BRACEWELL

BLOG POST

Supreme Court Further Opens the Door to Wetlands Taking Claims

June 26, 2013

During a week of high profile Supreme Court cases, the Court handed down a lesser-noticed decision that could significantly benefit developers. Yesterday, the Court expanded the right of permit applicants to protest unreasonable mitigation requirements imposed by regulatory agencies. The decision should enhance the ability of permit applicants to negotiate reasonable terms.

In *Koontz v. St. Johns River Water Management District*, the Court ruled that an agency requirement that a permit applicant conduct mitigation in order to obtain a wetlands permit can constitute a taking under the federal Constitution if the requirement is disproportional to the impact of the proposed development. Importantly, the holding applies not just when the government requires restrictions on land use but also when the government only requires that the permit applicant pay money to fund mitigation projects.

The Court was considering mitigation that a Florida water management district required for a landowner to obtain a state wetland permit. The landowner wanted to develop 3.7 acres of his property and offered to deed to the district a conservation easement on the rest of his property—approximately 11 acres. The district rejected the proposal and told him that to get a permit he could either (1) reduce the development to 1 acre and deed a conservation easement on the remaining 13.9 acres or (2) go ahead with his original plan but pay to either replace culverts on a district-owned parcel or fill in ditches on another, either of which would have enhanced approximately 50 acres of district-owned wetlands.

The Court concluded that the government's conditions amounted to a taking and that for the taking to be constitutional there must be "an essential nexus and rough proportionality" between the government's demands and the impact of the proposed development. This requirement came from prior Supreme Court cases where building permits were conditioned on deeding rights-of-way to the government. In this case, the Court concluded that the same test applied to the district's mitigation demands, rejecting arguments that this situation was different because it involved a permit denial (as opposed to a condition on a permit that was granted) and because the landowner had an option to pay money (as opposed to giving up property rights). The Court then sent the case back to the state court for a determination of whether the mitigation requirements met the nexus and proportionality test.

The Court did not decide whether the government's demands met the test, so we will have to await future decisions to see what mitigation requirements are constitutional. We also do not know what compensation a permit applicant would be entitled to if the government failed to meet the test in a case like this (where the permit is denied and therefore there is no physical taking of property). Presumably, the compensation would be similar to that provided in

situations where a permit application is denied outright, but that remains to be seen. Finally, the decision does not make clear, much to the dissenters' chagrin, how to distinguish this type of taking from other monetary permit conditions, like fees or taxes. In the meantime, we do know that there is a constitutional test that the government must meet, and permit applicants will undoubtedly try to use that test as leverage in permit negotiations; those trying to settle allegations of permit noncompliances will also probably try to do the same.