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## **What Can *Koontz* Do For You? A Discussion of the Most Important U.S. Supreme Court Land Use Decision In Thirty Years**

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In June 2013, amid the tumult of U.S. Supreme Court decisions on same-sex marriage, affirmative action, and voting rights, emerged the unusual specter of the Court weighing in on the conduct of local and state land use proceedings, and issuing a decision that not only favors property owners, but also describes property owners seeking permits from government agencies as "vulnerable to extortion." *Koontz v. St. Johns River Water Management District*, issued June 25, 2013, is a once-in-a-generation decision: a warning to government agencies not to overreach when imposing conditions on land use permits. This article summarizes the decision and its likely impact on land use proceedings.

The *Koontz* backstory is that in 1987 and 1994, the Supreme Court established what became known as the "*Nollan / Dolan doctrine*." This legal principle states that "exactions," which are conditions imposed on a permit by a municipal, regional, or state agency, must have (1) a "nexus," that is, the permit condition must correspond to an adverse impact of the proposed land use; and (2) "rough proportionality," meaning some measurable balance between the land use impact and the permit condition. In *Nollan* (1987), the Court struck down a requirement that a property owner grant the public an easement to cross his oceanfront lot as a condition of a permit to build a house, holding that the mere act of building a house overlooking the ocean did not justify the government imposing a public access easement across the property, even along a beach. (And it is important to note that government could have acquired that easement by eminent domain; the issue was whether it could achieve this through a permit condition, without paying just compensation.) In *Dolan* (1994), the Court invalidated a requirement that a property owner, who wanted to build a plumbing supply store, dedicate an easement across her land for a public bike trail. *Nollan / Dolan* thus established a minimum national standard for exactions, a standard rooted in the Takings Clause of the Fifth Amendment to the U.S. Constitution, which allows government to take interests in private property only for public use and only upon paying just compensation. *Nollan / Dolan* requires exactions to be logical and proportional.

After 1994, state courts and lower federal courts applied *Nollan / Dolan* to strike down and uphold government actions, but meanwhile cases raised, and various courts resolved differently, two questions not answered by *Nollan / Dolan*: does the requirement for nexus and rough proportionality between the proposed land use and the condition apply when government makes demands on a property owner who refuses them, and government then denies the permit?

And does *Nollan / Dolan* apply when the government, instead of demanding an interest in land such as an easement, requires money?

In 1994, Coy Koontz, Sr. owner of 14 acres of vacant land adjacent to the intersection of two busy state roads, SR 50 and SR 408, near Orlando, Florida, sought a permit from the St. Johns Water Management District to develop 3.7 of his 14 acres. Of the 3.7 acres, 3.25 were previously disturbed wetlands. As a permit condition, Koontz offered to preserve his remaining 11 acres as open space. The District, however, pressed Koontz for more, asking him to develop one acre and dedicate 13, or develop the 3.7 acres but pay the District to enhance culverts, ditches, and drainage on 50 acres owned by the District and located four to seven miles away. Koontz refused both demands. Discussion with the District continued for eleven years. The District then denied his permit.

Koontz sued the District in Florida state court under state law to try to get his development approved, but asserted that the District's proposed conditions violated federal constitutional law, the *Nollan / Dolan* doctrine. A Florida trial court held that the District's permit condition demand had illegally delayed Koontz for 11 years and awarded \$376,000 as just compensation for a temporary taking. The Florida Supreme Court reversed, holding that *Nollan / Dolan* did not apply where a permit had been denied and therefore no condition had been imposed; and *Nollan / Dolan* does not apply where the government demands money, not an interest in land.

In its June 25 decision, the U.S. Supreme Court said "yes" on both unresolved questions: *Nollan / Dolan* applies where a permit applicant refuses the conditions and the agency denies the permit, and it applies where the government's demand is for money, not property. Thus, the Court affirmed the broad scope of *Nollan / Dolan* as a protection of property rights, arising from the Takings Clause. But it is the Court's explanation of these results that is extraordinary.

The Court described *Nollan* and *Dolan* as reflecting "Two realities of the permitting process." The first, it said, is that (emphasis added) "*land-use permit applicants are especially vulnerable to . . . coercion*" because "*the government often has broad discretion to deny a permit that is worth far more than property it would like to take.*" In other words, a property owner, engaging in old-fashioned free enterprise by seeking a way to enhance the value of its land by obtaining a permit to develop it, is often at the mercy of government officials interested in extracting more of the enhanced value than is justified by mitigating the actual impacts of the proposed land use. "By conditioning a 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."

The second reality, said the Court, is that land uses often impose costs on the public that government may rightfully offset, such as by requiring dedications of land. *Nollan / Dolan*, the Court observed, aligns these two realities by *allowing* exactions, but *requiring* a nexus and rough proportionality. Thus, the doctrine allows the government to force property owners to mitigate the actual impacts of their own activities, but restrains it from arbitrary action, regulatory overreaching, or outright extortion.

The Court's observation about an imbalance of power in land use proceedings is not news to property owners. But the Court's repeated use of the word "extortion" to describe a possible outcome of land use permit proceedings, and its characterization of land use permitting as often involving flagrant misuse of the unequal bargaining power between the applicant and the government, are by any measure unprecedented and breathtaking – the Court putting a federal thumb on the side of property rights in proceedings that are mostly creatures of state and local law.

The decision's second reverberation is its description of permit conditions / exactions that fail the nexus / proportionality test as essentially a misuse of the power of eminent domain, a direct (or "*per se*") violation of the Fifth Amendment's Takings Clause, as opposed to a so-called "regulatory taking." The Court explained that the test for whether an exaction is unconstitutional is whether that condition, if issued by the land use agency as an administrative order rather than as a demand added to a permit, would require payment of just compensation. Thus, when the District demanded that Koontz dedicate 13 of his acres as open space to obtain a permit to develop the rest of his land, the question was whether, if the agency did this by direct order instead of permit condition, it would have "taken" the property, requiring payment of compensation. (It likely would.) Thus, the *Koontz* decision directs that illegal exactions are essentially direct condemnation / eminent domain, rather than to government "regulatory takings" in which a court balances the circumstances of property ownership against the government's policy objectives. In other words, once the property owner establishes that a government agency has demanded as a final position a permit condition that is not logical or proportional, and makes it clear that the demand is non-negotiable, the Fifth Amendment has been violated.

As is often the case after a broadly-worded decision like *Koontz*, in the immediate aftermath, property owners and property rights advocates declared resounding victory, while government officials described apocalypse. The reality, however, is that the decision will now play out during the next few years as owners, regulators, and courts try to apply the decision to real-life situations. The impact will be neither revolutionary nor catastrophic, but felt on a case-by-case basis. (In fact, the Court clarified the breadth of *Nollan / Dolan* protections, but did not rule on the merits of the *Koontz* development, which is based on Florida, not federal, law.) So, we expect *Koontz*, over time, to have the following consequences:

1. Land use agencies will need to think twice about conditions and demands imposed on permits, because it is now clearer that any demand that is not based on a solid logical nexus and rough proportionality will be suspect, and in the most egregious cases of agency overreaching, property owners will have a stronger, clearer basis to challenge agency action and potentially to sue for at least a temporary taking and just compensation.

2. The decision strengthens the hand of property owners who have the stamina, time, and resources to challenge permit conditions, by broadening the legal analysis and bringing exactions clearly under the federal Fifth Amendment; the holding solidifies a third type of Takings Clause protection of property owners, in addition to prohibiting takings that are not for public use and takings without payment of just compensation.

3. Specific types of government permit conditions / exactions that will now require more careful scrutiny include:

- open space dedications;
- utility upgrades;
- road improvements;
- anything off-site;
- anything on government land;
- anything involving wetlands mitigation;
- anything involving money (such as fees-in-lieu); and
- anything that stretches logic and proportionality beyond reason.

All of the above said, the realities are, and will remain, that property owners and developers will still be pressured to accept – and often will accept – unreasonable demands where there is more value to them in accepting than fighting. Constitutional challenges to permit conditions will still be expensive, time-consuming, and reserved for the most egregious situations. The *Koontz* decision will likely change the tone of land use proceedings involving permit conditions by allowing land owners and their representatives to challenge a broader range of demands, while causing government agencies to consider exactions more carefully before crafting them and insisting on their acceptance. The legal analysis to be applied when government agencies push hard on conditions will be better understood by all concerned. It is likely that most challenges to permit conditions will focus on proportionality rather than nexus. The decision will specifically help land owners most in the relatively small cadre of cases where the government's reaction is egregious and the property owner is willing to take the fight to court. The change will be incremental, and evident most in extreme situations.

Going back to our start, it is an extraordinary day when the U.S. Supreme Court puts its thumb directly on the state, regional, and local land use scale, and in *Koontz* it unmistakably did so. The decision will require government officials to consider more carefully the conditions they impose on permits and in some cases, the decision will give property owners a broader and clearer legal basis to challenge those conditions.

#### Author Biographies

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**BUILDING KNOWLEDGE SESSION**

**What Can Koontz Do For You?**  
*A Discussion of the Most Important U.S. Supreme Court Land Use Decision in Thirty Years*

FEBRUARY 4, 2014 | 10 - 11:00 AM

Presented by [S]:  
 Tim Hollister // Shjorn & Goodrich LLP, Hartford, CT

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**What Can Koontz Do For You?**

Many developers, builders and property owners are faced with impediments when seeking building and planning approvals through their local government. However, the U.S. Supreme Court's recent decision in *Koontz v. St. Johns River Water Management District* now gives owners ammunition to fight certain concessions and exactions that are often required as a condition for approving a development permit. A panel of legal experts will provide an introduction to exactions and how they differ from governmental takings as well as an overview of the Koontz case, an explanation of the Court's decision and why it matters. You will leave this session with proactive steps you can take when seeking development approvals and how to counter opposition.

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**Learning Outcomes**

- Understand exactions - what they are and how they differ from governmental takings.
- Learn the background for the Koontz case and why the Court's decision will have such a positive impact on the ability to develop property.
- Identify the proactive steps to take when seeking development approvals, including recognizing potential issues that may arise.
- Gain insights on how best to counter opposing views from planning departments and/or building officials.

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The 14th Amendment: Public Use, 2014 FEBRUARY 4, 2014 // BUILDERSHOW.COM

### Fifth Amendment to the U.S. Constitution - Takings Clause

*"...Nor shall private property be taken for public use, without just compensation."*

Guarantees:

Public Use	Good Faith	Just Compensation	Exactions
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The 14th Amendment: Public Use, 2014 FEBRUARY 4, 2014 // BUILDERSHOW.COM

### Doctrine of Unconstitutional Conditions

Citizens cannot be asked to give up a legal right in order to exercise a federal constitutional right.

- Public university cannot refuse to renew professor's contract because he exercises a First Amendment Free Speech right.
- County cannot deny right to travel by denying health care until person has resided in-state for one year.
- Police cannot force business owner to choose between warrantless search and shutting down business.
- Land use – Government cannot demand property in exchange for owner giving up Fifth Amendment Takings Clause rights.

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The 14th Amendment: Public Use, 2014 FEBRUARY 4, 2014 // BUILDERSHOW.COM

### The *Nollan/Dolan* Doctrine

- Nollan v. California Coastal Commission (1987)***: Commission could not demand public easement across beachfront property as condition of permit to build a home.
- Dolan v. City of Tigard (1994)***: Agency could not demand dedication of land for public bike trail as condition of permit for plumbing supply store.

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### Nollan-Dolan Requirements

- #1 • Logical "nexus" between development's impacts and the permit condition.
- #2 • "Rough proportionality" between development's impact and the condition.

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### Two Issues Left Open

- #1 • What if government makes a demand for property interest, property owner refuses, permit denied, so no property transferred?
- #2 • What if government demands money instead of property?

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### *Koontz v. St. John's River Water Management District* – June 25, 2013

- 14 acres near Orlando, intersection of State Routes 50 and 408
- Permit requested from District to develop 3.7 acres, 3.2 of which were wetlands and dedicate 11 acres as open space
- District demands:
  - Dedicate 13 acres as open space or
  - Pay District to **improve culverts/ditches/drainage on 50 acres of District property, 4-7 miles away**

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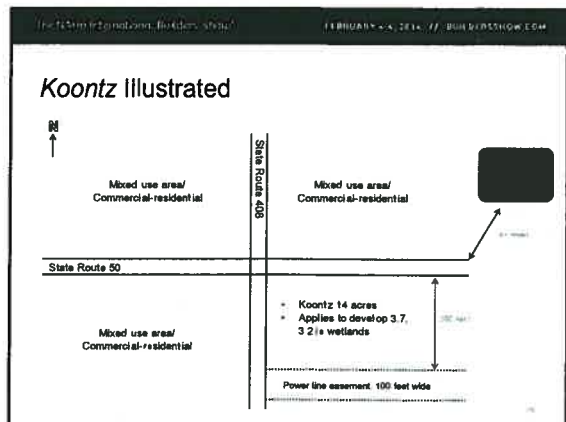
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**U.S. Supreme Court Opinion**

**“Two realities of the permitting process:”**

- Land use permit applicants are especially vulnerable to coercion and extortion
- Land use often imposes costs on the public that government may offset.

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**What Koontz Says:**

- In land use permitting, government has upper hand, can use its power to extract illegal concessions
- Land development is a right; government can't withhold right by requiring unconstitutional exaction
- *Nollan/Dolan* applies when government agency makes a final decision to require a permit condition that violates nexus/rough proportionality, even if permit is then denied
- Nexus and rough proportionality required even if permit is denied, and where demand is money, not property

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### The Decision in Context

- U.S. Supreme Court speaks in broad terms
- Sets minimum national standard for state land use law
- Will not prevent developers from accepting illegal/unconstitutional conditions if profitable

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### Impacts

1. Clearer, broader standards for all conditions
2. Stronger basis for permit applicants to demand detailed justification for conditions
3. Local, state, federal agencies affected
4. *Koontz* applies to:
  - Open space dedication
  - Utility studies/upgrade
  - Road improvements
  - Wetlands mitigation
  - Off-site
  - On government land
  - Money
  - In-lieu fees
  - Application fees/ expert fees

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