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# Construction Moratorium as a Taking Monks v City of Rancho Palos Verdes (2008)

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# Construction Moratorium as a Taking
# Monks v City of Rancho Palos Verdes (2008)
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**Moratorium on building homes in landslide area was permanent taking not justified by nuisance principles.**

Plaintiffs were prevented from building homes on their 16 lots by a moratorium enacted by the City of Palos Verdes and a new administrative process for exclusion from the moratorium. The court of appeal concluded that the city's moratorium effected a permanent taking of the properties, reversed the trial court, and remanded for determination of an appropriate remedy.

Part of the City of Rancho Palos Verdes sits on an ancient landslide. Residential development in the area had begun when, in August 1957, the Portuguese Bend landslide occurred east and southeast of plaintiffs' lots. In 1974–1976, the area known as the Abalone Cove landslide, south and southwest of plaintiffs' lots, began to move. These areas remain active. In 1978, the city imposed a moratorium on building new homes on over 1000 acres identified by a Landslide Moratorium Map, later divided into eight zones of various sizes. Zone 2, about 130 acres, where plaintiffs' lots are located, was unaffected by the land movement and remains quiet.

In June 2002, while the plaintiffs' application for exclusion from the moratorium was pending, the city approved Resolution No. 2002–43, which stated that a consultant's conclusion that there could be development without destabilization was in error and instituted, as a precondition of construction, owner demonstration of a safety factor of no less than 1.5 in a zone, as a whole. All prior consultant reports had concluded that Zone 2 as a whole had a safety factor of less than 1.5. In March 1996, the city geologist had reported the Zone 2 factor as greater than 1.25 and less than 1.5.

Plaintiffs then sued to overturn Resolution No. 2002–43, alleging inverse condemnation in violation of the takings clause (Cal Const art, I §19). The trial court denied the request to submit additional evidence and denied the writ based on the administrative record. The court of appeal reversed and remanded for a trial on the takings claim. The trial court found that the city acted properly in imposing and, in effect, continuing the moratorium and entered judgment for the city. On the second appeal, the court of appeal concluded that "the resolution, by implementing the moratorium and continuing to prevent plaintiffs from building on their properties, deprived plaintiffs' land of all economically beneficial use." See *Lucas v South Carolina Coastal Council* (1992) 505 US 1003, 1027, 120 L Ed 2d 798, 820, 112 S Ct 2886. Therefore, the city had the burden to prove that the moratorium was justified under the state's law of property and nuisance. 505 US at 1029, 120 L Ed 2d at 820.

In its statement of decision, the trial court concluded that "at best there remains uncertainty with respect to the stability of the geology of Zone 2." The trial court expressly noted that litigation, after the Portuguese Bend and Abalone Cove landslides, had required "large sums" for the city to resolve. The trial court stated: "A public entity is not required to risk bankruptcy in order to satisfy the unsubstantiated beliefs of property owners that development is safe in an area with less than geotechnically acceptable measurements." The trial court deemed the risk of land movement, however minor, to be a public nuisance. Therefore, the moratorium did not exceed reasonable regulation in light of its important purpose, negligible effect on permitted uses, and lack of interference with the reasonable expectations of the plaintiffs, who, after all, could seek to be excluded.

The court of appeal found the conclusion regarding exclusion from the moratorium contrary to the law of the case and the conclusion regarding the significance of land movement not supported by substantial evidence. The *Lucas* court established a four-part test:

1. Removal of all economically beneficial use was a taking. 505 US at 1019, 120 L Ed 2d at 815.

2. Such a severe limitation could not be "newly legislated or decreed (without compensation)." 505 US at 1029, 120 L Ed 2d at 821.

3. A use long engaged in by similarly situated owners ordinarily implies lack of any common-law impediment. 505 US at 1030, 120 L Ed 2d at 822.

4. The government bears the burden of proof that the intended use is not allowed under state law of property and nuisance. 505 US at 1031, 120 L Ed 2d at 823.

To constitute a public or private nuisance, the interference must be both substantial and unreasonable by an objective measure. The city did not produce substantial evidence of such an interference. There is nothing inherently harmful about homebuilding, especially in an area zoned for that purpose and provided with the necessary utilities. Moreover, the "uncertainty" found by the trial court was not a sufficient basis on which to deprive the landowner of a home. There must be, instead, a reasonable probability of significant harm. The city's expert witness agreed that there was no need to evacuate existing homes in Zone 2 because there was no significant risk of harm to anyone living there. Rather, the overwhelming evidence was that development, along with dewatering wells, would improve the stability of the land. Further, the city approved so many exemption permits for existing homes as to make application of the moratorium to plaintiffs questionable. Finally, speculation that the city might "risk bankruptcy" does not justify a violation of the California Constitution by depriving plaintiffs of all economical use of their land. The court of appeal reversed and remanded the case for determination of an adequate remedy, warning the city to proceed in good faith and without stalling tactics.

***THE EDITOR'S TAKE:*** Courts usually try to avoid acting like super zoning boards. Judges, after all, did not go to planning school, as planners did, or win election by the public, as city council members did. Sometimes, however, judges get dragged into that role by the constitution—as happened here.

Whether these lot owners should have had to demonstrate merely that it was safe for them to build houses on their own individual parcels, as they apparently were prepared to do, or should have had to show that the entire 116-acre zone was safe for construction, as the city wanted them to do, looks like a classic land-use issue—one to be decided by either experts and/or politicians, rather than judges. But when the effect of this dilemma is that landowners have been denied the ability to build on their parcels for over 30 years, the matter acquires a constitutional magnitude that puts it right into the lap of the judiciary, forcing those former law students to decide whether there has been a "taking" of property without just compensation.

In this case, the court of appeals seems to have held that its earlier, unpublished decision in this litigation compelled the finding that there had been a permanent and total taking of plaintiffs' property (although I confess to being somewhat unable to follow how a conclusion that plaintiffs' claims came within the ripeness futility exception established that the taking was permanent). Once that determination was made, the case came within *Lucas*, shifting the burden over to the city to prove that its decision was justified under "background nuisance rules." Once that burden had been shifted, it became easy to say that the testimony of the experts was too conflicting and self-contradictory to support a permanent refusal to permit the owners to build their houses on their properties, although the conclusions look remarkably similar to the findings that come out of a planning commission or related land-use-involved entity.

Had I been on the planning board or the city council, my concerns about safety and uncertainty might well have led me to vote just as they did: Who wants to feel responsible for having permitted unsafe structures to be erected? On the other hand, when the experts are split all over the place, and no one is likely to get hurt if the house moves except the owners themselves, should I still say no? If I am a judge, and both sides have merit, how can I possibly decide? Like *Monks I*, this decision should probably have gone unpublished. *—Roger Bernhardt*