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No. 11-1447

IN THE

Supreme Court of the United States

COY A. KOONTZ, JR.,
Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether, under the Just Compensation Clause, a landowner is entitled to compensation for the denial of a development permit where his land has not been physically invaded and retains economically viable uses, and where he has not been obligated to donate property or spend money.

2. Whether a condition of approving a development permit that would effectively require a landowner to spend money to satisfy a valid regulatory requirement constitutes a taking of the landowner's private property.

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BRIEF FOR RESPONDENT

INTRODUCTION

Petitioner applied for permits from the St. Johns River Water Management District ("the District") to dredge and fill part of his property in the Econlockhatchee River Hydrologic Basin.[1] Petitioner acknowledged that his proposal would destroy more than three acres of wetlands in an area designated for special protection, so he proposed to preserve about 11 acres elsewhere on his property as mitigation for the environmental harm. Applying generally applicable criteria—the validity of which petitioner does not contest—

[1] This litigation was initiated by Coy Koontz, Sr. After his death, his son, Coy Koontz, Jr., carried forward the proceedings. For simplicity we refer to both as "petitioner."

the District concluded that the mitigation petitioner proposed would not offset the harm caused by his project enough to meet the permitting standards. The District therefore told petitioner that the permits could not be issued unless he modified the project or proposed additional or alternative mitigation. The District suggested several ways petitioner could meet the permitting requirements, including by enhancing other wetlands near his property. Petitioner, however, disagreed with the District's conclusions about the sufficiency of the mitigation he had proposed. He refused to modify his project or propose any other mitigation, and the District denied the permits.

Instead of appealing the permit denial, petitioner filed this inverse-condemnation action. He sought monetary compensation on the ground that the District's decision constituted a taking. But nothing was taken from petitioner when the permits were denied. Petitioner did not have to convey any property interest to the District or suffer any other invasion of his property. He spent no money, time, or labor performing any mitigation. Nor does petitioner argue here that he suffered any taking of the economically viable uses of his property under *Lucas* or *Penn Central*. Indeed, he stipulated that his suit did not "proceed[] upon a theory that the [permit denial] deprived [him] of all or substantially all economically beneficial or productive use of the subject property." JA 76. In short, he suffered no loss for which he is entitled to compensation.

Before this Court, petitioner now seeks compensation for a regulatory taking of his real property on the ground that the District's request for additional mitigation was not sufficiently tailored to a legitimate regulatory purpose under the "nexus" and "proportionality" test of *Nollan* and *Dolan*. This Court rejected that

means-ends approach to regulatory takings in *Lingle*, and it should not revive it here.

Even if one could seek compensation under *Nollan* and *Dolan* for some proposed conditions that were never accepted or imposed, such a claim must fail in this case. Contrary to petitioner's characterizations, the District never required him to perform any particular form of mitigation. Nor does the District's suggestion for mitigation that petitioner singles out—which would have required him to spend money to enhance wetlands within the same hydrologic basin—constitute a taking under this Court's decisions. In these circumstances, the Supreme Court of Florida correctly held that petitioner has no valid claim to just compensation under *Nollan* and *Dolan*.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). As noted in the brief in opposition (at 1, 11-14), petitioner did not raise federal claims in the Florida courts, but expressly reserved them. The Supreme Court of Florida, however, rephrased the question certified to it in terms of both the federal and state constitutions. Pet. App. A-1 to A-2.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the Fifth and Fourteenth Amendments to the United States Constitution and relevant Florida statutes and regulations are reprinted in the Appendix to this brief.

STATEMENT

A. Statutory And Regulatory Background

1. In 1845, when Florida joined the Union, wetlands occupied more than 20 million acres of its territory. Dahl, U.S. Fish & Wildlife Serv., *Florida's Wetlands: An Update on Status and Trends 1985 to 1996*, at 7 (2005) ("*Florida's Wetlands*"). For decades, that number declined as wetlands were drained, dredged, filled, leveled, and flooded to accommodate Florida's growing population. Between the mid-1950s and mid-1970s, Florida lost approximately 72,000 acres of wetlands each year. *Id.* By the mid-1970s, only 11.3 million acres remained. Frayer & Hefner, U.S. Fish & Wildlife Serv., *Florida's Wetlands: Status and Trends, 1970's to 1980's*, at 2 (1991).

Florida responded by enacting several statutes to improve the management and protection of its water resources. The Water Resources Act of 1972 "declared [it] to be the policy of the legislature" that "water and related land resources" should be properly managed, conserved, and developed, and that "natural resources, fish and wildlife" should be preserved. 1972 Fla. Laws ch. 72-299, pt. I, § 2(2). The Act divided the State along hydrologic boundaries into five water management districts. *Id.* § 12. Respondent St. Johns River Water Management District, which covers almost all of northeast and east-central Florida, is one of these districts. Fla. Stat. § 373.069 (1993).

Among other things, the 1972 Act authorized each water management district to regulate the building or alteration of surface water management systems, including any "construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state." 1972 Fla. Laws ch. 72-299, pt. IV,

§ 1(5) (codified as amended at Fla. Stat. § 373.403(5) (1993)). A permit was generally required for such construction, and a district was authorized to issue permits with "such reasonable conditions as [were] necessary to assure" that the construction would "not be harmful to the water resources of the district." *Id.* § 4(1) (codified as amended at Fla. Stat. § 373.413(1), (2) (1993)).

In 1984, Florida acted to strengthen and clarify the state's regulation of wetlands by enacting the Warren S. Henderson Wetlands Protection Act, 1984 Fla. Laws 203—the first Florida law specifically directed at preservation of wetlands. *See* Smallwood et al., *The Warren S. Henderson Wetlands Protection Act of 1984: A Primer*, 1 J. Land Use & Envtl. L. 211, 212-215 (1985). In the Henderson Act, the legislature found that the State's wetlands "perform economic and recreational functions that would be costly to replace should their vital character be lost," and that "the continued elimination or disturbance of wetlands in an uncontrolled manner will cause extensive damage to th[ose] economic and recreational values." 1984 Fla. Laws at 203. The legislature also declared the public policy of the State "to establish reasonable regulatory programs which provide for the preservation and protection of Florida's remaining wetlands to the greatest extent practicable, consistent with private property rights and the balancing of other state vital interests." *Id.* at 204.

The Henderson Act generally prohibited any person from "dredg[ing] or fill[ing] in, on, or over surface waters" without obtaining a permit from the Florida Department of Environmental Regulation ("DER") (now called the Department of Environmental Protection). 1984 Fla. Laws at 205. The applicant was required to provide "reasonable assurance" that water quality standards would be met and that the proposed

project was "not contrary to the public interest," as determined by balancing enumerated criteria. *Id.* If a permit application did not meet these criteria, the Henderson Act required the DER to explore possible modifications to the proposed project to minimize any adverse environmental impacts and measures to mitigate the remaining adverse effects. 1984 Fla. Laws at 208-209.

After the Henderson Act, the annual rate of wetlands loss fell to approximately 5,000 acres—an 81 percent decline from the peak rate of loss in the 1970s and early 1980s. *Florida's Wetlands* 8. Florida's wetlands nonetheless remain far diminished from their original extent. Of the original wetland area, only about 56 percent remained as of 1996. *Id.*

2. The property at issue in this case lies east of Orlando, within the Econlockhatchee River Hydrologic Basin, also known as the "Econ Basin." The Econ Basin was one of 50 drainage basins designated in the District at that time. JA Ex. 168-169.[2] Petitioner's property included wetlands and neighboring uplands that were part of a special Riparian Habitat Protection Zone within the Econ Basin, which the District established to serve as a buffer between wetlands and developed areas to protect the integrity of the wetlands and their dependent wildlife. *See* JA 73-74; Fla. Stat. §§ 373.413, 373.415 (1993) (authorizing districts to create protection zones); Fla. Admin. Code r. 40C-41.063(5)(d)1 (1994).

Because of the location and size of petitioner's proposed development, Florida law at the time required him to obtain two permits from the District for his pro-

[2] Citations to "JA" refer to the volume captioned "Joint Appendix." Citations to "JA Ex." refer to the volume captioned "Joint Appendix Exhibits."

posed development. First, under rules implementing the 1972 Water Resources Act, petitioner had to obtain a Management and Storage of Surface Water ("MSSW") permit to undertake any "filling in, excavation in, or drainage of a wetland" in the Econ Basin. Fla. Admin. Code r. 40C-4.041(1), (2)(b)10 (1994). Second, under rules implementing the 1984 Henderson Act, he had to obtain a Wetlands Resource Management ("WRM") permit for any "dredging and filling conducted in, on, or over … surface waters of the state." *Id.* r. 17-312.030(1) (1994).[3]

Despite variation in their technical terms, the criteria for the two permits were similar.[4] An applicant for a WRM permit had to provide "reasonable assurance" that the development would not violate water quality standards and would not be "contrary to the public interest." Fla. Admin. Code r. 17-312.080(1), (2) (1994). The public interest standard required the District to consider, among other things, whether a project would "adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats." Fla. Stat. § 373.414(1)(a)2 (1993). To

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[3] The District administered the WRM permit requirement under authority delegated by the DER. *See* Fla. Admin. Code r. 17-101.040(12)(a)3 (1994).

[4] In 1993, Florida consolidated the MSSW and WRM permits into a single authorization known as the Environmental Resource Permit ("ERP"). 1993 Fla. Laws ch. 93-213, § 19. When petitioner applied for the permits at issue here, the 1993 Act had taken effect. But the administrative rules implementing the 1993 Act did not take effect until 1995. Hence, petitioner was required to apply for two permits. Under the rules in effect since 1995, a development like petitioner's would require only one consolidated ERP permit instead. *See* Want, *Law of Wetlands Regulation* § 13:8 (West Supp. 2012) (ERP program "became effective on October 3, 1995").

obtain an MSSW permit, the applicant had to provide (as relevant here) "reasonable assurance" that "[w]etland functions w[ould] not be adversely affected" by the development. Fla. Admin. Code r. 40C-4.301(2)(a)7; *see id.* r. 40C-4.301(1), (2); Fla. Stat. § 373.413(1). Also under the MSSW rules, an applicant seeking to build within the Riparian Habitat Protection Zone had to provide "reasonable assurance" that the project would "not adversely affect the abundance, diversity, food sources or habitat … of aquatic or wetland dependent species," Fla. Admin. Code r. 40C-41.063(5)(d)1, and to "demonstrate that the particular development … [would] not have an adverse effect on the functions provided by the zone to aquatic or wetland dependent species," *id.* r. 40C-41.063(5)(d)4.

In reviewing applications for WRM and MSSW permits, the District was required to "consider measures proposed by or acceptable to the applicant to mitigate adverse effects which may be caused by the regulated activity." Fla. Stat. § 373.414(1)(b) (1993); *see also* Fla. Admin. Code r. 17-312.300(4) (under WRM rule, District was to "consider any mitigation proposed by a permit applicant in accordance with this rule"); *id.* r. 40C-41.063(5)(d)5 (1994) (under MSSW rule, District was to consider proposed mitigation "on a case-by-case basis" for development in Riparian Habitat Protection Zone). The goal of such mitigation was to facilitate the issuance of development permits by "offset[ting] adverse impacts" from a given project "to the point where no net adverse impacts [were] antic[i]pated" and the permit could be granted. JA Ex. 145 (1989 District pol-

icy memorandum); *see also* JA Ex. 108-118 (Applicant's Handbook).[5]

B. Petitioner's Permit Applications And The District's Response

1. In December 1993 and February 1994, petitioner applied to the District for WRM and MSSW permits to "[r]eclaim approximately 3.75 acres of wetlands" on his property "for future commercial development." JA Ex. 3 (permit application); *see also* JA Ex. 5-6, 32-33; JA 72-73. The parties stipulated before trial that, at the time the application was submitted, petitioner's proposal would have resulted in the destruction of 3.4 acres of wetlands and 0.3 acres of protected uplands within the Riparian Habitat Protection Zone. JA 74.

After petitioner submitted his applications, District staff met with him, visited his property, and reviewed his permit-application materials, including an environmental report. *See* JA Ex. 50, 87-88, 132; Liability Trial Tr. 18, 69 (Aug. 28-29, 2002). The District staff found that the land petitioner proposed to develop "provide[d] a diversity of habitat and food sources, and serve[d] as an important refuge for a variety of wildlife species." JA Ex. 85 (WRM Technical Staff Report); *see* JA Ex. 130 (MSSW Technical Staff Report). The proposed project, the staff found, "would displace natural wildlife habitat," "cause adverse impacts to the conservation of fish and wildlife," and "adversely affect[]" the

[5] The Applicant's Handbook excerpted in the Joint Appendix contains the District's official guidelines for permit applicants as of the relevant time and was available to the public. The sections concerning wetland mitigation—§§ 16.1.3 through 16.1.6 (JA Ex. 108-117)—were incorporated by reference into the Florida Administrative Code. *See* Fla. Admin. Code r. 40C-4.091(1)(a) (1994).

"condition and relative value of functions being performed by" the affected wetlands. JA Ex. 87; *see* JA Ex. 84-87, 130-132. The staff therefore concluded that petitioner's applications did not provide reasonable assurances that the proposed development would not adversely affect wetland functions or the conservation of fish and wildlife habitat and, hence, without adequate mitigation or project modification, the permits could not be granted. JA Ex. 92, 135-136.

2. Under its administrative rules, the District could not "require[]" mitigation, but was obligated to "consider any mitigation *proposed by [the] permit applicant*." Fla. Admin. Code r. 17-312.300(4) (1994) (emphasis added). The District evaluated mitigation proposals "on a case by case basis," considering the amount and quality of both the proposed mitigation and the affected wetlands. *Id.* r. 17-312.340 (1994) (WRM standards for evaluating proposed mitigation); *see* JA Ex. 104 (Applicant's Handbook).

Petitioner's proposal to "mitigate the damages" created by his proposed project was to "dedicat[e] … development rights" on the remaining 11 acres of his property by placing it in a conservation easement. JA Ex. 5, 32 (permit applications); *see also* Pet. App. D-4; JA 57 (MSSW Final Order). That proposal would have yielded a 3:1 ratio of preserved-to-destroyed wetlands. As a member of the District's staff explained, "If you did that on every parcel of property that was proposed for development," Florida "would lose 25 percent of its wetlands." JA 42. Given that the State had "already lost half of [its] wetlands," such a mitigation proposal would have led to "an unacceptable cumulative loss of wetlands" (*id.*), contrary to the public policy of the State (*see supra* pp. 4-5).

Indeed, the District and the state Department of Environmental Regulation had long expressed a policy preference for the creation or enhancement of wetlands, rather than mere preservation, as mitigation for the destruction of other wetlands. *See* JA Ex. 78, 146-152. Wetland creation involves the excavation of upland areas to construct new wetlands. JA 125; JA Ex. 108. Wetland enhancement improves the ecological quality of an existing wetland by reversing adverse conditions that diminished the wetland's value and functions. JA 125-126; JA Ex. 108. Both methods add to the wetlands resources of a given region, thereby offsetting destruction of other wetlands. By contrast, wetland preservation—the form of mitigation petitioner proposed—does not actually offset the adverse impacts of wetland destruction, but simply limits the extent of the loss.[6] Nevertheless, in "unusual circumstances," the District would consider mitigation proposals that entailed the preservation of high-quality wetlands or uplands. JA Ex. 77-81, 152, 158-162; Fla. Admin. Code r. 17-312.370 (1994) (WRM rule discussing use restrictions and conservation easements as mitigation).

At the time petitioner applied for his permits, the District evaluated mitigation proposals based in part on the ratio between the extent of wetlands adversely affected by a project and the extent of wetlands that would be created, enhanced, or preserved. The ratios were established at the state level by the Florida Department of Environmental Regulation. *See* JA Ex. 81-82. These ratios were "general guidelines" that provid-

[6] The final rule on compensatory mitigation recently promulgated by the federal Environmental Protection Agency and the U.S. Army Corps of Engineers reflects the same preference for creation or enhancement over preservation. *See* 33 C.F.R. § 332.3; *see also id.* § 332.2.

ed "considerable flexibility to the District to determine whether a specific mitigation plan [wa]s adequate" in light of the condition of the affected wetlands and the wetlands to be enhanced, created, or preserved. JA Ex. 156-157; *see also* JA Ex. 81-82.

For wetlands preservation, the guidelines suggested that the ratio of preserved-to-destroyed wetlands should be at least 10:1 for preservation of the "highest quality" wetlands. JA Ex. 81. In other words, the preservation of ten acres of high-quality wetlands could acceptably mitigate the destruction of one acre. A higher ratio was called for if the lands to be preserved were of lower quality. JA Ex. 82; *see* JA Ex. 154. If preservation were generally allowed on a 1:1 ratio, Florida would lose half of its remaining wetlands. Even a 10:1 ratio would result in the loss of over nine percent of remaining wetlands. But limiting the rate of wetland destruction to that extent advanced Florida's public policy to balance wetland protection with development.[7]

By comparison, the ratios for wetlands creation ranged from less than 1:1 up to 5:1. JA Ex. 81. Ratios at the higher end of that range accounted for the temporary loss of wetland habitat that occurs while the created wetland is in early stages and the risk that creation might be unsuccessful. JA Ex. 81, 110-111. For wetlands enhancement, ratios ranged from 4:1 to 20:1 "because the wetlands prior to enhancement were already providing some wetland functions and the enhancement only adds a certain percentage of increased usefulness." JA Ex. 81.

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[7] *Cf. Alliance for Legal Action* v. *U.S. Army Corps of Eng'rs*, 314 F. Supp. 2d 534, 552 (M.D.N.C. 2004) (EPA's Region 4 (Southeast) Compensatory Mitigation Policy suggested mitigation ratios in "a range of 10:1 to 60:1" for preservation of wetlands).

Under these guidelines, and based on the quality of the affected wetlands, District staff concluded that petitioner's mitigation proposal was inadequate to offset the adverse impacts that would result from his proposed development. JA Ex. 89-92 (WRM Technical Staff Report), 131-136 (MSSW Technical Staff Report).

3. Rather than simply deny the permits, District staff suggested several ways petitioner could change his proposal that would have reduced or offset the adverse impacts of his development. *See* JA Ex. 90-92, 132-135 (technical staff reports); *see also* JA 24-25 (hearing before the District Board); JA 47-50 (WRM Final Order); JA 57-60 (MSSW Final Order). Some of these suggestions involved modification of the design or scale of petitioner's proposed construction to limit the resulting environmental harm and reduce the amount of mitigation that would have been required.

- District staff suggested that, instead of filling part of the site to construct a dry-bottom retention/detention pond, petitioner could employ a subsurface stormwater management system. JA Ex. 87-88, 132-133.
- The staff also suggested eliminating the proposed filling of side-slope areas and replacing them with stem walls. JA Ex. 88, 133.
- They also suggested that petitioner reduce the scale of his proposed project to one acre and preserve the rest of his land by conservation easement or deed restriction, in which case his preservation proposal would provide sufficient

mitigation and the permits could be granted. JA Ex. 91-92, 134-135; *see also* JA 47, 49, 57-58, 60.[8]

Petitioner rejected each of these options to modify his proposed development to reduce its adverse impacts. JA Ex. 88, 89, 132, 133.

The District also suggested alternatives for mitigation on other property within the Econ Basin—in lieu of, not in addition to, petitioner's proposed on-site preservation option—that would have been sufficient for petitioner to obtain the permits. *See* JA Ex. 90, 133; JA 47-48, 58-59. As "example[s]," District staff identified two properties on District land where off-site wetland enhancement "options" were available. JA Ex. 90, 133; *see also* JA 24.

- The District suggested that petitioner could improve the wetland functions on the Hal Scott Preserve by replacing approximately 15 inoperative or abandoned culverts or by plugging or eliminating the ditch system. JA Ex. 90, 133; *see also* JA 48, 59.
- The District suggested plugging or eliminating the ditch system on the Demetree Property. JA Ex. 90-91, 133-134; *see also* JA 48, 59.

The District did not limit off-site mitigation to its own land; equivalent mitigation on any property within the Econ Basin would have been sufficient. *See* JA Ex. 90-91, 133-134; JA 48-49, 59-60.

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[8] The Joint Pre-Trial Statement inadvertently stated that the suggested reduced development was 0.1 acre. *See* JA 74. It is undisputed that the correct number is one acre. *See* JA 49, 60; *see also* Pet. App. B-10 n.5, B-30.

As a further alternative, the District suggested that petitioner could achieve sufficient mitigation by combining his proposed on-site preservation with additional off-site enhancement of at least 50 acres of wetlands anywhere in the Econ Basin. JA Ex. 91, 134; JA 49, 60. The enhancement could have been done on either the Hal Scott or Demetree properties, or "[a] combination of enhancement activities on both of th[o]se example sites … would also [have been] acceptable." *Id.* "Equivalent off-site enhancement options on other properties within the basin could also [have been] developed." JA Ex. 91, 134; *see* JA 49, 60. As a District employee explained at trial, petitioner could have enhanced 50 acres of wetlands on the Hal Scott Preserve simply by installing one culvert and removing another. JA 147. According to one contractor's estimate, the removal and installation of those two culverts would have cost approximately $10,000. JA Ex. 75-76; *see also* JA 120-122.

Petitioner rejected all of these suggestions. He was "unwilling to consider any additional mitigation options other than what [he] originally proposed." JA Ex. 90, 133; *see also* Pet. App. D-4. Indeed, when asked at a subsequent hearing whether he would "prefer [that] th[e] permit be turned down" or whether he would like to take "30 days and try to work it out," his agent responded that petitioner's "offer [was] as good as it can get." JA 41; *see also* JA 37-38.

In the absence of sufficient mitigation or modification, the District staff recommended that petitioner's permit applications be denied on the ground that his proposal would result in unacceptable harm to the environment. JA Ex. 92, 135-136. As explained in the written staff reports, the only mitigation petitioner had proposed was inadequate to offset the destruction that

his development would cause, and thus he had failed to provide reasonable assurance that his proposed development would not yield adverse wetland impacts contrary to the public interest. *Id.*

4. The District's governing board held a hearing to address the staff's recommendation. The principal subject of that hearing was whether the on-site mitigation petitioner had proposed in his permit applications was sufficient to warrant granting the permits. JA 21-43. Petitioner disputed the District staff's conclusions as to the quality of the wetlands that would be affected by the proposed development. And he argued that the District should have been satisfied with his proposal to conserve the remaining portion of his land. JA 34, 41.

After considering the applications and supporting material, the written staff reports, and the oral presentations of petitioner's agent and the District staff, the board voted to deny the permits. JA 43. On June 9, 1994, the District issued two final orders denying his permit applications. JA 44, 55. In each, the board concluded that petitioner had failed to provide reasonable assurance that his proposed development would not adversely affect the wetland functions provided by the property and would not conflict with the public interest. JA 51, 61-62. Each order further concluded that the mitigation plan petitioner had proposed was insufficient to allow issuance of the permit. JA 52, 62.

C. Judicial Proceedings

1. Petitioner had two options to contest the District's denial of his permit applications.[9] First, under

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[9] Petitioner actually could have had a third option before the board issued its final orders denying the permits. After the District staff notified him of its intent to recommend denial of his

the Florida Administrative Procedure Act, he could seek judicial review of the District's orders in the District Court of Appeal, an intermediate state appellate court. In that proceeding, petitioner could challenge the orders as inconsistent with a District rule or in violation of a constitutional or statutory provision—a process akin to petitioning for review of a final order of a federal agency before a federal court of appeals. *See* Fla. Stat. § 120.68(1), (6), (7) (1993). Second, petitioner could bring an inverse-condemnation action in the Circuit Court, a state trial court. Under the latter option, the trial court could not review whether the District's orders were correct under applicable statutes and rules. *See Key Haven Associated Enters., Inc.* v. *Bd. of Trs. of Internal Improvement Trust Fund*, 427 So. 2d 153, 159 (Fla. 1982). Instead, the court's review would be "confined solely to determining whether [the District's] action [was] an unreasonable exercise of the state's police power constituting a taking without just compensation." Fla. Stat. § 373.617(2) (1993).[10]

Petitioner chose the inverse-condemnation option. In August 1994, he filed suit against the District in the Circuit Court for Orange County, Florida. As relevant here, he alleged that the District's orders denying permits for development of his property constituted a taking of his property for public use without compensation. JA 16. He sought an order "finding that the District

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permits, petitioner had 14 days to request a *de novo* hearing before an administrative law judge. *See* Fla. Stat. § 120.57 (1993). Petitioner did not pursue that option.

[10] Under certain circumstances, an aggrieved applicant can alternatively pursue an administrative appeal of a final District order before the state Land and Water Adjudicatory Commission, which can refer the matter for a hearing as needed. *See* Fla. Stat. § 373.114(1) (1993).

and [governing board] have taken the Plaintiff's property through regulatory action and are required to pay Plaintiff just compensation." JA 18.

After several trial and appellate court proceedings about ripeness, the case proceeded to a bench trial in August 2002. In the Joint Pre-Trial Statement, petitioner stipulated that he was "not proceeding upon a theory that the two District final orders deprived [him] of all or substantially all economically beneficial or productive use of the subject property." JA 76; *see also* JA 163 (conceding "there is still economical beneficial use on that property"). Rather, he argued that the District had "require[d] [him] to submit to excessive mitigation requirements and/or ratios to develop his property without evidence or proof that the required mitigation ratios advanced any substantial purpose." JA 69.

Petitioner's legal theory at trial rested heavily on *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980), which indicated that land-use regulation could be a "taking" if the regulation failed to "substantially advance" a legitimate state interest. *See* JA 87, 147-148. Petitioner argued that the off-site mitigation the District allegedly "demanded" failed that test because, in his view, it was not supported by any evidence showing that the off-site mitigation would benefit wildlife or habitats on petitioner's own property. *See* JA 149, 150-151, 154, 155, 161-162, 164, 175. Petitioner referred as well to *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), arguing that *Dolan* had "changed the law" by shifting the burden to the government to prove that the permit decision advanced a legitimate purpose. JA 150; *see, e.g.*, JA 149, 150-151.

On October 30, 2002, the trial court ruled in petitioner's favor. The court began its analysis by noting that "Mr. Koontz's legal argument looks to *Agins*[]."

Pet. App. D-5. A taking could occur, the court explained, "if the governmental restrictions did not 'substantially advance a legitimate state interest.'" *Id.* The court also noted petitioner's reliance on *Dolan* and *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), but found those cases "clearly distinguishable in fact and legal principle" because petitioner was "not being asked to give up his right to exclude others" and "[n]either the government nor anybody else is going to occupy the property." Pet. App. D-6 to D-8. The court nonetheless inferred from a footnote in the District Court of Appeal's prior decision on ripeness that the appellate court intended *Nollan* and *Dolan* to "provid[e] [the] constitutional tests applicable to the Koontz property." *Id.* at D-9 to D-11.

Applying *Nollan* and *Dolan*, the trial court concluded that the District "did not prove the necessary relationship between the condition of off-site mitigation and the effect of development." Pet. App. D-11. It found no "showing of a nexus between the requi[r]ed off-site mitigation"—which the court defined as "enhancement of 50 off-site acres of wetlands by replacing culverts and plugging some ditches"—and the requested development. *Id.* at D-4, D-11. Nor did it find a showing of rough proportionality. *Id.* at D-11. In the court's view, the District's "required conditions of unspecified but substantial off-site mitigation" therefore "resulted in a regulatory taking of the Koontz property." *Id.* at D-1, D-4.[11] The court did not address the le-

[11] The court made no finding on the cost of off-site mitigation. It noted that the mitigation could cost "as little as $10,000.00" or "between $90,000.00 and $150,000,00." *Id.* at D-4. Undisputed evidence showed that one of the District's mitigation suggestions—off-site enhancement of 50 acres of wetlands combined with petitioner's proposed preservation of 11 acres of his own property—

gality of any of the District's other mitigation suggestions, including the suggestions that petitioner reduce the size of his development to one acre or modify the design of the proposed development.

2. Under Florida law, the District had several remedial options: (1) it could decide to issue the permits; (2) it could otherwise modify its decision to "avoid an unreasonable exercise of the police power"; or (3) it could agree to pay damages as just compensation. Fla. Stat. § 373.617(3) (1993). In light of the significant deterioration of the quality of the wetlands on petitioner's property that had occurred in the eight years since he applied for permits (*see* JA Ex. 68; R. 1028, 1031-1032), the District elected to issue the permits, with the only mitigation being the on-site preservation that petitioner had originally proposed. JA 183.[12]

On June 18, 2004, the trial court approved the issuance of the permits. JA 183. The court found that the "issuance of the permit for which Koontz originally proposed the preservation mitigation" was a "reasonable exercise of police power that does not constitute a taking without just compensation." *Id.* Subject to appeal of the takings issue, the court reserved jurisdiction to determine damages for a temporary taking. *Id.* On December 12, 2005, after further proceedings not relevant here, the District issued the permits. Pet. App. C-2.

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could have been satisfied by installing one culvert and removing another for approximately $10,000. *See supra* p. 15. The $90,000-$150,000 range reflected the potential cost of the District's alternative suggestion that, *in lieu of preserving* the 11 acres, petitioner could replace approximately 15 culverts on the Hal Scott property. *See* JA 123.

[12] "R." refers to the record on appeal before the state courts.

On February 21, 2006, the trial court awarded petitioner $327,500 plus interest as "just compensation for the temporary taking" of his real property from the date the permits were initially denied to the date they were ultimately issued. Pet. App. C-1; *see id.* at C-2. The court based that amount on the methodology adopted by petitioner's appraisal expert (*id.*), who calculated the damages as the present value of the lost annual rents on the property from 1994 to 2005. R. 1442-1443 (Damages Trial Tr. 11-12).

3. The District appealed, arguing (among other things) that petitioner's theory under *Agins* did not survive *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 532 (2005), which disapproved the "substantially advance" language in *Agins* as a valid test for a taking. The District also argued that the trial court's decision could not be sustained on an alternative land-use exaction theory.

The Court of Appeal affirmed the trial court's liability judgment. *See* Pet. App. B-1 to B-30. Omitting any reference to *Agins* or *Lingle*, the majority relied on *Nollan* and *Dolan* and agreed with the trial court that the District had temporarily taken petitioner's real property. *See id.* at B-8 to B-10.[13]

Judge Griffin dissented. Noting that petitioner's "original theory of liability" under *Agins* had "evaporated" with *Lingle* (Pet. App. B-18 to B-19), she agreed

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[13] The majority acknowledged that the trial court had not addressed the legality of the District's other mitigation suggestions. Pet. App. B-10 n.5. It nonetheless concluded that the trial court had "implicitly rejected this contention" by "decid[ing] as fact that the conservation easement offered by Mr. Koontz was enough and that any more [mitigation] would exceed the rough proportionality threshold." *Id.*

with the District that there had been no taking under *Nollan* and *Dolan* (*id.* at B-19 to B-30). Judge Griffin reasoned that, although petitioner could have appealed the permit denial or mitigation conditions as invalid, he was not entitled to receive compensation when "*nothing* was ever taken." *Id.* at B-23. Moreover, Judge Griffin argued that where an unconstitutional condition does not involve the taking of an interest in land, the remedy of inverse condemnation is not available. *Id.* at B-22. Finally, she noted that "land-use exaction theory only appears to apply in circumstances where the property owner is faced with a choice between an exaction and permit denial." *Id.* at B-30. Here, she pointed out, petitioner "was never in that position because he had a third option—modification of his development to one acre with no 'exaction.'" *Id.*

4. The appellate court granted the District's motion for certification to the Florida Supreme Court. After reframing the certified question as involving both state and federal law, the Florida Supreme Court reversed. *See* Pet. App. A-1, A-3.

The Florida Supreme Court held that *Nollan* and *Dolan* apply "only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought, thereby rendering the owner's interest in the real property subject to the dedication imposed." Pet. App. A-19. The court explained that "[i]f a property owner is authorized to file an inverse condemnation claim on the basis of the exactions theory any time regulatory negotiations are not successful and a permit is denied," land-use regulation could become "prohibitively expensive," and regulators would "simply deny permits outright without discussion or negotiation

rather than risk the crushing costs of litigation." *Id.* at A-20. The court further observed that "because St. Johns did not issue permits, Mr. Koontz never expended any funds towards the performance of off-site mitigation, and nothing was ever taken" from him. *Id.* at A-21. Justice Polston and Chief Justice Canady concurred in the judgment, agreeing with the District that petitioner's claim was in reality an attack on the propriety of agency action, which petitioner was required to exhaust in administrative remedies before bringing a regulatory takings action. *Id.* at A-22.

SUMMARY OF ARGUMENT

This is an inverse-condemnation case—a proceeding in which a landowner claims entitlement, as a constitutional matter, to just compensation because the government has taken his private property. A fundamental prerequisite of that claim is that the government has in fact taken property, either directly or through burdensome regulatory measures. Petitioner, however, seeks compensation where the government has not taken any of his property. No decision of this Court supports a claim of compensation where the government has taken no property.

This Court's decisions in *Nollan* and *Dolan* set forth important constitutional limits on the government's ability to demand that a landowner surrender private property rights as a condition of obtaining a development permit. Unlike the plaintiffs in *Nollan* and *Dolan*, however, petitioner did not ask the Florida courts to direct the District to purge the alleged unconstitutional conditions from the permits he sought. Instead, he declined to accept any additional mitigation options, the permits were denied, and he sought compensation. But because no permit was ever approved,

petitioner was never required to give up any property interest and never spent any money to comply with any "condition." The District thus never imposed any "exaction," within the meaning of *Nollan* and *Dolan*, for which compensation could be required.

Moreover, contrary to petitioner's contention, *Nollan* and *Dolan* do not establish another measure—in addition to this Court's decisions in *Loretto*, *Lucas*, and *Penn Central*—for determining whether government has effected a regulatory taking of the real property the owner seeks to develop by denying issuance of a permit. As *Lingle* makes clear, *Nollan* and *Dolan* apply only in the specific situation where the government exacts a condition for approval of a permit that, if imposed outside the permitting process, would itself amount to a taking for which just compensation would be constitutionally required. In that situation, the government may avoid the obligation to pay compensation if the proposed condition has an "essential nexus" to the government's pursuit of a legitimate objective and is "roughly proportional" to the severity of the regulatory problem that the government seeks to resolve. The government's obligation to carry that burden makes sense where, as in *Nollan* and *Dolan*, the proposed condition would actually transfer a property interest from the landowner to the government.

By seeking compensation where nothing has been taken from him, however, petitioner seeks to use *Nollan* and *Dolan* (instead of *Lucas* or *Penn Central*) to establish a regulatory taking of his real property on the grounds that the District did not sufficiently justify its decision. This is no different than the approach to regulatory takings that courts used to follow under *Agins*—an approach this Court has soundly repudiated and should not revive.

Even if one could seek compensation under *Nollan* and *Dolan* for some proposed conditions that were never accepted or imposed, such a claim must fail in this case. Unlike the exactions imposed in *Nollan* and *Dolan*, which were classic interests in real property, the only "conditions" at issue here would not themselves have worked a taking of private property for which just compensation would be constitutionally required. The only condition on which the District insisted was that petitioner show that his development would not harm the wetland environment within the Econ Basin. That was not a taking of private property; it was a valid exercise of regulatory authority. To the District, it was irrelevant whether petitioner modified his project to lessen its adverse impacts or whether he offset those impacts through mitigation, and it was irrelevant whether any mitigation was to take place on petitioner's property, off that site, or on a combination of both. The choice was petitioner's, so long as the mitigation was sufficient for the project as a whole to comply with environmental standards. Nor can petitioner establish that the off-site mitigation would have been a taking because it would have required him to spend money. This Court has never held that requiring a person to comply with a regulation constitutes a taking merely because the person must spent money in order to do so. Such a holding could dramatically extend the just compensation requirement into previously uncharted areas.

ARGUMENT

I. AN APPLICANT WHOSE LAND-USE PERMIT IS DENIED IS NOT ENTITLED TO COMPENSATION UNDER *NOLLAN* AND *DOLAN* FOR A CONDITION THAT WAS NEVER IMPOSED

The Just Compensation Clause obligates the government to pay compensation when it "take[s]" "private property … for public use." U.S. Const. amend. V. In recognition of "the nearly infinite variety of ways in which government actions or regulations can affect property interests," this Court has repeatedly declined to set a "magic formula" for "a court to judge, in every case, whether a given government interference with property is a taking." *Arkansas Game & Fish Comm'n* v. *United States*, 133 S. Ct. 511, 518 (2012). Instead, the Court has employed several metrics to determine whether a governmental regulation "goes too far" and amounts to a taking of private property. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922).

The Court has recognized two categories of regulatory action as *per se* takings. A regulation that compels a landowner to suffer any physical invasion of his real property—regardless of the scope of the invasion—is a *per se* taking. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). So too is a regulation that deprives a landowner of all economically beneficial use of his real property. *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992).

Where neither of these categorical rules applies, a landowner may establish that governmental regulation works a compensable taking of his property under the "essentially ad hoc, factual inquiries" set forth in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 124 (1978). The *Penn Central* formula exam-

ines "[t]he economic impact of the regulation on the claimant," especially "the extent to which the regulation has interfered with distinct investment-backed expectations" and "the character of the governmental action." *Id.* at 124 (internal quotation marks omitted). These factors are the "principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

In addition, this Court's decisions in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), provide a particularized framework for the "special context of land-use exactions." *Lingle*, 544 U.S. at 538. Those decisions "involve a special application of the doctrine of unconstitutional conditions, which provides that the government may not require a person to give up a constitutional right—here the right to receive just compensation where property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property." *Id.* at 547 (internal quotation marks omitted); *accord Dolan*, 512 U.S. at 385.

Nollan and *Dolan* apply where the government has exacted a condition that, if imposed outside the context of a permitting decision, would itself constitute a *per se* physical taking requiring just compensation. *Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831; *see Lingle*, 544 U.S. at 546-547. A land-use agency may insist on such a condition for granting a permit without paying just compensation if it can establish that the condition has an "essential nexus," *Nollan*, 483 U.S. at 837, to the government's legitimate interest in regulating the land's use and bears a "rough proportionality" to the impact of the proposed use, *Dolan*, 512 U.S. at 391.

Nollan and *Dolan* thus provide a framework under which a landowner may "challenge[] … [an] adjudicative land-use exaction[]" on the ground that the exaction demanded amounts to an unconstitutional condition—*i.e.*, an uncompensated taking that bears an insufficient connection to the legitimate state interest underlying the land-use regulation. *Lingle*, 544 U.S. at 546.

A. Petitioner Cannot Obtain Compensation For Property That Was Never Taken

Unlike Mr. and Ms. Nollan and Ms. Dolan, petitioner does not "challenge" any land-use exaction at all. His suit seeks not to invalidate an unconstitutional condition, but to obtain just compensation for a taking of his property. Petitioner argues that the applicability of *Nollan* and *Dolan* does not "depend upon *when* in the permit process the exaction is imposed." Pet. Br. 13. But whether or not the timing is relevant when a landowner seeks to *invalidate* an unconstitutional condition, it most certainly does matter when the landowner instead seeks *compensation*. A landowner cannot obtain compensation under *Nollan* and *Dolan* for an exaction that has not been imposed.

The standard measure of just compensation for a taking of private property by the government is the amount of the owner's loss. *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 235 (2003); *Boston Chamber of Commerce* v. *Boston*, 217 U.S. 189, 195 (1910). Thus, "[n]othing [is] recoverable as just compensation" where "nothing of value was taken from the [owner,] and it was not subjected by the Government to pecuniary loss." *Marion & Rye Valley Ry. Co.* v. *United States*, 270 U.S. 280, 282 (1926).

Here, petitioner never lost any property as a result of the District's alleged "demand" that he perform off-site mitigation. Petitioner never agreed to do any off-site mitigation. He never spent a penny on public improvements or off-site mitigation or any other efforts to comply with any condition on the use of the land. He was never ousted from his land. He never lost the right to exclude others from it. Accordingly, petitioner did not have any property taken from him that would be compensable under *Nollan* and *Dolan*. The District cannot owe petitioner compensation for property he never lost.

Petitioner's claim for compensation differs markedly from what the petitioners in *Nollan* and *Dolan* did. In those cases, the landowners sought to purge unconstitutional conditions on their land-use permits through judicial review of the permitting decision. Instead of compensation, those actions sought to prevent imposition of the challenged condition. The Nollans, for example, "filed a supplemental petition for a writ of administrative mandamus" asking the court "to invalidate the access condition." 483 U.S. at 829. Similarly, Ms. Dolan "appealed to the Land Use Board of Appeals" from the commission's denial of her request for variances from the permitting standards "on the ground that the city's dedication requirements … constituted an uncompensated taking of her property." 512 U.S. at 380, 382.

If petitioner had a valid objection to the District's permit denial decision, he too could have raised that objection through the administrative process or on direct judicial review of the District's final orders. *See supra* pp. 16-17. Under Florida law, the appellate court is the "proper forum to resolve" a "claim that an agency has *applied* a … statute or rule in such a way that the ag-

grieved party's constitutional rights have been violated." *Key Haven Associated Enters., Inc.* v. *Board of Trs. of Internal Improvement Trust Fund*, 427 So. 2d 153, 158 (Fla. 1982). The appellate court could have "declare[d] the agency action improper and [could have] require[d] any modifications in the administrative decision-making process necessary to render the final agency order constitutional." *Id.*; *see also Paradyne Corp.* v. *State*, 528 So. 2d 921, 926-927 (Fla. Dist. Ct. App. 1988) (invalidating permit condition under *Nollan* on appeal from agency final order).

To be sure, had petitioner pursued that avenue, the District would have argued there as well that his claim lacked merit. As discussed below, *see infra* Part II, the District did not exact any condition at all. It suggested several ways in which petitioner could have satisfied the statutory and regulatory standards for permit eligibility. Petitioner refused them all. The District's denial of a permit in such circumstances cannot give rise to a claim under *Nollan* and *Dolan*, even if it were brought in the proper forum and sought the proper remedy. But in any event, petitioner is clearly not entitled to compensation where he gave up no property interest. This Court's cases nowhere suggest that compensation is required where a landowner has not been deprived of a property right.[14]

[14] Petitioner's reliance (Br. 36-39) on the opinion dissenting from denial of certiorari in *Lambert* v. *City & County of San Francisco*, 529 U.S. 1045 (2000) (mem.), is misplaced. As in *Nollan* and *Dolan*, the petitioner in *Lambert* sought to invalidate the allegedly unconstitutional permit condition. *Id.* at 1045-1046 (Scalia, J., dissenting). Moreover—as portions of the opinion that petitioner does not quote make clear—the *Lambert* dissent confirms that *Nollan* and *Dolan* do not readily apply where a permit has been denied. The dissenting Justices acknowledged that "the subject of

B. *Nollan* And *Dolan* Do Not Provide The Standard For Showing A Regulatory Taking Of Petitioner's Property

By seeking just compensation under *Nollan* and *Dolan* where the demanded exaction was never actually imposed, petitioner effectively seeks to convert *Nollan* and *Dolan* into an *Agins*-style test for determining whether a landowner is entitled to compensation for a regulatory taking of property. This Court soundly rejected that approach to regulatory takings in *Lingle*.

1. Petitioner seeks compensation for a regulatory taking of his real property under a novel application of the "nexus" and "proportionality" standard

"Land-use regulations are ubiquitous," this Court has recognized, "and most of them impact property values." *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002). But "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Mahon*, 260 U.S. at 415. Thus, a landowner whose permit application is denied because he refuses to accede to a proposed condition may of course contend that the burdens imposed on the use of his land as a result of the denial are so onerous that he is constitutionally entitled to compensation. *See Lucas*, 505 U.S. at 1019; *Penn Central*, 438 U.S. at 124; *see also Nollan*, 483 U.S.

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any supposed taking in [such a] case is far from clear" because "there is neither a taking nor a threatened taking of any money," and noted that reasoning was a "plausible" basis for denying the petitioner's claim. *Id.* at 1048. They dissented from the denial of certiorari only because they perceived *other* bases on which the state court might have denied relief that were worthy of plenary review. *Id.* at 1048-1049.

at 835-836 (noting that the Commission could "unquestionably" have denied the Nollans their permit outright unless the denial "would interfere so drastically with [their] use of their property as to constitute a taking" under *Penn Central*).

Here, petitioner claims to be entitled to the same relief that would be available under a successful *Penn Central* or *Lucas* claim: monetary compensation for a loss in the value of his land. But he seeks to substitute the stricter "nexus" and "proportionality" test of *Nollan* and *Dolan* in place of the *Lucas* and *Penn Central* standards the Court ordinarily applies in regulatory takings cases, which are more deferential to legitimate state regulation and place the burden on the claimant to show that the government's regulation "goes too far."

Before this Court, petitioner repeatedly contends that the "exaction" implicating *Nollan* and *Dolan* in this case was the alleged requirement that he pay for off-site mitigation on District-owned land. *See* Pet. Br. 11, 14, 15, 17, 23-24, 38, 40. It is little wonder that he does so, for in *Nollan* and *Dolan* it was the exactions themselves—the easements demanded as a condition of the permits—that would have constituted takings for which the government would have owed just compensation had they been imposed unilaterally.

But that is not the theory on which petitioner litigated his claim below. Petitioner did not seek, and the trial court did not award, damages having any relationship to the expected cost of performing off-site mitigation. Instead, petitioner sought and obtained damages for the impact that the permit denial allegedly had *on the rental value of his real property*—not for the amount or cost of the condition that the District supposedly demanded. The trial court found a "regulatory tak-

ing of the Koontz property" (Pet. App. D-1) and awarded damages in an amount representing lost rents that petitioner could have earned on the property itself had the permit been granted (Pet. App. C-2; R. 1442-1443).

Of course, petitioner could have sought precisely that relief under either *Lucas* or *Penn Central*. But he abandoned those claims in the state courts. In the Joint Pre-Trial Statement, petitioner specifically admitted that he was "not proceeding upon a theory that the two District final orders deprived [him] of all or substantially all economically beneficial or productive use of the subject property." JA 76; *see also* JA 163 (concession of petitioner's trial counsel that "there is still economical beneficial use on that property"); R. 1450-1451 (Damages Trial Tr. 19-20) (concession of petitioner's expert that property value appreciated).[15] In other words, petitioner chose not to pursue compensation for any type of regulatory taking that this Court has recognized. Instead, he pursued a compensation claim under the "nexus" and "proportionality" test that ordinarily applies to exactions under *Nollan* and *Dolan*. As dis-

[15] The parties disputed in the Florida courts the precise contours of petitioner's stipulation that he was not deprived of "all *or substantially all*" economically beneficial or productive use of his property. JA 76 (emphasis added). Petitioner did not dispute that this stipulation was intended to foreclose a *Lucas* claim, but he contended that he retained a *Penn Central* claim. Pet. Fla. S. Ct. Br. 42-46. The District argued that petitioner's stipulation that he had not lost "substantially all" economic value of his property conceded a *Penn Central* claim as well. Resp. Fla. S. Ct. Br. 15 n.8. The Florida Supreme Court did not resolve that dispute, as it limited its review only to the availability of a *Nollan-Dolan* claim on these facts. Pet. App. A-21. Accordingly, if this Court affirms the Florida Supreme Court's decision that a *Nollan-Dolan* claim is not available here, petitioner could still pursue his *Penn Central* claim unless the Florida courts determine that he waived it.

cussed below, this Court's decisions do not support that expansion of *Nollan* and *Dolan* into a new category of regulatory taking.

2. Allowing compensation for a regulatory taking under the *Nollan-Dolan* standard would improperly revive *Agins*

Petitioner's attempt to substitute the *Nollan* and *Dolan* standard for those that this Court has repeatedly applied under *Loretto*, *Lucas*, and *Penn Central* would wrench the special rules of *Nollan* and *Dolan* from their proper context and would sever the constitutional link between the requirement of just compensation and the existence of an actual taking of property. In effect, it would revive the "substantially advance" theory of *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980). But as this Court recognized in repudiating *Agins*, the kind of means-ends inquiry the trial court applied here in upholding petitioner's takings claim under the "nexus" and "proportionality" standard is not a proper metric for determining whether government regulation is so burdensome as to constitute a taking. *See Lingle*, 544 U.S. at 542.

The Court's frameworks for deciding whether regulatory action results in a taking of property—*Loretto*, *Lucas*, and *Penn Central*—"share a common touchstone." *Lingle*, 544 U.S. at 539. Each "focuses … upon the severity of the burden that government imposes upon private property rights," so as "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Id.* The "substantially advances" test of *Agins*, in contrast, focused not on the burden of regulation on private property rights, but on the degree of fit

between regulatory means and ends. Although that test might have "ha[d] some logic in the context of a due process challenge," it is "not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment." *Id.* at 542.

Like the *Agins* test, the "nexus" and "proportionality" standard of *Nollan* and *Dolan* "reveals nothing about the *magnitude or character of the burden*" imposed on private property rights by a particular permitting decision. *Lingle*, 544 U.S. at 542. *Nollan* and *Dolan* nonetheless survived *Lingle* because both cases "involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings." *Id.* at 547. In *Nollan*, the state agency required the owner to dedicate an easement allowing the public to traverse the owner's beachfront property. 483 U.S. at 828. Had the state simply required an easement for public access, the Court "ha[d] no doubt there would have been a taking." *Id.* at 831. Likewise, in *Dolan*, the city required the landowner to dedicate a portion of her real property to a "greenway" that would include a bike and pedestrian path for the public. 512 U.S. at 379-380. The issue in *Nollan* and *Dolan* was not whether the government's condition had the character of a taking; "[w]ithout question," the Court noted, "a taking would have occurred" had the government simply required the landowner to dedicate an easement for public use. *Id.* at 384.

Rather, *Nollan* and *Dolan* examined the connection between legislative means and ends for a different purpose entirely: to decide whether a condition that would require compensation if imposed independently was sufficiently related to a legitimate goal of land-use regulation that the government need not pay for it. *See Lingle*, 544 U.S. at 546-547; *Dolan*, 512 U.S. at 385.

Nollan and *Dolan* thus placed the burden on the government to establish that the conditions imposed for approving the permit were appropriately connected to the government's legitimate regulatory objectives. They did so, however, only because the conditions demanded by the government would have actually transferred a property right from the landowner to the public. Where the government actually insists on such a transfer as a condition of granting a permit, without paying compensation, it is appropriate to require that the government justify its action.

Here, however, petitioner seeks something quite different. He insists that the District justify under the "nexus" and "proportionality" standard its enforcement of the requirement that he engage in mitigation, even though no exaction was ever imposed and petitioner suffered no loss of his property rights at all. In effect, petitioner is seeking to use the Just Compensation Clause to challenge the validity of the government's application of its regulatory framework to his property. Indeed, he rested his theory of the case at trial on *Agins*, arguing that the central issue for the court to determine was whether the District's enforcement of the mitigation requirement "substantially advanced any purpose." JA 147; *see supra* pp. 18-19. As this Court reaffirmed in *Lingle*, that is not the proper focus of the Just Compensation Clause.

Of course, petitioner could have brought a claim for compensation if the District's decision had required the physical invasion of the land, as in *Loretto*, or if it had eliminated all economically beneficial uses of the land, as in *Lucas*. He could also have argued that the District's denial of his permits was so onerous as to warrant compensation under *Penn Central*. Moreover, he was not limited to the Just Compensation Clause: he

could have challenged the District's decision as arbitrary or irrational under the Due Process Clause or the Equal Protection Clause (or state law) if it lacked any connection to a legitimate governmental objective. *See infra* pp. 50-51. But where a landowner challenges the validity of a proposed condition in a rejected development permit as a taking, he cannot obtain compensation merely by showing that *if* the District had approved the permit, and *if* he had accepted the condition, that condition would have failed the nexus and proportionality standards of *Nollan* and *Dolan.* Such a claim would simply resurrect the rejected approach of *Agins*.

II. THE *NOLLAN-DOLAN* FRAMEWORK DOES NOT APPLY BECAUSE THE DISTRICT DID NOT IMPOSE A CONDITION THAT WOULD, ON ITS OWN, WORK A TAKING

Even if a landowner could invoke *Nollan* and *Dolan* to obtain compensation for expenses he never incurred to comply with a condition that was never actually imposed, petitioner's claim nonetheless would fail. *Nollan* and *Dolan* apply only where the government exacts a condition that would itself constitute a taking if imposed by the government unilaterally, outside the permitting context. The government's demand for the surrender of an easement, for example—a classic invasion of real property rights—unquestionably would have been a taking on its own. *See Lingle*, 544 U.S. at 546; *Dolan*, 415 U.S. at 384; *Nollan*, 483 U.S. at 831-832.

Here, the predicate for application of *Nollan* and *Dolan* is absent. The District did not demand that petitioner surrender any property right. In fact, the District did not impose any condition on petitioner at all. Rather, it adjudicated his permit applications under generally applicable and facially valid rules requiring an applicant to show that the proposed development

would not result in unacceptable adverse effects on the environment. The District did suggest various ways that petitioner could have altered his project to reduce the harm to wetlands or to offset the destruction of wetlands on his property by enhancing other wetlands within the same hydrological basin, so that his proposals would meet the regulatory standards—and petitioner could have proposed additional options to satisfy those standards. But he declined all of the District's suggestions and offered no other options of his own. Accordingly, the District's governing board denied his permits on the ground that petitioner had not provided reasonable assurances that his development would not have an adverse impact on wetlands within the Econ Basin.

The particular suggestion that petitioner singles out for attack—that he undertake mitigation activity on District property that would have cost him money—also would not have constituted a taking, even if the District actually *had* mandated it (which it did not). Petitioner therefore cannot establish the fundamental requirement of a *Nollan-Dolan* claim, for no condition attendant to the permit would itself have been a taking.

A. *Nollan* And *Dolan* Do Not Apply Where The Government Denies A Permit Without Demanding Any Particular Condition

1. The District never conditioned issuance of a permit on payment for off-site mitigation

Contrary to petitioner's submission, the District never "exacted" *any* condition—much less did it impose a specific obligation on him to finance projects to enhance wetlands on the District's property within the Econ Basin. Under the District's permitting standards (Fla. Stat. § 373.414(1)(b) (1993)), petitioner was re-

quired to provide reasonable assurance that his project would not adversely affect the functions of the wetland system. Where mitigation was necessary to meet that requirement, it was the applicant's obligation to propose the form that mitigation would take. As explained above, *see supra* p. 10, the District's rules did not permit it to *require* any form of mitigation. Rather, as petitioner stipulated, the District instead suggested several alternatives "to reduce and offset the adverse impacts" of his development to the wetlands system within the Econ Basin "so that the District could permit the proposed project." JA 74. When petitioner rejected all these suggestions and offered no acceptable alternatives of his own, the District denied the permit.

Petitioner's inverse-condemnation claim does not challenge the facial validity of Florida's requirement that landowners mitigate the adverse environmental impacts of development as a condition to obtaining a permit; nor does it challenge the facial validity of the standards the District applied to determine whether the mitigation he proposed was sufficient. Petitioner stipulated that his proposed development would have resulted in the destruction of 3.4 acres of wetlands and 0.3 acres of protected uplands. JA 74. All that the District required was that petitioner offset—in whatever way he chose—the adverse environmental impact of his project in a manner sufficient to comply with the applicable regulatory standards. *Cf. Dolan*, 512 U.S. at 394 (noting that "it would have been reasonable to require [Ms. Dolan] to provide some alternative greenway space for the public either on her property or elsewhere" if her proposal encroached on existing greenway space). Accordingly, the essential predicate of a *Nollan-Dolan* claim—a concrete exaction that could amount to a taking—is absent in this case.

2. *Nollan* and *Dolan* should not be extended to cases where no particular condition is demanded and a permit is denied

Had the District denied petitioner's permit applications outright, without suggesting any ways in which petitioner could qualify for approval, it clearly would not have imposed any "exaction" subject to *Nollan* and *Dolan*. Petitioner nonetheless contends that the District incurred liability under *Nollan* and *Dolan* by identifying possible ways he could have provided adequate mitigation. But unlike the agencies in *Nollan* and *Dolan*, the District did not demand that petitioner perform any particular form of mitigation or relinquish any property interest. Imposing liability for a taking in such a circumstance would work considerable damage to the flexible process by which landowners and permitting agencies negotiate permit conditions. As the Supreme Court of Florida noted, if the government could be held liable for an "exaction" taking merely because it suggested ways of complying with the permit requirements, then it would "simply deny permits outright without discussion or negotiation rather than risk the crushing costs of litigation." Pet. App. A-20.

A rule allowing a *Nollan-Dolan* claim wherever an agency denies a permit without exacting any particular condition would also be difficult for courts to administer. As this case well shows, where a regulatory agency has merely suggested a range of ways an applicant may become eligible for a development permit, *Nollan* and *Dolan* make at best an uncomfortable fit. *See City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999) (noting that *Nollan* and *Dolan* are "not readily applicable" to the "denial of development" context). Without a final "deal" on the table between a landowner and a regulatory agency, it is unclear how

the "nexus" and "proportionality" standard would even apply. Under *Nollan* and *Dolan*, courts must scrutinize whether "the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. That test cannot be readily applied where there is no final "required dedication," but only a series of alternative proposals, none of which is ever insisted upon as the *sine qua non* of a permitting decision. To apply *Nollan* and *Dolan* in that context, a reviewing court would have to examine *each* of the potential options that the agency suggested to the applicant during the permitting process. If *any one* of those options satisfied the "nexus" and "proportionality" standard, then the agency's denial of the development permit would not be predicated on an unconstitutional condition.[16]

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[16] In this case, for example, the District suggested that petitioner reduce the scale of his development to one acre and dedicate his adjacent land to a conservation easement. The trial court never ruled whether that proposal satisfied the *Nollan-Dolan* standard. The District Court of Appeal suggested that the trial court "implicitly … decided as fact that the conservation easement offered by Mr. Koontz was enough," and that requiring any further mitigation "would exceed the rough proportionality threshold, whether in the form of off-site mitigation or a greater easement dedication for conservation." Pet. App. B-10 n.5 (majority op.). That statement lacks support in the record. First, the trial court's order did not even mention, much less address, any of the other mitigation suggestions. Second, the difference between petitioner's conservation proposal and the District's suggestion for conservation was less than three acres. It is implausible that the trial court "implicitly" decided, without any analysis, that accepting petitioner's conservation proposal would satisfy this Court's rough proportionality standard but that the District's suggestion violated the Constitution. It is much more likely, as the dissent observed, that the trial court simply failed to analyze the legality of this (or any other) option. *See* Pet. App. B-30 (Griffin, J., dissenting).

The expansion of *Nollan* and *Dolan* that petitioner seeks thus threatens to embroil courts in extensive litigation over the conduct of negotiations between landowners and permitting agencies. Permitting frequently consists of an extended give-and-take as the parties seek a resolution that is satisfactory to both the developer and the community. *See* Fenster, *Failed Exactions*, 36 Vt. L. Rev. 623, 643 (2012). When negotiations fail and the result is a lawsuit, the parties are likely to dispute what conditions were actually suggested (and by which party), whether those conditions were proposed in good faith, and what the burden of those conditions would have been had they been finalized into a development permit. Adding this layer of factual complexity would only exacerbate the problem that "[c]ases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law." *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

The litigation of this case illustrates the problem. This was in many respects a run-of-the-mill permitting decision. District staff made findings that petitioner's proposed development would adversely affect wetland functions in the Econ Basin. They found that petitioner's proposed mitigation was insufficient to offset those adverse effects. As often may occur, petitioner disagreed with those conclusions. In the trial of petitioner's "takings" claim, the parties simply relitigated those issues in the guise of a claim for just compensation. Such litigation seems far removed from the focused inquiry that the Court anticipated in *Nollan* and *Dolan*. And, as the Supreme Court of Florida observed, allowing a claim under *Nollan* and *Dolan* every time negotiations fail and a permit is denied would threaten agencies with

"prohibitively expensive" litigation (Pet. App. A-20), which would constrain agency flexibility to the detriment of both the community and the landowner. Therefore, *Nollan* and *Dolan* should not be expanded to cases where the government denies a permit without ever imposing or requiring any condition.

B. Even If The District Had Required Petitioner To Spend Money To Offset Wetland Destruction, That "Condition" Would Not Have Been A Taking

Petitioner contends that the District refused to issue permits to him unless he paid for projects to enhance wetlands on the District's own property. That simply is not what happened. But even if it was, that "condition" still would not support a claim under *Nollan* and *Dolan* because it does not constitute a taking. Petitioner's theory is that conditioning the issuance of permits on his agreement to spend money performing off-site mitigation would be a taking of his money. As noted, that theory bears little resemblance to the "taking" of *real property* for which petitioner sought and received compensation in the trial court. *See supra* p. 21. But in any event, the mere requirement to spend money to satisfy a regulatory standard does not amount to a taking of private property.

1. Under *Eastern Enterprises*, a financial obligation is not a taking

Petitioner exclaims that the District demanded "[his] money or [his] land!" Pet. Br. 7. In fact, to the extent that any of the District's suggested methods of mitigation—which were not demands at all—involved any payment of money, they would have required only that petitioner pay a third-party contractor to carry out

the suggested mitigation. The District did not demand a monetary exaction from petitioner's pockets into the government's coffers. Especially in this circumstance, *Eastern Enterprises* makes clear that the "condition" to perform off-site mitigation would not have effected a taking.

In *Eastern Enterprises*, the Court considered whether a federal statute imposing retroactive liability on a coal company to fund lifetime benefits for retirees effected a taking. *See* 524 U.S. at 504 (plurality op.). Five Justices concluded that it did not, holding that the Just Compensation Clause does not apply to a requirement to spend fungible money. Justice Kennedy agreed with the plurality that the statute was unconstitutional, but his analysis relied on the Due Process Clause. *See id.* at 539-540 (Kennedy, J., concurring in the judgment and dissenting in part). Justice Kennedy disagreed that a general financial liability is a taking. Specifically, he reasoned that the Court's regulatory takings jurisprudence has consistently been limited to government actions implicating "a specific property right or interest." *Id.* at 541. Although the statute at issue imposed a "staggering financial burden," Justice Kennedy wrote, it did not involve "an identified property interest." *Id.* It did not "appropriate, transfer, or encumber an estate in land … , a valuable interest in an intangible … , or even a bank account or accrued interest." *Id.* at 540. To the contrary, the statute "simply impose[d] an obligation to perform an act, the payment of benefits," and was "indifferent as to how the regulated entity elect[ed] to comply or the property it use[d] to do so." *Id.*

The four dissenting Justices—Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg—agreed with Justice Kennedy that takings analysis was

inapplicable. *See* 524 U.S. at 554-555 (Breyer, J., dissenting). They likewise reasoned that "[t]he 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property"—not "an ordinary liability to pay money." *Id.* at 554.

After *Eastern Enterprises*, the prevailing view among the federal courts of appeals is that a mere obligation to spend money is not a taking. *See, e.g.*, *West Va. CWP Fund* v. *Stacy*, 671 F.3d 378, 386-387 (4th Cir. 2011) (holding "that the mere imposition of an obligation to pay money does not give rise to a claim under the Takings Clause" and noting that other circuits are in accord); *McCarthy* v. *City of Cleveland*, 626 F.3d 280, 286 (6th Cir. 2010) ("[T]he Takings Clause is not an appropriate vehicle to challenge the power of [a legislature] to impose a mere monetary obligation without regard to an identifiable property interest." (alterations in original; internal quotation marks omitted)); *Swisher Int'l, Inc.* v. *Schafer*, 550 F.3d 1046, 1054 (11th Cir. 2008) ("[T]he takings analysis is not an appropriate analysis for the constitutional evaluation of an obligation imposed by Congress merely to pay money."); *Commonwealth Edison Co.* v. *United States*, 271 F.3d 1327, 1340 (Fed. Cir. 2001) ("[T]he mere imposition of an obligation to pay money … does not give rise to a claim under the Takings Clause[.]").

Even under petitioner's view, the alleged condition at issue here would have required him to do nothing more than spend money. The alleged condition "simply impose[d] an obligation to perform an act" that might have entailed the payment of funds, and the District was "indifferent" as to how petitioner "elect[ed] to comply" with that obligation "or the property [he] use[d] to do so," *Eastern Enters.*, 524 U.S. at 541 (Ken-

nedy, J., concurring in the judgment and dissenting in part); *accord id.* at 554-555 (Breyer, J., dissenting). Consequently, under the reasoning of a majority of Justices in *Eastern Enterprises*, even an actual obligation that petitioner spend money, had it been imposed, would not rise to a taking.

2. This Court's other decisions do not recognize an obligation to spend money to be a taking

Petitioner does not acknowledge (or even cite) *Eastern Enterprises*. Instead, he asserts without elaboration that "money" is property within the meaning of the Just Compensation Clause. Working from that faulty premise, and relying on this Court's decision in *Brown* v. *Legal Foundation of Washington*, 538 U.S. 216 (2003), he claims that imposing an obligation to spend money effects a taking of property.

Brown, however, has nothing to do with an obligation to spend money from general funds, which is what is at issue here. The specific property interest at stake there was the accrued interest on funds held in an IOLTA account by a lawyer on behalf of his clients. *See* 538 U.S. at 235; *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 170 (1998). The Court concluded that a State's seizure of that interest, a discrete asset, was analogous "to the occupation of a small amount of rooftop space in *Loretto*." *Brown*, 538 U.S. at 235; *see also Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163-164 (1980) (analogizing government seizure of interest accruing on funds placed in interpleader to an appropriation of private property).

The touchstone in *Brown*, as well as *Webb's Fabulous Pharmacies*, is a government burden that is functionally equivalent to an appropriation of real property.

Accord Lingle, 544 U.S. at 539. That touchstone is notably absent here. First, unlike in *Brown* or in *Webb's Fabulous Pharmacies*, the District never *seized* anything. Even accepting petitioner's theory of this case, the District at most required that he mitigate the impact on wetlands within the Econ Basin by *spending* money for mitigation projects within that Basin.[17]

Second, unlike the seizure of accrued interest, the imposition of monetary liability "is not, of course, a permanent physical occupation of … property of the kind that [the Court] ha[s] viewed as a *per se* taking." *Eastern Enters.*, 524 U.S. at 530 (plurality op.) (citing *Loretto*, 458 U.S. at 441)). "Unlike real or personal property, money is fungible." *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989); *see McClung* v. *City of Sumner*, 548 F.3d 1219, 1228 (9th Cir. 2008) (relying on *Sperry* in rejecting argument that *Nollan* and *Dolan*

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[17] The Court's decision in *Village of Norwood* v. *Baker*, 172 U.S. 269 (1898), is not on point here. That case involved a special assessment that effected an uncompensated condemnation of real property. *See id.* at 274-278. The Village of Norwood condemned a strip of land for the purpose of constructing a road. *Id.* at 274-275. A jury awarded the landowner, Ellen Baker, $2,000 for the value of the condemned strip, and the village paid the full amount to Ms. Baker. *Id.* at 275. But the village then passed an ordinance providing that the full costs of the condemnation, including the compensation it had paid to her, were to be assessed on the "abutting property" owner—that is, Ms. Baker. *Id.* Consequently, the village assessed Ms. Baker "not only the full amount paid for the strip condemned, but [also] the cost and expenses of the condemnation proceedings[.]" *French* v. *Barber Asphalt Paving Co.*, 181 U.S. 324, 344 (1901). The Court plainly understood the village's action to be a remarkable effort to evade its just compensation obligation: the village physically took Ms. Baker's real property and then forced *her* to pay for the privilege. The Court thus rightly rejected the village's argument that its "act of confiscation" was "a valid exercise of the taxing power." *Id.*

apply to a "monetary exaction"). If a general financial liability were construed to be "a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance." *Sperry*, 493 U.S. at 63 n.9. "Such a rule," the Court cautioned, "would be an extravagant extension of *Loretto*." *Id.* This caution counsels strongly against recognizing the takings claim here as well.[18]

3. *Nollan* and *Dolan* should not be extended to reach conditions that merely require an applicant to spend money to satisfy regulatory standards

"As the range of governmental conduct subjected to takings analysis has expanded," this Court has "been careful not to lose sight of the importance of identifying the property allegedly taken, lest all governmental action be subjected to examination under the constitutional prohibition against taking without just compensation, with the attendant potential for money damages." *Eastern Enters.*, 524 U.S. at 543 (Kennedy, J., concurring in the judgment and dissenting in part). Expanding the application of *Nollan* and *Dolan* to reach conditions on the issuance of permits that merely require the expenditure of fungible money would expose a broad range of monetary obligations—application

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[18] None of the other authorities cited by petitioner provides any support for such an extravagant extension of *Loretto*. Petitioner cites the Court's "grant, vacate, and remand" (GVR) order in *Ehrlich* v. *City of Culver City*, 512 U.S. 1231 (1994) (mem.), for the proposition that *Nollan* and *Dolan* must apply to a monetary obligation. But the Court's GVR order was "not a 'final determination on the merits.'" *Tyler* v. *Cain*, 533 U.S. 656, 664 n.6 (2001). It was a means of allowing lower-court consideration of an intervening legal development: namely, the Court's decision in *Dolan*, issued three days earlier. *See Ehrlich*, 512 U.S. at 1231.

fees, usage fees, and so forth—to heightened scrutiny under *Nollan* and *Dolan*. Petitioner suggests no limiting principle that would prevent many other fees, assessments, and taxes imposed on a daily basis, for everything from obtaining a driver's license to traveling on a toll road or parking at a metered space, from being subjected to takings litigation. But that cannot be the law. *See, e.g.*, *Sperry*, 493 U.S. at 62 n.9; *Brown*, 538 U.S. at 243 n.2 (Scalia, J., dissenting) ("[T]axes and user fees … are not takings[.]").

Nor does petitioner explain why his theory would not result in an exaction taking every time a permit applicant incurs costs to bring himself into compliance with a generally applicable regulatory standard. Many permitting standards require applicants to acquire new technologies to minimize harm to the environment or to undertake offsetting mitigation to compensate for expected harms from a proposed project. *See, e.g.*, 42 U.S.C. § 7475 (requiring, as part of the Clean Air Act's Prevention of Significant Deterioration permitting process, that new major emitting facilities in certain areas be constructed with "the best available control technology for each pollutant subject to regulation"). Permit applicants often must spend money to ensure that they satisfy those standards and that their development projects do not contravene public policy. For courts to impose heightened scrutiny under *Nollan* and *Dolan* merely because regulators have enforced those standards would mark a significant expansion of the scope of the Just Compensation Clause and of the Judiciary's power at the expense of the other branches.

Rejecting petitioner's claim for compensation under *Nollan* and *Dolan* would not mean that the government is free to impose monetary or other similar conditions on the issuance of land-use permits without

any constitutional restraint. Petitioner could have argued that the District's application of the regulatory framework so heavily burdened his right to use his property as to constitute a regulatory taking under *Lucas* or *Penn Central*. He might have argued that, in denying the permits, the District violated the Equal Protection Clause because it intentionally treated him differently from other similarly situated landowners with no rational basis. *See Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564-565 (2000). Or he might have contended that denial of the permits was arbitrary and irrational and therefore violated the Due Process Clause. *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *Lingle*, 524 U.S. at 548 (Kennedy, J., concurring) ("[T]oday's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process."); *Eastern Enters.*, 524 U.S. at 539 (Kennedy, J., concurring in the judgment and dissenting in part) (expressing view that the statute in question "must be invalidated as contrary to essential due process principles"); *id.* at 556 (Breyer, J., dissenting) ("The question involved … finds a natural home in the Due Process Clause[.]"). And landowners in petitioner's position might also have numerous claims arising under state law, including state constitutional protections for property rights, state takings analogues, and well-settled principles that state permitting agencies may not act in an arbitrary and capricious manner. *See, e.g.*, Fla. Stat. § 70.001 (providing a cause of action for "laws, regulations, and ordinances of the state and political entities in the state" that "may inordinately burden, restrict, or limit private property

rights without amounting to a taking under the State Constitution or the United States Constitution").[19]

Any of these approaches presents a means by which landowners can challenge permit denials based on refusals to accede to monetary or similar conditions without extending *Nollan* and *Dolan* to that context. Given the availability of these alternative remedies to a landowner in petitioner's position, there is no merit to petitioner's concern that his novel takings theory is necessary to protect landowners from oppressive permitting agencies.

CONCLUSION

The judgment of the Supreme Court of Florida should be affirmed.

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[19] Petitioner's amici inveigh at length on what they allege to be examples of extortionate conditions demanded of property owners in other cases. These stories are based on, among other things, untested allegations in a complaint and assertions made in amicus briefs filed in other cases. *See, e.g.*, Br. of Ass'n of Fla. Cmty. Developers 10 & n.5 (example based solely on allegations in a complaint that was voluntarily dismissed). Such unverified claims should not be taken at face value and have no bearing here. Moreover, as discussed above, rejecting petitioner's theory of *Nollan* and *Dolan* does not foreclose judicial review of land-use regulation on other Just Compensation Clause grounds (such as *Lucas* or *Penn Central*) or on Due Process or Equal Protection Clause grounds, to say nothing of state-law grounds.

Respectfully submitted.

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APPENDICES

U.S. Const. amend. V

No person shall … be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, § 1

… No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fla. Stat. § 120.57 (1993)—Decisions which affect substantial interests

The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency, unless such proceedings are exempt pursuant to subsection (5). Unless waived by all parties, subsection (1) applies whenever the proceeding involves a disputed issue of material fact. Unless otherwise agreed, subsection (2) applies in all other cases.

(1) FORMAL PROCEEDINGS.—

* * *

(b) In any case to which this subsection is applicable, the following procedures apply:

1. A request for a hearing shall be granted or denied within 15 days of receipt.

2. All parties shall be afforded an opportunity for a hearing after reasonable notice of not less than 14 days; however, the 14-day notice requirement may be waived with the consent of all parties. …

* * *

3. Except for any proceeding conducted as prescribed in s. 120.54(4) or s. 120.56, a petition or request for a hearing under this section shall be filed with the agency. If the agency elects to request a hearing officer from the division, it shall so notify the division within 15 days of receipt of the petition or request. When the Florida Land and Water Adjudicatory Commission receives a notice of appeal pursuant to s. 380.07, the commission shall notify the division within 60 days of receipt of the notice of appeal if the commission elects to request the assignment of a hearing officer. In the request of any agency, the division shall assign a hearing officer with due regard to the expertise required for the particular matter. The referring agency shall take no further action with respect to the formal proceeding, except as a party litigant, as long as the division has jurisdiction over the formal proceeding. Any party may request the disqualification of the hearing officer by filing an affidavit with the division prior to the taking of evidence at a hearing, stating the grounds with particularity.

4. All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to any order or hearing officer's recommended order, and to be represented by counsel. When appropriate, the general public may be given an opportunity to present oral or written communications. If the agency proposes to consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebut it.

* * *

6. The record in a case governed by this subsection shall consist only of:

a. All notices, pleadings, motions, and intermediate rulings;

b. Evidence received or considered;

c. A statement of matters officially recognized;

d. Questions and proffers of proof and objections and rulings thereon;

e. Proposed findings and exceptions;

f. Any decision, opinion, proposed or recommended order, or report by the officer presiding at the hearing;

g. All staff memoranda or data submitted to the hearing officer during the hearing or prior to its disposition, after notice of the submission to all parties, except communications by advisory staff as permitted under s. 120.66(1), if such communications are public records;

h. All matters placed on the record after an ex parte communication pursuant to s. 120.66(2); and

i. The official transcript.

7. The agency shall accurately and completely preserve all testimony in the proceeding, and, on the request of any party, it shall make a full or partial transcript available at no more than actual cost. In any proceeding before a hearing officer initiated by a consumptive use permit applicant pursuant to subparagraph 14., the applicant shall bear the cost of accurately and completely preserving all testimony and providing full or partial transcripts to the water management district. At the request of any other party, full or partial transcripts shall be provided at no more than cost.

8. Findings of fact shall be based exclusively on the evidence of record and on matters officially recognized.

9. Except as provided in subparagraph 13., the hearing officer shall complete and submit to the agency and all parties a recommended order consisting of his findings of fact, conclusions of law, interpretation of administrative rules, and recommended penalty, if applicable, and any other information required by law or agency rule to be contained in the final order. The agency shall allow each party at least 10 days in which to submit written exceptions to the recommended order.

10. The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the recommended order. The agency may not reject or modify the findings of fact, including findings of fact that form the basis for an agency statement, unless the agency first determines from a review of the complete record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action. When there is an appeal, the court in its discretion may award reasonable attorney's fees and costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion.

* * *

(2) INFORMAL PROCEEDINGS.—In any case to which subsection (1) does not apply:

(a) The agency shall, in accordance with its rules of procedure:

1. Give reasonable notice to affected persons or parties of the action of the agency, whether proposed or already taken, or of its decision to refuse action together with a summary of the factual, legal, and policy grounds therefor.

2. Give affected persons or parties or their counsel an opportunity, at a convenient time and place, to present to the agency or hearing officer written or oral evidence in opposition to the action of the agency or of its refusal to act, or a written statement challenging the grounds upon which the agency has chosen to justify its action or inaction.

3. If the objections of the persons or parties are overruled, provide a written explanation within 7 days.

(b) The record shall only consist of:

1. The notice and summary of grounds;

2. Evidence received or considered;

3. All written statements submitted by persons and parties;

4. Any decision overruling objections;

5. All matters placed on the record after an ex parte communication pursuant to s. 120.66(2); and

6. The official transcript.

(3) Unless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order.

(4) This section does not apply to agency investigations preliminary to agency action.

* * *

Fla. Stat. § 120.68 (1993)—Judicial review

(1) A party who is adversely affected by final agency action is entitled to judicial review. … A preliminary, procedural, or intermediate agency action or ruling, including any order of a hearing officer, is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(2) Except in matters for which judicial review by the Supreme Court is provided by law, all proceedings for review shall be instituted by filing a petition in the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides. … Review proceedings shall be conducted in accordance with the Florida Rules of Appellate Procedure.

* * *

(4) Judicial review of any agency action shall be confined to the record transmitted and any additions made thereto in accordance with subsection (6).

(5) The record for judicial review shall consist of the following:

(a) The agency's written document expressing the order, the statement of reasons therefor, if issued, and the record under s. 120.57, if review of proceedings under that section is sought.

(b) The agency's written document expressing the action, the statement of reasons therefor, if issued, and the materials considered by the agency under s. 120.54, if review is sought of proceedings under that section.

(c) The agency's written document expressing the action, and other written documents identified by the agency as having been considered by it before its action and used as a basis for its action, if review is sought of proceedings under s. 120.56 or s. 120.565 or if there has been no proceeding under s. 120.54 or s. 120.57.

(6) When there has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts, the court shall order the agency to conduct a prompt, factfinding proceeding under this act after having a reasonable opportunity to reconsider its determination on the record of the proceedings.

(7) The reviewing court shall deal separately with disputed issues of agency procedure, interpretations of law, determinations of fact, or policy within the agency's exercise of delegated discretion.

(8) The court shall remand the case for further agency action if it finds that either the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure. Failure of any agency to comply with s. 120.53 shall be presumed to be a material error in procedure.

(9) If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:

(a) Set aside or modify the agency action, or

(b) Remand the case to the agency for further action under a correct interpretation of the provision of law.

(10) If the agency's action depends on any fact found by the agency in a proceeding meeting the requirements of s. 120.57, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record.

(11) If the agency's action depends on facts determined pursuant to subsection (6), the court shall set aside, modify, or order agency action if the facts compel a particular action as a matter of law, or it may remand the case to the agency for further examination and action within the agency's responsibility.

(12) The court shall remand the case to the agency if it finds the agency's exercise of discretion to be:

(a) Outside the range of discretion delegated to the agency by law;

(b) Inconsistent with an agency rule;

(c) Inconsistent with an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency; or

(d) Otherwise in violation of a constitutional or statutory provision;

but the court shall not substitute its judgment for that of the agency on an issue of discretion.

(13)(a) The decision of the reviewing court may be mandatory, prohibitory, or declaratory in form; and it

shall provide whatever relief is appropriate irrespective of the original form of the petition. The court may:

1. Order agency action required by law, order agency exercise of discretion when required by law, set aside agency action, remand the case for further agency proceedings, or decide the rights, privileges, obligations, requirements, or procedures at issue between the parties; and

2. Order such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld.

(b) If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as the court finds necessary to preserve the interests of any party and the public pending further proceedings or agency action.

(14) Unless the court finds a ground for setting aside, modifying, remanding, or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.

(15) No petition challenging an agency rule as an invalid exercise of delegated legislative authority shall be instituted pursuant to this section, except to review an order entered pursuant to a proceeding under s. 120.54(4) or s. 120.56, unless the sole issue presented by the petition is the constitutionality of a rule and there are no disputed issues of fact.

Fla. Stat. § 373.413 (1993)—Permits for construction or alteration

(1) Except for the exemptions set forth herein, the governing board or the department may require such permits and impose such reasonable conditions as are necessary to assure that the construction or alteration

of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works will comply with the provisions of this part and applicable rules promulgated thereto and will not be harmful to the water resources of the district. The department or the governing board may delineate areas within the district wherein permits may be required.

(2) A person proposing to construct or alter a stormwater management system, dam, impoundment, reservoir, appurtenant work, or works subject to such permit shall apply to the governing board or department for a permit authorizing such construction or alteration. The application shall contain the following:

(a) Name and address of the applicant.

(b) Name and address of the owner or owners of the land upon which the works are to be constructed and a legal description of such land.

(c) Location of the work.

(d) Sketches of construction pending tentative approval.

(e) Name and address of the person who prepared the plans and specifications of construction.

(f) Name and address of the person who will construct the proposed work.

(g) General purpose of the proposed work.

(h) Such other information as the governing board or department may require.

* * *

Fla. Stat. § 373.414 (1993)—Additional criteria for activities in surface waters and wetlands

(1) As part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district, the governing board or the department shall require the applicant to provide reasonable assurance that state water quality standards applicable to waters as defined in s. 403.031(13) will not be violated and reasonable assurance that such activity in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), is not contrary to the public interest. However, if such an activity significantly degrades or is within an Outstanding Florida Water, as provided by department rule, the applicant must provide reasonable assurance that the proposed activity will be clearly in the public interest.

(a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not contrary to the public interest or is clearly in the public interest, the governing board or the department shall consider and balance the following criteria:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;

2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

5. Whether the activity will be of a temporary or permanent nature;

6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

(b) If the applicant is unable to otherwise meet the criteria set forth in this subsection, the governing board or the department, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects which may be caused by the regulated activity. If the applicant is unable to meet water quality standards because existing ambient water quality does not meet standards, the governing board or the department shall consider mitigation measures proposed by the applicant that cause net improvement of the water quality in the receiving body of water for those parameters which do not meet standards. If mitigation requirements imposed by a local government for surface water and wetland impacts of an activity regulated under this part cannot be reconciled with mitigation requirements approved under a permit for the same activity issued under this part, the mitigation requirements for surface water and wetland impacts shall be controlled by the permit issued under this part.

* * *

(8) The governing board or the department, in deciding whether to grant or deny a permit for an activity regulated under this part shall consider the cumulative impacts upon surface water and wetlands, as delineated in s. 373.421(1), within the same drainage basin as defined in s. 373.403(9), of:

(a) The activity for which the permit is sought.

(b) Projects which are existing or activities regulated under this part which are under construction or projects for which permits or determinations pursuant to s. 373.421 or s. 403.914 have been sought.

(c) Activities which are under review, approved, or vested pursuant to s. 380.06, or other activities regulated under this part which may reasonably be expected to be located within surface waters or wetlands, as delineated in s. 373.421(1), in the same drainage basin as defined in s. 373.403(9), based upon the comprehensive plans, adopted pursuant to chapter 163, of the local governments having jurisdiction over the activities, or applicable land use restrictions and regulations.

* * *

Fla. Stat. § 373.415 (1993)—Protection zones; duties of the St. Johns River Water Management District

(1) Not later than November 1, 1988, the St. Johns River Water Management District shall adopt rules establishing protection zones adjacent to the watercourses in the Wekiva River System, as designated in s. 369.303(10). Such protection zones shall be sufficiently wide to prevent harm to the Wekiva River System, including water quality, water quantity, hydrology, wetlands, and aquatic and wetland-dependent wildlife species, caused by any of the activities regulated under

this part. Factors on which the widths of the protection zones shall be based shall include, but not be limited to:

(a) The biological significance of the wetlands and uplands adjacent to the designated watercourses in the Wekiva River System, including the nesting, feeding, breeding, and resting needs of aquatic species and wetland-dependent wildlife species.

(b) The sensitivity of these species to disturbance, including the short-term and long-term adaptability to disturbance of the more sensitive species, both migratory and resident.

(c) The susceptibility of these lands to erosion, including the slope, soils, runoff characteristics, and vegetative cover. In addition, the rules may establish permitting thresholds, permitting exemptions, or general permits, if such thresholds, exemptions, or general permits do not allow significant adverse impacts to the Wekiva River System to occur individually or cumulatively.

* * *

(4) Nothing in this section shall affect the authority of the water management districts created by this chapter to adopt similar protection zones for other watercourses.

(5) Nothing in this section shall affect the authority of the water management districts created by this chapter to decline to issue permits for development which have not been determined to be consistent with local comprehensive plans or in compliance with land development regulations in areas outside the Wekiva River Protection Area.

(6) Nothing in this section shall affect the authority of counties or municipalities to establish setbacks from any surface waters or watercourses.

(7) The provisions of s. 373.617 are applicable to final actions of the St. Johns River Water Management District with respect to a permit or permits issued pursuant to this section.

Fla. Stat. § 373.617 (1993)—Judicial review relating to permits and licenses

(1) As used in this section, unless the context otherwise requires:

(a) "Agency" means any official, officer, commission, authority, council, committee, department, division, bureau, board, section, or other unit or entity of state government.

(b) "Permit" means any permit or license required by this chapter.

(2) Any person substantially affected by a final action of any agency with respect to a permit may seek review within 90 days of the rendering of such decision and request monetary damages and other relief in the circuit court in the judicial circuit in which the affected property is located; however, circuit court review shall be confined solely to determining whether final agency action is an unreasonable exercise of the state's police power constituting a taking without just compensation. Review of final agency action for the purpose of determining whether the action is in accordance with existing statutes or rules and based on competent substantial evidence shall proceed in accordance with chapter 120.

(3) If the court determines the decision reviewed is an unreasonable exercise of the state's police power

constituting a taking without just compensation, the court shall remand the matter to the agency which shall, within a reasonable time:

(a) Agree to issue the permit;

(b) Agree to pay appropriate monetary damages; however, in determining the amount of compensation to be paid, consideration shall be given by the court to any enhancement to the value of the land attributable to governmental action; or

(c) Agree to modify its decision to avoid an unreasonable exercise of police power.

(4) The agency shall submit a statement of its agreed-upon action to the court in the form of a proposed order. If the action is a reasonable exercise of police power, the court shall enter its final order approving the proposed order. If the agency fails to submit a proposed order within a reasonable time not to exceed 90 days which specifies an action that is a reasonable exercise of police power, the court may order the agency to perform any of the alternatives specified in subsection (3).

(5) The court shall award reasonable attorney's fees and court costs to the agency or substantially affected person, whichever prevails.

(6) The provisions of this section are cumulative and shall not be deemed to abrogate any other remedies provided by law.

Fla. Admin. Code r. 17-312.030 (1994)—Jurisdiction

(1) Pursuant to Sections 403.031(12) and 403.913, F.S., dredging and filling conducted in, on, or over those surface waters of the state as provided in this rule, require a permit from the Department unless spe-

cifically exempted in Sections 403.813, 403.913, 403.927, F.S., or Rule 17-312.050, F.A.C.

* * *

Fla. Admin. Code r. 17-312.080 (1994)—Standards for Issuance or Denial of a Permit

(1) In accordance with Section 403.918(1), F.S., no permit shall be issued unless the applicant has provided the Department with reasonable assurance based on plans, test results or other information that the proposed dredging or filling will not violate water quality standards.

(2) No permit shall be issued unless the applicant provides the Department with reasonable assurance based on plans, test results or other information that the project is not contrary to the public interest in accordance with Section 403.918(2), F.S.

* * *

(4) A permit may contain specific conditions reasonably necessary to assure compliance with Section 403.918, F.S.

* * *

Fla. Admin. Code r. 17-312.300 (1994)—Intent

(1) It is the intent of this rule to implement Section 403.918(2)(b), F.S., by establishing criteria to be followed in evaluating proposals to mitigate the adverse impacts of dredging and filling in waters of the state that caused the project to be not permittable.

* * *

(3) The Department will, in each case, first explore project modifications that would reduce or eliminate the adverse environmental impacts of the project, and will suggest any such modifications to the applicant either in addition to or in lieu of mitigation, as provided

in Rule 17-312.060(10), F.A.C. The applicant shall consider modifications to the project proposed by the Department, whether or not a mitigation proposal has been submitted. Should such mutual consideration of modification and mitigation not result in a permittable project the Department must deny the permit.

(4) The Department shall consider any mitigation proposed by a permit applicant in accordance with this rule. Mitigation may be proposed by a permit applicant, or suggested by the Department only where the proposed dredging and filling would otherwise be unable to meet the criteria of Sections 403.918(1) and (2)(a), F.S., and Rule 17-312.080, F.A.C. However, mitigation may not be required by the Department. Mitigation is neither necessary for nor applicable to projects covered by general permits or projects exempt from the requirements for individual dredge and fill construction permits.

(5) It is understood that in certain circumstances mitigation proposals for dredging and filling projects will not be able to offset the adverse impacts of the project sufficiently to yield a permittable project. Such instances may include projects that are in or that would significantly degrade Outstanding Florida Waters, the presence of endangered species or the likelihood that a particular wetland type may not be successfully created.

(6) The Department recognizes that other agencies are concerned with adverse impacts on waters of the state and may require mitigation for such impacts. Mitigation or reclamation required by other agencies will be acceptable to the Department to the extent that such mitigation or reclamation fulfills the Department's statutory requirements. If not, additional measures

shall be necessary to fulfill the Department's requirements. It is the intent of the Department to reduce duplication of regulatory requirements. To that end, inspections, reports or other similar reviews of mitigation projects by the Department of Natural Resources or other agencies will be used to augment the Department's determination of compliance with permit requirements.

* * *

Fla. Admin. Code r. 17-312.340 (1994)—Evaluation of Mitigation Proposals

The Department recognizes that each mitigation proposal must be evaluated on a case by case basis. It is necessary to first determine the probability that the proposed mitigation will offset the actual adverse impacts of the dredging and filling, including cumulative impacts, as identified by those negative aspects of the project that resulted in a negative permitting balance. The Department in making this determination will consider the likelihood that the mitigation will be successful.

The permit applicant shall provide the Department with reasonable assurances that the mitigation shall meet the success criteria in Rule 17-312.350, F.A.C., and shall comply with the following standards, where applicable:

(1) Type of waters of the state.

(a) Reclamation activities pursuant to Section 211.32, F.S., may be considered as mitigation to the extent that the type, nature, and function of the biological systems existing prior to mining are restored or improved. For waters and mining activities that fall under the jurisdiction of the Florida Department of Natu-

ral Resources pursuant to Chapter 378, F.S., approved DNR reclamation plans that have been reviewed and favorably commented upon in writing by the Department prior to final approval by DNR will be presumed to be acceptable as mitigation by the Department with respect to the waters addressed in those plans. This presumption may only be rebutted by evidence that the plans do not fulfill the Department's statutory and regulatory requirements.

(b) For other activities, the Department will identify the functions that will be impacted by the project and that have resulted in the project being determined to be contrary to the public interest pursuant to Sections 403.918(1) and (2)(a), F.S. Based on that analysis the Department will judge whether the mitigation proposal will offset those identified negative aspects of the dredge and fill project. Offsetting the adverse impacts will usually be best addressed through protection, enhancement or creation of the same type of waters (e.g., Spartina marsh, Cypress swamp, etc.), as those being affected by the proposed project. However, where the waters being affected have been significantly altered by human activity or other factors such as, but not limited to, drainage or invasion of exotic or nuisance species, a mitigation proposal utilizing other types of waters may be considered. Where mitigation using other types of waters is considered, preference will usually be given to utilization of the type of waters that were historically present before alteration.

(2) Ratios for created waters of the state. The mitigation proposed shall be sufficient to offset the adverse impacts expected to occur due to the proposed dredging and filling that render the project unpermittable. For mitigation involving the creation of waters of the state, the Department shall use as a guideline two acres

created for each acre adversely impacted by the proposed dredging or filling. This guideline is for preliminary planning purposes only and the actual extent of wetland creation may be more or less based on a consideration of the factors listed in subparagraphs (a) through (h) below.

(a) The length of time that can be expected to elapse before the functions of the waters of the state identified during the permitting process as being adversely affected have been restored or offset.

(b) Any special designation or classification specified in Chapters 17-3, 17-4, or 17-312, F.A.C., affecting the water body.

(c) The type of waters to be created and the likelihood of successfully creating that type of waters.

(d) Whether or not the waters of the state to be affected by the proposed dredging or filling are functioning as natural, healthy waters of the state of that type, and the current condition and relative value of functions being performed by the areas affected by the proposed activity compared to the proposed character and quality of the wetlands to be created.

(e) Whether the waters of the state are unique for that geographical area.

(f) For mine reclamation activities subject to Chapter 211, F.S., Part II, whether the ratio is consistent with the mine reclamation plan submitted to the Department of Natural Resources.

(g) The presence or absence of exotic or nuisance plant species within the waters of the state to be disturbed or altered.

(h) Whether the proposed project eliminates waters or changes waters from one type to another.

(3) Ratios for enhanced waters of the state. It is recognized that stressed wetlands provide some degree of wetland function. When enhancement is proposed, the Department must make a judgment regarding the degree of enhancement expected to occur. The degree of expected enhancement must be weighed against the adverse impacts identified in the evaluation of the dredge and fill project. In general, ratios for enhanced waters shall be higher than for created waters. Factors that should be considered in establishing a ratio include:

(a) The degree to which the wetlands to be enhanced have been stressed.

(b) The type of stress the wetlands to be enhanced have experienced.

(c) The cause of the stress.

(d) Whether the proposed method of enhancement is one that will be low maintenance or self-regulating once implemented.

(e) The likelihood that the proposed enhancement will be successful in offsetting the adverse impacts of the dredge and fill project that caused the project to be not permittable.

(4) Protection of the mitigation area. The permit applicant shall propose appropriate methods to assure that the created or enhanced waters will not be adversely affected during the establishment phase by secondary impacts resulting from human activities such as, but not limited to, boat traffic and other recreational uses. Such assurances may include, but shall not be limited to, restricting access to the site.

(5) Exotic or nuisance species. The proposed mitigation plan shall include a requirement that exotic and nuisance species be removed from the mitigation area. The plan shall also include reasonable measures to assure that these species do not invade the mitigation area in such numbers as to affect the likelihood of success of the project. Depending on the topography of the area and the species involved, such measures could include, but not be limited to, continuing maintenance and/or a buffer zone.

(6) Location of mitigation area. Because the adverse impacts of a dredge and fill project rarely occur off-site, mitigation activities off-site are not generally acceptable unless they would better offset the adverse impacts. There are some instances where on-site mitigation may not be possible or may be restricted, such as, but not limited to, road projects and utility corridors. In such instances, the mitigation should be in close proximity to the dredge and fill site, in the same waterbody or within the same drainage basin, if possible. The negative aspects of the dredge and fill project must be offset by the off-site mitigation, as in any other mitigation.

When fish and wildlife habitat functions are a concern, several points shall be considered:

(a) The types of habitat function being performed at the site; such as fishery nursery area, rookery, multi-species habitat, foraging value, shelter value.

(b) The species to be affected by the project.

(c) The relative value of the site; such as whether it is the last remaining area of that habitat in the vicinity or whether the site is pristine.

(d) Whether the proposed off-site mitigation can reasonably be expected to offset the impacts of the project on specific habitat functions that would be affected as a result of the project.

(7) Use of donor sites. The use of waters of the state as plant or soil donor sites, where such use involves any dredging or filling, shall not be allowed except pursuant to an exempted activity, a Department permit or consent order.

(8) Location of donor site. Whenever practical, waters of the state which are to be dredged or filled shall be utilized as plant or soil donor sites for mitigation under this Part.

Fla. Admin. Code r. 17-312.370 (1994)—Restrictions on Property Use

(1) Property restrictions as mitigation.

(a) Conservation easements or other such deed restrictions, and land conveyances, will be considered as mitigation only where they offset potential adverse impacts of the proposed dredging and filling, including cumulative impacts pursuant to Section 403.919, F.S.

(b) Property restrictions and conveyances may be considered as mitigation when they would preclude development in wetlands otherwise unprotected by the regulatory processes in Section 403.918, F.S., or in waters of the state that may be subject to future dredge and fill permit applications. In certain circumstances property restrictions on or conveyance of uplands adjacent to protected wetlands will be acceptable. The evaluation of the lands proposed for restriction or conveyance will be considered with respect to whether they would offset the negative aspects of the dredge and fill project that have rendered it unpermittable.

(2) Conservation easements on mitigation areas.

(a) A conservation easement for any mitigation area created, enhanced or reclaimed as part of a mitigation proposal may be required as a condition of the dredge and fill permit under the following circumstances:

1. If the applicant proposes mitigation which, upon completion, would be outside the Department's dredge and fill jurisdiction, and the applicant cannot provide reasonable assurance that the mitigation of adverse impacts will not be lost after completion of the mitigation, the Department may require a conservation easement for such mitigation area, equal in duration to the period of time necessary to provide such reasonable assurance.

2. If necessary to provide a reasonable period of time for establishment of a functioning system, the Department may require a temporary conservation casement for the mitigation area, equal in duration to the period necessary for establishment of a functioning system in such area.

(b) The Department may accept a comparable use restriction such as, but not limited to, state or federal ownership.

(3) Requirements for conservation easements. Any conservation easement provided under Rule 17-312.370(1), F.A.C., shall be perpetual, and all conservation easements shall be consistent with the requirements of Section 704.06, F.S.

(a) It shall be the responsibility of the permit applicant to provide for a survey of the boundaries of any property which is being conveyed to the State or for which a conservation easement is being provided.

(b) The recording of the conservation easement is required and shall be the responsibility of the permittee.

(4) Title to mitigation area. The applicant shall demonstrate sufficient title to the created or enhanced waters of the state to meet the requirements of Rule 17-312.370(3)(a)-(b), above, or shall provide the appropriate conveyance from the owner or owners holding such title so that the requirements are met.

Fla. Admin. Code r. 40C-4.041 (1994)—Permitting Thresholds

(1) Unless expressly exempt by sections 373.406 and 403.813, F.S., or sections 40C-4.051 or 40C-44.051, F.A.C., an individual or general permit must be obtained from the District prior to the construction, alteration, operation, maintenance, abandonment or removal of any dam, impoundment, reservoir, appurtenant work or works and for the maintenance and operation of existing agricultural surface water management systems or the construction of new agricultural surface water management systems.

(2) The District issues three types of surface water management permits: conceptual approval permits, individual permits and general permits.

(a) A conceptual approval permit may be issued for projects that are to be developed in phases. A letter of conceptual approval does not authorize any construction.

(b) An individual or general permit is required prior to the construction, alteration, operation, maintenance, abandonment or removal of a surface water management system which:

* * *

10. Consists of or includes filling in, excavation in, or drainage of a wetland which is not isolated when any of the filling, excavation, or drainage is located within the Econlockhatchee River Hydrologic Basin; or

* * *

(d) An individual permit may be issued for projects which do not qualify for general permits under the provisions of Chapter 40C-40, F.A.C. An individual permit may authorize the construction, alteration, operation, maintenance, abandonment or removal of a system.

* * *

Fla. Admin. Code r. 40C-4.091 (1994)—Publications Incorporated by Reference

(1) The Governing Board hereby adopts by reference:

(a) Part I "Policy and Procedures," Part II "Criteria for Evaluation," section 16 "Wetlands," subsections 18.0, 18.1, 18.2, and 18.3 of section 18 "Wekiva River Hydrologic Basin Criteria," and Appendix K "Legal Description Upper St. Johns River Hydrologic Basin," "Legal Description Ocklawaha River Hydrologic Basin," "Legal Description of the Wekiva River Hydrologic Basin," "Legal Description of the Econlockhatchee River Hydrologic Basin," "Legal Description of the Sensitive Karst Areas Basin, Alachua County," and "Legal Description of the Sensitive Karst Areas Basin, Marion County" of the document entitled "Applicant's Handbook: Management and Storage of Surface Waters," effective 2-27-94.

* * *

(2) These documents provide information regarding the management and storage of surface waters permitting program.

(3) These documents may be obtained by contacting one of the following District offices:

Director, Division of Permit Data Services,
St. Johns River Water Management District,
P.O. Box 1429,
Palatka, Florida 32178-1429.

St. Johns River Water Management District,
7775 Baymeadows Way, Suite 102,
Jacksonville, Florida 32256.

St. Johns River Water Management District,
618 East South Street, Suite 200,
Orlando, Florida 32801.

St. Johns River Water Management District,
305 East Drive,
Melbourne, Florida 32904.

Fla. Admin. Code r. 40C-4.301 (1994)—Conditions for Issuance of Permits

(1)(a) To obtain a general or individual permit for operation, maintenance, removal or abandonment of a system or to obtain a conceptual approval permit each applicant must give reasonable assurance that such activity will not:

1. Adversely affect navigability of rivers and harbors;

2. Adversely affect recreational development or public lands;

3. Endanger life, health, or property;

4. Adversely affect the maintenance of minimum flows and levels established in chapter 40C-8, F.A.C.;

5. Adversely affect the availability of water for reasonable beneficial purposes;

6. Be incapable of being effectively operated;

7. Adversely affect the operation of a Work of the District established in chapter 40C-6, F.A.C.;

8. Adversely affect existing agricultural, commercial, industrial, or residential developments;

9. Cause adverse impacts to the quality of receiving waters;

10. Adversely affect natural resources, fish and wildlife;

11. Induce saltwater or pollution intrusion;

12. Increase the potential for damages to off-site property or the public caused by:

a. Floodplain development, encroachment or other alteration;

b. Retardance, acceleration, displacement or diversion of surface water;

c. Reduction of natural water storage areas;

d. Facility failure;

13. Increase the potential for flood damages to residences, public buildings, or proposed and existing streets and roadways; or

14. Otherwise be inconsistent with the overall objectives of the District.

(b) Because a proposed system may result in both beneficial and harmful effects in terms of various indi-

vidual objectives, in determining whether the applicant has provided evidence of reasonable assurance of compliance with Rule 40C-4.301(1)(a), F.A.C., the District may consider a balancing of specific effects to show the system is not inconsistent with the overall objectives of the District.

(2)(a) To obtain a general or individual permit for construction, alteration, operation, or maintenance of a system or to obtain a conceptual approval permit, each applicant must give reasonable assurance that such activity meets the following standards:

1. Adverse water quantity impacts will not be caused to receiving waters and adjacent lands;

2. Surface and ground water levels and surface water flow, including the minimum flows and levels established in chapter 40C-8, F.A.C., will not be adversely affected;

3. Existing surface water storage and conveyance capabilities will not be adversely affected;

4. The system must be capable of being effectively operated;

5. The activity must not result in adverse impacts to the operation of Works of the District established in chapter 40C-6, F.A.C.;

6. The quality of receiving waters will not be adversely affected such that the water quality standards set forth in chapters 17-3, 17-4, 17-302 and 17-550, F.A.C., will be exceeded.

7. Wetland functions will not be adversely affected;

8. Otherwise not be harmful to the water resources of the District.

(b) If the applicant has provided reasonable assurance that the design criteria specified in Applicant's Handbook Part II "Criteria for Evaluation" adopted by reference in subsection 40C-4.091(1), F.A.C., have been met, then it is presumed that the standards contained in paragraph (2)(a) above have been satisfied.

* * *

Fla. Admin. Code r. 40C-41.063 (1994)—Conditions for Issuance of Permits

* * *

(5) Within the Econlockhatchee River Hydrologic Basin the following standards and criteria are established:

* * *

(d) Riparian Wildlife Habitat Standard.

1. The applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal or abandonment of a system within the following designated Riparian Habitat Protection Zone will not adversely affect the abundance, diversity, food sources or habitat (including its use to satisfy nesting, breeding and resting needs) of aquatic or wetland dependent species:

a. The wetlands contiguous with the Econlockhatchee River and the following tributaries: Little Econlockhatchee River north of University Boulevard, Mills Creek, Silcox Branch (branch of Mills Creek), Mills Branch (branch of Mills Creek), Long Branch, Hart Branch, Cowpen Branch, Green Branch, Turkey Creek, Little Creek, and Fourmile Creek;

b. The uplands which are within 50 feet landward of the landward extent of the wetlands above; and

c. The uplands which are within 550 feet landward of the stream's edge as defined, for the purpose of this subsection, as the waterward extent of the forested wetlands abutting the Econlockhatchee River and the above named tributaries. In the absence of forested wetlands abutting these streams, the stream's edge shall be defined, for the purpose of this subsection, as the mean annual surface water elevation of the stream; however, if hydrologic records are unavailable, the landward extent of the herbaceous emergent wetland vegetation growing in these streams shall be considered to be the stream's edge.

* * *

2. Any of the following activities within the Riparian Habitat Protection Zone are presumed to adversely affect the abundance, food sources, or habitat of aquatic or wetland dependent species provided by the zone: construction of buildings, golf courses, impoundments, roads, canals, ditches, swales, and any land clearing which results in the creation of any system. (activities not listed above do not receive a presumption of no adverse effect.)

3. The presumption in subparagraph 2. shall not apply to any activity which promotes a more endemic state, where the land in the zone has been changed by man. An example of such an activity would be construction undertaken to return lands managed for agriculture or silviculture to a vegetative community that is more compatible with the endemic land cover.

4. Applicants seeking to develop within the Riparian Habitat Protection Zone shall be given the opportunity to demonstrate that the particular development for which permitting is being sought will not have an adverse effect on the functions provided by the zone to

aquatic or wetland dependent species. The functions provided by the zone are dependent on many factors. When assessing the value of the zone to aquatic and wetland dependent species, factors which the District will consider include: vegetative land cover, hydrologic regime, topography, soils, and land uses, existing within and adjacent to the zone; and range, habitat, and food source needs of aquatic and wetland dependent species, as well as sightings, tracks, or other such empirical evidence of use.

5. The standard of subparagraph 40C-41.063(5)(d)1., may be met by demonstrating that the overall merits of the proposed plan of development, including the preservation, creation or enhancement of viable wildlife habitat, provide a degree of resource protection to these types of fish and wildlife which offsets adverse effects that the system may have on the abundance, diversity, food sources, or habitat of aquatic or wetland dependent species provided by the zone. Mitigation plans will be considered on a case-by-case basis upon detailed site specific analyses. The goal of this analysis shall be the determination of the value of the proposed mitigation plan to aquatic and wetland dependent species with particular attention to threatened or endangered species. Mitigation plans should include: the information set forth in subsection 16.1.5, Applicant's Handbook: Management and Storage of Surface Waters, for the uplands and wetlands within the zone and within other areas to be preserved, created or enhanced as mitigation for impacts within the zone; as well as other pertinent information, including land use, and the proximity of the site to publicly owned land dedicated to conservation. Implementation of this paragraph contemplates that the proximity of development to the river and tributaries named herein and ac-

tivities permitted in the zone may vary from place to place in support of a functional resource protection plan. Furthermore, some reasonable use of the land within the protection zone can be allowed under paragraph 40C-41.063(5)(d).

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