

ORIGINAL

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: DAVID H. LUCAS, Petitioner V.

SOUTH CAROLINA COASTAL COUNCIL

CASE NO: 91-453

PLACE: Washington, D.C.

DATE: March 2, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 DAVID H. LUCAS, :

4 Petitioner :

5 v. : No. 91-453

6 SOUTH CAROLINA COASTAL COUNCIL :

7 - - - - -X

8 Washington, D.C.

9 Monday, March 2, 1992

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 10:58 a.m.

13 APPEARANCES:

14 A. CAMDEN LEWIS, ESQ., Columbia, South Carolina; on behalf  
15 of the Petitioner.

16 C.C. HARNESS III, ESQ., Charleston, South Carolina; on  
17 behalf of the Respondent.

C O N T E N T S

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A. CAMDEN LEWIS, ESQ.	
On behalf of the Petitioner	3
C.C. HARNESS III, ESQ.	
On behalf of the Respondent	27



1 P R O C E E D I N G S

2 (10:58 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in 91-453, David H. Lucas v. South Carolina Coastal  
5 Council. Mr. Lewis.

6 ORAL ARGUMENT OF A. CAMDEN LEWIS

7 ON BEHALF OF THE PETITIONER

8 MR. LEWIS: Mr. Chief Justice, and may it please  
9 the Court:

10 We are here because Mr. Lucas' land has been  
11 taken without just compensation being paid. The guiding  
12 principle in a case like this seems to rest on a  
13 determination when justice and fairness require that the  
14 economic injuries caused by public action should be borne  
15 by the many rather than the few, or, as Justice Holmes  
16 said, when has a regulation gone too far?

17 Our position is simple. When Mr. Lucas was  
18 denied all economically viable uses of his land, these  
19 basic principles demand that Mr. Lucas be paid just  
20 compensation for that taking.

21 QUESTION: Mr. Lewis, is it perfectly clear from  
22 the opinion of the majority in the supreme court of South  
23 Carolina that they accepted the hypothesis that he was  
24 denied all economically viable use of his land?

25 MR. LEWIS: Yes, sir.

1 QUESTION: So you feel it was completely  
2 worthless.

3 MR. LEWIS: Yes, sir.

4 QUESTION: Would you be willing to give it to  
5 me?

6 MR. LEWIS: I don't own it, but with the taxes  
7 that are owed on it I would be willing to give it to you,  
8 yes, sir.

9 (Laughter.)

10 QUESTION: On the subject of concessions, do  
11 you, or did you concede that discouraging construction --  
12 and I'm referring, by the way, to the findings set out on  
13 page 16 of the red brief -- that discouraging the  
14 construction near the beach dune area is necessary to  
15 prevent a great public harm?

16 MR. LEWIS: No, sir, we did not concede that.  
17 We conceded that the regulation was a regulation that  
18 substantially advanced legitimate State interests. That's  
19 all we did. We did not challenge the regulation on the  
20 first prong of the Tiburon or Agins test, we just said  
21 that we were not going to challenge that, that we were  
22 going to say, and as we did prove, that all economically  
23 viable uses of the land were gone.

24 QUESTION: Does that always require, in your  
25 view, the payment of compensation if all economically

1 viable use of the land is gone, or is that not applicable  
2 if there's a nuisance?

3 MR. LEWIS: I think it is always applicable, and  
4 I don't think that --

5 QUESTION: So even if this were a nuisance,  
6 compensation would be required if the restriction on the  
7 land took away all of its economic viability.

8 MR. LEWIS: Yes, sir. My question would then  
9 become is when you look at the uses that were available  
10 before and after, if the only use was something was so  
11 obnoxious and so bad as to be able to meet whatever  
12 definition you want to as a Lucas it wouldn't be worth  
13 very much money, so therefore when you apply the before  
14 and after value, or the before and after use, I think that  
15 takes care of that extreme case that I can't imagine that  
16 you've just mentioned.

17 QUESTION: Is land different from --

18 QUESTION: I guess the reason we can't imagine  
19 it and we haven't had a case on it is because the  
20 definition of nuisance would be so expansive.

21 MR. LEWIS: Yes, sir. Nuisance is different to  
22 everybody, yes, sir.

23 QUESTION: Is land different from other property  
24 in that regard?

25 MR. LEWIS: Yes, sir. You have said in the

1 Tiburon case -- and I think it's very different. In the  
2 Tiburon case your -- denies an owner economically viable  
3 use of the land. You use the word land in that case.

4 QUESTION: Well, it happened to be land.

5 MR. LEWIS: Yes, sir.

6 (Laughter.)

7 QUESTION: I mean, if it had been a cow, we  
8 would have said a cow, I assume.

9 (Laughter.)

10 MR. LEWIS: Yes, sir.

11 QUESTION: That doesn't seem to be very  
12 remarkable. That doesn't show that land is distinctive.  
13 Suppose a State decides that it wants to prohibit the sale  
14 of alcoholic beverages and it enacts a statute to that  
15 effect and somebody has a factory that is useless for  
16 anything else except for manufacturing beer?

17 MR. LEWIS: Well, I think first of all --

18 QUESTION: It's totally useless. Would there be  
19 recovery?

20 MR. LEWIS: No, sir.

21 QUESTION: Because that's a building and not  
22 land.

23 MR. LEWIS: That is -- the building and the land  
24 go together as a unit. That's the case in Mugler, and  
25 that case I think you looked -- in that case they haven't



1 denied all economic uses of it, and to go back to your  
2 question on real versus personal property, there is a  
3 great distinction. Real property throughout our  
4 jurisprudence has been found to be unique. You can have a  
5 specific performance for real property.

6 There's also a big difference when you're  
7 dealing with real property and personal property between  
8 what's entitlement and what's a fundamental right. It's a  
9 fundamental right to own property, to live on property.  
10 How you go out and what you can sell and how you can do  
11 that, that's an entitlement --

12 QUESTION: It's not a fundamental right to own  
13 personal property.

14 MR. LEWIS: Yes, sir, it's a fundamental right  
15 to own it. It's not a fundamental right to go out and  
16 sell it if something's wrong with it or if it's diseased  
17 or something like that. That's not a fundamental right,  
18 no, sir.

19 QUESTION: What's your authority for the  
20 proposition that the ownership of property is a  
21 fundamental right?

22 MR. LEWIS: I think if you go back to the fact  
23 of the Fifth Amendment, when they say that you can't take  
24 property without paying just compensation, that's a right  
25 to own and use property.

1 QUESTION: It's a right not to be deprived of  
2 property without being paid compensation.

3 MR. LEWIS: Yes, sir.

4 QUESTION: But that's a much more careful  
5 statement of the proposition than the statement that  
6 ownership of property is a fundamental right. Do you have  
7 any further authority for that?

8 MR. LEWIS: Oh, I'm sorry. I'm saying that the  
9 right to use your property is the fundamental right.  
10 Ownership, not everybody owns property.

11 QUESTION: Well, why do you say it's a  
12 fundamental right?

13 MR. LEWIS: I say it's a fundamental right  
14 because if you have property and you go back and see that  
15 the uses of property are what makes up property. If you  
16 have property, you have the right to use it. You have  
17 said that in Tiburon, that when you take all the uses,  
18 it's gone. You have said in the cases that you look at  
19 the uses that are remaining afterwards, so property is  
20 just made up of uses.

21 QUESTION: Well, the fact that property is jus  
22 made up of uses does not necessarily prove that the  
23 ownership of it is a fundamental right. It seems to me  
24 you can do all you need for your case by simply adhering  
25 to the language of the just compensation clause.

1 MR. LEWIS: Yes, sir. Yes, sir.

2 QUESTION: You don't have to expound on whether  
3 property is a fundamental right. All you have to prove is  
4 that you were deprived of the use of property without  
5 being -- by the Government.

6 MR. LEWIS: Yes, sir. I agree, and that is what  
7 I meant to say, and if I didn't, I apologize.

8 QUESTION: Mr. Lewis, could we change direction  
9 here a moment, and may I inquire, there was a law passed  
10 subsequently that -- under which South Carolina provided  
11 that a property owner affected by this earlier regulation  
12 could apply for a permit to build nonetheless with certain  
13 conditions attached, right?

14 MR. LEWIS: That was two years between the first  
15 enactment --

16 QUESTION: Yes.

17 MR. LEWIS: And then this amendment in 1990,  
18 yes, ma'am.

19 QUESTION: Did the petitioner ever apply for  
20 such a permit?

21 MR. LEWIS: No, he did not.

22 QUESTION: Don't -- to the extent that you are  
23 arguing there is a permanent taking here, regulatory  
24 taking, don't our cases indicate that perhaps it's not  
25 right unless and until the application for an exemption

1 has been sought?

2 MR. LEWIS: Not in this case, no. What happened  
3 in this case, you have two courts finding that all the  
4 viable uses are gone. You have the lower court finding  
5 that it is a permanent taking. You have a stipulation of  
6 the --

7 QUESTION: But did that finding determine the  
8 effect of this new exemption permit?

9 MR. LEWIS: What we have is, it's interesting in  
10 the stipulations in the court below. You have a  
11 stipulation in the court below, number 11, which says that  
12 the current law will not allow any structures to be on  
13 this piece of property, and then we have a stipulation  
14 number 16 which says that any permit would be denied. At  
15 that same period of time, this act that later came law was  
16 in the process and in the legislature, so those two things  
17 right there show that there was at least a contemplation  
18 when they said the current law says --

19 QUESTION: Well, slow down a minute. At the  
20 time the stipulation was filed the permit law had not yet  
21 been enacted.

22 MR. LEWIS: It had not been enacted, but it was  
23 in the process -- Senate Act Number 391. It was in the  
24 process of being debated. It was a hotly debated subject  
25 all over South Carolina because of the impact of this act



1 on the beach property owners. The Supreme Court was asked  
2 to include the 1990 amendment in this and they refused and  
3 found that the case went forward to be right. If you look  
4 at that particular amendment --

5 QUESTION: Well, that doesn't settle the  
6 rightness for us.

7 MR. LEWIS: No, sir, it is just a consideration.  
8 I think that they looked at it --

9 QUESTION: But do you still have a right to  
10 apply for the exemption?

11 MR. LEWIS: I do not think so. I think with the  
12 finding of the South Carolina supreme court that this --  
13 the building of a house or a home on this property is  
14 detrimental to the health, safety, or welfare, that they  
15 are required under the amendment to turn my application  
16 down. There's nothing in this record to show that they  
17 would have a change of heart.

18 QUESTION: Well, you're asking us to decide  
19 that, but we don't really know if you applied for an  
20 exemption whether you'd get it or not.

21 MR. LEWIS: I think that under the -- if you  
22 look at the findings of the Supreme Court and you look at  
23 the law and you compare the two, which is section 48.39  
24 290(d) --

25 QUESTION: What if you looked at the dissenting

1 opinion? Didn't they think you had a right to apply, the  
2 dissenting judges below?

3 MR. LEWIS: No, sir. I think the dissenting  
4 judges said that -- if I remember correctly, they said  
5 that either pay them the money or give them a permit.

6 QUESTION: They said I would remand to the  
7 Coastal Council its decision as to whether to issue the  
8 permits in view of the recent 1990 amendments.

9 MR. LEWIS: Or to pay the money.

10 QUESTION: Yes, but certainly one of the options  
11 was to consider it under the 1990 amendment. That's what  
12 the dissenting judge says in so many words.

13 MR. LEWIS: I cannot say that one of the options  
14 in this case, because there has been --

15 QUESTION: I know you don't say that. What I'm  
16 saying is the dissenting judges on the supreme court of  
17 the State said that was an option.

18 MR. LEWIS: They also said that it wasn't  
19 detrimental to the health, welfare and safety, so once  
20 they take -- there you have to look at their opinion,  
21 dissenting opinion as a whole. They say it wasn't  
22 detrimental to the health, safety, and welfare, so you  
23 take that particular stamp on Mr. Lucas' property away,  
24 and he sure could apply, but the dissent didn't carry the  
25 day on that particular finding of fact.

1 QUESTION: Well, there's no doubt, is there,  
2 Mr. Lewis, that there was a period from 1988 until 1990  
3 when there was no permit for which you could have applied  
4 for?

5 MR. LEWIS: Absolutely.

6 QUESTION: And you simply -- the situation  
7 described by the supreme court of South Carolina did  
8 obtain.

9 MR. LEWIS: Absolutely. There are 2 years where  
10 there's absolutely nothing Mr. Lucas could do with this  
11 property whatsoever.

12 QUESTION: We're throwing around the term no  
13 economic viability of this property.

14 MR. LEWIS: Yes.

15 QUESTION: Viable is a good medical term, it  
16 isn't a legal term, but the lawyers have taken it over and  
17 the judges too. What do you mean by economic viability?

18 MR. LEWIS: What I'm saying by that, that this  
19 property is worth 0, \$0. That before and after the uses,  
20 the before and after value, before it was worth a  
21 \$1 million and it was a nice home site, two nice home  
22 sites. Afterwards it has no uses and no value.

23 QUESTION: So it's a matter of valuation.

24 MR. LEWIS: Well, valuation is, of course, one  
25 of the keys in it. It also goes to uses. The uses

1 determine the value in all pieces of property. So I think  
2 when you go down and you take a piece of property from  
3 uses down to no uses and from \$1 million down to \$0, you  
4 have a taking under our Constitution regardless of what --

5 QUESTION: That's hardly the medical definition  
6 of an old-time term of being viable.

7 QUESTION: Mr. Lewis, can I ask you a factual  
8 question that perhaps isn't in the record? Is this  
9 property located right where that hurricane hit in  
10 Charleston?

11 MR. LEWIS: No, sir.

12 QUESTION: This is on the Isle of Palms, is it?

13 MR. LEWIS: This is on the Isle of Palms, and,  
14 well it is --

15 QUESTION: I thought that whole island was  
16 virtually desolated by the hurricane.

17 MR. LEWIS: Most of the homes, believe it or  
18 not, on that island made it. What really caught most of  
19 it was when it came across Charleston and it came on  
20 inland and all the way to Charlotte. But those homes that  
21 were on the Isle of Palms at the time of Hugo, most of  
22 those made it. There was more damage to some of the  
23 condominium high-rise structures than it were to the low  
24 homes, with reference Hugo. But it is just north of  
25 Charleston and it did get plenty of Hurricane Hugo, I can



1     assure you of that.

2             QUESTION: Counsel, suppose there's a  
3     residential subdivision and a person owns lots that are  
4     zoned for residential improvement, but they're vacant  
5     lots. And an earthquake fault is discovered and the  
6     expert opinion is that it is very very dangerous to build  
7     and the county denies zoning permit for that reason. And  
8     assume also that all economic viability of the land is  
9     gone. Is that a taking?

10            MR. LEWIS: It is not taking for the following  
11     reason. It was not the regulation that took the value of  
12     the land, it was the discovery of the fact that the land  
13     had no value in the first place. So when you take the  
14     before and after test, the uses before and after, you find  
15     that it is the fact that it's on a fault and it's no good  
16     to build on anyway, if that's the case.

17            QUESTION: Well, why, why can't the State say  
18     here that the finding was that this coastal zone, because  
19     of new and detailed studies with reference to erosion, is  
20     now a very dangerous place to build; dangerous for the  
21     owner, dangerous for the neighbors.

22            MR. LEWIS: Because if look -- if you go out  
23     there and if you look at the land, and you go out there  
24     and see it, you have a big house on the left, you have a  
25     big house, a four story house in the middle, and on the

1 other side you have a big house, and you have houses all  
2 around it. I mean the facts of this case don't support  
3 such a conclusion, and Justice Toll --

4 QUESTION: Well then it's just a factual matter  
5 we're arguing about. We -- your client stipulated the  
6 fact that this ordinance had, or this regulation had a  
7 valid public purpose.

8 MR. LEWIS: Yes, sir. We indeed say that.

9 QUESTION: And it seems to me that there are  
10 instances in which all economic viability can be deprived  
11 because of an urgent safety reason, and that there's no  
12 taking.

13 MR. LEWIS: Well this is --

14 QUESTION: And I don't think your answer has  
15 refuted that proposition.

16 MR. LEWIS: Well, what I'm saying in that case,  
17 if there's an urgent safety reason, the urgency of that,  
18 whatever it is, if it's a fire coming down on you, if it's  
19 a fact that there's a bomb underneath of you, the  
20 exigencies of that situations are what demands that. In  
21 this case there's no such thing.

22 Justice Toll took some findings in the legislature  
23 that said it was to protect the beaches from erosion and  
24 for tourism and so forth, and she made a quantum leap and  
25 said that therefore we have said that it is a great public

1 harm to build a house on this property. And that is not  
2 at all the case.

3 QUESTION: But that wasn't challenged in this  
4 case. All you -- your whole theory is that if all  
5 economic viability is lost, that that's the end of the  
6 case.

7 MR. LEWIS: No, sir. What I am saying is, is  
8 the findings that there was a great public harm was not a  
9 finding that ever came out until Justice Toll made that  
10 quantum leap in the South Carolina supreme court. That  
11 was never a finding of any other court. It just came --

12 QUESTION: Well, I assume the legislature can  
13 make a finding, can't it?

14 MR. LEWIS: They never said anything about it  
15 being a great public harm. All they said was that, and if  
16 you can look at the factual findings of the legislature it  
17 talks about a -- the erosion, it talks about tourism, it  
18 talks about making the beaches nice and making them  
19 pretty, it has a whole bunch of nice statements that all  
20 legislation has for the reason they passed such an act.

21 But to take that and to say, okay, I'm going to jump  
22 from that and say that these findings make it a great  
23 public harm, I don't think you can do that. If you're  
24 going to do that, what happens is that we're going to have  
25 to -- us lawyers out here in every regulatory taking case,

1 we're going to have to attack the statute.

2 Because we're going to be in fear that some higher  
3 authority or judge is going to say we didn't attack the  
4 statute as it substantially advances legitimate State  
5 interests, and because you didn't do that, hey it's a  
6 nuisance and we can take your property. So you're going  
7 to turn every regulatory taking case into an attack on the  
8 statute as to whether or not it can be interpreted as a  
9 nuisance or not. And I don't think that's the way it  
10 should be.

11 And we have not conceded anything by saying that this  
12 is a laudable purpose, to try to protect the beaches.  
13 We've not conceded our land, to put a house on our land, a  
14 home on our land, is a nuisance.

15 QUESTION: May I ask, Mr. Lewis, on that  
16 question, the South Carolina supreme court thought you'd  
17 conceded that, at least they said that in their opinion.  
18 Did you in your cert petition ask us to review the  
19 accuracy of that concession?

20 MR. LEWIS: I don't --

21 QUESTION: It seems to me we took the case on  
22 the assumption that you had made such a concession.

23 MR. LEWIS: Yes.

24 QUESTION: Now you're telling us you really  
25 didn't, and I'm not saying you did, obviously.



1 MR. LEWIS: We --

2 QUESTION: But were we on notice that that was  
3 going to be one of the things we'd have to decide?

4 MR. LEWIS: Yes, sir. In our petition we took  
5 the position that the mere labeling by the South Carolina  
6 supreme court that it was a great public harm was not  
7 something that could be used as a basis for denying just  
8 compensation. Surely, we did that. That is an integral  
9 part of our whole case.

10 QUESTION: Mr. Lewis, may I ask you two factual  
11 questions. I seem to recall that somewhere in the record  
12 there's an indication that at some point in the recallable  
13 past, maybe 10 or 15 years ago, your land was under water  
14 at one point. Is that correct?

15 MR. LEWIS: There is something in the record,  
16 and I don't remember how long back, that there was a pond  
17 on one of our lots. If you ever go out to the ocean  
18 you'll see, you'll sit on one side and you have to walk  
19 around some water that's out there to get to the beach on  
20 the other side. There was that, that was there.

21 QUESTION: And that has disappeared naturally in  
22 the meantime.

23 MR. LEWIS: Yes, sir. And this whole island has  
24 been accreting for some 1,500 years, and you'll find that  
25 under the methodology used, that they had to choose a

1 vegetation line for purposes of setting the setback lines  
2 on this piece of property because of the fact that it's  
3 been accreting and that they could not use that other  
4 formula with reference to the last, 40 times the erosion  
5 rate. They could not use that on this property simply  
6 because it was accreting and had been accreting for some  
7 time.

8 QUESTION: All right. Let me ask you my second  
9 question. You spoke of the -- what I think you refer --  
10 you described as the finding of the South Carolina supreme  
11 court that the development of the land would be  
12 detrimental to public welfare, safety, health, and so on.  
13 And you said that finding came out of the blue.

14 Was that finding possibly based on, and simply a kind  
15 of an interpretation of this record evidence that at one  
16 point some of your land, at least, was inundated? Or in  
17 the alternative, was that so-called finding simply a  
18 statement in a shorthand kind of way that that's what the  
19 legislature had found, and there was at least a reasonable  
20 or non-reviewable basis for so finding?

21 MR. LEWIS: I think, well first of all if I used  
22 the word finding I want to withdraw that. It's a  
23 labeling. There was no finding whatsoever, it was a mere  
24 labeling of what the legislature had found, as you say.

25 QUESTION: I may have used that, you may not

1 have. About the rest of my question, whether it's a  
2 finding or a labeling, A, was it referring back to the  
3 period of inundation? And B, if it was not, is it fair to  
4 read it as, in effect, a restatement of the findings of  
5 the legislature with the assumption that those findings  
6 were reasonable or at least non-reviewable?

7 MR. LEWIS: It is a shorthand for the  
8 legislature and a labeling of the legislature and has no  
9 basis. And then the court doesn't say so, that it has any  
10 basis in the record, or the facts of the record.

11 QUESTION: Okay, counsel, I see that your  
12 opponent at one point says the issue of temporary taking  
13 was preserved at trial by stipulation, and hence that it  
14 too is not right.

15 MR. LEWIS: I don't believe the stipulation said  
16 that the argument on the temporary take is reserved. In  
17 other words, there is no more facts for a temporary  
18 taking. If they say, hey --

19 QUESTION: Let's assume that -- let's assume  
20 that we disagree with you that, that your overall claim is  
21 not right because of your right to apply for an exception.  
22 And that the only issue that's left then, as far as we're  
23 concerned, is the temporary taking issue. That issue  
24 hasn't been dealt with by any of the courts below, whether  
25 there was a temporary taking.

1 MR. LEWIS: Yes, it's -- we say the temporary  
2 taking would be the same standard so that all of the  
3 facts, everything is in this record with reference to  
4 temporary take. The only difference is, is the quantum of  
5 the damages that would be available to you.

6 QUESTION: Well, I don't know. I suppose  
7 somebody, if you're arguing for a temporary taking, you  
8 would have to -- there would be issues about, well when  
9 did you really intend to build.

10 MR. LEWIS: That's it. The trial court found,  
11 in the record, that he was going to build a house and that  
12 he was going to hold the other piece of property for  
13 investment.

14 QUESTION: Well I know he was going to build a  
15 house. When?

16 MR. LEWIS: The plans are in the record, of the  
17 house that he's going to build.

18 QUESTION: Well I know plans are in the record,  
19 but you never did apply for a building permit, I guess.  
20 Was there evidence, I expected to build tomorrow, or next  
21 year, or what?

22 MR. LEWIS: There was evidence that he was going  
23 to build the house that's in the record, and there's a  
24 stipulation that they wouldn't let him.

25 QUESTION: Well yes, but we still -- you still



1 haven't answered my question. Was there evidence,  
2 specific evidence, as to when he was -- wanted to build?

3 MR. LEWIS: Was there specific evidence --

4 QUESTION: Was it?

5 MR. LEWIS: -- as to the starting date, no sir.  
6 Because you can't have a starting date until you have a  
7 permit, and they dismissed that and said I couldn't have a  
8 permit.

9 QUESTION: Well I don't know, you could say I  
10 intended to build right away, I suppose --

11 MR. LEWIS: Oh, I think that is definitely  
12 within the record, that he intended to build right away.

13 QUESTION: If you were going to build two  
14 houses, one of them for speculation.

15 MR. LEWIS: No question. I was going to hold  
16 one piece for investment.

17 QUESTION: Well, then if you're building -- if  
18 you're going to build a spec house, you don't always just  
19 build right away, you try to figure out what the market  
20 is.

21 MR. LEWIS: Oh, that is exactly right. But I  
22 don't -- that has nothing to do with whether or not  
23 there's been a temporary take or not.

24 QUESTION: Well, I think it does.

25 MR. LEWIS: It only goes to the quantum of the

1 damages.

2 QUESTION: Well, I don't know. I don't know  
3 whether there would be proof that you ever would have  
4 built during these 2 years.

5 MR. LEWIS: Oh, yes, sir, I think that is in the  
6 record already, as to at least one house.

7 QUESTION: Mr. Lewis, the Respondent's brief  
8 contends that the South Carolina supreme court understood  
9 you to be advancing a very narrow argument, to wit, that  
10 any use of the police power that takes away the total  
11 economic value of your land is a taking, no matter what  
12 nuisance or no nuisance, no matter what, the basis of the  
13 use of the police power. Is that a fair characterization  
14 of your argument below?

15 MR. LEWIS: No, sir, my argument is that -- and  
16 I think you will look at the order of Judge Patterson and  
17 you will find that what we said was that when we are  
18 denied, under the Tiburon test, we are denied an owner  
19 economically viable use of the land, we get paid for a  
20 taking. That is what we are saying.

21 QUESTION: No matter what the reason for the  
22 statute was?

23 MR. LEWIS: Yes, sir. That is because --

24 QUESTION: So your answer is yes, that is a fair  
25 characterization?

1 MR. LEWIS: Yes, sir. We gave up the  
2 substantially advanced legitimate State interest. We said  
3 that the statute did that, and we think that there is no -  
4 - they want a per se rule. They want to say there is some  
5 legitimate State interest type situation as to -- and that  
6 you can forget about what you do to the value and the uses  
7 and you can take it.

8 They are asking for the per se rule --

9 QUESTION: You want the per se rule, and you  
10 argued it below. If it takes away all the economic value,  
11 it is a taking that has to be compensated. They are  
12 saying that is so sometimes but not all the time, that if  
13 there is a nuisance, if it is threatening the public  
14 safety, you can take it all away without paying and you  
15 deny that.

16 MR. LEWIS: I deny that, yes, sir.

17 QUESTION: You denied it below and you continue  
18 to deny it here.

19 MR. LEWIS: That's right because if I take the  
20 Tiburon test, I have to read out the word "or" to make  
21 that test work because that is an "or" test in Tiburon and  
22 it says, substantially advanced legitimate State interest  
23 or denies an owner economically viable uses.

24 We do, in our reply brief, point out, if, and we  
25 say that, if, and that we don't agree that if you are

1 going to go to some kind of exception that it be something  
2 that is an imminent danger of such a magnitude to justify  
3 denial of just compensation, and only when such action's  
4 purpose is to control that imminent danger.

5 QUESTION: But that is a fall-back position.

6 MR. LEWIS: Yes --

7 QUESTION: You don't think you should do it at  
8 all --

9 MR. LEWIS: No, sir, absolutely not.

10 QUESTION: You always have to pay even if it is  
11 to save the city, right?

12 MR. LEWIS: Well, to save the city, now then you  
13 are going to get into factual information as to what your  
14 before use was, your after use was --

15 QUESTION: No, you have to just pay, just pay.  
16 You don't have to inquire in any fashion. Your position  
17 is, if it takes -- at least with real estate, if it takes  
18 away the total value --

19 MR. LEWIS: Right.

20 QUESTION: You pay, no matter what the reason.

21 MR. LEWIS : If it had value before --

22 QUESTION: Right.

23 MR. LEWIS: And you took it away, you pay.

24 QUESTION: But, Mr. Lewis, you do have a fall-  
25 back position, do you?



1 MR. LEWIS: Yes, ma'am.

2 QUESTION: That if we don't agree with that and  
3 think there is a nuisance exception, that this doesn't  
4 fall within it, is that it?

5 MR. LEWIS: We call it a public necessity  
6 exception, if there is such one, and that is has to be  
7 imminent danger of such a magnitude to justify denial of  
8 just compensation and that the action's purpose is to  
9 control the imminent danger, not in this case -- and that  
10 this case would not meet that test whatsoever, and I would  
11 reserve the rest for rebuttal.

12 QUESTION: Very well, Mr. Lewis.

13 Mr. Harness, we will hear now from you.

14 ORAL ARGUMENT OF C.C. HARNESS III

15 ON BEHALF OF THE RESPONDENT

16 MR. HARNESS: Mr. Chief Justice, and may it  
17 please the Court:

18 South Carolina asks you to uphold the decision  
19 of our supreme court for what we believe to be two very  
20 compelling reasons. First is that the restrictions of the  
21 South Carolina Beach Front Management Act are based upon a  
22 very real and considered truth, and that is building upon  
23 unstable land, unstable beaches, the fragile beach dune  
24 system creates great public risk of harm.

25 Secondly, the Petitioner never challenged that

1 legislative determination, but instead claimed it was  
2 irrelevant to his takings claim. His theory of the case  
3 is based upon the extreme proposition that economic impact  
4 alone, without any other consideration, is a determinant  
5 of taking.

6 The theory is wrong. There is no constitutional  
7 right to harm others. Secondly, the threat is well  
8 documented. Building on an unstable and fragile beach  
9 dune system does create harm.

10 QUESTION: Well, if you say there is no  
11 constitutional right to harm others and link it to your  
12 argument -- what about Justice Holmes' opinion in Mann  
13 against Pennsylvania Coal Company, where there was no  
14 question that the sub-surface mining would very likely to  
15 cause the subsidence of some residences, and yet the Court  
16 said that the compensation had to be paid.

17 MR. HARNESS: I think what Justice Holmes was  
18 looking at was the balance between the degree of harm.  
19 There was very little public harm, in his way of thinking.  
20 It was a private harm that he was discussing. And in that  
21 instance, in that particular instance, the degree of  
22 diminution in value was very significant.

23 I think in looking at the harm, what the Court  
24 does is to look at the degree of the harm.

25 QUESTION: Well, but don't you think then your

1 proposition that there is no right to harm others in  
2 support of your idea of the nuisance exception is perhaps  
3 too broad, that sometimes there will be some actions of  
4 property owners that may cause some sort of harm to others  
5 and yet, perhaps they may not be totally proscribed  
6 without paying compensation?

7 MR. HARNESS: I would concede that. I think  
8 that this goes back to what has been termed the Mugler  
9 principle. The community has authority to prevent serious  
10 public harm by denying uses without being required to pay  
11 compensation, but certainly it is a measure of the degree  
12 of harm that the State is seeking to prevent.

13 QUESTION: Well, it seems to me we have two  
14 extreme positions here. Mr. Lewis takes the position, it  
15 doesn't matter how much harm, you have to pay. And as I  
16 read the South Carolina supreme court, it seems to say, it  
17 doesn't matter how little harm, you don't have to pay.  
18 Isn't that a fair description of what the South Carolina  
19 supreme court said?

20 MR. HARNESS: I think what the -- no --

21 QUESTION: Did they find that this was an  
22 enormous amount of harm, that it was something that rose  
23 to the level of a threat to life and limb or even a public  
24 nuisance?

25 MR. HARNESS: I think if I might answer, they

1 did two things. One is they first said that the  
2 Petitioner never raised the issue, that all he raised was  
3 the unique argument that diminution in value alone equaled  
4 to a taking.

5 But secondly, I think that the legislative  
6 findings and facts that are laid out in the act gave the  
7 court reason, and sufficient reason to believe that there  
8 were great public harms. If you read the findings and  
9 purposes of the act, clearly they're directed at the  
10 highest type of police power activity, that is preventing  
11 threat to life and property.

12 QUESTION: Did it say highest type of police  
13 power activity?

14 MR. HARNESS: No, sir, it does not say that, but  
15 I think that that has been the position taken by the  
16 solicitor general and by this Court, that if there is a  
17 great threat to life and property, that certainly would  
18 fit within the commonly called nuisance exception. And in  
19 essence the nuisance exception, it seems to me to be a  
20 shorthand way of saying, the State has the permission or  
21 the authority to prevent great public harm without paying  
22 compensation depend upon that degree.

23 QUESTION: What was the great threat to life or  
24 property? That over the next 50 years, some adjacent land  
25 might erode, is that the kind of immediate threat that you



1 think --

2 MR. HARNESS: I think that the threat is very  
3 real. First of all, the act looked at the threat to life  
4 and property by building near the ocean. It is well  
5 recognized that portions of homes, even homes themselves  
6 during times of great storm events will be blown or washed  
7 into houses behind them

8 Secondly, that septic tanks and that sewer lines  
9 that lead to these houses are very near the ocean, break  
10 asunder and that those contaminants are put into public  
11 waters. Thirdly, that water lines are broken and the water  
12 supply is contaminated, and fourthly --

13 QUESTION: And that is enough to prevent all  
14 building entirely, not necessary precautions, just say you  
15 can't build?

16 MR. HARNESS: If I follow your question, I think  
17 that the answer is that there is clear evidence that the  
18 closer you build to the ocean and if you build upon the  
19 beach dune system, that you run --

20 QUESTION: This is behind the dunes, isn't it?  
21 This is behind the dunes, that is what I understood, a  
22 good distance behind the dunes.

23 MR. HARNESS: Currently, the property is behind  
24 the dunes, but the evidence presented by the South  
25 Carolina Coastal Council said 20 percent of the time in

1 the last 40 years, the shoreline has been landward of the  
2 road behind him, and 50 percent of the time this lot has  
3 either been on the active beach or under water. It is  
4 certainly an unstable type of beach that typically the act  
5 was seeking to address.

6 QUESTION: Apparently not unstable enough and  
7 not often enough to stop people from building houses all  
8 up and down the same street.

9 MR. HARNESS: People, before the passage of this  
10 act, built up to the highest up-rush of the waves on our  
11 coast with no consideration at all for what threat they  
12 would create for themselves and others. This act was  
13 passed to prevent the experience that the council had been  
14 through and that a blue ribbon committee looked at for 6  
15 months.

16 QUESTION: Is there any indication that this  
17 property was ever in front of the dunes?

18 That the dunes were ever eliminated entirely?

19 MR. HARNESS: Completely. It was under, it was  
20 in the ocean in 1963. It was in the ocean 20 percent of  
21 the time since 1949. That is what Exhibit No. 22, which  
22 is in your Appendix, shows. It shows you the shoreline  
23 fluctuations which have been great and significant.  
24 Erosion is a problem along this beach. While it is  
25 generally accreting there are severe episodes of erosion.

1 QUESTION: Well, Mr. Harness, with reference to  
2 the adjacent homes, the homes that have been built on  
3 adjacent property. I guess under your theory South  
4 Carolina could require those homes to be removed because  
5 it still is the same threat to public safety that exists  
6 with respect to allowing new construction on these lots.  
7 Isn't that right? Wouldn't your theory take you that far?

8 MR. HARNESS: My theory would not take me that  
9 far for two reasons, I think. First of all -- or three  
10 reasons. First of all, it is typical of States to pass  
11 laws once they recognize there is a harm, to prevent new  
12 construction or new harm.

13 QUESTION: No, I know that's typical. I am  
14 saying, if I understand your theory, it would permit the  
15 State to require existing homes to be removed, and no  
16 compensation paid.

17 MR. HARNESS: Again --

18 QUESTION: Wouldn't your theory go that far?

19 MR. HARNESS: No, I don't think it would, for  
20 two reasons.

21 QUESTION: Then what's the difference?

22 MR. HARNESS: For two reasons. I think that  
23 what you would have to look at, under those circumstances,  
24 would be the reasonable expectations of the property  
25 owners, and secondly --

1 QUESTION: Excuse me, I don't understand.  
2 Before you go to secondly, didn't this person have the  
3 same expectation when he bought the land? He didn't buy  
4 it look at the sand, he bought it to build a house.  
5 MR. HARNESS: These people had already built --  
6 QUESTION: And he had already bought the  
7 property.  
8 MR. HARNESS: These people had already built --  
9 QUESTION: He spent several million dollars,  
10 didn't he? Over a million. What was the total price?  
11 MR. HARNESS: About a million dollars. These  
12 people had already built under an older law.  
13 QUESTION: Yeah, and they probably didn't even  
14 spend a million dollars.  
15 MR. HARNESS: Probably not, yeah. And the law  
16 changed --  
17 QUESTION: When they built, there was nobody  
18 else who had houses. I would think his case is even  
19 better. He laid out a million dollars, looking at these  
20 houses all up and down the street, and you don't think he  
21 had any expectation that he could build a house?  
22 MR. HARNESS: If we allow economics to be the  
23 sole determinant of takings, then you will in essence  
24 eliminate the nuisance exception.  
25 QUESTION: Well, I am sorry, I interrupted you



1 on reason one. What's number two? Reason one was economic  
2 expectations.

3 QUESTION: We need an answer to Justice  
4 O'Connor's question.

5 MR. HARNESS: Excuse me. The second one is the  
6 physical character of the land. It seems to me that what  
7 we're trying to do here is to prevent an ongoing and  
8 continuing damage to the environment. The houses that  
9 have already been built there will be removed over time,  
10 and I think it is a wise decision on the part of the State  
11 because it would disrupt entirely the existing uses of  
12 property, and I think it is -- it could be -- it is more  
13 fair to prevent new construction and then to remove these  
14 houses as they are destroyed and let --

15 QUESTION: Well, it seems to me you're talking  
16 policy issues that could be addressed by a legislative  
17 body, but you're not addressing the limits of the  
18 Constitution at all, by that response. And I think what  
19 we are interested in is what are the constitutional limits  
20 to State action, that is why we are here.

21 MR. HARNESS: I think that the answer to that  
22 question, first of all -- let me get some clarification.  
23 If you could ask the question again. I am not certain  
24 that I have followed you completely.

25 QUESTION: Well, I'm trying to have you describe

1 for us what limitations there are under your view of what  
2 the Constitution requires with the takings clause. It  
3 would -- nothing you have said gives me any concept of  
4 where the line has to be drawn. Would you like to try to  
5 spell that out?

6 MR. HARNESS: At least as it relates to public  
7 health and safety, if there is a great threat to public  
8 health and safety, as there is at least from the  
9 legislators' point of view in this case, I think that  
10 there is insulation given to the activity of the State.  
11 This Court has said it depends upon the facts of each  
12 case. I am not certain that I can stand here and tell you  
13 today where the limit can be drawn, but I think certainly  
14 in this instance --

15 QUESTION: Well, suppose the danger is to the  
16 property owner himself or herself as to construction on a  
17 particular site, either because it's too steep and the  
18 house will slide away with the next rain, or because it's  
19 on an earthquake faultline, or because it's on a  
20 shoreline, not concerned with the neighbors or other  
21 people, just with the safety of the people who would build  
22 on it.

23 MR. HARNESS: I think even in those  
24 circumstances, I think I would agree with the solicitor  
25 general that even in circumstances where there is

1 construction upon unstable or very dangerous land, that  
2 even there, it is for protection of that house, and those  
3 people that the State could pass a law to prevent that  
4 such construction, even though it may not have the --

5 QUESTION: You could prevent new construction.

6 MR. HARNESS: That is correct.

7 QUESTION: Now, can you require the person  
8 living in an unsafe dwelling to totally remove it? It's  
9 not safe because the next rain is going to come and your  
10 beautiful house, on which you have spent a million  
11 dollars, is going to slide down the mountain, so we tell  
12 you to take it down, now. Compensation or no  
13 compensation?

14 MR. HARNESS: No compensation. It would be very  
15 similar to the tenement houses where the court has said  
16 you have to either remove these things or improve them.  
17 It makes it impossible for the landowner to do so, because  
18 of the threat to the public. And let's say, for example,  
19 in your instance, the people rented the house out, didn't  
20 live in it themselves. Certainly under those  
21 circumstances, the people that are in there are threatened  
22 by the sheer construction, or the mere construction upon  
23 an unsafe, unstable place. So I think the answer to that  
24 question is yes.

25 QUESTION: How do you explain an alternative

1 statement in the Agins case in which we do, it seems to  
2 me, indicate that there is a taking, if the owner is  
3 denied all economically viable use of his land. That's  
4 the court's term, economically viable.

5 MR. HARNESS: The court has never, to my  
6 knowledge, applied that test. It has repeatedly said that  
7 diminution in value alone is not sufficient to equate to a  
8 taking, but I think it -- from the way I have read it --  
9 it may be a shorthand for the fact that you have to look  
10 at two things, the diminution in value and also the  
11 reasonable investment-backed expectations.

12 I don't think it has been applied literally and  
13 I have had the same problem of determining what the word  
14 viable means. I assume that you would have to look to the  
15 character of the land as well to be certain it is of the  
16 type that would warrant construction.

17 QUESTION: There is no doubt that there was an  
18 investment expectation here. Are you saying that it was  
19 unreasonable as a matter of law?

20 MR. HARNESS: Well, yes, but the court below has  
21 never asked to reach that point because it was never an  
22 issue before them. They never had to get to it.

23 But secondly, this, Mr. Lucas, the petitioner  
24 here, was owner, participated in wild use in the very  
25 beginning of the construction, knew of the erosion events



1 that occurred, significant erosion events all the way  
2 through the 1980's, could or should have known the history  
3 of the property. He was on notice about the character of  
4 the land.

5 Secondly, this beach front along South Carolina  
6 has been highly regulated for some years.

7 QUESTION: But do you think -- I didn't  
8 understand the South Carolina court to go on that basis,  
9 that he didn't have any valid expectation.

10 MR. HARNESS: The supreme court did not discuss  
11 that because it did not have to reach it.

12 QUESTION: Well, if it comes here, I think if  
13 the case comes here, I thought the California court -- or  
14 your State court said that even if there is a valid  
15 investment expectation, even if the law deprives the  
16 landowner of all economic value, even if this law is  
17 valid, and no pay.

18 MR. HARNESS: That is not the way I read it.  
19 The way I understood the case was that, first of all, the  
20 petitioner raised a very extreme position, that diminution  
21 alone was sufficient to equate to a taking, and second,  
22 that he conceded the purposes and findings, and as a  
23 result the court did not have to go in and look at  
24 specifically the harms above what the legislature had  
25 dictated, because it was never questioned.

1           It was never raised. And they were addressing  
2 the very narrow theory that he presented to the court,  
3 which is diminution alone was sufficient to equate to a  
4 taking.

5           QUESTION: Am I right at least to this extent,  
6 that if -- that your State court's opinion would bar also  
7 any claim of a temporary taking?

8           MR. HARNESS: That's correct.

9           As the Supreme Court opinion analogizes to  
10 wetlands regulation, and they say just as with respect to  
11 the '77 Coastal Zone Management Act, which prevented the  
12 uncontrolled use of coastal wetlands, and it says our  
13 analysis there did not contain a discussion of whether any  
14 economically viable use remained in the property, so also  
15 we don't have to have that discussion here, and I don't  
16 think wetlands regulation is something that I would call  
17 calling into question high concerns of public safety.

18          MR. HARNESS: In Carter -- the case they're  
19 referring to is Carter v. South Carolina Coastal Council.  
20 The same type of questions that were raised here, that is  
21 diminution alone is sufficient for taking, was also raised  
22 in that case. They did not have to look at reasonable  
23 investment-backed expectations, but it was -- they did  
24 rely upon an old case, Just v. Marinette County, that  
25 talks about justified expectations in that there is no

1 justified expectation on the part of any person to use  
2 property in a way that harms others and requires that you  
3 change the natural character of the area so as to make it  
4 economically -- or, to make an economic use of it, so I  
5 think the court implicitly talked about it in Carter, the  
6 reasonable investment-backed expectations, although it was  
7 not raised.

8 QUESTION: I'm not talking about reasonable  
9 investment-backed expectations. I'm saying that the court  
10 here said we will be overruling Carter if we acknowledged  
11 that a total taking would require compensation.

12 That's what they said, and I take that to  
13 mean -- I take that to be the position that any valid  
14 regulation of the land -- any valid regulation, regardless  
15 of whether it rises to the level of regulation in order to  
16 prevent a public nuisance, does not require compensation  
17 even if it requires -- even if it results in a complete  
18 taking, a complete diminution of value.

19 MR. HARNESS: That is --

20 QUESTION: Isn't that a fair characterization of  
21 the opinion?

22 MR. HARNESS: No, sir. That has not been our  
23 position, it was not that position presented to the court,  
24 and I think their position is better characterized as not  
25 having to reach that issue because of the narrow way in

1 which the case was postured to them.

2 They weren't required -- they weren't -- at no  
3 point in time were they asked to look at the harm. The  
4 State was not required to defend on that position. As a  
5 consequence, he made his bed and the court said you sleep  
6 in it. You didn't challenge it and we don't have to get  
7 to it because you didn't ask us about it.

8 QUESTION: I agree that they didn't have to get  
9 to it, but I'm not sure I agree that they didn't get to  
10 it. I do not see how the Carter case would have been  
11 overruled by acknowledgement that in at least -- that a  
12 total taking requires compensation. I did not think that  
13 Carter rested upon the importance of the -- of public  
14 interest in the wetlands.

15 MR. HARNESS: Carter rested upon the  
16 proposition -- and the court talked about the difference  
17 between eminent domain and taking in that case -- rested  
18 on the proposition that you do not have a right to use  
19 your property in a way that harms others, so they dealt  
20 with the issue of whether or not there was public harm.

21 QUESTION: Is that the position you're  
22 defending? Any use of your property that harms others can  
23 be prohibited, even to the extent of depriving your land  
24 of all its value, without compensation?

25 MR. HARNESS: No, my position is not that. Our



1 position is --

2 QUESTION: Well then again I don't understand  
3 why Carter would have been overruled by acknowledging the  
4 claim here.

5 MR. HARNESS: In Carter, there was no question  
6 raised about the degree of harm. It simply said public  
7 harm. Our position has been throughout the course of this  
8 trial and before this Court that there is a degree of  
9 public harm that warrants insulation. I don't know  
10 exactly where that line is and certainly the court has had  
11 to do it on an ad hoc basis.

12 As it relates to the South Carolina supreme  
13 court, however, all they were faced with was not the  
14 degree of harm, it was the fact that they conceded that  
15 there was harm, and secondly they did not raise it in  
16 their very extreme position.

17 One of the other points that I would like to  
18 make is again back to the degree of harm and to talk a bit  
19 about the purpose of the act. The purpose of the act was  
20 to prevent people from building on unstable or eroding  
21 beaches, and that was the purpose of the set-back scheme.

22 QUESTION: But we can't assume that that purpose  
23 applies in this case, can we, because the -- isn't the  
24 effect of the -- what was it, the 1990 amendments,  
25 indicates that that purpose is in fact not going to be

1 realized in every case, otherwise they wouldn't have made  
2 provision for exceptions, so we can't assume that that is  
3 necessarily a fact that applies to this case, can we?

4 MR. HARNESS: I think that you can. I don't  
5 think that the 1990 amendments detract from the fact that  
6 there is serious public harm created by building near the  
7 ocean. I think what the legislature did was to bring it  
8 down to the council level to see if in some rare and  
9 unusual circumstances the purposes and the ends or the  
10 means could be considered and --

11 QUESTION: Sure, but the rare and unusual  
12 circumstances would be circumstances in which building on  
13 a given lot would not pose a threat of harm to the public.  
14 That's the circumstance, isn't it, and we have to assume  
15 that that is possible.

16 MR. HARNESS: That it is possible that --

17 QUESTION: It may be possible on this lot.

18 MR. HARNESS: It may be possible from a  
19 cumulative sense. I don't think that the legislature  
20 instructed the Coastal Council to go down and look at each  
21 individual lot but to consider the --

22 QUESTION: Well, who issued -- maybe I'm just  
23 playing with words here. Who issues the permits in the  
24 cases where an exception is made under the amendments?

25 MR. HARNESS: It would be issued by a 14-member

1 commission.

2 QUESTION: Okay, so it's the 14-member  
3 commission that can go up and down the coast if there's a  
4 request for a permit and decide whether in a given case  
5 there would be harm to the public in building.

6 MR. HARNESS: That is correct.

7 QUESTION: And that hasn't been done here, so we  
8 can't assume what the result would be.

9 MR. HARNESS: I don't think you can at all  
10 assume what a 14-member council will do.

11 QUESTION: Mr. Harness, and you say the claim is  
12 not right because application to that council hasn't been  
13 made. I would agree with that if the South Carolina court  
14 had taken that position, but in -- don't we go along with  
15 at least where in the area of prudential standard, where  
16 the State courts have allowed the suit to proceed, don't  
17 we take appeals from those State courts?

18 In tax cases, for example, the Federal rule is a  
19 taxpayer has no standing, but if a State wants to give a  
20 State taxpayer standing we will review that case and we  
21 won't apply our prudential rule, will we?

22 MR. HARNESS: No, sir, but could I tell you why  
23 the South Carolina supreme court did what they did?  
24 Shortly after arguing the case, or after arguing the case  
25 the legislation was passed allowing for what amounts to a

1 variance.

2           The counsel for the South Carolina Coastal  
3 Council applied to the court seeking to see if the 1990  
4 amendments would have any effect on their decision, and  
5 the South Carolina supreme court said it is too late to  
6 make that request. We don't have any way under our  
7 current rules to allow you to argue after oral arguments  
8 have been made. So as the dissent said, they would have  
9 preferred to send it back down to the Coastal Council to  
10 see what they had gotten.

11           QUESTION: Well, whatever the reason, they went  
12 ahead, and they did not consider it unright. Rightness is  
13 a prudential doctrine. I don't know why it is not prudent  
14 for us, having a decision by the South Carolina supreme  
15 court, in effect to say in this case we'll treat it the  
16 same way. Why don't we just do the same thing that they  
17 did?

18           MR. HARNESS: Let me say that -- let me try to  
19 answer that question, and I'm not attempting to avoid it,  
20 but it seems to me that what we are asking for first of  
21 all is that you uphold the South Carolina Coastal Council  
22 decision because of the narrowness of its argument, but if  
23 you're going to remand it, if you consider remand I think  
24 the remand should go to whether or not they can rely upon  
25 the petition's concessions, and whether they incorrectly



1     rely upon the findings --

2             QUESTION: It seems to me that you've already  
3     conceded that the opinion of your State court bars any  
4     claim of a temporary taking, even if the rest of the case  
5     is not right, in which event, then the legal issue about  
6     the correctness of the judgment of the State court is  
7     before us and we have to -- we can't say the temporary  
8     takings claim isn't right.

9             MR. HARNESS: Well, it seems to me that you can  
10    say that the temporary takings claim is not right because  
11    no evidence was presented below at all about --

12            QUESTION: Well, I know, but that just  
13    assumes -- but let's just assume that under the State  
14    court's opinion and judgment there could be no temporary  
15    takings claim for the same reason that it decided there  
16    couldn't be any claim at all. I don't know how you can  
17    say we can just completely remand the whole case.

18            MR. HARNESS: Well, it seems to me that the  
19    appropriate remedy -- and I agree with the Solicitor  
20    General. I think the appropriate remedy is if you cannot  
21    uphold the South Carolina court that you would remand to  
22    get to the other parts of the test, since the only thing  
23    presented to the court below was the issue of whether the  
24    loss of economic value alone was sufficient to equate to a  
25    taking.

1 Thank you.

2 QUESTION: Thank you, Mr. Harness.

3 Mr. Lewis, you have 2 minutes remaining.

4 MR. LEWIS: I will entertain any questions of  
5 the Court.

6 CHIEF JUSTICE REHNQUIST: Apparently the Court  
7 has no questions. The case is submitted.

8 (Whereupon, at 11:55 a.m. the case in the above-  
9 entitled matter was submitted.)

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## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents and accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 91-453 - DAVID H. LUCAS, Petitioner V. SOUTH CAROLINA COASTAL COUNCIL

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Michelle Sanders

(REPORTER)