SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. 1000-99T5
STATE OF NEW JERSEY, NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL
PROTECTION, AND ROBERT C. SHINN, JR.
COMMISSIONER,
Appellants
v.
EAST CAPE MAY ASSOCIATES

Respondent.

Civil Action On Appeal From Superior Court of New v. Jersey, Law Division, Cape May County

Sat Below: Joseph C. Visalli, J.S.C.

BRIEF OF AMICUS CURIAE
NEW JERSEY CONSERVATION FFOUNDATION IN SUPPORT OF APPELLANTS STATE OF NEW JERSEY, ET AL.

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Volkema v. Dep't of Natural Resources, 542 N.W.2d 282 (Mich. Ct. App. 1995), aff'd in part, disapp'd in part, 586 N.W.2d 231 (Mich. 1998)

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Zealy v. City of Waukesha, 548 N.W. 2d 528 (Wisc. 1996)

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Other Authorities

Michael C. Blumm, The End of Environmental law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit, 25 Envtl. L. 171, 186 (1995)

Robert Bork, The Tempting of America: the Political Seduction of the Law, 230 (1990)

John F. Hart, Colonial Land Use Law and its possession, 109 Harv.L.Rev. 1252 (1996)

William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Col.L.Rev. 782 (1995)

The New Jersey Conservation Foundation respectfully submits this brief amicus curiae in support of the appeal by the State of New Jersey, the Department of Environmental Protection and its Commissioner seeking reversal of the trial court decision.

STATEMENT OF INTEREST

The New Jersey Conservation Foundation ("NJCF") is a private, non-profit, statewide, member-supported organization dedicated to the conservation of open space and natural resources in New Jersey. NJCF has over 5000 members, including some members in Cape May County. Certification of Michele S. Byers dated April 12, 2000 ("Byers Cert.") It protects open space and natural resources by, among other things, advocating the enactment of appropriate laws and regulations, developing and publicizing new techniques for advancing appropriate land use and assisting the government in protecting various types of open space in New Jersey. *Id.* Its members include many individuals who use and enjoy New Jersey coastal resources and who have a significant stake in the protection and wise use of these resources. *Id.*

NJCF is very concerned about the outcome of this case because of its potential to affect New Jersey's future ability to protect its coastal and environmental resources and because of the important natural resources which are affected by the proposed development. The respondent developer and its predecessors in interest have already developed most of the property and have sold hundreds of units after paying less than $100,000 for the property. The respondent is now seeking tens of millions of dollars from the public as "just compensation" because the State has prohibited the development of the remaining portion of the property which consists of valuable wetlands. Unless the decision of the trial court is reversed, the respondent will reap a large windfall at taxpayer expense, and the State's future ability to protect critical natural resources will be severely undermined. Byers Cert.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

NJAS adopts the Procedural History and Statement of Facts in the brief of the appellants.

SUMMARY OF ARGUMENT

East Cape May's takings claim is barred as a matter of law because it lacks the investment-backed expectations necessary to support a regulatory takings claim. East Cape May acquired this property in 1990, long after the enactment of the Coastal Area Facility Review Act ("CAFRA") in 1973 and the Fresh Water Protection Act ("FWPA") in 1987. As the United States and New Jersey Supreme Courts have frequently recognized, an owner who has acquired property with notice of existing restrictions cannot subsequently seek "just compensation" based on these restrictions under the federal or state takings clauses.

Second, East Cape May's takings claim is barred because East Cape May failed to demonstrate a taking of the "property as a whole." The trial court erroneously concluded that the relevant unit of property for the purpose of takings analysis consists of the approximately 100 acres of property East Cape May seeks to develop at this time. Proper application of the "property as a whole rule" mandates that the relevant property be defined to include the entire 200 acres involved in this comprehensive development project.

Finally, assuming arguendo that a taking did occur in this case, the trial court erred in its analysis of the consequences of the State's offer pursuant to N.J.S.A. 13:9(B)-22(b) on the State's potential liability for a permanent regulatory taking. The trial court believed that the value of the State's offer to permit certain development of the property could serve, at most, as an offset

against the State's obligation to pay "just compensation" for a permanent regulatory taking. Instead, as this Court already has recognized in its decision in the first appeal in this case, the purpose of this statutory process is to provide the State an opportunity to modify its initial regulatory decision in order to avoid an unintended permanent taking.

ARGUMENT

I. EAST CAPE MAY'S LACK OF INVESTMENT-BACKED EXPECTATIONS PRECLUDES A FINDING OF A TAKING.

East Cape May's claim is barred, first, because East Cape May lacks the reasonable "investment backed expectations" necessary to support a valid regulatory takings claim. The basic purpose of the investment-backed expectations factor in takings analysis is to limit takings relief to "owners ... who bought property in reliance on a state of affairs that did not include the challenged regulatory regime." Loveladies Harbor vs. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994). The takings claim in this case arises from restrictions on the use of the property imposed pursuant to the Coastal Area Facility Review Act, enacted in 1973, and the Freshwater Protection Act, enacted in 1987. East Cape May acquired this property after the enactment of CAFRA and after the enactment the Freshwater Wetlands Act. Therefore, East Cape May lacks the "investment-backed expectation" of being able to proceed with development without regard to the requirements of these laws. Accordingly, East Cape May's takings claim fails as matter of law.

The trial court erroneously believed that East Cape May's investment-backed expectations should be defined, not as of the date that East Cape May acquired the property, but as of some earlier date when East Cape May's predecessors in interest obtained their interests in the property. This theory has no basis in established takings doctrine. Indeed, this theory would render the entire concept of "investment-backed expectations" nonsensical: a claimant's investment expectations obviously can only be defined as of the time the claimant invested in the property, not as of the date some other entity or person invested in the property. Accordingly, the Court should reverse the trial court's erroneous failure to dismiss this claim for lack of reasonable investment-backed expectations.[1]

The U.S. Supreme Court has long recognized that an owner's investment-backed expectations -- that is, the actual expectations the owner formed at the time he acquired the property -- are a critical factor in takings analysis. As the Court said in the seminal case of *Penn. Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), "the extent to which the regulation interfered with distinct investment-backed expectations" has "particular significance" in takings cases. See also Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602 (1993) (rejecting regulatory takings challenge to federal pension regulations because, "at the time Concrete Pipe purchased" the property, pension regulations were already in place).

The New Jersey Supreme Court also has recognized the critical importance of "investment-backed expectations." See *Gardner v. New Jersey Pinelands Comm'n*, 125 N.J. 193, 593 A.2d 251 (1991) (rejecting takings claim based in part on lack of "showing that the economic impact of the regulations interferes with distinct investment-backed expectations"). See also *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 129 N.J. 221, 242, 608 A.2d 1377, 1388 (1992) (fact that "purchase of property was...motivated" by expectation of being able to engage in particular use helps define owner's "distinct investment backed expectations"). Cf. Matter of Plan for Orderly Withdrawal from New Jersey of Twin City Fire Ins. Co., 129 N.J. 389, 414, 609 A.2d 1248, 1262 (1992) (rejecting takings claim despite fact that plaintiff insurance company presented plausible argument that requirement imposed by Commissioner of Insurance "may not have been anticipated" and therefore interfered with investment-backed expectations).

In accordance with this authority, lower federal and other state courts have routinely rejected takings claims brought by owners based on regulations already in place at the time they purchased the property. The recent decision of the U.S. Court of Appeals for the Federal Circuit in *Good v. United States*, cert. denied, 2000 WL 339382 (April 3, 2000) is illustrative. Mr. Good purchased a tract of land in the Florida Keys, consisting mostly of salt water and freshwater wetlands, at a time when the Rivers and Harbors Act and Clean Water Act wetlands permitting requirements were already in place. After a lengthy administrative review process, Good was ultimately denied permits to fill the wetlands on the property, and sued for a taking on the ground that the permit denial effected a "total taking." Despite the allegedly large adverse economic impact of this regulatory action, the court affirmed rejection of the takings claim "in light of the regulatory climate that existed when [Good] acquired the subject property." *Id at 1361.* The court concluded that Good "lacked a reasonable, investment-backed expectation that he would obtain the regulatory approval needed to develop the property," and that the "lack of reasonable, investment-backed expectations defeats his takings claim as a matter of law." *Id. at 1363*.[2]

The rule that a purchaser with notice of regulatory restrictions already in place cannot challenge the restrictions as a taking is consistent with the basic principles of "justice and fairness" which animate regulatory takings jurisprudence. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). As the Federal Circuit has explained:

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 any economic loss. In economic terms, it could be said that the market has already discounted for the risk, so that a purchaser could not show a loss in his investment attributable to it."

Loveladies Harbor v. United States, 28 F.3rd 1171, 1177 (Fed. Cir. 1994). However the rule is explained, when an owner has purchased property with notice of existing restrictions, it is entirely fair and reasonable to reject a takings claim challenging such pre-existing restrictions.

Indeed, if this rule were not respected, the law would be entirely unjust. If takings claimants were entitled to have the courts disregard their investment-backed expectations, the government would be routinely compelled to make windfall payments to undeserving property owners at taxpayer expense. See, e.g., Gazza,supra (rejecting takings claim by claimant seeking $400,000 "in compensation" for restrictions on wetlands purchased for $100,000); see also Pro-Eco, 57 F.3d at 512 (7th Cir. 1995) (because purchase price reflects restrictions already in place, allowing plaintiff "further compensation under the Takings Clause would overvalue the land"). Ignoring an owner's actual investment-backed expectations would be manifestly unfair to the public.

Applying these principles to the present case, this takings claim must be rejected. East Cape May obtained title to the property in 1990. At that time, the Coastal Area Facility Review Act, which was enacted in 1973, and the Freshwater Wetlands Act, which was enacted in 1987, were already both in place. As a result, East Cape May cannot claim any investment-backed expectation to proceed with development without regard to these laws, and its takings challenge based on enforcement of these pre-existing regulatory constraints fails as matter of law.

The trial court disregarded East Cape May's actual investment expectations, apparently on the theory that the investment expectations of one of the partners in East Cape May, who was one of the original investors in the property at issue in this case, could be ascribed to East Cape May itself. There is no support for this argument and it should be rejected.

At the outset, there is a fundamental factual flaw in the argument that the expectations of the East Cape May limited partnership should be defined by reference to the investment expectations of its individual general partners. While one of the partners, Phillip Robinson, originally acquired the property at issue in this case prior to the enactment of either CAFRA or the Freshwater Wetlands

Act, and therefore could be said to have formed investment expectations which did not include these laws, the same is not true of Thomas Brodesser, Jr, another partner in East Cape May. Mr. Brodessor first obtained an interest in the property in his individual capacity in 1987 (when Cape May Greene, Inc. dissolved and the property was transferred to Robinson and Brodessor as tenants in common), and first obtained an interest in the property (as a shareholder in Cape May Greene, Inc.) in 1974, following the enactment of CAFRA. Thus, even assuming there was merit to the argument that the investment expectations of East Cape May should be defined by reference to the investment expectations of its individual partners, this takings claim would still have to be rejected because Mr. Brodessor would lack sufficient investment-backed expectations to support a taking claim under this theory.

Furthermore, this argument must be rejected because there is no logical justification for disregarding the East Cape May limited partnership as a separate legal entity distinct from its general partners or Cape May Greene. It can reasonably be assumed that East Cape May was formed for legitimate legal and business purposes to take over the development of the property following the dissolution of Cape May Greene, Inc. See Op. at 5. The existence of the partnership and its acquisition of the property in 1990 cannot be disregarded for the convenience of East Cape May in prosecuting this takings claim. [3]

When faced with factually similar situations, courts have repeatedly rejected efforts by takings claimants to avoid the consequences of the expectations formed as of the time the claimants actually took title to the property. For example, in *City of Virginia Beach v. Bell*, 498 S.E.2d 414 (Va.), cert. denied, 119 S.Ct. 73 (1999), the Supreme Court of Virginia rejected a takings claim brought by an individual denied a permit to build on a coastal lot under recently adopted coastal development regulations. The plaintiff had transferred the property to himself from a close corporation which he controlled. While the property was transferred from the corporation to the plaintiff after the regulations were put in place, the corporation acquired the property before the regulations were enacted. The Court rejected the plaintiff's contention that, for the purposes of takings analysis, its was the expectations of the corporation, rather than those of the plaintiff himself, that mattered. The plaintiff's position, the court stated, "is directly contrary to well-settled principles of law." *Id. at 418.* The rights acquired by the corporation when it acquired the property, observed the court, "belonged solely" to the corporation, as it was an "entity distinct and separate" from the plaintiff, who "took the property subject to the ordinance's restrictions." Id. The court concluded:

It is elementary that a corporation is a legal entity entirely separate and distinct from the shareholders or members who compose it.... [W]here persons have deliberately adopted the corporate form to secure its advantages, they will not be allowed to disregard the existence of the corporate entity when it is to their benefit.... Accordingly, [plaintiff], who accepted the benefits of corporate ownership, cannot avoid its disadvantages. [The corporation's] acquisition of [the property] does not protect [plaintiff] ... from the restrictions of the Ordinance.

Id. (internal citations and quotations omitted).

Similarly, in *Brotherton v. Dept. of Envt'l Conservation*, 675 N.Y.S.2d 121 (N.Y. App. Div. 1998), the New York Appellate Division rejected a takings claim based on the plaintiff's lack of investment-backed expectations, despite the plaintiff's argument that he had effectively acquired title to the property prior to adoption of the regulation through a corporation which he controlled. The court stated,

The petitioner contends that the corporation was merely his alter ego and that he therefore should be considered the true owner of the property since 1958. However, since he received the benefits of corporate ownership for many years ... he may not now disregard the corporate form of ownership merely because it no longer serves his interests.
Id. at 122.

In its decision in the first appeal in this case, this Court stated that "East Cape May is entitled to assert whatever development rights its predecessors in interest would have had." East Cape *May Associates v. State of New Jersey*, 300 N.J. Super. 325, 693 A.2d 114 (App. Div. 1997). In support of this statement, the Court relied, without elaboration, upon *Nollan v. California Coastal Commissio*n, 483 U.S. 825, 833 n. 2 (1987). Nollan does not in fact support the revolutionary idea that investment-backed expectations can be disregarded in takings analysis.

First, the idea that a footnote in Nollan repudiated the relevance of investment-backed expectations in takings analysis is contradicted by the numerous decisions of the U.S. Supreme Court and the New Jersey Supreme Court, following Nollan, which reaffirm the importance of this factor. *See, e.g., Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602 (1993); Gardner v. New Jersey Pinelands Comm'n,* 125 N.J. 193, 593 A.2d 251 (1991). In fact, we are not aware of any other appellate decision in any jurisdiction, federal or state, which has adopted this expansive reading of Nollan.

Second, Nollan is most sensibly read as establishing a specific rule which applies only in the context of takings challenges to regulations which involve physical occupations of private property. Nollan involved a takings challenge to a permitting action of the California Coastal Commission which required the landowner, as a condition of obtaining permission to develop his property, to grant the public an easement across his private beach. As the Nollan Court emphasized, restrictions on the ability to exclude third parties from private property have long been viewed as involving a particularly serious intrusion upon private property rights. *See Nollan, 483 U.S. at 831. See also Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994) (the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."). Reflecting the special character of physical occupations, Nollan establishes that an owner can challenge a continued physical occupation as a taking even if the owner acquired the property with notice of the law mandating the physical occupation. This understanding of Nollan is not consistent with the idea that investment-backed expectations have been rendered irrelevant in regulatory takings analysis generally.

This reading of Nollan is supported by several decisions of the U.S. Court of Appeals for the Federal Circuit. In *Preseault v. United States*, 100 F.3rd 1525, 1540 (Fed. Cir. 1996) (en banc), a plurality of the court rejected an investment-expectations defense to the claim that the federal rails-to-trials program resulted in a physical-occupation type taking. "In regulatory takings cases" generally, the court acknowledged, "the owner's reasonable investment-backed expectations have been held to be highly relevant to whether a regulatory imposition goes too far." *Id. at 1540*. But, sharply distinguishing between ordinary regulatory takings and takings involving physical occupations, the plurality rejected "the Government's effort to inject into the analysis of this physical occupation case the question of the owner's 'reasonable expectations.'" *Id (emphasis added)*. In the same vein, in *Good v. United States*, supra, which involved a regulatory takings challenge to use restrictions, the court said that investment-backed expectations remain an essential precondition for a valid takings claim involving use restrictions rather than physical occupations, and specifically rejected the argument that the decision in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), "eliminate[d] the requirement that the landowner have reasonable, investment-backed expectations of developing his land" in order to support a regulatory takings claim. *Id. at 1361*.

Finally, it bears emphasis that the conclusion that a purchaser with notice of regulatory restrictions is barred from bringing a valid takings claim does not mean that a land owner is precluded from challenging pre-existing regulations on any legal basis. For example, the New Jersey Supreme Court has long recognized that an owner does not lose the right to seek a variance from zoning regulations simply because the owner acquired the property with notice of the zoning restrictions. See *Wilson v. Borough of Mountainside*, 42 N.J. 426, 201 A.2d 540 (1964). This rule of New Jersey zoning law is distinct from and has no logical relationship to the rule that a purchaser with notice is barred from demanding financial compensation under the

takings clause. Compare Matter of Gazza, 679 N.E.2d at 1039 (recognizing that a property owner is entitled to challenge the legal validity of a regulation regardless of the fact that a lack of investment-backed expectations precludes a takings claim).

NJCF recognizes that in Karam v. Department of Environmental Protection, 308 N.J.Super. 225, 242, 705 A.2d 1221, 1229 (App. Div., 1998),), aff'd, 157 N.J. 187, 723 A.2d 943 (1999), the Court made the broad statement "that rights in property pass from one owner to the next," and therefore "the right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter's knowledge of the impediment to development." However, this statement was plainly dictum because the Court in fact affirmed rejection of the takings claim in the case Moreover, notwithstanding the foregoing language, the Court actually relied heavily on the plaintiff's lack of investment expectations to support rejection of the takings claim. "We stress," the court stated, "that the prohibition against the erection of docks along the Manasquan river was a matter of public record long before the plaintiff purchased the property." *Id.* The Court also observed that "[w]hile the conditions for obtaining a development permit have undoubtedly become more onerous...., plaintiffs could not have reasonably expected that they would be immune from all changes in the law during that period." *Id.* Thus, while certain language in Karam appears to undermine the relevance of investment-backed expectations, the Court's analysis strongly supports the relevance of this factor in takings analysis. [4]

II. EAST CAPE MAY FAILED TO DEMONSTRATE A TAKING OF THE "PROPERTY AS A WHOLE."

If the Court decides, contrary to the argument presented above, that this claim is not barred by a lack of investment-backed expectations, it should decide, in the alternative, that the claim is barred under the traditional "property as a whole" rule. Assuming the plaintiff's expectations in this case should be defined based on Mr. Robinson's expectations when he acquired the property, as the plaintiff contended and as the court below ruled, then the relevant parcel must also be defined, by parallel reasoning, based on the entire property Mr. Robinson originally acquired. This includes not only the 100 acres east of Pittsburgh Avenue currently proposed to be developed, but also the 100 acres west of the avenue which Mr. Robinson and his various successors in interest have already developed.

The principle that a regulatory takings claim must be analyzed based on the "property as a whole" has been repeatedly affirmed by the U.S. Supreme Court. As the Court explained in *Penn. Central Transportation Co. v. New York City*, 428 U.S. 104 (1978):

Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.
Id. at 130-31 (emphasis added). *See also Andrus v. Allard*, 444 U.S. 51, 66 (1979) (no taking where only one "stick" in the claimant's "bundle of rights" was adversely affected by the regulatory action because "the aggregate must be viewed in its entirety"); Keystone Bituminous Coal Ass'n v. DeBenedictis, supra (applying parcel as a whole rule to justify rejection of takings challenge to restrictions on coal mining). More recently, in Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602 (1993), a unanimous Supreme Court once again rejected the idea that a taking claim should be analyzed by focusing on the restricted portion of the property rather than on the property as a whole:
We rejected [this proposed] analysis years ago in Penn Central..., where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the

relevant question, however is whether the property taken is all, or only a portion of the parcel in question.
Id. at 644.

New Jersey courts have also consistently followed the property as a whole rule, most recently in the case of *Karam v. Dept. of Envir. Protection*, supra. In that case, this Court rejected a takings claim when a landowner was denied a permit to build a dock on a riparian grant adjoining his upland property. The court rejected the plaintiff's argument that the relevant property consisted of the "portion of the property subject to the confiscating regulation," and instead ruled that the relevant property included both the upland parcel and the adjacent riparian grant. Karam, 308 N.J. Super at 239, 705 A.2d 1221, 1228.

Similarly, in American Dredging Co. v. State Dept. of Envtl Protection, 169 N.J. Super 18, 404 A.2d 42 (App. Div. 1979), the court found no taking based on the "property as a whole rule" when a landowner was denied a permit to fill 80 acres of wetlands. According to the court, the 80 acres were part of a larger parcel, and the "tract must be viewed as a whole in determining the impact of... the government regulation in question." [5]

The parcel as a whole rule applies regardless of whether the applicant has already developed a portion of his original ownership. For example, in the seminal case of Penn. *Central Transportation Co. v. New York City*, supra, the Supreme Court defined the relevant parcel to include not only the air rights above Grand Central terminal which the company was seeking to develop, but also the land on which the terminal had been constructed many years earlier. *See also K & K Constr., Inc. v. Dep't of Natural Resources*, 575 N.W.2d 531 (Mich.), cert. denied, 119 S.Ct. 60 (1998) (reversing and remanding because intermediate appellate court failed to consider whether already developed land should be included in the property as a whole).[6]

Applying the foregoing principles, the evidence in this case demonstrates that the entire 200 acres which Mr. Robinson originally acquired for the purpose of carrying out a single, long-term development project represents the relevant unit of property for the purpose of takings analysis. Mr. Robinson acquired the entire 200 acre property through a single set of orchestrated land purchases in the mid 1950s. *Op. at 3.* Then, in a variety of different ways, both Robinson and the City of Cape May exhibited their common understanding that this development project encompassed the entire 200 acres. First, the City granted and Robinson accepted a quit claim deed for the entire 200 acres conditioned on Robinson's agreement to construct housing units on the 200 acres. Defendant's Proposed Findings of Fact at 8. Second, the City entered into several working agreements with Cape May Greene, Inc. (established by Robinson and Brodesser) under which the City committed to provide infrastructure for entire the entire property. Op. at 8. Significantly, this agreement repeatedly refers to the 200 acres as a "contiguous" parcel and a single "tract" dedicated to a single development project. *Op. at 8, 12.*

In addition, when Cape May Greene, Inc. was formed in 1974 in order to continue to pursue the development, all of the remaining undeveloped land, including land on both the east and west sides of Pittsburgh Avenue, was transferred to the corporation. *Op. at 5.* When Cape May Greene, Inc. submitted a drainage plan to the City, and the City attempted to require different drainage elevations for the lands on the east and west sides of Pittsburgh Avenue, Cape May Greene successfully prosecuted a lawsuit to compel the City to abide by the drainage plan the City had approved for the entire 200 acres. Op. at 13-14. Finally, both Robinson and Brodesser have repeatedly stated in affidavits and other testimony in various fora that they viewed the property as a single "contiguous" unit and that they believed they were engaged in single, continuous development project. Defendant's Proposed Findings of Fact, pp. 38-44. In view of this persuasive, cumulative evidence, the only plausible conclusion the trial court could have reached is that the relevant property includes the full 200 acres.

In other cases, the courts have recognized that the critical factor in defining the relevant property is whether the property as a whole is being used to pursue a single development project, even if the property includes some legally and geographically distinct parcels. For example, in *Ciampitti v. United States*, 22 Cl Ct 310, 320 (1991), a federal takings action involving a New Jersey developer, the court concluded that noncontiguous parcels of land represented one property for the purpose of takings analysis when, among other things, the developer "treated all of the [property] ... as a single parcel for purposes of purchase and financing." *See also Forest Properties v. United States*, 177 F.3d, 1360 1365 (Fed. Circ.), cert. denied, 120 S.Ct. 373 (1999) ("Where the developer treats legally separate parcels as a single economic unit together they may constitute the relevant parcel."); cf. *Naegele Outdoor Advertising v. Durham*, 803 F.Supp. 1068 (M.D.N.C.1992), aff'd, 19 F.3d 11 (4th Cir.) (holding that all of an advertising company's billboards within a metropolitan area represented a single property because they constituted a single income producing unit, even though each sign location involved a separately negotiated lease, each sign was separately taxed, and each sign was recognized as "an individual structure by the City and [was] subject to separate inspection and permitting procedures"). [7]

While the trial court acknowledged the numerous facts in the record which support the conclusion that the land on both sides of Pittsburgh Avenue should be recognized as the "property as a whole," the court nonetheless concluded that the 100 acres on the east side of the avenue alone represented the relevant unit of property. The trial court's conclusion rested on several factors, including the fact that the 200 acres were acquired and assembled through several different transactions, different portions of the 200 acres were or are subject to different zoning classifications, and the 200 acres are bisected by a road. But none of these factors support the trial court's definition of the relevant property, especially in view of other persuasive factors discussed above supporting the conclusion that the relevant property consists of the entire 200 acres.

In other cases, the courts have specifically rejected the significance of the factors cited by the trial court. First, the courts have routinely rejected the idea that a property assembled through separate purchases cannot properly be treated as a single property. *See, e.g., Forest Properties v. United States*, supra (fact that different portions of property were acquired in separate transaction irrelevant to definition of property as a whole); *Bevan v. Township of Brandon*, 475 N.W.2d 37, 43 n. 10 (Mich.1991) ("a parcel of land is not considered separate and independent merely because it was bought at a different time"). The courts also have rejected the idea that differences in zoning justify segmentation of a single property. *See, e.g., Forest Properties* (treating as irrelevant fact that different local government authorities had regulatory jurisdiction over two portions of the property); K & K Constr., Inc., supra (holding that lands subject to different zoning scheme are part of the same parcel). Finally, the courts have rejected the idea that the mere fact that a property is bisected by a road calls for treating a single property as two separate properties. *See, e.g., Bevan* ("a parcel of land is not considered separate and independent merely because... the parcels are separated by a highway, street or alley").

In its decision in the first appeal in this case, the Court acknowledged the traditional parcel as a whole rule, and expressed the view that, based on a fuller record, application of that rule might well require rejection of this claim. However, the Court also said that the relevant property for takings analysis appeared to be "presently unsettled," pointing to three specific decisions: *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); *K & K Constr., Inc. v. Dep't of Natural Resources*, 551 N.W.2d 413 (Mich. Ct. App. 1996), and Volkema v. Dep't of Natural Resources, 542 N.W.2d 282 (Mich. Ct. App. 1996). While the Court's statement was fair and accurate at the time it was made, several of the decisions the Court cited have subsequently been reversed or otherwise repudiated. Upon careful analysis, none of these authorities supports the conclusion that the relevant property in this case is limited to the 100 acres of remaining undeveloped land east of Pittsburgh Avenue. [8]

Today, neither K & K Construction nor Volkema can be cited as support for a narrow definition of the relevant property. Following this Court's 1997 decision, the Michigan Supreme Court, in *K & K Constr., Inc. v. Dep't of Natural Resources*, 575 N.W.2d 531 (Mich.), cert. denied, 119 S.Ct. 60 (1998), reversed the intermediate court of appeals' decision which this Court had cited, and expressly rejected the lower court's narrow definition of the relevant parcel. In *Volkema v. Dep't of Natural Resources*, 586 N.W.2d 231 (Mich.), cert. denied 119 S.Ct 590 (1998), the Michigan Supreme Court again repudiated the intermediate court of appeals' decision which this Court had cited. Despite the fact that it upheld the lower court's conclusion rejecting the takings claim, the Michigan Supreme Court Supreme Court in Volkema went out of its way to expressly disavow the portion of the lower court's opinion restricting the relevant parcel to the remaining undeveloped property following the enactment of new regulations. *Id.*

The other decision to which this Court referred in 1997 to support the conclusion the definition of the relevant parcel was "presently unsettled" was *Loveladies Harbor, Inc. v. United States*, supra. However, Loveladies Harbor represents a highly dubious precedent which this Court should decline to follow. Even if this Court chose to follow Loveladies Harbor's erroneous definition of the relevant property, however, this takings claim still should be rejected.

On the facts of the case, the court in Loveladies Harbor concluded that the relevant property in that case was properly defined by excluding from consideration the portion of the owner's property which had been developed and sold off prior to the enactment of the regulation which allegedly effected the taking. However, the Court identified no basis, either in logic or the law, for excluding a portion of an the property based on the fact that it had previously been developed. In addition, the court's definition of the relevant property in Loveladies Harbor is inconsistent with the U.S. Supreme Court's analysis in Penn Central; as discussed above, the Penn Central Court included previously developed property within the relevant property. Finally, the purported Loveladies Harbor exception to the property as a whole rule would promote improper gamesmanship by developers seeking to maximize their chances of obtaining a takings recovery at public expense. *See Michael C. Blumm, The End of Environmental law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit, 25 Envtl. L. 171, 186 (1995)*. For all these reasons, Loveladies Harbor has doubtful precedential value.

Even assuming Loveladies Harbor applied the correct rule in excluding land which has been developed prior to adoption of new regulations, application of this approach in this case would mandate rejection of the takings claim. This takings claim arises from the denial of a development permit under CAFRA, but the state's coastal law has hardly been a complete bar to continued development of this property. In fact, following the enactment of CAFRA, in 1973, the State granted East Cape May's predecessors in interest permission to develop and sell almost 40% of the property the owners then held. Under the logic of Loveladies Harbor, the property developed following enactment of CAFRA should unquestionably be included in the relevant property for taking analysis. Because the owners were permitted to make significant economic use of the property post-CAFRA, there plainly was no taking in this case even under Loveladies Harbor.

III. THE STATE'S OFFER TO PERMIT DEVELOPMENT OF A PORTION OF THE PROPERTY PRECLUDES A FINDING OF A PERMANENT TAKING.

For the reasons discussed in sections I and II, the trial court erred in concluding that denial of East Cape May's development application effected a taking, and the decision of the trial court should therefore be reversed and the taking claim in this case dismissed. However, assuming for the sake of argument that the permit denial did result in a taking, the trial court also erred in its analysis of how the Court's offer to permit certain development of the property pursuant to N.J.S.A. 13:9B-22b affected the State's potential liability for the taking. The trial court erroneously concluded that the State's offer could, at most, serve as partial payment of the "just compensation" due for a permanent taking. Instead, the trial court should have treated the State's offer as a new regulatory decision which, so long as it allowed East Cape May some reasonable

economic use of the property, precluded State liability to pay compensation for a permanent regulatory taking. [9]

The statutory provision at issue provides, in relevant part, that, if a court determines that denial of a permit "constitutes a taking," then

the court shall give the [State] the option of compensating the property owner for the full amount of the lost value, condemning the affected property pursuant to the provisions of the Eminent Domain Act of 1971, or modifying its actions or inaction concerning the property so as to minimize the detrimental effect on the value of the property.

N.J.S.A. 13:99-22b (internal citations omitted; emphasis added). As is apparent from its language, this provision's purpose is to permit the State, upon a judicial determination that a regulatory action will result in a taking, to modify the regulatory action to permit the owner to exercise its constitutionally protected property rights while relieving the taxpayers of the burden of paying for an unintended taking. In accordance with its plain meaning, this Court, in its prior decision in this case, interpreted this provision as granting the State "the opportunity to decide whether the application of the regulations to a particular property should be relaxed... to avoid a taking." *300 N.J. Super. at 340; 693 A.2d at 122 (emphasis added)*. A basic objective of this statutory process, the Court stated, was to "avoid exposing the State to the risk of having to acquire property by the exercise of the power of eminent domain whenever an application for a development permit is denied." *Id. at 340, 693 A.2d at 122.*[10]

New Jersey's statutory process for relieving the State of potential liability for a permanent regulatory taking implements the holding of the *U.S. Supreme Court in First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). In that decision, the Court explicitly held that regulatory takings claims cannot be used as weapons to force the public to purchase private property. Following a judicial determination that a regulation would result in a regulatory taking, the Court said, "the government retains a whole range of options," including "amendment of the regulations, withdrawal of the invalidated regulation, or exercise of eminent domain." *Id. at 321*. In other words, if a regulation is found to offend the Takings Clause, the government has the authority to modify the regulatory decision in order to eliminate the possibility of a permanent taking. The fact that one particular regulatory restriction would result in a taking also does not bar the government from subsequently applying other, less onerous restrictions to the same property. As the First English Court said, following a judicial determination that a regulation effects a taking, the government retains the option of "amend[ing] the regulation" and continuing to regulate use of the property in a less intrusive fashion.

In this case, the trial court completely misconstrued the meaning and purpose of N.J.S.A. 13:9B-22(b). Notwithstanding this Court's clear statement that this provision grants the State the opportunity "to avoid a taking," the trial court concluded that the State was powerless to avoid liability for a permanent taking. "A taking has occurred," declared the court, and the State's offer to permit certain development was only relevant, in the trial court's view, in determining whether the offer would "fully compensate the Plaintiff for the value of its land." *Opinion at 25-6*. The trial court ignored this Court's determination that the statute was designed to allow the State "to avoid" an unintended permanent taking. The question the trial court should have posed and answered (based on the assumption that the original permit denial effected a taking) was whether the government's offer to permit certain development avoided another finding of a taking. If granting permission to develop the property in accordance with the State's offer would not have resulted in a finding of a taking, the State would be completely relieved of liability for a permanent taking.

If the Court decides to reverse the trial court's decision based on either or both of the arguments presented in sections I and II, the Court should reverse the trial court's decision and remand the case with instructions that this action be dismissed. However, if the Court rejects these argument,

the Court should, based on the trial court's patent misapplication of N.J.S.A. 13:9B-22(b), vacate the trial court's decision and remand this case for a proper application of the statutory procedure.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the trial court and instruct the trial court to either dismiss this action or to conduct further proceedings in accordance with N.J.S.A. 13:9B-22(b).

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Footnotes

[1]NJCF recognizes that the Court, in its earlier decision in the first appeal in this case, stated that East Cape May "is entitled to assert whatever development rights its predecessors would have had." East Cape May Associates v. State of New Jersey, 300 N.J. Super 325, 337 (App.Div., 1997), citing Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n. 2 (1987). NJCF respectfully submits that the Court should revisit and correct this prior statement which probably should be viewed as dictum. In any event, it is well established that the law of the case doctrine is discretionary, see Brown v. Township of Old Bridge, 319 N. J. Super. 476, 494, 725 A.2d 1154, 1163 (App. Div. 1999),), cert. denied, 741 A. 2d 99 (1999), and should not be relied upon "to justify an incorrect substantive result." Hart v. City of Jersey City, 308 N. J. Super 487, 498, 706 A.2d 256, 261 (N.J. Super A.D.1998). For the reasons discussed in the text, the Court's prior statement regarding investment-backed expectations was plainly wrong.

[2] For examples of other federal court decisions rejecting takings claim based on a lack of investment-backed expectations, see Pro-Eco, Inc. v. Bd. of Comm'rs, 57 F.3d 505, 511-12 (7th Cir.) (no taking when plaintiff purchased land following city's adoption of moratorium on construction of new landfills); Hoeck v. City of Portland, 57 F.3d 781 (9th Cir. 1995) (no taking when owner purchased abandoned building after enactment of city ordinance regulating maintenance of abandoned structures); Outdoor Graphics v. City of Burlington, 103 F.3d 690 (8th Cir. 1996) (no taking when billboard owner acquired billboards after enactment of law requiring removal of billboards); M & J Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir.) (1995) (no taking when company was denied permit to exploit coal lease obtained four years after enactment of federal surface mining regulations); Superior-FCR Landfill, Inc. v. County of Wright, 59 F. Supp.2d 929 (D. Minn. 1999) (no taking when plaintiff purchased property five months after enactment of challenged land-use restrictions).

For similar examples from the state courts, see Myron v. City of Plymouth, 562 N.W.2d 21 (Minn. Ct. App.), aff'd, 581 N.W.2d 815 (Minn. 1998) (no taking when property was purchased subject to setback requirement rendering land unbuildable); Matter of Gazza v. New York Sate Dept. of Envtl. Conservation, 679 N.E.2d 1035 (N.Y) (no taking when property was purchased subject to wetland protection laws); Alegria v. Keeney, 687 A.2d 1249 (R.I. 1997) (no taking when property was purchased subject to state wetland protection act); Grant v. South Carolina Coastal Council, 461 S.E. 2d 388 (S.C. 1995) (no taking when property was acquired ten years following enactment of statute restricting wetlands development); Hunziker v. State of Iowa, 519 N.W. 2d 367 (Iowa 1994) (no taking when owner acquired property subject to statutory prohibition on disinterment of indian burial mounds); Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870 (N.Y. 1997) (no taking when owner acquired property following adoption of municipal steep-slope ordinance); FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone, 673 N.E.2d 61, 70 (Mass. App. 1996) (no taking when owner acquired property subsequent to enactment of wetland protection regulations); Claridge v. New Hampshire Wetlands Bd., 485 A.2d 287, 291 (N.H. 1984) (no taking when owner acquired property four years after passage of wetland protection ordinance).

[3]It is true, of course, that for certain purposes the rights and duties of partners in a partnership are indistinguishable from their rights and duties as individuals. However, as this Court has observed in Watson v. Agway Insurance Company, 291 N.J.Super. 417, 427, 677 A.2d 788, 793 (App. Div.), "[f]or purposes of facilitating transfers of property ... [a] partnership is regarded as a legal entity." Moreover, in this case Mr. Robinson transferred his individual interest in the property to a separate corporation Cape May Greene, Inc, which held the property from 1974 to 1987, when the corporation was dissolved and the property was transferred to East Cape May. To whatever extent a partnership may be able to succeed to the investment expectations of its individual partners, that issue is irrelevant in this case because of the intervening ownership of the property by the corporation Cape May Greene. New investment-backed expectations arose both when Cape May Greene acquired the property and when that corporation was dissolved and the property was transferred once again. See pp. 8-9 (discussing City of Virginia Beach v. Bell and Brotherton v. Dept. of Envt'l Conservation).

[4]In support of the statement that "the right.. to fair compensation... passes to the next owner," the Karam Court cited two cases. The first, Urban v. Planning Board of Manasquan, 124 N.J. 651, 592 A.2d 240 (1991), did not involve a takings claim at all but instead involved a challenge to a denial of a variance. For the reasons discussed above, the rule allowing a purchaser with notice of zoning restrictions to apply for a zoning variance has no bearing on the question of whether a lack of investment expectations bars a constitutional takings claim. The second decision, Moroney v. Mayor & Council of the Borough of Old Tappan, 268 N. J. Super 458, 633 A.2d 1045 (App. Div. 1993), did involve a takings claim, but provides only weak support for the stated proposition. The Moroney Court acknowledged the general rule that a lack of investment-backed expectations precludes a regulatory taking claim, but concluded, without citation to any relevant authority, that an exception should be recognized when the regulation at issue eliminates "all economically beneficial use" of the property. For the reasons discussed above, this conclusion is contradicted by recent U.S. and New Jersey Supreme Court decisions affirming that a lack of investment expectations bars a regulatory taking claim, as well as by the recent Federal Circuit decision in Good v. United States, supra, specifically holding that a lack of investment expectations bars a "total taking" claim under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). See pp. 9-10, supra. See also Loveladies Harbor v. United States, 28 F.3d 1171 (1994) (lack of reasonable investment-backed expectations defeats regulatory taking claim alleging denial of "all economic use" of property); Avenal v. United States, 100 F.3d 933 (Fed. Cir. 1996) (lack of reasonable investment-backed expectations defeats taking claim alleging property rendered worthless); Matter of Gazza, 679 N.E.2d at 1040-41 (knowledge of regulations at time of purchase defeats taking claim based on denial of all economic use because, following Lucas, absolute right to develop property is not part of title). Cf. Palm Beach Isles Associates v. United States, 2000 WL 337591 (Fed.Cir. April 3, 2000) (concluding that Federal Circuit ruling in Good v.

United States is inconsistent with statement in a prior Federal Circuit case, despite the fact that investment expectations were not an issue in the prior case and the prior case did not discuss the issue).

[5]In the wetland context specifically, numerous lower federal and other state courts have rejected takings challenges to wetlands restrictions which affected only a portion of the property. For federal court decisions, see, e.g., Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 802 (Fed. Cir. 1993) (holding that "[c]learly, the quantum of land to be considered is not each individual lot containing wetlands or even the combined area of wetlands. If that were true, the ... protection of wetlands via a permit system would ipso facto, constitute a taking in every case..."); Deltona Corp. v. United States, supra, (takings claim analyzed based on entire 10,000 acres originally purchased by plaintiff, rather than the smaller parcel which developer sought to fill); Jengten v. United States, 657 F.2d 1210 (Ct. Cl. 1981) (1982) (rejecting challenge to denial of permission to fill 60 wetland acres because applicant's entire parcel consisted of 102 upland and wetland acres). For state court decisions, see, e.g., Fox v. Treasure Coast Reg'l Planning Council, 442 So.2d 221, 225 (Fla. Dist. Ct. App. 1983) (not a taking to prohibit "development on certain portions of the tract" of 1705 wetland acres); Smith v. Williams, 560 N.Y.S.2d 816, 817 (N.Y. App. Div. 1990) (denial of wetland permits to build on three parcels not a taking where economic value remained in property as a whole "including the unrestricted lots"); State Dep't of Envt'l Regulation v. Schindler, 604 So.2d, 565, 567-78 (Fla. Dist. Ct. App. 1992) (regulatory prohibition not a taking, considering entire parcel including uplands and wetlands).

[6]At bottom, the property as a whole rule appears to rest on the fact that allowing a property owner to define the relevant unit of property as the portion of the property subject to regulation would make virtually every regulation a taking. See Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust, supra ("[t]o the extent that any portion of property is taken, that portion is always taken in its entirety"). While the U.S. Supreme Court has recognized that certain extreme regulations can effect a taking, it has also recognized that the overwhelming majority of regulations do not result in takings. See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985) (regulatory takings occur only in "extreme circumstances"). This narrow understanding of the Takings Clause is supported by the fact that, as a matter of original understanding, the Takings Clause did not apply to regulations under any circumstances. As Justice Scalia acknowledge in Lucas, 505 U.S. at 1145, prior to the twentieth century, "it was generally thought that the Takings Clause reached only a direct appropriation of property, or the functional equivalent of practical ouster of [the owner's] possession." See John F. Hart, "Colonial Land Use Law and its Significance for Modern Takings Doctrine," 109 Harv.L.Rev. 1252 (1996); William Michael Treanor, "The Original Understanding of the Takings Clause and the Political Process," 95 Col.L.Rev. 782 (1995). See also Robert Bork, The Tempting of America: the Political Seduction of the Law 230 (1990) (criticizing expansive takings theory as "not plausibly related to the original understanding of the Takings Clause").

[7]The conclusion that the 200 acres represent a single property for the purpose of takings analysis is not affected by the fact that Mr. Robinson and the various successor owners carried out the development in gradual steps over several decades. The trial court stated if Cape May Greene, Inc. had applied for a permit in 1980 to develop both the property on the east of the avenue as well as the remaining undeveloped property on the west, "in all probability a permit would have been granted." Opinion, at 21. Whether or not this speculation is accurate, this statement implicitly acknowledges that the land on both sides Pittsburgh Avenue should be viewed as a single property. It is obvious that if Cape May Greene had in fact applied for a permit to develop the entire 200 acres, but the State had permitted development of the land west of Pittsburgh Avenue but not the land east of the avenue, Cape May Greene, Inc. would not have had a viable takings claim under the property as a whole rule. The result should not be any different simply because Cape May Greene completed the development on the west side of Pittsburgh Avenue and the shareholders in that corporation are now pursuing development on the east side of the property through a newly formed partnership.

[8]The Court also observed that language in the Supreme Court's decision in Lucas can be read as "signaling a change" in the property as a whole rule. 300 N.J., Super at 349; 693 A.2d at 126. However, to the extent Justice Scalia's opinion in Lucas seemed to cast doubt on the parcel rule, the statement was mere dictum. See Zealy v. City of Waukesha, 548 N.W. 2d 528, 532 (Wisc. 1996). In any event, in several cases subsequent to Lucas, the U.S. Supreme Court has erased any doubt that was arguably created by Lucas by reaffirming the validity of the parcel as a whole rule. See Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust, supra (unanimous opinion reaffirming property as a whole rule); Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (stating that "[t]here can be no argument" that open space restrictions on part of property would have effected a taking, given that the owner was permitted to operate a retail store on the property); see also Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) (Scalia, J. concurring) (explaining result in Penn Central as an application of the "parcel as a whole rule").

[9]NJCF understands that other environmental amici will argue that the State's offer to permit certain development was ineffective because the State lacked the authority to make such an offer. NJAS agrees with this argument, but, given the long-term importance of the proper analysis of this type of offer in the context of a regulatory takings action, NJCF focuses on the issue of the consequences of the State's offer on the assumption that the State had the authority to make it.

[10]Taking the view that "the administrative process leading to the issuance or denial of a development permit is not complete" unless and until the State has exercised its options under N.J.S.A. 13:9B-22b, the Court also ruled that the mere denial of a permit could not subject the State to liability for a temporary taking. See 300 N.J. Super. at 340; 693 A.2d at 121. On remand, the trial court rejected East Cape May's temporary takings claim.