

## **SUMMER 2013 NEWSLETTER**

### **LAND USE, ZONING and REGULATORY TAKING**

**By John F. Roehm III**

#### **United States Supreme Court**

***Koontz v. St. John's River Water Management District*, 570 U.S. \_\_ (2013).**

The government's demand for property from a land-use permit applicant must satisfy the *Nollan/Dolan* requirements even when it denies a permit or when its demand is for money.

Koontz sought permits to develop a portion of his property. Under Florida law, a permit applicant asking to build on wetlands must offset the resulting environmental damage. Koontz offered to deed to the District a conservation easement on nearly three-quarters of his property. The District rejected the proposal but informed Koontz it would approve construction if he reduced the size of the development and deeded to the District a conservation easement on the resulting larger remainder of his property or hired contractors to make improvements to District-owned wetlands several miles away. Koontz, believing the District's demands to be excessive, filed suit under a state statute that provides money damages for agency action that is an "unreasonable exercise of the state's police power constituting a taking without just compensation."

The trial court found that the District's actions were unlawful because they failed to meet the requirements of *Nollan/Dolan*. The District Court of Appeals affirmed, but the Florida Supreme Court reversed, finding that the District denied the application and a demand for money cannot give rise to a claim under *Nollan/Dolan*. The U.S. Supreme Court granted the petition because the Florida Supreme Court's decision rested on a question of federal constitutional law.

The Court's holdings in *Nollan* and *Dolan* allow a governmental entity to condition approval of a permit on the dedication of property to the public as long as there is a "nexus" and "rough proportionality" between the property that the government demands and the social costs of the applicant's proposal. The Court found that the principles that undergird *Nollan* and *Dolan* do not change depending on whether the government approves a permit on the condition the applicant turn over property or denies because the applicant refuses to do so. The unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.

The Court held that the government's demand for property from a land-use permit applicant must satisfy the nexus and rough proportionality requirements in *Nollan* and *Dolan* even when the government denies the permit for refusal to surrender a land interest or when its demand is for money, *i.e.* monetary exactions.

#### **Texas Supreme Court**

***El Dorado Land Company, LP v. City of McKinney*, 395 S.W.2d 789 (Tex. 2013).**

A reversionary interest in a deed is a property interest capable of being taken by condemnation and compensable under the Takings Clause of the Texas Constitution.

El Dorado Land Company sold several acres of land to the City of McKinney for use as a park. El Dorado's special warranty deed provided that the conveyance was "subject to the requirement and restriction that the property shall be used only as a community park." If the City decided not to use the property for that purpose, the deed further granted El Dorado the right to purchase the property. The deed labeled this right an option. Ten years after acquiring the property, the City built a public library on part of the land. The City did not offer to sell the property to El Dorado or otherwise give notice before building a library. Upon learning about the library, El Dorado notified the City that it intended to exercise its option to purchase. The City failed to acknowledge El Dorado's rights under the deed and El Dorado sued for inverse condemnation.

The City filed a plea to the jurisdiction arguing El Dorado's claim did not involve a compensable taking of property but rather a mere breach of contract for which governmental immunity had not been waived. The trial court granted the City's plea and the Court of Appeals affirmed.

El Dorado argued on appeal that its right to purchase the property is a real property interest, in the nature of a reversionary interest – a right of reentry. A right of reentry is a future interest created in the transferor that becomes possessory on the termination of a fee simple subject to a condition subsequent. El Dorado argued that its possessory interest was contingent on the property's use and if the City violated the deed restriction, El Dorado retained the power to terminate the City's estate. The deed referred to this power or right as an option, but it effectively functioned as a power of termination, or as El Dorado labels it, "a right of reentry." El Dorado's claim was that the City took or destroyed its reversionary interest in the property by refusing either to convey the property to them or to condemn their interest. The City argued that El Dorado's option is not a real property interest but a mere contract right and attempted to distinguish the possibility of reverter and the right of reentry.

The Texas Supreme Court held that El Dorado's deed conveyed a defeasible estate ("a fee simple subject to a condition subsequent") to the City with El Dorado retaining a conditional future interest – the power to terminate the City's defeasible estate on the occurrence of a condition subsequent. This right is an estate or interest in land. The Court held that the possibility of reverter and the right of reentry are future interests in property and El Dorado retained a reversionary interest in the property. The Court held that a reversionary/future interest in real property can support a takings claim and is compensable under the Takings Clause of the Texas Constitution.

The Court reversed and remanded the case to the trial court to determine where the City violated its deed restrictions by building a library on part of the land dedicated for use as a community park.

### **Texas Court of Appeals**

***Comunidad Balboa, LLC v. City of Nassau Bay*, 2013 Tex. App. Lexis 7231 (Tex.App. – Houston [14th Dist.], June 13, 2013)**

An ordinance that creates a financial burden on a property owner but does not deny the owner of all economically viable use of the property or totally destroy the value of the property is not a regulatory taking.

Comunidad, a nonprofit corporation, purchased an apartment complex (“Complex”) with the intent to use it for affordable housing for low-income persons. Comunidad was unable to find a developer to sell the Complex. The City amended its fire prevention ordinances to require the installation of sprinkler systems in certain newly built and existing structures. The Complex was the only existing structure subject to the ordinances. The ordinances imposed a two thousand dollar fine for each day of noncompliance. Comunidad alleged it would cost over a million dollars to retrofit the Complex with the required sprinkler system. Comunidad sued the City for inverse condemnation and conspiracy and nuisance.

Comunidad argued that the cost of installing a sprinkler system was prohibitively high and it could not continue to operate the Complex without installing the sprinkler because of the continued ticketing. Comunidad argued that this situation renders the property wholly useless and causes a total destruction of value. The City filed a plea to the jurisdiction which was granted by the trial court.

The Court of Appeals found that Comunidad’s inverse condemnation claim was based on a regulatory taking theory. A total regulatory taking occurs when a restriction denies the property owner all economically viable use of the property or totally destroys the value of the property because the restriction renders the property valueless. Comunidad did not complain that the ordinances left its property with no economic use or value, but rather that the ordinances were too financially burdensome for Comunidad.

The Court held that Comunidad’s inability to afford the required sprinkler system or the continued ticketing has not denied them all economically viable use of the property or totally destroyed the value of the property by rendering the property valueless. The Court held that since Comunidad did not allege that the ordinances left its property with no economic use or value, they had not alleged facts affirmatively demonstrating that the trial court had jurisdiction of this claim for a total regulatory taking. Further, the Court held that Comunidad did not allege an appropriate *Penn Central* taking, because the ordinances were reasonably tempered, provided an extended compliance schedule, and pertained to the significant governmental concern.

The trial court’s judgment was affirmed.