REGULATORY TAKINGS DEVELOPMENTS SINCE *LUCAS*

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Introduction

In the last decade since the Supreme Court issued its ruling in *Lucas v. South Carolina Coastal Council*,[1] which changed landscape of modern takings analysis, the Court has decided a number of other major takings cases. Now, with the benefit of hindsight, it seems as though *Lucas* may have been the high point for property right's activists in the realm of Takings by government entities. Since *Lucas*, the Supreme Court has decided several cases which have limited the application of the *Lucas* "*Total*" Takings analysis to only the most severe instances of regulatory takings. This limiting has logically lead to a resurgence in the importance of the *Penn Central Transportation Co. v. New York City*,[2] balancing analysis in takings cases. There have also been several other trends surrounding takings jurisprudence since *Lucas*. The Supreme Court has clarified the degree of relationship required for a government entity to require an exaction for the approval development plans. This ruling has some serious implications, especially given the new strategies of land use planning government entities have undertaken. These implications are particularly relevant along the Gulf and Atlantic coasts as rebuilding efforts are often subject to extensive state and local regulation. The Supreme Court has also seemingly relaxed the prudential ripeness requirement allowing landowners to more successfully turn to the courts for redress of their takings claims, but has made clear that litigants will only get one bite at the apple. Finally, the Supreme Court has confirmed that a right to a jury trial is guaranteed for takings claims brought under 42 U.S.C. § 1983.

These recent developments in takings jurisprudence have important implications on new land

[1] 505 U.S. 1003 (1992).

[2] 438 U.S. 104 (1978).

use planning strategies and initiatives. Recently, government entities have undertaken new land use planning strategies such as "Smart Growth" that seek to regulate use of land for the overall public good, but consequently restrict individual landowner's use and enjoyment of their land. While these "Smart Growth" plans usually have worthy goals, sometimes the restrictions imposed go "too far" in restricting the owner's use of the land.[3] The Founder's of this nation recognized that government may sometimes trample on the property rights of individuals and sought to prevent this by the adoption of the Fifth Amendment. The Supreme Court's recent interpretation of this Amendment has provided important clarification on the limits imposed upon government entities when restricting landowner's use and enjoyment of their property. These limitations on government powers are becoming more important as states and municipalities seek to more comprehensively regulate land use through new strategies such as "Smart Growth" and will have particular application as landowners and state and local governments attempt "Smart Rebuilding" in the wake of the 2005 Hurricane season.

Part One of this paper will seek to describe and explain the United States Supreme Court's Takings Jurisprudence since *Lucas v. South Carolina Coastal Council.*[4] Part Two will seek to highlight trends in takings jurisprudence since *Lucas*. Finally, Part Three will seek to explain a new strategy for land use planning, deemed "Smart Growth," and highlight where such planning measures implicate limitations placed on this regulation by Takings law.

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[3] *See Penn. Coal v. Mahon*, 260 U.S. 393, 415 (1922) (stating that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking").

[4] 505 U.S. 1003.

I. Supreme Court Jurisprudence Since *Lucas v. South Carolina Coastal Council*

In *Lucas v. South Carolina Coastal Council,*[5] the Supreme Court held that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of the title to begin with."[6] These title investment backed expectations were further described as the denominator "may lie in how the owner's reasonable expectations have been shaped by the State's law of property."[7] A regulation that denies an owner of all economically viable use of property affected by the regulation is considered a categorical or "total" taking of the use value of that property interest and entitles the owner to just compensation.

Just two years later in *Dolan v. City of Tigard,*[8] the Court addressed the regulatory takings issue in the context of an exaction. Respondent conditionally approved zoning for the development proposed by the landowner with the caveat the landowner dedicate a portion of the proposed parcel to the City for public use. The Court clarified the heightened scrutiny standard for a regulatory taking conditioned on an exaction from *Nollan v. California Coastal Commission*.[9] The Court held the exaction must bear a "reasonable relationship" between the required dedication and the impact

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[5] *Id.*

[6] *Id.* at 1027.

[7] *Id.* at 1016, n. 7.

[8] 512 U.S. 374 (1994).

[9] 483 U.S. 825 (1987).

of the proposed development.[10] However the Court renamed this degree of relationship as "rough proportionality" so not to be confused with the "rational relationship" level of scrutiny of the equal protection clause.[11] The Court concluded the exaction proposed by the City was not roughly proportional to the proposed development by Dolan and would require just compensation.

In 1997, the Court decided *Suitum v. Tahoe Reg'l Planning Agency,*[12] the sole issue before the Court was whether the claimant's claim was ripe. Both lower courts, including the Ninth Circuit, had determined this claim was unripe because no final determination had been issued from the Respondent and without final determination it was impossible to determine if the regulation proscribes all beneficial use.[13] The Supreme Court reversed the decision and held that because the Respondent had finally determined that Suitum's land was entirely within a stream environmental zone and since the Planning Agency permitted no additional land coverage or permanent land disturbance on Suitum's land, the claim was ripe for review.[14]

Two years later in *City of Monterey v. Del Monte Dunes, Ltd.,*[15] the Court found the Seventh Amendment guaranteed the right to a jury trial on certain issues for a regulatory takings claim brought under 42 U.S.C. § 1983 against the City of Monterey. Note this was not an inverse condemnation action. The court reasoned that since takings analysis required ad hoc factual based

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[10] *Dolan*, at 391.

[11] *Id.*

[12] 520 U.S. 725 (1997).

[13] *Id.* at 732-733.

[14] *Id.* at 744.

[15] 526 U.S. 687 (1999).

inquiries under *Penn Central* that they were proper for a jury to consider.[16] The Court also made clear the "rough proportionality" standard from *Dolan* only applies to exactions, not to traditional regulatory takings.[17]

In 2001, the Court was again faced with a regulatory takings issue in *Palazzolo v. Rhode Island.*[18] This case is an example of one step short of a complete "total" taking. The Court found a regulation permitting a landowner to build a substantial residence on an eighteen acre parcel does not leave the property owner without economically viable use.[19] The property owner claimed that the property fully developed was worth over three million dollars, while the residential development alone was only worth $200,000. The Court flatly rejected any segmentation of property prior to determining whether any parcel has been stripped of all economically viable use. The case was remanded to the Rhode Island Supreme Court for traditional *Penn Central* analysis.[20]

Again, the Supreme Court addressed a takings question stemming from the extensive land use planning and regulation around Lake Tahoe. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[21] the Court sharply limited, by clarifying, the *Lucas* "total" takings rule. After *Tahoe-Sierra*, a "total" taking probably does not exist unless there is a *permanent*

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[16] *Id.* at 720-721.

[17] *Id.* at 702.

[18] 533 U.S. 606 (2001).

[19] *Id.* at 616 (stating that "[a] regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle'").

[20] *Id.* at 632.

[21] 535 U.S. 302 (2002).

deprivation of use.[22] Also there must be a *permanent* loss of all value (not 95% if value, but more like 100% loss of value), and a loss of the use of the entire relevant parcel of property.[23] Vital to this ruling was that a claimant must show a "complete elimination of all value" or a "total loss" before the *Lucas* per se rule applies.[24] The majority in *Tahoe-Sierra* seemed to reject most applications of the categorical rules, such as the *Lucas* "total taking", preferring instead to use the traditional *Penn Central* ad hoc multi-factor balancing test as the default takings test. It seems that after *Tahoe-Sierra*, *Lucas* style takings will be confined to truly extraordinary cases where there is either permanent physical occupation of land or permanent loss of all value.

In *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528 (2005), the state of Hawaii had passed a statute which limited the amount of rent oil companies could charge dealers who lease service stations from them. Chevron brought suit against Hawaii claiming that the statute should be considered a taking. In order to prove there was a taking, Chevron tried to use language from *Agins v. City of Tiburon* which stated that government regulation of private property "effects a taking if [such regulation] does not substantially advance legitimate state interests ...." 447 U.S. 255, 260, 100 S.Ct. 2138 (1980). However, the Supreme Court concluded that "this formula provides an inquiry in the nature of a due process, not a takings test, and that it has no proper place in our takings jurisprudence." Therefore, the Court, in continuing to afford local governments deference in making policy, held that the first prong of the test espoused in *Agins* is not a viable test to be used in determining whether or not a taking has occurred. Further, the Court set out in detail and clarified

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[22] *Id.* at 332.

[23] *Id*. at 330.

[24] *Id.* (citing *Lucas*, 505 U.S. at 1019-20, n. 8).

the analysis for determining whether a taking has occurred. *See Lingle* at 538-543 (setting out the complete moderns takings analysis).

Most recently, in *San Remo Hotel L.P. v. City and County of San Francisco, CA*, 545 U.S. 323 (2005), the Court was confronted with whether a hotel conversion ordinance constituted a taking. While the Court did not address any substantive takings issues the case highlights the importance of the choice of forum in litigating takings questions. Initially, the plaintiffs filed a mandamus action in state court, but subsequently filed an action in federal district court. Initially, the District Court granted the city summary judgment, but the 9th Circuit abstained under *R.R. Comm'n of Tex. v. Pullman Co.*,, which allows a federal court to "avoid resolving the federal question by encouraging a state-law determination that may moot the federal controversy." 312 U.S. 496, 61 S.Ct. 643 (1941). The plaintiffs made their takings claim before the state court, but the court rejected their arguments and held in favor of the city. The plaintiffs attempted to bring suit in federal court based on their takings claims by requesting that the District Court exempt the state court's rulings on their takings claims from Full Faith and Credit Clause analysis. In addition, the plaintiffs claimed that they had reserved their federal takings claims under *England v. LA Bd. of Med. Exam'r*. 375 U.S. 411, 84 S.Ct. 461 (1964). However, the Court found that for such reservation to be effective, the plaintiff must refrain from broadening the scope of the state court's analysis beyond the state-law issue. Since the plaintiffs "chose to advance broader issues than the limited issues contained within their state petition for writ of administrative mandamus ...", they were not entitled to re-raise the issues already litigated in state court. The Court also overrules *Santini v. CT Hazardous Waste Mgmt. Service,* which had ruled that parties cannot be precluded from having their takings claims heard in Federal Court. 342 F.3d 118 (2nd Cir. 2003). The Supreme Court rejected

this logic stating that there is "no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding ...."

II. Trends in Regulatory Takings Jurisprudence Since *Lucas*

There are a number of cognizable trends or developments that have emerged in Takings jurisprudence since the Supreme Court announced it decision in *Lucas*. These include: (1) the limiting of the application of the *Lucas* "total" takings analysis, (2) the resurgence of the importance of the *Penn Central* balancing analysis, (3) the relaxation of the prudential ripeness requirement, (4) the pronouncement of the "rough proportionality" standard for exactions, (5) the guarantee of a right to a jury trial for takings claims brought under 42 U.S.C. § 1983 and (6) the Takings analysis is clarified by *Lingle*. These developments are significant because of the limitations each places on government entities, and especially since new comprehensive land use planning initiatives such as "Smart Growth" are becoming more common across the country,[25] and are of particular importance in the wake of the destruction had in 2005 along the Gulf and Atlantic coastlines.

A. The Limiting of a *Lucas* "Total" Taking

The recent holdings in *Palazzolo*[26] and *Tahoe-Sierra*[27] have limited the application of the *Lucas* "total" takings analysis to extraordinary cases. In *Palazzolo,* the court found that all economical viable use not eliminated when a 3.15 million dollar parcel could still be used to build

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[25] See *infra*, Part III.

[26] *Palazzolo*, 533 U.S. 606.

[27] *Tahoe-Sierra*, 535 U.S. 302.

$200,000 residence.[28] The Court emphasized that regulation must be a true total taking. Also, in *Tahoe-Sierra* the Court held any "total" taking must be *permanent* in nature.[29] The majority in *Tahoe-Sierra* seemed to reject most applications of the categorical rules, such as the *Lucas* "total taking," preferring instead to use the traditional *Penn Central* ad hoc multi-factor balancing test as the default takings test. It seems that after *Tahoe- Sierra*, *Lucas* style takings will be confined to truly extraordinary cases where there is either permanent physical occupation of land or *permanent* loss of *all* value.

B. The Resurgence of the *Penn Central* Analysis- (logical result of limiting *Lucas*)

Now, given the extremely limited application of the *Lucas* rule, *Palazzolo, Tahoe-Sierra*, and *Lingle* indicate that the *Penn Central* balancing test is the appropriate test for most takings cases. The majority in *Tahoe-Sierra* seemed to reject most applications of the categorical rules, such as the *Lucas* "total taking," preferring instead to use the traditional *Penn Central* ad hoc multi-factor balancing test as the default takings test. In *Palazzolo*, after the court refused to apply the *Lucas* total takings analysis, the Court remanded the case to state court for review under traditional *Penn Central* balancing test analysis. These decisions highlight the Court's continued reliance on the *Penn Central* balancing analysis and indicate that this test will be the appropriate test for most takings cases to come. Most recently in *Lingle v. Chevron U.S.A. Inc*.,[30] the Court explicitly recognized the primary role of the Penn Central analysis, "outside these two relatively narrow categories [referring to actual physical invasion and a *Lucas* style total taking] regulatory takings challenges are governed

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[28] *Palazzolo*, 533 U.S. at 616.

[29] *Tahoe-Sierra*, 535 U.S. at 330.

[30] 544 U.S. 528 (2005).

by the standards set forth in Penn Central."[31]

C. Relaxation of the Prudential Ripeness Requirement

In both *Suitum*[32] and *Palazzolo,*[33] the Supreme Court rejected lower court's determinations that claims were unripe for adjudication. It seems that now that the Court has articulated some standards, although very complex, the Court seems more willing to hear these claims. So too, lower courts should be more willing to hear the merits of these cases as the doctrines of ripeness and exhaustion are now of lesser application.

However, the Court has clarified in *San Remo* that the holding of *England* (supra) does not give claimants two bites at the apple.

D. Pronouncement of "Rough Proportionality" Standard for Exactions

Relying on *Nollan v. California Coastal Comm'n,*[34] which held that "heightened scrutiny" is the appropriate standard for review when zoning approval conditioned on donation of lands for public dedication, the Court clarified in *Dolan v. City of Tigard*[35] that a "reasonable relationship" is appropriate standard to determine if an exaction requires just compensation. However, the Court chose to rename this standard as the "rough proportionality" standard so it would not confused with the level of scrutiny under the Equal Protection Clause. The pronouncement of this "rough proportionality" standard should serve to limit regulatory bodies' ability to exact land and fees from

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[31] *Id*. at 538.

[32] *Suitum*, 520 U.S. 725.

[33] *Palazzolo*, 533 U.S. 606.

[34] 483 U.S. 825.

[35] 512 U.S. 374.

landowner's and developers only to the extent the development will impact the community.

E. Right to Jury Trial Guaranteed for Takings Claims under 42 U.S.C. § 1983

In *City of Monterey v. Del Monte Dunes*,[36] the Court held that because of the fact intensive nature of Takings Claims brought under § 1983, the 7th Amendment guarantees a jury trial on certain issues. Such issues include whether the state has a legitimate state interest it seeks to further by the regulation and whether the regulation is reasonably related to the goal it seeks to further.

These developments in Takings Jurisprudence should provide for continued constitutional limitation on government regulation to strike a healthy balance between effective land use planning and individual property rights. This will continue to be important as new strategies in land use planning emerge in the 21st Century.

F. The Takings Analysis is Clarified by *Lingle*

In *Lingle* the Court took the opportunity to clarify the proper analysis of a Fifth Amendment Taking. First, a court must determine whether a per se taking has occurred. The Court has recognized two categories of per se takings, (1) a permanent physical invasion[37] and (2) a Lucas style total taking where regulations completely deprive an owner of "all beneficial use." Aside from these two narrow categorical rules, and aside from the special context of land-use exactions, regulatory takings challenges are governed by the balancing analysis set forth in *Penn Central*.

III. A New Strategy for Land Use Planning-"Smart Growth" and the Takings Implications

A. What is Smart Growth?

"Smart Growth" is a new term that has come to mean the modernization of land use policy

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[36] 526 U.S. 687.

[37] See *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982).

that can affect land use, growth management, public infrastructure and facilities, social welfare, natural resources, environment quality, and the quality of life.[38] Smart growth is land use planning that seeks to implement public policy in planning to effect the development of the community. Smart Growth planning takes into account three broad public interests: markets, natural resources, and social welfare. These interests often conflict or compete in local and state policy-making where local and state policy-makers establish public policies that are then furthered with land use, growth management, natural resources, and other regulation.[39]

B. Some Components of Smart Growth

Some of the key components of "Smart Growth" initiatives that implicate takings concerns are dedications, impact fees, and environmental mitigation. First, dedications are common conditions of zoning approval for new proposed development**.** *Nollan v. California Coastal Commision* [40] and *Dolan v. City of Tigard* [41] are excellent examples of cases involving dedications. Second, impact fees are fees imposed upon landowners as a condition for development. These fees are generally used to fund infrastructure needed to support users of the new development. Third, "Smart Growth" measures intended to protect natural resources such as wetlands, wildlife habitats, or floodplains all fall under the category of environmental mitigation. Regulatory tools such as buffer zones and requirements for landowners to create or enhance resources in other areas to

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[38] *See* About Smart Growth *at* http://www.smartgrowth.org (last visited on August 7, 2006).

[39] *See* James E. Holloway & Donald C. Guy, *Smart Growth Limits on Government Powers: Effecting Nature, Markets and the Quality of Life Under the Takings and Other Provisions*, 9 DICK. J. ENV. L. POL. 421 (2001).

[40] 483 U.S. 825.

[41] 512 U.S. 374.

compensate for those which are affected by the development are common. All of these components of Smart Growth initiatives have constitutional implications, especially when the conditions imposed are excessive or go "too far."

C. Constitutional Limitations on Smart Growth- the Takings Implications

The Supreme Court's holding in *Lucas* makes clear that no governmental land use planning, whether traditional or modern Smart Growth, may proscribe all beneficial use of the land.[42] However, given the inherently limited nature of this limitation on government regulation, and the recent holdings in *Tahoe-Sierra* and *Palazzolo*, requiring the loss be *permanent* and of truly *all* the beneficial use, the requirement of compensation for *Lucas* style "total" takings will not provide protection to many landowners. Most will have to pursue judicial recourse and urge the courts to perform the traditional *Penn Central* balancing in order to get compensation for a taking.

Takings jurisprudence has established other key limitations on Smart Growth initiatives. Earlier cases required that any land use regulation must substantially advance a legitimate state interest. However, as the Court recently made clear in *Lingle*, this prong alone is insufficient to invalidate a scheme of regulation and that state and local governments will be afforded substantial deference in making these policy decisions. Nonetheless, *Nollan* and *Dolan* shed some light on the analysis. *Nollan* established the requirement of an essential nexus between the legitimate state interest that the government seeks to achieve through its regulation, and any development conditions imposed by the regulation.[43] Additionally, when the government seeks to exact land for public use from private landowners as a condition for development approval, *Dolan* has required these

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[42] *Lucas*, 505 U.S. at 1027.

[43] *See Nollan*, 483 U.S. 825.

exactions be "roughly proportional" to the impact of the of proposed development. *Nollan* and *Dolan* should prove to be substantial obstacles for Smart Growth regulations. Let us consider some of the key components of Smart Growth regulation and the impact these limitations have on them.

Nollan and *Dolan* suggest that regulations requiring the dedication of private lands to for public use warrant close scrutiny by reviewing courts. While the Lingle Court suggested otherwise, it was not in the context of a traditional development project. Smart Growth regulators that exact land for the general public's use must identify burdens specifically created by the new development to justify the exaction. Also, the exaction must be roughly proportional to the impact of the new development.[44] Given the weight attached to the permanent dedication of lands for public use, the impact of the proposed development must be substantial to confer any right to the government to demand such conditions. Also, there must be an "essential nexus" between the give and take from the governmental body and the landowner.[45] So the government can't demand land for a floodplain if the proposed development only would increase traffic volume, only if development would create greater flood risk could the government demand such conditions.

By implication, these same standards from *Nollan* and *Dolan* should also apply to the assessment of impact fees on developers. These fees can only be constitutionally assessed to the extent the funds will provide for infrastructure and other governmental services needed to support users of the proposed development. This seems to indicate that fees imposed on new development must be individually determined, no generalized rates or formulas will meet the constitutional "rough proportionality" standard. Arguably, these strictures may mandate the use of individualized

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[44] *Dolan*, 512 U.S. at 391.

[45] *Nollan*, 483 U.S. at 837.

accounting of these fees, so deposit of these fees into a general fund for infrastructure may violate the individualized nature of this quid pro quo system imposed by these constitutional restrictions.[46]

A final component of Smart Growth regulation that is limited by these constitutional strictures is environmental mitigation. Regulatory tools such as buffer zones and requirements for landowners to create or enhance resources in other areas to compensate for those which are affected by the development are common environmental mitigation tools. These constitutional strictures prevent regulators from imposing conditions that aren't roughly proportional to the development impact, such as buffer zones that extend much farther than needed to protect the resource, or mitigation requirements that require the creation or enhancement of more acres of the resource that was impacted by the development. Clearly, takings problems are encountered when governmental bodies seek to gain more from the development that the public stands to lose. After all the purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[47]

A recent development in Takings Jurisprudence that is beneficial to landowners and developers is the relaxation of the prudential ripeness requirement.[48] Previously, landowners and developers were forced to endure years of frustrating applications, appeals, requests for variances, etc. to avoid the harsh application of the ripeness and exhaustion doctrines. Only when landowners or developers had a final determination of the disposition of the development request could they seek

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[46] *San Remo* would have provided needed clarification of the feasibility of generalized forumulas, however, because the litigants ineffectively asserted those rights in the state court action, the question remains.

[47] *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960).

[48] *See Suitum*, 520 U.S. 725; *Palazzolo*, 533 U.S. 606.

redress of these grievances in court. However, recently in *Suitum* and *Palazzolo* the U.S. Supreme Court has reversed the lower courts findings that these claims were unripe for adjudication. It seems that now that the Court has articulated some standards for Takings claims, even though complex, that courts should be more willing to hear these matters. This should prove beneficial to developers and landowners who won't have to endure the whole of the application, variance, and appellate process of numerous state and municipal boards and councils prior to seeking judicial intervention. This could also prove beneficial to government entities as well. Although this would make government entities more readily vulnerable to suit, it would also provide for more expedient determinations of the limitations and powers of the entity's land use planning scheme.

Another recent development in Takings law that may prove beneficial to landowners and developers faced with Smart Growth regulation is the right to jury trial on certain issues for takings claims brought under 42 U.S.C. § 1983. In *City of Monterey*, the Court reasoned that since takings claims were largely ad hoc factual based inquiries that a jury was appropriate to resolve certain issues. Such issues deemed appropriate for jury determination are whether the government's conditions substantially advances a legitimate public purpose and whether there is a reasonable relationship between the city's denial of the proposed development and the legitimate public interest the denial sought to further. While governmental bodies strenuously object to jury review of the government's regulatory conditions, the Supreme Court has found this to be appropriate and this will likely be beneficial to landowners and developers who are suppressed by unreasonable governmental regulation.[49]

The rules applied by the Supreme Court in this context, while complex, make sense. Growth

[49] *City of Monterey*, 526 U.S. at 722.

control policies such as Smart Growth inevitably impose substantial costs on property owners who are suddenly unable to realize their legitimate expectations. These limitations imposed by the Fifth Amendment and Takings Jurisprudence seek to strike a healthy balance between needed and worthy land use regulation and the legitimate property rights of individual landowners.

D. Smart Rebuilding and the Takings Implications in the Wake of the 2005 Hurricane Season

In the wake of the damage left by so many major storms during 2005, including Hurricane Katrina, smart growth will also include "smart rebuilding." After the storms many state and local governments have passed sweeping reforms limiting the rights of landowners to rebuild on their properties. Many of these regulations involve prohibitions restricting the construction of sea walls and jetties by landowners seeking to protect their homes and investments from destruction by nature. Regulations similar to those in *Lucas* will prevent landowners from rebuilding and reinforcing their properties along the Gulf and Atlantic coasts. Several commentators have suggested that in the wake of the 2005 Hurricane season that the result in Lucas would likely be overturned if similarly presented to the Supreme Court.[50] These commentators ignore a fundamental principle of Lucas in that they do not recognize the impact of such devastation to the denominator in the takings analysis. The *Lucas* court made a limited, but important, discussion of the denominator for takings analysis would lie in the state's law of property.[51] Logically, this analysis would also consider the impact of the laws of mother nature. If it is an act of nature that reduces the value impliedly allocated to the

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[50] See "Looking at Lucas", ABA Journal at 50 (July 2006)(discussing Professor John Echeverria's belief that "If we relitigated Lucas after Katrina, hands down it comes out the other way.") Echeverria is the head of Georgetown Law Center's Environmental Law and Policy Institute.

[51] See *Lucas* at 1016, n. 7 (stating the denominator "may lie in how the owner's reasonable expectations have been shaped by the State's law of property.")

denominator in the takings analysis, it is likely the court would give local authorities more leeway in making policy, so long as they do not run afoul of the fundamental holding in *Lucas* so as not to deprive landowners of all beneficial use of their property.

Conclusion

In the past decade since the decision in *Lucas*, there have been an number of major regulatory takings decisions handed down by the United States Supreme Court. These decisions have revealed several trends and developments in takings jurisprudence including: the limiting of the application of the *Lucas* "total" takings analysis, the resurgence of the importance of the *Penn Central* balancing analysis, the relaxation of the prudential ripeness requirement, the pronouncement of the "rough proportionality" standard for exactions, and the guarantee of a right to a jury trial for takings claims brought under 42 U.S.C. § 1983, and the recent clarification of takings analysis in *Lingle*. These developments should provide the basis constitutional guidelines in the coming years as governmental entities implement more comprehensive land use regulations, especially along the coast in the wake of 2005 Hurricane Season, as courts attempt to strike a fair balance between legitimate regulation and landowners' property rights.