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.

PETITIONER'S BRIEF ON JURISDICTION

On Discretionary Review From A Decision Of
The Fifth District Court Of Appeal

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TABLE OF CONTENTS

TABLE OF CITATIONS

Case Law

Florida Constitution

Florida Statutes

Appellate Rules

Florida Laws

PREFACE

The following abbreviations and designations are used in this jurisdictional brief:

- "A-__" refers to the Appendix, which contains a conformed copy of *St. Johns River Water Mgmt. Dist. v. Koontz*, (Fla. 5th DCA January 9, 2009), reported at ___ So. 2d ___ ; 2009 WL 47009; 34 Fla. L. Weekly D123.
- "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.

STATEMENT OF THE CASE AND FACTS

This case began when St. Johns denied a dredge and fill/management and storage of surface waters permit for destruction of 3.4 acres of wetlands and 0.3 acres of upland (A-2). Koontz agreed to place a conservation easement over the remainder of his parcel as "on-site" preservation mitigation (A-2). St. Johns required additional mitigation before it would authorize 3.4 acres of wetland destruction. (A-2). Additional mitigation would be "off-site" because the available conservation land on-site was, in St. Johns' view, insufficient mitigation. (A-2).

St. Johns identified property several miles from the Koontz property where the off-site wetland mitigation could be accomplished by plugging ditches or replacing non-functional culverts (A-2). In the alternative, St. Johns stated it could authorize development impacting only one wetland acre, with preservation of the remainder of the property but no off-site mitigation (A-2). The conditions for permit approval did not compel Koontz to dedicate land to public use (A-3).

Koontz did not agree to additional off-site mitigation or to reducing his wetland destruction to one acre (A-2). Instead of pursuing his administrative remedies under Chapter 120, Florida Statutes, Koontz proceeded directly to circuit court, claiming St. Johns had inversely condemned his parcel by permit denial (A-3).

At trial, Koontz conceded he had not lost all or substantially all economically viable use of his property (A-12 n3). However, the trial court "decided as fact that

the conservation easement offered by Mr. Koontz was enough and that any more would exceed the rough proportionality threshold ..." (A-12 n5). The trial court concluded that St. Johns' requirement for off-site mitigation was unreasonable and had temporarily taken Koontz's property (A-1, 2).

The Fifth District affirmed, expressly rejecting St. Johns' argument that section 373.617(2), Florida Statutes, and Chapter 120, Florida Statutes, preclude the circuit court from hearing a challenge to the propriety and correctness of the St. Johns' unappealed final agency permitting action (A 2). The decision also holds that the permit denial constituted an exaction taking under *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (A 2). On March 20, 2009, the District Court denied rehearing en banc, but certified the question set forth at page 3, *infra*, as one of great public importance (A-12).

SUMMARY OF ARGUMENT

This case presents three bases for discretionary jurisdiction. In a case of first impression, the decision below incorrectly interprets and amplifies Article X, section 6(a), Florida Constitution, to encompass exaction takings liability for a regulatory decision that does not compel a dedication of property for public use. The Fifth District used an overbroad reading of *Nollan* and *Dolan* to construe Florida's Constitution to greatly expand Florida precedent related to exaction takings, thus presenting the important question certified by the Fifth District.

In addition, the decision below expressly and directly conflicts with *Key Haven Associated Enter., Inc. v. Bd. of Trustees of the Internal Improvement Trust Fund*, 427 So. 2d 153 (Fla. 1982), and its progeny, and also with *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). These cases hold that challenges to the propriety of an agency decision cannot be pursued in a circuit court takings suit, but instead must be pursued in accordance with Chapter 120. This Court should accept review because the decision below disregards the established administrative procedures for challenging agency decision-making, in conflict with this Court's precedent.

ARGUMENT

I. THE DECISION BELOW ADDRESSES A QUESTION CERTIFIED TO BE OF GREAT PUBLIC IMPORTANCE AND ALSO EXPRESSLY CONSTRUES ARTICLE X, SECTION 6(a) OF FLORIDA'S CONSTITUTION.

The decision below takes Florida where it has not gone before, vastly extending the boundary of Florida takings law. In light of this, the Fifth District has certified the following question as one of great public importance:

> 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* 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?

(A-12) (footnotes providing *Nollan* and *Dolan* citations omitted). As is evident

from the certified question, the decision below expressly construes Article X, section 6(a), of the Florida Constitution. Accordingly, this court has discretionary jurisdiction, on both constitutional interpretation and certified question grounds. Art. V, § (b)(3), Fla. Const.; Rules 9.030(2)(A)(ii) and (v), Fla. R. App. P.

Existing Florida law recognizes a very narrow category of takings claims pursuant to federal precedent established in the *Nolan* and *Dolan* cases.[1] This limited type of constitutional taking claim is now referred to as an "exaction" takings claim, with exactions being conditions sought by government for development approval (A-2).

Until the Fifth District issued its decision below, both Florida precedent and the United States Supreme Court construed exaction takings quite narrowly. The Supreme Court has not applied the exaction takings test except to land use decisions conditioning approval of development on the dedication of property to public use.[2] *City of Monterey v. Del Monte Dunes at Monterey Ltd*., 526 U.S. 687, 702 (1999); *Lingle v. Chevron U.S.A. Inc*. 544 U.S. 528, 547 (2005).

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[1] *Paradyne Corp. v. State, Dep't of Transp*., 528 So. 2d 921 (Fla. 1st DCA), *rev. denied*, 536 So. 2d 244 (Fla. 1988); *Hernando County v. Budget Inns of Fla., Inc*., 555 So. 2d 1319 (Fla. 5th DCA 1990); *Aspen-Tarpon Springs Ltd. Partnership v. Stuart*, 635 So. 2d 61 (Fla. 1st DCA 1994).

[2] The rational for treating compelled dedications of private property for public use as an exaction is that when government compels public use of a landowner's property, government is forcing the landowner to give up the right to exclude others, "one of the most essential sticks in the [landowner's] bundle of rights." *Dolan* at 384. A landowner's right to exclude others "[is] perhaps the most fundamental of all property interests." *Lingle v. Chevron U.S.A. Inc*. 544 U.S. 528, 539 (2005).

Lingle, the Supreme Court's most recent case discussing exaction takings, noted that *Nollan* and *Dolan* both involved property dedications "so onerous that, outside the exactions context, they would be deemed *per se* physical takings." *Id*. at 547. No Florida case other than the decision below has applied an exaction takings test outside of compelled dedications of real property as a condition of permit approval.

As a matter of first impression under Florida law, 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. Because this expanded view of exaction takings flows from the Fifth District's interpretation of Florida's Constitution, the decision below has a potentially sweeping effect on the exercise of police powers by any Florida government entity.

Virtually every government regulatory process, whether by ordinance or by individual permits, places conditions on obtaining a permit, to protect the public health, safety and welfare. The types and scope of regulatory conditions are innumerable, encompassing such conditions as permit fees, impact fees, buffers, setbacks, downsizing, project re-design, wetlands avoidance, height restrictions, mitigation, zoning restrictions, and building code requirements. The exposure to exactions takings liability for such conditions is incalculable, since under the decision below, almost any condition for permit approval would be fair game for an exaction taking claim and all government entities throughout the state could

potentially be held liable for a taking under Article X, section 6(a) for development conditions it deemed necessary for approval.

The decision below contained three separate opinions; each noted the unsettled state of exactions law. *See e.g.*, Griffin, J., dissenting (A-6) ("There is very little law important to this case that is settled law, and if the outcome in this case is dictated by the law of exaction, then somebody needs to get it fixed"). In reaching its decision, the Fifth District attempts to remove existing doubt as to how exactions takings law is to be implemented under Article X, section (6)(a), "absent a more definitive pronouncement from our high court on this issue" (A-3). Given the magnitude and significance of the expanded scope of exactions takings claims described in the Fifth District's decision, the unsettled law on this constitutional issue should be settled by Florida's Supreme Court.

II. THE DECISION BELOW CREATES CONFLICT WITH EXISTING CASE LAW PROHIBITING A CIRCUIT COURT FROM DETERMINING THE CORRECTNESS OF AN AGENCY PERMITTING DECISION.

The decision below expressly and directly conflicts with *Key Haven* and *Bowen*. These cases establish that permit applicants may contest the correctness of agency permitting decisions only through the Chapter 120 administrative process, and not by going directly to circuit court. Such conflict establishes the basis for discretionary jurisdiction. Rule 9.030(2)(A)(iv), Fla.R.App.P.

According to the majority opinion below, an exaction taking assesses whether

an exaction is "arbitrary" or whether there is a "rough proportionality" between a permit's conditions and development impacts (A-2, 3). This is precisely the kind of analysis–the correctness of agency action–heretofore carried out solely in the administrative forum, with judicial review under section 120.68, Florida Statutes.

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 under Chapter 120, 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…." *Id*. at 156. It underscored that crucial point:

> We emphasize that, by electing the circuit court as the judicial forum, a party foregoes any opportunity to challenge the permit denial as improper and may not challenge the agency action as arbitrary or capricious or as failing to comply with the intent and purposes of the statute.

Id. at 160. Chapter 120 mandates that such "correctness" attacks proceed administratively, "to assure that the responsible agency 'has had a full opportunity to reach a … considered decision upon a complete record appropriate to the issue'." *Id*. at 158.

If an applicant disputes some aspect of an agency decision, Chapter 120 requires an administrative law judge to evaluate the merits of competing expert opinions before an agency makes its final decision. The agency will thus reach the "considered decision upon a complete record appropriate to the [challenged] issue"

as described in *Key Haven*. *Id.* at 158. This leads to a correct final decision by the agency, one that will not subject it to liability and damages for a temporary taking. On the other hand, allowing a landowner to choose to forgo Chapter 120, ask a circuit court to evaluate the merits of competing expert opinions and determine whether mitigation is "roughly proportional"–after an agency finalizes its decision–subjects the agency to temporary taking liability and damages, as here, even though the agency agrees to eliminate the objectionable permitting condition.

A minor procedural aspect of *Key Haven* was found by *Bowen* in 1985 to be superseded by statute.[3] But *Bowen* reconfirmed *Key Haven's* principle, which was unchallenged precedent until the decision below, that the correctness of an agency permitting decision cannot be attacked in circuit court. *Key Haven's* continuing vitality is apparent. *See, e.g., Flo-Sun, Inc. v. Kirk* 783 So.2d 1029, 1037 (Fla. 2001) (quoting from *Key Haven* with approval).

In *Bowen*, the landowners brought an inverse condemnation claim in circuit court in accordance with sections 253.763 and 403.90, Florida Statutes, immediately after they were denied a permit necessary to develop their property. In reaching its holding, this Court had to interpret the following statutory language:

[3] *Key Haven's* procedural requirement of an appeal to the Trustees of the Internal Improvement Fund before agency action was "final" was held by *Bowen* to be superseded by statute. *Bowen* at 568-69 ("section 253.763(2) merely short-circuits the procedure of administrative appeal to TIIF required by *Key Haven.* . . . Section 253.763 now only requires, before resort to the circuit court, 'final action of any agency' and not an *appeal from* 'final action of any agency'") (original emphasis).

> 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.

Bowen at 569. This language in sections 253.763(2) and 403.90(2) is identical to that in subsection 373.617 (2), Florida Statutes, the provision at issue in this case. (The three identical statutes were enacted together in Ch. 78-85, Laws of Florida).

Interpreting the statutory language quoted above as reiterating *Key Haven's* principle, *Bowen* concluded that by choosing to raise a takings claim in circuit court without first contesting the correctness of the permit denial administratively or by appellate review, a landowner had "to accept the final agency administrative action as procedurally and substantively correct." *Bowen* at 569. However, if perceived "substantive errors … result in a permit denial … chapter 120 is still the proper remedy." *Id.* This Court reiterated the same principle in *Dep't of Agriculture and Consumer Servs. v. Mid-Florida Growers, Inc.*, 521 So. 2d 101, 103 n.1 (Fla. 1988) (section 253.763(2) provides "the propriety of an agency's action may not be challenged in an inverse condemnation proceeding"), and *Dep't of Agriculture and Consumer Servs. v. Polk*, 568 So. 2d 35, 38 (Fla. 1990) (same).

Challenging a condition for permit approval necessarily involves challenging "whether the action is in accordance with existing statutes or rules and based on competent substantial evidence," the type of circuit court challenge expressly prohibited by section 373.617(2). Here, the very basis of Koontz's lawsuit was

whether the challenged permit condition was substantively correct. However, the Fifth District rejected St. Johns' position that a landowner cannot attack the substantive correctness of an agency permitting decision in circuit court. (A-3). The decision below directly conflicts with *Bowen* by allowing Koontz to challenge the correctness of the off-site mitigation (i.e. the exaction) in circuit court.

Moreover, under the Fifth District's reasoning, there is no discernible limit on what conditions could be challenged in circuit court as a "taking." Any condition found to be unreasonable, no matter how trivial, would result in a damages claim for temporary loss of use of the property, flooding the courts with challenges resolved until now through the Chapter 120 administrative process.

CONCLUSION

The Fifth District's expansive view of exaction takings is a matter of first impression affecting virtually all state, county, and local governments, making this case one of great public importance, as certified by the decision below. By allowing circuit courts to evaluate the propriety of agency permitting decisions, the decision below conflicts with this Court's prior precedent and eviscerates the legislatively established administrative process under Chapter 120. St. Johns respectfully requests that this Court accept jurisdiction to review this case.

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 May, 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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