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*Securing Florida's
Future*

Property Rights 101

- **What is Property?**
- **What is a Property Right?**
- **What are the Competing Interests in Property Rights?**
- **What do Property Rights look like in Florida?**
- **Why does the Chamber care?**

What is Property?

Three Basic Types

Personal

Intellectual

Real

Three Basic Forms

Communal

Private

State

Why have Property?

Protects Owners

Protects Society

Incentivizes Economic Growth

Bundle of Rights



Right to Exclude



Right to Transfer



Right to Use

Competing Interests

Example HB 4001



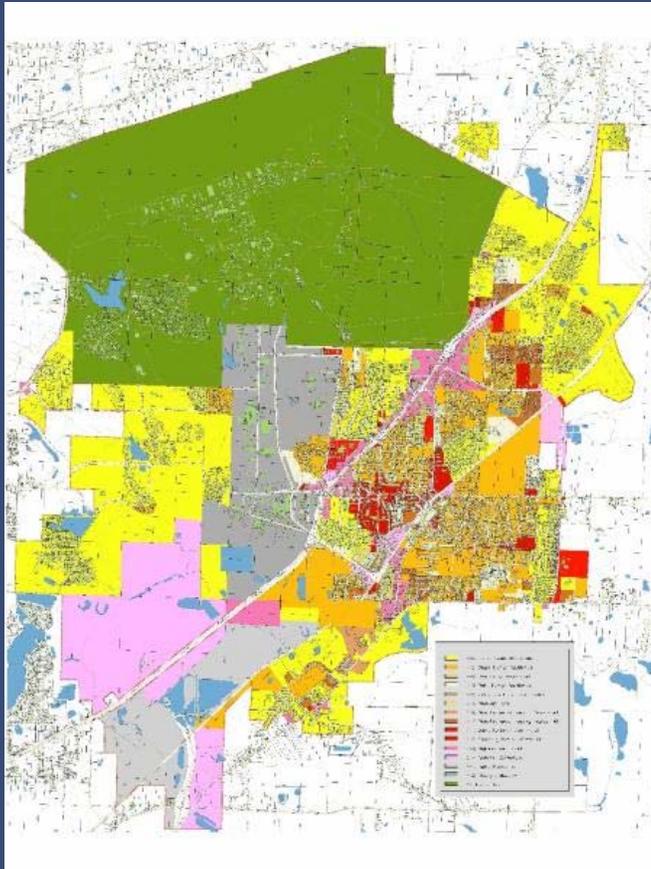
Pleading the Fifth

“...nor shall private property be taken for public use, without just compensation.”

Eminent Domain and Takings

- **Kelo v. City of New London (2005)**
 - City creates plan of economic redevelopment in New London to rejuvenate area of city.
 - City claims eminent domain for private development, homeowners challenge.
 - Court held that the city's plan for the public good prevails.
- **Lucas v. South Carolina Coastal Council (1992)**
 - State forbids construction of new buildings on beachfront property.
 - Homeowner sues, saying lots were valueless.
 - Court held that this was a taking because there was no economically viable use.

Zoning



- A form of regulation enforced through the administration by virtue of its police powers.
- Promotes orderly growth as well as the health, safety, and welfare of the community.
- If zoning amounts to a taking, just compensation must be given by the state.

Exactions and Easements

Exactions are conditions imposed by a government that a landowner or developer must meet before the government will issue the landowner or developer a permit.

Easements are irrevocable rights to use another person's land for a specific purpose.

Examples:

- Utility lines
- Pipelines
- Railroad tracks

Where does Florida stand?

- **Burt Harris Act**
 - Provides a specific process for property owners to seek relief when their property is unfairly affected by government action.



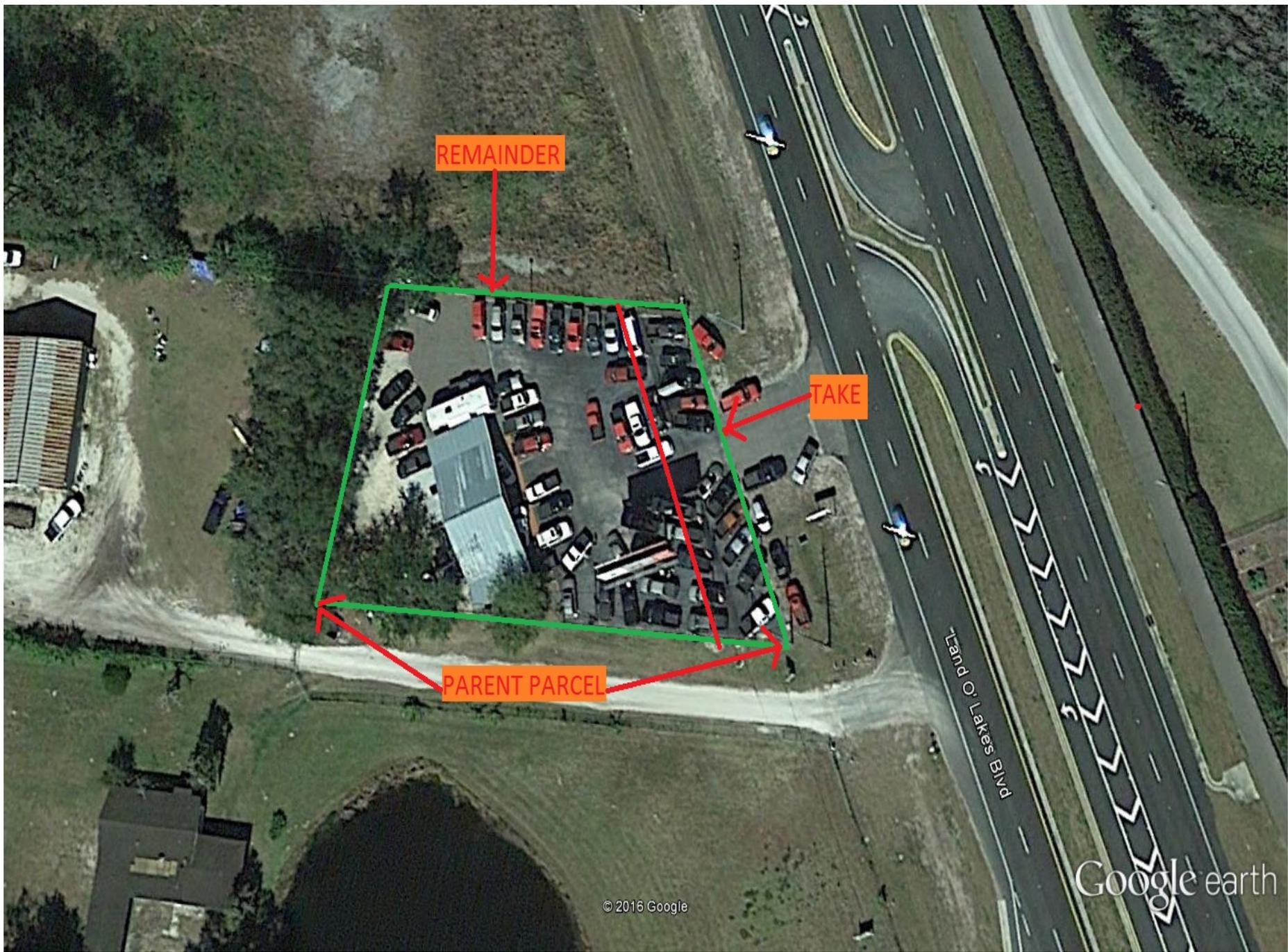
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EMINENT DOMAIN PARENT PARCEL

- The parcel of property from which the condemning authority takes some part of the property.
- Establishes the basis for take value. (land and improvements)
- Establishes the basis for severance damages.
- Establishes the basis for business damages.



REMAINDER

TAKE

PARENT PARCEL

Land O' Lakes Blvd

Google earth

© 2016 Google



TAKE

2

1

3

45

54

Land O' Lakes Blvd

Carson Dr

Raden Dr

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Property Rights 101: Inverse Condemnation, Regulatory Takings, & Exactions

Jacob T. Cremer, Esq.

STEARNS WEAVER MILLER

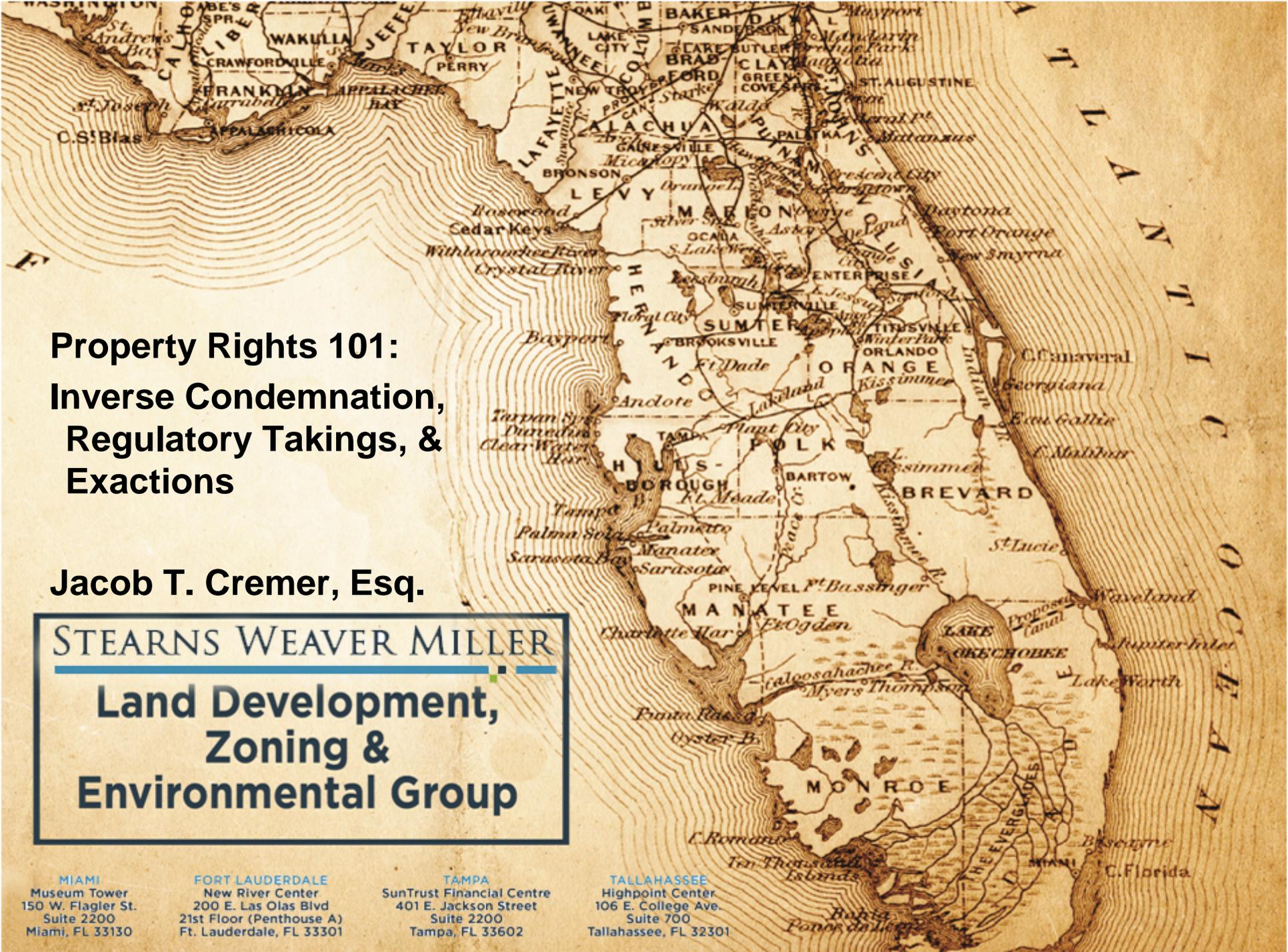
Land Development,
Zoning &
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FORT LAUDERDALE
New River Center
200 E. Las Olas Blvd
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SunTrust Financial Centre
401 E. Jackson Street
Suite 2200
Tampa, FL 33602

TALLAHASSEE
Highpoint Center
106 E. College Ave.
Suite 700
Tallahassee, FL 32301



WHERE WE'RE HEADED

- Today's goal: issue spot property rights and inverse condemnation problems
- How we got here: 800 years of property rights history
- Learn to identify the 4 types of inverse condemnation
- Miscellaneous issues
- Practical suggestions

800 YEARS OF PROPERTY RIGHTS

- “In general, the art of government consists in taking as much money as possible from one party of the citizens to give to the other.”
- Voltaire



800 YEARS OF PROPERTY RIGHTS

- "The true foundation of republican government is the equal right of every citizen in his person and property and in their management."
-Thomas Jefferson



TYPES OF INVERSE CONDEMNATION

- **Physical takings**
- **Regulatory takings**
 - *Per Se* - Deprivation of all economically beneficial use of land
 - *Ad Hoc* - Land retains value, but justice and fairness require compensation
- **Exactions**
- **Judicial takings?**

PHYSICAL TAKINGS - LORETTO



PHYSICAL TAKINGS - *LORETTO*

“In short, when the ‘character of the governmental action,’ is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.... Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, the government does not simply take a single ‘strand’ from the ‘bundle’ of property rights: it chops through the bundle, taking a slice of every strand.”

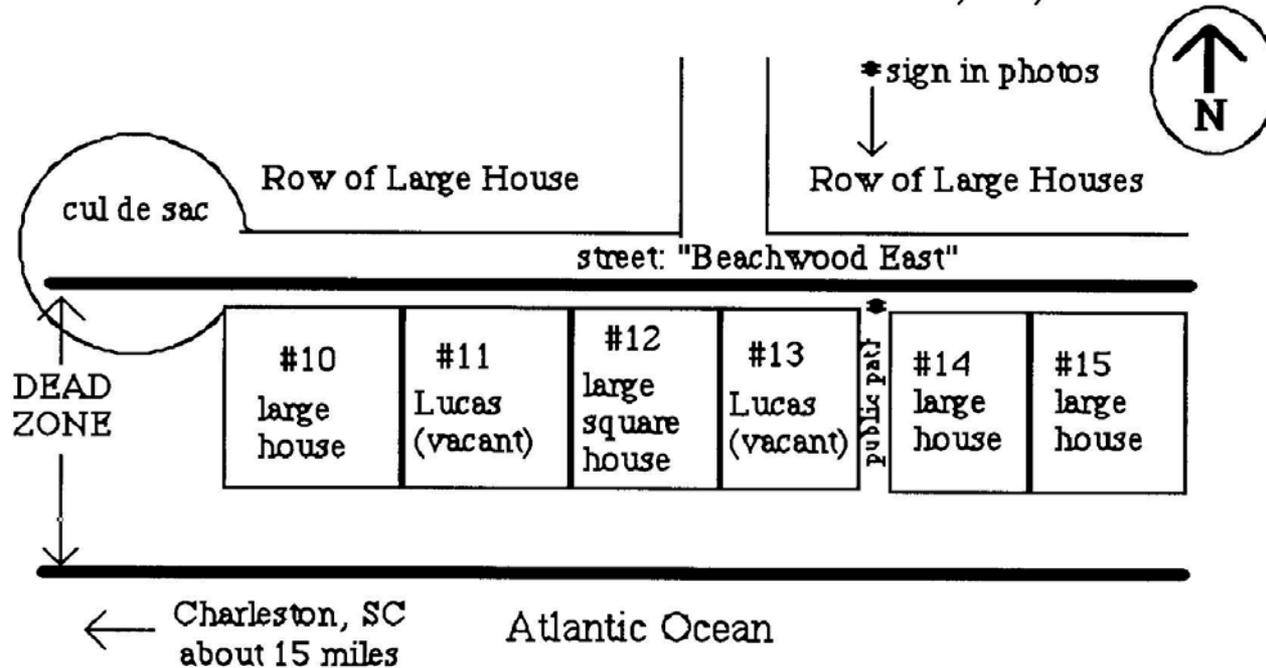
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982)

PER SE REGULATORY TAKINGS - *LUCAS*



PER SE REGULATORY TAKINGS - LUCAS

Part of "Wild Dunes" resort on Isles of Palms, SC, 11/94



PER SE REGULATORY TAKINGS - *LUCAS*

“We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”

Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)

AD HOC TAKINGS – PENN CENTRAL

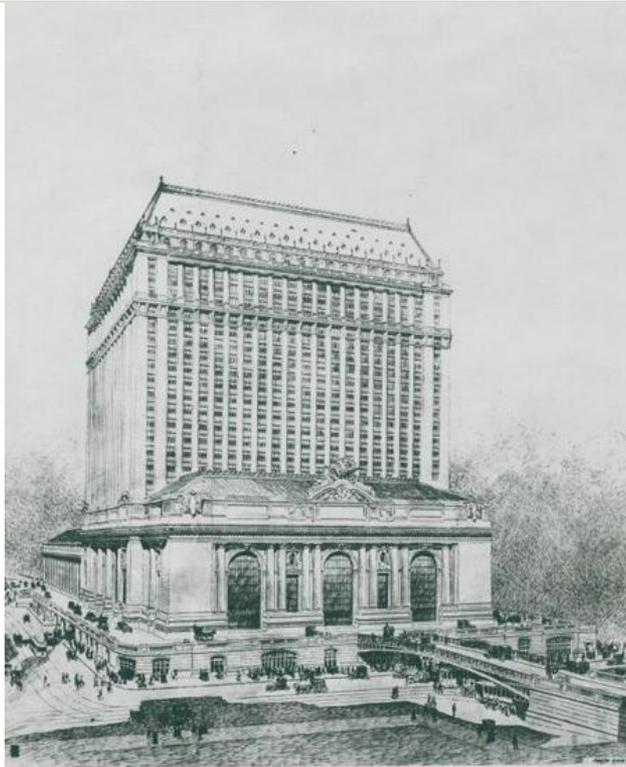
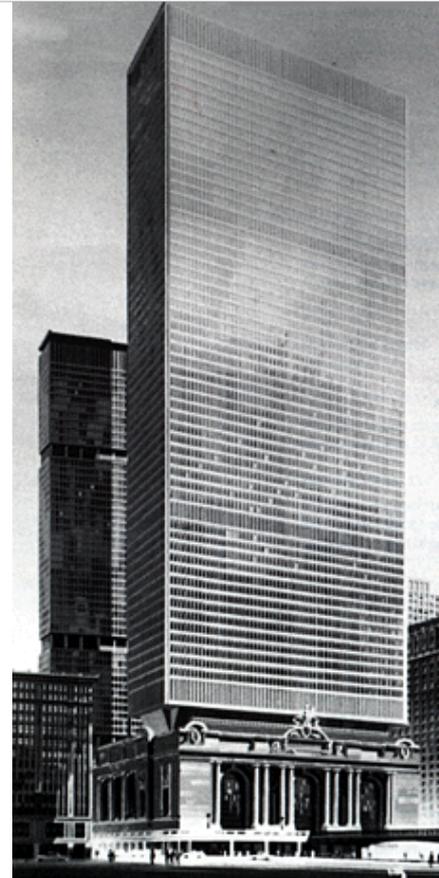


Fig. 22

FUTURE GRAND CENTRAL TERMINAL

(If and when a high building is added surrounding the concourse - compare with Fig. 12)



AD HOC TAKINGS – *PENN CENTRAL*

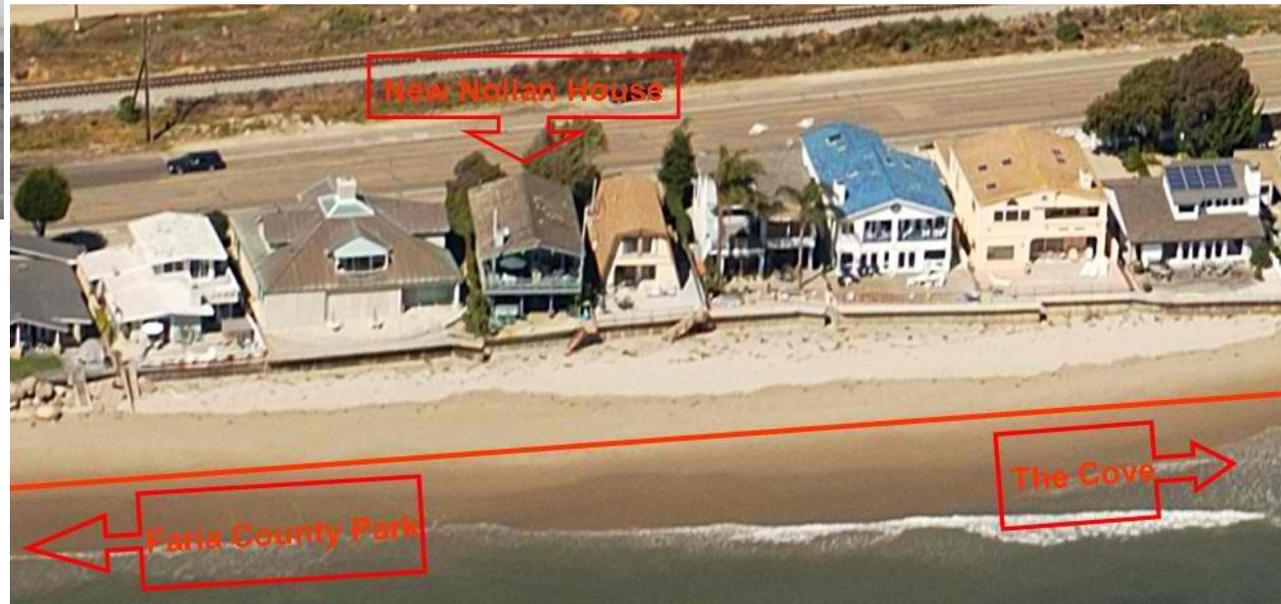
“In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.

A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”

Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)

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EXACTIONS - NOLLAN



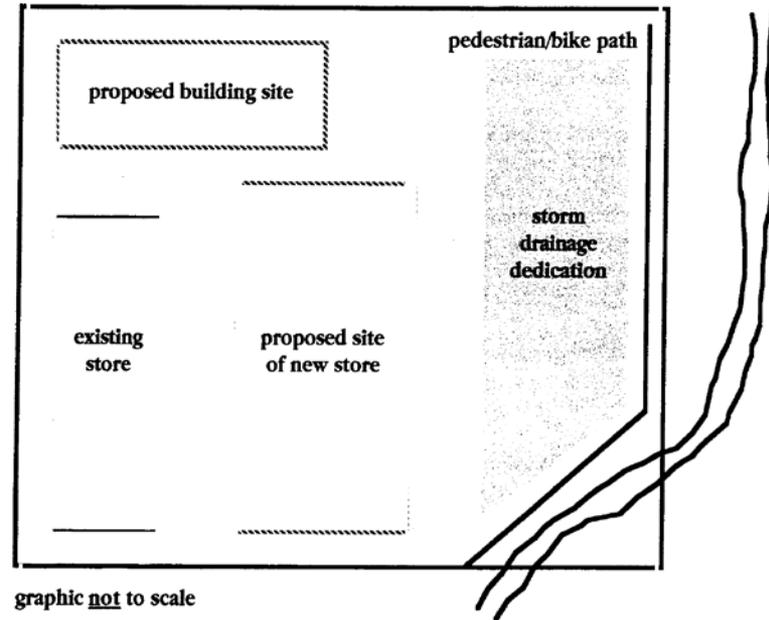
EXACTIONS - *NOLLAN*

“Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking....

Whatever may be the outer limits of ‘legitimate state interests’ in the takings and land-use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but ‘an out-and-out plan of extortion.’”

Nollan v. California Coastal Com'n, 483 U.S. 825, 831, 837 (1987)

EXACTIONS - *DOLAN*



EXACTIONS - *DOLAN*

“We think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the 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....

Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization.... The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done. ‘A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.’”

Dolan v. City of Tigard, 512 U.S. 374, 396 (1994)

EXACTIONS - KOONTZ



EXACTIONS - KOONTZ

“The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so. We have often concluded that denials of governmental benefits were impermissible under the unconstitutional conditions doctrine. In so holding, we have recognized that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.”

Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2595 (2013)

MISCELLANEOUS ISSUES

- **Public Use requirement**
- **Ripeness**
- **Temporary takings**
- **Administrative remedies**
- **Due process and other civil rights claims**

PRACTICAL SUGGESTIONS

- **Landowners: plan for the effects of regulations on your property rights just like you already do for taxes**
- **For attorneys: don't get in over your head. Know when you need outside expertise.**
- **For consultants: get an attorney with property rights experience involved early – way before the permit denial!**
- **For government attorneys and staff: try to be creative early on to avoid claims. The root cause of most property rights claims is a landowner who feels she has been treated unfairly at the general public's benefit.**

Questions?

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FORT LAUDERDALE

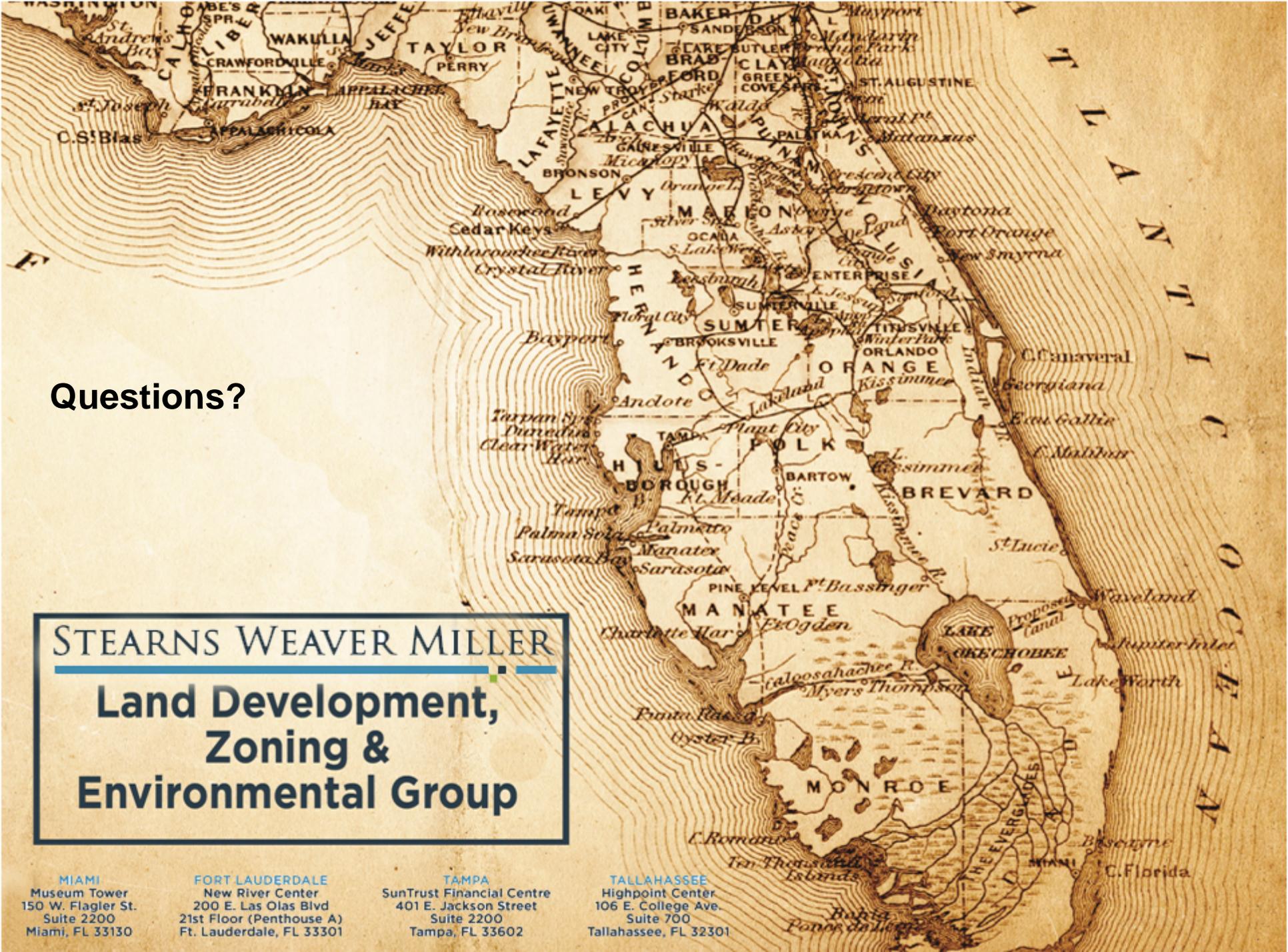
New River Center
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PROPERTY RIGHTS 101

Local Government Perspective

David A. Goldstein, Chief Assistant County Attorney



- 
- Takings and Harris Act Claims can arise from land use/permit denials or approvals
 - Most common government challenge--defending exactions of land or money in the land use approval context
 - Government staff generally have their heart in the right place



- 
- “A...reality of the permitting process is that many proposed land uses threaten to impose costs on the public that dedications of property can offset....Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack.” Koontz v. St. Johns River Water Management District, 133 S.Ct at 2595 (2013)



Positives to Exactions

- Reduces burden on taxpayers
- Reduces eminent domain expenses
- Helps to expedite construction of infrastructure, which furthers economic development and tax base



Negatives to Exactions

- If go too far, taxpayer funds used to defend lawsuits instead of funding infrastructure
- May negatively impact economic feasibility of development project



Nexus and Rough Proportionality

- Demonstrating compliance with Nollan “nexus” and Dolan “rough proportionality” requirements are key to defense of exactions
- Determining assumptions for “rough proportionality” is not always easy—Dolan does not require a “precise mathematical calculation,” but must show that the required dedication is related both in nature and extent to the proposed development’s impact



Difficult Dolan Examples

- Transit shelter or bike path land dedication to offset development's roadway impacts
- Exacting land for co-located park/school site
- Dedication of 2-lane subdivision road serving land locked parcels
- Land dedication for impact to wildlife habitat



Impact Fees

- Easiest form of exaction to defend is a legislatively imposed impact fee that complies with dual rational nexus test and Florida Impact Fee Act (Section 163.31801, Florida Statutes).
- Impact fees not subject to Harris Act exaction claims. See Section 70.45(2), Florida Statutes.
- But see Section 163.31801(5)—burden on local government to prove that impact fee meets legal requirements
- Recommend studying and determining maximum impact fee amount that can legally be charged, even if don't charge that amount, to help determine rough proportionality ceiling
- However difficult to foresee and address every “negative externality” caused by development through legislatively adopted impact fees; some ad-hoc exactions inevitable



The Koontz Dilemma for Ad-Hoc Exactions

- In 2013, the U.S. Supreme Court in Koontz held that a taking can occur from an exaction “demand,” even if the exaction never occurs, and even if the project is never approved with the exaction condition.
- How clear must the “demand” be? Who has authority to make an actionable “demand”?
- Justice Kagan dissent in Koontz: “If a local government risked a lawsuit every time it made a suggestion to an applicant about how to meet permitting criteria, it would cease to do so; indeed, the government might desist altogether from communicating with applicants...that danger would rise exponentially if something less than a clear condition...triggered Nollan-Dolan scrutiny. At that point, no local government official with a decent lawyer would have a conversation with a developer.” Koontz, 133 S. Ct. at 2610 (dissenting opinion).



The Koontz Dilemma for Ad-Hoc Exactions

➤ Pasco County pre-application form:

“The applicant/owner hereby acknowledges and agrees that any staff discussions or negotiations about conditions of approval are preliminary only, and are not final, nor are they the specific conditions or demands required to gain approval of the application, unless the conditions or demands are actually included in writing in the final development order or the final denial determination or order.”

➤ See also Section 70.45(2), Florida Statutes: “Such action may not be brought until a prohibited exaction is actually imposed or required in writing as a final condition of approval for the requested use of real property.”



Agreement/Waiver

- Recommend communication with applicants about nexus and rough proportionality analysis, and document agreement/waiver
- Pasco County standard condition: “To the extent that any of the conditions of this approval constitute monetary or property exactions that are subject to Nollan v. California Coastal Comm’n, 483 U. S. 825 (1987), and Dolan v. City of Tigard, 512 U. S. 374 (1994), the applicant/owner, and successors and assigns, agrees that there is a nexus and rough proportionality between such conditions and the impacts of this project/development, and that such conditions are necessary to ensure compliance with the criteria of the Pasco County Land Development Code and Comprehensive Plan that are applicable to this approval, and waives any claims based on such conditions. This agreement/waiver was entered into voluntarily, in good faith, for valuable consideration, and with an opportunity to consult legal counsel, but does not affect the applicant/owner’s ability to seek variances, administrative remedies, or modifications of the conditions of this approval through applicable processes in the Land Development Code, and does not affect the applicant/owner’s ability to bring an action pursuant to Section 70.45, Florida Statutes.”



Administrative Remedies

- Try to funnel exaction and other land use disputes to administrative resolution as much as possible
- Local government should have chance to resolve disputes about exactions before they get to court
- See Section 407.4 of Pasco County Land Development Code
 - Provides process for applicants to dispute exactions as not meeting nexus and rough proportionality requirements
 - Decision made by County DRC/BOCC, based on recommendation from County Attorney
- See Section 70.45(3), Florida Statutes
 - Requires property owner to notify government about alleged prohibited exactions before filing Harris Act claim
 - Allows government to respond or remove all or part of exaction
- See Section 70.51, Florida Statutes
 - Special Magistrate process if property owner feels a development order is unreasonable or unfairly burdens the use of the owner's property



Summary Recommendations

- Always have nexus and rough proportionality requirements in mind when reviewing land use conditions
- Use impact fees wherever possible
- Communicate with applicants about exactions, but clarify that discussions are not “demands”
- Use administrative remedies as much as possible

