

The Supreme Court Takes on "Takings":

LUCAS V. SOUTH CAROLINA COASTAL COUNCIL:

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On June 29, 1992, the United States Supreme Court handed down its decision in the high profile "takings" case, *Lucas v. South Carolina Coastal Council* (112 S.Ct. 2886). During its journey from the South Carolina courts to the United States Supreme Court, the case was hailed as a potential landmark in "takings" jurisprudence. Property rights advocates were particularly optimistic that the Court would take the opportunity in *Lucas* to strengthen protections for private property rights. The case probably fell short of these expectations, however, because the opinion was both narrowly drawn and raised new questions that will require further examination. This article discusses the decision, and analyzes its impacts.

BACKGROUND

In 1986, David Lucas purchased two residential lots on a South Carolina barrier island for \$975,000. At the time, one single-family residence would have been allowed on each of the lots, and no permits would have been required from the South Carolina Coastal Council ("Council"). In 1988, South Carolina enacted the Beachfront Management Act ("Act"), which directed the Council to establish a "baseline" along the shoreline, seaward of which occupiable improvements would be prohibited. For David Lucas, the baseline drawn by the Council had the direct effect of barring the development of any habitable structures on his property.

Lucas filed suit in state court, arguing that the Act and its construction ban effected a taking of his property without just compensation, in violation of the Fifth Amendment to the United States Constitution. Lucas contended that the Act deprived him of his property's entire value, and that he was entitled to compensation regardless of whether the State had legiti-

mate reasons for enacting the legislation. The trial court agreed and ordered that Lucas be paid \$1,232,387.50, representing his initial investment with interest. The Supreme Court of South Carolina reversed, finding that the Act was validly enacted as a means of preserving the state's beaches. Lucas took this decision up to the United States Supreme Court.

THE SUPREME COURT'S DECISION

The Supreme Court began its analysis of the merits of Lucas's claim by invoking one of the few settled rules of takings jurisprudence: that a government's physical occupation of private property, no matter how small, will almost always amount to a taking for which just compensation must be paid. The Court also stated that a second class of cases deserves "categorical treatment" as resulting in takings: when regulations deny all economically beneficial or productive use of land. The culmination of the Court's decision was a thirteen page analysis of the exceptions to its "categorical" rule of "total takings."

The Court first dismissed the argument that a state may regulate land use in a manner that results in a total deprivation of value if the proposed use would constitute a "harmful or noxious use." Drawing an analogy to its physical invasion cases, the Court stated that the harmful or noxious use characterization does not relieve the government of paying just compensation in the case of a total taking of property.

Instead, the Court held that in a case where all economically beneficial use is taken, the state "may resist compensation only if...[an] inquiry into the nature of the owner's estate shows that the proscribed

use interests were not part of his title to begin with." Justifications for limitations this severe must be found "in the restrictions that background principles of the state's law of property and nuisance already place upon land ownership." Thus, if the prohibited use of the property was always unlawful under state nuisance and property law, then the state could enact a regulatory measure denying all economically beneficial use of the property, without paying compensation. *Public Trust*, p.9

Applying this rule, the Court remanded the case to the South Carolina courts to determine whether the state's nuisance and property law would prohibit Lucas's development plans. The Court expressed doubt, however, that common law principles would prevent the development of Lucas's property.

THE IMPACT OF LUCAS

For land use regulators and property owners, Lucas is significant for several reasons. First, the Court announced the circumstances under which government may resist the payment of just compensation in cases where all economically beneficial use is deprived. For regulators, the principal lesson is that totally confiscatory land use controls are vulnerable to attack, unless a strong preexisting basis in state law can be identified as a justification for the regulation. Some have argued that there is nothing new in this aspect of the decision, since "total takings" are very rare. Furthermore, many land use regulations (including the 1990 revision of the South Carolina Beachfront Management Act) include variance or appeal provisions that may insulate the legislation from a "total takings" attack.

Land use regulators should also be aware that the Supreme Court narrowed the so-called "harm-prevention" or "noxious use" exception as it applies to total takings. This will require governments, in

those cases where deprivation of all economically beneficial uses has been established, to defend regulations with more than a mere incantation that the use is inconsistent with the public interest. The Supreme Court expressed a willingness to take a hard look at the justification for a regulation by requiring support in the state's property or nuisance law. Where takings are less than total, the Court has apparently left property owners to prove their case under the traditional takings analysis.

The Court pointedly discussed, but left for future consideration, the important question of the nature and extent of the "property" interest that is appropriate for a "total takings" analysis. In a footnote, the majority framed the issue with the example that where a "regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether [the Court] would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole."

If in the future the Court is willing to consider whether a property owner has been deprived of all economically beneficial use on only a portion of his property, the "total takings" rule announced in *Lucas* may prove to be significant. In that event, the takings equation might shift toward compensating property owners whenever all development is barred by government regulation on a segment of property recognized under state law. This would potentially hamper local government's ability to implement certain land use controls, such as wetlands regulations, hillside protection regulations, and public land or open space dedication requirements. Without further judicial extension, however, the *Lucas* decision will probably be limited to those cases where government has deprived a

property owner of virtually all economically beneficial use on an entire tract of property.

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The Public Trust Doctrine

State "public trust" doctrines are likely to become increasingly important as a result of *Lucas*. Public trust doctrines typically provide that title to tidal and navigable waters and associated submerged lands is held by the State *in trust* for the public. By statute and case law, the public trust may extend to other lands, waters and natural resources. If title is held by the State, all use may be prohibited *without* triggering a taking.

Interestingly, in one of the first takings decisions after *Lucas*, Oregon's Supreme Court held that beachfront property owners had no right to recover damages when state and local authorities denied them permits to build a seawall on their two vacant lots to make them suitable for hotel or motel development. The Court reasoned that there could not be a taking because the owners had no property interest in the dry sand area of the beach, as a matter of state law. *Stevens v. City of Cannon Beach*, 835 P. 2d 940 (1992).