

E-ALERT | Environmental

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SUPREME COURT EXPANDS PROTECTION AGAINST GOVERNMENT EXTORTION OF DISPROPORTIONATE OR UNRELATED PAYMENTS

Most of the press at the end of the Supreme Court term focused on the high-profile gay marriage and voting rights cases. But a 5-4 decision announced on the second-to-last day of the term that did not receive much attention, *Koontz v. St. Johns River Water Mgmt. Dist.*, 2013 WL 3184628, No. 11-1447 (U.S. June 25, 2013), may be more significant for business. *Koontz* holds that government may not require a permit applicant to provide in-kind benefits or monetary payments in order to secure a land-use permit, unless such benefits or payments have both an “essential nexus” and a “rough proportionality” to the impacts of the proposed permitted activity. *Id.* at *8. In dissent, Justice Elena Kagan predicts that the majority’s approach will alter “the very heart of local land-use regulation and service delivery.” *Id.* at *21. That may be an overstatement, but at a minimum, *Koontz* provides businesses an important new tool with which to challenge disproportionate or unrelated government demands. While the holding is limited to land-use permits, the logic of the decision is broader and we expect cases will be brought in the lower courts seeking to expand the principle into other areas in which governments (local, state, or federal) attempt to condition favorable governmental action on monetary payment or in-kind compensation.

BACKGROUND

In two earlier decisions, the Supreme Court had established that the government may not condition approval of a land-use permit on the permit applicant’s agreement to restrict the use of its property, unless there was both (1) a “nexus” between the proposed restriction and a legitimate state interest, and (2) a “rough proportionality” between the impact of the proposed development and the scope of the restriction the government sought to impose. *Dolan v. City of Tigard*, 512 U.S. 374, 386, 391 (1994); see also *Nolan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987). The basis for these decisions was the concept of unconstitutional conditions: allowing the government to demand disproportionate restrictions on property use in exchange for a necessary permit would, in effect, require a person to give up the constitutional right to receive just compensation “in exchange for a discretionary benefit conferred by the government.” *Dolan*, 512 U.S. at 385.

These decisions left two important questions undecided. First, the decisions did not address whether a *denial* of a permit was subject to the two-part test. Second, the decisions did not address whether a government’s request of money, as opposed to restrictions on property development or other similar exactions, triggered scrutiny under *Dolan*.

Both of these questions were raised in *Koontz*. There, a Florida property owner wished to develop his property, which was located in part on wetlands, and so *Koontz* had to obtain a permit from the water district. *Koontz*, 2013 WL 3184628 at *5. The district told *Koontz* his permit would be denied unless he either (1) agreed to substantially reduce the size of his proposed development and deed to the District a conservation easement on the remainder of his property, or (2) hire contractors to make improvements to district-owned land several miles away. *Id.* *Koontz* believed these

requirements were excessive and brought suit against the district. *Id.* at *6. The Florida Supreme Court relied on these two unanswered questions to deny Koontz’s request for relief. *Id.*

THE SUPREME COURT’S DECISION IN *KOONTZ*

The Court in *Koontz* answered both of these questions favorably to property owners. The majority and dissent agreed on the first issue, finding that the requirements of *Dolan* and *Nolan* apply to permit denials, in large part because the contrary result would allow the government to evade these constitutional limitations simply by re-framing the required condition in negative terms (“the permit is denied until” a certain action is taken) as opposed to positive terms (“the permit will be approved only if”). *Koontz*, 2013 WL 3184628 at *8; *id.* at *17 (Kagan, J., dissenting) (agreeing with the majority on this point).

The Court split 5-4 over the question of whether requests for monetary payments were subject to review for a sufficient nexus and proportionality. The majority found such payments would trigger such review, at least where there is a “direct link between the government’s demand and a specific parcel of real property.” *Id.* at *12. The majority also reasoned that excluding monetary demands would create a loophole which governments could easily exploit. *Id.*

While the Court settled two important questions, its decision leaves open several key questions regarding use of the unconstitutional conditions doctrine to challenge government demands during the permitting process.

First, the Court has made clear that for now the restrictions outlined in *Koontz*, *Dolan*, and *Nolan* are limited to the situation of “land use permit” applications. *Id.* at *16; see also *id.* at *7 (explaining why these restrictions apply only to “land use permits”). Left unanswered, however, is the question of which types of permits qualify as “land use permits” triggering review. In *Koontz*, the answer was clear: restrictions on developing a property because of the presence of wetlands clearly falls within the scope of a land-use permit. However, arguably restrictions on the *activities* that take place on a particular property also ought to fall within the scope of these cases, as the dissent suggested by referring to permits relating to “landowners who engage in a certain activity,” such as “liquor licenses.” *Id.* at *21 (Kagan, J., dissenting). If such restrictions fell within the scope of land-use permits, then a wide range of environmental permits could be subject to review under *Koontz*.

Second, the Court did not address the question of how “concrete” a governmental demand must be to give rise to review under *Nolan* and *Dolan*. *Id.* at *11. This is important as a practical matter, because the standard will define when claims may be brought to challenge attempted government exactions made during the course of the permitting process.

Finally, the Court did not clarify when a land-use permitting fee is a permissible “tax” as opposed to a potentially unconstitutional exaction. *Id.* at *15. Again, this distinction will be important as a practical matter, as in the wake of *Koontz* many governmental entities will likely characterize any fees that must be paid to secure a permit as a permissible tax, rather than an impermissible exaction.

BROADER IMPLICATIONS?

In a variety of areas, government has conditioned favorable regulatory action on payment of fees or other compensating mitigation. For example, permission to fill a wetland is frequently conditioned on preserving other wetlands as “compensatory mitigation.” See, e.g., http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation_index.cfm. *Koontz* gives

companies subject to such exactions by government a new way to challenge the government's demands in court if they are disproportionate or unrelated. It remains to be seen how far the lower courts will be willing to go in expanding the logic of *Koontz* to situations outside the land use context. In principle, the doctrine of unconstitutional conditions upon which the Court relied is not limited to land use, but may apply to many other activities, such as the right to do business in a state. Could a company successfully challenge state surcharges on eWaste if the amount was disproportionate to actual harm? Could a company challenge environmental permitting fees that are far in excess of costs? Might there even be applications outside of environmental regulation?

CONCLUSION

While *Koontz* leaves many questions regarding the applicability of the unconstitutional conditions doctrine in the land-use context unsettled, it is nonetheless a significant victory for businesses. The decision will subject governmental requests for payment or restrictions on property use made in connection with a land-use permit application to additional scrutiny, and closes loopholes that governmental entities have used in the past to evade the requirement that such payments or restrictions be proportionate to the proposed development.

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