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GOV-LAW CONNECTION

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U.S. Supreme Court Rules on Another Takings Case

IN JUNE OF THIS YEAR, the federal Supreme Court issued a landmark decision regarding the authority of municipalities to require "monetary exactions" during the building permit process. The Court also held that the federal Takings Clause analysis applies to court review of a building permit denial, if an "unconstitutional condition" existed during the permit process. The case, entitled *Koontz v. St. Johns River Water Management District* ("Koontz"), was decided by a majority of the Court, led by Justice Alito, in a 5/4 decision.

The majority of the Court held that:

- During the building permit process, "monetary exactions" required by a municipality of the developer may "amount to a *per se* taking similar to the taking of an easement or a lien," and must pass the federal takings analysis under *Nollan v. California Coastal Comm'n*, and *Dolan v. City of Tigard* ("*Nollan-Dolan* test"). The Court clarified that "monetary exactions" do not include taxes, though may include "land use permitting fees."

- A municipal requirement that a building permit applicant reserve or set aside a portion of its property as part of the project – e.g., as a conservation easement for wetland mitigation – must also pass the *Nollan-Dolan* test. If it does not pass the federal Takings Clause analysis, then even a permit denial may be unconstitutional. Importantly, the Court stated that "so long as a permitting authority offers the landowner at least one alternative that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition." But the Court found that this requirement had not been met in this case.

The facts of the case are informative. A developer applied to his local Florida water management district ("District") to build on 3.7 acres of his 14.9 acre property. The property had wetlands on it, and the buildable portion had the most wetlands. The developer proposed to construct a building, parking lot, and stormwater catchment pond on the 3.7 acres and, to meet wetland mitigation requirements, deed the rest of the property to the water management District as a conservation easement.

The District rejected the developer's proposal and "suggested" that the permit could be approved if the developer: (1) reduced the building footprint to 1 acre by eliminating the aboveground stormwater catchment pond and installing a stormwater management system underground, then deed the rest of the property as a conservation easement; or (2) develop the 3.7 acres as proposed, and also pay for improvements to District wetlands at another location, i.e., fund offsite wetland mitigation.

The developer declined the District's offers, and the District denied his building permit. In the above holding, the Court concluded that both of the District's proposals – an increased dedication for a conservation easement and a "monetary exaction" for offsite wetland mitigation – ran afoul of the federal Takings Clause.

This decision will likely have sweeping and, as yet, undefined repercussions. And in our Ninth Circuit, it effectively takes away the ground local governments gained in the *West Linn Corporate Park v. City of West Linn* case, in which the Oregon Supreme Court and Ninth Circuit Court of Appeals determined that such monetary exactions were not subject to the Takings Clause.

QUESTIONS ABOUT THIS ARTICLE? Please contact Adina Cunningham at 503.226.7191.

MANAGING PARTNER'S MUSINGS

from Pam's desk...

As we enter the final quarter of the year (can it be that late already?!), many of us are contemplating our personal and professional accomplishments for the year and are looking ahead to what comes next as 2013 comes to a close. It has been a challenging year for our local government clients as the 2008 recession made itself felt in the form of reduced revenue; while development has begun to pick up pace, there are fewer staff members to handle the load. Nevertheless, we find that folks are finding ways to provide the services the public needs and wants.

In this issue of our newsletter, we review two significant recent rulings from the U.S. Supreme Court that may impact you and your organization. With respect to telecom, the Court upheld the strict timelines for processing wireless telecom facility applications, and with its decision in Koontz v. St. Johns River Water Management District, *the Court significantly expanded the reach of*

IS THAT LAND USE COMPATIBILITY STATEMENT YOU JUST SIGNED A LAND USE DECISION?

WE FIND IN TALKING with planning staff for our municipal clients that there is confusion over the significance of the Land Use Compatibility Statement (LUCS) that is commonly submitted in conjunction with land use reviews. Until 1995, it was commonly understood that this form, which often involves simply "checking a box" indicating that a use is in compliance with applicable land use regulations, was an administrative action and not a land use decision subject to review by the Land Use Board of Appeals (LUBA).

Then along came the 1995 Court of Appeals decision in the case of *Knee Deep Cattle Company v. Lane County*, in which the Court held that the County Planning Director's approval of a LUCS was a land use decision appealable to LUBA. The LUCS in the *Knee Deep Cattle* case affirmed that a recreational vehicle park was in compliance with the County's code as to its proposal to dispose of wastewater in a nearby creek because that wastewater disposal was "incidental" to an allowed use. The Court held that this statement required the exercise of policy or legal judgment and was therefore appealable as a land use decision.

Cases that have followed the *Knee Deep Cattle* case over the years have consistently treated the LUCS as an appealable land use decision. But LUBA and the Court of Appeals recently concluded that a particular LUCS was not a land use decision and therefore was not appealable. The facts are these: in a case arising in Yamhill County, the Riverbend Landfill Company sought DEQ approval for renewal of its permit, and for expansion of a landfill which included an earthen berm as a perimeter. DEQ requested that the County issue a LUCS determining whether or not the expansion was consistent with the land use plan. In 1992, the County Board authorized the LUCS. Then in 2012, the landfill company applied for a modification of the western perimeter berm, seeking to create a "mechanically stabilized berm" that was 40 feet higher than what then existed. After consideration, the County issued another LUCS determining that the modification was acceptable because it was only a technical change to the existing berm.

McPhillips Farm, Inc. appealed the decision to LUBA, asserting that the landfill was prohibited from installing the mechanically stabilized berm because it was an expansion of the landfill which had not been authorized. LUBA determined that the land use decisions that first approved the landfill in 1980 specifically allowed for a landfill with berms and that the 1992 LUCS had interpreted the County's design review ordinance as not requiring review for previously approved components of the land use, i.e., the berms surrounding the landfill. For that reason, LUBA held that the County's new LUCS was not a land use decision. LUBA relied on a little known state law exception to the definition of a "land use decision" which provides that if the local government has already made a land use decision, the LUCS that later confirms that decision is not appealable to LUBA.

The Court of Appeals agreed with LUBA and affirmed the dismissal of the case.

So, the answer to the question of whether a LUCS is a land use decision depends on its scope (does it require the exercise of policy or legal judgment?) and the history of the use in question (has the specific proposed action already been approved through a land use process?). As you can see, it's sometimes not so easy to tell.

The bottom line is, if you become subject to an appeal of a LUCS, you should consult legal counsel to determine whether that appeal has any merit.

QUESTIONS ABOUT THIS ARTICLE?
Please contact Pam Beery at 503.226.7191.

U.S. Supreme Court Gives Thumbs Up to FCC's "Shot Clock" Rule for Wireless Telecom Facility Applications

IN THE SPRING 2010 ISSUE of our newsletter, we reported on the FCC's new limitations on local government land use authority to review land use applications for wireless communications facilities (WCF) in the so-called "shot clock rule." On May 20, 2013, the U.S. Supreme Court decided a legal challenge to the rule brought by a host of municipalities and national municipal organizations, and upheld the rule on a 6-3 vote. As such, the limitations – strict timelines for processing applications, particularly collocation applications on existing towers that do not "substantially increase" the size of that tower—remain in place.

Distilled to its essence, the Supreme Court's opinion upheld the FCC's authority to interpret the scope of its own jurisdiction under the Federal Telecommunications Act. The Court relied on its 1984 decision in a seminal case, *Chevron USA, Inc. v. Natural Resources Defense Council*, finding that the FCC's action was "within the bounds of its statutory authority." Lawyers and legal scholars have been engaged in fierce debate over the ruling, but the fact remains that the shot clock rule is now a firm reality.

Local governments should already be aware of and complying with the rule. One continuing question is how to know whether an application "substantially increases" the size of a tower. The FCC issued non-binding "guidance" on January 25, 2013, but despite what industry representatives may say this not binding on local jurisdictions. It is still possible and advisable to define the scope of this provision in a local code.

The Supreme Court's validation of the shot clock rule may have consequences for local governments. The FCC has another "notice of inquiry" pending related to a second important component of the Telecom Act – Section 253(c) concerning local right of way

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WARRANTLESS SEARCH: WHEN IS IT LAWFUL?

THE FOURTH AMENDMENT to the United States Constitution prohibits police officers from entering an enclosed front yard – known as part of a home's "curtilage" – to the same extent it prohibits officers from entering a home. There are two exceptions recognized by courts that could allow an officer to enter a front yard without a warrant: *exigency* and *emergency*. Whether a case fits either of these two exceptions, thus justifying entry, is fact-dependent and the courts analyze each situation on a case by case basis.

In *Sims v. Stanton*, arising out of a hot pursuit of a suspect in LaMesa, California, a police officer kicked down a front gate in pursuit of a suspect. The property owner, who happened to be standing behind the gate, was seriously injured when the gate swung open. The officer believed that he was authorized to make this warrantless entry into the owner's yard because he was in pursuit of a person who refused to stop for questioning when ordered to do so. Generally, the failure to stop under these circumstances is a misdemeanor offense under California law. In this instance, as it turns out, the officer was wrong.

The consequence of an alleged Fourth Amendment violation is often a lawsuit for damages under federal law, 42 USC § 1983. A government can defend its officer's actions by seeking "qualified immunity" in cases where the officer's conduct meets certain standards. In order to assert this defense against unreasonable search and seizure within the curtilage of a home, the officer must either be chasing someone who is suspected of a felony violation or who is presently a violent threat to the community or the officer.

The Ninth Circuit Court of Appeals noted in *Sims v. Stanton* that the *exigency exception* requires that an officer must "point to some real immediate and

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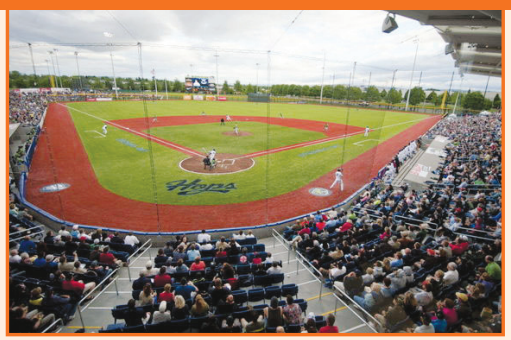
takings cases. Land use law also saw an interesting twist in the area of land use compatibility statements. To round out this issue, we have included a review of a Ninth Circuit decision with interesting facts and a good reminder about how law enforcement officials can run afoul the Fourth Amendment's prohibition on warrantless searches. Be sure to also check out the Client Corner *this month regarding the exciting opening of a new stadium in the City of Hillsboro to host the Hillsboro Hops, a single A baseball team.*

In news around BEH, we have begun the selection process to hire a new attorney for our Portland office, deepening our already "deep bench" of lawyers. We hope to have the new attorney on staff by the end of the year, so look for our announcement in the coming months!

As always, we hope that our newsletter, in some small measure, informs and interests you. Please let us know if there are topics that you would like to see more about in future issues.

HILLSBORO'S NEW STADIUM FEATURES HOPS BASEBALL

CLIENT CORNER



A KEY LINE of dialog in the 1989 baseball film, *Field of Dreams*, was "If you build it, they will come." As far as the City of Hillsboro is concerned, this statement is apt. Unquestionably, the City's new 170,000 sq. ft. stadium has proven to be a big draw for baseball fans. With newly installed artificial turf, the stadium provides just what sports teams in Oregon need – an all-weather playing surface.

The new Hillsboro Hops, a Short Season Single-A baseball team, took to the field for the first time on June 17th before a sold out crowd. Affiliated with the Arizona Diamondbacks, the Hops impressed spectators by routing the Eugene Emeralds 12-0 in their inaugural game at the new stadium. An exuberant crowd and civic pride were evident for the game and the players – even the weather cooperated with a vibrant double rainbow during the 5th inning.

The greater metropolitan area has been bereft of baseball since 2010 with the loss of the Portland Beavers. Hops baseball has filled that void and proven to be tremendously appealing to baseball fans and families looking for a way to engage in the "all-American pastime." We at BEH are proud of the accomplishment of the City of Hillsboro; they brought baseball back!

HAVE A SUBMISSION? Please contact Pam Beery at 503.226.7191.

For more frequent information updates, please visit our Northwest Government Law Blog:
www.gov-law.com/blog

"Shot Clock" – continued from page 3

management. This is a proceeding to watch for and to participate in, as the FCC is likely to exercise authority that may be detrimental to *local* authority. In addition, the 2011 FCC inquiry and rulemaking concerning whether it should go even further in "improving government policies" affecting the siting of WCF is still pending. The potential additional impact on zoning decisions remains to be seen.

Finally, you need to be aware that Congress has waded into this arena; included as a part of the Middle Class Tax Relief and Job Creation Act of 2012, is 47 USC § 1455(a), enacted February 23, 2013. It, too, mandates approval of certain applications for collocation.

We will update you as this slow but steady assault on local government authority continues…

QUESTIONS ABOUT THIS ARTICLE?
Please contact Pam Beery at 503.226.7191.

Warrantless Search – continued from page 3

serious consequences if he postponed action to get a warrant." An *emergency exception* requires that an officer must show an "objectively reasonable basis for fearing that violence was imminent." In *Sims*, the fleeing suspect was neither suspected of having committed a felony nor did he shown any sign of imminent physical threat against the officer or the community. The officer was familiar with the neighborhood as one where violence associated with area gangs often occurred, but had no specific evidence that the suspect had any weapon or any involvement in the disturbance that precipitated the police call that night.

This case serves as a reminder for peace officers and public safety personnel. Even if a suspicious individual enters a fenced yard during a pursuit, he or she may not be pursued within its boundaries without a warrant unless an exigent circumstance is present (i.e., the individual is suspected of committing a felony) or an emergency circumstance is present (i.e., the individual demonstrates immediate intent to act violently toward self or others).

Sims v. Stanton (9th Cir. Dec. 2012)

QUESTIONS ABOUT THIS ARTICLE?
Please contact Paul Elsner at 503.226.7191.

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