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Zoning Bulletin

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Preemption—Zoning ordinance prohibits commercial banquet facilities but allows noncommercial banquet facilities

Use permit applicant says distinction is invalid

Citation: *Keener v. Rapho Tp. Zoning Hearing Bd., Lancaster County, 2013 WL 3929834 (Pa. Commw. Ct. 2013)*

CALIFORNIA (02/10/11)—This case addressed the issue of whether a zoning ordinance's distinction between commercial and noncommercial

Contributors

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banquet facilities bore a real or substantial relation to the health, safety, and welfare of the community, or was invalid.

The Background/Facts: James C. Keener ("Keener") owned a 130-acre active farm (the "Property") in the Agricultural Zoning District in Rapho Township (the "Township"), Lancaster County, Pennsylvania (the "County"). In March 2010, Keener sought approval of a mixed use of Property, including for: banquets; weddings; farm tours; walking and riding tours; hayrides; and use of the pond and paddle boats. Keener contended that the proposed use must be permitted under § 201.2.6 of the Township Zoning Ordinance (the "Zoning Ordinance"). Section 201.2.6 allowed "Parks and Playgrounds" by right in the Agricultural Zoning District. By definition, "Parks and Playgrounds" included a wide range of recreational activities, including "banquet and social halls" as long as they were "not operated on a commercial basis."

The Township's Zoning Hearing Board ("ZHB") found that Keener's proposed use was not a "Park or Playground" under the Zoning Ordinance because the proposed facility would not be available for use by the general public but would be operated on a commercial basis and only be available to those who paid for the use of the facilities.

Keener appealed. The Court of Common Pleas affirmed the ZHB's conclusion.

Keener again appealed. On appeal, Keener contended that by restricting the uses to those that "are not operated on a commercial basis" the Zoning Ordinance illegally restricted ownership of land used as "Parks and Playgrounds." Keener said this was because the Zoning Ordinance prohibited a "for-profit" owner from operating the same permitted use as a "non-profit" owner, without any discernible relationship to public health, safety, morals, or general welfare.

DECISION: Judgment of Court of Common Pleas reversed, and matter remanded.

The Commonwealth Court of Pennsylvania disagreed with Keener's interpretation of the Ordinance, but nonetheless concluded that it was not reasonable to find that Keener's proposed use did not meet the definition of "Parks and Playgrounds" under the Ordinance.

The court explained that in "promulgating zoning ordinances, ordinance drafters are to provide for uniform uses in respective zoning districts pursuant to Section 605 of MPC, 53 P.S. § 10605, which provides, in pertinent part, as follows: 'Where zoning districts are created, all provisions shall be uniform for each class of uses or structures, within each district, except that additional classifications may be made within any district. . . .' "

Again, here, Keener had argued that the Zoning Ordinance's prohibition on banquets "operated on a commercial basis" illegally restricted ownership of land used as "Parks and Playgrounds" because the Ordinance prohibited a "for-profit" owner from operating the same permitted use as a "non-profit" owner, without any discernible relationship to public health, safety, morals, or general welfare. Rejecting Keener's interpretation, the court found that the term "commercial" in the Zoning Ordinance was unaffected by the use of property by a for-profit or not-for-profit entity. Rather, the court found the

term "commercial" as used in the Ordinance meant an activity which is carried on as a business. Applying that meaning, the court concluded that the Zoning Ordinance did not illegally restrict land "ownership" because anyone was free to operate a banquet facility on a noncommercial basis. Contrary to Keener's position, said the court, "commercial activity encompasses a much broader range of uses than only those conducted by profit-seeking entities." Nonprofit entities could engage in business or commercial activity and that such activity alone does not indicate that the organization has a for-profit purpose. Therefore, held the court, the Zoning Ordinance did not, as Keener contended, unlawfully regulate land "ownership" by discriminating between for-profit and nonprofit entities.

However, the court also found that although the zoning restriction did not improperly regulate land ownership, it nevertheless purported to distinguish between two classes of the same use: a "commercial" banquet facility use and a "non-commercial" banquet facility use in the same zone. Such a restrictive zoning ordinance had to bear a rational relationship to public health, safety, morals, or general welfare of a community, said the court. Here, the court found "no evidence of record to indicate any logical basis for the commercial/non-commercial distinction" in the "Zoning Ordinance." "A banquet facility operated by an owner who charges a fee is the same in all respects as a banquet facility operated by an owner who charges no fee. There is no perceivable difference in the operations or the impacts on the community," found the court.

The Township had also argued that notwithstanding the commercial/noncommercial distinction, Keener's proposed use did not meet the definition of "Parks and Playgrounds" because it would be available only to those who entered into a contract with Keener and paid a fee and not open to the "general public." The Township reasoned that the Zoning Ordinance created a valid use distinction between those facilities open to the "general public" and those open only to those who pay for the privilege of using it. The court found that a banquet facility that charges no fee is still not, in reality, open and accessible to the indefinite public. When in use, the "public" facility would, in actuality, be unavailable to other "uninvited" members of the "general public." Furthermore, regardless of whether a banquet facility is available to the "general public" or available only to those who enter into a contract with Keener and pay a fee, the underlying nature of the use is the same. Accordingly, the court concluded that it was not reasonable to find that Keener's proposed use did not meet the definition of "Parks and Playgrounds" under § 112 because it was not open to the "general public."

In sum, the court declined to recognize a commercial/noncommercial distinction as a relevant difference between banquet facilities permitted in the Township's Agricultural Zoning District. Since the drafters of the Zoning Ordinance specifically permitted banquet facilities as a use in that Zone, the court concluded that the Zoning Ordinance must not be interpreted to exclude banquet facilities that are operated as a business, yet allow only those that are open to the "general public" free of charge, especially because there was no support in the record that such a distinction was reasonable and necessary to protect the health, safety, and welfare of the community.

The court remanded the matter to the ZHB to reevaluate Keener's applica-

tion to operate his banquet facility use in the Agricultural Zone without regard to whether he intended to conduct it as a business and charge a fee for the use.

See also: *Ludwig v. Zoning Hearing Bd. of Earl Tp., 658 A.2d 836 (Pa. Commw. Ct. 1995).*

See also: *Rapaport v. Zoning Hearing Bd. of City of Allentown, 687 A.2d 29 (Pa. Commw. Ct. 1996).*

Scope of Review—Landowner applies to town seeking to "unmerge" lots per state statute

Landowner contends statute's placement of burden of proof on municipality altered the typical judicial differential standard of review in zoning cases

Citation: *Roberts v. Town of Windham, 2013 WL 3724899 (N.H. 2013)*

NEW HAMPSHIRE (07/16/13)—This case addressed the issue of whether the enactment of New Hampshire's RSA 674:39-aa, which restores involuntarily merged lots to their premerger status and puts a burden of proof on municipalities to prove voluntary merger, altered the typical judicial deferential standard of review in zoning cases with respect to the issue of proving voluntary merger of lots.

The Background/Facts: Charles A. Roberts ("Roberts") owned an approximately one-acre parcel of land in Windham, New Hampshire (the "Town") (the "Property"). The Property has been identified as a single lot on the Town's tax map since the 1960s. However, the Property originated from seven separate lots—lots 8 through 14—as recorded with the County Registry of Deeds in 1913. As of 1962, the Property was owned as it exists today, consisting of lots 8 through 14. The Property was conveyed to Roberts in 1995.

Apparently, in the 1960s, the Town administratively merged the seven lots into a single lot. The seven lots were designated as a single lot for tax purposes and given a single street address. Neither Roberts nor any previous owner in the chain of title applied to the Town to merge the lots.

In 2011, the New Hampshire legislature enacted RSA 674:39-aa. That statute provides that lots that were "involuntarily merged prior to September 18, 2010" shall be "restored to their pre-merger status" upon request of the owner, subject to certain conditions. Under the statute, " '[i]nvoluntary merger' . . . mean[s] lots merged by municipal action for zoning, assessing, or taxation purposes without the consent of the owner." Under the statute, an owner is not entitled to such restoration if "any owner in the chain of title voluntarily merged his or her lots." "Voluntary merger" means a merger expressly requested under RSA 674:39-a, or "any overt action or conduct that indicates

an owner regarded said lots as merged such as, but not limited to, abandoning a lot line." The statute provides that the municipality bears the burden to prove voluntary merger.

Following the statute's passage, Roberts applied to the Windham Board of Selectmen ("Selectboard") seeking to "unmerge" the lots from their single lot designation on the Town's zoning and tax maps and to create four lots consisting of: lots 8 and 9; lots 10 and 11; lot 12; and lots 13 and 14. The Selectboard held a meeting to consider the application and determined that the Town had involuntarily merged lots 12-14. The Selectboard, however, concluded that lots 8 through 11 had been voluntarily merged and, thus, denied the Roberts' request to unmerge the four lots.

Roberts appealed the decision regarding lots 8 through 11 to the Town's Zoning Board of Appeals (the "ZBA"). The ZBA affirmed the Selectboard's decision for the reasons found by the Selectboard, as well as an additional reason: that by accepting the Town's taxation of the lots as a single lot, the owners voluntarily merged the lots.

Roberts moved for a rehearing, which the ZBA denied. Roberts appealed the ZBA's decision to the superior court, which affirmed the ZBA's decision.

Roberts again appealed. On appeal, Roberts argued that the superior court applied an incorrect standard of review. Typically, a deferential standard of judicial review applies in zoning cases: "The factual findings of a zoning board are deemed prima facie lawful and reasonable, and a zoning board's decision will not be set aside by the superior court absent errors of law unless it is persuaded by the balance of probabilities, on the evidence before it, that the zoning board decision is unlawful or unreasonable." Roberts contended, however, that the enactment of RSA 674:39-aa altered the deferential standard of review in zoning cases with respect to the issue of proving the voluntary merger of lots.

DECISION: Judgment of superior court affirmed.

The Supreme Court of New Hampshire held that the enactment of RSA 674:39-aa did not alter the deferential standard of review in zoning cases with respect to the issue of proving the voluntary merger of lots.

In so holding, the court found that Robert's argument "conflated two concepts": "a party's burden of proof and an appellate tribunal's standard of review." The court explained that a burden of proof is "[a] party's duty to prove a disputed assertion or charge." On the other hand, a standard of review is "[t]he criterion by which an appellate [tribunal] . . . measures the constitutionality of a statute or the propriety of an order, finding, or judgment entered by a lower [tribunal]." The court said "that a party bears the burden of proof at trial does not dictate the standard of review applied on appeal." Here, the court found that RSA 674:39-aa expressly placed the burden of proof on the municipality to prove voluntary merger; however, the statute made no provision for an alternate standard of review. Interpreting the plain language of the statute, the court concluded that the superior court did not err in applying the usual deferential standard of review to the ZBA's decision.

The court went on to also find that the "totality of the evidence reasonably support[ed] a finding that [Robert's] predecessors voluntarily merged the lots

under RSA 674:39-aa." Accordingly, the court held that the superior court's decision affirming the ZBA's decision was not unlawful or unreasonable.

See also: *Brandt Development Co. of New Hampshire, LLC v. City of Somersworth, 162 N.H. 553, 34 A.3d 593 (2011).*

See also: *Radziewicz v. Town of Hudson, 159 N.H. 313, 982 A.2d 415 (2009).*

See also: *DaimlerChrysler Corp. v. Victoria, 153 N.H. 664, 917 A.2d 209 (2006).*

Standing—Zoning commission approves PUD that would demolish, replace existing library

Association organized to protect the library appeals Commission's approval

Citation: *D.C. Library Renaissance Project/West End Library Advisory Group v. District of Columbia Zoning Com'n, 2013 WL 4016278 (D.C. 2013)*

DISTRICT OF COLUMBIA (08/08/13)—This case addressed the issue of whether an association had constitutional standing and prudential standing to seek judicial review of a zoning commission's approval of a PUD application.

The Background/Facts: The District of Columbia government decided to replace the library and fire station in the West End, because the facilities had become obsolete. The Office of the Deputy Mayor for Planning and Economic Development ("DMPED") developed a plan to fund the construction of a new library and fire station through a land transfer. EastBanc-W.D.C. Partners, LLC ("EastBanc") submitted the winning bid proposal for the project. EastBanc ultimately applied to the District of Columbia Zoning Commission (the "Commission") for relief from certain zoning requirements as part of approval of a planned unit development ("PUD"). The proposed development included a new public library, as well as retail and residential uses.

The West End Library Advisory Group ("WELAG") was a nonprofit association organized to protect the West End Library, which would be demolished and replaced as part of the PUD. WELAG opposed the project and participated as a party in the Commission proceedings. After the Commission approved the PUD application, WELAG unsuccessfully sought rehearing and then petitioned the court for review.

As a threshold matter, EastBanc challenged WELAG's standing to seek judicial review of the Commission's order.

DECISION: WELAG has standing, and judgment of Zoning Commission affirmed.

The District of Columbia Court of Appeals concluded that WELAG had both constitutional standing and prudential standing to seek judicial review of the Zoning Commission's approval of EastBanc's PUD application.

In so concluding, the court explained that in order to have constitutional standing, WELAG had to show: (1) it suffered an injury in fact, (2) that was fairly traceable to the challenged action, and (3) that was likely to be redressed by a favorable decision. The court noted that an organization or association "has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose, and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

Here, the court found that WELAG's members had adequately alleged injury in fact. WELAG had alleged that implementation of the PUD would cause its members to lose the use and enjoyment of the current library and that the replacement library would be inadequate. Specifically, one WELAG member stated that she has used the West End Library for almost 30 years and expressed concern that the proposed replacement library would lack adequate facilities. "Such an allegation of specific and concrete interference with the use and enjoyment of a recreational or aesthetic resource suffice[d] to support a conclusion of injury in fact," said the court.

EastBanc had argued that WELAG had failed to adequately allege injury in fact because the alleged harms were speculative and asserted "without explication." However, the court found it was "neither speculative nor conclusory to suggest that WELAG members' use and enjoyment of their neighborhood library would be adversely affected if that library were demolished and replaced by a new library that WELAG alleges would lack adequate facilities."

The court also found that WELAG's alleged injury was also traceable to the Commission's order approving the PUD (i.e., the challenged action) because EastBanc's plan to demolish and replace the library was contingent on that approval.

For the same reason, the court found that the alleged injury was capable of being redressed by a favorable decision of the court.

Finally, as to organizational standing, the court concluded that WELAG's legal claims and its requested relief—remand to the Commission for further proceedings—did not require its members to participate as parties in this appeal. Thus, the court concluded that WELAG had adequately established constitutional standing.

As to prudential standing requirements, the court noted that WELAG could "not attempt to litigate generalized grievances, and [could] assert only interests that [fell] within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."

Here, the court found that WELAG's alleged injuries were not generalized grievances: "Demolition and replacement of the West End Library would 'not fall indiscriminately upon every citizen,' but rather would adversely affect only those who use the library."

Also, the court found that WELAG also had alleged injury to an interest that was "arguably within the zone of interests to be protected or regulated by the statute . . . in question." The court explained that "to establish standing

under the [District of Columbia Administrative Procedure Act] to challenge an agency order, the petitioner must allege . . . that the interest sought to be protected . . . is arguably within the zone of interests protected under the statute or constitutional guarantee in question . . . and . . . [there must not be a] clear legislative intent to withhold judicial review . . . ." Here, WELAG had alleged that the Commission's approval of the PUD violated three provisions: (1) by failing to properly consider the value of the land contributed by the District of Columbia, the Commission violated 11 DCMR § 2403.8 (2012); (2) by approving a plan that is inconsistent with the Comprehensive Plan, the Commission violated 11 DCMR § 2403.4; and (3) by permitting the PUD without insisting on compliance with IZ requirements, the Commission violated 11 DCMR §§ 2602.1, 2606.1 (2012). The court concluded that these provisions were part of an "integrally related zoning framework" and that the asserted interest of WELAG's members—the loss of the use and enjoyment of the existing library as a result of the approval of the PUD—fell within the "zone of interests" of that framework.

Accordingly, the court concluded that WELAG had both constitutional and prudential standing to assert its claims.

See also: *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351, 34 Env't. Rep. Cas. (BNA) 1785, 22 Envtl. L. Rep. 20913 (1992).*

See also: *Friends of Tilden Park, Inc. v. District of Columbia, 806 A.2d 1201 (D.C. 2002).*

See also: *Community Credit Union Services, Inc. v. Federal Exp. Services Corp., 534 A.2d 331 (D.C. 1987).*

See also: *D.C. Appleseed Center for Law and Justice, Inc. v. District of Columbia Dept. of Ins., Securities, and Banking, 54 A.3d 1188 (D.C. 2012).*

Case Note:

The court went on to address the merits of WELAG's claims. The court concluded that: (1) the Commission acted reasonably in concluding that it was not required under an "adverse effects" zoning regulation to consider the value of land rights being transferred to a public contractor in determining whether to approve the PUD; (2) evidence supported the conclusion of the Commission that the PUD would not generate adequate revenue without relief from the inclusionary zoning requirements; and (3) evidence supported the Commission's determination that approval of the PUD would not be inconsistent with the District's comprehensive plan as a whole.

Signs/Validity of Zoning Regulation—Business convicted of violating zoning code by placing commercial signs on public property

Business seeks reversal of conviction, arguing entire zoning chapter is unconstitutional since it favors commercial speech over noncommercial speech

Citation: *People v. On Sight Mobile Opticians, 2013 WL 3581784 (N.Y. App. Term 2013)*

NEW YORK (07/08/13)—This case addressed the issue of whether the provisions of a zoning code unconstitutionally favored commercial speech over noncommercial speech.

The Background/Facts: Chapter 57A of the zoning code (the "Code") of the Town of Brookhaven (the "Town"): barred all commercial advertising on public roads and property; barred virtually all commercial advertising aside from the premises on which the goods or services were provided (i.e., permitted "onsite" and barred "offsite" advertising) (Code § 57A-4[A]); limited the size and configuration of all signs (Code § 57A-4[A][2]); and permitted limited forms of noncommercial signage in most areas of the Town, albeit, with respect to political advertising, for only 30 days in relation to a particular campaign (Code §§ 57A-3, 57A-10[B], [C]). Chapter 57A also exempted from regulation several categories of signs, including utility signs, signs associated with government interests and traffic control, and other signs required by law (Code § 57A-3). Code violations were punishable by fines and up to 15 days of incarceration (Code § 57A-24[A]).

On Sight Mobile Opticians ("On Sight") was charged with five different counts of placing a sign advertising its opticians' business on public property at five locations in the Town. On Sight pleaded not guilty and asked the court to dismiss the charges. On Sight contended that Chapter 57A was unconstitutional in that, among other things, its provisions unconstitutionally favored commercial speech over noncommercial speech.

The District Court disagreed and denied On Sight's motion. On Sight subsequently pleaded guilty for violations of the Code, but appealed the denial of its motion.

DECISION: Judgment of district court reversed.

The Supreme Court, Appellate Term, New York, Ninth and 10th Judicial Districts, held that Chapter 57A was unconstitutional because its provisions favored commercial speech over noncommercial speech.

The court explained that noncommercial speech is to be afforded "a greater degree of protection" than commercial speech. The court further explained

that a governmental body favors commercial speech over noncommercial speech when it, for example, allows greater scope to onsite commercial speech than to onsite noncommercial speech. Here, the court found that while Chapter 57A had few explicit limitations on noncommercial advertising, aside from public lands and roads, and on "political" advertising, Chapter 57A's language of limitation (e.g., "only the following signs" are "permitted" or "allowed") could only be construed as imposing broad restrictions on noncommercial speech that was not "political." Moreover, the court found that Chapter 57A permitted commercial advertising in every zoning district aside from public lands and roads, but barred noncommercial speech in most contexts in which commercial speech was allowed. The court concluded that Chapter 57A's "commercial favoritism" and "relative absence of media of expression for noncommercial speech" was unconstitutional.

Although the specific section of Chapter 57A that On Sight violated—§ 57A-11(B)—was found by the court to, in isolation, be constitutional, the court concluded that the unconstitutional portions of Chapter 57A could not be severed from the constitutional portions. The court noted that there was no severability clause, and concluded that, "[i]n light of the ubiquitous use of the language of limitation quoted above and the relative absence of media of expression for noncommercial speech, it is impossible to sever so much of [C]hapter 57A as permits 'commercial favoritism' while retaining the remainder." In other words, the court found that Chapter 57A's provisions were so closely interwoven that "removing them wholesale would render the regulatory scheme incoherent and would amount to a judicial rewriting of a legislative scheme, which the courts do not favor." Thus, Chapter 57A, in its entirety, was deemed unconstitutional. Accordingly, the court reversed the judgments convicting On Sight of violating § 57A-11(B) of the Code.

See also: *Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 516, 101 S. Ct. 2882, 69 L. Ed. 2d 800, 16 Env't. Rep. Cas. (BNA) 1057, 11 Envtl. L. Rep. 20600 (1981).*

Zoning News from Around the Nation

MARYLAND

Frederick County commissioners have voted to change the county code to match a new state law rerouting the appeals process for development rights and responsibilities agreements. A bill approved in the Maryland General Assembly last session altered the process in Frederick County to bypass the county appeals board and send these cases straight to court. The County commissioners voted to incorporate the legislation in to local law.

Source: *The Frederick News-Post; www.fredericknewspost.com*

MASSACHUSETTS

The City of Worcester administration has "proposed limiting the siting of registered medical marijuana dispensaries to areas of the city zoned for commercial/medical, business-general, manufacturing or institutional-hospital

use." Reportedly, the proposed zoning ordinance amendment "would allow medical marijuana dispensaries in most higher-density areas of the city, including the downtown and primary commercial/industrial corridors." Without the zoning restrictions, medical marijuana dispensaries could locate anywhere in the city, except for within 500 feet of a school, day care center, or facility in which children commonly congregate. Municipalities in Massachusetts are not allowed to ban medical marijuana facilities.

Source: *Worcester Telegram & Gazette; www.telegram.com*

NEW JERSEY

The Florence Township Council has adopted a new ordinance that aims "to permit renewable energy facilities in appropriate locations in the township in a way that is consistent with the Florence Township Master Plan and state legislation, to facilitate development of alternative forms of energy production and to minimize potential land use conflicts and potential negative impacts associated with such facilities on surrounding properties, according to the ordinance."

Source: *www.centraljersey.com*

WYOMING

Reportedly, "two bills that would push more public notices onto the Internet and reduce the frequency with which some items appear in local newspapers will be sponsored by the Joint Corporations, Elections and Political Subdivisions Interim Committee. They are expected to be filed for the 2014 legislative session, which begins Feb. 10."

Source: *Wyoming Tribune Eagle; www.wyomingnews.com*

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Constitutionality of Zoning Law—Under statutory protest provision, five landowners prevent Board of County Commissioners from adopting zoning resolution

Constitutionality of protest provision and

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delegation of legislative authority is challenged

Citation: *Williams v. Board of County Com'rs of Missoula County, 2013 MT 243, 2013 WL 4552927 (Mont. 2013)*

MONTANA (08/28/13)—This case addressed the issue of whether a state statute's protest provision, which allowed property owners representing 50% of the agricultural and forest land in a zoning district to block zoning proposals, was an unconstitutional delegation of legislative power that violated due process guarantees in federal and state constitutions.

The Background/Facts: In Montana, the establishment of local zoning districts is governed by statute. A local zoning district can be created in two different ways: (1) by citizen petition to the board of county commissioners under § 76-2-101, MCA, known as "Part 1 zoning"; or (2) directly by the board of county commissioners under § 76-2-201, MCA, referred to as "Part 2 zoning." The procedure for establishing district boundaries and adopting or revising zoning regulations, which includes notice and public hearing requirements, is set forth in § 76-2-205, MCA. Section 76-2-205(6), MCA, contained a protest provision that allowed landowners to prevent the board of county commissioners from adopting a zoning resolution when protests were received from one of the following two groups: (1) 40% of the real property owners within the district; or (2) real property owners representing 50% of property taxed for agricultural purposes or as forest land in the district. When a successful protest was received, it prevented the board of county commissioners from proposing any further zoning resolutions with respect to the subject property for one year.

In April 2010, in a case involving Part 2 zoning pursuant to § 76-2-201, MCA, the Board of County Commissioners of Missoula County (the "Commissioners") passed a resolution of intention to establish a special zoning district north of Lolo, Montana. Shortly thereafter, five landowners (the "Landowners"), who together owned more than 50% of the agricultural and forest land within the district, filed a written protest pursuant to § 76-2-205(6).

Subsequently, L. Reed Williams ("Williams") challenged the constitutionality of the protest provision—§ 76-2-205(6), MCA—by filing a complaint against the Commissioners in district court. Among other things, Williams argued that the protest provision constituted an unconstitutional delegation of legislative power.

The Commissioners agreed with Williams, but admitted that they would apply the protest provision to prevent adoption of the zoning regulations absent an order from the district court directing otherwise.

The district court agreed with Williams and the Commissioners. Find-

ing there were no material issues of fact in dispute and deciding the matter on the law alone, the district court issued summary judgment in favor of Williams and the Commissioners. Among other things, it held that the protest provision constituted an unconstitutional delegation of legislative power because it failed to provide any standards or guidelines for the application of a protest and failed to provide a legislative bypass to allow for review of a protest. Furthermore, the district court determined that the protest provision, § 76-2-205(6), MCA, was severable from the remainder of the statute.

The Landowners, who had intervened in the case, appealed.

DECISION: Judgment of district court affirmed.

The Supreme Court of Montana agreed that the protest provision, § 76-2-205(6), MCA—specifically, the provision allowing agricultural and forest landowners representing 50% of the titled agricultural or forest land within the district to block a board of county commissioners from adopting a zoning resolution and prevent another from being proposed for one year—was an unconstitutional delegation of legislative power because: (1) it provided no standards or guidelines to inform the exercise of the delegated power; and (2) it contained no legislative bypass.

In addressing the delegation of legislative power, the court explained that: "The law-making power may not be granted to an administrative body to be exercised under the guise of administrative discretion. Accordingly, in delegating powers to an administrative body with respect to the administration of statutes, the legislature must ordinarily prescribe a policy, standard, or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion with regard thereto, and a statute or ordinance which is deficient in this respect is invalid."

Here, the court found that the protest provision provided no standards or guidelines to inform the exercise of the delegated power. The court said that without any standards or guidelines for the exercise of the delegated power, the protest provision of § 76-2-205(6), MCA allowed "a minority of landowners, or even one landowner, to strike down proposed zoning regulations without any justification or for no reason at all." The court noted there was no requirement that the protesting landowners consider public health, safety, or the general welfare of the other residents of the district when preventing the board of county commissioners from implementing zoning regulations. As a result, agricultural and forest landowners could "exercise their unfettered power in a proper manner, or in an arbitrary and capricious manner, making zoning decisions dependent wholly on their will and whim," said the court.

The court also found that the protest provision lacked a legislative bypass—a provision for review by a legislative body with the power to consider exceptional cases, which the court said was "essential to the

proper exercise of police power." Without a legislative bypass provision, explained the court, "a small number of agricultural or forest landowners, or even a single landowner, would be granted absolute discretion to make the ultimate determination concerning the public's best interests with no opportunity for review." Here, not only did the statute lack a provision allowing a legislative body to take action notwithstanding the protest, it actually prohibited the board of county commissioners from even proposing an alternative zoning resolution for a period of one year.

Accordingly, the court concluded that the protest provision at issue represented an unconstitutional delegation of legislative power.

Having found the protest provision utilized by the Landowners was unconstitutional and thereby ineffective, the court upheld the Commissioners' adoption of the North Lolo Rural Special Zoning District.

See also: *Bacus v. Lake County, 138 Mont. 69, 354 P.2d 1056 (1960).*

See also: *Shannon v. City of Forsyth, 205 Mont. 111, 666 P.2d 750 (1983).*

See also: *Cary v. City of Rapid City, 1997 SD 18, 559 N.W.2d 891 (S.D. 1997).*

Case Note:

The court also affirmed the district court's conclusion that the protest provision was severable from the rest of the statute—§ 76-2-205, MCA.

Constitutionality of Zoning Ordinances—City ordinances prohibit any and all business and commercial uses

Adult entertainment business owner contends ordinances violate the First Amendment

Citation: *Peterson v. City of Florence, Minn., 2013 WL 4259817 (8th Cir. 2013)*

The Eighth Circuit has jurisdiction over Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

EIGHTH CIRCUIT (MINNESOTA) (08/16/13)—This case ad-

dressed the issue of whether city ordinances that prohibited any and all business and commercial uses within the city violated the First Amendment to the United States Constitution.

The Background/Facts: The City of Florence ("Florence") is located within Lyon County, Minnesota. It has a population of 39 and is approximately .2 square miles. Florence contains 16 single-family residences, a small shop used to store Florence's equipment, an unheated metal building operating as Florence's office, and a park.

In 2008, Florence adopted Ordinance No.2008-02, which defined three zoning classifications: (1) "R-1 Single-Family Residential District"; (2) "B-1 Business District"; and (3) "C-2 Commercial District." The ordinance also zoned all areas within Florence as "R-1."

In 2011, Florence adopted Ordinance No. 2011-09, which states, in relevant part, that Florence "desires to maintain [itself] solely as a residential community" due to its "limited infrastructure, staff, and resources," which could not support business and commercial uses. Florence also enacted Ordinance No. 2011-02, which repealed the sections of Ordinance No.2008-02 that established the "B-1" and "C-2" zoning classifications.

Accordingly, Florence's zoning ordinances prohibited any and all business and commercial uses within the city.

In December 2010, Dale Peterson opened The Juice Bar, LLC, an adult entertainment establishment, in Florence. The Juice Bar featured live, nude dancers. After opening, law enforcement cited Peterson for violations of the Ordinance.

Peterson filed suit against Florence. He alleged that Florence's zoning scheme violated the First and 14th Amendments, namely his constitutional rights relating to the operation of his adult entertainment business.

"Freedom of speech . . . [is] protected by the First Amendment from infringement by Congress, [and is] among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action. . . . The First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed." A content-based regulation restricts speech because of its expressive content, while a content-neutral regulation is "justified without reference to the content of the regulated speech." "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." A content-based regulation must satisfy strict scrutiny, and is presumptively invalid. A content-neutral regulation is subject to intermediate scrutiny.

Finding there were no material issues of fact in dispute, and deciding

the matter on the law alone, the district court granted summary judgment in favor of Florence. It concluded that Florence's zoning scheme was a valid content-neutral, time, place, and manner regulation.

Peterson appealed. On appeal, Peterson contended that the zoning ordinances constituted an invalid total ban on the operation of adult entertainment businesses in Florence. Alternatively, Peterson contended the zoning ordinances were content-based and thus subject to strict scrutiny, or lastly, the zoning ordinances constituted an invalid time, place, and manner regulation which failed intermediate scrutiny.

DECISION: Judgment of district court affirmed.

The United States Court of Appeals, Eighth Circuit, held that Florence's zoning scheme was a valid content-neutral, time, place, and manner regulation.

In so concluding, the court noted that by zoning the city entirely residential, Florence effectively prohibited an entire class of conduct—all commercial and business uses—not just conduct pertaining to adult entertainment. The court found that the zoning ordinances at issue did not target adult entertainment and its expressive content. Thus, contrary to Peterson's contention, the court found that the zoning ordinances did not constitute an invalid total ban on adult entertainment businesses, nor were they content-based. Rather, the court found that the zoning ordinances constituted content-neutral regulations subject to intermediate scrutiny.

The court explained that a content-neutral time, place, or manner regulation will be upheld if it is "narrowly tailored to serve a substantial governmental interest and leaves open ample alternative channels for communicating the speech." The court further explained that an ordinance is narrowly tailored if it " 'promotes a substantial interest that would be achieved less effectively absent the regulation' and the means chosen does not 'burden substantially more speech than is necessary to further' the city's content-neutral interest."

Here, the court found that Florence had articulated substantial interests, including: "to ensure public health, safety and general welfare . . . to improve the quality of the physical environment of the city; to protect and maintain property values, and to preserve and develop the economic base of the city." Further, Ordinance Nos. 2011-09 and 2011-02 stated that Florence's limited infrastructure, staff, and resources restricted its ability to accommodate commercial or business establishments. The court found that given Florence's small size and population, its desired interests would be achieved less effectively absent the regulation. Thus, any incidental burden on speech from the zoning scheme was therefore no greater than necessary to furthering the interest in keeping Florence residential. As such, the court concluded that Florence's zoning scheme was narrowly tailored to serve a substantial government interest.

Additionally, the court concluded that there existed a reasonable alternative avenue in which Peterson could operate an adult entertainment business despite the zoning ordinances: in the surrounding areas of Lyon County. The court explained that the United States Supreme Court "has left open the question whether, at least in the case of small municipalities, opportunities to engage in the restricted speech in neighboring communities may be relevant to determining the existence of adequate alternative channels." Here, Peterson's own expert had stated that 204.26 (or 32.22%) of the total acres zoned for commercial use in Lyon County were available for adult entertainment uses. The court found that this availability would provide Peterson with a reasonable alternative for operating an adult entertainment business in the county.

Accordingly, the court held that the zoning ordinances in question did not violate Peterson's constitutional rights relating to the operation of his adult entertainment business.

See also: *Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989).*

See also: *Schad v. Borough of Mount Ephraim, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671, 7 Media L. Rep. (BNA) 1426 (1981).*

See also: *Alexander v. City of Minneapolis, 928 F.2d 278, 18 Media L. Rep. (BNA) 2344 (8th Cir. 1991).*

Open Meetings—Neighborhood Planning Committee holds meetings in private residences and uses password-protected Web Site message board

Landowners contend planning committee violated open meetings laws, which warranted a voiding of the final neighborhood plan

Citation: *Allen v. Lakeside Neighborhood Planning Committee, 2013 MT 237, 2013 WL 4434251 (Mont. 2013)*

MONTANA (08/20/13)—This case addressed the issues of whether a neighborhood planning committee's violation of open meetings laws warranted the voiding of the committee's neighborhood plan and/or the

voiding of the county commissioner's adoption of the planning committee's neighborhood plan.

The Background/Facts: In March 2007, Flathead County adopted the Flathead County Growth Policy (the "Growth Policy"). Under that new Growth Policy, the Flathead County Planning Board (the "Planning Board") determined that the 1995 Lakeside Neighborhood Plan required revisions. To that end, in October 2007, the Lakeside Community Council created the Lakeside Neighborhood Planning Committee (the "LNPC") to assist with the update of the earlier plan.

For the first year of its existence, the LNPC worked on drafting a new plan or revising the old plan. The Committee held numerous meetings, most of which were held in private residences without adequate notice or invitation to the public. LNPC also created a password-protected, private Yahoo Group Web site for the exclusive use of LNPC members. Eventually, the Flathead County Attorney advised LNPC that it was subject to the "open meeting" laws and must hold public meetings in publicly-accessible places with proper notice. All LNPC meetings held after October 13, 2008, were properly noticed and held at the Lakeside Library.

In any case, in June 2009, numerous Lakeside property owners (the "Landowners") filed a lawsuit against LNPC and Flathead County. They alleged that LNPC had violated Montana's open meeting laws by conducting Plan-related meetings in private and on a "secret" Web site (i.e., a password-protected Yahoo Group Web site message board). However, in May 2010 the parties stipulated to holding the cause of action in abeyance until the Commissioners either approved or rejected the recommended Plan.

The Planning Board ultimately approved the revised Lakeside Neighborhood Plan as submitted by LNPC in September 2010 (the "Plan"). The County Commissioners adopted the Plan in December 2010.

Upon adoption of the Plan, the complaint was revived in district court and the action proceeded. The Landowners sought to have the Plan declared void as a result of the alleged open meeting law violations.

Under Montana statutory law—§ 2-3-114, MCA—"the district courts of the state have jurisdiction to set aside an agency decision . . . ." Section 2-3-213, MCA, states: "Any decision made in violation of [§] 2-3-203 [i.e., the open meetings law] may be declared void by a district court having jurisdiction."

The district court agreed that LNPC was a "public or governmental body" required to "make all its meetings open to the public" under Article II, Section 9 of the Montana Constitution and § 2-3-203, MCA. And, the court found that LNPC violated the open meetings laws. However, it also concluded that voiding the Plan was not an appropriate

remedy for the offenses since the LNPC was not an "agency" as defined by the statute and therefore " 'procedural irregularities' pertaining to LNPC's early meetings were 'not decisions by an agency' " that could be voided under §§ 2-3-114 and -213, MCA. Therefore, the district court held that voiding the entire Plan based upon LNPC's early noncompliance with the open meeting laws was not an available remedy under the statutes.

The Landowners appealed.

DECISION: Judgment of district court affirmed

The Supreme Court of Montana agreed that the LNPC's violations of the open meetings laws did not warrant voiding the Plan because the Landowners were deprived only of information generated during the early exchanges among the members of the LNPC, including discussion and ongoing analysis of possible plan revisions; they were not deprived of "hard data" that was critical to the decision making. The court emphasized the fact that following the open meetings law violations, the public was able to participate for two years of meetings and discussions before the County Commissioners finally adopted the Plan.

The Landowners had argued that the County Commissioner's adoption of the Plan could be voided based on LNPC's noncompliance because the County Commissioners were an "agency" under the statute. The court disagreed with the Landowners. The court noted that the Planning Board was not bound by the LNPC's proposed Plan, but could have rejected it, just as the County Commissioners were not bound to accept the recommendations of the Planning Board.

Furthermore, while the court found that the statutes—§§ 2-3-102, -114, and -213, MCA—clearly and expressly stated that an agency decision reached in violation of the open meeting laws may be voided, the court agreed with the district court that the LNPC was not an "agency" whose decisions could be voided as a remedy under those statutes. The court explained that under § 2-3-102(1), MCA, an "agency" is defined, with certain inapplicable exceptions, as "any board, bureau, commission, department, authority, or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts . . . ." The court determined that the LNPC was not an agency but rather was an "advisory committee." Consequently, the court concluded that while the open meeting laws applied to the LNPC's proceedings, the statutes pertaining to the voiding of agency decisions had no application to the LNPC.

Accordingly, the court concluded that vacating the revised neighborhood plan and reinstituting the entire lengthy drafting process was not an appropriate remedy.

See also: *Common Cause of Montana v. Statutory Committee to Nominate Candidates for Com'r of Political Practices, 263 Mont. 324, 868 P.2d 604 (1994).*

See also: *Bryan v. Yellowstone County Elementary School Dist. No. 2, 2002 MT 264, 312 Mont. 257, 60 P.3d 381, 172 Ed. Law Rep. 979 (2002).*

Case Note:

The case also addressed the issue of whether an electronic "meeting" of the LNPC occurred on the Yahoo Web site message board in violation of open meetings laws. Section 2-3-202, MCA, requires that "meetings" convened by electronic equipment must comply with open meeting law. Here, the Landowners argued that the LNPC violated the open meetings laws, but the district court ruled that no evidence was presented that a quorum of LNPC members could actually convene on the Yahoo Group "such that a meeting . . . would have been possible." The district court noted that during the time LNPC used the Yahoo Group, it did not have online chat capability. Additionally, the System and Network Administrator for Flathead County's Information Technology Department testified by affidavit that "it is impossible to hold a meeting on the Yahoo Work Group [because it] was not designed for this purpose and could not be used as an alternative to holding an actual meeting." The Supreme Court of Montana affirmed the district court's ruling based upon the lack of evidence that such an electronic meeting occurred in this case. However, "given the constantly evolving technology," the court also declined to state that a "meeting" could never be convened by way of a Yahoo e-mail group. The court cautioned public officers that "conducting official business via e-mail can potentially expose them to claims of violation of open meeting laws."

Zoning News from Around the Nation

CALIFORNIA

Two Los Angeles City Council members have introduced a zoning amendment proposal "that would outlaw fracking and related methods such as 'acidizing.' " The proposal has been referred to the City Council's Planning and Land Use Management Committee for review and public hearings.

Source: *Los Angeles Times; www.latimes.com*

The California State Senate has passed a bill, AB 1229, that would "ensure that local governments can require affordable housing set-asides in new developments, if they choose." Reportedly, the bill is intended

to address "uncertainty and confusion created by a 2009 appellate court ruling that the state's rent control law, the Costa-Hawkins Act, prohibits such programs for rental housing." The bill now awaits Governor Brown's signature or veto.

Source: *http://sdgln.com/news*

MARYLAND

Maryland Attorney General Douglas Gansler has deemed unconstitutional a portion of Senate Bill 370, which deals with setback requirements for wind turbines. Gansler has said that the provision of the bill that requires an adjoining property owner's consent to a variance for a wind turbine setback requirement is unconstitutional because it would give adjacent neighbors zoning authority. It is Gansler's view that "such delegation of zoning authority to individual landowners is of doubtful constitutionality."

Source: *Cumberland Times-News; http://times-news.com*

MASSACHUSETTS

The City of Worcester's Planning Board has advanced to the City Council proposed zoning rules for siting medical marijuana dispensaries in the city. Reportedly, two board members support limiting medical marijuana dispensaries to areas zoned for business-general, manufacturing-general and institutional-hospital uses, two other board members favor expanding it to also include areas zoned for light manufacturing. The City Council can accept, amend, or reject the board's recommendations. In Massachusetts, "[w]ithout local zoning restrictions, medical marijuana dispensaries could locate anywhere in the city, except for within 500 feet of a school, day care center or facility where children congregate."

Source: *Worcester Telegram & Gazette; www.telegram.com*

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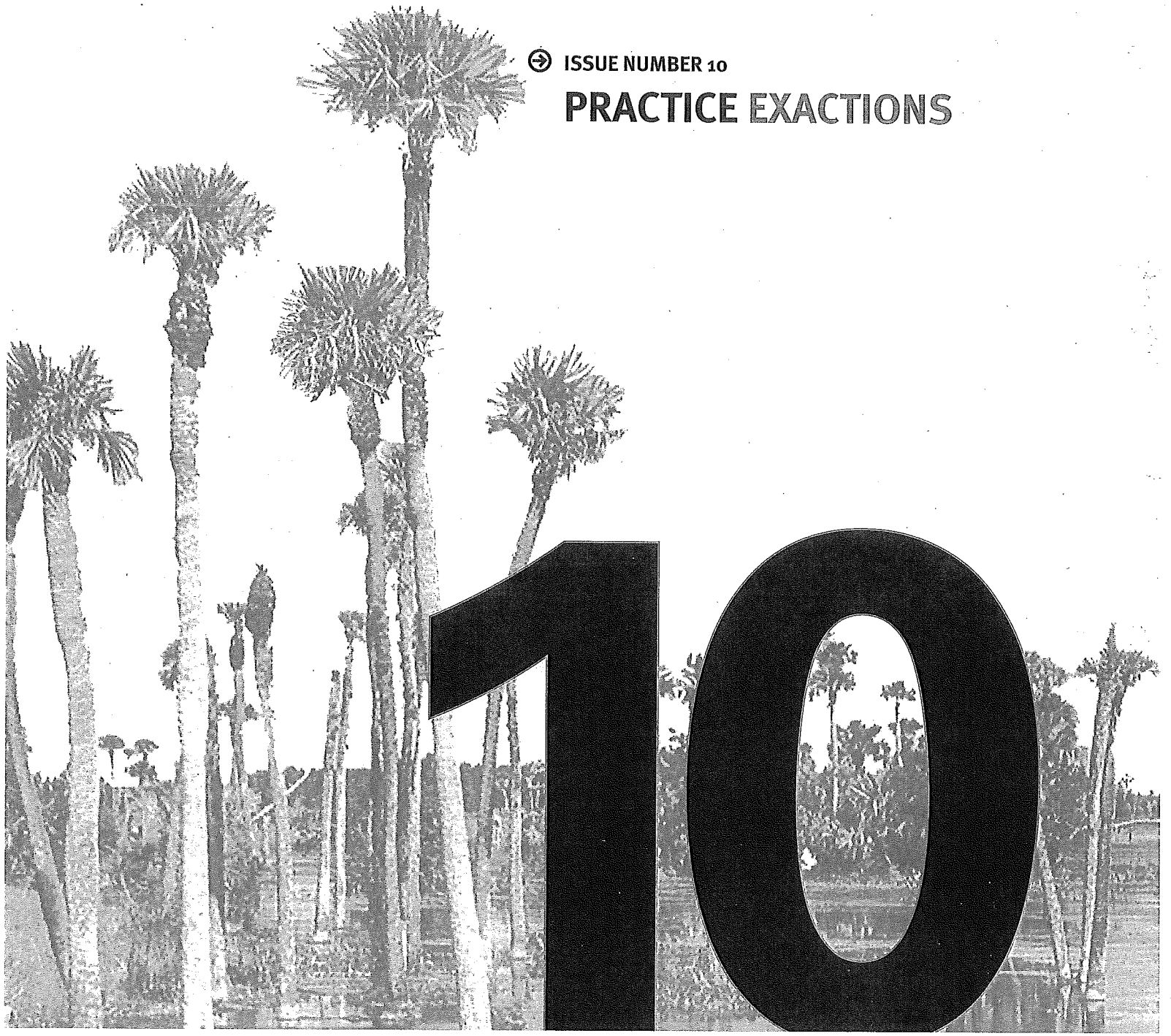


What *Koontz v. St. Johns River Water Management District* Means for Planners . . . For Now

By Tyson Smith, AICP

On June 25, 2013, the U.S. Supreme Court issued a ruling in *Koontz v. St. Johns River Water Management District*. Some will view *Koontz* as a significant case that corrects an imbalance of power between government officials and property owners negotiating discretionary exactions in zoning cases.

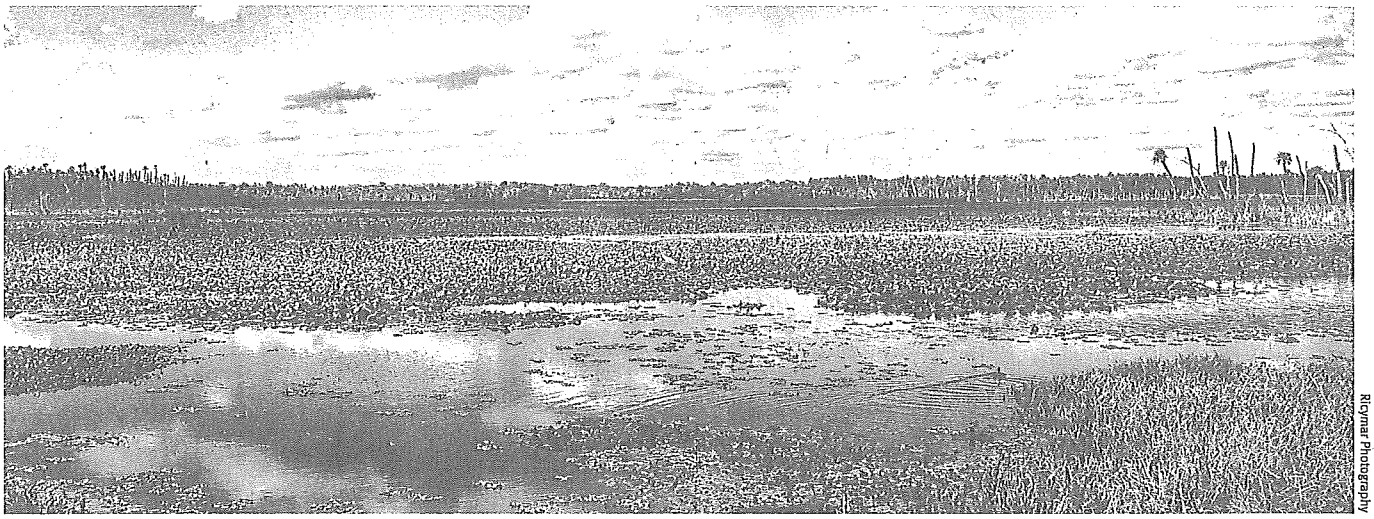
Others will say that it does not—that the distinctions the case purports to draw (between property-based and monetary exactions) are not commonly made in practice and that the protections the case suggests are needed are already in place. One thing is for sure, however: the *Koontz* decision has gotten everyone talking and it may have raised more issues than it settled. In any case, the opinions of both the majority and the dissent—it was a 5–4 decision in favor of the property owners—suggest that a reexamination of current protocol is in order for planners and local officials who find exactions and mitigation part of their daily routine.

The holdings in the case, standing alone, at first appear to clarify a long-standing disagreement among lower courts about whether the Supreme Court decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) apply to permit denials (not just approvals) and to monetary exactions (not just property exactions). The majority answered yes to both questions. However, given the facts in this case, the issues the Supreme Court sent back to the Florida courts, and the commentary and reasoning of the *Koontz* majority, a closer look at the case gives one the sense that very little may have been clarified.

The relevant underlying facts and key legal issues for the planning practitioner are set out in this article, as are several steps local governments should take to ensure compliance with *Koontz*. To understand *Koontz*, however, one must first understand *Nollan* and *Dolan*.

NOLLAN AND *DOLAN*

Nollan and *Dolan* involve a special application of the doctrine of "unconstitutional conditions" and of taking jurisprudence. Taken together, these two cases have become the established standard in land-use exactions and governmental negotiations. Their princi-



Rickymar Photography

Wetlands play an important role in water quality management in Central Florida. These man-made wetlands at the Orlando Wetlands Park ensure that nitrogen and phosphorous levels from outflows remain significantly below background levels in the St. Johns River.

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About the Author

Tyson Smith, AICP, is a planner and attorney at White & Smith Planning and Law. Smith has worked in or on behalf of local government since 1992. His work includes public facilities planning and funding, exactions, development and interlocal agreements, impact fees, adequate public facility programing, military planning and encroachment policies, and a host of other land-uses issues facing states, cities, and counties around the country. Smith is a partner at White & Smith and manages their office in Charleston, South Carolina.

ples of "nexus" and "proportionality" circumscribe the types and extent of public facilities and resources for which land developers are responsible based on their developments' impacts.

In *Nollan*, the U.S. Supreme Court held that, in order to withstand scrutiny under the Takings Clause of the Constitution, there must be an "essential nexus" between real property dedications required by government as a condition of development approval and the governmental objective to be achieved. In the *Nollan* case, the Court held that this nexus did not exist because the California Coastal Commission's demand for an easement running north-south along the beach was not sufficiently related to the "east-west" objective of protecting public access to (not along) the beach. It is often said that *Nollan* requires that "the nature" of the required dedication be related to the governmental objective.

Seven years later, in *Dolan*, the U.S. Supreme Court clarified that a taking also may occur if a required dedication is not related in extent, as well as in nature, to the governmental objective to be accomplished; in that case, mitigating the impacts of a proposed development on the local floodplain and bike and pedestrian paths. The *Dolan* Court overturned the governmental condition for land dedication because there was no evidence in the record that the amount of land to be dedicated was "roughly proportionate" to the extent of impact the new development would have on the public.

There were, however, a few questions *Nollan* and *Dolan* left unanswered, such as, for example, whether they apply to exactions of money and not just to dedications of real property. In addition, and perhaps more esoterically, what if a potential dedication is merely discussed between governmental officials and a property owner, but the conditional approval is never consummated, only talked about? Is there a point in discussions when the property owner can stand up from the conference room table, declare that staff's proposals violate *Nollan* and *Dolan*, and dart out to the courthouse? After all, if a proposed condition is rejected, no property (or money) is actually converted to public ownership. Most agree, nonetheless, that the principles of nexus and proportionality remain the standards by which even failed negotiations should be governed. What to do?

KOONTZ V. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

Coy Koontz Sr. purchased a 14.9-acre property in the St. Johns River Water Management District (the District), east of Orlando, Florida, in 1972. The northern 3.7 acres of the property, though classified as wetlands, were viewed as the most appropriate for development. Pursuant to state law, two District permits were required to develop the property. In order to meet state law requirements, the District required applicants to offset environmental impacts through mitigation either on-site or by "creating, or preserving wetlands elsewhere" (*Koontz* Slip Opinion p. 3).

In 1994, Koontz applied for permits to develop the 3.7-acre portion of his property and, in order to meet his mitigation requirements, he offered to give the District a conservation easement over the remaining 11.2 acres. As a counterproposal, if you will, the District proposed approval under two different scenarios:

(a) that only one acre be developed, with the conservation easement then applying to the remaining 13.9 acres; or

(b) that the 3.7 acres be developed as proposed (along with the proposed conservation easement for the rest) and that off-site mitigation be provided either by (1) enhancing 50 acres of off-site District wetlands or (2) an equivalent off-site alternative.

The District also invited Koontz to propose equivalent mitigation alternatives. However, believing the District's alternatives to be excessive, he instead filed suit in state court.

Based on expert testimony at trial, the state court found that the 11.2-acre easement originally proffered by Koontz sufficiently offset the development's impacts and, therefore, the alternatives proposed by the District failed to meet *Nollan*'s "essential nexus" and *Dolan*'s "rough proportionality" requirements. The intermediate appellate court affirmed, but, distinguishing *Nollan* and *Dolan* from Koontz's situation, the Florida Supreme Court reversed in favor of the District.

The Florida Supreme Court found *Nollan* and *Dolan* inapplicable because, since the District never approved Koontz's application, the mitigation never occurred and, therefore, no taking ever occurred. In addition, it distinguished the property-based dedications of *Nollan* and *Dolan* from the mitigation that required Koontz to spend money.

Since there has been a division of authority among the lower courts on exactly these points, the U.S. Supreme Court agreed to review the case. It is worth noting, of course, that within a day of the *Koontz* decision, the Supreme Court also issued headline-grabbing decisions related to affirmative action, the Voting Rights Act, adoption and the Indian Child Welfare Act, and the Defense of Marriage Act.

The *Koontz* Holding

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 the government's demand is for money.

Nonetheless, the reasoning that the majority lays out and the opportunity it took to comment on and to characterize land-use negotiations the way it did, are significant and undoubtedly will result in conflicting interpretations.

KOONTZ: WHAT THE U.S. SUPREME COURT HELD AND WHY

Some believe that the holdings in *Koontz*, on their face, do not necessitate a significant change of course for most planners who already use *Nollan* and *Dolan* as their guide; or, as the *Koontz* dissent put it, no evidence was presented that local officials "routinely short-circuit *Nollan* and *Dolan* to extort the surrender of real property interests having no relation to a development's costs."

Holding 1: *Nollan* and *Dolan* Apply Even in Permit Denials

The majority held that the principles of *Nollan* and *Dolan* apply regardless of "whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so." In other words, *Nollan* and *Dolan* can be violated regardless of whether mitigation is required as a condition of final approval or is demanded and rejected, resulting in denial. In reaching its holding, the majority touched on four key areas.

Excessive conditions may not be used to withhold a governmental benefit to a person who exercises a constitutional right. Specifically, government cannot deny a land-use permit (a benefit) on the condition that an applicant makes a dedication in excess of its proportionate impact on the public facilities or resources (a constitutional right violation). The majority makes this well-settled point, it seems, to demonstrate the potential for government to "coerce" property owners to dedicate more property or contribute more mitigation than their impacts require by threatening to withhold approval.

The government's authority to deny approval outright is not a basis for exacting an excessive demand. The majority goes on to say that the government's authority to withhold approval does not mean it may do so simply because "someone refuses to give up constitutional rights" (i.e., the right to have mitigation limited only to the development's proportionate impact). Conversely, it would follow that approval may be lawfully withheld if an applicant refuses to make a dedication that does meet nexus and proportionality requirements. The question on this point and the preceding point, for the planner, will turn out to be whether the exaction does, in fact, comply with *Nollan* and *Dolan*. More on this below.

The Takings Clause may be violated even where there is no taking. "Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation," the majority writes. It goes on to conclude that "[w]here the permit is denied and the condition is never imposed, nothing has been taken."

The idea that the Takings Clause can be violated without there being a taking was a point of disagreement among the lower courts (and land-use attorneys) since *Dolan* was decided, which usually boils down to the question of the appropriate remedy if a demand for mitigation is rejected and, therefore, the transfer of land (or money) to the government never occurs.

The majority concluded that if *Nollan* and *Dolan* are violated, but no property is taken, just compensation is not available as a remedy. The dissent suggests that the appropriate remedy in this circumstance would be removal of the unconstitutional condition and recovery of any damages available under state law. The majority leaves this question to the Florida courts to resolve on remand.

Mitigation alternatives complying with Nollan *and* Dolan *preclude a taking.* As noted, the District offered several mitigation alternatives to Koontz and invited him to propose others. This raised the question of whether a taking can be found if alternatives determined to be constitutional under *Nollan* and *Dolan* are among those rejected by an applicant. The *Koontz* opinion is clear on the point: "so long as a permitting authority offers the landowner at least one alternative that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition."

Holding 2: *Nollan* and *Dolan* Apply Even if the Demand Is for Money

The District argued that an obligation to spend money does not amount to a taking. The majority disagreed and held that where there is a "*direct link* between the government's demand and a specific parcel of real property" the monetary exaction is sufficiently land-based to trigger the *Nolan/Dolan* analysis. The dissent, conversely, viewed the District's off-site mitigation option as simply imposing "an obligation to perform an act (the improvement of wetlands) that costs money."

In sum, the Court's majority concluded *Nollan* and *Dolan* would apply to the monetary exaction in *Koontz* because the off-site mitigation Koontz could have paid for "several miles away" was sufficiently related to the property proposed for actual development.

On Remand

Beyond the holdings themselves, the majority leaves to the Florida courts a number of key points to resolve, including:

1. whether the manner in which the case was brought precludes adjudication of the unconstitutional conditions claim;
2. what damages, if any, are appropriate in the case;

3. whether the "demand" by the District was sufficiently concrete to trigger a *Nollan/Dolan* claim; and
4. whether the District did, in fact, comply with the requirements of *Nollan* and *Dolan*.

THE SCOPE OF THE *KOONTZ* DECISION

A concern of the dissent and of commentators following the decision is how far the *Koontz* decision extends in the realm of land-use exactions. For example, a key disagreement among lower courts has been whether to apply *Dolan* to legislatively adopted, generally applicable mitigation of impacts, like impact fees. Though it purports to limit the extent of its holdings, the majority does not address directly the distinction between ad hoc exactions and legislatively adopted regulatory fees or mitigation, despite numerous conflicting lower court opinions on this particular issue.

The majority felt that its holdings would be sufficiently limited by settled law and, otherwise, would not have the dramatic impact on planning that the dissent predicts. The majority, for example, references "in-lieu" fees as the types of exactions that *should* be subject to *Nollan* and *Dolan*, noting their "functional equivalent to other types of land use exactions." It then goes on to say that its holdings do not affect "property taxes, user fees, and similar laws and regulations," but gives little idea of what it would include in those categories in the land-use context.

> *Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land use policy, and we have long sustained such regulations against constitutional attack.*
>
> —Justice Alito, writing for the majority

By distinguishing "user fees" and "laws and regulations" it may be that the Court would not apply *Nollan* and *Dolan* to impact fees and other "legislatively imposed" mitigation. On the other hand, the majority cites cases that applied, "or something like it," in dealing with impact fees and subdivision exactions to suggest, it would appear, that doing so will not create "significant practical harm."

In short, it is unclear whether the parameters the majority intended to draw distinguish ad hoc exactions like those in *Koontz* from other legislatively imposed mitigation tools, like impact fees, mitigation fees, or inclusionary housing requirements. As the dissent put it: "Maybe today's majority accepts that distinction; or then again, maybe not."

WHAT ARE PLANNERS (AND THEIR ATTORNEYS) TO DO?

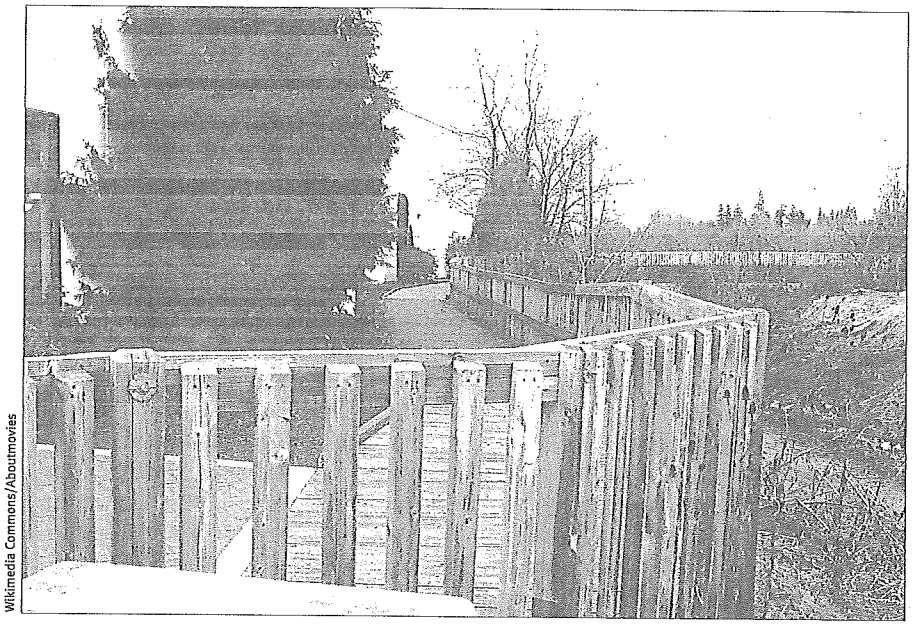
The extent to which the *Koontz* opinion will change daily life for planners will vary, of course, from jurisdiction to jurisdiction. Nexus and proportionality are so ingrained in the existing practice that the two central holdings in the case, standing alone at least, may not change the way of doing business for some. In those cases, the jurisprudential meanderings of the justices will remain largely a concern for lawyers and less one for planners. However, with this opinion, one can only conclude that the Supreme Court intended to expand the reach of *Nollan* and *Dolan* and and that a few precautionary steps are advisable until the courts clear things up.

So what are the options?

Option 1: Approve Everything Without Mitigation

Commentators have suggested that, in light of *Koontz*, some agencies will be too afraid to impose *any* conditional exactions on approvals and will simply approve development without regard to off-site impacts on public infrastructure and resources. Perhaps some may, but this would be an overreaction to the *Koontz* opinion. Even the majority notes that dedications of property are a reality of the permitting process.

While *Nollan* and *Dolan* may have a broader reach after *Koontz*, their nexus and proportionality principles have a long-standing presence in planning, and this case should not mark the end of reasonable and proportionate development conditions as a part of the permitting process.



Wikimedia Commons/Aboutmovies

A required dedication for the creation of this bicycle pathway running behind the A-Boy hardware store in Tigard, Oregon, was central to the *Dolan* case.

Option 2: Deny Everything Without Mitigation

At the other extreme have been those (including the dissenting justices) who suggest governmental agencies will now deny applications without requiring (or even discussing) mitigation simply to avoid new threats of litigation. Again, this takes *Koontz* too far. First, as is discussed further below, most agencies either are already conducting some level of nexus and proportionality analysis or can do so without significant increases in time or expertise in most cases. Second, a lawsuit resulting from a denial without conditions would simply be a different kind of lawsuit.

Dolan on Establishing 'Rough Proportionality'

With respect to the pedestrian/bicycle pathway, we have no doubt that the city was correct in finding that the larger retail sales facility proposed by petitioner will increase traffic on the streets of the Central Business District. The city estimates that the proposed development would generate roughly 435 additional trips per day. Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use. But on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway 'could offset some of the traffic demand . . . and lessen the increase in traffic congestion.'

As Justice Peterson of the Supreme Court of Oregon explained in his dissenting opinion, however, '[t]he findings of fact that the bicycle pathway system '*could* offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system *will*, or *is likely to*, offset some of the traffic demand' (317 Or., at 127, 854 P.2d, at 447) (emphasis in original). No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.

—*Dolan*, 114 S.Ct. 2309, 2321–22, 512 U.S. 374, 395–96 (footnotes excluded)

Denying applications without requiring or accepting mitigation will not deter litigation and, in fact, may encourage it.

Option 3: Stop Negotiating

Another option would be to accept offers of mitigation, but not to respond to them or to negotiate alternatives. After all, if your agency risks a *Nollan/Dolan* claim by suggesting mitigation options, the safest way to avoid one is to refuse to negotiate, right? Perhaps, but in reality, this benefits no one and sells planners and property owners short—neither desires litigation and, of course, most do not end up in litigation. The technical expertise needed to determine whether a development has met the requirements of *Nollan* and *Dolan* are available and widely used and should be part of ongoing negotiations.

Property owners benefit from open communication with their public agencies and from understanding the rationale for an exaction needed to maintain the levels of public service existing residents enjoy. It seems, again, that cutting off all negotiation could deter good planning and actually create or exacerbate disputes.

Option 4: Apply *Nollan* and *Dolan* to All Exactions and Discussions Related to Exactions

The reality is that, in light of *Koontz*, local governments should reexamine existing protocols and standards to ensure that all discussions related to mitigation and exactions, whether ad hoc or legislatively adopted, are grounded in the principles of *Nollan* and *Dolan*. Here are some tips.

Avoid open-ended, informal discussions without following established protocol and nexus/proportionality standards. The question the majority leaves open in *Koontz* is at what point mitigation suggested by government becomes a "demand" that is sufficiently concrete to trigger scrutiny under *Nollan* and *Dolan*. The majority regarded the point to have been settled by the lower courts but noted the issue may be addressed on remand. In any case, agency officials should avoid open-ended discussions or communications (including e-mails) that are not based on adopted protocol and nexus/proportionality standards or before enough information has been gathered to fully grasp the scope of the development and its public impacts. Otherwise a preliminary communication could be misinterpreted as (or build into) a concrete governmental "demand." Of course, if the communications comply with *Nollan* and *Dolan*, the point likely is moot, which leads to the next point.

Establish nexus/proportionality protocols and standards. With respect to the dedications in *Dolan*, the Supreme Court said: "No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication . . . beyond the conclusory statement that it could offset some of the traffic demand generated."

Ensuring compliance with this standard could, in some cases, add costs for local government. However, in the case of ad hoc, discretionary exactions, a documented set of calculations likely will suffice. With most public facilities, this can be a fairly simple calculation. With others, like housing mitigation, transportation, and environmental resources, the process and calculations will be a bit more complex. In the case of impact fees, concurrency or adequate public facility programs, and other legislatively adopted tools, the technical bases for them are well established and the expertise readily available.

Adopt procedures for negotiated or discretionary exactions. Local government should formally document the process of requesting, evaluating, and providing mitigation alternatives for property owners. For example, procedures may specify:

1. existing level of service standards and service areas for impacted public facilities and resources;
2. a specific pre-application process;
3. that mitigation, where needed, is limited to facility types impacted by the development (*Nollan*) and to only the development's proportionate share of new facility demand (*Dolan*);

Voluntary Offers and *Nollan/Dolan*

The question commonly comes of up whether a "voluntary" offer is subject to the Takings Clause and *Nollan* and *Dolan*. Legal arguments exist on both sides of this question. Relevant factors will include whether the application is pending or has been submitted, whether the facilities are being offered in response to a staff or board request, and whether the amount of mitigation was offered by the property owner or suggested by the government.

In the end, the best planning approach will continue to be to negotiate and implement regulations under the rubric of *Nollan* and *Dolan*. Why risk the success of a good project on the unsettled question of voluntariness?

> Often these cases . . . have little impact beyond those litigating them. The appropriate course of action . . . is to reevaluate all procedures related to mitigation or dedications . . . to ensure ongoing compliance with *Nollan* and *Dolan*.

4. that any communication or opinion, other than those issued as a formal assessment, are nonbinding and are not intended to be relied upon for purposes of development approval or final agency approval;
5. the calculations or assumptions the government will use to guide mitigation assessments; and
6. the official or governing body with final decision-making authority.

Development agreements also provide a more formalized framework for developing appropriate mitigation alternatives and an opportunity to document how the parties mutually arrived at its terms.

Emphasize legislatively adopted fees and programs. Since the 1970s, local governments have increasingly relied upon formally adopted standards and procedures for measuring the public impacts of private development against available capacity and for handling situations where those impacts would overburden public facilities. These programs are referred to variously as adequate public facility ordinances or concurrency management systems. Over the same period, impact fees, inclusionary housing requirements, housing mitigation fees, and the like have allowed local governments to handle off-site impacts with an established, generally applicable set of standards, instead of through ad hoc negotiations.

These legislatively adopted techniques have historically been based on pre-adoption nexus and proportionality studies, which reduce the chances of running afoul of *Nollan* and *Dolan*. Certainly some local governments and some developers prefer the predictability of this approach. In any case, some local governments will consider formal concurrency programs and impact fees as a safer alternative to ad hoc, negotiated exactions after *Koontz*.

Note, however, this is not to say *Nollan* and *Dolan* do not apply to these legislative programs (indeed, they very well may under *Koontz*). It is to say, simply, that concurrency and impact fees are established tools that, by definition, have always included a rigorous verification of nexus and proportionality.

CONCLUSION

The confusion that resulted from the Supreme Court's "inelegant" decision in *Agins v. City of Tiburon*, 447 U.S. 255 (1980) took 25 years and a follow-up opinion (in *Lingle v. Chevron U.S.A. Inc.*, 554 U.S. 528 (2005)) to correct. Will it take that long to sort out the questions created by *Koontz*? Has the majority's treatment of the issues created enough confusion to affect planners' daily lives, or do the overarching holdings merely verify a standard that most planners already apply?

It is too soon to tell, of course. Often these cases, despite the heights from which they are handed down, have little impact beyond those litigating them. The appropriate course of action at this point, however, is to reevaluate all procedures related to mitigation or dedications, whether discretionary or a product of legislatively adopted ordinances, to ensure ongoing compliance with *Nollan* and *Dolan*.

Cover: The Orlando Wetlands Park, located about 25 miles east of Orlando, consists of more than 1,220 acres of man-made wetlands near the St. Johns River. Image by Ricymar Photography; design concept by Lisa Barton.

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DOES *KOONTZ* CHANGE THE RULES FOR DEVELOPMENT EXACTIONS?

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