



MEMORANDUM

Date: July 23, 2013

To: The Honorable Chairman and Members
Pima County Board of Supervisors

From: C.H. Huckelberry
County Administrator 

Re: **July 18, 2013 Memorandum from Chief Civil Deputy County Attorney Christopher Straub and Deputy County Attorney Regina Nassen Regarding *Koontz v. St. Johns River Water Management District***

The U.S. Supreme Court's opinion in *Koontz v. St. Johns River Water Management District* involves the State of Florida and their imposition of environmental investigation requirements of Florida State law, similar to the federal Clean Water Act Section 404 process. The case does not have any direct impact on how the County conducts its land use approval processes and requirements to offset adverse impacts; however, it will require review of our procedures to ensure compliance.

There are some rezoning condition fees that may be questionable and require review, and our Development Services Department is undertaking a review of its processes. An area I have been somewhat concerned about in the past is the specificity to which rezoning conditions are written. In my opinion, departments have taken a relaxed approach to requiring certain conditions of approval. The most concerning is related to adjacency or offsite infrastructure requirements "as required by the department." The vagueness of such a requirement is inappropriate, and I have asked Development Services and other Public Works agencies to be very site and condition specific when writing rezoning conditions so the impacts of the proposed development are clearly reflected as being mitigated by the actual requirements being specified in the zoning conditions.

I have been concerned for some time about the generality of certain requirements, since they lead to misinterpretation and confusion, particularly when projects are constructed years after a zoning has been approved by the Board of Supervisors.

The July 18, 2013 memorandum from the County Attorney's Office regarding *Koontz v. St. Johns River Water Management District* is attached for your information and review.

CHH/dph

Attachment

The Honorable Chairman and Members, Pima County Board of Supervisors
Re: **July 18, 2013 Memorandum from Chief Civil Deputy County Attorney Christopher
Straub and Deputy County Attorney Regina Nassen Regarding *Koontz v. St. Johns
River Water Management District***

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c: Christopher Straub, Chief Civil Deputy County Attorney
Regina Nassen, Deputy County Attorney
John Bernal, Deputy County Administrator for Public Works
Priscilla Cornelio, Director, Transportation
Carmine DeBonis, Jr., Director, Development Services
Jackson Jenkins, Director, Regional Wastewater Reclamation
Ursula Kramer, Director, Environmental Quality
Rafael Payan, Director, Natural Resources, Parks and Recreation
Suzanne Shields, Director, Regional Flood Control District



**ATTORNEY/CLIENT PRIVILEGED
M E M O R A N D U M**

Pima County Attorney's Office
Civil Division

32 North Stone Ave, Suite 2100
Phone 520.740.5750 Fax 520.620.6556

This is a privileged attorney-client communication and should not be disclosed to persons other than Pima County officials and employees involved in the matter that is the subject of the communication. The privilege is held by Pima County and can be waived only by an official action of the Board of Supervisors.

To: C.H. Huckelberry, County Administrator

From: Christopher Straub, Chief Civil Deputy County Attorney
Regina Nassen, Deputy County Attorney

Date: July 19, 2013

Subject: New Supreme Court "Takings" Case

Chuck, quite a bit of discussion is going on in the land use community regarding the U.S. Supreme Court's opinion in *Koontz v. St. Johns River Water Management District*, which was issued on June 25th. 133 S.Ct. 2586 (2013). The lawyers in the Civil Division have reviewed and discussed the opinion at length in an attempt to assess its likely impact on County practices. This memo summarizes that analysis and makes some recommendations.

Prior Law:

Previous decisions by the Supreme Court (in the *Nollan* and *Dolan* cases)¹ established that a governmental entity cannot take property from a landowner, without compensation, as a condition of issuing a permit or some other type of development approval sought by the landowner, *unless* the property taken truly offsets some public burden or problem *caused* by the development. Such an "exaction" must share a reasonable "nexus", and be "roughly proportionate" in scope, with the development's anticipated impact; an exaction that fails this test is invalid.

This is a more rigorous standard than courts would otherwise apply when assessing the constitutionality of an economic regulation imposed by a government. Lawyers representing governmental entities have therefore argued, often successfully, that the application of this *Nollan/Dolan* standard is limited in several ways: (1) a governmental entity's *denial* of a requested permit or approval is not subject to the *Nollan/Dolan* test; (2) the *Nollan/Dolan* test only applies to exactions that effect the taking of some interest in tangible real property, not monetary exactions; and (3) the *Nollan/Dolan* test does not apply to exactions, like impact fees, that are imposed by a

¹ *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994).

generally applicable legislative act (rather than an ad hoc exaction that only applies to one parcel). In fact, the Arizona Supreme Court agreed with the second and third arguments, holding—in *Home Builders Ass’n of Cent. Arizona v. City of Scottsdale*, 187 Ariz. 479, 486 (1997)—that *Nollan/Dolan* does not apply to exactions imposed legislatively, nor to monetary fees.

Koontz:

The Court, in *Koontz*, explicitly rejected the first two arguments; it held that:

1. It is unconstitutional for a governmental entity to *withhold* a permit, or *deny* some other type of development approval requested by a landowner, based on the landowner’s refusal to agree to an exaction that violates the *Nollan/Dolan* test.
2. Monetary exactions are subject to the *Nollan/Dolan* test.

In addition, the Court’s analysis and reasoning indicate that the third argument (legislative vs. adjudicative exactions) would, if addressed by the Court, also fail.

The Court did hold that when a permit or approval is denied, and therefore the illegal exaction is never actually imposed on the landowner, there has been no “taking” for which the landowner is constitutionally entitled to compensation. Unfortunately, it also indicated that the landowner might still, in that situation, have some *other* basis for recovering monetary damages, in addition to invalidation of the illegal exaction.

Impact:

Monetary Exactions

Our office has, at various times in the past, relied on the availability of two of the above arguments to conclude—and advise County officials—that the legality of a proposed re-zoning condition or fee was legally defensible. The affordable housing fee, and 2% “enhancement contribution” come to mind. Based on the *Scottsdale* case we felt that if these fees were ever challenged, we could defend them based on the fact that they are monetary, and are imposed as part of a re-zoning, which in Arizona is considered a legislative act subject to referendum.

Based on *Koontz*, however, the monetary-exaction argument is no longer colorable. In addition, it is clear that the legislative-exaction argument is now extremely weak. The Court, in rejecting the limitations on *Nollan/Dolan* that were presented in this case, made it clear that it was simply applying its “unconstitutional conditions” doctrine: a government may not legally condition receipt of a government benefit on the recipient’s waiver of constitutional rights, whether that right is one of due process, equal protection of the laws, or—as in this case—just compensation. The Court cited a number of unconstitutional-conditions cases, including some that involved *legislatively-imposed* conditions. It is unlikely, therefore, that the Court would decide, if presented with the issue, that legislative acts are exempt from a *Nollan/Dolan* challenge (even if one assumes that a re-zoning is the type of “generally applicable” legislative act that the Arizona Supreme Court found was not subject to *Nollan/Dolan*, which was always questionable).

We therefore recommend that we discuss whether something should be done with respect to these fees in those cases in which they have been imposed, and we would encourage the County to avoid imposing them in the future. Any similar fees should likewise be more critically evaluated going forward. The good news is that the County's impact fees, though now more clearly subject to *challenge* under *Nollan/Dolan*, probably meet that test; the impact fees statutes and the County Code require the type of benefit analysis and assessment that will normally meet the *Nollan/Dolan* standard. Likewise, permitting fees that are based on the cost to the County of providing services related to the permits are clearly valid and defensible.

Permit Denials & Damages

The Court's holding that it is unconstitutional to deny a permit based on a landowner's refusal to waive his constitutional right to just compensation is troubling because it means that the motive of a county official—perhaps even the Board of Supervisors—for denying, or recommending denial of, a development approval or re-zoning is now subject to scrutiny. And motive is a factual matter, which means that it will be difficult to obtain summary judgment in a case involving an allegation that a denial was improperly motivated.

If a successful plaintiff in such a lawsuit can obtain only a declaration that the condition sought to be imposed is invalid, the expense of a legal action would presumably discourage this type of lawsuit. If, however, monetary damages are available, that makes such a lawsuit considerably more attractive. The Court in *Koontz* did *not* specifically hold that a landowner *would* have a cause of action for monetary damages when a permit or approval has been denied. But the Court's failure to conclude that no such cause of action could logically exist—when there has been no actual “taking” requiring just compensation—indicates that it believes there might be a basis for recovering monetary damages. If there is such a cause of action, the damages would presumably be measured in much the same way as a temporary taking; perhaps with additional consequential delay damages. Perhaps the plaintiff could even recover attorney fees. This increases the likelihood of being sued, and incurring defense costs, even if the claim is ultimately found to be meritless.

This doesn't mean that the County should radically change its practice. Most mitigation requirements sought by the County are no doubt still quite defensible. If, however, a development approval or re-zoning is being denied after an unsuccessful negotiation with the property owner regarding mitigation measures, it would be wise to make some sort of record showing that the denial was not improperly motivated.