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PALAZZOLO ON REMAND: THERE WAS NO TAKING UNDER *PENN CENTRAL*

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On June 28, 2001, the U.S. Supreme Court rejected Anthony Palazzolo's claim that a Rhode Island regulation had effected a total taking of his property.[1] The Court remanded the case for examination of Palazzolo's takings claim under the analysis set forth in *Penn Central Transportation Co. v. City of New York*.[2] This Article concludes that Mr. Palazzolo did not suffer a taking under *Penn Central*.

Chief Justice Holmes enunciated the regulatory takings doctrine eighty years ago: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[3] The Court has been unable to develop any set formula for determining when justice and fairness require compensation for a taking, and has instead relied on "ad hoc, factual inquires."[4] Since 1978, when the Court decided *Penn Central*, courts have decided whether the government went "too far" in a particular case by applying a balancing test in which three factors have particular significance.[5] Those three factors are: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action.[6] As explained below, Palazzolo has not suffered a taking under these three factors.

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[1] Palazzolo v. Rhode Island, 533 U.S. 606, 631–32 (2001).

[2] 438 U.S. 104 (1978).

[3] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[4] *Penn Cent.*, 438 U.S. at 124.

[5] There is an exception to the three-factor test: if regulation strips *all* economically beneficial use from the property, the court may find a "categorical taking" without applying the other two factors in *Penn Central*'s three-factor balancing test. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992). The Court rejected this type of categorical takings claim by Palazzolo, and so the *Lucas* approach does not apply here.

[6] *Penn Cent.*, 438 U.S. at 124.

I. The Economic Impact of the Regulation

Palazzolo's property consists primarily of salt marsh wetland subject to tidal flooding, with at least one developable upland section.[7] Palazzolo argued to the U.S. Supreme Court that the upland portions of his property should be excluded from the takings analysis and his case should be viewed as a total regulatory taking of the wetlands portion.[8] However, such a "partial taking" approach is contrary to *Penn Central*, where the Court stated that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[9] The court instead looks to the economic impact on the "parcel as a whole."[10] The majority in *Palazzolo v. Rhode Island* noted in dicta that the Court had "at times expressed discomfort with the logic of this rule," citing dicta from *Lucas v. South Carolina Coastal Council*.[11] However, the Court has not overruled, and in fact has repeatedly reaffirmed, *Penn Central*'s "parcel as a whole" approach.[12]

The Court has also held repeatedly that mere diminution in the value of property alone is insufficient to establish a regulatory taking.[13] However, the Court stated in *Palazzolo* that compensation may be required under *Penn Central* where regulation does not completely eliminate the value and use of the parcel as a whole, but diminishes them so much that only a "token interest" remains.[14]

The Rhode Island Coastal Resource Management Council indicated that it would have allowed Palazzolo to build one house on an

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[7] Palazzolo v. Rhode Island, 533 U.S. 606, 613, 621–23 (2001).

[8] *Id.* at 631.

[9] 438 U.S. at 130.

[10] *Id.* at 130–31. The "partial taking" approach has been adopted in a small number of federal cases. *See, e.g.*, Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1380–81 (Fed. Cir. 2000), *aff'd on reh'g*, 231 F.3d 1354 (Fed. Cir. 2000), *reh'g en banc denied*, 231 F.3d 1365 (Fed. Cir. 2000); Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1568–70 (Fed. Cir. 1994). However, under *Penn Central*, it generally is not a taking where regulation strips economic use, in whole or in part, from just one segment of an owner's property. Referring to takings under *Lucas* as "total" and takings under the *Penn Central* analysis as "partial" takings add confusion to the terminology and ignore *Penn Central*'s emphasis on analyzing the parcel as a whole.

[11] *Palazzolo*, 533 U.S. at 631; *cf.* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016–17 n.7 (1992).

[12] For example, see *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 496–97 (1987), and, after the *Lucas* decision, *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993), and, most recently, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1481 (2002).

[13] *Concrete Pipe*, 508 U.S. at 645; *Penn Cent.*, 438 U.S. at 131.

[14] *Palazzolo*, 533 U.S. at 617, 631.

upland portion; the trial court found that there was such a developable lot, and that it would be worth about $200,000 (in 1986 dollars).[15] The U.S. Supreme Court described such upland value as "substantial" in rejecting Palazzolo's total takings claim.[16] A house lot with that value, while less valuable than the subdivision or recreational beach club sought by Palazzolo, is an economically beneficial use, not a mere token. Given that the Rhode Island court on remand is bound by the "law of the case" to find that an upland piece can be developed and has value of about $200,000, the court will have to conclude that Palazzolo did not suffer a taking.

In assessing the fairness to property owners of Rhode Island's regulations, the Rhode Island court should consider the "average reciprocity of advantage."[17] "While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."[18] Tideland and sewage disposal regulations on the Rhode Island coast have burdened owners of coastal wetlands somewhat, but such regulations also have increased the value of developable upland parcels.

II. The Extent of Regulatory Interference with Distinct Investment-Backed Expectations

Under this second *Penn Central* factor, a landowner's expectations must be "reasonable" in order to support a taking.[19] Was it reasonable for Palazzolo to expect, when he acquired title to the property, that the government would permit him to fill a salt marsh tideland?

The U.S. Supreme Court's majority was clear in *Palazzolo* in rejecting the so-called "notice" rule; it stated that an owner's pre-acquisition notice of regulations on property does not automatically bar a takings claim.[20] However, Justice O'Connor represented a critical swing vote.[21] She voted with the five-Justice majority to reject the notice rule, but was also part of a majority, with the four dissenters, indicating that the existence of prior regulations may affect the rea-

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[15] *Id.* at 621–22.

[16] *Id.* at 616.

[17] *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[18] Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 491 (1922).

[19] E. Enters. v. Apfel, 524 U.S. 498, 500 (1998); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

[20] *Palazzolo*, 533 U.S. at 630.

[21] *See id.* at 633 (O'Connor, J. concurring).

sonableness of expectations.[22] She stated that a prior regulatory regime "helps to shape the reasonableness of those expectations," and that "[c]ourts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred."[23] Therefore, whether Palazzolo's expectations were reasonable may depend in part on whether, when he became the owner of the property, Rhode Island law regulated the filling of salt marsh tidelands. In other words, should Palazzolo be compensated for the loss of development value of his land if, when he became the owner, existing Rhode Island law prohibited development without permits? The U.S. Supreme Court did not rule on this point.

As the state attorney general pointed out on brief to the Court, Rhode Island has protected public rights to tidelands long before Palazzolo owned the property.[24] At common law, the state owned in fee the soil in tidewaters below the high-water mark.[25] In 1876, Rhode Island enacted a law to control and manage "the public tide-waters."[26] The principle of public rights in tidelands and the requirement of permits for encroachments or filling were reaffirmed by subsequent statutes and case law.[27] In 1965, Rhode Island enacted a comprehensive regulatory program, derived from these long-standing protections of public rights, imposing permitting requirements and restricting

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[22] *See id.*; *id.* at 643 n.6, 644–45 (Stevens, J., concurring in part, dissenting in part); *id.* 654 n.3 (Ginsburg, Souter & Breyer, JJ., dissenting); *id.* at 654–55 (Breyer, J., dissenting).

[23] *Id.* at 633, 635 (O'Connor, J., concurring).

[24] Brief for Respondents, 2002 WL 22908, at *7, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047) [hereinafter Brief for Respondents].

[25] Bailey v. Burges, 11 R.I. 330, 331 (1876); *accord, e.g.*, Town of Warren v. Thornton-Whitehouse, 740 A.2d 1255, 1259 (R.I. 1999) ("the state holds title to all land below the high water mark in a proprietary capacity for the benefit of the public"). This state ownership of soil under tidewater continues until a private owner actually fills under some form of state "license" to do so. Gerhard v. Seekonk River Bridge Comm'rs, 5 A. 199, 200 (R.I. 1886).

[26] 1876 R.I. Acts & Resolves ch. 556, §§ 3–4, 7.

[27] *See, e.g.*, R.I. GEN. LAWS §§ 3–5, 10–12, 14 (1896) (current version at R.I. GEN. LAWS §§ 46-1-2, 46-6-1 to -6-6) (R.I. GEN. LAWS § 46-6-5 repealed 2002); 1918 R.I. Pub. Laws ch. 1669, §§ 2, 10 (current version at R.I. GEN. LAWS §§ 46-1-1, 46-1-2); Dawson v. Broome, 53 A. 151, 152 (R.I. 1902).

uses to those that would not be detrimental to the salt marshes.[28] Rhode Island has also regulated sewage disposal for decades.[29]

Given Rhode Island's long history of regulating the filling of tidelands and sewage disposal, Palazzolo could not have reasonably expected that he would be permitted either to fill the tideland or to build the proposed seventy-four-unit subdivision upon which he based his takings claim of $3.15 million.

On remand, there may be an argument regarding when Palazzolo became the owner of the property. This may help determine whether his investment-backed expectations were reasonable. The facts regarding the timing of ownership are complicated. It appears that while Palazzolo had involvement with the property beginning in 1959 through the corporation that owned the property, Shore Gardens, Inc. (SGI), he did not become the owner of the property until 1978, and then only by Rhode Island's revocation of SGI's corporate charter.[30] Whether Palazzolo acquired title to the property in 1959 or 1978 apparently makes no difference. Given that Rhode Island law required a permit for any filling of tidelands well before 1959, Palazzolo had constructive knowledge of Rhode Island's restrictions when he became the owner of the property, whether that occurred in 1959 or 1978.[31]

The court on remand may consider a related issue that the United States Supreme Court did not decide: whether Rhode Island's public trust doctrine and its laws requiring permits for filling tidelands are part of "background principles of the State's law of property

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[28] R.I. GEN. LAWS §§ 2-1-13, 2-1-14. In 1971, Rhode Island enacted a law creating the Coastal Resources Management Council and transferring the authority to regulate coastal wetlands to that agency from the Division of Harbors and Rivers. *See* R.I. GEN. LAWS §§ 46-23-1 to -12 (1971).

[29] The Rhode Island Attorney General indicated on brief to the Court that such laws date back to 1920. Brief for Respondents, *supra* note 24, at *7–9; *cf.* R.I. GEN. LAWS § 46-12-2 & compiler's note (1956); 1963 R.I. Pub. Laws ch. 89, § 2; 1935 R.I. Pub. Laws ch. 2250, §§ 110, 115; 1921 R.I. Pub. Laws ch. 2090; 1920 R.I. Pub. Laws ch. 1914, § 2 (creating the Board of Purification of Waters); Bd. of Purification of Waters v. City of East Providence, 133 A. 812, 814 (R.I. 1926).

[30] Palazzolo v. Rhode Island, 533 U.S. 606, 614 (2001).

[31] If 1978 is the proper date for Palazzolo's ownership and expectations rather than 1959, the trend toward tighter wetlands restrictions could be an additional reason that Palazzolo's expectations were unreasonable. *See* Good v. United States, 189 F.3d 1355, 1362 (Fed. Cir. 1999) (holding that a developer lacked reasonable investment-backed expectations when he purchased land that would require regulatory approval before development was allowed). The *Good* court stated that "rising environmental awareness translated into ever-tightening land use regulations. Surely Appellant was not oblivious to this trend." *Id.*

and nuisance"[32] or are reasonably derived from such background principles.[33] The *Palazzolo* Court described background principles as "those common, shared understandings of permissible limitations derived from a State's legal tradition."[34] Given Rhode Island's long legal traditions explained above, the public trust doctrine and Rhode Island laws regulating the filling of tidelands and sewage disposal are either part of background principles of state law or at least reasonably derived from such background principles.

The court on remand may also consider whether the filling of Palazzolo's wetland would be a nuisance.[35] Again, as the Rhode Island Attorney General pointed out on brief to the United States Supreme Court, nuisance doctrine has for many years limited what could be done in developing property in the State of Rhode Island.[36] The trial court found that filling Palazzolo's eighteen-acre salt marsh would be a public nuisance.[37] Unless the Rhode Island Supreme Court reverses the trial court's nuisance finding on remand, there would be no taking based on reasonable investment-backed expectations even if the regulations are not derived from other background principles of Rhode Island law.[38]

III. The Character of the Government Action

The Court said in *Penn Central* that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose, . . . or perhaps if it has an unduly harsh impact upon the owner's use of the property."[39] In re-

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[32] The Court discussed "background principles" in *Lucas v. South Carolina Coastal Council* in the context of total takings. 505 U.S. 1003, 1029 (1992). Justice Kennedy, who delivered the Court's opinion in *Palazzolo*, stated in his *Lucas* concurrence that "[c]oastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit." *Id.* at 1035 (Kennedy, J., concurring).

[33] *Palazzolo*, 533 U.S. at 629–30.

[34] *Id.*

[35] *See id.* at 630; Palazzolo v. Coastal Res. Mgmt. Council, C.A. No. 88-0297, 1997 WL 1526546, at *5 (R.I. Super. Ct. Oct. 24, 1997), *aff'd on other grounds sub nom.* Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707, 709 (R.I. 2000), *aff'd in part, rev'd in part, remanded sub nom.* Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[36] Brief for Respondents, *supra* note 24, at *42–43; *see, e.g.*, Payne & Butler v. Providence Gas Co., 77 A. 145, 151 (R.I. 1910).

[37] *Coastal Res. Mgmt. Council*, 1997 WL 1526546, at *5.

[38] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

[39] 438 U.S. 104, 127 (1978) (citations omitted). The alleged interference with property here is not a physical invasion by the government, where a taking could more readily be

jecting the notice rule, the Court in *Palazzolo* distinguished between reasonable and unreasonable prospective enactments regarding takings.[40]

There should be no question that Rhode Island has a substantial state interest in protecting environmentally sensitive salt marsh tidelands, and that the permitting requirements regulating filling are reasonably necessary to effectuate that purpose. The character of the government action therefore does not support Palazzolo's takings claim.

In conclusion, Rhode Island's land regulations clearly did not "go too far."[41] The court should find on remand that Palazzolo did not suffer a taking.

found. *Id.* at 124. *See generally* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[40] *Palazzolo*, 533 U.S. at 627.

[41] *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).