CONDEMNATION & EMINENT DOMAIN

Condemnation & Eminent Domain: Attorney Fees

***Calhoun, Dreggors & Associates v. Volusia County*,**
26 So. 3d 624 (Fla. 5th Dist. App. 2009)

Florida law bars an award of attorney's fees or appraisal costs incurred by landowners before the commencement of an eminent domain action in circuit court, except in the case of pre-suit settlement.

FACTS AND PROCEDURAL HISTORY

In June 2006, Volusia County (County) notified two landowners (Owners) that a road-widening project would require condemnation of their property. The notice included a statement of the Owners' rights, including the possibility of reimbursement of reasonable attorney's fees, appraisal fees, and other costs in connection with the condemnation. The notice also included a brochure that referenced three Florida statutes allowing recovery of attorney's fees and costs in eminent domain actions under varying circumstances.

Shortly after receiving the County's notice, the Owners retained an attorney. Meanwhile, the County retained an appraisal company and a land planning firm to negotiate with the Owners. In October 2006, the County offered $76,700 for the property. More than a year later, in November 2007, the County notified the Owners that condemnation proceedings would commence absent a settlement. The Owners, dissatisfied with the County's offer, retained Calhoun, Dreggors & Associates and Rahenkamp Design Group, Inc. to prepare an alternative opinion as to their property value.

However, on June 3, 2008, the County rescinded its earlier offer and notified the Owners that it had decided not to move forward with the road-widening project. When the Owners requested reimbursement of their attorney's fees and other costs, the County refused. The Owners' law firm and other experts then filed suit in circuit court. The trial judge entered final judgment for the County. In rejecting the Owners' bid for reimbursement of

fees and costs, the trial court acknowledged that the Owners had acted in good faith in hiring an attorney and appraisal experts in response to the County's condemnation notices. The judge stated that the Owners arguably should prevail, but that Florida law did not allow for reimbursement of attorney's fees and costs under the particular circumstances of this case.

ANALYSIS

On appeal, the Fifth District agreed with the trial judge, noting that a circuit court generally may not order attorney's fees and costs unless authorized to do so by a state statute, rule of court, or contract. In affirming the final judgment, the court analyzed the three statutes that provide for an award of attorney's fees and costs in eminent domain actions: Florida Statutes Sections 73.015, 73.091 and 73.092 (2008).

First, Section 73.015(4) states that a property owner is entitled to recover costs under Section 73.091 and attorney's fees under Section 73.092 if a settlement is reached prior to the filing of a lawsuit. Second, Section 73.091 authorizes the reimbursement of costs incurred while defending a proceeding filed in the circuit court. Third, Section 73.092 awards attorney's fees based on the difference "between the final judgment or settlement and the last written offer made by the condemning authority . . . ."

In short, all three statute sections require either a pre-suit settlement between the government and the property owner, or the actual commencement of a condemnation proceeding in circuit court. Neither a settlement nor the filing of a petition by the County occurred in this case. The statute's plain language, as read by both the trial and appellate courts, "does not authorize an award of fees or costs in this case, because there was no pre-suit settlement and no condemnation action filed." *Calhoun, Dreggors & Assocs.*, 26 So. 3d at 10.

Finally, although the Fifth District's unanimous opinion voiced support for the Owners' "policy" arguments in support of reimbursement of fees and costs, the court stated that such arguments should not be considered by the judiciary but were proper subjects for the legislature's consideration.

SIGNIFICANCE

This case should serve as a warning to property owners and eminent domain practitioners alike: do not assume that a county will ultimately file suit after giving notice of condemnation. A county could change its mind and withdraw its offer before filing suit, and in such event—based on current law—the property owner will not have his or her attorney's fees or other costs reimbursed. In sum, equity will not trump an apparent statutory shortcoming regarding preliminary eminent domain proceedings.

RESEARCH REFERENCE

- 21 Fla. Jur. 2d *Eminent Domain: Attorney's Fees* § 174 (2005).

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Condemnation & Eminent Domain:
Unconstitutional Exactions & Conditions

***St. Johns River Water Management District v. Koontz*,**
5 So. 3d 8 (Fla. 5th Dist. App. 2009)

When a landowner requests a land-use permit from the government for development that would otherwise be prohibited and the government agrees to grant the permit if the landowner meets an unconstitutional condition, the landowner may have a regulatory taking claim under the Fifth Amendment of the United States Constitution and be entitled to compensation, even if the landowner refused to comply with the improper condition. To be constitutional, a condition on a land-use permit—also known as an exaction—must have an essential nexus to the developmental prohibition and be roughly proportional to the impact of the proposed development.

FACTS AND PROCEDURAL HISTORY

Coy Koontz (Koontz) wanted to develop a section of his 14.2-acre commercial property located within the Riparian Habitat Protection Zone (RHPZ) of the Econlockhatchee River Hydrological Basin. The section of land he wanted to develop included 3.4 acres of wetlands and 0.3 acres of uplands—3.7 acres total. Increased development near Koontz's property had significantly de-

graded the land, and it could no longer serve as an animal habitat.

Koontz's planned development was not allowed by existing regulations. He needed approval from the St. Johns Water Management District (St. Johns) for both developing the entire 3.7-acre piece of land and dredging the 3.4-acre wetlands section of the property to prepare it for development. When he sought a permit from St. Johns, it conditioned its approval on Koontz (1) performing off-site mitigation and making the rest of the property into a conservation area or, alternatively, (2) cutting his development to one acre and making the rest of the property into a conservation area. Koontz agreed to turn the remainder of the property into a conservation area. However, he refused to perform off-site mitigation or decrease the size of his development. St. Johns refused to issue him a permit, basing its decision on the adverse impact the development would have on fish and other wildlife in the RHPZ as well as Koontz's unwillingness to mitigate that impact.

Koontz sued St. Johns, claiming that it had unconstitutionally taken his property. The trial court agreed with Koontz and awarded him damages, applying the standards articulated by the United States Supreme Court. The Fifth District Court of Appeal affirmed the trial court's decision.

ANALYSIS

The Fifth District began by explaining the trial court's application of Supreme Court precedent. To address the discretion involved in issuing permits, the Supreme Court has set out two requirements for the conditions a government may impose on permit applicants without effecting a compensable taking. As decided in *Nollan v. California Coastal Commission*, the condition must have the same goal as or an essential nexus to the developmental ban; and, as decided in *Dolan v. City of Tigard*, the condition must be roughly proportional to the impact of the proposed development. *Nollan*, 483 U.S. 825 (1987); *Dolan*, 512 U.S. 374 (1994). The trial court found the off-site mitigation requirement St. Johns had given Koontz conflicted with both of these requirements. The Fifth District noted that St. Johns had not challenged this finding by the trial court. Taking a different approach, St. Johns argued (1) that the trial court did not have subject matter jurisdiction to

hear the case and (2) that Koontz had no cause of action because approval was not conditioned on dedicating Koontz's land. The Fifth District rejected both of these arguments.

First, St. Johns argued that nothing was exacted from Koontz, and therefore the trial court did not have subject matter jurisdiction over Koontz's challenge under Florida Statutes Section 373.617(2). Instead of responding to this question in terms of subject matter jurisdiction, the Fifth District reframed it as a question of whether a landowner has an exaction claim at all where the government denies him a permit because he has refused to comply with an unconstitutional condition. The Fifth District held that St. Johns' argument had already been implicitly rejected by the Supreme Court. In *Dolan*, the dissent had directly addressed the same argument, and thus the majority had impliedly rejected it. In *Nollan*, the majority relied on a case that had rejected the same argument.

Next, St. Johns argued that Koontz had no cause of action because the government had conditioned approval on a financial payment to enhance St. Johns' land, not a physical dedication of Koontz's land. The Fifth District explained that the Supreme Court had already implicitly spoken on this issue as well in *Ehrlich v. City of Culver City*. 512 U.S. 1231 (1994). In that case, the Supreme Court vacated a decision that had upheld a city's conditioning permit approval on the applicant paying for artwork and tennis courts. The Court remanded the case for the state court to revisit its decision, taking the *Dolan* decision into account.

Judge Richard B. Orfinger's concurring opinion discussed a few uncertain areas of exactions and takings law: (1) how "exaction" is defined; (2) whether a condition can be considered a taking if the landowner refuses to comply with it; and (3) whether the unconstitutional conditions doctrine should be made a part of takings law at all. First addressing the definition of "exaction," Judge Orfinger noted that courts must be able to identify an exaction that constitutes a taking before applying the Supreme Court's *Nollan*/*Dolan* test, stated that the term has been defined in widely varying ways, and argued that that such an exaction must be considered a taking apart from the limitation on development for the *Nollan*/*Dolan* test to be triggered. Second, if the *Dolan* majority had not rejected the same argument, Judge Orfinger would have agreed with St. Johns' claim that a landowner has

no cause of action if he refuses the government's condition because the landowner's position merely remains the same after a permit is denied—there is no taking. Finally, Judge Orfinger suggested that the *Nollan*/*Dolan* test should be interpreted to mean that the government's permitting decisions must be reasonable even if they are sometimes incorrect, a standard articulated in *Illinois v. Rodriguez*. 497 U.S. 177 (1990). He preferred such an interpretation to the doctrine of unconstitutional conditions—under which "the government ordinarily may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government has the discretion to withhold the benefit altogether"—because the unpredictable application of the doctrine may lead the government to refuse to grant permits that require conditions for fear of liability, whereas a reasonableness test would not pose the same risk. *Koontz*, 5 So. 3d at 14 (Orfinger, J., concurring).

Judge Jacqueline R. Griffin dissented, arguing that despite the majority's suggestion that it was merely applying settled law, Supreme Court precedent actually mandates the conclusion that nothing had been taken from Koontz. According to Judge Griffin, the Supreme Court clarified in *Lingle v. Chevron* and *City of Monterey v. Del Monte Dunes* that *Nollan* and *Dolan* address the unconstitutionality of governmental conditions only in situations where a landowner relinquishes an actual, physical use of land by dedicating his property to the government. *Lingle v. Chevron*, 544 U.S. 528 (2005); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999). Until the Supreme Court directly addresses whether all invalid conditions on land-use permits—even those that do not involve dedicating land—should be considered takings, relinquishing an actual interest in land should be the determining factor in identifying a taking that entitles a landowner to compensation. Judge Griffin also contended that the Supreme Court clarified in *Lingle* that a taking could not occur where the landowner had refused the unconstitutional condition because no property was given up by a landowner or taken by the government. Judge Griffin also argued that the majority's holding that a taking occurred in this case is also impractical for policy reasons because the two-part *Nollan*/*Dolan* test is "completely arbitrary" and will lead government agencies to avoid granting permits that would require attached conditions. Finally, Judge Griffin opined that

land-use exactions law should not even apply to Koontz's situation because he was never required to choose between complying with the condition and having his permit denied—he had the additional option to decrease the size of his development and avoid the exaction.

SIGNIFICANCE

Koontz extends regulatory takings jurisprudence and the unconstitutional conditions doctrine by finding that a taking may occur where the government conditions permit approval for land development on a financial payment meant to improve government land, even if the proposed development would otherwise be prohibited and the landowner never complies with the condition. After *Koontz*, the question of whether a government condition constitutes a taking is answered by the two-part *Nollan*/*Dolan* test. As both the concurring and dissenting judges noted, this application of the *Nollan*/*Dolan* test exposes government agencies to increased liability when they grant conditional permits for otherwise-prohibited development. To avoid liability, agencies may simply reject applications for permits in situations like Koontz's—where conditions are needed to mitigate the damage to the local community and environment caused by the otherwise-prohibited development—instead of trying to work with the landowner by conditionally approving his or her permit application.

RESEARCH REFERENCES

- 58 Am. Jur. Proof of Facts 3d *Denial of Wetland Permit As Basis for Landowner's Regulatory Taking Claim* § 81 (2008).
- Allan E. Korpela, *Conservation: Validity, Construction, and Application of Enactments Restricting Land Development by Dredging or Filling*, 46 A.L.R.3d 1422 (1972).
- Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 Hastings L.J. 729 (2007).

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