Florida State University Journal of Land Use and Environmental Law

Volume 8
Number 2 *Spring 1993*

Article 10

April 2018

Takings Law in Florida: The Whole is Greater than the Sum of Its Parcels

David K. Thulman

Takings Law in Florida: The Whole is Greater than the Sum of Its Parcels

Cover Page Footnote
The views expressed in this article are those of the author and do not necessarily reflect the position of the Department of Environmental Regulation.

TAKINGS LAW IN FLORIDA: THE WHOLE IS GREATER THAN THE SUM OF ITS PARCELS

DAVID K. THULMAN*

I. INTRODUCTION

In the summer of 1992, the United States Supreme Court stirred the pot of inverse condemnation law with *Lucas v. South Carolina Coastal Council.*[1] Never a quiescent area of jurisprudence in the best of times, the *Lucas* decision has caused a flurry of speculation about the direction in which the Supreme Court is headed. Private property rights advocates hailed the decision as heralding a new era of property rights expansion.[2] Meanwhile, environmentalists quickly moved to limit the damage by reading the case as narrowly as possible.[3]

While the *Lucas* decision was arguably quite narrow, merely remanding the case to the state court to determine whether a taking had occurred,[4] two footnotes in Justice Scalia's majority opinion are provocative in their implications.[5] In these footnotes, Justice Scalia referred to, but declined to settle, the continuing difficulty of recognizing precisely when a given regulation that restricts the use of some portion of a parcel amounts to a taking of the whole, or alternatively, to a taking of that regulated portion of the whole. Given the Court's tendency to leave an issue unresolved for perhaps decades,[6] the full import of these footnotes will be left for state and lower federal courts to ponder for the indefinite future. Advocates on

* Assistant General Counsel, State of Florida Department of Environmental Regulation; B.A. 1978, *cum laude*, University of Pennsylvania; J.D. 1982, with honors, George Washington University. The views expressed in this article are those of the author and do not necessarily reflect the position of the Department of Environmental Regulation.

1. 112 S. Ct. 2886 (1992). In his dissent, Justice Blackmun characterized the impact of the decision in more militaristic terms: "Today the Court launches a missile to kill a mouse." *Id.* at 2904.

2. *See, e.g.*, Ronald L. Weaver & Mark D. Solov, *New Standards, If Not Greater Protections, Against Land Use Regulations*, FLA. B.J., Dec. 1992, at 58; Daniel J. Popeo & Paul D. Kamenar, *In* Lucas's *Wake, Whither the Law of Takings? The Tide Has Finally Turned in Favor of Property Rights*, N.J. L.J., Aug. 3, 1992, at 15.

3. *See* Richard Grosso, *Takings Law in Florida: What* Lucas *Really Means*, ENVTL. EXCHANGE POINT, (Fla. Dep't of Envtl. Reg., Tallahassee, Fla.), Oct. 1992, at 7; *see also* Jeremy Paul, *In* Lucas's *Wake, Whither the Law of Takings? Scalia's Pursuit of Holy Grail Has Its Price*, N.J. L.J., Aug. 3, 1992 at 15, 21 ("Scalia's opinion is confined to the very narrow class of cases where the government deprives a landowner of virtually 100 percent of the value of the affected property. This means that typical zoning, environmental, and other land-use regulations are not affected by *Lucas* at all.").

4. *Lucas*, 112 S. Ct. at 2902 (Kennedy, J., concurring).

5. *Id.* at 2894-95 nn.7-8.

6. Fifty-six years elapsed between the Court's decision in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), and in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), when the Court next addressed the inverse condemnation issue.

all sides of the takings issue will have to wait until the Justices expound on the ancillary questions raised in *Lucas*.

This comment reviews *Lucas* footnotes seven and eight and the status of takings law in Florida prior to the *Lucas* decision. Then, with *Lucas* as a backdrop, this comment addresses whether Florida property owners may now successfully argue that a portion of their property has been restricted to such an extent as to constitute a taking of at least that portion, if not of the property as a whole. This issue is examined by way of an analysis of Florida's first post-*Lucas* inverse condemnation decision, *Department of Environmental Regulation v. Schindler*.[7] This comment concludes that in determining whether government action amounts to inverse condemnation, Florida courts will likely continue to consider an owner's entire parcel, rather than separately considering the distinct segments affected by the action.

II. THE *LUCAS* FOOTNOTES

One of the crucial inverse condemnation questions that Justice Scalia mentioned in the majority opinion (although not at issue in *Lucas*) concerns the scope of property a court must consider in determining whether a taking has occurred. In footnote seven, the majority observed:

> 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 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 value of the tract as a whole. . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. . . . 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

7. 604 So. 2d 565 (2d DCA), *rev. denied*, 613 So. 2d 8 (Fla. 1992). The appellee landowners submitted the *Lucas* decision as supplemental authority prior to the issuance of the *Schindler* decision. Because oral argument was requested but not granted, it is not known how the appellees would have argued the applicability of the case. Also decided on the same date was the companion case of Board of Trustees of the Internal Improvement Trust Fund v. Schindler, 604 So. 2d 569 (Fla. 2d DCA 1992), wherein the court reversed the partial summary judgment entered against the Board of Trustees. The court stated: "[W]e have serious doubts that appellees can state a cause of action against the Board." *Board of Trustees*, 604 So. 2d at 570.

> in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.[8]

Justice Scalia again addressed the problems involved in determining what property is at issue in footnote eight:

> Justice Stevens criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary", in that "[the] landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." *Post*, at 2919. This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. 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. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these "all-or-nothing" situations.[9]

These footnotes are clearly a warning from Justice Scalia that regulators should not assume that previously settled case law has accurately established a test for determining what property is at issue in a takings claim. Justice Scalia belies his dissatisfaction with this assumption by stating that

> [w]hen, 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 value of the tract as a whole.[10]

---

8. *Lucas*, 112 S. Ct. at 2894 n.7.
9. *Id.* at 2895 n.8 (citation omitted).
10. *Id.* at 2894 n.7.

He goes on to state that the Court itself has produced inconsistent results, leaving open the possibility that in the future the Court may remedy the inconsistencies.[11]

Finally, Justice Scalia recognizes that this important issue will turn, at least in part, on state laws of property; to what extent and to what degree a particular state "accord[s] legal recognition and protection to the particular interest in land."[12] With that admonition in mind, both property rights advocates and land regulators will be closely examining future state inverse condemnation cases.[13]

III. THE STATUS OF FLORIDA LAW PRIOR TO *LUCAS*

The law in Florida has been relatively clear with regard to whether the whole or a portion of the whole of an affected owner's property is to be considered in determining when a taking has occurred:[14]

> "[A] taking will not be established merely because the agency denies a permit for the particular use that a property owner considers to be the most desirable, or because the agency totally denies use of some *portion* of the property,". . . so long as some economically viable use of the property remains.[15]

The law required that when analyzing the effect of government action on the value of property in a takings claim, the property must be viewed as a whole, not in distinct segments.[16]

The case of *Department of Environmental Regulation v. MacKay*[17] illustrates clearly this principle. In *MacKay*, the property owners owned 3.2 acres of land in Key West. Two and one-half acres of the property were completely submerged. The MacKays applied for a permit from the Florida Department of Environmental Regulation

---

11. *Id.*

12. *Id.*

13. For a discussion and analysis of the *Lucas* decision and of regulatory takings law generally, see John R. Nolon, *Footprints in the Shifting Sands of the Isle of Palms: A Practical Analysis of Regulatory Takings Cases*, 8 J. LAND USE & ENVTL. LAW 1 (1992).

14. While this body of law may be relatively clear, the issue of when it applies to a particular case is not. *See* Orange County v. Lust, 602 So. 2d 568 (5th DCA), *rev. denied*, 613 So. 2d 6 (Fla. 1992). "[I] hope our Florida Supreme Court will take jurisdiction in an appropriate case and instruct us on these matters. We obviously need some help!" *Id.* at 576 (Sharp, J., concurring specially).

15. Department of Envtl. Regulation v. MacKay, 544 So. 2d 1065, 1066 (Fla. 3d DCA 1989) (quoting Fox v. Treasure Coast Regional Planning Council, 442 So. 2d 221, 226 (Fla. 1st DCA 1983) (emphasis added)).

16. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); Fox v. Treasure Coast Regional Planning Council, 442 So. 2d 221 (Fla. 1st DCA 1983); Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla.), *cert. denied*, 454 U.S. 1083 (1981); Department of Transp. v. Burnette, 384 So. 2d 916 (Fla. 1st DCA 1980).

17. 544 So. 2d 1065 (Fla. 3d DCA 1989).

(DER) to fill the submerged portion of their property.[18] DER denied the application, and the MacKays alleged that DER had taken their property without compensation. The court held that their taking claim could not stand because the evidence showed that DER's decision had not deprived the MacKays of all beneficial uses of their entire property.[19]

In Florida, prior to *Lucas*, it had always been clear that the portion of property affected by a land use regulation would be examined in the context of the property surrounding the disputed portion, provided the surrounding property and the disputed portion were legally considered to be a consolidated unit for purposes of inverse condemnation.[20] Thus, the determination of whether a taking had occurred always turned in large part on how a parcel of property was characterized. That characterization was, and under *Lucas* continues to be, a function of state law.[21]

The determination of "what property is at issue" may vary from state to state. An example of the Florida calculus is provided in *Department of Transportation v. Jirik*.[22] The issue before the court in *Jirik* was whether separate platted lots should be considered as one parcel for purposes of inverse condemnation.[23] In *Jirik*, the landowner originally owned five vacant contiguous platted lots. She had previously sold Lot Five and had a contract to sell Lot Four when the Department of Transportation (DOT) constructed a bridge that restricted access to Lot One. DOT argued that the remaining Lots One, Two, and Three constituted a single parcel of property. DOT further argued that no taking occurred because access to the three-lot parcel was not restricted.[24]

The Florida Third District Court of Appeal found that determining how property should be divided for inverse condemnation purposes is very fact dependent.[25] Nevertheless, the court adopted one of two prevailing presumptions to aid in the fact

18. *Id.* at 1066.

19. *Id.*

20. *See, e.g., Fox*, 442 So. 2d at 225 ("[T]he focus is on the nature and extent of the interference with the landowner's rights in the parcel *as a whole* in determining whether a taking of private property has occurred. Prohibition of development on certain *portions* of the tract does not in itself effect an unconstitutional taking.") (emphasis in original); *see also supra* notes 14-19 and accompanying text.

21. While it is ostensibly an issue of state law, state law may have some constitutional limits. *See infra* notes 82-84 and accompanying text. In footnote seven of *Lucas*, the Court described with displeasure the extent to which the New York state court considered properties owned by Penn Central adjoining and in the area of Grand Central Station. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 n.7 (1992).

22. 471 So. 2d 549 (3d DCA 1985), *approved*, 498 So. 2d 1253 (Fla. 1986).

23. *Id.* at 551.

24. *Id.*

25. *Id.* at 554.

finding process: if property is platted, there is a presumption that the platted lots are separate units when determining whether a taking has occurred.[26] In *Jirik*, DOT did not present any evidence to rebut this presumption; thus, the court found the lots to be separate units.[27]

Jirik also considered and approved the use of another presumption: contiguous parcels of property are presumed to be a single unit in takings cases.[28] Hence, in the absence of evidence regarding separate platting or of other evidence of separateness, contiguous parcels will be analyzed as a consolidated unit. Therefore, in an inverse condemnation action brought in pre-*Lucas* Florida, landowners could reasonably expect a court to consider their property as a whole rather than as distinct segments. What property made up that whole was determined by employing the presumptions and by considering the factors set forth at length in *Jirik*. This was the state of the law presented to Florida's Second District Court of Appeal when it decided *Department of Environmental Regulation v. Schindler*.[29]

IV. THE *SCHINDLER* DECISION

The *Schindler* lawsuit has a long and tortuous history. The following sections trace this history, from the various property transfers involved to a contested permit denial in 1976, and continuing through the inverse condemnation action and the decision of the Second District Court of Appeal.[30]

---

26. *Id.* at 555.

27. *Id.* The Florida Supreme Court agreed with this finding in approving the *Jirik* decision. "Given the complexity and formalities of modern-day city planning, we believe that a presumption of separateness as to vacant platted urban lots is reasonable and would facilitate the determination of the separateness issue in the absence of contrary evidence." 498 So. 2d at 1257. "We . . . hold that vacant city property constitutes presumptively separate units if platted into lots. This presumption of separateness is, of course, rebuttable. *Id.*

28. 471 So. 2d at 553. In accepting jurisdiction, the Florida Supreme Court found conflict between *Jirik* and Di Virgilio v. State Road Dep't, 205 So. 2d 317 (4th DCA 1967), *cert. dismissed*, 211 So. 2d 556 (Fla. 1968). 498 So. 2d at 1254. In *Di Virgilio*, the court considered whether physically separated lands could be considered as adjoining property under the state statute governing condemnation. The court found the lack of physical contiguity alone would not defeat a finding that the parcels were adjoining. The court considered the fact that the parcels were only separated by a highway easement with unrestricted access, and that they shared the highest and best use of the land. 205 So. 2d at 320. In approving *Jirik*, the Florida Supreme Court disapproved *Di Virgilio* "to the extent it conflicts with our holding herein." 498 So. 2d at 1257. *Di Virgilio* presents a situation intermediate between that presented in *Penn Central* and in *Schindler*: a fee simple interest cut in half by an easement with the halves physically separated by an asphalt ribbon. Considering Justice Scalia's unhappiness with the New York state court's consideration of noncontiguous properties, however, the continuing usefulness of *Di Virgilio* is problematic.

29. 604 So. 2d 565 (2d DCA), *rev. denied*, 613 So. 2d 8 (Fla. 1992).

30. From the denial of the permit application in 1976, there have been three other appeals: Albrecht v. Board of Trustees of the Internal Improvement Trust Fund, 481 So. 2d 555 (Fla. 2d DCA 1986); Albrecht v. State, 407 So. 2d 210 (2d DCA 1981), *quashed*, 444 So. 2d 8 (Fla. 1984);

A. History of the Transfers of the Property

In 1950, Edwin Thomas purchased Lots One through Four of Indian Rocks Manor in Indian Rocks Beach in Pinellas County.[31] Each lot fronted Gulf Boulevard and each had a back lot line adjacent to the Intercoastal Waterway.[32] The present landowners alleged that from 1943 to 1960, approximately one-half of the property was eroded away, submerging the waterward half of each of the four lots.[33] By operation of law, the submerged lands reverted to ownership by the state.[34]

On November 10, 1960,[35] Thomas purchased the 1.85 acres of submerged lands that abutted his uplands from the Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees) for $925. This transaction caused the submerged and upland portions of the platted parcels to reunite in single ownership.[36] The sale was approved at a meeting of the Board of Trustees on October 18, 1960.[37] "Nothing in the minutes of the approval of the sale or in the deed itself grant[ed] Thomas [the] right to fill the submerged 1.85 acres."[38] "On April 24, 1964, Thomas purchased Lot [Five]. Together with his 1.65 acres of uplands, [he] then owned 3.5 contiguous acres."[39]

On January 18, 1974, George Albrecht and Nellie C. Richey purchased the entire 3.5-acre parcel from Thomas for $75,000, after having had the entire parcel appraised on November 21, 1973.[40] According to that appraisal, the value of the property in its natural unfilled state was $125,000. Its appraised value in a filled state was $230,000.[41]

On December 4, 1974, Albrecht and Richey sold C. G. Schindler and L. Brett White an undivided one-third interest in the entire 3.5 acres for $60,750.[42] On August 25, 1975, Richey sold her remaining undivided one-third interest in the parcel to Schindler and White for

---

Albrecht v. Department of Envtl. Regulation, 353 So. 2d 883 (1st DCA 1977), *cert. denied*, 359 So. 2d 1210 (Fla. 1978).

31. *Schindler*, 604 So. 2d at 565-66.

32. *Id.* at 566.

33. *Id.*

34. 1958 FLA. ATT'Y GEN. BIENN. REP. 865.

35. This is the actual date the deed was transferred. Appendix to the Initial Brief of Defendant, Appellant, State of Florida Department of Environmental Regulation at 81, *Schindler* (No. 78-8484-10).

36. *Schindler*, 604 So. 2d at 566.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

$50,000.[43] "After those sales, Albrecht, Schindler, and White each owned an undivided one-third interest in the property."[44]

On April 6, 1976, Schindler exchanged a parcel of Bahamian property with White for White's remaining interest in the property. Schindler then owned an undivided two-thirds and Albrecht owned an undivided one-third interest in the parcel. "The approximate value of the exchange was $60,000.[]"[45] Approximately six months after that transfer, White reacquired a one-third interest.[46] "On September 24, 1981, Albrecht sold his remaining one-third undivided interest to White. As of 1986, White, Schindler, and White, as trustee, each possessed undivided one-third interests in the property."[47] All of the deeds transferring the various interests back and forth between the owners have always characterized the property as Lots One, Two, Three, Four, and Five.[48]

B. Permitting History of the Property

On October 12, 1961, the Pinellas County Water and Navigation Authority issued a permit to Thomas to fill the 1.85 acres of submerged land he had purchased from the Board of Trustees.[49] By its terms, the Authority's permit was subject to approval by the Board of Trustees. The Board of Trustees approved the permit on October 24, 1961. The permit expired on October 12, 1963, two years after the

---

43. *Id.*

44. *Id.*

45. *Id.*

46. This was done through an unrecorded deed. *Id.*

47. *Id.*

48. Since Thomas purchased the eroded portion of the property in 1960, the property has always been transferred as a single parcel with the following description: "Lots 1, 2, 3, 4, and 5 of INDIAN BEACH MANOR SECTION "A", according to plat thereof recorded in Plat Book 22, page 48, Public Records of Pinellas County, Florida. Together with . . . all riparian rights." Appendix to the Initial Brief of Defendant, Appellant, State of Florida Department of Environmental Regulation at 89, 91-93, *Schindler* (No. 78-8484-10). In 1975, Thomas issued a corrective deed to Albrecht and Richey to clarify that the previous deed included the submerged portion of Lots 1, 2, 3, and 4. *Id.* at 87. The submerged portion of the property was never mentioned in any of the subsequent transfers.

49. *Schindler*, 604 So. 2d at 566. Thomas purchased the 1.85 acres from the Board of Trustees under the authority of Chapter 57-362, *Laws of Florida* (1957), which was later codified as Chapter 253, *Florida Statutes* (1959). Established within section 253.124 was a new statutory standard for filling submerged lands purchased from the Board of Trustees. When Thomas purchased the property from the Board of Trustees in 1960, this section provided that any person who wished to fill in navigable waters had to apply for permission to the Board of County Commissioners. A permit granted under this provision lasted only two years and could be revoked for good cause. Section 253.124 provided a number of prerequisites that had to be met by applicants prior to the issuance of a permit to fill, including the need for a plan or drawing of the proposed construction, a finding of "no harmful obstruction to or alteration of the natural flow," a finding of no harmful increase in erosion, shoaling or stagnation, and a finding that no monetary damage or material injury to adjoining property would be caused by the filling. FLA. STAT. § 253.124 (1959).

date of issuance. "Thomas never acted on the permit and never filled the submerged 1.85 acres."[50]

Shortly after purchasing the property in 1974, Richey and Albrecht applied for a permit to fill the submerged 1.85 acres, which consisted of Lots One through Four.[51] The application did not include any filling of Lot Five.[52] "That permit application was denied by DER and the denial was upheld by the [Board of Trustees] on November 10, 1976."[53] Richey and Albrecht appealed the denial.[54] The First District Court of Appeal upheld the denial on December 27, 1977, upon finding that DER had the statutory authority to determine that the granting of the permit would have been contrary to the public interest.[55] This present action was filed soon after the permit denial was upheld on appeal.[56]

C. Facts Concerning the Takings Claim

Although the property was zoned for commercial and residential use, neither Albrecht nor Schindler ever attempted to develop the upland portion of the lots.[57] They claimed that it was always their intent to fill the entire submerged portion of the property and to use the property as a whole.[58] Yet, from January of 1974, when Albrecht and Richey purchased the property, through at least July of 1979, the property had two income-producing rental houses on it.[59]

The landowners claimed that the submerged portion of their property had no commercial use in its natural state.[60] The court found this contention to be merely a "self-serving statement," not supported by independent evidence.[61] In fact, there was evidence to

---

50. *Schindler*, 604 So. 2d at 566.

51. *Id.*

52. *Id.* Lot Five is adjacent to Lot Four but was not part of the permit application or the taking claim.

53. *Id.*

54. *Id.*

55. Albrecht v. Department of Envtl. Regulation, 353 So. 2d 883, 885 (1st DCA 1977), *cert. denied*, 359 So. 2d 1210 (Fla. 1978).

56. *Schindler*, 604 So. 2d at 566.

57. *Id.* at 566-67.

58. *Id.* at 567.

59. Neither Albrecht, Richey, White nor Schindler ever applied for a permit from DER to fill less than the entire 1.85 acres. This situation raises an issue of ripeness. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 188 (1985) (holding takings claim premature because, among other things, complainant had not applied for variances from the zoning ordinance in order to seek to develop the tract); *see also* Reahard v. Lee County, 968 F.2d 1131, 1135 (11th Cir.), *supplemental op.*, 978 F.2d 1212 (11th Cir. 1992) (Landowner must overcome two hurdles for just compensation claim to be ripe for review: final decision hurdle and just compensation hurdle; "[t]he final decision requirement includes a requirement that the property owner seek variances from the applicable regulations.").

60. *Schindler*, 604 So. 2d at 567.

61. *Id.*

show that the submerged lands "could be used to compliment the use of the uplands by installing a boardwalk, walkway, gazebo, fishing pier and perhaps boating slips."[62]

D. The Schindler Decision

The *Schindler* case presented a situation not directly at issue in previously reported Florida appellate decisions. In *Schindler,* the parcel of property that the landowners alleged was taken, specifically the submerged portion of Lots One, Two, Three, and Four, had been purchased as a separate and distinct parcel within the previous thirty-five years by a predecessor in interest. Even though it was an integral part of the platted lots, the submerged portion of the property could have continued to be transferred by separate deed, as it had been from the Board of Trustees to Thomas.[63]

The landowners argued strenuously that it was inherently unfair for the state to sell the submerged lands to Thomas, to grant Thomas a permit to fill the lands in 1961, and then to unceremoniously deny the present landowners the right to fill the property.[64] The Second District Court dismissed this "implied contract" argument with little discussion.[65] Rather, the court concentrated on what it identified as being the seminal issue in the case: "what 'property' the court should consider in deciding whether there has been a taking, i.e., the 1.85 acres of submerged land or the entire 3.5 acres."[66] Resolution of this issue partly turned on whether the 1960 deed should be treated as a separate land transaction having retained its separate nature through the years and through the multiple transactions, or as having lost its "separateness" and having melded back into the platted deeds, restoring the boundaries of the original purchase of the whole in 1950.[67]

The court examined the landowners' argument that the property should be split along the boundaries established in the 1960 deed from the Board of Trustees to Thomas.[68] The landowners argued that under *Jirik,*[69] a presumption existed that the parcels were separate because of the physical differences between the upland and submerged portions of the property.[70] The court rejected that argument as insufficient without more to rebut the presumption of

62. *Id.*
63. *See supra* notes 35-39 and accompanying text.
64. *Schindler,* 604 So. 2d at 568.
65. *Id.*
66. *Id.* at 567.
67. *See supra* notes 35-48 and accompanying text.
68. *Schindler,* 604 So. 2d at 567.
69. *See supra* notes 22-29 and accompanying text.
70. 604 So. 2d at 567.

unity.[71] The court noted that in addition, the landowners and all predecessors in interest had treated the property as a single unit, both in the deeds and in the development plans.[72]

The court also rejected the landowners' argument that a contract arose between Thomas and the Board of Trustees when the property was sold.[73] Noting that the factors at issue in *Schindler* are like those set forth in *Graham v. Estuary Properties, Inc.*,[74] in that the landowners had not purchased their properties from the state and that the properties were not entirely submerged,[75] the court ordered that on remand the property should be viewed as a whole[76] and that the *Estuary Properties* balancing test for determining whether a taking has occurred should be employed.[77]

V. DOES *SCHINDLER* FALL AFOUL OF *LUCAS*?

If there is a guiding principle to be gleaned from the *Lucas* footnotes, it is that the Supreme Court will look, at least in the first instance, to a state's law of property in determining how a particular property interest should be characterized; that is, whether the interest is to be protected or unprotected.[78] Other than the Court's apparent blanket rule for all states that a fee simple interest will always be protected,[79] no guidance is provided in the opinion as to how broad that "law of property" may be. The question presented in *Schindler* involved determining what portion of the fee formed "the denominator in our 'deprivation' fraction."[80] Another facet of the

71. *Id.*

72. *Id.*

73. The landowners argued that "because Thomas was granted a permit to fill the submerged land in 1961, [they] succeeded to [this right]." *Id.* at 568.

74. 399 So. 2d 1374 (Fla.), *cert. denied*, 454 U.S. 1083 (1981).

75. *Schindler*, 604 So. 2d at 567-68. The court noted that both properties were purchased "from a private individual 'with full knowledge that part of [them were] totally unsuitable for development.'" *Id.* at 568 (quoting *Estuary Properties*, 399 So. 2d at 1382).

76. *Id.*

77. "The owner of private property is not entitled to the highest and best use of his property if that use will create a public harm." *Id.* (quoting *Estuary Properties*, 399 So. 2d at 1382). The *Estuary Properties* balancing test is a "formula for determining when the valid exercise of police power stops and an impermissible encroachment on private property rights begins." 399 So. 2d at 1380.

78. "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." Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 n.7 (1992).

79. The Court did not find it necessary to determine "to what degree the State's law [had] accorded legal recognition and protection to [Lucas's] particular interest in [the land at issue.]" *Id.* The Court avoided this difficulty, "since the 'interest in land' that Lucas [had] pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law. . . ." *Id.*

80. *Id.*

problem, which has some significance in *Schindler*, lies in determining how many formerly separate fee simple interests a court may consolidate to produce the denominator. The Supreme Court clearly views with some consternation the notion that physically separate fee simple interests can be considered together.[81]

While the designation of the denominator is, in part at least, clearly a function of the landowner's reasonable expectations based upon state law, that designation is apparently subject to some constitutional constraints. What is not clear is the breadth of those constraints.[82] In *Schindler*, the landowners argued that they reasonably expected the right to bulkhead and fill the submerged portion of the property to have traversed the many property transactions unscathed. The landowners considered that it was reasonable for them to have expected that they would have inherited the same rights acquired by Thomas when he purchased the submerged property in 1960 from the Board of Trustees. They argued that the essential character of the submerged parcel as a separate and distinct fee interest was unaltered by its consolidation into the upland fee.[83] If *Lucas* had been decided in time, the landowners might have characterized this argument differently. They might have argued that for purposes of inverse condemnation, the state is constitutionally constrained from destroying the "separate" nature of the submerged fee.[84]

---

81. It is for this reason that the Court disapproved of the state court progenitor of *Penn Central:*

> For an extreme–and, we think, unsupportable (sic)–view of the relevant calculus, see Penn Central Transportation Co. v. New York City, where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the taking claimant's other holdings in the vicinity.

Id. *(citation omitted).*

82. Justice Scalia's reliance on the state court progenitor of *Penn Central* as an extreme example gives us little guidance in this regard. *Id; see supra* note 81. The *Penn Central* case is more complicated than the Court's description. In *Penn Central*, the trial court considered that the development rights restricted at Grand Central Station could be transferred to other properties owned by Penn Central in the vicinity. Penn Cent. Transp. Co. v. New York City, 366 N.E.2d 1271, 1277 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978); *see supra* note 21 and accompanying text.

83. *See supra* notes 68-77 and accompanying text. A necessary, but unrealized, component in the landowners' theory was that Thomas indeed acquired some inalienable right to bulkhead and fill the submerged lands, a conclusion the record does not support and the Second District Court of Appeal specifically rejected. Department of Envtl. Regulation v. Schindler, 604 So. 2d 565, 568 (2d DCA), *rev. denied*, 613 So. 2d 8 (Fla. 1992).

84. It is dubious whether this argument would have prevailed. In Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992), decided two weeks before *Schindler*, the United States Court of Appeals for the Eleventh Circuit took note of the Supreme Court decision in *Lucas*. The court observed that the *Lucas* Court "left open how the categorical takings rule set forth in its opinion applies to situations in which a part of a landowner's property is rendered unusable by a regulation." *Reahard*, 968 F.2d at 1134 n.5. The court vacated and remanded a United States magistrate judge's order finding the adoption of the Lee County, Florida Comprehensive Land

The view of the landowners in *Schindler* that fee interests are fossilized when originally transferred and that their boundaries and essential natures are unaltered by consolidation in a single deed is problematic. The property in *Schindler* is really a jumble of fee interests, involving five parcels joined along lotlines and two parcels joined along shorelines. The *Lucas* footnotes really give no clue as to how the Supreme Court would balance the "rich tradition" of the fee simple interest against Florida's view that all the fee interests in *Schindler* were consolidated into one unit for purposes of this inverse condemnation action, a view that accords with the State's bureaucratic interest in simplifying property transfers. Moreover, the landowners' position is at odds with the Court's pronouncement that a state's law of property shapes the owner's reasonable expectations. Florida clearly has allowed fee interests to be divided and combined, both along physical and intangible boundaries.[85]

The Second District Court of Appeal quite properly analyzed the acts and statements of the *Schindler* landowners to discern their true reasonable expectations and, through that analysis, the extent of the "whole property."[86] The court concluded that the landowners'

Use Plan resulted in a taking of the Reahard family's property, "because the magistrate judge misapplied the legal standard for partial takings and failed to make adequate factual findings." *Id.* at 1132. The court stated that "the only issue in just compensation claims is whether an owner has been denied all or substantially all economically viable use of his [sic] property." *Id.* at 1136. In resolving this issue, "the factfinder must analyze, at the very least: (1) the economic impact of the regulation on the claimant; and (2) the extent to which the regulation has interfered with investment-backed expectations." *Id.* At issue in this case were 40 acres of waterfront land that the Comprehensive Plan restricted the Reahard family from developing into a subdivision. The land was once part of a larger parcel of approximately 540 acres, which Mr. Reahard's parents owned, developed, and sold during the 1970s. The Reahards inherited the remaining 40 acres in November, 1984, one month before the Comprehensive Plan went into effect. *Id.* at 1133.

Under these facts, the court found it necessary for the factfinder to address a number of questions in addition to analyzing the two factors set out above in order to achieve a proper takings analysis:

> In this case, those questions are: (1) the history of the property--when was it purchased? . . . (2) the history of development--what was built on the property and by whom? . . . (3) the history of zoning and regulation--how and when was the land classified? . . . (4) how did development change when title passed?; (5) what is the present nature and extent of the property?; (6) what were the reasonable expectations of the landowner under state common law?; (7) what were the reasonable expectations of the neighboring landowners under state common law?; and (8) perhaps most importantly, what was the diminution in the investment-backed expectations of the landowner, if any, after passage of the regulation?

Id. at 1136.

85. *See supra* notes 14-29 and accompanying text. In *Schindler*, the property is split into three distinct, undivided interests. 604 So. 2d at 566.

86. Regarding the landowners' argument that the only reason Thomas bought the submerged land was to bulkhead and fill it, the court sensibly discerned that

understanding of their property extended to the four corners of the five lots and that the five lots included the submerged and upland portions.[87] Put another way, the court found that in this case, following the analysis in *Jirik*,[88] it was unreasonable for the landowners to expect that the property would be carved in half solely for purposes of pursuing the takings claim but would remain whole for all other purposes.[89]

The real problem with the landowners' approach to identifying the "denominator in the deprivation fraction" lies in determining how far back one must go in the chain of title before arriving at the proper denominator. The *Schindler* landowners rather arbitrarily stopped in 1960, but they could just as easily have stopped when the area was originally platted, or when the property was owned by Spain. For this reason, a court's focus must be on the present owner's reasonable expectations for his or her land holdings.

In *Lucas*, Justice Scalia did not clarify what he meant by a "[s]tate's law of property."[90] Would he compartmentalize a state's law of property as applied to condemnation, taxation, or real estate transfers? If he is saying that a state may only view property on a strictly common law basis or, for example, that a state may not look beyond the boundaries of the fee as defined by the owner, then this could result in significant change in takings jurisprudence. If a court is unable to consolidate fee interests to arrive at the proper denominator, then calculating developers may be able to divide undevelopable pieces from large parcels and require the state to "acquire" the less desirable parts.[91]

A landowner's reasonable expectations about developing a parcel must be shaped by everything that makes up the state and federal law

---

> [i]f this [were] true, then Thomas would not have let two years elapse[, nor would he have] allow[ed] the permit to expire without filling the land. [The landowners] appear to be speculating as to what was in Thomas' mind and [in] the [T]rustees' minds in 1960, when the purchasing and permitting occurred.

604 So. 2d at 566.

87. *Id.*

88. *See supra* notes 22-29 and accompanying text.

89. A more difficult case would be presented if the submerged lands had always been treated separately from the uplands. In that case, a thorough, fact intensive, *Jirik* analysis would be required. *See supra* notes 25-29 and accompanying text.

90. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2984 n.7 (1992).

91. A similar situation was apparently presented in Namon v. Department of Envtl. Regulation, 558 So. 2d 504 (3d DCA), *rev. denied*, 564 So. 2d 1086 (Fla. 1990), where the original landowner divided his property into unbuildable five-acre parcels. The purchasers sued for inverse condemnation when their applications for fill permits were denied. See also Orange County v. Lust, 602 So. 2d 568 (5th DCA), *rev. denied*, 613 So. 2d 6 (Fla. 1992), for a case where the division was not intentional but nevertheless left the purchaser with an unbuildable lot. This view of property does not conflict with the *Schindler* decision, as it was clear that the property had been consolidated into a single unit.

regulating the use of that parcel, including the panoply of common and statutory laws, and local and state regulations, all of which become more or less restrictive through time.[92] In *Schindler*, Thomas, the landowners' predecessor in interest, took title to the property under the statutory strictures of Chapter 57-362, *Laws of Florida*.[93] Therefore, he could not have reasonably expected the state to permit the unrestricted bulkheading and filling of the submerged lands. By the time the present landowners acquired title, the regulations governing these activities had changed, and so their reasonable expectations must have changed to reflect the new restrictions. A denominator in the takings equation that considers reasonable expectations to include those that do not align with applicable regulations is an invitation to speculation and abuse. Developers should not be able to create takings claims merely through modification of property descriptions.

VI. CONCLUSION

Schindler represents a continuum from the pre-*Lucas* cases of *Estuary Properties*,[94] *Department of Transportation v. Burnette*,[95] and *Fox v. Treasure Coast Regional Planning Council*.[96] Despite the confusion arising from the understandably vague footnotes in *Lucas*, it is clear that under most analyses, the result in *Schindler* does not do violence to the intent of the footnotes.[97] *Schindler* simply applied the presumptions and tests established in *Jirik* for determining the proper "denominator" in the "condemnation fraction."[98] It appears that for now, Florida courts will continue to look at the property as a whole when deciding takings cases.

92. DER's mangrove regulations are a good example of rules that have become more and then less strict through time. *Compare* FLA. ADMIN. CODE ANN. chs. 17-27 (1985), 17-321 (1991), 17-321 (1992).

93. *See supra* notes 49-50 and accompanying text.

94. 399 So. 2d 1374 (Fla.), *cert. denied*, 454 U.S. 1083 (1981); *see supra* notes 14-16, 74-77 and accompanying text.

95. 384 So. 2d 916 (Fla. 1st DCA 1980); *see supra* notes 14-16 and accompanying text.

96. 442 So. 2d 221 (Fla. 1st DCA 1983); *see supra* notes 14-16 and accompanying text.

97. Even the outcome in Di Virgilio v. State Road Dep't, 205 So. 2d 317 (4th DCA 1967), *cert. dismissed*, 211 So. 2d 556 (Fla. 1968), was not foreclosed by *Jirik* or by *Lucas*. *See supra* note 28 and accompanying text; *see also* Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp., 608 So. 2d 52, 54 n.3 (Fla. 2d DCA 1992) (referring to *Mackay* and to *Schindler* in asserting that "[u]nder well-established precedent, an inverse condemnation action concerning a use restriction affecting only a portion of a parcel of property is difficult, if not impossible, to prove.").

98. *See supra* notes 22-29 and accompanying text.