Understanding Lucas and related “takings” law:

Would rebuilding restrictions after a storm event result in a “total economic wipeout” and constitute a “taking”?

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Lucas – Background Facts

- 1986 - Lucas purchased two residential lots for $975,000 on Isle of Palms in South Carolina
- Intended to build single family residential dwellings
Lucas – State Regulation

- 1988 – South Carolina Legislature adopts Beachfront Management Act

  - Purpose of Act was to preserve South Carolina’s beaches; Legislature found that new construction erosion in a coastal zone threatened this public resource.

  - Barred Lucas from erecting any permanent habitable structures on his parcels
What is a Regulatory Taking?

- “[W]hile property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

- Extension of protections of Takings Clause of the 5th Amendment beyond direct appropriation of property (i.e., condemnation).
**Lucas - Holding**

- **Total Takings** - Created new rule that regulation constitutes a *per se* taking if it prohibits “*all economically beneficial uses*” of a property.

- Established “categorical” taking, in contrast to pre-existing “ad hoc, factual inquiry” for regulatory taking determinations (*See Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978))
**Lucas - Remanded**

- Trial court found that Act “deprived Lucas of any reasonable economic use of the lots,” but that such a deprivation was not compensable.
- SCT remanded the case to determine whether any “background principles” constituted existing restrictions on property such that compensation was not required.
- Does “the nature of the owner’s estate show[] that the proscribed use interests were not part of his title to begin with”?
**Lucas - “Background Principles” Defense**

- Compensation for total taking not necessarily required if landowner had no expectation of right due to “background principles” of law.
- What is “the content of, and the State’s power over, the “bundle of rights” that [a landowner] acquire[s] when they obtain title to property?”
- E.g., a landowner would not expect to be permitted to fill a lake if it would flood other properties, thus, no compensation is required for restricting such behavior.
**Lucas - “Background Principles” Defense**

Examples of possible applicable “backgroundprinciples”:

- Public or private nuisance
- Previously existing statutory law
- Public necessity, e.g., emergencies
- Public trust doctrine
“Today, the Court launches a missile to kill a mouse.”

- Justice Blackmun, dissenting, in reference to the establishment of the total takings rule.
WOULD REBUILDING RESTRICTIONS AFTER A STORM EVENT RESULT IN A “TOTAL ECONOMIC WIPEOUT” AND CONSTITUTE A “TAKING”? 

Not necessarily. . . .
Relevant Concepts

- *Lucas* decision speaks to what constitutes a total take such as to trigger a *per se* right to compensation.
- But consider the remaining uses that are permitted – if there is an economic use – *Lucas* is not a barrier
- “Bundle of rights” – one stick left does not = a total taking under *Lucas*.
Chilling Effect of Lucas

- Since Lucas – more likely for people to raise issue of “takings”
- This has caused a chilling effect on policy-making
- Coupled with claims of “violation” of the Dillon Rule – Virginia decision-makers may feel hamstrung
However, if not a total take:

- Total takings rule applies in few circumstances
  - Justices even express doubt that facts of *Lucas* necessarily constitute a total taking (had Trial Court not found otherwise – issue not appealed)
- If not total taking, “ad hoc, factual inquiry” is required to determine if regulation constitutes a regulatory taking. *See Penn Central.*
Penn Central factors:

- Whether a restriction constitutes a taking “depends largely upon the particular circumstances [in that] case.”

- Factors considered include:
  - Economic impact on owner
  - Interference with distinct “investment-backed expectations.” This is somewhat akin to “background principles” defenses.
  - Character of governmental action
Consider:

- **Purpose of regulation** – instead of preservation of beaches (*Lucas*)– maybe public safety or other nuisance protection purpose (and make the regulation part of a comprehensive program)

- **Effect of regulation** – result is to protect public health, safety and welfare – in VA both a goal of general police power and zoning specifically (no Dillon Rule issue)

- **Not a total take** - remember bundle of rights – allow at least one to remain (not *Lucas*)

- **Compliance with other requirements** - E.g., Rough proportionality and essential nexus requirements met
Few cases in Virginia in which the Courts have found a total take or ordered compensation for landowners for a regulatory taking.
Virginia Regulatory Takings Cases

Virginia Courts found no regulatory takings in the following cases:

- **Board of Supervisors of Prince William County v. Omni Homes, Inc., 253 Va. 59 (1997)** – no regulatory taking under *Penn Central* test because: 1) access by road was a risk, not investment-backed expectation, 2) economic impact not significant because access could not be assumed in initial valuation.

- **Board of Sup’vrs of Culpeper Cnty. v. Greengael, L.L.C., 271 Va. 266 (2006)** – reasonable investment-backed expectation would include understanding of risk of acquisition of water and sewer, therefore, not a regulatory taking.
Additional Virginia Regulatory Taking Cases:

- *Front Royal Indust. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998) - mere diminution in value does not constitute partial taking

- *City of Virginia Beach v. Bell*, 255 Va. 395 (1998) – no *Lucas* taking in the denial of a permit under the Sand Dune Protection Act because the landowner acquired the property after the regulation became effective
Examples of Current Virginia Regulations:


- Floodplain limitations: §§ 10.1-600, et seq., VA Code Ann. and federal law
Conclusion:

- Decision-makers can choose to pay for large numbers of easements or acquisition of substantial land because of fear, or

- Think creatively, this requires:
  - careful development of policies and regulations
  - willingness to accept some risk of litigation
  - demonstration of necessity to public and public acceptance