

Resources

U.S. Supreme Court Significantly Expands Landowner Rights in Regulatory Takings Cases by Clarifying and Expanding “Nexus” and “Rough Proportionality” Standards of *Nollan* and *Dolan* Decisions

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Somewhat lost amid the United States Supreme Court’s recent high-profile decisions on affirmative action, voting rights and same-sex marriage, was the Court’s decision in *Koontz v. St. Johns River Water Management District*, 570 U.S. ____; 133 S. CT. 2586 (2013). Though this decision received less publicity, the impact of *Koontz* should not be underestimated. At a minimum, this decision will increase the burden on local governments to justify each condition imposed by it as part of the land-use permit process and create new avenues for regulatory takings claims by property owners against state and local governments.

On June 25, 2013, the Supreme Court held that the *Nollan* and *Dolan* standards (which govern the constitutionality of conditions imposed on the issuance of land-use permits) apply: (1) regardless of whether a governmental body denies a permit application because of the landowner’s unwillingness to agree to requirements imposed as a condition of permit issuance or approves an application subject to conditions that then must be satisfied by the landowner to develop its property; and (2) when the government demands a payment of money as opposed to the historically more common demand that the landowner place a specific burden (e.g. an easement or public dedication) on property interests.

In *Koontz*, Coy Koontz, Sr., a real estate developer, applied for permits from a local Water Management District (the “District”) to develop his property, a portion of which were protected wetlands. Under Florida law, permit applicants wishing to build on wetlands are required to offset the resulting environmental damage caused by the development by taking mitigating measures. The District rejected Koontz’s first proposed mitigating measure (whereby Koontz offered to deed to the District a conservation easement over nearly three-quarters of his property) and informed him that it would approve construction only if he agreed to one of two conditions; one being a significant reduction in the size of the proposed development and granting of a conservation easement over the remainder of the property and the second requiring a smaller easement together with the hiring of contractors to perform improvements on off-site wetlands. Believing the District’s demands to be excessive in light of the environmental effects of the proposed development, Koontz filed suit in state court.

The *Koontz* opinion begins by highlighting the significance of the Court’s prior decisions in *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), where the Court held “that a unit of government may not condition the approval of a land-use permit on the owner’s relinquishment of a portion of his property unless there is a ‘nexus’ and ‘rough proportionality’ between the government’s demand and the effects of the proposed land use.” In this case, the District attempted to circumvent the requirements of *Nollan* and *Dolan* by suggesting to Koontz (before rendering a decision on Koontz’s application) that it would approve his application if he reduced the size of the proposed development and granted the District a conservation easement or paid for the off-site wetland improvements. The District argued that, by suggesting the mitigating measures to Koontz before making a decision on his application (as opposed to approving the application subject to conditions) the requirements of *Nollan-Dolan* were inapplicable. The Court rejected this semantic argument, holding 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.”

Prior to *Koontz*, states were divided as to whether a demand for money (e.g. the District’s demand for off-site wetland improvements) could give rise to a claim under *Nollan-Dolan*. The *Koontz* decision clarifies this issue, holding that “monetary exactions must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.”

The “nexus” and “rough proportionality” standards were delineated by the Supreme Court to address two undeniable realities of the permitting process. The first reality is that land-use permit applicants are vulnerable to coercion and extortion from governmental bodies with broad discretion to approve or deny permit applications. The second reality is that many

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proposed land uses present potentially negative environmental consequences and costs that can and should be mitigated by the permit applicant. Although it is impossible to predict the full impact that *Koontz* will have on the land-use permitting process, it can be safely assumed that the Court’s decision will give governmental bodies reason for pause before issuing decisions on land-use permits, and provide real estate developers with compelling legal authority to support claims of regulatory taking and to defend against government overreach during the all-important permit pre-application and discussion stage.

For more information, please contact the author of this alert, **Michael R. Vogt**, at 248-203-0739 or mvogt@dykema.com, any of the Real Estate attorneys listed to the left or your Dykema relationship attorney.

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