

Supreme Court's Ruling in *Koontz* Extends Concept of Unconstitutional Takings to Monetary Exactions

Introduction

At first glance, the Supreme Court's recent decision in *Coy A. Koontz, Jr. v. St. Johns River Water Management District*, 570 U.S. ___ (2013), improves the ability of real estate developers to obtain permits and entitlements without conceding to governmental mitigation demands. But on closer review, the decision may cause entitlement proceedings to become slower and less transparent affairs. It is far too early to determine what practical effect the *Koontz* decision will have on the land-use entitlement process. But we expect that, while the decision will embolden developers to resist onerous mitigation demands, it also might give permitting agencies an incentive to avoid negotiations and deny applications for reasons that remain obscure to the developer.

Summary of Development Exactions Jurisprudence

The seminal Supreme Court decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), established a two-prong test for determining whether a development "exaction" would pass muster under the U.S. Constitution's Takings Clause. First, *Nollan* requires that an "essential nexus" exist between the existing development restriction and the exaction demanded by the government. Second, *Dolan* requires that there be "rough proportionality" between the condition exacted and the social harm or impact of the proposed development.

The *Nollan* and *Dolan* cases both arose from the *approval* of permit applications conditioned on required dedications of interests in *real property* (e.g., easements) to the government. *Nollan* and *Dolan*, therefore, left unresolved two questions that arise in many entitlement situations: First, would the *Nollan-Dolan* test be applied in the context of *rejected* permit applications, and second, would the *Nollan-Dolan* test be applicable if the government exactions were in the form of monetary payments instead of real property rights such as easements. The Supreme Court resolved both issues in the affirmative in *Koontz*. In the process, the Court has sent a message to land-use permitting agencies that in-kind or monetary mitigation commitments suggested in response to, or mentioned as reasons for denying, a development proposal must have the requisite "nexus" to the project and be "roughly proportional" to the project's actual impacts.

Facts of *Koontz* and Procedural Posture

Coy Koontz purchased a 14.9 acre tract of undeveloped land near Orlando, Florida. Most of the parcel consisted of undevelopable wetlands, but the northern-most portion, although wet, was suitable for development if certain grade changes and drainage improvements were made. Mr. Koontz wished to develop 3.7 acres of the northern portion by elevating the land and installing a detention basin to receive runoff from his proposed building and parking lot. The project required development permits under two Florida wetland protection statutes. In his application for these permits, Mr. Koontz offered, as mitigation, to dedicate a conservation easement to the St. Johns River Water Management District (the "District") over the undeveloped 11.2 acres of the tract. The District rejected this offer as inadequate. The District suggested that Mr. Koontz either (i) reduce the project's footprint to one acre and convey a 13.9 acre conservation easement to the District or (ii) proceed with the proposed 3.7 acre development, but pay for the restoration of approximately 50 acres of District-owned wetlands located off-site.

Mr. Koontz believed the District's suggestions were excessive and refused to consider either of them. The District subsequently denied his application and Mr. Koontz filed suit in state court seeking monetary damages. He claimed that the District unreasonably exercised its police power to a degree that resulted in an unconstitutional taking without just compensation.

In light of findings that the northern section of the land had already been degraded by surrounding development, and of Mr. Koontz's offer to dedicate almost three-quarters of his land to the District, the trial court found that the District's request for further mitigation in the form of funding for off-site wetlands restoration work was improper as it lacked both a nexus and rough proportionality to the impact of the proposed development. The Florida District Court affirmed, but the Florida State Supreme Court reversed reasoning that (i) the *Nollan-Dolan* "nexus and proportionality" analysis did not apply because the District did not *approve* Koontz's application conditionally, but rather *denied* the permit outright in response to Koontz's refusal to make further concessions, and (ii) that the *Nollan-Dolan* test does not apply in any event to monetary exactions as opposed to demands for interests in real property. The Supreme Court reversed the Florida State Supreme Court on both grounds.

Koontz Holdings and Analysis

The Supreme Court's 5-4 decision holds that denial decisions and monetary exactions are just as susceptible to *Nollan-Dolan* review as conditional approvals and in-kind exactions.

The *Nollan-Dolan* test applies even when a permit is denied.

Justice Alito, writing for the majority, rejected the Florida Supreme Court's reasoning that a distinction exists between the *approval* of a permit conditioned on a developer's agreement to implement certain mitigation measures, and the *denial* of a permit based on a developer's refusal to so implement. Justice Alito reasoned that drawing such a distinction would allow government agencies to sidestep the heightened scrutiny of *Nollan-Dolan* by simply designing exactions in the form of denials with conditions precedent instead of as approvals with conditions subsequent. In response to the idea that a denial would mean no property was actually taken, Justice Alito stated that "Extortionate demands for property...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."¹

The *Nollan-Dolan* test applies to monetary exactions.

The more significant holding of *Koontz*, and the part that drew the dissent, was that the "essential nexus" and "rough proportionality" tests of *Nollan-Dolan* apply to monetary exactions as well as in-kind exactions of real property interests. Justice Alito noted that, because the government only needs to provide one constitutional alternative for the applicant to obtain the permit, excluding monetary exactions from *Nollan-Dolan* scrutiny would allow permitting officials to evade heightened scrutiny by offering applicants an extortionate set of choices: (1) convey an easement, which may fail the *Nollan-Dolan* nexus and proportionality test, or (2) pay money of equal value, a requirement that would evade *Nollan-Dolan* scrutiny.

Justice Alito's majority opinion concluded that a "direct link" between the government's demand of money and a specific parcel of real property (the proposed development) exists in this context, and implicates the concern addressed in *Nollan* and *Dolan*: that the government will abuse its land-use permitting power to

¹ *Koontz v. St Johns River Water Management District*, 570 U.S. ____ (2013), at page 10.

pursue exactions that lack an essential nexus and rough proportionality to the harms of the proposed development.²

Dissent

Justice Kagan’s dissent focuses on the majority’s extension of *Nollan-Dolan* to monetary exactions. The main disagreement was over whether monetary exactions “affect a specific and identified property or property right” (in which case it would be a taking requiring just compensation) or “simply impose[s] an obligation to perform an act that costs money” (which would function like a tax).³ For the dissent, it was not enough that the District’s monetary exaction suggestion arose from a land-use permitting process. The requisite connection between the requested payment and “a specific and identified property” (i.e., the Koontz parcel) was lacking because complying with the exaction would not have affected the land.

The dissent also argues that the majority will regret extending *Nollan-Dolan* scrutiny despite the District not having made a concrete demand or condition when it denied the permit application. Justice Kagan warns that if a government agency could be subject to *Nollan-Dolan* review for making suggestions, it may opt instead to simply deny applications without providing guidance as to alternative mitigation conditions rather than risk litigation.

Implications and Unanswered Questions

While *Koontz* may provide further protection for developers and landowners against extortionate demands by government agencies, the ruling’s practical impacts are difficult to predict and may not be entirely favorable to developers unless they take certain steps to steer the permitting process. The four dissenting Justices admonish that the extension of *Nollan-Dolan* scrutiny to monetary exactions and to conditions discussed during failed negotiations risks diminishing the flexibility with which local governments act to expeditiously issue permits while ensuring that developers internalize the costs of a development’s externalities. In fact, the *Koontz* decision gives rise to several unanswered questions that could cause government agencies to be more deliberative and cautious, and less transparent or communicative, during a permitting process, including (i) whether and how a request for monetary mitigation can be structured so as to satisfy the *Nollan-Dolan* requirements for nexus and proportionality, (ii) whether a request for monetary mitigation crosses the line between a permissible “tax” and an impermissible “exaction,” and (iii) under what circumstances a suggestion for mitigating the effects of a project could be viewed as a concrete and specific demand that crosses the constitutional line.

After *Koontz*, permitting boards may be less willing to engage in constructive discussions about how a project could be modified in ways that balance private and public interests. Or boards could more frequently seek legal advice on how to structure monetary requests or denial decisions in a way that will survive judicial review. These dynamics could result in slower processes marked by poor communication, or, even more unproductively, expedited denials. To expedite the process, developers applying for permits will be well-advised to preemptively suggest their own mitigation measures and expressly explain how those measures have the necessary “nexus” and “proportionality” rather than wait for advice from a board that may be reluctant to provide such guidance. A practice of using negotiation agreements, similar to those used in settlement negotiations, may develop between developers and government agencies to encourage open-ended dialogue immune from *Nollan-Dolan* liability. On the other hand, it remains to be seen whether

² *Id.* at 17.

³ *Koontz* dissent at 6 (internal quotes and citations omitted).

developers are likely to really use the threat of *Nollan-Dolan* liability given the potential reputational effects of threatening litigation.

Regardless of how the law evolves on this topic, it remains the case that most developers motivated to pursue a project would rather negotiate a list of conditions than litigate their right to be free of conditions. Given the uncertainty that *Koontz* creates for government agencies, developers who control the discussion about mitigation from the inception of the permitting process will best be able to take advantage of *Koontz*'s pro-development potential.