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Extort Me Not: Supreme Court Expands Protections for Permit Applicants Under the Takings Clause

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The high court's decision in Koontz v. St. John's River Water Management District *extends the landmark decisions in* Nollan *and* Dolan, *which set standards on when an agency can condition a land use permit on the relinquishment of property. The 5-4 decision in* Koontz *extends those standards— which require an "essential nexus" and "rough proportionality" between the demands of an agency and the effects of the proposed land use—to conditional permit denials and monetary exactions.*

On June 25, 2013, the Supreme Court of the United States in a 5-4 decision in *Koontz v. St. Johns River Water Management District* extended the "nexus" and "rough proportionality" standards of its landmark *Nollan* and *Dolan* decisions. Those standards now apply to conditional permit denials by government agencies and to "monetary exactions" imposed as conditions of permit approvals.

Background of Unconstitutional Exactions

The seminal cases of *Nollan v. California Coastal Comm'n*[1] and *Dolan v. City of Tigard*[2] prohibit the government from conditioning approval of a land use permit on the applicant/owner's relinquishment of a portion of his or her property unless there is an "essential nexus" and "rough proportionality" between the agency demand and the effects of the proposed land use. Both decisions stemmed from a permitting authority using its substantial power and discretion to overreach in demanding concessions that were not adequately tied to project effects, but rather, served the agency's broader public objectives. The Court held that these agency decisions diminished the applicant's property value without justification, thereby violating the Takings Clause, which protects land use permit applicants from an unfair allocation of public burdens.

[1] 483 U.S. 825 (1987).

[2] 512 U.S. 374 (1994).

Thus, under *Nollan* and *Dolan*, a requirement that an applicant dedicate property as a condition of permit approval must be related both in nature and extent to the impact of the proposed land use or permitted activity.[3] However, before *Koontz*, courts were split on the issue of whether a demand for money could give rise to a claim under *Nollan* and *Dolan*.[4] The *Koontz* Court resolved this conflict.

The *Koontz* Case and the Supreme Court's Decision

The *St. Johns River Water Management District* ("District") denied Koontz's application[5] to develop portions of his property, which included wetlands, rejecting as insufficient Koontz's offer to dedicate three-quarters of his property in exchange for permit approval. The District refused to approve the project unless Koontz either (1) shrank the development footprint from 3.7 acres to 1 acre and dedicated a conservation easement over the remaining 13.9 acres of the property or (2) agreed to pay for improvements to wetlands on a relatively significant portion of other public lands in addition to carrying out all the mitigation he had offered originally, in which case Koontz could develop his property as originally proposed. Koontz found the District's demands unreasonable and overly burdensome, so he challenged this "conditional denial" of his permit.

Conditional Denial. The Court held that the District's conditioned denial of Koontz's application was no different than a conditioned approval for *Nollan* and *Dolan* purposes. The Court acknowledged that no property was actually transferred to the government because the permit was denied. Nevertheless, the *Nollan* and *Dolan* standards were implicated: "Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation."[6] The Court remanded the case for application of the Court's holding to the facts.

Monetary Exactions. Similarly the Court rejected the District's argument that the District's alternative requirement of paying money to finance offsite mitigation freed the case from *Nollan/Dolan* scrutiny.

[3] The *Nollan*/*Dolan* inquiries focused on exactions in which a land use decision conditioned approval of development on dedication of property to public use. The Supreme Court has characterized these exactions as *per se* takings (the transfer of an interest in property from the permit applicant to the government). In appropriate cases, unconstitutional takings may also be established under the ad hoc regulatory taking standards of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). The Court in *Koontz* determined the *Penn Central* factors did not apply to the *per se* taking at issue, not reaching the question of whether the government can commit a regulatory taking by directing someone to spend money.

[4] Notably, the California Supreme Court held in *Ehrlich v. Culver City*, 12 Cal.4th 854 (1996), that the *Dolan* and *Nollan* tests for determining whether a compensable regulatory taking has occurred applied, under the circumstances of that case, to the monetary exaction imposed by the City as a condition of approving plaintiff's request that the real property in suit be rezoned to permit the construction of a multi-unit residential condominium. Making reference to the Mitigation Fee Act under California law, (Gov. Code, § 66000 *et seq*.), the court held that the local regulatory authority must demonstrate a "reasonable relationship" between the monetary exaction and the public impact of the development. *Id*. (remanding for consideration of justification of the city's determination that plaintiff pay a so-called mitigation fee of $280,000 as a condition for approval given insufficient record). *See also San Remo Hotel LP v. City and County of San Francisco*, 83 Cal.App.4th 239 (2000) (citing *Ehrlich*) ("The Hotel, like any other property owner challenging a monetary exaction under the takings clause, may attempt to show, under the heightened scrutiny standard, that there is no proof of "both an 'essential nexus' or relationship between the permit condition and the public impact of the proposed development, and of a 'rough proportionality' between the magnitude of the fiscal exaction and the effects of the proposed development."); see *also McClung v. Sumner*, 548 F.3d 1219 (9th Cir. 2008) (applying *Penn Central* factors to generally applicable ordinance requiring specified diameter pipe for new developments).

[5] The estate of the permit applicant, Coy Koontz, Sr., was represented by Coy Koontz, Jr., collectively referred to as "Koontz."

[6] Opinion at 10.

Characterizing such "in lieu of " fees as "functionally equivalent to other types of land use exactions", i.e., transfer of an interest in property, the Court asserted that recognizing an exception for such fees would make it too easy for government agencies to evade the protections of the Takings Clause.

The Court rejected the dissent's concern that the decision would adversely affect local governments' ability to charge "reasonable" permitting fees,[7] pointing out the independent check provided by many state laws[8] and the *Nollan/Dolan* – or similar – standards effectively applied by state courts. Indeed, in the Court's view, not providing permit applicants with the protection afforded under *Nollan* and *Dolan* when the government demands money would essentially overrule those cases.[9]

Implications of the Court's Decision

The *Koontz* decision provides a strong reaffirmation of *Nollan* and *Dolan*, and protects against erosion of the "nexus" and "rough proportionality" doctrines. Further, the decision reinforces longstanding principles of accountability for government agencies charged with protecting and improving the public interest and empowered with broad discretion to achieve those goals. By subjecting monetary exactions and other conditions of approval to the *Nolan/Dolan* standards, *Koontz* limits the government's opportunity to make public gains by unfairly allocating the cost of such gains to an individual permit applicant. As the Court noted, these applicants are vulnerable to the pressures of accepting such exactions in order to meet project schedules or avoid project denial altogether where significant investments have been made. For cases where the government attempts to leverage its permitting power and discretion to pursue objectives that lack the requisite relationship to project impacts, permit applicants have a slightly more level playing field in the negotiation of permit conditions.

The Court's extension of *Nollan/Dolan* scrutiny to monetary exactions applies with particular import to mitigation costs related to purported environmental harm that would be caused by a new or continuing land use for which permits are required. Although concerns have been raised that the decision will lead to a radical shift, the decision and the extension of the *Nollan/Dolan* doctrine is entirely consistent with the concept of "mitigation" embodied in virtually all land use and environmental protection statutes. Mitigation refers to activities and efforts to offset the adverse impacts or environmental effects caused by a land use activity as compared to existing conditions without the use or activity, or change/ increase in such activity. Even before *Koontz*, governmental permitting authorities were wise to carefully consider the nature and extent of impacts and document all mitigation decisions in relation to those impacts with supporting evidence. Mitigation requirements have long been tied to direct, or cumulative, project impacts in California under the California Environmental Quality Act. The same is true of federal statutes, such as the federal Endangered Species Act, which requires applicants for incidental take permits to demonstrate that they will minimize and mitigate the impacts of take to the maximum extent practicable. When the California Endangered Species Act incidental take provisions were enacted, the new permitting standards included a

7 The dissent disagreed with the majority's opinion on monetary exactions, but agreed that the unconstitutional conditions doctrine applies to project denials as well as approvals.

8 See footnote 4.

9 The majority further disagreed with the dissent's reliance on Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) for the proposition that a takings claim cannot be based on an obligation to spend money. The Court concluded in Eastern Enterprises that a retroactive obligation to pay medical benefits violated the Takings Clause on due process grounds, but the dissent argued that the Takings Clause does not apply if an identified property interest is not affected. See Koontz Opinion at 16. The majority pointed out that, unlike Eastern Enterprises, in Koontz the monetary obligation did burden Koontz's ownership of a "specific parcel of land." Id. Thus, the takings analysis applied.

limitation on the nature and extent of mitigation requirements patterned after *Nollan/Dollan*.[10] That standard applies regardless of the mechanism used for effecting the mitigation.

It is important to distinguish mitigation from "enhancement" measures, i.e., measures designed to improve conditions over what would be reasonably necessary to make up for a project's actual individual or cumulative effect. Taking one example, under the Endangered Species Act it would be inconsistent with *Nollan/Dolan* to require a permittee to contribute to the recovery of an endangered species where the project's impacts on that species do not adversely affect the species as a whole and could be mitigated with a less costly and burdensome requirement. Such a contribution requirement would not be proportional to the impacts caused. In the same vein, it would not be consistent with *Nollan/Dolan* to impose fees needed to improve the species' condition over and above what it would have been without the project's impact.

Post-*Koontz*, mitigation fees that have a nexus to a project impact and are proportional to that impact are still allowed. They make possible the use of mitigation banks and other mitigation mechanisms that improve the efficiency and effectiveness of mitigation and conservation efforts. The *Koontz* decision merely ensures that mitigation fee calculations will be tied to the proposed project's impact in nature and extent. In that regard, the *Koontz* decision may improve the credibility of such mitigation fee/mitigation banking mechanisms, if it gives permit applicants greater confidence that fees imposed upon them will be calculated to compensate for their actual project impacts, rather than funding broader public objectives. Extending *Nollan/Dollan* scrutiny to in-lieu-mitigation-fee assessments in other regulatory contexts can and should be built on the same foundations as those for determining substantive mitigation requirements.

Finally, given that the Court's decision arises in the land use permitting context, it also remains to be seen how broadly courts will apply the inquiry in other contexts. As reflected in *Koontz* itself, environmental statutes such as Florida's wetlands protection measures are part of land use regulation, directly regulating potential impacts of landowner activities upon public resources. The rationale applied in *Koontz* applies with equal force to closely related regulatory regimes such as air quality permitting. Challenges to unreasonable agency exactions in these areas will likely follow the *Koontz* decision.

Conclusion

The *Koontz* decision represents an important expansion of protection for permit applicants under *Nollan* and *Dolan*, but the battles are not over. For example, the Court left significant issues to be determined on remand.[11] The Court left other issues, such as available remedies, to be resolved as the decision is applied in future permitting disputes under particularized state and federal law. These issues, and the stark differences between the majority's opinion and the dissent, promise many more years of litigation.

10 Pillsbury has a long history and substantial experience in this arena and participated in the crafting and negotiation of this language. Please contact our offices if we may offer additional analysis specific to your situation.

11 The Court did not determine the merits of Koontz's claim or whether the agency demands did in fact violate the protections afforded under *Nollan* and *Dolan*.

If you have questions, please contact the Pillsbury attorney with whom you regularly work, or the authors.

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