Takings: Supreme Court Expands Governmental Liability to Property Developers

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One of the most significant environmental cases to come out of the U.S. Supreme Court last session was Koontz v. St. Johns River Water Management District, 570 U.S. ___ (2013), a case which many have characterized as a dramatic expansion of the scope of potential governmental liability for takings under the Fifth Amendment. In Koontz, the Court ruled that a taking occurs at the point at which a permitting authority makes an improper demand for money or property (an “exaction”) under the “proportionality” and “nexus” tests set out in two previous Supreme Court decisions — Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374. The decision impacts both sides in the development process. On the one hand, it encourages development as it constrains governmental authorities from demanding exactions that are not related to or proportionate with a proposed development action. On the other hand, the decision may have a chilling effect on the development process as it discourages the government from granting discretionary permits based on specified conditions. Governmental authorities may find it safer to simply deny discretionary permits rather than to specify conditions that may not withstand scrutiny under a takings analysis. In addition, the procedural status of the holding in Koontz (finding takings liability in the absence of a final governmental decision) may work to deter decision makers from engaging in the “give and take” that is a routine and integral part of the development approval process. The Koontz decision also leaves uncertainty regarding the future of “user impact fees” and other more generalized monetary conditions that are routinely imposed as part of the development approval process. The majority does not draw a clear line between the taxes and user fees that are permissible under the Fifth Amendment and the unconstitutional exactions that will require a payment of just compensation.

Takings Generally – Nollan and Dolan

Governmental interference with a person’s use and control of their property can be a “taking” under the Fifth Amendment’s “Takings Clause”, which requires the governmental entity involved to pay “just compensation” to the injured party. Both the physical taking of property and a taking through “excessive” governmental regulation can require the payment of compensation to a developer under the Fifth Amendment. Takings liability can arise in certain situations where governmental exactions are imposed as conditions of development approval. A line of cases in the Supreme Court seeks to establish when such exactions constitute a taking under the Fifth Amendment.

In Nollan and Dolan, the Supreme Court announced a two-part test for the evaluation of exaction conditions. The Court held that the government may not condition the approval of a land use
permit on the surrender of a portion of property unless the government can show there is both a “nexus” and “rough proportionality” between the governmental exaction and the impact of the proposed land use. The “essential nexus” test announced in Nollan evaluates the nature of an exaction. To avoid being a taking, “an exaction condition on development permission must substantially advance a government purpose that would justify denial of the permit”[1]. In Nollan, a local government approved the development of a beach front parcel on the condition that the property owner dedicate a strip of its property as an easement to allow public access to a nearby park. The Court ruled that the required easement lacked an “essential nexus” to the development proposal because it did not address the visual impact concerns that had been used by the government to justify its regulatory scheme. As a result, the local government issuing the permit was required to provide the landowner with just compensation under the Fifth Amendment in order to obtain the desired easement.

The “rough proportionality” test announced in Dolan evaluates the magnitude of an exaction condition. This test analyzes “whether the degree of the exaction demanded by the city’s permit conditions bears the required relationship to the projected impact” of a proposed development[2]. The Court in Dolan held that, “the burden imposed on the landowner by the exaction condition must be no greater than roughly proportional to the burden that the landowner’s proposed development would impose on the community”[3]. The decision in Dolan placed the burden of proof on the government to show that its proposed exaction was roughly proportional to the impact of the proposed development. Dolan requires the government to make an “individualized determination” of both the scope and impact of a condition of development. In Dolan, the City conditioned approval of a permit to expand a store and parking lot on the dedication of additional land for a bike path. The City reasoned that the bike path would mitigate against impacts from storm water runoff on the lot. The Court ruled the City had failed to establish “rough proportionality” between the condition and the proposed development because there was insufficient evidence to show that a newly dedicated bike path would reduce needed parking areas and show a corresponding decrease in storm water runoff.

The rulings in Nollan and Dolan more narrowly apply the Fifth Amendment takings analysis to situations where a governmental entity demands the conveyance of a real property interest as a condition of development approval. In Koontz, the Supreme Court has expanded the Nollan and Dolan takings analysis to situations where development approval is not granted and to where the governmental exaction is a payment in money.

Koontz Factual Background

In Koontz, a land use applicant sought to develop a 14.9 acre tract of land that bordered on a major traffic thoroughfare and was bisected by both a drainage ditch and high voltage power lines. A major portion of the property at issue was classified as a “wetland” and Florida law required the property owner to obtain wetlands and development permits from the local water management district (the “Water District”). Florida law allows the Water District to impose development conditions as necessary to protect wetlands and water resources. To mitigate against the environmental impacts of his proposal, the property owner offered to provide the Water District with a conservation easement that covered 11 of the 14.9 acres of property. The district found the proposed conservation easement to be inadequate and informed the property
owner it would only approve construction if he agreed to one of two additional concessions. First, the property owner could reduce the scope of his proposed development to 1 acre in size and record a conservation easement against the balance of the property. Alternatively, the property owner could proceed to develop the proposed 3.7 acre footprint if he agreed to hire contractors to make improvements to 50-acres of Water District owned lands located several miles away from the project. From a procedural perspective, the Water District did not issue an approval decision conditioned on specific exactions. Rather, it indicated these conditions or something “equivalent” would be required to obtain development approval.

The landowner found the Water District’s demands to be excessive in light of the impact of its proposed development and filed suit in Florida state court. The state trial court determined that the subject property had already been “seriously degraded” by extensive construction on surrounding parcels. The court determined the Water District’s actions were unlawful under both Nollan and Dolan, finding that the required mitigation measures (additional dedications, payment for offsite improvements) lacked both a “nexus” and “rough proportionality” to the environmental impact of the proposed construction project. The trial court decision was affirmed in an initial appeal but was ultimately reversed by the Florida Supreme Court, which distinguished Nollan and Dolan on two grounds[4]. First, the state’s Supreme Court held that the Water District had merely denied the development application—not granted its approval subject to a specific exaction of property. Second, the Water District demand was for the payment of money not the conveyance of property as in Nollan and Dolan.

US Supreme Court’s Decision

In a 5-4 decision, the U.S. Supreme Court reversed Florida’s highest court and affirmed the decision of the trial court below. In doing so, Justice Alito’s majority decision, answered two fundamental questions left unanswered by Nollan, Dolan and the series of state and lower court cases that had followed. The Court held that denial of a permit based on a failure to meet exactions proscribed by Nollan and Dolan was itself enough to constitute a “taking” of private property. The Court noted that the “unconstitutional conditions doctrine, vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up”[5]. Nollan and Dolan represent a special application of the Fifth Amendment right to just compensation when the government demands property in exchange for a development permit. The majority referenced what it characterized as the “two realities of the permitting process”. First, “land use permit applicants are especially vulnerable to the type of governmental coercion the unconstitutional conditions doctrine prohibits because the government has broad discretion to deny a permit that is worth far more than the property it would like to take”[6]. As a result, government can demand that a property owner give up property for which the Fifth Amendment would otherwise require compensation. The second reality of land use permitting is that proposed developments can inflict monetary impacts on the public that dedications can help to offset. The Court noted that Nollan and Dolan accommodate both situations by allowing “government to condition approval of a permit on the dedication of property to the public as long as there is a ‘nexus’ and ‘rough proportionality’ between the property the government demands and the social costs of the applicant’s proposal”[7]. These precedents enable permitting authorities to require applicants to accept the costs associated with their development while
prohibiting “out-and-out… extortion that would thwart the Fifth Amendment right of compensation”[8].

Denial of the Application

The Court ruled that the “principles that undergird our decisions in Nollan and Dolan do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so”[9]. Any contrary rule would allow the government to evade its constitutional limitations by simply denying a permit until certain conditions are met.

In other words, the Court applied the Nollan/Dolan analysis to the exaction at issue because there was a threat of an exaction as a condition of development — even though no “actual” physical taking of the developer’s property had yet occurred. The Court noted that “extortionate demands” for property violate the takings clause not because they take property but “because they impermissibly burden the right to have property taken without just compensation”[10]. The refusal to cede a constitutional right in the face of coercive pressure was characterized by the majority as a cognizable injury. The court noted that it was well settled that the unconstitutional conditions doctrine applies even where the government threatens to withhold a gratuitous benefit.

The majority noted a distinction between a consummated taking and the denial of a permit based on an “unconstitutionally extortionate demand”. Where a permit is denied and the condition is never imposed— no taking has occurred. While the unconstitutional conditions doctrine recognizes that this burdens a constitutional right, the Fifth Amendment remedy of just compensation does not apply. In cases where there is an excessive demand but no taking, the availability of money damages will turn on the particular federal or state cause of action—an issue that was remanded in Koontz to the Florida state courts for decision.

Monetary Exactions

The second ground for the Florida Supreme Court decision had been because the subject of the exaction was the payment of money rather than a more tangible interest in real property. The U.S. Supreme Court held that the distinction did not matter. It held that monetary exactions imposed as conditions of development approval must also satisfy the nexus and rough proportionality requirements, and that a contrary ruling would make it “very easy for land use permitting officials to evade the limitations of Nollan and Dolan”[11]. Settled law provides that the government need only offer a property owner one exaction alternative that satisfies the requirements of Nollan and Dolan[12]. As a result, a permitting authority wishing to exact a property interest would need only to offer a land use applicant the choice of surrendering the property or making a monetary payment equivalent to its value.

In making this ruling, the Court distinguished its holding in Eastern Enterprises v. Apfel, where it invalidated a statute that had retroactively required a mining company to pay medical benefits to retired employees[13]. A four justice plurality concluded that the retroactive imposition of
financial liability was arbitrary and violated the Takings Clause. Justice Kennedy concurred in the result on due process grounds but joined four other Justices in the dissent, arguing that the Takings Clause does not apply to government imposed financial obligations that do not “operate upon or alter an identified property interest”[14]. The Koontz Court distinguished Eastern Enterprises, noting that the money demand did “operate upon … an identified property interest” by directing the property owner to make a specific monetary payment that was tied to the refurbishment of Water District owned wetlands[15]. The majority characterized the direct link between the proposed governmental exaction and a specific parcel of real property as the “fulcrum” of the case. This direct link “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”[16]. Thus, under Koontz, the Nollan/Dolan takings analysis will be implicated when the government demands the relinquishment of funds that are linked to a specific identifiable property interest.

In reaching its decision, the Court was forced to distinguish the monetary exaction in Koontz from the taxes and user fees that are not deemed to be takings. It has been well established that taxes are not takings[17]. The Court made it clear that the case does not affect the ability of governments to impose property taxes, user fees and similar laws and regulations that may impose financial burdens on property owners[18]. Despite significant criticism from the dissenting Justices, the Court found that “teasing out the difference between taxes and takings is more difficult in theory than in practice”[19]. While the majority provided little guidance to differentiate between an unconstitutional taking and a permissible tax or user fee, the opinion did note that taxes are levied by the legislature and not the courts and any argument that the exactions in Koontz were levied as taxes would be implausible in this case as Florida law greatly circumscribes the power to tax[20]. Florida state law limits user fees so that they cannot exceed the cost for processing, monitoring and inspection to insure compliance with a permit. The Court declined to decide at precisely what point a land use permitting charge denominated by the government as a tax becomes so arbitrary that it was not the exertion of taxation but a confiscation of property. The Court noted that power of taxation should not be confused with the power of eminent domain.

**Dissenting Opinion**

A dissenting opinion authorized by Justice Kagen (joined by Justices Ginsburg, Breyer and Sotomayor) argued that the “heightened scrutiny” of Nollan and Dolan should not be applied when a governmental exaction takes the form of a payment or expenditure of money. Rather, the dissenting justices argued that claims of regulatory governmental takings should be governed by the standards of Penn Central v. New York City[21]. In Penn Central, the Court set out a multi-factor test to balance the governmental need to pass laws and regulations adversely affecting economic values with the longstanding recognition that some regulation goes too far[22]. Under this test, the courts examine the “character” and economic impact of a regulation to determine whether it interferes with “distinct investment-backed expectations”[23]. The decisions in Nollan and Dolan provide an independent layer of protection where the government exacts property that, if taken outside of the land use permitting process, would constitute a taking requiring just
compensation. *Nollan* and *Dolan* preclude the government from demanding property by exaction that it would have an obligation to pay for under the Takings Clause. Accordingly, the dissent stated that the *Nollan-Dolan* test has no application where the governmental demand is merely for the payment of money. The dissent found this result dictated by *Eastern Enterprises* where the Court held that the government may impose ordinary financial obligations without triggering the protections of the Takings Clause[24]. The Takings Clause applies only when the government appropriates a “specific interest in physical or intellectual property” or “a specific, separately identifiable fund of money”[25]. The Takings Clause does not apply when the government imposes an ordinary liability to pay money. In *Koontz*, the order to pay money for the repair of Water District owned wetlands is just such an order. It does not affect a specific and identified property right. This demand, if viewed independent of the permitting process, would not constitute a taking. *Nollan* and *Dolan* restrain governments from using the land use permitting process to do what the Takings Clause would otherwise prevent - taking a specific property interest without just compensation. The cases have no application when governments impose a general financial obligation under the permitting process[26].

Commenting on the procedural nature of the proposed exaction, the Dissenting Opinion found it determinative that Mr. Koontz did not give up anything (including money) as a condition of receiving a permit. Before applying the analysis of *Nollan* and *Dolan*, a court must find that the permit denial occurred because the government made a demand on the landowner which he did not accept[27]. In this case, the Water District never made any formal demand on *Koontz*. Facts show that the Water District only discussed potential exactions in “broad strokes” that were “not in any great detail”[28]. The record indicated that the Water District specifically solicited additional mitigation proposals from Koontz to offset damages to the wetlands. The Water District never made a formal demand or set forth a specific condition of development approval. In contrast, the Water District suggested a number of ways Koontz might alter his application to comply with state law. Koontz’s failure to obtain the required permits did not result from his refusal to comply with a specific demand or condition imposed by the government. Rather, it “arose from the legal deficiencies of his applications, combined with his unwillingness to correct them by any means”[29]. The dissent saw no unconstitutional condition imposed on Koontz and no basis for applying a takings analysis.

**Conclusion**

Builders, developers and property rights advocates have quickly heralded the *Koontz* decision as a major victory that will, “even the playing field” between development interests and governmental regulators. While permitting authorities can no longer evade the takings analysis and compensation obligation of the Fifth Amendment by simply denying a permit or imposing monetary exactions, the *Koontz* decision will likely have a mixed impact on the development process. The decision will slow the pace of the land use entitlement process as governmental planners and their lawyers will be careful not to reference or impose development conditions without a thorough analysis of a development project and its likely impacts on public infrastructure. This is certain to have a “chilling effect” on the informal communications that routinely occur between developers and regulators. At the same time, it provides developers with an opportunity to independently evaluate the impact of their proposed project and to approach decision makers with suggested mitigation measures through private development agreements.
The *Koontz* Court provided little guidance in evaluating the constitutional line between permissible taxes/user fees and impermissible exactions. The questions left unanswered in *Koontz* provide a powerful incentive for mutual cooperation in the permitting process.

For more information, please contact Myles Conway in the firm’s Bend, Oregon office or any other member of Marten Law’s Property Development group.

[1] Nollan, 483 U.S. at 837


[3] Id.


[5] *Koontz* 570 U.S. at ____

[6] *Koontz* 570 U.S. at ____

[7] *Koontz* at p.8

[8] *Koontz* 570 U.S. at ____ siting *Nollan* and *Dolan*

[9] Id.

[10] Id.


[12] Id.


[14] Eastern Enterprises 524 U.S. at 540

[15] 570 U.S. at ____

[16] Id.


[18] *Koontz* 570 U.S. at ____

[19] Id.


[26] Koontz 570 U.S. at ____

[27] Id.

[28] Id.

[29] Id.