Courts have long recognized the “centrality of negotiation” in Florida’s modern system of land use regulation. Gen. Dev. Corp. v. Div. of State Planning, Dep’t of Admin., 353 So. 2d 1199, 1206 (Fla. 1st DCA 1978). But these negotiations happen over a tilted bargaining table. Governments are afforded deference on the law, the facts, and the application of the law to the facts. The U.S. Supreme Court’s recent decision in Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2856 (2013) tilts the bargaining table ever so slightly in favor of property owners, making negotiations fairer and more meaningful.

Specifically, in Koontz, the U.S. Supreme Court extended its decisions in Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987), and Dolan v. City of Tigard, 512 U.S. 374 (1994) to provide further protections for property owners. Nollan and Dolan require a land use condition to have an “essential nexus” and a “rough proportionality” to the harm the government expects to avoid, minimize, or mitigate. Koontz now extends these protections to instances where the government denies a permit, or imposes a monetary condition like an impact fee. Stated differently, because of Koontz, government must now explain that a land use condition has an “essential nexus” and a “rough proportionality” regardless of the timing or type of condition.

Koontz was the culmination of decades of litigation over the development of 3.7 acres of an approximately 15 acre parcel in central Florida. There, a property owner challenged permit conditions proposed by the St. Johns River Water Management District. The trial court and intermediate appellate court held that the conditions violated the requirements of Nollan and Dolan. The Florida Supreme Court disagreed, concluding instead that Nollan and Dolan do not apply when government denies a permit (thus failing to impose the questionable conditions), and when the conditions are unrelated to a specific interest in real property. The U.S. Supreme Court reversed.

All 9 members of the U.S. Supreme Court agreed that Nollan and Dolan apply regardless of whether the applicant accepts, and the government issues, a permit with questionable conditions. And a 5-4 majority of the U.S. Supreme Court held that Nollan and Dolan apply to monetary conditions with a “direct link” between the government’s demand for relinquishment of funds, and a “specific, identifiable property interest such as a bank account or a parcel of property.”

Because of Koontz, government must do its homework before negotiating with property owners over conditions for a proposed land use. The government must be able to explain why it believes that a condition it is proposing has an “essential nexus” and a “rough proportionality” to some harm the government hopes to avoid, minimize, or mitigate. Of course, the government would provide this explanation with the caveat that its conditions are based on a certain understanding of the facts, assumptions, models, or whatever else might be relevant. As part of the negotiations, the property owner would then have an opportunity to test and correct the government’s understanding of the relevant facts, assumptions, and models.

But if the government is clearly overreaching, where its understanding of the relevant facts, assumptions, and models is correct but the conditions clearly fail the nexus and proportionality requirement, then the property owner could simply walk away from the negotiations and file a Koontz claim. In the past, the property owner would have had to sit through these one-sided negotiations, knowing that if the government proposed a condition with which a project could go ahead, then it was better to accept the condition than litigate with the deck stacked in favor of the government. Koontz thus serves as a deterrent to government overreaching, making government more mindful of its actions because of the threat of a Koontz claim.

While Koontz serves as a deterrent to government overreaching, it does not serve as a deterrent to negotiation between government and property owners. Negotiation was, is, and will always remain central to land use planning in Florida. The reason is simple: the interests of local governments and property owners run parallel. Local governments depend on development to increase their tax base so that they can raise the revenues needed to govern. Property owners see development as the source of profit. If one stops negotiating with the other, then land development would indeed come to a halt, harming both.

Conceptually then, Koontz sets the outer bounds of the negotiations that government and property owners must have. It gives property owners a chip with which to bargain: the credible threat of a lawsuit. By doing this, in instances where the government hopes to impose a land use condition, Koontz tilts the bargaining table ever so slightly in favor of the property owner by forcing government to negotiate with sincerity, to think before it acts, to explain why it has acted, to give and not just take.

Mohammad Jazil is an attorney with Hopping Green & Sams. His practice focuses on litigation in state and federal courts and he can be reached at Mohammad.J@hgslaw.com.