

**The Supreme Court Revisits Regulatory Takings:**

**\* The Parcel-As-A-Whole Rule in 2016**  
**\* Inclusionary Zoning in the Future?**

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## Background

The traditional regulatory takings analysis arises from the protections of the Fifth Amendment, as applied to the states and their local governments through the Fourteenth Amendment: “No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” The purpose of the takings clause is, in part, “barring Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>1</sup>

Physical takings are when government directly appropriates or physically invades private property or an interest in property. They are usually easy to identify, and are most directly comparable to the government’s exercise of eminent domain or direct condemnation powers. Regulatory takings are when government regulation “goes too far,” when it is so onerous that it is tantamount to direct appropriation or ouster of a property.<sup>2</sup> But, how far is too far? This is much harder to identify, and has spawned decades of caselaw attempting to provide predictable analytical rules.

Regulatory takings fall into three main categories, which have been fairly stable for the last decade or so. The first is most similar to a physical taking, and arises when a governmental regulation requires a property owner to suffer a permanent physical invasion of his or her property by the government or by another entity, even if that invasion is quite minor. An example is the required easement to allow wires for cable television service to be laid on the side

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<sup>1</sup> *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537, 125 S. Ct. 2074 (2005).

<sup>2</sup> *Id.* (“[G]overnment regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster[, which] may be compensable under the Fifth Amendment.”); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158 (1922) (“The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

of building in *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>3</sup> This is often referred to as a “*per se*” taking.

A second category is the categorical taking, where regulation completely deprives landowner of all economically beneficial use of a property right, if the burdened property right is one that is recognized under state law and is not a nuisance.<sup>4</sup> The owner continues to retain ownership and control of the property, and the focus on the limitation of use.

Finally, the third category is an as-applied partial taking. When a governmental regulation is applied to take some interest in property that is less than the whole property right, it may be a regulatory taking even if the regulation does not work a taking on its face. In *Penn Central Transportation Co. v. City of New York*,<sup>5</sup> the U.S. Supreme Court announced the three balancing factors used to determine whether a partial taking has occurred: (1) the character of the governmental regulation (is it more akin to a physical invasion or to “some public program adjusting the benefits and burdens of economic life to promote the common good”), (2) the economic impact of the regulation as applied to the particular property, and (3) the property owner’s distinct investment-backed expectations in the property. No one of these factors is dispositive of the taking question, and very few cases have met this standard.

A related concept is monetary liability arising from land use exactions. Where the government requires dedication of an interest in private property for public use as a condition of a permit approval, property owners may sue for a taking. The courts analyze such a claim as a violation of unconstitutional-conditions doctrine under the Fifth Amendment.<sup>6</sup> A condition of approval will not violate this doctrine so long as it furthers a legitimate governmental interest, is

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<sup>3</sup> 458 U.S. 419, 73 L. Ed. 2d 868 (1982) (hereinafter, *Loretto*).

<sup>4</sup> *See, e.g.*, *Lucas v. S.C. Coastal Council*, 112 U.S. 2886, 120 L. Ed. 2d 798 (1992) (hereinafter, *Lucas*).

<sup>5</sup> 438 U.S. 104, 57 L. Ed. 2d 631 (1978).

<sup>6</sup> *See, e.g.*, *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 835, 107 S. Ct. 3141 (1987) and *Dolan v. City of Tigard, Or.*, 512 U.S. 374, 114 S. Ct. 2309 (1994).

related to the governmental interest that is served (rational or essential nexus), and is roughly proportional to the impacts of the development on which the condition imposed (mathematical exactitude is not required). In the recent case of *Koontz v. St. Johns River Water Management District*,<sup>7</sup> the U.S. Supreme Court clarified that the *Nollan/Dolan* exactions test applies to purely monetary conditions of approval, not just conditions that impose an easement or otherwise burden a real property right.

The U.S. Supreme Court has granted certiorari review of a regulatory taking case for the October 2016 term, which is focused on the issue of how the court measures the property interest at issue in determining whether the impact of the governmental regulation triggers the requirement for compensation. The Court also took the unusual step of considering another petition for certiorari on another regulatory taking case (involving the California Supreme Court's decision that inclusionary zoning ordinances are not subject to challenge as exactions under *Nollan/Dolan/Koontz*) at four different conferences before finally deciding not to grant review, but Justice Clarence Thomas issued an opinion on the denial of review inviting the submission of the issue in future cases.

This paper examines these two cases, and their potential impact on regulatory takings doctrine.

## **I. *Murr v. Wisconsin*—The Parcel-as-a-Whole Doctrine**

### *A. Overview*

Local government police powers can be used to adopt zoning and other land use regulations to protect the health, safety, and general welfare of its residents.<sup>8</sup> However, regulatory takings can occur, as proscribed by the Fifth Amendment, when a government overly

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<sup>7</sup> 570 U.S. 2588, 133 S. Ct. 2586 (2013),

<sup>8</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

restricts use of private property. In determining whether there has been a taking under the Fifth Amendment, a court “does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”<sup>9</sup> To the contrary, a court must focus “both on the character of the action and on the nature and extent of the interference with rights in the **parcel as a whole**.”<sup>10</sup>

One reason for this parcel-as-a-whole rule is that any other approach runs the risk of creating windfall profits on the taxpayers’ dime. For example, a property owner might take a large tract of land, develop it and realize all of his investment-based expectations even though he is required to set aside portions of the property such as wetlands, steep slopes, and landscape buffers. Then, in the absence of the parcel-as-a-whole rule, he might turn around and sue the government for full compensation for his inability to develop those remaining undevelopable portions of the property. Any compensation he could win would be a windfall funded by the taxpayers, above and beyond his reasonable expectations of profit, which undercuts the legitimate governmental purposes of regulations requiring preservation of certain properties.

When enacting zoning ordinances, the local governments often create an amortization period that softens the impact of regulation by giving owners of nonconforming uses or structures time to phase out their operations.<sup>11</sup> If the amortization period is sufficiently long to permit the owner to recoup his investment, this method of balancing landowners’ expectations and the public good is often approved as compensation for the impact of the regulation.<sup>12</sup> However, zoning ordinances that establish a minimum lot size are different; the government

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<sup>9</sup> Penn Cent. Transp., 438 U.S. at 131.

<sup>10</sup> *Id.* (emphasis added).

<sup>11</sup> *Murr v. Wisconsin*, No. 15-214, Nat’l Assoc. of Cnty. Amicus Brief, at 8 (hereinafter “NAC Brief”) (quoting *Village of Valatie v. Smith*, 632 N.E.2d 1264, 1266 (N.Y. 1994)).

<sup>12</sup> *Id.* (citing 2 Patricia E. Salkin, *American Law of Zoning* § 12:23 (5th ed. Westlaw)).

cannot phase out substandard lots over time without taking their value.<sup>13</sup> Thus, nonconforming lots remain exempt from the zoning restriction and the goals of the zoning restrictions are subverted.<sup>14</sup>

To address this issue, many local governments across the country have used “merger” provisions “designed to strike a balance between a municipality’s interest in abolishing nonconformities and the interests of property owners in maintaining land uses that were allowed when they purchased their property.”<sup>15</sup> “Merger” in the land use context is when a substandard lot is involuntarily merged by operation of law with a commonly owned, contiguous lot so as to make one fully conforming lot.<sup>16</sup>

A Wisconsin family (the Murrs) challenged the application of the parcel-as-a-whole rule to a merger ordinance, claiming that the regulation has left one of their parcels of land valueless.<sup>17</sup> Specifically, the Murrs claim that the County’s merger provision should not permit a court to combine the two distinct lots into one parcel for purposes of determining whether there has been a taking of one of the lots. Based on the ubiquitous nature of the merger regulation under attack, the Court’s decision could have wide-reaching consequences depending on the outcome.

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<sup>13</sup> *Id.* (citing Salkin, § 12:12).

<sup>14</sup> *Id.*

<sup>15</sup> *Day v. Town of Phippsburg*, 110 A.3d 645, 649 (Me. 2015).

<sup>16</sup> *Miller & Starr Cal. Real Estate*, 7 CAL. REAL EST. § 20:44 (4th ed.) (“Merger refers to the combination of two or more separate, contiguous lots into a single lot. . . . Involuntary merger generally refers to the local agency-initiated combination of two or more contiguous lots in common ownership that were validly created under the applicable law at the time of the division but that do not meet the minimum standards of current law.”).

<sup>17</sup> *Murr v. Wisconsin*, 136 S. Ct. 890 (2016) (Mem.).

B. *The Murr Case*

In 1960, the Murrs' parents bought a riverfront parcel of land in St. Croix County along the western border of Wisconsin, east of Minneapolis, "Lot F," and built a cabin.<sup>18</sup> Three years later, the Murrs' parents bought an adjacent parcel, "Lot E," which was and remains vacant.<sup>19</sup> The lots are similar in characteristics, with each lot divided by a bluff.<sup>20</sup> Combined, the lots equate to .98 acres of contiguous land.<sup>21</sup>

In the mid-1970s, St. Croix County enacted an ordinance that prohibited the development or sale of contiguous, substandard lots that had common ownership (the "Ordinance").<sup>22</sup> The relevant provision of the Ordinance provides as follows:

**4. SUBSTANDARD LOTS**

- a. Lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:

- 1) The lot is in separate ownership from abutting lands, or
- 2) The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. **Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.**
- 3) All structures that are proposed to be constructed or placed on the lot and the proposed use of the lot comply with requirements of this subchapter and any underlying zoning or sanitary code requirements.<sup>23</sup>

Thus, pursuant to the Ordinance, "if abutting, commonly owned lots do not each contain the minimum net project area, they together suffice as a single, buildable lot."<sup>24</sup> Furthermore, the

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<sup>18</sup> *Murr v. Wisconsin*, 859 N.W.2d 628, 2014 WL 7271581, at\*1 (Wisc. Ct. App. Dec. 23, 2014), *review denied*, 366 Wis. 2d 59 (Wisc. April 16, 2015), *cert. granted*, 136 S. Ct. 890 (Jan. 15, 2016).

<sup>19</sup> *Murr*, 2014 WL 7271581 at \*1.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> ST. CROIX CNTY., WISC., CODE OF ORDINANCES, LAND USE & DEV., SUBCH. III.V, LOWER ST. CROIX RIVERWAY OVERLAY DIST. § 17.36.I.4.a (Jan. 1, 1976), *repealed and replaced*, (July 1, 2005).

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

Ordinance “prohibits the individual development or sale of adjacent, substandard lots under common ownership, unless an individual lot has at least one acre of net project area.”<sup>25</sup>

In 1994, the Murrs’ parents transferred Lot F (the lot with the cabin) to the Murrs.<sup>26</sup> A year later, the Murrs’ parents transferred Lot E (the vacant lot) to the Murrs.<sup>27</sup> Once Lot E was transferred to the Murrs, both parcels were under common ownership and were considered merged as an operation of law under the Ordinance to make one contiguous parcel.<sup>28</sup>

*C. The Lower Court Proceedings*

Many years after their acquisition of the Lots, the Murrs sought to sell Lot E as a separate, buildable lot and requested a variance from the County to accomplish this goal.<sup>29</sup> However, after receiving opposition from zoning regulators, the St. Croix Board of Adjustment denied the Murrs’ application for a variance.<sup>30</sup>

After exhausting their administrative challenges to the Board’s decision, the Murrs filed a complaint against St. Croix County and the State of Wisconsin challenging the application of the Ordinance as an uncompensated “taking” in violation of the Fifth Amendment.<sup>31</sup> Particularly, the Murrs framed their claim by alleging that the Ordinance “deprived them of ‘all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot.’”<sup>32</sup>

The trial court entered summary judgment in favor of the State and County, in pertinent part, because governing law “required [the court] to analyze the effect of the Ordinance on the

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<sup>24</sup> Murr, 2014 WL 7271581 at \*1.

<sup>25</sup> *Id.* (footnote omitted).

<sup>26</sup> *Id.*

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

<sup>28</sup> *Id.* (citing the Ordinance).

<sup>29</sup> Murr, 2014 WL 7271581, at \*1.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at \*2.

<sup>32</sup> *Id.* at \*2 (quoting Compl.).



Murrs’ property as a whole, not each lot individually.”<sup>33</sup> Thus, because the entire contiguous property could still be used for residential and other purposes, the Ordinance did not create an uncompensated taking as to Lot E.<sup>34</sup>

On appeal, the Murrs maintained their argument that the Ordinance totally or substantially deprived them of the beneficial use of Lot E. The appellate court’s analysis necessarily turned on what constituted the “property”—i.e., beneficial use of Lot E alone, or beneficial use of Lots E and F combined.<sup>35</sup> Relying on the principles established in *Penn Central*,<sup>36</sup> the court affirmed the judgment because the contiguous parcels must be considered as a whole.<sup>37</sup> In short, the court held that “the challenged regulatory action, an ordinance that effectively merged the Murrs’ two adjacent, riparian lots for sale or development purposes, did not deprive the Murrs of all or substantially all practical use of their property.”<sup>38</sup> The reviewing court reasoned that the Ordinance did not prevent the Murrs from building a “residence on top of the bluff, if they choose to raze their cabin located near the river. Notably, this use may include the vacant Lot E, as the new residence could be located entirely on Lot E, entirely on Lot F, or it could straddle both lots.”<sup>39</sup> The court further opined that the Murrs improperly focused on what Lot E could *not* be used for, as opposed to what it could be used for.<sup>40</sup>

#### *D. Supreme Court Review*

The Murrs’ brief on the merits presented the question to the Court as follows:

In a regulatory taking case, does the “parcel as a whole” concept as described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130–

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

<sup>34</sup> Murr, 2014 WL 7271581, at \*2.

<sup>35</sup> *Id.* at \*4.

<sup>36</sup> 438 U.S. 104.

<sup>37</sup> Murr, 2014 WL 7271581, at \*4–5.

<sup>38</sup> *Id.* at \*1.

<sup>39</sup> *Id.* at \*5.

<sup>40</sup> *Id.* at \*6.

31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?<sup>41</sup>

The Murrs argue that the parcel-as-a-whole rule “does not imply support for the very different theory that commonly owned parcels must be aggregated for takings analysis—the theory adopted by the Wisconsin court.”<sup>42</sup> The Murrs cite *Penn Central* and *Lucas* for the proposition that takings valuation must be limited to the parcel they choose to identify as the subject of the taking, and not include other property holdings of the parcel owner.<sup>43</sup> Specifically, they quote *Lucas* as follows:

In *Lucas*, this Court underscored its rejection of the New York court’s aggregative approach. The Court stated:

For an extreme—and, we think, unsupportable—view of the relevant calculus, see *Penn Central Transportation Co. v. New York City*, 42 N.Y.2d 324, 333-334, 366 N.E.2d 1271, 1276-1277 (1977), *aff’d*, 428 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978), where the state court examined the diminution in a particular parcel’s value produced by a municipal ordinance in light of total value of the taking claimant’s other holdings in the vicinity.<sup>44</sup>

The Murrs’ brief also plays on what they call “traditional understandings of property law,” but really seems to just be arguing that “this is not fair.” It specifically cites that the Murrs were “flabbergasted” when they learned that they could not sell Lot E separate from Lot F due to the Ordinance, and asserts that “[m]ost Americans would probably react the same way . . . [b]ecause people understand the basic unfairness of what happened to the Murrs.”<sup>45</sup>

On the other hand, the State and County argue that the State’s merger provisions legally define the property as merging with the contiguous lot so as to retain the value of Lot E because it can be used in conjunction with Lot F. Stated differently, the two lots are really just one

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<sup>41</sup> Murr, No. 15-214, Petitioners' Brief on the Merits, 2016 WL 1459199 (April 2016).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 18–19.

<sup>44</sup> *Id.* at 18–19 (citing *Lucas*, 505 U.S. at 1016 n.7).

<sup>45</sup> *Id.* at 27.

bigger lot now as a matter of state property law and thus, the takings analysis turns on the value of the entire merged lot.<sup>46</sup> Furthermore, they argue that the long-established history of merger ordinances makes it part of “legal tradition upon which reasonable expectations must be understood in defining property rights in land.”<sup>47</sup> This principle is buttressed by a citation to *Lucas* for the proposition that the identity of a parcel ““may lie in how the owner’s reasonable expectations have been shaped by the State’s law of property—i.e., whether and to what degree the State’s law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.””<sup>48</sup>

The County also argues that “lot lines” are not determinative of property rights for purposes of a takings claim and that the parcel-as-a-whole issue is simply a red herring because “no matter how one draws the lines, sufficient valuable use of [the Murrs’] land remains to warrant dismissal of [the Murrs’] complaint on summary judgment.”<sup>49</sup>

The Supreme Court’s decision to accept review of the Murrs’ case is surprising. For nearly a century, state governments have allowed, and local governments have created, similar “merger” regulations to the Ordinance at issue in *Murr* in an attempt curb over-development while balancing the countervailing rights of property owners.<sup>50</sup> Accordingly, a Supreme Court

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<sup>46</sup> See *id.*, Brief for Respondent St. Croix Cnty, at 20–25 (June 10, 2016); see also *id.*, Brief of Respondent State of Wisconsin, at 23–26 (June 10, 2016).

<sup>47</sup> St. Croix Brief, at 21–22 (quoting *Lucas*, 505 U.S. at 1035) (internal quotation marks omitted).

<sup>48</sup> Wisconsin Brief, at 29 (quoting *Lucas*, 505 U.S. at 1016 n.7).

<sup>49</sup> *Id.* at 23–24.

<sup>50</sup> *E.g.*, MINN. STAT. § 394.36(5)(c)–(d); MASS. GEN. LAWS CH. 40A, § 6; R.I. GEN. LAWS § 45-24-38 (“Provisions may be made for the merger of contiguous unimproved, or improved and unimproved, substandard lots of record in the same ownership to create dimensionally conforming lots or to reduce the extent of dimensional nonconformance.”); N.M. STAT. ANN. § 47-6-9.1(B) (“Nothing in this section limits a board of county commissioners, pursuant to notice and public hearing, from requiring consolidation of contiguous parcels in common ownership for the purpose of enforcing minimum zoning or subdivision standards on the parcels.”); *Timperio v. Zoning Bd. of Appeals*, 993 N.E.2d 1211, 1215 (Mass. App. Ct. 2013) (recognizing merger doctrine as common law principle); HUNTSVILLE, ALA., CODE § 74.1.2 (“Where two or more contiguous lots under common ownership are sufficient to create one lot of dimensions conforming to the requirements for the district in which the lots are located but the lots are not sufficient for the creation of two or more fully conforming lots, then all of the said lots shall be deemed merged into one lot.”); see generally NAC Brief, at 14–31 (providing links to 131 merger

decision that reverses the Wisconsin court’s rulings could have a ripple effect across the Country, negatively impacting state and local governments’ ability to control overdevelopment—and the related negative impacts on the public welfare, which include overcrowding, the depletion of natural resources, loss of community character, and challenges to property values.<sup>51</sup>

*E. Takeaway*

The briefing is complete, but an oral argument date has not yet been assigned to *Murr*.<sup>52</sup> The Court may decide this case narrowly, based on the Murrs’ facts, or it may announce a refinement of the analytical test for regulatory takings that sweeps more broadly. If the Court determines that a merger regulation is not evaluated in accordance with the parcel-as-a-whole rule, it may determine that the substandard Lot E is completely valueless under the Ordinance, constituting a taking for which the Murrs would be entitled to just compensation. This might also mean that every other substandard lot owner would have a similar claim against the impact of similar merger ordinances. The result could be a roll-back or revision of either minimum lot-size requirements or merger provisions or both, throughout the country. Local governments might also need to make sure that their variance provisions protect them from potential liability by providing some use for the sub-standard lots.

The basis on which the court might refuse to apply the parcel-as-a-whole rule also matters, and could cast into doubt a broader range of regulations that have been repeatedly upheld on the basis of this rule. Environmental protection regulations, such as requirements not to build on wetlands, steep slopes or other sensitive lands, are a likely target.

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regulations); McQuillin: *The Law of Municipal Corporations* § 25:179.6 (3d ed. Westlaw) (“Municipalities often have ordinances which treat commonly owned, contiguous lots, one or more of which are nonconforming, as one conforming lot.”).

<sup>51</sup> NAC Brief at 5–6.

<sup>52</sup> See <http://www.scotusblog.com/case-files/cases/murr-v-wisconsin/> (last visited August 24, 2016).

Though the practicalities of undoing nearly a century of merger ordinances would seem to weigh in favor of upholding the Ordinance, the Justices often care little about practicality and approach constitutional rights from an ivory-tower, abstract perspective that is out of touch with the everyday realities of local government land use and zoning regulation.

## **II. Inclusionary Zoning**

Income disparity, a steadily recovering housing market, and gentrification have led to decreasing availability of affordable housing to lower/middle-income workers in the metropolitan communities in which they work.<sup>53</sup> Traditional housing efforts such as public housing, Section 8 vouchers, and tax credits have fallen short of the demand in many markets. And even median and above-median income families (sometimes referred to as “workforce” income) are feeling the pinch. In an effort to combat this issue, some states have allowed and local governments have implemented mandatory or voluntary incentive-based inclusionary zoning (“IZ”) regulations.<sup>54</sup> IZ regulations, in general, require developers to allocate a percentage of their units for affordable or workforce housing, provide such units nearby, or pay a fee in lieu of the required units. The IZ incentives can include density bonuses, expedited approval, and fee waivers to offset some of the costs associated with providing the affordable units, and to increase the number of lower-cost units provided beyond any mandated number.<sup>55</sup>

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<sup>53</sup> U.S. DEP’T OF HOUS. & URBAN DEV., *Inclusionary Zoning & Mixed-Income Communities* (Spring 2013), Evidence Matters (hereafter 2013 HUD Inclusionary Zoning). <https://www.huduser.gov/portal/periodicals/em/spring13/highlight3.html> (last visited August 24, 2016); see also *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 351 P.3d 974, 977 (Cal. 2015) (recognizing that over 170 Californian municipalities have adopted inclusionary zoning programs), *cert. denied*, 136 S. Ct. 928 (2016).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

States such as Florida permit their local governments to use mandatory or incentive-based zoning.<sup>56</sup> However, some states, such as Tennessee, have partially nipped IZs in the bud by enacting legislation that expressly prohibits mandatory IZ regulations.<sup>57</sup> Whether mandatory or incentive based, IZ ordinances face strong opposition from private interest groups that wish to build without regulation. The smoldering issue is how the courts should review the IZ ordinances for their constitutionality.

A. *Inclusionary Zoning as Legislative Action or Exaction*

Mandatory IZ ordinances affect landowners' ability to use their property indiscriminately, but so do all zoning ordinances. The question is whether IZ ordinances can be challenged as a regulatory taking in violation of the Fifth Amendment to the U.S. Constitution, which prohibits the taking of private property for public use without just compensation.<sup>58</sup> The answer to that question turns on whether the IZs are considered a legislative constraint on development, similar to setbacks, height and bulk regulations and other generally applicable land development regulations, or an exaction. The distinction is important because, as set forth

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<sup>56</sup> See, e.g., FLA. STAT. § 166.04151 (2015) (“Notwithstanding any other provision of law, a municipality may adopt and maintain in effect any law, ordinance, rule, or other measure that is adopted for the purpose of increasing the supply of affordable housing using land use mechanisms such as inclusionary housing ordinances.”).

<sup>57</sup> E.g., TENN. CODE ANN. § 66-35-102 (2016) provides:

(a) A local governmental unit shall not enact, maintain or enforce an ordinance or resolution that would have the effect of controlling the amount of rent charged for leasing private residential or commercial property.

(b) **A local governmental unit shall not enact, maintain, or enforce any zoning regulation, requirement, or condition of development imposed by land use or zoning ordinances, resolutions, or regulations or pursuant to any special permit, special exception, or subdivision plan that requires the direct or indirect allocation of a percentage of existing or newly constructed private residential or commercial rental units for long-term retention as affordable or workforce housing.** This subsection (b) shall apply to all current and future zoning regulations.

(c) This section does not affect any authority of a local governmental unit to create or implement an incentive-based program designed to increase the construction and rehabilitation of moderate or lower-cost private residential or commercial rental units.

<sup>58</sup> U.S. CONST. AMEND. V.

below, if IZs are considered legislative, a more deferential standard is applied to their review<sup>59</sup>; if they are considered exactions, the burden would be much heavier on local governments to show that the IZs are constitutional.<sup>60</sup>

### 1. Legislative Actions

As a general proposition, review of legislative regulations that affect property owners' right to use property without transferring control of the property focuses on whether the regulation is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."<sup>61</sup> This deferential standard reflects concerns over separation of powers between the legislative and judicial branches of government, and arises from the Fourteenth Amendment's due-process requirement rather than from the Fifth Amendment's takings analysis.<sup>62</sup>

### 2. Government Exactions

Notwithstanding a government's power to reasonably regulate through zoning, it is not permitted to take private property without just compensation<sup>63</sup> or "deny a benefit to a person because he exercises a constitutional right."<sup>64</sup> The latter principle is referred to as the unconstitutional-conditions doctrine.<sup>65</sup> It is upon this principle that the Supreme Court has

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<sup>59</sup> *E.g.*, *City of Miami Beach v. Lachman*, 71 So. 2d 148, 150 (Fla. 1953) (*en banc*) (upholding zoning regulation as constitutional, legislative act because it had substantial relation to public health, safety, morals, and general welfare); *Cal. Bldg. Indus. Ass'n*, 351 P.3d at 987 ("As a general matter, so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible.").

<sup>60</sup> *Koontz*, 133 S. Ct. 2586 (requiring monetary condition for permit approval to have rational nexus with and be roughly proportional to the impacts of proposed land use, but allowing claims for compensation against such conditions only where state law provides for such a cause of action).

<sup>61</sup> *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *see also Penn Cent. Transp. Co.*, 438 U.S. at 138 (holding that regulation does not effect a taking if "[t]he restrictions imposed [were] substantially related to the promotion of the general welfare").

<sup>62</sup> *Euclid*, 272 U.S. 365.

<sup>63</sup> U.S. CONST. AMEND. V.

<sup>64</sup> *Koontz*, 133 S. Ct. at 2594 (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983)) (internal quotation marks omitted).

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

created special rules to protect landowners' Fifth Amendment right to just compensation when the government conditions land-use permits on certain concessions.<sup>66</sup>

In the 1987 case of *Nollan v. California Coastal Commission*,<sup>67</sup> the Court reviewed a landowner's claim that the California Coastal Commission improvidently conditioned a public easement on their beach property in exchange for permission to build a new home on that property.<sup>68</sup> Though the Court first recognized that "land-use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land,"<sup>69</sup> it held that, in the context of permit conditions requiring the conveyance of an interest in land, unless there is an "essential nexus" "between the condition and the original purpose of the building restriction," the condition would not be "a valid regulation of land use but 'an out-and-out plan of extortion.'"<sup>70</sup> In so holding, the Court deemed the coastal commission's permit condition an impermissible exaction because the expressed purpose of the condition—to preserve visual access to the shoreline—was not advanced by the condition requiring the donation of a pedestrian access easement along the shoreline.<sup>71</sup>

Seven years later, in *Dolan v. City of Tigard*,<sup>72</sup> the Court defined how much of a nexus is required between the regulatory purpose and the condition requiring conveyance of an interest in land, and held that the Fifth Amendment requires a "rough proportionality" between the condition and the legitimate state interest, with the city making "some sort of individualized

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<sup>66</sup> *Id.*

<sup>67</sup> 483 U.S. 825 (1987).

<sup>68</sup> *Id.* at 827–28.

<sup>69</sup> *Id.* at 834 (internal quotation marks omitted).

<sup>70</sup> *Id.* at 837 (quoting *J.E.D. Assocs., Inc. v. Atkinson*, 432 A.2d 12, 14–15 (N.H. 1981)).

<sup>71</sup> *See id.* at 841–42.

<sup>72</sup> 512 U.S. 374 (1994).



determination that the required dedication is related both in nature and extent to the impact of the proposed development.”<sup>73</sup> Mathematical certainty is not required.

In 2013, Justice Alito, writing for the Court, expanded the *Nollan–Dolan* precedent in the context of a permit that was allegedly denied based on the applicant’s unwillingness to comply with a requested condition of a wetlands permit—either to provide an easement, or pay to make off-site improvements to land owned by the district—in *Koontz*.<sup>74</sup> The Court first summarized its jurisprudence in stating that “a unit of government may not condition the approval of a land-use permit on the owner’s relinquishment of a portion of his property unless there is a ‘nexus’ and ‘rough proportionality’ between the government’s demand and the effects of the proposed land use.”<sup>75</sup> In determining that the conditions at issue were unconstitutional, the Court also stated that the denial of a permit for failing to succumb to an unconstitutional condition is equally as impermissible as granting a permit with such a condition.<sup>76</sup> The Court’s ruling extended what was once a principle limited to conditions taking land to conditions requiring monetary exactions.<sup>77</sup>

Justice Kagan’s dissent agreed with the general holding of the majority, but disagreed with the extension of the *Nollan–Dolan* standard to monetary exactions and would have left the scope of the standard as applying only to conditions requiring the transfer of real property.<sup>78</sup>

While IZ ordinances generally do not require the dedication of an interest in property, they often combine a requirement to construct affordable units onsite or offsite (with required covenants to maintain the affordability of the unit for a specified time) with an option to pay a

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<sup>73</sup> *Id.* at 391.

<sup>74</sup> 133 S. Ct. 2586 (2013).

<sup>75</sup> *Id.* at 2591.

<sup>76</sup> *Id.* at 2595 (“The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so.”).

<sup>77</sup> *Id.* at 2659.

<sup>78</sup> *Id.* at 2603 (Kagan, J., dissenting).

monetary fee in lieu of providing the required units. The question is whether such a requirement is subject to review under *Nollan*, *Dolan* and *Koontz*.

*B. California Building Industry Ass’n v. City of San Jose, Cal.*

In 2015, the California Supreme Court, in *California Building Industry Ass’n v. City of San Jose, California*,<sup>79</sup> was faced with a challenge to a San Jose IZ ordinance. There, the California Building Industry Association (“CBIA”) filed a lawsuit on the basis that the City of San Jose’s (City’s) IZ ordinance<sup>80</sup> was facially invalid because the City failed to provide an adequate evidentiary basis “to demonstrate a reasonable relationship between any adverse public impacts or needs for additional subsidized housing units in the City ostensibly caused by or reasonably attributed to the development of new residential developments of 20 units or more and the new affordable housing exactions and conditions imposed on residential development by the Ordinance.”<sup>81</sup>

In the initial discussion of the issues, the court framed the housing crisis as follows:

It will come as no surprise to anyone familiar with California’s current housing market that the significant problems arising from a scarcity of affordable housing have not been solved over the past three decades. Rather, these problems have become more severe and have reached what might be described as epic proportions in many of the state’s localities. All parties in this proceeding agree that the lack of affordable housing is a very significant problem in this state.<sup>82</sup>

The San Jose IZ ordinance under review (1) compelled developers of new residential-development projects with 20 or more units to allocate a minimum of 15 percent of its units for low-income buyers; (2) required the allocated units to be sold below market value without exceeding 30 percent of a buyer’s median income; and (3) required the allocations must remain

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<sup>79</sup> 351 P.3d 974.

<sup>80</sup> SAN JOSE MUN. CODE §§ 5.08.010–5.08.730.

<sup>81</sup> Cal. Bldg. Indus. Ass’n, 351 P.3d at 978.

<sup>82</sup> *Id.* at 977.

in effect for 45 years.<sup>83</sup> The CBIA asked the superior court to treat the ordinance as an exaction and the superior court acquiesced and enjoined the City from enforcing the ordinance.<sup>84</sup> On appeal, the reviewing court reversed the superior court’s judgment on the basis that it had improperly applied the exaction standard instead of determining whether the ordinance bears a real and substantial relationship to a legitimate government purpose.<sup>85</sup>

The California Supreme Court accepted jurisdiction and agreed with the appellate court that the San Jose ordinance was regulatory, and was thus properly reviewed under the more deferential legislative standard, rather than the *Nollan–Dolan–Koontz* unconstitutional-conditions standard.<sup>86</sup> Specifically, the court opined: “As a general matter, so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible.”<sup>87</sup> The court further recognized that it reviews the legislative decisions with a presumption of constitutionality that “come before the court with every intendment in their favor.”<sup>88</sup> The California court’s analysis highlights just how important the standard of review can be in determining the constitutionality of IZs.

*C. Justice Thomas Foreshadows Supreme Court Weigh-In—Again*

After the California Supreme Court issued its decision upholding the San Jose ordinance, the CBIA petitioned the United States Supreme Court for writ of certiorari. After holding no less than four conferences on the petition, on February 29, 2016, the Supreme Court finally denied CBIA’s petition with a concurring-in-denial opinion authored by Justice Clarence Thomas.<sup>89</sup>

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<sup>83</sup> Cal. Bldg. Indus. Ass’n, 136 S. Ct. 928 (2016) (Thomas, J., concurring in denial of certiorari) (summarizing challenged ordinance).

<sup>84</sup> Cal. Bldg. Indus. Ass’n, 351 P.3d at 978.

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

<sup>86</sup> *Id.* at 979.

<sup>87</sup> *Id.* at 987 (collecting cases).

<sup>88</sup> *Id.* (quoting *Associated Home Builders etc., Inc. v. City of Livermore*, 557 P.2d 473 (Cal. 1976)) (internal quotation marks omitted).

<sup>89</sup> Cal. Bldg. Indus. Ass’n, 136 S. Ct. 928 (Thomas, J., concurring in denial of certiorari).

In his concurring opinion, Justice Thomas stated that the CBIA case was not the proper case for review because of issues with the timeliness of the CBIA’s petition and because the distinction between an administrative and legislative review were not properly litigated before the California courts.<sup>90</sup> However, he took the opportunity to acknowledge the uncertainty lower courts face regarding the appropriate standards for determining whether governments can legislatively impose conditions that would otherwise fail under *Nolan* and *Dolan*—an issue he once wrote on before.<sup>91</sup> Specifically, Justice Thomas opined:

I continue to doubt that the existence of a taking should turn on the type of governmental entity responsible for the taking. Until we decide this issue, property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively. These factors present compelling reasons for resolving this conflict at the earliest practicable opportunity.<sup>92</sup>

Justice Thomas’s invitation to disgruntled property owners to challenge IZ ordinances will no doubt be heard and will lead to additional petitions for certiorari being filed on this issue. With the passing of Justice Scalia, though, it may be less likely that a majority of the Court will agree with his concerns.

### **III. The Chilling Effects of The Potential Over-Protection of Property Rights**

If the parcel-as-a-whole rule is substantially modified in *Murr* or if the Supreme Court chooses to address the conflict pointed out by Justice Thomas and decides to follow the *Nollan–Dolan* exaction standard for IZ ordinances, the chilling effects could be felt throughout the country. Local governments’ efforts to forestall the eradication of lower and middle class

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

<sup>91</sup> *Id.* (citing *Parking Ass’n of Ga., Inc. v. Atlanta*, 515 U.S. 1116, 1117 (1995) (Thomas, J., dissenting from denial of certiorari)).

<sup>92</sup> *Id.* (citation omitted) (quoting *Parking Ass’n of Ga., Inc.*, 515 U.S. at 1117–18 (Thomas, J., dissenting from denial of certiorari)) (internal quotation marks omitted).

residents from the city limits and to implement other land use and zoning regulations could be forced to overcome a much larger hurdle.

Already, private-interest groups have successfully helped state legislatures pass further limitations on local governments' ability to regulate the development of property.<sup>93</sup> Over the past 20 years, many states have adopted private-property-rights protection acts allowing property owners to seek compensation for local government regulatory impacts that do not amount to takings under federal constitutional law. A Florida example is the Bert J. Harris Private Property Rights Protection Act, which provides a cause of action for compensation against regulations that place an "inordinate burden" on private property.<sup>94</sup>

A new kind of private property rights statute is emerging, and may be coming to your state next. *Koontz* arose from the application of a Florida wetlands regulation; it broadened the scope of the unconstitutional conditions clause to monetary exactions, but only where the applicable state law provided for such a cause of action for compensation. In response to *Koontz*, the Florida Legislature enacted Section 70.45, Florida Statutes, which provides that effective October 1, 2015, "[i]n addition to other remedies available in law or equity, a property owner may bring an action . . . to recover damages caused by a prohibited exaction. Such action may not be brought until a prohibited exaction is actually imposed or required in writing as a final condition of approval for the requested use of real property. . . ." <sup>95</sup> The statute also permits the prevailing party to recover attorney's fees, and mandates that the property owner be awarded

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<sup>93</sup> *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, John D. Echeverria & Thekla Hansen-Young, GEORGETOWN ENVIRONMENTAL LAW & POLICY INSTITUTE (2008).

<sup>94</sup> See FLA. STAT. § 70.001.

<sup>95</sup> *Id.* § 70.45(2) (2015) ("In addition to other remedies available in law or equity, a property owner may bring an action . . . to recover damages caused by a prohibited exaction. Such action may not be brought until a prohibited exaction is actually imposed or required in writing as a final condition of approval for the requested use of real property. . . ."); see also *id.* § 70.001 (Bert J. Harris Jr., Private Property Rights Protection Act) (1995).

fees if the exaction lacks an essential nexus to a legitimate public purpose,<sup>96</sup> which increases the risk of substantial financial loss on local governments.

Other states have also adopted *Koontz* statutes. A Virginia statute provides that:

“[A]ny applicant aggrieved by the grant or denial by a locality of any approval or permit, however described or delineated . . . , where such grant included, or denial was based upon, an unconstitutional condition pursuant to the . . . Constitution, shall be entitled to an award of compensatory damages and to an order remanding the matter to the locality with a direction to grant or issue such permits or approvals without the unconstitutional condition and may be entitled to reasonable attorney fees and court costs.”<sup>97</sup>

That statute also establishes a clear and convincing burden of proof for the local government defending the condition if the applicant objected to it in writing:

“[O]nce an unconstitutional condition has been proven by the aggrieved applicant to have been a factor in the grant or denial of the approval or permit, the court shall presume, absent clear and convincing evidence to the contrary, that such applicant's acceptance of or refusal to accept the unconstitutional condition was the controlling basis for such impermissible grant or denial provided only that the applicant objected to the condition in writing prior to such grant or denial.”

Texas has a *Koontz* statute that applies only to conditions assessing the cost of municipal infrastructure improvements against a developer.<sup>98</sup>

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<sup>96</sup> FLA. STAT. § 70.45(5) (“The court may award attorney fees and costs to the prevailing party; however, if the court determines that the exaction which is the subject of the claim lacks an essential nexus to a legitimate public purpose, the court shall award attorney fees and costs to the property owner.”).

<sup>97</sup> VA. CODE ANN. § 15.2-2208.1 (“Damages for unconstitutional grant or denial by locality of certain permits and approvals.”).

<sup>98</sup> TEX. LOC. GOV'T CODE ANN. § 212.904. APPORTIONMENT OF MUNICIPAL INFRASTRUCTURE COSTS.

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

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

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

Though a state statute may authorize or permit municipalities to adopt inclusionary zoning ordinances,<sup>99</sup> such legislation does not prevent a party from bringing an unconstitutional-conditions claim under *Nollan* and *Dolan* and seeking remuneration under a *Koontz* statute.<sup>100</sup> *Koontz* statutes will only increase the chilling of local governments' ability and desire to plan for its residents.<sup>101</sup> The fear of being sued and of liability for compensation may lead local governments to forego environmental protections and other zoning and land use regulations.<sup>102</sup>

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

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

<sup>99</sup> See, e.g., FLA. STAT. § 166.04151.

<sup>100</sup> See *Koontz*, 133 S. Ct. at 2597 (“In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies.”).

<sup>101</sup> Echeverria, *supra*, n.93 at 14, 19, 47.

<sup>102</sup> E.g., *id.* (citing Fort Lauderdale Commission decision overturning city's historic preservation board denial of building permit upon demand by developer for 120 million in compensation under Bert Harris Jr., Private Property Rights Protection Act).