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“REASONABLE INVESTMENT-BACKED EXPECTATIONS” AS A FACTOR IN DEFINING PROPERTY INTEREST

ROBERT M. WASHBURN*

I. INTRODUCTION

The concept of “reasonable investment-backed expectations” as a factor in takings analyses first saw judicial daylight in 1978 in *Penn Central Transportation Co. v. New York City*,¹ as part of a discussion to determine at what point a land use regulation goes “too far” and constitutes a taking.² Since that opinion, courts have varied in their interpretation of the reasonable investment-backed expectations doctrine, resulting in a lack of clear direction as to its meaning and importance.³

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1. 438 U.S. 104, *reh'g denied*, 439 U.S. 883 (1978). *See generally* Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215 (1995) (reviewing the use of the reasonable investment-backed expectations standard in takings law) [hereinafter Mandelker, *Investment-Backed Expectations*].

2. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

3. *See* DANIEL R. MANDELKER, LAND USE LAW §§ 2.05, 2.18 (3d ed. 1993) (discussing the harm benefit theory and the two part test used by courts to find a

Legal commentators have also differed greatly on the meaning and usefulness of this doctrine.⁴

This Article examines the function of reasonable investment-backed expectations as a factor in modern takings jurisprudence. Part II of the Article explores the origins of the doctrine. Part III examines how the phrase has been defined and interpreted since the *Penn Central* decision. This part separately discusses the two components of the doctrine ("reasonable" and "investment-backed"). Part IV examines recent holdings applying this doctrine, emphasizing the most recent takings decision to come from the Supreme Court, *Lucas v. South Carolina Coastal Council*.⁵ The Article concludes with a discussion of the future of this factor in takings jurisprudence.

regulatory taking) [hereinafter MANDELKER, LAND USE LAW]; Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 765-70 (1988) (discussing the uncertainty in the area of reasonable investment-backed expectations due to the Supreme Court's lack of guidance to lower courts); Mandelker, *Investment-Backed Expectations*, *supra* note 1, at 225 (discussing the confusion among the courts over the term "investment-backed expectations"); Lynn Ackerman, Comment, *Searching for a Standard for Regulatory Takings Based on Investment-Backed Expectations: A Survey of State Court Decisions in the Vested Rights and Zoning Estoppel Areas*, 36 EMORY L.J. 1219 (1987) (discussing the reluctance of federal courts to set a clear legal standard for regulatory takings).

4. Compare Berger, *supra* note 3 (discussing the conflict in what constitutes a reasonable investment-backed taking); William C. Leigh & Bruce W. Burton, *Predatory Governmental Zoning Practices and the Supreme Court's New Takings Clause Formulation: Timing, Value and R.I.B.E.*, 1993 B.Y.U. L. REV. 827 (discussing the direction of new takings clause jurisprudence); Ackerman, *supra* note 3; William I. Gulliford, III, Note, *The Effect of Notice of Land Use Regulations Upon Investment-Backed Expectations and Takings Challenges*, 23 STETSON L. REV. 201 (1993) (discussing a systematic approach to regulatory takings); with MANDELKER, LAND USE LAW, *supra* note 3, §§ 2.05, 2.18; Bruce W. Burton, *Post-Lucas Regulatory Takings and the Supreme Court's Riddle of the R.I.B.E.: Where No Mind Has Gone Before*, 25 U. TOL. L. REV. 155 (1994) (discussing the inconsistencies in Supreme Court decisions regarding reasonable investment-backed expectations); Nathaniel S. Lawrence, *Regulatory Takings: Beyond the Balancing Test*, 20 URB. LAW. 389 (1988) (discussing when governmental regulations are so burdensome that they overstep constitutional bounds); Mandelker, *Investment-Backed Expectations*, *supra* note 1; Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 WASH. U. J. URB. & CONTEMP. L. 3 (1987) (discussing the meaning of the investment-backed expectations factor and its application) [hereinafter Mandelker, *Is There a Taking?*].

5. 112 S. Ct. 2886 (1992).

II. THE EVOLUTION OF "REASONABLE INVESTMENT-BACKED EXPECTATIONS" AS A FACTOR IN TAKINGS ANALYSES

The phrase, "distinct investment-backed expectations," was originally penned in Justice William J. Brennan, Jr.'s opinion in *Penn Central Transportation Co. v. New York City*.⁶ In that opinion, Justice Brennan attempted to clarify the multi-factor balancing test used by courts facing regulatory taking claims.⁷ In *Penn Central*, the owner of Grand Central Terminal challenged as an unconstitutional taking New York City's designation of the terminal as an historic landmark and the city's rejection of the owner's proposal to construct a high-rise building in the airspace over the terminal.⁸ Justice Brennan's opinion for the majority reviewed Supreme Court takings doctrine and noted that the Court had never adopted a "set formula" for conducting Takings Clause analysis.⁹ "[Brennan] adopted a multi-factor balancing test by identifying several factors the Court had considered when it made . . . 'ad hoc, factual inquiries.'"¹⁰ The *Penn Central* standard, which numerous state and federal cases have applied, reads:

[T]he Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with *distinct investment-backed expectations* are, of course, relevant considerations. So, too, is the character of the governmental action.¹¹

The concept of distinct investment-backed expectations brings the economic impact of a regulation into the takings analysis by asking whether the regulation interferes impermissibly with expectations on which the owner has invested resources.¹² Justice Brennan did not define "distinct investment-backed expectations" in *Penn Central*, but he

6. 438 U.S. 104 (1978).

7. *Id.* at 124.

8. *Id.* at 115-22.

9. *Id.* at 123-24.

10. MANDELKER, LAND USE LAW, *supra* note 3, § 2.13.

11. *Penn Central*, 438 U.S. at 124 (emphasis added) (citation omitted).

12. See MANDELKER, LAND USE LAW, *supra* note 3, § 2.13 (noting that the takings factors include the economic impact of the regulation).

noted that the plaintiff had not established a taking "simply by showing that [it had] been denied the ability to exploit a property interest" it previously believed it could develop, namely the "air rights" over Grand Central Terminal.¹³

Justice Brennan went on to illustrate that the distinct investment-backed expectations factor was actually first identified in *Pennsylvania Coal Co. v. Mahon*.¹⁴ In *Pennsylvania Coal*,¹⁵ the Supreme Court held that because the statutory restrictions placed on the claimant mining company "had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land," the statute constituted a taking without just compensation.¹⁶ The *Pennsylvania Coal* opinion considered the costs to the property owner affected by a government regulation, as well as the character of the government's regulation.¹⁷ Justice Holmes, delivering the opinion of the Court, stated that although some diminution in property value must be tolerated, when "it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."¹⁸ The *Pennsylvania Coal* opinion does not explicitly use the phrase "distinct investment-backed expectations." However, as Justice Brennan pointed out in *Penn Central*, it captures the spirit of the factor: it requires the government to compensate an owner of property when governmental regulation has an extreme impact on property value.¹⁹ In this way, *Pennsylvania Coal* "set the terms for modern takings analysis."²⁰

The phrase "reasonable investment-backed expectations" appears to have its origin in a 1967 article by Professor Frank Michelman²¹ which discusses the multiplicity of rules developed by the courts under takings

13. *Id.* (quoting *Penn Central*, 438 U.S. at 130).

14. *Penn Central*, 438 U.S. at 127.

15. 260 U.S. 393 (1922).

16. *Penn Central*, 438 U.S. at 127 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922)).

17. Lawrence, *supra* note 4, at 396.

18. *Id.* (quoting *Pennsylvania Coal*, 260 U.S. at 413).

19. *See Penn Central*, 438 U.S. at 127.

20. Lawrence, *supra* note 4, at 396.

21. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

jurisprudence.²² Justice Brennan adapted the phrase from Michelman's text:

[T]he test poses not nearly so loose a question of degree; it does not ask "how much," but rather (like the physical-occupation test) it asks "whether or not": whether or not the measure in question can easily be seen to have practically deprived the claimant of some *distinctly perceived, sharply crystallized, investment-backed expectation*.²³

Justice Brennan chose not to define the requisite expectations as narrowly as Professor Michelman, but he did retain two components: the first, "distinct," can be interpreted as well-defined or explicit; the second, "investment-backed," involves a financial venture with a view toward a specific future use. In later cases, "reasonable" replaced "distinct" in the phrase.²⁴ This change may reflect a shift to an objective standard or, as Professor Daniel Mandelker suggests, "a balancing test that weighs public benefits against private costs."²⁵

"Although this taking factor implies more, not less, protection for landowners, the Court has so far applied it to uphold rather than strike down land use regulations."²⁶ Courts have rarely relied on reasonable investment-backed expectations as the sole factor in concluding that a taking without just compensation has occurred. This is because it is only one of several factors used in the takings analysis. It is nonetheless an important facet of the current multi-factor balancing test the Court uses when deciding a takings question.

22. For an in-depth and theoretical analysis of the relationship between Professor Michelman's article and Justice Brennan's opinion in *Penn Central*, see Mandelker, *Is There a Taking?*, *supra* note 4, at 10-13.

23. Michelman, *supra* note 21, at 1233 (emphasis added).

24. E.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). It is worth noting that some courts still use the term "distinct" investment-backed expectations. For example, see *Szymkowicz v. District of Columbia*, 814 F. Supp. 124, 128 (D.D.C. 1993). Some courts use both "distinct" and "reasonable" interchangeably, *Lyons v. Raymond Rosen & Co.*, No. CIV.A.93-1514, 1994 WL 129955, at *12, *14 (E.D. Pa. Apr. 12, 1994), while still others follow *Keystone Bituminous Coal Ass'n v. Duncan*, 771 F.2d 707, 713 (3d Cir. 1985), *aff'd sub nom. Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), and use the term "distinct, reasonable, investment-backed expectations," e.g., *Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (1991).

25. Mandelker, *Is There a Taking?*, *supra* note 4, at 14.

26. MANDELKER, *LAND USE LAW*, *supra* note 3, § 2.18.

Although reasonable investment-backed expectations constitutes only one of the factors recognized by the majority of the Court in *Penn Central*, it is an important one, given the emphasis it is at times given by the Supreme Court.²⁷ The reasonable investment-backed expectations factor compels judicial consideration of "the bundle of rights that constitutes property to determine the investment required to establish an investment-backed expectation."²⁸ As illustrated in *Penn Central*, where a regulation destroys only "one strand" in the bundle, courts have not found a taking under this factor.²⁹

This limitation, which affects the regulation of the entire property, is further illustrated by *Keystone Bituminous Coal Ass'n v. DeBenedictis*.³⁰ *Keystone* stands for the proposition that where the governmental regulation adversely affects a reasonable investment-backed expectation as to only one strand in the bundle of property rights, no taking will be found; where the regulation adversely affects a number of strands in the bundle, a taking may indeed be found.³¹ This bundle of rights analysis balances all rights against the rights regulated. This approach is analytically different from other Takings Clause approaches, such as the balancing of a regulation's private harm versus its public benefit.³²

27. 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, 1324 (1989) (discussing the role of reasonable expectations in the Supreme Court's takings analysis).

28. MANDELKER, LAND USE LAW, *supra* note 3, § 2.18.

29. *Id.*

30. 480 U.S. 470 (1987).

31. See MANDELKER, LAND USE LAW, *supra* note 3, § 2.18.

32. See Thomas A. Hippler, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of "Noxious Use," "Average Reciprocity of Advantage," and "Bundle of Rights" from Mugler to Keystone Bituminous Coal*, 14 B.C. ENVTL. AFF. L. REV. 653, 695-97 (1987) (discussing the Supreme Court analyses of regulatory takings in *Penn Central*).

III. HOW THE COURTS HAVE DEFINED "REASONABLE INVESTMENT-BACKED EXPECTATIONS"

A. "Reasonable"

1. The General View of "Reasonable"

The word "reasonable" in "reasonable investment-backed expectations" would seem to be the easiest word in the phrase for courts to consider and for litigants to predict outcomes, for it is a common and familiar criterion in legal reasoning.³³ As one commentator noted:

When the Court discusses this factor, it usually is considering whether the claimant reasonably relied to her economic detriment on an expectation that the government would not act as it did — that is, that it would not deprive her of the property at issue. Sometimes, however, the Court focuses not on the claimant's reliance, but rather on whether the challenged law permits the claimant to make *some reasonable* use of her tangible resource. In still a third class of cases, the Court equates "*reasonable expectations*" with "property." Furthermore, the Court sometimes treats the second *Penn Central* factor as decisive, and at other times it does not.³⁴

Although the concept of "reasonable" in the phrase may seem simple at first glance, it is essential to determine in what context to consider it.

A landowner's expectations are shaped by certain givens. In the land use context, the most important are the law of property and nuisance³⁵ and the land use rules (statutes and ordinances) in existence at the time the owner purchased or otherwise invested in the land.³⁶ A

33. See Berger, *supra* note 3, at 765 (noting that the term "reasonable" is the easiest part of the phrase for courts to use).

34. Peterson, *supra* note 27, at 1320 (emphasis added).

35. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899-2902 (1992) (reviewing takings jurisprudence); John M. Groen & Richard M. Stephens, *Takings Law, Lucas, and the Growth Management Act*, 16 U. PUGET SOUND L. REV. 1259 (1993) (examining Washington state takings regulations after the Supreme Court's decision in Lucas v. South Carolina Coastal Council); Robert M. Washburn, *Land Use Control, The Individual and Society: Lucas v. South Carolina Coastal Council*, 52 MD. L. REV. 162 (1993) (discussing regulatory takings law and the nuisance exception in light of the Supreme Court's decision in Lucas v. South Carolina Coastal Council).

36. Leigh & Burton, *supra* note 4, at 843-44.

landowner should not be heard to complain that land use or environmental regulations existing at the time of purchase constitute a taking on the basis of interference with investment-backed expectations.³⁷ The landowner's expectations are shaped by the practicable and probable uses available under the law of property and nuisance, as well as existing rules and regulations.³⁸ A legislature should not be able to interfere with those expectations in a retroactive manner, without stripping the Takings Clause of its meaning.³⁹

In his article, Michael Berger identifies twelve factors which have been utilized by courts in determining whether a property owner's expectations are reasonable under this component of the takings analysis:⁴⁰

37. The property owner *can* complain on other grounds: physical interference, denial of economically viable use, or failure to substantially advance a legitimate state interest. MANDELKER, *LAND USE LAW*, *supra* note 3, §§ 2.03-2.05.

38. See Leigh & Burton, *supra* note 4, at 868 (citing *United States v. 320.0 Acres*, 605 F.2d 762, 818 (5th Cir. 1979) ("If . . . a proffered potential use is not reasonably practicable or probable . . . then of course the landowner is not entitled to have evidence concerning that use considered by the trier of fact."); Mandelker, *Investment-Backed Expectations*, *supra* note 1, at 227-31 (discussing different approaches to defining expectations in property under the Taking Clause); Gulliford, *supra* note 4, at 218-19 (considering what is meant by reasonable expectations).

While vested rights may be a clear way for property owners to obtain enforceable expectations, see Mandelker, *Investment-Backed Expectations*, *supra* note 1, at 237-38, a rule that equates the two doctrines is too narrow and would result in insufficient protection of property interests.

39. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900 (1992); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 (1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

40. Similarly, in *Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir. 1992), *cert. denied*, 115 S. Ct. 1693 (1995), the Eleventh Circuit remanded the case so that the fact-finder could answer certain questions in order to apply the *Penn Central* multi-factor inquiry, including, the extent to which the regulation interfered with investment-backed expectations:

In this case, those questions are: (1) the history of the property—when was it purchased? How much land was purchased? Where was the land located? What was the nature of title? What was the composition of the land and how was it initially used?; (2) the history of development—what was built on the property and by whom? How was it subdivided and to whom was it sold? What plats were filed? What roads were dedicated?; (3) the history of zoning and regulation—how and when was the land classified? How was use proscribed? What changes in classifications occurred?; (4) how did development change when title passed?; (5) what is the present nature and extent of the property?; (6) what were the reasonable expectations of the landowner under state common law?; (7) what were the reasonable expectations of the neighbor-

(1) the severity and extensiveness of regulations at the time the property was purchased; (2) the past regulatory history of the specific property; (3) the degree of impairment of the uses of the property; (4) the uses available before enactment of the challenged regulation; (5) the novelty or expectedness of the governmental action; (6) whether specifically (and traditionally) recognizable "sticks" were removed from the owner's bundle of property rights; (7) whether any rights (like the transferable development rights in *Penn Central*) were substituted for those impaired; (8) whether existing uses were permitted to continue; (9) whether government representations were formal or informal; (10) the ability to sell the property to others at a fair price; (11) the general power of government to regulate; and (12) the harshness of the local regulatory and legal climate.⁴¹

The Supreme Court's adoption of the investment-backed expectation factor added a new element to takings jurisprudence, emphasizing the rights of property owners and suggesting that courts apply this new factor to strengthen the position of the property owner against governmental regulation. The doctrine, however, has not developed in such a clear analytical line.⁴² As illustrated in the following cases, what seemed like reasonable investment-backed expectations to the property owner (*i.e.*, the ability to develop one's land) were usually found to be unreasonable by the courts when considered in light of the elements identified by Michael Berger.

2. A More Discrete View of the Factors

In practice, courts have relied upon some factors more often than others and have given the factors different weights in their analyses. For instance, the first factor, which concerns the severity and extensiveness of regulations at the time the property was purchased, was especially

ing landowners under state common law?; and (8) perhaps most importantly, what was the diminution in the investment-backed expectations of the landowner, if any, after passage of regulation?

Id.

41. Berger, *supra* note 3, at 765-67 (footnotes omitted).

42. See MANDELKER, LAND USE LAW, *supra* note 3, § 2.18 (discussing the development and application of the investment-backed expectation factor).

important to the court in *Deltona Corp. v. United States*.⁴³ In *Deltona Corp.*, the plaintiff developer claimed that it suffered an uncompensated taking as a result of federal regulations that affected one of its planned subdivisions.⁴⁴ Deltona had purchased a 10,000 acre tract of land in 1964 which it planned to develop as a waterside community.⁴⁵ Deltona subdivided this tract into five areas which it planned to develop sequentially. The developer obtained dredge and fill permits in both 1964 and 1969 for its first and second subdivisions, but the Army Corps of Engineers denied the developer's request for a permit to develop the entire third subdivision in 1976.⁴⁶ The circumstance of the denial involved a change in federal jurisdiction encompassing Deltona's land.⁴⁷ The Court of Claims, noting that the regulations were very complex,⁴⁸ wrote that "Deltona is no longer able to capitalize upon a reasonable investment-backed expectation which it had every justification to rely upon until the law began to change."⁴⁹ The court noted that Deltona previously succeeded in obtaining permits in 1964 and 1969, and recognized that it was not able to develop a portion of the third subdivision "[a]s the result of an unforeseen change in the law."⁵⁰ In its final analysis, however, the court denied Deltona's takings claim because the frustration of reasonable investment-backed expectations "neither 'extinguish[es] a fundamental attribute of ownership,' nor prevents Deltona from deriving many other economically viable uses from its parcel—however delineated."⁵¹

The third factor identified by Berger, the degree of impairment the regulation places upon the property, proved significant in *Southview Associates, Ltd. v. Bongartz*.⁵² In *Southview Associates*, a developer

43. 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982).

44. *Id.* at 1185.

45. *Id.* at 1188.

46. *Id.* at 1188-89.

47. *Id.*

48. *Id.* at 1187.

49. *Id.* at 1191.

50. *Id.*

51. *Id.* at 1192 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980) (citation omitted)).

52. 980 F.2d 84 (2d Cir. 1992), *cert. denied sub nom.* *Southview Assocs. Ltd. v. Individual Members of Vermont Env'tl. Bd.*, 113 S. Ct. 1586 (1993).

sued members of the Vermont Environmental Board claiming that the Board's denial of a permit to develop a residential subdivision because the proposed development would severely impair a deeryard, constituted a taking of property without just compensation.⁵³ Application of the reasonable investment-backed expectations factor led the court to conclude that Southview's expectations were not reasonable, rather, they were optimal. The Board's decision left intact the claimant's ability to (1) construct improvements for farming, logging, or forestry; (2) construct residential or commercial improvements "involving" less than ten acres of the property; (3) construct and sell up to nine homes; and (4) make recreational use of the land.⁵⁴ The *Southview Associates* opinion illustrates how much economic loss may be sustained by an owner without compensation from the government, based on an analysis that balances all rights against the rights regulated.⁵⁵

A clear application of the "reasonable" standard appears in *Lakeview Development Corp. v. City of South Lake Tahoe*.⁵⁶ In this case, the plaintiff developer claimed it had a vested right to complete its development without further restrictions from the regional planning agency.⁵⁷ The Ninth Circuit Court of Appeals stated unequivocally that Lakeview had not been denied all economically viable use of its land and thus its reasonable investment-backed expectations had not been upset.⁵⁸ In support of this conclusion, the court noted that of the two hundred dwelling units originally proposed by the developer, only twenty-eight would not be permitted.⁵⁹

In *Mountain States Legal Foundation v. Hodel*,⁶⁰ the Tenth Circuit Court of Appeals sustained the Wild Free-Roaming Horses and Burros

53. *Id.* at 87, 90-91.

54. *Id.* at 94.

55. See Hippler, *supra* note 32, at 695-96 (describing this consideration in *Penn Central*). See also *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (holding that an ordinance establishing a mining depth limitation is not so onerous as to result in a taking); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (holding that an ordinance that prohibited the manufacturing of bricks on plaintiff's property was not a taking).

56. 915 F.2d 1290 (9th Cir. 1990), *cert. denied*, 501 U.S. 1251 (1991).

57. *Id.* at 1291.

58. *Id.* at 1300.

59. *Id.*

60. 799 F.2d 1423 (10th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987).

Act,⁶¹ and refused to find a taking without just compensation. In “[c]onsidering the economic impact on the Association’s property as a whole,” the court held that “the Act [did] not interfere with the Association’s ‘distinct investment-back[ed] expectations’ of using its property for grazing cattle. Nor [did] it impair the Association’s right to hold the property for investment purposes.”⁶²

Finally, in *Jentgen v. United States*,⁶³ the Claims Court concluded that even though the claimant landowner was able to develop only fifty percent of his property as a consequence of a federal regulation that affected his ability to develop a planned residential community, this fact “merely present[ed] an instance of some diminution in value.”⁶⁴ The Supreme Court has long held that mere diminution in value, standing alone, cannot establish a taking.⁶⁵

The fourth factor identified by Michael Berger, the examination of the uses available before the enactment of the challenged regulation,⁶⁶ is also commonly discussed by courts. A few non-land use cases can illustrate this factor. In *Price v. City of Junction*,⁶⁷ the constitutionality of a city’s “junk car” ordinance was at issue. The Fifth Circuit Court of Appeals found that “[b]y their very nature such inoperable junk vehicles do not embody reasonable, investment-backed expectations.”⁶⁸ The lesson here is that courts will not include something of little or no value when applying this factor.

Similarly, in *In re Gifford*,⁶⁹ the appellant debtors sought to avoid a non-possessory, non-purchase money security interest in personal

61. *Id.* at 1425, 1430 (citing 16 U.S.C. §§ 1331-1340 (1982)).

62. *Mountain States Legal Foundation*, 799 F.2d at 1431 (quoting *MacLeod v. Santa Clara County*, 749 F.2d 541, 547 n.7 (9th Cir. 1984)).

63. 657 F.2d 1210 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982).

64. *Id.* at 1214.

65. *E.g.*, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978) (noting that courts “uniformly reject the proposition that diminution in property value, standing alone, can establish a ‘taking’”); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (holding that one of the factors in deciding whether a taking has occurred is the degree in which the values incident to the property are diminished by the regulation in question).

66. Berger, *supra* note 3, at 766.

67. 711 F.2d 582 (5th Cir. 1983).

68. *Id.* at 591.

69. 688 F.2d 447 (7th Cir. 1982).

property, to which the creditor objected on the grounds that it would constitute a taking. The Seventh Circuit Court of Appeals concluded that the "property" interest affected involved a "less than substantial" investment-backed expectation, as the value of the collateral was "insignificant" to begin with.⁷⁰

It is interesting to note that the dissent in *Loretto v. Teleprompter Manhattan CATV Corp.*,⁷¹ concluded that the statute at issue there did not interfere with the appellant's reasonable investment-backed expectations because she could not have expected to produce income from the use of her one-eighth cubic foot of roof space occupied by the cable television installation.⁷² The majority opinion found a taking not through interference with investment-backed expectations, but on the basis of a physical appropriation.⁷³

Michael Berger's sixth factor, whether specifically (and traditionally) recognizable "sticks" were removed from the owner's bundle of property rights,⁷⁴ has also played an important role in takings jurisprudence. The Supreme Court has indicated that a reasonable investment-backed expectation may protect divisible property rights from regulation.⁷⁵ However, this protection is limited because courts do not safeguard all divisible property rights.⁷⁶ A court will deny Takings Clause protection where only a single strand in the bundle is affected so long as there are enough other strands to make up for the loss, reasoning that the owner's primary investment-backed expectations have not been frustrated.⁷⁷

*Hodel v. Irving*⁷⁸ involved a section of the Indian Land Consolidation Act⁷⁹ that required small fractional property interests to escheat to the respective Indian tribe. Individual members of the tribe brought suit,

70. *Id.* at 456, 458.

71. 458 U.S. 419 (1982).

72. *Id.* at 453 (Blackmun, J., dissenting).

73. *Id.* at 438.

74. Berger, *supra* note 3, at 766.

75. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

76. MANDELKER, LAND USE LAW, *supra* note 3, § 2.18.

77. *Id.*

78. 481 U.S. 704 (1987).

79. *Id.* at 706 (citing Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, tit. II, 96 Stat. 2519 (current version at 25 U.S.C. §§ 2201-2211 (1994))).

claiming that the statute resulted in an unconstitutional taking of their property without just compensation.⁸⁰ The Supreme Court found that the statute did, indeed, “go[] too far.”⁸¹ The Court characterized the right to devise valuable property to one’s heirs as a valuable right, which was not outweighed by the weak “average reciprocity of advantage” argument advanced by the government.⁸²

The strongest opinion on the “stick removal” issue is *Kaiser Aetna v. United States*.⁸³ In this case, the Supreme Court had to determine whether a private waterway could be termed a navigable water of the United States, thus qualifying it as a public right-of-way.⁸⁴ The Court held that the “‘right to exclude,’ so universally held to be a fundamental element of the property right, [fell] within [the] category of interests that the Government cannot take without compensation.”⁸⁵

3. The Notice Issue

Michael Berger’s ninth factor, government notice,⁸⁶ receives much attention in reasonable investment-backed expectations analysis. This factor inquires into “whether the claimant parted with [a property right] of economic value in reliance on an expectation that the government would not act in a particular manner.”⁸⁷ The foreseeability of the government’s action negates a takings claim under this element of the test, with the proviso that if the government promises a property owner one thing, but does another, a taking may indeed occur.⁸⁸ Several cases, including two United States Supreme Court cases, have squarely addressed this consideration.

In *Ruckelshaus v. Monsanto Co.*,⁸⁹ a corporation attempting to register a pesticide brought suit to enjoin the operation of the data-disclosure provisions of the Federal Insecticide, Fungicide, and

80. *Hodel*, 481 U.S. at 710.

81. *Id.* at 718 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

82. *Id.* at 715.

83. 444 U.S. 164 (1979).

84. *Id.* at 168.

85. *Id.* at 179-80 (footnote omitted).

86. Berger, *supra* note 3, at 766-67.

87. Peterson, *supra* note 27, at 1321.

88. *See id.* (discussing takings cases where the government has broken a promise).

89. 467 U.S. 986 (1984).

Rodenticide Act (FIFRA),⁹⁰ claiming that these provisions effectuated a taking. Under the original 1947 FIFRA, all pesticides had to be registered with the Secretary of Agriculture prior to sale.⁹¹ The 1947 version of FIFRA prohibited disclosure of any information regarding the formulas of the pesticides,⁹² but did not protect any information concerning health and safety data.⁹³ In 1972, Congress amended FIFRA by passing the Federal Environmental Pesticide Control Act.⁹⁴ Subsequent to its amendment, FIFRA protected only data the submitter denoted as "trade secrets or commercial or financial information."⁹⁵ In addition, the 1972 amendments permitted the Environmental Protection Agency (EPA) to use all of the registered data submitted by one applicant for the purpose of evaluating other applicants seeking to register similar chemicals.⁹⁶ The 1972 amendments also provided a procedure governing public disclosure of the submitted data.⁹⁷ Congress amended FIFRA again in 1978⁹⁸ in order to clarify the definition of "trade secrets or commercial or financial information," and to provide more guidance for the use of registered data in the evaluation of a new product.⁹⁹

Monsanto brought suit against the EPA alleging that the disclosure of their secret data pursuant to FIFRA's provisions effectuated a taking of property without just compensation, in violation of the Fifth Amendment.¹⁰⁰ After finding that Monsanto had a protectable property interest in its data in the form of a trade secret, the Supreme Court turned

90. *Id.* at 990 (citing 7 U.S.C. § 136 (1994)).

91. *Id.* at 991 (citing FIFRA, §§ 3(a), 4(a), 61 Stat. 163, 166-67 (1947) (current version at 7 U.S.C. § 136 (1994))).

92. *Id.* (citing FIFRA §§ 3(c)(4), 8(c), 61 Stat. 163, 166, 170 (1947) (current version at 7 U.S.C. § 136 (1994))).

93. *Id.* at 991.

94. *Id.* (citing Pub. L. No. 92-516, 86 Stat. 973 (codified as amended at 7 U.S.C. § 136 (1994))).

95. *Id.* at 992 (citing Federal Environmental Control Act of 1972, Pub. L. No. 92-516, § 10(a), 86 Stat. 973, 989 (codified as amended at 7 U.S.C. § 136h(a) (1994))).

96. *Id.* (citing § 3(c)(1)(D), 86 Stat. at 979-80).

97. *Id.* at 992-93 (citing §§ 10(a)-(c), 86 Stat. at 989).

98. *Id.* at 994 (citing Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819 (current version at 7 U.S.C. § 136 (1994))).

99. *Id.* at 993-94 (citing § 15, 92 Stat. 819, 829-32; § 2(a), 92 Stat. 819, 820).

100. *Monsanto*, 467 U.S. at 998-99.

to the takings question. The Court held that data disclosure was foreseeable, with regard to data submitted before the 1972 amendments.¹⁰¹ Therefore, Monsanto's investment-backed expectations were not reasonable.¹⁰² With regard to data submitted between 1972 and 1978, however, the Court held that Monsanto's investment-backed expectations were reasonable because FIFRA had explicitly "guaranteed to Monsanto . . . an extensive measure of confidentiality and exclusive use."¹⁰³

This holding suggests that a finding of reasonable investment-backed expectations may be enough to establish that the government has caused a taking to occur. Also important to the Court's analysis of the pre-1972 data-disclosure provisions was the fact that by registering its product under FIFRA, Monsanto received the ability to market its pesticides in the United States.¹⁰⁴ The Court emphasized this exchange of data for certain economic advantages in its conclusion that no taking had occurred.¹⁰⁵

The Supreme Court's distinction between the pre-1972 data and the 1972-1978 data is a touchstone for further development of the reasonable investment-backed expectations doctrine. The Court established that a taking may occur under circumstances where the statutory scheme provided protection for trade secrets because the property owner could clearly rely on the existing statutory protection. The improper use of trade secret data by EPA in this situation frustrated "Monsanto's reasonable investment-backed expectation with respect to its control over the use and dissemination of the data it had submitted."¹⁰⁶

In reaching its decision, the Court opined that to be reasonable, the expectation must be more than a "unilateral expectation or an abstract need."¹⁰⁷ The reasonableness of Monsanto's expectations were defined by the statutory law at the time it submitted the data to EPA.¹⁰⁸

101. *Id.* at 1009.

102. *Id.* at 1009-10.

103. *Id.* at 1011.

104. *Id.* at 1007.

105. *Id.*

106. *Id.* at 1011.

107. *Monsanto*, 467 U.S. at 1005-06 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

108. *Id.* at 1006.

Therefore, the protection granted in the 1972 amendments gave Monsanto certain reasonable expectations, while the 1978 amendments changed those expectations for data submitted after that date.¹⁰⁹ Because the statute explicitly permitted the protection of trade secrets from 1972 to 1978, Monsanto had a right to rely on the statute then in effect.¹¹⁰ This explicit statutory guarantee of confidentiality supplied a reasonable basis for Monsanto's expectations.¹¹¹ While EPA was granted the authority under the 1978 amendments to prospectively disclose trade secret data, it could not employ that authority retroactively to disclose data submitted prior to the 1978 amendments.¹¹² Because the 1972-1978 data was protected by different statutory language which created confidentiality expectations in Monsanto, EPA's disclosure triggered the obligation to pay just compensation.¹¹³

The second Supreme Court opinion to consider Berger's ninth factor is *Connolly v. Pension Benefit Guaranty Corp.*¹¹⁴ The petitioner, an employer, challenged the constitutionality of the Multiemployer Pension Plan Amendments Act (MPPAA),¹¹⁵ which required an employer withdrawing from a multiemployer pension plan to pay a fixed share to the plan amounting to the employer's proportionate share of the plan's "unfunded vested benefits."¹¹⁶ The Supreme Court analyzed the statute under the takings framework set forth in *Penn Central*.¹¹⁷ A unanimous Court concluded that employers "had more than sufficient notice" that pension plans were not only being regulated at the time MPPAA was enacted, "but also that withdrawal itself might trigger additional financial obligations."¹¹⁸ In support of this conclusion, the Court noted that long before the adoption of the Employee Retirement Income Security Act of 1974 and MPPAA, it was clear that if an

109. *Id.* at 1006-07. See Gulliford, *supra* note 4, at 219-20 (analyzing the reasonable investment-backed expectations discussion in *Monsanto*).

110. *Monsanto*, 467 U.S. at 1010-14.

111. *Id.* at 1011.

112. *Id.*

113. *Id.* at 1013-14.

114. 475 U.S. 211 (1986).

115. *Id.* at 213, 220-21 (citing 29 U.S.C. §§ 1381-1461 (1982)).

116. *Id.* at 217 (citing 29 U.S.C. § 1391).

117. *Id.* at 224-26.

118. *Id.* at 227.

employer "exercised its discretion to pay benefits upon the termination of a multiemployer pension plan, employers who had contributed to the plan during the preceding five years were liable for their proportionate share of the plan's contributions during that period."¹¹⁹

Part of the Court's rationale has special ramifications for land use law. Justice White stated that "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."¹²⁰ Accordingly, participants in any field of endeavor that is highly regulated, such as land use, will be considered to be "on notice" that later amendments, which may be economically detrimental to the landowner but serve the legislative ends of the original statute, will likely be held constitutional under the *Connolly* reasoning.¹²¹ Foreseeability is the key; if an action was foreseeable, there is no taking. Under this reasoning a taking will occur only where the regulation was not foreseeable.¹²²

In the land use context, *Monsanto* appears to create more enforceable property rights than does *Connolly*. The Court found Monsanto's property rights in the explicit wording of FIFRA from the 1972 amendments through the 1978 amendments.¹²³ Legislatures can always amend statutes, and part of a property owner's expectations depend on the statutory law in place when the owner acquires the property interest. What the legislature cannot do, however, is interfere with existing property rights which form the owner's expectancy interest.¹²⁴ In the

119. *Id.* at 226-27 (citing 29 U.S.C. § 1364).

120. *Id.* at 227 (quoting *F.H.A. v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958), *reh'g denied*, 358 U.S. 937 (1959)).

121. Katherine Stone and Philip Seymour noted that "[i]n areas subject to extensive, ongoing regulation," especially in land use, "there can seldom be a reasonable expectation that current rights will remain inviolate against future regulation." Katherine E. Stone & Philip A. Seymour, *Regulating the Timing of Development: Takings Clause and Substantive Due Process Challenges to Growth Control Regulations*, 24 LOY. L.A. L. REV. 1205, 1223 (1991). See also Gulliford, *supra* note 4, at 218-19, 230-31 (noting that investment-backed expectations must be at least consistent with the law in force at the time the property was acquired).

122. Peterson, *supra* note 27, at 1320-22.

123. *Monsanto*, 467 U.S. at 1010-11.

124. See generally, *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2904 (1992) ("[T]he means as well as the ends of regulation must accord with the owner's reasonable expectations. Here, the State did not act until after the property had been zoned for individual lot development and most other parcels had been improved, throwing the whole burden of the regulation on the remaining lots.").

land use context, a property owner purchases property based on existing rules and regulations created by applicable statutes and ordinances. There is no limitation on the government's ability to alter these regulations, provided the change advances a legitimate state interest and avoids one of the categorical or per se classifications for finding a taking.¹²⁵ However, if the law is changed, thus altering the existing rules upon which a property owner has already reasonably relied, the owner's property rights should be protected.¹²⁶

Subsequent cases have extended the "reasonably foreseeable" rationale of *Connolly* to deny relief to property owners. One such opinion is *Parkridge Investors Ltd. Partnership v. Farmers Home Administration*.¹²⁷ *Parkridge Investors* involved a petitioner who owned an apartment complex financed by the Farmers Home Administration (FmHA) under the Rural Rental Housing Program.¹²⁸ In order to obtain financing through this program, owners of rural apartment complexes were required to provide affordable low-income housing.¹²⁹ In 1985 Parkridge Investors Limited Partnership, purchased an FmHA complex in Deadwood, South Dakota, assuming the rights and obligations of the previous owner.¹³⁰ The financing agreement assumed by Parkridge allowed for prepayment of the mortgage at any time.¹³¹ In 1987, however, Congress adopted the Emergency Low Income Housing Preservation Act of 1987.¹³² The Act placed strict conditions and limitations on mortgage prepayment, such as a waiting period and a sale

125. *Id.* at 2897 (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) ("[L]and-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests'")).

126. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (finding a taking where the state passed legislation regulating the plaintiff's property); *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984) (finding a taking where plaintiff relied on provision of FIFRA); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (finding a taking where county took interest payments of an interpleader fund). But see *Leigh & Burton*, *supra* note 4, at 843-44 (indicating that a reasonable actor might anticipate changes in statutes or regulation).

127. 13 F.3d 1192 (8th Cir.), *cert. denied*, 114 S. Ct. 2163 (1994).

128. *Id.* at 1195 (citing 42 U.S.C. § 1485 (1988) and § 515 of the 1949 Housing Act).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* (citing Pub. L. No. 100-242, 101 Stat. 1815 (1988) (current version at 42 U.S.C. § 1472(c) (1988))).

requirement, in order to preserve low-income housing facilities.¹³³ When Parkridge was precluded from exercising its contractual prepayment option in 1990, it brought suit seeking to declare the Preservation Act unconstitutional as applied and an unconstitutional taking of property.¹³⁴ The Eighth Circuit Court of Appeals, taking into account the owner's reasonable investment-backed expectations, concluded that such action was foreseeable.¹³⁵ The court based its decision upon the policy underlying the loan program and the Act, which was to prevent the decline of senior citizen and low-income housing through prepayment.¹³⁶ Because this type of action was foreseeable, Parkridge's investment-backed expectations were not reasonable and therefore, the takings claim failed.

In a further case, *Ciampitti v. United States*,¹³⁷ a group of landowners who bought various tracts of land in the beach town of Wildwood, New Jersey, sued, claiming a taking when the Army Corps of Engineers denied their permits to fill wetlands.¹³⁸ Ciampitti purchased seven tracts of land in an area known as Diamond Beach. In all but the last of these purchases, he purposely avoided buying land within the wetland-designated areas.¹³⁹ The United States Claims Court noted that Ciampitti had been put on notice that he might not be able to obtain the necessary permits by both his engineering firm and federal government officials before he purchased the last tract of land.¹⁴⁰ Despite Ciampitti's argument that the land had a riparian grant which he thought would allow him to fill, and that other similar properties were allowed to be filled, the Claims Court denied his takings claim.¹⁴¹ The opinion relied heavily on the fact that Ciampitti had notice and therefore his distinct investment-backed expectations were not reasonable.¹⁴²

133. *Parkridge Investors*, 13 F.3d at 1195-96.

134. *Id.* at 1197.

135. *Id.* at 1199.

136. *Id.*

137. 22 Cl. Ct. 310 (1991).

138. *Id.* at 311.

139. *Id.* at 312-13.

140. *Id.* at 321.

141. *Id.* at 314-15.

142. *Id.* at 321.

4. The Opinion in *Bowles v. United States*

A recent opinion from the United States Court of Federal Claims breathes new vitality into the "reasonableness" requirement. In *Bowles v. United States*,¹⁴³ the Army Corps of Engineers refused to grant the petitioner a permit to fill his land in a subdivision known as Treasure Island in Brazoria County, Texas.¹⁴⁴ The Corps of Engineers required the permit to fill for the installation of a septic tank for a single-family home.¹⁴⁵ Mr. Bowles argued that he never knew that a fill permit was required, and that a single-family home was the only possible use for the small lot.¹⁴⁶ Denying the permit, Bowles contended, basically robbed him of all economically viable use of his property.¹⁴⁷ The Claims Court found a taking, holding that denial of the fill permit rendered the property worthless.¹⁴⁸

In dicta, the court discussed Bowles' investment-backed expectations, focusing heavily on the question of notice to determine if his expectations were objectively reasonable.¹⁴⁹ The evidence established that owners of other lots in the subdivision never had to obtain fill permits from the Army Corps. Therefore a reasonable person would have no notice of the need to apply for a fill permit.¹⁵⁰ Furthermore, the court noted that Bowles had experience working with local regulatory agencies, was aware of the permit requirements and even discussed his plans with agency officials before purchasing the property. Even with this experience, Bowles was still not aware of the jurisdiction of the Army Corps. This fact, the court reasoned, supported its finding that Bowles did not have notice of the permit requirement. Therefore, the court held that Bowles' investment-backed expectations were reasonable.¹⁵¹

The implication of this decision is that if Mr. Bowles had had notice of the Corps' jurisdiction, his expectations would have included the full

143. 31 Fed. Cl. 37 (Cl. Ct. 1994).

144. *Id.* at 40.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Bowles*, 31 Fed. Cl. at 46, 47-49.

149. *Id.* at 50-51.

150. *Id.* at 51.

151. *Id.*

extent of Corps ability to regulate in areas under its jurisdiction. While Bowles' knowledge of Corps' jurisdiction still would not excuse a total deprivation of use or value resulting from the denial of a fill permit, the extent of his expectations would be affected by his awareness of Corps' regulatory jurisdiction.¹⁵²

Several facts weighed heavily in Bowles' favor in the court's discussion of the reasonableness of his expectations. Significantly, the court noted the fact that Bowles merely wanted to build a retirement residence on his lot, like other property owners in the subdivision had done.¹⁵³ Moreover, Bowles could have met all other legal and regulatory requirements to build his home, which strongly indicated that his expectations were reasonable. The court also found his plans to be "financially and physically feasible."¹⁵⁴

5. General Power of the Government

Finally, Berger's eleventh factor, which involves the general power of the government to regulate,¹⁵⁵ was used by the Third Circuit to deny plaintiffs' takings claims. In *Pace Resources, Inc. v. Shrewsbury Township*,¹⁵⁶ the town planning commission denied the plaintiff's application for a permit to develop its land for industrial use pursuant to an amendment to the local zoning ordinances.¹⁵⁷ Pace purchased a 146 acre tract of land which it divided into 47 lots. Pace planned to sell these lots for the development of an industrial park, and obtained a permit in 1973 for industrial use for the first six lots, which it later sold.¹⁵⁸ In 1976, the town adopted a new zoning ordinance which

152. *Id.* See Mandelker, *Investment-Backed Expectations*, *supra* note 1, at 225 (observing the *Lucas* court's holding that a landowner should "expect" newly enacted regulations to restrict the use of her property is counter intuitive).

153. *Bowles*, 31 Fed. Cl. at 46. See also *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901 (1992) ("The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition."); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 n.2 (1987) ("[T]he right to build on one's own property . . . cannot remotely be described as a 'governmental benefit.'"); *Groen & Stephens*, *supra* note 35 (discussing the difference between federal and state law protection of property rights).

154. *Bowles*, 31 Fed. Cl. at 50.

155. *Berger*, *supra* note 3, at 767.

156. 808 F.2d 1023 (3d Cir.), *cert. denied*, 482 U.S. 906, *reh'g denied*, 483 U.S. 1040 (1987).

157. *Id.* at 1025.

158. *Id.*

zoned all of Pace's land for industrial use.¹⁵⁹ Pace submitted a second permit request for an industrial park in 1978. At the same time, however, the Township, after receiving complaints by citizens, began reconsidering the 1976 zoning ordinance.¹⁶⁰ In 1979, the Township denied Pace's permit, based on defects in Pace's plan under the 1976 ordinance, and subsequently denied a modified plan submitted by Pace.¹⁶¹ In the same month, the Township rezoned thirty-seven acres of Pace's land for agricultural rather than industrial use.¹⁶² Pace brought an action to invalidate the rezoning, and eventually prevailed.¹⁶³ In a further proceeding, Pace claimed that the illegal rezoning constituted a taking, and sought to recover damages for losses it sustained between the time the Township denied the permit and the time Pace prevailed in its challenge to the rezoning.¹⁶⁴ In rejecting Pace's takings claim, the Third Circuit Court of Appeals held that:

[b]ecause Pace's expectations, in order to be reasonable, were necessarily subject to the power of the state to reasonably regulate in the public interest, Pace could have had no reasonable expectation in the Spring of 1979 that it would be entitled to utilize its 37 acres in accordance with its original plan.¹⁶⁵

In other words, Pace was operating within a regulatory scheme in which its permits could either be granted or denied. Within this framework, it had no reasonable investment-backed expectation that each permit it requested would definitely be issued once the Township changed its zoning ordinance. This point is further illustrated:

Given this regulatory framework, Pace could have had a reasonable expectation of recouping its \$142,000 investment in accordance with its original plan only through its 1978 submission. That submission, however, was considered by the Board of Supervisors under the original ordinance and was unaffected by the 1979 rezoning.

159. *Id.*

160. *Id.*

161. *Pace Resources*, 808 F.2d at 1025.

162. *Id.*

163. *Id.*

164. *Id.* at 1025-26.

165. *Id.* at 1033.

Once the Township modified its zoning ordinance in 1979, Pace became subject to the amendments with respect to any plans Pace submitted after the date of enactment¹⁶⁶

A subsequent Third Circuit opinion, *Midnight Sessions, Ltd. v. City of Philadelphia*,¹⁶⁷ also views the power to regulate as an a fortiori bar to reasonable expectations. In *Midnight Sessions*, the City of Philadelphia denied licenses to two businesses that sought to operate as dance halls. The city based its denial primarily on neighborhood disapproval and safety concerns generated by the potential for large crowds.¹⁶⁸ Although the district court held that the plaintiffs had been denied their reasonable investment-backed expectations, the court of appeals reversed.¹⁶⁹ The court of appeals noted that the district court looked mainly to the investment-backed expectation factor rather than considering this factor in conjunction with the decrease in property value.¹⁷⁰ More importantly, the circuit court followed *Pace* and held that "[w]hile appellees' expectations of dance hall licenses and profits are investment-backed, they cannot be reasonable in light of the City's explicit power to regulate dance halls."¹⁷¹ The Third Circuit requires that for an investment-backed expectation in a regulatory framework to be reasonable, landowners must take into account the possibility that the government may change its ordinance or regulation, or simply deny a license.¹⁷²

These cases illustrate that there cannot be a set formula for determining when an owner's expectations are reasonable. Each case must be decided on its own facts. There is one principle that does commonly apply, however, and that is the extent to which the government can change the rules in mid-stream. It is clear that a property

166. *Id.*

167. 945 F.2d 667 (3d Cir. 1991), *cert. denied*, 503 U.S. 984 (1992).

168. *Id.* at 671.

169. *Id.* at 673, 687.

170. *Id.* at 678.

171. *Id.*

172. If this reasoning were true, why should not value be enhanced by reasonably foreseeable or available ordinance changes or permits? See Leigh & Burton, *supra* note 4, at 863 (arguing that reasonably foreseeable zoning changes that would benefit the property value should be part of the reasonable investment-backed expectations analysis).

owner does not have a vested right in the rules remaining unchanged.¹⁷³ Even Justice Scalia, writing for the majority in *Lucas*, recognized the state's right to enact value-affecting regulations.¹⁷⁴ On the other hand, a property owner's rights are not simply what the government says they are.¹⁷⁵ Between these extremes, property owners have a right to rely on the existing rules, provided that their reliance is reasonable and backed by some investment.¹⁷⁶ Courts are still struggling with the delicate balance between a property owner's right to rely on the existing rules and the scope and extent of the government's authority to change those rules.¹⁷⁷

173. MANDELKER, *LAND USE LAW*, *supra* note 3, at § 2.18 ("[A] property owner does not have investment-backed expectations . . . when he is on notice of a regulation that may affect the value of his property.") (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984)). *But see* *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899-900 (1992) (stating that although there is an implied limitation on a person's use of land, if the state eliminates all viable use of the property, a taking has occurred). The *Lucas* rationale appears to fix the date for reasonable investment-backed expectations on the date of acquisition or the date the investment is made. This seems to be too narrow a definition, rendering government virtually powerless. *See* Leigh & Burton, *supra* note 4, at 847, 852-53 (arguing that the more appropriate method of calculating investment-backed expectations is to look to the legal status of the property just before the government began its regulatory activities).

174. *Lucas*, 112 S. Ct. at 2899 ("[S]ome values are enjoyed under an implied limitation and must yield to the police power.") (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)). *See also* *Lucas*, 112 S. Ct. at 2903 (Kennedy, J., concurring) ("The Takings Clause, while conferring substantial protection on property owners, does not eliminate the police power of the State to enact limitations on the use of their property."); Mandelker, *Investment-Backed Expectations*, *supra* note 1, at 225 (arguing that the *Lucas* court's recognition of an implied police power limitation is inconsistent with the Court's holding that a taking occurs when the economic viable use is denied).

175. *Lucas*, 112 S. Ct. at 2900 (holding that confiscatory regulations cannot deprive the land of economic vitality unless such restrictions inhere in the title itself); Leigh & Burton, *supra* note 4, at 839-40, 848, 855 & n.156 (arguing that predatory local land use regulation is at the core of takings). *See* *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 n.2 (1987) ("[T]he right to build on one's own property . . . cannot remotely be described as a 'governmental benefit.'"); *Florida Rock Indus. v. United States*, 791 F.2d 893, 905 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987) ("In determining the severity of economic impact, the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored.").

176. Leigh & Burton, *supra* note 4, at 843-44 & nn.86, 88.

177. For an example of an extreme resolution of this problem, based on a literal projection of the *Lucas* rationale, see Leigh & Burton, *supra* note 4, at 856. It is clear that the government's ability to change the rules depends on the property owner's notice of the rules when he purchased the property. *E.g.*, *Bowles v. United States*, 31 Fed. Cl. 37, 49

B. "Investment-Backed"

1. Reasonable Return vs. Speculation

The second component of the reasonable investment-backed expectations analysis, whether the expectations are "investment-backed,"¹⁷⁸ has spawned much commentary from both courts and legal critics. The problem seems to have originated within the *Penn Central* opinion itself. Justice Brennan carefully distinguished mere profitability or the most optimal use of property from seeking to obtain a "reasonable return" on the investment.¹⁷⁹ This has been characterized as the "speculator exception," referring to a speculator interested in the profitability of land as opposed to others who will theoretically be satisfied with a reasonable return on their property investment.¹⁸⁰ Consequently, since the *Penn Central* decision, courts have been confused and conflicted over the proper interpretation of this distinction.

Professor Mandelker notes the limitations placed on the expectations taking factor by Justice Brennan. Professor Mandelker attributes the Courts' refusal to protect speculation to the "social undesirability" of land speculation.¹⁸¹ One definition distinguishes land investment from land speculation by characterizing the former as holding land to earn a profit on activities conducted on the land during the holding period, and the latter as holding land to earn a profit on its capital appreciation when it is sold.¹⁸² This approach limits application of the investment-backed expectations factor by circumscribing the type of expectations a court will consider investment-backed.¹⁸³ The Supreme Court has held that the mere purchase of land does not make an expectation investment-backed; the only expectation the law recognizes is the expectation that

(1994). *But see* Mandelker, *Investment-Backed Expectations*, *supra* note 1, at 225 (asserting that property owners expect that new regulations will restrict the use of their property from time to time).

178. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

179. *Id.* at 136.

180. Michelman, *supra* note 21, at 1223 ("A decision not to compensate is not unfair as long as the disappointed claimant ought to be able to appreciate how such decisions might fit into a consistent practice . . .").

181. Mandelker, *Is There a Taking?*, *supra* note 4, at 19.

182. *Id.* at 21 (citing R. HEALY & J. SHORT, *THE MARKET FOR RURAL LAND* 65 (1982)).

183. MANDELKER, *LAND USE LAW*, *supra* note 3, § 2.18.

regulation will not restrict the use of land so much so that no reasonable use remains.¹⁸⁴ Recall that a taking does not occur so long as a landowner's primary expectations in the use of his land are not frustrated.¹⁸⁵ Limiting expectations to those which attempt to earn a profit on activities conducted on the land seems to fit squarely within this notion of reasonableness.

Professor Mandelker, however, notes that there are serious difficulties with this approach to determining whether a purchaser bought the land for investment or speculation. Not only is an analysis of motive required, but a court must also consider whether the motive has changed over time.¹⁸⁶ By contrast, whether an investment is reasonable is considered only in reference to the time at which the investment was made.¹⁸⁷ Conceivably, one who purchases land speculatively but who later decides to profit from the use of the land, could be denied compensation for a taking because his motive changed from that of a speculator to that of a developer.¹⁸⁸ At the same time, an owner whose investment is found to be reasonable when made before the enactment of a governmental regulation will be compensated for a taking, while the same investment made after the governmental regulation would be deemed unreasonable. In many cases, courts have focused on the "reasonable" factor in their application of this test,¹⁸⁹ only applying the speculator exception to the "investment-backed" factor when it is clear that the landowner is attempting to exploit the land to receive a capital gain.¹⁹⁰

184. *Id.*

185. *Id.*

186. Mandelker, *Is There a Taking?*, *supra* note 4, at 21.

187. Peterson, *supra* note 27, at 1322.

188. See Mandelker, *Is There A Taking?*, *supra* note 4, at 21.

189. In a number of cases, courts appear to decide the issue solely upon examination of the reasonableness of the expectations involved. *E.g.*, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Hodel v. Irving*, 481 U.S. 704, 715 (1987); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 226-27 (1986); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984).

190. *E.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495-96 (1987); *Southview Assocs. Ltd. v. Bongartz*, 980 F.2d 84, 94 (1992); *Lakeview Dev. Corp. v. City of South Lake Tahoe*, 915 F.2d 1290, 1300 (1990); *Jentgen v. United States*, 657 F.2d 1210, 1213 (1981).

2. Character of the Investment

Two Supreme Court opinions addressing the takings issue have focused on the character of the investment rather than the amount of return received by the property owner.¹⁹¹ In *PruneYard Shopping Center v. Robins*,¹⁹² the California Supreme Court held that a California state constitutional provision allowing individuals to exercise their free speech and petition rights on the property of a privately owned shopping center did not violate the owner's Fifth Amendment rights.¹⁹³ Justice Rehnquist, writing for the United States Supreme Court employed the reasonable investment-backed expectations test to affirm that no taking occurred. The Court noted that PruneYard failed to show that the "right to exclude others" was so essential to the economic value of the property that a taking had occurred.¹⁹⁴ The Court was careful to distinguish the factual context from that in *Kaiser Aetna v. United States*,¹⁹⁵ emphasizing that in *Kaiser Aetna* the investment in the property contemplated exclusive and private use, while in *PruneYard*, the investment contemplated public use of the property.¹⁹⁶ However, this distinction is unique to these two cases, each of which virtually ignores the profitability/reasonable return dilemma.

3. Investment as Vested Rights

A decisive factor in establishing whether a property owner's expectations are investment-backed is the extent to which the owner has fulfilled his development plans.¹⁹⁷ The law of vested rights prohibits the government from changing the rules along a spectrum of activity ranging from the developer's application for a building permit, up to the

191. Matthew P. Pritts, Note, *The Material Burden Test: The Better Method of Determining Takings Issues Arising Under Section 621(a)(2) of the Cable Communications Policy Act of 1984*, 48 WASH. & LEE L. REV. 1109, 1137-38 (1991).

192. 447 U.S. 74 (1980).

193. *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979).

194. *PruneYard*, 447 U.S. at 84.

195. 444 U.S. 164 (1979).

196. *PruneYard*, 447 U.S. at 84.

197. See generally John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Taking Claims*, 49 WASH. U. J. URB. & CONTEMP. L. 27 (1996); Ackerman, *supra* note 3.

actual or substantial start of construction.¹⁹⁸ Once a property owner obtains vested rights under the relevant rules in effect in a given jurisdiction, the owner's expectations should be held sufficiently investment-backed to deserve judicial protection.¹⁹⁹ However, while obtaining vested rights under state law should be a clear case for finding that expectations are investment-backed, with the permit or construction serving as objective evidence, it should not be the only basis. To hold that the investment-backed test is met only when a property owner has substantially relied on a development permit²⁰⁰ ignores the original investment in the property and the myriad of financial and other forms of investment that can occur between the purchase of the property and the attainment of a building permit.²⁰¹

Clearly, in order for expectations to be investment-backed, some form of distinct, well-defined, monetary investment must be present.²⁰² However, the courts have given little guidance on the type or extent of such investment.

The Supreme Court has not addressed the "investment-backed" component of the test squarely, but may in the near future, as "[l]ower courts [] have rendered conflicting decisions on whether to accept the notion of profitability as a test for determining whether a taking has occurred."²⁰³

198. *E.g.*, *Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374 (11th Cir. 1994). See generally MANDELKER, *LAND USE LAW*, *supra* note 3, §§ 6.12-6.23; John J. Delaney, *Protecting Development Rights*, 10 PRAC. REAL. EST. LAW. 53 (1994); John J. Delaney, *Development Agreements: The Road from Prohibition to "Let's Make a Deal!"*, 25 URB. LAW. 49, 51-52 (1993); Delaney & Vaia, *supra* note 197; Ackerman, *supra* note 3, at 1235-56.

199. See Delaney & Vaia, *supra* note 197; Mandelker, *Investment-Backed Expectations*, *supra* note 1, at 236-38; Ackerman, *supra* note 3, at 1235; Gulliford, *supra* note 4, at 216-17.

200. See Mandelker, *Investment-Backed Expectations*, *supra* note 1, at 236-38.

201. See, *e.g.*, Gulliford, *supra* note 4, at 217-18.

202. *Id.*

203. *Berger*, *supra* note 3, at 768. See also *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 905 (Fed. Cir. 1986) (finding a taking based on the fact that Florida Rock was prevented from doing profitable business); *Park Ave. Tower Assocs. v. City of New York*, 746 F.2d 135 (2d Cir. 1984), *cert. denied sub nom.* 40 Eastco v. City of New York, 470 U.S. 1087 (1985) (denying a taking where Park Avenue alleged loss of profit); *William C. Haas & Co. v. City of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) (holding that the fact that a regulation creates a substantial economic loss for an individual does not convert the regulation into a taking), *cert. denied*, 445 U.S. 928, *reh'g denied*, 446 U.S.

IV. THE FUTURE OF THE "REASONABLE INVESTMENT-BACKED EXPECTATIONS" FACTOR IN TAKINGS JURISPRUDENCE

A. *Lucas v. South Carolina Coastal Council*

In June 1992, the Supreme Court decided the landmark case of *Lucas v. South Carolina Coastal Council*.²⁰⁴ *Lucas* is significant, if for no other reason, because the Court found that the regulation in question amounted to a taking as applied to the landowner. Justice Scalia, writing for the Court, did not use the "reasonable investment-backed expectations" factor in his analysis. Instead, he fashioned a categorical standard of whether the regulation in question denied the landowner "all economically beneficial or productive use" of the property.²⁰⁵ This analysis actually echoes the two pronged test applied in *Keystone Bituminous Coal Ass'n v. DeBenedictis*²⁰⁶ as opposed to the multi-factor balancing test of *Penn Central*.²⁰⁷ *Keystone* confirmed a test the Court had established earlier in *Agins v. City of Tiburon*,²⁰⁸ namely that a taking occurs if the regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land."²⁰⁹ Because the Court in *Lucas* found that the claimant's two beachfront lots had been rendered valueless, rather than merely diminished in value, by the regulation banning coastal zone construction, the Court did not need to reach the three pronged analysis articulated in *Penn Central*.²¹⁰

Expectations analysis did appear in Justice Scalia's formulation of the categorical test. In discussing the nuisance exception, the Court indicated that the state law of property and nuisance help shape a

929 (1980).

204. 112 S. Ct. 2886 (1992).

205. *Id.* at 2893.

206. 480 U.S. 470, 485 (1987).

207. 438 U.S. 104, 124 (1978).

208. 447 U.S. 255 (1980).

209. *Id.* at 260 (citations omitted).

210. These three factors are: (1) the economic impact of the regulation on the claimant; (2) its interference with distinct investment-backed expectations; and (3) the character of the governmental action. *Penn Central*, 438 U.S. at 124.

landowner's expectations:

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property.²¹¹

Justice Scalia hinted that expectations can be measured at the time of the owner's acquisition of the property.²¹²

Justice Scalia also responded to Justice Stevens' dissent by making clear that the Court's analysis in *Lucas* did not obviate the need to examine other factors, such as "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" in cases where the landowner does not suffer a total loss.²¹³

Justice Kennedy's concurrence clearly supported consideration of reasonable investment-backed expectations in regulatory takings analyses. Justice Kennedy specifically stated that, "[w]here a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations."²¹⁴ In addition, the concurrence would allow the government more leeway in affecting land values. Justice Kennedy stated that

211. *Lucas*, 112 S. Ct. at 2899 (footnotes omitted).

212. *Id.* ("[O]ur 'takings' jurisprudence, . . . has traditionally been guided by the understandings of our citizens regarding the content of . . . the 'bundle of rights' that they acquire when they obtain title to property.").

213. *Id.* at 2895 n.8 (quoting *Penn Central*, 438 U.S. at 124). See Leigh & Burton, *supra* note 4, at 844-50 (discussing reasonable investment-backed expectations and *Lucas*). See also *Lucas*, 112 S. Ct. at 2894 n.7 (discussing the "deprivation of all economically feasible use" rule).

214. *Lucas*, 112 S. Ct. at 2903 (Kennedy, J., concurring). Justice Scalia's categorical formulation does not depend on inquiry into the interference with investment-backed expectations. Justice Scalia reserved that inquiry for non-categorical cases. *Id.* at 2895 n.8. Although Justice Kennedy heavily emphasized the expectations test, he clearly departed from the majority opinion by combining the two tests and by not recognizing the categorical test that is the core of the majority opinion.

"[t]he common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society,"²¹⁵ and that "reasonable expectations must be understood in light of the whole of our legal tradition."²¹⁶ In essence, in order to support a severe restriction on property, "the means as well as the ends of regulation must accord with the owner's reasonable expectations."²¹⁷ Despite the fact that the discussion in the majority opinion is dicta, and the obvious differences on this point between Justice Scalia and Justice Kennedy, *Lucas* not only leaves the reasonable investment-backed expectations factor in place, but re-emphasizes its role in takings analyses. The repeated references to property owners' expectations in both the Scalia and Kennedy opinions may be a signal that the Supreme Court intends to give greater consideration to this factor in future opinions than it has in the past.

B. *Post-Lucas Holdings*

A number of 1992 rulings, as well as a recent 1994 opinion, seem to take their cue from *Lucas*' underscoring of the inquiry into reasonable investment-backed expectations as part of their takings analysis. In *Naegele Outdoor Advertising, Inc. v. City of Durham*,²¹⁸ an outdoor advertising company sued the city seeking to invalidate, on constitutional grounds, an ordinance prohibiting all commercial, off-premises advertising signs.²¹⁹ The district court's decision relied primarily on an inquiry into the ordinance's interference with Naegele's investment-backed expectations. The court concluded that the five and one-half year amortization provision gave rise to the expectation that there would be no use of the signs thereafter.²²⁰ The court did not reach its conclusion on that factor alone, but also looked briefly into the character of the government action.²²¹

215. *Id.* at 2903 (citing *Goldblatt v. Hempstead*, 369 U.S. 590, 593 (1962)).

216. *Id.*

217. *Id.* at 2904.

218. 803 F. Supp. 1068 (M.D.N.C. 1992), *aff'd*, 19 F.3d 11 (4th Cir.), *cert. denied*, 115 S. Ct. 317 (1994).

219. *Id.* at 1070.

220. *Id.* at 1079.

221. *Id.* at 1079-80.

Similarly, in *Berrios v. City of Lancaster*,²²² the district court relied on the reasonable investment-backed expectations factor in its determination that a sixty-day notice provision concerning condemned property nullified any expectation that may have arisen by the payment of monthly rent.²²³ The court admitted that a reasonable investment-backed expectation to remain in possession of the property for thirty days arises upon payment of a monthly rent.²²⁴ Nonetheless, because the ordinance at issue involved a sixty-day notice period, there simply was no reasonable investment-backed expectation to retain possession beyond those sixty days when the "investment" purchased was in thirty day periods.²²⁵

Finally, in *Bowles v. United States*,²²⁶ the Court of Federal Claims focused heavily on whether Bowles had a reasonable investment-backed expectation that he could place fill on his land.²²⁷ In finding for the plaintiff, the court ultimately held that he had been robbed of all economically beneficial use.²²⁸ The court, in dicta, indicated that even if all economically beneficial use had not been taken, Bowles' reasonable investment-backed expectations had "been substantially frustrated so that compensation is required under the Fifth Amendment."²²⁹

V. CONCLUSION

These cases embody the increasing significance that the reasonable investment-backed expectations factor is receiving in takings jurisprudence. Initially, when Justice Brennan described this factor in *Penn Central*,²³⁰ lower courts considered it a minor part of the takings analysis. However, more recently, and especially after *Lucas*, courts seem less hesitant to rest their decisions predominately on whether the governmental act has wrongly interfered with the reasonable investment-backed expectations of the landowner and, as illustrated above, to

222. 798 F. Supp. 1153 (E.D. Pa. 1992).

223. *Id.* at 1158.

224. *Id.*

225. *Id.* at 1159.

226. 31 Fed. Cl. 37 (1994).

227. *Id.* at 49-50. See *supra* notes 143-54 and accompanying text.

228. *Id.* at 53.

229. *Id.*

230. See *supra* notes 6-20 and accompanying text.

dispose of cases on this factor alone. Recent court opinions are laying a firm foundation for future judicial reliance on reasonable investment-backed expectations as an important factor in determining whether governmental regulation constitutes a taking of private property.