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NYT: A Legal Blow to Sustainable Development.

Lost amid the Supreme Court's high-profile decisions on affirmative action, voting rights and same-sex marriage was another ruling that may turn out to have a profound impact on American society. The court handed down a decision on Tuesday that, in the words of Justice Elena Kagan, will "work a revolution in land-use law."

While that may sound obscure, the decision in *Koontz v. St. Johns River Water Management District* will result in long-lasting harm to America's communities. That's because the ruling creates a perverse incentive for municipal governments to reject applications from developers rather than attempt to negotiate project designs that might advance both public and private goals — and it makes it hard for communities to get property owners to pay to mitigate any environmental damage they may cause.

The court's 5-to-4 decision, with Justice Samuel A. Alito Jr. writing for the majority, arose from an order issued by a Florida water management district denying an application by Coy A. Koontz Sr. to fill more than three acres of wetlands in order to build a small shopping center. The district made clear that it was willing to grant the permit if Mr. Koontz agreed to reduce the size of the development or spend money on any of a variety of wetlands-restoration projects designed to offset the project's environmental effects. Because Mr. Koontz declined to pursue any of these options, the district denied the permit.

Mr. Koontz, who is now deceased, went to court and claimed that the permit denial constituted a "taking" under two Supreme Court precedents, *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*. These cases established that when the government approved a development subject to certain conditions, like a requirement that a developer dedicate an easement to the public, the conditions would be deemed an appropriation of private property unless the government could show a logical relationship and a "rough proportionality" between the conditions imposed and the projected effects of the development.

The Florida Supreme Court rejected Mr. Koontz's takings argument on two grounds. First, it interpreted *Nollan* and *Dolan* as being limited to cases in which the government has issued a permit subject to a condition — not in those in which a permit has been denied. Second, it ruled that *Nollan* and *Dolan* applied only when the government's condition took an interest in some tangible property (like demanding an easement, for example), not when a government imposed a generalized requirement on someone to spend money.

In what can fairly be described as a blockbuster decision, the Supreme Court has reversed the Florida court on both points.

Leaving the majority's legal reasoning aside, the Supreme Court's ruling is likely to do some serious real-world damage. As Justice Kagan correctly explains in her dissent, the decision will very likely encourage local government officials to avoid any discussion with developers related to permit conditions that, in the end, might have let both sides find common ground on building projects that are good for the community and environmentally sound. Rather than risk a lawsuit through an

attempt at compromise, many municipalities will simply reject development applications outright — or, worse, accept development plans they shouldn't.

"Nothing in the Takings Clause requires that folly," Justice Kagan said. But arguably it does now.

As for the second part of the majority's ruling, that Nollan and Dolan apply to permit conditions requiring the general expenditure of money, that will also have unfortunate consequences. Cities and towns across America routinely attach fees and other payment obligations to permits, for example, to support wetlands mitigation banks, to finance roads, to pay for new schools or to build affordable housing.

While, to be sure, such mandates must be reasonable under the Constitution, the revolutionary and destructive step taken by the court in *Koontz* is to cast the burden on the government to justify the mandates according to the heightened Nollan-Dolan standard. This is contrary to the traditional court approach of according deference to elected officials and technical experts on issues of regulatory policy. Moreover, this heightened standard will result in a huge number of costly legal challenges to local regulations.

Consider the challenges of waste disposal. Many communities impose development-impact fees on developers if a proposed project would require expanding waste-disposal sites or building new ones. Before *Koontz*, a developer could raise a constitutional challenge if the charges were unreasonable, but judges typically deferred to local governments in such cases.

After *Koontz*, developers have a potent new legal tool to challenge such charges because now the legal burden of demonstrating their validity is on the communities themselves.

In the wake of this under-the-radar ruling, the cost of protecting a community from a harmful building project now lies not with the developer but with the local residents and taxpayers. It's hard to fathom that the framers of the Constitution would call this either fairness or justice.