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USING DEVELOPMENT FINANCING TOOLS TO HELP COVER COSTS OF ADAPTING TO CLIMATE CHANGE IN TORNADO ALLEY AND BEYOND

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I. INTRODUCTION

Such pessimism stunned me. Has the need to adapt the built environment to climate change truly overshadowed the hope for mitigation and sustainability? Has climate change already spawned a new reality that requires us to adjust our land use strategies and our building design and construction practices to an irreversible pattern of more frequent and more severe natural disasters? Unfortunately, the scientific community makes a compelling case for this sad prognosis.¹

And so, with reluctance, I began to wonder how the U. S. heartland regions with which I am most familiar might need to adapt. In particular, must the country’s midsection adjust its land use practices to prepare for more frequent and more damaging assaults by the weather disaster it knows best—the tornado?²

Upon accepting the premise of this conference, my attention quickly fixed on the challenge of financing adaptation of the built environment. I wondered whether we might apply some common

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¹. See Rosina Bierbaum, et al., A Comprehensive Review of Climate Adaptation in the United States: More Than Before, but Less Than Needed, 18 MITIGATION AND ADAPTATION STRATEGIES FOR GLOBAL CHANGE 361, 362-63 (2013) (discussing the need for both mitigation and adaptation strategies in response to climate change).

². As I’ve spent the majority of my life living in Nebraska and Kansas, tornadoes have provided my most immediate exposure to natural disasters. While Arkansas, where I now live, is not consistently noted as one of the areas of the county facing the greatest risk of tornadoes, it also has many tornado prone regions. Mary Sue Passe-Smith, Modeling the Tornado Threat in Arkansas with GIS, ESRI CONFERENCE PROCEEDINGS (2004), available at http://proceedings.esri.com/library/userconf/proc04/docs/pap1062.pdf.
land use financing devices to this problem. After all, financing adaptation of the built environment to the effects of climate change should not be all that much different from adapting it to growth—a process with which we now have several decades’ worth of experience.

This article discusses whether and how communities might use development fee programs to help pay some of the costs of adapting the built environment to climate change. Given that the potential effect of climate change in “tornado alley” first piqued my interest, Part I presents the financing problem in the context of concerns that climate change may cause more frequent and more severe tornadoes. For the most part, however, the legal analysis developed in Part II applies equally to regions most affected by other natural disasters, some even more commonly associated with climate change, such as extreme heat waves, hurricanes, coastal storm surges, forest fires, and flooding. The initial emphasis on severe windstorms is simply the framework I used to develop the analysis.4

II. ADAPTING TO CLIMATE CHANGE IN TORNADO ALLEY

As a law professor, I happily leave it to the scientists to explore and explain the connection between climate change and the frequency and severity of tornadoes. It is enough for purposes of this article to observe that some who are far more immersed in the question than I have asserted the relationship. A recent study by one climate scientist, for example, predicts that we can expect a significant increase in tornado activity in the United States that may be attributable to climate change.5 Additionally, more than a

3. The term, “tornado alley” may be imprecise and colloquial, but even weather experts use the term. See Charles A. Doswell III & Harold E. Brooks, Lessons Learned from the Damage Produced by the Tornadoes of 3 May 1999, 17 WEATHER & FORECASTING 611, 614 (2002) (explaining the lack of preparedness in areas prone to tornadoes).

4. There is at least one important distinction between the challenges of adapting the built environment to tornadoes in contrast to most other natural disasters. Avoidance is not an option. Particularly in this country, as anyone who has ever seen a U.S. map showing tornado-prone areas will know, the regions threatened by tornadoes are far too extensive to permit any planning based on limiting real estate development in areas most likely to be hit. See, e.g., DAVID O. PREVATT, ET AL., STRUCTURAL DAMAGE SURVEY AND CASE FOR TORNADO-RESILIENT BUILDING CODES 41 (2013) (displaying a map of tornado-prone areas); Doswell & Brooks, supra note 3, at 616 (reproducing such maps). In the case of some other natural disasters, such as flooding, the argument is increasingly made that, in areas especially prone to the most devastating weather events, we should adopt policies that favor relocating communities after major damage occurs rather than rebuilding them. See Justin Pidot, Deconstructing Disaster, 2013 B.Y.U. L. REV. 213, 220-24 (advocating land use regulations and policies that encourage relocation over rebuilding in some circumstances).

5. Cameron C. Lee, Utilizing Synoptic Climatological Methods to Assess
few of the environmental law commentators have suggested that tornado activity may increase significantly in future years due to climate change.\(^6\)

If we must anticipate more frequent and more severe tornadoes, then perhaps tornado alley can no longer be satisfied with building codes and construction practices that do not require structures to be designed to resist the effects of tornado force winds.\(^7\) Recent engineering studies recommend land use strategies and design and construction practices that may help make communities more resistant to tornado strikes and that could reduce other economic and social costs associated with tornado damage.\(^8\) Significant changes in building codes, construction practices, and periodic maintenance procedures can be especially effective to mitigate the effects of tornadoes on light commercial buildings and wood-frame residences; particularly those in the poorest neighborhoods where the lowest cost practices prevail.\(^9\) Studies of discrete components, such as roof designs for low-rise structures, can help identify specific shortcomings in building codes and construction practices.\(^10\) Steps can also be taken to retrofit existing structures for enhanced resistance to tornadoes.\(^11\) In the case of the most severe storms, structural enhancements and the introduction of storm shelters and "safe rooms" can at least provide life safety improvements even if they

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the Impacts of Climate Change on Future Tornado-Favorable Environments, 62 NAT. HAZARDS 325, 340 (2012) (projecting “that over the USA as a whole, the number of F2+ tornado-favorable environment days from February through August is projected to increase anywhere from 3.8 to 12.7% in response to changes in the frequency of synoptic patterns under a changing climate”).


7. PREVATT, ET AL., supra note 4; Curtis Geise, Lessons Learned from the Joplin Tornado, STRUCTURE, July 2012, at 30.

8. See, e.g., PREVATT, ET AL., supra note 4, at 52-56 (offering detailed design and construction suggestions based on a study of the 2011 Joplin, Missouri tornado); Byerly, supra note 7, at 982 (noting the potential value of “safe rooms and storm shelter development in anticipation of tornadoes”); Doswell & Brooks, supra note 3, at 612-15; Timothy A. Reinhold, et al., Case for Enhanced In-Home Protection from Sever Winds, 8 J. ARCHITECTURAL ENGINEERING 60 (2002) (offering specific design suggestions).


cannot protect the buildings themselves.\textsuperscript{12}

In coming years, therefore, we can expect building codes and design and construction standards to call for much more by way of tornado resistance or resilience.\textsuperscript{13} But there are logical limits on how far we can go to make infrastructure and buildings more resistant to tornado damage. The probability that a tornado will hit a particular structure or neighborhood will remain relatively low.\textsuperscript{14} It is simply not financially feasible or economically rational to build everything to the highest standards of tornado resistance.\textsuperscript{15}

Moreover, even the best engineering and construction practices cannot immunize the built environment to tornado damage.\textsuperscript{16} The most severe storms will always cause devastating losses of life and property, and they will still leave communities struggling to rebuild.\textsuperscript{17} Adapting to a greater risk of severe tornadoes means that we must improve our disaster management and recovery programs as well as change our building practices.\textsuperscript{18} All of this will be expensive.

Can tornado alley afford to adapt to climate change in this way? Casualty insurance alone is not the answer.\textsuperscript{19} Perhaps

\begin{itemize}
  \item \textsuperscript{12} John W. van de Lindt, et al., \textit{Dual-Objective-Based Tornado Design Philosophy}, 139 J. STRUCTURAL ENGINEERING 251, 257, 261 (2013); PREVATT, \textit{supra} note 4, at 48, 53 (reflecting the somber reality that when tornadoes are at their fiercest, the only realistic planning objective is life safety); Doswell & Brooks, \textit{supra} note 3, at 614-15 (2002) (noting the advantages of shelters and safe rooms and expressing concern over the limited number of shelters revealed in the investigation of specific tornado events under study).
  \item \textsuperscript{13} See, e.g., Deborah L. Seifert & Deborah L. Lindberg, \textit{Managing Climate Change Risk: Insurers Can Lead the Way}, RISK, HAZARDS & CRISIS IN PUBLIC POLICY, June 2012 at 1, 7.
  \item \textsuperscript{14} Reinhold, et al., \textit{supra} note 8, at 62-63.
  \item \textsuperscript{15} Id. at 64-66. While residential building codes that impose more demanding disaster resistance standards can improve safety, there are limits to the premiums that consumers will pay for safer housing. Randy E. Dumm, et al., \textit{The Capitalization of Building Codes in House Prices}, 42 J. REAL EST. FIN. ECON. 30, 37-38 (2011).
  \item \textsuperscript{16} Reinhold, \textit{supra} note 8, at 66.
  \item \textsuperscript{17} The horrific tornado season of 2011 reportedly caused some 600 deaths, $16 Billion in insured losses and over $22 Billion in total economic losses. PREVATT \textit{et al.}, \textit{supra} note 4, at 45.
  \item \textsuperscript{18} Over the years, tremendous improvements to tornado early warning systems have been made, but such improvements are both complex and expensive. See J. Brotze & W. Donner, \textit{The Tornado Warning Process: A Review of Current Research, Challenges, and Opportunities}, 94 BULL. AM. METEOROLOGICAL SOC'Y 1715 (2013) (discussing the challenges faced with implementing early detection and tornado predictability systems), available at http://journals.ametsoc.org/doi/pdf/10.1175/BAMS-D-12-00147.1
  \item \textsuperscript{19} See generally, Mary C. Comerio, \textit{Paying for the Next Big One}, 16 ISSUES IN SCIENCE AND TECHNOLOGY 65 (2000) (emphasizing the need for change in government and insurance policies both in response to disasters and in promoting mitigation). Even assuming the availability of adequate and affordable insurance, studies show that people routinely opt not to insure
developers of new commercial and high-end residential projects can pass along to their end-users the added costs of improved design and construction. But fully effective tornado adaptation programs will require a more comprehensive financial solution. How will municipalities fund more expensive infrastructure? How will code enforcement and land use agencies pay for new compliance programs? Should government programs help fund the costs of tornado resistance programs for low and moderate income housing? Should public assistance be provided to subsidize retrofitting of existing structures and aging neighborhoods to comply with more demanding engineering standards and construction and maintenance practices? Can the residential resale market absorb the costs of additional pre-sale inspections to assess the ability of existing homes to withstand tornado force winds? And what about the increasing costs of emergency management and disaster recovery, such as early warning and emergency response systems that save lives, and resources to care for the temporarily homeless, and to provide counseling services for entire communities traumatized by the most catastrophic events? Would it even be wise for municipalities, perhaps acting through regional consortiums, to build up substantial capital reserve funds to draw on when a massive tornado disrupts a local economy for months or years?

This article assumes that the public financial burden of tornadoes and other natural disasters may increase significantly throughout the rest of this century, and it questions whether general tax revenues at federal, state, and local levels will be sufficient. Even where there are few legal limits on the amount a governmental unit may raise through taxes of general application, there are political limits. Will citizens consent to


20. For example, should local governments finance the construction of community storm shelters in especially vulnerable, low-income communities, such as manufactured home parks? Cf. Doswell & Brooks, supra note 3, at 615 (noting that one shelter the authors inspected in such a park suffered from serious deficiencies, including inadequate construction and limited accessibility).

21. Cf. id. at 617 (complimenting the tornado preparedness of the communities affected by the specific storms the authors investigated).

22. The fact that current practices in the United States assure that the local community affected by a severe natural disaster will not bear anything close to the full economic cost of recovery while rebuilding actually "causes perverse incentives favoring development" in high risk areas. Pidot, supra note 4, at 222.

23. Tax programs of many varieties might provide the necessary financing.
general tax increases sufficient to adapt to the increasing risk? Perhaps. Or perhaps not.

For the past several decades, state and local governments have increasingly been inclined to shift many costs associated with urban growth and real estate development onto new projects through an array of development financing tools. Is such the pattern of the growth management and smart growth movements? Is the same approach appropriate in this case?

Thus, we come to the central question of this article. In a future menaced by global climate change, to what extent can and should development financing tools help defray the public and social costs of tornadoes and other natural disasters? To begin with, should new projects be required to internalize some of the potential costs that severe weather events affecting those projects may impose on their communities in the future? Such a program might, for example, impose impact fees on new development to improve emergency management systems or even to fund a reserve account to defray future disaster recovery costs. Beyond that, should new development finance any of the costs of fortifying existing communities and new affordable housing projects against future natural disasters and the costs of recovering and rebuilding when disaster strikes? A program of this type might be comparable to those that impose linkage fees on new development, including commercial projects, to help fund so-called soft infrastructure needs, such as child care and affordable housing objectives.

Drawing on growth management and smart growth approaches, this article will assess whether certain developer funding mechanisms can, and should play any role in a comprehensive framework to help prepare communities for the future impacts of climate change on the built environment. Funding devices of potential interest could include development fees, impact fees, in-lieu fees, mitigation fees, linkage fees, development conditions, tax credits and other economic incentives, transferrable development rights, and density bonuses. The programs could include property, sales, income, and excise taxes.


25. Id.


27. JUERGENSMEYER & ROBERTS, supra note 24, at 341.

28. See generally, id. at 317-49 (focusing on how to effectively implement
specific focus of this article, however, is on what are generally called impact and linkage fees. Just as many land use agencies use impact fees to finance sewers, traffic improvements, and other infrastructure, and rely on linkage fees to subsidize such diverse public objectives as affordable housing and public art programs, this article considers whether local governments concerned about the growing public costs of tornadoes and other severe weather events might turn to what I will call disaster impact and linkage fees. Among other legal considerations, any use of such devices to finance climate change adaptation will require fresh analysis of the peculiar constraints on development exactions imposed under the U.S. Constitution and the rational nexus test of state land use law.

III. THE VIABILITY OF DISASTER IMPACT AND LINKAGE FEES

The balance of this article explores how judicial limitations on developer fees may apply to disaster impact and linkage fees. Two related, but distinct, limitations are at the heart of the inquiry. One is the exaction branch of the U.S. Supreme Court’s land use jurisprudence. The other is the rational nexus standard of state land use law. Many scholars have thoroughly covered these controls on land use regulation. As a result, a brief recounting of the basic principles will suffice here as a prelude to the specific analysis of the prospects for disaster impact and linkage fee programs.

The U.S. Supreme Court, in Koontz v. St. Johns River Water Management District, recently extended the Court’s restrictive oversight of land use exactions. In contrast to the markedly more deferential standard used to determine whether garden variety land use controls are constitutional, the court applies a form of heightened scrutiny when a governmental agency demands certain concessions from the property owner as a condition to obtaining a land use permit. For our purposes, the most important aspect of Koontz is that the Court, for the first time, applied to a monetary condition, which became a basis for the denial of a land use permit, the same two-pronged test that determines the constitutionality of a land dedication exaction.

The first part of this heightened scrutiny was introduced in Nollan v. California Coastal Commission, where the Court required an “essential nexus” between a land use exaction

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29. I leave broader questions of limits on a municipality’s authority to regulate land use to a later day.
32. Id. at 2603.
33. Id.
condition and some legitimate police power purpose affected by the
development project for which the permit was requested. The other prong, which the Court has denominated the “rough proportionality” test, was established in *Dolan v. City of Tigard.* It calls for “some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”

In dealing with land use exaction conditions, and in particular in addressing the legality of impact fees, state courts have independently developed their own form of heightened scrutiny, which commentators often call the dual rational nexus, or more simply, the rational nexus test. Until *Koontz,* the U.S. Supreme Court’s land use exaction cases dealt primarily with exactions in the form of conditions requiring landowners to transfer to the government or to dedicate to public use interests in specific land. As a result, over the past several decades, the limits on monetary exactions have primarily been left to state courts, which have developed an extensive body of law covering an array of monetary exaction programs employed by land use authorities. When a governmental agency conditions a land use permit on the payment of certain kinds of development fees, contemporary land use law requires the government to establish that the condition meets a fairly rigorous test. This test requires a showing that the fee is justified, both as to its nature and as to its economic burden, by reference to public expenditures reasonably connected to the proposed new development.

State courts have articulated somewhat different formulas and have established distinct principles for determining which kinds of exactions are subject to rational nexus analysis, but they generally agree that the test involves two components. While the two parts of the rational nexus test are not inconsistent with the *Nollan* and *Dolan* prongs of the federal exactions standard, they evidence a somewhat different jurisprudential perspective. As

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35. *Id.* at 834-37.
37. *Id.* at 391.
39. *Id.* at 253, 329-30.
40. 5 E.D. Ziegler, Rathkoff’s *The Law of Zoning and Planning* § 90:46 (4th ed.).
42. *Id.* at 253, 329-30.
most commonly understood, the two elements of the rational nexus test concern (1) the demonstrable impact that the proposed land use will have on the need for some public benefit (most often this would be infrastructure) and (2) the reasonableness of the exaction in comparison to the benefit that the landowner enjoys by virtue of the purpose for which the government requires the exaction (again, the objective is often improved infrastructure). In this way, the rational nexus test allows land use authorities to require developers to internalize some of the external costs that their developments create while at the same time it prevents government from using land use controls as the opportunity to make unreasonable demands on developers.

Rational nexus analysis is often understood to require the land use authority to show that the new development not only will share in the public benefit for which the fee is earmarked, but that the fee collected is no greater than the cost of the benefit that is conferred on the development. Because the process calls for a special calculus, land use authorities often undertake rigorous studies to justify impact fee programs. On this basis, some commentators consider the rational nexus test to set an even higher standard than the U.S. Supreme Court’s essential nexus and rough proportionality requirements.

The net result of these developments in the federal exactions jurisprudence and state land use law is that land use exactions (or at least certain exactions) receive a far more demanding brand of judicial review than do other applications of the police power in land use matters, such as basic zoning and subdivision regulations. Will federal and state courts apply this same heightened scrutiny to determine the legality of a disaster impact or linkage fee program of the kind that Part I of this article contemplates? If so, state and local governments face a daunting task if they wish to use land use exactions to fund some of the costs of adapting to the perceived risk of more frequent and more intense natural disasters.

How, for example (returning for the moment to Part I’s focus on tornado alley), can government demonstrate a connection between new real estate development and the costs of dealing with an increase in tornado events? Real estate development does not

43. Id.
44. Id.
45. Id. at 330.
46. Id. at 325.
47. Id. at 336.
48. The government-friendly standard courts apply to garden variety land use controls such as zoning derives from an early 20th century case decided by the U.S. Supreme Court. See Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (holding that the Court will not declare a zoning ordinance unconstitutional unless it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare").
cause or contribute to the causes of tornado activity. Perhaps there may be a sufficient nexus simply because losses from tornadoes will be more costly when there is more real estate development in the path of storms, especially if the development increases population density in concentrated areas. But even if courts accept that rationale, what about the other prong of the analysis? How can land use authorities possibly devise a formula that will assess an impact or linkage fee on a specific project that is roughly proportional to the project’s disaster impact or that is rationally related to the benefit that the fee program confers on the project being assessed the fee?

An examination of the three key U.S. Supreme Court cases already mentioned and of a few of the leading state court authorities will help illustrate just how rigorous exaction analysis can be. Perhaps disaster impact fee programs that pass through to a development reliably projected costs of discrete disaster adaptation measures, such as a proportionate share of the costs for a new early warning system, can pass the heightened scrutiny tests. But it seems far less likely that more comprehensive programs could.

In Nollan, the Supreme Court held that the California Coastal Commission could not constitutionally condition its approval for a new beachfront home on the landowner’s agreement to dedicate a public easement across part of the land to provide public access along the beachside part of the property.\(^49\) The condition had the primary effect of making it easier for the public to traverse the route between two public beaches on either side of the private property.\(^50\) The Court struck down the Coastal Commission’s action because there was no “essential nexus” between the impact that the new house would have on any legitimate public interest and the Coastal Commission’s desire to provide more public access along the beachfront.\(^51\) Justice Scalia made clear that the essential nexus standard cannot be satisfied by sophomoric logic that merely establishes that the proposed development may have some adverse impact on some legitimate governmental interest that is a sufficient basis for the exercise of the police power.\(^52\) Thus, even though the proposal to replace a small cottage with a two story residence would reduce the public’s view of the ocean from the highway, the dedication exaction did not withstand scrutiny because providing better access to public beaches could do nothing to improve views of the beach for those on the opposite side of the house.\(^53\) It is quite impossible to understand how a requirement that people already on the public

\(^{49}\) Nollan, 483 U.S. at 827-29, 838-42.

\(^{50}\) Id. at 828.

\(^{51}\) Id. at 836-37.

\(^{52}\) Id. at 837.

\(^{53}\) Id. at 838.
beaches are able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house.\textsuperscript{54} 

\textit{Dolan} added the rough proportionality standard to the essential nexus requirement.\textsuperscript{55} In that case, the Court held unconstitutional a city's demand that the landowner dedicate easements for a public greenway and a bicycle and pedestrian path across her property as conditions to approving the expansion of her plumbing and electrical supply store.\textsuperscript{56} The case further underscores that the Court will subject land dedication conditions to far greater scrutiny than it applies to other exercises of the police power for land use purposes. The Court acknowledged that the requirements for the greenway and trail easements had an essential nexus to the project's impact on matters of public concern.\textsuperscript{57} The additional improvements would increase surface water runoff in a floodplain, and the store's expansion would increase traffic flow and congestion.\textsuperscript{58} Indeed, the record even included an estimate of the additional daily vehicular trips that the expansion would generate.\textsuperscript{59} But the record failed to show that the burden the land dedications imposed on the landowner was roughly proportionate to the project's impacts.\textsuperscript{60}

Chief Justice Rehnquist explained that land dedication conditions require heightened scrutiny because of the risk that a land use authority may resort to such conditions to pressure a landowner to give up a specific constitutional right.\textsuperscript{61} The government may not condition the granting of a land use permit on the applicant's agreement to waive the constitutional right to be compensated for the land the government wishes to have "where the benefit sought has little or no relationship to the property."\textsuperscript{62} Thus, the defining basis for the holdings in \textit{Nollan} and \textit{Dolan} is the unconstitutional conditions doctrine, and the constitutional right being protected is the landowner's right to just compensation for property taken for public use.

To grasp the full effect of the \textit{Dolan} decision on land use planning, it is important to examine the precise logic involved. The Court noted that a simple restriction against building any improvements over the greenway would have addressed the flood control issue.\textsuperscript{63} Requiring the landowner to give up exclusive control and possession of the area imposed an unnecessary but highly intrusive burden on private property rights. The Court's

\begin{itemize}
  \item \textsuperscript{54} Id.
  \item \textsuperscript{55} \textit{Dolan}, 512 U.S. at 391.
  \item \textsuperscript{56} Id. at 394-96.
  \item \textsuperscript{57} Id. at 386-88.
  \item \textsuperscript{58} Id. at 387-88.
  \item \textsuperscript{59} Id. at 395.
  \item \textsuperscript{60} Id.
  \item \textsuperscript{61} Id. at 385.
  \item \textsuperscript{62} Id.
  \item \textsuperscript{63} Id. at 393-95.
\end{itemize}
reasoning with respect to the bicycle path dedication sent an especially powerful signal to land use authorities that rough proportionality contemplates a calculus based on a properly developed record. There was support in the record for the conclusion that the store's expansion would increase traffic and that some of that increase might be alleviated by tying the project into the public trail. But the city had not established that an easement across the property for the bicycle and pedestrian path would address that concern in a way that would be proportionate to the legitimate traffic concerns. The city merely determined that the easement could help alleviate some of the projected increase in traffic congestion attributable to the expansion. Chief Justice Rehnquist held that rough proportionality required a more definitive showing. The city had failed to meet "its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relates to the city's requirement for a dedication of the pedestrian/bicycle pathway easement."

Taken together, Nollan and Dolan have established an analysis that is highly protective of property rights, at least for cases involving land dedication exactions. The essential nexus and rough proportionality tests require land use authorities to justify land dedication exactions with legitimate studies and meaningful evidence in the record to show that the requirement for the landowner to give up property without compensation is a fair trade in light of the specific burden that the proposed development imposes on the public. This is a far cry from the deferential test that the Court generally applies to land use controls.

While Nollan and Dolan have had a profound effect on land use planning over the past 25 years, they also left many important questions unresolved. As a result, these cases have generated considerable litigation throughout the federal and state court systems. What Nollan and Dolan portend for anything like a disaster impact or linkage fee program cannot be determined solely from an analysis of the two opinions.

The uncertainty begins with the fact that Justice Scalia's opinion in Nollan relied on broad language in earlier cases, but it did not fully explain the precise constitutional basis for the Court's special concern over land use exactions. It was only in Dolan that

64. Id. at 395.
65. Id.
66. Id.
67. Id.
68. See, e.g., Euclid, 272 U.S. at 395 (articulating the Court's deferential treatment in favor of municipalities in land use control cases); ZIEGLER, supra note 40, § 90:46.
69. ZIEGLER, supra note 40, § 90:46.
70. Nollan, 483 U.S. at 839-40.
we begin to see more clearly how the unconstitutional conditions
doctrine lies at the heart of the matter. Rehnquist explained the
principle in this way: "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 sought has little or no relationship to the
property." Moreover, because the majority in Nollan could
discern no logical link at all between the exaction and the Coastal
Commission's stated concerns about the proposed project, Nollan
was a relatively easy case that did not require the Court to
address the more difficult question of balancing interests when a
nexus does exist.

Again, we learn much more in Dolan, where the Court saw
unquestionable connections between the city's land dedication
conditions and the impacts that the proposed development would
have on the floodplain and on traffic congestion. Thus, that case
required the Court to consider how to determine whether the
precise conditions imposed were justified in light of the established
nexus. What, in other words, is the formula that courts must use
to weigh the legitimate governmental interest burdened by the
proposed project against the normal right of the landowner to
receive just compensation when the government seeks to take a
property interest?

While Rehnquist twice declared in Dolan that the standard
did not require mathematical precision, in each instance he
followed up with what seems a near equivalent. He explained
what Nollan and Dolan contemplate by stating that a government
agency defending a land dedication condition "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." Then, in applying that principle to one of the
specific conditions before the Court, he demonstrated that rough
proportionality is a demanding standard, requiring that "the city
must make some effort to quantify its findings in support of the
dedication for the pedestrian/bicycle pathway beyond the
conclusory statement that it could offset some of the traffic
demand generated." From this language, the courts and land use
planners have generally concluded that individualized
determinations and quantifiable findings require that a land
dedication exaction must be based on credible studies, often

71. Dolan, 512 U.S. at 385 (citing Perry v. Sinderman, 408 U.S. 593 (1972);
72. Nollan, 483 U.S. at 837.
73. Dolan, 512 U.S. at 386-87.
74. Id. at 391, 395.
75. Id. at 391.
76. Id. at 395-96.
conducted by experts at some expense, and that the economic impact on the landowner of the exaction must be justified by objectively verifiable methods.\textsuperscript{77}

For years after \textit{Dolan}, courts and scholars debated whether the federal essential nexus and rough proportionality standards apply equally to all kinds of exactions.\textsuperscript{78} In particular, two potentially critical distinctions have been noted that may be relevant to the viability of disaster impact and linkage fees.\textsuperscript{79} First, it was not clear from \textit{Nollan} and \textit{Dolan} whether heightened scrutiny applies as much to development fees as it does to land dedication requirements. Does a governmental demand for money as a condition to a land use approval, as contrasted to an interest in land, implicate the unconstitutional conditions doctrine? Second, should a legislatively adopted program that imposes exactions according to principles generally applicable to similar development projects be treated the same as a decision in an adjudicative proceeding in which a land use authority demands an exaction as an ad hoc condition to approval of a specific development?

\textit{Koontz} addressed the first question, holding “that so-called ‘monetary exactions’ must satisfy the nexus and rough proportionality requirements of \textit{Nollan} and \textit{Dolan}.”\textsuperscript{80} Does this mean that every kind of land use development fee is subject to the same heightened scrutiny?

The circumstances that the case presented could support a more limited reading. Koontz proposed to develop a portion of his approximately fifteen acre site near Orlando, Florida.\textsuperscript{81} Because a significant portion of the land was classified as wetlands, the state regulatory scheme required Koontz to obtain permits from the St. Johns River Water Management District.\textsuperscript{82} The legislation authorized the District to impose conditions necessary to protect water resources and, in particular, to regulate projects calling for dredging or filling of wetlands.\textsuperscript{83} The District's regulations required a landowner proposing a project such as Koontz's to "offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere."\textsuperscript{84} Koontz proposed to develop a 3.7 acre portion of his land and, to mitigate the impact on the wetlands, he offered to grant to the District a conservation

\begin{thebibliography}{9}
\bibitem{77} Juergensmeyer \& Roberts, \textit{supra} note 24, at 331-340.
\bibitem{78} \textit{Id.} at 336.
\bibitem{79} See generally Michael B. Kent, Jr., \textit{Theoretical Tension and Doctrinal Discord: Analyzing Development Impact Fees as Takings}, \textit{51} \textit{W. \& Mary L. Rev} \textit{1833, 1838-39} (2010) (describing the debate as to whether impact fees necessarily amount to a taking).
\bibitem{80} Koontz, 133 S. Ct. at 2599.
\bibitem{81} \textit{Id.} at 2591-92.
\bibitem{82} \textit{Id.} at 2592.
\bibitem{83} \textit{Id.}
\bibitem{84} \textit{Id.}
\end{thebibliography}
The District rejected that proposal and instead gave Koontz two options. He could either reduce the size of his development and increase the acreage subject to the conservation easement, or he could agree to pay for the costs of improving District property located elsewhere. Koontz argued that the District’s demands were excessive in light of the impact his project would have.

In his opinion for the majority, Justice Alito characterized the District’s negotiating tactic as an attempt to circumvent Nollan and Dolan by proposing to accept the monetary option in lieu of forcing Koontz to extend the conservation easement over more of his land. Justice Alito reasoned that to allow the District to do this would provide a failsafe route for governmental evasion of Nollan and Dolan. If monetary demands in land use cases were exempt from heightened scrutiny “a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement’s value.” But beyond this observation, Justice Alito provided no hint that the specific context that gave rise to the proposed in-lieu fee was a controlling factor indicating the risk of evasion.

Perhaps Koontz is only intended to apply when “a so-called monetary exaction” operates as little more than a disguised equivalent of a land dedication exaction rather than when the government assesses what might be characterized as a true monetary exaction that has no antecedent in an opportunistic attempt to grab an interest in land without paying for it. In other words, future cases may establish that Koontz only applies when the monetary exaction is explicitly or implicitly an alternative to a governmental request for an interest in specific land. The stated rationale for the holding, however, seems to cut the other way, signaling a potentially remarkable expansion of heightened scrutiny in land use cases. Justice Alito justified the decision to subject the District’s monetary exaction to the essential nexus and rough proportionality tests simply because “the monetary obligation burdened petitioner’s ownership of a specific parcel of land.” Does not every land use development fee, and indeed practically every land use regulation of any kind, burden ownership of a specific parcel?

85. Id.
86. See id. at 2593 (describing that the District’s response also left open the possibility that Koontz might be able to suggest some other mitigation equivalent to what the District proposed).
87. Id.
88. Id. at 2591.
89. Id. at 2599.
90. Id.
91. Id. at 2599.
Might Justice Alito's reference to a burden on "ownership of a specific parcel of land" suggest that *Koontz* will be limited to an ad hoc monetary exaction imposed in an adjudicative proceeding concerning a specific project, rather than to a general or legislative exaction program applicable to a category of projects? This reading seems plausible and could eventually prevent the case from overshadowing the deferential attitude the Court has generally shown toward the exercise of the police power in most land use matters. But, as Justice Kagan's dissent notes, while the majority does not foreclose the possibility, it also offers no indication that it might give different treatment when a generally applicable legislative program imposes development fees on all similarly situated projects.  

The *Koontz* holding, therefore, may be broad enough to encompass almost any development fee. If so, the consequences could be fatal to the kind of disaster impact and linkage fees under consideration here. As suggested above, any form of heightened scrutiny may prove to be too restrictive to allow states and local governments to use the land use control process in this way to raise significant funds to finance some of the costs of making communities more resilient to disasters.

But at least unless and until the U.S. Supreme Court definitively holds that all forms of development funding devices must meet the essential nexus and rough proportionality tests, the analysis should not stop with a review of the limited circumstances in which land use exactions have come before the Court. There are too many variables in exaction practices across the country, and relatively few land use cases are decided in federal court, let alone by the U.S. Supreme Court. Thus, we turn to a further consideration of the highly developed and often intricately nuanced treatment of development funding devices under state land use law.

After a somewhat tortured history, state land use law in most jurisdictions finally embraced the idea of using exactions to shift onto new real estate projects many costs associated with growth. The earliest of these devices to withstand legal challenges were land dedication conditions and fees assessed in lieu of dedications to offset some of the costs of new or improved infrastructure required to service the project being assessed. Even this was controversial for a time, as property owners seeking to put their land to its highest and best use argued that growth was a public good, the cost of which should be borne by the public at large. But in time, most courts settled on the notion that new development should internalize some of the external costs to which

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92. *Id.* at 2608 (Kagan, J., dissenting).
93. JUERGENSMEYER & ROBERTS, *supra* note 24, at 249-255.
94. *Id.*
95. *Id.*
it contributes.96 

Eventually, courts in many jurisdictions allowed land use authorities to rely on an ever-expanding array of development exactions to shift more and more of the social costs associated with urban growth.97 After legitimizing in-lieu fees, legislatures began to authorize and state courts began to approve pure impact fees—in some jurisdictions not only those earmarked to pay for infrastructure necessitated by development but also to support some of the social programs that municipalities pursue as they grow.98 At first, these programs were predominately addressed to environmental protection and natural resource preservation. But later, courts in some jurisdictions approved monetary exactions, often characterized as linkage fees, to promote other social benefits only indirectly related to the projects being charged.99 Thus, in some states, development fees help finance affordable housing programs, energy conservation, and even public art programs.100 Although these expanded developer financing tools do not necessarily rest on the rationale that new development creates the need for the expenditures they fund, in determining the legitimacy of the programs, courts sometimes use rational nexus analysis.101 

Because Koontz has now extended constitutionally mandated heightened scrutiny to monetary exactions, the rational nexus test of state land use law, as a substantive standard, might seem to add only marginally to the present discussion. True, cases in different jurisdictions articulate the rational nexus test in different ways and sometimes reach contrasting results when state courts analyze whether similar exactions do or do not have the required connection102 True also that in some instances rational nexus analysis conceivably demands more than the U.S. Supreme Court requires through its essential nexus and rough proportionality tests.103 But if we must take Koontz literally, monetary exactions that lack the essential nexus or rough proportionality required under the federal standard will fail without regard to the rational nexus test of a given jurisdiction. There remains, however, a compelling reason to consider whether, even after Koontz, the state exaction cases may suggest a future for well-conceived disaster impact and linkage fee programs. What matters on this question are not the differences in how state courts define the rational nexus test, but rather the more refined

96. Id. 
97. Id. at 336-45. 
98. Id. 
99. Id. 
100. Id. at 341-45. 
101. Id. 
102. Id. at 336. 
103. See supra notes 39-44 and accompanying text (discussing the scrutiny courts have given to land use exaction cases).
and variable analyses by which some of the state cases have exempted certain exaction programs from heightened scrutiny. Indeed, because of the experience and richness of state land use law, the U.S. Supreme Court has previously turned to state court opinions to inform and refine its own land use jurisprudence. In an appropriate case, the Court might well examine the subtleties of state land use law to consider whether a sound basis exists to exempt some monetary exactions from any requirement of heightened scrutiny.

The rational nexus standard of state land use law stems from a principle similar to, but conceptually distinct from, the Supreme Court's unconstitutional conditions doctrine. State courts have not necessarily worried about whether an exaction impermissibly burdens the exercise of a constitutional right, such as the right to just compensation. Rather, they have more commonly considered whether a conditional land use approval "is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking" for something. In this sense, the heightened judicial scrutiny of the rational nexus standard is simply an extension of the usual principle that exercises of the police power must be reasonable. While in most land use contexts the reasonableness test is highly deferential to the police power, the perception that the permitting process can tempt land use authorities to adopt abusive practices justifies a more demanding review of conditional approvals. State courts, it seems, tend to view crass opportunism as unreasonable.

While this focus on the risk of governmental overreaching has led courts to apply the rational nexus standard to many exactions, it has also induced courts in some states to accept one of three rationales to exempt certain development fees from that degree of heightened scrutiny. One rationale applies when a linkage fee can be justified as a proper use of the taxing power. Another recognizes a categorical distinction between legislative and adjudicative exactions. The third affords generous judicial deference to exaction programs seen as means toward especially

104. See Dolan, 512 U.S. at 389–91 (drawing on state court opinions to formulate the rough proportionality standard).
105. See Koontz, 133 S. Ct. at 2608 (Kagan, J, dissenting) (explaining how the Court might adopt a rationale developed in state exactions cases and thereby limit the holding in Koontz "to permitting fees that are imposed ad hoc").
110. San Remo Hotel, 41 P.3d at 91.
important policy objectives.\textsuperscript{111}

**Development fees as permissible taxation.** The least controversial distinction that some state courts have made is that certain costs imposed on the development process will stand or fall not on the specialized analysis applied to exaction conditions but based simply on whether or not the governmental entity has the legal authority to assess the kind of fee that is involved. In *McCarthy v. City of Leawood*,\textsuperscript{112} the Supreme Court of Kansas took this tact in upholding an impact fee that a city imposed on all new development within an area that would benefit from the improvement of a certain traffic corridor.\textsuperscript{113} Noting “the critical leap which must be made from a fee to a taking of property,” the court concluded that the land use exaction cases do not apply to an ordinance simply “conditioning certain land uses on payment of a fee.”\textsuperscript{114} This analysis gives effect to the principle, expressly recognized by Justice Alito in *Koontz*, that a tax is distinguishable from a land use exaction condition.\textsuperscript{115} Thus, subject to whatever state law restrictions may apply to a land use authority’s power to impose taxes or specific categories of fees, disaster impact and linkage fee programs might completely escape the holding in *Koontz* when they are structured and implemented as authorized exercises of a power to impose a tax or to assess a fee.\textsuperscript{116} While the theory is compelling in jurisdictions in which municipalities and land use authorities have considerable authority to impose excise taxes or to resort to other similar revenue tools, its viability in a great many jurisdictions is highly questionable.\textsuperscript{117}

**Development fees as legislative rather than adjudicative exactions.** Another exception to the rational nexus test stems from the distinction, already mentioned above, between ad hoc exactions imposed as conditions in adjudicative land use proceedings relating to a specific landowner’s property and those based on legislative programs that apply to a category of real estate developments. The California Supreme Court provided a leading example of this exception in *San Remo Hotel L.P. v. City*

\begin{enumerate}
\item \textsuperscript{111} *Holmdel Builders Assoc.*, 583 A.2d at 279.
\item \textsuperscript{112} *McCarthy v. City of Leawood*, 894 P.2d 836 (Kan. 1995).
\item \textsuperscript{113} Id. at 837.
\item \textsuperscript{114} Id. at 845.
\item \textsuperscript{115} *Koontz*, 133 S. Ct. at 2601. “This case therefore does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners.” Id.
\item \textsuperscript{116} See also *Home Builders Assn. v. West Des Moines*, 644 N.W.2d 339, 350 (Iowa 2002) (holding that a fee imposed on new development to help finance a neighborhood park system was an illegal tax and therefore not subject to regulatory takings analysis).
\item \textsuperscript{117} See generally Kent, supra note 59, at 1869-76 (stating excise taxes may work in some jurisdictions where they are exempt from the uniformity requirement, but simply labeling something as an excise tax will not work in jurisdictions requiring uniformity).
\end{enumerate}
The San Remo Hotel had been used to some extent as a residential hotel that provided long-term housing especially attractive to low-income residents of the city.\textsuperscript{119} The hotel's owners and operators wished to turn the project into a tourist hotel.\textsuperscript{120} Because of San Francisco's special concerns about a shortage of housing of this kind, the city's Residential Hotel Unit Conversion and Demolition Ordinance and the city's Planning Code required the developer to obtain a conditional use permit.\textsuperscript{121} Based on this ordinance, the city granted the permit on the condition that the developer takes specific action to mitigate the loss of residential units that the conversion would entail.\textsuperscript{122} The ordinance did not leave the nature or extent of the required mitigation for the city to determine or negotiate in each instance on a case-by-case basis. Rather, it established a generally applicable principle that the developer of a proposed residential hotel conversion project must either replace the residential units attributable to the conversion or pay a mitigation fee into a special fund in accordance with a formula that the ordinance established.\textsuperscript{123}

In upholding the application of the ordinance, the California Supreme Court focused on the difference between an ad hoc development condition that results from the approval process for a specific project and a condition imposed in accordance with a legislative scheme that applies uniformly to a class of projects.\textsuperscript{124} The former case calls for heightened scrutiny because the discretion vested in the land use authority creates the "potential for illegitimate leveraging of private property."\textsuperscript{125} But when a legislative body determines that all property owners seeking approval in a particular development category should meet specified conditions, the risk of opportunistic behavior by public officials simply does not exist to the same extent.\textsuperscript{126} The court therefore held that heightened scrutiny of the \textit{Nollan} and \textit{Dolan} variety did not apply and that the conditions imposed under the ordinance only needed to satisfy a far less demanding test.\textsuperscript{127} Such legislatively impose fees, the court held, "must bear a reasonable

\textsuperscript{118} San Remo Hotel, 41 P.3d at 91 (Cal. 2002). The issue preclusion doctrine subsequently prevented these plaintiffs from re-litigating the dispute in the federal courts. See San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005) (holding the plaintiffs Federal claims under the Fifth Amendment takings clause were precluded by the state court decision).

\textsuperscript{119} San Remo Hotel, 41 P.3d at 95.

\textsuperscript{120} Id.

\textsuperscript{121} Id. at 91-93.

\textsuperscript{122} Id. at 95.

\textsuperscript{123} Id. at 92.

\textsuperscript{124} Id. at 102.

\textsuperscript{125} Id.

\textsuperscript{126} Id. at 105.

\textsuperscript{127} Id.
relationship, in both intended use and amount, to the deleterious public impact of the development."128 This may seem but a fine linguistic adjustment to the essential nexus and rough proportionality tests, but it proved to be a sufficient distinction to allow the San Francisco ordinance to avoid the degree of scrutiny required by Nollan and Dolan. As applied, this approach, therefore, supports an important, general distinction between legislative exactions and adjudicative ones. Other courts follow a similar principle, and some commentators also argue in favor of it.129

Development fees as legitimate means toward especially important policy objectives. A variation on this line of state cases establishes a more limited, yet more radical, exception applicable only to certain legislative programs that use development fees in support of critical public policies, the benefits of which outweigh the burdens imposed on individual property rights. These cases are more limited because they do not derive from a categorical distinction between legislative and adjudicative exactions. They are more radical because, in limited circumstances, they afford significantly greater deference to an exaction designed to serve a legislative policy of overarching importance.

The New Jersey Supreme Court's decision in Holmdel Builders Association v. Township of Holmdel illustrates.130 The case involved an affordable housing fee that several townships imposed on developers to help the townships meet their obligations under New Jersey law to provide affordable housing.131 Most of the ordinances imposed affordable housing linkage fees on non-residential as well as residential projects.132 The programs provided for the fees collected for this purpose "to be dedicated to an affordable-housing trust fund."133 The underlying justification for assessing the fees on non-residential projects was that "unfettered non-residential development has exacerbated the need for lower-income housing."134 The developer argued that this kind of linkage fee could not withstand application of New Jersey's rigorous version of the rational nexus test because the monetary exaction required "developers to provide for off-site public needs that have not been caused by their developments and furnish them

128. Id.
129. See Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 696 (Colo. 2001) (holding that a sanitary district's plant investment fee was not subject to a regulatory takings analysis because it was "a generally applicable, legislatively based development fee" rather than "a discretionary adjudicative determination"); JUERGENSMEYER & ROBERTS, supra note 24, at 336.
131. Id. at 280.
132. Id. at 281-83.
133. Id.
134. Id. at 283-84.
no benefits.”135 Assuming that the rational nexus standard applied, the argument was a powerful one because, as the court acknowledged, under the New Jersey cases, rational nexus analysis requires an “almost but-for causal nexus between off-site public facilities and private development in order to justify exactions.”136 We should expect developers to challenge a disaster linkage fee on a similar basis because no new development project contributes in any measurable way to weather conditions.

In light of the special importance attached to New Jersey’s affordable housing policy, the court held that the affordable housing fees were not subject to rational nexus analysis.137 Rather, the fees could be justified as a legitimate form of land use regulation under a highly deferential standard requiring only “a sound basis to support a legislative judgment that there is a reasonable relationship between unrestrained nonresidential development and the need for affordable residential development.” Pursuant to this approach, a development fee assessed in service of a key legislative policy can survive so long as the government can present a “sound basis” for asserting a link between the type of real estate development involved and the policy objective.139 Such a standard, roughly equivalent to rational basis review, seems to establish a potent exemption from heightened scrutiny for limited instances in which the court perceives the legislative policy to be sufficiently important. In effect, if an exaction is part of a legislative program designed to implement a critical policy objective, the court will generally respect a legislative determination that there is a satisfactory link between real estate development of a particular character and the policy objective.140 What is most significant about this standard is that it does not call for any evidence about the actual impact of the particular development involved.141

A recent California case goes even further in deferring to a legislative decision to impose an exaction in service of an affordable housing policy. The case, decided by the Court of Appeals for the Sixth District, and now pending appeal to the California Supreme Court, presented a challenge by the California Building Industry Association (CBIA) to San Jose’s inclusionary housing ordinance.142 In a manner similar to New Jersey, the

135. Id. at 287.
136. Id.
137. Id. at 288.
138. Id.
139. Id. at 295. Although the court held that the challenged linkage fees were not subject to rational nexus review, the court further held that the fees had not been validly adopted “because of the absence of enabling administrative regulations.” Id.
140. Id. at 572.
141. Id. at 580.
142. California Building Indus. Assoc. v. City of San Jose, 157 Cal. Rptr.3d
California legislature imposed on local governments the responsibility to assure adequate housing for low and moderate income households, but left it to local governments to determine how to achieve that objective. The City of San Jose enacted an ordinance that imposed affordable housing conditions on developers of residential projects that included 20 or more units. Under the ordinance, a developer could choose from several options. To directly contribute affordable housing, a developer could set aside 15 percent of the units in the development for purchase by low or moderate income buyers or could construct affordable housing on a different site. A developer also had the option to dedicate land for affordable housing. As an additional alternative, the ordinance provided that a developer could pay an in-lieu fee to an Affording Housing Fee Fund according to a formula.

The Court of Appeals held that even the deferential reasonable relationship test announced by the California Supreme Court in the San Remo case was too demanding under these circumstances. The court found it especially relevant that San Jose's affordable housing exaction was not intended to mitigate the impact of a particular development. Rather, the ordinance was intended to "enhance the public welfare" through a program designed to address the critical need in California for affordable housing. On that basis, the court concluded that "whether the Ordinance was reasonably related to the deleterious impact of market-rate residential development in San Jose is the wrong question to ask in this case." The court reviewed at length California's exactions jurisprudence and explained that the standards of review that those cases established were inappropriate to San Jose's affordable housing ordinance.

After concluding that the exaction cases were inapt, the court held "that the Ordinance should be reviewed as an exercise of the
City’s police power.” The court, therefore, analyzed the ordinance under the California cases establishing the scope of the police power in regulating the use of land. The controlling standard under California law, which is consistent with the principles followed throughout the United States, recognizes broad discretion in governmental power to regulate land use. “A land use ordinance is a valid exercise of the police power if it bears a substantial and reasonable relationship to the public welfare. It is invalid only if it is arbitrary, discriminatory, and [without a] reasonable relationship to a legitimate public interest.” Based on these authorities, the court remanded the case to the trial court “to determine whether CBIA has rebutted the presumption that the inclusionary housing conditions are reasonably related to the City’s legitimate public purpose of ensuring an adequate supply of affordable housing in the community.”

The CBIA opinion extends judicial deference in the case of certain legislative exactions to an extreme by treating the exaction program itself as an ordinary exercise of the police power justifiable on the basis of the public welfare interest that it purports to serve. Viewed in this way, an exaction will survive a facial challenge absent a showing that it bears no substantial relationship to its policy objective. The California Court of Appeals radically altered the focus concerning the affordable housing linkage fee by shifting the inquiry away from the relationship between real estate development and the social ills addressed by the legislative policy and toward the relationship between the exaction condition and the legislative policy it supports. Using this approach, a court should uphold exactions if they are arguably capable of serving sufficiently important policy objectives. When the exaction condition is a monetary contribution to a fund established to support a mandated legislative program, there should be little doubt that the exaction will survive the challenge because a fee set aside to help fund an important policy objective is per se reasonably related to the public welfare.

It remains to be seen whether this approach can survive review under the U.S. Constitution following Koontz.

Viewed as two variations on a common theme, the rationales of the Holmdel and CBIA cases seem to suggest particularly compelling arguments in favor of programs requiring new

153. Id. at 824.
154. Id. at 824-25.
155. Id. at 824 (citations omitted).
156. Id. at 825.
157. Id. at 817.
158. This conclusion assumes that the reviewing court concludes that the legislative mandate addresses a sufficiently important policy objective. Whether a particular legislative objective, such as affordable housing or disaster relief and management, meets that requirement may well vary from one jurisdiction to another.
development to fund some of the costs of adapting the built environment to climate change. Where, as in those cases, a court is willing to give great deference to generally applied funding devices, the rational nexus test need not constrain a linkage fee program. A standard that simply asks whether an exaction can be justified by an important land use policy objective implies none of the quantifiable methodology of heightened scrutiny. The kind of disaster fee program contemplated in Part I of this article might well survive that brand of judicial review. A legislative fee program that links large scale real estate projects to a community’s need for enhanced disaster response and emergency management would seem to stand firmly on a sound basis (as required by the Holmdel case), and it certainly is rationally related to a legitimate police power objective (as required by the CBIA case).

A critical question now is whether the U.S. Supreme Court will permit state courts to lead the way through any of the nuanced analyses discussed in this part that allow for greater deference to some exaction programs. With the CBIA case still making its way through the appeals process, we may soon learn the answer.

IV. CONCLUSION

At a minimum, adapting the built environment to climate change in tornado alley may require building departments and land use authorities to revise codes and ordinances to assure greater tornado resilience. While more stringent building standards may be essential, they probably will not be sufficient to respond to the threats that climate change present in tornado alley and elsewhere. More comprehensive solutions may require some creative funding solutions, especially if financially stressed state and local governments must cope with these serious threats in an era of reduced federal spending. A thorough approach will likely require costly infrastructure improvements and enhancements to disaster recovery and emergency management systems. Some communities may also wish to subsidize the costs of retrofitting existing structures, especially in the poorest residential neighborhoods, or even to provide financial support to help new affordable housing projects meet the more demanding building standards. Other communities may wish to create long-term capital investment funds for future disaster recovery and rebuilding programs.

Developer funding devices, especially in the form of disaster impact and linkage fees, could play a small but meaningful role in tornado alley and beyond. This will be possible, however, only if

159. Other development funding devices are also worth considering. Of special interest are a range of economic incentives for projects engineered to
impact and linkage fee programs can avoid or survive heightened judicial scrutiny under the U.S. Supreme Court cases and the rational nexus standard of state land use law. The current state of the law, especially following the Koontz case, creates a quandary for any land use authority that may consider resorting to development funding devices to help adapt the built environment to climate change.

higher standards, such as expedited development plan review, reduced permitting fees, fee rebates, development bonuses, and tax credits and tax abatements. Cf. Carl J. Circo, Should Owners and Developers of Low-Performance Buildings Pay Impact or Mitigation Fees to Finance Green Building Incentive Programs and Other Sustainable Development Initiatives, 34 WM. & MARY ENVTL. L. AND POL'Y REV. 55, 61-74 (2009) (considering the advantages and disadvantages of such economic tools for financing green building programs). A consideration of these devices, however, is beyond the scope of this article.