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IN THE SUPREME COURT OF FLORIDA

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Petitioner,

v.

Case No. SC14-1092

COY A. KOONTZ, JR., AS PERSONAL REPRESENTATIVE OF THE ESTATE OF COY A. KOONTZ, DECEASED,

Lower Tribunal Case No. 5D06-1116

Respondent.
_____/

RESPONDENT'S BRIEF ON JURISDICTION

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I

THERE IS NO REVIEWABLE CONFLICT BETWEEN *KOONTZ V*, AND EITHER THIS COURT'S REMAND ORDER OR THE UNITED STATES SUPREME COURT'S DECISION

St. Johns argues that a conflict exists between the Fifth District Court of Appeal's decision in *St. Johns River Water Mgmt. Dist. v. Koontz,* 39 Fla. L. Weekly D925 (Fla. 5th DCA Apr. 30, 2014) (*Koontz V*), and this Court's remand order to hold proceedings consistent with the United States Supreme Court's 2013 decision. *St. Johns River Water Mgmt. Dist. v. Koontz*, 129 So. 3d 1069 (Fla. 2013). No conflict exists between *Koontz V* and this Court's remand order.

Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure permits review where the decision of the District Court "expressly and directly conflict[s] with a **decision** . . . of the supreme court **on the same question of law**." Fla. R. App. P. 9.030(a)(2)(A)(iv) (emphasis added). But this Court's order simply remanded the case for further proceedings consistent with the Supreme Court's decision—an order that the District Court faithfully followed. The order was not a "decision" on any "question of law" with which *Koontz V* could conflict.

At bottom, St. Johns' complaint is that *Koontz V* conflicts with a decision of the United States Supreme Court, not this Court. But conflict with a Supreme Court

decision is not grounds for review. And even if it were, *Koontz V* is consistent with the High Court's decision. In 2009, in *Koontz IV*, the District Court considered whether a permit denial for refusal to accede to a monetary exaction was subject to *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The District Court answered in the affirmative, holding that "an exaction claim is cognizable when, as here, the land owner refuses to agree to an improper request from the government resulting in the denial of the permit," and when it is "a requirement . . . [to] expend money." *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8, 11-12 (Fla. 5th DCA 2009) (*Koontz IV*).

This Court reversed, holding that *Nollan* and *Dolan* did not apply. But the Supreme Court in turn reversed this Court, effectively endorsing *Koontz IV*: "[T]he government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2603 (2013). When this Court remanded the case, the District Court held proceedings consistent with the High Court's opinion and reaffirmed *Koontz IV*. *Koontz V*, App. A-3.

St. Johns argues that *Koontz V*'s affirmance of Koontz's damages is at odds with the Supreme Court's dictum that "the Fifth Amendment mandates a particular *remedy*—just compensation—only for takings," and "[w]here the permit is denied and

the condition is never imposed, nothing has been taken." *Koontz*, 133 S. Ct. at 2597. St. Johns is wrong.

First, St. Johns labors under the mistaken impression that Koontz seeks the federal constitutional remedy of "just compensation" under the Takings Clause for the actual imposition of the permit condition that he finance improvements to State-owned lands at a cost of up to $150,000. St. Johns District reluctantly removed that requirement after it was ruled unconstitutional under *Nollan* and *Dolan*, so that Koontz never had to expend money. But Koontz never alleged to the contrary, nor sought damages for an unconsummated permit exaction.

As the Supreme Court recognized, Koontz obtained damages under Florida statutory law, because St. Johns unlawfully exercised its police power in a way that deprived him of the use of his land—not because St. Johns made him expend money. *Koontz*, 133 S. Ct. at 2597-98.[1] Specifically, the circuit court awarded Koontz damages under Florida Statute section 373.617, which authorizes "monetary damages and other relief" for "an unreasonable exercise of the state's police power constituting a taking without just compensation." Fla. Stat. § 373.617(2). Here, St. Johns'

[1] The Supreme Court correctly observed: "[W]e need not decide whether *federal* law authorizes plaintiffs to recover damages for unconstitutional conditions claims predicated on the Takings Clause because petitioner brought his claim under state law. Florida law allows property owners to sue for 'damages' whenever a state agency's action is 'an unreasonable exercise of the state's police power constituting a taking without just compensation.' Fla. Stat. Ann. § 373.617." *Koontz*, 133 S. Ct. at 2597-98.

unreasonable exercise of police power (unlawfully withholding ***for 11 years*** Koontz's permits as punishment for his rejection of an unconstitutional exaction) deprived Koontz of the use of his land. Damages remedy this deprivation of use, not an unconsummated monetary exaction.

Second, St. Johns has waived any challenge to damages as being inconsistent with the federal Takings Clause. St. Johns' initial appeal from the circuit court's 2006 judgment and damages award was only "directed to the trial court's jurisdiction and the legal viability of Mr. Koontz's [*Nollan/Dolan*] claim." *Koontz IV*, 5 So. 3d at 10. St. Johns failed to raise the argument that the federal Takings Clause precluded damages under section 373.617(2). After it decided *Koontz IV*, St. Johns moved to certify to this Court ***only*** the *Nollan/Dolan* question, and the District Court granted that motion. This Court, in turn, limited its review to the certified *Nollan/Dolan* question, expressly "declin[ing] to address the other issues raised by the parties." *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1231 (Fla. 2011). St. Johns long ago abandoned the argument that the federal Takings Clause bars Koontz's damages, and the Supreme Court in no way allows it to escape the consequences of its waiver.

II

KOONTZ V CONSTRUES NO PROVISION OF THE FLORIDA CONSTITUTION

According to St. Johns, *Koontz V* expressly construes Article X, section 6(a), of the Florida Constitution—the state counterpart to the federal Takings Clause—"to encompass takings liability." Pet. Brief on Jur. at 6. On that basis, St. Johns urges this Court to exercise jurisdiction under Rule 9.030(a)(2)(A)(ii), which provides for review of District Court decisions that "expressly construe a provision of the state . . . constitution." *Koontz V* does not construe any provision of the Florida Constitution. Rather, *Koontz V* construes only a United States Supreme Court decision that, in turn, construes federal constitutional law. *Koontz V*, 39 Fla. L. Weekly D925. Tellingly, St. Johns quotes no relevant language from *Koontz V* substantiating its claim that the decision construes the Florida Constitution.[2]

[2] *Koontz V* quotes the certified question that this Court decided in 2011, which makes reference to Article X, section 6(a), of the Florida Constitution (as well as the federal Takings Clause). *Koontz V*, 39 Fla. L. Weekly D925. But, as this Court held, "this case is controlled by the existing interpretation of the United States Constitution by the United States Supreme Court"—not by the Florida Constitution. *Koontz*, 77 So. 3d at 1222 (noting that the state and federal takings clauses are interpreted coextensively). Moreover, the Supreme Court decision that is the basis for *Koontz V* construes *only* federal constitutional law. Consequently, as *Koontz V* itself reveals, the District Court had no occasion to construe the Florida Constitution.

III

KOONTZ V CORRECTLY DECIDES THE EXHAUSTION ISSUE, WHICH IS LAW OF THE CASE

According to St. Johns, Koontz challenges the correctness under agency rules of the permit denial and, therefore, should have exhausted his administrative remedies under chapter 120 before suing in circuit court. In *Koontz V*, the District Court ***for the third time*** rejected St. Johns' exhaustion argument. *Koontz V*, App. A-3 n.2. St. Johns claims that *Koontz V* conflicts with the "exhaustion" decisions of this Court and the Second District Court. But St. Johns' argument is off the mark.

First, it is law of the case that Koontz properly brought his claim in the circuit court. The District Court rejected St. Johns' exhaustion argument in *Koontz I*,[3] *Koontz IV*, and *Koontz V*. *Koontz V*, App. A-3 n.2. Further, this Court left the District Court's resolution of the issue in *Koontz I* and *Koontz IV* undisturbed no fewer than ***three times***, making it law of the case. *St. Johns River Water Mgmt. Dist. v. Koontz*, 129 So. 3d 1069 (Fla. 2013); *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d at 1222; *St. Johns River Water Mgmt. Dist. v. Koontz*, 729 So. 2d 394 (Fla. 1999). As the District Court observed with respect to *Koontz IV*, St. Johns "did not challenge [its] disposition on this issue by proffer of a proposed certified question, and, after hearing argument on this issue, a majority of the Florida Supreme Court chose not to

[3] *Koontz v. St. Johns River Water Mgmt. Dist.*, 720 So. 2d 560 (Fla. 5th DCA 1998) (*Koontz I*).

expand the scope of [St. Johns'] proposed question to address this issue." *Koontz V*, App. A-3 n.2; *Koontz*, 133 S. Ct. at 2597 (recognizing that this Court declined to address this issue).

Second, the District Court correctly resolved the exhaustion issue. Section 373.617 provides that "any person substantially affected by a final action of any agency with respect to a permit may seek review . . . and request monetary damages and other relief ***in the circuit court***," and requires the circuit court to decide whether the agency's action "is an unreasonable exercise of the state's police power constituting a taking without just compensation." Fla. Stat. § 373.617(2) (emphasis added). Here, St. Johns' final action denying Koontz his permits (and, thereby, the use of his land) for eleven years, simply because he refused to accede to an unconstitutional permit condition, was an unreasonable exercise of police power constituting a taking without compensation.

St. Johns points to Section 373.617(2)'s requirement that "[r]eview 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." *Id.* In St. Johns' view, this exhaustion requirement applied, because Koontz allegedly claimed that "the offsite mitigation condition was substantively incorrect and in excess of what was required ***under the agency's rules***." Pet. Brief on Jur. at 8 (emphasis added). Not so. Koontz challenged St. Johns'

unreasonable permit denial, because it was based on Koontz's lawful refusal to submit to a permit condition that was incorrect under ***federal constitutional law***. St. Johns' "agency rules" had no bearing on the claim.

St. Johns also mistakenly relies on the now-obsolete proposition in *Key Haven Associated Enterprises, Inc. v. Bd. of Trustees of Internal Imp. Trust Fund*, 427 So. 2d 153 (Fla. 1982), that ***any*** challenge to the correctness of a final agency action must proceed under chapter 120. Pet. Brief on Jur. at 7. *Key Haven* is superseded by Section 373.617, which allows some such challenges to be initiated in circuit court—namely, those based on an agency's unreasonable exercise of police power. *Koontz V,* App. A-3 n.2 ("The creation of that independent statutory cause of action to redress takings claims superseded the holding in that case.").

The only other case to which St. Johns cites is *Bowen v. Florida Dep't of Envtl. Reg.*, 448 So. 2d 566 (Fla. 2d DCA 1984), *approved by* 472 So 2d. 790 (Fla. 5th DCA 1985). There, the Second District held that *Key Haven*'s "exhaustion" rule had been superseded by statute. *Id.* at 568-69. Despite this, St. Johns misleadingly contends that *Bowen* "confirms that challenges to the propriety of any agency permitting decision must first be pursued in a chapter 120 proceeding." Pet. Brief on Jur. at 8. St. Johns conveniently ignores the fact that *Bowen* distinguishes between (1) a permit denial resulting from "procedural or substantive errors in the application or administrative hearing thereon," which must be challenged in a chapter 120

proceeding, and (2) a permit denial based on the merits of the application, which can be challenged directly in the circuit court. *Bowen*, 448 So. 2d at 568-69. Koontz challenged a permit denial based on the merits of his application, not a defect in his applications or in St. Johns' administrative hearing; thus, he was entitled to initiate his claim in circuit court.

IV

KOONTZ V IS CONSISTENT WITH DECISIONS ON PRESERVATION OF ERROR

St. Johns claims that the District Court's refusal to consider the propriety of Koontz's damages under Section 373.617(2) "is in express and direct conflict" with two decisions: *Cantor v. Davis*, 489 So. 2d 18 (Fla. 1986), and *City of Miami v. Steckloff*, 111 So. 2d 446, 447 (Fla. 1959). Those cases hold that issues not raised are waived, unless the party had no realistic opportunity to do so. Here, the District Court applied that rule, finding that St. Johns had waived argument on the propriety of damages under Section 373.617(2) by failing to raise the issue in any of the preceding appeals over the last eight years. *Koontz V*, App. A-3.

Accepting *arguendo* St. Johns' absurd claim that it never had the opportunity to raise that issue, the District Court's finding to the contrary does not conflict with *Cantor* and *Steckloff*. The most that St. Johns can argue is that the District Court correctly applied the waiver rule, but erroneously found that St. Johns enjoyed

multiple opportunities in the past to raise the damages issue. What St. Johns cannot argue is that the District Court created a *new* rule that conflicts with *Cantor* and *Steckloff*, by holding that waiver applies regardless of the existence and nature of prior opportunities. Of course, a District Court's allegedly erroneous finding is no basis for this Court's discretionary jurisdiction.

CONCLUSION

For all these reasons, the Court should deny jurisdiction in this case.

DATED: July 7, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief is Times New Roman 14 point and in compliance with Fla. R. App. P. 9.210(a)(2).

DATED: July 7, 2014.

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I hereby certify that the foregoing Respondent's Brief on Jurisdiction was electronically served through the Florida Court's E-Filing Portal and furnished to the following via email, the 7th day of July, 2014:

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