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# 2000 Survey of Rhode Island Law: Cases: Property Law

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**Property Law.** *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707 (R.I. 2000). A regulatory takings claim is not ripe if the landowner has never submitted an application specifying the planned development of the property. Upon rejection by the state, the landowner must submit a "less grandiose" plan for development.

#### FACTS AND TRAVEL

Anthony Palazzolo (Palazzolo) brought an inverse condemnation action against Rhode Island's Coastal Resource Management Council (CRMC).<sup>1</sup> Palazzolo claimed that CRMC's denial of his application to fill eighteen acres of his coastal wetlands constituted a taking of his property for which just compensation was required under the United States and Rhode Island Constitutions.<sup>2</sup> Palazzolo was seeking compensation in the amount of \$3,150,000.<sup>3</sup> That amount was based on the profit he stood to gain had he been able to develop a seventy-four lot subdivision on his property.<sup>4</sup>

From 1960 to February 27, 1978, Palazzolo was the president and sole shareholder of Shore Gardens, Inc. (SGI).<sup>5</sup> During that time, SGI was the owner of the property in question. On February 27, 1978, SGI's corporate charter was revoked and Palazzolo became the sole owner of the property.<sup>6</sup>

Between 1962 and 1985, Palazzolo filed several applications with various state agencies seeking permission to substantially alter his property.<sup>7</sup> On April 1, 1971, the Division of Harbors and Rivers (DHR) approved Palazzolo's application to dredge the pond and fill his property so he could construct a beach club.<sup>8</sup> On November 17, 1971, DHR revoked its assent.<sup>9</sup> Palazzolo did not appeal this revocation.<sup>10</sup> By 1977, the state's regulatory framework evolved so that the Coastal Resources Management Council

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1. See *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 709 (R.I. 2000).
  2. See *id.* at 711.
  3. See *id.*
  4. See *id.*
  5. See *id.* at 710.
  6. See *id.*
  7. See *id.*
  8. See *id.*
  9. See *id.*
  10. See *id.*

(CRMC) was the agency responsible for issuing permits for the filling of coastal wetlands.<sup>11</sup>

In 1983 and 1985, Palazzolo, acting in his own capacity, filed applications with CRMC to fill his property.<sup>12</sup> His 1985 application sought permission to construct a beach club.<sup>13</sup> Both applications were denied.<sup>14</sup> Thereafter, Palazzolo filed a regulatory takings claim against CRMC and the state.<sup>15</sup> At a jury waived trial, the trial justice found that Rhode Island's regulatory scheme did not amount to a taking of Palazzolo's property and that no compensation was required under the Rhode Island or United States Constitutions.<sup>16</sup>

### BACKGROUND

The Fifth Amendment to the United States Constitution prevents states from taking private property without just compensation.<sup>17</sup> Traditionally, this concept was applied to a physical intrusion onto, or confiscation of, real property.<sup>18</sup> However, the United States Supreme Court has found that a government-imposed regulation may rise to a level at which just compensation is required.<sup>19</sup> This is referred to as a regulatory taking.<sup>20</sup>

A person seeking compensation for a regulatory taking must first show that his claim is ripe.<sup>21</sup> A regulatory takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."<sup>22</sup>

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11. Rhode Island's regulatory framework underwent dramatic changes between 1962 and 1985. See *Palazzolo*, 746 A.2d at 710 and accompanying notes. However, the court found that Mr. Palazzolo could not possibly have owned the property in his own name until the corporation dissolved in 1978. See *id.* at 716. Hence, the relevant law in this case is that which was in place as of Mr. Palazzolo's acquisition date of February 27, 1978. See *id.* at 716-17.

12. See *Palazzolo*, 746 A.2d at 711.

13. See *id.*

14. See *id.*

15. See *id.*

16. See *id.*

17. See *id.* at 712.

18. See *id.*

19. See *id.*

20. See *id.*

21. See *id.*

22. *Id.* (quoting *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985)).

Upon a showing of ripeness, the court must determine if the government regulation constitutes a per se taking.<sup>23</sup> A per se taking may occur if a regulation requires any physical invasion of a property owner's property.<sup>24</sup> Alternatively, a per se regulatory taking may occur if a regulation "denies all economically beneficial or productive use of land."<sup>25</sup>

A regulation not amounting to a per se taking may still constitute a regulatory taking for which compensation is required.<sup>26</sup> A regulation may constitute a regulatory taking if it meets the three-factor test established in *Penn Central Transportation Co. v. New York City*.<sup>27</sup> Under *Penn Central*, the first consideration is the character of the regulation.<sup>28</sup> The second is the economic impact of the regulation.<sup>29</sup> Finally, the trial court should consider the extent to which the regulation complained of has interfered with the property owner's "investment-backed expectations."<sup>30</sup>

#### ANALYSIS AND HOLDING

The Rhode Island Supreme Court reviewed the issue of ripeness de novo.<sup>31</sup> The court held that as a matter of law Palazzolo's claim was not ripe.<sup>32</sup> Justice Lederberg referred to two facts to justify her holding.<sup>33</sup> The first concerned the contents of Palazzolo's applications. Palazzolo's 1966 and 1985 applications sought to fill the wetlands so he could construct a beach club.<sup>34</sup> His 1963 and 1983 applications sought permission to fill the wetlands, but made no mention of his planned use of the property.<sup>35</sup> As Palazzolo never submitted an application concerning the development of the seventy-four lot subdivision that he claims to have had taken

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23. See *id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)).

24. See *id.*

25. *Id.* (quoting *Lucas*, 505 U.S. at 1015).

26. See *id.* at 713 (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

27. See *id.* (citing *Penn Cent.*, 438 U.S. at 124).

28. See *id.* (citing *Penn Cent.*, 438 U.S. at 124).

29. See *id.* (citing *Penn Cent.*, 438 U.S. at 124).

30. *Id.* (citing *Penn Cent.*, 438 U.S. at 124).

31. See *id.* at 714.

32. See *id.*

33. See *id.*

34. See *id.*

35. See *id.*

from him, the state never rendered a "final decision regarding the application of the regulations to the property at issue."<sup>36</sup>

The second fact that convinced Justice Lederberg that Palazzolo's claim was not ripe was that he never modified his application to seek permission for a "less grandiose" plan.<sup>37</sup> Palazzolo's 1963 and 1983 applications sought to fill all eighteen acres of his property.<sup>38</sup> His 1966 and 1985 applications sought to fill all eighteen acres except a fifty-foot strip between the pond and area of the proposed fill.<sup>39</sup> Palazzolo failed to ripen his claim by not seeking to use the property in a way that would allow him to fill a substantially smaller amount of his property.<sup>40</sup> Additionally, Palazzolo could have built at least one house on the upland portion of the land without having to fill any of the property.<sup>41</sup>

The supreme court's holding that Palazzolo's claim was not ripe for review disposed of the case. However, in dicta, the court went on to discuss the merits of Palazzolo's claim.<sup>42</sup> The court stated that even if the claim was ripe, the government's regulations did not constitute a taking for which compensation was required.<sup>43</sup>

In its analysis of Palazzolo's claim under a per se takings theory, the court stated that Palazzolo was not deprived of all economically beneficial use of his property.<sup>44</sup> The court relied on the fact that Palazzolo would have been able to receive up to \$200,000 had he developed the upland portion of his property.<sup>45</sup> Although this was significantly less than the \$3,150,000 he stood to gain if he was permitted to fully develop his property, the fact was that there was still remaining value in the land.<sup>46</sup> Accordingly, Palazzolo was not deprived of all economically valuable or beneficial use of his land.<sup>47</sup>

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36. *Id.* (quoting *Williamson County Reg'l Planning Comm'n*, 473 U.S. at 186).

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.*

42. *See id.*

43. *See id.* at 714-17.

44. *See id.* at 715.

45. *See id.*

46. *See id.*

47. *See id.*

Further, the court stated that Palazzolo could not show a per se taking if he was not the owner of the property at the time the regulation was passed.<sup>48</sup> The court stated that Palazzolo could not have acquired the property in his name until SGI was dissolved in 1978.<sup>49</sup> By that time, regulations limiting his ability to fill the wetlands were already in place so he never had the right to fill the wetlands.<sup>50</sup> Hence, nothing had been taken from him.<sup>51</sup>

The supreme court also found that Palazzolo could not have prevailed in his takings claim under a *Penn Central* analysis.<sup>52</sup> The court again relied on the fact that Palazzolo was not the owner of the property until 1978.<sup>53</sup> In light of the regulations that were in place at that time, Palazzolo could not have reasonable investment back expectations to develop the property as he wished.<sup>54</sup> The lack of reasonable investment backed expectations caused Palazzolo's claim of a regulatory taking under *Penn Central* to fail.<sup>55</sup>

#### CONCLUSION

The Rhode Island Supreme Court determined that because Palazzolo had neither sought permission to undertake less grandiose plans nor applied for the subdivision that he claims was taken from him, his claim was not ripe for review. Additionally, the court found that substantial value still remains in Palazzolo's land defeating his claim of a per se regulatory takings claim. Palazzolo's claim also failed under a *Penn Central* analysis because he never had a reasonable investment backed expectation to develop a seventy-four lot subdivision.

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48. *See id.*

49. *See id.* at 716.

50. *See id.*

51. *See id.*

52. *See id.* at 717.

53. *See id.*

54. *See id.*

55. *See id.*