IN THE SUPREME COURT
OF FLORIDA

Case No: SC09-713
Lower Tribunal No: 5D06-1116

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Petitioner,

vs.

COY A. KOONTZ, ETC.,

Respondent.

On Appeal From The Fifth District Court Of Appeals
Daytona Beach, Florida

PETITIONER/APPELLANT'S INITIAL BRIEF ON THE MERITS

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PREFACE

The following abbreviations and designations are used in this brief:

- "Fifth District" refers to Florida's Fifth District Court of Appeal.
- "Koontz" refers to Coy A. Koontz, deceased, the landowner in the decision below, who is represented in this matter by Respondent Coy A. Koontz, Jr., as Personal Representative of the Estate of Coy A. Koontz.
- "St. Johns" refers to Petitioner St. Johns River Water Management District, an agency subject to chapter 120 of the Florida statutes.

References to the record on appeal will cite to "R," followed by the appropriate volume, then appropriate page number. References to trial transcript will cite to "T," then the appropriate page number.

STATEMENT OF THE FACTS

This case involves review of a decision that, if it stands, greatly extends the boundary of Florida exaction takings law under Article X, section 6(a), of the Florida Constitution. No longer does an exaction taking require the landowner give up "property" as a prerequisite to permit issuance. Now, any permit denial found to be unreasonable subjects government to exaction takings liability, not only for what was exacted but also for a *per se* taking of the entire underlying parcel sought to be developed. In addition, the decision below disregards the established administrative procedures for challenging agency decision-making. Instead, it allows challenges to the propriety of an agency decision to be pursued in a circuit court takings suit, in conflict with prior decisions of this Court.

This case began when St. Johns denied Koontz's application in early 1994 for a dredge and fill/management and storage of surface waters permit.[1] The property Koontz proposed to develop was 14.2 acres located in Orange County, within the Econlockhatchee River Hydrologic Basin ("Econ Basin"). (R6: 1020). Almost all of Koontz's property lies within the Econ Basin's Riparian Habitat Protection Zone ("RHPZ"). (R6: 1020). Koontz application sought to destroy 3.4 acres of wetlands

[1] Koontz applied to St. Johns for both a management and storage of surface water (MSSW) permit and a wetland resource permit (WRP or "dredge and fill" permit). (R9: 1501-65, 1579-1612). The difference in the application types is not relevant to the issues in this appeal. For ease of reference, this brief will use the singular "application" and "permit."

and 0.3 acres of protected uplands within the RHPZ. (R4: 618).

As mitigation for the wetland destruction, Koontz's application offered to preserve the undeveloped remainder of his property through a conservation easement (preservation mitigation). (R9: 1645). The acreage of the preservation mitigation was found by the trial court to be "approximately 11 acres." (R6: 1020). Thus, the ratio of the 11-acre preservation area to the 3.7-acre impact area ("mitigation ratio") was 3:1. (T 187). As Koontz's wetlands expert admitted at trial, the proposed 3:1 mitigation ratio was only one third of the 10:1 minimum required under St. Johns' mitigation guidelines. (T 188).

At its May 1994 meeting, the District's Governing Board considered the Koontz permit application and was faced with disagreement between Koontz's engineer and District staff regarding the sufficiency of the proposed preservation as full mitigation for the proposed wetland destruction. (R9: 1667). After considering Koontz's application, the written District staff report, and the oral information presented by both Koontz's engineer and District staff at the Board meeting, the Board determined that the offered preservation mitigation at a 3:1 ratio was insufficient and unanimously voted to deny the project as proposed. (R9: 1656-86). The Board's final order contained findings of fact and conclusions of law

establishing the basis for its denial of the Koontz permit application.[2]

The Board's final order suggested mitigation options as well as a project design alternative that would make the proposed development approvable. (R9: 1627–28). One suggestion would allow Koontz to construct the desired 3.7-acre project by augmenting his proposed on-site preservation through enhancing an additional 50 acres of wetlands at an off-site location. (R9: 1628 ¶17). Since Koontz's proposed on-site preservation encompassed the remainder of his property, there was no on-site area available for additional mitigation. (R6: 1020). Thus, any additional mitigation would necessarily be off-site, either on other property owned by Koontz or property owned by someone else. (T 247)

The final order identified two St. Johns' properties within the Econ Basin, referring to them as "example sites," where off-site wetland enhancement mitigation could be accomplished by plugging ditches or replacing nonfunctional culverts. (R9: 1628 ¶¶17, 14–15). As Koontz stipulated before trial (R4: 619 ¶L4), the final order allowed equivalent off-site enhancement mitigation to occur on any piece of property located within the Econ Basin, should Koontz propose

[2] The Board rendered two final orders, one for the MSSW permit application and one for the dredge and fill permit application. (R9: 1613–22, 1623–32). Mitigation that would be sufficient for permit issuance was set forth in both final orders and is the same for each type of permit. (R9: 1616–18 (¶¶13–19) and R9: 1627–29 (¶¶13–19)). For simplicity, this brief will refer to the 3.4 acres of wetlands and the 0.3 acres of protected RHPZ uplands collectively as "wetlands," will use the singular "final order," and will cite to only the dredge and fill final order.

some other location within the basin.[3] (R9: 1628 ¶18).

In addition to supplemental off-site mitigation alternatives, the final order also identified a possible design alternative that would eliminate the need for additional off-site mitigation. Koontz could reduce the development from 3.7 acres of impact to 1 acre of impact and retain his proposed on-site mitigation over the remainder of the property. (R9: 1628 ¶19).

Koontz did not agree to any of the supplemental alternatives proposed by St. Johns in the final order. (R6: 1021). He chose not to seek an administrative hearing under section 120.57, Florida Statutes, to contest whether his proposed mitigation was sufficient. (R4: 619 ¶M). Koontz also chose not to appeal under section 120.68, Florida Statutes. (R4: 619, ¶N). Instead, he brought suit in circuit court, claiming the permit denial inversely condemned his property under Article X, section 6 of the Florida Constitution. (R2: 375 ¶48). Koontz's Amended Complaint did not plead any due process claim under Article I, section 9 of the Florida Constitution, nor any claims under the U.S. Constitution. (R2: 364–379).

A week before trial, Koontz stipulated that the final order did not deprive him "of all or substantially all economically beneficial and productive use of the

[3] Any off-site mitigation had to be somewhere within the Econ Basin because of section 373.414(8)(a) of the Florida Statutes (1993), which required the Board to consider the cumulative impacts of wetland destruction within the same drainage basin when evaluating a permit application. "In-basin" mitigation avoids cumulative impacts within the same basin.

property." (R4: 619 ¶S). Because of the stipulation, the District filed a Motion in Limine to exclude any evidence regarding the correctness or propriety of the permit denial on the basis that such evidence was precluded by section 373.617(2) of the Florida Statutes and by binding precedent. (R3: 590–604). The trial court denied the motion, but granted St. Johns a continuing objection at trial to the admission of such evidence. (T 5).

In August of 2002, the trial court conducted a bench trial to determine whether St. Johns had inversely condemned Koontz's property. (R6: 1018) The trial court described Koontz's inverse condemnation claim as contending "that the District has taken his property as a result of the District's conditioning the development of his property upon off-site mitigation, which Mr. Koontz contends is an unreasonable exercise of the District's police power." (R6: 1021). Koontz's trial evidence focused solely on whether the Board's 1994 final order was factually correct in denying the permit for failure to provide additional off-site mitigation.

At trial, Koontz introduced into evidence a new 2001 wetlands assessment[4] from a new environmental consultant, Breedlove, Dennis and Associates. (R9: 1687-95). The new assessment reported that "[t]he approximate acreage of wetlands within the 4± acre northern parcel is .8± acre." (R9: 1690). The 0.8± acre

[4] As part of the permit application, Koontz's environmental consultant, Morgan Environmental, Inc., submitted an environmental assessment showing that all of Koontz's property was wetlands, except for two small areas. (R9: 1610, 1735).

of wetlands in the project area reflected a significant decrease in wetland area when compared to the 3.7 acres of wetlands identified by Koontz in his permit application that the Board denied. (R9: 1581, 1584).

In addition to the new wetlands report, Koontz presented the testimony of two wetland experts who had not participated in the 1994 permitting process. (T 123, 215). Their testimony was based upon their present-day site inspections, in conjunction with materials submitted in the Koontz permit application. (T 119, 129, 214-215). One expert was asked to determine "whether or not any off-site mitigation was necessary" for the proposed project. (T 214). He opined that the proposed off-site mitigation was unnecessary. (T 217-18). Koontz's other expert opined that the mitigation proposed in the application was sufficient for permit issuance. (T 133).

Consistent with his pretrial stipulation, Koontz did not present any evidence that the permit denial deprived him of any economic or productive use of the property. The liability judgment factually determined that "Koontz has not proven that all or substantially all economically viable use of his property has been denied by the District." (R6: 1024). The judgment also factually determined that "Koontz is not being asked to give up his right to exclude others in favor of passers by. Neither the government nor anybody else is going to occupy property of Mr. Koontz." (R6: 1023).

Although the trial court expressly found the District's permit denial did not involve a dedication of Koontz's land for public access and that the denial had no substantial effect on the economic use of the property, the trial court nonetheless determined that "the District's 1994 Final Order requiring Plaintiff to provide off-site mitigation in addition to on-site preservation of property was an unreasonable exercise of the police power constituting a taking without just compensation." (R6: 1016). The liability judgment also determined that St. Johns' denial of Koontz's application "was invalid." (R6: 1027). Pursuant to section 373.617 of the Florida Statutes, the lower court remanded the matter to St. Johns for consideration of the alternatives set forth in section 373.617(3) of the Florida Statutes. (R6: 1027).

On remand, after the trial court's invalidation of its permit denial, St. Johns' Governing Board issued a "proposed order" as contemplated under section 373.617(4) of the Florida Statutes. (R6: 1028). The proposed order was based on the new evidence presented to the trial court regarding the much-reduced size of the wetlands to be destroyed. (R6: 1031-32). Because the evidence showed that Koontz's property contained only 0.8± acres of wetlands in the project area rather than the 3.7 acres of wetlands in that area when the application was first considered, the Board decided that preservation of the remainder of the property alone would be sufficient to offset the impacts of the development of that 0.8 acres of wetlands. (R6: 1031-32). Koontz's proposed 11 acres of on-site preservation

mitigation, when compared to 0.8 acres of wetland destruction, gives a mitigation ratio that exceeds the minimum 10:1 ratio under the mitigation guidelines (11 acres divided by 0.8 acres exceeds a 13:1 ratio). The Board agreed to issue the permit for the original development, with the only mitigation being the on-site preservation mitigation originally proposed by Koontz. (R6: 1032). The trial court, after considering the Board's proposed order as required by section 373.617(4), Florida Statutes, determined that the Board's new permitting decision was a reasonable exercise of the police power that did not constitute a permanent taking without just compensation. (R6: 1017).

In 2006, the trial court held a bench trial to determine compensation for a temporary taking. Appraisals Koontz introduced into evidence (R7: 1327) show that the property's value had more than tripled during the pendency of this litigation, from $457,000 in 1994 (R10: 1773) to $1,405,000 in December of 2005. (R10: 1804). The judgment against St. Johns exceeded $376,000. (R7: 1330).

STATEMENT OF THE CASE

This case has a protracted and circuitous procedural history. In 1997, the lower court dismissed all of Koontz's claims. (R3: 506). Koontz appealed, and the Fifth District affirmed all dismissals except for the regulatory takings claim which the Court determined was ripe for adjudication. *Koontz v. St. Johns River Water Mgmt. Dist.*, 720 So.2d 560 (Fla. 5th DCA 1998).

On remand, after the takings liability trial, St. Johns appealed what the trial court labeled a "final judgment." (R6: 1018). The "final judgment" concluded that St. Johns' denial of Koontz's permit application "was invalid," thereby appearing to require St. Johns to issue the permit and appearing to obviate the need for judicial review of that permit issuance. (R6: 1027). The Fifth District dismissed the appeal *sua sponte* for lack of jurisdiction, based on the need for judicial approval of St. Johns' action. *St. Johns River Water Mgmt. District v. Koontz*, So.2d 1267 (Fla. 5th DCA 2003).

On remand, St. Johns' Governing Board entered a proposed order agreeing to issue the permit sought by Koontz and submitted it to the trial court as required by section 373.617(4), Florida Statutes. (R6: 1028-1034). Section 373.617(4) requires the trial court to "enter its *final order* approving the proposed order" if the trial court determines that the proposed action was a reasonable exercise of the police power. §373.617(4), Fla. Stat. (emphasis added). The trial court found the Board's agreement to issue Koontz a permit without the invalidated off-site mitigation "a reasonable exercise of the police power" that "does not constitute a taking without just compensation" and entered what was labeled a "final judgment." (R6: 1016). The "final judgment" stated that "[s]ubject to the appeal of the taking issue, this Court reserves jurisdiction to determine the takings damages." (R6: 1017).

In light of the trial court's determination that there was "no taking," the "final

order" language in section 373.617(4), and the Florida precedent holding that an incorrect permitting decision did not allow imposition of temporary taking damages for the delay in receiving a permit, *Mandelstam v. City of South Miami*, 685 So.2d 868, 869(Fla. 3d DCA 1996), St. Johns appealed the "final judgment." The Fifth District dismissed the appeal *sua sponte* for determination of temporary taking damages. *St. Johns River Water Management District v. Koontz*, 908 So. 2d 518 (Fla. 5th DCA 2005).

On remand, the trial court conducted a bench trial to determine compensation for the temporary taking of Koontz's 14.2 acres, resulting in a final judgment awarding damages to Koontz. (R7: 1329–30). St. Johns appealed. The Fifth District rendered the decision that is the subject of this appeal and, on St. Johns' motion, certified the following question:

> Where a landowner concedes that permit denial did not deprive him of all or substantially all economically viable use of the property, does Article X, section 6(a), of the Florida Constitution, recognize an exaction taking under the holdings of *Nollan*[5] and *Dolan*[6] where, instead of a compelled dedication of real property to public use, the exaction is a condition for a permit approval that the circuit court finds unreasonable?

St. Johns River Water Management Dist. v. Koontz, 5 So. 3d 8, 12 (Fla. 5th DCA 2009). St. Johns' timely invoked the jurisdiction of this Court based on constitutional interpretation and certified question grounds and on asserted conflict

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5 *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

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

with binding precedent from this Court.

SUMMARY OF ARGUMENT

This is the only case under the *Nollan/Dolan* land-use exaction takings theory where the property found to have been taken was not the target of any compelled government regulatory exaction. The Fifth District altered this critical point and viewed the "exaction" as not the property being compelled by the government that would be a *per se* physical taking, but viewed the "exaction" as an unjustified regulatory requirement that prevents the landowner from pursuing development of the underlying real property. This sweeping expansion of *Nollan* and *Dolan* fundamentally upends conventional regulatory takings law by broadening the narrow reach of the land-use exaction takings analysis to the extent that it effectively displaces the proper conventional takings analyses which should have been applied in this case.

In *Lingle v. Chevron,* 544 U.S. 528 (2005) the Court stressed that the land-use exaction takings theory was conjoined to the doctrine of unconstitutional conditions and therefore applies only where the government exaction in itself would be a *per se* taking of real property if unilaterally imposed. The Fifth District erroneously viewed the exaction as St. Johns' off-site wetland mitigation requirement, which simply did not exact any real property from Koontz, and certainly did not exact his real property found to have been taken. When the land-

use exaction takings analysis is unlinked from a compelled dedication of property and instead an "exaction" is characterized as any unjustified regulatory condition, then this new exactions takings theory wholly undermines regulatory takings law. The error of the Fifth District's decision is self-evident. Had St. Johns simply denied the permit for lack of sufficient mitigation there certainly would not have been a *per se* taking of the parcel, or even a conventional regulatory taking of the parcel, because the trial court found no physical invasion and no substantial economic loss as a result of the St. Johns permitting decision. But under the District Court's novel land-use exaction takings theory, because St. Johns' proposed off-site mitigation was found to be an unwarranted exaction—even though that mitigation would have resulted in a permit approval—a *per se* temporary taking of the parcel resulted. Therefore, the Fifth District's decision should be reversed.

The Fifth District's decision also should be reversed because it conflict with this Court's precedent prohibiting a circuit court from determining the correctness of an agency permitting decision. The District Court and trial court found a temporary taking because the District erroneously denied Koontz's permit application based upon a permit condition found to be unreasonable. There was no issue of economic impact or physical invasion raised or tried—the only issue litigated was whether the permitting decision was correct. **T**his Court has

examined section 373.617(2) and ruled that it precludes the circuit court in a takings case from evaluating the substantive correctness of the underlying permitting decision. *Bowen v. Fla. Dep't of Envtl. Regulation*, 448 So.2d 566 (Fla. 2d DCA 1984), *approved and adopted*, 472 So.2d 460 (Fla. 1985). In addition, *Key Haven Associated Enter., Inc. v. Bd. of Trustees of the Internal Improvement Trust Fund,* 427 So.2d 153 (Fla 1982) prohibits an inverse condemnation plaintiff's grievance against the correctness of a St. Johns permitting decision imbedded in an exaction takings claim is not legally cognizable in a circuit court. That remedy lies in the Chapter 120, Florida Statutes, administrative process, with judicial review of a takings claim under section 120.68, Florida Statutes. Because of sections 120.68 and 373.617(2), *Key Haven,* and *Bowen* the Fifth District erred .

ARGUMENT

I.

WHERE A LANDOWNER CONCEDES THAT PERMIT DENIAL DID NOT DEPRIVE HIM OF ALL OR SUBSTANTIALLY ALL ECONOMICALLY VIABLE USE OF THE PROPERTY, ARTICLE X, SECTION 6(A), OF THE FLORIDA CONSTITUTION DOES NOT RECOGNIZE AN EXACTION TAKING UNDER THE HOLDINGS OF *NOLLAN* AND *DOLAN* WHERE, INSTEAD OF A COMPELLED DEDICATION OF REAL PROPERTY TO PUBLIC USE, THE EXACTION IS A CONDITION FOR A PERMIT APPROVAL THAT THE CIRCUIT COURT FINDS UNREASONABLE.

This Court has not confronted a land-use exaction takings case. Until the Fifth District's decision, both Florida precedent and the U.S. Supreme Court have narrowly construed land-use exaction takings to government decisions that

conditioned development on the dedication of property for access by the public. Florida courts have heretofore applied the *Nollan/Dolan* land-use exaction takings test only to regulatory actions compelling the dedication of real property.[7]

As a matter of first impression under Florida law, the decision below interprets and extends Article X, section 6(a) of the Florida Constitution to remove the critical link required in all other exaction takings cases, an exaction that is the compelled relinquishment of property as a *quid pro quo* for permit issuance. Under the Fifth District's expansive exaction theory, any permitting requirement later found unreasonable, not just those compelling the landowner to give up property, can lead to an exaction taking. Moreover, the "unreasonable" permitting requirement (exaction) results in a temporary *per se* taking of the entire underlying parcel, even though no part of that parcel was exacted. The Fifth District presented this expansion of exaction takings law through a certified question to this Court.

A. Standard of Review.

The *de novo* standard of review applies to interpretations of the Florida Constitution. *Bush v. Holmes*, 919 So.2d 392, 399 (Fla. 2006).

B. Background.

The U.S. Supreme Court's most recent comprehensive discussion of takings

[7] *Paradyne Corp. v. State, Dep't of Transp.*, 528 So.2d 921 (Fla. 1st DCA 1988); *Aspen-Tarpon Springs Ltd. Partnership v. Stuart*, 635 So.2d 61 (Fla. 1st DCA 1994).

law is *Lingle v. Chevron U.S.A., Inc*., 544 U.S. 528 (2005). There, the Court identified the four categories of inverse condemnation theories available to a takings plaintiff. *Lingle*, 544 U.S. at 537. In the case at bar, three of the inverse condemnation theories are inapplicable.[8] Accordingly, the only takings theory remaining in the case is a land-use exaction taking under *Nollan* and *Dolan*.

In a very general sense, land-use exactions are those concessions demanded by government as a prerequisite for the issuance of authorizations that allow the intensified use of real property.[9] Exactly what constitutes an exaction that can trigger an exaction takings claim is "far from settled." *Koontz*, 5 So.3d at 13. The claimed exaction in this case involves additional mitigation required to offset the destruction of wetlands and protected uplands.

Koontz sought a permit from St. Johns to destroy wetlands and protected uplands to construct a commercial development. Koontz proposed to preserve the remainder of his property as "on-site" mitigation, but that amount of mitigation

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[8] The trial court factually found, and Koontz also stipulated, that the St. Johns permitting denial did not result in a deprivation of all, or substantially all, economically viable use of Koontz's real property. (R4: 619 ¶S, 1024, 1026). Thus, there can be neither a total regulatory taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) nor a *Penn Central* regulatory taking. The trial court also factually found that St. Johns' permitting decision would not result in any physical invasion of Koontz's property (R6: 1023), thereby eliminating a permanent physical taking of the kind recognized in *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982).

[9] M. Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Cal. L. Rev. 609, 613 (2004).

was only one-third of the mitigation required under St. Johns' mitigation guidelines. St. Johns' Governing Board denied Koontz's permit application, but agreed to issue a permit if Koontz would provide additional mitigation. Because none of Koontz's remaining property was available for additional mitigation, any additional mitigation had to be "off-site."

After considering opposing expert opinions, the trial court found that "requiring [Koontz] to provide off-site mitigation in addition to on-site preservation of property" was a taking. (R6: 1016). The requirement for additional mitigation was invalidated by the trial court. (R6: 1027).

Primarily at issue in this case is "whether an exaction claim is cognizable when, as here, the landowner refuses to agree to an improper request from the government resulting in the denial of the permit." *Koontz*, 5 So.3d at 11. The correct answer to that question requires application of the "doctrine of unconstitutional conditions" and depends on whether the improper request requires the landowner give up "property" as a prerequisite for permit issuance. *See* subpart C below. The request at issue here, additional mitigation, did not involve any property of Koontz. *See* subpart E below. Significantly, neither the majority nor the concurring opinion below mentioned *Lingle*, which clarified the law relating to exaction takings. The dissent referenced *Lingle* numerous times. As noted by the dissent, "nothing was ever 'taken' from Mr. Koontz, in the Fifth Amendment sense

of the word." *Id*. at 8. Nevertheless, the majority and concurring opinions concluded that the additional mitigation demand subjected St. Johns to exaction takings liability, contrary to *Lingle*.

C. Only The Exaction Of "Property" Leads To A Land-Use Exaction Taking Under *Nollan/Dolan* And *Lingle*.

The foundational cases for land-use exaction takings, *Nollan* and *Dolan*, triggered an exaction taking under the "doctrine of unconstitutional conditions because of the requirement in each case that the landowner dedicate land for public use in exchange for a land-use permit," *Lingle*, 544 U.S. at 546. *Lingle* confirmed that doctrine as the linchpin for exaction takings:

> Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.

Id. at 547. The U.S. Supreme Court has applied the unconstitutional conditions doctrine in numerous cases outside of the takings context.[10] As shown by the cases applying the doctrine, the *sine qua non* of an unconstitutional condition is government's demand that one relinquish a constitutional right in order to receive a discretionary government benefit.

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[10] *See, e.g., Sherbert v. Verner*, 374 U.S. 398 (1963); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Fed. Communications Comm'n, v. League of Women Voters of Calif.*, 468 U.S. 364 (1984); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1997)

The first critical component of an unconstitutional conditions analysis is identification of the particular constitutional right the person receiving the benefit is required to relinquish.[11] In the exaction takings context, the constitutional right a landowner is being asked to give up is the right to compensation for the property being exacted as the *quid pro quo* for permit issuance. *Lingle*, 544 U.S. at 547. Because takings claims must be brought under the takings clause of the Fifth Amendment or, in Florida, Article X section 6(a) of the Florida Constitution, the only constitutional right a landowner could give up under those constitutional provisions is the right to receive compensation for the taking of the exacted property.[12] This leads to the Court's statement in *Dolan*, repeated in *Lingle*, that, absent justification, government cannot force a person to give up the constitutional right to receive just compensation when property is demanded in exchange for a discretionary benefit. *Dolan*, 512 U.S. at 385; *Lingle*, 544 U.S. at 547.

The threshold inquiry in an exaction takings case, therefore, asks if the landowner seeking a land-use authorization must turn over his "property" to public

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[11] Daniel L. Siegel, *Exactions After Lingle: How Basing Nollan and Dolan On The Unconstitutional Conditions Doctrine Limits Their Scope*, 28 Stan. Envtl. L. J., 577, 581 (2009).

[12] The takings clause in the Florida Constitution prohibits the taking of property without just compensation: "No private property shall be taken except for a public purpose and with full compensation therefore . . . ." Fla. Const. Art. 10 §6. The takings clause in the U.S. Constitution is essentially the same, ". . . nor shall private property be taken for public use, without just compensation." U.S. Const. Amend V.

use without compensation, in exchange for the authorization. If the exchange compels the landowner to donate property—as opposed to something that is not property—that required surrender of property would constitute a *per se* taking of the surrendered property. The *per se* taking of the exacted property abridges the landowner's constitutional right to just compensation for the exacted property and the exaction would be presumptively unconstitutional. If government fails to justify the presumptively unconstitutional *per se* taking of the exacted property, an exaction taking of the exacted property would occur.[13]

Lingle confirmed that the land-use exaction at issue must itself be a *per se* taking of the exacted property. *Lingle*, 544 U.S. at 546-47 (In *Nollan* and *Dolan* "the Court began with the premise that had the government simply appropriated the easement in question, this would have been a per se physical taking"). It is this *per se* taking premise that factually distinguishes exaction takings from conventional regulatory takings.

Thus, for a land-use exaction takings case to even arise, the landowner must be placed in a regulatory circumstance of physically giving up property to the

[13] Appropriate justification for a presumptively unconstitutional exaction taking is present if government demonstrates an "essential nexus" between the exaction and the legitimate state interest that would be furthered by permit denial and a "rough proportionality" between the exaction and the impacts of development. *Lingle,* 544 U.S. at 547. Appropriate justification is not an issue in this case because Koontz was never required by St. Johns to give up any of his property as a *quid pro quo* for permit issuance, as discussed in subpart D, below.

government that would otherwise require the payment of compensation (the constitutional right to just compensation for a *per se* taking) in exchange for a permit. *Id.* at 547. Where the government condition or exaction does not itself violate the right to just compensation, the unconstitutional conditions doctrine is inapplicable; therefore, the land-use exaction takings analysis is also inapplicable.[14] This is the "special context" in which exaction takings arise. *Id.*

Accordingly, the critical threshold question in a land-use exaction takings claim is whether the exaction that government is demanding as a *quid pro quo* for permit issuance is property, or something other than property. If government is not demanding a surrender of property, then no constitutional right to just compensation arises, because just compensation is due only when "property" is taken. Without surrender of the constitutional right to just compensation for taken property, there can be no exaction taking under the linchpin doctrine of unconstitutional conditions. St. Johns could find no case in the country, other than

[14] *Norman v. United States*, 429 F.3d 1081 (Fed. Cir. 2005) (a landowner's transfer of property to satisfy a mitigation requirement, where the owner does not lose the right to exclude, is not an exaction taking and is subject to *Penn Central* test); *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998) (the first inquiry of whether *Nollan/Dolan* apply is whether the government demand effects a taking in itself); *Kamaole Pointe Dev. LP v. County of Maui*, 573 F.Supp.2d 1354, 1364 (D. Hawaii 2008) (the first inquiry under the *Nollan/Dolan* standard is whether the government's exaction effects a physical taking); *Tapps Brewing Inc. v. City of Sumner*, 482 F.Supp.2d 1218, 1230 (W.D. Wash. 2007), *aff'd sub. nom McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 2765 (2009) (the first inquiry of whether *Nollan/Dolan* apply is whether the government demand effects a taking in itself).

the decision below, where an exaction taking was based on a *quid pro quo* demand for something other than the property claimed to be exacted.

D. **The U.S. Supreme Court Has Only Recognized Exaction Takings For Compelled Dedications Of Land.**

In *Nollan,* a permit to expand a home on beachfront property required the landowners to dedicate a beach access easement to the public, across an undeveloped strip of their property. *Nollan,* 483 U.S. at 828. The Court subjected the permit condition to exaction takings analysis because it eliminated the landowners' right to exclude the public, a right the Court referred to as "one of the most essential sticks" in the owner's bundle of property rights. *Nollan,* 483 U.S. at 831. Exactions analysis was appropriate because of the dedication requirement: "We are inclined to be particularly careful . . . where the actual conveyance of property is made a condition to the lifting of a land-use restriction . . . ." *Id.* at 841.

Similarly, *Dolan* focused upon the demand by government that the landowner give up her right to exclude the public from parts of her land. The Court started its analysis with the observation, "had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred." *Dolan,* 512 U.S. at 384. The Court again spot-lighted the right to exclude by questioning "why a public greenway, as opposed to a private one, was required in the interest of flood control" and observing that

"[t]he difference to petitioner, of course, is the loss of her ability to exclude others." *Id*, at 393. The Court went on to note, as it did in *Nollan*, that "this right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* (citation omitted).

The Supreme Court has twice reaffirmed that a *Nollan/Dolan* exaction only arises where government attempts to compel dedications of property in exchange for a permit. In *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687 (1999), the Court unanimously confirmed that *Dolan's* rough proportionality test applies only to "land-use decisions conditioning approval of development on the dedication of property to public use." *Id* at 702. Reconfirmation came in *Lingle*, where the Court, again, unanimously described *Dolan* as limited to "exaction[s] requiring dedication of private property." *Id*. at 547.

As in *Del Monte Dunes*, the Court in *Lingle* also carefully circumscribed the circumstances in which an exaction taking could arise, beginning with the statement that "[b]oth *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." *Id*. at 546. Again, the Court noted that a landowner's right to exclude others "[is] perhaps the most fundamental of all property interests." *Id.* at 539.

The *Lingle* court also observed that in both *Nollan* and *Dolan*, "the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking." *Id.* at 546. The Court then identified the critical question in *Nollan* and *Dolan* as "whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny." *Id*. at 546-47. Highlighting its view that land-use exaction takings require a dedication of land, the Court in *Lingle* described its earlier *Del Monte Dunes* decision as "*emphasizing* that we have not extended this standard beyond the special context of [such] exactions."[15] *Id.* at 547 (insertion in original, emphasis added).

Limiting exaction takings to those exactions demanding dedications of land is completely consistent with *Lingle's* clarification of the doctrinal focus of the Takings Clause, the "severity of the burden that government imposes upon private property rights." *Id*. at 539. In rejecting the *Agins* "substantially advance" theory of takings,[16] the *Lingle* court observed that the *Loretto*, *Lucas*, and *Penn Central* inquiries "share a common touchstone," the identification of "regulatory actions

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[15] The phrase "such exaction" refers to "an adjudicative exaction requiring dedication of private property," the description appearing in the sentence preceding the one quoted here.

[16] *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (describing a regulatory takings test that would apply to a regulation that failed to "substantially advance legitimate state interests").

that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Id.* at 539. To be functionally equivalent to a direct appropriation of property, the exaction must be a demand for the dedication of land.

Prior to *Lingle* and its "functionally equivalent" declaration, the vast majority of the federal and state courts recognized the limited applicability of the land-use exactions takings analysis to compelled dedications of land. However, a few courts were unsure of the reach of the statement in *Del Monte Dunes* characterizing exactions as "land-use decisions conditioning approval of development on the dedication of property to public use." *Del Monte Dunes*, 526 U.S. at 702. Accordingly, some courts extended the exactions takings theory to non-dedication exactions.[17] However, *Lingle* put any doubts to rest by "emphasizing" that the Court had not extended *Nollan/Dolan* beyond dedication of property to public use. *Lingle*, 544 U.S. at 547. Other than cases applying binding state precedent that predated *Lingle* (*see, e.g., Ocean Harbor House Homeowners Ass'n v. Cal. Coastal Comm'n*, 77 Cal. Rptr. 3d 432 (Cal. App. 2008), *cert. denied*,

[17] *See, e.g., Ehrlich v. City of Culver City*, 911 P. 2d 429 (Cal. 1996); *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W. 3d 620, 634 (Tex. 2004); *Benchmark Land Co. v. City of Battle Ground*, 972 P. 2d 944 (Wash. App. 1999), *aff'd on other grounds*, 49 P. 3d 860 (Wash. 2002); *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E. 2d 821 (N.Y. 2003); *Reynolds v. Inland Wetlands Comm'n Of The Town of Trumbull*, 1996 WL 383363 [unreported] (Conn. Super. Ct. 1996).

129 S.Ct. 1336 (2009), applying *Erhlich*) and the decision in this case, St. Johns could find no post-*Lingle* case applying the exactions takings theory to non-dedication exactions. Thus, through *Nollan*, *Dolan*, *Del Monte Dunes,* and *Lingle*, the Supreme Court has effectively limited exaction takings to a demanded transfer of land that, if acceded to, would constitute a *per se* physical taking of the demanded land.

The decision below did not cite or discuss *Del Monte Dunes* or *Lingle* in reaching its conclusion that an exaction taking can occur without a dedication of land. *Koontz*, 5 So.3d at 12. Instead, the Fifth District cited *Ehrlich v. City of Culver*, 512 U.S. 1231 (1994). *Id*. Significantly, *Ehrlich* predated *Del Monte Dunes* and *Lingle* and was only a one-paragraph summary order remanding for reconsideration in light of *Dolan*, *Ehrlich, supra,* and the exaction in that case was the property claimed to have been taken.

E. The Requirement That Koontz Provide Additional Mitigation For Permit Issuance Did Not Exact "Property" From Koontz.

The District Court misapplied exaction takings theory in two critical aspects warranting reversal. First, St. Johns' permitting decision did not compel Koontz to give up any property as a condition of permit approval. In addition, St. Johns denied the development permit and consequently never placed Koontz in the special context of a compelled relinquishment as a condition of permit approval.

As previously discussed, the threshold question in an exaction takings claim is whether any property of the plaintiff is taken by government as a *quid pro quo* for permit issuance. If the U.S. Supreme Court's limited view of exaction takings is followed, the *quid pro quo* must be real property.[18] Even under a broader view, some form of "property," albeit not necessarily real property, must be taken in exchange for a permit. In this case, no property of any kind was taken from Koontz in exchange for development approval. As the dissent below compellingly points out, "[w]hat is 'taken' in these [exaction] cases is what was improperly exacted" and "[i]n this case, *nothing* was ever taken" from Koontz. *Koontz*, 5 So. at 18 (Griffin, J., dissenting) (emphasis in original).

No property belonging to Koontz was demanded as a condition for permit issuance. What was demanded from Koontz by St. Johns in exchange for a permit was additional mitigation, not property.[19] The Governing Boards' final order suggested some of the ways in which additional mitigation could be accomplished, describing two of the possible options in this manner:

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[18] In Florida, the U.S. Supreme Court's interpretations of a corresponding provision of the federal Constitution "have long been considered helpful and persuasive, and are obviously entitled to great weight." *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774, 779-80 (Fla. 1980).

[19] Although money is a form of property, the final order did not demand money or the payment of a fee as a prerequisite for permit issuance. (R9: 1623–32). Koontz has never claimed that money was exacted as a condition of development approval. *See* Complaint (R2: 364–379) and Joint Pre-trial Statement (R4: 614–629). Accordingly, the exaction of money is not an issue before this Court.

> 17. District staff indicated that if the applicant supplemented its on-site mitigation plan with an off-site enhancement mitigation option which included a total of at least 50 acres of wetland enhancement on either of the two suggested example sites, such an approach would sufficiently mitigate for the impacts proposed in Koontz's [dredge and fill] application. A combination of enhancement activities on both of these example sites totaling at least 50 acres of wetland enhancement would also be acceptable.
>
> 18. Equivalent off-site mitigation enhancement options on other properties within the basin could also be developed.

(R9: 1628). By definition, this "off-site" mitigation is mitigation that is not "on-site," not on Koontz's property. The fact that the mitigation was to be off-site demonstrates that the mitigation requirement did not force Koontz to exchange any of his real property for the permit. Accordingly, if the takings provision in Florida's Constitution is interpreted as the Supreme Court has interpreted the Fifth Amendment, there could be no taking in this case.

Even if exaction takings under Florida's Constitution were not limited to land dedications, the requirement for additional mitigation would not lead to an exaction taking because Koontz was not compelled by that requirement to relinquish any kind of property as a prerequisite for his development permit. The final order did not purport to limit Koontz's mitigation options to any particular mitigation; it merely suggested to Koontz several mitigation options that would be acceptable for permit approval. In fact, St. Johns was statutorily precluded by section 373.414(1)(b) of the Florida Statutes (1993) from mandating a particular

type or form of mitigation.[20] Because the final order did not and could not require Koontz to surrender any type of property for permit issuance, there was no exaction taking in this case.

There would still be no exaction taking in this case, even if the requirement for additional off-site mitigation were somehow deemed to be property belonging to Koontz, because Koontz's permit application was denied. *See Del Monte Dunes*, 526 U.S. at 703 (the *Dolan* test "was not designed to address, and not readily applicable to, the much different questions arising where, as here, the landowner's challenge is not based on excessive exactions but on denial of development"). As the dissent below observed, "there is only a 'taking' if the interest is actually taken. It is not the demand that is compensable, only the taking." *Koontz*, 5 So.3d at 20 (Griffin, J., dissenting). Since no property was taken from Koontz by the permit denial, there could be no exaction taking in this case.

F. <u>This Court Should Disapprove The Fifth District's Expansive View Of Exaction Takings Because It Revives The Discredited *Agins* "Substantially Advances" Takings Test, A Takings Test This Court And The U.S. Supreme Court Have Rejected.</u>

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[20] Section 373.414(1)(b) states, in pertinent part:

> (b) If the applicant is unable to otherwise meet the [permitting] criteria set forth in this subsection, the governing board or the department, in deciding to grant or deny a permit, shall consider measures *proposed by or acceptable to the applicant* to mitigate adverse effects which may be caused by the regulated activity....

Id. (emphasis added).

As Judge Griffin correctly observed below, in exaction cases "[w]hat is 'taken' . . . is what was improperly exacted." *Koontz*, 5 So. at 18 (Griffin, J., dissenting). Even though the improper exaction found in this case was the off-site mitigation, Koontz's entire 14.2-acre parcel was also *per se* temporarily taken and he was awarded just compensation for the lost income from the whole parcel. (R6: 1016, R7: 1329, R10: 1824). Thus, the Fifth District's decision transformed an unreasonable permit condition that did not involve the surrender of property—and therefore was not a *per se* taking of property—into an exaction taking of property that was not exacted. Koontz's entire parcel ended up being taken, simply because the permit condition for additional mitigation was found to be unreasonable.

The decision below is the only land-use exaction case in the country where the "taken" property was not the property targeted as a compelled exaction. The Fifth District's decision does not cite any case in which the property sought by government as the exaction is different from the property found by the court to be the exaction, and St. Johns' research did not disclose any such case. Prior to this case, in every land-use exaction takings suit, the property being exacted as a prerequisite to permit issuance was the property claimed to have been taken.

The Fifth District's decision, therefore, is the first case to eliminate the required congruity, present in all other exaction takings cases, between the property exacted and the property for which just compensation must be paid. By

eliminating this congruity, the "exaction" upon which a takings claim can be based is no longer limited to the doctrine of unconstitutional conditions and to *Lingle's per se* physical taking of the particular property being demanded for permit issuance. Instead, the "exaction" upon which an exaction takings claim can be brought is any unjustified regulatory requirement that prevents the landowner from developing the underlying real property in the manner he wishes.

In the Fifth District's view, an improper land-use exaction could take the form of any government regulatory requirement that "materially alters the design, density or economic feasibility of the project." *Koontz*, 5 So.3d at 12 n.4. As a result, a *per se* land-use exaction taking of the underlying real property temporarily occurs whenever "the landowner refuses to agree to an improper request from the government resulting in the denial of the permit" and the government does not justify the condition. *Koontz*, 5 So.3d at 10-11. This automatic *per se* taking of land based on an unreasonable permit condition effectively reincarnates the "substantially advances" takings test of *Agins v.City of Tiburon*, 447 U.S. 255 (1980). That takings test was rejected by both the U.S. Supreme Court and this Court.

In *Lingle,* the Court concluded that the *Agins* "substantially advance" inquiry revealed nothing about the magnitude the regulatory burden placed on property—the doctrinal touchstone of the Takings Clause inquiry—but rather was in the

nature of a substantive due process inquiry. *Lingle* 544 U.S. at 540-542. *Lingle* rejected the "substantially advances" test not only because it is "doctrinally untenable" as a takings test, but also because it allowed "the courts to scrutinize the efficacy of a vast array of state and federal regulations" and would empower the courts "to substitute their predictive judgments for those of elected officials and expert agencies." Id. at 544.

Years ago, this Court rejected the *Agins* "substantially advance" theory as a free-standing takings test by holding an improper government decision may raise due process grounds of invalidation of the decision, but that alone does not constitute a regulatory taking absent proof of deprivation of all or substantially all economically viable use of the property at issue. *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp*., 640 So.2d 54 (Fla. 1994) (agency's invalid map reservation filing was not a *per se* as-applied taking without further proof of loss of substantially all economically beneficial use of the property); *Palm Beach County v. Wright*, 641 So.2d 50 (Fla. 1994) (invalid county thoroughfare map was not a *per se* temporary taking without further proof of loss of substantially all economically beneficial use of the property); *Dep't of Transp. v. Weisenfeld*, 617 So.2d 1071 (Fla. 5th DCA 1993), *approved*, 640 So.2d 73 (Fla. 1994)(the *Agins* test was rejected as a "remarkably broad generalization" and held the agency's invalid map reservation filing was not a *per se* temporary taking and that the

landowner otherwise presented no evidence of substantial economic loss to prove a temporary taking).

The error of the Fifth District's expanded exactions theory is self-evident. Had St. Johns simply denied the permit for lack of sufficient mitigation, there certainly would not have been a *per se* taking of the parcel, or even a conventional regulatory taking of the parcel, because the trial court found no physical invasion and no substantial economic loss resulted from the St. Johns permitting decision. But under the Fifth District's expanded land-use exaction takings theory, St. Johns subjected itself to *per se* temporary exaction taking liability for the entire underlying parcel simply because St. Johns proposed mitigation that would have resulted in a permit approval.

The Fifth District's exaction takings theory can leads to serious financial consequences to those agencies that try to assist permit applicants when the agency believes a permit application is deficient. If suggestions to a permit applicant subject an agency to *per se* takings liability as here, "[i]t will be too risky for a governmental agency to make offers . . . Better to deny the permit and defend the decision under the traditional law of regulatory "takings." Koontz 5 So.3d at 21 (Griffin, J., dissenting). Forcing agencies into uncommunicative permit denials is unwise, because it "would expose a landowner to the treadmill effect of repeated denials without any indication from governmental agencies of changes in his

proposal that would permit an economically beneficial use of his property." *Estuary Properties, Inc. v. Askew*, 381 So.2d 1126, 1137 (Fla. 1st DCA 1979), *rev'd on other grounds sub nom. Graham v. Estuary Properties, Inc*., 399 So.2d 1374 (Fla. 1981).

Prior to this case, an incorrect government decision could not result in a taking of the entire parcel under Florida's Just Compensation Clause; the landowner would still have to prove a deprivation of all or substantially economically viable use of the property at issue. *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp*., 640 So.2d 54 (Fla. 1994); *Palm Beach County v. Wright*, 641 So.2d 50 (Fla. 1994); *Dep't of Transp. v. Weisenfeld*, 617 So.2d 1071 (Fla. 5th DCA), *approved*, 641 So.2d 50 (Fla. 1994). Just as in a permanent regulatory takings claim, a landowner asserting a temporary taking must prove the government action deprived the landowner of all or substantially all economically viable use of the subject property as a whole during the alleged taking period.[21] The Fifth District's new exaction takings theory displaces Florida's existing temporary regulatory takings jurisprudence by eliminating the landowner's burden of proving economic loss of use and eliminating the "property

[21] *A.G.W.S. Corp*.; *Wright*; *City of Miami v. Keshbro, Inc*., 717 So.2d 601 (Fla. 1999); *Weisenfeld*; *Tampa-Hillsborough County Expressway Auth. v. Harrell*, 645 So.2d 1026 (Fla. 2d DCA 1994); *Bradfordville Phipps Ltd. Partnership v. Leon County*, 804 So.2d 464 (Fla. 1st DCA 2002); *Town of Jupiter v. Alexander*, 747 So.2d 395 (Fla. 4th DCA 1998).

as a theory, a developer can simply reject a regulatory requirement for permit approval by calling it an "exaction" and, instead, accept a permit denial. The developer then proceeds to circuit court under the Fifth District's "exaction" theory and requires the government to prove the whole" principle.

Under the new need for the rejected requirement. If the developer prevails, a *per se* temporary taking results, regardless of the extent of economic impact, if any, to the underlying property use. This *per se* temporary takings theory was flatly rejected by this Court in A.*G.W.S Corp.* and *Wright*.

Moreover, courts have uniformly rejected temporary takings claims in circumstances where a landowner successfully challenges and overturns a government agency's erroneous regulatory decision implementing a valid law. Courts have treated such circumstances as normal delays in the government decision-making process that do not subject government to takings liability. Otherwise, normal and inherent government processes would be subjected to a temporary takings claim in every instance a government entity changes or unsuccessfully defends its position.

For instance, in *Mandelstam v. City of South Miami*, 685 So.2d 868 (Fla. 3d DCA 1997), the landowners successfully overturned several city special use permitting decisions that restricted the subject property. The landowners then sued for a federal and state temporary taking, from the date the city erroneously denied

the permits until the date the city was ordered to issue the permit. The appellate court found the city's actions did not give rise to a temporary taking claim, because "there is no guarantee that regulatory bodies will not become embroiled in disputes with property owners in which the property owners ultimately prevail," and there is "no concomitant guarantee that property owners may recover for harm caused by these disputes." *Id*. at 869 (quoting *Jacobi v. City of Miami Beach*, 678 So.2d 1365 (Fla. 3d DCA 1996). In other words, a landowner's successful challenge to a government permitting decision is not a *per se* temporary taking during the contest period, but is part of the decision-making process. Otherwise, there would be a *per se* temporary taking in every case where a landowner successfully contests an agency decision precluding the desired development. Other jurisdictions have reached identical conclusions.[22]

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[22] *See, e.g., Landgate, Inc. v. California Coastal Comm'n*, 953 P.2d 1188 (Cal. 1998), (litigation over bona fide disputes between the government and landowner is a normal part of the regulatory process whether the landowner or the government ultimately prevails, and the resulting delay is an incident of property ownership and cannot be a temporary taking); *Tabb Lakes, Ltd. v. U.S.*, 10 F.3d 796 (Fed. Cir. 1993) (no temporary taking for the three-year period the Corps of Engineers erroneously asserted regulatory jurisdiction, because the landowner was not denied all economic use during the period and the delay was not extraordinary or in bad faith); *Chioffi v. City of Winooski*, 676 A.2d 786 (Vt. 1996) (no temporary taking during period the city erroneously denied a variance, because legitimate regulatory delay cannot give rise to a takings claim; otherwise there would be a temporary taking in every case where the city denies a variance); *Smith v. Town of Wolfebro*, 615 A.2d 1252 (N.H. 1992) (no temporary taking during period the town improperly applied an ordinance, because the delay was inherent in the regulatory process, including resort to the courts, was one of the incidents of property

The District Court's new takings theory now allows developers to circumvent this temporary takings precedent and pursue a *per se* temporary taking regardless of the economic burden the government regulation has on the real property. As pointed out by the U.S. Supreme Court, treating all government land-use regulations as *per se* takings "would transform government regulation into a luxury few governments could afford." *Tahoe-Sierra Preservation Council, Inc.,v. Tahoe Reg'l Planning Agency*, 535 U.S. *302 (2002).*

Such a transformation is exactly what the Fifth District's decision accomplishes. The decision shifts the exaction takings focus away from the justification for a regulatory condition that exacts the demanded property without required compensation and turns that focus to the justification for a challenged regulatory condition that exacts no property. The court's decision is a radical departure from Florida's regulatory takings law, as it now converts government permit denials into *per se* takings liability simply for unreasonable regulatory

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ownership that is borne by the property owner); *Sea Cabins On The Ocean IV Homeowners Assoc., Inc. v. City of North Myrtle Beach*, 548 S.E.2d 595 (S.C. 2001) (regulatory delay in successfully contesting the government decision does not constitute a temporary taking); *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334 (N.J. 2001) (a per se temporary taking does not occur as a result of the application of a zoning ordinance that is ultimately declared invalid); *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269 (Mass. 1992), *cert. denied*, 508 U.S. 909 (1993) (delay caused by landowner's successful challenge to the city's ordinance is the type of delay that commonly occurs in seeking regulatory approvals or changes in local ordinances and have not traditionally been viewed as a taking).

decisions.

In sum, by altering the *Nollan/Dolan* analysis beyond its unconstitutional conditions foundation, the Fifth District authorizes circuit courts to reevaluate any government regulatory requirement under the guise of an "exaction" and to *post hoc* judge that requirement under a substantive due process, means-ends analysis explicitly rejected by *Lingle* and this Court. This new type of challenge can result in a *per se* taking of real property where no real property is actually proven to have been taken. As aptly noted by Judge Griffin in her dissent, ". . . in what parallel legal universe or deep chamber of Wonderland's rabbit hole could there be a right to just compensation for the taking of property under the Fifth Amendment when no property of any kind was ever taken by the government and none ever given up by the owner?" *Koontz*, 5 So.2d at 20 (Griffin, J., dissenting).

When the land-use exaction takings analysis is unlinked from a compelled dedication of property and instead an "exaction" is characterized as any unjustified regulatory condition, this new exactions takings theory wholly undermines regulatory takings law. This Court should reject the Fifth District's novel interpretation of Article X, section 6.

II.

THE FIFTH DISTRICT ERRED IN ALLOWING KOONTZ, IN A CIRCUIT COURT TAKINGS CASE, TO CHALLENGE THE CORRECTNESS OF THE UNAPPEALED FINAL

ORDER THAT DENIED HIS PERMIT APPLICATION, CONTRARY TO THIS COURT'S PRECEDENT.

Administrative litigation involving wetland mitigation is commonplace.[23] The mitigation issue Koontz brought to circuit court is precisely the kind of analysis heretofore carried out solely in the administrative forum, with judicial review under section 120.68, Florida Statutes. The trial court allowed Koontz to challenge the correctness of St. Johns' mitigation determination in circuit court, over St. Johns' continuing objection. (T 5) On appeal, St. Johns argued that it was error to allow litigation of the propriety of the permit denial in Koontz's circuit court inverse condemnation case, citing sections 120.68 and 373.617(2), Florida Statutes, *Key Haven Associated Enter., Inc. v. Bd. of Trustees of the Internal Improvement Trust Fund*, 427 So.2d 153 (Fla. 1982), and *Bowen v. Fla. Dep't of Envtl. Regulation*, 448 So.2d 566 (Fla. 2d DCA 1984), *approved and adopted*, 472 So.2d 460 (Fla. 1985). (St. Johns' Fifth DCA Initial Brief at 17-32). The Fifth District summarily rejected this argument, without discussing either case. *Koontz*, 5 So. 3d at 10.

A. Standard of Review.

Whether a challenge to the correctness of an unappealed permit denial can be brought in a circuit court takings case is a pure question of law. Pure questions of

[23] A search of Westlaw's "Florida Environment Cases and Administrative Materials" (FLENV) database shows more than 100 final orders containing the words "wetland" and "mitigation" in the same sentence.

law are subject to the *de novo* standard of review. *D'Angelo v. Fitzmaurice*, 863 So.2d 311, 314 (Fla. 2003).

B. The Continuing Wisdom of *Key Haven* and *Bowen* is Demonstrated by the Facts of This Case.

The 1994 valuation appraisal Koontz introduced into evidence (R7: 1327) shows the value of the property with a permit would have been $457,000. (R10: 1773). That $457,000 value included a reduction of "$10,000 for the enhancement of 50 acres of off-site wetlands." *Id*. Koontz also introduced a 2005 valuation appraisal, which showed that the value of the property had more than tripled during the pendency of this litigation, to $1,405,000. (R10: 1804). In addition to this noteworthy appreciation, Koontz has been awarded takings damages of $376,154 and seeks attorney fees and costs of $638,736. The damages and attorney's fees represent a significant expenditure from the public fisc, an expenditure that would have been avoided if the trial court had followed *Key Haven* and *Bowen*.

The Chapter 120, Florida Statutes, administrative process prescribes a trial-type adversarial proceeding to find the facts on which agency discretion is to operate. *McDonald v. Dep't of Banking & Finance*, 346 So.2d 569, 577 (Fla. 1st DCA 1977). Where there are disputed factual issues, such as the appropriate amount of mitigation in this case, Chapter 120 requires an administrative law judge to evaluate the merits of competing expert opinions before an agency makes its final decision. A Chapter 120 administrative hearing is a *de novo* proceeding that

is intended to formulate agency action, not to review action taken earlier. *Beverly Enterprises-Florida, Inc. v. Dep't of Health and Rehabilitative Serv.*, 573 So.2d 19, 23 (Fla. 1st DCA 1990). The administrative process thus facilitates a correct agency permitting decision before the decision is finalized. Consequently, use of the chapter 120 process leads to good government decision-making, correct final agency action, and a timely decision for the permit applicant. Chapter 120 not only furthers the government's and public's interest in avoiding damages, but also benefits the developers by avoiding delay.

Had Koontz challenged the need for additional mitigation through Chapter 120, an administrative law judge (ALJ) would have determined the relative merits of the competing experts' opinions. The ALJ's independent evaluation of expert opinion would result in a mitigation recommendation from the ALJ to St. Johns' Governing Board as part of the ALJ's recommend order. The Board would then use the ALJ's recommendation on the mitigation issue to formulate its final order on the Koontz's permit application. The ALJ's independent evaluation of competing expert opinions would lead to the correct final decision by the agency.

Allowing a landowner to forgo chapter 120 processes and take a permit challenge to circuit court for a *de novo* hearing after an agency finalizes its decision is a procedure that subjects the agency to taking liability, damages, and attorney's fees, as here, even though the agency accepts the trial court's evaluation

of competing expert opinions. That procedure also allows the introduction of *post hoc* evidence that was not provided to the agency decision maker before the permitting decision is made. An after-the-fact challenge to the merits of a permitting decision is much more likely to succeed than a challenge based on evidence that is submitted to the decision maker before the decision is finalized.

An after-the-fact *de novo* evidentiary determination in circuit court may facilitate a correct decision, but it may also result in an award of temporary taking damages, as here. This *post hoc* procedure, and the potential for a temporary taking under the Fifth District's expansion of exaction takings, can result in a windfall for landowners, such as Koontz here, that choose not to expeditiously test the agency's preliminary determination through an independent ALJ. Permit applicants should not be rewarded for waiting until the agency decision becomes final and then seeking an after-the-fact circuit court evidentiary evaluation that, if different than the agency's, costs taxpayer dollars as damages for an incorrect permitting decision.

C. The Fifth District's Decision is Contrary to the Chapter 120 Review Process and *Key Haven*.

All exaction takings cases require the takings plaintiff to claim that the agency decision was improper because the exaction lacked an "essential nexus" between the exaction and the legitimate state interest that would be furthered by permit denial or a "rough proportionality" between the exaction and the impacts of

development. *Lingle*, 544 U.S. at 547. A correct agency decision would have the essential nexus and rough proportionality. Accordingly, exaction taking claims necessarily involve challenges to the propriety or correctness of an agency decision.

It is well-settled Florida law that challenges to the correctness of an agency decision cannot be litigated in a circuit court takings suit. Instead, such challenges must be pursued under chapter 120.[24] This is because only district courts of appeal (as opposed to circuit courts) have jurisdiction to review the propriety of final agency action. Under more than 25 years of Florida precedent, starting with *Key Haven Associated Enter., Inc. v. Bd. of Trustees of the Internal Improvement Trust Fund*, 427 So.2d 153 (Fla. 1982), it has been reversible error for circuit courts to evaluate the merits of agency permitting decisions.

In *Key Haven***,** an applicant was denied a dredge and fill permit and then brought a circuit court action claiming a taking. This Court held that only "by accepting the agency action as completely correct, [could the landowner] seek a circuit court determination of whether that correct agency action constituted a total taking…." *Key Haven*, 427 So.2d at 156. The *Key Haven* decision reiterated the necessity of "accepting the agency action as completely correct" four additional times (at pages 158 and 159), and then underscored the point one more time, stating: "We emphasize that, by electing the circuit court as the judicial forum, a

[24] St. Johns' permitting actions are expressly subject to Chapter 120 remedies and judicial review. §§ 120.52(1)(b)8, and 373.617(2), Fla. Stat.

party foregoes any opportunity to challenge the permit denial as improper . . . ." *[Id*. at 160.] This requirement that a circuit court litigant must first accept the agency action as completely correct flows from section 120.68.

Florida's legislature, pursuant to Article V, sections (4)(b)2 and 5(b) of the Florida Constitution "has the power and discretion to provide the mechanism for judicial review of administrative agency action." *Griffin v. St. Johns River Water Mgmt.Dist.* 409 So.2d 208, 210 (Fla. 5th DCA 1982); *State ex rel. Dep't of Gen. Serv. v. Willis*, 344 So.2d 580, 589 (Fla. 1st DCA 1977). Through section 120.68, the legislature has determined that the review of "final" agency action is solely by a district court of appeal. Section 120.68(2)(a) states, "[j]udicial review *shall* be sought in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law." (emphasis added).

The legislative forum-mandate in section 120.68 is the underpinning of the *Key Haven* requirement that a circuit court litigant must first accept the agency action as completely correct: "the only way [a party] can challenge the *propriety* of the permit denial, based on asserted error in the administrative decision-making process . . . is on direct review of the agency action in the district court." *Key Haven*, 427 So.2d at 159 (emphasis in original). This Court ultimately upheld Key Haven's circuit court inverse condemnation claim by concluding the claim "is not a veiled attempt to collaterally attack the propriety of agency action." *Id*. Until the

Fifth District's decision below, no appellate decision has questioned the validity of *Key Haven's* prohibition against circuit court challenges to permitting decisions.[25]

Key Haven also indirectly answered the question of the proper forum in which an exaction claim against a state agency must be decided, citing *Estuary Properties, Inc. v. Askew*, 381 So.2d 1126 (Fla. 1st DCA 1979), *aff'd in part and rev'd on other grounds sub nom.Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla.) *cert. denied*, 454 U.S. 1083, 102 S.Ct. 640, 70 L.Ed.2d 618 (1981).[26] *Key Haven* at 159. *Key Haven* said that "the only way" a plaintiff can challenge the propriety of agency action "is on direct review of the agency action in the district court. The claim of the taking of property can be raised *in this direct review proceeding*, and . . . the district court could require the state to institute condemnation proceedings." *Id*. at 159 (emphasis added). *See also Estuary Properties*, note 26 , *supra*; *Paradyne Corp. v. State, Dept. of Transp.*, 528 So.2d

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[25] *See, e.g., State, Dep't of Envtl. Protection v. Burgess*, 667 So.2d 267, 270 (Fla. 1st DCA 1995); *Lee County v. Zemel*, 675 So.2d 1378, 1381-82 (Fla. 2nd DCA 1996); *Verdi v. Metro.Dade County*, 684 So.2d 870, 874 -875 (Fla. 3rd DCA 1996); *Golf Club of Plantation, Inc. v. City of Plantation*, 717 So.2d 166, 172 (Fla. 4th DCA 1998); *Osceola County v. Best Diversified, Inc.*, 936 So.2d 55, 59 (Fla. 5th DCA) *rev. denied*, 945 So.2d 1289 (Fla. 2006).

[26] In *Estuary Properties*, the hearing officer declined to determine the taking issue, because he correctly concluded that determination was a function of the judiciary. *Estuary Properties*, 381 So.2d at 1131. On appeal, the district court determined that the permit denial constituted a taking of Estuary's property. *Id.* at 1140.

921, 926-27(Fla. 1st DCA 1988) (finding an exaction taking of Paradyne's property on appeal of an agency final order).

Accordingly, Koontz's exaction taking claim—assuming an exaction taking can be based on an incorrect or unreasonable permitting decision—should have been brought to the Fifth District under section 120.68, after a section 120.57 hearing, if Koontz desired such a hearing. On appeal, the Fifth District could have determined the propriety of St. Johns' permit denial and whether that denial constituted an exaction taking of Koontz's land, the procedure followed in *Estuary Properties* and *Paradyne Corp.*

Key Haven is still controlling precedent and it, along with section 120.68, precludes Koontz's circuit court challenge to the correctness of the Governing Board's permit denial. Significantly, this Court concluded in *Key Haven* that the prohibition against correctness challenges in circuit court exists independently from the specific statutory authority found in section 253.763(2) (and therefore section 373.617(2), which is discussed below). *Key Haven* at 159.

D. The Fifth District's Decision is Contrary to Section 373.617(2) and *Bowen*.

A regulatory taking claim against St. Johns brought under Article X, section 6 of the Florida Constitution, the claim Koontz brought here, is subject to the provisions of section 373.617 of the Florida Statutes. This provision plainly authorizes circuit court jurisdiction over a just compensation takings claim

regarding the *effect* of a final District permit decision. But critical to this appeal, it also removes jurisdiction from the circuit court to entertain a claim attacking the validity of the permit decision itself. The decisive language is in the last sentence of section 373.617(2). That provision states, in pertinent part:

> . . . circuit court review shall be confined solely to determining whether final agency action is an unreasonable exercise of the state's police power constituting a taking without just compensation. Review of final agency action for the purpose of determining whether the action is in accordance with existing statutes or rules and based on competent substantial evidence shall proceed in accordance with chapter 120.

§373.617(2), Fla. Stat. The last sentence quoted expressly mandates that the propriety or correctness of a District permitting decision is not subject to scrutiny by the circuit court in a taking case, but must, instead, be challenged in accordance with chapter 120 of the Florida Statutes. This Court previously analyzed the language in section 373.617(2) and ruled that it precludes a circuit court from examining the substantive correctness of the underlying permitting decision. *Bowen v. Fla. Dep't of Envtl. Regulation*, 448 So.2d 566 (Fla. 2d DCA 1984), *approved and adopted*, 472 So.2d 460 (Fla 1985).

Bowen involved the interpretation of sections 253.763(2) and 403.90(2) of the Florida Statutes, provisions identical to section 373.617(2), the provision at issue

here.[27] As in the instant case, the plaintiffs in *Bowen* were denied a permit to develop their property. As in the instant case, the plaintiffs neither contested the permit denial in an administrative hearing, nor appealed the resulting agency final order to a district court of appeal. Like Koontz here, the plaintiffs went directly to circuit court asserting a regulatory taking.

Two issues were before the Court in *Bowen.* The first was whether section 253.763(2), "which was not effective at the time pertinent to the decision in Key Haven" eliminated *Key Haven's* requirement that a permit denial be administratively appealed to the Governor and Cabinet (sitting as the Board of Trustees of the Internal Improvement Trust Fund) before a circuit court inverse condemnation suit could be filed. The second issue was whether a landowner could accept the permit denial as correct and pursue an inverse condemnation claim in circuit court without initiating an administrative hearing under chapter 120 to contest the denial if the administrative appeal requirement to the Trustees was eliminated by section 253.763(2). *Bowen*, 448 So.2d at 568.

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[27] The statute's wording is identical to four contemporaneous statutes enacted in the same law that are applicable to the permitting decisions of the Board of Trustees of the Internal Improvement Trust Fund; the Department of Environmental Protection; the Land and Water Adjudicatory Commission, and every local government. Ch. 78-85, Laws of Fla.; §§ 161.212; 253.763; 380.085; 403.90, Fla. Stat. Therefore, the entire State, through the environmental permitting decisions of the Governor and Cabinet, the Department of Environmental Protection, and local governments, are affected by a circuit court's improper exercise of jurisdiction under this statutory language.

This Court concluded that the enactment of section 253.763(2) superseded *Key Haven's* procedural requirement of an appeal to the Trustees of the Internal Improvement Fund. *Id* at 568-69 ("section 253.763(2) merely short-circuits the procedure of administrative appeal to TIIF required by *Key Haven*") This Court also concluded that an administrative hearing under chapter 120.57 of the Florida Statutes was not a prerequisite to an inverse condemnation suit in the circuit court, provided the takings plaintiff accepted the propriety of the agency decision. *Id*. at 569 In the Court's words, "We find nothing to preclude affected parties from *acquiescing* in the final [agency] action, even though it results in a denial of an application on the merits." *Id*. (emphasis added). Thus, under the language in section 253.763(2), a regulatory takings plaintiff could choose not to contest an agency's permit denial, either through an administrative hearing or an administrative appeal, and go directly to circuit court to pursue a regulatory takings claim.

Such a choice comes at a price. As explained by this Court, when a regulatory takings plaintiff chooses the circuit court forum, the last sentence of section 253.763(2) precludes the plaintiff from attacking the correctness of the underlying permitting decision:

Where procedural or substantive errors in the application or administrative hearing thereon result in a permit denial, administrative and judicial appeal

through the applicable substantive statutes and chapter 120 is still the proper remedy. This requirement is reiterated by the last sentence of section 253.763(2). *Bowen* at 569.

Thus, while plaintiffs could bring an inverse condemnation suit in circuit court without administratively contesting the final permit decision through chapter 120, that choice required them *"*to accept the final agency administrative action as procedurally and substantively correct.*" Id*. Section 373.617(2) plainly states that a circuit court cannot conduct a trial to reexamine the correctness of the District's final permitting decision. That type of claim "shall" be pursued under chapter 120. This Court has twice reaffirmed its interpretation of the language in section 373.617(2). *Dep't of Agric. and Consumer Serv. v. Polk*, 568 So.2d 35, 39, n.2 (Fla. 1990) (§253.763(2) provides "the propriety of an agency's action may not be challenged in an inverse condemnation proceeding"); *Dep't of Agric. and Consumer Serv. v. Mid-Florida Growers, Inc.*, 521 So.2d 101, 103 n.1 (Fla. 1988).

Put simply, section 373.617(2) limits a circuit court's jurisdiction in an inverse condemnation suit to whether the effect of a *valid* permitting action rises to the level of an economic just compensation taking. This reading is consistent with the legislature's determination that only appellate courts have jurisdiction to review the propriety of final agency decisions. The jurisdictional limitation in section 373.617(2) is statutorily mandated and, therefore, not a matter of judicial policy.

Any attack Koontz wished to level against the correctness of St. Johns' permit denial should have proceeded "in accordance with chapter 120," either through an administrative hearing under 120.57 or an appeal pursuant to 120.68. Instead, Koontz was allowed to challenge the merits of St. Johns' permitting decision in a circuit court takings case.

A circuit court clearly has subject matter jurisdiction under section 373.617 over a just compensation takings claim regarding the *effect* of a final permitting decision. But, section 373.617(2), in conjunction with section 120.68, eliminates the jurisdiction of a circuit court to entertain a claim attacking the validity of the permit denial itself, exactly what Koontz achieved here. Both the trial court and the Fifth District disregarded sections 373.617(2) and 120.68, disregarded binding precedent, and erroneously found takings liability based exclusively upon the correctness of St. Johns' permit denial—a subject matter expressly excluded by applicable law. Accordingly, St. Johns' takings liability should be reversed and judgment entered for St. Johns.

CONCLUSION

This Court should reverse the decision below and remanded for entry of a final judgment in favor of St. Johns.

Respectfully submitted,

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WILLIAM H. CONGDON

CERTIFICATE OF COMPLIANCE

I CERTIFY that this answer brief complies with rule 9.210 of the Florida Rules of Appellate Procedure and is in Times New Roman 14-point font.

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WILLIAM H. CONGDON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail this _____ day of November, 2009, to Michael D. Jones, Esquire, P. O. Box 196130, Winter Springs, Florida, 32719-6130 and Christopher V. Carlyle, Esquire, The Carlyle Appellate Law Firm, 1950 Laurel Manor Dr., Suite 130, The Villages, Florida, 32162.

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