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PERSPECTIVE

'Takings' decision raises state law questions

By Rick McNeil

In a 5-4 decision authored by Justice Alito, the U.S. Supreme Court last week expanded the scope of private property right protections in a takings case which held that a local land use authority must adhere to constitutional takings protections in cases in which a development permit is denied (as opposed to where it is conditionally approved) and in cases in which a monetary exaction (as opposed to a dedication of real property) is demanded as a condition to the granting of the permit.

In addition to ruling in favor of the landowner, the U.S. Supreme Court noted that local land use agencies have been known to impose "[e]xtortionate demands" upon developers in the form of development exactions, and specifically observed that, in this case, the local agency had attempted to "circumvent[]" prior U.S. Supreme Court precedents (namely, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)). In this regard, the U.S. Supreme Court was also critical of Florida's Supreme Court, noting that "[t]he Florida Supreme Court blessed this maneuver [by the local agency] and thus effectively interred those important decisions."

The case, *Koontz v. St. Johns River Water Management District*, 2013 DJDAR 8221 (June 25, 2013), involved the proposed development of a mostly soggy 15-acre tract in Orange County, Fla. The plaintiff sought permits to fill wetlands on the property to accommodate commercial development.

Inasmuch as Florida law required the mitigation of any environmental impacts due to the proposed development, Koontz offered to deed to the local agency an 11-acre conservation easement and, therefore, to develop only four of his 15 acres.

The local agency rejected the proposed mitigation and instead conditioned project approval on an agreement by Koontz either that he deed 14 (not 11) of his 15 acres (and thus develop only one acre) or that he pay money to fund improvements to other, unaffected, distant property owned by the local agency (the St. Johns River Water Management District).

> Koontz likely also will raise additional questions in California given that, under prior state Supreme Court cases ... legal challenges to certain development fees have been subject to a very deferential 'reasonable relationship' standard.

Koontz considered these demands excessive and challenged the permit denial on the ground that it constituted a taking without just compensation under the Fifth Amendment.

In *Nollan* and *Dolan,* the Supreme Court recognized that land use decisions can be "especially vulnerable" to "[e]xtortionate demands" by local governments vested with the power to grant or deny development permits. At the same time, reasonable offsets or exactions that reflect responsible land use policy should be sustained. For this reason, the Supreme Court held in *Nollan* and *Dolan* that "the government [may] condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal."

In *Koontz*, the Florida Supreme Court had distinguished Nollan and Dolan in part because the case involved the denial of a permit as opposed to the conditional approval of a permit. ("The Florida Supreme Court puzzled over how the government's demand for property can violate the Takings Clause even though 'no property of any kind was ever taken …..'") The Supreme Court explained that a "ready answer" to this puzzle was provided in the "unconstitutional conditions principle," a doctrine that "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."

In this regard, the Supreme Court further explained: "Under the Florida Supreme Court's approach, a government order stating that a permit is 'approved if' the owner turns over property would be subject to Nollan and Dolan, but an identical order that uses the words 'denied until' would not. Our constitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent."

Another important issue in the case was whether the local government's demand for money to fund offsite improvements (rather than a demand for the dedication of real property to mitigate development impacts) could form the basis of a takings claim. The Supreme Court decided that because the monetary obligations demanded of Koontz burdened the specific parcel of land in question, the "so-called 'monetary exactions'" at issue also "must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*." In this regard, the Supreme Court stated that "if we accepted this argument [by the local agency] it would be very easy for land use permitting officials to evade the limitations of *Nollan* and *Dolan*."

The full impact of the *Koontz* case likely will not be known for quite some time as the Supreme Court left open many important questions, including the remedy for an improper permit denial and the extent to which development charges are permissible exactions or unreasonable demands for money.

It also is likely that *Koontz* will raise additional questions in California. Both the majority and dissenting opinions in *Koontz* cited to *Ehrlich v. Culver City*, 12 Cal. 4th 854 (1996), a California Supreme Court case that addressed the extent to which Nollan and Dolan applied to development permits that exact a fee as a condition to their issuance. (*Ehrlich* arose under California's Mitigation Fee Act, Cal. Gov't Code Sections 66000 *et seq.*, which requires that there be a reasonable relationship between development fees and the proposed project.) The uncertainty concerning the impact of *Koontz* in California may in fact have been foreshadowed by the California Supreme Court in its conclusion in *Ehrlich*, in which it observed that "the question of when land use regulation under the police power becomes compensable [is] 'the most haunting jurisprudential problem in the field of contemporary land-use law.'"

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