Do Progressive Property Scholars Really Want to Limit Nollan and Dolan to Administrative Exactions?

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Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, **Harv. Envtl. L. Rev.** (forthcoming), available at SSRN.

In *Legislative Exactions and Progressive Property*, Professor Timothy Mulvaney provides a clear and thoughtful discussion of whether legislative exactions should be subjected to the same heightened level of scrutiny that applies to administrative exactions under current Supreme Court doctrine. For those who view exactions as a device that internalizes externalities and forces owners wishing to intensify their use of land to bear the full cost of their development, the conventional wisdom is that Nollan v. California Coastal Commission and *Dolan v. Tigard* should be read as narrowly as possible.

Both of those cases addressed only administrative exactions and did not need to decide the question of whether similar rules should apply in cases in which the exaction is imposed through more generally applicable legislation. Those who believe that *Nollan* and *Dolan* hold government actors to an unreasonably high standard may naturally resist expanding their reasoning to legislative exactions. While acknowledging and largely agreeing with this first-order reasoning, Mulvaney notes second-order effects of confining those two cases to administrative exactions. These second-order effects, he argues, might be more harmful in the long run than those who object to expanding the reach of *Nollan* and *Dolan* may have initially recognized.

Mulvaney notes and discusses three straightforward and persuasive reasons why progressive property scholars may object to interpreting *Nollan* and *Dolan* as applying to legislative exactions: reliance on “the checks and balances of democratic government, the likelihood of reciprocal advantages stemming from legislation, and an aversion to judicial usurpation of the legislative process.” (P. 8.) But he discourages too much reliance on the initial appeal of these arguments by noting that any approach that applies a higher level of scrutiny to administrative exactions risks marginalizing administrative action more generally, which may lead to closer scrutiny of administrative acts in other contexts.

More broadly, any interpretation that leads regulators to rely more heavily on inflexible legislative processes reduces the ability of regulators to consider the individual facts presented by particular humans who may merit the greater flexibility that only administrative exactions can afford. By raising these second-order concerns, Mulvaney is warning progressive property scholars to be careful what they wish for.

Mulvaney’s warning springs from the progressive property movement, which encourages the consideration of individualized factors when assessing what ownership means and when deciding how a land use law should be applied to a particular owner. Relying on this influential line of scholarship, he suggests that only more flexible administrative exactions can be tailored to these circumstances and—citing the work of several progressive property scholars—that the use of legislative exactions exclusively might disfavor marginalized groups. His creative and thorough review of the literature seeks to caution progressive property scholars that attempts to limit the perceived damage of *Nollan* and *Dolan* in this way might backfire, or at least to consider the question with care before assuming otherwise.

But *Nollan*, *Dolan*, and the more recent *Koontz v. St. Johns River Water Management District* give progressive property scholars plenty to worry about already. To the extent the Supreme Court seems attentive to the individualized circumstances of particular property owners, it seems most concerned with the rights of those who wish to intensify

existing uses of property, a group that may overlap little with the types of owners of concern to progressive property scholars.

Thus, in *Dolan*, the Court demanded a high level of correlation between the externalities the owner would create—increased road traffic from an enlarged store and increased water runoff from an expanded and paved parking lot—and the measures the government sought to impose to ameliorate those problems. In *Koontz*, the Court required the government defendant to make a similar showing before it could impose a monetary fee on a landowner to offset the negative environmental effects the owner's proposed development was expected to have on local water resources. The Court shows heightened concern for the rights of the owner that wishes to use property more intensively, with a concomitant reduction in concern about the rights of that owner's neighbors.

These applicants may be the sorts of owners whose stories concern progressive property scholars. Or they may simply be what many takings plaintiffs are: property owners who believe that government efforts to require them to bear costs they would rather not bear infringe unconstitutionally on their private property rights. And scholars are likely to disagree about the extent to which these two groups intersect. But it is not clear that increased consideration of individualized stories will benefit the types of owners (or neighbors) about which progressive property scholars are most concerned.

Justice Alito's opinion for the five-member *Koontz* majority is instructive. It portrays regulatory officials as overreaching bureaucrats who must be vigilantly monitored rather than as public servants charged with protecting the common good. If they are not supervised, regulatory officials may engage in "out-and-out…extortion." (*Koontz*, 133 S. Ct. 2586, 2595). They might seek "to evade the limitations of *Nollan* and *Dolan*." (*Id.*) Their activities may be "pressuring someone into forfeiting a constitutional right" and "coercively withholding benefits from those who exercise them." (*Id.*) The *Koontz* Court demonstrates no similar concerns about the behavior of property owners.

In short, exaction cases present a real problem to progressive property scholars, who are concerned with individual human stories. The reason is that these cases, much like nuisance cases, often present facts in which an owner's gain is a neighbor's loss. Regulatory takings law, however troubled and confusing it may be, seeks to strike a balance between the applicant's right to use property and the community's right not to suffer unreasonably from that use.

Mulvaney insightfully reminds us that progressive property scholars need to be concerned with the individual parties on both sides of that dispute and warns us against reflexively assuming that the wisest course is to limit *Nollan* and *Dolan* to administrative exactions. It is entirely possible, though, that after reflecting on the issues Mulvaney raises, those same scholars will conclude that their initial instinct was correct, and that the application of *Nollan* and *Dolan* to legislative exactions will cause more harm than good. At least now they will have reached that conclusion after a more sophisticated consideration of the issues his fine article highlights.

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