

LEGAL AND REGULATORY NOTES U.S. Supreme Court “Settles” Takings Case

The power of the lawyer is in the uncertainty of the law. – Jeremy Bentham

As the final arbiter of legal questions in the country, the U.S. Supreme Court is expected to resolve uncertainty in the rules governing our lives. Even when the questions raised by the cases and controversies are answered, uncertainty in how those answers will be interpreted in the real world persist and breed anxiety.

The facts of this case date back to 1972 when Coy A. Koontz purchased 14.9 acres of land in Orlando, Florida. Later that same year, the State of Florida enacted a regulatory regime placing Mr. Koontz’s property under the permitting authority of the St. Johns River Water Management District (District), one of five water districts in the state with jurisdiction for ensuring compliance with Florida’s Water Resources Act and in 1984 the Warren S. Henderson Wetlands Protection Act. Fast forward to 1994 when Mr. Koontz sought permission to develop 3.7 acres of his property. His application called for elevating a portion of his land to construct a building, erecting a dry-bed pond to manage stormwater runoff from the development, and deeding an 11-acre conservation easement to the District to preclude any future development on the parcel. The District responded with two counterproposals: (1) reduce the size of the area to be developed to one acre and deed the District a conservation easement on the remaining 13.9 acres; or (2) move forward with his proposed development (develop 3.7 acres and conserve 11) so long as he also funded about 50 acres of offsite mitigation work of District-owned wetlands.

Unwilling to accept either proposal, Mr. Koontz filed suit in state court against the District, claiming that its “exaction” violated the Fifth Amendment to the U.S. Constitution which

states, in relevant part, that “... nor shall private property be taken for public use, without just compensation.” This section of the Fifth Amendment, referred to as the “Takings Clause,” has been interpreted to mean that government must compensate a landowner when a government regulation is so unduly restrictive that it prevents a landowner from enjoying his or her property. After the case worked its way up, down, and up again through the Florida court system, that state’s Supreme Court ultimately ruled in favor of the District. Because this decision relied upon an interpretation of federal constitutional law, Mr. Koontz was able to appeal to the U.S. Supreme Court (Court).

When evaluating whether land-use exactions – that is, when “government demands that a landowner dedicate an easement’ or surrender a piece of real property ‘as a condition of obtaining a development permit’” – qualify as unconstitutional takings warranting compensation, the Court applies what has become known as the Nollan-Dolan standard. Nollan and Dolan were the names of two cases decided by the U. S. Supreme Court – the first, *Nollan v. California Coastal Commission*, 483 U.S. 825, decided in 1987 and the second, *Dolan v. City of Tigard*, 512 U.S. 374, decided in 1994. Together, these cases stand for the proposition that a governmental exaction of an interest in property as a condition of the permitting process will not constitute a taking so long as there is a “nexus” and “rough proportionality” between the interest demanded and the impact of the proposed development. With this analytical background in mind, the two questions brought before the Court to resolve were:

1. Do Nollan-Dolan requirements apply when a permit is denied?
2. Do Nollan-Dolan requirements apply when the demand is for money and not an interest in property?

The Court's answers to these questions were succinctly summarized at the end of its opinion: "We hold that the government's demand for property from a land-use permit applicant must satisfy the requirements of Nollan and Dolan *even when the government denies the permit and even when its demand is for money.*" (Emphasis added.) The impact of these answers is open to debate.

The District tried to keep the Court from even reaching the first question, arguing that a Nollan-Dolan analysis is unnecessary because the District had provided Mr. Koontz with an alternative for permit approval. Nollan-Dolan precedent demands that so long as a permitting authority offers at least one alternative to off-site mitigation, a landowner hasn't been subject to an unconstitutional taking. The only problem with the District's argument was that Mr. Koontz wasn't offered an alternative to off-site mitigation for his proposed development of 3.7 acres of land. He was offered an alternative to off-site mitigation for developing one acre of land and then precluded from developing on the other 2.7 acres unless he agreed to a monetary exaction to fund offsite mitigation on District lands. The District's proposed alternative, therefore, wasn't a true apples-to-apples alternative, but rather an entirely different proposal from that put forth by Mr. Koontz. Undeterred, both the majority and minority agreed that the Nollan-Dolan standard is to be applied even when a permit is denied, thereby allowing a landowner to challenge the denial of a permit on the grounds that the government's unconstitutional conditions lacks the requisite "nexus" and "rough proportionality" to address the development's impact. At first glance, this decision leads to the absurd result of compensation being awarded when no "taking" of property has actually occurred. The Court, however, never held that Mr. Koontz was due constitutional compensation for a taking. Because the permit was denied, no taking occurred and, consequently, no entitlement to compensation was due under the Constitution. It did rule, though, that he may be entitled to a monetary remedy under state law, but that was a question it left for the Florida courts to decide on remand. (Florida law permits landowners to recover monetary damages in response to "an

unreasonable exercise of the state's police power constituting a taking without just compensation." Fla. Stat. § 373.617(2))

The uncertainty generated by this case mostly surrounds the Court's answer to the second question. Here, the Court split. The majority opinion (written by Justice Alito and joined by Chief Justice Roberts and Justices Scalia, Thomas, and Kennedy) held that "so-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements of Nollan and Dolan." If the exactions meet this standard, then they are permissible. If not, then some compensation must be afforded the landowner.

The dissent (written by Justice Kagan and joined by Justices Ginsburg, Breyer, and Sotomayor) disagreed, echoing the District's position that the Takings Clause has "no bearing when the government imposes 'an ordinary liability to pay money.'" *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1988). The majority's counter to this argument was that both the District and the minority interpret *Eastern Enterprises* too broadly; it does not stand for the proposition that the Takings Clause can never apply to government imposed financial obligations, but rather that it can't apply when those monetary exactions "[d]o not operate upon or alter an identified *property interest*." (Emphasis added.) The majority goes on to distinguish its prior holding in *Eastern Enterprises* from the present case on the grounds that the demand for payment in *Eastern Enterprises* was for medical benefits, while those in *Koontz* were directly tied to the applicant's land. "In this case, unlike *Eastern Enterprises*, the monetary obligation burdened petitioner's ownership of a specific parcel of land. ... The fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property. Because of that direct link, this case implicates the central concern of Nollan and Dolan" – the coercive power of government.

Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.

Turning to the practical implications of this case, the minority characterized the reach of the Court's "new rule" as "uncertain" and forewarned that "it threatens to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny." The majority downplayed the predicted dire consequences wrought upon the use of monetary exactions in the permitting world by its decision. "Finally, we disagree with the dissent's forecast that our decision will work a revolution in land use law by depriving local governments of the ability to charge reasonable permitting fees ... state law normally provides an independent check on excessive land use permitting fees." In Vermont, that law can be found in 24 V.S.A. §§ 5200, et. seq. governing the imposition of impact fees.

Wise as they may be, the Supreme Court justices are not soothsayers. There is no magical crystal ball under armed guard in its hallowed halls. Not only can they not predict the future consequences of their own decisions, but sometimes they even disagree internally as to the practical effects of how their decisions will play out outside their doors in communities like ours around the country. Only time will tell whether the majority's opinion will sufficiently assuage the uncertainty in the country surrounding this case, though it seems the impact of this decision will be mitigated in Vermont more so than in other states like Florida. Until that time, that old adage from Bentham will probably ring true, "(t)he power of the lawyer is in the uncertainty of the law."

The *Koontz* decision is posted online at www.supremecourt.gov/opinions/12pdf/11-1447_4e46.pdf

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