BRIEF OF AMICUS CURIAE FLORIDA AUDUBON SOCIETY
SUPPORTING APPELLEE UNITED STATES OF AMERICA
SEEKING AFFIRMANCE OF THE DECISION BELOW

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 97-5138

LLOYD A. GOOD, JR.,
Plaintiff-Appellant
v.
THE UNITED STATES,
Defendant-Appellee.

APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF FEDERAL CLAIMS IN 94-442L

ENTERED AUGUST 28, 1997, BY THE HONORABLE JAMES MEROW

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INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE

Florida Audubon Society ("Florida Audubon"), the State's oldest conservation organization, is a Florida nonprofit corporation. Florida Audubon has over 35,000 members in the State, over 400 of whom reside in the Florida Keys (Monroe County). Florida Audubon and its members rely on wetlands to help maintain the quality of Florida's coastal waters and to help support the State's abundant wildlife resources. Accordingly, Florida Audubon has a longstanding commitment to the protection and restoration of Florida's wetlands. Florida Audubon has a major interest in this case because the case threatens to undermine the authority of the Army Corps of Engineers to use its authority under the Rivers and Harbors Act and the Clean Water Act to regulate dredging and filling activities that destroy wetlands.

This case raises a fundamental question of fairness: whether a professional investor who invested in a speculative real estate project can ask the U.S. taxpayer to act as guarantor of the project when he fails to obtain the necessary regulatory approvals, especially when a sensible investor in Florida real estate in the early 1970's was or should have been aware of the

increasingly stringent federal and state regulations limiting development of the State's valuable coastal wetlands. Florida Audubon submits that the answer to this question is "no."

This brief amicus curiae focuses on two of the potentially dispositive issues in this case: whether the claim is barred by appellant's lack of reasonable investment-backed expectations, and whether the claim is barred because the transferable development rights held by appellant had significant economic value.

SUMMARY OF ARGUMENT

Appellant lacks the reasonable investment -backed expectations necessary to support a taking claim. A number of independent factors support this conclusion, including the extensive federal and state restrictions already in place when appellant purchased the property, that this parcel was one piece of a larger real estate investment, appellant's decision to continue to invest in the project in the face of increasing regulatory obstacles, that a substantial portion of the alleged value of the investment was based on obtaining the right to exploit the federal navigational servitude, and that appellant was a sophisticated, knowledgeable participant in a heavily regulated field of investment. The court of federal claims also properly dismissed this claim because the transferable development rights held by appellant have significant value which must be taken into account in determining whether or not the applicable regulations effected a taking requiring the payment of compensation under the taking clause.

ARGUMENT

I. APPELLANT LACKS THE INVESTMENT-BACKED EXPECTATIONS NECESSARY TO SUPPORT A CLAIM FOR FINANCIAL COMPENSATION UNDER THE TAKING CLAUSE.

A. The Lack of Reasonable Investment-Backed Expectations Precludes A Finding of a Taking.

The U.S. Supreme Court and this Court have long-recognized the critical importance of investment expectations in taking analysis. See generally Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978). A taking claim is barred as a matter of law when the owners cannot carry the burden of "demonstrat[ing] that they bought their property in reliance on a state of affairs that did *not* include the challenged regulatory regime." Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994) (Emphasis added); accord Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994) (expectations factor "limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation"). A lack of reasonable investment-backed expectations, standing alone, is sufficient to defeat a taking claim. See Ruckeslhaus v. Monsanto, 467 U.S. 986, 1005 (1984) ("the force of this factor [i.e. the lack of reasonable investment-backed expectations] is so overwhelming... that it disposes of the taking question"); see also Avenal v. United States, 100 F.3d 933 (Fed.Cir. 1996). As the Court stated in Loveladies:

In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of the economic loss. In economic terms, it could be said that the market had already discounted for the restraint, so that a purchaser could not show a loss in his investment attributable to it.

28 F.3d at 1171.

B. Appellant Lacks Sufficient Reasonable Investment-Backed Expectations to Support a Taking Claim.

For several independent reasons, appellant lacks the investment-backed expectations necessary to support a taking claim with respect to this property. In combination, these different reasons overwhelmingly support the court of federal claims' dismissal of this action. The appellant was entitled to pursue this highly speculative project in the hope of making a significant profit, but "he cannot look to the Fifth Amend-ment for compensation when such speculation proves ill-taken." 39 Fed.Cl. at 114.

Pre-Existing Federal Regulations Protecting Wetland Habitat. The land purchase agreement appellant signed in 1973 acknowledged that "certain of the lands covered by this contract may be below the mean high tide line and that as of today there are certain problems in connection with the obtaining of State and Federal permission for dredging and filling operations." (Emphasis added.) As of 1973, the Army Corps had extensive authority under the Rivers and Harbors Act (RHA), and was vigorously using this authority to protect this and other tidal wetland areas. See 39 Fed.Cl. at 85 ("much of the property is periodically submerged by the tides"); id. at 96 n.26 (owner planned development below mean high water line). Compare Weiszman v. U.S. Army Corps of Engineers, 526 F.2d 1302 (5th Cir. 1976) (rejecting challenge to 1971 and 1973 Corps orders requiring RHA permits for development of wetlands on Sugarloaf Key).

In 1972, Congress amended the Clean Water Act (CWA) to extend federal regulatory authority to non-tidal wetlands. Section 404 of the amendments authorized the Secretary of the Army to issue permits for the "discharge of dredged or fill material" into "the waters of the United States." P.L. 92-500; see § 502(7) (defining "navigable waters" as used in the CWA to mean "waters of the United States"). While the exact scope of this new law was initially a matter of some dispute, see, e.g., United States v. Ashland Oil & Transportation Co., 364 F.Supp. 349, 351 (W.D. Ky. 1973), aff'd, 504 F.2d 1317 (6th Cir. 1974), it is clear in fact that the 1972 amendments substantially expanded the Army Corps' wetlands permitting jurisdiction. See generally Riverside Bayview Homes, Inc. v. United States, 474 U.S. 121 (1985).[1]

As of 1973, federal law regulating both tidal and non-tidal wetlands encompassed concern for wildlife and habitat protection -- the specific concern which lead to the permit denial in this case. As a result of changes to regulations adopted in 1968, Army Corps review under the RHA was expanded to include, among other things, wildlife issues. See 33 CFR 209.120(d) (1968); Deltona v. United States, 637 F.2d 1184, 1187 (Ct.Cl. 1981), cert. denied 455 U.S. 1017 (1982) (describing evolution of Army Corps implementation of RHA); Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971) (affirming denial of RHA wetlands permit -- in the Florida Keys -- based on ecological concerns) See also Clean Water Act, P. L. 92-500, § 101 (basic objective of the Clean Water Act is "to restore and maintain the chemical, physical, *and biological integrity* of the Nation's waters"); §101(a)(2) (establishing interim national water quality goal for "the protection and propagation of fish, shellfish, *and wildlife*") (Emphases added.) Accordingly, as of 1973, the Army Corps had full authority under the RHA and the CWA to reject this wetlands permit because of adverse impacts on wildlife. See also 39 Fed.Cl. at 111 (discussing consultations mandated by Fish and Wildlife Coordination Act as of 1973).

As a result, appellant's argument that the Endangered Species Act of 1973 was not enacted until after the purchase of this property is beside the point. Appellant was on constructive if not actual notice that wildlife impacts would be taken into account in the federal regulatory review. Appellant cannot plausibly contend that he purchased this property in reliance on a state of affairs that did not include federal regulatory review of the impacts of wetlands development on wildlife and wildlife habitat.

Pre-Existing State Restrictions Protecting Wetland Habitat. Equally important, the State of Florida had established very extensive restrictions on tidal and non-tidal wetlands as of 1973. As described in detail in the court of federal claims' opinion, at least *three* separate measures in place as of 1973 specifically limited the potential for this type of environmentally destructive wetlands development: (1) the Beach and Shore Preservation Act of 1965, which required

permits for activities below the mean high water line; (2) the Air and Water Pollution Control Act of 1967, which granted a state agency authority to regulate wetland filling above the high tide line; and (3) the Water Resources Act of 1972, which mandated protection of water resources, and fish and wildlife in particular. The court of federal claims correctly concluded that these laws created a "pervasive[]... regulatory regime [which] deprive[d] [appellant] of a reasonable expectation to effect his development plan," 39 Fed.Cl. at 112.

Appellant Purchased a Portfolio of Real Estate Investments. In addition, appellant acquired this parcel of property as part of one transaction "together with a nearby motel area and marina known as Sugarloaf Lodge, parcels adjacent to the motel, additional parcels on Lower Sugarloaf Key, as well as property on Saddleback Key, which was subsequently developed as a recreational park" 39 Fed.Cl. at 85 n.2.

The larger transaction of which this parcel is a part is relevant in determining whether the Army Corps permit decision interfered with appellant's reasonable investment-backed expectations.[2] Appellant acquired in one transaction various properties with different development potential and different levels of associated risk, allowing appellant to spread his investment risk in this property across other, more predictably remunerative properties. Given appellant's ability to spread his risk, it is easy to understand why appellant might have undertaken such a speculative investment. At the same time, appellant's ability to spread the investment risk also supports the conclusion that granting "compensation" for the failure of this speculative venture would not comport with the principles of "fairness and justice" underlying the taking clause. Armstrong v. United States, 364 U.S. 40 (1960).

The parcel at issue in this case amounted to little more than "boot" which was essentially irrelevant to the success of the investment as a whole. Appellant paid a total of $2,000,000 for a package of properties acquired in 1973 and, according to appellant's own figures, the basis in this property was less than 5% of the purchase price of the entire package of properties. 39 Fed. Cl. at 89 & n.2. Appellant obviously derived substantial economic benefit from the 95% of the $2,000,000 investment allocated to the other properties. Under the circumstances, it borders on the absurd for appellant to claim a "taking" because he was unable to derive profit from 5% of the total transaction.

Appellant Continued to Invest as Regulatory Obstacles Grew. Another factor is that appellant made a substantial portion of his investment in pursuing this project long after -- even under appellant's theory -- he knew or should have known of legal restrictions in place which might prevent development of the property, including the Endangered Species Act of 1973. 39 Fed. Cl. at 85. In October 1980, seven years after he purchased the property, appellant entered into a joint venture agreement with a firm named Keycology, and agreed to pay the firm a fixed fee of $24,000 to attempt to obtain the necessary permits to develop the property, and a contingency fee of one-third of the increase in value of the property if Keycology succeeded in obtaining the permits. Recognizing the even more substantial regulatory hurdles facing the project at this point, appellant and Keycology together acknowledged that "obtaining said permits is *at best difficult* and *by no means assured*...." 39 Fed.Cl. at 86. (Emphasis added).) None of appellant's post-1973 investment was even arguably based on a reasonable investment-backed expectation. Compare Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) (definition of "relevant parcel" properly "include[s] consideration of the timing of transfers [of property] in light of the developing regulatory environment").

Appellant's response (Br. at 40) is that the timing of his different investments is irrelevant to the merits of this claim because, prior to 1990, the Army Corps issued several permits for the project before finally rejecting the project in 1990. However, this argument confuses the character of a claimant's expectations in light of the existing regulatory regime, and the actual outcome of the regulatory process. That the Corps, weighing the available evidence in light of current law and policies, decided on several occasions to approve some version of appellant's project did not

grant appellant a vested right to receive a permit after the first permits expired, much less establish that appellant purchased the property in reliance on a state of affairs that did not include the challenged regulatory regime. See 39 Fed.Cl. at 86, citing 33 CFR 325.6 (activity authorized by Army Corps permit must be completed within five years); 33 CFR 325.7(a) (permit subject to revocation based on, among other things, changed circumstances or receipt of new information). See also Deltona v. United States, supra, 657 F.2d at 1993 (developer "must have been aware that the standards and conditions governing the issuance of permits could change").

Strong policy considerations also support this conclusion. Under the general principle favoring mitigation of damages, a potential taking claimant should curtail investment in the face of increasing evidence that the investment is being wasted. On the other hand, allowing a claimant to ignore the evolving regulatory environment would encourage wasteful investment.

Value Attributable to Access to Navigable Water. Another important factor supporting the conclusion that appellant lacks reasonable investment-backed expectations is that a substantial portion of the asserted value of appellant's investment rested on appellant's application to the Army Corps for permission to fill tidal wetlands subject to the federal navigational servitude.

The federal navigational servitude requires automatic rejection of a regulatory taking claim based on federal regulation of dredging and filling of lands covered by navigable waters or of other private activity designed to exploit the economic value of access to navigable waters. See Marks v. United States, 34 Fed.Cl. 387, 403 (1995), aff'd, 116 F.3d 1496 (Fed.Cir. 1997), cert. denied, January 20, 1998, No. 97-652. See also Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (federal navigational servitude constitutes inherent limitation on scope of private property rights), citing Scranton v. Wheeler, 179 U.S. 141 (1900); United States v. 30.54 Acres of Land, 90 F.3d 790, 796 (3rd Cir. 1996) (rejecting regulatory taking counterclaim because prohibition on existing use below mean high water falls within navigational servitude).

The trial court concluded that the federal navigational servitude did not, standing alone, "defeat" appellant's taking claim. 39 Fed.Cl. at 96-97. While the court acknowledged appellant's evidence indicating that "residential lots lacking water access would not be marketable," the trial court concluded this evidence did not demonstrate that "all economically relevant" limitations on the title were traceable to the federal navigational servitude. Id. at 97. Accepting this conclusion, the federal navigational servitude nonetheless supports the conclusion, together with other factors, that appellant could not have formed compensable expectations in relation to this property.

Appellant is a Sophisticated Investor in a Heavily Regulated Field. Finally, the court of federal claims properly took into account the fact that appellant was an active, sophisticated businessman operating in a heavily regulated business who could fairly be presumed to be cognizant of the regulatory risks inherent in this business activity.

Participants in heavily regulated businesses bear a heavy burden in attempting to demonstrate that they purchased property in reliance on a state of affairs that did not include the challenged regulatory regime. See Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602, 645 (1993) ("[t]hose who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end") quoting Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 227 (1986). See also Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); California Housing Securities, Inc v. United States, 959 F.2d 955 (Fed. Cir.), cert. denied, 506 U.S. 916 (1992) (savings and loan "lacked the fundamental right to exclude the government from its property," based on extensive federal regulations in place at the time savings and loan obtained federal deposit insurance). In this case, the court of federal claims concluded that real estate investment in the Florida Keys in the early 1970's was "not different in kind from the highly regulated business enterprises at issue in Monsanto, Connolly and Concrete Pipe." 39 Fed. Cl. at 110. In view of the extensive network of federal and state wetlands regulations discussed above, the substantial public interest in the

potential adverse impacts of coastal development on Florida's environmental quality, and the especially fragile ecological character of the Keys, this conclusion cannot plausibly be disputed.

C. Whether or Not this Case Involves a Lucas-type Claim, the Lack of Reasonable Investment-Backed Expectations Requires Rejection of this Claim.

Appellant acknowledges (Br. at 35) that in Loveladies Harbor v. United States, 28 F.3d 1171 (1994), the Court concluded that a lack of reasonable investment-backed expectations defeats a regulatory taking claim, including a claim based on alleged denial of "all economic use" of the property under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). This claim is not governed by Lucas, because the alternatives developed by the Fish and Wildlife Service, as well as the appellant's valuable transferable development rights, see section II, permit appellant substantial economic use of and/or value in the property. However, even on the assumption that this case is governed by Lucas, this Court should reject, based on the conclusion and reasoning in Loveladies Harbor, appellant's effort to avoid the determination that he lacks sufficient investment-backed expectations to support a taking claim.

First, the Court should reject appellant's request (Br. at 37) that it "reconsider its conclusion in Loveladies" because Loveladies Harbor represents binding precedent in this Circuit. See In re Kemps, 97 F.3d 1427, 1431 (Fed. Cir. 1996); Newell Companies, Inc. v. Kenney Manufacturing Co., 864 F.2d 757, 765 (Fed. Cir. 1988), cert. denied 493 U.S. 814 (1989)

Second, the Court has, since its decision in Loveladies, issued other decisions affirming the conclusion in Loveladies. For example, in Avenal v. United States, 100 F.3d 627, 632 (Fed. Cir. 1997), the Court rejected a taking claim by oyster cultivators who alleged that a federal water project destroyed the value of their leases on oyster growing beds. The Court relied on the fact that the claimants lacked investment-backed expectations, even though the government action did not merely reduce the value of the leases but made them completely worthless. See also Preseault v. United States, 100 F.3d 1525 (Fed.Cir. 1996) (plurality opinion) (owner's investment expectations irrelevant in taking case based on physical occupation of private property, but owner's expectation are relevant "when the Government restrains an owner's use of property").

Third, the decision in Loveladies Harbor correctly reads Lucas as reaffirming the long-standing importance of expectations in regulatory takings analysis. The Lucas case involved a landowner who purchased two beachfront building lots for approximately $1,000,000; at the time he purchased the lots, development was permissible under state law. Two years later, the legislature passed a statute which prohibited development of the lots, reducing the property's value, according to the explicit findings of the trial court, from $1,000,000 to zero. The unexpected, total loss of Mr. Lucas' $1,000,000 investment was critical to the outcome of the case. It would be preposterous to contend, as appellant's argument implies, that if Mr. Lucas had purchased the lots for a nominal amount after enactment of the statute, he could then have turned around and demanded a windfall of $1,000,000 in "just compensation" at public expense. To state the position is to refute it. Moreover, the Lucas Court's reasoning supports this common sense conclusion. The Lucas Court made clear that it was addressing restrictions which were "newly legislated or decreed," 505 U.S. at 1029, and that had a "dramatic effect" on the value of the owner's land, id. at 1007. Nothing in the Lucas decision supports the notion that a claimant who purchases with full notice of applicable regulations is entitled to a windfall at public expense. Under this theory, despite the fact that investors who lack investment-backed expectations are generally barred from claiming a taking, investors who bought subject to particularly stringent use limitations would be subject to a radically different rule. This rule would be especially perverse because it would likely grant particularly large windfalls to investors who purchased at particularly deep discounts, and who had as much if not more reason than other investors to learn about the applicable regulations. See Loveladies Harbor, 28 F.3d at 1177. Finally, this proposed rule would encourage economically wasteful speculative investment in properties that are particularly

unsuited for intensive development for public safety, environmental, or other reasons, based on the hope of obtaining taking "compensation" awards.

D. Nollan Does Not Require a Different Result.

Finally, amicus curiae Pacific Legal Foundation (PLF) seeks to avoid the conclusion that a lack of reasonable investment-backed expectations defeats this taking claim with the bald statement (Br. at 16-17) that "[i]t is axiomatic that when property is transferred without any interests being retained by the prior owner, the new owner stands in the shoes of the predecessor in interest." This supposed axiom would wipe out an unbroken line of precedent in the Supreme Court and this Court establishing that the owner's actual expectations, formed at the time he or she acquired the property, is central to takings analysis. PLF refers to a non-existent axiom.

This argument is a variant of an argument appellant apparently presented to the court of federal claims based on a footnote in the Supreme Court's opinion in Nollan v. California Coastal Commission, 483 U.S. 825, 833 n.2 (1987). However, as the court of federal claims explained, see 39 Cl. Ct. at 113 & n.53, the language in Nollan simply reflects the Supreme Court's distinct approach to taking claims involving physical occupation of property as opposed to regulatory restrictions on the use of property. See also Preseault v. United States, 100 F.3d 1525 (Fed.Cir. 1996) (plurality opinion) (expectations irrelevant in physical occupation taking case, but expectations are highly relevant "when the Government restrains an owner's use of property") (Emphasis Added). See generally Abrahim-Youri v. United States, __ F.3d __ (Fed. Cir., December 4, 1997) ("[T]here are important analytical differences that must be respected between a claim for a taking based on a regulatory imposition that constrains an owner's continuing use of property, and one that is based on an outright governmental seizure or occupation of private property").[3]

II. EVEN IF THIS CLAIM WERE NOT BARRED BY A LACK OF REASONABLE INVESTMENT-BACKED EXPECTATIONS, THE TRANSFERABLE DEVELOPMENT RIGHTS POSSESSED BY APPELLANT PRECLUDE A FINDING OF A TAKING.

While appellant's lack of reasonable, investment-backed expectations is sufficient, by itself, to support affirmance of the decision below, amicus Florida Audubon submits that the substantial transferable development rights (TDRs) held by appellant independently support the conclusion that no taking occurred in this case.

The U.S. Supreme Court's decision in Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978), holds that TDRs are relevant in determining whether or not a government action effects a taking. In Penn Central, the Court expressly stated that the TDRs mitigated the effect of the New York City landmarks law on the city's ability to make profitable use of the property:

Appellants... exaggerate the effect of the [landmarks] law on the ability to make use of the air rights above the Terminal.... [T]o the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied all use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. 438 U.S. at 136-37.

In addition, the Court stated that the ability to transfer development rights must be taken into account in determining the threshold question of whether a taking has occurred at all:

Although appellants and others have argued that New York City's transferable development rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted

'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation. Id. at 137.

The reasoning in the Supreme Court's recent decision in Suitum v. Tahoe Regional Planning Agency, 117 S.Ct. 1659 (1997), which involved an alleged "total" taking under Lucas v. South Carolina Coastal Council, reaffirms and extends the Penn Central decision. 39 Fed.Cl. at 108. The Suitum opinion focused on the procedural issue of whether the claim was ripe for adjudication, and the majority specifically noted that, as to the merits, "we have no occasion, and we do not decide, whether or not these TDRs may be considered in deciding the issue of whether there has been a taking in this case." Id. at 986-87. The Court's discussion of the ripeness issue, however, rests squarely on the premise that the value of TDRs is, in fact, relevant to the takings inquiry. Responding to the appeal court's determination that Mrs. Suitum had to pursue the agency's adminis-trative process to fix the value of the TDRs and thereby make her claim ripe, the Court stated: "The valuation of Suitum's TDRs is... simply an issue of fact about possible market prices, and one on which the District Court had considerable evidence before it," 137 LE2d at 995; the Court's inquiry into whether value could be placed on the TDRs at this stage would have been beside the point if the value of the TDRs were not relevant to the taking claim. Confirming this reading of Suitum, three Justices refused to join in the por- tion of the Court's opinion discussing this issue, because they objected to the majority's analysis "on the ground that it necessarily required the Court to accept as valid the premise that TDRs are relevant to the question of determining takings liability." Id. at 108.

Amicus curiae PLF seeks to rebut the force of this precedent by contending that a TDR, while it may provide value which mitigates the effect of a regulatory action on a landowner, cannot be viewed as a "use" of the property. However, this argument is directly refuted by Penn Central, in which the Court stated that "it is not literally accurate to say that they have been denied all use of ... pre-existing air rights, [because the rights were] made transferable." 438 U.S. at 136-37. Moreover, contrary to appellant's view, even if a TDR is viewed as simply providing substitute value, there is nothing in Lucas v. South Carolina Coastal Council, to support the argument that a TDR cannot be considered in takings analysis for that reason. The Lucas Court rested its decision on the fact that the coastal commission's decision had not only denied Mr. Lucas any significant "use" of the property, but had also resulted in the "complete extinguishment of his property's value." Id. at 1009 (Emphasis added). See also Id. at 1026 (distinguishing previous Supreme Court cases because "[n]one of them... involved an allegation that the regulation wholly eliminated the *value* of the claimant's land) (Emphasis added.) The Lucas Court's emphasis on "value," in addition to "use," confirms that land use regulations which include a TDR program that maintains part of the value of regulated private property is distinguishable from the type of regulatory program which effects a "total taking" at issue in Lucas.

In addition, there is no merit to PLF's suggestion (Br. at 10) that the value of the TDRs should be disregarded in this case because the TDR program is administered by state and local authorities whereas the alleged taking arises from the denial of a federal permit. It is obvious that federal as well as state and local restrictions have, to varying degrees over time, affected appellant's development opportunities; nonetheless, the trial court concluded that the responsibility of the State and local government for many of these restrictions should be disregarded in deciding the United States' takings liability. See 39 Fed.Cl. at 105, citing Ciampitti v. United States, 18 Cl.Ct. 548, 556 (1989). As a matter of fairness, if the United States is to be subjected to potential responsibility for restrictions on development imposed by the State and local government, then logically the federal government also should receive the benefit of the state and local regulations.[4]

As appellant acknowledges, the Court in Deltona Corp v. United States, 657 F.2d 1184, 1192 (Cl.Ct. 1981), affirmed the rejection of a taking challenge to the denial of a federal wetlands permit based on the fact that claimant "possesse[d] Transferable Development Rights granted by

the county." Id. at 1192 n. 14. The Court continued: "According to the [U.S. Supreme Court's] Penn Central case..., such rights mitigate whatever financial burdens the law... impose[s] ... and, for that reason are to be taken into account in considering the impact of the regulation'" Id. The Court's conclusion that the value of TDRs should be taken into account in determining potential takings liability is consistent with the conclusions reached by other courts around the country. See, e.g., Gardner v. New Jersey Pinelands Commission, 593 A.2d 251, 261 (N.J. 1991); Glisson v. Alachua County, 558 So.2d 1030 (Fla. App.), review denied, 570 So.2d 1304 (Fla. 1990).

Contrary to appellant's argument, the Court's decision in Whitney Benefits, Inc. v. United States, 752 F.2d 1554 (Fed.Cir. 1985), does not support the argument that the value of TDR's should be disregarded in deciding the taking issue. In that case, the trial court dismissed the claim for just compensation under the Tucker Act on the theory that the "property exchange" program established by the Surface Mining Control and Reclamation Act provided all the relief to which the claimant was assertedly entitled. The Court reversed, holding that the statute did not require a claimant to pursue the exchange program in lieu of or in advance of seeking just compensation. The Court's resolution of the case on statutory grounds obviated the need to resolve the question whether the government can constitutionally force a person to accept land rather than money as "just compensation." Id. at 1557. Compare Regional Rail Reorganization Act Cases, 419 U.S. 102, 149-152 (1974) (suggesting that a payment for a taking might not be required to be made in cash). More importantly for present purposes, the Court specifically distinguished the constitutional issue of whether, assuming a taking has occurred, an award of just compensation must be in the form of money, from the separate constitutional issue (which the Court did not resolve either) of whether TDRs are relevant to whether a taking has occurred in the first place. This case involves the latter issue. Accordingly, Whitney Benefits is simply irrelevant to this case.

CONCLUSION

The Court should affirm the judgment of the court of federal claims.

Respectfully submitted.
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Notes

[1] Appellant misleadingly states (Br. at 4, 5) that it was not until the 1977 amendments to the Clean Water Act that the Army Corps' permitting jurisdiction was extended to non-tidal wetlands. This statement is incorrect. See Riverside Bayview Homes, 474 U.S. at 123 (section 404 wetlands regulatory authority "originated in the Federal Water Pollution Control Act Amendments of 1972..., and ha[s] remained essentially unchanged since that time").

[2] While the trial court concluded that the different parcels included in the 1973 transaction need not be treated as "one property" for assessing the economic impact of the denial of the Corps permit, that conclusion is debatable, see Ciampitti v. United States, 22 Cl.Ct. 310, 320 (1991); Naegele Outdoor Advertising v. City of Durham, 803 F.Supp.1068 (MDNC 1992), aff'd, 19 F.3d 11 (4th Cir.), cert. denied, 513 U.S. 928 (1994). In any event, that issue is distinct from the issue of how purchasing this property as part of a larger transaction shaped appellant's investment expectations in the property.

[3] Furthermore, even in a physical occupations-type case, a lack of investment-backed expectations is not necessarily irrelevant to the resolution of a taking claim. See Abraham-Your,

supra (Clevenger, J., concurring opinion). See also California Housing Security, Inc. v. United States, supra.

[4] Appellant makes a number of other arguments against the court of federal claims' reliance on the TDRs to support a finding of no taking, based principally upon the dissenting opinion of Justice Scalia in Suitum. The opinions of a dissenting Justice obviously have no precedential value and provide no basis for disregarding Supreme Court precedent. Furthermore, to the extent PLF relies on the suggestion that local jurisdictions can be expected to implement TDR programs in bad faith, that suggestion has no basis in fact and does not comport with the respect the courts owe other branches of government. In reality, TDR programs represent an extremely promising vehicle for improving the effectiveness of land use regulation for the benefit of the entire community, and at the same reducing the unequal economic impacts of regulation on different land owners. See Lincoln Institute of Land Policy, "Alternatives to Sprawl" (1995).

PLF also refers (Br. at 11) to a recently enacted Florida statute which PLF says "is much more consistent with our views of fundamental fairness." However, PLF's opinion about that statute as a matter of policy is obviously irrelevant to the constitutional issue presented in this case.