Did Koontz Stop Illegal Development Exactions?

By John Erskine
August 15, 2014

Much was written by law school professors and property rights groups following the U.S. Supreme Court's 5-4 decision in *Koontz v. St. John's River Water Management District* (2013), which found that land-use permit requirements may constitute a taking. Headlines varied, including "A Legal Blow to Sustainable Development" (New York Times, June 26, 2013), "A Legal Blow to Cities That Want to Take Your Property" (CATO Institute, June 28, 2013), and "Koontz's Unintelligible Takings Rule: Can Remedial Equivocation Save the Court From a Doctrinal Quagmire?" (PrawfsBlog, June 25, 2013).

Justice Elena Kagan wrote in her dissent that the decision would likely encourage local government officials to avoid any discussion with developers related to permit conditions, and in a fairly significant overstatement, "work a revolution in land-use law."

If developers and their attorneys in California are any indication, the rest of the country is going to be waiting for several more years for Kagan's "revolution in landuse law." The entitlement process as practiced in the halls of local government in our state since the real estate development industry's nascent 2013 recovery can be summed up as follows: "You're profitable again, and we want a bigger cut!" And illegal exactions are not an unusual occurrence.

To be fair, California municipalities are under unrelenting budget pressures, from unfunded pension liabilities, deferred infrastructure maintenance, and loss of state revenue. However, exactions, extra fees and extorted "voluntary" contributions for a wide array of projects are far from being affected by Koontz, or any other state or federal law. Municipal consultants, city managers and city attorneys are ever more focused on extracting needed revenue from property owners and developers who can't "shop elsewhere."

Writing for the majority in Koontz, Justice Samuel Alito held that the Fifth Amendment's takings clause analysis applies when the government demands monetary exactions (as opposed to a dedication of a portion of the property to be developed) and also applies whether the land use approval is granted "subject to" or "denied until" specified conditions are met. The plaintiff, Koontz, had been required to put up 95

percent of his 15 acres of property for conservation, or pay substantial funds for wetland restoration elsewhere, before he could develop his property. Koontz refused to give up property or pay money, and so was denied permission to build.

The Koontz decision expands on the "nexus" and "rough proportionality" relationship requirements of *Nollan v. California Coastal Commission* (1987) and *Dolan v. City of Tigard* (1994) between project land use approval conditions and the projected effects of the development.

In California, the Mitigation Fee Act (Government Code Section 66000-66011), adopted in the mid-1980s, was also intended to provide an element of control on overreaching city governments through specified procedural rules for impact fees and exactions, as set out in Nollan and Dolan. Pay-under-protest procedures as well as detailed requirements for local governments establishing, imposing and litigating challenges to development fees, dedications of easements or other exactions, are set forth in the act, all designed to stop local agencies from imposing development fees for purposes unrelated to development projects.

As the pace of real estate development has picked back up over the last few years, both in-fill and greenfield developers are under constant pressure to adjust their proformas and send those of us who represent them in to negotiate unexpected fee increases, unusual infrastructure exactions, and the never-ending municipal pursuit of cash for supplemental budget needs. During one recent protracted subdivision map approval, the entitlement required specialized California Environmental Quality Act (CEQA) findings by the lead agency, which required the applicant to "voluntarily" provide almost $4 million to fund city water stock purchases and approximately $750,000 in park funds well beyond legal requirements. Both were patently illegal exactions, but presented the classic Hobson's choice - agree to the "volunteer" payment or have the city refuse the findings necessary to support the CEQA action. The project was approved.

Neither Nollan, Dolan or Koontz provide a way out of this "doctrinal quagmire" for courts, as illegal exactions seem to be in full bloom among the hundreds and thousands of negotiations between hard-pressed developers' counsel, their often controversial and unpopular clients, and public agencies throughout California.

As pointed out in PrawfsBlog, because the remedy in lower courts has often been, particularly in other states, restoration of the pre-exaction status quo (which means freedom from the condition but no permission to build), developers are usually reluctant to sue. And even with the procedural boost provided by the Mitigation Fee Act in California, most developers are reluctant to sue unless the illegal exaction is so significant in amount that it is considered project-threatening, particularly in a flat or declining real estate market.

Land-use entitlement risk is a constant concern for developers and the associated merchant builder who seeks to procure finished lots for residential or mixed use construction after the entitlement gauntlet. Obtaining project approvals while avoiding illegal exactions is a tight-rope walk, and Koontz unfortunately appears to be a rather

porous net. Local government officials are not avoiding discussions with developers, as Kagan had suggested could occur, nor are they getting any less creative in converting potential project revenue into municipal budget supplements.