2013

What Exactly are Exactions?

Jessica Owley
University of Miami School of Law

Stephen J. Tulowiecki

What Exactly Are Exactions?

By Jessica Owley

This is going to be an exciting year for takings jurisprudence. The Supreme Court has appeared eager to take up cases involving Fifth Amendment Takings claims in a variety of contexts. One of these cases in particular, *Koontz v. St. John's River Water Management District*, could have signifi cant implications for New York law.

I. Takings Jurisprudence

Historically, takings jurisprudence involved instances where governments encroached on or occupied private land without providing just compensation. In 1922, however, the Supreme Court recognized that governmental regulations that "go[] too far" in restricting property use can qualify as a taking even where the government has not physically seized the parcel.[1] Since the 1922 case of *Pennsylvania Coal Company v. Mahon*, the Supreme Court has struggled to articulate when a regulation has "gone too far" such that landowners must be compensated for the regulation's deleterious effects. Most acknowledge that this has been a tricky and not altogether successful endeavor. Where a regulation deprives a parcel of "all economically viable use," courts fnd little difference between regulating and physical occupation of the property, declaring the regulation a taking which requires either just compensation or an invalidation of the regulation.[2]

Generally, courts look to the balancing test established in *Penn Central Transportation Company v. City of New York*[3] to determine if there has been a taking. The *Penn Central* factors instruct courts to examine "the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-back expectations and the character of the government action."[4] Courts depart from this *Penn Central* balancing test, however, when the regulatory action is an exaction. Exactions are a special category of regulatory behavior that the Supreme Court has deemed to merit a different level of analysis as spelled out in two important cases: *Nollan v. California Coastal Commission*[5] and *Dolan v. City of Tigard*.[6]

Nollan and *Dolan* set forth specifi c rules for assessing when an exaction is impermissible under the Fifth Amendment's prohibition of taking property without just compensation. In *Nollan*, the Supreme Court explained that the land-use restriction must be tied to the harm the restriction seeks to cure. In the words of the Court, the exaction must have an "essential nexus" with the public harm sought to be alleviated.[7] In that case, the Court found that the government-mandated public access did not have an essential nexus with the purported harm of obstructed ocean views and a psychological barrier, created by a developed shorefront that prevented beach use.[8] Thus, the exaction did not work to cure the harm caused by the proposed development project. The Court noted that other land-use restrictions, such as height limitations or width restrictions, might have been valid, as they would have been tailored to address the problem of visual impediments to the beach.[9]

In *Dolan*, the Court further described the contours of permissible exactions by declaring that the exaction must be roughly proportional to the harm imposed.[10] Once a government entity meets the *Nollan* requirement and demonstrates that the exaction is linked to the harm caused, it also needs to show that the level of the exaction does not outstrip the level of harm caused by the project in question. The *Dolan* Court declared that the exaction must be "roughly proportional" to the impact of the proposed activity. Based on this theory, the Court invalidated requirements that a landowner dedicate portions of her property for storm drainage and a pedestrian and bicycle path. The Court found a nexus between the development and the exactions because the development would increase impervious surfaces (affected storm drainage) and increase vehicular traffi c. However, the Court concluded that the City of Tigard failed to demonstrate that the proposed construction's impacts on food control and traffi c merited the proposed dedications, requiring "some sort of individualized determination that the required dedication is related in both the nature and extent to the impacts of the proposed development."[11]

In the wake of *Nollan* and *Dolan*, scholars and courts delved into the signifi cant nexus and rough proportionality tests in attempts to assess what levels of exaction might be permissible. The Court limited the reach of these tests in *City of Monterrey v. Del Monte Dunes at Monterey, Ltd.*, where it explained that the "rough proportionality" test does not apply beyond the unique circumstances of cases involving exactions.

II. Exactions in New York

Faced with these instructions from the Supreme Court, New York has grappled with how to apply the *Nollan* and *Dolan* tests, usually limiting the use of these tests by defining what qualifies as an exaction. There is some variation in the definition of exaction, but generally exactions are requirements placed on a landowner seeking to obtain a development permit. At the most basic, we can think of exactions as permit conditions, although some argue for more limited definitions.

Exactions most commonly take the form of contributions of money or dedications of land.[12] Exactions enable local governments to transfer the costs associated with

NYSBA *The New York Environmental Lawyer* | Spring/Summer 2013 | Vol. 33 | No. 1 31

new development to the developers and future residents of the projects.[13] Exactions for streets, sidewalks, and utilities within a subdivision are common examples.

The Supreme Court has validated the use of exactions as an implementation of a zoning authority's police power, as long as the condition substantially furthers governmental purposes that could justify denial of a building permit. The federal takings jurisprudence requires an assessment of whether the proposed exaction is roughly proportional and bears an essential nexus with the expected impacts of the project. The discussion hinges on our view of property rights. The Fifth Amendment prohibits the taking of property without just compensation; however, it is sometimes difficult to evaluate what constitutes property for Fifth Amendment purposes. Some might argue that every limitation on a landowner's freedom of action should be a compensable property right. Thus, a *Nollan/Dolan* analysis would be required for laws regarding actions as diverse as requiring a landowner to dedicate a portion of her land to a public footpath or requiring her to paint her house a color that blends in with the landscape. While most courts agree turning a portion of private land over to the public (or restricting a landowner's right to exclude) qualifies as an exaction, courts are less comfortable with invalidating a restriction on the ability to paint a house hot pink for its infringement on a compensable property right. Where should the line be drawn?

In *Smith v. Town of Mendon*,[14] the New York Court of Appeals avoided evaluating a permit condition on *Nollan* and *Dolan* grounds by finding that it was not an exaction. In *Smith*, the court held that what would generally be termed an "exacted conservation easement"[15] was not an exaction. It reached this conclusion by limiting the definition of exaction to requiring a dedication of property for public use.

Paul and Janet Smith owned a 9.7-acre lot in the Town of Mendon, located along a protected waterway. Their lot was described as including "several environmentally sensitive parcels" and falling with the Honeyoe Creek's 100-year flood plain. In particular, steep slopes on the property created concerns for erosion. The Mendon Town Code established environmental protection overlay districts (EPODs),[16] with four different EPODs that limited the Smiths' use of their property. Landowners can acquire development permits for projects within EPODs if they can show that their proposed activities will not cause undue harm, for example. by destabilizing soil and causing erosion. Permit applicants must make a specific showing that the proposed activity will not injure the environmentally sensitive features of the property.

In December 2001, the Smiths applied to the Town Planning Board for site plan approval to construct a single-family home in the non-EPOD portion of their property. In July 2002, the Board issued a final site plan approval, concluding that the Smiths' proposal was not likely to result in any adverse environmental impacts as long as there was no development in the EPOD portions of the site. The Planning Board also conditioned final site plan approval on the Smiths' filing a conservation restriction on any development within the mapped EPODs and amending the final site plan map accordingly. The Board characterized these restrictions as putting the EPOD requirements into the deed and thereby "put[ting] subsequent buyers on notice that the property contains constraints which may limit development."[17] The proposed conservation restrictions closely mapped the limitations established by the EPOD regulations and did not require the Smiths to open up their property to public access.

The Town argued that the conservation restriction did not take any property right from the Smiths, because it merely repeated already existing regulatory restrictions. The difference, however, was that the conservation restrictions would operate in perpetuity, while the Town of Mendon could amend its EPOD ordinance at any time. Additionally, putting the land-use restrictions in the deed gave the Town an additional enforcement mechanism. If the Smiths or a subsequent landowner violated the terms of the conservation restriction (which again were the same as the terms of the EPOD), the Town could seek equitable relief in court. Thus, for the same violation, the Town could both get injunctive relief based on the deed restriction and issue a citation for violating the EPOD.

If the conservation restriction constitutes an exaction, the Fifth Amendment takings analysis would involve application of the *Nollan* and *Dolan* inquiries into the essential nexus and rough proportionality of the exaction. If the restriction is not an exaction, only the *Penn Central* balancing test—which is generally considered more favorable to the regulators—applies. The court was persuaded by the Attorney General's amicus brief asserting that conservation restrictions of this type do not constitute exactions because they do not involve the dedication of property to public use. The New York Court of Appeals reviewed the federal exaction cases and found that they all involved dedications of real property that limit the landowner's ability to exclude the public from her property. Where the right to exclude is not involved, there is no exaction. Thus, although the Smiths were required to place a limitation on their property rights, this limitation did not rise to the level of an exaction, because there was no requirement to allow public access to the site. The *Smith* court narrowly interpreted "public use" to only involve actual presence on the land by members of the public. Thus, in New York, only possessory rights or affirmative public easements constitute exactions.

Perhaps because it was already bound by precedent, the *Smith* court also noted that a "fee imposed in lieu of a physical dedication of property to public use" also qualifies as an exaction for the purpose of takings jurisprudence.[18] It is unclear how the court reconciled these two holdings. The *Smith* Court explained that the paramount

NYSBA *The New York Environmental Lawyer* | Spring/Summer 2013 | Vol. 33 | No. 1 31

stick in the property rights bundle for assessing whether something is an exaction is whether the right to exclude others has been taken. This analysis does not support the holding that in lieu fees should constitute exactions. This creates a strange juxtaposition where New York has both a narrower and broader view of exactions than other states. For example, in California, requiring a landowner to place a conservation easement on her property is considered an exaction while requiring her to pay an in lieu fee is not.[19] In fact, many courts are conflicted on the issue of fees but find little debate about conservation easements or similar restrictions.

Smith v. Town of Mendon may need revisiting pending the result of *Koontz v. St. Johns River Water Management District*. The Supreme Court heard oral argument of the case in January[20] and an opinion is expected this summer.

II. Supreme Court Revisits Exactions

Koontz involved a Florida landowner's claim that he is owed just compensation for an exaction that never actually occurred.[21] Coy Koontz, Sr. owned land in Orange County, Florida. He wanted to develop 3.7 acres but was restricted by the St. John's River Water Management District ("the District") that controlled a habitat protection zone encompassing those acres. Koontz applied for two permits in 1993 and 1994 that would have destroyed 3.4 acres of wetland and 0.3 acres of protected uplands. In return for the permits, Koontz volunteered to place 11 other acres of his property into a conservation easement. The district deemed the 11 acres to be inadequate mitigation and suggested additional mitigation including the option of paying for improving wetlands on land owned by the district. Koontz refused the deal, and his permit application was denied.

Koontz (who died in 2000 and has been succeeded in this matter by his son Coy Koontz, Jr.) filed suit, claiming the proposed exactions would have been invalid under the Fifth Amendment takings jurisprudence. Essentially, Koontz asserted that the proposed exaction was excessive and would fail *Dolan*'s requirement of rough proportionality.

This case raises major questions about the right of government agencies to impose conditions in return for permit approval. These conditions (which some might term exactions…but not us New Yorkers) can take many forms, including "money, services, labor or any other type of personal property."[22] Koontz's circumstance dif- fers from that in *Nollan*, *Dolan*, and *Smith*, because the landowner was not only being asked to limit action on his own property but also provide payments for offsite wetland restoration and rehabilitation. It is not clear whether either of these requirements (had they actually been imposed) would constitute exactions in New York because, under *Smith*, conservation easements are not exactions unless they involve public access and this one did not. Furthermore, it is not clear that these types of payments would even be considered exactions in New York. While the New York Court of Appeals held payments to be exactions in *Twin Lakes Development Corp. v. Town of Monroe*, it limited its holding to fees imposed in lieu of a physical dedication. Mitigation fees do not appear to meet that definition.

The Supreme Court has not yet determined whether exactions include fees or partial property rights where public access is not involved. However, there is nothing in the language of *Nollan/Dolan* suggesting such a limitation.

The Koontz oral argument offers some indications as to how the Supreme Court Justices view and define exactions. For example, both Justice Kennedy and Chief Justice Roberts pushed the attorneys to evaluate whether exactions change nature when offsite or onsite, but both argued offsite and onsite mitigation should be treated in a similar manner. In Koontz's view, this means viewing offsite mitigation as an exaction, while in the District's view, it means subjecting the condition to a *Penn Central* analysis (i.e., not treating it as an exaction). Justice Breyer seemed to find the location of the permit condition important, pointing out that the District had given Koontz several options (beyond the offsite mitigation fees) to mitigate the impacts of his proposed development, many of which were on his own property. Thus, at least three of the justices are interested in where the permit condition occurs when determining whether the condition qualifies as an exaction, meriting *Nollan/Dolan* analysis.

The District argued in its brief that a takings analysis (neither *Nollan/Dolan* or *Penn Central*) should not be applied when a permitting agency imposes conditions that require a developer to spend some money for a public project, but the court seemed to have trouble accepting that argument. The District argued that by extending the takings concept to monetary obligations, there would be no logical stopping point. Again, it was not clear that the justices agreed. Justice Kagan inquired into whether all permit conditions are takings. Koontz argued that anytime a permitting authority asks for any property (including money), there is an exaction. Justice Scalia agreed, and several other justices appeared to agree, that if the permitting authority required payments of money, there would be an exaction appropriately subject to *Nollan/Dolan* analysis. If the Supreme Court addresses these issues in its opinion, and thereby broadens the scope of permit conditions that it defines as exactions (or subjects to exaction-like analysis), New York law will be out of step with federal requirements. Whether you characterize the move as extending the definition of exaction or just applying the *Nollan/Dolan* analysis to additional categories of permit conditions, New York State will end up with more takings cases and a heavier burden on public agencies to justify their environmental protection permitting schemes.

NYSBA *The New York Environmental Lawyer* | Summer 2013 | Vol. 33 | No. 1 31

Endnotes

1. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).
2. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).
3. 438 U.S. 104 (1978).
4. *Palazzolo v. Rhode Island,* 533 U.S. 606, 617 (2001).
5. 483 U.S. 825 (1987).
6. 512 U.S. 374 (1994).
7. *Nollan,* 483 U.S. at 837.
8. *Id.* at 835.
9. *Id.* at 836.
10. *Dolan,* 512 U.S. at 391.
11. *Id.*
12. *See* Elaine Spencer, *A Developer's Perspective on Government Exactions in the Wake of* English Church v. Los Angeles *and* Nollan v. California Coastal Commission, C356 A.L.I.-A.B.A. 449, 453 (1988).
13. Donald L. Connors & Michael E. High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 68, 69 (1987); John P. O'Connor, Jr., Note, *Extortion Loses a Synonym Thanks to Court Ordered Accountability in Land Use Exaction Programs:* Nollan v. California Coastal Commission, *107 S. Ct. 3141 (1987),* 57 U. CIN. L. REV. 397 (1988).
14. *Smith v. Town of Mendon*, 822 N.E.2d 1214 (N.Y. 2004).
15. *See generally,* Jessica Owley, *The Emergence of Exacted Conservation Easements*, 84 NEBRASKA L. REV. 1043 (2006).
16. Mendon Town Code section 200-23.
17. *Id.* at 1216.
18. *Id.* at 1219 (citing *Twin Lakes Development Corp. v. Town of Monroe*, 801 N.E.2d 821 (2003)).
19. *Building Industry Ass'n v. Stanislaus County*, 190 Cal. App.4th 582 (2010); *see also* Jessica Owley, *Exacting Conservation Easements in California*, 21 ENVTL L. NEWS 3 (Winter 2012).
20. *Koontz v. St. John's River Water Management*, The Oyez Project at IIT Chicago-Kent College of Law, *http://www.oyez.org/cases/2010-2019/2012/2012_11_1447* (last visited March 3, 2013).
21. One of the key elements of this case is whether a constitutional violation can occur when the government never actually issues a permit. That issue could end up being the crux of the case and leave us without an answer regarding the Supreme Court's view of fees and other conditions as exactions. For a thorough and engaging discussion of proposed exactions as takings, *see* Timothy Mulvaney, *Proposed Exactions,* 26 J. LAND USE & ENVTL. L. 279 (2011).
22. Petition for Writ of Certiorari, *Koontz v. St. Johns River Water Management Dist.* (No. 11-1447), 2012 WL 1961402.

Jessica Owley is an Associate Professor at SUNY Buffalo Law School.