When Good is Bad: *Good v. United States* and Reasonable Investment-Backed Expectations

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In Good v. United States *the Federal Circuit tried to clarify the parameters of the reasonable investment-backed expectations test. In ruling against Good's regulatory takings claim, the court held that Good had actual and constructive knowledge of the regulations limiting the use of his property. The court's holding expands prior analyses in two important ways. First, it inquired into Good's expectations after he had already acquired the property. Second, it imputed knowledge of growing public environmental awareness to Good. Given the facts, the court's holding unnecessarily broadened prior case law and did not define its limits for future courts to follow.*

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INTRODUCTION

In *Good v. United States*,[1] the Federal Circuit applied the reasonable investment-backed expectations test to determine whether or not a claimant suffered a compensable loss under the Takings Clause. This case presented the court with easy facts and a narrow issue, but the court's broad analysis went further than necessary in denying the takings claim. The court first determined that claimant Lloyd A. Good (Good) had actual knowledge of the challenged regulations because it was openly acknowledged in the contract for the purchase of the land. On the basis of this fact alone, the court could have decided the case without expanding or changing takings doctrine. Instead, the court broadened the expectations analysis to include an inquiry into an owner's expectations after initial investment. Additionally, the court based its decision on the nebulous ground that Good should have known that growing environmental concerns could lead to stricter regulatory restrictions. For all of these reasons, the court held that Good's actual and constructive knowledge of the development restrictions on his property precluded him from claiming that the denial of his wetlands development permit effectuated a taking.

In so doing, however, the court made it difficult to imagine when a claimant would *ever* have reasonable investment-backed expectations. By unnecessarily expanding an already confusing doctrine, the court may have presented property owners with impossible hurdles to overcome in bringing takings claims. This Note addresses the *Good* case in the broader context of takings law, focusing on how *Good* fits within previous decisions addressing the reasonable investment-backed expectations test. Specifically, this Note analyzes how *Good* expanded the test and created a broad precedent whose limits future courts may struggle to define.

1. 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000).

I

DESCRIPTION OF THE CASE

A. Facts

In 1973, Good bought 40 acres of land, 32 of which consisted of wetlands, in Lower Sugarloaf Key, Florida.[2] Wanting to develop the land, Good began the permit process in 1981 by applying to the U.S. Army Corps of Engineers (Corps)[3] for permission to dredge and fill the wetlands on the tract.[4] After slight modifications, the Corps granted the original request in January 1984. The permit required Good to complete the construction within five years.[5] In July of that same year, Good also received state and county permits for the project.[6]

Under the Florida Environmental Land and Water Management Act (FELWMA),[7] however, Good's project required additional approval from the Florida Department of Community Affairs (DCA). The DCA is responsible for reviewing local land development orders in Areas of Critical State Concern.[8] The DCA appealed Monroe County's prior approval of Good's project to the Florida Land and Water Adjudicatory Commission (FLAWAC).[9] Based on the recommendations of the DCA, FLAWAC ordered the county to review the plan under a stricter standard of review.[10] Due to tougher County regulations passed since Good's original approval and the FLAWAC's imposition of the more rigorous standard of review, Good's re-application would have been prohibited.[11]

In response, Good sued the county. After lengthy legal wrangling, the county granted him a conditional permit.[12] The

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

3. The Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act require the Corps oversee this permit process. 33 U.S.C. § 403 (2000); 33 U.S.C. § 1344 (2000).

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

5. *Id.*

6. *Id.*

7. FLA. STAT. ANN. §§ 380.012-380.12 (West 2000). According to the court, the FELWMA "created a statutory regime for regulating development in Areas of Critical State Concern, including the entire Florida Keys." *Good*, 189 F.3d at 1358.

8. *See* FLA. STAT. ANN. § 20.18 (West 2000). Areas of Critical State Concern are defined by the FELWMA. *See* FLA. STAT. ANN. § 380.031 (West 2000).

9. FLA. STAT. ANN. § 380.07 (West 1997). The FLAWAC is composed of the Governor and Cabinet of the state of Florida. *See Good*, 189 F.3d at 1358 n.5.

10. *Good*, 189 F.3d at 1358.

11. *Id.*

12. *Id.*

permit's requirements were more exacting than those of the original county permit. In the interim, Good had used up most of the Corps' original five-year time limit for completing the project. The Corps denied Good's request to extend the time limit, but in 1988 issued a new permit allowing substantially the same development.[13]

Fearing he would be unable to obtain the necessary conditional state approvals required by the modified county permit, Good resubmitted a scaled-down proposal to the Corps in 1990.[14] Between issuance of the 1988 Corps permit and the 1990 request, the Lower Keys marsh rabbit was listed as endangered under the Endangered Species Act (ESA).[15] As required by the ESA, the Corps consulted with the U.S. Fish and Wildlife Service (FWS) to insure that the wetland development would not put the marsh rabbit in jeopardy,[16] and FWS performed a biological review of the development's impact. FWS concluded that the development would not threaten the marsh rabbit. Nevertheless, in 1991 it recommended, based on the overall environmental impact of the project, that the Corps deny the permit and instruct Good not to proceed under the 1988 permit.[17]

Subsequent to the FWS report, the silver rice rat was listed as an endangered species.[18] In response, FWS prepared a new biological report on the effect of Good's development on the two endangered animals. Contrary in part to the previous study, the second report concluded that the 1988 plan and the 1990 application jeopardized the continued existence of both species.[19] Consequently, in 1994 the Corps denied Good's 1990 permit application and notified him that his 1988 permit had expired.[20]

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13. *Id.*

14. *Id.* at 1358-59.

15. *See* 16 U.S.C. §§ 1531-1544 (1994); Endangered and Threatened Wildlife and Plants; Endangered Status for the Lower Keys Rabbit and Threatened Status for the Squirrel Chimney Cave Shrimp, 55 Fed. Reg. 25,588 (June 21, 1990).

16. *See* 16 U.S.C. § 1536(a)(2) (1994); *Good*, 189 F.3d at 1359.

17. *Good*, 189 F.3d at 1359.

18. Endangered and Threatened Wildlife and Plants; Endangered Status for the Lower Keys Population of the Rice Rat (Silver Rice Rat), 56 Fed. Reg. 19,809-13 (Apr. 30, 1991); *Good*, 189 F.3d at 1359.

19. *Good*, 189 F.3d at 1359.

20. *Id.*

B. Procedural History

Good brought suit against the Corps, alleging that the denial of his permit constituted an uncompensated taking.[21] The Court of Federal Claims granted the government's motion for summary judgment, rejecting Good's two primary arguments.[22] First, the court held that the permit denial did not represent a per se taking under *Lucas v. South Carolina Coastal Council*[23] because the government had substantially demonstrated that the land retained value either for development or for sale of transferable development rights.[24] Second, the court held that there was no taking under the ad hoc analysis of *Penn Central Transportation Co. v. New York City*.[25] The court found that because federal and state regulations placed significant restrictions on the land both before Good purchased it and after he began to develop it, Good lacked reasonable, investment-backed expectations.[26]

C. Federal Circuit Decision

Good appealed to the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit affirmed the lower court's ruling and denied Good's requested relief. The court rejected Good's first argument that *Lucas* had eliminated the reasonable investment-backed expectation test, finding that the questions raised by *Lucas* addressed per se takings and did not determinatively answer the issues raised by Good.[27] In holding against Good, the court used the three-factor *Penn Central* test to determine whether a regulation constitutes a taking.[28]

Specifically, the *Good* court applied the three-part *Penn Central* inquiry into (1) the character of the government action; (2) the economic impact of the regulation and (3) the extent to which the regulation interferes with distinct, investment-backed expectations. The *Good* court found the requirement that a party have reasonable investment-backed expectations to be

21. *See* Good v. United States, 39 Fed. Cl. 81 (1997).
22. *See id.* at 98.
23. 505 U.S. 1003 (1992).
24. *Good*, 39 Fed. Cl. at 107-08.
25. 438 U.S. 104, 124 (1978).
26. *See Good*, 39 Fed. Cl. at 110-13.
27. *See* Good v. United States, 189 F.3d 1355, 1361 (Fed. Cir. 1999). In a subsequent case, the court concluded that where a categorical taking occurs, as determined by the *Lucas* analysis, reasonable investment-backed expectations are not a proper part of the analysis. *See* Palm Beach Isles Assoc. v. United States, 231 F.3d 1354, 1364 (Fed. Cir. 2000).
28. *See Good*, 189 F.3d at 1360 (citing *Penn Central*, 438 U.S. at 124).

dispositive and did not address the other two factors.[29] The reasonable investment-backed expectations requirement "limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation."[30] The court reasoned that Good failed to satisfy the requirement because "[o]ne who buys with knowledge of a restraint assumes the risk of economic loss. In such a case, the owner presumably paid a discounted price for the property. Compensating him for a 'taking' would confer a windfall."[31]

The court found that Good could not have had reasonable, investment-backed expectations because his contractual statements indicated his awareness of the stringent regulatory climate. Before purchasing the property, Good knew he would need a permit to dredge or fill the land. Focusing on the purchase agreement, the court stressed that the contract specifically recognized the uncertain nature of the permitting process.[32] Moreover, when Good contracted with a land development consulting company to aid in the compliance process, the court found that he again acknowledged the uncertainty of the permit process in the consulting contract.[33]

The court added that Good must have known about the rising public concern over environmental matters and the resulting increase in regulation between 1973 and 1980.[34] Good "must also have been aware that standards could change to his detriment, and that regulatory approval could become harder to get."[35] The court rejected Good's argument that he had obtained the required dredging and filling permits three times, and the Corps denied the final permit application based upon the restrictions of the ESA, a law that did not exist in early 1973. The court presumed that Good had knowledge of growing environmental awareness, and notwithstanding his knowledge, waited seven years before trying to obtain the necessary regulatory approval.[36] His inaction from 1973 to 1980 and

29. *See id.*

30. *Id.* (quoting Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994)).

31. *Id.* at 1361 (quoting *Creppel*, 41 F.3d at 632).

32. The relevant section of the sales contract stated that "[t]he Buyers recognize that . . . as of today there are certain problems in connection with the obtaining of State and Federal permission for dredging and filling operations." *Id.* at 1362.

33. The consulting contract with the land development company stated in pertinent part that "obtaining said permits is at best difficult and by no means assured." *Id.* at 1363.

34. *Id.*

35. *Id.*

36. *See id.*

awareness of environmental concern combined to reduce "his ability to fairly claim surprise when his permit application was denied."[37] Consequently, the court concluded that Good "lacked a reasonable, investment-backed expectation that he would obtain the regulatory approval needed to develop the property at issue."[38]

II

DISCUSSION

The Federal Circuit has again addressed the issue of the reasonable investment-backed expectation analysis in determining the occurrence of a compensable taking.[39] While the court ultimately reached the right result, it stretched the idea of investment-backed expectations beyond the *Penn Central* concept[40] by expanding the universe of factors that a landowner must be aware of to claim a taking. As a result, the decision will likely restrict the spectrum of regulatory takings cases requiring compensation.

The court partially answered open questions about how courts should address an unanticipated change in a regulatory scheme.[41] While expectations may "extend beyond legal restrictions already in place,"[42] previous cases have been unclear as to how far beyond existing schemes expectations should go.[43] *Good* dealt with this issue by looking at the owner's expectations both at the time of purchase and at the time of development and by imputing to the owner knowledge of rising environmental awareness.

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37. *Id.*

38. *Id.*

39. Meltz *et al.* point to Frank Michelman's influential article on inverse compensation law, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, as the source of the phrase distinct investment-backed expectations, which the *Penn Central* Court subsequently used in its analysis. *See* ROBERT MELTZ ET AL., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION, 133-34 (1999); Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1233 (1967).

40. *See* MELTZ ET AL., *supra* note 39, at 396 (referring to the lower court's conclusion, which the *Good* court eventually affirmed).

41. *See* David F. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit*, 29 ENVTL. L. 821, 838-39 (1999) (discussing the unresolved questions regarding changes in regulatory schemes).

42. *Id.* at 838.

43. *Id.* ("[t]hose who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." (quoting Concrete Pipe & Prods., Inc. v. Construction Labor Pension Trust, 508 U.S. 602, 645 (1992))).

A. *Takings Law and Investment-Backed Expectations*

The reasonable investment-backed expectations requirement has emerged from a complex web of decisions growing out of the constitutional roots of the Takings Clause.[44] The Fifth Amendment to the Constitution prevents the government from confiscating "private property . . . for public use, without just compensation."[45] In its simplest sense, takings jurisprudence revolves around the axiom that if property laws maintain a balance of "reciprocity" between citizens, and one owner is disproportionately burdened by laws that benefit society, society should compensate the burdened owner for society's gain.[46] Thus, courts have struggled with the question of how to best balance the competing private costs vis-a-vis the public benefits often at stake. Traditionally, courts limited compensation to instances of actual or practical physical ouster of a property owner.[47] In *Pennsylvania Coal Co. v. Mahon*,[48] however, Justice Holmes extended the takings clause to include claims where government regulation had stripped property of its value.[49]

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44. Professor Joseph Sax and others point to Justice Harlan's opinion in *Mugler v. Kansas*, 123 U.S. 623 (1887), as the beginning of modern takings jurisprudence. *See* Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 149 n.3 (1971); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 38 (1964).

45. U.S. CONST. amend. V. For excellent analyses of the early foundational underpinnings and historical developments of the takings clause, see Sax, *Takings, Private Property and Public Rights*, *supra* note 44; Michelman, *supra* note 39; and Sax, *Takings and the Police Power*, *supra* note 44.

46. *See* Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 492 (1987) (citing Agins v. City of Tiburon, 447 U.S. 255, 260-61 (1980)). *But see* Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1449-50 (arguing that non-compensation may promote adaptive behavior among individuals affected by change).

47. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 n.15 (1992). In the majority opinion, Justice Scalia pointed out that prior to the seminal case of *Pennsylvania Coal*, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, . . . or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Id.* at 1014 (quoting Legal Tender Cases, 79 U.S. 457, 551 (1870) and Transp. Co. v. Chicago, 99 U.S. 635, 642 (1879)). *See generally* Glenn P. Sugameli, Lucas v. South Carolina Coastal Council*: The Categorical and Other "Exceptions" to Liability for Fifth Amendment Takings of Private Property Far Outweigh the "Rule"*, 29 ENVTL. L. 939, 945 n.39 (1999) (citing further support of Justice Scalia's conclusion).

48. 260 U.S. 393 (1922).

49. *See id.* at 415 (holding that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"). The *Pennsylvania Coal* Court's analysis joined the previously separate federal government's eminent domain and regulatory powers under its police power authority. *See id.*; Laura Pfefferle, *Comment: A New Green Government Weapon: Shooting Down Regulatory Takings with Estoppel*, 13 TUL. ENVTL. L.J. 471, 474 (2000).

While *Pennsylvania Coal* announced a new standard in takings jurisprudence, it did little to define this standard's parameters.[50] Consequently, the Supreme Court has struggled to articulate its boundaries.[51] Justice Holmes' theory, as applied in *Pennsylvania Coal* and prior decisions,[52] focused on "the extensiveness of the economic harm inflicted by the regulation,"[53] but failed to answer the threshold question of how much regulation is too much.[54]

Fifty-six years after *Pennsylvania Coal*, the Court tried to delineate the limits of regulatory takings in *Penn Central Transportation Co. v. New York City*.[55] In upholding the designation of the Grand Central Terminal as a historic landmark, the *Penn Central* court articulated a standard based on (1) the character of the government action; (2) the economic impact of the regulation and (3) the extent to which the regulation interferes with distinct, investment-backed expectations.[56] While the first two factors were a reformulation of elements within prior case law,[57] the Court's addition of the investment-backed expectation element expanded its query into regulatory takings.

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50. *See Lucas*, 505 U.S. at 1015.

51. *See id.*

52. *See* Sax, *Takings and the Police Power*, *supra* note 44, at 41 (pointing to Hudson County Water v. McCarter, 209 U.S. 349, 355 (1908), Interstate Consol. St. Ry. v. Massachusetts, 207 U.S. 79, 87 (1907), and Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911), as earlier examples of cases where Holmes focused on the degree of economic harm as he did in writing for the *Pennsylvania Coal* majority).

53. *Id.*

54. Indeed, as Prof. Sax points out, Holmes "participated in cases which held, and he occasionally expressly stated, that even total or near total destruction of property might sometimes be constitutionally permitted without compensation." *Id.* at 41-42 (footnotes omitted). *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915), and Erie R.R. v. Bd. of Pub. Util. Comm'rs, 254 U.S. 394, 410 (1921).

55. 438 U.S. 104 (1978).

56. *See id.* at 124; Creppel v. United States, 41 F.3d 627, 631-32 (Fed. Cir. 1994); *see also* Good v. United States, 189 F.3d 1355, 1360 (Fed. Cir. 1999); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994); Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1567 (Fed. Cir. 1994).

57. In early takings cases, the character of the government's action often impacted the success of the plaintiff's takings claim. *See, e.g.*, L'Hote v. New Orleans, 177 U.S. 587 (1900) (regulating prostitution); Mugler v. Kansas, 123 U.S. 623 (1887) (regulating alcohol). Early cases revolved around whether or not government actions were "taking property" in the literal sense. Holmes' articulation of the diminution-in-value theory replaced this initial analysis as government regulation became more ubiquitous and far-reaching. *See* Sax, *Takings and the Police Power*, *supra* note 44, at 38-40.

Following *Penn Central*, the Court attempted to further define the standard underlying investment-backed expectations[58] and its role in takings cases.[59] Usually, however, such claims were adjudicated as "essentially ad hoc, factual inquiries"[60] under the *Penn Central* analysis. In an attempt to clarify the analysis, the Court revisited parts of the three-prong *Penn Central* approach[61] in its "1987 Takings Trilogy Cases."[62] The Court folded the three-part *Penn Central* test into a two-part inquiry, distilling its core elements into the new inquiry[63] without rejecting its basic analysis or clearly explaining how courts were supposed to thereafter apply *Penn Central*.[64] The two-part *Keystone* test focused on whether the regulation (1) advanced "legitimate state interests" and (2) left the owner with an "economically viable use of his land."[65] While the first element functioned similarly to previous examinations into the character of the government regulation,[66] the second element combined the second and third elements of the *Penn Central* inquiry,

58. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (examining whether the injured party had notice of the regulation in determining if the party had an investment-backed expectation). The *Monsanto* Court held that "[a] 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Id.* at 1005-06 (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980)).

59. *See* Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS 121 (David L. Callies ed., 1996). Mandelker argues that the Court's decisions prior to the "1987 Takings Trilogy Cases" served to confuse the Court's role in takings cases. *See, e.g.*, Kirby Forest Indus. v. United States, 467 U.S. 1 (1984); Andrus v. Allard, 444 U.S. 51 (1979); Kaiser Aetna v. United States, 444 U.S. 164 (1979).

60. *Kaiser Aetna*, 444 U.S. at 175.

61. For a critique of the many different tests the Court has used and of takings law in general, *see* Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299 (1989).

62. *See* Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470 (1987); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304 (1987).

63. *See, e.g.*, *Keystone*, 480 U.S. at 481, 485 (distinguishing *Penn Central* on factual grounds but still using investment-backed expectation analysis); *Nollan*, 483 U.S. at 834 (citing with approval the *Penn Central* focus on the "effectuation of a substantial government purpose").

64. *See* Mandelker, *supra* note 59, at 123. Mandelker points to *Agins v. City of Tiburon*, 447 U.S. 255 (1980) as the case where the Court first announced the two-part test, but which subsequently received little judicial attention. *Id.* at 123, n.20.

65. *Keystone*, 480 U.S. at 485 (quoting *Agins*, 447 U.S. at 260).

66. *See Nollan*, 483 U.S. at 835 (citing *Agins*, 447 U.S. at 260-62 (scenic zoning); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (landmark preservation); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (residential zoning)).

addressing a property owner's expectations within a broader examination of the economic impact.

Justice Scalia tried to articulate the second element's boundaries in *Lucas v. South Carolina Coastal Council*,[67] and in so doing created a new baseline from which to evaluate a property owner's expectations. While almost any government regulation could arguably take some value from a related property, as both *Pennsylvania Coal* and *Keystone* point out, there is a "reciprocity of advantage" between citizens.[68] Citizens simultaneously benefit from those restrictions government places upon others, and are burdened by those placed upon them. However, the *Lucas* court held that when regulation denies all economically beneficial or productive uses of land to a property owner, the owner has suffered a compensable taking under the Fifth Amendment.[69] *Lucas* created a new category of per se or categorical takings, which included statutes more restrictive than the state's nuisance law.[70]

The *Lucas* court reworked the balance of interests between society and individual land owners[71] into an inquiry regarding the background principles of state property and nuisance law affecting property,[72] even though the case did not raise the specific question of reasonable investment-backed expectations.[73] Justice Scalia's nuisance-exception principle effectively asks whether a property owner has within her bundle

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67. 505 U.S. 1003 (1992).

68. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *Keystone*, 480 U.S. at 491; *Penn Central*, 438 U.S. at 147. *See generally* Sax, *Takings, Private Property and Public Rights*, *supra* note 44.

69. *Lucas*, 505 U.S. at 1015-16.

70. *Id.* at 1027. As a corollary, Scalia and the majority concluded that a statute that denies all economical uses of contested property can be valid absent compensation if it does no more than duplicate the result that could have been achieved by other affected parties under the state's private nuisance law or the state's general powers to abate public nuisances. This focus has changed the general examination into the character of the government's action to one where "state property law, incorporating common law nuisance doctrine, controls." Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994); *see also* MELTZ ET AL., *supra* note 39, at 29. *See generally Understanding Lucas*, *supra* note 46; Sugameli, *supra* note 47.

71. Prior to *Lucas*, courts generally balanced public and private concerns through inquiry into the nature of the government action. *See, e.g.*, *Loveladies*, 28 F.3d at 1176; Palm Beach Isles Assoc. v. United States, 231 F.3d 1354, 1358 (Fed. Cir. 2000) (discussing how the *Loveladies* decision clarified *Lucas'* impact on the *Penn Central* analysis).

72. *See* MELTZ ET AL., *supra* note 39, at 29.

73. *See* Good v. United States, 189 F.3d 1355, 1361 (Fed. Cir. 1999); *Loveladies*, 28 F.3d at 1178.

of sticks any rights to that property at all.[74] If not, the inquiry ends without a fact-intensive analysis into how the regulation affects the property.[75] In other words, since state property and nuisance law would have effectuated the same result as the disputed regulation because "the proscribed use interests were not part of [the land owners'] title to begin with,"[76] the property owner has no claim for compensation. The regulation would have done nothing more than that which other neighboring land owners or the State could have achieved through the State's power to abate nuisances.[77] While the *Lucas* court was specifically interested in categorical takings, i.e, those taking all economic value, its focus on state background principles points to the inherent limitations on a property owner's expectations.[78] Expectations should not extend beyond those implicitly unavailable because of background restrictions.[79]

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74. *See Lucas*, 505 U.S. at 1027-28. Relevant to the *Good* facts, Goldman-Carter argues that wetlands regulation in general will fall under the nuisance-exception and therefore be impermissible even under *Lucas*. She concludes that "[b]ecause many wetland conversion activities do fall within the Restatement definition of a nuisance or public trust violation, and because the § 404 regulations so closely mirror the applicable common law tests for nuisance and public trust violations, wetland permit denials should rarely require compensation, even when they arguably result in a total diminution in value." Jan Goldman-Carter, *Protecting Wetlands and Reasonable Investment-Backed Expectations in the Wake of* Lucas v. South Carolina Coastal Council, 28 LAND & WATER L. REV. 425, 457 (1993). Her analysis, however, fails to explain why nuisance regulation has nonetheless historically failed to stop wetlands development. Moreover, if indeed background nuisance law was strong enough to duplicate the results available under Section 404, why then should Congress have felt the need to create Section 404 in the first place?

Goldman-Carter includes one exception to her conclusion, which she terms the "Cumulative Impacts Caveat." If courts view the separate individual effects of a wetlands development, rather than the cumulative impact it could have, the economic impact on the individual landowner may well outweigh the benefits society receives through stopping the individual project. *See id.* at 457. While indeed this exception may explain the difficulty in applying nuisance to wetlands, it seems like an exception that would swallow the rule.

75. *See Good*, 189 F.3d at 1361.

76. *Lucas*, 505 U.S. at 1027.

77. *See id.* at 1029.

78. This reading of *Lucas* has received recent attention. Stein points out several sources in favor of this analysis. *See* Gregory M. Stein, *Who Gets the Takings Claim? Changes in Land Use Law, Pre-Enactment Owners, and Post-Enactment Buyers*, 61 OHIO ST. L.J. 89, 114 n.76. For example, Blais "observes that even if a court chooses not to consider pre-existing statutes when it examines inherent limitations on title, it still may examine those same statutes when looking into the broader question of whether an owner's reasonable investment-backed expectations have been impaired." *Id.* (citing Lynn E. Blais, *Takings, Statutes and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1, 55-61 (1996)).

79. *See Lucas*, 505 U.S. at 1029-30 (citing Michelman, *supra* note 39, at 1239-41). *But see* Richard A. Epstein, Lucas v. South Carolina Coastal Council: *A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1371 (1993) (arguing that the *Lucas*

The state of the investment-backed expectation requirement after the 1987 Trilogy and *Lucas* was at best unclear.[80] While it is undisputed that investment-backed expectations still play a role in takings claims,[81] it is uncertain what that role is. To illustrate this uncertainty, one commentator has identified three classes of cases where the Court interprets reasonable investment-backed expectations differently. Normally, the Court analyzes whether the claimant reasonably relied on an expectation that the government would not act as it did. In a second class of cases the Court examines whether or not the regulation prevents a reasonable use of the claimant's property. Finally, in a third class of cases the Court seems to define property through its analysis of investment-backed expectations.[82]

Within the last ten years, the Federal Circuit has partly clarified the investment-backed expectation analysis. First, the court will look to whether or not the regulation has denied the owner all economic use of her land. If so, the owner has suffered a categorical taking and must be compensated without an inquiry into her expectations. In partial takings cases, the court will examine investment-backed expectations under the *Penn Central* ad hoc analysis. A taking claim will not survive unless the owner can "demonstrate that [she] bought [her] property in reliance on a state of affairs that did not include the challenged regulatory regime."[83] That is, one cannot have a reasonable investment-backed expectation founded on a violation of otherwise valid laws.[84] Furthermore, the claim cannot involve a speculative or unilateral expectation.[85] In other words, the claim

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formulation of the expectations element serves to impermissibly put all property owners on notice about future regulations).

80. One commentator summed up takings doctrine as of 1988 as a series of categorical "either-ors": "either (a) the regulation is categorically a taking of property because (i) it works a permanent physical occupation (however practically trivial) of private property by the government, or perhaps, specifically undermines a 'distinct investment-backed expectation,' or (ii) it totally eliminates the property's economic value or 'viability' to its nominal owner, or (b) the regulation is categorically not a taking." Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1622 (1988).

81. *See, e.g.*, Good v. United States, 189 F.3d 1355, 1361 (1999).

82. *See* Peterson, *supra* note 61, at 1320-25.

83. Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994); *see also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1006-08 (1984) (concluding that when a party is aware of a government regulation, which relates to a legitimate governmental interest, they are on notice that any loss in value in their property right will not effectuate a taking).

84. *See* Preseault v. United States, 100 F.3d 1525, 1539 (Fed. Cir. 1996).

85. *See Loveladies*, 28 F.3d at 1177 (citing Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 161 (1980)).

must be objectively reasonable and not based entirely upon the subjective expectations of the owner. "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."[86] Thus, the question focused on the expectations of the property owner at the time she acquired the disputed property.

B. Good's Impact

The facts presented in *Good* could have made for an easy case. Good's express acknowledgement of the uncertainties surrounding permitting alone could have demonstrated the absence of reasonable investment-backed expectations. However, the *Good* court did not stop there. The court broadened prior analyses in two important ways. First, it addressed the question of when best to apply an owner's expectations. The court not only looked to Good's expectations at the time he acquired the property, but also examined them at the time he began the permit process. In looking at both time periods, the *Good* court set a precedent for future courts to look beyond a property owner's expectations at the time the property was acquired, weakening arguments that future regulations were unanticipated.

The *Good* court also inquired into the "rising . . . awareness" and "greater general concern" surrounding a regulation.[87] In so doing, it opened the door to imputing constructive knowledge of future regulations upon a property owner based on general public concern. Before *Good*, courts disputed the extent to which parties must anticipate a legislative scheme. Courts have generally accepted that increasingly stringent restrictions to an existing regulation will not support a takings claim.[88] According to the Supreme Court, business owners in a regulated field "cannot object if the legislative scheme is buttressed by

86. *Loveladies*, 28 F.3d at 1177.

87. Good v. United States, 189 F.3d 1355, 1362-63 (Fed. Cir. 1999).

88. *See Loveladies*, 28 F.3d at 1179 (citing Golden Pac. Bancorp v. United States, 15 F.3d 1066 (Fed. Cir. 1994) (bank holding company and stockholders had no reasonable expectation that FDIC would not take over insolvent bank); Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal. 508 U.S. 602, 645 (1993) (no reasonable expectation in light of regulation in pension field); Ciampitti v. United States, 22 Cl. Ct. 310, 321-22 (1991) (landowner who purchased land with knowledge of strict wetlands regulation had no reasonable expectation); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 226-27 (1986) (holding similar to *Concrete Pipe*); *see also* Sugameli, *supra* note 47, at 980 n.295 (1999) (citing numerous other cases in a variety of fields standing for the same proposition).

subsequent amendments to achieve the legislative end."[89] However, the extent to which parties must anticipate *new* regulations or a fundamental shift in regulatory schemes has been unclear.[90]

The court's reasoning also makes it difficult to determine the extent to which any individual ground would have been determinative, leaving future courts to define the bounds of the court's holding. Future courts will have to resolve whether, for example, growing environmental concern carries enough weight to deny a takings claim independent of other grounds.

1. *Expectations at the Time of Purchase*

Good specifically stated in the purchase contract for the land that "[t]he Buyers recognize that . . . as of today there are certain problems in connection with the obtaining of State and Federal permission for dredging and filling operations."[91] The court concluded that this was actual knowledge that "either state or federal regulations could ultimately prevent him from building on the property."[92] Good knew not only the necessity of obtaining regulatory approval but the difficulty as well. He implicitly acknowledged that he might be unsuccessful in the process. In contrast with many takings claims, the court had direct evidence of a claimant's regulatory knowledge prior to his purchase, rather than being forced to infer what that knowledge was.

Based on the purchase agreement alone, the case presented the Federal Circuit with an easy call. Good's interpretation of the regulatory climate at the time of purchase led him to believe that development was less than a sure thing. His subsequent claim that his expectations of development were reasonable is contradicted by the contract's language, giving the court adequate grounds for its decision. Even if Good had interpreted the existing regulatory climate inaccurately, it seems likely that he would have factored his expectation into the financial terms of the offer.

Inquiry into the circumstances surrounding the purchase could have buttressed the effect of this contractual language. For example, the court could have examined whether or not Good actually received a discount on the sale. This information could

89. *Concrete Pipe*, 508 U.S. at 645 (quoting Fed. Housing Admin. v. The Darlington, Inc., 358 U.S. 84, 91 (1958)).

90. *See* Coursen, *supra* note 41, at 838-39.

91. *Good*, 189 F.3d at 1362.

92. *Id.*

have demonstrated both the extent of Good's knowledge and the reasonableness of his expectations.[93] If Good paid a significantly lower amount for the property than he would have absent regulation, the court would have correctly concluded that compensation would effectuate a windfall. If the converse were true, then Good's argument that the regulation was unanticipated would be stronger, and the court could have discounted the contractual language's importance. Failing to examine this question weakens the court's conclusion that Good would have received a windfall according to its market compensation theory.

2. *Expectations Beyond the Time of Purchase*

Rather than limiting its holding to the purchase agreement's language, the court mistakenly broadened its analysis by inquiring into Good's knowledge at the time he began to develop the property. The court stated that "[w]hen in 1980 he finally retained a land development firm to seek the required permits, he acknowledged that 'obtaining said permits is at best difficult and by no means assured.'"[94] The court noted that similar language was included in the purchase contract. Thus, based on the contractual language of the purchase and consulting agreements, the court found that Good had actual knowledge of the regulatory environment both at the time of purchase *and* at the time of development.

The court's focus is misplaced. The test for when and if Good had knowledge of the regulatory environment should have been when he bought the property, not when he began to develop it. Despite the court's repeated emphasis on the fact that Good took no steps in acquiring regulatory approval for seven years,[95] a

93. This is not to say that government should compensate every property owner who owned land prior to the ESA's enactment. The purpose behind the test is to determine the expectations of the owner. Categorical takings, as well as physical takings, in contrast, do not inquire into the landowner's intent because the owner's intent is irrelevant. *See* Palm Beach Isles Assoc. v. United States, 231 F.3d 1354, 1362-63 (Fed. Cir. 2000) (concluding that the *Lucas* holding stood for this proposition). Due to the different inquiries, in cases of partial takings property owners must demonstrate their intentions for the property. For example, a party acquiring land in 1870 and passing it to successive generations who farmed and lived on the land would have a weaker argument that he had a reasonable expectation that any wetlands would be developed 100 years later. On the other hand, a party who bought land in 1972, never lived on it and had business plans for the wetlands would have a stronger argument that she expected to develop the land.

94. *Good*, 189 F.3d at 1362-63.

95. *See id.* at 1362.

party's reasonable expectations only make sense if evaluated at the time of purchase, i.e., when the investment was made.[96] Only then can the parties factor the risk of regulatory constraints into the price.[97] An unanticipated regulation that affects a property's value *after* its purchase will confer a loss rather than a windfall.[98] An evaluation of a developer's expectations at the time of development ignores the party's expectations at the time of purchase.[99] If new regulations had thwarted Good's expectations after he bought the property, the court's market rationale that parties can discount property for regulatory effects cannot be justified by awareness of regulations demonstrated seven years after the purchase. Whether Good became aware of new regulations after he had purchased the property is irrelevant in evaluating his investment-backed expectations. Good would have watched his property value diminish with no apparent remedy.

3. *Expectations and Public Environmental Awareness*

The court continued its inquiry into Good's expectations beyond the time of purchase with the third ground in its decision: Good's imputed knowledge of the heightened atmosphere of environmental regulation denied him any claim of reasonable investment-backed expectations. The court viewed general environmental concern, which developed following his

96. *See* Peterson, *supra* note 61, at 1322 (quoting the *Monsanto* Court's statement that "the relevant consideration . . . is the nature of the expectations of the submitter at the time the data were submitted." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1013 n.17 (1984)).

97. *See* Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994).

98. See Sax, *supra* note 46, for a discussion of the policy considerations into whether or not compensation is appropriate. As Prof. Sax points out, there are several policy arguments in favor of not paying compensation. Most importantly, by not compensating parties, property owners have the incentive to adapt quickly to changing environments. Public policy avoids awarding parties stagnating in the market and looking to the government for help. *Id.* at 1449-51. Outside of its argument that Good should have anticipated the regulation, the *Good* court never attempts to justify its analysis on policy grounds and failed to identify why Good rather than society should have to bear the loss when the restriction clearly benefited society. The decision's lack of depth is troubling considering the weight the court lays on public opinion in determining that Good had notice of the growing environmental concern.

99. Indeed, contrary to the court's conclusion, the development's delay may evidence that Good truly believed that Congress would not issue more expansive regulations. Otherwise, it seems unlikely that Good would have waited. The court concludes that the delay gave more time in which Good would have realized that the environmental regulatory climate was becoming stricter. It is unclear as to whether it was poor economic conditions, lack of funding, a belief that the waiting would provide greater profits, or some other factor caused Good not to begin development immediately after purchasing the property.

purchase of the property in question, as constructive knowledge which it could attribute to Good. The court's reasoning, however, seems troubling in several respects. First, the court failed to answer Good's fundamental objection that a party should not have to anticipate new regulatory schemes. Clearly, if Good's case involved a more stringent application of the Clean Water Act or tougher enforcement of already existing state laws, his argument would have failed.[100] Good stressed, however, that because the ESA did not exist when he bought the land, he could not have expected to have the Corps reject his permits based on the ESA's provisions. The court's analysis glosses over the fundamental difference between anticipating future legislation and applying stricter standards to an existing statute.

The court defended its position by finding that the Corps had considered environmental criteria in permitting decisions for a number of years. In 1968, the Corps announced that it would consider additional factors like fish and wildlife, conservation, pollution, aesthetics, ecology and the general public interest.[101] In 1975, the Corps broadened its interpretive authority to regulate wetlands.[102] In 1977, the Corps redefined its definition of wetlands, expanding the lands subject to Section 404 permits.[103] Thus, it is true that the role of the Corps with respect to wetlands permitting did change and expand during this time.

Nevertheless, the Corps' expansive construction of its role in wetlands development was not a new statutory scheme, but rather a more stringent application of pre-existing law. The ESA, on the other hand, is a separate, distinct regulatory program codified by Congress. By creating stringent protections for specific species of wildlife, the ESA is a fundamentally different protection scheme than the more generalized environmental protections that preceded it.

Instead of focusing on the ESA's unique role in denying Good's claims, the court addressed the denial of permits as

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100. *See* Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 645 (1993); *supra* note 88 and accompanying text. Accordingly, Good's argument that the Corps' expansion of regulation into wetlands did not occur until 1977 is clearly weaker than his argument against the ESA, which had not been enacted prior to the property purchase, because wetlands oversight was implemented prior to Good's purchase.

101. Good v. United States, 189 F.3d 1355, 1362 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000) (citing Deltona Corp. v. United States, 657 F.2d 1184, 1187 (Ct. Cl. 1981)).

102. *Id.* (citing United States v. Riverside Bayview Homes, 474 U.S. 121, 123-24 (1985)).

103. *Id.*

though it resulted from a more stringent application of a pre-existing law. According to the court's reasoning, the ESA was nothing more than another expansive application of environmental considerations by the Corps under the Section 404 permitting process. Under this analysis, it is difficult to imagine when a permitting denial would ever lead to a regulatory taking since no regulation ever really comes out of the blue. The Corps, for example, can tie new legislation into a separate permitting process and deny property owners remedy for their reliance upon the absence of the new regulation.

In contrast, prior to *Good*, claimants were only required to demonstrate that "they bought their property in reliance on the nonexistence of the challenged regulation."[104] Parsing the ESA from the Section 404 permitting process would seem to give Good a *prime facie* case of reliance, absent the contractual provision, because the ESA did not exist when he bought the property.[105] Congress had passed predecessors to the ESA when Good purchased the property,[106] but the 1973 ESA changed the enforcement mechanisms available and provided administrative agencies with far greater enforcement powers.[107] Furthermore, it

104. Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994).

105. Prof. Sax describes the foundational problem saying "[c]ertain individuals will inevitably be caught up in the transitional moment. These first owners to who the new rule applies will have no opportunity to respond adaptively. At some level the problem is inescapable: Someone must always be first, and new regulation may come without much warning." Sax, *supra* note 46, at 1451. *See generally* Stein, *supra* note 78. However, "various nonconstitutional devices" such as grandfathering certain properties, hardship variances, or gradual adoption of new regulations may mitigate this effect. Both grandfathering and hardship variances were ultimately used in the South Carolina law challenged in *Lucas*. *See* Sax, *supra* note 46, at 1451. While it is true that new property restrictions often must necessarily affect all similarly situated landowners, these devices may still be desirable in displacing the regulatory burden. In ruling against Good, the lower court ruled that the property retained value through transferable development rights (TDRs). *See* Good v. United States, 39 Fed. Cl. 81, 107-08 (1997). Outside of noting this finding and using it to conclude that Good did not suffer a categorical taking under *Lucas*, unfortunately the Federal Circuit does not comment further on the significance of this finding. *See generally* David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?*, 19 HARV. ENVTL. L. REV. 303 (1995).

106. *See, e.g.*, Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, §§ 1-3, 80 Stat. 926 (1966) (repealed 1973); Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (1969).

107. *See* MICHAEL BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 194-207 (3d ed. 1997) (describing the difference between the ESA and prior legislation including the Endangered Species Preservation Act and the Endangered Species Conservation Act); Stanley H. Anderson, *The Evolution of the Endangered Species Act*, *in* PRIVATE PROPERTY AND THE ENDANGERED SPECIES ACT: SAVING HABITATS, PROTECTING HOMES 11-13 (Jason F. Shogren ed., 1998) (discussing same).

offered a more comprehensive approach to species preservation than did earlier legislative efforts.[108] In short, it represented a fundamental change to prior law. Congress did enact the ESA the same year Good purchased the property, but it seems unreasonable to expect Good to have anticipated its final provisions prior to the Act's enactment.

If the court had limited its reasoning to analogizing environmental regulation to a highly regulated field such as banking,[109] it would have expanded prior precedents without necessarily overstepping their bounds. As noted earlier, prior case law suggests that the court could have found that Good was unreasonable to *not* expect some restrictions on his land use. Indeed, even the *Lucas* court concluded that a property owner "necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers."[110] Thus, it is plausible that the court could have simply concluded that wetlands development represents a regulated field where land owners cannot claim surprise at new regulations.[111] Independent of the ESA, Good knew that wetlands oversight made receiving a permit less than certain.

The court's analysis, however, does not explicitly characterize wetlands development as a highly regulated field, and provides no clear bounds for its environmental awareness rationale. Rather than pointing to specific laws that in 1973 were susceptible to expansion, the court points to the general "public concern" and "the growing consciousness of and sensitivity toward environmental issues."[112] Apparently, Good should have been sensitive not only to tightening regulations by the Corps,

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108. *See* BEAN & ROWLAND, *supra* note 107, at 199.

109. *See* Golden Pac. Bancorp v. United States, 15 F.3d 1066 (Fed. Cir. 1994) (bank holding company and stockholders had no reasonable expectation that FDIC would not take over insolvent bank due to the highly regulated nature of the industry); *see also* Cal. Hous. Sec., Inc. v. United States, 959 F.2d 955, 958-59 (Fed. Cir. 1992); Fahey v. Mallonee, 332 U.S. 245, 250 (1947). The court's reasoning would probably be difficult to align with the general conclusion that a claimants' expectations in banking cases could not have formed due to the "historically rooted expectation" that has grown up around certain financial practices. *Cal. Hous. Sec.*, 959 F.2d at 958 (quoting *Fahey*, 332 U.S. at 250). This expectation derives from the fact that "banking is one of longest regulated and most closely supervised of public callings." *Id.* It is unclear if classifying land use and environmental regulation would meet this historical test.

110. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992).

111. Though the court never explicitly compares wetland development to other examples of regulated fields such as those addressed in note 88, this conclusion is probably implicit in their holding.

112. *See* Good v. United States, 189 F.3d 1355, 1362, 1363 (Fed. Cir. 1999).

but also to the trend of increased public concern for the environment. The court concluded that "rising environmental awareness translated into ever-tightening land use regulations. Surely Appellant was not oblivious to this trend."[113]

Thus, a landowner's risk of economic loss may be dependent upon the responsiveness of a given political regime to public input. This is an area not well understood by political scientists, and is surely less certain than is necessary for parties to factor in a price calculation. Furthermore, parties must anticipate the responsiveness of administrative agencies to legislative action. Lacking this knowledge, parties will have great difficulty in rationally discounting property. This uncertainty stands in contrast to the court's conclusion that parties will use their knowledge of regulatory restraints to determine possible discounts in price.[114]

This analysis widens prior inquiries into regulated fields in an important way. It pushes a claimant's expectation inference one step beyond prior decisions by directly linking public concern to government regulation. Prior to *Good*, strong federal and state government regulatory regimes in industries such as banking and other financial markets linked expectations to the state of the respective regulatory environment. Accordingly, courts prevented claimants in affected businesses from receiving compensation due to the regulated nature of their field.[115] This inference now includes at least one of the influences behind regulation, public awareness and concern. Once a field is considered regulated, not only must claimants be aware of regulation within the field and its potential changes, but also the possibility that external public influences could impute to them knowledge of future regulation. This remains true even though they may have already made their investment and factoring new information into the price is no longer possible. Within this framework, it seems unlikely that a claimant would ever have a realistic regulatory takings case. Landowners will have to anticipate future regulations coming from a number of angles.

CONCLUSION

Good expands previous analyses of a landowner's investment-backed expectations. The decision also makes it

113. *Id.* at 1362.

114. *Id.* at 1361 (citing Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994)).

115. *See supra* notes 88, 109.

difficult for future courts to draw bounds around the holding. The court's decision is curious considering that outside of complete regulatory takings or physical invasions, courts have required compensation in few cases.[116] Indeed, the Supreme Court has upheld regulations that have significantly reduced the economic value of a landowner's property.[117] Thus, it is unclear why the court broadened the analysis,[118] rather than simply relying on Good admitting in the purchase contract that he did not necessarily expect to develop his property. In so doing, it could have avoided expanding an already loose doctrine and still reached the same result.

The court also fails to identify the import of the contractual language in terms of procedural value for future courts analyzing a party's investment-backed expectations. Under a narrow reading of the case, future courts would need information evidencing parties' actual and constructive knowledge of an increasingly regulated field. Thus, parties could simply excise such language from their contracts and eliminate other indications of their actual knowledge.

Under a broader view, one of the factors alone could be dispositive in establishing knowledge of regulations that could prevent development.[119] That is, the *Good* court does not identify whether or not growing public awareness was enough to have undone Good's investment expectations, or if it was only in

116. *See* Goldman-Carter, *supra* note 74, at 339; MELTZ ET AL., *supra* note 39, at 9 (noting that the Supreme Court "has never found a regulatory taking based on land-use restrictions in the absence of either a physical invasion or total deprivation of economic use.").

117. *See* Joseph L. Sax, *Property Rights in the U.S. Supreme Court: A Status Report*, 7 UCLA J. ENVTL. L. & POL'Y 139, 149 (1988).

118. It may well be that courts do not need any further tools in denying compensation. *See supra* note 116.

119. It is likely the notice requirement can be read broadly. The *Monsanto* court first articulated the notice requirement, concluding that where a party is aware of a government regulation, which relates to a legitimate governmental interest, they are on notice that any loss in value in their property right will not effectuate a taking. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1006-08 (1984). This formulation was refined in *Nollan*. In addressing the dissent's emphasis on the constructive notice test, Justice Scalia, writing for the majority, explained that where the notice in question prevents construction upon one's property, this will not amount to a legitimate government benefit. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987). Presumably the wetlands regulation in *Good* advanced a legitimate government benefit, but the court is less than explicit in identifying this fact. Moreover, *Good* expands the *Monsanto* and *Nollan* concepts of notice because the ESA was enacted after the property purchase, as were the more rigorous Florida statutes restricting development. Thus, the court was forced to wrap its ESA notice inquiry into its CWA analysis by identifying Section 404 as the pre-existing law giving Good notice of the regulatory climate.

combination with the language of the purchase and consulting contracts and previous regulation that his expectations were unreasonable. If *Good* is read broadly, courts could impute knowledge onto almost any party in an environment under increasing regulation.[120] Aside from the impossible task of defining the appropriate equivalent level of "rising environmental awareness" in other fields, this analysis gives courts grounds for rejecting any takings claim.[121] Taken to an extreme, Professor Epstein sees expectations in general as "pav[ing] the way for the rapid elimination of all perceived entitlements by simply claiming that the enactment of a single government regulation reasonably creates an expectation that further regulations will follow."[122] Despite the implications, *Good* leaves open the opportunity for courts to broadly examine public awareness of a given regulated field absent other evidence of reliance.

Considering public concern absent other evidence of regulatory knowledge seems like a Pandora's box which future courts should leave closed. *Good* presents enough case-specific facts that it is hard to imagine future courts being faced with strikingly similar cases. Moreover, environmental law has not seen an equivalent flurry of environmental legislation comparable to that surrounding Good's purchase of his property and is unlikely to in the near future. Presently, environmental

120. See note 88 for examples of different regulatory areas.

121. This task becomes even more complicated considering the environmental context of the decision. The 1960s and early 1970s saw unprecedented growth in the amount and breadth of environmental laws passed by Congress. Therefore, defining the appropriate cumulative equivalent in other bodies of law seems like an impossible task. For example, with the proliferation in digital copying software, consumer file-sharing and software end-user licensing agreements, Congress has responded with several laws such as the Digital Millennium Copyright Act to deal with these issues. *See* 17 U.S.C. §§ 512, 1201-1205, 1301-1332 (2000); 28 U.S.C. § 4001 (2000). Some states have also attempted to deal with hi-tech challenges facing state UCC codes such as "click-wrap" licenses, which are the Internet equivalent of traditional shrinkwrap licenses. *See generally*, Bradley J. Hillis, *Federal and State Electronic Signature Law in the United States: From the E-sign Act to Click Wrap: A Legal Guide to the Creation of Binding Transactions in Electronic Commerce*, 634 PRACTICING LAW INST. PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 161 (2001); Scott J. Spooner, *The Validation of Shrink-Wrap and Click-Wrap Licenses by Virginia's Uniform Computer Information Transactions Act*, 7 RICH. J.L. & TECH. 27 (2001). Does this activity satisfy the *Good* court's regulatory atmosphere analysis such that hi-tech companies do not have an argument that future government regulations could interfere with their reasonable investment-backed expectations? Or does regulation have to be at its apex? Furthermore, considering that environmental regulations may have already reached its statutory apogee, would current "environmental awareness" be enough to impute constructive knowledge of future regulations on a claimant?

122. Epstein, *supra* note 79, at 1371.

law is far-reaching in its effects, preventing most parties from claiming ignorance. In contrast, the *Good* court was faced with facts where, outside the Section 404 process, no pre-existing law existed to which the court could point to as giving *Good* notice. With the ubiquity of the modern environmental regime, this situation is unlikely to be the case in future decisions. Given these distinctions, future courts are likely to avoid treating public concern as an independent ground. In the long run, the nebulous aspects of the *Good* decision will probably not be as durable as its treatment of the contractual evidence of Good's knowledge at the time of purchase.