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REGULATORY TAKINGS

**Iowa Supreme Court Rejects Takings
Challenge to State Law Prohibiting
Destruction of Ancient Burial Mounds**

*The Iowa Supreme Court has ruled that the application of an Iowa statute prohibiting the destruction of Indian burial mounds did not result in a taking of property in violation of federal and state constitutions. Relying on the U.S. Supreme Court's recent decision in **Lucas v. South Carolina Coastal Council**, 112 S. Ct. 2886 (1992) [12 P.L.R. 1085], the court reasoned that compensation was not due even if the statute denied the owners all economically beneficial use of their property, because the restrictions were in existence at the time the owners purchased the property in question. The court explained that "the 'bundle of rights' the [owners] acquired by their fee simple title did not include the right to use the land contrary to [that law]." In other words, the court reasoned that because the owners purchased the property subject to the legislation in question, they were not entitled to violate it. (**Hunziker v. State of Iowa**, No. 176/93-302 [Sup. Ct. Iowa Jul. 27, 1994].)*

In May 1988, plaintiffs Erben A. Hunziker, Donald M. Furman, R. Friedrich and Sons, Inc., and Buck Construction Company, Inc., purchased a 59-acre tract of farmland for residential development. They platted the tract as the Second Addition, Northridge Parkway Subdivision and then sold lot 15 in the addition two years later for \$50,000. The purchaser, Dr. Jon Fleming, planned to build a home on the lot.

In April 1991, the state archaeologist discovered a Native American burial mound near the center of lot 15, believed to have been built by Native Americans of the Woodland Period approximately 1000 to 2500 years ago. Acting pursuant to authority established under § 305A.9 of the Iowa Code, the state archaeologist prohibited the disinterment of the burial mound and required that a buffer zone be placed around the mound to ensure its protection. Because of the mound's particular location on the lot, construction of a house became legally infeasible. A building permit would not be issued.

Thereafter, the developers agreed to refund the purchase price to Dr. Fleming, taking the lot back and filing suit in state court to recoup their losses on the alleged basis that the State's action amounted to a regulatory taking without

compensation in violation of state and federal constitutions. The district court granted summary judgment in favor of the state, finding that the developers did not have a vested property right to construct a house on an ancient burial mound and the developers appealed. The Iowa Supreme Court affirmed the lower court's decision, ruling that no taking had occurred as a matter of law.

Three state code provisions are at issue in this case. Section 305A.7 of the Iowa Code, enacted in 1976, places general authority within the state archaeologist to protect ancient human remains. This provision states in part:

The state archaeologist shall have the primary responsibility for investigating, preserving and reintering discoveries of ancient human remains. For the purposes of [this section] ancient human remains shall be those remains found within the state which are more than one hundred fifty years old

Section 305A.9, enacted in 1978, further provides that:

The state archeologist shall have the authority to deny permission to disinter human remains that the state archaeologist determines have state and national significance from an historical or scientific standpoint for the inspiration and benefit of the people of the United States.

Lastly, Section 716.5.2, also enacted in 1978, makes the intentional disinterment of human remains a criminal offense.

The Court's Decision. The Iowa Supreme Court ruled that a taking had not occurred since the relevant statutory provisions were in effect at the time the developers had purchased the property, and thus the

contested restrictions inhered in the developers' title to their land. Relying on the U.S. Supreme Court's ruling in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992)[12 PLR 1085], the Iowa court explained that even if application of the law denied the owners all economically beneficial or productive use of their property, the state may "resist payment of compensation" where "it can be shown that the property owner's 'bundle of rights' never included the right to use the land in the way the regulation forbids" as "determined under state nuisance and property law."

In support of their claim, the developers had essentially argued that the statutory provisions were not a relevant factor in determining whether compensation is due under *Lucas*. They also maintained that a taking did not take effect until the state archaeologist had actually discovered the mound and taken action denying permission to disinter the human remains, all of which occurred after they had purchased the property in question. Also relying on language in *Lucas*, the developers essentially argued that "regulatory takings can happen from a law or decree and that such regulatory action may well have the effect of eliminating the land's only economically productive use."

Declining to interpret *Lucas* "as restrictively as the [developers]," the Iowa Supreme Court observed that the statutory provisions at issue in this case were in existence long before the developers had purchased the land in question. Accordingly, the court determined that the "'bundle of rights' the [developers] acquired by their fee sim-

ple title did not include the right to use the land contrary to the provisions of those three Iowa Code sections." The court explained that "[a]ny prohibited use of lot 15 is directly attributable to the provisions of these three Code sections." It stated that "[t]he plaintiffs took title to the land in question subject to the provisions of these sections" and that "[t]hese sections and their resulting prohibitions concerning the use of land ran—so to speak—with the land." In distinguishing the present case from *Lucas*, the court also attached significance to the fact that in *Lucas* the regulation at issue had been passed after the plaintiff had acquired title.

The Iowa Supreme Court relied heavily on the U.S. Supreme Court's "bundle of rights" analysis in *Lucas*, observing that "the right to use the land in the way contemplated is what controls." The court explained that when the developers

acquired title, "there was no right to disinter the human remains and build in the area where the remains were located" and thus "no taking [occurred] when the state archaeologist made the significant find and took action denying permission to disinter the human remains." The court noted that "at the time the [developers] acquired title, the State, under existing state law, could have prevented disinterment."

Dissent. In a dissenting opin-

ion, Justice Snell stated that he found the developers' takings "claim to be just and supported by law." Describing lot 15 as part of the owners' investment-backed expectation in developing a 59-acre tract for the construction of houses, Judge Snell took issue with the majority's conclusion that the owners had "caused their own loss by buying property without recognizing a burial mound was on it" Rather, Justice Snell asserted that a taking had occurred because the

owners had been denied all use of their property, rejecting the majority's analysis under *Lucas*. Justice Snell also observed that the was virtually no notice to the landowners of the State's claim and no opportunity to review the government's action or appeal to the courts. Arguing that § 305A.9 is not a "self-executing statute creating a covenant running with the land," Justice Snell stated that "[b]y its own terms the statute

is activated only by an application for permission to disinter."

Analysis. While the Iowa Supreme Court upheld the state's action in this case against a takings claim, the court's decision highlights the difficulty of applying the U.S. Supreme Court's analysis in *Lucas v. South Carolina Coastal Council* and accordingly is likely to spark considerable debate. In *Lucas*, the U.S. Supreme Court ruled that a taking would result where the application of a regulation goes so

The court explained that when the developers acquired title, "there was no right to disinter the human remains and build in the area where the remains were located," and thus no taking occurred.

far as to deny *all* economic use of property *unless* the prohibited use is one that is not inherent in the rights of the property owner as determined by reference to "background principles of a state's law of property and nuisance already placed upon land ownership." In other words, a government must compensate a property owner for a total deprivation of economic use *unless* the prohibited use would not be considered part of the owner's title to begin with.

The Iowa Supreme Court, in ruling for the state, relied on a passage in the *Lucas* decision in which the U.S. Supreme Court stated that it would permit a government to assert preexisting limitations on landowners. Specifically, that passage states:

Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved . . . though we assuredly *would* permit the government to assert a permanent easement that was a preexisting limitation upon the landowners We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land: *Any limitation so severe 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.* A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complimentary power

to abate nuisances that affect the public generally or otherwise.

112 S. Ct. at 2900 (emphasis added by the Iowa Supreme Court).

Under the Iowa court's interpretation of *Lucas*, compensation is not due where a property owner purchases property subject to the challenged restriction because a property owner's "bundle of rights" do not include the right to use land in a way that a regulation forbids. In other words, a taking cannot occur where a property owner does not have a reasonable expectation that he or she can build on property in violation of state law. Under this interpretation of *Lucas*, the answer to the question of whether compensation is due would turn on whether the restriction was in effect at the time of purchase, rather than its impact on the owner. Others argue that only common law (rather than statutory restrictions) may be considered under *Lucas* for purposes of determining whether compensation is due.

Putting aside the question of whether the Iowa court properly construed *Lucas*, a strong argument can be made that the result should be the same. In reaching its decision, the court *assumed* that the developers had been denied all reasonable beneficial use of his property, thereby limiting the scope of its analysis to the single lot affected by the state's Native American burial law. By making that assumption, the court never reached the question of whether a taking actually occurred in this case in light of the "parcel as a whole" principle of taking analysis. That principle requires that a reviewing court examine the impact of the regulation on

the "property as a whole" rather than a discreet portion of an owner's property interest. In the present case, lot 15 represents only a small portion of the 59 acre tract of land purchased by the developers in 1988.

Significantly, the U.S. Supreme Court recently rejected an attempt to "shoehorn" a claim under *Lucas*, in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 1113 S. Ct. 2264 (1993)[12 PLR 1085], adhering to the rule set forth in *Penn Central Transportation Co. v. New York City*, that property cannot be separated into parcels for purposes of artificially characterizing regulation affecting the use of some portion of the property as the unlawful taking of an entire parcel. [Note, however, that in *Loveladies Harbor, Inc. v. U.S.*, No. 91-5050 (Ct. Cl. Jun. 15, 1994), the United States Claims

Court determined that a property owner had been denied virtually all economic use of its property where the court defined the property at issue as 12.5 acres of a 250-acre parcel in a case challenging the federal government's denial of a permit to fill wetlands under § 404 of the Clean Water Act. Complicating that case, however, was the fact that 199 acres had already been developed when the permit was denied. Of the 51 remaining undeveloped acres, 38.5 acres were to be dedicated to New Jersey pursuant to a settlement agreement to a lawsuit.]

[Robert W. Goodwin, Esq. of Ames, Iowa, represented the developers. Bonnie J. Campbell, Esq., Attorney General, Elizabeth M. Osenbaugh, Esq., Deputy Attorney General, and Michael H. Smith, Esq., Assistant Attorney General, represented the State of Iowa.]