CA Nos. 99-15641, 99-15771

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TAHOE-SIERRA PRESERVATION COUNCIL, INC., et al.

Plaintiffs/Appellees/
Cross-Appellants,

v.

TAHOE REGIONAL PLANNING AGENCY, et al.

Defendants/Appellants/
Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BRIEF OF AMICUS CURIAE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF THE DEFENDANTS-APPELLANTS

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QUESTION PRESENTED

Whether a land use regulation may effect a per se taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), where the regulated land has value.

STATEMENT OF INTEREST

The International Municipal Lawyers Association (IMLA), whose members include attorneys from more than 1400 municipalities throughout the United States, has a strong interest in the law of regulatory takings. Local governments "have long engaged in the commendable task of land use planning." *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994). These planning efforts, which often include temporary planning moratoria, sometimes give rise to regulatory takings claims. This case, which involves a takings challenge to temporary planning moratoria designed to preserve a threatened and treasured natural resource, falls squarely within that focus.

This brief addresses the elements of a per se takings challenge to land use controls, an issue of vital importance to the continued viability of municipal protections for local communities. It is filed pursuant to the written consent of all the parties.

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

The ruling below rests on a radical and unwarranted expansion of per se takings liability that contravenes Supreme Court precedent and common sense.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Supreme Court articulated a per se rule of takings liability. In so doing, the Court was careful to limit that rule to the rare and extraordinary situation in which government action renders land "valueless."

In the case at bar, the lower court unequivocally found that "none of the [claimants'] land is completely 'valueless,' as was the case in *Lucas*." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F. Supp. 2d 1226, 1243 (D. Nev. 1999). Incredibly, the lower court then ignored the Supreme Court's painstaking limitation of the per se rule and held that the protections for Lake Tahoe at issue effected a temporary per se taking under *Lucas.*

The district court so ruled notwithstanding the claimants' failure to offer any evidence of value reduction for any parcel at issue (*id*. at 1241), and notwithstanding its finding that "all land in the Tahoe Basin has, and has always had, some value, no matter how limited its uses." *Id*. at 1242-43. The ruling directly contravenes *Lucas* and stands as an aberrational outlier

among *Lucas*'s progeny. The ruling is all the more remarkable because the district court found that under the multi-factor inquiry traditionally used in takings analysis, every factor weighs against a finding of a taking. We demonstrate in this brief that this ruling is seriously flawed and that *Lucas*'s narrow per se rule is inapplicable to this case.

The source of the district court's error lies in confusing dicta from *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *aff'd on other grounds*, 119 S. Ct. 1624 (1999). There, the panel suggested that in analyzing a per se takings claim under *Lucas*, the "focus is primarily on use, not value." *Id*. at 1433. We show below that this purported distinction between economic use and value is both meaningless and directly contrary to *Lucas*.

The district court recognized the controlling nature of its attempt to distinguish between use and value, describing this portion of its analysis as the "key to our case, because it is clear that the plaintiffs' properties -- no matter how restricted their use -- did retain some value during the period at issue." 34 F. Supp. 2d. at 1242. We agree. The issue is controlling, and a proper reading of *Lucas* requires the rejection of the per se claims because the claimants' land was not rendered valueless.

This brief proceeds in three parts. In Section I, we demonstrate that *Lucas*'s per se rule is inapplicable unless government action renders land valueless. In Section II, we explain how the panel in *Del Monte Dunes* arrived at its erroneous "use/value" dicta. We ask this Court either to repudiate the dicta or limit it to the unique facts of *Del Monte Dunes*. In Section III, we demonstrate how the district court multiplied this error, and we show that the Tahoe Regional Planning Agency (TRPA) is entitled to a ruling as a matter of law that its protections for Lake Tahoe do not constitute a per se taking.[1]

[1] The proper application of *Lucas*'s per se rule is essential to the development of a coherent takings jurisprudence, and we give it our exclusive attention in this submission. We concur in the arguments made by the TRPA and other amici that show that: (1) reasonable temporary planning moratoria do not effect a temporary taking, (2) the district court misapplied the standards for a facial takings challenge, and (3) the moratoria at issue did not effect a taking because they replicate restrictions that could be imposed under background principles of state nuisance law.

ARGUMENT

I. *LUCAS*'S PER SE RULE APPLIES ONLY WHERE LAND IS RENDERED "VALUELESS."

Most takings claims proceed under the now-familiar, multi-factor inquiry set forth in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978). After finding that every factor of this test cuts against liability (34 F. Supp. 2d at 1240-42), the district court concluded that the challenged moratoria effected a per se taking under *Lucas.*

Lucas articulates a per se rule that imposes takings liability without regard to the public interest advanced by the regulation at issue. The *Lucas* Court recognized, however, that the Takings Clause was originally understood as applying only to physical expropriations of property,[2] and thus it was careful to confine the per se rule for regulatory takings to what it described as "extraordinary circumstance[s]." *Lucas*, 505 U.S. at 1017.[3] As shown in this Section, these extraordinary circumstances are limited to situations where government action renders land valueless.

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[2] *Lucas*, 505 U.S. at 1028 n.15 ("early constitutional theorists did not believe the Takings Clause embraced regulations of property at all").

[3] The other per se rule in takings jurisprudence -- for government-compelled, permanent physical occupations of property -- is similarly "very narrow." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

The district court acknowledged that this case is fundamentally different from *Lucas* because "none of the [claimants'] land is completely 'valueless,' as was the case in *Lucas*." 34 F. Supp. 2d at 1243. It found that the claimants failed to offer evidence of value reduction regarding any parcel at issue (*id*. at 1241), and that "it is clear that the plaintiffs' properties -- no matter how restricted their use -- did retain some value during the period at issue." *Id*. at 1242. It further found that the record shows that "all land in the Tahoe Basin has, and always had, some value, no matter how limited its uses." *Id*. at 1242-43. Properties comparable to the claimants' sold to private parties for as much as $110,000 during the relevant time periods, and some actually appreciated in value from 1980 to 1987.[4]

As shown below, the *Lucas* opinion, other Supreme Court precedent, and lower court rulings make clear that *Lucas*'s per se rule does not apply here because the claimants' land was not rendered valueless.

[4] The record shows that: "Class 1-3" lots in Nevada sold for prices that ranged from $6,000 to $95,000, with median prices around $45,000, during the relevant time period (ER 5; Transcript at 1396-1400); "Class 1-3" lots in California sold for prices ranging from $10,000 to $18,415 between 1981 and 1986 (ER 6; Transcript at 1400-01); and "Stream Environment Zone" (SEZ) lots in the Tahoe Basin sold for prices ranging from $12,000 to $110,000 during the relevant time period. ER 10; Transcript at 1483-92. Some comparable parcels appreciated in value from 1980 to 1987. *Id.* at 1415.

A. "Economically Beneficial or Productive Use" Includes the Ability to Sell Land for Value.

The *Lucas* Court held that unless a regulation may be justified under background principles of law (505 U.S. at 1027-32), a categorical taking occurs "where regulation denies *all* economically beneficial or productive use of land." *Id*. at 1015 (emphasis added). The Court made clear that one economically productive use of property is the sale of that property. *Id*. at 1027-28 (discussing situations where "the property's only economically productive use is sale or manufacture for sale").

This equation of economic use and value reflects the commonsense notion that the ability to sell property for value constitutes both a use of the property and an economic benefit to the owner. Indeed, for many real estate investors who buy and sell raw acreage to profit from the appreciation, the selling of vacant land is the only economically beneficial use they ever make of it. Because *Lucas*'s per se rule applies only where regulation denies *all* beneficial use, it is inapplicable where the owner is able to sell the land for value or make any other beneficial use of it.

In view of this reciprocal relationship between economic use and value, the *Lucas* Court quite naturally used the terms interchangeably. In describing how to determine whether there is a denial of "all economically feasible *use*," *Lucas* emphasizes the importance of accurately defining "the

'property interest' against which the loss of *value* is to be measured." *Id*. at 1016 n.7 (emphasis added). This same discussion includes five additional references to value in analyzing how to show denial of all economically feasible use. *Id*. The *Lucas* Court elsewhere combines the two phrases, describing the per se rule as applying where the government "eliminate[s] all economically valuable use." *Id*. at 1028. And in explaining why total deprivation of value is the equivalent of a physical appropriation from the landowner's perspective, the *Lucas* Court equates land use with monetary gain, stating: "'[F]or what is the land but the profits thereof[?]'" *Id*. at 1017 (quoting 1 E. Coke, Institutes, ch. 1 § 1 (1st Am. ed. 1812)).

The *Lucas* Court's treatment of beneficial use and economic value as virtually synonymous reflects the Court's historic understanding of these concepts in takings analysis. *Lucas* relies heavily on *Agins v. City of Tiburon*, 447 U.S. 255 (1980), which holds that a taking may occur where zoning denies a landowner "economically viable use" of the land. *Id*. at 260. As in *Lucas*, the *Agins* Court was careful to stress that this inquiry required examination of the "diminution in market value" caused by the zoning at issue. *Id.* at 262; *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502 n.29 (1987) (it could not be determined whether the

claimants were denied "economically viable use" of their support estate in coal because "[t]here is no record as to what value" the support estate had).

Some takings claimants argue that *Lucas* establishes a new "right to develop" property and that a per se taking occurs whenever regulation prohibits development, regardless of the effect on value. In fact, there is no such "right to develop." Just two years after *Lucas*, the Supreme Court made clear that a development permit is a "discretionary benefit" that may be withheld where the public interest so requires. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). More to the point, *Lucas* describes its per se rule as applying where regulation denies the owner "all economically beneficial or productive use of the land," not where it denies the owner the ability to develop. To be sure, mere denial of permission to develop might constitute a non-per se taking under the multi-factor inquiry articulated in *Penn Central.* But a development ban must render land valueless -- and thereby deny the owner "all economically beneficial or productive use" -- to trigger the *Lucas* per se rule.

B. Value is Central to the Entire *Lucas* Opinion.

The *Lucas* Court's equation of economically beneficial use and value, by itself, is sufficient to show that its per se rule applies only where land is rendered valueless. If any further support were needed, *Lucas* provides it

overwhelmingly, for the essential role of value to the per se rule permeates the entire opinion.

The very first paragraph recites the trial court's finding that the challenged development ban rendered Mr. Lucas's land "valueless," and it then articulates the question presented as whether the development ban effects a taking due to its "dramatic effect on the economic value of Lucas's lots." 505 U.S. at 1007.

The Court describes Lucas's complaint as rooted in the government's "complete extinguishment of his property's value." *Id*. at 1009. It characterizes the state supreme court's ruling as finding no taking "regardless of the regulation's effect on the property's value." *Id*. at 1010. It describes the state supreme court dissent as concluding that a taking occurred due to the government's "obliteration of the value of petitioner's lots." *Id*. Thus, the record and posture of *Lucas* starkly presented the U.S. Supreme Court with the issue of whether a complete obliteration of value effects a taking.

In delineating its per se rule of takings liability, the *Lucas* opinion once again emphasizes the key factual predicate that underlies the per se rule: the trial court's finding that the lots had been "rendered valueless" by the regulation at issue. 505 U.S. at 1020. The pivotal nature of this finding

is evidenced by the Majority's specific justification for accepting it,[5] as well as the skepticism regarding its accuracy expressed by each of the four separate opinions in the case.[6]

Lucas then emphatically addresses the question of whether the per se rule applies to a near-complete, but not total, deprivation of value. Responding to a hypothetical regarding a "landowner whose property is diminished in value 95%" -- in language that could not be clearer -- *Lucas* states that "in at least *some* cases the landowner with 95% loss [in value] will get nothing" under the Takings Clause because such an owner would "not be able to claim the benefit of [the *Lucas*] categorical formulation." *Id*. at 1019-20 n.8 (emphasis in original). Of course, the landowner with a 95% loss could argue a claim under *Penn Central*, but both the Majority and

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[5] *Id*. at 1020 n.9 (trial court's finding that the lots were rendered valueless "was the premise of the petition for certiorari, and since it was not challenged in the brief in opposition we decline to entertain the argument * * * that the finding was erroneous.").

[6] *Id*. at 1034 (Kennedy, J., concurring in the judgment) ("I share the reservations of some of my colleagues about a finding that a beachfront lot loses all value because of a development restriction"); id. at 1043-44 (Blackmun, J., dissenting) ("The Court creates its new takings jurisprudence based on the trial court's finding that the property had lost all economic value. This finding is almost certainly erroneous."); id. at 1065 n.3 (Stevens, J., dissenting) (the "land is far from 'valueless.'"); id. at 1076 (Souter, J., statement) (trial court's finding that the development ban rendered the land valueless is "highly questionable").

Justice Stevens in dissent agree that only "the landowner who suffers a complete elimination of value" recovers under the per se rule. *Id*. at 1019 n.8 (quoting Justice Stevens's dissent, 505 U.S. at 1064). This exchange shows that the per se rule is inapplicable where land may be sold for 5% of its original value, even where the land is required to be left vacant. The inquiry that drives the per se rule is value, not the ability to build.

To reinforce this point, the Court distinguished several earlier cases that found no taking because "[n]one of them * * * involved an allegation that the regulation wholly eliminated the value of the claimant's land." *Id*. at 1026 & n.13. One of the cases so distinguished -- *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) -- involved a value loss of 92.5% (from $800,000 to $60,000), further demonstrating that the *Lucas* per se rule applies only where land suffers a 100% value loss.

The *Lucas* Court noted that land typically will not be rendered valueless unless it is required to be left in its natural state. *Id*. at 1018. The point is an obvious one. But the Court was quick to emphasize that its per se rule applied only where the owner of such land "sacrifices *all* economically beneficial uses." *Id*. at 1019 (emphasis in original). Thus, where land is required to be kept undeveloped but may be sold for value or put to other beneficial use, no per se taking occurs.

C. Other Binding Supreme Court Precedent Confirms the Central Role of Value in Takings Analysis.

Other cases also reflect the High Court's special concern with regulation that renders land valueless. Just one year after *Lucas*, a unanimous Supreme Court cited with approval cases finding no taking despite land value losses exceeding 90%. *See Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 645 (1993) (citing *Hadacheck* and other cases).

More recently, in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), the Court examined a takings claim based on regulation that allegedly "deprived [the claimant] of 'all reasonable and economically viable use' of her property." *Id*. at 731. Although the agency argued that the claim was unripe because the claimant did not attempt to sell her transferable development rights (TDRs), the Court deemed the claim ripe because the trial court could determine a market value for the TDRs without an actual sale. *Id*. at 740-42. In other words, the lower court could determine whether the claimant lost all economically viable use because the record allowed for a determination of value. As in *Lucas*, value evidence informed the "viable use" inquiry.

Even before *Lucas*, the Court expressed heightened concern for regulation that completely devalues property. In *Pumpelly v. Green Bay*

Co., 13 Wall. 166 (1872), the Court found that flooding of property effected a taking because it caused the "total destruction" of the land and "destroy[ed] its value entirely." *Id*. at 177-78. Justice Scalia, the author of *Lucas*, has written elsewhere that "[t]raditional land-use regulation (short of that which totally destroys the economic value of property) does not violate [the Takings Clause]." *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part).

D. Lower Courts and Commentators Agree that *Lucas*'s Per Se Rule is Limited to Regulation that Renders Land Valueless.

In assessing takings liability for alleged denials of economically viable use, federal appeals courts across the country limit such liability to government action that renders land valueless. The Federal Circuit, which has jurisdiction over all takings claims for compensation against the United States, has rejected the very position adopted by the district court here. *See Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986) (five judge panel), *cert. denied*, 479 U.S. 1053 (1987). In assessing whether a federal permit denial deprived a landowner of "economically viable use" of the land, the *Florida Rock* court held that where the owner can mitigate the impact of the regulation by selling the property for value, "that would be a sufficient remaining use of the property to forestall a determination that a taking had occurred * * *." *Id*. at 903.

Other federal appeals courts are in accord.[7] To our knowledge, no federal court has ever found a per se taking under *Lucas* where the land at issue has value. Legal scholars across the philosophical spectrum agree that the per se rule of *Lucas* is limited to government action that renders land valueless.[8]

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[7] *E.g.*, *Stern v. Halligan*, 158 F.3d 729, 734 n.7 (3d Cir. 1998) (denial of all economically viable use under *Lucas* requires "the total destruction of value"); *Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 286 & n.5 (4th Cir. 1998) (no taking under *Lucas* where government action "did not deprive [claimant's] land of all economic value;" "even where the only residual economic uses of land are recreational, such as camping or picnicking, economic value still remains"); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1031 (3d Cir.) (claimant not denied all economically viable use, despite an 89% value loss, because the land "retains a substantial value that establishes the existence of residual economically feasible uses"), *cert. denied*, 482 U.S. 906 (1987); *Pompa Constr. Corp. v. City of Saratoga Springs*, 706 F.2d 418, 424-25 (2d Cir. 1983) (burden is on claimant to show technically feasible uses are not economically viable; economically viable use remains where "[t]he economic value of the property has not been destroyed, nor is 'all but a bare residue of its value' remaining;" citation omitted); *see also Zealy v. City of Waukesha*, 548 N.W.2d 528, 534 (Wis. 1996) (background principles inquiry is required to preclude per se takings liability only where "as in *Lucas*, the value of the land at issue is 'wholly eliminated'").

[8] *Compare* Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 Stan. L. Rev. 1433, 1435 (1993) (*Lucas* per se rule applies where government action "deprives an owner of all economic value in real property") *with* Richard A. Epstein, *Lucas v. South Carolina Coastal Council: Tangled Web of Expectations*, 45 Stan. L. Rev. 1369, 1375-76 (1993) (criticizing *Lucas*'s focus on value and the Court's ruling that the per se rule does not apply unless regulation deprives land of all value).

In short, *Lucas*, other Supreme Court precedent, and *Lucas*'s progeny compel the conclusion that the *Lucas* per se rule applies only where land is rendered valueless.[9]

II. THE *DEL MONTE DUNES* "USE/VALUE" DICTUM CONTRAVENES *LUCAS*.

In *Del Monte Dunes*, a panel of this Court upheld a jury determination that a municipal permit denial caused a taking. In so ruling, the panel rejected the city's contention that the owner's sale of the property to the State of California, while the litigation was pending, precluded takings liability. The panel expressed concern that relying on such a government buyout to defeat a takings claim might allow the government to acquire property without paying full "just compensation" as required by the Fifth Amendment. 95 F.3d at 1432. The record before the panel suggested that from the outset, the city wanted the State to acquire the property for use as a

[9] To be sure, the district court noted that some lots in the Basin may have "relatively low" value (*id*. at 1244), but even these situations would require analysis under *Penn Central*, not *Lucas*'s loss-of-all-value per se rule. Just as the takings implications of a permanent physical occupation that is but one millimeter from a claimant's property should be analyzed under *Penn Central* and not *Loretto*, a regulation that leaves but a small residual value should be analyzed under *Penn Central* and not *Lucas*. The per se rules for takings liability, which are expressly designed to be very narrow and apply only in extraordinary circumstances (*supra*, page 6 & n.3), should not be stretched beyond their appropriate limits to cover cases that require analysis under *Penn Central*.

public park, giving rise to the inference that the permit denial was a ruse to compel a sale to the government at a reduced price. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624, 1633-34 (1999). The panel further held that the jury reasonably could have concluded that the land was rendered unsaleable and the claimant had no choice but to sell to California. *Id*. at 1433-34.

The panel should have stopped there, for these rulings were sufficient to dispose of the city's arguments regarding California's purchase of the property. Unfortunately, the panel went on to suggest in dicta that while value is relevant to the multi-factor inquiry under *Penn Central*, under *Lucas* the "focus is primarily on use, not value." *Id*. at 1433. The panel thereby created an artificial distinction between economically viable use and value, and ignored *Lucas*'s limitation of its per se rule to government action that renders land valueless.

In articulating this purported distinction between use and value, the panel committed two critical errors. First, it failed to recognize that per se rules of takings liability are derived from, and form part of, the multi-factor takings inquiry under *Penn Central*, and that both *Penn Central* and *Lucas* thus focus on value. Second, the panel misread a *Lucas* footnote and relied on non-per se case law to support its erroneous suggestion that *Lucas*'s per

se rule may apply even where land may be sold for value. We address these errors separately below. We request this court either to repudiate the erroneous "use/value" dicta or limit it to the unique facts of *Del Monte Dunes*.[10]

A. Per Se Rules of Takings Liability are Integrally Related to the Multi-Factor Inquiry.

In stating that *Lucas*'s per se rule focuses primarily on use and not value, the *Del Monte Dunes* panel attempted to drive a wedge between per se and non-per se takings analyses, stating:

> [F]ocusing solely on property values confuses the economically viable use inquiry [under *Lucas*] with the diminution of value inquiry normally applied only where no categorical taking exists.

95 F.3d at 1433. This conclusion reflects a serious misunderstanding of the relationship between per se and non-per se standards of liability in takings jurisprudence.

Per se rules are not separate, independent tracks of takings analysis, but instead specific applications of the multi-factor test. The per se rules are derived from, and integrally related to, the multi-factor inquiry. For

[10] The Supreme Court recently and unanimously repudiated similarly expansive dicta from a separate portion of the same panel's opinion. *City of Monterey*, 119 S. Ct. at 1635, 1645, 1650 (rejecting panel's application of the "rough proportionality" test to a permit denial).

example, the *Loretto* Court held that a government-compelled, permanent physical occupation is a per se taking, and it expressly tied this per se rule to the multi-factor inquiry under *Penn Central*. After noting that *Penn Central* requires an examination of the character of the government action, the *Loretto* Court explained that "when the physical intrusion reaches the extreme form of a permanent physical occupation, * * * 'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative." *Loretto*, 458 U.S. at 426. Such permanent occupations are a taking "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner" under *Penn Central*. *Id*. at 434-35. Thus, the analytical relationship between *Loretto* and *Penn Central* is evident from the face of *Loretto*.

So too in *Lucas*. The *Lucas* Court articulated its per se rule within the general context of *Penn Central*, explaining that although *Penn Central* generally requires a multi-factor inquiry, per se takings rules create liability "without case-specific inquiry [under *Penn Central*] into the public interest advanced in support of the restraint." 505 U.S. at 1015. *Lucas* juxtaposes the per se and multi-factor tests in a way that shows both their integration and mutual focus on value, stating that takings claimants must allege either

"a diminution in (or elimination of) value". *Id*. at 1017 n.7; *accord*, *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113, 1123 (4th Cir. 1995) (*Lucas* and *Loretto* per se rules are specific and dispositive applications of the *Penn Central* inquiry).

The Supreme Court's use of per se takings rules tracks its use of per se rules in other areas of the law. In antitrust law, for instance, the Court employs a multi-factor "rule of reason" to evaluate the reasonableness of a trade practice, but it has derived rules of per se liability "[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the [multi-factor] rule of reason will condemn it." *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 344 (1982). In the same way, the Court derives per se rules of takings liability if a particular kind of land use restriction always leads to takings liability under the multi-factor inquiry. The *Loretto* and *Lucas* per se rules are simply shorthand inquiries under certain *Penn Central* factors that dispense with the need to examine the other factors.

From the very first regulatory takings case through the modern era, the Supreme Court has evaluated takings liability by examining the regulation's effect on value. *Compare Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (diminution in value is relevant to takings analysis)

with Keystone, 480 U.S. at 497 (regulatory takings analysis "requires us to compare the value that has been taken from the property with the value that remains"). *Lucas*'s per se rule does not shift the focus away from value, but simply abbreviates the traditional analysis in cases where land is rendered valueless. Thus, it was error for the *Del Monte Dunes* panel to suggest that value is primarily relevant only to *Penn Central*. Because *Penn Central* focuses on value, *Lucas* necessarily focuses on value as well.

B. The *Del Monte Dunes* Panel Misread a *Lucas* Footnote and Used Non-Per Se Case Law in Improperly Expanding the Reach of *Lucas*.

Del Monte Dunes interpreted footnote 8 of *Lucas* as "implicitly" rejecting the proposition that the ability to sell land for value precludes per se takings liability. 95 F.3d at 1433 (citing *Lucas*, 505 U.S. at 1018-20 & n.8). In fact, neither footnote 8 of *Lucas* nor the accompanying text says any such thing. In responding to Justice Stevens's dissent, which criticized the Majority for focusing on development uses, the Majority stressed that takings jurisprudence recognizes the importance of non-economic interests as well. *Id*. at 1020 n.8. Justice Stevens did speculate that Lucas could have sold his land to a neighbor (*id.* at 1065 n.3), but the Majority's response to this speculation was to insist that the record and posture of the case required the assumption that Lucas's land had been rendered "valueless." *Id*. at 1020

& n.9. The dissent's disagreement stemmed from the Majority's acceptance of this finding (which compelled the conclusion that Lucas's land was unsaleable), not from any "implicit" refusal by the Majority to consider ability to sell. Nowhere does the Majority state that per se liability may attach where the land has value and thus is saleable. As shown in Section I, *supra*, it repeatedly says just the opposite.

Del Monte Dunes also cites certain cases for the proposition that a taking may occur where land retains significant value. 95 F.3d at 1433. As shown in the margin, however, these cases are non-per se cases, and *none* of them found a per se taking under *Lucas* where land had value.[11] In short,

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[11] In *Yancey v. United States*, 915 F.2d 1534, 1539-42 (Fed. Cir. 1990), the Court applied *Penn Central*'s multi-factor inquiry to conclude that a poultry quarantine effected a taking. In *Formanek v. United States*, 26 Cl. Ct. 332, 335-41 (1992), the court applied *Penn Central*'s multi-factor inquiry to conclude that a federal permit denial effected a taking. In *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1549-50 (11th Cir. 1994), the court applied *Penn Central* and expectations analysis to affirm a jury's advisory verdict of a taking, a ruling ultimately vacated by the full Eleventh Circuit. 42 F.3d 626 (11th Cir. 1994). In *Bowles v. United States*, 31 Fed. Cl. 37 (1994), the court first found a per se taking under *Lucas* because the government's proposed use of the land would have resulted in "a substantial negative value," effectively rendering the land valueless. *Id*. at 49. The court then assumed arguendo that the land had value and found a taking under the multi-factor inquiry. *Id*. at 49-52. Finally, in *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604 (9th Cir. 1993), the challenged regulation caused only a de minimis reduction in value, and no taking was found. *Id*. at 617. Thus, none of the cases cited by the panel support the proposition that *Lucas* applies where land has value.

both *Lucas* and uniform lower court rulings confirm that *Lucas*'s per se rule is inapplicable unless regulation renders land valueless.

III. THE DISTRICT COURT MISAPPLIED *LUCAS*'S PER SE RULE AND IMPROPERLY DISREGARDED ITS OWN FINDINGS THAT THE CLAIMANTS' LAND HAS VALUE.

The court below correctly concluded that under *Penn Central*, all three factors -- expectations, economic impact, and the character of the government action -- weigh in favor of TRPA. 34 F. Supp. 2d at 1240-42. Regarding economic impact in particular, the court emphasized the claimants' total failure to meet their burden of proving diminution in the value of the property at issue. *Id*. at 1241. The court stressed that the plaintiffs' counsel evidently made a "calculated choice" not to offer the requisite proof on this element of their takings claim. *Id*. The court further found that the temporary moratoria did not interfere with any reasonable, investment-backed expectations. *Id*. at 1240-41.

After disposing of the plaintiffs' claims under *Penn Central*, however, the court found a temporary, per se taking under *Lucas*. We are not aware of any other case in the entire corpus of takings jurisprudence in which a court imposed per se takings liability after finding that every factor under *Penn Central*'s multi-factor inquiry weighed against liability. This unprecedented ruling not only ignores the analytical relationship between per se rules and

the multi-factor inquiry (see Section II.A), but also ironically suggests that it is easier to prevail on a per se claim under *Lucas* -- claims that succeed only in the most "extraordinary circumstance[s]" (505 U.S. at 1017) -- than to succeed under *Penn Central*.

The district court erred in two fundamental ways.

First, it took the "use/value" discussion in *Del Monte Dunes* -- dicta unnecessary to the panel's ruling (see pages 17-18, *supra*) -- and improperly elevated it to the status of a holding. 34 F. Supp. 2d at 1242-43. While recognizing that "*Lucas* clearly relied on the lower court's finding that the regulations at issue had in fact rendered the plaintiff's property 'valueless'" (*id*. at 1242), the district court stated that it need not resolve the use/value issue because, "regardless of how *Lucas* could be read, [*Del Monte Dunes*] has essentially resolved the issue for us." *Id*. In other words, the district court refused to look to the plain holding of *Lucas* because it read *Del Monte Dunes* as ruling that the *Lucas* per se rule may apply even where land has value. *Id*. It bears repeating that the district court viewed this conclusion as the "key to our case, because it is clear that the plaintiffs' properties -- no matter how restricted their use -- did retain some value during the period at issue." *Id*. at 1242. The district court should not have viewed the *Del Monte*

Dunes "use/value" dicta as binding precedent that trumps the plain language of *Lucas* itself.

Second, the district court latched onto a single phrase in the *Del Monte Dunes* dicta -- "competitive market" -- and misapplied it to justify disregard of its own findings that the claimants' land has value. The *Del Monte Dunes* panel equated a competitive market with an open market, thereby suggesting that value evidence is relevant to the takings inquiry so long as it is based on arm's-length transactions in the marketplace. 95 F.3d at 1433 (citing *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1330-31 (9th Cir. 1977) (finding a taking where land was rendered "unsaleable on the open market")). The panel also relied on *Formanek*, in which two offers were held not to establish a competitive market because they "'were not the product of negotiations between a willing buyer and seller under no duress.'" *Formanek*, 26 Cl. Ct. at 340 (citation omitted). Read in its entirety, the discussion confirms that the *Del Monte Dunes* panel used the phrase "competitive market" simply to exclude from takings analysis offers made under duress.

The district court misread this "competitive market" dicta from *Del Monte Dunes* as requiring the government to show not only lack of duress, but some unidentified, critical mass of purchases and offers for the same

property. The court required TRPA to show that "a sufficient number of people would be willing to buy the property for [a particular] use," emphasizing that "if there is only one willing buyer, there would not, by definition, appear to be a 'competitive market.'" 34 F. Supp. 2d at 1243.

As a result, the district court disregarded its own findings of value based on actual sales of comparable land because, in the court's view, the comparable sales did not constitute the undefined critical mass of sales needed to demonstrate a competitive market. *Id*. at 1243-44. There is no evidence, however, that the comparable sales at issue were made under duress, or that they were anything other than bona fide, arm's-length transactions. They constitute the very essence of fair market value. To disregard them because they did not constitute some undefined, critical mass of offers is economic and legal nonsense.

Nothing in *Del Monte Dunes* justifies the trial court's disregard of its own findings of value based on comparable sales. To be sure, the *Del Monte Dunes* panel stated that evidence of one willing buyer, "especially where the buyer is the government, does not, as a matter of law, defeat a takings claim." 95 F.3d at 1433. This is no doubt true on the facts of *Del Monte Dunes*, where the record suggested that the claimant had no choice but to sell to the government (*id*. at 1432-34), and that from the outset the

government wanted to acquire the property. *See City of Monterey,* 119 S. Ct. at 1633-34. The *Del Monte Dunes* panel emphasized the phrase "especially if that buyer is the government" precisely because the claimant in that case evidently had no other choice but to sell to the government. *Id*. This dicta, however, does not justify the trial court's disregard of its own findings of value based on arm's-length, private transactions between a willing buyer and a willing seller.

In deriving its competitive market dicta, the *Del Monte Dunes* panel cited two Second Circuit cases that make clear that a single arm's-length transaction is sufficient to defeat takings liability. In both cases -- *Park Ave. Tower Assocs. v. City of New York*, 746 F.2d 135 (2d Cir. 1984), *cert. denied,* 470 U.S. 1087 (1985), and *Sadowsky v. City of New York*, 732 F.2d 312 (2d Cir. 1984) -- the Second Circuit ruled that an owner has no takings claim where the permissible use of land allows the owner "to 'sell the property to someone for that use.'" *Park Avenue*, 746 F.2d at 139 (quoting *Sadowsky*, 732 F.2d at 318). In *Sadowsky*, the Court specifically held that to prevail on a takings claim, the landowner has the burden to show the absence of marketability because sale of property to another is a viable use:

> Appellants argue that there was no evidence in the record regarding the marketability of the properties in question, and that the district court was therefore in error in reasoning that the properties might be sold. Since, however, appellants had the

> burden to show that economically viable uses were not available, the court did not abuse its discretion in determining that, where appellants did not show unmarketability, sale of the properties was a possible use.

Id. at 318 n.3; *accord*, *Pompa Constr. Corp. v. City of Saratoga Springs*, 706 F.2d 418, 424 (2d Cir. 1983) (in determining whether a claimant can make beneficial use of land by selling it for religious use, "the key question" is not whether the use would be a profitable enterprise, but whether anyone would purchase the land for that purpose).

A fortiori, where (as here) the trial court finds that the land at issue has value based on comparable sales, the defendant should prevail on a per se takings claim as a matter of law. The record shows that the permissible uses of the regulated land allowed the owners of Class 1-3 and SEZ lands to sell their parcels to someone else for value. This ability to sell to another in an arm's-length transaction to recoup value precludes per se taking liability. As discussed in Section I, *Lucas* makes clear that the ability to sell land for value is, by definition, a beneficial use of the land.

The implications of the district court's analysis are startling. The court's misapplication of *Lucas* would allow claimants to extract pre-regulation market value from taxpayers under a per se takings theory notwithstanding their ability to sell the property at a profit. Because the Takings Clause and the *Lucas* per se rule reach only physical expropriations

of property and their functional equivalent (*Lucas*, 505 U.S. at 1014, 1017), it is inappropriate to allow such an unjust windfall.

CONCLUSION

To establish a per se taking claim under *Lucas*, the claimants had the burden of showing that TRPA's planning moratoria rendered their land valueless. Even if they could have proven that their land had lost 95% of its value, they would not be permitted to take advantage of *Lucas*'s per se rule. *Lucas*, 505 U.S. at 1019 n.8. In fact, the district court found that they presented no value evidence whatsoever. This failure of proof, along with the district court's findings based on comparable sales that the lots had value at all relevant times, require a ruling for TRPA on the per se claims as a matter of law.

Respectfully submitted,

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