

The Palazzolo Decision
Dwight H. Merriam, FAICP
and
Bryan W. Wenter
Robinson & Cole LLP

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Factual and Procedural History

In 1959 Anthony Palazzolo purchased an interest in eighteen acres of Rhode Island coastal wetlands. Mr. Palazzolo and the other landowner transferred their interests to a Rhode Island corporation of which Mr. Palazzolo was the president. Mr. Palazzolo then bought out his associate and became the sole shareholder.

Three times in the 1960s Mr. Palazzolo attempted to develop his land. His first two applications proposed to dredge portions of the pond and to use the dredge material to fill the eighteen acres. The third application proposed to fill the land for use as a private beach club. The state agency initially granted approval of the latter application, but the approval was withdrawn shortly thereafter due to environmental concerns. For more than ten years Mr. Palazzolo made no additional attempts to develop his land.

Two critical events followed. First, in 1971 Rhode Island created an agency that enacted coastal protection regulations including one in 1977 requiring

special permits for wetland development. Second, in 1978 the corporation failed to pay its state income taxes, the state revoked the corporate charter, and title to the land passed to Mr. Palazzolo, as sole shareholder, by operation of state law.

In 1983 Mr. Palazzolo applied to build a bulkhead and to fill the entire wetlands area to build a beach club. The application was denied, and Mr. Palazzolo did not appeal. Mr. Palazzolo submitted a new application in 1985 that sought to fill eleven acres of the wetlands to build a beach club. Justice Kennedy, writing for the Court, remarked that “[t]he details do not tend to inspire the reader with an idyllic coastal image, for the proposal was . . . to accommodate 50 cars with boat trailers, a dumpster, port-a-johns, picnic tables, barbeque pits of concrete, and other trash receptacles.”^[1] When this application was denied, Mr. Palazzolo sought his day in court.

Mr. Palazzolo filed an inverse condemnation action in the Rhode Island state courts, claiming that the state’s wetlands regulations had taken his land without compensation, in violation of the Fifth and Fourteenth Amendments. Citing *Lucas v. South Carolina Coastal Council*,^[2] Mr. Palazzolo asserted that the state agency had deprived him of “all economically beneficial use” of his land. He sought \$3,150,000 in damages based on the speculative value of a 74-lot subdivision. The state supreme court denied Mr. Palazzolo’s takings claim on several grounds.^[3] Because Mr. Palazzolo acquired his land subsequent

to the enactment of the wetlands regulations, he could not maintain a taking claim, according to the lower court. Further, the case was not ripe for review because Mr. Palazzolo never sought to develop a 74-lot subdivision and because he never pursued “less ambitious” development plans. And Mr. Palazzolo’s *Lucas* taking claim was defeated because the development value of the “upland” portion of the parcel was at least \$200,000. The lower court also concluded Mr. Palazzolo could not have had *Penn Central*^[4] reasonable investment-backed expectations to develop his land because the wetlands regulations predated his ownership of the land.

In the Supreme Court

In a case with multiple concurring and dissenting opinions, the U. S. Supreme Court affirmed the Rhode Island Supreme Court in part, reversed in part, and remanded *Palazzolo* back to the lower court to be considered under the *Penn Central* multi-factor test (the character of the government regulation, the economic impact of the regulation, and the extent to which the regulation has interfered with distinct investment-backed expectations). The Court, with Justice Kennedy writing for a 6-3 majority on the ripeness issue, reviewed the ripeness issue under the “final decision” requirement of *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City*.^[5] The state court’s holding that the case was not

ripe because Mr. Palazzolo had not pursued other possible uses of his land was “belied by the unequivocal nature” of the state’s wetland regulations and their application to Mr. Palazzolo’s land.^[6] The Supreme Court held that “[w]hile a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.”^[7] A landowner does not, according to the Court, have to pursue varied development opportunities on his land if there is no uncertainty about the land’s permitted uses.

The Court also examined the ripeness requirement that a taking claim be based on an application for a specific development. Since the state’s wetlands regulations clearly indicated that no “substantial structures or improvements” would have been permitted, the Court held that “[w]here the state agency charged with enforcing a challenged land use regulation entertains an application from an owner and its denial of the application makes clear the extent of development permitted, and neither the agency nor a reviewing state court has cited non-compliance with reasonable state law exhaustion or pre-permit processes [citation omitted], federal ripeness rules do not require the submission of further and futile applications with other agencies.”^[8]

The Court then examined the state court’s holding that a landowner who acquires title after regulations are adopted cannot claim compensation for a regulatory taking based on a deprivation of all economic use or interference with reasonable investment-backed expectations—the so-called “notice defense.” The theory is that a purchaser or successive title holder who has notice of earlier enacted regulations should not be permitted to recover for lost value when they acquired title knowing of the limitation. The Court held that “[t]he State may not put so potent a Hobbesian stick into the Lockean bundle.”^[9] The Court reasoned that while certain regulations can limit the value of land because they are reasonable, other regulations are not reasonable and cannot become reasonable with the passage of time or title. “Future generations,” according to the Court, “have a right to challenge unreasonable limitations on the use and value of land.”^[10] “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.”^[11]

The Court did not decide at what time a legislative act becomes a background principle of state law, but it did say that the mere passage of title does not so transform an unconstitutional regulation and also that mere enactment does not turn a law into a background principle. The Court hinted that factors it

considered objective, such as “common, shared understandings of permissible limitations derived from a State’s legal tradition,” must be part of the equation.^[12]

The Court agreed with the lower court that because Mr. Palazzolo retained at least \$200,000 in development value under Rhode Island’s wetlands regulations, he was not deprived of all economically beneficial use. This was not, according to the Court, a mere “token interest.” “A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property ‘economically idle.’”^[13]

The Court refused to take up the “numerator-denominator” or “relevant parcel” problem. Since Mr. Palazzolo did not put the issue directly before the lower court or in his petition for certiorari, the Court would not address whether the appropriate parcel for takings analysis is the entire parcel or just that portion covered by the regulations. Because Mr. Palazzolo framed his claim such that the entire parcel was the basis for his takings claim, he could not properly claim a total deprivation.^[14]

Accordingly, the Court reversed the lower court’s rulings that Mr. Palazzolo’s claims were unripe and that his post-regulation acquisition of title barred his takings claims. The Court upheld the lower court’s ruling that Mr. Palazzolo could not claim a deprivation of all economic value because his land still retained significant value. Since Mr. Palazzolo’s claims were not considered under

the *Penn Central* multi-factor analysis, the Court remanded the case to be reconsidered under those tests.

The justices were split on several issues. Justice O'Connor concurred in the opinion, expressing her view how the "notice defense" should play out under the *Penn Central* analysis. The post-regulatory acquisition of title, according to Justice O'Connor, should be a factor under the *Penn Central* analysis. Interference with investment-backed expectations is just one factor that must be examined, and it would be just as erroneous to completely omit it from consideration as it would be to accord to it all weight in the analysis.

Justice Scalia wrote a concurring opinion in which he took the opposite view. According to Justice Scalia, "the fact that a restriction existed at the time a purchaser took title (other than a restriction forming part of the 'background principles of the State's law of property and nuisance' [citation omitted]) should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking."¹⁵¹

Justice Stevens joined the majority on the ripeness issue, but he dissented from the judgment and would have affirmed the lower court in its entirety. Justice Stevens focused particularly on the timing issue and feared that the Court's decision might lead to "a tremendous—and tremendously capricious— one-time transfer of wealth from society at large to those individuals who happen to hold

title to large tracts of land at the moment this legal question is permanently resolved.”^[16]

Justice Ginsburg wrote a dissenting opinion and was joined by Justices Souter and Breyer. Justice Ginsburg characterized Mr. Palazzolo’s takings claim as a “bait-and-switch ploy,” writing that Mr. Palazzolo’s takings claim was not ripe because he never sought to develop only the “uplands” portion of his land. Further, Justice Ginsburg noted that Mr. Palazzolo never raised a *Penn Central* claim in the lower court and she would not have considered it in the decision to grant certiorari. Justice Ginsburg considered the Court’s rejection of the lower court’s ripeness decision “inaccurate and inequitable” and would have affirmed the state supreme court. If Mr. Palazzolo’s takings claim were ripe, in the eyes of Justice Ginsburg, she would have agreed “that transfer of title can impair a takings claim.”^[17]

Justice Breyer wrote a separate dissenting opinion in which he agreed with Justice Ginsburg that Mr. Palazzolo’s takings claim was not ripe for adjudication. Justice Breyer additionally noted that he agreed with Justice O’Connor that mere transfer of ownership “does not always and *automatically* bar a takings claim.”^[18] (Emphasis in original).

- [\[1\]](#) *Palazzolo v. Rhode Island*, 533 U.S. ___, 121 S. Ct. 2448 (2001), slip op. at 5.
- [\[2\]](#) *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).
- [\[3\]](#) *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 30 Env'tl. L. Rep. 20420 (R.I. 2000).
- [\[4\]](#) *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), reh'g denied, 439 U.S. 883, 99 S. Ct. 226, 58 L. Ed. 2d 198 (1978).
- [\[5\]](#) 473 U.S. 172, 186, 105 S.Ct. 3108, 87 L. Ed. 2d 126 (1985).
- [\[6\]](#) *Palazzolo*, slip op. at 9.
- [\[7\]](#) *Palazzolo*, slip op. at 10.
- [\[8\]](#) *Palazzolo*, slip op. at 16.
- [\[9\]](#) *Palazzolo*, slip op. at 17.
- [\[10\]](#) *Palazzolo*, slip op. at 18.
- [\[11\]](#) *Palazzolo*, slip op. at 18.
- [\[12\]](#) *Palazzolo*, slip op. at 20.
- [\[13\]](#) *Palazzolo*, slip op. at 21.
- [\[14\]](#) *Palazzolo*, slip op. at 22.
- [\[15\]](#) *Palazzolo*, slip op. at 2.
- [\[16\]](#) *Palazzolo*, slip op. at 9.
- [\[17\]](#) *Palazzolo*, slip op. at 10.
- [\[18\]](#) *Palazzolo*, slip op. at 1.