IN THE SUPREME COURT OF FLORIDA

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,

Petitioner, CASE NO. SC09-713

v.

COY A. KOONTZ, JR., ETC.,

Respondent.
_____/

RESPONDENT'S AMENDED ANSWER BRIEF ON THE MERITS

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

THE CARLYLE APPELLATE LAW FIRM
The Carlyle Building
1950 Laurel Manor Drive, Suite 130
The Villages, Florida 32162
Telephone (352) 259-8852
Facsimile (352) 259-8842
CHRISTOPHER V. CARLYLE
Florida Bar No. 991007
SHANNON McLIN CARLYLE
Florida Bar No. 988367

~ and ~

MICHAEL D. JONES
Florida Bar No. 0137608
MICHAEL D. JONES & ASSOCIATES, P.A.
Post Office Box 196130
Winter Springs, Florida 32719-6130
Telephone (407) 695-7666
Facsimile (407) 695-7157

Appellate Counsel for Respondent,
COY A. KOONTZ, JR., ETC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

Federal Courts of Appeal

Florida Supreme Court

Florida District Courts of Appeal

Florida Constitution

Other Jurisdictions

Florida Statutes

Other Authority

INTRODUCTION

The Petitioner, St. Johns River Water Management District, will be referred to as "the District." The Respondent, Coy A. Koontz, Jr., as Personal Representative of the Estate of Coy A. Koontz, deceased, will be referred to as "Koontz."

Citations to the trial court record on appeal will be indicated as (R ___), shall the appropriate page number inserted. Citations to the record on appeal provided by the Fifth District Court of Appeal pursuant to this Court's Order of September 16, 2009 shall be indicated as (Appeal R ___) with the appropriate page number inserted. Citations to the transcript of the trial shall be indicated as (T ___), with the appropriate page number inserted.

References to the Appendix filed with this Brief shall be indicated as (App. __, at __) with the appropriate tab and page number inserted. References to the Petitioner/Appellant's Initial Brief on the Merits shall be indicated as "Initial Brief, at __" with the appropriate page number inserted.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

It goes without saying that this case has an unusually long, protracted history. The lawsuit was originally filed in 1994 (R 1-95), and the matter was considered by the Fifth District Court of Appeal on four occasions. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 720 So. 2d 560 (Fla. 5th DCA 1998), *rev. denied*, 729 So. 2d 394 (Fla. 1999) ("*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*"); *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8 (Fla. 5th DCA 2009) (the "Opinion"). The facts have been repeatedly addressed by the Fifth District's Opinions; nevertheless, the District's Statement of the Case and Facts is incomplete and inaccurately portrays critical information. Therefore, pursuant to Florida Rule of Appellate Procedure 9.210(c), Koontz offers this Supplemental Statement of the Case and Facts to ensure this Court has an accurate briefing of the issues.

Since the early 1970s, Koontz[1] owned 14.9 acres of property near State Road 50 and the East-West Expressway in Orange County, Florida. *Koontz I*, at

[1]This action was originally brought by Coy Koontz, though Mr. Koontz died in the period between the *Koontz I* and *Koontz II* opinions. *See Koontz II*, 861 So. 2d at 1269 n.1 (Pleus, J., concurring specially). After Coy Koontz's death, his son,

561. In 1994, through his engineer, Koontz applied for a permit to develop approximately 3.7 acres of the property. Opinion, at 10. The proposed development consisted of 3.4 acres of wetlands, and .3 acres of uplands. Koontz offered to preserve the undeveloped remainder of the property - approximately 11 acres - as mitigation (T 30).

As the *Koontz I* court stated, a District staffer

> agreed to recommend approval if Koontz would deed the remaining portion of his property to a conservation area *and* do off-site mitigation by either replacing culverts on St. Johns' property four and one-half miles southeast of the Koontz property or by plugging certain canals on other property owned by St. Johns some seven miles from the Koontz property. Koontz agreed to deed his excess property into conservation status but refused the off-site mitigation demand. St. Johns rejected his application.

Koontz I, 720 So. 2d at 561 (emphasis in original) (R 757-76).

Koontz sued the District in circuit court in August, 1994 (R 1-95). The matter eventually went to trial on Koontz's Amended Complaint (R 364-430). In that pleading, Koontz alleged that "the mitigation requirements, and the cost of mitigation, are impossible to accomplish while maintaining an economical (sic) viable use in the property" (R 376). In the Amended Complaint, Koontz sought to

---

Coy Koontz, Jr., as personal representative of his estate, became the plaintiff in the action. *Id.*

establish that a regulatory taking occurred.[2] *Koontz I*, at 561. The District argued that since there was a chance that a modified application might be approved, there was no final agency action, and therefore the action was not ripe. *Koontz I*, at 562. The Fifth District disagreed and noted that Koontz's application was "specific," and that he sought to develop "a fraction of his property." *Id.* Koontz's position 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.

Id. The Fifth District held that the issue was ripe for adjudication, and that the issue to be tried was whether Koontz "can now convince the [trial] court that there has, in fact, been a taking." *Id.*

The Fifth District also expressed concern with the manner in which the District applied the relevant statutes and/or the District's rules. *Id*. at 561. As the Court stated:

> We inquired at oral argument just where an owner would look in the statutes or in the District's rules to see what would be required of him to get a permit. By what criteria did the staff person determine that two-thirds of

[2]In the alternative, Koontz argued that the legislation which created the Econlackhatchee River Hydrologic Basin was an unconstitutional delegation of authority. *Koontz I*, at 561. The trial court rejected this constitutional argument. *Id.*

> the property would be required instead of one-half? Why was off-site mitigation necessary and, if necessary, why not require mitigation on both parcels? What would insure that if his neighbor made a similar application, similar demands would be made of him? Would the District's requirements have been the same if a different staff person had been assigned to the case? How does a landowner or prospective buyer reasonably assess what the District is likely going to require in order for development to take place in areas regulated by the District. The attorney for the District could do no better than say the requirements are set out somewhere in the statutes and the rules.

Id. at 561 n.1. After remand, the case eventually went to trial (T 1). The testimony brought forth at trial was addressed in Judge Pleus's special concurrence in Koontz II, and will not be repeated here. *Koontz II*, at 1268-72 (Pleus, J., concurring specially).[3]

The trial court entered a "final judgment" in Koontz's favor on October 30, 2002 (R 865-74) (hereafter, the "Liability Judgment"). The trial court stated:

> [a]fter 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.

(R 865). Concerning the lengthy list of questions posed to the District in *Koontz I*, the trial court found that they "remain unanswered" (R 872). The trial court also

[3]The trial testimony was also addressed in Koontz's Answer Brief before the Fifth District in this matter (Appeal R at Tab B, p. 4-8).

concluded that the 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 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. Under this legal approval, the St. Johns District's required conditions of unspecified but substantial off-site mitigation resulted in a regulatory taking.

(R 873-74). The Liability Judgment noted that the matter was remanded to the District for further proceedings in accordance with Florida Statutes section 373.617 (R 874).

After the trial, the District filed a lengthy Motion for Rehearing (R 875-86). In the Order Denying Motion for Rehearing, the trial court noted that "the fact allegedly misapprehended by the district court of appeal was that the Plaintiff Koontz had not lost all or substantially all economical and viable use of his property" (R 887). In rejecting this argument, the trial court noted that it "reviewed the entire record in the case," and found that Koontz "did not base his case on losing all or substantially all use of the property" (R 887-88). Rather, the trial court noted that Koontz's case "from the outset has focused on the cost of the mitigation requirements" (R 888). The trial court noted that

> all of the circumstances reflected in the history of the dealings between the owner and the district make clear nobody ever said there was a denial of all or substantially

> all viable, economic use. As the appellate court noted in its line-in-the-sand metaphor, it was strictly a question of *how far* the district could go in its requirements.

(R 888) (emphasis in original).

Despite the trial court's explicit reservation of jurisdiction in the Liability Judgment, the District appealed (R 894-907). In *Koontz II,* the Fifth District dismissed the appeal for lack of jurisdiction because the Liability Judgment was not a final order since further judicial labor was explicitly required. *Koontz II,* 861 So. 2d at 1268. Judge Pleus concurred specially in *Koontz II*. *Id.* (Pleus, J., concurring specially). His concurrence was offered to "describe the [District's] extortionate actions," and to express a hope that, upon remand, the District would "agree to a reasonable option for the property owner." *Id.* (Pleus, J., concurring specially).

On remand, the District agreed to issue a permit authorizing the original 3.7 acre development with mitigation being the on-site preservation originally proposed (R 1028-34). In other words, the District accepted the *exact* proposal made by Koontz a decade before (R 1017). On June 16, 2004, the trial court entered a "final judgment" which approved the District's proposed order and found that the requirement that Koontz perform only the proposed on-site mitigation was a reasonable exercise of police power (R 1017). However, the "final judgment"

also stated that the trial court reserved "jurisdiction to determine the takings damages" "subject to the appeal of the takings issue" (R 1017).

The District appealed that "final judgment," and it was considered by the Fifth District in *Koontz III*. *Koontz III* held that the "final judgment" was not in fact a final order since it merely made a finding of liability, yet reserved jurisdiction to determine damages. *Koontz III*, at 518. Judge Torpy concurred and concurred specially. *Koontz III*, at 519 (Torpy, J., concurring and concurring specially). Judge Torpy agreed that the court lacked jurisdiction, though he wrote to note that if it had jurisdiction, he would have affirmed for the reasons set forth in Judge Pleus' concurring opinion in *Koontz II*, and because he believed that the District waived the right to appeal by agreeing to issue the permit. *Id.* The matter was once again remanded. *Id.*

At the trial court, a flurry of litigation initiated by the District preceded the damages trial.[4] On February 13, 2006, the matter was tried (R 1432-1500), and a Final Judgment was entered on February 21, 2006 (R 1329-30). The Final

[4]The District filed, among other items: Defendant's Response to Notice for Jury Trial and Defendant's Motion to Reconsider the Interlocutory Order of June 16, 2004 (R 1058-97); Defendant's Motion for Summary Judgment on Damages (R 1120-23, 1126-28); Defendant's Amended Motion for Summary Judgment on Damages (R 1137-43); Defendant's Request to Take Judicial Notice (R 1154-59); Defendant's Motion in Limine Regarding Prior Judicial Opinions in this Case (R 1294-1300); and, Defendant's Memorandum in Support of the Period of Temporary Taking (R 1306-09).

Judgment awarded Koontz damages of $327,500 for the temporary taking during the approximately eleven and one-half year period from June 9, 1994, to December 12, 2005 (R 1333-34). With interest, the Final Judgment totaled $376,154, and the trial court reserved jurisdiction to award fees under section 373.617 (R 1334). The District, for the third time, appealed to the Fifth District (R 1331).

The Opinion recognized that in determining that the District's actions had effected a taking, "the trial court applied the constitutional standards in *Nollan* and *Dolan*." Opinion, at 10. The Opinion also noted that

> 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 [] Koontz. The District makes no challenge to the evidentiary foundation for these factual findings.

Opinion, at 10.

The Opinion went on to hold that an exaction claim was cognizable when a property owner "refuses to agree to an improper request from the government resulting in a denial of the permit," and that Koontz properly challenged as a taking a condition imposed by the government that involves not the "physical dedication of land, but instead a requirement that [] Koontz expend money to improve land belonging to the District." Opinion, at 11, 12. Judge Orfinger authored a concurring opinion, and Judge Griffin authored a dissent. The Fifth

District, on the District's motion for certification, certified a question to this Court as being of great public importance. Opinion, at 22. This Court accepted jurisdiction by Order of September 16, 2009.

SUMMARY OF THE ARGUMENT

This case involves Florida Statutes section 373.617 which gives the right to any person substantially affected by a final agency action to seek relief in circuit court and request monetary damages, as Koontz did in this case. In such an action, the circuit court determines whether the agency action is "an unreasonable exercise of the state's police power constituting a taking without just compensation." In this case, the circuit court applied the standards set forth in *Nollan* and *Dolan* and determined that a taking occurred.

The Opinion correctly affirmed the circuit court. *Nollan* and *Dolan* are applicable to exactions (concessions demanded from the government in order to receive permit approval), including monetary exactions such as those that require a property owner to pay for off-site mitigation. Applying *Nollan* and *Dolan* in that context is supported by Supreme Court precedent and well-reasoned decisions of numerous courts. Applying *Nollan* and *Dolan* in this context is also consistent with the legislative intent behind section 373.617.

The Opinion also correctly held that the District's requirement that Koontz provide off-site mitigation constituted an exaction even though Koontz refused the

condition. Section 373.617 states that an individual substantially affected by a final agency action may seek damages and other relief in circuit court; it does not require, as a condition precedent to filing the action, that the individual accept the improper condition. Further, there is no logical reason under *Nollan* and *Dolan* that would force one to suffer the consequences of an improper condition in order to challenge the validity of the condition.

Florida Statutes section 373.617 gives an impacted property owner the right to proceed directly to circuit court and attempt to convince that court that, as occurred in this case, the agency's final action constituted an unreasonable exercise of the state's police power constituting a taking without just compensation. This Court has affirmed that right, and there was no requirement that Koontz proceed under Chapter 120.

It is clear that the *Nollan* and *Dolan* standards applied to the issue of takings under section 373.617. However, should this Court conclude that *Nollan* and *Dolan* are inapplicable, affirmance is still required because liability under *Penn Central* is demonstrated by the record.

Finally, the District has waived the right to appeal, and therefore the Final Judgment should be affirmed. By electing to issue the permit to Koontz, the District waived its right to challenge the Final Judgment, and the attempt to reserve jurisdiction to appeal must fail.

ARGUMENT

Largely ignored by the District (and the Amici supporting the District) is the reality that this case involves the application and interpretation of a statute, specifically Florida Statutes section 373.617.[5] As the Opinion notes, Koontz maintained his claim under that statute. Opinion, at 10. The critical portion of the statute provides that

> [a]ny person substantially affected by a final action of any agency with respect to a permit may seek review within 90 days of the rendering of such decision and request monetary damages and other relief in the circuit court in the judicial circuit in which the affected property is located; however, circuit court review shall be confined solely to determining whether final agency action is an unreasonable exercise of the state's police power constituting a taking without just compensation.

§373.671(2), Fla. Stat. Section 373.617 was enacted in 1978, and has remained the law in Florida for over 30 years. The issues in this case must be viewed through the prism of the relevant statutory language.

Here, a person (Koontz) was substantially affected by final agency action of the District. He timely filed an action in circuit court seeking monetary damages. Under the statute, he would be entitled to such damages if he were able to convince the circuit court that the final agency action constituted "an unreasonable exercise

[5]Due to the fact that the statute has never been amended and due to the lengthy history of this case, the statute will be cited throughout this Brief without reference to a specific year.

of the state's police power constituting a taking without just compensation." *Id.* As stated in *Koontz I*, decided by the Fifth District over a decade ago, the issue for the circuit court on remand was whether or not Koontz could "convince the trial court that there has, in fact, been a taking." *Koontz I*, at 562.

Koontz prevailed, and the trial court entered the Liability Judgment in Koontz's favor on October 30, 2002 (R 865-74). The trial court found the 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 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. Under this legal approval, the St. Johns District's required conditions of unspecified but substantial off-site mitigation resulted in a regulatory taking.

(R 873-74).

The Liability Judgment applied the standards set forth by the Supreme Court of the United States in *Nollan v. California Coastal Commission*,[6] which requires an "essential nexus" between the required condition and the development ban, and *Dolan v. City of Tigard*,[7] which requires "rough proportionality" between the condition and the impact of the proposed development. As the Opinion notes, the District made "no challenge to the evidentiary foundation of these findings."

---

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

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

Opinion, at 10. Rather, as here, the District argued that the trial court lacked jurisdiction and argued against the application of *Nollan* and *Dolan* to the matter. *Id.* Simply put, if this Court concludes that the standards set forth in *Nollan* and *Dolan* apply, then Koontz must prevail because the District has not challenged the Liability Judgment's findings (supported in the record with competent, substantial evidence) that "the off-site mitigation conditions imposed upon Koontz by the District resulted in a regulatory taking of the Koontz property" (R 865).

The Certified Question is:

> Where a landowner concedes that permit denial did not deprive him of all or substantially all economically viable use of the property, does Article 6(a) of the Florida Constitution recognize an exaction taking under the holdings of *Nollan* and *Dolan* where, as here, 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?

Opinion, at 22. It is respectfully submitted that the Certified Question is somewhat inartfully drawn in that it fails to mention section 373.617; however, it should be answered in the affirmative.

Through the fog of the complex procedural history of this case, through the appeals and all the information now before this Court, this Court is now called on to consider whether, under the facts of this case, the trial court and the Fifth District correctly concluded that, applying *Nollan* and *Dolan*, an unreasonable

exercise of the state's police power resulted in a taking without just compensation under section 373.617. As the Fifth District correctly concluded, the District's actions did, in fact, result in a taking.

Koontz agrees that, because this case involves the interpretation of the federal and state Takings Clauses as well as a Florida Statute, the standard of review is de novo.

ISSUE I. THE FIFTH DISTRICT CORRECTLY APPLIED *NOLLAN* AND *DOLAN* AND DETERMINED THAT THE DISTRICT'S CONDITIONING OF PERMIT APPROVAL RESULTED IN A TAKING UNDER FLORIDA STATUTES SECTION 373.617 (Restated).

A. The History And Legislative Intent Of Florida Statutes Section 373.617.

For this Court to properly consider the issues before it, the history and terms of Florida Statutes section 373.617 must be examined. The Legislature, through statutory enactments, sets the public policy of the State. *See, e.g., Gracey v. Eaker*, 837 So. 2d 348, 352 (Fla. 2002). Section 373.617 became law on May 29, 1978. Later that year, the *Florida Bar Journal* published an article entitled "Compensating Police Power Takings,"[8] and it provides an excellent background of the state of takings law in Florida at the time, and the rationale for the enactment

[8]Robert M. Rhodes, *Compensating Police Power Takings: Chapter 78-85, Laws of Florida*, Fla. Bar J., Nov. 1978 at 741 (hereafter "*Rhodes*"). A copy of the article appears at Tab "A" of the Appendix.

of section 373.617.[9] The author begins by noting the Florida Constitution's Just Compensation Clause, Article X, section 6, states that a landowner will be compensated for property taken by the government. The author also states:

> Private property may also be subordinated to the public interest through exercise of the police power. Like eminent domain, police power action must benefit the public; however, as distinguished from eminent domain, a valid police power exercise may restrict the use of private property without payment of compensation.

Rhodes, at 741. The "clear distinction" between the appropriation of private property under eminent domain (which required compensation) and through the use of the police power (which did not) was recognized by Florida courts at the time. *See, e.g., Mailman Dev. Corp. v. City of Hollywood*, 286 So. 2d 614, 615 (Fla. 4th DCA 1974), *cert. denied*, 293 So. 2d 717 (Fla. 1975). As the author states:

> The "clear distinction" perceived by the [*Mailman*] court between a compensable exercise of eminent domain through condemnation and noncompensable exercise of the police power contrasts sharply with the U.S. Supreme Court's directive in *Pennsylvania Coal*[10] that courts must consider if governmental interference with private property is of such magnitude that "there must be an exercise of eminent domain compensation to sustain [it]."

Rhodes, at 741.

---

[9]Another source that addresses the legislative context behind the enactment of section 373.617 is Kent Wetherell, *Private Property Rights Legislation: The "Midnight Version" and Beyond*, 22 Fla. St. U. L. Rev. 525, 538-43 (Fall 1994) (hereafter "*Wetherell*").

[10]*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

The Governor formed a Property Rights Study Commission to examine the issue, and that body issued a Final Report ("Final Report") in early 1975.[11] The Final Report recognized that preservation of land and controlling pollution was an "urgent need," but also recognized that governmental restraints designed to protect those goals must be imposed "wisely, fairly and in accord with strong American traditions of individual liberties, including those related to property" (App. B at 4). The Final Report recommended that a system should be created which would allow for compensation related to the imposition of regulations, and that "[c]ompensation or other relief should be determined by judicial proceeding rather than by administrative proceeding." (App. B, at 15). The Florida Senate also formed a Senate Select Committee on Property Rights and Land Acquisition to address the issue, and it determined, as did the Governor's Committee, that "regulations which unduly diminish property value or inequitably burden owners must be compensated." *Rhodes*, at 741.

After considerable modification to the legislation initially propsed,[12] the Legislature ultimately enacted legislation that "implicitly adopts several of the policy statements of the [Governor's] Study Commission and conclusions of the

[11]A copy of the Final Report appears in the Appendix under Tab "B."

[12]The legislative history is addressed by Rhodes (*Rhodes*, at 742), and all of the materials available from the Florida State Archives dealing with the legislation is attached under Tab "C" of the Appendix.

[Senate] Select Committee." *Wetherell*, at 541. This legislation was aptly described as "police power taking compensation legislation." *Rhodes*, at 742. The Act ultimately created five identical statutes dealing with different environmental chapters,[13] and "created a circuit court action enabling persons substantially affected by state agency action on environmental permits to request monetary damages and other appropriate relief." *Rhodes*, at 744.

As noted above, subsection 373.617(2) provides that

> [a]ny person substantially affected by a final action of any agency with respect to a permit may seek review within 90 days of the rendering of such decision and request monetary damages and other relief in the circuit court in the judicial circuit in which the affected property is located; however, circuit court review shall be confined solely to determining whether final agency action is an unreasonable exercise of the state's police power constituting a taking without just compensation.

§ 373.671(2), Fla. Stat.

It is important to note that, even if the circuit court determines that there has been an unreasonable exercise of the state's police power resulting in a taking without just compensation, the matter is not immediately resolved in favor of the

[13]The Act created the statute at issue in this case (section 373.617, addressing water resources), as well as section 161.212 (beach and shore preservation); section 253.763 (state lands); section 380.085 (land and water management; and section 403.90 (environmental control).

landowner with only the issue of appropriate damages to be determined.[14] Rather, the statute provides *the agency* with a variety of options that it may choose from if the circuit court rules in favor of the interested person. First, the agency may simply agree to issue the permit. § 373.617(3)(a), Fla. Stat. Second, it could choose to pay the "appropriate monetary damages." § 373.617(3)(b), Fla. Stat.[15] Third, it may choose to "modify its decision to avoid an unreasonable exercise of police power." § 373.617(3)(c), Fla. Stat. If the agency chooses one of those options, it "submits a statement of its agreed-upon action to the court in the form of a proposed order" and the circuit court then determines if the proposed action satisfies the statutory requirements. § 373.617(4), Fla. Stat. Finally, the agency may choose not to submit a proposed order, and essentially leave the remedy up to

[14]The dissent states that Koontz's decision to refuse an unconstitutional condition as a "lucrative move" which "will no doubt be emulated all over that state of Florida." Opinion, at 16 (Griffin, J. dissenting). The concurring opinion notes the potential for "significant liability" to a governmental agency under the holding of this case. Opinion, at 14 (Orfinger, J. concurring). However, neither opinion addresses the options available to the District under the statute, which included granting Koontz the permit upon remand. Moreover, it is respectfully submitted that the lengthy history of this case (and the size of the judgment for temporary taking damages) was largely due to the District aggressively litigating the matter (and instituting three appeals) over more than a decade.

[15]In determining what the "appropriate monetary damages" are, consideration should be given to "any enhancement to the value of the land attributable to governmental action." § 373.617(3)(b), Fla. Stat. *Rhodes* notes that this provision is a "windfall deterrent mechanism designed to at least bring before the parties and the court value that may have been conferred by the government." *Rhodes*, at 744.

the circuit court. If the agency has not submitted a proposed order within ninety days after the circuit court's determination, then the circuit court may fashion a remedy from 373.617(3)(a), (b) or (c). § 373.617(4), Fla. Stat.

As can be seen from the plain language of section 373.617 and the history offered above, Florida law provides a remedy when a taking occurs due to a final agency action constituting an unreasonable exercise of the state's police power. As noted, "the legislation did not attempt to statutorily define a taking." *Wetherell*, at 541. Therefore, the issue then becomes what test is used to determine when a taking has occurred.

B. *Nollan* And *Dolan* Are Not Limited To Exactions Requiring The Dedication Of Land For Public Use.

Nollan and *Dolan* form a two-pronged test for the constitutionality of adjudicatory land use exactions which require the government to prove that an exaction is related to the impact of a development in both nature and degree.[16] In meeting this standard, "no precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication

[16]"Over the past two decades, the Court has established under the Takings Clause a logic and metrics for constitutionally permissible exactions that require concessions to have an 'essential nexus' and be 'roughly proportional' to the harms a proposed development is expected to cause." Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Cal. L. Rev. 609, 611 (2004) (hereafter "*Fenster*").

is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391.

Nollan and *Dolan* apply to "exactions" imposed by governmental agencies. As the District recognized, the term "exaction" is one of art, and may be characterized as "those concessions demanded by government as a prerequisite for the issuance of authorizations that allow the intensified use of real property." Initial Brief, at 15.[17] Defined more broadly, and as noted in the Opinion, "any requirement 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); Opinion, at 11.

This case concerns the conditioning of adjudicatory land use approval upon the applicant paying for and constructing off-site infrastructure improvements. The District contends that only exactions of interests in real property warrant review under *Nollan* and *Dolan*. While there has been much academic debate on this issue, the Supreme Court of the United States (as well as most other appellate courts addressing the question) has rejected the notion that the scope of the *Nollan/Dolan* standards is so limited.

[17]The District relied on a definition provided by Professor Mark Fenster. *Fenster*, at 613. This definition was also cited by Judge Orfinger in his concurring opinion. Opinion, at 13.

The Supreme Court had occasion to consider the scope of *Nollan* and *Dolan* when it granted certiorari review in case originating in California. *See Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994). *Ehrlich* involved the conditioning of a proposed redevelopment upon the payment of fees (a non-dedicatory exaction). The Supreme Court vacated and remanded with instructions to reconsider the case in light of *Dolan*. *Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994).

Specifically, in *Ehrlich*, the owner of a failing tennis club wanted to convert the property into a condominium complex. *Ehrlich v. City of Culver City*, 911 P.2d 429, 433-34 (Cal. 1996). The City was concerned about the impact of the project, and informed the landowner that the project would not be approved unless he agreed to build new recreational facilities for the City. *Id.* The City ultimately agreed to approve his project if the owner paid the City $280,000. *Id.* The City also required the owner to pay an additional $33,200 to provide art work for the City. *Id.* at 435.

The landowner brought suit and argued that the recreation and art fees were unconstitutional takings. *Id.* The trial court found that the recreational fee was indeed a taking, noting that there was no "reasonable relation . . . between the plaintiff's project and the need for public tennis courts in the City." *Id.* The Court of Appeal, however, reversed and found that the recreational fee was not an unconstitutional taking without just compensation. *Id.* at 436. The landowner then

sought certiorari review from the Supreme Court which as noted, granted the petition, vacated the judgment, and remanded the case to the Court of Appeal "for further consideration in light of *Dolan*." *Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994).

As it must, the California Supreme Court complied. The court discussed *Nollan* and *Dolan* extensively, as well as the controversy surrounding application of those cases to situations involving monetary exactions before concluding that the *Nollan* and *Dolan* standards applied to the monetary exaction in the case. The court noted that *Dolan* made clear that the "discretionary context" of a government agency in a permitting situation

> presents an inherent and heightened risk that local government will manipulate the police power to impose conditions unrelated to legitimate land use regulatory ends, thereby avoiding what would otherwise be an obligation to pay just compensation. In such a context, the heightened *Nollan-Dolan* standard of scrutiny works to dispel such concerns by assuring a constitutionally sufficient link between ends and means. It is the imposition of land use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the *sine qua non* for application of the intermediate standard of scrutiny formulated by the court in *Nollan* and *Dolan*.

Id. at 439.

No fair reading of *Ehrlich* can deny that it extended *Nollan* and *Dolan's* application to adjudicatory development conditions beyond dedications of real property. As one commentator has noted, the *Nollan* and *Dolan* standards "extend to exactions beyond physical dedications even though *Nollan* and *Dolan* were land dedication cases. How else [can one] explain the *Ehrlich* remand –- an impact or 'mitigation' fee case – to be decided in light of *Dolan*?" David J. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed From Penn Central to Dolan, and What State and Federal Courts are Doing About it*, 29 Stetson L. Rev. 523, 575 (1999). Professor Fenster has also acknowledged that the Court's "remand of *Ehrlich* and lower federal and state court decisions (including the California Supreme Court's subsequent decision in *Ehrlich* on remand) may have settled the issue in favor of extending *Nollan* and *Dolan* to non-possessory exactions such as impact fees." *Fenster*, at 637.[18]

In a case highly analogous to this one, the Supreme Court of Texas applied *Nollan* and *Dolan* to a development condition requiring a developer to pay for improvements to an adjacent public street to gain plat approval. In *Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (Tex. 2004) the court stated:

[18]In fairness, Fenster also noted that, "[o]n the other hand, the *Del Monte Dunes dicta* associating the exactions cases solely with dedications leaves sufficient ambiguity to keep the issue open." *Fenster*, at 637.

> For purposes of determining whether an exaction as a condition of government approval of development is compensable taking, we see no important distinction between a dedication of property to the public and a requirement that the property already owned public be improved. The *Dolan* standard should apply to both.

Flower Mound, 135 S.W. 3d at 639-40.

The District contends that review under *Nollan* and *Dolan* is confined to cases involving exactions of real property. As support, they point first to *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005). *Lingle*, in reaffirming the validity of the *Nollan* and *Dolan* to exactions, contains *dicta* that those arguing for the limitation to dedications of land have seized on to support their position.[19] *Lingle* notes that those cases involved "adjudicative land-use exactions – specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." *Lingle*, 125 U.S. at 547. This summary reference cannot be fairly read as a holding concerning the scope of *Nollan* and *Dolan's* application, nor can it be reconciled with *Ehrlich*. The quoted statement in *Lingle* is a true, though it merely addresses the facts of

[19]Professor Fenster has acknowledged that it is possible to dismiss "*Lingle's* entire discussion of *Nollan* and *Dolan* [] as non-binding dicta." Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 Hastings L.J. 729, 731 (2007).

those cases and does not make a definitive declaration that limits the application to *Nollan* and *Dolan* to only those situations.[20]

Similarly, language in *City of Monterey v. Del Monte Dunes of Monterey, Ltd.*, 526 U.S. 687, 702 (1999) noting that the *Nollan* and *Dolan* standards do not apply "beyond the special context of exactions–land-use decisions conditioning approval of development on the dedication of property to public use" cannot be fairly read as a specific holding on the scope of applicability. This language was merely making the point that *Del Monte Dunes* did not involve unconstitutional conditions, but rather dealt with an outright denial of development. Thus, the Supreme Court held that *Dolan's* rough proportionality test "was not designed to address, and is not readily applicable to, the much different questions arising where . . . the landowner's challenge is based not on excessive exactions but on denial of development." *Id*. at 703.

[20]The District also makes a strained argument that *Lingle's* statement that takings under *Loretto* (permanent physical invasion of land is a taking), *Lucas* (deprivation of all economically beneficial use of the property) and *Penn Central* (used when takings claims do not fall under physical takings or *Lucas* takings) share the "common touchstone" of aiming to "identify regulatory actions that are functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from this domain." *Lingle*, 544 U.S. at 539. The District seizes upon what it terms the "functionally equivalent declaration" as controlling *Nollan* and *Dolan*, but the Court's deliberate exclusion of those cases from the "functionally equivalent" discussion noted above should lead to the opposite conclusion.

The court in *Flower Mound* had no difficulty in distinguishing *Del Monte Dunes* and rejecting the argument the District makes here. It found that the passage from *Del Monte Dunes* cited above

> does no more than elaborate on the same distinction drawn in *Dolan* between conditions limiting the use of property and those requiring a dedication of property. In neither *Dolan* nor *Del Monte Dunes* did the Supreme Court have reason to differentiate between dedicatory and non-dedicatory exactions. Nor does either case suggest that conditioning development of property on improvements to abutting roadways is somehow more like a restriction on the use of property rather than a dedication of property.

Flower Mound, 135 S.W. 3d at 636. The District's position that *Lingle* and *Del Monte Dunes* settled the issue is incorrect.

The District also argues that, prior to *Lingle*, "the vast majority of the federal and state courts recognized the limited applicability of the land-use exactions analysis to the compelled dedication of land," and that "some" courts had extended exactions theory to "non-dedication exactions." Initial Brief, at 24. The Supreme Court of Texas refuted the contention that "most" courts have restricted use to land use dedications by noting that position "does not appear to be correct about courts of last resort."[21] *Flower Mound*, 135 S.W. 3d at 636-37.

[21] *Homebuilders Assoc. v. City of Beaver Creek*, 729 N.E. 349 (Ohio 2000); *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1995), *cert. denied*, 519 U.S. 929

The District also claims that it has been unable to find any exaction cases post-*Lingle* that applied to non-dedicatory exactions, yet it cites just such a case. Initial Brief, at 24; *Ocean Harbor House Homeowners Ass'n v. California Coastal Comm'n*, 163 Cal. App. 4th 215 (Cal. Ct. App. 2008). The District has also overlooked several post-Lingle decisions applying *Nollan* and *Dolan* scrutiny to adjudicatory exactions other than dedications of land. *See, e.g.*, *Sefzik v. City of McKinney*, 198 S.W.3d 884 Tex. Ct. App 2006); *B.A.M. Development, L.L.C. v. Salt Lake County*, 196 P.3d 601 (Utah 2008); *Toll Bros., Inc. v. Board of Chosen Freeholders of County of Burlington*, 944 A.2d 1 (N.J. 2008). Simply put, the District urges this Court to adopt an incorrect, expansive reading of *Lingle* that should be rejected.

Finally, it should be recognized that this matter involves not the imposition of an impact fee, but to an individualized determination requiring Koontz to upgrade infrastructure as a condition of development. Individualized upgrade exactions pose a greater risk for improper governmental "leveraging"[22] than is present with the application of some type of uniform fee. As the California Supreme Court noted:

(1996); *Northern Illinois Homebuilder Assoc. v. County of Dupage*, 649 N.E. 2d 384 (Ill. 1995); *Trimen Dev. Co. v. King County*, 877 P. 2d 187 (Wash. 1994).

[22]*Nollan*, 483 U.S. at 837, n.5.

> In our view, the intermediate standard of judicial scrutiny formulated by the high court in *Nollan* and *Dolan* is intended to address just such indicators in land use "bargains" between property owners and regulatory bodies – those in which the local government conditions permit approval for a given use on the owner's surrender of benefits which *purportedly* offset the impact of the proposed development. It is in this paradigmatic context – where the individual property owner-developer seeks to negotiate approval of a planned development – that the combined *Nollan* and *Dolan* test quintessentially applies.

Ehrlich, 911 P.2d at 438 (emphasis in original).[23]

It is clear that *Nollan* and *Dolan*, and the heightened scrutiny they require, should be applied in this case. *Nollan* and *Dolan* are intended "to serve as doctrinal shields that would protect property owners and the integrity of property rights against the effects of local government's unchecked administration of their police powers." *Fenster*, at 632.[24] If *Nollan* and *Dolan* are not applied in the context of section 373.617, then there will be no "shield" to protect property owners from the very abuses of police power that section 373.617 sought avoid,

[23]"It is the imposition of land use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the *sine qua non* for application of the intermediate standard of scrutiny formulated by the court in *Nollan* and *Dolan.*" *Ehrlich*, 911 P.2d at 439.

[24]Colorado, in an attempt to "underscore and reinvigorate federal and state protections against certain uncompensated takings," has passed legislation requiring that the *Nollan* and *Dolan* standards be applied in the context of regulatory takings. *See Wolf Ranch, LLC v. City of Colorado Springs*, 207 P.3d 875 (Colo. Ct. App. 2008) (discussing Colo. Rev. Stat. Ann. § 29-20-203).

and the legislative intent will be thwarted. Agencies will be free to use (and potentially abuse) their police power with impunity, and thus will be free to require exactions that bear no relationship to any proposed development. Property owners will be forced to agree to any such conditions, without the recourse specifically provided in 373.617 if, as the District suggests, a taking may only occur if land is physically taken or all economic use is destroyed. This is not what was intended when section 373.617 was enacted, it was not what was intended when *Nollan* and *Dolan* were decided, and certainly should not be the law in this state.

C. The Requirement That Koontz Provide Additional Mitigation For Permit Issuance Constituted An Exactment.

All three Opinions below address whether or not an "exaction" occurred where Koontz did not agree to the improper requirement that he provide offsite mitigation in this case. As the Opinion notes, the District's position is "that no exaction occurred here because nothing was exacted from Mr. Koontz." Opinion, at 11. The Opinion correctly concluded that an exaction constituting a regulatory taking occurred in this case.

Analysis of this issue must begin with the relevant statute. As noted above, Florida Statutes subsection 373.617(2) specifically permits "any person substantially affected by a final action of any agency with respect to a permit may seek review within 90 days of the rendering of such decision and request monetary

damages and other relief in the circuit court." § 373.617, Fla. Stat. Note that the statute does not read "any person who has consented to conditions imposed by an agency" may bring an action; rather, the entire focus of the statute provides a cause of action to challenge the denial of a permit by a final order *without having to give in to such conditions*. Nothing in the statute remotely hints that an aggrieved property owner must consent to the unconstitutional condition as a prerequisite for bringing suit under section 373.617.

The Opinion provides several reasons for its holding that an exaction occurred where Koontz refused to agree to the condition of offsite mitigation. First, the court noted that *Dolan* itself had already answered the question by implicitly rejecting the argument raised in a dissenting opinion.[25] Opinion, at 11; *Dolan,* 512 U.S. at 408 (Stephens, J., dissenting). Second, the Opinion cites Justice Scalia's dissent in *Lambert v. City & County of San Francisco*, 529 U.S. 1054 (2000) where the Court refused to grant a writ of certiorari. In that dissent, Justice Scalia noted that

> [w]here there is uncontested evidence of a demand for *money or other property* – and still assuming the 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

[25]Judge Orfinger's concurring opinion likewise noted that "the *Dolan* majority rejected this precise argument." Opinion, at 14 (Orfinger, J., concurring).

> would have ensued even if the demand had been met . . . 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'[26] . . . *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*.

Lambert, 529 U.S. at 1047 (Scalia, J., dissenting) (quoting *Nollan*, 438 U.S. at 837) (emphasis added).

Third, the Opinion cites other cases which held that the denial of a permit gave rise to a taking claim under *Nollan* and *Dolan*[27] including *Flower Mound*, which also noted that the existence of a state statute may also impact the resolution of the issue. *Flower Mound*, 135 S.W.3d at 629. As noted above, the issue is resolved by the clear language of section 373.617.

---

[26]One judge who considered this case concluded that just such "an out and out plan of extortion" was undertaken in this matter. *Koontz II*, at 1268, 1272 (Pleus, J., concurring specially) (describing the District's actions as "extortionate," and noting that the District's "demands for offsite mitigation were nothing more than an out-and-out plan of extortion").

[27]*See Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983); *Goss v. City of Little Rock*, 90 F.3d 306 (8th Cir. 1996); *Salt Lake County v. Board of Educ. of Granite Sch. Dist.*, 808 P.2d 1056 (Utah 1991).

The District argues on one hand that "[n]o property belonging to Koontz was ever demanded as a condition precedent for permit issuance," and then immediately contradicts itself by agreeing that "money is a form of property." Initial Brief, at 26 n.19. The District then makes the semantic argument that what was demanded from Koontz "was additional mitigation, not property," as if the additional mitigation required would not have to be paid for the permit to be granted. The reality of this matter was that the trial court found that the cost of performing the required off-site mitigation "could cost between $90,000.00 and $150,000.00, but there is evidence that it could cost as little as $10,000.00" (R 868). Clearly, the District's demand resulted in a taking.

Finally, as the Opinion notes, "an aggrieved property owner [should not be forced] 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." Opinion, at 12 n.4. The Opinion is correct in its reasoning. Additionally, the Legislature prevented a property owner from having to submit to such a potentially unworkable rule when it enacted section 373.617, which affords a property owned the right to challenge a final agency action with respect to a permit.

D. The Fifth District's Opinion Does Not Revive The "Substantially Advances" Test Of *Agins v. City Of Tiburon*.[28]

Lingle held that the "substantially advances" test[29] found in *Agins v. City of Tiburon*, 447 U.S. 255 (1980) was not an appropriate test for determining regulatory takings, and should not be used. *Lingle*, 544 U.S. at 532. Nothing in the Opinion even remotely suggests that the Court was applying the "substantially advances" test to his matter, and the District cites nothing in support of its position to the contrary. Rather, the issues considered by the Fifth District concerned the application of *Nollan* and *Dolan*. Moreover, even though the *Agins* "substantially advances test" was at issue at one time early in this case, in entering the Liability Judgment the trial court "applied the constitutional standards enunciated by the Supreme Court in *Nollan* and *Dolan*." Opinion, at 10. Thus, the District is incorrect in asserting that *Agins* played any role in the consideration of this case.

In this section of its Initial Brief the District, as do some of the Amici, attempts to scare this Court with the potential impact, including financial impact, if this Court allows the Opinion to stand.[30] As a starting point, it is clear the

---

[28]447 U.S. 255 (1980).

[29]The "substantially advances" test stated that government regulation of private property "effects a taking if [the regulation] does not substantially advance legitimate state interests." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

[30]The District argues that the application of *Nollan* and *Dolan* in this case "can lead[] to serious financial consequences to those agencies." Initial Brief, at 32.

Legislature thoroughly considered the potential impacts, including financial impacts, in the mid-1970's when section 373.617 was being drafted, revised and debated. A review of the legislative history of the Act provided in Appendix "C" clearly bears this out.[31] Nevertheless, the Legislature saw fit to enact section 373.617 (and its companion statutes) over 30 years ago.

The question of whether the legislation was a good idea or not was answered by the enactment of the law, and it is not for this Court to substitute its judgment about the wisdom of the Act's passage. Rather, this Court is called upon to interpret its terms. If the District and the Amici are concerned about the dire implications of section 373.617, then they should put forth as much effort in trying to change the law as they have in seeking to deny the citizens of Florida the right to challenge final agency action under section 373.617 granted to them in 1978.

Further, if the Supreme Court requires governmental entities to ensure that proposed exactions demonstrate an "essential nexus" between the development condition and the problem sought to be ameliorated, and requires them to determine if there is a "rough proportionality" between the condition and the impact of the permit in order prevent improper leveraging, then that is what they

[31] *See also Rhodes*, at 745 n.19, 26 (noting that the "final drafting session was . . . attended by representatives of the Governor's office, development interests, environmental groups . . .and the Florida Association of Realtors. . . .As is customary, interested executive agencies submitted comments to the Governor").

should do. To hold otherwise is to let state agencies freely engage in "out and out plan[s] of extortion" that *Nollan* decried. It is respectfully submitted that requiring agencies to meaningfully tie their demands to proposed impacts is proper, appropriate and required under the law.

The process set forth in the statute must be examined when the impact of the Opinion is considered. Section 373.617 and its sister statutes are only applicable in the contexts of the Chapters where they appear – the mechanism they provide is not available for every final order with respect to every permit considered by every state agency. Additionally, the statute imposes liability on governmental entities only when a landowner prevails, which is far from a certain result in a given case. The statute also contains a prevailing party attorney's fees provision which logically would discourage baseless litigation. § 373.617(5), Fla. Stat.

Moreover, even if a landowner prevails and the court determines that the decision under review was an unreasonable exercise of police power without just compensation, the matter is remanded to the agency where *it has the power* to choose among four options.[32] One option is to pay damages, though the statute specifically limits the damages if the value has been enhanced by the governmental

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

action (described at the time as a "windfall deterrent provision").[33] § 373.617(3)(b), Fla. Stat. Another option is to grant the permit immediately, thereby immediately mitigating any potential damages.

In this case, the District dramatically increased the amount of temporary takings damages by refusing to issue the permit immediately, forcing Koontz to endure over 11 years[34] of litigation to obtain *exactly* what he sought in the first place – the issuance of the permit. Upon prevailing, Koontz was entitled to damages under subsection 373.617(2), which specifically notes that he was entitled seek "monetary damages and other relief" in the circuit court. It is clear that damages for the temporary taking of his property were appropriate. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987); *see also Tampa-Hillsborough County Expressway Auth. v. A.G.W.S.*, 640 So. 2d 54, 58 (Fla. 1994) (citing *First English* in concluding that compensation for a temporary taking is an appropriate remedy for the pendency of an unconstitutional regulatory condition that prevents the development of property subject to the invalid regulation); *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864,

[33] *Rhodes*, at 744.

[34] The Final Judgment states that the circuit court heard differing theories on damages, and determined that Koontz was entitled to temporary takings damages from "June 9, 1994 through the issuance of the permit on December 12, 2005" (R 1333-34). Judge Griffin's dissent incorrectly states that damages were calculated from 1999 to 2005. Opinion, at 17 (Griffin, J. dissenting). With interest, the Final Judgment totaled $376,154 (R 1334).

872-874 (Fla. 2001) (also granting temporary takings compensation under the remedies precedent of *First English*). Because by the terms of the statute indicate that the remedies available only apply where the property owner has demonstrated a taking, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English*, 482 U.S. at 321.

Finally, similar arguments were presented to the Supreme Court of Texas in *Flower Mound* where the town agued that "if non-dedicatory exactions are subject to the *Dolan* standard, 'Texas cities will be forced to run a fierce constitutional gauntlet that will significantly erode the practical ability of cities to regulate land development to protect community rights.'" *Flower Mound*, 135 S.W.2d at 639. The Texas Supreme Court reasoned that it was "unable to see any reason why limiting a government exaction from a developer to something roughly proportional to the impact of the development – in other words, prohibiting an 'out and out plan of extortion' – will bring down the government." *Id.* *Flower Mound* concluded that placing this burden on the government "is essential to protect against the government's unfairly leveraging its police power over land-use regulation to extract from landowners concessions to which it is not entitled." *Id.* The reasoning is sound, and should be adopted by this Court.

ISSUE II. **UNDER SECTION 373.617, KOONTZ HAD THE RIGHT TO PROCEED IN CIRCUIT COURT AND WAS NOT REQUIRED TO PROCED UNDER CHAPTER 120.**

The District argues, as it has throughout the protracted history of this matter, that Koontz should not have been allowed to bring an action in circuit court (as permitted by section 373.617), but rather should have proceeded under Chapter 120, Florida Statutes. Specifically, the District asserts that the "trial court allowed Koontz to challenge the correctness of [the District's] mitigation determination in circuit court." Initial Brief, at 38. In reality, the circuit court gave Koontz his statutorily permitted opportunity to see if he could convince the circuit court that his property had been taken by an unreasonable exercise of the state's police power.

The Fifth District addressed the appropriate procedure for claims brought under section 373.617 in *Griffin v. St. Johns River Management District*, 409 So. 2d 208 (Fla. 5th DCA 1982). The *Griffin* court noted that some courts held that issues such as takings had to be brought in Chapter 120 proceedings before they could be brought in circuit court. *Id.* at 210. However, *Griffin* noted that such cases failed to consider "the later applicable statutes" such as section 373.617. It should also be noted that the legislative history of section 373.617 clearly indicates

the intent to create a procedure for a landowner to avoid exhausting administrative remedies and proceed directly to circuit court.[35]

Griffin went on to state that subsection 373.617(2) clearly permitted a landowner to bring an action in circuit court to determine if a final agency action constituted a taking. *Id.* The court stated that "the circuit court can fully litigate *de novo* this issue and prepare a complete record," as was done in this case. *Id.* Notwithstanding that the statute is clear on the procedural right to a *de novo* takings trial, *Griffin* also noted that administrative agencies might not hear testimony on the constitutional issue, and further are not supposed to decide constitutional issues in the first place. *Id.* (citing *Pickerill v. Schott*, 55 So. 2d 716 (Fla. 1951)). *Griffin* also noted that the district courts of appeal are not set up to take testimony. *Id.*

The Second District Court of Appeal specifically agreed with *Griffin* in *Bowen v. Florida Department of Environmental Regulation*, 448 So. 2d 566 (Fla. 2d DCA 1984), *approved and adopted*, 472 So. 2d 460 (Fla. 1985). In *Bowen*, the court considered the application of *Key Haven Associated Enterprises v. Board of Trustees of the Internal Improvement Trust Fund*, 427 So. 2d 153 (Fla. 1982), to

[35]*See, e.g.*, Senate Staff Analysis and Economic Statement dated April 10, 1978 (noting that "currently, any landowner may challenge the validity of regulations through administrative channels. . . . [Under the Act] [t]he landowner whose land is diminished in value or has been restricted from certain uses is given direct access to court to challenge the validity of the regulation"). Appendix "C."

actions involving Florida Statutes subsection 253.763(2), which is identical to Florida Statutes subsection 373.617(2). The *Bowen* court specifically found that the enactment of subsections 253.763(2) and 373.617(2) (as well as the identical 403.90(2)) "altered the case law as established in *Key Haven*, and later approved in *Albrecht v. State*, 444 So. 2d 8 (Fla. 1984)." *Bowen*, 448 So. 2d at 568. *Bowen* went on to note that

> inverse condemnation actions cannot be adjudicated by administrative boards or agencies. We conclude that section 253.763(2) merely short-circuits the procedure of administrative appeal to TIIF required by *Key Haven*. We find this change in procedure is in accord with the general policy against requiring exhaustion of administrative remedies where administrative proceedings would be useless, and where the parties are willing to accept the final administrative action as procedurally and substantively correct.

Bowen, 448 So. 2d at 568-69.

Bowen, approved by this Court, specifically recognized that *Key Haven's* general principles were legislatively superseded by enactment of 373.617 and its sister statutes. This reality has been recognized consistently since that time. *See, e.g., Wilson v. County of Orange*, 881 So. 2d 625, 631 (Fla. 5th DCA 2004) (recognizing that *Key Haven* has been superseded by statute as noted in *Bowen*); *In re Commitment of Rodgers*, 875 So. 2d 737, 741 (Fla. 2d DCA 2004) (same); *Florida Marine Fisheries Comm'n v. Pringle*, 736 So. 2d 17, 20 (Fla. 1st DCA

1999) (same); *Verdi v. Metropolitan Dade Co.*, 684 So. 2d 870, 875 (Fla. 3d DCA 1996) (same). The current state of Florida law unequivocally recognizes that *Key Haven*, and the principles set forth in that case, are not applicable to actions brought under section 373.617. Therefore, the District's reliance on *Key Haven* is misplaced.

While the District would have preferred Koontz to challenge its decision in the more familiar arena (to the District) of a Chapter 120 administrative proceeding, Koontz exercised his right under section 373.617 to, as the Fifth District stated, "convince the [trial] court that there has, in fact, been a taking." *Koontz I*, at 562. Koontz did so, and it is difficult to understand what evidence the District believes would be appropriate for the circuit court to consider at trial. The District argues that a landowner may challenge in circuit court the "*effect* of a final permitting decision." Initial Brief, at 50 (emphasis in original). But, what does this mean? If the standard is *Nollan* and *Dolan*, then the trial court must hear evidence about the "essential nexus" and the "roughly proportional" standards, and determine if the required exaction met those standards or was nothing more than extortion. That evidence, by necessity, must involve an examination of the requirements imposed by the District, and the impacts of the proposed permitting change. While the District clearly would like to deny interested persons the opportunity to have their day in circuit court under section 373.617 and force them

into administrative proceedings, Florida law gives its citizens the right to challenge a final order to determine if agency action constituted an unreasonable exercise of the police power constituting a taking.

ISSUE III. **SHOULD THIS COURT CONCLUDE THAT *NOLLAN* AND *DOLAN* ARE INAPPLICABLE, AFFIRMANCE IS STILL APPROPRIATE BECAUSE LIABILITY UNDER THE *PENN CENTRAL* FACTORS IS EVIDENCE ON THIS RECORD.**

The District adopts the position, contrary to one of the Amici in support,[36] that if this Court determines that *Nollan* and *Dolan* do not apply to takings under section 373.617, then neither should the standards set forth in *Penn Central Transportation Company v City of New York*, 438 U.S. 104 (1978).[37] As the preceding portions of the Brief have demonstrated, section 373.617 did not attempt to set forth the substantive tests for takings (leaving that to the judicial constitution interpretation), but rather provides a procedural mechanism for judicial consideration of takings claim and the opportunity for permitting agencies to moderate their position in light of any court rulings prior to the award of any

[36]The Brief of Amici Curiae Florida Association of Counties, Inc. and Florida League of Cities argues that "this case closely resembles *Penn Central* and clearly falls within the category of regulatory takings in that case represents." Brief, at 7.

[37]The District argues that *Penn Central* is inapplicable to this case. Initial Brief, at 15.

compensation. In short, the plain language of section 373.617 evinces that it is an implementing statute for *any* cognizable takings claim.

The circuit court and the Fifth District properly applied *Nollan* and *Dolan* because the facts here present a quintessential *ad hoc,* adjudicatory decision on an application for development, for which approval was withheld absent the applicant's agreement to constitutionally offensive conditions. Because the lower courts applied the proper test, and because no one disputes that the trial court's findings concerning nexus and rough proportionality were supported by competent, substantial, evidence, this Court should affirm the lowers court's findings that the conditions which the District sought to impose were unconstitutional. Because it is undisputed that Koontz's property necessarily remained fallow while he fought to vindicate his constitutional rights *and* while the District maintained its constitutionally invalid position, this Court should affirm the award of temporary takings compensation. *First English, A.G.W.S., supra*.

That said, should this Court decline to apply *Nollan/Dolan* scrutiny to the District's regulatory actions, it may nonetheless affirm that takings compensation is due because the factors of *Penn Central* are also satisfied on this undisputed record.[38] A compensable taking may be found under *Penn Central:*

[38]If a taking under *Penn Central* were found, however, compensation should be recalculated on the basis of *permanent* taking. Applying the *Nollan/Dolan* test,

> *Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred*, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. *Penn Central* . . . These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from forcing some people along to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Palazzo v. Rhode Island, 553 U.S. 606, 617-18 (2001) (emphasis added). This Court has likewise recognized that concept. *See, e.g., Keshbro.*

As previously argued in the alterative in Koontz' Answer Brief to the Fifth District Court of Appeal (Appeal R Tab B, at 29-36), compensation could be alternatively be awarded on this record applying the *Penn Central* factors.[39] The conditions to approval imposed by the District indisputably caused an economic impact adverse to Koontz. As the circuit court noted, the case "from the outset has

---

the courts below held the District's conditioning of Koontz's approval to be invalid. This should result in compensation only for the period of time that the disputed condition remained in play. Under a *Nollan/Dolan* claim, the period of the taking ended with the District granted the permit without the offending condition. The contrary is true of a *Penn Central* taking, in which the regulatory action is deemed valid and remains in force, but requires compensation because of its permanent effects.

[39]As previously noted, the District "makes no challenge to the evidentiary foundation of the factual findings" set forth in the Liability Judgment. Opinion, at 10.

focused on the cost of the mitigation requirements" (R 888). The imposition of the conditions interfered with Koontz's reasonable expectation of developing a portion of his property consistent with its zoning. Significantly, the character of the District's regulatory action was to require a citizen, without compensation, to make public infrastructure improvements that would benefit the whole community but which were unrelated in nature or degree to the impacts of Koontz's proposed use of his private property.

Meeting any of the *Penn Central* factors can trigger liability for compensation. The character of the government's regulatory actions, in itself, can support the finding of a compensable taking or it may predominate in the weighing of the *Penn Central* factors.[40] The character of the District's excessive regulatory imposition here were properly condemned by the lower courts considering this

[40]*See, e.g., Morton Thiokol v. United States*, 4 Cl. Ct. 625, 630-32 (Fed. Cl. Ct. 1984) (restriction against mining operations was plainly for the benefit of a specific public works project); *American Pelagic Fishing Co. v. U.S. ,* 55 Fed. Cl. 575, 590-91 (2003) *rev'd on other grounds,* 379 F.3d 1363 (Fed. Cir. 2004)(legislatsive act which actually targeted a particular item of private property). A taking more readily be found if the offending action "may be characterized as acquisition of resources to permit or facilitate uniquely public functions." *Penn Central* at 128; *Morton* at 631. Or, if the burden of the regulatory action falls disproportionately on relatively few property owners while conferring a widely enjoyed public benefit. *Lingle* at 543; *CCA Associates v. U.S.*, 75 Fed. Cl. 170, 188-191 (2007); *Florida Rock Industries, Inc. v. United States,* 18 F.3d 1560, 1571 (Fed. Cir. 1994).

case, and their reasoning remains relevant to any *Penn Central* analysis this Court might undertake.

ISSUE IV. UNDER THE TERMS OF SECTION 373.617, DISTRICT WAIVED THE RIGHT TO APPEAL.

Though not addressed in the Opinion nor as part of the certified question, there is another issue involving the interpretation of section 373.617 that this Court should consider, and that is whether the District waived the right to appeal after it made a choice of remedy under subsection 373.617(3) as Judge Torpy stated in his concurrence in *Koontz III*.[41] Consideration of this issue is within this Court's jurisdiction. *See In Re Adoption of Baby E.A.W.*, 658 So. 2d 961, 964 (Fla. 1995) (noting that the Court has jurisdiction to consider issues beyond the certified question); *Savoie v. State*, 422 So. 2d 308 (Fla. 1982) (noting that "once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process").

This Court must consider the statutory scheme at issue, and the actions taken by the District. Here, after the matter was tried, the circuit court remanded the matter back to the District where, according to the statute, it had the option of issuing the permit, paying appropriate damages, agreeing to modify its decision to avoid the unreasonable exercise of police power, or, taking no action for 90 days

[41] *Koontz III*, 908 So. 2d at 519 (Torpy, J., concurring specially).

and letting the trial court choose an option. The District chose to submit a proposed order in which it agreed to issue Koontz the permit (R 1032). The order was incorporated into a new "final judgment" which approved the proposed order, and noted that it gave Koontz what he sought in the original permit application (R 1016-17). However, the "final judgment" reserved jurisdiction to determine the amount of takings damages (R 1017), and this Court dismissed the appeal for lack of jurisdiction in *Koontz III*.

The statute notes that the agency may submit "a statement of its agreed-upon action to the court in the form of a proposed order," and the trial court then determines if the action that the agency has chosen "is a reasonable exercise of police power." § 373.617(4), Fla. Stat. (2006). Two of the options, payment of money or a modification of the decision, require court oversight to determine if the agency has indeed done enough to solve the problem. The issuance of the permit automatically cures the unreasonable action. Here, the District considered its options, and agreed to issue the permit. Therefore, it took an action which by statutory definition cured the problem, then submitted to the circuit court a proposed order which was then approved by the trial court. In essence, the District voluntarily agreed to take action (issuing the permit) which cured any defect, allowed the circuit court to enter an order approving its decision, and then sought appellate review to challenge that very action.

As Judge Torpy argued in his concurring opinion in *Koontz III*, the District "has waived its right to challenge the lower court's order by agreeing to issue the permit." *Koontz III*, at 519 (Torpy, J., concurring and concurring specially). Judge Torpy cited the three options available to the District under subsection 373.617(3), and stated:

> Had [the District] wished to challenge the lower court's finding, it should have done nothing for 90 days, giving the lower court the option to order that it do 1, 2 or 3. Once an appropriate and final order was entered, [the District] would have had the right to appeal. In electing to issue the permit instead, I think Appellant waived its right to challenge the court's ruling. *See Dargis v. Maguire*, 156 So. 2d 897 (Fla. 3d DCA 1963) (compliance with court order waives right to appeal, even if compliance expressly conditioned on reservation of right to appeal).

Koontz III, at 519 (Torpy, J., concurring and concurring specially). Judge Torpy's reasoning is sound, and this matter should be dismissed because the District has waived its right to appeal.

The case cited by Judge Torpy, *Dargis v. Maguire*, 156 So. 2d 897 (Fla. 3d DCA 1963), concerns remittitur and stands for the basic proposition that the acceptance of a remittitur may not be conditional, and a trial judge may not "confer upon [a party] the right to appeal from the remittitur order which [the party] voluntarily accepted." *Id.* at 898-99. Other cases have followed this clear line of reasoning. *See e.g., White Constr. Co., Inc. v. DuPont*, 423 So. 2d 549 (Fla. 1st

DCA 1982) (motion to dismiss cross-appeal granted where a party accepted remittitur and attempted to reserve the right to appeal the remittitur).

Additionally, in *Hattaway v. McMillian*, 903 F.2d 1440 (11th Cir. 1990), the court noted the existence of "a long line of consistent decisions from the United States Supreme Court that forbid the plaintiff from accepting a remittitur –- even under protest –- and then appealing the order granting the remittitur. *See Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649-50 (1977)." *Id.* at 1451. The *Hattaway* court also noted that "the defendant's means of preserving the issue for appeal was to submit to the re-trial of the damages issue and then appeal the new trial order along with the issues brought on this appeal. The Defendant cannot save the issue for review by accepting the additur 'subject to all rights of appeal.'" *Id.* at 1452.

Judge Torpy correctly pointed out that the reasoning set forth in these cases requires that the District's acceptance of one of the alternatives set forth in subsection 373.617(3), which is then adopted in a final judgment, waives the right to appeal.

CONCLUSION

For all the foregoing reasons, the Certified Question should be answered in the affirmative, and the Fifth District's Opinion should be affirmed. In the

alterative, this court should approve Judge Torpy's reasoning in Koontz III and find that, under section 373.617, the District has waived the right to appeal.

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

_____

CHRISTOPHER V. CARLYLE
Florida Bar No. 991007

SHANNON MCLIN CARLYLE
Florida Bar No. 988367

~ and ~

MICHAEL D. JONES
Florida Bar No. 0137608
MICHAEL D. JONES & ASSOCIATES, P.A.
Post Office Box 196130
Winter Springs, Florida 32719-6130
Telephone (407) 695-7666
Facsimile (407) 695-7157

Appellate Counsel for Respondent,
COY A. KOONTZ, JR., ETC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been sent via□ U.S. regular Mail and/or □ facsimile to: **William H. Congdon, Jr., Esquire**, Post Office Box 1429, Palatka, Florida 32178-1429 (Counsel for the Petitioner); **Harry Morrison, Jr., Esquire** and **Kraig A. Conn, Esquire,** 301 South Bronough Street, Suite 300, Tallahassee, Florida 32301, **Virginia Saunders DeLegal, Esquire**, 100 South Monroe Street, Tallahassee, Florida 32301; (Counsel for Amici Curiae, Florida League of Cities and Florida Association of Counties, Inc.); **John Escheverria, Esquire**, Professor of Law – Vermont Law School, Post Office Box 96, South Royalton, Vermont 05068 and **Mark A. Fenster, Esquire**, Professor of Law – University of Florida Levin College of Law, 376 Spessard Holland Hall, Gainesville, Florida 32611-7625 (Special Counsel for Amici Curiae – Florida League of Cities/Counties); **Courtney Brewer, Esquire** and **Scott D. Makar, Esquire**, The Capitol – PL 01, Tallahassee, Florida 32399-1050 and **Thomas M. Beason, Esquire** and **Meredith C. Fields, Esquire**, 3900 Commonwealth Boulevard, Tallahassee, Florida 32399-3000 (Counsel for Amici Curiae, Florida Department of Environmental Protection, Florida Water Management District, South Florida Water Management District, and Southwest Florida Water Management District); **E. Thom Rumberger, Esquire** and **Noah D. Valenstein, Esquire**, 215 South Monroe Street, Suite 130, Tallahassee, Florida 32302-2507

(Counsel for Amicus Curiae, Audubon Society); and **David L. Powell, Esquire, Gary K. Hunter, Jr., Esquire**, and **Mohammad O. Jazil, Esquire**, Post Office Box 6526, Tallahassee, Florida 32314 (Counsel for Amicus Curiae, Florida Community Developers); **Steven Geoffrey Gieseler, Esquire**, and **Nicholas M. Gieseler, Esquire**, Pacific Legal Foundation, 1002 SE Monterey Commons Boulevard, Suite 102, Stuart, Florida 34996 (Counsel for Amicus Curiae, Pacific Legal Foundation); this _____ day of January, 2010.

_____
CHRISTOPHER V. CARLYLE
Florida Bar No. 991007

CERTIFICATE OF COMPLIANCE

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

_____
CHRISTOPHER V. CARLYLE
Florida Bar No. 991007