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Richard J. Grosso

David J. Russ, A.I.C.P.

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TAKINGS LAW IN FLORIDA: RAMIFICATIONS OF *LUCAS* AND *REAHARD*

RICHARD J. GROSSO*

DAVID J. RUSS, A.I.C.P.**

I. INTRODUCTION: REFLECTIONS ON TAKING CASES

The regulatory taking decisions announced last summer in *Lucas v. South Carolina Coastal Council*[1] and *Reahard v. Lee County*[2] illustrate again the importance and fascinating nature of the Takings Clause branch of land use law, especially for practitioners in a rapidly growing but naturally fragile state such as Florida.

The *Lucas* opinion is of major significance because it ends decades of speculation as to how the United States Supreme Court would rule on a harm preventing regulation that preempted all economically viable use of land. The case holds that the government adopting the regulation is liable for a taking unless the harmful use could have been proscribed under background property and nuisance law principles in effect when the owner acquired the property or made some other reasonable investment in the land.[3] The impact of *Lucas* on regulatory behavior is hard to predict because the law has not yet developed on what it will take to convince a court that a use truly could be prohibited under state common law. The scope of this impact will be narrowed, however, by the fact that it applies only in those exceptionally rare cases where property has no remaining economically viable use.

The *Reahard* decision is similarly important because, even though it contains no new pronouncements on takings law, it does apply existing doctrine to a fact intensive situation. It also addresses land use restrictions (very low density residential uses in wetlands areas) that are likely to be encountered by other local governments in

* Legal Director, 1000 Friends of Florida; B.A., 1983, Florida State University; J.D., 1986, Florida State University College of Law.

** Assistant General Counsel, Supervisor of Growth Management Attorneys, Florida Department of Community Affairs; B.A. 1975, University of South Florida; J.D. 1981, Florida State University College of Law.

1. 112 S. Ct. 2886 (1992).
2. 968 F.2d 1131 (11th Cir. 1992).
3. *Lucas*, 112 S. Ct. at 2901-02.

Florida. Its fact pattern manages to touch just about every significant issue in takings law analysis, including the nature of the regulation, parcelization, return on investment, and residual value, making it a valuable subject for study and a convenient opportunity to review the state of takings law in Florida generally.

Takings cases in general are fascinating because they always pit one mighty force in our society, the zeal to maximize commerce, profits and land values, against another, the need to have government limit land uses to protect or restore what is vital or dear to some segment of the citizenry.[4] They are important because they define the outer limits of legitimate regulatory control over our physical environment. Also, the clash of contemporary values inevitably evokes strong reactions from the courts and from the advocates on each side of the conflict.[5]

The *Lucas* and *Reahard* decisions will be intensely scrutinized and argued by the environmental and land use bar. Unlike cases in legal specialties where precedents are many and controlling principles are easily applied, takings cases usually hinge on an intensely ad hoc, factual inquiry[6] and depend on guidelines which remain very much blurred, oftentimes by deliberate choice of the court.[7] In fact, the continuing misty nature of takings cases through the decades led Charles Haar to comment: "The attempt to distinguish 'regulation' from 'taking' is the most haunting problem in the field of contemporary land-use law--one that we have encountered many

4. *See* Andrus v. Allard, 444 U.S. 51 (1979). In *Andrus* the Court unanimously upheld a federal law prohibiting trade in eagle artifacts, even those legitimately acquired prior to passage of the law, stating: "Suffice it to say that government regulation--by definition--involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property." *Id.* at 65.

5. Justice Blackmun in his dissent says the *Lucas* majority "launches a missile to kill a mouse." 112 S. Ct. at 2904. Justice Scalia, writing for the majority, labels Justice Blackmun's suggestion to remand the case "strange," 112 S. Ct. at 2892 n.5, accuses him of "mistaken citation of case precedent," 112 S. Ct. at 2893 n.6, and says his test for taking would amount to nothing more than seeing "whether the legislature has a stupid staff," 112 S. Ct. at 2898 n.12; *see also Viewpoints on the Lucas Decision*, 3 ENVTL. EXCH. PT. (Fla. Dep't Envtl. Regulation, October 1992); Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735 (1988); Frank I. Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600 (1988); Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

6. *See Reahard*, 968 F.2d at 1135 n.5 (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

7. The *Lucas* decision "disappointed those persons who hoped the Court would provide better guidance in a murky area of the law. Nonetheless, the significance of the case reaches beyond its ruling." Robert M. Rhodes & Cathy E. Sellers, Lucas*: Nuisance Redux is Nuisance Reduced*, 14 FLA. BAR ENVTL. & LAND USE LAW SECTION REP. 28, 28, No. 3 (August 1992). The case gave the Court "still another opportunity to bring some much needed clarity" but "raises more questions than it answers." Thomas G. Pelham, *The* Lucas *Decision: New Challenges for Land-Use Lawyers*, 16 ABA URB. ST. & LOCAL LAW NEWSLETTER 1, 1, No. 1 (Fall 1992).

times already, one that may be the lawyer's equivalent of the physicist's hunt for the quark."[8]

The scarcity of bright line rules makes every phrase and footnote in a fresh precedent the object of hasty vivisection by advocates working for and against stricter regulations. Almost inevitably, each side quickly discovers segments of each opinion that it may legitimately cite as authority for a conclusion in its favor.[9] Scrutiny of takings decisions is thus always, at the very least, an interesting legal exercise.

But the real world results reached in takings cases also must not be forgotten. These cases determine whether, in our delicate and increasingly dangerous world,[10] the general public, through its governments, may subordinate a property owner's investment and business decisions to protect the public health, wealth, and quality of life, without compensating that owner. By way of example, it probably is not too far fetched to say that a taking case may determine whether a developer in Collier County can fill mangrove wetlands for a new golf course community, even if it sets off an ecological chain reaction which, multiplied many times, ultimately puts a Panacea

8. Charles M. Haar, LAND-USE PLANNING 766 (3d ed. 1976), *cited in* Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 199 n.17 (1985) (Blackmun, J., concurring). A "quark" is "[a]ny of three hypothetical subatomic particles having electrical charges of magnitude one-third or two-thirds that of the electron, proposed as the fundamental units of matter. Also called 'ace.' [From a line in Joyce's *Finnegan's Wake*, 'three quarks for Mr. Marks.']" AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1068 (1973).

9. The *Lucas* case is a good example. While private property advocates celebrate the seemingly sound rejection of the Court's precedents on banning uses of property which pose a threat of harm to the public, *see* Robert M. Rhodes & Cathy E. Sellers, Lucas*: Nuisance Redux is Nuisance Reduced*, 14 FLA. BAR ENVTL. & LAND USE L. SEC. REP. 28 No. 3 (August 1992) (the decision represents "a moderate balance between competing interests engaged in the regulatory takings debate"), the *Lucas* opinion clearly says compensation is not required if the uses prohibited by the regulations "were also proscribed by 'background principles of the State's law of property and nuisance.'" Thomas G. Pelham, *The* Lucas *Decision: New Challenges for Land-Use Lawyers*, 16 ABA URB. ST. & LOC. L. NEWSL. 1 No. 1 (1992). Also, the *Lucas* opinion acknowledges that some regulations may safely deprive an owner of 95 % of the value of the owner's property. The majority stated:

> Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally. It is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full.

112 S. Ct. at 2895 (quoting Penn Central, 438 U.S. at 124). In other words, the owner of a $100,000 lot may have to absorb a $95,000 reduction in the value of the property for which the owner still retains a marginal use, while a neighbor collects in full for the total loss of use of a $20,000 lot.

10. No doubt the 1986 Chernobyl nuclear power plant accident in the former Soviet Union is the prototypical example of how a land use, itself not a nuisance, can nevertheless threaten the welfare of virtually the entire planet. *But see infra* note 34 and accompanying text.

shrimping family out of business. Another case may determine whether a local government must allow a house to be built on an oceanfront lot on a barrier island, even in the face of scientific proof that the houses become dangerous, wind driven missiles during a storm and that the construction of houses so alters the natural forces at work on the island that its geological purpose of protection of the mainland from storm surges is seriously compromised. These are the types of interests at stake when takings cases come before the court.

The *Lucas* case deserves special study because it interrupts a trend that saw lower courts, adjudicating whether a regulation had finally gone "too far,"[11] exhibiting a willingness to allow the legitimate extent of the police power to be a function of the progress legislative bodies have made in understanding our physical and economic surroundings and the interrelation of man made and natural forces. When the subject was the well-being of society in general, and natural resources in particular, this evolving judicial deference to legislatures was well under way in the early 1990s.[12] At least it was until the evolution was slowed by the 5-1-2-1 result in *Lucas*. As the first substantive taking decision since 1987,[13] the *Lucas* majority opinion rejects the legislative progress model and attempts to freeze certain concepts and assumptions about land use at the time an owner

11. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Prior to the *Pennsylvania Coal* decision, it was virtually impossible to win a takings case without proof of "direct appropriation" of property, Legal Tender Cases, 12 Wall. 457, 551 (1871), or the "practical ouster of [the owner's] possession." Transportation Co. v. Chicago, 99 U.S. 635, 642 (1879). *Pennsylvania Coal* has been cited well over 100,000 times. *See* Berger, *supra* note 5, at 738 n.21 (citing Richard G. Carlisle, *The Section 1983 Land Use Case: Justice Stevens and the Hunt for the Taking Quark*, 16 STETSON L. REV. 565, n.1 (1987)). Given the revolution it wrought, and the almost boundless leeway it left for the Court's interpretation of what was "too far," these few words of dicta by Justice Holmes must be among the most powerful ever uttered by a justice, even if neither Justice Holmes nor his contemporaries put much store in them. *See* Charles L. Siemon, *Of Regulatory Takings and Other Myths*, 1 J. LAND USE & ENVTL. L. 105, 112-13 (1985), in which the author proposes that Justice Holmes used the term "taking" in only a metaphorical sense.

12. *See, e.g.*, Barancik v. County of Marin, 872 F.2d 834, 837 (9th Cir. 1989) (density of one unit per 60 acres justified by need to protect agriculture); Adolph v. Federal Emergency Management Agency, 854 F.2d 732 (5th Cir. 1988) (restrictions on issuance of flood insurance did not constitute a taking); Elsmere Park Club v. Town of Elsmere, 771 F. Supp. 646 (D. Del. 1991) (building basement residences prohibited because of vulnerability to flooding); Stephans v. Tahoe Regional Planning Agency, 697 F. Supp. 1149 (D. Nev. 1988) (banning commercial uses and gaming in area renowned for its natural beauty); Lee County v. Morales, 557 So. 2d 652 (Fla. 2d DCA 1990) (banning commercial uses based on danger to resources on barrier island).

13. *See generally* David M. Callies, *New Paradigm Impacts Regulatory Takings*, ABA URB. ST. & LOCAL LAW SECTION NEWSLETTER, Vol. 14, No. 2 (1992); Salsich, *Life After the Takings Trilogy–A Hierarchy of Property Interests?*, 19 STETSON L. REV. 795 (1990). Another takings decision was issued two months before *Lucas* in Yee v. City of Escondido, 112 S. Ct. 1522 (1992), in which a mobile home park rent and lot control ordinance was unsuccessfully challenged as a physical taking; however, the issues were much more clear cut and the 9-0 decision by Chief Justice Rehnquist quite uncontroversial.

acquires title or makes improvements to property that is rendered valueless by a subsequent regulation.[14] The Court thus shifts the forum for deciding the wisdom and legality of restrictive but harm-preventing land use laws from legislative chambers to judges' chambers.[15] This marks a radical departure from the analysis performed in earlier cases.[16] It may also mark a significant enlargement of the role federal common law will play in determining the timing of the creation of certain rights in real property, an issue previously left to state law.[17]

This article discusses the decisions in *Lucas* and *Reahard* and analyzes their potential impact on takings law and governmental decision making in Florida. The article concludes that *Reahard* should reassure governments that sensitive lands may be limited to very low-intensity uses. On the other hand, *Lucas* will continue to be a puzzler but will, until clarified, be of little behavioral effect due to its limited reach.

II. THE SUPREME COURT'S LATEST WORD: MR. LUCAS' BARRIER ISLAND LOTS

A. Facts

Developer David Lucas paid nearly $1 million in 1986 for two oceanfront lots on the Isle of Palms, located about two miles east of Charleston off the coast of South Carolina. He and others began extensive residential development of the island in the late 1970s. However, the two lots at issue, intended for two single-family residences, were purchased for Lucas' "own account."[18]

In 1977 South Carolina passed a law requiring a permit from the South Carolina Coastal Council before altering existing land uses in a "critical area," defined to include beaches and immediately adjacent sand dunes.[19] However, Lucas' lots were 300 feet seaward of this

14. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2921 (1992), where Justice Stevens says: "Arresting the development of the common law is not only a departure from our prior decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution--both moral and practical."

15. *See infra*, notes 104 to 142 and accompanying text.

16. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Mugler v. Kansas, 123 U.S. 623 (1887).

17. *See infra* text accompanying notes 55, 56.

18. *Lucas*, 112 S. Ct. at 2889 (1992).

19. See S.C. CODE ANN. § 48-39-10 (Law. Co-op. 1987). Florida passed a similar law in 1970 which, based upon a finding that "unguided development of . . . beaches and shores coupled with uncontrolled erosive forces are destroying or substantially damaging many miles of our valuable beaches each year," prohibited the construction of a habitable structure (or incidental use) within 50 feet of the line of the mean high water along the coast (presumed to be the

line. The South Carolina legislature stepped up its coastal protection program in 1988 by adopting the Beachfront Management Act (Act).[20] The Act was based on findings that development too close to the water jeopardized the beach/dune system, accelerated erosion, and endangered adjacent property.[21] It established a line landward of the forty-year erosion line and prohibited the construction of habitable structures seaward of that line, allowing only decks, walkways, and similar structures.[22] Unfortunately for Mr. Lucas, the erosion control line ended up completely landward of his lots. Since the 1988 Act allowed for no exceptions, he sued. Legislation adopted after the state supreme court had heard the case authorized the issuance of "special permits" in certain circumstances.[23]

The evidence at trial showed unusually frequent sales of, and rapidly escalating prices for, the two lots. One was bought for $96,000 in 1979, sold for $187,000 in 1984 (a ninety-five percent increase over five years), sold for $260,000 in 1985 (a thirty-nine percent increase in one year), and sold for $475,000 to Lucas in 1986 (an eighty-three percent increase in one year). The other lot had a similar history.[24] Therefore, a lot escalated in value by more than 490 percent over twelve years, or an average of about forty-one percent per year,[25] and was alleged to be worth $650,000 in 1991 (another thirty-seven percent increase), only two years after Hurricane Hugo killed twenty-nine people and caused $6 billion in property damage along South Carolina's coast.[26]

The trial court found that Lucas' lots were "valueless" because the Beach Management Act deprived him of "any reasonable economic use" and "eliminated the unrestricted right of use," and awarded

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erosion control line) without a permit from the Florida Department of Natural Resources. Ch. 70-231, 1970 FLA. LAWS 674.

20. S.C. CODE ANN. § 48-39-25 (Law. Co-op. Supp. 1992).

21. *Id.* § 48-39-250(4).

22. *Id.* § 48-39-290(4). Florida law provides a similar erosion line based on 30 years, FLA. STAT. § 161.053 (1991), but allows exceptions by variance. The reason such lines are important to the public interest is that coastal beaches and dunes are constantly changing systems, eroding and accreting over time. Interference with these systems through development can "jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or interfere with public beach access." *Id.* § 161.053(1)(a). In hurricanes, beachfront buildings are destroyed, are driven "like battering rams" into adjacent upland homes, and often destroy the natural sand dune barriers that provide storm breaks. *See* Natasha Zalkin, *Shifting Sands and Shifting Doctrines: South Carolina's Coastal Zone Statute*, 79 CAL. L. REV. 205, 212-13 (1991) (cited by Lucas v. South Carolina Coastal Council, 112 S. Ct. 2866, 2904 n.1 (1992) (Blackmun, J., dissenting)).

23. *Lucas*, 112 S. Ct. at 2891.

24. *Id.* at 2905 n.3.

25. This was at a time when the rate of inflation for housing was rising at an annual rate of approximately 4.5%. INFORMATION PLEASE ALMANAC 43 (44th ed. 1991).

26. *Lucas*, 112 S. Ct. at 2905 n.3.

damages in excess of $1.2 million.[27] This was so even though under South Carolina law, as under Florida law, the simple act of purchasing these two platted lots, which conformed to zoning regulations in effect at the time of purchase, did not create development rights for Lucas or guarantee a perpetual right to develop according to that zoning.[28] The South Carolina Supreme Court reversed, ruling that the compelling nature of the regulation, preventing the destabilization of shorelines and damage to lives and property, outweighed the economic impact to the property owner.[29]

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27. *Id.* at 2890. In a bit of understatement the majority opinion issued by the Supreme Court characterizes the 1988 law as having a "dramatic effect on the economic value of Lucas's lots." *Id.* at 2889. The "valueless" finding was later attacked with great gusto by the four Supreme Court justices who did not join the majority opinion. Justice Kennedy called this "a curious finding," *id.* at 2903; Justice Blackmun said "implausible," *id.* at 2904; Justice Stevens opined that the land was "far from 'valueless,'" *id.* at 2919 n.3; and Justice Souter blasted the finding as "highly questionable," *id.* at 2925.

28. *See* Friorsgate, Inc. v. Town of Irmo, 349 S.E.2d 891 (S.C. 1986). This is consistent with Florida case law. *See, e.g.*, Smith v. City of Clearwater, 383 So. 2d 681 (Fla. 2d DCA 1980).

29. South Carolina Coastal Council v. Lucas, 404 S.E.2d 895 (S.C. 1991), *rev'd*, 112 S. Ct. 2886 (1992). The South Carolina legislature's findings about the Beachfront Management Act included the following:

> The General Assembly finds that:
>
> (1) The beach/dune system along the coast of South Carolina is extremely important to the people of this State and serves the following functions:
>
> (a) protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner;
>
> (b) provides the basis for a tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of the state's economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues;
>
> (c) provides habitat for numerous species of plants and animals, several of which are threatened or endangered. Waters adjacent to the beach/dune system also provide habitat for many other marine species;
>
> (d) provides a natural health environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being.
>
> (2) Beach/dune system vegetation is unique and extremely important to the vitality and preservation of the system.
>
> (3) Many miles of South Carolina's beaches have been identified as critically eroding.
>
> (4) . . . [D]evelopment unwisely has been sited too close to the [beach/dune] system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development.
>
> (5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proven effective. These armoring devises have given a false sense of security to beachfront property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.

It found that no compensation was due under authority of *Mugler v. Kansas*,[30] because the Beachfront Management Act had the primary purpose of preventing a nuisance or harm to the public in the form of unwise coastal development.[31] On June 29, the last day of the Spring 1992 term, the U.S. Supreme Court released its decision reversing and remanding the case.

B. The Majority Opinion

The majority opinion was written by Justice Scalia and joined by Chief Justice Rehnquist and Justices White, O'Connor, and Thomas. Justice Kennedy filed a concurring opinion. Justices Blackmun and Stevens dissented. Justice Souter filed a separate "statement."

As a threshold matter, Justice Scalia's majority opinion held that the amendment to the Beachfront Management Act, subsequent to the trial court's decision, which allowed special permits to be granted for construction seaward of the control line, did not make Lucas' claim unripe, even though he never applied for such a permit.[32] This position was seemingly inconsistent with prior takings precedent, which insisted on "knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it."[33] It was explained, however, by the fact that the subsequently adopted variance procedure could not have eliminated any temporary taking that occurred prior to its adoption.[34]

> (6) Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.
>
> * * *
>
> (8) It is in the state's best interest to protect and to promote increased public access to South Carolina's beaches for out-of-state tourists and South Carolina residents alike.

S.C. CODE ANN. § 48-39-250 (Law. Co-op. Supp. 1991).

30. 123 U.S. 623 (1887).

31. *Lucas*, 404 S.E.2d at 906.

32. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2890-91 (1992).

33. *Id.* at 2891 (quoting MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986)).

34. *Lucas*, 112 S. Ct. at 2890-92. Justice Kennedy accepts this notion because "whatever may occur in the future cannot undo what has occurred in the past." *Id.* at 2902. Justice Blackmun notes that Mr. Lucas could have challenged the placement of the control line. *Id.* at 2907. Justice Stevens says it is not clear he has a viable "temporary takings" claim because his only injury may have been "the temporary existence of the absolute statutory ban on construction." *Id.* at 2917. Justice Souter said that by proceeding, "the Court cannot help but assume something about the

The *Lucas* opinion went on to describe the two discrete categories of regulatory actions that in past cases had been deemed to require compensation without case specific inquiry into the public interest advanced in support of the restraint. The first includes regulations that compel the physical invasion of property. In such cases, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it," compensation has been required.[35] The second situation is that in which regulation denies all economically beneficial or productive use. Citing *Agins*,[36] *Nollan*,[37] *Keystone Bituminous Coal*,[38] and *Hodel*,[39] the Court stated that "the denial of all economically beneficial or productive use" standard is a long established rule it saw no need to repudiate.[40] In a key footnote to the opinion, the Court stated:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use rule" is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in the tract as a whole.[41]

Justice Scalia decried the lack of precision in prior Court pronouncements on the subject of exactly *what* interest had to be taken away to establish a constitutional violation in order to satisfy the test for an actionable deprivation. The sloppy interchange of phrases such as "economically viable use,"[42] or an inability to derive "economic benefit" from property,[43] has vexed land use attorneys for many years. Unfortunately, having drawn attention to the serious nature of the problem, Justice Scalia then exacerbates it, as pointed out in an article by Thomas G. Pelham:

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scope of the uncertain concept of total deprivation, even when it is barred from explicating total deprivation directly." *Id.* at 2925.

35. *Lucas*, 112 S. Ct. at 2893 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

36. Agins v. City of Tiburon, 447 U.S. 255 (1980).

37. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

38. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

39. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

40. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2866, 2893-94 (1992).

41. *Id.* at 2894 n.7.

42. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

43. Andrus v. Allard, 444 U.S. 51, 66 (1979).

> Justice Scalia uses more than twenty different phrases--e.g., "all economically beneficial or productive use," "economically viable use," "all economically valuable use," "all economically feasible use," "economically idle"--to describe the regulatory result that will trigger the new categorical rule. One searches the majority opinion in vain for any meaningful explanation of the concept. Consequently, state and lower federal courts will have to wrestle with this critical definitional issue.[44]

The Court went on to state that the uncertainty of this test has produced inconsistent pronouncements by the lower courts, but suggested that:

> The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property--i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.[45]

The majority announced that it was simply reaffirming a prior rule that, when the owner of property is called upon to sacrifice all value in the property, the owner has suffered a taking.[46] In a footnote, the Court stated that the categorical rule it reaffirms with this opinion does not supplant the existing general rule that the economic impact of regulation is only one factor in takings analysis.[47] In other words, the Court says that a complete elimination of value is not absolutely required for a taking; lesser diminutions can be deemed to be a taking, depending on the traditional ad hoc analysis performed by the courts.

The Court did state that, at least in some cases, a landowner with a ninety-five percent loss will not be compensated.[48] It thus suggested that there will be situations where an owner whose valuable property is regulated heavily but not rendered valueless will receive no compensation, while another person who suffers less diminution in value but whose less valuable property has been appropriated by the government will receive full compensation for the reduction in value.[49]

The majority sidestepped Justice Stevens' dissenting criticism that the opinion assumes that the only uses of property under the

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44. Thomas G. Pelham, *The* Lucas *Decision: New Challenges for Land-Use Lawyers*, 16 ABA URB. ST. & LOC. L. NEWSL. 1, 14 (1992).

45. *Lucas*, 112 S. Ct. at 2894 n.7.

46. *Id.* at 2895.

47. *Id.* at 2895 n.8.

48. *Id.*

49. *Id.*

constitution are development uses, stating that "there are plainly a number of non-economic interests in land whose impairments will invite scrutiny under the Takings Clause."[50] In other words, the opinion suggests that only a single strand of an owner's rights may be the focus of a takings claim, and a taking may occur even if the interest regulated or prohibited is not one in the actual development of land. The Court did not, however, squarely address the issue of what happens when some use of land is allowed other than the development of that land, such as the use of the land for farming, hunting, passive recreation, or camping.[51] Rather, by implicitly questioning the conclusion that South Carolina's ban on the construction of single-family homes did in fact render Lucas' oceanfront beach lots completely valueless, the Court suggested that a residual, remaining fair market value in a regulated parcel may lead to a finding that no taking has occurred, regardless of what portions of the property are producing that value.[52]

The most important and most radical aspect of the *Lucas* opinion is the way in which it severely limits the application of the "prevention of harm" versus "conferring of benefit" analysis that had been used in recent takings cases. This analysis, based on *Mugler v. Kansas*[53] and its progeny, had reached the point where it would allow a regulation to stand, even if it arguably rendered property valueless, if it was designed to prevent and did prevent a harmful use, as opposed to conferring a benefit on the public at the expense of the private property owner.[54] Finding this distinction difficult to determine objectively, and thus subject to the whim of legislative bodies at the behest of the public, the Court ruled that regulations that wholly eliminate the value of land cannot otherwise be upheld merely because they are designed to prevent a harmful use.[55] The court stated:

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50. *Id.*

51. Rather ominously, the Court does say that regulations that have the effect of "requiring land to be left substantially in its natural state–carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.* at 2895 (citations omitted).

52. Justice Scalia seems to enjoy the dissent being stuck with the rather incredible finding by the trial court that lots appraised at $600,000 each suddenly plunge to a value of zero when habitable structures are prohibited on them. At one point he said he would decline to entertain the argument about value since value was the "premise" of the petition for *certiorari*. *Id.* at 2896 n.9. The majority opinion somewhat disingenuously points out the South Carolina trial court's finding that the lots are "valueless," *id.* at 2890, and comments on the Act's "dramatic effect on the economic value" of the lots, *id.* at 2889.

53. 123 U.S. 623 (1887).

54. The closest the modern Supreme Court came to enunciating this doctrine as part of the constitutional law of taking was its decision in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). *See id.* at 513-14 (Rehnquist, C.J., dissenting).

55. *Lucas*, 112 S. Ct. at 2898-99.

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.[56]

The Court rejected the argument that title to land is held subject to the implied limitation that the state may subsequently eliminate all economically viable use, saying:

> Any limitation so severe [as to prohibit all economically beneficial use] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts--by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[57]

Under *Lucas*, therefore, the enforcement of state or local legislation that was not in place at the time the property was acquired, which prohibits activities that could not be prohibited by background principles of property law or nuisance, and which deprives an owner of all economically viable use of land, will be deemed to be a regulatory taking. Left unresolved, however, is the effect of "background principles of the law of property or nuisance" in which a state, like Florida, has recognized by judicial doctrine that the legislature has the power to change the meaning of nuisance based on changing knowledge and conditions.[58] Also unresolved is the effect of a state nuisance statute, like Florida's, that creates a cause of action to abate nuisances but does not specify what sort of conduct or use will be deemed a nuisance.[59] These are rather obvious omissions in the extensive discussion of nuisances in the *Lucas* majority opinion, omissions that will no doubt bedevil advocates for stricter government land use regulations, especially since liability now exists for temporary takings of property.[60]

By way of illustration, however, the Court stated that the denial of a permit to place landfill in a lake bed that would have the effect of

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56. *Id.* at 2899 (footnote omitted).

57. *Id.* at 2900 (footnote omitted).

58. *See infra* notes 143 to 190 and accompanying text.

59. FLA. STAT. § 60.05 (1991).

60. *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).

flooding other people's land would not be a taking.[61] Nor would a government regulation prohibiting a nuclear generating plant in an area that sat astride an earthquake fault be a taking.[62] According to the Court, in these examples the use of the properties for purposes that are now expressly prohibited by positive law was "always unlawful."[63]

This dicta might be read to suggest that if an activity had not been understood well enough in the past to be deemed harmful and prohibitable under a state's background principles of common law property and nuisance,[64] the state would be precluded from later acting upon new information or understandings and implementing statutory changes. On the other hand, the Court's use of nuclear generating plants as an example is somewhat encouraging in a curious way. Since the development of such plants has occurred only in the last thirty years,[65] it is doubtful that there is much common law in any state that expressly addresses them.[66]

The most logical interpretation of the nuclear plant example is that "nuisances" would not be restricted to only those uses or activities specifically found to be a common law nuisance by a state court prior to the purchase of the property, but would also include those things which could be deemed a nuisance today by a court legitimately applying the factors and criteria established by prior state case law or the type of legislation used for establishing and stopping a nuisance. This optimistic interpretation appears to be reasonable, since the Court said:

> The "total taking" inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities . . . the social value of the activities and their suitability to the locality in question . . . and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners)

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61. *Lucas*, 112 S. Ct. at 2900. Leave it to Justice Scalia to propose filling up a lake. *See* J. William Futrell, *The Ungreening of the Court*, 19 ENVTL. & URB. ISSUES No. 3, 1 (1992).

62. *Lucas*, 112 S. Ct. at 2900.

63. *Id.* at 2900-01. The factual basis for Justice Scalia's assertion that the use of land to erect a nuclear generating plant astride an earthquake fault "was always unlawful" is unknown. The authors of this article are unaware of any law making such a use *per se* unlawful.

64. Perhaps something like an asbestos operation that released fibers into the air off-site.

65. The first full scale use of nuclear fuel to produce electricity occurred in the United Kingdom in 1956, albeit for a small customer base (part of a university). Commercial nuclear power did not come to the United States until almost a decade later. INFORMATION PLEASE ALMANAC 538 (44th ed. 1991).

66. The authors have utilized ordinary and extraordinary means to discover precedent on the issue of the applicability of state law to nuclear plants, all to no avail.

> alike. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (*though changed circumstances or new knowledge may make what was previously permissible no longer so*) . . . So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.[67]

Nevertheless, the Court found it unlikely that common law would prevent erection of "habitable structures or productive improvements" because, according to the majority, the common law rarely allows prohibiting the "essential use" of land, although the "question, however, is one of state law to be dealt with on remand."[68] The Court held that, on remand, South Carolina must identify background principals of nuisance and property law that prohibit the uses Lucas now intends.[69] Only on this showing, stated the Court, can the state fairly claim that, in proscribing all such beneficial uses, it is taking nothing.[70]

The South Carolina Supreme Court's judgment was reversed and the cause remanded to the state to determine whether or not the common law of South Carolina would have prohibited the erection of any habitable structures on Mr. Lucas's property, which--as noted above--the Court deemed unlikely.

C. *Justice Kennedy's Concurrence*

As previously noted, Justice Kennedy's concurring opinion characterized as "curious" the state trial court's finding that the

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67. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901 (1992) (citations omitted; emphasis added).

68. *Id.* at 2901. The case cited for the "essential use" proposition, Curtin v. Benson, 222 U.S. 78 (1911), is unusual because of its age and its facts. Curtin was a rancher who owned land within the boundaries of the Yosemite National Park on which he regularly grazed his cattle. Benson was the park superintendent (an army officer) given the thankless task of enforcing regulations that prohibited Curtin from crossing other people's land or using his own land for grazing. The Court was convinced that the regulation prevented a "legal and essential use," one which helped "make up [the land's] value." *Curtin*, 222 U.S. at 86. The Court said taking away this use was "practically to take his property." *Id.* The *Curtin* case is cited in Justice Rehnquist's dissent in Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 145 (1978), and his dissent (joined in by Justice Scalia) in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 512 (1987). The citation of the *Curtin* case may, therefore, be significant to the *Lucas* majority and a harbinger of an expanding view of what are "essential uses," since the case does not mesh well with the precedent that no owner is guaranteed the highest and best use of his or her property. *See Penn Central*, 438 U.S. at 131.

69. *Lucas*, 112 S. Ct. at 2901. Indeed, one remand, the South Carolina Supreme Court found that the state's common law did not prohibit all construction on Mr. Lucas' lots and remanded the case for an assessment of "the actual damages Lucas has sustained as the result of his being temporarily deprived of the use of his property." Lucas v. South Carolina Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992).

70. *Id.* at 2901-02.

property had no significant market value or resale potential.[71] Justice Kennedy shared the reservations of some of his colleagues about a finding that a beachfront lot loses all value because of a development restriction. This strongly suggests that courts should not presume that a ban on the construction of a single-family dwelling completely eliminates all market value in coastal property.

In Justice Kennedy's view, reasonable expectations must be understood in light of the whole of our legal tradition. He wrote:

> The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source.[72]

Justice Kennedy agreed with the majority that nuisance prevention accords with the most common expectations of property owners who face regulation, but did not believe this could be the sole source of state authority to impose severe restrictions. He stated: "Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit."[73]

Justice Kennedy opined that the South Carolina Supreme Court erred in reciting the general purposes for which the regulations were enacted without a determination that they were in accord with the owner's reasonable expectations and therefore sufficient to support severe restrictions.[74] In his view, the promotion of tourism, for instance, was not sufficient to deprive specific property of all value.[75]

> "Furthermore, the means as well as the ends of regulation must accord with the owner's reasonable expectations. Here, the State did not act until after the property had been zoned for individual lot development and most other parcels had been improved, throwing the whole burden of the regulation on the remaining lots."[76]

71. *Id.* at 2903.
72. *Id.* at 2903 (Kennedy, J., concurring; citation omitted).
73. *Id.*
74. *Id.*
75. *Id.* at 2904.
76. *Id.*

D. The Dissents

Justice Blackmun authored a dissenting opinion which began: "Today the Court launches a missile to kill a mouse."[77] Justice Blackmun strongly criticized the trial court's finding that the restriction had left Mr. Lucas' property valueless and stated that the Court should have reached a result less sweeping and more confined to the narrow facts of the case. He also argued that the case was not ripe because Lucas never took advantage of the statutory process that would have allowed him to challenge the setback lines, the baseline, or the erosion rate applied to his property--even though he had argued at trial that his land was perfectly safe to build on and that he had studies to prove it.[78]

Justice Blackmun suggested that, on remand, the South Carolina courts would be free to reconsider the issue of whether all economical use of the land had been precluded. He cited to various state court opinions that have recognized that land has economic value where the only residual uses are recreation or camping.[79] Justice Blackmun expressed concern with the narrowness of the interests that states may regulate under the nuisance exception. Based on the Court's reference to common law background principles, he stated that legislative determinations would not be sufficient to uphold nuisance restrictions.[80] He pointed to *Mugler v. Kansas*,[81] *Miller v. Schoene*,[82] and *Pennsylvania Coal*[83] as cases where the Court upheld legislative prohibitions of activities that had previously been lawful.[84] Justice Blackmun argued that the majority opinion altered long standing precedent that had deferred greatly to legislative determinations of the need to remedy the existence or threat of activities deemed to be harmful to the public.[85]

Justice Blackmun found great fault with the majority's establishment of a categorical "takings" rule when the one absolute statement which could previously have been gleaned from prior opinions was that there was no set formula involved in takings jurisprudence.[86] He noted that, as recently as *First English*,[87] the

77. *Id.* (Blackmun, J., dissenting).
78. *Id.* at 2906.
79. *Id.* at 2908.
80. *Id.* at 2910-13.
81. 123 U.S. 623 (1887).
82. 276 U.S. 272 (1928).
83. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
84. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2910-13 (1992).
85. *Id.* at 2911-13.
86. *Id.* at 2911.
87. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).

Court had remanded a case for a consideration of whether, even if it denied all beneficial use, the challenged floodplain ordinance could be justified as a safety measure.[88] On remand, the California court found no taking, in part because the regulation "involves this highest of public interests--the prevention of death and injury".[89]

Justice Blackmun also argued that discarding the public harm/benefit distinction in favor of the common law nuisance test would provide no greater certainty or predictability due to the subjective nature of nuisance law. He was critical of the lack of historical basis for the Court's ruling and discussed the concept of the state's authority over private property as it existed during colonial times. Justice Blackmun argued, by reference to 19th century cases and commentary thereon, that the Takings Clause had historically been intended and assumed to apply only to direct physical takings of property and protected possession, not value.[90]

Justice Stevens' dissent also found precedent for the majority opinion lacking. He wrote that, although prior dicta had said that regulation was a taking *if* it denied all economically viable use, the Court's actual rulings had rejected any such absolute position.[91] "In my opinion, a categorical rule as important as the one established by the Court today should be supported by more history or more reason than has yet been provided."[92] Justice Stevens, like Justice Blackmun, found the ruling contrary to *Mugler*, and its line of cases, wherein the prohibition of legislatively determined nuisances was not found to be a taking. According to him, the majority opinion "effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property."[93]

Quoting an 1877 case for the proposition that "the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time,"[94] Justice Stevens expressed a fear that the majority decision represented a return to the *Lochner*[95] era of judicial restriction of legislation affecting common law rights and cited the evolving understanding of endangered species, wetlands, and the vulnerability of coastal lands as requiring the further development of "our evolving understanding of property

88. *Lucas*, 112 S. Ct. at 2911.

89. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2911 n.10 (1992) (quoting First Lutheran Church v. Los Angeles, 258 Cal. Rptr. 893, 904 (1989), *cert. denied*, 493 U.S. 1056 (1990)).

90. *Lucas*, 112 S. Ct. at 2915.

91. *Id.* at 2920 (Stevens, J., dissenting).

92. *Id.*

93. *Id.* at 2921.

94. *Id.* at 2921 (quoting Munn v. Illinois, 94 U.S. 113 (1877)).

95. Lochner v. New York, 198 U.S. 45 (1905).

rights."[96] In the absence of an opportunity for that kind of evolution, Justice Stevens predicted uncertainty for public policy makers and the establishment of the equivalent of a form of insurance for landowners against future exercises of the police power.[97] Stevens criticized the majority for establishing an analysis which excludes consideration of one of the three factors the Court had previously used to determine the takings issues: the character of the governmental regulation, which had often been characterized as the most critical factor,[98] had previously been weighed against the landowner's investment-backed expectations and the economic impacts. The *Lucas* majority had focused exclusively on the latter two factors; it focused on the "nuisance" requirement not so much to establish that the governmental purpose must be very important where there is great individual financial hardship, but to give weight to what the landowner thought he or she could do at the time of purchase. According to Justice Stevens, the comprehensiveness of and scientific basis for the regulation were lost in this analysis.[99]

E. Justice Souter's Statement

Justice Souter also criticized the majority for erroneously assuming that the regulations deprived the owner of his entire economic interest in the lots.[100] He described the "valueless" assumption as being "questionable as a conclusion of Fifth Amendment law and sufficient to frustrate the Court's ability to render certain the legal premises on which its holding rests."[101] He noted that the Court could not squarely address the question of what constituted total deprivation of use in the case because of this faulty conclusion and recommended dismissing the writ of *certiorari* as being improvidently granted and awaiting the opportunity to face the total deprivation question squarely before rendering an opinion.[102] He concludes by pointing out that nuisance laws are almost always directed at conduct, leaving the owner who stops the nuisance other economically viable uses of his or her property.[103]

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96. *Lucas*, 112 S. Ct. at 2921-22.
97. *Id.* at 2922.
98. *Id.* at 2922-23.
99. *Id.* at 2925.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 2926.

F. Lucas' *Activism*

Before proceeding to a discussion of the applicable background principles of Florida law to which the majority opinion will be applied, it is worthwhile to pause to examine the ramifications of Justice Scalia's conservative brand of judicial activism in favor of private property rights at the expense of governmental powers. This may help explain some of the less compelling parts of the majority opinion. The short shrift the majority gives to arguments by Justices Blackmun,[104] Stevens,[105] and Souter[106] that the *Lucas* case was not ripe for adjudication (Justice Blackmun calls it a "willingness to dispense with precedent in its haste to reach a result")[107] is only one indicator of this approach.[108]

When Justice Scalia was appointed to the Court in 1986, those who favored strong state and local governments were hopeful that he would side with them on issues involving the application of federal law.[109] But he quickly saw the Court's review of Fifth Amendment limitations on government powers as "a standing invitation to conservative judicial activism."[110]

This activism was initially revealed in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[111] in which Justice Scalia joined five other justices in finding a right to monetary damages for temporary takings. The case involved an ordinance adopted by the County of Los Angeles which prohibited construction on a church campground located in a canyon that had experienced a disastrous flood.[112] The church sued for damages, alleging that the prohibition denied it all use of the property.[113] As was the prevailing view of the law at that time, the California court held that no compensation was due unless the government insisted on enforcing the regulation, even after it had been found unconstitutional.[114] Similar cases before the Supreme Court had been dismissed for lack

104. *Id.* at 2906-09.
105. *Id.* at 2917-18.
106. *Id.* at 2925.
107. *Id.* at 2909.
108. *See* Stewart A. Baker & Katherine H. Wheatley, *Justice Scalia and Federalism: A Sketch*, 20 URB. LAW. 353 (1988).
109. *Id.* at 353.
110. *Id.* at 356. Typically, Justice Scalia joined justices Rehnquist, Powell, and O'Connor in the dissent in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), the last takings case decided in government's favor.
111. 482 U.S. 304 (1987).
112. *Id.* at 307-08.
113. *Id.* at 308.
114. *Id.* at 309.

of finality.[115] The majority, however, "swept procedural questions aside and moved quickly to the merits,"[116] finding that a temporary taking was compensable under federal law.

Justice Scalia then authored the majority opinion in *Nollan v. California Coastal Commission*,[117] where the owners of beachfront property applied to the Commission for a permit to replace an existing structure with a new, larger house. The Commission granted the permit on the condition that the Nollans grant the public an easement to pass along the area parallel to the seawall at the back side of their lot, not laterally across their property from the public road to the water.[118] Justice Scalia's opinion made plain that he thought the Commission was using its regulatory power to wring from the Nollans an interest in their property without compensation and concluded that the lack of nexus between the easement requirement and the impact of the new building was the regulatory equivalent of the physical invasion of property that would always be adjudicated a taking.[119] The authors of one article on Justice Scalia's conservative brand of judicial activism have observed:

> Justice Scalia is not always so skeptical about the motives of state and local government. His *Nollan* opinion, for example, contrasts sharply with his defense of Louisiana's 'creation science' law; there he accepted at face value state legislators' assurances that they had only secular purposes in mind when they enacted a law mandating equal time in school for the biblical view of creation.
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> * * *
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> Whatever else they may suggest, the takings cases show that Scalia is hardly a defender of governmental authority across the board. For property owners, at least, he is willing to expose state and local governments to substantial new liabilities.[120]

The *Lucas* majority opinion embodies Justice Scalia's activism in yet another area, where he is willing to use the federal courts to create new rights for property owners under federal common law. Traditionally, federal courts have looked to state law to establish

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115. *See, e.g.*, MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

116. *See*, Baker & Wheatley, *supra* note 108 at 358. On remand the California Court of Appeals found that no compensable taking had occurred because the property could still be used for activities such as cooking meals, teaching, and pitching tents. First English Evangelical Church v. County of Los Angeles, 258 Cal. Rptr. 893 (1989), *cert. denied*, 493 U.S. 1056 (1990).

117. 483 U.S. 825 (1987).

118. *Id.* at 828-29.

119. *Id.* at 834.

120. Baker & Wheatley, *supra* note 108 at 359 (citing Edwards v. Aguillard, 482 U.S. 578, 611 (1987) (Scalia, J., dissenting)).

property rights, typically in employment cases where the right to a job and due process are at stake.[121] If state law created no protectable interest in property, the deprivation of that property created no federal question.[122]

Before *Lucas*, the Supreme Court stated on several occasions that the Fifth Amendment protected only those property interests recognized by state law and that the federal constitution did not define or create these property rights; they were created by state law.[123] "State law creates and defines the parameters of a plaintiff's property interest,"[124] and a "[m]ere abstract need or desire for a benefit will not create a protectable property interest; instead there must be a legitimate claim of entitlement to the expected benefit."[125] Ever since the Court's opinion in *Pennsylvania Coal*, the idea of distinct, investment-backed expectations based upon common law concepts of vested rights and equitable estoppel has been at the core of federal court decisions finding that property rights are implicated in certain government actions.[126] As stated by one court, "state law determining when a right vests such that a property right is recognized is crucial to ascertaining whether there has been . . . a taking of property."[127]

The possession of rights to a certain type of property under state law has been part of the Supreme Court's test that, before a taking will be found, it must be demonstrated that the complaining party had distinct and reasonable investment-backed expectations, based upon those state law rights.[128] For example, the Florida Supreme Court held, in *Graham v. Estuary Properties, Inc.*,[129] that intangible property rights are not protected. Similarly, the Supreme Court in *Penn Central* found "quite simply untenable" the argument that an owner could establish a taking merely by showing a denial of "the

121. *See* Colburn v. Trustees of Ind. Univ., 739 F. Supp. 1268 (S.D. Ind. 1990); Thomas v. Board of Trustees of Galveston Indep. Sch. Dist., 515 F. Supp. 280, 285 (E.D. Tex. 1981) ("The right to employment by state, in itself, is not a right secured by the [Due Process Clause]. Nevertheless property interests may be created and their dimensions defined by [state law]"); *see also* Ferry v. Spokane, 258 U.S. 609 (1922).

122 *See* Jenkins v. Weatherbotz, 909 F.2d 105 (4th Cir. 1990).

123. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (quoting United States v. General Motors Corp., 323 U.S. 373 (1945)).

124. Marine One, Inc. v. Manatee County, 877 F.2d 892, 894 (11th Cir. 1989).

125. Spence v. Zimmerman, 873 F.2d 256, 258 (11th Cir. 1989).

126. Lynn Ackerman, *Searching for A Standard for Regulatory Takings Based on Investment Backed Expectations: A Survey of State Court Decisions in the Vested Rights and Zoning Estoppel Areas*, 36 EMORY L.J. 1219, 1222 (1987).

127. S.W. Diversified, Inc. v. City of Brisbane, 652 F. Supp. 788, 796 (N.D. Cal. 1986).

128. *See* Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023 (3d Cir. 1987).

129. 399 So. 2d 1374 (Fla. 1981).

ability to exploit a property interest that they heretofore had believed was available for development."[130]

Typically, land owners base a taking claim on an expectation that a certain type or level of development that was permitted in the past will continue to be permitted until the fruition of the project at issue. These circumstances, however, almost universally have been held to fall far short of a taking. This is illustrated in a leading wetlands case, *Deltona Corp. v. United States*,[131] in which a property owner sued the government for damages when the Army Corp of Engineers, which had previously issued permits to fill wetlands for a residential community development, refused to issue additional permits after the permitting law changed to make the standards much stricter. The Court of Claims held that the denial of the permit did not constitute a taking of property because

> when Deltona acquired the property in 1964, it knew that the development it contemplated could take place only if it obtained the necessary permits from the Corps of Engineers. Although at that time Deltona had every reason to believe that those permits would be forthcoming when it subsequently sought them, it also must have been aware that the standards and conditions governing the issuance of permits could change. *Deltona had no assurance that permits would issue, but only an expectation.*[132]

The common thread that runs through these opinions is the notion that with changing times come changing circumstances, including changing laws, that may frustrate a property owner's expectations about how he can develop his property. *Lucas* can be read as an attempt to allow landowners to rely on the continued existence of the statutory and common law on the books when land is purchased, at least as an assurance that not all economic benefit will subsequently be precluded. It can be read to freeze a state's common law at the time property is purchased,[133] thereby insulating an owner's development expectations from the changing forces that govern other impulses in society.

Justice Scalia attempts to characterize this unusually slavish fidelity to a state's property law at one frozen moment in time as nothing more than the Court's traditional "resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as

130. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130 (1978).

131. 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982).

132. *Id.* at 1193 (emphasis added).

133. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2913-14 (1992) (Blackmun, J., dissenting).

'property.'"[134] In doing so, he endows the word "existing" with a temporal meaning; that is, rules or understandings that "exist" at the time property is acquired or improvements to property are begun. However, the three cases he cites for the proposition that the phrase "existing rules or understandings" means "existing" in a temporal sense do not support this statement. *Board of Regents of State Colleges v. Roth*[135] discusses "rules of property" not in relationship to a specific time, but as a matter of whether they are "interests that a person has already acquired" which are "more than an abstract need or desire," and "more than a unilateral expectation," and are in fact "a legitimate claim of entitlement." Similarly, in *Ruckelshaus v. Monsanto Co.*,[136] the existence of property was not discussed from a temporal viewpoint, but from a viewpoint of denoting "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." The third case cited by Justice Scalia, *Hughes v. Washington*,[137] which deals with ownership of land accreted to upland property, is really a Supremacy Clause case, the majority opinion of which deals only tangentially with the nature of acquired rights to property. It merely states that a federal deed of riparian property carries with it the right to ownership of further accretions.[138] Given, however, the fact that it is cited by Justice Scalia in the *Lucas* opinion to help justify a new day of federal control over state property law, the *Hughes* case contains a particularly ironic statement on the law of property by Justice Stewart, where he says:

> Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer. And surely Washington, or any other state is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners. Nor are riparian owners who derive their title from the United States somehow immune from the changing impact of these general state rules. For if they were, then the property law of a State like Washington, carved entirely out of federal territory, would be forever frozen into the mold it occupied on the date of the State's admission to the Union. . . . [Of course, Ms. Hughes] may insist, quite apart from the federal origin of her title, that the State not take her land without just compensation.[139]

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134. *Id.* at 2901.

135. 408 U.S. 564, 576-77 (1972).

136. 467 U.S. 986, 1003 (1984) (quoting United States v. General Motors Corp., 323 U.S. 373 (1945)).

137. 389 U.S. 290 (1967).

138. *Id.* at 291.

139. *Id.* at 295 (Stewart, J., concurring).

None of these cases uses the phrase "existing rules or understandings" in the temporal way advocated by Justice Scalia. But Justice Scalia papers over his new found veneration for the word "existing" as "unexceptional."[140] Still, one is left to wonder whether Justice Scalia would be as quick to enforce against government a prohibition against changing basic assumptions about other forms of "property," such as whether he would find that a state which allowed someone to acquire a property interest in employment could not thereafter change or eliminate that interest. Given his ideological infrastructure, it is difficult to imagine him recognizing such a right.

It is no exaggeration or admission of failure to call the majority opinion in *Lucas* a mystery, even after concentrated study. In many places it is difficult to square the language chosen in the majority opinion with many of the cases and principles it cites for support. In many places, the opinion appears to be deliberately vague and open ended. As Pelham observes, the opinion is "peppered with intriguing dicta and enigmatic footnotes that create further doubt and suspicion about the intended import of the decision."[141] The judicial sleight of hand involved in leaving the door open to further change through these dicta and footnotes is entirely consistent with an intent to proceed apace with the "essential use" theme, regardless of state law, perhaps even in the more typical land use cases where viable uses are only less profitable, not eliminated entirely. However, changes in the composition of the Court[142] will likely stem this judicial activism and again strike the proper balance between the responsibility of government and the rights of individual landowners.

H. The Background Principles of Florida Law

As mentioned above, the key language that the *Lucas* majority uses to indicate what restrictions will in the future govern the content of "harm preventing" land use regulations that deny all economically viable use is in the following phrase:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.[143]

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140. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901 (1992).

141. Thomas G. Pelham, *The* Lucas *Decision: New Challenges for Land-Use Lawyers*, 16 ABA URB. ST. & LOC. L. NEWSL. 1, 1 (Fall 1992).

142. Justice White's retirement removes the bare majority of *Lucas*. Justice Kennedy's concurring opinion in *Lucas* may well become the majority view the next time the Court issues a substantive takings opinion.

143. *Lucas*, 112 S. Ct. at 2899 (footnote omitted).

Also, the language in the majority opinion that appears to hold out the greatest promise for flexibility to allow governments to react to changed conditions or new knowledge is where the Court stated:

> The "total taking" inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (*though changed circumstances or new knowledge may make what was previously permissible no longer so*). So also does the fact that other landowners, similarly situated, are permitted to continue the uses denied to the claimant.[144]

The purpose of this part of this article is to examine how these ideas will fit within the framework of Florida law on property rights.

Despite having a well deserved reputation through the mid-1970s as a "grow-at-any-cost" place where land was bought, drained, denuded, developed, and sold at dizzying speeds and bargain basement prices,[145] Florida nevertheless seems relatively well positioned to roll with the anti-government punches thrown by the *Lucas* decision. This is because the background principles of property and nuisance under Florida law maximize the legislature's flexibility to declare activities and uses a public nuisance and maximize the flexibility of litigants bringing private nuisance actions to show the far reaching effects of uses and activities that might not otherwise be considered nuisances.[146]

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144. *Id.* at 2901 (citations omitted; emphasis added).

145. *See generally* MARK DERR, SOME KIND OF PARADISE: A CHRONICLE OF MAN AND THE LAND IN FLORIDA (1989).

146. The *Lucas* majority mentions two types of nuisance cases, the kind that can be brought "by adjacent landowners . . . under the State's law of private nuisance" and the kind that can be brought by the "State under its complementary power to abate nuisances that affect the public generally, or otherwise." *Lucas*, 112 S. Ct. at 2900 (the footnote omitted from this quotation discussed what the Court meant by "otherwise"; that is, the destruction of property in real emergencies, like to prevent the spread of fire). A private nuisance is a tort cause of action that began in the early days of the common law and now covers any unreasonable interference with the use and enjoyment of land. Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After* Boomer, 54 ALBANY L. REV. 359, 362-63 (1990). Public nuisances had their origin in the exercise of the sovereign's police powers, were often criminal in nature, and until the sixteenth century, could only be brought by specific officers of the government to abate general offenses to the public such as blocking roads, selling rotten meat, keeping a tiger in a pen next to a highway, or being a

The common law[147] of real property in Florida is that the rights which naturally attend the ownership of land include freedom from physical intrusion, freedom from nuisance, right to support, riparian rights, and rights to underground and surface water.[148] Also, while the common law favors the free and unrestrained use of real property,[149] the Florida Supreme Court made it clear in *Graham v. Estuary Properties, Inc.*[150] that a land owner has no "absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state." And "[a]ll property is owned and used subject to the laws of the land" and use of land is limited by the reasonableness of use and compliance with the laws established for the use of others.[151] Further, in *Palm Beach Mobile Homes, Inc. v. Strong*,[152] the court said:

> The right to contract and to use one's property as one wills are fundamental rights guaranteed by the constitution of the United States and the constitution of Florida; however, this court has oftentimes declared that the degree of such guaranties must be determined in light of social and economic conditions which prevail at a given time.

The Restatement of Property[153] describes the rights acquired in property as follows:

> The totality of . . . rights, privileges, powers and immunities which it is legally possible for a person to have with regard to a given piece of land . . . constitutes complete property in such land. . . . This totality varies from time to time, and from place to place, either because of changes in the common law, or because of alterations by statute. Thus if the law should come to be that no person could build a five story building on his land, the totality of privileges that every person has who owns land would be correspondingly diminished. So if a zoning ordinance were passed, the totality of interest would be affected, to the extent of the ordinance, for persons owning land within the district to which the ordinance applied. At any one time and place, however, there is a maximum combination of rights, privileges, powers and

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common scold. *Id.* The differences between these two causes of action are "fast disappearing." *Id.*

147. "Common law" may be defined as custom sanctioned by immemorial usage and judicial decision; it is not a fixed body of rules but instead a juristic manner of treating legal questions. Quinn v. Phipps, 113 So. 419, 824 (Fla. 1927).

148. CUNNINGHAM, THE LAW OF PROPERTY 410 (1984).

149. Ballinger v. Smith, 54 So. 2d 433 (Fla. 1951).

150. 399 So. 2d 1374, 1382 (Fla. 1981), *cert. denied*, 454 U.S. 1083 (1981).

151. Corbett v. Eastern Air Lines, Inc., 166 So. 2d 196, 201 (Fla. 1st DCA 1964) (citations omitted).

152. 300 So. 2d 881, 884 (Fla. 1974).

153. RESTATEMENT OF PROPERTY § 5 cmt. e (1936).

> immunities in the land that is legally possible, and which constitutes complete property in the land, or thing other than land.

The *Estuary Properties* case, which is a seminal case on modern land use rights in this state, involved a developer's application for a project that would have filled 1800 acres of black mangrove wetlands in addition to the 526 high and dry acres on site, all part of a plan to erect 26,500 dwelling units, along with attendant marinas, golf courses, and commercial centers.[154] When the filling of the black mangroves was prohibited, and an order entered to allow for only 12,968 residences, the developer alleged the order was unconstitutional and took its property.[155]

The court pointed out that when Estuary Properties bought the property, "it did so with no reason to believe that the conveyance carried with it a guarantee from the state that dredging and filling the property would be permitted."[156] The court also discussed the harm versus benefit aspect of land use regulation as follows:

> As previously stated, the line between the prevention of a public harm and the creation of a public benefit is not often clear. It is a necessary result that the public benefits whenever a harm is prevented. However, it does not necessarily follow that the public is safe from harm when a benefit is created. In this case, the permit was denied because of the determination that the proposed development would pollute the surrounding bays, i.e., cause a public harm. It is true that the public benefits in that the bays will remain clean, but that is a benefit in the form of maintaining the status quo. Estuary is not being required to change its development plan so that public waterways will be improved. That would be the creation of a public benefit beyond the scope of the state's police power.[157]

This language from a relatively modern case is substantively indistinguishable from Florida opinions on land use reaching back seven decades. The development of the law of nuisances in Florida also seems to bode well for the type of analysis to be done under *Lucas*. Among the first cases to discuss the theoretical basis for the law of nuisance in Florida was *Cason v. Florida Power Co.*,[158] where the court in 1917 stated:

> All property is owned and used subject to the laws of the land. Under our system of government property may be used as its owner desires within the limitations imposed by law for the

154. *Estuary Properties*, 399 So. 2d at 1376.
155. *Id.* at 1377.
156. *Id.* at 1379 (footnote omitted).
157. *Id.* at 1382.
158. 76 So. 535, 536 (Fla. 1917).

> protection of the public and private rights of others. Those who own real estate may use it as desired so long as the rights of others are not thereby invaded. And there is no such invasion when the use is authorized by law and is reasonable with reference to the rights of others. Legality and reasonableness in the use of property, as such use affects the public and private rights of others, mark the limitations of the owners' rights. The reasonableness of the use of the property by its owner must of necessity be determined from the facts and circumstances of particular cases as they arise, by the application of appropriate provisions or principles of law and the dictates of mutual or reciprocal justice.

Some thirteen years later, in *Sheip v. Amos*,[159] the Florida Supreme Court also stated that there is no inherent right to use property if the use of the property is adverse to the welfare of the public.[160] The case of *Pompano Horse Club, Inc. v. State ex rel. Bryan*,[161] which concerned a horse track and betting parlor that the plaintiffs sought to suppress by injunction, was an early case that discussed the legislature's ability to control public nuisances by statute. The proceeding was specifically authorized by statute,[162] which permitted suit by any citizen, for an injunction to stop the nuisance. Furthermore, the statutes specifically prohibited as nuisances any "place which tends to annoy the community . . . or become manifestly injurious to the morals or manners of the people as described in Section 5624, . . . or any . . . place or building where games of chance are engaged in."[163] In somewhat circuitous language, law provided that "[a]ll nuisances which tend to annoy the community or injure the health of the citizens in general, or to corrupt the public morals, shall be indictable and punishable."[164]

The language in the *Pompano Horse Club* opinion also indicates that the Florida Supreme Court recognized as far back as 1927 the legislature's power to declare certain uses to be nuisances based upon

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159. 130 So. 699 (Fla. 1930).

160. The law of nuisance was further explained in Reaver v. Martin Theaters of Fla., Inc., 52 So. 2d 682 (Fla. 1951), where the owner of a private airport sued his neighbor to stop the construction of a drive-in theater based upon its constituting a nuisance and hazard to the public generally. Discussing the law related to private nuisances, the court pointed out that under the familiar maxim *sic utere tuo ut alienum non laedas*, it is "well settled that a property owner may put his own property to any reasonable and lawful use, so long as he does not thereby deprive the adjoining landowner of any right of enjoyment of his property which is recognized and protected by law, and so long as his use is not such a one as the *law will pronounce* a nuisance." *Id.* at 683 (emphasis added) (citation omitted). The court pointed out that the reasonableness of the use must be determined according to circumstances of each case, and in accordance with established legal and equitable principles. *Id.*

161. 111 So. 801 (Fla. 1927).

162. Ch. 3223, Laws of Fla. (1920).

163. Ch. 5639, Laws of Fla. (1920).

164. Ch. 5624, Laws of Fla. (1920).

violations of public policy. The court said that "[t]he question for determination is, not whether a place kept and maintained for purposes forbidden by statute constitutes a nuisance--that fact having been lawfully determined by the Legislature--but whether the place in question was so kept and maintained."[165] Quoting the opinion by Justice Story in *Mugler v. Kansas*, the *Pompano Horse Club* court stated:

> In regard to public nuisances, the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so-called, but also to purprestures[166] upon public rights and property.[167]

The court went on to say that, where the state is concerned "the presence of actual injury is not an essential element of or prerequisite to chancery jurisdiction,"[168] and quoted a case stating that when "a business is a public nuisance, no matter how it gets to be such, whether inherently so or made so by law, the court of chancery has power to enjoin."[169]

The court also affirmed the legislature's power to declare uses and activities to be nuisances, saying:

> It does not lie within the Legislative power to arbitrarily or capriciously declare any or every act a nuisance. *State v. Saunders.* 'It does not at all follow that every statute enacted ostensibly for the promotion of these ends [the preservation of the public health, safety and morals] is to be accepted as a legitimate exertion of the police powers of the state.' *Mugler v. Kansas*, supra. *It rests, however, very largely within the province of the legislative body to prescribe what shall constitute a nuisance, and in defining nuisances, the Legislature may rightfully exercise a broad and extended discretion. It may make that a nuisance which was not one at common law.*[170]

Florida still has a law which declares as a nuisance "any . . . place which tends to annoy the community or injure the health of the community, or become manifestly injurious to the morals or manners of the people . . . or any place where the law of the state is violated" and says that the nuisance may be abated or enjoined.[171] This statute has been on the books since 1917.

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165. *Pompano Horse Club*, 111 So. at 807 (citing Mugler v. Kansas, 123 U.S. 623 (1887)).

166. Encroachments upon public rights and easements. BLACK'S LAW DICTIONARY 1236 (6th ed. 1990).

167. *Pompano Horse Club*, 111 So. at 808.

168. *Id.* at 810 (citations omitted).

169. *Id.* (quoting State v. Marshall, 56 So. 792 (Fla. 1911)).

170. *Id.* (citations omitted; emphasis added).

171. FLA. STAT. § 823.05 (1991).

The 1972 opinion of the Florida Supreme Court in *Orlando Sports Stadium, Inc. v. State ex rel. Powell*[172] is another most instructive case on the expansive possibilities of the use of the public nuisance doctrine by the legislature to enjoin and prevent all manner of uses with the potential to hurt the public health, safety, or welfare. A suit was filed to enjoin a public nuisance at the Orlando Sports Stadium where a variety of drug users congregated during rock concerts for the purpose of consuming unlawful drugs.[173] The statute cited in the suit prohibited anyone from erecting, establishing, continuing, or maintaining any place "where any law of the State" is violated and said that maintaining such a place would be declared a nuisance which could be abated or enjoined as provided by law.[174] The stadium owners claimed the statute violated their due process rights because it did not sufficiently describe the acts which were forbidden.[175] The court rejected that argument, stating:

> A public nuisance violates public rights, subverts public order, decency or morals or causes inconvenience or damage to the public generally. The Legislature has broad discretion to designate a particular activity to be a public nuisance. In the exercise of its police power the State has authority to prevent or abate nuisances, for police power is the sovereign right of the State to enact laws for the protection of lives, health, morals, comfort and general welfare.[176]

On the subject of the legislature's obligation to provide in advance for all circumstances that could constitute behavior which the legislature would like to proscribe as a nuisance but which is not one under common law, the court went on to say:

> It is not possible to define comprehensively "nuisances" as each case must turn upon its facts and be judiciously determined. The statutes under attack are not so vague and indefinite as to invade the constitutional rights of the defendants in the case *sub judice*, where the plaintiffs seek an injunction. If the injunction does issue, it must be definite and certain.
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> It has been said that an attempt to enumerate all nuisances would be almost the equivalent as an attempt to classify the infinite variety of ways in which may be annoyed or impeded in the enjoyment of his rights.

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172. 262 So. 2d 881 (Fla. 1972).
173. *Id.* at 882-83.
174. FLA. STAT. § 823.05 (1991).
175. *Orlando Sports Stadium*, 262 So. 2d at 884.
176. *Id.* (citations omitted).

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> To make a statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited. Impossible standards are not required. Statutory language that conveys a definite warning as to prescribed conduct measured by common understanding and practices satisfies due process.[177]

Florida's background law of nuisance also includes an extraordinarily far reaching opinion, *National Container Corp. v. State ex rel. Stockton*,[178] in which the Supreme Court in 1939 recognized a right to bring suit founded on private and public nuisance law theories to prevent an environmental nuisance from being established in the form of paper mill discharges that would pollute the St. Johns River. In *National Container Corp.*, approximately ninety citizens and taxpayers sued to stop the location of a wood pulp mill on industrial land in Jacksonville, alleging that the operation of the mill would create a public nuisance because of the odors it would produce and the fact that wells to be drilled on site would hasten saltwater intrusion into the potable water supply.[179] The plaintiffs also asked to restrain the discharge of wastewaters into the St. Johns River which would prove "harmful, injurious, and toxic to fish and aquatic life," alleging "that the supply of fish would be seriously reduced, if not cut off entirely, thereby seriously and permanently damaging the profitable business and pleasure incident to fishing which now exists in said River."[180] The complaint further averred that the wastewaters would contribute such additional oxygen demand to the river water that the poorly treated sewage of the city of Jacksonville dumped in the river would thereby not be rendered sterile and harmless.[181] This 1939 nuisance complaint therefore alleges the sort of ecological chain of events leading to ultimate harm to the public that South Carolina authorities unsuccessfully used to defend the 1988 Beachfront Management Act in *Lucas*.

The Florida court was bound to reject the charge that the operation of the pulp mill, *per se*, would create a nuisance because opposition to it was rendered untenable by a state constitutional amendment approved by referendum in 1930 which specifically permitted the establishment of pulp mills in Florida and exempted them from all taxation for fifteen years.[182] The court stated that, by

177. *Id.* (citations omitted).
178. 189 So. 4 (Fla. 1939).
179. *Id.* at 5.
180. *Id.*
181. *Id.*
182. *Id.* at 11; FLA. CONST. art. IX, § 12.

adopting this amendment, the state was not only allowing but was "importun[ing] these types of operation to take up residence in Florida."[183] The court pointed out that it was commonly known that pulp mills emit noxious and disagreeable odors and that it was presumed that the ratification of this amendment was meant to eliminate them from the category of nuisance based on these emissions.[184]

The court refused, however, to dismiss the water pollution portion of the suit, which was brought pursuant to three inter-related nuisance laws which in combination and paraphrasing provided the following:

> Whenever any nuisance as defined [to include any building, booth, tent or place which tends to annoy the community or injure the health of the community, or become manifestly injurious to the morals or manners of the people][185] [by tending to annoy the community or to injure the health of the citizens in general, or to corrupt the public morals, or which tends to the immediate annoyance of the citizens in general, or is manifestly injurious to the public health and safety, or tends greatly to corrupt the manners and morals of the people][186] any citizen may maintain his action by bill in chancery in the proper court in the name of the State of Florida upon the relation of such citizen to enjoin said nuisance, the person, or persons conducting or maintaining the same and the owner or agent of the building or ground upon which said nuisance exists.[187]

The court rejected the argument that suit by private citizens to prevent or abate a public nuisance was not permitted and also held that the allegations of the complaint which alleged that toxic or otherwise harmful materials would be discharged into the St. Johns River stated a cause of action for equitable relief, saying:

> If, as a matter of fact, it is a necessary part of the operation of such pulp and craft paper mill at its particular location to discharge enormous quantities of waste and refuse matter into the River which will be highly toxic to fish and other forms of marine and aquatic life and which will be highly toxic to aquatic plants upon which the fish are accustomed to feed and the result will be that the supply of fish in the River will be seriously reduced, if not entirely cut off, and the profitable commercial business which now exists in the catching and marketing of such fish will be seriously and

183. *National Container Corp.*, 189 So. at 11.

184. *Id.*

185. Section 5639, R.G.S., 7832, C.G.L.

186. Section 5624, R.G.S, 7817, C.G.L. This section provided a criminal fine and indictment and removal procedure for those maintaining nuisances.

187. *See National Container Corp.*, 189 So. at 10.

> permanently damaged and the facilities for pleasure and recreation will be thereby diminished and damaged, we think that it requires no citation of authority to support the assertion that the State may enjoin the consummation of the damage which is threatened *even before the damaging condition comes into being.* The allegations are such as to admit of denial.
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> While the constitutional provision, *supra,* immunizes the appellant from the status of a public nuisance in the operation of its plant with all its necessary and unavoidable and objectionable features and conditions, it in no wise immunizes it from being held to constitute a public nuisance by reason of its offending the public welfare, health and convenience by creating an obnoxious condition which, by the application of known and practical matters, it may obviate.
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> The bill of complaint shows that the Appellees, as individuals, are riparian owners along the allegedly affected areas of the St. Johns River, and, although it is not necessary for them, as individuals, to show any special damage in the suit instituted in the name of the State, the allegations are sufficient to show, if it were necessary, that they will suffer peculiar damage if the allegations of the bill are shown to be true.[188]

Through these early cases, the Florida Supreme Court put governments in Florida in good stead when they are called upon to show the "background principles of the law of property and nuisance" that *Lucas* demands be present to sustain certain land use restrictions. First, in *Pompano Horse Club* the court recognizes that the legislature

188. *Id.* at 13-14 (citations omitted) (emphasis added). *See also* State v. SCM Glidco Organics Corp., 592 So. 2d 710 (Fla. 1st DCA 1991), in which Glidco and Seminole Craft Corp., which operate a paper mill in Jacksonville, were charged with violating section 823.01, *Florida Statutes* (1991), which made a second degree misdemeanor "all nuisances which tend to annoy the community or injure the health of the citizens in general." The trial court dismissed the charges, finding section 823.01 was unconstitutionally vague, after making a preliminary finding that the section superseded the common law and that therefore section 775.01, *Florida Statutes* (1991), prohibited reference to the common law nuisance to supply the definition of nuisance in section 823.01. The appellate court reversed and said that while section 775.01 may prevent the English common law on the crime of nuisance from being in full force in this state, it does not prohibit the use of English case law as an aid in establishing legislative intent. The court also drew attention to the language in Orlando Sports Stadium, Inc. v. State, 262 So. 2d 881 (Fla. 1972) about the difficulty of defining nuisance comprehensively and before the fact. However, the *Glidco* court did affirm dismissal of the charges under section 823.01 because, it said, it was the legislature's intent to handle air pollution violations through another statute, section 403.021, *Florida Statutes* (1991). For a contrary opinion, see Town of Surfside v. County Line Land Co., 340 So. 2d 1287 (Fla. 3d DCA 1977), where the court said the existence of an air pollution statute and section 403.412, *Florida Statutes* (1991), did not preclude bringing an action for nuisance based on, among other things, the foul and obnoxious odors generated by a landfill.

has great leeway in declaring certain activities or uses to be public nuisances which were not nuisances under the common law. The court stated: "It rests, however, very largely within the province of the legislative body to prescribe what shall constitute a nuisance, and in defining nuisances, the legislature may rightfully exercise a broad and extended discretion. It may make that a nuisance which was not one at common law."[189]

Second, in *National Container Corp.*, the court exhibited great foresight in permitting a party to plead and to attempt to prove by scientific evidence the veracity of common law claims of nuisance for certain types of activities, such as pollution of a river, that harm the public generally even if they do not fit neatly into the traditional common law concept of a nuisance as an invasion of a property right. This nuisance law has been in place for more than seventy years and therefore surely is a part of the "background principles of property and nuisance law" in Florida. Thus, if the *Lucas* majority is to be taken at its word, governments should be able to rely on the statement that they will be able to use "changed circumstances or new knowledge" to make "what was previously permissible no longer so."[190]

I. LUCAS *APPLIED*

Several cases have been handed down since June 29, 1992, giving observers a chance to see how courts will apply the *Lucas* doctrine. The first of these is *Stevens v. City of Cannon Beach*,[191] in which an owner of vacant lots in the dry sand area of a beach sued for inverse condemnation after permits to build a seawall as a prelude to further development were denied. The trial court dismissed the case and the appellate court affirmed, finding that the public had acquired the right to use the dry sand area under the "doctrine of custom" and therefore the owner's title did not include a right to obstruct or interfere with that right.[192] The public's right was first recognized in a 1969 case.[193] Mr. Stevens pointed out that he acquired the land in 1957, twelve years before the *Thornton* decision, but the *Cannon Beach* court said that the relevant date was the date the right to use the beach was created ("long before 1957"), not the date that it was recognized by the court.[194]

189. Pompano Horse Club v. State, 111 So. 801, 810 (Fla. 1927) (citations omitted).
190. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901 (1992).
191. 835 P.2d 940 (Or. Ct. App. 1992).
192. *Id.* at 942.
193. State *ex rel.* Thornton v. Hay, 462 P.2d 671 (1969).
194. *Stevens*, 835 P.2d at 941.

Florida also recognizes the public's right to use the dry sand area of the beach as a "custom,"[195] but permit an owner to make "any use of the land consistent with, or not calculated to interfere with, the exercise of [custom] by the public."[196] The Florida Supreme Court favorably cites the *State ex rel. Thornton* case from Oregon on public custom and recognizes the "right of customary use of the dry sand area."[197]

A second case applying the *Lucas* doctrine was *Powers v. Skagit County*,[198] where the owner of a fifty-acre parcel located in a twenty-five year floodplain was denied permission to plat 144 lots on the property. Fourteen one-acre lots eventually were platted and the owner applied for a permit to erect a house on one of the lots. The permit was issued but expired, and in 1987 the County adopted new FEMA floodplain maps and prohibited new residences in the floodways. The *Skagit County* court read *Lucas* to require compensation for a complete regulatory taking "unless the restriction is one that background principles of this State's law of property and nuisance already place upon ownership."[199] The court repeated the language from *Lucas* that it was "unlikely" that Washington common law would tolerate a prohibition against a prevented erecting of a "habitable structure or productive improvements" on the land.[200] It declined, however, to rule on the common law issue because it had not been briefed or argued on appeal.[201]

III. *REAHARD*: A BAD RULING REVERSED

A. Facts

On January 16, 1991, a federal magistrate ruled that Lee County's Comprehensive Plan and implementing development order that allowed only one residence to be built on a thirty-eight acre wetland resulted in an inverse condemnation of the landowner's property.[202] The opinion, only one and one half pages long, concluded that Lee County's decision resulted in "a substantial deprivation of the value of Plaintiff's property resulting in a taking."[203] The opinion included

195. City of Daytona Beach v. Tona-Roma, Inc., 294 So. 2d 73, 77 (Fla. 1974).

196. *Id.* (citation omitted); *see also* Duval v. Thomas, 114 So. 2d 791 (Fla. 1959).

197. *Tona-Roma*, 294 So. 2d at 78.

198. 835 P.2d 230 (Wash. Ct. App. 1992).

199. *Id.* at 236.

200. *Id.*

201. *Id.*

202. The county regulation required a 40-acre tract for the construction of a single family home in wetlands but allowed one unit "as of right" for parcels of a smaller size.

203. *See* Reahard v. Lee County, 968 F.2d 1131, 1136 (11th Cir. 1992).

no citation to any prior federal or state case law. Following a jury trial on damages, judgment for the plaintiffs was entered for more than $700,000.[204]

The property that was originally found to have been taken is thirty-eight undeveloped acres of land that Mr. Reahard inherited from his mother in 1984. The tract was part of a larger 540-acre parcel purchased by Mr. Reahard's father in 1944 for $1250. The property is virtually covered with undisturbed coastal mangrove forests and is regularly inundated during spring and fall high tides and during storms. Mr. Reahard's mother and father cleared and filled wetlands and sold off parcels from the original 540 acres from the time it was acquired up to approximately 1975. In 1984, Mr. Reahard's mother died and the property passed to him.

With respect to preventing substantial public harm, the testimony at trial echoed current scientific knowledge that wetland resources are among the most vital ecosystems in the state. They are irreplaceable natural assets which perform the vital functions of protecting shorelines, acting as a nursery for wildlife and fish, filtering sediments and pollutants in rainwater, recharging aquifers, and other functions. The Reahards did not challenge the fact that their property was clearly suited for and correctly classified as a Resource Protection Area designation. The regulation assigning a very low intensity use to the wetlands was therefore obviously designed to prevent the serious public harm of destroying these vital natural resources.

Despite having taken evidence on disputed issues concerning the condition, development potential, and permittability of the parcel, its value, and the Reahard's investment-backed expectations, the magistrate limited his findings to two: development of some of the property could have occurred but for the county's regulation, and the regulation caused a substantial deprivation of the property's value.

B. Trial Court Reversed

On August 14, 1992, the Eleventh Circuit Court of Appeal reversed the magistrate's order.[205] The court rejected the notion that a "substantial reduction in value" constituted a taking and held that, in cases where a regulation substantially advances a legitimate state interest like wetlands protection, compensation is required only if a landowner has been denied all or virtually all economically viable use of the regulated property.[206]

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204. *Id.* at 1134.
205. *Id.*
206. *Id.* at 1136.

The Court also ruled that, in addition to applying an incorrect legal standard, the magistrate failed to make adequate factual findings concerning the character of and the ownership, use, and development history of the property.[207] Also, it ruled that the magistrate should have determined the actual extent to which the plaintiff had been granted land use approvals and spent money or built infrastructure in reliance on such approvals.[208]

There were three substantive reasons the case was reversed on appeal. First, the county's land use designation was designed to prevent the substantial public harm of destruction of wetlands. Second, the land in question was merely a part of a larger parcel out of which an economically reasonable use had been derived. Third, the ordinance in question, despite its restrictions, still permitted an economically reasonable use.

The court begins its opinion by describing the four types of takings challenges which can be brought against the government: just compensation claims; due process claims; arbitrary and capricious claims; and equal protection claims.[209] The court characterized the instant claim as one for just compensation because damages, not invalidation of the ordinance, was sought by the Reahards.[210] In just compensation cases, the landowner concedes that the regulation is a valid exercise of the police power and substantially advances a legitimate state interest.[211] The court ruled that, in such cases, a taking occurs only if no economically viable use of the property remains.[212] The magistrate judge had not determined whether the regulation left the Reahards with an economically viable use for their property.

The court ruled that, on remand, the magistrate should supply answers to what undoubtedly will become known as the "Eight *Reahard* Questions." Specifically, the opinion requires a determination of and written fact-finding on:

> 1. The history of the property, including when and how much land was purchased, the location of the land, the nature of the title, the composition of the land and how was it initially used.
>
> 2. The history of development on the property, including what was built, when and by whom, how the property was subdivided and to whom sold, what plats were filed, and roads dedicated.

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207. *Id.*

208. *Id.*

209. *Id.* at 1134 (citing Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1073 (1991)).

210. *Id.* at 1135.

211. *Id.* at 1134.

212. *Id.* at 1135.

3. The history of zoning and regulation of the property, including how and when it was classified in the comprehensive plan and zoning code, how these classifications changed and how uses were then proscribed.

4. How did development change when title passed.

5. What is the present nature and extent of the property.

6. What were Mr. Reahard's reasonable expectations under common law.

7. What were the reasonable expectations of Reahard's neighbors under common law.

8. Perhaps most importantly, what was the exact diminution in investment backed expectations, if any, suffered by the Reahards.[213]

The case was remanded to the magistrate to make rulings on these issues for the purpose of determining whether the ability to build one home on the thirty-five acre parcel completely, or nearly completely, deprived the landowner of any reasonable and investment-backed expectations which had arisen as a result of these circumstances.[214]

The *Reahard* opinion is good law, consistent with *Lucas* and prior precedent in repudiating the "substantial reduction in value" test employed by the magistrate judge. The next section of this article analyzes both *Lucas* and *Reahard* in terms of their impact on takings law in Florida using the factors commonly employed by courts in conducting takings analysis.

C. *Investment-Backed Expectations*

Analysis of a takings case requires an examination of the extent to which the challenged regulation curtails investment-backed expectations.[215] The Takings Clause protects only reasonable and distinct expectations.[216] The United States Supreme Court has "dismissed 'takings' challenges on the ground that, while the challenged government action caused economic harm, it did not

213. *Id.* at 1137.

214. *Id.* On April 22, 1993, the magistrate judge issued an Amended Order of Taking Following Remand which included the required findings and which again found a taking on the basis that the regulation "greatly diminished" the Reahard's investment-backed expectation. That order is currently on appeal.

215. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1381 (Fla. 1981).

216. *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

interfere with interests that were sufficiently bound up with reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes."[217] *Lucas* can be viewed in two ways: it either increases the weight to be given to a landowner's expectations or it establishes that, in cases where all economically viable use has been precluded, a taking has occurred regardless of the landowner's investment-backed expectations. The former interpretation is supported by the great emphasis the Court placed on the legal status of the title to property at the time of its acquisition. The latter interpretation is supported by the fact that Mr. Lucas had no vested rights in the property and had made no apparent investment other than the initial acquisition.

The Supreme Court has previously stated that expectations are reasonable only if they are consistent with the law in force at the time of the formation of the expectation.[218] In *Kirby Forest Industries v. United States*,[219] the Court discussed the investment-backed expectations factor and opined that a taking occurred only when regulatory burdens are "so substantial and unforeseeable . . . that justice and fairness require that they be borne by the public as a whole."[220]

Lower federal courts have used this rule to preclude claims that the proper application of laws which existed when property was purchased could constitute a taking. In *Succession Suarez v. Gelabert*,[221] it was held that "whatever investment-backed expectations the plaintiffs had in their land were unreasonable if they ignored the law of Puerto Rico on the exploitation of natural resources."[222] Whether or not an investment-backed expectation is reasonable depends "on the extent to which state law fostered and protected the expectation at the time the expectation was formed."[223] This rule has also been applied in Florida.[224]

The *Lucas* decision would not control a situation where the regulated parcel was bought after the adoption of the challenged law. *Lucas*' reliance on the landowner's expectations would suggest that a person purchasing subject to existing legislation could not claim a taking when a correct interpretation of that law prohibits any

217. *Penn Central*, 438 U.S. at 124-25.

218. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

219. 467 U.S. 1 (1984).

220. *Id.* at 14.

221. 541 F. Supp. 1253 (D.P.R. 1982), *aff'd*, 701 F.2d, 231 (1st Cir. 1988).

222. *Id.* at 1260.

223. Furey v. City of Sacramento, 592 F. Supp. 463, 470 (E.D. Cal. 1984); *see also* S.W. Diversified, Inc. v. City of Brisbane, 652 F. Supp. 788, 796 (N.D. Cal. 1986).

224. Namon v. Department of Envtl. Regulation, 558 So. 2d 504 (3d DCA), *rev. denied*, 564 So. 2d 1086 (Fla. 1990).

economically viable use. On the other hand, its reliance on the nuisance doctrine provides an argument that compensation would be required where previously enacted legislation precludes a non-nuisance and allows no other use.

Apparently, Florida's Fifth District Court of Appeal desires to embrace the latter interpretation. In *Vatalaro v. Department of Environmental Regulation*,[225] the court, completely ignoring *Namon*, reversed a summary judgment granted in favor of DER and found that a taking occurred where DER denied a dredge and fill permit for the construction of two housepads, driveways, and septic tank drainfields in a high quality forested wetland. Summary judgment had been granted against the landowner, who bought the land well after the Warren S. Henderson Wetlands Protection Act of 1984[226] had been passed and without investigating whether the property would require wetlands permits. The plaintiff's son, Orange County's chief building inspector, had inspected the property and concluded it could be built upon.[227] After the county issued the necessary building permits and construction began, DER took enforcement action which was suspended while Vatalaro sought an after the fact permit. The permit was denied based on the quality of the wetland and water quality impacts from septic tanks. DER stated that mitigation would not work and that only a boardwalk could be constructed on the site.[228] This decision was upheld by a hearing officer after a formal administrative hearing.[229] This decision was not appealed; instead the Vatalaros brought an inverse condemnation claim.[230]

The circuit court granted summary judgment, based on *Namon*, which holds that a person who purchases land which cannot be built upon without approval under regulations that existed at the time of purchase cannot claim a taking based on the proper denial of such authorization under that regulation.[231] A person in such a position has no reasonable and distinct expectation of building and cannot require the public to assume the risk of this speculative business decision.

The Fifth District reversed, stating that if the property could not be built upon, there was a taking because the Henderson Wetlands Protection Act did not flatly prohibit wetlands alteration.[232] According to the court, the mere possibility that a permit might issue

225. 601 So. 2d 1223 (Fla. 5th DCA 1992).
226. FLA. STAT. §§ 403.91-403.938 (1991).
227. *Vatalaro*, 601 So. 2d at 1225.
228. *Id.* at 1227.
229. *Id.*
230. *Id.* at 1227 n.4.
231. *See* Namon v. State Dept. of Envtl. Regulation, 558 So. 2d 504 (Fla. 3d DCA 1990).
232. *Vatalaro*, 601 So. 2d at 1229.

gave Vatalaro a legitimate expectation of building two homes, notwithstanding apparently that the subsequent permit denial was determined to be the correct application of the Act to the property in question.[233] Not only did the court overturn the summary judgment, but it also ruled, on the pleadings, that a taking had occurred.[234]

DER submitted a jurisdictional brief asking the Florida Supreme Court to assert its conflict jurisdiction over the case. The case was denied review by the court on December 30, 1992, by a four to three vote, with no opinion issued.[235] Still, there appears to be clear conflict with *Namon*, which itself is good law under *Lucas* and *Reahard*. The *Vatalaro* opinion is not well reasoned or supported by precedent, and its attempts to refute DER's arguments are confusing and non-responsive. This opinion, if it in fact represents the law of takings, creates an absolute insurance policy for land speculators and removes from a potential purchaser of land any duty to investigate the natural and regulatory status of the property. *Vatalaro* rewards willful ignorance of these matters. This opinion is, quite frankly, offensive to the doctrine of investment-backed expectations and would not likely withstand the scrutiny of even Justice Scalia. *Vatalaro* is simply not in the same position as Mr. Lucas, who did not even need a coastal permit when he bought his property and, less than two years later, could not even apply for a permit to build.

Vatalaro notwithstanding, the Florida common law is that owners are deemed to purchase property with constructive knowledge of state,[236] local,[237] and presumably regional regulations. At the local level, this carries with it the duty not only to review recorded property records but also to review the record of the rezoning hearing held years before to determine what conditions, if any, were placed on the rezoning.

Even before *Lucas*, the U. S. Supreme Court had stated that the Takings Clause protects only those property interests recognized by state law. The Constitution does not define or create the property rights protected by the Fifth Amendment.[238] Ever since the Court's opinion in *Pennsylvania Coal Co. v. Mahon*,[239] the idea of distinct investment-backed expectations has been developed through use of

233. *Id.* at 1227.

234. *Id.* at 1229.

235. Department of Envtl. v. Vatalaro, 613 So. 2d 3 (Fla. 1992).

236. Namon v. Department of Envtl. Regulation, 558 So. 2d 504 (3d DCA), *rev. denied*, 564 So. 2d 1086 (Fla. 1990).

237. Metropolitan Dade County v. Fontainbleau Gas & Wash, Inc., 570 So. 2d 1006 (Fla. 3d DCA 1991).

238. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

239. 260 U.S. 393 (1922).

the common law concepts of vested rights and estoppel.[240] "State law determining when a right vests such that a property right is recognized is crucial to ascertaining whether there has been . . . a taking of property." [241] State law "creates and defines the parameters of a plaintiff's property interest."[242] This is the "distinct" part of investment-backed expectations.[243] The *Lucas* decision is consistent with this approach in allowing the individual state's law to define "property" and the reasonableness of landowner expectations.

In *Kaiser Aetna v. United States*,[244] the Court held that it would be a taking to require the developer of an artificial lagoon to allow access to the lagoon by the general public. The Court found that compensable expectations existed in that the United States Army Corps of Engineers' acquiescence in the creation of the lagoon and its access "lead to the fruition of a number of expectancies embodied in the concept of property."[245] Similarly, in *Monroe County v. Gonzalez*,[246] the Florida Third District Court of Appeal found that a newly enacted density limit of one unit per ten acres and open space requirement of ninety percent constituted a taking where the landowner had previously sought, been granted, and relied upon an upzoning which allowed a higher density.[247]

In an earlier leading wetlands case, *Deltona Corp. v. United States*,[248] the United States Court of Claims held that the denial of a permit to fill wetlands did not constitute a taking of property, and found that:

> when Deltona acquired the property in 1964, it knew that the development it contemplated could take place only if it obtained the necessary permits from the Corps of Engineers. Although at that time Deltona had every reason to believe that those permits would be forthcoming when it subsequently sought them, it also must have been aware that the standards and conditions governing the issuance of permits could change. *Deltona had no assurance that permits would issue, but only an expectation.*[249]

In *Deltona*, the court found that no taking had occurred even though the criteria that governed the challenged permit denial had

240. *See* Ackerman, *supra* note 112, at 1222.

241. S.W. Diversified, Inc. v. City of Brisbane, 652 F. Supp. 788, 796 (N.D. Cal. 1986).

242. Marine One, Inc. v. Manatee County, 898 F.2d 1490, 1492 (11th Cir. 1990) (holding there was protectable property interest in a permit to build a marina on sovereign land).

243. *See* Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023 (3d Cir. 1987).

244. 444 U.S. 164 (1979).

245. *Id.* at 179.

246. 593 So. 2d 1143 (Fla. 3d DCA 1992).

247. *Id.* at 1145.

248. 657 F.2d 1184 (Cl. Ct. 1981), *cert. denied*, 455 U.S. 1017 (1982).

249. *Id.* at 1193 (emphasis added).

changed drastically and unforeseably from the time when Deltona had originally bought the property.[250] It was enough for the court that Deltona was aware that permits were necessary and that the governing criteria were subject to change.[251] *Lucas* can be read to allow landowners to rely on the continued existence of the statutory law on the books when land is purchased, at least as an assurance that not all economic benefit will subsequently be precluded.

Takings analysis has recognized the state's interest in modifying its land use rules when it perceives the need for a change. The United States Court of Appeals for the Third Circuit, in *Pace Resources, Inc. v. Shrewsbury Township*,[252] found that no taking occurred where the plaintiff landowner, even though he had a reasonable time within which to do so, had failed to pursue his expectations prior to the effectiveness of the challenged regulation. In *Claridge v. New Hampshire Wetlands Board*,[253] the court, in finding no taking, considered the risk the plaintiffs took in waiting to develop the property while concerns about diminishing wetlands resources increased.[254] In *McNulty v. Town of Indialantic*,[255] Florida's federal middle district court found that no protected investment-backed expectations had been taken where the owner waited fifteen years after the lot's purchase to attempt to develop and was denied a permit to construct a home in regulated shoreline area.[256] Cases like these, especially where all economically beneficial use is precluded, are likely to be most affected by *Lucas*.

The purchase of property, without more, has previously been determined to not be the type of investment protected by takings law.[257] In *Furey*, the court stated that the Fifth Amendment protects only those property rights granted by state law and that a contrary rule "would be tantamount to . . . a vested right to develop if consistent with sound business judgment."[258] Other lower federal courts have held that the prohibition of a "present and primary use," as opposed to the prevention of an intended use, is more likely to make a government liable for a taking.[259] In Florida, a landowner has

250. *Id.* at 1190-91.

251. *Id.* at 1191.

252. 808 F.2d 1023, 1003 (3d Cir. 1987), *cert. denied*, 482 U.S. 906 (1987).

253. 485 A.2d 287 (N.H. 1984).

254. *Id.* at 292.

255. 727 F. Supp. 604 (M.D. Fla. 1989).

256. *Id.* at 614.

257. Furey v. City of Sacramento, 592 F. Supp. 463 (E.D. Cal. 1984), *aff'd*, 780 F.2d 1448 (9th Cir. 1986).

258. *Id.* at 469.

259. *See, e.g.*, MacLeod v. County of Santa Clara, 749 F.2d 541, 547 (9th Cir. 1984), *cert. denied*, 472 U.S. 1009 (1985); Traweek v. City and County of San Francisco, 659 F. Supp. 1012, 1029 (N.D. Cal. 1984).

no vested right in a particular zoning classification and must actually have expended monies or have made improvements based on some concrete governmental action in order to acquire vested rights.[260] The language of the *Lucas* opinion could in fact, be read to recognize a right to rely on existing law and zoning at the time property is purchased and to apply similar rights to the value of unimproved and improved property. However, the opinion clearly limits a landowner's expectations to those that are consistent with the existing common law. The question then becomes whether a state's common law can negate any valid reliance on existing legislation.

According to the U.S. Supreme Court, in order for expectations to be protected they must be reasonable as well as distinct,[261] and the frustration of speculative economic gain is not protected by the Takings Clause.[262] Florida law is in accord and is represented by *Graham v. Estuary Properties, Inc.*,[263] where a landowner had been denied a permit to fill wetlands. In that case the Florida Supreme Court found that the developer's expectations were not investment-backed because it "had only its own subjective expectation that the land could be developed in the manner it now proposes."[264]

In analyzing the reasonableness of a landowner's expectations, Florida courts have looked to the type of property involved as well as to its use prior to the challenged governmental action. In *Smith v. City of Clearwater*,[265] a case very similar to *Reahard*, the court found that no taking resulted from the rezoning of a substantial portion of a landowner's property into a restrictive "aquatic lands" zone. The court noted that, except for a very small strip above the mean high water line, all of the property involved was submerged. The court stated: "While there is no doubt that appellants will not be able to do much with their wetlands in the face of aquatic zoning, there wasn't very much they could have done with this land without such zoning."[266] The court's analysis, in noting the "serious environmental considerations" which justified the rezoning, strongly suggests that the public should not have to compensate a landowner who purchases or inherits property that is unsuitable for intensive development:

> The fact that Cooper's Point is so low that the flood plain and setback requirements work against the economics of residential

260. Smith v. City of Clearwater, 383 So. 2d 681 (Fla. 2d DCA 1980).
261. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980).
262. United States v. Grand River Dam Auth., 363 U.S. 229, 236 (1960).
263. 399 So. 2d 1374 (Fla. 1981).
264. *Id.* at 1383.
265. 383 So. 2d 681 (Fla. 2d DCA 1980).
266. *Id.* at 685.

> development does not mean that the City of Clearwater cannot zone the property for residential use. As a practical matter, municipalities cannot be required to adjust their ordinary residential zoning classifications to take into account every peculiar land elevation and configuration.[267]

In *Estuary Properties*, the leading Florida takings case, the Florida Supreme Court ruled that "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."[268]

If *Smith* and *Estuary Properties* are deemed to be part of Florida's common law, properties purchased after these cases were decided may validly be subjected to regulations which preclude property from being put to a use for which it is not inherently suited, even if the result is a lack of economically viable use. Even if *Smith* and *Estuary Properties* had never been decided, Florida's common law of property has historically subjected the ownership of land to constraints imposed by nature and government.

Reahard, the first post-*Lucas* Florida case, reaffirms that landowners must prove the existence of investment-backed expectations, which are the product of statutory law and perhaps even common law at the time of purchase, the physical nature of the property, and of the actual approvals granted by government and monies spent in reliance thereon.[269] This inquiry will also be relevant in cases where, as the result of a permit denial, there is no economically viable use of the property. Even after *Lucas*, just compensation should not be due if, at the time of purchase, there was no reasonable and distinct expectation of an economically viable use. This is because, as will be demonstrated in the next section of this

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267. *Id.*

268. 399 So. 2d at 1382 (quoting Just v. Marionette County, 201 N.W.2d 761, 768 (Wis. 1972)).

269. Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992). The *Reahard* opinion's statement that the common law expectations of both the Reahards and their neighbors was a relevant consideration on remand is curious. *See id.* at 1136. Not unexpectedly, the court had awaited the outcome of *Lucas* before issuing its opinion. *Id.* at 1134. It was also no surprise when the Court denied Lee County's motion to allow the parties to brief *Lucas* as *Reahard* did not involve a claim that the regulation had completely diminished the value of the subject property. *Id.* at 1133. Although nothing in *Lucas* suggests that its categorical rule and "nuisance exception" would apply in the absence of a complete diminution, the Eleventh Circuit borrowed the concept in instructing the magistrate. *Id.* at 1136. In the authors' opinion, this should not be seen as an attempt to introduce common law doctrine wholesale into all takings analysis but rather a reflection of the fact that the record before the Eleventh Circuit did not include a finding as to whether or not the Reahards' parcel had been rendered economically valueless. The court was most likely only trying to establish a comprehensive analysis to apply to whatever factual findings the magistrate might enter on remand.

article, fair market value at the time of a purchase is a product of the most likely development scenario under existing law.

D. Economic Impact

The magistrate judge in *Reahard* has ruled alternatively that a "substantial deprivation" or a "great diminution" of the value of private property amounts to a taking of that property.[270] However, in the area of land use and environmental regulation, compensation is required only where there was virtually a complete diminution in property value.[271] In *Estuary Properties*, the Florida Supreme Court found no taking where a wetlands regulation precluded the use of approximately one-half of the plaintiff's property. Given the legitimate public purpose the question was "whether the regulation precludes *all* economically reasonable use of the property."[272] More recently, in *Glisson v. Alachua County*,[273] while not ruling on the takings issue, the First District Court of Appeal expressed its doubt that a downzoning or down-planning from one unit per acre to one unit per five acres would be a taking.

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270. *Reahard*, 968 F.2d at 1136-37. *See also supra* note 214.

271. In Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978), the Court began its analysis of the takings claim by noting that it had consistently rejected the proposition that a mere diminution in property value can establish a taking and had "previously upheld land use regulations that *destroyed* or adversely affected recognized real property interests." *Id.* at 124. (citations omitted) (emphasis added). The 1985 decision of Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), stated the relevant question as whether the landowner "had been denied all reasonable beneficial use of the property" or "will be unable to derive economic benefit from the land." *Id.* at 191. Two years later, in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987), the Court did not address the actual question of whether a taking had occurred, but assumed that the challenged regulation had deprived the landowner of *all* use of the property. *Id.* at 321. In Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), the Court stated that "land use regulation can affect a taking if it does not substantially advance legitimate state interests, . . . or denies an owner of economically viable use of his land." *Id.* at 485; *see also* Hadacheck v. Sebastian, 239 U.S. 394 (1915) (no taking even though the property value had been reduced by 80%); Euclid v. Ambler Realty, 272 U.S. 365 (1926) (75% diminution not a taking).

The federal courts have recently ruled similarly. *See, e.g.*, Benenson v. United States, 548 F.2d 939 (Ct. Cl. 1977) (taking occurred where there was no reasonable income producing use left); Rymer v. Douglas County, 764 F.2d 796, 800 (11th Cir. 1985) (no taking unless the plaintiff is denied "any" viable economic use); Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023, 1031 (3d Cir. 1987) (no taking where value reduced from $495,000 to $52,000); Atlantic Ltd. v. Hudson, 574 F. Supp. 1381, 1405 (E.D. Va. 1983) (taking occurred where regulation precluded "all viable economic use" or "any reasonable beneficial use" of the property); Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990) (99% diminution in value a taking); Florida Rock Indus. Inc. v. U.S., 21 Cl. Ct. 161 (1990) (denial of limerock mining permit resulted in a 95% diminution of value, which constituted a taking). *But see* Haas & Co. v. City of San Francisco, 605 F.2d 1117 (9th Cir. 1979) (reduction in property value of 95 % not a taking).

272. Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1380 (Fla. 1981) (emphasis added). There is a taking only when a plaintiff has been deprived of *all* beneficial uses.

273. 558 So. 2d 1030 (Fla. 1st DCA 1990).

A landowner has no absolute right to gain a profit from an investment in land.[274] Thus, as long as a plaintiff retains more than a nominal value in the land or can put the land to any gainful use, a "categorical" taking has not occurred. Profitability is not required in order to have a gainful use.[275] In the words of the Supreme Court in *Andrus*:

> [L]oss of future profits--unaccompanied by any physical property restriction--provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.[276]

Although *Andrus* involved personal property, not realty, the Takings Clause makes no distinction between the two.[277] The term "economically viable use . . . should not be read to assure an owner will be able to use property to earn a profit or to produce income. Rather, it assures an owner will be able to make some use of property that economically can be executed."[278]

Lucas does little to change economic impact analysis and, as interpreted by the Eleventh Circuit in *Reahard*, clearly does not support any categorical "substantial reduction in value" test. Nor does *Lucas* protect any interest in future profit. After *Lucas*, in cases where the negative economic impact on the landowner is less than total, it seems likely that government will still be able to avail itself of the benefit of the ad hoc test, which is generally favorable to government. Dicta in *Lucas*, however, suggests that the Court will not absolutely require a complete diminution in value to find a taking in future cases. The actual result of *Lucas* and *Reahard* is that a legitimate exercise of the police power, whether or not required to prevent a

274. *See* Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985); Andrus v. Allard, 444 U.S. 51 (1979).

275. MacLeod v. County of Santa Clara, 749 F.2d 541, 548 (9th Cir. 1984). The *MacLeod* court stated "[a]lthough the Supreme Court has never elaborated on the meaning of 'economically viable,' *Penn Central, supra,* linked its use of the term to 'the ability to use the property *for its intended purpose* in a gainful fashion.'" *Id.* (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978)). Therefore, the court concluded, "[w]e are unwilling to equate immediate overall profitability with the requirement of 'economic viability.'" *Id.*

276. *Andrus*, 444 U.S. at 66; *accord*, FCC v. Florida Power, 480 U.S. 245, 253 (1987).

277. In *Lucas*, the Court distinguished *Andrus*, not to say that a profitable use of land was required to avoid a taking, but to say that while a subsequently enacted regulation may validly destroy the value of real property, such was not the case with real property unless the regulation was designed to prevent a nuisance. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899-900 (1992).

278. McNulty v. Town of Indiatlantic, 727 F. Supp. 604, 608 (M.D. Fla. 1989).

nuisance, will not be a taking absent a complete diminution in fair market value.

Courts will take a practical approach to value, ascribing to land the same value the owner or a prospective owner might give it. In *Department of Agriculture v. Polk*,[279] the Florida Supreme Court explained that fair market value is what a willing buyer and seller, who are both aware of all relevant facts regarding the property, would agree to pay. The market's perception of factors that would negatively impact value are also relevant.[280] In *Pace Resources, Inc. v. Shrewsbury Township*,[281] a case involving a diminution of value from $495,000 to $52,000, the Third Circuit Court found no taking where the plaintiff's land "retain[ed] some value,"[282] and stated that the "concept of reasonable, distinct, investment-backed expectations may . . . involve a recognition of the fact that a property can have value . . . that is unique to its owner and not reflected in its current market value."[283]

On the question of residual value, *Lucas* and *Reahard* may actually strengthen the requirement that landowners bear the burden of demonstrating that all value has been removed from a parcel. Several of the Justices in *Lucas* found it highly unlikely that beachfront property would be completely worthless if the owner could build no house on it. Too often, lower courts have been quick to assume that a prohibition on building a single-family house automatically rendered property valueless. *Lucas* and *Reahard* clearly require strict judicial scrutiny of such a claim.

E. Character of the Regulation

"The nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred, and thus whether compensation is required."[284] Although *Lucas* may not have reduced the importance of this factor, it clearly attempted to reduce the scope of governmental interests that justify the complete diminution of property value.

Three of the factors established by the Florida Supreme Court in *Estuary Properties* for deciding whether a taking has occurred relate to the nature of the government's interest:

279. 568 So. 2d 35, 41 (Fla. 1990).
280. *Id.* at 41.
281. 808 F.2d 1023 (3d Cir. 1987).
282. *Id.* at 1029.
283. *Id.* at 1032-33.
284. Keystone Bituminous Coal Ass'n v. DeBenidictis, 480 U.S. 470, 488 (1987).

1. Whether the regulation confers a public benefit or prevents a public harm.

2. Whether the regulation promotes the health, safety, welfare, or morals of the public.

3. Whether the regulation is arbitrarily and capriciously applied.[285]

In *Keystone*, the U.S. Supreme Court found that the more compelling the purpose of the governmental regulation, the further the regulation can go before it will be a taking.[286] *Lucas* is consistent with this notion, stating that only the need to prevent a common law nuisance can justify the uncompensated preclusion of all economic use. The real change brought about by *Lucas* is that the "nuisance exception" employed by *Estuary Properties* and similar cases has been supplanted by the more limited "*Lucas* nuisance exception." For instance, the Florida Supreme Court in *Estuary Properties*, ruled that the prevention of harm to wetlands prevented a public harm and was not compensable due to "the interrelationship of the wetlands, swamps, and natural environment to the purity of the water and natural resources such as fishing."[287] In *Reahard*, Lee County's decision to allow the Reahards to build only one home on forty acres of wetlands, as opposed to a 126-unit condominium, was mandated by the county's duly adopted comprehensive plan which, by state law, must govern all local land use decisions.[288] In these and other cases, the government pointed to legislative findings which declared a certain activity to be harmful to the public interest.[289] The local ordinance in *Reahard* implemented the Local Government Comprehensive Planning and Land Development Regulation Act (Act),[290] which *requires* local governments to establish and implement comprehensive planning programs to guide and control future

285. Graham v. Estuary Properties, 399 So. 2d 1374, 1381 (Fla. 1981).

286. *Keystone*, 480 U.S. at 488-93.

287. 399 So. 2d at 1382.

288. Reahard v. Lee County, 968 F.2d 1131, 1133 (11th Cir. 1992).

289. The Florida legislature, when it adopted the Warren S. Henderson Wetlands Protection Act, found that wetlands are "a major component of the essential characteristics that make this state an attractive place to live" and they perform "economic and recreational functions that would be costly to replace should their vital character be lost." Ch. 84-79, 1984 Fla. Laws 202, 203 (codified at FLA. STAT. §§ 403.901-.915 (1984), *transferred* Fla. CS for CS for HB 1751 (1993) (Second Engrossed), Ch. 93-213, 1993 Fla. Laws 2129, 1993 Fla. Sess. Law Serv. 1652 (West)). Indeed, even the magistrate in *Reahard* seemed to have understood that the regulation was clearly meant to prevent public harm by preserving wetlands when he said: "We've already agreed that the taking was a correct function of government, we're not arguing that point. If there was a taking, I don't care, they still need to reimburse the property owners."

290. FLA. STAT. §§ 163.3161-163.3243 (1991).

development.[291] An express intent of the Act is that local governments "encourage the most appropriate use of land, water, and resources, consistent with the public interest . . . and deal effectively with future problems that may result from the use and development of land within their jurisdictions," including the *conservation and protection of natural resources.*[292] Thus, pre-*Lucas*, a court may have ruled that even if a growth management regulation precluded all economically viable use of property, it could be justified based on the legislative determination that unmanaged growth is harmful to the public interest. Under *Lucas*, however, regulations that have that effect will have to be addressed to the prevention of a common law nuisance if compensation is to be avoided. Additionally, governments and their attorneys must be mindful of the statement in *Lucas* that regulations that require land to be left substantially in its natural state "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[293]

In cases where there is less than a total diminution, however, legislative findings and the existence of a broad legislative approach will still provide a weighty defense to a takings claim. For instance, Florida's First and Second District Courts of Appeal, in *Glisson v. Alachua County*,[294] and *Lee County v. Morales*,[295] respectively, have held that local land use decisions that are based on comprehensive plans (which in turn are supported by scientific data and analysis) substantially advance legitimate state interests and are not arbitrary and capricious.[296] Both cases involved substantial but not complete reductions in property values, and in neither case was a taking found. *Glisson* and *Morales* make a strong case that local, state, and regional governments should engage in meaningful, thorough, comprehensive, and coordinated planning. Local comprehensive plans, which are legally binding, and agency functional or strategic

291. *See id.*

292. FLA. STAT. § 163.3161(3) (1991). Section 163.3177(6)(d) requires every local comprehensive plan to contain an element for the "conservation, use, and protection of natural resources in the area, including . . . water recharge areas, wetlands . . . forests, fisheries and wildlife . . . and other natural and environmental resources." All local comprehensive plans must be consistent with the requirements of § 163.3177, the state comprehensive plan, and Rule 9J-5, Florida Administrative Code. FLA. STAT. § 163.3177(10) (1991). Within one year of submission of their comprehensive plans, local governments must adopt and enforce land development regulations which are consistent with and implement their adopted comprehensive plan. FLA. STAT. § 163.3202(1) (1991). These regulations must, at a minimum, "[e]nsure the protection of environmentally sensitive lands designated in the comprehensive plan." FLA. STAT. § 163.3202(2)(e) (1991).

293. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 (1992).

294. 558 So. 2d 1030 (Fla. 1st DCA 1990).

295. 557 So. 2d 652 (Fla. 2d DCA 1990).

296. *Glisson*, 558 So. 2d at 1038; *Morales*, 557 So. 2d at 656.

plans, which typically are not, will demonstrate to a court that any particular decision on a specific set of facts is not a result of a capricious, random decision. In *Glisson*, a comprehensive plan's restriction of wetland development to only accessory uses, with a permitted density of one unit per five acres which had to be transferred to uplands, was found to be a valid regulation with a reasonable basis in the technical data.[297] Restrictions on wetland areas were similarly reviewed in *Rowe v. Town of North Hampton*.[298] The court in *Rowe* held that:

> [N]o taking occurs where the 'public policy advanced by a regulation is particularly important and the landowner's action would substantially' change the essential natural character of [the] land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.[299]

Florida has adopted this view. The prevention of change to the natural character of land is not compensable.[300]

In *McNulty v. Town of Indialantic*,[301] a federal district court found no taking where the application of the defendant's coastal construction setback ordinance precluded the construction of even a single-family home on the plaintiff's lot. The opinion was based on the finding that the governmental action was necessary to prevent beach erosion, which had been determined to be a threat to the public economy and welfare.[302] Further, the court found that even if a single-family home could not be built, the construction of walkovers, boardwalks, sand fences, gazebos, a viewing deck, snack bar, stairways, and other such structures would constitute an economic use of the property.[303]

In a case where all economic use has been precluded, *Lucas* gives less deference than these previous cases to legislative determinations of harm, criticizing the public harm/benefit distinction. A case like *McNulty* might still be decided in favor of the government, even under *Lucas*, if the argument for the nuisance preventing objectives of the ordinance (like preventing flooding, groundwater contamination, or deaths resulting from flying shrapnel that used to be part of a coastal structure) were articulated well and proven factually. In the wetlands cases, where some economic use is still available, *Lucas* would not diminish the government's argument. However, in cases

297. *Id.* at 1032-33.
298. 553 A.2d 1331 (N.H. 1989).
299. Id. at 1335 (citations omitted).
300. Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1382 (1981).
301. 727 F. Supp. 604 (M.D. Fla. 1989).
302. *Id.* at 610.
303. *Id.* at 608.

where no economic value is left, under *Lucas*, reliance on generalized public harm will not be persuasive and, again, government will have to demonstrate the safety, health, or welfare justifications for regulations, or rely upon an expansive reading of Florida common law.[304]

The decision in *Conner v. Reed Bros.*[305] provides an interesting glimpse at how Florida courts would react to the *Lucas* nuisance requirement. In *Conner*, the court found that a taking occurred when a citrus owner was required to destroy all of its healthy citrus trees "to prevent a potential, but invisible and undiagnosed, disease from spreading to other groves."[306] A prophetic footnote stated that the range of "police power" actions that would prevent a just compensation claim for a total diminution of value had narrowed as a result of recent U.S. Supreme Court decisions.[307] Thus, although the destruction of trees, as a "purely precautionary" measure may have survived a due process claim, the preclusion of *all* value apparently required the state to present evidence of the actual need to protect a health or safety interest. After *Lucas*, the valid general concern will not necessarily justify a specific confiscatory action and specific factual and scientific evidence will be required.

In reality, however, *Lucas* changes almost nothing in Florida, where the Florida Supreme Court had ruled in 1990 that the complete destruction of the value of property was a taking if not required to prevent a nuisance or imminent danger.[308] A concurring opinion by Justice Barkett states that a regulation is not completely insulated from a takings claim just because it is a valid exercise of the police power.[309]

F. Property as a Whole

The thirty-eight acres in question in *Reahard* were only a small part of the 540 acres of land originally purchased by the plaintiff's father in 1944. Of that parcel, the plaintiff's parents earned a living for the next forty years by carving out and selling both commercial

304. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900-01 (1992). It must be remembered that South Carolina did not establish a record as to the scientific necessity of the regulation challenged in *Lucas* because the validity of the public purpose had been conceded. *See* Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 898 (S.C. 1991), *rev'd*, 112 S. Ct. 2886 (1992).

305. 567 So. 2d 515 (Fla. 2d DCA 1990).

306. *Id.* at 517.

307. *Id.* at 519 n.7.

308. *See* Department of Agric. v. Polk, 568 So. 2d 35, 40 n.4 (Fla. 1990).

309. *Id.* at 49 (Barkett, J., concurring).

and residential lots.[310] The acres themselves were part of a subdivision, of which numerous lots had been sold over the years.

In determining whether a regulation deprives property owners of all economically viable use of their land, thus constituting a taking, a "court must examine the impact of the regulation on the property as a whole."[311] As the Supreme Court stated in *Penn Central*:

> '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 both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.[312]

Prior Supreme Court cases have held that regulation does not effect a taking when it prohibits development on only a certain physical portion of the owner's property.[313] Florida law is essentially the same.[314]

A complete ban on the development of a portion of property was at issue in *Fox v. Treasure Coast Regional Planning Council*.[315] In *Fox*, the property owner was forced to preserve 340 acres of the 1704 acres of wetlands he planned for intensive development. The court said that this requirement was not a taking because it left the owner "some economically reasonable use of his property."[316] The court also said that in determining whether a land use restriction takes private property the focus must be on interference with rights in a parcel as a whole.[317] "Prohibition of development on certain *portions* of the tract does not in itself effect an unconstitutional taking."[318]

In *Deltona Corp. v. United States*,[319] a corporation had purchased some 10,000 acres of coastal land in southwest Florida in 1964 which included areas landward and seaward of the mean high water line, including large areas of coastal mangrove forests and wetlands.[320] It

310. Reahard v. Lee County, 968 F.2d 1131, 1133 (11th Cir. 1991).

311. Mountain States Legal Found. v. Hodel, 799 F.2d 1423, 1430 (10th Cir. 1986).

312. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978).

313. *See id.* (aerial rights above property may not be isolated); Gorieb v. Fox, 274 U.S. 603 (1927) (government may prohibit use of property within setback area thirty feet wide); Welch v. Swasey, 214 U.S. 91 (1909) (upheld height restriction on buildings).

314. *See* City of Miami v. Romer, 58 So. 2d 849 (Fla. 1952) (building setback line upheld); Town of Indialantic v. McNulty, 400 So. 2d 1227 (Fla. 5th DCA 1981) (beachfront setback line of 25 feet not invalid on its face).

315. 442 So. 2d 221 (Fla. 1st DCA 1983).

316. *Id.* at 226.

317. *Id.*

318. *Id.* (emphasis in original) (footnote omitted).

319. 657 F.2d 1184 (Ct. Cl. 1981).

320. *Id.* at 1188.

planned to develop 12,000 residential lots and other uses which would have involved considerable destruction of the mangroves and dredging and filling.[321] Deltona was ultimately denied authorization to dredge and fill the majority of the land it had purchased under regulations which had been expanded subsequent to its purchase of the property. However, after receiving permits to impact some amount of wetlands and developing a portion of its property, less than one percent of the land purchased in 1964 was worth twice the purchase price nine years later.[322]

The Court of Claims "accepted that the expansion of the [Army] Corps [of Engineers'] regulatory jurisdiction and the stiffening of its requirements for granting permits have substantially frustrated Deltona's reasonable investment-backed expectation."[323] Nevertheless, the exercise of jurisdiction neither extinguishes a "fundamental attribute of ownership . . . nor prevents Deltona from deriving many other economically viable uses from its parcel—however delineated. Indeed, the residual economic value of the land is enormous, both proportionately and absolutely."[324]

The *Lucas* ruling, given the facts of the case, does not change the "property as a whole" analysis. A footnote in the majority opinion, however, suggests that state law may accord "legal recognition" to interests in property more narrowly than that of the fair market value of the entire parcel that is touched by the regulation.[325] A number of commentators, perhaps in their zeal to find in *Lucas* some fundamental shift in takings analysis, have misread this footnote to repudiate the *Penn Central* "property as a whole" analysis.[326] *Lucas* does not change this analysis, as suggested by the commentators, but cites, as an "extreme" example of this analysis, the *Penn Central* trial court's statement that the property as a whole included the claimant's other holdings in the vicinity.[327]

A recent Florida appellate decision confirms that courts will take a practical, realistic view of the property as a whole for takings analysis. In *Department of Environmental Regulation v. Schindler*,[328] a prohibition on filling 1.85 acres of wetlands was found not to be a taking when the landowner also owned 1.65 acres of uplands which were immediately adjacent.[329]

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321. *Id.*
322. *Id.* at 1192.
323. *Id.* at 1192.
324. *Id.* at 1192 (citation omitted) (quoting Agins v. City of Tiburon, 447 U.S. 255 (1980)).
325. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 n.7 (1992).
326. *E.g.*, Rhodes & Sellers, *supra* note 7.
327. *Lucas*, 112 S. Ct. at 2894.
328. 604 So. 2d 565 (Fla. 2nd DCA 1992).
329. *Id.* at 567-68.

G. Temporary Takings: Moratoria and Concurrency

Lucas seems to reaffirm the ill defined cause of action of temporary taking established in *First English Evangelical Lutheran Church v. County of Los Angeles.*[330] This calls into question the validity of *Dade County v. National Bulk Carriers,*[331] which held that a Florida landowner aggrieved by a land use decision is generally entitled only to nonmonetary remedies.[332]

Lucas does not address the question of whether moratoria will be deemed to be temporary takings. Previous case law, however, appears not to consider temporary prohibitions as takings. Two passages in *First English* suggest that moratoria, otherwise valid under the established case law, will not be deemed to be temporary takings:

> *Agins* likewise rejected a claim that the city's preliminary activities constituted a taking, saying that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership.'"
>
> * * *
>
> We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.[333]

Moratoria are necessary to protect the public health, safety, and welfare.[334] Accordingly, courts have upheld moratoria against substantive due process claims based on the need to plan to avoid growth-induced public facility problems, or to cure existing problems caused by prior development.[335]

Moratoria must be necessary and must also be reasonably limited in scope and duration, and have a firmly fixed termination point.[336] A moratorium of excessive or unlimited duration is generally held to be unreasonable. Government has a duty to take steps expeditiously to rectify the problem upon which the moratorium is based.[337] The

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330. 482 U.S. 304 (1987).

331. 450 So. 2d 213 (Fla. 1984).

332. *See* Ants v. Dade County, 541 So. 2d 1329 (Fla. 3d DCA 1989).

333. *First English,* 482 U.S. at 320.

334. City of Boca Raton v. Boca Villas Corp., 371 So. 2d 154 (4th DCA 1979), *cert. denied,* 381 So. 2d 765 (Fla.), *cert. denied,* 449 U.S. 824 (1980).

335. *See* Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291 (N.Y. 1972), *appeal dismissed,* 409 U.S. 1003 (1972).

336. *See* Deal Gardens, Inc. v. Board of Trustees of Loch Arbour, 226 A.2d 607, 611 (N.J. 1967).

337. Smoke Rise v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369 (D.C. Md. 1989).

courts recognize that some delay in providing the public facilities will be unavoidable. Government must demonstrate that it is firmly committed to construction of the necessary improvements and actively engaged in solving the problem, and must make meaningful progress towards a solution.

In *Zilber v. Town of Moraga*,[338] the court granted summary judgment in favor of a town which had enacted a one and one-half year moratorium on processing and approving subdivision applications pending completion of a study of an open space plan. The court ruled that this did not amount to a "taking" of property because the moratorium, "in order to develop a comprehensive scheme for regulating open space seems neither unreasonable nor, standing alone, sufficiently burdensome to require compensation."[339] The fact that the moratorium resulted in a lost sale for the plaintiff was seen as simply an "incident of ownership," even though no development could occur on the property during the period of the moratorium.[340]

In *Wincamp Partnership v. Anne Arundel County*,[341] the court rejected a challenge to a "de-facto" moratorium on sewer hookups that was expected to last five years. The county's decision, it was held, was reasonably related to the public health, safety, and welfare.[342] Further, the "necessity, character, and extent of public improvements is usually committed to the discretion of municipal authorities."[343] Significantly, the court also restated that a property owner has no vested right in the continuance of the zoning status of land unless he has proceeded with construction in reliance upon the zoning.[344] In *Wincamp*, the court stated

> that if the county is attempting to meet its sewerage problems in good faith and with reasonable speed and efficiency, then the order in which it deals with affected areas appears to be a matter within the County's discretion, so long as there is no improper motive underlying its priorities and a rational, non-arbitrary basis for the assignment of priorities."[345]

Florida's First District Court of Appeal, in *Paradyne Corp. v. Department of Transportation*,[346] stated that the elimination of undue

338. 692 F. Supp. 1195 (N.D. Cal. 1988).
339. *Id.* at 1206.
340. *Id.* at 1207.
341. 458 F. Supp. 1009 (D. Md. 1978).
342. *Id.*
343. *Id.* at 1025.
344. *Id.* at 1027.
345. *Id.* at 1030 (footnote omitted).
346. 528 So. 2d 921 (Fla. 1st DCA 1988).

disruption of traffic and the prevention of safety hazards were legitimate public purposes. The provision of adequate transportation infrastructure, hurricane evacuation capacity, drinking water, and sewer service, would appear to be a legitimate public purpose. Further, although moratoria are generally appropriate only for emergency type situations, the required justification appears to be relaxed where the moratorium does not prohibit all development on a given parcel.

The Massachusetts Supreme Court has upheld a two year moratorium on apartment construction in an apartment zone, which "effectively reclassified the district to a more restrictive use, if only for a temporary period."[347] The court was persuaded, however, that the landowner was "no worse off than if the town had simply rezoned the area to exclude apartment buildings in the traditional manner, with the intent of again amending the by-law in two years to reflect a new comprehensive plan."[348] In *Bernhard & Co. v. Planning and Zoning Commission of Westport*,[349] a moratorium was upheld where "it did not prevent all development but applied only to business uses."[350]

In *Jackson Court Condominiums v. City of New Orleans*,[351] the Fifth Circuit Court upheld a moratorium on the establishment of time-share condominiums in residential areas. The court rejected the argument that disallowing this use but allowing other transient uses, such as boardinghouses, constituted a violation of the plaintiff's equal protection rights.[352] Finding the classification to be rationally related to a legitimate state objective, the court stated that government is allowed to attack a perceived problem piecemeal.[353] "Under-inclusivity" alone does not constitute an equal protection violation.[354]

In another Fifth Circuit case, *Schafer v. City of New Orleans*,[355] a city had adopted a moratorium on building permits for fast food restaurants in a certain neighborhood pending a study of the area. The maximum duration of the moratorium was eleven months and did not affect other commercial uses in the area. The court upheld the moratorium, and in doing so, approved of interim "bridging the gap" development controls during the pendency of a study.[356] The court

347. Collura v. Arlington, 329 N.E.2d 733, 737 (1975).
348. *Id.* at 737.
349. 479 A.2d 801 (Conn. 1984).
350. *Id.* at 807.
351. 874 F.2d 1070 (5th Cir. 1989).
352. *Id.* at 1079.
353. *Id.*
354. *Id.*
355. 743 F.2d 1086 (5th Cir. 1984).
356. *Id.* at 1090.

agreed with the city that such measures may be necessary to prevent a plan's defeat before its formulation.

One of the earliest but still one of the leading cases on moratoria is *Golden v. Planning Board of Ramapo.*[357] It was one of the first judicial validations of planning efforts to promote sequential development and timed growth. The court stated that when faced with the challenge of population growth, local governments may impose temporary development restrictions to allow the provision of municipal services in a rational manner.[358] In this case, the court upheld a zoning ordinance under which development approvals would be denied unless the projects could provide necessary facilities.[359] The ordinance had been adopted in conjunction with an eighteen year capital budget.

In *Ghidorzi Construction, Inc. v. Town of Chapel Hill,*[360] the court ruled that evidence of "potential for serious personal injury and property damage" was competent and substantial evidence that justified the denial of a special use permit for ninety-one residential units, which would have lowered traffic levels of service from level C to level E.[361]

In the future, Florida courts are likely to focus on the nature of the menace posed by inadequate public facilities. A moratorium based on inadequate water or sewer facilities will likely be easier to justify than one predicated on inadequate roads or park and recreational facilities. Florida courts may also focus on the reasonableness of the levels of service since they determine whether moratoria must be imposed.[362]

IV. CONCLUSION

Lucas and *Reahard* do not suggest a general broadening of the application of the Fifth Amendment in favor of property owners. In cases which do not involve a claim that all economic value has been lost, *Lucas* will not apply. An ad hoc analysis, in consideration of the rulings and language of *Lucas,* will still generally yield a ruling in favor of government's ability to regulate land. In the authors' view, based on the specific factual findings made, the magistrate judge's

357. 285 N.E.2d 291 (N.Y. 1972).

358. *Id.* at 303.

359. *Id.* at 304.

360. 342 S.E.2d 545 (N.C. Ct. App. 1986).

361. *Id.* at 549.

362. *See* Town of Indialantic v. Nance, 419 So. 2d 1041 (Fla. 1982); City of Miami Beach v. Lachman, 71 So. 2d 148 (Fla. 1954), *appeal denied,* 348 U.S. 906 (1955); S.A. Healy Co. v. Town of Highland Beach, 355 So. 2d 813 (Fla. 4th DCA 1978).

Amended Order of Taking will again be reversed by the Eleventh Circuit.

The general impact of *Lucas* on Florida inverse condemnation cases may be less than that for other states. Florida's common law of property rights and nuisance is relatively narrow in terms of the interest acquired when title is taken and the deference to the power of government to prohibit activities in unsuitable places.

Very few regulatory programs in Florida result in the complete preclusion of any construction on property, and even fewer result in the absolute worthlessness of private property. Many local government comprehensive plans and zoning codes provide an "as of right" density of one residential unit per parcel to ensure an economically viable use. Still others provide for Transferable Development Rights. Finally, Florida's state, regional, and even local agencies, both public and private, engage in relatively aggressive land acquisition programs that target environmentally sensitive lands. These are prudent and appropriate responses to *Lucas* and prior precedent.