LAND USE

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Sidewalks and the Takings Clause

Every first-year law student knows that the Constitution prohibits governmental taking of private property for public use without just compensation. But applying that precept across diverse fact patterns can be an elusive exercise.

IMLA is currently involved as an amicus in a Sixth Circuit case testing the parameters of the Takings Clause. *Knight v. The Metropolitan Government of Nashville and Davidson County,* no. 21-6179 (6th Cir. Dec. 13, 2021) involves a city ordinance that conditions the grant of a residential building permit on the landowner's agreement to build a sidewalk across their lot, or make an in-lieu contribution to Nashville's pedestrian benefit fund, based on the length of their road frontage. A homebuilder constructed a residence and paid the fee, while a second landowner declined to build based on the sidewalk requirement. Both challenged the ordinance on Fifth/Fourteenth Amendment grounds. The district court upheld the measure, and the two appealed.

The Standards: *Knight* reignites the continuing debate about the Takings Clause as applied to real property. Numerous precedents are instructive in the case, including a trilogy of now-familiar Supreme Court decisions:

Nollan v. California Coastal Commission, 483 U.S. 825 (1987), involved a California couple who wanted to expand their oceanfront residence, located on a lot between two public beaches. The state's Coastal Commission required that, as a condition of obtaining the building permit, they would have to grant a lateral easement across their land, so that the public could walk along the tideline between the two public beaches. The state's rationale was that, because the new larger residence would further obscure the public's limited view of the ocean, the waterfront easement would restore viewing opportunities. That rationale did not survive Supreme Court review, which found a taking without just compensation.

In *Dolan v. City of Tigard,* 512 U.S. 374 (1994), the owner of an Oregon electrical supply business sought to expand her store and pave the parking lot. The city planning commission conditioned approval of the project on her dedicating land to an adjacent public greenway and developing a bicycle and pedestrian walkway, contending that the larger structure would create additional stormwater runoff and increase congestion for passers-by. This explanation also failed a challenge at the Supreme Court.

And in *Koontz v. St. Johns River Water Management District,* 570 U.S. 595 (2013), an owner desiring to develop 3.7 acres of his wetland property was informed by the water management district that he must either significantly reduce the scope of his project or pay for improvements to property owned by the district several miles away. Again, the Court found this structure to violate the prohibition on the taking of property without just compensation.

What emerged from that trilogy and their progeny are the parameters of permissible governmental exactions: first, the concession or payment required by the government must bear a substantial nexus to the right sought to be exercised by the landowner; and second, that concession or payment must be proportional to the right sought to be exercised.

Two lower court cases help illustrate the application of the nexus and proportionality tests.

The Tree Ordinance: One such decision involves a Michigan tree ordinance. In *F.P. Development v. Township of Canton,* 16 F.4th 198 (6th Cir. 2021), the township passed an ordinance aimed at forest preservation (Ordinance). The Ordinance required a permit for the removal of larger trees, landmark or historic trees, trees within a forest canopy dripline, and so on. While there were exceptions for agriculture and tree farms, and for occupied lots of fewer than two acres, all others had to apply for a permit. Issuance was conditioned on the property owner replacing trees or paying into Canton's tree fund. Each "landmark" tree required replacement with three trees or payment of $450; "non-landmark" trees required replanting one tree or payment of $300.

F.P. Development owned 62 acres in Canton. In 2016, the company divided the property into two parcels, removing 159 trees (14 of which were "landmark"), without a permit. Under the Ordinance, F.P. would have to replant 187 trees or pay $47,898 into Canton's tree fund. F.P. chose neither. It sued under 42 U.S.C. § 1983, claiming that the Ordinance constituted a facial and as-applied unconstitutional taking, in violation of the Fifth/Fourteenth Amendments. (It also claimed an unreasonable seizure and excessive fines, but these were not determinative).

Upholding the district court, the Sixth

Circuit agreed that the Ordinance violated F.P.'s Fifth Amendment rights. The Circuit looked to *Nollan, Dolan,* and *Koontz* for support. F.P. had not challenged the "essential nexus" between Canton's "legitimate" interest in forest and natural resource preservation and the permit conditions, so the court needed only to address the "rough proportionality" prong of *Nollan* and *Dolan*:

> The "required relationship" does not have to be "exacting," but it cannot be "generalized." It must be "rough[ly] proportional[ ]." Of course, "[n]o precise mathematical calculation is required, but the [township] must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[1]

Here, the Circuit found that the township had failed to demonstrate the required "individualized determination":

> Canton has pointed to nothing indicating, for example, that F.P.'s tree removal effects a certain level of environmental degradation on the surrounding area. Nor does it demonstrate whether it considered that F.P.'s clearing of the clogged ditch on its property or its removal of dead trees may have improved the surrounding environment.... At bottom, Canton's support fails to get it over the bar set by *Nollan and Dolan*.[2]

The Roadway Easements: The F.P. court referenced a contrasting scenario where proportionality had been demonstrated. In *Sparks v. Douglas County,* 127 Wa.2d 901 (Wa. 1994), the landowners sought to short-plat various parcels for development. The County conditioned the grant of plats on dedication of easements for rights of way to allow improvements to adjoining public roadways. The property owners sued on the basis of the Takings Clause.

The County prevailed below but was stopped at the Washington Court of Appeals, which found no evidence that the plaintiffs' development of their properties for residential purposes would create greater burdens on the adjacent roadways. On appeal, the Washington Supreme Court reversed. It found that the County's rationale was supported by particularized statistical evidence: the four short-plat parcels would accommodate up to 32 duplex units, generating up to 304 additional average daily vehicle trips. This satisfied the "rough proportionality" needed to justify wider roadways and related enhancements:

> It is undisputed that the developments would generate increased traffic on adjacent roads which are not adequate for safe access under county standards. The County has, in the process of individualized analysis, satisfied the final step of the *Dolan* test.[3]

Another View--Individualized versus General Application: Although the *Knight* district court discussed the *Nollan/Dolan/Koontz* standards, it saw a distinction common to each of those cases that made them inapposite: in each, the unconstitutional action had been taken by an adjudicative body, responding to a specific landowner scenario. In contrast, the sidewalk ordinance was a legislative enactment, applicable generally to all would-be home builders:

> The *Koontz* majority, however, "emphasized the individualized, property-specific nature of the exaction that falls within *Nollan/Dolan*," as distinct from regulations that "apply generally to parcels of land" and, as such, are akin to "property taxes, user fees, and similar laws and regulations." Although the plaintiffs' concerns are certainly understandable, the legislatively imposed Sidewalk Ordinance and alternative in-lieu fee are more in the nature of a tax or user fee than the "individualized, property-specific" exactions at issue in *Nollan, Dolan,* and *Koontz*.[4]

This distinction, said the court, meant that the nexus/proportionality tests did not apply to the sidewalk ordinance. Instead, *Penn Central* applied, requiring a balancing of (1) the economic impact of the regulation on the plaintiffs; (2) the interference with plaintiffs' investment-backed expectations; and (3) the "character of the governmental action"—whether it was a physical invasion or merely an incidental impact arising from a program "adjusting the benefits and burdens of economic life to promote the common good." Under those criteria, the ordinance was constitutional.

The *Knight* Appeal: On appeal, the Nashville landowners challenge the court's application of the adjudicative versus legislative inquiry, arguing that the precedents validating that distinction have now been reversed. They also argue that if the *Nollan/Dolan/Koontz* nexus and proportionality tests are applied, the sidewalk ordinance will fail.

The municipality can point to a wide range of purposes served directly by the building of sidewalks, including a most obvious benefit—reducing the number of people killed while walking on city streets. Nashville believes that its sidewalk program is not only a vital enhancement to the community, but constitutionally sound. IMLA is pleased to support that position. **ML**

Notes

1. F.P. Development LLC v. Township of Canton, 16 F.4th 198 (6th Cir. 2021).
2. *Id*.
3. Sparks v. Douglas County, 127 Wa.2d 901 (Wa. 1994).
4. Knight v. The Metropolitan Government of Nashville and Davidson County, no. 20-cv-0922 (M.D. Tenn. Nov. 16, 2021).