Environmental Law & Property Rights

Koontz v. St. Johns River Water Management District and Its Implications for Takings Law

*By Brian T. Hodges**

Note from the Editor:

This article is about the Supreme Court's decision in *Koontz v. St. Johns River Water Mangement District*. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to further discussion about the Taking Clause and property rights. To this end, we offer links below to other perspectives on the issue, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

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- John D. Echeverria, Vermont Law School, Koontz*: The Very Worst Takings Decision Ever?*, Dec. 4, 2013:

  http://www.chapa.org/sites/default/files/Echeverria%20Koontz.pdf

Introduction

The U.S. Supreme Court's recent decision in *Koontz v. St. Johns River Water Management District* is one of the most significant and decisive victories for property owners in decades.[1] In broad terms, the Court's opinion recognizes that the Takings Clause of the U.S. Constitution places strict limits on the all-too-common municipal practice of exacting money from land-use applicants to fund unrelated public projects.[2] The decision holds that the government cannot use the land-use permit process to compel landowners to give up land, money, or any other property as the "price" of obtaining development approval, unless the government can show that its demand is necessary to mitigate some harmful impact caused by the proposed land use. As a result, *Koontz* promises to have huge ramifications in jurisdictions where the government is increasingly relying on so-called "impact fees" to fund public projects. *Koontz* also promises to have a long-lasting effect on litigation under the Takings Clause by clarifying several points of law that have confounded courts, practitioners, and scholars for decades.

I. The Background: Constitutional Standards and Lower Court Splits

The *Koontz* case arose when Coy Koontz, Sr., sought permission to develop a small portion of his 14.9 acre undeveloped, commercial property located at the intersection of two major highways in Orlando.[3] The St. Johns River Water Management District ("the District"), a Florida land-use agency, however, had designated his property a wetland, and demanded that Mr. Koontz pay upwards of $150,000 to improve 50 acres of state-owned property miles away from his proposed development as a condition of receiving his permits.[4] In short, the government demanded, "your money or your land." And when Mr. Koontz objected to the off-site mitigation demand, the agency denied his permits, rendering his property unusable.

Mr. Koontz filed a lawsuit in a Florida trial court, challenging the agency's off-site mitigation demand under two U.S. Supreme Court cases, *Nollan v. California Coastal Commission*[5] and *Dolan v. City of Tigard*.[6] Together, those cases hold that the government cannot condition approval of a land-use permit on a requirement that the owner dedicate private property to the public, unless the dedication is necessary to mitigate for impacts caused by the proposed development. A demand that does not satisfy those tests is simply an attempt to take property without payment of just compensation and violates the Takings Clause.

In *Nollan*, the California Coastal Commission required the Nollans, owners of beach-front property, to dedicate to the public an easement over their private beach as a condition of obtaining a permit to rebuild their home.[7] The Commission justified the dedication on the grounds that "the new house would increase blockage of the view of the ocean, thus contributing to the development of 'a "wall" of residential structures' that would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to

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visit,'" and would "increase private use of the shorefront."[8] The Nollans refused to accept the condition and brought a federal taking claim against the Commission in state court, arguing that the condition violated the Takings Clause because it bore no connection to the impact of their proposed remodel. The U.S. Supreme Court agreed, holding that the easement condition was invalid because it lacked an "essential nexus" to the alleged harmful impact.[9]

In *Dolan*, the City of Tigard imposed conditions on Florence Dolan's permit to expand her plumbing and electrical supply store that required her to dedicate some of her land for flood-control and a bicycle path.[10] Ms. Dolan refused the conditions and sued the city in state court, alleging that the development conditions violated the Takings Clause and should be enjoined. On review, the U.S. Supreme Court held that the City established a connection between both conditions and the impact of Ms. Dolan's proposed expansion under the nexus test, but nevertheless held that the conditions were unconstitutional. Even where a nexus exists, there still must be a "degree of connection between the exactions and the projected impact of the proposed development."[11] There must be rough proportionality—*i.e.*, "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[12] The *Dolan* Court held that the city had not demonstrated that the conditions were roughly proportional to the impact of Ms. Dolan's expansion and invalidated the permit conditions as violations of the Takings Clause.[13]

It would seem, therefore, that *Nollan* and *Dolan* would have provided an easy solution for Mr. Koontz. But, over the years, agencies devised ways to get around the constitutional requirements. For example, instead of demanding an interest in real property, agencies began imposing monetary obligations—*i.e.*, requirements that property owners pay a fee in lieu of the desired property dedication as a condition of obtaining a land-use permit. That strategy was successful in many jurisdictions. Because *Nollan* and *Dolan* involved interests in real property, and not monetary obligations, numerous courts held that the government did not have to demonstrate nexus and rough proportionality when exacting money or other non-real property from land-use applicants.[14] Thus, at the time Mr. Koontz's case was winding its way through the courts, there was a significant split of authority about whether or not the Takings Clause protects a person's money to the same degree that it protects a person's land.[15]

The split of authority directly impacted Mr. Koontz's rights. The Florida trial and appellate courts concluded that the District's permit condition was subject to *Nollan* and *Dolan*, and found the demand for 50 acres of off-site mitigation to be unconstitutional because it lacked the necessary connection to any impacts of the development.[16] The Florida Supreme Court disagreed and reversed the lower court decisions:

> [W]e hold that under the takings clauses of the United States and Florida Constitutions, the *Nollan/Dolan* rule with regard to "essential nexus" and "rough proportionality" is applicable only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought, thereby rendering the owner's interest in the real property subject to the dedication imposed.[17]

The U.S. Supreme Court took review of the case in order to settle questions of federal constitutional law decided by the Florida court.[18]

II. Arguments of the Parties

Most of the parties' arguments were focused on characterizing the nexus and rough proportionality tests amongst the Supreme Court's case law, and explaining how that character impacts the parties' substantive and procedural rights. Mr. Koontz argued that the District's demand that he finance improvements to the government's property as a condition of permit approval was an exaction implicating the Takings Clause and, therefore, triggering review under the unconstitutional conditions doctrine. The doctrine, Mr. Koontz explained, has long been a staple of the U.S. Supreme Court's jurisprudence.[19] In its most basic formulation, the doctrine provides that government may not grant an individual a benefit or permit to exercise a constitutional right on the condition that he surrender another constitutional right.[20] The doctrine protects citizens who seek a government benefit or permit from government "deals" that would strip them of their constitutionally protected rights, including the right to free speech, the right to free exercise of religion, and the right to be free from unreasonable searches.[21] Mr. Koontz argued that the Court made the doctrine applicable to the land-use permitting context in *Nollan* and *Dolan*.

As for the Florida Supreme Court's conclusion that monetary exactions are not subject to the same scrutiny as demands for real property, Mr. Koontz contended that nothing in the unconstitutional conditions doctrine, the Takings Clause, *Nollan*, or *Dolan* recognizes a relevant distinction among the *types* of permit exaction subject to the nexus and rough proportionality limitations. Government demands for real or personal property—both categories of property protected by the Takings Clause—are subject to the same limitations.

Application of the nexus and proportionality limitations does not depend upon *when* in the permit process the exaction is imposed. A decision to deny a permit application based on refusal to accede to an unlawful exaction and a decision to approve a permit application subject to acceptance of an unlawful exaction are substantively identical: In both cases, no permit issues unless and until the permit applicant agrees to waive his right to compensation for the confiscated property.

The District did not respond to Mr. Koontz's arguments based on the unconstitutional conditions doctrine. Instead, it characterized *Nollan* and *Dolan* as establishing a regulatory takings test—a distinctly different cause of action. The District then explained that a fundamental prerequisite of a regulatory takings claim is that the government has *in fact* taken property, either directly or through burdensome regulatory measures. Because the District denied Mr. Koontz's permit applications, the exaction remained unfulfilled and no taking had, in fact, occurred. Thus, the District insisted that its demand, which had formed the basis of its permit denial, cannot be subject to

heightened scrutiny under the nexus and rough proportionality standards. Alternatively, the District argued that, as a matter of black letter law, a government demand obligating an individual to spend money on a public project can never result in a taking.

III. The Decision

On June 25, 2013, the U.S. Supreme Court issued its opinion in the case, ruling in favor of Mr. Koontz on both questions. Justice Alito wrote the opinion for the Court, joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas. Justice Kagan filed an opinion concurring in part and dissenting in part, which was joined by Justices Ginsburg, Breyer, and Sotomayor.

The Court unanimously agreed that the nexus and proportionality tests of *Nollan* and *Dolan* constitute "'a special application' of the [unconstitutional conditions] doctrine that that protects the Fifth Amendment right to just compensation for property that the government takes when owners apply for land-use permits."[22] The Court explained that the nexus and proportionality tests place a limit on the government's authority to condition approval of a land use permit upon a dedication of property to a public purpose.[23] If a condition satisfies the tests, it is lawful; if not, it is unconstitutional.[24] The principles that undergird that rule "do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so."[25] Thus, the Court held "that a demand for property from a land-use permit applicant must satisfy the requirements of Nollan and Dolan even when the government denies the permit[.]"[26]

The Court split 5-4 on the question whether a demand for money is subject to *Nollan* and *Dolan*. The majority opinion ruled that a permit condition demanding money must satisfy nexus and proportionality.[27] The dissent, however, opined that different types of property should be provided differing degrees of protection under the Takings Clause.[28] Thus, while a demand for real property may be properly subject to heightened scrutiny under *Nollan* and *Dolan*, the dissent suggested that a demand for money should be subject to less scrutiny—if any at all.[29] The Court ultimately reversed and remanded the case for the Florida state courts to enter a decision consistent with the U.S. Supreme Court's opinion and to determine whether the District had preserved a series of factual and state-law questions for further consideration below.[30]

IV. Implications of the Court's Ruling

Already, commentators on both sides of the property rights debate are calling *Koontz* one of the most significant and far reaching property rights decisions in decades.[31] Most of those proclamations focus on the immediate impact that the decision will have on the land-use permitting process. But two legal issues decided in the case will likely make *Koontz* a long-lasting and important precedent for property owners. First, the Court's decision to resolve *Koontz* under the doctrine of unconstitutional conditions will provide aggrieved property owners with a cause of action that is substantively and procedurally distinct cause from a regulatory takings claim. And second, the majority opinion recognized that one's money is private property subject to the protections of the Takings Clause, bringing a much-needed end to the government's argument that some types of property (*e.g.*, money) should be given less protection against uncompensated takings than other types of property.

A. Revitalization of the Doctrine of Unconstitutional Conditions

The *Koontz* decision confirmed that the *Nollan* and *Dolan* tests constitute a special application of the doctrine in the context of land-use permitting. Together, the nexus and proportionality tests operate to address the realities of the permitting process. Permitting agencies enjoy broad discretion in considering development applications. When properly applied, an agency's permitting authority allows the government to demand that the owner mitigate for any negative impacts caused by a proposed development. But that same discretion can result in demands for dedications of property so onerous that, outside the permitting context, they would be deemed takings.[32] Such unfettered power exposes landowners to the type of unlawful coercion that the unconstitutional conditions doctrine protects against:

> [L]and-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.[33]

Nollan and *Dolan* address both realities by "allowing the government to condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal."[34]

The distinction between a regulatory taking and a violation of the unconstitutional conditions doctrine raises a fine—but extremely important—point. The Court's regulatory takings theories focus on the degree to which the government interferes with an owner's rights in his or her property.[35] Over the years, the Court has developed several different tests for determining when the government interference "goes too far" and effectively appropriates a person's rights in his or her property.[36] Unlike a claim for a regulatory taking, a property owner alleging a violation of the unconstitutional conditions doctrine need not show that the government actually exercised control over the demanded property.[37] Instead, the owner only needs to show that the demand, *if imposed directly*, would entitle the owner to just compensation.

As Justice Alito explained in the majority opinion, "Extortionate demands for property in the land use permitting context run afoul of the Takings Clause *not because they take property but because they impermissibly burden the right not to have property taken without just compensation*."[38] Properly understood, the unconstitutional conditions doctrine defines a constitutional

limitation on government authority. Thus, a violation of the doctrine occurs the moment the government makes an unlawful demand: "As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury."[39] And because the demand itself causes the injury, it does not matter whether the government ultimately succeeds in pressuring someone into forfeiting property as the "price" of securing a permit approval:

> [R]egardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.[40]

It is, therefore, irrelevant whether the government could have denied the permit outright for some other reason because the "greater authority [to approve or deny a permit] does not imply a lesser power to condition permit approval on petitioner's forfeiture of his constitutional rights."[41]

Of course, the fact that property need not be actually taken for the government to violate the unconstitutional conditions doctrine means that just compensation—a remedy mandated by the Takings Clause—will not always be available.[42] In some cases, a permit condition will be consummated and property will change hands. In that circumstance, just compensation may be an appropriate remedy.[43] But where a permit is denied based on an owner's objection to an unlawful condition and the owner is not deprived of a property interest, a taking is not consummated and just compensation may not be available as a remedy.[44]

That is not to say, however, that there is no remedy when a permit is denied—far from it. Typically, the remedy for a violation of the unconstitutional conditions doctrine is issuance of the land-use permit without the unlawful exaction.[45] The *Koontz* decision, however, recognizes the government may also incur liability under state or federal statutes when it imposes a condition that burdens a property interest.[46]

B. Money is Property and is Protected by the Takings Clause

Perhaps the furthest-reaching issue decided in *Koontz* was the conclusion that certain government demands for money will categorically violate the Takings Clause. At first blush, the Court's conclusion seems uncontroversial; after all, a person's money is private property and a seizure of property is protected by the Takings Clause. Indeed, the Court had repeatedly found that an appropriation of money constitutes a taking, just like a seizure of land.[47] But the question was made controversial by the 4-1-4 plurality opinion *Eastern Enterprises v. Apfel*.[48]

In *Eastern Enterprises*, the Court evaluated whether a federal statute that imposed retroactive financial liability on a former coal company to provide lifetime medical benefits for retirees violated the Takings Clause and/or Due Process Clause.[49] Justice O'Connor, writing for a plurality, concluded that the statute effected a regulatory taking of the company's money.[50] Justice Kennedy concurred in the judgment, but on the basis that the statute violated due process.[51] Justice Kennedy was of the opinion that the Takings Clause does not apply where the government imposes a general obligation to pay money that "does not operate upon or alter an identified property interest."[52] Writing in dissent, Justice Stevens opined "whether the provision in question is analyzed under the Takings Clause or Due Process Clause, Eastern has not carried its burden of overcoming the presumption of constitutionality accorded to an act of Congress[.]"[53]

The District insisted that, when Justice Kennedy's opinion is read in conjunction with the dissent, *Eastern Enterprises* created a bright line rule holding that "an obligation to spend money can never provide the basis for a takings claim."[54] The District argued that a monetary exaction can never be subject to the *Nollan* and *Dolan* tests, because those tests only apply to exactions of property that is protected by the Takings Clause. The District's argument was not novel. Over the years, the plurality opinion in *Eastern Enterprises* has caused much confusion in regard to how, or whether, money is protected under the Takings Clause, with many lower courts adopting the District's argument.[55]

The *Koontz* majority rejected the District's argument, finding that the government's demand for Mr. Koontz's money had operated directly upon his land.[56] In contrast with *Eastern Enterprises*, where the government had simply imposed a general financial liability on the companies, the "fulcrum [*Koontz*] turns on is the direct link between the government's demand and a specific parcel of real property."[57]

> Because of that direct link, this case implicates the central concern of *Nollan* and *Dolan:* the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.[58]

Focusing on that "direct link," the Court held that "when the government commands the relinquishment of funds linked to a specific identifiable property interest such as . . . a parcel of real property, a *per se* [takings] approach" is the proper standard.[59]

The *Koontz* dissent begins by suggesting that, under *Eastern Enterprises*, government demands for money are typically not subject to the Takings Clause, and therefore monetary exactions can never implicate the heightened scrutiny required by *Nollan* and *Dolan*.[60] But later, when discussing possible remedies for landowners like Mr. Koontz, Justice Kagan acknowledged that a monetary exaction does, in fact, operate upon a protected property right and concluded that Mr. Koontz could have brought a regulatory takings claim under *Penn Central* or alleged a violation of due process.[61]

Justice Alito responded that carving out a different rule for monetary exactions would make no sense. Monetary exactions—particularly, fees imposed "in lieu" of real property dedications—are "commonplace" and are "functionally equivalent to other types of land use exactions."[62] To subject monetary exactions to lesser, or no, protection would make it "very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*."[63] Furthermore, such a rule would effectively render

Nollan and *Dolan* dead letters "[b]ecause the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standard, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value."[64]

V. Conclusion

Koontz constitutes a major step forward in protecting the rights of property owners. The decision brings an end to the argument that some types of property are given less protection against uncompensated takings than others. By eliminating any distinction between the type of property demanded as an exaction, *Koontz* should assure that every permit condition pass constitutional muster before private property can be taken as the "price" of securing a permit approval. Critics of such a rule may accuse *Koontz* of effecting a "sea change" or "revolution" in land-use planning, but in truth the decision demonstrates fidelity to the Constitution, which remains more important than a local government's discretion during the permitting process.[65]

Endnotes

1 Koontz v. St. Johns River Water Mgmt. Distr., __ U.S. __, 133 S. Ct. 2586 (2013).

2 U.S. Const. amend. V ("Nor shall private property be taken for public use, without just compensation.").

3 *Koontz*, 133 S. Ct. at 2591-92.

4 *Id.*

5 483 U.S. 825 (1987).

6 512 U.S. 374 (1994).

7 483 U.S. at 827-28.

8 *Id.* at 828-29 (quoting Commission).

9 *Id.* at 837.

10 512 U.S. at 377.

11 *Id.* at 386.

12 *Id.* at 391.

13 *Id.*

14 *See*, *e.g.*, West Linn Corporate Park, LLC v. City of West Linn, 428 Fed. Appx. 700 (9th Cir. 2011); West Linn Corporate Park, LLC v. City of West Linn, 240 P.3d 29, 45 (Or. 2010); McClung v. City of Sumner, 548 F.3d 1219, 1224 (9th Cir. 2008); *see also* Richard Epstein, *Introduction: The Harms and Benefits of* Nollan *and* Dolan, 15 N. Ill. U. L. Rev. 477, 492 (1995) (The lower courts "worked a pretty thorough nullification of *Nollan*, which was dutifully confined to its particular facts.").

15 *Koontz*, 133 S. Ct. at 2594.

16 St. Johns River Water Mgmt. Distr. v. Koontz, 5 So.3d 8 (Fla. Ct. App. 2009).

17 St. Johns River Water Mgmt. Distr. v. Koontz, 77 So.3d 1220, 1230 (Fla. 2011)

18 *Koontz*, 133 S. Ct. at 2594.

19 *See* Frost & Frost Trucking Co. v. R.R. Comm'n, 271 U.S. 583, 593-94 (1926) (Sutherland, J.) ("[T]he power of the state […] is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.").

20 The doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz*, 133 S. Ct. at 2594; *see also* Richard A. Epstein, *Bargaining with the State* 5 (1993) (The doctrine holds that even if the government has absolute discretion to grant or deny any individual a privilege or benefit—such as a land-use permit, "it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights."); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989); Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

21 James Burling & Graham Owen, *The Implications of Lingle on Inclusionary Zoning and other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 407 (2009) (The unconstitutional conditions doctrine has been invoked in a wide range of cases in which "government has traded with people for their right to free speech, their right to freedom of religion, their right to be free from unreasonable searches, their right to equal protection, and their right to due process of law.").

22 *Koontz*, 133 S. Ct. at 2599.

23 *Id.* at 2595.

24 *Id.*

25 *Id.* (A "contrary rule would be especially untenable …because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval. … and would effectively render *Nollan* and *Dolan* a dead letter.").

26 *Koontz*, 133 S. Ct. at 2603; *see also id.* at 2603 (Kagan, J., dissenting) ("I think the Court gets the first question it addresses right.").

27 *Koontz*, 133 S. Ct. at 2603.

28 *Koontz*, 133 S. Ct. at 2604-09 (Kagan, J., dissenting).

29 *Id.* at 2609 n.3.

30 *Id.* at 2603. In its briefing to the U.S. Supreme Court, the District argued that Mr. Koontz had "sued in the wrong court, for the wrong remedy, and at the wrong time" based on a variety of state law issues, such as administrative exhaustion, statutory remedies, and factual disputes. *Id.* at 2597. The Court declined to address those arguments, remanding them for the Florida state courts to determine whether they had been preserved and, if so, to resolve them. *Id.* at 2603.

31 *See* Sophia M. Standyk, *A Fistful of Dollars—Exactions and Extortion*, 65(9) Planning & Envt'l Law 4, 4 (2013) ("*Koontz* represents a sea change in the rules[.]"); Ilya Somin, *Two Steps Forward for the 'Poor Relation' of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause*, George Mason Law & Economics Research Paper No. 13-48 (2013 (*available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2325529); John Echeverria, *Koontz: The Very Worst Takings Decision Ever?*, Vermont Law School Faculty Working paper No. 28-13 (2013) (draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2316406).

32 *Dolan*, 512 U.S. at 384 ("Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred."); *Nollan*, 483 U.S. at 831 ("Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.").

33 *Koontz*, 133 S. Ct. at 2594-95.

34 *Id.* at 2595.

35 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537-38 (2005).

36 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Two regulatory takings theories focus on "the severity of the burden that government imposes upon private property rights"—an inquiry that implicates questions about the extent of the economic impact of regulation. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992) (regulation depriving property owner of all "economically beneficial use" of land effects a per se taking); Penn Central Transp. Co. v. New York, 483 U.S. 104, 124 (1970) (creating a multi-factor test for non-categorical regulatory takings designed to determine the extent of a regulation's impact on an owner's reasonable investment backed

expectations). Another theory holds that just compensation is required if a regulation authorizes a physical occupation of private property. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

37 *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538-39 (2005) (discussing the various regulatory takings theories).

38 *Koontz*, 133 S. Ct. at 2596 (emphasis added).

39 *Id*.

40 *Id*. at 2595.

41 *Id*. at 2596.

42 *Id*. at 2597

43 *Id*.

44 *Id*.

45 *Id*. at 2597; *id*. at 2603 (dissent).

46 *Id*. at 2597.

47 *See*, *e.g.* Brown v. Legal Found. of Wash., 538 U.S. 216, 231 (2003); Phillips v. Washington Legal Foundation, 524 U.S. 156, 165-67, 172 (1998); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 162 (1980); Village of Norwood v. Baker, 172 U.S. 269, 279 (1898).

48 524 U.S. 498 (1998).

49 *Eastern* Enterprises, 524 U.S. at 517-19 (O'Connor, J., plurality opinion).

50 *Id.* at 537-38 (joined by Rehnquist, Scalia, Thomas, JJ.).

51 524 U.S. at 550 (Kennedy, J. concurring in part, dissenting in part).

52 524 U.S. at 540 (Kennedy, J., concurring in the judgment and dissenting in part); *see aslo* 524 U.S. at 567-68 (Breyer, J., dissenting, joined by Stevens, Souter, Ginsburg, JJ.).

53 524 U.S. at 552 (Stevens, J. dissenting, joined by Souter, Ginsburg, Breyer, JJ.)

54 *Koontz*, 133 S. Ct. at 2599 (citing dissent at 2605-07).

55 Many lower courts held that demands for money are not protected by the Takings Clause. *See*, *e.g.*, West Va. CWP Fund v. Stacy, 671 F.3d 378, 386-387 (4th Cir. 2011); *Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1054 (11th Cir. 2008). Other courts, however, held that there is no rule to be found among the opinions in Eastern Enterprises. See Berwind Corp. v. Commissioner of Social Security, 307 U.S. F.3d 222, 234 (3d Cir. 2001); Unity Real Estate v. Hudson, 178 F.3d 649, 658 (3d Cir. 1999).

56 *Id*. at 2599

57 *Id*. at 2600

58 *Id*.

59 *Id*. ("[A]ny such demand would amount to a *per se* taking similar to the taking of an easement or a lien.").

60 The dissent concedes that *Nollan* and *Dolan* would be applicable if the government imposed a monetary exaction as a "contrivance" to take an interest in real property. *Id*. at 2608 (dissent).

61 The dissent read Mr. Koontz's complaint as raising a *Penn Central* claim, arguing that the "permitting condition makes it inordinately expensive to develop land." *Id*. at 2609 n.3.

62 *Id*. at 2599 ("respondent has maintained throughout this litigation that it considered petitioner's money to be a substitute for his deeding to the public a conservation easement on a larger parcel of undeveloped land.").

63 *Id*.

64 *Id*.

65 First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987) ("many of the provisions of the Constitution are designed to limit the flexibility and freedom of government authorities").