IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 99-5030

PALM BEACH ISLES ASSOCIATES, a Florida Partnership; MARTIN SLIFKA, individually and as trustee; MARJORIE MARGOLIS AND ROBERTA FRANKLIN, individuals as tenants in common; and the ESTATE OF JOSEPH SLIFKA, represented by Alan Slifka and Barbara J. Slifka, co-executors,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

Appeal from an order of the United States Court of
Federal Claims in 93-CV-654, Judge Marian Blank Horn

AMICUS BRIEF OF COMMUNITY RIGHTS COUNSEL IN SUPPORT OF THE UNITED STATES' PETITION FOR REHEARING EN BANC

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Community Rights Counsel (CRC) submits this amicus brief in support of the petition for rehearing and rehearing en banc filed by the United States.

STATEMENT OF INTEREST

CRC is a nonprofit, public interest law firm that assists municipalities in defending against takings challenges to land-use controls and other community protections. We have represented municipalities as defendants, and the International Municipal Lawyers Association, the American Planning Association, and others as amici curiae, in takings cases before the U.S. Supreme Court, federal courts of appeals, and the highest courts of several states.

This brief highlights how the panel's analysis of the parcel-as-a-whole issue would undermine federal protections important to municipalities and, if adopted by other courts, eviscerate everyday municipal land use planning.

ARGUMENT

As the rehearing petition for the United States explains (pp. 10-11), the panel seriously erred in its analysis of the parcel-as-a-whole issue. The United States asserts that if the Court grants rehearing en banc, it would be appropriate for the full Court to address the parcel issue. *See id*. (cross-referencing the amicus briefs of the Florida Audubon Society and Community Rights Counsel). Due to the importance of this issue to municipalities, this amicus brief demonstrates that the panel's parcel definition conflicts with binding precedent in a way that

threatens important federal protections and municipal land use planning. The issue plainly warrants rehearing.[1]

The panel's parcel analysis considered several factors. Section I below discusses the most troubling aspect: the panel's exclusion of the unregulated upland portion of the parcel because, in the panel's words, it is "legally unconnected" to the protected portion of the parcel. Section II discusses other disturbing aspects of the panel's parcel definition that warrant rehearing.

I. The Panel Opinion Contravenes Binding Supreme Court and Federal Circuit Precedent by Excluding the Contiguous Upland Portion of the Property Purchased by the Claimants from the Relevant Parcel Definition.

The parcel inquiry often drives takings analysis, and it certainly did so in the panel opinion.

In 1956, Palm Beach Isles Associates (PBIA) purchased 311.7 acres of property as a single parcel in a single transaction subject to a single deed for $380,190. Slip op. at 2; 42 Fed. Cl. at 342-43. The parcel included 261 acres of uplands, 49.3 acres of land submerged under Lake Worth, and 1.4 acres of shoreline wetlands. *Id*. In 1968, PBIA sold the 261 acres of uplands for

[1] For the reasons set forth in the petition filed by the United States, we concur that panel rehearing and rehearing en banc also are warranted by the panel's treatment of the role of expectations and the navigational servitude in takings analysis.

$1 million, nearly three times its initial investment in the 311.7-acre parcel. *Id*. The U.S. Army Corps of Engineers subsequently denied PBIA a permit to fill the remaining 50.7 acres of submerged land and wetlands. In response, PBIA brought this suit for a taking.

PBIA argued to the panel that in considering its takings claim, the panel should focus exclusively on the 50.7-acre regulated portion of its parcel that was affected by the permit denial**.** *See* Reply Brief of Plaintiffs-Appellants, at 17 (June 11, 1999). The panel agreed and applied this affected-portion standard, excluding the profitable, 260-acre upland portion of PBIA's 311.7-acre parcel from consideration. Slip op. at 8-13. Having defined the relevant parcel very narrowly, the panel concluded that the permit denial "constitutes a categorical taking" of the regulated portion. *Id*. at 12-13. The panel's narrow definition of the relevant parcel plainly was critical to its categorical takings analysis.

In explaining its exclusion of the upland portion, the panel stressed that the uplands are "legally unconnected" to the regulated portion of the 311.7-acre parcel. Slip op. at 12. In other words, a key factor in the panel's relevant parcel definition was the fact that the uplands are not subject to the Corps regulations that led to the permit denial.

The panel's exclusion of the unaffected portion of the 311.7-acre parcel contravenes decades of Supreme Court precedent. The mandate of the Supreme

Court could not be clearer: A takings claimant may not manipulate the relevant parcel definition by excluding the unregulated portion of its property.[2] Rather, courts must analyze a takings claim with respect to the claimant's parcel as a whole. These binding precedents are more fully described in the United States' May 28, 1999 brief to the panel (pp. 41-46). A detailed discussion of these familiar cases need not be repeated here.

Two points, however, warrant emphasis. First, it is a considerable understatement to say that the panel's parcel determination conflicts with Supreme Court precedent. The very purpose of the Supreme Court's parcel-as-a-whole rule is to preclude courts from relying on the factor used by the panel to exclude the upland portions of the 311.7-acre parcel purchased by PBIA. In other words, the parcel-as-a-whole rule is expressly designed to pull into takings analysis the unaffected portions of a claimant's property that are fairly considered in evaluating the economic impact of the challenged regulation on the claimant. *See* cases cited

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[2] *E.g.*, *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 644 (1993) ("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."); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978) ("'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. * * * [T]his Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole * * *.").

in note 2. If portions of a claimant's property could be excluded from takings analysis because they are "legally unconnected" to the affected portion, nothing would remain of the parcel-as-a-whole rule. As this Court made clear in *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796 (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 * * *.

Id. at 802; *accord*, *Ciampitti v. United States*, 22 Cl. Ct. 310, 318-20 (1991).

Second, in articulating its parcel-as-a-whole rule, the Supreme Court heavily relied on early rulings upholding municipal land use controls that have become a routine part of local land use planning. For example, in the landmark *Penn Central* ruling, the Court derived its parcel-as-a-whole rule in part from 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 Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), 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 well constitute a taking in every case. *See id*. at 498.

If applied to municipal land use planning, the panel's affected-portion analysis would wreak constitutional havoc. Consider a setback ordinance that requires a landowner to refrain from building within ten feet of a road. The buildable portion would be, in the panel's phrase, "legally unconnected" to the vacant portion. For myriad municipal land use regulations, the panel's approach would isolate the regulated, unbuildable portion of the property for analysis and could result in a finding of a taking in virtually every case. The panel's extraordinary exclusion of the "legally unconnected" portion of PBIA's 311.7-acre parcel warrants rehearing because it conflicts with Supreme Court precedent (*e.g.*, cases cited in note 2, *supra*) and binding precedent of this Circuit (*e.g., Tabb Lakes, Ciampitti, supra*), and it creates a conflict with other circuits that properly adhere to the Supreme Court's parcel-as-a-whole rule.[3]

[3] *See, e.g.*, *District Intown Properties Ltd. v. District of Columbia*, 198 F.3d 874, 881 (D.C. Cir. 1999) (relevant parcel includes both regulated and unregulated portions of a takings claimant's parcel).

II. The Panel's Definition of the Relevant Parcel Would Encourage Unfair Manipulation of Takings Analysis by Savvy Developers and Other Takings Claimants.

In excluding the "legally unconnected" upland portion of the 311.7-acre parcel, the panel also misapplied other aspects of the parcel-as-a-whole rule, errors that further justify rehearing.

This case raises the pivotal question of how to prevent a landowner from unfairly manipulating the parcel inquiry by selling off the unregulated portion of its property, thereby isolating the regulated portion in an attempt to show a compensable taking. This issue repeatedly arises in takings cases, and its proper resolution is essential to the development of a coherent takings jurisprudence.[4]

Here, PBIA sold off the uplands portion of its parcel in 1968. The panel concluded that this sale could not have been motivated by a desire to manipulate the parcel definition because, the panel assumed, it occurred before the environmental considerations considered by the Corps came into play. Slip op. at 12. But the panel's key assumption is demonstrably false. As early as 1958, the

[4] As the trial court recognized, the Takings Clause "should not be construed to provide a windfall to claimants in light of the known regulatory permitting requirements or the selling off of valuable portions of a parcel by the plaintiffs and their retention of only those acres subject to regulation." 42 Fed. Cl. at 363; *see also Forest Properties, Inc. v. United States*, 39 Fed. Cl. 56, 73 (1997) (parcel definition must not "allow sophisticated real estate investors to design a transaction so as to segregate those parts of a parcel which could run afoul of regulations, such as the Clean Water Act, and maximize the possibility of a successful taking claim"), *aff'd*, 177 F.3d 1360 (Fed. Cir.), *cert. denied*, 120 S. Ct. 373 (1999).

Congress expressed its desire for broad consideration of ecological impacts in federal permit proceedings for private dredge and fill operations. *See Zabel v. Tabb*, 430 F.2d 199, 209-10 (5th Cir. 1970) (discussing S. Rep. No. 1981). The Corps denied Florida landowners fill permits under the Rivers and Harbors Act (RHA) due to environmental concerns as early as 1967, a full year before PBIA sold off the uplands portion of its property. *See id*. at 201-15 (upholding a 1967 Corps' denial of a fill permit to a Florida landowner under the RHA due to ecological concerns). Florida law also imposed increasingly stringent environmental protections on private fill operations beginning in 1965. *See Good v. United States*, 39 Fed. Cl. 81, 111 (1997) (discussing the Florida Beach and Shore Preservation Act of 1965 and the Air and Water Pollution Control Act of 1967), *aff'd*, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1554 (2000).

The writing clearly was on the wall when PBIA sold off the upland portion of its parcel in 1968. PBIA knew or should have known that the remaining, ecologically sensitive portion of its parcel was subject to stringent environmental regulation. As the trial court's extensive findings show, the environmentally sensitive nature of this healthy and productive estuarine wetland and submerged habitat was plainly evident. 42 Fed. Cl. at 343-47. In the face of the federal and state environmental protection regimes applicable to this property in 1968, PBIA

should not be allowed to manipulate the parcel definition through the simple expedient of selling off the unregulated portion of its property.[5]

By giving undue weight to PBIA's 1968 sale of the uplands, the panel improperly discounted the undisputed record evidence showing that PBIA treated and viewed these two contiguous portions, separated by only a road, as one unit. *E.g.*, J.A. 457 (reflecting PBIA's view that its "larger tract * * * included the 52 acres" of submerged land); *id*. at 458-59 (reflecting PBIA's description of the 311.7-acre parcel as one piece of property consisting of a lakeside portion and an oceanside portion). PBIA purchased the property through a single deed for a single purchase price, and held the property as a single parcel for more than ten years. In view of this commonality, the panel contravened binding precedent by excluding from the relevant parcel the portions sold off in the face of the environmental and other protections that led to the permit denial. *E.g., Ciampitti*, 22 Cl. Ct. at 320 (where a landowner purchases and finances land as a single

[5] Moreover, the United States' rehearing petition (pp. 11-15) shows that the permit denial was authorized under the 1899 RHA because it prevented the destruction of nearly 50 acres of navigable waters. Indeed, the panel itself recognizes that PBIA's permit application to fill navigable waters was subject to potential denial under the RHA (slip op. at 22-23). This authority to protect navigable waters predates PBIA's 1968 sale of the uplands by almost seventy years! PBIA should not be allowed to manipulate the parcel-as-a-whole determination by selling off the upland portion and isolating the submerged portion when it knew in 1968 that the Corps might well deny permission to build on the lakebed to protect navigable waters.

parcel, "it would be inappropriate to allow him to sever the connections he forged when it assists in making a legal argument."); *Deltona Corp. v. United States,* 657 F.2d 1184 (Ct. Cl. 1981) (takings analysis must consider the economic impact of the challenged permit denial in view of all contiguous property originally purchased by the claimant, regardless of whether the claimant owned the property at the time of the denial).

CONCLUSION

The Court should grant the rehearing petition of the United States. If the Court rehears the case en banc, it should address, inter alia, the proper definition of the parcel as a whole.

Respectfully submitted,

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