STATE OF MAINE
CUMBERLAND, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. CUM-99-362

WILLIAM W. WYER
Plaintiff-Appellant

v.

BOARD OF ENVIRONMENTAL PROTECTION
AND THE STATE OF MAINE
Defendants-Appellees

ON APPEAL FROM THE CUMBERLAND COUNTY SUPERIOR COURT

BRIEF OF *AMICUS CURIAE*
MAINE AUDUBON SOCIETY

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STATEMENT OF THE ISSUE

WHETHER THE DEPARTMENT OF ENVIRONMENTAL PROTECTION'S DENIAL OF THE PERMIT SUBSTANTIALLY DIMINISHED THE VALUE OF APPELLANT'S PROPERTY CONSTIUTING A REGULATORY TAKING IN VIOLATION OF THE MAINE AND U.S. CONSTITUTIONS?

ARGUMENT

I. MAINE'S COASTAL SAND DUNE RULES CONSTITUTE A VITALLY IMPORTANT AND REASONABLE RESPONSE TO THE NATURAL HAZARDS OF THE SHORELINE, PROTECTING LIVES, COASTAL AND INLAND PROPERTY, AND THE TAXPAYER FROM THE COSTS OF UNWISE DEVELOPMENT.

The Court should affirm the decision of the Superior Court rejecting Appellant's taking claim because the claim does not meet the standards under the Maine and U.S. Constitutions and because the Coastal Sand Dune Rules under which Appellant's permit application was denied are an indispensable tool in the protection of life, property, and natural resources in Maine.

A. Maine's Coastal Sand Dune Rules Protect a Natural Resource of Statewide Significance from Destruction Due to Interference With Essential Natural Processes

.

Maine, like many other states, has enacted a system of land use control laws designed to channel land development away from environmentally-sensitive areas as well as control the rate of growth that must be supported by public services and infrastructure. One of these laws, the Natural Resources Protection Act (NRPA), 38 M.R.S.A. §§ 480-A - U, recognizes that certain natural resources provide critical services that are difficult if not impossible to supply with either public or private infrastructure, such as clean water, and protection from flooding and soil erosion. The NRPA protects the State's rivers, streams, great ponds, fragile mountain areas, wildlife habitat, freshwater and coastal wetlands, and coastal sand dune systems from development that unreasonably interferes with the provision of these natural services or which threatens to reduce their protective functions. The Coastal Sand Dune Rules, Code Me. R., Ch. 355, 06-096, promulgated under the NRPA, protect one of these invaluable natural features, the sand beach system. The environmental services of sand dune systems range from providing essential habitat for migratory shorebirds and a

buffer zone protecting inland habitat areas like salt marshes and estuaries, to protecting buildings, other property, and the people who inhabit them from the forces of wind and water driven by ocean currents and storms.

Maine's beaches constitute only about 10% of the State's 3,300-mile tidal shoreline. The sand beach systems are located primarily along Maine's southern coastline, in the Saco Bay and Wells embayments; the northern beaches are typically composed of cobble. While most of the land adjacent to these southern beaches is already developed, every year brings greater pressure for increasing the density of this development, even though it stands in the path of rising sea levels and ocean storms of increasing severity. Without the restrictions provided by the Coastal Sand Dune Rules, coastal properties lying within sand dune systems would be built upon. The properties would then be damaged by the inevitable coastal erosion, then armored by seawalls, as landowners attempt to prevent continuing erosion, but only exacerbate the process by damaging the dunes and disrupting the normal transport of sand. Such actions only increase the damage by coastal processes to existing homes and other development and to the natural habitat areas upon which coastal wildlife depends. The Coastal Sand Dune Rules disrupt this vicious cycle, recognizing that "the frontal dune area and beach sections seaward of it are the most active parts of the sand dune system in terms of sand transport. Construction in this critical area constitutes an unreasonable interference with the natural supply or movement of sand, and also reduces the ability of the dune to buffer upland areas from storm impacts, thus causing an unreasonable flood hazard." Ch. 355, Section 3, B(2). The rules guide the Department of Environmental Protection in its application of the NRPA standards to proposals to alter natural systems.

The NRPA and the Coastal Sand Dune Rules apply with equal stringency to both new and existing beachfront homes in areas like Higgins Beach, the location of Appellant's lot. The NRPA requires landowners to obtain a permit for any new construction, or the repair or alteration of any existing permanent structure in a coastal sand dune system (defined to include beach berms, frontal dunes, dune ridges, back dunes, and other sand areas deposited by wave or wind action. 38 M.R.S.A. § 480-B(1). Anyone who wishes to engage in such activities on or adjacent to a sand dune must demonstrate that the proposed activity "will not unreasonably interfere with the natural supply or movement of sand within or to the sand dune system or unreasonably increase the erosion hazard to the sand dune system." *Id*. § 480-D(7). Additionally, the applicant must show that the activity will not unreasonably cause or increase the flooding of the alteration area or adjacent properties. *Id*. § 480-D(4).

In applying these statutory standards, the Coastal Sand Dune Rules require the Department to consider impacts which may reasonably be expected to occur during the following 100 years; projects will not be permitted if, within 100 years, the project may reasonably be expected to be damaged as a result of changes in the shoreline, including changes from sea-level rise. Ch. 355, Section 3, A. The Rules establish a policy of mobility or retreat if a coastal beach system is migrating inland in response to sea-level rise, as demonstrated by the rate of erosion and the movement inland of sand. To effectuate this retreat policy, the Rules prohibit the repair or rebuilding of an existing building that sustains damage to the extent of 50% or more of its appraised value, unless the applicant can meet the above standards for new construction, Ch. 355, Section 3, B(3)(b), which is very unlikely if a existing home is being damaged by coastal flooding and wind. If, however, a permit is secured for either a new or replacement structure, the Rules require that, as conditions of approval, the structure to be

removed in the event that the shoreline recedes to the extent that tidal lands extend to any part of the building for six months or more. In that event, the site must be restored to its natural condition. Ch. 355, Section 3, B(1)(b). The Rules also prohibit the construction of new seawalls in or on any sand dune system, and they limit the repair or maintenance of existing seawalls. Ch. 355, Section 3, F. The Law Court upheld these provisions prohibiting rebuilding of extensively damaged structures in *Hall v. Board of Environmental Protection*, 528 A.2d 453 (Me. 1987).

The importance of Maine's Coastal Sand Dunes Rules has been recognized by both the U.S. Environmental Protection Agency (EPA), and the National Oceanic and Atmospheric Administration, which administers federal Coastal Zone Management Act (CZMA), 16 U.S.C. § 1451 et seq. The CZMA encourages and assists the states in preparing and implementing management programs to "preserve, protect, develop and where possible, to restore or enhance the resources of the nation's coastal zone." *Id*. § 1452. The NRPA is one of the core laws of Maine's federally-approved coastal zone management program. Without effective rules under the NRPA, allowing the State to protect coastal lands and waters, Maine would have insufficient legal authority to carry out the national policies of the CZMA. In its 1995 report, "Anticipatory Planning for Sea-Level Rise Along the Coast of Maine," the U.S. EPA notes that Maine's sand dune regulations have received "national recognition as an exemplary coastal erosion response strategy," and form a very solid basis for a sea-level rise adaptation strategy which should be retained and enforced.

B. <u>The Coastal Sand Dunes Rules Are a Reasonable Response to Coastal Erosion and the Threat of Accelerated Sea Level Rise</u>

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The threat of global climate change, due to human-induced increases in atmospheric concentrations of heat-trapping gases (carbon dioxide and methane), is one of the major issues facing the world as it enters the 21st century. One of the possible projected impacts of this global change is an accelerated rise in global sea level due to thermal expansion of the oceans and melting of polar and glacial ice. Sea level has been rising in New England during the last fifty years on the average of 2.4 millimeters (mm) per year. In Maine, all of Maine's major coastal municipalities have experienced a gradual rise in sea level during the last fifty years. Global warming will increase the present rate of sea level rise. Although estimates vary, a recent estimate suggests that sea level will be 48 centimeters (approximately 1.5 feet) higher than present levels in the year 2100. A vertical rise of from 11 to 32 centimeters (4 to 12 inches) translates to a much larger horizontal (landward) migration of the high tide line. The extent of the migration depends on the type of shoreline and the slope of the adjacent land surface. On gently sloping coasts, as in the southern part of Maine, small vertical changes in sea level will shift the coastline dramatically. An accelerated rate of sea level rise means that the coastal erosion protection and storm buffering provided by natural sand dunes is more vital than ever. In addition to a faster rate of sea level rise, some scientists predict that warmer temperatures may result in a 40-50% increase in the destructive potential of hurricanes. In Maine, an increase in the intensity and frequency of ocean storms could cause storm-driven beach erosion above and beyond the coastal erosion that would be due to an increase in the sea level. The Coastal Sand Dunes Rules, with their retreat and mobility policies described above, are a reasonable regulatory response to the

hazards of sea level rise and the threats of erosion and flooding aggravated by the interference with natural sand transport system.

C. The Higgins Beach Management Plan Demonstrates That the Coastal Sand Dune Rules Are a Key Part of the Community's Strategy to Protect the Sand Beach Resource

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Higgins Beach, where Appellant's lot is located, offers an example of the need for and importance of the Coastal Sand Dune Rules and the manner in which the Rules and the policies behind them have been incorporated into the 1998 Higgins Beach Management Plan (Management Plan). The Beach, once healthy, is now suffering from erosion, storm flooding, and sea level rise. The Management Plan addresses these problems, identifies their causes, and poses possible solutions while utilizing the Coastal Sand Dune Rules as a foundation for protection.

Higgins Beach was once a healthy barrier beach system with a wide dune field and foredunes to protect against storm wave erosion. This protective frontal dune structure has disappeared and the remaining dunes are low and narrow, providing less protection to back dune areas. Today, the Beach is sand-starved and erosional. While the foredunes have been disappearing, its shoreline has also been receding or migrating landward. The Management Plan identified the 1700 foot seawall the "primary reason for the continual loss of sand from the beach system."

Storms, flooding and rising sea level rise all pose risks to Higgins Beach. According to Dr. Joseph Kelley, storms and rising seal level, together with the flooding that accompanies them, represent a genuine threat to the Beach's long term (100 year) existence. Higgins Beach is also facing short term (10 years) risks of further narrowing of the beach and damage to homes. "Continuing the status quo will probably result in the slow but steady decline in recreational beach area, especially around high tides. Houses will be damaged by storms and may be destroyed."

The erosion of Higgins Beach has both natural and man-made causes. The development on the dunes both faces the greatest risk of harm and causes the greatest damage to the sand dune system. The development directly upon the dunes has eliminated the protection the natural dunes provide. In particular, the construction of several generations of seawalls has exacerbated and accelerated the natural erosion process. In an undeveloped beach system experiencing erosion, the ocean would move landward, in response to waves and current, while the beach itself would retain its general shape and size.

The walls and houses [located in the area east of Bayview Avenue which includes the Wyer property] occupy what would be beach and dune space if the area had not been developed. The walls will not protect the properties fully from large storms, but they do interfere with dune formation and other normal beach processes. The future of the beach depends on what happens to the houses in this area. . . .

Development on the frontal dunes has constructed its own demise.

The Management Plan includes a set of recommendations to address these issues. These recommendations vary and include eliminating beach access to promote dune restoration, initiating a dune restoration program, removing nonfunctional seawalls, continuing beach profiling, and adopting a retreat program to develop Town policy to restore the beach through the purchase of damaged properties. While we do not necessarily endorse all of the Plan's recommendations, it is significant that the community is attempting to address the very real hazards to its beach system within the parameters of the Coastal Sand Dunes Rules.

In southern Maine, beach communities are coming to grips with the hazards caused by the development of the sand dune systems. The situation at Higgins Beach illustrates how communities are acknowledging the changes which have occurred and are continuing to occur to their beaches, identifying the risks, ascertaining the causes, and developing solutions. The State's policy codified in the Coastal Sand Dune Rules are on the one hand a beacon guiding local communities in developing their land use planning and zoning, and on the other a guardian insisting that new development on frontal sand dunes is not acceptable and retreat is a sensible response to the ongoing processes of sea level rise and erosion of the sand dune system.

I. THE BASIC TEST FOR WHETHER A REGULATION RESULTS IN A COMPENSABLE TAKING UNDER THE MAINE AND U.S. CONSTITUTIONS IS WHETHER THE REGULATION SUBSTANTIALLY DIMINISHES THE VALUE OF PRIVATE PROPERTY.

The Court should affirm the decision of the trial court rejecting this takings claim because the Appellant failed to demonstrate that the Coastal Sand Dune Rules resulted in a "substantial diminution" in the economic value of the property.

This Court's regulatory takings decisions make clear that a straightforward test governs the resolution of a takings challenge to a regulatory restriction on the permissible uses of land. The Court's "principal focus ... in 'takings' cases has [been] a factual inquiry into the substantiality of the diminution in value of the property involved." *Seven Islands Land Co. v. Maine Land Regulation Commission*, 450 A.2d 475, 482 (Me. 1982). Before a taking can be found, the Court has said, the diminution in value must be "very substantial indeed." *Id*. *See also Hall v. Board of Environmental Protection, supra* at 455 ("We have previously stated that 'the principal focus of the courts in 'taking' cases has become a factual inquiry into the substantiality of the diminution in value of the property involved'."); *Maine Land Use Regulation Commission v. White*, 521 A.2d 710, 713 (Me. 1987) (affirming denial of regulatory takings claim because record demonstrated "that the property has not been substantially reduced in value").

Applying the "substantial diminution" test to the facts in this case, it is clear there was no regulatory taking. The trial court made a finding that the property, absent regulatory restrictions, would have a market value of $100,000, which was actually a very generous estimate. Following the Department of Environmental Protection's (DEP's) denial of Appellant's variance, the trial court concluded, the property retained a value of $50,000. This (at most) 50% reduction in property value can hardly be characterized as "very substantial." Indeed, this claim is completely unprecedented, not only in Maine but across the country, because, as Appellant frankly concedes, "courts in other jurisdictions have found that reductions of similar percentages are not compensable." Appellant's Brief, at 24.

Appellant nevertheless contends that he has established a regulatory taking, relying principally on *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). He argues that, even if the property retains significant value, a taking has occurred because the State has denied Appellant the opportunity to "use" the property for development. The premise of this argument is questionable, on several different grounds. First, the Coastal Sand Dune Rules only prohibit certain types of development in the dune area and the local municipal regulations, of their own force, prohibit certain other development which the State law would permit. It is difficult to understand, under these circumstances, how the State can be charged with prohibiting any development of the property, especially when Appellant did not pursue available judicial remedies for obtaining a variance from local municipal officials. *See Hall v. Board of Environmental Protection, supra*.

Second, it is not accurate to say that the regulations eliminate "all use" of the property. The trial court found that, in addition to the development uses that appellant can potentially make of the property, a number of neighboring owners are able and willing to purchase the property in order

to expand the size of their lots and to use the property for a variety of purposes, including family recreation, parking, and even possibly as a relocation site for an existing home threatened by coastal erosion. In general, but along the highly desirable Maine coast in particular, a larger-sized property is more desirable and useful to a residential property owner than a smaller-sized property. Thus, even assuming new permanent development on the property is prohibited, the property remains available for valuable uses and the rights to the exclusive enjoyment of these uses can be transferred to others for valuable consideration.

But in any event, even on the assumption that the Coastal Sand Dune Rules can be characterized as prohibiting all development "use" of the property, *Lucas* hardly supports the idea that a taking occurs when, as in this case, the property retains significant economic value. In *Lucas*, the owner purchased the property for nearly $1,000,000, with the understanding that applicable law permitted development of the property. Two years later, the South Carolina legislature enacted a new law prohibiting any development of the property and rendering the property, as the trial court found and the U.S. Supreme Court repeatedly emphasized, "valueless." 505 U.S. at 1007; *see also Id*. at 1009, 1020, 1026. It would be gross over-reading of *Lucas* to suggest that the decision supports a finding of a taking if the property, rather than being rendered "valueless," retains significant economic value. As the U.S. Supreme Court asked rhetorically in *Lucas*: "What is the land but the profits thereof?" *Id*. at 1017 (quoting E. Coke, Institutes, ch 1, § 1 (1st Am ed 1812)). When, as in this case, an owner can sell the property for valuable financial consideration, the owner retains the right to "profit" from ownership of the land and there is no taking. The conclusion that the significant market value of this property precludes a finding of a taking is especially appropriate given that appellant never sought to develop the property himself and instead has held the property for many years for the sole purpose of selling it.

Thus, Appellant's rigid theory that a taking necessarily occurs if an owner is denied permission to develop the property as he wishes, even if the property retains substantial market value, is contradicted by the decisions of this Court and the U.S. Supreme Court as well as a common sense understanding of regulatory takings doctrine. Beyond that, however, Appellant's theory that "use," rather than "value", is the central criterion in takings analysis is contradicted by the courts' treatment of takings challenges to various kinds of land use regulations, including so-called transferable development rights (TDR) programs and laws requiring the termination of nonconforming land uses following a reasonable "amortization period."

Under a TDR program, a restricted landowner is permitted to exploit the development value of her land by transferring the "development rights" to other property in the community deemed suitable for intensive development. TDR programs have been widely praised as a fair and reasonable tool for promoting strong conservation policies while ensuring that all land owners share in the benefits of community economic development. *See generally* R. Roddewig & C. Ingraham, *Transferable Development Rights Programs* (1987).

The U.S. Supreme Court has squarely ruled that the "value" of a TDR, even though it involves no actual use of the owner's restricted property, is highly significant in takings analysis. In the landmark case of *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978), the Court rejected a takings challenge to the designation of Grand Central terminal as an historic landmark, which effectively barred the owners from developing the air space above the Terminal. The Court ruled that even though the company had "been denied the right to build above the terminal," the value of the TDRs mitigated the adverse economic effect of the regulatory restriction. Moreover, the Court expressly held that the value of the TDRs should be considered in the takings analysis:

[T]he rights afforded [the company] *are valuable*. While these rights may well not have constituted "just compensation" if a "taking" had occurred, *the rights nevertheless undoubtedly mitigate*

whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.

Id. at 137 (emphases added). Following *Penn Central*, the lower federal and state courts have repeatedly treated the value of TDRs as a relevant consideration in takings analysis.

The Supreme Court's explicit holding that the value of TDRs should be taken into account in conducting takings analysis refutes Appellant's idea that *only* the ability to use and develop property can "count" for the purpose of evaluating a takings claim. Just as the value of a TDR to an owner can defeat a regulatory takings claim, regardless of what use the owner can make of the restricted property itself, so too in this case the significant economic value of the property to appellant precludes a finding of a taking, regardless of whether the Appellant can obtain permission to "use" the property for development.

The established rule that the public may require the removal of billboards and other nonconforming uses after a reasonable amortization period without effecting a taking also supports the same fundamental point. This Court has in several cases rejected takings challenges to laws prohibiting certain land uses after a reasonable amortization period. *See, e.g., State of Maine v. National Advertising Co.*, 409 A.2d 1277, 1289 (Me. 1979) (rejecting takings challenge to state billboard legislation, based in part on billboard company's failure "to show that the length of the amortization period was insufficient to permit adequate recoupment of [the company's] investments in the signs"); *Inhabitants of the Town of Boothbay v. National Advertising Co.,* 347 A.2d 419 (Me. 1975) (upholding ordinance requiring removal of off-premises advertising signs after 10-month amortization period). Other courts across the country have repeatedly followed the same rule. *See generally* "Validity of Provisions for Amortization of Nonconforming Uses." 8 ALR5th 391, 412-22 (1992) (collecting cases). The basic rationale for upholding amortization provisions is that, even though they ultimately require that the use be terminated, they permit the owner "to recover all or part of the *value* of the property before the use is forbidden at the end of the [amortization] period." *Naegele Outdoor Advertising v. Durham*, 803 F.Supp. 1068, 1077 (N.D.N.C. 1992), *aff'd*, 19 F3d 11 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994) (emphasis added); *See also Modjeska Sign Studios, Inc. v. Berle*, 373 NE2d 255, 262 (NY 1977), *appeal dismissed*, 439 U.S. 809 (1978) ("As a general rule, most regulations requiring the removal of nonconforming billboards and providing a reasonable amortization period should pass constitutional muster.").

The authorities discussed above establish the principle that even an existing property use can be prohibited without offending the Takings Clause, so long as the owner is permitted to recoup a significant portion of the "value" of the property. This principle contradicts Appellant's position that he is entitled to financial compensation under the Takings Clause if he is prohibited from using the property for his preferred development use, regardless of whether the property retains significant value. Especially when, as in this case, the owner's basic goal all along has been to sell the property for value, so long as the owner can reap a significant portion of the property's value through a sale, there has been no taking.

III. NEITHER THE MAINE NOR THE U.S. CONSTITUTIONS SUPPORTS A PARTIAL TAKINGS ANALYSIS.

The Appellant also contends that, even if his "total taking" claim fails, he is entitled to pursue his takings claim based on a "partial" regulatory takings theory. More specifically, applying a two-tiered analysis, he contends that the trial court first had to determine whether the evidence supported a finding of a taking under *Lucas, supra*; if not, the court then had to determine whether there had been a "partial taking" of the property under *Penn Central, supra*, based on consideration of three factors, (1) the economic impact of the regulation; (2) the appellant's investment-backed expectations; and the (3) the character of the coastal law. We submit that,

even if this Court were to analyze this appeal using this two-tier analysis, there was no taking in this case and the appeal should be rejected.

But the more important long-term issue is whether the Appellant is correct in asserting that Maine's traditional "substantial diminution" test should be replaced with this proposed two-tier takings analysis. Appellant is requesting that this Court make a radical change in the State's regulatory takings doctrine. Neither the decisions of this Court nor the decisions of the U.S. Supreme Court have ever embraced the theory of a "partial" regulatory takings. Furthermore, other state and lower federal courts, almost without exception, have rejected this theory. Apart from precedent, this proposed test would ignore the original understanding of the Takings Clause, would be fundamentally unfair to Maine taxpayers, and would replace this Court's straightforward takings test with a vague and unprincipled standard which would make it impossible for the Maine courts to decide takings cases in a fair and predictable fashion. Accordingly, we submit, that the Court should reject this proposed change in Maine's regulatory takings doctrine and should affirm the straightforward "substantial diminution" test.

A. Both Maine and U.S. Supreme Court Precedents Support the Existence of a Single Basic Test for Evaluating Regulatory Takings Claims

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As discussed above, this Court has repeatedly addressed regulatory takings claims based on whether a regulation has a substantial adverse effect on the property's economic value. *See, e.g, Seven Islands Land Co. v. Maine Land Regulation Commission*, *supra*; *Hall v. Board of Environmental Protection, supra.* No Maine precedent of which we are aware suggests that, if a takings claimant fails to establish a case under the "substantial diminution" standard, he is entitled to a second bite at the apple based on an alleged "partial" diminution in value. Moreover, no Maine decision embraces the theory that *Penn Central* establishes a separate and entirely distinct test for regulatory taking. *Cf. Seven Islands Land Co. v. Maine Land Use Regulation Commission*, *supra* (citing *Penn Central* only to support the rule that a takings claim should be analyzed based on the "parcel as a whole" to determine whether a regulation has resulted in a substantial diminution in economic value).

Likewise, the U.S. Supreme Court's regulatory takings decisions demonstrate that a compensable taking will only be found if the regulation causes a substantial diminution in the property's economic value. *See Lucas, supra* (coastal regulation that renders property "valueless" effects a compensable taking). *See also United States v. Riverside Bayview Homes*, 474 U.S. 121, 126 (1985) (regulatory takings occur only in "extreme circumstances"). Consistent with this principle, the Supreme Court has emphasized that "our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993). Thus, under U.S. Supreme Court precedent, only regulations which eliminate all (or substantially all) economic value will result in a regulatory taking. The Court's recent, major takings decisions confirm that regulatory takings claims based on the alleged economic burden imposed by a regulation are governed by a single standard. *See, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd*, 119 S.Ct. 1624, 1634 (1999); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 312 (1987).

The actual outcomes of many U.S. Supreme Court takings cases confirm this rule. *Compare Lucas* (total elimination of value of two building lots effects a taking) and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (destruction of value of trade secrets results in a taking) *with Agins v. City of Tiburon*, 447 U.S. 255 (1980) (rejecting takings challenge to zoning restrictions which allegedly reduced property value by 85%); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (rejecting takings challenge based on 75% reduction in value); *Hadacheck v.*

Sebastian, 239 U.S. 394, 405 (1915) (rejecting takings challenge based on 92.5% reduction in value).

While the U.S. Supreme Court also has said that an owner's investment expectations are relevant in evaluating a regulation's economic impact, *see Penn Central*, the mere fact that newly enacted regulations interfere with investment expectations and make property less valuable does not mean a taking has occurred. As Justice Scalia said in *Lucas*, 505 U.S. at 1027, "the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." Similarly, in *Concrete Pipe & Products*, the Court said that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations..., [and] even though the effect of the legislation is to impose a new duty or liability based on past acts." 508 U.S. 602, 637 (1993) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976)).

In accord with the rule followed by the Maine Supreme Court and the U.S. Supreme Court, other state and lower federal courts also have generally concluded that only drastic impacts on property value are sufficient to support regulatory takings claims. *See. e.g., Stern v. Halligan,* 158 F.3d 729, 734 n.7 (3d Cir. 1998*)* (proof of a taking requires a showing of "the total destruction of value")*; Front Royal v. Town of Front Royal,* 135 F.3d at 286 (rejecting takings challenge where regulation caused "only" a 50% diminution in value, because "a regulatory deprivation that causes land to have 'less value' does not necessarily make it 'valueless'"). *See also* note 23 (discussing *Florida Rock*).

Appellants' argument that the *Penn Central* decision establishes an independent takings test is apparently based on the following language from the decision. After describing the Court's prior takings decisions, which it said rested on "essentially ad hoc, factual inquiries," the Court said:

[T]he Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by the government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

438 U.S. at 124. While these factors are undoubtedly relevant in takings cases, the *Penn Central* decision hardly supports the existence of a freestanding, "partial" regulatory takings test.

First, it is difficult to read *Penn Central* itself as establishing a free-standing regulatory takings test of any sort. The *Penn Central* Court did not attempt systematically to apply the three "significant" factors quoted above to evaluate whether or not there had been a taking in that case. Moreover, the Court discussed a whole variety of other factors which it apparently thought should be considered in the takings analysis, but which have little if any connection to the ostensible three-factor test. *See Id*. at 124-25, 135, 138. In short, *Penn Central* itself does not appear to actually articulate a separate takings test.

Second, while the U.S. Supreme Court has referred to the *Penn Central* factors in subsequent decisions, the U.S. Supreme Court has never said that the *Penn Central* decision established some kind of "partial regulatory" takings analysis. The *Penn Central* Court certainly never suggested the idea of a "partial" regulatory taking, and instead emphasized that only the most drastic types of regulatory restrictions could support a finding of a taking. *See* 438 U.S. at 130 (rejecting as "quite simply untenable" the argument that property owners "may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development"). Moreover, the adverse economic

impact at issue in *Penn Central* certainly was great (but still not sufficient to show a taking) than the purported 50% reduction in value (but 400% profit over investment) at issue in this case.

Finally, it is significant that the U.S. Supreme Court has *never* ruled in favor of a takings claim based on the ostensible three-factor test. Reviewing the relative handful of cases in which the U.S. Supreme Court has actually upheld a regulatory taking claim, each decision rests on the presence of some special factor, such as the fact that the regulation destroyed the value of the property, *see Lucas* (total elimination of value of coastal lots); *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1011-12 (destruction of economic value of trade secret); the fact that the regulation resulted in a physical occupation of private property, *see Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982) (forced occupation of private property by cable television equipment); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (exaction resulting in a physical occupation); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (same); or the fact that the regulation abrogated an especially fundamental property interest, *see Hodel v. Irving*, 481 U.S. 704, 716 (1987) (right to devise property). The closest the Court has come to finding a taking based on a straightforward application of the *Penn Central* test was in *Eastern Enterprises. v. Apfel,* 524 U.S. 498 (1998), in which a *plurality* of the Court, applying the *Penn Central* test, joined in a ruling striking down the Coal Act as unconstitutional; but a *majority* of the Court actually rejected the takings claim. The fact is that the U.S. Supreme Court has *never* applied the ostensible *Penn Central* three-factor test to support a finding of a taking.

The only U.S. Supreme Court case law Appellant cites in support of the ostensible "partial" takings test is Justice Scalia's opinion in *Lucas*. In responding to Justice Stevens' criticism that the "total taking" rule applied in *Lucas* would lead to the anomaly of awarding compensation to an owner who experiences a 100% loss in value when the owner who suffers a 95% diminution in value would get nothing, 504 U.S. at 1064, Justice Scalia stated in a footnote that Stevens was wrong to assume that the owner in the 95% case would necessarily get nothing. *See Id.* at 1018 n.8. (citing *Penn Central*). But, again, the *Lucas* Court certainly did not hold that *Penn Central* would apply in other than a *Lucas*-type case, and the Court has never applied *Penn Central* in any case to find takings liability. Justice Scalia's remark, rather than supporting the idea of two entirely distinct tiers of takings analysis, is most reasonably understood as recognizing the possibility that not only complete destruction, but also a substantial diminution of property value, can give rise to a takings claim. That interpretation of the Takings Clause is, of course, entirely consistent with the rule in this State. *Lucas* simply affirms the principle originally established in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and reaffirmed in *Penn Central*, and to which the Maine Law Court has long subscribed, that regulations that have a drastic adverse impact on property value will be deemed to have gone "too far."

B.Retaining A Single Basic Test for a Regulatory Taking is Supported by the Original Understanding of the Takings Clause, Fundamental Concerns About Fairness, and the Need for Coherent and Predictable Legal Rules.

Apart from precedent, the conclusion that regulatory takings claims are governed by a single basic "substantial diminution" standard is supported by the original understanding of the Takings Clause, fundamental concerns about fairness, and the need for coherent and predictable legal rules.

Original Understanding. Jurists and scholars of virtually all ideological persuasions agree that the drafters of the Bill of Rights originally intended the Takings Clause to apply only to direct physical appropriations, as the use of the word "take" suggests, and never intended the clause to apply to regulations under any circumstances. *See, e.g.*, *Lucas*, 505 U.S. at 1028 n. 15 (Scalia, J.) ("early constitutional theorists did not believe the Takings Clause embraced regulations of property at all"). *See generally* Hart, John "Colonial Land Use Law and its Significance for Modern Takings Doctrine," 109 *Harvard Law Review* 1252, 1292 (1996); Treanor, William Michael, "The Original Understanding of the Takings Clause and the Political Process," 95 *Columbia Law Review* 782

(1995). Notwithstanding the drafters' original understanding, it has been clear, at least since the U.S. Supreme Court's decision in *Pennsylvania Coal Co. v. Mahon*, *supra*, that the Takings Clause extends to certain regulations that go "too far." But, in keeping with the drafters' original intentions, the courts have only applied the Takings Clause to regulations with such drastic economic effects that they are the functional equivalent of the type of physical appropriation at the heart of takings doctrine. Thus, in *Lucas*, for example, the U.S. Supreme Court explained its ruling in favor of the takings claimant by pointing to the fact that the alleged taking in that case was, "from the owner's point of view, the equivalent of a physical appropriation." 505 U.S. at 1017 *See also Pennsylvania Co. v. Mahon*, *supra,* at 414 (Holmes, J.) (the issue in regulatory takings case is whether the regulation "has very nearly the same effect for constitutional purposes as appropriating or destroying it").

In sum, a single "substantial diminution" standard, by defining regulatory takings to include only those regulatory actions which are fairly analogous to confiscation, interprets the Takings Clause in a fashion which is supported by and respects the original intentions of the drafters of the Bill of Rights.

Fairness. The "substantial diminution" test also is justified by the fact that it properly takes into account the extent to which regulations and other government actions protect private property rights. It is well recognized that regulations support and enhance private property values, including the property values of owners who themselves are subject to regulation. In addition, all types public investments, in highways, sewage treatment facilities, schools and libraries, etc., support and enhance property values in the community. Because regulations and other government actions positively affect private property values, adoption of the "partial" regulatory takings theory would routinely result in unfair windfall payments to landowners at taxpayer expense. The established "substantial diminution" test avoids such unfair results.

The U.S. Supreme Court's regulatory takings decisions adopt the common sense view that the Takings Clause must be interpreted in light of how government actions actually affect property values in the real world. For example, in *Penn Central* the Court rejected the Penn Central Company's argument that it received no benefit from the City's historic landmark law, stating:

Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole -- which we are unwilling to do -- we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law.

438 U.S. at 134. To like effect, in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491 (1987), the Court said: "While each of us is burdened somewhat by [regulatory] restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." *See also Agins v. City of Tiburon*, 447 U.S. at 262 (observing that takings claimants "share with other owners the benefits and burdens of the city's exercise of its police powers"). Because regulatory restrictions (and other government actions) enhance the property values of all owners in the community, it is both fair and reasonable (as well as constitutional) to conclude that a regulatory taking only occurs when the alleged diminution in property value is "very substantial indeed." *Seven Islands Land Co. v. Maine Land Regulation Commission*, *supra,* at 482.

The positive effects of regulatory restrictions on property owners, including restricted landowners, are dramatically illustrated by this case. The Appellant paid $10,000 for the property and now, according to the findings of the trial court, the property has a fair market value *five times* that amount, even though the potential development uses of the property are severely restricted. It can fairly be inferred that a substantial portion of this increase in value is attributable to, among other things, Maine's sand dune regulations and their effectiveness in maintaining the Maine coast as an attractive place for investment. Under these circumstances, Appellant cannot reasonably contend that the Maine coastal law has affected him in a fundamentally unfair fashion.

Under Appellant's "partial" taking theory, he apparently contends that he is entitled to "compensation" from the public for the "lost" market and also to retain the property for resale to others based on its remaining market value. Appellant's Brief, at 34. In other words, Appellant believes he is constitutionally entitled to the entire fair market value of his property, regardless of the fact that a large portion of the value he claims entitlement to was actually created by the community, both through reasonable regulatory and taxpayer investment programs. The idea that the Takings Clause provides citizens protection from any and all fluctuations from market value as a result of regulation is not only grossly unfair to taxpayers, but it is inconsistent with any plausible reading of the Takings Clause. *See Keystone Bituminous Coal Assn v. DeBenedictis*, *supra*, at 491 ("Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property.")

Unpredictable/Incoherent Doctrine. Finally, this Court should reject Appellant's "partial" takings theory because it would destabilize regulatory takings doctrine in the State of Maine and make the doctrine completely unpredictable and unprincipled. The theory of regulatory takings liability that is untethered from the drafters' original focus on direct appropriations of private property has no principled limits. As a result, if a partial taking theory were adopted, neither Maine courts, state and local officials, nor interested citizens could predict with any degree of certainty whether or not a regulation might result in a taking. For this additional reason, the Court should affirm that the basic test for evaluating a regulatory taking claim is whether the regulation has a substantial adverse impact on the property's economic value.

CONCLUSION

For the reasons stated above, Amicus requests that this Court affirm the decision of the Superior Court finding that the Department of Environmental Protection's denial of the NRPA permit did not constitute a regulatory taking in violation of the Maine and U.S. Constitutions.

DATED at Falmouth, Maine this 22nd day of December, 1999.

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CERTIFICATE OF SERVICE

I, Jennifer Burns Cost, Esq., hereby certify that I have caused two copies of Maine Audubon Society's Amicus Curiae brief to be served on Margaret Bensinger McCloskey, Esq., counsel for Defendants-Appellees, and Kurt E. Olafsen, Esq., counsel for Plaintiff-Appellant, by depositing conformed copies thereof in the U.S. Mail, first class and postage prepaid, to the following addresses:

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