New York Law Journal
Real Estate Trends
WWW.NYLJ.COM
An ALM Publication
VOLUME 250—NO. 17
WEDNESDAY, JULY 24, 2013

ZONING AND LAND USE PLANNING

U.S. Supreme Court Divides Sharply in 'Koontz' Ruling

By **Anthony S. Guardino**

In arguably the most significant land use decision by the U.S. Supreme Court since *Kelo v. City of New London*,[1] nearly a decade ago, a sharply divided court ruled in late June that a local government's demand for property from an applicant in exchange for granting the applicant a land use permit must satisfy the "takings" test set forth in the court's landmark decisions of *Nollan v. California Coastal Comm'n*[2] and *Dolan v. City of Tigard*[3]—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 the owner's property unless there was a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use—even when the government actually denies the requested permit and even when the government's demand is for money.

The majority decision in *Koontz v. St. Johns River Water Management District*,[4] by Justice Samuel Alito, Jr., in which Chief Justice John Roberts and Justices Antonin Scalia, Anthony M. Kennedy, and Clarence Thomas joined, dismissed the concerns expressed in the dissent, by Justice Elena Kagan, with the three remaining justices joining, that the practical result of *Koontz* would be a "revolution" in land use law. Although the majority may (or may not) be correct on that point, one thing is certain: because property owners, developers, and local government officials involved in the land use process all now will have to consider the implications of *Koontz*, it is, at the very least, going to significantly alter the decision-making dynamics in the permitting process.

The Case

Koontz involved the 3.7-acre northern section of an undeveloped 14.9-acre tract of land on the south side of Florida State Road 50, a divided four-lane highway east of Orlando, that was owned by Coy Koontz, Sr., which he decided to develop. Accordingly, Koontz applied to the St. Johns River Water Management District (the district) for a Management and Storage of Surface Water permit and a Wetlands Resource Management permit, both of which were required by Florida law.

Koontz proposed to raise the elevation of the northernmost section of his land to make it suitable for a building, grade the land from the southern edge of the building site down to the elevation of the high-voltage electrical lines that bisect the property, and install a dry-bed pond for retaining and gradually releasing stormwater runoff from the building and its parking lot. To mitigate the environmental effects of his proposal, Koontz offered to foreclose any possible future development of the approximately 11-acre southern section of his land by deeding to the district a conservation easement on that portion of his property.

The district considered the 11-acre conservation easement to be inadequate, and it informed Koontz that it would approve construction only if he agreed to one of two concessions. First, the district proposed that Koontz reduce the size of his development to one acre and deed to the district a conservation easement on the remaining 13.9 acres. To reduce the development area, the district suggested that Koontz could eliminate the dry-bed pond from his proposal and instead install a more costly subsurface stormwater management system beneath the building site. The district also suggested that he install retaining walls rather than gradually sloping the land from the building site down to the elevation of the rest of his property to the south.

In the alternative, the district told Koontz that he could proceed with the development as proposed, building on 3.7 acres and deeding a conservation easement to the government on the remainder of the property, if he also agreed to hire contractors to make improvements to district-owned land several miles away. Specifically, the district told Koontz that he could pay to replace culverts on one parcel or fill in ditches on another. Either of those projects would have enhanced approximately 50 acres of district-owned wetlands.

Believing the district's demands for mitigation to be excessive in light of the environmental effects that his building proposal would have caused, Koontz sued the district in a Florida state court. Among other claims, he argued that he was entitled to relief under a Florida law that allowed owners to recover "monetary damages" if a state agency's action was "an unreasonable exercise of the state's police power constituting a taking without just compensation."[5]

The state trial court ruled that payment for offsite improvements to district property lacked both a nexus and rough proportionality to the environmental impact

ANTHONY S. GUARDINO *is a partner with Farrell Fritz in the firm's Hauppauge office.*

of the proposed construction and held the district's actions unlawful under *Nollan* and *Dolan*. The decision was affirmed, and the case reached the Florida Supreme Court.

That court reversed, distinguishing *Nollan* and *Dolan* on two grounds. First, the court thought it significant that in this case, unlike in *Nollan* or *Dolan*, the district did not approve Koontz's application on the condition that he accede to the district's demands; instead, the district denied his application because he refused to make concessions. Second, the majority drew a distinction between a demand for an interest in real property (which was what happened in *Nollan* and *Dolan*) and a demand for money.

The case then reached the U.S. Supreme Court.

The Majority Opinion

There were a number of important rulings in the majority opinion. First, the majority found that the *Nollan-Dolan* standard applied not only when the government approved a development permit conditioned on the owners conveyance of a property interest (i.e., imposed a condition subsequent), but also when the government denied a permit until the owner met the condition (i.e., imposed a condition precedent). In other words, the majority ruled that the principles underlying *Nollan* and *Dolan* did not change depending on whether the government approved a permit on the condition that the applicant turn over property or denied a permit because the applicant refused to do so.

The majority also found that there could be a "taking" even though no property had been taken, stating that "[e]xtortionate 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."

Significantly, however, the majority declared that just compensation under the Fifth Amendment was required only for actual takings, and that in cases where there was an excessive demand but no taking, whether money damages were available was not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relied. Because Koontz had brought his claim pursuant to a state law cause of action, the majority decided that it would not opine on what remedies might be available for a *Nollan-Dolan* unconstitutional conditions violation in this case, or in other cases.

The majority then rejected the Florida Supreme Court's holding that Koontz's claim failed because the district had asked him to spend money rather than give up an easement on his land, holding that so-called "monetary exactions" must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.

In concluding, the majority stated that it "disagree[d] with the dissent's forecast" that its decision would "work a revolution in land use law by depriving local governments of the ability to charge reasonable permitting fees," reiterating that the "nexus and rough proportionality requirements" of *Nollan* and *Dolan* would help protect land use permit applicants from "extortionate demands for money."

> The majority found that the 'Nollan-Dolan' standard applied not only when the government approved a development permit conditioned on the owners conveyance of a property interest, but also when the government denied a permit until the owner met the condition.

The Dissent

The dissent did not disagree with every aspect of the majority's opinion. In fact, it specifically agreed that the *Nollan-Dolan* standard applied in cases where the government imposed a condition subsequent as well as in cases where the government imposed a condition precedent.

However, the dissent vehemently disagreed with the majority's decision that *Nollan* and *Dolan* applied to cases in which the government conditioned a permit not on the transfer of real property, but instead on the payment or expenditure of money. According to the dissent, this holding threatened to subject "a vast array" of land use regulations to heightened constitutional scrutiny. In the dissent's view, *Nollan* and *Dolan* restrained governments from using the permitting process to take a specific property interest without just compensation and those cases had no application when governments imposed a general financial obligation as part of the permitting process.

Ramifications of 'Koontz'

The majority opinion did not resolve every issue that arose in the case. For example, Koontz may—or may not—be entitled to damages; because his claim was brought under Florida law, the majority said that it was up to the Florida courts to decide on a remedy. It also is not clear from the majority's opinion whether "standard" land use planning tools such as impact fees or "fees in lieu" now are suspect, and whether their merely being raised by a local government essentially amounts to a clear invitation to a lawsuit against the government.

Certainly, the majority decision increases the potential for litigation against local municipalities when they impose, or perhaps even suggest, conditions on their willingness to grant permits and approvals that require applicants to relinquish property or make or fund off-site improvements. One possible result is that it will lead to significant delays in local government decisions on applications for permits as government decision makers seek to carefully examine all issues and try to avoid even the possibility of falling into the *Koontz* web by making what might later be considered an "extortionate" demand.

Of course, another possibility is that it might make local officials more likely to simply deny permits rather than to work with applicants toward mutually acceptable resolutions. With a simple denial an easy answer, developers and property owners might have to decide in advance what to propose on their own—perhaps even offering more at the application phase than they would have had to agree to during a full and open discussion.

The practical implications of *Koontz* will become clearer as property owners and government officials continue to process land use applications against the backdrop of this significant ruling and the courts are called upon to rule on future "takings" claims. Stay tuned.

1. 545 U.S. 469 (2005).
2. 483 U.S. 825 (1987).
3. 512 U.S. 374 (1994).
4. 570 U.S.__ (2013); No. 11-1447 (U.S. June 25, 2013).
5. Fla. Stat. §373.617(2).