

July 10, 2013

US Supreme Court Protects Landowners from “Extortionate” Demands by the Government in Land-Use Permitting Decisions, Including Permit Denials

In a 5-4 decision authored by Justice Alito, and joined by Chief Justice Roberts and Justices Scalia, Thomas and Kennedy, the US Supreme Court in *Koontz v. St. Johns River Water Management District* broadened the protections afforded to landowners against unconstitutional conditions imposed by the government in land-use permitting decisions. In 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), the Court prevented the government from conditioning 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 *Koontz*, the Court held that the *Nollan/Dolan* standard applies to circumstances where the government denies a land-use permit because the permit applicant does not acquiesce to its demands and where the government’s demand involves a monetary exaction. All of these cases involve application of the unconstitutional conditions doctrine which protects the Fifth Amendment right to just compensation.

Koontz involved a landowner’s proposal to develop a 3.7-acre property near Orlando, Florida. Because the proposed development had the potential to impact water resources of the state, the landowner was required to obtain a Management and Storage of Surface Water (MSSW) permit from the St. Johns River Water Management District (“District”), one of five water management districts authorized under Florida law to regulate “construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state.” In evaluating the permit application, Florida law requires that any resulting environmental damage be offset by creating, enhancing or preserving wetlands elsewhere.

Although the landowner offered to deed to the District a conservation easement on a separate 11-acre parcel of his property, the District would not approve the MSSW permit unless the landowner agreed to reduce the size of his development to 1 acre or, alternatively, make improvements to District-owned land several miles away. Believing the District’s demands for mitigation were excessive in light of the environmental effects of the proposed construction, the landowner filed suit in state court seeking, among other things, “monetary damages” under state law based on “an unreasonable exercise of the state’s police power constituting a taking without just compensation.”

The trial court applied the *Nollan/Dolan* standard and found that the mitigation sought by the District did not meet the “nexus” and “rough proportionality” tests because the property at issue had already been “seriously degraded.” Accordingly, the trial court found the permit denial unlawful. The Florida Supreme Court reversed, distinguishing *Nollan* and

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Dolan on two grounds. First, unlike *Nollan* or *Dolan*, there would be no actual taking because the landowner's refusal to agree to the government's conditions resulted in a permit denial. Second, the court found a distinction between a demand for an interest in real property (such as the easements in *Nollan* and *Dolan*) and a requirement to spend money which is akin to a tax assessment.

The Supreme Court in *Koontz* reversed on both grounds. The Court first acknowledged that landowners are vulnerable to unreasonable governmental demands because the government often has broad discretion to deny a permit that is worth far more than property it would like to take:

By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.

According to the Court, *Nollan* and *Dolan* protect property owners in these situations by ensuring that there is "nexus" and "rough proportionality" between the conditions imposed and the social costs of the applicant's proposal, thus ensuring that "that applicants bear the full costs of their proposals while still forbidding the government from engaging in out-and-out . . . extortion" (internal quotes omitted).

The Court then addressed the Florida court's holding that a permit denial does not implicate the Takings Clause. The principles underlying *Nollan* and *Dolan*, according to the Court,

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. A contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval.

(Emphasis in original.) In response to the Florida court's question of how there could be a violation of the Takings Clause where "no property of any kind was ever taken," the Court stated:

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*. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.

(Emphasis added.) The Court did find the fact that the taking was not consummated relevant to the issue of remedy. According to the Court, while the unconstitutional conditions doctrine seeks to prevent the unlawful burdening of a constitutional right, the Fifth Amendment mandates just compensation only for actual takings:

In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies. Because petitioner brought his claim pursuant to a state law cause of action, the Court has no occasion to discuss what remedies might be available for a *Nollan/Dolan* unconstitutional conditions violation....

The Court also reversed the Florida court's alternative holding that an obligation to spend money can never be the basis for a takings claim, citing *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). The *Koontz* Court distinguished *Eastern Enterprises* because "the monetary obligation [in *Koontz*] 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."

In reversing on these grounds, the Court rejected the Florida court's and the District's argument that if monetary exactions are made subject to scrutiny under *Nollan* and *Dolan*, then there will be no way of distinguishing impermissible land-use exactions from property taxes:

We think they exaggerate both the extent to which that problem is unique to the land-use permitting context and the practical difficulty of distinguishing between the power to tax and the power to take by eminent domain.... The need to distinguish taxes from takings is not a creature of our holding today.... Rather, the problem is inherent in this Court's long-settled view that property the government could constitutionally demand through its taxing power can also be taken by eminent domain.

In her dissent, Justice Kagan, joined by Justices Ginsburg, Breyer and Sotomayor, agreed with the majority that the *Nollan/Dolan* standard applies when the government denies a permit and also agreed the issue of remedy is not one of just compensation but rather based on the underlying cause of action. However, relying on *Eastern Enterprises*, Justice Kagan disagreed with the application of *Nollan/Dolan* to financial demands:

The boundaries of the majority's new rule are uncertain. But it threatens to subject a vast array of land-use regulations, applied daily in the States and localities throughout the country, to heightened constitutional scrutiny. I would not embark on so unwise an adventure.

The *Koontz* majority's application of the *Nollan/Dolan* standard to monetary exactions in land-use decisions appears to be consistent with existing California authority established in *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996). In *Ehrlich*, the California Supreme Court applied *Nollan* and *Dolan* in holding that the defendant city had acted improperly in assessing a \$280,000 "recreation fee" against a property owner as a condition of approving a residential project. According to the California Supreme Court, which seemed to anticipate Judge Kagan's concerns in the *Koontz* dissent, the heightened scrutiny standard in *Nollan* and *Dolan* "is triggered by a relatively narrow class of land use cases – those exhibiting circumstances which increase the risk that the local permitting authority will seek to avoid the obligation to pay just compensation." 12 Cal. 4th at 868. When these circumstances are present, the California high court found that "it matters little whether the local land use permit authority demands the actual conveyance of property or the payment of a monetary exaction." *Id.* at 876 (emphasis in original). Like the *Koontz* Court, the California Supreme Court was concerned with a demand imposed on a specific development and with the government imposing an individualized assessment.

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