Floodplain Protection and the Regulatory Takings Issue: Or How to Slay the Property Rights Goliath with Tweezers

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“Nor shall private property be taken for public use, without just compensation”

“That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person’s property is taken for the use of the public, the owner ought to receive an equivalent in money”
Does the claimant hold “property”? 

*Lucas:* Does the “logically antecedent inquiry into the nature of the owner's estate show[] that the proscribed use interests were not part of his title to begin with?”

*Lucas:* Do the regulatory limitations already “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.”
Has the property been “taken”? (I)

Has the regulation denied the owner ”all economically viable use of the property,” i.e., has the property been rendered “valueless”? 
Has the property been “taken”? (II)

Assuming the owner has NOT been denied all economically viable use of the property, has the property nonetheless been “taken” based on an ad hoc analysis focusing on the facts of the particular case, including:

(1) the economic impact of the regulation,

(2) the degree of interference with the owner’s investment-backed expectations, and

(3) the character of the government action (whether involving a physical occupation, whether comprehensive or targeted, and whether or not harm-preventing)
Also (III), does an exaction have an “essential nexus” with a legitimate government objective and is the burden “roughly proportional” to the projected impacts of development?

An exaction is a condition mandating physical access... and possibly placing legal restrictions on title.

Exception for legislatively imposed exactions.
Legal Strategy for Defeating a Takings Challenge to a Floodplain Ordinance

Blame the Client!

(Really)
Legal Strategy for Defeating a Takings Challenge to a Floodplain Ordinance

Determine the size of the relevant parcel
Legal Strategy for Defeating a Takings Challenge to a Floodplain Ordinance

Figure out when the claimant purchased the property and for how much? Should the owner have been aware of potential regulatory hurdles?
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Identify Potentially Valuable Alternative Uses of the Property.
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Determine degree of “reciprocity of advantage”
Legal Strategy for Defeating a Takings Challenge to a Floodplain Ordinance

Identify Harms Regulation Will Avoid

E.g., First English Evangelical Lutheran Church v. County of Los Angeles
What about a “nuisance defense”?
Do property owners really have a property right to flood the neighbors downstream?

*Lucas:* “[T]he owner of a lake-bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a land filling operation that would have the effect of flooding others’ land.”

Floodplain advocates need a good test case:

-- with compelling historical evidence

-- with compelling hydrological data
What are the odds of defeating a takings suit based on a floodplain regulation?

- Good to Excellent.
- Nothing is certain in the law; particular facts matter.
- Odds would be better if nuisance defense were better established.
- Odds can be minimized through careful policy-making.
Legislative Strategies for Implementing a Floodplain Protection Policy

-- Act as early as possible to put landowners and other citizens of the community “on notice.”
Legislative Strategies for Implementing a Floodplain Protection Policy

-- Map proposed ordinance to understand potential economic burdens of regulation.
Legislative Strategies for Implementing a Floodplain Protection Policy (I)

-- Legislate as comprehensively as possible
Legislative Strategies for Implementing a Floodplain Protection Policy (I)

--- Document the harms that have occurred in the past and that will be forestalled in the future
Legislative Strategies for Implementing a Floodplain Protection Policy (I)

-- Provide Offsetting Benefits
Legislative Strategies for Implementing a Floodplain Protection Policy

-- Include a hardship waiver option.
Legislative Strategies for Implementing a Floodplain Protection Policy

-- Not the end of the world to pay a takings award or to pay to settle a potential takings claims.

-- “As [the] language [of the Takings Clause] indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power.... This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.”
Thank you and good luck!