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Environmental Protection Cost Could Skyrocket Due to Supreme Court Decision

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The cost of protecting environmentally sensitive areas, such as wetlands and sand dunes, will be affected by a recent U.S. Supreme Court decision that defined the ability of governments to regulate certain uses of land by property owners. The decision, *Lucas* v. *South Carolina Coastal Council*, left many questions unanswered and will fuel a wave of litigation.

The decision was released June 29, the same day the U.S. Supreme Court upheld *Roe* v. *Wade* (*Planned Parenthood* v. *Casey*). Dwarfed by the attention focused on the abortion case, the *Lucas* decision ultimately could be more significant because it creates a new balance between property owners' rights and public bodies' rights to protect environmentally sensitive areas. As a result, several of Michigan's key programs designed to protect sand dunes, coastal areas, and wetlands could be in serious jeopardy.

BACKGROUND

In 1986 David H. Lucas purchased two beachfront lots on a South Carolina barrier island on which he intended to build homes. Two years later the state enacted a law barring construction on certain coastal property subject to erosion. The law sought to prevent construction in high-erosion beach areas that were under water at least once during the previous forty years. This law had the effect of prohibiting Lucas from building on his property even though homes were already built on adjacent property.

Because he could not build any "permanent habitable structures" on his property, Lucas filed a lawsuit claiming that the prohibition was a "taking" under the Fifth and Fourteenth amendments to the U.S. Constitution. Those amendments require compensation when governments "take" land. Court decisions have interpreted "taking" to mean that, in some cases, the land is so regulated that it has no economic value and that this is the equivalent of the land having been taken from the landowner.

The state trial court agreed with Lucas and held that such a taking had occurred; he was awarded $1.2 million. On appeal, the South Carolina Supreme Court reversed the trial court and held that no taking had occurred because Lucas did not contest the validity of the law that was intended to protect public interests. The state supreme court said 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 effect on the property's value.

In a 6–3 decision, the U.S. Supreme Court said that the state supreme court failed to apply the proper test. That test, the Court said, is based on state nuisance and property law. According to the Court, to avoid a taking, "South Carolina must identify background principles of nuisance and property law that prohibit the uses he [Lucas] now intends in the circumstances in which the property is presently found." In making that ruling the Court paid particular attention to the scope of the regulation that, it said, deprived Lucas of all economically beneficial uses of the land. Such a law must do no more than duplicate the result that could have been achieved in the courts by adjacent landowners or the state through existing nuisance law, the Court said. "Any limitation so severe [that it prohibits all economically beneficial uses] cannot be newly legislated or decreed (without compensation), but 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," the Court stated.

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UNANSWERED QUESTIONS

In *Lucas* the Court said there are times when it is necessary for landowners to sacrifice all economically beneficial uses for the common good, but that does not necessarily absolve governments of the obligation to compensate the landowners. Thus, the Court believes that in cases where all economically beneficial uses are prohibited—even to protect sensitive environmental areas—governments must, in practical terms, "buy" the land if nuisance principles do not support the regulations.

Unfortunately, the Court has not provided much guidance in determining if a taking has occurred. Because *Lucas* was decided on the facts of this particular case, the Court gave neither property owners nor government bodies clear standards on prohibitive regulations or compensation values. In *Lucas* the landowner was prohibited from building any residences, but the regulations did not necessarily preclude him from using the lots for camping, swimming, or for temporary living. By not addressing the potential value of these uses the Court left open the question of how much interference with economically beneficial uses constitutes a taking.

Also unanswered is the question of whether the nuisance law test used in this case applies only in instances where regulation occurs **after** a purchase for an intended use. If Lucas had purchased the property two years later, after the environmental protection law had been enacted, would the courts still be required to examine nuisance law principles?

LIKELY RESULTS

Questions raised by the Court's decision will likely be answered first in lower courts. It is in the best interests of many clients in even somewhat similar circumstances to have their lawyers fashion new arguments on takings based on *Lucas*. With so much room for argument on both sides, however, it is unlikely that most issues will be settled short of the high court. Instead, the U.S. Supreme Court will be forced to settle many more takings issues.

Until the Court resolves the remaining issues, litigation is likely to increase significantly. This is partly because of the vague manner in which the Court handled *Lucas* but also because the most likely plaintiffs—developers—have substantial investments in regulated property. In addition, the Court appears to open the door for a case-by-case review of the public interests advanced where all economic values are claimed to have been lost. This approach is conducive to speculation on the outcome of a given case, and the potential return on investments makes this an attractive gamble.

The takings provisions of the U.S. Constitution apply to local as well as state governments. After *Lucas*, local governments may be more reluctant to create and enforce their own environmental protection laws, such as municipal wetland protection ordinances. They will be pressured to wait until this vital legal issue is better defined before risking a taking judgment that could cost them many thousands of dollars.

Lucas also will have immediate effects on environmental protection. The expected wave of litigation and resulting hesitation to create and enforce new regulations may place valuable, critical areas in peril. Uncertainty will forestall at least some aggressive environmental protection regulations, which will provide enough time for landowners to develop property that might otherwise be protected.

NEXT CASE

This Supreme Court has demonstrated its willingness to settle the takings issue. Although the facts of *Lucas* do not lend themselves to legal definitions that have broad effects, there are many such cases, and it is reasonable to expect the Court to review this topic again soon. Next time, however, the results are likely to be less vague, and the price of conservation could skyrocket.

Lucas was decided on a 6–3 vote. Only justices Harry A. Blackmun and John Paul Stevens clearly dissented. In his dissent, Justice Blackmun chastises the Court for being so anxious to take the case. He

argues that there were other, procedural means of handling the case; in particular, Justice Blackmun felt it should have been remanded back to state court for further findings without a U.S. Supreme Court decision.

In a separate opinion, Justice David H. Souter said the Court should not have heard the case at all because the facts inevitably would lead to the opinion that resulted—one that compounds uncertainty. Perhaps the opening line of the *Planned Parenthood* v. *Casey* majority opinion pertains as well to the *Lucas* decision: "Liberty finds no refuge in a jurisprudence of doubt." Justice Souter said it would have been better for the Court to wait for a case that would enable them to handle the deprivation issues directly. *Lucas,* he said, simply did not possess the facts that would allow them to do so.

Lucas was remanded for further findings to the South Carolina Supreme Court. Because South Carolina has since amended its law and certain economically beneficial uses may be preserved, some observers believe the case will not be revisited by the U.S. Supreme Court. Still, there are many cases, some originating in Michigan, that could fit Justice Souter's call.

How will the Court refine its guidelines in the future? We can only speculate that the Court, willing to create a new test of takings and reassert property rights in *Lucas*, will hand down decisions that will substantially increase the cost of environmental protection. In turn, wholesale changes in environmental law may follow. For Michigan, that could mean more rigorous valuation and cost-benefit analysis of protection of wetlands, Great Lakes coasts, sand dunes, and some endangered species.

The *Lucas* v. *South Carolina Coastal Council* opinion is available to Public Sector Reports subscribers at no charge. To obtain a copy call Public Sector Consultants, Inc., at (517) 484-4954. It is available to nonsubscribers for $40.

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