APPLYING *KOONTZ* IN A REAL WORLD SETTING

Perspectives from the Private Sector, a Municipal Attorney,
and a Planning Director
Rocky Mountain Land Use Institute 2014

THE FIRST PERSPECTIVE: *KOONTZ* WILL EXACT A TOLL ON LAND USE CONVERSATIONS

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I. Candid Conversation is Indispensable to Good Land Use Regulation

A. The Timeless Virtues of Conversation

Across contexts and cultures, talking has always been understood as a good thing. It allows parties to identify agreement, find truth, and explore solutions. Conversation is perceived as an alternative to litigation—not a platform for litigation.

B. Land Development Always Entails A Conversation.

Back in the day, zoning was conceptualized as a purely legislative process and "contract zoning" was an epithet. Over the decades, however, land use regulation has come to expect and depend upon dialogue between the landowner and local government. Various tools of regulation presuppose and require conversations between applicants and local government. These entail rezoning conditions, as well as subdivision approvals, and development agreements.

II. *Koontz* Leaves Everyone Wondering about Unanswered Question

A. When Do the Koontz Rules Apply?: Adjudications vs. Legislation.

B. Who Does It Apply to?

C. When Does a Discussion Ripen into a "Demand"?

D. What Is The Remedy for Violation?

III. *Koontz* Imposes a Cost on Frank Conversation.

A. *Koontz* Undermines the Virtues of Candor.

When "anything you say can and will be used against you" it is rational to put up one's guard. The stakes are raised, because the conversation it not just about itself, but also about the litigation it could spawn. This is not the dynamic of working through problems—it is the dynamic of creating evidence for litigation. Savvy participants must continually assess "Can I trust this guy"?

B. *Koontz* Points the Way to a Hypothetical Sting Operation.

A paranoid scenario—but plausible, and that's what is scary. A landowner/applicant should win trust of staff and elected officials. Wear a wire while you wine and dine them. Inevitably people will say things that can be used against them. Then sue for damages and/or strings-free approval

C. Possible ways to Preserve a Candid and Productive Dialogue

- Express "waivers" of *Koontz* protection: probably not
- Voluntary agreements along the lines of Rule 408
- "We won't talk unless you sign"
- Ordinance provisions codifying that "talk is just talk"
- Banning recording of conversations

A CITY ATTORNEY'S PERSPECTIVE: NEVER ADMIT IN PUBLIC THAT *KOONTZ* HAS CHANGED ANYTHING

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I. General: Your clients are going to think you have multiple personality disorder—what they hear you say in public meetings doesn't match what you say to them privately

A. In public: *Koontz* hasn't changed any of the exactions rules already established by *Nollan* and *Dolan*

B. To clients: *Koontz* has probably affected our best "legal technicalities" defenses

i. *Nollan* and *Dolan* now apply to purely monetary exactions

ii. We can get sued before we make a final decision—we will still raise "finality" and "failure to exhaust" defenses, but they're not as sure winners as before

II. Day-to-day business:

A. In public: *Koontz* won't have any practical effect

B. To clients: Even your earliest preliminary horse-trading can get you in trouble

III. Rezoning cases:

A. In public: Rezonings are legislative, and *Koontz* doesn't apply to legislative decisions

i. The government has broad legislative discretion in the rezoning process

ii. The developer will accept almost any condition to get zoning entitlements, as long as the project still pencils out

B. To clients: Being stupid or excessively blunt could get you in trouble

i. Make the developer come to the city with stipulations and conditions of rezoning that make the project more appealing and acceptable; be circumspect ["Coy"?] about horse-trading

ii. Troubling exchange:

Council member: "I can't see us approving your project without you building a fire station/community center"

Developer: "So my project won't get approved unless we bear those costs?"

Council member: "You certainly won't get my vote"

iii. Less troubling exchange:

Council member: “I just can’t imagine your project being approved considering the lack of public infrastructure and facilities in that area; come back to us in about ten years”

Developer: “We want to be part of the solution and don’t want to wait for our project to move forward; how about if we voluntarily build a fire station and community center as part of our project?”

IV. Development agreements:

A. In public: The developer has initiated the horse-trading process, so *Koontz* can’t possibly apply

i. Like the rezoning process, the city has broad discretion when dealing with a requested development agreement

ii. Depending on the particular benefits the developer is seeking to get with the development agreement, the developer may accept onerous infrastructure and facility demands

B. To clients: Being stupid or excessively blunt could get you in trouble in this context as well

i. Don’t offer staff support for a development agreement unless/until the developer has initiated discussion of all infrastructure and facilities the city wants

ii. Have a plausible “essential nexus”/”rough proportionality” argument to support any request for infrastructure or facilities initiated by city staff

iii. Be particularly careful when the city is motivated to enter into a development agreement (for example, to win an annexation or an economic development bonanza)

V. Development impact fees:

A. In public: Like *Nollan* and *Dolan*, *Koontz* doesn’t apply

i. DIFs are general legislative actions

ii. The *Nollan*, *Dolan*, and *Koontz* cases only apply when there is ‘ “an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel,” instead of imposing an “essentially legislative determination [ ] classifying entire areas of the city.” ‘ *Dolan*, 512 U.S., at 385, 114 S.Ct. 2309; *Koontz*, 133 S.Ct. at 2608.

B. To clients:

i. The initial adoption of DIFs is probably not affected by *Koontz*

ii. How the city calculates and applies DIFs to a particular parcel of property could be affected

iii. *Koontz* applies *Nollan* and *Dolan* to purely financial exactions; anything other than a pure mathematical calculation of a DIF can raise potential claims

iv.

VI. Subdivision approvals:

A. In public: The subdivision approval process is ministerial already, so *Koontz* won't affect the process

B. To clients: *Koontz* is another arrow in the developer's quiver

i. You may have gotten away with that major streets and routes plan right-of-way dedication before, but I'm not sure you will anymore

ii. If you can't clearly justify your approval conditions based on the adopted subdivision standards and well-established standard engineering practice, you're now taking a bigger risk of being sued

A PLANNING DIRECTOR: TAKING THE NEGOTIATION OUT OF LAND USE REGULATION

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I. It's time to change the development paradigm

- A. Koontz has highlighted a problem that has been growing for decades
- B. Nollan, Dolan & Koontz all represent ad hoc conditions imposed on a development application in exchange for approval
- C. Other segments of our society don't operate this way: imagine a grocery store that sets terms for your bananas while you check out.

II. How did we get here?

- A. The first 50 years of zoning were dedicated to keeping 'bad' uses out
- B. Our needs and visions have changed from what those Euclidian plans were meant to accomplish
- C. Instead of changing the zoning scheme, jurisdictions leave old zoning in place and put the onus to rezone on each developer

III. Today's negotiated zoning creates problems

- A. Equal treatment: Identical properties or developments could end up with different requirements
- B. Equal treatment: Less sophisticated property owners tend to get railroaded, while more experienced developers can cut a better deal or walk away
- C. System is designed to improve poor development proposals, but discourages quality proposals

IV. Changing the way we do business

- A. Jurisdictions should zone for what they want, making desired development the path of least resistance
- B. Requirements that would otherwise be part of PUD negotiations should be codified
- C. Land dedications, affordable housing, impact fees and other priorities can be regulated and applied proportionally to all new development
- D. Define requirements for all development before a proposal is submitted; it is much easier to defend nexus/proportionality that is predefined, codified and applied equally.
- E. Projects that don't conform to jurisdiction's requirement are then in the position of applying to the city to waive a code requirement rather than heading to court to challenge a negotiation demand

V. Have some skin in the game: urban renewal, TIF, public-private partnerships

A. Fewer and fewer large developments are happening without some form of public investment.

B. Negotiations for zoning approval may be legally questionable, but negotiations for use of public money or purchase of public land are unlimited.