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Koontz and Exactions: Big Deal or Not?

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Exactions: U.S. Supreme Court Right on the Money

On the next-to-last-day of its term, the U.S. Supreme Court issued its opinion in *Koontz v. St Johns River Water Management District*, No. 11-1447 (June 25, 2013). The opinion came at nearly the end presumably because—unlike the earlier two takings cases the Court considered—*Koontz* was not unanimous, but was what one colleague referred to as a "classic" split in the Justices: the Chief, Kennedy, Scalia, and Thomas joining the opinion authored by Justice Alito, with the Court's liberal wing siding at least partially with the government. Here are my thoughts on *Koontz*:

All nine Justices agreed that a property owner need not accept a permit which is subject to conditions she believes are unconstitutional in order to challenge it. This is a remarkable shift in tone from the oral arguments, where the prevailing wisdom was that the Court might conclude that there was no Fifth Amendment takings problem at all because the District did not grant the permit, and thus nothing was "taken" from Koontz. Instead, the entire Court agreed that it made no difference, and would be pointless to require a property owner to obtain a permit in order to ripen a challenge to its conditions. Note to practitioners: it seems the Court is growing weary of silly procedural arguments such as these. *Cf. Horne*.

Second, the majority concluded that money is property. Yes, we know we've said it before, and it does seem kind of obvious to all but perhaps those familiar with Supreme Court jurisprudence on what constitutes "property" for Fifth Amendment purposes, but until now, the Court has not expressly said so. This was the major point that the dissenters, led by Justice Kagan, focused on, employing both the "slippery slope" and "the sky will fall" arguments. The slippery slope in that if owners could challenge monetary exactions, then what's next, a takings

challenge to taxes? (Paging Professor Epstein!) The majority rightly rejected this rhetorical hyperbole, and we can't seriously believe that the dissenters don't understand the fundamental differences between taxes and fees, and exactions. The Court make it a point to say that to be subject to the rule announced, the demand for cash must be tied to some piece of land.

The majority also rejected the chicken little argument (echoed by the APA and lawprof John Echevarria), noting that in places such as California and Texas, where land regulators have been subject to *Nollan* and *Dolan*'s requirements for monetary exactions for some time, not only has planning not ground to a halt, having government show a nexus and rough proportionality has actually resulted in a *better* planning environment. And we didn't just make this up: these are planners saying this, not property rights advocates.

The Court also held that whatever you might call it, they're all exactions, or at least are subject to the *Nollan* and *Dolan* "nexus" and "rough proportionality" requirements. *See* slip op. at 18 where Justice Alito correctly notes that whether you call them in lieu fees, exactions, impact fees, fair share requirements, or mitigation fees, they're pretty much the same as far as *Nollan*/*Dolan* are concerned.

Our view of the case is that the "vibe" underlying the Court's opinion is that the Fifth Amendment is the *Takings* Clause, not just the Just Compensation Clause, as the government argued. We've said it before, and now so has the Court. Twice (again, *cf. Horne*). Compensation isn't the only remedy for a violation of the "Takings Clause." And between the holdings in *Koontz* and *Horne*, we think a revisit to *Williamson County*'s ripeness rules may be primed, even though neither case squarely addressed it. So please, government guys and friendly reporters, give that one a rest. All Fifth Amendment claims need not seek compensation, and here, it's burdening the constitutional right to compensation that is the violation, by being forced to shoulder more than your share of burdens which should be borne by all, and forcing a property owner to make that choice.

Surprise! Environmental Lawprof Dislikes Koontz

Some things are constant: the speed of light, the sun rises in the east. And Professor John Echeverria, the well-known environmental lawprof, has never met a taking he's liked. Even if that means disagreeing in one takings case with Justice Ginsburg writing for a unanimous Supreme Court, the unanimous Court in another takings case, or, as in his June 27, 2013 op-ed in the *New York Times*, "*A Legal Blow to Sustainable Development*," it means arguing that the Court's ruling in *Koontz v. St. Johns Water Management District*, No. 11-1147 (June 25, 2013) says what it doesn't necessarily say. The op-ed merits careful reading.

First, he argues that "[t]he district made clear that it was willing to grant the permit if Mr. Koontz agreed to reduce the size of the development or spend money on any of a variety of wetlands-restoration projects designed to offset the project's environmental effects." Wait, the District's property, miles away, was affected by Koontz's project? Not really, but as Justice Alito wrote for the *Koontz* majority, "the District told petitioner that he could proceed with the development as proposed, building on 3.7 acres and deeding a conservation easement to the government on the remainder of the property, if he also agreed to hire contractors to make improvements to District-owned land several miles away." Slip op. at 5. The essence of Koontz's *Nollan*/*Dolan* argument is that his project has nothing to do with the District's land, so let's not confuse the situation by suggesting that the District's demand was objectionable because it was related to Koontz's project.

Second, the op-ed argues that the Court's ruling that a property owner can challenge the government's demand (and does not have to first accept the condition), will cause "serious real-world damage." This overlooks the fact that all nine Justices agreed with Koontz that a permit applicant need not accept the permit with the offensive conditions in order to challenge it because it's asking a property owner to choose between her rights and a permit is the wrongful act. As Justice Kagan wrote in dissent:

> I think the Court gets the first question it addresses right. The *Nollan-Dolan* standard applies not only when the government approves a development permit conditioned on the owner's conveyance of a property interest (i.e., imposes a condition subsequent), but also when the government denies a permit until the owner meets the condition (*i.e.*, imposes a condition precedent). That means an owner may challenge the denial of a permit on the ground that the government's condition lacks the "nexus" and "rough proportionality" to the development's social costs that *Nollan* and *Dolan* require. Still, the condition-subsequent and condition-precedent situations differ in an important way. When the government grants a permit subject to the relinquishment of real property, and that condition does not satisfy *Nollan* and *Dolan*, then the government has taken the property and must pay just compensation under the Fifth Amendment. But when the government denies a permit because an owner has refused to accede to that same demand, nothing has actually been taken. The owner is entitled to have the improper condition removed; and he may be entitled to a monetary remedy created by state law for imposing such a condition; but he cannot be entitled to constitutional compensation for a taking of property. So far, we all agree.

Dissent at 1-2. The dissenters' only beef was the majority's conclusion that a demand for money in return for development approvals is the same as a demand for land. So whatever "real-world damage" that Koontz might cause (and it likely won't, see below) it's something that the entire Court is responsible for, at least to the extent that it purportedly ties government's hands by making it too concerned about being subject to claims merely for negotiating.

Third, what about Justice Kagan's claim that the sky will fall because demands for money are subject to the nexus and proportionality requirements? The majority rejected the dissent's assertion, echoed by Professor Echeverria, that *Koontz* "will 'work a revolution in land-use law.'" Justice Alito noted that several of the most populous jurisdictions have held monetary exactions to *Nollan* and *Dolan*'s standards for some time and planning has not ground to a halt, or permits simply denied. Moreover, as we pointed out in our amicus brief, not only has planning as we know it not ended in these jurisdictions, requiring government show a nexus and rough proportionality has actually resulted in a better planning environment by making the rules more concrete and the process more transparent. As our law

partner commented, landowners don't want takings claims, they want to know the rules.

As a 2001 U.C. Davis Law Review study of California planners' reactions to Nollan and Dolan concluded, "the requirements of *Nollan* and *Dolan* seem to have nudged developing communities into more systematic, comprehensive planning through the preparation of reports and studies documenting the rationale for exacting money and land from developers. Perhaps surprisingly, a large majority of California planners view the Supreme Court decisions as establishing 'good planning practices.'" It also concluded that built-out communities may "lose the ability to exact land or higher fees from developers in order to pay for unfunded infrastructure needs." Those are the situations in which the Armstrong rationale (forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole) tells us that taxes and eminent domain is the proper means to fund and build, not individual exactions.

Fourth, what of Professor Echeverria's assertion that the Court shifted the burden in *Koontz* from the property owner to the government?

> While, to be sure, such mandates must be reasonable under the Constitution, the revolutionary and destructive step taken by the court in *Koontz* is to cast the burden on the government to justify the mandates according to the heightened *Nollan-Dolan* standard. This is contrary to the traditional court approach of according deference to elected officials and technical experts on issues of regulatory policy.

Notice the sleight-of-hand. Only by conflating as-applied challenges (subject to *Nollan*/*Dolan*) with facial challenges (which some courts have held are subject only to rational basis review), and "technical experts" (your local municipal planners) with elected officials (legislators), can he argue that *Koontz* is "revolutionary." What he fails to mention is that the government has always borne the burden, at least since *Dolan*:

> But, on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement.

And even he acknowledges that the government bears the burden: "[*Nollan* and *Dolan*] established that when the government approved a development subject to certain conditions, like a requirement that a developer dedicate an easement to the public, the conditions would be deemed an appropriation of private property unless the government could show a logical relationship and a 'rough proportionality' between the conditions imposed and the projected effects of the development." Is *Koontz* "revolutionary?" Hardly.

This ties into our last point. The post-opinion commentary that *Koontz* will unduly bind the hands of land regulators (see the APA's statement, and this article, for example) isn't a serious concern. Chilling the fervor of the government is just what the provisions in the Bill of Rights are supposed to do, and fidelity to the Constitution's protections is more important than insulating government's freedom to bargain from reasonable restraints. As Justice William Brennan (that well-known conservative Justice) once wrote:

> Even if I were to concede a role for policy considerations, I am not so sure that they would militate against requiring payment of just compensation. Indeed, land-use planning commentators have suggested that the threat of financial liability for unconstitutional police power regulations would help to produce a more rational basis of decisionmaking that weighs the costs of restrictions against their benefits. . . . Such liability might also encourage municipalities to err on the constitutional side of police power regulations, and to develop internal rules and operating procedures to minimize overzealous regulatory attempts. . . . After all, a policeman must know the Constitution, then why not a planner? In any event, one may wonder as an empirical matter whether the threat of just compensation will greatly impede the efforts of planners.

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting). Moreover, remember that Nollan and Dolan do not

prohibit exactions but merely condition their imposition on the government first articulating their justifications. And planners and municipal lawyers are nothing if they aren't creative when it comes to getting the goodies.

So in sum, we get it: the good professor disagrees with the ruling. But we didn't need the op-ed to have predicted that.

Cal App: "Inclusionary Housing" Money Exaction Might Just Survive Low-Level Scrutiny

In *California Building Industry Ass'n v. City of San Jose*, No. H0338563 (June 6, 2013), the California Court of Appeal (6th District) held that the city's affordable housing exaction might survive judicial scrutiny because it was designed to promote the development of affordable housing, and not to mitigate the impacts of developing market priced ("unaffordable?") housing.

San Jose is one of the most expensive markets in the country, where homes don't come cheap. The city's "inclusionary housing" ordinance requires developers of residential projects of more than 20 units to set aside 15% for purchase at below-market rates by those earning no more than 110% of the area median income. Alternatively, a developer could either construct affordable housing on a different site, dedicate land, or pay an in lieu fee "not to exceed the difference between the median sale price of a market-rate unit in the prior 36 months and the cost of an 'affordable housing' unit for a household earning no more than 110 percent of the area median income." A waiver is available if the developer can show the lack of a "reasonable relationship" between the impact of the project and the exaction, or that applying the ordinance would result in a taking.

The California Building Industry Association brought a facial challenge to the ordinance seeking declaratory and injunctive relief, arguing that the city had not made a showing that the exactions were reasonably related to any impacts caused by a proposed project, and there was no attempt made to calculate the public

impacts causes. In the plaintiff's view, the set-aside percentages and in lieu fees were arbitrary.

The trial court invalided the ordinance, and enjoined its implementation, concluding that "the challenged portion of the ordinance bears no reasonable relationship to permissible outcomes in the generality or great majority of cases," and that the city was not able to show where in the record there was evidence showing the reasonable relationship between the exactions and projected impacts. The court of appeal reversed:

> The "reasonable relationship" required by the [Califfornia] Supreme Court in *San Remo* was between the development mitigation fee and the "deleterious public impact of the development." (*San Remo*, *supra*, 27 Cal.4th at p. 671.) Thus, it was appropriate to require a connection between the in-lieu fee and the loss of housing—that is, the "deleterious public impact" of the conversion. (Ibid.) Unlike the mitigation fee challenged in *San Remo*, the Ordinance at issue here does not appear to have been enacted for the purpose of mitigating housing loss caused by new residential development. Its express purposes were to "enhance the public welfare by establishing policies which require the development of housing affordable to households of very low, lower, and moderate incomes" and to promote the use of available land for those households, thereby alleviating the demand for affordable housing. Thus, whether the Ordinance was reasonably related to the deleterious impact of market-rate residential development in San Jose is the wrong question to ask in this case.

Slip op. at 11. The court also held that it is the plaintiff's burden and not the city's to show the connection, or, more precisely, the lack of connection. The court distinguished a decision from another court of appeal which struck down an affordable housing in lieu fee, contrasting a facial challenge and its attendant "formidable burden," with the "as applied" challenge in that case.

The court concluded that the exaction test applied by the trial court was not the right test, and it should have reviewed the ordinance as an exercise of the city's police power. And we know what that means, even though the court of appeals held that "this does not entail unthinking acquiences to the City's stated goals." Slip op. at 16. The court remanded the case:

> We again emphasize, however, that it is CBIA's burden to establish the facial invalidity of the IHO, not the City's to prove that it survives the challenge. (*Cf. Building Industry Assn of Cent. California v. County of Stanislaus*, *supra*, 190 Cal.App.4th at p. 590 [party attacking the regulation must demonstrate its invalidity]; *see also Action Apartment Ass'n v. City of Santa Monica* (2008) 166 Cal.App.4th 456, 468 [party asserting facial takings claim must demonstrate that its "mere enactment constitutes a taking"].) We thus leave it to the superior court to determine whether CBIA has rebutted the presumption that the inclusionary housing conditions are reasonably related to the City's legitimate public purpose of ensuring an adequate supply of affordable housing in the community.

Slip op. at 18.

Notably absent from the opinion is an analysis of *Nollan/Dolan*, because the plaintiff "*repeatedly* emphasized that 'this is not a takings case.'" Slip op. at 6 (emphasis original). *See also* slip op. at 15 & n.8 (*Nollan*/*Dolan* only apply to land exactions, not demands for money).

After *Koontz*, you should not be surprised that the decision has been taken to the next higher level and the California Building Industry Association has petitioned the California Supreme Court to review the case. The petition points out that the lower California courts have reached different conclusions when considering nearly identical ordinances (see here, for example):

> *Building Industry Association of Central California v. City of Patterson*, 171 Cal. App. 4th 886, 898 (2009), holds that *San Remo Hotel* applies to inclusionary housing ordinances. The Opinion of the court below holds that *San Remo Hotel* does not apply to such ordinances. These two published decisions deal with materially identical inclusionary housing ordinances, and so cannot be distinguished on any principled ground. Trial courts and appellate courts will have no basis on which to decide whether the facts of a challenged inclusionary housing ordinance are more like those in *City of Patterson* or more like those in the Opinion, because the facts in these two cases are materially the same. As a consequence, future courts will have to choose which case to follow, and the result will be a patchwork of legal standards across the state.
>
> This Court should also grant review to settle the important legal question of the extent to which the United States Supreme Court's recent decision in *Koontz v. St. Johns River Water Management District*, No. 11- 1447, 2013 WL

> 3184628 (U.S. June 25, 2013) (*Koontz*), governs the judicial review of in-lieu development fees in California. *Koontz* clarifies that all in-lieu fees are land use exactions, which calls into serious question the Opinion's holding that in-lieu fees in inclusionary housing ordinances can be upheld as mere exercises of a city's police power.

Petition at 2-3. More details here from Pacific Legal Foundation.

The Ninth Circuit Botches Regulatory Takings Again

Finally, a case that may be of some interest, even though it is not about exactions. We're not quite sure what to make of the Ninth Circuit's latest foray into the regulatory takings doctrine which holds that a municipal rent control ordinance did not qualify under *Penn Central* (*MHC Financing Ltd P'ship v. City of San Rafael*, No. 07-15983 (Apr. 17, 2013), given that the court's hand is mostly tied by the en banc Ninth Circuit decision in *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir.2010) (en banc), *cert. denied*, 131 S. Ct. 2455 (2011).

Before we begin, two preliminary thoughts. First, the district court's decision finding that San Rafael's mobile home rent control ordinance worked a taking of the mobilehome park owner's property because it reduced the value by more than 80% was not some one-off aberration by a conservative district judge out on a lark. No, the decision was by the now-retired Vaughn R. Walker, the same judge who invalidated California's Proposition 8 in one of the same-sex marriage cases currently before the Supreme Court. Apparently a proponent of actual judicial review for all constitutional rights, he also found a taking in another case we've covered here, *Yamagiwa v. City of Half Moon Bay*, No. 05-4149 VRW (Nov. 28, 2007), in which he concluded that the city was liable for $37 million in compensation.

Second, San Rafael is not in some backwater, but is the heart of Marin County, which a source no less than *Wikipedia* tells us "is well known for its natural beauty, liberal politics, and affluence" (they forgot to mention hot tubs). San Rafael is the place where Frank Lloyd Wright designed the county courthouse, and is up

the street from Tiburon and just south of George Lucas' broken dream of expanding his Lucasfilm studio. In other words, you need some serious coin to live in Marin County. Indeed, the property at issue in this case is no "trailer park" but is quite tony and just a stone's throw from Skywalker Ranch.

But the city fathers and mothers apparently thought it important to insure that owners of mobile homes could enjoy the bounty that Marin County has to offer. So they adopted a rent control ordinance in 1989, amended it in 1993, and then in 1999 amended it yet again. We'll leave it to you to read the ordinance in its entirety, but here's the short version. The ordinance initally tied the park owner's ability to increase the ground rent to the CPI, with a sliding scale. The 1993 amendment added vacancy control which gave the mobile home owner the ability to transfer the lower-than-market rent to the purchaser of a mobile home. The 1999 amendment removed the sliding scale, and all pad rent increases are limited to 75% of CPI.

The rent-control-as-a-taking issue has been before the Ninth Circuit before with pretty much the same results, most recently in *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir.2010) (en banc), *cert. denied*, 131 S. Ct. 2455 (2011). [Disclosure: in that case, we filed an amicus brief for the Manufactured Housing Institute, arguing the Ninth Circuit was wrong, and that the Supreme Court should grant cert.]. See also this case and this case for more examples of challenges to mobilehome rent control ordinances.

In *MHC*, after a bench trial (two, actually) the district court held the ordinance was a taking under *Penn Central*, but not a due process violation:

> "[p]urchasers of mobilehomes in Contempo Marin after the 1999 Amendments have paid a premium reflecting the present value of expected rent savings due to San Rafael rent regulation. This premium averages $67,000 for the right the enjoy the below market regulated rent." Because the premium is being paid to the Contempo Marin mobilehome owners, "the amendments reduced MHC's revenue streams from Contempo Marin and the value of its property by $10,609,136." The district court also held that "the whole Ordinance reduced MHC's net operating income by 75 percent and reduced the value of the park from $120 million to $23 million."

Slip op. at 11-12.

The Ninth Circuit, as we mentioned above, reversed. According to the panel, the central fact that made hash of the plaintiff's *Penn Central* claim was that when it purchased the park in 1993, the original 1989 ordinance had already been adopted. Thus, analysis of each of the three *Penn Central* factors results in no taking:

- **Economic Impact:** The property owner didn't suffer a huge economic impact because the district court should only have measured the diminution in value by comparing present market value with the market value of the property at the time of MHC's acquisition, instead of at the time of the amended ordinance. Apparently, the original ordinance had already depressed the market value of the park, and the district court should have measured the economic impact as "only" $10 million, and not $97 million (the value of the park with no rent control at all). *See* slip op. at 17-18. However, even if measured against the value of the park unencumbered by any ordinance, an 81% reduction in value would not be sufficient according to the court. Slip op. at 18-19. Read that again, to make sure you got it: a transfer of $97 million is not enough. Wow. Maybe this is just Marin County, and you know, a dollar doesn't go as far here as elsewhere.

- **Investment-backed Expectations:** the Ninth Circuit rejected the district court's conclusion the property owner expected that the rent it charged would be set by the market, not by the city. "[T]hat is, MHC's expectation was that Contempo Marin would be subject to no rent control at all." Slip op. at 19. This was not a reasonable expection to the Ninth Circuit because "MHC had even less reason to expect that the rent control regime would disappear altogether." *Id*. Renting property is a "regulated field," and those who choose to participate in it "cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." Slip op. at 19-20. Relying upon the rationale in *Guggenheim*, the court held this is the "primary factor," and surmised that the "price they paid for the mobile home park doubtless refected the burden of rent control they would have to suffer." Slip op. at 20.
- **Character of the Government Action:** This was not a physical invasion (allowing mobile home owners to occupy space in the park, or a physical taking of the rent premium), but rather a mere adjustment of the benefits and burdens of economic life. In other words, you knew the regulatory environment was harsh when you decided to buy a mobile home park. Slip op. at 22-23.

Some thoughts:

- **Presuming Expectations.** First, the Ninth Circuit reached its conclusions as a matter of law, not because the district court misunderstood the facts. In other words, when you buy property already subject to a regulation that takes property, you simply cannot form investment-backed expectations that you can operate free of the regulation, even if it may be a taking. This was a case where the district court held two trials before concluding that the ordinance was a taking under an "essentially *ad hoc*, factual inquiry." But even though appellate courts usually defer to a trial court's factual findings, the Ninth Circuit didn't do so because it was simply legally impossible for those expectations to be formed when a restrictive ordinance predates purchase. But aren't someone's "expectations" and how property is priced questions to be decided by the trier of fact and not by appellate judges who surmise about what the price "doubtless" reflected? Instead, the court substituted its view that it was "doubtless" that MHC's acquisition price for the park was already discounted to account for the rent control regulation. But was there any testimony on this? Even if there was, would it matter to the Ninth Circuit?

- **Where's *Palazzolo*?** Second, where's the Ninth Circuit's analysis of *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001), in which the Supreme Court rejected the proposition that "postenactment purchasers cannot challenge a regulation under the Takings Clause[?]" The Ninth Circuit cited that case only in the section of the opinion dealing with ripeness, not in the *Penn Central* discussion. Our read of *Palazzolo* is that a property owner's right to make reasonable use of her land does not evaporate simply because restrictive regulations predate her acquisition. Purchasers of property subject to restrictive regulations maintain all of the rights protected by the Fifth Amendment and may assert a takings claim, and regulations do not become part of a parcel's "background principles" simply because the property is transferred to a new owner. As the Court put it, the government cannot "put an expiration date on the Takings Clause." *Id.* at 627. The Ninth Circuit doubled down on its *Guggenheim* rationale, which ignores the above principle.

- **The *Armstrong* rationale.** Finally, even if a rent control ordinance does not allow another to physically occupy property (we thought that in *Yee v. City of Escondido*, 503 U.S. 519 (1992) the Court held that rent control was a physical occupation, but that hey, you threw open your property by offering to rent it, so that's on you), the San Rafael ordinance in particular seems designed to effectively create "affordable" housing in Marin County. If so, then isn't MHC being required to provide this public benefit at its own cost, and therefore doesn't the ordinance run up against the central principle of

> regulatory takings theory? Shouldn't the cost of providing affordable housing be provided by the public as a whole?

This case will result in another cert petition challenging rent control as a taking, asking the Supreme Court for clarification on how to apply the *Penn Central* factors, so the last chapter has definitely not yet been written.

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