Koontz: The latest chapter in land use permitting and takings

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In a landmark environmental case, the United States Supreme Court expanded the scope of potential governmental liability for takings. In Koontz v. St. Johns River Water Mgmt. Dist, 133 S. Ct. 2586 (2013), the Court held that the “nexus” and “rough proportionality” standards for assessing takings apply when a government entity denies a land use permit and when a government entity imposes a monetary assessment as mitigation for permitted actions.

This alert provides a brief background of the Court’s prior holdings concerning land use permitting, an overview of both the Koontz majority opinion and dissent, and discusses the potential implications of the Koontz decision.

Background

The unconstitutional conditions doctrine prevents the government from coercing people into giving up their constitutional rights. Koontz, 133 S. Ct. at 2594. In the land use permitting context, two leading cases, Nollan and Dolan, set the standard for land-use takings claims. In Nollan v. California Coastal Comm’n, 483 U. S. 825 (1987), the Court held that a “nexus” is required between a legitimate governmental interest and the permit condition imposed. In Dolan v. City of Tigard, 512 U. S. 374 (1994), the Court expanded on Nollan, requiring a “rough” proportionality between the imposed condition and the impact of the proposed project. Following Nollan and Dolan, “the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.” Koontz, 133 S. Ct. at 2595. In Koontz, the Court took an additional step in the takings analysis, extending the Nollan-Dolan standard to apply to permit denials, as opposed to only permit approvals, and to monetary assessments.

The Majority Opinion

In Koontz, a landowner sought a permit to develop a section of his 14.9 acre property; his property was located on wetlands. 133 S. Ct. at 2592. In the application, the landowner offered to deed to the government 11 acres of his property as a conservation easement. Id. at 2592-93. The government demanded the landowner either deed over a larger portion of the property (13.9 acres) or pay for wetland enhancements on government-owned property that was located several miles away. Id. at 2593. The landowner refused, the government denied his application and the landowner filed suit, alleging the government’s demands constituted an unconstitutional taking. Id.

In Koontz, the Court began its analysis by describing the competing realities of permitting. On the one hand, landowners are especially vulnerable to coercion during land-use permitting because the government has broad discretion to deny a permit. Id. at 2594. On
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the other hand, proposed land uses may impose costs on the public that a permitting authority may appropriately mitigate through permit conditions and offsets. Id. at 2495. The Koontz Court acknowledged that the Nollan-Dolan standard addressed these competing realities and found that the standard does not change whether the government approves or denies a permit. Id. at 2595-96. The Court reasoned that it would inappropriate for government to evade the limitation of Nollan-Dolan by imposing preconditions to a permit approval. Id. The Court did not have trouble reaching this conclusion, because it has consistently held in other cases that government cannot require someone to give up a constitutional right in exchange for a government benefit. Id. at 2596.

The Court rejected the argument that the Nollan-Dolan standard does not apply to monetary assessments. The Court held that monetary assessments are subject to the takings clause when there is a direct link between the government’s demand and a specific parcel of real property. Id. at 2600. Consequently, government demands, such as impact fees or payments in lieu of an easement, are subject to the takings clause when those demands are tied to a permitting action for a specific property.

The Dissent

The dissent agreed with the majority opinion that the Nollan-Dolan standard applies when a government approves or denies a permit. Id. at 2603. However, the dissent rejected the proposition that the Nollan-Dolan standard applies to cases where the government conditions a permit on the payment or expenditure of money. Id. at 2603-06. Instead, the dissent argued that the Nollan-Dolan test only applies “when the appropriation of that property, outside of the permitting process, would constitute a taking.” Id. at 2605.

The dissent was troubled by the difficulty distinguishing between some monetary “exactions” and taxes. Id. at 2607. “[O]nce the majority decides that a simple demand to pay money—the sort of thing often viewed as a tax—can count as an impermissible ‘exaction,’ how is anyone to tell the two apart?” Id. The dissent pointed to the majority’s failure to provide guidelines on how to distinguish between a tax and a fee as likely to lead to government agencies and courts being unable to determine what monetary assessments fall under the takings clause. Id. at 2607-08.

Potential Implications

The Court substantially expanded property owners’ rights by increasing the potential bases for a property owner to challenge the validity of a permit. Now, a property owner can challenge a permit, even if the permit was denied. Also, a property owner can now challenge instances where the government conditions a permit on monetary contributions. These new rights will likely lead to an increase in litigation as property owners explore what “roughly proportional” means in regards to monetary contributions.

The decision will also cause permitting jurisdictions to examine closely all potential conditions tied to a permit. In addition, permitting jurisdictions may need to review how impact fees or payments in lieu of mitigation are linked to permitting actions. In short, the Koontz decision will demand heightened scrutiny by permitting authorities, which will likely lengthen the review process for permit applications.

Certain questions remain unanswered by Koontz. The Court did not reach the question of whether a taking actually occurred of Mr. Koontz’s property, and therefore, did not illustrate how such analysis works in practical terms. Instead, the Court limited its holding to the
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concepts that unconstitutional conditions may occur in permit denials and monetary conditions. Uncertainty, therefore, remains on how permitting authorities should determine proportionality in practice for fees and monetary obligations. Agencies may likely choose to request additional information from applicants on this question, placing the burden and cost on applicants for demonstrating proportionality. In addition, the question of a proper remedy for a successful takings claim remains unclear. In a footnote, the court indicated (apparently in passing) that the proper remedy for an unconstitutional condition is to set aside a permit application—an impractical remedy which may impose greater hardship on property owners and set back permitting timelines significantly. These and other issues will need to be addressed in future cases.

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