Lucas and its Aftermath

Throughout the past year, coastal managers, planners and land- use lawyers across the country waited expectantly for the United States Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 112 F.Ct. 2886 (1992). In many respects, that decision raises more questions than it answers. To begin to answer those questions, a group of experts with extensive background in ocean and coastal policy, planning and land-use law convened in Chapel Hill, N.C., in July 1992. Included in the group were Fred Bosselman (Chicago-Kent College of Law, Chicago, IL); David Brower (Department of City and Regional Planning, University of North Carolina at Chapel Hill); Daniel Mandelker (Washington University School of Law, St. Louis, MO); Dwight Merriam (Robinson & Cole, Hartford, CT); David Owens (Institute of Government, University of North Carolina at Chapel Hill); and Judith Wegner (Dean of the University of North Carolina at Chapel Hill School of Law). This summary outlines the key conclusions reached during the Chapel Hill conference.

What, exactly, did the *Lucas* case hold, and how does it square with earlier Supreme Court decisions? Like all land-use cases, Lucas must be viewed with careful attention to the underlying facts, regulatory scheme and procedural stance.

Lucas purchased two beachfront lots in 1986 for $975,000. Subsequently, in 1988, the South Carolina legislature passed the Beachfront Management Act which precluded all development of the property. On appeal, the U.S. Supreme Court remanded the case to South Carolina and requested that the state court address several critical questions. These include whether a taking occurred in light of newly articulated principles found in the Supreme Court's decision, and whether Lucas sustained damages from a temporary taking.

The Court's conclusion rested, in part, on several significant assumptions: (1) the Court's view that it was bound to accept, for the purposes of this case, the trial court's finding that the Lucas property had lost all economic value as a result of the state restrictions; (2) the absence of variance provisions in the Beachfront Management Act at the time the case was initiated; (3) the uncertainty whether Lucas could have successfully sought administrative relief under the legislation as later amended; and (4) Lucas suffered a special burden in that his lots were among the very few beachfront parcels that had not already been developed with substantial structures.

The opinion by Justice Scalia and four other members of the Court articulates two key principles as a matter of federal constitutional law. First, a categorical taking (that is, a taking per se, without need to balance a variety of factors) may be found where a regulatory scheme results in the elimination of all of a property's economic use. And second, the categorical rule may be inapplicable if the relevant restrictions are justified by state law relating to nuisance or real property rights. The first of these principles seems to parallel prior holdings by state courts in those rare instances in which no economic value remains as a result of government regulation.

The opinion appears to leave most other aspects of taking law intact. The balancing approach used in most cases for determining whether a taking exists remains intact. Exceptions include those cases involving a physical invasion of property and, as articulated in this case, those cases involving a total elimination of all economic use. Procedural requirements such as the requirement of presenting a ripe controversy after exhausting state administrative and judicial remedies also remain intact. Notably, the Court did not overrule earlier cases, such as the *Keystone Bituminous* case which had upheld Pennsylvania strip mining legislation on the basis of environmental concerns. However, the Court does seem to have rejected the traditional harm/benefit distinction that in some past cases has been used to justify or challenge regulations. In the Court's view the categorization of conduct as harmful or beneficial may be too subjective.

The *Lucas* case also reflected the diversity of opinions on taking issues within the U.S. Supreme Court. This diversity suggests that the Court has not yet taken a marked turn that would herald the end of government regulation as we know it. The majority opinion written by Justice Scalia was joined by Chief Justice Rehnquist and Justices White, O'Connor and Thomas. The nuances of the majority opinion may reflect some tension within that majority. Some of these Justices would prefer to make a sharp turn toward restricting government regulation while others like Justice O'Connor appear committed to more moderate approaches that address individual cases on narrow facts. Concurring or dissenting opinions were written by Justices Souter, Kennedy, Blackmun and Stevens. These members of the Court

believed that the result in the case was dictated largely by procedural restraints on the U.S. Supreme Court's review. Their opinions seem to indicate that after a closer examination of state law regarding nuisance and property rights, the administrative remedies currently available to Lucas and a review of the facts of the case, it is possible that there was not a temporary taking or that very modest compensation would be required.

When will the new categorical rule prohibiting regulation that results in the "deprivation of all economically feasible use" be applied?

Cases involving "deprivation of all economically feasible use" of property should be rare. Governments have many ways to forestall these allegations. Government regulations can include mitigation measures so that all property value is not eliminated. An example of this type of measure are development density transfers both within a parcel of property or to another parcel. Governments can also incorporate provisions within land-use regulations that identify other viable uses of the regulated property. In cases where regulations pose significant restrictions on use, governments can explore and document the feasibility of these other viable uses. Finally, government regulations can, and often do, include variance or administrative review provisions that allow relief from regulatory requirements in appropriate instances in which all economically feasible use would be lost.

In instances in which there are allegations that "all economically feasible use of property" has been lost, a variety of unanswered questions will now be posed. As in the past, the presence or absence of economically feasible use will be assessed with an eye toward market values of comparable property. It is unclear whether "uses" must include developmental uses as opposed to retention and use in a more natural state. It is also unclear at what point the line will be drawn indicating that "no economic value" remains. Will "no economic value" be interpreted as absolutely no resale value or will it be interpreted as a dramatic reduction in value with less than 10 percent remaining? Past cases which appear to remain good law, such as those which involved the prohibition on continued operation of a quarry, suggest that the *Lucas* rule is only triggered when values are reduced to this minimal level.

Although not new, complex questions are likely to be posed regarding property interests that are segmented. In *Lucas* the property interest was not segmented. The owner held the whole property including all rights to the land in question. The Supreme Court has generally been unwilling to allow property owners to segment property rights as a means of demonstrating that some aspect of their rights has been rendered completely valueless. For example, the Court declined to allow the separation of "air rights" from "surface rights" in its decision regarding development of Grand Central Terminal. Under *Lucas*, it may be possible for property owners who divided and sold aspects or segments of their land prior to the imposition of government regulation to demonstrate that those aspects or segments of property have subsequently been rendered valueless. However, it is likely that close inquiry will be made concerning whether those rights continue to be associated with other rights retained by the property owner as was true for the support rights associated with surface ownership or mineral development rights in *Keystone Bituminous*. It is also likely that close inquiry will be made as to whether the property owner made representations during the development process that all aspects or segments of the property were being treated as a whole. An example of this type of situation are instances of phased development and the dedication of green space.

How will the "nuisance" and "state property law" exceptions be applied?

It will be unnecessary to consider these issues unless the categorical rule itself has been triggered as a result of the absence of any remaining economic use. In essence, these exceptions provide grounds for re-examining the view that all economic value has been "taken," either because the proposed use of the property amounted to a "nuisance" that was not allowed in the first instance or because state law failed to recognize the "property" right that was allegedly taken.

"Nuisance" law has developed in state judicial decisions that date back many years. As discussed in the Restatement of Torts, a nuisance can be found if conduct on private land results in unreasonable injury to nearby property owners. A determination of "reasonableness" takes into account such issues as the nature and significance of the harm, the suitability of the conduct to the location, the social utility of the conduct, the extent to which harm could have been avoided and similar issues concerning the neighbor's circumstances. Most states recognize nuisance law and also recognize that legislative enactments addressing related health and safety issues are relevant to the courts' nuisance calculus. The Supreme Court took pains to cite two examples of nuisance-like conduct that could justify the application of this exception. The Court did this even though nuisance law is a matter of state law for the state and not the federal courts to define. The first example states that, in the Court's view, the owner of a lake bed could be denied a permit to fill his property if the landfilling operation would have the effect of flooding others' land. The second example states that the corporate owner of a nuclear generating plant could also be directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Recent lower court decisions have also relied upon nuisance analysis in upholding restrictions on the placement of revetments and docks.

The Court recognized that exceptions to the *Lucas* categorical taking rule might arise as a result of state property law. Subtle questions are raised by this view. The Court seemed to anticipate

that such state property rules would be ones of long standing. This is likely to be the case where state law may recognize limitations on private property rights in beach property as a result of the "public trust doctrine," or "customary rights" that have long been exercised by the public (perhaps even though only recently formalized by the courts). Other states may adopt the strategy articulated by the Wisconsin court in its *Just* decision, where only limited rights in development of wetlands were seen to be consistent with state property law. Some uncertainty is likely to exist concerning the nuances of such state property doctrine in individual jurisdictions, and courts are likely to face novel questions on these points in the aftermath of *Lucas*. In addition, questions may be raised as to what extent state legislation can anticipate or modify judicial determinations regarding the existence of such property rights. It does seem that legislation is possible to clarify rights of competing private claimants rather than to claim rights for public use. Areas with boundaries that are in rapid flux such as barrier islands might well be subject to state legislation with these concerns in mind. Legislation designed to clarify public and private rights might also be designed to end developer uncertainty where critical questions have not been adequately resolved under common law. For example, a growing number of statutes have been adopted to resolve questions of vested rights.

What are the broader implications of the Lucas decision for the legislatures and the courts?

A majority of the Supreme Court appears to have moved away from the traditional presumption of legislative legitimacy, at least where no economic value remains in the aftermath of regulation. This change means that those working with state and local legislators and regulators should take care to make a solid record of detailed and relevant findings in support of restrictions that sharply reduce property value, so that it will be possible to sustain such regulations in the event of litigation. In addition, it appears advisable to carefully distinguish between health and safety concerns, and aesthetic or economic concerns in developing legislative statements of purpose. There can be no doubt that the health and safety concerns provide an independent, weighty justification for the proposed government action. Moreover, it is advisable to consider an array of carefully tailored strategies in addition to traditional regulation to address the public health and safety concerns underlying proposed legislation. For example, in the context of beachfront management, such strategies might include: (1) requirements that bonds be posted to cover removal of facilities that become hazards as a result of shoreline migration; (2) requirements that information concerning shifts in shoreline patterns be recorded as part of the public record as a way of providing notice to potential purchasers; and (3) prohibitions against rebuilding structures destroyed by storms. Finally, careful attention should be given to possible mitigation measures and administrative review provisions in the event that in an individual instance virtually all economic value is lost.

Following *Lucas*, there is likely to be an increase in the number of cases in which property owners allege that they have been denied all economic use of their property as a result of government regulation. Judicial proceedings are likely to be more complex, and lawyers will need to explore procedural issues with special care. Pursuant to the Supreme Court's "ripeness" doctrine, administrative remedies must still be exhausted and, in most instances, a concrete development proposal must be presented before commencing litigation. Cases are more likely to proceed to trial since procedural motions to dismiss challenges on the law without the development of detailed facts are unlikely to succeed. The traditional battle of experts, in this case appraisers, is likely to follow but now against a legal backdrop that is more unclear. For example, additional attention will be needed to clarify the following: (1) the distinction between questions of law and questions of fact; (2) the availability of jury trials and the questions that can rightly be presented to the jury; (3) the standard of review that will be applied by appellate courts; and (4) the comparative burdens and benefits of litigation in federal or state courts. Finally, the courts will be forced to struggle with complex questions associated with the determination of compensation awards in the event that a "total taking" of the sort discussed in *Lucas* is established. For example, they must decide whether a concrete development proposal is necessary to trigger an award and how "compensation" is to be measured during periods of market fluctuation.

What are the most critical steps that can be taken by states and local governments to comply with federal constitutional requirements following Lucas?

Governments should avoid overreaction and should not pull back on the legitimate use of the police power to address concerns such as protection of wetlands, historic areas and mountain ridges. They should take special care to provide background information to citizen volunteers so that they are not deterred from continuing to provide needed assistance.

Governments should think ahead and work out potential legal problems through careful planning and drafting, rather than waiting for litigation to arise. Whenever possible, avoid creating situations that could lead to a successful total takings claim.

Governments must, more than ever, be sure to do their homework on a wide range of issues, including the law, economic and environmental issues. Special attention must be given to the law of nuisance and real property. Whenever possible, governments should base regulations on these foundations. They should also establish good working relationships with consultants who can be called upon to provide information and evidence as needed.

Governments should think through general policy questions and potential site-specific issues in developing laws or ordi-

nances. They should closely link planning and regulatory action, as is done, for example, in states that have mandatory planning and consistency requirements.

Governments should keep fairness in the forefront particularly where new policies are being phased in that result in substantially greater hardships for some members of the public. They should also recognize the necessity for flexible, creative solutions, such as those included in new statutes on vested rights and development agreements. In addition, they should appreciate the need for appropriate procedural mechanisms that allow structured dialogue between the government and individual citizens to attempt to resolve disputes at early stages in their development.

Governments should look carefully at each individual case. They should recognize that some tools (such as some types of computer programs) may not provide all relevant information concerning a specific parcel and that they should make full use of the range of tools for fact finding and government responses (including non-regulatory responses) that may be available.

More detailed discussion of these and other points is provided in a videotape of the group's discussion. It is designed to be of use to both lawyers and non-lawyers (including coastal managers, planners and town officials). The tape is available for $15 from UNC Sea Grant, Box 8605, N.C. State University, Raleigh, NC 27695. Support for the development of the tape was provided, in part, by the University of North Carolina Sea Grant College Program, the South Carolina Sea Grant Consortium and the Virginia Sea Grant College Program.

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