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A Taking of What? How Extending *Nollan* and *Dolan* to Monetary Exactions will have a Significant Impact on the Effectiveness of Minnesota's Wetland Conservation Act

The abundance and diversity of Minnesota's wetlands are virtually unmatched by any other state.[1] The economic and ecological benefits of these wetlands range from providing critical wildlife habitat and natural flood prevention[2] to playing a unique cultural role.[3] However, only fifty percent of Minnesota's original wetlands remain.[4] To stop this depreciation, the legislature enacted the Wetland Conservation Act of 1991 ("WCA"), calling for a "no net loss in the quantity, quality, and biological diversity of Minnesota's existing wetlands."[5] While it is

[1] *See* MINNESOTA POLLUTION CONTROL AGENCY, A COMPREHENSIVE WETLAND ASSESSMENT, MONITORING, AND MAPPING STRATEGY FOR MINNESOTA vii (2006), *available at* files.dnr.state.mn.us/eco/wetlands/wetland_monitoring.pdf ("[O]ther than Florida, [Minnesota has] more wetland acreage than any other of the contiguous states."); MINNESOTA POLLUTION CONTROL AGENCY, STATUS AND TRENDS OF WETLANDS IN MINNESOTA: DEPRESSSIONAL WETLAND QUALITY BASELINE 1 (March 2012) [hereinafter "MPCA QUALITY REPORT"], *available at* http://www.pca.state.mn.us/index.php/view-document.html?gid=17741 ("[T]he diversity of Minnesota's wetlands is arguably unmatched by any other state.").

[2] *See Wetland Regulation in Minnesota*, MINNESOTA BOARD OF WATER & SOIL RESOURCES, http://www.bwsr.state.mn.us/wetlands/publications/wetlandregulation2.html (last visited May 1, 2013). *See also* MINN. STAT. § 103A.201, subd. 2(b) (recognizing in law the various benefits provided by Minnesota's wetlands).

[3] *See* MPCA QUALITY REPORT, *supra* note 1, at 5 (noting that wetlands have long been a part of Minnesotan tradition, from wild rice harvesting to waterfowl hunting).

[4] Estimates vary as to how much the wetland resource has depreciated since Minnesota became a state, but it is usually close to fifty percent. *See Wetland Regulation in Minnesota*, *supra* note 2 (estimating a deprecation from 21 million acres to 10 million); Steven M. Kloiber, *Status and Trends of Wetlands in Minnesota: Wetland Quality Baseline* 1, MINNESOTA DEPARTMENT OF NATURAL RESOURCES (December 2010) (estimating a current area of 10.62 million acres).

[5] MINN. STAT. § 103A.201, subd. 2(b)(1); *see also* Minn. R. 8420.0100.

difficult to know the exact impact of the WCA, Minnesota's wetlands are now likely increasing.[6]

On January 15, 2013, the U.S. Supreme Court heard oral arguments in *Koontz v. St. Johns River Water Management District*,[7] a regulatory takings case brought under *Nollan* and *Dolan* that could significantly impact the framework of the WCA. A review of the oral arguments in *Koontz* shows that, while the Supreme Court may not be willing to extend *Nollan* and *Dolan* to instances where one's permit to develop is denied, the Court may be willing to extend the framework to "monetary exactions."[8] If so, the Minnesota legislature will likely have to reexamine two key aspects of the WCA: (1) replacement ratios under Wetland Banking programs and (2) the discretion and autonomy provided to Local Government Units ("LGU") to develop and implement Local Comprehensive Wetland Protection and Management Plans.[9]

I. Regulatory Takings Jurisprudence: When is an "Exaction" Unconstitutional?

Under the Fifth Amendment to the U.S. Constitution, the government may not take one's private property without providing just compensation.[10] Article I, section 13 of the Minnesota Constitution serves the same purpose and is generally interpreted as similar in scope.[11] The

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[6] *See* Dan Gunderson, *Scientists Check Health of State's Wetlands*, MPRNEWS (Aug. 10, 2012), http://minnesota.publicradio.org/display/web/2012/08/10/environment/wetlands-mpca (discussing the difficulty in measuring the wetland resource base). *See also* MINNESOTA BOARD OF WATER AND SOIL RESOURCES, 2001-2003 MINNESOTA WETLAND REPORT 2 (2005) [hereinafter "2005 BWSR REPORT"], *available at* www.bwsr.state.mn.us/wetlands/publications/wetlandreport.pdf ("[R]equired mitigation replaces the impacts with more acres than have been lost.").

[7] 133 S.Ct. 420 (2012) (granting certiorari).

[8] *See infra* note 36 and accompanying text.

[9] *See* MINN. STAT. §§ 103G.2242, 103G.2243; Minn. R. 8420.0700, 8420.0830.

[10] U.S. CONST., amend. V; U.S. CONST., amend. XIV (applying the Fifth Amendment to states).

[11] MINN. CONST., art. I, § 13 ("Private property shall not be taken, destroyed or damaged for

Court's regulatory takings jurisprudence is based on the notion that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[12]

Three types of regulatory takings claims are recognized. First, a taking occurs under the Court's *Lucas* framework if a regulation deprives a landowner of "all economically beneficial use of the land."[13] A court may also find a taking under *Penn Central* by weighing the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the government action.[14] The third type of regulatory takings claim applies to development exactions, which occur when a government authority conditions the grant of a permit on a property owner agreeing to dedicate a portion of his or her real property to mitigate the negative environmental effects of the proposed development.[15]

This third claim fits within the Court's "unconstitutional conditions" doctrine, which provides that "the government may not require a person to give up a constitutional right [to receive just compensation when property is taken for a public use] in exchange for a discretionary benefit [permit to develop] conferred by the government."[16] Under this framework,

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public use without just compensation."); *see also* Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 631 (Minn. 2007) (interpreting the state provision to be generally similar in scope).

[12] Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922).

[13] Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003, 1029 (1992) (noting that this is true so long as what is prohibited is not already prohibited by State property or nuisance law).

[14] *See* Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[15] *See* Lauren Reznick, Note, *The Death of Nollan and Dolan? Challenging the Constitutionality of Monetary Exactions in the Wake of Lingle v. Chevron*, 87 B.U. L. REV. 725, 727 (2007).

[16] Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 547 (2005) (quoting Dolan v. City of Tigard, 512 U.S. 374, 385 (1994)).

courts apply the heightened scrutiny analysis established in *Nollan* and *Dolan*.[17] First, the court will first ask if an "essential nexus" exists between a "legitimate state interest" and the "permit condition exacted."[18] The court will then ask if the authority made a determination that the requirement is roughly proportional to the nature and extent of the development's impact.[19]

The majority of wetlands takings cases utilize the first two tests, often in situations where the development authority denies the landowner his or her permit outright.[20] However, such denials are rare, and permits are often issued with mitigating conditions.[21] Typically, the condition that is imposed is the result of protracted negotiations between the developer and the permitting agency, leading to relatively little litigation under the *Nollan* and *Dolan* framework.[22] However, in *Koontz*, the Court could extend the doctrine beyond its current focus, exposing previously insulated government activity and regulatory frameworks to new takings claims.

II. *Koontz v. St. John's River Water Management*: Protecting Individual Property Rights or Imprudently Extending *Nollan* and *Dolan*?

In 1994, Mr. Koontz requested a permit to develop a portion of his property.[23] 3.4 acres

[17] *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. California Coastal Comm'n, 438 U.S. 825 (1987).

[18] *See Dolan*, 512 U.S. at 386 (citing *Nollan*, 483 U.S. at 387).

[19] *See id.* at 391.

[20] *See* ROBERT MELTZ, CONG. RESEARCH SERV., RL30423, WETLANDS REGULATION AND THE LAW OF PROPERTY RIGHTS "TAKINGS" (Feb. 17, 200), *available at* http://cnie.org/NLE/CRSreports/wetlands/wet-6.cfm

[21] *See id.*

[22] *See id.* (noting the applicant is therefore "likely to perceive it as reasonable").

[23] *See* St. Johns River Water Management Dist. v. Koontz, 77 So.3d 1220, 1224 (Fla. 2011).

of the proposed 3.7 acre development were wetlands.[24] To offset the adverse environmental impacts the development would have, the permitting agency [St. Johns] requested that Koontz deed the remaining 14 acres to conservation status and pay for offsite mitigation that would replace culverts or plug drainage canals on properties owned by St. John's.[25] Koontz agreed to deed his property over but refused to pay for offsite mitigation. St. Johns denied his permit and Koontz filed suit, alleging the denial constituted a regulatory taking under *Nollan* and *Dolan*.[26]

The trial court held the denial of Koontz's permit, upon his refusal of the proposed development exaction, to constitute a taking,[27] and the court of appeals affirmed.[28] The Florida Supreme Court reversed, stating that *Nollan* and *Dolan* only apply where the mitigating condition involves a dedication "of the owner's interest in real property in exchange for a permit approval", and only where a permit has been issued, "thereby rendering the owner's interest in the real property subject to the dedication imposed."[29] While the Florida Supreme Court quickly foreclosed any argument that *Nollan* and *Dolan* could apply to permit denials or monetary exactions, much of its ruling hinged on the fact that the U.S. Supreme Court had not expressly addressed either issue.[30] Indeed. the Court has only considered the parameters of *Nollan* and

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[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *See* St. Johns River Water Management Dist. v. Koontz, 5 So.3d 8 (Fla. Ct. App. 2009)

[29] *See* St. Johns River Water Management Dist. v. Koontz, 77 So.3d 1220, 1230 (Fla. 2011).

[30] *See id.* at 1230 (declining to expand the doctrine "[a]bsent a more limiting or expanding statement from the [Supreme Court] with regard to the scope of *Nollan* and *Dolan*").

Dolan twice since the framework was established.[31] Therefore, it is worth briefly considering the scholarship and lower court proceedings on point to gauge the likelihood of the Court extending the framework to these two areas.

A. PERMIT DENIALS AND MONETARY EXACTIONS UNDER *NOLLAN* AND *DOLAN*

A large majority of lower court applications of *Nollan* and *Dolan* involve final permit approvals,[32] making it difficult to gauge whether the framework can apply to denials.[33] The Supreme Court refused to apply the *Nollan* and *Dolan* framework where a city rejected nineteen of a developer's site plans, imposing conditions that the developer ultimately refused.[34] In contrast, the Eighth Circuit applied *Nollan* and *Dolan* when a property owner was denied a rezoning application after he refused to comply with the city's requests to dedicate a portion of his land for a highway extension.[35] Therefore, precedent is unclear as to whether *Nollan* and *Dolan* should extend to these "failed exactions."

As is the case with permit denials, the applicability of monetary exactions to *Nollan* and *Dolan* remains unclear, with little Supreme Court guidance. A monetary exaction is a

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[31] *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).

[32] *See* Tim Mulvaney, *SCOTUS Grants Cert in Takings Case (Koontz v. St. John's)* (Oct. 5, 2002), http://lawprofessors.typepad.com/environmental_law/2012/10/scotus-grants-cert-in-takings-case-koontz-v-st-johns.html ("Nearly all of the many lower court applications of the *Nollan/Dolan* test have addressed final permit approvals.").

[33] *See* Mark Fenster, *Failed Exactions*, 36 VERMONT L. REV. 623, 640 (2012) (labeling such denials "failed exactions").

[34] *See Del Monte Dunes*, 526 U.S. at 698 (stating that *Dolan* was not "readily applicable to . . . denial of development").

[35] *See* Goss v. Little Rock, 151 F.3d 861, 863 (8th Cir. 1998); *see also* William J. (Jack) Jones Ins. Trust v. City of Fort Smith, Ark., 731 F.Supp. 912, 913–14 (W.D. Ark. 1990) (finding a taking following permit denial after a developer refused to grant the city a right of way).

requirement imposed on a developer to pay a fee or monetary assessment, as opposed to ceding over an interest in his or her real property, as a condition of issuing a development permit.[36] In *City of Monterey v. Del Monte Dunes*, the Supreme Court noted in dictum that *Nollan* and *Dolan* had not extended beyond "exactions," which it characterized in dicta as "land-use decisions."[37] Nevertheless, four days after *Dolan*, the Court heard *Ehrlich v. City of Culver City*, a case from California involving a condominium developer who was issued a permit but was required to pay a $280,000 fee to be used by the city to develop recreational facilities near the development. The Court remanded the case "for further consideration in light of *Dolan*."[38] Lower courts remain split on the issue.[39]

B. A TAKING OF WHAT? FAILING TO EXTEND *NOLLAN* AND *DOLAN* TO PERMIT DENIALS BUT EXTENDING THE FRAMEWORK TO MONETARY EXACTIONS

Any hopes of extending *Nollan* and *Dolan* to permit denials were struck down almost immediately at oral argument in *Koontz*. Throughout the entire proceeding, Scalia seemed hostile to the idea that a taking occurred, asking directly at one point "[w]hat has been taken?"[40] The more liberal justices seemed to be of the same opinion, from Justice Breyer questioning why the

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[36] *See* Reznick, *supra* note 15, at 727 (2007).

[37] *See Del Monte Dunes*., 526 U.S. at 702 (1999).

[38] *See* Ehrlich v. City of Culver City, 512 U.S. 1231, (1994).

[39] *See*, *e.g.*, Iowa Assur. Corp. v. City of Indianola, Iowa, 650 F.3d 1094, 1099 (8th Cir. 2011) (refusing to apply *Nollan* and *Dolan* to a vehicle enclosure ordinance, noting there was no dedication of land); McCarthy v. City of Leawood, 894 P.2d 836, 845 (Kan. 1995) (holding that *Dolan* did not apply to the city's use of impact fees). *But see* Ehrlich v. City of Culver City, 911 P.2d 429, 433 (Cal. 1996) (holding that *Nollan* and *Dolan* apply to monetary exactions); Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 640 (Tex. 2004) (finding "no important distinction" between monetary and land exactions under *Nollan* and *Dolan*).

[40] Transcript of Oral Argument at 5, Koontz v. St. John's River Water Management Dist., 133 S.Ct. 420 (2012) (No. 11–1447). *See also id.* ("A taking of what?").

case had not been brought under *Lucas* or *Penn Central*,[41] to Justice Sotomayor asking "why are we here?"[42] Justice Alito seemed to be the only conservative member positing that a permit denial could constitute a taking under *Nollan* and *Dolan*.[43]

In contrast, at least six justices seemed open to extending *Nollan* and *Dolan* to monetary exactions. While Justice Breyer seemed to believe this case implicated substantive due process rather than takings issues, he did allude that a taking could occur if the government "let[s] you develop your land if and only if you give [it] $50,000."[44] Justice Kagan directly connected this to the wetlands context, stating "if the State just had a policy for every acre of wetlands you fill in, it costs us $10,000, you need to pay $10,000, that's subject to *Nollan* and *Dolan* analysis, too."[45] The more conservative members agreed, arguing that there is no difference between an exaction of one's interest in real property or their money. Justice Scalia stated that to rule otherwise would mean "cash is magical,"[46] while Justice Kennedy failed to distinguish between the government parking its truck on a property and forcing the owner to "pay them money."[47]

Therefore, an examination of the oral arguments from *Koontz* may show that the Court is

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[41] *See id.* at 20 ("[T]his is a form of regulatory taking of the kind that Holmes was talking about. And that—that's what was going on in—in *Penn Central*.").

[42] *Id.* at 7.

[43] *Id.* at 55 (noting to rule otherwise makes the framework "a trap for really stupid districts").

[44] *Id.* at 40.

[45] *Id.* at 24.

[46] *Id.* at 34; *see also id.* (Alito J.) (suggesting there is no difference between a landowner paying the government fair market for their land versus the government taking the land and offering the landowner fair market value); *id.* at 37 (Roberts, J.) (suggesting that forcing someone to pay for the construction of an offsite football stadium is a taking).

[47] *Id.* at 38.

willing to extend *Nollan* and *Dolan* to monetary exactions but not permit denials. This could have a significant effect on local conservation planning regimes, including Minnesota's WCA. Because much of the WCA relies on what could be considered monetary exactions, Minnesota policymakers will likely have to reexamine two key aspects of the law: (1) replacement ratios imposed under wetland banking systems, and (2) the large amount of flexibility granted to LGUs in implementing the WCA at a local level.

III. The Wetland Conservation Act: Restoring Crucial Natural Resources through Innovative Resource Banking and Local Control.

The WCA is one of many wetland[48] regulations in Minnesota,[49] and its mandate is clear: "Wetlands must not be drained or filled . . . unless replaced by restoring or creating wetland areas of at least equal public value."[50] LGUs administer the WCA by making "determinations" regarding "replacement plans," with statewide regulatory oversight provided by the Board of Water and Soil Resources (BWSR).[51] To be issued a determination, a replacement plan applicant must comply with "sequencing" requirements, which in general means the applicant must show that he or she (1) avoided impacts to the wetland as much as possible, (2) minimized any

[48] While each regulatory framework defines "wetland" differently, wetlands can generally be identified by three characteristics: (1) mostly hydric soils; (2) standing water or saturated soil; and (3) vegetation adapted to wet soil conditions. *See also* MINNESOTA BOARD OF SOIL AND WATER RESOURCES, WETLANDS REGULATION IN MINNESOTA 1–2 (May 2003) [hereinafter "WETLANDS REGULATION"]. *See also* MINN. STAT. § 103G.005, subd. 19.

[49] The other two major regulatory programs are the DNR's Public Waters Work Permit Program, MINN. STAT. § 103G.245, and Section 404 under the Clean Water Act, 33 U.S.C. § 1344.

[50] MINN. STAT. § 103G.222, subd. 1(a); *see also* Minn. R. 8420.0105, subpt. 1.

[51] Minn. R. 8420.0100. The LGU issues "determinations," not permits. *Id.*

unavoidable impacts, and (3) restored or replaced wetlands of equal or greater public value.[52]

A. WETLAND BANKING AND LOCAL CONTROL: KEY COMPONENTS OF THE WCA

While the applicant may choose to comply with the WCA by replacing or restoring wetlands directly, much of the mitigation under the Act occurs through wetland banking. Put simply, "the wetland banking system helps connect landowners who have already restored or created wetlands with those who need to replace wetlands they plan to drain or fill."[53] A market-based approach to conservation,[54] any banking applicant may restore or create a wetland under a replacement plan sponsored by a LGU.[55] If approved, the banking applicant will receive an allotment of credits based on the type of work done and wetland restored or created.[56] Because it is often impractical or impossible for a replacement plan applicant to conduct mitigation on their own,[57] he or she can purchase replacement credits from the bank account holder. While replacement ratios are established by law, the prices of the credits are determined by private

[52] *See* Minn. R. 8420.0520 (establishing five sequencing requirements), *see also* WETLANDS REGULATION, *supra* note 48, at 14.

[53] *See* 2005 BWSR REPORT, *supra* note 6, at Appendix F-2.

[54] *See* Minn. R. 8420.0700 (stating the purpose of wetland banking is to "provide a market-based structure that allows for replacement of unavoidable impacts with pre-established wetlands"); *see also* Royal C. Gardner, *Banking on Entrepreneurs: Wetlands, Mitigation Banking, and Takings*, IOWA L. REV. 527, 530 (1996) (calling banking "an incentive-based approach").

[55] *See* Minn. R. 8420.0705 (providing the procedure for receiving replacement credits).

[56] *See* Minn. R. 8420.0526 (listing approved activities for receiving replacement credits and providing default values for each activity or type of wetland restored).

[57] *See* 2005 BWSR REPORT, *supra* note 6, at 19 ("[O]n-site replacement is often impractical–and the person proposing the project may have no idea where to create or restore a wetland.").

transaction.[58] The state is ramping up its efforts to increase wetland banking state-wide, offering significant financial incentives to landowners.[59]

As an alternative to the replacement requirements under the WCA, LGUs may adopt an ordinance[60] implementing their own comprehensive wetland protection and management plan (CWPMP).[61] The CWPMP must meet minimum standards that correspond to the objectives of the WCA, such as achieving a "no net loss" of wetlands.[62] A CWPMP is provided flexibility to vary in its sequencing requirements, replacement standards and ratios, location of replacement sites, actions eligible for credit under a locally-operated wetland bank, goals to be achieved by

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[58] *See* WETLANDS REGULATION, *supra* note 48, at 18 ("The price is determined through negotiation between the buyer and the seller.").

[59] *See $5 million available for wetland bank program*, THE STILLWATER GAZETTE (Mar. 13, 2013), *available at* http://stillwatergazette.com/2013/03/13/5-million-available-for-wetland-bank-program/ (stating that the BWSR is offering $5 million for wetland restoration projects).

[60] *See* Minn. R. 8420.0830, subpt. 9 (requiring the CWPMP to be implemented by ordinance).

[61] For examples of CWPMP's, *see* CITY OF BURNSVILLE, WETLAND PROTECTION AND MANAGEMENT PLAN [hereinafter "BURNSVILLE PLAN"], *available at* http://www.ci.burnsville.mn.us/DocumentCenter/Home/View/2212, RICE CREEK WATERSHED DISTRICT, COLUMBUS COMPREHENSIVE WETLAND PROTECTION AND MANAGEMENT PLAN (Apr. 29, 2010) [hereinafter "RICE CREE PLAN"], *available at* http://www.ricecreek.org/vertical/Sites/%7BF68A5205-A996-4208-96B5-2C7263C03AA9%7D/uploads/%7B50E11CEA-CAD3-4ECE-BBEB-D46FC9551BA5%7D.PDF, SAULK RAPIDS, COMPREHENSIVE WETLAND PROTECTION & MANAGEMENT PLAN (2011) [hereinafter "SAULK RAPIDS PLAN"], *available at* http://www.ci.sauk-rapids.mn.us/vertical/Sites/%7B0431F973-8F1A-45B9-BC40-963EF7BF7919%7D/uploads/Sauk_Rapids_CWPMP_FINAL_010612.pdf, LAKE OF THE WOODS COUNTY, WETLAND CONSERVATION ORDINANCE OF 2002 [hereinafter "LAKE OF THE WOODS ORDINANCE"], *available at* http://www.co.lake-of-the-woods.mn.us/PDF/Ordinances/LOW%20County%20Wetland%20Ordinance%207-29-03.pdf

[62] *See* Minn. R. 8420.0830, subpt. 1 (providing minimum standards the CWPMP must abide by).

the plan, and more.[63] This flexibility is allowed if the plan's overall purpose is to "maintain and improve the quality, quantity, and biological diversity of wetland resources within watersheds."[64]

While the wetland banking program and local CWPMPs play a key role in fulfilling the "no net loss" goals of the WCA, an extension of *Nollan* and *Dollan* to monetary exactions may require state policymakers to make significant changes to these components. While neither wetland banking nor local control should raise constitutional concerns at face value, changes may need to be made to the replacement ratios under the WCA and the amount of deference given to LGU's in changing those ratios and implementing conservation programs of their own.

B. ASSESSING THE CONSTITUTIONALITY OF WETLAND BANKING AND LOCAL CONTROL IN LIGHT OF *KOONTZ*.

In many ways, wetland banking should prevent regulatory takings claims under *Penn Central* and *Lucas*. First, it is less likely that a permit will be denied, resulting in loss of economic value in the property, because a developer would be more willing to comply with mitigation requirements that affect land not being developed.[65] Even if the permit is denied, the undeveloped wetland retains market value as it can later be sold in the banking system.[66] However, the argument that a loss in value is less likely to occur under a wetlands banking regime is not applicable to takings under *Nollan* and *Dolan*.

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[63] *See* Minn. R. 8420.0830, subpt. 4. *See also, e.g.*, RICE CREEK Plan, *supra* note 61, at 54 (adopting a number of additional replacement requirements, such as prohibiting one from receiving credits for any excavation in upland areas); BURNSVILLE PLAN, *supra* note 61, at 3 (stating an additional goal of the CWPMP is to ensure that "[p]eople find that Burnsville is an environmentally sensitive community and they understand their role in pursuing these results").

[64] *See* Minn. R. 8420.0830, subpt. 1.

[65] Shirley Jeanne Whitsitt, *Wetlands Mitigation Banking*, 3 ENVTL. L. 441, 443 (1997).

[66] *See* Gardner, *supra* note 54, at 572.

Before analyzing the constitutionality of the wetland banking program under *Nollan* and *Dolan*, one must first ask whether a developer's payment pursuant to the program would be a "monetary exaction" as understood in the takings context. No case law or scholarship was found on point. On the one hand, the payment is made to another private individual in a market system, not procured by a government entity. However, the government entity requires that the payment be made; that is, requires the developer to transfer his or her property right to another in exchange for receiving a permit. This sounds like a monetary exaction, and raises the same issues that are of constitutional concern should *Nollan* and *Dolan* extend to monetary exactions.

Even if *Nollan* and *Dolan* apply to the wetland banking program, it is almost guaranteed that the "essential nexus" requirement under the framework will be met in many instances. After all, the purpose of the WCA is to replace or restore wetlands when they are adversely impacted by development. Arguments to the contrary have been foreclosed by federal case law analyzing permitting requirements as applied to wetlands under § 404 of the Clean Water Act.[67] However, while the "essential nexus" test would be met under the WCA, it is not apparent that the "rough proportionality" prong of the framework will also be met.

The main challenge to the wetland banking program under *Nollan* and *Dolan* would be to the replacement ratios established by law. On the one hand, Minnesota rules provide detailed requirements for determining the value of credits under the system.[68] However, once the value of the credit is determined, credits are not exchanged on a 1:1 ratio. Rather, the WCA sets varying

[67] *See* Norman v. United States, 429 F.3d 1081, 1090 (Fed. Cir. 2005) ("The public interest served by requiring the preservation of wetlands in exchange for the filling and dredging of other [wet]lands related directly to the condition imposed. There is no disconnect.").

[68] *See* Minn. R. 8420.0522, subpt. 1 (requiring an analysis of water quality, flood water retention, public recreation, commercial uses, wildlife, low-flow augmentation, and "other functions").

replacement ratios depending on the amount of original wetlands remain in the surrounding area. If the affected wetland is located in an area that has retained less than 80% of its original wetlands, credits are exchanged on a 2.5:1 basis. For areas that have retained greater than 80%, the ratio is 1.5:1.[69] The LGU may also impose a greater replacement ratio if it determines it is necessary to do so in a specific instance.[70]

If the *Nollan* and *Dolan* framework is extended to monetary exactions, these replacement ratios would appear to be a facial violation of the framework's rough proportionality test. Therefore, Minnesota policymakers may have to alter these ratios to make the purchase of credits proportional to the impact to the wetland, likely on an individualized basis. To the extent these disproportionate ratios have led to an increase in wetlands, the WCA's effectiveness could be seriously impeded if they are altered.

Extending *Nollan* and *Dolan* to monetary exactions will likely have a greater effect on conservation efforts established under CWPMP's. Planning districts have taken full advantage of the flexibility allowed them under the WCA in establishing replacement ratios for their local wetland banking programs. Ratios under CWPMPs can be as low as 1:1[71] or as high as 6:1,[72] and

[69] *See* Minn. R. 8420.0522, subpt. 4 (noting different ratios for agricultural activity).

[70] *See generally* MINN. STAT. 103G.222; Minn. R. 8420.0522. The geographical areas upon which replacement ratios are based are also very roughly defined. The less than fifty percent category comprises southern and northwestern Minnesota, the fifty to eighty percent category comprises central Minnesota, and the greater than eighty percent category comprises northeastern Minnesota. *See* Minn. R. 8240 (providing a map of the different classifications).

[71] *See* RICE CREEK PLAN, *supra* note 61, at 65.

[72] *See* SAULK CITY PLAN, *supra* note 61, at 13.

LGUs often retain flexibility to alter these ratios.[73] In practice, this leads to results that almost certainly violate *Dolan*'s "rough proportionality" requirement. Results from the BWSR's most recent report from LGU's on wetland replacement data, published in 2005, varied markedly. Koochiching County reported a steady 100% replacement percentage from 2001 to 2003, but Rice County achieved 200% replacement, and Wabasha County saw a rate as high as 1113% replacement in 2001.[74] While statewide rates were around 100% during this period,[75] this wide variance among localities suggests that policymakers may have to reexamine the flexibility given to LGUs in determining ratios to ensure that "rough proportionality" requirements are met.

"In lieu fee" programs are another common aspect of CWPMP's that will likely need to be reexamined if *Koontz* extends *Nollan* and *Dolan* to monetary exactions. These programs allow replacement plan applicants to pay into a general fund managed by the LGU where a dedication of real property is impractical. This money is later used for conservation projects.[76] Even though "in lieu" fee programs may be subject to *Nollan* and *Dolan*, Minnesota statute already requires planning agencies to ensure an essential nexus and rough proportionality between the fees imposed and purpose to be achieved by the fee.[77] Nevertheless, LGUs give little guidance in their CWPMPs as to how these funds ought to be used, sometimes simply requiring that they be

[73] *See* LAKE OF THE WOODS ORDINANCE, *supra* note 61, at 11 (providing the LGU with authority to alter ratios if they determine that the functions of the wetland in question are performed at a substantially different level than the functions of a typical wetland of similar type and location).

[74] *See* 2005 BWSR REPORT, *supra* note 6, at Appendix C.

[75] *Id.* (noting a 105% replacement rate for 2002 and 116% rate for 2003).

[76] *See* Reznick, *supra* note 15, at 727.

[77] *See* MINN. STAT. 462.358, subd. 2c(a).

used broadly to "enhance or protect the natural resources within the City."[78] To ensure compliance with *Nollan* and *Dolan* for "in lieu fee" programs, local planning agencies may have to more clearly define the purposes served by such fees and expressly ensure that these purposes comply with the framework's rough proportionality and essential nexus requirement.

IV. Conclusion: the Future of Minnesota's Wetland Conservation Act

Extending the *Nollan* and *Dolan* framework to monetary exactions could have a significant effect on key aspects of the WCA. However, given the Court's apparent hostility to the argument that a permit denial can give rise to a taking claim under *Nollan* and *Dolan*, it is unclear whether the monetary exaction question will even be decided in *Koontz*. Nevertheless, a claim could be brought pursuant to this narrow question in the near future. If the Court's ideological makeup does not change, Minnesota policymakers may be sent back to the drawing board to determine an alternative means of achieving "no net loss" of wetlands under the WCA. While the framework of the WCA will certainly remain intact if *Nollan* and *Dolan* are extended to monetary exactions, key components of that framework will likely have to be revisited. Given the fact that much of the WCA's effectiveness relies on replacement ratios, wetland banking and methods of local control, it may be difficult to draft an alternative framework that is both constitutional and achieves the policy goals of the WCA.

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[78] *See* SAULK CITY PLAN, *supra* note 61, at 14.