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IN THE SUPREME COURT OF THE UNITED STATES

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COY A. KOONTZ, JR., :

Petitioner : No. 11-1447

v. :

ST. JOHNS RIVER WATER MANAGEMENT :

DISTRICT :

- - - - - x

Washington, D.C.

Tuesday, January 15, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

PAUL J. BEARD, II, ESQ., Sacramento, California; on behalf of Petitioner.

PAUL R.Q. WOLFSON, ESQ., Washington, D.C.; on behalf of Respondent.

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Respondent.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in Case 11-1447, Koontz v. St. Johns River Water Management District.

Mr. Beard?

ORAL ARGUMENT OF PAUL J. BEARD, II,
ON BEHALF OF THE PETITIONER

MR. BEARD: Thank you, Mr. Chief Justice, and may it please the Court:

This case is about the extent to which Nollan and Dolan review should be made available to individuals to challenge excessive exactions imposed as conditions to land use approval.

Here, before he could make small use of his property, Coy Koontz was told by the district that he had to finance enhancements to 50 acres of publicly held --

JUSTICE GINSBURG: Let's back up. When he asked for a permit, he voluntarily said, As mitigation for the loss of wetlands, I am going to voluntarily create a conservation easement on the rest of my property. So he recognized from day one that there had to be some mitigation for what he was seeking to do in the permit. Is that right?

1 MR. BEARD: That is correct. With his
2 application, Justice Ginsburg, he did offer a mitigation
3 in the form of a conservation easement on most of his
4 property.

5 JUSTICE GINSBURG: And if he had offered
6 nothing and he just said, I want this permit to develop
7 my land, and the agency said, You have offered no
8 mitigation, we deny your permit, would he have a claim?

9 MR. BEARD: If there was no condition
10 attached to the permit denial, then there would be no
11 claim; although it would be up to the district, under
12 Nollan and Dolan, to make the individualized
13 determination, both of the amount of impact to wetlands
14 and the amount necessary to offset.

15 JUSTICE GINSBURG: Suppose he just put in
16 the application, no mitigating -- no mitigation of any
17 kind, and the agency says no. You recognize that he
18 would have no claim, right? That he had an obligation
19 to mitigate.

20 MR. BEARD: It depends, Your Honor. If the
21 denial was based on the idea that he was obligated to
22 offer mitigation, and that was the extent of the
23 district's communication with him -- in other words,
24 that the district told him, You must offer us something,
25 we won't tell you what and we'll let you decide what you

1 want to offer in mitigation -- if that was in the
2 record, and that was the -- and the result of that was a
3 permit denial because Mr. Koontz said, for example,
4 Well, gee whiz, I don't know how much I need to mitigate
5 for, you haven't told me, I still believe there would be
6 a Dolan violation because in Dolan the Court made clear,
7 there has to be an individualized determination --

8 JUSTICE SCALIA: For what? For what? You
9 wouldn't -- you wouldn't know what property was taken.

10 MR. BEARD: He wouldn't know where --

11 JUSTICE SCALIA: You are posing a situation
12 in which he never came forward with any suggestion.
13 They never came forward with any suggestion. You say he
14 still has a cause of action for a taking?

15 MR. BEARD: Not for --

16 JUSTICE SCALIA: A taking of what?

17 MR. BEARD: Not for a taking, Your Honor,
18 but he -- he may have a cause of action under Nollan and
19 Dolan for the imposition of an unconstitutional
20 condition that may not -- the contours of which may not
21 be known. But the fact that the district told him, You
22 need to --

23 JUSTICE SCALIA: I think the other side says
24 that you may have such a cause of action here.

25 MR. BEARD: Excuse me, I didn't understand.

1 JUSTICE SCALIA: Wouldn't -- wouldn't the
2 other side in this case acknowledge that you have such a
3 cause -- that you may have such a cause of action here?

4 MR. BEARD: Yes, Your Honor. I believe
5 they -- well, their argument --

6 JUSTICE SCALIA: They are just saying you
7 don't have a cause of action for a taking.

8 MR. BEARD: That is correct. They are
9 saying that we don't have a cause of action for a
10 taking. Of course, in Nollan and Dolan, there was no
11 transfer of property from the applicant to the relevant
12 agencies. As this Court will recall in both Nollan and
13 Dolan, there was an imposition of an exaction and
14 immediately the applicant in both cases sued to prevent
15 the unlawful exaction from being consummated. So --

16 JUSTICE SOTOMAYOR: Counsel, I've had a
17 problem with your argument, okay? From the record it's
18 very clear that a conservation offer is not considered
19 mitigation because there's still a net loss of wetlands.
20 The policy is abundantly clear, stated, and undisputed.
21 Okay?

22 So, given that policy, why are we even in
23 this case? Meaning whether there was an exaction or no
24 exaction or whatever happened in terms of the denial,
25 you couldn't win on your offer because the policy of the

1 State was clear, and in my mind, unassailable. We have
2 to preserve wetlands. Conservation of other wetlands is
3 not enough. Mitigation means make sure that we get a
4 net gain of wetlands.

5 So why are we here?

6 MR. BEARD: Justice Sotomayor, we don't
7 contest the legitimacy of the policy, of course, in
8 preserving wetlands; nor do we contest, for that matter,
9 the ratios that the district has imposed via its
10 regulations.

11 It is undisputed, the trial court found
12 below and the Court of Appeals affirmed and the finding
13 was undisturbed in the Florida Supreme Court, that in
14 fact the offsite mitigation, that part of the mitigation
15 that went beyond the conservation easement, was in
16 excess; it violated Nollan and Dolan. So the underlying
17 factual findings are not in dispute.

18 JUSTICE GINSBURG: I think you -- I think
19 you have a problem with that, Mr. Beard, because if you
20 look at the record, the record is very clear that it was
21 not -- that the district didn't come back and say, Take
22 it or leave it, you -- you improve our wetlands or you
23 get no permit.

24 There was and if you -- they are set out in
25 the Respondent's brief at pages 13 to 15, oh, at least

1 half a dozen, maybe more, that the district said here
2 are several ways, several ways that you could
3 sufficiently offset the adverse impact. And some of
4 them had nothing to do with improving the government's
5 own land.

6 So if we can't -- we really can't say this
7 was a take it or leave it, either you do the
8 improvements that we are asking you to do or you get no
9 permit, what do you do with the fact that as the
10 appendix certainly bears out, that the district offered
11 a range. It offered many, many ways that this permit
12 might be granted, and then it says, Then you are free to
13 come up with some other, something else.

14 MR. BEARD: Justice Ginsburg, it's true that
15 there were negotiations and that a range of offers were
16 made. On Mr. Koontz's application to use 3.7 acres of
17 his property in conjunction with the conservation
18 easement, the district made a final decision denying him
19 his permit because he would not go beyond the easement
20 and offer offsite mitigation. And that is --

21 JUSTICE GINSBURG: And that is because he
22 wouldn't go beyond what he was offering, but that's --
23 some of these options -- - one was that he -- that he
24 adjust the size of his project, that he make it smaller.
25 The staff suggested eliminating -- no, that's a

1 different one. But there was one that suggested that
2 he -- he reduce the scale, the Petitioner reduce the
3 scale of his project to 1 acre, and preserve the rest
4 for the conservation easement.

5 Now, if he took that, would you have any --
6 any case here?

7 MR. BEARD: I'm sorry, Justice Ginsburg? If
8 we took --

9 JUSTICE GINSBURG: If they said, we will
10 give you a permit if you reduce the scale of your
11 project to 1 acre, and then preserve the rest by a
12 conservation easement.

13 MR. BEARD: Unlikely not, Your Honor,
14 because the trial court did conclude based on the
15 evidence that he was having minimal impact on any viable
16 wetlands. And so even a reduction in the size of the
17 project with an increase in the amount of mitigation
18 would have a fortiori gone beyond even what we have in
19 this case.

20 The court of appeals made clear as a matter
21 of law that Mr. Koontz was entitled to a determination
22 on the application he submitted. He submitted that
23 application and, as the district admitted in a pretrial
24 statement right before trial, the denials were based
25 exclusively -- and this is a quote -- "the denials were

1 based exclusively on the fact that the plaintiff would
2 not provide additional mitigation to offset impacts from
3 the proposed project."

4 JUSTICE KAGAN: Mr. Beard, can I go back to
5 Justice Ginsburg's first question and make sure I
6 understand your answer to it? Suppose that the State
7 just had a policy that said, we're concerned about
8 wetlands; in order to develop your piece of property,
9 you have to come forward with a proposal, a mitigation
10 proposal, and an adequate mitigation proposal. And then
11 it gives some guidance about what an adequate mitigation
12 proposal would mean, but it really leaves it up to the
13 landowner.

14 And the landowner says, sorry, I'm not
15 giving you anything. I think I should be able to
16 develop this on my own without providing any mitigation.
17 And the State says, well, then, sorry, you don't get a
18 permit.

19 Is that a taking? Does the man have a
20 takings claim? I heard you answer the question yes.

21 MR. BEARD: My answer was that he may have a
22 Nollan-Dolan claim. I don't want to get confused about
23 the term "taking," because "taking" could imply many
24 types of regulatory takings claims.

25 JUSTICE KAGAN: Well, that's the next

1 question I was going to ask you, because my
2 understanding of Nollan and Dolan was that it assumed
3 the conditions, if taken alone, would constitute a
4 taking.

5 Do you disagree with that?

6 MR. BEARD: I do not disagree with that,
7 Your Honor.

8 JUSTICE KAGAN: Okay. So then you need a
9 taking someplace in the picture. Isn't that right?
10 Nollan-Dolan said this is how we analyze takings in the
11 context of a permit scheme. So we have to look for a
12 taking. So in my example, where is the taking?

13 This was Justice Ginsburg's example.

14 MR. BEARD: Right. And I think that's
15 correct, that under Nollan and Dolan you would have to
16 have a condition that was imposed on you.

17 My only point was would it be lawful, would
18 it be a problem in the district shifting its burden on
19 to the applicant and saying: We're not going to
20 establish what mitigation is required; we're not going
21 to establish what the impacts are; we'll leave that up
22 to you; you give us what you think is necessary.

23 JUSTICE KENNEDY: Suppose the district did
24 have, as I think it did here, a uniform policy that for
25 every acre you develop, you have to preserve 10

1 wetlands, 10 acres of wetlands.

2 And then two cases, both hypothetical. One
3 is somebody had an 100-acre parcel and they want to
4 develop 5 acres, and they have 50 acres that they
5 mitigate for wetlands. The other person has only 1 acre
6 and he wants to -- and he has to develop the whole acre.
7 Can the district then say, we'll give you the 1-acre
8 development permit if you reclaim wetlands on 10 other
9 acres that you -- that we can designate for you
10 elsewhere?

11 The hypothetical being designed to point out
12 whether or not the crux of your argument is that he had
13 to go off offsite.

14 MR. BEARD: The crux is not that he had to
15 go offsite, but that -- that did play into the trial
16 court's analysis as to the connection between his impact
17 and what was being required. And there was testimony
18 below that there was no connection there. And the fact
19 that the mitigation was 4 to 7 miles away played into
20 the analysis as to whether there was a connection.

21 JUSTICE KENNEDY: So in my hypothetical you
22 would -- would there be a violation in my hypothetical
23 as you understood it?

24 MR. BEARD: It depends, Your Honor, because
25 you have to determine what in each respective

1 hypothetical, what the impact was actually to the
2 wetlands, and then determine what the appropriate
3 mitigation --

4 JUSTICE SOTOMAYOR: How do you decide
5 whether the agency has done that right or not?

6 MR. BEARD: Excuse me?

7 JUSTICE SOTOMAYOR: How do you normally
8 decide? Let's assume Justice Kagan's question or
9 Justice Ginsburg's question. No -- it just says, come
10 to us with a mitigation plan. And you say, this is what
11 I offer and it's enough. And they say, no, it's not
12 enough; denied.

13 Would you go through the State
14 administrative process to figure out whether that was
15 arbitrary and capricious, whether it was a Penn Central
16 violation? What would you do with that claim in the
17 normal circumstance? Justice Kennedy's question.

18 MR. BEARD: In the normal circumstance, if
19 there was no condition imposed, there would not be a
20 Nollan and Dolan claim. There may be another kind of
21 claim, say, under Penn Central. And that could be
22 brought. That wouldn't have to be brought via
23 administrative remedies if there was a final agency
24 action.

25 JUSTICE SOTOMAYOR: It would be an inverse

1 condemnation.

2 MR. BEARD: Correct. It could be an inverse
3 condemnation type of a claim.

4 JUSTICE BREYER: So what I think might be
5 driving some of these questions is the district court
6 says, just as you say, had Koontz offered additional
7 mitigation, the additional, that would have cost
8 \$10,000, he would have gotten the permit. That's what
9 he said.

10 So then you look back to see what additional
11 mitigation. And here we have in the record, at least
12 that my law clerk finds, he noted that they went to
13 Koontz and they said, here are some choices: Install a
14 subsurface stormwater management system in the
15 development, I mean right on your land; or reduce the
16 size to 1 acre; or eliminate the filling of the slide
17 slope areas; or replace 15 culverts and eliminate a
18 ditch system somewhere else; or enhance 50 acres
19 somewhere else.

20 Now, at that point -- and then they said,
21 won't you negotiate for 30 more days, maybe we can find
22 some other things?

23 He says, no, I'll bring a lawsuit. Okay.
24 Now, I absolutely can see a Penn Central claim there.
25 But the land -- what you're talking about is not some

1 land somewhere off the site. We're talking about his
2 land. If after all they said you have to leave all the
3 coal in the mine to hold up the ceiling -- you know what
4 I'm referring to?

5 Then they go too far. And here, if we look
6 at all these conditions proposed and said -- you know,
7 this is just terrible, they don't do it for anybody
8 else, your client's the only one, it bears no relation,
9 oh, it just goes too far, you win under Penn Central.

10 So I can see the framework here. I'm not
11 saying you're going to win, but I got it clear what the
12 framework is. But suddenly you bring this Nollan-Dolan
13 business into it and I get confused. And the reason is
14 because there was a different piece of land in Nollan
15 and Dolan.

16 The piece of land that was different was an
17 easement in front of -- and an easement is a piece of
18 property in Nollan, and there was a bike path in Dolan,
19 right across his property.

20 So I don't see how Nollan and Dolan have to
21 do with this.

22 I see everything that Penn Central has to do
23 with it, and that grows out of the nature of what was
24 being offered. You were saying what they are offering
25 you is simply going too far. Okay. I've got that

1 conceptually.

2 I ask this question because all these briefs
3 are about Nollan and Dolan, and I don't understand what
4 they have to do with it. I must be missing something,
5 and that's why I am asking you.

6 MR. BEARD: Justice Breyer, Nollan and Dolan
7 fundamentally are about whether a property owner has
8 been singled out to bear public burdens.

9 JUSTICE BREYER: But of course, they are
10 land claims because they took a piece of land which
11 everybody assumes -- right in front of his house -- and
12 said you've got to let everybody from the beaches walk
13 back and forth from one beach in the north to another
14 one in the south.

15 And they are going to walk over your land.
16 And the Court said you can't take his land unless you
17 have a nexus to some public purpose that is related to
18 his building the house.

19 I got it. I just don't see what it has to
20 do with this case.

21 MR. BEARD: Because you can have an
22 unconstitutional condition imposed on your right to do
23 something, in this case make use of your property. And
24 the --

25 JUSTICE BREYER: Of course you can. You

1 backed out too much coal. That's an unconstitutional
2 condition. It goes too far, and there is a framework
3 called Penn Central which deals with it.

4 MR. BEARD: Penn Central is a special
5 takings case that goes to the question of whether a
6 regulation of the use of property that is sought to be
7 developed has gone too far so as to affect the taking.
8 Penn Central is not --

9 JUSTICE SOTOMAYOR: Which -- how does that
10 not address going too far? You just said it. If -- if
11 this is unrelated to the denial of your permit of all
12 uses of your land and you're saying that's the problem,
13 which is I still have a use, I just want more, why does
14 that entitle you to your lost profits? When were you
15 ever entitled to start with the claim that somehow
16 you're entitled to a permit as a matter of law?

17 MR. BEARD: We're entitled under the
18 Unconstitutional Conditions Doctrine to not have to bear
19 a public burden that has no bearing on the impact that
20 we're trying to use on our property.

21 JUSTICE SCALIA: Yes, that's fine. That --
22 that would enable you to challenge the denial of the
23 permit, saying it's based upon an unconstitutional
24 condition. But how does it -- how does it enable you to
25 say there's been a taking? What has been taken?

1 MR. BEARD: What has been -- what has been
2 taken in effect is his funds that have to be put now to
3 a public use, the enhancement of 50 acres of public
4 wetlands. And there is nothing in the takings clause,
5 nothing --

6 JUSTICE SCALIA: It hasn't -- it hasn't been
7 taken. I mean, he turned it down.

8 MR. BEARD: Nothing was taken in Nollan and
9 Dolan, either. What was proposed there, though, was a
10 threat of a taking.

11 JUSTICE SCALIA: The -- the -- the permit
12 was granted in Nollan and Dolan. And -- and the
13 condition attached to the permit, therefore, took
14 effect; namely, that you had to dedicate this easement
15 over your -- over your beach whereas -- as my colleague
16 pointed out, anybody could walk back and forth
17 barefooted.

18 (Laughter.)

19 MR. BEARD: Justice Scalia, in Nollan and
20 Dolan, there was approval -- approval with conditions.
21 There were no permits issued, and that's -- that is an
22 important distinction to make that most agencies,
23 including this one, you approve a permit with a -- with
24 conditions, which means, We will give you your permits
25 as soon as you comply; which is substantively the same

1 as saying, We won't give you your permits until you say
2 yes to our conditions.

3 JUSTICE BREYER: All right. But it's the
4 same question. I just want an answer to my question.
5 And for the purposes of this question, I am assuming
6 enormously in your favor. I am assuming that this set
7 of conditions is the worst thing since sliced bread.

8 (Laughter.)

9 JUSTICE BREYER: I think there -- all right,
10 I'm assuming that in your favor. All right.

11 JUSTICE SCALIA: Sliced bread's supposed to
12 be good.

13 JUSTICE BREYER: No, no, it's been proved
14 bad.

15 (Laughter.)

16 JUSTICE BREYER: But -- but in any case,
17 the -- the -- the point is, you see, I assume that in
18 your favor. I'm trying to figure out the conceptual
19 framework. I assume that in your favor. I assume
20 whether they didn't issue the permit and would have, but
21 they haven't quite or maybe they have, it means nothing.

22 Now, having assumed that, it seems to me
23 what your argument is, is that this is a form of
24 regulatory taking of the kind that Holmes was talking
25 about, and that -- that's what was going on in Penn

1 Central, and so we simply look to see if it went too far
2 or whatever. The lower courts could do that. I got
3 that part.

4 Now I want you to answer the question, which
5 is, am I right? Is there another part, a different part
6 to this case called the Nollan, Dolan part and explain
7 that to me. That's why I asked the question. I want to
8 hear what you're going to say.

9 MR. BEARD: Justice Breyer, there is another
10 part, a very distinct part, and that part goes to the
11 question of the condition that produced the denial. So
12 there are -- there are actually two parts here. There's
13 the conditioning of your permit. In other words, We
14 will not issue you permits unless you agree to perform
15 offsite mitigation.

16 Now, the question under Nollan and Dolan is,
17 was that condition constitutional? Was he asked to give
18 up something that the State or the district in this case
19 should not have asked him to give up in exchange for his
20 right to use his property?

21 Now, it's true as -- as, Justice Breyer, you
22 mentioned, that the permit denial and whether that
23 affects a regulatory taking of his land, of the thing he
24 wants to use, that's an entirely different question, and
25 it may raise another kind of claim, another kind of

1 taking claim.

2 But the crux of the claim that was litigated
3 in this case from the trial court all the way up to the
4 Florida Supreme Court is: Was the condition to perform
5 offsite mitigation, and that was accepted as true by the
6 courts below, that this was a condition that had been --

7 JUSTICE GINSBURG: Suppose the record just
8 doesn't bear that out. The record shows that it wasn't
9 one option. They gave him a laundry list of things he
10 could do, some of them having nothing whatever to do,
11 anything off his own property. Suppose the -- whatever
12 the district court might have said, the record shows
13 that the agency said, You're right, seven things you
14 could do, come up with something else if you have
15 something else. And some of them have absolutely
16 nothing to do with other properties.

17 MR. BEARD: We agree that there were
18 negotiations and that even in the orders allege that
19 various options were provided to Mr. Koontz, but
20 ultimately the decision, as the district admits, the
21 decision, the final decision to deny the permit
22 application for 3.7 acres of use was Mr. Koontz's
23 refusal to acquiesce in the condition that he perform
24 50 acres of offsite improvements. And by the way, the
25 reference --

1 JUSTICE GINSBURG: Where -- where is that?

2 MR. BEARD: It's in the Joint Appendix,
3 pages 70 to 71, which is the pretrial statement where
4 each party sets forth his and her position. There the
5 court -- I'm sorry -- the district made clear that the
6 condition that had been refused and was the cause of the
7 permit denial was the one to perform offsite mitigation
8 at a cost of a range between \$10,000 on the low end, our
9 experts said in the range of 100 to 150,000 -- 90 to
10 150,000.

11 So, the district later on, even in the
12 Florida Supreme Court, Justice Ginsburg, said in its
13 petitioner's brief on jurisdiction at page 1 that it
14 required additional mitigation before it would authorize
15 the permits and that quote: "Additional mitigation
16 would be offsite because the available conservation land
17 on site was, in the district's view, insufficient
18 mitigation."

19 So there's no question that an actual
20 condition was imposed, whose rejection produced a permit
21 denial.

22 JUSTICE KAGAN: Mr. -- Mr. Beard, I don't
23 think anybody is contesting that there was a condition
24 imposed or maybe there are. But -- you know, there's
25 another question whether that position is a taking. And

1 we've been trying to figure out what's the taking here.
2 In Nollan and Dolan, they took an easement, they took a
3 piece of land. So that's the taking. Now, you said the
4 funds are the taking; is that correct?

5 Any time that somebody comes up with a
6 proposal for -- for a developer to pay money in order to
7 compensate the State for the costs that are associated
8 with his development, that that is itself a taking?

9 MR. BEARD: I want to be clear that we're
10 not saying that all monetary fees or exactions would be
11 subject to Nollan and Dolan, only within the permit
12 context, the special context of land use permitting.

13 JUSTICE KAGAN: No, I understand. But in
14 the permit context, a State can't say to somebody, You
15 have to pay to perform some service or to compensate
16 without it being a taking and without it being subject
17 to Nollan and Dolan analysis.

18 MR. BEARD: Correct. If the State or the
19 government or the permitting authority asks for the --
20 for the property owner to give up property, even money
21 to be put to a public use and it's not an application
22 for your user fee or something like that, it's for
23 mitigation, that should be subject --

24 JUSTICE KAGAN: So -- so, for example, and
25 I'll try to do this very quickly, if -- if the State

1 just had a policy for every acre of wetlands you fill
2 in, it costs us \$10,000, you need to pay \$10,000, that's
3 subject to Nollan and Dolan analysis, too.

4 MR. BEARD: Correct, it would be subject to
5 Nollan and Dolan analysis to determine if they're really
6 on the ground, there's a connection between the
7 impact --

8 JUSTICE SCALIA: No, it would be subject to
9 Nollan and Dolan analysis if they took the \$10,000. If
10 they issued the permit, the developer went ahead with
11 the development and the State then attached the bank
12 account in the amount of \$10,000 or whatever, that would
13 be Nollan -- and Nollan and Dolan -- in Nollan, there
14 was a taking.

15 He had gone ahead with the -- with the
16 development of his house under the permit which said if
17 he did that, he gave away the easement. So there --
18 there was a -- a taking there. The easement would have
19 been taken automatically.

20 In -- in -- in Dolan, there was -- the
21 individual had not gone ahead with the development, but
22 it was clear that any development the person undertook
23 would be subject to the -- the exaction that the
24 municipality required. So there was a -- a taking
25 there, we said.

1 Here, there's nothing that happens. The
2 permit was denied, unlike in -- unlike in -- in Dolan
3 where the permit was granted and it was understood that
4 if she went ahead with it, she was going to lose -- lose
5 some land rights. Here, the permit's been denied. I
6 can't see where there's a taking here. Nothing's been
7 taken.

8 MR. BEARD: In Nollan and Dolan, Your Honor,
9 nothing was taken, either. In Nollan you had a permit
10 approval with conditions. It's true that development
11 had not gone forward, but here as well development had
12 not gone forward.

13 Presumably -- theoretically if the
14 development had gone forward he might have been subject
15 to conditions that he would have had to satisfy. But I
16 would submit to the Court --

17 JUSTICE SCALIA: The permit had issued. The
18 permit had issued in both of those cases, and therefore
19 the person was saying: To go ahead with this permit I
20 give up this land.

21 MR. BEARD: The permits in Nollan and Dolan
22 actually did not issue. There was only approval with
23 conditions and there is a difference. And that is no
24 different from what happened here. The threat is the
25 same. You don't get a permit issued to you until you --

1 JUSTICE SCALIA: There was no approval with
2 conditions. There's one thing for a municipality to
3 issue an approval with conditions, and a municipality
4 saying we can't approval it unless you agree to these
5 conditions. And the person doesn't agree and the
6 municipality says we don't approve it.

7 MR. BEARD: But in either case he faces the
8 threat, the unconstitutional condition on his use of his
9 property: You don't get your use until you comply with
10 our conditions.

11 Mr. Chief Justice --

12 JUSTICE KENNEDY: I have one question. I
13 know you are running short on your rebuttal time.
14 Assume that when we look at this record, assume we think
15 there is a due process violation, not a taking
16 violation. That is not before us here, is it?

17 MR. BEARD: No. The due -- there is no due
18 process claim here. There is only a State statute that
19 embodies sort of a due process standard, but there is no
20 due process claim here.

21 And may I reserve the balance of my time,
22 Your Honor?

23 CHIEF JUSTICE ROBERTS: And I will afford
24 you some additional time since our questioning intruded
25 on yours.

1 MR. BEARD: Thank you.

2 CHIEF JUSTICE ROBERTS: Mr. Wolfson?

3 ORAL ARGUMENT OF PAUL R.Q. WOLFSON

4 ON BEHALF OF THE RESPONDENT

5 MR. WOLFSON: Mr. Chief Justice and may it
6 please the Court:

7 The parties agree that Florida may require a
8 landowner to perform mitigation as a condition for a
9 permit that would allow the destruction of a wetlands.
10 The parties disagreed as to how much mitigation was
11 appropriate in this case.

12 The district thought that Mr. Koontz's
13 proposal was insufficient to mitigate the damage to
14 wetlands. Mr. Koontz rejected the district's
15 counterproposals and he refused to do anything more.
16 And the district denied his permit application because
17 he refused to do anything more.

18 CHIEF JUSTICE ROBERTS: Does it make any
19 difference in his refusing to do anything more whether
20 the condition is onsite or offsite?

21 MR. WOLFSON: I don't think it makes any
22 difference, Mr. Chief Justice. I mean, the -- under the
23 Florida regulatory regime, we cannot demand certain
24 conditions from the landowner. The -- we are
25 obligated -- if the -- if the permit -- the landowner

1 has to establish under his permit application, and it's
2 his burden, that he meets the various standards, the
3 public interest standard which includes no adverse
4 impact --

5 CHIEF JUSTICE ROBERTS: State law provisions
6 you are talking about.

7 MR. WOLFSON: Correct. Correct.

8 CHIEF JUSTICE ROBERTS: What about is there
9 anything in the Federal Constitution that limits the
10 conditions that you can demand?

11 MR. WOLFSON: I don't -- not -- not -- if I
12 understand your question, Mr. Chief Justice, I don't
13 think so. I think that the question is, when you are
14 talking about what analytical rubric you should apply,
15 whether it be Nollan or Dolan or Penn Central, I think
16 you can always argue that the impact of any of the
17 conditions that we would demand -- and I will assume
18 here that they are true demands -- you can always argue
19 that the impact of the conditions, be they onsite,
20 offsite, or monetary, would be so burdensome that it
21 would called into play Penn Central or --

22 CHIEF JUSTICE ROBERTS: But there is no,
23 there is no restraint on the agency. It can ask for the
24 moon -- before it will give a permit?

25 MR. WOLFSON: Well, I don't -- I think that

1 Penn -- first of all, I think there are many restraints
2 on the agency. First of all, I think Penn Central
3 imposes a restraint on the agency.

4 CHIEF JUSTICE ROBERTS: Do you know of any
5 case where the government has lost a Penn Central case?

6 MR. WOLFSON: Yes. There are several in
7 this case, Mr. Chief Justice. I mean, Hodel v. Irving
8 is a Penn Central case, I believe, and I think
9 Kaiser-Aetna was also a Penn Central case.

10 CHIEF JUSTICE ROBERTS: May we -- I'm sorry.

11 MR. WOLFSON: It does -- it certainly
12 doesn't --

13 CHIEF JUSTICE ROBERTS: It doesn't happen
14 very often.

15 MR. WOLFSON: Well, it is -- certainly the
16 burden is on the landowner. But I think that Penn
17 Central, I think in Lingle when this Court tried to sort
18 of restore some coherence to the takings jurisprudence
19 and repudiated the Agins point, the Court pointed out
20 that they -- that the normal -- sort of the normal
21 jurisprudence is that the government is not required to
22 establish by a heightened scrutiny sort of that there is
23 a connection between means-ends analysis when it engages
24 in economic regulation. And that --

25 CHIEF JUSTICE ROBERTS: Just to nail it

1 down, your position is that there is no limit in the
2 Federal Constitution on what the agency can demand as a
3 condition for the issuance of a permit?

4 MR. WOLFSON: No, no, no, I don't think that
5 is our position. First of all, the Due Process Clause
6 may certainly impose conditions. The Equal Protection
7 Clause may certainly impose conditions.

8 CHIEF JUSTICE ROBERTS: But the Takings
9 Clause does not.

10 MR. WOLFSON: If the conditions are so
11 onerous that it would make it essentially impossible to
12 derive any value from the land, that may very well call
13 into question Penn Central or Lucas. I mean, in many
14 ways this case could have been litigated as a very
15 straightforward Penn Central case.

16 JUSTICE KENNEDY: Suppose -- suppose the
17 agency said, we are really short of revenue; we will let
18 you develop your land if you contribute a million
19 dollars to our new football stadium.

20 MR. WOLFSON: Justice Kennedy, I think that
21 that may very well raise a Penn Central or Lucas claim.
22 It also sounds like --

23 JUSTICE SCALIA: It doesn't raise Penn
24 Central. You keep on running away from it by saying
25 Penn Central or Lucas.

1 MR. WOLFSON: Well, it's not --

2 JUSTICE SCALIA: It does not deprive the
3 land of all value. The land still has some value. Penn
4 Central is totally out of the case.

5 MR. WOLFSON: It's not a Nollan or Dolan
6 claim is my point, Justice Kennedy, and it's not a
7 Nollan or Dolan claim because it's not a -- the, as my
8 friend acknowledged, the question in Nollan and Dolan or
9 the rationale of Nollan and Dolan is would the condition
10 by itself, if demanded unilaterally and outside the
11 permitting context, would that have been a taking of
12 property for which just compensation would have been
13 required.

14 CHIEF JUSTICE ROBERTS: Sure it would have
15 been. Sure it would have been if they just went
16 along -- to a landowner and the landowner is there
17 minding his own business and they say, well, you own
18 some property, so give us a 1 million dollars to build a
19 football stadium. That would be -- that would be
20 unconstitutional, right?

21 MR. WOLFSON: I think that would -- I mean I
22 think that would violate, could well violate the Due
23 Process Clause. It's hard to see what the rationality
24 of it is. But I don't think that this Court has ever
25 extended the concept of a taking to requirements that a

1 landowner, that anybody or a landowner, either pay money
2 or, more importantly because I think what really is this
3 case, is come into compliance with a regulatory
4 requirement that would have -- which he would have to
5 expend money to comply with.

6 JUSTICE ALITO: I'm trying to understand
7 what would be -- what would be left of Nollan and Dolan
8 if we agree with you. Let me give you three situations.
9 First, the petition -- the district says, we are
10 granting your permit on the condition that you give us
11 one-third of your land. That's Nollan and Dolan, right?

12 MR. WOLFSON: Yes.

13 JUSTICE ALITO: Okay. Situation number 2:
14 Permit is denied, but it will be granted if you give us
15 one-third of your land. What about that?

16 MR. WOLFSON: I think in that situation, in
17 other words, if the situation is really exactly the same
18 like Nollan and Dolan, but the permit is denied but it's
19 clear that it is a concrete -- concrete condition, the
20 landowner can go up through the judicial review process
21 and say, this is -- you know, the denial of the permit
22 application is predicated on an unconstitutional
23 condition, and you should set that aside.

24 JUSTICE ALITO: Is that the same as the
25 first example for purposes of Nollan and Dolan?

1 MR. WOLFSON: Almost. Almost,
2 Justice Alito.

3 JUSTICE ALITO: All right. I want to get to
4 my third. The permit is denied but it will be granted
5 if you give us the fair market value of the third of the
6 land, and once you have done that then we're going to
7 condemn your land and pay you the fair market value for
8 it.

9 MR. WOLFSON: Justice Alito, I think that
10 this Court's decision, this Court decision in Village of
11 Norwood, essentially says if what is going on is just a
12 pure contrivance to avoid the requirement of
13 compensation in the Just Compensation Clause, that the
14 Court has said, no, it will look through to the
15 substance of the demand and determine that there was --
16 you know, essentially an evasion of the just
17 compensation requirement.

18 JUSTICE SCALIA: As I understand your
19 position, cash is magical, right? The government can
20 come in and come into my house, take all of the cash
21 that's there, and that is not the basis for takings
22 claim, right? Because cash is not -- is not a taking.
23 Does that make any sense?

24 MR. WOLFSON: First of all, Justice Scalia,
25 of course this case we don't believe involves cash. It

1 involves a requirement to do something that costs money,
2 which is different than cash. Cash is -- the problem
3 with extending -- the problem with extending the takings
4 concept to a monetary obligation which can be paid for
5 out of sort of undifferentiated funds --

6 JUSTICE SCALIA: Right.

7 MR. WOLFSON: -- is that it has no logical
8 stopping point. I mean, the court --

9 JUSTICE SCALIA: The stopping point is don't
10 take my cash. Your answer to my question is: That's
11 okay, it's not a taking, right? I may have some other
12 cause of action, but not a -- not a taking? The
13 government's come in and taken my money.

14 MR. WOLFSON: It's not a -- it's not a
15 Nollan and Dolan claim for the government to say if you
16 want --

17 JUSTICE SCALIA: I'm not talking Nollan and
18 Dolan. I'm talking about your position that the taking
19 of cash cannot be a taking.

20 MR. WOLFSON: Well, if a -- I'm sorry,
21 Justice Scalia. If the government is seizing the
22 identifiable dollar bills that are in your house, I mean
23 that sounds more like a case like --

24 JUSTICE SCALIA: I see, I see.

25 MR. WOLFSON: Webb's Fabulous Pharmacies,

1 where --

2 JUSTICE SCALIA: If they -- if they say, You
3 have to turn over to us whatever money you have in your
4 house, or you have to turn over to us whatever's in your
5 bank account, that's not a taking.

6 MR. WOLFSON: Justice Scalia, I think there
7 are many -- there are many constitutional claims that
8 could be made. And I also want to add, there is an
9 extensive overlay of State law in this area that
10 protects landowners from arbitrary, irrational,
11 intrusive, excessive demands by government agencies.

12 CHIEF JUSTICE ROBERTS: One of the
13 things the Federal provision, the Takings Clause, is
14 designed to prevent property owners from having to bear
15 the costs that should be borne by the people as a whole.
16 The football stadium example. There is no reason that a
17 particular landowner should have to pay for the football
18 stadium simply because he owns property.

19 The Takings Clause was designed to make sure
20 that those exactions are not imposed on property owners
21 but spread more evenly across the citizens who benefit
22 from it.

23 And I guess I don't understand why you say
24 that the Takings Clause is the one provision that
25 doesn't apply in that type of situation.

1 MR. WOLFSON: Mr. Chief Justice, the -- the
2 Armstrong policy of the -- that the government -- that
3 an individual person should not be forced to bear what
4 society should -- what should be spread to society as a
5 whole -- is not violated when the government insists
6 that a landowner comply with a generally applicable
7 regulation. Now, of course --

8 CHIEF JUSTICE ROBERTS: The generally
9 applicable regulation in the football stadium
10 hypothetical is not generally applicable. It says, You
11 are the owner of this property, and if you want to
12 develop it, you've got to build a football stadium.

13 MR. WOLFSON: Well, I think that is saying
14 to one particular landowner, You may have to build a
15 football stadium where no other type of similar
16 regulation or requirement would ever be imposed on any
17 other landowner sounds -- you know, like -- you know,
18 sounds like an equal protection claim if the government
19 just picks out one landowner.

20 JUSTICE SCALIA: What if they do it to five
21 or six other landowners, okay?

22 MR. WOLFSON: Then, Justice Scalia, I think
23 you have to ask what -- what regulatory scheme is the
24 government --

25 JUSTICE KENNEDY: Let's -- let's put --

1 let's put it this way. I take it it's a given that the
2 government cannot take an easement on your property. It
3 cannot use your property for its own purposes. It
4 cannot park its trucks there. It cannot cut the grass.

5 Why is it that if it can't do those, it can
6 still force you, as a condition to using your property
7 to its highest and best use, to pay them money?

8 MR. WOLFSON: Well, I think --

9 JUSTICE KENNEDY: Why isn't that an equal
10 burden -- why isn't that an equal use of the property by
11 the government?

12 MR. WOLFSON: I think for several reasons,
13 Justice Kennedy. First of all, I think that this nation
14 has a long legal tradition of giving unique legal
15 protection to property as opposed to money. I mean,
16 there are many circumstances -- many circumstances --
17 where the government can say to an individual, You must
18 give me \$1,000, but cannot say -- or a group of
19 individuals -- but cannot say to the same group or
20 individual, You must give me land worth \$1,000. I mean,
21 there -- that is what the Just Compensation Clause --

22 JUSTICE SCALIA: Really? Gee, that doesn't
23 strike me as -- as entirely true.

24 MR. WOLFSON: Well, Justice Scalia, the
25 government obviously --

1 JUSTICE SCALIA: You mean a tax that is
2 imposed only on landowners, and it's -- you know, it's a
3 tax -- \$5,000 per landowner, if that were replaced by a
4 provision that said, Every landowner shall contribute to
5 the State a portion of his property worth \$5,000.
6 That --

7 MR. WOLFSON: I think that would --

8 JUSTICE SCALIA: -- the latter is bad and
9 the former's okay?

10 MR. WOLFSON: I think that would raise very
11 serious questions. I mean, I don't know that this Court
12 has ever -- has ever been faced with exactly such a
13 case, but I think that would raise a very serious
14 question.

15 JUSTICE BREYER: So that -- am I
16 wrong about -- I might have this -- I thought the
17 framework roughly is the following: It is not the case
18 that Penn Central applies only where there is a physical
19 invasion of property, or there is total destruction of
20 the value of the property.

21 In those two situations, what we said in
22 Lucas is it applies without case-specific inquiry, but
23 there are another set of cases where Penn Central and
24 McMahon apply with case-specific inquiry. And those to
25 discover whether you have one, you look into such things

1 as whether the regulation destroys investment-backed
2 expectations, and then you look to the nature of the
3 government interest and the relationships, et cetera.
4 That's what I thought the framework was.

5 Now, if that's the framework, then when the
6 government says, I will let you develop your land if and
7 only if you give \$50,000 to the Shriners hospital, you
8 would say, I can't develop my land. And besides, that
9 significantly interferes with my investment-backed
10 expectations. And besides, there is no relation
11 whatsoever. Therefore, I win under the Takings Clause.

12 Now, I spell all that out, because if I'm
13 wrong about that framework -- if I am right about the
14 framework, that could apply to this case. If I am wrong
15 about the framework, I want to know where in the cases
16 I'm wrong.

17 MR. WOLFSON: Justice Breyer, we think that
18 you are right about that framework. That -- and just 6
19 weeks ago in the --

20 JUSTICE SCALIA: That surprises me.

21 MR. WOLFSON: Well, just 6 weeks ago, in the
22 Arkansas Fish and Game Commission case, this Court
23 reiterated that Penn Central is presumed to be the test.

24 JUSTICE BREYER: Okay. So if I'm right
25 about the framework, that takes care of all the

1 hypotheticals you were asked. In those cases, there is
2 a significant interference with investment-backed
3 expectation, and there's no justification whatsoever, so
4 the Takings Clause applies.

5 MR. WOLFSON: We agree, Justice Scalia, and
6 we don't --

7 JUSTICE SCALIA: Justification is the
8 protection of wetlands. That's a justification. The
9 protection of wetlands.

10 There's no necessary comparison, as Nollan
11 and Dolan requires, between the harm that would be
12 occasioned if the permit were granted and what the State
13 is exacting in order to mitigate. That doesn't exist
14 anywhere in -- in the analysis that you are talking
15 about.

16 MR. WOLFSON: Well, Justice Scalia, there
17 are -- there is another problem with the Nollan and
18 Dolan claim in this case, which is, it's hard to see how
19 you can have an exactions takings claim when nothing has
20 ever actually been exacted.

21 JUSTICE SCALIA: Now, that is a problem.

22 (Laughter.)

23 MR. WOLFSON: Right. And so -- and in this
24 case, if the -- if the claim for the taking -- for the
25 compensation is based on Nollan and Dolan, it seems that

1 there is a mismatch, and that what the Petitioner is
2 trying to do is sort of take the Nollan-Dolan heightened
3 scrutiny government bears the burden of proof analysis
4 and sort of convert that into what is the regulatory
5 takings analysis for the entire parcel of his land,
6 which is -- which is the measure of damages that he
7 received.

8 So I think that there is the mismatch. And
9 now, this is --

10 CHIEF JUSTICE ROBERTS: I think that your
11 point goes to the question that has been raised about --
12 there's no permit issued. He didn't accept the permit.
13 And I don't understand that proposition. Are you saying
14 that if you are confronted with an unconstitutional
15 condition, you have to accept it, and then you can
16 challenge it?

17 You can't simply say you denied that on the
18 basis of an unconstitutional condition, and that's
19 wrong?

20 MR. WOLFSON: No, that's not our argument,
21 Mr. Chief Justice. Florida has opened an avenue for
22 judicial relief for you to go up through the Florida EPA
23 process just like the Federal EPA, where you can say,
24 Stop -- stop the district from doing this to me; they
25 are predicating their -- either their grant or --

1 CHIEF JUSTICE ROBERTS: Okay. I'm trying to
2 get to the Federal. You often fall back to the State
3 provisions. I'm looking at the Federal Constitution,
4 and assuming the State provisions give you no relief, is
5 it your position that he has no claim unless he accepts
6 a permit with unconstitutional conditions?

7 MR. WOLFSON: If there is no -- if there's
8 no claimed avenue as I was saying, then I would think we
9 would then -- you would have to obtain -- you have to
10 seek compensation, but your compensation is for the
11 value of your land that was taken.

12 And in Lingle, this Court reiterated that
13 the Takings Clause is not a substantive limitation on
14 the government's power to regulate.

15 The Takings Clause -- or as I should call
16 it, the Just Compensation Clause -- is a requirement
17 that if -- that the government will pay you just
18 compensation for any property or property interest it
19 has seized from you. It does not -- it does not itself
20 impose a -- a requirement that the government
21 substantively justify its regulation.

22 JUSTICE GINSBURG: Mr. Wolfson, why isn't it
23 entirely reasonable to say, If you are going to put a
24 condition on a permit, that condition has to have some
25 rough proportionate relationship to the harm that is

1 being done to the permit -- that seems to me permanently
2 sensible, that if they are going -- if they are going to
3 exact a condition, the condition has to have some
4 discrete proportional relationship to the harm?

5 MR. WOLFSON: Justice Ginsburg, I think that
6 the district thought that they were acting roughly
7 proportional. In other words, we are not saying that
8 the government shouldn't act -- that government should
9 not act reasonably.

10 But I think when you force these cases into
11 court under the Nollan, Dolan framework, you have a --
12 you have basically a mismatched and extraordinarily
13 complex situation, and you have -- you run right into
14 what this Court said in Lingle, which is that it is not
15 ordinarily the Court's jurisdiction -- the appropriate
16 approach to require the government to bear the burden of
17 proof.

18 JUSTICE KENNEDY: Well, in Penn Coal v.
19 Mahon, the government didn't enter the property. It
20 didn't take the property in the physical sense of moving
21 in and appropriate it. It just says, congratulations,
22 you have some coal under your land, and we hope you
23 enjoy it because you can't move it. And we said that is
24 a taking; that is a regulation that goes too far, and it
25 deprived, as Justice Breyer indicated, the owner of

1 investment- backed expectations, although that word
2 wasn't in that Penn-Mahon.

3 MR. WOLFSON: Correct. And,
4 Justice Kennedy, nobody is disputing that Mr. Koontz
5 could have made the argument that the regulation goes
6 too far in the sense of the burden on his proposed
7 project. I mean, he had all of those arguments
8 available to him.

9 He bought the -- he says he bought the land
10 before the regulation went into effect. He had
11 investment-backed expectations and all the rest of it.
12 But that is not the claim that he is advancing to this
13 Court.

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Mr. Wolfson.

17 Mr. Kneedler?

18 ORAL ARGUMENT OF EDWIN S. KNEEDLER,
19 FOR UNITED STATES, AS AMICUS CURIAE,
20 SUPPORTING THE RESPONDENT

21 MR. KNEEDLER: Mr. Chief Justice, and may it
22 please the Court:

23 I would like to emphasize at the outset that
24 Petitioner's argument that Nollan and Dolan should apply
25 in this context would -- would constitute a radical

1 change in the -- in the way standard generally
2 applicable regulatory programs are operated.

3 It is standard procedure when someone
4 applies for a permit from the government, it is the
5 permit applicant's burden to establish that he complies
6 with the regulatory program.

7 Nollan and Dolan shift that burden to the
8 government. That has never been the case under
9 regulation, including land use regulation.

10 JUSTICE SCALIA: What was taken in Nollan
11 and Dolan?

12 MR. KNEEDLER: If --

13 JUSTICE SCALIA: In Nollan and Dolan, wasn't
14 the easement what was taken?

15 MR. KNEEDLER: That is what -- if -- if the
16 permit had issued and an easement was granted, yes, it
17 was the easement.

18 JUSTICE SCALIA: Well, but it -- wasn't what
19 was taken unreasonably the ability of this homeowner to
20 make the alterations to his house that he wanted to
21 make? He wanted to add another story and the court --
22 and the State said, you can't do it. And its only basis
23 for saying, you can't do it was, because you wouldn't
24 give us the easement.

25 MR. KNEEDLER: The basis of the -- the

1 theory of Nollan and Dolan, and the Court made this
2 clear in Lingle and in Delmonte Dunes, for that matter,
3 is those two cases apply in a specific situation where
4 there is an exaction of a right of access, an easement
5 for the public to enter the land as a condition. And
6 the reason for that, the Court explained in Lingle,
7 there are really two reinforcing points.

8 The first was that there would be public
9 access, which is a permanent physical occupation, which
10 is one of the exceptions to the general Penn Central
11 test for regulatory takings. The other is that it was a
12 per se taking. It was per se that the government could
13 not have acquired that easement for paying -- without
14 paying compensation; therefore, the government could not
15 attach as a condition to the granting of a permit that
16 the person convey something unless it was proportional.

17 So the theory began with the idea that the
18 easement itself would have been -- the taking of that
19 would have been a per se taking. This is a very
20 different situation because the other way in which
21 Petitioner's theory would constitute a radical departure
22 is that compliance with regulatory programs frequently,
23 maybe almost always, requires the expenditure of money.

24 If someone wants to build a power plant, a
25 coal-fired power plant, he's going to have to install a

1 scrubber to protect the air, to prevent no diminution of
2 air quality. Constructing that costs money. It can't
3 be that the requirement to spend money to comply with a
4 regulatory program is itself a taking. The taking would
5 be --

6 CHIEF JUSTICE ROBERTS: What about -- what
7 about the football stadium? Do they -- can you pick a
8 particular landowner? I mean, you took a case in which
9 there is no question under Nollan and Dolan about the
10 relationship, proportionality, and nexus. Let's put
11 those to one side because the issue is whether Nollan
12 and Dolan apply. Can the government say, okay, you want
13 a permit, we will give you the permit if you fund the
14 new football stadium?

15 MR. KNEEDLER: I think in that situation
16 there would be a very substantial equal protection
17 challenge because one landowner is being singled out
18 with no rational basis. -

19 CHIEF JUSTICE ROBERTS: But the one
20 constitutional provision that is concerned with
21 protecting property owners from having to bear burdens
22 that should be borne by the public at large is not
23 applicable?

24 MR. KNEEDLER: Well, that -- it applies when
25 there is an identifiable property taken --

1 JUSTICE BREYER: No, no. Why isn't the
2 answer yes, it is applicable? Of course it's
3 applicable. I own a piece of land and they have
4 significantly interfered with my investment-backed
5 expectation.

6 MR. KNEEDLER: Right, right, right.

7 JUSTICE BREYER: And to say that I can't put
8 a house on this because I'm supposed to pay for a
9 football field, which has nothing to do with it, is as
10 close to insisting that you have to have 4,000 columns
11 of coal in your mine so that you can never use it as I
12 can think of. It's Holmes brought up to date.

13 MR. KNEEDLER: Well, certainly --

14 JUSTICE BREYER: At least that argument
15 would be made --

16 MR. KNEEDLER: Certainly --

17 JUSTICE BREYER: And why wouldn't it be a
18 winning argument?

19 MR. KNEEDLER: Certainly a Penn Central
20 argument could be made there, but I think that's very
21 different from a Nollan argument --

22 JUSTICE BREYER: I agree with you --

23 MR. KNEEDLER: -- which -- which imposes
24 the -- the burden on the government and basically treats
25 the payment of money as itself a taking.

1 JUSTICE SOTOMAYOR: Mr. Kneedler, can I go
2 back to the questions presented for a moment? The court
3 below did two separate rulings, I think. One is there
4 can't be a taking if the -- if the claim is that it's of
5 an undifferentiated money, not a risk. And I think you
6 would agree with that. If the only issue is an
7 obligation to pay money, that that's not a takings
8 claim, correct?

9 MR. KNEEDLER: Yes. And this is not even an
10 obligation to pay money. It's an obligation to spend
11 money to come into compliance.

12 JUSTICE SOTOMAYOR: Right. There was a
13 second holding, however, which really gets eclipsed by
14 the second, which is a denial of a permit doesn't permit
15 you to raise the Nollan-Dolan case, and it appears to me
16 even if there is an easement situation, so even if there
17 is an actual takings claim at issue. Do you agree with
18 that first holding by the court below?

19 MR. KNEEDLER: We think --

20 JUSTICE SOTOMAYOR: Assuming we narrow it
21 not to undifferentiated money, but is there a difference
22 between a denial or a grant?

23 MR. KNEEDLER: No. If the -- if the agency
24 decision is written where there is an express condition,
25 we don't think that it matters -- an express condition

1 satisfying Nollan and Dolan; in other words, an
2 exaction, a per se taking, we don't think it matters
3 whether the -- whether it's a permit grant or permit
4 denial. There was no actual taking in the sense that
5 compensation would be owed, but it could be challenged
6 as an unconstitutional condition under the Nollan and
7 Dolan analysis.

8 But we think it's critical when thinking
9 about that that the permit denial -- that only applies
10 if the permit denial expressly is based on the
11 condition, because otherwise you would get into a
12 situation of negotiations and what was discussed and
13 liability could turn on an exchange of ideas, whereas it
14 should turn on the formality of the agency's final
15 decision. It's akin to the Williamson County final
16 decision requirements.

17 CHIEF JUSTICE ROBERTS: Do you agree -- your
18 friend on the other side cited a number of places in the
19 record where he thought your condition was satisfied,
20 that the denial of the permit was expressly based on the
21 failure to comply with the offered conditions.

22 MR. KNEEDLER: Well, if you look at the
23 orders denying the permit applications in the record at,
24 I believe it's 49 to 51 and 59 to 61. In those
25 situations it says the permits were denied because the

1 plaintiff did not give the reasonable assurances that
2 the statute requires in order to get the permit, the
3 reasonable assurances of no loss of wetlands functions.

4 JUSTICE SCALIA: Isn't this unreal? I mean,
5 you are saying all along in the negotiations the agency
6 says, If you do X, you get the permit. And X is --
7 would -- would be an unconstitutional condition. Okay,
8 he refuses to do X. The permit is denied with a general
9 statement like this: The permit is denied because he
10 has refused to do the necessary mitigation. Isn't it
11 clear that the reason he's refused to do the necessary
12 mitigation is he has refused the last demand of the
13 agency?

14 MR. KNEEDLER: But the ultimate standard
15 under the statute is whether he has provided reasonable
16 assurances. What assurances -- the way in which he goes
17 about it, whether offsite or onsite -- the offsite part
18 just arises because this is a wetlands case. Normal
19 regulation wouldn't raise the offsite --onsite problem.
20 But the ultimate question is he didn't carry his burden
21 of establishing no net loss of wetlands.

22 JUSTICE BREYER: What he's going to say in
23 part is, I guess, I did a little numbers from your
24 brief, the 37 million acres in Florida, say about
25 4 million are bodies of water, and say a third of them

1 are built up, and we have 11 million that are wetland
2 and 11 million that aren't. That's crude.

3 So they're saying why in heaven's name are
4 we supposed to -- everybody wants to build, and why
5 should the people that happen to live in wetland have to
6 pay for all the other wetland? That's just coincidence.
7 So he is going to say that that is like the Shriners
8 Hospital. You are going to say, No, it isn't like the
9 Shriners Hospital.

10 Now, all I'm saying is, isn't it at least an
11 issue under the takings clause whether it is or isn't?

12 MR. KNEEDLER: I think it's clearly not like
13 the Shriners Hospital --

14 JUSTICE BREYER: I know you'll say that. He
15 will say that it is.

16 MR. KNEEDLER: But I did want to come back
17 to Justice Scalia's question. The permit denials, just
18 general permit denials, the Court made clear in Del
19 Monte Dunes are not covered by Nollan and Dolan. They
20 are covered by Penn Central. And the Court made clear
21 in Nollan that the Court could have denied the permit
22 without attaching the condition. We think it's
23 important that the agency always have that option.

24 And the third point is --

25 JUSTICE ALITO: You made the reference --

1 you are making Nollan and Dolan a trap only for really
2 stupid districts -- you know. They -- they say the
3 right words and then they are out from under it, isn't
4 that right?

5 MR. KNEEDLER: Well, I don't think so
6 because -- because there are situations in which an
7 agency actually wants to get the easement. But this
8 Court, in Lingle, made clear that the general rule is
9 Penn Central with only the two exceptions for
10 regulatory --

11 JUSTICE ALITO: It shouldn't matter whether
12 the -- whether the permitting authority says expressly
13 in the denial, "it's denied because you didn't do this,"
14 or it just says, "it's denied," but it's perfectly well
15 understood what was needed, what they were going to
16 demand in order to get.

17 MR. KNEEDLER: If may I answer, because the
18 agency has to reserve, has to have the ability to deny
19 the permit because the conditions required by the
20 statute were not met, and Nollan and Dolan deal with
21 formality and the formality of conveyance of an
22 easement. If there is not a document that requires
23 that, then the strict requirements for the narrow
24 exception for Nollan and Dolan do not apply.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Kneedler.

2 Mr. Beard, you have three minutes.

3 REBUTTAL ARGUMENT OF PAUL J. BEARD, II,

4 ON BEHALF OF THE PETITIONER

5 MR. BEARD: Thank you, Mr. Chief Justice.

6 I would just like to point the Court, and
7 particularly Justice Scalia, to pages 30 and 31 of our
8 brief on the merits where we describe with citations to
9 the Nollan and Dolan, what precisely happened there. I
10 want to make sure that it's clear that what they did
11 there was not issue permits. They approved with
12 conditions, but the property owner still had to satisfy
13 the conditions in order to receive the permit.

14 As to the question about --

15 JUSTICE SOTOMAYOR: What do we do with what
16 Mr. Kneedler says is a ruling in your favor on this
17 question, that all denials are subject to Nollan and
18 Dolan? What do we do with that?

19 What's the -- I see an enormous flood gate
20 here, and one in which we are sending a signal that
21 perhaps States should be more quiet rather than more
22 engaging. They should just say no, because anything
23 they offer is going to be seen as an -- potentially as
24 an unconstitutional taking.

25 They should just plain say no, not explain

1 why, not engage in any work with you to mitigate.

2 MR. BEARD: Justice Sotomayor, I don't
3 believe that negotiations will suddenly break down, and
4 we will see a flurry of permit denials if the Court
5 rules in our favor. What will happen, instead -- it's
6 true, I should say, they will lose flexibility in
7 demanding whatever it is that they want under the
8 Takings Clause.

9 They won't have any review. But the benefit
10 of applying our rule that says monetary exaction should
11 be treated like other exactions and be reviewed under
12 Nollan and Dolan --

13 JUSTICE SOTOMAYOR: But they're not. People
14 are asked to pay taxes. Homeowners are asked to pay
15 taxes all the time; development fees if they want to
16 develop something. People are subject to money
17 exactions all of the time in this society.

18 MR. BEARD: No question that we all are
19 subject on a daily basis to government demands that we
20 pay, that we have a financial obligation.

21 JUSTICE SOTOMAYOR: So what happens in
22 just -- when the legislature passes a development fee?
23 Are you now saying that's subject to Nollan and Dolan,
24 too?

25 MR. BEARD: If the legislation requires an

1 agency who processes a permit to impose a fee in
2 exchange for a permit -- again, within the land-use
3 context, we are not talking about taxes, homeowners
4 fees, we are talking within the discretionary land-use
5 process -- that is imposed there, then the risk of
6 coercion, undue influence and the like arise and Nollan
7 and Dolan should apply.

8 But I wanted to respond specifically to
9 Justice Breyer's questions about Penn Central. I think
10 conceptually there is an important difference between
11 the unconstitutional conditions doctrine which is what
12 we seek to apply here, and what would be a permit -- or
13 what would be a Penn Central claim.

14 The unconstitutional conditions doctrine,
15 the offense there is the --

16 CHIEF JUSTICE ROBERTS: Finish your thought.

17 MR. BEARD: The offense there is the
18 conditioning, the improper conditioning of a permit.
19 It's not did the condition force me to lose the value in
20 my land. That's a very different question that a case
21 like Penn Central might answer subsequent to a permit
22 denial.

23 The Unconstitutional Conditions Doctrine
24 focuses exclusively on the permit exaction and on the
25 conditioning, not on subsequent decisions by the

1 government, for example, to deny.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 MR. BEARD: Thank you.

4 CHIEF JUSTICE ROBERTS: The case is now
5 submitted.

6 (Whereupon, at 12:09 p.m., the case in the
7 above-entitled matter was submitted.)

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