Reprinted with permission from the 02/07/2013 issue of The Legal Intelligencer. (c) ALM Media Properties. Further duplication without permission is prohibited.

The Legal Intelligencer

The Supreme Court Revisits the Takings Clause

The U.S. Supreme Court granted certiorari this term on two issues concerning the Fifth Amendment's Takings Clause. The justices heard oral arguments January 15 on a case focused on the conditions that a land-use agency may attach when issuing a development permit.

Stephen A. Miller and Dylan M. Alper

2013-02-07 12:00:00 AM

The U.S. Supreme Court granted certiorari this term on two issues concerning the Fifth Amendment's Takings Clause. The justices heard oral arguments January 15 on a case focused on the conditions that a land-use agency may attach when issuing a development permit. The other, decided December 4, 2012, addressed whether recurrent, temporary flooding induced by the government's negligence implicated the Takings Clause.

Essential Nexus and Rough Proportionality?

At its most basic level, the Takings Clause proscribes the seizure of private property for public use without just compensation. The Supreme Court, however, has broadened the reach of the Takings Clause beyond literal seizures. The doctrine of "regulatory takings," for example, bars regulatory actions that constructively deprive a property owner of use of her property. Furthermore, "exaction takings" may exist where excessive conditions for development are imposed on landowners in an attempt to offset the forecasted negative impact of the development.

In exaction takings cases, the court applies an "essential nexus" test that parallels in form its analyses of government regulations under the Equal Protection Clause, First Amendment and other constitutional provisions. The court asks whether there is an "essential nexus" between the conditions on development proposed by a governmental agency and the anticipated impact of the development. (See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).) The floodgates of litigation under this test are maintained only by a rather circular threshold requirement — does the challenged regulation actually take away something from the landowner?

It is easy to see why application of this doctrine would generate confusion among lower courts, and the justices were again called upon to explain its contours in *Koontz v. St. Johns River Water Management District*, No. 11-1447 (cert. granted Oct. 5, 2012). In *Koontz*, the Florida water district denied Coy A. Koontz's request for a permit to redevelop several acres within a Riparian Habitat Protection Zone. Koontz refused to acquiesce to the water district's condition requiring him to fund the protection of wetlands many miles from his property.

Koontz claimed that the government was essentially denying him the use of his property unless he succumbed to its unreasonable stipulation. Koontz relied heavily on the *Nollan* and *Dolan* precedents, asserting that the financing condition did not serve the same governmental purpose as the development ban, and that the condition was disproportionately burdensome when compared to the impact of the proposed development. The water district, conversely, argued that imposition of a monetary obligation did not amount to a taking.

At oral argument, the justices lobbed uncomfortable hypotheticals at both parties' counsel. Chief Justice John Roberts asked the water district's attorney if he envisioned any limits on the government's power to demand conditions without triggering a takings analysis: "Can you ask for the moon?" Roberts also asked whether it would be constitutionally permissible to exact funds to build a municipal football stadium — something totally unrelated to a proposed development project. The water district's attorney held firm that, while Koontz might well have other constitutional claims under those scenarios, a monetary condition is never a taking under the Fifth Amendment because no property is actually taken.

That argument seemed to resonate with the justices. Justice Antonin Scalia noted that Koontz was requesting an expansion of existing Fifth Amendment law; the alleged takings in *Nollan* and *Dolan* consisted of demands to dedicate actual property to public use in exchange for development approval. The justices seemed reluctant to endorse Koontz's proposed expansion. In addition to Scalia's questioning, Justices Sonia Sotomayor, Ruth Bader Ginsburg, Elena Kagan and Stephen Breyer posed hard questions that were variations on the fundamental theme of whether a taking existed at all under these facts and, thus, whether Koontz was proceeding under the correct legal theory.

In the end, the justices grappled here — as they seem to do in all takings cases — with two competing considerations. On the one hand, there is a lurking threat that property owners seeking to develop protected land will be left with little or no recourse — at least in the form of a takings claim — if government agencies may impose unlimited monetary conditions in exchange for approval. On the other hand, as Sotomayor noted, landowners could collectively shut down regulatory agencies if the Takings Clause applied to every demand on property owners when no land was actually taken. Regardless of the outcome, the deep-seated tension between property rights advocates and the government's land use regulators will only be exacerbated by the court's decision.

Taking by Temporary Flooding

In *Arkansas Game and Fish Commission v. United States*, 568 U.S. ___ (Dec. 4, 2012), the court held that frequent, temporary, government-induced flooding required compensation to the owner of the affected property. The Arkansas Game and Fish Commission owned a wildlife management area of 23,000 acres containing numerous species of hardwood oak trees. In 1948, the U.S. Army Corps of Engineers built a dam upstream from the management area and implemented a release schedule. From 1993 until 2000, however, the corps deviated intermittently from this schedule in an effort to aid the harvests of local farmers, which resulted in flooding in the management area's peak timber growing season. According to the commission, these periodic extensions adversely affected tree growth each year and substantially changed the character of the terrain. As such, notwithstanding the corps' eventual decision to end its temporary deviations, the commission sued in 2005, arguing that these deviations constituted a violation of the Takings Clause.

The court held on December 4, 2012 — an 8-0 opinion authored by Ginsburg in which Kagan took no part — that the Takings Clause could provide relief for these temporary, government-caused floods. The justices unanimously reached this conclusion by synthesizing several precedents from the past 140 years. First among these cases was *Pumpelly v. Green Bay*, 13 Wall. 166, 181 (1872), in which the court ruled that government-induced flooding could constitute a taking, as the usefulness of real estate "invaded by superinduced additions of water, earth, sand, or other material" might be effectually destroyed or impaired. The justices also relied upon *United States v. Cress*, 243 U. S. 316 (1917), which held that seasonally recurring flooding could generate a takings claim. The majority decision married these flood-specific cases with the well-established rule that even temporary takings can be compensable. With this doctrinal foundation, the court held that takings claims should be allowed under these circumstances based on the foreseeability of damage to the disputed land, the clear causation of harm, and the landowners' investment-

backed expectations.

The malleable standards and myriad factual wrinkles in the court's Takings Clause cases seem to ensure one thing: repeat business, as lower courts will likely remain confused about the proper application of this complex doctrine. •

Stephen A. Miller *practices in the commercial litigation group at Cozen O'Connor's Philadelphia office. Prior to joining Cozen O'Connor, he clerked for Justice Antonin Scalia on the U.S. Supreme Court and served as a federal prosecutor for nine years in the Southern District of New York and the Eastern District of Pennsylvania.*

Dylan M. Alper *also practices in the commercial litigation group at the firm in Philadelphia. He graduated from Washington University and Villanova University School of Law.*

Copyright 2013. ALM Media Properties, LLC. All rights reserved.