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## Coates' Canons Blog: The Koontz Decision and Implications for Development Exactions

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The U.S. Supreme Court has long held that when a government agency conditions approval of a development permit on the dedication of some property interest, that condition must have an “essential nexus” and “rough proportionality” with the impacts of the development that the condition seeks to mitigate. Thus, if a new development would moderately increase traffic to a site, a permit condition would need a nexus, or relation, to the particular kind of impact (*i.e.*, road improvements, not parks) and the condition would need to be proportionate to the impact (*i.e.*, turn lanes, not major highway construction). This test of “essential nexus” and “rough proportionality” are commonly referred to by the names of the cases that set forth the test: *Nollan* and *Dolan*. (*Nollan v. California Coastal Comm’n*, 483 U. S. 825 (1987), and *Dolan v. City of Tigard*, 512 U. S. 374 (1994)).

In the recent decision of *Koontz v. St. Johns River Water Management District*, 570 U. S. \_\_\_\_ (2013), the Supreme Court addressed two questions concerning the application of the *Nollan/Dolan* test:

- 1) Does it apply to demands for property, even when a permit was denied and no conditions attached?
- 2) Does it apply to conditions requiring money, not property?

The answers? Yes and yes. The Supreme Court extended the *Nollan* and *Dolan* test to demands for property prior to permit approval (not just exactions that attach to approved permits) and to conditions for cash payment (rather than just interests in real property). The *Koontz* decision has clarified some issues for development permitting, but the full implications of this decision are not perfectly clear. This blog discusses what we know and what questions remain.

It helps to understand the basic facts and how the issue came before the court. In the 1990s, Mr. Koontz sought to develop about 4 acres of his nearly 15 acre tract of land in Florida. State regulation required him to obtain certain wetlands permits from the Water Management District. State law authorized the District to apply reasonable conditions to the permits to ensure that construction is not harmful to the water resources of the district. Such conditions could include mitigation for wetland impacts. In seeking the permit to develop Mr. Koontz proposed to grant a conservation easement on 11 acres of his property to prevent any future development. The District found the conservation easement to be inadequate to offset the impacts of the proposed development; the District suggested other mitigation conditions that would be acceptable offsets, including reducing the footprint of the development and using retaining walls or paying for off-site wetlands improvements on District-owned property several miles away. The District did not require these alternatives, and left the door open for Mr. Koontz to suggest other possible mitigation.

Mr. Koontz felt the requests for additional mitigation were excessive, accepted his permit rejection, and filed suit in state court. The parties appealed the case through the Florida court system and eventually to the U.S. Supreme Court which answered those questions about the application of the *Nollan/Dolan* test, but opened other questions.

### What We Know

Some issues are clear. Government agencies may still apply conditions to prevent a development from imposing costs on the public, as long as the conditions meet the test of “nexus” and “rough proportionality.” As Justice Alito notes in his opinion for the majority, “[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack.”

While an agency may apply conditions to a development approval, such conditions may not force an individual to waive a constitutional right. The *Nollan* and *Dolan* decisions involve a special application of the unconstitutional conditions doctrine. That doctrine essentially says that the government may not require an individual to give up a constitutional right

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in order to obtain a government benefit. In the case of development permits, the government may not require an individual to give up her right to just compensation for property taken. To be clear, compensation may be due if that demand goes beyond the *Nollan/Dolan* standard of nexus and proportionality; no compensation is due if the government agency can show the nexus and proportionality between the impact of the development and the exaction.

The *Nollan/Dolan* test applies to demands for property attached to approved permits *and to* demands for property that an applicant refuses to accept. Thus, an applicant may challenge the denial of a permit on the ground that the government agency's demand for property does not have a "nexus" and "rough proportionality" with the impacts of the development. As discussed below, the Court did not answer an essential question here: How concrete and specific must a condition be before it can be challenged as a demand for property?

When challenging a denied permit, the claim is not for an uncompensated taking, but for damages caused by an unconstitutional condition. This issue is technical, but important: No property was taken from Mr. Koontz. The majority identified the injury to the applicant to be an unconstitutional condition, not a taking of property. The remedy may be money damages but will not be "just compensation" for a taking. Because the Koontz case arose from a state cause of action, the Supreme Court remanded the case for Florida courts to determine, among other things, the appropriate remedy for the injury. In future cases, as with Mr. Koontz's claim, the remedy will depend on the specific cause of action, state or Federal.

Government agencies may still say "no" to a development applicant (in the case of discretionary permit approvals). The majority opinion tacitly acknowledges that the District may have simply denied the permit. What the District could not do, the Court emphasizes, is withhold a permit because someone refuses to accept an unconstitutional condition.

Conditions for monetary contribution are subject to the *Nollan/Dolan* test. While prior Supreme Court decisions found that a financial obligation for money is not a taking of an identified property interest under the Fifth Amendment, in *Koontz* the Court sees "in lieu of" fees as a commonplace land use exaction that burdens the applicant's real property (the Court relates the burden to a lien on the property). Thus, conditions for cash imposed as a condition for getting the permit are subject to the test for "nexus" and "rough proportionality."

### **The Questions That Remain**

*When does a mitigation alternative become a demand for property? And, what is the effect on negotiating conditions?*

If a government agency *demand*s property for a permit approval, that condition is subject to a *Nollan/Dolan* test, even if it is not accepted by the applicant and applied to a permit. But what about conditions that are discussed in preliminary negotiations? What about a list of possible conditions that may be considered? Are each of these subject to a *Nollan/Dolan* test and potential for litigation?

The dissent raises this concern based on the facts of the *Koontz* case. By the dissent's statement of the case, the District never made a demand for any condition; the District identified several options and left the door open for Mr. Koontz to identify other mitigation options. Going forward, the dissent warns, government agencies may be inclined to simply deny a permit—without any discussion—rather than risk litigation of conditions.

The Court's decision did not clarify this issue. The majority did not reach the question of whether the District's demands for property were concrete and specific enough to trigger *Nollan/Dolan* review, holding that the question was not properly before the Court. The majority left it open for the Florida courts to determine on remand.

The majority does affirm that as long as the government agency provides at least one option that would satisfy *Nollan/Dolan*, the applicant does not have a claim of unconstitutional conditions. Arguably, the District's mitigation alternative for Mr. Koontz to reduce the footprint of the development to 1 acre (rather than 4 acres) would have met this test. However, the Court found that the option to develop only 1 acre did not alter the need for a *Nollan/Dolan* review because the District in effect told Koontz that he must spend money for off-site mitigation to develop the remaining 3 acres of proposed development.

*Where do we distinguish between monetary exactions and fees and taxes?*



Although the *Koontz* decision extends the *Nollan/Dolan* test to demands for monetary payment, the decision affirms that taxes and user fees are not considered exactions. But, as the dissent highlights, it may be challenging to draw the line between monetary conditions and user fees or taxes. The dissent points to fees for traffic or pollution impacts, fees to provide sewer and water to a development, and fees to restrict certain land uses such as liquor stores—each of these, the dissent warns, are now subject to the *Nollan/Dolan* test. The dissent further ponders whether government agencies may distinguish between ad hoc fees (that would be subject to *Nollan/Dolan*) and generally applicable fees (that would not).

The majority does not provide a clear test for this aspect of its holding. The majority states that the distinction between exaction and fee is more difficult in theory than in practice. Indeed, in North Carolina the statutory enabling authority may clarify this issue.

### Summary

The *Koontz* decision provided clarification on some matters. It further delineates the scope of the *Nollan/Dolan* test—the requirement that demands for property in relation to development approvals must have an “essential nexus” and “rough proportionality.” The *Nollan/Dolan* test applies to demands for property related to permit approval, even if the demand is rejected and no permit issued. Moreover, the test applies to demands for money related to permit approvals, as well as demands property. The *Koontz* decision also opened new questions: When does a condition negotiation become a demand for property? And, what is the line between monetary exaction and property-related user fee?

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- [www.supremecourt.gov/opinions/12pdf/11-1447\\_4e46.pdf](http://www.supremecourt.gov/opinions/12pdf/11-1447_4e46.pdf)