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Constitutional Law - Inverse Condemnation: Supreme Court Gives Property Owners New Rights

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CONSTITUTIONAL LAW—INVERSE CONDEMNATION: SUPREME COURT GIVES PROPERTY OWNERS NEW RIGHTS *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001)*

I. FACTS

Anthony Palazzolo and associates originally formed Shore Gardens, Inc. (SGI) in 1959, to acquire waterfront property in Westerly, Rhode Island.[1] The town of Westerly was incorporated in 1669.[2] In recent years, Westerly had become a popular vacation and seaside destination, with thousands of visitors coming regularly to enjoy its beaches and coast.[3] SGI's property was located between Winnapaug Pond and a well-traveled road.[4] The road provided chief access to the popular Misquamicut State Beach.[5] Most of the property had always been salt marsh subject to tidal flooding.[6] Thus, substantial fill was needed before significant structures could be built.[7] Over the years, SGI's periodic applications to develop the property were rejected by various government agencies due to environmental concerns, but after 1966 no applications were made for over a decade.[8]

Two intervening events were critical to the case.[9] The first occurred in 1971, when the State formed respondent Rhode Island Coastal Resources Management Council (Council) to protect the State's coastal properties, and the Council created regulations known as the Rhode Island Coastal Resources Management Program (CRMP).[10] The CRMP designated salt marshes like those on SGI's property as protected "coastal wetlands" on which development was very limited.[11] The second occurred in 1978 when

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* Winner of a North Dakota State Bar Foundation Outstanding Note/Comment Award.

1. Palazzolo v. Rhode Island, 533 U.S. 606, 613 (2001).
2. *Id.* at 612.
3. *Id.*
4. *Id.* at 613.
5. *Id.*
6. *Id.*
7. *See* Brief for Petitioner at 3, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047) (explaining that Petitioner would have to fill his land in the same manner that neighboring landowners did).
8. *Palazzolo*, 533 U.S. at 614.
9. *Id.*
10. *Id.*
11. *Id.*

SGI's corporate charter was revoked and title to the property passed to Palazzolo as the sole shareholder.[12] In 1983 Palazzolo applied to the Council for permission to fill his entire marsh land area. The Council rejected the proposal, stating it would conflict with the CRMP.[13] In 1985 Palazzolo filed a new application with the Council, seeking permission to fill eleven of the property's eighteen wetland acres to build a private beach club.[14] The Council rejected this application as well, ruling that the proposal did not satisfy the standards for obtaining a special exception to fill salt marsh, whereby the proposed activity must serve a "compelling public purpose."[15]

Subsequently, Palazzolo filed an inverse condemnation action in Rhode Island Superior Court, claiming that the State's wetland regulations had taken his property without compensation in violation of the Fifth and Fourteenth Amendments.[16] The suit asserted that the Council's action violated the test from *Lucas v. South Carolina Coastal Council*,[17] which states that a regulation that deprives a landowner of "all economically beneficial use" of property is a total taking, thus requiring compensation.[18]

The court ruled against Palazzolo, and the Rhode Island Supreme Court affirmed, holding that Palazzolo's takings claim was not ripe[19] and that he had no right to challenge regulations that existed before he became the sole owner of the property in 1978.[20] The court also held that Palazzolo could not assert a takings claim based on denial of all economic use of his property because $200,000 in development value remained on an upland portion of the property.[21] The court further stated that *Penn Central Transportation Co. v. New York City*,[22] which would allow recovery for owners with reasonable expectations of developing their property, would not enable Palazzolo to recover because his notice of the regulation eliminated any reasonable development expectations.[23]

The United States Supreme Court granted certiorari and *held* that Palazzolo's takings claim was ripe and had standing, yet it did not amount

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12. *Id.*
13. *Id.* at 614-15.
14. *Id.* at 615.
15. *See* Petitioner's Brief at 4, *Palazzolo* (No. 99-2047) (setting out the regulatory standards).
16. Palazzolo v. Rhode Island, 533 U.S. 606, 613 (2001).
17. 505 U.S. 1003 (1992).
18. *Lucas*, 505 U.S. at 1012; *Palazzolo*, 533 U.S. at 615.
19. Palazzolo v. State, 746 A.2d 707, 712-15 (R.I. 2000).
20. *Id.* at 716.
21. *Id.* at 715.
22. 438 U.S. 104 (1978).
23. *Palazzolo*, 746 A.2d at 717 (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

to a deprivation of all economic use of the property.[24] The Court reasoned that a final regulatory decision had been made to ripen the claim and passage of title should not excuse a wrongful taking, but there was still some value on the property.[25] However, the Court remanded for further consideration of the claim under the factors set forth in *Penn Central*.[26]

II. LEGAL BACKGROUND

Federal and state governments, along with other sovereigns, have the inherent power of eminent domain, which is the power to "take" private property for public use.[27] To "take" means to compel property owners to transfer interests in real or personal property to these governmental entities.[28] However, the Fifth Amendment Takings Clause prohibits the government from taking private property for public use without just compensation.[29] The Takings Clause is applicable to states through the Fourteenth Amendment.[30]

There is a difference between an inverse condemnation suit and a direct condemnation proceeding.[31] Direct condemnation proceedings are those in which a government asserts its authority to condemn property on the basis of its power of eminent domain.[32] The government acknowledges that it is taking private property in a direct condemnation proceeding and is willing to pay fair market value to the property owner as just compensation.[33] Inverse condemnation, on the other hand, is a claim by a property owner for the taking of private property for public use by the government without formal condemnation proceedings and without just compensation.[34] Therefore, inverse condemnation is a cause of action that property owners have when they think that the government should be required to pay them for taking their private property.[35]

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24. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 616 (2001).

25. *Id.* at 618-31.

26. *Id.* at 632.

27. *See generally* United States v. Clarke, 445 U.S. 253 (1980) (discussing the application of the power of eminent domain).

28. *Id.* at 257.

29. U.S. CONST. amend. V.

30. *See generally* Chicago, B. & Q. Ry. Co. v. Chicago, 166 U.S. 226 (1897) (explaining the background and application of the Takings Clause to the states).

31. *Clarke*, 445 U.S. at 255.

32. *See id.* at 255-58 (showing the distinction between types of condemnation).

33. *Id.* at 256.

34. *See id.* at 257 (stating that inverse condemnation is initiated by a property owner, not the government).

35. BLACK'S LAW DICTIONARY 287 (7th ed. 1999).

The government's physical occupation of private land for its own use is the clearest kind of taking that occurs.[36] The Supreme Court's decisions establish that even the smallest physical encroachment on property requires compensation under the Takings Clause.[37] It becomes more difficult to determine whether a taking has occurred, however, when the government limits property use through oppressive regulation because this is not as tangible or obvious as a physical invasion of property.[38]

A. REGULATORY TAKINGS

In *Pennsylvania Coal Co. v. Mahon*,[39] the Court recognized that there will be times when government action does not physically occupy private property, but nonetheless limits the property's use so much that a taking occurs.[40] Writing the opinion, Justice Holmes stated the famous maxim that "if regulation goes too far it will be recognized as a taking."[41] Since *Pennsylvania Coal*, the Court has given some broad guidance to assist in determining whether a government regulation goes "too far" and is a regulatory taking.

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36. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (stating that physical encroachment upon private property by the government is an obvious taking).

37. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982). After purchasing a five-story apartment building in New York City, a landlord discovered that cable television (CATV) companies had installed cables on the building, both for serving other buildings and for serving the landlord's tenants. *Id.* at 421-22. The companies relied on a New York statute that provided that landlords must permit CATV companies to install its facilities upon their property and may not demand payment from the company. N.Y. EXEC. LAW § 828 (McKinney 1972) (repealed 1996); *see also Loretto*, 458 U.S. at 423. The landlord then sued for a taking and the United States Supreme Court held that the New York statute worked a physical taking of the landlord's property for which the landlord was entitled to just compensation. *Id.* at 441; *see also* Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979). The Court held that the government's imposition of a navigational servitude requiring public access to a pond was a taking where the land owner had relied on government consent in connecting the pond to navigable water. *Id.* at 180. The Court emphasized that a physical invasion is a government intrusion of an unusually serious character. *Id.*

38. *See* Penn Central v. New York City, 438 U.S. 104, 124-25 (1978) (explaining that absent physical intrusion upon private property the government often has the right to regulate in ways that adversely effect economic values when the regulation is for the purpose of health, safety, morals, or general welfare).

39. 260 U.S. 393 (1922).

40. *Pennsylvania Coal*, 260 U.S. at 415 (reasoning that limiting property through regulation can sometimes be as devastating as physically occupying it).

41. *Id.* Justice Holmes conceded that the mere diminution of property value due to government regulation does not necessarily constitute a taking. *Id.* at 413. He remarked that "[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." *Id.*

1. *Lucas v. South Carolina Coastal Council*

In *Lucas*, a regulation was enacted that had the direct effect of barring the property owner "from erecting any permanent habitable structures on his" property.[42] The Court found this unconstitutional, and it held that a regulation that "denies all economically beneficial or productive use of land" will require compensation under the Takings Clause.[43] A lawsuit that alleges this occurrence has thus been called a "*Lucas* claim."[44]

The *Lucas* Court determined that a state could avoid paying for a total regulatory taking only if the landowner did not have the "proscribed use interests" before the regulations were established.[45] Thus, the government could avoid paying compensation for regulations that are otherwise total takings if those regulations are to prevent landowners from using the property in ways that were never allowed under the state's property law, such as nuisances.[46]

2. *Penn Central Transportation Co. v. New York City*

In *Penn Central*, a property owner sued for a taking by New York City because it refused to approve plans for construction of a fifty-story office building over Grand Central Terminal, which had been designated a landmark.[47] The Court ruled that when a regulation puts limits on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex set of factors.[48] These factors include: (1) the character of the governmental action; (2) the economic effect on the landowner; and (3) the extent to which the regulation interferes with reasonable investment-backed expectations.[49] These factors are referred to as the *Penn Central* analysis.[50]

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42. S.C. CODE ANN. § 48-39-290(A) (Law. Co-op. Cum Supp. 2001); *see also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1007 (1992). In 1986 Lucas paid $975,000 for two residential lots in South Carolina, with the intention of building single-family homes. *Id.* at 1006-07. In 1988, the South Carolina Legislature enacted the statute that barred Lucas from developing his property because of concerns about harming ecological resources on the coast. S.C. CODE ANN. § 48-39-290(A); *see also Lucas*, 505 U.S. at 1007-08.

43. *Lucas*, 505 U.S. at 1015.

44. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 649 (2001) (referring to Palazzolo's takings claim as a *Lucas* claim).

45. *Lucas*, 505 U.S. at 1027.

46. *Id.* at 1029.

47. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 115-19 (1978).

48. *See id.* at 124 (discussing the rationale and history behind all of the factors).

49. *Id.*

50. *Palazzolo* v. Rhode Island, 533 U.S. 606, 632 (2001); *see also Penn Central*, 438 U.S. at 124.

Underlying these factors is the purpose of the Takings Clause, which is to stop the government from making some individual people pay the price for benefits that help the public as a whole.[51] Before a court can decide whether there was a regulatory taking, however, it must decide the two threshold questions of whether the claim was ripe and whether the claim had standing when the regulation predated acquisition of title.[52]

B. RIPENESS REQUIREMENT

The purpose of the ripeness requirement is to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements."[53] Judgment would be premature when "the courts would benefit from further factual development of the issues."[54] By contrast, when the issue "will not be clarified by further factual development"[55] outside the courtroom, then the issue "is fit for judicial resolution,"[56] and adjudication is not premature.

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,[57] the Court held that a takings claim challenging the application of land-use regulations was not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."[58] The Court stated that a final decision by the appropriate state agency aided the constitutional determination of whether a regulation has deprived a landowner under a *Lucas* claim or *Penn Central* claim.[59] A court must know the amount of authorized development on the land in question before

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51. Armstrong v. United States, 364 U.S. 40, 49 (1960). One way to test a regulation is that if it "requires a landowner to confer some benefit on the public," it is a taking; but if the "regulation . . . merely prohibits the landowner from using the land to injure others," it is not a taking. GRAND S. NELSON ET AL., CONTEMPORARY PROPERTY 1061 (1996). However, Justice Scalia said in *Lucas* that this test is merely "in the eye of the beholder" and does not provide a principled distinction. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

52. MacDonald, Sommer, & Frates v. Yolo County, 477 U.S. 340, 350 (1986).

53. Abbott Lab. v. Gardner, 387 U.S. 136, 148 (1967).

54. Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 737 (1998) (quoting Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 82 (1978)).

55. Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 581 (1985).

56. Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 743 (1997) (quoting *Abbott Lab.*, 387 U.S. at 153).

57. 473 U.S. 172 (1985).

58. *Williamson County*, 473 U.S. at 186.

59. *Id.; see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (stating the requirement of compensation for a total regulatory taking); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (explaining the key factors when determining partial takings).

it can resolve the takings issue.[60] "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."[61]

MacDonald, Sommer & Frates v. Yolo County[62] reveals how a massive development application may not ripen to a takings claim.[63] The landowner in that case sued after being denied a proposal to develop his 159-home subdivision.[64] The Court stated that his claim was not ripe because the denial of the huge development plan left "open the possibility that some development would be permitted."[65]

Williamson County's final decision requirement is in place to enable land-use boards to exercise their discretion and ease the regulations they control.[66] Landowners must allow regulatory agencies to exercise this discretion before their claim can be deemed ripe.[67] Regulators may well decide to grant a variance or waiver after considering the development plans for the property.[68] Nevertheless, government authorities may not burden property by imposing repetitive or unfair land-use procedures in order to avoid a final decision.[69] Once a claim is deemed ripe, the other threshold consideration of standing must be investigated.[70]

C. STANDING WHEN REGULATION PREDATES ACQUISITION OF TITLE

In recent years, federal courts and state courts have been faced with the issue of whether a property owner has standing to assert a takings claim when the relevant property was regulated before the present owner acquired

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60. *See* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 351 (1986) (stating that a court cannot determine whether there was a taking until the government has reached a final decision on permitted development).

61. *Id.* at 348 (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

62. 477 U.S. 340 (1986).

63. *MacDonald*, 477 U.S. at 342.

64. *Id.*

65. *Id.* at 352; *see also* Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 182 (1985) (involving a 476-unit subdivision); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (holding that the claim was not ripe because no plan to develop was submitted).

66. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985).

67. *Id.*

68. *See* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 736 (1997) (showing the difficulty of demonstrating that "mere enactment" of regulations restricting land-use effects a taking).

69. *See* Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698 (1999) (holding that nineteen different site plans submitted during a five year period to the regulatory agency established that the agency was unfairly avoiding a final decision by imposing repetitive land use procedures).

70. *See* MacDonald, Sommer, & Frates v. Yolo County, 477 U.S. 340, 350 (1986) (explaining the threshold requirements to be met before a takings claim can be discussed on the merits).

the property.[71] The Supreme Court ruled in *Nollan v. California Coastal Commission*[72] that purchasers with notice of regulations on the land might still have a compensation right when a claim becomes ripe.[73] The regulatory agency in *Nollan* required certain developers to grant an easement to the public before being allowed to develop their property.[74] The Nollans sought development in the area subject to the regulation and sued, claiming an unconstitutional taking.[75] The Court ruled in favor of the Nollans, holding that the regulation was a taking because it did not "substantially advance[ ] legitimate state interests" because the easement did not serve the public's health, welfare, or morals.[76] Most notably, the Court stated that the Nollans' rights did not change simply since they had notice of the regulation on their property, and "the prior owners must be understood to have transferred their full property rights in conveying the lot."[77]

Other state courts have followed the reasoning in *Nollan*.[78] Massachusetts courts have stated that property owners have standing to challenge regulations despite knowledge of the regulations before they acquired the property because real estate would lose its "transferability" otherwise.[79] The rule is similar in Florida, Colorado, and New Jersey.[80]

Federal courts have also followed this rationale. In *Levald, Inc. v. City of Palm Desert,*[81] the Ninth Circuit distinguished a facial challenge from an applied challenge.[82] The Ninth Circuit stated that for a facial challenge, there is only a single injury imposed on the owner at the time a regulation is

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71. *See* Palm Beach Isles Associates v. United States, 208 F.3d 1374, 1383 (Fed. Cir. 2000) (stating that the government has a defense to a takings claim when the express regulation at issue was merely codifying an existing principle of common law nuisance); *see also* City of Virginia Beach v. Bell, 498 S.E.2d 414, 417 (Va. 1998) (reasoning that the key issue is whether the property use was regulated before the present owner acquired the property).

72. 483 U.S. 825 (1987).

73. *Nollan*, 483 U.S. at 834.

74. *Id.* at 825-29.

75. *Id.* at 829.

76. *Id.* at 834.

77. *Id.* at 833 n.2.

78. *See* Lopes v. City of Peabody, 629 N.E.2d 1312, 1314-15 (Mass. 1994); *see also* Karam v. State, 705 A.2d 1221, 1229 (N.J. Super. Ct. App. Div. 1998) (noting that the government should compensate an owner for an unreasonable zoning law despite the owner's knowledge of it prior to acquisition).

79. *Lopes*, 629 N.E.2d at 1314-1315; Barney & Casey Co. v. Milton, 87 N.E.2d 9, 13 (Mass. 1949).

80. Vatalaro v. Dep't of Envtl. Regulation, 601 So. 2d 1223, 1229 (Fla. 1992); Cottonwood Farms v. Bd. of County Comm'rs, 763 P.2d 551, 556 (Colo. 1988); Urban v. Planning Bd. of Manasquan, 592 A.2d 240, 244-45 (N.J. 1991).

81. 998 F.2d 680 (9th Cir. 1993).

82. *Levald, Inc.*, 998 F.2d at 688.

enacted; thus, any subsequent owner of that property has no claim.[83] However, the Ninth Circuit explained that a regulation's harm may continue and thereby enable a subsequent owner to have standing on a takings claim when the regulation is applied to the subsequent owner.[84] The Court of Federal Claims also recognized that despite the existence of heavy regulation, property owners should not automatically lose all of their rights related to the regulated use.[85]

However, other courts have not followed this line of reasoning. Some state courts have reasoned that a regulation constitutes a "background principle" of state property law, and as such, subsequent owners have no right to assert takings claims.[86] These courts focus on whether the use was regulated before the present owner acquired the property.[87] These state courts apply the general rule of direct condemnation cases, which states that any award for a taking goes to the owner at the time of the taking, and the right to compensation is not passed to a subsequent owner.[88] An owner has no takings claim whenever the enactment of the regulation is prior to the owner's acquisition of the property.[89]

The Eighth Circuit also reached this result when it concluded that owners were barred from asserting takings claims when the owners knowingly purchased property that was subject to existing regulations.[90] The Federal Circuit also held that a regulation predating acquisition of title precluded a takings claim by a subsequent owner under the "reasonable investment-backed expectations" formula from *Penn Central*.[91] In *Good v.*

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83. *Id.*

84. *Id.*; *see also* Carson Harbor Village Ltd. v. City of Carson, 37 F.3d 468, 476 (9th Cir. 1994), *overruled on other grounds by* WMX Techs v. Miller, 104 F.3d 1133 (9th. Cir. 1997) (implying that a subsequent owner could have standing to assert a takings claim despite regulations in existence before acquisition).

85. Maritrans, Inc. v. United States, 40 Fed. Cl. 790, 797 (1998).

86. Wooten v. S.C. Coastal Council, 510 S.E.2d 716, 717-718 (S.C. 1999); Kim v. New York City, 681 N.E.2d 312, 314-16 (N.Y. 1997); *see also* Potomac Sand & Gravel Co. v. Governor of Maryland, 293 A.2d 241, 250 (Md. 1972) (stating that riparian owners being placed in the same position as under the common law precludes those owners from having standing on takings claims).

87. City of Virginia v. Bell, 498 S.E.2d 414, 417 (Va. 1998); *Kim*, 681 N.E.2d at 314-16; *see also* Kellogg v. Schreiber (*In re* Kellogg), 197 F.3d 1116, 1121 (11th Cir. 1999) (regarding owners creating their own hardship).

88. *See* Danforth v. United States, 308 U.S. 271, 284 (1939) (stating essentially that a taking in any condemnation suit takes place at the moment of the taking, and not thereafter).

89. Hunziker v. Iowa, 519 N.W.2d 367, 371 (Ia. 1994).

90. *See* Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690, 694 (8th Cir. 1996) (stating that the owner did not have the claimed property right in his title at all).

91. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (discussing key factors that determine whether a taking has occurred under a regulation). *But see* Bd. of County Supervisors v. United States, 48 F.3d 520, 526 (Fed. Cir. 1995) (explaining that free transferability of property is important and should not be unduly stifled).

United States,[92] the Federal Circuit stated that any person who buys with notice of a regulation cannot reasonably expect to use the property in a way that is contrary to the regulation, and no compensation may be obtained.[93] Therefore, before *Palazzolo*, there was a split in the lower courts on the issue of whether property owners had standing on takings claims when they had notice of regulations before acquiring title.[94]

III. ANALYSIS

Justice Kennedy delivered the opinion of the Court, which Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas joined in a five-to-four decision.[95] Justice Stevens filed an opinion concurring with the Court regarding the ripeness issue but dissented overall, specifically on the standing and notice issues.[96] Justices O'Connor and Scalia filed concurring opinions, with Justice O'Connor stating that postenactment transfer of title was still a factor in the *Penn Central* analysis,[97] and Justice Scalia stating that it was not a factor.[98] Justice Ginsburg filed a dissenting opinion based on the ripeness issue and waiver ruling, which Justices Souter and Breyer joined.[99] Justice Breyer also filed a separate dissenting opinion, stating that reasonable investment-backed expectations must be the focus of the *Penn Central* analysis.[100]

A. THE MAJORITY OPINION

The Court held that Palazzolo's takings claim was ripe and had standing, yet it did not amount to a deprivation of all economic use of the property.[101] The Court reasoned that a final regulatory decision was made to ripen the claim, and passage of title should not excuse a wrongful taking, but

92. 189 F.3d 1355 (Fed. Cir. 1999).

93. *Good*, 189 F.3d at 1361.

94. Eric Pianin, *Landowners Given New Rights on Environmental Curbs*, WASH. POST, June 29, 2001, at A18. The notion that property owners could not win regulatory takings claims if they bought their land after regulations became effective had some precedence in lower courts at all levels—federal, state, circuit, and district courts. *Id.*

95. Palazzolo v. Rhode Island, 533 U.S. 606, 610 (2001).

96. *Id.* Justice Stevens especially thought that a subsequent purchaser of property only possessed the rights that the property already had, and could not maintain a takings claim unless the taking occurred when the subsequent owner was in possession. *Id* at 637-45 (Stevens, J., dissenting).

97. *Id.* at 632-36.

98. *Id.* at 634-37.

99. *Id.* at 645-54 (Ginsburg, J., dissenting).

100. *Id.* at 654-55 (Breyer, J., dissenting).

101. *Id.* at 616.

there was still some value on the property.[102] However, the Court remanded for further consideration of the claim under the factors set forth in *Penn Central*.[103]

1. *Ripeness of Palazzolo's Takings Claim*

The main question with respect to ripeness of the claim was whether Palazzolo obtained a final decision from the Council regarding the permitted use of the land.[104] The Court found that Palazzolo received such a final decision from the Council in this case.[105] Palazzolo applied to fill his land twice.[106] In 1983 he proposed to fill the entire parcel, and in 1985 he proposed to fill eleven of the eighteen wetland acres to build a beach club.[107] The Court concluded that the Council's denials of these applications erased any doubt as to the extent of permitted development.[108]

The Court responded to the Rhode Island Supreme Court's rationale.[109] The Rhode Island Supreme Court stated that doubt remained as to what development would be allowed because Palazzolo only submitted large proposals, and he should have had to propose smaller plans before it could be said that the Council made a final decision.[110] For example, perhaps the Council would have allowed Palazzolo to fill approximately five acres as opposed to the eleven acres he proposed in 1985.[111]

However, the Court stated that the wetland regulations at issue here were unambiguous.[112] Under CRMP, Winnapaug Pond was under a certain

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102. *Id.* at 618-32 (observing that the extent of permitted development was known, thus ripening the claim and notice of a prior regulation did not bar the claim either). The Court stated that Palazzolo's *Lucas* claim failed because there was substantial value remaining on the property. *Id.* Nevertheless, the Court enabled Palazzolo to argue his claim under the *Penn Central* analysis on remand to the state court. *Id.*

103. *Id.* at 632; *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (discussing the factors to weigh, such as reasonable investment-backed expectations and the character of the government action).

104. Palazzolo v. Rhode Island, 533 U.S. 606, 618 (2001).

105. *See id.* at 619 (disagreeing with the Rhode Island Supreme Court's ruling that there was not a final decision).

106. *Id.*

107. *Id.*

108. *See id.* at 619-21 (discussing how no permission to fill was granted by the Council).

109. *Id.* at 618-19.

110. *Id.* at 619; MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 342 (1986) (claiming that a highly ambitious proposal may not ripen a takings claim).

111. Palazzolo v. Rhode Island, 533 U.S. 606, 619 (2001).

112. *Id.* The Court explained that the only way the Council would have been able to grant an exception to the regulations was if the proposed use served a compelling purpose. *Id.* The agency stated that Palazzolo's proposed use did not serve that high purpose, and thus Palazzolo would not be granted an exception to the regulations no matter what size of development he proposed. *Id.* at 619-20.

classification that prevented a landowner from filling or building on wetlands adjacent to it, but the landowner could seek a unique exception from the Council to perform a forbidden use.[113] However, the Council was only allowed to permit an exception when a "compelling public purpose" was served.[114] The Court reasoned that the Council found that Palazzolo's proposed use did not fit this standard because the use itself was prohibited, so it would not matter whether Palazzolo proposed to fill a smaller surface.[115]

The Court noted that the final decision requirement was in place to allow regulators the opportunity to "exercise discretion" and to decide and explain the reach of regulations.[116] Until a landowner allows these processes to take place, the extent of the restriction on property is not known and a regulatory taking is not established.[117] Yet once it becomes clear that the agency lacks the discretion to permit any development, a takings claim is likely to have ripened because there is no need for further regulatory consideration of the issue.[118] Government authorities cannot avoid a final decision by establishing inequitable land-use processes on property.[119]

The Court claimed that *Palazzolo* was distinguishable from the other cases Rhode Island relied on because in those cases there was actual doubt as to whether a more humble proposal would have been allowed.[120] In *MacDonald*, for instance, there was only an application for a 159-home subdivision, where smaller development likely would have been permitted.[121] *Williamson County* was similar, except the proposal was even larger, consisting of a 476-unit subdivision.[122] In *Palazzolo*, further permit applications were not needed to prove that the Council would not allow any filling of the wetlands because it clearly would not.[123]

However, the Court stated that not all of Palazzolo's parcel contained preserved wetlands.[124] There was evidence that an upland portion would be

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113. *Id.* at 619. (citing Coastal Resources Management Program (CRMP) §§ 200.2, 210.3(C)(4)(1971)).

114. *Id.* at 619 (citing CRMP § 130A(2)(1971)).

115. *Id.* at 619-20.

116. *Id.* at 620.

117. *Id.* at 621.

118. *Id.* at 620.

119. *Id.* at 621 (citing Monterey v. Del Monte Dunes, 526 U.S. 687, 698 (1999)).

120. *Id.* at 620.

121. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 351 (1986).

122. Williamson County Reg'l Planning Comm'n v. Hamilton, 473 U.S. 172, 182 (1985).

123. Palazzolo v. Rhode Island, 533 U.S. 606, 621 (2001).

124. *Id.* Eighteen acres of the approximately twenty-acre property consisted of the preserved wetlands where no development was permitted. *Id.*

worth around $200,000 if developed.[125] The Court established that this portion was not regulated by the "compelling public purpose" standard, and the Council stated that it would have allowed development on that upland parcel.[126] The Court explained that ripeness jurisprudence imposed the obligation on Palazzolo to attempt development on the upland parcel only if the land's permitted use was unknown, and it was not.[127] Also, there was no ambiguity as to the value of the uplands because the $200,000 value was uncontested and agreed upon by both parties.[128] Therefore, there was certainty in the record as to the extent of permitted development on Palazzolo's land, on the wetlands and uplands.[129]

The Court explained that Rhode Island argued that it had no reason to not accept the $200,000 value for the upland parcel because only a *Lucas* claim was raised in the pleadings by Palazzolo.[130] Thus, the argument was that Rhode Island simply had to show that there was some value remaining on the property for Palazzolo's claim to fail.[131] However, the Court said that Rhode Island knew that *Penn Central* applied, and it was discussed earlier in the litigation.[132] Hence, the Court also concluded that a *Penn Central* claim was properly presented from the beginning of litigation.[133]

2. *Standing When Regulation Predates Acquisition of Title*

The second reason the Rhode Island Supreme Court declined to address Palazzolo's takings claim was that the disputed parcel was owned by the corporation of which he was the sole shareholder when the regulations were in force.[134] When Palazzolo acquired title by operation of law, the wetlands regulations were in place.[135] The Court disagreed with the Rhode Island Supreme Court's holding that postenactment acquisition of title barred the

125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 630-31 (citing Petitioner's Brief at 21, *Palazzolo* (No. 99-2047)).
129. *Id.* at 623-24. The Court explained that the Council made it clear that no fill would be allowed for the wetlands portion for any purpose, be it a beach club or houses or something else. *Id.* at 621. No structures could be built without fill, and development could not proceed. *Id.*
130. *Id.* (paraphrasing Brief for Respondent at 29-30, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047)); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
131. *See Palazzolo*, 533 U.S. at 623 (explaining the view that the state had no reason to fight the notion that more than a $200,000 residence could be developed on the uplands).
132. *Id.*
133. *Id.*
134. *Id.* at 626.
135. *Id.*

Lucas and *Penn Central* claims.[136] The Court stated that these holdings would "amount to a single, sweeping, rule" that a subsequent property owner would be seen as having notice to the regulation and be barred categorically from asserting a takings claim.[137] "This ought not to be the rule," the Court remarked, because "[f]uture generations, too, have a right to challenge unreasonable limitations on the use and value of land."[138]

The Court explained that the right to improve property is subordinate to the reasonable exercise of state power such as valid zoning regulations.[139] However, when particular restrictions become so burdensome and unreasonable, the Takings Clause requires compensation.[140] An unreasonable restriction remains so, even with passage of time or title.[141] The Court stressed that if it accepted Rhode Island's view, the state would not have to defend any action restricting land use, no matter how irrational, as long as title transferred after the regulation.[142] "A State would be allowed, in effect, to put an expiration date on the Takings Clause," since any postenactment transfer of title would bar a takings claim.[143]

The Court pointed out that there are different considerations for cases alleging a taking based on an oppressive regulation as opposed to a direct condemnation.[144] The general rule in direct condemnation cases, that compensation may only go to the owner at the time of the taking, did not apply because a challenge to land-use regulation does not mature until ripeness requirements have been met.[145] The Court stated that this could take a long time, and it would be unfair to bar a regulatory takings claim because of the postenactment transfer of title "where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner."[146]

The Court then turned to *Nollan* and found that its holding and reasoning was the controlling precedent.[147] The Court also found that *Lucas* did not limit *Nollan* by stating that any new regulation becomes a background principle of property law that cannot be challenged by subsequent title-

136. *Id.* at 627; Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
137. Palazzolo v. Rhode Island, 533 U.S. 606, 626-27 (2001).
138. *Id.* at 627.
139. *Id.* (citing Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 628.
145. *Id.*
146. *Id.*
147. *Id.* (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987)).

holders.[148] The Court stated "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title."[149] The background principles in *Lucas* did not consist of a regulation that applied to some landowners and not others, but rather, the principles apply to all landowners.[150] The Court then declared that the state court should address petitioner's claims under *Penn Central*, because mere acquisition of title after the date of regulatory enactment does not bar that claim.[151]

3. "Lucas *claim*"—*Total Deprivation of Value Taking*

The Court next turned to the issue of whether there was a total taking under *Lucas*.[152] It agreed with the Rhode Island Supreme Court and held that there was not a total taking because substantial value remained on the property.[153] The Court explained that Palazzolo accepted the Council's position that the parcel retained $200,000 in development value under the CRMP.[154] Palazzolo still asserted that he suffered a total taking because the Council only left him with a nominal value in the land.[155] However, the Court found that the $200,000 value was not a token interest because a spacious residence could be built on a few acres, which clearly was not economically useless under *Lucas*.[156]

The Court reasoned that Palazzolo was precluded from arguing for the first time that the upland parcel was distinct from the wetlands portion, and that he should be allowed to claim a deprivation limited to the wetlands portion.[157] The Court stated that the case was based on the premise that Palazzolo's entire parcel was the basis for his cause of action, and thus, the total deprivation argument failed.[158] The Court concluded that despite the

148. *Id.*; *Nollan*, 483 U.S. at 829; *see generally* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

149. *Palazzolo*, 533 U.S. at 629-30.

150. *Id.* at 630 (citing *Lucas*, 505 U.S. at 1029-30).

151. *Id.* (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978)).

152. *Id.* at 630-31.

153. *Id.* at 631-32. The Court found that the $200,000 undisputed value remaining on the property did not constitute "total deprivation" as is required under *Lucas*. *Id.* To meet the *Lucas* standard, it must be proven that the value remaining on the property is at or near zero. *Id.*

154. *Id.* at 630-31.

155. *Id.*

156. *Id.* at 631.

157. *Id.*

158. *Id.* at 631-32.

failure of Palazzolo's *Lucas* claim the state court did not address the merits of his claim under *Penn Central*, and so the case was remanded.[159]

B. JUSTICE O'CONNOR'S CONCURRENCE

Justice O'Connor addressed the second part of the Court's opinion, the standing and notice aspects.[160] She stated that the Court's holding did not mean that the timing of the regulation's enactment relating to the acquisition of title was "immaterial to the *Penn Central* analysis."[161] She stressed that the postenactment acquisition of title should be seen as one factor among others, rather than exclusively significant or insignificant, because a landowner's reasonable expectations are affected by regulations in place at the time of title acquisition.[162] Justice O'Connor found that if existing regulations were not a part of the analysis, then some property owners could "reap windfalls" and fairness would be lost.[163] There are several significant factors in determining whether there was a taking under *Penn Central*, and the outcome depends mainly on the particular circumstances of each case.[164] She stated that *Penn Central* does not give precise, bright line rules, but rather it provides key guideposts that lead to the final conclusion of whether just compensation is required.[165]

C. JUSTICE SCALIA'S CONCURRENCE

Justice Scalia stressed that he did not share Justice O'Connor's view of the standing and notice aspects of the Court's opinion.[166] He provided an example of what Justice O'Connor feared would happen if postenactment acquisition of title had no bearing on the constitutionality of a regulation.[167] A smart or risky real estate developer would realize that a regulation on an unknowing landowner's property was unconstitutional and buy the land at a low price because of the restriction.[168] Then, the developer would get the "unconstitutional restriction invalidated" and sell the property at the higher

159. *Id*; *see generally* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

160. Palazzolo v. Rhode Island, 533 U.S. 606, 632 (2001) (O'Connor, J., concurring).

161. *Id.*; *Penn Central*, 438 U.S. at 124.

162. *Palazzolo*, 533 U.S. at 633.

163. *Id.* at 635.

164. *Id.*; *Penn Central*, 438 U.S. at 124.

165. *Palazzolo*, 533 U.S. at 636; *Penn Central*, 438 U.S. at 124.

166. *Palazzolo*, 533 U.S. at 636 (Scalia, J., concurring).

167. *Id.* at 637.

168. *Id.*

value or develop it to its full value.[169] Thus, the developer would obtain a windfall, the naïve original owner would not receive any benefit, and the original owner was the one who should have received compensation from the government for the partial taking.[170]

However, Justice Scalia explained that such knowledge or risk by the developer is rewarded in a similar fashion in the stock market regularly.[171] He remarked that it may be nice to compensate the original owner, but certainly the government should not benefit because it would be the only party of the three (original owner, smart or risky developer, and government) that acted "unlawfully—indeed, unconstitutionally."[172] Allowing the government to benefit from the situation would be similar to forcing an innocent purchaser, who bought property at a low rate from a thief, to turn over the profit to the thief.[173] Therefore, Justice Scalia concluded that postenactment acquisition of title should have no role in whether the regulation is constitutional, whether analyzed as a total taking or *Penn Central* taking.[174]

D. JUSTICE STEVENS' DISSENT

Justice Stevens joined the Court's opinion on the ripeness issue but dissented overall, specifically on the standing and notice issues.[175] He remarked that the Court made a broad decision on the postenactment acquisition of title issue and "oversimplified a complex calculus" by not addressing the particular facts and claims in *Palazzolo*.[176] He stressed that a succeeding landowner should not be able to receive compensation for a taking of the previous owner's interest.[177] Seemingly concluding that the rule for a direct taking applies to a regulatory taking, Justice Stevens explained that a taking is an event which occurs at a specific point in time, and only the owner of the property being infringed upon at that time is entitled to compensation.[178]

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169. *Id.*
170. *Id.*
171. *Id.* at 636.
172. *Id.* at 637.
173. *Id.*
174. *Id.*; *see generally* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978). Justice Scalia explained in his concurrence in *Palazzolo* that the timing of title acquisition should not matter because no matter when title was acquired, if there was an unconstitutional taking at some point, it cannot go uncompensated. Palazzolo v. Rhode Island, 533 U.S. 606, 644 (2001).
175. *Palazzolo*, 533 U.S. at 638 (Stevens, J., dissenting).
176. *Id.*
177. *Id.* at 638.
178. *Id.* at 638-39.

Justice Stevens stated that the difficulty of *Palazzolo* was determining when the alleged taking occurred.[179] He stated that "precise specification" was key.[180] The adoption of the regulation was when the taking occurred, according to Palazzolo's complaint, because that is when filling the land was prohibited.[181] Even if that was so, Palazzolo was the wrong party to bring this claim, Justice Stevens stated, because the owner of the property at the time of the taking suffered the injury, and that was not Palazzolo.[182]

Justice Stevens declared that Palazzolo's standing should not depend on whether he had notice of the regulation because that "is irrelevant."[183] If the prior owner's property decreased in value from the earlier regulations, Palazzolo "acquired only the net value that remained after that diminishment occurred."[184] If the regulation was invalid, Palazzolo had no right to recover because he had no standing to complain about the events that happened before he was the owner; thus the only remedy for him was to enjoin the enforcement of the regulation.[185] Similar to a situation with a trespasser on a new owner's land, the new owner could eject the trespasser but could not recover damages for fruit taken from the garden before the new owner acquired the property.[186]

Justice Stevens also noted that the holding in *Nollan* was consistent with his analysis because the "triggering event" in that case occurred when the Nollans owned the property.[187] Despite having notice of the possible taking, the Nollans did not try to obtain compensation for a taking that was inflicted on a previous owner.[188] However, Palazzolo was trying to obtain compensation for a possible taking of a right that he never had.[189]

Justice Stevens warned that the majority's extension of the right to compensation for people "other than the direct victim of an illegal taking"

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179. *Id.* at 640-41. Justice Stevens also pointed out that this is a major area of dispute, with the state bringing evidence revealing "that limitations on coastal development have always precluded or limited schemes such as Palazzolo's." *Id.* at 641 (citing Respondent's Brief at 11-12, 41-46, *Palazzolo* (No. 99-2047)). Justice Stevens noted that, in his view, a new regulation that diminishes property value does not constitute a takings issue if it is "generally applicable" and "directed at preventing a substantial public harm," and he believed the Council's regulation met those criteria. *Id.* (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992)).

180. *Id.* at 639.

181. *Id.* at 640-41.

182. *Id.* at 641.

183. *Id.* at 642.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 643.

188. *Id.*; *see generally* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

189. Palazzolo v. Rhode Island, 533 U.S. 606, 641-42 (2001).

could have broad consequences.[190] Justice Stevens concluded by saying that state law should determine whether Palazzolo or the previous owner had the right to fill the wetlands, and if so, when that right was acquired by the state.[191] He declared that the judgment of the Rhode Island Supreme Court should be affirmed.[192]

E. JUSTICE GINSBURG'S DISSENT

Justice Ginsburg wrote that the nature, extent, and permitted development under the regulation were still unknown, and Palazzolo's claim was not ripe.[193] A regulatory takings claim is not ripe until the agency administering the regulation has made a final determination on how it will apply the regulation to a particular parcel of land.[194] When a landowner seeks development from a regulatory agency and is denied, there is still not a final decision unless the agency reveals the specific force of the regulations on the land.[195]

Therefore, Justice Ginsburg stated that rejections of large proposals for development "may not ripen a takings claim."[196] She then turned to the *MacDonald* case as an example and claimed that Palazzolo's proposals were very similar because they were "grandiose."[197] Palazzolo could have proposed a smaller development plan that would have been accepted because development on the uplands portion undisputedly would have been allowed.[198] Hence, Justice Ginsburg wrote, Palazzolo's claim did not ripen.[199]

Justice Ginsburg declared that the Court's decision was unfair and inexact.[200] First, she stated the decision was unfair because Palazzolo initially had the choice whether he would sue under *Lucas* or under *Penn*

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190. *Id.* at 645.

191. *Id.*

192. *Id.*

193. *Id.* at 654 (Ginsburg, J., dissenting). Justices Souter and Breyer joined Justice Ginsberg's dissent. *Id.* at 645.

194. *Id.* at 646 (citing Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 191 (1985)).

195. *Id.*

196. *Id.*

197. *Id.* (citing MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348-51 (1986)). Justice Ginsburg remarked that the 159-home subdivision in *MacDonald* was similar to what Palazzolo wanted to develop. *Id.*

198. *Id.* at 649.

199. *Id.*

200. *Id.* at 652.

Central, or both.[201] Palazzolo chose to sue only under *Lucas*, claiming that Rhode Island's regulations left no use or value on his property.[202] Therefore, Justice Ginsburg reasoned, Rhode Island only needed to prove that some value remained on the property to defeat Palazzolo's claim, and it did establish that around $200,000 remained in development value.[203] Because Palazzolo never sued under the *Penn Central* partial-taking claim, Rhode Island did not have to defend against it.[204] Before the Court, however, Palazzolo argued the *Penn Central* issue for the first time, and the Court should not have allowed him to do so.[205] This enabled Palazzolo to use Rhode Island's admission of the $200,000 value as "offensive support for other claims he state[d] for the first time," which was unfair to Rhode Island since it had relied on Palazzolo's prior claim.[206]

Justice Ginsburg wrote that the Court's decision was inaccurate because it found that there was no ambiguity in the record as to the extent of permitted development on the uplands.[207] Yet, she stated that there was ample testimony at trial that indicated ambiguity as to how much development would be allowed.[208] Rhode Island simply confirmed that "it 'would' approve a 'single home' worth $200,000."[209] This left open the possibility that it would approve even more development.[210] Justice Ginsburg explained that the Court should not now state that Rhode Island waived its ability to contest the $200,000 figure because the reason Rhode Island initially accepted the figure was because it was more than enough to defeat Palazzolo's *Lucas* claim.[211]

She declared that "the State's failure to appreciate that Palazzolo had moved the pea to a different shell hardly merits the Court's waiver finding."[212] Justice Ginsburg explained that the Court's waiver ruling establishes a dangerous precedent; unprincipled litigants can change their legal theory and the record in their petition for certiorari, and if their opponent does not object, the Court will review the case on a completely different

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201. *Id.* at 648; Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1011 (1992); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 118 (1978).

202. Palazzolo v. Rhode Island, 533 U.S. 606, 648 (2001) (citing petitioner's Complaint ¶ 17).

203. *Id.*

204. *Id.* at 650; *Penn Central*, 438 U.S. at 104.

205. *Palazzolo*, 533 U.S. at 650; *Penn Central*, 438 U.S. at 104.

206. *Palazzolo*, 533 U.S. at 652.

207. *Id.* at 653-54.

208. *Id.*

209. *Id.* at 652 (citing Respondent's Brief at 19, *Palazzolo* (No. 99-2047)).

210. *Id.*

211. *Id.*; Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

212. *Palazzolo*, 533 U.S. at 652.

basis.[213] Therefore, she claimed that the Rhode Island Supreme Court's decision should be affirmed.[214]

F. JUSTICE BREYER'S DISSENT

Justice Breyer agreed completely with Justice Ginsburg's dissent and added that simply because property changes hands does not automatically bar a takings claim.[215] He remarked that a great deal depends on whether the circumstances of a change of ownership affects whatever reasonable investment-backed expectations were in place.[216] Typically, reasonable expectations will decrease rapidly as property changes hands over time.[217] According to Justice Breyer, the *Penn Central* analysis handles these factors appropriately and fairly.[218]

IV. IMPACT

Palazzolo is expected to have broad ramifications for environmental and other land-use regulations and thus for property owners.[219] Despite giving property owners new rights, the long-term impact of the decision is somewhat unclear because it was fractured, and both sides in the case claimed victory.[220]

A. STANDING WHEN REGULATION PREDATES ACQUISITION OF TITLE

The most significant part of the Court's decision was the notice aspect, allowing even property owners who purchased land after regulations take effect to file suit for compensation.[221] This "marks the most explicit state-

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213. *Id.* at 653.

214. *Id.* at 654.

215. *Id.* (Breyer, J., dissenting).

216. *Id.* at 655.

217. *Id.*

218. *Id.* Justice Breyer mentioned that a number of amici admonished that allowing *Lucas* claims to survive despite changes in ownership may entice some landowners to make up claims by purposefully transferring land until only "a nonusable portion remains." *Id.* (citing Brief of Amici Curiae David W. Bromley, at 7-8, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No.99-2047)). Yet, he remarked, he did not think "a constitutional provision concerned with 'fairness and justice' could reward any such strategic behavior." *Id.* (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978) (quoting Armstrong v. United States, 364 U.S. 40 (1960))).

219. *See* Pianin, *supra* note 94, at A18.

220. *Id.* Rhode Island claimed that key environmental protections were preserved by the ruling because the Court did not condone the filling of sensitive wetlands, while Palazzolo stated landowners could now go to court without filing repeated land use applications. *Id.*

221. Warren Richey, *Court Hands Victory to Property Owners*, CHRISTIAN SCIENCE MONITOR, June 29, 2001, at 3.

ment yet by the high court" on this issue.[222] Lower federal and state courts were split on the issue, but it was widely adopted in many courts that property owners could not win regulatory takings claims if they acquired their property after regulations became effective.[223]

Property rights groups such as the Pacific Legal Foundation and the American Farm Bureau Federation are thrilled and stated it was a "breakthrough in their efforts to curtail government encroachment" on private land.[224] Some environmental groups like "Save the Bay" are afraid that *Palazzolo* could motivate developers to start a wave of litigation challenging environmental and zoning rules, seeking large amounts of compensation.[225] Some regulators also fear that there will be a "chill" on environmental regulations throughout all levels of government.[226]

The Pacific Legal Foundation also claimed that the notice ruling sends a strong message to regulators throughout America that they must give an owner a fair price for land when they put a freeze on its private use.[227] The Foundation further added that "[i]f government cannot take property from one person, it also cannot take it from the person who buys or inherits the property."[228]

Palazzolo should help people who want to sell their regulated property for a fair price and those who already own regulated property they cannot use.[229] However, some people argue that allowing a person to sue who knowingly buys property that has restricted uses is an "invitation to unscrupulous litigants" and could result in an undesirable increase in litigation for takings claims.[230]

One case has addressed the impact of the Court's decision.[231] In *Abka Limited Partnerships v. Wisconsin Dep't of Natural Resources*,[232] a Wisconsin court stated that a dockominium owner would have a ripened takings claim if the state ever tried to "interfere with the owner's

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222. *Id.*

223. Pianin, *supra* note 94, at A18.

224. *Id.*

225. *Id.*

226. *Id.*

227. Lyle Denniston, *Landowners Gain New Weapon Against Zoning*, BOSTON GLOBE, June 29, 2001, at A14.

228. *Id.*

229. *Id. Palazzolo* gives such people the recourse of going to court on a takings claim when their land's value plummets due to excessive regulation. *Id.*

230. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 653 (2001) (stating there could be negative consequences to the Court's decision).

231. *See generally* Abka Ltd. Partnerships v. Wis. Dep't of Natural Res., 635 N.W.2d 168 (Wis. Ct. App. 2001).

232. 635 N.W.2d 168 (Wis. Ct. App. 2001).

entitlement to the appurtenant pier and boat slip," because of the decision in Mr. Palazzolo's case.[233] The Wisconsin court cited the Supreme Court's language regarding ripeness and notice of prior regulations and stated that those words could have "potential implications."[234]

The ripeness aspect of the decision means that many landowners who previously may have been discouraged from even attempting legal challenges know that they do not have to apply for permits over and over again before they can go to court.[235] Although the decision is thus likely to give property owners more access to the courts through the ripeness decision, it does not resolve the question of whether they can be compensated if their land does not end up being worth their "investment-backed expectations" at the time they bought it.[236] These are the basic unanswered questions of the case: what is Palazzolo entitled to under the *Penn Central* analysis, and what is fair compensation, if any?[237] The Court remanded these questions back to state court.[238]

B. NORTH DAKOTA

North Dakota does not have "coastal wetlands" per se, but regulatory takings issues pertain to North Dakota as much as any other state. North Dakota has many farmers and ranchers, and they own or lease large amounts of land, which is increasingly subject to "regulation from all levels of government—such as the state wetlands regulation at issue in this case."[239] Therefore, the Court's decision regarding compensation for regulatory takings affects property owners and government planners throughout the state.[240]

V. CONCLUSION

The United States Supreme Court gave property owners a "new weapon"[241] against property regulations by finding that Palazzolo's claim was ripe and had standing, yet it also said that the claim did not amount to a

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233. *Abka*, 635 N.W.2d at 181.

234. *Id.*

235. *See* Harold Johnson, *Supreme Court Strikes a Blow for Property Rights*, WALL STREET JOURNAL, July 3, 2001, at A14.

236. *Id.*

237. *Id.*; *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

238. Palazzolo v. Rhode Island, 533 U.S. 606, 632 (2001).

239. Brief of Amici Curiae Am. Farm Bureau Fed'n at 1, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047).

240. *Id.*

241. Denniston, *supra* note 227, at A14.

deprivation of all economic use of the property.[242] The Court remanded for further consideration of the claim under the factors set forth in *Penn Central*.[243]

Brent L. Slipka

242. *Palazzolo*, 533 U.S. at 616.
243. *Id.*; Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).