

Environmental Regulation and Private Property in *Lucas v. South Carolina Coastal Council*

Overview

In this lesson, students will examine *Lucas v. South Carolina Coastal Council* and learn about regulatory takings. Students will then participate in small group simulations of the Coastal Resources Advisory Council and explore a local issue related to the Lucas case. Teachers may also choose to team up with a science teacher to further study the environmental issues facing coastlines.

Grades

10-11

NC Essential Standards for American History: The Founding Principles, Civics and Economics

- FP.C&G.2.1: Analyze the structures of national, state and local governments in terms of ways they are organized to maintain order, security, welfare of the public and the protection of citizens
- FP.C&G.2.3: Evaluate the U.S. Constitution as a “living Constitution” in terms of how the words in the Constitution and Bill of Rights have been interpreted and applied throughout their existence
- FP.C&G.2.6: Evaluate the authority federal, state and local governments have over individuals’ rights and privileges
- FP.C&G.2.7: Analyze contemporary issues and governmental responses at the local, state, and national levels in terms of how they promote the public interest and/or general welfare
- FP.C&G.3.1: Analyze how the rule of law establishes limits on both the governed and those who govern while holding true to the ideal of equal protection under the law
- FP.C&G.3.3: Analyze laws and policies in terms of their intended purposes, who has authority to create them and how they are enforced
- FP.C&G.3.6: Explain ways laws have been influenced by political parties, constituents, interest groups, lobbyists, the media and public opinion
- FP.C&G.5.2: Analyze state and federal courts by outlining their jurisdictions and the adversarial nature of the judicial process

NC Essential Standards for American History II

- AH2.H.2.1: Analyze key political, economic, and social turning points since the end of Reconstruction in terms of causes and effects (e.g., conflicts, legislation, elections, innovations, leadership, movements, Supreme Court decisions, etc.).
- AH2.H.2.2: Evaluate key turning points since the end of Reconstruction in terms of their lasting impact (e.g., conflicts, legislation, elections, innovations, leadership, movements, Supreme Court decisions, etc.).

Essential Questions

- What is a taking?
- What restrictions does the Fifth Amendment place on government takings? (“...nor shall private property be taken for public use, without just compensation.”)
- What is the government’s responsibility to preserve the coastal environment?
- Why would the government want to regulate private property?
- How can a government regulation take someone’s property?
- How did the Supreme Court decide the Lucas case?

Materials

- *Lucas v. South Carolina Coastal*, Voices of American Law DVD Documentary, available at <https://law.duke.edu/voices/>
- Television and DVD Player
- *Lucas v. South Carolina Coastal Council* Viewer's Guide and Answer Key, attached
- Abridged Supreme Court Opinion, *Lucas v. South Carolina Coastal Council* (attached)
- "Time Running Out for Sandbags," attached
- Group Responsibilities and Roles for Day Two Activity, attached

Duration

90-120 minutes (spilt over two days)

Procedure

Day One

Warm-Up: Your Dream House and What You Can Do With It

1. As an introduction to the lesson and to assist students in understanding the probable emotions involved in regulatory takings, begin class with the following creative writing assignment:
 - Imagine that it is around 8 years into the future. You have graduated from your favorite college, gotten your first real job, and have already saved enough money to purchase your first dream home. In a paragraph, describe the home that you have purchased in detail. Consider questions such as: Where is it located? What does it look like (outside and inside)? How have you decorated it? How large is your home, as well as the property it sits upon? How is the property landscaped? What is your favorite thing about your home?
2. Give students around 5 minutes to imagine their home and become attached to their vision. Then, allow a few student volunteers to share the details of their home. Encourage students as they share, commenting on how great their home sounds, and how lucky they are to have such a fantastic place to live. After several students have shared, discuss:
 - Your houses sound amazing! Now let me ask you a few things as new homeowners. Since you own the property, should you be able to do anything you want with it? Explain.
 - In actuality, are you allowed to do *anything* you want with a property once you own it?
 - While some students may say yes to one or both of the above questions, others may note ordinances and laws that are determined by local governments, home owner's associations, etc. that set expectations from the height of one's grass, to how loud a stereo inside can be played, to what structures you can and can't build/add to your home. Encourage students to consider the positive and negative aspects of such regulations.
 - Should the type of property you purchase determine what you can and can't do with it? For example, imagine the house you bought is considered a historic landmark. Should there be regulations regarding what changes you can make to your property, in order to preserve the history? Why or why not?
 - Imagine someone buys the property right next door to your dream house. They decide to put a chemical plant there. Should that be allowed? Why or why not?

Understanding Eminent Domain & Regulatory Takings

3. Introduce students to the word **nuisance**: use of property or course of conduct that interferes with the legal rights of others by causing damage, annoyance, or inconvenience. Explain that to prevent nuisances and to control land use, governments often pass zoning regulations deeming what can and cannot be done with various lands. Discuss:
 - How might such government regulations be a positive thing for a homeowner? How might such regulations have a negative impact on a homeowner?
 - Do you think government regulations could affect the value of private property?
 - Think back to your dream house and the man who wants to put a chemical plant next door. If the government didn't stop him, how would that plant affect your property's value?

- Imagine your dream house is on the North Carolina coast. In the two years after you bought that dream house, you received a raise at work. You want to renovate your house to include a third level with 3 extra bedrooms and a movie theatre. Even though you have the money, the local government tells you that you can't do this renovation; a third floor would block the view of the ocean for people living on the street behind you. How is the government affecting your property value now? How is the government affecting the property value of the people living on the street behind you?
- Should government consider how their decisions regarding zoning regulations will affect someone's property value?
- What if it was the government who chose to put a chemical plant near your home, or perhaps they decided the very land your home is located on would make a good location for the plant. Would they be allowed to take your land?

4. Next, introduce the concept of eminent domain:

- **Eminent domain** – the right of a government to appropriate private property for public use, usually with compensation to the owner
 - **Taking** – a government action assuming ownership of real property by eminent domain.

Project the text of the 5th Amendment to the Constitution and explain that it provides some restrictions on the government's power of eminent domain: "...nor shall private property be taken for public use, without just compensation."

Documentary: *Lucas v. South Carolina Coastal Council*

5. Tell students that they will be learning more about these issues by watching a documentary about a Supreme Court case called *Lucas v. South Carolina Coastal Council*. Teachers should determine which of the viewing options below they will use. While a synopsis of the case is provided for teacher reference, students need no further introduction to the film.

- **Teacher Reference - Synopsis of the Case**

During the 1980s, David Lucas bought two oceanfront lots on the Isle of Palms in South Carolina for \$975,000. Lucas planned to build a family home on one of the lots; but before he could, South Carolina's General Assembly passed the Beachfront Management Act. The Act was intended to preserve beaches and address the erosion of South Carolina's coastline. The Act also had the effect of preventing Lucas from building on his lots. Lucas sued, claiming that the government had taken his property through regulation and that he deserved compensation. A trial court awarded Lucas \$1.2 million for his loss, but the South Carolina Supreme Court reversed the decision. In the meantime, the Beachfront Management Act was modified to allow a landowner to apply for a variance if he wanted to build a family home. Nonetheless, Lucas appealed to the Supreme Court, claiming that he was fighting on behalf of all homeowners who had suffered regulatory takings. The Supreme Court ruled in Lucas' favor. Since the government regulation deprived Lucas of ALL economically beneficial use of his land, the South Carolina Supreme Court was wrong to say there was no taking. The provisions of the regulation were not part of Lucas' title, so the state could not use these restrictions to deprive Lucas of the use of his land.

- **Viewing Options**

There are several ways you can choose to have the class view the documentary:

- You may choose to have the class watch the video with no pauses and have students work on the attached Viewer's Guide while watching
- *Suggested Viewing*: You may choose to pause the video at the times outlined below and ask the class to discuss the questions listed. Students may complete the questions below in addition to or instead of the questions on the Viewer's Guide.

- **Discussion Point #1:** (*pause at 1:12*) What do you think about the conflict between coastal development and environmental concerns? Should people be able to build anywhere? How can states protect the environment and address serious problems like erosion?
- **Discussion Point #2:** (*pause at 9:24*) What do you think about the Beachfront Management Act? Is it fair that Lucas can't build a house when his neighbors already have homes on the same beach? Why or why not?

6. Upon completion of the documentary, further discuss:

- How serious are the environmental problems facing South Carolina's coastline?
- Was the government's response appropriate? Does it seem consistent with the 5th Amendment? Explain.
- If you feel the government's response was inappropriate, what should the government have done differently? (i.e., Would it have helped if the regulations didn't apply uniformly to the entire coastline? Should there have been an exception for people like Lucas, who already owned beachfront property before the Act was passed?)
- Is it possible to reconcile environmental concerns with property rights?
- If you were Lucas, what would you have done? Would you have chosen to build your house after the changes in the Beachfront Management Act? Are there another options Lucas could have explored?

Court's Opinion: *Lucas v. South Carolina Coastal Council*

7. After discussion, tell students the outcome of the case (passing out the attached abridged opinion is optional):

- The Supreme Court ruled in favor of Lucas. The Court determined that a regulation that deprives a property of all economically beneficial use is a taking under the 5th Amendment. The reason is that any regulation that causes this kind of total loss to the landowner is practically the same as physically taking the property.
- The Court remanded (sent back) the case to the South Carolina courts. Ultimately, the state bought the property from Lucas for \$850,000 and paid him an additional \$725,000 to cover his court costs and interest. Lucas estimates that he still lost about \$2 million in the fight. By the end of the case, the state of South Carolina was also suffering financially. The state eventually sold Lucas' lots to a developer who built luxury homes there.

After explaining the holding and/or having students read the edited opinion, ask students for their reactions:

- Was the Court's opinion consistent with opinions represented in our class discussion after the documentary?
- What is your opinion of the Court's holding? Do you agree or disagree? Why?
- What aspects of the Court's decision do you find most and least persuasive?
- What do you think about the state's sale of the disputed lots?
- How do you imagine Lucas feels today regarding the experience he went through and the Court's decision?

8. Distribute the attached News & Observer article to the class. Instruct students to read the article and answer the Guided Reading Questions. Tell students that the next day's activities will be based on the situation in the newspaper article, so it is important that they complete this assignment.

Day Two

Coastal Resources Advisory Council

9. Briefly reintroduce the reading from the previous night and the Guided Reading Questions. Call on students to answer questions from the homework assignment.

10. Divide the class into groups of 6. Tell students that based on their reading, they will now be assuming the roles of members of the Coastal Resources Advisory Council in each of their groups, where they will determine what to do regarding the sandbag issue in the Outer Banks. Explain that the Coastal Resources Advisory Group is a group that provides the Coastal Resources Commission (CRC) with local government perspectives and technical advice. Tell students that as members of this advisory council, they represent coastal counties and cities, as well as regional councils of government and state agencies. Their responsibility is to meet, express their opinions on the sandbag issue, then try to come to a consensus on what recommendation to make to CRC regarding the sandbags.
11. Distribute the appropriate instructions to each group member (see attached “Group Member Roles”) and give students a few minutes to read their role. Explain:
 - Each of you has an individual role that you will be playing in this activity. First develop a brief argument (in character) regarding the sandbags and how you feel about them. Also, review the administrative responsibility you have during the meeting as well (these include Facilitator, Time Keeper, Note Taker, Spokesperson, Responder, Reality Checker)
 - When the meeting begins, your group’s Facilitator will call the meeting to order. You will each have up to 2 uninterrupted minutes in your group to explain your opinion, and also to share what recommendation you think your group should make the CRC. After each of you have shared your thoughts, you will have 8 minutes to openly discuss and debate what recommendation you should make regarding the sandbags.
 - Remember, the Coastal Resource Advisory Council cannot change the regulation, but only can provide citizen and expert advice to the Coastal Resources Commission. Together, your group must come to a compromise resolution that will be presented to the Coastal Resource Commission in your upcoming joint meeting.
12. Once the groups are ready to begin, the teacher should review expected behavior for cooperative learning. Give students 20 minutes to meet in their groups, reminding students to assume their character as well as take responsibility for their administrative role.
13. After all groups have completed their meeting, have each spokesperson present their resolution to the remainder of class. At this point, the remainder of class should assume they are the CRC and can ask questions of the presenting group, which the Responder will answer. As each group presents, the teacher should summarize their stance on the board or on chart paper. Once all groups have presented and been question, discuss:
 - Of all the ideas that were presented today, which advised plan do you think the CRC should adopt and why?
 - What arguments did you find most persuasive and why?
 - In what ways is the NC case similar to the Lucas case?
 - Was your group’s decision consistent with the 5th Amendment? Why or why not?
14. In closing, or as homework, have students develop a creative response to the activity. Students will design a poster either in favor of or against removing the sandbags from the beach residences. Students should consider the most persuasive arguments from the reading and advisory council activity and how to represent it visually and with limited text.

Differentiation

Students with Special Needs

- Ensure that students are placed in mixed ability groups.
- Students may have more difficulty with readings opinion readings. Access brief description and ruling for the case at www.oyez.org. Enter case name in the search bar in the top right hand.

- Allow class time to complete newspaper article reading. A news video about the sandbags can be accessed at: <http://www.wral.com/news/local/video/3282942/> or by searching www.wral.com for “sandbag”.

AIG

- Research the resolution to the sandbag controversy.
- Pretend you are a reporter for the Nags Head News. Write a 1-page article about the Advisory Council meeting. Try to include the basic facts of the dispute, the viewpoints expressed by the representatives, the Council’s ultimate conclusion and the reasons behind it.
- Imagine that a resident sued the North Carolina Division of Coastal Management and the case made it all the way to the Supreme Court. Author a majority opinion in which you decide whether or not the state’s action is a taking and if the resident deserves compensation for his/her property

Name: _____

Lucas v. South Carolina Coastal Council Viewer's Guide

1. What is the main environmental problem facing American coastlines?

2. What is the Beachfront Management Act?

3. Had other property owners built in the area around Lucas' property?

4. What is the main issue in the case, according to Lucas' attorneys?

5. What is the "inverse condemnation theory"?

6. Why didn't the state want to settle with Lucas?

7. According to Lucas' expert, what was the value of Lucas' property after the Beach Management Act?

8. How did the state change the Beachfront Management Act after the SC Supreme Court decision?

9. Why did Lucas decide to go to the Supreme Court?

10. Why do some groups, particularly environmentalists, think Lucas should NOT be compensated?

Lucas v. South Carolina Coastal Council Viewer's Guide –ANSWER KEY

1. What is the main environmental problem facing American coastlines?

Erosion

2. What is the Beachfront Management Act?

It was a piece of legislation that affirmed the importance of beach preservation and declared that building too close to the beach was detrimental to the coastal ecosystem. All new construction on the coast was severely restricted.

3. Had other property owners built in the area around Lucas' property?

Yes

4. What is the main issue in the case, according to Lucas' attorneys?

The state must pay Lucas if it takes his property or if state regulation deprives Lucas of his property's value.

5. What is the "inverse condemnation theory"?

If state regulation deprives property of all or nearly all value, it may constitute a "taking."

6. Why didn't the state want to settle with Lucas?

A settlement might undermine the entire Beachfront Management Act.

7. According to Lucas' expert, what was the value of Lucas' property after the Beach Management Act?

It was worthless, perhaps even of negative value because of the taxes.

8. How did the state change the Beachfront Management Act after the SC Supreme Court decision?

Property owners could apply for a variance to build single-family homes, even in restricted areas.

9. Why did Lucas decide to go to the Supreme Court?

He says he was fighting for the rights of individual property owners.

10. Why do some groups, particularly environmentalists, think Lucas should NOT be compensated?

He chose to build in an eroding area. The public shouldn't compensate people for stupid decisions.

Abridged Supreme Court Opinion
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)

Justice Scalia delivered the opinion of the Court.

This case requires us to decide whether the Act's dramatic effect on the economic value of Lucas' lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of "just compensation." U.S. Const., Amdt. 5.

Lucas filed suit in the South Carolina Court of Common Pleas. The court concluded that Lucas' properties had been "taken" by operation of the Act, and it ordered "just compensation" in the amount of \$1,232,387.50. The Supreme Court of South Carolina reversed. The court ruled that, when a regulation respecting the use of property is designed "to prevent serious public harm," no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value. We granted certiorari.

Prior to Justice Holmes' exposition in *Pennsylvania Coal Co. v. Mahon*, it was generally thought that the Takings Clause reached only a "direct appropriation" of property, *Legal Tender Cases*, or the functional equivalent of a "practical ouster of [the owner's] possession." Justice Holmes recognized in *Mahon*, however, that, if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."

Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation.

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. As we have said on numerous occasions, the Fifth Amendment is violated when land use regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land."

We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. Surely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," in a manner that secures an "average reciprocity of advantage" to everyone concerned.

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use - typically, as here, by requiring land to be left substantially in its natural state - carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

We think, in short, that there are good reasons for our frequently expressed belief that, when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

The trial court found Lucas' two beachfront lots to have been rendered valueless by respondent's enforcement of the coastal-zone construction ban. Under Lucas' theory of the case, which rested upon our "no economically viable use" statements, that finding entitled him to compensation.

[M]any of our prior opinions have suggested that "harmful or noxious uses" of property may be proscribed by government regulation without the requirement of compensation. The transition from our early focus on control of "noxious" uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between "harm-preventing" and "benefit-conferring" regulation is often in the eye of the beholder. One could say that imposing a servitude on Lucas' land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve.

[N]oxious-use logic cannot serve as a touchstone to distinguish regulatory "takings" - which require compensation - from regulatory deprivations that do not require compensation. [T]he legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. Our cases provide no support for this: none of them that employed the logic of "harmful use" prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land.

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 pre-existing limitation upon the landowner's. We believe similar treatment must be accorded 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...do no more than duplicate the result that could have been achieved...under the State's law of private nuisance....

On this analysis, the owner of a lakebed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. When, however, a regulation that declares "off limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.

The "total taking" inquiry we require today will ordinarily entail...analysis of...the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government...alike.

It seems unlikely that common law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the "essential use" of land. The question, however, is one of state law to be dealt with on remand. We emphasize that, to win its case, South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest.... As we have said, a

"State...may not transform private property into public property without compensation. . . ." Instead, as it would be required to do if it sought to restrain Lucas in a common law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.

The judgment is reversed, and the case is remanded.... So ordered.

(Justice Blackmun's dissent is omitted.)

JUSTICE STEVENS, dissenting.

In my opinion, the Court is doubly in error. The categorical rule the Court establishes is an unsound and unwise addition to the law, and the Court's formulation of the exception to that rule is too rigid and too narrow.

In addition to lacking support in past decisions, the Court's new rule is wholly arbitrary. A landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value.

The Court's holding today effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property.

The Court's categorical approach rule will, I fear, greatly hamper the efforts of local officials and planners who must deal with increasingly complex problems in land use and environmental regulation.

The State, with much science on its side, believes that the "beach/dune system [acts] as a buffer from high tides, storm surge, [and] hurricanes." Ibid. This is a traditional and important exercise of the State's police power, as demonstrated by Hurricane Hugo, which, in 1989, caused 29 deaths and more than \$6 billion in property damage in South Carolina alone.

Accordingly, I respectfully dissent

Time running out for sandbags

Owners face a May 1 deadline, but they fear loss of property

News & Observer, March 30, 2008

By Jerry Allegood, Staff Writer

NAGS HEAD - Huge sandbags piled on the beach like carcasses may not be too scenic to some, but they're a welcome sight to beach house owners such as Bob Rickabaugh.

A wall of thick tan sandbags is all that keeps the ocean from gobbling up the 20 feet of sand in front of the Nags Head house Rickabaugh bought 18 years ago as a retirement investment. Back then, there was a road and steep dune between his house and the ocean. "If my sandbags come out, my house will be gone in six months," Rickabaugh said.

Time is running out for Rickabaugh and others who have counted on sandbags to keep the ocean from swallowing their homes and businesses. The sandbags were allowed as a temporary erosion control measure, but state agencies want many of them gone by May 1.

About 150 sandbag structures, most of them lining ravaged beaches in Dare County, don't meet regulations, according to the N.C. Division of Coastal Management. One structure can have multiple bags, so some places have layers spreading across the beach. Critics say uncovered bags are unsightly and encroach on the public beach.

But 220 sandbag structures can remain because they are covered by sand and vegetation, and removing them would be disruptive.

The prospect of homes and motels falling into the sea has spurred talk of legal action. It also will likely result in debate about the state's ban on permanent ocean erosion control structures such as sea walls.

Sandbags generally are permitted when a structure or road is imminently threatened by erosion about 20 feet away. They can stay in place for two years if the building is less than 5,000 square feet, five years if it is larger.

The rationale is that sandbags can provide temporary protection until the beach rebuilds or a building can be moved. Typically, the sandbags facing the ocean are 3 to 5 feet wide and 7 to 15 feet long.

State officials granted extensions in some cases in which communities were pursuing beach nourishment, a process of pumping sand onto beaches. Some sandbags have been in place for years.

The state Coastal Resources Commission, a 15-member panel that regulates development in 20 counties, set the deadline last year.

Hotel's line of defense

At a meeting Thursday in Kill Devil Hills, the commission rejected an appeal for regulations that would allow sandbags to remain at the Comfort Inn in South Nags Head. "The sandbags are our only defense," said Michelle Pharr of the Landmark Hotel Group, which owns the hotel.

The seven-story hotel, the tallest on the Outer Banks according to its Web site, overlooks a receding shoreline that has undermined an oceanfront deck. Sandbags protect one corner that precariously sticks out onto the beach.

Pharr said it made no sense to require removal of the hotel's sandbags when bags will still be allowed on the beach at nearby property. If erosion forces the \$10 million hotel to shut down, she said, the community will lose about 100 jobs.

Ted Sampson, another Landmark representative, told the commission that the sandbag rule could raise a constitutional issue about the taking of property by a government agency. He said forcing sandbag removal would cause the property to drop substantially in value.

Commissioners expressed sympathy for owners who may lose homes but said the state has to look at the broad public interest.

Bob Emory, commission chairman, said the panel thought some sandbags had remained too long and that a deadline was needed even though some homes and property might be lost. "It's not like we're taking any joy in it," he said. "Nobody here is forgetting they are real people."

He said commission members want the state to take a comprehensive approach to beach erosion that will address problems coastwide.

Commission member Jim Leutze, former chancellor at UNC-Wilmington, disputed Sampson's suggestion that requiring removal of sandbags means the state is taking property. "I don't think it's a taking," he said. "It's the Atlantic Ocean that is doing the taking."

Wayland Sermons, another commission member, said he reluctantly voted to uphold the sandbag removal regulation despite his belief in private property rights. He said people take a risk when building on the oceanfront. "It's not going to change," he said of the threat. "We're not going to stop the ocean."

Owners' frustrations

Property owners said in interviews that state regulations leave them with few options. Richard Murphy of Raleigh, who owns oceanfront property in Nags Head, said the state should do more to support beach nourishment.

Rickabaugh, whose main home is in Currituck County, said he would be glad to cover his sandbags by trucking in sand, even though that gets expensive -- up to \$250 a truckload. He said he and nearby property owners on Camelot Street would be willing to bring in sand. State regulations allow sand to be trucked in, but it requires a special permit, and the bags eventually have to be covered with vegetation. "It's a private street," he said. "If they would let us take care of it, we would." Moving the house is not feasible, he said, because vacant lots are rare and expensive.

Gail Jones of Nags Head said there was 300 feet of beach in front of her family's beach house when it was built in 1978. Now the ocean swirls around pilings underneath the house during storms. Stacked sandbags keep the waves from undercutting the home and exposing the septic tank, which would cause the house to be condemned.

Jones said her house is the first on the street, and once it goes, others will follow. "We're just waiting," she said.

“Time is Running Out” Guided Reading Questions

For homework, read the newspaper article and answer the following questions based on the reading and the concepts from Lucas v. South Carolina.

1. From the reading, what is the most convincing reason for forcing residents to remove the sandbags from their beach property?
2. From the reading, what is the most convincing reason why residents should be allowed to keep the sandbags on their beach property?
3. How is the current controversy at Nags Head similar to the *Lucas v. South Carolina Coastal Council*? Give at least two reasons supported by details from the documentary and the reading.
4. How is the current controversy at Nags Head and Kill Devil Hills different from the *Lucas v. South Carolina Coastal Council*? Give at least two reasons supported by details from the documentary and the reading.
5. In the majority opinion for *Lucas v. South Carolina Coastal Council* , Justice Scalia states “when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”
 - a. Summarize the quote in your own words?
 - b. In this situation, are the owners of the homes in Nags Head and Kill Devil Hills being forced to sacrifice all economically beneficial uses in the name of common good”?
6. In your opinion, does the N.C. Division of Coastal Management regulation for the removal of sandbags qualify as a government taking of private property under the Fifth and Fourteenth Amendments requiring the payment of "just compensation"? Explain your answer supported by details from the documentary and the reading.

**COASTAL RESOURCE ADVISORY COUNCIL
GROUP MEMBER ROLES**



Town Commissioner of Kill Devil Hills

You want the sandbags to remain on the beach at all costs. If the sandbags are removed, Landmark Hotel, the largest hotel in your town, will eventually fall into the ocean, costing the company \$10 million and reducing tourism to your beach and town. You care about the environment, but you think it is ridiculous that you should have to lose a hotel just so the beaches will look better. It seems especially unreasonable because the hotel provides jobs for about 100 North Carolinians, and all these jobs will be lost if the sandbags are removed and the hotel is destroyed. You also find it unfair that the hotel should have to remove sandbags when other properties may keep some sandbags. You feel the hotel has contributed a lot to your community and that the government should be more lenient towards Landmark. You will do everything in your power to convince fellow advisory council members to make a recommendation to the CRC that the sandbags stay.

Administrative Role: Facilitator

Lead the conversation and keep the debate civil and on track. Even though you have your own proposal, you are responsible for coordinating compromise.



Representative of the State Board of Tourism

You want the sandbags to be removed as soon as possible. You've seen them several times, and they make the beach look terrible. They also make it harder for visitors to access and enjoy the beach. The beaches are one of the state's major attractions, and these sandbags are a serious problem. You've observed a steady drop in tourism since the sandbags were put in place, and the state can't afford to lose tourist dollars. You feel that anyone who buys land on the beach should have been aware of the risk of erosion. You think it's selfish for these property owners to be causing the state to lose money and preventing people from enjoying the beaches. As far as you're concerned, the state has given these people a chance and it's time the sandbags were removed for good. You hope to convince your fellow advisory council members to make a recommendation to the CRC that the sandbags be removed immediately.

Administrative Role: Timekeeper

Watch the time and ensure each committee member gets up to 2 uninterrupted minutes to state his/her opinion (no more than 2!); after all have spoken, time 8 minutes for open debate (when you are down to only 2 minutes left during the open debate period, let your fellow committee members know to begin to wrap things up)



Mayor of Nags Head

You are the mayor of Nags Head and your constituency is made up of many people who own homes on the beach. Many of them bought their homes years ago, when the beaches were much larger and erosion did not seem to be a problem. It seems to you that the state is putting everyone's property at risk by demanding the removal of the sandbags. Of course, you think it is important for the beaches to look nice, but you don't think the beaches are more important than saving people's homes. Besides, many of your constituents have offered to bring in sand to replenish the beaches and cover the sandbags, but the state regulations make it extremely difficult. You feel like the state is putting you in a very difficult position. Nags Head is part of a federally approved Outer Banks beach nourishment project, but Congress has declined to fund all but the initial phase. In a 2007 referendum, taxpayers overwhelmingly voted against paying for a town project. You hope that the state and Congress will be able to fund a plan to address erosion, but you think Nags Head residents should be allowed to protect your property in the meantime.

Administrative Role: Spokesperson

Summarize your group's final recommendation decision for the rest of the class once the activity ends.

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Coastal Land Development Representative

You don't understand why these property owners are being so unreasonable. The sandbags were always supposed to be a temporary measure, and you feel that your regulations made this clear from the beginning. Permission was never granted from the Division of Coastal Management to have sandbags indefinitely. First to go will likely be the beat-up, uncovered sandbags that block public access on the beach. Next could be the ugly bald bags piled willy-nilly in front of oceanfront houses. These property owners had years to move their structures back further from the ocean, or to cover their sandbags with vegetation. After all, you're leaving most of the sandbags on the beach. Only the uncovered ones have to be removed, and this was also made clear in the regulations. You truly sympathize with the people whose homes are threatened, but they chose to live on an eroding beach and not take the necessary precautions. Even with the sandbags, the ocean would eventually overwhelm their homes. It's unfortunate, but they put themselves in this situation. The state helped them for several years, and now it's time to remove the sandbags so the state can start a new program of beach replenishment and erosion prevention. That is what you feel the recommendation to the CRC should be.

Administrative Role: : Note-taker

Take notes when each council member is making their proposals.

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Conservation Representative

You are a member of the advisory council representing environmental conservation. As far as you're concerned, the sandbags have to go—the sooner, the better. Not only do they destroy the natural beauty of the beach, but they're getting in the way of more serious erosion control measures. You have a hard time feeling bad for the property owners. After all, they bought beachfront land, which is particularly prone to erosion. Frankly, you think building or living on the ocean should be illegal anyway. You prefer shores like those in Ocracoke Island: no structures on the beach at all! Building on beaches causes all sorts of environmental problems, including making erosion worse. While sandbags may provide temporary and limited benefits in protecting the properties upon which they are installed, they frequently have the detrimental effect of accelerating and worsening shoreline erosion on unprotected adjacent properties. These people decided to build in a risky area, worsened the conditions of the beaches, and now they want the state to rescue them. You think the state has used stopgap measures, like sandbags, for too long. If North Carolina is going to address the problem of coastal erosion, it will have to start looking at permanent solutions. There's no point in preserving these properties any longer. The state can't be expected to hold back the Atlantic Ocean, and you don't think these people should be rescued from their bad decisions.

Administrative Role: Responder

After the spokesperson presents your groups recommendation to the Coastal Resources Council, you will be responsible for responding to any questions other groups have. If the group has any questions regarding the procedure of this activity, it is your job to communicate with the teacher if needed.

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Partner with K & L Gates

You are a lawyer with K & L Gates law firm in Raleigh and will be representing 49 property owners who have sandbag permits in North Carolina. Of those, about 20 are in Nags Head. You have been invited as a special guest to this meeting of the Coastal Resource Advisory Council to provide your legal expertise about government takings and the controversy with the removal of the sandbags. In your legal opinion, this case is very similar to *Lucas v. South Carolina Coastal Council*. By forcing residents to remove protective sandbags, the state is using regulation to deprive citizens of the economic value of their private property. You hope to convince the advisory council and the Coastal Resource Commission that communities seeking sand replenishment should be allowed extensions for the deadline to remove the sandbags. The goal for Nags Head property owners is to give them enough time to keep the sandbags until the beaches can be widened. If they are allowed this time, the government will no longer be participating in a taking of private property through eminent domain.

Administrative Role: Reality-Checker

As the group discusses, your job is to ensure everyone stays on task, remains in "character", and that the discussion remains realistic. Ensure the group's discussion stays serious and that ideas presented are not preposterous.