

Legal Issues in Environmental Permitting and Land Use

presented by

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Presentation Overview

- Unlawful Exactions
- Damages for Prohibited Exactions
- Bert Harris Updates
- Conservation Easements
- Mineral Rights and Rights-of-Way
- Post-Permitting Compliance

Unlawful Exactions

- 3 major Fifth Amendment (takings clause) cases.
- *Nollan, Dolan, and Koontz* cases:
 - *Nollan/Dolan*: a government may not condition the approval of a land use permit on the owner's relinquishment of a portion of his property (or money) unless there is a **nexus** and **rough proportionality** between the government's demand and the effects of the proposed land use.
 - *Koontz*: Standard applies whether the government approves a permit on an unlawful condition or denies a permit because applicant refuses to turn over property.
 - *Koontz*: Applies where government is requesting money, not just real property
- Lesson: Know your rights! Compare what is being asked of the applicant to what is being received in exchange.

Damages for Prohibited Exactions

- Starting October 1, 2015...
 - Property owners can bring suits to recover damages caused by a prohibited exaction
 - for any prohibited exaction imposed or required **in writing** as a final condition of approval for a requested use
 - Prohibited exaction = no nexus to legitimate public purpose/not roughly proportionate to impacts
 - § 70.45, *Florida Statutes*
- Lesson: if it seems unfair, get it in writing!

Bert Harris Updates

Settlement

- § 70.001, *Fla. Stat.* as amended by 2015-142, *Laws of Florida*.
- Under Bert Harris, governmental agency may settle a claim by issuing a variance, special exception, or “other extraordinary relief.”
- The agency and the landowner petition to court to approve the settlement to ensure that the agreement protects the public interest.
- Now, the statute that requires court approval for Bert Harris settlements now “applies to any settlement reached between a property owner and a governmental entity regardless of when the settlement agreement was entered so long as the agreement fully resolves all claims asserted under this section.”

Bert Harris Updates

Definitions

- 70.001 Private property rights protection.—
- (3) For purposes of this section:
 - (f) The term “property owner” means the person who holds legal title to the real property that is the subject of and directly impacted by the action of a governmental entity at issue. The term does not include a governmental entity.
 - (g) The term “real property” means land and includes any appurtenances and improvements to the land, including any other relevant real property in which the property owner has ~~had~~ a relevant interest. The term includes only parcels that are the subject of and directly impacted by the action of a governmental entity.
- Lesson: Property now must be directly impacted by a government action to qualify for a Bert Harris claim.

Conservation Easements

Post-Permitting Compliance

- Allocation of Responsibility for Third-Party Damage
 - Who is responsible if ATV's break in and degrade the conservation or mitigation area?
 - Should be determined in Easement language:
 - Who bears responsibility
 - What measures may be taken to correct/prevent damage
 - What measures are sufficient to have applicant considered compliant?
- Lesson: Pay careful attention to the terms of conservation easements and allocations of responsibility.

Mineral Rights and Rights-of-Way

- Some public bodies (especially WMDs) retain jurisdiction over certain reserved rights, such as mineral rights or rights of way to construct canals and roads.
 - These rights can prevent certain permits and approvals from being issued.
- Applicants can request releases of the reservations, or request non-use commitments which allow the district to maintain the rights but commits not to use them.
 - Releases authorized by 373.096, Fla. Stat.
- Conversely, Districts may be prohibited from accepting a conservation easement that is or could be encumbered by mineral rights.
 - Marketable Record Title Act; Economic Hardship Arguments
- LESSON: Investigate all title issues early in the project planning process.

Post-Permitting Compliance

- Continuing Responsibilities, especially for long term projects
 - Further submittals required
 - Actions to be taken 10+ years from date of permit issuance
- HOAs, Special Districts.
- **LESSON:** Make a continuing compliance plan – do not rely on institutional memory!