Federal and State Standards Governing Exactions, Impact Fees, and Permit Conditions

Robert C. Apgar

Tallahassee, Florida;
J.D., Florida State University, 1978;
B.S., United States Air Force Academy, 1966.

Adam G. Schwartz

Akerman Senterfitt, West Palm Beach, Florida;
J.D., Florida State University, 2006;
B.A., Florida State University, 2002.

In general, the term "exaction" refers to a local government or State agency's requirement that exacts land or improvements, or cash payments in lieu thereof, from developers or landowners as a condition of issuing a development permit. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Some exactions, such as impact fees and proportionate fair share fees, are levied pursuant to local ordinances or State law. Other exactions are applied administratively, on a case-by-case basis. In light of the economic issues facing the state of Florida and the country as a whole, and the Florida electorate's propensity to approve limitations on State and local taxing power, government can be expected to turn more and more to exactions to provide needed infrastructure. Federal cases recognize that while exactions may serve a valid public purpose, exactions imposed administratively, on a case-by-case basis, and some legislatively imposed exactions, that do not satisfy the "essential nexus" and "rough proportionality" standards can be challenged as unconstitutional regulatory takings. Under Florida law, the particular exaction created by local ordinance known as an impact fee will be invalidated if it does not satisfy the "dual rational nexus" test. Florida courts apply the dual rational nexus test to other types of exactions as well

I. Federal Law.

A. *Essential Nexus and Rough Proportionality.*

The federal standards governing exactions were established in two landmark cases, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In general, valid exactions will withstand a takings claim if (a) there is an essential nexus between a legitimate state interest and a potential impact of the proposed development,

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and (b) if the exaction is roughly proportional to the projected impacts of the proposed development. The rough proportionality standard applies only in cases involving exactions. Both the majority and the dissenting opinions of the Supreme Court, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), restricted the application of the *Dolan* "rough proportionality" test to exactions cases. *See Del Monte Dunes*, 526 U.S. at 702-03.

In *Nollan*, the California Coastal Commission granted a permit to appellants to replace a small bungalow on their beachfront lot with a larger house upon the condition that they allow the public an easement to pass across their beach, which was located between two public beaches. The U.S. Supreme Court held that the exaction would not run afoul of the takings clause if an "essential nexus" existed between a "legitimate state interest" and the permit condition which is exacted. *Nollan,* 483 U.S. at 836. The Court found that such a nexus did not exist since the condition did not serve any of the public purposes put forth by the government to justify the permit requirement: protecting the public's ability to see the beach, assisting the public in overcoming a perceived "psychological" barrier to using the beach, and preventing beach congestion. The Court found that none of the justifications put forth for the exaction were plausible. Nor was the non-land use related purpose, to promote more public beach access, a legitimate use of the police power in this instance (the Court found that such a program must use the power of eminent domain to achieve its goals). *Id*. at 832.

In *Dolan*, a landowner's application for approval to expand her business and pave a parking area was conditioned upon her dedicating a portion of her property (a) for a public greenway along a nearby creek to alleviate flooding which would result from the development and (b) for a bicycle path to alleviate traffic congestion in the downtown area. *Dolan*, 512 U.S. at 379-80. The Court analyzed these permit conditions under the doctrine of unconstitutional conditions, which it described as follows: "[u]nder the well settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right — here the right to receive just compensation when property is taken for a public use — in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Id.* at 385. The Court stated that two factors must be considered when determining whether an exaction constitutes a taking. First, an "essential nexus" must exist between a "legitimate state interest" and the permit condition which is exacted. *See Nollan*, 483 U.S. at 825. Second, if an essential nexus exists, there must be "rough proportionality" between the exactions and the projected impact of the proposed development. Determining whether rough proportionality exists does not require a "precise mathematical calculation"; however, a "city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391.

If an exaction does not meet these two standards, a taking may have occurred. The *Dolan* Court held that the dedication requirements constituted a taking of the landowner's property because "the findings upon which the city relie[d] do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building." *Dolan*, 512 U.S. at 394-95. Moreover, the city failed to show that a potential increase in traffic

from petitioner's store reasonably related to the pedestrian and bicycle exaction; its analyses stated that such an increase "could" occur, rather than definitively "would" occur.

B. *Are Both Administrative and Legislative Exactions Subject to Nollan and Dolan?*

There is no question that the *Nollan* and *Dolan* tests apply to exactions determined on a case by case basis. There is a split among federal courts on the question of whether the exaction standards apply to legislative action, such as requirements enacted in codes and ordinances and applied uniformly, rather than on a case-by-case basis, such as a requirement for landscape islands in parking lots of all commercial development. Some jurisdictions have held that the *Dolan* standard is applicable to a local legislative act. *See*, *e.g.*, *Trimen Dev. v. King*, 877 P.2d 187, 194 (Wash. 1994) (fees imposed in lieu of dedication were reasonably necessary as a direct result of proposed development, citing *Dolan's* rough proportionality requirement). Other jurisdictions have held that legislative acts are not subject to *Dolan* because of the "individualized determination" requirement. *See*, *e.g.*, *Action Apartment Ass'n v. City of Santa Monica*, 82 Cal. Rptr. 3d 722, 731-32 (Cal. Ct. App. 2008) ("the two part *Nollan*/*Dolan* test developed for use in land exaction takings litigation applies only in the case of individual adjudicative permit approval decisions; not to generally applicable legislative general zoning decisions"); *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 450 S.E.2d 200, 203 n.3 (Ga. 1994) (*Dolan* is inapplicable because the city made a "legislative determination with regard to many landowners and it simply limited the use the landowners might make of a small portion of their lands"), *cert. denied*, 515 U.S. 1116 (1995), *reh'g denied*, 515 U.S. 1178 (1995); *Harris v. City of Wichita*, 862 F. Supp. 287 (D. Kan. 1994) (city and county's land use restrictions are legislative rather than adjudicative and, therefore, *Dolan's* rough proportionality test does not apply), *aff'd*, 74 F.3d 1249 (10th Cir. 1996). No Florida court has yet addressed the application of the *Nollan* and *Dolan* standards to legislatively-imposed exactions in a takings case. However, as discussed below, Florida courts apply an equally strict state law standard to invalidate both exactions imposed administratively, and by local ordinance. For example, in *Lee County v. New Testament Baptist Church*, 507 So. 2d 626 (2d DCA 1987), *review denied*, 515 So. 2d 230 (Fla. 1987), the Second DCA invalidated a county ordinance on its face because it uniformly required traffic-related dedications of land without regard to whether there was any reasonable connection between the ordinance's requirements and any problems generated by new development.

Other jurisdictions have applied the *Nollan/Dolan* test to legislative acts and have reached various conclusions. In *Curtis v. Town of S. Thomaston*, 708 A.2d 657 (Me. 1998), a developer was required to build a fire pond and grant the town an easement to maintain and use the pond as a condition of subdivision approval. The court found that the land proposed for development lacked an adequately proximate supply of water for firefighting purposes. Therefore, the court found that the town could impose a requirement that would cure this deficiency and that an essential nexus existed between the town's interest in public safety and the permit condition. *Curtis*, 708 A.2d at 659. The *Curtis* court seemed to give weight to the fact that the town's dedication requirement was a legislative rule of general applicability rather than a "plan of extortion" directed at a particular property owner. *Id.* at 660. The court also examined the requirement in practice and held that a "more than sufficient proportionality exists between

the fire protection demands created by the subdivision plan and the easement requirement designed to meet these demands." *Id*.

The California Supreme Court concluded that the *Nollan* and *Dolan* tests for determining whether a compensable regulatory taking has occurred applied to monetary exactions imposed "neither generally nor ministerially, but on an individual and discretionary basis." *Ehrlich v. Culver City*, 911 P.2d 429, 444 (Cal. 1996). This was the court's second look at the case, after the case was remanded from the U.S. Supreme Court for rehearing in light of *Dolan*. *Ehrlich v. Culver City*, 512 U.S. 1231 (1994). In *Ehrlich*, Culver City had imposed a mitigation fee of $280,000 as a condition of approving a request for a rezoning to permit the construction of a multi-unit residential condominium. The court ultimately determined that there was a connection or nexus between the rezoning (from private recreational to residential) and the imposition of a monetary exaction to be used for recreational purposes as a means of mitigating the loss of recreational areas. *Ehrlich*, 911 P.2d at 433. However, although the city might be able to justify the imposition of a monetary exaction in some amount, there was insufficient evidence to show that the specific mitigation fee of $280,000 was justified. The court ordered that the case be remanded to the city for further proceedings.

A Washington appellate court ruled that there was no "essential nexus" between required roadway improvements and the alleged traffic problems resulting from the proposed development. *Benchmark Land v. City of Battle Ground*, 972 P.2d 944 (Wash. Ct. App. 1999). The court's decision was primarily based on the fact that there was no evidence before the planning commission that the roadway improvements would alleviate the traffic problems. *Benchmark Land*, 972 P.2d at 951. However, the Washington Supreme Court granted review and remanded the case for consideration in light of *Del Monte Dunes*. *See Benchmark Land v. Battle Ground*, 989 P.2d 1140 (Wash. 1999); *see also Burton v. Clark Cnty.*, 958 P.2d 343 (Wash. Ct. App. 1998) (evidence did not support finding of rough proportionality between problems created by the proposed development and the exaction of the road).

C. *The Court Shifts the Constitutional Basis of the* Nollan *and* Dolan *Standards,*

In 2005, the United States Supreme Court reconsidered, and upheld, the *Nollan* and *Dolan* standards in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005). The Court receded from the "substantially advances" takings test, which had long been recognized as a substantive due process claim rather than a true takings issue. However, the Court specifically preserved the *Nollan* and *Dolan* standards as a unique regulatory takings claim under the doctrine of unconstitutional conditions. The Court offered the following explanation of its reasoning:

> Although *Nollan* and *Dolan* quoted *Agins'* language, the rule those decisions established is entirely distinct from the "substantially advances" test we address today. Whereas the "substantially advances" inquiry before us now is unconcerned with the degree or type of burden a regulation places upon property, *Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings. In

> neither case did the Court question whether the exaction would substantially advance *some* legitimate state interest. Rather, the issue was whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether. As the Court explained in *Dolan*, these cases involve a special application of the "doctrine of 'unconstitutional conditions,'" which provides that "the government may not require a person to give up a constitutional right -- here the right to receive just compensation when property is taken for a public use -- in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property." That is worlds apart from a rule that says a regulation affecting property constitutes a taking on its face solely because it does not substantially advance a legitimate government interest. In short, *Nollan* and *Dolan* cannot be characterized as applying the "substantially advances" test we address today, and our decision should not be read to disturb these precedents.

Lingle, 544 U.S. at 547-48 (citations omitted).

Proving that there is still life in the substantive due process doctrine, in *Hillcrest Property, LLP v. Pasco County*, 939 F. Supp. 2d 1240 (M.D. Fla. 2013), the United States District Court for the Middle District of Florida applied the *Nollan* and *Dolan* standards for unconstitutional conditions to invalidate a Pasco County ordinance in a facial substantive due process challenge. The substantive due process claim was filed in a civil rights action pursuant to 42 U.S.C. § 1983. The Pasco Right of Way Preservation Ordinance required landowners to dedicate to the County in fee simple all lands on their property within designated county transportation corridors as a condition of receiving development permits. The court described the ordinance as "a land grab, the manifest purpose of which is to evade the constitutional requirement of just compensation." *Hillcrest Prop.*, 939 F. Supp. 2d at 1265.

Pasco County appealed to the Eleventh Circuit. On June 18, 2014, the Eleventh Circuit vacated the summary judgment, holding that the property owner's civil rights action was barred by Florida's four year statute of limitations. Hillcrest Prop. LLC v. Pasco County, 2014 U.S. App Lexis 11409 (11th Circuit, Case No. 13-12383, June 18, 2014). In the ruling below, the District Court held that the four year statute did not begin to run until the County subjected the property to the ordinance in 2006, when the site plan application was filed. The Eleventh Circuit, however, held that the property was subjected to the ordinance in 2005, when the ordinance was adopted, because the property decreased in value at that time. The Eleventh Circuit vacated the District Court Order and remanded for further proceedings on Hillcrest's pending as-applied substantive due process claim.

D. *Other Considerations.*

Practitioners should also be aware of the *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), ripeness doctrine, providing certain regulatory takings cases brought in federal district courts are not ripe without finality in state court proceedings. As the court said in *Guggenheim v. City of Goleta*, 582 F. 3d 996, 1006 (9th Cir. 2009)

> [T]he Supreme Court [in *Williamson County*] held that a takings claim is not ripe until the property owner has attempted to obtain just compensation for the loss of his or her property through the procedures provided by the state for obtaining such compensation and been denied. Williamson also set forth an additional hurdle, applicable only to as-applied challenges: the property owner must have received a 'final decision' from the appropriate regulatory entity as to how the challenged law will be applied to the property at issue.

Id. (citations omitted)

Additionally, at least one federal court, in *Kamaole Pointe Development LP v. County of Maui*, 573 F. Supp. 2d 1354, 1370 (D. Haw. 2008), has stated that because the substantially advanced "test is no longer viable per *Lingle*, it logically follows that the other formulation explicitly recognized by the Ninth Circuit as viable for facial takings claims—i.e., a *Lucas-style* attack—is now the *only* means available for mounting such a challenge. As already established, a plaintiff must first seek compensation at the state level when pursuing such a challenge."

II. Florida Law.

A. Impact Fees and the Dual Rational Nexus Test.

The limits of Florida local governments' power to impose exactions through permit conditions have been developed largely through challenges to local government ordinances imposing impact fees on new development. While local governments have broad home rule powers to regulate land use, their ability to levy fees is limited by the Florida Constitution, Article VII, Section 9, which provides that cities and counties shall be authorized to levy ad valorem taxes, and may be authorized "by law" to levy other taxes. The only alternative to a tax or fee authorized by State law is a fee set by local ordinance, comparable to an impact fee such as many local governments have enacted.

Impact fees are controlled by standards set by the Florida Supreme Court in *Contractors & Builders Association v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976), commonly known as the "dual rational nexus test." The Florida Legislature has been notably silent on impact fee standards. The Legislature adopted the Florida Impact Fee Act, section 163.31801, Florida Statutes, in 2006. The Act states that impact fees are "an outgrowth of the home rule power of local governments." § 163.31801(2), Fla. Stat. (2013). The Act prescribes procedures for implementing and administering local impact fee ordinances. Most notably, it prescribes that in any action to challenge an impact fee the government has the burden of proof by a

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preponderance of the evidence, and the court may not apply a deferential standard of proof. *Id.* § 163.31801(5).

As set out in *Dunedin*, and refined in later cases—see, e.g., *Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126 (Fla. 2000); *St. Johns County v. Northeast Florida Builders Association*, 583 So. 2d 635 (Fla. 1991)—local governments may impose a fee on new development to raise expansion capital where the local government can demonstrate a reasonable connection between (1) the need for additional capital facilities and the population growth generated by a subdivision, and (2) where the expenditure of the funds collected provides a unique benefit to the subdivision assessed.

The dual rational nexus test is similar to, but more restrictive than the federal "essential nexus" and "rough proportionality" tests in its requirement to show both a causal connection and a unique benefit. Florida courts have held that impact fee ordinances that satisfy the dual rational nexus test of the *Dunedin* case also serve a legitimate state purpose, meet constitutional equal protection and due process standards, and do not effect an unconstitutional taking. *See Ne. Fla. Builders Ass'n*, 583 So. 2d at 635 (school impact fee); *Home Builder & Contractors Ass'n. v. Bd. of Cnty. Comm'rs*, 446 So. 2d 140 (Fla. 4th DCA 1983) (road impact fee); and *Hollywood, Inc. v. Broward Cnty.*, 431 So. 2d 606 (Fla. 4th DCA 1983) (park impact fee). However, a successful challenge under the dual rational nexus test will invalidate the contested regulation rather than requiring payment of compensation to the claimant.

In order to satisfy the dual rational nexus test, the local government must demonstrate (1) a reasonable causal nexus between the proposed development and the additional need to be served by the exaction, and (2) a reasonable nexus between the exaction paid and the benefits accruing to those who pay it. *Aberdeen at Ormond Beach*, 760 So. 2d at 126 (holding that no substantial relationship existed between the need for new schools and the new development because no children resided in Aberdeen); *Collier Cnty. v. State*, 733 So. 2d 1012 (Fla. 1999); *Ne. Fla. Builders Ass'n*, 583 So. 2d at 635 (holding that no impact fee on new home construction for new school construction may be collected under the ordinance until the second prong of the dual rational nexus test has been met, and that it was not met because the money raised by the school impact fee could be spent in municipalities which were not subject to the impact fee). A variety of such ordinances have been upheld. *See Hollywood, Inc.*, 431 So. 2d at 606 (ordinance required developer to dedicate land or pay fee for parks as condition of plat approval); *Wald Corp. v. Metro. Dade Cnty.*, 338 So. 2d 863 (Fla. 3d DCA 1976) (ordinance required developer to dedicate land for canal purposes as condition of plat approval), *cert. denied*, 348 So. 2d 955 (Fla. 1977); *Admiral Dev. Corp. v. City of Maitland*, 267 So. 2d 860 (Fla. 4th DCA 1972) (ordinance required developer to dedicate land for park and recreation purposes as condition of plat approval).

The practitioner should be aware that Florida Courts have developed other limits on the scope of local impact fees. The benefit that accrues to the development that pays the impact fee must be measured at the subdivision level. A particular governmental service must benefit the <u>subdivision</u> paying the fee in a manner not shared by other members of society. *State v. City of*

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Port Orange, 650 So. 2d 1 (Fla. 1994). In *Port Orange*, the court invalidated a transportation utility fee used to fund operation, maintenance and improvement of the local road system because it did not benefit the party paying the fee in a manner not shared by others. In *Northeast Florida Builders Association*, the Florida Supreme Court invalidated a school impact fee that was collected from new residents in the unincorporated area only, but was not limited to constructing schools that could only benefit residents in the unincorporated area. *Ne. Fla. Builders Ass'n*, 583 So. 2d at 635.

Impact fees cannot be assessed to pay for general government services. In *Collier County v. State*, the Florida Supreme Court invalidated an "Interim Governmental Services Fee" levied by the County to pay for "growth sensitive" services to improved property during the interim between the completion of improvements and the County's first opportunity to collect ad valorem taxes. The fee was calculated to be a "pro rata share" of the cost of governmental services that would have been paid from general revenues funded by ad valorem taxes. The court found that such general government services did not provide a unique benefit to the property assessed.

In order to charge an impact fee for a permit to alter an existing structure, there must be a substantial alteration to the existing water or sewer system and increased usage. A change of use, or ownership, or an increase of use alone will not justify an additional impact fee. *City of Zephyrhills v. Wood*, 831 So. 2d 223 (Fla. 2d DCA 2002); *City of Tarpon Springs v. Tarpon Springs Arcade Ltd.*, 585 So. 2d 324 (Fla. 2d DCA 1991).

1. *HOME RULE POWERS*.

Local governments derive the ability to impose impact fees and other exactions from their constitutionally guaranteed home rule powers. Not until 1968 did the State of Florida grant home rule powers to local governments. Art. VIII, § 1, Fla. Const. Even then Florida courts narrowly construed this power. *See City of Miami Beach v. Fleetwood Hotel*, 261 So. 2d 801, 803 (Fla. 1972). However, in 1973 the Legislature passed the Municipal Rules Power Act, codified in Chapter 166, Florida Statutes. Enacted to reverse the narrowed interpretation that was applied to home rule powers by the courts, the Act states that local governments retain "governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, . . . except when expressly prohibited by law." § 166.021(1), Fla. Stat. (2013); Art. VIII, § 2(b), Fla. Const. Florida courts have found that unless the local government action is (1) preempted by state law, or (2) in conflict with state law, the action should be allowed. *See Tallahassee Mem'l Reg'l Med. Ctr. v. Tallahassee Med. Ctr.*, 681 So. 2d 826 (Fla. 1st DCA 1996). [1]

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[1] Preemption of local law by state law can either be express or implied. For express preemption the language of the statute must be clear that the Legislature intended to have exclusive jurisdiction over an issue or concerning a matter. *Hillsborough Cnty. v. Fla. Rest. Ass'n*, 603 So. 2d 587 (Fla. 2d DCA 1992). However, a statute need not speak directly to the action at issue, if the action would have consequences which would be preempted by state statute. In addition to preemption, if a local government ordinance conflicts with state law then state law prevails. Determining whether conflict exists is not always an easy endeavor. Just because a local law addresses a similar

2. *ADMINISTRATIVELY IMPOSED PERMIT CONDITIONS*.

The landmark Florida case on takings claims as a remedy for administratively imposed exactions is undoubtedly *St. Johns River Water Management District v. Koontz*, 77 So. 3d 1220 (Fla. 2011), *rev'd*, 133 S. Ct. 258 (2013). This case thoroughly explores the issues raised when exactions that do not require the landowner to give up an interest in real property are analyzed under takings standards.

The land owner, Koontz, applied to the St. Johns River Water Management District ("District") for a permit to impact wetlands on the property for a commercial development. The subject property was purchased by Koontz in 1972, and Kootnz owned approximately 14.2 acres following a condemnation of a portion of the property in 1987. The majority of the property is wetlands and approximately 1.4 acres of the property is within a Riparian Habitat Zone of the Econlockhatchee River Hydrological Basin and is subject to the District's jurisdiction.

Koontz proposed to develop 3.7 acres, and asked for authorization to dredge approximately three acres of wetland. It was undisputed that the District could have denied the application outright. However, the District offered to grant the application with conditions that would have required Koontz to place the balance of his property in a conservation easement and to provide offsite mitigation for impacts to the wetlands by either replacing culverts on property four and one half miles away or by plugging certain drainage canals approximately seven miles away. Alternatively, the District offered to issue a permit for a one acre development with the balance of the property deed restricted for conservation. Koontz agreed to deed restrict his excess property, but refused to provide the off-site mitigation or to reduce the development to one acre. The District denied his permit application.

Koontz brought an inverse condemnation claim, and the initial trial court ruled in his favor. The District appealed to the Fifth District Court of Appeals ("DCA"). The DCA found that the District had exceeded its police power authority, and remanded the case. *Koontz v. St. Johns River Water Mgmt. Dist.*, 720 So. 2d 560 (Fla. 5th DCA 1998). On remand, the trial court issued a final judgment in favor of Koontz on his inverse condemnation claim, finding that the off-site mitigation exaction required by the District was an unconstitutional taking because it failed the dual rational nexus test. The District then appealed the trial court's order again to the DCA. The second (861 So. 2d 1267) and third (908 So. 2d 518) appeals were dismissed for lack of a final order. On the fourth try, (5 So. 3d 8) the Fifth DCA affirmed the lower court judgment awarding Koontz compensation for a temporary taking (during the multiple reviews the District issued the permit, thus limiting the action to a claim for a temporary taking).

On this appeal the Fifth DCA made two notable holdings. First, the Court allowed the claim even though the permit had not been issued with the disputed conditions. The District

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subject matter as a state law does not mean that there is conflict. State law and local law must coexist, and therefore the local law cannot frustrate the purpose of the state law. *Shelter v. State*, 681 So. 2d 730 (Fla. 2d DCA 1996), *review denied*, 680 So. 2d 424 (Fla. 1996).

argued there was no exaction, and therefore no cause of action, because Koontz's permit application was denied when he refused to accept the offsite mitigation requirements. Secondly, the Court allowed a taking claim despite the fact that the disputed condition did not require the owner to give up an interest in real property. The District argued that a taking action could not lie in this case because the condition for off-site mitigation did not involve a physical dedication of land but required that Koontz contribute money to improve land belonging to the District.

Finally, the DCA certified the following question to the Florida Supreme Court:

> Where a landowner concedes that permit denial did not deprive him of all or substantially all economically viable use of the property, does Article X, Section 6(a) of the Florida Constitution recognize an exaction taking under the holdings of *Nollan* and *Dolan* where, instead of a compelled dedication of real property to public use, the exaction is a condition for permit approval that the circuit court finds unreasonable?

Koontz, 5 So. 3d at 22. The Supreme Court of Florida granted review. *St. Johns River Water Mgmt. Dist. v. Koontz,* 15 So. 3d 581 (Fla. 2009).

The Florida Supreme Court rephrased the question to address the Fifth DCA holdings discussed above, as follows:

> Do the fifth amendment to the United States Constitution and *Article X, Section 6(a) of the Florida Constitution* recognize an exactions taking under the holdings of *Nollan* . . . and *Dolan* . . ., where there is no compelled dedication of any interest in real property to public use and the alleged exaction is a non land-use monetary condition for permit approval which never occurs and no permit is ever issued?

The Florida Supreme Court answered both questions in the negative and quashed the Fifth DCA decision. On certiorari review, however, the U.S. Supreme Court reversed. In *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), the Court concluded that a taking may occur even when the challenged condition requires payment of money, rather than a compelled dedication of an interest in real property. Further, a takings challenge may be maintained even when the applicant refuses to accede to the proposed condition and the permit is denied. The Court deferred the question of whether money damages are an available remedy, holding that this is a question of State law arising from the cause of action below, to be addressed on remand. This question was answered on remand by the Fifth DCA in *St. Johns River Water Management District v. Koontz*, Case No. 5D06-1116 (Fla. 5th DCA Apr. 30, 2014). The Fifth DCA reinstated its earlier decision (5 So. 3d 8) upholding the lower court award of damages for a temporary taking.

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3. LIMITS ON INVESTMENT-BACKED EXPECTATIONS.

Florida courts have also held that a subsequent owner is bound by conditions and restrictions in permits issued to a prior owner, and such conditions limit a subsequent owners' claims of "investment backed expectations." In *Palm Beach Polo, Inc. v. Village of Wellington*, 918 So. 2d 988 (Fla. 4th DCA 2006), the property owner purchased a tract of land with an existing Planned Unit Development ("PUD") zoning ordinance. The PUD required that a portion of the property, known as Big Blue, be set aside as preservation land. The new owner of the property did not comply with the requirement that Big Blue be conserved in certain manners, notably, the construction of a berm around Big Blue to change the hydrology so that, among other things, the native species would survive and invasive species would not. The Village of Wellington filed a declaratory action and also requested injunctive relief to enforce the PUD's conservation requirement for Big Blue. The land owner counterclaimed for inverse condemnation and violation of the Bert J. Harris, Jr., Private Property Rights Protection Act (§ 70.001, Florida Statutes) claiming that the "Conservation" designation of Big Blue in Wellington's Code, as well as Wellington's insistence that Polo "preserve" and "restore" the area, constituted an "as applied" taking. Additionally, the land owner argued that it was not subject to the exaction to preserve Big Blue in the manner prescribed "vaguely" in the PUD. The Fourth District Court of Appeal ruled that the property owner was on constructive notice of the PUD conservation requirements at the time they purchased the property. The development rights were transferred from Big Blue to the rest of the property and therefore, an economic interest was realized by the property owners for Big Blue. As such, there was no investment backed expectation to be able to develop Big Blue.

4. *STATUTE OF LIMITATIONS.*

In *New Testament Baptist Church v. State*, 993 So. 2d 112 (Fla. 4th DCA 2008), the court held that the land owner's claim for an unconstitutional taking that was brought fourteen years after the required exaction was barred by the statutes of limitations. New Testament argued that the dedication of a 7.5 acre parcel of property to the local government in exchange for approval of its plat was an unconstitutional exaction because it failed the dual rational nexus test. The court said while the required dedication may have been voidable, the regulatory takings claim was subject to a four year statute of limitations. The court said that there must be an outside limit on when a landowner can seek compensation for a taking where the owner does not pursue administrative or judicial remedies readily available at the time of approval and continues to accept the benefits of the approved development.

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