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SHAPIRO AND SANDEFUR: Koontz case to protect property rights

Bureaucrats unfairly charge for permits

By Ilya Shapiro and Timothy Sandefur – 11/30/12

The right to build a home or a business on your own land is basic to the very concept of property rights. Of course, government can impose reasonable conditions for health and safety, but too often, officials misuse land-use permitting to enrich the public sector rather than for legitimate regulation. In fact, many bureaucrats view the right to develop one's property as a privilege landowners must purchase, sometimes at the cost of their constitutional freedoms. Thankfully, the U.S. Supreme Court recently accepted a Florida case that could force an attitude change on regulators across the country.

Koontz v. St. Johns River Water Management District is the story of a family that was targeted for a bureaucratic shakedown and decided to fight back. The saga started more than 15 years ago, when the now-deceased Coy Koontz Sr. and his family asked for permission to commercially develop about four acres of land they owned in Orange County, Fla. The St. Johns River Water Management District responded that a permit would come with a price: Mr. Koontz would have to dedicate 11 acres for conservation and pay up to \$150,000 for improvements on the district's own property.

Mr. Koontz was willing to dedicate the 11 acres, but he objected to paying for work at the government site, which was miles away and had no connection to his property or his project.

When he refused, his permit application was denied.

Sadly, this kind of abuse is all too common. Bureaucracies often see permitting as a way to fund government projects and provide "public" benefits not with tax dollars — but with money extorted from property owners.

To be sure, the U.S. Supreme Court isn't unfamiliar with this problem. In a landmark 1987 case — *Nollan v. California Coastal Commission* — the court ruled that arm-twisting permit applicants isn't just unseemly, it's unconstitutional. The court held that Golden State bureaucrats had gone too far when they ordered Patrick Nollan and his family to give up property in exchange for permission to renovate their home. Justice Antonin Scalia wrote that permit

conditions must be limited to alleviating a harm caused by the proposed development. Otherwise, “the building restriction is not a valid regulation of land use, but ‘an out-and-out plan of extortion.’”

Unfortunately, as the Koontz family found out, bureaucrats have made a cottage industry out of inventing exceptions to the high court’s Nollan ruling. For example, they say Nollan only stops them from coercing land out of permit applicants, not money and other kinds of rights.

For example, in 2002, San Francisco ordered a small hotel to pay \$500,000 for permission to offer rooms on a night-to-night basis instead of a long-term residential basis. Two years later, the city of Elk Grove, Calif., ordered a family to pay \$240,000 for a permit to construct a \$500,000 home. The city of Carlsbad, Calif., has forced homeowners to give up their right to vote on property taxes — a right guaranteed by the state constitution — as the price of permission to renovate their homes.

The Koontz family sued the agency that used the permit process to demand a payoff. Coy Koontz Sr. died before the litigation moved forward, but his son, Coy Jr., is carrying on the case. The Florida Supreme Court sided with the regulators, stressing that they need “flexibility” and “authority” and endorsing the idea that Nollan only bans the extortion of land, not cash or other rights.

Now the U.S. Supreme Court has agreed to take the case. The high court has a chance to fortify the constitutional rights of property owners everywhere, by telling land-use bureaucrats — and lower courts — that Nollan’s anti-shakedown rule is meant to be obeyed, not evaded.

Indeed, the implications of this case go beyond issues of property rights. When officials start treating permits as a kind of benefit for which people can be forced to pay with resources or concessions that have no connection to their proposed project, our constitutional concept of individual rights is radically transformed into a system of government-created privileges that can be granted or withheld as regulators please.

That idea puts all of our freedoms at risk.

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