FRANCES MANSOLDO AND RONALD G. MANSOLDO,	)	SUPREME COURT OF NEW JERSEY
Plaintiffs-Appellants,	)	Docket No. 58,344
- versus -	)	Civil Action
STATE OF NEW JERSEY,	)	On Appeal from the Superior Court of New Jersey, Appellate Division, Docket No. A-3109-03T1, Hon. H. Weissbard and Hon. H. Hoens
Defendant-Respondent.	)	

BRIEF OF AMICUS CURIAE ASSOCIATION OF STATE FLOODPLAIN MANAGERS, INC. IN SUPPORT OF THE STATE OF NEW JERSEY

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March 15, 2006

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The Association of State Floodplain Managers, Inc. ("ASFPM") respectfully submits this brief amicus curiae to urge the Court to either (1) affirm the ruling below that a prohibition on hazardous development in the floodway cannot support a legitimate claim for financial compensation under the Takings Clause, but clarify that this ruling should lead to the conclusion that plaintiffs' taking claim must be dismissed in its entirety, or (2) dismiss the petition as improvidently granted.

PRELIMINARY STATEMENT

Amicus ASFPM is the supporting organization of professionals involved in floodplain management, flood hazard mitigation, flood preparedness, and flood warning and recovery. The mission of the Association is to mitigate the losses, costs and human suffering caused by flooding and to promote wise use of the natural and beneficial functions of floodplains. The ASFPM is the premier voice in floodplain management practice and policy throughout the nation. The Association's more than 9,000 national and chapter members, including approximately 20 members in New Jersey, represent local, state and federal government agencies, citizen groups, private consulting firms, academia, the insurance industry, and lenders.

This case raises the question whether the public can rely on traditional police power authority to prevent hazardous development in the "floodway" without triggering takings liability. Consistent with the general practice around the country, the State of New Jersey has defined the "floodway" as that portion of the floodplain containing "the channel and portions of

the flood plain adjoining the channel which are reasonably required to carry and discharge the regulatory flood." See Petitioners' Appendix ("PA"), at 38, As stated by the Department of Environmental Protection (DEP) in its denial of plaintiffs' application: "The floodway area of a river or stream is the most dangerous portion of the flood plain in the event of flooding. The velocity of flood waters and the depth of flow are greater in the floodway than in areas further removed from the stream channel." Id.

If the government had to pay landowners to prohibit development in the floodway the public would be unable to control effectively the serious hazards to life and property associated with flooding. Because many thousands of property owners are subject to these type of restrictions, the financial burden could be so great that government would be forced to abandon regulatory controls altogether. As the U.S. Supreme Court said many years ago in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922), "Government 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." In addition, requiring that owners in flood-prone areas be paid not to develop their properties would create a perverse "moral hazard," encouraging more ill-advised investment in such areas and, in turn, leading to ever greater conflicts between development interests and public safety policies.

The potential weakening of floodplain regulation as a result of takings litigation is a matter of significant public concern because flooding is the nation's most destructive natural hazard in terms of damage and economic loss. Government Accountability Office, National Flood Insurance Program: Actions to Address Repetitive Loss Properties 2 (2004). In recent years, property damage from flooding has totaled in excess of $1 billion each year in the United

States and in 2004, the last year for which complete data are available, total losses reached nearly $14 billion. See U.S. Weather Service http://www.nws.noaa.gov/oh/hic/flood_stats. Not only does flooding cause property damage and loss, but it causes significant loss of life – between 1992 and 2001 flooding caused the deaths of 900 persons. Government Accountability Office, at 2.

Plaintiffs' proposed placement of fill in the floodway of the Hackensack River would unquestionably lead to increased flood damage in this river basin. As explained on the Department of Environmental Protection website, restricting development in floodplains not only "protects the person who is building from loss of life and property," but also "protect[s] other properties along the stream... from flood damage."

> When you build in a flood plain and the waters begin to rise, the buildings on your property displace water thus increasing the height of the rising waters and making the flooding worse everywhere along the banks. In addition, your buildings and pavement cover the natural ground surface that would have helped soak up the water. Therefore, the more building and pavement allowed, the higher the flood waters along that water body will rise, and the worse the flooding problems will get.

http://www/state.nj.us/dep/landuse/se.html. According to DEP, as of 1999, the Hackensack River in the vicinity of plaintiffs' property "has been hit with significant floods on at least 7 occasions; 1968, 1972, 1975, 1984, 1987, 1989, and 1997 over the last 25 years." The State properly contends that allowing plaintiffs to fill and develop this site would contribute to more severe flooding along the Hackensack River in the future.

The decision of the Appellate Division is also of concern to the ASFPM because we

know of no other case in which a court has held that similar development restrictions constitute a taking. The New Jersey courts have consistently rejected takings claims based on regulation of this type. See Ronade Assocs. v. Dept. of Cons. & Econ. Development, 7 N.J. Super. 132, 72 A.2d 355 (App.Div. 1950); Usdin v. State of New Jersey, 173 N.J. Super. 311 (1980). See also Morris Cty. Land v. Parsippany-Troy Hills Tp., 40 N.J. 539, 556 n. 3 (1963) (holding that stringent regulation of private swampland represented a taking, but distinguishing the case of regulation "of the use of land in a flood plain on the lower reaches of a river by zoning, building restrictions, channel encroachment lines or otherwise" and stating "nothing said in this opinion is intended to pass upon the validity of any such regulations"). Likewise, other courts across the country have consistently rejected takings claims based on flood plain regulations. See, e.g., Gove v. Zoning Board of Appeals of Chatham, 444 Mass. 754, 831 N.E.2d 865 (2005); First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal.Rptr. 893 (Cal.App. 1989); Reel Enterprises v. City of LaCrosse, 146 Wis.2d 662, 431 N.W.2d 743 (1988); Responsible Citizens v. City of Asheville, 308 N.C. 255, 302 S.E.2d 204(1983); Maple Leaf Investors, Inc. v. State of Washington, 88 Wash.2d 726, 565 P.2d 1162(1977).

PROCEDURAL HISTORY AND STATEMENT OF THE FACTS

Amicus ASFPM adopts the State's Procedural History and Statement of the Facts.

SUMMARY OF ARGUMENT

The courts below reached two contradictory conclusions: (1) that the State can properly restrict hazardous development in the floodway without triggering liability under the Takings Clause, but (2) that the State is liable for a taking based on the floodway regulations because they ostensibly eliminated all economically viable use of plaintiffs' property. Under a logical

reading of the Takings Clause, and in accordance with longstanding precedent, the first conclusion, which ASFPM believes is correct, should have led the lower courts to conclude that the taking claim had to be rejected altogether. Instead, the courts below ruled that the State is liable for the value of the remaining uses of the property (other than development), despite the fact that these uses are not restricted by the regulations.

Apparently based on the view that its potential liablity under this takings test was, at worst, only nominal, the State did not appeal the liability determination. Thus, this case, as presented to this Court, apparently involves a question about the appropriate measure of compensation due upon the finding of a taking, rather than the underlying issue of whether a taking actually occurred. However, given that the liability determination is both unprecedented and logically incoherent, the Court cannot sensibly address the issue of the quantum of compensation without also examining the liability issue.

The Court appears to have two sensible options for dealing with this case. First, the Court could recognize that, in substance, the courts below rejected the taking claim and, in any event, the issue of takings liability is inextricably intertwined with the issue of the measure of compensation. Taking this approach, the Court should address the merits of the case, affirm the conclusion that the floodplain regulation cannot support a finding of a taking, but clarify that the logical conclusion from that ruling is that the taking claim as a whole must be rejected. Alternatively, the Court could choose to dismiss the petition as improvidently granted, on the ground that it would be a waste of judicial resources, and impede the sound development of the law, to address the issue of the quantum of compensation in a case in which the underlying question of takings liability was answered in mistaken fashion.

Apart from the fact that the takings analysis employed by the lower courts was flawed, the decisions below are problematic in two other specific respects. First, the courts did not carefully define the applicable takings standard, and in particular did not clearly distinguish between the analysis under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (establishing a per se takings test for regulations that render property valueless), and the analysis under Penn Central Transportation Co. v. City of New York. 438 U.S. 104 (1978) (establishing a fact-intensive, multi-factor takings test for burdensome regulations that fall short of eliminating all value). While the ASFPM believes plaintiffs' claim cannot be sustained under either test, we believe is necessary to recognize that two different types of analysis are potentially applicable in this case.

Second, and relatedly, the courts below incorrectly upheld plaintiffs' taking claim on the ground that some of the factual findings made by the Administrative Law Judge hearing plaintiffs' appeal from the DEP's denial of their waiver application provided the predicate for finding a taking under Lucas. The trial court plainly took a mistaken approach. For collateral estoppel to apply, the issue addressed in the first proceeding must be "identical" to the issue addressed in the second proceeding, the issue must have been actually decided in the first proceeding, and resolution of the issue must be "essential" to the resolution of the first proceeding. The ALJ did not specifically address whether the floodway regulation rendered plaintiffs' property "valueless," the issue was not actually decided by the ALJ, and resolution of that issue certainly was not essential to the determination that plaintiffs were not entitled to a waiver.

Applying the proper legal standards to this case, the lower courts were correct to

conclude that the restriction on hazardous floodplain development could not support a finding of a taking. The threshold question in any regulatory takings case, whether brought under Lucas or under Penn Central, is whether the claimant has a property right to engage in the planned property use to begin with. A takings claim falls at the threshold if the challenged regulations merely impose limitations that are already inherent in the claimant's property interests under background principles of state nuisance or property law. In this case plaintiffs' taking claim fails because the State of New Jersey has long recognized that a landowner has no inherent right to develop his property in a fashion that would cause flooding leading to injuries to persons or property.

Assuming for the sake of argument that the Court concludes that background principles of state law do not bar this claim, it would then become necessary to resolve whether this case falls into the Lucas or Penn Central category. The plaintiffs failed to carry their burden of showing the property was rendered completely valueless, and the courts below erred in concluding that a prohibition on all or most development necessarily translated into a destruction of all property value. Accordingly, if the case is not barred under background principles, the case must be resolved under the Penn Central factors. All three factors weigh against a taking claim because plaintiffs failed to adduce any direct evidence of the effect of the regulation on the property's value, plaintiffs should have known based on the location of the property adjacent to a river as well as longstanding legal rules limiting riparian rights that development of this site was problematic, and the harm-preventing character of the regulation strongly militates against a finding of a taking.

ARGUMENT

I. The Analysis Applied by the Lower Courts Was Plainly Mistaken.

Before explaining how, in our view, the applicable law should be applied to this case, the ASFPM will first explain how we believe the lower courts went awry.

Mistaken Takings Analysis. First, the courts below applied a mistaken – and so far as we know unprecedented – approach in determining takings liability. The courts said, on the one hand, that the State can properly restrict hazardous development in the floodway without triggering liability under the Takings Clause. But the courts said, on the other hand, that the State is liable for a taking based on the floodway regulation because it ostensibly eliminated all economically viable use of plaintiffs' property. The upshot, according to the courts below, was that plaintiffs are not entitled to any compensation based on the floodplain regulation about which they are objecting, but they are entitled to compensation based on the value of non-development uses that were not restricted and as to which plaintiffs raised no complaint. The Court should reject this approach.

A regulatory taking case involves two basic questions: whether the regulation impinges upon a property interest belonging to the claimant, and whether the regulation "took" the property without paying compensation. If a claimant can establish both of these elements, the courts should declare a taking and require the government to pay compensation for the property. But the takings inquiry does not turn on whether the government may have burdened one or another of the individual sticks in the proverbial bundle of property rights. Rather, taking into account the impact of the regulation on the property as a whole, the issue is whether the regulation rises to the level of taking of the entire property. As the U.S. Supreme Court recently explained, the basic aim of regulatory takings doctrine is to identify those measures that are so

economically burdensome that they are the "functional equivalent" of "paradigmatic takings," that is, "direct government appropriation[s] or physical invasion[s] of private property." Lingle v. Chevron USA, 125 S.Ct. 2074, 2081 (2005).

Based on these standards, the courts below plainly erred in concluding that the State effected a taking. The courts concluded that the floodplain regulation could not provide the basis for assessing takings liability against the State, apparently on the ground that plaintiffs could not claim a property right to use their property in a way that would cause upstream and downstream flooding. Contrary to the view of the lower courts, this ruling should have led to the conclusion that plaintiffs' taking claim had to be rejected altogether.

On many different levels, the approach adopted by the lower courts was plainly mistaken. Most fundamentally, the only logical deduction from the conclusion that the restriction on flood plain development could not support a finding of a taking was that the plaintiffs failed to establish a taking. After all, the only restriction being complained of was the floodplain regulation, and if that regulation did not effect a taking, that should have been the end of the case. Second, the approach of the lower courts is self–contradictory, because if the regulation truly rendered the property valueless, thus triggering application of Lucas, then there could be no "remaining" value for which compensation could be owed. Lastly, there is the suggestion in the Appellate Division decision that the DEP regulatory decision was at least partly responsible for making the remaining non-development uses "not viable." See Mansoldo v. State of New Jersey, 2005 WL 20767608 *5. But since the regulation did not restrict the remaining uses the regulation could not have effected a taking of those uses.

The lower courts' analysis appears to reflect a fundamental misunderstanding of the

Supreme Court Lucas case. In that case, the U.S. Supreme Court, reversing a decision of the South Carolina Supreme Court, declared that the plaintiff could establish a taking if he could show that the State statute denied him all economically viable use of the property. At the same time, the U.S. Supreme Court said that the State was free on remand to attempt to defeat the taking claim by showing that the plaintiff had no right to develop the property to begin with. The reasoning of Lucas made clear that, if the State was successful in showing the plaintiff had no threshold property right based on background principles of state law, those principles would defeat the taking claim altogether. In any event, so far as we are aware, that is how every subsequent federal and state court has interpreted Lucas. This Court should follow that consistent pathway, and reject the novel analysis of the lower courts.

Muddled Legal Standard. The decisions of the courts below also are problematic because they applied a pastiche of legal standards without clearly articulating what standard should govern this case and why. The trial court and the Appellate Division cited both the U.S. Supreme Court's decision in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) as well as the Court's earlier decision in Penn Central Transp. Co. v. City of New York, 434 U.S. 104 (1978). But the courts did not actually lay out the quite distinctive tests established by these decisions, nor did they recognize how the choice to apply one test or the other might influence the outcome. The ASFPM believes that it may be of assistance to the Court to briefly describe the contours of modern regulatory takings doctrine, highlighting several issues that appear to be critical to the resolution of this case.[1]

[1] The lower courts proceeded on the assumption that New Jersey takings law is a mirror image of federal takings doctrine, and the ASFPM knows of no basis for questioning that assumption in this case.

As discussed, the overarching theme of regulatory takings doctrine is to identify those regulatory measures that are so economically burdensome that they are the "functional equivalent" of paradigmatic takings. Under this broad conceptual umbrella, the U.S. Supreme Court has developed different standards for regulations that eliminate all property value, see Lucas v. South Carolina Coastal Council, regulations that are extremely burdensome but fall short of eliminating all value, see Penn Central Transp. Co. v. New York City, and regulations that result in a permanent physical occupation of private property. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). If a regulation amounts to a taking, the government can continue to enforce the regulation only if it is willing to acquire the property by paying for it, in other words to exercise the power of eminent domain. See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987).

Under both Lucas and Penn Central,[2] the threshold question is whether the plaintiff can claim a protected entitlement to engage in the proposed use of the property. As the U.S. Supreme Court explained in Lucas, a taking claim should be rejected "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." 505 U.S. at 1027. These restrictions "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." Id. at 1029. While first articulated in the Lucas case, it is well established that the backgrounds principle defense is equally available in a Penn Central case.[3]

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[2] There is no claim in this case that the regulation amounted to a physical occupation, triggering the Loretto test.

[3] For a sampling of decisions recognizing that the government can invoked a background principles defense in a Penn Central case, see, e.g., Mutschler v. City of Phoenix, --- P.3d ----, 2006 WL 336232 (Ariz.App. Div. Feb 14, 2006) ("the logic of the rationale for the Lucas

This is only logical because if a plaintiff cannot meet the threshold requirement to identify a protected property interest, the specific theory of takings liability being advanced becomes irrelevant.

If a claim is barred under background principles of state law, the takings case ends and there is no need for the court to proceed to the question of whether the regulation has effected a taking. On the other hand, if the plaintiff can demonstrate that she possessed a protected property right, the court must proceed to the "takings" question. That step necessarily begins with deciding what takings standard to apply.

In Lucas, the U.S. Supreme Court stated that when a regulation eliminates "all economically viable use" of protected property, a finding of a per se taking will follow. In the wake of Lucas, there was substantial debate about whether the Lucas test focused on eliminating property uses or property value and, more generally, exactly how burdensome a regulation must be to fit into this per se category. In its most recent decisions the Court has made clear that Lucas should be reserved for the truly extraordinary case. Thus in Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002), the Court said that the Lucas per se rule only applies to "the permanent obliteration of the value of a fee simple estate." id. at 330, and, more recently, the Court in Lingle explained that a Lucas claim must involve "the complete elimination of a property's value." 125 S.Ct. at 2082. While the Court has not directly

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nuisance exception--that there can be no taking of a non-existent private property right--appears equally applicable to all takings claims, including partial regulatory takings that would otherwise be analyzed pursuant to the Penn Central test"); Appollo Fuels, Inc. v. United States, 381 F.3d 1338, 1347 (Fed.Cir. 2004) ("It is a settled principle of federal takings law that under the Penn Central analytic framework, the government may defend against liability by claiming that the regulated activity constituted a state law nuisance without regard to the other Penn Central factors.").

explained why it has given the Lucas rule such a restrictive scope, it probably reflects the Court's concern that the Lucas per se test affords a relatively narrow opportunity to consider the factual nuances of each particular case.[4] In any event, the lower courts have taken the Supreme Court at its word, rejecting takings claims under Lucas when the reductions in value fall short of total wipeouts. See, e g. Cooley v. United States, 324 F.3d 1297 (Fed.Cir. 2003) (trial court finding that regulation reduced property's market value by 98.8% not sufficient to support a Lucas taking).

If this case does not fit the Lucas per se category, then it is governed by the Penn Central analysis, which calls for a fact-intensive analysis of the case, focusing on (1) the economic impact of the regulation, (2) the extent to which the regulation interferes with the owner's reasonable investment-backed expectations, and (3) the character of the regulation. While the Penn Central inquiry, by definition, applies in those case where the owner has suffered less than a total economic wipe out, it is still reserved for "extreme circumstances." United States v. Riverside Bay View Homes Inc., 474 U.S.121, 126 (1985).

One important question about the Penn Central analysis, particularly relevant in the context of this case, has been whether the "character" factor calls for consideration of whether a regulation serves to safeguard other citizens or the public generally from harmful activities. Since the 19th century, dating back to the U.S. Supreme Court's decision in Mugler v. Kansas,

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[4] In historical terms, it is also noteworthy that one member of the five-justice majority that joined in Justice Scalia's opinion for the Court retired shortly after the decision. Also, Justice Anthony Kennedy supported the judgment but filed a concurring opinion that was critical of the Court's opinion. See Lucas, 505 U.S. at 1032-36. One indication of how narrowly the Supreme Court has read Lucas is provided by the dissent of former Chief Justice Rehnquist in Tahoe-Sierra, in which he complained that the Court's statement of the Lucas test in that case was so narrow that even David Lucas, the prevailing plaintiff in the Lucas case, could not have met the test. See Tahoe-Sierra, 535 U.S. at 351.

123 U.S. 623 (1887), the Court has said that "a prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property." Id. at 668-629. See also Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 479 (1987) (quoting Mugler). For many years this principle stood in uneasy tension with the Court's frequent statements that a regulation eliminating all of a property's economic value necessarily constitutes a taking. See, e g., Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

In Lucas, the U.S. Supreme Court resolved this tension by concluding that regulation that eliminates all value does indeed effect a taking – unless the proposed activity violates background principles of state nuisance or property law such that the owner had no right to engage in the activity to begin with. The Court rejected the notion that a mere legislative expression of a general goal to prevent public harms, not specifically rooted in the state law of nuisances or property, could automatically defeat a takings claim. But the question left open by Lucas was whether, outside the total regulatory takings context, the Mugler harm-prevention principle remained viable. Justice Antonin Scalia, writing for the Court in Lucas, used seemingly sweeping language to explain why the plaintiff could not rely on Mugler. In his words, "the distinction between regulation that 'prevents harmful use' and that which 'confers benefits' is difficult, if not impossible, to discern on an objective, value-free basis." 505 U.S. at 1026. Accordingly, he said, "it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings' –which require compensation – from regulatory deprivations that do not require compensation." Id. One could certainly question, as a matter of first principles, whether there is actually no meaningful distinction between benefit-conferring

and harm-preventing regulation. But it is a distinction the U.S. Supreme Court has plainly declared beside the point in a Lucas-type case.

Read superficially, Justice Scalia's statement could also be interpreted to preclude consideration of the harm-preventing character of a regulation in a Penn Central case. But this interpretation would read Lucas too broadly. First, it would extend the analysis far beyond the facts of Lucas, where the trial court found that the property had actually been rendered valueless. Second, it would go beyond the logic of Justice Scalia's reasoning. He argued that recognizing the Mugler principle in the Lucas context would "nullify Mahon's affirmation of limits to the noncompensable exercise of the police power." But the Takings Clause only places some limits on the police power. It does not require ignoring the harm-preventing character of a regulation in every takings case, especially if harm-prevention is treated as informing the "character" of the government action, one factor in the multi-variate Penn Central analysis. Furthermore, Justice Scalia in Lucas left the door open to considering the harm-preventing character of regulation in a Penn Central case by acknowledging that "[n]one" of the Court's prior cases that "employed the logic of 'harmful use' prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land." 505 U.S. at 1026. Stated differently, Justice Scalia accepted that the Court's precedents affirmatively support consideration of the harm-preventing character of a regulation outside of the Lucas context. The ASFPM respectfully suggests that the Court embrace this reading of the governing precedents.

The upshot of the foregoing is that the trial court in this case, applying the proper legal principles, should have utilized the following roadmap for analyzing this case. First, the court should have asked whether the plaintiffs' claim, regardless of whether it was categorized as a Lucas claim or a Penn Central claim, was barred under background principles of New Jersey

nuisance or property law. The court should have answered that question by concluding that the claim was barred under background principles as a nuisance. However, assuming the court concluded that background principles did not apply in this case, it should have addressed whether the case was a Lucas case or a Penn Central case, and it should have concluded that Penn Central governed. Viewing the case as a Penn Central case, the court then should have proceeded to apply the multi-factor Penn Central analysis to the facts of the case. In evaluating the character of the regulation, the court should have specifically considered whether the regulation, regardless of whether it mirrored state background principles, was designed to address a serious hazard to property and public safety. If so, that should have weighed heavily against a finding of a taking under Penn Central.

Erroneous Calculation of Loss in Value. Finally, the factual basis for the trial court's finding of a taking under Lucas is highly suspect. The trial court received no actual evidence on the economic value of the property subject to the regulation, and therefore had no record basis for making the findings necessary to support application of the Lucas test in this case. Rather, the trial court, "extending the logic of... [the] findings" made by an Administrative Law Judge, simply concluded on the basis of the ALJ's earlier opinion that the plaintiffs had been "denied all economically viable use." Applying the doctrine of collateral estoppel, the trial court ruled that the State was bound by this determination for the purpose of this subsequent takings litigation.

It is plain that the trial court erred in applying the doctrine of collateral estoppel in this case. This Court has set strict limits on the use of collateral estoppel, including, among other things, that (1) "the issue to be precluded [be] identical to the issue decided in the prior proceedings," (2) "the issue was actually litigated in the prior proceedings," and (3) "the determination of the issue was essential to the prior judgment." See Hennessey v. Winslow

Township, 183 N.J. 593, 599 (2005). See generally Restatement (Second) of Judgments § 27. In this instance, none of these prerequisites was satisfied.

First, the issue of whether the regulation rendered the property "valueless" – the critical issue for the purpose of takings analysis – is not "identical" to the issue "decided" in the administrative proceedings. The regulatory provisions referred in a general way to various factors, including but not limited to the economic burdensomeness of the regulation See N.J.A.C. 7:13-4.8(a) (2) (referring to cases where "the costs of compliance are unreasonably high"); N.J.A.C. 7:13-4.8(d) (1) (referring to situations where regulation results in "exceptional and undue hardship"). But the proceeding before the DEP did not involve a taking claim and the DEP did not address the specific question of whether the property was rendered valueless (making Lucas applicable) or whether the regulation was only extremely burdensome (making Penn Central applicable). Second, the issue was not actually litigated in the DEP proceeding, because there was no actual evidence introduced at that proceeding about the remaining value of the property subject to the restrictions. Although the ALJ made some observations about plaintiffs' efforts to sell the property, and commented on the "viability" of certain uses, the issue of whether the property was rendered valueless was not actually litigated. Finally, the determination of the issue was in no sense "essential" to the judgment. While a finding of "undue" burden would have tended to support the granting of a waiver, the DEP denied the waiver application. Thus, the ALJ's irrelevant statements regarding the impact of the restrictions were in no way "essential" to the outcome of the administrative proceeding.

The trial court apparently believed that because the regulation eliminated all or virtually all opportunity to develop the property, it necessarily triggered liability under Lucas. But a total destruction of property value has to be proven as a matter of fact. Moreover, the courts have

repeatedly recognized that a property may retain significant value even if it cannot be developed. See, e g., Wyer v. Board of Environmental Protection, 747 A.2d 192 (Me. 2000) (concluding that, despite complete prohibition on development, building lot retained value of $50,000 based on value of property to abutters for "parking, picnics, barbecues and other recreational uses"). In this case the trial court stated that the town apparently had no interest in purchasing the property, and efforts to sell the property (at some unspecified price) had been unsuccessful. But those few observations fall well short of findings supporting the conclusion that the property was literally valueless.

For all of the foregoing reasons, the trial court erred in giving statements by the ALJ preclusive effect on the specific question of whether the plaintiffs' property was rendered valueless. Accordingly, the trial court erred in concluding, without conducting an independent factual examination, that Lucas applied in this case.

II. There Was No Taking in This Case Because, Under Background Principles of New Jersey Nuisance Law, Plaintiffs Can Claim No Protected Property Right To Engage in Development That Would Cause Flooding and Create Increased Risks of Property Damage and Personal Injuries.

Regardless of whether this case is viewed as involving a complete obliteration of private property value (triggering the Lucas per se analysis) or a less severe burden on private property (triggering Penn Central analysis), the taking claim should be rejected because plaintiffs have no protected property right to develop the property in a way that would create serious risks of flood damage. Developing stream-side property in a fashion that would cause serious up or downstream flooding is not and has never been part of a riparian owner's bundle of property rights in New Jersey.

The conclusion that this claim is barred by relevant background principles is most

directly supported by the U.S. Supreme Court's opinion in Lucas itself, which describes a fact pattern essentially identical to the facts of this case to illustrate how background principles of nuisance law can bar a taking claim. The Court said that "the owner of a lake-bed.... would not be entitled to compensation when he is denied the requisite permit to engage in a land-filling operation that would have the effect of flooding others' land." Lucas, 505 U.S. at 1029. If one substitutes the word riverbed for lake-bed, this example is completely on all fours with this case. Thus, the Supreme Court in Lucas plainly intended the background principles defense to apply in precisely this type of case.

In addition, this conclusion is supported by New Jersey precedent. Under the traditional natural flow rule, a riparian owner has a right to have the water flow in its natural channel in natural quantities and quality. See Holsman v. Boiling Spring Bleaching Co., 1862 WL 2700, 6 (N.J.Ch.)(1862) ("The right of the riparian proprietor … to the use and enjoyment of a stream of water in its natural state is as sacred as the right to the soil itself."). As the Court of Errors and Appeals explained in East Jersey Water Co. v. Bigelow, 60 N.J.L. 201 (1897), "it is the right of every owner of land upon a stream to have the water come to him in its natural flow, undiminished in quantity, and unimpaired in quality, and, it may be added, with no increase of the volume except from natural causes." Id. at 207-208 (emphasis added). Activities of riparian landowners that interfere with their neighbors' right to natural flow constitute a nuisance under New Jersey law.

The New Jersey courts traditionally treated interference with a riparian owners' natural flow right as a per se nuisance. See, e.g. Shields v. Arndt, 1842 WL 3345 (1842) (diversion of stream water through ditch is a nuisance); East Jersey Water Co. v. Bigelow, 60 N.J.L. 201 (1897) (diversion of river into reservoir system is a nuisance); Stevenson v. Morgan, 63 N.J.Eq.

805 (1902) (dam causing flooding in water-course is a nuisance); Smith v. Orben, 119 N.J.Eq. 291 (1935) (increased discharges into water-course is a nuisance). Under this longstanding precedent, because the floodplain regulation simply parallels limitations already placed on plaintiffs' title by background principles of nuisance law, plaintiffs' taking claim should be dismissed.[1]

More recently, the Court has adopted a so-called "reasonable use" test to resolve many conflicts over surface waters. See Armstrong v. Francis Corp., 20 N.J. 320 (1956). Under this approach, whether a proposed water use or effect on water is permissible depends on a complex calculus taking into account the purpose and social utility of the planned activity, the projected impacts of the activity on others, and the availability of options for avoiding or minimizing adverse impacts. Id. at 330. The New Jersey courts have indicated that the reasonable use doctrine has superseded the natural flow rule in at least certain limited contexts. See Birchwood Lakes Colony Club, Inc v. Borough of Medford Lakes, 90 N.J. 582 (1982) (natural flow rule not applicable in case involving discharge of sewage effluent); see also Borough of Westville v. Whitney Home Builders, Inc., 40 N.J. Super. 62, 81 (1956) (same). However, so far as we are aware, the New Jersey courts have never declared that the reasonable use rule supersedes the traditional natural flow rule in all cases, including cases of this type.

In any event, even if the reasonable use doctrine did apply, the floodplain regulation did not effect a taking because it serves in this instance to bar an unreasonable use. In Armstrong,

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[1] For further information on the nature and magnitude of the flooding problems in the Hackensack River basin and surrounding areas, see, e.g., "After the Flood: With a Billion Dollars in Damage. New Jersey Will Be Wringing out a Long Time," The New York Times 14NJ (October 17, 1999); "After the Storm: the Overview; 12,000 Homes Said to Sustain Storm Damage," The New York Times A1 (December 15, 1992).

this Court's seminal reasonable use case, the Court held that a developer violated the reasonable use standard by draining water off its property After heavy rains, the stream, still in its natural state through plaintiff's property, conveyed additional upstream waters that prior to the development were absorbed or held back. The water would cause a "flash rise or crest in the stream, with a tremendous volume of water rushing through at an accelerated speed. As a result, the stream has flooded on several occasions within the last year…. More distressing, however, is the fact that during these flash situations the body of water moving at the speed it does tears into the banks of the brook," causing extensive damage to plaintiff's land. 20 N.J. at 323. See also I/M/O Freshwater Wetlands Statewide General Permits, 185 N.J. 452, 453 (2006) (observing that a development permit is not "a license to flood [the] neighbor's property" and the developer would be subject to civil liability if "by developing its property it caused damaging flooding to its neighbors' properties").

The State's floodplain regulation is designed to prevent precisely the type of unreasonable flooding damage that the Armstrong Court said supported a finding of unreasonable use. The Flood Hazard Area Control Act and Stream Encroachment Rules reflect the judgment that building in a floodway increases the amount and velocity of water flow. See N.J.A.C. 7:13-1.1 et. seq. In this particular case, the DEP determined that plaintiffs' proposed filling and development would "constitute a significant obstruction to flow of floodwaters," distorting and reducing the river's flood carrying capacity and creating a risk of flooding problems upstream and downstream. See PA, at 40-41. On this basis, the DEP concluded, "it is clear that the issuance of this waiver... will pose a threat to the public health, safety, and general welfare." Id. at 41. Plaintiff has never contested the DEP's findings on this point. See Monsaldo v. State, 2005 WL 2076708, 2 (2005). In fact, plaintiffs admitted that construction of

structure in the floodway would pose "a threat to other properties during a flood," effectively conceding that their proposed use of the property was a nuisance. See PA, at 70, Answer to Interrogatories No. 24. Furthermore, the DEP emphasized that the plaintiffs' property was indistinguishable from thousands of other properties in the state, and that permitting this development would have set a precedent supporting the development of all similar properties, significantly upping the stakes in terms of the magnitude of threatened flood damage. Accordingly, plaintiffs' proposal to fill and develop the site on the Hackensack River plainly represented a prospective nuisance under the reasonable use rule. As a result, the State "took" nothing from plaintiffs and their taking claim should be rejected under the reasonable use standard as well..

III. In the Alternative, the Court Should Rule that the Taking Claim Fails Under the Penn Central Analysis.

If, contrary to the position urged above, the Court decides that the taking claim cannot properly be rejected based on background principles of New Jersey law, the Court should proceed to consider whether the claim can succeed under the Penn Central analysis. For the reasons discussed above, plaintiffs failed to carry their burden of demonstrating that the property was rendered valueless and that the case falls within the scope of the Lucas rule. Therefore, assuming for the sake of argument that the claim cannot properly be rejected based on background principles, the takings inquiry must turn on an analysis of the economic impact of the regulation, the reasonableness of the plaintiffs' investment-backed expectations, and the character of the regulation.

While both the record and the findings below are somewhat spare, the ASFPM believes

they are sufficient to demonstrate that this taking claim must fail under Penn Central.[2] First, while the regulation unquestionably imposed some economic burden on plaintiffs, the magnitude of the burden remains unquantified. See Gove v. Zoning Bd. of Appeals of Chatham, 444 Mass. 754, 831 N.E.2d 865 (2005) (ruling that plaintiffs'"failure to introduce a thorough assessment" of the impact of the regulation on the property "left the judge no basis to conclude that [the plaintiff] suffered any economic loss at all"). The regulation plainly stripped the property of all or most of its development uses, but the focus of the economic impact factor is on property value, not property use, and the elimination of development uses cannot necessarily be equated with a severe impact on value. See Wyer v. Board of Environmental Protection, 747 A.2d 192, (Me. 2000). More fundamentally, at least outside of the category of Lucas-type cases, adverse economic impact, no matter how severe, is insufficient by itself to establish a taking. See Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 645 (1992) ("Mere diminution in the value of property, however serious, is insufficient to demonstrate a taking."). Thus the economic impact factor, though potentially supportive of plaintiffs' claim, is certainly insufficient to establish a taking under Penn Central.

The other two Penn Central factors, on the other hand, clearly weigh against the taking claim. As to the reasonable investment-backed expectations factor, the plaintiffs should have been aware, based on the extensive history of flooding in the Hackensack River basin and across the State of New Jersey, that investing for development purposes in property along a river was an inherently problematic venture. See Appollo Fuels, Inc. v. United States, 381 F.3d 1338, 1349 (Fed. Cir. 2004). Furthermore, the extensive New Jersey precedent limiting the rights of

[2] If the Court disagrees, if might consider remanding the case for further fact-finding and analysis by the trial court.

property owners to engage in activities that cause flooding, even if they did not bar the taking claim outright, put plaintiffs on notice of that they might well face legal restrictions.. See Ronade Assocs. v. Dept. of Cons. & Econ. Development, 7 N.J. Super. 132, 72 A.2d 355 (App.Div. 1950). Finally, plaintiffs cannot complain of interference with serious investment-backed expectations, given that they purchased the property for a modest sum many years ago and then did little with the property even as the regulatory regime became more robust in response to evidence of ever more serious flooding problems. See Grenier v. Zoning Board of Chatham, 62 Mass.App.Ct. 62, 814 N.E.2d.1154 (Mass.App. Sept. 17, 2004), aff'd, 444 Mass. 754, 831 N.E.2d 865 (2005) (fact that owner held property for over decade without developing it or selling it for development suggests a lack of sufficient investment-backed expectations to support a takings claim).

Finally, the Penn Central character factor strongly supports rejection of this taking claim. Even if the regulation did not address the kinds of harms covered by New Jersey nuisance principles (it does), the regulation is plainly aimed at preventing serious harms to persons and property. For the reasons discussed above, the harm-preventing purpose of a regulation is highly pertinent in assessing the character of the government action under Penn Central. In this regard, the recent decision of the Massachusetts Supreme Judicial Court in a case involving a taking claim based on restrictive coastal foodplain regulations is highly instructive. See Gove v. Zoning Bd. of Appeals of Chatham, 444 Mass. 754, 831 N.E.2d 865 (2005). The Massachusetts Court rejected the landowner's taking claim under Penn Central, stating that "[i]t is not at all clear that [plaintiff] has 'legitimate property interests' in building a house." The court went on to state that "it is undisputed that [plaintiff's property] lies in the flood plain and that its potential flooding would adversely affect the surrounding areas if the property were developed with a

house," and that "[r]easonable government action mitigating such harm, at the very least when it does not involve a 'total' regulatory taking or a physical invasion, typically does not require compensation. Id. at 767, citing e.g., Goldblatt v. Hempstead, 369 U.S. 590 (1962) (regulation restricting extent of excavation below ground water level); Miller v. Schoene, 276 U.S. 272 (1928) (statute requiring landowner to destroy disease-harboring trees).

CONCLUSION

For the foregoing reasons, the Court should affirm the ruling below that the State's floodplain regulations cannot support a finding of a taking, but the Court should clarify that this ruling means that the plaintiffs' taking claim must be rejected altogether. The Court should either rule that the claim is barred under background principles of New Jersey law or, in the alternative, recognize that this taking claim is governed by Penn Central rather than Lucas, and that plaintiffs failed to establish a taking based on the Penn Central factors. If the Court were to conclude that the procedural posture of the case prevented it from arriving at any of these sensible resolutions, the ASFPM urges the Court to consider simply dismissing the petition as improvidently granted.

Respectfully submitted,

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