

>> >> PLEASE RISE.

HEAR YE HEAR YE HEAR YE, THE
SUPREME COURT OF FLORIDA IS NOW
IN SESSION.

ALL WHO HAVE CAUSE TO PLEA, DRAW
NEAR, GIVE ATTENTION AND YOU
SHALL BE HEARD.

GOD SAVE THESE UNITED STATES,
THIS GREAT STATE OF FLORIDA AND
THIS HONORABLE COURT.

>> LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> GOOD MORNING, AND WELCOME TO
THIS SESSION OF THE FLORIDA
SUPREME COURT.

THE FIRST CASE ON OUR CALENDAR,
THIS MORNING, IS ST. JOHN'S
RIVER MANAGEMENT DISTRICT VERSUS
KOONTZ.

ARE THE PARTIES READY TO
PROCEED?

YOU MAY PROCEED.

>> PLEASE THE COURT, I'M BILL
CONGDON REPRESENTING THE WATER
MANAGEMENT DISTRICT.

I'D LIKE TO RESERVE FIVE MINUTES
FOR REBUTTAL, PLEASE.

>> ALL RIGHT.

THIS CASE INVOLVES THE
STRAIGHTFORWARD PERMIT DENIAL
BASED ON MITIGATION, AND...
INSTRUCTION.

MR. KOONTZ DID NOT CHALLENGE
THROUGH THE 120 PROCESS AND
INSTEAD WENT TO CIRCUIT COURT...

>> LET ME ASK YOU THAT...

[INAUDIBLE]

>> THEY COULD HAVE GONE TO THE COMMISSION, AND 37114, THAT IS WHAT YOUR NOTICE SAYS THEY CAN DO AND CHOSE THE FIRST OPTION AND WHAT IS IT THEY SHOULD HAVE DONE.

>> OKAY, THAT IS ONE OF THE -- THE FINAL ORDER... THE AGENCY COMES OUT WITH A PRELIMINARY ACTION.

YOU CAN CALL IT A STAFF REPORT. AND, IN THAT STAFF REPORT, IT IS PROVIDED TO THE APPLICANT AND THE STAFF REPORT SAYS YOU HAVE THE RIGHT TO CHALLENGE THIS PROCEEDING THROUGH CHAPTER 120, THEY DON'T HAVE TO EXERCISE THAT RIGHT.

THEY CAN LET THE TIME ELAPSE AND GET A FINAL ORDER BASED ON THE RECOMMENDED ORDER.

AND, THEY HAVE THE APPELLATE RIGHTS THAT YOU MENTIONED.

>> SO WHAT... WHEN WAS THE ORDER ENTERED THAT GAVE THEM THAT...

[INAUDIBLE].

>> IT WOULD HAVE BEEN PROBABLY A MONTH BEFORE THE GOVERNING BOARD HEARING.

>> WERE THE MITIGATION FACTORS SPECIFIED IN THAT.

>> YES, THEY WOULD HAVE BEEN.

>> THAT ORDER STATES ESSENTIALLY THE SAME AS THE... [INAUDIBLE].

>> IT SHOULD BE ADS -- I'M NOT POSITIVE OF THAT.

>> WHAT YOUR POSITION IS, AND WHAT YOU -- ONCE YOU EXHAUST THE THE ADMINISTRATIVE REMEDIES THEY SHOULD HAVE EXERCISED THEIR RIGHT TO GO TO A 120-57 HEARING AND ABSENT THAT COULD NOT HAVE EXHAUST THERE'D ADMINISTRATIVE REMEDIES.

>> AT THAT POINT, ONCE THE STAFF REPORT WENT OUT, SAYING, YOU DON'T HAVE ENOUGH MITIGATION, WE ARE PREPARED TO DENY THIS. THAT IS WHEN THEY WOULD HAVE NEEDED TO INSTITUTE THE CHAPTER 1 20 PROCEEDING.

>> IS THERE ANYTHING IN THE NOTICE OF RIGHTS PROVISION YOU ARE CONTENDING THERE SHOULD HAVE BEEN EXHAUSTION OF ADMINISTRATIVE REMEDIES ON.

>> NOT IN THE NOTICE OF RIGHTS, IN THE FINAL ORDER. IT IS IN THE NOTICE OF RIGHTS IN THE PRELIMINARY AGENCY DECISION.

>> OKAY.

>> AND ONCE A FINAL ORDER IS ENTERED THE TIME IS ELAPSED FOR THE 120 PROCEEDING.

>> AND IS IT YOUR POSITION, THAT IN THAT CONTEXT, THAT ADMINISTRATIVE CONTEXT, THEY WOULD HAVE BEEN ABLE TO LITIGATE THE ISSUES ABOUT ESSENTIAL NEXUS AND ROUGH PROPORTIONALITY.

>> YES, IT IS.

>> IF THEY WERE DISSATISFIED WITH THE MITIGATION THEY -- AND THIS IS THE STANDARD 120 PROCESS, ALMOST EVERY CASE WHERE THERE IS LITIGATION OVER THE MITIGATION THE PARTIES ARE ARGUING, IS THAT TOO MUCH MITIGATION --... THE APPROPRIATE LITIGATION AND GOT THE PRELIMINARY STAFF REPORT AND BELIEVED THAT IS TOO MUCH MITIGATION, AND, THEY WANTED TO BRING A TAKINGS CLAIM THEY'D PREPARE THE RECORD FOR THAT AND IN THE ADMINISTRATIVE PROCEEDINGS, AND, WHAT WOULD HAPPEN, THOUGH, THE ADMINISTRATIVE... WOULD LISTEN TO THEIR EXPERTS, TO THE DISTRICT'S STAFF, AND THE ADMINISTRATIVE LAW JUDGE WOULD EVALUATE WHAT HE THOUGHT THE APPROPRIATE MITIGATION WAS AND THEN HE'D PRESENT A RECOMMENDED ORDER, BACK TO THE GOVERNING BOARD FOR A FINAL ORDER.

>> AND ONCE THAT ORDER BECOMES FINAL, THEN YOU WOULD HAVE TO APPEAL IT, CORRECT?

SO WHEN WOULD YOU GOT A POINT WHERE YOU WOULD ACTUALLY BE ABLE TO MOUNT A TAKING CLAIM?

>> SEE, THERE IS NO REQUIREMENT THAT YOU APPEAL THE FINAL ORDER. AS JUST POLSON SAID YOU HAVE THE

OPTION AT THAT TIME, WHEN THERE IS A FINAL ORDER OF GOING TO CIRCUIT COURT, OR YOU CAN APPEAL.

>> YOU COULD LET THE FINAL ORDER STAY IN PLACE AND MOVE ON TO CIRCUIT COURT, AND, MAKE AN INVERSE CONDEMNATION CLAIM.

>> THAT IS CORRECT.

SO LONG AS YOUR INVERSE CONDEMNATION CLAIM AS LONG AS IT DOES NOT DEAL WITH THE SUBSTANCE OF THE MITIGATION.

>> IT CHANGES THE NATURE OF THE REVIEW OR THE CHALLENGE.

>> YES.

IT DOES.

>> ONCE, IF YOU DO NOT -- ONE IS PROVIDED FOR ONE TYPE OF CHALLENGE AND THEN, IF THAT IS NOT FOLLOWED, YOU ARE LIMITED AS TO THE NATURE OF THE STATUTORY CHALLENGE.

>> EXACTLY.

>> THAT IS WHERE WE ARE HERE IS WHAT YOUR POSITION IS.

>> YES, SIR.

>> YOU'LL HAVE TO EXPLAIN IT TO ME.

WHAT WOULD BE THE NATURE OF THE INVERSE CONDEMNATION CLAIM, A TAKINGS CLAIM, ONCE THEY WENT THROUGH THE ADMINISTRATIVE SIDE? AND, THEY -- AT -- I THOUGHT -- I THOUGHT THE ISSUE WE WERE DEALING WITH HERE, BESIDES YOUR

DISCUSSING WHAT THE PROPER PROCEDURE IS, IS WHETHER, WHEN SOMEBODY DOES NOT ACCEPT THE MITIGATION, THAT IS BEING OFFERED IN EXCHANGE FOR PROVIDING THE PERMIT, THAT THEY DON'T HAVE A RIGHT TO BRING A TAKINGS CLAIM.

IS THAT NOT WHAT -- ONE OF THE ISSUES?

>> IF THEY DON'T ACCEPT MITIGATION, THEY NEED TO CHALLENGE IT, THROUGH THE 120 PROCESS, IF THEY DO NOT DO THAT, THEN, THE MITIGATION DECISION IS FORECLOSED.

YOU CAN GO TO CIRCUIT COURT, CIRCUIT COURT FOR A TAKING BUT IT WOULD BE A TAKING, ESSENTIALLY ON ECONOMIC IMPACT.

IS THERE --

>> YOU MEAN A REGULAR -- ARE YOU TALK ABOUT A REGULATORY TAKING.

>> YES, IT WOULD BE A REGULATORY TAKING.

>> I DON'T UNDERSTAND IN THIS SITUATION, IF THE AGENCY -- THAT IS A FRIENDLY QUESTION, CAN DENY THE PERMIT, THESE ARE WETLAND WE'RE DEALING WITH.

WHAT IS IT THAT YOU ARE SAYING CHANGES IT, IF THE PERSON... THE AGENCY IS SAYING, LISTEN, WE HAVE... WE'LL GIVE YOU A PERMIT BUT YOU HAVE TO DO THUS AND SUCH.

HOW IS THAT A PENN CENTRAL TAKING.

>> WHAT THEY WOULD ARGUE, IT WOULD BE DIFFICULT IN THAT CIRCUMSTANCE, WHAT THEY COULD SHOW IS THIS MITIGATION IS SO EXPENSIVE, A LOT HAS TERRIFIC WETLANDS ON IT AND YOU NEED A LOT OF MITIGATION AND THE COST OF THE MITIGATION COULD EXCEED THE VALUE OF YOUR PROJECT.

>> BUT IF THE GOVERNMENTAL AGENCY HAS A RIGHT TO COMPLETELY DENY THE PERMIT, AND THEY ARE OFFERING SOMETHING THAT IS SORT OF, YOU CAN DO, AND DEVELOP YOUR PROPERTY, OR, NOT GOING TO -- YOU ARE NOT GOING TO BE ABLE TO DEVELOPER PROPERTY, BECAUSE WE HAVE NO RIGHT TO -- YOU HAVE TO RIGHT TO GET A PERMIT, HOW IS THAT A TAKING?

>> IT WOULD NOT BE AN EXACTION TAKING IN MY VIEW.

UNDER ANY POSSIBILITY.

THE ECONOMIC -- IT COULD BE AN ECONOMIC TAKING, BASICALLY, THAT WOULD GO TO COURT, SAYING THIS MITIGATION COSTS SO MUCH IT HAS TAKEN SUBSTANTIALLY ALL ECONOMIC VALUE OUT OF MY LAND.

THAT IS WHAT THEY HAVE TO SHOW AND THAT WOULD BE A DIFFICULT BURDEN BECAUSE WE WANT TO LET PEOPLE DEVELOP THEIR PROPERTY. WE JUST WANT TO DO IT SO THEIR WETLAND IMPACTS ARE MITIGATED.

SO THEY COULD HAVE THAT KIND OF
TAKING IT BUT IT WOULD BE
EXCEEDINGLY RARE.

EXCEEDINGLY RARE.

>> WE ARE TALKING ABOUT A
SPECIFIC TYPE OF THING, SENTENCE
THAT A FAIR STATEMENT AND THAT
IS ONE AS TO WHETHER WE ACCEPT,
BECAUSE THERE WAS NO 120
CHALLENGE, WE ACCEPT, AS VALID,
THE MITIGATION, THERE IS NOTHING
WRONG WITH THAT, BUT, BY
APPLICATION OF WHAT IS THERE,
THERE IS AN ALLEGATION, AND A
CLAIM, THAT IT WAS AN EXACTION,
CLAIMED BY ASKING FOR THAT
MITIGATION.

IS THAT A FAIR STATEMENT?

>> OUR QUESTION, REALLY, WE HAVE
TO ANSWER THIS MORNING, IS GOING
TO BE WHETHER UNDER THE
NOLLAN-DOLAN LINE OF CASES, THAT
IS ALLOWING A GOVERNMENT TO MAKE
A PROPERTY OWNER GIVE UP ACCESS
TO THE PROPERTY, BECAUSE OF --
THAT THEORY WOULD APPLY IF THERE
ARE NEGOTIATIONS THAT GO ON BUT
NEVER MATERIALIZE WITH REGARD TO
MITIGATION ON THE PROPERTY.

WE'D BE IN A DIFFERENT
SITUATION, HAD THEY ACCEPTED THE
MITIGATION.

THEN WE'D BE -- AS TO WHETHER A
MONETARY PAYMENT, IS IN THE
NOLLAN-DOLAN LINE OF CASES, IS
THAT A FAIR SUMMARY.

>> YES.

THEY BROUGHT THE TAKINGS CLAIM AND THEY CLAIMED IT WAS NO REASONABLE EXERCISE... THEY DROPPED THE ECONOMIC TAKING, AFTER DISCOVERY, THEY REALIZED, OKAY, WE HAVE ECONOMIC VALUE. SO, IT LEFT ONLY THAT CLAIM BASED, REALLY, ON THE CORRECTNESS OF THE AGENCY DECISION.

>> THERE ARE SOME STATES, APPEARS TO BE, AS WE LOOK AT THIS, SORT OF A SPLIT OF AUTHORITY, THE NOLLAN-DOLAN THEORY OF EXACTION, IS APPLICABLE.

FOR A MONETARY AMOUNT.

WHY DO YOU SAY FLORIDA OUGHT TO FOLLOW THE ROUTE THAT -- OF THOSE CASES THAT SAY THAT JUST THE MONETARY AMOUNT WOULD NOT BE -- OR LIKE WE ALMOST SAY THE MONETARY AMOUNT IS SUFFICIENT.

I MEAN, IT IS STILL TAKING MONEY, EXACTING MONEY, I GUESS IS THE THEORY RATHER THAN EXACTING LAND.

>> THERE ARE SEVERAL RESPONSES TO THAT.

FIRST, IN THE CASE, THEY NEVER ALLEGED THERE WAS A TAKING OF MONEY.

IT WAS --

>> BECAUSE THAT DIDN'T ACCEPT IT.

>> NO, IN THE CIRCUIT COURT,
THEY NEVER CLAIMED THE EXACTION.
NEVER CLAIMED --

>> THEY DIDN'T DO -- THEY DID
NOT SPEND ANY MONEY FOR THE
MITIGATION, WHAT THEY DID WAS,
THE PROPERTY WAS HELD UP.
DURING THE PERIOD OF TIME YOU
ALL WERE TALKING ABOUT IT, ISN'T
THAT A FAIR STATEMENT OF WHAT --
AND THAT WHAT IS THE COURT GAVE
THEM IS THE AMOUNT OF MONEY, FOR
THAT PERIOD OF TIME.
THAT IS A FAIR STATEMENT.

>> YES.

>> SO, THE COURT RECOGNIZED IT
IS' LIMITED AMOUNT.
AND IT WAS ONLY FOR A LIMITED
PERIOD OF TIME.

>> THE COURT ESSENTIALLY AWARDED
DAMAGES FOR A TEMPORARY TAKING
AND, THE PROBLEM WITH THAT IS,
THE TEMPORARY TAKING, WAS BASED
ON AN ERRONEOUS AGENCY DECISION
AND THIS COURT BACK IN 1994, IN
THE TAMPA-HILLSBOROUGH COUNTY
EXPRESSWAY AUTHORITY CASE, HAD A
SITUATION THAT WAS SOMEWHAT
SIMILAR, THE... CASE ALONG THE
LINES OF THOSE CASES, THERE WAS
A REGULATORY RESTRICTION, THAT
PREVENTED DEVELOPMENT, AND, IT
WAS INVALIDATED.

JUST LIKE HERE, THE REQUIREMENT
FOR ADDITIONAL MITIGATION WAS
INVALIDATED.

WHAT THE LOWER COURTS WERE DOING, WAS SAYING, OKAY, THAT INVALIDATION, CONSTITUTES A PER SE TAKING OF THE LANDOWNER'S PROPERTY, AND, THEN IT IS JUST A QUESTION OF PROVING UP THE IMAGES, WHAT THIS COURT RULED WAS THAT IT IS NOT A PER SE TAKING OF THE PROPERTY THAT CANNOT BE DEVELOPED, WHILE IT IS IN PLAY.

THE COURT SAID WHAT YOU HAVE TO SHOW IN ORDER TO HAVE A TEMPORARY TAKING IS DENIAL OF SUBSTANTIALLY ALL ECONOMICALLY BENEFICIAL USE OF THE PROPERTY AND THEY STIPULATED AND THE TRIAL COURT FOUND THEY WERE NOT DENIED ALL OR SUBSTANTIALLY ALL ECONOMIC BENEFIT AND THERE WAS REALLY NO BASIS TO AWARD THE DAMAGES THAT WERE AWARDED IN CASE UNDER THE TAMPA-HILLSBOROUGH COUNTY CASE.

>> WHAT IS THIS COAST OF THE MITIGATION, I HAVE SEEN INDICATION MAYBE THAT WAS \$10,000 AND ONE ALTERNATIVE, OFF SITE MITIGATION, WOULD HAVE BEEN \$10,000, AND ANOTHER ONE WOULD HAVE COST A SUBSTANTIAL AMOUNT IN EXCESS OF THAT AND WHAT DOES THE RECORD SHOW ON THAT.

>> ONE OPTION WAS 20 ENHANCE 50 ACRES OF WETLAND PLUS THE PRESERVATION OF PROPERTY AND THE

EVIDENCE SHOWS THERE WAS A LOCATION WHERE YOU COULD REPLACE THE CULVERT AND REMOVE A CULVERT, AND THAT WOULD COST \$10,000, AND, ENHANCE 50 ACRES OF WETLAND.

THAT WAS SUFFICIENT FOR PERMIT ISSUANCE.

THERE WAS ANOTHER --

>> ALL OF THIS IS OVER \$10,000 COST OF MITIGATION?

>> YES, SIR.

THE OTHER OPTION WAS DIFFERENT.

NO ONSITE MITIGATION, 15 CULVERTS IN PLACE AND YES, THIS IS OVER \$10,000, AND, THAT IS PART OF THE PROBLEM, IN THE CASE, IN MY VIEW, IF YOU GO THE 120 ROUTE YOU FORMULATE THE AGENCY ACTION FOR WHAT APPEARS TO BE A VERY SMALL AMOUNT OF MONEY, YOU GO THROUGH, YOU GET THE CORRECT DECISION, AND THE ALJ SAYS, THIS IS WHAT THE EVIDENCE TELLS ME, AND, I'M CONFIDENT THE AGENCY WILL --

>> WELL, THAT --

>> THEY DIDN'T GIVE THE CORRECT DECISION THEN, THEY LITIGATE THAT, IN THE DISTRICT COURT.

IF THEY --

>> RIGHT.

>> GOT A LEGAL BASIS FOR CHALLENGING THAT DECISION.

>> THEY WOULD GO TO THE DISTRICT COURT AND DISTRICT COURTS CAN

HANDLE TAKINGS CLAIMS, GO TO THE DISTRICT COURT AND AN EXAMPLE OF -- IMAGINE THE GOVERNMENT BOARD NOT FOLLOWING THE ALJ MITIGATION RECOMMENDATION AND THE BOARD SAYS, I THINK...

>> NOW, LET ME -- I'M TRYING TO UNDERSTAND WHETHER YOU THINK THEY CAN EVER HAVE A TAKINGS CLAIM, IF THEY DON'T ACTUALLY DO THE MITIGATION.

>> THE -- THEY COULD HAVE -- IF THEY DON'T DO THE MITIGATION, THEY -- THEY ARE GOING HAVE A PERMIT DENIAL.

OKAY, SO THE TAKINGS CLAIM ON THE PERMIT DENIAL WOULD BE LOST ALL VALUE OF MY PROPERTY, AND THE PENN CENTRAL TAKING AND IF YOU ARE TALKING ABOUT AN EXACTION CLAIM AS WE HAVE HERE AND IT IS A PERMIT DENIAL, WHERE IT SAYS IF YOU WANT TO GET A PERMIT YOU NEED TO PROVIDE ADDITIONAL MITIGATION, I THINK, THERE, BECAUSE OF THE PERMIT DENIAL, THEY WOULD NOT HAVE AN EXACTION TAKEN.

UNDER THE SUPREME COURT OF THE UNITED STATES' DEFINITION, A LAND USE DEDICATION, OR...

>> BACK UP.

I'M HAVING A SENIOR MOMENT.

>> WE'RE ALL SUBJECT TO THOSE. WE'LL GO ON TO ANOTHER QUESTION. LET'S GO BACK -- IT GOES BACK TO

MY ORIGINAL QUESTION, IT APPEARS, SOME STATES DO ALLOW AN EXACTIONS CLAIM, JUST FOR THAT MONETARY AMOUNT.

BUT, LET'S ASSUME THERE IS A CLAIM, TO ACTUALLY DO IT, DO THE MITIGATION AND THERE IS AN EXACTIONS CLAIM FOR THAT, SOME STATES ALLOW THAT, DO YOU AGREE.

>> YES.

>> AND I'M ASKING YOU, IF WE ADDRESS THE ISSUE, WE MAY NOT HAVE TO, BUT, IF WE ADDRESS IT, WHY SHOULD FLORIDA BE IN THE COLUMN OF THOSE CASES, THAT SAY NO?

THAT WE'RE NOT EVEN GOING TO ALLOW THE EXACTION CLAIM UNLESS THERE IS A TAKING OF PROPERTY AND SOME ALLOW FOR THE MONEY, MONETARY PAYMENT, CORRECT.

>> CORRECT.

THOSE...

>> IS WHAT I WOULD LIKE TO DODDS.

>> THOSE STATES, PRIMARILY CALIFORNIA AND TEXAS, BUT THERE ARE OTHERS, SUPREME COURTS IN THOSE STATES MADE THE DECISION OVER THE U.S. SUPREME COURT CAME OUT WITH THE LINGLE DECISION AND IN THAT CASE THEY CLARIFIED TAKINGS LAW AND SAID, REALLY THE BORDER WE ARE -- BURDEN WE ARE TALKING ABOUT IS THE MAGNITUDE OF THE HARMED PROPERTY AND THE

REASON THE COURT SHOULDN'T ALLOW
A MONETARY EXACTION IS BECAUSE
LINGLE CLARIFIES, THAT, REALLY,
IT IS SOMETHING THAT IS THE
EQUIVALENT OF A DIRECT
APPROPRIATION OF PROPERTY OR
OUSTER.

>> A CONTROL OF THE PROPERTY.

>> THAT IS TAKEN.

>> ANY DISCREPANCY BETWEEN THE
U.S. SUPREME COURT RULINGS AND
THIS COURT RULINGS ON TEMPORARY
TAKING?

ARE THEY THE SAME?

>> THE UNITED STATES RULINGS ON
TEMPORARY TAKINGS ARE GENERALLY
LEFT TO OTHER COURTS TO DECIDE,
WITH THE U.S. SUPREME COURT,
THAT SAYS, FOR EXAMPLE, WELL, WE
FIND A TEMPORARY TAKING HERE,
BECAUSE... OR, THERE IS NO
TEMPORARY TAKING HERE, BECAUSE,
FOR EXAMPLE, IN TAHOE SIERRA
PRESERVATION COUNCIL THERE WAS A
MORATORIUM BUT IT WAS ONLY
30-SOME MONTHS AND THEY SAID,
YOUR PROPERTY WILL HAVE VALUE
AFTER THOSE 30 MONTHS, SO, THERE
IS NO LUCAS OR PENN CENTRAL-TYPE
TAKING.

>> YOU ARE INTO YOUR REBUTTAL.
IF YOU WANT TO SAVE SOME TIME.

>> I WILL, THANK YOU.

>> GOOD MORNING.

MAY IT PLEASE THE COURT, I'M
CHRIS CARLYLE, HERE ON BEHALF OF

THE RESPONDENT, AND ALSO WITH ME AT THE COUNSEL TABLE IS MICHAEL JEFF.

>> COULD YOU HELP ME AT THE BEGINNING, I'M NOT A BIG FAN OF GOVERNMENTS CONTROLLING PROPERTY, BUT HERE IT SEEMS... I'M TRUCKED THAT WE GET INTO A SITUATION THAT EVERY TIME THERE IS SOME DISCUSSION BETWEEN A PROPERTY OWNER AND A GOVERNMENTAL ENTITY, ABOUT SOME KIND OF RESTRICTION ON THE PROPERTY, AND, NOTHING HAPPENS, THAT WE'RE INTO A TAKING. BECAUSE WE HAVE GOT A PERIOD, WE ARE TALKING ABOUT, THESE RESTRICTIONS, AND I MEAN, IT IS TROUBLING, THAT THAT CAN HAPPEN, ISN'T IT? ISN'T IT A PRACTICAL ISSUE AS WILL?

>> IT IS PRACTICAL, AND I THINK THAT ACCORDING TO THE -- LOOKING AT THE STATUTE WE ARE TALKING ABOUT, THE STATUTE ALLOWS ONE WHO IS SUBSTANTIALLY AFFECTED BY A TIME ORDER, NOT THE PRELIMINARY NEGOTIATIONS, ONCE YOU HAVE A FINAL ORDER, THE STATUTE CLEARLY ALLOWS YOU TO PURSUE THIS ACTUAL... I'LL ADDRESS THE REST OF YOUR QUESTION IN A MOMENT BUT THERE IS A LOT OF DISCUSSION ABOUT THE 120 PROCEEDING AND THERE ARE TWO

SEPARATE THINGS, IF THE COURT LOOKS AT THE GRIFFIN DECISION AND THE BOEING DECISION, THE COURT NOTED ADMINISTRATIVE PROCEEDINGS ARE NOT SET UP TO DEAL WITH CONSTITUTIONAL ISSUES AND THE RECORD IS NOT CREATED THERE AND THE ALJs ARE NOT ALLOWED TO DO THAT AND TO SUGGEST THE 120 PROCEEDING WOULD PROVIDE THE BATES FOR A CONSTITUTIONAL CHALLENGE LATER ON IS MISTAKEN.

>> BUT IT PROVIDES THE MECHANISM TO DETERMINE WHETHER THE RESTRICTION IS APPROPRIATE.

>> I DISAGREE, YOUR HONOR.

>> IT IS DETERMINE WHETHER IT IS CORRECT.

ONCE YOU GO INTO THE OTHER STATUTORY PROCEEDINGS, IT IS MY UNDERSTANDING THAT YOU ARE PRECLUDED FROM GOING IN AND CHALLENGING THE ACTUAL RESTRICTION, ITSELF.

>> THE STATUTE ITSELF.

>> IS THAT A MISUNDERSTANDING.

>> SLIGHTLY.

>> HELP ME.

>> AGAIN THE 120 PROCEEDING AND THE STATUTE ITSELF TALKS ABOUT IT, TALKS ABOUT THE 120 PROCEED, THE BASIS BEING THE CHALLENGE TO WHETHER OR NOT THE DECISION COMPLIED WITH EXISTING RULES OR STATUTES.

WHETHER OR NOT THEY COMPLIED WITH THEIR OWN RULES IS A FAR DIFFERENT SITUATION, THAN A TAKINGS CLAIM ARISING UNDER CONSTITUTIONAL LAW.

AGAIN, THIS COURT RECOGNIZED THAT YOU HAVE THE RIGHT, THIS RIGHT EXISTS, IT WAS GIVEN 30 YEARS AGO BY THE LEGISLATURE, FOR SOMEONE TO PROCEED IN CIRCUIT COURT AND CHALLENGE THESE DECISIONS IN THE WAY.

AND TO SUGGEST SOMEHOW THAT STATUTE IS SUPERSEDED BY OR IS A RES -- RES JUDICATA.

>> AND IT GIVES YOU THE RIGHT TO THE CHALLENGE TO THE TAKING BUT AT THE SAME TIME, IF YOU HAVE NOT TESTED THE VALIDITY OF THOSE IN A NONCONSTITUTIONAL SENSE, THAT IS NOT PART OF WHAT CIRCUIT COURT IS GOING TO BE DOING.

IS IT?

>> ISN'T THE CIRCUIT COURT GOING TO BE DETERMINING WHETHER IT IS TAKING OF YOUR PROPERTY.

>> THE 120 ACTION WOULD BE TO SEE WHETHER THERE WAS PROPRIETY WITHIN EXISTING RULES OR STATUTES AND THE OTHER, TAKINGS PROCEEDING, DEPENDS ULTIMATELY ON THE ORDERS FOR FINES TO BE USED IN THAT CONTEXT.

BUT, IT IS FAIR TO SAY, AND, AGAIN WE PROVIDE THE LEGISLATIVE HISTORY BEHIND THIS, TO CREATE A

RECORD, TO CHALLENGE THE
CONSTITUTIONAL THING AND WHAT
WILL WE DO AT THE CIRCUIT COURT
PROCEEDING, IF IT'S NOT ON THE
DOLAN INQUIRY AND THE EVIDENCE
THAT WILL BE BROUGHT FORTH WILL
DEAL WITH ROUGH PROPORTIONALITY
TO THE EXTENT THERE IS AN
OVERLAP WITH WHAT COULD HAVE
BROUGHT IN THE 120 PROCEEDING,
SO BE IT.

>> I UNDERSTAND YOU HAVE TO TAKE
THE 120 POSITION TO EXHAUST YOUR
ADMINISTRATIVE REMEDIES TO
DETERMINE THE PROPRIETY OF THE
REGULATORY ACTION, THAT IS THEIR
POSITION.

>> THEIR POSITION, YES.

>> WHY IS THAT INCORRECT AS A
MATTER OF LAW?

>> BECAUSE, THERE ARE TWO
DIFFERENT INQUIRIES.

120 PROCEEDING CHALLENGES,
AGAIN, PROPRIETY AND WHETHER OR
NOT THEY COMPLIED WITH THE
STATUTES AND THE RULES AND WE
CAN FILE A 120 PROCEEDING SAYING
WELL, THE PROPERTY WAS NOT
WITHIN THE RIPARIAN ZONE OR
SOMETHING TO THAT EFFECT.

BUT, WHEN WE TALK ABOUT THE
CONSTITUTIONAL TAKING ISSUE,
THEY ARE SEPARATE.

AND, AGAIN, THE STATUTES AND THE
LAW OF --

>> I UNDERSTAND, YOUR POSITION

IS, UNDER THE CIRCUIT COURT ACTION, UNDER THE STATUTE YOU HAVE FILED AN ACTION UNDER, THAT YOU'RE TRYING TO DETERMINE THE PROPRIETY OF THE REGULATORY ACTION, NOT FOR PURPOSES OF ALTERING THE PERMIT DECISION BUT FOR PURPOSES OF DECIDING WHETHER THERE WAS A TAKING OR NOT.

>> YES.

>> AND THAT IS YOUR POSITION, BUT, AS A PREREQUISITE TO THAT, WHY ISN'T IT THE LAW THAT YOU ARE HAVING TO EXHAUST YOUR ADMINISTRATIVE REMEDIES, UNDER 120.

THAT IS WHAT THEY ARE SAYING.

>> THE STATUTE DOESN'T PROVIDE FOR THAT AND THIS COURT SAID YOU DON'T HAVE TO DO THAT WHEN PROCEEDING ALONG THE ROUTE OF 37, 36, 17 AND THE SISTER STATUTES.

AND IT IS CLEAR...

>> YOU NEVER CONSIDERED AN EXACTION STATEMENT LIKE THIS, HAVE YOU.

>> NO.

>> I'M NOT SURE YOU ARE CORRECT WHEN YOU SAY WE HAVE REQUIRED CERTAIN THINGS, IN THE CONTEXT...

>> YOU LOOK AT THE BOWEN DECISION, AND... IT TALKS ABOUT HOW THIS STATUTE GAVE THE RIGHT TO A PROPERTY OWNER TO PROCEED

DIRECTLY TO CIRCUIT COURT
WITHOUT EXHAUSTING THE
ADMINISTRATIVE REMEDY AND THE
EXACT ISSUE, NO.

BUT --

>> WE HAVE NEVER ALLOWED THE
EXACTION -- THAT IS A LITTLE
DIFFERENT THAN PENN CENTRAL KIND
OF TAKING, CORRECT.

>> AND LET ME ASK YOU THIS
QUESTION, WITH REGARD TO THE
LINGLE AND WHAT THAT IS SAYING,
WHY WOULDN'T WE LIMIT THESE
TYPES OF EXACTION TAKINGS TO
THOSE KINDS OF CASES WHERE THERE
IS SOME CONTROL OF PROPERTY,
SOME PROHIBITION, EASEMENTS,
THOSE KINDS OF THINGS, AS WE
SAW.

BECAUSE, YOU DO AGREE, NO ONE IN
DOLAN DID NOT INVOLVE AN ALLEGED
MONETARY DAMAGE, THAT WAS ACCESS
ACROSS THE PEOPLE AS PROPERTY.

>> I WOULD POINT OUT AND LET ME
ANSWER YOUR QUESTION, THIS WAY,
LINGLE IS CONFUSED... THE
DISTRICT... [INAUDIBLE] IT
STANDS FOR THE PROPOSITION,
NOLLAN AND DOLAN WERE PROPERTY
CASES AND IF THAT WAS THE CASE I
SUGGEST WE'D SEE A SLEW OF THE
CASES IN THE FOUR YEARS SINCE
OVERRIDING THE EXISTING LAW AND
WE HAVE NOT SEEN THAT.
IT'S NOT THE CASE AND DOESN'T
PROVIDE CLARITY THEY ARE

SUGGESTING HERE AND THE ONE TIME
THE UNITED STATES SUPREME COURT
HAS CONSIDERED AN ISSUE BEYOND A
DEDICATION OF LAND WAS IN THE
ERLICH CASE, THE ERLICH REMAND

--

>> YOU CANNOT REALLY TELL MUCH
FROM A DECISION THAT SAYS WE ARE
VACATING AND REMANDING FOR RE--
CONSIDERATION IN LIGHT OF THIS
OPINION.

I MEAN...

>> YOUR HONOR, AGAIN, IF THERE
WAS CLARITY GIVEN I WOULDN'T BE
HERE TODAY, WE CAN AGREE ON
THAT.

>> IT IS A PRETTY SMALL --

>> I DISAGREE, THE SUPREME COURT
RAN THE POSITION DO ACCEPTS...
AND REMANDED THE CASE BACK TO BE
CONSIDERED IN LIGHT OF DOLAN AND
HOW CAN THAT BE CONSTRUED IN ANY
OTHER MANNER.

>> WHETHER THERE IS A CAUSE OF
ACTION.

IT IS SIMPLE TO COME BACK AND
ANALYZE IT AND MAYBE GO BACK UP
THE CHAIN.

I MEAN, WE SEE A LOT OF CASES
THAT GO FROM THIS COURT PEOPLE
WOULD LIKE TO HAVE IT CLARIFIED
AND, IT IS REMANDED NOT BECAUSE
THEY AGREE WITH WHAT IS THERE
BUT, FOLLOW WHAT WE HAVE SAID
BEFORE.

>> I UNDERSTAND.

>> AND WHY -- LET'S -- I'D LIKE TO GO TO THE QUESTION CERTIFIED BY THE 5TH DISTRICT. IT STARTS OUT WITH, WHERE A LANDOWNER CONCEDES THE PERMIT DENIAL DID NOT DEPRIVE HIM OF ALL OR SUBSTANTIALLY ALL ECONOMICALLY VIABLE USE OF THE PROPERTY. THAT IS THE PENN CENTRAL, WE'RE NOT THERE.

>> ACTUALLY, THAT IS LUCAS. BUT...

>> ALL RIGHT. THE ONE ABOUT REGULATORY TAKINGS. CORRECT.

>> WELL, AGAIN, IT CAN -- FALLS UNDER LUCAS, THE STANDARD AND THAT IS... [INAUDIBLE] IN ANY EVENT, YES, OBVIOUSLY, NOT A LOSS OF ALL OR SUBSTANTIALLY ALL BENEFIT HERE.

>> SO IT'S IS NOT AN INVERNESS CONDEMNATION CLAIM THAT IN WAY. IT IS ASKING WHETHER FLORIDA CONSTITUTION RECOGNIZES THE DIFFERENT TYPE OF UNCONSTITUTIONAL TAKING. WHICH IS AN EXACTION TAKING. IS THAT -- THAT IS THE -- UNDER THE FLORIDA CONSTITUTION, SO, UNDER THE HOLDINGS OF NOLLAN AND DOLAN AND I'M NOT SURE IF EVERYONE IS ASSUMING THE CASE, THERE IS NO QUESTION, A PERMIT

CONDITIONED ON LAND BEING GIVEN
TO THE GOVERNMENTAL AGENCY.
AND, THAT IS IN FACT, THE
PERMITS ACCEPTED WITH THAT --
WITH THAT CONDITION.
THAT THE LANDOWNER CAN CHALLENGE
THAT AS AN UNCONSTITUTIONAL
TAKING.

>> YES.

>> OKAY.

NOW, HERE, THEY ARE SAYING
INSTEAD OF A COMPELLED
DEDICATION OF REAL PROPERTY, FOR
THE PUBLIC USE, THE EXACTION IS
A CONDITION FOR PERMIT APPROVAL.
TALKING ABOUT THE \$10,000 IN
MITIGATION, THAT IS ESSENTIALLY
WHAT WE ARE TALKING ABOUT.

>> THE DECISION SAID THERE WAS
EVIDENCE OF 10,000 TODAY'S
250,000 --

>> A SUM OF MONEY.

>> A SUM OF MONEY REQUIRED.

>> AND, JUDGE GRIFFIN IN HER
DISSENT MENTIONS THERE WAS
ANOTHER OPTION WHICH IS THAT
YOUR CLIENT COULD HAVE DEVELOPED
ONLY ONE ACRE WITH NO EXACTION.
IS THAT CORRECT.

ANOTHER OPTION THAT WAS PUT ON
THE TABLE.

>> ON THE TABLE, BUT THE
CONDITION ALSO, THAT WAS
IMPOSED, IN CIRCUIT COURT,
FOCUSED ON WAS THE ADDITIONAL
MITIGATION, OFF SITE MITIGATION.

>> AND IT WOULDN'T HAVE BEEN, IF YOU ACCEPTED AND DEVELOPED YOUR PROPERTY.

>> I'M SORRY?

>> IF YOU HAD ONLY AGREED TO THE ONE ACRE DEVELOPMENT, WAS THERE ANY OFF SITE MITIGATION.

>> NO, THAT WAS, I BELIEVE, AN ALTERNATIVE.

>> I'M SAYING, THERE WAS EVEN AN ALTERNATIVE THAT WOULD HAVE REQUIRED NO MITIGATION, SO, IN THE SITUATION, WHERE YOUR CLIENT DOESN'T AGREE TO DO THIS, NO, WE'RE NOT DOING IT, WHAT AUTHORITY IS THERE THAT THAT WOULD RISE TO THE LEVEL OF AN UNCONSTITUTIONAL TAKINGS ACTION ON THE PART OF THE GOVERNMENTS? I'M JUST HAVING, YOU KNOW, MAYBE I'M THERE WITH JUDGE GRIFFIN'S DISSENT AND HER DISSENT, TO ME HOLDS A LOT OF LOGIC, AND UNDER THE CIRCUMSTANCES, TELL ME WHY THE COURT SHOULD RECOGNIZE A -- ESSENTIALLY AN UNCONSTITUTIONAL TAKINGS CLAIM, UNCONSTITUTIONAL ACTION, ON THE PART OF THE GOVERNMENT, THAT RISES TO THE LEVEL OF A TAKINGS CLAIM.

>> YOUR HONOR, AGAIN, THE COURT MADE CLEAR IN LINGLE THAT THE NOLLAN-DOLAN APPLIED TO LAND USE EXACTION CASE AND THIS IS A LAND USE EXACT CASE AND EXACTION IS A TERM OF ART, DEFINED IN... BY

THE FLORIDA SUPREME COURT AS A
CONDITION THAT IS PLACED ON
RECEIVING APPROVAL OF THE
PROPERTY.

THIS UTAH SUPREME COURT SAID THE
CONDITION PRECEDENT TO RECEIVING
APPROVAL AND THE CASE WE
PROVIDED THE SUPPLEMENTAL
AUTHORITY OUT OF TEXAS LAST WEEK
NOTES BLACK'S DICTIONARY TALKING
ABOUT THE ACT OF ASKING FOR
THIS.

IT IS THE ACTION, THE CONDITION
PRECEDENT, THE CONDITION THAT IS
PLACED ON IT.

WHETHER OR NOT THAT IS CEDED TO
OR AGREED TO DOES NOT CHANGE THE
CONSTITUTIONAL ISSUE WE ARE
TALKING ABOUT HERE.

>> THERE IS AUTHORITY ON THAT
ISSUE.

>> THERE IS.

>> SOME STATES ACCEPT THAT AND
OTHER STATES SAY NOLLAN AND
DOLAN REQUIRE TAKING OF THE
PROPERTY OR CONTROL OF THE
PROPERTY, DO THEY NOT.

>> THEY --

>> RECOGNIZING YOUR --

>> THERE IS A SPLIT, HOWEVER --

>> WELL, NOT NECESSARILY, NOT
ALWAYS, SO THAT IS WHERE IT
GOES, SOME SAY YOU CAN FOR THE
MONETARY CLAIM AND BEFORE YOU GO
THROUGH THE -- AND OTHERS SAY,
NO, THAT IT IS LIMITED TO THOSE

CASES, WHERE YOU GIVE UP RIGHTS AND PROPERTIES, BUT, I THINK, AGAIN IN THIS CONTEXT --

>> YES, OKAY.

>> THERE WERE CASES WITH THE FLORIDA STATUTE WE ARE TALKING ABOUT HERE WHICH HAS NO REQUIREMENT YOU CREED TO THESE CONDITIONS.

>> THE STATUTE CAN'T CREATE THE CONSTITUTIONAL RIGHT.

>> NO, BUT, BEGAN --

>> THE CONSTITUTION RIGHT IS WHAT JUSTICE PARIENTE IS ASKING YOU ABOUT, WHERE DOES IT COME FROM.

>> IT COMES FROM THE, AGAIN, THE EXACTION THEORY, TALKING ABOUT, THIS IS A CONDITION IN ORDER TO GET --

>> WHEN WE FIND THAT, YOU FIND

--

>> U.S. SUPREME COURT.

>> AND BOTH OF THOSE ARE CONTROLLED PROPERTY CASES.

>> WE'RE TALKING -- REALLY TALKING ABOUT TWO SEPARATE ISSUES AND I CAN ADDRESS THEM BOTH.

>> NEITHER INVOLVE THE MONEY YOU ARE TALKING ABOUT OR THE FAILURE TO PAY MONEY.

IS THERE?

>> THOSE CASES DID NOT.

>> OKAY.

THAT IS WHY I'M ASKING, WE HAVE

TO FIND THE CONSTITUTIONAL POWER
SOMEWHERE ELSE, IN OUR
CONSTITUTION, OR...

>> WELL.

>> THE U.S. CONSTITUTION, WHERE
THE HIGH COURT, OUR SUPERIOR
COURT HAS NOT FOUND IT YET.

>> WELL, YOUR HONOR, AGAIN,
LET'S --

>> A SIMPLE QUESTION.

THAT IS WHERE WE HAVE TO GO.

>> YOU HAVE TO LOOK AT, AGAIN, I
WOULD SUGGEST, RESPECTFULLY,
OBVIOUSLY, THE ERLICH REMAND
CARRIES WEIGHT AND I WOULD NOTES
JUSTICE GIVEN'S DISSENT IN THIS
CASE ACKNOWLEDGES, GIVEN THE
SUPREME COURT'S DESCRIPTION OF
UNCONSTITUTIONAL CONDITIONS, SHE
DID NOT SEE A WAY TO DISTINGUISH
BETWEEN A CONDITION THAT
REQUIRES THE PERMIT APPLICANT TO
IF G UP INTEREST IN THE LAND
AND... [INAUDIBLE] ANYTHING
ELSE, AND EVEN JUSTICE GRIFFIN
IN THE DISSENT RECOGNIZE THAT'S
PRINCIPLE IN THE CASE.

>> WELL, THERE ARE TWO SEPARATE
ISSUES...

>> YOU APPLY THE JUDGE'S
DISSENTING OPINION WOULDN'T YOU
HAVE TO HAVE MADE THE PAYMENT --

>> AGAIN, THEY ARE TWO SEPARATE
ISSUES AND THE FIRST IS DO YOU
APPLY IT SOLELY TO MONETARY
EXACTIONS AND NO, THEY DON'T,

AND, AGAIN THE REASON THINGS OF THE SUPREME COURT... THE [INAUDIBLE] IMPLICIT REJECTION OF THAT, WHICH IS RAISED IN THE DISSENTS IN DOLAN AND THERE ARE A PLETHORA OF REASONS WHY IT DOES NOT APPLY AND JUDGE GRIFFIN ANALOGIES THAT.

>> BEFORE YOU... THERE IS NO QUESTION ABOUT THAT.

WE ARE TALKING ABOUT, THEN, THE CONSTITUTION, THAT SAYS THE PROPERTY SHALL BE TAKEN...

>> YES.

>> AND, THE PROPERTY IN THE SITUATION, YOUR -- THE ACRES, THE WETLAND, AND, YOU ARE TRYING TO DEVELOP OR THE PROPERTY, THE MONEY YOU WOULD HAVE HAD TO PAY

--

>> THE PROPERTY IS MONEY PAID FOR THE MITIGATION.

>> AND WHERE IS IT THAT -- MAYBE I'M MISSING SOMETHING, THAT UNDER THE 5th AMENDMENT AND FLORIDA'S CONSTITUTIONAL ARTICLE TEN, SECTION 6A, THAT TAKING MONEY, OR PUTTING CONDITIONS ON PEOPLE, WOULD FALL UNDER THE... MAIN CLAUSES OF THE FLORIDA AND FEDERAL CONSTITUTIONES.

>> THE U.S. SUPREME COURT DECISIONS HAVE BEEN CITED GOING BACK 100 YEARS, RECOGNIZING THAT, IN THE DISTRICT'S INITIAL BRIEF, THEY NOTE... [INAUDIBLE].

ERLICH, ET CETERA, ALL TALK ABOUT IT.

THE KEY FOCUS HERE IS THIS:

>> THE GOVERNMENT WANTS TO -- IS TAKING MONEY... FINED FOR EXAMPLE AND THEY -- THE FINE THEY EXACTED FROM ME IS UNCONSTITUTIONAL AND CAN BE BROUGHT AS AN UNCONSTITUTIONAL TAKINGS CLAIM.

>> THAT IS FRAUD AND THAT HAPPENED IN ERLICH AND IN --

>> IRRESPECTIVE THAT THERE IS A PROPERTY ATTACHED TO THIS, THEY ARE SAYING TAKING MONEY FROM A PERSON RISES TO THE LEVEL OF THE INVERSE CONDEMNATION.

>> IN THIS CASE, IMAGINE IF THE DISTRICT WENT TO MR. TIMMS, SAID WE WANT YOU TO SPEND MONEY AND DO OFF SITE MITIGATION FOR US [INAUDIBLE] WOULD THEY HAVE THE ABILITY TO SPEND \$150,000.

>> AND YOUR CLIENT SAID, NO, HE'D HAVE THE... [INAUDIBLE] TO SAY, YOU WERE WRONG IN ASKING ME THAT.

>> THAT IS NOT THE POINT.

>>... WHAT A GOVERNMENT CAN ASK AND WHAT YOU END UP SAYING NO TO.

>> IT WAS TIME, THE CONDITION THEY WERE REQUIRING, AND THE POINT IS, UNDER THE NOLLAN AND DOLAN ANALYSIS YOU ARE ASKING SOMEONE TO GIVE UP SOMETHING FOR

THE BENEFIT OF THE PUBLIC AND
BEAR A DISPROPORTIONATE BURDEN.
>> YOUR CLIENT, THIS MAN DID NOT
HAVE A RIGHT TO DEVELOP HIS
PROPERTY.

>> CORRECT.

>> OKAY.

SO, STOP -- WHENEVER HE BOUGHT
IT, HE WAS BUYING WETLAND AND
WETLANDS CANNOT BE DEVELOPED
WITHOUT THERE BEING AN EXACTION
ON WHAT THE IMPACT WILL BE ON
THE ENVIRONMENT.

AND NOT TALKING ABOUT SOME PIE
IN THE SKY, THE GOVERNMENT IS
COMING IN AND SAYING, YOU COULD
ONLY DEVELOP ONE ACRE OF YOUR
PROPERTY IF YOU GIVE ME 99
ACRES.

>> YOUR HONOR, THE... IT IS
UNCHALLENGED IN THIS CASE THAT
THE REQUIREMENTS PLACED ON HIM
DID NOT BEAR AN ESSENTIAL NEXUS
AND ROUGH PROPORTIONALITY, AND
WHAT IS GOING ON HERE AND THESE
WERE WETLANDS AND HE KNEW THAT
AND THE FOUNDATION NEVER HAD
BEEN CHALLENGED, HE HAD NOT THE
APPROPRIATE RELATION WE ARE
TALKING ABOUT HERE...

>> LET ME ASK YOU, HOW THE
DAMAGES WERE KEPT AND WHAT WERE
THE DAMAGES AWARDED HERE.

>> THE DAMAGES AWARDED HERE,
WERE FROM THE PERIOD OF TIME,
FROM DENIAL OF THE PERMIT, TO

WHEN THE DISTRICT ACTUALLY
ISSUED THE PERMIT, LET ME -- I'M
GLAD YOU BROUGHT THAT UP, YOUR
HONOR.

>> GIVE AN ANSWER.

>> THE ANSWER IS THAT -- THE
U.S. SUPREME COURT MAN DADE
UNDER FIRST ENGLISH THAT WHEN
YOU HAVE A DENIAL OF THIS TYPE,
AND THIS COURT RECOGNIZED THAT,
IN OTHER CASES...

>> WHAT WAS THE AMOUNT OF
DAMAGES, LET'S START WITH THE
AMOUNT OF DAMAGES.

>> AMOUNT OF DAMAGES,
300-SOMETHING THOUSAND DOLLARS.

>> AND WHAT WAS THAT BASED ON
AND HOW WAS THAT CALCULATED.

>> UNCHALLENGED, METHODOLOGY
THAT WAS APPLIED HERE WAS THE
VALUE, RENTAL VALUE I BELIEVE,
ET CETERA OF THE PROPERTY FOR
THE 11 YEARS.

>> WHAT PROPERTY.

>> THE PROPERTY --

>> THE REAL ESTATE.

>> YES.

>> I THOUGHT EARLIER, AND HERE'S
MY POINT, I THOUGHT EARLIER YOU
SAID THE PROPERTY TAKEN WAS THE
MONEY THAT WOULD BE PAID FOR
MITIGATION.

NOW, I DON'T UNDERSTAND HOW
THAT, IF THAT IS THE PROPERTY
TAKEN, THE TEMPORARY TAKING IS
CALCULATED ON THE BASIS YOU ARE

SAYING.

>> I'LL DO MY BEST.

>> AND MAYBE THAT IS NOT PRESERVED.

>> I THINK, I BELIEVE, BEGAN YOU ARE TALKING ABOUT TWO SEPARATE THINGS.

>> I THINK I AM, TOO.

>> ONE IS, THE ISSUE OF -- ABOUT WHETHER OR NOT THE CONDITION, THE EXACTION PLACED BY THE GOVERNMENT MEETS THE NOLLAN AND DOLAN STANDARDS AND THEN WE HAVE AN ISSUE ABOUT THE REMEDY AND WHAT DOES THAT MEAN?

AND UNDER AGAIN, FIRST ENGLISH CITED BY THE U.S. SUPREME COURT AN ADOPTED BY THIS COURT ON SEVERAL OCCASIONS, THAT SOMEONE IN THAT CIRCUMSTANCE, IS ENTITLED TO HAVE A REMEDY TO THE DAMAGES THAT OCCURRED DURING THAT PERIOD OF TIME, WHEN IT WAS WRONGFULLY TAKEN AWAY.

AND WHERE THE GOVERNMENT'S ACTIVITIES HAVE ALREADY WORKED A TAKING, NO SUBSEQUENT ACTION, CAN RELIEVE IT OF THE DUTY TO PROVIDE COMPENSATION DURING THE PERIOD OF TIME WHEN THE TAKING WAS IN EFFECT AND THAT WHAT IS WE'RE TALKING ABOUT HERE.

>> ISN'T THAT WHAT WE'RE TALKING ABOUT, GET THE PERMIT AND PAY THE MONEY UNDER PROTEST, 10 TO \$50,000 AND DEVELOP YOUR

PROPERTY, IF THAT IS WHAT YOU WERE INTERESTED IN DOING.

>> YOUR HONOR, NUMBER ONE, AGAIN, THE STATUTE DOESN'T REQUIRE THAT.

AND WE'RE TALKING ABOUT A STATUTE IN EFFECT 30 YEARS AND NUMBER 2 THE SITUATION AS POINTED OUT IN THE MAJORITY OPINION IS COMPLETELY UNWORKABLE UNDER CERTAIN CIRCUMSTANCES, WHAT ABOUT A LARGE DEVELOPER WHO IS BEING FORCED TO PAY AN INORDINATE AMOUNT OF MONEY TO MAKE THE PROJECT NO LONGER ECONOMICALLY VIABLE?

THEIR CHOICE IS GO HOME, I'M ALLOWED TO IMPOSE ON YOU A GOVERNMENTAL CONDITION WITH NO RELATIONSHIP TO THE PROPERTY, AND YOUR CHOICE IS ACCEPT IT AND PAY A BUNCH OF MONEY AND HOPE IT IS SOMEWHERE DOWN THE ROAD YOU WIN ON THIS THING.

>> I'D LIKE TO GIVE AN OPPORTUNITY AND YOU TRIED TO GET TO A SECOND POINT AND NEVER GOT TO.

>> YOUR HONOR, ONE OF THE POINTS I WAS TRYING TO MAKE, I'M JUST ABOUT OUT OF TIME, IN RESPONSE TO THE ISSUE OF -- AGAIN, TWO FINAL POINTS.

NUMBER ONE, LOOK AT THE STATUTORY SCHEME HERE, THE GOVERNMENT ENTITY HAS THE

OPPORTUNITY ONCE IT IS
CHALLENGED -- NUMBER ONE THEY
HAVE TO WIN AND IT IS THEIR
CHOICE TO PROVIDE THE REMEDY IN
THIS CASE AND THE DISTRICT IN
THIS CASE, TIME AND TIME AGAIN,
REFUSED TO DO THAT AND DIDN'T
ISSUE THE PERMIT FOR YEARS.
BEYOND WHEN IT WAS ORDERED TO BY
THE COURT IN THIS CASE.
THAT, AGAIN, LED TO SOME
OBVIOUSLY, A LARGE NUMBER OF THE
DAMAGES WE ARE TALKING ABOUT
HERE.
FINALLY, TO THE POINT BEING, AND
THERE WAS QUESTIONS RAISED ABOUT
WHETHER OR NOT BECAUSE THERE WAS
NO RIGHT IN FACT OF THE PERMIT I
WOULD DIRECT THE COURT'S
ATTENTION TO THE RUMSFELD CASE
OUT OF THE SUPREME COURT WHICH
TALKS ABOUT THE GOVERNMENT
CANNOT DENY A BENEFIT ON THE
CASES THAT INFRINGES ON THE
CONSTITUTIONALLY PROTECTED RIGHT
EVEN IF THERE IS NO ENTITLEMENT
TO THE RIGHT AND THE POINT IS
YOU CANNOT IMPOSE AN
UNCONSTITUTIONAL CONDITION AND I
KNOW I'M OUT OF TIME BUT THERE
WERE CASES CITED BY THE BRIEF BY
THE NATIONAL ASSOCIATION OF
HOMEOWNERS WHERE THE COURT
IMPOSED, THE DUAL RATIONAL NEXUS
TEST AND SO, I THINK IT IS
IMPORTANT FOR THE COURT TO

CONSIDER, VERY BRIEF SCENARIO,
NUMBER ONE, IF THERE IS
DEDICATION OF PROPERTY, NOLLAN
AND DOLAN APPLY AND...
[INAUDIBLE] AND, IF THERE IS AN
INDIVIDUALIZED DETERMINATION, OF
MONEY TO BE PAID, A LESSER
STANDARD WOULD APPLY THOUGH THE
POTENTIAL FOR ABUSE IS GREATER
IN THAT CIRCUMSTANCE THAN AN
IMPACT [INAUDIBLE] CASE AND WE
DRAW THE COURT'S ATTENTION TO
THE ST. JOHN'S CASE DEALING WITH
THE DUAL RATIONAL BASIS TEST AND
HAVE THE COURT UNDERSTAND, TO GO
DONE THE OTHER ROAD, IS TO A
DON'T A LESSER STANDARD OR A
CIRCUMSTANCE WITH GREATER
POTENTIAL ON EXTORTION AND
LEVERAGING THAN IMPACT FEE
CASE.

>> WITH THAT, THANK YOU VERY
MUCH.

>> REBUTTAL?

>> THANK YOU, YOUR HONOR.

WITH RESPECT TO THE REMEDY, THE
REMEDY IS COMPENSATION FOR THE
PROPERTY TAKEN.

SO, IF IT IS MONEY TAKEN, THE
REMEDY IS THE AMOUNT OF MONEY.

WHAT WOULD HAPPEN IS THIS
DISTRICT WOULD RECEIVE THE
PROPERTY, AND, OWE THE MONEY,
WHATEVER THE AMOUNT WAS.

>> AT THIS POINT, IS THERE
SOMETHING -- SOME DEVELOPMENT ON

THE PROPERTY.

>> THEY HAVE THE PERMANENT AND I
DON'T KNOW IF THEY BUILT
ANYTHING OR NOT.

>> HOW LONG DO THEY HAVE TO...

[INAUDIBLE].

>> SINCE 200...

>> THAT IS FINE.

I DON'T WANT TO GET TOO FAR OFF
TRACK.

>> WELL, THERE IS AN IMPORTANT
POINT ABOUT THAT.

IF YOU LOOK AT ONE OF THE
APPELLATE CASE OPINIONS, OF --
ONE OF THE JUDGES, RAISED THE
ISSUE OF WAIVER.

ALL RIGHT.

THE REASON IT TOOK SO LONG TO
GET THE PERMIT OUT, IS THAT WE
WANTED THEM TO APPLY AND SUBMIT
A NEW APPLICATION, ALL THEY HAD
TO DO WAS SUBMIT A NEW
APPLICATION AND WE'D ISSUE THE
PERMIT.

THEY DIDN'T SUBMIT THAT
APPLICATION, UNTIL SEPTEMBER OF
2004.

IT IS IN THE RECORD, AT...

>> I GUESS ONE OF THE THINGS I
FIND DISTURBING ABOUT THIS CASE,
IS THAT IT SEEMS TO ME, THAT --
SOMEONE MAY HAVE MENTIONED IT
EARLIER, THAT ANY TIME YOU GET
INTO NEGOTIATIONS, WITH THE
STATES, OVER THESE KINDS OF
PROPERTIES, THAT THE STATE IS

GOING TO END UP HAVING TO PAY
OUT THE MONEY.

AND, I DON'T SEE HOW WE CAN
DISTINGUISH THAT CASE, FROM
ANYONE ELSE, WHO IS NEGOTIATING
BACK AND FORTH, AND TRYING TO --
NO, I DON'T WANT TO DO THAT AND
THE STATE WILL BE ON THE HOOK.

>> THAT IS THE PROBLEM, IS, WHAT
THAT SAYS, TO THE STATE IS, IN
ESSENCE PLEAD THE 5th, CLOSER
MOUTH, DON'T ADVISE THE
APPLICANT, HERE IS WHAT WE THINK
YOU NEED TO DO TO GET THE
PERMIT.

BECAUSE, IF THE NEGOTIATIONS ARE
GOING TO BE USED AGAINST THE
STATE, THEY ARE GOING TO -- NOT
GOING TO WANT TO BE FORTHCOMING,
AND, GOOD PUBLIC POLICY TO ME
IS, TELL APPLICANTS WHAT THEY
NEED TO DO.

DON'T SAY, GUESS AGAIN, GUESS
AGAIN, SUBMIT ANOTHER
APPLICATION.

>> BUT ON THE OTHER HAND IF THE
GOVERNMENT IS GIVING THEM THINGS
THEY HAVE TO DO, THAT END UP
BEING UNREASONABLE OR
UNCONSTITUTIONAL, THEN THE
PROPERTY OWNER ON THE OTHER
HAND, IS LEFT WITH HAVING TO
DEAL WITH THESE ISSUES THAT THEY
SHOULDN'T HAVE TO DOLE WITH, IF
THE MITIGATION THAT IS WANTED OR
IS NOT PROPER.

SO, THERE SEEMS TO BE SOME LINE
HERE THAT...

>> THE TENSION THERE IS RESOLVED
AND UNREASONABLE PERMANENT
CONDITION IS GENERALLY
INVALIDATED.

THERE IS A CONSTITUTIONAL
INFIRMITY AND IT IS GENERALLY
UNDER SOME SORT OF DUE
PROCESS-TYPE ANALYSIS.

DUE PROCESS AND TAKINGS ARE TWO
DIFFERENT THINGS AND YOU CAN
BRING A DUE PROCESS CLAIM AND
INVALIDATE THAT CONDITION AND
YOU WOULD HAVE A CLAIM, FOR LOSS
OF USE, IF YOU LOST ALL OR
SUBSTANTIALLY ALL ECONOMIC
BENEFIT.

BUT, IT IS A DUE PROCESS CLAIM
NOT TAKINGS CLAIM AND THE COURT
MADE IT CLEAR IN LINGLE WHEN
THEY REJECTED WHAT THEY CALLED
THE TAKINGS TEST FOR A LONG TIME
AND SAID THAT IS DUE PROCESS,
NOT TAKING AND INVALIDATION --

>> HOW WOULD THE DAMAGES BE
DIFFERENT?

>> PARDON ME.

>> HOW WOULD THE DAMAGES BE
DIFFERENT?

>> THE DAMAGES COULD BE THE
SAME.

DEPENDS ON THE PERIOD OF TIME,
THE DAMAGES WOULD BE LIMITED TO
THE QUESTION WOULD BE, JUST LIKE
IN THE TAMPA-HILLSBOROUGH COUNTY

CASE, WAS THE LANDOWNER DEPRIVED OF ALL OR SUB STAGES ALL USE AND HERE THERE WAS AN OPTION FOR THE ONE PAPER -- ONE ACRE PROJECT. SO, THEY WEREN'T DEPRIVED OF THAT.

>> THAT WOULD BE -- DO YOU HAVE AN -- YOU HAVEN'T ATTACHED THE DAMAGES THAT WERE AWARDED IN THIS CASE, HAVE YOU.

>> NO, NO, THERE WAS... OUR ATTACK IS LOOK, YOU CLAIMED THE MITIGATION WAS BAD.

AND, YET, WE END UP WITH A TAKING OF THEIR REAL PROPERTY. THERE WAS NEVER A DEMAND, THERE WAS NEVER AN EXACTION OF THE REAL PROPERTY, TO HAVE AN EXACTION TAKING, THE GOVERNMENT HAS TO DEMAND THE PROPERTY THAT IS CLAIMED TO BE TAKEN.

IN EXCHANGE FOR PERMITS. HERE, GOVERNMENT NEVER DEMANDED THAT THEY GIVE US THE REAL PROMPT, THEY WANT TO DEVELOP. AND IN EXCHANGE WE'D GIVE THEM THE PERMIT.

THEIR COMPLAINT HAS STRICTLY TO DO WITH THE MITIGATION AND IF YOU ARE GOING TO TRY TO SAY THE REMEDY IS DAMAGES FOR LOSS OF USE, THEY HAVE TO SHOW ALL OR SUBSTANTIALLY ALL USE OF THE PROPERTY WAS FINISHED.

>> WITH THAT, I BELIEVE YOU HAVE USED UP ALL OF YOUR TIME, ALSO.

WE THANK YOU BOTH FOR YOUR
ARGUMENTS HERE TODAY.

>> THANK YOU.