WETLAND MITIGATION AND THE U.S. SUPREME COURT: KOONTZ v. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

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Overview

• When regulation goes “too far”: a brief review of the law of takings

• Setting the stage: the factual background of Koontz v. St. Johns River Water Management District

• Amicus brief of former members of the National Research Council Committee on Mitigating Wetland Losses

• Q&A and final observations
A brief review of the law of takings

- Physical takings

- **Lucas-type takings**
  - No economically beneficial use

- **Penn Central** takings
  - Consider economic impact, interference with reasonable investment-backed expectations, character of government’s action

- **Nolan/Dollan** unconstitutional exactions
  - Essential nexus and rough proportionality
The factual background of Koontz


- In 1987, .7 acres were taken by eminent domain.

- In 1994 Koontz sought permission to adversely impact 3.4 acres of wetlands for future commercial development.

- Koontz offered a conservation easement on the remaining approximately 11 acres.

- District guidelines suggested a 10:1 preservation ratio and thus additional mitigation was required.
The factual background of Koontz

• The district suggested several methods to reduce impacts or provide sufficient offsets.

• One of the suggestions was to improve wetland functions on district land by replacing culverts and/or plugging ditches.

• Koontz declined to modify his original proposal; accordingly, the district denied the permit.

• The district’s action was then characterized as an extortionate demand that Koontz “dedicate his money and labor to make improvements to 50 acres of government-owned property located miles away from the project.”
Koontz and implications for off-site mitigation

**Issue:** (1) Whether a land-use agency can be held liable for a taking when it refused to issue a land-use permit on the sole basis that the permit applicant did not accede to a permit condition that, if applied, would violate the essential nexus and rough proportionality tests set out in *Nolan v. California Coastal Commission (1987)* and *Dolan v. City of Tigard (1994)* (2) whether the nexus and proportionality tests set out in Nollan and Dolan apply to a land-use exaction that takes the form of a government demand that a permit applicant dedicate money, services, labor, or any other type of personal property to a public use.
No. 11-1447

In the Supreme Court of the United States

COY A. KOONTZ, JR., Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

BRIEF OF FORMER MEMBERS OF THE
NATIONAL RESEARCH COUNCIL
COMMITTEE ON MITIGATING WETLAND
LOSSES AS AMICI CURIAE
IN SUPPORT OF RESPONDENT

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December 28, 2012
I. Fully Replacing Lost Wetland Functions is a Central Tenet of Modern Water Law ........... 5

A. Wetlands perform chemical, physical, and biological functions essential to watershed integrity and provide services essential to community well-being....................................................... 5

B. “No net loss” of wetland function is a widely accepted objective guiding the issuance and conditioning of state and federal water permits .................. 10

C. “No net loss” of wetland function is achieved through avoiding, minimizing, and compensating for wetland impacts ......................................................... 15
II. A Sound Scientific and Legal Framework Requires that Mitigation Conditions Replace Wetland Functional Losses in a Watershed Context

A. Wetland functional loss and gain are most accurately accounted for in a watershed context

B. Scientifically sound functional assessment methodologies measure the permitted loss and necessary replacement of wetland function

C. Proper mitigation-to-wetlands loss ratios are also necessary to achieve “no net loss” of wetland function
D. Wetland restoration is most likely to replace lost wetland function, but wetland preservation is not ............ 30

E. Scientifically supported off-site mitigation can often replace more wetland function in the watershed than on-site mitigation ........................................... 32

III. The Sound Scientific and Legal Framework that Bounds Mitigation Conditions Requires a Reasonable Relationship and Rough Proportionality Between Wetland Functions Lost to Development and Those Gained Through Permit Conditions ........................................... 35
JUSTICE SOTOMAYOR: Counsel, I've had a problem with your argument, okay? From the record it's very clear that a conservation offer is not considered mitigation because there's still a net loss of wetlands. The policy is abundantly clear, stated, and undisputed. Okay?

So, given that policy, why are we even in this case? Meaning whether there was an exaction or no exaction or whatever happened in terms of the denial, you couldn't win on your offer because the policy of the State was clear, and in my mind, unassailable. We have to preserve wetlands. Conservation of other wetlands is not enough. Mitigation means make sure that we get a net gain of wetlands.

So why are we here?

MR. BEARD: Justice Sotomayor, we don't contest the legitimacy of the policy, of course, in preserving wetlands; nor do we contest, for that matter, the ratios that the district has imposed via its regulations.
MR. BEARD: We're entitled under the Unconstitutional Conditions Doctrine to not have to bear a public burden that has no bearing on the impact that we're trying to use on our property.

JUSTICE SCALIA: Yes, that's fine. That -- that would enable you to challenge the denial of the permit, saying it's based upon an unconstitutional condition. But how does it -- how does it enable you to say there's been a taking? What has been taken?

MR. BEARD: What has been -- what has been taken in effect is his funds that have to be put now to a public use, the enhancement of 50 acres of public wetlands. And there is nothing in the takings clause, nothing -

JUSTICE SCALIA: It hasn't -- it hasn't been taken. I mean, he turned it down.
MR. BEARD: It is undisputed, the trial court found below and the Court of Appeals affirmed and the finding was undisturbed in the Florida Supreme Court, that in fact the offsite mitigation, that part of the mitigation that went beyond the conservation easement, was in excess; it violated Nollan and Dolan.

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JUSTICE KENNEDY: Suppose the district did have, as I think it did here, a uniform policy that for every acre you develop, you have to preserve wetlands, 10 acres of wetlands.

And then two cases, both hypothetical. One is somebody had an 100-acre parcel and they want to develop 5 acres, and they have 50 acres that they mitigate for wetlands. The other person has only 1 acre and he wants to -- and he has to develop the whole acre.

Can the district then say, we'll give you the 1-acre development permit if you reclaim wetlands on 10 other acres that you -- that we can designate for you elsewhere? The hypothetical being designed to point out whether or not the crux of your argument is that he had to go off offsite.

Source: Transcript of oral argument at pages 11-12, Coy A. Koontz, Jr. v. St. Johns River Water Management District
MR. BEARD: The crux is not that he had to go offsite, but that -- that did play into the trial court's analysis as to the connection between his impact and what was being required. And there was testimony below that there was no connection there. And the fact that the mitigation was four to seven miles away played into the analysis as to whether there was a connection.
JUSTICE KENNEDY: Suppose -- suppose the agency said, we are really short of revenue; we will let you develop your land if you contribute a million dollars to our new football stadium.

MR. WOLFSOON: Justice Kennedy, I think that that may very well raise a Penn Central or Lucas claim.
JUSTICE BREYER: ... then, when the government says, I will let you develop your land if and only if you give $50,000 to the Shriners hospital, you would say, I can't develop my land. And besides, that significantly interferes with my investment-backed expectations. And besides, there is no relation whatsoever. Therefore, I win under the Takings Clause.

Now, I spell all that out, because if I'm wrong about that framework -- if I am right about the framework, that could apply to this case. If I am wrong about the framework, I want to know where in the cases I'm wrong.

MR. WOLFSON: Justice Breyer, we think that you are right about that framework.
Questions?