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McQueen v. South Carolina Costal Council: Misinterpreting Lucas

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McQUEEN V. SOUTH CAROLINA COASTAL COUNCIL: MISINTERPRETING *LUCAS*

I. INTRODUCTION

The United States Supreme Court has experienced much difficulty over the years formulating useful and cohesive rules of law for interpreting the last line of the Fifth Amendment of the United States Constitution, specifically, that "private property [shall not] be taken for public use, without just compensation."[1] The difficulty stems from the Court's attempt to identify when a governmental regulation of property-use is so severe that it amounts to a "regulatory taking" of property, triggering a governmental duty to pay just compensation. The hardships do not end with the United States Supreme Court, but grow exponentially as state and lower federal courts try to interpret the law as set forth by the Supreme Court in this complex field of takings law.[2] Confusion arises even when the Supreme Court explicitly creates a "per se" category of regulatory takings, as the Court did in *Lucas v. South Carolina Coastal Council*.[3] *Lucas* held, as a categorical matter, that just compensation for the loss of value in property is required when a regulation denies *all* economically beneficial or productive use of land.[4] Unfortunately, the state and lower federal courts have interpreted this holding to have two different and inconsistent meanings.[5]

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1. U.S. CONST. amend. V.

2. *See generally* Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW. 307 (1998) (critiquing the Court's inability to provide useful and useable law in the takings law area).

3. 505 U.S. 1003 (1992).

4. *Id.* at 1015.

5. For cases finding that *Lucas* did create a "per se" category, see *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1379 (Fed. Cir. 2000) ("[W]hen the analysis . . . reveals that the regulatory imposition has deprived the owner of *all* economically viable use of the property (a 'categorical taking'), then the only remaining issue is the Government's defense. . . ." (citations omitted)); *Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1564 (Fed. Cir. 1994) ("If a regulation categorically prohibits *all* economically beneficial use of land . . . [t]here is, without more, a compensable taking." (footnotes omitted)); *Balough v. Fairbanks N. Star Borough*, 995 P.2d 245, 265 (Alaska 2000). *But see* Good v. United States, 189 F.3d 1355, 1361 (Fed. Cir. 1999) ("Reasonable, investment-backed expectations are an element of *every* regulatory takings case." (emphasis added)); Dep't of Envtl. Prot. v. Burgess, No. 1D99-1764, 2000 WL 889840, at *2 (Fla. Dist. Ct. App. July 6, 2000) (establishing that a "total taking" requires demonstration of interference with reasonable, distinct, investment-backed expectations); McQueen v. S.C. Coastal Council, 340 S.C. 65, 74, 530 S.E.2d 628, 633 (2000), *petition for cert. filed*, 69 U.S.L.W. 3166 (U.S. Aug. 22, 2000) (No. 00-285) (stating that a successful takings claim must include proof that regulation interfered with distinct, investment-backed expectations).

South Carolina courts have contributed to the confusion. Recently, in *McQueen v. South Carolina Coastal Council*,[6] the South Carolina Supreme Court held that when a governmental regulation deprives a landowner of all economically viable use of his land, the landowner still must prove he had distinct, investment-backed expectations to establish that the regulation has "taken" his property.[7] The Supreme Court in *Lucas* did not say that proof of distinct, investment-backed expectations was necessary to establish a taking under its per se rule for those regulations that destroy all economically viable use of land. The court in *McQueen* nonetheless believed that such proof *is* necessary and suggested that the Supreme Court in *Lucas* did not mention the need for proof of investment-backed expectations because the property owner in *Lucas* so clearly had such expectations.[8]

This Note proposes that the South Carolina Supreme Court has misinterpreted *Lucas*. The *Lucas* court failed to mention the distinct, investment-backed expectations factor in its analysis not because it was so obvious that those expectations existed, but because investment-backed expectations do not have to exist in order for a regulation denying all economically productive use of land to be deemed a taking.[9] In short, as most courts outside of South Carolina have recognized, the Court in *Lucas* meant exactly what it said: If a regulation denies all economically beneficial or productive use of land, then "[t]here is, *without more*, a compensable taking."[10] The only exception to this principle is the one that the *Lucas* Court made explicit: A taking will be found *only* if the proscribed-use interests that the regulation removes were *originally* part of the landowner's title to begin with.[11] Part II of this Note provides a background for the issues involved in *McQueen* by briefly discussing the modern history of regulatory takings law, from the 1978 decision of *Penn Central Transportation Co. v. New York City* to the 1992 decision of *Lucas v. South Carolina Coastal Council*. Part III examines *Lucas* and the inconsistencies between the South Carolina Supreme Court's decision and the majority view of the precedent set by *Lucas*. Part IV reviews misinterpretations of the *Lucas* case, including the South Carolina Supreme Court's analysis in reaching its decision in *McQueen v. South Carolina Coastal*

6. 340 S.C. 65, 530 S.E.2d 628 (2000).

7. *Id.* at 74, 530 S.E.2d at 633.

8. *Id.*

9. The investment-backed expectations factor was first introduced in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) and has since been "a frequently invoked dictum in takings opinions." 9 THOMPSON ON REAL PROPERTY, § 81.04(e), at 488 (David A. Thomas ed., 2d Thomas ed. 1999).

10. Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1565 (Fed. Cir. 1994) (emphasis added).

11. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992). For example, no taking occurs when a regulation destroys all economically viable use of land merely by preventing common law nuisances. A.B.A. SECTION OF STATE AND LOCAL GOV'T LAW, TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 5 (David L. Callies ed., 1996).

Council. Part V applies the per se takings test to the facts of *McQueen*. This Note concludes by suggesting that the highest court in South Carolina misinterpreted *Lucas* by requiring a landowner to prove distinct investment-backed expectations even when land subjected to a governmental regulation no longer has any economic value.

II. BACKGROUND

A regulatory taking is not technically a "taking" at all.[12] In a regulatory taking, the government is not physically taking the land from the landowner; rather a regulatory taking may occur when the government enacts a regulation that limits the use of the land by its owner in some way. In the landmark case of *Penn Central Transportation v. City of New York*, the Court developed the modern regulatory takings test by identifying "several factors that have particular significance."[13]

The Court adopted three factors that became the foundation of the regulatory takings law test: (1) the economic impact of the regulation; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.[14] The first factor is usually determinative.[15] The regulation in question must have "a dramatic impact on the value of the property" to amount to a taking.[16] The second factor, distinct investment-backed expectations, protects the government from having to compensate a landowner who did not buy the land in reliance on the absence of the regulation.[17] In *Loveladies Harbor, Inc. v. United States*,[18] the court explained the legal and economic justifications for the expectations factor:

> In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss. In economic terms, it could be said that the market had already discounted for the restraint, so that a purchaser could not show a loss in his investment attributable to it.[19]

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12. *See generally* 9 THOMPSON, *supra* note 9, ch. 81 (examining the complex field of regulatory takings law).

13. *Penn Central*, 438 U.S. at 124.

14. *Id.* at 124-25.

15. *See* DOUGLAS T. KENDALL ET AL., TAKINGS LITIGATION HANDBOOK: DEFENDING TAKINGS CHALLENGES TO LAND USE REGULATIONS 25 (2000).

16. *Id.*

17. Good v. United States, 189 F.3d 1355, 1360 (Fed. Cir. 1999).

18. 28 F.3d 1171 (Fed. Cir. 1994).

19. *Id.* at 1177. For a complete examination of this factor, see Robert M. Washburn, *"Reasonable Investment-Backed Expectations" as a Factor in Defining Property Interest*, 49 WASH. U. J. URB. & CONTEMP. L. 63 (1996).

In examining the third factor, the character of the governmental action, a taking can more readily be found if the action can be characterized as a physical invasion by the government than if the regulation, even though causing hardship to one individual, is for the public good.[20] The character of the governmental-action factor implicitly balances private interests and the public good.[21] According to *Penn Central*, under any regulatory-takings case these three factors determine whether a taking has occurred.[22]

In 1992, the Supreme Court modified the *Penn Central* regulatory takings test by creating an important distinction between regulations that deprive a landowner of *all* economically viable use of the land and regulations that deprive *less than all* economically viable use of the land.[23] Also, the Supreme Court added an exception or defense in favor of the government called the background principles defense.[24] If a regulation deprives a landowner of all economically beneficial or productive use of land, then a taking has occurred unless the government can prove that a background principle of nuisance or property law could have prohibited the proscribed use before the regulation was enacted.[25] If the regulation has not deprived a landowner of all economically beneficial or productive use of land, the background principles defense is still available to the government and the factors of *Penn Central* will be analyzed to determine if a taking has occurred.[26]

III. *LUCAS*: CREATION OF A PER SE TAKING

A. Analysis

The *Lucas* case arose out of a landowner's failed attempts to obtain the permits necessary to build on his property.[27] Lucas bought two residential lots on a South Carolina barrier island with the intention of building single-family homes.[28] After he had bought the land, the state enacted a regulation that barred Lucas (and other similarly-situated landowners) from erecting any permanent, habitable structures on the two residential lots.[29] Lucas challenged the regulation in state court, where it was found that the regulation deprived the land of all economically viable use.[30] However, the South Carolina Supreme Court found that when a regulation is designed to prevent serious public harm,

20. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
21. KENDALL ET AL., *supra* note 15, at 26.
22. *Penn Central*, 438 U.S. at 124.
23. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015, 1019 (1992).
24. *Id.* at 1027.
25. *Id.*
26. *Id.* at 1019-20 n.8.
27. *Id.* at 1003.
28. *Id.* at 1006-07.
29. *Lucas*, 505 U.S. at 1007.
30. *Id.*

then no compensation is due regardless of the effect of the regulation on the value of the property.[31]

The United States Supreme Court disagreed with the reasoning of the South Carolina Supreme Court and concluded that when a regulation denies all economically beneficial or productive use of land, a landowner has suffered a taking requiring just compensation.[32] In its analysis, the Court decided to give categorical treatment to the situation in which a landowner has been deprived of all economically viable use of his land by governmental regulation.[33] The Court equated a total deprivation of land use with physical invasion; "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, [the Court] ha[s] required compensation."[34] The Court's rationale was that a governmental regulation "requiring land to be left substantially in its natural state [presents] a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[35] The Court explicitly found that compensation is unnecessary only when the landowner's bundle of rights do not include the right that the regulation is allegedly taking away.[36] Allowing the state to take away all value in a parcel of land without just compensation is inconsistent with the Takings Clause of the Constitution.[37]

Apparently creating a per se takings rule, the Court did not explicitly address the *Penn Central* requirement of investment-backed expectations in its analysis, but the requirement was mentioned in two footnotes of the majority opinion.[38] In footnote seven the Court acknowledged the situation where land has not been completely diminished in its value and recognized that the owner's reasonable investment-backed expectations may be examined.[39] However, the Court refused to elaborate since the South Carolina Court of Common Pleas found that the regulation left Lucas with land that had no economic value and so that type of situation was not presented by the case.[40]

In footnote eight the Court acknowledged Justice Stevens' criticism of the categorical taking as "'wholly arbitrary'" because the "'landowner whose property is diminished in value 95% recovers nothing,' while the landowner who suffers a complete elimination of value 'recovers the land's full value.'"[41] The Court reminded Justice Stevens that even though a landowner who has not

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31. *Id.* at 1010.
32. *Id.* at 1019. The case was remanded to state court and the only way South Carolina could prevail was to prove that background principles of nuisance and property law prohibited the uses Lucas intended for the property. *Id.* at 1031.
33. *Id.* at 1015.
34. *Id.*
35. *Lucas*, 505 U.S. at 1018 (citations omitted).
36. *Id.* at 1027.
37. *Id.* at 1028.
38. *Id.* at 1017 n.7, 1019 n.8.
39. *Id.* at 1016-17 n.7.
40. *Id.*
41. *Lucas*, 505 U.S. at 1018 n.8 (citation omitted).

suffered a complete loss of economically viable use of her land cannot claim the benefit of the categorical formulation, such a landowner can still use the general regulatory takings test espoused in *Penn Central*, which includes consideration of a property owner's distinct investment-backed expectations requirement.[42]

A logical interpretation of the Court's opinion taken as a whole leaves one to conclude, using the very words of the Court, that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[43]

B. Precedential Value of Lucas *in Other Jurisdictions*

Many courts and commentators have recognized that *Lucas* has created a distinct category of regulatory takings in which examining investment-backed expectations is unnecessary.[44] While courts frequently cite *Lucas*, courts infrequently find it applicable because regulation rarely deprives a landowner of all economically viable use of property.[45] In *Bowles v. United States*,[46] the court followed the total deprivation rule under *Lucas* and found that the landowner had suffered a taking requiring just compensation.[47] The plaintiff applied for a permit to fill his wetland lot so he could install a septic system required by his subdivision, but the Army Corps of Engineers denied the permit.[48] He alleged that he had lost all economically viable use of his property because without the fill he would be unable to construct a home.[49] The court then determined whether the economic impact of the regulation resulted in total diminution of the value of the property by comparing the fair market value of the property before the alleged taking with the fair market value of the property after the alleged taking.[50] The court concluded that "[w]hen, as in this case, a single owner of real property has been called upon to sacrifice *all* economically

42. *Id.*
43. *Id.* at 1019 (footnote omitted).
44. *See* Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1379 (Fed. Cir. 2000); Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1564 (Fed. Cir. 1994); Maritrans, Inc. v. United States, 40 Fed. Cl. 790, 793 (Fed. Cl. 1998); Balough v. Fairbanks N. Star Borough, 995 P.2d 245, 265 (Alaska 2000); KENDALL ET AL., *supra* note 15, at 192; Michael K. Braswell & Stephen L. Poe, *Private Property vs. Federal Wetlands Regulation: Should Private Landowners Bear the Cost of Wetlands Protection?*, 33 AM. BUS. L.J. 197, 199-200 (1995).
45. *See* Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 FORDHAM ENVTL. L.J. 523, 543-48 (1995).
46. 31 Fed. Cl. 37 (Fed. Cl. 1994).
47. *Id.* at 53.
48. *Id.* at 40.
49. *Id.*
50. *Id.* at 46-49.

beneficial use of his land, in this case his future homestead, in the name of the common good he has suffered a taking."[51]

In *City of St. Petersburg v. Bowen*[52] the Florida District Court of Appeals construed *Lucas* similarly.[53] The owner of an apartment complex sued for compensation after the city ordered the closure of the complex based on evidence of tenant drug use.[54] The court noted that if the closure "resulted in depriving the owner of all economic use of the property, . . . then as a matter of law there is deemed to have been a taking and the property owner is entitled to be compensated for the economic loss suffered."[55] Both of these cases demonstrate the precedential worth of *Lucas* intended by the Supreme Court.

IV. MISINTERPRETATIONS

Some courts have inferred that the Supreme Court's omission of the investment-backed expectation factor from the per se test was an oversight, because in *Lucas* investment-backed expectations clearly existed.

A. Good v. United States

In *McQueen* the South Carolina Supreme Court relied on *Good v. United States*, a United States Court of Appeals decision.[56] Good, the landowner, purchased wetlands property in the Florida Keys in 1973[57] and spent many years obtaining the proper permits from federal, state, and local governments.[58] Good was granted a permit from the U.S. Army Corps of Engineers in 1988, but, due to a permit denial from another agency, he resubmitted a new, scaled down version of his development plan to the Corps of Engineers in 1990.[59] However, between 1988 and 1990, the Lower Keys marsh rabbit and silver rice rat were listed as endangered species.[60] Therefore, the Fish and Wildlife Service recommended to the Corps that Good's permit application be denied.[61]

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51. *Id.* at 53 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)). The court did mention reasonable investment-backed expectations, but only assumed arguendo that the landowner's sacrifice was less than total. *Id.*

52. 675 So.2d 626 (Fla. Dist. Ct. App. 1996).

53. *Id.* at 629.

54. *Id.* at 627-28.

55. *Id.* at 629.

56. 189 F.3d 1355 (Fed. Cir. 1999). The South Carolina Supreme Court is not the only court that has relied on *Good*. The Florida District Court of Appeals found that a claimant must demonstrate investment-backed expectations in order to establish a claim for a compensable regulatory "total" taking. Dep't of Envtl. Prot. v. Burgess, No. 1D99-1764, 2000 WL 889840, at *2 (Fla. Dist. Ct. App. July 6, 2000).

57. *Good*, 189 F.3d at 1357.

58. *Id.* at 1357-59.

59. *Id.* at 1358-59.

60. *Id.* at 1359.

61. *Id.*

The Corps denied Good's permit application and informed him that his 1988 permit had expired.[62] Good then filed suit alleging that the permit denial was an uncompensated taking in violation of the Fifth Amendment.[63] In determining whether a taking had occurred, the court ruled that reasonable, investment-backed expectations are an element of *every* regulatory takings case.[64] The court in *Good* admitted that the Supreme Court in *Lucas* set out a categorical takings rule, but the *Good* court found that "[a] *Lucas*-type taking . . . is categorical only in the sense that the courts do not balance the importance of the public interest advanced by the regulation against the regulation's imposition on private property rights."[65] The *Good* court reasoned that those who purchase property already subject to development restrictions would receive windfalls because purchase prices are discounted to reflect development risks.[66] According to *Good*, when a landowner has been deprived of all economically viable use in his land, the test to determine whether a taking has occurred would be the same three-prong test created in *Penn Central* with only a modification of the third element, the character of the governmental action.[67] The court in *Good* was treading on dangerous ground to infer that *Lucas* included an element that the Court did not discuss. The United States Supreme Court made it quite clear in its opinion that under this per se category of takings, "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[68]

B. McQueen v. South Carolina Coastal Council

1. Facts and Procedural History

The South Carolina Supreme Court followed the erroneous interpretation of *Lucas* in *McQueen v. South Carolina Coastal Council*. The *McQueen* case arose out of a landowner's failed efforts to obtain the necessary permits to improve his land.[69] After the permits were denied, he sued the state claiming that its denial of the permits rendered his land worthless and amounted to a

62. *Id.* at 1359.
63. *Good*, 189 F.3d at 1359.
64. *Id.* at 1360. Notice that the court in *McQueen* refers to investment-backed expectations as "distinct" while the court in *Good* uses the term "reasonable." *Penn Central* introduced the requirement as "distinct," yet the Court, a few years later, referred to investment-backed expectations as "reasonable." Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980). As one commentator put it, "[n]o one seemed to notice, or care, that 'distinct' expectations had turned to 'reasonable' ones." 9 THOMPSON, *supra* note 9, at 488.
65. *Good*, 189 F.3d at 1361 (citation omitted).
66. *Id.*
67. *Id.* at 1360.
68. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).
69. McQueen v. S.C. Coastal Council, 340 S.C. 65, 68, 530 S.E.2d 628, 630 (2000).

taking requiring just compensation.[70] McQueen purchased two, unimproved lots in North Myrtle Beach in 1961, which are located on manmade, saltwater canals created by fill.[71] In July 1991, McQueen applied to the South Carolina Coastal Council for a permit to construct bulkheads on these two lots to prevent further erosion on his and his neighbor's property.[72] The Coastal Council issued a permit for one lot, but due to confusion on the part of another agency involved in the permitting process, no action was taken on the other lot.[73] To correct the confusion, McQueen resubmitted the applications only to have both permits denied because the proposed bulkheads were located within the tidelands critical area.[74] The permits McQueen sought were prohibited by a South Carolina Regulation[75] that provides in part, "[t]he creation of commercial and residential lots strictly for private gain is not a legitimate justification for the filling of wetlands. Permit applications for the filling of wetlands and submerged lands for these purposes shall be denied, except for erosion control."[76] This regulation was enacted after McQueen had purchased the property.[77] McQueen appealed the denial of the permits to the Coastal Council, then to the Coastal Zone Management Appellate Panel, and both bodies upheld the denial.[78] McQueen sought review in circuit court, which referred the case to the master-in-equity who found that McQueen had suffered a taking because the Coastal Council's refusal to grant the permits denied him of all economically beneficial use of his property.[79] A divided court of appeals affirmed the master's ruling, finding that McQueen had suffered a "textbook regulatory taking."[80] The supreme court subsequently reversed the court of appeals.[81]

2. *The Court's Analysis*

The critical point that the South Carolina Supreme Court noted in its discussion was that "[i]t is uncontested the permit denial at issue here deprives respondent of all economically viable use of his property."[82] Yet, the court

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70. *Id.*
71. *Id.* at 67, 530 S.E.2d at 629-30.
72. *Id.* at 67, 530 S.E.2d at 630.
73. *Id.*
74. *Id.* at 67-68, 530 S.E.2d at 630.
75. 23A S.C. CODE ANN. REGS. 30-12-(G)(2)(a) (Supp. 1999).
76. *Id.* In its opinion, the court left out the exception in the regulation for erosion control. The court did not discuss why McQueen did not fall into this exception because McQueen's reason for constructing the bulkhead was to prevent further erosion on his and his neighbors' property.
77. *McQueen*, 340 S.C. at 68, 530 S.E.2d at 630.
78. *Id.*
79. *Id.*
80. *McQueen*, 329 S.C. at 600, 496 S.E.2d at 650.
81. *McQueen*, 340 S.C. at 77, 530 S.E.2d at 635.
82. *Id.* at 69, 530 S.E.2d at 631.

continued and applied a three-prong test to determine whether McQueen could recover on a regulatory takings claim. According to the court, a property owner can recover on a regulatory takings claim if:

> (1) there was a denial of economically viable use of the property as a result of the regulatory imposition; (2) the property owner had distinct investment-backed expectations; and (3) the interest taken was vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.[83]

The supreme court found that the court of appeals erred by failing to address the second prong of the regulatory-takings test:

> In order to recover on a takings claim, a property owner must establish the regulation interfered with his distinct, investment-backed expectations. Without the requirement of investment-backed expectations, a property owner could obtain a windfall by claiming a taking in the face of new regulations, without any real intent to develop. This issue was not discussed in *Lucas* as there was no question David Lucas had distinct investment-backed expectations.[84]

In identifying this supposed error, the court relied on *Good v. United States*.[85] The court in *McQueen* admitted that the facts of the two cases were quite different, but found that the underlying principle was the same.[86] The court held that McQueen did not suffer a taking of property without just compensation because he failed to demonstrate that he had distinct, investment-backed expectations.[87] He lacked these expectations, according to the court, because the beachfront property had been the subject of at least some developmental regulations since 1899.[88] Thus, the court implicitly stated that any buyer of beachfront property since 1899 could not have investment-backed expectations.

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83. *Id.* at 69, 530 S.E.2d at 630-31 (citing *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994). One argument raised by Amici Curiae is that the public trust doctrine is a background principle of state law which could bar a property owner from backfilling wetlands. *Id.* at 70 n.2, 530 S.E.2d at 631 n.2. In South Carolina the state owns, as part of the public trust, property below the high water mark of a navigable stream. *Id.* The court declined to address this issue because it was not raised in the lower courts, and the court reversed on other grounds. *Id.*

84. *Id.* at 74, 530 S.E.2d at 633 (citations omitted).

85. 189 F.3d 1355 (Fed. Cir. 1999).

86. *McQueen*, 340 S.C. 65, 76, 530 S.E.2d 628, 634.

87. *Id.* at 77, 530 S.E.2d at 635.

88. *Id.* at 76, 530 S.E.2d at 634. In 1899 a federal statute was enacted that required a landowner to obtain a permit from the Army Corps of Engineers before developing a wetland area. *See* Rivers & Harbors Appropriation Act of 1899, 33 U.S.C. § 403 (1994).

The court further noted McQueen's failure to seek permits to develop the land for so long after buying the property.[89]

The court's argument that the landowner would receive a windfall in a situation like McQueen's is also flawed. A landowner has little chance of obtaining a windfall when he has been denied all economically viable use of his land. The court's concerns that landowners, in order to gain a profit from the government, would purposely own land with no intent to develop, hoping that a regulation will be enacted to strip away all economic value of the land, is also misguided. The windfall is avoided when the court or administrative entity decides what amount will justly compensate the landowner. The proper measure of just compensation is the property's fair market value,[90] which has been legally defined as the amount in cash, or on terms reasonably equivalent to cash, for which, in all probability, the property would be sold by a knowledgeable owner willing, but not obligated, to sell to a knowledgeable purchaser who desires but is not obligated to buy.[91] The court or administrative entity undergoes a case-specific inquiry when deciding the property's value by examining all the relevant attributes that would effect the price a reasonable buyer would be willing to pay;[92] thus, the just compensation inquiry avoids a situation that the South Carolina Supreme Court believes may threaten regulatory takings law. A landowner will only be compensated an amount he would have received had he sold the property to a knowledgeable buyer a second before the taking occurred, hardly receiving a windfall.[93]

V. APPLYING *LUCAS* TO THE FACTS OF *MCQUEEN*

If the South Carolina Supreme Court had followed the test created in *Lucas* by the United States Supreme Court, the outcome would have been quite different. The court would have first determined the economic impact of the regulation on the land: Did the regulation destroy all economically viable use of the property? In *McQueen* the court recognized that the permit denial at issue deprived the landowner of all economically viable use of the property.[94] Since the regulation did destroy all economically viable use of the property, McQueen should have been entitled to compensation without further analysis unless the government had been able to prove that common law property or nuisance law would have prevented McQueen from filling his property and

89. *McQueen*, 340 S.C. at 76, 530 S.E.2d at 634-35.

90. Kirby Forest Indus. v. United States, 467 U.S. 1, 10 (1983).

91. BLACK'S LAW DICTIONARY 597 (6th ed. 1990).

92. *See* Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474 (1973).

93. A windfall is defined as "an unanticipated benefit, usu[ally] in the form of a profit and not caused by the recipient." BLACK'S LAW DICTIONARY 1594 (7th ed. 1999).

94. *McQueen*, 340 S.C. at 69, 530 S.E.2d at 631.

constructing a bulkhead.[95] Regardless of whether common law background principles of property and nuisance law permitted construction of a bulkhead, the first part of the analysis should not have included an inquiry into the reasonable or distinct investment-backed expectations of McQueen as defined under the general three-pronged regulatory takings test.

VI. CONCLUSION

Takings law has been described by at least one commentator as "a very messy collage of strewn concepts and aphorisms that must pass for a rational jurisprudence."[96] *McQueen v. South Carolina Coastal Council* has added to that messy collage.[97] It is highly implausible that the majority of the United States Supreme Court failed to mention a requirement for a "per se" category simply because it seemed so obvious under the facts. Coupled with the expressly-stated explanation in the footnotes of the opinion that the reasonable investment-backed expectations requirement under the general test of regulatory takings can still be used in the analysis of a landowner who has *not* suffered a complete loss of value in its land, it becomes clear that the United States Supreme Court did not intend for the "distinct" or "reasonable" investment-backed expectations test to be a part of the analysis of a landowner that has lost all economically viable use in his land. The only defense when a regulation has destroyed all productive and beneficial use in the land is that the use the regulation prohibits did not inhere in the title itself.[98] Unless that defense can be proven, a taking requiring just compensation has occurred. In this particular area, the inconsistences and uncertainties will continue to develop; thus, lawyers and their clients in South Carolina, for now at least,[99] will have to prove more than what is necessary under the test explicitly set out in *Lucas*.

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95. *See supra* note 83. The court did not thoroughly examine this issue because it erroneously based its decision on the lack of investment-backed expectations.

96. 9 THOMPSON, *supra* note 9, § 81.04(i), at 497.

97. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

98. *Id.* at 1027.

99. A petition for certiorari to the United States Supreme Court was filed on Aug. 22, 2000. *See* McQueen v. South Carolina Coastal Council, 340 S.C. 65, 530 S.E.2d 628 (2000), *petition for cert. filed*, 69 U.S.L.W. 3166 (U.S. Aug. 22, 2000) (No. 00-285).