

U.S. Supreme Court decision affirms constitutional limits on exactions from developers

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On June 25, 2013, the U.S. Supreme Court held in *Koontz v. St. Johns River Water Management District*, 570 U.S., that the Fifth Amendment's Takings Clause limits on the exaction of property from a landowner as a condition

of permit approval apply, whether the permit is granted or denied, and apply to demands for mitigation payments.

Koontz sought to develop 3.7 acres of his 14.9-acre parcel, much of which is wetlands. Florida's Water Resources and Wetlands Protection Act required that to mitigate his project's environmental effects, Koontz offered to do so by deedling to the St. Johns River Water Management District a conservation easement over his remaining approximately 11 acres. The district wanted more. It gave Koontz two alternatives for obtaining the required management and storage of surface water permit. He could reduce his development footprint to one acre and give the district a conservation restriction on the remaining 13.9 acres, or he could build his project as proposed if he agreed to hire contractors to enhance district-owned wetlands located several miles away.

Believing the district's mitigation demands to be excessive, Koontz filed suit in state court. The Florida Circuit Court found, based on expert testimony, that the proposed development area already was "seriously degraded" by construction on surrounding parcels. It found that the district's demand for mitigations in the form of payment for offsite improvements to district property lacked both a nexus and rough proportionality to the project's environmental impacts. Consequently, it found the district's actions unlawful under the U.S. Supreme Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

The Florida District Court affirmed. The Florida Supreme Court reversed, finding a distinction between a *Nollan* or *Dolan* permit approval with unconstitutional demands and the district's denial of Koontz's application, because he refused to concede in advance to such demands. It also distinguished demanding an interest in real property *Nollan* or *Dolan* from demanding money in the form of payment to improve the district's property.

SUPREME COURT'S DECISION

In reversing the Florida Supreme Court, the U.S. Supreme Court held that a governmental demand for property from a

land use permit applicant must satisfy the Fifth Amendment's right to just compensation even when the government denies the permit and/or demands money. The *Nollan* and *Dolan* decisions reflect "two realities of the permitting process." First, land use permit applicants are "especially vulnerable to the type of coercion that the unconstitutional conditions doctrine

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prohibits," because the government often has the discretion to deny a permit worth much more than the property it would take in exchange. Second, many proposed land uses impose public costs that dedications of property can offset. *Nollan* and *Dolan* "accommodate both realities" by allowing governmental exactions of property if

there is a nexus and rough proportionality between the property the government demands and the project's social costs.

The Supreme Court found untenable the district's attempt to evade the limitations of *Nollan* and *Dolan* by making its demands as conditions precedent to permit approval. An application "approved if" the owner turns over property is constitutionally indistinguishable from an application "denied until" the owner does so. "Exorbitant demands for property in the land use context run afoul of the Takings Clause," the court wrote, because they impermissibly burden the applicant's right not to have property taken without just compensation, even if the property has not yet been taken.

The Supreme Court went on to hold that monetary exactions also must satisfy the nexus and rough proportionality requirements. Because the district's second alternative—that Koontz spend money to improve the district's property—burdened Koontz's ability to develop his own land, it also violated the Takings Clause. The district (and the dissent) argued that if monetary exactions were subject to nexus and rough proportionality requirements, there would be no principled way to distinguish impermissible land use exactions from property taxes.

The majority pointed to a developed body of cases distinguishing taxes from

See U.S. SUPREME COURT page 10

CONTINUED FROM PAGE 8

takings that will guide future courts deciding whether a land use permitting charge is so arbitrary as to be a confiscation of property. The Koontz dissent predicts that the decision will deprive local governments of the ability to charge reasonable permitting fees. The majority noted that this has not occurred in the two decades since the *Nollan* and *Dolan* decisions.

What are the limits on a permitting authority's ability to demand exactions

from a land use permit applicant? The Supreme Court has upheld as reasonable land use policy regulations requiring a landowner to internalize a project's external costs. The Koontz majority noted that where a proposal "would substantially increase traffic congestion, for example, officials might condition permit approval on the owner's agreement to deed over the land needed to widen the public road."

Requiring Koontz to improve the district's wetlands several miles from his property lacked the required nexus and

rough proportionality. The nexus between making a project proponent remove, or pay to remove, inflow and infiltration from the municipal sewer system in exchange for a connection permit may be clear. But is there rough proportionality in an I/I removal rate of four to one, or of 10 to one? Where are the nexus and rough proportionality in imposing job training impact fees on a project to transform a disused parcel into a multi-family or an office tower? Such a project would create construction jobs, not cause any loss

of jobs. The Koontz dissent may be correct in predicting that future litigation will be determine the constitutionality of the specific exactions imposed on particular projects.

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