

# Recent Legislation and Court Decisions Impacting Delaware Municipalities

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# TOPICS

- I. First Amendment/Free Speech**
- II. Takings**
- III. Fee Litigation and HB 333**
- IV. Board of Adjustment Decisions**
- V. Municipal Firearm Legislation**
- VI. Miscellaneous Cases**



## I. FIRST AMENDMENT

- ❑ The huge new case is *Reed v. Town of Gilbert* – decided on June 18, 2015 by the United States Supreme Court.
- ❑ This is a landmark sign regulation case.
- ❑ Reed claimed that the Town's sign ordinance which restricted the size, duration, and location of temporary directional signs violated his/their right to free speech.



## I. FIRST AMENDMENT, Cont'd

- ❑ In the Town of Gilbert, no permit is required for temporary “directional signs relating to a qualifying event”, political signs, and ideological signs.



## *Reed v. Town of Gilbert, Cont'd*

- ❑ Directional signs have a size and time limit. They can go up 12 hours before an event, can be no more than 6 feet in height, and must go down within 1 hour after the event. No more than 4 signs are permitted and they cannot be placed in the right of way.
- ❑ Political signs, by contrast, are bigger and can be up to 32 square feet. They can go up anytime before an election, and can stay up for 10 days after the election, and may be placed in the right of way.



## *Reed v. Town of Gilbert*, Cont'd

- ❑ Ideological signs can be 20 square feet, are not limited in time or number, and may be placed in the public right of way.
- ❑ The cert. petition shows the discrepancy in this ordinance very well.



## *Reed v. Town of Gilbert, Cont'd*

Gilbert's Code severely restricts this:



# *Reed v. Town of Gilbert, Cont'd*

But broadly permits this:



## *Reed v. Town of Gilbert, Cont'd*

- ❑ The dispute began when Church placed 15-20 signs surrounding the place of worship (a school) for which it received a citation for keeping the signs up too long and for not having a date of the event on the signs.
- ❑ The Church claimed that the directional sign limitation violated their First Amendment rights – and won.



## *Reed v. Town of Gilbert, Cont'd*

- ❑ The Supreme Court held that a municipal government “has no power to restrict expression because of its message, its ideas, its subject matter or its content.”
- ❑ Content based laws (e.g. if the law applies to particular speech because of the topic of the speech or the message expressed) are *presumptively* unconstitutional.
- ❑ This includes laws that are content neutral that are adopted “because of” the content of the message.



## *Reed v. Town of Gilbert, Cont'd*

- ❑ The restrictions in the Town of Gilbert's sign code were “presumptively unconstitutional” because the signs directing people to attend worship services are treated differently than signs conveying other types of ideas.
- ❑ The government's motives for regulation of the signs is irrelevant – if there is a content based distinction, it is subject to the most restrictive scrutiny.
- ❑ So, what does this mean for your sign code?



## *Reed v. Town of Gilbert*, Cont'd

- ❑ The majority opinion gave some hints about what can be regulated:
  1. Sign size, lighting, materials, moving parts, and portability.
  2. And, the “Town may go a long way toward entirely forbidding the posting of signs, so long as it does it in an evenhanded, content-neutral manner.”
  3. A sign ordinance narrowly tailored to the challenges of protecting pedestrians, drivers and passengers might well survive strict scrutiny.



## *Reed v. Town of Gilbert*, Cont'd

Justice Alito's concurring opinion listed the following sign regulation options:

- Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below.
- Rules regulating the locations in which signs may be placed. These rules may distinguish between free-standing signs and those attached to buildings.



## *Reed v. Town of Gilbert, Cont'd*

- Rules distinguishing between lighted and unlighted signs.
- Rules distinguishing between signs with fixed messages and electronic signs with messages that change.
- Rules that distinguish between the placement of signs on private and public property.
- Rules distinguishing between the placement of signs on commercial and residential property.



## *Reed v. Town of Gilbert, Cont'd*

- Rules distinguishing between on-premises and off-premises signs.
- Rules restricting the total number of signs allowed per mile of roadway.
- Rules imposing time restrictions on signs advertising a one-time event. Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed.



## II. TAKINGS LAW

- ❑ There are a pair of key recent cases decided by the U.S. Supreme Court that everyone should know about.
  - *Koontz v. St. Johns River Management District.*
  - *Arkansas Fish and Game Commission v. United States.*



## *Koontz v. St. Johns River Water Management Authority*

- Taking without a taking.
- Under Florida law, the environmental damage for the wetlands to be developed had to be offset.
- Koontz offered to build on 3 acres and provide a conservation easement on 11 additional acres.
- The counter proposal was that Koontz had to reduce his developable envelope to one acre or provide mitigation on an additional 50 acres owned by the authority.



*Koontz v. St. Johns River Water Management Authority,*  
Cont'd.

- When Koontz refused, the application was denied.
- The Court held that the exactions demanded from Koontz did not satisfy the nexus and rough proportionality test required for development.
- The demand for the exactions was an unconstitutional condition and constituted a taking.



# Key Holdings of Koontz

- ❑ The unconstitutional conditions doctrine prevents the government, through coercion, from causing someone to give up (or otherwise unreasonably burden) a constitutional right.
- ❑ The rule applies regardless of whether the government ultimately succeeds in pressuring someone to forfeit such a right.
- ❑ Unconstitutional conditions doctrine applies even if the permit is denied.
- ❑ Monetary exactions (e.g. payment of money) must satisfy the rough proportionality standards if there is a “direct link between the government’s demand and a specific parcel of real property”.



# Justice Kagan's Dissent in Koontz

- ❑ Safe to say, Justice Kagan hates the majority's decision in Koontz.
- ❑ She states, under the majority decision, that “The Federal Constitution... will decide whether one town is overcharging for sewage, or another is setting the price to sell liquor too high. And the flexibility of state and local governments to take the most routine actions to enhance their communities will diminish accordingly”.
- ❑ “If every suggestion could become the subject of a lawsuit under Nollan and Dolan, the lawyer can give but one recommendation: Deny the permits, without giving Koontz any advice – even if he asks for guidance”.



# Practical Pointers After Koontz

- ❑ Be very careful when discussing special permit conditions. Make sure any demand can be tied to the project and set forth the reason for the request at the time the request is made. Remember that the government has the burden of justifying the exaction sought.
- ❑ Boundaries of the Koontz decision are not yet determined – thus, careful monitoring of subsequent decisions is required.



## Koontz Implemented

- ❑ Let's take a look at how Courts are treating Koontz.
- ❑ *Cheatham v. City of Hartselle* (Ala. March 3, 2015).
  - Subdivision regulations required 60 feet for future widening. Subdivision plan only had 45 feet.
  - Developer claimed that the additional 15 foot dedication, even though it was required, constitutes an unconstitutional condition.
  - The Court held that the City did not establish that the additional 15 feet was roughly proportional to the development and constituted a taking.



## *California Bldg. Assoc. v. City of San Jose*

- ❑ *California Bldg. Assoc. v. City of San Jose* (Cal. June 15, 2015).
  - Case is a challenge by a building trade association to a San Jose requirement that certain large housing developments of 20 or more units must sell at least 15% of units at affordable housing prices.
  - The Court stated that this ordinance did not constitute an impermissible exaction because it did not require the developer to pay a monetary fee and merely limited the way that a developer may use its property.
  - It was held that the limitation on the use of property is not an exaction.



## *California Bldg. Assoc. v. City of San Jose, Cont'd*

- ❑ *California Bldg. Assoc. v. City of San Jose* (Cal. June 15, 2015).
  - “Nothing in *Koontz* suggests that the unconstitutional conditions doctrine \* \* \* would apply where the government simply restricts the use of property without demanding the conveyance of some identifiable protected property interest (a dedication of property or the payment of money) as a condition of approval.”
  - “It is the governmental requirement that the property owner convey some identifiable property interest that constitutes a so-called exaction under the takings clause and that brings the unconstitutional conditions doctrine into play.” (citations omitted).



## Delaware Decisions to Watch

- While we have never had a Delaware case that discusses the rough proportionality test, we now have two cases that will be discussing the *Koontz* decision.
  - *Golf Course Assoc. LLC and Toll Bros. Inc. v. New Castle County Board of Adjustment* (demand for off site improvements for an intersection claimed to be an unconstitutional demand).
  - *New Castle County v. Pike Creek Recreational Services LLC* (alleged demand for a golf course use in 1969 purportedly was an unconstitutional condition that negates deed restrictions).



# Arkansas Fish and Game

- ❑ *Arkansas Fish and Game Commission v. United States.*
  - Holds that government induced flooding may constitute a taking.
  - The severity of interference with the property right is a factor in the calculus.
  - Government induced flooding of a temporary duration gains no automatic exception from a takings analysis.
  - This holding is one that may be heavily litigated because water damage and flooding is a huge issue.



## *Arkansas Fish and Game Implemented*

- ❑ *Henderson v. City of Columbus* (Neb. 2013).
- ❑ Takings claim asserted related to a sewer and water backup.
- ❑ Court held no viable takings claim was established because the invasion of property rights must be the foreseeable result of authorized governmental action.



## *St. Bernard Parish Gov't v. United States*

- ❑ *St. Bernard Parish Gov't v. United States* (Fed. Ct. May 1, 2015).
  - Court held that a compensable taking was established against the government for a flooding related to Hurricane Katrina and that compensation was owed to the owners of the land because the cause of the flooding was foreseeable.
  - The court held that the Army Corp.'s construction, expansion, operation, and failure to maintain channels caused subsequent storm surge that was exacerbated by a “funnel effect” during Hurricane Katrina and subsequent hurricanes and severe storms.
  - These actions caused flooding on Plaintiffs' properties that effected a temporary taking under the Fifth Amendment to the United States Constitution.



## III. FEES

- ❑ Municipal fees are supposed to be at least roughly proportional to the cost of providing services.
- ❑ Otherwise, the fees are for the purpose of raising revenue and constitute a tax.



### III. FEES, Cont'd

- There are two recent cases that address fees:
  - *Harvey v. City of Newark.*
  - *Jimmy's Grille v. The Town of Dewey Beach.*



### III. FEES, Cont'd

- The *Jimmy's Grille* decision sparked an amendment to the Delaware Code, known as HB 333, which was adopted last year.
- This is codified at Chapter 20 of Title 22.
- It states that municipalities may not impose a tax unless expressly authorized in the municipal charter.
- But the bill also exempts home rule municipalities from the statute and allows for the increase of taxes in existence as of June 15, 2014.
- None of this answers the key question – when does a fee evolve into a tax?



### III. FEES, Cont'd

- ❑ *Sterling Property Holdings Inc. v. New Castle County* (Del. Ch. Aug. 5, 2014).
  - Sterling is the first Delaware Court of Chancery case that significantly addressed what can and cannot be included when a fee is charged.
  - In Sterling, plaintiffs challenged New Castle County's fee under 9 *Del. C.* § 3010— a statute that is unique to the County.
  - That statute states that the County's land use fees must be proportionate to the cost of processing a subdivision and no schedule of fees shall be effective unless and until approved by New Castle County Council.



### III. FEES, Cont'd

- In this case, the Court confirmed that direct and indirect expenses may be included in the fee calculation.
- Thus, in processing the County's fees, the County was not required to look at the time an individual planner spent reviewing a subdivision plan.
- Rather, the County could justify the fee by looking at the overall costs of the planning section of the Department of Land Use.
- The Court held that even if the County did not act with the motive of complying with 9 *Del. C.* § 3010, the Court would look to the overall circumstances to determine if the fee is valid.



## IV. BOARD OF ADJUSTMENT

- ❑ *Riker v. Board of Adjustment* (Del. Super. Ct. Feb. 2, 2015).
  - Case where Board applied the unnecessary hardship test instead of the exceptional practical difficulty test for an area variance.
  - The Court held, as it has held consistently of late, that where the wrong standard is presented to the Board, the failure to articulate the correct standard is reversible error.



## IV. BOARD OF ADJUSTMENT, Cont'd

- ❑ *Zober v. Kent County Department of Planning Services* (Del. Super. Ct. Mar. 12, 2014).
  - The Court held that the “Board must particularize its findings of fact and conclusions of law.”
  - Because the Board did not do so, the decision of the Board was reversed.



## IV. BOARD OF ADJUSTMENT, Cont'd

- ❑ *Laird v. Board of Adjustment of the Town of Dewey Beach* (Del. April 30, 2015).
  - This case is a one page affirmance of a board of adjustment case with one footnote that significantly impacts board of adjustment procedure.
  - In a footnote, the Court holds that it was in error to not allow members of the public to testify in a code interpretation appeal case.
  - Thus, it now appears clear that all Board of Adjustment cases must allow public comment of some sort.



## V. MUNICIPAL FIREARMS LEGISLATION

- ❑ Until this past year, 22 *Del. C.* § 111 made clear that no municipality could pass any ordinance regulating the ownership or possession of firearms unless such ordinance was on the books as of July 4, 1985.
- ❑ Thus, there was no way to prohibit open carry firearms in municipal buildings and police stations.



## V. MUNICIPAL FIREARMS LEGISLATION, Cont.d

- ❑ HB 192 allows limited regulation of open carry firearms in municipal buildings. To regulate, the following is required:
  - A. Adoption of an ordinance.
  - B. Posting of a sign in a place where firearms are prohibited.
  - C. Penalties for violation must be established by ordinance.



## VI. Other Noteworthy Cases

- ❑ Cases to watch and noteworthy decisions:
  - New FOIA case will likely be filed today.
  - *Traders Alley LLC v. Board of Adjustment of the City of Newark.*
  - *Nichols v. The City of Rehoboth Beach.*
  - *Covington v. The City of Rehoboth Beach.*
  - *Pike Creek Recreational Services v. New Castle County.*

