Are Municipal Land-Use Commissions Paying Attention?

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Following the U.S. Supreme Court's strongly pro-developer holding in Koontz v. St. John's River Management District*, a seminal 2013 decision on land use, permitting, and inverse condemnation, most real estate developers and their legal counsel anticipated a relaxation in the aggressiveness of municipal permitting and regulatory bodies. Some of those municipal bodies, however, apparently place little importance on judicial rulings and restrictions no matter how "supreme." In the* Koontz *decision, Justice Samuel Alito wrote, "Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause [of the Constitution] not because they take property but because they impermissibly burden the right not to have property taken without just compensation."[1] Notwithstanding the Supreme Court's recent guidance, it seems to be an increasingly common story that a real estate developer reaches a common understanding with a municipal land-use authority concerning the permissibility of a particular development—then, after commencing or completing the development, is met with additional or inconsistent demands from the municipal authority, often in apparent bad faith.*

In Hawaii

An example of municipal authority exercised in apparent bad faith may be found in the far westward reaches of our nation, where four purchasers of small beachfront parcels in Maui County, Hawaii, filed suit against local land-use regulators. The parcels were zoned "hotel-multifamily," a designation that expressly permitted the construction of single-family residences.

The parcels, however, were within a "special management area" under a state statute that imposed permit requirements for "developments."

The definition of "developments" expressly excluded single-family residences from the permit requirements *unless* regulators actively determined that the proposed construction would have a "cumulative impact or a significant environmental or ecological effect on a special management area."

Although the "burden of proof" under the statute was plainly on the regulators to show that the proposed development would harm the environment, local regulators lacked the funds to make such a determination. Therefore, the owners agreed to pay for the assessments, with the reasonable expectation that their modest plans to construct single-family residences would be permitted.

However, the regulators, apparently heeding strong community support for the creation of a public oceanfront park in the area, refused to accept the assessments.

An appellate court reviewing the case noted that:

> Several commissioners advocated . . . a deliberate strategy to preserve the status quo—a *de facto* beach park on the privately-owned lots. As one commissioner explained:
>
> > So if we decide on no action on this thing then the whole beach would remain as it is now and they [the landowners] would not be able to build on the land that they own. Granted, we can't buy it [because of

> insufficient public funds] but if we say no you can't develop it then we then have access to it, at least the beach.
>
> This strategy would "allow the people of Maui to utilize [the] beach area" while preventing property owners from constructing homes. Another commissioner acknowledged that moving forward with the process would result in a loss of the "de facto parking that people are enjoying now" on the private lots. . . . At least one commissioner expressly sought to preserve the public's illegal camping, which had resulted in littering, defecating, and parking on the private beach lots, bemoaning the landowners' resort to hiring security guards to remove the trespassers.[2]

In New Jersey

Regulators in New Jersey apparently refuse to be outdone by their western counterparts. Another long-running dispute between city authorities and a private developer has resulted in a pending petition for certiorari to the U.S. Supreme Court[3] involving similar issues of strong interest to real estate developers generally.

The petitioner is Medford Village East Associates, LLC (MVE), a real estate development company that owns 280 acres of land in Medford, New Jersey.

After more than a decade of litigation against respondent Medford Township (the "Township") concerning the MVE development plans for the land, MVE prevailed in 2004 and was awarded preliminary and final approval for the construction of a retail factory-outlet mall and multiuse project—plans the Township and many members of the public strongly opposed.

Rather than live with its loss in the litigation, the Township invoked its eminent domain authority to take control of the MVE property. The Township also sought to replace MVE with a different developer, Freeco,[4] which planned to construct a 60-unit affordable-housing development on a portion of the land.

Exhausted by its prior (and expensive) legal battles with the Township, MVE opted not to commence new litigation to fight the Township's use of its eminent domain authority, but instead negotiated a settlement agreement with it to allow development of the land.

The agreement modified MVE's original construction plan by eliminating the retail factory-outlet mall, replacing it with significant commercial retail space, a new municipal building (including a public library), and an affordable housing project intended to meet the Township's obligations under New Jersey's *Mount Laurel* doctrine.[5]

Under the settlement agreement, MVE consented to sell its property to the Township in stages for $60 million and additional consideration, including the construction of various improvements necessary to the project as a whole.

The Township agreed to convey portions of MVE's land to various redevelopers, including Freeco, who then would construct the project. The Township's Planning Board approved the settlement agreement and the new development plan.

MVE claims that in a separate agreement with Freeco, the Township "requested assurances as to the Freeco financial ability to perform and assumed the risks with respect thereto."[6]

Soon thereafter, MVE deeded the portion of its land dedicated to the affordable housing project to the Township. The Township conveyed it to the developer. But MVE claimed that it received no compensation whatsoever from the Township for this conveyance, which was made pursuant to the settlement agreement that included the Township's promise of payment.

Then the real trouble began. Freeco thereafter filed for bankruptcy and was ultimately discharged of its duties under the new development plan by a federal bankruptcy court.

The bankruptcy court issued an order allowing the Township to modify the development plans, but only in a way consistent with the property rights and contractual approval powers of MVE (which still retained most of its original land), and only with the planning board's approval of any modifications to the plans.

Important for MVE, Freeco also never constructed significant improvements required for the entire development, as it was supposed to.

MVE claimed that the Township then, in violation of the bankruptcy court's order and its settlement agreement, secretly "administratively modified" the planning board's approved development plan (and the many conditions it mandated)—without notice, any applications, or even a hearing with the public or MVE.

Although 60 affordable housing units were eventually constructed by another developer and are now occupied by qualified residents, the Township allegedly disavowed its agreement with MVE, refused to pay MVE for the land it provided for the project, and refused to compensate MVE for the loss of other valuable consideration resulting from its secret "administrative modification" of the approved plans.

MVE alleged that Freeco's failure to finish the affordable housing project—and the Township's consequent recourse to another developer to finish the work—resulted in "the cost of the improvements set forth in the approved plans [to] exceed the bonded amount by millions of dollars" that the Township is responsible for and that it, in effect, is pushing on to MVE by refusing to comply with the settlement agreement and the new development plan.

In its petition to the Supreme Court, MVE asserted that "[a]s a result [of the Township's secret "administrative modification" of the development plan], MVE received no compensation from the Township for the affordable housing tract, and the remaining portion of its land and the approvals from the Planning Board were substantially devalued. . . ."

MVE estimated the value it lost as a result of the Township actions to be between "$4 [million] to $5 million, in addition to millions of dollars in diminished value of the proposed building lots. . . ."

MVE further claimed that the Township blatantly and intentionally caused this injury "without filing any development application, without any planning board review, hearing or approval, and without the knowledge or approval of MVE."

MVE attempted to seek legal relief in the New Jersey state courts but claims that its arguments unjustly "fell on deaf ears."

The trial court, MVE claimed, overemphasized the fact that the litigation between MVE and the Township had been ongoing for 16 years and summarily concluded that enough was enough and dismissed MVE's claims, without reaching the merits of its legal arguments.

Both the New Jersey intermediate appellate court[7] and its Supreme Court[8] summarily rejected the MVE appeals without any substantive analysis or comment whatsoever.[9]

MVE's legal argument to the U.S. Supreme Court is a very basic one that highlights the Township's alleged culpability: that MVE's right to just compensation under the Fifth Amendment[10] was denied by the Township, which represented to MVE that it would condemn the property and pay it "just compensation" (i.e., the market value of the land in question) as required. MVE transferred ownership of a portion of its property to the Township but was not paid any compensation for it.

MVE stated that "these actions . . . would justify a conclusion that the Township must pay compensation for the taking of the MVE property. . . ."

MVE's chief legal authority was *Lingle v. Chevron USA*,[11] in which the U.S. Supreme Court emphasized a fundamental precept of the federal Constitution's Takings Clause:

> The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property. . . . [P]hysical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using [the] property—perhaps the most fundamental of all property interests.[12]

MVE further argued that:

> [T]here is no question that MVE's Property was taken by the Township, and sixty affordable housing units were constructed upon it, without any compensation being paid. After the affordable housing parcel had been taken, the Township unilaterally approved significant and material changes to the approvals, conditions and approved plans secured by MVE through many years of effort and litigation and caused improvements to be constructed on other portions of MVE's Property, pursuant to the modified plans, without MVE's approval and over MVE's objection. In doing so, the Township eliminated millions of dollars in improvements that were to benefit MVE and authorized the installation of other improvements that in part destroyed the value of MVE's proposed building lots that had not yet been conveyed and that were to be sold for millions of dollars.

MVE also emphasized the importance of its appeal based on the "awesome power of the sovereign to take property for public use without the owner's consent" under its eminent domain authority.

MVE's legal arguments extend beyond the Fifth Amendment's Takings Clause to the Township's allegedly blatant violation of MVE's due-process guarantees, which MVE emphasized were infringed "by [the Township's] effecting a diminution in value of MVE's property without notice, without a hearing, and without just compensation."

MVE also accused the Township of violating the bankruptcy court's order, which required the Township:

1. to obtain the necessary planning board approvals for any changes in the new development plan and
2. not to violate MVE's property and approval rights.

And, as a contractual matter, the Township also was not permitted to alter its settlement agreement with MVE without MVE's approval in writing.

MVE also emphasized the U.S. Supreme Court's *Koontz*[13] decision, in which it reaffirmed the "unconstitutional conditions" doctrine as applied to a property owner's Fifth Amendment right to just compensation in the land use context, and held that the government cannot deny a benefit to a developer on a basis that infringes constitutional rights.

"In this case, MVE refused to consent to the modification of its vested property rights, approvals secured after years of hearings, permit applications and state court litigation, in the face of coercive pressure by the Township, followed by a unilateral action to modify those permits to the detriment of MVE. That action constitutes a taking for which MVE is entitled to just compensation, which was denied it by the Township. . . ."

The U.S. Supreme Court's decision on MVE's petition should be issued by June 2015.[14]

Across the Nation

From east to west, land use overreach by cash-strapped governments apparently continues in the face of the judicial strictures mandated by the U.S. Supreme Court.

When those limitations are applied to a questionable exercise of municipal authority via increasingly costly judicial and administrative proceedings, the overall expense to municipal growth and public coffers begs for a more reasoned approach by applicable regulatory bodies at the outset of a proposed project, rather than a stick-up in the interim or, worse, at its conclusion.

Notes:

1. Koontz v. St. John's River Management District, 133 S. Ct. 2586, 2596, 186 L. Ed. 2d 697, 710 (2013).
2. Leone v. County of Maui, 128 Haw. 183, 188, 284 P.3d 956, 961 (Haw. Ct. App. 2012).
3. Docket No. 14-1150. MVE's petition can be found at 2015 U.S. S. Ct. Briefs LEXIS 1129.
4. "Freeco" is a shorthand reference used by the parties to the litigation to describe certain companies owned by developers Carl Freedman and Mitchell Cohen.
5. The doctrine requires authorities to create land-use zones that provide a realistic opportunity for the development of housing affordable to low- and moderate-income households. S. Burlington Cty. NAACP v. Townsh. of Mt. Laurel, 92 N.J. 158, 456 A. 2d 390 (1983).
6. The Township denies this allegation. Its attorney stated that the claim is "meritless" and that "the town never agreed and was never responsible for Freeco's contractual obligation to purchase the property."
7. 2014 N.J. Super. Unpub. LEXIS 624; 2014 WL 1125303.
8. 2014 N.J. LEXIS 1395 & 1396; 220 N.J. 207; 104 A.3d 1076.
9. MVE's recourse for review by the U.S. Supreme Court is mandated by the so-called "Rooker-Feldman doctrine," which generally prevents lower federal courts, including the Circuit Courts of Appeal, from hearing appeals from state courts. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).
10. In relevant part, the Fifth Amendment to the U.S. Constitution provides that "nor shall private property be taken for public use, without just compensation."
11. Lingle v. Chevron USA, 544 U.S. 528, 537,125 S. Ct. 2074, 161 L. Ed. 2d 826 (2005).
12. Citations omitted from quotation.
13. Koontz, supra at note 1..
14. The Township's response to MVE's petition was not yet filed with the Court when this article was written.

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