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FEATURED CASE:

TAKINGS: Nashville Permit Ordinance Requiring Dedication of Right-of-Way for Sidewalk Must be Examined Under *Nollan*

***Knight v. Metro*, no 21-6179 (6th Cir. May 10, 2023).**

The Sixth Circuit set out to resolve a split in the lower courts over the appropriate doctrinal framework to be applied in a takings case. The City unsuccessfully argued that the *Nollan* unconstitutional-conditions test should apply exclusively to administrative discretionary requirements and should not be extended to legislative requirements imposed on all applicants.

Facts/Background: The "Sidewalk Ordinance" passed by the Metropolitan Government of Nashville and Davidson County ("Metro") requires landowners applying for building permits to comply with sidewalk-related conditions. These conditions are applicable to owners who intend to renovate or construct a new single-family house in a designated area. Owners are required to construct a sidewalk in the front of the structure as a requirement of the permit. In cases where constructing a sidewalk is infeasible, owners are required to pay a fee into a sidewalk fund to construct a sidewalk elsewhere in the city. In either case, whether an owner constructs a sidewalk or pays a fee, the ordinance also *requires* landowners to dedicate a right-of-way or a public pedestrian easement across their property to allow the public to use the sidewalk, whether it is built immediately or in the future. Metro cited a comprehensive list of beneficial purposes of the ordinance, encompassing various factors such as traffic control, pedestrian safety, population growth, increased property value, and better access to services for underprivileged communities, among others.

Two individual plaintiffs sued Metro, alleging that the sidewalk ordinance violated the Fifth Amendment's Takings Clause. Both plaintiffs sought waivers for constructing a new sidewalk on their property and waivers for the in-lieu contribution. One plaintiff opted to pay the in-lieu fee, while the other plaintiff allowed his permit to expire, deliberately choosing not to fulfill the fee requirement.

Appeal: Applying *Penn Central,* the district court granted summary judgment in favor of Metro. On appeal, the Sixth Circuit reversed and remanded the question of appropriate remedy to the district

court. Because Metro waived any argument that it can satisfy the *Nollan* unconstitutional-conditions test, the court did not address the issue.

Issue: Whether the Sidewalk Ordinance should be evaluated under *Penn Central's* balancing test that governs direct restrictions on the use of property or evaluated under *Nollan's* unconstitutional-conditions test that governs conditions on building permits.

Ruling: The Sidewalk Ordinance is an automatic taking and must be evaluated under *Nollan's* "nexus and rough" proportionality test.

Reasoning: The decision highlights that there are no overarching general principles that govern the imposition of conditions, as there is no specific "Unconstitutional Conditions Clause" in the Constitution. Consequently, courts are required to examine a particular constitutional right to determine the applicable rules. In this case, the *Nollan* decision established a distinct framework for evaluating unconstitutional conditions in the context of takings. This framework specifically addresses the concept of an "exaction," which refers to a demand or requirement imposed by the government as a condition for granting a permit or approval.

The requirement to convey an easement was a major deciding factor when determining which legal doctrine to apply. Under the *Nollan* line of cases, the first step in determining if the condition is unconstitutional is to ask whether the condition would qualify as a taking if the government had directly required it. In this case, the court determined that a conveyance of an easement outright rather than as a condition of a permit would squarely place this in the court's automatic-taking rule framework, not under *Penn Central's* balancing test. The court notes an important point, that not all takings are unconstitutional. The court references several sidewalk ordinances that qualify as a taking under this framework, but ultimately are deemed constitutional under the *Nollan* line of cases.

The court explains that Metro cannot evade the unconstitutional-conditions test established under *Nollan* due to procedural reasons. Despite the fact that one of the plaintiffs refused to comply with the Metro's conditions and chose not to develop his property, *Nollan* applies whenever the government gave a landowner the choice between just compensation and a building permit. The fact that the Ordinance allowed the plaintiffs to pay fees instead of building sidewalks is also irrelevant, as these fees trigger *Nollan's* test because they resemble other types of land-use exactions. It doesn't matter if Metro did not explicitly require an easement if the landowners chose to pay the in-lieu fees because *Nollan* still applies since Metro would have necessarily required the easement if the landowners had built sidewalks.

The Court classified Metro's main argument as part of a broader judicial debate, as many state courts have refused to apply the *Nollan* test to legislatively compelled permit conditions, while others have rejected this distinction and applied *Nollan* to all permit conditions. Few federal circuit courts have addressed this debate, likely because the Supreme Court recently overruled its precedent requiring takings claimants to exhaust their claims in state court.

The Court also mentions that if Metro had only required the plaintiffs to build sidewalks on its existing easement as a permit condition, the question of whether the command to pay for improvements falls under the balancing test of *Penn Central* or something else would arise, but it remains unanswered as the case involves the dedication of an easement, which triggers the automatic-taking rule.

Knight v. Metro

SHORT SUMMARIES:

4th Circuit – Excessive Force, Qualified Immunity, Monell Liability

In another case with a tragic result, we see a 4th Circuit panel reverse a lower court's grant of qualified immunity to an officer in the shooting death of an armed man. The case, however, offers thoughtful analysis regarding the potential for Monell liability following a CRB decision. The facts basically involve a call to police of a man threatening patrons with a gun. The police respond, do not see the weapon (but one officer believes it to be in the suspect's hands as he crouches behind a car) and yell at him to show his hands and then (despite his failure to show hands or otherwise communicate with them; they yell for him to drop his weapon. Turns out his weapon was in his jacket and when he reached to remove the handgun from his jacket, he was shot by the officer who thought the weapon was in his hands. The City was also sued under Monell and apparently the post shooting investigation and CRB hearing results were admitted into evidence in an effort to argue that the city had Monell liability. The CRB had reversed a finding by the internal investigation and of the chief. That CRB finding was reversed by the city manager and as the argument went the manager's doing so constituted ratification of the unconstitutional conduct by the officers which subjected the city to liability. The panel concluded that Monell doesn't allow for *respondeat superior* liability and therefore its liability must rest with its policies or procedures that allowed for the unconstitutional acts. Claiming that *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988) supported a theory that a city could be held liable by ratifying unconstitutional conduct of subordinates, the Plaintiff asserted that the City Manager's decision amounted to ratification creating city liability. The court would have none of that and, I think, in a well-reasoned conclusion determined that for *Monell* or *Prapotnik* to apply, the policy maker must take an action that ratifies unconstitutional conduct that could be corrected if not ratified. To my mind, this means that a CRB analysis of an event ought not to have materiality in a case as it is clearly post hoc and should be excluded. Great job by the Charlotte City Attorney's legal team despite the result as to the officer.

Franklin v. City of Charlotte

4th Circuit – K-9 – Excessive Force

Police get a call about a potentially armed and suicidal man. Responding, the police cannot find him. They call in the K-9 and the dog quickly finds the scent and discovers the man lying in a shallow ditch on his own property. The police attempt to get the man to respond to their commands and bring him into control, but without success. After some initial resistance the man rises from the ground and he and the officers exchange words. Among the words exchanged, the man tells the officers to get off his property, demands that they show him a search warrant and lets them know that he's going to sue them (apparently, he was quite prescient on this last issue). When he refused to respond to commands that would allow the officers to confirm he was unarmed, the officers told him he'd "get bit" and eventually he did get bit. Once bitten, he was placed in custody and eventually sued as promised. The lower court refused a request for immunity, but the 4th Circuit panel reversed finding that the officers understood that he was armed, couldn't determine if he had a gun, believed he was dangerous to himself and others and under Virginia law could make a mental health seizure. Long story short the panel held that while the body cam footage told a part of the story, it didn't include the additional information the officers learned when they were dispatched and spoke with the man's wife who authorized the police to enter the property.

Putman vs. Harris

6th Circuit – Tax Sales – Takings – Statute of Limitations

We all know what SOL means and in this case the panel found that the Plaintiff still had some luck. Despite a host of opportunities to resolve the tax debt the property owner failed and the County under Ohio law took the opportunity to take title to the property rather than sell it. Had the County sold the property, the owner would have been entitled to any proceeds over and above the tax debt, but under the option where the County takes title, the property becomes the County's free and clear of all liens and debts. Suit was filed and the issues of violation of the Takings Clause were not resolved due to the lower court's decision to apply the Statute of Limitations. All parties agreed to the period of limitations but disagreed as to its starting point. The panel found the period started when the owner lost all right to redemption, not before. The case was remanded. It looks as though the Supreme Court will be overturning law that has existed since the Middle Ages that offered counties a superior right to title when taxes were not paid. The case was argued Wednesday (April 26, 2023) in the Supreme Court under the title Tyler v. Hennepin County (22-166). Reporting on the case can be found at **Supreme Court tilts toward woman with seized condo in property rights case: NPR**. IMLA participated as an Amicus supporting Hennepin County.

Beaver Street Investments vs Summit County, OH

6th Circuit – First Amendment – Retaliation – Monell Liability

Having come from a smallish county, this case reminds me of those days. A tow company operator who was also the fire chief of an all-volunteer fire department and whose wife was its treasurer. As in most small communities and some large when the government needs vehicles towed from their streets, they call towing companies and usually use a rotation list so that each company gets a fair share of the business. The Plaintiff believed that he was not getting his fair share and supported a person at the next election to become the county's "judge executive" on a promise of fixing the rotation list. That person was elected but dismissed a friend of the Plaintiff in the EMS service leading to the Plaintiff posting a derogatory Facebook account of the incident. That led to a curse laden call from the judge executive and an agreement to delete the post in return for fixing the rotation list. Subsequently, the relationship further soured despite what seemed like an immediate fix of the rotation. The judge executive accused the Plaintiff of stealing from the fire department and sought an audit (which found nothing wrong) and according to the Plaintiff set in motion a campaign against the Plaintiff spreading gossip and innuendo derogatory to him. That led to another post which shortly thereafter seemed to have spurred the judge executive to remove Plaintiff from the rotation list and also remove the fire department from those called to respond to emergencies. Suit followed and the lower court dismissed for failure to provide adequate support for a claim of First Amendment retaliation or Monell liability. The 6th Circuit reversed as to the retaliation claim concluding that there was sufficient support for a jury to consider whether the first post spawned the adverse reactions against Plaintiff. The panel concluded that the Plaintiff could not show that the judge executive was the final decision maker and thus could not succeed in the suit against the county.

For those in large jurisdictions, it might be difficult to imagine the close interrelations between members of a community that lead to these types of cases and situations, but for those who live in smaller communities, where relatives may be on both sides of a case or political issue and be members of the governing body, it's common place.

Lemaster v. Lawrence County, KY

8th Circuit – Qualified Immunity – Taser

It was a dark and rainy night. The police attempted to stop a perceived gang member and when the car in which the suspected gang member finally stopped its occupants fled. In the area an officer saw two youngsters in hoodies walking down the street. The officer accosted them to determine if they had been occupants of the fleeing vehicle who had ditched it and took off. At about the same time as the officers ordered the two to the ground with while directing a gun towards them, a woman appeared and told the officer the two were her sons and that she had been waiting for them. She asked what was going on. The officer directed her to step back but she couldn't and instead walked back a few steps. The officer told her to step back again, to which she responded, "are you serious?" The officer pointed his taser at her and told her to get in the house. She did. Ultimately, once the children were cleared of any wrongdoing, they were released. The whole incident took about 7 minutes. The woman sued on the kids' behalf and separately sued asserting her own constitutional rights were violated when the officer pointed the taser at her as it was an unreasonable use of force. The 8th Circuit panel in a 2-1 decision found for the officers and affirmed qualified immunity for them. The other case against the officers had previously been dismissed on qualified immunity grounds.

Pollreis v. Marzolf

8th Circuit – Pretrial Detainee – Medical Needs – Deliberate Indifference – Sheriffs

Recognizing that when claims are made and dismissed by a lower court that the appeals court views the allegations in a light most favorable to the Plaintiff, we all understand that the real facts may be different after a trial allows for cross examination and testimony from witnesses. Nevertheless, this case offers a teaching point for those who represent jails: when a detainee enters the facility with a valid prescription from a doctor, absent a review and analysis by the jail's physician that changes those prescriptions, a jailer should not withhold the prescribed medicine or administer it in a manner different from how prescribed. Here, in a pro se case, a detainee entered the jail with a number of ailments that the detainee's doctor was treating with various medications the doctor prescribed for the detainee. The jail staff according to the allegations withheld some of the medicine entirely, and administered other medications differently from how prescribed; notably, administering Ambien several times a day (but apparently, not ensuring the detainee actually took the medication, as he later took 20-30 of the pills in an attempt at suicide). All in all, my guess is that the Plaintiff will have little trouble finding an attorney to pursue his claim, now that it's back in the lower court.

Presson vs. Reed

9th Circuit – Preemption – Natural Gas

One of the more polarizing issues in our country today involves climate change vs utilizing abundant national carbon resources. Over the past decade or so, the US became a net exporter of natural gas and, with increased drilling, built reserves and satisfied energy needs of this country for many years. Nevertheless, increased dependence on carbon fuels has led some local leaders to address climate change that the national government has largely ignored. Enter the trend for local governments to ban gas in new construction. The 9th Circuit recently concluded that federal law preempted a city's efforts to impose this limit. The Energy Policy and Conservation Act ("EPCA"), 42

U.S.C. § 6297(c), expressly preempts state and local regulations concerning the energy use of many natural gas appliances, including those used in household and restaurant kitchens. To avoid this direct preemption, the city adopted a building code prohibiting gas piping in new construction. The California Restaurant Association sued, and the lower court dismissed its suit. On appeal the panel for the 9th Circuit concluded that the group had associational standing and that the Act preempted the city's efforts to ban gas piping.
As an aside, in other cities, I've wondered how bans on natural gas might fall under anti-trust laws where the city also owns and supplies competing electrical services. Recent studies seem to suggest that cooking with gas can create some harmful health consequences in a home (and I guess in a restaurant), but what in the world will we do if "cooking with gas" leaves our lexicon?

California Restaurant Association v. City of Berkeley

10th Circuit – Attorney's Fees – Costs – Summary Judgment

The court starts out this opinion by describing the facts in a way that likely leads you to expect the outcome: "In 2013, Sergeant Robert Motyka, a Denver police officer, shot Michael Valdez, who was lying unarmed on the ground and surrendering." The result was a decision that resulted in judgments against both the officer and the City and attorney's fees and costs. The appellate panel affirmed all of the awards expect those for costs which the court concluded were totally unsupported. I'll need attempt to get into a full analysis, but suggest that those of you handling federal litigation might want to use the IMLA listserv to coordinate with each other in claims for attorney's fees. Often, the same attorneys are involved in cases throughout the country and re-use research and memoranda that they seek fees for developing as new in each case. Other issues associated with prevailing rates and how to attack those rates could well be the basis for discussion and sharing ideas. Denver did a great job with facts that from the outset of the opinion seemed to color the ultimate result.

Valdez v. MacDonald

10th Circuit – Excessive Force vs Reasonable Force

Is inflation really on the wane: new CPI numbers suggest it might be. And in other good news, a deputy sheriff following a motorist, notices the vehicle violating some rather basic traffic laws indicating impairment of the driver. The deputy stops the vehicle and converses with the driver through a partially open window. The deputy sees what appears to be marijuana and smells the drug. The deputy asks the driver to for various tidbits of information, such as license, registration and insurance, but the driver has some difficulty with the insurance piece and ultimately the deputy asks the driver to step out of the vehicle. The driver refuses. Ultimately, the deputy pulls the driver from the vehicle and in doing so sees a handgun in the door panel pocket. The deputy continues to struggle with the driver and to move the driver to the rear of the vehicle. At some point the deputy takes a knee to the driver's chest and brings the driver under control. The driver is arrested for a number of offenses and seeks medical assistance which is promptly provided. Now, here's the piece that's hard to understand – the prosecution drops all charges except speeding violation which apparently, validates the driver's lucky litigation lottery card and the driver brings suit under Section 1983. The claims are dismissed, qualified immunity. On appeal, the panel for the 10th Circuit upholds the dismissal finding that no constitutional violation exists. Reasonable force was used to remove the driver from the vehicle as the driver was compelled by law to leave the vehicle when asked by the officer under the circumstances of the traffic stop. When the officer saw the handgun, the officer had

every right to move the driver away from the weapon and use necessary force to do so and to bring the driver under control. No body cams involved and the dispute of whether the officer saw the handgun when the officer claimed to have seen it was not factually challenged so not a jury question.

Helvie v. Jenkins

11th Circuit - Body Cams – Excessive Force – Duty to Intervene - Monell

With the use of body cams in policing, sometimes the truth gets in the way of a complaint. In this case, a man complained that the police responded to a traffic accident in which he had had a seizure and while still under the influence of the seizure was tazed for not responding to the officer's directions and when the City responded to the man's subsequent complaint about the officer's conduct, he asserted that the City was liable under *Monell*. The suit sought damages against the officer for excessive force, against another officer for failing to intervene and from the City. The lower court dismissed the complaint finding no constitutional violation after reviewing the body cam footage. On appeal the 11th Circuit panel described what it saw and heard on the body cam footage in some detail. The description made clear that the man's complaints were unencumbered by the facts and the panel upheld the lower court's decision. Finding that there was no constitutional violation, the court concluded that the City could not be liable and the second officer had nothing to intervene and protect.

Baker v. Madison, AL

11th Circuit – Chronic Nuisance Property

This case tests Boynton Beach's Chronic Nuisance Property Ordinance and procedures. The Ordinance provides opportunity to receive notice, contest the government action at a hearing at which witnesses are sworn and cross examined, and gives a right to appeal to a state court from which an appeal can be taken. The property owner in this case owns a 113 room hotel that contributed greatly to a demand for emergency services and the demand caused a violation of the ordinance: "Under the Code, a property exhibits a pattern of nuisance activity when the City "has responded to" three or more nuisance activities at that property within thirty days or to seven or more nuisance activities within six months. Id. § 15-112(h)(1)–(2)." The suit asserted violations of the First Amendment and Fourteenth Amendment. As to the First, the court concluded that the owners lacked standing to complain on behalf of their guests and that the record did not support a claim that their rights were chilled by the ordinance or its enforcement. As to the Fourteenth Amendment, the Court concluded that the City's process provided substantial due process and where administrative errors exist but can be corrected on appeal the failure to appeal limits a party's right to complain under Section 1983.

MATA CHORWADI INC v. City of Boynton Beach, FL