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POST-*KOONTZ* EXACTIONS

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I.

INTRODUCTION

In the Summer of 2013, the U.S. Supreme Court issued a 6-3 decision in its long-awaited decision on the scope of the federal constitution's heightened exactions scrutiny tests in *Koontz v. St. Johns River Water Management District*, 570 U.S. ____, 133 S. Ct. 2586 (2013), which tests the Court had previously established in its 1987 decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836 (1987), and its 1994 decision in *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). At issue in *Koonz* was whether *Nollan/Dolan* exactions requirements must be satisfied when a government demands property from a land-use permit applicant when (1) the permit is denied and, hence, no property is taken through an exaction, or (2) money is demanded as a condition of development approval, rather than a requirement to dedicate real property. The Court answered both questions in the affirmative. *Koontz*, 133 S. Ct. at 2603 ("We hold that the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money.").

Almost ten years prior to *Koontz,* the Texas Supreme Court issued its ground-breaking development exactions opinion in *Town of Flower Mound, Texas v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (Tex. 2004). In that case, the Court held, among other matters, that both the Texas Constitution and U.S. Constitution required the application of the *Nollan/Dolan* tests to a requirement that a developer spend money, and not just to a requirement that real property be dedicated. *Stafford* at 639-40 ("For purposes of determining whether an exaction as a condition of government approval of development is a compensable taking, we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved. The *Dolan* standard should apply to both.").

The *Stafford* Court also noted, albeit in dicta, that permit approvals with conditions, as well as permit denials for a failure to agree to conditions, would implicate the *Nollan/Dolan* tests. *Stafford*, 135 S.W.3d at 638 ("When the practical effect is exaction, conditional approval and denial are both measured by the *Dolan* taking standard.").

Given that *Stafford* correctly predicted how the U.S. Supreme Court would resolve the two questions presented in *Koontz*, what practical impact will *Koontz* have on development exactions practices in Texas? This paper offers some thoughts on that question, as well as providing some practical suggestions for governmental entities on how they can walk the very fine line between negotiating with developers over matters of consequence without falling into a *Koontz/Stafford* "denial with conditions" taking.

II.

EXACTIONS AS A TAKING – A BRIEF OVERVIEW

Article I, Section 17 of the Texas Constitution provides that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person…." Tex. Const. art. I, § 17. The federal Takings Clause is substantially similar. *See* U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation"). As a result, the Texas Supreme Court relies upon interpretations of the federal Takings Clause in construing the Texas takings provision and analyzes Texas takings claims under the more familiar federal standards. *See*, *e.g.*, *City of Austin v. Travis County Landfill Co., L.L.C.*, 73 S.W.3d 234, 239 (Tex. 2002) (considering aircraft overflights takings claim, asserted under Texas Constitution, by reference to federal standard established in *United States v. Causby*, 328 U.S. 256 (1946)); *City of Corpus Christi v. Pub. Util. Comm'n of Texas*, 51 S.W.3d 231, 242 (Tex. 2001) (examining federal precedent to decide the framework for determining whether utility charges constitute a taking); *Mayhew v. Town of Sunnyvale,* 964 S.W.2d 922, 932 (Tex. 1998) ("[W]e assume, without deciding, that the state and federal guarantees in respect to land-use constitutional claims are coextensive, and we will analyze the Mayhews' claims under the more familiar federal standards.").

Both the Texas and Federal Constitutions recognize a claim for a taking of property. *Mayhew,* 964 S.W.2d at 933; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). There are three general categories of takings claims: (1) physical occupation, (2) exactions and (3) regulatory takings. *Stafford*, 135 S.W.3d at 630; *Sheffield Development Company, Inc. v. City of Glenn Heights, Texas*, 140 S.W.3d 660, 671-72 (Tex. 2004); *Mayhew*, 964 S.W.2d at 933.

The U.S. Supreme Court has determined that the first category, a physical invasion or a regulatory activity that produces a physical invasion, will support a takings claim without regard to the public interest advanced by the regulation or the economic impact upon the landowner. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 330 (2002); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-440 (1982). *See also Mayhew*, 964 S.W.2d at 933 (recognizing physical takings as takings category).

The second category of takings claims is found where an exaction, such as the required dedication of land, is made a condition of development approval. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999); *Dolan*, 512 U.S. at 391; *Nollan*, 483 U.S. at 836.

The third category of takings claims -- regulatory takings -- encompasses the majority of takings cases and involves the most complex analysis. *See Mayhew*, 964 S.W.2d at 933 (recognizing regulatory takings as category of takings claim); *Sheffield*, 140 S.W.3d at 670-73 (holding that factors relevant to determine whether a regulatory taking has occurred include, but are not limited to, those factors identified by the U.S. Supreme Court in *Penn Central Transp. Co. v. City of New York*,

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