

# Land Use and Climate Change: 20 Years After *Lucas* in the Wake of *Koontz*

Regulatory Takings Rules  
First Clarified (*Lingle* - 2005)  
Then Confused (*Koontz* - 2013)



**PACE LAW SCHOOL**  
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**LAND USE LAW CENTER**  
**PACE UNIVERSITY SCHOOL OF LAW**  
WHITE PLAINS  NEW YORK

# Panelists



Professor John Nolon, Pace Distinguished Professor,  
Counsel, Land Use Law Center

Molly Stuart, Associate, Kilpatrick Townsend &  
Stockton, Raleigh, North Carolina

David S. Silverman, AICP, Partner, Ancel Glink, et  
al., Chicago, Illinois

Sean Nolon, Associate Professor, Director, ADR  
Program, Vermont Law School



# Regulatory Taking Barriers to Protection Vulnerable Areas

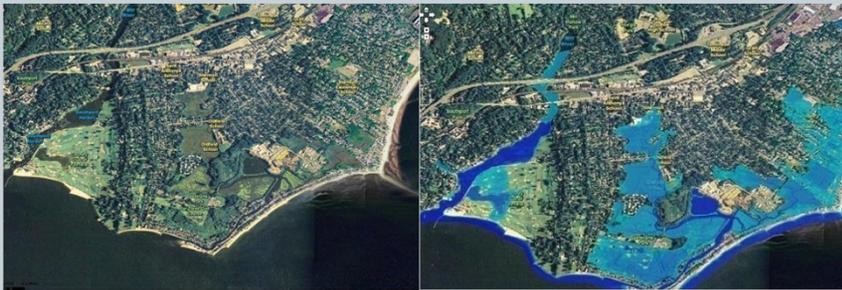
- Coastal Communities: Sea Level Rise and Storm Surges
- Inland Communities: Flooding and High Risk Zones
- Enhanced Resilience Through Soft Solutions
- Other concerns: protecting wetlands, watersheds, habitats, surface water, groundwater, etc.
- How big of a barrier is current regulatory takings doctrine?

# Sea Level Rise and Coastal Development



**Fairfield, Conn.: Current**

**Fairfield, Conn.: +1 ft SLR**



# Sea Level Rise and Coastal Development



## Necessity of a Swift Response:

### ○ By 2050

- ✦ 100 year storms every ten years
- ✦ 1.5 foot sea level rise and more frequent & ferocious storm surges
- ✦ Over 100 million increase in U.S. population
- ✦ 90 million new/replacement residential units
- ✦ 190 billion square feet nonresidential space
- ✦ *Buildings, on average, have 50 year estimated useful life*



# Lucas v. South Carolina Coastal Commission



- Facts: Lucas bought two ocean side lots. After, Coastal Commission prohibited construction of lots. Lucas won at the Supreme Court on a 5<sup>th</sup> Amendment takings claim.
- Holdings:
  - A taking will occur where a government regulation eliminates all economically viable use of property.
  - State common law like public trust doctrine and nuisance can protect against a takings claim.



# *Lucas: Doctrinal Leeway*

## **Changed Circumstances**

- “The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so).”
- It has been over 20 years since the *Lucas* decision, and we have accumulated most of our knowledge about climate change, flooding, and sea-level rise during that time.

# Comprehensive Plan Illustration



- Comprehensive Plan Component –Collier Co, Fla.  
“**Policy 10.6.2:** For shoreline development projects where an EIS is required, an analysis shall demonstrate that the project will remain fully functional for its intended use after a **six-inch rise in sea level.**”

<b>San Francisco Bay, Calif.</b>	<b>Miami-Dade County, Fla.</b>
<b>New York City, N.Y.</b>	<b>Town of Duck, N.C.</b>
<b>East Hampton, N.Y.</b>	<b>Tillamook County, Or.</b>
<b>Malibu, Calif.</b>	<b>Falmouth, Mass.</b>
<b>Barnstable, Mass.</b>	<b>Bainbridge Island, Wash.</b>

# Memorializing Sea Level Rise



- Adopt SLR Component to the Comprehensive Plan
- Adopt Third Party SLR Projections (1 ft.) and SLR Overlay Map



## New Law in New York Community Risk and Resiliency Act

- DEC to establish sea level rise projections
- DEC to collect data and create risk analysis tools to aid municipalities in planning for future extreme weather events
- DEC is to develop additional guidance to promote the implementation of natural, as opposed to artificial, resiliency measures
- DOS is to craft model local laws that enable planning authorities to adapt to the future effects of climate change at the local level

# Clarifying Regulatory Takings: *Lingle v. Chevron USA*

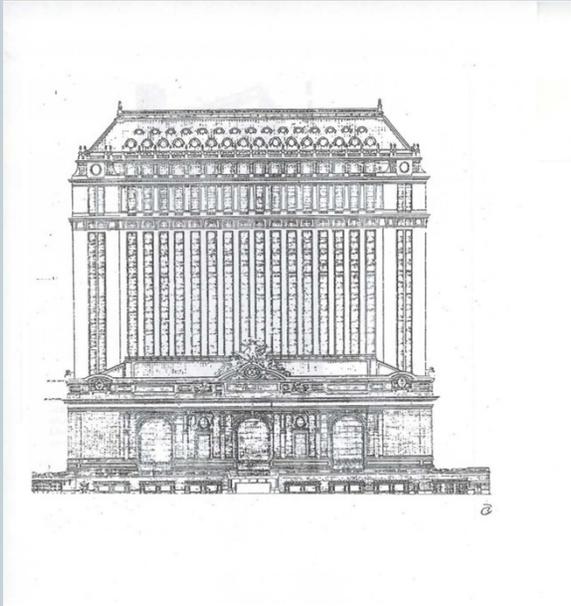


*Lingle*: Regulations that fail to advance a legitimate public purpose are not takings, they are due process violations and the remedy is invalidation.

Four instances where a regulation is a taking:

1. *Loretto*: It simply appropriates a property right where the owner is not applying for a permit
2. *Lucas*: It takes all value and is not justified by nuisance law or other background principle of state law
3. *Penn Central*: It fails a three-factor balancing test, where the Court defers to legislative prerogatives
4. *Nollan and Dolan*: Conditions imposed on permits that unreasonably take property rights

# *Penn Central Story in Pictures*



# *Penn Central* Applies to Most Regulatory Takings Cases

The court balances:

- The extent of diminution of property values
- The extent to which legitimate investment-backed expectations are frustrated and
- The character of the regulation

The court also:

- Presumes the validity of the regulation
- Imposes a burden of proof on the challenger
- Defers to the legislative or administrative decision-maker

# No Taking was Found Penn Central's Failure of Proof

- Character of the Government Action
  - ✦ Regulated all similarly situated properties similarly
- Diminution in Value
  - ✦ Extent of Economic Impact – No Proof
- Interference with Reasonable Investment Backed Expectations
  - ✦ Did not interfere with existing uses
  - ✦ Did not frustrate owner's purpose

# *Penn Central Consequences*



Scalia: We have upheld regulations where more than 90% of value was taken

Regulations are given deference by judges

Plaintiffs have a very heavy burden of proof

Ad hoc application of three factors in the multi-factor balancing test make outcomes difficult to predict, but

Most cases are lost by plaintiffs



# Category Four: Unconstitutional Conditions



- *Nollan*: essential nexus test
- *Dolan*: rough proportionality text and individualized determinations
- *Koontz*: denial of a permit for failure to accept an unconditional condition is a taking

# *Nollan* Facts and Holding



- Nollan wanted to replace smaller oceanfront house with a larger one
- Nollan property was subject to oceanfront development regulations administered by California Coastal Commission
- Coastal Commission conditioned approval on Nollan granting public easement across oceanfront portion property
  - “the new house would increase blockage of the view of the ocean, [and would] burden the public's ability to traverse to and along the shorefront.” *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 828 (1987).
- Issue: Does Takings Clause permit government to require uncompensated conveyance of property interest from a property owner as a condition for a land use permit?
- Holding: No, unless the government could show that the condition “substantially advance[s] legitimate state interests” and the condition did not “den[y] an owner economically viable use of his land.” *Nollan* at 834
  - “lack of nexus between the [building] condition and the original purpose of the building restriction” was critical because “unless the permit condition serves the same governmental purpose as [a] development ban, the building restriction is not a valid regulation of land use but an ‘out-and-out plan of extortion.’” *Nollan* at 837

# Old Nollan House



# New Nollan House



# *Dolan* Facts and Holding



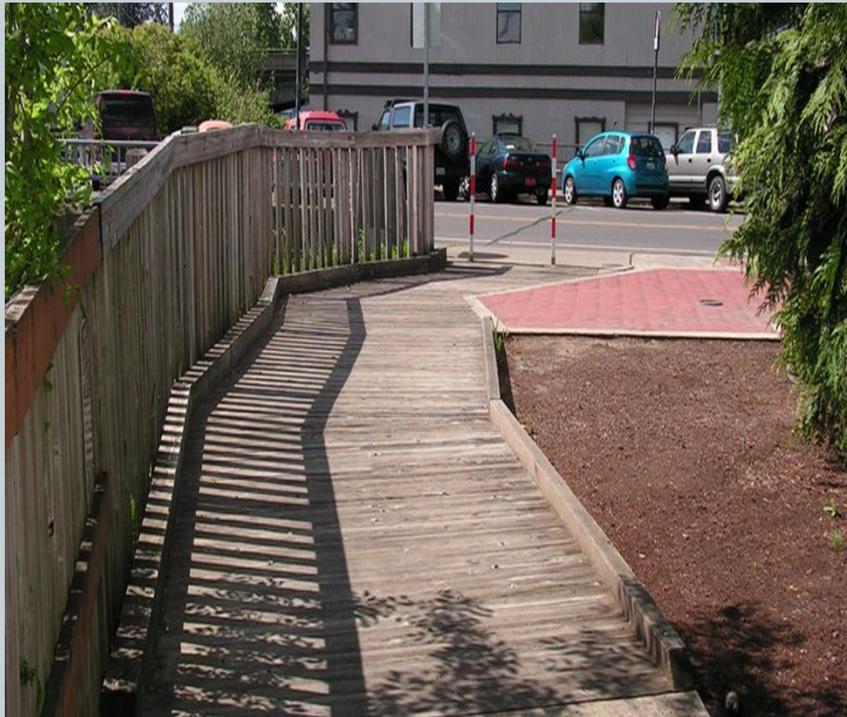
- Dolan wanted to redevelop her commercial property
- City conditioned redevelopment approval on Dolan building a walk/bike path across 15% of property
- Issue: U.S. Supreme Court expanded and clarified its *Nollan* decision by addressing what the required degree of connection is between imposed exactions and impacts of development
- Court framed its holding through the “unconstitutional conditions” doctrine that says government cannot require a person to give up a constitutional right for some discretionary benefit, (in this case, the right to just compensation for taking of property)
- Holding: In order to impose an exaction, the government needs to satisfy two tests:
  - 1) there must be an “essential nexus” between the exaction and a legitimate state interest; and
  - 2) there must be a “rough proportionality” between this state interest and the exaction. *Id.* at 391.

If government cannot satisfy these two tests, then the exaction impermissibly burdens property owner's right to development and is unconstitutional.

# The Redeveloped Florence Dolan Plumbing and Electronic Store



# The Florence Dolan Fanno Creek Greenway Bike/Walk Path



**Take Away Lessons: *Nollan & Dolan*  
That is: Before *Koontz***



**APPLY TO PERMIT CONDITIONS ON PROJECT APPROVALS**

**DO NOT APPLY TO PROJECT DENIALS**

**APPLY TO “TITLE EXACTIONS” - REQUIRE DEDICATION OF LAND OR EASEMENTS ACROSS LAND**

**DO NOT APPLY TO MONETARY EXACTIONS OR REQUIREMENTS**

**DO NOT APPLY TO LEGISLATED FEES OR CONTRIBUTIONS**

# Take Away Lessons: *Nollan & Dolan* That is: Before *Koontz*

proposed and imposed

APPLY TO PERMIT CONDITIONS ON  
PROJECT APPROVALS ← and denials

~~DO NOT APPLY TO PROJECT DENIALS  
APPLY TO "TITLE EXACTIONS" -  
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~~DO NOT APPLY TO MONETARY  
EXACTIONS AND REQUIREMENTS~~

~~DO NOT APPLY TO LEGISLATED FEES  
OR CONTRIBUTIONS~~

See *Levin v. C&C of San Fran* (2014)

# *Koontz v. St. Johns River Water Management District*



## *Koontz v. St. Johns River Water Management District*



- ***Koontz* facts:**
  - Koontz owned 15 acres of land in the St. Johns River watershed and wanted to develop 4 acres.
  - Land was subject to District regulations requiring 10:1 ratio of protected land to developed land on a parcel.
  - The District gave Koontz two options:
    - ✦ reduced his development to 1 acre and place a conservation easement over 14 acres or
    - ✦ build on the 4 acres and pay \$150,000 for wetlands remediation on other District lands.
- Koontz rejected the options and sued.

# *holding*

We hold 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.

## Likely impact of *Koontz v. St. Johns River Water Management District*



- Ad hoc development proposals must pass higher review standards in *Nollan/Dolan* (nexus & rough proportionality)
- A chilled development negotiation process
- Limited authority to impose impact fees
- More denials
- More restrictive ordinances

# Post *Koontz*: Negotiations Options



1. Don't negotiate – deny if non-compliant and approve if compliant
2. Facilitate negotiation among developer and community
3. Negotiate without stating positions
4. Negotiate
5. Insulate Negotiations – so proposals don't become demands
  - Pre-application processes
  - Waiver

# Post *Koontz*: Applications and Negotiations



- Be careful what you say in development negotiations
- Have developers suggest conditions and then play “hot and cold” without giving any reasons
- Be prepared to reject more applications without providing reasons
- Add disclaimers in applications
  - Specify that any suggestions are not “concrete, specific or definite” enough to be demands
  - Communication with community is encouraged but not required
  -

# Post *Koontz*: Municipal Regulations



- Amend development regulations:
  - Bolster purpose statements
    - ✦ Tie back to comprehensive plan findings to show nexus and rough proportionality
  - Remove ambiguity in planned development ordinances and add “normal” conditions imposed
  - Be more conservative (e.g. add greater restrictions)
  - Require development agreements (where authorized)
  - Ensure that impact fee formulas meet the nexus and rough proportionality requirements

## Post *Koontz*: The Practical Side



- Developers are some of the most rational economic actors in the marketplace
- Litigation is costly and time consuming
- Developers like to have amenable reputations
- Be guarded, but if both sides know each other, likely maintain normal predispositions to each other
- Be wary of “that” developer

## The Effect of *Koontz*



### **Higher Scrutiny Applies to Post-Negotiation Permit Denials and Monetary Exactions**

Denials after proposed condition and monetary exactions are now subject to higher scrutiny. From this flow several other consequences and concerns.



## More Land Use Decisions are Subject to Doubt vs. Deference



- Before *Koontz*, all but title exactions were subject to a judicial presumption of validity and a burden imposed on the applicant to prove that denials or monetary exactions were unreasonable.

# Is *Koontz* Beneficial to Developers?



- Federal takings law is notoriously vague and flawed. Its many conflicting, perplexing, and complex doctrines are now seated at the head of the table regarding the many land use decisions to which *Koontz* might be applied.
- This may not benefit developers; it may sap the system of predictability, could lead to more restrictive zoning standards, and might require them to pay the costs of the now-required municipal studies.



9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 DANIEL LEVIN, ET AL.,

No. 3:14-cv-03352-CRB

12 Plaintiffs,

**MEMORANDUM OF FINDINGS OF  
FACT AND CONCLUSIONS OF LAW**

13 v.

14 CITY AND COUNTY OF SAN FRANCISCO,

15 Defendant.  
\_\_\_\_\_ /

16

17 In July 2014, the City and County of San Francisco enacted an Ordinance that requires

18 property owners wishing to withdraw their rent-controlled property from the rental market to

19 pay a lump sum to displaced tenants. The 2014 Ordinance requires that property owners pay

20 the greater of a relocation payment due under a 2005 Ordinance or the new, “enhanced”

## Take Aways from Koontz and Levin



- The give-and-take negotiations among applicants, affected stakeholders, and land use boards, is now subjected to judicial oversight.
- Under the majority’s decision, *suggestions* to mitigate harms caused by non-compliance may be “unconstitutional conditions” that will be subjected to higher scrutiny and that can result in monetary damage awards against state and local agencies.
- Levin v. San Francisco uses Koontz to extend Nollan/Dolan scrutiny to legislatively imposed impact fees.

# Land Use and Climate Change: 20 Years After *Lucas* in the Wake of *Koontz*

Regulatory Takings Rules: Clarified  
(*Lingle*) and Confused (*Koontz*)

Lucas: Total Takings

Lingle: Four Categories

Nollan, Dolan, and Koontz



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