

International Municipal Lawyers Association
2013 Mid-Year Seminar
Washington, D.C.

Work Session II - What's New in Takings Law and Storm Water Regulation: *Arkansas Game & Fish Commission v. U.S., Koontz v. St. Johns River Water Management District,* and *Virginia Department of Transportation v. EPA*.

A "Worms-Eye" View of *Koontz v. St. Johns River Water Management District*: The Continuing Importance of Contesting the Facts in Takings Litigation

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At the heart of almost every Takings Clause case is the question of whether landowners have an absolute right to use their property as they see fit, or whether the government may impose limits designed to mitigate the costs of development on the community at large. That's the question at the center of *Koontz v. St. Johns River Water Management District* – the most important takings case to be decided by the Roberts Court to date. In particular, *Koontz* will determine under what circumstances courts may use the Takings Clause to second-guess the terms offered by government agencies during the course of their land-use negotiations with private parties.

This article proceeds in three parts. Part I discusses the important role that each side's account of the facts often plays in takings litigation. In particular, it focuses on how the property rights movement has used sympathetic clients and favorable facts to advance its cause in previous cases. From there, it notes that a similar strategy may be at work in *Koontz*, where, at least at first blush, Supreme Court precedent would seem to cut against Koontz's legal claim.

Part II then turns to how the St. Johns River Water Management District and its *amici* used their briefs to contest Koontz's account of the facts – stressing, in particular, that the District acted reasonably under well-established state guidelines when it ultimately decided to reject Koontz's permit application after a period of negotiations and a hearing. Finally, Part III presents some early signs that the District's efforts in *Koontz* may have paid off, as Justices from across the ideological spectrum expressed skepticism about Koontz's takings claim at oral argument.

Needless to say, it's perilous to attempt to predict the outcome of Supreme Court cases based on the questions asked by the Justices at oral argument. Nevertheless, recent history suggests that getting key Justices to buy into one's account of the facts is a necessary – but not sufficient – condition for success in contentious, well-lawyered takings litigation.

I. The Recipe for the Property Rights Movement's Early Success in Takings Litigation: Using Sympathetic Clients and Favorable Facts to Frame Each Case

For years, the property rights movement won a series of stunning victories in high-stakes takings litigation before the Supreme Court – in *Nollan v. California Coastal Commission*,[1] in *Dolan v. City of Tigard*,[2] in *Lucas v. South Carolina Coastal Council*,[3] among others. In many of these cases, the movement's recipe for success was to choose sympathetic clients and provide the Court with a compelling account of the facts, while simultaneously pushing the Court to widen the reach of the Takings Clause.

Take *Nollan*, for instance. In that landmark case, a couple sought permission to replace a small oceanfront bungalow with a much larger home. While the government agency granted them their permit, it included a condition requiring the Nollans to dedicate a public easement along the beach at the edge of their property. In getting the Court's conservatives to adopt a new

[1] 483 U.S. 825 (1987).
[2] 512 U.S. 374 (1994).
[3] 505 U.S. 1003 (1992).

test that required closer scrutiny of permit conditions, the Pacific Legal Foundation (PLF) – the conservative public interest organization representing the Nollans in the case – leaned heavily on the powerful facts underlying the Nollans's legal claim.

Beginning with their "Questions Presented" and continuing throughout their brief, PLF stressed three key points: 1) the Nollans were an ordinary couple from Anytown, U.S.A. (*not* a big developer); 2) the property at issue was a private residence (*not* commercial real estate or some other business interest); and 3) the condition involved was especially onerous (*not* a mere inconvenience or minor financial hit).

For instance, PLF stressed time and again that the property at issue was a "small, residential lot,"[4] with the Nollans simply seeking permission to "replace [an] old, dilapidated house with a moderate-size, new home on the same site" – one that was to serve as "their personal family residence."[5] And, far from a mere inconvenience or minor expense, the permit condition at issue was framed as "the most severe form of deprivation short of formal expropriation," a condition that "required [the Nollans] to dedicate a public right-of-way across a large portion [one-third] of their property to allow repeated physical invasions of the yard of their personal residence by the public at large."[6] In fact, one of PLF's lawyers would return to this theme again at oral argument in a rhetorically effective flourish, noting,

> [P]eople can walk along just a few feet from the Nollans's house. They can see over the seawall directly into their living room. They can reach over the seawall into the very small area that is left between their house [and the seawall]. Now, as . . . parents of small children, that concerns them.[7]

Finally, PLF contrasted the Nollans, an ordinary couple, with the California Coastal Commission, a heartless, oppressive government agency:

> The Nollans are recognized only as applicants in the state permit process – as something being processed through the bureaucratic mill. There is no recognition of their individual interest in retaining full enjoyment of their property and not allowing the public at large open access to the yard of their personal residence. The burdens suffered by the Nollans were irrelevant to the considerations of the government agency which assumed control over their lives. The Nollans were characterized as being "one more brick in the wall" interfering with the state's desire to enhance the use of the coastal area by the people of California.[8]

In the end, the Nollans prevailed, and the Court constructed a new test that required closer scrutiny of permit conditions. Now, PLF is trying to work similar magic in *Koontz*; however,

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[4] Brief of Petitioner at 13, *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (No. 86-133).
[5] *Id.* at 4.
[6] *Id.* at 13.
[7] Transcript of Oral Argument at 5, *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (No. 86-133).
[8] Brief of Petitioner at 30, *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (No. 86-133).

before turning to the specifics of PLF's legal strategy there, first, a little background information about the case itself.

Coy Koontz, Sr.,[9] was a developer who sought a permit to dredge and fill more than three acres of wetlands located within a special protected zone around a river in Florida. Because Koontz's proposed development would destroy protected wetlands, he was required under state law to propose mitigation measures that would offset the environmental harms associated with his proposed development. Following a period of negotiations, Koontz and the District failed to agree upon a set of mitigation measures that satisfied state guidelines. From there, the District denied Koontz's permit application, and Koontz sued the District, alleging a regulatory taking.

The main problem with Koontz's legal claim is that the District took absolutely nothing from him. After the permit denial, he was left with the same wetlands property he had before starting his permit application. Moreover, the permit process itself revealed that the District was more than willing to let Koontz make some use of his land, making it impossible for him to show that the District's permit denial constituted the "functional equivalent" of an actual expropriation of property, as required by the Court's recent (and unanimous) decision in *Lingle v. Chevron*.[10]

To avoid *Lingle*'s limits, PLF reframed Koontz's claim as a challenge to the mitigation measures suggested by the District during the course of the parties' negotiations, a move designed to allow Koontz to take advantage of the specialized tests developed by the Supreme Court in *Nollan* and its companion case, *Dolan*. Decided at the zenith of a significant expansion of regulatory takings law by the Rehnquist Court, *Nollan* and *Dolan* require a government to demonstrate that a dedication of land demanded in return for a permit bears a "substantial nexus" and "rough proportionality" to the costs imposed upon the community by a given development project.

While *Nollan* and *Dolan* both involved dedications of land, PLF argues in *Koontz* for an expansion of those tests to cover additional conditions, including those merely suggested by the government during the process of permit negotiations – in other words, conditions that were

[9] Because Coy Koontz, Sr., died during the course of the litigation, his claim is being pursued by his son, Coy Koontz, Jr.

[10] 544 U.S. 528, 537 (2005). While the Supreme Court has long allowed takings challenges when government regulation – as Justice Oliver Wendell Holmes famously wrote – "goes too far," the Court struggled for decades with how to apply Holmes's mysterious test. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). However, in one of her last – and finest – opinions for the Court, Justice Sandra Day O'Connor offered a reasonable solution to this puzzle in *Lingle*. There, writing for a unanimous Court, Justice O'Connor explained that regulations "go too far" only when their impact on the property owner is "functionally equivalent" to the "classic taking in which government directly appropriates private property." 544 U.S. at 539. With that, *Lingle* imposed doctrinal coherence upon a previously messy corner of constitutional law – first, by embracing functional equivalency as the "common touchstone" for all takings tests, and, second, by jettisoning prior Court statements suggesting that a taking could be found whenever a government regulation did not "substantially advance a legitimate state interest." *Id.* at 540, 545.

merely *proposed*, but never actually *imposed* by the government. Of course, even with this attempt to reframe the law, *Lingle* still stands squarely in PLF's path.

As the *Lingle* Court itself recognized, *Nollan* and *Dolan* were both rooted, at least in part, in the very same "substantially advance" test that the *Lingle* Court jettisoned[11] – a test that focused on the *reasonableness* of a government action, not that action's *impact* on a property owner.[12] As a result, the *Lingle* Court specifically addressed the continued validity of *Nollan* and *Dolan* and limited their application to permit conditions that were *per se* takings – meaning that the challenged condition must unquestionably be a taking of property if unilaterally imposed outside of the permitting context. While dedications of land (as in *Nollan* and *Dolan*) were paradigmatic examples of *per se* takings, none of the challenged conditions in *Koontz* – which focused mainly on work that could have been performed on-site to improve Koontz's remaining wetlands or off-site to improve the functioning of other wetlands in the same river basin – were *per se* takings.

Furthermore, PLF's theory raises serious practical concerns, as well. Should Koontz prevail, any failed negotiation could serve as the basis of a constitutional challenge based on little more than the informal offers of a government agency. For instance, in *Koontz* itself, the District offered the landowner a long list of potential mitigation options that would have complied with state guidelines – some calling for on-site mitigation and others for off-site mitigation. Under such circumstances, it's unclear which conditions a court should scrutinize under *Nollan* and *Dolan* – all conditions proposed during the parties' negotiations, only those on the table when talks break down, or all conceivable conditions that could have been suggested by either party? No matter the answer, extending *Nollan* and *Dolan* to cover such situations would be problematic (and cumbersome) for both public officials and judges.

In the end, to counteract these serious legal (and practical) problems, PLF offers a gripping account of the facts, framing *Koontz* as a classic David-versus-Goliath case – with a small landowner engaged in an eighteen-year struggle with a powerful (and power-hungry) state agency. Stripped down to its essence, PLF's theory of the case boils down to this: Koontz was treated *so* unfairly that there *must* be a constitutional violation. And, concededly, if taken at face value, PLF's factual account is, indeed, quite powerful. In short, PLF claims that, in order to receive a development permit, the District "demanded that [Koontz] give up 75% of his land to the State *and* perform costly off-site improvements to government-owned property"[13] – an oppressive demand that ignited an "18-year old legal battle."[14]

However, as demonstrated in the District's brief, as well as those of its *amici*, Koontz's account has more smoke to it than substance.

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[11] *Id.* at 545.

[12] Therefore, as the *Lingle Court* reasoned, the "substantially advance" test did not help to identify those regulations whose *effects* were "functionally comparable to government appropriation or invasion of private property." *Id.* at 542.

[13] Brief of Petitioner at 2, *Koontz v. St. Johns River Water Mgmt. Dist.* (No. 11-1447).

[14] *Id.* at 3.

II. Learning from the Property Rights Movement, and Developing Winning Litigation Strategies

Over the last decade, local governments have finally caught on to the property rights movement's successful litigation strategy in takings cases. And, beginning (most prominently) with *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[15] they started to aggressively push back against attempts by property rights advocates to own the facts in any given takings case. For instance, in *Tahoe-Sierra* itself, then-super-lawyer John Roberts began his brief on behalf of a government agency with the following zinger: "Because petitioners and their *amici* take such liberties with it, we begin by quoting the Question Presented . . . ."[16] Roberts then went on to eviscerate the other side's characterization of both the facts and the law, en route to a significant Supreme Court victory that effectively stalled the property rights movement.

As noted in Part I, the St. Johns River Water Management District and its *amici* have followed a similar strategy in *Koontz*, aggressively pushing back against PLF's questionable account of both the facts and the law. With that strategy in mind, this Part uses examples from the *amicus* brief filed by Constitutional Accountability Center (on behalf of the American Planning Association, the City of New York, and the National Trust for Historic Preservation) to show some of the ways in which our side pushed back against PLF's most tenuous claims.

First, in its opening brief in *Koontz*, PLF accused the District of carrying out a "plan of extortion," requiring Koontz to give up "his land *and* his money" in exchange for a development permit.[17] The truth is that, from the beginning of its negotiations with Koontz, the District bent over backwards to find a way to allow his project to go forward – with *Koontz* cutting off negotiations before the parties could settle upon a single, concrete mitigation plan. Far from carrying out a "plan of extortion," the District's discretion was guided and constrained throughout by state law – guidelines and constraints rooted in scientific best practices and intended to respond to decades of unchecked wetlands destruction. In the end, under state law, it was always *Koontz*'s burden, *not* the District's, to come up with mitigation options that offset any damage to protected wetlands caused by his proposed development.

Second, PLF claimed that the District threatened to "hold [Koontz's] property hostage"[18] unless he "agreed to finance improvements to [the District's] lands."[19] The truth is that the District never issued any such threat. Rather, the District provided Koontz with a long (and open-ended) list of options for both satisfying state guidelines and allowing his project to go forward, some of which included measures that could have been carried out entirely on-site. For instance, Koontz could have reduced the size of his development project or performed on-site remediation to improve the functioning of his own wetlands. Furthermore, the District was open

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[15] 535 U.S. 302 (2002).
[16] Brief of Petitioner at 1, *Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l Planning Agency* (No. 00-1167).
[17] Brief of Petitioner at 23, *Koontz v. St. Johns River Water Mgmt. Dist.* (No. 11-1447).
[18] *Id.* at 7.
[19] *Id.* at 25.

to other proposals brought to the table by Koontz himself. Therefore, the District didn't "require[]"[20] Koontz to perform off-site mitigation, as PLF alleged. It only required that Koontz perform enough mitigation – whether on-site *or* off-site – to offset the environmental harms associated with his development proposal and, therefore, comply with state guidelines.

Even the condition explicitly challenged by Koontz, requiring him to carry out off-site improvements to wetlands within the same river basin, was not nearly as onerous (or nefarious) as PLF claimed. For instance, while the details of the off-site mitigation options were never fully settled by the parties, a District staff member testified at Koontz's hearing that the related costs "would be very minimal." And, later, at trial, a District scientist testified that the District was simply asking Koontz to install one culvert and remove another, which would restore and enhance 50 acres off-site. In fact, Koontz's own engineer described this proposal as "excellent," and testified that Koontz himself understood that the related costs of the off-site improvement "would be minimal." Finally, even if Koontz had agreed to carry out such improvements, the District didn't require him to do so on District lands – as PLF claimed. Instead, he was free to improve other wetlands within the same river basin – whether on District-owned lands or not.

Third, PLF alleged that the District "demanded" that Koontz "give up 75% of his land."[21] However, the District "demanded" no such thing. The truth is that Koontz himself agreed to this condition and offered it as mitigation for the environmental harms associated with his development proposal. In addition, the condition itself didn't require him to "give up . . . his land."[22] Instead, it required him to place his undeveloped land – which consisted mostly of wetlands already protected by state law – into a conservation easement. Under this arrangement, Koontz would still both own and control the land – just as he had before – and it would not affect his right to exclude others, except for possible periodic visits by District staff to ensure compliance.

Fourth, PLF suggested that Koontz's proposal to place his remaining wetlands into a conservation easement should have been "more than enough" to satisfy his obligations under Florida law.[23] However, Koontz's proposal – which included only a conservation easement – would have resulted in a net loss of wetlands within the river basin, as he was seeking to destroy 3.4 acres of protected wetlands in exchange for agreeing not to develop 11 additional acres of already-protected wetlands – a net loss of 3.4 acres for the State. Furthermore, Koontz's proposal would have yielded a 3:1 ratio of preserved-to-destroyed wetlands, well below the minimum 10:1 ratio suggested by state guidelines. In the end, proposals for conservation easements are a much less desirable form of mitigation (from the State's perspective) than other mitigation options, such as wetlands creation, restoration, or enhancement, which actually add to the acres of viable, protected wetlands statewide.

Fifth, PLF argued that if the Court rejects its legal arguments in *Koontz*, the District (and similarly situated government agencies) would have "unbridled power to confiscate property in

[20] *Id.* at 5.
[21] *Id.* at 2.
[22] *Id.*
[23] *Id.* at 5.

the permit process"[24] and, as a result, "the potential for government abuse . . . would be limitless."[25] The truth is that, even if the Court rejects PLF's legal arguments, Koontz – and other similarly situated landowners – would still have several other potential claims available, including claims under the Takings Clause, the Fourteenth Amendment, and state law. The problem for Koontz is that the factual record in his case doesn't support relief under any of those theories.

In the end, following the powerful narrative offered by PLF in its opening brief, the District and its *amici* effectively pushed back against some of its boldest assertions. While this alone may not be enough to win the case, leaving PLF's narrative unchallenged would have almost certainly resulted in defeat.

III. Reading the Tea Leaves: Oral Argument in *Koontz*

Early signs are that these efforts by the District and its *amici* in *Koontz* may pay dividends.[26] Although it's dangerous to make a firm prediction about how a case will turn out based upon the questions asked at oral argument, a majority of the Court – from Justices Ginsburg and Sotomayor on the left to Justice Scalia on the right – expressed some level of skepticism about Koontz's takings claim.

Interestingly, from the very outset of the *Koontz* argument, the Justices focused on the differing factual accounts offered by PLF and the District. Take the following questions asked of Koontz's counsel, for instance:

> JUSTICE GINSBURG: If you look at the record, the record is very clear that . . . the District didn't come back and say, "take it or leave it" . . . . There was . . . at least half a dozen, maybe more, [ways] that the District said . . . that you could sufficiently offset the

[24] *Id.* at 12.
[25] *Id.* at 25.
[26] But don't take my word for it. Here's how Lyle Denniston summarized the *Koontz* argument for *SCOTUSBlog*:

> Something really big, and potentially decisive, happened to a major new property rights case between the time the Supreme Court took it on, and [the] argument by lawyers before the Court. The very idea that an unconstitutional "taking" had occurred to an owner of a small plot of ground in Florida seemed near to vanishing, propelled toward oblivion by a spreading fear on the bench that maybe the entire regulatory apparatus of government might be at risk. Credit lawyers for a state agency and the federal government for deepening this anxiety.

Argument recap: An ever-shrinking "takings" claim, SCOTUSblog (Jan. 15, 2013, 4:40 PM), http://www.scotusblog.com/2013/01/argument-recap-an-ever-shrinking-takings-claim/.

adverse impact. And some of them had nothing to do with improving the government's own land.[27]

JUSTICE SOTOMAYOR: From the record it's very clear that a conservation [easement] offer is not considered mitigation because there's still a net loss of wetlands. The policy is abundantly clear, stated, and undisputed. . . . So given that policy, why are we even in this case?[28]

JUSTICE KAGAN: Where is the taking?[29]

Furthermore, near the end of the argument, Justice Sotomayor reminded the Court of the practical impact of a ruling in favor Koontz, echoing another major theme developed in both the District's brief and those of its *amici*: "I see an enormous floodgate here, and one in which we are sending a signal that perhaps states should be more quiet rather than more engaging. They should say no, because anything they offer is going to be seen . . . potentially as an unconstitutional taking."[30]

Of course, these views weren't unanimous. Koontz received some help from Chief Justice Roberts, for instance, who asked the District's counsel, "Is there anything in the federal Constitution that limits the conditions that you can demand? . . . Can you ask for the moon?"[31] In addition, the Chief Justice pushed the District's counsel on a hypothetical involving a single property owner asked to give money for a municipal football stadium in exchange for a development permit – therefore, testing the possible limits on an agency's discretion in an especially egregious case. Finally, Justice Alito pushed the District's counsel on the doctrinal effects of a District win in *Koontz*, asking what would be left of *Nollan* and *Dolan* as a practical limit on a government agency's discretion in such a circumstance.

However, in the end, even Justice Scalia expressed skepticism about Koontz's takings claim. Scalia, who wrote the majority opinion in *Nollan*, explained to Koontz's counsel that both *Nollan* and *Dolan* involved situations in which the government's conditions actually took something away from the landowner – in other words, a permit was granted and something was actually given up. Scalia suggested, however, that when the District denied Koontz's permit – which it was within its power to do – no property was taken. Indeed, Scalia repeatedly asking Koontz's counsel, "What has been taken?,"[32] adding later, "I can't see where there's a taking here. Nothing's been taken."[33]

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[27] Transcript of Oral Argument at 7-8, *Koontz v. St. Johns River Water Mgmt. Dist.* (No. 11-1447).
[28] *Id.* at 6-7.
[29] *Id.* at 11.
[30] *Id.* at 56-57.
[31] *Id.* at 28, 29.
[32] *Id.* at 18.
[33] *Id*. at 25.

In the end, even a powerful counter-narrative alone won't ensure a District victory in *Koontz*. Nevertheless, such a counter-narrative remains a necessary predicate for a favorable ruling in any closely contested takings case – particularly when a government agency faces a conservative court (like the Roberts Court), a sympathetic plaintiff (like Coy Koontz), and talented property rights advocates (like the lawyers at the Pacific Legal Foundation).