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U.S. Supreme Court Places Its Thumb On The Land Use Scale

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Somewhat lost amid the tumult of U.S. Supreme Court decisions on same-sex marriage, affirmative action, and voting rights, was the unusual specter of the Court weighing in on the conduct of local and state land use proceedings, and issuing a decision that not only favors the property owner, but also describes property owners seeking permits as "vulnerable to government extortion." *Koontz v. St. Johns River Water Management District*, issued June 25, 2013, is a once-in-a-generation decision, for its subject matter, outcome, and tone. This article summarizes the decision and its likely impact on land use proceedings.

The *Koontz* backstory is that in 1987 and 1994, the Supreme Court established what became known as the "*Nollan / Dolan doctrine*," which holds that "exactions," which are permit conditions imposed by a municipal, regional, or state agency, must provide a "nexus" – a logical connection between the impact of the proposed land use and the condition that tries to mitigate that impact – and "rough proportionality" – some measurable balance between the land use impact and the condition imposed by the permit. In *Nollan* (1987), the Court struck down a requirement that a property owner grant the public an easement to cross his oceanfront lot as a condition of a permit to build a house, holding that the application did not justify requiring public access, even along a beach. In *Dolan* (1994), the Court invalidated a requirement that a property owner, who wanted to build a plumbing supply store, dedicate an easement across her land for a public bike trail. *Nollan / Dolan* thus established a minimum national standard for exactions, a standard rooted in the Takings Clause of the Fifth Amendment to the U.S. Constitution, which allows government to take interests in private property only for public use and only upon paying just compensation.

Since 1994, state courts and lower federal courts have raised and resolved differently two questions not answered by *Nollan / Dolan*: does the requirement for nexus and rough proportionality between the proposed land use and the condition apply when government makes demands on a property owner who refuses them, such that the permit is then denied? And does *Nollan / Dolan* apply when the government, instead of demanding an interest in land such as an easement, requires money?

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Koontz owned 14 acres of vacant land near Orlando and sought a permit from the Water Management District to improve three of his acres. In exchange, he offered to preserve his remaining 11 acres as open space, but the District pressed Koontz for more, asking him to develop one acre and dedicate 13, or pay the District to enhance 50 acres owned by the District and located several miles away. Koontz refused both demands. The District then denied his permit. Koontz sued the District in state court under state law to try to get his development approved, but asserted that the District's proposed conditions violated federal law, *Nollan / Dolan*.

In its June 25 decision, the Supreme Court said "yes" on both unresolved questions: *Nollan / Dolan* applies where a permit applicant refuses the conditions and the agency denies the permit, and it applies where the government's demand is for money, not property. Thus, the Court confirmed the broad scope of *Nollan / Dolan* as a protection of property rights, arising from the Takings Clause. But it is the Court's explanation of these results that is extraordinary.

The Court described *Nollan* and *Dolan* as reflecting "Two realities of the permitting process." The first, it said, is that (emphasis added) "*land-use permit applicants are especially vulnerable to . . . coercion*" because "*the government often has broad discretion to deny a permit that is worth far more than property it would like to take*." In other words, a property owner, engaging in old-fashioned free enterprise by seeking a way to enhance the value of its land by obtaining a permit to develop it, is often at the mercy of government officials interested in extracting more of the enhanced value than is justified by mitigating the actual impacts of the proposed land use. "By conditioning a permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property." The second reality is that land uses often impose costs on the public that government may rightfully offset, such as by requiring dedications of land. *Nollan / Dolan*, the Court observed, aligns these two realities by allowing exactions but requiring a nexus and rough proportionality; thus, it allows the government to force property owners to mitigate the actual impacts of their own activities, but restrains it from arbitrary action, regulatory overreaching, or outright extortion.

The Court's observation about an imbalance of power in land use proceedings is not news to property owners. But the Court's repeated use of the word "extortion" to describe a possible outcome of land use permit proceedings, and its characterization of land use permitting as often involving flagrant misuse of the unequal bargaining power between the applicant and the government, are by any measure unprecedented and breathtaking – the Court putting a federal thumb on the side of property rights in proceedings that are mostly a creature of state and local law.

The decision's second reverberation is its description of permit conditions / exactions that fail the nexus / proportionality test as essentially a misuse of the power of eminent domain, a direct (or "*per se*") violation of the Fifth Amendment's Takings Clause, as opposed to a so-called "regulatory taking." The Court explained that the test for whether an exaction is unconstitutional is whether that condition, if issued by the land use agency as an

administrative order rather than as a demand added to a permit, would require payment of just compensation. Thus, when the Water District demanded that Koontz dedicate 13 of his acres as open space to obtain a permit to develop the rest of his land, the question was whether, if the agency did this by direct order instead of permit condition, it would have "taken" the property, requiring payment of compensation. (It likely would.) Thus, the *Koontz* decision directs that the exactions are, or are at least closer to, direct condemnation / eminent domain, than to government "regulatory takings" (destroying a property's value through excessive regulation).

As is often the case after a broadly-worded decision like *Koontz*, in the immediate aftermath, property owners and property rights advocates declared resounding victory, while government officials described apocalypse. The reality, however, is that the decision will now play out during the next few years as owners, regulators, and courts try to apply the decision to real-life situations. The impact will be neither revolutionary nor catastrophic. (In fact, the Court clarified the breadth of *Nollan / Dolan* protections, but did not rule on the merits of the *Koontz* development, which is based on Florida, not federal, law.) So, we expect *Koontz*, over time, to have the following consequences:

1. First and foremost, land use agencies will need to think twice about conditions and demands imposed on permits, because it is now clearer that any demand that is not based on a solid logical nexus and rough proportionality will be suspect, and in the most egregious cases of agency overreaching, property owners will have a stronger, clearer basis to challenge agency action and potentially to sue for just compensation.

2. The decision strengthens the hand of property owners who have the stamina, time, and resources to challenge permit conditions, by broadening the legal analysis and bringing exactions clearly under the federal Fifth Amendment; the holding solidifies a third type of Takings Clause protection of property owners, in addition to prohibiting takings that are not for public use and takings without payment of just compensation.

3. Specific types of government permit conditions / exactions that will now require more careful scrutiny include: open space dedications, utility upgrades, road improvements, anything off-site, anything on the government's own land, anything involving money (such as fees-in-lieu), and anything that stretches logic and proportionality beyond reason.

All of the above said, the realities are, and will remain, that property owners and developers will still be pressured to accept – and often will accept – unreasonable demands where there is more value to them in accepting than fighting. Constitutional challenges to permit conditions will still be expensive, time-consuming, and reserved for the most egregious situations. The *Koontz* decision will likely change the tone of land use proceedings involving permit conditions by allowing land owners and their representatives to challenge a broader range of demands, while causing government agencies to consider exactions more carefully

before crafting them and insisting on their acceptance. The legal analysis to be applied when government agencies push hard on conditions will be better understood by all concerned. The decision will specifically help land owners most in the relatively small cadre of cases where the government's reaction is egregious and the property owner is willing to take the fight to court. The change will be incremental, and evident most in extreme situations.

Going back to our start, it is an extraordinary day when the U.S. Supreme Court puts its thumb directly on the state, regional, and local land use scale, and in *Koontz* it unmistakably did so. The decision will require government officials to consider more carefully the conditions they impose on permits and in some cases, the decision will give property owners a broader and clearer legal basis to challenge those conditions.

Questions or Assistance:

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