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Koontz Decision Extends Property Owners' Constitutional Protections

U.S. Supreme Court decision requires more government exactions to meet "essential nexus" and "rough proportionality" requirements.

The U.S. Supreme Court's decision in *Koontz v. St. Johns River Water Management District*[1] on June 25, 2013 expands the holdings of *Nollan v. California Coastal Comm'n*[2] and *Dolan v. City of Tigard*[3] to provide more extensive protections to property owners faced with government-imposed land use conditions. *Nollan* and *Dolan* hold that government exactions must have a sufficient nexus and be roughly proportional to the effects of the property owner's proposed use of the property to apply in situations where the government denies a permit request and the government's demand is for money. While many commentators hail this decision as a significant victory for property owners, numerous questions regarding the decision's practical impacts remain unanswered. This Client Alert reviews the *Koontz* decision and answers several real-world questions in our recent webinar on the case.

Background: Fifth Amendment Takings Law | The U.S. Constitution's Fifth Amendment states that the government shall not take private property "for the public use, without just compensation."[4] Historically, a regulatory taking required a government action to cause a physical invasion of property,[5] the deprivation of all economically beneficial use of the property,[6] or a distinct impact on the property owner's investment-backed expectations[7] before a property owner could obtain relief. The Supreme Court's decisions in *Nollan* and *Dolan*, however, provide a more favorable standard for property owners facing exactions in the land-use context. *Nollan* requires a "nexus" between the property the government demands and the social costs of the applicant's proposal.[8] *Dolan* expanded on *Nollan* to require an exaction to be "roughly" proportional to the impact of the proposed project.[9]

The U.S. Supreme Court's Decision in *Koontz* | In 1994, Coy Koontz, Sr. applied to the St. Johns River Water Management District (District) for a permit to develop 3.7 acres of his 14.9 acre tract of land. He proposed to place a conservation easement on the 11 remaining acres. The District informed Koontz it would approve his permit if he met one of two conditions: 1) develop his 3.7 acres as proposed but finance the restoration and enhancement of at least 50 acres of wetlands, or 2) develop only one acre on his parcel and deed the remainder to the District in the form of a conservation easement. Because Koontz refused to meet either condition, the District denied the permit. Koontz then brought suit in state court under a Florida statute providing for damages when an agency's unreasonable exercise of the state's police power constitutes a taking without just compensation.[10]

The trial court granted Koontz relief because it found that the District failed to meet the *Nollan* and *Dolan* requirements. The Florida Supreme Court reversed the trial court's decision, holding that the protections of *Nollan* and *Dolan* do not apply when the government denies an applicant's permit or when the government's demand is for money.[11] The U.S. Supreme Court then granted certiorari.

The Majority Opinion | In an opinion by Justice Alito, the U.S. Supreme Court ruled five to four in favor of the landowner. The Court held that neither the fact that the government denied the permit nor that it made a demand for money is sufficient to justify dismissal of *Nollan* and *Dolan* claims. The Court based its holding largely on the unconstitutional conditions doctrine, which prevents the government from coercing people to give up their constitutional rights. Justice Alito reasoned that extortionate demands in the land use context violate the Takings Clause "not because they take property but because they impermissibly burden the right not to have property taken without just compensation."[12] After *Koontz*, neither an actual physical invasion of property nor a condition requiring dedication of real property is required to trigger the "nexus" and "rough proportionality" requirements of *Nollan* and *Dolan.*

The Kagan Dissent | The four-member dissent written by Justice Kagan would have affirmed the Florida Supreme Court's Decision. The dissent highlighted perceived practical difficulties in implementing the majority's decision, warning that the "boundaries of the majority's new rule are uncertain" and the decision "turns a broad array of local land-use regulations into federal constitutional questions."[13] The dissent also argued that a requirement to

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pay money is not a taking because it does not impact specific real estate or a specific property right and that difficulties in distinguishing between exactions and taxes will plague the application of the *Koontz* decision. The majority contented this last charge was exaggerated, and also noted that Florida law circumscribed the District's power to tax.

The dissent further disagreed with the majority regarding the requisite level of concreteness for a government official's statement to constitute an exaction, stating that only an "unequivocal" demand can constitute an exaction under *Nollan* and *Dolan.* It also argued the District's proposals were mere statements during negotiations, thus not sufficiently concrete to constitute an exaction. The dissent cautioned that, after *Koontz*, agencies will be more likely to issue a simple "yes" or "no" permit decision rather than risk a lawsuit for giving an applicant guidance regarding mitigation measures which would make permit approval more likely. The majority declined to address this distinction, as it accepted the trial court's findings that the District's proposed mitigation measures, were in fact, exactions.

Questions Remaining After the Koontz Decision | The U.S. Supreme Court carefully limited its holding in *Koontz* to two questions: whether *Nollan* and *Dolan* apply to monetary exactions and whether they apply to permit denials. Because of this narrow focus, the decision did not address several important issues.

The first unanswered question is whether the District's demands actually violated the "nexus" and "rough proportionality" requirements of *Nollan* and *Dolan*. The Court declined to address the potential nexus between off-site wetlands mitigation and Koontz's development or the proportionality of financing 50 acres of wetlands restoration and enhancement with the impacts of Koontz's project, instead leaving those questions for lower courts on remand.

Second, the Court did not answer whether different standards apply to ad hoc fees and legislatively imposed fees. The California Supreme Court in *Ehrlich v. Culver City*[14] applied to *Nollan* and *Dolan* to monetary exactions but implemented a lesser form of scrutiny for legislatively imposed fees. The *Koontz* dissent notes that it is unclear whether *Koontz* overrules *Ehrlich* to apply heightened scrutiny to a myriad of common-place legislatively imposed fees, including sewer fees and liquor licenses. The majority clarifies that its opinion does not apply *Nollan* and *Dolan* to taxes or user fees, but otherwise leaves open the level of scrutiny to which legislatively imposed fess with now be subject.

Finally, the Court refrained from deciding what remedy would apply, leaving that question to Florida courts to decide based on the Florida statute under which Koontz brought suit. As a result, the *Koontz* decision is unlikely to affect the remedies available for violations of *Nollan* and *Dolan*; it simply applies their protections to more cases. In addition, *Koontz* does not address the question of whether a judge or jury determines the amount of damages for an unconstitutional exaction.

Although it left important questions open, the Court's concern over the potential for government agencies to extort concessions from property owners in the permitting process was noteworthy. Certainly this concern is highlighted in the ad hoc permitting context where a developer is anxious to receive project approval and break ground. It is not apparent, however, that the Court will accept the distinction drawn by the California Supreme Court in *Ehrlich*, and it could apply the *Koontz* protections broadly.

The Implications of *Koontz* for Property Owners | The Court's extension of the *Nollan* and *Dolan* protections to government demands for money and permit denials provides property owners with a new remedy when faced with impermissible government exactions, as well as helping to level the playing field in permit negotiations. These protections are far-reaching, as they will apply to conditions imposed by local, state and federal government entities. Prudent permit applicants should develop a *Koontz* strategy before entering into negotiations over permit conditions and mitigation measures.

Property owners should document offers made by government officials during negotiations, as such offers may give rise to a *Koontz* claim. Permit applications should also be aware, however, that agency personnel may be increasingly hesitant to offer guidance on potential mitigation measures for fear of triggering a *Koontz* claim. Especially when a property owner anticipates repeat interactions with an agency official, developing a productive relationship could prove more beneficial than challenging an exaction.

In addition, external constraints may limit a developer's ability to take advantage of *Koontz*'s added protections. For example, energy generation project developers often contend with incentives for timely construction to meet on-line dates required by contracts or regulations. In such a time-sensitive scenario, the benefit of avoiding lengthy litigation and meeting project completion deadlines may outweigh the costs of paying an unconstitutionally high mitigation fee.

While the procedure for obtaining relief may vary from state to state, property owners should keep in mind several important principles. A property owner may have a right to have an unconstitutional condition removed, be compensated for it, or both. Also, state courts may hear claims for unconstitutional conditions even though they arise under the federal Constitution. A litigant will, however, be required to follow state procedures for state law claims, which could include exhaustion of administrative remedies before proceeding in court.

Although the precise contours of the *Koontz* decisions are not yet know, it provides additional protections for property owners facing unconstitutional exactions from government agencies and is likely to be beneficial in removing such conditions or obtaining compensation for them. •

Answers to Participant Questions from July 11, 2013 *Koontz* Webinar

Webinar participants posed various questions during the presentation that delve deeper into the real-world impacts of the Koontz decision. These questions and answers are listed below.

1. How does this case (*Koontz)* affect assignment of mitigation rations for habitat loss? Can ratios be limited to some threshold ratio?

A: The *Koontz* holding does not affect what constitutes a nexus or rough proportionality under *Nollan* and *Dolan.* With respect to ratios, nothing has changed. What has changed is that there is more clarity regarding the application of the Takings Clause to mitigation fees.

In *Koontz*, the St. John River Water Management District actually had an informal policy, not a regulation, where the District sought a 10:1 ratio. Apparently, the trial court determined that under Florida Law, 10:1 was too much. Around twenty years ago, a government agency might say that 10:1 was proportional because it might have taken 10 acres to re-create one acre of wetland due to the uncertainty about creating a wetland. Today, if a landowner has an expert that can state that mitigation will create wetlands effectively and consistently, or if the landowner is also required to assure the continued success and performance of newly created wetlands, it will be much more difficult for the government to claim that 10:1 ration is roughly proportional. Agencies and project applicants should develop appropriate mitigation ratios based on the best available science.

2. Are the *Nollan/Dolan/Koontz* protections applicable only to discretionary permit determinations or do they also limit a local government's ability to impose generally applicable regulations, particularly economic ones, through the zoning code?

A: The *Koontz* decision probably does not say anything about "community shaping" zoning where the government determines that one area is zoned for a specific type of residential, commercial, or industrial to the exclusion of other uses. However, *Koontz* probably does apply to zoning which is site-specific. Zoning which imposes a uniform fee is likely also covered by *Nollan* and *Dolan.* Many cases already apply *Nollan* and *Dolan* to zoning regulations. The open question after *Koontz* is whether the California Supreme Court's distinction in *Ehrlich* about the level of scrutiny applies.[15] In *Ehrlich*, the California Supreme Court applied greater scrutiny to ad hoc fees as opposed to legislatively imposed fees.

It is unknown whether *Ehrlich* is still good law, as the dissent in *Koontz* notes. A distinction between ad hoc and legislatively imposed fees, however, does not seem justifiable under the wording of the majority opinion. *Koontz*, itself, is a great example. The District's staff had an informal policy of seeking a 10:1 ratio. Would the constitutional principles have differed had this been an actual regulation from the legislation? Probably not. The majority opinion does not distinguish between ad hoc and legislatively imposed regulations.

3. You mentioned that in California, Fifth Amendment property rights claims must be brought in state courts. What case stands for that proposition?

A: In *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, the U.S. Supreme Court said that if a state provides an adequate procedure for seeking just compensation, a land owner cannot claim a violation of the just compensation clause until he has used the procedure and was denied just compensation.[16] As a result, if a land owner files a Fifth Amendment takings claim in federal court, most federal judges will say, "Go to the state court first." Some federal district courts have entertained Fifth Amendment claims upon a showing that the agency took no action and there was no available state court remedy. However, many states have a statute for determining a takings remedy and, therefore, arguably this process must take place in the state court before federal courts will accept a Fifth Amendment *Nollan* and *Dolan* type claim.

More recently, the U.S. Supreme Court reaffirmed the *Williamson County* decision in *San Remo Hotel, L.P. v. City & County of San Francisco.*[17] However, in *San Remo Hotel*, four justices signed onto a concurring opinion questioning the *Williamson County* decision and demonstrating a willingness to review it.

4. If you do not own property, can you still get damages based on the value of the project?

A: To have standing to complain about an exaction, you probably need to be the land owner or a long-term lessee. If you are a long-term lessee, it would nonetheless be a good idea to include the landowner in the lawsuit. The limitations of *Nollan* and *Dolan* arguably should apply also to the use of public property when government actions on government property harm a private party seeking to use or lease government land. The doctrine of unconstitutional conditions should apply when a private party asks to use government land in the context of a permit, and the relevant agency seeks to impose unconstitutional conditions on the requested permit that do not have the requisite nexus or rough proportionality. It is not clear, however, whether the damages would be based solely on the value of the project.

5. The *Koontz* majority opinion ("fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property") indicates that the *Koontz* case is more relevant to ad hoc than legislatively applied fees, where the fee is generally applied. Thoughts?

A: That is a fair reading of the *Koontz* case. The Court left this issue open. It is possible that the next U.S. Supreme Court takings decision, depending on the makeup of the Court, could make a distinction between ad hoc and legislatively applied fees. Certainly, there is some persuasive value in the California Supreme Court's reasoning that the local government's decisions are less likely to be overreaching and excessive where this is a legislatively imposed fee.[18] However we are seeing that some legislatively imposed fees are aimed at certain developers and seek benefits unrelated to the impacts of the development and as a result, creating a strong factual case for the application of *Koontz, Nollan* and *Dolan.*

6. Did the Court explain why it distinguished *Koontz* from *Eastern Enterprises v. Apfel*? (monetary damages are not a taking)

A: It did. The distinction the court made between the *Koontz* decision and *Eastern Enterprises v. Apfel*, 524 U.S. 498 (U.S. 1998)

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was that "unlike the financial obligation in *Eastern Enterprises*, the demand for money at issue here did 'operate upon ... an identified property interest' by directing the owner of a particular piece of property to make a monetary payment."[19] In *Koontz*, unlike *Eastern Enterprises*, the monetary obligation burdened Koontz's ownership of a specific parcel of land. The majority reasoned that, because of the direct link between the government's demand and a specific parcel of real property, *Koontz* implicates the central concern of *Nollan* and *Dolan*: "the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property."[20]

7. How were the damages determined in *Koontz*? Opportunity costs? How are damages normally calculated?

A: In *Koontz*, the Court did not determine what damages were available. When a permit is denied, there is no actual taking; therefore, just compensation for the value of the entire property would not be the remedy. State law will be the primary driver for determining whether and how monetary damages would be computed.

Damages can be determined in many ways. If opportunity cost means low profits (*i.e.*, a land owner could not proceed to build a project because there was a horrible condition on it such that the owner could not afford it even under protest), then yes, a land owner can collect opportunity costs and lost profits for the delay. In *First English Evangelical Lutheran Church v. County of Los Angeles*, the U.S. Supreme Court stated that a land owner can obtain temporary damages for governmental takings.[21] In *First Evangelical*, the U.S. Supreme Court remanded the case to determine what the temporary damages were.[22] However on remand, the California appellate court granted no temporary damages because acquiring a permit takes four or five years even without an unconstitutional exaction.[23] Therefore, a court is unlikely to grant temporary damages unless the lost opportunity was a result of the exaction being unconstitutional and not just due to administrative delay. We do not know how the court in *Koontz* calculated damages but it did seem to factor in opportunity cost.

Developers should be cautious in claiming damages for loss of an entire project when an unconstitutional condition (which violated *Nollan/Dolan/Koontz* standards) has been imposed, because the government could claim that the developer could still have moved forward despite the exaction condition. A land owner probably needs to make a threshold showing that the exaction stopped the development in order to obtain damages for opportunity costs.

8. What effect does *Koontz* have on exaction fees imposed by a legislative body as opposed to by a governmental agency?

A: *Koontz*'s impact on legislatively imposed fees is unclear. The majority does not make much distinction about the difference between a tax and a fee but it does note that Florida state law would have made the District's offer improper even if the demand was a legislatively imposed tax. The majority in *Koontz* says that, practically speaking, it is easy to determine whether the exaction fee is a tax or a taking. In Florida, the determination was based on state law. Likewise, Proposition 26 in California defines a tax as "any levy, charge, or exaction of any kind imposed by the State," except for charges for government ensured services or privileges which do not exceed the reasonable costs of providing the service or privilege. Based on this definition, California courts can readily determine whether a government's action is a tax or a taking.

9. Supposing that government employees will likely be instructed to avoid any types of negotiation offers to avoid *Koontz* type arguments, what can developers do to avoid this effect of the *Koontz* decision?

A: It depends. For developers in need of a quick turnaround time, perhaps being more generous in the initial offer would help. *Koontz* increases the likelihood that government employees will be instructed to not say anything that the permit seeker could construe as a demand and will merely answer permit requests with a "yes" or "no". Increasing the likelihood of an initial favorable response will alleviate the time and effort required to play a guessing game with the agency on re-applications.

Another strategy would be to present multiple proposals so the government can merely accept one of them without requiring the developer to circle back with a counterproposal. That way, the developer can get through the permit process more quickly while the government agency can have options to which it can apply a simple "yes" or "no" answer. The purpose of the proposal, of course, is to obtain a permit and build a project, not initiate a lawsuit.

10. Will *Koontz* apply if the government issues a conditional denial of a permit rather than a conditional approval – *i.e.*, if the agency denies a permit until the landowner complies with certain mitigation measures?

A: Yes, *Koontz* will apply if an agency denies a permit until a landowner accedes to an unconstitutional condition. The majority emphasized that *Koontz* applies *Nollan* and *Dolan* both when the government makes an unconstitutional demand as a condition precedent and as a condition subsequent. Otherwise, an agency could circumvent the *Koontz* ruling by merely changing its wording.

11. If an agency offers a property owner a choice between various potential mitigation measures which would result in permit approval, can the property owner bring a *Koontz* claim if any of the options are unconstitutional exactions?

A: No. The Court discussed this issue in *Koontz* and determined that if the government offers even one alternative which complies with *Nollan* and *Dolan*, the landowner has not been subject to an unconstitutional condition. Consequently, a property owner has a *Koontz* claim only if all conditions or government-proposed mitigation measures are unconstitutional.

End Notes

1. No. 11-1447, 2013 U.S. LEXIS 4918 (June 25, 2013).

2. 483 U.S. 825 (1987).

3. 512 U.S. 374 (1994).

4. U.S. Const. Amend. V.

5. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

6. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

7. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

8. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (holding that the California Coastal Commission's actions conditioning the Nollans' construction permit to replace an existing house with a larger one on a requirement that they dedicate an easement across their property for public beach access was an unconstitutional taking because no nexus existed between the view obstruction caused by the new house and public's ability to access the beach).

9. *Dolan v. City of Tigard*, 512 U.S. 374 (holding that a city planning commission's conditional permit approval constituted an unconstitutional taking when it required a property owner seeking to expand an electric and plumbing supply store to dedicate a 7,000 square foot greenway for flood control and a bike path on her property because such conditions were not roughly proportional to the project's impacts.

10. Fla. Stat. §373.617(2).

11. The District's proposed option that Koontz pay for off-site mitigation was a monetary exaction because it required the payment of money. *Koontz v. St. Johns River Water Management District,* No. 11-1447 2013 U.S. LEXIS at *28, *30-32.

12. *Id*. at 3-4

13. *Id*. at *43 (Kagan, J., dissenting).

14. 12 Cal. 4th 854 (1996).

15. *See id.* at 876.

16. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 194 (U.S. 1985).

17. 545 U.S. 232, 335 (U.S. 2005).

18. *See Ehrlich v. City of Culver City*, 12 Cal. 4th at 876

19. *Koontz v. St. Johns River Water Management District*, No. 11-1447 2013 U.S. LEXIS at *31.

20. *Id.* at *32.

21. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (U.S. 1987).

22. *Id.* at 322.

23. *First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal. App. 3d 1353, 1374 (Cal. Ct. App. 1989).

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