TO BARGAIN OR NOT TO BARGAIN? A RESPONSE TO *BARGAINING FOR DEVELOPMENT POST*-KOONTZ

Shelley Ross Saxer[*]

There are two major questions remaining after the U.S. Supreme Court's 2013 decision in *Koontz v. St. Johns River Water Management District*[1]: 1) whether subjecting proposed exactions, not just imposed exactions, to *Nollan*[2] and *Dolan*[3] heightened scrutiny will chill negotiations between local governments and developers over whether a permit for a project with potential adverse externalities should be granted; and 2) what type of monetary fees will be subject to heightened scrutiny after *Koontz* held that monetary exactions, not just physical exactions, will be subject to the *Nollan* and *Dolan* test. In his excellent article, *Bargaining for Development Post*-Koontz*: How the Supreme Court Invaded Local Government*,[4] Professor Sean F. Nolon addresses the first major question[5] and identifies, but does not address, the second.[6]

Bargaining for Development Post-Koontz provides a practical guide to assist local governments in deciding whether and when they should bargain with developers to arrive at mutually beneficial agreements that allow projects to move forward while protecting the communities' rights against the projects' adverse impacts. Professor Nolon begins by stating, somewhat alarmingly, that the *Koontz* decision "will drastically change the way thousands of land use boards interact with landowners seeking to develop their land."[7] Nolon admits that he can only point to anecdotal evidence that attorneys are cautioning municipal clients to use restraint in making approval proposals before they understand the impact of development projects.[8] At this early stage in the *Koontz* aftermath, making such statements about municipal behavior greatly exaggerates the actual impact *Koontz* may have on negotiations for development permits. Indeed, Nolon himself notes that "many scholars feared that the heightened review of *Nollan* and *Dolan* would discourage the use of exactions,"[9] but extensive empirical research conducted by Professors Ann E. Carlson and Daniel Pollak found that "an overwhelming percentage of California planners now view the *Nollan* and *Dolan* cases not as an encroachment

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* Vice Dean & Laure Sudreau-Rippe Endowed Professor of Law, Pepperdine School of Law.

1. 133 S. Ct. 2586 (2013).
2. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).
3. Dolan v. City of Tigard, 512 U.S. 374 (1994).
4. 67 FLA. L. REV. 171 (2015).
5. *See id.* at 176–191.
6. *See* Shelley Ross Saxer, *When Local Government Misbehaves*, UTAH L. REV. (forthcoming Winter 2015/2016) (addressing this second question, but not the first).
7. Nolon*, supra* note 4, at 173.
8. *Id.* at 207.
9. *Id.* at 175 n.20.

upon their planning discretion but instead as establishing 'good planning practices.'"[10]

I agree with Nolon that when land-use boards deny developer permits because they adversely impact communities, their decisions receive a more favorable standard of review under *Penn Central* if challenged as a taking.[11] Alternatively, land-use boards that work with developers to suggest ways to mitigate the adverse impacts identified in project applications will be potentially subject to a higher degree of scrutiny after *Koontz*. Land-use boards may hesitate to propose improvements to applications for fear that they will be viewed as proposed demands subject to *Nollan* and *Dolan* scrutiny. Unfortunately, if land-use boards opt to deny projects instead of negotiate with developers to offset externalities by imposing conditions, such a behavioral change will detrimentally impact a community's ability to gain the benefits of development, including improved services and revenue. Instead of denying these projects, land-use officials should be aware of their bargaining power restrictions and adjust their negotiation stances accordingly. This adjustment will require that government officials request only those conditions that are related and proportionate to the impact of the proposed project on the community.

Without the benefit of empirical evidence to guide his approach for dealing with the uncertainty following *Koontz*, Nolon discusses the importance of negotiation in land-use approvals and the consequences of *Koontz* on the efficiency of future land-use negotiations.[12] Nolon speculates that after *Koontz*, land-use boards will change their behavior in favor of denying permits rather than discussing or offering development conditions that would be subject to judicial review requiring a nexus and rough proportionality between the conditions and the public harm caused by the development.[13] This is particularly problematic since it will be "difficult for attorneys to advise municipal clients about what negotiation behavior courts will see as a demand that triggers heightened scrutiny."[14]

Nolon offers practical advice to land-use boards for responding to the *Koontz* decision and its remaining uncertainties. The obvious suggestion is that municipalities avoid negotiation and instead outright deny permits that fail to meet local requirements.[15] Nolon aptly observes that not negotiating will be difficult as many municipal ordinances contemplate and encourage negotiation.[16] Instead, municipalities can encourage developers to

10. Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 104–05 (2001).

11. *See* Nolon, *supra* note 4, at 174–75.

12. *See id.* at 211–19.

13. *Id.* at 207.

14. *Id.* at 207.

15. *Id.* at 211.

16. *Id.* at 212.

negotiate with the community at large by enacting rules giving developers the opportunity to work with stakeholders before submitting a formal application.[17] If conditions are arrived at by consensus of the developer and the impacted neighbors, potentially with the help of mediators, land-use officials will not need to be involved in the negotiation, and the conditions will not be subject to *Nollan* and *Dolan* scrutiny.[18] The downside of this approach is that citizens will not be able to take advantage of the knowledge and experience of their land-use officials. Nevertheless, some of the most successful retail developments in Southern California have been brought to communities by developer Rick Caruso, precisely because he spends so much time with community stakeholders in advance of submitting a proposal to local government.[19]

Another option Nolon explores is for the board to negotiate with the developer, but then refrain from proposing any mitigating conditions.[20] I agree with Nolon that such an alternative would protect the decision from heightened scrutiny but would be unnecessarily inefficient.[21] Alternatively, the board could go ahead and negotiate and make mitigation suggestions that may be subject to heightened scrutiny under *Nollan* and *Dolan*.[22] The board would be required to more thoroughly analyze conditions before they are proposed, but for certain projects, the risk of litigation may be offset by the value of the development to the community.[23] It is unlikely that an experienced land-use lawyer would advise her clients to take this approach, and as Nolon notes in his article, Julie Tappendorf, a partner at Ancel Glink Diamond Bush DiCanni & Krafthefer, advises her "municipal clients that they should assume all suggestions made prior to a decision must satisfy the *Nollan–Dolan* criteria."[24]

The final option Nolon considers is for land-use officials to insulate their negotiations by specifying when a proposal becomes a demand, negotiating during a pre-application process before accepting an application, or asking the developer to waive a takings challenge.[25] Such attempts at avoiding heightened scrutiny may be seen by the courts as circumventing the takings clause or constituting extortionate behavior.[26]

Nolon concludes that the *Koontz* decision will cause land-use boards to

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17. *Id.*

18. *Id.*

19. *See*, *e.g.*, Sylvie Belmond, *Calabasas City Council Gives Kudos to Commons Mall Developer*, THE ACORN (Sept. 20, 2012), http://www.theacorn.com/news/2012-09-20/Schools/Calabasas_City_Council_gives_kudos_to_Commons_mall.html.

20. Nolon, *supra* note 4, at 215.

21. *Id.* at 216.

22. *Id.*

23. *Id.*

24. *Id.* at 207 n.269.

25. *Id.* at 216–18.

26. *Id.* at 217–18.

retreat from negotiating with developers and severely limit their ability "to work with developers who present noncompliant proposals."[27] While I agree that the *Koontz* decision will likely cause local officials to think more strategically about how they present conditions to developers, I disagree with Nolon that land-use boards must respond by constructing protections around their negotiations to ensure that all suggestions meet the heightened scrutiny of *Nollan* and *Dolan*. Nolon speculates that these increased protections will raise transaction costs and expand the burdens on developers, planners, and municipalities.[28] However, my guess is that many, if not most, developers are interested in preserving relationships with local communities and are especially cognizant of time delays that translate directly into lost profits.

Litigation over land-use development is at risk when negotiations break down, and land-use officials, typically in conjunction with community dissenters, delay a project or seek extortionate demands such that the developer can no longer maintain a profitable project. Indeed, it is at this point that the municipality is at risk for suggesting or demanding conditions that will not meet heightened scrutiny. Nolon predicts that the *Koontz* decision will "impede developers' ability to improve their projects in the development review process."[29] I predict that once we have more evidence of developer and land-use board responses to *Koontz*, we will see that the consequences of this decision are not as dire as predicted by Nolon and others and that instead, developers and local officials will continue to work together for the benefit of both the developer and the community.

27. *Id.* at 219.
28. *See id.* at 216.
29. *Id.* at 173.