21-*Koontz* v. St.Johns River Water Management District—Comment by Prof. Poirier

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Subject: brief analysis of *Koontz* Decision

The majority opinion in *Koontz*, by Justice Alito, makes clear that it is an unconstitutional conditions case and views Nollan and Dolan as unconstitutional conditions cases. And Justice Kagan's dissent agrees. Majority and dissent also agree that the Nollan/Dolan requirements of essential nexus and rough proportionality should apply to permit denials premised on a property owner's clear refusal to agree to a condition -- in addition to imposition of permit conditions, such as those at issue in Nollan and Dolan, that require a transfer of property interests. (Kagan, J., dissenting, at 1, describing these as conditions precedent and subsequent; Justice Alito uses the same labels, Opinion at 9.) Both Justices agree that a straightforward permit denial without any attempt to negotiate falls under Penn Central, an easier test to pass.

As Justice Alito writes, Koontz is not a Takings case, for "[w]here the permit is denied and the condition is never imposed, nothing has been taken." (Opinion at 11). Takings Doctrine is nevertheless part of the puzzle because it here supplies the underlying right that is impaired by a possibly unconstitutional condition. (Id.) I do find Justice Alito's use later in the opinion of "per se takings" to explain why fees related to specific property are subject to Nolan/Dolan scrutiny to be confusing and unhelpful here – he could have said "per se" without the takings part. (Id. at 17- 18)

There is ***no*** new federal obligation to pay money based on Takings claims articulated in this case. Justice Alito's opinion makes clear that any potential obligation to pay derives from Florida state law. (Opinion at 11, 13) On remand, the regulatory actions may result in payment for a taking under Florida law, if they constitute demands and are not justified under the now clarified Nollan/Dolan standard. Kagan's dissent argues that there is no taking of anything, and that the Florida courts got it right the first time.

The majority opinion views permit denial after negotiations exploring what mitigation the developer would and would not agree to as tantamount to the imposition of a condition triggering Nollan/Dolan scrutiny. One of Justice Kagan's objections is that it seems that any government suggestion of possible conditions on a permit, or any exploration of mitigation different from that proposed by the property owner, might trigger Nollan/Dolan scrutiny, even though in her view Nollan and Dolan require a ***demand*** that a property owner turn over property in exchange for a permit. (Kagan, J., dissenting, at 13 (citing Lingle on exactions)) "If a local government risked a lawsuit every time it made a suggestion to an applicant about how to meet permitting criteria, it would cease to do so; indeed, the government might desist altogether from communicating with applicants." (Kagan, J., dissenting, at 13 – 14). Sounds like a problem to me.

To be sure, as a question of fact, one issue on remand is whether the negotiation over a permit here constituted a demand for Nollan/Dolan purposes. (Opinion at 13) "This Court therefore has no occasion to consider how concrete and specific a demand must be to give rise to liability under Nollan and Dolan." (Id.) And the Court repeats the word "demand" twice in its concluding paragraph, suggesting that what constitutes a

demand will surely be the subject of much future litigation. The Court *__does__* state that if one of the government's offers satisfies Nollan/Dolan scrutiny, then the landowner has not been subject to an unconstitutional condition. (Id. at 14)

The majority and dissent disagree as to what other government actions are covered by Nollan/Dolan scrutiny. In particular, as Zyg makes clear, one issue is the level of scrutiny for fees related to permits. As an alternative holding, the Florida Supreme Court held that because the petitioner could have spent money for offsite mitigation to get the permit rather than give up a conservation easement larger than the one he had proposed, his claim fails. Courts have been split on whether Nollan/Dolan scrutiny ever applies to fees, and if so to what kinds of fees. The majority in Koontz says that Nollan/Dolan scrutiny does apply to fees. To hold otherwise would provide an easy loophole to escape from Nollan/Dolan scrutiny, as only one alternative has to meet that test. (Opinion at 15)

Justice Kagan is unhappy with the lack of clarity and perhaps breadth of this part of the majority opinion. She reads Eastern Enterprises (a case challenging statutorily-imposed retroactive responsibility for health insurance for coal miners) to say that the government may impose financial obligations without triggering Takings Clause protections, although the action is still subject to Due Process review concerning excessive retroactivity. Justice Alito distinguishes Eastern Enterprises, saying that case was about funds, while Koontz is about property in land. He explicitly distinguishes taxes and user fees as not subject to heightened Nollan/Dolan scrutiny. "The fulcrum in this case turns on is the direct link between the government's demand and a specific parcel of real property." (Opinion at 16 – 17, footnote omitted) The Court analogizes to cases involving liens on property or income streams derived from property, the loss of which clearly constitutes a taking. I'm not persuaded by the distinction. Besides, it said earlier this wasn't a takings case. It would have been clearer to say that fees related to specific parcels of real property get special constitutional scrutiny under unconstitutional conditions doctrine because of the underlying constitutional right re no taking without just compensation. Note that footnote 2 on page 17 seems to save for another day the question of whether monetary exactions not tied to specific parcel of land are subject to the Court's analysis here.

Justice Kagan writes that the Court's supposed clarification doesn't go nearly far enough. "[O]nce the majority decides that a simple demand to pay money – the sort of thing often viewed as a tax – can count as an impermissible 'exaction,' how is anyone to tell the two apart?" She believes that the opinion constitutionalizes challenges to sewage assessments, liquor license charges, and so on. There is a general "intrusion into local affairs…." (Kagan, J. dissenting, at 10) She points to disarray in state court opinions that have treated some kinds of fees as subject to Nollan/Dolan heightened scrutiny, characterizing the decisions as "all over the map" (Kagan, J., dissenting, at 10 n. 2). "[T]he majority's refusal to 'to say more' about the scope of its new rule now casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money." (Kagan, J., dissenting, at 10) The opinion "turns a broad array of local land-use regulations into federal constitutional questions." (Kagan, J., dissenting, at 18). Sounds like another problem to me.

So the opinion leaves open questions of what constitutes a demand during negotiations over a permit, and what types of fees trigger heightened scrutiny.

Beyond that, one consequence of Koontz is that state and local governments will have to

justify a broader range (just how broad, Kagan rightly worries?) of land-use policies and actions more carefully, and must link them to specific consequences of denying or conditioning requested permits or charging fees related to property use. I suspect the land-use authority may permissibly take a certain amount of time to develop a justificatory study without an adverse consequence (see generally Tahoe-Sierra on good faith delay related to government processes). Koontz does give the landowner the edge in that denial of a permit request or rejection of a landowner's version of appropriate mitigation will have to be justified carefully. All in all, more work for government regulators. Will land-use regulators be able to afford to do this? How much work will it be? The answer may depend on how zealous judges turn out to be in applying the heightened review. One might argue that insisting on some kind of explicit nexus and rough proportionality isn't such a bad thing if it doesn't deter regulation altogether and is not too expensive to carryout. Maybe this ruling breathes life into the notion of having a comprehensive plan, up to date and specific enough to justify particular actions/denials with some level of clarity.

I'm assuming most subsequent cases will be brought in state court when challenging state and local regulation. Since it's not Takings, I don't see Williamson County applying; instead my assumption is based on the general aversion of federal courts to deal with local land use matters claimed to violate the Due Process Clause. Could be wrong.

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