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Exactions at the Forefront: The U.S. Supreme Court Decides *Koontz*

by Jacob T. Cremer, Esq.

*Jacob T. Cremer is an attorney at Smolker, Bartlett, Schlosser, Loeb & Hinds, P.A., in Tampa, Florida. He practices property rights, environmental, and land use law. He assisted counsel of record for the landowner-petitioners before the U.S. Supreme Court in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592 (2010). He also co-authored an amicus brief in support of the landowner-petitioner in *Koontz* and attended oral arguments. Follow the developments on this case and others at his blog, *The Florida Land Environment*, www.jacobtcremer.com.*

In what could be the most important decision in the world of land use and environmental permitting in years, the U.S. Supreme Court recently decided *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586 (2013). As argued before the Supreme Court, the case called into question common bargaining practices by governments when requesting conditions in exchange for development permits. In the development approval process, governments commonly require a dedication of real property to mitigate adverse impacts. But what if the request is for cash or for services? What if the demand is unreasonable, and the landowner cannot use the property as a result? The Supreme Court provided some insights into these questions.

What is an Exaction?

An exaction is a government requirement to donate something in exchange for the right to develop property. Generally, the government cannot force landowners to give up the right to exclude others from property in return for the ability to develop it. It can, however, require mitigation of adverse development impacts. As Professor Evans-Cowley explains:

"Development exactions are a form of land use regulation whereby a property owner must provide a payment or property in order to initiate land development. Exactions are an exercise of police power intended to protect the public health, safety, and welfare. They do so by protecting the community from the negative effects of growth. When growth happens there is a need for an increase in public facilities such as roads, fire stations, and sewers. Exactions aid in protecting the community from the increased cost of providing infrastructure by sharing the cost with the new residents."

"The basic principle behind the adoption of an exaction is that it should protect existing residents from the impacts of growth by providing a revenue source to pay for needed public facilities. An exaction requires a land developer or builder to contribute a share of a local government's cost of providing on- and off-site

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infrastructure and public facilities to serve the developing property. For example, an exaction can require the dedication of land for a new park, or an impact fee can be charged for the cost of extending a road to a development before a developer can hook up the internal streets of a subdivision to the city street network." -- Jennifer Evans-Cowley, Development Exaction: Process and Planning Issues, 1 (Lincoln Institute 2006)."

As exactions arose in the 1970s and became more prevalent, they came under increasing scrutiny. *See generally* Alan A. Altschuler et. al, *Regulation for Revenue: The Political Economy of Land Use Exactions* (Brookings Inst. & Lincoln Inst. of Land Pol'y 1993). They came under scrutiny, too, by the U.S. Supreme Court, roughly coinciding with the increased scrutiny the Court was giving to its takings jurisprudence.

The Takings Clause of the Fifth Amendment to the U.S. Constitution ensures that private property cannot "be taken for public use, without just compensation." The Takings Clause was intended to bar government from forcing individuals to bear public burdens alone. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005). Early cases focused on physical invasions of property. As the regulatory state grew in the twentieth century, the Supreme Court began to recognize that government regulation of private property can sometimes be so onerous that it is tantamount to the government appropriating the property. *Id.* The Takings Clause applies to exactions through the doctrine of "unconstitutional conditions." *Id.* at 547. Under this doctrine, the government may not require a person to give up a constitutional right, such as the right to receive just compensation where property is taken for a public purpose, to get a discretionary benefit from the government. *Id.*

From this background, the Court has given some limited guidance on how to determine whether an exaction passes constitutional muster. First, there must be an "essential nexus" between the exaction and the interest that the exaction is advancing. *Nollan v. Cal. Coastal Com.*, 483 U.S. 825, 837 (1987). Second, there must be a "rough proportionality" in both the nature and extent of the exaction and the impact of the proposed development. *Dolan v. Tigard*, 512 U.S. 374, 391 (2005). *Nollan* and *Dolan* both addressed exactions of easements for public access. The Supreme Court left unanswered the question of whether the *Nollan-Dolan* test applies to exactions not involving real property, such as exactions for money or other personal property. Courts have answered this question differently, leading to confusion among landowners, planners, regulators, and government officials.

The Koontz Saga

In *St. Johns River Water Management District v. Koontz*, 77 So. 3d 1220 (Fla. 2011), the Florida Supreme Court issued a controversial opinion that declined to find a taking under *Nollan* and *Dolan*. Koontz,

who had owned his property since 1972, had been trying to develop it since 1994, when he had applied to the District for a development permit. All but 1.4 acres of the 14.2-acre property were in a riparian habitat protection zone. Koontz only wanted to develop 3.7 acres of the property, but he would have to fill 3.4 acres of wetlands to do so.

The District agreed to grant the permit on two conditions. First, the District required that Koontz deed the remainder of his property into a conservation area, which he agreed to do. Second, the District required that Koontz perform offsite

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**GOOD PLANNING MUST
START AND END WITH A
HEALTHY RESPECT FOR
PROPERTY RIGHTS.**



Land Banking In Focus: New York Joins the Ranks of States Authorizing Local Land-Banking Entities

by Lee Wellington

Lee Wellington is pursuing a joint-degree in Law and City Planning at Brooklyn Law School and Pratt Institute, and is a Planning Fellow at the Pratt Center for Community Development. Lee was PLD's 2010-2011 Daniel J. Curtin Jr. Fellow, and is Chair of PLD's Technology & Social Media Committee.

In July 2011, the New York State Land Bank Act was signed into law. This enabling legislation authorizes local governments to create land banks in a large-scale effort to minimize blight. This initiative is especially crucial for the Western portion of New York State, a region that has suffered from a rapid decline in industrial activity and now has high volumes of vacant commercial space and abandoned housing stock, particularly in the aftermath of the subprime mortgage crisis.

Ten months after the Land Bank Act's passage, the following five land banks were approved

across the State: (1) Cities of Buffalo, Lackawanna, Tonawanda and Erie County; (2) City of Syracuse and Onondaga County; (3) City of Schenectady, County of Schenectady and City of Amsterdam; (4) Chautauqua County; and (5) City of Newburgh. More recently, three additional land banks were approved: (6) Broome County; (7) City of Rochester; and (8) Suffolk County. Before turning to the details of New York State's new local land banks, a brief background on land banks is instructive.

What is a land bank?

A land bank enables a public authority to acquire vacant, underdeveloped, and deteriorating lands that are valued minimally in the open market. The land

banking entity then holds these lands in their real estate portfolio, managing them in the interest of future urban development and disposing of them in a thoughtful manner to address local needs.

How are land banks created?

While land banks can be structured in a number of ways, state enabling legislation, like New York's Land Bank Act, is a common mechanism for

to create their own land banking entities to acquire tax delinquent properties.

Professor Cassandra Jones Harvard, in "Public Land Banking and Mount Laurel II: Can There Be a Symbiotic Relationship?", characterized the formation of a land bank as a process with three distinct stages. The first stage involves the development of an area growth plan, cataloguing the developable land and identifying potential short and long-term uses serving important regulatory goals. The area growth plan is made in close coordination with land use officials to ensure that redevelopment plans are consistent with local zoning laws. The second stage involves the creation of a local land banking entity, often through statute, which acquires and manages vacant or abandoned parcels. The land bank's holdings consist of tax delinquent land, land acquired on the open market, and on occasion, land banks may use the power of eminent domain to secure property. The final stage of the process is the transfer of some of the land to private parties in a manner consistent with the pre-determined development priorities.

How are land banks financed?

Land banks are generally financed through government grants, as well as through the direct recapture of a portion of property tax revenue after parcels are transferred to private owners. Because the creation of land banks often goes hand-in-hand with a streamlining of antiquated foreclosure laws, land banks benefit from the ability to more simply acquire tax delinquent parcels. Once acquired,

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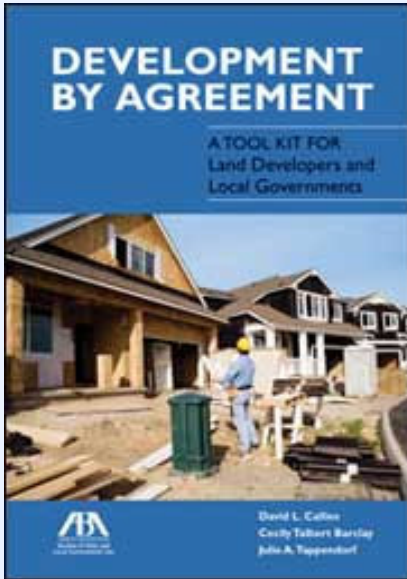
Distressed property, City of Newburgh, NY.

- Photo courtesy of Jennie Nolon Blanchard

authorizing the creation of local land banks. New York now joins eight other states (Georgia, Indiana, Kentucky, Maryland, Michigan, Missouri, Ohio, and Texas) with similar enabling legislation, empowering municipalities



New Book Published!



The ABA Section of State and Local Government Law is releasing the book, "Development by Agreement: A Tool Kit for Land Developers and Local Governments," this past fall. The book is co-authored by long-time PLD members David Callies, Cecily Talbert Barclay, and Julie Tappendorf. The book provides an overview of problems that can be solved by entering into land use agreements, as well as a detailed discussion of development, annexation, TIF, conservation, subdivision, community benefits, affordable housing, among many other agreements between municipalities and developers/property owners. Practitioners will find the appendices particularly helpful as they include sample agreements and checklists for a variety of land use situations.

[The book is available on the ABA's website by clicking here](http://apps.americanbar.org/abastore/index.cfm?pid=5330222§ion=main&fm=Product.AddToCart)

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Form-based Codes: Checking in on the Implementation of FBCs in Arlington, VA, Flagstaff, AZ and Miami, FL

by Philip C. Dales

Philip C. Dales is a third year law student at the University of Maryland and a graduate of the University of Virginia's Master's program in Urban & Environmental Planning. Philip is also a law clerk at Hyatt & Weber, P.A. in Annapolis, Maryland.

Form-based codes are often characterized as transformative tools of place making. They aim to reshape dysfunctional auto-dominated sprawl environments into efficient, pedestrian-friendly examples of new-urbanism at work. All across the country, local governments seeking to establish traditional neighborhood form continue to replace conventional zoning codes with new ones that primarily regulate form, and only secondarily restrict use. According to the Codes Study by Hazel Borys and Emily Talen, available at smartcodecomplete.com/learn/links.html, there were purportedly over 330 local governments with form-based codes in place or in development as of August, 2010. And since 2007, the Form-based Codes Institute has recognized outstanding examples of FBCs with its annual Driehaus Awards.

As this fundamentally different approach becomes more popular, there has yet to be a dispute in federal court over the validity of such transformative tools. Perhaps this isn't surprising given that form-based codes often allow significantly more intense development while simultaneously imposing requirements to enhance public space. However, during this early period of form-based codes, it is worth taking notice of the important choices local governments are making to implement their new codes. Given the ubiquity of NIMBYs and the usual

contentiousness of land use decisions, these choices may ultimately have important implications for when and how any takings, exactions or due process challenges arise.

Arlington, Virginia

In July, Arlington, Virginia adopted the Columbia Pike Neighborhoods Area Plan, which is expected to serve as the basis of a new form-based code to be developed over the coming year. The Plan addresses areas adjacent to the district governed by the successful Columbia Pike form-based code adopted in 2003. Since then, ten major projects, including 1,500 residential units and approximately 280,000 square feet of mixed-use development, have been approved in the three and a half mile corridor governed by the form-based code. The new code to implement the Neighborhoods Area Plan will establish form-based standards for a much larger multifamily residential area where up to 10,000 new multifamily units may be added to the existing stock over the next thirty years. The expansion of form-based standards to this larger area calls attention to the piece-by-piece approach by which Arlington is implementing form-based code.

Arlington's adoption of form-based code in 2003 did not envision countywide, mandatory transformation. It was instituted parallel to the preexisting Euclidian zoning such that by-right development was not restricted by the introduction of the new form-based regulations. Instead, the code was developed specifically for the Columbia Pike Revitalization District to provide a



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Wake of the Flood: Flood Waters, Bloated Budgets, and a Plan to Save Your Community

by Brent Denzin, Esq.

Brent Denzin is an attorney with the law firm Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C. and is an active member of the American Planning Association. He specializes in the areas of Land Use, Environmental, and Municipal Law, and has lectured and written on a range of topics, including the use of zoning laws to reduce costs and increase efficiency of stormwater management.

When cutting costs, few municipalities start with an overhaul of their stormwater management program. But, as it turns out, they should.

Stormwater management eats up a large percentage of tax revenue, e.g., 20% of property taxes in Downers Grove, Illinois. Stormwater management is often wildly inefficient and ripe for dramatic gains with little to no impact on the public. Finally, all municipalities—home rule and non-home rule—have express authority to take action immediately.

In short, stormwater management is the low hanging fruit of budget cuts. Instead of reaching for painful employment cuts, start with the following steps and make some easy gains.

Step 1: Fix Your Code

[Many local governments are given the] legal authority to regulate and determine the area of open spaces, within and surrounding buildings, and to set standards to which structures must conform. Under that authority, local governments may set landscaping and grading standards for development sites in their jurisdiction. Moreover, [many state legislatures authorize] local governments to use this authority to address the hazards to persons and damage to property resulting from the

accumulation or runoff of storm or flood waters.

Most communities exercise this landscaping and grading requirements in their zoning codes. However, few ordinances connect landscaping ordinances with stormwater management goals. Take, for example, Village A and B.

Village A manages runoff by funneling all stormwater from parking lots and roofs directly to the municipal storm system (in some cases, with temporary detention on-site to reduce flow rate). At the same time, Village A requires landowners to plant vegetation in islands throughout a parking lot and around the perimeter. Landowners are required to put curbs around the



vegetated areas which keep stormwater funneling toward the municipality's storm sewer system. A new parking lot can create 16 times more stormwater runoff than the lawn or field it replaced. Using the tax dollars, Village A takes on the sole responsibility of managing this flood of water with its storm sewer system.

Village B takes a different approach. Using the above authority, Village B requires parking lots to be graded toward the vegetated islands and perimeter. Curbs are removed and

water flows into these depressed vegetated areas (i.e. bioswales). The runoff is filtered and absorbed by the plants that are required under the Village's landscaping ordinance.

Storm drains are placed in the vegetated areas and collect water not absorbed. By coordinating its landscaping and stormwater management requirements, Village B dramatically reduces the volume (and pollutant load) of stormwater entering their system. As a result, the system has less wear and a greater capacity to handle flash flood events.

Step 2: Shift Your Expenses

In addition to maintenance costs, local governments must budget funds for pollution prevention. Most storm sewer systems are federally regulated ("Municipal Separate Storm Sewer Systems" or "MS4s") under the Clean Water Act ("CWA"). Among other requirements, local governments must choose from a menu of best management practices to reduce the amount of dirt, grease, salt and other pollutants that reach the storm sewer. For many communities, street sweeping, at a cost of hundreds of thousands of dollars per year, is the pollution reduction method of choice.

Street sweeping, however, is not the only option. In fact, it is not even the preferred option for state and federal EPA regulators. In the past few years, IEPA and USEPA have repeatedly noted that on-site retention using vegetated swales is the preferred best management practice when compared to street sweeping. Agency guidelines are now pushing local governments to follow Village B's lead. By doing so, local governments not only gain the benefits of reduced sewer maintenance,

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but can reduce street sweeping efforts, saving additional money. For example, in the City of Naperville, Illinois, a reduction in the scope and frequency of street sweeping is projected to save \$170,000 annually.

Step 3: Educate the Public

To gather support for your shifting regulations, make sure to educate the public. For landowners, the shift in landscaping, grading and curb requirements is good for their long-term bottom line. First, most applicants are required to grade parking lots and install vegetated islands under existing codes. The new ordinance simply shifts the direction of the grading and type of vegetation. The cost of installing bioswales instead of curbed, vegetated (and watered) islands is likely a wash. Second, remind the public that the modified zoning code is designed to reduce flooding. In Illinois, flooding is the greatest threat to both residential and commercial property. By reducing this threat, local governments are reducing flood-related expenses for private landowners.

In the end, an efficient stormwater management policy will reduce government spending, reduce property taxes, reduce flood losses, and please state and federal regulators (who control future funding). Before cutting much needed community services to repair your budget, look at how you manage stormwater. Are you taking advantage of these reductions or washing your money away?

This article was originally published in the In the Zone e-newsletter, a publication of the Zoning and Land Use Group of Ancel Glink, in which active PLD members David Silverman and Julie Tappendorf are partners. In the Zone is designed to inform local government officials about current trends in Illinois land use law and provides resources to promote planning and zoning practice throughout the state. To subscribe to In the Zone, please send an email to inthezone@ancelglink.com with the subject: SUBSCRIBE IN THE ZONE. ♦

~ Meet our Curtin Fellow ~



The Planning & Law Division is thrilled to have Melissa Conrad-Alam as this year's recipient of the Daniel J. Curtin Fellowship. Melissa is a second year law student at the University of Georgia in Athens, Georgia.

While staying in the top 10% of her class, Melissa serves as a member of the UGA Moot Court Team and the Editorial Board of the *Georgia Journal for International and Comparative Law*, one of the country's oldest student edited law journals. This spring she traveled with the Moot Court team to Vienna to participate in the Willem C. Vis International Commercial Arbitration Moot. And last summer, she served as the sole legal intern for the Federal Home Loan Bank of Atlanta.

Prior to law school, Melissa served as an independent consultant assisting nonprofits and local governments with public policy campaigns and community development projects, including developing and implementing a three month community engagement plan for the Preservation of Pittsburgh engaging more than 1,000 residents in land use planning efforts. Melissa also served as the Associate Director for Georgia Stand-Up, "A Think and Act Tank for Working Communities". In her role at Georgia Stand-Up, she was responsible for leading the BeltLine Community Benefits Campaign, which led to the passage of historic legislation in the City of Atlanta requiring that all projects receiving public subsidies from the \$2.8 billion economic development project include community benefits, such as local hiring and workforce development programs. Resulting from those campaign efforts, historic legislation was also passed regarding affordable housing requirements, local hiring and workforce development standards.

In October 2010, Melissa was recognized as one of Georgia Trend Magazine's Top 40 under 40 Georgians. She has also been honored with a STAND-UP and Act Award from Georgia STAND-UP and Policy Leader of the Year from the Younger Women's Taskforce of Atlanta. She participated in multiple training programs, including the International Association of Public Participation's certification for public participation professions and the Atlanta Regional Commission's Community Planning Academy. She also served on a number of committees for the City of Atlanta, including the BeltLine Tax Allocation District Advisory Committee and the Atlanta Community Land Trust Collaborative Development Committee.

Melissa lives in Clarkston, Georgia along with her husband, Asim, and their two dogs Morrissey and Annabelle Lee. Melissa has been working hard as the Chair of PLD's new Early Career Program Committee, organizing a hugely successful networking event at Brooklyn Law School this spring, and planning an extremely well-attended PLD social gathering for students and young professionals at this year's APA Conference in Chicago.

The purpose of the PLD Daniel J. Curtin, Jr. Fellowship is to foster increased interest in the study of land use planning and its interrelationship with the law at the graduate, and law school levels; increased participation in the planning profession; and ultimately, greater service to communities across the nation.



Comprehensive Solution to the Biofouling Problem for the Endangered Florida Manatee & Other Species

by Kathleen Oppenheimer Berkey, Esq., AICP & Todd K. BenDor, Ph.D.

Kathleen Oppenheimer Berkey is a Florida licensed attorney and certified land planner with the Pavese Law Firm in Fort Myers, Florida. Her practice focuses primarily on land use and zoning, real estate and environmental issues related to the development of land. Dr. Todd K. BenDor is an Assistant Professor of City and Regional Planning at UNC Chapel Hill and Visiting Professor of Urban Studies and Planning at MIT. Professor BenDor's research and teaching focuses on ecosystem service markets, urban growth modeling, and environmental impact assessment. He is currently writing a book on the use of computer modeling for improving environmental conflict resolution.

Biofouling is the undesirable accumulation of microorganisms, plants, algae, arthropods, or mollusks on a surface, such as a ship's hull, when it is in contact with water for a period of time. Biofouling and its traditional remedies pose serious environmental consequences, including 1) the transportation of nonindigenous aquatic species that can outcompete native species for space and resources, thereby reducing biodiversity and threatening the viability of fisheries or aquaculture, 2) the harmful accumulation of zinc- or copper-based toxins, and 3) the increase in weight, decrease in flexibility and mobility, and topical damage of marine mammals hosting biofouling organisms.

There are a number of existing legal mechanisms that address biofouling under international law. However, due to the complexity of biofouling, this Article posits that existing mechanisms are inadequate for comprehensively regulating the problem, leaving aquatic species susceptible to numerous negative effects from biofouling.

To address these inadequacies, the authors recommend biofouling also be

mitigated under the federal Endangered Species Act (ESA).

First, the authors consider the Florida manatee (*Trichechus manatus latirostris*) as a case study species, and suggest that Florida's Resource Conservation and Development (RC&D) areas develop a Safe Harbor umbrella agreement under section 10 of the ESA to create a new generation of ecological harbors that are safe from the dangers of biofouling. The agreement would include a Habitat Conservation Plan (HCP) that incorporates a combination of behavioral and infrastructural biofouling mitigation techniques to be applied regionally across estuary, freshwater, and saltwater ecosystems.

EXISTING MECHANISMS ARE INADEQUATE FOR COMPREHENSIVELY REGULATING THE PROBLEM, LEAVING AQUATIC SPECIES SUSCEPTIBLE TO NUMEROUS NEGATIVE EFFECTS FROM BIOFOULING.

Second, the authors suggest that both public and private owners of existing, proposed, and expanding marina developments be encouraged to voluntarily sign Safe Harbor Agreements under the RC&D areas' umbrella agreement to avoid owners having to navigate the long and strenuous process of obtaining individual HCPs. The comprehensive biofouling management strategy proposed as a model here would require RC&D areas to carry out a

range of biofouling best management practices that would protect species and the habitats on which they depend from the adverse effects of biofouling. It would also encourage public and private landowners to follow suit, while maintaining efficiency and rewarding participating landowners for voluntarily implementing additional species conservation practices.

In addition, the suggested comprehensive biofouling management strategy model has several implications for the urban planning processes surrounding marina construction and expansion. If implemented, urban planners and land use attorneys will be expected to proactively lead interdisciplinary collaborations between developers, engineers, biologists, and municipal and state representatives during the marina site selection phase to an unprecedented degree.

Planners and land use attorneys will then bring together information obtained from all parties to determine which site is the most economically, biologically, legally, and structurally feasible for the client and has the greatest potential to minimize the negative effects of biofouling on surrounding ecosystems.

Private and municipal planners may also be a key resource for increasing awareness and understanding of both the harms of biofouling and the introduction of nonindigenous aquatic species amongst their clients and the general boating public, as well as the various biofouling mitigation techniques proposed here.

The full article discussed in the summary above was published in ENVIRONMENTAL LAW and is accessible to the public by clicking [here](http://law.lclark.edu/live/files/11789-422berkeypdf) or visiting: law.lclark.edu/live/files/11789-422berkeypdf. ♦



~ SIGN REGULATION RESOURCES ~

From PLD Members

Free Speech Law for On Premise Signs



PLD member Professor Daniel R. Mandelker has published a new handbook, *Free Speech Law for On Premise Signs*. The first three chapters discuss general principles of free speech law, and basic constitutional issues concerning on premise sign regulation. These include issues such as whether proof is needed that a sign ordinance directly advances aesthetic and traffic safety interests, and a discussion of exemptions for on premise sign ordinances. The final two chapters discuss free speech problems raised by various types of on premise signs, and regulations for the display of on premise signs.

Professor Mandelker is one of the nation's leading scholars and teachers in land use law. He has authored several widely-used casebooks on land use law, environmental law and state and local government law as well as authored treatises on land use law and the National Environmental Protection Act law and litigation. Professor Mandelker is currently the Howard A. Stamper Professor of Law at the Washington University School of Law in St. Louis, MO.

Professor Mandelker's Free Speech Law for On Premise Signs handbook is available for free download on the United States Sign Council site, www.ussc.org.

The Michigan Sign Guidebook: Local Planning & Regulation of Signs



PLD Members Brian Connolly and Mark Wyckoff, FAICP, have recently co-authored *The Michigan Sign Guidebook: The Local Planning and Regulation of Signs*, funded entirely by Scenic Michigan, an affiliate of Scenic America. The 286-page *Guidebook* is a comprehensive guide to the planning and legal aspects of sign regulation, and offers information on how communities can develop sign ordinances in order to minimize legal risks. The *Guidebook* contains a variety of approaches to regulating different sign types in a content neutral manner that meets the requirements of the First Amendment, while ensuring that signs meet the functional purposes for which the signs are created.

The *Guidebook's* seventeen chapters include discussions of basic sign regulation principles, constitutional considerations, dealing with nonconforming signage, a review of model ordinances, and a case digest containing hundreds of sign regulation cases. While the book deals with Michigan sign regulation law, most of the material is broadly applicable across the United States. ♦

Help the APA Amicus Committee!

The APA occasionally files *amicus curiae*, or "friend-of-the-court," briefs in state and federal courts in cases of importance to the planning profession and the public interest.

The role of the Amicus Curiae Committee (which is populated entirely by PLD members!) is to find and review cases of potential interest and to make a recommendation as to whether APA participation is warranted.

The Committee is always interested in learning about cases that it might consider for participation, and is always searching for attorneys interested in drafting amicus briefs. If you hear of an interesting case or are interested in joining our bank of brief writers, please email Molly Stuart, APA Staff Attorney, at mstuart@planning.org.

For additional information on Committee members and briefs, visit: www.planning.org/amicus

Job Announcements

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Please send your job postings to pld.newsletter@gmail.com and we'll include them in our next newsletter.

Be sure to include the name of the employer, position, contact information, and deadline for applications.



This section of the Planning & Law Newsletter features memorandum written by students working at the Land Use Law Center of Pace Law School. Memos selected for inclusion will cover a wide range of topics of national interest.

The Municipal Response to Electric Cars

by John Scherer

John Scherer is a third year law student at Pace Law School and is Secretary of the school's Land Use & Sustainable Development Law Society. He will graduate this spring with a J.D. and a Certificate in Environmental Law.

With the rising cost of gasoline, concerns over carbon emissions, generous tax incentives, and improved battery technology, Americans are purchasing electric cars in unprecedented numbers. According to the Huffington Post, American consumers purchased a combined total of 52,000 gas-electric hybrids and electric vehicles in March 2012, 3.64% of total US sales. Although the amount may seem small, it is the highest percentage of market share hybrids and electrics have ever achieved. According to a forecast by Accenture, a consulting firm, the number of electric vehicles on the road may reach 1.5 million by 2015, with 10 million possible by 2020. This transition will also significantly reduce carbon emissions. According to a report by the Union of Concerned Scientists, electric vehicles produce fewer emissions than the average compact gasoline powered vehicle even when the power source is coal. In regions with the "cleanest" sources electric vehicles produce fewer emissions than the most fuel-efficient hybrids, greater than 50 mpg.

However, electric cars face the chicken or the egg dilemma. If adequate charging facilities cannot be found, consumers are less likely to purchase electric cars; but charging stations will not be constructed unless there is adequate demand. Despite this problem, consumer demand is growing. Part of the growth in demand may also stem from increased investment in electric vehicle infrastructure by state and local government. Some reports



suggest that the infrastructure may be in oversupply, with many charging stations barely utilized.

As local governments anticipate increased demand for electric vehicles over the next decade, many are actively working to adopt policies that accommodate or even promote the transition. Municipalities have also recognized the economic benefits that may come from the promotion of electric vehicles through businesses associated with electric car

construction and maintenance. This memo details the key components of a successful electric vehicle infrastructure ordinance along with various examples.

Best Practices Permit Charging Stations in Most Districts

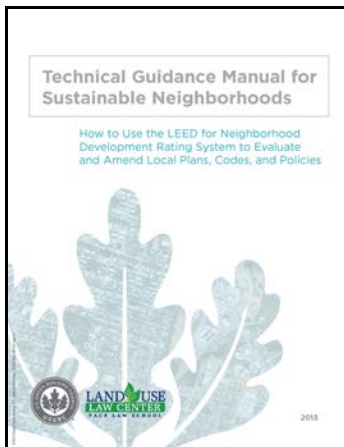
Municipalities should allow charging stations as an accessory use in most, if not all, of their zoning districts. There are three types of charging stations, differentiated by the amount of voltage and thus the amount of time it takes to charge a vehicle. A Level-1 charger, also called a slow battery charger, uses 120-volts. The medium Level-2 battery charger uses between 120-240 volts. Both Level-1 and 2 chargers use AC electric current. Level-3 chargers use 240 volts of DC current and can recharge a vehicle in 20-40 minutes. In most cases Level-1 and 2 chargers are grouped together and permitted in zoning districts as an accessory use while Level-3 chargers are confined to districts away from primarily residential areas. This distinction is based on the idea that Level-1 and 2 chargers should primarily be used residentially. Charging at home also facilitates charging during off peak hours.

Level-2 and 3 chargers may be subject to a building permit or site plan approval, depending on the municipality. If the ordinance permits a site to be used primarily for the retail charging of electric vehicles, rather than as an accessory use, the site may be considered a gas station for zoning purposes and be subject to a special use permit. This has been permitted in Auburn Hill, Michigan, as well as Kane County, Illinois.

Continued on page 18

Two Resources to Help Local Governments Create Sustainable Neighborhoods

The U.S. Green Building Council (USGBC) and the Land Use Law Center at Pace Law School recently announced two new free resources—the [Technical Guidance Manual for Sustainable Neighborhoods](#) and the [Neighborhood Development Floating Zone](#)—to help local governments leverage the [LEED for Neighborhood Development](#) rating system as a sustainability tool. Generous funding for the Center, in conjunction with USGBC, for the research, writing, and production of these resources was provided by the Fund for the Environment and Urban Life of The Oram Foundation, Inc., with additional support from the Natural Resources Defense Council. The announcement was made at the Center's 11th annual Land Use and Sustainable Development Conference held at Pace Law School in White Plains, NY.



Traditional U.S. zoning codes have resulted in communities with separated land uses and low-density sprawl that contribute to increased greenhouse gas emissions through vehicles miles traveled, building energy consumption, increased potable water consumption, and loss of natural resources, among other environmental and social consequences. Local governments can combat these challenges by adopting plans and regulations reflecting more sustainable land use patterns. Although

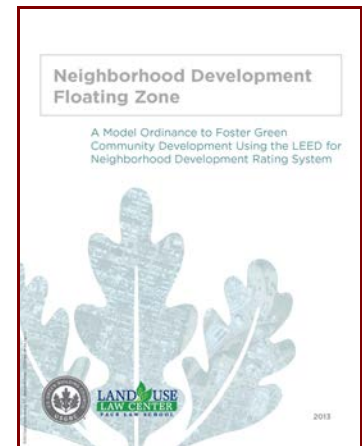
many communities have already taken significant action, many more are realizing that green neighborhood development practices—such as building narrower streets and creating more compact, mixed-use development—are not permitted presently under their municipal codes.

“We have taken advantage of the extensive expertise of the USGBC and its partner organizations in creating for local governments a single document they can use to zone-in sustainability, which so often is zoned-out and otherwise frustrated by local codes,” said John Nolon, Founder of the Land Use Law Center. “It has been a truly exciting project and we are anxious to provide this resource to the many communities wanting to foster green development.”

As the first national benchmark for green neighborhood design, [LEED-ND](#) integrates the principles of smart growth, new urbanism, and green building and is a planning tool available to local governments that want to support and encourage sustainable development within their communities. Sustainable neighborhood development, as defined by LEED-ND, benefits communities by reducing urban sprawl, increasing transportation choices and decreasing automobile dependence, encouraging healthy living, and protecting threatened species.

Accompanied by case studies of how municipalities have leveraged LEED-ND as a sustainability tool, the [Technical Guidance Manual for Sustainable Neighborhoods](#) will assist elected officials, local planners, and other professionals who work with municipalities to use the LEED-ND rating system to evaluate and amend land use regulations, plans, and policies to promote more environmentally sound and economically robust

communities. The manual draws from research and interviews with more than 60 municipalities that have already leveraged LEED-ND to reform their comprehensive plans, land development regulations, and infrastructure planning to achieve sustainability goals.



Augmenting the manual, the [Neighborhood Development Floating Zone](#) is a model ordinance to help local governments foster green community development using the LEED-ND rating system. The [Floating Zone](#) is offered as a cost-effective and efficient tool that can be used by local governments hoping to incentivize the private sector to follow green neighborhood development principles when the more extensive zoning update process laid out in the manual is not an option.

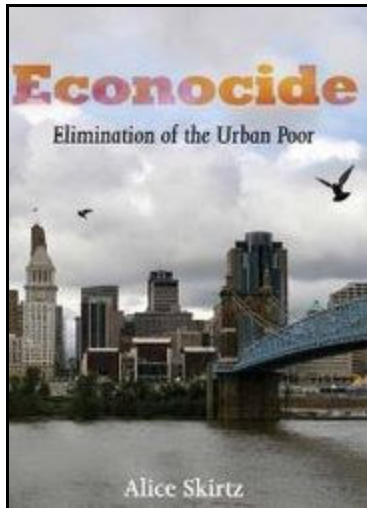
Both resources are available for download at no cost. To download, click on the links below:

- [Technical Guidance Manual for Sustainable Neighborhoods](#) (www.usgbc.org/resources/technical-guidance-manual-sustainable-neighborhoods)
- [Neighborhood Development Floating Zone](#) (www.usgbc.org/resources/neighborhood-development-floating-zone) ♦



~ BOOK REVIEW ~

by Timothy G. Mara, JD, AICP



In *Econocide: Elimination of the Urban Poor* (2012, National Association of Social Workers Press; 188 pp.; \$24.95), Alice Skirtz, who was for thirty years the director of social services for Cincinnati's local Salvation Army, writes about Cincinnati's once-notorious Over-the-Rhine (OTR) community. Since the riots of 2001, OTR has undergone significant changes characterized by gentrification and renewed investment. In addition, some have claimed the character of OTR has changed due to displacement of the homeless and poor.

3CDC, a private development corporation controlled by Cincinnati's major corporate citizens but also heavily dependent upon public subsidies like tax increment financing and historic preservation tax credits, has spearheaded much of this change. The corporation, Skirtz explains, has also been effective in securing public investment for OTR, including renovation and expansion of the community's largest park and a planned streetcar link to downtown.

3CDC's operations, however, lack transparency and do not appear to be subject to Ohio's open meetings and public records laws. Moreover, 3CDC-sponsored projects are often foisted on the public with little advance notice and

little oversight. And, it is difficult, if not entirely impossible, to secure remedial action when 3CDC projects adversely impact OTR residents.

Skirtz laments that removing decisions on planning, housing, economic development, and management of public assets from elected officials and placing those decisions in the hands of private, nonprofit development corporations is leaving the homeless with no voice in their fate. But, aren't the working poor and the middle class also being disenfranchised by the relentless march to privatize services? It could be that all but the wealthiest and most influential citizens are losers in this power grab in the name of getting things done. Skirtz misses her opportunity to appeal to a wider audience when she implies that the homeless are the sole victims of this controversial trend.

The OTR experience applies to nearly any community in which city leaders are contemplating ceding control of development and city services to private entities. While the democratic process may be slow and difficult, Skirtz is correct when she complains that people are being excluded from government by the privatization of services. Had she stuck to that theme, and not focused so narrowly on the homeless, *Econocide* may have garnered more support for those who need it most.

Nevertheless, *Econocide: Elimination of the Urban Poor* is a thought-provoking book for planners and city attorneys who would do well to consider the downside of privatization when recommending strategies for plan implementation. ♦

*Don't forget to visit the
[PLD homepage](http://apapld.wordpress.com)
(apapld.wordpress.com)
for new content, such as
articles and announcements!*

FORM BASED CODES

Continued from page 4

streamlined redevelopment process in an area lagging behind other parts of Arlington in economic vitality. Despite over 200 discrete form requirements and the required transformation of private property adjacent to publicly owned right-of-ways, developers have not shied from pursuing entitlement under the relatively unfamiliar new alternative. Where property owners choose to develop under the form-based code, approval is conditioned on including certain elements of form on private space. For example, the Code requires the construction of street walls to show where private space ends and public space begins and, that "Neighborhood" or "Local" sites (as designated by the Code's regulating plan), have a formulaically determined number of "canopy shade trees" on the rear portion of lots. But when property owners choose to develop under the FBC and requirements such as these, they gain a streamlined entitlement process, the right to significantly greater density and the collective benefits of a well-functioning urban environment.

In a 4th Circuit contract dispute, the Court of Appeals referred to Arlington's FBC as a "zoning process" offering a "streamlined alternative" to the traditional procedure. *Litman v. Toll Bros., Inc.*, 263 F. App'x 269, 271 (4th Cir. 2008). Administrative by-right approval is available for projects under 40,000 square feet, not requiring modification from the Code's form standards and for other projects, the County Board has discretion to allow modifications needed to accommodate topography, historic structures, and other site specific features. This streamlined and flexible approach is also notable of the Columbia Pike Form Based Code. In addition to being adopted as an alternative to existing regulation in a targeted revitalization district, the Code also provides a process designed to facilitate

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I Read it in the Blogs...

by Conor Walline

This column features a roundup of land use law issues as reported in recent blogs. We provide a brief summary of the posts, with links to the original postings. This quarter we focused on issues of wind energy.

The Future of Wind Energy in Idaho

As Marc Bybee notes on IdahoNEXT, a blog based out of the University of Idaho, the last four years in Idaho have seen a dramatic change in the State's energy infrastructure. The State has approved over 30 different wind turbine projects—ranging in size from 20 to over 100 turbines—which, combined, have resulted in excess wind energy. While having excess energy to export may seem like a great situation for the State, it has also resulted in an overtaxed energy grid. [Read the blog...](#)

Green Zoning in the Big Apple

The New York City Council has recently adopted significant changes to the City's zoning code. These changes are designed to promote renewable energy and green building practices, particularly by streamlining the process New Yorkers must go through to gain approval for small wind turbines and other renewable energy installations. Several provisions of the amendments encourage rooftop wind turbines on buildings over a certain height. Contributors to the Land Use Prof Blog think that the impact of these provisions, over the next few years, will be interesting to follow. [Read the blog...](#)

At Odds: Exclusive Farm Use (EFU) Land and Wind Energy

In the case *WKN Chopin, LLC v. Umatilla County*, the Oregon Land Use Board of Appeals held that the County's denial of a wind energy transmission line on EFU land was improper. Carrie Richter reports on the Northwest Land Law Forum blog that, in so holding, the

Board rejected the County's position that WKN Chopin's failure to consider other alternatives and establish that they were not feasible was grounds to deny the line. The Board also re-affirmed cases holding that applicants for utility facilities necessary for public service need not consider EFU-zoned alternatives in its impact analysis. [Read the blog...](#)

O-HI (Wind Energy)-O!

As reported on Professor Salkin's Law of the Land Blog, Buckeye Wind, LLC, a wind energy developer, planned a development of 70 wind turbines on over 9,000 acres in Champaign County, which qualified it as a "major utility facility" requiring site plan approval. A group of neighboring landowners, along with the County, opposed the application on grounds of noise, property setbacks, and diminution of property value. The siting board approved the site plan, and the neighbors and County appealed the decision in *In re Application of Buckeye Wind*. The Ohio Supreme Court found for the board on the issues of procedural due process raised by the claimants. [Read the blog...](#) ♦



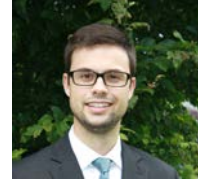
~ Member Activities ~ Share your pictures with us!

We want to know what PLD members are up to! Did you see another PLD member at a networking event? Hold an exciting conference? Participate in a Habitat build? Join other PLD members in a 5K walk?

Whatever your story, send your pictures and captions to pld.newsletter@gmail.com and we will publish them in future newsletters.

Announcement of New Student Editorial Board Members

Conor Walline joins the *Planning & Law* Newsletter as our Copy Production & Features Editor. He graduated *summa cum laude* from



Westminster College in 2008 with a Bachelor of Arts degree in philosophy and

sociology. Conor graduated from the University of Utah in 2011 with his Master of Science in philosophy, completing his thesis on "The Value of Lockean Labor-Mixing: A Critique of Nozick's Ownership-by-Fiat Theory of Property," and working as both a research assistant and a graduate instructor for introductory philosophy courses. A rising third-year law student, Conor is currently a Senior Associate on Pace Environmental Law Review and a member of the Federal Judicial Honors Program. He has been Professor Noa Ben-Asher's research assistant since December 2011 and was Professor John R. Nolon's Research Assistant from May to December 2012. Conor is expected to graduate from Pace Law School in 2014 with a J.D. and a Certificate in Environmental Law.

Casey O'Donnell joins the *Planning & Law* Newsletter as our Acquisitions Editor. He is a rising third year law student focusing on environmental and



land use law at Pace Law School. Prior to attending Pace, Casey was the

Zoning Enforcement Officer for the town of Greenwich, CT. Casey has a diverse background including commercial and residential development as well as engineering and marketing in the industrial sector. Casey earned his bachelor's degree from the University of Connecticut in 2010 and his associate's degree in electrical engineering from Fairfield University in 2005. Casey is expected to graduate from Pace Law School in 2014. ♦



PLD Announces Winners of 29th Annual Smith- Babcock-Williams Student Writing Competition

by Professor Alan C. Weinstein

PLD would like to congratulate the winners of last year's Smith-Babcock-Williams Student Writing Competition for their exemplary contributions to the field of planning.



First prize went to **Sarah Schenck** for her article entitled, "Buoying Environmental Burdens in Bankruptcy Floodwaters".



Second prize was awarded to **David A. Lewis** for his article, "Implementing Form-Based Zoning to Overcome Exclusionary Zoning and Local Opposition to Affordable Housing".



Third prize went to **Catherine Hall** for her article, "Valid Regulations of Land-Use or an Out-and-Out Plan of Extortion? Commentary on *St. Johns River Water Mgmt. Dist. V. Koontz*".



The honorable mention was awarded to **Chloe Angelis** for her article, "The Public Trust Doctrine and Sea Level Rise in California: Using the Public Trust to Prohibit Coastal Armoring."

Winners for this year's 30th Annual Smith-Babcock-Williams Student Writing Competition will be selected next month. Thanks to those of you who gave your support to the competition by passing along the announcement to eligible students and encouraging them to submit entries. ♦

Land Use Movie Recommendation

By Steven E. Gavin

The Island President (Samuel Goldwyn Films, 1 hr. 41 min., Rated: PG) is the story of Mohamed Nasheed, the diminutive former leader of the tiny archipelago nation of the Maldives. Nasheed saw the literal existence of his nation threatened by rising sea levels and embarked upon an audacious challenge: to save his nation by brokering a comprehensive international carbon deal at the 2009 Copenhagen Climate Summit.

The Maldives comprise almost 1,200 flat atoll islands in the Arabian Sea, where the highest elevation is only eight feet above sea-level. To much of the rest of the world, the Maldives are known for their pristine beaches and ultra-exclusive hotels, but as this film points out, Nasheed's predecessor, dictator Maumoon Abdul Gayoom, tortured hundreds of his own citizens and silenced any political opposition—Nasheed included.

The film chronicles Nasheed's rise to become the first democratically-elected leader of the Maldives, focusing his efforts to address climate change on both local and global levels. The effects of climate change, particularly sea-level rise, pose an existential threat to the lowest island nation in the world and promise to force thousands of Maldivian citizens from their low-lying island homes. Nasheed dedicated much of his first year in office to reducing carbon emissions and raising awareness, conducting a cabinet meeting entirely underwater with SCUBA gear and developing a 10 year plan to become the world's first carbon neutral country.

The film follows Nasheed backstage at Copenhagen, where the viewer is reminded of the seemingly

insurmountable cacophony of political inaction, self-interest, and polarization that has crippled most international efforts to address the growing risk of climate change. Standing boldly with and against world leaders, Nasheed remains defiantly optimistic, desperately attempting to garner enough support to achieve a comprehensive carbon deal. Even as the cold reality of political impotence sets in, Nasheed reminds his cabinet of his resolution, "At least we'll die knowing we tried to do the right thing."

The seminal rock group, Radiohead, contributed 14 tracks to the project. "Unless something is done to stop rising sea levels, they will lose everything" said Radiohead front man and activist Thom Yorke. "They will lose everything. The country will be under water. Some of our music was used to help tell the story." Sadly, Mr. Yorke's warning became more likely recently as a coup overthrew Nasheed and sent him into exile. ♦



Want to publish in APA's *Planning & Environmental Law*

APA's legal publication for planners, *Planning & Environmental Law*, is seeking new authors!

If you are interested in publishing in *PEL*, please contact editor Molly Stuart at mstuart@planning.org.



LAND BANKS

Continued from page 3

the hope is that the land's value will appreciate in response to ongoing economic development programs. The land banking entity is then able to reinvest appreciation gains in the local community.

What role do land banks play in community revitalization?

Land banks have become an increasingly important tool in shrinking, post-industrial cities that are struggling to provide basic services to businesses and residents in light of smaller, more dispersed populations. City officials must reassess where to locate housing and central services, and how to repurpose vacant tracts of land to serve the existing community. Land banking entities serve as active stewards in that process, carefully managing parcels over time rather than selling off land in an uncoordinated fashion to disparate private owners in a weak real estate market. The land banking entity's careful disposition of parcels to private entities helps cities to provide basic services more efficiently in the long term, and avoids real estate speculation in the short term. In addition to furthering important fiscal goals, land banking can serve important social and environmental goals. Land banking entities are able to choose end-users carefully, and focus their immediate attention on areas where vacancy is causing the most community hardship. As a result, land banking has been used as a tool to reduce crime, increase affordable housing, facilitate transit-oriented development, and encourage storm-water management.

In Practice:

Michigan—a Model for New York State's Land Bank Act:

The New York State legislature worked closely with the Center for Community Progress to develop the land banking framework in place today. The Center's then-president, Dan Kildee, was responsible for developing a land banking program in Flint, Michigan, which has had striking impacts on community redevelopment efforts. In the late 1990s, Kildee successfully

advocated for tax foreclosure reform (P.A. 123 and P.A. 258), taking what was once a seven-year process to address abandoned, tax-delinquent properties in Michigan, and turning it into a two-year process for counties to take control of foreclosed properties. The new streamlined foreclosure laws paved the way for the Genesee County



*Distressed property, City of Detroit, MI
- Photo courtesy of Jennie Nolon Blanchard*

Land Reutilization Council, and in 2004, the State passed enabling legislation (the Michigan Land Bank Fast Track Act) authorizing land banks across the State. The Genesee County and Bank Authority (GCLBA) became the first land banking entity

in the State, which involved inter-local coordination between Genesee County and the City of Flint. Since the land bank's inception, GCLBA has helped to transform more than 4,000 parcels into active residential, commercial, and industrial uses.

The Genesee County Land Bank now has a set of comprehensive programs, including a partnership with the Environmental Protection Agency to encourage the redevelopment of brownfield sites; assistance with

demolition of abandoned properties; a foreclosure prevention program to work with families in the community facing financial hardship; and a side lot transfer program to help maintain and encourage local ownership in the City

of Flint and Flint Township. The

regulatory structure in place in Michigan has allowed the GCLBA to redirect revenue from real estate speculators purchasing tax liens to a county fund that uses proceeds from appreciating land values to acquire more

vacant parcels and maintain tax-foreclosed property.

New York's Land Banking Program:

The New York State Land Bank Act set out a competitive process for a total of ten land banks across the State, with no more than five to be designated in the program's first year. There were eight applicants in the program's first year, of which five were selected as newly authorized land banks. Interestingly, three of these five land banks involve inter-municipal agreements within a single county. While land banks are often thought of as a solution to urban blight, they can provide an equally important redevelopment tool in suburban neighborhoods. As an example, in Erie County, NY, the obvious place for a land bank would be the City of Buffalo, given the number of tax delinquent properties in the State. However, the Erie County Department of Real Property Tax Services found that while the majority of the County's nearly 74,000 tax delinquent properties are indeed in the City of Buffalo, those properties only represent 11 percent of the total assessed value of all tax liens, or approximately \$6 million of the estimated \$54 million owed in taxes.

With these figures in mind, municipalities in Erie County joined together in a countywide effort to

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LAND BANKS HAVE BECOME
AN INCREASINGLY
IMPORTANT TOOL IN
SHRINKING, POST-INDUSTRIAL
CITIES.



LAND BANKS

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propose the Buffalo Erie Niagara Land Improvement Corporation (BENLIC), a land banking entity that will address vacancy not only in three cities, but also in 25 suburban communities and 16 village centers. To ensure that the various municipalities are well-represented by BENLIC, the land banking entity will be managed by an 11-member board, with five representatives from the City of Buffalo, three county representatives, a representative from Lackawanna and Tonawanda, and a representative from New York State Empire State Development Corporation, the State economic development agency that oversees the land banking process.

Joseph Maciejewski, Director of Real Property Tax Services for Erie County and BENLIC Board Member, played a significant role in crafting the BENLIC's land banking application. He emphasized the importance of the inter-municipal

agreement in the competitive application process, but also cautioned, "as a land bank, we cannot simply go against land use policies established in local communities. While most towns have embraced the land bank, as a general rule, we will only intervene and acquire properties where the community is supportive of what we are doing." In the land bank's first year, BENLIC will focus on identifying properties where relatively low-cost cosmetic work will have a large impact on surrounding property values. By starting small, the land bank can establish trust and generate the proceeds needed to tackle more distressed properties. Mr. Maciejewski explained, "you cannot get too big too

fast—first the land bank needs to show what we can do. We will start by building a model, say ten properties that we acquire, improve, and market to investors. This will help us establish a budget. If the land bank were to assume control of 100 of the worst parcels without any budget, and let them fall into disrepair, the land bank would be a failure. What our community realizes is that we are taking a step forward while being realistic."

BENLIC is presently working to secure seed funding, with \$150,000 in Erie County funds identified to get the land banking process started. The hope, however, is that once BENLIC sees returns on properties they have improved, that money can be returned. BENLIC also indicated that several foundations are expressing interest in

their work, and they have already received in-kind services from area non-profits. The underlying philosophy of the land bank is to avoid creating another level of government bureaucracy. Mr. Maciejewski noted the following example: "rather than sending out our own land bank

building inspectors, we're making the land bank a repository for data, photos and information from local building inspectors; who knows better than the local code enforcement officers about where these parcels are?"

Looking to the Future in New York State:

The potential of land banks in New York is indeed enormous. Empire State Future, a state-based smart growth advocacy group that helped to promote New York State's land banking framework, cites research in Philadelphia indicating that neighboring home values decreased by over \$6,000 as a result of one vacant or abandoned property in the

neighborhood. The hope is that New York State's newest land banks can achieve a dual objective, helping to maintain ownership of properties within local communities while thoughtfully repurposing abandoned sites in a way that spurs future redevelopment.

Resources:

- (1) Frank S. Alexander, Local Initiatives Support Corp., Land Bank Authorities: A Guide for the Creation and Operation of Local Land Banks 2 (2005).
- (2) Alan Mallach, The Brookings Institution Metropolitan Policy Program, Tackling the Mortgage Crisis: 10 Action Steps for State Government 1-3 (2008). ♦

PLD BLOGGERS

PLD's members sure have some terrific blogs to share!

This edition features two blogs:

Garvey Schubert Barer's "Land Law Forum"

northwestlandlawforum.com
out of Portland, Oregon, which focuses on recent developments in land use law and how they affect the pacific northwest, and

Robinson & Cole's "RLUIPA Defense"

www.rluipa-defense.com
out of Hartford, Connecticut, focusing on cases and scholarly articles involving the Religious Land Use and Institutionalized Persons Act (RLUIPA).

Both blogs contain regular updates with analyses of cases, news items, and other matters. Reader comments are encouraged!

Do you have a blog that you think we should mention in the next PLD newsletter?

Send the link to:

pld.newsletter@gmail.com



FORM BASED CODES

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development rather than merely police design standards. The same combination of detailed form requirements and administrative flexibility could soon be promoting the new-urbanist redevelopment envisioned in the 2012 Columbia Pike Neighborhoods' Area Plan.

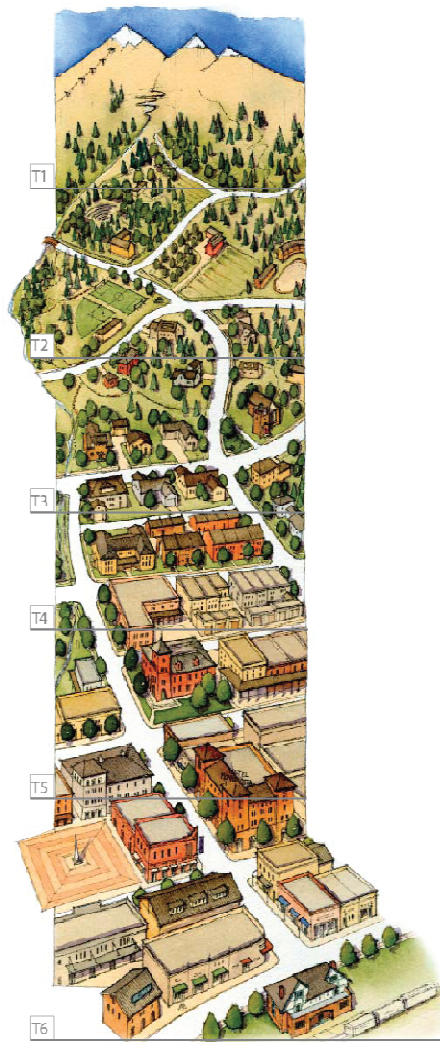
Flagstaff, AZ

As featured in the February 2012 issue of Planning Magazine, Flagstaff, Arizona implemented its form-based code as part of a hybrid zoning ordinance adopted last November. While that zoning ordinance applied form-based code transects to all of the City's downtown and surrounding historic neighborhoods, Flagstaff, like Arlington, implemented form-based code as an alternative to an underlying more traditional zoning ordinance.

The new ordinance is a hybrid of form-based code and conventional zoning. The ordinance is organized according to a form-based code framework (as defined by the Form-Based Codes Institute) even though mostly conventional zoning alone governs much of the City's suburban land with form-based code applied to particular areas. Specifically, the form-based standards are available as an alternative throughout the downtown and surrounding neighborhoods as delineated by the Downtown Regulating Plan. A revamped, simplified version of the City's preexisting Land Development Code is the sole option in the surrounding suburban areas and the underlying alternative in the Downtown Regulating Plan area.

In consideration of Arizona's Proposition 207, which empowers landowners to seek compensation whenever land use regulation reduces the fair-market value of their property, Flagstaff was careful not to mandate stricter development standards with its new ordinance. While even the refined conventional zoning ordinance was influenced by Duany Plater-Zyberk's

Smart Code, Flagstaff elected to take a conservative approach in reconciling proposed new standards with those in the preexisting Land Development Code. When confronted with conflicting metrics for setbacks or other development standards, the City systematically adopted the less restrictive standard. Similarly, the standards of the form-based code elements do not mandate any new restrictions since landowners may still choose to develop their property in any of the ways allowed by the preexisting Land Development Code.



When landowners do opt to develop under the form-based code, however, they must comply with all of its requirements and may not selectively choose some standards from the conventional zoning and others from the form-based code. The form-based standards found in Divisions 10-40 through 10-70 of the Flagstaff Code are

adapted to Flagstaff based on the Rural-to-Urban Transect concept as envisioned by Andres Duany. They offer developers advantages not available in non-transect zones but also require private frontages to comply with standards typical of FBCs based on the transect. What is notable of Flagstaff's private frontage requirements, though, is that various frontage types are allowed, rather than required and private space is not required to be developed for elements of primarily public function. That is, with the possible exception of "frequent steps" required in the "Terrace Shopfront" frontage type, all elements of private frontages serve primarily private functions. In this regard, Flagstaff's form-based code is both optional and relatively undemanding of private landowners. According to Flagstaff Zoning Code Administrator Roger Eastman, implementation is going smoothly thus far and only minor amendments to the Code are planned.

Miami 21

Miami 21 is not optional. The largest and probably best-known application of form-based code to date does not function as an alternative to prior land use regulation. City wide, Miami 21, an application of DPZ's Smart Code, replaced Miami Zoning Ordinance 11000. Though Article 7 of Miami 21 establishes various procedures for nonconforming structures to be altered without conforming to the code depending on the type of development and extent to which the nonconforming use will be enlarged, Miami 21 establishes form-based standards, which generally must be followed. (There are also provisions governing nonconforming structures affected by fire or natural disaster.)

The City encountered significant resistance in the process of adopting Miami 21. A 2009 Miami Herald Article proclaimed a 2-2 initial vote by City Commissioners to have killed the new code and later, following approval, claims for property losses totaling over \$150 million were filed under the Bert J. Harris Jr. Private Property Rights

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FORM BASED CODES

Continued from previous page

Protection Act. The Bert J. Harris Act is a Florida state law that provides landowners a cause of action when laws or regulations, as applied, have "inordinately burdened an existing use of real property or a vested right to a specific use of real property." But those lawsuits have not been successful and claims overwhelmingly focused on the height restrictions in a particular district of the City – a type of requirement not unique to form-based codes.

Characteristically form-based code requirements of Miami 21 include minimum frontage at setbacks, minimum building height, parking placement, frequent fenestration and other regulations for building configuration and disposition. With regard to private frontages, Sections 5.5.6 and 5.6.6 require the first "layer" of private lots to be paved and landscaped to match and extend the enfronting public space. The form of that public space in turn is governed by Miami 21's thoroughfare standards.

Under these new regulations, projects comprising over 10 million square feet of development, including 3,000 residential units, have already been submitted for approval with many projects under construction this year. Generally, Miami 21 has enjoyed support from the development community, while also winning national awards, including the Driehaus Award in 2010 and the APA's National Planning Excellence Award for Best Practice in 2011. In remarking on the

success of the Miami 21 implementation, it is worth taking note of the extensive associated public outreach. According to the Miami 21 website, there have been over 500 meetings held by City of Miami Planning Department staff and consultants, DPZ.

Another step forward came this summer when the City Commissioners approved the Special Area Plan for the Design District Retail Street. Developer Craig Robbins plans to build a \$312 million dollar high-end retail project through the district that he has worked to help revive for the past ten years. The Plan, which will be appended to Miami 21, establishes special regulations for approximately 1 million square feet of new development.

Luciana Gonzalez of Miami 21 noted, "I think the biggest challenge with FBC's is in the implementation stage. Prior to a municipality adopting such a code, testing of actual projects in different parts of the City is crucial for its successful implementation. Such testing should include different scenarios and take

into consideration existing conditions of the City. This is one of the many lessons learned as we continue to implement Miami 21."

While legal issues relating to form-based codes are yet to be fully developed, those interested in promoting their use should pay careful attention to the lessons gleaned by pioneering cities. Choices made in implementation may have a significant effect on challenges to the application of form-based codes in court. ♦

ALL ACROSS THE COUNTRY,
LOCAL GOVERNMENTS
SEEKING TO ESTABLISH
TRADITIONAL
NEIGHBORHOOD FORM
CONTINUE TO REPLACE
CONVENTIONAL ZONING
CODES WITH NEW ONES THAT
PRIMARILY
REGULATE FORM.

WEBINAR ANNOUNCEMENT!

PLD's Education & Outreach Committee will be conducting a 90-minute webinar on:

Ethical Rules and Considerations for Planners, Planning Commissioners, and Lawyers

~ September 4, 2013 ~
1:00-2:30pm CDT

1.5 CM Ethics Credits

Please join us for this important, informative, and engaging webinar on the ethical rules and considerations governing planners, plan commissioners, and lawyers who work with planners and appear before plan commissions.

The webinar will cover the primary sources of ethical rules, common ethical mistakes, and procedures to correct common mistakes. In addition, the webinar will have an interactive component that will enable participants to interact with the presenters and other participants on ethical scenarios.

PLD Members: \$20
Non-Members: \$40

Speakers:

Sorell E. Negro, Esq., Attorney, Robinson & Cole LLP, Hartford, CT
Hiram Peck, AICP, Director of Planning, Simsbury, CT
David Silverman, Esq., Attorney, Ancel Glink, Chicago, IL

For more information and to register please [click here](http://www.planning.org/divisions/planni)

or copy and paste the following link:
www.planning.org/divisions/planni
ngandlaw/training



New on the PLD Website

Last fall, PLD began compiling an online library of “Planning Law FAQs,” building on the database of planning and law information already available on [PLD’s Resources page](http://apapld.wordpress.com/resources/#FAQ) (apapld.wordpress.com/resources/#FAQ). These brief summaries are designed to provide a snapshot of important legal concepts in land use law, including landmark cases and secondary sources. Even seasoned practitioners can reduce research time and refresh their fundamentals using this free and concise resource.

Although the library will take time to build, visit now for answers to our inaugural topics, including:

- Must a city adhere to its master plan?
- How does a practitioner distinguish between legislative and quasi-judicial proceedings, and why does it matter?
- What is the current state of the “public purpose” requirement for eminent domain?

As always, don’t forget to visit the [PLD homepage](#) for new content.

Call for Submissions

Want to contribute to the PLD Newsletter? Send us your proposals for **articles, case studies, case law updates, or book reviews**. Be creative; think beyond the ordinary and send us something our membership is not likely to find anywhere else.

Submit your proposals to pld.newsletter@gmail.com

ELECTRIC CARS

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Encourage or Require New Construction to be Ready for Charging Station Installation

Retrofitting a home or commercial structure can be extremely expensive when compared to the cost of constructing units that are already capable of supporting charging stations. This cost can deter the construction of charging stations. Municipalities appear to be split on requiring new construction to be equipped for later charging station installation. While most highly encourage it, a few have mandated it. For example, Mountlake Terrace, Washington, requires all new home construction and additions modifying greater than 50% of the assessed value of the building to accommodate one electric vehicle charging station at Level-2. Mountlake Terrace also requires a set percentage of parking spaces that must be reserved for electric vehicles when other multifamily and non-residential construction takes place.

Signage and Notice

Another common challenge is signage and notice. Most ordinances require adequate signage to guide the driver to the charger’s location, and to put the public on notice that the spot is reserved for electric vehicles only. A variation on this approach is to allow parking exclusively for electric vehicles during certain hours and leave the spot open to the public during others. It is also common for an electric car ordinance to require information about the charging station to be posted on site. This may include the type of model, amperage level, safety information, fees that may be charged, and owner contact information.

Preferred Locations

The preferred location of charging stations on public streets varies by municipality. Kane County, Illinois permits charging stations on public streets with a preferred location at the end of the block. Corner locations are also listed as a best practice in

Washington State’s Best Practice Guide. In contrast, the City of Lacey, Washington does not permit charging stations on public streets if they will affect the landscaping and aesthetics of the streetscape. Thus, a permit to place a charging station requires approval from the Public Works Director. Other ordinances remain completely silent on this matter, or focus more on off-street charging stations. For example, the City of Mountlake Terrace, Washington focuses heavily on fostering off-street charging stations, but does not even mention on-street charging. Other ordinances, such as the City of Auburn Hills, Michigan mention on-street charging stations but do not designate a preference. If charging infrastructure is placed in a parking lot, it may be used to satisfy minimum parking requirements in most cases.

Accessibility

Generally, electric parking spaces may not interfere with accessibility requirements for disabled persons. Municipalities such as Kane County, Illinois, and Lacey, Washington merely prohibit charging infrastructure from interfering with the State Accessibility Code. Other municipalities have taken affirmative steps to promote the construction of accessible spaces. For example, Mountlake Terrace, Washington requires a certain ratio of accessible charging spots to the total number of charging spots. For example, one accessible spot must be constructed if between 4 and 50 charging stations have been built. However, in most cases there is no requirement that accessible spaces be reserved exclusively for disabled persons.

Development Standards

Development standards help ensure that owners of Electric Vehicles can access charging infrastructure in a safe, consistent, predictable manner, and that such infrastructure is compatible with the surrounding streetscape. A height of at least 36 inches off of the ground and no higher than 48 inches appears to be a standard practice for station outlets and connector devices

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ELECTRIC CARS

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across multiple ordinances. This charging equipment must be at least 24 inches from the curb and contain a retraction device and a place to hang permanent cords and connectors.

Conclusion

By updating their zoning codes to permit or promote the construction of electric vehicle infrastructure municipalities may be able to finally solve the chicken or the egg dilemma. With regulatory barriers removed, market forces will be unshackled, allowing private enterprise to respond to the rising demand. Government mandated requirements will allow existing electric vehicle drivers more charging options and will help ease the range anxiety many prospective drivers feel. Development standards will ensure that this transition is safe, efficient, and easy for drivers and pedestrians alike. Furthermore, in a difficult economy, electric vehicle infrastructure will bring needed economic benefits. The age of the electric car has come and municipalities that respond early are poised to gain a decisive advantage. ♦

APA Policy News Blog

APA launched a policy blog last year, which addresses federal legislation, accompanying funding, and much more. Recent posts include: "*HUD Proposes Sweeping Fair Housing Rule*", "*CDBG—'Lifeblood of Communities' Under Attack*", and "*New Guidance and Opportunities for Federal Hazard Mitigation Assistance*."

APA encourages regular reading of the blog, which is accessible at <http://blogs.planning.org/policy>, and social media interaction with its twitter feeds (@jasonljordan and @APA_Planning).

National Poll on Planning Perceptions & Priorities

Last year, the APA released the results of an objective research study that it commissioned to determine what the general public wants from community planning and what perceptions of community planning currently exist amongst the American public.

The results of the survey demonstrate that the majority of Americans support community planning and over 50% of small town, suburban, and urban respondents agreed that tax revenues should support such planning. The survey also showed that the top priority of planners should be job creation.

This survey provides a resource for planners facing scrutiny from local political groups and assists in the prioritization of planning objectives. Some of the survey's key findings are:

- (1) Less than one third of Americans believe their communities are doing enough to address the country's economic situation.
- (2) Community planning is seen as needed by a wide majority of all demographics.
- (3) Very few Americans believe that market forces alone will improve the economy and encourage job growth.
- (4) 84% feel that, compared with five years ago, their community is getting worse or is staying the same.
- (5) Top priorities for local planning efforts and local finding priorities are closely aligned around a basic agenda: jobs (70%), safety (69%), schools (67%), neighborhoods (64%), and clean water (62%).
- (6) Key features of an "Ideal community" include locally-owned businesses and the ability to stay in one's homes (age in place) while growing older.
- (7) Half of all Americans would like to be involved in community planning in the future.

To view the complete study, visit:
www.planning.org/policy/economicrecovery



KOONTZ

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mitigation by replacing culverts and plugging drainage canals on District-owned properties seven miles from his property, which Koontz refused.

When the District then denied the permit, Koontz sued in state court, arguing that the District's offsite mitigation condition was an unconstitutional exaction because it violated the *Nollan-Dolan* test. The case bounced around between the trial court and the intermediate appellate court for years, producing some important takings jurisprudence in Florida. Ultimately, the trial court found that the District had taken Koontz's property through an unconstitutional exaction because the condition was not related to the impacts of his project. The intermediate appellate court affirmed.

The Florida Supreme Court reversed, holding there was no taking because (1) no permit was ever issued, (2) the exaction did not demand real property, and (3) public policy precluded expansion. The court explained that the *Nollan-Dolan* test only applied to exactions of real property, where a permit was actually issued imposing the onerous conditions. The court acknowledged a line of cases applying the *Nollan-Dolan* test beyond real property exactions, but it held that these cases went beyond the U.S. Supreme Court's decisions. The court also pointed to *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 to support its conclusion that the *Nollan-Dolan* test only applies when the government actually issues the permit because only then is the owner's property interest subject to dedication.

Finally, even though the court denied the property owner's claim, it expressed a public policy concern for other developers and landowners. It worried that:

"agencies will opt to simply deny permits

outright without discussion or negotiation rather than risk the crushing costs of litigation. Property owners will have no opportunity to amend their applications or discuss mitigation options because the regulatory entity will be unwilling to subject itself to potential liability. Land development in certain areas of Florida would come to a standstill. We decline to approve a rule of law that would place Florida land-use regulation in such an unduly restrictive position." 77 So. 3d at 1231.

KOONTZ WILL HAVE EVEN FARTHER- REACHING IMPLICATIONS FOR THOSE OF US IN LAND USE CAREERS.

The U.S. Supreme Court Hears *Koontz*

On October 5, 2012, the U.S. Supreme Court granted certiorari, and it heard oral arguments on January 15, 2013. Koontz asked the Court to establish that (1) the *Nollan-Dolan* exactions test applies to exactions other than real property, such as where a permit applicant is required to pay for work; and (2) the *Nollan-Dolan* exactions test applies even where a permit is denied because an applicant rejects an exaction.

Koontz argued that the Court did not have to stretch far to make such a ruling, as it has held in other contexts that government may not withhold discretionary benefits on the condition that the beneficiary surrender a constitutional right. Koontz also argued that both of these issues need to be settled by the Court because of the confusion amongst lower courts.

The District, on the other hand, echoed the Florida Supreme Court by arguing that it did not exact or take anything because it never issued a permit or collected an exaction. Various amici for the District argued that if takings law did apply, the Court should apply a test balancing public and private concerns

based on *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

Early on, there were reasons to think that this case would be an important case for planners and land use lawyers to watch. First, the Pacific Legal Foundation, which represented Koontz, has shown a knack for litigating environmental and property rights cases before the U.S. Supreme Court, having participated in more than half a dozen landmark decisions. Indeed, it argued and won *Nollan*, and in March of last year, it won *Sackett v. EPA*, 132 S. Ct. 1367 (2012), which gave property owners the right to take EPA to court over a compliance order dealing with wetlands. Second, some saw this case as a vehicle for the Court's property-rights advocates, since it seemed to present the review of a clean issue of law, rather than a messy fact-specific or jurisdictional fight. Justices Scalia, Kennedy, and Thomas had previously shown an interest in the past in the timing of permit conditions. See *Lambert v. San Francisco*, 529 U.S. 1045, 1048 (2000) (dissenting from denial of certiorari).

The *Koontz* Decision from the Court

On June 25, 2013, the U.S. Supreme Court issued the *Koontz* decision. Justice Alito authored the 5-4 decision that was split along ideological lines. As mentioned, Koontz asked the Court to establish (1) that the *Nollan-Dolan* exactions test applies even where a permit is denied because an applicant rejects an exaction, and (2) that the *Nollan-Dolan* exactions test applies to exactions other than real property, such as where a permit applicant is required to pay for work. The Court agreed with Koontz on both points, overturning the Florida Supreme Court.

On the first point, the Supreme Court focused on the unconstitutional conditions doctrine, writing:

"The principles that undergird our decisions in Nollan and Dolan do not change depending on whether the government approves a permit on the

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KOONTZ

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condition that the applicant turn over property or denies a permit because the applicant refuses to do so. We have often concluded that denials of governmental benefits were impermissible under the unconstitutional conditions doctrine. In so holding, we have recognized that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them. A contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of Nollan and Dolan simply by phrasing its demands for property as conditions precedent to permit approval." Koontz, 133 S. Ct. at 2596-96 (citations omitted).

On this, all nine justices agreed. *See id.*; 133 S. Ct. at 2603 (Kagan, J., dissenting). The second point was more divisive:

"In this case, unlike Eastern Enterprises, the monetary obligation burdened petitioner's ownership of a specific parcel of land. In that sense, this case bears resemblance to our cases holding that the government must pay just compensation when it takes a lien—a right to receive money that is secured by a particular piece of property. The fulcrum this case turns on is the specific parcel of real property.... [P]etitioner does not ask us to hold that the government can commit a regulatory taking by directing someone to spend money. As a result, we need not apply Penn Central's "essentially ad hoc, factual inquiry...." Instead, petitioner's claim rests on the more limited proposition that when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a "per se [takings] approach" is the proper mode of analysis under the Court's precedent." Koontz,

133 S. Ct. at 2599-2600 (citations omitted).

The *Koontz* decision showed the folly of relying too heavily on oral argument to predict case outcomes. At oral argument, even though a majority of the justices seemed to agree the landowners had been wronged, they had seemed to disagree about the particular theory at play. The reach of the unconstitutional conditions doctrine had taken center stage at oral argument. The parties agreed that "[a]cts generally lawful may become unlawful when done to accomplish an

FOR MANY OF US WHO WEAR BOTH A LAWYER'S HAT AND A PLANNER'S HAT, CASES LIKE *KOONTZ* CAN LEAVE US TORN.

unlawful end, and a constitutional power cannot be used by way of condition to attain an unconstitutional result." *See Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583, 598-99 (1926). The Supreme Court has traditionally struggled with defining the appropriate breadth of this doctrine, however, even though *Nollan*, *Dolan*, and *Lingle* indicate it is the origin of exactions law. Thus, while it was not surprising that the Justices unanimously agreed that the unconstitutional conditions doctrine grounded their exactions jurisprudence, it was surprising that they found agreement in its application.

The Planning Lawyer's Perspective

Once again, my home state of Florida is on the forefront of takings law. Just a few years ago, Florida was defending its beach renourishment program before the Supreme Court in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592 (2010). That case broke new ground when a plurality of Justices acknowledged that a court can take property, just as the

legislative and executive branches can. *Koontz* will have even farther-reaching implications for those of us in land use careers.

For many of us who wear both a lawyer's hat and a planner's hat, cases like *Koontz* can leave us torn. This case has ended up before the Supreme Court because it involves complex issues not amenable to simple solutions. Reasonable minds will disagree in these tough cases. Although I have long been a member of the American Planning Association, I found myself opposing the association in *Koontz*. My client filed an amicus brief supporting the landowner, and the APA submitted a brief supporting the state agency. Nevertheless, I have attempted here to offer an objective look at the *Koontz* case.

Inevitably, though, some of my biases will have crept in, so I may as well offer my opinion on the case. The *Nollan-Dolan-Koontz* trilogy provides that a government may exact real or personal property from a landowner either before or after it issues a development permit as long as the "essential nexus" and "rough proportionality" tests are met. Instead of undercutting good planning, these rather limited property rights protections ensure that those who bear the costs of planning are fairly compensated. This not only means that government must carefully consider the costs of planning alongside its benefits, it also ensures that, in an era of public skepticism about government, the public does not see planning as a mindless exercise of the sovereign. From my view in the trenches of environmental and land use law, good planning must start and end with a healthy respect for property rights. ♦



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