Koontz v. St. Johns River Water Mgmt. Dist., No. 11-1447, 570 U.S. ___ (2013)

Mark Fenster
Levin College of Law
University of Florida

Nollan and *Dolan*

- Supreme Court decisions that require courts under the federal Takings Clause (5th Amendment/ incorporated to states under 14th Amendment) to review land use and environmental conditions to make certain:
  - that the conditions bear an "**essential nexus**" to the expected effects of the proposed project (*Nollan*), and
  - that the conditions are "**roughly proportional**" to the expected effects of the proposed project (*Dolan*).

Two issues in *Koontz*

- Can *Nollan* and *Dolan*, which concerned conditional permit approvals, apply to a permit denial? (the "**failed exactions**" issue)
- Do *Nollan* and *Dolan*, which concerned land exactions (public easements, in both cases) apply to money conditions? (the "**money exactions**" issue)
  - Because the **money exactions** issue is settled under Florida law (the dual rational nexus test), we will focus only on the "failed exactions" issue

Brief facts of *Koontz*, as the majority characterized them

- Property owner sought approval to dredge and fill wetlands.
- The parties engaged in discussions about mitigation.
- Property owner rejected all of WMD's suggested mitigation measures.
- WMD rejected permit application.
- Property owner sued, alleging that the denial violated the Takings Clause under *Nollan* and *Dolan*.

Holding

- In a 5-4 decision (Justice Alito writing, with "conservative" members of Court joining without any separate opinions), the Court held that *Nollan* and *Dolan* were an application of the unconstitutional conditions doctrine, and could apply in this case because of the unequal bargaining power between the regulatory agency and the property owner.
- The effort to extort property rights in exchange for a permit approval triggered constitutional protections provided under the Takings Clause.

Reasoning

- Government agencies may have the authority to make regulatory demands that force owners to "bear the full costs" that their development proposals will impose on others, and that does not by itself create constitutional liability for the state.
- But the balance between fair and "extortionate" demands is precisely why the Court had developed the *Nollan* and *Dolan* limitations on exactions—those decisions, like all of its regulatory takings jurisprudence, are intended to stop the government from making unconstitutional demands.
- *"[T]he government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building 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 for which the Fifth Amendment would otherwise require just compensation. . . . Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them."* Slip op. at 7.

Reasoning (cont'd)

- There is no reason to distinguish between "conditions subsequent" to approval (as in *Nollan* and *Dolan*), and "conditions precedent" to approval, which is what occurred in *Koontz*. Koontz faced the same extortion as the property owners in the earlier decisions had endured, even if Koontz had lost no identifiable property right by refusing the conditions precedent he was offered.
- *"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. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury."* (Slip op. at 10)

Counter-arguments (Justice Kagan, joined by three "liberal" justices)

- The District exercised valid authority in denying *Koontz*'s permit, and had the District not discussed any conditions with *Koontz* and merely denied his permit, it would have faced a lower level of scrutiny under the Takings Clause (*Penn Central*'s multi-factor test).
  - *Majority: It doesn't matter, because this is an unconstitutional conditions case—cases that frequently provide prophylactic protection in order to stop coercion*.

Counter-arguments (cont'd)

- No property was taken from Mr. Koontz—no conditions were imposed, and he could not state a *Lucas* claim that his property was left with no value.
  - This too didn't matter to the majority, because *Nollan* and *Dolan* are not typical takings cases.
- The Fifth Amendment's "just compensation" is inapplicable where no property is taken.
  - Remedy issue (next slide).

Remedy

- Courts should look to state law to provide a remedy in a *Koontz* case.
- Here, because the property owner brought his takings claim under state law, he could rely on a Florida statute allowing the award of damages for a state agency action that is "an unreasonable exercise of the state's police power constituting a taking without just compensation." Fla. Stat. Ann. §373.617.

What kind of negotiations trigger *Koontz*? What can the government say or propose informally that can avoid constitutional liability?

- Unclear: The Court declined to offer any specifics about how concrete a demand an agency would have to make in order to trigger *Nollan* and *Dolan* scrutiny, and, where relevant, which demands could form the basis for *Nollan* and *Dolan* review if the parties discuss multiple possible conditions. Slip op. at 13-14.

Issues on remand

- *Was this in fact a constitutional violation?*
  - Even the majority conceded that the record did not firmly establish what happened in this case. (Slip op. at 13-14)
- *If so, what is the remedy?*
  - Whether § 373.617 covers an unconstitutional conditions claim "is a question of state law that the Florida Supreme Court did not address and on which we will not opine." (Slip op. at 13)
- Are you confused? So am I.

Hypo: *Koontz* at the Margins

- You are city attorney for a mid-sized municipality with a commission majority that is suspicious of growth but is averse to litigation.
- In past practice, staff members would engage in initial, open-ended conversations with permit applicants regarding the expected impacts of a proposed project and the means to mitigate those impacts.
- Sometimes, these initial conversations would lead to a site visit by a staff member, where the owner and staff would engage in more specific discussions about mitigation.
- Staff has generally had good relationships with applicants, and the city has not been sued under *Nollan* and *Dolan*, but there has been some staff turnover in the past few years.

Response to *Koontz*

- Do you advise staff to:
- 1. Continue with current practice.
- 2. Continue with current practice, but make certain that staff members clearly state that these are merely preliminary conversations pending formal nexus and proportionality review.
- 3. Stop any preliminary conversations that touch on possible mitigation.
- And if you have conversations that fail to result in an agreement, how do you “protect” yourself from liability?