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THE SUPREME COURT'S *PALAZZOLO* DECISION—ITS BARK IS WORSE THAN ITS BITE

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Despite the spin of the "property rights" movement, the United States Supreme Court's decision in the case of *Palazzolo v. Rhode Island* is good for protection of our natural resources.[1]

The bottom line of the decision is that the Supreme Court did *not* find a taking.[2] Instead, the Court sent the case—arising from a state coastal protection agency's denial of a landowner's application to fill a salt marsh—back to the Rhode Island courts where the landowner's takings claim for monetary damages will almost certainly be rejected.[3]

On some of the underlying legal issues, the State of Rhode Island (and its allies who filed ten *amicus* briefs) won outright; in other areas, the ruling was consistent with Rhode Island's position.[4] Where Rhode Island won outright, the Court was implicitly unanimous; where the "property rights-ers" claim victory, the vote was five to four (with the Justices grouped in a configuration identical to that in *Bush v. Gore*[5]).

I. WHAT THE SUPREME COURT SAID

The United States Supreme Court discussed four issues—and ruled on three of those issues—in deciding that the landowner, Anthony Palazzolo, had not yet shown that the environmental regula-

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** Assistant Attorney General, State of Rhode Island. Mr. Rubin was trial counsel and assisted in preparation of the *Palazzolo* case throughout the course of the litigation. At the *Boston College Environmental Affairs Law Review and Environmental Law Society Spring 2002 Symposium on* Palazzolo v. Rhode Island, the perspective of state government was represented by Mr. Rubin and Assistant Attorney General for the Commonwealth of Massachusetts Edward G. Bohlen, who was also counsel *amicus curiae* to the case in the United States Supreme Court. For purposes of this issue of the law review, this essay and the piece submitted by Assistant Attorney General Bohlen represent the state perspective on the case.

[1] *See generally* 533 U.S. 606 (2001).

[2] *Id.* at 631–32.

[3] *Id.* at 632.

[4] *See id.*

[5] 531 U.S. 98 (2000).

tions, as applied to his property, constituted a taking. The four issues were:

(1) Ripeness[6]—a procedural issue concerning whether a claim is ready to be adjudicated;
(2) Value[7]—the extent of the loss necessary to automatically win a takings claim;
(3) Parcel[8]—whether to consider a landowner's *entire* contiguous holdings in assessing the impact of government actions; and
(4) Sequence[9]—whether a person who acquires land subsequent to the promulgation of a regulation can claim a taking at all.

First, the U.S. Supreme Court reversed the Rhode Island Supreme Court's holding that the landowner's takings claim was not ripe under federal ripeness principles;[10] *second*, the U.S. Supreme Court affirmed the Rhode Island courts' holding that the landowner failed to establish a deprivation of all economic value of his property;[11] *third*, the Court refrained from ruling on the parcel issue, noting it was not properly presented[12]; and *fourth*, the Court reversed the state court's invocation of a per se rule that a pre-acquisition regulation automatically bars a takings claim.[13]

II. Analysis

How do these rulings fare from an environmental perspective?

Ripeness. The outcome on the ripeness issue was fact-specific and the Court made no adverse change to existing law.[14] The conclusion that Palazzolo's claim was ripe was unavoidable under the facts as the Court viewed them: the State would allow no development in the wetlands and would permit one house to be built on the upland por-

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[6] *Palazzolo*, 533 U.S. at 618–26.
[7] *Id.* at 630–31.
[8] *Id.* at 631–32.
[9] *Id.* at 626–30.
[10] *Id.* at 619.
[11] *Id.* at 630.
[12] *Palazzolo*, 533 U.S. at 631.
[13] *Id.* at 627.
[14] *Compare id.* at 624–26, *with* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698 (1999), Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 738 (1997), MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 342, 351, 353 n.9 (1986), *and* Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 182, 186 (1985).

tion.[15] Read thus, there was no administrative step left for Palazzolo to take.[16] This is completely in line with the prevailing ripeness requirements.

Indeed, the Court reaffirmed that, where ambiguities do exist, the ripeness defense is as applicable as ever: "A landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation."[17] Thus, the ripeness defense lives on in situations where there is ambiguity as to the nature and extent of either the regulations or the land.[18] Vague or incomplete applications submitted by developers will still not support takings claims. Nor will it be sufficient for a developer to make a cursory run at the agency process before turning to court. Existing law remains intact.

There was even one favorable advance beyond the status quo in this area. Justice Kennedy, writing for the Court, extended an explicit invitation to state legislatures and courts to fashion their own independent, reasonable, state law ripeness rules which the U.S. Supreme Court would be bound to respect.[19] Thus, states can reinforce the mandate that a developer must make a meaningful and informative application (and, where necessary, multiple applications). This invitation merits the attention of environmental organizations.

As national precedent, the *Palazzolo* decision dealing with federal ripeness principles is a very small net plus for the environment.

Value. This was the primary point of attack by Palazzolo's counsel, the Pacific Legal Foundation (PLF). PLF had complained that the regulation left Palazzolo with mere "crumbs" or "smidgeons" of value.[20] PLF argued for the expansion of the categorical takings rule espoused in *Lucas v. South Carolina Coastal Council*, which concerned regulations that deprived a landowner of "*all* economically beneficial uses"[21] of his property, in an effort to allow takings claims to arise whenever there are *substantial* reductions in property value due to regulation.[22] On this, their main contention, PLF lost totally and

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[15] *See Palazzolo*, 533 U.S. at 624–26.

[16] *Id.* at 624–25.

[17] *Id.* at 620.

[18] *See id.* at 620–21.

[19] *Id.* at 625–26.

[20] Petitioner's Brief on the Merits, 2000 WL 1742033, at *9, *38, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047) [hereinafter Petitioner's Brief on the Merits].

[21] 505 U.S. 1003, 1019 (1992).

[22] *See* Petitioner's Brief on the Merits, *supra* note 20, at *36–48.

unanimously.[23] The Court's opinion should be interpreted as reaffirming the public's authority to impose significant restrictions on the use of privately-owned land.

Count this as a solid plus for the environment.

Whole Parcel. The Court's refusal of Palazzolo's invitation to revisit the "whole parcel" rule leaves in place favorable precedent.[24] Previously, in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust,* the Court reiterated the "whole parcel" rule set forth in *Penn Central Transportation Co. v. City of New York* stating: "[T]he relevant question . . . is whether the property taken is all, or only a portion of the parcel in question."[25] The "whole parcel" principle remains intact to thwart attempts by developers to manipulate their holdings so as to contrive the appearance of an actionable taking.

This affirmation of the status quo leaves intact good law for environmentalists.

Sequence. The Supreme Court rejected the convenient bright-line rule adopted by the Rhode Island Supreme Court and a number of other courts that only regulations imposed *after* a plaintiff's investment in property can constitute a taking of that property.[26]

To quote Professor John Echeverria of Georgetown University Law School:

> On the positive side, however, the Court's decision does not *preclude* consideration of pre-acquisition notice as a factor in takings analysis. Indeed, in light of Justice O'Connor's crucial concurring opinion, the case is best read as endorsing consideration of pre-acquisition notice as a relevant *factor* in takings cases. This likely means that most long-established environmental and land use regulations will be largely immune from takings challenges. And they should become increasingly immune from challenge as properties change hands and additional time passes.

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

[24] *See id.* at 631.

[25] 508 U.S. 602, 644 (1993) (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978)).

[26] *Palazzolo,* 533 U.S. at 627. *Contra, e.g.,* Golf Club of Plantation, Inc. v. City of Plantation, 717 So. 2d 166, 170 (Fla. Dist. Ct. App. 1998); Nat'l Adver. Co. v. Vill. of Downers Grove, 561 N.E.2d 1300, 1309 (Ill. App. Ct. 1990); Adams Outdoor Adver. v. City of East Lansing, 614 N.W.2d 634, 645 (Mich. 2000), *reh'g denied,* 618 N.W.2d 589 (Mich. 2000) (table decision), *cert. denied,* 532 U.S. 920 (2001); Claridge v. N.H. Wetlands Bd., 485 A.2d 287, 291 (N.H. 1984).

> . . . Justice O'Connor insisted that pre-acquisition notice must be a relevant factor in takings analysis in order to avoid potential "windfalls." It seems very likely following *Palazzolo*, at least as a matter of practice if not strict legal rule, investors who have purchased restricted lands at a deep discount, or who have engaged in other strategic behavior in an attempt to manufacture a taking claim in light of pre-existing regulatory restrictions, will continue to be barred from recovering under the Takings Clause.[27]

The conclusion reached by the Supreme Court is the correct one, and Attorney General Whitehouse, in arguing the case, conceded as much.[28] The Attorney General felt that the *Penn Central* standard that the Court adopted could avoid harsh and unjust results in unusual circumstances, while still keeping developers that would abuse the system at bay. We believe, provided it is approached with sensitivity and understanding by bench and bar alike, that this is the fair and proper outcome.

Count this as a wash for the environment. The "bright line" rule was unsustainable in light of its potential for unfair results.

CONCLUSION

In the final analysis, the Court's reluctance to adopt per se rules means that the *Palazzolo* decision will do little to change the actual outcomes of specific lawsuits. It will force judges and lawyers alike to do the hard work of sifting through the particularized facts of each case. Although *Palazzolo* initially caused a ripple of anxiety throughout the environmental community (largely because of immediate and high-speed "spin" from property rights activists), balanced land use planning and control should actually gain legal ground against takings challenges. Our task now, as environmental advocates, is to explain this, not only to courts, but to regulators and, most importantly, to the people of this environmentally blessed country.

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[27] John D. Echeverria, *A Preliminary Assessment of* Palazzolo v. Rhode Island, 31 ENVTL. L. REP. 11,112, 11,113–14 (2001) (first emphasis added).

[28] *See* Transcript of Oral Argument, 2001 WL 196990, at *43–44, Palazzolo v. Rhode Island (Feb. 26, 2001) (No. 99-2047).

BACKGROUND: THE *PALAZZOLO* FACTS

Anthony Palazzolo was president of Shore Gardens, Inc. (SGI) when (or very shortly after) it acquired a parcel of land in 1959 in the Misquamicut section of the town of Westerly, Rhode Island for roughly $8,000.[29] Palazzolo became the sole shareholder of SGI in 1960.[30] The parcel is located on the inland side (the inter-coastal or bay side—*not* the ocean side) of a barrier beach, between the crest of the beach strip (a road called Atlantic Avenue runs along this crest) and the shore of a 460-acre saltwater coastal estuary called Winnapaug Pond.[31] Between 1959 and 1961, SGI sold off eleven individual subdivided house-lots to various purchasers.[32] Most of these subdivided lots were carved out of the upland, non-marsh area of the larger parcel and could be, and in fact were, built upon with little alteration to the land.[33]

After this series of transactions, SGI retained the status of record owner of the twenty-acre remnant, eighteen acres of which was occupied by marshland.[34] Most of this land is subject to daily tidal inundation in addition to "ponding" in small pools that occurs throughout this wetland acreage.[35] "This area serves as a refuge and feeding ground for fish, shellfish, and birds, provides a buffer for flooding, and absorbs and filters run-off into the pond."[36]

From 1965 through 1977, state regulations governing alterations to coastal wetlands grew stricter, evolving into a virtual absolute prohibition as of 1977.[37] In 1971, Rhode Island created the Coastal Resources Management Council (CRMC) and it was given responsibility for administering this prohibition and related regulations.[38]

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[29] Palazzolo v. Coastal Res. Mgmt. Council, C.A. No. 88-0297, 1997 WL 1526546, at *1 (R.I. Super. Ct. Oct. 24, 1997), *aff'd on other grounds sub nom.* Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707 (R.I. 2000), *aff'd in part, rev'd in part, remanded sub nom.* Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[30] *Tavares*, 746 A.2d at 710.

[31] *Id.* at 709.

[32] *Id.* at 710.

[33] *See id.*

[34] *Id.*

[35] *Id.*

[36] *Tavares*, 746 A.2d at 710.

[37] *See id.* at 710–11.

[38] *Id.*

SGI's corporate charter was revoked by the Rhode Island Secretary of State in 1978, and Palazzolo, the sole shareholder, became the automatic successor to whatever property SGI previously owned.[39]

In March 1983, Palazzolo filed an application with the CRMC, seeking approval to fill the full eighteen acres of salt marsh.[40] No particular purpose was specified.[41] That application was rejected by the CRMC.[42] In January 1985, Palazzolo filed another application to fill the wetlands on the property so he could create a recreational beach facility.[43] This application was likewise denied by the CRMC.[44]

This lawsuit eventually followed.[45] Palazzolo sought damages in the amount of $3,150,000 (plus interest), based on the value he claimed the land would have after filling the wetlands and developing the property as seventy-four lots for single-family homes.[46] Each new home would presumably be served by its own septic system. After a Rhode Island trial judge found that the denial of Palazzolo's application was not a taking for which compensation was owed, and, that the filling would have been a public nuisance, Palazzolo appealed to the Rhode Island Supreme Court and then the United States Supreme Court.[47]

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[39] *Id.* at 710.

[40] *Id.* at 711.

[41] *See id.*

[42] *Tavares*, 746 A.2d at 711.

[43] *Id.*

[44] *Id.*

[45] *See id.*

[46] *Id.*

[47] *See* Palazzolo v. Coastal Res. Mgmt. Council, C.A. No. 88-0297, 1997 WL 1526546, at *5–6 (R.I. Super. Ct. Oct. 24, 1997), *aff'd on other grounds sub nom.* Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707 (R.I. 2000), *aff'd in part, rev'd in part, remanded sub nom.* Palazzolo v. Rhode Island, 533 U.S. 606 (2001).