Chapter 11

Regulatory Takings

I. Background

From the early days of the Clean Water Act Section 404 program through today, private property rights advocates have criticized government regulation of wetlands. Although the Corps denies very few Section 404 permit applications, over the years, several landowners have challenged wetland permit denials as "takings" of their property. In light of the fact that almost 75% of the remaining wetlands in the lower 48 states are privately owned, the takings issue is likely to remain an important consideration in the design and implementation of wetlands protection programs.

To the extent that "takings" claims arise regarding federal or state wetlands regulation, the claims usually arise when the government denies a permit to a landowner that would authorize development in wetlands, although some landowners have raised takings claims as soon as the government has asserted jurisdiction over wetlands on their property. Landowners have also raised takings challenges when the government issues a permit, but includes conditions or limits in the permit that the landowners oppose.

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Takings claims are based on the Fifth Amendment of the United States Constitution, which provides that private property shall not be "taken for public use, without just compensation." *See* U.S. Const., Amend. 5. While the Fifth Amendment provides the basis for takings claims against the Corps of Engineers and other ***federal*** agencies, the takings prohibition is also made applicable to states and state agencies through the Due Process Clause of the Fourteenth Amendment of the Constitution. *See Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226 (1897).

Although early court decisions focused on physical invasion or appropriation of property by government as takings, the Supreme Court has held, since 1922, that government regulation of property that restricts the use of the property can constitute a taking ***if*** the

regulation ***"goes too far."*** *See* *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). At the same time, though, Justice Holmes, writing for the Court, stressed that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* at 413.

Fifty years later, the Court provided some guidance to help determine when government regulation "goes too far," so that is a taking. In *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 124 (1978), the Court eschewed adopting any bright line rules, but held that several factors are significant in evaluating whether government regulation constitutes a taking, including (1) the ***economic impact*** of the regulation on the claimant; (2) the extent to which the regulation has ***interfered with investment-backed expectations*** of the claimant; and (3) the ***character*** of the government action. Regarding the ***character*** of the government action, the Court suggested that it was less likely that government regulation would be a taking when the interference with private property rights "arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* According to the Court, the three factor *Penn Central* test requires an ad hoc, factual analysis in each case. *Id.* The *Penn Central* Court again stressed that the government is not required to pay for every reduction in property value caused by regulation, but is only required to pay when the regulation "goes too far." *Id.* In *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), a case cited by the *Penn Central* Court, the Supreme Court upheld a law prohibiting the operation of a brickyard in a residential neighborhood against a taking challenge even though the regulation reduced the landowner's property value by more than 90%.

II. Jurisdiction and Timing of Takings Claims

According to the Tucker Act, takings claims against the United States must be brought in the United States Court of Federal Claims if the plaintiff is seeking more than $10,000. *See* 28 U.S.C. § 1491. Takings claims for less than $10,000 can be brought in the federal district courts. *See* 28 U.S.C. § 1346. The Court of Federal Claims does ***not*** have jurisdiction to adjudicate the validity of the Corps' denial or issuance of a Section 404 permit, an EPA veto of a permit, or a jurisdictional determination by EPA or the Corps, so a landowner who is seeking more than $10,000 in compensation for a taking based on those actions must bring two separate actions if they want to challenge the validity of the underlying agency determination that is allegedly a taking. Decisions of the U.S. Court of Federal Claims can be appealed to the United States Court of Appeals for the Federal Circuit. Consequently, most of the takings jurisprudence developed outside of the Supreme Court is developed in the Court of Federal Claims and the Federal Circuit.

Since a court determining whether a government regulation constitutes a taking must conduct an ad hoc factual analysis of the impact of the government regulation on the property, the Supreme Court has stressed that a takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *See*

Williamson County Regional Planning v. Hamilton Bank, 473 U.S. 172 (1985). In that case, the Court held that a developer could not challenge, as a taking, a county planning commission's decision to deny approval for a development proposal because the developer had not yet sought a variance that might have allowed the development to proceed. In the following year, in *McDonald et al v. County of Yolo*, 477 U.S. 340, 351 (1986), the Court again stressed that a landowner cannot pursue a takings challenge based on the application of a government regulatory program to its land until the landowner receives the government's "final, definitive position regarding how it will apply the regulations at issue to the particular land in question." In *McDonald,* the Court determined that, even though the government had denied the landowner's subdivision proposal, it was possible that the government would approve a more limited subdivision proposal if the landowner sought approval, so the Court could not determine the extent of the government interference with the landowner's property rights until the government identified a final, definitive position on the limits on the development of the property. *Id.*

There are, however, limits to this line of authority. In *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001), the Supreme Court held that "once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." In that case, the government argued that the plaintiff's takings challenge to regulation limiting the development of wetlands was unripe because the plaintiff had not submitted additional development proposals after three development proposals were rejected, but the Court concluded that the plaintiff could pursue a takings claim because it was clear that the government would not allow any development of the wetlands even if the plaintiff submitted another development proposal. *Id.* Thus, if the limits that the government will ultimately place on a landowner's property can be determined to a reasonable degree of certainty, the landowner's taking claim will be ripe and they do not have to pursue variance procedures or advance other development proposals that would be futile.

In light of ripeness concerns like those in the *Williamson County* and *McDonald* cases, landowners are generally unable to bring takings challenges based on a preliminary or approved jurisdictional determination by the Corps or EPA. *See United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). Since a landowner might still be able to obtain a Section 404 permit to develop their property after the government has determined that the property contains jurisdictional waters, it is not clear, at the time of the jurisdictional determination, what restrictions, if any, will be placed on the landowner's use of their property. Similarly, a landowner will generally not be able to challenge a cease and desist order or administrative compliance order as a taking, since the landowner may ultimately be able to engage in the prohibited development of their property if they seek and obtain a Section 404 permit. *See Tabb Lakes, Ltd. v. United States,* 10 F.3d 796 (Fed. Cir. 1993). For the same reasons, when the government determines that an activity is not exempt from the Section 404 permit requirement or that an activity is not authorized by a general permit, a landowner will generally be unable to challenge the government decision as a taking because the

landowner may still apply for, and perhaps obtain, an individual Section 404 permit. In each of the preceding scenarios in this paragraph, though, if it is clear that *any* application for a Section 404 permit would be ultimately rejected, a landowner may be able to argue their takings challenge is ripe in light of the *Palazzolo* decision.

Once landowners apply for a permit and the Corps or EPA (though a veto) make a final decision on the permit, it becomes easier for landowners to raise takings challenges, although some of those decisions may still not be ripe for a takings challenge. If the Corps has issued a Section 404 permit to a landowner and the landowner wants to challenge the restrictions placed on his property by the conditions included in the permit, the landowner's claim is probably ripe for review, since the permit reflects the government's final definitive application of the Clean Water Act regulatory program to the landowner's property.

If, however, a Section 404 permit application is withdrawn or denied "without prejudice" because the applicant did not provide all of the information required to process the permit application or because the applicant was not able to obtain the necessary state or local approvals for the development project (i.e. State permit, 401 certification, CZMA consistency, local zoning approval, etc.), the landowner will probably not be able to pursue a takings claim against the Corps at that time. *See Heck v. United States,* 37 Fed. Cl. 245 (1997). After all, it is not clear, at that time, whether the Corps would have issued a permit or included specific conditions in the permit if the applicant had obtained the other necessary approvals. If the Corps, in denying the permit "without prejudice", indicates that it would have denied the permit anyway, though, a court may determine that a takings claim against the agency is ripe. *See City National Bank v. United States,* 33 Fed. Cl. 224 (1995).

When the Corps denies a permit and does not deny it "without prejudice", landowners are in the best position to pursue a ripe takings challenge. Although the Corps might argue that the landowner must re-submit a less ambitious permit application before challenging the denial as a taking, in light of the *Williamson County* and *McDonald* precedent, the Court of Federal Claims frequently rejects that argument, finding that additional permit applications would be futile. *See, e.g., Cristina Inv. Corp. v. United States,* 40 Fed. Cl. 571 (1998); *City National Bank v. United States*, 30 Fed. Cl. 715 (1994).

Questions and Comments

1. **Ripeness and appeals:** Pursuant to the Corps' regulations, permits denied with prejudice and declined permits can be appealed administratively and cannot be challenged in court if they are not challenged administratively. *See* 33 C.F.R. § 331.12. In light of those regulations, it is unclear whether the Court of Federal Claims will allow a landowner to pursue a takings challenge to a permit denial or permit conditions if the landowner has not exhausted its administrative remedies. If the landowner *has* sought administrative review, though, the Court of Federal

Claims will not review a takings claim until the Corps has made a final decision on the appeal. *See Bay-Houston Towing Co. v. United States,* 58 Fed. Cl. 462 (2003).

2. **Swampbuster:** Landowners have not generally brought takings claims based on a denial of farm benefits due to the Swampbuster provisions of the Food Security Act. Do you understand why not?

3. **State laws providing compensation for diminution in value:** Although the Supreme Court has held that the government is not required to pay for every reduction in property value, but is only required to compensate landowners when government regulation "goes too far," many states have passed laws that require government entities to compensate landowners when government regulation reduces property values by a specific degree (i.e. 50%, 70%, etc.) *See* Environmental Law Institute, *State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act* 20-23 (May 2013). The laws are not based on the federal or state constitutions, but create additional limits on government regulation to protect "private proeprty rights." Many of the laws allow states to avoid paying compensation by waiving the application of the regulation to the landowner challenging the government action. *Id.* What impact might these laws have on federal or state regulation of wetlands?

Hypotheticals

1. Alex Pritchett owns an acre of land in Glynn County, Georgia. She would like to build a dock on the property, which is primarily coastal wetlands, but the Corps of Engineers has just issued an approved jurisdictional determination, finding that the entire parcel of land is "waters of the United States." Without focusing on whether the Corps' action ultimately would be a taking, can she bring a taking action in federal district court seeking $8,000 in damages (the amount that she paid for the property) based on the Corps' jurisdictional determination? If the Corps subsequently informs her that her plans to build her dock on the property do not qualify for the regional general permit that the Corps district issued to authorize the construction of small docks, can she bring her takings lawsuit at that time? Would it make a difference if the Corps simultaneously told her that she would never be able to build a dock on her property because any construction on her property would harm a sensitive breeding area for several species of snakes and rodents?

2. Arthur Gomez applied to the Corps of Engineers for a Section 404 permit to fill 7 acres of wetlands on a 10 acre plot of land that he owned, so that he could develop the property as a residential subdivision. When the State would not provide a Section 401 certification for his proposed development, the Corps denied his permit without prejudice, although they encouraged him to submit a new application that would impact fewer acres of wetlands because they would never approve a proposal to fill all 7 acres of wetlands on his property. Without focusing on whether the Corps' action would ultimately be a taking, can he bring a taking action in federal district court seeking $500,000 (the amount that he paid for the property)? Would your answer be different if the State provided the Section 401 certification but the Corps denied the permit application after the agency asked Gomez to submit a development proposal that would impact 5 acres or less of wetlands on the property and Gomez refused? Should Gomez appeal the permit denial administratively before bringing his takings claim?

III. The Takings Analysis

In determining whether government regulation constitutes a taking, courts generally engage in an ad hoc, fact-sensitive analysis using the *Penn Central* analysis. However, the Supreme Court has established a few categorical rules that apply in takings cases. The following case examines one of those rules. As additional background for the case, it is helpful for the reader to know that, prior to this case, the Supreme Court held that a landowner can recover compensation when a government regulation "temporarily" takes their property, even though the regulatory restriction is later removed. *See* *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987).

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Lucas v. South Carolina Coastal Council

505 U.S. 1003 (1992)

JUSTICE SCALIA delivered the opinion of the Court.

Resources for the Case

Unedited Opinion (From Justia)
Google Map of all the cases in the coursebook
Oral argument (from the Oyez Project)
Photos, Documentary and Court Documents (from Duke Law - American Voices Project)

In 1986, petitioner David H. Lucas paid $975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, * * * which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. * * * A state trial court found that this prohibition rendered Lucas's parcels "valueless." * * * This case requires us to decide whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of "just compensation." U. S. Const., Amend. 5.

I

A

South Carolina's expressed interest in intensively managing development activities in the so-called "coastal zone" dates from 1977 when, in the aftermath of Congress's passage of the federal Coastal Zone Management Act of 1972, * * * the legislature enacted a Coastal Zone Management Act of its own. * * * In its original form, the South

Carolina Act required owners of coastal zone land that qualified as a "critical area" (defined in the legislation to include beaches and immediately adjacent sand dunes, * * * to obtain a permit from the newly created South Carolina Coastal Council (Council) (respondent here) prior to committing the land to a "use other than the use the critical area was devoted to on [September 28, 1977]." * * *

In the late 1970's, Lucas and others began extensive residential development of the Isle of Palms, a barrier island situated eastward of the city of Charleston. Toward the close of the development cycle for one residential subdivision known as "Beachwood East," Lucas in 1986 purchased the two lots at issue in this litigation for his own account. No portion of the lots, which were located approximately 300 feet from the beach, qualified as a "critical area" under the 1977 Act; accordingly, at the time Lucas acquired these parcels, he was not legally obliged to obtain a permit from the Council in advance of any development activity. His intention with respect to the lots was to do what the owners of the immediately adjacent parcels had already done: erect singlefamily residences. He commissioned architectural drawings for this purpose.

The Beachfront Management Act brought Lucas's plans to an abrupt end. Under that 1988 legislation, the Council was directed to establish a "baseline" connecting the landwardmost "point[s] of erosion ... during the past forty years" in the region of the Isle of Palms that includes Lucas's lots. * * * In action not challenged here, the Council fixed this baseline landward of Lucas's parcels. That was significant, for under the Act construction of occupable improvements[2] was flatly prohibited seaward of a line drawn 20 feet landward of, and parallel to, the baseline. * * * The Act provided no exceptions.

B

Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act's construction bar effected a taking of his property without just compensation. Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives. Following a bench trial, the court agreed. Among its factual determinations was the finding that "at the time Lucas purchased the two lots, both were zoned for single-family residential construction and ... there were no restrictions imposed upon such use of the property by either the State of South Carolina, the County of Charleston, or the Town of the Isle of Palms." * * * The trial court further found that the Beachfront Management Act decreed a permanent ban on construction insofar as Lucas's lots were concerned, and that this prohibition "deprive[d] Lucas of any reasonable economic use of the lots, ...

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[2] The Act did allow the construction of certain nonhabitable improvements, e. g., "wooden walkways no larger in width than six feet," and "small wooden decks no larger than one hundred forty-four square feet."

eliminated the unrestricted right of use, and render[ed] them valueless." * * * The court thus concluded that Lucas's properties had been "taken" by operation of the Act, and it ordered respondent to pay "just compensation" in the amount of $1,232,387.50. * * *

The Supreme Court of South Carolina reversed. It found dispositive what it described as Lucas's concession "that the Beachfront Management Act [was] properly and validly designed to preserve ... South Carolina's beaches." * * * Failing an attack on the validity of the statute as such, the court believed itself bound to accept the "uncontested ... findings" of the South Carolina Legislature that new construction in the coastal zone-such as petitioner intended-threatened this public resource. * * * The court ruled that when a regulation respecting the use of property is designed "to prevent serious public harm," * * * (*citing*, *inter alia, Mugler v. Kansas*, 123 U.S. 623 (1887)), no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value.

Two justices dissented. They acknowledged that our *Mugler* line of cases recognizes governmental power to prohibit "noxious" uses of property-i. e., uses of property akin to "public nuisances"-without having to pay compensation. But they would not have characterized the Beachfront Management Act's "primary purpose [as] the prevention of a nuisance." * * * To the dissenters, the chief purposes of the legislation, among them the promotion of tourism and the creation of a "habitat for indigenous flora and fauna," could not fairly be compared to nuisance abatement. * * * As a consequence, they would have affirmed the trial court's conclusion that the Act's obliteration of the value of petitioner's lots accomplished a taking.

We granted certiorari. * * *

III

Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it was generally thought that the Takings Clause reached only a "direct appropriation" of property * * * or the functional equivalent of a "practical ouster of [the owner's] possession," * * * Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U.S., at 414-415. * * *

Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any " 'set formula' " for determining how far is too far, preferring to "engag[e] in ... essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (*quoting Goldblatt v. Hempstead*, 369 U.S. 590,594 (1962)). * * * We have, however, described at least two

discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. * * *

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. *See Agins v. City of Tiburon*, 447 U.S. 255, 260; *see also Nollan v. California Coastal Comm'n*, 483 U. S. 825, 834 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining & Reclamation Assn*., Inc., 452 [*1016] U.S. 264, 295-296 (1981). * * * As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests *or denies an owner economically viable use of his land*." *Agins, supra*, at 260 (citations omitted) (emphasis added).[7]

We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point

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[7] Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme-and, we think, unsupportable-view of the relevant calculus, *see Penn Central Transportation Co. v. New York City*, 42 N.Y. 2d 324, 333-334, 366 N.E. 2d 1271, 1276-1277 (1977), *aff'd*, 438 U.S. 104 (1978), where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the takings claimant's other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. *Compare Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (law restricting subsurface extraction of coal held to effect a taking), with *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497-502 (1987) (nearly identical law held not to effect a taking); *see also id.*, at 515-520 (REHNQUIST, C. J., dissenting); * * * The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property-i. e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.

of view, the equivalent of a physical appropriation. *See San Diego Gas & Electric Co. v. San Diego,* 450 U.S., at 652 (dissenting opinion). "[F]or what is the land but the profits thereof[?]" 1 E. Coke, Institutes, ch. 1, § 1 (1st Am. ed. 1812). Surely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," *Penn Central Transportation Co.*, 438 U.S., at 124, in a manner that secures an "average reciprocity of advantage" to everyone concerned, *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 415. And the functional basis for permitting the government, by regulation, to affect property values without compensation-that

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,"

id., at 413 - does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use-typically, as here, by requiring land to be left substantially in its natural state-carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. *See, e. g., Annicelli v. South Kingstown*, 463 A.2d 133, 140-141 (R.I. 1983) (prohibition on construction adjacent to beach justified on twin grounds of safety and "conservation of open space"); *Morris County Land Improvement Co. v. Parsippany-Troy Hills Township*, 40 N.J. 539, 552-553, 193 A. 2d 232, 240 (1963) (prohibition on filling marshlands imposed in order to preserve region as water detention basin and create wildlife refuge). As Justice Brennan explained:

> "From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property."

San Diego Gas & Elec. Co., supra, at 652 (dissenting opinion). The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation. * * *

We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property

economically idle, he has suffered a taking.[8]

B

The trial court found Lucas's two beachfront lots to have been rendered valueless by respondent's enforcement of the coastal-zone construction ban.9 Under Lucas's theory of the case, which rested upon our "no economically viable use" statements, that finding entitled him to compensation. Lucas believed it unnecessary to take issue with either the purposes behind the Beachfront Management Act, or the means chosen by the South Carolina Legislature to effectuate those purposes. The South Carolina Supreme Court, however, thought otherwise. In its view, the Beachfront Management Act was no ordinary enactment, but involved an exercise of South Carolina's "police powers" to mitigate the harm to the public interest that petitioner's use of his land might occasion. * * *

It is correct that many of our prior opinions have suggested that "harmful or noxious uses" of property may be proscribed by government regulation without the requirement

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[8] JUSTICE STEVENS criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary," in that "[the] landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." *Post*, at 1064. This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and ... the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally. *Penn Central Transportation Co. v. New York City*, 438 U. S. 104, 124 (1978). It is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these "all or-nothing" situations.

JUSTICE STEVENS similarly misinterprets our focus on "developmental" uses of property (the uses proscribed by the Beachfront Management Act) as betraying an "assumption that the only uses of property cognizable under the Constitution are developmental uses." *Post*, at 1065, n. 3. We make no such assumption. Though our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land, there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause. *See, e. g., Loretto v. Teleprompter Manhattan CATV Corp*., 458 U. S. 419, 436 (1982) (interest in excluding strangers from one's land).

of compensation. For a number of reasons, however, we think the South Carolina Supreme Court was too quick to conclude that that principle decides the present case. The "harmful or noxious uses" principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate-a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power.* * * "Harmful or noxious use" analysis was, in other words, simply the progenitor of our more contemporary statements that "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' .... " *Nollan, supra*, at 834 *(quoting Agins v. Tiburon*, 447 U.S., at 260); *see also Penn Central Transportation Co., supra*, at 127; *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-388 (1926).

The transition from our early focus on control of "noxious" uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between "harmpreventing" and "benefit-conferring" regulation is often in the eye of the beholder. It is quite possible, for example, to describe in either fashion the ecological, economic, and esthetic concerns that inspired the South Carolina Legislature in the present case. One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve.[11] Compare, e. g., *Claridge v. New Hampshire Wetlands Board*, 125 N.H. 745, 752, 485 A.2d 287,292 (1984) (owner may, without

[11] In the present case, in fact, some of the "[South Carolina] legislature's 'findings' " to which the South Carolina Supreme Court purported to defer in characterizing the purpose of the Act as "harm-preventing," * * * seem to us phrased in "benefit conferring" language instead. For example, they describe the importance of a construction ban in enhancing "South Carolina's annual tourism industry revenue," * * * in "provid[ing] habitat for numerous species of plants and animals, several of which are threatened or endangered," * * * and in "provid[ing] a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being," * * * It would be pointless to make the outcome of this case hang upon this terminology, since the same interests could readily be described in "harm-preventing" fashion.

JUSTICE BLACKMUN, however, apparently insists that we must make the outcome hinge (exclusively) upon the South Carolina Legislature's other, "harm-preventing" characterizations, focusing on the declaration that "prohibitions on building in front of the setback line are necessary to protect people and property from storms, high tides, and beach erosion." * * * He says "[n]othing in the record undermines [this] assessment," * * * apparently seeing no significance in the fact that the statute permits owners of existing structures to remain (and even to rebuild if their structures are not "destroyed beyond repair," * * *), and in the fact that the 1990 amendment authorizes the Council to issue permits for new construction in violation of the uniform prohibition * * * .

compensation, be barred from filling wetlands because landfilling would deprive adjacent coastal habitats and marine fisheries of ecological support)*, with, e. g., Bartlett v. Zoning Comm'n of Old Lyme*, 161 Conn. 24, 30, 282 A.2d 907, 910 (1971) (owner barred from filling tidal marshland must be compensated, despite municipality's "laudable" goal of "preserv[ing] marshlands from encroachment or destruction"). Whether one or the other of the competing characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate. * * * A given restraint will be seen as mitigating "harm" to the adjacent parcels or securing a "benefit" for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors. *See* Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 49 (1964) ("[T]he problem [in this area] is not one of noxiousness or harm-creating activity at all; rather it is a problem of inconsistency between perfectly innocent and independently desirable uses"). Whether Lucas's construction of single family residences on his parcels should be described as bringing "harm" to South Carolina's adjacent ecological resources thus depends principally upon whether the describer believes that the State's use interest in nurturing those resources is so important that any competing adjacent use must yield.[12]

When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings" -which require compensation - from regulatory deprivations that do not require compensation. A fortiori the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. The South Carolina Supreme Court's approach would essentially nullify Mahon's affirmation of limits to the noncompensable exercise of the police power. Our cases provide no support for this: None of them that employed the logic of "harmful use" prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land. *See Keystone Bituminous Coal Assn*., 480 U.S., at 513-514 (REHNQUIST, C. J., dissenting) * * *

Where the State seeks to sustain regulation that deprives land of all economically

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[12] In JUSTICE BLACKMUN'S view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm-preventing justification for its action. *See post*, at 1039, 1040-1041, 1047-1051. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. * * * This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 413. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). *See Andrus v. Allard*, 444 U.S. 51, 66-67 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.* * *

Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved, *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S., at 426 -though we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the land title. * * *

We believe similar treatment must be accorded confiscatory regulations, i. e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts-by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[16]

On this analysis, the owner of a lakebed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation

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[16] The principal "otherwise" that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of "real and personal property, in cases of actual necessity, to prevent the spreading of a fire" or to forestall other grave threats to the lives and property of others. *Bowditch v. Boston*, 101 U.S. 16, 18-19 (1880); *see United States v. Pacific R. Co.*, 120 U.S. 227, 238-239 (1887).

that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was always unlawful, and (subject to other constitutionallimitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. * * * In light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth and Fourteenth Amendments, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *see, e. g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011-1012 (1984); *Hughes v. Washington*, 389 U.S. 290, 295 (1967) (Stewart, J., concurring), this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional. When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.[17]

The "total taking" inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, *see, e. g., Restatement (Second) of Torts* §§ 826, 827, the social value of the claimant's activities and their suitability to the locality in question, *see, e. g., id.*, §§ 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, *see, e. g., id.*, §§827(e), 828(c), 830. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so, *see id.*, §827, Comment g. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the "essential use" of land, *Curtin v. Benson*, 222 U.S. 78, 86 (1911). The

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[17] Of course, the State may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation. *See First English Evangelical Lutheran Church*, 482 U. S., at 321. But "where the [regulation has] already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Ibid.*

question, however, is one of state law to be dealt with on remand. We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as sic utere tuo ut alienum non laedas. As we have said, a "State, by ipse dixit, may not transform private property into public property without compensation .... " *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U. S. 155, 164 (1980). Instead, as it would be required to do if it sought to restrain Lucas in a commonlaw action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can [*1032] the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.[18]

The judgment is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

So ordered.

Questions and Comments

1. **Categorical Rule:** After *Lucas*, if government regulation of wetlands denies a landowner “all economically beneficial or productive use” of their property, the government will be required to compensate the landowner. If the impact of the government action is less than a denial of all economically beneficial or productive use of property, though, the court will continue to use the ad hoc, three factor *Penn Central* analysis to determine whether the government action is a taking.

2. **Denial of All Economically Beneficial or Productive Use:** Did the Court provide any direction regarding how to determine when government regulation denies “all economically beneficial or productive use” of a landowner’s property? In a separate statement, Justice Souter suggested that the determination that the state regulation deprived Lucas of his entire economic interest in his property was “highly questionable”, and Souter suggested that the Court should dismiss

[18] JUSTICE BLACKMUN decries our reliance on background nuisance principles at least in part because he believes those principles to be as manipulable as we find the "harm prevention" / "benefit conferral" dichotomy, *see post*, at 1054-1055. There is no doubt some leeway in a court's interpretation of what existing state law permits-but not remotely as much, we think, as in a legislative crafting of the reasons for its confiscatory regulation. We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.

the writ of certiorari and await a case to directly address the issue of what constitutes a "total deprivation" of use. 505 U.S. at 1076, 1078. In his dissenting opinion, Justice Blackmun labeled the determination "implausible". 505 U.S. at 1036. Why did the South Carolina Coastal Council never challenge the trial court's determination that the regulation denied the landowner all economically beneficial or productive use of his property?

3. **Temporary v. Permanent Taking:** David Lucas bought the lots at issue in this litigation in 1986. The Beachfront Management Act, which limited Lucas' development of the property, was enacted in 1988. In 1990, after Lucas challenged the statute and government regulation as a taking, the Act was amended to authorize landowners like Lucas to apply for a permit to develop their property. Lucas never applied for the permit, but pressed forward with his takings challenge. If the Supreme Court was reviewing Lucas' challenge as a permanent taking claim, would the challenge be ripe? The Court did not review the challenge as a permanent taking claim but, rather, as a claim that the state regulation constituted a "temporary taking" from the time that the Beachfront Management Act was enacted until it was amended to provide an opportunity to seek a permit (1988-1990). In a portion of the opinion not reproduced above, the majority indicated that Lucas could still apply for a permit even after the Supreme Court's decision in the case. If Lucas were to receive a permit to develop his property after the Court's decision, what damages could he recover for the temporary taking?

4. **An Exception to the Categorical Rule:** Prior to the *Lucas* decision, it was believed that there was a "noxious use" exception in takings jurisprudence, whereby governments would not have to provide compensation, regardless of the extent of economic harm caused by regulation, if the government was regulating to prevent a "noxious use" of property. As the *Lucas* Court noted, the South Carolina Coastal Council argued that regulation designed to prevent harm should be treated differently than regulation to confer benefits on citizens. Although the *Lucas* Court rejected that approach, how is the exception to the categorical rule created by the Court different from the "noxious use" exception? Justice Blackmun, in dissent, argues that the new test adopted by the Court could be as malleable as the harm prevention/benefit conferral analysis that the Court was rejecting. What "background principles of the State's law of property and nuisance" will be considered in determining that a regulated use of property is not "part of [the landowner's] title to begin with", so that government regulation can extinguish that use without paying compensation? Should the exception be limited to common law principles or can it include state statutory provisions? In a concurring opinion, Justice Kennedy suggested that reasonable expectations regarding property use should be "understood in light of the whole of our legal tradition" and that the Court should not limit its focus to the common law of nuisance and property. 505 U.S. at 1035. Did the *Lucas* Court find that background principles of South Carolina nuisance or property law prohibited the

uses of property prohibited by the Beachfront Management Act?

5. **Background Principles in Wetlands Cases:** Although the *Lucas* Court allows the government to avoid paying compensation when prohibiting uses of property that, based on background principles of state property or nuisance law, are not part of the landowner's title to begin with, that exception has had little influence in wetlands cases so far. The Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit have generally rejected claims that wetland filling activities are nuisances which can be prohibited by the government without compensation. *See, e.g., Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171 (Fed. Cir. 1994); *Florida Rock Industries v. United States,* 45 Fed. Cl. 21 (1999); *Bowles v. United States,* 31 Fed. Cl. 37 (1994); *Florida Rock Industries v. United States,* 21 Cl. Ct. 161 (1990), *vacated on other grounds*, 18 F.3d 1560 (Fed. Cir. 1994), *cert denied* 513 U.S. 1109 (1995). While some state courts have viewed the "public trust" doctrine as a background principle of state law that justifies regulation without compensation, *see Just v. Marinette County,* 201 N.W. 2d. 761 (Wis. 1972); *McQueen v. South Carolina Coastal Council,* 580 S.E.2d 116 (S.C. 2003), the Court of Federal Claims and the Federal Circuit have not adopted that approach.

   For an outline of the "public trust" doctrine and a proposal for a new theoretical framework for the doctrine, *see* Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards,* 82 Notre Dame L. Rev. 699 (2013). For an exploration of whether "background principles" can evolve to incorporate natural capital and ecosystem services, *see* J.B. Ruhl, *The 'Background Principles' of Natural Capital and Ecosystem services - Did Lucas Open Pandora's Box?,* 22 J. Land Use & Envtl L. 525 (2007). Professor Timothy M. Mulvaney also explores the scope of "background principles" in *Foreground Principles,* 20 Geo. Mason L. Rev. 837 (2013). Professors Michael C. Blumm and Lucus Ritchie explore the rise in categorical defenses to takings claims resulting from the *Lucas* focus on "background principles" in *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 Harv. Envtl. L. Rev. 321 (2005).

6. ***Agins v. City of Tiburon*:** The *Lucas* Court noted that the Supreme Court, in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), held that government regulation can be a taking if it does not substantially advance legitimate state interests or if it denies an owner economically viable use of his land. Although the Supreme Court routinely cited that test in takings decisions, suggesting that government regulation that did not deny an owner economically viable use of his land could still be a taking if the regulation did not substantially advance legitimate state interests, the Court later held, in *Lingle v. Chevron, U.S.A.*, 544 U.S. 528 (2005), that the requirement that government regulation substantially advance legitimate state interests is based on the Due Process clause, and is not part of the takings analysis. That decision had little impact on wetlands taking litigation, since few

challengers ever asserted that the government regulation of wetlands did not substantially advance legitimate government interests.

7. **Subsequent History:** On remand, the South Carolina Supreme Court found that there were no background principles of South Carolina law that limited Lucas' construction of a home on his property, so that the restrictions on his development constituted a temporary taking of his property. *See* *Lucas v. South Carolina Coastal Council,* 424 S.E. 2d 424, 23 E.L.R. 20297 (S.C. 1992). The South Carolina Supreme Court then remanded the case to the trial court to make specific findings of damages from the date of enactment of the Beachfront Management Act through the date of the court's order. *Id.* South Carolina ultimately settled the case for $1.5 million, buying the two lots from Lucas for $425,000 each, and paying legal fees, costs, and interest. *See* H. Jane Lehman, *Case Closed: Settlement Ends Property Rights Lawsuit,* Chicago Tribune, July 25, 1993. The State subsequently sold the lots to a private developer for $750,000. *See* Royal C. Gardner, *Lawyers, Swamps, and Money* 207 (Island Press 2009). In 1996, a 4200 square foot home was built on Lot 22, and it was valued at $2,124,999 in 2013, according to the Charleston County tax records (search for 11 Beachwood East, Isle of Palms). In 2001, a 3400 square foot home was built on Lot 24, and it was valued at $2,700,000 in 2013. *Id.* (Search for 13 Beachwood East, Isle of Palms). Professor Oliver Houck outlines the history of the *Lucas* litigation in detail in *More Unfinished Stories: Lucas, Atlanta Coalition, and Palila/Sweet Home*, 75 U. Colo. L. Rev. 331 (2004).

IV. Applying *Lucas* and *Penn Central* in the Wetlands Context

While *Lucas* created a categorical rule for total deprivations of economically beneficial or productive uses of property, which the Court of Federal Claims has applied in one case involving the denial by the Corps of a Section 404 permit, *see Lost Tree Village Corp. v. United States,* No. 08-117L (Fed. Cl. 03/14/2014), most takings claims based on wetland regulation continue to be analyzed under the *Penn Central* analysis. As noted above, the analysis focuses on the extent of ***economic impact*** on the landowner's property caused by the government action, the interference with the landowner's ***reasonable investment backed expectations***, and the ***character*** of the government action.

"Brass scales with cupped trays" by Toby Hudson - Own work. [CC-BY-SA-3.0]

In calculating the extent of ***economic impact***, courts generally compare the fair market value of the landowner's property immediately before the government action challenged as a taking to the value of the property immediately after the action. *See*

Florida Rock Industries v. United States, 18 F.3d 1560 (Fed. Cir. 1994), *cert denied* 513 U.S. 1109 (1995); *Bowles v. United States,* 31 Fed. Cl. 37 (1994). Courts are no more willing to create bright line rules regarding the extent of economic impact that could trigger a taking in the wetlands context than in other contexts. While cases where plaintiffs have prevailed on takings claims for wetland permit denials usually involve reductions in property value of 90% or more, *see* *Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171 (Fed. Cir. 1994) (99% reduction)*; Florida Rock Industries v. United States,* 21 Cl. Ct. 161 (1990) (95% reduction) the Court of Federal Claims has found that a 73% reduction in property value could constitute a taking of property, when considered in light of the other *Penn Central* factors. *See Florida Rock Industries v. United States,* 45 Fed. Cl. 21 (1999). While landowners frequently assert that Corps permit denials require them to leave wetlands in a natural state and render their property valueless, the increase in mitigation banking, creating opportunities to reap economic benefits from restoring, enhancing, preserving or creating wetlands, may impact the analysis of the economic impact of development restrictions in more cases.

For the second *Penn Central* factor, in reviewing the extent to which government regulation interferes with a landowner's ***reasonable investment-backed expectations***, courts focus on the regulatory landscape that was in place at the time that the landowner acquired the property. Although the Supreme Court has rejected a bright line rule that would prohibit landowners from recovering for a taking if the regulatory scheme that allegedly triggers the taking was in place at the time the landowner acquired the property, *see* *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001), it is more difficult for the landowner to prove that the government regulation interfered with reasonable investment backed expectations in such a case. Thus, when a landowner acquired property after the Clean Water Act Section 404 permit program was implemented and it was clear that the program applied to wetlands, it will be more difficult for the landowner to prevail on a claim that restrictions on development of the property based on the 404 program constitute a taking than it will be for a landowner who acquired property before the Section 404 program was implemented and applied to wetlands. After all, to the extent that it was clear, at the time that the landowner acquired the property, that a permit would be required to develop the property, any expectation that the property can be developed without obtaining the permit, is unreasonable.

The final factor in the *Penn Central* analysis is the ***character of the government action***. As noted earlier, in focusing on this factor, courts often examine the "average reciprocity of advantage" created by the government regulatory scheme. If a landowner receives a benefit from restrictions placed on his property because other landowners are subject to similar restrictions, courts will be less likely to find that the government restriction is a taking. On the other hand, if courts feel that a landowner is being unfairly singled out and forced to shoulder a significant share of the burden to protect a broad social interest, courts will be more likely to find that the government restriction is a taking.

Questions and Comments

1. **Compensation:** If a permit denial, a condition in a permit, or other land use restriction in a wetlands protection program "takes" a landowner's property, the government will required to pay compensation for the restriction. To the extent that the restriction deprives the landowner of all or almost of the property value, the government can acquire title to the property in exchange for the payment of compensation. However, if a government regulation only deprives a landowner of 70% of their property value, what should the remedy be? *See Florida Rock Industries v. United States,* 45 Fed. Cl. 21 (1999).

2. **Temporary Takings:** While landowners can recover compensation for temporary takings caused by a government restriction on the use of property which is later removed, courts have ***not*** found that the delay caused by the processing of a Section 404 permit application constitutes a temporary taking. *See Bay-Houston Towing Co. v. United States,* 58 Fed. Cl. 462 (2003). However, a landowner may be able to recover compensation for damages suffered between the time that the Corps denied the landowner a Section 404 permit and the time that the Corps eventually issued the permit, following a judicial challenge to the initial permit denial, *see* *Resource Investments, Inc. v. United States,* 85 Fed.Cl. 447 (2009), or for the damages suffered between the time that the Corps issued a case and desist order and the time that a court remanded the matter to the Corps after a judicial challenge. *See Creppel v. United States,* 30 Fed. Cl. 323 (1994), ***aff'd*** 41 F.3d 627 (Fed. Cir. 1994). To the extent that such claims are allowed, courts analyze the claims under the *Lucas* or *Penn Central* frameworks, depending on the severity of the deprivation of property use.

3. **Litigation Trends:** The government prevailed in the first wetlands-related takings lawsuit in 1970, *Zabel v. Tabb*, 430 F.2d 199 (1970), *cert. denied* 401 U.S. 910 (1971), as well as most of the takings lawsuits brought against it through the mid-1980s. *See, e.g., Deltona Corp. v. United States,* 657 F.2d 1184 (Cl. Ct. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Jentgen v. United States,* 657 F.2d 1210 (Cl. Ct. 1981), *cert. denied*, 455 U.S. 1017 (1982). From the mid-1980s through the mid-1990s, courts found that Corps' wetland permit denials constituted takings in several cases, including two on the same day in 1990. *See Florida Rock Industries v. United States,* 21 Cl. Ct. 161 (1990); *Loveladies Harbor v. United States,* 21 Cl. Ct. 153 (1990). The United States fared better between 1994 and 2005, prevailing in every wetlands taking lawsuit except one. *See* Robert Meltz, *Wetlands and Regulatory Takings,* in Wetlands Law and Policy: Understanding Section 404 429 (American Bar Association, Section on Environment, Energy and Resources 2005). However, the government did not fare as well in the recent litigation surrounding the Lost Tree Village development in Florida, discussed after the next note.

4. **Parcel as a Whole:** One issue that is significant for wetlands takings cases and

was raised in a footnote, but not resolved, in *Lucas* concerns the extent of the property that courts examine when determining whether government regulation constitutes a total deprivation of economically beneficial or productive use, for *Lucas*, and that courts examine when determining the economic impact of government regulation for *Penn Central.* If a person owns 100 acres of land that includes 20 acres of wetlands, and the government regulatory scheme limits the development of the 20 acres of wetlands, but does not limit the development of the other 80 acres, should the court focus on the economic impact of the government regulation on the 20 acres or the 80 acres? The Supreme Court has repeatedly held that courts should focus their analysis on the "parcel as a whole", *see* *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978); but the Court has not provided concrete guidance on how to determine what constitutes the "parcel as a whole." In footnote 7 in *Lucas*, the Court did not establish a bright line rule but noted, instead, that "[t]he answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property- i.e, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value."

Although the Supreme Court focused on state property law as the basis for determining the extent of property to be evaluated in a takings case, when a landowner contemporaneously acquires or owns several lots in the vicinity of a lot containing wetlands, the Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit frequently focus on the expectations of the landowner and the manner in which the landowner treated the property for development purposes in determining whether the parcel to be evaluated is limited to the lot containing the wetlands or whether the parcel includes other lots in the vicinity that the landowner owns or acquired contemporaneously with the lot containing the wetlands. *See, e.g., Palm Beach Isles Associates v. United States*, 208 F.3d 1374 (Fed. Cir. 2000); *Forest Properties, Inc. v. United States,* 177 F.3d 1360, 1365 (Fed. Cir. 1999).

The following case demonstrates the approach taken by the Federal Circuit.

Lost Tree Village Corporation v. United States

43 E.L.R. 20012 (Fed. Cir. 2013)

RADER,Chief Judge.

Resources for the Case

Unedited Opinion (Findlaw)
Google Map of all the cases in the coursebook
Oral Argument - from Federal Circuit website

The United States Court of Federal Claims determined that the Army Corps of Engineers did not effect a regulatory taking compensable under the Fifth Amendment

when it denied Lost Tree Village Corporation's application for a permit to fill wetlands on its 4.99 acre plat (Plat 57). In reaching this conclusion, the Court of Federal Claims found Lost Tree's parcel as a whole includes Plat 57, a neighboring upland plat (Plat 55), and scattered wetlands in the vicinity owned by Lost Tree at the time the permit was denied. Because the Court of Federal Claims erred in its determination of the relevant parcel, this court reverses and remands for further proceedings.

I

In 1968, Lost Tree Village Corporation (Lost Tree) entered an Option Agreement to purchase approximately 2,750 acres of property on Florida's mid-Atlantic coast, near the City of Vero Beach. The property covered by the Option Agreement encompasses a barrier island on the Atlantic Ocean, which is bisected by the A-1-A Highway, and stretches westward to interior land and islands on the Indian River. Lost Tree purchased substantially all of the land covered by the Option Agreement in a series of transactions during the period 1969-1974. In 1974, Lost Tree purchased the 4.99 acres now known as Plat 57 as part of a transaction in which it acquired the entire peninsula on which Plat 57 is located (known as the Island of John's Island), Gem Island, and other parcels in and along the Indian River.

Beginning in 1969 and continuing through the mid-1990s, Lost Tree developed approximately 1,300 acres of the property purchased under the 1968 Option Agreement into the upscale gated residential community of John's Island. The John's Island community includes most of Lost Tree's holdings on the barrier island, Gem Island, and the Island of John's Island. The John's Island community also includes some property that was not covered by the 1968 Option Agreement and was never owned by Lost Tree. Lost Tree built the infrastructure for the community, including utilities, sewage systems, and the majority of the roads and bridges within the community. The community includes two golf courses, a beach club, a private hotel, condominiums, and single family homes. * * *

In 1980, Lost Tree submitted to the Army Corps of Engineers (Corps) an application for a permit under § 404 of the Clean Water Act * * * to make numerous infrastructure improvements including construction of causeways connecting the barrier island, Gem Island, and the Island of John's Island. The application also sought approval to dredge canals and fill some wetland areas to create developable lots. Lost Tree's application was accompanied by plans and drawings for its proposed development of the Island of John's Island and Gem Island (the 1980 Development Plan). A drawing in the 1980 Development Plan depicts a substantial portion of Plat 57, as well as other areas, shaded in green and labeled "wildlife preserve." * * *

The Corps did not act on Lost Tree's 1980 permit application as submitted because the State of Florida required numerous changes to Lost Tree's plans. Lost Tree submitted a revised proposal to the Corps in 1982. The proposal stated that "all originally proposed project features are being deleted from this application except the bridge from John[']s

[Island] to Gem Island and its approaches." * * * The Corps approved a modified version of the 1982 application, and development of the Island of John's Island and Gem Island proceeded throughout the 1980s and 1990s "in a manner that diverged in significant ways from the 1980 Application." * * * During development, Lost Tree sought and received two additional § 404 permits for infrastructure improvements and construction of canals, and reserved various parcels as conservation easements by deed restrictions recorded in favor of the local, state, or federal government. Plat 57 was not among the land dedicated for conservation.

Plat 57 lies on Stingaree Point, a small peninsula located on the southwestern portion of the Island of John's Island. Lost Tree developed Stingaree Point in 1985-1986. At that time, the company built Stingaree Point Road, installed water and sewer lines, and recorded Plat 40, which is comprised of six lots to the south and west of the road. Also in 1985, Lost Tree "stubbed out" water and sewer lines to Plat 40 and to unplatted land on the eastern end of the Point that was later recorded as Plat 55. Lost Tree sold the six lots on Plat 40 within a few years after the plat was recorded. Homes have been built on those properties.

To east of Plat 40, on the north side of Stingaree Point Road, is the 4.99 acre tract eventually recorded as Plat 57. Plat 57 consists of 1.41 acres of submerged lands and 3.58 acres of wetlands with some upland mounds installed by Florida's "Mosquito Control" authority. To the east of Plat 57 is a mosquito control impoundment, a narrow, 323 foot long shoulder along the north side of the road, and then Plat 55. Although Lost Tree neither "stubbed out" nor recorded Plat 57 when it developed the rest of Stingaree Point, an April 1986 appraisal stated that "Stingaree Point development is substantially completed, with the exception of the entrance area, landscaping, and a final layer of asphalt on the road." * * *

As the trial court found, Plat 57 was "ignored entirely" during Lost Tree's development of Stingaree Point and the rest of John's Island. * * * In 1994, when "most knowledgeable people considered development of the community of John's Island to have been completed, the property constituting Plat 57 had not been platted, utilities had not been extended to it, nor had it been dedicated to any use such as mitigation for a project on other plats." * * *

Lost Tree did not consider Plat 57 for development until approximately 2002, when the company learned it would obtain "mitigation credits" as a result of improvements a neighboring landowner had agreed to make as part of a development project. Lost Tree identified Plat 57 as a property that could be developed profitably to exploit the mitigation credits. In August 2002, Lost Tree filed an application with the Town of Indian River Shores requesting approval for a preliminary plat and permission to fill 2.13 acres of wetland on the property. The company then filed a corresponding application for a § 404 wetlands fill permit from the Corps. Lost Tree obtained all state and local approvals to develop Plat 57 into a site for one residential home. The Corps, however, denied Lost Tree's § 404 permit application in August 2004, stating that less environmentally

damaging alternatives were available, and that Lost Tree "has had very reasonable use of its land at John's Island." * * *

II

The Court of Federal Claims held a seven-day trial, after which it denied Lost Tree's takings claim. The trial court rejected the government's argument that the entire John's Island community is the relevant parcel for the takings analysis, finding Lost Tree's development of Plat 57 was "physically and temporally remote from" its development of the rest of the community. * * * The court also rejected Lost Tree's argument that the relevant parcel was Plat 57 alone. Instead, the court determined that the relevant parcel is "Plat 57 and Plat 55, plus those scattered wetlands still owned by Lost Tree within the community of John's Island." * * * The court found that, while Plats 55 and 57 are "distinct legal parcels, they are undoubtedly contiguous." * * * Further, it found Lost Tree has comparable usage objectives for the two plats, because it hopes to sell for profit the lots on each plat.

Based on its relevant parcel determination, the trial court found the Corps' denial of the § 404 permit application for Plat 57 "diminished the value of Lost Tree's property by approximately 58.4%." * * * After analyzing the factors set forth in *Penn Central Transportation Co. v. City of New York* * * * , the court found the diminution in value insufficient support a takings claim. Lost Tree appeals, and this court has jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

III

* * *

Lost Tree asserts the denial of a § 404 permit to fill wetlands on Plat 57 by the Corps effectively deprived Lost Tree of its property such that it is entitled to just compensation under the Fifth Amendment. While the Government's authority to "prevent a property owner from filling or otherwise injuring or destroying vital wetlands" is unquestioned, the issue is whether the denial of a fill permit for a particular project imposes a disproportionate loss on the affected landowner. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171,1175 (Fed. Cir. 1994) * * *

Regulations requiring land to be left substantially in its natural state – such as when a wetlands fill permit is denied – may sometimes "leave the owner of land without economically beneficial or productive options for its use." *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992). In the "relatively rare situations where the government has deprived a landowner of all economically beneficial uses," the regulatory action is recognized as a "categorical taking" that must be compensated. Id.; *see Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1564-65 (Fed. Cir. 1994). * * *

Most regulatory takings cases, however, are analyzed under the framework set out in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). * * *

In many cases, as here, the definition of the relevant parcel of land is a crucial antecedent that determines the extent of the economic impact wrought by the regulation. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496 (1987) ("Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'") * * * ; *Palm Beach Isles*, 208 F.3d at 1380 (discussing the "denominator problem"). Definition of the relevant parcel affects not only whether a particular regulation is a categorical taking under *Lucas*, but also affects the *Penn Central* inquiry into the economic impact of the regulation on the claimant and on investment-backed expectations. The relevant parcel determination is a question of law based on underlying facts. *Palm Beach Isles,* 208 F.3d at 1380.

The Supreme Court has not settled the question of how to determine the relevant parcel in regulatory takings cases, but it has provided some helpful guideposts. *See Lucas*, 505 U.S. at 1016 n.7. First, the property interest taken is not defined in terms of the regulation being challenged; the takings analysis must focus on "the parcel as a whole." * * * Second, the "parcel as a whole" does not extend to all of a landowner's disparate holdings in the vicinity of the regulated property. *Lucas*, 505 U.S. 1003, 1017 n.7, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (characterizing as "extreme" and "unsupportable" the state court's analysis in *Penn Central Transportation Co. v. New York City*, 42 N.Y.2d 324, 333-34, (N.Y. 1977) *aff'd,* 438 U.S. 104 (1978), which examined the diminution in a particular parcel's value in light of the total value of the takings claimant's other holdings in the vicinity).

This court has taken a "flexible approach, designed to account for factual nuances," in determining the relevant parcel where the landowner holds (or has previously held) other property in the vicinity. *Loveladies*, 28 F.3d at 1181. In this inquiry, the "critical issue is 'the economic expectations of the claimant with regard to the property.'" *Norman v. United States*, 429 F.3d 1081, 1091 (Fed. Cir. 2005) (*quoting Forest Props., Inc. v. United States,* 177 F.3d 1360, 1365 (Fed. Cir.1999)). When a "developer treats several legally distinct parcels as a single economic unit, together they may constitute the relevant parcel." *Forest Props*., 177 F.3d at 1365 (holding relevant parcel included 53 upland acres and 9 acres of lake bottom where tracts were acquired at different times but "economic reality" was that owner treated the property as single integrated project).

Conversely, even when contiguous land is purchased in a single transaction, the relevant parcel may be a subset of the original purchase where the owner develops distinct parcels at different times and treats the parcels as distinct economic units. *Palm Beach Isles*, 208 F.3d at 1381 (holding relevant parcel consisted of 50.7 acre wetland portion of original 311.7 acre purchase where landowner "never planned to develop the

parcels as a single unit," and sold 261 acres of upland, oceanfront property prior to enactment of relevant regulatory scheme); *Loveladies*, 28 F.3d at 1181 (holding relevant parcel consisted of 12.5 acres from original 250 acre purchase where landowner developed and sold 199 acres before regulatory scheme was enacted and deeded remaining 38.5 acres to state in exchange for development permits).

Here, Lost Tree did not treat Plat 57 as part of the same economic unit as other land it developed into the John's Island community. The trial court correctly found that Lost Tree did not include Plat 57 in its formal or informal development plans for the community. * * * The only proposal that ever addressed Plat 57 was the unapproved 1980 Permit Application. While the 1980 application proposed dedicating Plat 57 as a wildlife preserve to mitigate other development, Lost Tree withdrew that application. Thus, when the Corps eventually granted Lost Tree's permit application, Plat 57 had no designated use.

The government argues Plat 57 was informally part of the John's Island development because Lost Tree intentionally included undeveloped land within the perimeter of its gated community. Lost Tree advertised such "open spaces" as part of the unique environment offered by John's Island. However, Lost Tree expressly planned open spaces in its development of the community, through the use of large lots for single family homes, and inclusion of golf courses and dedicated conservation wetlands. Lost Tree's failure to plan for Plat 57 even as open space supports the trial court's conclusion that the parcel was "ignored"--rather than intentionally left undeveloped--when the company carried out the John's Island project. * * *

Lost Tree's actual course of development further demonstrates that it did not treat Plat 57 as part of the John's Island community. Lost Tree did not seek a fill permit or run utility service to the area that became Plat 57 when it developed the rest of Stingaree Point. Plat 55, by contrast, was brought to grade and water and sewer lines were stubbed out to that area. Although the company did not immediately plat the land that became Plat 55, it developed it in the mid-1980s in preparation for eventual sale as part of the John's Island community. Plat 57, by contrast, was absent from Lost Tree's development plans until 2002--at least seven years after the development of the John's Island community was considered complete. * * *

Indeed, the record shows that after 1982, Lost Tree was essentially unaware of its ownership of Plat 57 until the company prepared an inventory of its residual properties in 1995. At that time, Lost Tree had already transitioned its business from real estate development to focus on investment in commercial properties. The company also was working to divest itself of remaining real estate holdings in the vicinity of John's Island. When the Corps denied Lost Tree's § 404 permit application in 2002, the company held only the "West Acreage," which lies well outside the John's Island community, Plat 55, Plat 57, and scattered wetlands within John's Island. The objective evidence of Lost Tree's actions demonstrates that the company considered the John's Island community completed long before it proposed to fill wetlands on Plat 57. The company's long

hiatus from development efforts reinforces the conclusion that Lost Tree did not consider Plat 57 part of the same economic unit as the John's Island community.

In short, this court sees no error in the trial court's factual findings that "Lost Tree's belated decision to develop Plat 57 was not part of its planned actual or projected use of the property constituting the community of John's Island." * * * This finding, however, conflicts with the court's conclusion that the relevant parcel comprises not just Plat 57, but also Plat 55 and "scattered wetlands still owned by Lost Tree within the community of John's Island." * * * Unlike Plat 57, Lost Tree treated Plat 55 as part of the John's Island community, developing it for eventual sale as three single family home sites at the same time that it developed Plat 40 on Stingaree Point.

The Court of Federal Claims erred by aggregating Plat 57, Plat 55, and the scattered wetlands as the relevant parcel. The only links between the two plats identified by the trial court are: 1) they are connected by the 323 foot strip of land owned by Lost Tree and therefore "undoubtedly contiguous," and 2) both currently are held with the "usage objective[ ] . . . to sell for profit the lots" on each plat. * * * Similarly, the scattered wetlands are only linked to Plat 57 by their geographic location within the gated community of John's Island. Here, the mere fact that the properties are commonly owned and located in the same vicinity is an insufficient basis on which to find they constitute a single parcel for purposes of the takings analysis. * * * *Loveladies*, 28 F.3d at 1180 (holding relevant parcel excludes 6.4 acres of previously-developed uplands purchased in same transaction as regulated parcel and owned by claimant when § 404 permit was denied).

After a careful review of the entire record, this court determines that the relevant parcel is Plat 57 alone. The trial court's factual findings support the conclusion that Lost Tree had distinct economic expectations for each of Plat 57, Plat 55, and its scattered wetland holdings in the vicinity. Because the Court of Federal Claims erred in its determination of the relevant parcel, this court reverses the judgment and remands for further proceedings. On remand, the court first should determine the loss in economic value to Plat 57 suffered by Lost Tree as a result of the Corps' denial of the § 404 permit, and then apply the appropriate framework to determine whether a compensable taking occurred. In determining the loss in value to Plat 57, the court may revisit the property values it adopted in the course of determining the impact of the Plat 57 permit denial on Lost Tree under its definition of the relevant parcel. * * *

IV

For the reasons set forth above, the judgment of the Court of Federal Claims is reversed and remanded for further proceedings.

Questions and Comments

1. **The Remand:** On remand, the Court of Federal Claims concluded that the value

of Plat 57 in light of the Corps' permit denial was $27,500, which the court characterized as "a nominal amount that does not reflect any economic use." *See Lost Tree Village Corp. v. United States,* No. 08-117L (Fed. Cl. 03/14/2014). Thus, the court held that the Corps' action was a categorical taking under *Lucas*. Despite reaching that conclusion, the court also analyzed the Corps' action under the *Penn Central* analysis. For purposes of that analysis, the court suggested that the 99.4% reduction in property value that resulted from the Corps' permit denial was a factor that weighed in favor of finding a taking. *Id.* The court also suggested that the character of the government action weighed in favor of finding a taking, because the court was persuaded that the landowner was singled out for adverse treatment in the case, and that the Corps would have issued a permit for the proposed development if a different develop had applied for the permit. *Id. .* The Court of Appeals for the Federal Circuit affirmed the court's holding on June 1, 2015. *See Lost Tree Village Corp. v. United States,* 787 F.3d 1111 (Fed. Cir. 2015).

2. **Strategic Behavior**: Justice Stevens, in a dissenting opinion in *Lucas*, predicted that the Court's decision in that case could be manipulated in light of the lack of a clear definition of the "parcel as a whole." 505 U.S. at 1065. Stevens predicted, "developers and investors may market specialized estates to take advantage of the Court's new rule. The smaller the estate, the more likely that a regulatory change will effect a total taking. Thus, an investor may, for example, purchase the right to build a multifamily home on a specific lot * * *"

The Supreme Court provided clarification regarding the manner in which courts should determine the extent of the "parcel as a whole" in the following case, decided in June 2017.

Murr v. Wisconsin

582 U.S. ___ (2017)

Resources for the Case
Unedited opinion (From Justia)
Google Map of all the cases in the coursebook
Oral argument audio - from the Oyez Project
Pacific Legal Foundation website re: Murr

Justice Kennedy delivered the opinion of the Court.

The classic example of a property taking by the government is when the property has been occupied or otherwise seized. In the case now before the Court, petitioners contend that governmental entities took their real property—an undeveloped residential lot—not by some physical occupation but instead by enacting burdensome regulations that forbid its improvement or separate sale because it is classified as substandard in size. The relevant governmental entities are the respondents.

Against the background justifications for the challenged restrictions, respondents contend there is no regulatory taking because petitioners own an adjacent lot. The

regulations, in effecting a merger of the property, permit the continued residential use of the property including for a single improvement to extend over both lots. This retained right of the landowner, respondents urge, is of sufficient offsetting value that the regulation is not severe enough to be a regulatory taking. To resolve the issue whether the landowners can insist on confining the analysis just to the lot in question, without regard to their ownership of the adjacent lot, it is necessary to discuss the background principles that define regulatory takings.

I

A

The St. Croix River originates in northwest Wisconsin and flows approximately 170 miles until it joins the Mississippi River, forming the boundary between Minnesota and Wisconsin for much of its length. The lower portion of the river slows and widens to create a natural water area known as Lake St. Croix. Tourists and residents of the region have long extolled the picturesque grandeur of the river and surrounding area. * * *

Under the Wild and Scenic Rivers Act, the river was designated, by 1972, for federal protection. * * * The law required the States of Wisconsin and Minnesota to develop "a management and development program" for the river area. * * * In compliance, Wisconsin authorized the State Department of Natural Resources to promulgate rules limiting development in order to "guarantee the protection of the wild, scenic and recreational qualities of the river for present and future generations." * * *

Petitioners are two sisters and two brothers in the Murr family. Petitioners' parents arranged for them to receive ownership of two lots the family used for recreation along the Lower St. Croix River in the town of Troy, Wisconsin. The lots are adjacent, but the parents purchased them separately, put the title of one in the name of the family business, and later arranged for transfer of the two lots, on different dates, to petitioners. The lots, which are referred to in this litigation as Lots E and F, are described in more detail below.

For the area where petitioners' property is located, the Wisconsin rules prevent the use of lots as separate building sites unless they have at least one acre of land suitable for development. * * * A grandfather clause relaxes this restriction for substandardlots which were "in separate ownership from abutting lands" on January 1, 1976, the effective date of the regulation. * * * The clause permits the use of qualifying lots as separate building sites. The rules also include a merger provision, however, which provides that adjacent lots under common ownership may not be "sold or developed as separate lots" if they do not meet the size requirement. * * * The Wisconsin rules require localities to adopt parallel provisions, * * * so the St. Croix County zoning ordinance contains identical restrictions, * * * The Wisconsin rules also authorize the local zoning authority to grant variances from the regulations where enforcement would create "unnecessary hardship." * * *

B

Petitioners' parents purchased Lot F in 1960 and built a small recreational cabin on it. In 1961, they transferred title to Lot F to the family plumbing company. In 1963, they purchased neighboring Lot E, which they held in their own names.

The lots have the same topography. A steep bluff cuts through the middle of each, with level land suitable for development above the bluff and next to the water below it. The line dividing Lot E from Lot F runs from the riverfront to the far end of the property, crossing the blufftop along the way. Lot E has approximately 60 feet of river frontage, and Lot F has approximately 100 feet. Though each lot is approximately 1.25 acres in size, because of the waterline and the steep bank they each have less than one acre of land suitable for development. Even when combined, the lots' buildable land area is only 0.98 acres due to the steep terrain.

The lots remained under separate ownership, with Lot F owned by the plumbing company and Lot E owned by petitioners' parents, until transfers to petitioners. Lot F was conveyed to them in 1994, and Lot E was conveyed to them in 1995. * * (There are certain ambiguities in the record concerning whether the lots had merged earlier, but the parties and the courts below appear to have assumed the merger occurred upon transfer to petitioners.)

A decade later, petitioners became interested in moving the cabin on Lot F to a different portion of the lot and selling Lot E to fund the project. The unification of the lots under common ownership, however, had implicated the state and local rules barring their separate sale or development. Petitioners then sought variances from the St. Croix County Board of Adjustment to enable their building and improvement plan, including a variance to allow the separate sale or use of the lots. The Board denied the requests, and the state courts affirmed in relevant part. In particular, the Wisconsin Court of Appeals agreed with the Board's interpretation that the local ordinance "effectively merged" Lots E and F, so petitioners "could only sell or build on the single larger lot." * * *

Petitioners filed the present action in state court, alleging that the state and county regulations worked a regulatory taking by depriving them of "all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot." * * * The parties each submitted appraisal numbers to the trial court. Respondents' appraisal included values of $698,300 for the lots together as regulated; $771,000 for the lots as two distinct buildable properties; and $373,000 for Lot F as a single lot with improvements. * * * Petitioners' appraisal included an unrebutted, estimated value of $40,000 for Lot E as an undevelopable lot, based on the counterfactual assumption that it could be sold as a separate property. * * *

The Circuit Court of St. Croix County granted summary judgment to the State, explaining that petitioners retained "several available options for the use and enjoyment of their property." * * * For example, they could preserve the existing cabin, relocate the

cabin, or eliminate the cabin and build a new residence on Lot E, on Lot F, or across both lots. The court also found petitioners had not been deprived of all economic value of their property. Considering the valuation of the property as a single lot versus two separate lots, the court found the market value of the property was not significantly affected by the regulations because the decrease in value was less than 10 percent. * * *

The Wisconsin Court of Appeals affirmed. The court explained that the regulatory takings inquiry required it to " 'first determine what, precisely, is the property at issue.' * * * Relying on Wisconsin Supreme Court precedent * * * , the Court of Appeals rejected petitioners' request to analyze the effect of the regulations on Lot E only. Instead, the court held the takings analysis "properly focused" on the regulations' effect "on the Murrs' property as a whole"—that is, Lots E and F together. * * *

Using this framework, the Court of Appeals concluded the merger regulations did not effect a taking. In particular, the court explained that petitioners could not reasonably have expected to use the lots separately because they were " 'charged with knowledge of the existing zoning laws' " when they acquired the property. * * * Thus, "even if [petitioners] did intend to develop or sell Lot E separately, that expectation of separate treatment became unreasonable when they chose to acquire Lot E in 1995, after their having acquired Lot F in 1994." * * * The court also discounted the severity of the economic impact on petitioners' property, recognizing the Circuit Court's conclusion that the regulations diminished the property's combined value by less than 10 percent. The Supreme Court of Wisconsin denied discretionary review. This Court granted certiorari * * * .

II

***

B

This case presents a question that is linked to the ultimate determination whether a regulatory taking has occurred: What is the proper unit of property against which to assess the effect of the challenged governmental action? Put another way, "[b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.' * * *

Defining the property at the outset, however, should not necessarily preordain the outcome in every case. In some, though not all, cases the effect of the challenged regulation must be assessed and understood by the effect on the entire property held by the owner, rather than just some part of the property that, considered just on its own, has been diminished in value. This demonstrates the contrast between regulatory takings, where the goal is usually to determine how the challenged regulation affects the

property's value to the owner, and physical takings, where the impact of physical appropriation or occupation of the property will be evident.

While the Court has not set forth specific guidance on how to identify the relevant parcel for the regulatory taking inquiry, there are two concepts which the Court has indicated can be unduly narrow.

First, the Court has declined to limit the parcel in an artificial manner to the portion of property targeted by the challenged regulation. * * *

The second concept about which the Court has expressed caution is the view that property rights under the Takings Clause should be coextensive with those under state law. Although property interests have their foundations in state law, the *Palazzolo* Court reversed a state court decision that rejected a takings challenge to regulations that predated the landowner's acquisition of title. * * * The Court explained that States do not have the unfettered authority to "shape and define property rights and reasonable investment-backed expectations," leaving landowners without recourse against unreasonable regulations. * * *

By the same measure, defining the parcel by reference to state law could defeat a challenge even to a state enactment that alters permitted uses of property in ways inconsistent with reasonable investment-backed expectations. For example, a State might enact a law that consolidates nonadjacent property owned by a single person or entity in different parts of the State and then imposes development limits on the aggregate set. If a court defined the parcel according to the state law requiring consolidation, this improperly would fortify the state law against a takings claim, because the court would look to the retained value in the property as a whole rather than considering whether individual holdings had lost all value.

III

A

As the foregoing discussion makes clear, no single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors. These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. The endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition. * * *

First, courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law. The reasonable expectations of an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property. * * * A valid takings claim will not evaporate just because a purchaser took title after the law was enacted. See *Palazzolo*,

533 U. S., at 627 (some "enactments are unreasonable and do not become less so through passage of time or title"). A reasonable restriction that predates a landowner's acquisition, however, can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property. * * * In a similar manner, a use restriction which is triggered only after, or because of, a change in ownership should also guide a court's assessment of reasonable private expectations.

Second, courts must look to the physical characteristics of the landowner's property. These include the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation. Cf. *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) ("Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit").

Third, courts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings. Though a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty. A law that limits use of a landowner's small lot in one part of the city by reason of the landowner's nonadjacent holdings elsewhere may decrease the market value of the small lot in an unmitigated fashion. The absence of a special relationship between the holdings may counsel against consideration of all the holdings as a single parcel, making the restrictive law susceptible to a takings challenge. On the other hand, if the landowner's other property is adjacent to the small lot, the market value of the properties may well increase if their combination enables the expansion of a structure, or if development restraints for one part of the parcel protect the unobstructed skyline views of another part. That, in turn, may counsel in favor of treatment as a single parcel and may reveal the weakness of a regulatory takings challenge to the law.

State and federal courts have considerable experience in adjudicating regulatory takings claims that depart from these examples in various ways. The Court anticipates that in applying the test above they will continue to exercise care in this complex area.

* * *

IV

Under the appropriate multifactor standard, it follows that for purposes of determining whether a regulatory taking has occurred here, petitioners' property should be evaluated as a single parcel consisting of Lots E and F together.

First, the treatment of the property under state and local law indicates petitioners' property should be treated as one when considering the effects of the restrictions. As the Wisconsin courts held, the state and local regulations merged Lots E and F. * * *

The decision to adopt the merger provision at issue here was for a specific and legitimate purpose, consistent with the widespread understanding that lot lines are not dominant or controlling in every case. * * * Petitioners' land was subject to this regulatory burden, moreover, only because of voluntary conduct in bringing the lots under common ownership after the regulations were enacted. As a result, the valid merger of the lots under state law informs the reasonable expectation they will be treated as a single property.

Second, the physical characteristics of the property support its treatment as a unified parcel. The lots are contiguous along their longest edge. Their rough terrain and narrow shape make it reasonable to expect their range of potential uses might be limited. * * * ("[Petitioners] asserted Lot E could not be put to alternative uses like agriculture or commerce due to its size, location and steep terrain"). The land's location along the river is also significant. Petitioners could have anticipated public regulation might affect their enjoyment of their property, as the Lower St. Croix was a regulated area under federal, state, and local law long before petitioners possessed the land.

Third, the prospective value that Lot E brings to Lot F supports considering the two as one parcel for purposes of determining if there is a regulatory taking. Petitioners are prohibited from selling Lots E and F separately or from building separate residential structures on each. Yet this restriction is mitigated by the benefits of using the property as an integrated whole, allowing increased privacy and recreational space, plus the optimal location of any improvements. * * * ("They have an elevated level of privacy because they do not have close neighbors and are able to swim and play volleyball at the property").

The special relationship of the lots is further shown by their combined valuation. Were Lot E separately saleable but still subject to the development restriction, petitioners' appraiser would value the property at only $40,000. We express no opinion on the validity of this figure. We also note the number is not particularly helpful for understanding petitioners' retained value in the properties because Lot E, under the regulations, cannot be sold without Lot F. The point that is useful for these purposes is that the combined lots are valued at $698,300, which is far greater than the summed value of the separate regulated lots (Lot F with its cabin at $373,000, according to respondents' appraiser, and Lot E as an undevelopable plot at $40,000, according to petitioners' appraiser). The value added by the lots' combination shows their complementarity and supports their treatment as one parcel.

The State Court of Appeals was correct in analyzing petitioners' property as a single unit. Petitioners allege that in doing so, the state court applied a categorical rule that all contiguous, commonly owned holdings must be combined for Takings Clause analysis. * * * This does not appear to be the case, however, for the precedent relied on by the Court of Appeals addressed multiple factors before treating contiguous properties as one parcel. * * * The judgment below, furthermore, may be affirmed on any ground permitted by the law and record. See *Thigpen* v. *Roberts*, 468 U. S. 27, 30 (1984) . To

the extent the state court treated the two lots as one parcel based on a bright-line rule, nothing in this opinion approves that methodology, as distinct from the result.

Considering petitioners' property as a whole, the state court was correct to conclude that petitioners cannot establish a compensable taking in these circumstances. Petitioners have not suffered a taking under *Lucas*, as they have not been deprived of all economically beneficial use of their property. * * * They can use the property for residential purposes, including an enhanced, larger residential improvement. * * * . The property has not lost all economic value, as its value has decreased by less than 10 percent. * * *

Petitioners furthermore have not suffered a taking under the more general test of *Penn Central*. * * * The expert appraisal relied upon by the state courts refutes any claim that the economic impact of the regulation is severe. Petitioners cannot claim that they reasonably expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots. Finally, the governmental action was a reasonable land-use regulation, enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land.

Like the ultimate question whether a regulation has gone too far, the question of the proper parcel in regulatory takings cases cannot be solved by any simple test. * * * Courts must instead define the parcel in a manner that reflects reasonable expectations about the property. Courts must strive for consistency with the central purpose of the Takings Clause: to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." * * * Treating the lot in question as a single parcel is legitimate for purposes of this takings inquiry, and this supports the conclusion that no regulatory taking occurred here.

The judgment of the Wisconsin Court of Appeals is affirmed.

It is so ordered.

Questions and Comments

1. **Federal Circuit Precedent**: In cases such as *Lost Tree Village, supra,* the Federal Circuit focused heavily on "the economic expectations of the claimant with regard to the property" in determining how to identify the "parcel as a whole." That approach accords property owners with significant control over the manner in which the parcel is defined for takings analysis. Is it likely that the Federal Circuit can continue to focus as heavily on the landowners' economic expectations in determining the extent of the "parcel as a whole" after *Murr*?

2. **State property law:** In a footnote in *Lucas,* the Supreme Court suggested that the manner in which courts determine the extent of the "parcel as a whole" "may lie in how the owner's reasonable expectations have been shaped by the State's

law of property – i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." Is the Court's decision in *Murr* based simply on the fact that the two lots owned by the petitioners were merged for purposes of redevelopment under the State's property laws? What problems might be raised by relying solely on the State's property laws to define the extent of the "parcel as a whole"? Petitioners argued that the Court should adopt a bright line test for determining the extent of the "parcel as a whole" based simply on the lot lines established for the two parcels under state law. Justice Roberts, in a dissenting opinion, agreed. What are the flaws with that approach in a case like this? Does the Court's multi-factor test give governments too much power to shape the contours of the "parcel as a whole" for takings purposes to reduce the likelihood that compensation will be due?

3. **Physical characteristics / conservation:** One of the three factors identified by the Court as relevant for determining the extent of the "parcel as a whole" was the physical characteristics of the property, including whether it is located in an area that is subject to, or likely to become subject to, environmental or other regulation. How might this impact the ability of landowners to prevail in future takings cases challenging environmental restrictions on land use?

4. **Reciprocity of advantage:** In analyzing the third factor of its "parcel as a whole" test, the Court suggests that "courts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings." This is a factor that courts also consider in the multi-factor *Penn Central* analysis, *after* the "parcel as a whole" is identified, to determine whether government regulation has "gone too far", so that the government must pay the landowner compensation for a taking. Justice Roberts, in dissent, argues that the majority's decision allows the government to stack the deck against landowners by focusing on the purposes of the government's regulation in both the "parcel as a whole" analysis and in the *Penn Central* takings analysis.

5. **Justice Thomas' dissent:** In a solo dissenting opinion that adopts an extreme constitutional position, Justice Thomas questioned whether the Takings Clause, based on the drafters' original intent, should be limited to physical appropriation cases and whether it is more appropriate to analyze regulatory restrictions on land use under the Fifth and Fourteenth Amendments.

Hypothetical

Toby Mercer bought 100 acres of land in Monroe County, Georgia in 1970 from Lucy Tift for $100,000. Lucy sold the land, the Tift's family farm, when her father, Herschel, died. In 1985, Mercer subdivided the property into 75 lots, ranging in size from ½ acre to 2 acres, and a 10 acre lot, which he planned to set aside as a nature preserve for the subdivision. Between 1985 and 1998, Mercer developed or sold all of the lots, other than the 10 acre lot, for $1.5 million. In 2008, he decided to develop the remaining 10 acre lot. At that time, he subdivided the lot into 10 lots, ranging in size from ½ acre to an acre, and a 2 acre lot. He sold the 10 lots for $200,000 and sought a Clean Water Act Section 404 permit from the Corps of Engineers to fill the entire 2 acres of wetlands on the remaining lot, in order to build a house on the property.

During the public hearings on Mercer's proposal, Maggie Green vigorously protested the permit because she owned an organic farm on the property adjacent to Mercer's property and Mercer's proposal to fill the wetlands on his property would greatly increase flooding on her property and destroy her farm. Although Mercer and the Corps discussed other development options that would impact fewer acres of wetlands, the Corps ultimately told Mercer that they would not authorize him to fill any of the wetlands on his property, and they denied his permit application.

Mercer is upset because the property can now only be used as a nature preserve. A realtor he retained has indicated that the property is worth about $8,000, but would be worth about $130,000, if he could build a house on the property. Mercer files a lawsuit against the Corps of Engineers in the U.S. Court of Federal Claims, alleging that the denial of his permit application constitutes a taking of his property. Should the court award Mercer compensation for a taking of his property?

V. Mitigation, Permit Conditions and Exactions

Although most takings challenges in the wetlands context involve permit denials, conditions included in a permit, such as mitigation requirements, can also be challenged as takings based on a line of Supreme Court decisions that prohibit "exactions" takings. In *Nollan v. California Coastal Commission*, 483 U.S. 825, 836-37 (1987), when a landowner challenged the California Coastal Commission's decision to require the landowner to provide an easement for public beach access as a condition of approving a permit to allow construction of a house on the beach, the Supreme Court held that there must be an "essential nexus" between a legitimate state interest and a condition imposed in a permit or the permit condition will constitute a taking. The Court began its analysis by indicating that if California had simply required the Nollans to provide an easement for public access outside of the permitting context, it would clearly constitute a taking of property. *Id.* at 831. At the same time, the Court recognized that the state could deny the Nollan's development permit without facing a constitutional challenge if the permit denial substantially advanced a legitimate state interest. *Id.* at 835-836. Consequently, the Court held that the state could include conditions in the permit that

serve the same legitimate purpose without violating the Constitution. *Id.* at 836. The Court's decision seemed to be based, in part, on the Court's holding, in *Agins v. City of Tiburon*, that a regulation can be a taking if it does not substantially advance a legitimate state interest.

A few years later, the Supreme Court returned to the exactions issue in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In that case, a landowner challenged the decision of the city planning commission, when approving the expansion of her store and paving of the parking lot for the store, to condition the approval on dedication of land for a greenway and a bike path. *Id.* The Court reiterated the "essential nexus" requirement of *Nollan*, but added a requirement that the permit issuer must make an individualized determination that the permit condition is "related both in nature and extent to the impact of the proposed development." *Id.* at 391. The Court required that the condition must be "roughly proportional" to the impact of the proposed development. *Id.* Rather than simply citing *Agins* as authority for the new takings limits, the *Dolan* Court based its holding on the "unconstitutional conditions" doctrine, which provides that "the government may not require a person to give up a constitutional right - here the right to receive just compensation when property is taken for a public use - in exchange for a discretionary benefit where the benefit sought has little or no relationship to the property." *Id.* at 385.

In light of *Nollan* and *Dolan,* when a permit condition is challenged as an unconstitutional taking, the government has the burden of demonstrating that there is an essential nexus between the permit condition and a legitimate state objective and that the condition is roughly proportional to the impact of the proposed development. Although the Supreme Court held, in *Lingle v. Chevron,* 544 U.S. 528 (2005), that the "substantially advances a legitimate state interest" requirement in *Agins* was based on the process clause, rather than the takings clause, the *Lingle* Court held that its holding did not require it to disturb the holdings in *Nollan* and *Dolan. Id.*

In the wetlands context, the government should normally be able to meet the requirements of *Nollan* and *Dolan* when including conditions in Section 404 permits. When the Corps or EPA include conditions in permits to minimize harm to wetlands or to require compensatory mitigation for such harm, there is an "essential nexus" between those conditions and the legitimate government interest in protecting water quality and the environment. With mitigation conditions especially, the government makes an individualized determination of the amount and type of mitigation that are necessary to compensate for the values and functions of the wetlands that will be lost due to the development activity authorized by the permit. In most cases, therefore, this individualized analysis should meet the "rough proportionality" requirement of *Dolan.*

Questions and Comments

1. **Mitigation Ratios:** As discussed in Chapter 7, the ratio of mitigation acreage that the government will require compared to the acreage of wetlands harmed by an

activity authorized by a Section 404 permit will vary depending on whether the mitigation involves creation, restoration, enhancement, or preservation of wetlands, and depending on the location and type of wetlands being harmed and being protected. Although the mitigation ratios will vary, the goal of the government in fashioning the mitigation requirements is to replace the values and functions of the wetlands that are being harmed. As long as the government can demonstrate those connections in litigation, the mitigation requirements should meet the "essential nexus" and "rough proportionality" tests.

2. **Mitigation Banking and In Lieu Fee Mitigation:** Mitigation banking may involve protection of different types of wetlands than the wetlands that are harmed by development authorized by a Section 404 permit and will usually involve protection of wetlands that are not located at the site of the development project. Is it harder to defend mitigation banking conditions in a wetland permit under the *Nollan* and *Dolan* tests than it would be to defend a condition that required on-site, in-kind mitigation? What if the mitigation bank was authorized to issue mitigation credits in watersheds other than the watershed where the permitted activity occurred? Are there concerns raised by in lieu fee mitigation permit conditions that are not raised by mitigation banking or on-site, in-kind mitigation?

3. **Burden of Proof:** When the Corps of Engineers denies a Section 404 permit or EPA vetoes a Section 404 permit, the landowner, in a takings action, has the burden of demonstrating that the government's action has "gone too far" under the *Penn Central* analysis. Note, though, that when a landowner challenges the conditions included in a permit issued by the government, the government has the burden of demonstrating that the conditions meet the "essential nexus" and "rough proportionality" requirements.

4. Professor Timothy M. Mulvaney explores the constitutional constraints on the ability of local governments to attach conditions to land use permits to address future cumulative impacts of the proposed development in *Exactions for the Future,* 64 Baylor L. Rev. 511 (2012).

5**.** **Scope of *Nollan* and *Dolan:*** The Supreme Court's rulings in *Nollan* and *Dolan* both involved cases where a government entity required a landowner to provide public access to their property as a condition for approval of a permit or development proposal. The following case examines whether *Nollan* and *Dolan* apply when the government denies a permit or approval because the landowner won't agree to a permit condition and whether they apply to conditions that do not involve requiring public access to property.

Koontz v. Saint John's River Water Management District

133 S.Ct. 2586 (2013)

Resources for the Case

Unedited opinion (From Justia)
Google Map of all the cases in the coursebook
Oral argument audio - from the Oyez Project
Lecture on the case by Tim Mulvaney (Texas A&M Law)
Orange County Property Records for property
Pacific Legal Foundation website re: Koontz

Justice Alito delivered the opinion of the Court.

Our decisions in *Nollan v. California Coastal Comm'n,* 483 U. S. 825 (1987) , and *Dolan v. City of Tigard,* 512 U. S. 374 (1994) , provide important protection against the misuse of the power of land-use regulation. In those cases, we held that a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use. In this case, the St. Johns River Water Management District (District) believes that it circumvented Nollan and Dolan because of the way in which it structured its handling of a permit application submitted by Coy Koontz, Sr., whose estate is represented in this Court by Coy Koontz, Jr. * * * The District did not approve his application on the condition that he surrender an interest in his land. Instead, the District, after suggesting that he could obtain approval by signing over such an interest, denied his application because he refused to yield. The Florida Supreme Court blessed this maneuver and thus effectively interred those important decisions. Because we conclude that *Nollan* and *Dolan* cannot be evaded in this way, the Florida Supreme Court's decision must be reversed.

I

A

In 1972, petitioner purchased an undeveloped 14.9-acre tract of land on the south side of Florida State Road 50, a divided four-lane highway east of Orlando. The property is located less than 1,000 feet from that road's intersection with Florida State Road 408, a tolled expressway that is one of Orlando's major thoroughfares.

A drainage ditch runs along the property's western edge, and high-voltage power lines bisect it into northern and southern sections. The combined effect of the ditch, a 100foot wide area kept clear for the power lines, the highways, and other construction on nearby parcels is to isolate the northern section of petitioner's property from any other undeveloped land. Although largely classified as wetlands by the State, the northern section drains well; the most significant standing water forms in ruts in an unpaved road used to access the power lines. The natural topography of the property's southern section is somewhat more diverse, with a small creek, forested uplands, and wetlands that sometimes have water as much as a foot deep. A wildlife survey found

evidence of animals that often frequent developed areas: raccoons, rabbits, several species of bird, and a turtle. The record also indicates that the land may be a suitable habitat for opossums.

The same year that petitioner purchased his property, Florida enacted the Water Resources Act, which divided the State into five water management districts and authorized each district to regulate "construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state." * * * Under the Act, a landowner wishing to undertake such construction must obtain from the relevant district a Management and Storage of Surface Water (MSSW) permit, which may impose "such reasonable conditions" on the permit as are "necessary to assure" that construction will "not be harmful to the water resources of the district." * * *

In 1984, in an effort to protect the State's rapidly diminishing wetlands, the Florida Legislature passed the Warren S. Henderson Wetlands Protection Act, which made it illegal for anyone to "dredge or fill in, on, or over surface waters" without a Wetlands Resource Management (WRM) permit. * * * Under the Henderson Act, permit applicants are required to provide "reasonable assurance" that proposed construction on wetlands is "not contrary to the public interest," as defined by an enumerated list of criteria. * * * Consistent with the Henderson Act, the St. Johns River Water Management District, the district with jurisdiction over petitioner's land, requires that permit applicants wishing to build on wetlands offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere.

Petitioner decided to develop the 3.7-acre northern section of his property, and in 1994 he applied to the District for MSSW and WRM permits. Under his proposal, petitioner would have raised the elevation of the northernmost section of his land to make it suitable for a building, graded the land from the southern edge of the building site down to the elevation of the high-voltage electrical lines, and installed a dry-bed pond for retaining and gradually releasing stormwater runoff from the building and its parking lot. To mitigate the environmental effects of his proposal, petitioner offered to foreclose any possible future development of the approximately 11acre southern section of his land by deeding to the District a conservation easement on that portion of his property.

The District considered the 11acre conservation easement to be inadequate, and it informed petitioner that it would approve construction only if he agreed to one of two concessions. First, the District proposed that petitioner reduce the size of his development to 1 acre and deed to the District a conservation easement on the remaining 13.9 acres. To reduce the development area, the District suggested that petitioner could eliminate the dry-bed pond from his proposal and instead install a more costly subsurface stormwater management system beneath the building site. The District also suggested that petitioner install retaining walls rather than gradually sloping the land from the building site down to the elevation of the rest of his property to the south.

In the alternative, the District told petitioner that he could proceed with the development as proposed, build- ing on 3.7 acres and deeding a conservation easement to the government on the remainder of the property, if he also agreed to hire contractors to make improvements to District-owned land several miles away. Specifically, petitioner could pay to replace culverts on one parcel or fill in ditches on another. Either of those projects would have enhanced approximately 50 acres of District-owned wetlands. When the District asks permit applicants to fund offsite mitigation work, its policy is never to require any particular offsite project, and it did not do so here. Instead, the District said that it "would also favorably consider" alternatives to its suggested offsite mitigation projects if petitioner proposed something "equivalent." * * *

Believing the District's demands for mitigation to be excessive in light of the environmental effects that his building proposal would have caused, petitioner filed suit in state court. Among other claims, he argued that he was entitled to relief under Fla. Stat. §373.617(2), which allows owners to recover "monetary damages" if a state agency's action is "an unreasonable exercise of the state's police power constituting a taking without just compensation." * * *

II

A

We have said in a variety of contexts that "the government may not deny a benefit to a person because he exercises a constitutional right." * * *

Nollan and *Dolan* "involve a special application" of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits. *Lingle v. Chevron U. S. A. Inc.*, 544 U. S. 528, 547 (2005) ; *Dolan*, 512 U. S., at 385 (invoking "the well-settled doctrine of 'unconstitutional conditions'"). Our decisions in those cases reflect two realities of the permitting process. The first is that land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of- way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. * * * So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.

A second reality of the permitting process is that many proposed land uses threaten to impose costs on the public that dedications of property can offset. Where a building proposal would substantially increase traffic congestion, for example, officials might

condition permit approval on the owner's agreement to deed over the land needed to widen a public road. Respondent argues that a similar rationale justifies the exaction at issue here: petitioner's proposed construction project, it submits, would destroy wetlands on his property, and in order to compensate for this loss, respondent demands that he enhance wet- lands elsewhere. Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack. * * *

Nollan and *Dolan* accommodate both realities by allowing the government to condition approval of a permit on the dedication of property to the public so long as there is a "nexus" and "rough proportionality" between the prop- erty that the government demands and the social costs of the applicant's proposal. * * * Our precedents thus enable permitting authorities to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in "out-and-out . . . extortion" that would thwart the Fifth Amendment right to just compensation. * * * Under *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.

B

The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so. We have often concluded that denials of governmental benefits were impermissible under the unconstitutional conditions doctrine. * * * In so holding, we have recognized that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.

A contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval. Under the Florida Supreme Court's approach, a government order stating that a permit is "approved if" the owner turns over property would be subject to *Nollan* and *Dolan*, but an identical order that uses the words "denied until" would not. Our unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent. *See Frost & Frost Trucking Co. v. Railroad Comm'n of Cal.,* 271 U. S. 583 –593 (1926) (invalidating regulation that required the petitioner to give up a constitutional right "as a condition precedent to the enjoyment of a privilege"); *Southern Pacific Co. v. Denton*, 146 U. S. 202, 207 (1892) (invalidating statute "requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution"). * *

* To do so here would effectively render *Nollan* and *Dolan* a dead letter.

The Florida Supreme Court puzzled over how the government's demand for property can violate the Takings Clause even though " 'no property of any kind was ever taken,' " * * * but the unconstitutional conditions doctrine provides a ready answer. Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.

Nor does it make a difference, as respondent suggests, that the government might have been able to deny petitioner's application outright without giving him the option of securing a permit by agreeing to spend money to improve public lands. *See Penn Central Transp. Co. v. New York City,* 438 U. S. 104 (1978) . Virtually all of our unconstitutional conditions cases involve a gratuitous governmental benefit of some kind. * * * Yet we have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights. *E.g., United States v. American Library Assn., Inc.*, 539 U. S. 194, 210 (2003) ("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit" (emphasis added and inter- nal quotation marks omitted)); *Wieman v. Updegraff*, 344 U. S. 183, 191 (1952) (explaining in unconstitutional conditions case that to focus on "the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue"). Even if respondent would have been entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on petitioner's forfeiture of his constitutional rights. *See Nollan*, 483 U. S., at 836–837 (explaining that "[t]he evident constitutional propriety" of prohibiting a land use "disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition").

That is not to say, however, that there is no relevant difference between a consummated taking and the denial of a permit based on an unconstitutionally extortionate demand. Where the permit is denied and the condition is never imposed, nothing has been taken. While the unconstitutional conditions doctrine recognizes that this burdens a constitutional right, the Fifth Amendment mandates a particular remedy—just compensation—only for takings. In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies. Because petitioner brought his claim pursuant to a state law cause of action, the Court has no occasion to discuss what remedies might be available for a *Nollan/Dolan* unconstitutional conditions violation either here or in other cases. * * *

We hold that the government's demand for property from a land use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit * * *. The Court expresses no view on the merits of petitioner's claim that respondent's actions here failed to comply with the principles set forth in this opinion and those two cases. The Florida Supreme Court's judgment is reversed, and this case is remanded for further proceedings not inconsistent with this opinion.

Questions and Comments

1. **Burden of Proof:** In light of this decision, when the government denies a permit because the applicant refuses to agree to a condition proposed for the permit, in a takings challenge, the government will have the burden of proving that the rejected condition meets the "essential nexus" and "rough proportionality" tests. As noted above, if the landowner were challenging the permit denial as a taking because of the impact of the denial on the landowner's use of property, the landowner would have the burden of demonstrating that the denial constituted a taking under the *Penn Central* analysis. Did the *Koontz* Court determine that the government demonstrated that either of the mitigation proposals it requested met the "essential nexus" and "rough proportionality" tests?

2. **Compensation:** When a regulation "goes too far", a property owner is entitled to just compensation. If the government denies a permit application because the applicant won't agree to a condition that violates the *Nollan* or *Dolan* tests, but the permit denial doesn't "go too far" under the *Penn Central* analysis, what remedy is available to the landowner? Has anything been taken?

3. **Which Conditions are Examined?** The Section 404 permit application process frequently will involve negotiations regarding mitigation requirements or other permit conditions. The Corps may propose some conditions which it later decides to take off the table. Does *Koontz* suggest that a court should strike down a permit denial whenever *any* of the conditions proposed in negotiations violate the *Nollan* or *Dolan* tests, or do courts only look at the last offer that was on the table before the government denied a permit? How might the *Koontz* decision and the manner in which courts answer the question above affect the permit negotiation process? If the government can deny a permit outright without "going too far" to limit property usage under *Penn Central*, should it invite potential litigation by requesting permit conditions in the negotiation process that might be challenged under *Nollan* and *Dolan*?

4. **Money Payments:** In a portion of the opinion not reproduced above, the *Koontz* Court also held that *Nollan* and *Dolan* applied when the government asks a landowner, through a permit condition, to spend money instead of providing an easement over property. The Court wrote: "if we accept this argument it would be very easy for land use permitting officials to evade the limitations of *Nollan* and *Dolan.* Because the government need only provide a permit applicant with

one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value. Such so called 'in lieu of' fees are utterly commonplace * * * and they are functionally equivalent to other types of land use exactions. For that reason and those that follow, we reject respondent's argument and hold that so-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements * * *" In light of the Court's holding, it seems fairly clear that conditions included in Section 404 permits that require mitigation through the use of in lieu fee mitigation programs would be analyzed under the *Nollan* and *Dolan* tests.

5. Professors J.B. Ruhl and John Echeverria discussed the impact of *Koontz* on environmental law in a presentation at Vermont Law School entitled *Koontz: A Big Yawn for Environmental Law?* Video of their presentation is available on YouTube.

VI. Other Takings-Related Requirements

Because of the financial liability associated with takings, the Corps, EPA and wetland regulators routinely consider the likelihood that their actions will be challenged as takings when deciding whether to issue or deny permits and when deciding what conditions to include in permits. Even if they did not have a financial incentive to undertake that analysis, federal wetland regulators are required, by a Presidential Executive Order, to consider the takings implications of their actions. Executive Order 12630, issued in 1988, requires federal agencies, among other things, to consider the takings implications of actions before undertaking those actions and to document the takings analysis for regulations in the notice of proposed rulemaking, and to submit to the Office of Management and Budget, annually, a list of actions that have been challenged as, or held to be, takings. *See* Executive Order 12630, *Governmental Actions and Interference with Constitutionally Protected Property Rights*, 53 Fed. Reg. 8859 (Mar. 15, 1988). For permits, the Executive Order requires that conditions in the permit "serve the same purpose that would have been served by a prohibition of the use or action; and ... substantially advance that purpose." *Id.* ¶ 4. In addition, the Order provides that "When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress." *Id.*

In a 2003 report, the General Accounting Office (GAO) examined the implementation of the Executive Order by the Corps, EPA, the Department of Agriculture and the Department of Interior, and concluded that the Order was not being aggressively implemented. *See* General Accounting Office, GAO-03-1015, *Regulatory Takings: Implementation of Executive Order on Government Actions Affecting Private Property Use* (Sept. 2003). GAO criticized the Department of Justice for failing to update

guidelines regarding the implementation of the Executive Order and noted that OMB had informed agencies, in 1994, that they did not have to submit annual reports outlining the just compensation challenges or awards against the agencies. *Id.* at 4. Since takings claims against federal agencies are litigated by the Department of Justice, GAO was able to obtain data from the Department regarding the volume of takings claims against the four agencies during the three fiscal years preceding the report. *Id.* at 5. Between FY 2000 and FY 2002, 44 takings lawsuits were filed against the Corps, EPA, the Department of Agriculture or the Department of Interior. *Id.* The plaintiffs prevailed in 14 of those cases and received $36.5 million in awards or settlements. *Id.* GAO determined that the Executive Order did not apply to the actions of the agencies in 11 of those 14 cases, and determined that the four agencies generally only conducted the takings analysis required by the Executive Order in 1 out of every 3 cases where the Order did apply. *Id.* By the end of 2002, plaintiffs filed 54 more takings lawsuits against one or more of the four agencies. *Id.*

Just as federal agencies are required to evaluate the takings implications of actions before they undertake the actions, many state agencies are required to engage in similar analyses before undertaking actions. According to a 2013 study prepared by the Environmental Law Institute, at least 17 states have adopted legislation that requires state government officials to assess their actions for potential constitutional takings implications or for other impacts on private property rights. See Environmental Law Institute, *State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act* 24 (May 2013). Most of the states require the government officials to assess their own actions, but 3 states require agency officials to have at least some rulemakings reviewed for compliance by the attorney general or a legislative committee.

Interviewing and Drafting Problem

Doctor Leslie McCoy, a cardiologist from Charlotte, North Carolina, bought some property on Ocracoke Island, North Carolina a few years ago to build a vacation home. Apparently, there were some wetlands on the property that she bought. A few years later, she built a house on one of the lots that she bought and sold that house. Within the past few months, though, she tried to build a house on the other lot, but the Corps of Engineers would not grant her a Clean Water Act permit to fill the wetlands on the property. She thinks that challenging the validity of the permit denial is futile, but she wants to challenge the permit denial as a taking of her property. She says that the property is basically worthless now, and she bought it for $100,000.

Questions

1. Draft a series of questions that you would ask Doctor McCoy in order to evaluate the strength of any takings claim that she might have, based on the Corps' Section 404 permit denial. If you are not familiar with client interviewing techniques, or have not conducted client interviews in the past, the attached short summary of client interviewing may be helpful. The interview should include a mix of open-ended and closed-ended questions that will elicit the information that is necessary to determine whether the client can establish the prima facie case for a taking (i.e. economic impact of the decision, interference with reasonable investment-backed expectations, character of the government action, rationale for the government's action, identification of the parcel as a whole, final definitive agency position, etc.)

2. Doctor McCoy has arranged to meet with you to explore whether she should pursue a takings claim against the Corps of Engineers. Interview her and gather the information that you will need to assess the strength of her takings claim. For purposes of this simulation, it is not necessary to discuss financial arrangements for the representation. The confidential information for Doctor McCoy is in the teachers manual.

Chapter Quiz

Now that you've finished Chapter 11, why not try a CALI lesson on the material at http://www.cali.org/aplesson/10771 It should take about 30 minutes.