NOTES

BRIDGE TO TROUBLED WATER: EXACTIONS ALONG NEW YORK CITY'S SHORE

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New York City's coastline is transforming. Its waterfront zoning requirements have drastically expanded public waterfront access by trading building permits and similar discretionary property benefits to developers in exchange for publicly accessible parks, paths, and plazas. This process is almost certainly unconstitutional: Under the searching review of the Supreme Court's "exactions tetralogy," these mutually beneficial transactions are unconstitutional conditions. But no one seems to care. This Note addresses the unexpected survival of New York City's waterfront zoning. It proposes two methods by which the city can strengthen its expressed interests in these deals in case of constitutional challenge. More significantly, it uses New York City's waterfront zoning to argue that, contrary to the underlying values of the Takings Clause on which it is based, exactions doctrine restricts individual property rights. Certain rational actors, like profit-maximizing, large-scale developers, are not inclined to pursue legal remedies. Instead, it is in the interest of both private landowners and the government to sidestep exactions altogether and negotiate mutually beneficial deals.

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INTRODUCTION

The public owns the East River, as it owns all navigable waterways.[1] Only recently is that ownership paying dividends. When Williamsburg's iconic Domino Sugar refinery closed in 2004,[2] an extensive redevelopment permitting process began that would reshape the public's access to the waterfront.[3] In 2014, New York City (the "City") approved a proposal by Two Trees Management, the second developer to own the site since the refinery's closing.[4] A hugely successful New York real estate company responsible for much of Dumbo's[5] late-twentieth century redevelopment, Two Trees is undoubtedly a profit-making organism.[6] Despite this, its proposal and subsequent project did not effect a one-to-one transition from industrial to residential and commercial. Opened in 2018 at a cost of $50 million, Domino Park is a privately owned, publicly accessible five-acre

1. See, e.g., Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 455 (1892) (stating that "[t]he ownership of . . . navigable waters . . . is a subject of public concern" and those waters thus cannot be alienated from the governmental "trust with which they are held").

2. Josh Barbanel, New Neighborhood Emerging on the Domino Refinery Site, Wall St. J. (Apr. 26, 2017), https://www.wsj.com/articles/new-neighborhood-emerging-on-the-domino-refinery-site-1493235312 (on file with the *Columbia Law Review*).

3. Id.; Charles V. Bagli, Plan to Redevelop Domino Sugar Factory in Brooklyn Hits Snag: De Blasio, N.Y. Times (Feb. 27, 2014), https://www.nytimes.com/2014/02/28/nyregion/plan-to-redevelop-brooklyn-sugar-refinery-hits-roadblock-new-mayor.html (on file with the *Columbia Law Review*).

4. Barbanel, supra note 2.

5. Dumbo is a neighborhood of New York City located at the Brooklyn end of the Brooklyn and Manhattan bridges. The name is an acronym: "Down Under the Manhattan Bridge Overpass." Jeff Giles, The Most Instagrammable Neighborhood in America, Before It Was Cool, N.Y. Times (Sep. 12, 2019), https://www.nytimes.com/2019/09/12/nyregion/the-most-instagrammable-neighborhood-in-america-before-it-was-cool.html (on file with the *Columbia Law Review*) (last updated Sep. 16, 2019).

6. See David W. Dunlap, SoHo, TriBeCa and Now Dumbo?, N.Y. Times (Oct. 25, 1998), https://www.nytimes.com/1998/10/25/realestate/soho-tribeca-and-now-dumbo.html (on file with the *Columbia Law Review*) ("[Two Trees] has waited since 1981 for the political and economic stars to align that would allow [it] to redevelop the area . . . .").

park partially cantilevered over the East River.[7] Domino Square is a similarly accessible one-acre plaza nearby.[8] Developers have their own incentives to build parks and green spaces alongside more traditional developments,[9] but Domino Park and Square are not purely business or altruistic endeavors. They are the result of years of development proposals, zoning procedures, public feedback and pushback, and, most importantly, New York City's 1993 Waterfront Zoning Ordinance (the "Ordinance")[10] and its 2009 amendments, one of the diverse strategies by which the City has sought to reclaim its 520 miles of coastline.

The Ordinance requires landowners seeking redevelopment permits on waterfront lots to dedicate a portion of the lot to the public.[11] As Domino Park shows, New York City has created a functional system for establishing publicly accessible waterfront spaces. But the system is not as legally sound as it is effective. By conditioning development approval upon a land use restriction (the property owner only needs to build a park if they require a development permit), the Ordinance is an example of an "exaction," a commonly implemented but unique portion of Takings jurisprudence.[12] In essence, the City declares that: (1) Waterfront development interferes with the government's interest in securing access to the water for the people and (2) the developer can proceed with it provided they balance this impediment on the state interest by creating a publicly accessible waterfront area.[13] U.S. Supreme Court decisions make the Ordinance constitutionally unsteady as it relates to the Takings Clause of the Fifth Amendment. Its survival is unexpected.[14]

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7. See Damian Holmes, Domino Park Designed by James Corner Field Operations Opens in New York, World Landscape Architecture (June 16, 2018), https://worldlandscapearchitect.com/domino-park-designed-by-james-corner-field-operations-opens-in-new-york (on file with the *Columbia Law Review*).

8. Welcome to Domino, Refinery Domino, https://www.therefineryatdomino.com/the-domino-campus-in-williamsburg [https://perma.cc/2783-A5H2] (last visited Aug. 14, 2025).

9. See infra section III.B.3.

10. The City places the Ordinance within "Rules for Special Areas" in the Zoning Resolution. This Note uses the word "Ordinance" to explicitly refer to this portion of the zoning resolution, but practitioners refer to the "ZR."

11. N.Y.C., N.Y., Zoning Resolution art. IV, ch. 2, 62-50 (2025) (detailing public-access requirements in case of waterfront redevelopment).

12. The Ordinance is a "legislative" exaction, meaning it applies equally to all developments that fit within its definitions. An "adjudicative" exaction is determined on a case-by-case basis. See Lee Anne Fennell & Eduardo M. Peñalver, Exactions Creep, 2013 Sup. Ct. Rev. 287, 296 (explaining that "legislative" exaction takes the form of a "generally applicable formula" in ways that "adjudicative exactions" do not).

13. See Waterfront Access Map, NYC Plan., https://waterfrontaccess.planning.nyc.gov/waterfront-zoning-for-public-access [https://perma.cc/AW7D-N2BL] (last visited Aug. 14, 2025) ("This requirement is rooted in the long-standing public trust doctrine which ensures the public's access to the City's waterfronts and waterways.").

14. See Jill Ilan Berger Inbar, Note, "A One Way Ticket to Palookaville": Supreme Court Takings Jurisprudence After *Dolan* and Its Implications for New York City's

This Note addresses that survival. The Ordinance seemed destined to fail on day one, but it continues today. The City's waterfront regime requires developers to spend money and cede control, yet landowners decline to challenge it. This Note seeks to answer the question of why the Ordinance has survived. It uses this case study to argue that the Supreme Court's exactions jurisprudence is not properly designed to protect private property owners. To prevent the government from exacting unconstitutional conditions from landowners, the Supreme Court has instead limited the capabilities of both property owners and local government so much that even some well-resourced parties are unlikely to challenge municipal exactions. Contemporary exactions doctrine serves only as a hinderance on mutually beneficial municipal planning and thus is rarely implemented. Parties instead may choose to ignore it. New York City's Waterfront Zoning Ordinance displays the practical faults and resulting inefficacy of exactions law.

Part I will provide background on New York's successes and failures in reclaiming waterfront land, including the Ordinance. Part II will present and apply exactions law to the Ordinance. It will examine the Ordinance and its public-access requirements in the context of the "exactions trilogy" of *Nollan v. California Coastal Commission*,[15] *Dolan v. City of Tigard*,[16] and *Koontz v. St. Johns River Water Management District*,[17] and their recent successor, *Sheetz v. County of El Dorado*,[18] all of which suggest that the Ordinance would be overturned if subject to constitutional challenge. Part III will suggest that the Ordinance has stronger legal defenses available to it than one might expect, but most importantly it will argue that the Ordinance's survival is not purely a coincidence. Rather, the City's extensive powers in other methods of land use control incentivize developers to cooperate with a regime that, in many ways, aligns with their interests. Absent the Ordinance, the City would still be able to regulate similar or more intrusive results without conferring a benefit to developers. This places private developers in a scenario in which cooperation with municipal exactions is their best option.

I. BACKGROUND

Public rights to New York City's waterfront have been and continue to be nebulous. Discussion of New York's waterfront reclamation inherently

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Waterfront Zoning Resolution, 17 Cardozo L. Rev. 331, 365 (1995) ("Under the standards of current takings jurisprudence, the Court would probably hold that the Waterfront Ordinance effects an unconstitutional taking without just compensation.").

15. 483 U.S. 825 (1987).

16. 512 U.S. 374 (1994).

17. 570 U.S. 595 (2013).

18. 144 S. Ct. 893 (2024). As *Sheetz* seems essential to exactions jurisprudence (and is important as it applies to the Ordinance), this Note refers to these four cases as the "Exactions Tetralogy," adding it to the prior "Trilogy" of *Nollan*, *Dolan*, and *Koontz*.

refers to public trust doctrine, Takings jurisprudence, property rights and zoning, and the social value of public spaces. This section will provide information on New York City's historic approach to reclaiming its waterfront, the public trust doctrine in New York State, the Ordinance that is predicated on it, and non-Ordinance approaches the City uses to create publicly accessible waterfront spaces.

A. *The Twentieth-Century Approach*

New York City has been attempting to reclaim its waterfront from private developers for quite some time. Until 1993, however, even some well-funded projects floundered against public opposition and complex procedure. Soundview Park on the East Bronx's Clason Point Peninsula provides an example of the extreme means the City utilized in the mid-twentieth century and perhaps why it pivoted to a different approach.[19]

The area identified as the site for the future Soundview Park seemed easy for the City to acquire. In the early twentieth century, Clason Point Peninsula was notable for the Clason Point Amusement Park, the "Coney Island of the Bronx," until a series of disasters including polluted waters in the East River (and, by extension, in the amusement park's swimming pool)[20] and a Ferris wheel collapse in 1922[21] dissuaded visitors. The peninsula's other half featured a campground adjacent to the park, where visitors could stay for up to months at a time.[22] With time and the housing shortage of World War I, it evolved from a campground into permanent housing, where families hand-built increasingly elaborate homes on property still owned by a single landowner.[23] That neighborhood, Harding

19. Soundview Park is large, covering much of the area known as "Clason Point." This section particularly focuses on the southern end of that area, on the Clason Point Peninsula.

20. See Kara Murphy Schlichting, Rethinking the Bronx's "Soundview Slums": The Intersecting Histories of Large-Scale Waterfront Redevelopment and Community-Scaled Planning in an Era of Urban Renewal, 16 J. Plan. Hist. 112, 115 (2017) (explaining that coastal pollution was a major factor in the downfall of Clason Point Park); Ameena Walker, 100 Years Ago: Clason Point Freak Ferris Wheel Accident Kills Eight, Injures 27, Untapped N.Y. (June 10, 2022), https://untappedcities.com/2022/06/10/clason-point-ferris-wheel-accident/ [https://perma.cc/8KBV-XTK2] (internal quotation marks omitted) (discussing the unorthodox method of filling the park's pool).

21. Gale Wrecks Huge Machine, N.Y. Times, June 12, 1922, at 1, https://timesmachine.nytimes.com/timesmachine/1922/06/12/issue.html (on file with the *Columbia Law Review*) (detailing the accident). The name of the wheel's owner was Paul Simon. See id. In the end, the construction of the Whitestone Bridge over the polluted East River played a role in the park's collapse. Paul Simon's business went under because of a bridge over troubled water. See Walker, supra note 20 ("Coastal pollution, declining attendance, the Great Depression, and construction from the Whitestone Bridge ultimately shuttered the park for good.").

22. See Schlichting, supra note 20, at 115 ("To cater to Clason Point's summer visitors, Thomas Higgs opened a campground, Higgs Beach—the future Harding Park—adjacent to the amusement park district.").

23. See id. ("At Higgs Beach, campers began converting tents into permanent homes during the housing shortage of WWI.").

Park, was an unregulated working-class community of unauthorized homes without proper streets or addresses.[24] Harding Park was about as weak from a property rights perspective as a community could be.

New York City Department of Parks & Recreation ("NYC Parks" or "Parks") Commissioner Robert Moses began to purchase and claim the Clason Point waterfront in the 1930s.[25] Two types of land composed Moses's image of Soundview Park. First was reclaimed land, formed by piling trash in the East River as had been done successfully at Flushing Meadows Park in Queens.[26] Dumping began in 1938 and was extensive by 1941, though the land was not yet usable as a park by that time.[27] But landfill was not Moses's only plan for Soundview Park: Other portions of the park would be built on the Harding Park neighborhood.[28] This was easier said than done. A 1953 attempt to redevelop the land failed when it came up against local opposition from Harding Park residents[29] and citywide objections to land seizure.[30] A 1956 "urban renewal" plan to demolish Harding Park relied on branding Harding Park as "slums," which Moses did not hesitate to do.[31] But again the Soundview Park project became the target of public condemnation—Mayor Robert F. Wagner, Jr., eventually halted the project until the controversy blew over, which never happened.[32] Harding Park's lack of legal status, New York's liberal use of

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24. Id. at 116–17. The part of the Bronx east of the Bronx River (including Harding Park and Clason Point) became part of New York City in 1895 and was thus exempt from much of New York City's early planning strategies. Consolidation Timeline, NYC125, https://nyc125.org/consolidation-timeline [https://perma.cc/899M-JRAP] (last visited Aug. 14, 2025). Today, many of Harding Park's streets and addresses are disjointed, unnamed, or have multiple names.

25. Schlichting, supra note 20, at 117. Robert Moses served first as Parks Commissioner but rapidly took control of a wide array of New York City and State departments and organizations. See generally Robert A. Caro, The Power Broker: Robert Moses and the Fall of New York (1974). His famous failure, the "Lower Manhattan Expressway," turned its chief opponent, resident Jane Jacobs, into an urban planning celebrity. Moses is notorious today for his liberal use of urban renewal projects and large-scale construction to demolish low- and middle-income neighborhoods, particularly those with nonwhite populations. See id. at 5–24 (detailing the life and career of Robert Moses, particularly focusing on his unchecked power in city planning and administration and its consequences on communities to which Moses directed his gaze).

26. See Schlichting, supra note 20, at 117 ("Landfill, he promised, would improve this waterfront.").

27. Id.

28. Id.

29. See id. at 118–19 ("Peter Kokiadas, chairman of Harding Park's tenant association, declared the proposal was based on the misapprehension that the neighborhood was a 'shacktown.'").

30. See id. at 119. ("The *New York World-Telegram* picked up the story, running a two-part exposé of what it deemed an inappropriate land grab attempt.").

31. Id.

32. Id. at 121–23 ("Harding Park survived Title I demolition not because of any significant local activism but rather because of corruption charges and bureaucratic pitfalls."). Though it took many years, Harding Park eventually received New York City's approval. In

urban renewal laws, and Moses's near-unchecked power presented an easy opportunity to seize private lands, but the City failed.

The land around Soundview Park was the target of many of the City's primary methods of seizing waterfront in the twentieth century, among them land reclamation in the river, eminent domain, and urban renewal. These strategies varied in their efficacy. Queens's Astoria Park, for instance, was the result of both land acquisition and successful condemnation proceedings in the early twentieth century,[33] prompted by public desire for a park in the area.[34] There are difficulties inherent in this sort of aggressive park-building strategy, as Harding Park illustrates, not to mention extreme expense.

The City's approach today, though not standardized citywide, is much more predictable. The spirit of public ownership of waterfront land lives on, though, as the underlying justification for the City's 1993 Ordinance and several other major park efforts.

B. *Public Trust Doctrine in New York*

Whether constructing new public coastal land with trash or attempting to raze neighborhoods and sell the land to private developers, Robert Moses was insistent that his purpose was the preservation of access to New York City's waterfront.[35] He wrote in 1948: "Most, but by no means all, of the marginal waterfront belongs naturally to the public and should remain

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1982, the City (now the owners of the deed) and the Harding Park Homeowners' Association reached an agreement to transfer the land to the neighborhood. See Lizette Alvarez, A Neighborhood of Homesteaders: Hispanic Settlers Transform Harding Park in Bronx, N.Y. Times (Dec. 31, 1996), https://www.nytimes.com/1996/12/31/nyregion/hispanic-settlers-transform-harding-park-in-bronx.html [https://perma.cc/E6RT-7GAF] ("[T]o promote the rebuilding of Harding Park, Mayor Edward I. Koch took an unusual step. He exempted the shacks from building codes."). Harding Park's HOA was "the first cooperatively owned low and moderate-income community in the city." Harding Park History, Harding Park HOA, https://hardingparkbronx.com/harding-park-history/ [https://perma.cc/F599-M7YK] (last visited Sep. 2, 2025).

33. See City to Pay $765,451 for East River Park, N.Y. Times, May 16, 1915, at E4, https://timesmachine.nytimes.com/timesmachine/1915/05/16/104647106.pdf (on file with the *Columbia Law Review*) ("[T]he Commissioners find that the site is worth $534,549 less than the upset price agreed upon.").

34. See East Siders Revel at East River Park, Brooklyn Eagle, Mar. 29, 1913, at 4, https://www.newspapers.com/article/brooklyn-eagle-east-siders-revel-at-east/67560378/ [https://perma.cc/YX4M-7CWS] ("[T]here had been an overwhelming expression of opinion from the settlement workers, clergymen and civic associations of the East Side of Manhattan in favor of an early acquiring by the city of the park site.").

35. See Schlichting, supra note 20, at 117 ("Moses tirelessly advocated for coastal redevelopment and park facilities in the outer boroughs . . . ."). For a different perspective on Moses's goals, see Caro, supra note 25, at 19 ("[T]he criterion by which Moses selected which city-shaping public works would be built came to be not the needs of the city's people, but the increment of power a project could give him.").

or be restored to public or quasi-public ownership. It is infused with a paramount and inalienable public interest."[36]

The argument is persuasive but legally questionable. Moses argued in favor of a variation on public trust doctrine, which the Supreme Court formally recognized in 1892.[37] Certain lands are held in the public trust and are inalienable—federal doctrine includes the land underneath navigable waterways in this category.[38] Different states, however, manifest distinct expansions of this doctrine.[39] Some states, like New Jersey, have a broad public trust doctrine, encompassing all land beneath the high-water mark and including access rights even if that access intrudes upon private property.[40]

New York is not one of these states. Its public trust doctrine rarely exceeds the 1892 federal baseline.[41] In New York, "the extremely modest case law in this area suggests that the private property owner has the sole right to all real estate that is landward of the high water mark."[42] Land above the high-tide line is conceptually alienable. Even additional protections are not always enough to prevent alienation: Though parkland in New York "cannot be sold, leased, exchanged or used for non-park purposes," New York can alienate municipal parkland with state legislative approval.[43] Public trust doctrine wasn't enough to turn public opinion in favor of Moses. But his idea wasn't nonsensical. As land included in the

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36. Robert Moses, New York Reclaims Its Waterfront, N.Y. Times, Mar. 7, 1948, at 16, https://timesmachine.nytimes.com/timesmachine/1948/03/07/96420031.html?pageNumber=252 (on file with the *Columbia Law Review*).

37. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 455 (1892) ("The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental and cannot be alienated . . . .").

38. Id.; see also Steven M. Fink, Note, The Public Trust Doctrine: The Development of New York's Doctrine and How It Can Improve, 34 Touro L. Rev. 1201, 1202 (2018) ("[F]ederal doctrine . . . protects navigable-in-fact waters and the surrounding beds up to the high-water mark . . . .").

39. See Robin Kundis Craig, A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries, 16 Penn. St. Env't L. Rev. 1 (2007).

40. See Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 124 (N.J. 2005) (finding that a beach association cannot restrict membership as it interferes with public access to the land beneath the high-water mark, which is preserved in public trust).

41. See Craig, supra note 39, at 84–87 (explaining that New York's public trust doctrine does not provide access rights).

42. Fink, supra note 38, at 1212–13; see also Craig, supra note 39, at 87 ("[T]he line between state ownership and private ownership appears to be the high-tide line, although New York case law has not been crystal clear regarding this point.").

43. See Div. of Loc. Gov't & Sch. Accountability, Off. of the N.Y. State Comptroller, Parkland Alienation 2, 5 (2014), https://www.osc.ny.gov/files/local-government/audits/2017-11/lgsa-audit-swr-2015-Parkland-global.pdf [https://perma.cc/W9X7-HAQ8] ("[T]he municipality must receive prior authorization from . . . (State Parks) in the form of legislation enacted by the New York State Legislature (Legislature) and approved by the Governor.").

public trust is (and always has been) fundamentally inalienable, falsely alienated land reclaimed for the public through the public trust doctrine is immune to the Takings Clause;[44] if something isn't yours to begin with, no one is taking it from you. An expanded version of public trust doctrine could provide New York City with a method by which to reclaim its coastline.

How the public trust doctrine works is a more complicated question. The public trust doctrine is a common law doctrine, but scholars disagree on whether state versions are common law manifestations of a single federal common law or truly state common law.[45] Therefore, it is unclear to what extent a legislature, for instance, can expand a state's public trust doctrine. Courts, too, are perhaps limited: Different courts place emphasis on different aspects of the doctrine; some depend on history and tradition while others operate freehand on their own opinions of how public trust doctrine works.[46] Relying on the latter could neutralize judicial decisions. If courts attempt to "expand" public trust doctrine rather than restate that public trust doctrine already includes the relevant coastal space, they could be subject to the nebulous doctrine of "judicial takings."[47]

Regardless, New York courts have broadly declined to acknowledge a public trust doctrine beyond the federal minimum, even as the municipal government has implied it extends further. Instead, New York's coastline remained largely private for over a century, in the hands of industry and private landowners.[48] Moses wrote, "Our waterfront was, through past neglect, indifference, stupidity, corporate and individual selfishness, and planless and feeble government, allowed to degenerate for so many years

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44. See Fink, supra note 38, at 1205 ("Although the Takings Clause of the Fifth Amendment of the United States Constitution protects the people from the government's taking one's property for public use without just compensation, the public trust doctrine is an exception.").

45. See Craig, supra note 39, at 3 (discussing the idea that each state's public trust doctrine is not fundamentally unique, but rather a varying manifestation of federal doctrine).

46. Compare Juliana v. United States, 217 F. Supp. 3d 1224, 1276 (D. Or. 2016) (expanding the reach of the public trust doctrine to include the federal government), rev'd, 947 F.3d 1159 (9th Cir. 2020), with San Luis & Delta-Mendota Water Auth. v. Jewell, 52 F. Supp. 3d 1020, 1069 (E.D. Cal. 2014) (relying on the history of the public trust doctrine to explicate its modern use), aff'd in part, rev'd in part sub nom., San Luis & Delta-Mendota Water Auth. v. Haugrud, 848 F.3d 1216 (9th Cir. 2017).

47. See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 714 (2010) (plurality opinion) (finding "no support for the proposition that takings effected by the judicial branch are entitled to special treatment"). Like the public trust doctrine, judicial takings are hard to make sense of. Justice Antonin Scalia's *Stop the Beach* plurality opinion, the Supreme Court's only real guidance on the issue, is neither binding precedent nor simple to apply. See Cameron M. Morrissey, Comment, Judicial Takings: A Nothingburger?, 52 U. Tol. L. Rev. 591, 604–09 (2021) (describing lower courts' difficulty in applying *Stop the Beach*).

48. See Kenneth R. Cobb, New York's Working Waterfront, NYC Dep't Recs. & Info. Servs. (July 24, 2020), https://www.archives.nyc/blog/2020/7/24/new-yorks-working-waterfront [https://perma.cc/3Q7E-LH55] (covering the ebb and flow of private use of the City's waterfronts).

that reclamation became difficult and expensive."[49] He was not alone in this opinion. As the twentieth century progressed, New Yorkers became increasingly agitated by the City's failure to provide access to its coastline.[50]

C. *The Waterfront Zoning Ordinance*

New York eventually found a partial solution: the 1993 Waterfront Zoning Ordinance, designed to provide public access to the waterfront, expand views of the coastline, permit further waterborne public transit, and standardize interactions between coastal development and surrounding communities.[51] Unlike Moses's projects, the Ordinance did not target individual sections of the coastline, nor did it completely remove landowners' volition. Rather, it established waterfront access requirements triggered by redevelopment.[52] Now, owners of waterfront lots seeking permitting and rezoning for construction projects have to ensure that "15 to 20 percent of the open space on the zoning lot be available for public access," particularly the part of the lot closest to the water.[53] Landowners must also provide access to the coastal area from the "upland" side of the lot.[54] Developers then have a choice: They are able to maintain full control of the property themselves, contingent upon the public easement and covering all operating costs, or they can transfer the land to the City (but still cover the operating costs).[55] Among the lots transferred to the City are Greenpoint Landing,[56] Schaefer Landing,[57] and The Edge North Tower in Williamsburg.[58]

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49. Moses, supra note 36.

50. See, e.g., Kenneth Silber, The Wasted Waterfront, City J. (1996), https://www.city-journal.org/article/the-wasted-waterfront [https://perma.cc/KN4J-SWAY] (discussing the uselessness of the waterfront for New Yorkers and blaming it on harsh city regulations).

51. Dep't of City Plan., City of N.Y., New York City Comprehensive Waterfront Plan: Reclaiming the City's Edge 145 (1992), https://www.nyc.gov/assets/planning/download/pdf/about/publications/cwp.pdf [https://perma.cc/9E32-EMQU] [hereinafter Dep't of City Plan., Waterfront Plan].

52. See id. (detailing the proposed regulation's reliance on redevelopment).

53. Id. at 162 ("The percentage represents a balance among the public's desire to enjoy the waterfront, the costs of providing and maintaining public access . . . and . . . proposed urban design standards.").

54. Rules for Special Areas, NYC Plan., https://www.nyc.gov/content/planning/pages/zoning/zoning-districts-guide/rules-for-special-areas#waterfront-zoning [https://perma.cc/U7HV-XWSU] (last visited Aug. 14, 2025).

55. N.Y.C., N.Y., Zoning Resolution art. IV, ch. 2, 62–73 (2025) ("The owner of a zoning lot on a waterfront block may, at the owner's option . . . , make a request . . . to transfer to the City of New York its fee simple absolute interest . . . .").

56. Greenpoint Landing, Handel Architects LLP, https://handelarchitects.com/project/greenpoint-landing-master-plan [https://perma.cc/3YL4-7HKH] (last visited Aug. 14, 2025).

57. Schaefer Landing, NYC Parks, https://www.nycgovparks.org/parks/B591/ [https://perma.cc/9UMD-HCMU] (last visited Aug. 14, 2025).

58. The Edge North Tower at 34 North 7th Street Building Details, Edge N. Tower, https://34north7th.com [https://perma.cc/UR82-WRDW] (last visited Sep. 3, 2025).

Whether 15% or 20% of a waterfront lot must be publicly accessible is dependent upon the lot's floor area ratio, or "FAR."[59] In New York City, FAR is the "principal bulk regulation controlling the size of buildings."[60] In high-density neighborhoods (or neighborhoods intended to be high-density), a high FAR will permit taller buildings.[61] Lower FARs result in lower-density neighborhoods and shorter buildings. The Ordinance is three-tiered. First, high-density lots with FARs over 4.0 must allocate 20% of the zoning lot to public access.[62] On many of these high-density lots, developers likely already intend to leave significant portions of the lot underdeveloped in some capacity to maximize their FAR. Lower-density lots, with FARs under 4.0, must allocate 15% of the lot.[63] Lastly, the Ordinance fully exempts "low-density residence districts, [some] heavy commercial and industrial uses[,] . . . and certain city infrastructure facilities, such as airports."[64] Ergo, a waterfront homeowner seeking redevelopment in a neighborhood like Harding Park would not need to dedicate any portion of their waterfront land to public access.

Although design discretion is partially left to the redeveloping landowners, the Ordinance established a variety of qualifications for designing the public spaces that were later expanded in a 2009 update.[65] Generally, this space is styled as a park or plaza.[66] These publicly accessible areas are "privately owned public spaces," or "POPS."[67] Unlike a standard park,

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Confirmation of these transfers to the City came from current employees at the New York City Department of Parks & Recreation. Memorandum from Max McCulloch to the Columbia L. Rev. (Oct. 26, 2025) (on file with the *Columbia Law Review*) (describing an interview with a legal staff member of the New York City Department of Parks & Recreation).

59. Rules for Special Areas, supra note 54.

60. NYC Plan., Glossary of Zoning Terms 14 (2021), https://www.nyc.gov/assets/planning/downloads/pdf/zoning/downloadable-zoning-resources/zoning-glossary.pdf [https://perma.cc/4S3B-SF62].

61. For example, on a lot with a FAR of 2.0, a two-story building could cover the entire lot. Alternatively, a developer could use just half that lot and build a four-story building or use a quarter of the lot for an eight-story building. See id. at 15. All these options would result in a 2.0 ratio between the square footage of the building and the lot.

62. Rules for Special Areas, supra note 54.

63. Id.

64. Id.

65. See Waterfront All., Fine-Tuning Waterfront Policy, Waterfront All.: WaterWire Blog (Jan. 28, 2009), https://waterfrontalliance.org/2009/01/28/fine-tuning-waterfront-policy/ [https://perma.cc/K5K3-8ZVK] ("The new requirements . . . would enhance the quality of the public space, requiring it to be greener, with high-quality seating, lighting and other design elements . . . and would improve connections between the water's edge and upland streets.").

66. New York has had some trouble with privately owned public spaces in other contexts. See Urvashi Uberoy & Keith Collins, New Yorkers Got Broken Promises. Developers Got 20 Million Sq. Ft., N.Y. Times (July 21, 2023), https://www.nytimes.com/interactive/2023/07/21/nyregion/nyc-developers-private-owned-public-spaces.html (on file with the *Columbia Law Review*) (detailing the numerous violations the City has issued to such spaces).

67. Id.

POPS are privately administered. New York City has a variety of zoning requirements, programs, and trade-offs that result in POPS. Many come in the form of "bonus space" exchanges—developers are permitted to expand beyond standard FAR regulations provided they create POPS on their land (traditionally a ground-level plaza).[68] In this form, POPS are a subject of criticism, as private developers may have little interest in maintaining them (and keeping them open) after construction.[69] If properly executed, however, POPS can provide extensive funding and maintenance for public areas in neighborhoods that may need them.

With community board approval, public-access requirements along a given waterfront can be tailored by a Waterfront Access Plan, or "WAP."[70] These plans adjust design and access requirements to best suit the neighborhood's needs, "supersed[ing], supplement[ing], or modify[ing] certain provisions" of the waterfront area zoning ordinance[71] but "cannot increase the total public access requirement on a given parcel."[72] WAPs are best thought of as additional specifications on top of the Ordinance, removing some of the developer's discretion, but they can hypothetically eliminate certain requirements. For instance, a plan that requires Lot A to create a path from one adjoining park to another might not require that Lot A itself provide access between its POPS and a publicly accessible upland area. WAPs can also permit lot joinder: Two or more adjacent lots might be combined so that 15% or 20% of the combined area is properly accessible to the public.[73] The Ordinance itself does not apply to some low-density development areas, but WAPs may apply public-access requirements to areas not covered by the Ordinance like "multi-family lower-density districts."[74] Currently, there are nine WAPs citywide in six distinct areas.[75] The largest is located on the Greenpoint–Williamsburg waterfront,

68. See id. ("These agreements allow developers to build larger towers and earn more revenue in exchange for providing public spaces.").

69. See id. ("The lack of compliance with the law has been a problem for years.").

70. Rules for Special Areas, supra note 54 ("Regulations also allow for the site-specific modification of public access requirements through Waterfront Access Plans (WAPs) for stretches of waterfront parcels with unique conditions and opportunities."); see also NYC Plan., Greenpoint–Williamsburg Land Use and Waterfront Plan (2006), https://www.nyc.gov/assets/planning/download/pdf/plans/greenpoint-williamsburg/greenpointwill.pdf [https://perma.cc/U6RN-J9H5] [hereinafter Greenpoint–Williamsburg] ("A WAP can specify the locations of particular access elements, such as supplemental access areas, modifying or reducing public access requirements . . . .").

71. N.Y.C., N.Y., Zoning Resolution art. IV, ch. 2, 62-14 (2025) (detailing public-access requirements in case of waterfront redevelopment).

72. Greenpoint–Williamsburg, supra note 70.

73. See id. ("[P]roposed zoning text changes would allow the Greenpoint–Williamsburg WAP to combine public access requirements on parcels spanning multiple blocks . . . .").

74. Dep't of City Plan., Waterfront Plan, supra note 51, at 164.

75. For a map, see Waterfront Access Plans, NYC Open Data, https://data.cityofnewyork.us/Environment/Waterfront-Access-Plans/d9z4-v86m [https://perma.cc/B3VR-E2KW] (last updated Feb. 19, 2024).

but the Gowanus Canal in Brooklyn and the Bronx side of the Harlem River are sites of other significant WAPs.[76]

The Ordinance has led to a significant expansion of publicly accessible coastland in New York over the past thirty years.[77] This is particularly evident in northern Brooklyn, where Domino Park is one of several distinct projects, some of which are still incomplete, that will span the continuous Greenpoint–Williamsburg waterfront.[78] The forms these parks, plazas, and pathways take differ by developer, location, and WAP. On principle, the resulting parklands should maintain or promote unique neighborhood development.[79]

D. *Other Methods of Waterfront Reclamation*

The City has many tools in its park-creation repertoire. Even as waterfront agreements have taken a major role in the development of public spaces, the City's continual use of other methods is important to its legal defense of the Ordinance and to its grander public-space scheme. First, the City taking a variety of approaches to create parks and publicly accessible areas along the waterfront clarifies that its state interest is not pretextual—the City is not adding regulations purely for the sake of squeezing something out of wealthy developers. Second, the success of other approaches provides an alternative path that could survive even if the Ordinance does not. Developers are likely aware of this. Third, extensive and successful park development in recent years may also serve to catalyze developer interest in public spaces.[80] Briefly, this section overviews some alternatives that support the City's justifications for the Ordinance and display its necessity.

The City can always follow its standard approach to new park construction, which begins with the Uniform Land Use Review Procedure.[81] Typically, "Parks files applications for changes to the city map

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76. Id. Greenpoint–Williamsburg is over three times larger than any other WAP. Id. (showing the areas of various WAPs).

77. For a map of the Ordinance's accomplishments, see Waterfront Access Map, supra note 13. In the strictest sense, privately owned, publicly accessible parks are not "parkland," which describes publicly owned parks.

78. See N.Y.C. Dep't of Parks & Recreation, Greenpoint–Williamsburg Waterfront Open Space Master Plan, https://www.nycgovparks.org/sub_your_park/greenpoint_williamsburg_waterfront/images/greenpoint_williamsburg_waterfront_masterplan.pdf [https://perma.cc/FA65-ZWCR] (last visited Sep. 3, 2025).

79. See, e.g., NYC Plan., Principles of Good Urban Design for New York City, https://www.nyc.gov/assets/planning/downloads/pdf/our-work/reports/principles-of-good-urban-design-nyc-022024.pdf [https://perma.cc/H84Y-ZR9E] (last visited Sep. 3, 2025) (detailing the myriad goals of municipal urban design choices).

80. See infra section III.B.3.

81. See Jane Cleaver, Jesse Brackenbury & Tyler Thorn, How Do We Acquire New Land???, NYC Parks: The Daily Plant (Mar. 20, 2002), https://www.nycgovparks.org/parks/central-park/dailyplant/13491 [https://perma.cc/6TFN-8YWV] (explaining the land acquisition process).

and authorization for the acquisition of property for parkland."[82] In some cases, land is redirected from one city department to another, limiting acquisition costs.[83] Purchasing land, repurposing abandoned spaces, and occasionally deploying eminent domain are the methods one would likely expect a city to use in creating parks. These procedures echo Moses's less problematic approaches.

An example of this approach that also evidences its limitations is the High Line.[84] In 1999, two Chelsea residents created Friends of the High Line, a nonprofit organization, to advocate for the repurposing of an abandoned elevated railway line as a public space.[85] This grassroots movement found quick popularity, and the Bloomberg Administration reversed a Giuliani Administration–order to demolish the site.[86] Eventually, Mayor Michael Bloomberg approved over $40 million to design and construct the High Line park.[87] Though the property was long abandoned, the City did have to acquire it from the railroad owner (in this case, the railroad donated the land).[88] The first piece of the High Line opened in 2009, only ten years after the creation of Friends of the High Line.[89] Public support resulted in municipal support, which resulted in a new park. It was, in many ways, the ideal process. But this set of ideal facts is uncommon. The High Line's celebrity support, conveniently located abandoned property,

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82. Id.

83. See Press Release, Off. of the Mayor, N.Y.C., Mayor Adams Kicks Off "We Outside Summer" by Announcing New Effort to Transform Vacant, Abandoned Lots Into Greenspace Across New York City (May 27, 2025), https://www.nyc.gov/mayors-office/news/2025/05/mayor-adams-kicks-off-we-outside-summer-announcing-new-effort-transform-vacant-abandoned [https://perma.cc/RE3E-YB5E] ("The majority of new acquisitions by NYC Parks over the past three years have been property transfers from other agencies at no cost.").

84. The creation of every park is different. The High Line, built on the site of an elevated railroad, is unique in many ways. But the underlying tools the City and public use to create parks are on display there.

85. See History, High Line, https://www.thehighline.org/history/ [https://perma.cc/Z4KJ-HGLL] (last visited Aug. 14, 2025).

86. See Paul Owen, New York's Historic Elevated Train Line Becomes a Park, The Guardian (Nov. 18, 2008), https://www.theguardian.com/artanddesign/2008/nov/18/new-york-high-line-park [https://perma.cc/6T9M-AAA8] ("[Friends of the High Line] managed to overturn mayor Rudy Giuliani's demolition orders and get the new administration of Michael Bloomberg behind the project."). One of the park's major endorsements came from Robert Caro, Moses's biographer and arch-critic. See Thomas Demonchaux, How Everyone Jumped Aboard a Railroad to Nowhere, N.Y. Times (May 8, 2005), https://www.nytimes.com/2005/05/08/arts/design/how-everyone-jumped-aboard-a-railroad-to-nowhere.html (on file with the *Columbia Law Review*).

87. Demonchaux, supra note 86.

88. See Michelle O'Donnell, Metro Briefing New York: Manhattan: City Takes Title to High Line, N.Y. Times (Nov. 17, 2005), https://www.nytimes.com/2005/11/17/nyregion/metro-briefing-new-york-manhattan-city-takes-title-to-high-line.html (on file with *the Columbia Law Review*); History, supra note 85 ("CSX Transportation donated ownership of the structure to the City of New York . . . .").

89. History, supra note 85.

good-hearted railroad company, and significant funding commitment are not typical. NYC Parks is supremely limited by its budget.[90] Though capital expenditures (like constructing new parks) do not come out of NYC Parks' operating budget, the creation of new parks still involves significant upfront costs and, perhaps even more importantly, new parks need to be maintained using the operating budget after construction. In very few cases, the City can avoid this spending trap: The High Line (and Central Park) are fully administered by nonprofit organizations that collect donations.[91] This will not occur everywhere. Waterfront lots are extremely valuable and typically not abandoned.[92] Celebrities do not rally for every park proposal citywide. The mayor does not always support the Parks Department.[93] Most communities are not able to operate parks on their own.[94] These limitations have led the city to alternate approaches.

Public-benefit corporations are a recent and successful addition to the City's arsenal. Hudson River Park provides the best example. An expansive undertaking along Manhattan's West Side that now effectively stretches from the Battery to Hell's Kitchen and the south end of Riverside Park, Hudson River Park is administered by the Hudson River Park Trust, a state public-benefit corporation that is the result of a city–state partnership.[95] The Trust's goals include "[p]romot[ing] environmental stewardship"

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90. See Lauren Dalban, New York's Chronically Underfunded Parks Department Is Losing the Fight Against Invasive Species, Disrepair and Climate Change, Inside Climate News (June 22, 2024), https://insideclimatenews.org/news/22062024/new-york-underfunded-parks/ [https://perma.cc/95PL-WMPH] ("Due to consistent cuts, the Parks Department cannot do routine maintenance on facilities, nor is it able to adequately limit the impacts of invasive species or heavy rainfall."); Katie Honan & Gwynne Hogan, City Parks to Get Even Smaller Share of Budget Under Mayor Adams, The City (July 1, 2024), https://www.thecity.nyc/2024/07/01/parks-budget-shrinks-eric-adams/ [https://perma.cc/86C8-8MXU] (last updated July 2, 2024) ("The Parks Department is getting $20 million less funding than last year even as the city budget grew by $5 billion.").

91. See About Us, Cent. Park Conservancy, https://www.centralparknyc.org/about [https://perma.cc/J37W-9ZNK] (last visited Aug. 14, 2025) (explaining that the conservancy is "[f]unded primarily by individual donations"); Join, High Line, https://www.thehighline.org/membership/ [https://perma.cc/3SAU-ERAN] (last visited Sep. 3, 2025) ("Nearly 100% of [the High Line's] annual budget comes from members and friends."). Similar organizations exist for many popular New York City parks, but Central Park and the High Line are the only parks that are entirely self-sufficient.

92. See Peter Fleischer, Who Owns the "578 Miles" of Waterfront, and How Are They Being Used?, Gotham Gazette (Apr. 1, 2001), https://www.gothamgazette.com/environment/2219-who-owns-the-q578-milesq-of-waterfront-and-how-are-they-being-used [https://perma.cc/U4DB-KQVA] (detailing the ownership of waterfront lots and explaining the increased value of those lots).

93. See Honan & Hogan, supra note 90 ("[A] spokesperson for Mayor Adams[] defended the administration's spending on the city's greenspaces, saying the mayor had initially proposed slashing even more funding to the department.").

94. See Dalban, supra note 90 ("Most neighborhood parks do not have conservancies . . . .").

95. See Hudson River Park Trust, Hudson River Park, https://hudsonriverpark.org/about-us/hudson-river-park-trust/ (on file with the *Columbia Law Review*) (last visited Aug. 14, 2025).

and operating Hudson River Park as an "economic generator."[96] Since its creation, various sections of Hudson River Park have received significant acclaim, and the park has been credited with "revitaliz[ing]" the West Side's economy, attracting companies like Google to establish offices in the area.[97] Google's office was the result of an amendment to the Hudson River Park Act that permitted transfer of FAR from the park to private owners.[98] This ability is effectively unique—no standard city park is able to transfer FAR (and thus, no standard city park can fund itself by doing so).[99] In fact, private cooperation and investment has been a hallmark of Hudson River Park.[100] Among its popular destinations is the offshore Little Island, largely funded by the Diller–von Furstenberg Family Foundation, constructed on concrete piles rather than the landfills of twentieth-century offshore parks.[101] To its north is the privately run Chelsea Piers complex, rented out by the Hudson River Park Trust on the condition that tenants expand public access to the area.[102]

The principal tradeoff to the public-benefit corporation approach is a lack of parkland protection. Alienating mapped parkland requires legislative action,[103] but this rule does not apply to Hudson River Park. Instead, its land is still zoned for development.[104] The corporation is bound by its

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96. Id.

97. See Jane Margolies, How Hudson River Park Helped Revitalize Manhattan's West Side, N.Y. Times (Sep. 19, 2023), https://www.nytimes.com/2023/09/19/business/hudson-river-park-development-manhattan.html (on file with the *Columbia Law Review*) ("Hudson River Park draws 17 million visits a year and has helped spur real estate development on the West Side.").

98. N.Y. Unconsol. Law § 1647(1) (McKinney 2025) ("[T]he trust shall have the following power[] . . . to transfer by sale any unused development rights as may be available for transfer to properties located up to one block east of the boundaries of the park along the west side of Manhattan . . . .").

99. See Christopher Rizzo & Karen E. Meara, Money Grows on Trees in New York City (or at Least in Some of Its Parks), N.Y. L.J. (Feb. 21, 2019), reprinted by Carter Ledyard (Feb. 21, 2019), https://www.clm.com/money-grows-on-trees-in-new-york-city-or-at-least-in-some-of-its-parks/ [https://perma.cc/E7SM-6RCN] (calling on the state to allow parks to transfer FAR).

100. The same is true with Brooklyn Bridge Park, administered by the Brooklyn Bridge Park Corporation. Corporate Governance, Brooklyn Bridge Park, https://brooklynbridgepark.org/about/brooklyn-bridge-park-corporation/corporate-governance/ (on file with the *Columbia Law Review*) (last visited Sep. 28, 2025).

101. See Design & Construction, Little Island, https://littleisland.org/design-construction/ [https://perma.cc/9LC9-WBLE] (last visited Aug. 15, 2025) (detailing the philosophy and construction behind Little Island).

102. See Hudson River Park Tr., Abstract of Proposed Chelsea Piers Lease 5 (2022), https://hudsonriverpark.org/app/uploads/2022/03/Chelsea-Piers-Lease-Abstract-of-Proposed-Lease-Dated-Feb-2022-2-10-22.pdf [https://perma.cc/T8VX-FJBL] ("Lessee is required to undertake 'Baseline Public Access Improvements' . . . .").

103. See Off. of the N.Y. State Comptroller, supra note 43, at 2.

104. See N.Y. Unconsol. Law § 1647(5) (McKinney 2025) (noting that only passive and active open space uses are exempt from New York City zoning regulations, whereas other

public benefit requirements, but the land is not itself in the public trust. And as with the High Line, Hudson River Park's internal profitability is only possible in certain neighborhoods—Google and other major corporations are not interested in development rights near many of New York's parks.[105]

The City has also capitalized on unused public sites to create new parkland. Staten Island's Freshkills Park borders both Arthur Kill, a tidal strait separating the island from New Jersey, and Fresh Kills, a stream and series of minor creeks that deposit into it.[106] The City is currently partway through a decades-long process of transforming the largest landfill in the world into New York's second-largest park.[107] Freshkills is designed for public access, but the City has also emphasized the park's potential in coastal resiliency, particularly after the Freshkills wetlands (and landfill) played a large role in absorbing flood water during Hurricane Sandy.[108] Portions of Freshkills are designed as wetlands rather than as a standard urban park.[109]

Freshkills Park was not private land. Its transformation from public landfill to public park, though, is still an important part of the City's larger scheme to create waterfront open spaces and increase climate resiliency.[110] By manifesting these same desires on its own properties (and at great expense—estimates place the costs in the hundreds of millions of

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uses—including designated "park/commercial use[s]"—remain subject to zoning and development controls (internal quotation marks omitted)).

105. See, e.g., Norman Oder, Brooklyn's Stalled Atlantic Yards Plan Faces More Questions Than Answers, City Limits (Mar. 31, 2025), https://citylimits.org/brooklyns-stalled-atlantic-yards-plan-faces-more-questions-than-answers/ [https://perma.cc/Z2U7-SC4Q] (discussing how no new developer has come forward to take on the remaining Atlantic Yards development, illustrating the challenges in attracting major corporate interest in park-adjacent large-scale projects).

106. See Freshkills Park, NYC Parks, https://www.nycgovparks.org/park-features/freshkills-park/about-the-site [https://perma.cc/9B6X-ZBR5] (last visited Aug. 14, 2025) ("The Fresh Kills site in its natural state was primarily tidal creeks and coastal marsh.").

107. See Laura Bliss, The Wild Comeback of New York's Legendary Landfill, Bloomberg (Feb. 17, 2017), https://www.bloomberg.com/news/articles/2017-02-17/freshkills-park-once-a-legendary-landfill-now-a-haven (on file with the *Columbia Law Review*) (providing the history of the Freshkills redevelopment project).

108. See Michael Kimmelman, Former Landfill, a Park to Be, Proves a Savior in the Hurricane, N.Y. Times (Dec. 17, 2012), https://www.nytimes.com/2012/12/18/arts/freshkills-landfill-proves-savior-in-hurricane-sandy.html (on file with the *Columbia Law Review*).

109. See Freshkills Park, supra note 106 ("[D]evelopment over the next several years will focus on providing public access to the interior of the site and showcasing its unusual combination of natural and engineered beauty, including creeks, wetlands, expansive meadows and spectacular vistas of the New York City region.").

110. See Emma Loewe, From Environmental Disaster to Public Park: Exploring Staten Island's Freshkills, Nat'l Geographic (Oct. 23, 2024), https://www.nationalgeographic.com/travel/article/freshkills-park-staten-island-new-york-city [https://perma.cc/6N4D-JDTA] (providing the perspective of Parks Commissioner Sue Donoghue that Freshkills is a key piece of the City's climate resiliency project).

dollars,[111] though it is not perfectly clear which costs are associated with landfill capping and which are associated with the park[112]), New York is able to substantiate its waterfront reclamation plans. This kind of consistent application of broader schemes can bolster the state's interest in reclaiming waterfront generally and in its public trust doctrine. Further, the emphasis on coastal resilience at Freshkills may be important in making a similar case for the state's interest in protecting against climate risk.[113]

II. EXACTIONS LAW AND ITS APPLICATION

Unfortunately for the City, it cannot add exactions to its playbook without dealing with constitutional issues. Since 1987, exactions doctrine has been a hotbed for legal challenge.

A. *What Are Exactions?*

In property law, an "exaction" is a conditional agreement in which something is extracted by the government in exchange for a benefit given to a property owner.[114] As a hypothetical, a property owner in an area where buildings are zoned to be twenty or fewer stories could approach the government seeking an exception to that height limit. Often, these exceptions are well-known or explicitly provided by the local government—this is called "incentive zoning"—so some exactions may sometimes be better described as zoning requirements rather than zoning "exceptions." The government might permit a twenty-five-story building on the condition that the property owner provide a public plaza at the base of the new building. In this agreement, the government manifests a state and public interest in publicly accessible space; the property owner gains five additional stories and the (likely financial) benefits that come along with them. Presumably, any property owner seeking a similar deal with the government believes it would be overall beneficial to their interests to comply with at least some type of government requirements in exchange, else they would not attempt to acquire the exception.

Problems arise when property owners are unhappy with the government's requirements. The property owner wants the five extra stories, but the government has requested a public plaza *and* a viewing platform on the twenty-fifth story, for instance. The property owner does not like these terms. The property owner then has two choices: They can either abandon

111. See Kimmelman, supra note 108 ("[T]he price tag . . . has clearly daunted city leaders . . . .").

112. See Bliss, supra note 107 ("The intensive process of permanently capping the mounds began. Three out of four are now completely finished, at a cost of $600 million.").

113. See infra section III.A.2.

114. For the rules that govern exactions, see infra section II.B.

their pursuit of the five-story exception or they can challenge the government's requirement as an "unconstitutional condition."

Exactions are distinct from standard regulatory takings. States have substantial "police power," granting them the ability to regulate what property owners can do with their land.[115] In the example above, no one disputes that the City can implement a twenty-story restriction in the first place—FAR is an exercise of police power. There are circumstances in which a state takes police power too far and creates a regulatory taking that must be met with just compensation, per the Takings Clause.[116] *Penn Central Transportation Co. v. New York City*[117] is the preeminent case regarding regulatory takings. It creates a balancing test for determining when something constitutes a taking, including factors like the reasonable investment-backed expectations of the landowner and the "character of the governmental action."[118] There are two situations that are automatic regulatory takings and dispense with *Penn Central*'s balancing. First, physical occupation by the government is a regulatory taking.[119] Second, depriving a landowner of *all* economic value of their land is a taking regardless of the state's interest.[120]

But the Ordinance fits within the exactions framework rather than a standard takings analysis, though an exactions analysis does require consideration of takings. Under the Ordinance, New York City does not unilaterally seize any property. Permit requirements and redevelopment restrictions themselves are not takings, just an exercise of the state's police power. But the unconstitutional conditions doctrine requires consideration of whether the condition is unconstitutional, necessitating standard takings analyses as a step one.

B. *The Exactions Tetralogy*

Contemporary federal exactions law emerged in 1987 with *Nollan v. California Coastal Commission*.[121] Homeowners James and Marilyn Nollan

115. See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 389–90 (1926) (establishing municipal zoning abilities).

116. The Takings Clause reads "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

117. 438 U.S. 104 (1978).

118. Id. at 124.

119. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) ("We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."). The Court has been clear in recent years that even infrequently used access requirements are "physical" takings rather than "regulatory" ones. See Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) (finding a California regulation mandating that agricultural employers provide access to union organizers to be a physical taking).

120. See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) ("[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses . . . he has suffered a taking.").

121. 483 U.S. 825 (1987).

sought a building permit to reconstruct a home on their coastal property, a state requirement in cases of substantial redevelopment.[122] The California Coastal Commission granted this permit but mandated that the Nollans create a lateral easement across their beach property above the mean high-tide mark.[123] The Commission determined this easement would increase the public's ability to move between public beach areas.[124] The Commission found the redevelopment plans would "burden the public's ability to traverse to and along the shorefront" and impede views of the beach and thus merited an easement.[125] The Commission believed that an expansion of the property would result in "'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.'"[126] The easement would counteract the development's negative impact on the public by reducing "psychological barrier[s]" to the coast.[127] The Commission based this reasoning upon an articulable state interest expressed in the California Constitution: "[T]he California Constitution has prohibited beachfront owners from excluding the public's right of way to the tidelands wherever necessary for a public purpose."[128]

The Supreme Court disagreed on constitutional grounds.[129] Justice Antonin Scalia wrote an opinion for a five-justice majority finding that, even assuming that California had a legitimate state interest in public access to and view of the tidelands,[130] there was not a strong connection between the development's interference with that interest and the condi-

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122. Id. at 828.

123. Id.

124. Id. at 827.

125. Id. at 829 (internal quotation marks omitted) (quoting the California Coastal Commission).

126. Id. at 828–29 (alteration in original) (quoting the California Coastal Commission).

127. Id. at 835 (internal quotation marks omitted).

128. Brief for Appellee at 26–27, *Nollan*, 483 U.S. 825 (No. 86-133) (citing Cal. Const. art. X, § 4). "Tidelands" refers to the area between the low- and high-water marks on a beach.

129. *Nollan*, 483 U.S. at 839–41 (finding the California Coastal Commission's actions unconstitutional). This contrasted with the state court's approach. See Nollan v. Cal. Coastal Comm'n, 223 Cal. Rptr. 28, 31 (Ct. App. 1986) (discussing the reasons why the Nollans' new development fits into the California Coastal Act and requires authorization from the Commission), rev'd, 483 U.S. 825. The California Court of Appeals discussed the constitutionality of the access requirement, stating that "in [*Grupe v. California Coastal Commission*], the court . . . [held] that only an indirect relationship between an exaction and a need to which the project contributes need exist. We agree with the *Grupe* reasoning." Id. (citing 212 Cal. Rptr. 578 (Ct. App. 1985)).

130. *Nollan*, 483 U.S. at 835 ("The Commission argues that among these permissible purposes are protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches. We assume, without deciding, that this is so . . . .").

tion the Commission imposed.[131] The takeaway was the "essential nexus" test: An imposed exaction needs to advance a state interest that is negatively impacted by the proposed development.[132] Any constitutional exaction has to react to a threat to a state interest and then manifest a similar interest. On the facts of the case, the Court found that an easement would not serve to "lower[] any 'psychological barrier' to using the public beaches, or . . . help[] to remedy any additional congestion on them caused by construction of the Nollans' new house."[133] The Commission believed the public's interest in securing visual access to the coast (intruded upon by the new development) and the public's interest in easily accessing and traversing the coast (remedied by the easement) were one and the same, but the Court found them to be different.[134]

Against the objection of Justice William Brennan, who found that the situation "implicates none of the concerns underlying the Takings Clause,"[135] Justice Scalia's majority opinion raised the standard of review in exactions cases: "We have required that the regulation [in takings cases] 'substantially advance' the 'legitimate state interest' sought to be achieved, not that 'the State "could rationally have decided" that the measure adopted might achieve the State's objective.'"[136] Justice Scalia distinguished the standard in takings cases from that in, specifically, due process and equal protection cases regarding property regulation, which require only rational basis review.[137]

Under the *Nollan* framework, the first question to ask is whether the government mandating its half of the equation would be a taking on its own. In Justice Scalia's words, "We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'"[138] Citing to *Loretto v. Teleprompter Manhattan CATV Corp.*,[139] the

131. See id. at 838–39 ("It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house . . . [or] lowers any 'psychological barrier' to using the public beaches . . . .").

132. Id. at 837.

133. Id. at 838–39.

134. Id. at 838.

135. Id. at 842 (Brennan, J., dissenting).

136. Id. at 834 n.3 (majority opinion) (citation omitted) (first quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); then quoting *Nollan*, 483 U.S. at 843 (Brennan, J., dissenting)).

137. Id.

138. Id. at 834 (alterations in original) (citing *Agins*, 447 U.S. at 260); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978) ("[A] use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose . . . .").

139. 458 U.S. 419 (1982). *Loretto* is something of a departure from *Penn Central*, and *Nollan*'s determination that an easement constitutes a permanent physical occupation is an expansion of *Loretto*, too.

Nollan court deemed the lateral easement would be a taking if no benefit was conferred.[140] Then, it applied the essential nexus test as a remedy for the taking; based on the Court's reasoning, a benefit provided to property owners that meets the essential nexus test (the benefit conferred negatively impacts the same interest that the taking advances) could "cure" a taking.[141] Justice Scalia blessed potentially significant government benefits so long as they meet the essential nexus test, saying "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."[142]

Two problems: First, although Justice Brennan does not say it precisely in his *Nollan* dissent, the positioning of exactions within the Takings Clause in the first place is unusual. An exactions analysis requires consideration of an underlying taking to find an unconstitutional condition, but why would the terms of an elective deal qualify as a "taking?" This would come to a head after the Court's 2005 decision in *Lingle v. Chevron U.S.A. Inc.*, in which the Court found the *Agins v. City of Tiburon* takings test of whether a regulation "substantially advances" a state interest to be a due process inquiry but explicitly excluded exactions without thorough explanation.[143] Since then, scholars have suggested that exactions jurisprudence would be more properly placed under the Due Process Clause of the Fifth Amendment and examined with rational basis review.[144] Regardless, the Court continues to examine exactions under the Takings Clause. Second, *Nollan*'s rule and facts aren't consistent. In a technical sense, a lateral easement *does* provide visual access to the coast. Allowing beachgoers to walk across the Nollans' property would secure for them a similar view to the one the development would prevent. This visual access is insignificant given the surrounding public beaches, sure, but the *Nollan* Court failed to include an important link.

The Court partially remedied this latter issue in 1994's *Dolan v. City of Tigard*.[145] In *Dolan*, Tigard, Oregon, approved an expansion of Florence

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140. See *Nollan*, 483 U.S. at 832 ("[A] 'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.").

141. Id. at 836 ("The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree.").

142. Id.

143. 544 U.S. 528, 529, 540, 548 (2005) (internal quotation marks omitted) ("We conclude that this ['substantially advances'] formula prescribes an inquiry in the nature of a due process . . . test . . . . In short, *Nollan* and *Dolan* cannot be characterized as applying the 'substantially advances' test we address today . . . .").

144. See, e.g., Fennell & Peñalver, supra note 12, at 293–94, 358 (emphasizing the "tension that the Court cannot ultimately avoid addressing—one over the best way to reconcile fundamentally inconsistent strands of property rights protection").

145. 512 U.S. 374 (1994).

Dolan's store contingent on her dedicating the land within a designated floodplain as a storm drainage system and creating a fifteen-foot bicycle path to alleviate congestion.[146] Chief Justice William Rehnquist, writing for the majority, had no problem determining that these two demands fit the "essential nexus" test from *Nollan*:

> Undoubtedly, the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld. It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek's 100-year floodplain.[147]

The Court disagreed with the Oregon Supreme Court, however, and determined the exaction to be an unconstitutional violation of the Takings Clause.[148] The Court found this by using a "rough proportionality" test.[149] An exaction must be "related both in nature and extent to the impact of the proposed development."[150] *Dolan* solves *Nollan*'s internal reasoning problem: It is easy to imagine the Court finding an easement across private property to be out of proportion with the development's impediment to the public's line of sight to the beach.[151]

Dolan does not change *Nollan*; it only builds upon it. Exactions cases post-*Dolan* ask three questions. First, would there be a taking without the benefit to the property owner? Second, is there an essential nexus between the state interest being disrupted and the exacted property? And third, are the property exacted by the government and the impact of the benefit conferred to the property owner on the state interest roughly propor-

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146. Id. at 380.

147. Id. at 386–87 (citation omitted) (citing Agins v. City of Tiburon, 447 U.S. 255, 260–62 (1980)).

148. Id. at 391.

149. Id. In *Dolan*, the Court more explicitly refers to the "just compensation" part of the Takings Clause, which it had avoided in *Nollan*. Id. at 389. If the benefit exacted and the benefit conferred are within an essential nexus and roughly proportional, the *Dolan* Court determines that to satisfy the Takings Clause. See id. at 389–90.

150. Id.

151. The Supreme Court didn't find anything to fix, however. Chief Justice Rehnquist built on *Nollan*: "We were not required to reach this question [of proportionality] in *Nollan*, because we concluded that the connection did not meet even the loosest standard. Here, however, we must decide this question." Id. at 386 (citation omitted) (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 838 (1987)). But recall that, in *Nollan*, the Court did acknowledge the factors that theoretically would lead to this proportionality question: the state interest in visual access to the coast and the harm to that interest created by the redevelopment. *Nollan*, 483 U.S. at 838. The Court in *Dolan* reasons that enhancing visual lines to the beach and an easement across the beach are wholly unrelated: "[T]he Coastal Commission's regulatory authority was set completely adrift from its constitutional moorings when it claimed that a nexus existed between visual access to the ocean and . . . lateral public access along the Nollans' beachfront lot." *Dolan*, 512 U.S. at 387 (citing *Nollan*, 483 U.S. at 837).

tional?[152] *Dolan* applies *Nollan*'s higher standard of scrutiny, too: Chief Justice Rehnquist's majority opinion explicitly rejects rational basis review in proportionality, "[W]e do not adopt [a reasonable relationship test] as such . . . . We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment."[153]

Koontz v. St. Johns River Water Management District extends *Nollan* and *Dolan*, particularly into the pre-deal bargaining process.[154] In *Koontz*, the St. Johns River Water Management District denied a landowner a Wetlands Resource Management redevelopment permit, a statutory requirement for construction on his land, for refusing to reduce the size of his project or pay for contractors to restore wetlands elsewhere.[155] The Florida Supreme Court distinguished these facts from *Nollan* and *Dolan* on two grounds, but the U.S. Supreme Court disagreed on both.[156] First, *Nollan* and *Dolan* apply regardless of whether the government approves a conditional permit or denies it because the landowner rejected the condition.[157] Second, monetary exactions must also align with the essential nexus and rough proportionality tests of *Nollan* and *Dolan*.[158]

An outstanding exactions question after *Koontz* was if the tests applied to "legislative" exactions, in which the government imposes generalized requirements in exchange for specific benefits.[159] Incentive zoning is the easiest example of this: A city declares that any building in a particular area is eligible for a zoning benefit in exchange for an established price. *Sheetz v. County of El Dorado* answered this question: The standards of *Nollan* and *Dolan* apply to both legislative and adjudicative exactions.[160] In *Sheetz*, residential landowner George Sheetz had to pay a traffic mitigation fee to build a home on his property.[161] As this fee was imposed generally by the

152. Id. at 386–91.

153. Id. at 391.

154. See 570 U.S. 595, 606, 612 (2013) (explaining that the *Nollan* and *Dolan* requirements apply beyond demands for property and extend to payment or expenditure of money as well as pre-deal bargaining).

155. Id. at 601–02.

156. Id. at 603–04.

157. Id. at 606 ("The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so.").

158. Id. at 615 ("[W]e have repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax.").

159. See, e.g., Fennell & Peñalver, supra note 12, at 295–96 ("[Lower courts are] divided over whether the exactions doctrine applies only to so-called 'ad hoc' or 'adjudicated' exactions, that is, exactions whose terms are worked out on a case-by-case basis in negotiations with landowners.").

160. 144 S. Ct. 893, 900–01 (2024) ("So far as the Constitution's text is concerned, permit conditions imposed by the legislature and other branches stand on equal footing.").

161. Id. at 897.

county, not specifically upon Sheetz,[162] the California Court of Appeals found *Nollan* and *Dolan* did not apply.[163] The U.S. Supreme Court unanimously determined that legislative exactions are subject to the same tests as adjudicative ones, removing a potential avenue by which to distinguish the 1993 Waterfront Zoning Ordinance from *Nollan* and *Dolan*.[164] Incentive zoning regimes must now comport with the rigid requirements of exactions scrutiny.

C. *Applying the Exactions Tetralogy to the Waterfront Ordinance*

Jill Ilan Berger Inbar's 1995 note, *"A One Way Ticket to Palookaville": Supreme Court Takings Jurisprudence After Dolan and Its Implications for New York City's Waterfront Zoning Resolution*, addressed the constitutionality of the 1993 Waterfront Zoning Ordinance in the context of *Dolan*.[165] Inbar reasonably determined that, in the wake of *Dolan*, the Ordinance would likely be struck down if subject to a legal challenge.[166] Considering a hypothetical challenge related to the waterfront public path aspect of the Ordinance, Inbar concluded that "the Waterfront Ordinance would be deemed an attempt by the government to extract a public benefit under the guise of a proper exercise of police power and not as a compensatory measure for impact on the development on public interests protected under the public trust doctrine."[167] She wrote that a court would likely find the state's interest in securing waterfront access to be valid,[168] the interest to fit *Nollan*'s essential nexus test, and, ultimately, the Ordinance to be disproportional to the interest at play.[169] This could come in two ways: (1) publicly accessible areas along the waterfront are disproportionate to the development's impact on the state interest[170] or (2) the scope of the Ordinance's requirements for these areas is disproportionate.[171] This was likely true at the time of *Dolan*, but it is almost certainly true after the expanded requirements in the 2009 amendment to the Ordinance.[172]

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162. See id. at 898 ("The [fee] amount is not based on 'the cost specifically attributable to the particular project on which the fee is imposed.'" (quoting Sheetz v. County of El Dorado, 300 Cal. Rptr. 3d 308, 312 (Ct. App. 2022))).

163. Id.

164. Id. at 902.

165. Inbar, supra note 14. Though Inbar's note predates *Koontz*, that case is not necessary for an analysis of the Ordinance as it would not change the result.

166. Id. at 365 ("Under the standards of current takings jurisprudence, the Court would probably hold that the Waterfront Ordinance effects an unconstitutional taking without just compensation.").

167. Id. at 364 (footnote omitted).

168. This interest is predicated on the public trust doctrine but also, in Inbar's view, on the state's general desire to increase access to the waterfront. Id.

169. Id.

170. Id.

171. Id.

172. See Waterfront All., supra note 65.

Inbar also suggested two solutions. First, New York should legislate an expansion of its public trust doctrine, emphasizing that it includes public access to navigable waterways, not just the waterways themselves.[173] This would strengthen the state interest at play and its application in a *Nollan*-style essential nexus analysis and in weighing proportionality under *Dolan*.[174] Inbar proposed that this legislation include a right to access waterways held in the public trust over private property generally.[175] Second, given the difficulties that even a codified public trust doctrine would encounter in the strict "rough proportionality" *Dolan* test, Inbar suggested the Supreme Court recognize that its exactions law should not be equally applicable everywhere.[176]

Inbar was correct in predicting that the Ordinance would be found unconstitutional. First, per *Loretto* and *Nollan*, mandating the creation of a publicly accessible area effects a permanent physical occupation.[177] The underlying request is a taking, so it mandates exactions analysis.[178] Inbar assumed the best of a court in accepting the "essential nexus": The facts at play in the Ordinance are effectively the same as in *Nollan*. In the Ordinance, a larger-than-expected development is approved in exchange for a privately owned but publicly accessible coastal area (and upland access to that area). A court would likely find the Ordinance to fail *Nollan* too. Inbar also did not address the strongest defense the City had: claiming that legislative exactions, like the Ordinance,[179] were not covered by the case law. Unfortunately, that defense is no longer applicable. After *Sheetz*, the City will no longer be able to defend itself by claiming the Ordinance was legislative rather than adjudicative.[180]

Whether the Ordinance fails under *Nollan* or *Dolan* doesn't matter for the purposes of this exercise. The result is the same. Courts could find issue with the "nexus" between the development's impediment of sight-

173. Inbar, supra note 14, at 366. Inbar also suggested incorporated access to recreational activities. Id.

174. Id.

175. Id.

176. Id. at 370.

177. See Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 832 (1987) ("We think a 'permanent physical occupation' has occurred . . . where individuals are given a permanent and continuous right to pass to and fro . . . .").

178. See, e.g., Sheetz v. County of El Dorado, 144 S. Ct. 893, 903 (2024) (Sotomayor, J., concurring) ("There is, however, an important threshold question to any application of *Nollan/Dolan* scrutiny: whether the permit condition would be a compensable taking if imposed outside the permitting context.").

179. As explained in Part I, the Ordinance is complex. It applies differently in different areas due to WAPs, and the relevant permitting decisions are not always made by a unified municipal body. There was a compelling argument that New York's waterfront exactions were never legislative in the first place. See supra Part I.

180. For discussion on the tremendous impact that *Sheetz* could have on legislative exactions, potentially stretching as far as unraveling state police power, see generally Lee Anne Fennell & Timothy M. Mulvaney, The Exactions Illusion: *Sheetz*'s Missing Dissent, 135 Yale L.J. (forthcoming), https://ssrn.com/abstract=5193557 [https://perma.cc/6AJT-SJG8].

lines and waterfront access and the mandated public parks along the waterfront or with the proportionality of the development. Inbar may have been inaccurate in her description of how a court would apply these tests (and a court would likely apply them differently today than it would have in the '90s, further complicating her description), but she was correct that the Ordinance would likely be found unconstitutional.

There is a further problem: Although the Supreme Court doesn't tend to find state interests completely invalid in the first place,[181] New York City's is a little unusual. The City outwardly declares that the Ordinance is rooted in the public trust doctrine.[182] But nothing in New York State's public trust doctrine explicitly invokes a public right to the waterfront or even to access to the water.[183] New York State does specify some other interests, like protecting natural resources and incorporating coastal resiliency into private developments.[184] But the emphasis on preserving "physical and visual public access to and along the waterfront,"[185] among others, is a departure from New York courts' understanding of the public trust. And if maintaining access to the waterfront was the only state interest, it would limit the state in measuring the proportionality of the exaction: Interference with a view of the East River seems out of proportion with requiring 20% of a lot be dedicated as a POPS. A clearer interest, one development more obviously interfered with, would fare better under *Dolan*.

Inbar's proposed solutions will not remedy a court's potential issues. The idea to codify the public trust doctrine appears to make sense but might not function as expected. The Supreme Court hasn't delved into the actual state interests at play in exactions cases. The public trust doctrine is nebulous—it is unclear that it even *can* be legislated, much less that said legislation would impact the strength of a state interest.[186] And as the Court emphasized in *Sheetz*, legislation does not permit unconstitutional conditions in exactions.[187] With that said, Inbar never suggested that legislation would absolve the Ordinance of its problems. She suggested it would strengthen the underlying interest. This step is still valuable, at least persuasively. Inbar's second solution, exempting urban areas from the same

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181. See Fennell & Peñalver, supra note 12, at 309 ("The *Nollan/Dolan* analysis, however, like unconstitutional conditions doctrine generally, typically proceeds on the assumption that the government can lawfully decline to waive the land use restriction in question.").

182. See Waterfront Access Map, supra note 13 ("This requirement is rooted in the long-standing public trust doctrine which ensures the public's access to the City's waterfronts and waterways.").

183. See supra section I.B.

184. N.Y.C., N.Y., Zoning Resolution art. VI, ch. 2, § 62-00(f)–(g) (2025) (expressing an interest in "protect[ing] natural resources in environmentally sensitive areas along the shore" and seeking to "allow waterfront developments to incorporate resiliency measures that help address challenges posed by coastal flooding and sea level rise").

185. Id.

186. See infra section III.A.1.

187. See Sheetz v. County of El Dorado, 144 S. Ct. 893, 902 (2024) ("[T]here is no basis for affording property rights less protection in the hands of legislators than administrators.").

exactions scrutiny, is not likely. As the Court has found improper exactions to be violations of the Constitution, the doctrine cannot be adjusted on a case-by-case basis. In fact, adjusting the standards by which different municipalities are able to undertake incentive zoning would only add to the equity concerns already present in contemporary exactions law.[188]

The most striking part of Inbar's analysis is that it did not come to pass. Thirty years later, developers trade waterfront land and land use rights to the city for redevelopment permits on a regular basis.[189] It seems extremely unlikely that they have declined to challenge the Ordinance purely because exactions case law did not explicitly cover legislative exactions before *Sheetz*. With the law operating as successfully as it does, are changes necessary at all?

III. THE UNEXPECTED SURVIVAL OF THE ORDINANCE

This section will propose some solutions to the City's legal problem. It will suggest methods by which current exactions law can be avoided and will use the example of the Ordinance to demonstrate that exactions law has backed itself into a corner, leaving municipalities with ample options to skirt legal challenges. Exactions law is both too searching and too specific to adequately protect governments or landowners.

A. *Things the City Can Do*

1. *(Try to) Extend Public Trust Doctrine.* — As Inbar suggested, New York State can expand and strengthen its own state interests to compensate. The Supreme Court may not be broadly amenable to exactions, but it has not stepped in the way of state-expanded public trust doctrine. As mentioned previously, purely legislating an expanded public trust doctrine is unlikely to succeed. The public trust doctrine is (probably) not itself legislative, even if a common law doctrine immune to legislation sounds strange. In *Illinois Central Railroad Co. v. Illinois*, legislative interference with public lands was precisely the problem: The state legislature's 1869 grant of lakebed land to a private corporation was found to have

188. See infra section III.C.

189. See supra notes 77–79 and accompanying text; see also Paul Liotta, State Officials Approve Staten Island Waterfront Construction Project Despite Environmentalist Opposition, Staten Island Live (Feb. 24, 2025), https://www.silive.com/news/2025/02/state-officials-approve-staten-island-waterfront-construction-project-despite-environmentalist-opposition.html [https://perma.cc/F5GG-7TZG] (last updated Feb. 25, 2025) (reporting that the City granted a construction permit to build adjacent to Great Kills Harbor only when the developers agreed to take certain precautions against runoff); Uberoy & Collins, supra note 66 ("There are a number of well-maintained and prominent spaces that exist because of this [incentive zoning] program, like Zuccotti Park, the site of Occupy Wall Street protests in lower Manhattan, and the David Rubenstein Atrium at Lincoln Center.").

always been invalid.[190] Expanding public trust doctrine (rather than ignoring it) does not result in the same violation, of course, but the legislature's ability to deal in public trust doctrine simply is not very well established. Rather, public trust doctrine and statutes that refer to or build upon it, like the Zoning Resolution, are "symbiotically related."[191]

To accomplish a true expansion of public trust doctrine, the best approach is a slow one rather than a wide-reaching legislative definition: It is inconceivable in the contemporary climate that the New York legislature could single-handedly expand public trust doctrine to stretch, say, twenty feet from the high-tide mark without implicating the Takings Clause. Inbar's suggestion of legislation is still good, though, to strengthen that interest and eventually create a compelling argument that the land was always held in the public trust. At a base level, the state should clarify that public trust doctrine in New York includes the right to *access* navigable waters. In places where there is no navigable area between the high- and low-tide lines, like in most of New York City, this will lay the groundwork for lateral easements across private property. This is a feasible maneuver—many other states recognize something similar.[192] The state could thus legislate its way into a "weak-form" version of a public trust doctrine. Any development would intrude upon access rights, and that would require an exaction in turn.

Extrajudicially, though, New York has long held its public trust doctrine to be more substantial than case law indicates. Robert Moses certainly thought it was.[193] The Zoning Resolution says it is, as do other statutes.[194] With how unusual the public trust doctrine is, purely incorporating an expansive view into the zeitgeist is probably the most effective way to expand upon it. Utilizing police power under the public trust doctrine, as New York has, is a good way to do this: Public trust doctrine and police

190. 146 U.S. 387, 454–55 (1892) ("It is hardly conceivable that the legislature can divest the State of the control and management of this harbor and vest it absolutely in a private corporation.").

191. See, e.g., Ralph W. Johnson, Craighton Goepple, David Jansen & Rachael Paschal, Wash. Dep't of Ecology, The Public Trust Doctrine and Coastal Zone Management in Washington State 33 (1991), https://apps.ecology.wa.gov/publications/documents/93054.pdf [https://perma.cc/2KN2-M3FM] (explaining how public trust principles are reflected in—and thus reinforced by—the underlying policies of Washington's Shoreline Act).

192. See Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 124 (N.J. 2005) (finding that a beach association cannot restrict membership, as it interferes with public access to the land beneath the high-water mark, which is preserved in public trust); Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984) ("[W]here use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the [public trust] doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner.").

193. See supra note 36 and accompanying text.

194. N.Y.C., N.Y., Zoning Resolution art. VI, ch. 2, § 62-11 (2025).

power can build on each other.[195] After so many years of being included within the Zoning Resolution, New York's public trust is already more defensible than it was when Inbar wrote her note. If the City can convince a court of the "strong-form" public trust—that all this land fundamentally belongs to the public and could never be alienated in the first place—no further steps need to be taken. Properly supported with this history and properly phrased by a court, the strong-form public trust doctrine could conceivably survive the recent doctrine of judicial takings.[196] The underlying "taking" would not be a taking at all, and exactions analysis would not be triggered. At the same time, the City will have to argue against some of its own statements, likely by calling them antiquated and invalid in the first place. For instance, the 1992 Comprehensive Waterfront Plan describes a category of waterfront land where "the exercise of any public right of access or use is outweighed by the rights of riparian owners."[197]

2. *Clarify Coastal Resiliency as a Primary State Interest.* — No argument is as absolute as the state's possible "strong-form" approach to public trust doctrine (that all this land already exists in the public trust), but the state's interest in coastal resiliency is likely a more formidable legal argument. If the strong-form public trust doctrine argument fails, the weak form will likely be deemed disproportionate to the waterfront exactions under *Dolan*. To strengthen its argument, the City should extend its post–Hurricane Sandy emphasis on coastal resiliency to its waterfront zoning.

A parks-wide focus on coastal resiliency is not hard to spot. For example, East River Park and others parks on Manhattan's eastern coastline are the subject of the East Side Coastal Resiliency project.[198] In the Rockaways, the Rockaway Parks Conceptual Plan groups all NYC Parks space together to "create a long-term vision that integrates resiliency and

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195. See David L. Markell, The Future Application of the Public Trust Doctrine in New York State: Legislative Initiatives and Beyond, 4 Alb. L.J. Sci. & Tech. 97, 120 (1994) (explaining that there are incentives to integrate police power and public trust doctrine more thoroughly to permit states to properly utilize the doctrine as a reason for state action).

196. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, Justice Scalia, writing only for a plurality as to this part, determined that judicial takings *could* occur. 560 U.S. 702, 715 (2010) (plurality opinion) ("In sum, the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking."). On the facts of the case, though, the majority found that the Florida court's decision regarding the legislature's application of Florida's public trust doctrine was "consistent with the[] background principles of state property law." Id. at 731 (majority opinion). A New York court's role in strengthening public trust doctrine, then, is not to redefine background property rights in New York State but to explain that the state's background property rights have always been limited by the public's ownership of coastal areas.

197. Dep't of City Plan., Waterfront Plan, supra note 51, at 9.

198. See East Side Coastal Resiliency, NYC Parks, https://www.nycgovparks.org/planning-and-building/planning/neighborhood-development/east-side-coastal-resiliency [https://perma.cc/RXC8-3YF4] (last visited Aug. 13, 2025) ("[W]e're working . . . to protect Manhattan neighborhoods and parks from the effects of climate change, such as storm damage, increased flooding, and sea level rise.").

enhances community protection."[199] It outlines a cooperative endeavor with the U.S. Department of the Interior, which administers neighboring Jamaica Bay, "to create a great, urban national park destination in New York City, with a cohesive, resilient and accessible park system."[200] A renovation to Sunset Cove Park in Queens's Broad Channel neighborhood, within Jamaica Bay but on Parks property, made the link to Hurricane Sandy even more prominent by including a boardwalk created out of wood taken from the wreckage of Sandy on the Rockaways.[201] And Sandy only added to an existing program: The City's waterfront plan, "Vision 2020," clarified in 2011 that the municipality intended to incorporate resiliency into planning decisions.[202] Since then, City resiliency and park planning have gone hand in hand.

This purpose has carried over to POPS. The Ordinance requires that design proposals "be in accordance with an approval from the New York State Department of Environmental Conservation."[203] Domino Park's design, for instance, resulted from elaborate resiliency studies. The platform the park sits on was raised to prepare for rising sea levels and storm surges.[204] The park was built to be compliant with the Waterfront Alliance's Waterfront Edge Design Guidelines.[205] Private parties are not inclined to fight back on this particular requirement: Developers don't want their land to flood either.

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199. NYC Parks, Rockaway Parks Conceptual Plan 1 (2014), https://static.nycgovparks.org/images/pagefiles/71/Conceptual-Plan-Final-Report.pdf (on file with the *Columbia Law Review*).

200. Id. at 7.

201. See Bill Parry, NYC Parks Completes $4.2 Million Waterfront Recreational Space in Broad Channel, QNS (Sep. 25, 2023), https://qns.com/2023/09/nyc-parks-broad-channel-recreational-space/ [https://perma.cc/Y2LF-CVFE] ("NYC Parks announced it has . . . installed a boardwalk that was partially constructed with wood from the old Rockaway Boardwalk that was obliterated during Superstorm Sandy nearly 11 years ago.").

202. Dep't of City Plan. of N.Y., Vision 2020: New York City Comprehensive Waterfront Plan 112–13 (2011), https://www.nyc.gov/assets/planning/downloads/pdf/our-work/plans/citywide/vision-2020-nyc-comprehensive-waterfront-plan/vision2020_nyc_cwp.pdf (on file with the *Columbia Law Review*) [hereinafter Dep't of City Plan. of N.Y., Vision 2020].

203. N.Y.C., N.Y., Zoning Resolution art. IV, ch. 2, § 62-50 (2025).

204. See Jared Green, Domino Park: Privately-Owned Public Infrastructure, The Dirt (Jan. 27, 2022), https://dirt.asla.org/2022/01/27/domino-park-privately-managed-publicly-owned-coastal-infrastructure/ [https://perma.cc/D28W-KHTR] ("To ensure resilience to expected climate and storm impacts, the platform structure was lifted up as much as possible.").

205. See Domino Park—2020 ULI Urban Open Space Awards Winner, ULI Ams. (May 20, 2020), https://americas.uli.org/domino-park-2020-uli-urban-open-space-awards-finalist/ [https://perma.cc/MPB2-TVNL] ("[Domino Park] is one of the first projects to be certified under WEDG (Waterfront Edge Design Guidelines) . . . ."); see also Waterfront Edge Design Guidelines, Waterfront All., https://wedg.waterfrontalliance.org/ [https://perma.cc/88BG-AMVK] (last visited Aug. 14, 2025) (explaining how the guidelines work).

In applying this argument, the City can rely on flood maps as further persuasive authority. The City[206] and FEMA[207] both created extensive flood maps of New York City in the wake of Hurricane Sandy. FEMA and the CUNY Institute for Sustainable Cities also produced maps showing future floodplains through the year 2100.[208] The areas deemed high risk by these maps overlap extensively with the Ordinance and extend further inland at many locations.[209] The coastal locations not at high risk of flooding mostly match up with areas not covered by the Ordinance.[210] Use of these maps predates the Hurricane, too. The 2011 Vision 2020 plan indicated a reliance on them in resiliency planning.[211] The purpose of coastal resiliency projects is to prevent flooding and erosion along the City's coast.[212]

The arguments in favor of coastal resiliency are so strong, in fact, that the City could conceivably extend its exactions regime beyond the waterfront. The City's current scheme is a gentle manifestation of the public trust doctrine (private owners never had the right to possess this land in the first place, so the City asks them politely to give small pieces of it to the public), but it could easily pivot to a regulatory one and claim that the City's coastal resiliency focus is so significant that any development within the FEMA flood zone is itself infringing upon a valid state interest. The City could effectively add regulations to this zone and require public spaces and resiliency projects in exchange for development approvals, just like it first did to the waterfront in 1993.

Further emphasizing coastal resiliency would only be valuable to New York's legal arguments. The state can claim low-lying coastal development endangers the people of the City even outside of the immediate property and risks extreme economic impact. A park providing vegetation, particularly a wetlands park or something similar, would directly respond to this degradation of a state interest, "curing" the taking. It is unclear, though, how much this would help in an exactions battle. In *Nollan*, after all, the Court chose to focus on one state interest and ignore another.[213] And creating a public park is not necessarily manifesting the same interest that

206. NYC Flood Hazard Mapper, NYC Plan., https://dcp.maps.arcgis.com/apps/webappviewer/index.html?id=1c37d271fba14163bbb520517153d6d5 [https://perma.cc/CXS4-XUEW] (last updated Nov. 6, 2017).

207. FEMA Flood Map Service Center: Search by Address, FEMA, https://msc.fema.gov/portal/search?AddressQuery=new%20york%20city [https://perma.cc/964F-M7YC] (last visited Aug. 14, 2025).

208. See City of N.Y., Coastal Protection, *in* PlaNYC: A Stronger, More Resilient New York 37, 45 (2013), https://www.nyc.gov/html/sirr/downloads/pdf/final_report/Ch3_Coastal_FINAL_singles.pdf [https://perma.cc/JLU2-X538].

209. Id. at 57–60.

210. Id.

211. See Dep't of City Plan. of N.Y., Vision 2020, supra note 202, at 113.

212. Id. at 110.

213. See Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 850 (1987) (Brennan, J., dissenting) (explaining that the Court ignored the Commission's stated interest in preventing "an increase in private use of the shorefront" (emphasis omitted)).

is being infringed upon. Complex resiliency projects are more appropriate than volleyball courts.[214]

If the City takes this approach, Chief Justice Rehnquist's reasoning in *Dolan* that "a nexus exists between preventing flooding . . . and limiting development within . . . floodplain[s]" might provide an out.[215] If the City loosens specifications on how undeveloped land is administered and simply requires that developers vacate publicly accessible, undeveloped land, private landowners attempting to create quality landscapes may take up the mantle of park development on their own. Purely mandating "undeveloped" land could still result in public parks. There is a sliding scale of details that the City could require. Broadly, though, a coastal resiliency argument will provide support to the underlying reasons for the Ordinance, especially if a court finds the public trust reasoning to be flawed.

B. *The City Does Not Need to Do Anything*

New York's strongest defense against challenges to the Ordinance is that no one wants to bring them. The Court decided *Nollan* in 1987 and *Dolan* in 1994.[216] Inbar's note applying those cases to the Ordinance was published in 1995.[217] Her conclusion that the Ordinance would be overturned still seems correct, even more so after *Koontz* and *Sheetz*. But after thirty years and billions of dollars of investment, it seems extremely unlikely that anyone will float a challenge against the Ordinance. Even *Sheetz*, which removes one of the City's defenses, does not seem likely to provoke further challenge. There are several reasons that the Ordinance likely survives.

1. *Limits on Its Application.* — The Nollans, Dolan, Koontz, and Sheetz were all individuals challenging regulations on their residential lots.[218] The Ordinance only applies to medium- and high-density areas, explicitly

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214. See, e.g., Benefits of Green Infrastructure, EPA, https://www.epa.gov/green-infrastructure/benefits-green-infrastructure [https://perma.cc/FVY2-XMZW] (last updated Feb. 13, 2025) (explaining that green infrastructure such as parks decrease flood damage, reduce infrastructure costs, and increase public safety); see also Analysis of BPC's Coastal Resiliency Projects Shows Benefits of a Resilient Lower Manhattan Far Outweigh Costs, Battery Park City Auth. (Feb. 24, 2025), https://bpca.ny.gov/bpc-people/analysis-of-bpcs-coastal-resiliency-projects-shows-benefits-of-a-resilient-lower-manhattan-far-outweigh-costs/ ("When considering the total avoided impact on human health and well-being, economic productivity, parks, traffic, building and infrastructural damage, property value losses, and debris removal, the benefit-cost analysis (BCA) demonstrates that for each dollar invested, [coastal resiliency] projects generate more than $2 in project benefit.").

215. Dolan v. City of Tigard, 512 U.S. 374, 387 (1994).

216. Id. at 374; *Nollan*, 483 U.S. at 825.

217. See Inbar, supra note 14.

218. Sheetz v. County of El Dorado, 144 S. Ct. 893, 898 (2024); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 599 (2013); *Dolan*, 512 U.S. at 379; *Nollan*, 483 U.S. at 827.

excluding "low-density residence[s]" like Harding Park.[219] Small landowners might be more likely to feel they have been deprived of their individual property rights. They also may be more invested in one specific piece of property. Discussing the protection of "exit rights," economist William Fischel says something similar about the Nollans in his book, *Regulatory Takings*: "While [Nollan] was movable—he seems, indeed, to have 'moved to the taking' by buying after the coastal commission's scheme was in place—the *property* itself was not."[220]

For large-scale developers, though, the relevant property often *can* change. Developers feel less financial and emotional pressure to ensure they maximize their individual rights as it comes to each piece of property. Property is not selected for personal value: Large developers fully investigate the land use rights. On the other hand, the Nollans may not have been aware of the regulatory restrictions on their development at the time of purchase.[221] Larger developers select particular properties after extensive due diligence. Two Trees Management purchased the area that is now Domino Park, for instance, explicitly for large-scale redevelopment after the previous owner was at risk of folding as a result of its own development plans.[222] And that first owner's failure to stay solvent shows that these projects are on a tight timeline—one that likely cannot wait for five to ten years while a developer takes their case to the Supreme Court.

Large developers turn over undeveloped or to-be-redeveloped properties more often, which might insulate regulations against challenge. Only those that owned property at the time the regulation was enacted have a strong claim against the regulation itself—takings analysis weighs an owner's "investment-backed expectations," and a post-regulation land transfer would reflect the regulation's impact in the purchase price.[223] The initial landowner is most effectively able to challenge the regulations, and those not expecting to proceed with development themselves may find the adjustment in selling price to be less significant than the costs of a legal battle. That the developers are not taking legal action is an indication that

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219. See Rules for Special Areas, supra note 54, (excluding "low-density residence districts[] [and] heavy commercial and industrial uses").

220. William Fischel, Regulatory Takings: Law, Economics, and Politics 345 (1995).

221. Id. at 344 ("Beach houses are common in California.").

222. See Charles V. Bagli, Developer to Revive a Project in Brooklyn, N.Y. Times (June 21, 2012), https://www.nytimes.com/2012/06/22/nyregion/developer-to-take-over-domino-waterfront-project-in-williamsburg.html (on file with the *Columbia Law Review*) ("The original developer, C.P.C. Resources, ran into financial problems after years of planning and eventually defaulted on its loans, dashing hopes for the project's affordable housing and a waterfront esplanade.").

223. With that said, the Supreme Court has cautioned that this logic not be taken too far. Postenactment purchasers are still able to challenge land-use regulations as overly burdensome upon their property. See Palazzolo v. Rhode Island, 533 U.S. 606, 626–27 (2001) ("[Some] enactments are unreasonable and do not become less so through passage of time or title.").

the transaction costs of legal challenge outweigh less formal negotiation with the City.

2. *Public Opinion.* — The potential impact of challenging the regulation on developers extends well beyond the transaction costs of any individual legal battle. In New York, multiproject developers always have a lot to lose. Reputation is significant in New York City development. A public battle with the government, especially one in which the developer is opposed to building a public space, would have ramifications on the developer's future projects and their financial prospects. Complying with the Ordinance protects developers from public opposition.

New York City has many established methods by which community opinion can prevent development. Both the city council and the mayor's office have final approval over plans, even if they have already been approved by the City Planning Commission.[224] In 2010, for instance, differing opinions about redeveloping the Williamsburg waterfront indirectly put a halt to a permitted development.[225] By 2012, the developer defaulted.[226]

The City gives extensive deference to local community boards and borough governments.[227] Community board members are appointed by the borough president and local council members[228] and are responsible for holding public hearings and submitting recommendations to the City Planning Commission prior to final permit approvals.[229] Community cooperation is thus hugely valuable for developers. They are doubtlessly aware of examples of public opposition stifling development, including the high-profile Amazon HQ2 project planned for Long Island City, Queens.[230] On the other hand, successful developments seek community opinion, like

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224. See Charles V. Bagli, 2 Sides Clash at City Hall Over Domino Housing Plan, N.Y. Times (June 22, 2010), https://www.nytimes.com/2010/06/23/nyregion/23domino.html (on file with the *Columbia Law Review*) ("The Council and the mayor have the final say on the [approved] plan.").

225. Id.

226. Charles V. Bagli, Lured by Visions of Real Estate Profits, Nonprofit Group Stumbled, N.Y. Times (Mar. 14, 2012), https://www.nytimes.com/2012/03/15/nyregion/community-preservation-corp-hobbled-by-housing-investments.html (on file with the *Columbia Law Review*).

227. See N.Y.C., Uniform Land Use Review Procedure (ULURP), https://www.nyc.gov/assets/communityboards/images/content/pages/ULURP-1.png [https://perma.cc/4VZR-GGHT] [hereinafter N.Y.C., ULURP] (last visited Aug. 14, 2025).

228. See, e.g., Welcome to Community Board 5 Manhattan, Cmty. Bd. 5, https://www.cb5.org/ [https://perma.cc/TGF7-63EN] (last visited Aug. 14, 2025) ("Community Board 5, as all community boards, is made up of 50 members of the neighborhood appointed by the Manhattan Borough President and local City Council members.").

229. N.Y.C., ULURP, supra note 227.

230. See J. David Goodman, Amazon Pulls Out of Planned New York City Headquarters, N.Y. Times (Feb. 14, 2019), https://www.nytimes.com/2019/02/14/nyregion/amazon-hq2-queens.html (on file with the *Columbia Law Review*).

Two Trees Management did in Domino Park's construction process.[231] Community backlash slowed only after a redesign incorporated more park space.[232]

If the City is looking for methods by which to remove park requirements from a standard exactions process, it could formalize a sort of park review in community board proceedings. As community boards advise the City but do not make final decisions, this would avoid the *Koontz* exactions negotiation trap: Negotiations between boards and developers would not be subject to exactions doctrine. Though the City has not implemented this approach, developers with plans to pursue future projects in New York City do not want to anger community boards or New Yorkers generally.

3. *Economic Benefits for Developers.* — A developer's primary concern underlying the community–developer relationship is financial. Challenging a regulation in court is costly. In the case of the Ordinance, those costs could easily exceed the costs imposed by the exaction. Even more strikingly, imposed costs might not be very large: Waterfront park space comes with financial benefits (beyond protecting the developer's property from climate catastrophe). Parks have a baseline impact on property value.[233] The actual impact varies from place to place but also by the size and style of park, among other factors.[234] Though a poorly maintained public park could conceivably result in lower perceived security and thus have a negative impact on property value,[235] the Ordinance avoids this trap by allowing

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231. See Katherine Flynn, Private Money, Public Space, Architect Mag. (Oct. 1, 2018), https://www.architectmagazine.com/aia-architect/aiafuture/private-money-public-space_o (on file with the *Columbia Law Review*) ("[Two Trees] actually had those conversations with people in the community to get input and buy-in around the idea that a better public space, or a different configuration, was something that could be a positive . . . ." (first alteration in original) (internal quotation marks omitted) (quoting Susan Chin, Exec. Dir., Design Tr. for Pub. Space)).

232. See Vivian Yee, At Brooklyn's Domino Sugar Site, Waning Opposition to Prospect of Luxury Towers, N.Y. Times (Oct. 16, 2013), https://www.nytimes.com/2013/10/17/nyregion/at-brooklyns-domino-sugar-site-waning-opposition-to-prospect-of-luxury-towers.html (on file with the *Columbia Law Review*) (reporting that opposition to the development diminished after Two Trees advanced the revised plan, which included substantially more open space and other concessions).

233. See John L. Crompton, How Much Impact Do Parks Have on Property Values?, Nat'l Recreation & Park Ass'n: Parks & Recreation (Mar. 26, 2020), https://www.nrpa.org/parks-recreation-magazine/2020/april/how-much-impact-do-parks-have-on-property-values/ [https://perma.cc/5UTT-43HX] (describing how proximity to parks results in positive premiums).

234. See Michael Scisco, How Open Spaces Impact Property Values, Unique Places to Save (Apr. 2024), https://uniqueplacestosave.org/news/open-spaces-impact-property-values [https://perma.cc/E97J-6JWC] ("Those homes within 1/2 mile of protected space [in Chester County, Pennsylvania] saw an $11,379 average increase in value."). Of course, increases in property value may have an impact on the creation of new parks. The High Line is a good example of wealthy advocates creating new park space. See History, supra note 85.

235. See Matthew Iannone, The Impacts of Green Spaces on Crime in New York City 20 (May 14, 2018) (B.A. thesis, Fordham University), https://research.library.fordham.edu/cgi/viewcontent.cgi?article=1062&context=environ_2015 [https://perma.cc/5LQG-DVJF].

developers to maintain their park spaces. Private management of park spaces allows developers to cater the design and amenities to their ideal impact on their clientele and property value: New York's privately funded parks are typically designed by reputed landscape architects.[236]

The impact of high-quality public parks on property value is even more significant than the impact of parks generally.[237] The Central Park Conservancy, quoting an 1873 *New York Times* article, indicates that the value of the real estate in the Central Park area increased sevenfold from before the park's creation to after its completion.[238] It "estimate[s] that as of fiscal year 2014, proximity to Central Park contribute[s] nearly $26.07 billion in additional market value to the properties in the two tax block groups closest to the Park."[239] In a 2005 to 2007 study, the Hudson River Park Trust found that approximately 20% of property value within two blocks of the Greenwich Village section of Hudson River Park is a result of the park's existence.[240] The architecture firm partially responsible for the High Line indicates that the park "stimulated over $5 billion USD in urban development and created 12,000 new jobs."[241]

And considering New York's FAR zoning approach, very little is being taken in the first place. The land a developer uses for park space still

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Unfortunately, NYC Parks' shoestring budget does result in some poorly maintained park spaces. See New Yorkers for Parks, The 2016 Report Card on Parks 12–22 (2016), https://www.ny4p.org/client-uploads/pdf/Report-Cards/NY4P_Report_Card-CPI2016.pdf [https://perma.cc/6VHU-BQTA] (assessing parks on various metrics, including athletic fields, bathrooms, drinking fountains, and crime rates).

236. Field Operations designed Domino Park. Domino Park, Field Operations, https://www.fieldoperations.net/project-details/project/domino-park.html (on file with the *Columbia Law Review*) (last visited Oct. 23, 2025). Field Operations collaborated with Diller Scofidio + Renfro to design the High Line. High Line, Diller Scofidio + Renfro, https://dsrny.com/project/the-high-line [https://perma.cc/PG5M-HR9T] (last visited Aug. 15, 2025). Heatherwick Studio designed Little Island. Little Island, Heatherwick Studio, https://heatherwick.com/projects/public-space/pier55/ [https://perma.cc/B5MM-FAYE] (last visited Sep. 4, 2025). Of course, hiring landscape architects is a cost for developers in and of itself.

237. See, e.g., Katie Jo Black & Mallory Richards, Eco-Gentrification and Who Benefits From Urban Green Amenities: NYC's High Line, Landscape & Urb. Plan., Dec. 2020, at 1, 8 (finding that residential properties closest to the High Line increased in value by approximately 35.3%, far exceeding the property value premiums typically associated with neighborhood parks).

238. See Cent. Park Conservancy, The Central Park Effect: Assessing the Value of Central Park's Contribution to New York City's Economy 35 (2015), https://assets.centralparknyc.org/pdfs/about/The_Central_Park_Effect.pdf [https://perma.cc/3P6F-4CZL] ("In 1856, before the Park was begun, the assessed valuation of the real estate in these three wards . . . amounted to $26,429,565; it amounted in 1871, after the Park had been completed, to $185,801,195." (emphasis omitted)).

239. Id. at 37.

240. Friends of Hudson River Park, The Impact of Hudson River Park on Property Values 5 (2008), https://s3.us-east-1.amazonaws.com/rpa-org/pdfs/FOHRP-The-Impact-of-Hudson-River-Park-on-Property-Values.pdf [https://perma.cc/G4KY-DVBP].

241. High Line, supra note 236.

counts toward the lot's overall FAR. An exception applies to a developer who chooses to transfer the waterfront portion of their lot to the City: They can transfer waterfront land to the city and *keep* the FAR rights of the larger lot, even though the lot would no longer exist.[242] Together, this means that, though a waterfront developer needs to use 20% of their land as a park, that same land can be repurposed in constructing a taller building on the other 80% of the property.

On the legal side, the Court has established that a lateral easement is a per se taking,[243] so the underlying benefit exacted will constitute a taking regardless of its lack of financial impact on developers. But the Takings Clause requires that takings are met with "just compensation,"[244] which naturally requires an analysis of the financial impact on the property. If the taking meets the *Nollan* test and has zero top-line economic impact on a developer, then any benefit conferred to the property owner necessarily meets the *Dolan* proportionality test. This idea is, of course, limited: Though the underlying taking may not require additional compensation, putting it through the exactions process raises the standard of review for proportionality.[245] The Court is unlikely to respond well. But *developers* might respond well and not find the exaction to be unfair, especially because they are the people that trigger the dealmaking process.[246] Justice Brennan said something similar in his *Nollan* dissent, declaring that the landowner-initiated deal is a "classic instance of government action that produces a 'reciprocity of advantage.'"[247]

4. *Avoiding More Extreme Measures.* — Imagine that a developer takes the City to court and, under the heightened review of exactions, gets the Ordinance struck down. What would happen next? In the aftermath of *Nollan*, the California Coastal Commission did not move away from its underlying regulations, as the Nollans and Supreme Court likely hoped.[248] Instead, the Commission held firm to its permitting process and simply

242. See N.Y.C., N.Y., Zoning Resol. art. VI, ch. 2, § 62-73(a)(3) (2025) ("In the event of a transfer . . . the *zoning lot* shall include the transferred property.").

243. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987).

244. U.S. Const. amend. V.

245. See Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) ("We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment.").

246. This isn't to say, necessarily, that consent to a deal means that just compensation is met as a legal matter. Many have pointed out that private consent does not allow the government to exceed its constitutional bounds. E.g., Philip Hamburger, Unconstitutional Conditions: The Irrelevance of Consent, 98 Va. L. Rev. 479, 480 (2012). With that said, the Takings Clause doesn't feature the same underlying concerns that, say, the Due Process Clause does—there is room for an argument that the personal value of a land use right should be included within just compensation.

247. *Nollan*, 483 U.S. at 856 (Brennan, J., dissenting) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

248. See Fischel, supra note 220, at 346.

avoided straightforward negotiation.[249] Fischel explains: "By making dealmaking less attractive to the commission, the decision may have made it leery of initiating deals that would work to both sides' advantage."[250]

Koontz only further hinders any negotiation that would occur absent the Ordinance, even *Nollan–Dolan* compliant negotiation.[251] Professor Sean F. Nolon argues in *Bargaining for Development Post-*Koontz*: How the Supreme Court Invaded Local Government* that *Koontz*'s convoluted negotiation procedures create an obligation to keep records beyond the capabilities of local government and push them to avoid negotiation due to procedural costs.[252] Any proposal offered to developers must meet *Nollan* and *Dolan* at the outset, complicating the negotiation process. The simplest solution for a municipality is to avoid triggering heightened scrutiny altogether. Justice Elena Kagan emphasized this in her *Koontz* dissent: "If every suggestion could become the subject of a lawsuit under *Nollan* and *Dolan*, the lawyer can give but one recommendation: Deny the permits, without giving [the other party] any advice—even if he asks for guidance."[253]

Considering the strong state interest in coastal resiliency mentioned earlier,[254] the City could regulate the developer's coastal property *while denying* permitting proposals. Recall the first step of the exactions process: Would the exacted benefit be a taking absent the benefit conferred to the property owner, per *Nollan*? Hurricane Sandy exposed significant weaknesses in New York's coastal resiliency. Given the strong state interest in preventing the destruction of the City, the City can certainly regulate coastal property to accomplish its goals. A zoning regulation requiring that the coastal 20% of a lot be left undeveloped, for instance, passes muster under *Penn Central*. The inclusion of a park and a public easement makes the underlying exaction a taking per *Loretto* and *Nollan* (so the park requirement couldn't be regulated), but the City's options for regulating the coastline are extensive under a coastal resiliency framework.

As an extreme measure, the City also has exceptions to the Takings Clause altogether. The first is the public trust doctrine—though New York courts may have generally declined to extend the federal doctrine, the underlying spirit of public ownership over the shorefront is strong.

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249. Id.

250. Id.

251. See Sean F. Nolon, Bargaining for Development Post-*Koontz*: How the Supreme Court Invaded Local Government, 67 Fla. L. Rev. 171, 205 (2015) ("The shadow [*Koontz*] casts over development negotiation is more complete than *Nollan–Dolan* and, therefore, more likely to leave a chill.").

252. Id. at 208–09 ("Boards cannot satisfy *Nollan* and *Dolan* without adequate information about what the impacts of a development will be. That information is usually not available early in the approval process because most developers do not provide it until later stages.").

253. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 633 (2013) (Kagan, J., dissenting).

254. See supra section III.A.2.

Legislating public trust may not be effective, but it may also not be necessary. If the state can make a case that New York's public trust doctrine includes the shorefront, then any conveyances of the property to private developers was invalid from the start. (Climate change and sea level rise may have an interesting impact, too. As the shore moves inland, so does the land owned by the public. Long term, coastal developers are at risk of their land being incorporated into the public trust unless they work to protect it from flooding.) The second option is urban renewal. New York's extreme urban renewal laws, utilized by Robert Moses in his fight against Harding Park and frequently criticized, are still valid.[255] The City could conceivably redeploy urban renewal plans to target areas of large-scale private development.[256]

Collectively, developers are aware that the City has a variety of alternative options if they don't comply with the Ordinance. The Ordinance, on the other hand, creates opportunities to administer public-space design, engage in negotiation with the community and City, and improve local reputation. Developers shouldn't just comply with the Ordinance; they should prefer that it survives. The alternative might hurt the City's regime,[257] but it would also hurt the developers.

C. *The Ordinance Shows the Faults of the Exactions Doctrine*

Arguments against the applicability of exactions law are not new. The thirty-year survival of an exactions regime of such scale, though, shows the doctrine has practical faults. Exactions law does not benefit anyone. First, it hurts landowners. Fischel and others have been arguing for decades that exactions doctrine impedes dealmaking and pushes local governments to deny proposals.[258] The City can regulate property on rational basis review. The City can deny development proposals on rational basis review. The State can, over time, manifest a stronger public trust doctrine. Only when the City and private landowners both decide to come to the table and advance their own interests are they beholden to a higher standard of review and an unusual "essential nexus" test, which restricts possible bar-

255. See, e.g., Urban Renewal, NYC Hous. Pres. & Dev., https://www.nyc.gov/site/hpd/services-and-information/urban-renewal.page [https://perma.cc/D5EB-JFH6] (last visited Sep. 4, 2025).

256. Today's urban renewal is different from Moses's. Nowadays, it's mostly used to create high-quality and affordable housing and increase housing density while doing it. See, e.g., Jaime Lorite Chinchón, Urban Renewal in New York Designed for Longer Life, El País (Sep. 10, 2023), https://english.elpais.com/usa/2023-09-10/urban-renewal-in-new-york-designed-for-longer-life.html [https://perma.cc/Y3WY-6WJW]. For example, the intention of the Alafia development project in Brooklyn is "to address the chronic social, economic, and health disparities in a historically underserved area." Alafia, Dattner Architects, https://www.dattner.com/projects/view/alafia/ [https://perma.cc/MBW6-G64V] (last visited Sep. 4, 2025).

257. It might not, though, if the City and state can emphasize that the public trust doctrine made the original land transfers invalid in the first place.

258. See, e.g., Fischel, supra note 220, at 346.

gains but provides no benefit to property owners. Just *Dolan*'s standard, without the essential nexus test, accomplishes the same protections: "A regulation worthless to the public would, on the proportionality rule . . . be valueless in a bargaining game," Fischel wrote.[259] If the Nollans had *wanted* to provide the easement instead of a viewing platform, they could not have done so under *Nollan*. The essential nexus test prevents developers from exchanging what they want to exchange in return for a benefit they want, even if the deal is roughly equal.[260]

There are equity concerns in the essential nexus test, too. If the Nollans' neighbors already had a public viewing spot, the government would have had less desire to strike a deal with the Nollans to provide one (compared to a lateral easement or funding the construction of a garden across the street, for instance). Thus, not only could *Nollan* prevent homeowners and the government from striking the deal they might want, but it could also result in unequal access to bargaining in the first place if the government sees no value in a trade. Further, it might only open negotiation with parties unlikely to pursue legal remedies.

On the government's side, Justice Harry Blackmun's dissent in *Nollan* sets the stage for the criticism that the decision would impede effective city planning: "The land-use problems this country faces require creative solutions. These are not advanced by an 'eye for an eye' mentality."[261] New York City wants park space. It has a method by which to acquire public park space or, at minimum, POPS. But if that method is illegal,[262] the government's alternate plays are overall less effective at accomplishing its goals. Even a perfectly executed expansion of public trust doctrine would result in coastal park expenses coming from the Parks budget.

Lastly, the judicial system is negatively impacted. "[B]y offering a federal court option for developers who are dissatisfied with local decisions, the floodgates may be hard to administer," Fischel wrote.[263] And given that the remedy for exactions is pretty much always going to be (1) further dealmaking, which likely would have happened anyway, or (2)

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259. Id. at 349.

260. Fischel further points out that *Nollan*'s essential nexus test promotes third-party suits. Id. at 349–50. "To let the [Municipal Art Society, a third party,] prevail . . . is to elevate an unelected, private group above the elected officials of the city. The insistence on nexus in *Nollan* is apt to promote more undemocratic second-guessing of locally desired deals by courts." Id. at 350. Even deals all dealmaking parties agree to are subject to third-party analysis.

261. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 865 (1987) (Blackmun, J., dissenting). Justice Blackmun's criticism of the essential nexus test isn't to say that he would approve of *Dolan* taking over as the primary test—Blackmun joined Justice John Paul Stevens's dissent in *Dolan*. See Dolan v. City of Tigard, 512 U.S. 374, 396 (1994) (Stevens, J., dissenting, joined by Blackmun & Ginsburg, JJ.).

262. See supra section II.C.

263. Fischel, supra note 220, at 350.

local government resorting to its police power, the judicial system utilizes its resources to no positive impact on anyone.

New York's legal conundrum puts this all on display and shows that a different exactions doctrine could more adequately advance the interests of private property owners. There are many alternative approaches that might encourage developers. The standard of review could be the same between a government's police power and exactions, so that governments are encouraged to seek out deals with landowners without exposing themselves to stronger challenges. Proposals made during the dealmaking process could not be subject to exactions review unless final. Exactions review could proceed by first asking if the benefit conferred to the government is a "taking" absent the benefit conferred to the landowner, as it does now, and then roping the rest of the analysis into a due process analysis, which would apply rational basis review in determining the proportionality of the deal.[264] This could eliminate the unhelpful essential nexus test entirely. Or, instead, maybe exactions review could be a first-level Takings Clause analysis, inquiring if the benefit conferred on the property owner meets a broader reading of the Clause's "just compensation" requirement. This would save the landowners, lawyers, and courts from having to put each situation through a two-part, reflexive analysis that is overly unique and too complicated in and of itself. Any of these would encourage further cooperation between the government and private landowners.

The Court has repeatedly declined to alter its doctrine, even when it became clear in *Dolan* that the essential nexus test was unhelpful[265] and in *Lingle* that exactions was inconsistent with other doctrines.[266] For now, developers and governments are stuck with a doctrine that doesn't make sense. Instead of exactions law that reflects "the concerns underlying the Takings Clause,"[267] local governments and landowners struggle through a tedious process that reduces everyone's property rights. New York City's Waterfront Zoning Ordinance evidences a gap between what the law purports to do and what it truly accomplishes. As correct as Inbar was in determining the Ordinance to be a violation of law, the Ordinance's survival is a practical matter more than a legal one.

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264. See Fennell & Peñalver, supra note 12, at 293–94 ("This would appear to place the test in the domain that the Court identified in *Lingle* with the Due Process Clause, not the Takings Clause.").

265. See supra section II.B.

266. See Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547 (2005) ("Although *Nollan* and *Dolan* quoted *Agins*' language . . . the rule those decisions established is entirely distinct from the 'substantially advances' test we address today.").

267. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 842 (1987) (Brennan, J., dissenting).

CONCLUSION

Robert Moses lost a decades-long property battle with a neighborhood of unauthorized homes. His dream of a fully public waterfront, highways and parks and all, hit the barrier of public opposition.

> People of the communities affected have rarely been enthusiastic about our reclamation projects while they were going on, and we have never been able to stay in one place very long without storms of protest—agitations which were promptly forgotten when public improvements rose above the filled areas and provided benefits which the public had not dreamed of before, and took for granted a week after they became available.[268]

Parkland reclamation did not get much easier after Moses wrote this in 1948. Reporting on the Chelsea Piers in 1995, architectural critic Paul Goldberger expressed a common discontent: "[T]he purely public development of the waterfront in the form of open parkland has become an all but unobtainable goal . . . ."[269] In the confines of that tragedy, even partial fixes are incredible achievements. Unless and until New York City designs a working, fully public scheme for park development (and funds the Parks Department), a simpler and effective option is to push land acquisition or development onto the private sector.

The Ordinance solved Moses's problem: Nobody involved is advocating against the new parks. New York has created a nonadversarial system. Property owners work within the confines of the Ordinance and the public's desires to design and create parks that all will be happy with. The government does not need to seize any property; it needs only wait for redevelopment. Slow though it may be, the Ordinance has resulted in an expansion of quality public rights to land along the waterfront. Moses's Soundview Park project resulted in an unfinished, poorly maintained, and toxic waterfront.[270] Domino Park won design awards and has been visited by millions since 2018.[271]

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268. Moses, supra note 36.

269. Paul Goldberger, Chelsea Dawning; Giving New Life to Old Piers, N.Y. Times (Nov. 17, 1995), https://www.nytimes.com/1995/11/17/arts/chelsea-dawning-giving-new-life-to-old-piers.html (on file with the *Columbia Law Review*).

270. See Schlichting, supra note 20, at 124 ("Moses's land making had been the first blow against the ecological health of this waterfront . . . . [T]he park's intertidal ecosystem had experienced 'extreme aquatic ecosystem habitat degradation due to coastal filling and shore hardening.' Illegal dumping compounded the degradation caused by landfill." (footnote omitted) (quoting U.S. Army Corps of Eng'rs, N.Y. Dist., Soundview Park Bronx, New York Ecosystem Restoration Study Fact Sheet (on file with Parks Library, Folder X-118 Soundview Park))). Soundview Park eventually became habitable and even decent quality, but not until decades after Moses's death. Id. at 127–28.

271. See Domino Park, supra note 236 ("Domino Park . . . [has hosted] nearly 3.5 million visitors since opening in June 2018."); see also Green, supra note 204 ("To keep the park looking pristine, a staff of approximately 17 manage and maintain the site. In contrast, for a public park of this size elsewhere in the city, perhaps only a few parks department maintenance staff would be available, and they would also be tending to other parks.").

The survival of the Ordinance is not pure chance. Even though exactions doctrine is perfectly applicable to the situation, it does not help anyone involved. Designed to defend property owners against government intrusion, exactions law can now interfere with private use of property and encourage municipalities to avoid negotiations with developers, as was theorized by many scholars and Justice Kagan in her *Koontz* dissent.[272] The Ordinance is an example of both parties *knowing* the law and finding a better way to proceed. The state exercises its police power, a developer seeks an exemption, and together they find a way to make it work without resorting to a legal remedy. Exactions doctrine is made vestigial.

Striking down the Ordinance would be catastrophic for the City, its people, and its developers. In reaction, the state might choose to rely on other methods of land reclamation, like expanding its public trust doctrine, restoring urban renewal processes, or extensively regulating all waterfront property (and some inland property) under the banner of climate resiliency. By holding more significant regulation in its back pocket and applying exactions to parties with incentives to cooperate, New York City and other local governments don't need to live in fear of exactions law. It is not only in the interest of developers to comply with the Ordinance; it is in their interest that it survives.

Today, "[a]bout 80% of New Yorkers have access to at least one waterfront public open space and/or public swimming beach within 30 minutes of their home by public transportation."[273] Whether New Yorkers *should* swim at the City's waterfront is a different question entirely, but it is the public's prerogative to ask it.

272. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 633 (2013) (Kagan, J., dissenting).

273. NYC Waterfront Public Access Study, NYC Comprehensive Waterfront Plan, https://www.waterfrontplan.nyc/waterfront-public-access-study-summary [https://perma.cc/47VE-44ER] (last visited Aug. 14, 2025).