CHAPTER 6

THE PARCEL AS A WHOLE

I. Introduction

A local government agency should prevail in a regulatory takings challenge if it can show that the regulation at issue does not deprive the owner of all (or virtually all) economically viable use and value of the property at issue. This chapter addresses the threshold issue of how to define the relevant parcel of property for takings analysis. It explains why courts examine the impact of a regulation by reference to "the parcel as a whole" and provides government counsel with arguments for ensuring that the relevant parcel for takings analysis includes the entire parcel.

II. Defining the Relevant Parcel

Suppose a setback ordinance requires a landowner to locate any permanent structure a certain distance from the street, thereby allowing the landowner to build on the back 90% of the parcel, but completely devaluing the front 10%. The outcome of a takings challenge to the ordinance might well depend on whether the court analyzes the economic impact as a 10% reduction in value of the entire parcel or a complete devaluation of the front 10%.

In addition to such physical segmentation of a parcel, it is possible to sever property interests conceptually. Takings law often characterizes property as a bundle of rights, and describes individual property rights as "sticks in the bundle." *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994). Conceptual severance isolates one of the sticks in the bundle. For example, in a takings challenge to a ban on the sale of assault weapons, the claimant might argue for the conceptual severance of the right to sell the weapons and contend that the ban completely destroys that right, thus taking its property. As shown below, the claimant should lose.

The larger the parcel to be considered, the more difficulty the claimant has showing a dramatic impact on use and value. Accordingly, claimants generally try to define the relevant parcel as narrowly as possible by severing related property interests. They sometimes advocate an "affected portion" standard, arguing that the relevant parcel should include only the specific property restricted or affected by the challenged regulation. This section shows that such segmentation (both physical and conceptual) is improper and should be rejected.

A. The Supreme Court's Parcel-as-a-Whole Rule

1. The Parcel-as-a-Whole Rule Defined

The Supreme Court repeatedly has held that the relevant parcel to be examined is not the affected portion of the property, but the

entire parcel, or what the Court calls the parcel as a whole. This parcel-as-a-whole rule is sometimes called the nonsegmentation or nonseverance rule because it prohibits a claimant from severing the whole parcel into discrete segments for takings analysis. The Court has applied the parcel-as-a-whole rule to reject both physical severance and conceptual severance of one of the sticks in the bundle. Although the Supreme Court resisted segmentation in several early land use cases, it first articulated the parcel-as-a-whole rule in *Penn Central Transportation 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 construct an office building atop the Terminal. In rejecting the claimants' argument that the laws took the air rights above the Terminal, the Court stated:

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

438 U.S. at 130-31.

The Court relied on cases upholding height restrictions, mining restrictions, and setback requirements to conclude that takings analysis does not allow claimants to segment their property into discrete property interests to show a complete taking of the severed portion. *See id.* At first glance, *Penn Central* might be viewed solely as a rejection of physical segmentation (the airspace above the Terminal vs. the Terminal), but it also rejected conceptual severance of one of the sticks in the bundle of property rights (air rights vs. the right to use the Terminal). *See Keystone Bituminous Coal Ass'n v.*

DeBenedictis, 480 U.S. 470, 500 (1987) (stating that *Penn Central* precludes reliance on "legalistic distinctions" to sever property rights).

One year later, in *Andrus v. Allard,* 444 U.S. 51 (1979), the Court again rejected a claimant's attempt at conceptual severance. *Andrus* involved a takings challenge to a ban on the sale of artifacts made from the feathers of bald eagles and other federally protected birds. Although the ban extinguished the claimants' right to sell the artifacts, the Court found no taking: "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 65-66. Because the claimants retained the right to possess, transport, donate, and devise the property, there was no taking, even though the ban prevented the most (and perhaps the only) profitable use of the property. *See id.* at 66-67.

In *Keystone*, the Supreme Court emphatically reaffirmed the parcel-as-a-whole rule as applied to both physical severance and conceptual severance of one of the sticks in the bundle of property rights. There, the claimants first argued that Pennsylvania subsidence protections completely took 27 million tons of their coal required to be left in the ground. This coal comprised less than 2% of the total coal in the mines covered by the protections. The Court quoted extensively from *Penn Central* and *Andrus* to reject this physical segmentation argument, concluding that "[t]he 27 million tons of coal do not constitute a separate segment of property for takings law purposes." *Keystone*, 480 U.S. at 498.

The claimants then contended that the subsidence protections took the claimants' support estates, which Pennsylvania law recognizes as a separate property interest. *See id.* at 500-01. The Court used the parcel-as-a-whole rule to reject this conceptual severance. *See id.* Again relying on *Penn Central* and *Andrus*, the Court held that "takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights." *Id.* at 500. The Court also noted that "the support estate has value only insofar as it protects or enhances the value of the estate with which it is

associated," which further demonstrates the impropriety of severing it from the rest of the claimants' bundle of rights. *Id.* at 501.

Keystone reflects the Court's reluctance to fashion rules of takings liability that would call into question routine land use controls. The Court emphasized that if physical segmentation were allowed, "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." *Id.* at 498. This concern harmonizes with Justice Holmes recognition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), that the "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."

The Supreme Court most recently applied the parcel-as-a-whole rule in 1993, when a unanimous Court applied the rule to reject a takings challenge to a federal law that imposed liability on employers who withdrew from pension plans. In response to the claimant's argument that the law took its entire property, the Court admonished that takings claimants may not unfairly manipulate their property interests to demonstrate a compensable taking:

> [A] claimant's parcel of property [may] not first be divided into what was taken and what was left for the purposes 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.

Concrete Pipe and Prods., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 644 (1993). Although *Concrete Pipe* is not a land use case, it expressly relied on both *Penn Central* and *Keystone*, and thus its reaffirmation of the parcel-as-a-whole rule applies to regulatory takings cases across the board. *See id.*

2. Caveats

Notwithstanding the relative clarity of the parcel-as-a-whole rule, certain caveats are necessary, particularly concerning conceptual severance. First, the Court has deemed the right to exclude others from one's property as "one of the most essential sticks" in the bundle. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Therefore, as explained in Chapter 10, courts routinely segment the right to exclude others in takings analysis, and impairment of that right through government-compelled physical occupation might give rise to a taking.

Second, courts similarly afford special protection to the right to devise property to one's heirs, and abolition of that right might well constitute a taking. *See Babbitt v. Youpee*, 519 U.S. 234, 236 (1997); *Hodel v. Irving*, 481 U.S. 704, 716-18 (1987).

Third, *Andrus* qualifies its nonsegmentation ruling as applying "at least where the owner possesses a full 'bundle' of property rights." 444 U.S. at 61, 65-66. If the owner never possessed the full bundle of rights, courts are more willing to engage in conceptual severance. *E.g.*, *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (stating that the government's action effectively destroyed and thus took a materialman's lien); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 590, 594 (1935) (holding that a federal law took a mortgagee's property rights in mortgaged farms).

3. *Lucas* Footnote 7

Some takings claimants argue for an "affected portion" standard by trying to exploit dicta contained in footnote seven of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992), which is

reproduced in the margin.[96] Some historical background is necessary to understand the significance of this *Lucas* dicta.

In *Penn Central*, the Court noted that *Mahon* arguably treated the support estate in that case as a separate property interest, which raised the issue of whether the *Penn Central* Court should treat the air rights over Grand Central Terminal as a discrete property interest. *See Penn Central*, 438 U.S. at 130 n.27. The *Penn Central* Court rejected this contention, but it failed to make clear whether it was repudiating this reading of *Mahon* or distinguishing it. *See id.* In *Keystone,* the Court appeared to clarify this ambiguity when it expressly rejected the contention that a support estate should be

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[96] Footnote seven reads as follows:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme — and, we think, unsupportable — view of the relevant calculus, see *Penn Central Transportation Co. v. New York City*, 42 N.Y.2d 324, 333-334, 366 N.E.2d 1271, 1276-1277 (1977), aff'd, 438 U.S. 104 (1978), where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the takings claimant's other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. Compare *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (law restricting subsurface extraction of coal held to effect a taking), with *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497-502, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987) (nearly identical law held not to effect a taking); *see also id.*, at 515-520 (REHNQUIST, C. J., dissenting); Rose, *Mahon* Reconstructed: Why the Takings Issue is Still a Muddle, 57 S. Cal. L. Rev. 561, 566-569 (1984). The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property - *i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.

Lucas, 505 U.S. at 1016 n.7.

analyzed apart from the rest of the parcel. 480 U.S. at 500-01. The *Keystone* Court read *Mahon* not as allowing segmentation of property interests, but rather as finding that the claimant's entire coal company "could not undertake profitable anthracite coal mining in light of the Kohler Act." *Id.* at 498-99.

The ambiguity surfaced again, however, in the Court's 1992 ruling in *Lucas.* In footnote 7, the *Lucas* Court contrasted the treatment of the relevant parcel issue in *Mahon* and *Keystone,* identifying, but not resolving, the apparent tension between the cases. *See Lucas,* 505 U.S. at 1016 n.7. Writing for the majority, Justice Scalia speculated about the possible use of an affected portion standard in certain takings cases. *See id.* This speculation was clearly dicta, however, because Justice Scalia noted that there was no dispute in *Lucas* over the definition of the relevant parcel. *See id.* The following year, in *Concrete Pipe*, the Court unanimously reaffirmed the parcel-as-a-whole rule. 508 U.S. at 643-44. *Concrete Pipe* appears to have closed the door on the "affected portion" approach to which Justice Scalia alluded.

If a takings claimant relies on the dicta in footnote 7 of *Lucas*, government attorneys should respond that *Lucas*'s mere speculation is entitled to no weight when viewed against the clear holdings in *Penn Central*, *Andrus*, *Keystone*, and, most important, *Concrete Pipe*, a post-*Lucas* ruling joined by the entire Court (including Justice Scalia) that reaffirms the parcel-as-a-whole rule. *See Zealy v. City of Waukesha*, 548 N.W.2d 528, 532-33 (Wis. 1996) (using *Concrete Pipe* to negate the *Lucas* dictum).

Lucas footnote 7 also criticizes the definition of the relevant parcel by the New York Court of Appeals in *Penn Central Transportation Co. v. New York City*, 366 N.E.2d 1271, 1276-77 (N.Y. 1977), *aff'd,* 438 U.S. 104 (1978), characterizing it as "extreme" and "unsupportable." *Lucas*, 505 U.S. at 1016 n.7. Some takings claimants argue that this criticism is directed at the parcel-as-a-whole rule. In fact, the New York Court of Appeals considered the claimants' economic return not only from Grand Central Terminal, but also from the entirety of their "heavy real estate holdings in the Grand

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Why the "Relevant Parcel" Issue is Sometimes Called the "Denominator" Issue

In an influential law review article, Professor Frank Michelman argued that in takings analysis, the economic impact of the government action should not be considered in absolute terms, but instead in comparison to some other quantity. If this comparison were expressed as a fraction, he explained, the loss in value would compose the numerator of the fraction. The critical question concerns the composition of the denominator. If the denominator were the pre-existing value of the affected portion of the property, courts frequently would find a taking because the fraction often would be 1, signifying a complete economic wipeout of the affected portion. Professor Michelman argued that a "more relevant" denominator would be the claimant's "whole preexisting wealth or income" because this comparison "would 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).

As explained in the text, courts apply neither the "affected portion" standard nor the "preexisting wealth or income" standard, and instead examine the parcel as a whole. Perhaps due to the continuing influence of Professor Michelman's article, however, many courts continue to refer to the relevant parcel issue as the denominator issue. *E.g.*, *Lucas*, 505 U.S. at 1016 n.7; *Keystone*, 480 U.S. at 497.

Central area, including hotels and office buildings . . . ." *Penn Central*, 366 N.E.2d at 1276-77. Some of these other parcels are several blocks away from the Terminal and separated by major roads and other structures. The *Lucas* Court's criticism of the state court approach suggests only that on the facts of that case, the state court improperly included *all* of the claimants' properties, including non-contiguous properties situated several blocks away, to define the relevant parcel. *District Intown Properties Limited Partnership v. District of Columbia*, 198 F.3d 874, 880-81 (D.C. Cir. 1999) ("The *Lucas* dictum [in footnote 7] casts aspersions on the state court's

elevation of one factor, unity of ownership, over other factors in determining the relevant parcel."). Significantly, the *Lucas* Court did not question the Supreme Court's focus on the parcel as a whole when it rendered its own ruling in *Penn Central*.

In short, the Supreme Court repeatedly has held that the economic impact of the challenged government action should be evaluated by considering the action's effect on the parcel as a whole, not just the affected portion. We now turn to an examination of how lower courts have applied the parcel-as-a-whole rule.

B. Lower Court Application of the Parcel-as-a-Whole Rule

Although the parcel-as-a-whole rule is easy to articulate, it is sometimes difficult to apply. Some of the most influential relevant parcel rulings arise from challenges to wetland protections because they often raise interesting issues regarding the extent to which associated uplands should be included in the relevant parcel. In *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796 (Fed. Cir. 1993), a developer challenged a wetlands permit denial by the U.S. Army Corps of Engineers. The Federal Circuit provided a succinct, functional explanation of why the "affected portion" standard is inappropriate:

> Clearly, the 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.

Id. at 802.

Another wetlands case frequently cited on the relevant-parcel issue is *Ciampitti v. United States*, 22 Cl. Ct. 310 (1991). After

rejecting the claimant's affected portion standard, the *Ciampitti* court listed several factors to use in deciding whether arguably separate properties are in fact part of a single relevant parcel for takings analysis. *See id.* at 318. These factors include "the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, [and] the extent to which the protected lands enhance the value of remaining lands . . . ." *Id.* The court made clear that its list is not a comprehensive list, and that "the effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment." *Id.* at 319. Courts from other jurisdictions frequently use the list of factors in *Ciampitti* as a point of departure in defining the relevant parcel.

1. Contiguity and Common Ownership

Of the various factors listed in *Ciampitti*, contiguity and common ownership typically predominate. For example in *Zealy v. City of Waukesha*, 548 N.W.2d 528 (Wis. 1996), the Supreme Court of Wisconsin rejected a takings challenge to zoning designed to protect wetlands on 10.4 acres of undeveloped land owned by Zealy. *See id.* at 533-34. The zoning designated 8.2 acres for agricultural use, but allowed the rest of the land to be used for residential and business. *See id.* The *Zealy* court treated the entire 10.4 acres as the relevant parcel, concluding that *Penn Central*, *Keystone*, and *Concrete Pipe* "do not support the proposition that a contiguous property should be divided into discrete segments for purposes of evaluating a takings claim." *See id.* at 533. The majority of courts appear to follow the *Zealy* court's approach in defining the relevant parcel to include all contiguous property owned by the claimant.[97]

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[97] *See* 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 composition of the denominator of the taking fraction have held that it consists of all of the claimant's contiguous acreage in the same ownership."); *see also* Jentgen v. United States, 657 F.2d 1210, 1213 (Cl. Ct. 1981) (concluding that the relevant parcel consists of 100 contiguous acres owned by the claimant, including 60 undevelopable acres and 40 developable acres); K & K Constr., Inc. v. Department

This approach reflects not only the majority rule, but also the modern trend. For example, in a case decided fifteen years before *Penn Central*, the New Jersey Supreme Court appeared to consider only the affected portion of the property, excluding other contiguous property owned by the claimant. *See Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 193 A.2d 232, 235-36, 241-44 (N.J. 1963). More recently, however, the same court affirmed a lower court ruling that defined the relevant parcel to include all of the claimant's contiguous property. *See Karam v. New Jersey*, 723 A.2d 943 (N.J. 1999) (*per curiam*), *aff'g* 705 A.2d 1221 (N.J. Super. Ct. App. Div. 1998), *cert. denied*, 120 S. Ct. 51 (1999). The lower court in *Karam* had acknowledged that its earlier ruling used the affected portion approach, but concluded that more recent New Jersey rulings, as well as the decisions of most other jurisdictions, define the relevant parcel to include all of the claimant's adjacent acreage. *See Karam v. New Jersey*, 705 A.2d at 1226-28. Adhering to the majority rule, the *Karam* court defined the relevant parcel to include the claimant's riparian land and adjoining uplands because the land was contiguous, commonly purchased and owned, bound together by a riparian grant, treated as a single unit, and assessed as a single lot. *See id.* at 1228. Using the parcel-as-a-whole rule, the court concluded that denial of permission to build a dock on the riparian lands was not a taking. *See id.* The New Jersey Supreme Court effectively ratified this analysis by affirming "substantially for the reasons expressed" by the lower court. *Karam*, 723 A.2d at 944.

What happens if persons other than the claimant have a limited ownership interest in part of the property? Do their interests defeat the requisite commonality of ownership? Not necessarily. In *K & K Construction, Inc. v. Department of Natural Resources*, 575 N.W.2d

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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 purposes of the takings analysis"), *cert. denied*, 525 U.S. 819, *reh'g denied*, 525 U.S. 1033 (1998); Bevan v. Township of Brandon Bd. of Appeals, 475 N.W.2d 37, 43 (Mich. 1991) (determining that the relevant parcel includes all "contiguous lots under the same ownership . . . , despite the owner's division of the property into separate, identifiable lots"), *amended by* 439 Mich. 202 (1991).

531 (Mich. 1998), *cert. denied*, 525 U.S. 819 (1998), the lower court justified the segmentation of three parcels for takings analysis because one of the three parcels owned by the claimant was subject to an equitable lien. The Michigan Supreme Court disagreed. Notwithstanding the equitable lien, the Michigan high court found sufficient commonality of ownership because at the time of the alleged taking one claimant held title to all three parcels, and that claimant continued to have at least a joint ownership interest in all three. *See id.* at 537 & n.5.

2. The Claimant's Treatment of the Property

Another important factor in defining the relevant parcel is the claimant's treatment of the property. If the claimant had used the property as an integrated whole for development or other significant purposes, that action usually justifies treating the entire property as part of the same relevant parcel. In these situations, the courts generally forbid the claimant from manipulating the takings analysis by disavowing the claimant's own actions. For example, in *Forest Properties, Inc. v. United States*, 39 Fed. Cl. 56, 73-75 (1997), *aff'd*, 177 F.3d 1360 (Fed. Cir. 1999), *cert. denied sub nom. RCK Properties, Inc. v. United States*, 120 S. Ct. 373 (1999), the trial court defined the relevant parcel to include all 62 acres of Forest Properties' development project, including 53 acres of developable uplands, not just the 9.4 acres of lake-bottom Forest Properties was prohibited from developing. The court held:

> A property owner, who treats a series of parcels as one property for the purposes of development, financing, planning, and utilization, cannot then segregate the properties for the purpose of establishing a taking claim. . . . [I]f a property owner treats a series of properties as one income-producing unit, the value lost to the claimant is not simply the loss of the segregated parcel affected by the Government action, but the decrease in the

> owner's ability to utilize the unified parcels as one income-generating unit. Any other approach would elevate the style of the transaction over the substance of a property owner's treatment of a parcel.

39 Fed. Cl. at 73.

The Federal Circuit recently affirmed this ruling, emphasizing that "from the outset, the development was treated as a single integrated project . . . ." 177 F.3d 1360, 1365 (Fed. Cir. 1999). Forest Properties argued that the lake-bottom should be severed from the uplands because it held different kinds of title to these properties (equitable vs. fee), it had acquired the properties at different times, different local government authorities regulated the properties, and the two segments could be developed separately. *Id.* at 1366. The Federal Circuit rejected all of these arguments, stating that the trial court "properly looked to the economic reality of the arrangements, which transcended these legalistic bright lines. . . ." *Id.*

The *Ciampitti* court likewise refused to allow the owner to segment property for takings analysis where he had treated the property as a single unit for purchase and financing. The court concluded that it would be improper to allow the owner to "sever the connection he forged when it assists in making a legal argument." 22 Cl. Ct. at 320. The *K & K Construction* court also relied on the claimants' treatment of three parcels as a unified whole in development plans and permit applications to justify including all three in the relevant parcel despite the fact that the parcels were zoned differently. *See K & K Construction, Inc. v. Department of Natural Resources*, 575 N.W.2d 531, 537 n.6 (Mich. 1998), *cert. denied*, 525 U.S. 819 (1998). The *Karam* ruling similarly relied in part on the claimants' treatment of wetlands and associated uplands as a unified whole in defining the relevant parcel to include both. *See Karam v. New Jersey*, 705 A.2d 1221, 1228 (N.J. Super Ct. App. Div. 1998), *aff'd*, 723 A.2d 943 (N.J. 1999) (*per curiam*).

Even where the landowner's treatment of property changes over time, some courts rely on the owner's longstanding, prior use of property as an integrated unit to define the relevant parcel more broadly. In *District Intown Properties Limited Partnership v. District of Columbia*, 198 F.3d. 874, 883-84 (D.C. Cir. 1999), the claimants bought an apartment building with adjacent landscaped lawns in 1961 and used the property as an integrated whole for 27 years. In 1988, they subdivided the lawns to build townhouses on the subdivided lots. The District of Columbia denied the development permit under local historic preservation laws. In rejecting a takings challenge to the permit denial, the court defined the relevant parcel to include the entire property, not just the lawns, because the property is contiguous, commonly owned, and had been treated by the claimants as an integrated whole for at least 27 years. *See id.* at 880. Even after subdivision in 1988, there was no evidence that the claimants treated the lawns separately from the apartment for purposes of accounting or management. *Id.* Although the claimants argued that the District now taxed the subdivided lawn lots separately from the apartment, the court responded that the claimants retained the right to recombine the parcels to be taxed as a single parcel. *Id.* at 882.

What if the landowner buys property that is already subdivided, or subdivides the property immediately upon purchase? Does this by itself warrant treatment of the individual lots as separate relevant parcels? In *Keystone*, the Supreme Court ruled that takings jurisprudence precludes reliance on "legalistic distinctions within a bundle of property rights." 480 U.S. at 500. Accordingly, courts generally ignore parcel and lot designations in defining the relevant parcel.[98] If lot designations controlled the analysis, a landowner could

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[98] *E.g.*, Broadwater Farms Joint Venture v. United States, 35 Fed. Cl. 232, 239-40 (1996) (holding that the relevant parcel includes all of claimant's contiguous property owned at the time of the challenged government action even though it was subdivided prior to purchase), *aff'd in relevant part and vacated in part,* 121 F.3d 727 (Fed. Cir. 1997), *reh'g denied,* No. 96-500, 1997 U.S. App. LEXIS 31745 (Fed. Cir. Oct. 14, 1997); K & K Construction, 575 N.W.2d at 535-38 ("'[C]ontiguous lots under the same ownership are to be considered as a whole for purposes of judging the reasonableness of zoning ordinances [under the Takings Clause], despite the owner's division of the property into separate, identifiable lots.'") (quoting Bevan v.

jerry-rig a takings claim by simply subdividing the affected portion of the property. Most courts also seem to agree that a difference in zoning does not by itself justify segmentation.[99]

3. Previously Owned, Contiguous Property

Do the courts evaluate contiguity at the time of the claimant's original purchase, or at the time the government imposed the challenged restriction? Stated differently, how do the courts define the relevant parcel if the claimant has developed or sold portions of contiguous property purchased as a single unit? Courts generally prevent developers from enhancing a takings claim by unfairly manipulating their development plans or selling off developable properties.

Courts faced with this issue often begin their analysis with *Deltona Corp. v. United States,* 657 F.2d 1184 (Ct. Cl. 1981), where the court rejected a takings challenge to a federal wetlands permit denial. The court relied, in part, on the claimant's ability to develop other property purchased with and contiguous to the restricted land, even though the claimant had already developed and (presumably) sold off large portions of the unrestricted property before the permit denial. *See id.* at 1191. The court specifically noted that the restricted property contained only 20% of the total acreage of the original purchase and only a third of the developable lots. *See id.* In finding no taking, the court's decision principally rested on the claimant's ability to develop uplands within the restricted parcels. *See id.* Nevertheless, the *Deltona* court plainly considered the economic

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Township of Brandon Bd. of Appeals, 475 N.W.2d at 43; Zealy v. City of Waukesha, 548 N.W.2d 528, 532-33 (Wis. 1996) (deciding that the relevant parcel includes all contiguous property owned by claimant despite differences in zoning).

[99] *See* Zealy, 548 N.W.2d at 532-33 (determining that differences in zoning do not warrant segmentation of contiguous parcels); K & K Construction, 575 N.W.2d at 537 (difference in zoning across four contiguous parcels owned by claimant did not warrant segmentation). *But cf.* American Savings & Loan Ass'n v. County of Marin, 653 F.2d 364, 371-72 (9th Cir. 1981) (remanding for a determination of whether differently zoned, contiguous properties are part of the same relevant parcel).

impact of the permit denial in view of all contiguous property originally purchased by the developer, regardless of whether the developer owned the property at the time of the permit denial.

Deltona contrasts with the Federal Circuit's more recent ruling in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). In *Loveladies,* the court distinguished *Deltona* and affirmed the trial court's definition of the relevant parcel, which excluded property that Loveladies had developed before the agency imposed the challenged regulatory restrictions. *See id.* at 1181-82. Loveladies originally purchased 250 contiguous acres in 1958, but it developed 199 acres before the enactment of section 404 of the Clean Water Act, and before state authorities sought to restrict its development activities. Prior to the permit denial, Loveladies had sold all but 6.4 of the 199 developed acres. *See id.* at 1174, 1180-81. Moreover, in exchange for a state permit, Loveladies promised to convey a deed restriction or conservation easement ensuring that another 38.5 of the 51 undeveloped acres would remain unfilled. When Loveladies wanted to fill 12.5 acres of its undeveloped land, the federal government denied the permit under section 404 of the Clean Water Act. *See id.* at 1173. In the takings case, the trial court defined the relevant parcel to include only the 12.5 acres subject to the federal permit denial, and, subsequently, found a taking and awarded $2,658,000 plus interest. *See id.* at 1173, 1181.

The Federal Circuit affirmed, emphasizing that in defining the relevant parcel, its "precedent displays a flexible approach, designed to account for factual nuances." *Id.* at 1181. These factual nuances include "the timing of transfers in light of the developing regulatory environment." *Id.* The Federal Circuit found no clear error in the trial court's exclusion of the 199 acres developed before the change in the regulatory climate. *See id.* The appeals court also affirmed the trial court's exclusion of 38.5 acres that Loveladies promised the state to keep undeveloped, stating that "whatever substantial value that land had now belongs to the state . . . ." *Id.* at 1181; *see also Palm Beach Isles Assocs. v. United States*, No. 99-5030, 2000 U.S. App. LEXIS 5838 (Fed. Cir. March 31, 2000).

Municipal attorneys should expect claimants to rely on *Loveladies* in arguing for a narrow definition of the relevant parcel. Several responses are available. First, the *Loveladies* ruling is expressly limited to the specific "factual nuances" of that case, and thus should not be read to establish a rule that requires similar exclusions from the relevant parcel in other cases. *See id.* The Federal Circuit expressed concern that Loveladies had been whipsawed by the state, which extracted a promise from Loveladies to keep 38.5 acres unfilled in exchange for the state permit, but then recommended that the federal permit be denied. *See id.* The state's apparent change in position colored the Federal Circuit's view of the case; in affirming the exclusion of the 38.5 acres, the Federal Circuit stressed: "It would seem ungrateful in the extreme to require Loveladies to convey to the public the rights in the 38.5 acres in exchange for the right to develop 12.5 acres, and then to include the value of the grant as a charge against the givers." *Id.* at 1181. Government attorneys may therefore argue that *Loveladies* has no application beyond the unique factual nuances of that case.

Second, *Loveladies* is poorly reasoned. For example, in distinguishing *Deltona*, the *Loveladies* court described *Deltona*'s takings analysis as having considered only property owned by the claimant at the time of the permit denial. *See id.* In fact, the *Deltona* court considered all property originally purchased, including property developed and sold before the permit denial. *See Deltona*, 657 F.2d at 1192. Other courts have criticized and refused to follow *Loveladies*' idiosyncratic analysis. *E.g.*, *Volkema v. Michigan Dep't of Natural Resources*, 586 N.W.2d 231 (Mich. 1998) (denying review of lower court finding of no taking but "disavow[ing]" the lower court's reliance on *Loveladies* to the extent it conflicts with Michigan precedent).

Notwithstanding the flaws in *Loveladies*, the question remains as to whether the relevant parcel for takings analysis should include parcels sold by the landowner before the challenged regulation took effect. Where the evidence suggests that a landowner, in anticipation

of future regulation, sold off property to manipulate the relevant parcel and skew the takings analysis, government counsel should argue that the property should be considered as part of the relevant parcel where the other factors so warrant. Courts should not allow unfair manipulation of land holdings to influence takings analysis. On the other hand, where the owner sells off parcels long before the challenged regulation came into effect and without anticipation of future regulation, the court should consider this factor (along with the other factors) in defining the relevant parcel.

Takings claimants also sometimes rely on a 1986 ruling in *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), to argue for a narrow definition of the relevant parcel. There, the Federal Circuit addressed a takings challenge to the denial of a federal permit to fill and mine 98 acres of wetlands, which were part of a 1560-acre tract. The federal government argued that the relevant parcel was the entire 1560-acre tract, and that the permit denial did not take the 98 acres because it did not affect the rest of the tract. The Federal Circuit emphasized that this argument "had dignity" and was "of decisive importance" in *Deltona,* and *Jentgen*, thereby reaffirming the definition of the relevant parcel in those cases as including all contiguous property owned by the claimants. *Id.* at 904. In *Florida Rock*, however, the court found this argument unavailing because the challenged federal law prohibited filling and mining of the balance of the tract. *See id.* In other words, consideration of the rest of the parcel would not have affected the takings analysis in *Florida Rock* because the owner could not make economically viable use of the rest of the parcel. *District Intown Properties Limited Partnership v. District of Columbia*, 198 F.3d 874, 881 (D.C. Cir. 1999) (*Florida Rock*'s definition of the relevant parcel is premised on a finding that mining was prohibited on the entire 1560-acre tract and that consideration of the rest of the property would not have affected the analysis). Municipal attorneys should have little difficulty distinguishing *Florida Rock* where the claimant enjoys some economically viable use of other contiguous, commonly owned

Text Block 6.2

Disregard of the Parcel-as-a-Whole Rule

In 1994, the Federal Circuit issued *Florida Rock Industries, Inc. v. United States,* 18 F.3d 1560 (Fed. Cir. 1994), which is one of the most disturbing opinions in takings jurisprudence. Although the court reversed a trial court's finding of a taking and remanded for further analysis, the divided panel opined that a compensable taking might occur where government action reduces the value of property by 60%. *See id.* at 1570. On remand, the trial court found a taking based on a 73.1% value loss. *See Florida Rock Industries, Inc. v. United States*, 45 Fed. Cl. 21 (1999). This ruling might well be appealed.

The *Florida Rock* theory of liability, often referred to as the partial takings theory, is discussed at greater length in Chapter 7. It deserves mention here, however, because it is sometimes viewed as allowing for the conceptual segmentation of a "right" to exploit or derive value from property. As explained in Chapter 7, the good news for municipalities is that *Florida Rock* is aberrational and has had little effect on takings jurisprudence outside the Federal Circuit. Municipal attorneys should rely on *Penn Central*, *Keystone*, *Andrus*, and similar cases to respond to claimants' efforts to narrow the relevant parcel by using *Florida Rock.*

Finally, municipal attorneys should be aware that despite clear Supreme Court precedent, a small handful of lower courts will, at times, engage in impermissible severance. In a particularly troubling ruling, a split panel of a Pennsylvania Commonwealth Court essentially adopted an affected portion standard for a portion of land that had independent value prior to the challenged government action. *See Machipongo Land & Coal Co. v. Pennsylvania*, 719 A.2d 19, 28 (Pa. Cmmw. Ct. 1998). As noted by the dissent in that case, the ruling defies *Penn Central* and *Keystone*, and it deserves to be reversed on appeal. *See id.* at 30. In *Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1067 (N.Y. 1989), the New York Court of Appeals toyed with the idea of conceptual severance. The court ultimately concluded, however, that a taking had occurred regardless of how it defined the relevant parcel, and its discussion of conceptual severance may be dismissed as dicta. *See id.*; *see also Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 485-87 (N.Y. 1994) (concluding that although destruction of claimant's reversionary interest might constitute a taking, this issue is not "dispositive by itself in this case").

property. (Subsequent controversial rulings in the same case are discussed in Text Block 6.2 and at greater length in Chapter 7.)

4. Is Noncontiguity Fatal?

If two properties are not contiguous, the lack of contiguity does not automatically defeat a government defendant's effort to treat two properties as a single relevant parcel. For example, in *Ciampitti*, the court defined the relevant parcel to include non-contiguous properties because (1) at the time the claimant bought the properties he also owned property that linked the non-contiguous properties together, and (2) the claimant treated the non-contiguous properties as a single parcel for purposes of purchase and financing.

In *Town of Jupiter v. Alexander*, 1998 Fla. App. LEXIS 11626 (Dist. Ct. App. Sept. 16, 1998), the court defined the relevant parcel to include non-contiguous properties — a mainland parcel and an island located about 500 yards away — because the claimant owned them both and intended to use them as an integrated whole. In *Naegale Outdoor Advertising v. City of Durham*, 803 F. Supp. 1068, 1073-74 (M.D.N.C. 1992), *aff'd without opinion*, 19 F.3d 11 (4th Cir. 1994), a takings challenge to billboard restrictions, a federal court defined the relevant parcel to include not just the leasehold interest in each sign, as the claimant urged, but all the claimant's billboards in the metropolitan area because the claimant treated its signs as a single unit in charging its customers for advertising in the Durham area. Finally, in *Brotherton v. Department of Environmental Conservation*, 657 N.Y.S.2d 854, 857 (Sup. Ct. 1997), *aff'd*, 675 N.Y.S.2d 121 (1998), a New York court treated property as part of the same relevant parcel even though it was divided by a road.

Recommended Reading

John A. Humbach, *"Taking" the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments*, 42 CATH. U.L. REV. 771 (1993).

Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988).