

Environmental Alert

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Court Rules Government Cannot Make "Extortionate Demands" on Persons Seeking Land-Use Permits

In a landmark decision for land use and development, the United States Supreme Court has ruled under the Fifth Amendment of the U.S. Constitution that regulatory agencies cannot make "extortionate demands" on land-use permit applicants. In *Koontz v. St. Johns River Water Management District*, **517 U.S. __ (2013)**, the Court allowed a landowner to bring a claim for a Fifth Amendment takings, where the agency attempted to coerce him into providing what was considered excess or disproportionate mitigation as the "price" of getting land use approval.

Why Does This Decision Matter?

This decision is important because it signals that all government agencies—federal, state and local—will need to take greater care that the exactions and conditions they impose on permit applicants are fair and related to the purpose of the permit program. It also clarifies that an agency cannot deny a permit application because the applicant refuses to accept the agency's unreasonable mitigation demands. Applicants can rely on the constitutional protections recognized by this decision as they negotiate their permit mitigation terms.

Additional Information

The facts of the case are telling. Koontz sought a permit from a Florida state agency to develop a parcel of land along a major Orlando thoroughfare. The owner planned to develop only 3.7 acres of the 14.9 acre site. As mitigation for impacts to wetlands on the site, the owner proposed to grant the state a conservation easement for the remainder of the property.

The agency rejected the proposal. If the property owner wanted a permit, he would have to meet either one of two conditions "suggested" by the agency. The first option was to limit his project to 1 acre and grant the state a conservation easement to the remaining 13.9 acres of the property. Alternatively, he could complete his project as proposed, but in addition to giving the agency a conservation easement to the remainder of the site, he would have to pay for an offsite mitigation project approved by the agency. The land owner refused to agree to either of these conditions and the agency denied the permit.

The Court found that the agency's "extortionate demands" were an unconstitutional attempt to coerce the property owner to forgo his Fifth Amendment right to receive just compensation for property taken by the government. Writing for a slim 5-4 majority, Justice Alito explained that there are two competing realities for typical land use permits. On the one hand, it is fair to make permit applicants provide compensation for impacts to public resources such as wetlands. On the other hand, however, permit applicants are highly susceptible to coercion by permitting authorities who demand unfair exactions in exchange for the sought-after permit.

The way to reconcile these competing realities, according to the Court, is to mandate that mitigation conditions imposed for land use permits have a "nexus" to the impacts of the proposed project and be in "rough proportionality" to its impacts. In other words, permitting authorities cannot place unreasonable mitigation demands on applicants seeking land-use permits; the conditions on the permit must fairly compensate for the project impacts, but no more.

The principles outlined by the Court have been established in two prior cases—*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). But the *Koontz* decision significantly expands their application. First, this case clarifies that a constitutional violation occurs when a permitting authority denies a permit application because a land owner refuses to accept unjustifiable conditions. Permit applicants may therefore reject unreasonable permit conditions and still challenge the agency's action in court. Second, some prior cases had suggested that a constitutional violation would occur only if an applicant were forced to relinquish rights to land or other tangible property in order to obtain the permit. *Koontz* establishes that a permitting authority cannot

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demand “extortionate” *monetary* payments in exchange for a permit either.

Conclusion

The *Koontz* decision is likely to have far-reaching implications for persons seeking land-use permits. An applicant who believes that the mitigation restrictions and financial conditions attached to a denied or offered land-use permit are disproportionate to the impacts of the project will have a potential legal remedy. This constitutional right should function as a significant check on the power of permitting authorities to propose take-it-or-leave-it permits with unreasonable mitigation conditions. While the practical effects of this decision will become apparent with time, it is likely to facilitate more collaborative mitigation discussions between applicants and agencies who can negotiate on a less uneven basis.

Please contact your Venable counsel or any member of **Venable's Environmental Practice Group** if you have questions about this important decision.