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ENDNOTES

1. *Koontz v. Saint Johns River Water Management District*, 133 S. Ct. 2586 (2013).
2. 133 S. Ct. at 2595.
3. *Id.*
4. Amicus Curiae Brief of Former Members of the National Research Council Committee on Mitigating Wetland Losses, *Koontz v. Saint John's River Water Management District* [hereinafter Amicus Brief] at 5-10, citing, inter alia, MILLENNIUM ECOSYSTEM ASSESSMENT, ECOSYSTEMS AND HUMAN WELL-BEING: WETLANDS AND WATER SYNTHESIS 1-3, tbl.1, 30-38, 47-48 (World Res. Inst. 2005).
5. NAT'L RESEARCH COUNCIL, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT 1 (Nat'l Acad. Press 2001 [hereinafter NRC, WETLAND MITIGATION REPORT]).
6. 33 C.F.R. §332 and 40 C.F.R. §230; see also Compensatory Mitigation for Losses

- of Aquatic Resources, 73 Fed. Reg. 19594 et seq. (Apr. 10, 2008).
7. 133 S. Ct. at 2608.
8. Amicus Brief at 32-33, citing 33 C.F.R. §332.3(c)(2)(ii); 40 C.F.R. §230.93(c)(2)(ii); Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19601, 19604; NRC, WETLAND MITIGATION REPORT, *supra* note 5, at 144.
9. See, e.g., Royal C. Gardner's article at 10-11 re mitigation banks functioning essentially as monopolies with very high mitigation credit costs.
10. See, e.g., ENVIRONMENTAL LAW INSTITUTE, THE STATUS AND CHARACTER OF IN-LIEU FEE MITIGATION IN THE UNITED STATES at 4-5 (2006).
11. *Koontz*, 133 S. Ct. at 2611.
12. See, e.g., Amicus Brief at 5-9 at citations therein; John W. Day et al., *Restoration of the Mississippi delta: Lessons From hurricanes Katrina and Rita*, 315 SCIENCE 1679-84 (2007); Christine Shepard et al., *Assessing Future Risk: Quantifying the Effects of Sea Level Rise on Storm Surge Risk for the Southern Shores of Long Island, New York*, 60 NAT. HAZARDS 727-45 (2012).

## Turning *Koontz* Into an Opportunity for More Resilient Communities

By EDWARD THOMAS AND LYNSEY R. JOHNSON

Before the U.S. Supreme Court decided *Koontz v. St. Johns River Water Management District*<sup>1</sup>, much uncertainty surrounded the decision. Even after the Court released its decision in June 2013, some uncertainty remains. However, it is absolutely clear that the Supreme Court handed down a decision strongly supporting local and state efforts to ensure that the development activities of one person do not harm the community or neighboring properties. The decision will certainly impact future development decisionmaking. It compels local and state governments to more closely examine potential harm that may be caused by a development, then carefully craft conditions for that development to mitigate harm in a more open and transparent manner. We view the Court's decision as an opportunity for the "Whole Community"—insurance professionals, emergency managers, community development staff, elected officials, climate adaptation and mitigation specialists, and floodplain managers—to understand the importance of safe development based on the ancient maxim of property law: "use your property so you do not harm others."<sup>2</sup>

The *Koontz* case involves a specific type of taking called an exaction. An exaction is a condition tied to the granting of a development permit by the government.<sup>3</sup> It requires that a landowner take some action or refrain from some action in order to mitigate the negative anticipated effects of development.<sup>4</sup> It is the government's hope that the developer internalizes some of the external costs of new development.<sup>5</sup>

As Bruce Myers discusses in his opening article, there have been three fairly recent Supreme Court cases on exactions, including *Koontz*. *Koontz*'s recent predecessors, *Nollan v. Cal-*

*ifornia Coastal Commission*<sup>6</sup> and *Dolan v. City of Tigard*,<sup>7</sup> both address the issues of exactions. In *Nollan*, the Court found that where an exaction creates a public easement across private property, it is a compensable taking *unless* it has a "close nexus" between the purpose of requiring a permit and the requested exaction.<sup>8</sup> Further, the Court in *Dolan* required there to be a "rough proportionality" between the burden on the private-property owner and the benefit to the public.<sup>9</sup>

In *Nollan*, the property owners wanted to build a larger structure on their beachfront property. In order to do so, the Nollans needed to get a development permit from the California Coastal Commission. However, the Commission would only grant the permit if the Nollans allowed a public easement to pass across a portion of their beach property between the high-tide line and seawall. The Commission reasoned that the new house would block the ocean view and contribute to a wall of residential structures, which would prevent the public from viewing the ocean.<sup>10</sup> Ultimately, the Supreme Court held that reducing the barrier to the public beach was not a sufficiently legitimate government interest.

In *Dolan*, the owner of a supply store wanted to enlarge the size of the building and sought a permit to do so. The city required the owner to convey to it an affirmative easement on a portion of the lot lying within the 100-year floodplain adjacent to a creek and an easement on an additional 15-foot strip of land for a bike path. In addition to applying the *Nollan* test of a "close nexus," the Court held that the state must show that the extent of the exaction is proportional. The Court conceded that the store expansion may lead to increased traffic; however, the Court did not agree that the bike path was

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the only way to offset the increased demand. Further, the Court did not see why the city asked for a portion of the floodplain for public use. The Court did not require a specific mathematical equation in determining proportionality, but rather required an individualized determination related both in nature and extent to the proposed development.<sup>11</sup>

In both *Nollan* and *Dolan*, the local governments required the property owners to dedicate portions of their property to the government. However, *Koontz* examines another type of exaction—monetary exactions. As the preceding articles have explained, in *Koontz*, the property owner wanted to build on 3.7 acres of his 14.9 acres of wetlands property and was required to obtain a permit from the local Water Management District. Koontz offered to impose a conservation easement on 11 acres and to conduct additional engineering efforts. However, the District did not agree and offered two other alternatives. Either Koontz could develop a much smaller area than proposed, build a costly stormwater management facility, and enlarge the proposed conservation easement. Or he could develop the 3.7 acres of property, but make off-site mitigations to enhance 50 acres of land elsewhere in the watershed. When Koontz rejected both alternatives, the District denied the permit.

After the Supreme Court of Florida ruled that the trial court should not have applied the *Nollan/Dolan* test to the conditions because the exaction did not concern real property, the Supreme Court reversed and held in favor of Koontz.<sup>12</sup> The Court said that the unconstitutional conditions doctrine prevents governments from coercing people into giving up their rights. Further, the same legal test applies regardless of whether an applicant's condition was dedication of real property or monetary exaction. The Court found that monetary exactions are "functionally equivalent to other types of land use exactions."<sup>13</sup>

The Court reasoned that without applying *Nollan/Dolan* to both dedicatory exactions and monetary exactions, governments could work around the system. Without applying to both types, a government could tell a property owner that instead of a dedicatory exaction, they will accept a monetary exaction because one is constitutional and the other is not.

The good news is that the Supreme Court endorses the underlying philosophy of safe development-based planning. Justice Samuel A. Alito Jr. wrote in the majority opinion that "insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulation against constitutional attack."<sup>14</sup>

There is frequent confusion about what is actually considered an externality. An externality is a cost or benefit of a transaction that is not paid for or realized by the participants.<sup>15</sup>

A recent *New York Times* article defined negative externalities as "behavior with harmful side effects."<sup>16</sup> That *Times* article goes on to observe: "(b)ecause population density has been rising, behaviors with harmful side effects have been growing steadily more important. Our continued prosperity, and possibly even the planet's survival, will require thinking clearly about how to mitigate the resulting damage."<sup>17</sup>

These side effects will need to be carefully managed in the future in order to ensure both economic and environmental gains. So much of the devastation we describe as "natural disasters" is in reality a failure of human design, construction, planning, and community development in areas subject to the natural processes called natural hazards. These failures externalize into environmental plundering, which leads to costs for disaster survivors, especially the most vulnerable populations, as well as harm to communities, and huge costs to the taxpayer.<sup>18</sup>

The Supreme Court's endorsement of government action to reduce or eliminate the harm caused by improper development is a welcome reaffirmation of the ancient maxim of property law; *sic utere tuo ut alienum non laedas*, which means "use your property so it does not harm others." This legal maxim also has a strong moral and equitable basis. Mahatma Gandhi, one of the greatest moralists of the 20th century wrote: "Legal maxims are not so legal, as they are moral. I believe in the eternal truth of 'sic utere tuo ut alienum non laedas' (Use thy own property so as not to injure thy neighbour's)."<sup>19</sup> In *Koontz*, the Court strongly endorses preventative government action as a hallmark of responsible land use policy, which will prevent one person or group of people being permitted to take actions that will result in a disaster.<sup>20</sup>

Many did not see the positive side of *Koontz* when the decision was released. Almost immediately, many commentators viewed the case as a victory for property owners and a defeat for government regulation. Many alarmist articles were written quoting attorneys and well-recognized scholars in the legal community who predicted that the sky was falling as a result of the ruling. They claimed that the practice of subjecting monetary exactions to the *Nollan/Dolan* takings analysis would devastate land use planning and detract from the ability of local governments to negotiate for conditions that mitigate the impacts of proposed development.

As other authors in this issue have pointed out, it is important to note what the Supreme Court in *Koontz* did *not* do. The Court did not say that there was not a nexus between the off-site mitigation. Specifically, the Court only decided the issue of whether the *Nollan/Dolan* test applied to the facts in *Koontz*. The Supreme Court did not provide analysis of the *Nollan/Dolan* elements, but rather remanded it to the Florida Supreme Court to decide.

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*Koontz* almost guarantees and encourages future litigation. However, going forward, agencies can avoid litigation by changing their practices. Agencies will have a heavier burden in providing scientific data that supports the need for mitigation in order to avoid litigation. In the past, agencies have enjoyed a deferential approach to their decisionmaking process. It is now vital for agencies to articulate the benefits, costs, and justifications for hazard mitigation. While agencies may view this extra work as a burden, providing this information can lead to increased community support for such projects. Communities will be able to witness firsthand the cost of development and the benefit of mitigation. In turn, this can lead to an increase in support for mitigation projects.

There are several ways to deal with the threat of increased litigation as a result of *Koontz*. Communities must practice principled, legal, sustainable, and safe development. Communities can look to follow the safe development for Resilient Communities principles promoted by the Natural Hazard Mitigation Association; as well as the No Adverse Impact (NAI) principles promoted by the Association of State Floodplain Managers (ASFPM).<sup>21</sup> Communities can also accomplish principled development through planning, partnerships, negotiations, multi-use mapping and engineering, and fair regulations to prevent harm. In the end, safe design and fair hazard regulation is a winning concept for the developers, agencies, and citizens of the community.

*Koontz* may have created a major incentive for communities and their representative agencies to say “no” to development in order to avoid possible litigation. However, in reality, communities cannot avoid development altogether; demographic pressures from an increasing population will force development. Our choice as a society is not either “development” or “no development.” Rather, our choices are more accurately framed as: current practices that will lead to increased environmental despoliation, misery to disaster survivors, and huge costs to the taxpayer; *or* better planned, safer development that protects water resources, people, property, the environment, the economy, and the taxpayer. All involved with development decisions can choose a win-win-win-win solution or a lose-lose-lose solution to inevitable development. Right now, sadly, many communities and developers are making lose-lose-lose development decisions.

*Koontz* forces agencies to rethink their negotiation tactics with developers. When working through negotiations with developers, it is imperative that communities *do not* begin the discussion with “no.”<sup>22</sup> Rather, communities must begin the discussion positively. The agency can accomplish this by first identifying commonalities and points of agreement with the developers. The community can thank the developer for choosing them as the town in which to site their develop-

ment. After all, what community does not need the tax revenue or want development?

Subsequently, if there are issues with the development, it is important that the community bring the problems to the forefront. The community needs to clearly identify its possible concerns and discuss specific issues with the proposed development. When in negotiations, it is important that both parties approach the negotiations proactively. If the negotiations become too heated, take a time out to control emotions. The developer must also keep the community’s interests and values in mind during negotiations. It is also important to anticipate the other side’s possible moves. And finally, keep asking why. Asking questions will help the community understand the opposing party’s interests and values. Do not be afraid to bring in additional city departments to the discussion. Identify the planners, engineers, floodplain managers, other experts, and coalitions or partnerships that can help the community understand the project and ask the important questions.

Additionally, if needed, develop a well-thought-out and clear “no.” In order to do this, communities need to consider the worst-case scenario with the development and to set limits on when they need to say no. In the end, if the parties are unable to agree, let the other side know the specific issues that are preventing a “yes.” By doing this, an agency empowers the private sector to do what it does best—solve a problem. Only then, once the issues are flushed out and resolved so both parties’ interests are served, can the parties get together to collectively solve problems and agree to a positive outcome.<sup>23</sup>

In the end, the *Koontz* case gives the floodplain management community validation. Essentially, the case is a ringing endorsement of hazard mitigation and climate adaptation, especially when Justice Alito refers to the excerpt from the *Village of Euclid* case.<sup>24</sup> It encourages climate adaptation specialists, hazard mitigators, and wetland and floodplain managers to realize the importance and science of hydraulics and the art of hydrology. It further inspires all concerned with developing a safer, more just, and resilient society. It forces a deeper understanding of the interworkings of a wetland and its natural flood protection characteristics and quantifiable benefits to society as a whole.

*Koontz* provides a great opportunity for communities. It allows communities to decide whether they want better standards to protect the economy and taxpayers or prefer to continue with current practices that will only lead to destruction and future litigation. *Koontz* does not hurt, but rather supports, mitigation efforts to build a safer, more sustainable nation and world.

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ENDNOTES

1. *Koontz v. St. Johns River Water Management*, 133 S. Ct. 2586 (2013).
2. For further explanation of this concept, see Edward A. Thomas, Esq. & Sam Riley Medlock, *Mitigating Misery: Land Use and Protection of Property Rights Before the Next Big Flood*, 9 Vt. J. ENVTL. L. 155 (2008).
3. See ANNE SIDERS, *MANAGED COASTAL RETREAT: A LEGAL HANDBOOK ON SHIFTING DEVELOPMENT AWAY FROM VULNERABLE AREAS* (Oct. 2013), available at [http://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Publications/ManagedCoastalRetreat\\_FINAL\\_Oct%202030.pdf](http://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Publications/ManagedCoastalRetreat_FINAL_Oct%202030.pdf).
4. *Id.*
5. *Id.*
6. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).
7. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).
8. *Nollan*, 483 U.S. at 838-39.
9. *Dolan*, 512 U.S. at 391.
10. *Nollan*, 483 U.S. at 828.
11. *Dolan*, 512 U.S. at 395.
12. *Koontz*, 133 S. Ct. at 2586.
13. *Id.*
14. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).
15. HOLLY DOREMUS ET AL., *ENVIRONMENTAL POLICY LAW: PROBLEMS, CASES, AND READINGS* 12 (2012).
16. Robert H. Frank, *Ronald Coase, a Pragmatic Voice for Government's Role*, <http://www.nytimes.com/2013/09/15/business/ronald-coase-a-pragmatic-voice-for-governments-role.html> (accessed Feb. 17, 2014).
17. *Id.*

18. DAVID CONRAD & EDWARD A. THOMAS, ESQ., *15 WAYS TO RETHINK THE FEDERAL BUDGET* (Greenstone et al. eds., Brookings Institute 2013).
19. See Nirmal Kumar Bose et al., *Selections From Gandhi* (*Encyclopedia of Gandhi's Thoughts*), [http://www.google.com/url?sa=t&rct=j&eq=&escr=s&source=web&cd=7&cad=rja&tved=0CE0QFjAG&url=http%3A%2F%2Fsevagrandhiashram.org%2Fmkgandhi%2Febks%2FSelectionsFromGandhi.pdf&ei=klgDU6eCBaxf0gHHolBg&usg=AFQjCNGCn4r6T\\_e0yP0t5ygEkklntXHPqg&bvm=bv.61535280,d.dmQ](http://www.google.com/url?sa=t&rct=j&eq=&escr=s&source=web&cd=7&cad=rja&tved=0CE0QFjAG&url=http%3A%2F%2Fsevagrandhiashram.org%2Fmkgandhi%2Febks%2FSelectionsFromGandhi.pdf&ei=klgDU6eCBaxf0gHHolBg&usg=AFQjCNGCn4r6T_e0yP0t5ygEkklntXHPqg&bvm=bv.61535280,d.dmQ) (last visited Feb. 18, 2014). Additional information on Gandhi's thoughts on this maxim can be found at MOHANDAS GANDHI, *GANDHI: SELECTED WRITINGS* 133 (Dover Publications 2005).
20. See *Koontz*, 133 S. Ct. at 2586; see also Edward A. Thomas, Esq. & Sam Riley Medlock, *Mitigating Misery: Land Use and Protection of Property Rights Before the Next Big Flood*, 9 Vt. J. ENVTL. L. 155 (2008).
21. See EDWARD A. THOMAS, ESQ., *NATURAL HAZARDS AND THE LAW* (Kiefer & Jerrolleman ed., CRC Press 2013), as well as the many publications and workshops on the websites of the Natural Hazard Mitigation Association, [www.nhma.info](http://www.nhma.info), the Association of State Floodplain Managers, [www.floods.org](http://www.floods.org). See also Association of State Floodplain Managers, *No Adverse Impact Floodplain Management*, <http://www.floods.org/index.asp?menuID=349&firsdevelmenuID=187&siteID=1> (last visited Feb. 10, 2014).
22. WILLIAM URY, *THE POWER OF A POSITIVE NO* (2007).
23. The Natural Hazard Mitigation Association has developed a series of workshops and webinars built around this theme. PowerPoint presentations from some of those workshops are available on the web. See David Mallory, PE, CFM, & Edward A. Thomas, Esq., *5th Annual Montana Floodplain Resource Seminar and Floodplain Legal and Sustainable Development Workshop*, [http://dnrc.mt.gov/wrd/water\\_op/floodplain/2013\\_seminar/default.asp](http://dnrc.mt.gov/wrd/water_op/floodplain/2013_seminar/default.asp) (last visited Feb. 18, 2014).
24. *Village of Euclid*, 272 U.S. 365

## Consultant Perspectives on *Koontz*

BY ANN REDMOND

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*Koontz v. St. Johns River Water Management District* did not decide about the acceptability of mitigation *per se*. While the U.S. Supreme Court reflected at length on the effect of *Nollan/Dolan* on the expenditure of funds, it did not address whether *Nollan/Dolan* even applied to mitigation of impacts. But it did address the point that the requested mitigation must have a nexus and rough proportionality to the permitted impacts.

The case concerned a permit issued under the state of Florida's regulations, not a Clean Water Act §404 permit issued by the U.S. Army Corps of Engineers (the Corps). While there is a high degree of similarity between the two regulatory programs, there are some inconsistencies, such as how minimization of impacts is addressed in the permitting review. But in a general sense the two programs are reasonably similar—similar enough that the agencies implementing Florida's Environmental Resource Permitting (ERP) program and the Jacksonville District and commenting agencies have been able to effectively collaborate on permits over the years. On a similarity front, both use functional assessments to determine the appropriate amount of mitigation.

### Background

At the time of the St. Johns River Water Management District's *Koontz* permit application decision in 1994, the state's regulations required assessing how much mitigation was needed to offset the permitted wetland losses by assessing the functions expected to be lost. The Florida Legislature had just passed a law called the Florida Environmental Reorganization Act of 1993 (FLERA) that created a new section in Florida's statutes--§373.4135 Mitigation and Mitigation Banking--stating:

"The Legislature finds that the adverse impacts of activities regulated under this part may be offset by the creation and maintenance of regional mitigation areas or mitigation banks. Mitigation banks can minimize mitigation uncertainty and provide ecological benefits. Therefore, the department and the water management districts are directed to participate in and encourage the establishment of private and public regional mitigation areas and mitigation banks. The department and the districts are directed to adopt rules by January 1, 1994, governing the use of mitigation banks."

This change was driven by the regulated community, not the agencies. There was frustration with the agencies' imple-