Mercer Law Review

Volume 44
Number 4 *Annual Eleventh Circuit Survey*

Article 24

7-1993

Lucas v. South Carolina Coastal Council: Low Tide for the Takings Clause

Marshall Currey Cook

Lucas v. South Carolina Coastal Council: Low Tide for the Takings Clause

I. INTRODUCTION

In *Lucas v. South Carolina Coastal Council*,[1] the United States Supreme Court held that when a state government regulation[2] rendered a landowner's property totally valueless, the landowner must be compensated unless common law nuisance doctrine[3] at the time of the taking prohibited the use forbidden by the regulation.[4] The Supreme Court reversed the South Carolina Supreme Court and remanded the case to determine whether any principles of nuisance and property law existed that prohibited the forbidden use under the statute—the building of an occupiable improvement.[5] This Casenote will only address the court's analysis of the Takings Clause part of the opinion, not whether the petitioner's claim was ripe for decision.[6]

---

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

2. In 1988 South Carolina passed the Beachfront Management Act ["Act"], which prevented the construction of occupiable improvements seaward of a line drawn 20 feet landward of the "baseline." *Id.* at 2890 (citing S.C. CODE § 48-39-290(A) (Supp. 1988)). The "baseline" is a line connecting the landward most "point[s] of erosion . . . during the past forty years." *Id.* (citing S.C. CODE § 48-39-280(A)(2) (Supp. 1988)). The South Carolina Coastal Council ["Council"] fixed the baseline landward of Lucas's parcels. *Id.* The Act thus prohibited Lucas from erecting any permanent habitable structures on his land. *Id.* at 2889. The Act provided no exceptions. *Id.* at 2890.

3. Justice Scalia noted that relevant background principles are the restrictions the state's law of property and nuisance placed on a piece of property's ownership. *Id.* at 2900. If a newly passed regulation merely duplicates the result that could have been achieved in the courts under the state's law of private nuisance, or by the state under its complemantary power to abate nuisances that affect the public generally, the state will not be required to compensate. *Id.*

4. *Id.* at 2899.

5. *Id.* at 2901-02. On remand, the South Carolina Supreme Court held that no common law basis existed to restrain Lucas's desired use of his land. Lucas v. South Carolina Coastal Council, 424 S.E.2d 484, 486 (S.D.S.C. 1992). The court remanded to the circuit level for a determination of the actual damages Lucus sustained as a result of the temporary taking. *Id.* at 486. The court said that its decision did not bar any subsequent taking action, if Lucas's permit for building was later denied. *Id. See infra* notes 17 and 18 and accompanying text.

6. *See infra* note 17.

II. FACTUAL STATEMENT

In 1986 David H. Lucas paid $975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina. He intended to build single-family homes similar to those on adjacent lots.[7] In 1988 South Carolina passed the Beachfront Management Act ("Act").[8] The Act established a "baseline" connecting the landward most points of erosion during the past forty years.[9] The Act fixed the baseline landward of Lucas's parcels.[10] The Act barred construction of occupiable improvements seaward of a line drawn 20 feet landward of, and parallel to, the baseline, thereby preventing Lucas from erecting any residences on his land.[11] The Act provided no exceptions.[12] Prior to the Act, no portion of Lucas's lots qualified as a "critical area"[13] under the 1977 South Carolina Coastal Zone Management Act.[14] If the land was in a critical area, the owner had to obtain a permit from the South Carolina Coastal Council ("Council") before using the land for something other than what it was devoted to on September 28, 1977.[15] The older act did not require Lucas to obtain a permit from the Council before any construction.[16] After briefing and argument, but prior to the South Carolina Supreme Court's decision, the South Carolina legislature amended the current Act to authorize the Council to issue "special permits" for building habitable structures seaward of the baseline in certain circumstances.[17] Lucas has yet to apply for a permit to build a habitable structure.[18]

---

7. 112 S. Ct. at 2889.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 2889-90.
12. *Id.* at 2890.
13. The term "critcal area" is not used in the 1988 Beachfront Management Act, which prohibited Lucas from building occupiable improvements on his parcels. *Id.* at 2889.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 2890-91. The South Carolina Coastal Council argued that this amendment renders Lucas's claim of a permanent deprivation unripe. The Council argued that since he had not obtained a "final decision regarding how [he] will be allowed to develop [his] property," Williamson Co. Regional Planning Comm'n of Johnson City v. Hamilton Bank, 473 U.S. 172, 190 (1985), he is not entitled to a definitive adjudication of his claim. 112 S. Ct. at 2891.
18. 112 S. Ct. at 2891. The Court rejected the Council's argument that Lucas's claim was unripe. Since South Carolina decided the case on its merits instead of the ripeness issue, the Court said a decision by the Supreme Court on ripeness grounds would preclude any Takings claim with respect to Lucas's past deprivation. Lucas's temporary deprivation between his purchase of the property and the 1990 amendment is compensable under the Takings Clause as a temporary deprivation. *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). The Court said Lucas had properly

The South Carolina Supreme Court previously held that when a regulation is designed "to prevent serious public harm," the Takings Clause does not require compensation regardless of the effect the regulation has on the property's value.[19] The court hinged its decision on the landowner's failure to challenge the legislature's purpose for the Act.[20] Lucas conceded that the statute protected a valuable public resource and "that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm."[21] Thus, the court felt bound to the state legislature's finding that new construction threatened a public resource—the coastal zone.[22]

The South Carolina Supreme Court reversed the trial court.[23] The trial court agreed with Lucas and held that South Carolina's regulation rendered the property totally valueless entitling him to compensation regardless of the state's use of its police powers.[24] The court said that because the ban on construction had deprived Lucas of any economic use of the lots they were rendered valueless.[25] Also, the court found that the lots were zoned for single family residences and there were no existing restrictions on their use by any municipal ordinances or state laws.[26] The court ordered the state to compensate Lucas in the amount of $1,232,387.50.[27]

III. THE COURT'S OPINION

The Supreme Court, with Justice Scalia writing for the majority, adopted a new analysis for Takings cases[28] involving "police power" regulations. The Court said that it is evident that noxious use logic[29] can no longer "serve as a touch-stone to distinguish regulatory 'takings'—which

---

alleged Article III injury in fact with respect to the restraints on his land by the Act and his claim should be heard. 112 S. Ct. at 2891-92. On remand, the South Carolina Supreme Court remanded the case to the circuit court for a determination of compensation for the temporary taking. *Lucas*, 424 S.E.2d at 486.

19. 112 S. Ct. at 2890 (citing 404 S.E.2d 895, 899 (S.C. 1991)).

20. *Id.*

21. *Id.* (citing 404 S.E.2d at 896).

22. *Id.* (citing 404 S.E.2d at 898).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. The Takings Clause of the Fifth Amendment of the United States Constitution provides that: ". . . nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

29. Justice Scalia explained noxious use logic as the Court's "prevention of harmful use" doctrine. 112 S. Ct. at 2898-99. If a regulation was designed to prevent some public harm, property could be taken without compensation. *Id.*

require compensation—from regulatory deprivations that do not require compensation."[30] The Court said the "prevention of harmful use" was merely the Court's early formulation of the police power justification.[31] If a regulation was designed to prevent harmful use, the state could sustain, without compensation, any regulatory diminution in value.[32] Justice Scalia said that under the harmful use standard it becomes "difficult, if not impossible" to make a distinction between what "prevents harmful use" and that which "confers a benefit" on an objective basis.[33] The Court said no previous cases that employed the logic of harmful use prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land.[34]

The Court noted that the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the state may subsequently eliminate all economically viable use is inconsistent with the historical compact[35] recorded in the Takings Clause.[36] When a regulation that eliminates all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.[37] However, the Court did not apply a complete per se rule. It established the exception that if the prohibited use was somehow already restricted at common law, the government owes no compensation to the landowner.[38]

The Court said that it was not giving a new rule but simply supplying and applying the justifications for an often expressed rule in Takings Clause jurisprudence.[39] The Court gave three justifications for the deprivation of all economically viable use of land rule it established in *Lucas*.

First, the "total deprivation of beneficial use" is equivalent to a physical appropriation from a landowner's perspective.[40] Under the "perma-

---

30. *Id.* at 2899.

31. *Id.* at 2898.

32. *Id.* at 2898-99.

33. *Id.* at 2899.

34. *Id. See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 513-14 (1987) (Rehnquist, C.J., dissenting).

35. The Court considers the historical compact to be the belief that citizens expect their private property rights to be protected by the Constitution. 112 S. Ct. at 2892-93. Justice Scalia cites Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), as extending this notion to regulations if they "go too far" and by the text of the clause. 112 S. Ct. at 2900 n.15. The text of the clause can be read to encompass regulatory as well as physical deprivations. *Id.*

36. 112 S. Ct. at 2900.

37. *Id.* at 2895.

38. *Id.* at 2901.

39. *Id.* at 2894.

40. *Id.*

nent physical occupation" test,[41] the government must compensate no matter what public interests the government advances.[42] If no economic use remains, as in a physical invasion case, there is no adjustment of benefits and burdens, but an imposition on an individual for the benefit of the entire public.[43] The Court admitted that it would be hard for government to continue if every deprivation resulted in full compensation, but that situations when the government deprived the landowner of all "economically beneficial uses" would be rare.[44]

Second, situations when the landowner's property is left valueless carry a risk that "private property is being pressed into some form of public service under the guise of mitigating serious public harm."[45] The Court said this was especially true in cases such as this one when the land must be left in its natural state.[46]

Third, if legislatures were simply allowed to recite a noxious use justification to avoid compensation when property is rendered valueless, they would always find a noxious use justification.[47] In setting forth the exception to the holding of *Lucas*, the Court said a state may only resist compensation if the inquiry into the owner's property shows that the prohibited use was not a part of the landowner's original title.[48] The Court said if the prohibited use is one the landowner knows is prohibited when he acquires title, this expectation is part of his bundle of property rights and the state need not compensate.[49] However, if it is not, and the regulation prohibits all "economically beneficial uses," the government must provide compensation.[50] The fact that similarly situated landowners have long been engaged in a particular use ordinarily imparts a lack of a common-law prohibition.[51] Likewise, the fact that other landowners similary situ-

41. When a permanent invasion of property has occurred, no matter how minute the intrusion, and regardless of the public purpose behind it, the Court has not required compensation. *Id.* at 2893 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)). In *Loretto*, the Court determined that New York's law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking, even though the facilities occupied only 1 and ½ cubic feet of the landlords' property. *Id.* (citing *Loretto*, 458 U.S. at 438).

42. *Id.* at 2893.

43. *Id.* at 2895.

44. *Id.*

45. *Id.* at 2894-95.

46. *Id.* at 2895.

47. *Id.* at 2899.

48. *Id.*

49. *Id.*

50. *Id.* at 2895.

51. *Id.* at 2901.

ated are permitted to continue the use denied to the claimant suggests the same result.[52]

In applying the exception to the rule, the Court said that to win its case on remand, South Carolina must do more than proffer the legislative declaration given previously.[53] Instead, to restrain Lucas in a common law action for nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the use he now intends.[54] Only on this showing can South Carolina say it is "taking" nothing, and therefore provide no compensation.[55]

IV. Concurring Opinion

Justice Kennedy concurring, agreed with the majority that Lucas's claim was ripe for decision, but disagreed with the South Carolina Court of Common Pleas' conclusion that Lucas's property had been rendered valueless by South Carolina's regulation.[56] Justice Kennedy also shared the reseverations of Justice Blackmun, Justice Stevens, and Justice Souter about the finding that a beach front lot loses all value because of a development restriction.[57] In addition, Justice Kennedy indicated that courts should look to the landowner's reasonable investment backed expectations when determining if property was rendered valueless.[58] Justice Kennedy noted that simply looking to the common law nuisance doctrine is too narrow.[59] He agreed with the Court that nuisance prevention accords with the most common expectations of a property owner. However, he stated that this is not "the sole source of state authority to impose restrictions."[60] This is especially true with coastal property, because it may present such unique concern for a fragile land system that the state can go further in regulating than the common law of nuisance might permit.[61]

V. Analysis

The Takings Clause of the Fifth Amendment states that private property shall not be taken by a government for public use without just com-

52. *Id.*
53. *Id.*
54. *Id.* at 2901-02.
55. *Id.* at 2902. *See supra* note 5.
56. 112 S. Ct. at 2902-03.
57. *Id.* at 2903.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

pensation.[62] The Clause thus has two requirements: 1) The taking must be for a public use and, 2) it must be compensated. From this relatively simple beginning, Takings Clause jurisprudence has developed into a "doctrinal morass."[63]

Over time, the Court expanded the original requirement that land must be used by the public for a taking to occur to include the use of "police power" by a government.[64] Police power is the inherent power of a government to promote the public health, safety, or general welfare.[65] This conception of public use as the police power greatly expanded the situations in which government could use the Takings Clause. However, under this general conception, the Court developed a distinction between when a taking occurred requiring compensation and when there was no taking.[66] Basically, a "taking" required compensation but a government regulation designed to prevent a serious public harm did not.[67] In *Miller v. Schoene*,[68] the owner of diseased cedar trees was not compensated because his trees were destroyed to prevent infection of nearby orchards.[69] Also, in *Goldblatt v. Hempstead*,[70] a law prevented continued operation of a quarry in a residential area and required no compensation.[71] However, a regulation could be considered a taking if it somehow "went too far."[72]

To determine if a regulation goes too far and effectuates a taking, the Court has generally relied on an ad hoc-factual inquiry test.[73] This test usually involves looking to the extent of the intrusion, the nature of the intrusion, the legitimacy of the state's interest, and a balancing of the public and private interests involved.[74] While the Court has used this general test for most regulatory takings, the court has carved out an ex-

---

62. U.S. CONST. amend. V. ". . . nor shall private property be taken for public use, without just compensation." *Id.*

63. STONE, SEIDMAN, SUNSTEIN & TUSHNET, CONSTITUTIONAL LAW 1591 (1991).

64. *See* Hawaii Housing Auth. v. Midkiff, 465 U.S. 1097 (1984). *Midkiff* provided that a government's public use must only meet a rational basis test, thus making almost every use a valid public use. *Id.*

65. W. Keith Noel, Comment, *Just Compensation: The Constitutionally Required Remedy for Regulatory Takings*, 55 U. CIN. L. REV. 1237, 1252 (1987).

66. *See generally* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Miller v. Shoene, 276 U.S. 272 (1928), and *Keystone*, 460 U.S. 470.

67. *Miller*, 276 U.S. at 279-80.

68. 276 U.S. 272 (1928).

69. *Id.* at 272.

70. 369 U.S. 590 (1962).

71. *Id.* at 590-91.

72. *Mahon*, 260 U.S. at 415. Justice Holmes said that "while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking." *Id.*

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

74. Hodel v. Irving, 481 U.S. 704, 714 (1987).

ception. If the property is subject to some physical invasion, however slight, the property owner must be compensated.[75] This is the only situation in which the courts automatically apply a per se rule in a Takings Clause case.

In *Lucas* the Court said that the "deprivation of all economic value" rule was also an existing exception to the ad hoc test.[76] Justice Scalia said that the Court was merely applying and providing the justifications for this existing rule.[77] However, prior to *Lucas*, the Court had never explicitly carved out its new rule as an exception similar to the physical invasion rule. The Court now suggests that lower courts must determine the value of the land deprived the owner and if it is complete, it must compensate despite any public benefit provided.[78] In previous cases, the elimination of all economic value was merely considered as one of the factors in determining if a regulation had gone "too far" and accomplished a taking.[79]

The Court's per se rule in this area is flawed because it does not accomplish any other results than those available under the old ad hoc analysis, creates a per se rule more complicated than the ad hoc inquiry, and may inhibit legislatures from passing needed regulations in the future.

Under the Court's ad hoc inquiry, the fact that a regulation deprived the owner of all economic value weighed heavily in the overall determination.[80] In this sense, the Court's new rule does not add to a Takings Clause analysis. The rule was always there but it was never, as it is now, a per se rule automatically applied.

Apparently, the Court wants another per se rule, similar to the physical invasion rule, so it will be easier for the courts to apply to certain cases than the ad hoc test. However, the new rule does not accomplish this goal. The Supreme Court gives lower courts no guidance in determining what property to look at and what "economic value" actually is. A property's economic value is not often defined easily and may consist of different property rights than the right to build an occupiable improvement.[81] The Court's nuisance exception also makes the test difficult to apply. A court must somehow determine the property and nuisance doctrine at the time of the regulation and government must prove that the landowner's

---

75. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1992).

76. 112 S. Ct. at 2893.

77. *Id.* at 2894-95.

78. *Id.* at 2895.

79. *Hodel*, 481 U.S. at 714-718.

80. *Id.*

81. 112 S. Ct. at 2908 (Blackmun, J., dissenting). "Petitioner . . . may exclude others, . . . picnic, swim, camp in a tent, or live on the property in a house trailer." *Id.*

conception of what he could do with his property at the time of purchase included these restrictions.[82]

Not only is the exception difficult to apply, but it may also inhibit governments. As the world changes and technology advances, society may be aware of environmental hazards requiring regulation that never existed under old common law property and nuisance doctrine. Under these new regulations, a property owner will never be subject to the rule's exception. If a government deprives an owner of all economic value, the government will have to pay. This may inhibit governments from implementing environmental and other regulations that confer a benefit on the public but deprive the owners the value of their land. Under the ad hoc inquiry, if the public benefit were substantially important, it could outweigh the property owner's loss.[83] Although relatively rare, it would be for valid reasons. By their nature, these are the types of regulations which greatly benefit the public and as a matter of policy the Court should encourage governments to pass these types of regulations.

VI. CONCLUSION

While the Court's motive may have been pure in attempting to carve out another per se rule, the resulting rule is not sound. The existing ad hoc inquiry furthered all of the Court's goals and did so in a manner more in tune with public policy.

MARSHALL CURREY COOK

82. *Id.* at 2900.
83. Agins v. Tiburon, 447 U.S. 255, 261 (1980).