National Legal Issues

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I. Cases

A. Land development conditions (exactions, impact fees, etc.). The U.S. Supreme Court has heard oral argument this term in St. John's River Water Management District v. Koontz 77 So.3d 1220 (Fla. 2011) a Florida Supreme Court case in which one of the principle issues is whether the intermediate scrutiny requiring nexus and proportionality for all conditions attached to land use permits applies only to required dedications of land or other interests in real property, or also applies to monetary exactions like in-lieu fees, mitigation fees, and impact fees. The Florida supreme court held that such scrutiny only applies to physical dedications because the US Supreme Court cases (Nollan v. California Coastal Commission and Dolan v. City of Tigard) both factually involved only dedications of land or interests in land.

B. Inverse Condemnation. The U.S. Supreme Court decided a case involving the temporary flooding of state woodland preserves by the U.S. as part of a flood control project which resulted in the damaging of large areas of state forest. Arkansas Game and Fish Comm'n v. United States, 184 L.Ed.2d 417 (2012). Among the issues which could have been decided is whether the 5th Amendment applies if one government damages by inverse condemnation land owned by another government, since the 5th Amendment provides on its face a shield against the taking of private property, and says nothing about public property. The Court simply held that such a temporary flooding could be a taking and remanded the case back to the lower court to decide if in fact there had been a taking in

this instance. The government's position, which the Court rejected, is that such temporary flooding could never be a constitutionally-protected taking.

C. Application of residential zoning to houseboats. In Lozman v. City of Riviera Beach , 133 S.Ct. 735 (2013(the US Supreme Court held that a houseboat was not a vessel for regulatory purposes, but was in fact a floating home. Is it therefore subject to local zoning regulations, and in particularly to the applicable zoning district classification, if any?

D. Relevant Parcel for Regulatory Takings. In Lost Tree Village Corporation v. United States, 707 F.3d 1286 (2013)the US Court of Appeals for the Federal Circuit ruled that the court below improperly aggregated parcels of property for the purpose of determining the "relevant parcel" (the so-called denominator issue) in regulatory taking cases. The Court discussed applicable standards for deciding when a partial taking might occur under a Penn Central analysis, holding that merely holding title to contiguous parcels was not by itself sufficient to include other defined parcels as part of the parcel as a whole, a critical determination in deciding whether permitted development on such additional parcels should figure into the calculus of deciding when a landowner's distinct, investment-backed expectations have been frustrated by a land use regulation. In this instance, the landowner was denied a dredge and fill permit by the Army Corps of Engineers for a small parcel, rendering it economically undevelopable. The lower court had held that distinct adjacent parcels should be considered in deciding the issue of economic developability. The Court of Appeals held only the one undevelopable parcel should be considered.

E. Mandatory Affordable/Workforce Housing Requirements for Land Development Permits. In California Building Industry Association v. City of San Jose, ___Cal. Rptr. 3d ___(6th dist. 2013) the court of appeals overturned the trial court which had appiied a nexus standard to a mandatory affordable housing requirement imposed by the City on a residential development. According to the Court of Appeals, the standard is whether the housing set-aside requirement was justified under the general welfare clause of the City's police power – like a traditional zoning ordinance – not whether there was a nexus or reasonable relationship of the housing requirement to any need generated by the market-price housing development. The Court looked to California's Housing Accountability Act which recognizes lack of housing as a critical problem and requires local government to address regional housing needs through implementing housing elements in a community general plan. This the City did by passing the challenged

inclusionary housing ordinance, which "incentives" for affordable housing constructed on-site and waivers if there was no reasonable relationship between the impact of the proposed residential development and the affordable housing set-asides required by the ordinance. This case is at clear variance with another district court's decision in City of Patterson, 90 Cal. Rptr. 3d 63 (2009) which could find no reasonable relationship between a large housing mitigation fee and a market price residential development, and the 9th Circuit's federal decision in Commercial Builders of Northern California v. Sacramento, 941 F.2d 872 (9th Cir. 1991) which found such set-asides valid for commercial developments (to house low-paid workers) but only after studies so justifying. Interestingly, the case does not cite Commercial Builders at all. Moreover, the San Jose court is at pains to point out that the attack on the San Jose ordinance is facial whereas the Patterson case was an as-applied attack, and the plaintiffs in San Jose particularly eschewed any regulatory takings claims.

F. Ripeness and Other Barriers to takings claims. In Horne v. Department of Agriculture, __US__ (June 10, 2013) a unanimous US Supreme Court reversed the 9th Circuit Court of Appeals, holding that the petitioner's claim for compensation was ripe (the order of the Agriculture Secretary was final and there was no further action for petitioner to take), that the 9th Circuit had jurisdiction to hear the claim, and that the takings claim defense should be available even if the petitioner had not first paid fines levied by the government. Although the fines would be substantial if petitioner's defense fails, it would make no sense to force petitioner to pay the fines in once proceeding and then sue for recovery of that same money in another proceeding.

II. [Local Trends and Issues]

A. Customary Law. The Hawaii state supreme court has upheld the trespassing conviction of a native Hawaiian on state park land (Pratt v.State of Hawaii, ___P3d___((Hawaii 2012)) essentially holding that the constitutional protection of traditional and customary rights of native Hawaiians can be regulated –as the state constitution clearly permits – by the requirement of a permit to camp overnight at such parks. The court also unaccountably – and over the dissenting votes of two justices – replaced its relatively straightforward 3-part test concerning native Hawaiian rights with a vague and amorphous "totality of the circumstances" test which will render predictability in this volatile and growing area of land use law virtually impossible.

III. Miscellaneous National Issues and Trends

A. Development by Agreement. Development Agreements are essentially statutorily-authorized agreements between local governments and landowners for the guidance of a multiphase land development. Authorized by statute in 13 states (most prominently Hawaii and California), the development agreement is designed to accomplish several purposes:

1. permit local government to require public facilities and improvements beyond those which it may legally require as generated by a proposed land development project. Thus, for example, in the present Oceanside Partners project, Hawaii County could require adequate streets and parks to serve the projected residents of Hokulia, but under the rules laid down by the U.S. Supreme Court in *Nollan v. California Coastal Commission 483 U.S. 825 (1987)* and *Dollan v. City of Tigard*, *512 U.S. 374 (1994)* it could not require the partnership to provide the 6-mile highway bypass nor the 140 acre oceanside park since both of these facilities are wildly "oversized" in order to serve existing and future public needs.
2. Permit local government greater flexibility in regulating large, multiphase projects extending over many years, such as that proposed by the 1250 Oceanside Partners.
3. Strengthen the public planning process and encourage public and private participation in comprehensive planning.
4. Reduce the economic cost of development and allow for the orderly planning of public facilities and services and the allocation of costs.

These and other public purposes are all set out in Hawaii's Development Agreement Statute (HRS 46 et seq.) which, according to its purpose clause, finds that "The lack of certainty in the development process can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning. Predictability would encourage maximum efficient utilization of resources at the least economic cost to the public." All this is due to the increasing sophistication and number of land use regulations and the expenditure of "considerable sums of money" in the land development approval process. Together with the opinion of the Hawaii Supreme Court in *Graham Beach Partnership v. County of Kauai, 653 P.2d 766 (Haw. 1982)* (colloquially known as the *Nukolii* case) making it difficult for a landowner to obtain a legal right to proceed with a project without expending vast sums of money before obtaining a "last discretionary permit" for land development, it is these reasons that persuaded the Hawaii State Legislature in the mid-1980's to make the above findings and pass our Development Agreement Statute. It is under the authority of this statute that the County of Hawaii (in company with the other counties in Hawaii) passed an appropriate development agreement ordinance and accompanying regulations, and after many public hearings negotiated with the Partnership Hawaii's first development agreement.

Hawaii is far from alone in passing such a statute in response to local government need for public facilities guarantees and landowner need for a measure of legally vested rights. In 1980, California passed a similar development agreements statute in response to its own state supreme court case holding a landowner lacked vested rights even after spending millions of dollars in land improvements (*Avco Community Developers Inc. v. South Coast Regulatory Commission, 533 P.2d 546 (Cal.1976*). So popular is the development agreement as a vehicle for guiding planning and development, particularly of multi-stage projects, that by the early 1990's over half the local governments in California have negotiated and executed over 700 such agreements. Curtin and Edelstein, Development Agreement Practice in California and Other States, 22 Stetson L. Rev.761, 766 (1993). Moreover, not a single reported case has found fault with a development agreement. Indeed, it was not until 2000 that California courts were confronted with a direct challenge to such statutorily-authorized development agreements and then the court of appeals soundly upheld them (*Santa Margarita Area Residents Together (SMART) v.San Luis Obispo County*, 100 Cal. Rptr. 2d 740 (Cal. App. 2000). Indeed, virtually all commentary on the development agreement is uniformly positive, from its early inception (Porter and Marsh, ed. Development Agreements: Practice, Policy and Prospects, 1989; Wegner, Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, the the Theoretical Foundations of Government Land Use Deals, 65 N. C. L. Rev. 957 (1987); Griffith, Local Government Contracts: Escaping From the Governmental/Proprietary Maze, 75 Iowa L. Rev. 277 (1990)) to the present (Callies, Curtin and Tappendorf, Bargaining for Development: A Handbook on Development Agreements, Annexation Agreements, Land Development Conditions, Vested Rights, and the Provision of Public Facilities, 2003).

B. Fracking. There is a considerable amount of substantive activity over the regulation of fracking at the federal level, even though most such actual regulation is at the state and local government levels. Nevertheless, there is indirect federal regulation affecting local land use regulation, and if commentators and the environmental community win the next round in Congress, fracking will be heavily regulated by the federal government under the Safe Drinking Water Act. State courts are increasingly permitting local governments to regulate fracking under traditional state-delegated powers to zone, even if the state has a comprehensive mineral and mining extraction regulatory statute. In a major case raising such issues, the appellate division of the Supreme Court of New York upheld such traditional land use authority, holding that the state and its oil and gas statute neither implicitly nor explicitly preempted the local zoning power (Norse Energy Corporation v. Town of Dryden, -- N.Y.S.2df ___(2013) 2013 WL 1830800 (May 2, 2013). :

> [W]e hold that the OGSML does not preempt either expressly or impliedly a municipality's power to enact a zoning ordinance banning all activities related to the exploration for, and the production or storage of, natural gas and petroleum within its borders. ((at page 9)