No. _____

In the
Supreme Court of the United States

COY A KOONTZ, JR.,
Petitioner,

v.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Florida

PETITION FOR WRIT OF CERTIORARI

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place,
Suite 210
Bellevue, WA 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
E-mail:
bth@pacificlegal.org

PAUL J. BEARD II
Counsel of Record
Pacific Legal Foundation
930 G Street,
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: pjb@pacificlegal.org

MICHAEL D. JONES
P.O. Box 196130
Winter Springs, FL 32719
Telephone: (407) 359-9908

CHRISTOPHER V. CARLYLE
The Carlyle Appellate Law Firm
1950 Laurel Manor Drive, Suite 130
The Villages, FL 32162
Telephone: (352) 259-8852

Counsel for Petitioner

QUESTIONS PRESENTED

For over eleven years, a Florida land use agency refused to issue any of the permits necessary for Coy A. Koontz, Sr., to develop his commercial property. The reason was because Koontz would not accede to a permit condition requiring him to dedicate his money and labor to make improvements to 50 acres of government-owned property located miles away from the project—a condition that was determined to be wholly unrelated to any impacts caused by Koontz's proposed development. A Florida trial court ruled that the agency's refusal to issue the permits was invalid and effected a temporary taking of Koontz's property, and awarded just compensation. After the appellate court affirmed, the Florida Supreme Court reversed, holding that, as a matter of federal takings law, a landowner can never state a claim for a taking where (1) permit approval is withheld based on a landowner's objection to an excessive exaction, and (2) the exaction demands dedication of personal property to the public.

The questions presented are:

1. Whether the government can be held liable for a taking when it refuses to issue a land-use permit on the sole basis that the permit applicant did not accede to a permit condition that, if applied, would violate the essential nexus and rough proportionality tests set out in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and

2. Whether the nexus and proportionality tests set out in *Nollan* and *Dolan* apply to a land-use exaction that takes the form of a government demand that a permit applicant dedicate money, services,

labor, or any other type of personal property to a public use.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

Statutes

United States Constitution

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous

PETITION FOR WRIT OF CERTIORARI

As personal representative of the Estate of Coy A. Koontz, Sr.,[1] Coy A. Koontz, Jr. (hereinafter, "Koontz"), respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court.

OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at *St. Johns River Water Management District v. Koontz*, 77 So. 3d 1220 (Fla. 2011), and is reproduced in Petitioner's Appendix (Pet. App.) at A. The Florida Supreme Court's decision denying rehearing and/or clarification is reported at __ So. 3d __, 2012 Fla. LEXIS 1 (Fla. 2011). The opinion of the District Court of Appeal of the State of Florida, 5 So. 3d 8 (Fla. Ct. App. 2009), is reproduced in Pet. App. at B. The opinion of the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, is not published, but is reproduced in Pet. App. at D.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). Koontz filed an inverse condemnation lawsuit in the Florida state courts challenging the District's permit decisions as violating the Fifth and Fourteenth Amendments of the United States

[1] Coy Koontz, Sr., owned the subject property and filed the present lawsuit. When Koontz, Sr., passed away in the midst of litigation, his estate—as represented by his son, Koontz, Jr.—became the successor to the property and to his interest in the litigation.

Constitution, among other laws. Koontz prevailed in the Florida trial and appellate courts, but the Florida Supreme Court reversed in an opinion dated November 3, 2011. The Florida Supreme Court's decision became final on January 4, 2012, when the court denied Koontz's motion for reconsideration and/or clarification. On March 30, 2012, Justice Thomas granted Petitioner's application to extend the time within which to file the petition to June 1, 2012. *Koontz v. St. Johns River Water Management District*, No. 11A909.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. St. Johns River Water Management District Denies Koontz's Land-Use Permits, After He Refuses to Perform Costly Off-Site Work on the District's Property As the "Price" of Permit Approval

Koontz owned 14.2 acres of vacant land in Orange County, Florida. Pet. App. A-5. Zoned for commercial use, the property is immediately south of State Road 50 and immediately east of State Road 408—two major roadways. *Id*. Koontz sought to improve 3.7 acres of the property, which surrounding residential and commercial development, road construction, and other government projects had seriously degraded. Pet. App. D-3. Although the site had become unfit for animal habitat, most of it lay officially within a habitat protection zone subject to the St. Johns River Water Management District's jurisdiction. *Id*. Of the site's 3.7 acres, 3.4 were deemed to be wetlands, and 0.3 were uplands.[2] Pet. App. A-5.

In 1994, Koontz applied to the District for permits to dredge and fill 3.25 acres of wetlands. Pet. App. A-4 – A-6. As mitigation for the proposed project's disturbance of wetlands, Koontz agreed to dedicate the remainder of his property—almost 11 acres—to the State for conservation. Pet. App. A-6. But the District was not satisfied with nearly 80% of Koontz's land and leveraged its permitting power to press Koontz for

[2] After the inverse condemnation trial, the District determined that the development would only disturb approximately 0.8 acres of degraded wetlands. St. Johns River Water Management District's Opening Brief on the Merits at 5-8 (Fla. Sup. Ct., Nov. 12, 2009).

more: It demanded that Koontz enhance 50 off-site acres of wetlands on the District's property located between 4-1/2 and 7 miles away, by replacing culverts and plugging some ditches. Pet. App. A-6, D-4. The cost of the off-site work was estimated to be in the range of $10,000 (the District's estimate) to between $90,000 and $150,000 (Koontz's expert's estimate). Pet. App. D-4. The District never demonstrated how the off-site improvement of 50 acres of wetlands on government lands was related in nature or extent to the alleged impact of the Koontz's dredge-and-fill activities on little more than three acres of degraded wetlands. Pet. App. D-11.

Koontz refused the District's demand. Because of his refusal to comply, the District denied outright his permit applications. Pet. App. A-6. The District would not issue permits unless and until Koontz submitted to its off-site-work condition. *Id*.

B. Koontz Sues for Inverse Condemnation Under *Nollan* and *Dolan*, and Prevails in the Trial and Appellate Courts

Koontz brought an inverse-condemnation suit against the District in the Florida trial court. He alleged that the District's off-site improvements condition was unconstitutional under the Fifth and Fourteenth Amendments, as interpreted in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Pet. App. D-4. *Nollan* and *Dolan* provide the framework for assessing the constitutionality of extortionate conditions imposed by land-use agencies in the permitting process.

In *Nollan*, a state land-use agency, the California Coastal Commission, required the Nollans, owners of beach-front property, to dedicate an easement over a strip of their private beach as a condition of obtaining a permit to rebuild their home. *Nollan*, 483 U.S. at 827-28. The condition specifically was justified on the grounds that "the new house would increase blockage of the view of the ocean, thus contributing to the development of 'a 'wall' of residential structures' that would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit,'" and would "increase private use of the shorefront." *Id*. at 828-29 (quoting Commission). The Nollans refused to accept the condition and brought a federal taking claim against the Commission in state court to invalidate the condition. *Id*. at 828. The Nollans argued that the condition was unlawful, because it bore no connection to the impact of their proposed remodel.

This Court agreed, holding that the Commission's easement condition lacked an "essential nexus" to the alleged social evil that the Nollans' project caused. *Id*. at 837. The Court found that because the Nollans' home would have no impact on public beach access, the Commission could not justify a permit condition requiring them to dedicate an easement over their property. *Id*. at 838-39. Without a constitutionally sufficient connection between a permit condition and a project's alleged impact, the easement condition was "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id*. at 837 (citations omitted).

Similarly, in *Dolan*, 512 U.S. 374, this Court defined how close a "fit" is required between a permit condition and the alleged impact of a proposed land

use. There, the city imposed conditions on Dolan's permit to expand her store that required her to dedicate some of her land for flood-control and traffic improvements. *Id.* at 377. Dolan refused the conditions and sued the city, alleging that they effected an unlawful taking and should be enjoined.

This Court held that the city had established a connection between both conditions and the impact of Dolan's proposed expansion under *Nollan*, but nevertheless held that the conditions were unconstitutional. *Id.* at 394-95. Even when an "essential nexus" exists, the Court explained, there still must be a "degree of connection between the exactions and the projected impact of the proposed development." *Id.* at 386. There must be rough proportionality—i.e., "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391. This Court held that the city had not demonstrated that the conditions were roughly proportional to the impact of Dolan's expansion and struck them down. *Id.* at 394-95.

Applying *Nollan* and *Dolan*, the trial court found that the District "did not prove the necessary relationship between the condition of off-site mitigation and the effect of development." Pet. App. D at 11. The court explained that the District failed to show either an "[essential] nexus between the required off-site mitigation and the requested development of the tract[]" as required in *Nollan*, or "rough proportionality to the impact of site development," as required in *Dolan*. *Id.* Accordingly, the trial court concluded that the District's "denial of the Koontz

permit application . . . was invalid" and "resulted in a regulatory taking." *Id.*

On remand from the trial court, the District concluded that the proposed development would have substantially less impacts on wildlife habitat than it had previously thought and issued the permits to Koontz. Pet. App. A-7. The trial court subsequently awarded Koontz $376,154 in damages for the District's temporary taking of his property, which spanned the eleven years during which the District unlawfully withheld permit approval. *Id.* Pet. App. C-1 – C-2. The District appealed. Pet. App. A-7.

On appeal, the District did not argue that its condition requiring Koontz to perform off-site work on its property satisfies *Nollan* and *Dolan*. Pet. App. B-5 – B-6. Instead, the District argued that *Nollan* and *Dolan* apply only to permit approvals that contain unconstitutional conditions—not to permit denials that result from the property owner's refusal to accede to unconstitutional conditions. Because the District issued no permits until after the trial court invalidated the condition, it supposedly imposed no exaction, making *Nollan* and *Dolan* review unavailable to Koontz. Pet. App. B-6. Observing that the argument raised "a question that has evoked considerable debate among academics," the appellate court rejected the District's argument. Pet. App. B-6 – B-7. The court relied on *Dolan*, along with various federal and state supreme court decisions, to conclude that the "essential nexus" and "rough proportionality" tests apply equally to conditions attached to a permit approval and to conditions whose rejection results in a permit denial. Pet. App. B-7 ("Although the *Dolan* majority did not expressly address the issue, the precise argument was

addressed by the dissent and, thus, implicitly rejected by the majority" (citing *Dolan*, 512 U.S. at 408 (Stevens, J., dissenting))).

Moreover, the District unsuccessfully argued that the trial court erred in applying *Nollan* and *Dolan* to a condition requiring Koontz to "expend money to improve land belonging to the District." Pet. App. B-9 – B-10. According to the District, *Nollan* and *Dolan* can be applied only to those land-use exactions that compel a dedication of real property as a condition for permit approval. *Id*. Again, the court recognized that this question is the subject of broad debate and a nationwide split of authority. *Id*. at 10, 11-12, 21-22, 24-27. But, "[a]bsent a more definitive pronouncement from [this Court]," the court of appeal concluded that *Nollan* and *Dolan* apply to all property exactions—without distinction—and upheld the trial court's judgment. *Id*. at 10.

C. The Florida Supreme Court Refuses to Apply *Nollan* and *Dolan* to the District's Permit Condition and Reverses

The Florida Supreme Court accepted the District's petition for review. Pet. App. A-1. The supreme court noted that this Court "has only commented twice on the scope of the *Nollan*/*Dolan* test," and that "[s]tate and federal courts have been inconsistent with regard to interpretations of the scope of [that test]." Pet. App. A-15, A-17. In light of the lack of definitive guidance from this Court, and the court conflicts regarding the scope of *Nollan* and *Dolan*, the supreme court resigned itself to simply applying a very narrow and cramped interpretation of those cases. Because *Nollan* and

Dolan happened to involve exactions of easements imposed as part of permit approvals, the supreme court held that those cases could apply only to those kinds of exactions. Pet. App. A-18 ("Absent a more limiting or expanding statement from the United States Supreme Court with regard to the scope of *Nollan* and *Dolan*, we decline to expand this doctrine beyond the express parameters for which it has been applied by the High Court."). Importantly, the Florida Supreme Court did not consider the logic or purpose of the "essential nexus" and "rough proportionality" tests set forth in *Nollan* and *Dolan*—*i.e.*, to prevent land-use agencies from engaging in "out-and-out plan[s] of extortion," in whatever form, during the permitting process. *Nollan*, 483 U.S. at 837. Thus, the Florida Supreme Court adopted two per se rules of federal takings law:

> [U]nder the takings clauses of the United States and Florida Constitutions, the *Nollan*/*Dolan* rule with regard to "essential nexus" and "rough proportionality" is applicable only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought, thereby rendering the owner's interest in the real property subject to the dedication imposed.

Pet. App. A-19. The court overturned the lower court's conclusion that the District's refusal to issue the permits effected a temporary regulatory taking. Pet. App. A-21.

Koontz now respectfully asks this Court to issue a writ of certiorari and provide much-needed direction on the important questions of federal law decided below.[3]

REASONS FOR GRANTING THE WRIT

I

THE FLORIDA SUPREME COURT'S REFUSAL TO APPLY *NOLLAN* AND *DOLAN* SCRUTINY TO UNCONSTITUTIONAL EXACTIONS WHOSE REJECTION RESULTS IN PERMIT DENIALS RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD SETTLE

The Florida Supreme Court carved out a massive exception to *Nollan* and *Dolan*: Unconstitutional conditions whose rejection by the property owner results in a permit denial are immune from those decisions' heightened scrutiny. If it stands, the court's opinion threatens to effectively strip millions of Florida property owners of the important protections afforded by *Nollan* and *Dolan*—and the Takings Clause's guarantee that governments are barred "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49

[3] While this case was on appeal, the Estate of Coy A. Koontz, Sr., sold the subject property. The Estate, however, remains the judgment creditor and retains standing to petition the Florida Supreme Court's decision.

(1960). To avoid *Nollan* and *Dolan* under the Florida Supreme Court's decision, land-use agencies carefully will couch their demands for land, money, or labor as conditions precedent to permit approval; in this way, agencies will be able to bully landowners into "agreeing" to otherwise unconstitutional conditions as the heavy price of permit approval.

Three Justices of this Court have made clear that the timing of an otherwise unlawful condition—whether it is imposed before or after permit approval—does not matter. *Lambert v. City & County of San Francisco*, 529 U.S. 1045, 1048 (2000) (Scalia, J., dissenting from denial of cert.). And they have made clear that the relevance of such a distinction raises an important question of federal law "that will doubtless be presented in many cases." *Id*. at 1049.

In *Lambert*, a San Francisco hotel owner sought to convert residential rooms into tourist rooms. As a condition of permit approval, the city demanded that the owner pay $600,000 in mitigation for the lost residential units. The owner refused, and the city denied the permit application. The owner sued the city, challenging the constitutionality of the mitigation requirement under *Nollan* and *Dolan*. The trial and appellate courts ruled against the owner, on the same grounds that the Florida Supreme Court did in this case: Even though there was evidence that the city's permit denial was motivated by the owner's refusal to submit to its $600,000 demand, the courts concluded that, technically, no exaction had been imposed, since the permit had been denied. *Id*. at 1045-46.

This Court denied the property owner's writ of certiorari petition, which generated a three-Justice dissent. Joined by Justices Kennedy and Thomas,

Justice Scalia rejected the distinction between permit denials and approvals, as a basis for applying *Nollan* and *Dolan*. Justice Scalia explained:

> The court's refusal to apply *Nollan* and *Dolan* might rest on the distinction that it drew between the grant of permit subject to an unlawful condition and the denial of a permit when an unconstitutional condition is not met . . . . From one standpoint, of course, such a distinction **makes no sense**. The object of the Court's holding in *Nollan* and *Dolan* was to protect against the State's cloaking within the permit process an 'out and out plan of extortion' . . . . There is no apparent reason why the phrasing of an extortionate demand as a condition precedent rather than a condition subsequent should make a difference.

Id. at 1047-48 (emphasis added); *see also* Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. Ill. U. L. Rev. 513, 551 (1995) (The nexus and proportionality tests were intended to curtail the "common municipal practice of using the development exaction process as a means to capture already targeted tracts of land without paying just compensation[.]").

If a land-use agency imposes an exaction as a condition of obtaining permit approval, it still should have to establish the exaction's relationship to the impact of the proposed project. As the Justices observed,

> [w]hen there is uncontested evidence of a demand for money or other property—and

> still assuming that denial of a permit because of failure to meet such a demand constitutes a taking—it should be up to the permitting authority to establish either (1) that the demand met the requirements of *Nollan* and *Dolan*, or (2) that denial would have ensued even if the demand had been met.

529 U.S. at 1047-48.

Neither *Nollan* nor *Dolan* supports the distinction that the Florida Supreme Court made between conditions precedent and conditions subsequent. The question in *Nollan* and *Dolan* was whether the government could lawfully demand property as a condition of development; it was not whether the government's actual taking of property was unlawful. *Nollan*, 483 U.S. at 827; *Dolan*, 512 U.S. at 377. Both cases involved agency decisions that conditioned the issuance of a permit upon the dedication of a property interest to a public use. Neither landowner was required to actually dedicate the demanded property as a prerequisite to asserting a takings claim. *Nollan*, 483 U.S. at 828-30; *Dolan*, 512 U.S. at 382-83. And in both cases, this Court held that the constitutional violation occurred at the moment an unlawful demand was made. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 390. Similarly, Koontz's constitutional claim should not hinge on whether the District actually acquired his labor or money, but on whether the District's demands interfered with his right to make productive use of his property for its intended purpose as commercial land.

Finally, the Florida Supreme Court's distinction between conditions precedent and conditions subsequent ignore the theoretical foundations of

Nollan and *Dolan*. Both are "a special application of the 'doctrine of unconstitutional conditions,'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005), which holds that the government may not withhold a discretionary benefit on the condition that the beneficiary surrender a constitutional right. *See*, *e.g.*, *Marshall v. Barlow's Inc.*, 436 U.S. 307, 315 (1978) (holding that a business owner could not be compelled to choose between a warrantless search of his business by a government agent or shutting down the business); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 255 (1974) (holding a Florida statute unconstitutional as an abridgment of freedom of the press because it forced a newspaper to incur additional costs by adding more material to an issue or remove material it desired to print). In the context of a land-use exaction, the "government may not require a person to give up the constitutional right . . . to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit [that] has little or no relationship to the property." *Lingle*, 544 U.S. at 547 (citing *Dolan*, 512 U.S. at 391).

A violation of the unconstitutional conditions doctrine occurs the moment the government demands that a person surrender a constitutional right in exchange for a discretionary government benefit. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1421-22 (1989) (The unconstitutional conditions doctrine is violated "when the government offers a benefit on the condition that the recipient perform or forgo an activity that a preferred constitutional right normally protects from government interference."). Thus, it has never mattered to this Court whether the government

ultimately grants or denies the conditioned benefit. *See*, *e.g.*, *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972) (refusal to renew professor's employment contract in retaliation for professor's critical testimony regarding the university's board of regents violated unconstitutional conditions doctrine); *Sherbert v. Verner*, 374 U.S. 398, 404-06 (1963) (denial of unemployment benefits held unconstitutional where government required person to "violate a cardinal principle of her religious faith"); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (denial of tax exemption for applicants' refusal to take loyalty oath violated unconstitutional conditions doctrine); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 590, 593-94 (1926) (decision prohibiting use of public highways unless private carrier assumes the duties and burdens of common carrier violated unconstitutional conditions doctrine). Indeed, when formulating the rough proportionality test, this Court relied on a decision that applied an early version of the nexus and proportionality standards to invalidate a permit denial. *See Dolan*, 512 U.S. at 390 n.7 (citing *McKain v. Toledo City Plan Commission*, 270 N.E.2d 370, 374 (Ohio 1971) (Denial of a permit based on failure to dedicate property that was not sufficiently related to the proposed development amounts to a confiscation of private property)).

It should not make any difference, therefore, whether the District approved or denied Koontz's permit. The fact remains that the District violated the Constitution the moment it conditioned permit approval upon the dedication of Koontz's money and labor to a public project that was determined to be wholly unrelated to the impacts of his proposal. The District should not be allowed to dodge liability where,

for over eleven years, it decided to withhold all permit approvals necessary for Koontz to use his property because he refused to accede to the District's unlawful exaction. This Court should grant Koontz's petition to decide this important question.

II

THERE IS A CONFLICT AMONG THE LOWER COURTS ABOUT WHETHER THE *NOLLAN* AND *DOLAN* STANDARDS APPLY TO EXACTIONS OF MONEY OR OTHER PERSONAL PROPERTY

The Florida court held that the nexus and proportionality standards of *Nollan* and *Dolan* can never be applied to dedications of money or other personal property. Pet. App. A-19 - A-21. This issue has been the subject of a significant, nationwide split of authority that has been widening among the state courts of last resort and federal circuit courts of appeals for almost two decades.[4] Pet. App. A-17 - A-18. Most courts find *Nollan* and *Dolan* applicable to all forms of property dedications, including money.[5] A

---

[4] This split of authority arose almost immediately after this Court issued its decision in *Dolan* and has continued to grow since then. *See Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (*Dolan* applied to rent stabilization ordinance); *Waters Landing Ltd. P'ship v. Montgomery County*, 650 A.2d 712 (Md. 1994) (holding that *Dolan* cannot be applied to a monetary exaction).

[5] *See*, *e.g.*, *Toll Bros., Inc. v. Board of Chosen Freeholders of Burlington*, 944 A.2d 1, 4 (N.J. 2008); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 635, 639-40, 641-42 (Tex. 2004); *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d

(continued...)

significant minority, however, hold that the nexus and proportionality tests apply only to dedications of real property.[6] This deep and irreconcilable split of authority is firmly entrenched, and it cannot be resolved without this Court's clarification.

---

[5] (...continued)
821, 825 (N.Y. 2003), *cert. denied*, 541 U.S. 974 (2004)*; Krupp v. Breckenridge Sanitation District*, 19 P.3d 687, 697-98 (Colo. 2001); *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 353-56 (Ohio 2000); *Benchmark Land Co. v. City of Battleground*, 972 P.2d 944, 950-51 (Wash. Ct. App. 2000) *aff'd*, 49 P.3d 860 (Wash. 2002) (affirmed on non-constitutional grounds); *Dowerk v. Charter Township of Oxford*, 592 N.W.2d 724, 728 (Mich. Ct. App. 1998); *Curtis v. Town of South Thomaston*, 708 A.2d 547, 660 (Me. 1998); *National Association of Home Builders of the United States v. Chesterfield County*, 907 F. Supp. 166, 167 (E.D. Va. 1995), *aff'd*, 92 F.3d 1180 (4th Cir. 1996) (unpublished), *cert. denied*, 519 U.S. 1056 (1997); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995); *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995); *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995); *Trimen Development Co. v. King County*, 877 P.2d 187, 191 (Wash. 1994).

[6] *See e.g.*, *West Linn Corporate Park, LLC v. City of West Linn*, 428 Fed. Appx. 700, 702 (9th Cir.), *cert. denied*, 132 S. Ct. 578 (2011); *West Linn Corporate Park, LLC v. City of West Linn*, 240 P.3d 29, 45 (Or. 2010); *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008), *cert. denied*, 556 U.S. 1282 (2009); *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687, 695-97 (Colo. 2001); *Sea Cabins on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach*, 548 S.E.2d 595, 603 n.5 (S.C. 2001); *Home Builders Ass'n of Central Arizona v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz.), *cert. denied*, 521 U.S. 1120 (1997); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1579 (10th Cir. 1995); *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995); *Waters Landing Ltd. P'ship v. Montgomery County*, 650 A.2d 712 (Md. 1994).

A. The Florida Court's Rule Conflicts with the Fifth Amendment and the Purpose of *Nollan* and *Dolan*

The choice of some lower courts to carve out certain land-use exactions from constitutional scrutiny, based solely on the type of private property demanded, ignores the plain language of the Takings Clause and this Court's precedents. The Fifth Amendment protects all private property, including money and personal property, from uncompensated takings. U.S. Const. amend. V; *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980) (money); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (tangible and intangible goods); *Village of Norwood v. Baker*, 172 U.S. 269, 279 (1898) ("[T]he exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, or private property for public use without compensation."). The central question in any *Nollan* and *Dolan* challenge is whether, if the property demand were imposed directly, the government would have to pay just compensation. *Lingle*, 544 U.S. at 547. If so, the demand, whether for real or personal property, falls within the purview of *Nollan* and *Dolan*. *Id*. This question does not turn on the type of property being exacted, but on the impact that the exaction has on Koontz's rights in his private property and the question of who should bear the cost of the District's public improvement projects. *Id*. at 542-43.

As stated above, this Court's application of the unconstitutional conditions doctrine in *Nollan* and *Dolan* was intended to protect against the compelled

waiver of the right to compensation, which occurs whenever the government demands an excessive or unrelated dedication of property in exchange for a permit approval. *Id*. at 547. A rule that the right to just compensation will be safeguarded only when the government targets real property finds no support in this Court's unconstitutional conditions precedents. *See Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926) (invalidating state law that required trucking company to dedicate personal property to public uses as a condition for permission to use highways); *Baltic Min. Co. v. Mass.*, 231 U.S. 68, 83 (1913) ("[A] state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without the due process of law[.]"). Nor is the Florida court's rule supported by *Dolan*, which relied on cases that invalidated land-use exactions requiring the applicant to pay for unrelated, off-site public improvement projects when developing the proportionality test. *Dolan*, 512 U.S. 389-90 at n.7 (citing *J.E.D. Assocs. v. Atkinson*, 432 A.2d 12, 15 (N.H. 1981); *Divan Builders v. Planning Bd. of the Township of Wayne*, 334 A.2d 30, 40 (N.J. 1975)).

The fact that *Nollan* and *Dolan* both involved dedications of real property, which if imposed directly would have effected a physical taking, does not dictate the conclusion that any other type of property dedication must be categorically excluded from scrutiny under the nexus and proportionality tests. *Lingle*, 544 U.S. at 547 (explaining that the nexus and proportionality tests were applied to the exactions in *Nollan* and *Dolan* because they involved "dedications of property so onerous that, outside the exactions context, they would be deemed per se physical

takings"). Just like real property, one's money or other personal property can be subject to a physical taking. *See Brown v. Legal Foundation of Washington*, 538 U.S. 216, 231-32, 234 (2003) (likening a government act compelling the transfer of private funds to a public use to a physical taking); *see also Pioneer Trust & Sav. Bank v. Mt. Prospect*, 176 N.E 799, 801-02 (Ill. 1961) (invalidating a permit condition requiring the developer to dedicate property for recreational and educational facilities because the dedication was the functional equivalent of forcing the landowner to pay for public improvements), (*cited by Dolan*, 512 U.S. 389-90 at n.7). Accordingly, this Court has never limited the nexus and proportionality tests to dedications of real property; instead, it has consistently explained that *Nollan* and *Dolan* apply to a "dedication of property," "dedication of private property," or "excessive exactions." *See Lingle*, 544 U.S. at 547; *Del Monte Dunes*, 526 U.S. at 702-03; *Dolan*, 512 U.S. at 390. Many lower courts, nonetheless, continue to hold to the contrary.

Moreover, the Florida court's conclusion that *Nollan* and *Dolan* apply only to compelled dedications of real property cannot be squared with this Court's grant of certiorari and remand in *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 1743 (1993), *vacated and remanded*, 512 U.S. 1231 (1994). In *Ehrlich*, the owner of a private tennis club and recreational facility applied to the City of Culver City for an amendment to a general plan, a zoning change, and amendment of the specific plan to allow replacement of the tennis club and recreational facility with a condominium complex. *Id.* The City approved the application conditioned upon the payment of

certain monetary exactions, including a $280,000 fee to pay a portion of the cost of replacing the lost recreational facilities. *Id.* The California appellate court rejected the property owner's *Nollan*-based regulatory takings challenge, holding that monetary exactions are not subject to heightened scrutiny under the nexus test. *Id.* This Court granted certiorari, vacated the lower court's judgment, and remanded the case for consideration under *Dolan*. *Ehrlich*, 512 U.S. at 1231. On remand, the California Supreme Court held that the nexus and proportionality tests apply equally to land-use exactions that require a property owner to dedicate land or pay fees. 911 P.2d 429, 444 (Cal. 1996) ("[I]t matters little whether the local land use permit authority demands the actual conveyance of the property or the payment of a monetary exaction."); *see also San Remo Hotel v. City & County of San Francisco*, 41 P.3d 87, 102 (Cal. 2002) ("Though the members of this court disagreed on various parts of the analysis, we unanimously held that this ad hoc monetary exaction was subject to *Nollan*/*Dolan* scrutiny.").

Since *Ehrlich*, however, this Court has denied every petition for a writ of certiorari asking whether *Nollan* and *Dolan* apply to non-real property exactions. These petitions included cases where the lower court applied *Nollan* and *Dollan* to a monetary exaction and in cases where the lower court refused to subject such exactions to the nexus and proportionality tests. *See*, *e.g.*, *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d 821, 825 (N.Y. 2003), *cert. denied*, 541 U.S. 974 (2004) (*Dolan*'s rough proportionality test applies to an exaction of park fees); *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008), *cert. denied*, 129 S. Ct.

2765 (2009) (holding that *Nollan* and *Dolan* are limited to dedications of real property). Faced with an irreconcilable conflict on a question of federal takings law, lower courts, like the Florida court below, have repeatedly indicated that, due to a lack of guidance from this Court, they are simply having to choose sides in a deepening split of authority. Pet. App. A-19; Pet. App. B at 10-12, 21-22, 24-27; *see also West Linn Corporate Park, LLC v. City of West Linn*, 240 P.3d 29, 45 (Or. 2010), *cert. denied*, 132 S. Ct. 181 (2011) (explaining that, without guidance from the U.S. Supreme Court, it would strictly limit *Nollan* and *Dolan* to their facts). This is a wholly inappropriate basis upon which to deny a person's right to seek compensation for a violation of his or her rights under the Takings Clause and warrants certiorari.

B. *Del Monte Dunes* Did Not Limit *Nollan* and *Dolan*

Confusion about whether *Nollan* and *Dolan* apply to exactions of personal property is driven primarily by this Court's discussion of the nexus and proportionality tests in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-03 (1999); Pet. App. A-18 - A-19. In *Del Monte Dunes*, a property owner submitted a series of applications for a permit to build a multi-family residential complex on a coastal property zoned for such use. 526 U.S. at 695-98. The city delayed and denied every permit application for a variety of reasons (*id.*), and the landowner sued alleging two different regulatory takings theories: (1) that the reasons the city provided for its denials lacked a sufficient nexus to the government's stated objectives under *Nollan*; and (2) that the permit denial deprived the property owner of all economically viable

use under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).[7] *Del Monte Dunes*, 526 U.S. at 700-01.

The jury delivered a general verdict that the government's actions effected a temporary regulatory taking and awarded compensation. *Id*. The Ninth Circuit Court of Appeals upheld the verdict, concluding that there was sufficient evidence in the record to support the jury's verdict on either regulatory takings theory. *Id*. at 701-02 (citing *Del Monte Dunes*, 95 F.3d at 1430-34). In doing so, however, the Ninth Circuit posited that the evidence could have also established a violation of *Dolan*'s rough proportionality test. This Court granted certiorari, in part, to determine whether the Ninth Circuit "erred in assuming that the rough-proportionality standard of [*Dolan*] applied to this case." *Id*. at 702.

This Court briefly discussed the rough proportionality test, noting that, although all regulatory takings claims include consideration of whether the burden being placed on a landowner is proportional, *Dolan*'s "rough proportionality" test was specifically developed to address excessive land-use exactions and was not readily applicable to cases where the landowner challenges the application of a general land use regulation to deny a permit application. *Id*. at 703 (*Dolan* "was not designed to address, and is not readily applicable to . . . [a situation where] the landowner's challenge is based not on

---

[7] While Del Monte Dune's lawsuit was pending, the city purchased the property. 526 U.S. at 700. Accordingly, the property owner's claims were considered as alleging a temporary taking. *Id*. at 704; *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 95 F.3d 1422, 1425-26 (9th Cir. 1996).

excessive exactions but on denial of development."); *see also id*. at 733 (Souter, J., concurring in part and dissenting in part) (agreeing with lead opinion "in rejecting extension of 'rough proportionality' as a standard for reviewing land-use regulations generally"). Ultimately, however, this Court held that it was unnecessary to address whether the Ninth Circuit erred when it considered *Dolan* because there was substantial evidence on the record demonstrating that the city's decision to deny the permit lacked a sufficient nexus to the government's stated objectives:[8]

> Del Monte provided evidence sufficient to rebut each of [the City's] reasons [for denying the final proposal]. Taken together, Del Monte argued that the City's reasons for denying their application were invalid and that it unfairly intended to forestall any reasonable development of the [property]. In light of evidence proffered by Del Monte, the City has incorrectly argued that no rational juror could conclude that the City's denial of Del Monte Dune's application lacked a sufficient nexus with its stated objective.

---

[8] The decision speaks to both *Nollan*'s nexus requirement and the requirement that the decision substantially advance a legitimate government interest. *Del Monte Dunes*, 526 U.S. at 701, 704. In *Lingle*, this Court excised the "substantially advances" requirement from the nexus and proportionality tests. *Lingle*, 544 U.S. at 545-48 (The question whether a regulation substantially advances a legitimate government interest is properly part of a due process analysis; it "has no proper place in our takings jurisprudence."). The "substantially advance a legitimate government" inquiry is now properly considered as part of a due process analysis. *Lingle*, 544 U.S. at 545-48.

Id. at 703 (quoting *Del Monte Dunes*, 95 F.3d at 1431-32).

Just like *Del Monte Dunes*, the trial court in this case concluded that the District's proffered reason for denying Koontz's permit applications—his refusal to accede to the off-site improvement condition—lacked the required nexus linking the project impacts to the government's stated objectives:

> St. Johns Water Management District did not prove the necessary relationship between the condition of off-site mitigation and the effect of development. There was neither a showing of nexus between the required off-site mitigation and the requested development of the tract, nor was there a showing of rough proportionality to the impact of site development. . . . St. Johns District's required conditions of unspecified but substantial off-site mitigation resulted in a regulatory taking. It is the opinion of this Court that the denial of the Koontz permit application by the St. Johns Water Management District was invalid[.]

Pet. App. D-11. Koontz clearly stated a cognizable claim for a regulatory taking under this Court's precedents and the Takings Clause of the U.S. Constitution. *Lingle*, 544 U.S. at 548 ("[A] plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed . . . by alleging . . . a land-use exaction violating the standards set forth in *Nollan* and *Dolan*."); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987) (Temporary takings "are not different in kind from permanent takings, for

which the Constitution clearly requires compensation. The only difference is that a temporary taking puts private property to public use for a limited period of time.").

The Florida court, however, focused narrowly on the one sentence from *Del Monte Dunes* where this Court explained that it had not applied the proportionality test outside the context of land-use exactions, to hold that *Del Monte Dunes* had "specifically limited the scope of *Nollan* and *Dolan* to those exactions that involve[] the dedication of real property for a public use." Pet. App. A-19; *see also McClung*, 548 F.3d at 1227 (citing *Del Monte Dunes* as having limited *Nollan* and *Dolan*); *Sea Cabins*, 548 S.E.2d at 603 n.5 (same). By overlooking the actual holding of *Del Monte Dunes*, the Florida court reached an opposite conclusion on facts similar to those in *Del Monte Dunes*. The decision below creates more confusion on a constitutional test that is already the subject of a deeply entrenched split of authority and warrants certiorari.

C. Resolving the Split of Authority Is Necessary and Warranted in This Case

This petition provides the Court with a good opportunity to address the split of authority on the scope of *Nollan* and *Dolan* because it presents the issue as a pure question of law. There is no question that, if *Nollan* and *Dolan* apply to the District's off-site improvement demand, a taking occurred. The petition, therefore, squarely asks whether *Nollan* and *Dolan* apply to development conditions that compel a landowner to dedicate his or her personal property to

the public. This question arises frequently, particularly in regard to conditions compelling an applicant to make off-site public improvements, and is the subject of a nationwide split of authority. *See*, *e.g.*, *Toll Bros., Inc. v. Board of Chosen Freeholders of Burlington*, 944 A.2d 1, 4 (N.J. 2008) (The government "may only impose off-tract improvements on a developer if they are necessitated by the development."); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 635, 639-42 (Tex. 2004) ("For purposes of determining whether an exaction as a condition of governmental approval of development is a compensable taking, we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved."); *West Linn Corporate Park, LLC v. City of West Linn*, 428 Fed. Appx. 700, 702 (9th Cir. 2011) (nexus and proportionality tests do not apply to an exaction requiring landowner to dedicate money to off-site public improvements). And several lower courts, including the Florida court below, have indicated that they will not reconsider their positions on this question unless and until this Court clarifies that the nexus and proportionality tests protect all private property. Pet. App. A-19; *West Linn*, 240 P.3d at 45.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED: June, 2011

Respectfully submitted,

Brian T. Hodges
Pacific Legal Foundation
10940 NE 33rd Place,
Suite 210
Bellevue, WA 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
E-mail:
bth@pacificlegal.org

PAUL J. BEARD II
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: pjb@pacificlegal.org

MICHAEL D. JONES
P.O. Box 196130
Winter Springs, FL 32719
Telephone: (407) 359-9908

CHRISTOPHER V. CARLYLE
The Carlyle Appellate
Law Firm
1950 Laurel Manor Drive,
Suite 130
The Villages, FL 32162
Telephone: (352) 259-8852

Counsel for Petitioner

TABLE OF CONTENTS

Appendix A–1

Supreme Court of Florida

No. SC09-713

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Petitioner,

vs.

COY A. KOONTZ, etc.,

Respondent.

[November 3, 2011]

LEWIS, J.

This case is before the Court for review of the decision of the Fifth District Court of Appeal in *St. Johns River Water Management District v. Koontz*, 5 So. 3d 8 (Fla. 5th DCA 2009) (*Koontz IV*). In its decision, the Fifth District construed provisions of the state and federal constitutions. The district court also certified a question to be of great public importance, which we have rephrased as follows:

> DO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE X, SECTION 6(a) OF THE FLORIDA CONSTITUTION RECOGNIZE AN EXACTIONS TAKING UNDER THE HOLDINGS OF *NOLLAN V. CALIFORNIA COASTAL COMMISSION*, 483 U.S. 825 (1987), AND *DOLAN V. CITY OF TIGARD*, 512 U.S. 374 (1994), WHERE THERE IS NO COMPELLED DEDICATION OF ANY INTEREST IN REAL PROPERTY TO

> PUBLIC USE AND THE ALLEGED EXACTION IS A NON LAND-USE MONETARY CONDITION FOR PERMIT APPROVAL WHICH NEVER OCCURS AND NO PERMIT IS EVER ISSUED?[1]

We have jurisdiction. *See* art. V, § 3(b)(3)-(4), Fla. Const.

We rephrase the certified question to reflect that the issue presented by this case is controlled by the existing interpretation of the United States Constitution by the United States Supreme Court. This Court has previously interpreted the takings clause of the Fifth Amendment and the takings clause of the Florida Constitution coextensively. *See, e.g.*, *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54, 58 (Fla. 1994) ("We

---

[1] The original certified question provided:

> 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* [n.1] AND *DOLAN* [n.2] WHERE, INSTEAD OF A COMPELLED DEDICATION OF REAL PROPERTY TO PUBLIC USE, THE EXACTION IS A CONDITION FOR PERMIT APPROVAL THAT THE CIRCUIT COURT FINDS UNREASONABLE?

[N.1.] *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

[N.2.] *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

Koontz IV, 5 So. 3d at 22.

acknowledge that in striking down the offending portion of the statute in *Joint Ventures*, we referred to the takings clauses of our state and federal constitutions."); *Joint Ventures, Inc. v. Dep't of Transp.*, 563 So. 2d 622, 623 (Fla. 1990) ("We answer the question in the affirmative, finding those subsections invalid as a violation of the fifth amendment to the United States Constitution and article X, section 6(a) of the Florida Constitution."). We also rephrase the question to address the two actual factors to which the doctrine of exactions was expanded by the Fifth District—application of the doctrine to an alleged exaction that does not involve the dedication of an interest in or over real property; and application of the doctrine where an exaction does not occur and no permit is issued by the regulatory entity.

For the reasons expressed below, we answer the rephrased question in the negative and quash the decision under review.

BACKGROUND

This case has an extended procedural history. Prior to the issuance of the decision that is currently before the Court, issues related to the regulation of this property were before the Fifth District Court of Appeal on three occasions. During the first appeal, the Fifth District reversed a determination by the trial court that the claim of Coy A. Koontz, Sr. (Mr. Koontz) was not ripe for adjudication and remanded the matter for a trial on whether the actions of the St. Johns River Water Management District (St. Johns) effected a taking of Mr. Koontz's property. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 720 So. 2d 560, 562 (Fla. 5th DCA 1998) (*Koontz I*), *review denied*, 729 So. 2d 394 (Fla. 1999). After the trial court determined

that a taking had occurred, St. Johns twice attempted to appeal that determination, but the Fifth District dismissed both appeals, concluding that the orders issued by the trial court did not constitute final orders or appealable non-final orders. *See St. Johns River Water Mgmt. Dist. v. Koontz*, 861 So. 2d 1267, 1268 (Fla. 5th DCA 2003) (*Koontz II*); *St. Johns River Water Mgmt. Dist. v. Koontz*, 908 So. 2d 518, 518 (Fla. 5th DCA 2005) (*Koontz III*). After the trial court entered a judgment assessing damages in favor of Coy A. Koontz, Jr., as personal representative of the Estate of Mr. Koontz, St. Johns filed an appeal to review that judgment. *See Koontz IV*, 5 So. 3d at 8.

The decision resulting from that appeal in *Koontz IV* provides the following background:

This case involves a landowner, Mr. Koontz, who, in 1994, requested permits from [St. Johns] so that he could develop a greater portion of his commercial property than was authorized by existing regulation. . . . Based on the permit denial, Mr. Koontz brought an inverse condemnation claim asserting an improper "exaction" by [St. Johns].

In the most general sense, an "exaction" is a condition sought by a governmental entity in exchange for its authorization to allow some use of land that the government has otherwise restricted. Even though the government may have the authority to deny a proposed use outright, under the exactions theory of takings jurisprudence, it may not attach arbitrary conditions to issuance of a permit.

In relating the circumstances giving rise to this case, the trial court explained:

> The subject property is located south of State Road 50, immediately east of the eastern extension of the East-West Expressway in Orange County. The original plaintiff, Coy Koontz, has owned the subject property since 1972. In 1987, a portion of the original acreage[2] adjacent to Highway 50 was condemned, leaving Mr. Koontz with 14.2 acres. There is a 100-foot wide transmission line easement of Florida Power Corporation running parallel to and about 300 feet south of Highway 50, that is kept cleared and mowed by Florida Power. . . .
>
> . . . .
>
> All but approximately 1.4 acres of the tract lies within a Riparian Habitat Protection Zone (RHPZ) of the Econlockhatchee River Hydrological Basin and is subject to jurisdiction of the St. Johns River Water Management District.
>
> In 1994, Koontz sought approval from [St. Johns] for a 3.7 acre development area adjacent to Highway 50, of which 3.4 acres were wetlands and .3 acres were uplands.

In his concurring opinion in *Koontz II*, Judge Pleus explained the positions [advanced] by the parties during the permit approval process:

> Koontz proposed to develop 3.7 acres closest to Highway 50, back to and including the power line easement. In order to develop his

---

[2] Mr. Koontz owned a total of 14.9 acres in Orange County. *See Koontz I*, 720 So. 2d at 561.

> property, he sought a management and storage of surface waters permit to dredge three and one quarter acres of wetlands. A staffer from St. Johns agreed to recommend approval if Koontz would deed the remaining portion of his property into a conservation area and perform offsite mitigation by either replacing culverts four and one-half miles southeast of his property or plug certain drainage canals on other property some seven miles away. Alternatively, St. Johns demanded that Koontz reduce his development to one acre and turn the remaining 14 acres into a deed-restricted conservation area. Koontz agreed to deed his excess property into conservation status but refused St. Johns' demands for offsite mitigation or reduction of his development from three and seven-tenths acres to one acre. Consequently, St. Johns denied his permit applications.

Id. at 1269 (Pleus, J., concurring specially). In its orders denying the permits, [St. Johns] said that Mr. Koontz's proposed development would adversely impact Riparian Habitat Protection Zone ["RHPZ"] fish and wildlife, and that the purpose of the mitigation was to offset that impact.

After hearing conflicting evidence, the trial court concluded that [St. Johns] had effected a taking of Mr. Koontz's property . . . . In reaching this conclusion, the trial court applied the constitutional standards enunciated by the Supreme Court in *Nollan* and *Dolan*. In *Nollan*, with respect to discretionary decisions to issue permits, the Supreme Court held that the

government could impose a condition on the issuance of the permit without effecting a taking requiring just compensation if the condition "serves the same governmental purpose as the developmental ban." 483 U.S. at 837. This test is referred to as the "essential nexus" test. In *Dolan*, the Court added the requirement that, for such a condition to be constitutional, there must also be a "rough proportionality" between the condition and the impact of the proposed development. 512 U.S. at 390-91.

Koontz IV, 5 So. 3d at 9-10 (footnotes omitted) (citations omitted).

After the circuit court determined that St. Johns had effected a taking of Mr. Koontz's property, statutory law required St. Johns to take one of three possible actions: (a) agree to issue the permit; (b) agree to pay damages; or (c) agree to modify its decision to avoid an unreasonable exercise of police power. *See* § 373.617(3), Fla. Stat. (2002). Here, St. Johns chose to issue the permits to Mr. Koontz after it received additional evidence which demonstrated that the amount of wetlands on Mr. Koontz's property was significantly less than originally believed. The circuit court subsequently awarded Mr. Koontz $376,154 for a temporary taking of his property by St. Johns.

On appeal, St. Johns first contended that the trial court lacked subject matter jurisdiction to consider Mr. Koontz's exactions claim because the statute under which the claim was asserted, section 373.617, Florida Statutes (1993), limited circuit court review to cases in which a constitutional taking has actually occurred. *See Koontz IV*, 5 So. 3d at 10. St. Johns asserted that although an exactions claim is a form of taking and is cognizable under section 373.617, no exaction occurred

here because nothing had been taken from Mr. Koontz. *See id.* at 10-11. The original limitations applicable to the property were never challenged. The Fifth District Court of Appeal framed this challenge as "whether 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." *Id.* at 11. The district court concluded that the United States Supreme Court had implicitly determined in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), that an exaction occurs under such circumstances. *See* 5 So. 3d at 11.

St. Johns also contended that an action for inverse condemnation lacked merit because the condition proposed by St. Johns did not involve a physical dedication of land but instead would have caused Mr. Koontz to expend money for improvement of land belonging to St. Johns if accepted. *See id.* at 12. The Fifth District Court of Appeal also rejected this assertion and concluded that the United States Supreme Court had implicitly decided this issue adverse to St. Johns in *Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994). *See* 5 So. 3d at 12. In *Ehrlich*, the United States Supreme Court vacated a lower court decision that approved the conditioning of a permit on the payment of money to build tennis courts and purchase artwork and remanded the case for reconsideration in light of *Dolan*. *See id.* (citing *Ehrlich*, 512 U.S. 1231). The Fifth District concluded that in the absence of a more definite pronouncement from the United States Supreme Court on this issue, the distinction advanced by St. Johns was not legally significant. *See Koontz IV*, 5 So. 3d at 12. The Fifth

District affirmed the trial court judgment awarding compensation to Mr. Koontz. *See id.*

In dissent, Judge Griffin asked, "[i]n 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?" *Id.* at 20 (Griffin, J., dissenting). Judge Griffin asserted that whether a taking has occurred depends on whether a landowner gives up any protected interest in his or her land:

> If [a protected interest is given up], whether temporarily or permanently, the landowner is entitled to compensation as set forth in the "taking" cases. If, however, the unconstitutional condition does not involve the taking of an interest in land, the remedy of inverse condemnation is not available. In this case, the objected-to condition that was found to be an exaction was not an interest in land; it was the requirement to perform certain off-site mitigation in the form of clean-up of culverts and ditches to enhance wetlands several miles away.

Id. at 18 (Griffin, J., dissenting). Judge Griffin also reasoned that whether a condition that has been rejected can constitute a taking was not resolved in *Dolan*, and that a taking does not occur under such circumstances:

> In this case, if Mr. Koontz had given in to [St. Johns'] condition, gotten his development permit and done the off-site mitigation, he

> would be entitled to recover the value of the off-site mitigation. If he elected to refuse the offer, he had a judicial remedy to invalidate the condition . . . . The parcel of land for which he sought the development permit was not, however, in any wise "taken" by [St. Johns]. The only way a "taking" can even be conceptualized in such a circumstance is by adopting the view that by proposing an "unconstitutional condition" that was rejected, [St. Johns] forfeited its right (and duty) to protect the public interest to refuse the permit at all.

Id. at 20-21 (Griffin, J., dissenting).

St. Johns subsequently filed a motion for certification, which the Fifth District Court of Appeal granted. *See id*. at 22. The district court then certified a question to this Court as one of great public importance.

ANALYSIS

Standard of Review and Constitutional Provisions

As a preliminary matter, the interpretation of a constitutional provision is a question of law that is reviewed de novo. *See Fla. Dep't of Rev. v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005).

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. *See* amend. V, U.S. Const. The Fifth Amendment is applicable to the states through the Fourteenth Amendment. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). The purpose behind the takings

doctrine is to prevent government from forcing an individual to bear burdens that should be carried by the public as a whole. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). The takings provision of the Florida Constitution provides: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." Art. X, § 6(a), Fla. Const. As previously discussed, this Court has interpreted the takings clauses of the United States and Florida Constitutions coextensively. *See A.G.W.S. Corp.*, 640 So. 2d at 58; *Joint Ventures*, 563 So. 2d at 623.

Takings Under Supreme Court Case Law

The United States Supreme Court has stated that the takings clause of the Fifth Amendment does not prohibit the taking of private property by the government, but instead places conditions on the exercise of that power. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987). The clause is not intended to limit government interference with property rights, but rather to secure compensation where otherwise proper interference amounts to a taking. *See id.* at 315.

Outside the special context of land-use exactions (discussed below), the United States Supreme Court has recognized two types of regulatory actions that generally constitute *per se* takings under the Fifth Amendment. First, if government action causes a permanent physical invasion of private property, the government must provide just compensation to the owner of the property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (taking occurred where state law required landlords to allow

cable companies to install cable equipment in their apartment buildings). Second, a government regulation that completely deprives an owner of all economically beneficial use of his or her property effects a Fifth Amendment taking. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). In *Lucas*, the United States Supreme Court held that the government must pay just compensation for such "total regulatory takings," *id*. at 1026, except to the extent that the owner's intended use of his or her property is restricted by nuisance and property law. *See id*. at 1026-32.

Aside from regulations that allow physical invasions of private property or deprive a property owner of all beneficial property use, regulatory takings challenges are governed by the standard articulated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). The United States Supreme Court in *Penn Central* acknowledged that it had previously been unable to establish any "set formula" for evaluating regulatory takings claims, but identified a number of factors that have particular significance. *Id*. at 124. The United States Supreme Court stated that the primary factor to consider is "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Id*. The Supreme Court also concluded that the character of the governmental action, such as whether the action constitutes a physical invasion or merely impacts property interests, can be relevant to a determination of whether a taking has occurred. *See id*. The *Penn Central* standard has served as the principal guide for assessing allegations that a regulatory taking has

occurred where the government action does not fall within the physical-invasion or *Lucas* takings categories.

With regard to the doctrine of exactions, in the late 1980s and early-to-mid 1990s, the United States Supreme Court issued two decisions, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), a California case that involved a beach pass-through easement, and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), an Oregon case that involved storm-water and bike-path land dedications. These cases arose from landowner requests for building permits to expand the structures located on their real property. In response, the pertinent governmental entities approved the permits, but conditioned that approval on the receipt of exactions.

In *Nollan*, the California Coastal Commission approved the Nollans' request for a building permit subject to the dedication of an easement that would allow the public to pass across the beach that was owned by the Nollans behind their home. *See* 483 U.S. at 828. The Nollans proceeded to build their expanded home but legally contested the exaction imposed as an uncompensated taking. *See id*. at 828-30. On certiorari review, the United States Supreme Court articulated an "essential nexus" test, which required a government entity to establish that the condition imposed for approval of a building permit (i.e., the exaction) served the same public purpose that would have supported a total ban of the proposed development. *See* 483 U.S. at 836-37. Thus, if (as the Commission asserted) the public's right to view the shore from the street was the supporting reason for denying the Nollans' permit, the proposed

condition/exaction must directly relate to and further this supporting reason. *See id.* at 835-38. For example, a height restriction on the proposed development to preserve the view corridor might satisfy the requirement. *See id.* at 836. However, the easement at issue in *Nollan*, which would allow members of the public to pass across beach owned by the Nollans, failed this test because the right of the public to view the shore from a nearby street was not served by the ability of individuals to traverse up and down the Nollans' beach property. *See id.* at 838-39. Thus, the United States Supreme Court concluded that if the State of California desired an easement across the Nollans' property, the State must pay compensation for that easement. *See id.* at 841-42.

On certiorari review in *Dolan*, the Court expanded upon *Nollan* to not only require an "essential nexus" between the permit-approval condition upon the land and the alleged public problem caused by the proposed development, but also to require "rough proportionality" between the condition placed on the land and the extent of the impact of the proposed development. *See* 512 U.S. at 391. For example, where (as in *Dolan*) one asserted impact of the development was increased traffic congestion, and the permit-approval condition on the property was the dedication of land for a bike path, the government must demonstrate that the additional number of vehicle and bicycle trips generated by the development are reasonably related to the government's requirement for dedication of a bicycle path easement over the property. *See id.* at 387-88, 395-96. Similar to *Nollan*, the government entity in *Dolan* approved the requested permit subject to contested conditions on

the land (i.e., storm-water and bike-path land dedications), and the landowner filed an action claiming that these conditions over the land constituted uncompensated takings. *See Dolan*, 512 U.S. at 379-83.

In the sixteen years since the Supreme Court issued *Dolan*, the High Court has only commented twice on the scope of the *Nollan*/*Dolan* test. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999), the developer submitted nineteen different site plans to the City of Monterey for development of an oceanfront parcel of land. Each time, the city rejected the plan and imposed even more rigorous conditions upon the developer. *See id.* at 697-98. When the developer concluded that the city would not permit development under any circumstances, it filed suit in federal court contending that the final denial of development constituted a regulatory taking of the property. *See id.* at 698. The United States Supreme Court concluded that the *Nollan*/*Dolan* exactions standard was inapplicable to the actions of the city:

> [W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use. *See Dolan*, [512 U.S.] at 385; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987). The rule applied in *Dolan* considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts. It was not designed to address, and

> is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development. We believe, accordingly, that the rough-proportionality test of *Dolan* is inapposite to a case such as this one.

Id. at 702-03 (emphasis supplied).

More recently, in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), the United States Supreme Court rejected a takings test that it had previously adopted in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). *See Lingle*, 544 U.S. at 548 ("We hold that the . . . substantially advances formula is not a valid takings test . . . ."). The *Agins* standard had been mentioned in both *Nollan* and *Dolan*, which caused the Supreme Court to expressly note that its rejection of that standard had no impact on the holdings of these two more recent cases. *See id.* at 546-48.

In the context of this discussion, the Supreme Court reasoned that *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions—more specifically, government demands that landowners *dedicate easements* over their land to allow the public access across their property as a condition of obtaining development permits. *See id.* at 546. The Court further stated that it refined the *Nollan* "essential nexus" test in *Dolan* by holding that an adjudicative exaction *requiring dedication of private property* must also be " . . . rough[ly] proportiona[l]" . . . both in nature and extent to the impact of the proposed development." 512 U.S., at 391; *see also Del Monte Dunes*, *supra*, at 702

(emphasizing that we have not extended this standard "beyond the special context of [such] exactions"). *Id*. at 547 (alterations in original) (emphasis supplied).

The Scope of the *Nollan*/*Dolan* Test

State and federal courts have been inconsistent with regard to interpretations of the scope of the *Nollan*/*Dolan* test, even after the decisions in *Del Monte Dunes* and *Lingle*. The divide is most clearly evident on the issue of whether the test applies to conditions that do not involve the dedication of land or conditions imposed upon the land.

One line of cases holds that the *Nollan*/*Dolan* standard applies solely to exactions cases involving land-use dedications. *See, e.g., McClung v. City of Sumner*, 548 F.3d 1219, 1228 (9th Cir. 2008) (distinguishing monetary conditions from conditions on the land); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995); *Sea Cabins on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach*, 548 S.E.2d 595, 603 n.5 (S.C. 2001) (holding that *Del Monte Dunes* clarified that *Nollan* and *Dolan* only apply to physical conditions imposed upon land).

The other line of cases holds that the *Nollan*/*Dolan* test extends beyond the context of the imposition of real property conditions on real property. For example, the California Supreme Court has held that non-real property conditions can constitute a taking where the condition is imposed on a discretionary, individualized basis. *See Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996). However, in *Town of Flower Mound v. Stafford Estates Ltd Partnership*, 135 S.W.3d 620, 640-41 (Tex. 2004), the Texas Supreme Court expanded application of the

test further, holding that *Nollan* and *Dolan* can apply to certain non-real property conditions that arise from generally applicable regulations.

Despite the varied interpretations of the scope of *Nollan*/*Dolan*, we must follow the decisions of the United States Supreme Court with regard to Fifth Amendment takings jurisprudence. *See Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 220-21 (1931) (state courts are bound by United States Supreme Court's interpretations of federal law); *Carnival Corp. v. Carlisle*, 953 So. 2d 461, 465 (Fla. 2007) (state courts are generally not bound by the decisions of the lower federal courts on questions of federal law). Moreover, the Supreme Court itself has specifically stated that when it denies certiorari review, that denial "imports no expression of opinion upon the merits of the case." *Teague v. Lane*, 489 U.S. 288, 296 (1989) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923)). Thus, we decline to interpret a decision of the United States Supreme Court not to review a case that addresses an exactions issue as an approval of the merits or holding of the underlying decision in that case.

Instead, we are guided only by decisions in which the Supreme Court has expressly applied, or commented upon the scope of, exactions takings. *Nollan* and *Dolan* both involved exactions that required the property owner to dedicate real property in exchange for approval of a permit. *See Dolan*, 512 U.S. at 380; *Nollan*, 483 U.S. at 827. Additionally, in both cases the regulatory entities issued the permits sought with the objected-to exactions imposed. *See Dolan*, 512 U.S. at 379; *Nollan*, 483 U.S. at 828. Moreover, in *Del Monte Dunes* and *Lingle*, the United

States Supreme Court specifically limited the scope of *Nollan* and *Dolan* to those exactions that involved the dedication of real property for a public use. *See Lingle*, 544 U.S. at 546-47; *Del Monte Dunes*, 526 U.S. at 702-03. Absent a more limiting or expanding statement from the United States Supreme Court with regard to the scope of *Nollan* and *Dolan*, we decline to expand this doctrine beyond the express parameters for which it has been applied by the High Court.[3]

Accordingly, we hold that under the takings clauses of the United States and Florida Constitutions, the *Nollan*/*Dolan* rule with regard to "essential nexus" and "rough proportionality" is applicable only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought, thereby rendering the owner's interest in the real property subject to the dedication imposed.

It is both necessary and logical to limit land-use exactions doctrine to these narrow circumstances. Governmental entities must have the authority and

---

[3] Our holding today is consistent with the 2011 decisions of two federal appellate courts, both of which held that *Nollan* and *Dolan* are inapplicable to cases that do not involve the dedication of real property for a public use. *See Iowa Assurance Corp. v. City of Indianola*, 650 F.3d 1094, 1096-97 (8th Cir. 2011) (ordinance which required an enclosed fence to surround areas where two or more race cars are present not subject to a *Nollan*/*Dolan* exactions analysis); *West Linn Corporate Park, LLC v. City of West Linn*, 428 F. App'x 700, 702 (9th Cir. 2011) (refusing to extend *Nollan*/*Dolan* where city required developer to construct several off-site public improvements but did not require dedication of developer's interest in real property), *petition for cert.* filed, 80 U.S.L.W. 3135 (U.S. Sept. 6, 2011) (No. 11-299).

flexibility to independently evaluate permit applications and negotiate a permit award that will benefit a landowner without causing undue harm to the community or the environment. If a property owner is authorized to file an inverse condemnation claim on the basis of the exactions theory any time regulatory negotiations are not successful and a permit is denied, two undesirable outcomes inevitably ensue. First, the regulation of land use, deemed by the United States Supreme Court to be "peculiarly within the province of state and local legislative authorities," would become prohibitively expensive. *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975); *see also Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002) ("Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford.").

Second, and as a result of the first consequence, agencies will opt to simply deny permits outright without discussion or negotiation rather than risk the crushing costs of litigation. Property owners will have no opportunity to amend their applications or discuss mitigation options because the regulatory entity will be unwilling to subject itself to potential liability. Land development in certain areas of Florida would come to a standstill. We decline to approve a rule of law that would place Florida land-use regulation in such an unduly restrictive position.

Based on the above analysis, we conclude that the Fifth District in *Koontz IV* erroneously applied the *Nollan*/*Dolan* exactions test to the offsite mitigation

proposed by St. Johns. Since St. Johns did not condition approval of the permits on Mr. Koontz dedicating any portion of his interest in real property in any way to public use, this analysis does not apply. Further, even if we were to conclude that the *Nollan*/*Dolan* test applied to non-real property exactions—which we do not—Mr. Koontz would nonetheless fail in his exactions challenge because St. Johns did not issue permits, Mr. Koontz never expended any funds towards the performance of offsite mitigation, and nothing was ever taken from Mr. Koontz. As noted by the United States Supreme Court, *Nollan* and *Dolan* were not designed to address the situation where a landowner's challenge is based not on excessive exactions but on a denial of development. *See Del Monte Dunes*, 526 U.S. at 703. Here, all that occurred was that St. Johns did not issue permits for Mr. Koontz to develop his property based on existing regulations and, therefore, an exactions analysis does not apply. *See id.* ("[T]he rough-proportionality test of *Dolan* is inapposite to a case such as this one.").

CONCLUSION

Based on our analysis in this case, we answer the rephrased certified question in the negative, quash the decision of the Fifth District in *Koontz IV*, and remand for proceedings consistent with this opinion. We emphasize that our decision today is limited solely to answering the rephrased certified question. We decline to address the other issues raised by the parties.

It is so ordered.

PARIENTE, LABARGA, and PERRY, JJ., concur. QUINCE, J., concurs in result only. POLSTON, J.,

concurs in result only with an opinion, in which CANADY, C.J., concurs. NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

POLSTON, J., concurring in result only.

I agree with St. Johns River Water Management District's argument that underlying the landowner's claim for regulatory taking is an attack on the propriety of agency action. Therefore, under these circumstances, the landowner is required to exhaust administrative remedies under chapter 120, Florida Statutes, before bringing this regulatory taking action pursuant to section 373.617, Florida Statutes. *See* § 373.617(2), Fla. Stat. (2002) ("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."); *Key Haven Associated Enters., Inc. v. Bd. of Trs. of the Internal Improvement Trust Fund*, 427 So. 2d 153, 159 (Fla. 1982).

Accordingly, I would quash the Fifth District's opinion but not reach the certified questions as phrased by the Fifth District or the majority.

CANADY, C.J., concurs.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Fifth District - Case No. 5D06-1116

(Orange County)

William H. Congdon and Kathryn L. Mennella, Palatka, Florida,

for Petitioner

Christopher V. Carlyle and Shannon McLin Carlyle and The Carlyle Appellate Law Firm, The Villages, Florida, and Michael D. Jones of Michael D. Jones and Associates, P.A., Winter Springs, Florida,

for Respondent

Harry Morrison, Jr. and Kraig A. Conn, Tallahassee, Florida, Virginia Saunders Delegal, on behalf of Florida Association of Counties, Inc. and Florida League of Cities, Inc.; Pamela Jo Bondi, Attorney General, Scott D. Makar, Solicitor General, and Courtney Brewer, Deputy Solicitor General, Tallahassee, Florida, on behalf of the Attorney General, Thomas M. Beason, General Counsel and Meredith C. Fields, Assistant General Counsel, Tallahassee, Florida, on behalf of Florida Department of Environmental Protection, Kevin X. Crowley of Pennington Moore, Wilkinson, Bell and Dunbar, P.A., Tallahassee, Florida, on behalf of the Northwest Florida Water Management District, William S. Bilenky General Counsel, and Joseph J. Ward, Assistant General Counsel, Brooksville, Florida, on behalf of the South Florida Water Management District, and the Southwest Florida Water Management District; E. Thom Rumberger and Noah D. Valenstein of Rumberger, Kirk and Caldwell, Tallahassee, Florida, on behalf of National Audubon Society; David L. Powell, Gary K. Hunter, Jr., and Mohammad O. Jazil of Hopping Green and Sams, Tallahassee, Florida, on behalf of Association of Florida Community Developers, Inc.; Amy Brigham

Boulris and John W. Little, III of Brigham Moore, LLP, Coral Gables, on behalf of Florida Home Builders and National Association of Homebuilders, Keith C. Hetrick, General Counsel, Tallahassee, Florida, on behalf of Florida Homebuilders Association; and Steven Geoffrey Gieseler and Nicholas M. Gieseler, Stuart, Florida, on behalf of Pacific Legal Foundation,

As Amici Curiae

Appendix B–1

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT

JULY TERM 2008

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Appellant,

v.

COY A. KOONTZ, JR., ETC.,

Appellee.

Case No. 5D06-1116

_____/

Opinion filed January 9, 2009

Appeal from the Circuit Court for Orange County, Joseph P. Baker, Judge.

William H. Congdon, Palatka, for Appellant.

Christopher V. Carlyle, Shannon McLin Carlyle and Gilbert S. Goshorn, Jr., of The Carlyle Appellate Law Firm, The Villages, and Michael D. Jones, of Michael D. Jones & Associates, P.A., Winter Springs, for Appellee.

TORPY, J.

St. Johns River Water Management District ["the District"] appeals the trial court's final judgment awarding Coy A. Koontz, Jr., as personal representative of the Estate of Coy A. Koontz, Sr., compensation for the District's temporary taking of Coy A. Koontz, Sr.'s ["Mr. Koontz"] property. This is the fourth time that this case has been appealed to

this Court. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 720 So. 2d 560 (Fla. 5th DCA 1998) ["*Koontz I*"]; *St. Johns River Water Mgmt. Dist. v. Koontz*, 861 So. 2d 1267 (Fla. 5th DCA 2003) ["*Koontz II*"]; *St. Johns River Water Mgmt. Dist. v. Koontz*, 908 So. 2d 518 (Fla. 5th DCA 2005) ["*Koontz III*"]. We affirm.

This case involves a landowner, Mr. Koontz, who, in 1994, requested permits from the District so that he could develop a greater portion of his commercial property than was authorized by existing regulation. The District replied that it would approve the permits only if Mr. Koontz agreed to satisfy certain conditions, one of which was the performance of "off-site" mitigation involving property a considerable distance from Mr. Koontz's property. Mr. Koontz contended that the conditions were unreasonable and rejected the offer. The District then denied the permits. Based on the permit denial, Mr. Koontz brought an inverse condemnation claim asserting an improper "exaction" by the District.[1]

In the most general sense, an "exaction" is a condition sought by a governmental entity in exchange for its authorization to allow some use of land that the government has otherwise restricted.[2] Even though

---

[1] Mr. Koontz also asserted other theories that are not relevant to our disposition of this appeal.

[2] The "exactions" theory has roots in "the well-settled doctrine of 'unconstitutional conditions,'" which sets constitutional limits on the manner by which the government bargains away its discretionary authority. *Dolan v. City of Tigard,* 512 U.S. 374, 385 (1994). The application of the doctrine to land-use situations evolved in the state courts over many years and was finally

(continued...)

the government may have the authority to deny a proposed use outright, under the exactions theory of takings jurisprudence, it may not attach arbitrary conditions to issuance of a permit. *See Dolan v. City of Tigard*, 512 U.S. 374, 397 (1994) (Stevens, J., dissenting) (acknowledging correctness in majority's conclusion that arbitrary conditions may not be imposed even when government has authority to deny permit).

In relating the circumstances giving rise to this case, the trial court explained:

> The subject property is located south of State Road 50, immediately east of the eastern extension of the East-West Expressway in Orange County. The original plaintiff, Coy Koontz, has owned the subject property since 1972. In 1987, a portion of the original acreage adjacent to Highway 50 was condemned, leaving Mr. Koontz with 14.2 acres. There is a 100-foot wide transmission line easement of Florida Power Corporation running parallel to and about 300 feet south of Highway 50, that is kept cleared and mowed by Florida Power. A 60-foot wide drainage ditch runs north and south on the west boundary of the property.

The portion of the site that is proposed for development has been seriously degraded from its condition in 1972, by all of the activity around it.

---

[2] (...continued)
approved by the Supreme Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 839 (1987), and *Dolan*, 512 U.S. at 389.

There has been intense development in the vicinity, both residential and commercial, and road construction and other governmental projects. The site's usefulness as an animal habitat has been severely reduced.

All but approximately 1.4 acres of the tract lies within a Riparian Habitat Protection Zone (RHPZ) of the Econlockhatchee River Hydrological Basin and is subject to jurisdiction of the St. Johns River Water Management District.

In 1994, Koontz sought approval from the District for a 3.7 acre development area adjacent to Highway 50, of which 3.4 acres were wetlands and .3 acres were uplands.

In his concurring opinion in *Koontz II*, Judge Pleus explained the positions taken by the parties during the permit approval process:

> Koontz proposed to develop 3.7 acres closest to Highway 50, back to and including the power line easement. In order to develop his property, he sought a management and storage of surface waters permit to dredge three and one quarter acres of wetlands. A staffer from St. Johns agreed to recommend approval if Koontz would deed the remaining portion of his property into a conservation area and perform offsite mitigation by either replacing culverts four and one-half miles southeast of his property or plug certain drainage canals on other property some seven miles away. Alternatively, St. Johns demanded that Koontz reduce his development to one acre and turn the remaining 14 acres into a deed-restricted

> conservation area. Koontz agreed to deed his excess property into conservation status but refused St. Johns' demands for offsite mitigation or reduction of his development from three and seven-tenths acres to one acre. Consequently, St. Johns denied his permit applications.

Id. at 1269 (Pleus, J., concurring specially). In its orders denying the permits, the District said that Mr. Koontz's proposed development would adversely impact Riparian Habitat Protection Zone ["RHPZ"] fish and wildlife, and that the purpose of the mitigation was to offset that impact.

After hearing conflicting evidence, the trial court concluded that the District had effected a taking of Mr. Koontz's property and awarded damages. In reaching this conclusion, the trial court applied the constitutional standards enunciated by the Supreme Court in *Nollan* and *Dolan*. In *Nollan*, with respect to discretionary decisions to issue permits, the Supreme Court held that the government could impose a condition on the issuance of the permit without effecting a taking requiring just compensation if the condition "serves the same governmental purpose as the developmental ban." 483 U.S. at 837. This test is referred to as the "essential nexus" test. In *Dolan*, the Court added the requirement that, for such a condition to be constitutional, there must also be a "rough proportionality" between the condition and the impact of the proposed development. 512 U.S. at 390-91.

Here, the trial court determined that the off-site mitigation imposed by the District had no essential nexus to the development restrictions already in place on the Koontz property and was not roughly

proportional to the relief requested by Mr. Koontz. The District makes no challenge to the evidentiary foundation for these factual findings. Instead, it advances arguments directed to the trial court's jurisdiction and the legal viability of Mr. Koontz's claim. The District argues that the lower court never had subject matter jurisdiction to hear Mr. Koontz's claim because section 373.617(2), Florida Statutes, the statute under which Mr. Koontz maintained his claim, expressly limits the scope of circuit court review to cases in which a constitutional taking is proven. It 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. This argument, although couched in terms of jurisdiction, really addresses itself to whether 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. This is a question that has evoked considerable debate among academics and is the primary point of the dissent.[3]

---

[3] The debate is sparked in part by Justice Scalia's dissent in *Lambert v. City & County of San Francisco*, 529 U.S. 1045 (2000). Justice Scalia was dissenting to the Court's decision to deny certiorari. He speculated that the lower court could have based its decision on three theories. He dismissed the first two theories outright as implausible, but acknowledged that the third theory was "at least plausible." Speaking of a takings claim predicated on a rejected exaction, he said:

(continued...)

[3] (...continued)

> When there is uncontested evidence of a demand for money or other property - and still assuming that denial of a permit because of failure to meet such a demand constitutes a taking - it should be up to the permitting authority to establish either (1) that the demand met the requirements of *Nollan* and *Dolan*, or (2) that denial would have ensued even if the demand had been met. . . .
>
> [T]he court's refusal to apply *Nollan* and *Dolan* might rest upon the distinction that it drew between the grant of a permit subject to an unlawful condition and the denial of a permit when an unlawful condition is not met. . . . From one standpoint, of course, such a distinction makes no sense. The object of the Court's holding in *Nollan* and *Dolan* was to protect against the State's cloaking within the permit process "'an out-and-out plan of extortion,'" *Nollan*, 483 U.S., at 837, 107 S.Ct. 3141 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)). There is no apparent reason why the phrasing of an extortionate demand as a condition precedent rather than as a condition subsequent should make a difference. It is undeniable, on the other hand, that the subject of any supposed taking in the present case is far from clear. Whereas in *Nollan*, there was arguably a completed taking of an easement (the homeowner had completed construction that had been conditioned upon conveyance of the easement), and in *Dolan* there was at least a threatened taking of an easement (if the landowner had gone ahead with her contemplated expansion plans the easement would have attached), in the present case there is neither a taking nor a threatened taking of any money. If petitioners go ahead with the conversion of their apartments, the city will not sue for $600,000 imposed as a condition of the conversion; it will sue to enjoin and punish a conversion that has been prohibited.

Lambert, 529 U.S. at 1047-48 (Scalia, J., dissenting). We view Justice Scalia's comments as an acknowledgment that the (continued...)

Despite the ongoing debate, we conclude that this question has already been answered in *Dolan* itself, which also involved a challenge to rejected conditions. Although the *Dolan* majority did not expressly address the issue, the precise argument was addressed by the dissent and, thus, implicitly rejected by the majority. *Dolan,* 512 U.S. at 408 (Stevens, J., dissenting). The argument was also directly addressed and rejected in *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), a case upon which the Supreme Court relied in deciding *Nollan*. *See Goss v. City of Little Rock*, 90 F.3d 306, 309-10 (8th Cir. 1996) (*Dolan* applicable when owner alleges he refused permit predicated upon unlawful condition; case remanded for further proceedings); *Town of Flower Mound v. Stafford Estates Ltd. P'ship,* 135 S.W.3d 620, 625 (Tex. 2004) ("any requirement that a developer provide[s] or do[es] something as a condition to receiving municipal approval is an exaction."); *Salt Lake County v. Bd. of Educ. of Granite Sch. Dist.,* 808 P.2d 1056, 1058 (Utah 1991) (exactions include land dedications or payment of fees as condition for issuance of permit).[4]

---

[3] (...continued)
distinction made by the District today is one that is fairly raised, but one without any logical significance.

[4] The policies underpinning exactions claims clearly support this conclusion. As Justice Scalia observed: "The object of the Court's holding in *Nollan* and *Dolan* was to protect against the State's cloaking within the permit process 'an out-and-out plan of extortion.'" *Lambert*, 529 U.S. at 1048 (Scalia, J., dissenting) (internal citations omitted). An attempt by government to extort is no less reprehensible than *a fait accompli*. *Nollan* and *Dolan* are also grounded in a skepticism that there exists a correlation
(continued...)

The District also contends that an action does not lie here because the condition it imposed did not involve a physical dedication of land but instead a requirement that Mr. Koontz expend money to improve land belonging to the District. Again, we conclude that the Supreme Court has already implicitly decided this issue. In *Ehrlich v. City of Culver City,* 512 U.S. 1231 (1994), the city conditioned a permit on the payment of money to build tennis courts and purchase artwork. Although the state appellate court upheld the

---

[4] (...continued)
between the imposition of improper exactions and over regulation of property. *See Nollan*, 483 U.S. at 837 n.5 ("a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes."). Even an attempt to exact improper concessions supports an inference that the affected property owner's land is over regulated.

Certainly, as the dissent suggests, Mr. Koontz could have completed the off-site work and sued for the cost, which, in hindsight, would have mitigated the amount of assessed damages. However, this does not justify a rule of law that forces an aggrieved property owner to accede to unconstitutional conditions to preserve his right to challenge the abusive practice. Furthermore, such a rule would be completely unworkable when applied to a case where the improper exaction involves a condition that materially alters the design, density or economic feasibility of the project.

The dissent justifies its conclusion by its unexplained prognosis that: "No agency in its right mind will wade into this swamp." Although this might support an argument that *Nollan* and *Dolan* were wrongly decided, it offers no support for the dissent's conclusion that some *Nollan/Dolan* claims may proceed while others may not, depending on how the property owner reacts to the offer. If the dissent is right, it is not because a contrary ruling will rein havoc on the ability of governments to do business.

imposition of the conditions, the Supreme Court vacated the decision and remanded the case to the state court to reexamine it in light of *Dolan.* Absent a more definitive pronouncement from our high court on this issue, we conclude that the distinction advanced by the District is not legally significant. *See* Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Cal. L. Rev. 609, 637 (2004) (suggesting that Supreme Court "may have settled this issue in favor of extending *Nollan* and *Dolan* to non-possessory exactions" when it remanded *Ehrlich)*; *see also Town of Flower Mound*, 135 S.W.3d 620; *Benchmark Land Co. v. City of Battle Ground*, 14 P.3d 172 (Wash. Ct. App. 2000).[5]

We have carefully reviewed the District's remaining arguments but dismiss them without further discussion.

AFFIRMED.

ORFINGER, J., concurs, with opinion.

GRIFFIN, J., dissents, with opinion

---

[5] We have not overlooked the observation by the dissent that the trial court did not address the legality of the alternative offer to permit a one-acre development, a point not raised by the District. Even if this issue is properly before us, we think the court implicitly rejected this contention. In other words, 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, whether in the form of off-site mitigation or a greater easement dedication for conservation.

ORFINGER, J., concurring with opinion

CASE No. 5D06-1116

I concur with the Court's opinion. I write separately to comment on several unsettled issues in the jurisprudence of exactions and takings.

What Is An Exaction?

Though *Nollan*[1] and *Dolan*[2] established a two-part test to determine the constitutionality of an exaction demanded by the government as a condition for development approval, the threshold question of what constitutes an exaction, thereby triggering the *Nollan*/*Dolan* analysis is far from settled. *See generally* Jane C. Needleman, *Exactions: Exploring Exactly When Nollan and Dolan Should be Triggered*, 8 Cardozo L. Rev. 1563 (2006). Neither courts nor academics subscribe to a single definition. For example, one academic defines an exaction as a requirement that a landowner give up a constitutionally-protected right in exchange for some benefit from the government. Stewart E. Sterk, *What Counts as an Exaction?*, 19 No. 4 N.Y. Real Est. L. Rep. 1, 3 (Feb. 2005). Another expanded on this definition, concluding that exactions are "the concessions local governments require of property owners as conditions for the issuance of the entitlements that enable the intensified use of real property." Mark Fenster, *Takings Formalism & Regulatory Formulas: Exactions & the Consequences of Clarity*, 92 Cal. L. Rev. 609, 611 (2004). The Texas Supreme Court embraced a similar broad definition, recognizing that "any requirement

[1] *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

[2] *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

that a developer provide[s] or do[es] something as a condition to receiving municipal approval is an exaction." *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 625 (Tex. 2004). Likewise, the Utah Supreme Court in *Salt Lake County v. Board of Education of Granite School District*, 808 P.2d 1056, 1058 (Utah 1991), explained:

> [D]evelopment exactions may be defined as contributions to a governmental entity imposed as a condition precedent to approving the developer's project. Usually, exactions are imposed prior to the issuance of a building permit or zoning/subdivision approval . . . [and] may take the form of: (1) mandatory dedications of land for roads, schools or parks, as a condition to plat approval, (3) water or sewage connection fees, and (4) impact fees.

(Quotations and citations omitted). Finally, in *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687, 702 (1999), the United States Supreme Court concluded that exactions are "land-use decisions conditioning approval of development on the dedication of property to public use."

Regardless of how one chooses to define an "exaction," the first step in a *Nollan/Dolan* analysis is to determine whether the required "exaction," be it a dedication, fee or improvement, if separated from the development prohibition, would constitute a taking. If it would constitute a taking separate from the development prohibition, only then do I believe that the *Nollan*/*Dolan* standards become relevant. *See Sterk*, *supra* at 3.

**Can There Be A Taking
When the Landowner Says No?**

The dissent argues that Mr. Koontz has no right to compensation, as no taking occurred, given his refusal to surrender to the government's demands. This argument is premised on the notion that after the government turned down his application, Mr. Koontz had the same development rights that he had before he began the permitting process. He lost nothing, as nothing had changed. Given the divergent views of what constitutes an exaction, that argument has logical appeal, and was the specific argument made in the dissent by Justice Stevens in *Dolan*. *See Dolan*, 512 U.S. at 408 (Stevens, J., dissenting). Had the *Dolan* majority not rejected this precise argument, I would agree with the dissent on this point as it is doctrinally and logically supportable.

**Should the Doctrine of
Unconstitutional Conditions
be Applied to Takings Jurisprudence?**

The "exactions" theory of takings jurisprudence has its roots in "the well-settled doctrine of 'unconstitutional conditions,'" which sets limits on the manner by which the government exercises its discretionary authority. *Dolan*, 512 U.S. at 385. However, while the doctrine of unconstitutional conditions may be "well-settled," it is certainly not well understood. *See generally* Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U.L. Rev. 593 (1990); Richard A. Epstein, *Unconstitutional Conditions, State Power and the Limits of Consent*, 102 Harv. L. Rev. 4 (1988).

In general terms, the "doctrine of unconstitutional conditions" holds that the government ordinarily may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government has the discretion to withhold the benefit altogether. 16A Am. Jur. 2d Constitutional Law § 395 (2008). But applying that premise in the real world is extremely problematic. One who labors in this field might reasonably ask: When may the government properly ask a citizen to waive a constitutional right in order to obtain a benefit the government has no obligation to provide? The answer suggested by the doctrine of unconstitutional conditions "is that sometimes the government may condition discretionary benefits on the waiver of rights, and sometimes it may not." *See* Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 Denv. U. L. Rev. 859, 859 (1995). That uncertainty and unpredictability in the law benefits no one.

As the instant case demonstrates, when the government has the absolute discretion to grant or deny a privilege or benefit, it still may incur significant liability if, at the conclusion of the land use/development decision, it is found to have improperly pressured or coerced the landowner to give up or waive a constitutional right. And even more troubling, the potential for governmental liability may be just as likely if the government simply reaches a bit too far in the bargaining process. By way of example, no one can doubt that it would be improper to condition receipt of government approval for a development on the agreement of the developer to vote for a certain candidate in an upcoming election. In that circumstance, we would easily find such a condition to be unconstitutional. However, a more likely scenario

is one in which the government asks the landowner for the dedication of twenty acres of wetlands for conservation purposes. Then, after the fact, a court concludes that only a ten-acre dedication was "roughly proportional" to the impact of the proposed development. The consequence of the government asking for a bit too much (but far short of extortion) is governmental liability for damages premised on the exactions theory.

Given the imprecision inherent in the application of the doctrine of unconstitutional conditions, and assuming that governmental entities are generally risk averse, the response from the government to a request by a landowner for a discretionary benefit will likely be a resounding "no." That is unfortunate because at their best, "exactions reflect a sincere government effort to require developers to pay for the costs development places on the surrounding community." Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. Ill. U. L. Rev. 513, 513 (1995).[3]

Because the burden to justify a requested exaction is on the government, liability can be avoided if the government simply refuses to engage in the bargaining process with a landowner. Or, a more likely outcome is that the government will refuse to offer any conditions in exchange for development approval, but will consider offers from the landowner. It is hard to imagine that a landowner could invoke the doctrine of

---

[3] As Professor Cordes correctly points out, at their worst, the system of exactions has been a means by which governments can use their monopoly power to extort from developers property interests often unrelated to the proposed development. *Cordes, supra* at 513-14.

unconstitutional conditions and claim a taking if the landowner, and not the government, initiates the bargaining process and makes all of the offers. This role reversal accomplishes little, but seems a possible outcome given the uncertainty inherent when applying the doctrine of unconstitutional conditions to land use/development decisions rather than more traditional takings jurisprudence.

There is no doubt that the government should act reasonably in its negotiations with landowners during the permitting process. However, given the imprecision inherent in the "essential nexus" and "rough proportionality" tests mandated by *Nollan* and *Dolan*, the government risks significant liability if, after the fact, it is found to have asked for too much. Overreacting is an inherent risk in the bargaining process. But should every misstep by the government, however reasonable, equate to a taking and create liability? In Fourth Amendment jurisprudence, the United States Supreme Court held that "what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable." *Illinois v. Rodriguez*, 497 U.S. 177 (1990). I think *Nollan* and *Dolan* should likewise be read to require governments to act reasonably in its permitting and land use decisions, while recognizing that such decisions may not always be correct. Perhaps the Supreme Court intended the "rough proportionality" test to encompass such a "wrong but reasonable" standard, but that is far from clear.

GRIFFIN, J., dissenting. 5D06-1116

The majority speaks as if this case is no more than the unremarkable application of settled "exaction" law from the United States Supreme Court. I disagree. There is very little of the 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 basic terms, this is what happened:

Mr. Koontz had a mostly wetland fourteen-acre piece of undeveloped land on which he wanted to put a commercial development. For this, he needed a permit from the St. Johns River Water Management District ["the District"]. He concedes he had no right to the permit, and he acknowledges that the government had the right to turn him down flat but, following the time-honored legal principle that "there is no harm in asking,"[1] he submitted an application. This turned out to be a lucrative move, which, in light of this Court's decision, will no doubt be widely emulated all over the State of Florida. Elizabeth Johnson, a scientist employed by the District, told Mr. Koontz that the District would be willing to partly grant his request and allow either the development of one acre, preservation of the balance and no off-site mitigation or development of 3.7 acres, preservation of the balance and some off-site mitigation to enhance fifty acres of

[1] Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1055 (1936).

existing wetlands a few miles away by cleaning some culverts and ditches.[2] Mr. Koontz apparently thought this latter proposal was OK, except for the part about the culverts and ditches, and so he refused. In the absence of agreement, the permit was denied.

In 1994, Mr. Koontz filed an inverse condemnation lawsuit, claiming that, by imposing an unreasonable condition on the issuance of a permit – the off-site mitigation – the District had taken his property.

Mr. Koontz stipulated that he was not "proceeding upon a theory that the two District final orders deprived [him] of all or substantially all economically beneficial or productive use of the subject property." Rather, in describing the issue to be litigated, he stated:

> The issue before this Court is whether the conditions imposed by the District on the Koontz property and in particular, the required mitigation, resulted in a regulatory taking of Koontz property. The off-site mitigation did not serve a substantial purpose.

This theory was principally based on *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980). However, during the twelve years this suit proceeded below, Mr. Koontz'

---

[2] Elizabeth Johnson was the supervising regulatory scientist for the District that reviewed the original permit application in 1994 and performed an onsite assessment. She testified that the amount of mitigation required, based on "the quality of the habitat and the species that would likely utilize that type of habitat," was a preservation mitigation ratio that was well within the mitigation formula in use by the District at that time.

original theory of liability evaporated. In 2005, the United States Supreme Court issued its decision in

Lingle v. Chevron, 544 U.S. 528, 532 (2005), which significantly revised and restated federal "takings" jurisprudence.

In its order determining liability, the trial court explained that it did not appear to the court that Mr. Koontz had a "taking" claim, but that it felt bound to find one by virtue of this Court's 1998 opinion in *Koontz I* that a legally sufficient "taking" claim had been pled that was ripe for determination on the merits.[3] The trial judge ultimately settled on the

---

[3] The trial court said:

> Although the St. Johns District has argued otherwise, this court reads that language and the DCA opinion as mandating a trial on the issue of whether there has been a taking. The opinion does not make it clear precisely what legal theory of "taking" the DCA had in mind in its remand. The phrase "all that he could do and still retain an economic use of his property" is read by the District's attorney as saying the DCA perceived the issue on taking as whether the St. Johns District's conditions denied Mr. Koontz all or substantially all of the economically viable uses of his property. If so, one must wonder why the case was reversed and remanded. In that reading there is no issue to be tried since Mr. Koontz does not contend he has lost all or substantially all economically viable use of his property by reason of the conditions he has challenged.
>
> The DCA opinion must be read in its entirety, and the footnotes are important parts of the opinion. In trying to follow the mandate this court has read the opinion many times and listened to and read lengthy arguments about it. To accept the interpretation of the opinion by Mr. Koontz' counsel seems the more prudent choice. Therefore, the case was tried on whether the off-site mitigation required by the

(continued...)

Nollan/Dolan "exaction theory." He found as a matter of fact that the off-site mitigation condition met neither the *Nollan/Dolan* "nexus" or "rough proportionality" requirements and that, accordingly, the District had "taken" Mr. Koontz' property. Mr. Koontz was awarded, as compensation for this "taking," the sum of $376,154.00. This was calculated to be the rental value of the property based on a valuation *with* the permit of $477,000. The rental term was calculated to be from 1999, when the permit was denied, until the permit was issued in 2005.[4]

On appeal, the District does not contest the trial court's determination that the off-site mitigation condition was an "exaction" under *Nollan/Dolan*, but the District does contend that there was no "taking." I agree and would reverse this judgment.

It is clear after *Nollan* that the notion of "unconstitutional conditions" imposed by a government on the grant of a discretionary benefit, such as a permit, can cause a taking of property. *Nollan,* and later, *Dolan,* were occupied, however, with the problem of defining what sorts of conditions on the use or development of real property rose to the level of "unconstitutional." The legal *effect* of a judicial

---

[3] (...continued)
District was an unreasonable exercise of police power. The DCA opinion is consistent with reading the *Nollan* and *Dolan* cases as providing constitutional tests applicable to the Koontz property.

[4] The District urged that Mr. Koontz had suffered no damage at all because his property had more than tripled in value during the eleven years.

determination that an agency has imposed an unconstitutional condition, which the Court dubbed an "exaction" is barely and only inferentially dealt with. *Dolan* was remanded to the state court to make an individualized determination whether the land dedication condition was related both in nature and extent to the impact of the proposed development. 512 U.S. at 391. There are multiple basic questions about "exaction" law that have not yet been answered by the United States Supreme Court, and the limited number of cases decided by lower courts in light of *Nollan* and *Dolan* are not very helpful. In my opinion, the majority has chosen the wrong answers to several basic questions about "exactions."

The first and most basic question posed by this case is whether the imposition of an unconstitutional condition on an agency's issuance of a land use permit is necessarily a "taking" of the real property. There is little doubt after *Nollan* and *Dolan* that an unconstitutional condition that requires a landowner to give up any of its bundle of rights in the land is a "taking." That was the kind of condition that was at issue in those two cases, and a fair reading of the various opinions in *Nollan* and *Dolan* suggests that all the Court had in mind was the agency's acquisition of an interest in real property. In two later cases, *Lingle* and *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702-03 (1999), the Supreme Court indicated that application of *Nollan* and *Dolan* was limited to cases involving the dedication of private property as a condition of permit approval. *See Lingle*, 544 U.S. at 547 (noting that *Nollan* and *Dolan* not extended beyond special context of exactions requiring dedication of private property as condition of permit

approval); *City of Monterey*, 526 U.S. at 702-03 ("[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use."). Legal scholars who have focused on these cases agree that the issue is up in the air. *See, e.g.,* Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity,* 92 Cal. L. Rev. 609, 635-42 (2004); Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 Hastings L.J. 729 (2007).

Given the Court's description of an "unconstitutional condition," and the cases it relied upon in *Nollan* and *Dolan* as the source of this law, I do not see any principled way to distinguish an unconstitutional condition that requires a permit applicant to give up an interest in land from one that requires the permit applicant to give up anything else that belongs to him. If the condition does not meet the "nexus" and "rough proportionality" tests of *Nollan/Dolan*, it is invalid. As *Nollan* and *Dolan* make clear, such an "exaction" may constitute a "taking"; it is not, however, necessarily a "taking." Whether a "taking" has occurred ought to depend – and I suggest – does depend on whether any protected interest in land is actually given up. If it is, whether temporarily or permanently, the landowner is entitled to compensation as set forth in the "taking" cases. If, however, the unconstitutional condition does not involve the taking of an interest in land, the remedy of inverse condemnation is not available. In this case, the objected-to condition that was found to be an exaction was not an interest in land; it was the

requirement to perform certain off-site mitigation in the form of clean-up of culverts and ditches to enhance wetlands several miles away.

This does not mean that Mr. Koontz was without a remedy for this transgression on the part of the District. He no doubt has several. Most obviously, he could do as was done in the *Nollan/Dolan* cases, as well as most other subsequently reported cases, and challenge the permit denial or condition as invalid. Mr. Koontz did not have an absolute right to a permit, but he did have an enforceable right to consideration of his permit application, burdened only with constitutional conditions. If he had acquiesced in the District's unconstitutional demands, he should have had the right to recover whatever "exaction" he had paid or performed. He was not entitled, however, to a judgment in inverse condemnation for the temporary taking of his land. The right to compensation for the temporary or permanent taking of property under Florida law requires that substantially all beneficial value in the land actually be taken. In this case, *nothing* was ever taken.

The law of "unconstitutional conditions," which mainly grew out of the government's attempt to impose conditions on public employment limiting freedom of speech, such as loyalty oaths, is poorly developed in the cases and rarely applied. *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Bd. of Edu.,* 391 U.S. 563 (1968). Facile as it may seem to say, getting or keeping a government job and being compensated for the taking of private property are two very different things. In the employment cases, the employee either already had a job, or would have had the job, but for the unconstitutional condition. In those cases, the

litigation simply invalidated the condition. To say that an agency's imposition of a condition on the discretionary grant of a permit to develop real property necessarily "takes" the property until the condition is removed is illogical. If an agency imposes an unconstitutional condition on public employment that deprives a person of his right of free association or free speech, the invalidation of the condition does not require that the government employ, or continue in employment, anyone who was burdened by the condition. The unconstitutional condition is simply removed and the individual may or may not be hired or continued in employment based on constitutional criteria. By imposing an unconstitutional condition, the agency did not "take" the job. In this case, when the District imposed an unconstitutional condition on the application for permit approval, the District did not take the land, and Mr. Koontz was not entitled to be compensated as if it had been taken. Clearly, though, if what was exacted from Mr. Koontz was money or services, not real property, under the reasoning of *Nollan/Dolan,* he could recover it.

For example, in *Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (Tex. 2004), the Texas Supreme Court considered a case where a developer was required to rebuild a road as a condition to development. The court found that the Town had extracted a benefit to which the Town was not entitled and approved as the measure of damages the cost of the exaction, less the cost of improvements that the developer should have had to pay anyway and special benefits to the development. 135 S.W.3d at 627. It makes no sense that the damages for an exaction that is acceded to is the cost of the exaction,

but an exaction not acceded to gives rise to a "taking" of the property.

Another important issue that the United States Supreme Court has also yet to directly address is the issue of whether *Nollan* and *Dolan* can apply in a circumstance where the landowner has rejected the condition, and, therefore, nothing has been exacted. *See Fenster,* 92 Cal. L. Rev. at 639. In *Lambert v. City & County of San Francisco,* 67 Cal. Rptr. 2d 562, 659 (Cal. Ct. App. 1997), *cert. denied*, 529 U.S. 1045 (2000), the court concluded that because the condition was rejected "neither a property right nor money was in fact taken . . . there is [therefore] nothing requiring review under the *Nollan/Dolan/Ehrlich* standard." When the United States Supreme Court denied certiorari review of this decision, Justice Scalia wrote a dissent briefly discussing this issue, calling it "plausible":

> It is undeniable, on the other hand, that the subject of any supposed taking in the present case is far from clear. Whereas in *Nollan* there was arguably a completed taking of an easement (the homeowner had completed construction that had been conditioned upon conveyance of the easement), and in *Dolan* there was at least a threatened taking of an easement (if the landowner *had* gone ahead with her contemplated expansion plans the easement would have attached), in the present case there is neither a taking nor a threatened taking of any money. If petitioners go ahead with the conversion of their apartments, the city will not sue for $600,000 imposed as a condition of the

> conversion; it will sue to enjoin and punish a conversion that has been prohibited.

Lambert, 529 U.S. at 1048 (Scalia, J. dissenting).

The majority's only response to this point is that the issue was already settled in *Dolan* because, when it was raised in Justice Stevens' dissent, the majority ignored the issue. I suggest it was not addressed in the *Dolan* majority opinion, not because it was so lacking in substance that it did not merit any ink, but because at that procedural juncture in *Dolan*, it simply was not relevant. *Dolan* came to the Court through Oregon's administrative appeal process. Mrs. Dolan sought review of the decision of the Land Use Board of Appeals that a requirement of dedication of a portion of her property for drainage and a bike path were valid conditions to attach to approval of her application for a permit to enlarge her store. The fact that she had not made the dedication was no impediment to her right to appeal the decision. If, after exhaustion of her appeals, the condition were found to be valid, or "constitutional," she could then decide to accept or decline. All the Court did in *Dolan* was announce the second prong of the "exactions" test and send it back to see whether she ought to prevail in her appeal.

If we are going to be deciding this issue based on what was *not* said in an opinion, surely the fact that Justice Scalia never mentioned in his *Lambert* dissent that this issue already had been decided in *Dolan* is significant. For my money, given Justice Scalia's proclivities in this area of the law, for him to refer to the absence of a "taking" as a "plausible" defense to a "takings" claim is a pretty big deal. Besides, 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?

The position that a regulatory taking can occur under a land-use exaction theory in circumstances where the permit is denied and no property interest is actually conveyed may have made some sense in the pre-*Lingle* world; however, now that *Lingle* has clarified the proper focus of regulatory takings analysis, the position that a "taking" has occurred solely because the State made an offer that was rejected is untenable. It is not the *making* of an offer to which unconditional conditions are attached in violation of the limitations of *Nollan/Dolan* that gives rise to a taking; it is the receipt of some tangible benefit under such coercive circumstances that gives rise to the taking. *See Lingle*, 544 U.S. at 539-40.

Faced with the unconstitutional condition offered by the District in this case, Mr. Koontz had several options that he could have pursued. If he performed the mitigation, he could have sought recovery for it,[5] or he could have gotten a judicial determination that the condition was invalid by administratively appealing the District's decision. Just as with an ordinary inverse condemnation case, if the State demands an interest in land for which it offers no compensation, there is only a "taking" if the interest is actually taken. It is not the demand that is compensable, only the taking. If a landowner decides not to accede, his remedy is to contest the government action. Here, Mr.

---

[5] *See Town of Flower Mound*, 135 S.W. 3d at 630.

Koontz elected not to contest the validity of the permit denial decision on any basis other than a "taking."[6]

Nollan and *Dolan* are exactly the same. In explaining the concept of an exaction-type of "taking" in *Dolan*, the Court said that requiring the landowner to dedicate two strips of her property as a condition of approval might be a taking of the dedicated land. There is no suggestion that it was a taking of the entire 1.67 acre parcel. What is "taken" in these cases is what was improperly exacted. In this case, if Mr. Koontz had given in to the District's condition, gotten his development permit and done the off-site mitigation, he would be entitled to recover the value of the off-site mitigation. If he elected to refuse the offer, he had a judicial remedy to invalidate the condition, just as Mrs. Dolan did. The parcel of land for which he sought the development permit was not, however, in any wise "taken" by the District. The only way a "taking" can even be conceptualized in such a circumstance is by adopting the view that by proposing an "unconstitutional condition" that was rejected, the District forfeited its right (and duty) to protect the public interest to refuse the permit at all.

To suggest that the agency might forfeit its right to refuse or require constitutional conditions for issuance of a permit because the agency guessed incorrectly where the boundaries of "nexus" or "rough proportionality" lay has no basis in logic or in any law that I can find. Nor is it fair or practical. As challenging as this case has been to apply *Nollan/Dolan* exaction law, I am at least grateful that this case does not involve a nexus/rough

---

[6] *See* § 373.617(2), Fla. Stat. (1993).

proportionality analysis. Reading cases from other jurisdictions where courts have had to struggle with these twin issues shows that this analysis can be extremely complex, but in the final analysis, it is completely arbitrary. *See Ocean Harbor House Homeowners Ass'n v. Cal. Coastal Comm'n*, 163 Cal. App. 4th 215 (Cal. App. 2008); *B.A.M. Dev. L.L.C. v. Salt Lake County*, 196 P.3d 601 (Utah 2008). The twin issues of "nexus" and "rough proportionality" might be apparent in some cases at the margins, but in most of these cases, they come down to a judge's subjective opinion about connection and equivalency. No agency in its right mind will wade into this swamp. It will be too risky for a governmental agency to make offers for conditional permit approvals or to offer a trade of benefits out of fear that the offer might be rejected and the condition later found to have lacked adequate nexus or proportionality. Better to deny the permit and defend the decision under the traditional law of regulatory "takings."

I recognize that one judge looking at the facts of this case might see reasonable conduct on the part of the District to allow a landowner some flexibility to develop his land, even if it involves wetland destruction, by securing a benefit for the public's interest in improving wetlands within the same geographic basin, while another judge will see "gimmickry"[7] designed to steal from Mr. Koontz. Surely, even the most extreme view that conditions imposed on the issuance of a permit constitute an "out and out plan of extortion" would, nevertheless, recognize that removal of the unconstitutional condition cannot mean the applicant acquires the right

[7] *Dolan,* 512 U.S. at 389.

to be free of *any* condition. Such a judicially-invented notion might not do much harm on fourteen acres in the middle of rural central Florida but in a thousand other contexts, it could be disastrous.

In *Nollan*, the Court held that the government could impose a condition on the discretionary decision to issue a permit without effecting a taking requiring just compensation if "the permit condition serves the same governmental purpose as the developmental ban." *Nollan*, 483 U.S. at 837. Mr. Koontz had the right to a constitutional condition – no more, no less.

Finally, land-use exaction theory only appears to apply in circumstances where the property owner is faced with a choice between an exaction and permit denial. In this case, Mr. Koontz was never in that position because he had a third option—modification of his development to one acre with no "exaction." The trial court never found that the proffer of this option by the District was any form of a "taking."

In summary, correct application of exactions law requires the conclusion in this case that, although the off-site mitigation condition for issuance of the permit was invalid, nothing was ever "taken" from Mr. Koontz, in the Fifth Amendment sense of the word, and he has no right to recovery in inverse condemnation.

Appendix C–1

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO. C1-94-5673

COY A. KOONTZ, JR., as personal representative of the estate of Coy A. Koontz, deceased,

Plaintiff,

v.

THE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, et al.,

Defendants.

Entered: February 21, 2006

FINAL JUDGMENT

THIS CAUSE came on for trial pursuant to directions from the Fifth District Court of Appeals (*St. Johns River Water Management District v. Koontz*, 861 So.2d 1267 [5th DCA 2003]; and *St. Johns River Water Management District v. Koontz*, 908 So.2d 518 [5th DCA 2005]) to determine damages to be paid as just compensation for the temporary taking of Coy Koontz' property as determined by Judge Joseph P. Baker in the Final Judgment of October 30, 2002, and the parties agreeing that the only issue for trial was the determination of the amount of said damages, and the Court having heard argument of counsel and testimony of the witnesses, it is therefore:

ORDERED AND ADJUDGED:

1. The parties have submitted various methodologies for the determination of temporary taking damages. The Court finds that under the facts of this case, the amount of compensation and methodology opined by Steven Matonis, MAI, Appraiser, properly identifies the amount of temporary damages due from the initial taking date of June 9, 1994 through the issuance of the District permit on December 12, 2005. Accordingly, this court enters judgment for the Plaintiff, Coy A. Koontz, finding just compensation due from the Defendant, St. Johns River Water Management District, in the amount of $327,500.00, together with interest calculated yearly at the legal rate and carried forward since 1994, in the amount of $48,654.00 for a total award of damages of $376,154.00, for which let execution issue.

2. The Court reserves jurisdiction to determine the amount of attorney fees and costs due to Plaintiff, Koontz, pursuant to Florida Statutes, Section 373.617.

DONE AND ORDERED, this FEB 21 2006, in Orlando, Orange County, Florida.

LAWRENCE R. KIRKWOOD
CIRCUIT COURT JUDGE
Lawrence Kirkwood
Circuit Court Judge

Copies to:
William H. Congdon, Jr. Esquire
Michael D. Jones, Esquire

Appendix D–1

IN THE CIRCUIT COURT OF
THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

COY A. KOONTZ, JR., as Personal Representative of the estate of Coy A. Koontz, deceased,

Plaintiff,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, ET AL.,

Defendants.
_____/

Case No. C1-94-5673

Entered:
October 30, 2002

FINAL JUDGMENT

This cause coming on for trial before this Court on August 28, 2002, on the Plaintiffs', Coy A. Koontz, Jr., as personal representative of the estate of Coy A. Koontz, deceased, claim that the St. Johns River Water Management District's acts and conduct in denying the permit for the development of his property resulted in a regulatory taking of the property. After review of the file, the memorandums of law, the exhibits and having considered the qualifications and credibility of the witnesses testifying in this cause, it is the judgment of this court that the off-site mitigation conditions imposed upon Koontz by the District resulted in a regulatory taking of the Koontz property.

INTRODUCTION

"When a butterfly flutters its wings in one part of the world, it can eventually cause a hurricane in another." IT was the MIT meteorologist Edward Lorenz who wrote that in his book Chaos Theory. He was repeating an observation that has been repeatedly made over thousands of years to emphasize that the full range of possible consequences of events in our world is uncertain, unknowable and unpredictable. His book offsets the impression that comes from the degrees of predictability achieved in our physical sciences. Among those sciences are environmental sciences. Advanced as they are, Professor Lorenz and others have shown us the need to recognize the limits of even our best sciences. Any butterfly might be blowing up a hurricane. Which one, when and where is not foreseeable.

When the undersigned quoted Professor Lorenz in questioning some of the witnesses, it was to express the spirit of his book. By quoting Professor Lorenz there as no intention to discredit the expert witnesses who opined on environmental impacts. They appeared to accept the same limitation on their ability to know the future.

Some argue that because we can't know the consequences of human activity on "nature", any restraint on development is desirable. It is also argued an the other hand that since the consequences of development are unknowable, no regulation on development can be sound.

Recognizing one's limits on what one can know is realistic. In making a decision it is good sense to consider what one does not know as well as what one

does. The recognition is not paralyzing. IT cannot render the water management districts or other agencies incapable of decisions. It does not render this court incapable of making a decision. It does, however, make this court diffident in its decision.

HISTORY AND STATEMENT OF THIS CASE

The subject property is located south of State Road 50, immediately east of the eastern extension of the East-West Expressway in Orange County. The original plaintiff, Coy Koontz, has owned the subject property since 1972. In 1987, a portion of the original acreage adjacent to Highway 50 was condemned, leaving Mr. Koontz with 14.2 acres. There is a 100-foot wide transmission line easement of Florida Power Corporation running parallel to and about 300 feet south of Highway 50, that is kept cleared and moved by Florida Power. A 60-foot wide drainage ditch runs north and south on the west boundary of the property.

The portion of the site that is proposed for development has been seriously degraded from its condition in 1972, by all of the activity around it. There has been intense development in the vicinity, both residential and commercial, and road construction and other governmental projects. The site's usefulness as an animal habitat has been severely reduced.

All but approximately 1.4 acres of the tract lies within a Riparian Habitat Protection Zone (RHPZ) of the Econlockhatchee River Hydrologic Basin and is subject to jurisdiction of the St. Johns River Water Management District.

In 1994, Koontz sought approval from the District for a 3.7 acre development area adjacent to Highway 50, of which 3.4 acres were wetlands and a .3 acres were uplands. Mr. Koontz agreed to dedicate the remaining approximately 11 acres of his property for preservation. The District found the 11 acres was not sufficient mitigation of the development, and it offered alternative mitigation to Mr. Koontz. One of the conditions it settled upon was that he enhance off-site wetlands. This off-site mitigation has not been precisely prescribed, but in general terms, it was enhancement of 50 off-site acres of wetlands by replacing culverts and plugging some ditches. The off-site mitigation would be either four and a half or seven miles from the Koontz property. The cost of this off-site mitigation was not definite. It could cost between $90,000.00 and $150,000.00, but there is evidence it could cost as little as $10,000.00.

Mr. Koontz refused to accept the off-site mitigation. His application was denied. Mr. Koontz then filed suit in August, 1994. In 1997, Mr. Koontz' claim was dismissed by a predecessor judge in this division. This dismissal was appealed. The dismissal was affirmed on all but one ground. The Fifth District Court of Appeal reversed the dismissal on Mr. Koontz' claim of inverse condemnation. That left one issue, according to the Pretrial Statement, which is,

> whether the conditions imposed by the District on the Koontz property and in particular, the required mitigation, resulted in a regulatory taking of the Koontz property [because] the off-site mitigation did not serve a substantial purpose.

Mr. Koontz is contending, in other words, 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.

LEGAL ISSUE

Mr. Koontz' legal argument looks to *Agins v. City of Tiburon*, 447 U.S. 255 (1980). That was an action seeking a declaratory decree that a zoning law restricting development of five-acre lots in San Francisco was a taking. It was held not to be so. *Agins* cites *Euclid v. Ambler Co.*, 272 U.S. 365 (1926) as framing the legal issues. Property owners may bring actions for declaratory decrees from state courts on theories of inverse condemnation. In other words of the *Agins* court, this is what is to be decided in these cases:

> The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.

The *Agins* court upheld the zoning law before it, but announced a rule that it was not necessary for a taking that the property owner be deprived of virtually all economical use of the property. A taking could also occur if the governmental restrictions did not "substantially advance a legitimate state interest."

Mr. Koontz cites several other cases. One of his primary authorities is *Nollan v. California Coastal Commission*, 48 U.S. 825 (1987). In that case, the Nollans applied to the California Coastal Commission

for a permit to build on oceanfront property. This property had a seawall. The seawall was eight feet high. The historic mean high tide line determined the lot's oceanside boundary, which left property belonging to the Nollans beyond the wall, between the seawall and the ocean. The Nollan property was one of several that lay between two public beaches. The California Commission conditioned development by the Nollans on their allowing a public easement across their property between the high tide line and the seawall to make it easier for the public to have access to the two parks.

The Nollans protested the condition as a taking, and the case wound its way to the Supreme Court. The majority opinion of Justice Scalia can be fairly said to focus on the "nexus" between the conditions imposed on development and the proper governmental purpose of building restrictions. His opinion concludes that there was no connection between the legitimate concerns of the State of California in developing coastal properties and providing an easement for public passageway. As he wrote:

> In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "and out-and-out plan of extortion."

Mr. Koontz' case is quite clearly different in nature from the *Nollan* case. Justice Scalia's opinion relies on the legal principle that "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"

> [W]here governmental actions results in "[a] permanent physical occupation" of the property by the government itself or by others . . . "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owners."

Unlike the Nollans' situation, Mr. 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 the property of Mr. Koontz.

Dolan v. City of Tigard, 512 U.S. 374 (1994), requires a showing of a legitimate state interest and demonstrating an "essential nexus" between it and the exaction from the property owner's rights. There is the additional requirement imposed on the public agency of showing rough proportionality between the what is being exacted from the owner and the state interest. In Dolan the court found that the dedication of land for a storm drainage system and dedication of a 15-foot strip for a bike and pedestrian path were disproportionate.

Here. again, the *Dolan* case can be distinguished by the nature of the use for the property being dedicated. It would be turning over property from the owner for use by the government or by bicyclists and pedestrians. Neither of those uses were prohibited conditions and exactions in and of themselves. The City of Tigard lost because it failed to show how either or both condition could be roughly proportional to the impact of Dolan replacing an existing plumbing and electrical supply store with a larger one.

The St. Johns Water Management District argues very persuasively that all of this Federal precedent is inapplicable. As noted, the *Nolan* and *Dolan* cases are clearly distinguishable in fact and legal principle. The District also argues differences between the Federal and Florida Constitutions and different application of them in Federal and Florida courts. The District cites *Dept. of Transportation v. Weisenfeld*, 617 So. 2d 1071 (F1a. 5th DCA 1993), *Hillsborough Expressway Authority v. A.G.W.S. Corp.*, 640 So. 2d 54 (Aa. 1994), and *City of Pompano Beach v. Yardarm Restaurant*, 541 So. 2d 1377 (Fla. 4th DCA 1994) in support of its argument that *Agins v City of Tiburon* and the other cases relied upon by Mr. Koontz are not constitutional law in Florida. The District argues its authority decisively demonstrates that Koontz cannot prevail in this suit without proof the District permitting actions deprived him of all or substantially all economically beneficial or productive use of his entire parcel. Admittedly, Mr. Koontz has not proven that all or substantially all economically viable use of his property has been denied by the District.

St. Johns Water Management District also argues that Mr. Koontz was barred from attacking the validity of the District's decisions by Florida Statutes § 373.617 and by the doctrine of election remedies. That statute requires that,

> [Review of government] 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 same statute confines circuit courts to "determine whether final agency action is an unreasonable exercise of the state's police power constituting a taking without just compensation."

That brings us to the opinion and mandate of the Fifth District Court of Appeal. It reversed dismissal of Mr. Koontz' compliant and remanded for trial. Its directions on the issues to be addressed and resolved should be followed. Mr. Koontz and the St. Johns District do not agree on the interpretation of the DCA opinion.

In Footnote #1 of their opinion the district court judges quote themselves for unanswered questions posed in the case. These questions remain unanswered. The district court in its opinion explaining why the case was reversed and remanded for trial put it this way:

> {Koontz'} position, in effect, was that the application he filed and the concessions he was willing to make to the District in order for it to issue the permits (his giving up over two-thirds of his property to the District) was all that he could do and still retain an economic use of his property. The District turned him down. It made a final decision on the only application before it. . . . There is no requirement that an owner turned down in his effort to develop his property must continue to submit offers until the governing body finally approves one before he can go to court. If the governing body finally turns down an application (sic) and the owner does not desire to make any further concessions in order to possibly obtain the approval, the

> issue is ripe. The owner in this case drew a line in the sand and told the District: "I can go no further." Whether the owner can now convince the court that there has, in fact, been a taking is the issue property before this court.

Although the St. Johns District has argued otherwise, this court reads that language and the DCA opinion as mandating a trial on the issue of whether there has been a taking. The opinion does not make it clear precisely what legal theory of "taking" the DCA had in mind in its remand. The phrase "all that he could do and still retain an economic use of his property" is read by the District's attorney as saying the DCA perceived the issue on taking as whether the St. Johns District's conditions denied Mr. Koontz all or substantially all of the economically viable uses of his property. If so, one must wonder why the case was reversed and remanded. In that reading there is no issue to be tried since Mr. Koontz does not contend he has lost all or substantially all economically viable use of his property by reason of the conditions he has challenged. *See*, Joint Pretrial State ¶ II, 5.

The DCA opinion must be read in its entirety, and the footnotes are important parts of the opinion. In trying to follow the mandate this court has read the opinion many times and listened ta and read lengthy arguments about it. To accept the interpretation of the opinion by Mr. Koontz' counsel seems the more prudent choice. Therefore, the case was tried on whether the off-site mitigation required by the District was an unreasonable exercise of police power. The DCA opinion is consistent with reading the *Nollan* and

Dolan cases as providing constitutional tests applicable to the Koontz property.

CONCLUSION

Viewed in the manner just described, the St. Johns Water Management District did not prove the necessary relationship between the condition of off-site mitigation and the effect of development. There was neither a showing of a nexus between the requited off-site mitigation and the requested development of the tract, nor was there a showing of rough proportionality to the impact of site development. Under this legal approval, the St. Johns District's required conditions of unspecified but substantial off-site mitigation resulted in a regulatory taking.

It is the opinion of this Court that the denial of the Koontz permit application by the St. Johns River Water Management District was invalid and this case shall be remanded to the St. Johns River Water Management District, pursuant to § 373.617, Florida Statutes and the District shall submit a statement of its agreed upon actions with regard to the Koontz permit application to this Court within ninety (90) days hereof. This Court reserves jurisdiction for the entry of orders necessary to facilitate this judgment, as well as the issues of attorney fees and costs.

DONE AND ORDERED this 30 day of October, 2002.

/s/ JUDGE JOSEPH P. BAKER
JOSEPH P. BAKER
Circuit Court Judge

Copies to:
Michael D. Jones, Esquire
William C. Congdon, Esquire

Appendix E–1

IN THE CIRCUIT COURT OF
THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO. C1-94-5673

COY A. KOONTZ, JR., as personal representative of the estate of Coy A. Koontz, deceased,

Plaintiff,

v.

THE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, et al.,

Defendants.

JOINT PRE-TRIAL STATEMENT

* * * *

(L). The District staff suggested several design alternatives to Koontz to reduce and offset the adverse impacts to RHPZ fish and wildlife so that the District could permit the proposed project. Specifically, as set forth in the final orders:

(1) The District proposed that Koontz reduce the scale of his commercial development to .07 acres of wetlands and .03 acres of uplands within the RHPZ with mitigation in the form of a conservation easement or deed restriction over the remaining undeveloped wetlands and uplands, minus the .04 acre portion covered by an existing paved road and the .05 acre portion of the right-of-way.

(2) Alternatively, the District proposed that in addition to Koontz's proposed on-site mitigation plan, that Koontz also provide off-site mitigation by restoring and enhancing at least fifty (50) acres of wetlands on a District-owned parcel (Hal Scott Preserve) on the Econlockhatchee River located about four and a half miles southeast of Koontz's parcel. The replacement of nonfunctioning culverts would enhance the wetland functions to wildlife in the Preserve and maintain the hydrologic function of the wetland system. Also, several upland ditches have altered the natural hydroperiod of some isolated wetlands and the plugging of those ditches would rehydrate the affected wetland systems and enhance the wildlife functions of the Econ Basin.

(3) Alternatively, the District also proposed, as off-site mitigation, in addition to Koontz's proposed on-site mitigation, that Koontz could restore and enhance at least fifty (50) acres of wetlands on a District-owned parcel (Demetree parcel) in the Econ Basin located about seven miles northeast of the Koontz property. The plugging or elimination of a series of upland ditches connected to several

wetlands would assist the rehydration of the wetland system and enhance the wetland functions to wildlife in the Basin.

(4) The District would also favorably consider equivalent mitigation enhancement options on other properties within the Basin proposed by Koontz.

* * * *

From:	Incoming Lit
To:	Kiren K. Prasad; Kristen M. Thorup
Subject:	FW: Koontz case
Date:	Friday, June 01, 2012 1:58:58 PM
Attachments:	Cert Petition FINAL.pdf Certificate of Compliance.pdf Service List.pdf Appendix.pdf

---

From: Brian T. Hodges
Sent: Friday, June 01, 2012 1:58:54 PM
To: Incoming Lit
Subject: FW: Koontz case
Auto forwarded by a Rule

8-470 – outgoing