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Expert Analysis

State Environmental Quality Review Act Through the 'Koontz' Prism

In *Koontz v. St. Johns River Water Management District*, the U.S. Supreme Court signaled that governmental agencies must show that all conditions they impose on land use applications that require an applicant to spend money have an "essential nexus" to a legitimate governmental interest, and that the conditions be "roughly proportional" to the impact they are intended to offset.[1] This holding has broad implications for both applicants proposing development projects and the agencies that review their proposals. This article discusses how *Koontz* affects the critical operative component of the New York State Environmental Quality Review Act (SEQRA)—i.e., the determination of mitigation measures for a project's potentially significant adverse environmental impacts.

'Koontz' in Context

The Supreme Court previously established that the governmental authority to exact conditions from land use applicants involving physical restrictions on real property—such as through conservation easements—is circumscribed by the Fifth Amendment right to "just compensation," and the Fourteenth Amendment (which makes the Bill of Rights applicable to the states).[2] In *Nollan v. California Coastal Commission*, the Supreme Court held that there must be an "essential nexus" between a "legitimate state interest" and the condition that the reviewing agency seeks to impose.[3] Accordingly, the *Nollan* court held that an agency's conditioning of a permit on an applicant's grant of an easement allowing the public to cross over the applicant's beachfront in order to go between two public beaches separated by the site had no "essential nexus" to the agency's purported concern that the project would cause a visual barrier to the ocean.

By **Daniel M. Richmond**

In *Dolan v. City of Tigard*, the Supreme Court went further. It held that even where an "essential nexus" exists, the reviewing agency still must make an "individualized determination" that the required physical dedication "is related both in nature and extent to the impact of the proposed development"—i.e., that the condition is "roughly proportional" to the impact the agency intends to offset.[4] While "[n]o mathematical calculation is required," the reviewing agency "must make some effort to quantify its findings" in support of the condition; conclusory statements will not suffice.[5] In *Dolan*, the court held that the agency failed to demonstrate that requiring an applicant to dedicate a pedestrian/bicycle easement was "reasonably related" to the number of vehicles and bicycle trips that a project would generate.[6]

The *Koontz* decision signifies a noteworthy expansion in the applicability of the *Nollan/Dolan* test. The Supreme Court, in a 5-4 decision in *Koontz*, indicated that the *Nollan/Dolan* "essential nexus"/"rough proportionality" test applies to virtually all conditions reviewing agencies would impose on land use applicants where there is a "direct link between the government's demand and a specific parcel of real property."[7] In *Koontz*, a property owner was denied certain wetlands related permits. The reviewing agency had demanded either: (i) a significant reduction in the size of the proposed project, together with a conservation easement over the overwhelming majority of the site, or (ii) improvements to government-owned land several miles away.[8] The property owner balked at both options, the government denied the application, and litigation ensued.

After granting certiorari, Justice Samuel Alito, writing for the majority, held that the *Nollan/Dolan* analysis applies not only to conditions that require the physical dedication of real property, but also to conditions on land use applications that require an applicant to spend money.[9] The *Koontz* majority rationalized that even though the agency's condition did not involve the physical dedication of property, it nevertheless still implicated the Fifth Amendment because the "demand for money at issue"—i.e., money necessary to improve the government-owned land—"'operate[d] upon an identified property interest' by directing the owner of a particular piece of property to make a monetary payment."[10]

By subjecting "monetary exactions" on land use applications to the *Nollan/Dolan* analysis, the Supreme Court is now effectively requiring reviewing agencies to show (and empowering applicants to demand) that there is a "nexus" and "rough proportionality" between any conditions that require an applicant to spend money and the social/environmental impacts of the applicant's proposal.

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Implications for SEQRA

After *Koontz*, agencies undertaking SEQRA analysis can expect far greater scrutiny from applicants and the courts of the conditions or mitigation measures they seek to impose on development projects. It has been said that "the heart of SEQRA is its requirement that agencies minimize or avoid adverse environmental effects revealed" in a project's Environmental Impact Statement (EIS).[11] The regulations implementing SEQRA establish that the primary way of minimizing or avoiding a project's potential adverse

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impacts is through the imposition of mitigation measures.[12] Agencies are required to describe the mitigation measures they are imposing in SEQRA findings, which are issued at the culmination of an SEQRA review involving an EIS.[13]

Even before *Koontz*, SEQRA already established that mitigation measures or other conditions imposed by the reviewing agency under SEQRA must be "practicable," as well as "reasonably related to impacts identified in the EIS or the conditioned negative declaration."[14] The New York Court of Appeals similarly held that the "remedial measures" imposed by the reviewing agency must "have some demonstrable connection with the environmental impact" of the action under review.[15]

Judicial review of agency SEQRA determinations, however, has traditionally been quite deferential.[16] Courts have been hesitant to get in the middle of complex technical issues or "battles of the experts," which are often the predicate for the mitigation measures selected by reviewing agencies.[17] Consequently, reviewing agencies frequently feel empowered to require mitigation measures that are not necessarily proportionate to a project's impacts.

Indeed, land use applicants are frequently asked to address conditions that would appear to have broad historical causes that are unrelated to the application at hand. Requirements that applicants provide a certain amount of affordable housing in residential projects, for example, may have a tenuous connection to the project's actual socioeconomic impacts. Similarly, applicants have been required to reduce inflow/infiltration (I&I) to public sewer systems at ratios that patently surpass the impacts of the project under review. It can fairly be asked whether an applicant is being compelled to address pre-existing conditions, rather than simply to mitigate a project's incremental impacts above existing baseline conditions, as SEQRA rightfully requires.

In light of *Koontz*, however, agencies will be required to show that mitigation, because they require applicants to spend money in connection with specific real property, not only meet the deferential standard of review for agency actions traditionally used by New York courts, but also the *Nollan/Dolan* analytical framework. While agencies may not be compelled to undertake detailed mathematical calculations in their SEQRA findings to rationalize their choice of mitigation measures, in light of *Koontz*, they should set forth in some detail explanations for their choices, particularly when they can anticipate that they will be challenged.

On first blush, it would seem that post-*Koontz*, meeting *Nollan's* "essential nexus" test should not be a tough hurdle to overcome for SEQRA reviewing agencies. Mitigation measures set forth in SEQRA Findings or Conditioned Negative Declarations should almost by definition have a "nexus" to an identified potentially significant adverse impact. If, for example, traffic impacts at a particular intersection are at issue, the chosen mitigation measure should almost certainly relate to that intersection. The lack of a clear nexus would obviously be problematical.

Dolan's "rough proportionality" inquiry is likely to prove more challenging. Both reviewing agencies and applicants can expect greater attention to whether a proposed mitigation measure is commensurate with the impact at issue. Continuing with the traffic impact example, the reviewing agency's written Findings or Conditioned Negative Declaration should explain why the chosen mitigation reasonably addresses the project's potential impacts. If, for example, an agency seeks to impose as a condition a new traffic signal or expanded roadways, an applicant can fairly ask if its project's impacts truly warrant such an expensive solution, or if some lesser mitigation might be more appropriate. Again, the reviewing agency can only properly ask the applicant to mitigate its project's impacts above existing baseline conditions; it cannot use the application as a pretext to address preexisting conditions.

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Greenhouse Gases

Koontz is also likely to affect agency analysis of one of the emerging issues in SEQRA analysis—how to address a project's potential impacts on climate change, particularly in the form of greenhouse gas emissions. In 2009, the New York State Department of Environmental Conservation (DEC) issued a policy statement titled "Assessing Energy Use and Greenhouse Gas Emissions in Environmental Impact Statements." While this policy only applies to DEC staff, it has been used by other agencies to guide their SEQRA analyses of greenhouse gas emissions.

The DEC policy poses substantial issues when viewed through the *Koontz* prism. *Koontz* likely requires that the reviewing agency empirically demonstrate that the mitigation measures selected are roughly proportional to a project's potential greenhouse gas impacts. This would require the reviewing agency to both quantify the project's greenhouse gas impacts in the first instance, and then determine which mitigation measures would roughly offset that impact.

The policy contemplates that the reviewing agency will calculate "the projected reduction in GHG emissions that would result from each mitigation measure."[18] It recognizes, however, that modeling—i.e., the use of computer-based tools to simulate a project's annual energy usage—may not always allow for reasonable quantitative analysis, and states that in such circumstances the EIS should "provide qualitative comparisons of [greenhouse gas] emissions" of various potential mitigation measures.[19] Because the DEC policy offers little guidance on how to calculate the greenhouse gas reductions associated with its menu of proposed mitigation measures, reviewing agencies and developers will need to develop verifiable means for assessing the relative benefits of these measures.

Conclusion

Mitigation measures for potentially significant environmental impacts pursuant to SEQRA frequently cost applicants considerable amounts of money. Going forward, reviewing agencies and applicants should pay close attention to whether these measures have a nexus, and are roughly proportional, to the impacts of the project under consideration.

1. 570 U.S.__, 133 S.Ct 2586 (2013).
2. *Nollan v. California Coastal Comm'n*, 483 U.S. 835, 107 S.Ct 3141 (1987); *Dolan v. City of Tigard*, 512 U.S. 374,114 S.Ct 2309 (1994).
3. 483 U.S. at 837, 107 S.Ct at 3148; see also *Dolan*, 512 U.S. at 386, 114 S.Ct at 2317.
4. 512 U.S. at 391, 114 S.Ct. at 2319-2320.
5. 512 U.S. at 395-96, 114 S.Ct. at 2322.
6. 512 U.S. at 395, 114 S.Ct. at 2321-22.
7. 570 U.S.__, 133 S.Ct. at 2600.
8. 570 U.S.__, 133 S.Ct. at 2593.
9. 570 U.S.__, 133 S.Ct. at 2598-2600.
10. 570 U.S.__, 133 S.Ct. at 2599, quoting *Eastern Enter. v. Apfel*, 524 U.S. 498, 540, 118 S.Ct. 2131 (1998).
11. *Comm. for Environmentally Sound Dev. v. City of N.Y.*, 190 Misc.2d 359, 737 N.Y.S.2d 792, 803 (Sup. Ct. N.Y. Cty. 2001).
12. 6 N.Y.C.R.R. §§617.3(b) & 617.11(d)(5).
13. 6 N.Y.C.R.R. §617.11(d)(5); see also N.Y. Envtl. Conserv. L. §8-109(8). Mitigation measures also must be set forth in connection with a so-called "Conditioned Negative Declaration"—i.e., a determination that a project as modified through identified mitigation measures will not pose any potential significant adverse impacts (and, hence, no EIS is required). 6 N.Y.C.R.R. §§617.2(h) & 617.7(d).
14. 6 N.Y.C.R.R. §617.3(b).
15 *E.F.S. Ventures v. Foster*, 71 N.Y.2d 359, 526 N.Y.S.2d 56, 64 (1988).
16. See, e.g., *Eadie v. Town Bd. of N. Greenbush*, 7 N.Y.3d 306, 318, 821 N.Y.S.2d 142, 148 (2006).
17. *Chinese Staff & Workers' Ass'n v. Burden*, 88 A.D.3d 425, 429, 931 N.Y.S.2d 1, 3 (1st Dept. 2011), aff'd, 19 N.Y.3d 922, 950 N.Y.S.2d 503 (2012).
18. N.Y.S. D.E.C., "Assessing Energy Use and Greenhouse Gas Emissions in Environmental Impact Statements," at 11 (2009).
19. Id.