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INTRODUCTION: REGULATORY TAKINGS AFTER *LUCAS* v. *SOUTH CAROLINA COASTAL COUNCIL*

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In *Lucas v. South Carolina Coastal Council*,¹ the Supreme Court clarified its prior decisions involving the Takings Clause of the Fifth Amendment to the United States Constitution.² These prior cases and others had left open some of the more significant issues involving the application of the Takings Clause to governmental regulation. Specifically, there remained unresolved the issue of its application to invalidate regulation on property or to obtain money damages for an overbroad regulation when the regulation did not involve a physical intrusion into the property. This is in contrast to situations

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1. 112 S. Ct. 2886 (1992).

2. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Keystone Vituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981); *Agins v. Tiburon*, 447 U.S. 255 (1980).

in which the clause was invoked to protect against a physical intrusion on private property by the government.

The factual setting in which *Lucas* arose is that the property owner, Lucas, purchased two residential subdivision lots on a South Carolina barrier island.³ His intention was to build single family homes similar to those which had already been built on adjacent parcels.⁴ At the time of the purchase, Lucas' lots were not subject to the state's Coastal Zone Building Permit requirements.⁵ Two years after his purchase, the South Carolina State Legislature enacted the Beachfront Management Act, which barred Lucas and other similarly situated landowners from erecting any permanent habitable structure on their parcels.⁶ Based upon the Beachfront Management Act, the South Carolina Coastal Council determined that Lucas' parcel was located in a zone in which "occupiable improvements" were prohibited.⁷

THE SOUTH CAROLINA PROCEEDINGS

Lucas promptly filed suit in the South Carolina Court of Common Pleas.⁸ In his action, Lucas did not challenge whether the Act was a lawful exercise of South Carolina's police power.⁹ Rather, he contended that the complete extinguishment of his properties' values entitled him to "just compensation" under the Takings Clause.¹⁰ After a bench trial, the court found that the Beachfront Management Act as applied to Lucas had rendered the properties "valueless."¹¹ The court held that a taking had indeed occurred under the Fifth Amendment of the U.S. Constitution, and ordered the Coastal Commission to pay "just compensation" in the amount of \$1,232,387.50.¹²

On appeal, the South Carolina Supreme Court reversed, basing its decision upon Lucas' concession "that the Beachfront Management Act was properly and validly designed to preserve . . . South

3. *Lucas*, 112 S. Ct. at 2887.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 2889.

8. *Id.* at 2890.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

Carolina's beaches."¹³ Because Lucas chose not to challenge the state's power to enact such legislation, the court was bound by the legislature's findings that the regulation was designed to protect against the loss of valuable public resources.¹⁴ The court ruled that the government does not have to pay "just compensation" when its regulation was directed at protecting the public interest.¹⁵ Therefore, the court held, Lucas was not entitled to compensation.¹⁶ The United States Supreme Court then granted certiorari to review the South Carolina decision.¹⁷

THE UNITED STATES SUPREME COURT DECISION (SCALIA, J.)

A difficult and significant problem in connection with a takings claim is the issue of whether the case is ripe for plenary review by the federal court system. This has generally been characterized as "the ripeness issue."¹⁸ The question of ripeness is usually the first line of defense for a governmental entity accused of violating the Takings Clause of the Constitution.

In *Lucas*, after argument to the South Carolina Supreme Court but prior to the issuance of the court's decision, the state legislature amended the Beachfront Management Act.¹⁹ The amendment authorized the Council, in certain circumstances, to issue "special permits" for the construction or reconstruction of habitable structures in the prohibited zone.²⁰ Because the amendment had not yet taken effect when Lucas had filed suit, Lucas was unable to avail himself of this special permit procedure.²¹ The State argued to the South Carolina Supreme Court that Lucas' claim was not ripe because the anticipated amendment might allow him to construct on his prop-

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 436 (1991).

18. *See, e.g., MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986) (court unable to evaluate takings claim due to the absence of a final decision by county planning commission regarding application of challenged regulation to plaintiff's property); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (jury award of compensation was premature due to plaintiff's failure to obtain a final decision from the regional planning commission regarding application of ordinance to his property). *Cf. Agins v. City of Tiburon*, 447 U.S. 255 (1980) (plaintiff's submission of his development plan to the city did not demonstrate that the ordinance plan of the city denied him his reasonable investment expectation).

19. *Id.* at 2890.

20. *Lucas*, 112 S. Ct. at 2890-91.

21. *Id.* at 2891.

erty.²² The Supreme Court of South Carolina ignored the argument and only addressed the merits of the case.²³

Justice Scalia, writing for the majority, also made short shrift of this argument.²⁴ Since South Carolina had stipulated during the state proceedings that a building permit would not have been issued prior to the 1990 amendment, Lucas had properly invoked the Supreme Court's jurisdiction by claiming that he had in fact been injured by the action of the state legislature.²⁵ The action of the state amounted to the temporary taking of his property which occurred from the date of the passage of the Act "to such time as this matter [was] finally resolved."²⁶

THE MERITS OF THE TAKINGS CLAIM

The Court candidly recognized that there was no set formula in its taking jurisprudence for determining how far the regulation would have to go in order to amount to a taking, which would be compensable under the Fifth Amendment.²⁷ However, in analyzing the issues and in summarizing its prior decisions, the Court set forth several situations which are undisputed compensable takings.²⁸

The first type of compensable taking identified by the Court involves the physical invasion of property by the government.²⁹ When government regulation compels the property owner to suffer a physical invasion of his property, the owner is entitled to just compensation.³⁰ Such compensation is required regardless of the degree of the invasion and without inquiry into the significance of the public purpose which motivates the regulation.³¹

The second type of compensable taking exists when government regulation denies the property owner *all* economically beneficial or productive use of his/her land.³² The Court drew this conclusion from *Agins v. City of Tiburon*,³³ relying upon *Agins* for the proposi-

22. *Id.*

23. *Id.*

24. *Id.* at 2891-92.

25. *Id.* at 2891 n.3.

26. *Id.*

27. *Id.* at 2893.

28. *Id.* at 2892-95.

29. *Id.* at 2893.

30. *Id.*

31. *Id.*

32. *Id.* at 2893-94.

33. 447 U.S. 255 (1980). See *supra* note 18 and accompanying text.

tion that the Fifth Amendment is violated when land use regulation “denies an owner economically viable use of his land.”³⁴ However, in its own words, the Court stated that a compensable taking occurs “where regulation denies *all* economically beneficial or productive use of land.”³⁵

The unexplained inclusion of the word “all” by the Court seems to be a narrowing of the critical requirement of the cause of action, especially since it does not appear in the original *Agins* formula. Fortunately, the Court did not feel compelled to get into an in-depth analysis of its addition of the word “all.” This is probably because the trial court in South Carolina found that the Act had left each of Lucas’s beach front lots without *any* economic value whatsoever.³⁶ Therefore, since Lucas’ property had lost all economic use or benefit, it was not a matter that needed further explanation by the court.

The lack of a meaningful distinction between the deprivation of all value in property and a severe diminution in value has always been a vexing problem in the development of takings jurisprudence. However, Justice Scalia, citing *Penn Central Transportation Co. v. City of New York*,³⁷ entered the thicket and pointed out that the impact of the regulation on the plaintiff and the extent to which the regulation interfered with distinct investment-backed expectations of the plaintiff are very relevant in the takings analysis.³⁸ From that starting point, the Court then began to discuss the concept of diminution of value.

It is true that in at least *some* cases the land owner with 95% loss will get nothing, while the land owner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the land owner whose premises are taken for a highway (who recovers in full) and the land owner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these “all-or-nothing” situations.³⁹

It is critical to realize that the Court has signaled a willingness to examine harsh land use restrictions which do not equate with a total taking. The court clearly is indicating (and this is one of the most significant aspects of the decision) that there are situations in

34. *Lucas*, 112 S. Ct. at 2893-94 (quoting *Agins*, 447 U.S. at 260).

35. *Id.* at 2893 (emphasis added).

36. *Id.* at 2894 n.7.

37. 438 U.S. 104 (1978).

38. *Id.* at 2895 n. 8.

39. *Id.*

which diminution in value of less than 100% will be compensated under the Takings Clause of the Fifth Amendment. Just because the analysis appears in dicta in a footnote is no reason to give it any less precedence than if it, in fact, had appeared in the body of the opinion. By embracing the concept of compensation for less than a 100% taking, the Court creates a category of cases for which compensation may be awarded. Therefore, it seems that whether or not a claimant will be awarded damages for less than a total taking will be determined by analyzing whether the regulation has interfered with distinct investment-backed expectations which were entertained in good faith by a reasonable person in the position of the claimant.⁴⁰

Having made its statement, the Court returned to its exposition of *Lucas* which it characterized as a "total takings" case.⁴¹ The Court specifically held, "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, . . . [the State] may resist compensation only if the logically antecedent inquiry in the nature of the owner's estate shows that the prescribed use interests were not part of his title to begin with."⁴²

While the property owner may expect some restrictions in the use of his property, the Court recognized a limitation in the State's ability to avoid compensation in creating such regulation.⁴³ For one thing, the government could not subsequently eliminate all economically viable use of land without paying compensation.⁴⁴ Also, while some land-use limitations were deemed permissible, the justification for the regulation must be analyzed before determining whether compensation could be avoided.⁴⁵ Further, a mere proper exercise of a state's police power will not always justify the regulation to the extent that compensation will not be required.⁴⁶ The state can not place any new restrictions upon the use of real property that did not exist prior to the owner obtaining title to the land.⁴⁷ Additionally, restrictions based upon existing notions of state property law and nuisance law would be examples of non-compensable takings.⁴⁸

In other words, on remand, South Carolina must "identify back-

40. *See id.*

41. *Id.* at 2896.

42. *Id.* at 2899.

43. *Id.*

44. *Id.* at 2900.

45. *Id.* at 2901.

46. *See id.* at 2900.

47. *Id.*

48. *See id.*

ground principles of nuisance and property law” that prohibit the use that Lucas intends for the property.⁴⁹ Also important is whether there are limitations in the title itself.⁵⁰ The Court said that only by showing that the regulation was derived from pre-existing restrictions on the owner’s title can the state fairly claim that it is actually taking nothing.⁵¹ By the same analysis, the limitations set by the Court would protect the land owner who is asked to shoulder a social burden for society as a whole.

In its determination on remand to the trial court of South Carolina, the majority opinion indicated that an analysis should occur of at least the following: (1) The degree of harm to public lands and resources, or adjacent private property, posed by claimant’s proposed activities; (2) The social value of claimant’s activities and their suitability to the locality in question; (3) The relative ease with which the alleged mischief could be avoided through measures taken by claimant and the government alike; (4) Whether the particular use proposed by claimant had been engaged in by similarly situated owners for a period of time,⁵² and; (5) Whether similarly situated owners are permitted to continue the use which is being denied to the claimant.⁵³

The Court specifically stressed that South Carolina must do more than merely rely upon the legislative declaration that the intended use of the land by Lucas was inconsistent with the public interest.⁵⁴ Thus, to win its case on remand, the state must show that it would have been in the position to restrain Lucas in a common law action for public nuisance based upon state nuisance and property law.⁵⁵

Many commentators have tended to minimize the significance of this case as merely a close 5-3 decision. Reading Justice Kennedy’s concurring opinion, one perceives that his position on these issues is in accord with that of the majority.⁵⁶ In his concurrence, he set forth further areas of factual inquiry which should be pursued: (1) Whether the petitioner had the intent and capacity to develop

49. *Id.* at 2901-02.

50. *Id.*

51. *Id.*

52. “The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition. . . .” *Id.*

53. *Id.* at 2901.

54. *Id.*

55. *Id.* at 2901-02.

56. *Id.* at 2902-04.

the property and failed to do so because the State prevented him, and;⁵⁷ (2) Recognizing that property is bought and sold, and investments are made subject to the State's power to regulate, what are the owner's reasonable investment-backed expectations?⁵⁸

Further, Justice Kennedy notes that South Carolina had not acted until after the property had been zoned for single family lots and until after other parcels had been improved.⁵⁹ By limiting Lucas the State was casting the "whole burden" of the regulation on Lucas' lots, while permitting the existing adjacent housing to remain.⁶⁰ For Justice Kennedy, this was an important element in determining compensation under the Takings Clause.⁶¹

Justice Kennedy, while agreeing with the majority that there had been a compensable taking, was of the opinion that common law nuisance was too narrow a ground to be the sole justification for the exercise of regulatory power.⁶² He believed that the state should be able to show more than nuisance as the reason for its regulation.⁶³ Clearly, this argument was rejected by the majority, which holds specifically that the content of the owner's title and the law of nuisance are the only ways in which a State will prevail in cases of this type.⁶⁴

What is also very clear from the Court's decision is that the courts should not accept sterile legislative findings and legislative determinations as reasonable justifications to deprive a person of beneficial use of the property under the Takings Clause.⁶⁵ Rather, the only determination that will justify a taking is the body of judicial law within the state's law of nuisance and the owner's title.⁶⁶ It seems that there has been a major departure from the usual deference to legislative findings and statements of legislative intent. In its stead, the judiciary is catapulted into the position as final arbiter of the reasonableness of takings under the Fifth Amendment, with concepts of nuisance as the pivotal factor.

57. *Id.* at 2902.

58. *See id.* at 2903.

59. *Id.* at 2904.

60. *Id.*

61. *Id.* The analysis seems to have a distinct equal protection/due process flavor.

62. *Id.* at 2903.

63. *Id.*

64. *See supra* notes 48-51 and accompanying text.

65. *See supra* notes 54-55 and accompanying text.

66. *See supra* notes 48-51 and accompanying text.

CONCLUSION

Lucas is important because it establishes the categorical situations in which the Takings Clause is violated and provides an analysis for the taking of the entire value of property by way of government regulation. Significantly, both the majority and Justice Kennedy in concurrence, seem to go out of their way to set forth factual inquiries, which should be made at the trial court level, concerning the basis for the so-called reasonable expectations of property owners. The opinion will serve as a primer and a guide for attorneys in drafting complaints of this type and in analyzing their client's situation. It will also guide the lower courts in applying the overall broad brush of the Fifth Amendment Takings Clause.

Having established a recognition of the possibility of compensation for a partial taking, the methodology for proving a total taking becomes important in the analysis of such. Unfortunately, this approach is uncertain because it is factually driven on a case-by-case basis. Only after continued litigation will the area be developed into a coherent body of law.

However, since 1987, when the famous trilogy of the Takings cases occurred, it took only five years to reach the point where the Court has essentially rejected a rigid ripeness analysis for jurisdiction, thereby creating some flexibility on this threshold issue. Having gotten directly to the nub of the case and to the analysis of the Takings Clause, the Court has set forth the areas of factual inquiry that must be pursued in cases of this type if the regulation is to be justified by government. Thus, since the log jam has been broken, this decision now leaves implementation to the lower courts who must begin to define the parameters of the claims of regulatory takings—both total and partial.

