A NOTE ON THE FEDERAL CIRCUIT'S INTERPRETATION OF *LUCAS* IN WETLANDS CASES

The U.S. Court of Appeals for the Federal Circuit, which has appellate jurisdiction over many takings issues, has applied *Lucas* in two long-pending regulatory takings cases, in each of which the issue was denial of wetlands permits under §_404 of the federal Clean Air Act. *Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171 (Fed.Cir. 1994) (map of property at p.1184); *Florida Rock Industries, Inc. v. United States,* 18 F.3d 1560 (Fed.Cir., 1994). Consider how well these decisions have captured either the explicit or the implicit core of the Supreme Court's evolving doctrinal approach.

Loveladies Harbor. The landowner had begun development of a 250-acre tract along the New Jersey shore in 1958, prior to the advent of state and federal wetlands protection legislation. By 1982, when development was stopped, it had subdivided and developed 199 of those acres and had sold, apparently profitably, all but 6.4 of them. With respect to the remaining 51 acres, the state reached a settlement with Loveladies Harbor in 1981 permitting development of 12.5 acres (one acre of which had already been filled) in exchange for dedicating the development rights on the other 38.5 acres to the state. Loveladies Harbor then applied for a federal permit to fill the 11.5-acre portion of the 12.5-acre settlement tract and was denied. It claimed a taking and, after protracted proceedings, a lower court found that the 12.5-acre tract had declined in value from $2,658,000 to $12,500 as a result of the permit denial, a loss of more than 99%.

In applying *Lucas*, the parties and the Court had at least five possible parcels that could be used to measure whether there had been a per se taking: the original 250-acre tract; the 57.4 acres unsold in 1982; the 51 acres undeveloped in 1982; the 12.5 acres that remained developable after the settlement with the state; or the 11.5 acres for which the fill permit was denied. Before reading the remainder of the description of the case, work out for yourself what the arguments would be for and against each possible choice.

The court opted to treat the 12.5-acre site as a distinct tract, rejecting the government's argument that the developer's "investment backed expectations" were best measured with reference to the whole parcel of 250 acres. The following paragraphs describe the court's thinking:

> Our precedent displays a flexible approach, designed to account for factual nuances, [including] consideration of the timing of transfers in light of the developing regulatory environment. New Jersey apparently made no effort to impose restrictions on the development of this wetland area until after the initial project had been approved for development, and until 199 acres had been developed. This development occurred over a substantial period of years beginning in 1958, and involved many kinds of government permits. The trial court concluded that land developed or sold before the regulatory environment existed should not be included in the denominator. The Government has failed to convince us that the trial court clearly erred in this conclusion.
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> With regard to the land remaining after the regulatory fabric was in place, the trial court excluded from consideration the 38.5 acres which for all practical purposes had been promised to New Jersey in exchange for the NJDEP permit.

> This is only logical since whatever substantial value that land had now belongs to the state and not to Loveladies. 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.

The Court apparently concluded, *sub silentio,* that a diminution in value of more than 99% of the 12.5 acres triggered *Lucas'* per se test, even though, unlike *Lucas,* there was a residual value of at least $12,500 and no concession by the government that the land had zero value. (The government's offer to prove that the 12.5 acres had an assessed value in 1982 for tax purposes of $377,412 was excluded on other grounds. See 28 F.3d at 1182, n.16.) Having concluded that the *Lucas* test applied, the Court went on to conclude that it would be inequitable to allow invocation of the nuisance exception (without stating whether it would otherwise have been available) because of the state's acquiescence in filling some of the wetlands under the 1981 settlement.

Florida Rock. Notwithstanding the government's refusal to grant a permit to mine subsurface limestone because of the adverse impact on surface wetlands, the Court of Appeals found that the property had substantial (albeit speculative) residual value. (An interesting discussion on speculative value at 18 F.3d 1563-67 is not reproduced here.) Recognizing that the finding of substantial value precluded a per se taking under *Lucas* (although not considering first whether speculative value is consistent with the Supreme Court's treatment of Mr. Lucas' property), the majority nonetheless applied the reasoning of *Lucas* broadly to hold out the possibility that on remand what it called "a partial deprivation resulting from a regulatory imposition," 18 F.3d at 1568, might be compensable.

Judge Plager (who also wrote *Loveladies Harbor,* although the other panel members were different) relied on Justice Scalia's footnote 8 in *Lucas,* which suggests that deprivations "one step short of complete" might fall within the per se rule. Judge Plager contrasted partial physical occupation cases, such as *Loretto,* where the value of what is taken is compensated, whether it be 5% or 95% of the whole, and continued:

> Logically, the amount of just compensation should be proportional to the value of the interest taken as compared to the total value of the property, up to and including total deprivation, whether the taking is by physical occupation for the public to use as a park, or by regulatory imposition to preserve the property as a wetland so that it may be used by the public for ground water recharge and other ecological purposes. [Taking cases require case by case adjudication.] ... But recourse to the facts hardly solves the basic problem at hand — there simply is no bright line dividing compensable from noncompensable exercises of the Government's power when a regulatory imposition causes a partial loss to the property owner. What is necessary is a classic exercise of judicial balancing of competing values...
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> When there is reciprocity of advantage, paradigmatically in a zoning case, see, e.g., [*Euclid*], then the claim that the Government has taken private property has little force: the claimant has in a sense been compensated by the public program "adjusting the benefits and burdens of economic life to promote the common

> good." *Penn Central*, 438 U.S. 104, 124. Thus shared economic impacts resulting from certain types of land use controls have been held to be non-compensable....
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> In addition, then, to a demonstration of loss of economic use to the property owner as a result of the regulatory imposition — a fact yet to be properly determined in this case — the trial court must consider: are there 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? Are alternative permitted activities economically realistic in light of the setting and circumstances, and are they realistically available? In short, has the Government acted in a responsible way, limiting the constraints on property ownership to those necessary to achieve the public purpose, and not allocating to some number of individuals, less than all, a burden that should be borne by all?

Chief Judge Nies, dissented from this reading of the taking clause, and rejected the majority's holding that "under the ad hoc inquiry, the claimant may recover proportional compensation for the impairment of economic use if it passes a threshold beyond 'diminution in value.'"

Does Judge Plager mean that, after *Lucas,* every regulatory takings case falls into one of three potential categories: a bottom zone where the diminution in value is small enough that no compensation is required, a middle zone where compensation proportionate to loss is required, and per se zone of *Lucas* where the government must acquire the fee? Do the boundaries between these zones shift depending on the other factors he mentions?