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# A Heightened Standard for Land Use Permits Redefines the Power Balance Between the Government and Landowners

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# COMMENTS

## A HEIGHTENED STANDARD FOR LAND USE PERMITS REDEFINES THE POWER BALANCE BETWEEN THE GOVERNMENT AND LANDOWNERS

Michael Farrell

### I. Introduction

Coy Koontz Sr. wanted to build a small shopping center on a 3.7-acre portion of a 14.9-acre tract he purchased in 1972.<sup>1</sup> In an effort to do so he applied for Wetlands Resource Management permits from the St. John's River Water Management District because his parcel of land had been deemed a wetland by the state of Florida.<sup>2</sup> To obtain the permits, Koontz had to mitigate the environmental effects of the development, so he offered to grant the district an 11-acre conservation easement.<sup>3</sup> The district responded that the easement was inadequate so it presented two options for Koontz to choose from in order to satisfy the district's goal of mitigating development effects.<sup>4</sup> Koontz could either reduce his planned development from 3.7-acres to one acre and create a conservation easement for the other 13.9 acres or, he could develop the 3.7 acre portion as he planned if he paid for improvements to 50 acres of district owned wetlands several miles away.<sup>5</sup>

Koontz believed that these options were an extreme form of mitigation.<sup>6</sup> The district's denial of his permits without his submission to these excessive demands prevented him from developing his land.<sup>7</sup> This substantially decreased its value, which constituted a taking by the government without just compensation, under the fifth amend-

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1. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591-92 (2013); John D. Echeverria, *A Legal Blow to Substantial Development*, N.Y. TIMES (June 26, 2013), <http://www.nytimes.com/2013/06/27/opinion/a-legal-blow-to-sustainabledevelopment.html>.

2. *Koontz*, 133 S. Ct. at 2592.

3. *See id.* at 2592-93.

4. *See id.* at 2593.

5. *Id.* (stating that Koontz was asked to hire contractors to make improvements to district owned land).

6. *See id.*

7. *See id.*

ment of the U.S. Constitution.<sup>8</sup> Consequently, Koontz sued the water management district asserting that the demands forced Koontz to give up his right to develop his property without providing just compensation.<sup>9</sup> The Supreme Court ruled in favor of Koontz stating that the money demanded for the improvement of state owned wetlands to approve Koontz's land use permit must have an essential nexus between the money demanded and the regulatory purpose furthered, while also having a rough proportionality to the harm that is caused by Koontz's proposed land use.<sup>10</sup>

This holding will affect any section of government that regulates land as well as property owners seeking to exercise their property rights.<sup>11</sup> It will affect how the government and property owners will negotiate and the mitigating measures used in order to grant or receive land use permits.<sup>12</sup> Furthermore, it will change how the government raises funds necessary for infrastructure improvements as a consequence of land development, it will affect its power to regulate land, and above all, it will increase litigation over property rights.<sup>13</sup>

## II. Background

### A. *The Evolution of a Taking*

The holding in *Koontz* is an extension of the Takings Clause in the Fifth Amendment.<sup>14</sup> The Takings Clause in the Fifth Amendment states that private property cannot be taken for the purpose of public use without fairly compensating the owner.<sup>15</sup> A taking is defined by the Supreme Court as a direct appropriation or a physical invasion of private property.<sup>16</sup> The Supreme Court expounded on this idea in saying that a regulatory action could be a taking.<sup>17</sup> Specifically, a taking could occur where the government requires an owner to suffer a permanent physical invasion of his property or if regulations completely deprive the property owner of the economic benefits of the property.<sup>18</sup> Furthermore, the government cannot condition a benefit

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8. *See id.*

9. *See id.* at 2593-94.

10. *Id.* at 2600.

11. *See* Tejinder Singh, *Opinion Recap: Broadening Property Owners' Right to Sue*, SCOTUSBLOG (April 1, 2014, 2:53 PM), <http://www.scotusblog.com/?p=166657>.

12. *See* discussion and accompanying notes *infra* Part II.

13. *See* discussion and accompanying notes *infra* Part II.

14. U.S. CONST. amend. V. *See Koontz*, 133 S. Ct. at 2594.

15. U.S. CONST. amend. V.

16. *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 537 (2005) (citing *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951)).

17. *See Lingle*, 544 U.S. at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1014 (1992)).

18. *Id.*

on the surrender of a constitutional right.<sup>19</sup> Building on this principle, the Supreme Court found that it violates the takings clause for the government to demand a property right, like an easement, in exchange for approval of a land use permit application, where the approval is supposed to denote just compensation.<sup>20</sup> While the government may not take a property right without compensation, it can nonetheless demand measures like conservation easements because it has an interest in regulating property within its jurisdiction.<sup>21</sup>

### B. *The Nollan and Dolan Precedents*

In order to allow the government to regulate property, exclusive of the regulation becoming a taking without just compensation, the Supreme Court crafted two tests to apply to land use regulations in order to prevent such regulations from becoming takings.<sup>22</sup> In *Nollan*, the Court required that the government demonstrate that a nexus exist between the condition sought and the regulatory purpose that the condition serves.<sup>23</sup> The homeowners in *Nollan* wanted to renovate their beachfront property and the state conditioned the approval of the building permits on the homeowners granting an easement to the state allowing the public access to two other public beaches.<sup>24</sup> The Court found that there was no connection between obtaining an easement to be used as a right of way by the public and restricting the homeowners from building<sup>25</sup> because the purpose of the restriction was to prohibit any structures from blocking the public's view of the coast, not affording a right of way to public beaches.<sup>26</sup>

Seven years later the court fashioned a companion test to the essential nexus test of *Nollan* in *Dolan*.<sup>27</sup> The companion test states that there must exist a rough proportionality between the harm caused by the new land use sought and the benefit obtained by the government's requisite condition.<sup>28</sup> In *Dolan*, the property owner had applied for redevelopment permits to double the size of the hardware store on her property.<sup>29</sup> The city conditioned approval of the permits on the property owner's agreement to dedicate an easement for a "greenway" which could be either a bike path or pedestrian walkway.<sup>30</sup>

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19. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

20. *See Lingle*, 544 U.S. at 547 (citing *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)).

21. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841 (1987).

22. *See Dolan v. City of Tigard*, 512 U.S. 374, 398 (1994); *Nollan*, 483 U.S. at 841.

23. *Nollan*, 483 U.S. at 841.

24. *Id.* at 828.

25. *Id.* at 837.

26. *Id.* at 828-29.

27. *See Dolan*, 512 U.S. at 398.

28. *Id.*

29. *Id.* at 379.

30. *Id.*

The court found that the condition to have a “greenway” was meant to increase drainage of a 100-year flood plain on which the hardware store was built, but forcing the property owner to grant an easement for a bike path did not counteract the effects of increased water-impervious surfaces from the development.<sup>31</sup> Thus, there was no rough proportionality between the purpose of the condition placed on the property owner and the harm caused by her development.<sup>32</sup> With this, the Court established that both the “essential nexus” and “rough proportionality” tests need to be overcome for it to be constitutional to place a condition on the approval of a land use permit.<sup>33</sup> Subsequently, the decision in *Koontz* now imposes these tests on money demanded from a land use permit applicant in order to grant approval.<sup>34</sup>

### III. Analysis

#### A. *Affect of the Holding on Negotiations for Land Use Permits*

Will the display of *Koontz* rejecting the water management district’s demands signal to other property owners that they are better off not negotiating with the government on land use permits?<sup>35</sup> From *Koontz*, landowners can easily infer that if they think that the government’s demands are excessive they can refuse to negotiate and sue instead.<sup>36</sup> Landowners will have this incentive to sue because of the burden that the government will have to comply with under *Nollan* and *Dolan*.<sup>37</sup> Furthermore, landowners are now incentivized to only offer the easiest and cheapest mitigation condition and if this is not accepted then the landowner will feel empowered to sue.<sup>38</sup> Even the mere proposal of a condition that does not meet the standards set forth in *Nollan* and *Dolan* may trigger litigation.<sup>39</sup> In response to the likelihood of increased suits by landowners, government agencies are likely to reject land use applications outright in an effort to protect themselves from

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31. *Id.* at 403-04.

32. *See id.*

33. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591 (2013).

34. *See id.* at 2603.

35. *See id.* at 2599.

36. George Speir, *Will Koontz Mean Big Changes or Business as Usual for Real Estate Development in California*, 24 MILLER & STARR, REAL ESTATE 1, 1 (2013).

37. *See id.*

38. *Supreme Court Expands Takings Test*, AM. PLAN. ASS’N NEWS RELEASE (APA) June 25, 2013, <http://www.planning.org/newsreleases/2013/jun25.htm>.

39. Deborah M. Rosenthal, *The Supreme Court Gets it Right on Takings – And Wrong – A View from “Inside the Curtillage”: The Property Owner’s Perspective*, THE NAT’L LAW REVIEW (July 11, 2013), <http://www.natlawreview.com/article/supreme-court-gets-it-right-takings-and-wrong-view-inside-curtillage-property-owner-s>.

costly litigation.<sup>40</sup> The landowner's incentive to resist demands and to sue to invalidate the demands, coupled with the government's incentive to deny applications for land use permits outright in order to preclude lawsuits, will result in fewer land use permit negotiations.<sup>41</sup> This lack of negotiations could result in the harmful effects of property developments going unmitigated, or a total stagnation in land development.<sup>42</sup>

Conversely, does the ruling in *Koontz* expanding the tests in *Nollan* and *Dolan* to monetary exactions have a positive impact on the land use permit process?<sup>43</sup> A landowner who cannot accommodate granting an easement is likely to see that an exaction will work better for him and thus will have an incentive to negotiate with the government.<sup>44</sup> Moreover, because of the heightened standard that government conditions on land use permits must meet, landowners could use this as leverage to force the government to the negotiating table to secure conditions that are more amenable to their purposes.<sup>45</sup> Although there is a possibility that *Koontz* will lead to more negotiations, this seems unlikely given the reaction the case has received regarding the end of negotiation.<sup>46</sup> Overall, as a result of *Koontz* there appears to be more incentives not to negotiate the approval of land use permits for both landowners and the government.<sup>47</sup>

### B. Permit Process Impacts on Communities

As a way of offsetting increased development and to preserve wetlands, many communities attach fees to land use permits in order to finance preservation efforts.<sup>48</sup> However, these fees are now subject to the standards in *Nollan* and *Dolan*, which will make it harder for communities to raise money needed for preservation efforts to offset the impacts of proposed developments.<sup>49</sup> The burden placed on the ex-

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40. John Echeverria, *A Legal Blow to Substantial Development*, N.Y. TIMES, June 26, 2013, [http://www.nytimes.com/2013/06/27/opinion/a-legal-blow-to-sustainable-development.html?\\_r=0](http://www.nytimes.com/2013/06/27/opinion/a-legal-blow-to-sustainable-development.html?_r=0); Rosenthal, *supra* note 39.

41. *See supra* notes 36-40.

42. *Id.*

43. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013).

44. *But see* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 202 (2006).

45. *See*, Lowell M. Rothschild & Matthew A. Haynie, *Supreme Court Further Opens the Door to Wetlands Taking Claims*, THE NAT'L LAW REVIEW (June 26, 2013), <http://www.natlawreview.com/article/supreme-court-further-opens-door-to-wetlands-taking-claims>.

46. Echeverria, *supra* note 40 (quoting reaction by Justice Kagan stating that the ruling would cause a revolution).

47. *See* discussion *supra* Part III.A.

48. *See* Echeverria, *supra* note 40.

49. *See id.*

actions will prevent developers and landowners from internalizing the negative consequences of the proposed land use.<sup>50</sup>

The positive externality that will come from *Koontz* is that the standards that the government will have to comply with will require governments to incorporate better guidelines for decision making regarding land use policies.<sup>51</sup> This will allow creative solutions for developments when it comes to environmental mitigation.<sup>52</sup> Thus, there are both positive and negative effects that come from applying the *Nollan* and *Dolan* standards in *Koontz* to money exactions.<sup>53</sup>

### C. *The Effect on Government Exactions on Developers*

Previously, the government received exactions from developers in the form of easements or dedications of land.<sup>54</sup> Now governments can use demands for funds related to a land use permit as a way to raise capital if they comply with the *Nollan* and *Dolan* tests.<sup>55</sup> This shifts the burden of supporting the government's revenue stream from the taxpayer to the developer.<sup>56</sup> The benefit of having the monetary burden placed on developers is that this is more in line with the public's desire for developers to pay for the added improvements in infrastructure their developments will require.<sup>57</sup> Conversely, this increase in exactions would be bad for developers, as they would bear the brunt of government infrastructure costs instead of the taxpayers.<sup>58</sup>

With such a large amount of money to be gained by exactions from land use permits, government officials will use these exactions to extort concessions from developers,<sup>59</sup> and those developers will have no choice but to acquiesce to them.<sup>60</sup> However, developers and landowners still play a role in the political process and they have legal and political recourse in order to combat extortion and the unfair tax burden that would be imposed on them.<sup>61</sup> The ruling in *Koontz* gives

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50. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013).

51. Ali Paradis, Alfonso Dulcey, Brooks Kaufman, *Koontz v. St. Johns River Water Management District Appealed from the Florida Supreme Court Oral Argument: Jan. 15, 2013*, FED. LAW., April 2013, at 80.

52. *See id.*

53. *See id.*

54. Steven J. Eagle, *A Prospective Look at Property Rights and Environmental Regulation*, 20 GEO. MASON L. REV. 725, 764 (2013).

55. *Id.* at 765-766.

56. *See* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 180 & 202 (2006).

57. *Id.* at 180.

58. *Id.* at 182.

59. Ali Paradis, Alfonso Dulcey, Brooks Kaufman, *Koontz v. St. Johns River Water Management District Appealed from the Florida Supreme Court Oral Argument: Jan. 15, 2013*, FED. LAW., April 2013, at 80.

60. *See id.*

61. *But see id.*

developers tools to fight the extortion of holding up approval of their land use permits by the government for impermissible motives.<sup>62</sup> Accordingly, applying the tests in *Nollan* and *Dolan* gives developers the power to fight revenue burdens while allowing the government to further the public interest by forcing developers to pay for the required infrastructure expansion.<sup>63</sup>

#### D. *Effects of the Rule in Koontz on the Power of the Government*

By adding the tests under *Nollan* and *Dolan*, the Supreme Court has placed a higher burden on the government to comply with these standards in construing its exactions for land use permits.<sup>64</sup> This mandate accords the government very little deference in making land use regulatory policy, thereby superficially decreasing the government's power.<sup>65</sup> Additionally, the rules in *Nollan* and *Dolan* applied in *Koontz* make it more difficult for the government to defend a taking attack on one of its exactions because the government must supply qualitative support showing both "rough proportionality" and "essential nexus."<sup>66</sup> This has the effect of decreasing the government's power to exert its authority through requiring exactions.<sup>67</sup>

On the other hand, state governments have been using fees in place of exactions for some time, making the compliance with *Koontz* merely perfunctory and having no substantial impact on the power the government wields.<sup>68</sup> Furthermore, the rationale of *Koontz* bolsters the government's authority even when the court would find a violation of the *Nollan* and *Dolan* standard.<sup>69</sup> If the government was to offer an

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62. See Supreme Court Decision in *Koontz v. St. Johns River Water Management District*, NAT'L ASS'N OF HOME BUILDERS, <http://www.nahb.org/generic.aspx?genericContentID=211111> (last visited Sept. 10, 2013).

63. Michael T. Kersten, *Exactions, Severability, and Takings: When Courts Should Sever Unconstitutional Conditions from Development Permits*, 27 B.C. ENVTL. AFF. L. REV. 279, 286 (2000).

64. See John Echeverria, *A Legal Blow to Substantial Development*, N.Y. TIMES (June 26, 2013), [http://www.nytimes.com/2013/06/27/opinion/a-legal-blow-to-sustainable-development.html?\\_r=0](http://www.nytimes.com/2013/06/27/opinion/a-legal-blow-to-sustainable-development.html?_r=0).

65. See *id.*

66. Deborah M. Rosenthal, *The Supreme Court Gets it Right on Takings – And Wrong – A View from “Inside the Curtillage”*: *The Property Owner's Perspective*, THE NAT'L LAW REVIEW (July 11, 2013), <http://www.natlawreview.com/article/supreme-court-gets-it-right-takings-and-wrong-view-inside-curtillage-property-owner-s>.

67. See *supra* notes 62-64 and accompanying text.

68. But see Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 199 (2006) (defining in-lieu of fees as a prerequisite cash payment that was not a fee required by submitting a land use permit); Deborah M. Rosenthal, *The Supreme Court Gets it Right on Takings – And Wrong – A View from “Inside the Curtillage”*: *The Property Owner's Perspective*, THE NAT'L LAW REVIEW (July 11, 2013), <http://www.natlawreview.com/article/supreme-court-gets-it-right-takings-and-wrong-view-inside-curtillage-property-owner-s>.

69. See Deborah M. Rosenthal, *supra* note 66.

option that did not comply with *Nollan* and *Dolan* and the landowner rejected that option, he would have neither conveyed property nor money.<sup>70</sup> Since there is no transfer of property, there is no taking.<sup>71</sup> At this point in the litigation the excessive demand, in most cases, would not go into effect and thus the compensation afforded to the landowner if he should prevail is limited to a temporary taking rather than one that is permanent.<sup>72</sup> This effectively increases the government's power in regulating land use permits since the damages for losses in litigation would often be reduced.<sup>73</sup> However, despite the reductions in possible damages awards to property owners, there is an overall decrease in the government's power based on the standards enlaced by *Koontz*.<sup>74</sup>

#### IV. Conclusion

The decision by the Supreme Court in *Koontz* launches a new era in the land use-permitting arena. Negotiations between landowners and the government are impacted by both positive and negative incentives to negotiate.<sup>75</sup> However, the negatives outweigh the positives making landowners less likely to negotiate.<sup>76</sup> The effects of the application of the stricter standard of *Nollan* and *Dolan* may lead to negative environmental effects while improving the land use permitting process.<sup>77</sup> As a consequence of this higher standard, landowners may have a tool to fight excessive exactions while governments will try to continue to raise capital to fund increased infrastructure due to land development.<sup>78</sup> In this new battleground between landowners and the government, the Court has reduced the power of government to regulate the landowners' activities by adding a more burdensome standard.<sup>79</sup> With the lack of incentives surrounding negotiations, the loss of environmental mitigation measures, the new weapon that landowners possess in fighting exactions, and the reduced power of the government to regulate land use, the prospect for increased litigation in land use permitting is evident.<sup>80</sup>

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70. *Id.*

71. *Id.*

72. *Id.*

73. *See id.*

74. *Id.*

75. *See supra* Part III.A.

76. *See id.*

77. *See supra* Part III.B.

78. *See supra* Part III.C.

79. *See supra* Part III.C-D.

80. *See supra* Part III.D.