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Real Property Taxation And Regulation

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REAL PROPERTY TAXATION AND REGULATION

Hon. Leon D. Lazer:

I would like to discuss three cases that involve real property and that are certainly of local government interest. The first one is an assessment case, *Nordlinger v. Hahn*.¹ This is a case that relates back to Proposition 13,² which was adopted by referendum in California in 1978. There was enormous controversy surrounding Proposition 13.³ History has revealed that there were certain commercial real estate interests that seized the moment when enormous dissatisfaction existed among residential property owners because of burgeoning tax rates and assessments.⁴ Consequently, Proposition 13, in the form of a referendum, was approved by 64.8 percent of the voters.⁵ It was eventually codified into Article XIII A of the California Constitution.⁶ Since its codification, Proposition 13 has constricted the fund-raising and tax-raising ability of local governments in California to such a degree that their libraries are open only three days a week⁷ and public schools are short of funds.⁸ I have no doubt that this year's budget crisis in California is related to Proposition 13.⁹

Proposition 13 provided that all real property assessments would be rolled back to 1975-76 levels.¹⁰ Additionally, no real

1. 112 S. Ct. 2326 (1992).

2. CAL. CONST. art. XIII A.

3. *Nordlinger*, 112 S. Ct. at 2329; see also Ralph Frammolino, *State's Prop. 13 Shell Game Coming To An End*, L.A. TIMES, Sept. 6, 1992, at B1.

4. *Nordlinger*, 112 S. Ct. at 2329.

5. *Id.*

6. CAL. CONST. art. XIII A.

7. See Patrick McCartney, *Ventura County News Roundup: Santa Paula; City OKs Library's Study of Park Sale*, L.A. TIMES, Aug. 19, 1992, at B3 (prior to Proposition 13, Blanchard Community Library was open seven days a week and had staff of 42; it has since been reduced to 12).

8. See *The Proposition 13 Legacy: What They're Saying Now*, UPI, Jan. 3, 1988, available in LEXIS, NEXIS Library, UPI File.

9. See Frammolino, *supra* note 3, at B1.

10. CAL. CONST. art. XIII A, § 2(a). Article XIII A, § 2(a) states in pertinent part:

property taxpayers would pay more than one percent of the assessed value of their property. That is, the actual tax dollars could not exceed one percent of the assessment.¹¹ Furthermore, the assessment could not be increased more than two percent a year,¹² but the amount of money to be levied from each taxpayer would not exceed more than one percent of the assessment.¹³ However, if a house was bought after 1975, the property would be assessed based on the purchase price of the house.¹⁴ This was ultimately called the "Welcome Stranger Law."¹⁵ By 1989, forty-four percent of the taxpayers owning homes prior to the enactment of Proposition 13 were paying twenty-five percent of the real property taxes in California.¹⁶ Due to the enormous increase in California property values, new purchasers of property, with their assessment based on their purchase price, paid taxes that were astronomical compared to those which were grandfathered in by Proposition 13.¹⁷ One legal proposition that underlies this case and tax jurisprudence, in general, is that courts will give great deference to the taxing schemes of state and local governments.¹⁸ Many of these taxing schemes, which may seem grossly

The full cash value means the county assessor's valuation of real property as shown on the 1975-76 tax bill under "full cash value" or, thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment. All real property not already assessed up to the 1975-76 full cash value may be reassessed to reflect that valuation.

Id.

11. *Id.* at § 1(a). "The maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property." *Id.*

12. *Id.* at § 2(b). "The full cash value base may reflect from year to year the inflationary rate not to exceed 2 percent for any given year" *Id.*

13. *Id.* at § 1(a).

14. *Id.* at § 2(a).

15. *Nordlinger*, 112 S. Ct. at 2329 (1992).

16. *Id.*

17. *Id.* at 2341 (Stevens, J., dissenting).

18. *Id.* at 2332.

unfair, are almost universally sustained and survive constitutional attack.¹⁹

Prior to purchasing her home, the plaintiff in *Nordlinger* lived in an apartment in Los Angeles.²⁰ In 1988, she moved out of her apartment and bought a house for \$170,000.²¹ Her property was immediately assessed at \$170,100.²² The prior owner originally paid \$121,500 for the house two years earlier and had paid property tax based on that amount.²³ The plaintiff's property assessment of \$170,100 resulted in property taxes that were five times as much as some of her neighbors.²⁴ In fact, property taxes on her modest home equaled those of a pre-1976 owner of a \$2,100,000 beachfront home in Malibu Beach.²⁵

The plaintiff brought a lawsuit attacking the constitutionality of Article XIII A of the California Constitution. In her first cause of action, she claimed that Article XIII A infringed on her right to travel,²⁶ thereby invoking heightened constitutional scrutiny.²⁷

19. See *Kahn v. Shevin*, 416 U.S. 351, 355 (1974) (property tax exemption for widows and not widowers did not violate Equal Protection Clause since it was rationally related to State's goal of reducing financial disparity between males and females); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973) (ad valorem tax on property does not violate Equal Protection Clause since it is rationally related to State's educational and fiscal policies); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973) (ad valorem tax on personal property, applying only to corporations, was constitutional since "[s]tates have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation").

20. *Nordlinger*, 112 S. Ct. at 2330.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 2332. Plaintiff based her claim on the right to migrate within California. The right to interstate travel, though not codified in the Constitution, has been inferred by the Court to be a fundamental right under the Privileges and Immunities Clause, the Due Process Clause, the Commerce Clause, and more recently under the Equal Protection Clause. See generally *Zobel v. Williams*, 457 U.S. 55 (1982) (dividend distribution program places unconstitutional duration requirement impinging on right to travel); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (one year duration

Under heightened scrutiny, the state would have to demonstrate a compelling state interest for enacting Article XIII A.²⁸ The plaintiff alleged “that the exemptions to reassessment for transfers by owners over fifty-five and for transfers between parents and children r[a]n afoul of the right to travel, because they classify directly on the basis of California residency.”²⁹ In the plaintiff’s second cause of action, she claimed a violation of the Fourteenth Amendment’s Equal Protection Clause.³⁰ This claim

requirement to receiving non-emergency hospital or medical care at County’s expense impinged upon plaintiff’s right to travel); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (one year waiting requirement for welfare entitlements impinged upon plaintiff’s right to travel), *overruled in part* by *Edelman v. Jordan*, 415 U.S. 651 (1974) (Eleventh Amendment barred retroactive payments of entitlement benefits).

While the Court has recognized the fundamental right to interstate travel, the right to intrastate travel has not been firmly established by the Supreme Court. Circuit courts have addressed the issue by holding the right to intrastate travel a fundamental right under the Civil Rights Act of 1866, the Due Process Clause and the Equal Protection Clause. *See generally* *Spencer v. Casavilla*, 903 F.2d 171 (2d Cir. 1990) (racial attack on pedestrian established valid cause of action for claim of deprivation of right of intrastate travel under 42 U.S.C. § 1985(3)); *Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990) (traffic safety ordinance was a reasonable restriction on plaintiff’s right of intrastate travel under Due Process Clause); *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646 (2d Cir. 1971) (five year duration residency requirement unconstitutionally precluded in-state residents from public housing under Equal Protection Clause), *cert. denied*, 404 U.S. 863 (1971).

27. *Nordlinger*, 112 S. Ct. at 2332. *See also* JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.38 (4th ed. 1991) (“Any governmental act which restricts the right to interstate migration should be subject to independent judicial review to determine whether it serves a sufficiently important government interest to offset the impairment of the right to travel.”).

28. *See Shapiro*, 394 U.S. at 634 (“[A]ny classification which serves to penalize the exercise of that right [to travel], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.”), *overruled in part* by *Edelman v. Jordan*, 415 U.S. 651 (1974).

29. *Nordlinger*, 112 S. Ct. at 2332.

30. *Id.* at 2331; U.S. CONST. amend. XIV, cl. 3. The Equal Protection Clause provides: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, cl. 3.

simply requires a rational basis, rather than a compelling state interest, to support the legitimate furtherance of a state interest.³¹

Justice Blackmun, writing for the majority, rejected the plaintiff's first claim, infringement of the right to travel, since she lacked standing.³² He stated that the complaint did not allege that the plaintiff was prevented from moving or traveling within California.³³ As evidenced by the plaintiff's purchase of her home, Justice Blackmun concluded that she was not prevented from traveling within California.³⁴ Consequently, the Court rejected the plaintiff's assertion of an infringement upon her constitutional right to travel.³⁵

In the second cause of action, Justice Blackmun sustained the constitutionality of Article XIII A on two grounds.³⁶ First, since Article XIII A was enacted to help preserve residential neighborhoods, the Court concluded that there was a rational basis for the property tax disparities.³⁷ The state's interest in discouraging rapid gentrification in commercial and residential real estate, and slowing down the displacement of low income families and small family-owned businesses were considered legitimate state interests.³⁸ The Article XIII A taxing scheme, whereby older property owners pay less taxes than newer owners, was deemed rationally related to the state's preservation interest.³⁹ The second ground for sustaining Article XIII A was a protection against increases which Justice Blackmun called a "reliance interest,"⁴⁰ on the basis of the property owners' right to rely on their original assessment as a protection against the enormous increases in taxes.⁴¹ Justice Blackmun believed that the people of California required

31. *Nordlinger*, 112 S. Ct. at 2332. *See generally supra* note 18.

32. *Nordlinger*, 112 S. Ct. at 2332.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 2333.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

protection against the rising real estate market values.⁴² If real property was assessed at the current fair market value, instead of the historical or original cost of the property, earlier owners of property would unknowingly have been trapped into paying higher taxes.⁴³ In order to satisfy fair market value tax assessment, those earlier property owners might be left with the drastic option of either reducing their expenditures on necessities or selling their homes.⁴⁴ In contrast, later purchasers of real property know in advance that taxes are going to be increased and can plan their financial future accordingly.⁴⁵ Therefore, these earlier owners were entitled to protection.⁴⁶

Towards the end of his opinion, Justice Blackmun addressed the constitutionality of the exemptions to Article XIII A. These exceptions apply to owners of real property over the age of fifty-five⁴⁷ and to transfers of property from parents to children.⁴⁸ Owners of a principal residence, over the age of fifty-five, can

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. CAL. CONST. art. XIII A, § 2(a). Section 2(a) provides in pertinent part:

[T]he Legislature may provide that under appropriate circumstances and pursuant to definitions and procedures established by the Legislature, any person over the age of 55 years who resides in property which is eligible for the homeowner's exemption . . . may transfer the base year value of the property entitled to exemption . . . to any replacement dwelling of equal or lesser value located within the same county and purchased or newly constructed by that person as his or her principal residence within two years of the sale of the original property.

Id.

48. *Id.* at § 2(h). Section 2(h) provides in pertinent part:

[T]he terms "purchased" and "change in ownership" shall not include the purchase or transfer of the principal residence of the transferor in the case of a purchase or transfer between parents and their children . . . and the purchase or transfer of the first \$1,000,000 of the full cash value of all other real property between parents and their children

Id.

take their original assessment with them if they move.⁴⁹ Additionally, upon the transfer of a residence from a parent to a child, the home remains at the parent's original assessed value.⁵⁰ Whatever the reasoning behind these two exceptions, Justice Blackmun stated there is not much that can be done about them; they are rationally related to legitimate state interests.⁵¹

However, the Supreme Court had another problem; distinguishing this case from *Allegheny Pittsburgh Coal Co. v. Webster County*.⁵² In *Allegheny Pittsburgh Coal*, the county's taxing scheme was held unconstitutional.⁵³ Because there was a problem in maintaining the equality of assessments in Webster County, West Virginia, the county tax assessor created a "Welcome Strangers" scheme.⁵⁴ After a purchase of property in Webster County, the deed would arrive at the County Clerk's Office, where the tax assessor would look at the tax revenue stamps and increase the assessed value of the property to its purchase price.⁵⁵ In *Allegheny Pittsburgh Coal*, the plaintiff proved that his property taxes, based upon the land's purchase price, were thirty-five times higher than neighboring properties.⁵⁶ As a result, the Supreme Court held Webster County's taxing scheme violative of the Fourteenth Amendment's Equal Protection Clause.⁵⁷

If Webster County's taxing scheme was unconstitutional, how could Article XIII A of the California Constitution be held constitutional? Justice Blackmun distinguished Article XIII A of the California Constitution from Webster County's taxing scheme.⁵⁸

49. *Id.* at § 2(a).

50. *Id.* at § 2(h).

51. *Nordlinger*, 112 S. Ct. at 2335 (explaining that State has legitimate interest in preventing older persons from being discouraged from moving to more suitable and affordable residences and in promoting family continuity).

52. 488 U.S. 336 (1989).

53. *Id.* at 343.

54. *Id.* at 338; see generally *Nash v. Town of Southampton*, 168 A.D.2d 102, 571 N.Y.S.2d 951 (2d Dep't 1991) (reassessment of land upon sale, subdivision, improvement, or inclusion in land equalization program).

55. *Allegheny Pittsburgh Coal*, 448 U.S. at 338.

56. *Id.* at 341.

57. *Id.* at 343.

58. *Nordlinger*, 112 S. Ct. at 2334.

He declared that the California taxing scheme was an acquisition value scheme that was well thought out, whereas the Webster County scheme was merely a random scheme.⁵⁹ With some refreshing frankness in his concurrence, Justice Thomas stated that the decision in *Allegheny Pittsburgh Coal* was clearly incorrect and could not be distinguished from *Nordlinger*.⁶⁰ It was his view that the Court should not interfere with these local taxing schemes.⁶¹

Justice Stevens dissented⁶² and attacked the scheme by focusing on two points. First, if Article XIII A was a scheme for saving residential neighborhoods, why did the commercial property owners retain the same benefits as residential property owners?⁶³ Second, if a young couple inherited a house, they retained the old tax assessment, while, if another young couple bought an identical home, they were assessed at the full fair market value.⁶⁴ “[S]uch disparate treatment of similarly situated taxpayers is arbitrary and unreasonable.”⁶⁵

Apart from the political aspects of Article XIII A, in the face of large tax disparities, it is apparent that there is a great deal of deference to local tax schemes.⁶⁶ Nevertheless, the reasoning seems specious.

The Takings Clause of the Fifth Amendment⁶⁷ declares that private property shall not be taken for public use without just compensation.⁶⁸ There are two ways for property to be taken. The first method is defined as a permanent physical occupation of property, where the government acquires private property for such purposes as constructing a highway, park, or state office

59. *Id.* at 2334-35.

60. *Id.* at 2336 (Thomas, J., concurring).

61. *Id.* (Thomas, J., concurring).

62. *Id.* at 2341 (Stevens, J., dissenting).

63. *Id.* at 2345, n.6 (Stevens, J., dissenting).

64. *Id.* at 2342 (Stevens, J., dissenting).

65. *Id.* (Stevens, J., dissenting).

66. *See supra* note 18 and accompanying text.

67. U.S. CONST. amend. V, cl. 5.

68. *Id.* (“[N]or shall private property be taken for public use, without just compensation.”)

building and, in return, pays the owner just compensation for that property.⁶⁹ The second method is defined as a regulatory taking, a scheme that reduces the value of the regulated property to such a degree that it amounts to a taking.⁷⁰

For many years, the Supreme Court tried to avoid dealing with regulatory takings. Back in the 1920s, Oliver Wendell Holmes observed in his opinion in *Pennsylvania Coal Company v. Mahon*,⁷¹ that when a regulation goes too far it becomes a taking.⁷² Prior to 1987, the Supreme Court had not decided whether a temporary taking of property was compensable. For many years, real property owners attempted to get a case into the Supreme Court, hoping it would ultimately direct payment of damages for regulatory takings. However, the Supreme Court consistently found a way to avoid reaching the issue, either by holding that the ground was not ripe,⁷³ or that the State remedies had not been exhausted.⁷⁴ The Court, in *First English Evangelical Lu-*

69. See *United States v. Miller*, 317 U.S. 369 (1943) (compensation paid when federal reclamation project condemned land for railroad tracks); *Shoemaker v. United States*, 147 U.S. 282 (1893) (compensation paid when land was condemned for public park purpose).

70. See *Hodel v. Irving*, 481 U.S. 704 (1987) (federal escheat provision effected a taking of plaintiff's property without just compensation under Fifth Amendment); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (conversion of pond into public aquatic park subjected property to federal navigational servitude which resulted in taking requiring just compensation); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (statute prohibiting mining of coal exceeded police power and violated Contract Clause and Due Process Clause of Fourteenth Amendment).

71. *Mahon*, 260 U.S. at 412.

72. *Id.* at 415.

73. See *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981) (question of whether provisions of Surface Mining Control and Reclamation Act prohibiting mining in certain locations violates Just Compensation Clause not ripe for judicial review); *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621 (1981) (rezoning ordinance precluding possible construction of nuclear power plant not reviewable on appeal since action lacked final judgment).

74. See *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986) (Court will not determine whether county failed to provide just compensation in absence of final and authoritative determination by county planning commission as to how it would apply challenged regulations to

theran Church of Glendale v. County of Los Angeles,⁷⁵ finally ruled that a regulatory taking was compensable,⁷⁶ causing much alarm among governmental people because of the prospect of having to pay large sums and not being able to prevent attacks upon ecological resources.⁷⁷

In the past Term, two cases raised a regulatory taking argument.⁷⁸ The first case, which warrants little discussion since the Court circumvented the regulatory taking argument, was *Yee v. City of Escondido*.⁷⁹ In *Yee*, the owner of a mobile home camp attacked a combination of the California Mobile Home Residency Law⁸⁰ and the City of Escondido Rent Control Ordinance.⁸¹ The California statute prohibits an owner from evicting a trailer camp tenant from the trailer camp unless there was nonpayment of rent,⁸² a violation of the statutory rules,⁸³ or a change in the use

property in question); *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (since respondent had not yet obtained final decision regarding how it would be allowed to develop its property, jury verdict was premature).

75. 482 U.S. 304 (1987).

76. *Id.* at 322.

77. See Fred Strasser & Marcia Coyle, *Powell's Resignation Wasn't the Only Bombshell*, NAT'L L.J., July 20, 1987, at 5.

78. *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992) (city's rent control ordinance, which set mobile home rents back to their 1986 levels and prohibited increases without city council approval, did not amount to an unwanted physical occupation and therefore did not effect a taking); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (enactment of state legislation prohibiting petitioner from building on his residential beachfront property did not constitute taking when it did not deprive owner of all reasonable economic use of his land or when state common law principles, such as nuisance law, prohibit or restrict construction on property owner's land), *on remand*, 424 S.E.2d 484 (S.C. 1992).

79. 112 S. Ct. 1522 (1992).

80. CAL. CIV. CODE § 798 *et seq.* (West 1982 & Supp. 1992).

81. *Yee*, 112 S. Ct. at 1526-27; City of Escondido Mobile Home Rent Control Ordinance § 4(g) (1988) (enacted pursuant to voter approval of Proposition K).

82. CAL. CIV. CODE § 798.56(e). Tenancy may be terminated for "[n]onpayment of rent, utility charges, or reasonable incidental service charges; provided that the amount due has been unpaid for a period of at least five days from its due date" *Id.*

of the land.⁸⁴ Superimposed on the state statute was the City of Escondido Rent Control Ordinance which limited the amount of rent increase that the owner can impose.⁸⁵ The owner of the trailer camp attacked the effect of the trailer camp laws, claiming that they amounted to a physical taking.⁸⁶ He argued that since he could not evict the tenants and could not collect the market rent, there was a physical occupation.⁸⁷ Justice O'Connor, writing for the majority, rejected this line of reasoning.⁸⁸ She explained that the owner of the trailer camp voluntarily rented his land to mobile home owners and if he wanted to change the use of his land, he could evict his tenants to do so.⁸⁹

The plaintiff also raised a regulatory taking argument which was supported by an interesting theory that the tenants were being enriched by occupying his land.⁹⁰ Both statutes enabled the tenants to benefit from Yee's ownership of land.⁹¹ Therefore, this entire scheme contravened the Constitution.⁹² The plaintiff raised this argument below,⁹³ but his petition for certiorari failed to mention it.⁹⁴ The Supreme Court avoided the issue and spent about a page and a half stating why every argument to be raised should be placed on writ since the Court's calendar was so heavy.⁹⁵ As a result, the Court did not deal with the regulatory

83. *Id.* at § 798.56(a). Tenancy may be terminated for "[f]ailure of the homeowner or resident to comply with a local ordinance or state law" *Id.*

84. *Id.* at § 798.56(g). Tenancy may be terminated for "[c]hange of use of the park or any portion thereof" *Id.*

85. *Yee*, 112 S. Ct. at 1527; City of Escondido Mobile Home Rent Control Ordinance § 4(g).

86. *Yee*, 112 S. Ct. at 1526.

87. *Id.* at 1528.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Yee v. City of Escondido*, 274 Cal. Rptr. 551, 552-53 (Cal. Ct. App. 1990).

94. *Yee*, 112 S. Ct. at 1531.

95. *Id.*

taking aspect of this case.⁹⁶ So, in my opinion, *Yee* was not of any great significance.

A more significant case was *Lucas v. South Carolina Coastal Council*.⁹⁷ In *Lucas*, the plaintiff bought two beachfront lots on the Isle of Palms in Charleston, South Carolina for \$975,000.⁹⁸ In the meantime, Congress passed a law creating a federal coastal management council⁹⁹ and South Carolina's legislature passed another law establishing the South Carolina Coastal Council.¹⁰⁰ The South Carolina Coastal Council prohibited construction on the plaintiff's lots since it would cause erosion.¹⁰¹ Although there were other buildings and summer beachfront homes adjacent to the plaintiff's two lots, the South Carolina Coastal Council stopped him from building on his lots.¹⁰² The plaintiff attacked the prohibition and the South Carolina trial court found it was a taking.¹⁰³ The court awarded damages in the sum of \$1,232,387.50.¹⁰⁴ On appeal,¹⁰⁵ the South Carolina Supreme Court found that the plaintiff had conceded in his pleadings that the South Carolina law was constitutional and prevented a nuisance from occurring.¹⁰⁶ Therefore, he was not entitled to compensation.¹⁰⁷

The case went to the Supreme Court where Justice Scalia's opinion created a per se rule. Specifically, when a government regulation deprives an owner of all beneficial use of his or her property, compensation must be paid, with one exception.¹⁰⁸ If,

96. *Id.*

97. 112 S. Ct. 2886 (1992).

98. *Id.* at 2889.

99. Coastal Zone Management Act, 16 U.S.C. § 1451 (1988 & Supp. II 1990).

100. South Carolina Beachfront Management Act, S.C. CODE ANN. § 48-39-10 (Law. Co-op. 1987 & Supp. 1992).

101. *Lucas*, 112 S. Ct. at 2889.

102. *Id.*

103. *Id.* at 2890.

104. *Id.*

105. 404 S.E.2d 895 (S.C. 1991).

106. *Id.* at 896.

107. *Id.* at 902.

108. *Lucas*, 112 S. Ct. at 2899.

on a public nuisance basis, under state common law, the use of the property could have been prohibited by injunctive relief without payment or compensation, then even though there was a deprivation of all beneficial use of the property, there would be no obligation to pay.¹⁰⁹ In contrast, in *Nollan v. California Coastal Commission*,¹¹⁰ Justice Scalia had taken the position that if a community desires to accomplish some beneficial purpose at the expense of a private property owner, it should pay the property owner.¹¹¹ In narrowing this rule, the *Lucas* Court affirmatively supported a compensation requirement when regulations leave the owner of the land without any economically beneficial or productive options for its use.¹¹² Requirements that land "be left substantially in its natural state - carry with them a heightened risk that private property is being pressed into some form of public service."¹¹³ At this point, the public should pay for it.¹¹⁴

The dissenters in this case were appalled at what they conceived to be an unnecessary creation of a per se rule.¹¹⁵ Justice Blackmun began his dissent by declaring: "Today the Court launches a missile to kill a mouse."¹¹⁶ According to Justice Blackmun, in American jurisprudence there had traditionally been no obligation to pay compensation for a government regulated use.¹¹⁷ In fact, state governments often took property for the

109. *Id.*

110. 483 U.S. 825 (1987). Petitioner owned beachfront property and sought a permit to construct a home on it in keeping with the rest of the neighborhood. *Id.* at 827. The California Coastal Commission recommended that the permit be granted subject to the condition that petitioner allow a public easement for easy access to the ocean. *Id.* at 828. The Court held that the condition was an unconstitutional taking which violated the Fifth Amendment because there was no direct nexus between the condition and the purpose for such a requirement. *Id.* at 839.

111. *Id.* at 841-42.

112. *Lucas*, 112 S. Ct. at 2894-95.

113. *Id.* at 2895.

114. *Id.* at 2894-95.

115. *Id.* at 2904 (Blackmun, J., dissenting).

116. *Id.* (Blackmun, J., dissenting).

117. *Id.* at 2906 (Blackmun, J., dissenting); see, e.g., *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (regulation barring continued operation of existing sand gravel business was upheld since it was enacted to protect public

construction of roads without paying compensation.¹¹⁸ Instead, Justice Blackmun argued that these types of cases should be decided on an ad hoc basis weighing the seriousness of the public need against the investment-backed expectations of private property owners.¹¹⁹ The Court should not establish a "taking" based on economic value alone, but should consider the public interest.¹²⁰ Hence, the majority's per se rule was unnecessary.¹²¹

Justice Blackmun also maintained that it was unnecessary to reach the case at all since it was not ripe for review.¹²² He noted that there had been no final judgment on what uses would be permitted on the land in question. Thus, he concluded, without a final judgment, there was no jurisdiction.¹²³ Justice Blackmun explained that after the plaintiff's use was prohibited, the law had been amended to provide that a variance could be obtained by special permit.¹²⁴ However, the plaintiff did not indulge this option and the South Carolina Supreme Court did not bother with this question.¹²⁵ Therefore, Justices Blackmun,¹²⁶ Stevens,¹²⁷ and Souter¹²⁸ took the position that the case was not ripe, and it was not time for the creation of a per se rule.

safety); *Miller v. Schoene*, 276 U.S. 272 (1928) (no compensation was required to be paid to property owner ordered to destroy cedar trees to prevent disease from spreading to nearby apple orchids); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (excavated property was properly prevented from being used for anything other than brickyard); *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (regulation of manufacture of oleomargarine was upheld).

118. *Lucas*, 112 S. Ct. at 2915 (Blackmun, J., dissenting). See generally MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977); William Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

119. *Lucas*, 112 S. Ct. at 2910, 2912 (Blackmun, J., dissenting).

120. *Id.* at 2912 (Blackmun, J., dissenting).

121. *Id.* (Blackmun, J., dissenting).

122. *Id.* at 2906-07 (Blackmun, J., dissenting).

123. *Id.* at 2907 (Blackmun, J., dissenting).

124. *Id.* at 2902 (Blackmun, J., dissenting).

125. *Id.* at 2917 (Stevens, J., dissenting).

126. *Id.* at 2907 (Blackmun, J., dissenting).

127. *Id.* at 2918 (Stevens, J., dissenting).

128. *Id.* at 2925 (Souter, J., dissenting).

Justice Stevens observed that, if the rule required a finding that all beneficial use had been extinguished by the regulation, what about value extinguished to the extent of ninety-five percent?¹²⁹ Justice Stevens tossed various other darts at the reasoning of Justice Scalia.¹³⁰ He declared that “the Court’s new rule [was] wholly arbitrary.”¹³¹ For example, if the plaintiff’s neighbors’ homes were partially destroyed by a natural disaster, they would not be able to rebuild and recoup their losses. However, the plaintiff would be able to recover damages to his land, even though he could not build on his land.¹³² Justice Scalia responded to these arguments in the footnotes of his opinion¹³³ by stating that as far as the ninety-five percent loss as opposed to the one hundred percent loss argument, nothing was new; “[t]akings law is full of these ‘all or nothing’ situations.”¹³⁴ Property is frequently reduced in value, and zoning schemes themselves reduce property values.¹³⁵ Therefore, the Court was only enunciating that if there was a complete extinction of beneficial use, there would have to be payment of just compensation.¹³⁶

Well, the case will shortly be debated in the law reviews, and where it will go from here we do not know. I think the real property owners, developers and speculators expected more from this case. It presented such wonderful circumstances: a very expensive purchase and suddenly, out of the blue, a prohibition against its intended use.¹³⁷ It was expected that more would be

129. *Id.* at 2919 (Stevens, J., dissenting).

130. *Id.* (Stevens, J., dissenting).

131. *Id.* (Stevens, J., dissenting).

132. *Id.* (Stevens, J., dissenting).

133. *Id.* at 2895 n.8.

134. *Id.*

135. *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (establishment of zoning ordinance causing 75 percent reduction in market value of plaintiff’s land was constitutional and proper exercise of police power since it was rationally related to public health, safety, and morals, and not arbitrary and capricious).

136. *Lucas*, 112 S. Ct. at 2901.

137. *Id.* at 2889. The plaintiff purchased two residential lots in 1986 for \$975,000 on which he was going to build two single family homes. The

written, and really all the Court did was say: if all beneficial use is extinguished, there had to be payment of just compensation.¹³⁸

Incidentally, there was a debate in the case as to whether all use was actually extinguished. Justice Scalia did not say whether the Beachfront Management Act barred all economically productive or beneficial uses to the plaintiff, but remanded the case for the South Carolina courts.¹³⁹ Justice Blackmun thought that the land could still be used for picnicking, swimming, camping, or living in a movable trailer.¹⁴⁰ Justice Blackmun went further and stated that the plaintiff can still enjoy other attributes of ownership such as the right to exclude others and the right to alienate.¹⁴¹

In any event, there was disappointment in the real estate community that the case did not go further. The Supreme Court remanded the case back to the South Carolina courts¹⁴² to determine whether the use of Lucas' two lots would have been prohibited under South Carolina common law nuisance principles.¹⁴³ At least from the analysis and from what we know about nuisance law, the use of a couple of lots on a barrier beach adjacent to many existing buildings can scarcely be a nuisance. Apart from the excited debate, this case simply establishes a *per se* rule that when there is a *total* extinction of *all* property rights, just compensation will be awarded.

Beachfront Management Act, passed in 1988, essentially barred the plaintiff from building any permanent structures on his land. *Id.*

138. *Id.* at 2901.

139. *Id.* at 2902; see *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 (S.C. 1992).

140. *Lucas*, 112 S. Ct. at 2908 (Blackmun, J., dissenting).

141. *Id.* (Blackmun, J., dissenting).

142. *Id.* at 2902.

143. *Id.* at 2901-02.