

# U.S. Supreme Court Land Use Cases, 2012-13 Term

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# The *Koontz* Takings Case

- Whether a land-use agency is liable for a taking where refused to issue a land-use permit solely because the property owner would not accede to a permit condition that, if applied, would violate the essential nexus and rough proportionality tests set out in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, and (2) whether the nexus and proportionality tests apply to a non-real estate land-use exaction, i.e, a government demand that an applicant dedicate money, services, labor, or any other type of personal property to a public use.
- Appeal of *St. Johns River Water Management District v. Koontz*, 77 So. 3d 1220 (Fla. 2011), to be argued Jan. 15, 2013.

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

- District refused permits necessary for Koontz to develop his commercial property because he would not agree to a permit condition requiring dedication of money and labor for improvements on 50 acres of government-owned property located far from his site. The state courts found the condition was wholly unrelated to any impacts caused by Koontz's proposed development and the Florida trial and appellate courts ruled that the agency's refusal to issue the permits was a temporary taking of Koontz's property, and awarded just compensation. But the Florida Supreme Court reversed, holding that, as a matter of federal takings law, a landowner can never state a claim for a taking where (1) permit approval is withheld based on a landowner's objection to an excessive exaction, and (2) the exaction demands dedication of personal property to the public.

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

- Quick Takings Review:
  - *Nollan*: Created an “essential nexus” test, which required a government entity to establish that the condition imposed for approval of a building permit (i.e., the exaction) served the same public purpose that would have supported a total ban of the proposed development. This the condition/exaction must directly relate to and further this supporting reason.

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

- Quick Takings Review:
  - *Dolan*: Expanded the “essential nexus” test, to require “rough proportionality” between the condition placed on the land and the extent of the impact of the proposed development
  - Both *Nollan* and *Dolan* involved exactions of real property interests; *Koontz* asks whether a takings occurs if it is not real property but personal property (money and labor) that is exacted

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

- As stated (quite colorfully) by a dissenting Florida Appellate Judge
  - *“[i]n what parallel legal universe or deep chamber of Wonderland’s rabbit hole could there be a right to just compensation for the taking of property under the Fifth Amendment when no property of any kind was ever taken by the government and none ever given up by the owner?”*
  - *“If [a protected interest is given up], whether temporarily or permanently, the landowner is entitled to compensation as set forth in the “taking” cases. If, however, the unconstitutional condition does not involve the taking of an interest in land, the remedy of inverse condemnation is not available. In this case, the objected-to condition that was found to be an exaction was not an interest in land; it was the requirement to perform certain off-site mitigation in the form of clean-up of culverts and ditches to enhance wetlands several miles away.”*
- Supreme Court has not ruled whether personal property demands can be an exaction

# The *Arkansas Game & Fish Commission* Takings Case

- *Arkansas Game & Fish Commission v. United States*, 637 F.3d 1366 (Fed. Cir. 2011), argued Oct. 3, 2012
- Whether government releases from a dam that impose recurring flood invasions (but not permanent flooding) and resulting property damage are a taking.

# *Arkansas Game & Fish Commission v. United States*

- The federal government built the Clearwater Dam on the Black River to control water flows to reduce flooding. The Corps of Engineers occasionally opens the dam gates to let water flow downstream in aid of farmers, boaters and fishery interests, but is unable to completely eliminate all flooding, as was recognized in a 1953 water control plan with a schedule of releases. Deviations from the (extra flows) are at issue, in regard to their impact, 115 miles downstream on the state of Arkansas' Dave Donaldson Black River Wildlife Management Area. The Commission operates the area and sued the Corps of Engineers, contending that for a period of six years — from 1993 through 1998 — the releases caused lowland flooding, ultimately destroying trees or weakening them so that they died during the following drought years of 1999 and 2000.
- The Court of Federal Claims ruled for the Commission, awarding it \$5.6 million for the lost timber and \$178,428 for a program to regenerate the degraded forestry habitat

# *Arkansas Game & Fish Commission v. United States*

- The Federal Circuit the award, ruling that as the flooding eventually stopped – and therefore was only temporary – it did not qualify for compensation, based on past Supreme Court precedents on water releases.
- Arkansas argues the Federal Circuit “carved out a whole category of physical invasions that the government can make without incurring liability under the Takings Clause....The Federal Circuit’s decision upends the Court’s bedrock standards and grants the government authority to repeatedly invade by flooding, no matter who it injures, no matter how much damage it permanently and foreseeably causes, and no matter what the other circumstances might be, so long as the government’s actions are deemed ‘only temporary.’”

# *Arkansas Game & Fish Commission v. United States*

- U.S. argument: Landowners downstream of a government-operated dam cannot claim compensation in part because they should be aware of the inherent risks of owning land on a floodplain. The federal government would not “have got into the flood control business” if it was going to face litigation over its management of projects.
- Justice Scalia (during oral argument) “the issue is who is going to pay for the wonderful benefit.... Should it be everybody, so that the government pays, and all of us pay through taxes, or should it be... this particular sorry landowner who happens to lose all his trees?”

# Other Cases of Interest

- *Lefemine v. Wideman*, 568 U. S. \_\_\_\_ (Nov. 12, 2012), First Amendment case arising from anti-abortion protest
- Not a land use case, but a Section 1983/1988 case with implications for land use
- Court held that a plaintiff who secures a permanent injunction but no monetary damages can still be a “prevailing party” under 42 U. S. C. §1988, and receive fees

# LEFEMINE v. WIDEMAN

- “Contrary to the Fourth Circuit’s view, that ruling worked the requisite material alteration in the parties’ relationship. Before the ruling, the police intended to stop Lefemine from protesting with his signs; after the ruling, the police could not prevent him from demonstrating in that manner. So when the District Court “ordered [d]efendants to comply with the law,” 672 F. 3d, at 303, the relief given—as in the usual case involving such an injunction—supported the award of attorney’s fees.”
- Land use cases often seek to enjoin municipal conduct, not just damages

# Other Cases of Interest

- *Cable, Telecommunications, and Technology Committee of the New Orleans City Council v. Federal Communications Commission*, appeal from the Fifth Circuit (Case No. 10-60039, decided Jan. 23, 2012), to be argued Jan. 16, 2013
- Concerns the FCC's 90 day/150 day rule setting time limits for municipalities to decide on applications under the Telecommunications act of 1996, under which a state or local government must act "within a reasonable period of time" on a request for authorization to construct or modify "personal wireless services facilities." 47 U.S.C. 332(c)(7)(B)(ii)

# CABLE, TELECOMMUNICATIONS, AND TECHNOLOGY COMM. V. FCC

- The appeal turns on the Fifth Circuit's application of the rule established in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), under which a court defers to an agency on matters within that agency's expertise. The main question presented is whether *Chevron* applies to an agency's interpretation of a statute that defines the agency's own jurisdiction. If yes, the rule will be upheld, if not, as cert was only granted as to that question, the matter would be remanded for reconsideration of whether the FCC may use its general authority under the TCA to limit or affect State and local zoning authority over the placement of personal wireless service facilities.