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### The Supreme Court's Recent "Takings" Cases: The Koontz and Arkansas Decisions – What Do They Mean for Local Government?

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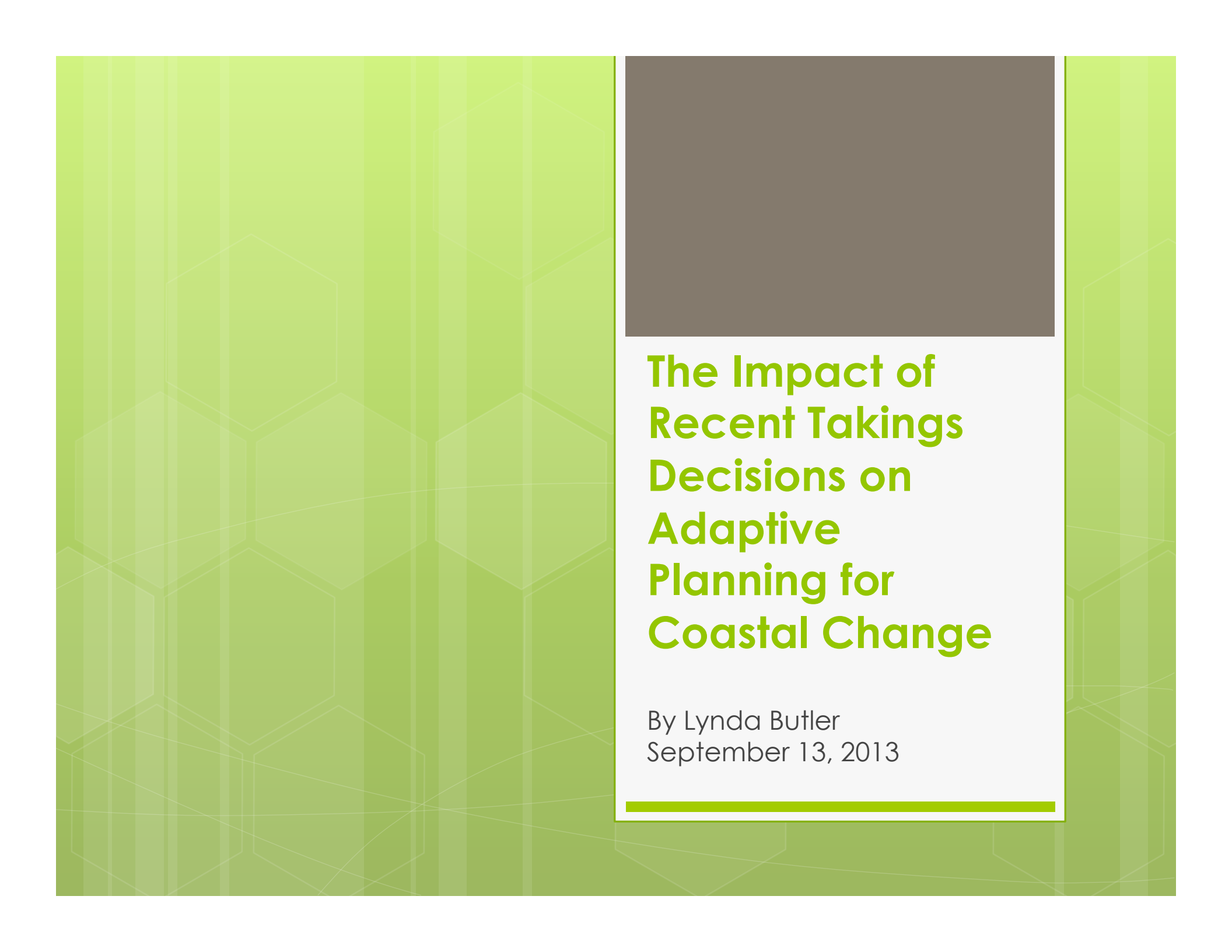


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# **The Impact of Recent Takings Decisions on Adaptive Planning for Coastal Change**

By Lynda Butler  
September 13, 2013

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# I. Two Important Victories

- *Koontz v. St. Johns River Water Management District* and *Arkansas Game and Fish Commission v. U.S.* expand protection for property rights under the Takings Clause
- *Koontz* in particular will pose problems for those planning for coastal change

## II. *Koontz*: A Perplexing Case

- FACTS: THE PROPERTY

- 14.9 acres located near the intersection of a 4-lane highway and a toll expressway
- The northernmost 2.45 acres were zoned commercial, the remaining single-family
- 3.4 acres of the northern part are wetlands
- The southern portion is more diverse
- Nearby encumbrances isolate the northern part



- FACTS: STATE ENVIRONMENTAL LAWS

- Florida Water Resources Act
- Florida Wetlands Protection Act

- FACTS: THE PROPOSED DEVELOPMENT PLAN

- Proposal to develop 3.7 of the 3.9 acres in the northern part of the tract
- Would fill in wetlands, raise the elevation, grade the land near the power lines, install a dry-bed pond, and offset loss of wetlands with a conservation easement for 11 acres in southern portion

**Why would Koontz want to develop just the northern portion with the wetlands?**

1200 feet and \$500,000

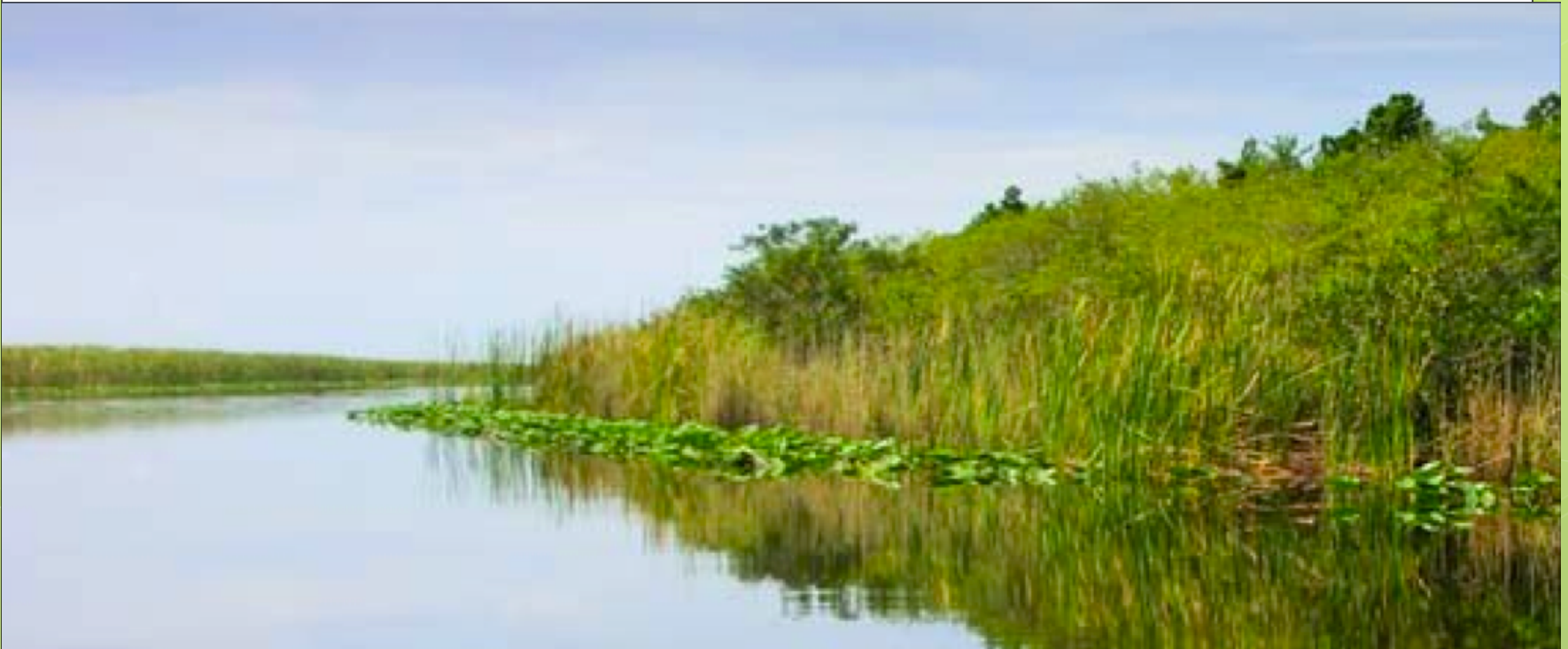
[http://ncsl.typepad.com/the\\_thicket/2013/07/supreme-court-decides-takings-case.html](http://ncsl.typepad.com/the_thicket/2013/07/supreme-court-decides-takings-case.html)



# The Northern Portion







<http://legalplanet.wordpress.com/2013/01/14/previewing-this-weeks-oral-arguments-in-the-supreme-courts-most-important-property-rights-case-this-term/>



- FACTS: REACTION OF THE WATER DISTRICT
  - Would approve the proposal only if:
    - Koontz decreased the size of the development by 1 acre, granted a conservation easement for the remaining 13.9 acres, installed a SWM system, and added a retaining wall instead of grading the land; OR
    - Koontz built as proposed, deeded the proposed conservation easement, and offset the damage to the wetlands by improving wetlands on a nearby 50-acre District tract.
  - Water District also indicated it was willing to listen to other ideas
- ***Query: How would you have responded to the landowner's offer?***

- STATE COURT LITIGATION

- **Trial court:** ruled for property owner
  - Landowner had sued under a state statute allowing recovery of damages when state action constitutes a taking
  - Trial concluded that the northern portion already was seriously degraded by construction activities on surrounding land and thus that there was an insufficient relationship between the offset condition and the projected harm of the proposed use
- **Fla Supreme Court:** Ruled for Water District
  - *Nollan/Dolan* takings analysis did not apply b/c there was no actual taking and *Nollan/Dolan* did not govern a monetary exaction

- SUPREME COURT'S MAJORITY DECISION: A SUMMARY

- 5-to-4 decision for the property owner, with an opinion written by Alito and joined by Roberts, Scalia, Thomas and Kennedy
- Held:
  1. A government demand followed by a denial of a permit application must satisfy *Nollan* and *Dolan*
  2. *Nollan/Dolan* takings analysis does apply to a government demand for money – a monetary exaction



## ○ MAJORITY'S REASONING

### 1. ***Just approvals or denials as well?***

- Overarching principle: the unconstitutional conditions doctrine, which prevents government from coercing people into giving up their individual rights

### ***So how does the Takings Clause fit in??***

- *Nollan* and *Dolan* apply this doctrine to protect the right to just compensation in the context of land use permitting
  - *Nollan*: Essential nexus between the condition and a legitimate public interest
  - *Dolan*: Roughly proportionality between the condition and projected harm



- o Denials too!

***Query: But where is the taking, asks Kagan and many others?***

The taking apparently is the burdening of the right protected by the Takings Clause – the right not to have property taken without just compensation.

***Query: But what is the remedy?***

Not federal because sued under state law, so the majority remands

***Query: And where is the discussion of what Nollan and Dolan require here?***

That's a job for the Fla Supreme Court on remand!



## 2. ***Do Nollan and Dolan apply to monetary conditions?***

- Monetary exactions that are linked to a specific property interest must satisfy *Nollan* and *Dolan* as well.

### **Query: Won't this allow any financial obligation to be challenged under *Nollan* and *Dolan*?**

- No – only one that “operate[s] upon . . . an identified property interest” by demanding payment in exchange for positive action affecting the property interest
- It's easy to tell the difference between a taking and a general financial obligation like a tax!



- ANALYSIS: IMPACTS

1. Resurrects *Nollan* and *Dolan* from the brink of being overruled
2. Recasts *Nollan* and *Dolan* primarily as applications of the unconstitutional conditions doctrine in the land use permitting context
3. Expands the scope of *Nollan* and *Dolan* to include monetary exactions seemingly in the face of a 1998 decision

**Query: What are the incentives of localities and regulators after *Koontz*?**

- Greater incentive to say no
- Greater incentive for more complete accounting

### III. *Arkansas Game and Fish*: A Change in Direction?



- THE HOLDING

- Reversed Federal Cir Ct of Appeals and concluded that government action causing repeated flooding could be a physical taking even though the flooding is not permanent or inevitably recurring
- “recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability”

## ○ THE FACTS

- Ark Game and Fish Commission owns a Wildlife Management Area that includes lands along the banks of the Black River
- In 1948 Army Corps built a dam upstream from the wildlife area and adopted a plan for determining water release rates, varying them seasonally and allowing deviations
- From 1993-2000, the Corps approved deviations that lowered the rates to provide downstream farmers with a longer harvest period and then increased them at other times to deal with the accumulated water

- THE LITIGATION

- **Ct of Fed Claims:** Concluded that the Corps' deviations caused 6 years of substantially increased flooding and constituted an appropriation, though temporary, of Commission's property

**Rationale:** The cumulative effect of the flooding changed the character of the soil and weakened the trees' root systems, ultimately destroying the trees and leading to the invasion of less desirable species

- **Fed Cir Ct of Appeals:** Reversed because the government-induced flooding was not “permanent or inevitably recurring”

## SUPREME COURT'S DECISION

### **1. *No blanket exemption from takings liability exists for temporary, government-induced flooding situations***

- There can still be an ouster of the landowner
- There can still be “direct and immediate interference with the enjoyment and use of the property”

### **2. *Temporary invasions require a “more complex balancing process,” not a categorical approach***

- Important factors include the degree to which the invasion is intended or foreseeable, the character of the land, the severity of the interference with RIBE

## IV. ADAPTATION AND PROPERTY RIGHTS

- **Avoid red lines**

- Instead of an outright ban, consider rolling development restrictions triggered by actual, recurring flooding that substantially interferes with customary use
- Instead of a ban, offer economic incentives to stop development sooner than later
- Instead of a ban, remove public subsidies when the flooding reaches that point or raises significantly the cost and danger of providing public services





- Understand the limits of private and public property
  - ***Eventually the sea level will rise*** in the Hampton Roads region, and private property will be lost
  - ***No property owner has the right to build in navigable waters or on public lands***
  - If you are a government official, ***bargain as a policymaker not as a private rational actor***
    - Koontz tells us that you cannot think simply from the landowner's economic perspective, imposing restrictions that allow the landowner to make some profit *without any connection to legitimate public interests or social costs*
    - Koontz also tells us that you cannot use the permitting process to demand a property interest for free