

U.S. Supreme Court Expands Scrutiny Of Land-Use Permit Conditions

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The United States Supreme Court ruled that a development condition must have a "nexus" and be "roughly proportional" to the project's impacts even if the condition requires payment of a fee or conveying property unrelated to the application to offset project impacts, and regardless whether it approves or denies the permit. The recent 5-4 decision in *Koontz v. St. Johns River Water Management District* revisits, and expands, the federal constitutional *Nollan/Dolan* "unconstitutional conditions" tests that have been in place for two decades.

The plaintiff in *Koontz* applied to develop his Florida wetlands property. Under Florida law, this required obtaining permits and mitigating environmental damage from the project by preserving onsite wetlands or improving or creating wetlands offsite. As mitigation, plaintiff offered to deed to the District a conservation easement for much of his property. The District proposed that he either convey a larger easement or hire contractors to improve District-owned wetlands nearby. Plaintiff refused. The District denied plaintiff's application and plaintiff sued. The Court ruled for plaintiff on two grounds.

First, the Court unanimously ruled that government must satisfy the *Nollan/Dolan* tests by showing permit conditions have a "nexus" and are roughly proportional with project impacts even if it denies the application. The Court reasoned that saying a permit is "approved if" is no different than saying it is "denied until." The government should not be allowed to sidestep constitutional protections merely by rephrasing its decision as a denial.

Second, the Court ruled permit conditions must satisfy the "nexus" and rough proportionality tests even if the government demands money (including in-lieu fees) or conveyance of an interest in property that is not the subject of the permit. The pivotal fact was the "direct link" between the monetary exaction and a specific parcel - the District's offsite wetlands. The Court did not decide whether the District's proposed conditions caused an unconstitutional taking, leaving that decision for the Florida courts.

The *Koontz* decision expands the *Nollan/Dolan* constitutional rule governing the validity of mitigation measures for land use projects. Justice Kagan, writing for the dissent, decried the ruling as "threaten[ing] to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny." In California, however, "ad hoc" impact fees imposed as a condition of project approval are subject to nexus and proportionality requirements pursuant to the California Supreme Court's decision in *Ehrlich v. City of Culver City*, 12 Cal.4th 854 (1996). Generally applicable development impact fees are subject to the state's Mitigation Fee Act (Government Code Sections 66000 through 66025, adopted by the Legislature in 1987), which requires local agencies to establish a "reasonable relationship" between both the need and use of the fee and the development, as well as between the amount of the fee and the cost of the public facility attributable to the

development.

Still, *Koontz* may generate more challenges to local permit conditions though it remains to be seen how future courts will apply it in California given these cases and statutes. *Koontz* serves as a reminder that local governments making land-use decisions should have factual support demonstrating that the amount of any in-lieu fee imposed as a condition has a nexus and is roughly proportional to the impacts of the project.

If you have any questions or would like more information on this ruling, please contact Saskia T. Asamura.