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Unconstitutional Land Development Conditions And Local Government Action: When the Permit is Denied

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I. The Issue

The U.S. Supreme Court has made crystal clear that a land development condition – at least one that requires a dedication of an interest in land – must pass the rational nexus test laid down in Nollan v. California Coastal Commission and the proportionality test laid down in Dolan v. City of Tigard. Many state appellate courts have further held that there is no meaningful distinction between such compulsory dedications of land as land development permit conditions, and money in lieu thereof.[2] However, most of the litigation over such land development conditions arise upon challenges to the allegedly unconstitutional conditions after, or in the course of, development permitted under a change in land use classification or a development permit (coastal zone, special or conditional use, with a handful of cases dealing with the issue and some excellent recent scholarly commentary[3] the issue is beginning to attract some attention. The issue is also squarely presented by a pending case before the Florida supreme court.[4] What follows in the remainder of this paper is a brief summary of the case, followed by a summary of the sparse recent case law on the issue, and a suggested resolution: the conditions are unconstitutional regardless of whether the land development permit has been granted or denied.

II. Case and Cases

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[2] E.g., and most prominently, the California Supreme Court in Ehrlich v. Culver City, 911 P.2d 429 (Cal. 1996)

[3] Most recently, Timothy M. Mulvaney, Proposed Exactions, 26 Journal of Land Use 279 (2011)

[4] St. Johns River Park Water Management District v. Koontz, 5 So. 3d 8 (Fla. App. 2009)

A. Koontz in Context

Interest in the issue of land development permit conditions when the underlying permit or rezoning is denied peaked somewhat as the Florida case of St. Johns River Water Mangement District v. Koontz[5] continues to languish before the Florida supreme court. There, the landowner requested permits from the District in order to develop a greater portion of his commercial property than was authorized under existing regulations. The District offered to approve the permits only if the landowner agreed to satisfy a number of land development conditions, including performance of off-site mitigation. The landowner rejected the conditions as unreasonable and so the District denied the permits. The landowner then brought an action in inverse condemnation on the ground that the rejected permit condition was improper. The trial court concluded that the condition resulted in a taking of the landowner's property and awarded damages, applying the standards of nexus and proportionality from Nollan and Dolan. The District argued, to no avail, that since nothing was in fact exacted from the landowner, there was no exaction.

The Court of Appeals phrased the argument – and the issue – as follows: "[W]hether an exaction claim is cognizable when, as here, the land owner refuses to agree to an improper request from the government resulting in the denial of a permit."[6] The appellate court concluded that the question had been answered in the negative by Dolan because the dissent had raised it and been ignored, citing other cases which came to the same conclusion both before and after Dolan.[7] As noted by the concurrence in the Appellate Court opinion, it is at least arguable that applying simple regulatory taking law to a situation

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[5] 5 So.3d 8 (2009)

[6] Id. at 11

[7] Parks v. Watson, 716 F.2d 646 (9th Cir. 1983); Goss v. City of Little Rock, 90 F.3d 306 (8th Cir. 1996); Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620 (Tex. 2004) and Salt Lake County v. Bd. Of Educ. Of Granite Sch. Dist., 808 P.2d 1056 (Utah 1991)

where, as here, the landowner is in precisely the same situation following the denial of a permit as the landowner was before, makes little doctrinal sense, except that the US Supreme Court arguably rejected that argument, as the majority points out.

However, the ground shifts substantially if we apply instead the doctrine of unconstitutional conditions, as the concurrent opinion also observes. That doctrine, simply stated, is that the government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government has the discretion to withhold the benefit altogether. Then the question may well become whether government has improperly pressured a landowner to give up or raise a constitutional right, regardless of whether the landowner has acceded and later challenges the condition, or, as here, is moved to reject the condition at the outset and so is denied the requested permit. Should the constitutionality of the condition turn on who offered it first? Doesn't government have an obligation to act reasonably and constitutionally regardless? Phrased thus, and divorced from customary regulatory taking law per se, it is easier to accept an interpretation that a land development condition is unconstitutional, or not, regardless of whether government grants or denies the land use development permit at issue.

B. Other Cases

The issue of whether the denial of a development permit with exactions precludes the application of nexus and proportionality principles set forth in Nollan and Dolan is relatively untried at the Supreme Court level; however, one case investigated the relevance of these principles in the wake of a denial. In City of Monterey v. Del Monte Dunes at Monterey, Ltd.,[8] a property owner brought a § 1983 action against city, alleging that city's repeated denial of owner's proposals for development of property had violated owner's equal protection and due process rights, and had effected a regulatory taking. The

[8] 526 U.S. 687 (1999)

Court ruled that it was unnecessary for the Fifth Circuit Court of Appeals to discuss Dolan and the rough proportionality test in evaluating a denial; however, the question of whether the denial of the proposal was reasonably related to a legitimate state purpose was valid.[9]

In interpreting Monterey, the Court did not disagree with the lower courts' application of the nexus test established in Nollan. In fact, the Supreme Court's outright willingness to determine a connection between the denial of a development permit and a legitimate state interest seems to indicate a tacit application of the nexus principle established in Nollan. The Court was less willing, however, to consider the proportionality test as established under Dolan when dealing with a run-of-the-mill zoning case applying total and partial takings analyses.

Florida and other jurisdictions' case law also indicate that the denial of a development permit does not preclude the application of nexus and proportionality principles established under Nollan and Dolan. Florida courts have recognized the viability of exaction claims where the approval was withheld. In Paradyne Corp. v. State Dep't of Transp.,[10] the court applied Nollan after a property owner's development permit was revoked and concluded that the exaction amounted to a constitutional taking. Further, in Lee Cnty. v. New Testament Baptist Church of Fort Myers, Fla., Inc.,[11] the Court also employed a rational nexus test of an exaction – the dedication of a right of way - despite the denial of a development approval.

Other jurisdictions have also not hesitated to invoke the principles of Nollan and Dolan in the wake of denial. In a pre-Nollan/Dolan case, Parks v. Watson,[12] the City conditioned its vacation of platted streets

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[9] Id. at 703-05

[10] 528 So.2d 921 (Fla. 1st DCA 1988)

[11] 507 So.2d 626 (Fla. 2d DCA 1987)

[12] 716 F.2d 646 (9th Cir. 1983)

on the petitioner dedicating land that contained geothermal wells, land whose value was significantly above the value of the street vacation.[13] The court adopted the analysis of Perry v. Sindermann[14] and found "that even though a person has no 'right' to a valuable governmental benefit, and even though the government may deny the benefit at its discretion, the government may not impose a choice between the government benefit and the exercise of a constitutionally guaranteed right."[15] For the dedication to be Constitutional it would have to be found to be "rationally related to the benefit conferred" and "the dedication should have some reasonable relationship to the needs created by the [development]."[16] The court found that the dedication did not meet these requirements and prohibited the City from requiring the dedication for the street vacation.[17] In B.A.M. Development LLC v. Salt Lake County,[18] the Utah Supreme Court instructed the lower court to adopt its interpretation of Dolan to the denial of the license. In William A. Jones Insurance Trust v. City of Fort Smith,[19] the City advised a landowner that it would not authorize the proposed construction of a convenience store unless the landowner granted the city an expanded street frontage right of way. In an opinion that arguably confused the power to tax and the power to exact for the health, safety and welfare of the people, the court held that the exaction bore no rational nexus to the alleged purpose of alleviating traffic and ordered the city to issue the requested permit unconditionally. More to the point is Goss v. City of

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[13] Id. at 650

[14] 408 U.S. 593 (1972)

[15] 716 F.2d at 650

[16] Id. at 652-53

[17] Id. at 654

[18] 196 P.3d 601 (Utah 2008)

[19] 731 F.Supp. 912 (W.D.Ark. 1990)

Little Rock, [20] where the court held that the city's denial of a rezoning request because the applicant refused to dedicate a portion of his property for highway expansion constituted a "exaction taking" but held that the City might be able to deny the rezoning request "outright." These cases demonstrate the readiness of courts in other jurisdictions to employ the principles established in Nollan and Dolan despite the denial of development permits or applications.

As evidenced by the preceding cases, each court has its own interpretation of the Nollan and Dolan test, but are consistent in holding that government denial of a land development permit or reclassification does not affect a court's willingness to apply the exactions doctrine, or some variation therein.

III. Conclusion

As a matter of policy, the issue boils down to which side – property owner or government – will gain or lose the most if the Florida supreme court upholds the appellate court in Koontz. On the one hand, government will certainly be exposed to more challenges to its regulatory authority. [21] However, the number of cases brought when government denies the requested permit or zoning change have so far been very small, as the foregoing sections of this paper demonstrate. While it may be that number will grow, it will not likely be by much. On the other hand, leaving an otherwise unconstitutional, extortionate, nexus-less land development condition merely because the landowner has not proceeded with a proposed project for lack of land development permission seems unduly technical and harsh. Not only does government get a free pass, but also regulators would, as one of the several amicus briefs point out, be able to wield the debilitating threat of outright denial as a sword to obtain free public

[20] 151 F.3d 861 (8th Cir. 1998)

[21] For more on such consequences, see Mark Fenster's thoughtful article, Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity, 92 Cal. L. Rev. 609 (2009), especially part V.

benefits for which the government would otherwise have had to account, probably by paying compensation. What government here appears to want is immunization from exaction claims – or at least from scrutiny. Is it really so bothersome that government be forced to more carefully craft its land development conditions so as to avoid arbitrary and unreasonable conditions to the point of unconstitutionality if the landowner proceeds under protest with a land development approval or reclassification so conditioned? As the Koontz intermediate court of appeals concluded:

> [A] aggrieved property owner [should not be forced] to accede to unconstitutional conditions to preserve his right to challenge the abusive practice. Furthermore, such a rule would be completely unworkable when applied to a case where the improper exaction involves a condition that materially alters the design density or economic feasibility of the project.[22]

Theory and philosophy aside, there does not seem to be express disagreement, either in Florida or on the federal level, with the application of the principles of Nollan and Dolan to the denial of a development permit or proposal. More importantly, case law at both levels support the application of these principles to circumstances where there has been a denial. This would suggest that the Supreme Court would also apply either, or both, of these principles to an exaction where there has been a denial. Additionally, both state and federal case law supports the application of these principles to non-property exactions such as performance or monetary factors. Consequently, performance factors such as off-site mitigation requirements are likely to be subject to the nexus and proportionality principles. As an aside, even if one were to accept the dubious proposition[23] that the USSCT's nexus and

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[22] 5 So. 3d at 12 n. 4

[23] Which, after the U.S. Supreme Court's remand of Ehrlich v. Culver City to be considered in light of its opinion in Dolan - where the exaction was purely monetary, and the California Supreme Court's agreeing that such a monetary exaction does not fail nexus and proportionality because it is not an interest in real property – is increasingly difficult to credit, as the Texas supreme court noted in Town of Flower Mound v. Stafford Estates Ltd.

proportionality standards for land development conditions apply only to exactions of interests in real property, the notion that the mitigation measures which the government proposed to require of Koontz on his off-site property does not constitution a property exaction is difficult to credit. As the leading treatise on regulatory takings aptly notes, the unconstitutional conditions doctrine "holds that even if a state has absolute discretion to grant or deny any individual a privilege or benefit, it cannot grant the privilege subject to the conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights."[24]

P'ship, 135 S.W. 3d 620, 625 (2004): "[A]ny requirement that a developer provide or do something as a condition to receiving municipal approval is an exaction."

[24] Steven J. Eagle, Regulatory Takings 871 (3d ed. 2005)