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KING v. NORTH CAROLINA: A Misinterpretation of the Lucas Takings Rule

I. INTRODUCTION

The Fifth Amendment of the United States Constitution provides that private property shall not "... be taken for public use without just compensation." The purpose of this clause is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." In Lucas v. South Carolina Coastal Council, the Supreme Court held that a government regulation that deprives a landowner of all economically beneficial use of his land is a taking unless the use prohibited amounts to a nuisance. While this decision was a step in the "right" direction, the narrow holding of Lucas only applies in rare cases where the affected land is left with no economically beneficial use. Much more common is the situation found in King v. North Carolina, where the North Carolina Court of Appeals upheld a state regulation which decreased the value of the plaintiff's land by prohibiting the best and most efficient use of the land, but did not totally diminish the value of the land.

In so doing, the court erroneously interpreted Lucas as holding that a government regulation amounts to a taking only where it deprives the land of all economically beneficial use. This note will examine the decision in King and analyze the facts of this case under the correct interpretation of Lucas. Part II of this note will present the facts and procedural history of King. Part III will demonstrate that the Lucas rule, as applied in King was erroneous, and will analyze the facts of King under the correct interpretation of Lucas.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY OF KING

Ruth A. King owned an eight acre peninsula extending into the Topsail Sound in Pender County, North Carolina. In the late

1. U.S. Const. amend. V.
1980's, King granted power of attorney over the peninsula to her son, Walter A. Warren, so that he could develop the property.\(^6\) Warren then initiated his plan to construct a marl/rock road along the middle of the peninsula, with residential lots on both sides of the road.\(^7\) However, in order to construct this road, Warren would have had to fill in approximately two acres of low-lying land in the center portion of the peninsula.\(^8\) This low-lying area was subject to runoff from the rest of the peninsula and to flooding during storm tides.\(^9\)

In July of 1988, Warren was ordered by the Coastal Area Management Act\(^10\) office (CAMA) in Surf City to cease and desist further development of the peninsula.\(^11\) The order resulted from Warren's failure to obtain a permit in regard to the interior two acres of the peninsula which CAMA identified as an area of "environmental concern."\(^12\) The next month, Warren was notified by the United States Army Corps of Engineers (COE) that the interior two acres of the peninsula were considered "wetlands."\(^13\) As a result, Warren was required to obtain a permit from the COE pursuant to § 404 of the Clean Water Act,\(^14\) prior to continuing development. Further, before the COE could issue a § 404 permit, Warren had to provide the COE with certification, pursuant to § 401 of the Clean Water Act, that the proposed fill would not violate state water quality standards.\(^15\) In North Carolina, the Division of Environmental Management (DEM) reviews § 401 certification requests, and the Environmental Management Commission (EMC) makes the final decision regarding the certification.\(^16\)

\(^6\) Id.
\(^7\) Id. at 814, 436 S.E.2d at 867.
\(^8\) Id.
\(^9\) King, 125 N.C. App. at 381, 481 S.E.2d at 331.
\(^10\) N.C. GEN. STAT. §§ 113A-100 to -134.3 (1994). This act, among other things, establishes an office that grants or denies building permits in the coastal areas of North Carolina.
\(^11\) King, 112 N.C. App. at 813, 436 S.E.2d at 866.
\(^12\) Id.
\(^13\) Id.
\(^14\) King, 125 N.C. App. at 381, 481 S.E.2d at 331(citing 33 U.S.C. § 1344 (1986)).
\(^15\) Id.
\(^16\) King, 125 N.C. App. at 381, 481 S.E.2d at 331.
The EMC denied Warren's request for certification.\textsuperscript{17} The EMC based its decision primarily on the findings of the DEM that the interior two acres of King’s property served as a filter, preventing certain harmful nutrients and sediments from seeping into surrounding shellfish beds, and that reasonable alternatives less harmful to the environment than Warren's proposal existed.\textsuperscript{18} The alternatives to Warren's proposed development scheme included moving the road to the south end, rather than the center, of the peninsula, and/or building some of the proposed houses on pilings.\textsuperscript{19}

In December of 1991, King (through Warren) filed a petition for judicial review of the EMC's denial of the § 401 certification. The Pender County Superior Court reversed the decision of the EMC\textsuperscript{20} holding that the DEM findings regarding the function of the wetland as a filter, and the existence of reasonable development alternatives, were in excess of the statutory authority of the agency, were not supported by substantial evidence, and were arbitrary and capricious.\textsuperscript{21}

The EMC appealed the trial court's reversal of its decision to the North Carolina Court of Appeals. The court stated that a court reviewing an agency decision must apply the "whole record test,"\textsuperscript{22} under which the reviewing judge determines whether there is substantial evidence in the whole record to justify the agency's decision.\textsuperscript{23} Then appellate review of the lower court's determination is limited to determining whether the lower court properly applied the whole record test.\textsuperscript{24} Based on this standard of review, the court of appeals held that the lower court had misapplied the "whole record test", in effect substituting his own judgment for that of the agency.\textsuperscript{25} Thus, the EMC denial of the § 401 certification was upheld on appeal.

Concurrent with the above described action, King filed suit claiming that the agency's denial of her § 401 certification limited the use of her property to the extent that she was denied all rea-

\begin{itemize}
  \item \textsuperscript{17} Id. at 382, 481 S.E.2d at 331.
  \item \textsuperscript{18} King, 112 N.C. App. at 815, 436 S.E.2d at 867
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} Id. at 816, 436 S.E.2d at 868 (citing Wiggins v. Dept. of Human Resources, 105 N.C. App. 302, 413 S.E.2d 3 (1992)).
  \item \textsuperscript{23} Id.
  \item \textsuperscript{24} Id. at 817, 426 S.E.2d at 869
  \item \textsuperscript{25} Id. at 818, 426 S.E.2d at 869.
\end{itemize}
reasonable use of her property, thus resulting in a taking of her property without just compensation. The State moved for summary judgment on the basis that King failed to meet a material element of her claim—i.e. that the total denial of the certification resulted in the total deprivation of reasonable use of her property. The State claimed that the holding in the previous case, challenging the validity of the agency decision, was binding on King here. As a result, King still had reasonable use of her property because the denial of the § 401 certification affected only one quarter of her property and reasonable alternatives to the proposed development existed.

In response to the State’s motion for summary judgment, King offered affidavits from two experts, James L. Powell and Collice C. Moore. Mr. Powell, a registered land surveyor, presented his opinion that the only practical way to subdivide the peninsula was with the road running along the middle—otherwise, Powell opined, some houses would have to be built on stilts or, bridges would have to be built from one side of the peninsula to the other. The implication of this testimony was that because houses on pilings are less valuable that ones not on pilings, and because bridges are expensive to construct, the property would not be worth developing in the manner recommended by the DEM. King also offered the affidavit of Collice C. Moore, a licensed real estate appraiser, who claimed the property would be worth $1,360,000.00 if developed according to Warren’s plan, but would be worth only $3,700.00 if not developed. Moore’s opinion was based on the assumption that Warren’s proposed plan was the only reasonable way to develop the peninsula.

Notwithstanding these affidavits, the trial court granted the state’s motion for summary judgment. The court treated the DEM findings as binding on King due to the previous suit whereby the EMC decision was upheld by the court of appeals; thus the affidavits presented by King were of no effect because they either stated or assumed that no reasonable alternatives existed to War-

26. King, 125 N.C. App. at 382, 481 S.E.2d at 332.
27. Id.
28. Id. at 383, 481 S.E. 2d at 332.
29. King, 125 N.C. App. at 384, 481 S.E.2d at 333.
30. Id. at 382, 481 S.E.2d at 332.
31. Id.
32. Id.
ren's proposed development, in contradiction to the binding DEM findings.33

King appealed the trial court’s decision to the North Carolina Court of Appeals. The court upheld the trial court’s treatment of the DEM findings as binding on King. Further, the court stated that in Lucas,34 the United States Supreme Court identified two situations where government regulation results in a taking: “regulations that compel physical invasions of property and regulations that deny an owner all economically beneficial or productive use of property.”35 The court then held that, because reasonable alternatives to the proposed development exist, the denial of a permit to fill in the wetlands in this case did not deprive King of all economically beneficial use, and thus there was no taking of property without just compensation.36 The North Carolina Supreme Court denied discretionary review.37

III. ANALYSIS

A. The Court of Appeals’ Misinterpretation of the Lucas Takings Rule

In King, the North Carolina Court of Appeals correctly stated that Lucas identified two instances where a government regulation can amount to a taking of private property for which just compensation is required. In particular, the court stated that Lucas requires just compensation where (1) a regulation compels physical invasion of the property, and (2) a regulation deprives the owner of all economically beneficial use of his property.38 Applying these two categories to the facts in King, the court of appeals determined that the State’s denial of the water quality certification did not compel a physical invasion of King’s peninsula, nor did it deprive King of all economically beneficial use of her property since reasonable alternatives to Warren’s plan existed.39 Assuming the DEM findings regarding reasonable development alternatives were accurate, to this point the court was correct in its analysis.

33. Id. at 383, 481 S.E.2d at 332.
35. King, 125 N.C. App. at 385, 481 S.E.2d at 333.
36. Id. at 386, 481 S.E.2d at 334.
38. King, 125 N.C. App. at 385, 481 S.E.2d at 333.
39. Id. at 385, 481 S.E.2d at 334.
But it is at this point that the court erred. The court of appeals then concluded that because the facts in King did not fall into either of the two categories described in Lucas, no taking had occurred. In other words, the North Carolina Court of Appeals reads Lucas as creating only two categories in which government regulation amounts to a taking—any case falling outside these categories, according to the court of appeals, is not a taking. But the majority opinion in Lucas does not stand for this proposition. Justice Stevens raised this precise issue in his dissent in Lucas. There, he stated that the majority's rule in Lucas seemed wholly arbitrary because the owner who is deprived of 95% of the value of his property would receive nothing while the owner deprived of 100% of its value is fully compensated. In response to Justice Stevens' concern, in a footnote to his majority opinion, Scalia wrote that

"[Justice Stevens'] analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, 'the economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with the distinct investment-backed expectations' are keenly relevant to takings analysis generally." (emphasis added).

Thus, the correct interpretation of Lucas is that there are indeed two situations where government regulations on the use of private property are categorically considered to be takings—i.e. regulations that compel physical invasions of the property, and regulations which deprive owners of all economically beneficial use of their property. However, where a certain fact pattern does not fit into one of these two categories, the court must analyze the facts based on other takings jurisprudence. That is,

40. *Id.*
42. *Id.* at 1019 n.8 (quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).
43. This rule is originally set forth in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Here, a New York law required landlords to permit the installation of cable television facilities inside their property for the benefit of the tenants. The Court held that a regulation permitting a permanent physical invasion was a taking without regard to the public interests the regulation might serve and without regard to how minor the occupation.
44. The exception to this rule, of course, is where the regulation merely prohibits a use that amounts to a nuisance. *Lucas*, 505 U.S. at 1022.
Lucas does not stand for the proposition that these two narrow categories are the only instances where a taking results. Yet in King, the North Carolina court of appeals interpreted the Lucas rule in this manner.

The Lucas rule only applies when a regulation deprives a property owner of all economically beneficial use of his property. This rule was made even more narrow by Justice Blackmun's dissent in Lucas where he stated that the South Carolina trial court was mistaken in finding that the plaintiff's property in Lucas had lost all economic value. According to Justice Blackmun, plaintiff's lots still had value because he could still exclude others, "... picnic, swim, camp in a tent, or live on the property in a movable trailer." This statement by Justice Blackmun is effectively providing a roadmap for trial courts to avoid the Lucas rule altogether by finding that some value still exists in the property. Justice Blackmun ignores the fact that Lucas paid almost 1 million dollars for the two lots; a hefty price for the right to exclude others and go swimming. Due to this narrow nature of the Lucas rule, it is reasonable to assume that the Court did not intend for the two categories to be the only situations where government regulation can amount to a taking.

As alluded to in Lucas, when the regulation is not severe enough to completely devalue the land, traditional takings analysis must be employed. Yet plaintiffs and courts generally seem to ignore this. The Lucas rule has quite an appeal to plaintiffs as a result of its apparent simplicity; but this simplicity is deceptive. Plaintiffs relish the idea that, to prevail, all that they must show is that the regulation has deprived them of all economically beneficial use. In most instances, plaintiffs likely believe that they have been deprived of all economically beneficial use because the government has taken away the only use the plaintiff desired. Reasonable alternatives may exist, however. The practical effect of the Lucas rule, then, is that nearly all plaintiffs bringing takings actions craft their complaints such that it appears that the regulation has the severe effect required by Lucas on their property. In so doing, they may fail to allege additional facts that

45. Lucas, 505 U.S. at 1044.
46. Id.
47. Blank
48. The plaintiff in King did this, as did the plaintiff in another recent North Carolina case, Messer v. Chapel Hill, 125 N.C. App. 57, 479 S.E.2d 221 (1997). There, the plaintiff alleged that an amendment to a zoning ordinance effectively
may be relevant to the traditional takings analysis and will be necessary if the court finds that the owner has not been deprived of all economically beneficial use. The court merely responds to the arguments raised by the parties, so if the parties concentrate on the issue of whether the property is deprived of all economically beneficial use, so will the court. As a result, once the court decides this issue, the parties and the court will assume that is the end. Yet clearly under *Lucas*, if this issue is decided in the negative, the analysis must continue under "traditional" takings jurisprudence.

B. "Traditional" Takings Analysis

It is no wonder that plaintiffs seek to frame their complaints so that the *Lucas* rule will apply. "Traditional" takings law does not offer much guidance nor assurance to plaintiffs whereas the *Lucas* rule seems simple, or at least understandable. It is a rule that a plaintiff can sink his teeth into, unlike the traditional takings law.

Prior to 1922, the "takings clause" of the Fifth Amendment to the U.S. Constitution was generally believed to reach only direct appropriations of property—e.g. land taken to build a road. In that year, however, the Supreme Court decided its first regulatory takings case. 49 Justice Holmes announced the general rule that, "...while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 50 In an attempt to define what is "too far," Justice Holmes discussed three "tests" relevant to whether a taking has occurred, 51 however each test has ambiguities.

Under Justice Holmes' first test, the diminution in value must be considered. One must compare the value of the land with the regulation to the value of the land without the regulation. If the regulation "goes too far," a taking has occurred. 52 But Justice Holmes did not define how much diminution in value "goes too far." After *Lucas*, one does know that if the value of the land after

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50. Id. at 415.
52. *Id.* at 413.
the regulation is zero, the regulation has "gone too far," and a tak-
ing has occurred.53 But as shown in Scalia's majority opinion in
_Lucas_, and as alluded to by Justice Holmes in his majority opinion
in _Pennsylvania Coal_, the value of the property does not have to
be entirely diminished for a taking to result.

Under the second test Justice Holmes' announced in _Penn-
sylvania Coal_, the public benefit derived from the regulation must
be weighed against the harm imposed on the private individual. If
the harm to the individual is great while the benefit to the public
is minor, then the regulation has resulted in a taking.54 Here
again, this test contains ambiguity in that one does not know how
severe the harm must be, nor how substantial the public benefit
must be.

Under Justice Holmes' third test, the so-called "average recip-
rocity of advantage" test, any benefit the regulation bestows
upon the landowner himself is weighed against whatever detri-
ment the landowner has suffered due to the regulation.55 This
test, too, is ambiguous. The weight courts give to the benefit and
detriment would determine the outcome of the case. What one
court may find to be a substantial benefit to the landowner,
another court may find minuscule. Although these three tests are
filled with ambiguities, taken together, they provide a framework
to analyze whether the regulation has gone too far, i.e. interfered
with the landowner's use and enjoyment of his property to the
extent that the government has effectively "taken" the property
from the landowner.

Since the Court decided _Pennsylvania Coal v. Mahon_, they
struggled with the notion of when a regulation "goes too far." Insted of defining this phrase, the Court has developed the two
categories described in _Lucas_ that are per se takings (i.e. physical
invasion and deprivation of all economically beneficial use). Other
than these two categories, however, the Court has basically
engaged in "ad hoc, factual inquiries"56 and has developed factors,
similar to those in _Pennsylvania Coal_, to consider in deciding
whether a taking has occurred. In _Penn Central Transp. Co. v.
City of New York_, the last major takings case decided before
_Lucas_, the Court described a new factor to consider: "the extent to
which the regulation has interfered with distinct investment-

53. Blank
54. _Id._ at 413-14.
55. _Id._ at 415.

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backed expectations.\textsuperscript{57} In this case, the majority held that the restrictions imposed on the plaintiff, due to its building being designated a landmark, did not result in a taking of the plaintiff's property because the restrictions did not interfere with the plaintiff's current business—i.e., it did not interfere with the plaintiff's "investment-backed expectations."\textsuperscript{58} The Court also reaffirmed the Pennsylvania Coal factor of diminution in value, but stated that a decrease in the value of the property alone is not sufficient to constitute a taking.\textsuperscript{59} Of course, one may conclude from Lucas that if all of the value of the property is diminished by a regulation, and the use prohibited is not a nuisance,\textsuperscript{60} then there has been a taking. But short of total diminution of value of the land, presumably Penn Central still applies and more than a mere decrease in value is required.

Justice Rehnquist, along with two other Justices, dissented in the Penn Central case. He argued that New York City had imposed a substantial cost on less than 0.1% of the landowners of the city "for the general benefit of all its people."\textsuperscript{61} According to Justice Rehnquist, "[i]t is exactly this kind of imposition of general costs on a few individuals at which the 'taking' protection is directed."\textsuperscript{62} This argument goes to the purpose of the taking clause—i.e., private individuals should not be forced to personally carry the financial burden of regulations that in all fairness should be borne by the general public.\textsuperscript{63} Justice Rehnquist's dissent perhaps carries more weight now because of the current makeup of the Supreme Court. When Penn Central was decided, Justice Rehnquist and his fellow conservative justices were the minority on the Court. Now, however, the conservative wing is in the majority, as it was when Lucas was decided. In Lucas, Justice Rehnquist joined with Justice Scalia's majority opinion, indicating that if the Court were faced with a case similar to Penn Central

\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Although it is not stressed in this casenote, it is clear from Lucas that if the use prohibited by a regulation amounts to a common law nuisance, no taking occurs even if the property is thus deprived of all economically beneficial use. This is because a landowner does not have an inherent right to use his property in a manner that amounts to a nuisance, so the regulation has not taken any rights away from the landowner. Lucas, 505 U.S. at 1022.
\textsuperscript{61} Penn Central, 438 U.S. at 147.
\textsuperscript{62} Id.
\textsuperscript{63} Armstrong v. United States, 364 U.S. 40, 49 (1960).
today, Chief Justice Rehnquist's opinion would likely become the majority opinion.

To summarize the "traditional" takings analysis, the court basically engages in an inquiry into the facts and circumstances of a given case, and applies certain factors to determine if the regulation involved has "gone too far." Such factors include the diminution in value, interference with distinct investment-backed expectations, public benefit verses private harm, and average reciprocity of advantage. Also, it is instructive to keep in mind the purpose of the taking clause to the Fifth Amendment. If the facts of a given case indicate that the regulation did not compel a physical invasion of the plaintiff's property, nor did the regulation deprive the owner of all economically beneficial use, this traditional analysis must be applied to determine whether a taking has occurred.

C. Analysis of King Under the Correct Interpretation of Lucas

As explained in Section A above, the North Carolina Court of Appeals correctly determined that the State's denial of the § 401 water quality certification did not compel a physical invasion of King's peninsula nor did it deprive King of all economically beneficial use of her property. However, upon making this determination, the court of appeals affirmed the trial court's grant of summary judgment for the State without engaging in traditional takings analysis. This was error, and resulted in the court reaching the wrong decision.

Instead, after determining that Lucas did not apply, the court of appeals should have applied traditional takings analysis. This would have involved using the factors mentioned above such as diminution in value, interference with distinct investment-backed expectations, public benefit vs. private harm, and average reciprocity of advantage. In regard to the first factor—the denial of the § 401 certification surely decreased the value of King's land. The value of land is determined by what the land would sell for on the open market. A given tract of land will sell for more on the open market if all of the land in that tract is available for development. Thus, an eight acre tract of land on which all eight acres is available for development is more valuable than an eight acre tract of land on which only six acres is available for development. In effect, the latter example has two wasted acres, or rather, it is merely viewed on the open market as a six acre tract. By not allowing Warren to fill in the two acres on King's property, the
state has effectively turned the peninsula into a six acre peninsula as opposed to the actual eight acres. As a result, the value of the land on the open market is decreased approximately to the value of a six acre peninsula.

Also relevant to the value of land on the open market is the cost that will be involved in developing the land. For instance, land that is flat is easier to develop than land that is sloped, and thus the flat land is more valuable. Similarly, land that does not require the construction of a bridge in order to develop is more valuable than land that will require such a construction. In King, one of the reasonable development alternatives advanced by the DEM included the construction of a bridge from one side of the property to the other. This additional cost of development decreases the price that the land would bring on the open market—i.e. it decreases the value of the land.

For these two reasons, it is clear that the state regulation decreased the value of King's land. However, the extent to which the land value was decreased is not actually known. One can conclude that the value of the land developed as proposed by Warren was $1.36 million, and that the value of the land not developed at all is $3,700. One does not know, however, what the value of the land would be as developed according to any of the supposedly reasonable plans promulgated by the DEM, nor does one know the extra costs involved in developing the property under one of these plans. The relevant figure in this “diminution in value test” would be the difference between the $1.36 million and the value of the land developed as proposed by the DEM.

Considering the second test mentioned above, it is not clear whether the investment-backed expectations test would even apply in a case such as this. If so, it would seem to be interwoven with the “diminution in value test.” The investment-backed expectations test first emerged in a case in which the plaintiff had a going business concern operating on the regulated property. The Court stated that the plaintiff's investment backed expectations were the profits it made from this business. In King, there is no business operating on the peninsula. The expectation of the owner, here, is the profits from the development and sale of the land. But any interference with this expectation is directly reflected in the diminution in value test above, so this test does not add anything to the takings analysis under the particular facts of this case.
Next, the harm the regulation inflicts on King must be weighed against the benefit the regulation confers on the public. Here again, one does not have adequate information. In particular, one does not know how much harm has been placed on King. Presumably, this harm will be reflected by the diminution in value of King’s land. However, even though the benefit of environmental regulations to the public is impossible to quantify, one does know that the public gains a substantial benefit from regulations that protect shellfish beds. It is important to note that the appropriate benefit to weigh against the private harm to King is the benefit the public receives from wetland regulation in general, as opposed to the benefit the public would receive from the denial to fill in King’s two acres specifically. The former is a substantial benefit, while the latter is a negligible benefit. This test seems to favor the State because wetland regulation does provide the public with a substantial benefit and one does know that King’s property still has some value.

The analysis of the “average reciprocity of advantage” factor is similar to the public benefit vs. private harm analysis. The private harm is of course the same. The benefit that King receives from wetland regulations is identical to the benefit of such regulations to the public as a whole.

Finally, although the substantial benefit the public receives from regulation of wetlands would seem to outweigh any amount of private harm, this notion must be reconciled with the purpose of the Fifth Amendment. Interstate highways, like regulations of wetlands, provide the public with a substantial benefit, albeit a different type of benefit. But no one would seriously argue that private landowners should not be compensated when a highway cuts through their property. Similarly, since the general public is benefited by regulation of wetlands, the general public should be willing to bear the cost of such regulations. Fairness dictates that private landowners, who happen to have part of their land designated as wetlands, should not have to shoulder the burden of these regulations alone if the regulation causes substantial diminution in value of their land.

On balance, considering all of these factors along with the purpose of the “takings” clause of the Fifth Amendment, this case should have been reversed and remanded to the trial court for determination of the diminution in value of King’s property. Unless the diminution in value was found to be miniscule, the
trial court should find that a taking has occurred, and King should receive just compensation.

IV. CONCLUSION

In King v. North Carolina, the North Carolina Court of Appeals misinterpreted the Lucas takings rule, and as a result, misapplied the law. Specifically, the Court of Appeals misinterpreted Lucas as holding that only two instances existed where government regulation amounted to a taking: (1) where the regulation compels a physical invasion of the plaintiff’s property, and (2) where the regulation deprives the owner of all economically beneficial use of his property. In King, the Court of Appeals correctly found that the facts did not fit into either of these categories, but then erred in holding that because the facts did not fit into one of these two categories, no taking had occurred.

In fact, Lucas did hold that the two categories above are per se takings; but it did not hold that they were the only two instances where a taking would occur. If the facts of a given case do not fit into one of these categories, then the court must apply a “traditional” takings analysis to determine whether a taking has in fact occurred. Under this traditional approach, the facts and circumstances of a given case are analyzed with regard to certain factors such as diminution in value, interference with investment-backed expectations, weighing public benefit against private harm, and average reciprocity of advantage. These factors then must be reconciled with the general purpose of the taking clause, i.e. to spread the burden of regulations that in all fairness should not be borne by individuals.

Applying these factors and considering this purpose of the takings clause, this case should have been reversed and remanded to the trial court for determination of the diminution in value of King’s property. Unless the trial court found the diminution in value to be negligible, it should have found the regulation to be a taking and thus should have ordered the State to pay King just compensation.

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64. King, 125 N.C. App. at 385, 481 S.E.2d at 333 (1997).