

## OCTOBER 1992 LAW REVIEW

### CONSTITUTIONAL DIRE STRAITS FOR PUBLIC BAN ON PRIVATE BEACH BUILDING

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On June 29, 1992, the United States Supreme Court issued the landmark "Lucas" decision which further defined the Constitutional balancing act between private property rights and governmental land use regulations. The inherent authority of government to take those measures necessary to preserve the public health, safety and welfare are referred to as "police powers." In exercising such police, governmental entities may legitimately regulate private property rights.

Zoning laws which restrict and control the uses and development of private property are the most obvious examples of police power regulations. Similarly, such land use controls as floodplain regulation, wetland restoration, and beach preservation have been regarded as a legitimate exercise of governmental police powers.

As illustrated by "Lucas," such governmental regulation may not deprive a private landowner of all legitimate economic use of his private property without compensation, unless traditional property law principles would allow adjacent private landowners to block such uses. In other words, the effective taking of private property without compensation will constitute a legitimate exercise of police powers, if and only if, the challenged governmental regulation simply codifies traditional common law principles which would allow a nuisance or similar noxious use of private land to be abated. Conversely, governmental regulations which effectively take private property without compensation to promote the general welfare and secure public benefits for the entire community, such as beach and open space preservation, may be unconstitutional under the "Lucas" standard.

#### Money for Nothing: Beach for Free?

In the case of *Lucas v. South Carolina Coastal Council*, (1992 U.S. LEXIS 4537; 60 U.S.L.W. 4842), plaintiff David Lucas argued that the South Carolina Beachfront Management Act effected a taking of his property without just compensation because it barred construction in critical areas. The facts of the case were as follows:

In 1986, David H. Lucas paid \$975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, S.C. Code '48-39-250 et seq. (Act), which had the direct effect of barring Lucas from erecting any permanent habitable structures on his two parcels ....

South Carolina's expressed interest in intensively managing development activities in the so-called "coastal zone" dates from 1977 when, in the aftermath of Congress's passage of the federal Coastal Zone Management Act of 1972, 86 Stat. 1280, as amended, 16 U.S.C. ' 1451 et seq., the legislature enacted a Coastal Zone Management Act of its own. In its original form, the South Carolina Act required owners of coastal zone land that qualified as a "critical area" (defined in the legislation to include beaches and immediately adjacent sand dunes, ' 48-39-100)) to obtain a permit from the newly created South Carolina Coastal Council prior to committing the land to a "use other than the use the critical area was devoted to" on September 28, 1977." ' 48-39-130(A).

In the late 1970s, Lucas and others began extensive residential development of the Isle of Palms, a barrier island situated eastward of the City of Charleston. Toward the close of the development cycle for one residential subdivision known as Beachwood East, Lucas in 1986 purchased the two lots at issue in this litigation for his own account. No portion of the lots, which were located approximately 300 feet from the beach, qualified as a "critical area" under the 1977 Act; accordingly, at the time Lucas acquired these parcels, he was not legally obliged to obtain a permit from the Council in advance of any development activity. His intention with respect to the lots was to do what the owners of the immediately adjacent parcels had already done: erect single-family residences. He commissioned architectural drawings for this purpose.

The Beachfront Management Act brought Lucas' plans to an abrupt end. Under that 1988 legislation, the Council was directed to establish a "baseline" connecting the landward-most "points of erosion.., during the past 40 years" in the region of the Isle of Palms that includes Lucas's lots. ' 48-39-280(A)(2). In action not challenged here, the Council fixed this baseline landward of Lucas's parcels. That was significant, for under the Act construction of occupable improvements was flatly prohibited seaward of a line drawn 20 feet landward of, and parallel to, the baseline, ' 4839-290(A). The Act provided no exceptions. The Act did allow the construction of certain nonhabitable improvements, e.g., "wooden walkways no larger in width than six feet," and "small wooden decks no larger than 144 square feet."

A state trial court found that this prohibition rendered Lucas's parcels "valueless." Accordingly, the issue on appeal was "whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking of private property under the Fifth and 14th Amendments requiring the payment of "just compensation'."

At trial, "Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature

had acted in furtherance of legitimate police power objectives." The trial court agreed. In the opinion of the trial court, Lucas's properties had been "taken" by operation of the Act, and it ordered the Council to pay "just compensation" in the amount of \$1,232,387.50.

Among the trial court's factual determinations was the finding that "at the time Lucas purchased the two lots, both were zoned for single-family residential construction and there were no restrictions imposed upon such use of the property by either the State of South Carolina, the County of Charleston, or the Town of the Isle of Palms." The trial court further found that the Beachfront Management Act decreed a permanent ban on construction insofar as Lucas's lots were concerned, and that this prohibition "deprived Lucas of any reasonable economic use of the lots, eliminated the unrestricted right of use, and rendered them valueless."

The Supreme Court of South Carolina, however, reversed based upon "Lucas's concession that the Beachfront Management Act was properly and validly designed to preserve South Carolina's beaches."

Failing an attack on the validity of the statute as such, the [state supreme] court believed itself bound to accept the uncontested findings of the South Carolina legislature that new construction in the coastal zone--such as Lucas intended--threatened this public resource. The [South Carolina] Court ruled that when a regulation respecting the use of property is designed to prevent serious public harm, no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value.

The United States Supreme Court granted Lucas's request for review of this decision. As described by the Supreme Court, the South Carolina General Assembly made the following express findings in the Beachfront Management Act:

The beach/dune system along the coast of South Carolina is extremely important to the people of this State and serves the following functions:(a) protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner; (b) provides the basis for a tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of the state's economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute, significantly to state and local tax revenues; (c) provides habitat for numerous species of plants and animals, several of which are threatened or endangered. Waters adjacent to the beach/dune system also provide habitat for many other marine species; (d) provides a natural health environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being...

Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space' to accrue and erode in its natural cycle. This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it. It is in the state's best interest to protect and to promote increased public access to South Carolina's beaches for out-of-state tourists and South Carolina residents alike.

According to the Supreme Court, "[w]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

[I]f the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, the natural tendency of human nature would be to extend the qualification more and more until at last private property disappeared.

We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.

Accordingly, the Supreme Court acknowledged that the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land."

A statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use of his land.

Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured.... The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's 'law of property'-i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or

elimination of) value.

However, in this particular instance, the Supreme Court found the deprivation issue was not in question "since the 'interest in land' that Lucas has pleaded (a fee Simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value."

Surely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," in a manner that secures an "average reciprocity of advantage" to everyone concerned. And the functional basis for permitting the government, by regulation, to affect property values without compensation--that Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,--does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use---typically, as here, by requiring land to be left substantially in its natural state--carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

Specifically, the Supreme Court found that, "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of common good, that is, to leave his property economically idle, he has suffered a taking." Further, the Supreme Court stated that "the economic impact of the regulation on the claimant and the extent to which the regulation has interfered with distinct investment-backed expectations are keenly relevant to takings analysis generally."

It is correct that many of our prior opinions have suggested that "harmful or noxious uses" of property may be proscribed by government regulation without the requirement of compensation. For a number of reasons, however, we think the South Carolina Supreme Court was too quick to conclude that that principle decides the present case.

The "harmful or noxious uses" principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate--a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power. These cases are

better understood as resting not on any supposed noxious quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy- not unlike historic preservation--expected to produce a widespread public benefit all and applicable to similarly situated property. Harmful or noxious use" analysis was, in other words, simply the progenitor of our more contemporary statements that "land-use regulation does not affect a taking if it substantially advances legitimate state interests."

As described by the Court, "the transition from our early focus on control of 'noxious' uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder."

It is quite possible, for example, to describe in either fashion the ecological, economic and aesthetic concerns that inspired the South Carolina legislature in the present case. One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve.-Whether one or the other of the competing characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate. A given restraint will be seen as mitigating "harm" to the adjacent parcels or securing a "benefit" for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors.

Accordingly, in those instances "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use," the Supreme Court concluded that the State "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. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "as long recognized, some values are enjoyed under an implied limitation and must yield to the police power."...

In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has

become part of our constitutional culture.

As a result, the Court found that "confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land... cannot be newly legislated or decreed (without compensation)." Rather, such State power "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."

A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the court--by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State to abate nuisances that affect the public generally, or otherwise.... On this analysis, the owner of a lake bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles.

The use of these properties for what are now expressly prohibited purposes was always unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.

As noted by the Court, "the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those ... existing rules of understandings that stem from an independent source such as state law to define the range of interests that, qualify for protection as 'property' under the Fifth (and 14th) amendments" to the Constitution. However, in the opinion of the Court, "a regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond that the relevant background principles would dictate, compensation must be paid to sustain it."

The "total taking" inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any

common-law prohibition, though changed circumstances or new knowledge may make what was previously permissible no longer so. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

Applying this reasoning to this particular situation, the Court found it "unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on Lucas's land; they rarely support prohibition of the 'essential use' of land." However, as noted by the Court, this issue was "one of state law to be dealt with on remand."

We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest.... Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beach-front Management Act is taking nothing.

We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.

The Court, therefore, reversed the judgment of the South Carolina supreme court and remanded (i.e., sent back) this case to the state court "or proceedings not inconsistent with this opinion."