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U.S. Supreme Court Decision Expands Scope Of Takings Clause

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The United States Supreme Court yesterday issued a ruling that expanded the scope of the Takings Clause of the Fifth Amendment, which reads: "nor shall private property be taken for public use, without just compensation." In Koontz v. St. Johns River Water Management District, 570 U.S. ___, No. 11-1447, slip op. (June 25, 2013), the Court ruled for the first time that the rigorous "nexus" and "rough proportionality" requirements, previously applicable only where a land owner is forced to transfer a property right to government, also applies to a government demand that an applicant pay money or spend money before the government would grant a land use permit. Coupled with the Court's decision earlier this month in Horne v. Department of Agriculture, which allowed for the possibility of a taking resulting from a government business regulation, this case signals a major expansion of Takings Clause limitations on government regulation.

The Koontz case is significant also because it recognizes "unconstitutional conditions" where a regulated party refuses to accede to a regulatory exaction resulting in a government denial of a permit or approval. While not technically a "taking," the Court recognized that permit denial based on unconstitutional conditions may result in liability for damages under Federal or State law. The significance of the decision was reflected by the concerns expressed by Justice Kagan, who wrote in dissent, "[t]he Federal Constitution thus will decide whether one town is overcharging for sewage, or another is setting the price to sell liquor too high."

Koontz has significant consequences for both government regulators and the regulated community. If you have questions, please contact one of the land use attorneys at Foster Pepper, including Pat Schneider (206.447.2905), Richard Settle (206.447.8980) Steve Gillespie (206.447.5942), or Steve DiJulio (206.447.8971).

FACTS OF THE CASE:

The plaintiff in Koontz owned a 14.9-acre parcel outside of Orlando, Florida. Recognizing the limitations on the property's development potential, such as a 100-foot-wide powerline easement traversing the property and the extensive wetlands, Mr. Koontz sought land use permits to develop only the northern 3.7 acres. Mr. Koontz sought to fill the wetlands on this portion to make it suitable for building. He also proposed a dry-bed stormwater pond. As mitigation, he proposed to deed to the District a conservation easement on the remaining 11 acres, much of which was wetland.

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The District concluded that the 11-acre deed was inadequate mitigation and refused to issue a permit unless Mr. Koontz agreed to one of two alternatives. First, he could reduce his buildable area to a single acre, constructing stormwater facilities underneath his planned building footprints, and put the remaining 13.9 acres into a conservation easement. Second, he could proceed with his proposal, but would have to hire contractors to make improvements on District-owned land several miles away. Mr. Koontz refused to comply with either suggestion.

PROCEDURAL HISTORY:

Mr. Koontz sued in state court under a state law that authorizes "'monetary damages' if a state agency's action is 'an unreasonable exercise of the state's police power constituting a taking without just compensation.'" Id. at 5 (emphasis added) (quoting Fla. Stat. s. 373.617(2)). The trial court agreed that, given the offer to dedicate three-quarters of the land to conservation, the District's demand that Mr. Koontz also pay to improve the District's property lacked both a nexus and rough proportionality to the harm caused by Mr. Koontz's development — the test for whether a demand for dedication of land constitutes a taking. The Florida State Supreme Court reversed on the ground that takings analysis is improper for the denial of a permit, as opposed to the granting of a permit containing an unconstitutional condition. In the alternative, the Florida court held that no taking occurs when the government merely requests funds, rather than a property right like an easement. Mr. Koontz's heirs (Mr. Koontz died during the 11 years the lawsuit worked its way through the Courts) appealed to the United States Supreme Court, which reversed the Florida court on both federal issues.

THE SUPREME COURT'S OPINION:

On the first issue, the Court unanimously concluded that a denial of a land use entitlement on the basis of a regulatory demand that lacks a "nexus" to the regulated activity and a "rough proportionality" between the demand and the impacts of the regulated activity. While not technically a "taking" requiring compensation under the Fifth Amendment, the demand nevertheless could be an "unconstitutional condition" that could subject the local government to liability under federal or state law. Addressing the question of whether a government could avoid a takings claim by denying a permit unless the applicant acceded to its demands, Justice Alito wrote: "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."

The Court declined to rule that federal law provided a remedy, however. The five-member majority instead chose to remand to the state court for a determination of liability under the Florida statute. In other words, while acknowledging that no property was actually taken — and therefore "just compensation" under the Fifth Amendment was not required — the majority nevertheless concluded that Mr. Koontz's estate could be eligible for an award of money damages under the Florida statute that requires the same where the state's action constitutes "a taking without just compensation." The Court declined to simply order the District to issue the permit without the offending condition. Under such circumstances, liability for damages also may be available under Washington State and federal statutes.

The five-member majority then concluded that a demand for payment of money, made as a condition precedent to issuance of a land use permit and "linked to a specific, identifiable property interest such as a . . . parcel of real property," should be analyzed as a taking, that is, whether the exaction satisfied the nexus and proportionality requirements of Nollan and Dolan. The Court was unconcerned about the possibility that its ruling would blur the line between permissible taxes/fees and unconstitutional exactions.

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THE DISSENT:

Writing for herself and three others in dissent, Justice Kagan pointed out that Justice Kennedy, who joined the majority of the Koontz ruling, had earlier written an opinion that a demand for money payment was not a taking. She accused the majority of giving short shrift to the confusion that could arise when municipalities impose fees to mitigate, for example, traffic impacts, asserting that the majority gave no practical guidance as to when an exaction was sufficiently "linked" to real property to satisfy the Constitution. As the dissent wrote, "The Federal Constitution thus will decide whether one town is overcharging for sewage, or another is setting the price to sell liquor too high."

The dissent addressed several possible, practical unintended consequences of the Court's ruling. It viewed the District's denial not as a demand for unconstitutional conditions, but as an attempt to negotiate mitigation that would satisfy the lawful requirement to properly preserve wetlands. In the dissent's view of the case, the majority directs municipalities to simply deny permits that do not meet requirements, rather than provide suggestions to the applicant on ways in which she could alter her application to satisfy those requirements. The dissent wrote that under the majority's opinion, "no local government official with a decent lawyer would have a conversation with a developer."

THE MAJORITY'S RESPONSE TO THE DISSENT:

The Court argued that the distinction between taxes and improper exactions was much easier to make in practice than in theory. On the facts of Koontz, for example, the government never argued that the demand for payment was a tax, nor could it, because the District's power to levy taxes was circumscribed by statute. "If [the District] had argued that its demand for money was a tax, it would have effectively conceded that its denial of [Koontz's] permit was improper under Florida law." The Court declined to give guidance on the line between proper taxes/fees and improper exactions.

The Court also disagreed with the dissent's assertion that the Koontz decision would "work a revolution in land use law by depriving local governments of the ability to charge reasonable permitting fees." Rather, the Court argued that several states had used the "nexus" and "rough proportionality" tests for monetary exactions without producing any significant practical harm. In the view of the Court, the dissent's argument depended on the premise that the "nexus" and "rough proportionality" tests should be abandoned in favor of other constitutional doctrines. In light "of the special vulnerability of land use permit applicants to extortionate demands for money," the Court declined to accept the dissent's premise.

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