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Implications of *Koontz v. St. John's River Water Management*

By Aaron N. Gruen

Background

Other articles in this Local Government Law newsletter provide reviews and analysis of the facts, procedural history, holdings of the majority opinion, and arguments of the dissent of the June 25, 2013 *Koontz v. St. John's River Water Management District* Supreme Court decision (See "Can Monetary Exactions Conditions of a Permit Constitute a Taking" by John H. Brechin and "A Timely Take on Takings" by Ronald S. Cope).

This note focuses on the implications of the *Koontz* decision for municipalities and developers engaging in the land use entitlement development process. The *Nollan*¹ and *Dolan*² Supreme Court decisions in which the essential nexus and rough proportionality tests were established foreshadowed that the equity and efficiency of the government's exaction condition relative to the external costs generated by the proposed development would be given stricter scrutiny. Brechin's article, however, concludes that the majority opinion does not provide sufficient guidance on determining whether monetary or other actions violate the *Nollan* and *Dolan* limitations. Cope's article identifies a variety of issues including the stricter standard to which municipalities in Illinois are subject for imposing exactions and implications that requiring "set asides" (such as for affordable housing) as a condition of approval may fall under the rubric of a monetary exaction.

Consistent, however, with the foreshadowing of these prior takings decisions, the *Koontz* decision extends the *Nollan* and *Dolan* limitations to demands for conveyance of or dedication of interests in real property prior to permit approval to: (1) circumstances

in which the government denies a permit request unless the developer applicant agrees to conditions proposed by the government; and (2) monetary exactions.

Holdings reflect concerns about the potential for coercion and uneven distribution of benefits and costs of the land use regulation

The holdings reflect concerns about the "two realities of the permitting process". One reality is the potential for the government entity to coerce the developer into agreeing to exactions which the developer may accept when obtaining the rights to develop exceed the costs of the exactions. The second reality, however, is the government does have an appropriate interest in requiring a developer to mitigate the negative impacts of the development.

The concerns about potential coercion relate especially well to regulatory demands imposed on one or few landowners but not to other similarly situated land owners without justification for the differing treatment;³ and when the regulations exceed the costs of the negative externality induced by the development even if the developer could afford to pay the cost because the value of obtaining the development permit would exceed the additional regulatory cost.⁴

Dissent raises concerns about adverse impacts of decision on government exercising land-use regulation authority

The dissent would not have extended *Nollan* and *Dolan* essential nexus and rough proportionality requirements to monetary

exactions but would have relied instead on the standards established under the Supreme Court decision in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978).⁵ The dissent maintained the scope of the *Koontz* holdings are unclear and could "subject a vast array of land use regulations ... to heightened constitutional scrutiny." The dissent expressed concern that the decision would extend "the Takings Clause . . . into the very heart of local land-use regulation and service delivery" and diminish "the flexibility of state and local governments to take the most routine actions to enhance their communities." Justice Kagan noted in the dissent: "If every suggestion could become the subject of a lawsuit under *Nollan* and *Dolan*, the (District's) lawyer can give but one recommendation: Deny the permits, without giving *Koontz* any advice-even if he asks for guidance."

Implications of *Koontz v. St. John's River Water Management District*

The *Koontz* decision will induce both intended and possibly unintended consequences. The ruling expands the rights of developers seeking approvals to develop land to include the *Nollan* and *Dolan* protections. The case will likely be interpreted as applying to almost all types of exactions, physical, monetary, and substitutes for monetary exactions such as off-site mitigations or service provisions, a municipality may impose in permit request cases.

In many cases developers may be better off absorbing the costs of an unconstitutionally high monetary exaction than engaging in lengthy and expensive litigation. The

Koontz decision, however, suggests it would be prudent for property owners to document proposals issued by municipal officers during negotiations in order to develop evidence for a potential takings claim.

The *Koontz* decision may encourage municipalities to exercise greater care in structuring exactions that are fair and encourage efficient land use. The exactions should be tailored to encourage property owners to internalize the costs of the negative externalities their developments produce, while ensuring that property owners do not bear a disproportionate share of the costs of the regulation.

The majority opinion did not clarify how open (“concrete and specific” enough) a “demand” must be to become a “condition” that must satisfy the *Nollan/Dolan* tests. The dissent disagreed with the majority about the level of concreteness required for a government official’s statement to constitute an exaction, stating that only an “unequivocal” demand can constitute an exaction under *Nollan* and *Dolan*. As a practical matter, in many circumstances, developers rationally conclude it is better to agree to exactions that do not comport with the *Nollan/Dolan* limitations in order to increase the probability and speed of obtaining required development approvals. As the result of the *Koontz* ruling, however, as alluded to in the dissent,

municipalities will have an incentive to deny the request without discussion of potential conditions. This incentive to deny will be higher when municipalities deal with developers with which the municipalities do not have prior experience negotiating development agreements and thus could give existing property owner-developers less competition for space users and customers of their developments.

Another potential result of the ruling is municipalities will structure the negotiations so that they can construe proposals made by the developer as factors to be considered in the evaluation of whether to approve the developer’s permit request rather than as condition of the approval of the developer’s permit request. One strategy developers may employ is to present multiple alternative offers so the government can merely accept one of the proposed alternatives. This will permit the government to merely answer “yes” or “no” to the alternatives and speed up the permit application process.

The most likely impact of the decision is to reduce the conduct of mutually beneficial negotiations and therefore voluntary transactions between property owner-developers and municipal regulators. As a result, less development may be realized that could benefit both the developer and the community. However, developers and municipalities

which are not seeking to game each other will likely most often find creative ways to communicate and identify permit conditions reasonably related and proportionate to the impact of the proposed land use development. ■

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1. *Nolan v. California Coastal Commission*, 483 U.S. 825 (1987).

2. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

3. Generalized, legislative exactions may hold less potential for extortion and unfairly burdening property owners than ad-hoc, individualized decisions.

4. The majority opinion states provided “the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to exceed to the government’s demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.”

5. The factors in the *Penn Central* test to determine whether a taking has occurred include: (1) the extent of the economic impact on the property owner; (2) “the extent to which the regulation has interfered with distinct investment-backed expectations”; and (3) the “character of the governmental action.” (Id. at 124).

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