

U.S. Supreme Court Rules Government Can Be Guilty of Taking When Denying a Land Use Permit or Requiring Monetary Payment as a Condition of Approval

By Kenneth A. Kecskes

Land developers will find it easier to challenge coercive exactions and unreasonable impact fees requested by governmental authorities during the land use permitting process in the aftermath of the U.S. Supreme Court's decision in *Koontz v. St. Johns River Water Management District*, 570 U.S. ____; 133 S.Ct. 2586 (2013).

The Court held that a demand for property from a land use permit applicant as a condition of approval can constitute an unlawful taking even when the government *denies* the land use permit. It does not matter that the governmental decision-maker might have been able to deny the application outright in the exercise of its discretion. The critical inquiry is whether the *proposed* condition of approval has a "nexus" and "rough proportionality" between the government's demand and the

anticipated effects of the applied-for land use. If the project applicant rejects the proposed condition because it does not meet the "nexus" and "rough proportionality" tests, the project applicant can bring a lawsuit claiming the government's condition is tantamount to a taking of its property.

The Court also held that a local government's demand for money – for example, impact fees – must satisfy the "nexus" and "rough proportionality" tests. In so holding, the Supreme Court took its takings jurisprudence beyond physical or regulatory takings of private property. This portion of the Court's holding is extremely important because, as local governments find themselves with less money for capital improvements and operations, governmental decision-makers have been tempted to solve fiscal shortfalls with impact fees. The *Koontz* decision should limit the size of impact fees so that such payments are more closely related to the environmental impacts of development.

The facts of the case were straightforward. Koontz applied for permits to develop a portion of his property from the St. Johns River Water Management District. The District required permit applicants who desired to build on wetlands to offset any environmental damage that might be caused by the proposed development. Koontz offered to deed to the District a conservation easement on nearly three quarters of his property as mitigation. The District refused Koontz's offer, stating that it

would approve his requested land use permit only if Koontz (1) reduced the size of his development and, among other things, deeded to the District an even larger conservation easement area or (2) hired contractors to improve District-owned wetlands several miles away. Believing the mitigation required by the District for his proposed development was excessive, Koontz filed suit claiming the District's action was an unreasonable exercise of the District's police power constituting a taking without just compensation.

The trial court agreed with Koontz, finding the District's demands failed the requirements of *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In *Nollan* and *Dolan*, the Court established the rule that government cannot condition the approval of a land use permit on the owner's relinquishment of a portion of his or her property unless there is a nexus and rough proportionality between the government's demand and the effects of the proposed land use. The Florida District Court of Appeal affirmed. However, the Florida Supreme Court reversed on the basis that (1) the District denied the application and (2) a local government's demand for impact fees cannot give rise to a takings claim.

Justice Alito's opinion for the U.S. Supreme Court reasoned that the unconstitutional conditions doctrine prevents the government from coercing people to give up their constitutional rights. When the government makes extortionate

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demands in the land use context, the government violates the Fifth Amendment's Takings Clause "not because they take property but because they impermissibly burden the right not to have property taken without just compensation."

The Court's decision will have significant repercussions in permit negotiations and land use litigation at the federal, state and local level. Land developers will have an incentive to document conditions proposed by governmental agencies that may appear to be excessive mitigation in light of a project's development impacts. Government staff may be reluctant to offer proposed conditions or comment on a developer's offer of mitigation, fearing that staff are creating a record for future land use litigation. Staff will also have an incentive not to disclose proposed conditions until later in the application review and approval process, perhaps as late as immediately prior to submission to decision-makers in a staff report or other transmittal required pursuant to public meeting laws.

We will likely see an increased emphasis on collecting and analyzing data to properly characterize the potential impacts of a proposed

development. Government staff will have an incentive to take their time and be cautious in the design of mitigation measures based on reasoned analysis and the best available science. As a result, project applicants can expect further delays in permit processing as impact studies and reports designing recommended mitigation measures are prepared prior to a formulation of the final conditions of approval. To protect themselves against *Koontz* litigation, government decision-makers will likely approve a variety of mitigation alternatives in the hope that at least one survives *Nollan/Dolan* scrutiny.

In California, the *Koontz* case raises the issue of the appropriate level of scrutiny that a court must use when evaluating the constitutionality of impact fees. In *Ehrlich v. Culver City*, 12 Cal.4th 854 (1996), the California Supreme Court used different tests to determine the constitutionality of project-specific impact fees as opposed to broadly applicable development impact fees.

A project-specific impact fee is one that is created and sought to be imposed specifically to address the environmental impacts of a particular development proposal. The *Ehrlich* court applied the *Nollan/Dolan* analysis

to a recreation fee that Culver City sought to impose because the proposed development project was eliminating recreation opportunities in the area.

Broadly applicable development impact fees are enacted by a legislative body in anticipation of new development in a geographic area (sometimes over the entire jurisdiction or more often over a portion thereof) for the purpose of achieving a public policy objective. In *Ehrlich*, the California Supreme Court declined to apply the *Nollan/Dolan* test because Culver City's public art fee was broadly applicable to most new development projects in the City, like other development standards.

Because the *Koontz* majority opinion does not distinguish between these two types of impact fees, it is questionable that the California Supreme Court's application of a lesser level of scrutiny to certain types of impact fees in *Ehrlich* is still good law.

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Subdivision and Land Development in Pennsylvania

By Clair E. Wischusen

Article V of the Pennsylvania Municipalities Planning Code (MPC) empowers Pennsylvania municipalities to regulate subdivision and land development by enacting a subdivision and land development ordinance (SALDO). The MPC defines subdivision, but essentially it is the division or redivision of land for any purpose except the lease of land for agricultural purposes. The MPC also defines land development to include the physical improvement of land for

any purpose involving a single nonresidential use or two or more residential uses on a lot.

Not all structures constitute land development. In *Upper Southampton Twp. v. Upper Southampton Twp. ZHB*, 934 A.2d 1162 (Pa. 2007), the Pennsylvania Supreme Court rejected an overly expansive reading of the definition of land development, holding that construction of billboards on already developed land did not trigger the cumbersome land

development approval process. Rather, the court reasoned that land development is the "allocation of land in such a way that issues related to public use, water management, sewers, streets and the like must be addressed." Similarly, the Pennsylvania Commonwealth has held that construction of a roof over a previously approved patio did not constitute land development, *Borough of Moosic*, 11 A3d 564 (Pa. Cmwlth. 2010), and construction of an

accessory structure on already developed property did not require land development approval. *Marshall Twp. Bd. of Sup'rs. v. Marshall Twp.*, 717 A.2d 1 (Pa. Commw. 1998).

The subdivision and land development review and approval process generally consists of two phases: preliminary plan and final plan approval. Applicants may also want to submit a sketch plan to obtain municipal input on design and layout factors prior to preparation of a preliminary plan. In most instances, preliminary plan approval accounts for the majority of the process. Approval of a preliminary plan virtually guarantees approval of the final plan so long as it meets the conditions upon which the preliminary plan was approved. The applicant will need to work closely with his or her engineer and attorney in preparing the preliminary plan application. Pay close attention to municipal filing, escrow and review fees.

A governing body has 90 days to review and render a decision on a subdivision and land development plan. The plan is deemed approved if the municipality does not render a

decision within 90 days. Applicants often extend the review period because the process typically takes longer. However, an applicant should never agree to an indefinite extension. Much of the review period is spent receiving and responding to comments from the municipal engineer. The governing body is also required to submit the plans to the county planning commission for comment and to the municipal planning commission for recommendation of approval or denial. No public hearing on a subdivision and land development plan is required but can be held if desired by the municipality.

A governing body is legally obligated to approve a subdivision and land development plan if it meets the provisions of the SALDO. An approved plan is protected for five years from any adverse changes or amendments to the ordinance. Prior to final approval, the applicant is required to post financial security to cover the cost of public improvements. Upon final approval, the applicant needs to record the final plan with the Office of the Recorder of Deeds within 90 days. If a governing body denies a plan, it must provide specific reasons for the denial

along with citation to pertinent sections of the ordinance. An appeal can be filed to the Court of Common Pleas within 30 days of the decision.

In certain circumstances, waivers can be obtained from subdivision and land development requirements. Waivers must not be contrary to the public interest and must observe the basic purpose and intent of the ordinance. Waivers are not to be confused with variances from zoning requirements that must go before the zoning hearing board. All waiver requests and reasons in support of same should be requested in writing and listed on the subdivision and land development plan.

While the subdivision and land development process may seem challenging, having the right legal team in place will keep your development on track.

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PA Commonwealth Court Clarifies Burden of Proof in Township Exemption Case

By Loren D. Szczesny

PA Case of the Month: *Norwegian Township v. Schuylkill County Board of Assessment Appeals, Pottsville Area School District*, 1764 C.D. 2012 (Pa. Cmwlth. June 19, 2013)

As efforts to preserve open space continue to grow and municipal governing bodies are provided with new opportunities to acquire land that would otherwise be put to private use, a question is raised as to the taxable status of the land acquired by the municipality. While the general rule regarding the taxable status of government-owned property is that the

property is presumed tax-exempt, there is conflicting case law addressing the burden of proof in establishing the tax-exempt status of a property.

The burden of proof in a case involving the taxable status of township-owned property was recently addressed by the Pennsylvania Commonwealth Court in the case of *Norwegian Township v. Schuylkill County Board of Assessment Appeals, Pottsville Area School District*. In this case, the Commonwealth Court held that the burden of proof in a government-owned property context was upon the taxing authority to prove

the taxability of the property. This decision conflicts with two prior decisions of the Commonwealth Court: *Guilford Water Authority v. Adams County Board of Assessment*, 570 A.2d 102 (Pa. Cmwlth. 1990), and *In Re Township of Middleton*, 654 A.2d 195 (Pa. Cmwlth. 1995), in which the Commonwealth Court held that the burden of proof was on the property owner to prove that property was tax-exempt.

In *Norwegian Township*, the township acquired a parcel of land from Community Banks, N.A. on August 6, 2007. On March 1, 2012, Schuylkill

County notified Norwegian Township that the property would be considered taxable. The township appealed the decision to the Schuylkill County Board of Assessment Appeals, and, by Order dated May 9, 2012, the Board affirmed the tax assessment of the property based upon its fair market value. Thereafter, on June 8, 2012, the township appealed the decision of the Board of Assessment Appeals to the Schuylkill County Court of Common Pleas seeking a tax exemption.

At the hearing before the trial court, the township presented evidence indicating it planned to build a playground on the property when funds became available. In fact, since 2007, the township had applied for grant money in each year. The township had been clearing the property and maintaining the property in the same manner as other township parks. The property was open for public access, and the township had spent considerable funds to make the property open for public use.

By Opinion and Order dated August 28, 2012, the trial court held that the property was exempt from real estate taxes. Most importantly, the trial court noted that the taxing authority has the burden of proof when establishing any tax liability for government-owned property. In its decision, the trial court found no evidence to suggest that the land in question had been used for a non-public purpose, but found the land available to the public for recreational activities and that the land had been used to benefit the public. The trial court determined that the township had made a good faith effort to

develop the land to be used as a park and/or playground.

In its appeal to the Commonwealth Court, the Schuylkill County Board of Assessment Appeals argued that the trial court erred in determining that the Board bears the burden of proving that the township was not using the property for a public purpose; and, therefore, that the property is taxable. The Board also argued that the trial court erred in concluding that the property was used for public purposes, the property was intended as a public park and/or playground, there were funds to develop the property for public purposes, and the property was available for public use as a park and/or playground.

In rejecting the arguments of the Schuylkill County Board of Assessment Appeals, the Commonwealth Court noted that, ordinarily, the property owner bears the burden of establishing a tax exemption under the rule that all property is subject to real estate taxes. However, where the matter involves government-owned property, the burden of proof of liability for taxes is clearly upon the taxing authority. The Commonwealth Court noted it failed to consider this important distinction in its decision in *Guilford* and misstated the appropriate burden of proof for government-owned property in that decision. Similarly, the Commonwealth Court noted the burden of proof was misplaced in its decision in *In Re Township of Middleton*.

In reaching its conclusion, the Commonwealth Court relied upon its

decision in *Granville Township v. Board of Assessment Appeals of Mifflin County*, 900 A.2d 1012 (Pa. Cmwlth. 2006), and clarified that the burden of proving liability for taxes is **on the taxing authority** where the real estate in question is owned by a governmental body, 900 A.2d at 1016. In addition to clarifying the burden of proof, the Commonwealth Court also discussed the use of the property for public purposes. The court concluded there was substantial evidence in the record to support the trial court's decision that the Schuylkill County Board of Assessment Appeals failed to meet its burden to prove that the property of Norwegian Township was taxable. The township produced evidence through testimony establishing that the subject property was actually and regularly being used for a public purpose, was available to the public for recreational activities, was used by the township to benefit the public, and that the township made a good-faith effort to develop the property for a park or playground. In light of such evidence and the failure of the Board of Assessment Appeals to prove otherwise, the Commonwealth Court found sufficient evidence supporting the decision of the trial court that the property of Norwegian Township was exempt from taxation.

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Recent PA Commonwealth Court Decision Addresses Timing Issues of Appeals of Zoning Hearing Board Decisions

By David H. Comer

In the recent Pennsylvania Commonwealth Court decision of *Schmader v. Cranberry Township Board of Supervisors*, 67 A.3d 881, the court

addresses timing issues related to the filing of an appeal of a zoning hearing board decision to a Court of Common Pleas.

In this case, involving an appeal to the zoning hearing board regarding the operation of a business in a residential district, the zoning hearing board

issued a decision dated March 30, 2012. The appellant received the decision on April 3, 2012, and filed an appeal to the Court of Common Pleas on May 2, 2012. Cranberry Township intervened, and, along with the zoning hearing board, filed a motion to quash the appeal as being untimely. The township argued the decision was mailed on March 30, 2012, and the appellant was required to file an appeal within 30 days of that date. The appellant argued that the zoning hearing board had a duty to formally notify him of the date of mailing of the decision of the zoning hearing board, as that date started the 30-day appeal period. The Court of Common Pleas quashed the appellant's appeal, and the appellant filed an appeal to the Commonwealth Court.

The appellant argued that the Court of Common Pleas ignored relevant case law and asserted that the zoning

hearing board was required to include in its decision notification of the actual mailing date and that the zoning hearing board's failure to provide such notice requires that the appellant be given 30 days to file an appeal from the date that the appellant received the zoning hearing board decision.

Relying on cases addressing the timing of appeals in administrative actions, the court held it was "incumbent on the Board to include in the notification of its decision the actual date on which the decision was mailed." The court also agreed with a prior Pennsylvania Supreme Court decision that held it would be "manifestly unjust" to dismiss an appeal where the agency failed to inform the party of the mailing date.

In conclusion, the court held that because of the zoning hearing board's failure to include a mailing date on its

decision, the appellant was justified in filing his appeal within 30 days of receipt of the zoning hearing board's decision.

Based on the court's decision in this matter, I would imagine that zoning hearing board decisions in the future will all include a line identifying the mailing date of the decision.

Currently, many agencies, such as various boards of assessment in Pennsylvania, already specifically list a mailing date on their decisions to avoid any potential issues regarding the calculation of an appeal period for a party to file an appeal to the Court of Common Pleas.

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Recent Approvals

By Jeffrey Hall

Pennview Partners Urban Renewal Entity, LLC, the applicant and owner of 1550 Route 73 in Pennsauken Township, Camden County, New Jersey, applied for major subdivision and preliminary and final site plan and variance and waiver approvals. The Applicant had previously negotiated a redevelopment agreement with Pennsauken Township. The application and requested approvals carried out that portion of the Agreement that called for the

subdivision of the property and a portion of a Township-owned lot into five lots -- two for stormwater basins and three for the following uses: a hotel, a multistory self-storage facility and a restaurant. While the site has presented a number of development challenges, the Applicant negotiated the resolution of most of them, which the Planning Board acknowledged in granting unanimous approval in early August. The Applicant is now seeking ancillary approvals and financing to

initiate the remediation of the site under the LSRP program of the New Jersey Department of Environmental Protection. A Financial Agreement and a PILOT remain to be negotiated.

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Pennsylvania Supreme Court Accepts Appeal Regarding the Standard in Granting Use Variance

By Carrie Nase-Poust

It is rare that a zoning case goes before the Pennsylvania Supreme Court, given the fact that the Supreme Court

only accepts a limited number of appeals that it believes are important to review. However, on August 15,

2013, the Supreme Court granted a Petition for Allowance of Appeal filed by the Archdiocese of Philadelphia in

connection with its request for a use variance.

The Archdiocese is the owner of a property located at 3255 Belgrade Street in the City and County of Philadelphia (the Property). The Property is zoned R-10A and contains a three-story building that was utilized as an elementary school from 1917 until 2008. In 2009, the Archdiocese proposed to convert the existing building into a 63-unit apartment building for low-income senior citizens and received funding for the project from the U.S. Department of Housing and Urban Development (HUD).

In 2010, the Archdiocese filed a Zoning/Use Registration Application with the City of Philadelphia Department of Licenses & Inspections (L&I), requesting a permit to construct a four-story addition to the existing building and use it for multifamily housing. L&I refused the Application for the following reasons:

- (1) Multi-family housing is not permitted in the R-10A zoning district;
- (2) The proposed parking did not meet the required number, size or landscaping requirements;
- (3) The rear yard depth and area, and the side yard depth, did not meet the minimum requirement; and
- (4) The height and number of stories of the proposed addition exceeded the maximum permitted.

The Archdiocese filed an appeal to the Zoning Board of Adjustment (ZBA).

At the hearing before the ZBA, the Archdiocese presented some testimony regarding its request for the dimensional variances, but focused its testimony on the need for low-income senior housing in the community. A neighboring property owner, Gloria Marshall, entered her appearance at the ZBA hearing and presented testimony in opposition to the proposed project and the relief being sought. Marshall argued that any

economic hardship was created by the Archdiocese itself and that the neighborhood surrounding the Property consists predominantly of single-family row homes and there are no multifamily homes in the area. The ZBA granted the variances requested. Marshall appealed the ZBA's decision to the Court of Common Pleas of Philadelphia (the trial court), arguing the Archdiocese failed to demonstrate the requisite hardship to establish the need for either the use or the dimensional variances. The trial court affirmed the ZBA's decision. Marshall filed an appeal to the Pennsylvania Commonwealth Court.

The Commonwealth Court relied on the longstanding case law that "in order to meet the burden necessary to obtain a use variance, a property owner must demonstrate that the entire building is functionally obsolete for any purpose other than one not permitted under the relevant zoning ordinance." The Commonwealth Court found that while the Archdiocese submitted evidence demonstrating the building was no longer viable for an elementary school, it offered no evidence whatsoever demonstrating:

- (1) The property could not in any way be used for any other permitted purpose;
- (2) It could only be used for such purpose at a prohibitive expense; or
- (3) It has no value for any purpose permitted by the Zoning Code.

The Commonwealth Court went on to state that the Archdiocese failed to present any evidence demonstrating that it could not utilize the Property as any of the other uses permitted in the R-10A zoning district.

At the hearing, the Archdiocese failed to present any testimony to satisfy the requirements to obtain a use variance, including the issue of unique hardship. Instead, the Archdiocese focused its testimony on the need for low-income senior housing in the

neighborhood and the fact that the proposed project was one of only two such proposals in Pennsylvania to receive approval from HUD. As a result, the Commonwealth Court reversed the trial court's decision.

The Archdiocese filed a Petition for Allowance of Appeal to the Supreme Court appealing the Commonwealth Court's decision. The Supreme Court granted the Petition. However, it limited its review to the issue of "whether the Commonwealth Court plainly misapplied the applicable standard of review, given the substantial public importance of, and pressing public need for, the project for which zoning relief was properly awarded, where the Court's reversal of the well-supported zoning relief threatens completion of the project due to potential loss of substantial and necessary federal funding."

The longstanding standard in obtaining a use variance is to demonstrate that:

- (1) There is unique hardship to the property;
- (2) There will be no adverse effect on the public health, safety or general welfare; and
- (3) The variance will represent the minimum variance that will afford relief at the least modification possible.

If the Supreme Court reverses the Commonwealth Court's decision, new law could be made regarding the standard to obtain a use variance, which might now require the demonstration of some public interest in the need for the proposed use.

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The New Jersey Economic Opportunity Bill Undergoes Radical Change

By Jeffrey M. Hall and Daniel V. Madrid

Since our article on A-3680 in the April 2013 edition of *In The Zone*, the New Jersey Economic Opportunity Act of 2013 (the Bill or Economic Opportunity Act) has received intense legislative attention. As a result, the Bill, once 47 pages in length, has grown to 82 pages. More fundamentally, there has been a dramatic shift to provide specific incentives for growth in South Jersey, in particular, the City of Camden and its neighbors.

Since April, the Bill was scrutinized by several legislative committees, which ultimately led to it being reported out of an Assembly Committee in late June. Known as A-3680, the Bill was passed at that time by the Assembly. On August 19, it passed the Senate. As of this writing, it is on the Governor's desk awaiting his signature.

While this legislation deserves a more comprehensive analysis (which we will present at the New Jersey Corporate Counsel Association's conference on September 20), it vastly overhauls

existing taxpayer programs in New Jersey and greatly expands the geographical area in which tax credits and incentives can be deployed.

In effect, the Economic Opportunity Act makes the State of New Jersey one economic development zone. It will merge five tax incentive programs into two. The first, the Economic Redevelopment and Growth Grant Program, will focus on creating jobs. The second, the Grow New Jersey Assistance Program, will provide incentives to keep jobs in the state. Phased out will be the Business Retention and Relocation Assistance and Grant Program, the Business Employment Incentive Program and the Urban Transit Hub Tax Credit Program.

There has been much criticism levied against the existing programs, which some pundits argued benefitted the northern part of the state disproportionately. Large companies located in the northeast urbanized area of the New Jersey received

multimillion-dollar incentives from the state. Last minute amendments to the Bill attempt to counter what some saw as an unfair imbalance and will funnel incentives to Camden. For example, Camden will be allotted \$175 million in credits. These changes have caused some to note the shift in the balance of power in the state legislature as South Jersey legislators have pushed hard and apparently successfully for more assistance for their region, noting the intense competition from Philadelphia and Southeastern Pennsylvania.

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