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Takings Law in Light of *Lucas v. South Carolina Coastal Council*

Judith M. LaBelle*

As democracy swept throughout Eastern Europe, one commentator struck a somber note: "Democracy has defeated communism," he said. "Now the question will be whether democracy can survive capitalism."

That comment comes to mind during this discussion of the takings issue because it is our strident strain of capitalism, with its extreme emphasis on the individual and individual rights and its characterization of land as just another form of capital that gets in our way and clouds our vision, as we consider the degree to which government may rightfully regulate the use of private land.

Given this capitalistic view of land, it should come as no surprise that takings jurisprudence is in a muddle. Rather than having an economy that serves the needs of a social and political system, we seem increasingly to mold our political and social systems to serve our economy. Yet our economic theory discourages us from recognizing that we live in a world of finite natural resources in which everything is intercon-

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nected. When we do manage to incorporate our growing environmental knowledge into our thinking or governmental actions, the regulation which results is often undercut by courts which place greater emphasis on individual economic expectations than on societal needs and expectations.

Therefore, in light of the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*,¹ I would like to step back and consider various social and political contexts within which takings cases arise and suggest some initiatives that could have a positive impact on the more general issue of land use and the jurisprudence that stems from its regulation.

For starters, our prevailing economic theory, which deeply influences both political and judicial decisions, must be revised and when so revised, applied. In a recent book entitled *For the Common Good*,² Herman Daly and John Cobb present a cogent analysis of why economic theory fails to recognize the environmental disaster it is creating. It is instructive to consider a few of the authors' major points.

To begin with, the prevailing paradigm of growth as the only measure of economic health refuses to account for the finite nature of the natural resources on which growth is based. Daly and Cobb argue that this cannot be sustained, that the system will undermine itself:

. . . The scale of human activity relative to the biosphere has grown too large. In the past 36 years (1950-86) population has doubled (from 2.5 to 5 billion). Over the same period, gross world product and fossil fuel consumption have each roughly quadrupled. Further growth beyond the present scale is overwhelmingly likely to increase costs more rapidly than it increases benefits, thus ushering in a new era of 'uneconomic growth' that impoverishes rather than enriches. This is the fundamental wild fact that so far has not found expression in words sufficiently feral to assault successfully the civil stupor of economic

1. 112 S. Ct. 2886 (1992), *rev'g and remanding* 404 S.E.2d 895 (S.C. 1991).

2. HERMAN E. DALY, & JOHN B. COBB, JR., *FOR THE COMMON GOOD: REDIRECTING THE ECONOMY TOWARD COMMUNITY, THE ENVIRONMENT, AND A SUSTAINABLE FUTURE* (1989).

discourse.³

Lest the stridency of these words leads you to discount them, note that Daly is a senior economist at the World Bank and Cobb is professor of philosophy and theology at the School of Theology at Claremont.

This is a primary point of their critique — that prevailing theory fails to recognize that the economy has a proper scale relative to the ecosystem. As the economy grows (whether through increases in population or consumption rates), it may demand resources in excess of the ecosystem's ability to renew them. Although the world economy gets bigger, the ecosystem in which it operates does not. There are limits to how much we can change our ecosystem and limits to how much we can take from it and discharge into it without undermining its capacity to cleanse the air, purify the water and maintain a stable climate.

Moreover, as a result of focusing on markets and market pricing mechanisms, the prevailing economic theory does not account for the environmental costs of economic growth — they become externalities, external to the market-based theory, but increasingly real to those who live with the results of the system on which it is based. At one point, when the scale of economic activity was such that the environment seemed to absorb its impacts without anyone having to bear the cost, this flaw in the theory might not have mattered. However, we are now beginning to reach or exceed those limits. PCBs in the Hudson River and dioxin in Lake Champlain are but two examples of environmental externalities and the difficulties they pose. In both instances, the true cost of PCBs and dioxin and their effect on the environment were not priced by any market. As a result, we now struggle to develop ways to restore the water quality and habitat they harmed, determine responsibility and assess the potentially staggering cost of remediation.

In addition, prevailing economic theory has such a strong focus on short-term return of capital that it provides a ration-

3. *Id.*

ale for depleting resources and harvesting species to extinction in an effort to obtain immediate economic gain rather than focusing on husbanding them for long-term public and private benefit. As Daly and Cobb put it, we generally treat the earth as if it were "a business in liquidation."

Finally, although economists use the term "land" as an inclusive term for the natural environment, their focus is generally on land as just another form of capital or commodity to be owned and exploited. Because economists frequently ignore ecological systems, their consideration stops at the boundary line, without regard for the impact that the use of the resource will have on ecological systems or the human community.

Consequently, our political discourse has gone awry in part because the economic theory that we rely on to grapple with real property issues is fundamentally flawed. The present market oriented economic theory provides few solutions to the real property issues which this nation faces. The importance of the critique put forth by Daly and others — and their proposals for revising the way we calculate Gross National Product and other reforms — are gaining recognition, but have yet to have a significant influence on American public policy.

Just as the economic view of land as merely another form of capital fails, so does a legal theory that is based on that view. To the extent that takings jurisprudence is based primarily on an economic view of land, it perpetuates, protects and encourages unsustainable growth. The *Lucas* decision signals the willingness of an emerging majority of the Court to substitute its judgment for that of legislatures which are becoming increasingly cognizant of the need to limit growth based upon environmental principles. Furthermore, the Court's decision reflects the principles espoused by the Chicago School of Economics, which seeks to protect and promote land use theories based on a market economy. Given the trend in the Court today, we are moving into an era of more frequent clashes over land use and its limitations.

A second initiative that would improve the way we manage land use is a more thoughtful approach to issues relating to equity. It cannot be stated too often that the *Lucas* deci-

sion relates to a very unusual situation (the existence of which, in this case, Justice Souter found “highly questionable”⁴), one in which the owner is deprived of all economic use (or “interest,” using Justice Souter’s terminology). And even then, the Court continues to recognize that the state may impose its regulations without compensation if, in effect, its intent is to prevent a nuisance. Therefore, *Lucas* by itself does not expand the situations in which the state must compensate for regulations that impact value.

However, to say that the state is not constitutionally obligated to compensate an owner when a severely restrictive regulation has stopped just short of wiping out all use or value of his property should not be the end of the discussion. If we look up from our parsing of the case law and consider the real world situations that generate the litigation in the first place, we see several forces at work that suggest that we will all benefit if we address the issue of equity more directly.

First, litigation is expensive; society’s resources could be better used in other ways. Moreover, adjusting the balance between the individual and society is more appropriately done by the legislature than the judiciary. Some takings litigation might be avoided if fairness issues were discussed and addressed more creatively when the regulations are devised.

Second, we tend to rely too heavily on regulation to achieve land use goals and fail to coordinate regulation with economic incentives and with public and private initiatives that seek the same end. We have a great deal to learn from the British in this regard. They realized long ago that merely precluding development would not preserve agricultural activity or the treasured pastoral countryside. Therefore, they provided a variety of carefully targeted subsidies to preserve key elements of the countryside and initiated efforts to integrate the various public and private efforts to promote appropriate economic development. Fostering more efforts such as these might take much of the sting out of stricter land use regulations in this country while making it more likely that our un-

4. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2925 (1992), *rev’g and remanding* 404 S.E.2d 895 (S.C. 1991).

derlying objectives would be achieved.

Third, our sense of fairness is closely related to expectations. Often we decide what is fair by considering not only the interests of each party (here, the individual and the state), but also the reasonable expectations of each.

To a large extent, the economic expectations of landowners have been created by our society's tendency, mirrored rather than tempered by the judiciary, to focus on individual economic cost more closely than society's, and to regard land as an economic rather than an ecological resource. Therefore, there may be some situations in which the Constitution does not compel compensation (or some variance from the strict application of the regulation), but our sense of fairness requires compensation because the regulation is both unexpected and extreme in its impact. Given that our sense of fairness relates to expectations, this may be considered a transitional problem; the next owner will take title with the knowledge of the restrictions.

For example, many farmers are now reaching retirement age and have come to perceive the development value of their land as a retirement nest egg. The imposition of strict agricultural zoning may reduce the value of the land dramatically, leaving the farmer with fewer, and perhaps inadequate, resources with which to face the rest of his life. This might be an appropriate situation in which to consider whether some form of compensation can be devised to reduce the impact on this generation of farmers while still protecting the land base.

The next farmer will not have the same financial expectations — the transition will have been completed. However, both the initial farmer and his successor may need new financial and other types of support for continuing the agricultural operation, since farmers have increasingly come to rely on their land as collateral for operating loans.

Our sense of fairness also relates to the nature of the parties. We may decide, for example, that the farmer's situation is far different from that of the speculative developer who has just bought the neighboring farm in the hopes of obtaining a zoning change that would allow him to build a shopping center. He assumed the risk relating to land value in a far

different way than the lifelong farmer.

The equity issue was a central concern to the Commission on the Adirondacks in the Twenty-First Century. I would like to use the Commission's proposal, released in 1990, to illustrate how a variety of techniques can be woven together to address this issue.

The Adirondack Park is one of the jewels of our nation, with its unique mix of mountains, lakes and forests. It is not the standard American "park" since its six million acres are a patchwork of public and private land (split approximately 40/60). Thus, what is done on the private land has a direct and significant impact on the public land.

In 1988, about one-third of the entire Park was owned by 564 private landowners who each owned over 500 acres of land. Just over half of this land was owned by the forest industry, which is also supported by many other private owners who have traditionally managed their lands for timber production.

As the Commission began its work, the trend toward the fragmentation of this land base and its timber resource was clear. For example, sales of subdivided property in the Park tripled between 1982 and 1985; sales doubled again by 1988. This continued fragmentation would not only have severe ecological consequences for the state-owned land in the Park (known as the Forest Preserve) but would undermine the private Adirondack forests as a sustainable economic base for the residents of the Park. The Adirondack Park Agency Act would allow over 150,000 additional residences on the 2.7 million acres of mostly forested land classed as resource management and rural use. An additional quarter of a million new residences could be built in the other areas of the Park.

The Commission proposed a variety of measures, including the reduction of both uses and density within the resource management and rural use areas. These measures however did not constitute a compensable taking. Nonetheless, because of a concern for the equities involved, the Commission proposed several measures to support the continuation of the timber and agricultural industries and to provide limited development potential and economic return to each owner.

Among the techniques included in the Commission's plan for the resource management and rural use land were:

— The purchase of conservation easements to preclude structural development, but wherever appropriate, allow for continued sustainable timbering. (Since the State pays taxes on its easement interests within the Park, the tax payments to local governments would not be reduced.)

— Coupling a reduction in density with a transferrable development rights program.

— Every landowner would be entitled to have one principal building (termed a "Structural Development Right" or "SDR").

— Large landowners would also retain one SDR for each additional 2,000 acres of their holdings (related to the smallest acreage considered capable of supporting an independent timbering operation in the Adirondack forest). The SDR could be sold with a much smaller parcel and the remaining land retained without the right for further structural development. (The Forest Use Tax Program, noted below, would encourage its retention in active timber production.)

— Transferable Development Rights (TDRs) would be granted to each owner based on densities allowed by the current Adirondack Park Agency (APA) Act. These TDRs could be sold to the state at a statutory price or sold on the private market for use, within certain limits, within the moderate intensity and low intensity use areas of the Park (areas previously identified as being capable of sustaining further development), where allowable densities would be increased.

— A Forest Use Tax Program that would reduce property tax to a level reflecting value for timbering rather than development would be open to owners of parcels larger than 125 acres (a size below which it is likely that other values supersede forest use values). In return for this tax reduction, the owner would give the state an option to buy the SDRs on the property at a fair market value determined by appraisal. The state would reimburse local governments for the taxes not paid by owners enrolled in

the program.

— Changes in federal and state tax policy were to encourage the continuation of the forest products industry, including preferential capital gains treatment for timber taken from lands which are guaranteed to remain in timber production for at least twenty years, and current use valuation for estate tax purposes of inherited forest land if the new owner agrees to maintain the land in forest use without structural development for at least twenty years.

The complexity of even this brief summary indicates how difficult it is to develop measures to respond to owners' expectations while protecting natural resources. Even with this plan, 10,000 to 15,000 new principal structures would be added to the 14,000 existing structures on resource management and rural use areas. Nevertheless, this would substantially reduce the potential impact from the more than 150,000 structures allowed by the current regulations.

This plan has not been enacted; it was swamped politically and has not yet received fair consideration. But the fact that it has been stalled does not undermine the importance of the concepts it embodies. In fact, the Commission proposed little that was new. If the techniques it incorporated seem unfamiliar to many New Yorkers, it is in part because we have long since fallen behind in the land use arena.

We in New York State tend to think that we are in the forefront of just about everything. But certainly in terms of land use planning and regulations that protect resources and provide greater predictability in the development process, we lag far behind many other states that have moved to state-wide planning and have recognized great benefit. For example, the Oregon system establishes urban growth boundaries and severely restricts land use in the countryside to protect agricultural uses. While the plan met with fierce opposition when first adopted about twenty years ago, even some commercial developers have since credited the growth boundary around Portland for the city's continued economic vitality. Also, Vermont's Act 250 has been credited with having helped Vermont avoid the real estate "bust" that has overwhelmed many of the states that indulged in the development "boom" during

the 1980's.

Moreover, a study concluded earlier this year by the Center for Urban Policy Studies at Rutgers University found that New Jersey's proposed growth management plan would save the state billions of dollars, without impacting the number of people or jobs added to the state by directing growth to areas where roads, sewers and schools already exist, rather than allowing sprawl across the remaining open land.

A major argument in favor of state-wide planning is that it brings a greater level of consistency and predictability to the land development process — responding to both the developers' and communities' complaints that their expectations are undercut by the present system. Better planning will avoid bad situations as well as promote better solutions and better overall use of resources. But to do so, it must incorporate the best available ecological thinking and must be allowed to *evolve* as our understanding of ecological systems *evolves*. The planning structure must also be able to deal with resources on the level at which they can be effectively managed. This will mean moving, when appropriate, from the strong focus on local control that characterizes New York State to more bioregional thinking and planning. Given the degree to which decisions made at the federal and state level impact local land use decisions, much of the thinking about the strength of local control is mythical anyway.

Since relationships are at the heart of issues of equity and fairness, the final initiative which must be addressed is the relationship between individuals and their communities. The property rights movement, which is fueling some of the current takings claims, may, in part, reflect the anti-institutional strain of the legacy of the 1980's. During this period of great economic activity, our political and economic institutions were discredited among large segments of the populace. Many Americans have come to think that they cannot influence the businesses or governmental agencies that affect their lives. Few of the corporations with which they deal are locally owned or evidence long-term commitments to the communities within which they operate. Congress and the federal bureaucracy are perceived as being increasingly irrelevant when

it comes to solving serious problems.

People are scared, angry and frustrated, and are taking a stand in the only arena that seems to be left to them — the use of their land. Not only is this consistent with our heritage, but many see the exploitation of the value that has accrued in their land as the only way to get a seat at the table in the capitalist game. Indeed, when our economic and social fabric is torn and our resources squandered by both public and private action and inaction, why should any individual be restrained? It is the tragedy of the commons writ large.

In *A Sand County Almanac*,⁵ Aldo Leopold suggests that ethics develop in sequence, the first set involving relations between individuals, the second between individuals and society, and the third between individuals and their environment. Leopold focused on the need to develop the third, his “land ethic.”

I suggest, however, that the current focus on the takings issue and the assertion of private property rights reflect to some degree the erosion of the first two sets of ethics; those between individuals and those between the individual and society. We are quick to assert the primacy of our individual rights — especially property rights — even when exercise of those rights are seriously detrimental to our neighbors. While we are quick to demand compensation for any diminution in value suffered as the result of regulation, we ignore the increase in value that results from government actions. The focus on the individual isolated from society echoes the focus on individual parcels of land isolated from ecological systems by arbitrary boundary lines.

We have become so taken with the pursuit of individual rights and personal economic gain that we have lost sight of the community and the social fabric of mutuality and reciprocity without which our economic and political systems cannot operate. Participants on both sides of the issue are often driven to extreme positions which do not foster civil discourse or the creative resolution of the basic conflict.

5. ALDO LEOPOLD, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* 202-03 (1987).

Thus, we return to the initial question — whether democracy can survive capitalism. The manner in which our takings jurisprudence develops will shape the answer.