

U.S. SUPREME COURT EXPANDS RIGHTS OF LANDOWNERS IN TAKINGS CASES

The United States Supreme Court recently rendered a decision that expands the ability of landowners to contest regulatory land use decisions under the “Takings Clause” of the United States Constitution. The “Takings Clause” is found within the Fifth Amendment to the U.S. Constitution, which states, in part, that the government shall not take private property “for public use, without just compensation.” This clause has been interpreted to mean that the government must compensate a landowner when acquiring land through eminent domain for the “public good,” such as for roads or power lines, and when a government regulation has the effect of preventing a landowner from using or enjoying their property (this is known as a regulatory taking). The Supreme Court’s recent decision in *Palazzolo v. Rhode Island* focuses on the circumstances under which a landowner may legally challenge the government’s denial of a permit that affects land use as a regulatory taking under the Fifth Amendment. *Palazzolo v. Rhode Island*, 121 U.S. 2448, 2451 (2001).

The relevant facts in *Palazzolo* are as follows: The landowner, Anthony Palazzolo, came into ownership of a large parcel of land on the coast of Rhode Island. The parcel was originally owned by a corporation in which Mr. Palazzolo was the chief shareholder. The corporation failed to file its corporate income taxes, thus, its charter was revoked and Mr. Palazzolo became the sole owner of the property by operation of law.

While the parcel was owned by the corporation, a number of attempts were made to obtain state and local permits to build either a large beach club, or a 74-lot residential subdivision. These permits were all denied by the State of Rhode Island. After Mr. Palazzolo became sole owner of the corporation, he also tried, unsuccessfully, to gain approval from the State of Rhode Island for a beach club that was very similar to the previous proposals.

Mr. Palazzolo ultimately sued Rhode Island in state court, alleging that the Rhode Island Coastal Resources Management Council (Council) had, by denying his application for a wetlands permit, effectively taken his property. The claim was based on Mr. Palazzolo’s assertion that the Council had taken away all economically beneficial uses of his land, and that it was a “total taking” requiring compensation under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). (Lucas is a United States Supreme Court case that sets forth the standards for determining whether a regulatory taking has occurred.)

In his suit Mr. Palazzolo sought damages in the amount of \$3,150,000, a figure derived from an appraiser’s estimate as to the value of a 74-lot residential subdivision. *Palazzolo v. Rhode Island*, 121 U.S. 2448, 2451 (2001). The State of Rhode Island Supreme Court denied Mr. Palazzolo’s claim, and Mr. Palazzolo appealed to the United States Supreme Court.

The U.S. Supreme Court decided two important issues in this case: 1. It defined when a case is “ripe,” and thus can be heard by an appellate judicial body, and 2. The Court held that an owner who assumes ownership after the regulation has been promulgated still has the right to challenge those regulations as unconstitutional. It is important to note that the Court did not rule on whether the denial of the permit

constituted a taking under the Fifth Amendment. The Court remanded the case back to the Rhode Island Supreme Court to decide this issue.

Ripeness is a legal concept that, in the administrative permitting context, prohibits a landowner from challenging a regulation unless the landowner has exhausted all possible venues with the agency applying the regulation. In this case, the State of Rhode Island argued that Mr. Palazzolo was required to submit an application for a lesser use of the land prior to filing a takings claim. By submitting such an application, the applicant could find out just how far the regulation goes. For example, while the petitioner's application to fill 11 of the property's 18 wetland acres was denied, it is entirely possible that an application to fill five of those acres may have been approved.

The Supreme Court disagreed with this point, stating, "On the wetlands (under Rhode Island's regulations) there can be no fill for any ordinary land use. There can be no fill for its own sake; no fill for a beach club, either rustic or upscale, no fill for a subdivision; no fill for any likely or foreseeable use. And with no fill there can be no structures and no development on the wetlands. Further permit applications were not necessary to prove this point . . . Ripeness doctrine does not require a landowner to submit applications for their own sake . . . there is no genuine ambiguity in the record as to the extent of permitted development on petitioner's property . . ." *Palazzolo v. Rhode Island*, 121 U.S. 2448, 2454 (2001). In sum, the Court concluded that when it is obvious that a regulatory agency will allow no development that obviousness does not require a landowner to keep submitting applications that will most likely be shot down anyway.

Municipalities should be aware that an applicant is not required to exhaust all options to develop a property prior to filing a takings claim. While the U.S. Supreme Court did not draw a bright line to define when an applicant has made enough attempts to develop to justify a takings claim, the Court clearly relaxed the standard for an applicant to proceed with a takings claim.

The U.S. Supreme Court also made it easier for an applicant to proceed with a takings claim by ruling that an owner who assumes ownership after the regulation has been promulgated still has the right to challenge those regulations as unconstitutional. In this case, Rhode Island asserted that because the ownership of the land changed hands (from the corporation to the petitioner who was a chief shareholder in the corporation), the new owner was on notice as to the regulations in effect, and had no right to bring up these claims. The conventional wisdom has been that a prospective land purchaser is placed on notice before purchasing a piece of property of the regulations in effect that may create obstacles to building on the land.

In this decision the Court went against this conventional wisdom by holding that: "A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken." *Id* at 2458. Accordingly, based on this decision subsequent landowners have the right to contest governmental regulations that were instituted prior to their purchase of the property. As with the ripeness decision, the Court's ruling may have the effect of increasing the likelihood of a takings claim against a municipality.

While it is important for municipalities to take note of this decision, there is nothing that cities and towns should do differently as a result of the decision. Municipal zoning and planning officials should act on applications for permits by following their

municipality's bylaws. If following the bylaws results in a denial, under the *Palazzolo* decision it may be easier for a landowner to obtain judicial review of a takings claim. However, it still is not easy to establish a takings claim and, as noted above, the U.S. Supreme Court *did not* alter the standards for determining whether a governmental taking has occurred.

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