, the T2 zone, does not prohibit buildings all together but it does strictly limit allowable development to very minimal form. The SmartCode also includes guidance that T1 and T2 zones should be included in "Reserved Open Space Sectors” as part of the regional planning process, described briefly below.\(^{50}\)

\(^{50}\) See Smart Code Version 9.2 at ix and SC6-SC7.
As discussed in Sections I and II above, strictly limiting development in rural areas is a key goal of Smart Growth and New Urbanism theories. T1 and T2 zones implemented through mandatory (rather than alternative) FBCs are the primary FBC tools for limiting development in rural areas. Regulatory takings challenges are therefore likely to affect mandatory transect-based codes that employ zones like the SmartCode's T1 and T2 zones to limit growth in rural areas.

In jurisdictions where FBCs are implemented as alternative regulations to Euclidean zoning, regulatory takings challenges based on restrictions specific to the FBC are unlikely to arise. Flagstaff's code, for example, operates as a “hybrid code” with Euclidean zoning as the only applicable regulation for rural areas and form-based code available as a regulatory alternative for the downtown area and surrounding urban neighborhoods. As noted in [footnote ], The T1 zone illustrated in Figure 5 is established by the Land Development Code but not actually applied to any area on the zoning map. As a practical matter, the T1 zone in Flagstaff is unlikely to be applied so long as the FBC regulation remains an alternative to the underlying Euclidean zoning, rather than stand alone mandatory regulation. If, however, T1 and/or T2 zones were applied in alternative codes, regulatory takings challenges specific to the FBC provisions would still be unlikely as long as the underlying Euclidean zoning did not also present grounds for a regulatory takings challenge.

In mandatory FBCs employing zones like the SmartCode T1 or T2 zones, however, Lucas and Penn Central challenges present a realistic threat. While the SmartCode provides that T1 zones are intended to be applied in the same way as “Open Space” zones commonly used in traditional Euclidean zoning schemes - to public
property or to private property where owners wish to retain the rural nature of their property - it is unclear that T1 zones will always be applied in this way.\textsuperscript{51, 52} The transect as a concept and the Smart Code more particularly have been invoked in codes drafted by in-house planning staff.\textsuperscript{53} With the growing popularity and the lack of a strong professional association to act as an authority for form based coding practices, continued invocation of transect principles could easily lead to application of the T1 zone in efforts that do not employ the planning and implementation process recommended in the Smart Code. Where T1 zones are applied to private property, the potential for violating Lucas seems relatively clear.

FBC zones like the SmartCode’s T2 zone also represent potential regulatory takings concerns. Even where T2 zones are used in the manner prescribed by the SmartCode’s regional planning process, \textit{Lucas} and \textit{Penn Central} challenges seem likely. Nothing about the T2 zone standards themselves suggests that regulatory takings challenges would differ from those brought in response to downzoning rural areas with Euclidean regulation.\textsuperscript{54} What should be noted about FBCs, though, is that the transition of land to T1 and T2 designations is arguably critical to the systematic purpose of transect-based zoning on a regional scale. The SmartCode, for example, directs that

\begin{itemize}
\item \textsuperscript{51} See SmartCode at SC6;
\item \textsuperscript{52} \textit{Steel v. Cape Corp.}, 111 Md. App. 1, 5, 677 A.2d 634, 636 (1996) ("As we shall indicate, an OS (Open Space) classification was obviously intended for public property or private property whose owners seek to preserve their property’s open space characteristics.")
\item \textsuperscript{53} Colorado Springs, Colorado and Jefferson County, Alabama are among the many municipalities that have adopted a form based code drafted in house. The author does not have detailed knowledge of the planning and implementation process followed by either municipality.
\item \textsuperscript{54} Smart Code at SC6. The SmartCode T2 zone allows one residential unit for every twenty acres and requires a 48 foot front setbacks and 96 foot rear and side setbacks. Other FBCs also limit building types to cottages and single family houses with maximum widths and define maximum lot coverage as 20% of the total lot area.
\end{itemize}
implementation of an FBC begin with regional planning to identify a “Preserved Open Sector” defined as “Open Space that is protected from development in perpetuity” and a “Reserved Open Space Sector” defined as Open Space that should be, but is not yet, protected from development.”  The outline of the Preserved Sector is said to effectively delineate the “Rural Boundary Line” and a “Reserved Open Sector” effectively outlining the “Urban Boundary Line.”  The Rural Boundary Line is defined as delineating “the extent of potential urban growth as determined by existing geographical determinants” and is intended to be “permanent.”  The Urban Boundary Line is defined as delineating “the extent of potential urban growth as determined by the projected demographic needs of a region” and is intended “to be adjusted from time to time.” Specifically, the SmartCode envisions a system of transferred development rights (TDRs) expanding the Reserved Sector overtime through the sale of development rights to “Intended Growth Sectors.” Both the Preserved and Reserved Sectors are to be coded using the T1 and T2 transect zones. The SmartCode also provides that after 20 years, all transect zones except the T1 and T2 zones should be upzoned to the next successive transect designation unless denied by the legislative body. The succession plan reflects the intent to accommodate growth within a smaller footprint by utilizing a well-functioning high density urban form and restricting rural development.

In this way, the planning and zoning process associated with regional FBC goals inherently involves purposeful, large scale downzoning like that associated with Urban

55 Smart Code at SC6.
56 Id at SC6-SC7.
57 Id at SC57.
Growth Boundaries (UGBs) imposed through Euclidean regulation. As demonstrated by copious litigation in Oregon, Colorado, and other areas, *Penn Central* challenges should be expected in such efforts. While courts have demonstrated a propensity for not finding takings under the “three-part test,” it is difficult to predict whether challenges to FBC "downzones" could be successful in some cases given the ad hoc nature of the analysis. The degree of impact necessary for a regulation to be considered as a regulatory taking seems to vary in conjunction with the other two factors of the test. While some courts have suggested a property owner must show his property value to be diminished to *de minimus* value, others have found regulatory takings for economic impact as low as 62% of property value.

To avoid these ordinary kinds of takings, localities can implement rural sector zoning without applying T1 sectors to private land, by providing exception for property where courts may find "investment-backed expectations" and by providing a clear variance process for circumstances where the form-based standards would result in

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58 State law may also impact FBC growth retention goals. Arizona and Florida have each passed state legislation strengthening property owners rights when affected by zoning changes. In consideration of Arizona’s Proposition 207, which empowers landowners to seek compensation whenever land use regulation reduces the fair-market value of their property, Flagstaff was careful not to mandate stricter development standards with its hybrid FBC ordinance. (APA Magazine, 2011) In response to Miami 21, claims for property losses totaling over $150 million were filed under the Bert J. Harris Jr. Private Property Rights Protection Act. (Miami Herald) The Bert J. Harris Act is a Florida state law that provides landowners a cause of action when laws or regulations, as applied, have “inordinately burdened an existing use of real property or a vested right to a specific use of real property.” State laws such as these are reminiscent of Oregon’s now defunct Measure 39 which placed the burden on the government to show that growth boundary driven regulation had not reduced the value of privately owned land.

59 See generally, Georgetown Environmental Law & Policy Institute, Property Values and Oregon Measure 37, Exposing the False Premise of Regulation's Harm to Landowners; Other Measure 49 articles.

60 See Andrew S. Gold, The Diminishing Equivalence Between Regulatory Takings and Physical Takings, 107 Dick. L. Rev. 571, 622 (2003); See also [LU Text from Cannon]; Percival casebook

61 2 Am. Law. Zoning § 16:9 (5th ed.) See also, noting that courts generally consider takings for regulation causing between 60-85% of value.
especially high economic impact to the property. TDR programs may also be critical in discouraging and defending against regulatory takings claims.

With regard to T1 zones, it may be best for localities to simply not use them on privately owned land. While the creation and perpetual preservation of land in a natural state may be an important goal of FBCs, zoning is not a particularly well-suited tool for either of the purpose. Give its legislative nature, zoning cannot be relied on to preserve open space in perpetuity and as discussed above, *Lucas* prohibits land use regulation that completely deprives landowners of all economically beneficial use. Conservation easements, covenants, and other contractual solutions provide better means for perpetual preservation of open land. For land subject to such agreements and for publicly owned land, T1 designation can be a means of making zoning consistent with the limitations established by those other means. Where no such agreement exists, however, T1 designation alone should not be expected to effectively achieve its purpose and may give rise to costly takings claims. If for example, land zoned T1 as part of a subdivision process were eventually sold to another private owner, that owner might successfully bring a regulatory takings suit to "unlock" the development rights of the land as in *Pallozollo*. There, the Court held that a landowner could still bring a valid regulatory takings claim even though the Rhode Island wetlands law, which prohibited development on most of the 18-acre site, was enacted *before* he purchased the property. In *Pallozollo*, the court rejected the *Lucas* claim and remanded for consideration under *Penn Central* analysis since Rhode Island's regulation did not prevent the owner from constructing a $200,000 house. That would not have been the case, had the property been zoned as T1. *Lucas* simply presents too great a threat to T1 zoning should it ever be challenged by a
private owner. T2 zoning or an even more restrictive designation which still allows for some economically beneficial use therefore seems a wiser choice for private land not subject to easement, covenant or other contractual agreement.

Grandfathering provisions and variance provisions are two other important considerations for jurisdictions seeking to implement rural sector zones. In *Penn Central*, the Court emphasized the importance of "investment-backed expectations" suggesting it may weigh heavily in the three part balancing test.\(^\text{62}\) Accordingly, grandfathering provisions, which would exempt property owners likely to be considered as having investment-backed expectations, may be advisable even if it may cause something of a rush to secure the right to develop in areas intended to be preserved. The point at which a property owner is thought to have such investment-backed expectations is not entirely clear and may vary from state to state, depending on whether state law allows for "early vesting" or "late vesting" of development rights. That is, while some state courts have ruled that a landowner who has made significant financial investment in submitting plans and applying for permits still has no vested right to develop until he has "broken ground," other courts have held that development rights vest much earlier in the entitlement process.\(^\text{63}\)

The creation of a *per se* variance for landowners who can show a given level of economic impact would also have a chilling effect on potential *Penn Central* claims. While courts are not likely to hold that a variance for all properties impacted by a certain

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\(^{62}\) *Penn Central* at 124 ("The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.")

\(^{63}\) See Schwartz.
percentage of property value completely insulates a jurisdiction from regulatory takings claims, claims for economic impact below the chosen level may face an uphill battle relying more heavily on arguments related to the other Penn Central factors. Further, a per se variance based on economic impact would allow the locality (and its fact finding administrative land use body) to set the rules for determining economic impact. For example, a state could require that analysis include consideration of positive economic effects of downzoning such as "amenity" and "scarcity" effects. 64

Finally, localities should invest significantly in creating a TDR process as prescribed by the SmartCode. In Penn Central the Court specifically considered the effect of New York's TDR program and held that the rights it provided "undoubtedly mitigate whatever financial burdens the [land use regulation] has imposed."65 The better the TDR program functions as a market for rights to be purchased by property owners in growth sectors, the more the program can be cited as mitigating economic impact on rural sector property owners.

Growth Sector Challenges.

One other way in which FBC regulations may give rise to regulatory takings challenges presents a more novel problem than the "downzoning" associated with implementing rural transect zones. That is, where FBCs establish mandatory minimums for form elements like building height, lot frontage or fenestration, cash-strapped

64 See Georgetown Environmental Law & Policy Institute, Property Values and Oregon Measure 37, Exposing the False Premise of Regulation's Harm to Landowners, (“Economists recognize that regulations can have both positive and negative effects on property values, making it difficult to predict their net effect... The development effect may be offset in whole or in part by the amenity effect of regulation, that is, the "positive externalities" (to use economics terms), or "reciprocity of advantage" (to use legal ones), created by regulation... Apart from amenity effects, negative development effects may also be offset by the positive scarcity effect that development restrictions generate.”

65 Penn Central at 137.
property owners may be financially unable to develop their property. While, in itself, the inability to develop because of standards which impose affirmative duties is not a new theme, FBCs will potentially pose the problem in new ways. Where a poor owner of a home in an area rezoned to allow only office buildings may not have the wherewithal to develop luxury office buildings could usually sell the property, no takings is likely to occur. The fact that the property owner does not have the ability to comply with affirmative land use obligations himself doesn't mean that his property has been taken. Where such rezoning occurs, it is almost always the case that there would be some market for the property in question and likely, the property owner will be able to sell for greater value because of the expanded use.\(^{66}\) In the case of FBCs, however, significant affirmative requirements may sometimes be imposed simply to ensure urban form consistent with the organizing principle of a regulating plan. For example, one story buildings may be prohibited and two or three story structures made the required minimum.\(^{67}\) Where the market for property in the area governed is not strong enough to support two or three story buildings, a poor land owner may find himself with a property he is unable to build on and unable to sell. Where that does not create a hardship for the owner - if, for example, he already owns a home elsewhere and has inherited the property in question - it is easy to imagine denial of a variance despite strong factual evidence that no market exists to sell the property.

\(^{66}\) Similarly, architectural standards might make the cost of building a home too expensive for a poor property owner but it seems relatively unlikely that such standards would preclude him from finding a market for sale of the property.

\(^{67}\) Decisions to require a minimum level of urban form greater than the real estate market will support seem much more likely than a decision to rezone to allow an entirely new more intensive use, like office buildings.
Under a *Penn Central* analysis, such a property owner would seem to have a strong claim since the "economic impact on the claimant" would be substantial in deed.\(^{68}\)

In Miami (allowed to rebuild if not making changes of where there has been a disaster.) In addition to providing variances which would permit exceptions in such cases, jurisdictions should be very cautious about applying affirmative requirements. While form-based code can be an effective way to encourage redevelopment, jurisdictions should be careful not to *require* gentrification or "economic development" before the market will support that change. Alternative codes which allow for development to continue under previously existing Euclidean zoning do not impose such burdens even where minimum building heights exist under the form-based regulations. In mandatory codes imposing affirmative obligations, jurisdictions should use an abundance of caution to ensure that poorer landowners are not unduly burdened in the interest of promoting urban form that the real estate marked will not yet support.

III.B.1. Physical Takings Claims

For mandatory FBCs, physical takings challenges represent the most direct threat to essential FBC objectives. As discussed in Section II above, FBCs regulate urban form elements that determine how well the built environment functions for pedestrian circulation, mass transit, and the provision of other public services. Theories of land use on which FBCs are based hold that ensuring that our built environment functions effectively allows for more efficient use of land on a systematic level. To achieve such

\(^{68}\) Note it does not seem that Lucas's "all economic benefit" was intended to address this type of problem. Economically "beneficial" development would still be possible under the regulations if the property owner had the wherewithal.
goals, however, FBC regulation may sometimes burden private property rights. As discussed below, physical takings challenges seem likely to arise in response where FBCs burdens on private property are mandatory.

III.B.1. Physical Takings Legal Standards

In *Loretto v. Teleprompter Manhattan*, the Court established a rule requiring compensation whenever regulation requires a landlord to suffer a permanent physical invasion of her property, however minor.\(^{69}\) While *Penn Central* provides the default analysis for takings cases and *Lucas* categorically makes regulation that deprives a landowner of all economically beneficial use a *per se* taking, *Loretto* additionally makes permanent physical invasion a *per se* taking. In *Loretto*, the Court held that a state law requiring landlords to permit cable companies to install facilities in apartment buildings effected a *per se* taking.\(^{70}\) The holding is relatively straightforward with the Court considering precedent involving various government occupation of property and finding that “when the “character of the governmental action,” is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.”\(^{71}\) With particular relevance to the discussion of FBCs which follows, *Loretto* based its reasoning in part on a case involving a navigational servitude that would impose temporary physical invasion of property and a

\(^{69}\) *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982);

\(^{70}\) *Id.* See also *Lingle* at 538.

\(^{71}\) *Loretto* at 434.
case involving frequent government flights over a property.\textsuperscript{72} In both cases, the Court ruled that the required easement constituted a takings. The bright line rule on physical invasion was reaffirmed in \textit{Lingle}, discussed below and, most recently, in a 2012 ruling that temporary flooding of property could effect a taking.\textsuperscript{73}

III.B.2. FBC Applications and Analysis

One way in which physical takings challenges present a problem for implementing essential FBC goals stems from the importance of streets and other right of ways (collectively referred to here as "ROWs") in FBC regulation. Where FBC zones like those in T3-T6 of the transect, provide for development of greater intensity than previously applicable Euclidean zoning, they do so in conjunction with regulations that ensure a network of well-functioning ROWs. The way in which street networks and ROWs are designed determines their capacity for supporting pedestrian and bicycle traffic, influencing the speed of automobile traffic, providing on-street parking, mitigating urban stormwater runoff and heat island effects, and other important functions of urban environments.\textsuperscript{74} Figure 6 below illustrates the streetscape requirements in

\textsuperscript{72} \textit{Loretto} at 433, ("Although the easement of passage, not being a permanent occupation of land, was not considered a taking per se, Kaiser Aetna reemphasizes that a physical invasion is a government intrusion of an unusually serious character," citing \textit{Kaiser Aetna v. United States}, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979)) and 430, ("We would not doubt that, if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land. The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it," (quoting \textit{United States v. Causby}, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946))).

\textsuperscript{73} \textit{Lingle} at 538; \textit{Arkansas Game & Fish Comm'n v. United States}, 133 S. Ct. 511, 518, 184 L. Ed. 2d 417 (2012) ("True, we have drawn some bright lines, notably, the rule that a permanent physical occupation of property authorized by government is a taking.")

\textsuperscript{74} Hanson and Giulian;
Livermore, California’s T4 and T5 zones Figure 7 shows the street network in the Warehouse District of Peoria, Illinois as illustrated by the “Heart of Peoria” Regulating Plan.
Figure 6
Figure 7.
When a jurisdiction seeks to implement an FBC in an area where the existing street network is insufficient to accommodate needed streetscape elements or a grid of pedestrian scaled blocks, it is unclear how these integral components of urban form can be coded. Accordingly, it may be unclear how the FBC can be applied at all since the greater intensity of private development permitted under the FBC may be undesirable if the adjacent ROWs lack the capacity to support the transportation systems or other urban functions necessitated by development of such intensity. Consider a corridor of strip malls traversed by a 30-foot wide ROW consisting entirely of a two lane road with no sidewalk. If a jurisdiction wishes to apply an FBC dictating building standards like those in the T4 transect zone, how is the jurisdiction to ensure that the new development will be accompanied by the construction of wide sidewalks, street parking, medians, bike lanes, or perpendicular cross streets? As Joseph Heller might put it, any town suffering from sprawl development can use FBCs to create good urban form, but any town without the ROWs for good urban form cannot apply an FBC.

Issues related to the construction of streets are less likely to occur when rezoning under typical Euclidean systems where building siting, block sizing and street patterns are left to the subdivision process or the process for planned development application. With FBCs however, where rezoning functions primarily to allow a new type of urban form by right, the standards for the street network in a zone are integrally linked to designation of allowable building in that zone. As the paradox is articulated by Boston land use attorney, Matt Lawlor, "[t]he form-based code drafter then has to either have a willing landowner/developer ready to move forward with rezoning and redevelopment of such an area or a municipality ready and willing to move forward with eminent domain..."
takings to create the intended patterns." That is, absent property owners willing to grant easements for streets and sidewalks which would allow a jurisdiction to apply the FBC standards for ROW form, along with building form, a jurisdiction must have a town government willing to take those easements through eminent domain.

To include the additional or wider ROWs on a zoning map without easements necessary to accommodate them would arguably effect a taking. Lawlor points to the town of Hamden, Connecticut as an example of a town facing such a problem. There, the town was concerned with large commercial parcels within the area to be rezoned. Those areas did not include the tight-knit network of streets desired for the T3 and T4 transects and were not expected to be redeveloped in the immediate future. While the town preferred to see such a network of streets developed throughout those parcels along with T3 and T4 buildings, it did not have a way of acquiring easements to allow for additional streets to create that tight-knit grid. The town therefore refrained from giving the FBC standards it had drafted the force of regulation as mapped on a regulating plan out of concern that doing so would give rise to takings claims.75

Had the town proceeded to establish an FBC, including a regulating plan mapping the desired street network or requirements for maximum block lengths or other streetscape elements for which the existing streets were insufficient, how would landowners be expected to make use of their property in compliance with the FBC? While the adoption of the FBC itself may not effect a taking - after all, the code itself

75 Lawlor does not indicate that Hamden was concerned specifically about physical takings claims. Instead, he notes that "[a]lthough planning activities by themselves are very rarely deemed to constitute a taking, if the circumstances indicate that a "substantial and unreasonable interference with property rights" has resulted from the policy treatment of a particular property, a taking may be found." Lawlor at 6 citing Robert Meltz, Dwight H. Merriam, and Richard M. Frank, The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation at 291-292.
requires no action at all - physical takings claims would be possible whenever the ROW requirements shown on the map were actually enforced against a landowner applying for permits governed by the FBC. The issue may be complicated by arguments over the effect of variances but in the end, the physical takings argument remains because, fundamentally, the FBC requires landowners to suffer physical invasion of their property. Assuming no variance process exists, the argument would be clear. In the context of Loretto, it seems obvious that the government could not achieve the purpose of the New York law in question (N.Y.Exec.Law § 828(1) (McKinney Supp. 1981–1982)) there by simply requiring landowners to permit cable facilities to be installed in order to achieve zoning approval.76

Even assuming a town provides for variances to allow landowners to develop their properties free from the FBC's ROW requirements, the fundamental problem remains. Consider the problem again in Loretto context, the government could hardly escape compensation by forcing landowners to apply for variances from the requirement that they permit cable facilities to be installed. If a landowner complies with all of an FBC's requirements except those requiring dedication to an ROW, on what grounds would a variance be denied?77 Where a variance from the ROW requirement is denied to a landowner who has complied with all other requirements of the FBC, a landowner is essentially just being required to allow an ROW to intrude into his property and so could bring a physical takings challenge. Where variances are granted freely, the FBC is essentially impotent to enforce the street requirements vital to the overall purpose of the

76 The law would still be facially invalid.

77 For consideration of a regulatory strategy that offers administrative approval where ROW requirements are met as an alternative to a default process involving a different set of requirements and procedural review, see Section III.C. below on exactions.
FBC. Thus, a landowner can virtually be assured of variance approval or a strong case for a physical takings claim.

Physical takings challenges may also present a problem for the implementation of another important FBC goal. An essential characteristic of FBCs is that they aim to shape public space through regulation of private frontages. To that end, FBCs include affirmative requirements like street walls, swales, landscaping, street trees and sidewalks. In Arlington, Virginia, for example, the Columbia Pike FBC requires streetwalls at the edge of private frontages. Where private property owners must suffer a wall or swale through their property, physical takings questions may arise since in some circumstances, the requirements would arguably be physical invasions of private property. Where a jurisdiction proposes to build, own and maintain such features on private property, the argument would seem strongest since the wall would seem more or less equivalent to Loretto’s cables fixtures. But even where property owners are merely required to build these features themselves, there is still support for physical takings challenges as discussed further below.

In the case of FBCs requiring landowners to construct private frontage elements on private space, physical takings arguments against seem most likely to arise in response to mandatory codes requiring elements of primarily public benefit. In the Columbia Pike

78 Columbia Pike Form Based Code at Definitions, Building Envelope Standards and Architectural Standards available at http://www.columbiapikeva.us/revitalization-story/columbia-pike-initiative/columbia-pike-form-based-code/ But note, Columbia Pike is an optional code as discussed below and is therefore not likely to meet with direct physical takings challenges. Related exactions challenges, however, are possible based on these types of regulations.

79 Loretto would offer support for such an argument at 427, (quoting Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. 166, 167, 20 L. Ed. 557 (1871) ("A unanimous Court stated, without qualification, that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution." Id., 13 Wall. (80 U.S.) at 181.

TOC
FBC example discussed earlier requirements exist as an alternative to the previously existing Euclidean zoning so a property owner need not chose to build a street wall on his property if he does not wish to build under the FBC. Where such regulations are imposed by a mandatory code, however, Loretto questions may arise. Figure 4, reprinted below illustrates the definition of "lot layers" from Article 4, Table 8 in Miami 21. "Private frontage" is defined as "[t]he Layer between the Frontage Line and the Principal Building Facade." the first layer, as illustrated. Sections 5.5.6 and 5.6.6 require the first “layer” of private lots in the T5 and T6 zones to be paved and landscaped to match and extend the enfronting public space. 80 As illustrated by Figure 8, the public space requirements are in turn dictated by Article 8, which requires sidewalks for the "enfronting public space" for street types permitted in T5 and T6. 81 Effectively therefore, landowners are required to extend sidewalks onto private space. Fences are not permitted along the frontage line in Miami 21. 82

80 Miami 21 is generally considered to be a mandatory code. Because of its nonconforming use provisions, however, it is arguably an optional code with regard to takings arguments. See section III.C on exactions for further discussion of optional FBCs and Miami 21.

81 All thoroughfare types permitted in T5 or T6, except "ST – streets” require sidewalks along the public frontage. In turn, this requires sidewalks along private frontages adjacent to those streets.

82 DOUBLE CHECK
Figure 4.
3.3 Public Frontages (continued)

a. (HB) For Highways: This Frontage has open swales drained by percolation, bicycle trails and no parking. The landscaping consists of the natural conditions or multiple species arranged in a naturalistic cluster. Buildings are shielded by distance or trees.

b. (RS) For Roads: This Frontage has open swales drained by bioswales and a walking path or bicycle trail along one or both sides and yield parking. The landscaping consists of multiple species arranged in naturalistic clusters.

c. (ST) For Streets: This Frontage has raised curbs drained by inlets and sidewalks separated from the vehicular lanes by individual or continuous planters, with parking on one or both sides. The landscaping consists of street trees of a single or alternating species aligned in a regularly spaced alley.

d. (DR) For Drive: This Frontage has raised curbs drained by inlets and sidewalks separated from the vehicular lanes by individual or continuous planters, with parking on one or both sides. The landscaping consists of street trees of a single or alternating species aligned in a regularly spaced alley.

e. (AV) For Avenues: This Frontage has raised curbs drained by inlets and wide sidewalks separated from the vehicular lanes by a narrow continuous planter with parking on both sides. The landscaping consists of a single tree species aligned in a regularly spaced alley.

f. (ST) (AM) For Mixed Use Streets or Avenues: This Frontage has raised curbs drained by inlets and very wide sidewalks along both sides separated from the vehicular lanes by separate tree wells with grasses and parking on both sides. The landscaping consists of a single tree species aligned with regular spacing where possible.

g. (BV) For Boulevards: This Frontage has slip roads on both sides. It consists of raised curbs drained by inlets and sidewalks along both sides, separated from the vehicular lanes by planters. The landscaping consists of rows of a single tree species aligned in a regularly spaced alley.

Note: Accessory types for Civic Zones shall be determined based on context and subject to moves.
Whether or not an easement is required for this sidewalk space, most reasonable people will understand that the purpose of a sidewalk running parallel and adjacent to the street is to provide a public walkway. Where that runs through private property, physical takings challenges are a real threat. Essentially, the problem here is the same as described above with regard to requirements for ROWs. While here the regulation takes the form of a standard in the "private frontages" section of FBC regulation (whereas, above, "street standards" requiring sidewalks were discussed), the demand on private space is the same in both cases. While it may seem less problematic to simply regulate the way private space is used, it might equally be argued that creating sidewalks through private frontage requirements more blatantly burdens private property with a public invasion.

In fact, Miami 21 addresses a problem similar to the one confronted by Hamden, Connecticut through direct regulation of private space. Recall that Hamden was concerned about mapping a tight-knit street network onto the regulating plan covering large commercial parcels within which the acquisition or voluntary grant of ROWs was not foreseeable in the immediate future. In Miami, rather than simply establish minimum block lengths in street standards or indicate where ROWs must be located on a regulating plan, the T5 and T6 zone requires "cross Block Pedestrian Passages" where the frontage line is more that 340 feet from a thoroughfare intersection. The T6 zone further requires a "vehicular cross-Block passage" where frontage lines are 650 feet from a thoroughfare intersection. To translate from Miami 21 technical terms, large lots, especially interior lots on larger blocks as shown in Figure 9 would be required to

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83 A Pedestrian Passage is defined as a public Open Space restricted to pedestrian use and limited vehicular access that connects Thoroughfares, Plazas, Alleys, garages and other public use spaces. Minimum width is 20 feet.
provide pedestrian ROWs if in the T5 or T6 zone. In the T6 zone, larger properties on larger blocks, would be required to provide vehicular ROWs.
Figure 9.
The most important difference between a) the Miami 21 cross-Block passage requirements, on the one hand, and b) the establishment of street networks in a regulating plan or the imposition of "street standards" where existing ROWs are insufficient to accommodate those standards, on the other hand, is that the Miami 21 directly apply to private land and therefore more directly raise *Loretto* challenges. In a T5 zone where the FBC requires street standards for which the ROW is insufficient, a landowner may argue that those street standards simply do not (or may not) apply to his property. That is, he may simply seek approval for development plans that comply with all FBC requirements, which directly regulate private property, including lot size and coverage standards, building and parking placement standards, building height and configuration standards and landscaping requirements for private frontage. If he is denied approval based on the absence of ROWs which are shown on the regulating plan, he may argue that the FBC *as applied* effects a physical takings. Similarly, codes may effect physical takings *as applied* where the landowner is denied because his application for development is not compatible with requirements the FBC establishes for ROWs, such as standards for lane or sidewalk widths or standards for maximum block lengths. Under FBCs structured in a way that allows for such arguments, it is logistically possible that application of the FBC (through the rules governing the entitlement process) could allow for development without requiring the landowner to comply with the regulations for ROWs. But in the case of private space regulation like the pedestrian and vehicular passage requirements of Miami 21, the requirements, *on their face*, clearly apply to the landowner's private property. FBCs which directly regulate private space to increase ROW networks are therefore likely to be challenged as *facetally* unconstitutional.
III.B.3. Recommendations

With the functional importance of ROW requirements and the associated risks in mind, code drafters can basically elect one of four alternatives with regard to mandatory codes. First, they could decide to impose a mandatory code directly imposing ROW requirements on private space. Second, they could decide to impose a mandatory code indirectly imposing ROW requirements on private space. Third, they could elect not to impose a mandatory code unless eminent domain can be exercised or landowners are willing to dedicate ROWs. Finally, they could elect not to impose a mandatory code at all but instead impose an optional FBC. As discussed below, the circumstances surrounding implementation of a code may determine how ROW requirements should be imposed and whether a mandatory FBC should be implemented at all.

The approaches taken by Hamden and Miami provide two useful examples for considering these alternatives. In Hamden, the town essentially decided to abstain from imposing a mandatory FBC where landowners were not willing to dedicate private space and the town was unwilling to exercise eminent domain. In Miami, the city elected to implement a mandatory code including ROW requirements directly imposed on private space. Neither jurisdiction elected to impose an optional FBC and neither decided to impose a mandatory code indirectly imposing ROW requirements on private space. While the circumstances surrounding the choices of these two jurisdictions are not fully known to this author, a few basic observations provide useful perspective for considering alternatives related to the implementation of mandatory codes.

84 Lawlor at 845.
Miami 21 is not optional. The largest and probably best known application of form-based code to date does not function as an alternative to prior land use regulation.

City wide, Miami Zoning Ordinance 11000 was replaced by Miami 21, an application of DPZ's Smart Code. Though Article 7 of Miami 21 establishes various procedures for nonconforming structures to be altered without conforming to the code depending on the type of development and extent to which the non-conforming use will be enlarged, Miami 21 establishes form-based standards, which generally must be followed.

The City encountered significant resistance in the process of adopting Miami 21. A 2009 Miami Herald Article proclaimed a 2-2 initial vote by City Commissioners to have killed the new code and later, following approval, claims for property losses totaling over $150 million were filed under the Bert J. Harris Jr. Private Property Rights Protection Act. The Bert J. Harris Act is a Florida state law that provides landowners a cause of action when laws or regulations, as applied, have “inordinately burdened an existing use of real property or a vested right to a specific use of real property.” But those law suits have not been successful and claims overwhelmingly focused on the height restrictions in a particular district of the City – a type of requirement not unique to FBCs.

Despite the contentious nature of its adoption, Miami 21 has not yet been undermined by legal challenges. Since adoption in 2010, over ten million square feet of new construction including 3,000 residential units have already been submitted for approval under the FBC with many projects beginning construction in 2012. Generally,

85 Again, it should be emphasized that, although Miami 21 is commonly considered to be a "mandatory" code, it is not "mandatory" in the absolute sense since non-conforming development is permitted under certain circumstances. Where codes provide the option to develop without complying with the code requirements which arguably effect a physical taking, landowners are not strictly speaking required to suffer a physical invasion. See Section III.C below for exactions arguments which may apply to Miami 21 where courts interpret Miami 21 to be optional rather than mandatory.

86 There are also provisions governing nonconforming structures affected by fire or natural disaster.
Miami 21 has enjoyed support from the development community, while also winning national awards, including the Driehouse Award in 2010 and the APA's National Planning Excellence Award for Best Practice in 2011. Another step forward came with the City Commissioners approved of the Special Area Plan for the "Design District Retail Street" in the summer of 2012. Developer Craig Robbins plans to build a $312 million dollar high end retail project through the district which he has worked to help revive for the past ten years. The Plan, which will be appended to Miami 21, establishes special regulations for approximately 1 million square feet of new development.

In remarking on success thus far, it should be noted that Miami 21 has not yet faced a physical takings challenge and it therefore remains uncertain that the code will withstand such a challenge. Nevertheless, the absence of challenge itself is also remarkable and the on-the-ground success of the Miami 21 implementation suggests that codes which directly impose ROW requirements on private space can be effective at transforming development. In fact, it stands to reason that such codes may be the best suited for citywide applications of FBCs in major cities like Miami. The cost of negotiating dedication of private space for individual ROWs throughout the city may be prohibitive at such a scale. Further, optional codes and codes which only apply ROW requirements to private space indirectly through the process for development application provide less assurance that a functioning ROW network will be developed along with more intensive building development. In a large city, there may be greater consequences for allowing more intensive building development without a network of functioning ROWs.
Two aspects of the Miami 21 implementation may help explain the absence of physical takings challenges. First, as discussed in [note 50], the provisions for nonconforming development contained in Article 7, may discourage physical takings challenges since technically speaking, they allow landowners a way of avoiding the physical invasion of their property. At a minimum all jurisdictions seeking to implement mandatory codes should include such provisions. In addition to the provisions for nonconforming development, the extensive public outreach associated with Miami 21 may help explain the lack of physical takings challenges. According to the Miami 21 website, there have been over 500 meetings held by City of Miami Planning Department staff and consultants, DPZ. The important role of public outreach is central in nearly all FBC literature and may help landowners and developers to understand the economic benefits provided to them by the FBC, thereby reducing the likelihood of lawsuits. Any jurisdiction seeking to impose a mandatory code should include a substantial public outreach program to promote public support for the FBC.

In Hamden, the town elected not to adopt an FBC and instead simply made the FBC standards the applicable guidelines for decisions by the Planning Commission regarding planned development. At the outset, it is important to note that the approach taken by Hamden does not represent an alternative process for applying FBC requirements since by-right development of applications in conformance with form-based standards is a defining characteristic of FBCs. While Hamden's approach may, over time, promote development which is consistent with the goals of Smart Growth or New Urbanism, it does not embody the shift in approach to land use regulation with which this
article is concerned. In this sense, Hamden's approach represents the philosophy that jurisdictions should simply abstain from adopting FBCs until easements needed to accommodate ROW standards are available in the area to be governed by the code. That is, jurisdictions should wait until landowners are willing to dedicate easements or the town is willing to take easements through eminent domain before adopting a code. Unlike the approach taken by Miami 21, such an approach allows governments to avoid the risk of takings challenges and yet make some progress toward improving the form of development within the jurisdiction. In jurisdictions realizing the urgent need for a new approach to land use regulation, however, this philosophy may preclude immediate application of effective new tools.

While this approach may be opposite that of Miami 21 on the spectrum of legal risk (for takings challenges), the Hamden and Miami strategies are similar in what they are not. Neither jurisdiction elected to implement an optional FBC or to implement an FBC where ROW requirements are directly applied only to public space. In between the diametrically opposed alternatives of 1) a mandatory code that requires dedication of ROWs directly through regulation of private space and 2) abstention from applying an FBC, jurisdictions could chose to impose an alternative code or one that does not impose ROW requirements on private space. Neither of these intermediate options would give rise to facial challenges alleging physical takings since neither type of FBC on its face could be said to require landowners to suffer a physical invasion of private space. As explained above, mandatory codes which restrict governance of ROWs to regulation bearing on public space may face as applied physical takings challenges but only where

87 Unlike FBCs, the Hamden approach does not require dedication of private space, while offering administrative approval. Unlike DAs, it does not affirmatively require infrastructure (etc) in exchange for zoning stability.
FBCs are administered in a way that imposes standards for public space on private landowners. Optional codes simply do not require the landowner to comply with any of the FBC standards but rather offer the FBC standards as an alternative set of rules should they landowners wish to apply for development in a way other than that required by previously existing zoning.\(^{88}\)

With either of these intermediate methods of implementation, however, the effect of the FBC on development is less likely to be uniform or immediate. Under an optional code, some landowners may immediately decide to take advantage of the enhanced development possibilities allowed by the FBC while others may wait years. Under a code which does not directly impose ROW requirements on private space, private space may be developed in accordance with the form permitted by the FBC before easements necessary to develop the envisioned ROW network are acquired by the city. As in Hamden, such FBCs depend on developers willing to dedicate necessary ROW space or local governments willing to exercise the power of eminent domain. Hamden's approach like Miami's ensures that urban development envisioned for the FBC will not occur before such acquisition can be expected.

III.C. Exactions

In addition to regulatory takings challenges and physical takings challenges, drafters of progressive land use regulation must be concerned with challenges based in the law of exactions. In the opinion of the author, these challenges are both the greatest threat to the progress of both FBCs and DAs based on case law to date and the least justifiable whether considered from a legal or policy perspective.

\(^{88}\) As discussed below, alternative FBCs may be susceptible to exactions challenges.
III.C.1. Case Law and Analysis

In 1987 the Supreme Court decided *Nollan v. California Coastal Commision*, engendering the modern law of unconstitutional land use exactions. In *Nollan*, the Court held that the Constitution prohibited California from conditioning approval to rebuild a house on the requirement that the property owner dedicate land for an easement allowing public access to the beach.\(^89\) *Nollan* famously created the requirement that such conditions have an “essential nexus” with a public purpose which would allow the state to prohibit a particular use of private property, such as the Nollans’ rebuilding of their house.\(^90\) The Court found that no such nexus existed between the dedication required by California and the harm that would be caused by the Nollans’ proposed redevelopment. Specifically, the California Coastal Commission had found that the Nollans’ proposed redevelopment would “increase blockage of the view of the ocean, thus contributing to the development of ‘a wall of residential structures’ that would prevent the public ‘psychologically ... from realizing a stretch of coastline exists nearby that they have every right to visit.’” The condition imposed on development was the dedication of an easement across the Nollans’ property providing “lateral access to the public beaches” on the other side of their lot. Justice Scalia opined that California’s argument that a nexus existed between the burden the redevelopment would place on visual access and the condition

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\(^{89}\) *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 838, 107 S. Ct. 3141, 3149, 97 L. Ed. 2d 677 (1987) at 838-839. “The evident constitutional propriety [of a condition designed to accomplish the same end as that of a valid police power prohibition] disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury.”

\(^{90}\) Id at 836-837.
requiring lateral access for pedestrians was merely a “play on the word access.”

Without passing on the “required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development,” he found no such connection existed.

Seven years later, the Supreme Court addressed the question left open by Nollan regarding the required degree of connection between exactions and the projected impact of proposed development. In Dolan v. City of Tigard, the Court held that conditions imposed by the City of Tigard, Oregon on the renovation and expansion of a hardware store were unconstitutional exactions. Specifically, the Tigard City Planning Commission had found that Dolan’s proposed development would “generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets” and create increased stormwater flow to an already strained creek and drainage basin. As a condition for the proposed development, Tigard therefore required the dedication of an easement on Dolan’s property within the 100-year floodplain for a storm drainage system and an additional 15-foot strip of land adjacent to the floodplain for a pedestrian/bicycle pathway.

Despite finding that the essential nexus required by Nollan existed between the conditions Tigard placed on development and Tigard’s interest in prohibiting development in the floodplain and additional traffic congestion, the Court nevertheless

91 Id at 838-840 (internal quotations omitted).
92 Dolan v. City of Tigard, 512 U.S. 374, 377, 114 S. Ct. 2309, 2312, 129 L. Ed. 2d 304 (1994) “We granted certiorari to resolve a question left open by our decision in Nollan v. California Coastal Comm’n, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.”
93 Id at 389; 381-382.
held that the conditions were unconstitutional exactions. Establishing a test for judging the relationship between the projected impact of development and conditions imposed on development approval, the Court held that Tigard’s had failed to show that the dedications required as conditions to development were “roughly proportional” to the projected impact of the development. Specifically, Justice Rehnquist held that “[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” He found that Tigard had not met its burden of “demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate[d] to the city's requirement for a dedication of the pedestrian/bicycle pathway easement.” He also held that Tigard had failed to show “the required reasonable relationship between [a] floodplain easement and the [impact on flooding caused by the] petitioner's proposed new building.” That is, because Tigard had not shown why an easement for a public greenway rather than a private one was necessary, the nature of the condition did not bear the required reasonable relationship to the projected impact.

The holdings of Nollan and Dolan were clarified by Justice O'Conner’s 2005 opinion in Lingle v. Chevron U.S.A. Inc. In Lingle, the Court held that “the substantially advances formula” announced in Agins v. City of Tiburon was not an

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94 Id at 387-388, “It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek's 100-year floodplain. Petitioner proposes to double the size of her retail store and to pave her now-gravel parking lot, thereby expanding the impervious surface on the property and increasing the amount of storm water runoff into Fanno Creek... The same may be said for the city's attempt to reduce traffic congestion by providing for alternative means of transportation. In theory, a pedestrian/bicycle pathway provides a useful alternative means of transportation for workers and shoppers: "Pedestrians and bicyclists occupying dedicated spaces for walking and/or bicycling ... remove potential vehicles from streets, resulting in an overall improvement in total transportation system flow.”

appropriate test for determining whether a regulation effects a Fifth Amendment taking.\textsuperscript{96} Writing for a unanimous Court, Justice O'Connor explained that Agins had posited that a regulation of private property “effects a taking if [it] does not substantially advance [a] legitimate state interest[s]” and that the lower courts had taken that statement to its logical conclusion, applying it as a stand-alone test.\textsuperscript{97} In removing the Agins “test” from takings doctrine, the Court made clear that doing so would not affect the holdings of Nollan and Dolan, which both cite Agins significantly.\textsuperscript{98,99} Differentiating the substantially advances test from the rule established by Nollan and Dolan, Justice O'Connor wrote, “[Nollan and Dolan] involve a special application of the ‘doctrine of ‘unconstitutional conditions,’ which provides that ‘the government may not require a person to give up a constitutional right- here the right to receive just compensation when property is taken for a public use- in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.’”\textsuperscript{100}

The doctrine of unconstitutional conditions will be discussed more fully below but, here, it will be useful to note several other points regarding Nollan and Dolan from the unanimous Lingle opinion. First, Justice O'Connor pointed out that in both Nollan and Dolan, the Court held that had the government simply appropriated the easements in question, the action would have been a \textit{per se} physical taking.\textsuperscript{101} The question in each case she tells us was whether the government could demand the same easement as a

\textsuperscript{96} Id at 531; 548.
\textsuperscript{97} Id at 548 quoting Agins, 447 U.S., at 260.
\textsuperscript{98} Id at 546.
\textsuperscript{99} For example, see Dolan at 387 citing Agins at 2141-2142, “No such gimmicks are associated with the permit conditions imposed by the city in this case. Undoubtedly, the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld.” See also, Nollan at 834 and n. 3.
\textsuperscript{100} Lingle at 547, quoting Dolan at 385.
\textsuperscript{101} Lingle at 546, citing Dolan at 384; Nollan at 831-832.
condition for granting a development permit the government was entitled to deny.\footnote{Id at 546-7.}

This phrasing of the issue provides another important point about \textit{Nollan} and \textit{Dolan}. That is, the reasoning of both cases includes the assumption that the government could rightfully deny the proposed development. No conditional approval need have been offered. The Nollans’ redevelopment could have been denied outright without effecting a taking as could have Mrs. Dolan’s application to renovate and expand her hardware store. This key observation will be discussed again below in the argument for overturning \textit{Nollan} and \textit{Dolan}.

\textbf{Lower Court Applications and Koontz}

Not surprisingly, lower courts have struggled over the proper application of exactions doctrine.\footnote{See Jake Hogue, Lines in the Dirt: West Linn Corporate Park, Exactions, and the Effort to Clarify Federal Takings Law, 90 Or. L. Rev. 885, 886 (2012), hereafter “Hogue”; See also, Michael B. Kent, Jr., Theoretical Tension and Doctrinal Discord: Analyzing Development Impact Fees As Takings, 51 Wm. & Mary L. Rev. 1833 (2010), hereafter “Kent”; See also Brief of Respondent \textit{Koontz} at 41.} While the Supreme Court has remained silent as to the scope of exactions cases to which \textit{Nollan} and \textit{Dolan} apply,\footnote{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 (1999) held that the rough proportionality requirements of \textit{Dolan} did not apply to cases in which “the landowner’s challenge is based not on excessive exactions but on denial of development.”} lower courts and scholars have questioned whether exactions analysis should be applied to 1) conditions bearing on personal property or money rather than real property,\footnote{Compare \textit{Ehrlich v. City of Culver City}, 12 Cal. 4th 854, 911 P.2d 429 (1996) (“[I]t matters little whether the local land use permit authority demands the actual conveyance of property or the payment of a monetary exaction.”) with \textit{West Linn Corporate Park, LLC v. City of West Linn}, 428 F. App’x 700, 702 (9th Cir. 2011) cert. denied, 132 S. Ct. 578, 181 L. Ed. 2d 441 (U.S. 2011) (“The Supreme Court has not extended \textit{Nollan} and \textit{Dolan} beyond situations in which the government requires a dedication of private real property. We decline to do so here.”); See also, \textit{McCarthy v. City of Cleveland}, 626 F.3d 280, 285 (6th Cir. 2010) (holding all circuits that have addressed the issue [of monetary obligations] have uniformly found that a taking does not occur when the statute in question imposes a monetary assessment that does not affect a specific interest in property.”) See also Hogue, Kent, Burling.} 2) legislatively enacted conditions as opposed to those imposed through adjudicative procedures,\footnote{Compare \textit{Home Builders Ass’n of Northern California v. City of Napa}, 90 Cal. App. 4th at 196-97 (rejecting the argument that \textit{Nollan} and \textit{Dolan} requirements of nexus and rough proportionality apply to} or 3)
conditions imposed by uniform application rather than ad hoc decision making.\textsuperscript{107} As the unanimous \textit{Lingle} opinion tells us that \textit{Nollan} and \textit{Dolan} were “special applications of the doctrine of unconstitutional conditions [to takings cases],” the importance of these distinctions could lie either in takings doctrine or in the doctrine of unconstitutional conditions.

Any importance of the first distinction – between conditions bearing on real property and conditions bearing on monetary or personal property interests - seems unlikely to stem directly from the doctrine of unconstitutional conditions. Takings doctrine on the other hand may suggest that the right imposed upon should be treated differently (with regard to unconstitutional conditions) when a condition burdens money or personal property rather than real property. For example, the applicability of unconstitutional conditions doctrine may turn on whether a particular interest is protected by the Fifth Amendment’s “Just Compensation” clause. Alternatively, the applicability of the unconstitutional conditions doctrine may turn on how closely the Fifth Amendment protects the burdened interest. That is, unconstitutional conditions doctrine might only apply where a condition would effect a \textit{per se} taking were it imposed independently outside the exactions context.\textsuperscript{108} While decisions finding that personal property and

\textsuperscript{107} Compare \textit{Ehrlich} (holding \textit{Nollan/Dolan} scrutiny was necessary “to ensure that the developer is not being subject to arbitrary treatment for extortionate motives”) with \textit{San Remo Hotel L.P. v. City And County of San Francisco}, 27 Cal. 4th 643, 670, 41 P.3d 87, 105 (2002) (distinguishing cases involving a “generally applicable development fee or assessment.”). See also \textit{McClung v. City of Sumner}, 548 F.3d 1219, 1225, 1227 (9th Cir. 2008) (refusing to consider a development condition under \textit{Dolan} where the matter did not involve an \textit{ad hoc} adjudicative decision but emphasizing that the development condition applied to “all new developments,” which set it apart from obligations imposed in exchange for approval of a specific permit.)

\textsuperscript{108} \textit{Lingle} at 547, (“\textit{Nollan and Dolan} both involved dedications of property so onerous that, outside the exactions context, they would be deemed \textit{per se} physical takings. In neither case did the Court question whether the exaction would substantially advance some legitimate state interest.”).
monetary interests are protected by the Fifth Amendment undermine the validity of the
distinction,\textsuperscript{109} the 9\textsuperscript{th} Circuit recently declined to extend \textit{Nollan} and \textit{Dolan} to conditions
calling for a developer to construct off-site public improvements with its personal
property (money, piping, sand and gravel, etc.).\textsuperscript{110} At present, the Supreme Court has not
yet addressed the issue but it is possible that it will do so in its decision in the case of
\textit{Koontz}, as discussed below.

The second and third distinctions noted above — relating to whether the condition
is legislative or adjudicative in nature and whether the condition is imposed uniformly or
in an ad hoc manner — are often considered jointly but, in fact, they should be
distinguished. While most uniformly imposed conditions may be legislative in origin and
vice versa, legislatively imposed conditions may be imposed on individual landowners\textsuperscript{111}
and uniformity does not necessarily imply legislative origin.\textsuperscript{112} The two distinctions may
be important for different reasons.

With regard to takings doctrine, the justification for excluding legislatively
enacted conditions is doubtful despite popular argument to the contrary. Advocates of a
relaxed standard of review for legislatively imposed exactions have suggested that
\textit{Dolan}'s footnote eight indicates that \textit{Nollan} and \textit{Dolan} analysis does not apply to

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violation of the Takings Clause); see also \textit{Brown v. Legal Foundation of Washington}, 538 U.S. 216, 234-35
(2003) (interest on lawyers’ trust accounts can be, in theory, taken); see also \textit{Phillips v. Wash. Legal
Found.}, 524 U.S. 156, 170, 172 (1998) (interest on lawyer trust accounts amounted to physical property
mining companies did not rise to the level of a \textit{per se} taking because they did not apply to a specific
property interest.)
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\textsuperscript{110} \textit{West Linn} at 702, citing \textit{Lingle}.
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\textsuperscript{111} \textit{Ehrlich}
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\textsuperscript{112} Consider the Commission in \textit{Nollan} uniformly requiring lateral easements from any landowner
proposing to obstruct the public view of the beach.
\end{flushleft}
legislatively imposed exactions.\textsuperscript{113} In pertinent part, footnote eight reads, "[Justice Stevens] is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights."\textsuperscript{114} Given the lack of specific reference to a regulation's legislative origin, footnote eight may also be relied on to argue for excluding administratively imposed conditions of general applicability (from \textit{Nollan} and \textit{Dolan} requirements).\textsuperscript{115}

Read in context of the full footnote and land use jurisprudence law, however, it is clear that footnote eight does not refer to the burden of showing an ordinance or condition violates takings doctrine. Instead, Justice Rhenquist's reference to the burden of proving a regulation "constitutes an arbitrary regulation of property rights" refers to the burden in due process challenges under the Fourteenth Amendment.\textsuperscript{116} First, the sentence cites \textit{Village of Euclid} which upheld zoning as a valid use of the police power

\begin{itemize}
\item \textsuperscript{113} See \textit{Burling} at 405 (citing \textit{City of Napa} at 197).
\item \textsuperscript{114} In its entirety, \textit{Dolan}'s footnote eight reads, "Justice STEVENS' dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. See, e.g., \textit{Village of Euclid v. Ambler Realty Co.}, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city. See \textit{Nollan}, 483 U.S., at 836, 107 S.Ct., at 3148. This conclusion is not, as he suggests, undermined by our decision in \textit{Moore v. East Cleveland}, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), in which we struck down a housing ordinance that limited occupancy of a dwelling unit to members of a single family as violating the Due Process Clause of the Fourteenth Amendment. The ordinance at issue in \textit{Moore} intruded on choices concerning family living arrangements, an area in which the usual deference to the legislature was found to be inappropriate. Id., at 499, 97 S.Ct., at 1935."
\item \textsuperscript{115} Of course, the argument may also be made that a condition which is both legislative and of general applicability should be exempt. Such an argument, however, would depend on articulation of reasons for excluding some legislatively imposed conditions and some generally applicable conditions.
\item \textsuperscript{116} As \textit{Burling} also points out that the use of "most" in "most generally applicable land use regulation" implies that for some legislative zoning regulations, the burden of showing validity could rest on the government.
\end{itemize}
against a due process challenge.\textsuperscript{117} Second, the rest of the footnote goes on to defend shifting the burden for adjudicative exactions cases from an argument that the Court had not shown legislative deference in \textit{Moore v. East Cleveland}. In \textit{Moore}, the Court held a zoning ordinance violated due process protections of the fourteenth amendment as explicitly explained in \textit{Dolan}'s footnote eight. Third, land use doctrine suggests that an independent showing of land use regulation as “an arbitrary regulation of property rights” relates to due process challenges rather than takings challenges.\textsuperscript{118} It should be remembered that at the time of \textit{Dolan}, a landowner seeking to challenge a zoning ordinance under takings doctrine could argue that the regulation did not meet \textit{Agins}’ now defunct “substantially advances” requirement. Following \textit{Lingle}, the validity of the government’s regulatory purpose is relevant to takings questions only as it relates to one prong of \textit{Penn Central}’s “three-prong test.” Likewise the legislative origin or general applicability of a land use regulation is relevant to takings questions only in this limited context. Thus, even if \textit{Justice Rehnquist} intended to refer to the burden of proving arbitrariness to show a takings, the legislative-generally applicable nature of land use regulation is no longer relevant to takings doctrine outside the context of \textit{Penn Central}’s “character of the government action” prong.

In summary, the argument that conditions of legislative origin or general applicability should be categorically excluded from \textit{Nollan} and \textit{Dolan} requirements finds little support in takings jurisprudence. While legislative origin and general applicability remain central to due process challenges, they are only of limited relevance to takings

\textsuperscript{117} \textit{Euclid}. Namely, the question in \textit{Euclid} was, “Is the ordinance invalid, in that it violates the constitutional protection ‘to the right of property in the appellee by attempted regulations under the guise of the police power, which are unreasonable and confiscatory’?”

\textsuperscript{118} See [list SDP and PDP cases from Canon notes]
claims. *Nollan* and *Dolan* apply the doctrine of unconstitutional conditions to conditions which would have “effected per se physical takings”\(^{119}\) and neither legislative origin nor general applicability would be relevant to considering such per se takings. Since, however, the unanimous *Lingle* opinion tells us that “*Nollan* and *Dolan* are special applications of the doctrine of unconstitutional conditions,” perhaps takings doctrine dictates that the *Nollan/Dolan* requirements, including burden reversal should only be relevant to per se takings cases. (Emphasis added.) In cases where it is alleged that conditions imposed would - outside the exactions context - violate *Penn Central* or due process rights, footnote eight does provide strong argument for excluding legislative and/or generally applicable conditions from *Nollan/Dolan* requirements.

Given that the second and third distinctions listed at the beginning of this section seem of only limited importance in exactions doctrine, what importance might those distinctions have in the doctrine of unconstitutional conditions? Generally, the Court’s unconstitutional conditions jurisprudence offers little support for excluding conditions from *Nollan* and *Dolan* requirements because they are legislatively imposed or because they are generally applicable, rather than individually imposed. But the theoretical justifications underlying unconstitutional conditions doctrine remain a subject of debate among legal scholars\(^{120}\)\(^{121}\) and several of the competing justifications may offer support

\(^{119}\) *Lingle* at 546. (“In each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a per se physical taking.”)

\(^{120}\) Burling at n.86 and at 430-431 (“The holdings of several states and the First Circuit confirm that generally applicable legislative enactments are subject to the standards established in *Nollan* and *Dolan,*” citing citing, inter alia, Seawall Associates v. City of New York (striking down permit fee legislatively imposed on hotel owners on Nollan grounds because of a lack of nexus with low income housing for which the fees would be used). J.C. Reeves Corp. v. Clackamas County, 887 P.2d 360, 365 (Or. Ct. App. 1994), (holding “the character of the [condition] remains the type that is subject to the analysis in Dolan’ whether it is legislatively required or a case-specific formulation. The nature, not the source, of the imposition is what matters.”) City of Portsmouth, N.H. v. Schlesinger, 57 F.3d 12 (1st Cir. 1995) certified question answered sub nom. City of Portsmouth v. Schlesinger, 140 N.H. 733, 672 A.2d 712 (1996);).
for considering the second and third distinctions important. Kathleen Sullivan, Richard Epstien and Mitchell Berman have offered theoretical analysis and proposed their own theories. This section briefly discusses how several theories considered by Dean Sullivan may be relevant to the question of whether *Nollan* and *Dolan* should apply to conditions of legislative origin or general applicability.

In her 1989 article on unconstitutional conditions in the Harvard Law Review, Dean Sullivan explored three theoretical approaches reflected in the cases and commentary to that time. She writes that each represents a distinct approach to explaining “why conditions on government benefits that ‘indirectly’ pressure preferred liberties should be as suspect as ‘direct’ burdens on those same rights, such as the threat of criminal punishment.” The first, “coercion theory,” focuses on “the harm of rights-pressuring conditions on government benefits in their coercion of the beneficiary.” The second, “corruption theory” focuses on whether government should be free to make an offer, instead of whether the regulated party is free to refuse it. The third, “commodification theory,” focuses on “whether unconstitutional conditions doctrine should be understood as imposing an inalienability rule upon constitutional rights.” As a justification for unconstitutional conditions doctrine, commodification theory does not

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121 Burling at 412, (“The doctrine of unconstitutional conditions is characterized by competing theoretical justifications, none of which is either universally accepted or in harmony with the case law.”).


123 Sullivan also proposes her own theory to “provide a better account than [the other three approaches],” focusing on “the systemic effect of conditions on the distribution of rights in the polity as a whole.” Sullivan at 1421.

124 Sullivan at 1419.
suggest any importance to the legislative origin or general applicability of conditions.125
But corruption theory and coercion theory offer potential support for excluding conditions of legislative origin and conditions of general applicability, respectively.

Coercion theory has been the dominant theory reflected in the case law and the primary theory considered by academics. Berman has suggested that coercion theory has been prominent in takings cases, in particular.126 Basically, the theory holds that conditions on constitutional rights should be as suspect (or nearly as suspect) as direct burdens on those rights because such conditions penalize those who chose to exercise their constitutional right.127 Sullivan is generally critical of the coercion theory. In addition to citing inconsistent application by the Court, she writes “the Court has never “refuted [the argument that] offers of conditioned benefits expand rather than contract options to the beneficiary class” or - assuming coercion is a valid concern - provided coherent rationale for determining when such offers rise to the level of coercion.128 She also notes that whether a condition should be deemed coercive depends on normative

125 Because commodification theory has little bearing on the distinctions made in the cases, it is not discussed in this section. It is, however, explored more fully in the argument for overturning Nollan and Dolan made in Section III.D.
126 Berman at 89. “Very possibly, the Supreme Court has come closer to grasping the essential logic of coercion in its takings decisions than anywhere else.”
127 Speiser v. Randall, (invalidating a state requirement that World War II veterans take a loyalty oath as a condition of receiving a veterans’ property-tax exemption); Sherbert v. Verner, (invalidating under the free exercise clause a denial of state unemployment benefits to a woman who would not work on Saturday because it was her sabbath, and who was therefore unemployed); Shapiro v. Thompson (holding that denial of welfare benefits to residents who had lived in-state for less than one year penalized the fundamental right to interstate travel).
128 Sullivan at 1428 and at 1437 (citing Wyman v. James, 400 U.S. 309 (1971) (simply stating that acceptance of a condition on a benefit program is a matter of free choice); Monroe, 431 U.S. 494 (upholding conditions on the assumption, even if empirically undocumented, that they will have little deterrent effect on the exercise of rights; Bowen v. Gilliard, 107 S. Ct. 3008 (1987) (suggesting that even if there is a deterrent effect, the government’s responsibility is insufficiently direct)).
judgment of the baseline from which a condition should be deemed a nonsubsidy or penalty.\textsuperscript{120}

Notwithstanding Sullivan’s persuasive critique of the relevant case law, coercion theory offers a potential justification for excluding generally applicable conditions. If it is presumed that conditioned benefits may have a coercive effect (perhaps where characterized as a penalty based on normative judgment), it may be argued that potentially coercive conditions are especially objectionable or dangerous where they target individuals, rather than the public generally.\textsuperscript{130} In this sense, the doctrine of unconstitutional conditions would ensure equal protection where potentially coercive conditions could otherwise be applied unfairly.

Corruption theory is the second theoretical justification analyzed by Sullivan. With particular relevance to this paper, she argues that \textit{Nolan} represents this approach to the doctrine of unconstitutional conditions. Corruption theory is concerned with whether or not the condition for a benefit proposed by the government reflects legitimate legislative process. Essentially, corruption theory suggests that conditions should be subject to as close scrutiny as direct limitations on constitutional rights because conditions often represent the opportunity to indirectly achieve illegitimate government

\begin{footnotesize}
\begin{enumerate}
\item[120] Sullivan at 1420 (“Conclusory labels often take the place of analysis—for example, conditioned benefits are frequently deemed ‘penalties’ when struck down and ‘nonsubsidies’ when upheld.”) and 1436 (“The notion of a ‘penalty,’ in this context, also poses problems; the characterization of a condition as a ‘penalty’ or as a ‘nonsubsidy’ depends on the baseline from which one measures.”) and citing \textit{Harris v. McRae}, 448 U.S. 297 (1980) (reasoning that ‘a refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity) and \textit{Regan v. Taxation With Representation}, 461 U.S. 540 (1983) (upholding federal income tax laws barring nonprofit organizations from using tax-deductible contributions for lobbying activities because a mere ‘decision not to subsidize the exercise of a fundamental right does not infringe the right.’)
\item[130] Thus, generally, the doctrine of unconstitutional conditions would protect against coercion where conditions \textit{penalize} the exercise of constitutional rights based on a normatively determined relative baseline.
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objectives.\textsuperscript{131} It is in this sense that conditions are compared to plans for extortion, as in \textit{Nollan}.\textsuperscript{132} As Sullivan points out, the Court has addressed these "corruption theory" concerns by asking whether conditions imposed are germane to the reasons for which the government could have withheld the benefit altogether.\textsuperscript{133, 134} Basically, the Court has reasoned that where a condition is germane to the reasons for which a benefit could be denied, 1) the greater power to deny the benefit may include the lesser power to impose the condition and 2) the condition is less likely to constitute a penalty and more likely to constitute a nonsubsidy.\textsuperscript{135, 136}

\textsuperscript{131} See Sullivan at 1415, ("[The doctrine of unconstitutional conditions] reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt. Consensus that the better view won, however, has not put an end to confusion about its application.").

\textsuperscript{132} \textit{Nollan} at 837. ("In short, unless 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.'")

\textsuperscript{133} Sullivan at 1457.

\textsuperscript{134} See Sullivan at 1457. Sullivan attempts to differentiate the function of the 'germaneness' question from the function of the standard inquiry into means-ends rationality characteristic of all claims of violation of constitutional right. She writes that where "[t]he standard inquiry into means-ends rationality asks whether, at the appropriate level of scrutiny (minimal, heightened, or strict), the government's action is justified by a sufficient (rational, close, or necessary) relationship to a sufficient (legitimate, substantial, or compelling) government end[, \(u\)]nconstitutional conditions cases have used the germaneness inquiry to resolve a different, prior question: does attachment of the condition to the benefit burden a constitutional right? In other words, in unconstitutional conditions cases, the degree of germaneness helps to determine at the threshold what level of government justification would suffice to uphold a condition, not whether the government has provided that justification." Her analysis on this point, however, does not comport to the rule established in \textit{Nollan} which \textit{requires} that conditions be germane to the benefit imposed. The rule does not subject the regulation to lesser scrutiny if the condition is germane to the benefit. Instead, it simply holds that the regulation is invalid if it is not germane to the benefit.

\textsuperscript{135} See \textit{Posadas de Puerto Rico Associates v. Tourism Co.}, 478 U.S. 328 (1986) (upholding a condition banning gambling advertisement to Puerto Rico residents where Puerto Rico could have banned casino gambling entirely); \textit{Nollan} (striking down condition of lateral easement where it was not germane to denial based on harm to the public's view of the beach. See also, \textit{Western Union v. Kansas}, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting) ("Even in the law the whole generally includes its parts. If the state may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way."); \textit{South Dakota v. Dole} (finding the condition that states raise minimum drinking age to twenty-one sufficiently relevant to the federal interest in highway safety to justify its attachment to federal highway funds) but see \textit{id.} (O'Connor, J., dissenting) (finding the condition unconstitutional on the ground that it was not sufficiently germane either to the purposes of the highway program or to any other federal regulatory power.)

Sullivan is equally critical of corruption theory as she is of coercion theory. She points out that the cases provide no insight as to why the degree of relationship between condition and benefit denial should trigger concerns of illegitimate process. Going farther, she considers several theories of appropriate legislative process and likewise finds none capable of explaining a requirement that conditions be germane to valid reasons for benefit denials. Yet as in the case of coercion theory and conditions of general applicability, it is possible to argue for excluding conditions of legislative origin from \textit{Nollan} and \textit{Dolan} requirements based on corruption theory. Conceding that conditions provide the potential for illegitimate legislative objectives, one might argue that the need for policing such conditions is greater when they are implemented through an adjudicative process rather than a legislative process. Whether that policing should be accomplished by considering how germane the condition is to the benefit which could be denied is another question. Sullivan’s critique of “germaneness” is relevant to that question yet the prior question of \textit{why} such scrutiny would be necessary offers a reason for arguing that legislatively imposed conditions should be considered differently than conditions imposed through adjudicative action.\footnote{As explained in [n.99], \textit{supra} this view of the role of germaneness in corruption theory is not consistent with Dean Sullivan’s view as expressed in her 1989 Harvard Law Review note. At least with regard to \textit{Nollan}, however, Dean Sullivan’s account of the connection between corruption theory and the question of germaneness is flawed. See [n. 99], \textit{supra}.}

Generally then, lower courts and academics may have some reason founded in either takings doctrine or the doctrine of unconstitutional conditions for distinguishing three types of conditions from those made in \textit{Nollan} and \textit{Dolan}. Excluding conditions affecting only non-specific monetary interests may be justified by takings doctrine. Excluding conditions of general applicability may be justified by the coercion theory.
underlying the doctrine of unconstitutional conditions. And excluding legislatively imposed conditions may be justified by the corruption theory underlying the doctrine of unconstitutional conditions.

Whether there is any merit to the three distinctions identified by lower courts and scholars, however, the Supreme Court has yet to rule on an exactions case involving these distinctions. As noted above, however, it may do so in its opinion in the Koontz case for which oral arguments were heard in January, 2013. In that case, a landowner argued that the denial of a permit to develop his land violated the standards required by Nollan and Dolan because approval of that permit was conditioned on an exaction which had no nexus with the impact of the proposed development and was not roughly proportional to the impact of the proposed development. As the landowner has posited the case, the “condition” in question was a monetary exaction imposed by the St. John's River Management District, which required mitigation for the destruction of wetlands that would be caused by the proposed development. Thus, the landowner's petition to the Supreme Court asks “Whether the nexus and proportionality tests set out in Nollan and Dolan apply to a land-use exaction that takes the form of a government demand that a permit applicant dedicate money, services, labor, or any other type of personal property to a public use.”

Additionally, the requirement imposed by the Board is arguably a legislatively imposed condition of general applicability. It is conceivable, therefore that the Court will address all three distinctions discussed above in its Koontz decision.

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139 While the condition in Koontz was merely authorized by statute as in Nollan (where the Court found the condition to have been made through adjudicative action), the statute also includes specific requirements, applicable to all wetlands development as in San Remo (where the Court found the condition at issue to be legislative since the housing replacement fee program required the Department of Building Inspection to deny any application to reduce the housing stock where the housing replacement requirements were not met, yet allowed the applicant to mitigate the loss by payment in lieu fee).
Because of a procedural problem, however, it seems equally likely if not more likely that the Court will dispose of the case without addressing any of these questions. Specifically, the procedural problem is that *Koontz* does not involve a permit approval conditioned on an exaction. Rather, it involves a permit denial, where the landowner and government could not agree on conditions under which the government would provide approval. This seems a distinction without a difference the landowner could simply have accepted the approval based on the condition proposed by the government and then brought a *Nollan/Dolan* challenge to hold the government “liable for a taking.”

Or, as agreed by both sides, the *Koontz* could have simply argued that the denial violated *Nollan* and *Dolan* because the denial was based solely on the failure to meet the government’s proposed condition. Yet this distinction without a difference is featured prominently in the Respondent’s brief, as well as the briefs of amicus curiae in support of Respondent, including the United States, the American Planning and the National Governors’ Association among others.

Further, it seems to have been latched onto by

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140 Petitioner’s Reply Brief, Koontz v. St. Johns River Water Management District, 2013 WL 98694 (U.S.) (U.S., 2013) (“Is it constitutionally relevant for the purpose of applying *Nollan* and *Dolan* that the District’s exaction was imposed as a condition precedent to permit approval and resulted in permit denial? It is not... [I]t makes no constitutional difference that the District “negotiates” with applicants over suggested mitigation alternatives, and leaves it to them to decide the nature and amount of the exactions necessary for permit approval.

See also Resp. Brief at 39. (“This exaction scheme - whereby the District requires applicants to choose their own poison - is an attempt to skirt its constitutional burden of establishing the requisite connection between exactions and the impact of a project. *Dolan*, 512 U.S. at 398. If all permitting agencies constitutionally could employ this artifice for imposing exactions, Nollan and Dolan would be dead letters, for applicants could simply be pressured by “suggestions” to acquiesce in otherwise unconstitutional exactions.”).

141 Brief for the United States as Amicus Curiae Supporting Respondent. Koontz v. St. Johns River Water Management District, 2012 WL 6759407 (U.S.), 1 (U.S., 2012) (“Alternatively, the aggrieved landowner would have the option of challenging the validity of the permit denial, arguing that the agency's action was inconsistent with state or federal statutory or constitutional law...In such a proceeding, for example, the landowner could challenge the validity of the permit denial on the basis of the unconstitutional-conditions rationale that informs the exaction-takings doctrine." (internal citations omitted)).

142 The APA takes a possibly important different angle on this argument turning on factual interpretation. That is, rather than simply argue that Nollan and Dolan cannot be applied to a permit denial, APA emphasizes that *Koontz* "broke off negotiations before any particular condition was demanded by the district.” Brief of the American Planning Association, The City of New York, and the National Trust for...
Justice Scalia at oral arguments. It therefore remains uncertain that the *Koontz* will address even the distinction between real property and private property or money, actually raised by the Petitioner. It is even less certain that the Court will address the distinctions between 1) legislative origin and adjudicative origin, and 2) general application and individual application. Because it is uncertain whether *Koontz* will address whether conditions imposing monetary exactions, legislatively imposed conditions or conditions of general applicability should be analyzed under *Nollan/Dolan* analysis, this paper proceeds under the presumption that uncertainty will remain with regard to the importance of each distinction.

**III.C.2. Application to Optional FBCs**

Where the essential elements of FBCs make them susceptible to takings challenges, optional FBCs do not require landowners to conform to new regulations, much less suffer an invasion of their property. That is, optional FBCs are implemented as a set of regulations parallel to the Euclidean zoning already in place. A landowner is free to continue developing his property in accordance with previous zoning regulations but may at his election chose to instead develop property in accordance with the provisions of

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143 In oral arguments, Justice Scalia, the author of *Nollan* repeatedly asked Petitioner "[w]hat was taken?" See transcript available at [http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-1447.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-1447.pdf). See also Lyle Denniston, Argument Recap: An ever shrinking takings doctrine. (January, 2013) Available at [http://www.scotusblog.com/2013/01/argument-recap-an-ever-shrinking-takings-claim/#more-157843](http://www.scotusblog.com/2013/01/argument-recap-an-ever-shrinking-takings-claim/#more-157843). The question suggests that Justice Scalia had procedural problem in mind, perhaps considering *Nollan* and *Dolan* only to apply where a landowner has actually received conditioned approval or has challenged the validity of denial rather than brought a case seeking to hold the government liable for a taking. Of course, nothing was actually taken in *Dolan* either. In *Dolan*, the landowner had received conditional approval but had not yet begun construction.
The reasons landowners would elect to develop under FBC regulations include the increased intensity of development often allowed by FBCs and the cost savings associated with administrative approval. Even where an FBC requires a landowner to dedicate an easement to public use, these benefits may far outweigh the costs of the dedication.

Additionally, cash strapped jurisdictions could theoretically use optional FBCs to encourage urbanization in suburban areas originally developed with infrastructure suited to auto-dependent transportation systems. In such areas, there are likely to be significant costs associated with improving ROWs to accommodate urban transportation systems that support pedestrian, bicycle and mass transit transportation systems. By making optional FBCs available where public space is improved to be consistent with streetscape standards and other public space requirements of the FBC provisions, jurisdictions can incentivize developers to contribute to the costs of public space improvement.

Unfortunately, though, *Nollan* and *Dolan* make exactions analysis applicable to alternative or optional FBCs. Wherever a mandatory FBC would be susceptible to *per se* physical takings challenges, implementing the code as an optional FBC makes the benefit of developing under the FBC conditional on the physical taking. For

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144 Codes like Miami 21 which are mandatory but include provisions allowing nonconforming development may also be challenged by exactions claims rather than physical takings claims. If these codes escape physical takings challenges and are instead challenged under *Nollan* and *Dolan*, they would seem to be more vulnerable to such challenges than optional codes since they better conform to the feared "extortion" strategy imagined by unconstitutional conditions theory in the land use context. That is, they typically restrict allowable future development to the footprint of existing structures, then provide as an "alternative" the development standards of the FBC conditioned on physical takings.

145 The discussion of optional codes is primarily relevant to urban transect zones since rural transect zones offer little incentive to landowners outside of any TDR system created by the jurisdiction. Thus physical takings typical of urban transects are the conditions of primary concern in exactions challenges to optional codes. Further, takings doctrine provides a strong argument for excluding conditions which would not result in *per se* takings outside of the exactions context from *Nollan/Dolan* analysis. Thus the rare urban transect zone provisions which may raise *Penn Central* challenges - consider FBC regulations affecting portions of a large property - may not be susceptible to *Nollan/Dolan* challenges even where they arise.
example, consider an optional FBC with T5 standards that include the requirement of pedestrian passages, as in Miami 21. Developers in T5 areas would be free to develop according to the standards of Euclidean zoning in place before the approval of the FBC. But those who wish to benefit from increased development standards allowed by the FBC would be required to dedicate easements for the pedestrian passage. This is precisely the choice faced by the Nollans and Mrs. Dolan. In *Nollan*, a lateral easement was required as a condition to building a larger home. In *Dolan*, bicycle path and greenway easements were required as a condition to redeveloping a larger hardware store and parking lot.

The similarity between the choices created by optional FBCs and the choices at issue in *Nollan* and *Dolan*, is deeper than semantic argument. As noted by Sullivan, *Nollan* applied the doctrine of unconstitutional conditions in a way that implicates corruption theory. Specifically, *Nollan* implies that a condition which is not germane to the impact of the proposed development reflects an improper use of the zoning power - namely that the government may have zoned restrictively in the first place "with the goal of trading back greater development rights for easements." Optional FBCs represent an

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146 The even more rare urban transect zone provisions which may raise *Lucas* challenges - consider again FBC regulations affecting a portion of a large property - may also raise *Nollan/Dolan* concerns but these will be so rare that they are not considered here. See *Penn Central* at 130-131, ("Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."). But see also *Palazzolo* at 631, "This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, see, e.g., *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); but we have at times expressed discomfort with the logic of this rule, see *Lucas*, supra, at 1016-1017, n. 7, 112 S.Ct. 2886, a sentiment echoed by some commentators.") (Citing Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation Law,"* 80 Harv. L.Rev. 1165, 1192 (1967); Epstein, *Takings: Descent and Resurrection*, 1987 S.Ct. Rev. 1, 16-17 (1987)).

147 Sullivan at 1475.

148 Id. ([T]he government may have zoned restrictively in the first place with the goal of trading back variances for free coastal access in the future—an arguable abuse of the zoning power.").
implementation structure which would inherently raise that same concern. Jurisdictions could downzone or simply freeze zoning, then offer an FBC as an alternative conditioned on the granting of easements.

The strategy would be perhaps even more overt where optional FBCs are are applied in cash-strapped areas requiring significant public space improvement. As suggested above, optional FBCs could allow jurisdictions to encourage developers to contribute to the costs of improving such space for urbanization by making the FBC available only where public space, including streets, sidewalks and other elements, has been developed to the public space standards of the FBC. Where legislation imposes these conditions directly to the developer, the applicability of *Nollan* and *Dolan* simply depends on whether any of the three distinctions discussed in II.B above are vindicated in the *Koontz* decision or future cases. Where the condition is imposed by simply denying applications for development of private space under the alternative code in areas where public space does not yet meet the FBC standards, exactions challenges could be brought to invalidate the code, *as applied* in the same way discussed in Section II.B with regard to "indirect" physical takings.149

A natural observation regarding the applicability of *Nollan* and *Dolan* would be that applicability itself does not doom the conditions of an FBC to invalidation. Of course, the burden reversal imposed by *Nollan* and *Dolan* makes applicability inherently costly and increases the risk of invalidation. Jurisdictions would need to construct

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149 If approval under the FBC is granted with the condition that improvements to public space be made as in *West Linn*, landowners could bring exactions claims to the code as applied. If, however, applications are denied because developers have not yet agreed to the conditions for improvement of public space, exactions claims would face the same procedural ripeness problem raised by St John's Management District and United States as amicus curiae in *Koontz*. See n. [ ] This distinction, however, would seem rather arbitrary so this author does not recommend it as a longterm strategy for jurisdictions seeking to avoid exactions challenges.
arguments to address Nolan's nexus requirement and confine FBC requirements to those arguments. Additionally, jurisdictions would need to produce or pay for studies regarding the impact of proposed development and the intended effect of conditions like the dedication of an easement of a pedestrian passage, in order to meet Dolan's rough proportionality. And with the burden of proof shifted to the government, jurisdictions implementing optional codes could expect on higher legal bills if Nollan and Dolan are applicable to such codes. But are these additional cost burdens and increased risk of invalidation the only concern regarding the applicability of Nollan and Dolan to optional codes? Unfortunately not.

The applicability of Nollan and Dolan would in fact doom key requirements of optional FBCs. The critical problem arises from the fundamental difference between land use approaches of the past and those of the present. As discussed in Section I, FBCs are designed to foster functional urban systems of development and thereby address the systematic harms of "sprawl development." The requirements of Nollan and Dolan, however, are aimed at evaluating conditions which mitigate localized land use harms. Specifically, Nollan required that the condition imposed by the California Coastal Commission share a nexus with reasons for which the proposed development could have been rightly denied because of the localized impact of the redevelopment on views of the beach. Dolan required the City of Tigard to demonstrate that "the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate[d] to the city's requirement for a dedication of the pedestrian/bicycle pathway easement." In this case too the nature of the harmful impact was local in that the individual development itself would add a particular amount of traffic.
The fundamental problem for FBCs is more easily illustrated by first considering the *Dolan* requirement that the condition be roughly proportional to the impact of the proposed development. An optional FBC faced with a similar requirement would often be unable to comply. As discussed in Section I, FBCs are designed to foster functional urban development and thereby address the systematic harms of "sprawl." Accordingly, the easements required by FBCs do not necessarily relate to the local impacts of individual proposed developments. Rather, in the context of sprawl development patterns, proposed new developments which do not allow for functioning urban systems, perpetuate systematic harms of urban sprawl. A building which will create a certain number of car trips does not on its own create the need for urban transportation systems which will reduce trips by a roughly proportionate number. But each new development which cannot accommodate well-functioning urban transportation systems further weakens the capacity of the system to reverse the harms of sprawl. The condition prevents that harm but it is not clear how the argument should be made that it does so in a “roughly proportionate” way. At the very least, such a requirement places an unreasonable burden on jurisdictions wishing to address systemic harm rather than simple localized harm.

Another way to pose this *Dolan* problem is to characterize FBC conditions as providing a benefit to the system potentially unrelated to any impact of the proposed development in exchange for the right to build more than would typically be allowed. In contrast, *Dolan* characterizes a condition as a benefit to the system in exchange for a benefit to the landowner which would harm the system in absence of the condition. For example, a proposed mixed-use pedestrian oriented development permitted by an FBC
may create very few trips, especially in relation to the number of trips which would be
generated by single-use, auto-oriented development in the same location. Nevertheless,
the provisions of an optional FBC may require the dedication of easements through
private property to enhance the street grid or along private frontage to accommodate the
ROW necessary to functioning urban transportations systems. A jurisdiction attempting
to show that the condition imposed is roughly proportional to the impact of the proposed
development will be attempting to show that which by design is not intended. This
inability to comply with the Dolan requirement highlights the Nollan problem. That is,
where jurisdictions cannot comply with the requirements of Dolan because the condition
is not intended to actually intended to relate to the impact of the proposed development,
the condition may also fail the prior nexus requirements of Nollan.

Where approval under an FBC alternative is conditioned on some requirement not
integrated into the the FBC, Nollan analysis may ask whether the condition is germane to
a reason for which the proposed development could have been denied under the FBC. Of
course, such an analysis would definitively invalidate the condition or lead to asking
whether the FBC requirement which would allow denial under the FBC was itself an
unconstitutional condition. In other cases where the condition is contained within the
code itself, Nollan analysis instead asks whether the condition is germane to reasons for
which the development could have been denied under the Euclidean zoning.

In almost all cases, proposed developments designed to meet FBC standards will
be deniable under underlying Euclidean zoning requirements. But the reasons for which
they would be deniable would not necessarily be related to the reasons for which
conditions are imposed by the FBC. That is, more intensive development proposed in
accordance with FBC standards would likely be deniable based on the underlying Euclidean zoning regulations for an array of reasons, including excessive density, incompatible uses, inadequate parking, and many others. These reasons will not necessarily share any nexus with the provisions of the FBC that effectively condition approval on submission to a physical taking, such as provisions in the standards for private space which require the dedication of land to an ROW on or through private property. As discussed in Section I and immediately above, the reasons for those provisions are often systematic rather than local in nature. Street networks are required for an effective transportation system, not because the new use will increase traffic but because in the absence of effective transportation networks, the system as a whole creates too many trips. Where a proposed development could have been denied for reasons related to traffic and the condition imposed by the FBC provisions will serve to mitigate traffic, the apparent nexus is, in fact, mostly coincidence.

Where municipalities seek to implement optional FBCs, they may avoid takings challenges by not including requirements which would raise Loretto issues if the code were mandatory. That is, just as mandatory codes can avoid Loretto challenges by not imposing requirements which require the landowner to suffer a physical invasion of his or her property, optional codes can avoid Nollan and Dolan challenges by not imposing the same requirements in the optional code. Of course, this will be problematic for the essential goals of FBCs where existing street networks or ROWs are insufficient to support the urban systems that allow for a functioning built environment. Unless landowners willingly grant private space prior to being granted the option to develop under the FBC's form regulations and process, requirements for ROWs and streetscape
may need to be included in the FBC regulations. Additionally, optional FBCs may be able to avoid *Loretto* challenges on what amounts to a technicality. As discussed further below, the recent *Koontz* case hinted that *Nollan* and *Dolan* may be less likely to apply where the development is denied because some condition has not been met rather than approved on a particular condition. If applications made under an optional FBCs are denied because an applicant has not satisfied some requirement for streetscape or ROW space, rather than approved on the condition that certain streetscape or ROW related requirements are complied with, then perhaps optional codes will not raise *Nollan* or *Dolan* issues. In the consideration of this author, however, that distinction without a difference would seem a tenuous theory, on which to build a code.

### III.C.3. Application of DAs and Analysis

As discussed above, DAs seek a contractual solution to modern land use problems. Takings challenges in the DA context sometimes arise where the negotiations leave developers or landowners dissatisfied with the agreement reached. Basically, the concern is that DAs can be used to achieve the kind of extortion that *Nollan* refers to by analogy and then describes in footnote five. A government willing to abuse the zoning power could easily restrict a landowner’s options, then simply trade back development rights by providing and guaranteeing desired zoning in exchange for property, which the government otherwise could not obtain without compensating the landowner.

Despite the clear applicability of the basic *Nollan/Dolan* concern to DA scenarios, many have argued that *Nollan/Dolan* should not apply to DAs because DAs are legislative in nature or because DAs are “voluntary” agreements.\(^{150}\) Further, several

\(^{150}\) Nadler; Callies and Tappendorf; Schwartz; Hammes;
courts have, in fact, held that DAs are legislative in nature and therefore should not be subject to the requirements of Nollan and Dolan. A California court considering a DA made pursuant to state authorizing legislation held that “[a] development agreement is a legislative act (§ 65867.5) and the County’s Board of Supervisors has the discretion to determine what legislation is necessary and appropriate.”

Other state courts, however, have reached different results. The Maryland Court of Appeals, considered the question in Queen Anne’s Conservation, Inc. v. County Com’rs of Queen Anne’s County, 382 Md. 306, 311, 855 A 2d 325, 328 (2004). Finding that the local legislative body had acted in its administrative capacity when enacting the DA, the Court denied appeal from a trial court finding that the plaintiffs had failed to exhaust administrative remedies required by state law. Shwartz and others have also argued that DAs are administrative rather than legislative and so should not be subject to referendum according to state laws which provide for such referendum. In keeping with that characterization, Hawaii and Maryland have statutorily defined DAs as administrative.

151 Santa Margarita Area Residents Together v. San Luis Obispo County, 84 Cal. App. 4th 221, 227, 100 Cal. Rptr. 2d 740, 744 (2000) at 227. See also id. (“Based on these standards, we conclude that the Agreement complies with the development agreement statute, and that the County’s exercise of its legislative power to enter into the Agreement was not arbitrary or capricious.”).

152 See also Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes, 191 Cal. App. 4th 435, 120 Cal. Rptr. 3d 797 (2010), review denied (Mar. 23, 2011) (also upholding a development agreement pursuant to California’s enabling legislation and characterizing the agreement itself as a legislative act); Bldg. Indus. Ass’n of Cent. California v. City of Patterson, 171 Cal. App. 4th 886, 897, 90 Cal. Rptr. 3d 63, 72 (2009), (upholding development agreement as a legislative act and explicitly finding that as such it was not subject to the heightened scrutiny of Nollan and Dolan.

153 Schwartz at 751, (“The adoption of a development agreement should be considered an administrative act and therefore not subject to referendum. A development agreement usually affects a single parcel or a small number of parcels of land, binds specific parties, and includes precise substantive findings concerning the permitted uses of the property, exactions and related conditions, as well as the duration of the agreement. Additionally, development agreements contain procedural requirements such as public hearings and notice. Considered together, these characteristics suggest that development agreements are the products of administrative acts as opposed to legislative acts because they do not involve broad questions of public policy that affect the population generally.”).

154 See also Judith Welch Wegner, Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals, 65 N.C. L. Rev. 957, 999
While the legislative/administrative distinction has not been addressed by the Supreme Court, as described above in Section III.C.1, corruption theory with its focus on illegitimate governmental purpose does provide some support for excluding DAs from Nollan/Dolan requirements where they are determined to be legislative actions.\textsuperscript{156} That DAs are not generally applicable in nature, however, militates against their exclusion under coercion theories which would simply protect against unequal use of potentially coercive conditions.\textsuperscript{157} On the contrary, since DAs are made with individual landowners, Nollan/Dolan theories based on coercion should be particularly concerned with DAs absent a normative argument that DAs are by nature noncoercive.

Arguments against applying DAs to analysis under Nollan and Dolan because they are “voluntary” make just that kind of assertion. That is, DAs should not be considered under Nollan or Dolan because they grant benefits rather than penalize. As noted above, however, arguments about coercion as a justification for or against applying the doctrine of unconstitutional conditions are, as Sullivan says, “inescapably normative.”

\textsuperscript{155} MD LAND USE § 7-302 (Revised by HB 1290 in 2012 following Queen Anne’s County to require DRRAs will be executed by a public principal statutorily required to be an administrative entity with only administrative capacity; Haw. Rev. Stat. § 46-131 (West) (“Each development agreement shall be deemed an administrative act of the government body made party to the agreement.”)).

\textsuperscript{156} See Michael L. Nadler, The Constitutionality of Community Benefits Agreements: Addressing the Exactions Problem, 43 Urb. Law. 587, 602 (2011) at 603, at 1071-1072 (“The most persuasive argument supporting the legislative/adjudicative divide is that when exactions are imposed on a broader scale through legislation, the risk that government will specifically target any individual or group is reduced. As Justice Stevens noted in dissent in Lucas v. South Carolina Coastal Council, ‘one of the central concerns of our takings jurisprudence is ‘preventing the public from loading up on one individual more than his just share of the burdens of government.’ We have, therefore, in our takings law frequently looked to the generality of a regulation of property.’”) (quoting Lucas).

\textsuperscript{157} But see Nadler at 603 quoting Parking Ass’n of Ga. v. City of Atlanta, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting from denial 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. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property.”)
Whether the government’s refusal to enter into a DA without a condition which would effect a taking outside the DA context, is either a nonsubsidy or a penalty depends on the baseline from which one considers the question. Attempts to differentiate the benefits provided by DAs from the benefits provided by other discretionary benefits fall into the same tempting logical trap as attempts to distinguish other benefits.¹⁵⁸

IV. *Nollan and Dolan* should be overturned.

In *Nollan* Justice Scalia mused, “If a prohibition designed to accomplish [a certain] purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.” Such a conclusion would be strange indeed. In fact, beginning with the premise that a certain activity can validly be prohibited altogether, it may seem strange to invalidate any condition which merely expands the right to that prohibited activity. Theories of unconstitutional conditions doctrine struggle with explaining just such a conclusion and in some cases, the theories provide compelling if not totally convincing explanations for the strange seeming doctrine. Considering the rationale of *Nollan*, however, it would seem “Birnam Wood has indeed come to Dunsinane.”¹⁵⁹ The opinion explains the result using conclusory

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¹⁵⁸ See Shwartz at (“Thus, a development agreement may be seen as “convey[ing] a governmental benefit upon the developer, since ‘[i]t is well established that there is no federal Constitutional right to be free from changes in land use laws.’”) As pointed out below, the constitutional nature of unconstitutional conditions questions derives not from the benefit offered but from the right burdened by the condition - the request that the landowner give up an easement in exchange for the benefit. In *Nollan*, it was presumed that the landowners did not have a right to develop in the way they proposed. The exception which would allow them to do so was therefore equally a “benefit.”

¹⁵⁹ The words of the Bard as quoted by Maryland Judge William McWilliams in *Habliston v. City of Salisbury*, 258 Md. 350, 352, 265 A.2d 885, 886 (1970), “Birnam Wood has indeed come to Dunsinane. Appellants importune us to… set at naught an ordinance of the City of Salisbury reclassifying a 16 acre
statements and plainly flawed logic. Furthermore, even if we infer a logically sound explanation, that explanation fails to justify the rule established in Nollan in part due to the socioeconomic nature of the right protected by the “Just Compensation” clause. That is, since the Fifth Amendment protects not the right to be free from takings but the right to be free from takings without compensation, theories regarding coercion and commodification are undermined by the transactional nature of the condition-benefit paradigm. In short, the decision in Nollan was wrong. Where modern land-use problems and the tools developed to address those problems offer compelling policy reasons for overturning Nollan (and Dolan), the Nollan opinion’s flawed reasoning and rickety theoretical foundation provide the means to overturn those decisions.

A central question in unconstitutional conditions doctrine is whether the greater power to withhold a gratuitous benefit always includes the lesser power to grant it on condition. The Nollan opinion acknowledges that in some cases, the greater-power does in fact include the lesser-power, holding that “the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end.” But the acknowledgement leaves open the question of whether the lesser-power is included in the tract from ‘Industrial’ to ‘Residential B’… Perhaps it is just as odd that we think they have the right of it.” (holding that rezoning of an individual parcel of property violated Maryland's “change or mistake rule.”).

See Sullivan at 1458.

See also Burling at 413. Burling mischaracterizes the role of the question in the doctrine to suggest that inclusionary zoning ordinances should be invalidated under the doctrine of unconstitutional conditions because there is “no 'greater power [to deny a building permit for affordable housing related reasons]’ in the first place.” The argument is flawed in that it contradicts its premise. As Burling notes "[t]he doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.” (quoting Sullivan). Thus the doctrine of unconstitutional conditions presumes the greater power, yet holds that the lesser power should nonetheless not be included. It cannot therefore be invoked to argue that a “lesser power” violates the doctrine because there is no "greater power."
greater power when the condition "does not serve the same end." Nollan answers this question with the conclusory statement that "the evident constitutional propriety [of a germane condition] disappears if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." 162

The statement reflects a view that germaneness is a logical determinant of constitutionality 163 and is conclusory in that it essentially reasons that a condition is unconstitutional if it is not germane because it is not germane. The only support given for the position is the claim that a condition which is not germane to the purpose of the building prohibition is the same as a law "which forb[ids] shouting fire in a crowded theater, but grant[s] dispensations to those willing to contribute $100 to the state treasury." But Justice Scalia's rhetorical analogy to a government law conditioning exemption from a prohibition on shouting 'fire!' in a crowded theater to those who pay a $100 fee is entirely inapposite. 164 It confuses a constitutional right permissibly burdened with a constitutional right implicated by the condition imposed. In Justice Scalia's analogy, no constitutional right is burdened. The condition might therefore be inappropriate but it does not invoke the doctrine of unconstitutional conditions. Simply put, people who do not meet the government condition are not made to sacrifice any constitutional right. They never had any right to shout “fire.” A better analogy would involve an application which could rightfully be denied being made conditional on the

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162 Nolan at 837.  
163 See Berman at at 91. "Although Justice Scalia correctly understood which discrete things should be assessed for germaneness, and also appreciated the basic relationship between germaneness and coercion, he mistook an inferential relationship for a logical one."  
164 Nolan at 837. "When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban."
relinquishment of a right which may not be burdened directly. For example, consider on-air speech which could validly be prohibited as offensive. If the government were to decide to allow the speech in question to be aired but only under the condition that it did not contain speech which usually would be protected as expressive conduct, then a question of unconstitutional conditions may arise. Where the condition related to expressive conduct had no nexus with the government’s interest in prohibiting the offensive speech, a violation would exist under the reasoning of Nollan. The doctrine of unconstitutional conditions applies in Nollan not because the condition burdened the Nollans’ right to develop as proposed but because it burdened their right to receive just compensation for a taking of an easement. If the condition had required her to abstain from building a fence rather than dedicate an easement, the case would not have implicated the doctrine of unconstitutional conditions.

Justice Scalia’s analogy thus switches the benefit/condition structure confusing the constitutional right supposedly burdened by the condition with the benefit conditioned. In keeping with the structure of the analogy, Nollan’s condition would be potentially invalid because it allows the Nollans to expand their constitutional right to develop their land only if they submit to the Coastal Commission's condition. In so confusing the issue, the opinion seems to explain why it is constitutionally important that a condition be germane without actually doing so. The apparent explanation in-turn implies a logic-based answer to the question of why the greater-power should not include

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165 Nollan at 834 (“Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome.”) See also, Lingle at 385, quoting Dolan (“[Nollan and Dolan] involve a special application of the ‘doctrine of ‘unconstitutional conditions,’ which provides that ‘the government may not require a person to give up a constitutional right- here the right to receive just compensation when property is taken for a public use- in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.’”).

166 Nollan at 836.
the lesser-power without actually addressing that question either. But when the trick is undone, we are left again with the question originally posed, *ibid est*, "presuming a prohibition is a valid use of the police power and not a taking, why should a condition which provides the landowner an exemption to that prohibition sometimes be considered a taking?"\(^{167}\)

Though *Nollan* rests its holding that constitutional impropriety exists wherever a condition implicating a constitutional right is not germane to a benefit provided on a flawed argument, we may yet attempt to infer a logically sound explanation from the reasoning. The real reasoning may be buried in *Nollan's* footnote five which provides,

"One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would result from more lenient (but nontradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not justify the imposition of unrelated conditions\(^{168}\) for eliminating the prohibition, but positively militates against the practice."

As Berman sees it, this explanation reveals concerns that when germaneness is lacking, the condition is coercive ("extortion").\(^{169}\) In Sullivan's account, this reasoning is described as consistent with corruption theory.\(^{170}\) Considering both theories in the context of footnote five, corruption concerns can be seen as including coercion concerns -

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\(^{167}\) See Berman at 94 ("[T]he Court sidestepped this difficult yet essential analysis by misconceiving the inferential relationship between germaneness and coercion as a necessary one.").

\(^{168}\) In the context of a rightful prohibition, a condition may better be understood as "offered" as a term by which the prohibition may be avoided rather than "imposed." This semantic difference draws attention to the question of whether such a condition needs to be justified.

\(^{169}\) See Berman at 91. See also Berman at 92 ("This is not yet to conclude, however, that *Nollan* reached the wrong outcome. *Nollan* is a difficult case because of the danger, identified by the majority [in footnote five]... [E]ven though the majority asserts, without adequate basis, that the California Coastal Commission was not really animated by legitimate purposes... it is right to worry that a rule sanctioning the type of trade proposed in *Nollan* would induce states to contrive land-use regulations they would not otherwise find justifiable...as a chip with which to secure other interests they could not directly pursue.

\(^{170}\) Sullivan at 1476 and 1494.
an illegitimate legislative purpose to coerce - whereas coercion concerns may arise from even where government zoning purposes are legitimate - effective extortion rather than purposeful extortion. In fact, Sullivan's critiques of both coercion and corruption theories apply to the holding in *Nollan*.

Where coercion is achieved through illegitimate legislative purpose - in other words, corruption - a germaneness solution attempts to restrict legislative capacity to coerce. By disallowing conditions which are not germane to benefits, the rule established in *Nollan* seeks to prevent governments from successfully engaging in overly restrictive zoning schemes not truly motivated by land use concerns, as described in footnote five. But, as Sullivan explains, “theories of germaneness are both significantly over- and underinclusive in relation to unconstitutional conditions problems.”\(^{171}\) The way in which *Nollan* is overinclusive is best illustrated by the facts of the case. Despite the majority's assertion that the Commission's purpose in denying the Nollans a permit was “the obtaining of an easement to serve some [nongermane] purpose,” the record in *Nollan* indicated legitimate motive for the California Coastal Act and the pursuant denial by the Commission. Thus, the focus on germaneness encourages invalidation even where no illegitimate government intent exists. The problem is exacerbated in *Nollan* because of the mistaken reliance on a logical connection between germaneness and corruption. Applications that simply treat germaneness as a heuristic device which calls for higher scrutiny due to a high correlation between nongermane conditions and impermissible governmental purposes, suffer from this problem of overinclusiveness. But the overinclusiveness in such applications only requires nongermane conditions to show

\(^{171}\) Sullivan at 1475.
legitimate government intent. *Nollan* is far more overinclusive in that it invalidates all nongermane conditions in all cases whether or not there is corruption.

Likewise, *Nollan* can also be realized as underinclusive by remembering that germaneness is not a logical indicator of constitutionality. An exaction which is germane to a prohibition, for example, the dedication of a viewing spot blessed by Scalia, could nonetheless be coerced by illegitimate legislative purpose if the government abuses the zoning power to legislate for view protection where view protection is not actually desired. An easement for lateral access and an easement for viewing affect the landowner's constitutional interests in the same way. Both require the landowner to suffer a physical invasion of property. But even if the condition for the viewing easement was imposed in a case involving abuse of the zoning power as described above, it would be permissible under *Nollan* while the lateral easement were not other would not.\(^{172}\)

In light of these problems, we see that "enforcing germaneness has more to do with internally disciplining legislative behavior than it does with protecting constitutional rights."\(^{173}\) Moreover, we see that *Nollan* is a particularly ineffective mechanism for disciplining legislative behavior because it does not even inquire as to the legitimacy of government process but overinclusively invalidates all nongermane conditions. There is no room for a rule designed for ineffective activist judging in constitutional jurisprudence.

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\(^{172}\) See Berman at 92. ("[I]magine this hypothetical rejoinder from the California Coastal Commission: We care about the public's ability to see the beach. But we care about other things too—including, for example, making existing public properties on the shorefront more easily accessible. Alas, we cannot always advance both interests. In the Nollans' case, we were willing to exchange some satisfaction of the first interest to realize a gain in the second. The Nollans preferred not to make that trade. That's fine. But once they rejected our offer we remained obligated to promote the first interest by denying their permit. The fact that we were prepared to make a trade does not mean that when our offer is rejected and we proceed with our initial plan the interest asserted is a sham.")

\(^{173}\) Sullivan at 1439
But it may also be argued that *Nollan* is more concerned with coercion theory than concerns regarding abuse of the zoning power as indicated in footnote five. As noted above, coercion does not require corruption since the government may inadvertently coerce right holders to yield their constitutional rights without abusing the zoning power as described in footnote five. For example, a government concerned with problems associated with liquor stores could downzone to address the problem and so create some financial difficulty for liquor store owners in the area downzoned. Where the government offers exemptions on the condition that the shops remain open on Saturdays and Sundays, the condition may coerce liquor store owners to give up religious freedoms and thus implicate the doctrine of unconstitutional conditions. An understanding that does not separate coercion concerns from corruption concerns may this this view of *Nollan's* inferred justification. Under such a view, government action may be thought of as impermissible because it coerces.

If this is the view, the justification is subject to general criticisms of coercion theory as noted by Sullivan. Essentially, theories of coercion turn on normative judgments as to whether denial of a discretionary benefit in question should be considered a penalty or a non-subsidy.\textsuperscript{174} Such judgments are "inescapably normative."\textsuperscript{175} In the case of *Nollan*, a coercion theory justification implies that denying the Nollans an exemption to the restriction on development amounted to a penalty. Yet nothing in the opinion even hints at a finding that the restrictions placed on the Nollans by the California Coastal Act were capable of producing a coercive effect. In fact, the CCA only

\textsuperscript{174} Sullivan at 1439 ("This penalty/nonsubsidy distinction has increasingly determined the outcomes of unconstitutional conditions challenges. 'Penalties' coerce; 'nonsubsidies' do not.")

\textsuperscript{175} Sullivan at 1446 ("[T]he concept of coercion is inescapably normative. This observation has prompted some to abandon any attempt to distinguish coercive from noncoercive offers in the first place, and others to attempt to specify the norms that would make such a distinction meaningful.")
permitted the Council to place public access conditions on the permit "where the proposed development would have an adverse impact on public access to the sea." The Nollans could therefore have rebuilt their house in any way that did not increase its impact at the expense of the public's access to the sea.

A greater problem is that the rule in *Nollan* does not permit of a solution which addresses the coercion problem. While it is theoretically possible to build a sound coercion-based justification for unconstitutional conditions doctrine, *Nollan* precludes the possibility of applying the doctrine consistently with a coercion justification. The reason again is that a coercion justification of *Nollan* would argue that lack of germaneness logically "converts" a condition to coercion. But, as illustrated above, theories of germaneness focuses on governmental process. They do not inquire into the effect of the benefit (on which the condition is placed) on the right holder. At best, germaneness therefore may be used as a heuristic device which requires higher scrutiny for nongermane conditions because experience suggests that germaneness effective indicates the risk of coercion. But even if the Court were to develop a some method for determining coerciveness, *Nollan* would not afford the opportunity to employ that method for nongermane conditions. Considering these flaws, coercion theories cannot provide a satisfactory explanation for Nollan's application of the doctrine of unconstitutional conditions.

As explained above, *Nollan's* answer to the question of why the greater-power should not include the lesser-power is based on flawed logical reasoning. And even inferring other potential logically sound reasons for reaching such an answer, *Nollan*
establishes a rule which cannot be justified by those reasons. In addition to these reasons for overturning the decision, yet another more fundamental problem exists with the finding in Nollan. The socioeconomic nature of the right protected by the Just Compensation Clause undermines both corruption and coercion theory reasons for applying the doctrine of unconstitutional conditions to conditions implicating the right.

Even assuming conditions are universally coercive - whether through corrupt or legitimate use of government power - we may ask ourselves what constitutional reasons supply our concern about coercion. In the case of other constitutional rights, coercion concerns represent not merely the concern that a right holder will be coerced into giving up a right for less than he would under noncoercive conditions, but also the concern that the right holder will be coerced to transact for his rights at all. If the government offers a grant or tax rebate on the condition that right holders give up their right to criticize the government, the constitutional right to free speech is threatened not simply because the right-holders will not be fully compensated by the amount offered, but because the government has coerced right-holders into transacting for free speech at all.

Commodification theory explains the doctrine of unconstitutional conditions by characterizing conditions-benefit transactions bearing on constitutional rights as inherently threatening the inalienability of those rights. Scalia’s "fire in the theater" fee

176 Perhaps coercion and corruption concerns support an argument that nongermane conditions should be subject to stricter scrutiny if some convincing evidence supports such a heuristic approach. But Nollan does not establish a rule that nongermane conditions should be subject to strict scrutiny. Rather, it establishes a prophylactic rule that nongermane conditions are per se unconstitutional and that germane constitutions should be subject to further scrutiny.

177 See Sullivan at 1476-1489 on commodification theory (explaining theories of paternalism, efficiency, distribution and personhood in the commentary but noting these theories have not been explicitly referenced by the cases.)

178 Id.
analogy engenders commodification theory fears related to a hypothetical law which inalienable rights like the right to free speech are bought or sold.\textsuperscript{179}

Commodification concerns do not apply, however, with regard to the Fifth Amendment right, which specifically supplies a right to be compensated.\textsuperscript{180} \textsuperscript{181} That is, the Fifth Amendment right to be justly compensated is not an inalienable civil right in the way that free speech is but rather a socioeconomic right inextricably connected to a commodity - property. Since unconstitutional conditions problems invariably involve a transaction or potential transaction, landowners in these problems are compensated in some way when they accede to conditions requiring the dedication of property or property rights. The only constitutional question is whether compensation was 'just.' That is, the constitutional concern is whether the benefit provided sufficiently compensates the right holder for the land taken by the allegedly coercive condition. The Fifth Amendment right to compensation is infringed only when the compensation is not just.

An unconstitutional conditions claim must therefore first show that the benefit provided does not constitute just compensation for the property required by the condition.\textsuperscript{182} For where the benefit does provide just compensation, the condition does

\textsuperscript{179} See \textit{Nollan} at 837.
\textsuperscript{180} USCA CONST Amend. V. “[N]o person shall be… deprived of… property, without due process of law; nor shall private property be taken for public use, without just compensation.”
\textsuperscript{181} See also Sullivan at 1505. Sullivan does not argue specifically that \textit{Nollan} and \textit{Dolan} should not apply to cases involving conditions implicating “Just Compensation” rights. Rather, she argues for a systematic approach to the doctrine of unconstitutional conditions which justifies strict scrutiny in all cases where a constitutional right is pressured. With regard to exactions, she therefore argues against germaneness scrutiny and suggests that conditions could be justified by showing the granting of building permits as in-kind compensation, satisfying the right to compensation.
\textsuperscript{182} As in cases of eminent domain, the question of whether the value of the benefit provides just compensation should be decided based on whether the owner is compensated at approximately market rate.
not require a landowner to give up a constitutional right in exchange for that benefit.\textsuperscript{183} In such a case, the doctrine of unconstitutional conditions is not 'germane.'

**Conclusion.**

The land use tools discussed in this note will not go unnoticed. They are conspicuously different from Euclidean zoning and other familiar regulations. Substantial employment of these tools will be needed to effect the land use objectives so key to addressing urbanization, population growth, climate change, and economic downturn. Yet this brave new world of regulation includes not just government solutions for these greater problems but also relief from the burdens traditional land use schemes impose on the development of an urban character. The capacity of these tools to enrich cities and private developers alike ensures that land use law will need to face novel questions related to their application.

As policy shifts in response to these prevailing forces, *Nollan* and *Dolan* stand as exposed and hazardous constructs. Optional FBCs and DAs draw attention to the unfounded, contrived rationale for the decisions. And yet *Nollan* and *Dolan* pose significant legal threat to these responsive tools, otherwise well-suited to navigate the constitutional land use confines. Municipal governments may nevertheless employ these tools in hopes that future, corrective decisions of the Court may exempt conditions of legislative origin, general applicability or those burdening monetary or personal property

\textsuperscript{183} To presume the compensation provided is not fair would be to assume an abuse of the police power rather than adhere to legislative deference. Simply because the Nollans would not have entered into a transaction for an easement absent the effect of the California Coastal Act does not imply the government abused its power in legislating or administering the legislation. Nor does it imply that the Nollans would accept less than just compensation for the easement.
interests. Because of inevitable variation in the application of FBCs and DAs, however, legal uncertainty is likely to remain until *Nollan* and *Dolan* are overturned.

Mandatory FBCs and other similar tools provide a safer vessel belonging to the "nontradeable" class blessed by Justice Scalia in *Nollan*'s footnote five. Yet these less nimble tools may have difficulty avoiding collision with the boundaries of well-established land use law. It is my hope that this paper may provide some assistance to drafters of FBCs faced with the constitutional challenges discussed in this paper, as well as those who would urge the decommissioning of *Nollan* and *Dolan*. 