



CELEBRATING  
55 YEARS

# nerej

## Supreme Court extends constitutional protections for development

September 05, 2013 - Northern New England

In *Koontz v. St. Johns River Water Management District*, decided in June, the U.S. Supreme Court gave another victory to landowners and developers faced with governmental-imposed land use conditions. While the practical impacts of the case are uncertain and it is unlikely that this case will affect New Hampshire's permitting process as significantly as in other states, the *Koontz* decision may spark some important changes in how local municipalities deal with development and how applicants approach municipal requests for monetary exactions as a condition of approval.

In *Koontz*, the plaintiff owned 14.9 acres of wetlands in Florida and sought permits from the local water management district to develop a small portion of the land. *Koontz* offered to mitigate the environmental effects of the development by giving the district a conservation easement over the remaining undeveloped portion of his property. The district rejected *Koontz*'s proposal and would only approve construction if he reduced the size of his development to one acre and encumbered the remaining portion of the land with a conservation easement, or, alternatively, if *Koontz* funded preservation work on wetlands owned by the district located several miles away. Unsatisfied with either option, *Koontz* sued the district, arguing that its denial of his proposal was an unconstitutional "taking" in violation of the constitution.

To understand what may change as a result of the *Koontz* decision, it is important to understand how the court has examined land-use restrictions of this type previously. It is not uncommon for a permitting board to approve a land use request on the condition that the developer conserve adjacent land or contribute to other vaguely-related capital or environmental improvements elsewhere. Fearing the danger of governmental overreach, the court previously reined in such authority, by requiring both a "nexus" and "rough proportionality" between the government's demand and the social cost of the proposed land use. By a slim majority of the court, *Koontz* expanded the scope of this legal test to specifically include monetary exactions. Thus, impact fees, mitigation fees, and other monetary exactions, in addition to the actual taking of land, must also bear a "nexus" and "rough proportionality" to the proposed development.

In New Hampshire, a similar legal standard has been in place for many years, by both legislative action and court decisions. For example, the state's impact fee law specifically requires such fees to be "proportional" to the municipal capital improvement costs and "reasonably related" to the capital needs created by the development. And, in *Upton v. Town of Hopkinton* (a 2008 decision), the N.H. Supreme Court held that, in order to require an impact fee or exaction from a property owner, the fee must bear a rational nexus and be proportional to the needs created by the project. In that case, the court used a seemingly identical test to that cited in *Koontz*, concluding that conditioning a permit approval on the requirement that a developer pay one-third of the road improvement costs was "reasonably related" to the proposed impact to the land and thus permissible.

Since New Hampshire law has long allowed planning boards to impose reasonable impact or mitigation fees when a developer proposes a project that might negatively impact municipal infrastructure, the land or environment, the Koontz decision will not prohibit planning boards from exacting those fees going forward. However, due to the fear of expensive legal battles related to the expanded federal standard, the decision may make municipalities more cautious when reviewing permitting applications and negotiating conditions for approval. The decision also could have the detrimental effect of encouraging municipalities to deny applications with greater frequency in order to avoid the possibility of enforcing exactions later found unconstitutional or - on the other end of the spectrum - approving ill-advised projects without reasonable conditions.

While it is impossible to predict with any certainty how the Koontz decision will effect permitting in the Granite State, landowners and developers should be aware of this decision and take its rationale into account when framing their permitting applications and subsequent negotiations. Given that the nexus and proportionality test is fact-intensive and will vary on a case-by-case basis, developers should be wary of any attempt by a municipality to impose monetary conditions and consult with legal counsel to determine whether those exactions satisfy the various, complex legal tests.

Philip Hastings and Mark Beaudoin are attorneys with Cleveland, Waters and Bass, P.A., Concord, N.H.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540