Supreme Court Takings Decisions: *Koontz v. St. Johns Water River Management District*

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Introduction

Last summer, the Supreme Court decided three cases centered on takings issues. Of the three, *Koontz v. St. Johns Water River Management District*[1] is widely regarded as the decision that will have the most impact, on both future takings cases and property rights in general. *Koontz* held 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."[2] Part I explains the framework of the takings decisions into which *Koontz* fits. Part II explores the major issues addressed by the court in *Koontz*. Possible future implications of the law are examined in Part III.

I. *History*

Koontz relies heavily on two previous Supreme Court takings decisions, *Nollan v. California Coastal Commission*[3] and *Dolan v. City of Tigard*.[4] Together the rulings have created the "Nollan/Dolan Rule," which stipulates that there must be both an "essential nexus" and a "rough proportionality" present in government decisions concerning land development or a taking occurs.

A. Nollan *and the "Essential Nexus" Rule*

The Nollan's owned a beachfront lot in California, situated between two public beach areas.[5] They applied for a coastal development permit, which the California Coastal Commission granted upon the condition that they agree to an easement on the beachfront right below the

[1] 133 S. Ct. 2586 (2013).
[2] *Id*. at 2603.
[3] 483 U.S. 825 (1987).
[4] 512 U.S. 374 (1994).
[5] 483 U.S. 827.

seawall on their property.[6] The Nollan's challenged the condition of the permit to the Ventura County Superior Court, arguing "that the condition could not be imposed absent evidence that their proposed development would have a direct adverse impact on public access to the beach."[7] The court agreed with the Nollan's and remanded the case back to the Commission, which held a public hearing and reaffirmed its findings.[8]

The Nollan's again brought the case to the Superior Court, arguing "that the imposition of the access condition constituted a violation of the takings clause."[9] The California Superior Court agreed,[10] but the Court of Appeals reversed, saying that the takings claim failed because the easement did not deprive them of "all reasonable use of their property."[11] The Nollan's took the case to the U.S. Supreme Court on the constitutional takings question.[12]

The Court affirmed that the right to exclude others from property held for private use is one of our most essential rights.[13] When "government action results in '[a] permanent physical occupation' of the property, by the government itself" or others, a taking results.[14] Applying this rule, the court held that a taking had occurred in the *Nollan* case.[15] Given that there was a taking and that "uncompensated conveyance of the easement" violated the Takings Clause, the question for the Court became whether the addition of the permit requirement would make the action constitutional.[16]

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[6] *Id*. at 828.
[7] *Id*.
[8] *Id*.
[9] *Id*. at 829.
[10] *Id*.
[11] *Id*. at 830.
[12] *Id*. at 831.
[13] *Id*.
[14] *Id*. (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432–33 (1982)).
[15] 483 U.S. at 832.
[16] *Id*.

The court held that takings resulting from an imposed condition are acceptable if there is a nexus, or ingrained relationship, between the condition and the proposed project.[17] However, when there is no essential nexus, the permit condition amounts to the obtainment of an easement without just compensation.[18] The Court explains that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is . . . 'an out-and out plan of extortion.'" [19] The *Nollan* test, then, is used to determine if there is a "nexus" between the required condition and the proposed development. Without this nexus, any required condition will violate the Takings Clause.

B. Dolan *and "Rough Proportionality"*

Florence Dolan applied for a permit to redevelop the site of her existing business.[20] The city granted the application subject to two conditions: (1) that she dedicate the portion of her property lying within a 100-year floodplain for improvement of a storm drainage system and (2) that she dedicate an additional 15-foot strip of land adjacent to the floodplain for a pedestrian/bicycle pathway.[21] The condition covered a 10% of the property.[22]

The City Planning Commission made a series of findings relating to the project's impact and the conditions for the permit approval.[23] They concluded that the pathway would help reduce the increased traffic congestion that is likely to occur because of the new development.[24] Additionally, they found that the dedication of the floodplain area was related to the proposed

[17] *Id*. at 836. The Court stated that, for example, requiring the Nollan's to provide a public spot for viewing the beach might be permissible under this rule because this would address the actual issue identified with the proposed development. *Id*. at 838.
[18] *Id*. at 837.
[19] *Id* (quoting J. E. D. Associates, Inc. v. Atkinson, 121 N.H. 581, 584 (1981)).
[20] Dolan v. City of Tigard, 512 U.S. 374, 379 (1994).
[21] *Id*. at 380.
[22] *Id*.
[23] *Id*. at 381.
[24] *Id*.

development because of the anticipated increased storm water flow.[25] Dolan contested the conditions with the Land Use Board of Appeals (LUBA), arguing that the conditions were unrelated to her proposed project and therefore unconstitutional under the Takings Clause.[26] LUBA ruled against Dolan, and the Oregon Court of Appeals affirmed.[27] The Court rejected Dolan's argument that *Nollan* required them to use the "essential nexus" test rather than the old standard requiring a "reasonable relationship."[28]

The Oregon Supreme Court affirmed again, reading *Nollan* to mean that an "exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve."[29] The U.S. Supreme Court granted certiorari to settle the conflict between its decision in *Nollan* and the Oregon Supreme Court's reading of the decision in *Dolan*.[30]

The Supreme Court held that a taking would have occurred if the city had simply required Dolan to dedicate the strip of land for public use rather than requiring it as a condition for a permit.[31] The Court determined that both the prevention of flooding and the reduction of traffic congestion qualify as the types of legitimate purpose required by the *Nollan* test.[32] A taking would only occur if "the required degree of connection between the exactions and the projected impact of the proposed development."[33]

The court held that there must be a rough proportionality between the need created by the development and the proposed dedication of land.[34] There is no "mathematical calculation" required, but Courts may individually determine whether the dedication is sufficiently related in

[25] *Id*. at 382.
[26] *Id*.
[27] *Id*. at 383.
[28] *Id*.
[29] *Id* (quoting Dolan v. City of Tigard, 854 P.2d 437, 443 (1993)).
[30] 512 U.S. at 383.
[31] *Id*. at 384.
[32] *Id*. at 387–388.
[33] *Id*.
[34] *Id*. at 391.

both extent and nature to the proposed project.[35] A strong desire for public improvement and change is not sufficient to warrant shortcutting the constitutional method of achieving and paying for that change.[36] Thus, adding onto *Nollan's* "nexus" requirement, *Dolan* further requires that there be a "rough proportionality" between the permit condition and the proposed development to avoid violating the Takings Clause.

II. *Koontz v. St. Johns River Water Management District*[37]

A. *Background of the Case*

Coy Koontz Sr.,[38] sought permits from St. John's River Water Management District to develop his property.[39] The projected proposal included development of the 3.7-acre northern section of the property.[40] Koontz offered to help mitigate environmental effects of the proposed development, in compliance with Florida law,[41] by proposing to deed over 11 acres, out of 14.9 total, to the district as an easement.[42] The District considered the conservation easement inadequate and informed him they would approve construction only if he agreed to one of two concessions.[43]

First, he could reduce the size of the development and deed the District more of the land or, alternatively, he could pay for improvements on other wetlands owned by the District several

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[35] *Id.*
[36] *Id.*
[37] 133 S. Ct. 2586 (2013).
[38] Coy Koontz Sr. originally brought the petition but passed away; his son, the representative of his estate, continued the claim. Ilya Somin, *Two Steps Forward for the "Poor Relation" of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause*, 2012–2013 CATO SUPREME COURT REVIEW 215, 226 (2013) *available at* http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2013/9/somin.pdf.
[39] 133 S. Ct. at 2592.
[40] *Id.*
[41] Florida law requires property owners wishing to begin construction projects on land that affects wetlands to obtain a permit from its local Water Management District. The District may "impose 'such reasonable conditions' on the permit as are 'necessary to assure' that construction will 'not be harmful to the district.'" *Id.* Further, owners building on wetlands are required to "offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere." *Id.*
[42] *Id.*
[43] *Id.* at 2593.

miles away.[44] Koontz sued in state court, arguing that he was entitled to relief under a Florida statute that allows landowners to recover monetary damages if a state agency takes action that is "an unreasonable exercise of the state's police power constituting a taking without just compensation."[45]

The Florida Circuit Court granted the District's motion to dismiss, holding that Koontz had not exhausted his state administrative remedies.[46] The Florida District Court affirmed but the State Supreme Court reversed.[47] On remand, the circuit court held, citing *Nollan* and *Dolan*, that the District's decision lacked both a nexus and rough proportionality between their proposed requirements and the environmental impact of the Koontz development.[48]

The Florida District Court of Appeal affirmed this decision, but the Florida Supreme Court reversed, distinguishing it from *Nollan* and *Dolan* on two grounds.[49] First, rather than conditioning the approval of the permit on the acceptance of the requirements like in *Nollan* and Dolan, the district denied the permit because of Koontz's refusal to make the concessions.[50] Second, the court found "a distinction between a demand for an interest in real property (what happened in *Nollan* and *Dolan*) and a demand for money."[51] Koontz then petitioned the U.S. Supreme Court for a writ of certiorari.

The U.S. Supreme Court agreed to hear the case to provide guidance on two questions dividing the lower courts: (1) do the *Nollan* and *Dolan* requirements (essential nexus and rough proportionality) change when a permit is denied rather than approved pending a condition;[52] and

[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] *Id*.
[50] *Id*.
[51] *Id*. at 2594.
[52] *Id*. at 2595.

(2) do those requirements also apply to cases where the condition is an obligation to spend money rather than an easement on land.[53]

B. *Issue I: Denial of the Permit*

In *Koontz*, the Court held that "the governments demand from a land-use permit applicant must satisfy Nollan and Dolan even when the government denies their permit and even when its demand is for money."[54] Regarding the first issue, the Court held that the Nollan and Dolan rule extended to cover denials of permits, and was not exclusive to conditional approvals.[55] The Court found that the District avoided *Nollan* and *Dolan* by suggesting changes to Koontz and then denying the permit when he declined rather than conditionally approving it.[56] State demands for property in the land-use permitting context conflict with the takings clause "not because they take property but because they impermissibly burden the right not to have property taken without just compensation."[57]

C. *Issue II: Physical Easement or Financial Obligation*

Second, the Court found that the District's demand for money affected the landowner's property interest because it burdens their ownership of the land.[58] The majority stated "[a] predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure the person into doing."[59] Thus, the Court observed that if the government had actually taken the

[53] *Id*. at 2598.
[54] *Id*. at 2063.
[55] *See* 133 S. Ct. at 2595 ("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.").
[56] *Id*. at 2591. Clearly, if the District had said they would only approve the permit if Koontz made the changes they suggested, they would have violated *Nollan* and *Dolan*.
[57] *Id*. at 2596.
[58] *Id*. at 2599. The court compares the demand for money to a government lien.
[59] *Id*. at 2598.

desired land in *Koontz*, it would have committed a *per se* taking.[60] However, the majority holds that "if we accepted this argument, it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*."[61]

The Court focuses on "the direct link between the government's demand and a specific parcel of real property."[62] This link implicates the central concern of *Nollan* and *Dolan*: the risk that the government might use its permit-granting power to pursue tasks that lack the essential nexus and rough proportionality to the land in question, "thereby diminishing without justification the value of the property."[63] Therefore, the majority holds that "the government's demand for property from a land-use permit application must satisfy Nollan and Dolan . . . even when its demand is for money."[64]

The dissent notes that the majority's definition of monetary exactions is extremely undefined, and could be read broadly to include "a vast array of land use regulations, applied daily in States and localities."[65] If local governments risked a lawsuit every time they made a suggestion to a permit applicant, they may cease communicating with applicants at all.[66] This could easily result in governments outright denying many permits without giving landowners any opportunity to amend their applications, or understand why their applications were denied.[67]

In response to the dissent, the Court notes that, while subjecting monetary exaction to *Nollan* and *Dolan* could create some confusion, this issue is "inherent in [the] Court's long settled view that property the government could constitutionally demand through its taxing

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[60] *Id*. at 2599. "The Florida Supreme Court held that the petitioner's claim fails at this first step because the subject of the exaction at issue here was money rather than a more tangible interest in real property."
[61] *Id*.
[62] *Id*. at 2600 ("[T]he monetary obligation burdened [the] petitioner's ownership of a specific parcel of land.").
[63] *Id*.
[64] *Id*. at 2603.
[65] *Id*. at 2604.
[66] *Id*.
[67] *Id*. at 2611.

power can also be taken by eminent domain."[68] The distinction between taxes, which are acceptable, and takings "is more difficult in theory than in practice."[69] Therefore, the Court did not decide or explain exactly when a land use permit conditional on money becomes a tax.[70]

For the dissent, the question at issue here comes down to whether, "[i]ndependent of the permitting process . . . requiring a person to pay money to the government . . . constitute[s] a taking requiring just compensation."[71] The dissent states, "only if the answer is yes does the *Nollan*/*Dolan* test apply," and further argues that precedent has already answered no.[72] Under *Eastern Enterprises v. Aplfel*,[73] "the takings clause applies only when the government appropriates a 'specific interest in physical . . . property' . . . by contract, the clause has no bearing when the government imposes 'an ordinary liability to pay money.'"[74]

III. *Future Implications*

In the aftermath of the *Koontz* decision, the issues raised outside the courtroom by commentators and legal scholars have largely echoed the dissent. There is concern that the decision will stymie districts and cities from communicating with developers about ways to improve a proposed project.[75] This may cause cities to reject developments that could have been positive, or plans that need only some work but eventually would be approved.[76]

However, there is also argument that in practice, this threat of lawsuits can be dealt with "by restricting the demands they impose on landowners to those that are unlikely to violate the

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[68] *Id*. at 2601.
[69] *Id*.
[70] *Id*. at 2602. "For present purposes, suffice it to say that 'the power of taxation should not be confused with eminent domain.'" (quoting *Houck v. Little River Drainage District*, 239 U.S. 254, 264 (1915)).
[71] *Id*. at 2605.
[72] *Id*.
[73] 524 U.S. 498 (1998).
[74] *Koontz*, 133 S. Ct. at 2605. (quoting *Eastern Enterprises*, 524 U.S. at 554–555).
[75] John D. Echeverria, *A Legal Blow to Sustainable Development*, N.Y. TIMES (June 26, 2013), *available at* http://www.nytimes.com/2013/06/27/opinion/a-legal-blow-to-sustainable-development.html.
[76] *Id*.

Takings Clause."[77] Even if demands are in danger of violating the takings clause, all a district needs to do is offer just compensation for the demands to become permissible.[78] "In this respect, enforcement of the Takings Clause just-compensation rights actually impose *fewer* constraints . . . than enforcement of most other constitutional rights" because the government can offer a remedy for the violation.[79]

Additionally, the application of the restrictions to general expenditures of money will have far-reaching impacts.[80] Many cities and townships attach fees to development permits to support public projects.[81] Of course, these fees have always had to be reasonable, but previously deference was given to elected officials and experts with regard to the size of the fees.[82] After *Koontz*, the burden is on the city to prove that fees are reasonable, which may not always be feasible.[83] "[T]he cost of protecting a community from a harmful building project now lies not with the developer but with the local residents and taxpayers."[84] However, not everyone feels the consequences of extending the restrictions to demands for money will not be nearly as negative as feared.[85] "California, has applied Nollan/Dolan to monetary exactions for nearly two decades . . . and it has hardly stopped the exactions process."[86]

Justice Kagan also argues in her dissent that subjecting exactions concerning money to stricter scrutiny could begin a slippery slope toward subjecting all public finance, including

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[77] Ilya Somin, *Two Steps Forward for the "Poor Relation" of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause*, 2012–2013 CATO SUPREME COURT REVIEW 215, 226 (2013), *available at* http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2013/9/somin.pdf.
[78] *Id*. at 230.
[79] *Id*. at 230–31.
[80] Echeverria, *supra* note 75.
[81] *Id*.
[82] *Id*.
[83] *Id*.
[84] *Id*.
[85] Jonathan Zasloff, Koontz *and Exactions: Don't Worry, Be Happy*, LEGAL PLANET (June 27, 2013), *available at* http://legal-planet.org/2013/06/27/koontz-and-exactions-dont-worry-be-happy/.
[86] *Id*.

taxes, to such scrutiny.[87] However, this has again not happened in states that have already subject exactions concerning money to increased scrutiny.[88]

Conclusion

In sum, *Koontz* is a case with the potential for far-reaching effects and implications regarding property rights in the United States. The Supreme Court opinion expands landowners' rights to their land while limiting the government's ability to enact regulations and apply them to land within their boundaries. The Court, in *Koontz*, has expanded the Takings Clause to include monetary exactions. However, it is impossible to tell at this point how significant these changes will be in practice. Only time will tell as local and state governmental units implement the ruling in the coming years.

[87] *Koontz*, 133 S. Ct. at 2607.
[88] Zasloff, *supra* note 85.