UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 99-5030

PALM BEACH ASSOCIATES, A Florida Partnership; MARTIN SLIFKA, individually and as trustee; MARJORIE MARGOLIS and ROBERT A. FRANKLIN, individuals as tenants in common and the ESTATE OF JOSEPH SLIFKA, represented by Alan Slifka and Brabara J. Slifka, co-executors

Plaintiffs -Appellants

vs.

UNITED STATES.

Defendant-Appellee.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS, JUDGE MARIAN BLANK HORN

BRIEF OF AMICUS CURIAE FLORIDA AUDUBON SOCIETY IN SUPPORT OF PETITION OF THE UNITED STATES FOR REHEARING AND FOR REHEARING EN BANC

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33 USC 403
Federal Civil Rule 56(e)

Florida Audubon Society ("Florida Audubon") respectfully submits this brief amicus curiae in support of the United States' petition for rehearing and petition for rehearing en banc.

STATEMENT OF INTEREST

Florida Audubon previously filed an amicus curiae brief in this case urging the Court to affirm the trial court decision. Florida Audubon supports the petition of the United States for rehearing and rehearing en banc because the panel decision contradicts established precedent and severely undermines government's ability to protect the environment and other aspects of the public interest.

ARGUMENT

I. THE PANEL DECISION CONFLICTS WITH THE BINDING CIRCUIT PRECEDENT ESTABLISHED IN GOOD V. UNITED STATES AND LOVELADIES HARBOR, INC. V. UNITED STATES.

The panel ruled the claimant's lack of investment-backed expectations to develop the property was no bar to this claim for compensation under the Takings Clause. 208 F.3d at 1381. This ruling contradicts the holdings of this Court in Good v. United States, 189 F.3d 1355

(Fed.Cir.1999), cert. denied, 120 S.Ct. 1554 (2000), and Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed.Cir. 1994), that investment expectations are a relevant factor in "every regulatory takings case." Good, 189 F.3d at 1361. The panel should grant rehearing and issue a revised decision that conforms to this binding Circuit precedent.

In a footnote, the panel expressed the mistaken view that it was free to ignore Good because that decision was "inconsistent" with existing law. See 208 F. 3d at 1379 n.3. First, even if the panel believed the ruling in Good was incorrect, it had no authority to ignore the precedent established in Good (and Loveladies). If the panel believed these decisions were incorrect, the proper procedure would have been for the panel to call for en banc review in this case.

Second, the panel erred in concluding that Good was inconsistent with existing law. The panel recognized that Good was consistent with the Federal Circuit's earlier ruling in Loveladies that investment-backed expectations are a necessary precondition for a valid regulatory taking claim. The Court nonetheless believed there was an inconsistency between Good and Federal Circuit precedent because the "subsequent" decision in Florida Rock Indus. v. United States, 18 F.3d 1560 (Fed.Cir. 1994), superseded Loveladies. But, in fact, the decision in Florida Rock actually preceded the decision in Loveladies.

Furthermore, there is no inconsistency between Good and Loveladies, on the one hand, and Florida Rock, on the other. Both Good and Loveladies hold that a lack of investment expectations bars a takings claim under Lucas. Indeed, Good explicitly relied on Loveladies to support its conclusion that the owners' lack of investment expectations barred the taking claim in that case. See 189 F3d at 1360-61. Florida Rock does not explicitly discuss the issue of investment-backed expectations, and it could not have established binding precedent on the point because a defense of lack of investment expectations was not even raised.

The panel's ruling also conflicts with Supreme Court precedent emphasizing the importance of investment expectations in takings analysis. See Ruckelshaus v. Monsanto, 467 U.S. 986, 1005-06 (1984). Penn Central Transportation Co v. New York, 438 U.S.104, 124 (1978). Contrary to the panel's view, Lucas does not undermine the relevance of this factor. Lucas indicated that a taking likely occurred when the owner purchased coastal property for development and the State later enacted legislation prohibiting development of the property and rendering it valueless. Lucas does not support the conclusion that a taking would have been found if the sequence were reversed, that is, if the State had first adopted the restrictions and the claimant then purchased the property knowing about the restrictions. See also 505 U.S. at 1034 (Kennedy, J., concurring) ("Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment- backed expectations."). Any other conclusion would invite extravagant claims under the Takings Clause for financial windfalls at taxpayer expense. Apparently no court has found a taking under Lucas when the claimant knew of the regulatory restrictions in place at the time she purchased the property. Cf. Palazzolo v. State of Rhode Island, 746 A.2d 707, 716(R.I. 2000) (plaintiff "was unable to cite a single case in which a court has ordered compensation for a regulatory taking when the claimant became the owner of the property after the regulation because effective").

II. THE PANEL DECISION CONFLICTS WITH THE PARCEL ANALYSIS ESTABLISHED BY THE SUPREME COURT AND THIS COURT.

The Court should grant rehearing or rehearing en banc for the additional reason that the panel relied on an improper factor in defining the relevant parcel. The panel ruled that 51 acres of the 312 acres plaintiffs originally purchased constituted the relevant parcel because the laws that allegedly effected the taking applied only to this area. This analysis is precluded by prior rulings of this Court as well as Supreme Court precedent.

The panel examined at some length the discussion of the parcel issues in Loveladies; the Court in that case excluded from the parcel lands developed and sold off before the imposition of the regulatory restrictions alleged to be a taking. The panel accepted the trial court's conclusion that Loveladies was distinguishable from this case, given "the Government's assertion that the regulatory structure under the Rivers and Harbors Act that led to the permit denials was in place before the 261 acres were sold in 1968, and therefore they should be included in the denominator." 208 F.3d at 1381 (emphasis added). The panel nonetheless concluded that the trial court had erred in defining the parcel, stating that "other factors" beside the timing of development and selling of the property "may be more compelling" in some circumstances. Ibid.

One of the "other factors" the panel determined to be relevant in this case was the fact that "[t]he regulatory imposition that infected the development plans for the [51] acres was unrelated to PBIA's plans for and disposition of the 261 acres of beachfront upland on the east side of the road." Id. at 6. Stating the point differently, the panel said that "the development of [the 261 acres] was... legally unconnected to.. the 51 acres of wetlands and submerged lake bed on the lake side of the spit." Ibid. In short, the panel believed that the fact that the Rivers and Harbors Act and the Clean Water Act applied to the wetlands and submerged lands, and did not apply to the adjacent upland, by itself, supported treating the wetlands and submerged lands as distinct from the rest of the property.

This approach to defining the parcel contradicts the Supreme Court's repeated articulation of the principle that a unit of property cannot be subdivided for the purpose of takings analysis because the challenged regulations apply to one portion of the property and not to another. See Penn Central, 438 U.S. at 130-131.

In Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987), the Court rejected the plaintiffs' effort to establish a taking of coal interests by focusing exclusively on the coal "they must leave in the ground under the Subsidence Act." Id. at 496-97. The Court ruled that coal subject to the restriction did "not constitute a separate segment of property for takings law purposes" that could be divided from the plaintiff's other coal. Id. at 498. The Court said, "where an owner possesses a full bundle of property rights, the des-truction of one strand of the bundle is not a taking because the aggregate must be viewed in its entirety," Id. at 497, quoting Andrus v. Allard, 444 U.S. 51 (1979).

More recently, in Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602 (1993), the Supreme Court rejecting the plaintiff's effort to establish a taking by focusing on the specific portion of the plaintiff's property affected by a federal pension law. The Court said:

[W]e rejected this 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.

This Court followed the same rule in Tabb Lakes, Ltd v. United States, 10 F.3d 796 (Fed.Cir.1993), a case involving facts virtually identical to the facts of this case. The plaintiff argued that its entire 167-acre property should not be treated as the relevant parcel and that instead the parcel should be defined as the 37 wetland acres subject to federal jurisdiction under the Clean Water Act. The Court categorically rejected this effort to segment the property: "Clearly, the quantum of land to be considered is not each individual lot containing wetlands or even the combined area of the wetlands. If that were true, the Corps' protection of wetlands via a permit system would, ipso facto, constitute a taking in every case where it exercises its statutory authority." Id. at 802. The Supreme Court's Penn Central decision, the Court said, "negates this view." Id.

Likewise, Loveladies, which the panel discussed at length, contradicts the panel on this point. The owner sought to develop 12.5 acres of land, 11.5 of which were regulated wetlands. In reviewing whether denial of a permit to fill the 11.5 acres effected a taking, the court considered not just the 11.5 acres, but the entire 12.5 acres, rejecting the idea that the restricted portion can be the relevant parcel. Thus, as recently stated by the U.S. Court of Appeals for the D.C. Circuit, "Loveladies Harbor argues against treating the property burdened by the regulation separately from the contiguous property." See District Intown Properties Ltd. v. District of Columbia, 198 F3d 874, 881 (D.C. Cir. 1999).

Combined with the panel's ruling that a lack of investment expectations does not bar a takings claim under Lucas (see section 1), the panel's novel approach to defining the relevant parcel (which obviously makes it far easier for claimants to frame a Lucas claim) threatens to expose the federal taxpayer to enormous demands for windfall "compensation" awards. Because the panel's approach so clearly contradicts established precedent, the Court should grant rehearing or rehearing en banc on this issue. [1]

III. THE PANEL RESOLVED THE NAVIGATIONAL SERVITUDE ISSUE BASED ON A MISREADING OF THE LAW AND THE FACTS.

Finally, Florida Audubon urges the Court to grant rehearing or rehearing en banc to reconsider whether this claim is barred as a matter of law because the government's denial of the permit was designed, at least in part, to preserve navigation. The navigational servitude represents a vitally important public property right, and the Court should grant rehearing to clarify when and how this right can be protected.

The panel opinion accurately states that "'[i]f the interests of navigation are served, it is constitutionally irrelevant that other purposes may also be advanced'." 208 F.3d at 1385, quoting United States v. Twin City Power Co., 350 U.S. 222 (1956). So long as a bona fide navigational purpose is served by the government action, it is beside the point that the action is primarily designed to serve one or more other purposes. See United States v. Appalachian Elec. Power Co., 311 U.S. 377, 426 (1940). Because it is plain that protecting navigation was one purpose served by denying the plaintiffs' application, the panel should have affirmed the trial court decision on this basis alone.

First, the panel improperly ignoring the larger regulatory context of this permitting action. The plaintiffs sought a permit pursuant to the Rivers and Harbors Act of 1899, which declares that "[t]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited." 33 USC 403. Thus, for the express purpose of protecting navigation, the Act is "structured as a flat prohibition unless -- the unless being the issuance of approval by the Secretary [of the Army] after recommendation of the Chief of Engineers." Zabel v. Tabb, 430 F.2d 199, 207 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971). The express navigation-protection purpose of the Rivers and Harbors Act distinguishes this case from other types of government actions cited by the panel involving reclamation or hydropower development. See 208 F.3d at 1385. Because the government acted in this case pursuant to the Rivers and Harbors Act, and because Congress adopted that Act specifically to protect navigation, there is no question that at least "a" purpose served by the permit denial was the protection of navigation.

Second, to the extent it is necessary to probe the actual motivations of the regulators implementing the Act in this case, it is clear beyond peradventure that one of the purposes served by the denial of plaintiffs' application was, in fact, the protection of navigation. In concluding otherwise, the panel apparently failed to consider all of the pertinent portions of the Army Corps' Memorandum of Decision. In the section entitled "Public Interest Review Factors Relevant to the Proposal," the Army Corps explained several times that its decision was intended to protect navigation. In particular, under the heading of "Recreation," the memorandum states:

The proposed project would eliminate an open water area of 48.4 acres currently utilized by recreational (as well as commercial) fishermen and boating enthusiasts, not to mention the scores of residents, educators, students, bird-watchers, and others who enjoy the fish, wildlife, and flora resources of the area.

Supp. App., at 41. In addition, under the heading of "Navigation," the Memorandum of Decision states that filling these submerged lands would result in "the elimination of 48.4 acres of navigable waters," barring access to the area by "shallow draft vessels." Supp. App., at 40-41. Reading the Memorandum of Decision as a whole, it is clear that (1) the Army Corps believed that permitting the filling of this area would block navigation, and (2) the Army Corps denied the permit, in part, to avoid this adverse effect on navigation.

The panel discerned a "contradiction," in the Army Corps Memorandum of Decision because the memorandum states that, "other than the elimination of 48.4 acres of navigable waters, the project should not have a significant adverse impact on navigation, in general." However, this statement creates no contradiction. The authors of the Memorandum of Decisions obviously meant that filling the 48 acres of navigable waters would not have any adverse impact on navigation in other nearby waters, including the adjacent intracoastal waterway. But so long as the decision was designed, in part, to protect the navigability of the 48 acres, as it obviously was, it is beside the point whether the Army Corps thought filling this area would impact navigation elsewhere.

The so-called Borda Declaration simply reinforces this reading of the Army Corps memorandum of decision. While the panel observed that the plaintiffs "vigorously contest[] the Declaration's assertions," 207 F.3d at 1386, that is hardly sufficient to create a triable issue of fact as to whether protecting navigability was one of the purposes of permit denial. First, the Borda Declaration is unnecessary to sustain the government' s position because the Memorandum of Decision speaks for itself; thus, even if there were some actual dispute about the veracity or accuracy of the Borda Declaration, that would be insufficient to create a material issue of fact. Second, contrary to the panel's statement, there is no "inconsis-tency" between the Memorandum of Decision and the Borda Declaration; the declaration merely explains the discussion in the Memorandum, and does not itself create any conflict or inconsistency. Finally, the plaintiffs were free in opposing summary judgment to attempt to counter the Borda Declaration through a factual submission of their own. Having failed to do so, however, plaintiffs cannot object to the grant of summary judgment on the basis of bare objections to the government's factual submission. See Federal Civil Rule 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial).

CONCLUSION

For the foregoing reasons, the Court should grant the petition of the United States for rehearing or for rehearing en banc.

Respectfully submitted,

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NOTES

[1] Because the panel did not disturb the trial court's conclusion that this case was not governed by the parcel analysis in Loveladies, the full Court need not address the validity of that analysis to resolve this case. We note, however, that the Court's conclusion in Loveladies that lands developed or sold off prior to the imposition of a new regulatory regime should not be included in the relevant parcel conflicts with Penn Central and Deltona Corp v. United States, 657 F.2d 1184 (Ct.Cl. 1981).