IN THE SUPREME COURT OF FLORIDA

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,

Petitioner,

v.

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

Respondent.
_____/

Case No. SC14-1092

Lower Tribunal Case No. 5D06-1116

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The decision below, if it stands, would greatly expand Florida takings law and have a far-reaching, chilling effect on the state and local government decisionmaking process. In this case, an ordinary dispute about the sufficiency of mitigation proposed for a land-use permit application was allowed to circumvent the administrative process and to subject an agency to takings liability in circuit court. The decision below holds that a permit denial where no property is taken can give rise to "just compensation" liability for the entire underlying property (as if there had been a *per se* taking of that property), plus attorney's fees and costs.

Respondent Coy A. Koontz, Jr., as personal representative of the estate of Coy A. Koontz, deceased (Koontz) alleged that St. Johns River Water Management District's (St. Johns') final orders denying his permit applications resulted in an "exaction" taking of his property. *See St. Johns River Water Mgt. Dist. v. Koontz*, 5 So. 3d 8, 8-10 (5th DCA Fla. 2009) (*Koontz IV*). St. Johns denied Koontz's applications to dredge and fill wetlands because the adverse impacts would not be offset by Koontz's proposed on-site conservation easement. *Id.* at 10. Before denying the permits, staff identified design alternatives as well as off-site mitigation alternatives as options for satisfying the permitting criteria. *See id.*

Koontz did not seek an administrative hearing under section 120.57, Florida Statutes, nor did he appeal the final orders under section 120.68, Florida Statutes.

Instead, Koontz "brought an inverse condemnation claim asserting an improper 'exaction' by the District." *Koontz IV*, 5 So. 3d at 9. After holding "a trial on the issue of whether there has been a taking," the circuit court held that "the off-site mitigation conditions imposed upon Koontz by the District resulted in a regulatory taking of the Koontz property." *Koontz v. St. Johns River Water Mgt. Dist.*, No. CI-94-5673 (Fla. 9th Cir. Ct. Oct. 30, 2002) (*available at* 2002 WL 34724740).

In December 2005, in light of the deterioration of the wetlands on Koontz's property since the initial permit applications, St. Johns issued Koontz a permit. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1224-1225 (Fla. 2011), *rev'd*, 133 S. Ct. 2586 (2013). After a damages trial, the circuit court awarded "just compensation for the temporary taking of Coy Koontz' property." *Koontz v. St. Johns River Water Mgt. Dist.*, No. CI-94-5673, (Fla. 9th Cir. Ct. Feb. 21, 2006) (*available at* 2006 WL 6912444) (awarding $327,500 in "just compensation" and $48,654 in interest). The circuit court's judgment was affirmed in *Koontz IV*.

This Court accepted jurisdiction and reversed *Koontz IV*, holding that the state and federal constitutions do not recognize an "exactions taking" where there is no compelled dedication of interest in real property to public use and where there is no expenditure of funds for offsite mitigation. *See Koontz*, 77 So. 3d 1220.

The United States Supreme Court granted certiorari and expanded property protection under the Constitution by holding that "the 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*, 133 S. Ct. at 2586, 2603. Significantly, the United States Supreme Court expressly agreed with this Court's conclusion that "*nothing was ever taken from Mr. Koontz*," *Koontz*, 77 So. 3d at 1231 (emphasis in original), when it held, "[w]here the permit is denied and the condition is never imposed, *nothing has been taken*," *Koontz*, 133 S. Ct. at 2597 (emphasis added). While an un-imposed unconstitutional condition could "run afoul of the Takings Clause," even when no property is taken, the remedy of just compensation is not available for such claims. *Id.* at 2596-2597; *id.* at 2596 ("the Fifth Amendment mandates a particular *remedy*—just compensation—only for takings"). In cases where there is an "excessive demand but no taking," whether money damages are available is a question of the cause of action on which the landowner relies. *Id.* at 2597.

This Court remanded the case to the Fifth District Court of Appeal "for further proceedings consistent with" the United States Supreme Court's decision. *St. Johns River Water Mgt. Dist. v. Koontz*, 129 So. 3d 1069 (Fla. 2013).

In *St. Johns River Water Mgt. Dist. v. Koontz*, 39 Fla. L. Weekly D925a (Fla. 5th DCA April 30, 2014) (*Koontz V*), a majority of the panel adopted and affirmed *Koontz IV*, and affirmed the judgment below. Appendix at A-1 to A-4. Judge Griffin dissented, concluding that the United States Supreme Court's

decision made it "impossible" to affirm the inverse condemnation judgment. A-11.

SUMMARY OF ARGUMENT

This case presents four bases for discretionary jurisdiction. First, *Koontz V* conflicts with this Court's decision mandating proceedings consistent with the United States Supreme Court's decision. *Koontz*, 129 So. 3d 1069. (By separate filing, in Case No. SC09-713, St. Johns is moving this Court to enforce its mandate.) *Koontz V* affirms an inverse condemnation judgment and award of just compensation in express and direct conflict with the United States Supreme Court's holdings that when a condition is not imposed, there is no taking of property and just compensation is not an available remedy. *Koontz*, 133 S. Ct. at 2597. Second, *Koontz V* expressly and wrongly construes Article X, section 6(a), Florida Constitution to provide "just compensation" liability for a regulatory decision where no condition was imposed and thus no property was taken. Third, *Koontz V* conflicts with case law establishing 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. *Key Haven Associated Enterprises, Inc. v. Bd. of Trustees of Internal Imp. Trust Fund*, 427 So. 2d 153 (Fla. 1982); *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). Finally, *Koontz V* conflicts with this Court's holdings on preservation of error.

ARGUMENT

I. *Koontz V* conflicts with this Court's decision mandating "proceedings consistent with" the United States Supreme Court's decision.

By affirming a judgment for the "exactions taking" of Koontz's property and an award of just compensation for that taking, A-3, *Koontz V* is in express and direct conflict with this Court's decision requiring "further proceedings consistent with" the United States Supreme Court decision. *Koontz V* is inconsistent with the holding that when a permit condition is not imposed, there is no taking, and just compensation is not available.[1] *Koontz*, 133 S. Ct at 2596-2597.

The Fifth District's conclusion that an "exactions taking" may occur "even when the unconstitutional condition is refused and the permit is denied," A-2, is in irreconcilable conflict with the United States Supreme Court's holding that "[w]here the permit is denied and the condition is never imposed, nothing has been taken." *Koontz*, 133 S. Ct. at 2597; *see id.* at 2596 ("[e]xtortionate demands for property in the land-use permitting context run afoul of the Takings Clause *not because they take property* but because they impermissibly burden the right not to have property taken without just compensation.") (emphasis added). The Fifth District's decision to affirm the circuit court's award of just compensation for a

[1] It is not necessary for the district court's decision to identify the conflict in order to establish a basis for jurisdiction. *Ford Motor Co. v. Kikis*, 401 So. 2d 1341, 1342 (Fla. 1981). Here, the district court discussed the legal principles that it applied, which "supplies a sufficient basis for a petition for conflict review." *Id.*

taking, A-3, is also inconsistent with the holding that just compensation is *not* an available remedy when an unconstitutional condition is not imposed and, therefore, there is no taking. *Koontz*, 133 S. Ct. at 2597.

The Fifth District's decision also conflicts with other decisions of this Court that hold when nothing has been taken, there can be no compensation for a taking. *E.g., Dep't of Transp. v. Gefen*, 636 So. 2d 1345, 1346 (Fla. 1994) ("compensation must await the actual taking of the property"). In addition, the decision is contrary to other district court takings cases. *See, e.g., Pinellas Cnty. v. Baldwin*, 80 So. 3d 366, 370 (Fla. 2d DCA 2012) ("Proof of a taking by the governmental body is an essential element in an action for inverse condemnation.").

II. *Koontz V* expressly construes Article X, section 6(a) of Florida's Constitution.

Koontz V expressly construes Article X, section 6(a), of the Florida Constitution, to encompass takings liability, A-2 to A-3, even though it is undisputed that the condition was never imposed and thus no property was taken.

If *Koontz V* is allowed to stand, it would greatly expand takings liability beyond the boundaries established by the United States Supreme Court and this Court. As discussed above, when a condition is not imposed, no property is exacted, and thus "just compensation" is inappropriate. *Koontz*, 133 S. Ct. at 2597. In contrast, *Koontz V* affirmed an award of just compensation as if there had been a *per se* taking of the entire underlying parcel sought to be developed. If authorized

to brief the merits, St. Johns would show that the compensation awarded to Koontz is more than 37 times what the "conditioned" mitigation would have cost him.

III. *Koontz V* conflicts with existing case law prohibiting a circuit court from determining the correctness of an agency's permitting decision.

Koontz V expressly and directly conflicts with *Key Haven, Bowen*, and their progeny by holding that Koontz's lawsuit, which challenges the correctness of an agency decision, can be pursued in circuit court instead of a Chapter 120 proceeding. A-3 at n.2. The parties briefed this issue when this Court reviewed *Koontz IV*. Based on section 373.617(2), Florida Statutes, and *Key Haven*, two justices would have quashed *Koontz IV* for failure to exhaust administrative remedies, but the remaining justices left the issue open. 77 So. 3d at 1231, 1232.

Key Haven holds that "by electing circuit court as the judicial forum, a party foregoes any opportunity to challenge the permit denial as improper . . . ." 427 So. 2d at 160.[2] The *Bowen* court similarly held 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 must "accept the final agency administrative action as procedurally and substantively correct." 448 So. 2d at 569. (*Bowen* notes that *Key Haven*'s procedural requirement of an appeal to the Trustees of the Internal Improvement Fund before agency action becomes "final"

[2] This Court has continued to cite *Key Haven* with approval. *See, e.g., Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1037 (Fla. 2001).

was superseded by statute, but confirms that challenges to the propriety of any agency permitting decision must first be pursued in a chapter 120 proceeding.[3] *Id.*)

Here, because the very basis of Koontz's lawsuit is that the offsite mitigation condition was substantively incorrect and in excess of what was required under the agency's rules, Koontz should have pursued his challenge through the Chapter 120 process, with any constitutional issues to be decided by the appellate court. If *Koontz V* is allowed to stand, its extension of circuit court review would expose every government agency in Florida to circuit court claims for damages, and associated fees and costs, every time it denies a permit application for failure to meet a condition of permit approval. Moreover, any unconstitutional condition—regardless of whether it is imposed and regardless of its cost of compliance—could give rise to government liability to compensate the landowner as if it had denied all or substantially all economically viable use of the entire underlying property *plus* liability for attorney's fees and costs. Such exposure is likely to have a strong chilling effect on the exercise of valid police powers.

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[3] Contrary to the assertions in *Koontz V*, A-3 at n.2, section 373.617, Florida Statutes, does not "supersede[]" the *relevant* holding in *Key Haven*. Indeed, under section 373.617(2), "[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." This subsection was enacted precisely to ensure that section 373.617 would not be interpreted to preempt the Chapter 120 process and allow de novo circuit court review of agency permitting decisions. *See* R. Rhodes, Compensating Police Power Takings: Chapter 78-85, Laws of Florida, 52 Fla. B.J. 741, 743 (Nov. 1978).

IV. *Koontz V* conflicts with decisions on preservation of error.

Koontz V states: "To the extent that Appellant [St. Johns] seeks to brief the state law issues left open by the Supreme Court, we conclude that those issues were either disposed of in *Koontz I* or *Koontz IV*, or they were not preserved and presented in those proceedings."[4] A-3. The Fifth District's conclusion that St. Johns failed to preserve its right to brief certain state law issues is in express and direct conflict with this Court's holdings in *Cantor v. Davis*, 489 So. 2d 18 (Fla. 1986) and *City of Miami v. Steckloff*, 111 So. 2d 446, 447 (Fla. 1959).

In *Cantor*, the petitioners asserted that a statute was unconstitutional on its face and as applied. 489 So. 2d at 20. Because the circuit court held the statute to be facially unconstitutional, the district court never reached the as-applied challenge. *Id.* This Court held that "because petitioners did not have a realistic opportunity to argue the matter below, they should not be precluded from raising" it before this Court. *Id.; see also City of Miami*, 111 So. 2d at 447 (it is only "points covered by a decree of the trial court [that] will not be considered by an appellate court unless they are properly raised and discussed in the briefs.").

Because the lower courts have consistently addressed only whether Koontz

[4] The United States Supreme Court's decision left open whether or not section 373.617, Florida Statutes, can provide a remedy for an unconstitutional condition that does not constitute a taking. *Koontz*, 133 S. Ct. at 2597-2598. Because Koontz's claim sought compensation for a taking of property, the circuit court never adjudicated a damages claim for an un-imposed unconstitutional condition.

suffered a taking of property, they have never reached some of the nuanced issues related to how section 373.617, Florida Statutes, should be applied to an unconstitutional condition claim when there is no taking. Therefore, St. Johns has never had an opportunity to address the issues that surround application of section 373.617 to an unconstitutional conditions claim that does not involve a taking.

Waiver could not have occurred here. As recognized by *Koontz IV* and this Court, St. Johns has consistently argued that section 373.617(2) does not cover Koontz's claim because there was no taking.[5] By not appealing the circuit court's *correct* application of section 373.617 to a judgment finding a taking of property, St. Johns did not waive arguments about how that statute should apply, if at all, to an unconstitutional condition claim where no property is taken. Similarly, by not appealing the trial court's *correct* conclusion that section 373.617 authorizes an award of just compensation for property that has been taken (as well as attorney's fees), St. Johns did not waive argument that the statute does not authorize damages (and fees) for an un-imposed unconstitutional condition, or, if available, that such damages should be different than compensation for the entire underlying property.

CONCLUSION

St. Johns respectfully requests that this Court accept jurisdiction in this case.

[5] *Koontz IV*, 5 So. 3d at 10 (St. Johns' argument that statute "expressly limits the scope of circuit court review to cases in which a constitutional taking is proven"); *Koontz*, 77 So. 3d at 1225 (St. Johns' argument that although "exactions claim is a form of taking and is cognizable under section 373.617, no exaction occurred").

Dated: June 9, 2014

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 9, 2014, I caused a copy of the foregoing brief and the appendix to the brief to be electronically served through the Florida Courts E-Filing Portal and by e-mail on the following counsel of record: Christopher V. Carlyle, Esq., The Carlyle Appellate Law Firm, The Carlyle Building, 1950 Laurel Manor Drive, Suite 130, The Villages, FL 32162 (ccarlyle@appellatelawfirm.com), Michael D. Jones, Esq., Michael D. Jones & Associates, P.A., 30 Windsormere Way, Suite 200, Oviedo, FL 32765 (mdj@mdjlaw.us and mdj124@embarqmail.com), Christina M. Martin, Pacific Legal Foundation, 8645 N. Military Trail, Suite 511, Palm Beach Gardens, FL 33410 (cmm@pacificlegal.org), and Paul J. Beard II, Pacific Legal Foundation, 930 G Street, Sacramento, CA 95814 (pjb@pacificlegal.org).

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief on jurisdiction complies with Rule 9.210 of the Florida Rules of Appellate Procedure, including its font requirements. The brief is prepared in Times New Roman 14-point font.

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