IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel., R.T.G., INC., et al.,	:	Case No. 01-748
Appellees-Cross Appellants,	:	On Appeal from the Franklin County Court
v.	:	of Appeals, Tenth Appellate District
STATE OF OHIO, et al.,	:	
Appellants-Cross Appellees.	:	Court of Appeals Case No. 98AP-1015

REPLY BRIEF OF AMICI CURIAE VILLAGE OF PLEASANT CITY AND COMMUNITY RIGHTS COUNSEL IN SUPPORT OF APPELLANTS-CROSS APPELLEES STATE OF OHIO, et al.

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I. RTG Is Flatly Incorrect In Asserting That This Court Must Ignore The Extensive Trial Evidence Of Harm Posed By RTG's Proposed Mining.

In our opening brief, amici Village of Pleasant City and Community Rights Counsel showed that the background-principles defense to takings liability articulated in *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003, is a flexible inquiry under which new information or changed circumstances may make what was once permissible no longer so. *See* Pleasant City Br. at 10. Moreover, where a challenged regulation is justified by background principles of state law, there can be no takings liability under any theory because the claimant does not own the property interest alleged to have been taken. *Id*. at 7. We also demonstrated that many courts have used nuisance law to address threats to public drinking water supplies, threats very similar to those posed by RTG, Inc.'s proposed mining to the Pleasant City Aquifer. *Id*. at 11-12. We further established that nuisance law should be used to protect against threats to future uses of valuable resources like the Pleasant City Aquifer. *Id*. at 12-13.

In its initial merits brief, RTG makes little effort to dispute these bedrock propositions of law. Instead it asserts, without citation, that in applying the background-principles defense under *Lucas*, this Court must limit itself to the administrative record before the State at the time of its 1989 Unsuitable-for-Mining (UFM) designation. RTG Brief at 39. RTG in effect contends that this Court must ignore the entire trial record in deciding whether RTG's proposed mining would constitute a nuisance and thus insulate the State from takings liability. According to RTG, this Court's nuisance inquiry under *Lucas* may not be based on what RTG calls the "defensive record" (by which it means the trial record) and may not use any "*post hoc* rationale" that was not advanced at the time of the UFM designation. *Id*. Rather, according to RTG, the Court "must find support [for any nuisance determination] at the time of the UFM [designation] for the

reasons that it occurred." *Id*. RTG argues that if the UFM designation and administrative record do not support a nuisance finding, that "should end the debate." *Id*.

Given the weakness of its case, it is no surprise that RTG would want to cut off debate so early. Tellingly, RTG cites no support for this strange contention. Nor could it. To our knowledge, in the nine years since *Lucas* no court has limited the background-principles inquiry in such a bizarre fashion.

RTG's effort to divert this Court's attention from the trial record is belied by *Lucas* itself. In *Lucas*, the U.S. Supreme Court remanded the matter to the state court for an application of South Carolina nuisance and property law to trial record evidence regarding "the circumstances in which the property is presently found." *Lucas*, 505 U.S. at 1031. The *Lucas* Court made clear that the background-principles inquiry ordinarily requires examination of several factors that might not have been relevant to the administrative process that gave rise to the challenged regulation. *Id*. at 1030-31 (discussing factors relevant to the background-principles inquiry). On remand, the South Carolina Supreme Court in *Lucas* was explicit in its review and consideration of the trial record in conducting the background-principles inquiry. *Lucas v. South Carolina Coastal Council* (S.C. 1992), 424 S.E.2d 484, 486 ("We have reviewed the record and heard arguments from the parties regarding whether Coastal Council possesses the ability under the common law to prohibit Lucas from constructing a habitable structure on his land.").

The State, of course, had no reason in 1989 to anticipate RTG's regulatory takings challenge to the UFM designation and mount a full defense at that time by making extensive nuisance findings. It fully discharged its responsibilities under applicable state law and this Court's orders regarding the requirements of that law. Now that RTG has brought its takings

challenge, it would be unfair in the extreme to tie the State's hands by ignoring the extensive trial record showing that the proposed mining would constitute a nuisance.

The absurdity of RTG's request that this Court ignore the trial record becomes apparent when one considers regulatory takings challenges to municipal ordinances or state legislation, as opposed to an administrative action. The legislative process cannot possibly anticipate how general laws will affect every covered parcel of property and then generate findings relevant to the background-principles inquiry for every affected parcel. Under RTG's theory, however, government counsel defending an ordinance or statute against a takings challenge would be precluded from presenting evidence regarding whether a particular use of land prohibited by the law would constitute a nuisance or otherwise be justified by background principles of state property law. Nothing in *Lucas* or any other takings case requires such a perverse result.

Courts use trial evidence relevant to nuisance issues not only to supplement findings made during administrative proceedings, but also to depart from earlier administrative determinations where appropriate. For example, in *Rith Energy, Inc. v. United States* (1999), 44 Fed. Cl. 108, *aff'd*, 247 F.3d 1355 (Fed. Cir. 2001), the court addressed a takings challenge to a federal prohibition on the holder of two leases for surface mining of coal on about 250 acres in Tennessee. The court rejected the takings claim based on the written and oral presentations made on cross-motions for summary judgment (*id*. at 109), concluding that the proposed mining would constitute a nuisance under state law due to the risk of acid mine drainage into an aquifer. *Id*. at 114. The claimant contended that there could be no nuisance under state law because state authorities had granted it a permit to mine. *Id*. at 115. The court responded, however, that the information the claimant submitted to the state did not inform the state of the risk of harm to the aquifer. "We can justifiably assume," the court concluded, "that even as the federal officials

were persuaded to reexamine the validity of the permit they initially had issued, so too would the state officials." *Id*.

RTG expends considerable energy in arguing that the administrative standard for an UFM designation is not identical to the standard for a common law nuisance. RTG Br. at 37-39. But this contention misses the point, for as shown above it is entirely permissible for the state to make its nuisance showing based on evidence and argument presented in the takings case itself.

RTG (Br. at 44) also makes much of the fact that it has previously mined in the vicinity. But as RTG concedes, *Lucas* makes clear that "changed circumstances or new knowledge may make what was previously permissible no longer so." RTG Br. at 43 (quoting *Lucas*, 505 U.S. at 1031). As an example, *Lucas* observes that no compensation would be due a power plant "upon discovery that the plant sits astride an earthquake fault." *Lucas*, 505 U.S. at 1029. In the same way, discovery of threats to drinking water supplies posed by mining justifies a ban on the mining, even where mining previously occurred in the area. The evidence collected and evaluated by the State in the UFM-designation proceeding, as well as during the trial in this case, plainly constitutes the kind of "new information" contemplated by the *Lucas* court that gives rise to a background-principles defense against takings liability. *Rith Energy, supra*, stands as a perfect illustration of how a prior decision to permit mining does not preclude a nuisance finding once new evidence of potential harm comes to the fore. 44 Fed. Cl. 114-15.

Lower courts have applied common-law nuisance principles expansively to defeat takings challenges to mining bans and other community protections. For example, in *State v. The Mill* (Colo. 1994), 887 P.2d 993, the court rejected a takings challenge to restrictions on mining that threatened to spread radioactive contamination, stating that "[u]nder Colorado common law, landowners have a duty to prevent activities and *conditions* on their land from creating an unreasonable risk of harm to others." *Id*. at 1002. The court determined that when "[i]mproperly

handled, radioactive materials in particular were treated as a public nuisance under Colorado solid waste laws enacted before The Mill purchased the site." *Id*. Thus, controls designed to prevent the spread of radioactive contamination did not constitute a taking because those uses were never lawful. *See id*.; *accord Aztec Minerals Corp. v. Romer* (Colo. Ct. App. 1996), 940 P.2d 1025 (state's cleanup of toxic waste site did not work taking because the claimant had no right to cause the pollution under common-law nuisance principles).

RTG's reliance (Br. at 33) on *Loveladies Harbor, Inc. v. United States* (Fed. Cir. 1994), 28 F.3d 1171, is plainly misplaced. In *Loveladies,* the state "publicly acknowledged it either did not have or was unwilling to exercise" any authority under state law to prohibit the land use at issue. *Id*. at 1183. This failure by the State of New Jersey in *Loveladies* stands in stark contrast to the action of the State of Ohio in the case at bar, which exercised its UFM-designation authority and has argued throughout this case that RTG's mining would constitute a nuisance.

RTG's other authorities also are distinguishable and have no bearing on the issues before the Court. For instance, in *Florida Rock Indus., Inc. v. United States* (1999), 45 Fed. Cl. 21 (cited at RTG Br. at 43), the court rejected a nuisance defense in a takings challenge to a federal prohibition on limestone mining on wetlands. The court stressed that "Plaintiffs placement of fill on wetlands, however, would be a violation of federal, not state law. In fact, the Florida Department of Transportation told Florida Rock that it was their *recommendation* and that of the Dade County Planning Department that new rock plants be located within the Pennsuco area, where plaintiff's property is located." *Id*. at 30. Moreover, other rock quarries were still in operation in the area without evoking official concern from state authorities. *Id*. In contrast, the State of Ohio has prohibited all mining that threatens the Pleasant City Aquifer. The cases could not be more different.

Evidently realizing that the record in this case may not be ignored, RTG attempts to poke holes in the State's showing that the proposed mining would constitute a nuisance by threatening public drinking water supplies. RTG Br. at 39-43. Rather than burden this Court with duplicate responses, amici rely on, and hereby incorporate by reference, the State's demonstration based on the record evidence that RTG's proposed mining would constitute a nuisance.

Finally, in a transparent effort to gain the Court's sympathy, RTG asserts that the Village of Pleasant City "had substantial resources to litigate" the UFM designation, which allegedly forced RTG to settle for only an 8.4-acre permit extension on the Haught property. RTG Br. at 2 & n. 4. This assertion must be something of a bad joke. The Village is a small rural community, and the municipal wells that tap the Pleasant City Aquifer serve only about 1000 residents. Magistrate's Decision at 13. The Village hardly has "substantial resources to litigate" and is represented before this Court on a pro bono basis. In fact, 90% of American cities and towns have less than 10,000 people and cannot afford even one full-time municipal lawyer. *See* S. Rep. No. 105-242, at 45 (1998) (minority views); *accord, Hearings on H.R. 2372 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (Statement of Diane S. Shea, Associate Legislative Director, National Association of Counties) (available at http://www.house.gov/judiciary/shea0915.htm) (discussing the chilling effect that the threat of takings litigation has on small municipalities at the expense of neighboring property owners and the public interest). Because small municipalities can ill afford to defend against claims brought by well-heeled corporations, dubious takings theories like RTG's threaten to undermine health, safety, and welfare protections for these small communities throughout Ohio and across the country. *Id*.

II. Amici Supporting RTG Do Not Provide Credible Arguments Against Finding A Nuisance In This Case.

The amicus submissions in support of RTG require only a brief response.

The Ohio Coal Association (OCA) makes a single point: mining is generally important to Ohio's economy. OCA Br. at 2 ("The focus herein is on the importance of its coal mining industry * * *."). No one disputes this assertion, but as noted in our opening brief, a nuisance is very often "merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." *Village of Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 388. Mining in an area that threatens public drinking water supplies is indisputably a pig in the parlor. Unlike OCA's brief, which does not cite any case law, this brief and our opening brief demonstrate that courts have found nuisances that preclude takings liability in cases involving mining and other significant economic activity.

Amicus Pacific Legal Foundation (PLF) argues that the background-principle defense is limited to common law and does not embrace statutes, regulations, and other positive law. PLF Br. at 7-10. This argument directly conflicts, however, with the U.S. Supreme Court's recent ruling in *Palazzolo v. Rhode Island* (2001), 121 S. Ct. 2448. The *Palazzolo* Court held only that a pre-existing statute or regulation is not automatically a background principle in every case. *Id*. at 2464. The Court stressed, however, that it had "no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here." *Id*. at 2464. This language that makes it crystal clear that pre-existing statutes and regulations may constitute background principles in appropriate circumstances. The Court went on to explain that these appropriate circumstances may arise where the pre-existing law is based on "common, shared understandings of permissible limitations derived from a State's legal tradition." *Id*. Because the common law of nuisance would prohibit mining that threatens public drinking water supplies, statutes and regulations that

are "derived from" this tradition likewise qualify as background principles that defeat a takings challenge to those laws.

In any event, the State has demonstrated that the proposed mining would constitute a common-law nuisance, and so PLF's argument is beside the point.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Reply Brief of Amicus Curiae Village of Pleasant City and Community Rights Counsel in Support of Appellants-Cross Appellees, State of Ohio, et al. was sent by first-class U.S. mail this 8th day of October, 2001, to:

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