STATE OF MICHIGAN

IN THE COURT OF APPEALS

K & K CONSTRUCTION, INC. and
JFK INVESTMENT CO., L.L.C.
(Successors-in-interest to Resorts and
Company and the JFK Company),

Plaintiffs-Appellees

v.

THE MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY and
STATE OF MICHIGAN,

Defendants-Appellants.

Court of Appeals
File No. 244455

Court of Claims
File No. 88-12120-CM

BRIEF AMICUS CURIAE OF CONSERVCATION AMICI

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April 7, 2003

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The conservation amici, including Michigan Environmental Council, Citizens for Alternatives to Chemical Contamination, Detroit Audubon Society, Friends of the Crystal River, League of Conservation Voters Education Fund, Lone Tree Council, Michigan Citizens Against Toxic Substances, Scenic Michigan, Sierra Club, Tipp of the Mitt Watershed Council, and West Michigan Environmental Action Council, respectfully submit this brief amicus curiae in support of the appeal by the Michigan Department of Environmental Quality.[1] The conservation amici urge the Court to reverse the judgment of the Court of Claims and remand the case with instructions that the claims be dismissed.

[1] The amici are filing simultaneously with this proposed brief a motion for leave to file a brief amicus curiae.

STANDARD OF REVIEW

The conservation amici adopt the Department's statement of the Standard of Review.

STATEMENT OF APPELLATE JURISDICTION

The conservation amici adopt the Department's Statement of Appellate Jurisdiction.

STATEMENT OF THE FACTS

The conservation amici adopt the Department's Statement of the Facts.

INTRODUCTION AND SUMMARY OF ARGUMENT

The conservation amici have a strong interest in this case because the decision of the Court of Claims, unless reversed, threatens to undermine the long established authority of state government to protect the public welfare, including public health and environmental quality. The Court of Claims' extreme ruling ignores well recognized limitations on the scope of the Takings Clause, both in Michigan and across the country. The importance of this appeal is magnified by the Michigan Supreme Court's prior decision in this case, which the Claims Court decision contradicts in several important respects. See K & K Construction, Inc. v Department of Natural Resources, 456 Mich 570; 575 NW2d 531, cert. denied, 525 US 819 (1998).

The amici seek to assist the Court by focusing on three issues. First, the amici will highlight several discrete points which conclusively demonstrate that the Court of Claims used an inflated estimate of the difference between the "before" (unregulated) and "after" (regulated) value of this property. Ignoring clear evidence in the record as well as the Supreme Court's prior determinations in this case, the Court of Claims excluded from consideration the valuable upland portions of so-called parcel one. In addition, the Claims Court made several other clearly erroneous findings which led to additional overestimation of the property's "before" value and underestimatation of its "after" value.[2]

Second, even if the Court of Claims' calculation of the before and after values were accurate (it clearly was not), the Court of Claims' ruling must be reversed because, under any view of the evidence, the restrictions imposed in this case do not rise to the level of a

[2] The parties debate at some length the possible significance of the so-called Goga plan in determining whether a taking occurred and the potential extent of any liability. In amici's view, since the initial permit denial on November 3, 1988, did not constitute a taking, it is unnecessary for the Court to address the Goga plan.

compensable regulatory taking. Under the Penn Central inquiry, a regulation can constitute a taking only if it denies the owner economically viable use of the property. The plaintiffs clearly cannot meet that standard. The other factors in the Penn Central analysis – whether the restriction interferes with reasonable investment-backed expectations, and the character of the government action – also demonstrate that there was no taking in this case.

Finally, the conservation amici attempt to assist the Court in resolving this appeal by examining the case in a somewhat larger context. Specifically, the amici explain why rejection of this takings claim is supported by the language and original understanding of the Takings Clause and why a restrained reading of the clause is consistent with the judiciary's obligation to defer to the judgments of the political branches on matters of social policy. Lastly, the amici explain why a restrained reading of the Takings Clause, far from being unfair to individual landowners, actually comports with fundamental fairness.

I. The Court of Claims' Estimate of the "Before" and "After" Value of the Property Contradicts the Supreme Court's Prior Determinations in this Case and Is Based on Clearly Erroneous Factual Premises.

Unfortunately, the record in this case includes a blizzard of conflicting property valuations submitted by the parties over the course of two separate trial court proceedings. It is nonetheless possible for the Court to cut through the confusion. A straightforward analysis demonstrates that the Court of Claims' estimate of the difference between the "before" (unregulated) and "after" (regulated) value of this property was greatly inflated. While the trial court believed that the difference between the before and after value was approximately 64%, the actual difference is, at most, only 33%.

Thus, the factual premise for the trial court's finding of a taking is mistaken and, therefore, the judgment of the Court of Claims should be overruled. As we explain in section II, this

case would still not rise to the level of a compensable taking even if the 64% figure were accurate. But the fact that the Court of Claims did not accurately calculate the before and after values independently supports the conclusion that the plaintiffs did not establish a constitutional taking. Even plaintiffs do not contend that a 33% "reduction" in property value would be sufficient to demonstrate a taking.[3]

The trial court, in its order on remand, determined that the "before" value of the property as a whole as of the date of the alleged taking was $9,339,181. Once the wetlands law was applied to the property, the court concluded, the property had an "after" value of $3,398,181. Based on these calculations, according to the Court of Claims, application of the wetlands law to the property produced a 64% reduction in the value of the property ($5,941,000 divided by $9,339,181).

The Department disputes these calculation on various grounds, and the Department has even offered its own appraisal, which the Department contends is more reliable, showing a difference between the before and after values of less than 20%. The conservation amici support the Department's position on this point. But the amici also submit that it is sufficient, for the purpose of resolving this appeal, to focus on three essentially indisputable errors in the trial court's calculations. Correcting the trial court's figures by addressing these three errors produces a difference in value of only 33%. This is somewhat higher than the Department's

[3] The type of before and after calculation employed by the Court of Claims typically overstates, often by a significant amount, the actual adverse effect (if any) of a regulation on a property owner. It is in part for this reason that the courts have demanded an extreme difference between before and after values before finding a constitutional taking. See Section III.

figure of approximately 20%, but far lower the trial court's 64% figure, and is plainly insufficient to support a finding of a taking.

First, the trial court's calculations ignore the value of the developed and developable upland portions of parcel one. The Supreme Court, in its 1998 opinion, explicitly and repeatedly stated that the value of the upland portions of parcel one needed to be included in the after value for parcel one. First, the Court noted that two parts of parcel one had been developed, as a JFK office building and as a Ram's Horn restaurant, and stated: "We see no reason for these two parts of parcel one to be excluded from the takings analysis. They were both part of parcel one as originally purchased, and neither was sold or developed before the enactment of the regulations in question." 456 Mich 570, 584. Second, the Court stated more generally that "plaintiffs were not prohibited from developing the remaining upland portion of parcel one," id. at 587, indicating that both the developed and developable upland portions of parcel one needed to be considered. The Court concluded by stating that the taking analysis had to be expanded, at a minimum, "to include at least all of parcel[] one." Id. at 586 (emphasis added).

The Court of Claims ignored the Supreme Court's instructions, not to mention the factual underpinning for the Supreme Court's determinations. While it acknowledged the existence of "two small" developed areas within parcel one, the Court of Claims failed to assign any value to any of the upland portions of parcel one. Thus, the trial court ignored the plaintiffs' own evidence that the JFK office building site had a value of $750,000, and ignored the Department's undisputed evidence that the Ram's Horn restaurant site had a value of $270,000. In addition, the trial court ignored the plaintiffs' own (low) estimate that the remaining undeveloped uplands on parcel one (variously estimated at between 8 acres (by the plaintiffs) and 17 acres (by the Department)) had a value of at least $300,000. Correcting for these errors, the trial court should

have calculated the after value of the property as $4,718,181 ($3,398,181, plus $1,320,000), which yields a 49% difference between the before and after values of the property as a whole ($4, 621,000 divided by $9,339,181).

Second, the trial court committed clear error by discounting the value of the developable upland portions of parcel one by 75%. The foregoing calculations accept the premise of the plaintiffs' expert witness that the value of the developable upland portions of parcel one (which plaintiffs' expert initially valued at $1,025,000) had to be discounted in value by approximately 75%, reducing the "after" value of this portion of parcel one to $300,000. The plaintiffs' expert justified this discounting on the ground that the ongoing takings litigation and the uncertain prospects of obtaining approval under the Plat Act made it impossible for the plaintiffs to realize the full value of this portion of the property. These conclusions were clearly erroneous. This uplands area was, by definition, non-wetlands, over which the Department neither did nor could assert permitting jurisdiction under the wetlands law. The fact that the plaintiffs, during this same period, successfully developed other upland portions of parcel one (the JFK office building and the Ram's Horn restaurant) contradict the suggestion that controversy over development of the wetlands on the property created a practical constraint on development of the uplands. Finally, the evidence showed that approval under the Plat Act was largely a ministerial action and did not represent an actual obstacle to development of the uplands.

Correcting for this error, and assigning the developable uplands on parcel one a value of $1,025,000 rather than $300,000, the trial court should have calculated the "after" value of the property as a whole at $5,443,181 ($3,398,181, plus $1,320,000 plus $725,000). These calculations yield a still lower 42% estimate of the difference between the before and after values of the property as a whole ($3,896,000 divided by $9,339,181).

Third, the trial court committed clear error by failing to recognize that the plaintiffs' estimate of the before value of parcel one was inflated. At least one final correction is needed because Mr. Cheyz, the plaintiffs' expert witness at the first trial,[4] assigned too high a value to the wetlands on parcel one for development purposes. Mr. Cheyz assigned a value of $1.50 per square foot to this area. However, this estimate failed to consider the added costs entailed in transforming wetlands into developable high ground. Thus, the plaintiffs' expert witness on retrial, Mr. Mawson, acknowledged that he thought Mr. Cheyz's $1.50 figure was inaccurate and stated that he would have assigned a far smaller value ($.05 per square foot) to these wetlands.[5]

Correcting for this mistake results in a reduction in the before value of the property as a whole to $8,139,181 ($9,339,181 minus $1,200,000). Assuming the total after value of the property as a whole is $5,443,181 (based on the two necessary corrections discussed above), these calculations yield an estimated 33% difference between the before and after value of the property as a whole ($2,696,000 divided by $8,139,181).

It is likely that even these three corrections do not fully correct for plaintiffs' efforts to inflate the impact of the wetlands law on the property. As discussed, the Department estimated the difference between the before and after values at less than 20%. This estimate is consistent with the fact that plaintiffs had developed, or retained the opportunity to develop, all of the high value road-side development sites on this property, and were only restricted from developing relatively low value wetland acres in the interior of the site. Furthermore, there are other errors

[4] Mr. Cheyz was not actually a licensed appraiser.

[5] Plaintiffs have contended that since the Supreme Court did not explicitly disturb the Court of Claims' original valuation of parcel one at $5,941,000, this figure was impervious to reexamination in the subsequent trial court proceedings. But since the plaintiffs' new expert in the remand proceedings explicitly adopted the $5,941,000 as his own, the validity of that figure was certainly open to testing upon cross-examination during the remand proceedings.

in the plaintiffs' valuation methodology, including undervaluing certain upland areas by treating them as wetlands, and assigning a relatively high value to certain uplands areas in the "before" calculation and then assigning the same upland areas a lower value for the purpose of the"after" calculation. Without delving into these further complexities, however, it is apparent that the Court of Claims seriously overstated the economic effect of the wetlands law on this property and that the probable maximum difference between the before and after values is approximately 33%, not 64%. On this basis alone, the decision of the Court of Claims should be reversed.

The trial court's ultimate ruling on the takings issue was apparently influenced in part by its conclusion that, even though parcels 2 and 3 of the property had significant value, development of these sites had not been a very profitable venture for plaintiffs. See Opinion and Order, at 5. But the trial court made no specific findings to support this conclusion and, in any event, this type of analysis is simply out of place in a takings case.

The Takings Clause requires the payment of just compensation, measured by the property's fair market value, assuming a government action actually rises to the level of a compensable taking. Takings law is not, on the other hand, concerned with the protection of profit interests. Indeed, it is black letter law that the Takings Clause does not protect the profitability of an investment. See Andrus v Allard, 444 US 51, 66 (1979); Goldblatt v Town of Hempstead, 369 US 590, 592 (1962). Moreover, assuming a taking has been found, lost profits cannot be considered in determining the just compensation due. See United States v General Motors, 323 US 373, 370 (1945). Thus, the critical benchmark for the purpose of takings analysis is the market value of the property as a whole as of the date of the alleged taking. It is irrelevant whether developed portions of a property have been developed with little or no profit or, on the other hand, at great profit. The basic measure is actual market value, and retrospective

analysis of profitability is beside the point.

Some courts, the U.S. Court of Appeals for the Federal Circuit in particular, have identified the claimant's original purchase price for the property as a potentially relevant benchmark for the purpose of takings analysis. See Walcek v United States, 303 F3d 1349 (CA Fed 2002). Unfortunately, the record in this case is so complex and confused that it is apparently impossible to reconstruct whether the value of the property is less than, equal to, or exceeds the original purchase price of the property. The critical point for present purposes, however, is that, in conducting this type of analysis, the Federal Circuit has never suggested that the profitability or lack of profitability of the initial investment is a relevant criterion. Indeed, in Walcek, the Federal Circuit recently concluded that the original purchase price must be compared with the current market value without even making an adjustment to the original price to take account of inflation. See Id. at 1356-57.

The Court of Claims' thinking on this issue may have been influenced by the testimony of the plaintiffs' expert, Dr. William Wade, although the court offered no explicit indication that it intended to embrace Dr. Wade's theory. With all due respect, Dr. Wade's theory, which is based on an amalgam of abstract economics and a radical reinterpretation of the Takings Clause, is mistaken and should be rejected. His theory, in brief, is that the Takings Clause should be read to protect an investor's projected profits from any specific investment. His approach is to establish the original cost basis for an investment and then to inflate that figure over time to reflect the rate of return expected if the venture had been successful. If the future value of a regulated property fails to accord with the projections, according to Dr. Wade, a taking should be found. Under this view, the public would become the guarantor of private investment activity and would be required to pay to enforce virtually any legal measure that affected a business'

profitability. This extreme view would improperly "compel the government to regulate by purchase." Andrus v Allard, 444 US 51, 65 (1979). See also Penn Central Transp Co. v New York City, 438 US 104, 130 (1978) (rejecting as "quite simply untenable" the argument that a property owner can "establish a 'taking' simply by a showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available"). [6]

II. In Any Event, Plaintiffs Have Failed to Demonstrate the Kind of Severe Adverse Economic Effect Necessary to Establish a Taking Under Penn Central.

Even if the Court of Claims' finding of a 64% difference between the "before" and "after" value of the property were correct, this factual finding would not be sufficient to establish a taking under the established legal standards. Indeed, we are not aware of a single final court ruling anywhere in the country upholding a regulatory taking claim based on land use restrictions on such a modest showing of economic impact.[7] The additional fact that the trial court's finding of a 64% reduction in value is inflated and erroneous only makes it more apparent that plaintiffs cannot establish a regulatory taking in this case.

As the Supreme Court explained in its 1998 opinion, the plaintiffs failed to demonstrate a so-called "categorical" taking under Lucas v South Carolina Coastal Council, 505 US 1003 (1992). That this conclusion was correct has been reinforced by the U.S. Supreme Court's

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[6] We are not aware of a single court or respected academic who has embraced Dr. Wade's novel thinking.

[7] Of course, a taking claim based on a government-mandated physical occupation of private property can proceed even if the economic impact is relatively modest. This case, however, clearly involves a use restriction, not a physical occupation. See Tahoe-Sierra, 535 US at 323 ("Th[e] longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa.").

subsequent decision in Tahoe-Sierra Preservation Council v Tahoe Regional Planning Agency, 535 US 302 (2002), in which the Court explained that, to establish a taking under Lucas, the claimant must show a "permanent obliteration of the value of a fee simple estate." Id. at 330. Plaintiffs could not conceivably show that the value of this property has been reduced to zero, and they have not attempted to do so.

Lacking a viable Lucas claim, plaintiffs must fall back on the general regulatory takings analysis established in Penn Central Transportation Co. v City of New York, 438 US 104 (1978). Penn Central requires courts to consider the economic impact of the challenged regulation, the reasonableness of the owner's investment expectations, and the character of the regulation. Analysis of all three factors supports the conclusion that there was no taking in this case.

Economic Impact. The U.S. Supreme Court has said that, even if impact short of the complete destruction of value can establish a taking, the impact must still be very severe to establish a constitutional violation. The basic inquiry is whether a regulation "denies an owner economically viable use of his land." Dolan v City of Tigard, 512 US at 385 (1994), Accord Bevan v Township of Brandon, 438 Mich 385, 391; 475 NW2d 37 (1991) ("The Supreme Court has made clear that "land use regulation does not effect a taking if it... does not 'deny an own economically viable use of his land"), quoting Nollan v California Coastal Commission, 483 US 825, 834 (1987).

This statement of the economic impact standard in a Penn Central case is in accord with the basic task in a regulatory takings case "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical appropriation." Williamson County Reg'l Planning Comm. v Hamilton Bank, 473 US 172, 199 (1985). The U.S. Supreme Court made the same point in its recent Tahoe-Sierra

decision, stating that a regulation constitutes a taking only when it "imposes restrictions so severe that they are tantamount to a condemnation or appropriation." 535 US at 322 n 17. Thus, under the Penn Central test, as under the Lucas test, a regulatory taking can be found only in "extreme circumstances." United States v Riverside Bayview Homes, Inc., 474 US 1231, 126 (1985).

Accordingly the U.S. Supreme Court's takings precedents "uniformly reject the proposition that diminution in value, standing alone, can establish a taking." Penn Central, 438 US at 131. The Court in Penn Central cited with approval several prior decisions in which no taking was found despite value losses exceeding 75%. See id. (citing Village of Euclid v Ambler Realty Co., 272 US 365 (1926) (no taking despite a 75% loss in value) and Hadacheck v Sebastian, 239 US 394 (1915) (no taking despite a 92.5 % loss in value). See also Concrete Pipe & Prods., Inc v Construction Laborers Pension Trust, 508 US 602, 645 (1993) (unanimous Supreme Court decision discussing Euclid and Hadacheck with approval).

The recent decision of the Colorado Supreme Court in Animas Valley Sand & Gravel, Inc. v Board of County Commissioners, 38 P3d 59 (Colo. 2001) (en banc) illustrates the proper application of the Penn Central test. The court said that "it is apparent that the level of interference must be very high" for a taking claim under Penn Central to succeed. Id. at 65. To prevail, the court said, the claimant "must show that it falls into the rare category of a landowner whose land has a value slightly greater than de minimis but, nonetheless, given the totality of the circumstances, has had its land taken by a government regulation." Id. at 67. The court concluded its analysis by characterizing the Penn Central test as a "a safety valve to protect the landowner in the truly unusual case." Id. at 66.

This approach is consistent with the approach followed by other leading courts around

the country. See, e.g., District Intown Properties, Ltd. P'ship. v. District of Columbia, 339 US App DC 127; 198 F3d 874, 883 (1999), cert. denied, 531 US 812 (2000) ("[A] claimant must put forth striking evidence of economic effects to prevail under the [Penn Central] ad hoc inquiry."); Reahard v Lee County, 968 F2d 1131, 1136 (CA 11 1992) ("[T]he only issue on just compensation claims is whether an owner has been denied all or substantially all economically viable use of his property."); Zealy v City of Waukesha, 548 NW2d 528, 531-32 (Wisc. 1996) ("[T]he rule emerging from opinions of our state courts and the United States Supreme Court is that a regulation must deny the landowner all or substantially all practical uses of a property in order to be considered a taking for which compensation is required.").

The Court of Claims assumed, without any citation to relevant authority, that a 64% reduction in value could be sufficient to support a finding of a taking under Penn Central. But, in fact, state and lower courts around the country, in accord with the U.S. Supreme Court precedent discussed above, have consistently rejected takings claims based on larger diminutions in value. See, e.g., Rith Energy, Inc v United States, 270 F3d 1347 (CA Fed 2001) (91% reduction in the value of coal mining properties not sufficient to establish a taking under Penn Central); Pace Resources, Inc v Shrewbury Township, 808 F2d 1023, 1031 (CA 3 1987) (reduction in value from $495,000 to $52,000 held not a taking); Pompa Constr. Corp. v Saratoga Springs, 706 F2d 418, 420 n. 2 (CA 2 1983) (use restriction that devalued property by approximately 77% not a taking); Haas v City of San Francisco, 605 F2d 1117, 1118 (CA 9 1978), cert. denied, 445 US 928 (1980) (reduction in value of 95% from $2,000,000 to $100,000 not a taking); HFH, Ltd. v Superior Court, 542 P2d 237, 240-44 (Cal. 1975) (downzoning reducing value by 81% from $400,000 to $75,000, not a taking).

In their efforts to support the Court of Claims' decision, plaintiffs rely heavily on the

Court of Federal Claims' decision in Florida Rock Industries, Inc v United States, 45 Fed Cl 21 (1999). See Plaintiffs/Appellants' Brief On Appeal 3-5. However, upon analysis, that decision does not support the plaintiffs' case.

First, the 73% reduction in value in Florida Rock was significantly greater than the 64% reduction in value found by the trial court in this case. Thus, a finding of a taking in this case would actually represent a significant expansion of Florida Rock. As discussed, even if the 64% reduction estimate were accurate (it is not), upholding a finding of a taking based on this level of economic impact would be unprecedented.

Second, Florida Rock is a weak authority because it is plainly an aberrational decision within the Court of Claims itself. As stated by the court in the subsequent case of Walcek v United States, 49 Fed Cl 248, 271(2001), aff'd, 303 F.3d 1349 (CA Fed 2002), "With one possible exception, this court has... relied on diminutions well in excess of 85 percent before finding a regulatory taking." Id. at 271 (emphasis added). The "one possible exception" to which the court pointed is the decision in Florida Rock. The court in Walcek suggested that Florida Rock could be distinguished, on several different grounds, from the court's other decisions demanding a greater showing of economic impact to support a taking claim.[8] "In

[8] The court observed that the Florida Rock decision stated that the level of diminution was "not dispositive of the issue, " and that the court supported its finding of a taking on the additional grounds that (1) subject to the regulation, plaintiff could recoup only half of its "inflation adjusted investment," and (2) the regulation had "destroyed plaintiff's reasonable investment backed expectations." The court in Walcek expressed the view that it was legal error to adjust the cost basis in the property for inflation (a view subsequently endorsed by the Federal Circuit on appeal in Walcek). The court also observed that, in contrast to the plaintiff in Florida Rock, the plaintiff in Walcek failed to demonstrate any interference with reasonable investment expectations, since Mr. Walcek had purchased the property after the regulations were already in place.

other regards," the court said, "this most recent Florida Rock opinion seems, with all due respect, disharmonious with Supreme Court precedent, for example, in suggesting that '[t]he notion that the government can take two thirds of your property and not compensate you but must compensate you if it takes 100% has a ring of irrationality, if not unfairness, about it.'" Id. at 271.

Third, Florida Rock involved a rare situation in which the regulation barred all immediate economically remunerative use of the property. The court concluded that nether mining nor residential development, the two potential uses of the property, were permissible on any portion of the property under the Clean Water Act wetlands permitting program. The only reason the plaintiffs could not establish a Lucas claim, the court said, was that the possibility that development might be permitted in the future supported an active speculative market in this and similar nearby properties. This case, in which the plaintiffs already have been permitted to develop extensive portions of the property, is plainly distinguishable from Florida Rock.

Investment-Expectations. The investment expectations factor also weighs heavily against this taking claim. The plaintiffs acquired a significant part, if not all, of their interest in the property after the wetlands law was already in place. In Palazzolo v Rhode Island, 533 US 606 (2001), a majority of the U.S. Supreme Court confirmed that a claimant's pre-acquisition notice of a regulatory restriction, although not necessarily precluding a taking claim, represents a highly relevant factor in taking analysis. See also Rith Energy, Inc v United States, 270 F3d 1347 (CA Fed 2001) (post-Palazzolo decision rejecting a Penn Central regulatory taking claim based in part on the fact that the claimant purchased its property interest after the regulatory regime was already in place).

On this issue as well, the Florida Rock decision, upon which plaintiffs rely so heavily, is

distinguishable from this case. In Florida Rock, the plaintiff purchased the property before the federal wetlands regulatory scheme was in place. Thus, the expectations factor supported the takings claim in Florida Rock. In this case, on the other hand, given that the plaintiffs acquired at least a substantial portion of their interest after the wetlands law was already in place, the expectations factor cuts against the claim.

Plaintiffs contend that they can establish an unreasonable interference with their investment expectations based simply on their subjective desire to develop their property and their investment of time and money in pursuing that objective. Under this view, every regulatory measure could be characterized as an unreasonable interference with investment expectations. The position is simply untenable.

Character of the Regulation. The plaintiffs' modest showing of economic impact, and their failure to demonstrate interference with reasonable investment-backed expectations, are sufficient to defeat this Penn Central claim. In addition, however, the "character" factor also weighs against the claim. The wetlands law, which applies to many properties across the state, furthers the vital public goals of protecting water quality, controlling flooding, and conserving critical natural areas. The law creates significant benefits for all Michigan citizens, including those subject to its requirements, such as the plaintiffs in this case. Thus, the character of the law also militates against the claim.

III. Rejection of This Takings Claim Is Consistent with the Language and Original Understanding of the Takings Clause, Reflects Appropriate Judicial Deference Towards the Legislature, and Promotes Fairness to All Citizens.

Apart from the fact that the law and the record demand that this taking claim be rejected, reversal of the Court of Claims judgment also is supported by the language and original understanding of the Takings Clause, the basic design of our constitutional system, and the principle

of fundamental fairness.

The Language and Original Understanding of the Takings Clause. First, an understanding of the language and original understanding of the Takings Clause supports rejection of this type of expansive taking claim.

The U.S. Supreme Court recently explained in Tahoe-Sierra that the entire doctrine of regulatory takings depends upon an analogy between certain regulatory restrictions and the kinds of condemnations and physical appropriations which were of concern to the drafters of the Bill of Rights:

> "[The Takings Clause's] plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property."

535 US at 321-22. Thus, the Court explained, the term "take" can only apply to regulations, which are the functional equivalents of physical appropriations:

> "When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed. When, however, the owner contends a taking has occurred because a law or regulation imposes restrictions so severe they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex."

Id. (emphasis added).

Moreover, jurists and scholars have long recognized that the original understanding of the drafters was that the Takings Clause would only apply to direct physical appropriations. In Lucas, Justice Scalia recognized that, "At least until the Court's landmark 1922 decision in Pennsylvania Coal Co. v Mahon, 260 US 393 (1922), it was generally thought that the takings clause reached only a 'direct appropriation' of property, or the functional equivalent of a

'practical ouster of the owner's possession." Lucas, 505 US at 1014. Justice Scalia stressed that "early constitutional theorists did not believe the takings clause embraced regulations at all." Id. at 1028 n. 15. See also Fred Bosselman et al., The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control 51 (1973) ("The word 'take' ordinarily refers to the act of obtaining possession or control of property, and although there are many other usages of the word, none of them seems descriptive of governmental regulation of the use of land."); William Michael Treanor, "The Original Understanding of the Takings Clause and the Political,"95 Columbia Law Review 782, 783 (1995) (the available evidence "clearly indicates that the Takings Clause was intended to apply only to physical takings, and the early case law interpreted it and its state counterparts as not extending to government regulations").

It is, in a sense, too late in the day to enforce a genuinely originalist interpretation of the Takings Clause, for the U.S. Supreme Court and the Michigan Supreme Court have both recognized that at least some regulations can result in takings. But the narrow scope of the Takings Clause, as revealed by its language and evidence of the original understanding, certainly has continuing relevance today. A restrained reading of the Takings Clause, which limits regulatory takings doctrine to those relatively rare cases in which regulation actually denies the owner economically viable use of the property, respects both its language and the drafters' original understanding.

Judicial Restraint. A restrained reading of the Takings Clause also is supported by the need for judicial restraint in the review of legislative policy judgments. Under our system of separated powers, making policy choices is assigned to the legislative and executive branches, and the courts are under a duty to decide cases in a fashion that respects the primacy of the political branches in making political choices. The need for judicial restraint is even greater in

the constitutional arena, where the courts are not permitted to experiment with different policy options, in the fashion of a legislature, but instead must attempt to discern the relatively fixed meaning of the Constitution. The traditional, relatively narrow reading of the Takings Clause is consistent with this approach because it leaves basic policy choices in the use and management of property to the political branches. See Keystone Bituminous Coal Assn. v DeBenedictis, 480 US 470, 491 (1987) ("Under our system of government, one of the States' primary ways of preserving the public weal is restricting the uses individuals can make of their property.").

The need for judicial restraint in interpreting the Takings Clause is not affected by the fact that a takings claimant seeks compensation rather than an injunction to block the government action. In the regulatory takings arena, the threat that a regulation can give rise to substantial monetary liability (which very likely will be uninsured) actually serves as a greater impediment to government decision-making than the threat of injunctive relief. As a result of the U.S. Supreme Court's decision in First English Evangelical Lutheran Church v City of Los Angeles, 482 US 304 (1987), even if the government rescinds a regulatory measure which has been held to be taking, the government cannot avoid liability for a temporary taking, as measured from the time the regulation was first enforced until it was rescinded. In other words, an expansive reading of the Takings Clause would necessarily "subject[] States and municipalities to the potential of new and unforeseen claims in vast amounts." Eastern Enterprises v Apfel, 524 US 498, 542 (1998) (Kennedy, J., concurring), seriously interfering with the ability of government to operate. See also Mahon, 260 US at 413 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.")

Fundamental Fairness. Finally, there is a fundamental fairness to a restrained reading of

the Takings Clause. Regulatory takings doctrine is not confined to extreme reductions in property value because the law is indifferent to anything other than the infliction of disastrous economic burdens on private landowners. Rather, takings doctrine reflects the view that most regulations impose no net burden on citizens at all, especially when they apply across an entire community. The traditional before and after calculation, while relatively easy to perform, and therefore frequently relied upon in takings cases, does not provide an accurate picture of how a regulation actually affects a property owner. The before and after calculation fails to consider that a restriction not only limits what a claimant can do with her property, but also confers significant economic benefits on her. Regulatory restrictions actually enhance property values by blocking activities which can harm the community and neighboring owners, thus creating what the Supreme Court has called a "reciprocity of advantage" among different landowners. Tahoe-Sierra, 535 US 341, citing Mahon, 260 US at 415.

In the real world, of course, it is extremely difficult to determine whether any particular regulation (not to mention the full complement of regulations to which property owners are subject) has a positive, neutral, or negative effect on an owner. The law of regulatory takings effectively solves this computational challenge by confining regulatory takings to extreme circumstances. As Justice Scalia explained in Lucas, when the value of property is destroyed by regulation, a finding of a taking should generally result, "because it is less realistic to indulge our usual assumption that the legislature is simply adjusting the benefits and burdens of economic life in a manner that secures an 'average reciprocity of advantage' to everyone concerned." 505 US at 1017-18 (emphasis added). Implicit in this statement, of course, is a recognition that a finding of a taking generally is not warranted when there is less than a total destruction of property value, because it can properly be assumed in that circumstances that the government is

simply adjusting the benefits and burdens of economic life. The Supreme Court relied on the same reasoning in rejecting the takings claim in Agins v City of Tiburon, 447 US 255 (1980), observing that the zoning ordinances

> "benefit the appellant as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open spaces.... Appellants will therefore share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer."

Id. at 262-63. See also Keystone Bituminous Coal Assn. v DeBenedictis, 480 US 470, 491 (1987) ("While each of us is burdened somewhat by... restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.").

In this case, it is undoubtedly true that if the plaintiffs could ignore the wetlands law their property would be more valuable. But this narrow focus would ignore that the plaintiffs also benefit from the wetlands law because it helps to control flooding, maintain water quality, and sustain the ecosystems upon which all life depends. Taking into account not only the burdens imposed on the plaintiffs by the wetlands law, but also the reciprocal benefits they enjoy as a result of this law, it cannot be said that the plaintiffs have been forced to bear a constitutionally illegitimate burden.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Court of Claims and remand the case with instructions that the claims be dismissed.

Respectfully submitted,

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April 7, 2003