

The Age of Aquarius

by Erich R. Eiselt, Assistant General Counsel

Several of the Court's recent cases have involved water and wetlands:

Where's the Taking?

Koontz v. St. Johns River Water Mgmt. Dist., 77 So. 3d. 1220 (Fla. 2012), cert. granted (U.S. Oct. 5, 2012) (No. 11-1447) was a case brought by Coy Koontz, a Florida property owner. He sought a permit to dredge wetlands so that he could develop 3.7 acres of his land near Orlando and offered to create a conservation easement on a portion of his property. The St. Johns River Water Management District requested instead that Koontz pay for mitigation, including replacing culverts and repairing canals, on public wetlands several miles away. Koontz refused, and the District declined to allow him to dredge. The Florida Supreme Court upheld the District, finding that there was no taking where Koontz did not perform any off-site mitigation and never received the permit.

The Supreme Court heard arguments in Mr. Koontz's case on January 15, 2013. Much of the discussion centered on the two leading land-use takings precedents, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

In *Nollan*, the California Coastal Commission allowed a small beachfront bungalow to be replaced with a larger three-bedroom home, conditional on the homeowners granting a public easement across their section of beach. The Commission cited a need to protect the public's view of the ocean, to overcome a barrier to beach usage and to reduce congestion. The Supreme Court held that the exaction was unconstitutional. There was no "essential nexus" between the requested beachfront easement and the state's interest in maintaining sightlines from roadway to ocean. And the City's desire to expand public access along the waterfront was not a state interest that would justify imposing a hardship on a private homeowner (as opposed to purchasing the beachfront property with publicly-funded tax dollars).

Dolan involved an Oregon retailer wanting to double the size of her store and pave an adjoining parking lot. The City approved her application, conditioned on her dedicating land for a public greenway abutting a nearby creek to minimize flooding. It also required her to provide a pedestrian and bicycle pathway across her land to relieve traffic congestion. Oregon courts upheld the conditions but the Supreme Court reversed. Applying *Nollan*, the Court saw no "essential nexus" between the land being exacted and the desired benefit; the City had not explained how the public easement furthered its flood control objectives better than an existing requirement that landowners leave at least 15% of their property development-free. *Dolan* voiced another test, requiring "rough proportionality" between the burden caused by the proposed use and the exaction sought. The City had not shown proportionality between the projected traffic caused by plaintiff's store expansion and the required pathway across her property.

Nollan and *Dolan* thus established that when the government conditions the issuance of a permit on the applicant's dedication of land, there must be an "essential nexus" between that land and the permit. There must also be "rough proportionality" between the land exacted and the impact of the requested development.

Koontz tested the *Nollan* and *Dolan* principles against a significantly different factual background. First, Koontz had not given up any of his land or property rights, had not spent any money and had not undertaken any wetlands mitigation; the requested permit had never issued. Second, unlike the California and Oregon precedents, no easement had been requested by St. John; instead, it was asking that Mr. Koontz spend his funds to improve wetlands.

Justice Scalia, who had authored *Nollan*, seemed particularly skeptical of the petitioner's takings argument. He pointed out that the two precedents only applied where the government had actually taken something from the landowner, requiring some form of forfeiture. Where, he asked repeatedly, was the "taking" in this instance, given that Koontz had not spent any monies on mitigation or given up any land or property rights? His skepticism on that point was echoed by Justices Kagan and Sotomayor and permeated much of the oral argument.

Several Justices focused on the fact that Koontz was objecting to a request that he expend money rather than provide an easement. Justice Kagan noted that developers are routinely required to pay fees and spend funds as a condition of obtaining approval for building projects. When she posited that Koontz was proposing that "[I]n the permit context, a State can't say to somebody, you have to pay to perform some service...without it being a taking and without it being subject to Nollan and Dolan analysis," Koontz's counsel replied "Correct." This led Justice Sotomayor to predict a "floodgate" of litigation which would engulf localities merely because they were requesting cash expenditures.

The tenor of the argument seemed inhospitable to Coy Koontz and similarly-situated property owners.

IMLA signed onto an amicus brief filed by the State and Local Legal Center (SLLC) in Koontz. IMLA is an associate member of the SLLC. That brief argued that Nollan and Dolan should not apply to permits conditioned on money because those precedents might then apply to public taxation programs.

Meet The New "Reasonable Observer" Admiralty Standard

In the last issue of *Municipal Lawyer* we profiled the dispute between Fane Lozman, the pugnacious owner of a boxy, two story houseboat and the Riviera Beach, Florida marina which was seeking payment from

Lozman for unpaid electricity bills and dockage fees. The marina sued Lozman in Federal court under admiralty jurisdiction on the basis that Lozman's floating home was a "vessel," which is defined in 1 U.S.C. § 3 as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

Under admiralty law, the marina was able to arrest Lozman's houseboat to protect its interest in being paid.

Lozman disputed that his houseboat was a "vessel." It was indefinitely moored, had no motor or other means of self-propulsion, could not be steered and was not intended to transport people over water. The Eleventh Circuit upheld the district court's finding that Lozman's floating residence was a "vessel" because it was "capable" of movement over water, regardless of whether Lozman had ever used it such manner or intended to in the future. Lozman appealed, and the Supreme Court granted certiorari in February 2012.

On January 15, the Supreme Court reversed, holding that the Eleventh Circuit had adopted an unacceptably generous interpretation of the concept "capable." *Lozman v. City of Riviera Beach*, No. 11-626 (U.S. Jan. 15, 2013)

In a 7-2 opinion penned by Justice Breyer, the Court held that not every floating contraption technically able to be moved through the water should be considered "capable of ... being used as a means of transportation on water" for purposes of admiralty jurisdiction. The opinion pointed to "a wooden washtub, a plastic dishpan, a swimming platform on pontoons" as items that would fulfill a rigid definition of "capable."

The Court moved away from the strict construction employed by the Eleventh Circuit, introducing a "reasonable observer" test. Justice Breyer stated that Lozman's houseboat "does not fall within the statutory phrase unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water."

The fact that Lozman's residence was an ungainly rectangular box that barely floated above the waterline, had no power or steering and was clearly not intended to transport people over water would require the reasonable observer to conclude that it was not a vessel. Other cases involving flat-bottomed craft such as dredging barges were distinguishable; they did in fact carry a crew and were in fact routinely towed from place to place.

The Court pointed out that its result did not undermine the purposes of federal maritime jurisdiction—to provide special attachment provisions lest a vessel avoid liability by sailing away. It was also consistent with laws in states with large houseboat communities such as Washington and California.

Justice Breyer disagreed strongly with the City's argument that his approach was subjective, stating unequivocally that "the Court has considered only objective evidence." While the reasonable observer test was not perfectly precise, "it is workable and consistent and should offer guidance in a large number of borderline cases." Finally, the majority declared that nothing would be gained by remand.

Justice Sotomayor dissented, joined by Justice Kennedy. She agreed that the Eleventh Circuit's test for what was "capable" of overwater transport was too broad. However, the majority's introduction of the "reasonable observer" standard was inherently subjective and would lead to more debate. The dissent pointed out that a wide swathe of erstwhile "vessels" which would be excluded under Justice Breyer's test were already excluded under existing standards and precedents: those which were permanently moored; those which while previously seaworthy had been modified or "mothballed" to the point of inutility; and those "whose physical characteristics and usage history reveal no maritime transport purpose."

Justice Sotomayor was unpersuaded by the majority's conclusion that Lozman's houseboat was not a vessel. It had in fact been towed hundreds of miles on two occasions. And it had much in common with watercraft that had been found to be "vessels" in a long line of precedent. At a minimum, she said, the case should have been remanded for further examination of the houseboat's specifics.

Los Angeles Not Liable for Upstream Pollutants

The Los Angeles County Flood Control District (District) operates a "municipal separate storm sewer system" (MS4) which collects, transports and discharges storm water. As the operator of an MS4 serving more than 100,000 people, the District was required to obtain a National Pollutant Discharge Elimination System permit (Permit). The Permit imposed restrictions on adding pollutants to the water. Water quality monitoring stations downstream from the MS4 in the Los Angeles and San Gabriel rivers revealed the presence of excessive pollutants, including aluminum, cyanide and coliform bacteria. The Natural Resources Defense Counsel (NRDC) and others sued the District, alleging that it was violating the Permit.

The US District Court for the Southern District of California granted summary judgment to the District, based on the fact that there were thousands of potential polluters upstream: there was insufficient evidence to conclude that the District's MS4 had "discharged" the pollutant-laden water.

The Ninth Circuit reversed in relevant part. It interpreted the facts more literally than the court below, finding that, because the polluted water "flowed out of the concrete channels" under the District's control, the District was liable for that discharge. The District appealed.

The Supreme Court reversed the Ninth Circuit, holding that flow from an improved portion of a navigable waterway into an unimproved portion of the same waterway does not constitute the "discharge of a pollutant" within the meaning of the Clean Water Act (CWA). The Ninth Circuit's decision was at odds with the Supreme Court's decision in *Fla. Water Management Dist. v. Miccosukee Tribe*, 541 U. S. 95 (2004), which had held that pumping polluted water from one part of a water body into another part of the same water body was not a discharge of pollutants under the CWA.

In a succinct unanimous opinion authored by Justice Ginsburg, the Court found that the material facts in *Los Angeles* were analogous to those in *Miccosukee*. If no discharge occurred in *Miccosukee* when polluted water was removed from one water body and transferred to another, then the mere flow of water from an improved portion of a waterway to an

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nal damages, usually this will be insufficient to support an award of attorney's fees under 42 U.S.C. § 1988.

> Where recovery of private damages is the purpose of ... civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." *Riverside v. Rivera*, 477 U.S. 561, 585 (1986) (Powell, J., concurring in judgment). Such a comparison promotes the court's "central" responsibility to "make the assessment of what is a reasonable fee under the circumstances of the case." *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989). Having considered the amount and nature of damages awarded, the court may lawfully award low fees or no fees without reciting the 12 factors bearing on reasonableness, see *Hensley*, 461 U.S., at 430, n. 3, or multiplying "the number of hours reasonably expended ... by a reasonable hourly rate," id., at 433.[7]

But Watch Out. *Farrar* leaves open the possibility that in some instances an award of nominal damages *might* support an attorney's fee award under 42 U.S.C. § 1988. Possible examples of such situations could include a successful suit for injunctive relief in which the plaintiff obtained only nominal damages or a suit for a small amount of damages, so that a one-dollar award could be characterized as a "prevailing."[8]

In addition, while courts hesitate to award punitive damages in civil rights cases against governments or public officials, they have done so in egregious cases.[9] When that happens, the proper measure of compensatory damages often fades into relative unimportance.

Notes

1. One example, among many, of what I believe to be an incorrect approach to damages calculation that gives property owners a windfall is *Superior Savings Association v. City of Cleveland*, 501 F. Supp. 1244, 1250 (N.D. Ohio 1980) (mortgage holder gets difference between value of collateral before and after demolition).
2. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).
3. *Gilbert v. Homar*, 520 U.S. 924, 930 (1997).
4. *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983).
5. *Carey v. Piphus*, 435 U.S. 247, 260 (1978) (citations and footnotes omitted).
6. *See* text accompanying n. 5.
7. *Farrar v. Hobby*, 506 U.S. 103, at 114-15.
8. *See Boraks v. Wilson*, 383 F. Supp. 195, 197 (D.D.C. 1974), for how a court might handle a jurisdictional minimum requirement in the context of a civil rights claim for a small amount of compensatory damages. For a recent in-depth discussion of calculating damages in civil rights cases, *see generally,* Michael L. Wells, *Civil Recourse, Damages-as-redress, And Constitutional Torts*, 46 Ga. L. Rev. 1003 (2012).
9. *See Smith v. Wade*, 461 U.S. 30 (1983). ML

Code Enforcement *Cont'd from page 20*

ditions, or alterations cost prohibitive or otherwise impossible to meet.

Noting the possible difficulties in dealing with historic preservation above, the goal of code enforcement and historic preservation are the same and are positive ones for any community. They both seek compliance and the continued viability of our structures and neighborhoods through the proper maintenance and care for properties and structures. Therefore, both are important to the enhancement and sustainability of our communities. What we see as traditional code enforcement and historic preservation can, and should, work together. While some municipalities may think that historic preservation doesn't fit their community, I think every community should take a good look and truly determine if any particular area is worthy of keeping a level of historic significance to that area. While the design standards add an additional layer of compliance to code enforcement, preserving a community's history is a positive goal and could lead to other positive impacts, such as tourism or simply other owners making improvements in order to keep their property looking as good as their neighbor's.

I didn't appreciate history until I was well out of college. And, our current younger generation seems to be lost in their i-pods, i-phones, x-boxes, facebook, and twitter. While they may not appreciate it now, we should always consider preserving history for future generations. ML

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our capabilities and our capacities and to be mindful that there are still real world consequences to our actions. The books might be virtual, the messages might be instant, but the impact on our cities and ourselves as people changes things in a real way and those changes play out over time.

It is an old story being retold in a new and different context, I suppose. Paul Bunyan was replaced by the chain saw, John Henry lost out to the steam hammer, and Casey Jones pushed the locomotive a little too hard.

While more information can be helpful, it may not lead us to better results or more long-lasting solutions. While the forest is bigger, the path is no wider or straighter than it ever was. It is still people who help us find our way and it is still people that we serve. ML

Supreme Court *Cont'd from page 27*

unimproved portion of the same waterway did not constitute a discharge of pollutants under the CWA. Furthermore, the Ninth Circuit's result did not square with the definitions in the CWA itself, which defines "discharge of pollutant" to mean "any *addition* of any pollutant." The case was reversed and remanded. *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, No. 11-460 (Jan. 08, 2013).

IMLA participated in an amicus brief in support of petitioner Los Angeles County Flood Control District. ML

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