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## Supreme Court Takes a Look at Takings

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**Abstract:** In the case of *Pazzalo v. Rhode Island* the United States Supreme Court reversed a determination by the Rhode Island Supreme Court which held that land owners had no right to sue for a regulatory taking if the land owners purchased title to land on which a preexisting restriction existed. Before this case, the rule in New York also precluded landowners from challenging land use regulations that existed at the time they purchased land. After holding that a regulatory takings challenge existed, the Supreme Court remanded the case back to Rhode Island to decide whether the preexisting regulations affected the plaintiff's investment-backed expectations. This article discusses the details and background of the *Pazzalo* case.

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The New York Court of Appeals has held that, when an individual purchases property that is subject to land use regulations that affect its value, the purchaser may not challenge the regulation as a taking of its property rights. Such a regulation, the court says, forms part of the title to the property as a preexisting rule of state law. While the title to the regulated parcel may be conveyed by the landowner, the purchaser's title is necessarily limited to the rights to use the property under the law at the time of the purchase.

The New York position on this point is different from that adopted by the U.S. Supreme Court. On June 28, 2001, the Supreme Court held that a blanket rule that purchasers who take title with notice of an adopted land use regulation have no right to compensation "is too blunt an instrument to accord with the duty to compensate for what is taken." The Court held that a pre-existing regulation affecting a parcel is not necessarily inherent in the title taken by a purchaser or heir and cannot be used as a *per se* device to deny the right to compensation. In *Palazzolo v. Rhode Island*, 2001 WL 721005, the Court reversed a determination by the Rhode Island Supreme Court that a landowner had no right to challenge a regulation as a regulatory taking when the regulation was in place when title to the land was acquired. The Court first held that Palazzolo's case was ripe for adjudication after having submitted an application for a permit to fill tidal wetlands for development as a private beach club.

Palazzolo owned a 20 acre parcel, most of which was salt marsh subject to tidal flooding. Development would have required significant fill, up to six feet in some places, to support any development. Under the Rhode Island coastal wetland regulations, development on the tidal wetlands portion of this site was prohibited unless the owner secured a special exception permit for an activity that serves a compelling public purpose which benefits the public as a whole. Since the responsible state agency, in denying Palazzolo's application to fill 11 of 18 tidal wetland acres for a private beach club, made a determination that this type of private development of tidal lands was not eligible for a special use permit, the Court held that the matter was ripe. In this unusual context, no further applications by Palazzolo were necessary to determine how the land could be developed privately under the regulations. An application for a permit to fill fewer acres would not change the determination that the requisite "public interest" was being served. This constituted a final determination that there can be no filling of this class of wetlands for any ordinary land use and, therefore, the case was ripe for judicial review.

The *Palazzolo* case does not appear to alter or affect the law regarding the ripeness of cases that challenge land use regulations. In *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Court ruled that a landowner must wait until the governmental agency responsible for implementing land use regulations has reached a final decision regarding the application of the regulations to the affected property. This has created some confusion as to how many applications, and for what intensity of use, a landowner must submit before it can be determined by the courts whether the regulation has gone far enough to constitute a taking. The *Palazzolo* decision leaves undisturbed the understanding that the landowner must submit applications for development activity sufficient to discover the permissible uses with a reasonable degree of certainty. It is not sufficient to submit, for example, a grandiose development proposal, obtain a denial, and then challenge the regulations as a regulatory taking. In the ordinary context, land use agencies have a high degree of discretion to soften the strictures of the regulations they administer. It remains the law that the landowner must submit applications that give the agency the opportunity to decide and explain the reach of a challenged regulation. Blanket prohibitions of private development activity of the type involved in the Rhode Island coastal wetlands regulations are not found in most land use regimes.

The ripeness issue bears on the U.S. Supreme Court's holding in *Palazzolo* regarding the effect of a preexisting regulation on the existence of a takings claim. The Court stated that it would be illogical and unfair to bar a regulatory takings claim because of the transfer of land after a regulation was adopted where the steps necessary to make the claim ripe were not taken by the previous owner. Here, Palazzolo's claim ripened after applications were submitted and denied, became ripe at that moment, and accrued to his benefit as owner.

The New York rule affected by the *Palazzolo* decision was articulated in four cases decided on the same day in 1997. In *Gazza v. DEC*, 89 N.Y.2d 603, 679 N.E.2d 1035, 657 N.Y.S.2d 555 (1997) the landowner challenged the denial of a variance from

a set back requirement which prevented any economical use on the affected parcel, a one acre lot . The landowner purchased the parcel for \$100,000 knowing it was subject to wetland regulations from which a variance from the State Department of Environmental Conservation (DEC) would have to be obtained to allow its development as a single-family parcel. The landowner estimated that, if the variances were granted, the land would be worth \$396,000. Because the owner could not demonstrate that the variances would have no adverse impact on the tidal wetlands contained on the property, the request was denied. The effect of the denial was to limit the use of the site to a catwalk, dock, and parking lot, activities which would have required variances from the village's zoning board. Rather than pursue these local variances, the landowner challenged the denials as a regulatory taking. The court noted that "[o]ur courts have long recognized that a property interest must exist before it may be taken." A taking claim may not "be based upon property rights that have already been taken away from a landowner in favor of the public." "[R]egulatory limitations that inhere in the title itself will bind a purchaser (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992))."

In *Anello v. ZBA*, 89 N.Y.2d 535, 678 N.E.2d 870, 656 N.Y.S.2d 184 (1997), the Court of Appeals denied a takings claim where the village's steep slope law prevented an owner who purchased a lot after the law was adopted from building a single-family house on her lot. In *Kim v. City of New York*, 90 N.Y.2d 1, 681 N.E.2d 312, 659 N.Y.S.2d 145 (1997), no taking was found where the landowner had constructive notice when he bought the land of a City Charter provision allowing the City to enter the site and place fill on it to provide lateral support for the elevation of a public road that was below legal grade. In *Basile v. Town of Southhampton*, 89 N.Y.2d 974, 678 N.E.2d 489, 655 N.Y.S. 2d 877 (1997), the court denied landowner's claim that the value of its land taken in condemnation proceedings should be valued as if wetland regulations did not apply to the site. The court held that wetland regulations "do not effect a taking when a purchaser acquires property subject to such regulations."

A majority of the U.S. Supreme Court in *Palazzolo* could not agree on whether the existence of a regulation at the time of purchase should be considered in determining whether the regulation interferes with the purchaser's investment-backed expectations, one of several factors used to determine if a taking has occurred. The Supreme Court remanded the case to the Rhode Island courts for a determination as to whether a taking had in fact occurred. In making its determination, the state court will have to consider the debate of two concurring justices in the *Palazzolo* decision. In her concurring opinion, Justice O'Connor noted that "Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial...." She cited *Penn Central Transp. Co. V. New York City*, 438 U.S. 104 (1978) for the proposition that several factors are considered in determining whether a regulation constitutes a taking, including whether it interferes with the landowner's legitimate investment-backed expectations. She noted that "the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations."

Justice Scalia disagreed in a separate concurring opinion. In his view, “the fact that a restriction existed at the time the purchaser took title ... should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking.” He added that the investment-backed expectations “do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional.”

The issue of most importance to regulators and landowners, of course, is the Court's position on the substantive matter of what constitutes a regulatory taking. On this point, the *Palazzolo* case makes little progress. Palazzolo's property contained two upland acres and it was agreed that a substantial residence could be built on that land. The Supreme Court upheld the Rhode Island Supreme Court's determination that the coastal regulations did not constitute a total taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Palazzolo submitted evidence that the land was appraised at \$3,150,000 under a 74-lot subdivision proposal he had submitted for approval before his private beach club application. The parties agreed that the upland acres had a value of \$200,000 for residential development. The Court noted that the development rights on the upland area did not constitute a token interest and that, therefore, the regulations did not leave the land economically idle as must be the case for the *Lucas* total taking rule to apply.

The U. S. Supreme Court also refused to consider Palazzolo's claim that the relevant parcel to use in a takings case is the land affected by the regulation, in this case the 18 wetland acres. The majority decision recognized that what parcel of land should be considered when a takings claim is raised is the “persisting question of what is the proper denominator in the takings fraction.” Since this issue was not presented in the petition for certiorari to the Court, the majority refused to consider it.

On remand, the Rhode Island courts will make their determination as to whether Palazzolo's investment-backed expectations were interfered with, while considering the importance of a preexisting regulation in shaping those expectations.