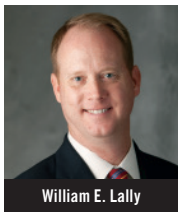
PROTECTING REAL PROPERTY

BY WILLIAM E. LALLY

In a recent opinion, the U.S. Supreme Court invoked the "unconstitutional conditions doctrine" in the context of land-use regulation and sided with a property owner who had challenged powerful government regulators. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2603 (2013). This case highlights the David and Goliath battles that often characterize negotiations between government land planners and property owners. As the battles become increasingly sophisticated, property owners debate whether to challenge questionable requirements or give in and finish their projects.

The thought of challenging a governmental entity with seemingly endless legal resources is a sufficient disincentive to initiating a legal battle. As a result, regulators routinely get what they want. But in June 2013, the Supreme Court held that conditions for permit approval must comply with the unconstitutional conditions doctrine. *Id.*

The facts date back to 1972, when Coy Koontz purchased 14.9 acres east of Orlando, Florida, on which he planned to construct a building.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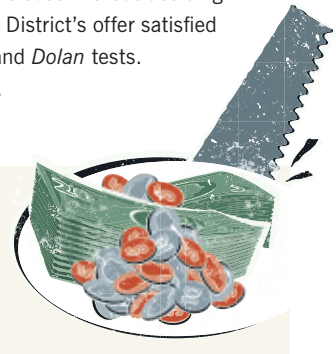
In Florida, a landowner must obtain a permit from the local water management district if a proposed development impacts the wetlands. Accordingly, in 1994, Koontz applied for a permit from the St. Johns River Water Management District (the "District") to develop 3.7 acres of his land. In exchange, Koontz offered to impose a conservation easement on the remaining eleven acres.

The District rejected this proposal but offered to issue the permit if Koontz either reduced the size of the development to one acre or paid to improve fifty acres of District-owned land. Koontz sued and alleged that the unreasonable request constituted an unlawful taking because the tests set forth in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), "allow[ed] the government to condition approval of a permit on the dedication of property to the public so long as there [wa]s a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." *Koontz*, 133 S. Ct. at 2595 (citing *Nollan*, 483 U.S. at 837, and *Dolan*, 512 U.S. at 391).

The Supreme Court agreed and "h[e]ld 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."[1] *Id.* at 2603. Thus, the Court acknowledged "the special vulnerability of land use permit[s]" and expanded the takings doctrine to the realm of land-use regulation. *Id.*

During an influx of real estate development and activity, local municipalities may explore ways to transfer the burden of growth to the private sector. As Arizona's real estate economy continues to rebound, private developers should be mindful that governmental land-use regulation has limits.

1. The Court reversed the Florida Supreme Court's decision and remanded the case without deciding whether the District's offer satisfied the *Nollan* and *Dolan* tests. *Id.* at 2603.



Recent Court Ruling Clarifies 'Compensable Damages' Under Arizona Condemnation Law

In *City of Phoenix v. Garretson*, 232 Ariz. 115, 302 P.3d 640 (App. 2013), the Arizona Court of Appeals held that the owner of a Jefferson Street parking lot in downtown Phoenix may be awarded "compensable damages" resulting from the "loss or 'material impairment'" of an established access route (via Jefferson Street) to his parking lot even though the lot can be accessed by Madison Street. The "loss or 'material impairment'" was caused by construction of the light rail on Jefferson Street. — *William M. Fischbach III*

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