Palazzolo v. Rhode Island

Yet Another Minor Earthquake in the Law of Regulatory Takings

by Marc R. Poirer

In June of 2001 the Supreme Court of the United States, in *Palazzolo v. Rhode Island*,[1] rejected a clear rule concerning owners' expectations that had been developed by lower courts to sort out regulatory takings claims, and remanded to the Rhode Island courts for consideration under a traditional ad hoc, fact specific test. The case evidences the continued splintering of judicial opinion on touchy regulatory takings issues. Different aspects of the opinion cut both ways in terms of the amount of leeway land use regulations have before they may face substantial takings challenges.

Mr. Palazzolo's claim was a classic one for regulatory takings in the land use area. He argued that the Rhode Island Coastal Resources Management Council would deny his request to fill tidal wetlands that he owned and wanted to develop (as it had in the past for other proposals), that he had been deprived of all economically viable use, and that he was therefore entitled to compensation for what amounted to a taking of his property. The case was complicated by the details of the property ownership. A corporation created and controlled by Mr. Palazzolo owned the property from 1959 to 1978, when the corporate charter was revoked and the title passed by law to Mr. Palazzolo. Both the corporation and Mr. Palazzolo had previously made several half-hearted stabs at developing the 20 acres, and six lots had been sold off at an early date.

The most important issue decided in *Palazzolo* concerns the often encountered situation where a property owner acquires property only after a regulatory scheme is in place. In the past decade a number of state supreme courts have developed a rule that "post-regulation acquisition" automatically bars a property owner from making a regulatory taking claim.[2] So had some decisions within the Federal Circuit, whose decisions govern all claims for regulatory takings against the federal government, including (of importance to coastal regulators and policymakers) wetlands fill permit denials and other Corps of Engineers actions affecting coasts, rivers and harbors.[3] The basic concept of the "post-regulation acquisition" rule (or "post-enactment purchase" or "preacquisition notice," as it is also known) is that an owner who bought property knew

Palazzolo,
continued on page 5

TCA Turns 25

John Duff, TCS President-Elect

As the Coastal Society turns 25, it seems appropriate to reflect upon the organizational accomplishments of the past and hopes for the future.

As you will note from the articles and Chapter News reports, TCS continues to benefit from the talent and energy of its student members. Increasingly, students are turning to the organization as a means of developing professional relationships that will serve them well as they enter the myriad fields related to coastal stewardship: anthropology, biology, economics, education, fishery management, geography, geology, law, oceanography, public health, public policy, sociology and a host of others.

The organization's long-standing members represent a wealth of experience and information that can serve as a foundation for our new members. The folks who formed TCS twenty-five years ago play a significant role in domestic and international ocean and coastal management today. They serve

TCS Turns 25,
continued on page 5

TABLE OF CONTENTS

now ran along the Maine shoreline. In other words, where New Hampshire had taken a legal position in the 1976 litigation, it could not take a contrary position now simply because its interests have changed. The Court found this to be especially true where, as here, alteration of this prior position would be detrimental to Maine, who by settlement had previously acquiesced to New Hampshire's point of view.

New Hampshire's recent argument expanded upon some of the language and concepts in the 1977 decree. The State argued that the 1977 consent decree did not settle the entire controversy, as it only fixed the lateral marine boundary and not the internal Piscataqua River boundary. New Hampshire also raised new arguments that during the decades preceding and following the 1740 decree, that state had exercised sole jurisdiction over all shipping and military activities in Portsmouth Harbor. For its part, Maine provided its own evidence of jurisdictional control of the Harbor. However, Maine primarily argued that where both the 1740 decree and the 1977 consent judgement affirmatively divided the Piscataqua at the middle of its navigational channel, New Hampshire should now be barred from asserting otherwise. On May 29, 2001, the Supreme Court agreed with Maine's position deciding, perhaps finally, that the States' boundary lies in the middle of the river's navigational channel and not along the Maine shoreline. As a result, the perhaps inopportunely named Portsmouth Naval Shipyard, is decidedly located in Kittery, Maine.

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TCS Turns 25,

continued from page 1

in the ranks of the National Oceans Commission, the National Marine Fisheries Service, state coastal management programs, private and public educational institutions, private industry and non-governmental organizations.

AS TCS celebrates its 25th anniversary, the organization will work to span the boundaries (and the generations) to build a stronger coastal community. The biennial meeting in Galveston (see registration info. pages TCS 1-4) will serve as an ideal opportunity to tell the story of where we've been and contemplate where the future will take us.

In the coming months, we will also work to document the work of the organization and its members over the years.

TCS hopes that you can come join us in Galveston in May and/or join our conversation about the prospects of the organization's future. ■

Palazzolo,

continued from page 1

or should have known about the risk of pre-existing regulation and could have protected herself by not buying the property or by buying at a discounted price. To force the government to pay compensation for burdensome regulation under such a scenario makes the government pay for a risk the property owner took.[4]

The "post-regulation acquisition" rule may well have been spurred by a reading *of Lucas v. South Carolina Coastal Council*,[5] which is still one of the most important regulatory takings cases in the land use area. One of the key holdings in *Lucas* was that a property owner's claim of a regulatory taking must be met with an "antecedent inquiry" based on the idea that property is held subject to the background limitations of nuisance and property law.[6] As Justice Scalia pointed out in *Lucas*, a property owner does not have a right to overflow a lake so as to injure the neighbors, to build a nuclear plant on a geological fault, or to obstruct a navigable river (at least without the permission of the federal government, which manages the navigation servitude).[7] Legislation that simply reflects such "background limitations" on property cannot be a taking because the property owner never had the right to that particular use in the first place. So says *Lucas*.[8] The "background limitation" doctrine of *Lucas* has triggered a legal history boomlet as environmentalists dig back into English history to discover traditional background limitations of hunting, fishing, draining fens, occupying shorelands – all arguably predecessors of modern environmental law use regulations. *See, e.g.*, Hope M. Babcock, *Should* Lucas v. South Carolina Coastal Council *Protect Where the Wild Things Are? Of Beavers, Bob-o-Links, and Other Things that Go Bump in the Night*, 85 Iowa L. Rev. 849 (2000); Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 Stanford Envtl. L.J. 247 (1996). Arguments about the scope of the public trust doctrine and customary beach use also can become exceedingly important. See, e.g., National Ass'n of Home Builders v. New Jersey Department of Environmental Protection, 64 F. Supp. 2d 354 (D.N.J. 1999) (state requirement of dedication of a riverside walkway and lateral access to it not a taking as to lands that were once submerged and therefore remain subject to a public trust); Stevens v. City of Cannon Beach, 854 P.2d 449 (Ore. 1993) (denial of permission to build sea wall on privately owned dry sand beach not a taking because of state custom of public use of dry sand beach).

Some courts began to carry out this inquiry into background principles – which can categorically eliminate a regulatory taking claim – with regard to other types of expectations of the property owner. To be sure, a consideration of the owner's distinct investment-backed expectations has always been one of the important factors that must be considered in a regulatory takings claim, under the *Penn Central* test.[9] But some courts began to treat this fact as decisive on its own, indeed sometimes articulating it as part of the antecedent inquiry into background principles.[10]

continued next page

There seemed to be precedents for this approach. In particular, *Ruckelshaus v. Monsanto*[11] stated that a right to compensation for loss of trade secret protection, in an environmental regulatory scheme, changed as the statute was amended. During a period where private parties could not expect trade secret protection because of the way the statute was written, they were not entitled to compensation. When the statute was amended, private parties acquired a property right the loss of which entitled them to compensation. *Ruckelshaus* thus takes a positivist view of property. That is, the scope of the property right derives from the statute and can be altered by amending the statute. This positivist view of property is reflected in other important decisions as well.[12]

On the other side of the ledger lies *Nollan v. California Coastal Commission*,[13] another of the key regulatory takings decisions. *Nollan* is principally a case about exactions.[14] But Justice Scalia, writing for the Court, also stated, in an important footnote, that "the Nollans' rights [are not] altered because they acquired the land well after the Commission began to implement its policy."[15] Some other federal decisions have suggested the same result.[16]

Neither the *Ruckelshaus* nor the *Nollan* position is palatable when taken to the extreme. We probably don't want to say that the government could by statute declare a right to regulate a broad range of property uses out of existence and that these losses would not be challengeable by any owner who purchased her property after this law were in place. On the other hand, as the Supreme Court said long ago, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[17]

To get back to *Palazzolo*, the Rhode Island Supreme Court indicated that if it were to reach the merits of the case, it would find that Mr. Palazzolo had acquired the property after the coastal wetland regulatory scheme was in place and that he therefore would have no takings claim.[18] The Supreme Court rejected this rule. "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 compensation for what is taken."[19] The Court relied on *Nollan*, and rejected as a misinterpretation of *Lucas* the view than any new regulation once enacted "becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment."[20] It is important to appreciate that the Court's decision in *Palazzolo* does not dismiss preexisting regulations altogether as a source of argument against a regulatory takings claim. The Court reiterated that:

> The right to improve property ... is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. ... The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through the passage of time or title.[21]

Justice O'Connor's concurring opinion is explicit on this point, and she wrote it to express her point of view on this specific issue. "Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance."[22] She goes on at some length, stressing that the Court's decision seeks to "restore balance" to the inquiry of how preexisting regulations inform legitimate expectations about property rights.[23] O'Connor's lengthy concurring opinion will no doubt be mined in future legal arguments over the significance of post regulation acquisition on expectations. One recent commentator opined that in light of Justice O'Connor's crucial opinion, "most long-established environmental and land use regulations will be largely immune from takings challenges[, a]nd they should become increasingly immune from challenge as properties change hands and additional time passes."[24]

Justice Scalia dissociated himself from the rest of the majority and specifically from Justice O'Connor. In a short, grumpy opinion, he said that post regulation acquisition "should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking."[25] His is an extreme view of the *Nollan* position: as to some property interests the legislature may not alter them at all without compensation. In contrast to my characterization of *Ruckelshaus* as legal positivism, such an extreme reading of *Nollan* partakes of natural law. There just are certain property rights, discernible by the courts though not created by them or by legislatures. Legislatures may not refine or tinker with these property rights without paying for them.

It is time for a head count. In addition to Justice O'Connor herself, Justice Breyer wrote a short separate dissent in *Palazzolo* specifically to state his agreement with Justice O'Connor.[26] The other Justices' dissents also state that they agree with Justices O'Connor and Breyer.[27] That means at least five votes for "it all depends" as the approach to the significance of post regulation acquisition. I would add Justice Kennedy to this group. Though he wrote the majority opinion in *Palazzolo*, he also authored a concurring opinion in *Lucas* which spelled out succinctly the idea that legislative actions can contribute to our subsequent background understanding of property.[28] By my count, then, there are six votes for a moderate interpretation of *Palazzolo*'s holding on post regulation acquisition in future cases. Only three current Justices – Scalia, Thomas and Rehnquist – would be likely to adopt Justice Scalia's hard line approach in a future case. Put another way, we are still two justices away from a revolution in property jurisprudence.

For the time being, though, even after *Palazzolo*, most of the cases that relied on preexisting regulations to find no taking are intact or can be rescued, so long as they appear to have performed an appropriate balancing of the fact of the preexisting regulations as one part of the expectation factor of the *Penn Central* ad hoc test. Indeed, this is what the Supreme Court's order requires the Rhode Island courts to do on remand. Nor does *Palazzolo* even mean that the positivist view of property articulated in *Ruckelshaus* has been discarded. One easy distinction to draw is that *Ruckelshaus* is about personal property, while *Nollan* is about real property or land. One authority suggests that the kind of interest protected against legislative tinkering on a strict reading of *Nollan* is no broader than the traditional and basic right of one who physically occupies property to exclude others.[29] On the other hand, *Palazzolo* may create considerable leeway for judges on the Court of Federal Claims and the Federal Circuit – where takings claims against the federal government are heard – to develop

a relatively conservative approach to post-regulation acquisition. Those courts are widely viewed as being disproportionately populated with conservative judges, especially on issues of property rights.

There is no room here to do more than mention some of the other issues addressed (or presented but ultimately not yet addressed) in *Palazzolo*. It contains an important holding on the transferability of takings claims to subsequent property owners. The Court finds that a takings claim is not restricted to the owner at the time of the taking, but may accrue to a successor owner.[30] This finding might have been necessary to the case because technically the property at issue was owned by a corporation set up by Mr. Palazzolo until 1978. Rhode Island's coastal wetlands statute was enacted in 1971. Mr. Palazzolo's claim seems to be about the generic impossibility of developing his wetlands, rather than about some specific proposal made recently. So it may be that the original injured party was the corporation, from which Mr. Palazzolo later acquired both the property and the claim. The holding has potential ramifications, as it seems to reverse federal law and the law of most states on the transferability of takings claims.[31] It will hardly open the floodgates to litigation, however. Regulatory takings claims will still be limited by statutes of limitations.[32] The holding may also be limited by future cases to certain classes of property transfers. The Court says that "It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership *where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.*" [33] Perhaps this is limiting language. The law of states like Minnesota and New Jersey, whose courts have some experience with transferable takings claims, may provide some useful guidance here.

The Rhode Island Supreme Court's controlling holding in the opinion below decided that Mr. Palazzolo's claim was not ripe because he had not fully presented a development proposal, and had not sought permission for any less ambitious development proposals.[34] The United States Supreme Court disagreed, finding that under the circumstances Mr. Palazzolo's claim was ripe.[35] The Court gives short shrift to the requirement from *MacDonald* that less grandiose proposals may be required to be presented to the regulatory agency before the property owner may go to court.[36] Essentially, the Court is satisfied that there was at least one final application, although it was not the proposal on which the compensation request was based. In addition, Rhode Island law made clear that any further applications involving coastal wetlands would be equally futile.[37] The Court finds this level of effort by the owner to be enough. In other words, *Palazzolo* articulates a futility exception to the ripeness requirement of takings doctrine.[38] The facts of the case are so peculiar, however, that the effect of this determination on ripeness doctrine in takings is probably limited.

The Rhode Island Supreme Court ruled in the alternative that Mr. Palazzolo had not lost all value of his property because he still had an upland portion he could develop.[39] To be sure the value of the developed upland property was estimated to be $200,000, a far cry from the more than $3,000,000 Mr. Palazzolo claimed he lost because he could not fill his wetlands. Nevertheless, the Rhode Island court said he had not been deprived of all economic value of the property, and therefore had to try to make his claim under the ad hoc *Penn Central* test instead of relying on the *Lucas* per se rule for a taking when property is deprived of all economic use.[40] The United States Supreme Court, in the briefest of holdings, stated, "On this point, we agree with the court's decision."[41] This is an important holding. It confirms that the *Lucas* per se test for compensation will be available only when there really is a loss of all economic use, not just loss of most economic use or nearly all economic use.

Mr. Palazzolo tried to salvage his "loss of all use" claim in his brief by reframing the loss as one hundred percent of the use of wetlands. The Court refused to reach the claim, which will be presented to the Rhode Island courts on remand.[42] Mr. Palazzolo is here engaging in what Professor Margaret Radin has called "conceptual severance."[43] By isolating the interest he lost from other interests he still has, he makes the impact of the regulation upon him seem enormous. One such classic claim was rejected (but by a 5-4 vote) in *Keystone Bituminous Coal Ass'n v. DeBenedictis.*[44] The coal companies claimed they had lost 100% of a technically separate right to cause subsidence; the state argued they could still take most of their coal out of the ground, as they only were required to leave enough of it behind to support the surface. Here the question will be whether Mr. Palazzolo has lost the use of 100% of his tidal wetlands or something like 93% of his overall property. It may be even less loss percentagewise, since the predecessor corporation sold several lots off the original parcel.

On these kinds of facts the remanded "conceptual severance" issue blends into the so-called "denominator" issue. That issue asks "how many acres to include in the 'before' picture."[45] Where a developer severs a larger parcel into pieces, one of which is mostly or all unbuildable because of wetlands regulations, it might seems that he has created a 100% loss for himself, and that the relevant question ought to be how severe the loss is as a portion of the original, larger parcel. A number of cases have addressed the issue,[46] though not yet the Supreme Court.[47]

Another important issue surfaced in the trial court decision in 1995[48] and may become relevant again on remand. That is whether protection of wetlands is part of the background principle of nuisance law in Rhode Island. If so, the regulation may be immune from a takings challenge regardless fo the impact it has on the property owner. Also, the state argued that its regulation was immune under the public trust doctrine. That defense has not been addressed by a court in this state.

Overall, *Palazzolo* does little to help define what may count as a regulatory taking or how to proceed to make a claim. It eliminates one bright line rule on post acquisition expectations, and reverses another on the transferability of takings claims. Ultimately, it falls back on the tried and true but oh so vague *Penn Central* balancing test to resolve the controversy on remand.[49] *Palazzolo* is moreover a close decision and a fragmented one, with a majority opinion garnering five votes (six for one part), two concurring opinions, a concurring and dissenting opinion, and two dissenting opinions. This kind of spread makes it even harder to read the cards as to the future direction of the Court's regulatory takings jurisprudence.

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[1] Palazzolo v. Rhode Island, 121 S.Ct. 2448 (2001).

[2] *E.g.*, Hunziker v. State, 519 N.W.2d 367 (Iowa 1994) (law protecting archaeological sites was in place at time of property acquisition; no taking); Gazza v. New York State Dep't of Envtl. Conservation, 679 N.E. 2d 1035, 1037 - 1039 (N.Y. 1997) (state statute protecting tidal wetlands was a background limitation on property purchases after the restrictions were in place; no taking); Grant v. South Carolina Coastal Council, 461 S.E. 2d 388, 391 (S.C. 1995) (prohibition on fill without a permit was not a taking where regulatory scheme was in place before purchase of property); City of Virginia Beach v. Bell, 498 S.E.2d 414, 417 - 418 (Va. 1998).

[3] *See, e.g.*, Good v. United States, 39 Fed. Cl. 81, 108 n.48, 109 - 114 (1997), *aff'd*, 189 F.3d 1355 (Fed. Cir. 1999) (rejecting regulatory takings challenge to denial of wetlands dredge and fill permit

continued on page

continued from page 7

entirely on the basis of lack of reasonable expectations, since regulatory scheme was in place at time of acquisition).

[4] As the Federal Circuit put it, "[T]he owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss." Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994).

[5] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[6] *See* M & J Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir. 1995) (laying out procedure for "antecedent inquiry" into background principles for federal courts).

[7] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029- 1030 (1992).

[8] This argument about the confusion between background limitations and property owners' expectations is developed in R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449 (2001).

[9] Even while holding that regulatory takings inquiries are inevitably ad hoc and highly fact specific, the Supreme Court articulated three relevant factors: the economic impact of the regulation on the claimant; the extent of interference of the regulation with distinct investment-backed expectations; and the character of the government action. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

[10] *E.g.*, Hunziker v. State, 519 N.W.2d 367 (Iowa 1994) (law protecting archaeological sites was in place at time of property acquisition; no taking); Gazza v. New York State Dep't of Envtl. Conservation, 679 N.E. 2d 1035, 1037 - 1039 (N.Y. 1997) (state statute protecting tidal wetlands was a background limitation on property purchases after the restrictions were in place; no taking); Grant v. South Carolina Coastal Council, 461 S.E. 2d 388, 391 (S.C. 1995) (prohibition on fill without a permit was not a taking where regulatory scheme was in place before purchase of property); City of Virginia Beach v. Bell, 498 S.E.2d 414, 417 - 418 (Va. 1998) (owner acquired beach property after enactment of coastal protection statute and ordinance, although related corporation owned the property prior to regulation; no taking) .

[11] 467 U.S. 986, 1005 (1984).

[12] "[T]he existence of a [protected] property interest is determined by reference to 'existing rules of understandings that stem from an independent source such as state law.'" Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998) (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 546, 577 (1972)).

[13] Nollan v. California Coastal Commission, 483 U.S. 825 (1987).

[14] The Commission could not without compensation condition permission to build a new beachfront house on an agreement to allow the public to cross the Nollans' private beach so as to help create a public beach walkway. The condition sought to be imposed did not substantially advance a legitimate state interest; it had no "essential nexus" with any difficulty caused by the activity to be permitted.

[15] *Id.* at 833 n.2 at 834.

[16] *E.g.*, Preseault v. United States, 100 F.3d 1525, 1538 (Fed. Cir. 1996) (longstanding general federal regulation of railroads does not diminish expectations of owner of lands underlying railroad rights-of-way).

[17] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

[18] Palazzolo v. Rhode Island, 746 A.2d 707, 716 (R.I. 2000), *rev'd*, 121 S.Ct. 2448 (2001).

[19] Palazzolo v. Rhode Island, 121 S.Ct. 2448, 2463 (2001).

[20] *Id.*

[21] *Id.* at 2462 (citations omitted).

[22] *Id.* at 2465 (O'Connor, J., concurring).

[23] *Id.* at 2467.

[24] John D. Echeverria, *A Preliminary Assessment of* Palazzolo v. Rhode Island, 31 ENVTL. L. REP. 11112, 11114 (2001).

[25] Palazzolo v. Rhode Island, 121 S.Ct. 2448, 2467 at 2468 (Scalia, J., concurring).

[26] *Id.* at 2477 (Breyer, J., dissenting).

[27] *Id.* at 2472, 2477 n. 3 (Ginsburg, J., dissenting); *id.* at 2468, 2471 n.6 (Stevens, J., dissenting).

[28] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring).

[29] John D. Echeverria, *A Preliminary Assessment of* Palazzolo v. Rhode Island, 31 ENVTL. L. REP. 11112, 11118 (2001).

[30] Palazzolo v. Rhode Island, 121 S.Ct. 2448, 2463 - 2464 (2001).

[31] *See, e.g.*, United States v. Dow, 357 U.S. 17 (1958); Danforth v. United States (1939). *But see* Karam v. New Jersey Dept' of Envtl. Protection, 705 A.2d 1221, 1229 (N.J. Super. App. Div. 1998) (subsequent owner may bring takings action); Vern Reynolds Construction, Inc. v. City of Champlin, 539 N.W. 2d 614 (Minn. App. 1995) (under certain circumstances, subsequent owner may bring takings action).

[32] *See generally* Marc R. Poirier, *Regulatory Takings* § 10A.17[6], in ENVIRONMENTAL PRACTICE GUIDE (Matthew Bender rev. 1999) (section on standing in regulatory takings claims).

[33] Palazzolo v. Rhode Island, 121 S.Ct. 2448, 2463 (2001) (emphasis supplied).

[34] Palazzolo v. Rhode Island, 746 A.2d 707, 713 - 14 (R.I. 2000), *rev'd*, 121 S.Ct. 2448 (2001). The Rhode Island court relied especially on the leading takings ripeness cases, MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986) and Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

[35] Palazzolo v. Rhode Island, 121 S.Ct. 2448, 2458 - 2462 (2001). Justice Stevens joined this part of the opinion, *id.* at 2468 (Stevens, J., concurring), making the tally 6 -3 on the ripeness holding.

[36] MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 353 n.9 (1986).

[37] Palazzolo v. Rhode Island, 121 S.Ct. 2448, 2459 - 61 (2001).

[38] *See also* Suitum v. Tahoe Regional Planning Agency, 520

U.S. 725 (1997); Cienega Gardens v. United States, 265 F.3d 1237 (Fed. Cir. 2001).

[39] Palazzolo v. Rhode Island, 746 A.2d 707, 715 (R.I. 2000), *rev'd o.g.*, 121 S.Ct. 2448 (2001).

[40] This per se test for a regulatory taking when an owner loses all economic value of the property was articulated and applied in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[41] Palazzolo v. Rhode Island, 121 S.Ct. 2448, 2464 (2001).

[42] *Id.* at 2464 - 2465.

[43] Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM L. REV. 1667, 1676 (1988).

[44] 480 U.S. 470, 500 - 502 (1987).

[45] Marc R. Poirier, *Regulatory Takings* § 10A.06[4] at 10A-25, in ENVIRONMENTAL PRACTICE GUIDE (Matthew Bender rev. 1999).

[46] *See, e.g.*, District Intown Properties Ltd.. Partnership v. District of Columbia, 198 F.3d 874 (D.C. Cir. 1999), *cert. denied*, 121 S.Ct. 34 (2000) (discussing factors, finding larger parcel to be the relevant parcel, and finding no taking); Forest Properties, Inc. v. United States, 177 F.3d 1360, 1365 (Fed. Cir.), *cert. denied*, 120 S.Ct. 373 (1999) (finding larger parcel to be the relevant parcel, and finding no taking); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) (finding the smaller parcel relevant on a test looking at all the facts, and finding a taking); Ciampitti v. United States, 22 Cl. Ct. 310, 318 (1991) (articulating factors to assess the relevant parcel); Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981) (substantial potential for development remained – no taking); K & K Construction, Inc. v. Department of Natural Resources, 575 N.W. 2d 531, 535 - 538 (Mich. 1998), *cert. denied*, 525 U.S. 819 (1998) (in denial of wetlands fill permits relevant parcel consisted of at least three lots – discussing factors); Zealy v. City of Waukesha, 548 N.W.2d 528, 532 - 534 (Wis. 1996) (in challenge to wetlands zoning ordinance, parcel at issue is the entire parcel).

[47] *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 - 1017 n.7 (1992).

[48] Palazzolo v. Coastal Resources Mgmt. Council, No. 86-1496, 1995 WL 941370 (R.I. Super. Jan 5., 1995).

[49] The Rhode Island Supreme Court will order remand to the Superior Court, although it has first asked the parties to fried for issues relevant on remand: the need for a survey of the part of Palazzolo's property below the mean high water line; the intial purchase price for the property; the proceeds and other consideration from the sale of six parcels from the original property; and the relevance of Rhode Island's version of the public trust doctrine, as described in Greater Providence Chamber of Commerce v. State of Rhode Island, 657 A.2d 1038 (R.I. 1995). Palazzolo v. Rhode Island, 2001 WL 1530186 (No. 98-333-A, Sept. 25, 2001). *See also* McQueen v. South Carolina Coastal Council, 530 S.E.2d 620 (S.C. 2000), *vac. & rem. sub nom.* McQueen v. South Carolina Dept. of Health and Envtl. Control, 121 S.Ct. 2581 (2001) (remand of regulatory takings case for reconsideration in light of *Palazzolo*).

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