



After Koontz:
Meeting the Requirements of
Nollan/Dolan

Kelly A. Lynch

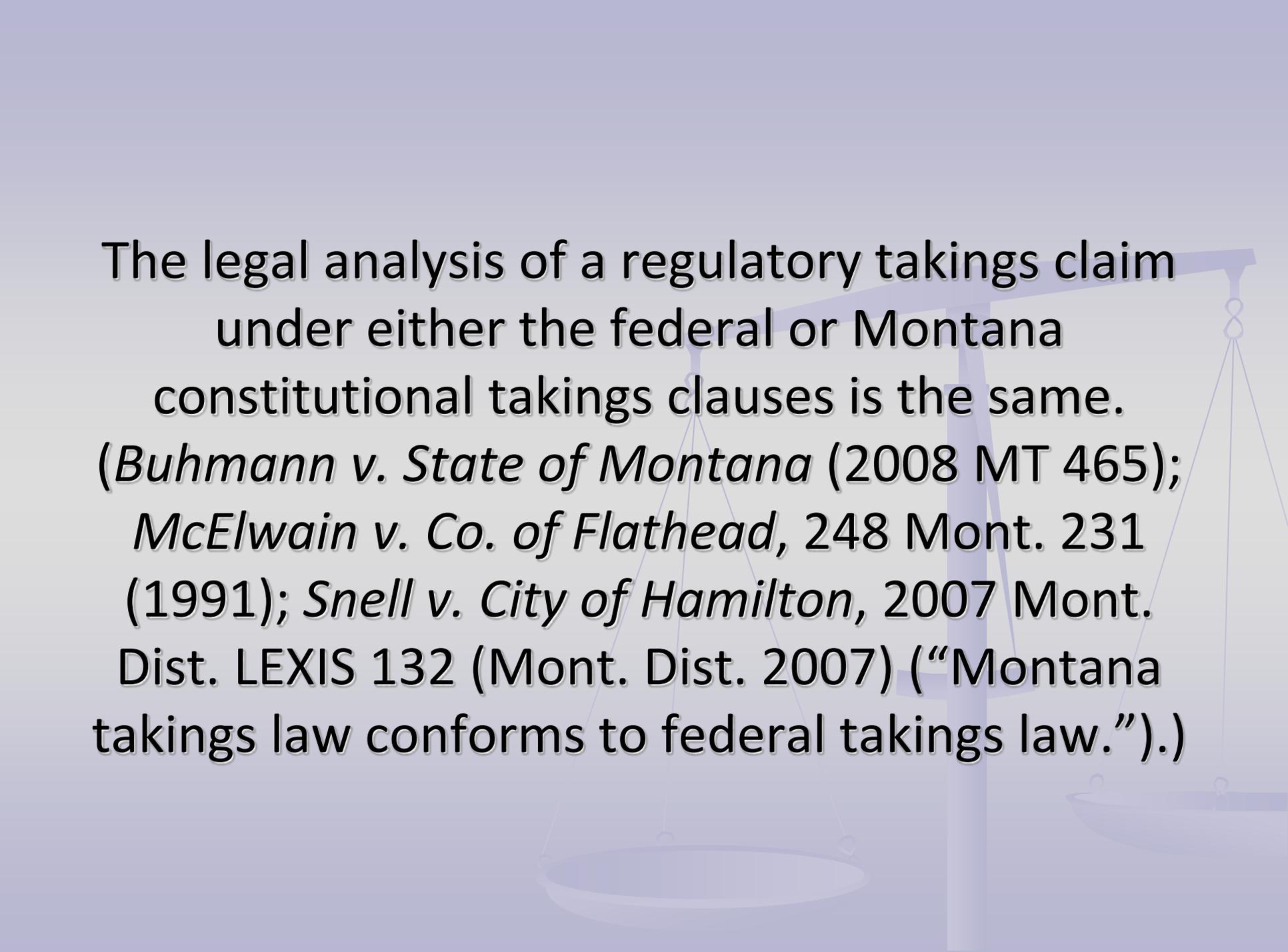
Montana Association of Planners Conference
September 10, 2013

Just Compensation Clause of the Fifth Amendment of the U.S. Constitution:

“ . . . nor shall private property be taken for public use, without just compensation.”

Article II, Section 29 of the Montana Constitution contains a similar clause:

“Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner.”



The legal analysis of a regulatory takings claim under either the federal or Montana constitutional takings clauses is the same. (*Buhmann v. State of Montana* (2008 MT 465); *McElwain v. Co. of Flathead*, 248 Mont. 231 (1991); *Snell v. City of Hamilton*, 2007 Mont. Dist. LEXIS 132 (Mont. Dist. 2007) (“Montana takings law conforms to federal takings law.”).)

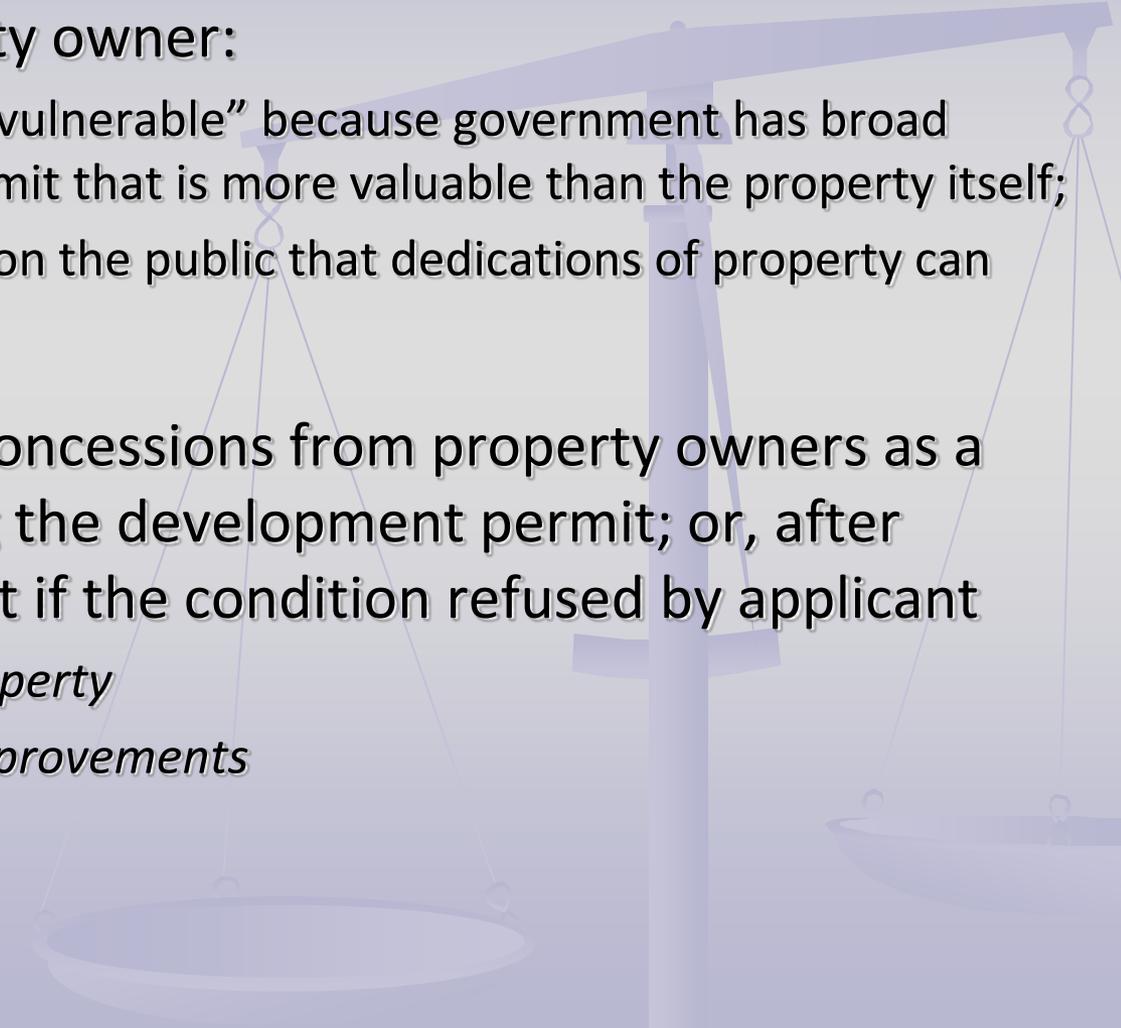
Categorical “Per Se” Takings

- A. Physical Takings - *Loretto v. Teleprompter Manhattan*, 458 U.S. 419, 421 (1982)
- B. Loss of All Economically Viable Use – *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (U.S. 1992)

Penn Central “Multi-Factor” Inquiry

- A. Diminution in the property value
- B. The character of the harm
- C. The distinct (reasonable) investment-backed expectations of the property owner

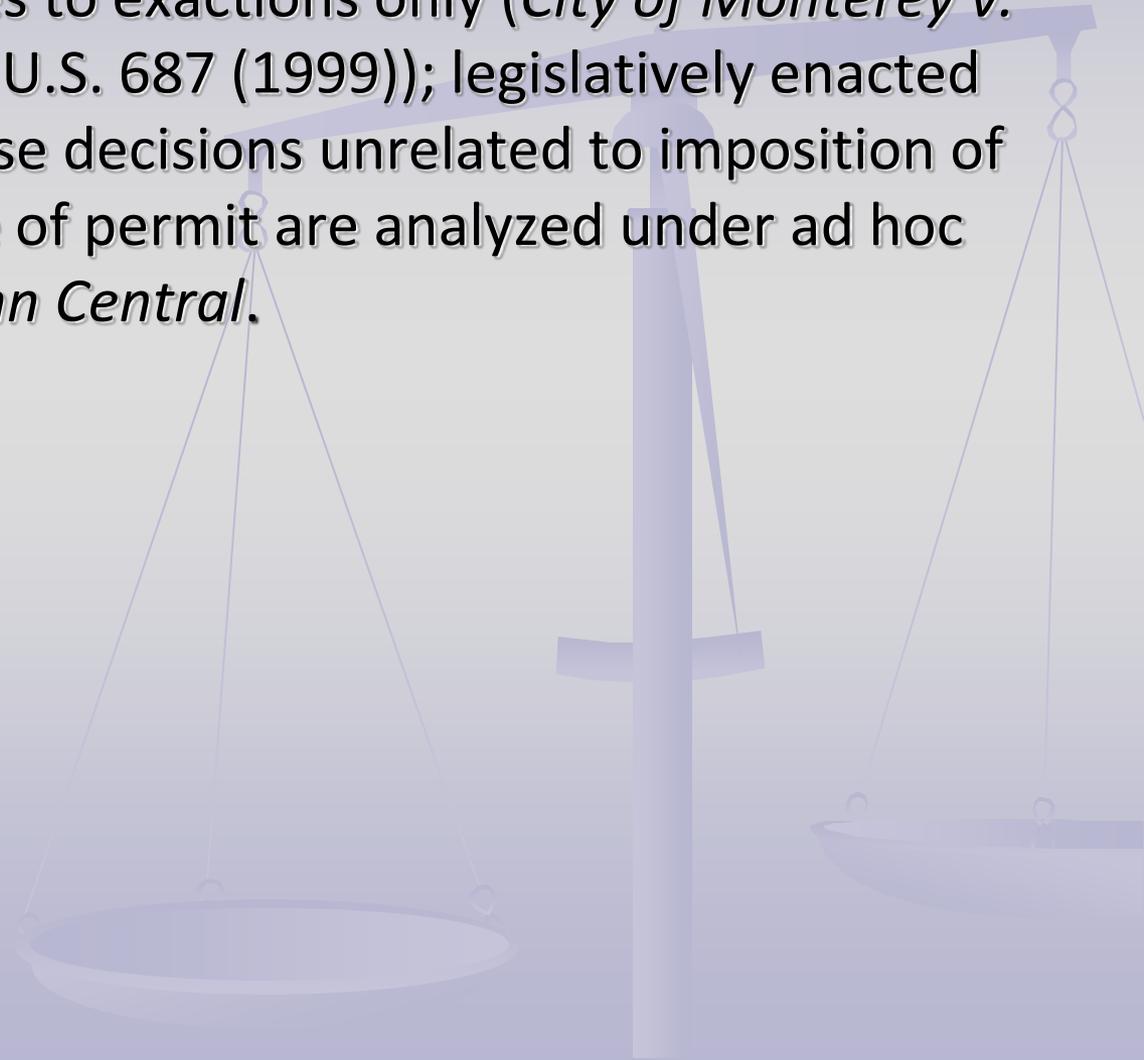
Exactions



- Specific subset of takings law where Supreme Court has recognized the need for a heightened scrutiny of governmental action against a property owner:
 - Landowners “especially vulnerable” because government has broad discretion to deny a permit that is more valuable than the property itself;
 - Land uses impose costs on the public that dedications of property can offset.
- Government “exacts” concessions from property owners as a condition for approving the development permit; or, after Koontz, deny the permit if the condition refused by applicant
 - *Dedicate portion of property*
 - *Make on- or off-site improvements*
 - *Pay in-lieu fee*

Exactions, cont.

- Heightened test applies to exactions only (*City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999)); legislatively enacted regulations and land use decisions unrelated to imposition of conditions on issuance of permit are analyzed under ad hoc “balancing” test of *Penn Central*.



Essential Nexus

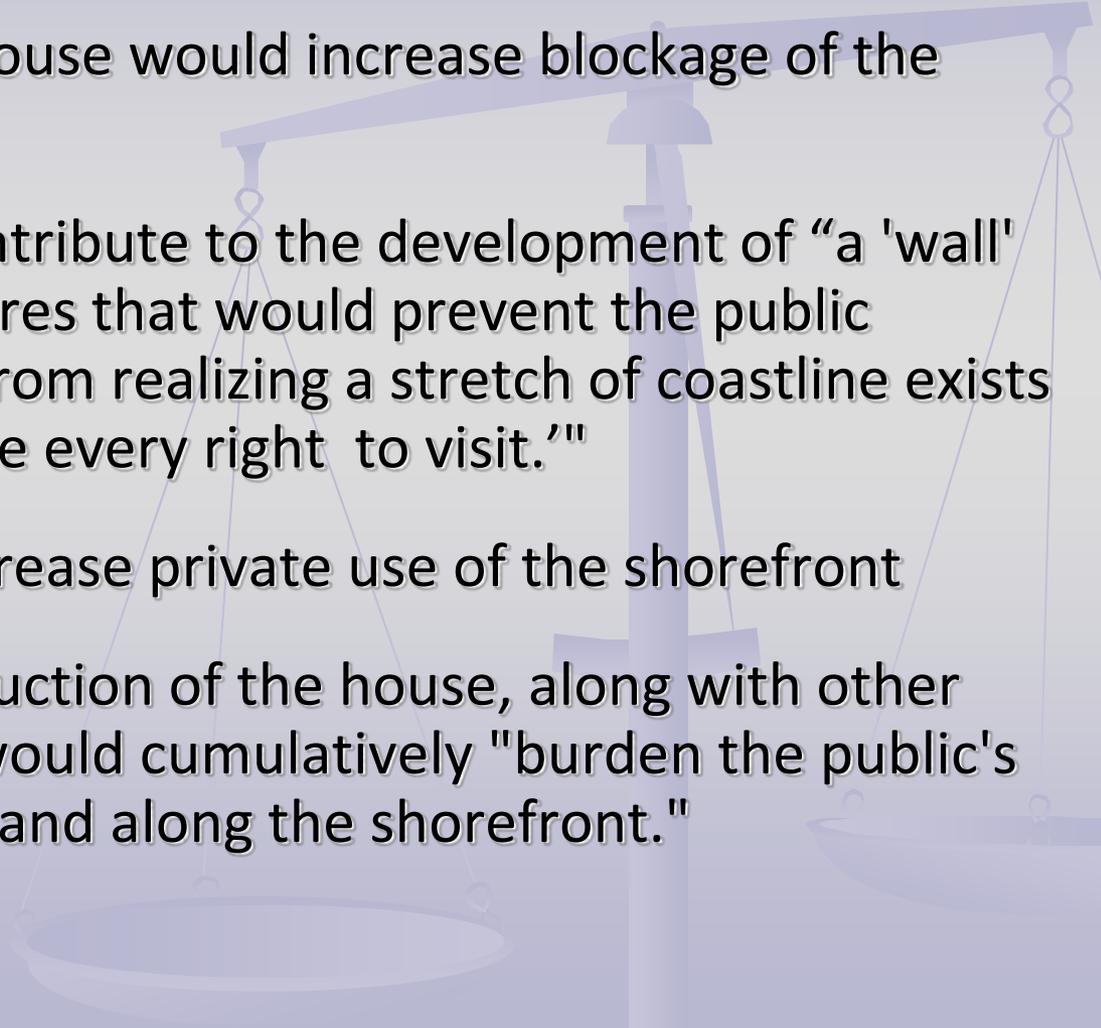
Nollan v. California Coastal Commission, 483 U.S. 825, 827 (1987)

- Beachfront property lying between two county parks, with small cottage and seawall on property
- Sought approval from Coastal Commission to replace cottage with single family residence
- Coastal Commission conditioned approval of land use permit on dedication of lateral beach easement between seawall and mean high tide line (standard practice of all permit approvals)



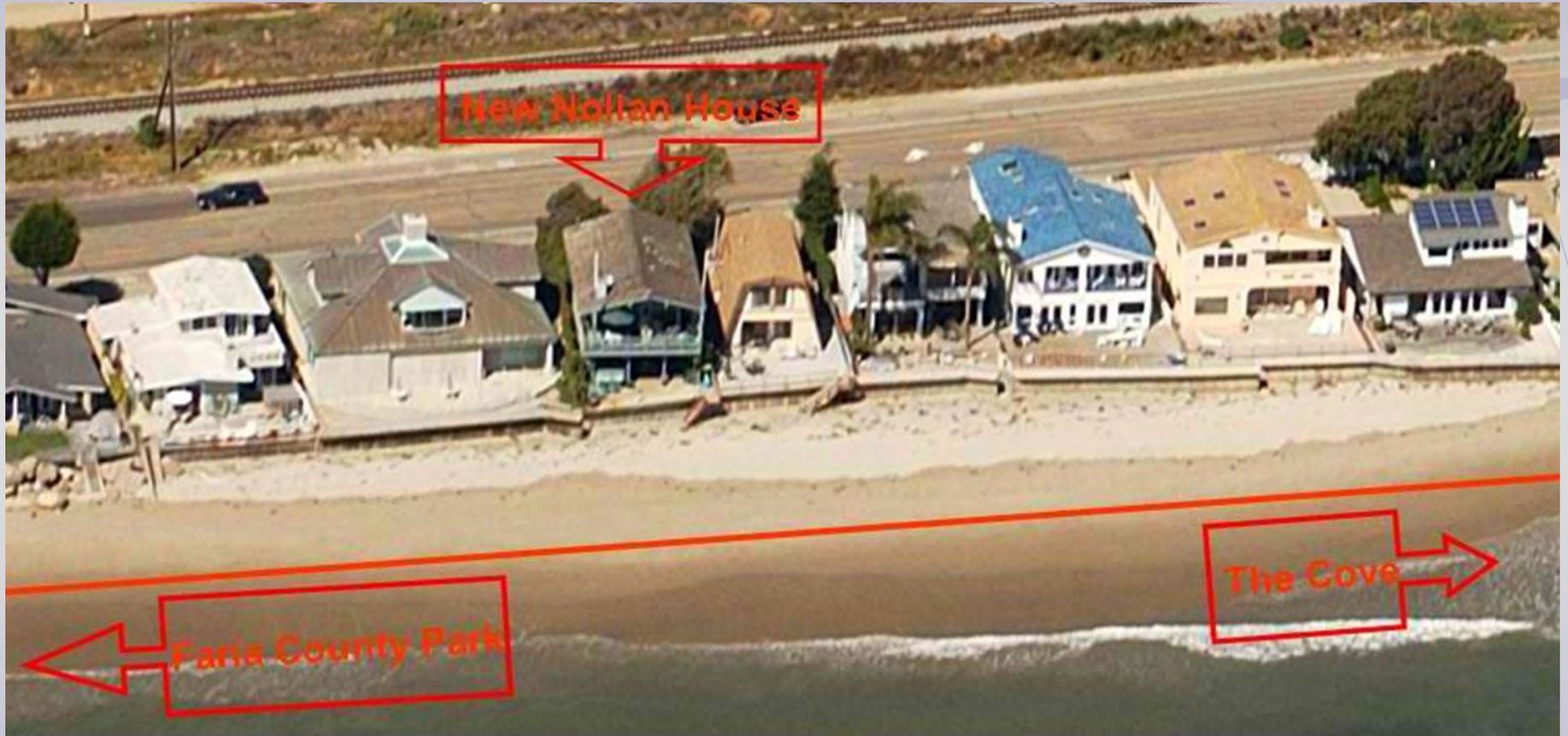


Essential Nexus – *Nollan, cont.*

- Commission defended the condition:
 - The proposed new house would increase blockage of the view of the ocean
 - The house would contribute to the development of “a 'wall' of residential structures that would prevent the public ‘psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit.’”
 - The house would increase private use of the shorefront
 - The effects of construction of the house, along with other area development, would cumulatively "burden the public's ability to traverse to and along the shorefront."
- 

Essential Nexus – *Nollan, cont.*

- Supreme Court (Justice Scalia) sets forth new heightened scrutiny standard of review for exactions: *“Unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but “an out-and-out plan of extortion.”*
- Court recognizes the Commission’s authority to prohibit construction of the house in order to protect the public's view of the beach, and that such authority “...include[s] the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end.”
- The condition imposed by the Commission here – dedication of a lateral beach easement for access by the public – failed to further the end advanced as the justification for the prohibition – impacts to views of the beach and increased private use of the beach.



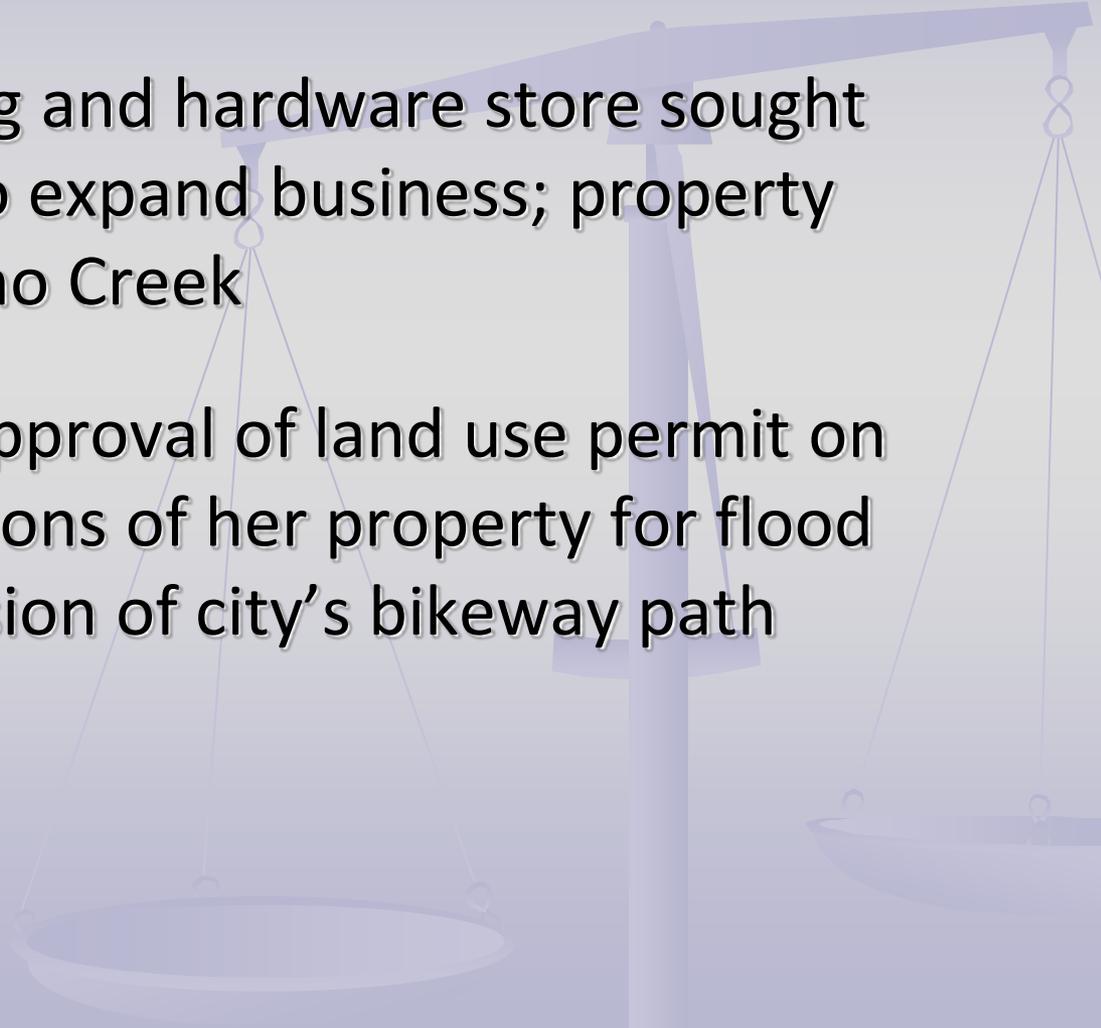
New Nollan House

Faria County Park

The Cove

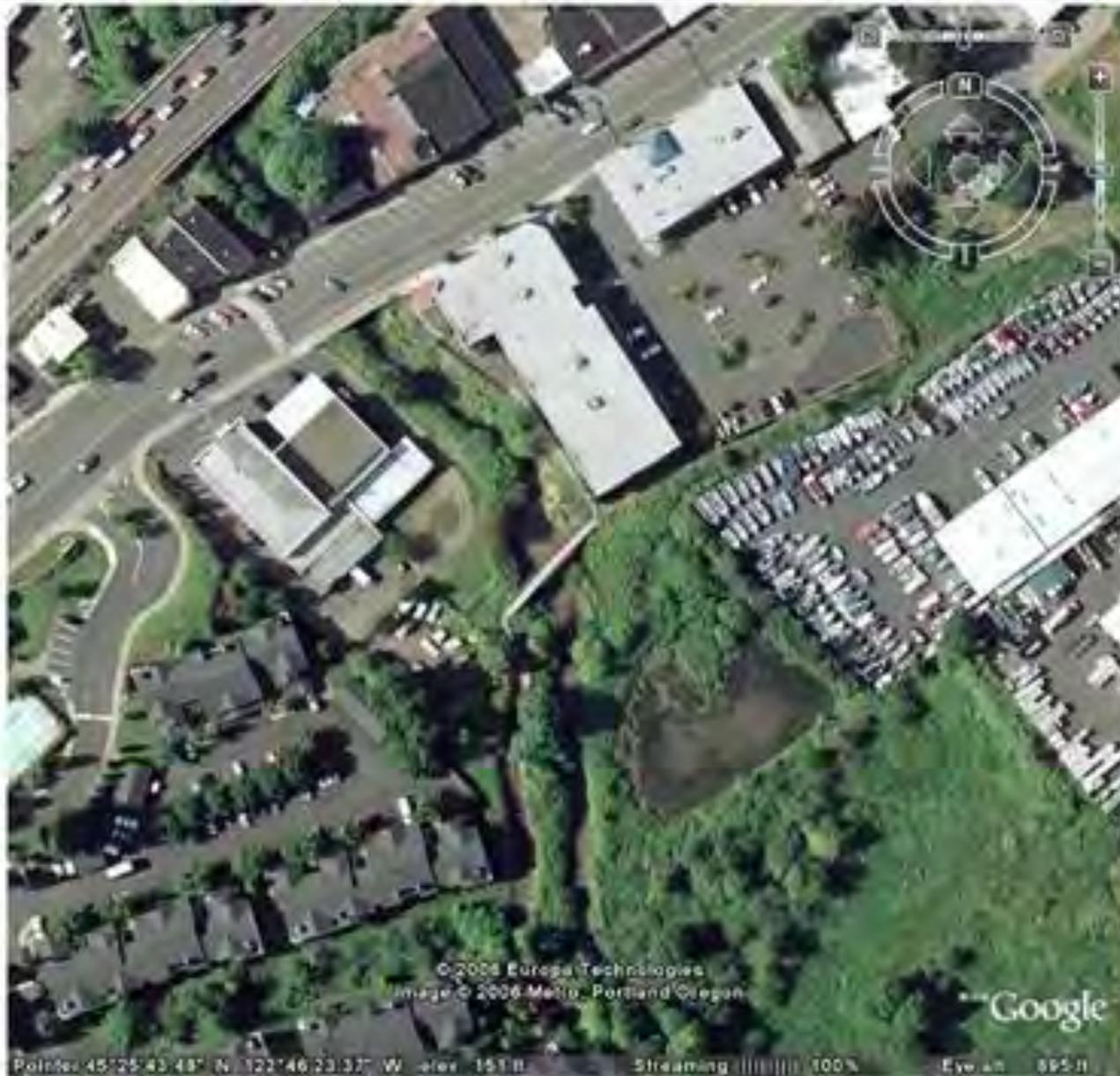
Roughly Proportional

Dolan v. City of Tigard, 512 U.S. 374, 383 (1994)

- Owner of plumbing and hardware store sought permit from city to expand business; property located along Fanno Creek
 - City conditioned approval of land use permit on dedication of portions of her property for flood control and extension of city's bikeway path
- 





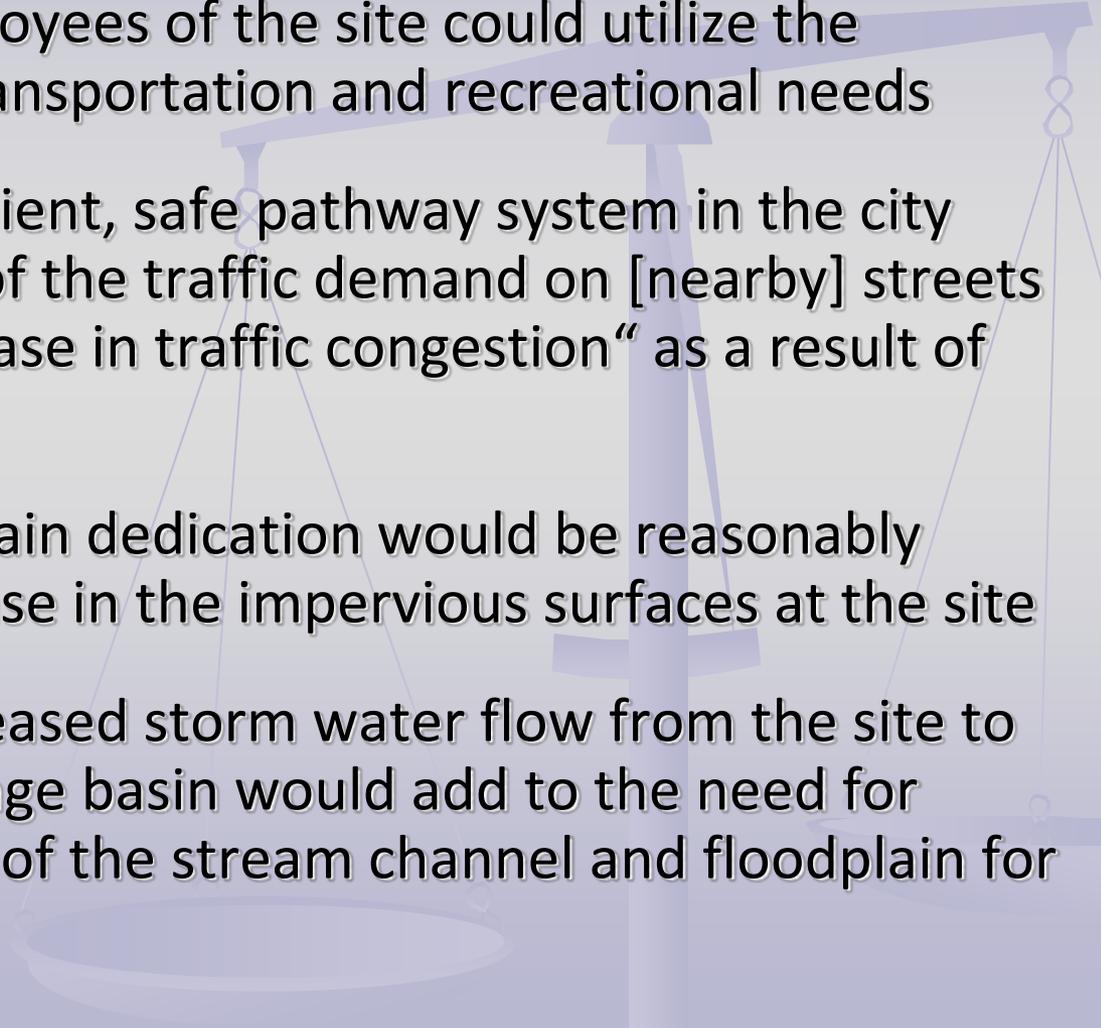


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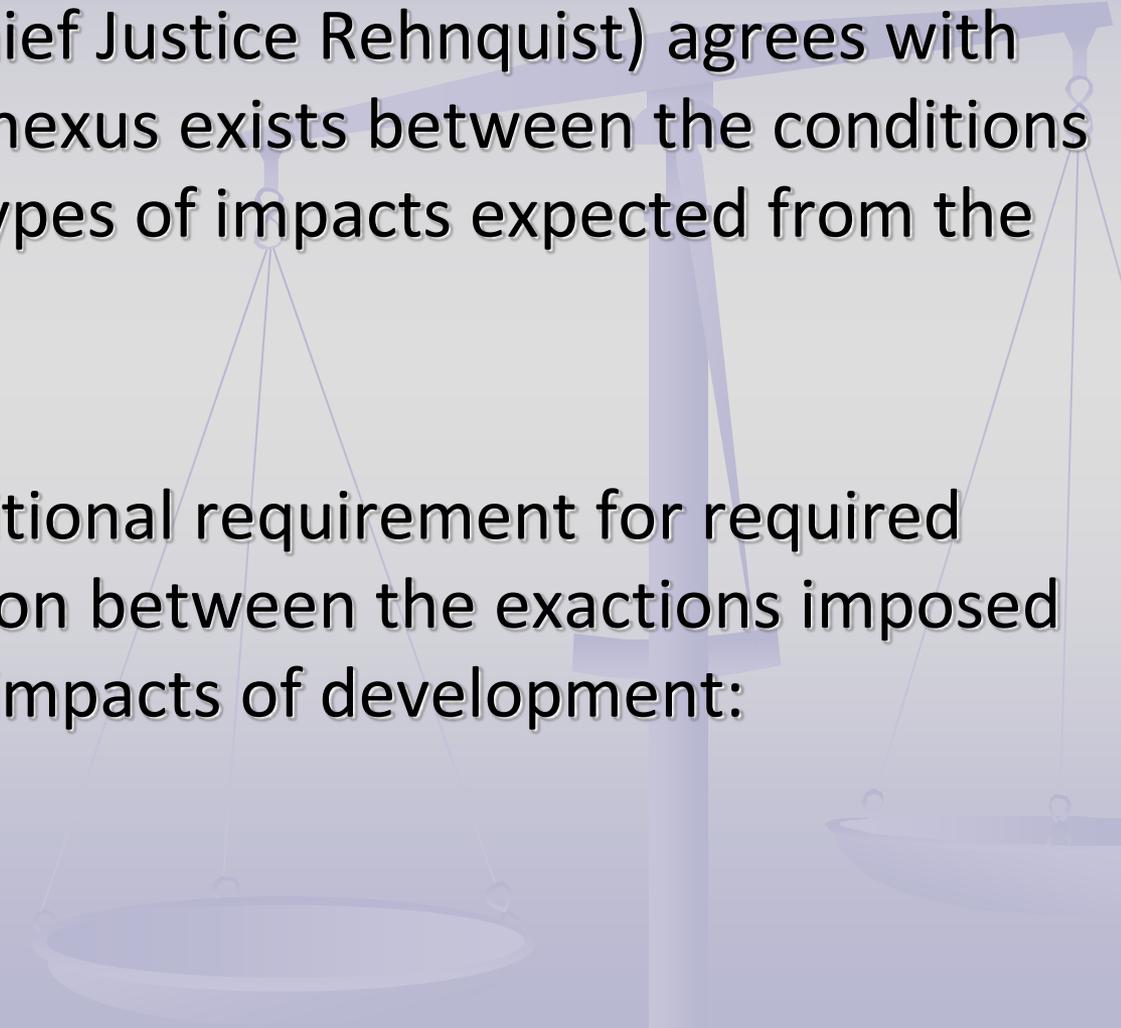
Google

Point: 45°25'43.48" N 122°46'23.37" W elev: 151 ft Streaming 100% Eye alt: 895 ft

Rough Proportionality – *Dolan, cont.*

- City defended the essential nexus of the conditions:
 - customers and employees of the site could utilize the pathway for their transportation and recreational needs
 - creation of a convenient, safe pathway system in the city "could offset some of the traffic demand on [nearby] streets and lessen the increase in traffic congestion" as a result of the expansion
 - the required floodplain dedication would be reasonably related to the increase in the impervious surfaces at the site
 - the anticipated increased storm water flow from the site to the creek and drainage basin would add to the need for public management of the stream channel and floodplain for drainage purposes
- 

Rough Proportionality – *Dolan*, cont.

- Supreme Court (Chief Justice Rehnquist) agrees with City that requisite nexus exists between the conditions imposed and the types of impacts expected from the development
 - But Court sets additional requirement for required degree of connection between the exactions imposed and the projected impacts of development:
- 

Rough Proportionality – *Dolan*, cont.

“No precise mathematical calculation is required, but the city 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. ... We think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment.”

- Burden of demonstrating rough proportionality is on the government body imposing the condition – different from other takings analyses

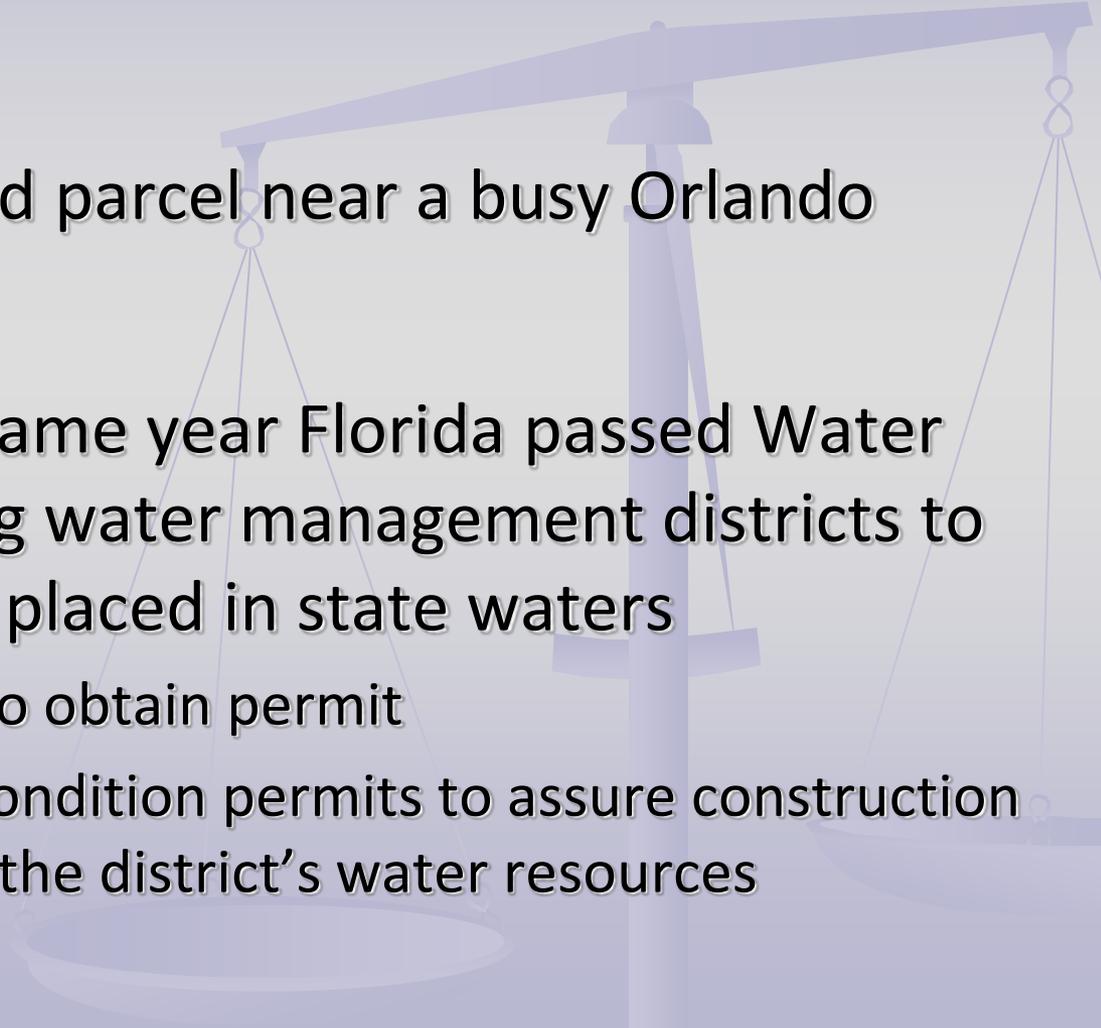




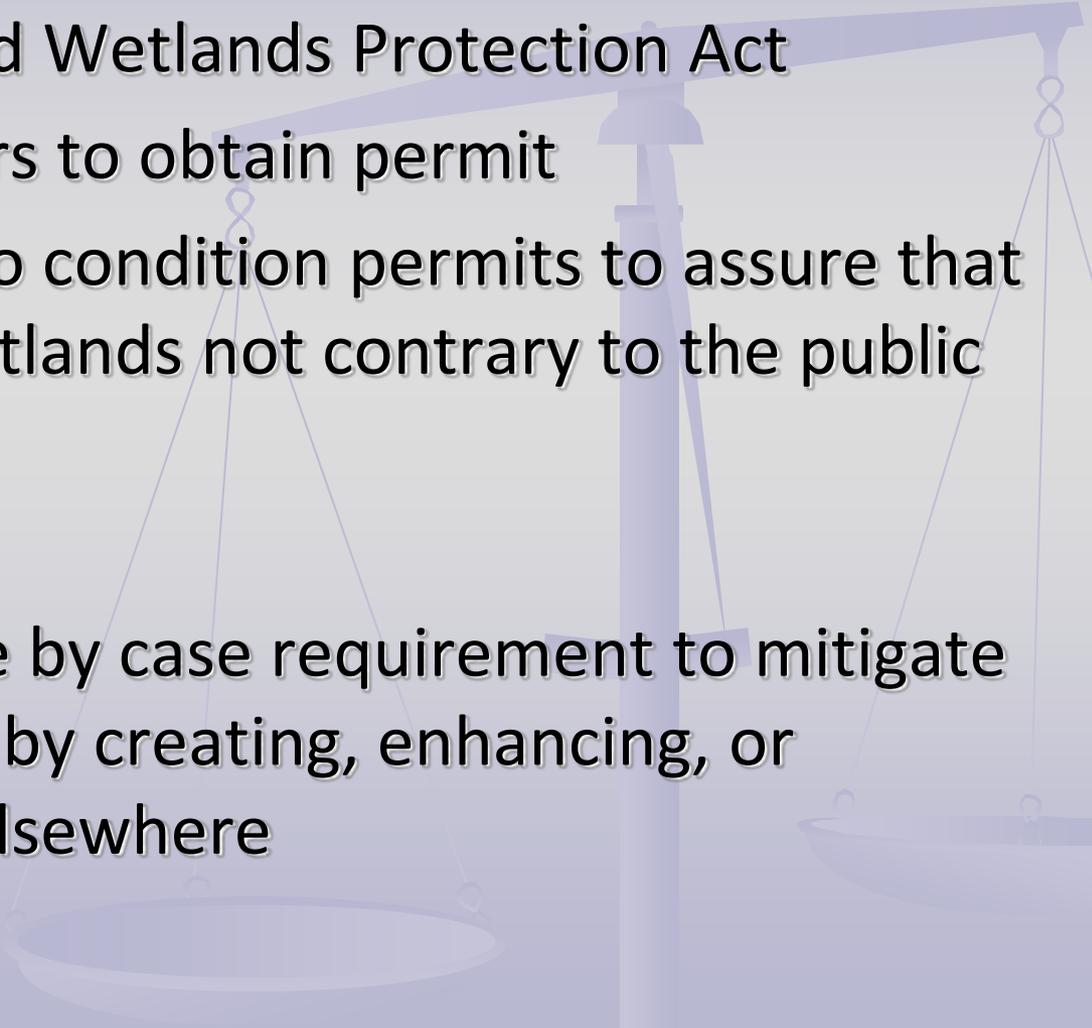
***Nollan/Dolan* Applies**

Even When Permit Denied and Monetary Exaction

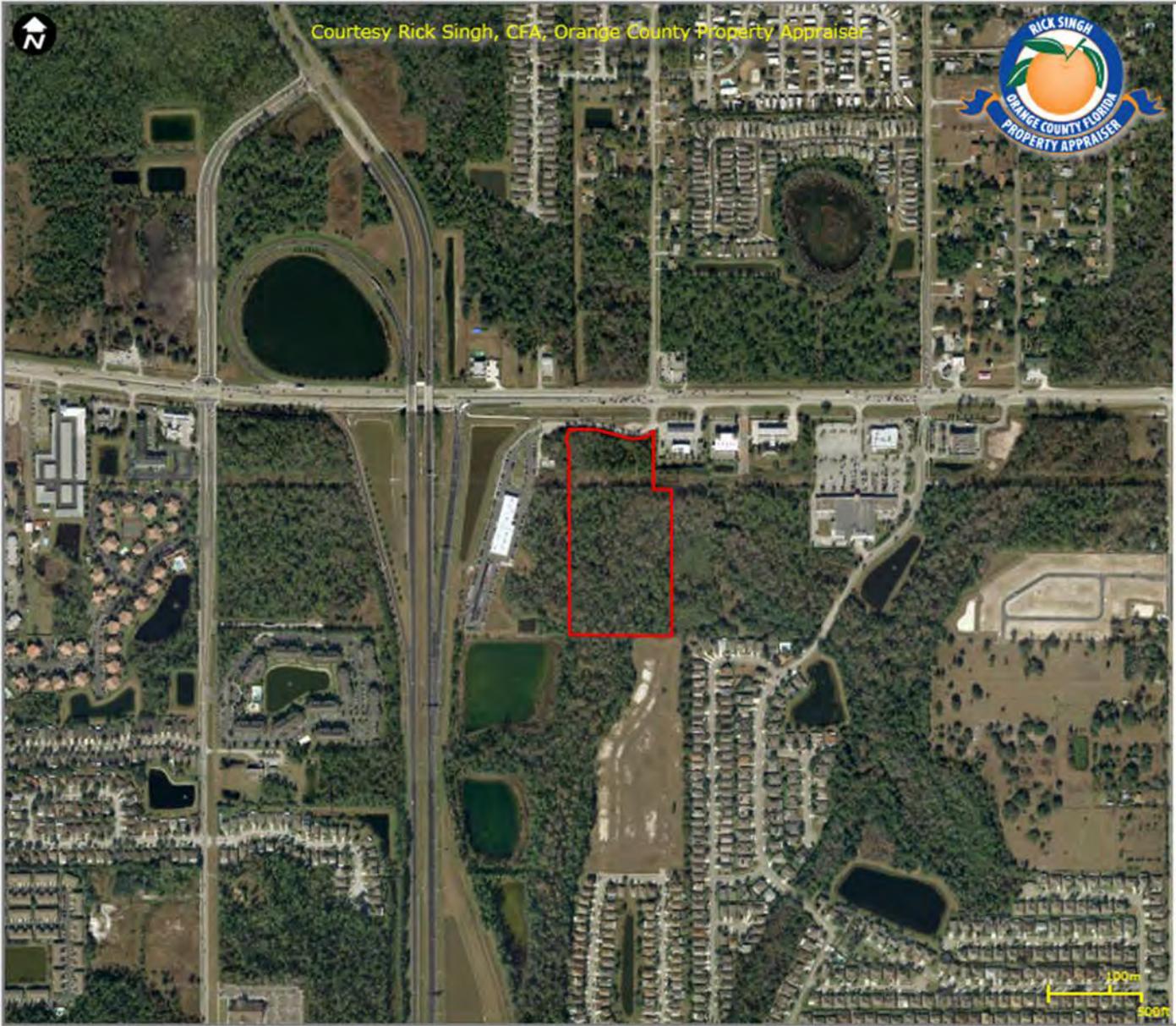
Koontz v. St. John's River Water Management Dist. 570 U.S. ___ (2013)

- 14.9-acre undeveloped parcel near a busy Orlando intersection
 - Purchased in 1972 – same year Florida passed Water Resources Act creating water management districts to regulate construction placed in state waters
 - Required developers to obtain permit
 - Required districts to condition permits to assure construction will not be harmful to the district's water resources
- 

Koontz, cont.

- In 1984, Florida passed Wetlands Protection Act
 - Required developers to obtain permit
 - Required districts to condition permits to assure that construction on wetlands not contrary to the public interest
 - St. John's WMD – case by case requirement to mitigate development impacts by creating, enhancing, or preserving wetlands elsewhere
- 

-  Florida turnpike
-  Interstate 4
-  Toll Road
-  Major Roads
-  Public Roads
-  Gated Roads
-  Road Under Construction
-  Proposed Road
-  US Road
-  State Road
-  County Road
-  Toll Ramp
-  Interstate Ramp
-  One Way
-  Brick Road
-  Rail Road
-  Proposed SunRail
-  Block Line
-  Lot Line
-  Residential
-  Agriculture
-  Commercial/Institutional
-  Governmental/Institutional/Misc
-  Commercial/Industrial Vacant Land
-  Hydro
-  Waste Land
-  Agricultural Curtilage
-  County Boundary
-  Parks
-  Golf Course
-  Lakes and Rivers
-  Building
-  Power Plant



This map is for reference only and is not a survey.

Koontz, cont.

- In 1994, owner Koontz Sr. applied to the District for permits to develop commercial building on northern 3.7 acres of site, along Colonial Drive. Offered conservation easement to District over remaining 11 acres to mitigate impacts.
- District concluded that the proposal did not sufficiently protect water resources, and offered Koontz two choices:
 - Reduce development to 1 acre and deed conservation easement to District on remaining 13.9 acres; OR
 - Proceed with development as proposed, with conservation easement over remaining 11 acres, and hire contractors to make improvements to approximately 50 acres of other district-owned wetlands in another area of the County
- Koontz refused to agree to anything other than his proposal, the District denied the permit, and Koontz sued District

Koontz, cont.

- Lower court – further mitigation in the form of payment for offsite improvements lacked both nexus and rough proportionality requirements
- Appeals court – affirmed
- Florida Supreme Court – reversed
 - *Nollan/Dolan* does not apply when permit is denied
 - *Nollan/Dolan* only applies when exaction is real property, not monetary
 - Cites *McClung v. City of Sumner*, 545 F.3d 803 (9th Cir. 2008) (*Nollan/Dolan* test does not apply to generally applicable development conditions that do not require an owner to relinquish rights in real property)
 - No decision whether condition met *Nollan/Dolan*

Koontz, cont.

USSC reverses Florida Supreme Court (Justice Alito)

1) *Nollan/Dolan* applies to a condition where permit denied because applicant refused the condition

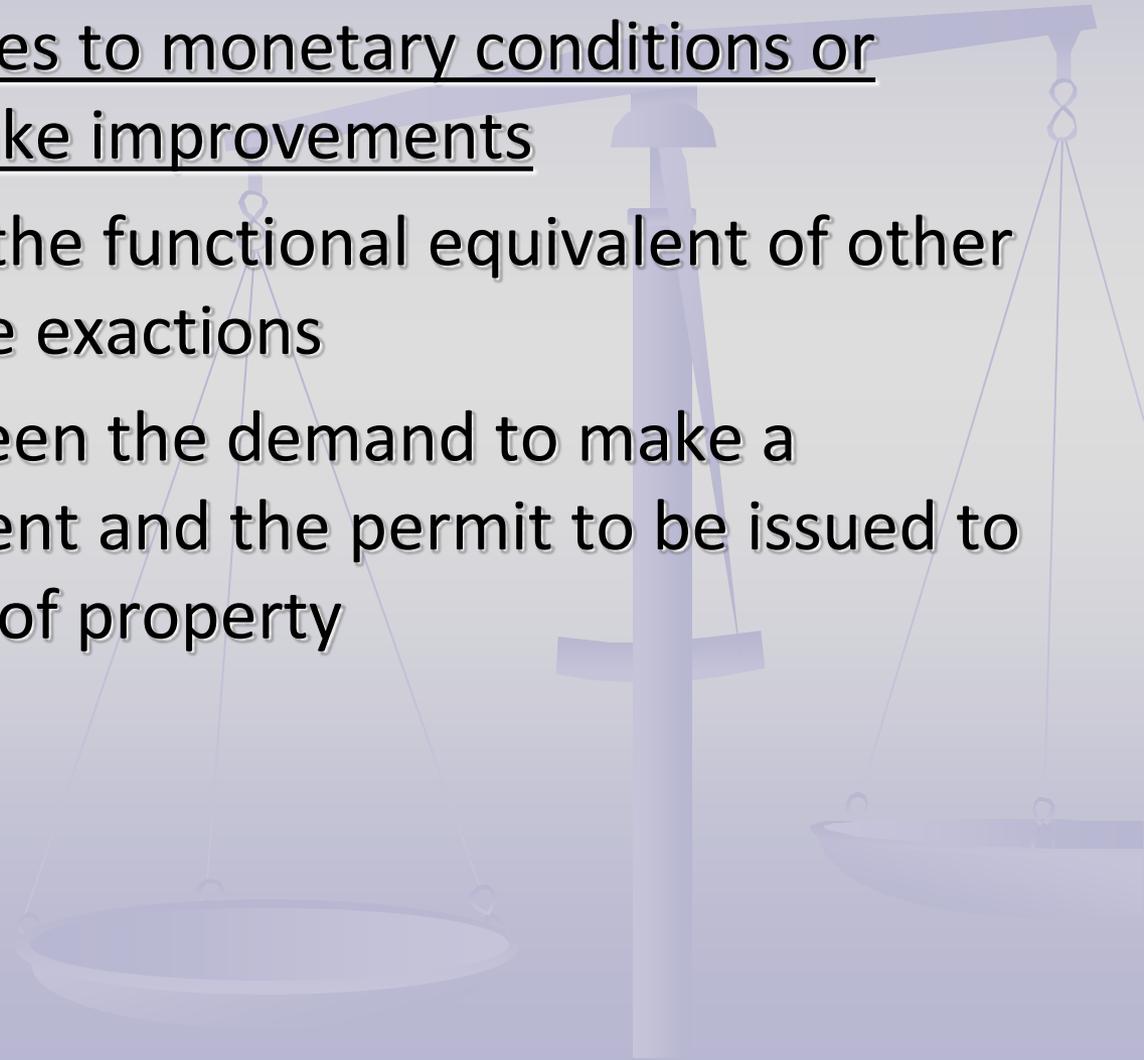
- No distinction between approval with unconstitutional conditions or denial when they are refused
- Issue is not that “no property was taken,” but rather that the condition impermissibly burdened the constitutional right not to have property taken without just compensation.
- *“The unconstitutional conditions doctrine forbids burdening the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them.”*

Koontz, cont.

USSC reverses Florida Supreme Court

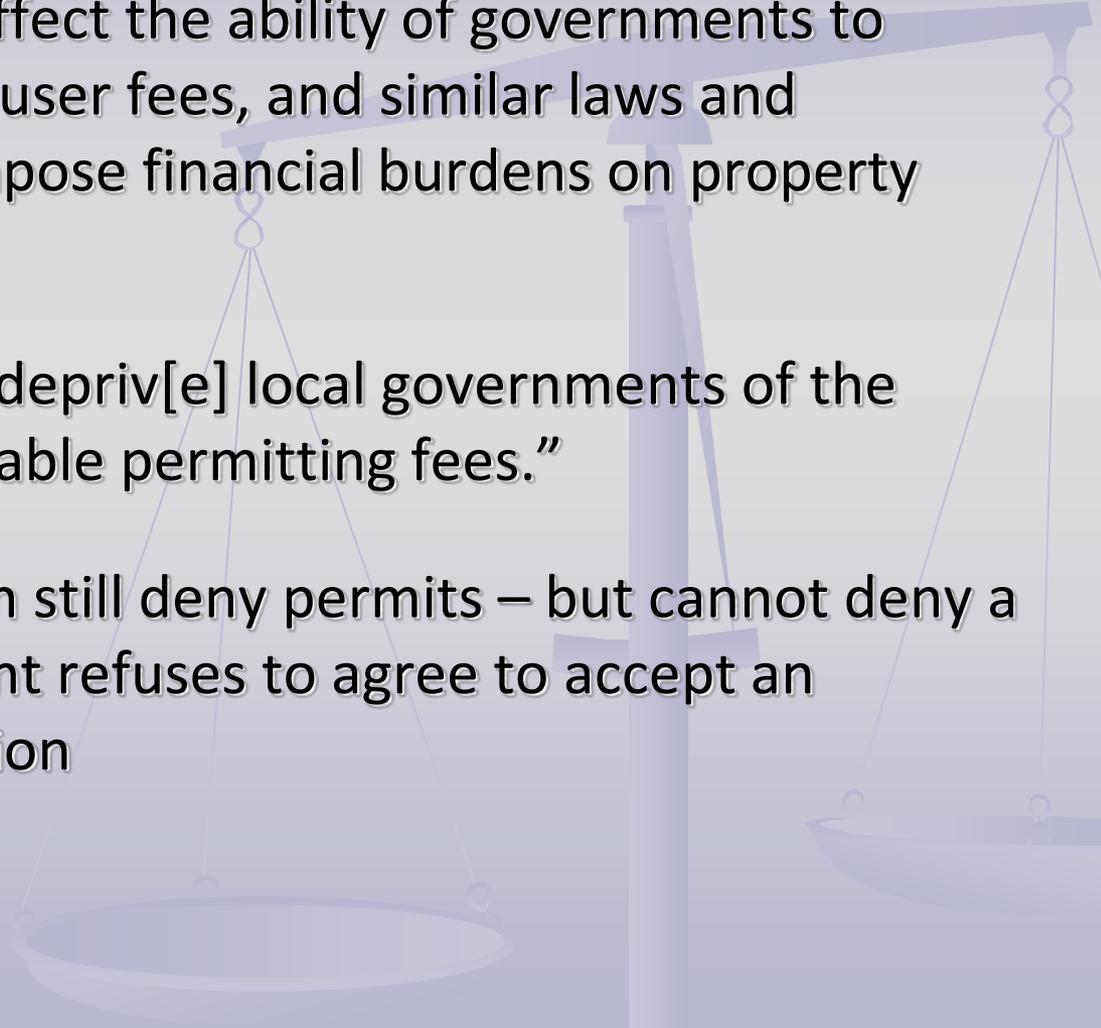
2) *Nollan/Dolan* applies to monetary conditions or requirement to make improvements

- Impact fees are the functional equivalent of other types of land-use exactions
- Direct link between the demand to make a monetary payment and the permit to be issued to a specific parcel of property



Koontz, cont.

What do we know about the decision?

- “This case ... 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.”
 - The decision does not “depriv[e] local governments of the ability to charge reasonable permitting fees.”
 - Permitting authority can still deny permits – but cannot deny a permit because applicant refuses to agree to accept an unconstitutional condition
- 

Koontz, cont.

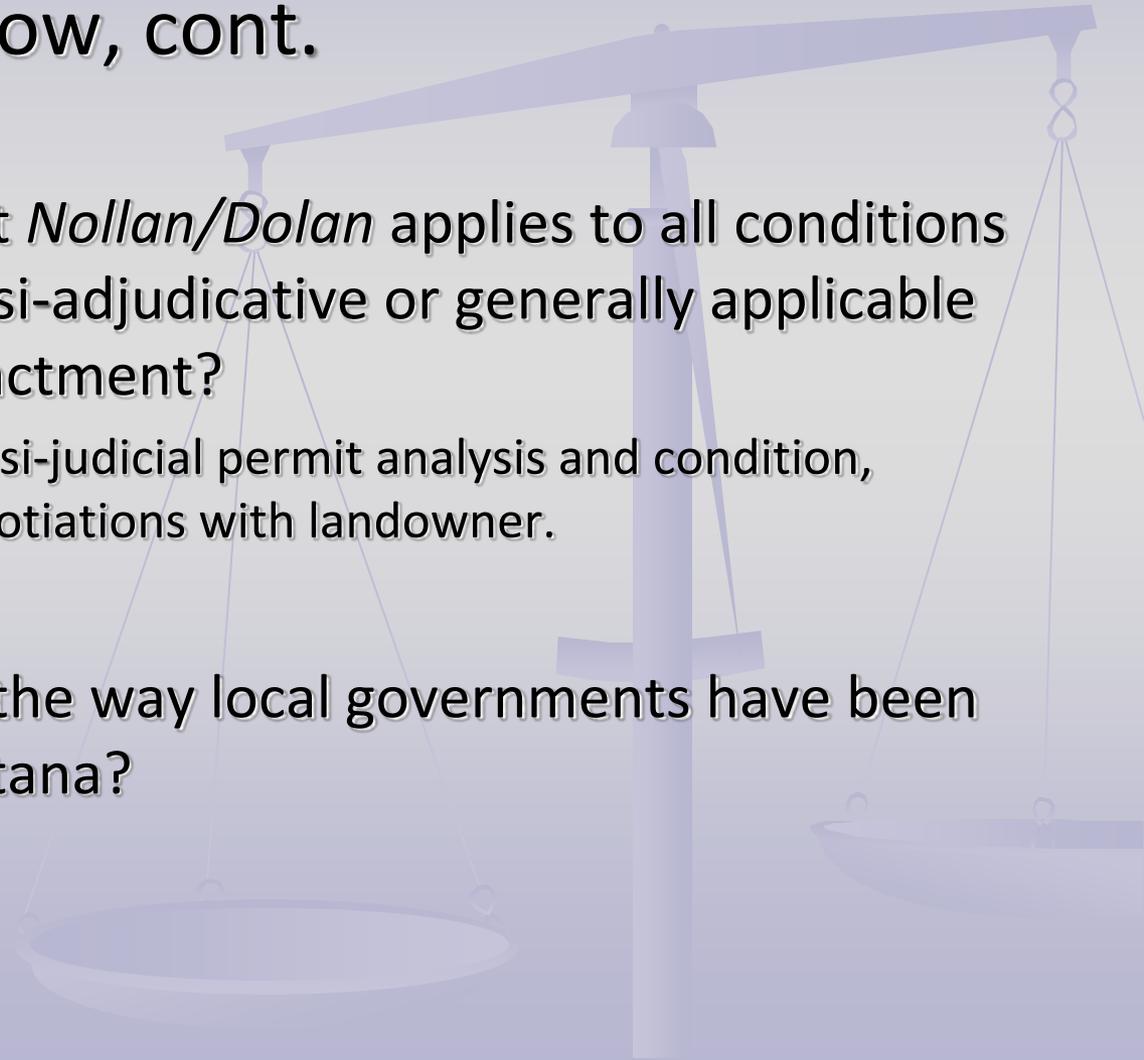
What do we NOT know about the decision?

- At what point has the local government “made a demand” for an exaction? How specific must a condition be before it can be challenged as a demand?
 - Court specifically declines to make determination of whether the District actually “demanded” the permit condition – remanded this question to Florida Supreme Court. But if it DID, then *Nollan/Dolan* applies.
- If permit is denied, what is the relief? Remand to Florida Supreme Court to answer this question. NOT a takings, rather an unconstitutional conditions issue:
 - Improper condition removed from permit approval?
 - Monetary remedy under state law??
 - Constitutional compensation for taking of property???

Koontz, cont.

What we DON'T know, cont.

- Does *Koontz* mean that *Nollan/Dolan* applies to all conditions imposed, whether quasi-adjudicative or generally applicable to all via legislative enactment?
 - *Koontz* was ad hoc, quasi-judicial permit analysis and condition, developed through negotiations with landowner.
- Will this really change the way local governments have been doing business in Montana?



Exactions in Montana

Christison v. Lewis and Clark County (1st Dist.)

➤ Order I (July 14, 2009)

- 12 lot subdivision conditionally approved on paving 1.8 miles of adjacent Lake Helena Drive
- Existing traffic levels already @800 VTD (road standard 400 VTD); additional 104-130 anticipated as result of development
- Developer options – pave the road; rebate program for repayment from other developers impacting road; creation of RID
- County had approved two similar subdivisions without requirement for off-site road improvements
- “County is well within its rights to require a subdivider to pay a reasonable fee to address impacts created by his proposal.”
- *Nollan/Dolan* applies - follows California courts that heightened scrutiny applies in application of ad hoc monetary exactions but not legislatively mandated, formulaic mitigation fees (*Ehrlich, San Remo*)
 - *Nollan* met; no individualized determination made to meet *Dolan*.

Exactions in Montana, cont.

Christison v. Lewis and Clark County (1st Dist.)

Order II (January 25, 2011)

- County adopted road mitigation assessment based on estimated increased traffic from proposed development
- County revised findings for *Christianson* subdivision – compared projected number of ADTs to existing number of ADTs, and imposed fee based on increase
- Fees imposed not earmarked to any particular development – to County general fund
- Section 76-3-510(2) requires “all fees ... be expended on the capital facilities for which the payments were required.”
- Court finds now the *Dolan* requirement was met, but no essential nexus to meet *Nollan*.
- County must establish road improvement fund for deposit of such fees

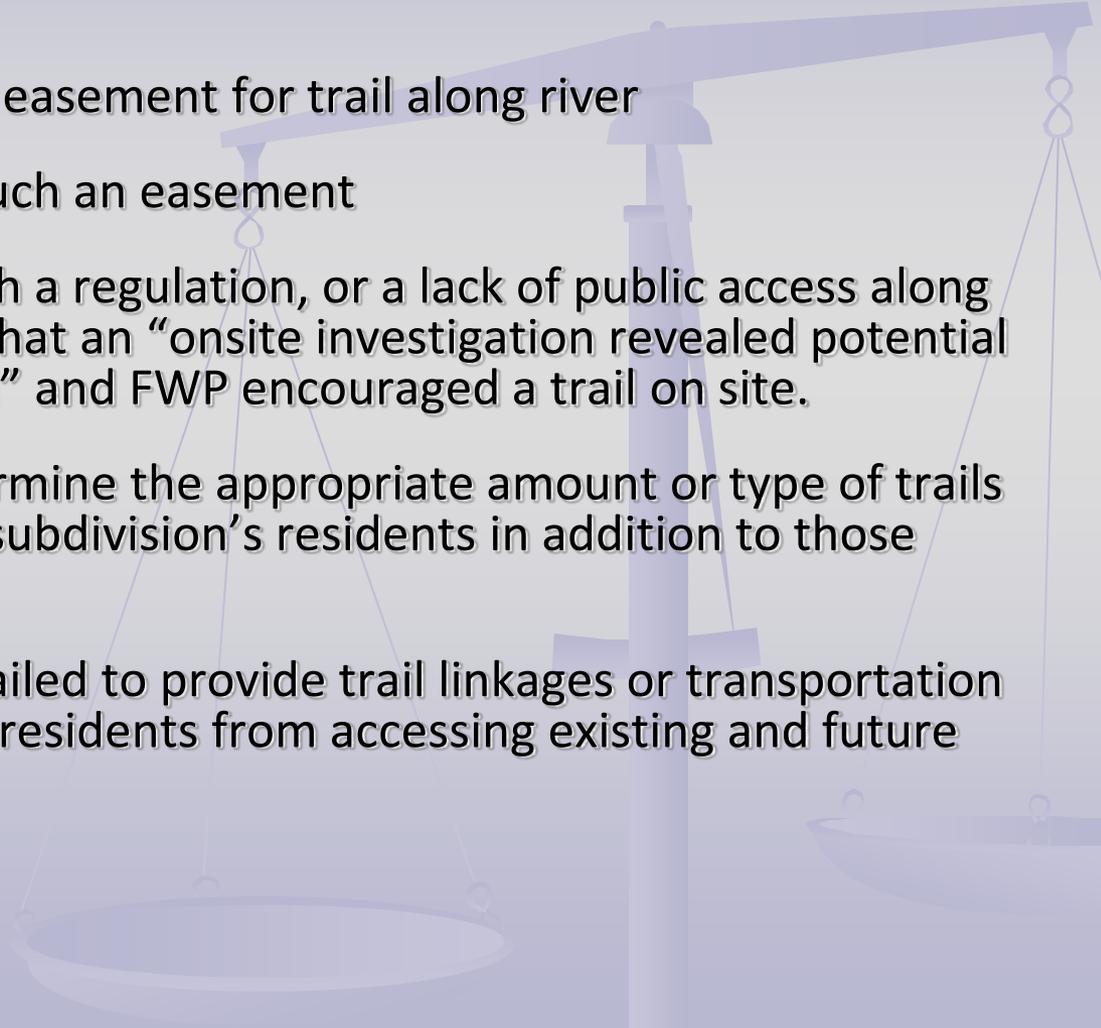
Exactions in Montana, cont.

Neighborhoods by Design v. City of Missoula (4th Dist. , March 15, 2010)

- Plaintiff sought annexation and approval of 33 lot subdivision adjacent to the Clark Fork River
- City approved subdivision subject to 36 conditions
- Plaintiff challenged four of the conditions as arbitrary and capricious, in violation of the Subdivision Act, and unconstitutional taking (all but #19):
 - Public access easement for trail along southern boundary of subdivision (#12)
 - Public access easement for trail along river (#15)
 - Private common area must be converted to public access easement (#17)
 - Provide specific development envelopes for each lot (#19)
- City admitted “the four conditions were not intended to address or mitigate impacts created by the subdivision.”

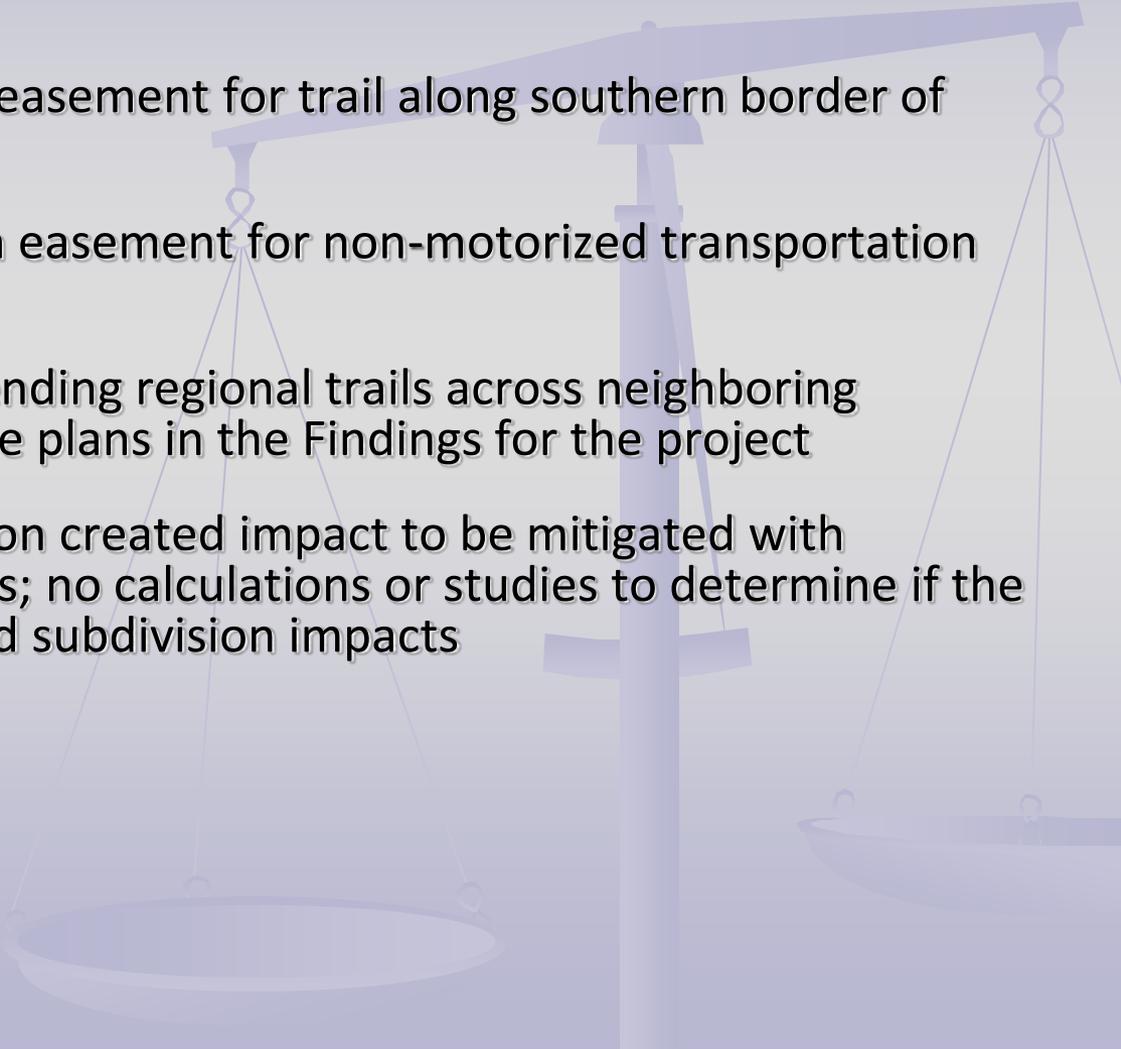
Exactions in Montana, cont.

Neighborhoods by Design, cont.

- Condition #15 – Public access easement for trail along river
 - Lack of regulation requiring such an easement
 - Nothing in Findings about such a regulation, or a lack of public access along the river; City only indicated that an “onsite investigation revealed potential for continuous river bank trail” and FWP encouraged a trail on site.
 - No calculations made to determine the appropriate amount or type of trails that might be needed by the subdivision’s residents in addition to those already provided
 - No findings that subdivision failed to provide trail linkages or transportation facilities, or that it prevented residents from accessing existing and future trails
- 

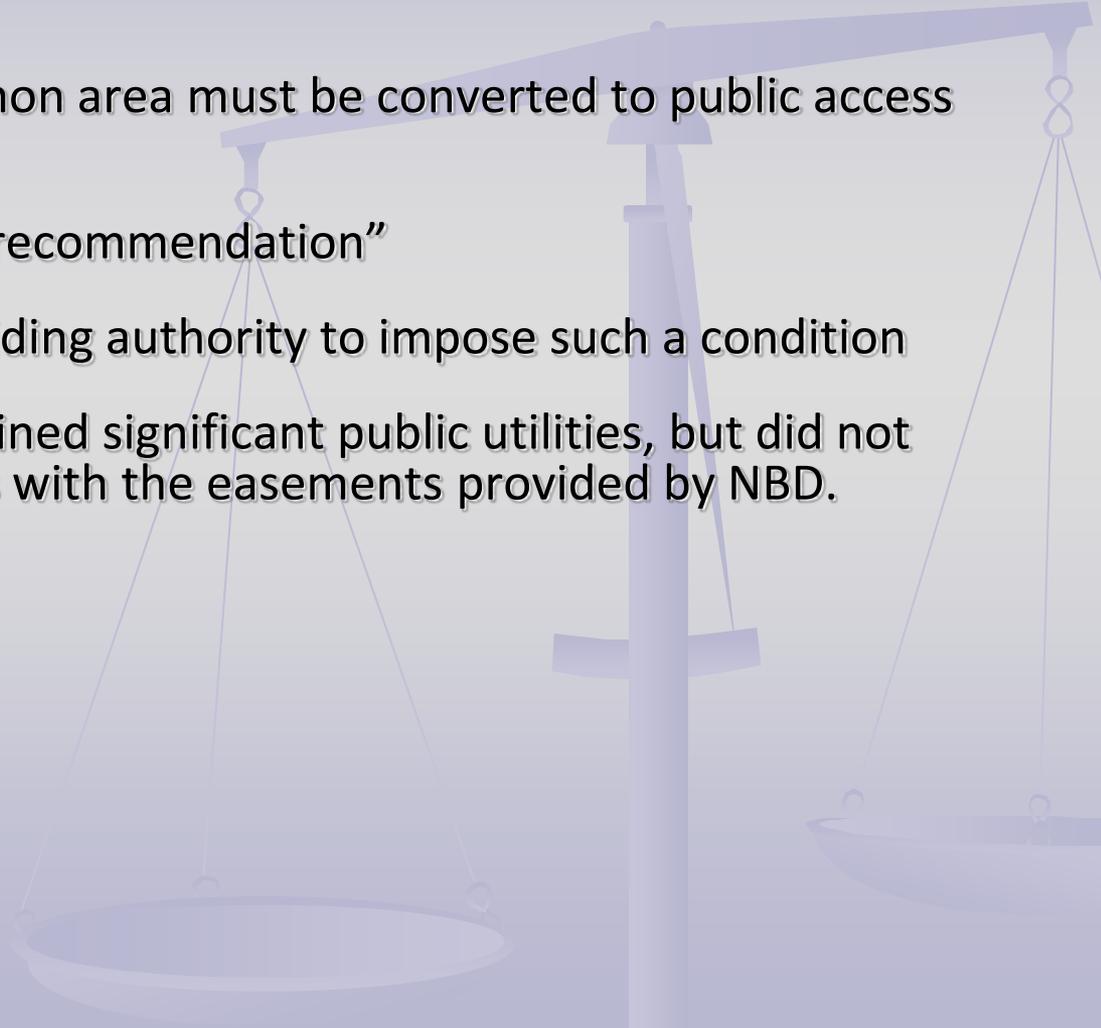
Exactions in Montana, cont.

Neighborhoods by Design, cont.

- Condition #12 – Public access easement for trail along southern border of subdivision
 - Lack of regulation requiring an easement for non-motorized transportation facilities
 - City pointed to priority of extending regional trails across neighboring property, but did not cite these plans in the Findings for the project
 - City did not find that subdivision created impact to be mitigated with additional non-motorized trails; no calculations or studies to determine if the conditions offset any identified subdivision impacts
- 

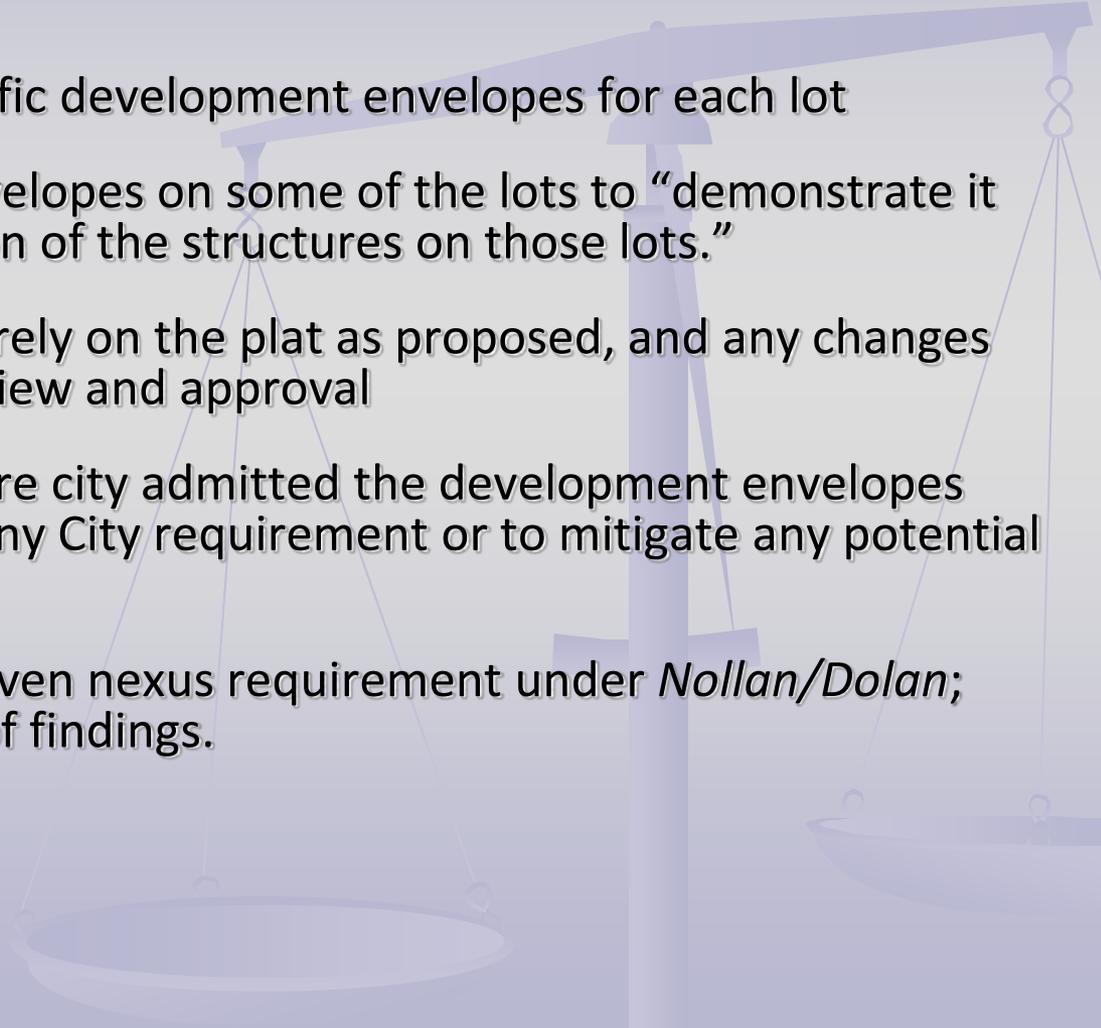
Exactions in Montana, cont.

Neighborhoods by Design, cont.

- Condition #17 – Private common area must be converted to public access easement
 - Based on a “City Engineering recommendation”
 - No statute or regulation providing authority to impose such a condition
 - City indicated that area contained significant public utilities, but did not identify any specific problems with the easements provided by NBD.
- 

Exactions in Montana, cont.

Neighborhoods by Design, cont.

- Condition #19 – Provide specific development envelopes for each lot
 - NBD had showed building envelopes on some of the lots to “demonstrate it planned to control the location of the structures on those lots.”
 - City argued it was entitled to rely on the plat as proposed, and any changes would require further city review and approval
 - Court agrees with city, but here city admitted the development envelopes were not necessary to fulfill any City requirement or to mitigate any potential impacts.
 - COURT – City failed to meet even nexus requirement under *Nollan/Dolan*; emphasized the importance of findings.
- 

Exactions in Montana, cont.

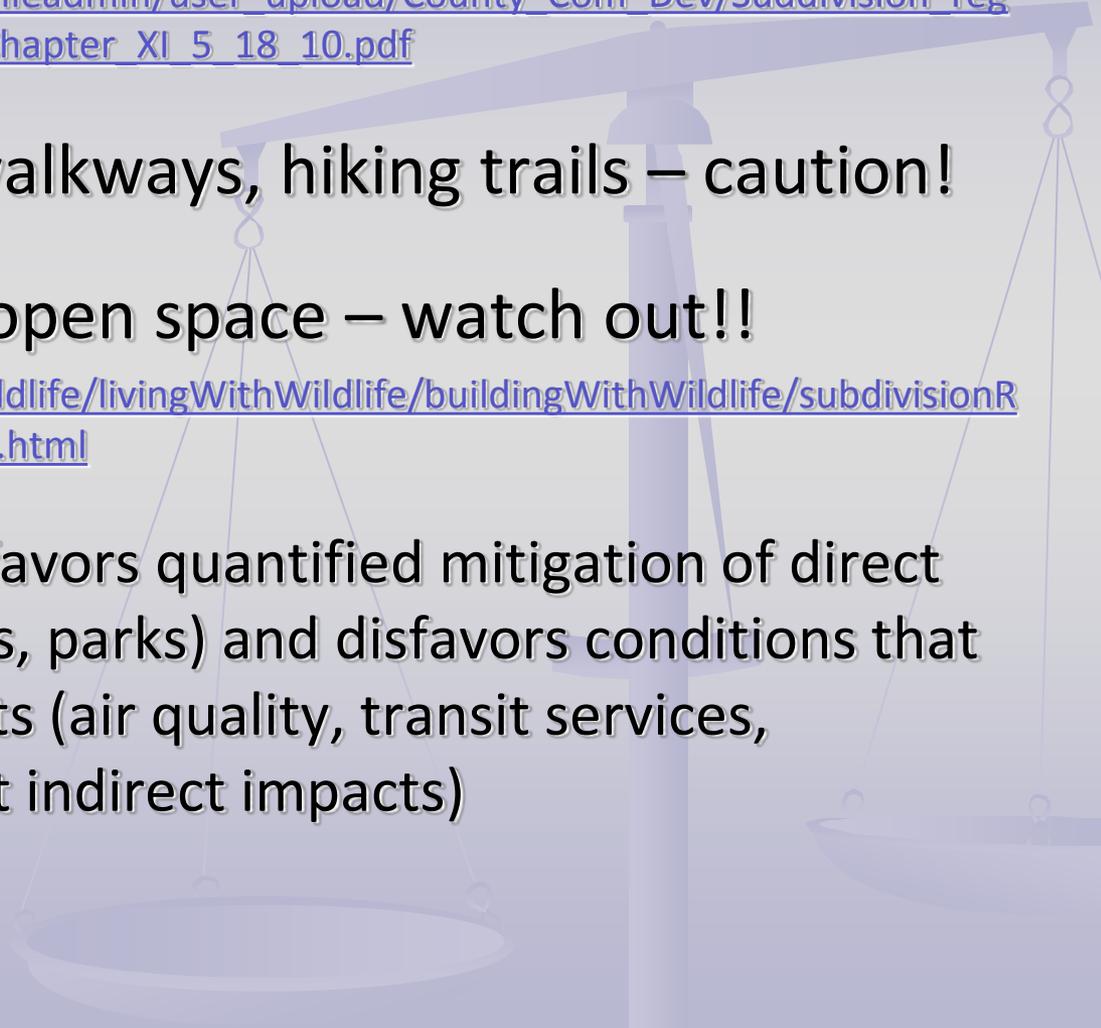
Outliers

- *McElwain v. County of Flathead*, 248 Mont. 231 (1991) (100-foot setback from floodplain for septic drain field not a taking)
- *Ferkovich v. Flathead County*, 2007 Mont. Dist. LEXIS 833 (11th District, 2007) (road improvements required for emergency vehicles to reach house in floodplain not a taking).

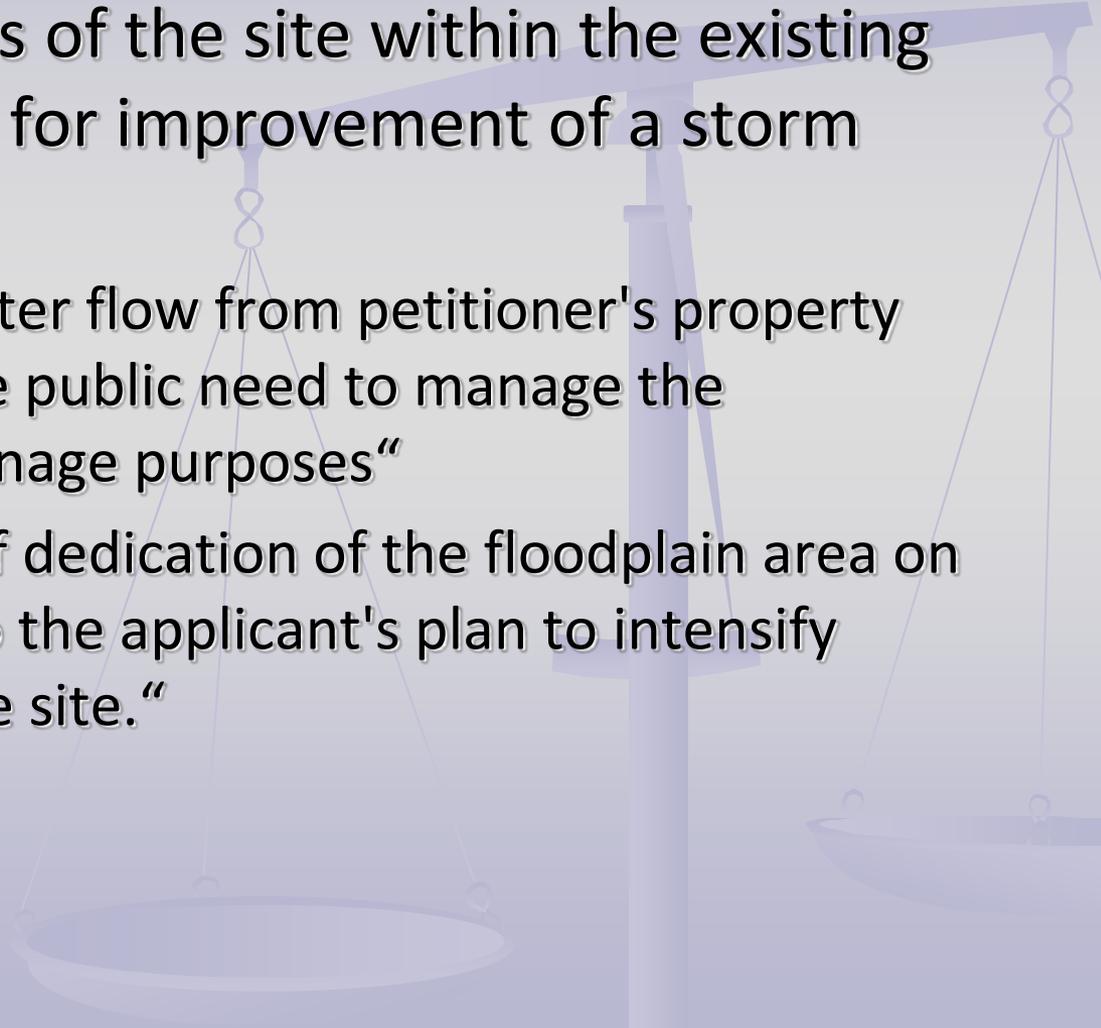
What to do?

Prof. Mark Fenster, University of Florida

- Under-regulate – fail to require developer to internalize all costs associated with impacts of development, or approve development proposals with no mitigation of impacts
- Over-regulate – deny proposals without exactions to avoid constitutional challenge
- Ignore the decisions – anti-growth, pro-regulation communities; areas with high level of trust between permitting authority and development community

- 
- Traffic impacts, water/sewer systems – easiest to quantify, studied extensively
 - <http://www.sanantonio.gov/dsd/RoughProportionality.asp>
 - http://www.lccountymt.gov/fileadmin/user_upload/County_Com_Dev/Suddivision_regulations/5-18-10_Sub_Regs/Chapter_XI_5_18_10.pdf
 - Bike paths, parks, walkways, hiking trails – caution!
 - Wetlands, wildlife, open space – watch out!!
 - <http://fwp.mt.gov/fishAndWildlife/livingWithWildlife/buildingWithWildlife/subdivisionRecommendations/documents.html>
 - *Nollan/Dolan* analysis favors quantified mitigation of direct impacts (traffic, schools, parks) and disfavors conditions that address indirect impacts (air quality, transit services, cumulatively significant indirect impacts)

Findings in *Dolan*

- 
- Dedicate all portions of the site within the existing 100-year floodplain for improvement of a storm drainage system:
 - Increased storm water flow from petitioner's property "can only add to the public need to manage the [floodplain] for drainage purposes"
 - the "requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site."

Findings in *Dolan*

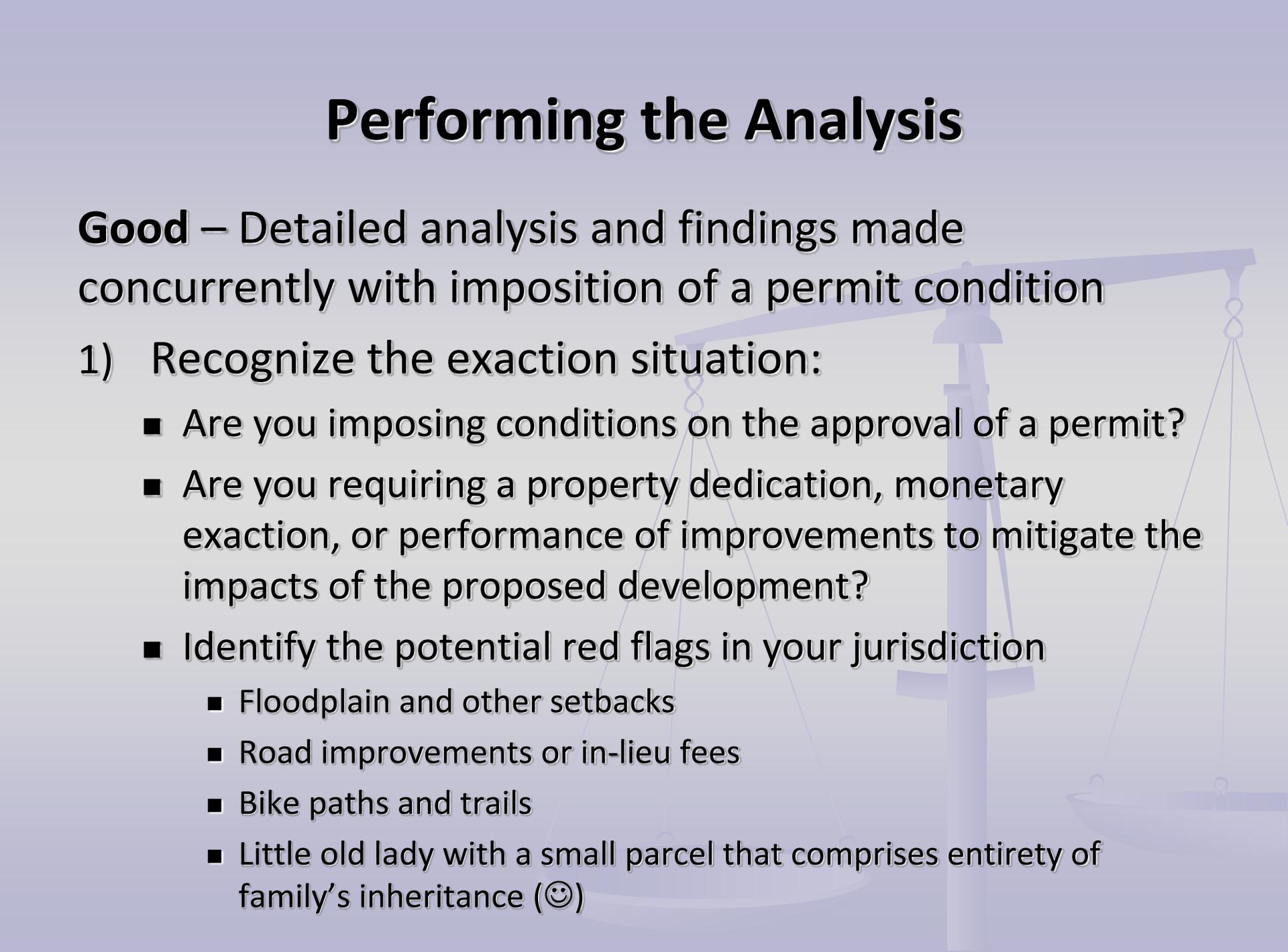
- Dedicate all property 15 feet above the floodplain boundary for use as a pedestrian/bicycle pathway:
 - “[T]he proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets.”
 - Reasonable to assume that customers and employees of the future uses of this site could utilize a ... pathway adjacent to this development for their transportation and recreational needs."
 - Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion."

Findings in *Dolan*

How did these fail “rough proportionality”?

- Floodplain: “But the city demanded more -- it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property for its greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.”
- Path: “Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use. But on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/ bicycle pathway easement.

Performing the Analysis



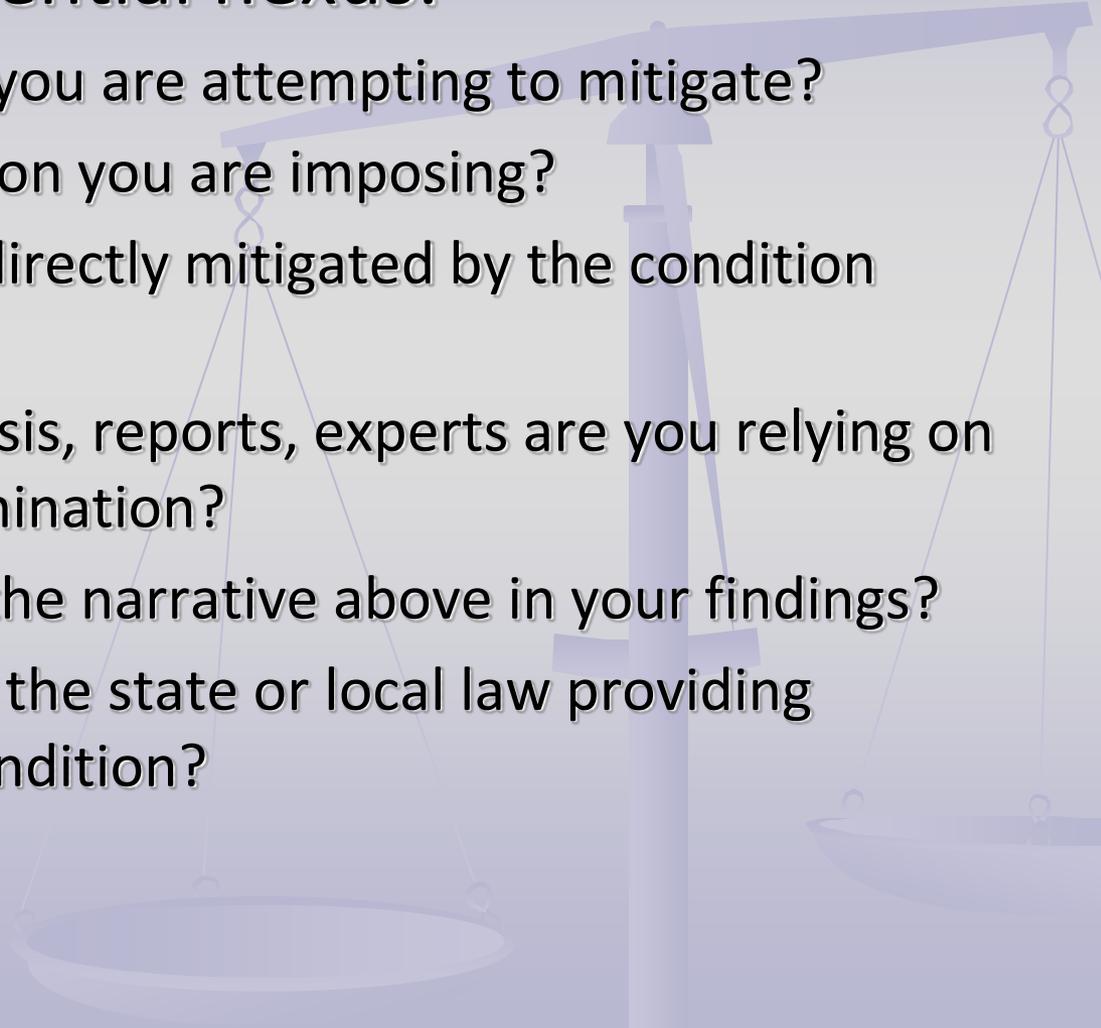
Good – Detailed analysis and findings made concurrently with imposition of a permit condition

1) Recognize the exaction situation:

- Are you imposing conditions on the approval of a permit?
- Are you requiring a property dedication, monetary exaction, or performance of improvements to mitigate the impacts of the proposed development?
- Identify the potential red flags in your jurisdiction
 - Floodplain and other setbacks
 - Road improvements or in-lieu fees
 - Bike paths and trails
 - Little old lady with a small parcel that comprises entirety of family's inheritance (☺)

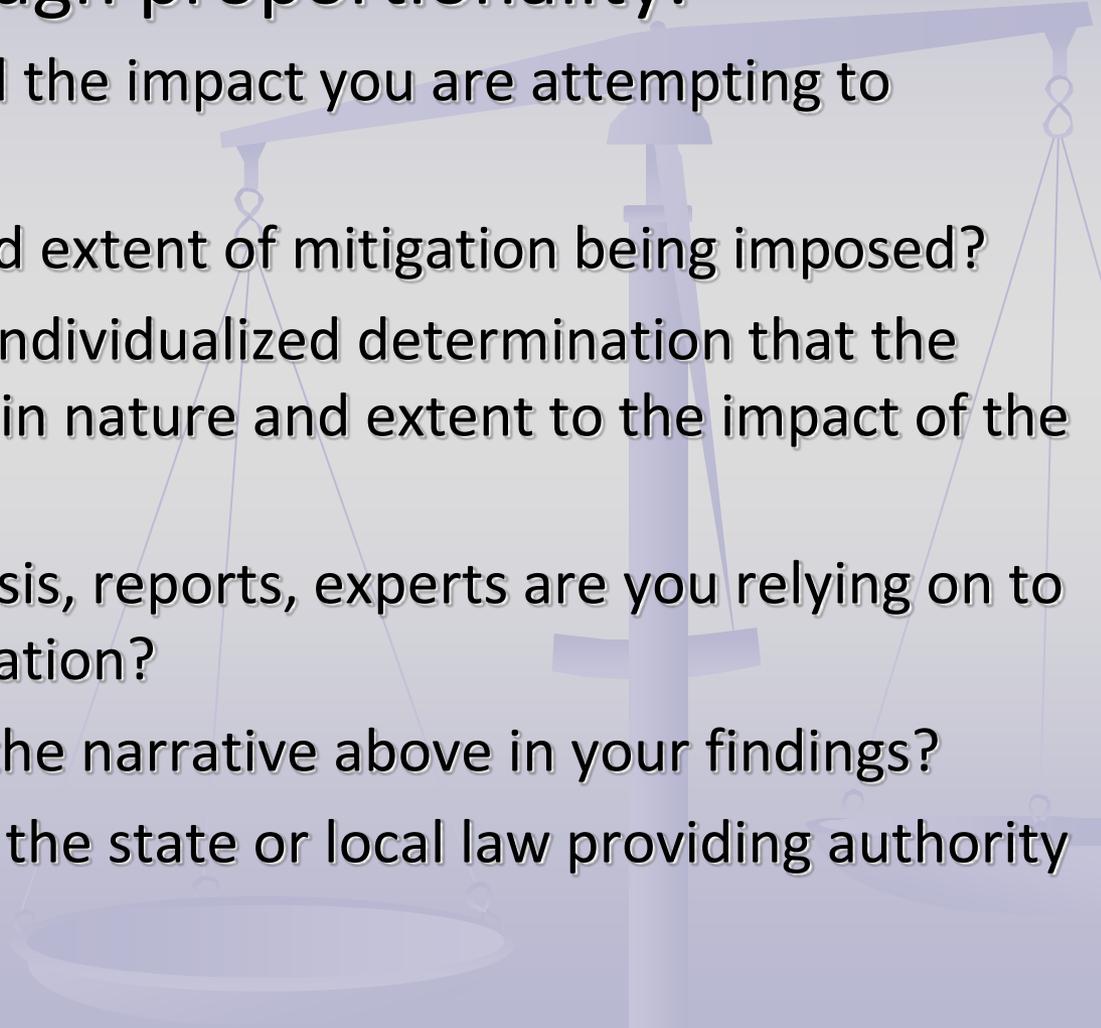
Performing the Analysis, cont.

2) Establish the essential nexus:

- What is the impact you are attempting to mitigate?
 - What is the mitigation you are imposing?
 - Will the impact be directly mitigated by the condition being imposed?
 - What studies, analysis, reports, experts are you relying on to make this determination?
 - Have you set forth the narrative above in your findings?
 - Have you identified the state or local law providing authority for the condition?
- 

Performing the Analysis, cont.

3) Demonstrate rough proportionality:

- Have you quantified the impact you are attempting to mitigate?
 - What is the type and extent of mitigation being imposed?
 - Have you made an individualized determination that the condition is related in nature and extent to the impact of the development?
 - What studies, analysis, reports, experts are you relying on to make this determination?
 - Have you set forth the narrative above in your findings?
 - Have you identified the state or local law providing authority for the condition?
- 

Performing the Analysis

Better – Adopt generally applicable conditions through legislative enactment, and reincorporate findings into individualized permit decisions

- In 9th Circuit, still the law (~) that *Nollan/Dolan* only applies in individualized, ad hoc decisions where unfettered discretion lies in the agency (See *McClung v. City of Sumner*, 548 F.3d 1219, 1228 (9th Cir. Wash. 2008) (ordinance requiring that all new development include a minimum of 12-inch storm pipe not a taking when applied to permit approval))
- Legislatively enacted standards should be clearly stated, applied uniformly, with limits on the maximum amount of the exaction.

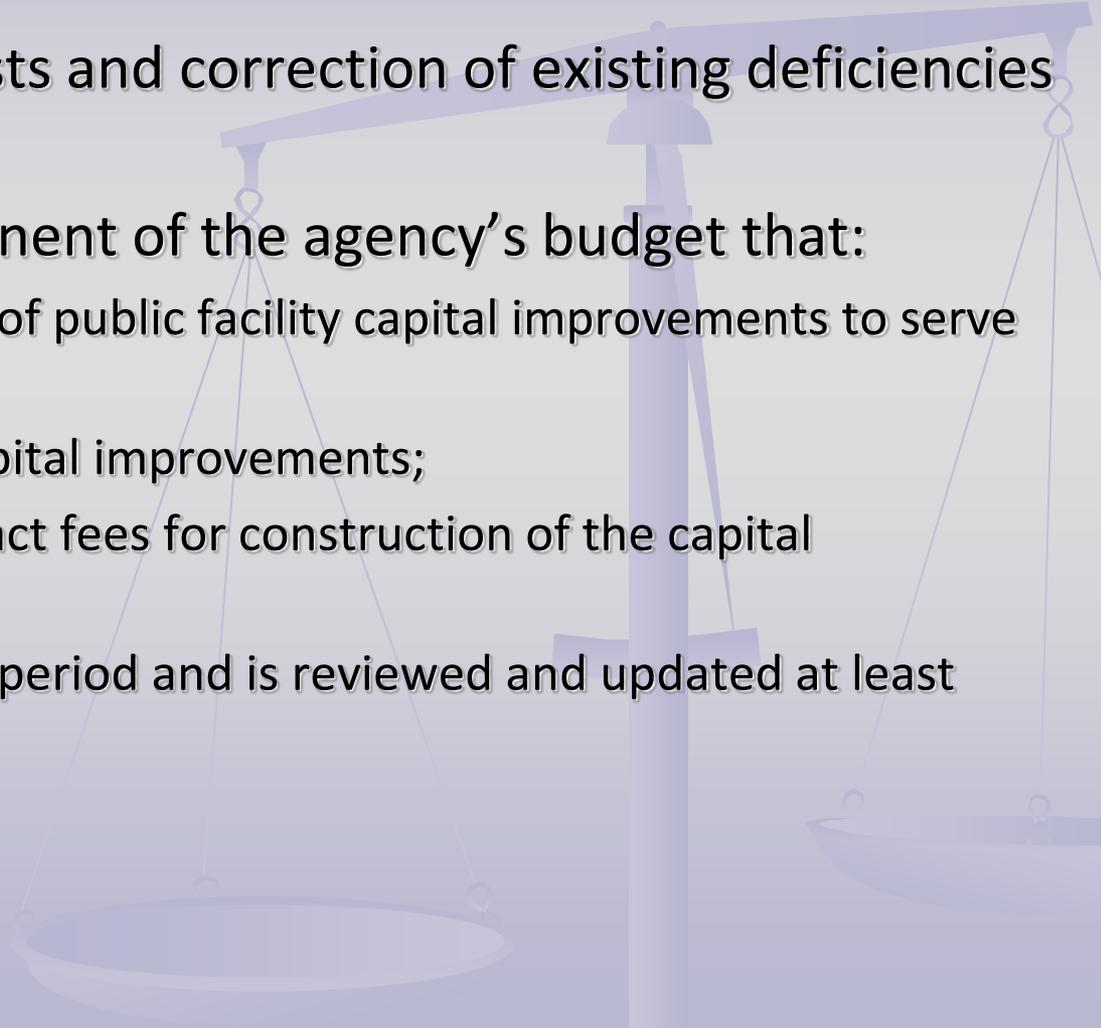
Performing the Analysis, cont.

Best – Adopt impact fees through Montana Impact Fee statute; Sections 7-6-1601, *et seq.*

- Prepare written “service area report” for each public facility for which an impact fee will be imposed
 - describe existing conditions of facilities and establish LOS standards;
 - forecast future needs for service for a defined time period;
 - identify capital improvements necessary to meet future service needs and for continued O&M of the facility;
 - establish the methodology and time period over which the proportionate share of costs to provide service to new development will be assigned.

Performing the Analysis, cont.

“Service area report,” cont.

- Must exclude O&M costs and correction of existing deficiencies from the fee;
 - Must develop a component of the agency’s budget that:
 - schedules construction of public facility capital improvements to serve projected growth;
 - projects costs of the capital improvements;
 - allocates collected impact fees for construction of the capital improvements; and
 - covers at least a 5-year period and is reviewed and updated at least every 2 years.
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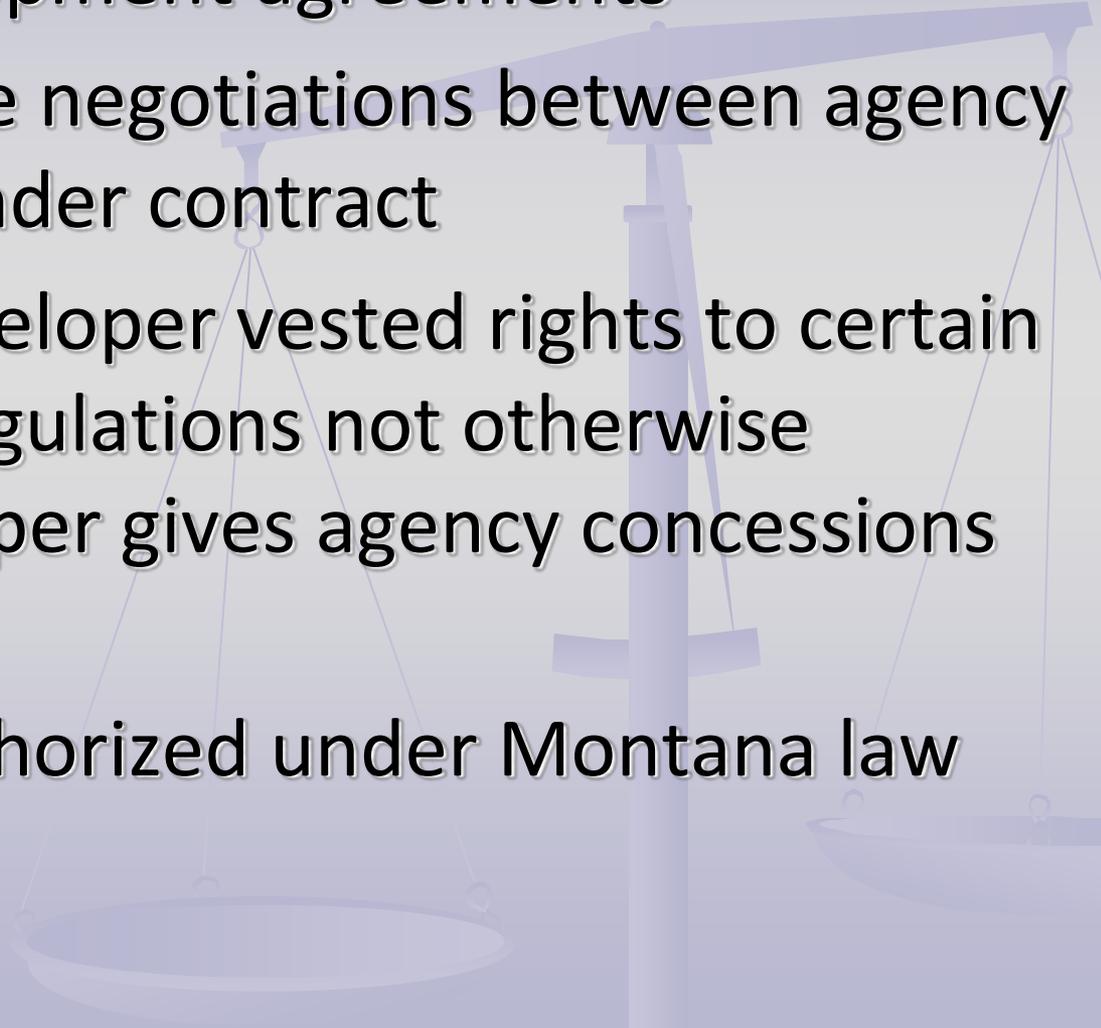
Performing the Analysis, cont.

State statute requires *Nollan/Dolan* analysis:

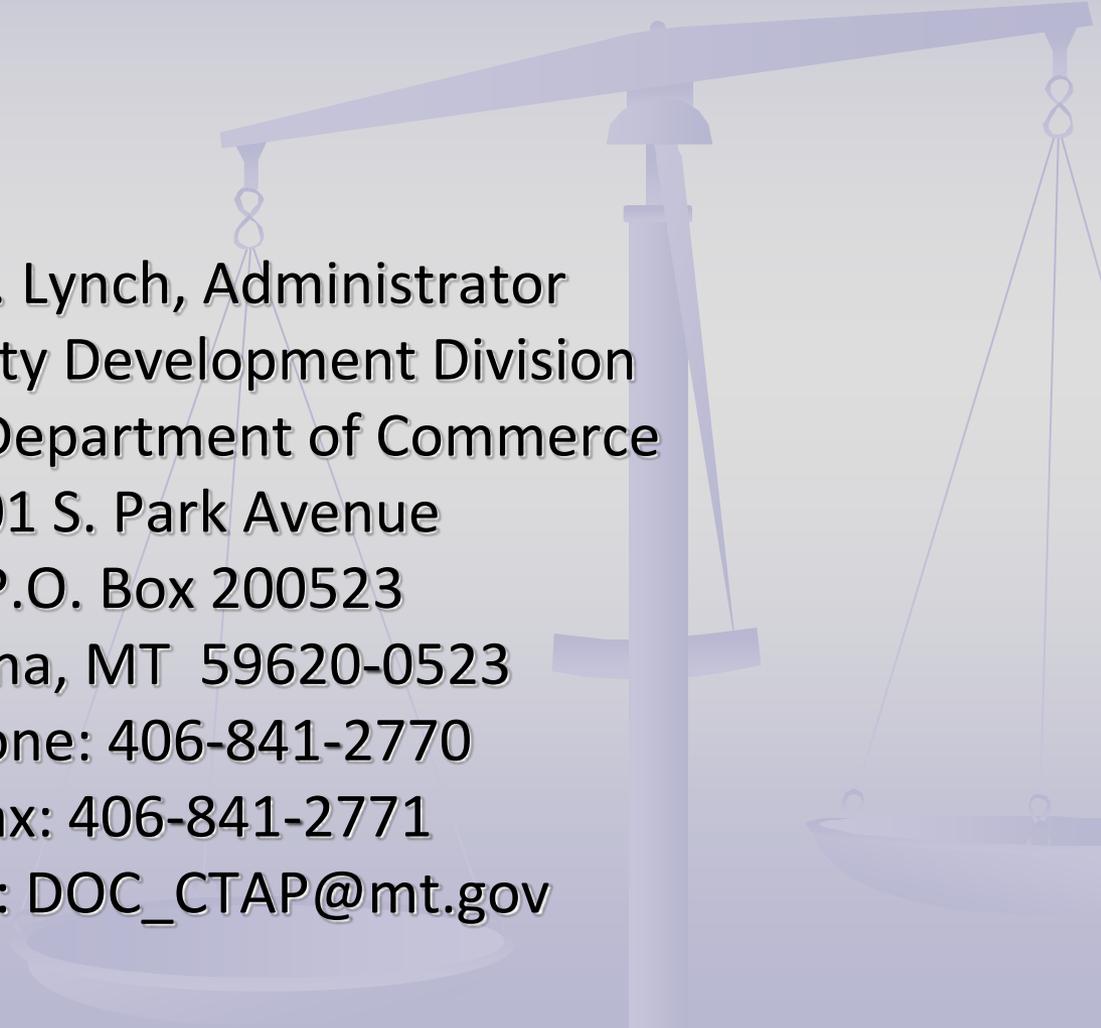
- The amount must be reasonably related to and reasonably attributable to the development's share of the cost of infrastructure improvements made necessary by the new development.
- The fees imposed may not exceed a proportionate share of the costs incurred by the agency in accommodating the development.
- Costs for correction of existing deficiencies in a public facility may not be included in the impact fee.
- Impact fees may not include expenses for operations and maintenance of the facility.

Performing the Analysis, cont.

Home run – Development agreements

- Allows for flexible negotiations between agency and developer under contract
 - Agency gives developer vested rights to certain standards and regulations not otherwise available; developer gives agency concessions in return
 - Not explicitly authorized under Montana law
- 

Questions? Comments? Concerns?



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