THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MACHIPONGO LAND AND COAL CO., INC. and the VICTOR E. ERICKSON TRUST and JOSEPH NAUGHTON	:	**No. 112 MAP 2000**
	:	**No. 119 MAP 2000**
Petitioners,	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, THE ENVIRONMENTAL QUALITY BOARD, and ARTHUR A. DAVIS, SECRETARY OF ENVIRONMENTAL RESOURCES	:	
Respondents.	:	

BRIEF OF AMICI CURIAE PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS, PENNSYLVANIA STATE ASSOCIATION OF BOROUGHS, PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP COMMISSIONERS, COUNTY COMMISSIONERS ASSOCIATION OF PENNSYLVANIA, PENNSYLVANIA LEAGUE OF CITIES AND MUNICIPALITIES, CITY OF PHILADELPHIA, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND NEW JERSEY STATE LEAGUE OF MUNICIPALITIES IN SUPPORT OF RESPONDENTS' APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Treatises and Journal Articles

Miscellaneous Authorities

Constitutional Provisions

QUESTION PRESENTED

This amicus brief addresses the first question presented in the Jurisdictional Statement submitted by the Commonwealth of Pennsylvania:

Did the Commonwealth Court err when it ignored the U.S. Supreme Court's parcel-as-a-whole rule and instead focused solely on the very small affected portion of the claimants' parcels, thereby disregarding the claimants' ability to use the overwhelming majority of their parcels?

Suggested Answer: Yes.[1]

INTEREST OF AMICI CURIAE

The Pennsylvania State Association of Township Supervisors (PSATS) has been serving townships since 1921 when the legislature of the Commonwealth created the Association to represent the interests of townships and authorized townships to join. PSATS represents the 1457 townships of the Second Class, which include some 10,000 elected township officials. Its member townships comprise 95 percent of the state's land area and are home to 4.6 million Pennsylvanians, more than 40 percent of the state's population. PSATS represents its members before the state and federal legislative bodies and the courts on a nonpartisan basis.

The Pennsylvania State Association of Boroughs (PSAB) was developed through legislative fiat in 1911 for the purpose of "advancing the interests of boroughs." For more than 90 years, PSAB has acted as a non-profit, non-partisan association representing the 962 borough communities of the Commonwealth. These boroughs,

[1] Amici address the parcel-as-a-whole rule due to its overriding importance to municipal land-use regulations and other community protections. This limited focus, however, should not be construed as suggesting disagreement with the Commonwealth's other defenses.

unique to Pennsylvania, range in population from 40 to over 39,000 residents. PSAB has worked with the more than 10,000 elected borough councilors, mayors, and tax collectors in dealing with urban and rural policy issues. PSAB has represented these borough communities, which comprise more than 2.7 million or 23% of the Commonwealth's residents, before the state and national governments and courts.

The Pennsylvania State Association of Township Commissioners (PSATC) is an organization comprised of First Class Townships throughout the Commonwealth. The organization currently includes 75 townships. PSATC has existed for approximately 75 years under the authority provided by the First Class Township Code. PSATC advances the interests of Townships of the First Class and such municipal corporations that were formerly Townships of the First Class now operating under Home Rule Charters or any Home Rule community abutting a First Class Township. It addresses questions and subjects pertaining to the duties of Township Commissioners or members of the governing body of a Home Rule Charter Municipality. PSATC devises uniform, economical, and efficient methods of administering the affairs of townships.

The County Commissioners Association of Pennsylvania is a non-profit, non-partisan association providing legislative, educational, research, and other services to the Commonwealth's counties. It is authorized by statute and has, since 1886, served as the voice of Pennsylvania county government. All 67 counties are members and active participants. The Association regularly represents counties in legal matters having an effect on the administration of county government.

The Pennsylvania League of Cities and Municipalities is a non-profit, non-partisan municipal organization with 100 years of service to local governments

throughout the Commonwealth. The League represents cities, boroughs, townships, and home-rule municipalities at the state and federal level before administrative agencies, during legislative proceedings, and in the courts. The League's 68 member municipalities make up one-third of Pennsylvania's total population. Furthermore, through its affiliation with the Pennsylvania State Association of Township Commissioners and the Association of Professional Municipal Managers, the League reaches more than 200 additional municipalities.

The City of Philadelphia is the largest city in the Commonwealth of Pennsylvania and is responsible for fulfilling both municipal and county functions. It carries out broad responsibilities for making and enforcing rules governing building, zoning, public streets, utilities, public health, environmental protection, and other functions requiring the regulation of property in some form. Philadelphia defends these rules against regulatory taking challenges. *See, e.g., United Artists' Theatre Circuit, Inc. v. City of Philadelphia*, 535 Pa. 370, 635 A.2d 612 (1993).

The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA members include attorneys from more than 1400 municipalities across the country. IMLA serves as the legal voice for the nation's local governments, and its members have a vital interest in legal issues that affect local communities, including regulatory takings issues.

The New Jersey State League of Municipalities is a voluntary association created to assist New Jersey communities. It is authorized by state statute and since 1915, has been serving local officials throughout the Garden State. More than 560 municipalities

are members of the League. Over 560 mayors and 13,000 elected and appointed officials of member municipalities are entitled to the services and privileges of the League. As in Pennsylvania, state and local governments in New Jersey protect their citizens from harmful land uses through land-use controls and other reasonable community protections. Unduly exacting judicial review of Pennsylvania environmental protections and land-use controls could result in cross-border effects on New Jersey municipalities that are downstream and downwind from harmful land uses.

Municipalities in Pennsylvania, New Jersey, and across the nation have a critical interest in takings jurisprudence and ensuring that this Court continues to adhere to the parcel-as-a-whole rule as set forth in longstanding, binding precedent. This rule requires courts to evaluate regulatory takings claims by considering the economic impact of the challenged government action on the claimant's entire parcel of property, not just the portion of that parcel affected by the challenged regulation. The parcel-as-a-whole rule promotes fundamental fairness by striking an appropriate balance between the rights of landowners, neighboring property owners, and the public interest. In developing its longstanding parcel-as-a-whole rule, the U.S. Supreme Court expressly rejected the argument that courts should focus exclusively on the affected portion of the claimant's property, an approach that would potentially render any local set-back requirement, height restriction, and other routine municipal land-use regulation a regulatory taking. The 1998 ruling by the divided panel of the Commonwealth Court (reported at 719 A.2d 19) applies the discredited affected-portion standard and thereby directly threatens everyday municipal planning measures. Through this brief, Amici urge that this Honorable Court reverse the Commonwealth Court.

PRELIMINARY STATEMENT

Amici hereby adopt the Commonwealth's statement of jurisdiction, statement of scope of review and standard of review, and statement of the case. Because this brief addresses only the question of how to define the relevant parcel, below we highlight the key facts set forth by the Commonwealth that are relevant to this issue. As shown below, the challenged protections for the Goss Run Watershed affect only about 6% of the parcel of property owned by the Machipongo Land and Coal Company, and only 2% of the parcel owned by the Victor E. Erickson Trust and Joseph Naughton (collectively, the Landowners).

According to the Commonwealth, Machipongo holds fee simple title to 373 acres within the Unsuitable For Mining ("UFM") area; fee simple title to 200 acres outside but contiguous to the UFM area; and title to the coal estate of 1000 acres outside but contiguous to the UFM area. R. 260a, 414a, 403-405a. Its entire parcel thus consists of about 1573 contiguous acres of property. As to the portion of its parcel within the UFM area, Machipongo claims only 131 acres as mineable (R. 44a), and at trial the Court found that the regulation affects a taking of only 96 acres. Adj. 2, 4, 38. Thus, the Goss Run Watershed protections affect only about 6% of Machipongo's parcel (96 affected acres / 1573 total acres x 100 = 6.1%).

The parcel owned by the Victor E. Erickson Trust and Joseph Naughton when the challenged regulation was adopted (the Erickson/Naughton parcel) consists of about 1350 contiguous acres. R. 260a, 265a, 414a, 403-405a. Erickson and Naughton hold fee simple title to about 1150 acres of this parcel. *Id*. Only 52 acres, less than 4%, of this parcel lie within the UFM area. *Id*. Of these 52 acres, the Landowners claim only 27

acres as mineable. R.42a. Thus, the Goss Run Watershed Protections affect only about 2% of the Erickson/Naughton parcel (27 mineable acres / 1350 total acres x 100 = 2%).

The overwhelming majority (more than 90%) of the Landowners' two parcels remains unaffected by the Goss Run Watershed protections. The Landowners may and do engage in economically viable use of the vast unaffected portion of their respective parcels. These uses include gas development, mining, and timbering. R. 262a-263a, 548a-552a, 559a, 1074a, 1049a.

ARGUMENT

This case involves a straightforward application of the parcel-as-a-whole rule set forth in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), and other binding precedent. Under these rulings, a court must evaluate a regulatory takings claim by considering the economic impact of the challenged regulation on the claimant's entire parcel of property, not just the portion affected by the regulation. As explained in Section I below, because the Goss Run Watershed protections affect only a miniscule portion of the Landowners' two parcels (2-6%), the protections do not effect a taking of property under the Federal and State Constitutions, which are coextensive for purposes of this case.[2]

[2] In *United Artists' Theatre Circuit, Inc. v. City of Philadelphia*, 535 Pa. 370, 635 A.2d 612 (1993), this Court emphasized that "this Court has continually turned to federal precedent for guidance in its 'takings' jurisprudence, and indeed has adopted the analysis used by the federal courts." *Id*. at 377, 635 A.2d at 616. After exhaustively examining the text and history of the Pennsylvania Takings Clause and other relevant considerations, this Court held that the state and federal Takings Clauses are co-extensive, at least with respect to government actions that promote historic preservation, pure water, and the other public values protected by the Environmental Rights Amendment to the Pennsylvania Constitution, Pa. Const. art. 1, § 27 (adopted May 18, 1971). *See United Artists' Theatre Circuit*, 535 Pa. at 376-86, 635 A.2d at 615-620. Because the case at hand involves water quality protections, the Pennsylvania Takings Clause should be read in a manner coextensive with the federal Takings Clause for purposes of this case.

As explained in Section II below, a divided panel of the Commonwealth Court disregarded the parcel-as-a-whole rule and instead adopted an "affected portion" standard, looking only to the minute portion of the Landowners' parcels affected by the Goss Run Watershed protections. The U.S. Supreme Court has rejected this affected-portion standard precisely because it could transform countless land-use regulations into takings. The Commonwealth Court itself seemed to recognize the extreme implications of its approach, stating that one "downside" to the affected-portion standard is "that almost any regulation can result in a take," even a set-back requirement. 719 A.2d at 27. Although the panel majority tried to adjust the affected-portion standard to avoid this bizarre and unprecedented result, the attempted fix is wholly inadequate and effectively leaves in place the unjustifiable consequences acknowledged by the panel itself.

I. The Landowners' Takings Claim Fails Because the Goss Run Watershed Protections Affect Only a Very Small Fraction of the Claimants' Land and Leave Them with Economically Viable Use of the "Parcel as a Whole."

Regulatory takings jurisprudence typically requires a comparison of the value of the claimant's property before the imposition of the challenged regulatory restriction with the value that remains after imposition of the restriction. *E.g.*, *National Wood Preservers, Inc. v. Commonwealth of Pennsylvania*, 489 Pa. 221, 236, 414 A.2d 37, 45 (1980) ("[I]t is relevant to compare property values before and after the regulation, though such a consideration is by no means conclusive."). The loss in value caused by the restriction is then compared to the value of the claimant's parcel prior to regulation to determine whether the value loss is so extreme as to suggest the functional equivalent of a "taking" of the property. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S.

121, 126 (1985) (it takes "extreme circumstances" for land-use regulation to rise to the level of a taking).

To constitute a taking, the loss in value must be total or nearly so. *E.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) ("A land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.") (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)); *Keystone*, 480 U.S. at 485 (same). The U.S. Supreme Court has rejected takings challenges to land-use restrictions even where the value loss ranged from 75-92.5%. *See Village of Euclid v. Ambler*, 272 U.S. 365, 384 (1926) (no taking where zoning ordinance decreased claimant's land value by 75%); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (no taking where brickyard ordinance decreased claimant's land value by 92.5%); *see also Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (reaffirming *Euclid* and *Hadacheck*); *National Wood Preservers*, 489 Pa. at 236, 414 A.2d at 45 (citing the *Euclid* and *Hadacheck* value-loss rulings with approval).

One key threshold question in regulatory takings analysis concerns the definition of the relevant parcel of property to be considered in evaluating the economic impact of the challenged regulation. As recently noted by the U.S. Court of Appeals for the D.C. Circuit, "[t]he definition of the relevant parcel profoundly influences the outcome of a takings analysis." *District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999), *cert. denied*, 121 S. Ct. 34 (2000). In gauging the economic impact, should the court consider only the affected portion of the property, or the entirety of the claimant's parcel?

The mandate of the U.S. Supreme Court on this question could not be clearer: a court must examine the regulation's economic impact by considering the claimant's entire parcel of property. In other words, a takings claimant may not manipulate the takings analysis by excluding the unaffected portion of its property from examination.

The U.S. Supreme Court expressly articulated this "parcel-as-a-whole" rule more than twenty years ago in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). There, the City of New York applied historic preservation laws to deny the owners of Grand Central Terminal permission to build an office building atop the Terminal. The Court rejected the owners' argument that takings analysis should focus solely on the air rights above the Terminal, stating:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather * * * on the nature and extent of the interference with rights in the parcel as a whole -- here, the city tax block designated as the "landmark site."

Id. at 130-31. Because the owners could still operate the Terminal and the surrounding contiguous properties that they owned, the challenged regulation did not deny them all economically viable use of their entire parcel, and the Court rejected the takings claim. *Id*. at 136-38. The Court did not allow the claimants to sever or segment the regulated air rights from the rest of the parcel for purposes of takings analysis.

The Court's most emphatic reaffirmation of the parcel-as-a-whole rule occurred in *Keystone*, another case involving Pennsylvania protections against harmful mining practices. There, coal companies challenged a Pennsylvania statute that required them to leave 27 million tons of coal in the ground to protect against subsidence. 480 U.S. at 498. The Court rejected the coal companies' contention that it should focus exclusively on the

coal required to be left in the ground, concluding that "[t]he 27 million tons of coal do not constitute a separate segment of property for takings law purposes." *Id*. at 498. The Court also rejected the claimants' argument that the relevant parcel consisted solely of their support estates, which Pennsylvania law recognizes as a separate property interest. *Id.* at 500-01. Applying the parcel-as-a-whole rule, the Court held that "takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights." *Id*. at 500. Instead, the Court considered the economic impact of the regulations on the claimants' entire parcels, and it rejected the claim because the subsidence protections allowed mining of the unregulated coal and thus did not deprive the claimants of all economically viable use of their property. *Id*. at 498-502.

The Supreme Court again applied the parcel-as-a-whole rule in 1993. *See Concrete Pipe*, 508 U.S. at 643-47. The claimant asked the Court to consider only the affected portion of its property and conclude that the challenged regulation worked a "total taking" under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The Court unanimously ruled that the claimant could not "shoehorn" its claim into a *Lucas*-type theory by unfairly manipulating its property interests:

> [W]e rejected this analysis years ago in *Penn Central* [] where we held that a claimant's parcel of property [may] not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question.

Id. at 643-44. Although *Concrete Pipe* involved a challenge to federal pension plan protections, it unanimously reaffirms *Penn Central* and other applications of the parcel-as-a-whole rule in the land-use context.

The parcel-as-a-whole rule has infused the Court's takings jurisprudence since the turn of the century, well before the clear articulations of the rule in *Penn Central*, *Keystone*, and *Concrete Pipe*. As noted above, in 1915 the Court rejected a takings challenge to the mining ban despite the 92.5% value loss. *Hadacheck, supra*. In 1926, it upheld a zoning ordinance despite the 75% value loss. *Euclid, supra*. In 1927, the Court sustained a setback requirement that prohibited development on the affected portion of the parcel at issue. *See Gorieb v. Fox*, 274 U.S. 603 (1927). All of these rulings and many more are necessarily premised on a consideration of the claimant's entire parcel, not just the regulated portion.

This parcel-as-a-whole rule rests on the common-sense notion that a landowner should not be allowed to manipulate the relevant-parcel determination unfairly to maximize the chance of success in takings litigation. If courts considered only the affected portion of the claimant's parcel, a taking might be found in almost every case, even where the claimant's remaining property could be put to economically viable use. Not surprisingly, virtually all courts that have addressed the issue have followed *Penn Central, Keystone*, and other binding precedent to hold that the relevant parcel for takings analysis consists of at least all of the claimant's contiguous property, not just the affected portion. *E.g.*, *District Intown Properties*, 198 F.3d at 881 (relevant parcel includes both the affected and unaffected portions of the owner's parcel); *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993) ("[T]he quantum of land to be considered is not each *individual* lot containing wetlands or even the combined area of wetlands. If that were true, the Corps' protection of wetlands via a permit system would, *ipso facto*, constitute a taking in every case where it exercises its statutory authority. [*Penn Central*]

negates that view * * *."); *City of Annapolis v. Waterman*, 745 A.2d 1000, 1022 (Md. 2000) ("[T]he property to be assessed for economically viable use is, as we have said, the entire tract of land."); *K & K Constr., Inc. v. Department of Natural Resources*, 575 N.W.2d 531, 537 (Mich. 1998) ("[C]ontiguity and common ownership create a common thread tying these three parcels together for the purpose of the takings analysis"), *cert. denied*, 119 S. Ct. 60 (1998); *Zealy v. City of Waukesha*, 548 N.W.2d 528 (Wis. 1996) (relevant parcel included about 8.2 acres zoned as wetlands and 2.1 acres of contiguous property zoned for residential and commercial development); *East Cape May Assocs. v. New Jersey*, 693 A.2d 114, 125 (N.J. Super. Ct. App. Div. 1997) ("The majority of out-of-state cases which have considered the [relevant parcel question] have held that it consists of all of the claimant's contiguous acreage in the same ownership.").

In a case similar to the case at bar, the Indiana Supreme Court rejected a takings challenge to the designation of an area as unsuitable for mining to protect an archeologically significant area. *See Department of Natural Resources v. Indiana Coal Council, Inc.*, 542 N.E.2d 1000 (Ind. 1989). The designated area, known as the Beehunter Site, comprised just over 2% of the claimant's entire parcel and contained only 6.5 % of the parcel's total coal. *Id*. at 1004. The Indiana Supreme Court found no taking, stressing that "the overall effect on the value of the land is minute * * *." *Id*.

It is important to note that the parcel-as-a-whole rule has two discrete applications, both of which are directly relevant to the case at bar. First, it prevents a takings claimant from severing the parcel geographically, *i.e.* from segmenting the unaffected portion from the affected portion of the parcel, as the claimants unsuccessfully attempted to do in *Keystone, District Intown, Tabb Lakes, K&K Constr., Zealy, Indiana*

Coal, and many other cases. Secondly, the rule also prevents a takings claimant from manipulating takings analysis by severing the regulated use from the remaining uses of the property, an approach sometimes referred to as conceptual severance. For example, in *Andrus v. Allard*, 444 U.S. 51 (1979), the Court rejected a takings challenge to a ban on the sale of artifacts made from the feathers of bald eagles and other protected birds. The Court did not allow the claimants to sever one "strand" in the bundle of property rights -- the right to sell -- from the rest of the bundle. Because the claimants could make other use of the property, there was no taking even though the ban prevented the most profitable use. *Id*. at 66-67; *accord Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296 (1981) (rejecting a facial takings challenge to federal mining restrictions because "[t]he Act does not purport to regulate alternative uses to which coal-bearing lands may be put."); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1577 (10th Cir. 1995) (in a takings challenge to hunting restrictions, the relevant parcel included not just the right to hunt but rather "the entire bundle of rights associated with the parcel of land."); *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377 (N.J. 1992) (mining restrictions did not effect a taking, notwithstanding an alleged 92% value loss, because the property could be used for the production of concrete or residential use). Thus, the entirety of the Landowners' two parcels must be considered in examining their respective claims, not just the affected portion or the ability to mine the land.

Although this Court has not had occasion to analyze the parcel-as-a-whole rule extensively, it repeatedly has prohibited takings claimants from severing the regulated use from other remaining uses for purposes of takings analysis. For instance, in *Miller and Son Paving, Inc. v. Plumstead Township*, 552 Pa. 652, 717 A.2d 483 (1998), this

Court rejected a takings challenge to mining restrictions as applied to 150 acres of land. This Court stressed that "[i]n a takings inquiry * * * the question is whether the governmental action effectively deprived the landowner of all beneficial use of his property," not just the affected use or portion of the property. *Id*. at 658 n.6, 717 A.2d at 486 n.6. Miller's property was zoned residential, and "[a]lthough the ordinance deprived Miller of the use of quarrying, other viable uses clearly existed," thereby precluding a finding of a taking. *Id*. at 657, 717 A.2d at 486. The claim here is far weaker than in *Miller and Sons* because the Landowners retain not only other viable uses of the property, but the ability to exploit the overwhelming majority of their mineral estate as well.

Again, in *City of Pittsburgh v. Weinberg*, 544 Pa. 286, 676 A.2d 207 (1996), this Court rejected a takings challenge to historic preservation protections as applied to the Howe-Childs-Gateway House in the City of Pittsburgh because the landowners "failed to demonstrate that they could not make any economic use of their property." *Id*. at 287, 676 A.2d at 208. Quoting *Penn Central*, this Court focused on "'[t]he economic impact of the regulation on the claimant," not merely on the affected portion of the property. *Id*. at 295, 676 A.2d at 212. Because the claimants retained the ability to sell the property, their inability to demolish the House and replace it with a larger structure did not constitute a taking. The Commonwealth Court, too, has recognized and applied the parcel-as-a-whole rule. *See Jones v. Zoning Hearing Bd.*, 134 Pa. Commw. 435, 440-41, 578 A.2d 1369, 1371-72 (1990) (citing *Penn Central*'s parcel-as-a-whole rule to reject a takings challenge to town zoning ordinance).

In the case at bar, the parcel-as-a-whole rule requires examination of the effect of the Goss Run Watershed protections on the claimants' entire parcels. Machipongo's

parcel consists of about 1573 acres of contiguous property. The Erickson/Naughton parcel comprises 1350 acres of contiguous property. Each of the two parcels must be considered as a whole because each is a contiguous whole under common ownership by the respective claimants. *See, e.g., Penn Central*, *Miller and Son Paving, District Intown, Tabb Lakes, K&K Construction, Zealy, East Cape May, Indiana Coal Council, supra* (treating all contiguous property owned by the claimant as the relevant parcel).

Because the protections affect only 2-6% of the claimants' parcels, no taking has occurred. Indeed, we are aware of no case in the entire annals of takings jurisprudence -- and the Landowners cite none -- in which a court has deemed such a miniscule effect to constitute a taking of property.

The Landowners argue that the parcel-as-a-whole rule does not apply here because Pennsylvania recognizes a mineral estate as a separate property interest. This argument is fundamentally flawed for two reasons. First, even if one were to focus exclusively on the Landowners' mineral estates for purposes of takings analysis, those estates extend throughout their entire parcels, far outside the small regulated area covered by the Goss Run Watershed protections. The Landowners' ability to exploit most of their mineral estates demonstrates that they have not been denied all economically viable use of those estates.

In this respect, the Landowners' claims are far weaker than the unsuccessful claims in *Keystone*. The coal operators in *Keystone* contended that Pennsylvania's subsidence protections prevented them from mining the entirety of their support estates, an estate recognized under Pennsylvania law as a separate property interest. 480 U.S. at 500-01. Nevertheless, the *Keystone* Court rejected the claim. *Id*. Here, there is no

allegation that the Goss Run Watershed protections destroyed or substantially destroyed any estate in land. Rather, the Landowners make only the naked assertion that this Court should consider only the affected portion of their mineral estate. Their position is improper severance run amok. Because the *Keystone* claim failed, this far weaker claim must fail too, *a fortiori*.

Indeed, the Landowners' ability to mine the vast bulk of their parcels shows why their leading case cited in support of their claim -- *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991) -- is entirely inapposite. In *Whitney Benefits*, the challenged statute regulated all of the claimants' parcel and deprived the claimants of all use of the coal estate. *Id*. at 1172-74. *Whitney Benefits* reaffirms the ruling in *Keystone* that no taking occurs where, as here, mining regulation allows the claimant to mine a portion of its coal holdings. *Id*. at 1176-77.

Second, and more fundamentally, takings jurisprudence requires consideration of the Landowners' entire "bundle of property rights," not just the one strand in the bundle that constitutes their mineral estates. *See Andrus v. Allard,* 444 U.S. at 65-66. The U.S. Supreme Court in *Keystone* rejected the argument that takings analysis should focus solely on individual estates within a larger parcel:

> Pennsylvania property law is apparently unique in regarding the support estate as a separate interest in land that can be conveyed apart from either the mineral estate or the surface estate. Petitioners therefore argue that even if comparable legislation in another State would not constitute a taking, the Subsidence Act has that consequence because it entirely destroys the value of their unique support estate. <u>It is clear, however, that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights.</u>

Keystone, 480 U.S. at 500 (emphasis added). The *Keystone* Court explained that just as it refused to sever the air rights in *Penn Central*, it would not sever the support

estate for purposes of takings analysis, regardless of how state law treats the estate. *Id*. at 500-01; *accord Clajon*, 70 F.3d at 1577 (relevant parcel included not just the right to hunt but rather "the entire bundle of rights associated with the parcel of land"). This Court, too, has rejected takings challenges to mining restrictions where non-mining uses remained available to the landowner. *E.g.*, *Miller and Son Paving*, 552 Pa. at 657, 717 A.2d at 486 (while mining ban "deprived Miller of the use of quarrying, other viable uses clearly existed" that defeated the takings claim); *Weinberg*, 544 Pa. at 286, 676 A.2d at 208 (rejecting takings claim because landowners "failed to demonstrate that they could not make any economic use of their property"); s*ee also Bernardsville Quarry*, 608 A.2d at 1389 (criticizing *Whitney Benefits* for ignoring *Keystone* with respect to the constitutionality of a mining ban where other viable uses exist). Thus, the Landowners should not be allowed to manipulate the takings analysis by severing one "strand" in their bundle of rights -- the mineral estate -- from the rest of the bundle of rights, which includes their rights in the surface estates.

Finally, it should be noted that the parcel-as-a-whole rule is such a fundamental principle of takings law that this rule applies with full force even where the claimant holds different kinds of property interests across the parcel. *See Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365-66 (Fed. Cir. 1999) (relevant parcel consists of 9.4 acres of submerged lands and 52.6 acres of contiguous uplands where the claimant held different kinds of title as to each portion and acquired each portion through different transactions). The rule also applies regardless of the absolute size of the parcel. *See Keystone*, 480 U.S. at 496-502 (relevant parcel included all 1.46 billion tons of coal in the 13 mines at issue, not just the 27 million tons of support estate coal restricted by the

challenged subsidence protections); *Indiana Coal Council*, 542 N.E.2d at 1004 (relevant parcel comprised the claimant's entire 305-acre farm, not just the 6.57 acres in the unsuitable-for-mining area).

II. The Commonwealth Court Improperly Applied the Discredited "Regulated-Portion" Standard.

Over the vigorous dissent of Senior Judge Rodgers, in 1998 a divided panel of the Commonwealth Court held "that only the regulated land is to be considered" in evaluating the economic impact of the Goss Run Watershed protections on the Landowners. Although the panel majority cited *Keystone* and *Penn Central* in its general discussion of takings law (719 A.2d at 24-25), it failed even to mention these and other binding precedents in its discussion of the relevant parcel in section II of its opinion. *Id*. at 26-28.

Instead, the panel majority (719 A.2d at 26) latched onto mere *dicta* in a footnote in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In footnote 7 of *Lucas*, the U.S. Supreme Court had suggested that in some circumstances the proper approach to defining the relevant parcel might be "unclear." *Lucas*, 505 U.S. at 1016-17 n.7. On this slim reed, the Commonwealth Court concluded that the parcel-as-a-whole rule is somehow open to question and that the Commonwealth Court could therefore develop a wholly new and unsupported approach. As noted by Judge Rodgers in dissent (719 A.2d at 30), this footnote is *dictum* because the *Lucas* Court concluded that it did not need to address the relevant-parcel issue because the regulation in question left the entirety of Lucas's parcel without economic value.

Moreover, the *Lucas* footnoted *dictum* was highly questionable, given the Court's unequivocal holding in *Penn Central* that "[t]aking' jurisprudence does not divide a

single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S. at 130. Instead, "this Court focuses rather * * * on the nature and extent of the interference with rights in the parcel as a whole." *Id*. at 130-31. *Accord*, *Keystone, Concrete Pipe, supra*.

Regardless of the state of the law at the time of the 1992 *Lucas* decision, the U.S. Supreme Court has more recently confirmed the parcel-as-a-whole rulings described in *Penn Central* and *Keystone*. In a unanimous 1993 ruling on this point, the Court held that, in assessing whether a regulatory taking has occurred, "a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable." *Concrete Pipe*, 508 U.S. at 644. As noted above, while *Concrete Pipe* itself was not a land-use case, it unanimously reaffirmed *Penn Central* and other applications of the parcel-as-a-whole rule in the land-use context. The highest courts of other states have relied on *Concrete Pipe* to override any contrary inference from the *Lucas dictum*. *See, e.g., Zealy v. City of Waukesha*, 548 N.W.2d 528, 532-33 (Wisc. 1996).

Having disregarded U.S. Supreme Court rulings on the issue, the divided Commonwealth Court panel created out of whole cloth its own rule for defining the relevant parcel, one divorced entirely from any foundational precedent. Its misguided analysis deserves close inspection.

First, the panel majority casually dismissed the parcel-as-a-whole rule, condemning what it perceived to be a "facial unfairness" in the test because it would preclude compensation where regulation affects only 10 acres of a 100-acre parcel, but require compensation where regulation completely wipes out the value of a 10-acre

parcel. 719 A.2d at 27. But this is precisely the point of the parcel-as-a-whole rule. As applied in *Keystone, Penn Central, Concrete Pipe*, and elsewhere, the rule ensures that the Takings Clause applies only where a landowner suffers the functional equivalent of an appropriation, a "taking" of property, *i.e.*, the complete deprivation of the entire parcel.

The parcel-as-whole rule promotes fairness by ensuring that landowners do not exact compensation from the public for land-use restrictions that fall short of an appropriation of their property. The rule finds its source in an influential article by Harvard Law School Professor Frank Michelman, who argued that to achieve fairness in takings law, courts should "forge a link between compensability and one's ability to sustain uncompensated burdens." Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967) ("Michelman"). By directing attention to the claimant's entire parcel of property, the parcel-as-a-whole rule does just that. In reaffirming the parcel-as-a-whole rule, the *Keystone* Court expressly relied on Professor Michelman's article that articulates the fairness rationale underlying the rule. *See Keystone*, 480 U.S. at 497 (citing Michelman).

In rejecting the parcel-as-a-whole rule, the divided Commonwealth Court also noted that the rule might be difficult to apply where a landowner has sold off contiguous portions of the property. 719 A.2d at 27. This hypothetical concern has been adequately addressed by other courts. *E.g.*, *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) (holding that sold-off portions of contiguous property are part of the relevant parcel if they were sold after issuance of the challenged regulation; otherwise, claimants could engage in unfair strategic manipulation of the parcel to prevail in takings

claims). But more importantly, the hypothetical has absolutely nothing to do with this case. The claimants have not sold off any portion of their parcels, and thus the relevant parcel definition need not take into account any prior sales.

The panel majority then adopted an approach that focuses exclusively on the affected portion of the parcel. Disregarding the strong public interest underlying the Goss Run Watershed protections, the panel candidly disclosed its pro-claimant bias by stating that "it makes sense for courts, at least initially, to tip the scales slightly in the plaintiff's favor." 719 A.2d at 28 (citation omitted). The panel acknowledged that one "downside" to its affected-portion test is that under this approach "almost any regulation can result in a take, e.g. a set-back requirement in a zoning ordinance could result in a take * * *." *Id*. at 27. This approach, of course, contravenes decades of case law upholding set-back requirements and other land-use controls dating back to the 1927 ruling in *Gorieb v. Fox, supra*.

In an apparent effort to soften the blow, the panel relied on a student comment to conclude that it would not use the affected-portion test if the regulated land had no value prior to the regulation and no use apart from the unaffected portion. 719 A.2d at 28. But this purported attempt to modify the affected-portion standard provides no useful limit at all. For instance, the coal required to be kept in the ground in *Keystone* and the air space over Grand Central Terminal in *Penn Central* had value prior to the regulations challenged in those cases, as well as potential uses separate from the unaffected portion of the parcel. Under the Commonwealth Court's proposed test, these segmented portions would be deemed the relevant parcel for purposes of takings analysis, a result directly contrary to the rulings in those cases. Setback requirements and other routine land-use

controls also would fail under the court's affected-portion test because in most cases the unbuildable portion of the parcel has value prior to the imposition of the setback and potential uses separate from the unaffected portion. The panel majority's attempted "fix" of its affected-portion standard is no fix at all.

Having adopted its affected-portion standard, the Commonwealth Court then compounded its error by further segmenting the affected portion. Rather than considering the entirety of the affected portion of the claimants' parcels (including the surface estate), the panel majority focused exclusively on the coal estate: "Because separate estates create separate interests, the appropriate [parcel] by which to determine whether the Coal Owners have lost all viable economic use of their land is solely the coal estate in the UFM designated area." *Id*. at 29. But this is exactly the argument rejected by the U.S. Supreme Court in *Keystone* when it ruled that Pennsylvania's recognition of a separate support estate does not affect takings analysis. *Keystone*, 480 U.S. at 500 ("It is clear, however, that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights."). The panel majority's only response to this binding ruling in *Keystone* was to suggest that the U.S. Supreme Court might have misread Pennsylvania law. *See* 719 A.2d at 29 n.24. The *Keystone* ruling, however, was based not on any particular interpretation of Pennsylvania law, but instead on the U.S. Supreme Court's definition of the relevant parcel to include both the support estate and the contiguous mineral estate, and the coal mine operators' ability to make economically viable use of the mineral estate.

Because the Landowners here may continue to make economically viable use of their property, their takings claim fails. In Judge Rodgers' words, they "have not come

close to adducing evidence that they have been denied the economically viable use of their property and, therefore, have failed to show that their property has been taken by the Commonwealth." *Id*. at 31.

III. The Parcel-as-a-Whole Rule Preserves the Ability of Municipalities to Engage in Everyday Land-Use Regulation.

As noted above, the panel majority conceded that one "downside" to its affected-portion standard is that it could require a finding of a taking whenever a municipality imposes a set-back requirement and other routine land-use control. 719 A.2d at 27. In articulating its parcel-as-a-whole rule, the U.S. Supreme Court heavily relied on early rulings arising in the context of, and upholding, such controls. For example, in *Penn Central*, the Court based its parcel-as-a-whole rule in part on cases that upheld height limitations, setback requirements, and other municipal land-use controls. *Penn Central*, 438 U.S. at 130 (citing *Welch v. Swasey*, 214 U.S. 91 (1909) (height limits), *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (mining ban), and *Gorieb v. Fox*, 274 U.S. 603 (1927) (setback requirement)). Likewise, in *Keystone*, the Court reaffirmed its parcel-as-a-whole rule by stressing that under an affected-portion standard, zoning ordinances and other common municipal land-use controls might constitute a taking:

> The 27 million tons of coal [required to be left in the ground by the challenged subsidence protections] do not constitute a separate segment of property for takings law purposes. Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. Similarly, under petitioners' theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes. Cf. *Gorieb v. Fox*, 274 U.S. 603 (1927) (upholding validity

> of setback ordinance) (Sutherland, J.). There is no basis for treating the less than 2% of petitioners' coal as a separate parcel of property.

Keystone, 480 U.S. at 498. Indeed, the U.S. Supreme Court has referred to mining bans as a kind of "[t]raditional zoning regulation[]." *Yee v. City of Escondido*, 503 U.S. 519, 529 (1992) (although traditional zoning regulations, such as a mining ban, can transfer wealth from the regulated landowner to neighboring landowners, such a transfer does not convert the regulation into a taking).

Applied to municipal land-use planning, the Commonwealth Court's affected-portion analysis would wreak constitutional havoc throughout the entire state. As the divided Commonwealth Court seemed to recognize, its affected-portion standard could require a finding of a taking in virtually every case. 719 A.2d at 27. At a minimum, affirmance would engender massive litigation contending just that. The threat of countless lawsuits seeking budget-busting compensation awards under the Takings Clause would have a severe chilling effect on the ability of local officials to address a broad range of local land-use issues, including routine zoning classifications, restrictions on harmful land use, and current smart-growth initiatives designed to combat sprawl.[3] If local officials still proceeded with regulation in the face of litigation threats, the taxpayer would be forced to foot the bill for the huge compensation judgments that could result from the affected-portion standard.

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[3] This chilling effect is not idle speculation but a hard reality, particularly for small municipalities. *E.g.*, *Hearing on H.R. 2372 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (Statement of Diane S. Shea, Associate Legislative Director, National Association of Counties) (available at http://www.house.gov/judiciary/shea0915.htm) (discussing the chilling effect that the threat of takings litigation has on small municipalities at the expense of neighboring property owners and the public interest).

As noted by Judge Rodgers in dissent, under the affected-portion test "the Commonwealth must pay for every ounce of coal [the Landowners] are unable to mine." 719 A.2d at 31. But the U.S. Supreme Court has expressly rejected takings theories that "would effectively compel the government to regulate by *purchase*." *Andrus v. Allard*, 444 U.S. at 65 (emphasis in original). Indeed, in the case giving birth to regulatory takings, Justice Holmes recognized that the Court should be cautious in its approach to determining when a regulation requires compensation. "Government hardly could go on," Justice Holmes explained, "if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). As a functional matter, the Commonwealth Court's suggestion that the takings inquiry should examine only those portions of land affected by regulations would raise precisely the danger recognized by Justice Holmes.

Indeed, developers and other landowners are already trying to exploit the divided panel's 1998 ruling in takings challenges to state and municipal land-use controls. For example, in *District Intown Properties, supra*, a developer relied on the panel's ruling in a takings challenge to municipal historic preservation rules that prevented it from building eight townhouses on the lawns adjacent to its apartment building. *See* Appellants' Reply Brief at 7-9, *District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999) (No. 98-7209) (citing the 1998 *Machipongo* ruling), *cert. denied*, 121 S. Ct. 34 (2000). The D.C. Circuit unanimously rejected the developer's invitation to follow the *Machipongo* panel's affected-portion approach, citing *Penn Central* and other binding precedent to hold that the relevant parcel includes both the affected and unaffected portion of the landowner's parcel. *District Intown*, 198 F.3d at

880-82. Not to be denied, the developer again relied on *Machipongo* in seeking review by the U.S. Supreme Court. *See* Petition for Writ of Certiorari at 14-15 (No. 99-1663) (filed April 27, 2000). The U.S. Supreme Court denied the request. 121 S. Ct. 34 (2000). For this Court's convenience, the relevant pages from the Reply Brief and Petition for Writ of Certiorari in *District Intown* are attached hereto as Exhibits A and B.

Unless the panel majority is overturned by this Court, we can expect developers and other landowners to continue to rely on the panel's affected-portion standard to challenge all manner of municipal land-use controls in Pennsylvania and elsewhere.

IV. The Parcel-as-a-Whole Rule Derives From the Very Nature of the Takings Clause.

The parcel-as-a-whole rule is compelled not only by precedent, but also by the Takings Clause itself. The text of the Takings Clause is quite narrow. Although the Constitution does not define the term "taken," it most naturally refers to a physical appropriation of property. In other words, the text does not readily suggest application to mere restrictions on the *use* of property. *See* FRED BOSSELMAN, ET AL., THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL 51 (1973) ("The word 'take' ordinarily refers to the act of obtaining possession or control of property, and although there are many other usages of the word none of them seems descriptive of governmental regulation of the use of land.").

The Framers' original understanding of the Takings Clause was consistent with its narrow plain meaning. *See id.* at 51-123; John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. Rev. 1099 (2000); John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 Harv. L. Rev. 1252 (1996); William Michael Treanor, *The Original*

Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782 (1995). In an opinion by Justice Scalia, a jurist generally regarded as sympathetic to takings claims, the U.S. Supreme Court in *Lucas* recognized that the ratifying generation and several succeeding generations read the Clause as applying only to actual dispossessions of property. *Lucas,* 505 U.S. at 1014 ("Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it was generally thought that the Takings Clause reached only a 'direct appropriation' of property * * * or the functional equivalent of a 'practical ouster of [the owner's] possession.'") (citations omitted); *id*. at 1028 n.15 ("early constitutional theorists did not believe the Takings Clause embraced regulations of property at all").

To be sure, in *Mahon* the U.S. Supreme Court held that the Takings Clause may apply to regulation. But the *Mahon* Court was careful to stress that the law at issue effected a taking because it had "very nearly the same effect for constitutional purposes as appropriating" private property. *Mahon*, 260 U.S. at 414.

This theme -- regulatory takings as the functional equivalent of an appropriation -- is a mainstay of takings jurisprudence. For example, the U.S. Supreme Court has held that a *per se* taking might occur where regulation denies all economically viable use of land because such regulation is, "from the landowner's point of view, the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1017. In *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982), the Court held that government-compelled occupations of private property are takings where they "'constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property.'" *Id*. at 428 (citation omitted). In *Williamson County Reg'l Planning Comm'n v.*

Hamilton Bank, 473 U.S. 172 (1985), the Court stated that in regulatory takings cases, its task is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Id.* at 199.

Not surprisingly, it takes "extreme circumstances" for land-use regulation to rise to this level. *Riverside Bayview Homes,* 474 U.S. at 126. Land-use controls that do not approximate the extreme situation of an outright appropriation, *i.e.*, that do not substantially destroy the value and use of the claimant's entire parcel, fall outside the scope of the Takings Clause.

The protections challenged in the instant case do not come close to the "extreme circumstances" that constitute the functional equivalent of an appropriation of property. The Goss Run Watershed protections affect only 2-6% of the claimants' land. More than 90% of their land remains unaffected. It would do severe violence to the text, history, and jurisprudence of the Takings Clause to deem these protections a taking of property in view of their slight economic impact on the claimants' parcels of property.

V. The Parcel-as-a-Whole Rule Preserves Important Principles of Federalism and Judicial Deference to the Policymaking Branches of Government.

Just weeks ago, the U.S. Supreme Court invalidated federal environmental protections designed to protect isolated wetlands, ruling that they are not authorized by the federal Clean Water Act. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 121 S. Ct. 675 (2001). The Court's adoption of this narrow construction of the federal Clean Water Act was driven in large measure by concerns that the federal rules at issue resulted "in a significant impingement of the States' traditional and primary power over land and water use." *Id*. at 684.

In view of this asserted primacy of state and local control over water and land-use issues, it is vital that state courts protect state and local environmental controls against extravagant takings theories that would wipe out these protections. The critical role of state courts is all the more vital in Pennsylvania, a state whose Constitution contains an Environmental Rights Amendment that expressly guarantees to the people "a right to clean air [and] pure water." Pa. Const. art. 1, § 27. *See United Artists' Theater Circuit*, 535 Pa. at 385, 635 A.2d at 620 (relying on the Environmental Rights Amendment, among other things, to reject a takings challenge); *see also Montana Envtl. Info. Ctr. v. Department of Envtl. Quality*, 988 P.2d 1236, 1246 (Mont. 1999) (ruling that state constitutional environmental protection provision establishes the right to a clean environment as a fundamental right).

The U.S. Supreme Court has underscored how the U.S. Constitution protects the role of the states in our federal system, stating that "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Unduly expansive theories of takings liability directly undercut the important role of state and local governments, federalizing local land-use issues by imposing an inappropriately strict, uniform, national standard on local land-use controls. These theories would improperly constrain the ability of state and local officials to respond to local issues through approaches tailored to local needs and preferences, thereby undermining the states' role as innovators of creative solutions to social ills. *Cf. New State Ice Co. v. Liebmann*, 285

U.S. 262, 311 (1932) (Brandeis, J., dissenting) (each state may act as a "laboratory" of democracy in our federal system).

The Takings Clause does not authorize courts to make land-use policy. The wisdom and efficacy of zoning and other forms of land-use regulation have traditionally been, and remain, the province of the legislative and executive branches of government, often acting through administrative agencies. While the courts need to ensure that land-use controls comport with the Constitution, judicial review should not be used simply to second-guess legislative or administrative policy judgments. Under the checks and balances of our constitutional system, the courts may interfere with land-use regulation by co-equal branches of government only in the most extreme circumstances. Indeed, government action like the Goss Run Watershed protections enjoy a "presumption of constitutionality" largely because courts respect the separation of powers reflected in the Constitution and the primary role the Constitution assigns our elected representatives and their agents in formulating public policy. *See Concrete Pipe*, 508 U.S. at 637 ("'it is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality . . . .'") (quoting *Usery v. Turner Elkhorn Mining Co*., 428 U.S. 1, 15 (1976)); *Local 22, Philadelphia Fire Fighters' Union v. Commonwealth*, 531 Pa. 334, 340, 613 A.2d 522, 525 (1992) ("[T]here is a strong and fundamental presumption that the legislature has acted properly and within constitutional bounds, and legislation will not be deemed unconstitutional unless it clearly, plainly and palpably violates some specific mandate or prohibition of the constitution.").

As noted by this Court in *Commonwealth v. Barnes & Tucker Co*, 472 Pa. 115, 371 A.2d 461 (1977), "it has long been recognized that property rights are not absolute and that persons hold their property subject to valid police regulation, made, and to be made, for the health and comfort of the people . . . ." *Id*. at 123, 371 A.2d at 465 (citations and internal quotes omitted). More recently, this Court stressed that "[a] landowner alleging a de facto taking is under a heavy burden to establish that such a taking has occurred." *Miller and Son Paving, Inc*, 552 Pa. at 656, 717 A.2d at 485. Because the Goss Run Watershed protections affect only 2-6% of the Landowners' parcels, they have fallen far short of meeting their "heavy burden." Respect for the proper role of the states in our federal system, as well as the role of the legislative and executive branches under the Constitution, requires a ruling in favor of the Commonwealth.

CONCLUSION

The judgment of the Commonwealth Court should be reversed. Given the very small portion of the Landowners' two parcels affected by the Goss Run Watershed protections, Amici urge the Court to rule on the existing record that no taking has occurred as a matter of law. Alternatively, the Court could remand the case and include instructions to evaluate the Landowners' loss in value caused by the challenged

protections as compared to the appraised value of their entire parcels before the challenged regulation was promulgated.

Respectfully submitted,

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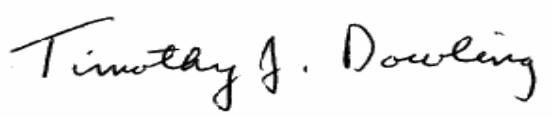

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