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Update on Takings Law

Dancing Between Raindrops: Emerging Strategies for Surviving Regulatory Taking Claims

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Dancing Between Raindrops

Emerging Strategies for Surviving Regulatory Taking Claims

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Disclaimer

The views expressed in this presentation have neither been authorized nor endorsed by the Commission or Law Center; and Mr. Gardner is solely responsible for this content.

Maryland-National Capital Park and Planning Commission

- Independent Agency of Maryland
- 2 counties ~2 M people ~ 1k mi^2
- 2,000 – 6,000 employees (seasonal)
- **Subdivision & Site Plan Approvals**
- SMEs in Planning and Zoning
- ~ 66,000 acres parkland + streams
- ~ 435 mi. trails
- Recreation programs (one county)
- Only six-time NRPA Gold Medal



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Remember: *Euclid* Was A Takings Case

- **Zoning is Anchored to the Police Power by Analogy to Private Nuisance – 47 S.Ct. 114 (1926)**
  - "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."
- **SCOTUS Dodged the Lower Court's Fifth Amendment Holding**
  - "Whether these purposes and objects would justify the taking of plaintiff's property as and for a public use need not be considered. It is sufficient to say that, in our opinion, and as applied to plaintiff's property, it may not be done without compensation under the guise of exercising the police power." 297 F. 307, 316 (N.D. Ohio 1924)
  - "The ordinance is assailed on the grounds that it … deprives appellee of liberty and property without due process of law and denies it the equal protection of the law…The relief sought here is of the same character, namely, an injunction against the enforcement of any of the restrictions, limitations, or conditions of the ordinance." 47 S.Ct. at 117, 121
- **On the Heels of *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922)**
  - "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."
  - Brandeis' dissent: "[A] restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use."

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Remember: *Euclid* Was A Takings Case

"… a pig in the parlour instead of the barnyard…"

J. Sutherland



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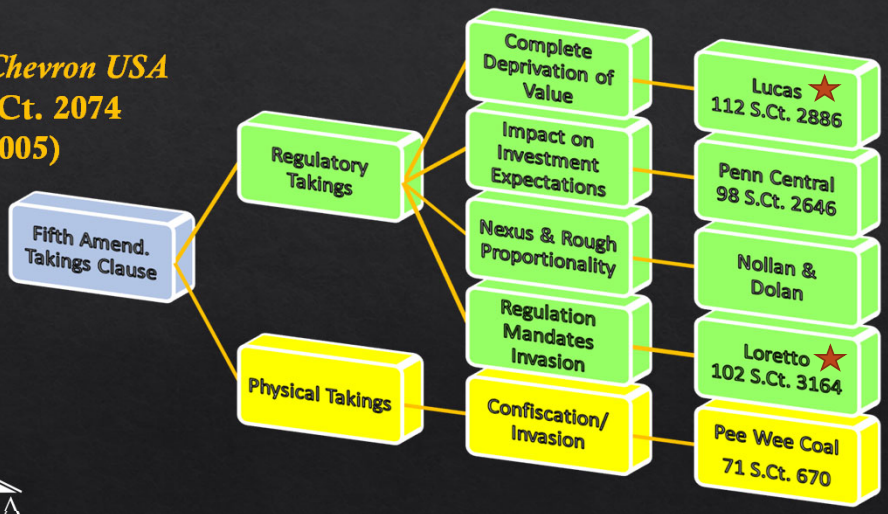
At Least There's *Lingle*

Lingle v. Chevron USA
125 S.Ct. 2074
(2005)



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At Least There's *Lingle*

- In *Agins v. City of Tiburon*, a case involving a facial takings challenge to certain municipal zoning ordinances, the Court declared that "[t]he application of a general zoning law to particular property effects a taking **if the ordinance does not substantially advance legitimate state interests**…or denies an owner economically viable use of his land…" 125 S.Ct. 2082
- *Agins* then went on to discuss [*Euclid*], a historic decision holding that a municipal zoning ordinance would survive a substantive due process challenge so long as it was not "**clearly arbitrary and unreasonable, having no substantial relation to the *public health, safety, morals, or general welfare.*"**
- **The "substantially advances" formula [may have] some logic in the context of a due process challenge**, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause… **But such a test is not a valid method of discerning whether private property has been "taken"** for purposes of the Fifth Amendment.

J. O'Connor



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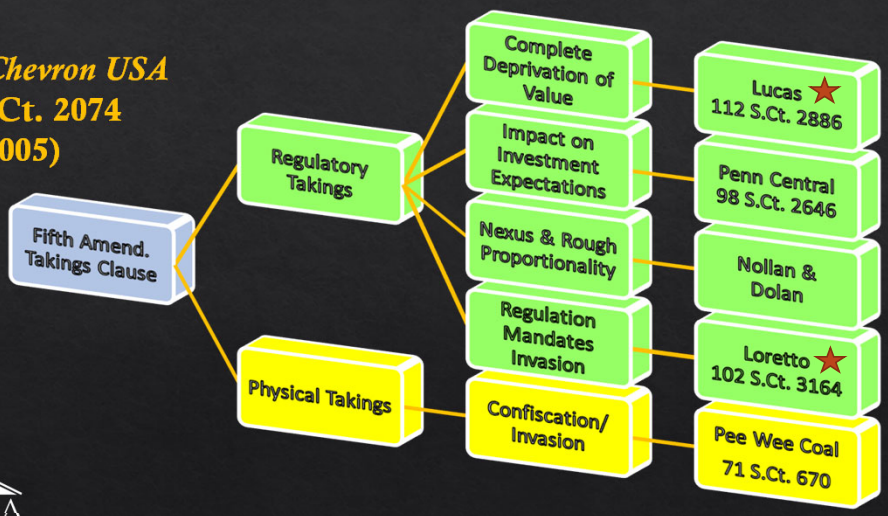
At Least There's *Lingle*

Lingle v. Chevron USA
125 S.Ct. 2074
(2005)



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Revisiting *Koontz* & Conditions

- Unless the **condition of approval** passes scrutiny under *Nollan* and *Dolan*, imposing a condition that requires some divestment, or curtails an owner's control/use, in exchange for approval of a permit may violate the "unconstitutional conditions doctrine."
  - A long series of cases "**reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up.**" 133 S. Ct. 2594
  - **"So far, we all agree."** (J. Kagan's dissent, 133 S.Ct. 2603)
- Likewise, **monetary "fees in lieu"** that are directly linked to property permit conditions that violate *Nollan/Dolan* standards **may also constitute** unconstitutional conditions.
- **Offering "optional" compliance methods may not cure the constitutional defect.**
  - Even if the permit could be denied outright – without offering the optional methods?

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Revisiting *Koontz* & Conditions

- Koontz never complied with the monetary or property-based conditions proposed as alternatives. He neither paid nor parted with anything of value in favor of the government. What was actually "taken"? What taking was consummated?

> "Before applying *Nollan* and *Dolan*, a court must find that the permit denial occurred because the government made a demand of the landowner, which he rebuffed. And unless *Nollan* and *Dolan* are to wreck land-use permitting throughout the country—to the detriment of both communities and property owners—that demand must be unequivocal. **If a local government risked a lawsuit every time it made a suggestion to an applicant about how to meet permitting criteria, it would cease to do so; indeed, the government might desist altogether from communicating with applicants. That hazard is to some extent baked into *Nollan* and *Dolan*; observers have wondered whether those decisions have inclined some local governments to deny permit applications outright, rather than negotiate agreements that could work to both sides' advantage.**" J. Kagan's Dissent, 133 S.Ct. 2610

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A Triumvirate? *Nollan, Dolan & Koontz*

- Echeverria, John D., ***Koontz*: The Very Worst Takings Decision Ever?**, 22 NYU Environmental Law Journal 1 (2014), available at https://ssrn.com/abstract=2316406.
- Martin, Christina, ***Nollan* and *Dolan* and *Koontz* – Oh My! The Exactions Trilogy Requires Developers to Cover the Full Social Costs of Their Projects, But No More**, Program for Judicial Awareness (November 1, 2013), available at https://ssrn.com/abstract=2348844.
- Mulvaney, Timothy M., **The State of Exactions**, 61 Wm. & Mary L. Rev. 169 (2019), https://scholarship.law.wm.edu/wmlr/vol61/iss1/4.

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Crystal Balls After *Nollan-Dolan-Koontz*?

- David L. Callies, **Through a Glass Clearly: Predicting the Future in Land Use Takings Law**, 54 Washburn L. Rev. 43 (2014), available at https://core.ac.uk/download/pdf/84320697.pdf
  - **[SCOTUS] will cut back the application of its ripeness rule, and particularly its second "state litigation" prong**, following the lead of several federal circuit courts which have had quite enough of government regulatory taking and successfully reduce the impact of the ripeness doctrine by emphasizing its prudential-rather than jurisdictional-reach.
  - The Court needs to, and will, resolve the so-called "relevant parcel" or denominator issue, both with respect to partial and total regulatory takings.
  - There will be more use of consensual tools like the development agreement to resolve exaction issues. Such agreements take the exaction issue out of the *Nollan-Dollan-Koontz* context altogether.
  - Courts will continue to be confused by the difference, if any, between legislative and administrative/quasi-judicial exactions in the application of *Nollan-Dollan-Koontz*. If this last unresolved land development conditions issue reaches the United States Supreme Court, the Court is likely to find the distinction irrelevant.

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The Crux of the Thing – Matching?

- [I]f the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end…. The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. J. Scalia in *Nollan*, 107 S. Ct. 3148
- Even if respondent would have been entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on petitioner's forfeiture of his constitutional rights. J. Alito in *Koontz*, 133 S.Ct. 2596

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The Trouble With *Koontz, Pakdel (& Knick)*

- Very difficult to implement – notwithstanding all good faith and due diligence.
  - *Pennsylvania Coal*'s admonition: "if a regulation goes too far…"
- "There are a nearly infinite variety of ways for regulations to affect property interests. And under modern takings law, there is no magic formula to determine whether a given government interference with property is a taking. For that reason, a government actor usually cannot know in advance whether implementing a regulatory program will effect a taking, much less of whose property." (J. Kagan's dissent in *Knick v. Twp. of Scott, Pennsylvania*, 139 S.Ct. 2162, 2187 (2019).) (Citations and internal quotations omitted.)
- Some members of SCOTUS imply conspicuous antipathy toward local motives
- Grudging tolerance of the ambition to mitigate profound externalities of development

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Even So, Exactions Are Alive and Well

- Transportation Infrastructure (principally roads, sidewalks and bike paths)
- Water, Sewer and Stormwater Facilities
- School Capacity
- Public Safety Facilities
- Environmental Conservation / Mitigation
- Low-Income, Middle, Affordable Housing
- Public Facilities – "may refer to any type of infrastructure, buildings, capital facility, or capital improvement and may include land, furnishings, equipment, and vehicles." (Oakland Impact Fee Nexus Analysis)

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Empirical Nexus for Dedications



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Monetizing Development Impacts

Proffers

Va. Code § 15.2-2303.4

C. Notwithstanding any other provision of law, general or special, as used in this chapter, a proffer, or proffer condition amendment, whether onsite or offsite, offered voluntarily … shall be deemed unreasonable unless:

1. It addresses an impact that is specifically attributable to a proposed new residential development or other new residential use applied for; and

2. If an offsite proffer, it addresses an impact to an offsite public facility, such that (i) the new residential development or new residential use creates a need, or an identifiable portion of a need, for one or more public facility improvements in excess of existing public facility capacity at the time of the rezoning or proffer condition amendment and (ii) each such new residential development or new residential use applied for receives a direct and material benefit from a proffer made with respect to any such public facility improvements. A locality may base its assessment of public facility capacity on the projected impacts specifically attributable to the new residential development or new residential use.

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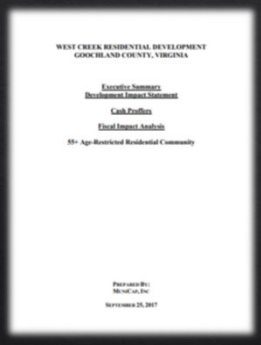
Monetizing Development Impacts

Proffers



WEST CREEK RESIDENTIAL DEVELOPMENT
GOOCHLAND COUNTY, VIRGINIA

Executive Summary
Development Impact Statement

Cash Proffers

Fiscal Impact Analysis

55+ Age-Restricted Residential Community

PREPARED BY:
MuniCap, Inc.

SEPTEMBER 25, 2017

Summary of Analysis

Based on MuniCap's analysis of various documents and research, the estimated cash proffer that may be collected from the Proposed Development is shown below.

Table M
Summary of Analysis

Public Facilities	Estimated Proffer per Dwelling Unit
Public school facilities	$0
Public parks	$177
Public safety facilities	$1,471
Public transportation facilities	$0
Estimated proffer per dwelling unit	**$1,648**
Projected number of units	520
Total projected cash proffer	**$856,960**

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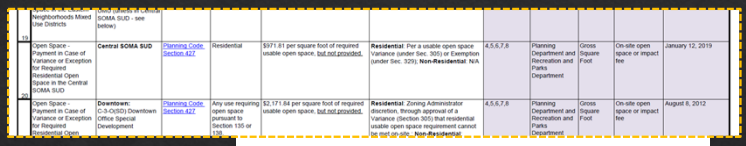
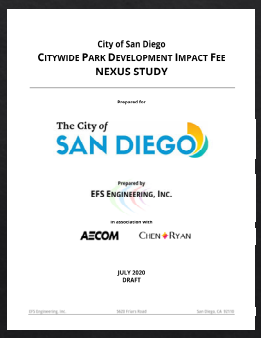
Monetizing Development Impacts

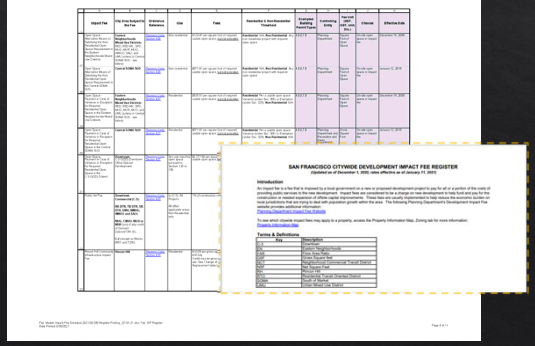
- California Mitigation Act
  Govt. Code §§ 66000 et seq. (1987)





	Neighborhoods Mixed Use Districts	SOMA SUD - see below)								
19	Open Space - Payment in Case of Variance or Exception for Required Residential Open Space in the Central SOMA SUD	**Central SOMA SUD**	Planning Code Section 427	Residential	$971.81 per square foot of required usable open space, but not provided.	**Residential**: Per a usable open space Variance (under Sec. 305) or Exemption (under Sec. 329); **Non-Residential**: N/A	4,5,6,7,8	Planning Department and Recreation and Parks Department	Gross Square Foot	On-site open space or impact fee	January 12, 2019
20	Open Space - Payment in Case of Variance or Exception for Required Residential Open	**Downtown:** C-3-O(SD) Downtown Office Special Development	Planning Code Section 427	Any use requiring open space pursuant to Section 135 of the	$2,171.84 per square foot of required usable open space, but not provided.	**Residential**: Zoning Administrator discretion, through approval of a Variance (Section 305) that residential usable open space requirement cannot be met on-site. **Non-Residential**	4,5,6,7,8	Planning Department and Recreation and Parks Department	Gross Square Foot	On-site open space or impact fee	August 8, 2012





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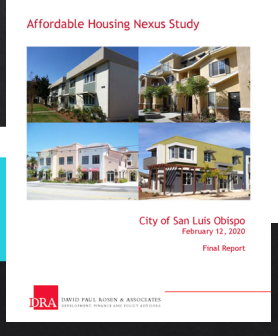
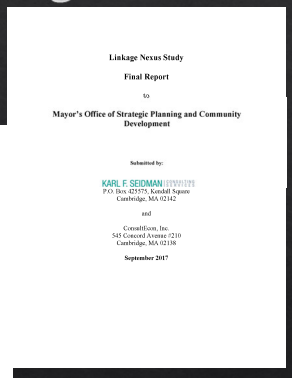
IZ + Affordable Housing Linkage







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Developer Rights & Responsibilities Agreements

- Callies' Crystal Ball: "more use of consensual tools like the development agreement"
- Concern over improper "bargaining away" the police power
- Considerable challenge in procuring effective enabling authority from state legislatures

Menu — WASHINGTON STATE LEGISLATURE

RCWs > Title 36 > Chapter 36.70B > Section 36.70B.180 — Print

36.70B.170 << 36.70B.180 >> 36.70B.190

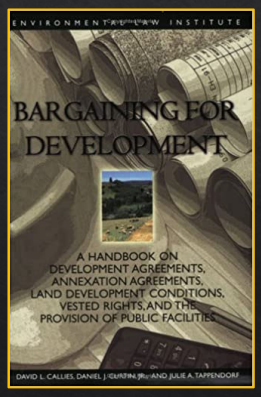
RCW 36.70B.180

Development agreements—Effect.

Unless amended or terminated, a development agreement is enforceable during its term by a party to the agreement. A development agreement and the development standards in the agreement govern during the term of the agreement, or for all or that part of the build-out period specified in the agreement, and may not be subject to an amendment to a zoning ordinance or development standard or regulation or a new zoning ordinance or development standard or regulation adopted after the effective date of the agreement. A permit or approval issued by the county or city after the execution of the development agreement must be consistent with the development agreement.

[1995 c 347 § 503.]

The legislature finds that the lack of certainty in the approval of development projects can result in a waste of public and private resources, escalate housing costs for consumers and discourage the commitment to comprehensive planning which would make maximum efficient use of resources at the least economic cost to the public. Assurance to a development project applicant that upon government approval the project may proceed in accordance with existing policies and regulations, and subject to conditions of approval, all as set forth in a development agreement, will strengthen the public planning process, encourage private participation and comprehensive planning, and reduce the economic costs of development. Further, the lack of public facilities and services is a serious impediment to development of new housing and commercial uses. Project applicants and local governments may include provisions and agreements whereby applicants are reimbursed over time for financing public facilities. It is the intent of the legislature by RCW 36.70B.170 through 36.70B.210 to allow local governments and owners and developers of real property to enter into development agreements. [1995 c 347 § 501]



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Setting Long Range Market Expectations

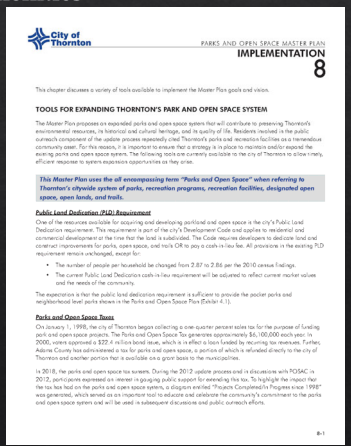
Functional Master Plans for Parks, Open Space and Other Public Amenities



Parks, Recreation and Open Space (PROS) Plan Update

Montgomery Parks is updating the 2017 Parks, Recreation and Open Space (PROS) Plan to guide the future development and management of our park system. Parks, recreation, and open spaces provide active, social, and leisure opportunities that are essential to the high quality of life for Montgomery County residents. The focus of the 2022 PROS Plan is to provide equitably activated, central community spaces that meet recreational needs and protect and manage natural and cultural resources for future generations.




City of Thornton

PARKS AND OPEN SPACE MASTER PLAN

IMPLEMENTATION 8

This chapter discusses a variety of tools available to implement the Master Plan goals and vision.

TOOLS FOR EXPANDING THORNTON'S PARK AND OPEN SPACE SYSTEM

The Master Plan proposes an expanded parks and open space system that will contribute to preserving Thornton's environmental resources, its historical and cultural heritage, and its quality of life. Residents involved in the public outreach component of the update process repeatedly cited Thornton's parks and recreation facilities as a tremendous community asset. For this reason, it is important to ensure that a strategy is in place to maintain and/or expand the existing parks and open space system. The following tools are currently available to the city of Thornton to allow timely, efficient response to system expansion opportunities as they arise.

This Master Plan uses the all encompassing term "Parks and Open Space" when referring to Thornton's citywide system of parks, recreation programs, recreation facilities, designated open space, open lands, and trails.

Public Land Dedication (PLD) Requirement

One of the resources available for acquiring and developing parkland and open space is the city's Public Land Dedication requirement. This requirement is part of the city's Development Code and applies to residential and commercial development at the time that the land is subdivided. The Code requires developers to dedicate land and construct improvements for parks, open space, and trails OR to pay a cash-in-lieu fee. All provisions in the existing PLD requirement remain unchanged, except for:

- The number of people per household be changed from 2.87 to 2.86 per the 2010 census findings.
- The current Public Land Dedication cash-in-lieu requirement will be adjusted to reflect current market values and the needs of the community.

The expectation is that the public land dedication requirement is sufficient to provide the pocket parks and neighborhood level parks shown in the Parks and Open Space Plan (Exhibit 4.1).

Parks and Open Space Taxes

On January 1, 1998, the city of Thornton began collecting a one-quarter percent sales tax for the purpose of funding park and open space projects. The Parks and Open Space Tax generates approximately $6,100,000 each year. In 2000, voters approved a $22.4 million bond issue, which is in effect a loan funded by recurring tax revenues. Further, Adams County has administered a tax for parks and open space, a portion of which is refunded directly to the city of Thornton and another portion that is available on a grant basis to the municipalities.

In 2018, the parks and open space tax sunsets. During the 2012 update process and in discussions with POSAC in 2012, participants expressed an interest in gauging public support for extending this tax. To highlight the impact that the tax has had on the parks and open space system, a diagram entitled "Projects Completed/In Progress since 1998" was generated, which served as an important tool to educate and celebrate the community's commitment to the parks and open space system and will be used in subsequent discussions and public outreach efforts.

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Some Closing Questions

- **Back to the future. In a new analogy to nuisance law, why not enable private parties to contest development permits issued without accounting properly for economic externalities caused by the development?**

  Stein, Gregory M., Reverse Exactions, 26 William & Mary Bill of Rights Journal 1 (2017), available at http://ssrn.com/abstract=2933013

- **Using formulae and schedules to support monetizing exactions may be, for the moment, a relatively safe way to comply with *Nollan-Dolan-Koontz*. But what if the economics are way off? What if negotiation is a better way for the public to get a fair economic deal? And what can you do to prevent a *Pakdel* problem in the negotiating process?**

  Kim, M., Negotiation or Schedule-Based? Examining the Strengths and Weaknesses of the Public Benefit Exaction Strategies of Boston and Seattle, Journal of the American Planning Association, 86 (2), 208-221 (2020), **available at** https://doi.org/10.1080/01944363.2019.1691040

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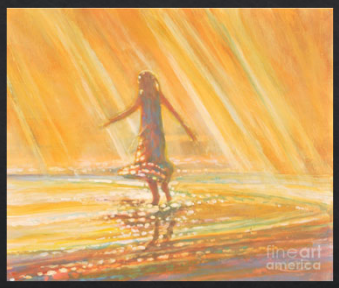
Thank you.

(But I don't think the dance is over.)



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