

# 2013 YEAR IN REVIEW

## SIGNIFICANT DECISIONS IN 2013: LAND USE, ZONING and REGULATORY TAKING UPDATE

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### 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**

***Kopplow Dev., Inc. v. City of San Antonio*, 2013 Tex. App. Lexis 178 (Tex.Sup.Ct., March 8, 2013).**

An inverse condemnation claim based on an owner's inability to develop its property as the City's previously approved is not rendered premature because there has been no flooding on the property.

Kopplow purchased undeveloped property, obtained permits (vested rights permits) and filled the portion of the property to the 100-year flood level. Later, the City decided to construct a facility partly on the property that would detain storm water in a significant flood, thus causing the property to be below the 100-year flood level and undevelopable without additional fill. The City further changed its regulatory 100-year flood plain to account for future, upstream development. The City requested an easement from Kopplow for the project but Kopplow refused. It was undisputed that the City's planned facility would cause an increase of storm water on Kopplow's property. The City would permit Kopplow to develop the property if it fills the property to the new level of the 100-year flood.

Kopplow sued the City for taking while it was constructing the facility and the City counterclaimed for condemnation of Kopplow's easement. A jury awarded damages to Kopplow for the taking and damages to the remainder of the property. Both parties appealed.

The Court of Appeals held that the remainder damages were unrecoverable under inverse condemnation because the property had not yet flooded and thus the inverse condemnation claim was premature.

The Supreme Court found that the City knew that the project would inundate part of Kopplow's property before it ever began construction, prompting the City to seek a drainage easement from Kopplow – there was little dispute that the City intended to take Kopplow's property for the project. The Court found that Kopplow's claim was about development, not flooding, so the fact that flooding had not occurred did not render the claim premature. Kopplow purchased the property to develop it, obtained development permits and filled the property to the 100-year flood level to develop it before the City constructed the project that rendered the land undevelopable unless filled again.

The Supreme Court found that Kopplow could no longer develop the property as previously proved and a lack of ripeness does not bar Kopplow's inverse condemnation claim. The damage award to the remainder is recoverable under Kopplow's inverse condemnation claim. The Supreme Court reversed and remanded the case back to the Court of Appeals.

***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 whether the City violated the deed restrictions by building a library on part of the land dedicated for use as a community park.

***Fisher v. Church & Akin, LLC*, 2012 Tex. App. LEXIS 8726 (Court of Appeals of Texas, Seventh District, Amarillo) (October 16, 2012)**

**A governmental entity's withholding of personal property under colorable contract rights does not constitute a takings violation under the Texas Constitution.**

The parties entered into a commercial lease agreement governing the use and operation of a marina. After the initial lease terms expired, the parties renewed their lease. Subsequently, the Plaintiffs became dissatisfied with the Defendant's operation of the marina and gave written notice to terminate the lease and notification to vacate the premises. Defendant was locked out of the premises and filed suit alleging breach of contract, wrongful eviction and tortious interference with business relationships. Plaintiffs filed a plea to the jurisdiction alleging that Defendant's claims were barred by governmental immunity. Defendant amended its pleadings and asserted a new claim, a takings claim under the Texas Constitution. Defendant alleges that personal property owned by the Defendant was being withheld by the Plaintiffs. The trial court denied the Plaintiffs' plea to the jurisdiction.

The Court held that the power to take property for public use extends to every species of property, including personal property. The Court found that when a governmental entity withholds property from an entity in a contract dispute, the governmental entity does not have the requisite intent under constitutional takings jurisdiction. The governmental entity is acting within a color of right under the contract and not under its eminent domain powers. In acting within a color of right to take or withhold property in a contractual situation, the governmental entity is acting akin to a private citizen and not under any sovereign powers. It does not have the intent to take under its eminent domain powers. Its intent is to act within the scope of the contract.

The Court found that the Plaintiffs are withholding Defendant's personal property pursuant to their colorable contract rights under the lease and have no intent to take the property under eminent domain powers. Thus, the Defendant's takings claim fails and the trial court erred in denying Plaintiffs' plea to the jurisdiction on that claim.