THE NEW SUPREME COURT STANDARD ON REGULATORY TAKINGS: A THREAT TO WETLAND PROTECTION?

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Abstract. The Supreme Court took an important step toward greater protection of private property rights in its June, 1992 opinion in *Lucas v. South Carolina Coastal Council.* Mere recitation by the government of an intention to protect the public from harm can no longer justify or excuse a regulation that renders one's real property "valueless". The new "categorical rule" has two exceptions. First, such results are allowable if the limitations complained of are inherent in the title as derived from a state's law of property and,second, if the restrictions are aimed at activities that constitute public or private nuisances.

BACKGROUND ON *LUCAS* CASE

In June, 1992 the U.S. Supreme Court conditionally disapproved of the impact of South Carolina's Beachfront Management Act (BMA) on the property of a citizen. The case, *Lucas v. South Carolina Coastal Council*, was sent back to the state to allow it an opportunity to demonstrate that the limitations of the BMA were consistent with the new standard announced by the Court. That standard, or "new categorical rule" is that " . . . where a state's regulations prohibit all economically beneficial use of land, compensation must be forthcoming unless the restriction made explicit by the regulation inhered in the title itself, that is, in the restrictions that background principles of the state's law of property and nuisance already place upon land ownership."

This new categorical rule does not prohibit the imposition of severe regulatory limitations on uses of private property. It does provide that, in particular instances where such regulation goes so far as to make it impossible to use one's property in an "economically beneficial" way, a taking contrary to the 5th Amendment may be found to exist. This "new categorical rule" is applicable only in cases where a parcel of property is rendered "valueless" by government regulatory action. Even the Supreme Court admitted that this result is a "rare" and "extraordinary circumstance".

This standard, on its face, does not jeopardize wetland protection regulation such as that presently in force pursuant to §404 of the federal Clean Water Act. However, the threat to wetland regulation signalled by the decision is raised in statements in the decision by Justice Scalia that had no direct bearing on Lucas' land or the issues of that particular case. Such gratuitous statements in an opinion, called "obiter dicta", often reveal judicial attitudes and positions that mature into the "law of the case" in future legal opinions. The language that portends trouble for wetlands regulations is: " . . . 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." Thus, although the "relevant parcel" question was not asked in Lucas, one can justifiably be concerned about the Court's very apparent attitude toward the existing law on the issue as it may impact on wetlands protection in the future.

The attitude revealed by the Court in footnote 7, discussed in more detail below, is one of dissatisfaction with the way its previous decisions aggregated all elements or constituent legal interests comprising the totality of one's "property" for the purpose of calculating the degree of diminution of value.

FACTS OF THE CASE

From a narrow legal point of view, the Lucas decision does not present a serious threat to wetland protection or to environmental protection regulations generally. As in all legal decisions, it is essential to know the "facts of the case" and to relate such facts to the Court's pronouncements.

The Problem and Remedy

In 1986, Mr. Lucas bought two half-million dollar lots facing on the Atlantic Ocean long before South Carolina enacted its Beachfront Management Act in 1988. The BMA's purpose and approach was to protect the naturally functioning "sand-sharing" system along its coastline by prohibiting human activities that interfere with the cyclic movement of sediments onto and off the shorelands and shallow seas near the coast. Lucas' land was in a subdivision where other owners had previously built residences on

both sides of the lots in question.

The BMA required the Coastal Council to establish "baselines" paralleling the shoreline that represented the "landward-most points of erosion . . . during the past 40 years" and prohibited construction of occupiable improvements seaward of a set-back line "20 feet landward of, and parallel to, the baseline". Thus, Mr. Lucas simply could not build houses on his lots.

Conclusive labels of the Past

The South Carolina legislature cited numerous "reasons" for the passage of the BMA that can be characterized as either "harm-preventing" or "benefit-conferring". The significance of the distinction between these two regulatory justifications is that courts have almost routinely upheld government infringements on property rights that were reasonably characterized as the former but have required payment of compensation in circumstances of the latter.

Trial Court Supports Property Owner

Mr. Lucas filed suit against the State claiming that his land had been "taken" in violation of the Fifth Amendment to the U.S. Constitution, and the local trial court judge agreed with him. The trial court said that the "prohibition [on Lucas' use of his lots] deprived Lucas of any reasonable economic use of the lots, eliminated the unrestricted right of use, and rendered them valueless." South Carolina did not contest this conclusion of fact in the State Supreme Court and accordingly was not allowed to raise it in the U.S. Supreme Court. Thus, Justice Souter urged the Court to not rule on Mr. Lucas' claims until the case could be sent back for better investigation by the State of the issue of the extent to which the value of his property had been diminished. A conclusion that the degree of deprivation is less than total could result in the removal of Lucas' case from protection under the "new categorical rule".

Justice Blackmun Dissents

Justice Blackmun did not agree with the majority opinion and, in his dissent, focused on the physical attributes of Lucas' lots - apparently to make the point that it was never a reasonable expectation that the lots could have been used for construction of residences. He noted that for approximately one-half of the last 40 years, all or part of the lots were "part of the beach or [were] flooded twice daily by the ebb and flow of the tide." Thus, according to Justice Blackmun, "reasonable investment-backed expectations" were absent. The preceding phrase is legalese for the proposition that persons can not sue the government for "takings" damages for frustrating their plans when those plans do not meet some objective standard of reasonableness.

REVERSAL IN THE U.S. SUPREME COURT

"Harm" and "Benefit" Standards Rejected

In announcing the new "categorical rule", quoted above, the Supreme Court rejected a long history of judicial toleration of government regulation that was purportedly intended to "prevent harm" to the public arising from the maintenance of "noxious uses" of property. The South Carolina Supreme Court had upheld application of the BMA to Lucas' lots on the basis of that supposed line of precedent. The Supreme Court said the standards of "harm-prevention" and "benefit-conferring" were too subjective in that they were vulnerable to the variabilities of individual observers. Then, in the second part of the categorical rule, the Court specified the type of harm prevention that will pass the new constitutional test. Such limitations, i.e., "harm-preventing", must be of the sort that are already constitutionally subject to regulation for being in violation of principles of common law - such as private and public nuisances.

Reinvigoration of Nuisance Principles

The "common law" is that body or collection of principles, rules, and standards that evolved over many years via court pronouncements in countless litigations beginning in England and later continuing in the U.S. Generally, a nuisance is an activity or condition carried out or maintained on one's property that unreasonably interferes with correlative rights of others on their property or with the similar rights of the public collectively. Thus, when the government proscribes an activity on private property, it must be able to demonstrate that, under the common law, private neighboring landowners, citizens, or the government on behalf of the public could also stop the activity under the respective nuisance principles. Part of the rationale for this conclusion is that no landowner can logically or legally expect to be able to create or maintain activities that interfere with others' use of their land. Thus, the government will be doing no more by regulatory edict than has always been legally possible under the common law - a source of property rights limitation under which all landowners are presumed to hold their land. After expressing doubt that South Carolina could conform its treatment of Mr. Lucas' land to the new categorical rule, the Court sent the case back to the Coastal Council for an opportunity to attempt to do so.

THE HIDDEN THREAT SIGNALLED IN LUCAS

"Obiter Dictum": The Significant *Lucas* Legacy

The primary "law of the case" of Lucas, i.e., regulations that render property valueless require compensation to the landowner, does not, by itself, threaten environmental protective measures. However, Justice Scalia discussed his concern about another aspect of the "taking" issue that

signals trouble for government property use limitations such as wetland preservation regulations like those imposed by §404 of the Clean Water Act. In introducing his concern, Justice Scalia said, "[r]egrettably, 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".

What is the Relevant "Parcel"?

This inquiry into what is the "relevant parcel" of property for takings analysis is best explained by an illustration based on circumstances that occur often in the present regulatory context of wetlands and endangered species protection. Farmer A has 1,000 acres of timber including 35 acres of forested wetland and a population of red cockaded woodpeckers, a listed endangered species, that inhabit a 25-acre stand of mature pines. Farmer A has been denied a permit to fill the wetland portion of his land, and he has been threatened with prosecution if he harvests the timber in which the woodpeckers nest. Existing Supreme Court precedent will allow these partial deprivations of Farmer A's rights because such limitations affect only 60 acres of the whole tract or 6 percent. In other words, when the extent or seriousness of the government's infringement on private property rights is evaluated, the Court will look at the whole tract in its balancing calculation. Thus, a high percentage of the value of the 60 acres to Farmer A could be "taken" via regulation because, compared to his entire property, the restricted portions are a relatively small part.

A New "Deprivation Fraction"

In a footnote in the Lucas case, Justice Scalia and the other justices of the majority clearly signalled their disapproval of this "composition of the denominator in [the] 'deprivation' fraction" that leads to a decision as to whether a particular limitation on private property has become so severe as to require compensation to the owner. There is little doubt that, given a proper set of facts in the future, the majority will explicitly change the "composition of the 'deprivation' fraction" so as to use as the denominator the parcel or part of a tract that is peculiarly affected by the use-limiting regulation.

In the hypothetical above, this very probable future change will result in a taking evaluation that is focused on the 35-acre wetland and the 25-acre woodpecker nesting area as separate property interests and not merely as a relatively small part of the whole 1,000-acre tract. The denominators will be "35" and "25" respectively, not "1,000". Thus, the inquiry will measure how severely Farmer A's rights in the wetland and nesting area are limited by the regulations, and a "taking" will certainly be found if the partial tracts are rendered "valueless" - as in Lucas and if the interests thus limited constitute a distinct, recognizable property interest under state law.

CONCLUSIONS

The law governing the extent to which government may limit the use of private land in pursuit of its environmental protection goals without running afoul of the constitutional prohibitions on taking property without compensation are bound to change in the near future. If Justice Scalia's comments in the footnotes of Lucas reflect the probable outcome in a proper case in the future, governments will have to be much more careful to construct a logically and scientifically valid rationale that relates restrictions imposed on private property to common law nuisance prevention or abatement standards.

REFERENCES

Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

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