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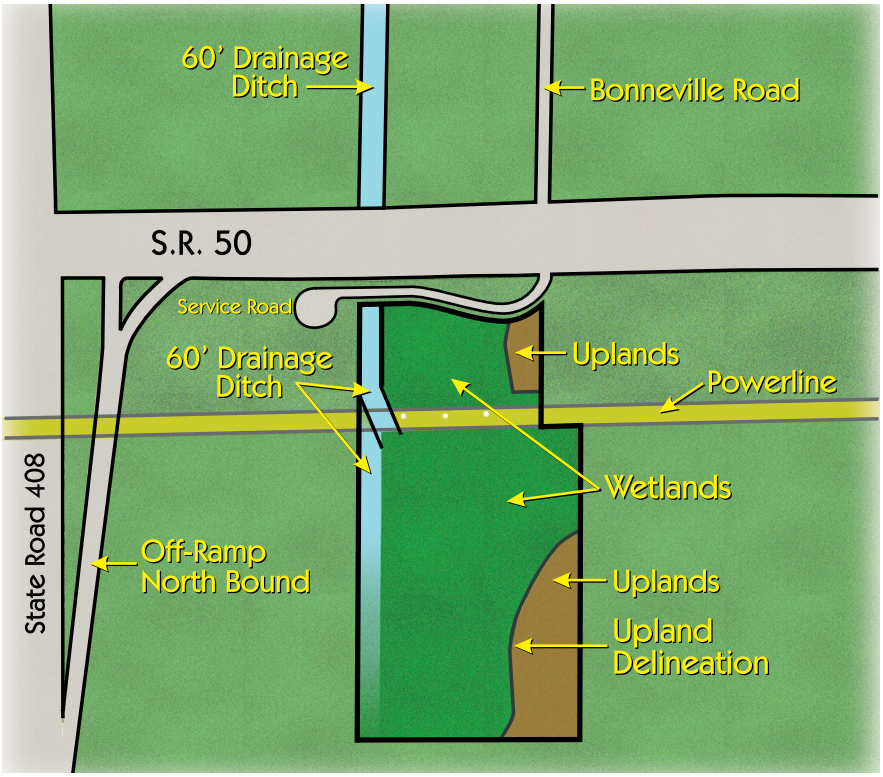
Exactions versus Extortion

The process of land development often involves a certain amount of give and take. While we like to think that in our society this translates to "cooperation" and a bit of "compromise," the "take" part sometimes culminates in claims of inverse condemnation and rights to compensation. As this is being set to print, the federal Supreme Court is about to issue its opinion (any day now…) on a Florida land development matter it heard in January. Depending upon the outcome, it's possible we could see some big changes in how the permit-issuing game is played.

At the outset of a series of 13 appellate and federal actions, the property of Florida landowner Coy A. Koontz, Sr. was zoned commercial in front and residential in the rear. His 14.9-acre tract had been affected by many legislated land-use restrictions since Koontz bought the land in 1971, and his quest to develop part of his land meant he needed a permit to dredge 3.4 acres of wetland and a wetland resource management permit.

Florida passed its Water Resources Act within a year after his purchase, and in 1985 passed a Wetlands Protection Act, each statute giving water management districts jurisdiction over use of privately owned wetlands and uplands that were suitable for fish and wildlife habitat. This is the reason Koontz had to apply to the St. Johns River Water Management District for permits: all but 1.4 acres of his land had been legislated into the Riparian Habitat Protection Zone managed by this District. The management and storage of surface waters are significant factors here because the property is on a tributary of the Econlockhatchee River that is currently identified by the District as being part of a designated hydrologic basin.



Sketch based on case illustration roughly shows Koontz' developable uplands in brown.

If a landowner knows his land is already legislatively restricted, what kinds of expectations should he have regarding development? One judge (dissenting in *5 So. 3d 8 at 16, 2009*) pointed out that Koontz conceded he had no right to a development permit but that "there is no harm in asking."

The District informed Koontz that for approval of the requested permits, he would need to deed the remainder of his undeveloped land into conservation status and also do some off-site mitigation (with two alternatives presented for the mitigation requirement). Alternatively, the District would require Koontz to reduce his development to one acre and deed-restrict the entire balance of his land to a conservation area. While Koontz agreed to the conservation aspect of Option 1, he refused its off-site mitigation component and he rejected the allowance of only one acre of development per Option 2, so his permit applications were rejected.

Now we need to sift through the many legal actions (since 1998) to find definitions of the terms hurled between the parties.

The District claimed it was only asking for an "exaction," while Koontz termed it "extortion." In a concurring opinion from the Florida Court of Appeal's decision of January 2009, the legal distinctions are compared to the landmark cases on which Koontz (and then for the next 15 years his son, as his father passed away after the first case) based his primary arguments. Those cases focus on (but are not limited to) *Nollan v. California Coastal Commission (483 US 825, 1987)* and *Dolan v. City of Tigard (512 US 374, 1994)*.

of development based on dedication (whether fee, easement, improvement, or other) of property to public use. No matter the definition, to decide if such an exaction amounts to a taking of private rights (as in *Nollan* and *Dolan*), the question to be answered is if the exaction would be a "taking" if it were unrelated to the development rather than being part of negotiation for issuing a permit.

The District argues that *Nollan* and *Dolan* standards for constitutional takings do not apply to Koontz' situation as

"Can there be a taking when a landowner says 'NO' to exactions?"

In *Nollan*, the Coastal Commission's condition for issuing a rebuilding permit was that the landowner would have to grant a public easement across his property to access the water. The Supreme Court struck down this condition, finding that it did not have an "essential nexus" to advancing a legitimate state interest and instead constituted an "out-and-out plan of extortion." (*483 U.S. 825 at 837*) In the *Dolan* case, Tigard had told Mrs. Dolan that if she wanted to expand her existing corner hardware store, she would have to deed a strip of her land to the city for a public bicycle path. She argued no one would be riding a bicycle to pick up plumbing fixtures at her store. Here the Supreme Court applied the test of "essential nexus" from *Nollan* to compel the city to prove two things: "(1) that an 'essential nexus' exists between a legitimate state interest and the permit condition exacted by the government; and (2) whether the degree of the exactions demanded by the government are 'roughly proportional' to the projected impact of the proposed development." *(Koontz, 861 So. 2d 1267 at 1270)*

These concepts of "essential nexus" and "roughly proportional" are key to the arguments of both sides. Returning to the 2009 concurring opinion we find that "exaction" does not have a single definition, slightly complicating the matter, but we can generalize the meaning as land-use decisions that set conditions for approval

the District did not actually take any of Koontz' property. If he were to argue a taking, he should have to comply with District conditions first and sue after. This is a core issue: can there be a taking when a landowner says "NO" to exactions? Or, as Koontz argues, are these "unconstitutional conditions" and "extortionate demands" imposed on him before he can acquire the permits he seeks? There is much discussion about the off-site mitigation, its location and purpose. While amusing at times (one witness justified the mitigation condition saying, "five or six miles is not a long way for a bird to fly" *861 So. 2d 1267 at 1270*), offsetting impacts of development with an eye to the larger community (including environmental health) is a serious matter.

If the Supreme Court rules in favor of Koontz, the standards of *Nollan* and *Dolan* will hold government liable for improper takings when refusing to issue development permits on the basis of non-compliance with exactions, and can further apply to non-real property exactions. On the other hand, if the Court upholds the District's position, these standards will continue to apply only to actual takings of real property from landowners. One of the District's arguments is that expanded application of standards isn't necessary due to other safeguards already in place to protect developers and landowners from government corruption.