

Litigation Trends in Florida

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Florida's Takings Clause: Florida Supreme Court Narrows The Scope of "Exaction Takings"

The Supreme Court of Florida recently issued an opinion clarifying the scope of the "exaction takings" doctrine and reaffirming that the Takings Clause of the Florida Constitution, Article X, Section 6(a), is coextensive with the Fifth Amendment to the United States Constitution.

The Takings Clause(s) require that where the government takes private property for public use, such as by the exercise of the power of eminent domain, the government must compensate the former property owner. To avoid the cost of this compensation states will generally attempt to accomplish their land use goals through regulation rather than the explicit exercise of eminent domain power. For example, rather than seize a piece of land for use as a public park, a municipality might pass an ordinance barring any construction in a region containing the land and bar the owner from excluding the general public. A substantial body of

law governs when a regulation is "really" a disguised taking entitling aggrieved landowners to compensation.

"Exaction takings" doctrine applies when the government requires a landowner to donate part of their land as a condition for obtaining a development permit. For example, a seaside township might condition all permits for construction on beachfront property on the granting of easements that would allow the general public access to the beach. Such a condition might be an "exaction taking." If the governmental condition is related to and proportionate to the effect of the proposed construction or development, then the condition will be viewed as a permissible regulation rather than as an exaction. The dual requirement is of an "essential nexus" between the condition and the public problem that would be created by the development; and of a "rough proportionality" between the two. These rules were laid down in a pair of United States Supreme Court cases, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Nollan and *Dolan* left open whether the "exaction" doctrine applies only where the government requires a donation of land, or whether it might have broader application to other requirements imposed as a condition for the granting of a development permit.

In *St. Johns River Water Management District v. Koontz*, No. SC09-713 (Nov. 3, 2011), the appellee was a landowner who sought a permit to dredge 3.25 acres of wetland lying on a portion of his property he wished to develop. A local agency agreed to approve the project, but only if the landowner donated a substantial portion of his land as a conservation area and also performed offsite mitigation work. The landowner agreed to donate the land but opposed the offsite mitigation requirement as a taking. No permits were issued, and the landowner sued for damages.

The trial court ruled that the mitigation requirement was a taking and awarded damages. The Fifth District Court of Appeals affirmed, the water management district appealed, and the Florida Supreme Court reversed,

holding that the “exaction” proportionality test only applies to governmental conditions that would require a landowner to donate land in exchange for a permit approval. Thus, where the municipality would impose the accomplishment of some work or task as a permit condition (i.e., offsite mitigation), the condition need not have either an “essential nexus” with, or be “roughly proportionate” to, the effect of the new development.

The Florida Supreme Court offered two rationales for this decision: First, that if landowners were permitted to bring suit whenever they were denied a permit, then the cost of litigation would render land use regulation prohibitively expensive; and Second, that the alternative might discourage agencies from negotiating mitigation efforts with landowners and instead cause them to simply deny permits outright.

Koontz demonstrates that the Florida Supreme Court intends to limit the application of the takings doctrine in order to protect the ability of administrative agencies to impose environmental regulations as a condition of development. In this way, *Koontz* is consistent with more recent United States Supreme Court cases that tend to adopt a narrower view of the Takings Clause as a burden on local land use regulation.

Notably, the land use permitting process at issue in *Koontz*

commenced in 1994 – and since an appeal to the United States Supreme Court is distinctly possible, the case may well continue on for more years. *Koontz* thus also stand for the additional proposition that, as in other States, so long as the law of takings remains in flux, litigation over a possible taking is likely to outlive local regulations themselves. Indeed, in *Koontz* the litigation outlived not just the regulation, but also the landowner.

Failure to Respond to Discovery Request Does Not Constitute Implicit Waiver of Privilege

The Fifth District Court of Appeals recently overturned a trial court’s finding of implicit waiver of privilege based on Petitioner’s failure to file a privilege log within 30 days of a discovery request. In *Fifth Third Bank v. ACA Plus, Inc. et al*, 36 Fla. L. Weekly D2409a (Fla. 5th DCA, November 4, 2011), the court granted certiorari because the trial court’s discovery order departed from the essential requirements of the law, thus causing material injury to the Petitioner. Relying on its holding in *Bankers Security Insurance Co., v. Symons*, 889 So.2d 93 (Fla. 5th DCA 2004), the appellate court reiterated its findings that attorney-client privilege and work product immunity are important protections in the adversarial legal system. As such, waiver of these protections should not be favored, but rather reserved for serious violations.

The trial court ruled that Petitioner’s failure to produce a privilege log within 30 days of the Second Request to Produce resulted in an untimely filing that waived objections on privilege grounds. Notably, the Petitioner had timely responded to the discovery request (albeit absent a privilege log), raising numerous objections but agreeing to produce other documents at a mutually-agreed upon time and place. Ignoring Petitioner’s counsel’s attempts to arrange for the mutually convenient production of documents, Respondent answered with a Motion to Compel and for the imposition of sanctions. Petitioner filed its privilege log two days after the Respondent’s motion was heard, in compliance with the court’s order. Nevertheless, and despite the trial court’s in camera finding that the documents were in fact work product or otherwise privileged, the documents at issue were ordered to be disclosed.

In overturning the trial court’s decision, the Fifth District Court of Appeals noted that Florida Rule of Civil Procedure 1.280(b)(5) does not mandate a time by which a privilege log must be filed. Rule 1.280(b)(5) provides that when a party withholds otherwise discoverable information by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the

documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. As the Fifth District Court of Appeals' decision highlights, the rule imposes no deadline.

Change to the Oath of Admission to the Florida Bar

On September 12, 2011, the Supreme Court of Florida,

recognizing the importance of respectful and civil conduct in the practice of law, revised the Oath of Admission to the Florida Bar. The oath now includes the following statement:

“To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.”

In adopting this new language, the Court cited *In re Snyder*, 472 U.S. 634, 647 (1985), recognizing the necessity for civility in the

“inherently contentious setting of the adversary process.” ■

**Courtesy of Berger Singerman's Dispute Resolution Team with offices in Fort Lauderdale, Miami, Boca Raton and Tallahassee.*

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