IN THE SUPREME COURT OF FLORIDA

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,

Petitioner,

v. Case No. SC09-713

COY A. KOONTZ, JR., as Personal
Representative of the Estate of COY A.
KOONTZ, deceased,

Respondent.
_____/

RESPONDENT'S BRIEF ON JURISDICTION

On Discretionary Review from the District Court of Appeal,
Fifth District Court of Appeal State of Florida

THE CARLYLE APPELLATE LAW FIRM
The Carlyle Building
1950 Laurel Manor Drive, Suite 130
The Villages, Florida 32162
Telephone (352) 259-8852
Facsimile (352) 259-8842

CHRISTOPHER V. CARLYLE
Florida Bar No. 991007
Email: ccarlyle@appellatelawfirm.com
SHANNON McLIN CARLYLE
Florida Bar No. 988367
Email: scarlyle@appellatelawfirm.com

~ and~

MICHAEL D. JONES
Florida Bar No. 137608
MICHAEL D. JONES & ASSOCIATES, P.A.
Post Office Box 196130
Winter Springs, Florida 32719-6130
Telephone (407) 695-7666
Facsimile (407-695-7157
Email: mdj124@earthlink.net

Appellate Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

United States Supreme Court

Florida Supreme Court

Florida District Courts of Appeal

Statutes

Other Authority

INTRODUCTION

The Petitioner, St. Johns River Water Management District, will be referred to as "the District." The Respondent, Coy A. Koontz, Jr., as Personal Representative of the Estate of Coy A. Koontz, deceased, will be referred to as "Koontz." Citations to the Petitioners' Brief in Support of Notice to Invoke Discretionary Jurisdiction shall be referred to as (Petitioners' Brief, at ____) with the appropriate page number inserted. References to the Fifth District Court of Appeal's Opinion in *St. Johns River Water Management District v. Koontz*, 5 So. 3d 8 (Fla. 5th DCA 2009), shall be referred to as the "Opinion, at ____", with the appropriate page number from Southern Reporter, 3d Series inserted.

SUPPLEMENTAL STATEMENT OF CASE AND FACTS

As the Opinion notes, this case began in 1994, and it found its way to the Fifth District on four occasions.[1] Opinion, at 8. A succinct recitation of the underlying facts may be found in *St. Johns River Water Mgmt. Dist. v. Koontz*, 861 So. 2d 1267, 1269-70 (Fla. 5th DCA 2003) (Pleus, J. concurring specially), and in the Opinion, at 8-11.

SUMMARY OF ARGUMENT

This Court should decline to accept jurisdiction because the Opinion correctly found that the circuit court applied controlling United States Supreme Court precedent in determining that the District's actions constituted an unreasonable exercise of the state's police power constituting a taking without just compensation. Further, the District's attempt to scare this Court into accepting jurisdiction on the basis of speculative scenarios should be rejected.

This Court should likewise reject jurisdiction over the second issue raised by the District because the Opinion does not provide the basis for express and direct conflict. Additionally, to the extent the issue is considered, no conflict exists.

---

[1] *Koontz v. St. Johns River Water Mgmt. Dist.*, 720 So. 2d 560 (Fla. 5th DCA 1998), *rev. denied*, 729 So. 2d 394 (Fla. 1999); *St. Johns River Water Mgmt. Dist. v. Koontz*, 861 So. 2d 1267 (Fla. 5th DCA 2003); *St. Johns River Water Mgmt. Dist. v. Koontz*, 908 So. 2d 518 (Fla. 5th DCA 2005); *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8 (Fla. 5th DCA 2009).

ARGUMENT

The District urges this Court to accept jurisdiction on two grounds: first, based on the certified question, and, second, based on an alleged conflict. It is respectfully submitted that this Court should decline to exercise jurisdiction.

I. THIS COURT SHOULD DECLINE TO ACCEPT JURISDICTION OVER THE CERTIFIED QUESTION.

It is respectfully submitted that the certified question misstates the issue in this matter. In reality, the only applicable issue is whether the circuit court applied the proper law in determining the District's actions constituted an unreasonable exercise of the state's police power constituting a taking without just compensation. The Opinion clearly sets forth its reasoning and applicable citations, and there is no need for this Court to consider the issue. Further, it is respectfully submitted that, to the extent that the state of takings jurisprudence is unclear, clarity should come from the Supreme Court of the United States.

In order to put this matter in context, the relevant statute[2] must be considered. Under Florida Statutes subsection 373.617(2):

> Any person substantially affected by a final action of any agency with respect to a permit may seek review within 90 days of the rendering of such decision and request monetary damages and other relief in the circuit court in the judicial circuit where the affected property is located;

[2]As the Opinion notes, "section 373.617(2), Florida Statutes, the statute under which Mr. Koontz maintained his claim . . . " Opinion, at 10.

> however, *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*.

§ 373.617(2), Fla. Stat. (emphasis added).[3]

As the Opinion notes, this matter involved an "exaction," a "condition sought by a governmental entity in exchange for its authorization to allow some use of land that the government has otherwise restricted." Opinion, at 9. Here, the exaction consisted of requiring Koontz to perform off-site "mitigation involving property a considerable distance from Mr. Koontz's property." *Id.* In finding a taking, "the trial court applied the constitutional standards enunciated by the Supreme Court" in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).[4] Opinion, at 10.

In general terms, *Nollan* held that an "essential nexus" must exist between a development condition and the public problem sought to be ameliorated by the

[3]This statute, along with several other identical statutes, was enacted in 1978 specifically to allow a party to be compensated for a taking of private property under the state's police power. For a thorough background on the statute, *see* Robert M. Rhodes, *Compensating Police Power Takings: Chapter 78-85, Laws of Florida*, 52 Fla. Bar J. 741 (Nov. 1978); Kent Wetherell, *Private Property Rights Legislation: The "Midnight Version" and Beyond*, 22 Fla. St. U. L. Rev. 525, 538-43 (Fall 1994).

[4]In 2005, the Supreme Court reaffirmed that "plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed . . . [under the theory of] land-use exaction violating the standards set forth in *Nollan* and *Dolan*." *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 548 (2005).

condition. *Nollan*, 483 U.S. at 837. *Dolan* adopted a "rough proportionality" standard between the required exaction and the development's projected impact. *Dolan*, 512 U.S. at 391. When the exaction at issue was considered in light of the *Nollan* and *Dolan* standards, "the trial court determined that the off-site mitigation imposed by the District had no essential nexus to the developmental restrictions already in place on the Koontz property and was not roughly proportional to the relief requested by Mr. Koontz." Opinion, at 10.

As the Opinion notes, the "District makes no challenge to the evidentiary foundation for these factual findings." Opinion, at 10. Rather, the District argued that, as a matter of law, *Nollan* and *Dolan* are not applicable to the facts. In the Petitioner's Brief, this issue is relegated to roughly one page of argument, and is summarized in the following statement: "The decision below removes the link between exaction takings and the compelled loss of an essential right that is so onerous that the loss would be deemed a *per se* physical taking." Petitioner's Brief, at 4-5.

The Opinion addresses two distinct yet related issues, and concluded, correctly, that the High Court provided the answers to the questions raised. The Opinion noted that the question of whether a landowner could maintain an exaction claim when the landowner refused to agree to an improper governmental request

which resulted in a denial of a permit was answered affirmatively in *Dolan*. Opinion, at 11. Further, the question of whether an exaction may occur when the governmental entity conditions approval not on the physical dedication of land, but on the expenditure of money to improve other land, was impliedly addressed by the Supreme Court's remand in *Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994). Opinion, at 12. To the extent that, as the District argues, the application of Supreme Court precedent on the relevant issues is "unsettled," it is respectfully submitted that clarity should only be found in a future decision of the High Court. Petitioner's Brief, at 6. As such, this Court should deny review on that basis alone.

Unable to sufficiently address the application of law to the issues set forth in the Opinion, the District attempts to scare this Court into accepting jurisdiction by arguing that, if the Opinion is allowed to stand, "the exposure to exactions takings liability for such conditions is incalculable." Petitioner's Brief, at 5. In reality, the District's doomsday scenario is fanciful given the nature of the issues in this case, and given the relevant statute.

It should be assumed that governmental entities are abiding by the "essential nexus" and "rough proportionality" requirements of *Nollan* and *Dolan*, and are not conditioning permits on arbitrary conditions.[5] Additionally, section 373.617

[5]The Court in *Koontz v. St. Johns River Water Mgmt. Dist.*, 720 So. 2d 560, 561 n.1 (Fla. 5th DCA 1998), *rev. denied*, 729 So. 2d 394 (Fla. 1999) noted that it

imposes liability on governmental entities only when the plaintiff landowner prevails, which is far from a certain result in a given case. Further, the statute contains a prevailing party attorney's fees provision which logically would discourage baseless litigation. § 373.617(5), Fla. Stat. Moreover, even if the plaintiff prevails and the court determines that the decision under review was an unreasonable exercise of police power without just compensation, the matter is remanded to the agency where *it has the power* to choose among four options.[6] Given the statutory scheme, and given that this statute has existed for over thirty years, it seems clear that the Opinion will not result in the nightmarish scenario the District implies. The District's baseless attempt to frighten this Court into accepting jurisdiction should be rejected.

---

was "concerned" with the District's application of its rules in this case. Judge Pleus described the District's actions as "extortionate," and wrote that the District's "demands for offsite mitigation were nothing more than an out-and-out plan of extortion." *St. Johns River Water Mgmt. Dist. v. Koontz*, 861 So. 2d 1267, 1272 (Fla. 5th DCA 2003) (Pleus, J. concurring specially). It is certainly possible that if the District had considered the "essential nexus" and "rough proportionality" requirements from the start, the fourteen plus years of litigation involved in this case might have been avoided.

[6] The agency can choose: 1) to issue the permit; 2) to pay the "appropriate monetary damages;" 3) to modify its decision to eliminate the improper exercise of police power; or, 4) to not to take any of the three listed actions, and then, after 90 days, the trial court is empowered to decide which of the three actions is appropriate. § 373.617, Fla. Stat.

II. THERE IS NO DIRECT AND EXPRESS CONFLICT WITH EXISTING CASE LAW.

The District argues that the Opinion "expressly and directly" conflicts with *Key Haven Associated Enterprises v. Board of Trustees of the Internal Improvement Trust Fund*, 427 So. 2d 153 (Fla. 1982) and *Bowen v. Florida Department of Environmental Regulation*, 448 So. 2d 566 (Fla. 2d DCA 1984), *approved and adopted*, 472 So. 2d 460 (Fla. 1985). Petitioner's Brief, at 6. This is simply not so. The Opinion does not even mention those cases, and the only passage in the opinion even remotely associated with the issue set forth by the District is the following:

> [The District] argues that Mr. Koontz's claim is really a challenge to the merits of the permit denial, which it contends may only be pursued in an administrative proceeding. *Although the District acknowledges that an exaction claim is a form of takings claim, and is thus cognizable under the statute*, it argues that no such exaction occurred here because nothing was exacted from Mr. Koontz.

Opinion, at 10-11 (emphasis added). Thus, the Opinion clarifies that the District acknowledged the statute's clear application, and therefore no basis for conflict jurisdiction exists. As this Court noted, "in those cases where the district court has not explicitly identified a conflicting decision, it is necessary for the district court *to have included some facts in its decision* so that the question of law addressed by the district court in its decision can be discerned by the Court." *Gandy v. State*,

846 So. 2d 1141, 1144 (Fla. 2003) (quoting *Persaud v. State*, 838 So. 2d 529, 532 (Fla. 2003)) (emphasis in original). Simply put, the Opinion contains no facts sufficient to establish the requisite express and direct conflict.

Even if this Court disagrees with this assessment, it should nevertheless decline jurisdiction. The essence of District's position on this issue is, as the Opinion notes, that Koontz's claim "is really a challenge to the merits of the permit denial, which [the District] contends may only be pursued in an administrative proceeding." Opinion, at 10. However, this argument misses the point. The question is not whether a landowner can challenge substantive issues in a Chapter 120 proceeding, which certainly is a possible course of action. However, this does not mean that a landowner, such as Koontz in this case, does not have the right to bring a challenge under subsection 373.617(2) to determine if the final action "is an unreasonable exercise of the state's police power constituting a taking without just compensation." § 373.617(2), Fla. Stat. The options are not an "either/or" proposition; both are available to a landowner subject to final agency action on a permit request.

The Fifth District clarified the issue in this case eleven years ago when it stated that whether Koontz "can now convince the court that there has, in fact, been a taking is the issue properly before the trial court." *Koontz v. St. Johns River*

Water Mgmt. Dist., 720 So. 2d 560, 562 (Fla. 5th DCA 1998), *rev. denied*, 729 So. 2d 394 (Fla. 1999). The Opinion notes: "[a]fter hearing conflicting evidence, the trial court concluded that the District had effected a taking of Mr. Koontz's property and awarded damages." Opinion, at 10. Simply put, Koontz had the right under the statute to bring an action seeking to establish that the District's actions constituted a taking, and he prevailed. This purported issue amounts to nothing more than a contention that the rights afforded under section 373.617 should be ignored, and that the only manner in which a landowner may proceed after a permit denial is through Chapter 120. Petitioner's Brief, at 6. The statute must be given effect, and this Court and others have recognized its validity and the manner in which it is applied.

In *Griffin v. St. Johns River Water Management District*, 409 So. 2d 208 (Fla. 5th DCA 1982), the court noted that some courts have held that issues involving takings had to be brought in Chapter 120 proceedings before they could be brought in circuit court. Id. at 210. However, *Griffin* also recognized that such cases failed to consider "the later applicable statutes" such as section 373.617. *Id.* *Griffin* went on to state that subsection 373.617(2) clearly permits a landowner to bring an action in circuit court to determine if a final agency action constituted a taking. *Id.*

The Second District Court of Appeal specifically agreed with *Griffin* in *Bowen*, which was approved by this Court, and specifically recognized that *Key Haven's* general principles were legislatively superseded by enactment of 373.617 and its sister statutes. The current state of Florida law unequivocally recognizes that *Key Haven*, and the principles set forth in that case, are not applicable to actions brought under section 373.617. The law on this issue is clear, and no conflict exists sufficient to invoke this Court's jurisdiction.

CONCLUSION

For all the foregoing reasons, this Court should decline to accept jurisdiction over this matter.

Respectfully submitted,

THE CARLYLE APPELLATE LAW FIRM
The Carlyle Building
1950 Laurel Manor Drive, Suite 130
The Villages, Florida 32162
Telephone (352) 259-8852
Facsimile (352) 259-8842

_____

CHRISTOPHER V. CARLYLE
Florida Bar No. 991007

SHANNON MCLIN CARLYLE
Florida Bar No. 988367

~ and~

MICHAEL D. JONES
Florida Bar No. 137608

MICHAEL D. JONES & ASSOCIATES, P.A.
Post Office Box 196130
Winter Springs, Florida 32719-6130
Telephone (407) 695-7666
Facsimile (407-695-7157
Email: mdj124@earthlink.net

Appellate Counsel for Respondent,
Coy A. Koontz, etc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been sent via □ U.S. regular Mail and/or □ facsimile to: **William H. Congdon, Jr., Esquire**, Post Office Box 1429, Palatka, Florida 32178-1429; this ____ day of May, 2009.

_____
CHRISTOPHER V. CARLYLE
Florida Bar No. 991007

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief conforms to the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) in that it was computer generated utilizing Times New Roman 14 point type.

_____
CHRISTOPHER V. CARLYLE
Florida Bar No. 991007