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When Does Governemnt Regulation Go "Too Far"?

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WHEN DOES GOVERNMENT REGULATION GO "TOO FAR"?

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INTRODUCTION

As the end of the Twentieth Century approaches, the law of regulatory takings is in an era of flux and rapid development. Fueled by the collision between development and environmental protection/land-use regulations, the battle lines have been drawn over the extent to which private property rights can be limited or destroyed by government in the name of the common good, without payment of compensation. The battle being waged now in courts and legislatures across the country was anticipated almost seventy-five years ago, in the seminal regulatory takings case of *Pennsylvania Coal Co. v. Mahon*,[1] in which Justice Holmes opined that the power of government to destroy private property rights via regulation is not unlimited and that "the police power can be stretched so far."[2]

Despite the plethora of regulatory takings cases since *Pennsylvania Coal*, the question of how far is "too far" has not been answered. Indeed, the much-heralded decision of *Lucas v. South Carolina Coastal Council*[3] has failed to provide a meaningful answer for the typical controversy involving governmental land-use regulations. Although *Lucas* makes clear that, absent a nuisance, a taking under the Fifth Amendment occurs when a governmental regulation deprives an owner of all economically viable use of property, little guidance is provided for the far more common scenario—when less than 100% of value is destroyed.[4] Indeed, we are left with Justice Scalia's somewhat whimsical remarks:

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1. 260 U.S. 393 (1922).
2. *Id.* at 413.
3. 112 S. Ct. 2886 (1992).
4. The Fifth Amendment to the U.S. Constitution provides in pertinent part that "private property should not be taken for public use without just compensation." U.S. CONST. amend. V. This protection of the Fifth Amendment is extended to the states through the operation of the Fourteenth Amendment. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 141 n.3 (1978). Moreover, most state constitutions have identical or similar "takings" provisions. For example, see Kirk v. Denver Publishing Co., 818 P.2d 262, 271 (Colo. 1991) (statute violated takings clause of state and federal constitutions), Baltimore v. Kelso Corp., 380 A.2d 216, 220 (Md. 1977) (takings clause of state constitution applied to zoning case). *See also* William A. Fischel, *Exploring the Kozinski Paradox: Why is More Efficient Regulation a Taking of Prop-*

> 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.[5]

While takings law may be full of these "all-or-nothing" situations, one must consider, as did the sometimes whimsical Oscar Hammerstein, that " '[A]ll or nothing' situations seldom are what they appear to be."[6] Certainly, property owners and governments remain uncertain as to how to apply government regulations of property that fall in between "all" or "nothing." The lack of clarity in this area is particularly troublesome as governments continue to enact and apply environmental and land-use regulations in recognition of the fact that we live on a small and fragile planet.[7]

Today, prudent land-use restrictions, such as the prohibition of construction on "steep slopes"[8] or the filling of valuable "wetlands,"[9] are as commonplace as conventional zoning or the restrictions on subsurface coal mining in Pennsylvania.[10] Indeed, some developers view these regulations as contributing to the value of property because they prevent overdevelopment of property, destruction of the environment, and other undesirable activities, thereby tending to increase the

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erty?, 67 CHI.-KENT L. REV. 865, 888 (1991) ("at least half of the state constitutions strengthened the language of their takings clauses in the late nineteenth century"); Jan G. Laitos, *The Takings Clause In America's Industrial States After* Lucas, 24 U. TOL. L. REV. 281, 281 n.3 (1993) (citing MICH. CONST. art. X, § 2: "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record").

5. *Lucas*, 112 S. Ct. at 2895 n.8.

6. The paraphrase is taken from the song *I Cain't Say No* from the musical comedy OKLAHOMA!, Act I, music by Richard Rodgers, lyrics by Oscar Hammerstein II (New York: Williamson Music, Inc., 1943).

7. The power of government to adopt regulations that destroy all or virtually all of the value of property for the purpose of eliminating or preventing a nuisance has been upheld against a takings claim. *See* Hadachek v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887). However, the so-called "Mugler" nuisance exception was read narrowly in *Lucas*, in which *Mugler* was held to authorize only governmental prohibition of uses that were never part of the property owner's title to begin with. *See Lucas*, 112 S. Ct. at 2899. *But see* M & J Coal Co. v. United States, 47 F.3d 1148, 1154-55 (Fed. Cir. 1995) (holding that a federal *statute* can establish the uses that are permitted at the time the property owner took title).

8. *See, e.g.*, Carole Gilbert Brown, *High-Rise For Senior Citizens on Back Burner, Church Says*, PITTSBURGH POST-GAZETTE, Apr. 20, 1994 at S1 (referring to township prohibition of construction on hillsides with 25% grade).

9. *See, e.g.*, LeAnn Spencer & Matt O'Connor, *Wetlands Suit Ends in $450,000 Fine*, CHI. TRIB., June 8, 1994, at 1 (referring to marina accused of filling wetlands).

10. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), citing The Bituminous Mine Subsidence and Land Conservation Act, PA. STAT. ANN. tit. 52, § 1406.1-1406.21 (1994).

value of all of the property in the regulated area. In other words, if all property owners must preserve wetlands and protect the environment, the result is a more desirable community and higher property values overall.[11]

Despite the overall effect of such regulations, individual property owners may believe that they are uniquely or unfairly burdened.[12] Thus, governmental bodies, especially smaller units of government, such as villages and towns, are faced with continued threats that enactment and application of land-use and environmental regulations will result in major litigation involving costs extending far beyond what a modest community can readily afford.[13] The threat to effective land-use regulation may not be so much in the actual award but in the threat posed by costly litigation and the *possibility* of such an award.[14]

Although the regulatory takings doctrine is an important safeguard against oppressive land-use legislation, the government's power to enact necessary limitations on the use of private property cannot be altogether destroyed. Unfortunately, *Lucas* did not provide much guidance for determining when government regulation goes "too far" and becomes oppressive. Indeed, aside from the rhetorical force of the *Lucas* categorical taking holding,[15] Justice Scalia's "all-or-nothing" analogy is of little assistance in resolving everyday land-use disputes.

Although *Lucas* holds that the "all" scenario occurs when all economically viable use of the property is destroyed,[16] the Court does not address whether a *complete* destruction of a *portion* of the property causes a taking. For example, if government regulation prevents two acres of a ten-acre parcel from being developed, it remains unclear whether there has been a complete destruction of the right to develop the two-acre portion, presumably a taking of the two acres, or a twenty percent reduction in value of the ten acres, presumably not causing a taking. *Lucas* also does not establish whether a taking is caused by *complete* destruction of *one strand* of the property owner's total bundle of property rights, such as his or her right to exclude others from a portion of the property[17] or change its use.[18] If a taking

11. *See* Dan Gordon, *The Environment vs. Property Rights; Want a Toxic Dump Next Door?*, N.Y. TIMES, Mar. 15, 1995, at 25.

12. *Id.* ("the sheer act of paying property owners for their claims and the specter of continued litigation would dramatically undermine our environmental and zoning laws").

13. *Id.*

14. *Id.*

15. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992) (describing categorical takings).

16. *Lucas*, 112 S. Ct. at 2899.

17. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (right to exclude others from a portion of coastal property).

18. Seawall Assocs. v. City of New York, 542 N.E.2d 1059 (N.Y. 1989) (right to change the use of one's property).

occurs when one or a few strands of the bundle of property rights are destroyed, then "all" no longer has the same meaning as it had in the colloquy between Justices Scalia and Stevens.[19]

Whether loss of the "whole parcel" is necessary to trigger a taking is the focus of Part I of this Article. The section examines the change from the Supreme Court's 1978 decision in *Penn Central* through Justice Brennan's dissent in 1981 in *San Diego Gas & Electric Co. v. City of San Diego*[20] to the majority's decisions in 1987 in *First English Evangelical Lutheran Church v. Los Angeles,*[21] *Nollan v. California Coastal Commission*[22] and *Keystone Bituminous Coal Ass'n v. DeBenedictis.*[23]

The principles set forth in the 1987 cases, however, cause further confusion, as described in Part II of this Article, which focuses on valuation issues that occur when less than the whole parcel is "taken." Although the phrase "all-or-nothing" was used in *Lucas*, Justice Scalia acknowledged that destruction of less than all economically viable use of the entire parcel could cause a regulatory taking under the *Penn Central* balancing test. *Penn Central* requires a court to focus on the economic impact of the regulation, the extent to which it interferes with distinct investment-backed expectations, and the character of the government action.[24] However, *Penn Central* provides little guidance regarding how this test is to be applied or when a regulation goes "too far" in light of the relevant factors. No significant additional guidance is provided by *Lucas*, thus still leaving open the question of how much diminution in value causes a taking when less than 100% of the property's value has been destroyed.

Part II of this Article explores the conundrum of determining any one property's loss in value arising from the application of a particular regulation. Is value to be determined based upon the reasonable investment-backed expectations for the property's development that its owners had at the time they took title? Even so, can anyone, today, have a reasonable expectation that property can be valued as if it were free and clear of government regulations? Part II of this Article considers the problem that, while some property owners' claims may be disallowed because the regulatory scheme they challenge was already in place when they took title to the property, in many instances regulations are imposed *after* title has been vested but before development was attempted. In such cases, *Lucas* leaves unanswered the question of how fair market value should be calculated, particularly when the property owner claims that fair market value should be based on a

19. *Lucas*, 112 S. Ct. at 2895 n.8.
20. 450 U.S. 621 (1981).
21. 482 U.S. 304 (1987).
22. 483 U.S. 825 (1987).
23. 480 U.S. 470 (1987).
24. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 125 (1978).

potential use of the property that was never in existence and for which none of the requisite permits had been obtained.

Lucas leaves these questions unanswered because, in *Lucas*, the Supreme Court found that *all*, not just a portion, of the economically viable use of the property had been destroyed. Thus, the Supreme Court had no occasion to integrate the *Penn Central* factors with the oft-litigated methods of determining fair market value in eminent domain cases. As a result, practitioners must look to state and lower federal court decisions for precedent concerning complex valuation issues.

Part II of this Article considers some of these decisions. Given the highly fact-specific setting in which most takings cases arise, the potential range of valuation issues is practically limitless.[25] Among the many valuation issues that may arise is whether the economic return from the "highest and best use"[26] of property is inherently equivalent to the owner's reasonable or distinct investment-backed expectations. What if the property owner *inherited*, rather than purchased, the land and had no present intention of using it for its highest and best use until the government precluded the highest and best use by enacting new regulations?

It has become apparent to practitioners forced to litigate these cases that the principles guiding eminent domain valuations have an important role to play in placing the *Penn Central* balancing test on a more concrete footing. Part II of this Article identifies some of those connections and, although not establishing the "holy grail" or a "bright line" for takings cases, at least suggests how the lessons from the law of eminent domain could be applied to make the *Penn Central* test more predictable.

Part III of this Article focuses on the "fairness" balancing test utilized by the courts to resolve cases in which less than all value of the affected property has been destroyed. The fairness test requires a court to determine whether a challenged regulation unfairly singles out one or a few property owners and subjects them to grossly disproportionate burdens, while conferring benefits on society generally. Ultimately, this balancing test assumes great importance in the regulatory takings arena, especially when the economic evidence is borderline.

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25. Loveladies Harbor v. United States, 28 F.3d 1171, 1181 (Fed. Cir. 1994) (using a flexible approach based on factual nuances).

26. The term "highest and best use" has a number of interpretations in divergent cases. The Supreme Court has used the term in at least 12 cases beginning with Willing v. Chicago Auditorium Ass'n, 277 U.S. 274, 285 (1928) ("highest and best use for the property of the financial gain of the tenant . . .") to Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2908 (1992) (appraiser's value based on "highest and best use of [plaintiff's] lots . . . [was] luxury single family detached dwellings") (Blackmun, J. dissenting).

Finally, as of this writing, Congress is considering legislation that would require compensation in the event the application of government wetland, endangered species, and certain other enumerated regulations cause property to lose in excess of twenty percent of its fair market value.[27] While such legislation would certainly establish the bright line that has proven to be elusive in the caselaw, it is obvious that a twenty percent diminution in value is such a low threshold that virtually any significant application of the enumerated regulations to property would trigger the right to compensation. By creating a right to compensation for virtually every significant application of such regulations, the proposed federal legislation would eliminate the takings "problem" by making government regulation prohibitively expensive. However, such legislation may not affect the vast majority of the country's takings cases, since they arise due to the application of *local* land-use and environmental laws or regulations. Thus, for the foreseeable future, practitioners will be called upon to try non-categorical takings cases and it is to the litigator "in the trenches" that this article is primarily addressed.

I. Development of the Regulatory Takings Doctrine

After the U.S. Supreme Court upheld the constitutionality of zoning in *Village of Euclid v. Ambler Realty Co.*,[28] few would have expected that a half-century would pass before it handed down another major constitutional land-use decision. When the Court finally did speak, in *Penn Central Transportation Co. v. New York City*,[29] it ushered in a new era—one in which land-use law was no longer the virtually exclusive province of state legislatures and courts.

In *Penn Central*, the owner of Grand Central terminal claimed that the New York City Landmarks Law was unconstitutional because it prevented Penn Central's development of the air space above the Terminal, a designated landmark.[30] Penn Central argued that the Landmarks Law completely destroyed its ability to use its "air rights" productively, and thereby caused a taking of its property.[31]

A majority of the Supreme Court rejected this challenge, holding that takings jurisprudence does not divide a single parcel into discrete components to ascertain whether rights in one of them has been destroyed.[32] Rather, the proper focus is on the nature and extent of the interference with rights in the parcel as a whole.[33] Having concluded

27. Private Property Protection Act of 1995, H.R. 925, 104th Cong., 1st Sess. (1995).
28. 272 U.S. 365 (1926).
29. 438 U.S. 104 (1978), *reh'g denied*, 439 U.S. 883 (1978).
30. *Id.* at 107.
31. *Id.* at 129-30.
32. *Id.* at 130.
33. *Id.* at 130-31.

that the Landmarks Law did not interfere with Penn Central's right to a reasonable return from its long-standing productive use of Grand Central Terminal, the Court determined that no taking had occurred.[34]

The *Penn Central* dissent came from a voice that was then in the minority on many issues, current Chief Justice William Rehnquist.[35] Justice Rehnquist noted that the Landmarks Law did not prevent a narrow band of noxious uses, as does a typical zoning ordinance, but instead placed an *affirmative* duty on a tiny number of property owners in New York City (approximately 400) to preserve their structures and thereby maintain the city's architectural and historic heritage.[36] According to the dissent, this "servitude," which prevented Penn Central from increasing the height of Grand Central Terminal or otherwise making use of its air rights, placed the entire cost of preservation on a few property owners rather than spreading it across the general public.[37] As a result, the dissenters indicated that they would have found a taking.[38]

With the decision in *Penn Central*, the battle escalated over the extent to which government land-use controls could legitimately regulate the use and development of private property. Perhaps because of the enormity of the issues involved, the Supreme Court moved slowly after *Penn Central*. The Court refused to hear a number of cases, remanding due to lack of ripeness.[39] To the extent that the Court did decide regulatory takings cases, it broke little new ground.

For example, in the years immediately following *Penn Central*, the Court regularly acknowledged the vitality of the principle established in *Pennsylvania Coal*—that a regulation which goes too far is a taking.[40] However, the Court's reaffirmation was perceived by other courts as somewhat tepid. For example, the highest courts in the states of New York and California held that a land-use regulation that goes too far is a denial of due process of law—not a taking—and that the appropriate remedy would be a declaration of the regulation's unconstitutionality.[41] Indeed, the Supreme Court expressly refused to

34. *Id.* at 138.

35. Justice Rehnquist's dissent was joined by Chief Justice Burger and Justice Stevens. *Id.* at 138 (Rehnquist, J., dissenting).

36. *Id.* at 138-40.

37. *Id.* at 143.

38. *Id.* at 144.

39. *See* MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981).

40. *See* Kaiser Aetna v. United States, 444 U.S. 164 (1979); Andrus v. Allard, 444 U.S. 51 (1979).

41. Agins v. City of Tiburon, 598 P.2d 25 (Cal. 1979), *aff'd* 447 U.S. 255 (1980); Fred F. French Investment Co., Inc. v. City of New York, 350 N.E.2d 381 (N.Y.), *cert. denied*, 429 U.S. 990 (1976).

resolve this issue in *Agins v. City of Tiburon*,[42] and instead merely reiterated its fundamental two-pronged constitutional test:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or [if it] denies an owner economically viable use of his property.[43]

Following *Agins* came Justice Brennan's noteworthy dissent in *San Diego Gas & Electric Co. v. City of San Diego*.[44] There, Justices Brennan, Marshall, Stewart, and Powell (not a group generally known to be antagonistic toward government regulation) indicated that they were prepared to hold that a land-use regulation that goes too far causes a taking and requires payment of just compensation.[45] Justice Rehnquist, who stated explicitly that he agreed with the dissenters on the merits, nevertheless voted with the majority to remand the case on ripeness grounds.[46]

With Justice Brennan's powerful dissent in *San Diego Gas & Electric Co.* paving the way, the Court finally acted decisively in 1987 when it handed down *First English Evangelical Lutheran Church v. Los Angeles County*.[47] From that point until the present, under the leadership of Chief Justice Rehnquist and Justice Scalia, the Supreme Court has put teeth into its oft-repeated holding that a regulation that "goes too far" causes a taking of property. In so doing, the Court, in a variety of cases, has established certain bedrock principles of modern regulatory takings jurisprudence:

1. A government regulation that "goes too far" is *not* simply a denial of due process of law, but is a taking of property for which just compensation must be paid.[48]

2. A per se or categorical taking occurs when a regulation deprives a property owner of all economically viable or productive use of property, unless the government establishes that the prohibited uses were not part of the property owner's title to begin with under established principles of property and nuisance law.[49]

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42. 447 U.S. 255 (1980).

43. *Id.* at 260. As a simple formulation of the overall constitutional test, *Agins* is still viable and often cited. *See, e.g.*, Seawall Assocs. v. City of New York, 542 N.E.2d 1059, 1066-68 (N.Y.), *cert. denied*, 493 U.S. 976 (1989).

44. 450 U.S. 621, 636 (1981).

45. *Id.* at 649.

46. *Id.* at 634-36 (Rehnquist, J., concurring).

47. 482 U.S. 304 (1987). It is important to note that *First English* was one of three land-use cases handed down by the Supreme Court that term. The others are Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), and Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

48. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2892-93 (1992); *First English*, 482 U.S. at 315.

49. *Lucas*, 112 S. Ct. at 2899.

3. If a regulation *temporarily* deprives a property owner of all economically viable or productive use of property, then just compensation must be paid for the period of time during which such a deprivation has occurred.[50]

4. A physical occupation of private property by government coupled with an ouster of the owner causes a per se taking, even if there is no substantial interference with actual use of the property.[51]

5. An exaction or condition imposed upon a property owner as a result of the application of land-use regulations must:

a. be substantially related to a legitimate governmental purpose;[52] and

b. be "roughly proportional" to the impacts anticipated from the proposed development.[53]

Despite the importance of these holdings, other critically important questions remain unanswered:

What is the unit of property that is the appropriate focus for the takings analysis? Does a taking occur if a single strand in the bundle of property rights—such as the right to exclude others—is destroyed? Does a taking occur if all economically viable or productive use of a *portion* of the property is destroyed?

If a regulation does not destroy all economically viable or productive use of property, when, if ever, can a taking occur? In other words, how far is "too far"? Is there a bright line after which a diminution in value inherently causes a taking?

At what point does the loss of a property owner's legitimate investment-backed expectations cause a taking to occur? Is such an inquiry functionally the same as determining diminution in value?

Can a meaningful test be developed to more accurately predict when government regulation goes "too far"?

The extent to which these and other questions have been answered by the courts is the focus of the remainder of this article.

II. The Whole Parcel Issue

When a land-use regulation is claimed to cause a taking, it typically is alleged that the provision so severely restricts use or development that it has precluded all reasonably productive or economically viable

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50. *First English*, 482 U.S. at 318.

51. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

52. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987).

53. Dolan v. City of Tigard, 114 S. Ct. 2309, 2319-20 (1994):

> We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

use of *the property*.[54] If the land-use regulation requires that every single square inch of a parcel of land be kept in its natural state, a taking invariably has occurred.[55] A more vexing problem arises when an owner claims that the ability to make productive use *of a portion of the property* is destroyed.[56]

Although it would appear that such a claim was conclusively rejected in *Penn Central*, Justice Rehnquist refused to abandon the position he staked out in his dissent. In a footnote presaging the thorny "whole parcel" issue, Justice Rehnquist noted the difficult conceptual and legal problems created by the rule that a taking occurs only where all reasonable return on property is denied: "Not only must the Court define 'reasonable return' for a variety of types of property . . . but the Court must define the particular property unit that should be examined. [If the Landmarks Law] restricted Penn Central's use of its 'air rights,' *all* return has been denied."[57] If, however, the majority in *Penn Central* is correct, then the whole parcel is the entire property and, at worst, Penn Central lost the right to maximize its profit, but could still make a reasonable return.

Nine years later, the whole parcel issue figured prominently in *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[58] There, a coalition of coal companies challenged the constitutionality of the Pennsylvania Subsidence and Land Conservation Act,[59] which required that fifty percent of the coal beneath certain structures be kept in the ground to provide surface support. The companies claimed that the Act took all of the value of this coal, and thus completely destroyed one of the strands of their bundle of property rights—the "support estate."[60]

Relying upon *Penn Central*, a majority of the Court held that the 27 million tons of coal left unmined did not constitute a separate segment of property for purposes of takings law.[61] This coal, which constituted less than two percent of the coal companies' in-ground reserves, was considered to be no different than land that must be left vacant be-

54. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 (1992); Agins v. City of Tiburon, 447 U.S. 255, 258 (1980).

55. *Lucas*, 112 S. Ct. at 2895.

56. The whole parcel problem is of concern only in the regulatory takings context. In the physical takings context, the Supreme Court has clarified that a permanent physical invasion and occupation of even a tiny portion of property causes a taking of the portion of the property so invaded and occupied. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

57. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 112 n.13 (1978) (emphasis in original).

58. 480 U.S. 470 (1987).

59. *Id.* at 474, *citing* The Bituminous Mine Subsidence and Land Conservation Act, PA. STAT. ANN. tit. 52, § 1406.1-1406.21 (1994).

60. Pennsylvania was unique in recognizing the "support estate" as a distinct interest in land that can be conveyed separately from either the mineral estate or the surface estate. *Keystone*, 480 U.S. at 500.

61. *Id.* at 498.

cause of the imposition of setbacks.[62] Setbacks do not cause a taking of the unusable land because the property must be valued as a whole.[63]

Similarly, the majority held that the support estate could not be treated separately from the remainder of the property owner's bundle of rights.[64] Thus, the destruction of the support estate was deemed analogous to the destruction of Penn Central's air rights.[65]

Chief Justice Rehnquist dissented once again.[66] He argued that the majority's focus on the ability of the coal companies to make a profit from their entire holdings highlighted the need to define the relevant property for purposes of takings jurisprudence.[67] The dissent urged that the Act destroyed all value in the coal just as effectively as if there had been a physical invasion of the coal companies' property and the government mined the coal itself.[68] Under these circumstances, the dissenters would find a taking.[69] Similarly, the dissent considered the support estate individually and found a taking, as the Act destroyed all value in that estate.[70]

Interestingly, the dissent's approach was the basis for a Supreme Court opinion just ninety days later in *Nollan v. California Coastal Commission*.[71] There, Justice Scalia wrote the majority opinion that struck down a land-use regulation because it destroyed an essential stick in the property owner's bundle of rights—the right to exclude others.[72] The Coastal Commission had required a property owner to grant a public access easement as a condition of receiving approval to construct a single-family home on an oceanfront lot.[73] The *Nollan* majority held that such a condition would destroy one of the most essential sticks in a property owner's bundle of rights and, therefore, would constitute a taking.[74]

The Supreme Court has also found a taking in other contexts in which the challenged government regulation did not cause the permanent destruction of all economically viable or productive use of the

62. A setback is a portion of a lot upon which building is not permitted. Setbacks are imposed to assure a minimum amount of light and air, as well as to provide ingress and egress for fire and emergency vehicles.

63. *Keystone*, 480 U.S. at 498.

64. *Id.* at 500-02.

65. *See also* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (loss of quarry rights not deemed a taking when compared to the rights the owner retained in the property as a whole).

66. Justices Powell, O'Connor, and Scalia joined in the dissent.

67. *Keystone*, 480 U.S. at 514-15.

68. *Id.* at 517-18.

69. *Id.*

70. *Id.* at 518-20.

71. 483 U.S. 825 (1987).

72. *Id.* at 839.

73. *Id.* at 828.

74. *Id.* at 831.

entire fee interest (the total bundle of rights) in the whole property (every square inch of an owner's land). For example, a *temporary* destruction of such rights was held to constitute a taking.[75] The government's mandate that property owners allow cable television companies to run their lines on or over private property constituted a taking.[76] Rather than insist upon the destruction of all interests in the entire property, the Court focused upon the presence of a physical invasion of property and a destruction of the right to exclude others—a single strand of the bundle of rights.[77]

Thus, despite *Penn Central* and similar cases, takings have been found in a variety of contexts when either less than all of the property was affected or less than all of the strands in the owner's bundle of rights were destroyed.[78] Moreover, in the Supreme Court's two recent major land-use takings cases, the conservative majority has gone out of its way to emphasize that the whole parcel issue is not settled law.[79] For the time being, this has left the state and lower federal courts to grapple with the issue.

Some federal courts have followed the *Penn Central* rationale and refused to focus on anything less than the full fee interest in the entire property. For example, in *Deltona Corp. v. United States*,[80] the property owner had purchased 10,000 acres of land in 1964 for a mixed-use waterfront development. The property was to be developed in phases. When the developer sought approval from the U.S. Army Corps of Engineers ("Corps") for the work, its successive applications were treated differently as the Corps' regulations became increasingly more stringent over time. After approving permits for two of the phases, the Corps denied permits for the last three phases.[81]

The Court of Claims refused to find a taking, holding that the denial of the permits did not destroy all economically viable use of the property as a whole.[82] The developer had retained valuable development rights in upland property that did not require a Corps permit.[83] More-

75. First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 318-19 (1987).

76. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982); *see also* Kaiser Aetna v. United States, 444 U.S. 164 (1979).

77. *Loretto*, 458 U.S. at 435.

78. *Compare* Andrus v. Allard, 444 U.S. 51 (1979) (taking did not arise from the government's declaration that eagle feathers and other bird artifacts cannot be sold) *with* Hodel v. Irving, 481 U.S. 704 (1987) (disposition at death was another one of the strands of the bundle of rights that could not be abrogated).

79. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 n.7 (1992); *see also* Dolan v. City of Tigard, 114 S. Ct. 2309, 2316, 2324 (1994). *But see* Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust For S. Cal., 113 S. Ct. 2264, 2290 (1993) (applying the whole property analysis articulated in *Penn Central*).

80. 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982).

81. *Id.* at 1188-89.

82. *Id.* at 1192-93.

83. *Id.* at 1192.

over, the property owner was able to develop large portions of its entire property before any permits were denied.[84] Thus, the Court declined to find a taking where prior development of property owned by the developer had been put to productive use and the challenged determination left the owner with development rights with value substantially exceeding their original cost.[85]

Other federal court decisions appear to have eroded the "whole parcel" concept as enunciated in *Penn Central.* For example, when local zoning treated two contiguous properties in common ownership differently, the Ninth Circuit held that the constitutionality of the zoning of each parcel should be examined separately.[86] The same result was reached when commonly owned non-contiguous properties were zoned differently.[87]

One of the leading "whole parcel" cases is *Florida Rock Industries, Inc. v. United States.*[88] In that case, Florida Rock purchased 1560 acres of land for limestone mining. The company sought permission from the Corps of Engineers to mine its land. However, the Corps would consider an application for only ninety-eight acres—the amount that Florida Rock could put to use over a three year period. The Corps would not entertain an application for a longer period of time. When the Corps denied the permit, Florida Rock claimed that the only use of its property had been destroyed.[89] The Corps argued that the ninety-eight-acre parcel could not be considered separate and apart from the balance of Florida Rock's property.[90] The Court of Appeals treated the ninety-eight-acre parcel as the "whole parcel," in part because the Corps itself would not allow Florida Rock to apply for a permit for a larger area.[91]

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84. *Id.* at 1192.

85. *Id.*; *see also* Jentgen v. United States, 657 F.2d 1210 (Ct. Cl. 1981), *cert. denied,* 455 U.S. 1017 (1982).

86. American Savings & Loan Ass'n v. County of Marin, 653 F.2d 364 (9th Cir. 1981).

87. Kaiser Dev. Co. v. City & County of Honolulu, 649 F. Supp. 926 (D. Haw. 1986), *aff'd,* 898 F.2d 112 (9th Cir. 1990).

88. 791 F.2d 893 (Fed. Cir. 1986), *cert. denied,* 479 U.S. 1053 (1987). *Florida Rock* is a long saga that appears to be completed. It currently consists of a total of four reported opinions. In chronological order, they are Florida Rock Indus., Inc. v. United States, 8 Cl. Ct. 160 (1985) (granting compensation) [hereinafter *Florida Rock I*]; Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986) (vacating grant of compensation) [hereinafter *Florida Rock II*]; Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161 (1990) (reversed; granted compensation, including attorney's fees) [hereinafter *Florida Rock III*]; Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied,* 115 S. Ct. 898 (1995) (vacating compensation and remanding) [hereinafter *Florida Rock IV*].

89. *Florida Rock IV,* 18 F.3d at 1563, *citing Florida Rock I,* 8 Cl. Ct. at 164.

90. *Florida Rock II,* 791 F.2d at 896 (government produced expert witness testimony of value of entire 1560 acres).

91. *Florida Rock II,* 791 F.2d at 904-05.

A similar result was reached in *Loveladies Harbor v. United States*.[92] There, the Court of Appeals refused to establish a bright-line test that the "whole parcel" is the portion of the property for which a developer seeks a permit. Instead, the Court noted that prior precedents favored a flexible approach that would account for factual variances in individual cases.[93] Not surprisingly, the decision in *Loveladies* turned on the manner in which government had treated the property owner over the course of a twenty-five-year period of development.[94]

Loveladies involved the proposed development of a fifty-one-acre parcel that was the last undeveloped portion of what was originally a 250-acre tract.[95] One hundred ninety-nine acres of the property had been developed by the owner prior to the enactment of various wetland protection regulations.[96] After promulgation of the wetland regulations, the owner proposed to develop the remaining fifty-one-acre parcel.[97] The State of New Jersey fought the development proposal because virtually all of the acreage was wetlands that could not have been developed without being filled.[98]

Eventually, after litigation and a contentious battle between the developer and the state, the developer agreed to develop only 12.5 acres and to dedicate the remaining 38.5 acres for preservation as undisturbed wetlands. However, state approval was insufficient in and of itself to enable the project to move forward, as the developer also needed approval from the Army Corps of Engineers. When the Corps sought comments from the state, the state recommended denial of the permit.[99] The Corps eventually denied the permit and the property owner claimed that the United States took its 12.5 acres of property.[100]

The United States contended that any diminution in value of the 12.5 acres caused by the denial of the permit should be measured against the fair market value of the 250-acre property as a whole.[101]

92. 28 F.3d 1171 (Fed. Cir. 1994)

93. *Loveladies*, 28 F.3d at 1181.

94. *Id.* (pointing out that New Jersey allowed development over a number of years since 1958, and the trial court's decision to omit this acreage from the "denominator" or the total parcel was not clear error).

95. *Id.* at 1173-74.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1174 (although the state of New Jersey gave a permit under the terms of a settlement, the New Jersey Department of Environmental Protection, when contacted by the Corps as required for a permit under § 404 of the Clean Water Act (33 U.S.C. § 1344 (1988)), denied that its permit approval indicated compliance with state requirements and nevertheless recommended disapproval of the § 404 permit).

100. *Loveladies*, 28 F.3d at 1173.

101. *Id.* at 1180 (referring to the "denominator problem," mentioned in *Florida Rock IV*, 18 F.3d 1560, 1567 (Fed. Cir. 1994)).

The developer countered by arguing that the "whole parcel" is the 12.5 acres that the Corps prevented from being developed.[102] The Federal Circuit agreed with the developer.[103] It rejected measuring value against the total 250-acre parcel because 199 acres had been developed before the wetland regulations were in effect.[104] It also rejected the idea that the fifty-one-acre tract was the whole parcel because the developer agreed to relinquish development rights for 38.5 acres in exchange for the right to develop 12.5 acres.[105] The Court could not see why the developer should be forced to include the value of the 38.5 acres in the whole parcel when the developer was forced to give up the value of that property to obtain state development approval for the 12.5-acre tract.[106] Thus, the Court held that the 12.5 acres was the whole parcel for purposes of evaluating the Corps permit denial.[107] Since the permit denial precluded all use of the 12.5-acre parcel, a taking occurred.[108]

This fact-based ad hoc inquiry was also applied in *Ciampitti v. United States*.[109] In *Ciampitti*, the United States Claims Court noted that a legitimate taking can be disguised if the whole property is defined too broadly, and an artificial taking can occur if the whole property is defined too narrowly.[110] Accordingly, the Claims Court focused on identifying the relevant parcel as realistically and fairly as possible, *given the entire factual and regulatory environment*.[111] Factors the Court identified as relevant include the degree of contiguity; dates of acquisition; the extent to which the parcel has been treated as

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102. *Id.* at 1181.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* ("It would seem ungrateful in the extreme to require Loveladies to convey to the public the rights in the 38.5 acres in exchange for the right to develop 12.5 acres, and then to include the value of the grant as a charge against the givers.").

107. *Id.* at 1181-82.

108. Due to the complicated and unique set of facts in *Loveladies*, its precedential value ultimately may be limited. *Id.* at 1181 ("Our precedent displays a flexible approach, designed to account for factual nuances."). However, *Loveladies* does fall in line with the pattern shown in *Florida Rock II* of treating commonly owned land separately for takings purposes when governmental regulation treated such land in distinct fashion.

109. 22 Cl. Ct. 310 (1991).

110. *Ciampitti*, 22 Cl. Ct. at 318-19.

111. *Id.* at 318-19:

> The effect of a taking can obviously be disguised if the property at issue is too broadly defined. Conversely, a taking can appear to emerge if the property is viewed too narrowly. The effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment.

Id.

a single unit; and the extent to which the undevelopable or protected lands enhance the value of the remaining lands.[112]

In New York, the Court of Appeals traditionally has applied the *Penn Central* whole parcel requirement. In *Spears v. Berle*,[113] involving the ability of a property owner to mine on wetland property, the Court of Appeals stated that:

> A petitioner who challenges land regulations must sustain a heavy burden of proof, demonstrating that under no permissible use would the parcel as a whole be capable of producing a reasonable return or be adaptable to other suitable private use.[114]

More recently, however, where the rights to possession and exclusion of others were destroyed, the Court of Appeals leaned toward acceptance of the idea of "conceptual severance"—focusing upon and assessing the value of the rights taken without regard to its relationship to the value of the whole property.[115] In *Seawall Associates v. City of New York*,[116] the Court struck down a New York City law requiring the owners of single room occupancy ("SRO") residential buildings to continue to use their property for SRO purposes. The Court stated:

> By any criterion—whether the property rights abolished or impaired are considered alone, as in *Hodel* and *Nollan*, or the values of these rights are compared with the values of the properties as a whole, as in *Penn Central* and *Keystone*—the conclusion is inescapable that the effect of the provisions is unconstitutionally to deprive owners of economically viable use of their properties.[117]

Without any firm doctrinal guidance from the Supreme Court, the state and lower federal courts rely upon an essentially ad hoc review of relevant facts and circumstances to arrive at a definition of the whole parcel. However, from *Florida Rock* and *Loveladies*, it is clear that if government singles out a portion of property for separate regu-

112. *Id.* at 318; *see also* Tabb Lakes, Inc. v. United States, 26 Cl. Ct. 1334 (1992), *aff'd*, 10 F.3d 796 (Fed. Cir. 1993) (refusing to determine *as matter of law* a definition of the "whole parcel" and engaging in a fact-based inquiry).

113. 397 N.E.2d 1304 (N.Y. 1979).

114. *Spears*, 397 N.E.2d at 1308; *see also* Pecora v. Gossin, 356 N.Y.S.2d 505 (Sup. Ct. 1974), *aff'd*, 370 N.Y.S.2d 281 (App. Div. 1975) (one parcel of landowner's property would not be considered in isolation from other parts of his property).

115. Seawall Assocs. v. City of New York, 542 N.E.2d 1059, 1067-68 (N.Y.), *cert. denied*, 493 U.S. 976 (1989).

116. 542 N.E.2d 1059 (N.Y.), *cert. denied*, 493 U.S. 976 (1989).

117. *Seawall*, 542 N.E.2d at 1068; *see also* Manocherian v. Lenox Hill Hospital, 643 N.E.2d 479 (N.Y. 1994) (holding that the destruction of a reversionary property interest, in this case by a statute that compels landlords to offer renewal leases of rent-stabilized apartments to a not-for-profit hospital so that the hospital can sublease the apartments to its staff, can cause a regulatory taking that does not further a legitimate state interest and is therefore unconstitutional).

latory treatment, then that will be considered the "whole parcel" in the takings analysis.[118]

As a practical strategic matter, property owners will always claim that a destruction of one strand of the owner's bundle of rights or loss of the ability to develop one portion of the property is the "whole parcel" that should be focused upon for purposes of determining whether a taking has occurred. Conversely, government will always attempt to show that what has been destroyed is merely a small portion of the value of the property as a whole. Given the huge impact that determination of the size of the whole parcel has on the takings formula, many cases will be won or lost simply on the basis of whether the rights destroyed were deemed to be part of the larger whole parcel or whether those rights were themselves the whole parcel. While *Penn Central* is still the last word from the Supreme Court, the lower state and federal courts have not applied the *Penn Central* whole parcel formulation rigidly, and in some cases, not at all.[119]

III. How Far Is Too Far?

Once the whole parcel is defined, the next step in the typical takings case is to determine whether the impact of the governmental regulation has caused such a substantial loss in the value of the property that a taking has occurred. At one extreme, *Lucas* establishes that a complete destruction of all productive or economically viable use of property constitutes a taking. In most cases, however, property is not so severely impacted by governmental regulation. Rather, the property owner suffers a large loss and claims that as a result the regulation "goes too far."

In *Lucas*, the Court specifically acknowledged that a property owner who lost ninety-five percent of the value of property *might* not recover at all.[120] Although such a property owner would not be able to claim a categorical taking, he could still invoke the *Penn Central* test in which the economic impact upon the property owner and the extent to which the regulation interferes with distinct investment-backed expectations are considered along with the character and nature of the government's action.[121] Historically, such claims have not always been successful.[122]

118. *See supra* notes 101-112 and accompanying text (describing the "denominator problem").

119. *See* Loveladies Harbor v. United States, 28 F.3d 1171, 1180-82 (Fed. Cir. 1994) (discussing several cases and using a flexible approach based on factual nuances) (citations omitted).

120. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 n.8 (1992).

121. *Id.* ("[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").

122. The fair market value of the property in question was reduced by approximately 75% in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), approxi-

It was well established, prior to *Lucas*, that a regulation, as applied to a particular property, may effect a taking if it does not substantially advance legitimate state interests,[123] or if it "denies an owner economically viable use of his land."[124]

In *Penn Central*, the Court conceded that there was no fixed formula for determining when the application of a regulation results in a taking.[125] Rather, the Supreme Court characterized the process as based on

> *ad hoc*, factual inquiries into the circumstances of each particular case. . . . To aid in this determination, however, we have identified three factors which have "particular significance". (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct invest-backed expectations"; and (3) "the character of the government action".[126]

In focusing on the extent to which government regulation impacts upon the economic viability of property, a court may combine the first two of these factors.[127] As a part of this analysis, the court must compare the value of the property before the challenged government action with the value after the government action. The economic impact upon property must be considered in light of the character of the governmental regulation. Despite the formulation of these general guidelines in *Penn Central* more than fifteen years ago, precious little has come from the Supreme Court regarding how this ad hoc inquiry actually should be undertaken.

A. *Value Before and Value After and Reasonable Return on Investment*

The test for when a governmental regulation goes "too far" is often expressed as a comparison between the fair market value of the property prior to the effective date of the challenged regulation and the fair market value of the property just after the effective date of the challenged regulation. If all or all but a bare residue of the property's

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mately 88% in Hadachek v. Sebastian, 239 U.S. 394 (1915), and approximately 95% in William C. Haas Co. v. San Francisco, 605 F.2d 1117 (9th Cir. 1979).

123. Agins v. Tiburon, 447 U.S. 255, 260 (1980) (citing Nectow v. Cambridge, 277 U.S. 183, 188 (1928)).

124. *Id.* (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 n.36 (1978)); *see also* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

125. *See Penn Central*, 438 U.S. at 123-24.

126. Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224-25 (1986) (citations omitted); *see also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 494-95 (1987) and cases cited therein. When Justice Holmes linked the amount of loss suffered by a property owner to causation of a regulatory taking in Pennsylvania Coal v. Mahon, he recognized that the inquiry was essentially an ad hoc process involving issues of diminution of value and reciprocity of benefits. *See* Pennsylvania Coal v. Mahon, 260 U.S. 393, 419 (1922).

127. *See Florida Rock II*, 791 F.2d 893, 905 (Fed. Cir. 1986).

value has been destroyed, a taking has occurred.[128] In *Village of Euclid*, the Supreme Court upheld the zoning of property even though the zoning destroyed approximately seventy-five percent of the property's value.[129] Thus, as far back as the 1920s, when zoning was in its fledgling stages, a diminution of seventy-five percent of value after imposition of a new land-use regulation was not held to be severe enough to cause a taking.

To establish sufficient diminution in value, both sides in a regulatory takings case will engage in a battle of expert appraisers to establish the relative values of the property prior to and after the alleged taking. This battle occurs in the eminent domain context on a regular basis—but with one key difference. In an eminent domain proceeding, the testimony regarding fair market value is used solely to establish the amount of damages that will be paid for a taking that is acknowledged to have already occurred. In the context of a regulatory taking challenge, however, such valuation testimony is used to establish whether a taking has occurred at all. Thus, in a regulatory takings case, if the property owner's valuation testimony is not believed, the property owner will have no taking claim and will receive nothing. In an eminent domain case, the worst that usually occurs if the property owner's appraiser is not believed is that the property owner will receive less in damages.

The critical importance of appraisal testimony in establishing diminution in value (or rebutting a property owner's claimed diminution) is vividly demonstrated by the *Florida Rock* litigation.[130] In *Florida Rock*, the United States submitted an appraisal based on comparable sales that showed that there was a substantial market comprised of speculators at the time of the alleged taking. To counter the substantial value shown by the government's appraisal, Florida Rock submitted an appraisal that rejected all comparable sales because the purchasers ostensibly lacked sufficient knowledge of the applicable wetland regulations.[131] Florida Rock contended that any potential purchaser who had full knowledge would offer no more than a nominal amount for the property.[132] The United States Claims Court accepted Florida Rock's appraisal, found that the property had virtually no value after the imposition of the regulations, and concluded that a taking occurred.[133] The Federal Circuit reversed, holding that the

128. De St. Aubin v. Flacke, 496 N.E.2d 879 (N.Y. 1986); Spears v. Berle, 397 N.E.2d 1304 (N.Y. 1979).

129. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 396-97 (1926).

130. As of this writing, *Florida Rock* is before the Court of Claims for the third time due to two reversals from the Federal Circuit.

131. *Florida Rock I*, 8 Cl. Ct. 160, 167 (1985).

132. *Id.*

133. *Id.*

United States Claims Court erroneously accepted Florida Rock's appraisal and rejected the government's appraisal.[134]

In particular, the Federal Circuit noted that a viable real estate market may be comprised of speculators and that such potential speculative purchasers need not be only persons who are legally trained or legally advised.[135] Rather, the Federal Circuit held that if a viable market for real estate existed at the time the regulations were applied to the property, then even if that market is comprised of speculators, the value of property as indicated by comparable sales must be considered in determining fair market value.[136]

In most cases, the appraisal testimony that is finally accepted by the court will demonstrate a diminution in value, but not a destruction of *all* value. Under such circumstances, the courts require something more than diminution in value to find a taking has occurred. Frequently, that "something more" is that the owner has been denied the current use of the property or that all permitted uses of the property will fail to yield the owner any reasonable economic return.

For example, in *Grimpel Associates v. Cohalan*,[137] approximately ninety-two percent of the value of the property was destroyed by a rezoning from "Business II" to "Residence AA."[138] However, this "mere" diminution in value was not enough, in and of itself, to cause a taking.[139] While the New York Court of Appeals held that such a reduction in value was "not itself dispositive of the constitutional issue, proof of a drastic reduction in value tends to establish that the property is not reasonably suited for the uses prescribed by the zoning ordinance."[140] In addition to the diminution in fair market value, the Court of Appeals looked to the ability of the property owner to obtain a reasonable economic return from each of the permitted uses and found that the area was not suited for residential use, as it was surrounded by major thoroughfares and commercial establishments,[141] and that the plaintiff did not have to prove unsuitability for the public uses allowed under Residence AA.[142]

134. *Florida Rock II*, 791 F.2d 893, 897 (Fed. Cir. 1986) (reversed the trial court's finding that a taking had occurred by discounting the trial court's assertion that government's higher appraisal was based on unscrupulous speculators who would always seem to find someone willing to buy land in Florida at a price).

135. *Florida Rock IV*, 18 F.3d 1560, 1566 n.12 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995).

136. *Florida Rock II*, 791 F.2d at 896-97 (referring to "numerous inquiries about possible sale of the property by Florida Rock and one offer of $4,000 an acre").

137. 361 N.E.2d 1022 (N.Y. 1977).

138. *Id.* at 1023-24.

139. *Id.* at 1024; *see also Lucas*, 112 S. Ct. 2886, 2895 n.8 (1992) (acknowledging that even in instances where 95% of the value of property is destroyed there is no categorical taking—something more must be shown).

140. *Grimpel*, 361 N.E.2d at 1024.

141. *Id.*

142. *Id.*

Because the plaintiff was able to prove both a very large diminution in value, as well as that the "return from the property would not be reasonable for each and every permitted use under the ordinance . . . and that no reasonable return could be had from any permitted use,"[143] the Appellate Division found a taking had occurred.[144] Thus, in affirming the decision of the Appellate Division, the New York Court of Appeals concluded that a taking occurs when there is a very large diminution in value (approximately ninety-two percent) and when the property owner is unable to obtain a reasonable economic return from any permitted use.[145]

Soon after *Grimpel*, in *Curtiss-Wright Corp. v. Town of East Hampton*,[146] the Appellate Division held that a property owner must show more than a "significant diminution in value" and must show that he or she cannot receive a reasonable return:[147]

> The owner who attacks a zoning ordinance as violative of the Fifth Amendment on the ground that its economic impact amounts to confiscation, "must show more than the current zoning classification has caused a significant diminution in value, or that a substantially higher value could be obtained if an alternate use is permitted. Rather, the proper test is whether the owner can presently receive a reasonable return on his property." . . . Such an owner must establish affirmatively that the regulation eliminates all reasonable return, . . . and this must be accomplished by "dollars and cents" proof. . . . To establish de facto confiscation, evidence of the market value of the property at time of acquisition as well as the value of the property as presently zoned is required.[148]

Moreover, the Appellate Division was not satisfied with proof of inability to obtain a reasonable return on the property solely for the purpose for which it was obtained.[149] Thus, even though the devel-

> It was not incumbent upon plaintiff to prove that its property was not suitable for various public or quasi-public uses permitted by the residential zoning classification such as church, school, college, public library, municipal building or municipal park. To confine private property to public uses alone amounts to an appropriation of property rights for the benefit of the public without compensation therefor.

Id.

143. *See* Grimpel Assocs. v. Cohalan, 380 N.Y.S.2d 279, 282 (App. Div. 1976), *aff'd*, 361 N.E.2d 1022 (N.Y. 1977).

144. Although the Court appears to distinguish between value and reasonable return, it then appears to equate them by concluding that "[t]he diminution in value of the magnitude above-described is tantamount to confiscation. . . ." *Id.*

145. *Grimpel*, 361 N.E.2d at 1024.

146. 442 N.Y.S.2d 125 (App. Div. 1981).

147. *Id.* at 127.

148. *Id.* (citations omitted).

149. *Id.* at 128 (plaintiff provided evidence on development costs of houses on large acreage, but "[w]hat plaintiff made no effort to prove however, was the current value of the property or that it could not produce a reasonable return if marketed as a single tract under current zoning). A review of the facts in *Curtiss-Wright* is appropriate. Curtiss-Wright, a developer, purchased a 1357-acre tract in the town of East

oper proved that the cost of houses suited to the large lots mandated by the zoning, plus the cost of developing such lots, would exceed the sale price for houses in the area, no taking was proven.[150] The Appellate Division indicated that the property owner must also prove that it could not produce a reasonable return if it marketed the property as a single unsubdivided tract under the current zoning.[151] Thus, Curtiss-Wright's takings claim failed because it did not prove that the property could not be sold, *as is*, for a reasonable return.[152]

Both *Grimpel* and *Curtiss-Wright* rely heavily on the concept of reasonable return as a limitation on the "value before/value after" test. Although many zoning and environmental regulations can cause substantial, even huge, diminutions in value, the New York State courts will not find a taking (absent destruction of all or virtually all value) unless the property owner cannot also receive a reasonable return on any use of the property or its sale.

This emphasis on reasonable return on investment as a key factor in the takings analysis was continued in *Seawall Associates v. City of New York*.[153] There, the Court of Appeals noted that the city's SRO Local Law prohibited "the sole use—entirely permissible before the enactment of the law—for which investment properties are purchased: commercial development."[154] The Court of Appeals distinguished *Seawall* from *Penn Central*[155] and *Keystone Bituminous Coal*,[156] stating that in neither of the latter two cases was the property owner denied continued use of the property or a reasonable return on the investment.[157]

In essence, the inability of the property owner to obtain a reasonable return on an investment has been utilized in situations in which the "value before/value after" test shows a very large diminution in value, but not one that in and of itself is sufficient to cause a taking as a matter of law—that is, a categorical taking. In addition, the reasonable investment-backed expectations of the property owner determine whether the destruction of a large portion of the property's value causes a taking. At least one court has concluded that existing governmental regulations form a backdrop against which reasonable ex-

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Hampton. The tract was zoned Residence B, which allowed half-acre lot sizes. In 1968, the town adopted a zoning plan, the "Voorhis Plan," and rezoned a large portion of the town, including Curtiss-Wright's remaining 777 acres in 1972 (other acreage had been conveyed), to Residence A, which required two-acre lots. Thus, Curtiss-Wright would not be able to develop as many home sites as when the land was acquired. *Id.* at 127.

150. *Id.* at 128.

151. *Id.*

152. *Id.*

153. 542 N.E.2d 1059 (N.Y.), *cert. denied*, 493 U.S. 976 (1989).

154. *Id.* at 1067.

155. *Id.* at 1067-68.

156. *Id.*

157. *Id.* at 1068.

pectations of property owners are to be measured. In *M & J Coal Co. v. United States*,[158] a coal company obtained state permits to mine and deeds to surface property that it asserted gave it the right to mine coal in a manner that would cause the surface of the land to subside.[159] Such mining activities were in conflict with federal mining regulations.[160] In upholding the applicability of the federal mining regulations against a takings challenge, the Federal Circuit noted that the mining operator knew or should have known of the existence of the federal regulations at the time the property owner took title.[161]

Thus, the Federal Circuit concluded that the right to mine in contravention of the federal mining regulations was not part of the bundle of rights that the coal company received when it took title to the property.[162] In that regard, the Federal Circuit considered the federal mining regulations to be analogous to limitations on title that arise from other antecedent legal restrictions, such as the common law of nuisance.[163] Indeed, the Federal Circuit went so far as to conclude that the existence of the federal regulations at the time a property owner took title would preclude just compensation even if the regulations deprived the property owner of all economically viable use of the property.[164]

However, when new regulations are adopted—even vis-a-vis heavily regulated industries such as banking—their imposition can destroy legitimate investment-backed expectations and cause a taking. Such was the case in *Branch v. United States*.[165] In *Branch*, a bank holding company, Bank of New England Corp. ("BNEC"), went insolvent, and under the Financial Institution Reform, Recovery, and Enforcement Act[166] and in particular its "cross-guarantee provision,"[167] its

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158. 47 F.3d 1148 (Fed. Cir. 1995).

159. *Id.* at 1150-51.

160. *Id.* at 1150 (citing the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1988), and in particular, 30 U.S.C. § 1271 (1988), which authorizes the Secretary of Interior or designee to order cessation of surface mining and reclamation operations).

161. *Id.* at 1154:

> Thus, at the time M & J acquired its mining rights, whatever they were, it knew or should have known that it could not mine in such a way as to endanger public health or safety and that any state authorization it may have received was subordinate to the national standards that were established under SMCRA and enforced by OSM [Office of Surface Mining Reclamation and Enforcement].

Id.

162. *Id.* at 1154.

163. *Id.*

164. *Id.* at 1155 ("Justice and fairness do not require that the community at large bear the 'burden' of M & J's inability to mine in a manner that is safe to the public.") (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Mugler v. Kansas, 123 U.S. 623, 668-69 (1887)).

165. 31 Fed. Cl. 626 (1994).

166. Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified in scattered sections of 12 U.S.C.).

"controlled" bank, Maine National Bank ("MNB"), was hit by the FDIC with an assessment of over $1 billion.[168] The plaintiff, a trustee of the holding company, sued on behalf of MNB for the return of "not less than $65 million,"[169] alleging a taking for a public purpose without just compensation.[170] The court concluded that the investment-backed expectations requirement limits takings recoveries to those owners who can demonstrate that they bought their property in reliance upon a state of affairs that does not include the challenged regulatory scheme.[171]

Thus, although the phrases sound similar, "no reasonable economic return" must be distinguished from "frustration of investment-backed expectations." The courts require a property owner to show that "no reasonable economic return" can be generated from property as an aid in resolving takings cases when there has been a very large diminution in value. The term "frustration of investment-backed expectations" is used by the courts as describing an eligibility hurdle a property owner must overcome in order to be able to establish the requisite economic loss.

B. *Highest and Best Use of Property*

To determine the property's fair market value both prior to and after the application of the challenged regulation, one must determine its highest and best use.[172] Although a property's fair market value is normally based upon its existing use, under certain circumstances the value of a potential use of the property, its highest and best use, can be included in its fair market value.[173]

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167. 12 U.S.C. § 1815(e)(1)(A) (Supp. V 1993).

168. *Branch*, 31 Fed. Cl. at 629.

169. *Id.* The sum of $65 million represented the net worth of MNB. *Id.*

170. *Id.*

171. *Id.* at 637. Expectations were key in *Branch*:

> The court must determine plaintiff's investment-backed interests at the time the taking occurred. If the individual banks within the multi-bank system ignored the corporate form and were operating as a single entity they would not have a reasonable expectation that their corporate form would be respected regarding their liability for their parent and sister banks' debts. . . . If MNB did respect its corporate form, it could hold an historically-rooted expectation that it would not become liable for BNEC's debts. If the evidence warrants such a finding, the court must also conclude that MNB has suffered a taking.

Id. at 637 (court denied motions for summary judgment by both parties and ordered a trial with the limited scope of determining whether or not MNB and BNEC operated within corporate forms).

172. Formanek v. United States, 26 Cl. Ct. 332, 335-36 (1992); *see also* United States v. Powelson, 319 U.S. 266, 275 (1943) (valuation "may reflect not only the use to which the property is presently devoted but also that use to which it may be readily converted").

173. *Formanek*, 26 Cl. Ct. at 335-36.

Highest and best use is "[t]he reasonably probable and legal use of vacant land or improved property, which is physically possible, appropriately supported, financially feasible, and results in the highest value."[174] To establish a potential use as the highest and best use, a property owner must prove that the potential use is physically possible, financially feasible, and that the property could have been readily converted to such a use in the near future.[175] If the property owner cannot satisfy all three tests, then the use will be considered speculative and the fair market value of the property cannot, as a matter of law, include any value attributed to the speculative use.[176]

One of the most difficult aspects of highest and best use determinations is whether property can be readily converted to the purported highest and best use if a governmental permit is a necessary precondition to commencing such a use. If a governmental permit is necessary, the claimant must establish that there is a reasonable probability that all applicable governmental permits could have been obtained within a discreet foreseeable time period.[177] For example, if the potential use would require a rezoning, then the property owner must establish that there is a reasonable probability that the local government would so rezone the property in the proximate future.[178]

Often, attempting to prove whether such a permit or approval could be obtained is a case unto itself within the overall takings litigation. It is quite common that a very large diminution in value can be shown only if the fair market value of the property prior to the imposition of the challenged regulation is based upon a potential use of the property as the highest and best use. It is also quite common, however, that such a highest and best use is not allowed as of right, but that one or more federal, state, and local permits are necessary. To establish the ready convertability of the property to the purported highest and best use, the property owner must show that there is a sufficient likelihood that the necessary approvals will be received.[179] To do so, the property owner must submit evidence showing that all of the permit crite-

174. AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, THE APPRAISAL OF REAL ESTATE 19, 269 (9th ed. 1987).

175. *Formanek*, 26 Cl. Ct. at 335, *citing* Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 156 (1990). *See also* United States v. Powelson, 319 U.S. 266, 275 (1943); National Bank of N. Am. v. Systems Home Improvement, Inc., 419 N.Y.S.2d 606 (App. Div. 1979), *aff'd*, 407 N.E.2d 1345 (N.Y. 1980).

176. *National Bank*, 419 N.Y.S.2d at 610. *See also* Rosen v. State of New York, 301 N.Y.S.2d 353 (N.Y. Ct. Cl. 1969).

177. *National Bank*, 419 N.Y.S.2d at 606-10; *Rosen*, 301 N.Y.S.2d at 357-60.

178. *In re* Town of Islip v. Mascioli, 411 N.Y.S.2d 645 (App. Div. 1978), *aff'd*, 402 N.E.2d 1123 (N.Y. 1980). *See also* Berwick v. State, 486 N.Y.S.2d 260 (App. Div. 1985); Chase Manhattan Bank, N.A. v. New York, 479 N.Y.S.2d 983, 988 (App. Div. 1984).

179. *Formanek*, 26 Cl. Ct. at 336-37 (defendant contended that plaintiff would have needed state and local permits, and thus *its* action as the federal government was not a taking; court found such contention to be without merit since state agency had no jurisdiction over site and local authorities enthusiastically supported development).

ria can be satisfied or that a variance is sufficiently likely for any permit criteria that cannot be satisfied.[180] Attempting to prove these facts often requires complex environmental and technical evidence tantamount to what would be required for an actual permit application.[181]

In a further attempt to increase the value of property just prior to the alleged taking, a property owner may attempt to equate the value of property at its highest and best use with the profits that purportedly would have been generated from that potential use of property. However, proving value from potential profits of a hypothetical business has been rejected by the courts. In *Levitin v. State of New York*,[182] a valuation of property based upon forecasts of income from a nonexistent business was rejected for eminent domain purposes. In *Levitin*, the claimant alleged that the highest and best use of certain condemned property would be as an extension of an existing motel onto another portion of the property that was vacant.[183] Although the court accepted the highest and best use, it rejected equating the value of the property with the discounted profits for the theoretically expanded business:

> Such a method of evaluation of vacant, unimproved land is completely unprecedented. There is no authority cited by claimants in support of it and none is to be found, for how can income be capitalized to produce a residual land value when the appropriated land is neither producing income nor equipped to produce such income? The fact that part of the entire parcel was producing income because of a business operated thereon is of no moment even if it be accepted that the highest and best use of the appropriated part would have been an extension of that business . . . [A] claim based upon a conclusion conjectured from data founded only in speculation [can] not be countenanced.
>
> This is not to say that prospective use of highest and best use and its influence on a prospective purchaser may not be an influence in the determination of market value. *But a claim is improper where it is based entirely on hypothetical profits estimated from a nonexistent business* . . . .[184]

180. *Id.*

181. *Id.* at 337.

182. 207 N.Y.S.2d 798 (App. Div. 1960).

183. *Id.* at 799 (claimants put in claim for $530,000 based on "projected" capitalization of hypothetical revenue stream).

184. *Id.* at 800 (emphasis added) (citations omitted). *See also* City of New York v. Chestnut Properties Co., 332 N.Y.S.2d 19, 20 (App. Div. 1972), *aff'd*, 316 N.E.2d 328 (N.Y. 1974) (land cannot be valued based upon "[e]laborate forecasts of income from non-existing structures on land which need large physical change to be usable . . . ."). *Id.*

Similarly, it is a long-standing rule of federal takings law that loss of future profits is a "slender reed upon which to rest a takings claim."[185] Rather, the proper method of valuation is to determine the amount that a willing buyer and seller would set as the price for the property in an arm's length transaction.[186]

While the fair market value of property before and after the imposition of the challenged regulation is to be measured at the highest and best use of the property, the highest and best use may be for the entire property or for less than the entire property if such a focus is appropriate under the "whole parcel" analysis. If the difference between the fair market value of the property before and after the imposition of the regulation is such that all or virtually all of the property's value has been destroyed, then a categorical taking has occurred. In most cases, however, such a gross disparity in value will not exist and the courts will rely upon other tests to determine whether a taking has occurred. One such test is whether the property owner can obtain a reasonable economic return from any permitted use of the property. In addition, as discussed in the following section, the courts will also balance the interests of the government in enacting and applying the regulation against the property owner's interest in the free use of property.

C. *Balancing of Benefits and Burdens*

Long before the decision in *Penn Central*, the Supreme Court relied upon a balancing of benefits and burdens in determining whether a land-use regulation caused a taking of property. In *Euclid*, the Supreme Court noted that the significant loss in value caused by zoning of property was not something isolated to the property owner. Rather, the benefits and burdens of the zoning ordinance—which had already been held to be a legitimate exercise of the police power—were spread among all of the property owners of the municipality.[187]

The notion that a diminution in value is more acceptable if spread generally across the population was one of the pillars upon which *Euclid* was based. A half century later, the same issue was the crux of the difference between the majority and the dissent in *Penn Central*. The majority saw the New York City Landmarks Law as merely an-

185. *See* Andrus v. Allard, 444 U.S. 51, 65 (1979); Park Avenue Tower Associates v. City of New York, 746 F.2d 135 (2d Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985); Sadowsky v. New York, 732 F.2d 312 (2d Cir. 1984); Elias v. Town of Brookhaven, 783 F. Supp. 758 (E.D.N.Y. 1992).

186. *In re* Huie, 152 N.Y.S.2d 95 (App. Div. 1956). *See also Formanek*, 26 Cl. Ct. at 340 (plaintiff received offers from conservationists for his property, but such offers were discounted by court since they were in amounts far less than value prior to government action and were not the product of negotiations between a willing buyer and a willing seller under no duress) (citations omitted).

187. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387, 392, 393-94 (1926).

other land-use restriction that applies generally throughout the city.[188] The dissent focused on the fact that only approximately 400 property owners were burdened by the Landmarks Law.[189] The dissenters noted that these property owners bore a substantially disproportionate share of the burdens of the Landmarks Law while the community generally enjoyed the benefits.[190]

Most recently, in *Lucas*, the same issue reappeared. There, Justice Scalia noted that the extraordinary impact of the beachfront protection regulations upon Lucas required him to "sacrifice all beneficial uses in the name of the common good."[191] Similarly, in *Florida Rock IV*,[192] the Court noted that one of the critical factors in the ad hoc analysis, from *Village of Euclid* through *Penn Central*, is the extent to which land-use regulation rests disproportionately on one or a few property owners, as opposed to a general public program to adjust the benefits and burdens of economic life to promote the common good.[193]

Since the *Penn Central* factors result in an inquiry that the Supreme Court characterized as ad hoc,[194] and since *Lucas* supplies no significant refinement or expansion of the *Penn Central* test in the context of non-categorical takings, the state and lower federal courts have been on their own in interpreting and applying the "fairness" balancing test in the situations in which a very large percentage, but not all, of the value of property is destroyed by government regulation.[195] In so doing, these courts have attempted to give meaning to the broad interests that must be balanced.

In *Florida Rock I*, the trial court noted that the severity of the loss of economic use suffered by the property owner was of great importance in determining whether a taking has occurred.[196] However, in *Florida Rock IV*, the appellate court stated that it and the trial court were bound to consider whether there were any "direct compensating benefits accruing to the property, and others similarly situated, flowing from the regulatory environment? Or are benefits, if any, general and widely shared through the community and the society, while the costs are focused on a few?"[197]

188. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130 (1978).
189. *Id.* at 138-39 (Rehnquist, J., dissenting).
190. *Id.*
191. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2866, 2895 (1992).
192. 18 F.3d 1560, 1570 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995).
193. *Id.* at 1570.
194. *Penn Central*, 438 U.S. 104, 124 (1978), *cited in Florida Rock IV*, 18 F.3d 1560, 1570 (Fed. Cir. 1994).
195. *Florida Rock IV*, 18 F.3d at 1569.
196. *Florida Rock I*, 8 Cl. Ct. 160, 166 (1985) ("In cases involving regulatory takings, the court must examine the substance, rather than the legal trappings, of what is left as a result of the government's regulatory action. If that which is left to the property owner is rendered meaningless by that which is taken compensation is due.").
197. *Florida Rock IV*, 18 F.3d at 1571.

In *Florida Rock IV*, the court acknowledged that this analysis must still account for the fact that government must be able to diminish property rights to some extent or government could hardly go on.[198] Ultimately, the court remanded for further fact finding, particularly on the "before" and "after" value of the property.[199] Despite its repeated pronouncement on the nature of the fact-finding process, it appears that the Federal Circuit's directives are not so easy to apply.[200]

Other courts have had similar difficulty in formulating guidelines for the trial courts' fact-finding process. For example, in remanding for further proceedings under the ad hoc *Penn Central* test, the Eleventh Circuit[201] developed a comprehensive list of factors to be weighed and considered by the trial court:

> (1) the history of the property—when was it purchased? How much land was purchased? Where was the land located? What was the nature of the title? What was the composition of the land and how was it initially used?; (2) the history of development—what was built on the property and by whom? How was it subdivided and to whom was it sold? What plats were filed? What roads were dedicated?; (3) the history of zoning and regulation—how and when was the land classified? How was use proscribed? What changes in classifications occurred?; (4) how did development change when title passed?; (5) what is the present nature and extent of the property?; (6) what were the reasonable expectations of the landowner under state common law?; (7) what were the reasonable expectations of the neighboring landowners under state common law?; and (8) perhaps, most importantly, what was the diminution in the investment-backed expectations of the landowner, if any, after passage of the regulation?[202]

In *Loveladies Harbor, Inc. v. United States*,[203] the Federal Circuit reaffirmed some of the key elements of the *Florida Rock* decision it handed down months earlier. For example, it noted that:

> A property owner who can establish that a regulatory taking of property has occurred is entitled to a monetary recovery for the

198. *Id.*

199. What is notable about *Florida Rock IV* is that the court applied the economic analysis utilized in physical takings to the regulatory context. In physical takings, even relatively minor invasions are compensable and the amount paid is equal to the estate taken. The *Florida Rock IV* court saw no reason to distinguish regulatory from physical takings and held that the amount of just compensation should be proportional to the interest taken as compared to the total value of the property. *Id.* at 1569.

200. For example, the appellate opinion in *Florida Rock II* was implemented in *Florida Rock III*, but resulted in the reversal reported in *Florida Rock IV*.

201. Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992), *cert. denied*, 131 L.Ed.2d 557 (1995).

202. *Id.* at 1136.

203. 28 F.3d 1171 (Fed. Cir. 1994).

> value of the interest taken, measured by what is just compensation.[204]

Thus, *Loveladies* reaffirmed the *Florida Rock* holding that compensation would relate to the value of the interest taken, which could be less than the full fee interest. *Loveladies* also posited yet another three-part test, ostensibly derived from *Lucas*, but which supposedly eliminates much of the vague balancing inherent in the *Penn Central* test:

> With regard to the interest alleged to be taken, there has been a regulatory taking if: (1) there was a denial of economically viable use of the property as a result of the regulatory imposition; (2) the property owner had distinct investment-backed expectations; and (3) it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.[205]

However, *Loveladies* contains little direction concerning how this test is to be applied. Most of the economic analysis in *Loveladies* focuses on the "whole parcel" issue, as discussed above.[206]

Until further refined by the courts, it appears that the balancing test most typically contemplated in regulatory takings cases involves the extent to which burdens of a regulation are unfairly isolated upon one or a few property owners and benefits are spread across society generally. In this balancing scenario, however, it is easier to see how the burdens are placed on a single property owner because that property owner is before the court. It is far more difficult to show that all or many property owners are similarly burdened. Indeed, in *Village of Euclid v. Ambler Realty Co.*,[207] the existence of such reciprocal benefits and burdens appeared to be accepted by the Court from the nature of the regulatory system (comprehensive zoning) and not from any empirical data.

In that regard, most localities have adopted a variety of different environmental and land-use regulations that together form a regulatory matrix that burdens all or virtually all property. One particular element of that system may burden a particular property more severely, but the entire system generally applies reciprocally to all property. Thus, some properties may be burdened by wetlands restrictions, others by limitations on development of steeply sloped land or on ridgelines, but all property is regulated for the overall protection of the public health, safety, and welfare. The salutary effect of such regulations and their ability to enhance the value of property—

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204. *Id.* at 1179.
205. *Id.*
206. *See supra* notes 84-91 and accompanying text.
207. 272 U.S. 365 (1926).

particularly individual homes—should not be overlooked in the takings arena.

Conclusion

The law of regulatory takings is clearly in a rapid state of development. Balancing the interests of private property owners and the public is proving to be both extremely difficult and critically important. It is evident, however, from the repeated remands in *Florida Rock* and *Loveladies*, that the Supreme Court has not established guidelines for the typical takings case. Indeed, the most recent *Florida Rock* decision, with its lengthy dissent, reveals a fundamental disagreement in the Federal Circuit between the teachings of *Lucas* and other cases in which less than all economically viable use of property is destroyed.

Against this background of uncertainty, local governments still must regulate and property owners will still seek to develop. In the middle, litigators will wage a battle of appraisers and expert witnesses. In this battle, the following considerations will continue to guide the resolution of non-categorical takings cases until the Supreme Court speaks again: (1) what is the appropriate "parcel" for purposes of the takings claim; (2) what was the fair market value of the property before and after the alleged taking, given its highest and best use; (3) could the property have provided a reasonable economic return from any of its permissible uses; (4) could the property have been sold, as is, for a reasonable economic return; (5) has the application of the regulation interfered with the property owner's reasonable investment-backed expectations; and (6) do the burdens imposed by the regulation unfairly single out the property owner and confer benefits to society generally?

In our complex world, the notion of "free use of property" as it existed in the formative years of our nation is no longer viable. Gone is the time when land could be exploited and discarded, with more readily available by expanding the frontier.

Our need for safe drinking water and a healthy environment and our ingrained belief in the sanctity of private property cause conflicts that are not amenable to easy resolutions. While some elements of takings law are becoming clearer, there is far more litigation on the horizon.