No. 99-2047

In the

Supreme Court of the United States

ANTHONY PALAZZOLO,
Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,
Respondents.

On Writ of Certiorari to the Supreme Court of Rhode Island

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a regulatory takings claim is *categorically barred* whenever the enactment of the regulation predates the claimant's acquisition of the property.

2. Where a land-use agency has authoritatively denied a particular use of the property and the owner alleges that such denial per se constitutes a regulatory taking, whether the owner must file additional applications seeking permission for "*less ambitious uses*" in order to ripen the takings claim.

3. Whether the remaining permissible uses of regulated property are *economically viable* merely because the property retains a value greater than zero.

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OPINIONS BELOW

The opinion of the Supreme Court of Rhode Island is reported at 746 A.2d 707 (2000); it appears in the Petitioner's Appendix (PA) starting at A-1. The decision of the Superior Court of Rhode Island (Washington County) is not reported; it appears in PA starting at B-1.

JURISDICTION

Petitioner has been granted review from the opinion and judgment of the Supreme Court of Rhode Island, filed February 25, 2000. This Court granted the Petition for Certiorari on October 10, 2000. *Palazzolo v. Coastal Resources Management Commission*, No. 99-2047. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in relevant part: "[N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

For nearly 40 years, Anthony Palazzolo owned, directly or indirectly, a valuable parcel of property in the ocean resort town of Westerly, Rhode Island. He has owned it directly since 1978 and has attempted to develop it since 1961. The government, however, has had other plans. Citing the

ecological value of the property if left in its natural state, and finding that Mr. Palazzolo's development proposals would benefit Mr. Palazzolo rather than fulfilling, among other things, "'a compelling public purpose providing benefits to the public as a whole as opposed to individual or private interests,'" the state has refused to allow Mr. Palazzolo to put his property to a reasonable economically beneficial and productive use. Joint Appendix (JA) at 27, Coastal Resources Management Plan (CRMP) Sect. 130(A)(1), reproduced in Decision of Coastal Resources Management Council, February 18, 1986 (CRMC Decision). But when confronted with Mr. Palazzolo's claim for a regulatory taking the Rhode Island courts have refused to grant relief, finding (1) that five permit applications (including two since Mr. Palazzolo directly owned the property) are not enough to ripen his claim, (2) that when Mr. Palazzolo acquired the property in 1978 from the corporation in which he was the sole shareholder he had acquired it upon notice of the regulatory scheme, thus defeating his claim, and (3) the alleged presence of some unrealized potential value for a single home site or an open-space gift removes the claim from the *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), denial of "all use" rule and, therefore, ultimately defeats his regulatory takings claim.

A. The State of Rhode Island Has Refused to Allow Mr. Palazzolo to Develop His Property

Mr. Palazzolo acquired the property from Natale and Elizabeth Urson in 1959 and 1960. During this time the ownership was transferred to Shore Gardens, Inc., and Mr. Palazzolo became the sole owner of Shore Gardens in 1960.[1] Opinion, PA at A-2 He has paid taxes on this property

[1] According to the court below, Shore Gardens transferred 11 (out of 80) lots to various grantees between 1959 and 1961. Opinion of

(continued...)

since 1959. JA at 59, Testimony of Anthony Palazzolo. The property consists of roughly 18 acres of wetlands and a small indeterminate amount of uplands. Opinion, PA at A-3 n.1. The land now owned by Mr. Palazzolo was divided into 74 parcels in 2 subdivision map filings that occurred in 1936 and 1959. *See* Opinion, PA at A-2. It is situated just north of Atlantic Avenue which borders the Atlantic Ocean. To the South, Atlantic Avenue is heavily developed with vacation homes. Just north of the property is Winnapaug Pond, an intertidal pond with an outlet to the Atlantic Ocean. "Land uses of Winnapaug Pond/Atlantic Beach area are moderate-to-heavy density seasonal development, residential and commercial; development directly adjacent to this site is moderate density seasonal dwellings." JA at 21, CRMC Biologist's Field Report. At the time of his application, the vicinity of Mr. Palazzolo's property was developed with vacation homes, mostly on the northern and western and eastern boundaries of the pond and along the ocean beach. *See* contemporaneous aerial photographs found in Joint Lodging No. 2, Defendants' Exhibits N and L, and Joint Lodging No. 1, Tab 6 (showing location of property). To the west of the property there is a public beach operated by the State of Rhode Island with parking spaces for 2800 cars. Trial Testimony of David S. Reis, CRMC Principal Environmental Scientist, June 25, 1997, Trial Transcript at 537-38. *See also* Joint Lodging No. 2, Defendants' Exhibit N and L. There is an airport to the northwest of the pond. *Id.* Mr. Palazzolo's property is bisected by a gravel road and there are several homes in the immediate vicinity; the road and homes were built on fill prior to the 1970's. JA at 71, 74, Trial Testimony of Grover John Fugate, CRMC Executive Director. Like the neighboring homes, the only way to develop Mr. Palazzolo's land is to raise the grade with fill.

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[1] (...continued)
Rhode Island Supreme Court (Opinion), reproduced in PA at A-2. It then reacquired five of these lots in 1969. *Id.*

During the 1960's the State of Rhode Island did not have any regulatory restrictions upon the filling of wetlands, although it did require permits for dredging from open bodies of water such as Winnapaug Pond. Opinion, PA at A-3-4. In 1965 the Rhode Island legislature gave the Department of Natural Resources the authority to restrict filling of coastal wetlands. Opinion, PA at A-4. This legislation was replaced by the adoption of the Coastal Resources Management Council (CRMC) Enabling Act, P.L. 1971, ch. 279, § 1, codified as G.L. 1956, ch. 23 of title 46, which created the CRMC and gave it authority to regulate coastal wetlands. Opinion, PA at A-4.[2] These regulations imposed a permitting requirement upon the filling of wetlands in Rhode Island. The CRMC regulations further require that any filling of coastal salt marsh, such as that found on Mr. Palazzolo's property, meet certain public interest requirements. For example, Section 130(A) of the CRMP states:

> A. Special exceptions may be granted . . . only if and when the applicant has demonstrated that:
>
> (1) The proposed activity serves a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests. The activity must be one or more of the following: (a) an activity associated with public infrastructure such as utility, energy, communications, transportation facilities; (b) a water-dependent activity that generates substantial economic gain to the state; and/or (c) an activity that provides access to the shore for broad segments of the public.

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[2] The implementing regulations are published in the State of Rhode Island Coastal Resources Management Program, as Amended June 28, 1983, reproduced at JA 27-28, CRMC Decision.

JA at 37-38, *Palazzolo v. Coastal Resources Management Council*, Case No. 86-1496, Decision by Judge Israel, January 5, 1995 (trial court decision in appeal of administrative decision) (hereinafter Judge Israel Decision). Tellingly, the CRMC has ruled that private housing, and even low-income public housing, does not meet this public interest requirement. JA at 73, Testimony of Grover Fugate; JA at 94, Testimony of David S. Reis.

Prior to the adoption of this regulatory regime, Mr. Palazzolo applied twice to utilize the property, seeking permission to dredge Winnapaug Pond in order to develop the property. (As noted, during this period permission was required to dredge open waters, but not for the filling of wetlands.) Opinion, PA at A-3. The first application, filed with the Department of Harbors and Rivers (DHR) in 1962, was rejected as being incomplete. Opinion, PA at A-3. Shore Gardens filed a second application in 1963, proposing to dredge a portion of the pond in order to provide fill for approximately 18 acres of wetlands. *Id*. When this application encountered difficulties, Shore Gardens filed a third application to fill less of the property for a recreational beach facility. DHR approved both applications in April of 1971, giving Mr. Palazzolo the choice of pursuing either plan. Opinion, PA at A-4. DHR found that *neither* application would " 'have any significant effect on wildlife,' " JA at 36, Judge Israel Decision. On November 17 of that year, DHR withdrew the approval. Opinion, PA at A-4.

Mr. Palazzolo had an interest in the property through the 1960's and early 1970's as the sole shareholder of Shore Gardens. Mr. Palazzolo let the corporation lapse and its charter was revoked in 1978. At this point, the property "pass[ed] by operation of law to Palazzolo, its sole shareholder." Opinion, PA at A-14.

After that time, Mr. Palazzolo, now as the owner of the property in his individual capacity, twice more applied for

permits to CRMC to fill the property. The first application, filed in 1983, like the one filed in 1963, was to fill approximately 18 acres of the property. Opinion, PA at A-5. Unlike the original applications, this involved no dredging. JA at 25, CRMC Decision. Mr. Palazzolo expected that approval of this application would allow him to proceed with the development of homes on the 74 lots that had been previously subdivided, although the 1983 application was only for the preliminary step of filling the wetlands, not the development of homes. *See* Opinion, PA at A-11. CRMC denied this application on July 12, 1984, and Mr. Palazzolo did not appeal the denial. Opinion, PA at A-5. *See also* JA at 13, CRMC Decision on 1983 application.

In 1985 Mr. Palazzolo applied to fill 11.4 acres; like his 1966 application to DHR, he intended to prepare the site to make it suitable for a family beach recreational area. JA at 32-33, Judge Israel Decision. The plan called for the construction of a 50 car parking lot with room for boat trailers, and the provision of picnic tables, concrete barbecue pits, and portable toilets. *Id*. This plan was rejected on February 18, 1986. JA at 25, CRMC Decision. CRMC found that, in its natural state, Mr. Palazzolo's property provided the public benefits of "refuge and feeding areas for larval and juvenile finfish and shellfish and for migratory waterfowl and wading birds," "access of [f]auna to cover areas," facilitates "the exchange of nutrient/waste products," and allows "sediment trapping," "flood storage," and "nutrient retention." JA at 27.

Furthermore, the proposal failed to meet various regulatory criteria outlined in CRMC's CRMP regulations. For example it found that Mr. Palazzolo's beach club was in "conflict" with CRMP Section 130 (A)(1) (beach club did not serve "a compelling public purpose providing benefits to the public as a whole as opposed to individual or private interests," CRMP Section 210.3(C)(1) (proposal did not serve "Council's goal . . . to preserve, and where possible, restore coastal

wetlands," CRMP Section 210.3(C)(4) (noting that "[a]lterations to salt marshes . . . are prohibited except for minor disturbances associated with residential docks and walkways . . . and . . . structural shoreline protection facilities," CRMP Section 300.2(B)(1) (fill is prohibited "unless the primary purpose of the alteration is to preserve or enhance the feature as a conservation area or buffer against storms, and CRMP Section 330(A)(1) (noting that the "primary goal of all Council efforts to preserve, protect and, where possible, restore the scenic value of the coast region is to retain visual diversity")). JA at 27-28.

B. The Rhode Island Courts Have Refused to Award Damages for the Taking of Mr. Palazzolo's Property

Mr. Palazzolo appealed the CRMC's denial of his 1985 application, alleging that the decision was arbitrary and capricious and that the denial deprived him the use of his property. A Rhode Island Superior Court upheld the denial. It agreed with CRMC that Mr. Palazzolo's beach club plan did not serve a "compelling public interest which provides benefits to the public as a whole as opposed to individual or private interests" because (1) the public was already walking across Mr. Palazzolo's property, (2) his beach club plan would not "provide access to the shore for broad, as opposed to narrow, segments of the public," and (3) that there might be better ways of serving the public's interest than Mr. Palazzolo's beach club proposal. JA at 38-39, Judge Israel Decision. The court also found that the claim that the denial deprived Mr. Palazzolo the use of his property was inappropriate in a case appealing the administrative decision. JA at 40-42, Judge Israel Decision. Mr. Palazzolo did not appeal.

Based on the four denials over the space of 23 years, Mr. Palazzolo concluded that CRMC would never tolerate any improvement of the wetlands on his property. Recognizing that the only uses that would be permitted on the wetlands were

public uses, he filed a complaint for inverse condemnation on June 15, 1988, seeking damages for the regulatory taking of his property. *Palazzolo v. Rhode Island*, Case No. 88-0297, Superior Court Decision, October 24, 1997 (hereinafter Judge Williams Decision), PA at B-3. An amended complaint was filed on October 23, 1995, JA at 43-46 (Amended Complaint).[3] At trial, Mr. Palazzolo alleged that based on its development potential, the property had a net value of $3,150,000. Opinion, PA at A-13. After a seven day trial the Superior Court ruled against Mr. Palazzolo. It found that his proposal would have an adverse effect on the environment,[4] that Mr. Palazzolo had no property right and no investment backed expectations in developing his property because he acquired it (in his individual capacity) after the CRMC regulations were in place, and finding that Mr. Palazzolo should pursue other development plans for the property. Judge Williams Decision, PA at B-9 to B-13.

The Rhode Island Supreme Court upheld the trial court decision. The court's first ground for affirming the trial court decision was that Mr. Palazzolo's claim was not ripe because he failed to apply for "less ambitious development plans." Opinion, PA at A-11. It found that the 1963 and 1983 applications sought to fill the entire 18 acres of wetlands and

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[3] While the amended complaint described the three applications from the 1960's as well as the 1985 application, it did not specifically mention or describe the 1983 application. JA at 44. Allegations regarding the applications from the 1960's were later dismissed. Order of the Superior Court in No. 88-1097, March 25, 1996. The essence of the takings claim, therefore, is the denial of the 1985 permit application.

[4] This discussion was predicated upon the construction of homes and the resulting nitrates that leach from residential septic systems. PA at B-10 to B-11. The inquiry that is the subject of *this* takings inquiry, of course, is an 11.4 acre fill for a beach club that would require no septic systems. JA at 33, Judge Israel Decision.

(mistakenly) that the beach club applications sought to "fill all of the wetlands except for a fifty-foot strip."[5] *Id.* The court concluded that Mr. Palazzolo should have filed another application to fill fewer wetlands acres or to utilize just the upland area of the property. *Id*.

The court also provided two other alternative bases for affirming the trial court decision.[6] It held because Mr. Palazzolo acquired the property in 1978 by virtue of the dissolution of Shore Gardens, Opinion, PA at A-14-15, he had acquired the property *after* the adoption of the regulations restricting the filling of wetlands and thus "had no reasonable investment-backed expectations." Opinion, PA at A-17. Put

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[5] In stating that Mr. Palazzolo's 1985 application "sought permission to fill all of the wetlands except for a fifty-foot strip between the fill and the pond," Opinion, PA at A-11, the Rhode Island Supreme Court simply erred. That statement is unsupported by any citation to the record and is contradicted not only by Judge Israel's opinion cited in the text but also by numerous statements of state employees. *See* JA at 21 (CRMC "Biologist's Field Report" referring to the "approx. 12± acres of fill"); JA at 23 (CRMC "Engineer's Field Report" describing the proposed fill as encompassing "11.4 ac±"); Plaintiff's Trial Exhibit 12 at 1 (Division of Fish and Wildlife "Inter-Office Memo" describing the area proposed to be filled as "between 10-15 acres").

[6] The court stated that "[a]lthough our determination that the claim was not ripe is dispositive of the case, we shall briefly discuss the merits of Palazzolo's claim." Opinion, PA at A-12. In addition to ruling on the issue of ripeness, it is critical that this Court reach the other grounds of the lower court's decision; otherwise the judgment below will forever preclude Mr. Palazzolo from proceeding with his regulatory takings claim. *See*, *e.g.*, *DiBattista v. Rhode Island*, 717 A.2d 640, 642 (R.I. 1998) ("The doctrine of res judicata renders a prior judgement by a court of competent jurisdiction in a civil action between the same parties conclusive as to any issues actually litigated in the prior action.").

another way, "the right to fill wetlands was not part of the title he acquired." Opinion, PA at A-15.

The court also found that Mr. Palazzolo "had not been deprived of all beneficial use of his property" because had he developed the upland portion of the land he could have realized some value from the property (approximately $200,000 compared to Palazzolo's estimate of a $3.1 million net value). Opinion, PA at A-12-13. Alternatively, he could have realized "value in the amount of $157,000 as an open-space gift." Opinion, PA at A-13.

This Court granted certiorari on October 10, 2000.

SUMMARY OF ARGUMENT

There is no question that the State of Rhode Island will not permit Mr. Palazzolo to place any fill upon the wetlands on his property. No further administrative process will alter this decision. Because Mr. Palazzolo alleges that he can realize no economically viable use of his property unless he can develop some of the wetlands, his claim for a regulatory taking is ripe. Furthermore, the fact that Mr. Palazzolo acquired the property after the adoption of the regulatory permitting requirement does not mean that he lacks the right to ripen and pursue a claim for a regulatory taking. Finally, just because the State of Rhode Island suggests that it will allow him to develop a single homesite on his property does not mean that an economically viable use remains in the property.

ARGUMENT

I

MR. PALAZZOLO'S REGULATORY TAKINGS CLAIM IS RIPE

The Rhode Island Supreme Court held that Mr. Palazzolo's "claim for [just] compensation was not ripe for review." Opinion, PA at A-11. In so holding, the court failed

to understand that Mr. Palazzolo has satisfied all of this Court's ripeness requirements for regulatory takings claims.

A. Because the Type and Intensity of Development Legally Permitted on Mr. Palazzolo's Property Is Perfectly Clear, This Takings Case Is Ripe for Review

Mr. Palazzolo's 1983 application for a special exception (a form of variance) to CRMC "sought permission to fill the entire eighteen acres of wetlands" owned by him. Opinion, PA at A–11. His most recent application in 1985 was less ambitious: he sought permission "to fill approximately 11.4 acres" in order "to create a private beach club . . . for swimming picnicking, shellfishing and boating without the erection of any structures on the property." JA at 32-33, Judge Israel Decision. CRMC denied Mr. Palazzolo's application. CRMC found that the "proposed project is in conflict with," among other provisions, the following three provisions of the CRMP:

> Section 210.3(C)(1): "The Council's goal is to ***preserve***, and where possible, restore ***coastal wetlands***."
>
> Section 300.2(B)(1): ". . . unless the primary purpose of the alteration is to preserve or enhance the feature as a conservation area or buffer against storms ***filling . . . is prohibited on . . . coastal wetlands*** . . . adjacent to Type 1 and 2 waters."
>
> Section 300.2(B)(2): "***Filling . . . on coastal wetlands is prohibited*** adjacent to Type 1 and 2 waters . . . unless a consequence of an approved mosquito control project."

JA at 27-28, CRMC Decision (emphasis added, omissions in original).

In brief, then, Mr. Palazzolo's application was denied because it sought to fill wetlands for purposes other than

conservation, mosquito control, and shoreline protection, and because the filling of wetlands for other than such purposes is simply prohibited. After all, CRMC's overriding goal is to "preserve, and where possible, restore" wetlands. JA at 28, CRMC Decision. Indeed, in denying Mr. Palazzolo's 1985 application to fill coastal wetlands in order to create a private beach club, CRMC was merely executing its statutory "mandate[] to give environmental concerns primacy over all other considerations." JA at 39, Judge Israel Decision; *accord id.* ("[P]reservation and restoration of ecological systems shall be the *primary* guiding principle upon which environmental alteration of coastal resources will be measured, judged, and regulated." (quoting R.I. Gen. Laws § 46-23-1(a))).

As should be apparent from the unconditional character of these statutory and regulatory mandates, the prohibition against filling coastal wetlands—or even making "alterations" to them—is not dependent on the magnitude of area proposed to be altered. Whether that area is 18.0 acres, 11.4 acres, or 0.1 acres, altering wetlands is flatly prohibited "unless the primary purpose of the alteration is to preserve or enhance the feature as a conservation area or buffer against storms." JA at 28. Indeed, Judge Israel relied on testimony that "[t]he only use for the land which would completely reduce environmental impact . . . would be to leave it in its present state." JA at 34, Judge Israel Decision. In order to pursue all possibilities, Mr. Palazzolo inquired what sort of wetland-altering proposal *would* be granted. Mr. Palazzolo testified without contradiction that "CRMC informed him that ***any*** *proposal* involving the filling of wetlands would be denied." PA at B-5, Judge Williams Decision (emphasis added).

On the other hand, "Grover Fugate, the Director of CRMC, and Steven Clarke, a professional engineer, testified that CRMC would have approved the eastern end of Shore Gardens Road as a home site." *Id.*; *accord* Memorandum in Opposition to Petition for Writ of Certiorari at 4 ("A portion of

the site, a piece of upland, would have been approved by the CRMC as a single home site."); Opinion, PA at A–11 (observing that Mr. Palazzolo could "build at least one single-family home on the existing upland area"). Thus, the uncontradicted evidence was that CRMC *would* continue to deny Mr. Palazzolo permission to alter any of the 18 acres of wetlands, thereby precluding any development of that portion, but *would not* deny him permission to build one single-family home on the small upland portion of his property.

These facts satisfy the Court's ripeness requirements for regulatory takings claims, for "the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 191 (1985). CRMC, the relevant administrative agency here, has arrived at a final, definitive position regarding how it will apply the CRMP to Mr. Palazzolo's coastal property. That position is simply stated: The Plan bars Mr. Palazzolo from altering ***any*** wetlands but does not bar him from building one single-family home on uplands. Thus, we know just how Mr. Palazzolo "will be allowed to develop [his] property." *Id.* at 190. CRMC says it will allow him to develop a single house, but not to develop a private beach club—or any other use of his property that involves alterations to wetlands.

"[T]he type and intensity of development legally permitted" on Mr. Palazzolo's 18-plus acres of land is perfectly clear: one single-family home and nothing more. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986). In these circumstances, Mr. Palazzolo has surely satisfied this Court's "insistence on knowing the nature and extent of permitted development" before it will adjudicate a regulatory takings claim. *Id.* at 351. The "nature" of permitted development is single-family residential, the "extent" is one home confined to the upland portion of Mr. Palazzolo's

property. Accordingly, "[t]he demand for finality is satisfied by [Mr. Palazzolo's] claim . . . there being no question here about how the 'regulations at issue [apply] to the particular land in question.' " *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 739 (1997) (quoting *Williamson County*, 473 U.S. at 191).

B. None of the Reasons Adduced by the Lower Court Detracts from the Conclusion That the Case Is Ripe

Notwithstanding this analysis, the Rhode Island Supreme Court ruled that Mr. Palazzolo's takings claim was not ripe because he did not seek "permission for less ambitious development plans," specifically permission for uses of the property that "would involve filling substantially less wetlands or that would involve development only of the upland portion of the parcel." Opinion, PA at A-11. More generally, the lower court reached what it called the "self-evident conclusion that a landowner who is denied regulatory approval to use his or her property in a particular way must file additional applications seeking permission for less ambitious uses before a takings claim may be sustained." Opinion, PA at A-12 n.6; *accord* Opinion, PA at A-11 (chiding Mr. Palazzolo because he had not "explored development options less grandiose"). The court did not cite any authority for this conclusion, but it apparently drew inspiration from the statement in *MacDonald* that "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." 477 U.S. at 353 n.9, *cited in* Opinion, PA at A-10.

This use of *MacDonald*—to impose a per se requirement that landowners denied permission to use their property in a particular way must *always* file "additional applications" seeking permission for "less ambitious" uses in order to ripen their takings claims, Opinion, PA at A-12 n.6—cannot be squared with this Court's ripeness jurisprudence. As explained

below, when the ripeness doctrine is applied with an eye toward its legitimate end—namely, ensuring a takings claim's "fitness for review"—it is apparent that there is no per se "additional applications" requirement in regulatory takings procedure.[7]

1. The "Point" of the Ripeness Doctrine in Takings Cases

Although governmental defendants too often view the ripeness doctrine merely as an artful device to stave off troublesome takings claims, it does have a nobler purpose. The doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Suitum*, 520 U.S. at 743 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967)). A disagreement is abstract (and adjudication therefore premature) when "further factual development would 'significantly advance our ability to deal with the legal issues presented' and would 'aid us in their resolution.' " *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726, 737 (1998) (quoting *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 82 (1978)). By contrast, when the issue "will not be clarified by further factual development" outside

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[7] In addition to the fact that Mr. Palazzolo did not seek permission for "less ambitious" plans, the Court below based its ripeness holding on one other "fact," namely, that "although Palazzolo claimed that his property was taken when he was *denied permission to develop a seventy-four-lot subdivision*, he never applied for permission to develop such a subdivision." Opinion, PA at A–11 (emphasis added). The court concluded that because Mr. Palazzolo "has not applied for permission to develop a seventy-four-lot subdivision, he has not received a 'final decision regarding the application of the regulations to the property at issue.'" Opinion, PA at A–11 (quoting *Williamson County*, 473 U.S. at 186). This conclusion does not follow. The denial that precipitated this case was for a beach club; the denial is based on the fact that no use is allowed on any of the wetlands.

the courtroom, *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985), then the issue "is fit for judicial resolution," and adjudication is not premature, *Suitum*, 520 U.S. at 743 (quoting *Abbott Laboratories*, 387 U.S. at 153).

How do these principles apply in takings cases? In *MacDonald*, the Court reiterated that to establish a regulatory taking, a property owner must show that "the regulation 'goes too far.'" 477 U.S. at 348 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). As *MacDonald* explained, however, "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *Id.* In other words, where "the inquiry asks if a regulation has 'gone too far,' . . . no answer is possible until a court knows *what use, if any, may be made of the affected property*." *Id.* at 350 (emphasis added). It is only with this knowledge that the court is able to measure "the effect the [application of the] regulations had on the value of [the landowner's] property and investment-backed profit expectation," two factors that contribute "in significant part" to resolving the ultimate question of takings liability. *Id.* at 349 (quoting *Williamson County*, 473 U.S. at 200). To return to general principles, once the court knows what uses may or may not be made of the property, the takings issue "will not be clarified by further factual development" outside the courtroom. *Thomas*, 473 U.S. at 581.

2. The Pointlessness of an "Additional Applications" Requirement in Many Cases

The Rhode Island court's "additional applications" requirement is inconsistent with these principles. In some cases, no doubt, an additional application will be necessary to provide the court with the information it needs to determine whether the regulation has effected a taking. In *MacDonald* itself, for example, the property owner had "submitted one subdivision proposal and ha[d] received the [agency's] response thereto." 477 U.S. at 351. This Court, however, accepted the lower court's assertion that "the refusal of the [agency] to

permit the intensive development desired by the landowner"—159 residential units—"does not preclude less intensive, but still valuable development." *Id.* at 352 n.8. In other words, because there was "the possibility that some development will be permitted," *id.* at 352, this Court simply did not know on the existing record what uses could be made of the property, making it impossible to determine whether the property had been taken, *see id.* at 352-53. An additional application by the property owner was therefore necessary to establish whether the "less intensive, but still valuable development" that was available in theory was also available in fact.

In many other cases, however, additional applications will be pointless and therefore not required. *Cf. id.* at 352 n.8 (strongly rejecting the notion that a court would require a property owner "to file further 'useless' applications to state a taking claim"). This is so for two reasons.

First, it may be pointless in a particular case because the agency's response to any additional application is already known with reasonable certainty. As the Eleventh Circuit put it, where "there is no uncertainty regarding the level of development that would be permitted," a "reapplication requirement serves no purpose." *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1576 (11th Cir. 1989).

This analysis helps to clarify *MacDonald's* statement that "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." 477 U.S. at 353 n.9. Although that statement is doubtless true, it is also true that rejection of "exceedingly grandiose development plans" does not logically imply that "less ambitious plans" will be accepted. The common thread here is that rejection of one plan does not *logically* (i.e., necessarily) imply anything about what treatment the second plan will receive, regardless of its relative size or

scale. The implications to be drawn from rejection of the first plan depend entirely on the particular facts of the case. Given the agency's concerns with things such as the "level of [police] protection capable of being afforded to the proposed site," *id.* at 343, it may have been reasonable to infer in *MacDonald* that the agency would be amenable to a 100-unit subdivision notwithstanding its rejection of a 159-unit subdivision.

Second, it may be pointless in a particular case to file an additional application because the agency's response to any such application would be legally irrelevant. As described above, this Court in *MacDonald* concluded that despite the agency's denial of a particular plan for development of 159 residential units, there was "the possibility that some development will be permitted." 477 U.S. at 352. But in identifying the existence of this possibility, the Court was careful also to identify its legal relevance, pointing out that the property owner "does not contend that only improvements along the lines of its 159-home subdivision plan would avert a regulatory taking." *Id.* at 352 n.8. As the Texas Supreme Court has observed, *MacDonald* thus implied that the takings claim would not have been dismissed for lack of ripeness "if the applicant's complaint had been that the only way to avert a regulatory taking was for the county to approve the subdivision proposal." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999). Accordingly, "[t]he ripeness doctrine does not require a property owner . . . to seek permits for development that the property owner does not deem economically viable." *Id.*

This conclusion accords with the above-described purposes of the ripeness doctrine. Consider a scenario in which the property owner in *MacDonald* had indeed alleged that "only improvements along the lines of its 159-home subdivision plan would avert a regulatory taking." In so alleging, the owner would essentially be conceding that the agency might approve a less intensive plan but arguing that no such plan would leave

him with economically viable use of his property or satisfy his reasonable investment-backed profit expectations. As should be apparent, it simply *does not matter* to the resolution of this legal issue precisely what size plan the agency would approve—or even whether the agency would in fact approve a less intensive plan at all. In other words, knowing whether the agency would approve a subdivision plan for 100 homes (or 50 or 10 or 5) would assuredly not "significantly advance [a court's] ability to deal with the legal issues presented." *Ohio Forestry Association*, 523 U.S. at 737.

Of course, it might turn out that the property owner's allegations regarding economic viability and profit expectations are simply wrong: the agency might show, for example, that a 100-home plan would be both economically viable and consistent with the owner's profit expectations. This showing, however, would turn on evidence obtained from appraisers and economists and the like, not on evidence about what the agency would or would not have done in response to "additional applications." If the agency were to make the hypothesized showing, the takings claim should be dismissed. But crucially, this dismissal would be *on the merits*, not for lack ripeness. Accordingly, the *ripeness* of a takings claim should not turn on the accuracy of the property owner's allegations about economic viability or profit expectation. After all, the ripeness analysis concerns "fitness for review," *Suitum*, 520 U.S. at 742; it should not be the review itself.[8]

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[8] The *Mayhew* case adhered to the paradigm described in the text. Although the Texas Supreme Court found the case to be ripe without the filing of additional applications for less ambitious uses because 3,600 homes was "the minimum number of units the Mayhews believed [i.e., alleged] necessary to make an economically viable use of their land," 964 S.W.2d at 931, the court also found, *on the merits*, that the city's failure to approve the 3,600-unit planned development did not deprive the property of economically viable use, *see id.* at (continued...)

Here, the Rhode Island Supreme Court criticized Mr. Palazzolo for not having "sought permission for any other use of the property that would involve filling substantially less wetlands or that would involve development only of the upland portion of the parcel." Putting aside the fact that Mr. Palazzolo's 1985 application sought to fill just 11.4 acres where his 1983 application had sought to fill 18.0 acres, *see supra*, at 9 and notes 5, 6, any additional applications would have been pointless. As explained above, it is undisputed on the record that "***any*** proposal involving the filling of wetlands would be denied" by CRMC. PA at B-5, Judge Williams Decision (emphasis added). As for seeking permission to develop only the upland portion of the parcel, CRMC asserts that it *would not* have denied permission to build one single-family home. Simply put, the Rhode Island Supreme Court surely did know "what use, if any, may be made of the affected property." *MacDonald*, 477 U.S. at 350.

II

THE EXPECTATIONS AND RIGHTS TO MAKE ECONOMICALLY VIABLE USE OF PROPERTY DO NOT DISAPPEAR MERELY BECAUSE TITLE HAS PASSED TO A NEW OWNER

The rights that inhere in the ownership of property are undeniably affected by regulation. But do those rights disappear, or become putatively owned by the government, merely because the ownership of regulated land is transferred

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[8] (...continued)
937. Similarly, although the Eleventh Circuit in *Greenbriar* found the property owner's claim to be ripe without the filing of additional applications for less ambitious uses because "there is no uncertainty regarding the level of development to be permitted," 881 F.2d at 1576, the court also found, *on the merits*, that the Constitution did not actually require the city to permit this level of development, *see id.* at 1577-80.

between owners? If not, who has the right to sue when the application of the regulation allegedly effects a taking? The new owner who acquired the property who actually or constructively knew of the regulatory scheme? Or the original owner, who, as in this case, may no longer exist and who certainly is not generally considered to have any remaining interest in the property?

The answer to these questions should not be difficult. Assuming that the Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), the prospect that any landowner (either the original or the new owner) can suffer a wipeout of use and value of the property without the prospect of the government paying compensation to *someone* should be unsettling. When that wipeout rises to the level of taking, compensation must be due. And, as will be shown, it must be due to the individual or entity with a remaining interest in the property who, by filing an application for a discretionary land use permit, set in motion the government action that took the property.

The court below found that Mr. Palazzolo could not assert a claim for an as applied regulatory taking because he acquired the property in 1978, well after the date of the adoption of the CRMP regulations. Because he was on "notice" of the regulations the court found his claim fails because (1) he had no investment backed expectations in trying to develop the property, Opinion, PA at A-17, and because (2) the right to fill was not part of the title that he acquired from Shore Gardens. Opinion, PA at A-15. Put bluntly, "all subsequent owners take the land subject to the pre-existing limitations and without the compensation owed to the original affected owner." Opinion, PA at A-16. The reliance of what can be called a "notice rule" theory of property, based upon either the restricted title theory or an investment backed expectations rationale, is inconsistent

with holdings of this Court and belies a misunderstanding of the nature of property.

A. This Court Has Previously Rejected the Notion That Notice of a Preexisting Regulation Allows Government to Take Property Without Compensation

This Court has previously considered and rejected the notion that the purchase of property upon "notice" of a pre-existing regulation somehow gives the state carte blanche to effect an uncompensated taking in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). In that case the California Coastal Commission was established by the California Coastal Act of 1972. Pursuant to the Act, "stringent regulation of development along the California coast had been in place at least since 1976," and in particular, a deed restriction granting the public an easement for lateral beach access "had been imposed since 1979 on all 43 shoreline new development projects in [the vicinity of the Nollan property.]" *Id.* at 859 (Brennan, J., dissenting). The Nollans purchased their property after this time and became subject to the Commission's forced dedication requirement. This Court found that the restriction violated the Takings Clause because it did not "substantially advance[] legitimate state interests." *Id*. at 834.

But, in dissent, Justice Brennan challenged this Court's holding on, among other grounds, the fact that the Nollans were "on notice that new developments would be approved only if provisions were made for lateral beach access." *Id*. at 860. With such notice, the Nollans "could have no reasonable expectation of . . . approval of their permit application without any deed restriction ensuring public access to the ocean." *Id*. This Court disagreed, stating:

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the

> Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Id. at 833 n.2. Just as the Nollans were able to proceed with a takings claim arising out of the application of regulations and policies in place at the time they purchased their property, so should Mr. Palazzolo be able to pursue his takings claim that arises out of the application of regulations that were applied after he acquired the land from Shore Gardens.

B. If the Promise of the Takings Clause Is to Retain Meaning, Then a State Cannot Acquire Substantial Interests in Real Property Without Cost

The *Nollan* understanding of the effect of preexisting regulations on subsequent owners is necessary in order to avoid the disappearance of valuable interests in property. As shown by the many developed properties surrounding Winnapaug Pond, it is plain that there at one time existed the reasonable expectation and right to fill privately owned wetlands and place homes upon that fill. Certainly that right existed in 1959 when Shore Gardens acquired the property and it is plain from the pattern of neighboring development that Shore Gardens had every expectation and right to develop its property. Furthermore, Shore Gardens could have easily severed its development rights on the property and transferred them, for valuable consideration, to a third party, retaining a fee interest in the underlying land. (In fact, that is exactly what the state seems to be admitting when it valued the property at $157,000 for an open-space gift.) But since 1986, it has been obvious to Mr. Palazzolo that it is impossible to exercise those development rights: fill, homes, and beach clubs can no longer be placed on the wetlands surrounding Winnapaug Pond. Exactly what has become of those development rights today?

Shore Gardens is no more. It ceased to exist in 1978 and lacks the legal identity required to assert any takings claim and has not been able to ripen a takings claim since 1978. Clearly, Shore Gardens has no expectations and does not hold the development rights. However, if the opinion of the court below were to be left undisturbed, neither does Mr. Palazzolo. That he was on notice of the regulatory regime defeats his very interest in the property made subject to the regulation. Mr. Palazzolo no longer holds the development rights. Therefore, the inescapable conclusion must be that Rhode Island is now the de facto possessor of the development rights, for which it has paid nothing. If the promise of the Takings Clause is to retain meaning, then the doctrinal anomaly that permits the state to acquire a substantial interest in real property without cost must be questioned. Indeed, such a doctrine is totally inconsistent with the nature and purpose of the Takings Clause.

1. The History and Structure of the Constitution Are Antithetical to a Theory That Government Can Acquire the Right to Use and Develop Property Without Paying Just Compensation

If Rhode Island has been able to acquire the rights to use and develop Mr. Palazzolo's property merely because he acquired his land after regulations had been adopted, that would make the nature of property rights in Rhode Island very ephemeral indeed. It would also be contrary to the notion that property is an individual *right* rather than a benefit bestowed by government. The drafters of the Constitution were profoundly influenced by John Locke who wrote that property, in the fullest understanding of the meaning of that word, is a right inherently possessed by individuals and that individuals only give up certain rights to government in order to better protect their property:

> [Man] seeks out, and is willing to joyn in Society with others who are already united, or have a mind to unite for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property.*

John Locke, *Two Treatises of Government*, The Second Treatise § 123 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967, amended 1970) (emphasis, spelling, and punctuation in original). As many legal scholars have noted, Locke's idea that government is instituted to protect property, rather than the government being the source of property, deeply influenced the Framers, especially James Madison, as they drafted the Constitution. *See*, *e.g.*, Bernard H. Siegan, *Property and Freedom: The Constitution, the Courts, and Land-Use Regulation* 14-19 (1997) (discusses Locke's influence); Dennis J. Coyle, *Property Rights and the Constitution: Shaping Society Through Land Use Regulation* 228-30 (1993) (same); Harry V. Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States?*, 10 U. Puget Sound L. Rev. 351, 378-80 (1987) (same); *see also* Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 41, 314-15 (1996) (discusses Madison's growing concern over usurpation of property by local governments); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 554-55, 578-79 (1972) (discusses precursors to adoption of Lockean view in federal Constitution).

The structure of the originally ratified Constitution was designed to protect property from, among other things, popular agitation for "an abolition of debts, for an equal division of property, or for any other improper or wicked project." The Federalist No. 10, at 49 (James Madison) (Bantam ed., 1982). Later, the Fifth Amendment added an even more explicit protection of private property.

The difficulty posed by the decision below is that all the words about the role of government to protect property would be hollow formalisms if government truly possessed those development rights on Mr. Palazzolo's property which the government has neither purchased nor condemned. The Framers' conception of property would be equally meaningless if the government could acquire those critical rights upon the mere adoption of a regulation followed by a change of ownership of the title.

Such a method for government acquisition of property is inconsistent with the Framers' vision of the relationship between individuals and their government. The Framers contemplated only one way by which government could acquire private property against the will of the owner—through the use of the condemnation power. *See* Stoebuck, *supra*, at 576-77; Siegan, *supra*, at 27.

2. A State Cannot Acquire Private Property by the Simple Expedient of Redefining the Title

The first explanation of the court below for applying the notice rule to Mr. Palazzolo was that the title he acquired was subject to the "pre-existing limitations" of the regulations. Opinion, PA at A-16. It held that "the right to fill wetlands was not part of the title he acquired." Opinion, PA at A-15. In other words the title acquired by Mr. Palazzolo was very different from the title held by the previous owner Shore Gardens.

But, as this Court has previously noted, a state cannot acquire property without paying for it by the simple expedient of redefining the title. In *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967), Justice Stewart, concurring, noted that "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." A retroactive assertion that property did not exist in the first place is no different from the court

below holding that the development rights in Palazzolo's property vanished (or were divested to the state government) upon the mere acquisition of the property by Mr. Palazzolo.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1014, this Court again returned to the idea that "the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." This Court held that the proper focus must be upon the "background principles" of property: "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas*, 505 U.S. at 1029. This implies the existence of stable property interest principles that do not mysteriously change to match every newly adopted regulation every time newly regulated property changes hands.[9]

3. The Acquisition of Property Carries with It the Reasonable Expectation That the Property May Be Put to Economically Viable Use

A second rationale given by the Rhode Island court for its "notice rule" holding was that Mr. Palazzolo lacked "reasonable investment-backed expectations." Opinion, PA at A-17. There

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[9] Professor Eagle suggests that the "notice rule" is in essence a de facto alteration of a critical element to the title to real property from fee simple title into a personal right. *See* Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law,"* 42 N.Y.L. Sch. L. Rev. 345 (1998). With the notice rule, Professor Eagle concludes, a court

> converts an important component of the fee simple—the right to use one's land—into a personal right that has to be exercised during life or else vanishes.

Id. at 368.

is no natural contradiction between a doctrine that incorporates investment-backed expectations and a legal system that recognizes that the acquirers of regulated property themselves have reasonable investment-backed expectations in being able to ripen an as applied regulatory takings claim. If the ability to own and use property is a fundamental right, then property must be more than a mere expectation that can be altered with the combination of the passage of new regulations and the transfer of property. In a nutshell, the court below misunderstood the relationship between expectations and the meaning of what property *is*. The court implicitly defined the extent of property rights by expectations; because expectations can be readily changed, so can property. But property is not such an evanescent concept.

The concept of "investment-backed expectations" was first articulated by this Court in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 124 (1978), where it was noted that an analysis of distinct investment backed expectations is *one* factor that a court may look to in determining whether there has been a regulatory taking. This Court, at 438 U.S. at 128, credited the derivation of this test to Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1229-34 (1967). But Professor Michelman cautions that expectations are not the exclusive way of defining property for he later said that there

> seems to be little historical or philosophical basis for a conclusion that constitutional property rights are exclusively reliance-based or expectation-based, that they are purely derivative and in no way direct, and that what counts as constitutionally protected property can at any moment be fully told by deciding what entitlements can from time to time be inferred from official standing law.

Frank I. Michelman, *Property as a Constitutional Right*, 38 Wash. & Lee L. Rev. 1097, 1103 (1981). Michelman finds unsatisfactory the result of a pure expectations theory that, when combined with a denial of compensation to riparian owners, would force those riparian owners to discount the value of their property. *Id.* at 1106. Instead, Michelman posits there "must be some kind of direct right of property under the Constitution" and cites *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), as a paradigmatic example where the rights of riparian owners were protected *despite* expectations. *Id*.

Similarly, Professor Tribe has written that "expectations" are not a mere product of state action:

> To the degree that private property is to be respected in the face of republican and positivist visions, it becomes necessary to resist even an explicit government proclamation that all property acquired in the jurisdiction is held subject to government's limitless power to do with it what government wishes. Indeed, government must be denied the power to give binding force to so sweeping an announcement, whether explicit or implicit, if we are to give content to the just compensation clause as a real constraint on federal power and, through the fourteenth amendment, on state and local power. But this shows that the expectations protected by the clause must have their source outside positive law. Grounded in custom or necessity, these expectations achieve protected status not because the state has deigned to accord them protection, but because constitutional norms entitle them to protection.

Laurence H. Tribe, *American Constitutional Law* 608 (2d ed. 1988).[10] Thus, while expectations may be one of several factors that a court may consider in determining whether there has been a compensable taking, nothing this Court has said, and nothing in a legitimate theory of property, supports the notion that mere "notice" of a regulatory scheme can defeat a legitimate claim for a regulatory taking.

It must also be recognized that the theory of the lower court that Mr. Palazzolo's notice of the regulation means that "the right to fill wetlands was not part of the title he acquired," Opinion, PA at A-15, is inconsistent with this Court's categorical takings jurisprudence. In *Lucas* this Court noted that

> when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

505 U.S. at 1019. This form of a taking occurs without regard of the expectations of the owner. As the Federal Circuit recently found, "when there is . . . a regulatory taking that constitutes a total wipeout, investment backed expectations play no role." *Palm Beach Isles Associates v. United States*, No. 99-5030, 2000 U.S. App. Lexis 27828 at *23 (Fed. Cir. 2000).

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[10] This reasoning was followed in *Phillip Morris, Inc. v. Reilly*, 113 F. Supp. 2d 129, 145 (D. Mass. 2000). In that case the court rejected the notion that the State of Massachusetts could take plaintiffs' trade secrets because those trade secrets were the product of the state. Citing Tribe, the court rejected that syllogism:

> This argument rests on the positivist notion that since, in a broad sense, all property rights emanate from the State, the State is free to take them away whenever it determines to do so. That proposition must be rejected.

C. Other Courts Have Followed the Logic of *Nollan* and Have Rejected the Notice Rule

Other courts have rejected the notice rule. It has been articulated by the lower courts in two contexts: first, when new owners challenge the application of the regulations and, second, when new owners seek just compensation for the application of the regulations.

That a subsequent owner can challenge a preexisting land-use regulation, even one of long standing, was the holding of the Massachusetts Supreme Court in *Barney & Carey Co. v. Town of Milton*, 87 N.E.2d 9 (Mass. 1949). There the court held that the mere passage of time does not validate an otherwise unlawful regulation:

> The existence of a zoning by-law, which purports to apply to one's land but which in fact cannot be lawfully applied, constitutes a direct invasion of the rights of the owner, and it has been said that mere acquiescence on the part of the owner for whatever period of time does not legalize a usurpation of power which violates rights protected by constitutional provisions.

87 N.E.2d at 14. Likewise, the Minnesota Supreme Court held:

> There is no logical reason why one who purchases with notice of such an ordinance but has sufficient vision and initiative to believe that the property is illegally zoned should not have the same standing he would have enjoyed had he been the owner at the time the ordinance was adopted.

Filister v. City of Minneapolis, 133 N.W.2d 500, 504 (Minn. 1964), *cert. denied*, 382 U.S. 14 (1965). Similarly, the Illinois Supreme Court wrote:

> Counsel for appellants argue that as appellee purchased this property after the passage of the

> zoning ordinance he should not now be heard to complain that that ordinance is invalid. We know of no rule of law that creates an estoppel against attack by such purchaser on the validity of a zoning ordinance unless there be in his acts or the acts of his grantor that which of themselves would estop him.

Forbes v. Hubbard, 180 N.E. 767, 771 (Ill. 1932). *See also Cottonwood Farms v. Board of County Commissioners of the County of Jefferson*, 763 P.2d 551, 555 (Colo. 1988) ("majority of courts have held that the fact of prior purchase with knowledge of applicable zoning regulations does not preclude a property owner from challenging the validity of the regulations").

Just as courts have long held that new owners of regulated property can challenge the application of the regulations, other courts have found that subsequent owners can seek just compenation. *See*, *e.g.*, *Karam v. New Jersey, Department of Environmental Protection*, 705 A.2d 1221 (N.J. Super. 1998), *aff'd by adopting appellate opinion*, 723 A.2d 943 (N.J. 1999) (new owner steps into the shoes of the original owner); *Carson Harbor Village, Ltd. v. City of Carson*, 37 F.3d 468 (9th Cir. 1994) (an as applied takings challenge can be brought by a purchaser of regulated property); *Vatalaro v. Department of Environmental Regulation*, 601 So. 2d 1223, 1229 (Fla. Dist. Ct. App.), *reh'g denied*, 613 So. 2d 3 (Fla. 1992) (even though plaintiff acquired property after a regulatory scheme was adopted, she could still pursue an as applied takings claim because take did not occur until permits denied); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999) (a landowner's takings claim proceeded despite the fact that land was purchased with knowledge of permitting requirements).

D. If the Government Is Not to Obtain an Unjust Windfall at the Expense of Property Owners, a Subsequent Owner of Regulated Property Must Be Able to Pursue a Regulatory Takings Claim

Finally, there are pragmatic reasons for eschewing the notice rule: to avoid government windfalls created by placing unjust burdens on property owners. By regulating the development rights on Mr. Palazzolo's wetlands into total inutility, and by preventing Mr. Palazzolo from even seeking inverse condemnation damages because he acquired the land after the regulatory scheme was adopted, the state has achieved the practical effect of acquiring the development rights at no cost. This windfall to the government is contrary the principle underlying the Just Compensation Clause that the owner will be fairly and fully compensated when government takes private property. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893) (compensation must be "full and perfect equivalent for the property taken").

The rule that forbids a subsequent owner from pursuing a regulatory takings claim based upon the application of a preexisting rule imposes unjust burdens on property owners. As noted in Section I, this Court has made it quite plain that a landowner is barred from bringing an as applied takings claim until the claim is fully ripe. The mere adoption of a discretionary permit requirement does not, by itself, constitute a taking. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 127 (1985). Landowners, instead, must pursue the application process to its logical end. *See id.* The time and resources necessary to ripen a regulatory takings claim can be considerable and beyond the reach of many landowners of ordinary means. For that reason, a rule that would force landowners to file development applications and, if necessary, sue for a regulatory takings, *prior* to selling the property, would effectively deny just compensation to many individuals. In fact,

if the notice rule were to prevail, claims like Mr. Palazzolo's would expire before they ever became ripe.

Moreover, such a rule imposes particularly unjust burdens in the common circumstance where land is transferred through means other than a sale—such as through foreclosure (as was the case in *Williamson County*), devise, or, as here, the dissolution of a corporation. In those situations, the person or entity owning the property at the time a regulation is adopted may never have an opportunity to ripen a takings claim before the land is transferred to a third party.

It might be suggested that the notice rule is not unfair when both parties know of the difficulties that the regulations might impose and the buyer obtains the property at a "discount" from the seller. If the buyer were allowed to prevail on a regulatory takings claim based on the existing regulation, the theory goes, the purchaser would obtain a "windfall." Or, as the court below put it, this "could lead to pernicious 'takings claims.' " Opinion, PA at A-16. But there is no "windfall" when buyers and sellers fairly assess the risk of a regulatory taking and decide to allocate that risk in the price. Put another way, if the parties know that the subsequent owner can pursue a regulatory takings claim, the buyer will pay more. But if the "notice rule" were adhered to, then the taking of the development rights would be forever uncompensated. The government would be the entity obtaining a windfall.

Why the government should obtain a windfall just because the property's original owner did or could not bring a ripened takings claim has never been explained. Why should it matter that the purchaser has acquired property at a certain discount? The new owner buys at a discount because a buyer assumes certain expenses, risks, and transaction costs in pursuing the permit process and potential takings claim. The Takings Clause is not concerned with the allocation of risk between the original owner and the subsequent purchaser, but with whether the

government will have to pay any compensation to anyone whose property it has taken. As the Minnesota Supreme Court put it in responding to the assertion that a purchaser of regulated property might obtain a windfall:

> Nor do we believe the amount of the consideration is entitled to any weight. There should not be one rule for a purchaser who drives a hard bargain and a different rule for one who pays a more substantial price.

Filister v. City of Minneapolis, 133 N.W.3d at 504.

If new owners cannot seek just compensation when pre-existing regulations are applied, then the original owners will be unable to sell their property, except at a great discount. The only alternative for existing owners of newly regulated property, in order to recoup some of their value, would be to rush to development. Permits in one hand, bulldozers in the other, landowners would have to attempt to develop property whenever potentially confiscatory regulations are adopted. They would have to do this before they sell or otherwise dispose of the property; and certainly before they shed this mortal coil. Otherwise, death, would constitute the ultimate statute of limitations. Furthermore, land encumbered by confiscatory regulations is difficult enough to sell. If purchasers of property had no hope of challenging the application of the regulations, then such property will be all that more difficult to sell. The adverse effect of the notice rule on the alienability of property will become an increasing problem in the years ahead as property becomes less and less valuable with each new regulation and new owner. *See*, *e.g.*, *Lopes v. City of Peabody*, 629 N.E.2d 1312, 1315 (Mass. 1994) (such a rule would affect "free transferability of real estate," "tend to press owners to bring actions . . . of doubtful validity before selling," and result in a "crazy-quilt" pattern of enforceability).

If this Court rejects the notice rule, buyers will be able to ripen and pursue regulatory takings claims. The discount on the purchase price will be substantially less, reflecting only the transaction costs of permitting and potential litigation. The seller will receive something closer to the true value for the property, the buyer will receive fair compensation if the lot is actually taken, and the government will not wind up holding development rights to all regulated property that the original owners (those at the time a regulation is adopted) were not able to exercise before divesting the property.

In short, a legal regime in which the buyer of regulated property can ripen and pursue a regulatory taking claim is the only regime that will fully protect both buyers and sellers of property from unjust burdens while avoiding an unjust windfall to the government.

III

PROPERTY DOES NOT HAVE ECONOMICALLY VIABLE USE JUST BECAUSE IT HAS A NONZERO VALUE

The State of Rhode Island refused to give Mr. Palazzolo a permit to develop his property because his plans did not serve "'a compelling public purpose providing benefits to the public as a whole as opposed to individual or private interests.'" JA at 27, CRMP, Sect. 130(A)(1). By retaining the property in its natural state, the state has obtained the use of Mr. Palazzolo's land for "refuge and feeding areas for larval and juvenile finfish and shellfish and for migratory waterfowl and wading birds," "access of [f]auna to cover areas," facilitates "the exchange of nutrient/waste products," and allows "sediment trapping," "flood storage," and "nutrient retention." JA at 27, CRMC Decision. It is undisputed that CRMC was not going to give Mr. Palazzolo permission to fill a single acre of wetland for his own economic use. *See* Discussion, Page 12; JA at 73-74, Testimony of Grover Fugate, JA at 94, Testimony of David S.

Reis. Clearly, the state is using Mr. Palazzolo's property for the public purpose of providing benefits to the public as a whole. Yet the court below held out the possibility that Mr. Palazzolo might develop a single homesite with an alleged value of $200,000, or obtain $157,500 for it as an open-space gift, and held Mr. Palazzolo "had not been deprived of all beneficial use of his property." Opinion, PA at A-12-13. Mr. Palazzolo, it may be recalled, alleged that the value of his property was $3,150,000 at the time it was taken. Opinion, PA at A-13.

The third question presented to this Court is "whether the remaining permissible uses of regulated property are *economically viable* merely because the property retains a value greater than zero." In this case, the court below was too quick to dismiss the takings claim merely because there may have been some nominal remaining value. First, the holdings of this Court in *Agins* and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, cannot be avoided by the simple expedient of leaving a landowner with a few crumbs of value, especially when the state has turned valuable private property into a de facto nature reserve. Second, the tremendous disparity between the fair market value of the property in its preregulated state, and its nominal value after the permit denials, deprives Mr. Palazzolo of any reasonable return on the property and therefore denies him economically viable use. Third, even assuming that some use remains, albeit a nominal use, of a portion of the property, the wipeout of the great bulk of the property should be subject to the same rule as a physical invasion of that same property. Finally, under the ad hoc three part analysis of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, Mr. Palazzolo has stated a credible claim that he is entitled to an award of takings damages.

A. *Agins* and *Lucas* Mandate That a Taking Should Be Found When There Is a Denial of Economically Viable Use and Land Must Be Retained in Its Natural State

Just because the state finds that there is some small value remaining in the property does not obviate the possibility that a taking has occurred, especially when that small value does not overcome the clear implication that Mr. Palazzolo has been denied the economically viable use of his property. This Court wrote in *Lucas*

> that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

505 U.S. at 1018.

In this case, there is no question of "heightened risk." The State of Rhode Island *is* most assuredly pressing 18 acres of Mr. Palazzolo's property into public service. Its regulations expressly require that property of this nature be put to a "compelling public purpose." There can also be little question that at the time Mr. Palazzolo is held to have acquired the property, in 1978, 18 acres of wetlands on the Rhode Island coast was valuable investment property. But the court below found that because of the putative value of a single home on a small upland portion of Mr. Palazzolo's property, he did not fall under the umbrella of the Takings Clause. Opinion, PA at A-13. But it is not that simple. Mr. Palazzolo alleged that the value of his property was $3,150,000. The state suggests that he could have possibly built a single home worth $200,000 or that the land was worth $157,500 as an open space gift. *Id*. But the fact that the state has left a few crumbs on the table, in the

amount of 5 to 6.3% of the alleged value of the property, does not mean that Mr. Palazzolo has been left anything close to the economically viable use of his property.

"Economically viable use" must mean something more than a value greater than zero. This Court articulated the two part takings test in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (citations omitted), where it held:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land . . . .

This Court never reached the question of whether there had been a taking in *Agins* because the plaintiff there had never pursued the full extent of the permit process. But there is no suggestion in that opinion that a denial of economically viable use would be found only in the extraordinary circumstance that the property was left with absolutely no use or value.

There are two significant instances where this Court has found the possibility of a taking because of a denial of economically viable use. The first is *Lucas*. That was a case with extremely unusual facts because this Court was presented with a situation where the lower courts had concluded that *all* use and value of the property had been destroyed. Indeed, some members expressed skepticism on the appropriateness of accepting such a characterization from the South Carolina courts. *See* 505 U.S. at 1033-34 (Kennedy, J., concurring).

Lucas was a relatively easy case to find a loss of economically viable use because of the lower court determination of a total wipeout. But that opinion also made it plain that a total wipeout was not the sine qua non of a denial of economically viable use. In response to a concern raised by Justice Stevens in dissent, the Court noted that acceptance of a

regulatory taking in *Lucas* did not mean that a "landowner whose property is diminished in value 95% recovers nothing." 505 U.S. at 1019 n.8. There is certainly no reason why a denial of economically viable use must be confined only to those circumstances where an owner has lost everything. A business venture that held out the prospect of leaving the owner, as here, with 6.3% of the value of its holdings would assuredly not be considered "economically viable." While it is not the government's role to guarantee that investors will not lose 93.7% of the current value of their holdings, the government cannot avoid all culpability when, as here, it has decided to divert the investment to another "compelling public purpose" resulting in the 93.7% loss of present value.

In contrast to the total wipeout of *Lucas*, this Court upheld a finding of a regulatory taking in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). In that case, the Ninth Circuit evaluated whether the sale to the state of a conservation easement for some $800,000 *more than the original sales price paid by the landowner* obviated the finding of a taking. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996). It did not. The court rejected the city's argument that "because Del Monte sold the [property] to the State of California for $800,000 more than it paid, economically viable uses for the property must have existed." 95 F.3d at 1432.[11]

In the present case, when the trial court heard testimony on the economic return from converting the entire property into a single home site, it merely heard estimates of the cost of upgrading a road to the homesite and the value of a comparable single homesite. To this figure the state "added value" of $7,000 per acre for 19 acres of wetlands and isolated uplands that Mr. Palazzolo cannot touch. *See* JA at 103-04, Testimony

[11] It is also worth mentioning that the jury found that Del Monte Dunes had been denied "economically viable use." 526 U.S. at 700.

of Thomas S. Andolfo, CRMC's expert appraiser. In other words, the court derived two-thirds of its $200,000 figure by imputing private benefits from the land being pressed into public service. The courts below, however, did not consider at all whether the proffered house would be economically feasible in light of its costs—including the costs of raising the grade of the lot, the installation of a septic system, whether any wetlands would have to be filled in upgrading the road, and the lost opportunity costs of not building on the remaining lots. Nor did the courts below consider whether Mr. Palazzolo would receive a viable return on the four-decade long investment in the property, or whether the residual value was economically significant in light of the $3,150,000 in lost value he has alleged. These are questions that the court below should have, but did not, address in reaching the conclusion of whether Mr. Palazzolo had suffered a denial of economically viable use.

When viewed in light of the these questions it should be plain that the courts below too cavalierly dismissed the possibility that Mr. Palazzolo suffered the type of taking envisioned by this Court in *Agins*. Nor does this Court's economically viable use formulation mean that a taking cannot be found in the present case. Indeed, if it were otherwise, then the leaving-crumbs-on-the-table exception to economically viable use would quickly overwhelm the *Agins* rule.[12]

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[12] Or, as the Court of Federal Claims recently said, a rule that immunizes the government from takings liability because there is some nominal value remaining would be irrational and wrong:

> The notion that the government can take two thirds of your property and not compensate you but must compensate you if it takes 100% has a ring of irrationality, if not unfairness, about it. If the law said that those injured by tortious conduct could only have their estates compensated if they were killed, but not themselves if they could still breathe, no matter how seriously injured, we would certainly think it odd, if not

(continued...)

B. Mr. Palazzolo Has Been Denied a Reasonable Return on His Property and Has Been Denied Economically Viable Use of His Property

To determine whether a landowner has been denied economically viable use a court might begin by asking whether the regulations are denying the landowner a reasonable return on the property. This would be consistent with the emphasis in *Penn Central* on the "reasonable return" allowed by the Landmarks Law and this Court's admonition that if economic circumstances changed, the result could be the deprivation of economically viable use. 438 U.S. at 138 n.36.

In this case, where the existence of the taking is disputed by virtue of a pittance remainder in value (the $200,000 homesite or $157,000 open space gift), it is appropriate to first determine whether that remainder constitutes a reasonable return on Mr. Palazzolo's property—both in terms of its value and use. For a starting point, a court can compare the remaining value of Mr. Palazzolo's property—$157,000 as a gift, or $200,000 as a homesite—with the reasonably foreseeable uses of his property when he acquired it. Those uses, of course, would have been consistent with 74 subdivided lots in a popular beach resort area with "moderate-to-heavy density seasonal development," JA at 21, CRMC Biologist's Report. If one were to compare the fair market value of developable property when he acquired it in 1978, to the alleged remainder value of $200,000—then it could be estimated whether Mr. Palazzolo has received anything close to a reasonable return.

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[12] (...continued)

> barbaric. Yet in takings trials, we have the government trying to prove that the patient has a few breaths left, while the plaintiffs seek to prove, often at great expense, that the patient is dead. This all-or-nothing approach seems to ignore the point of the Takings Clause.

Florida Rock Industries, Inc. v. United States, 45 Fed. Cl. 21, 23-24 (1999).

Unfortunately, in its haste to dispose of Mr. Palazzolo's claims, the court below never reached the issue of what the fair market value of Mr. Palazzolo's property actually was in 1978 when he acquired the property. Nor did it make a conclusive determination of what the fair market value was in 1986 when the last permit application was denied. Nevertheless, what the court should have done was to estimate that fair market value and consider whether Mr. Palazzolo had realized anything but a substantial *negative* return on the original fair market value of the property. Concomitantly, the court should have compared the original uses of the property (potential subdivision or beach club development) and compared those uses to what Mr. Palazzolo was left with (single potential homesite and dedication of 18 acres to a nature preserve). As this Court noted in *Lucas*, an important element of property is profit: " 'For what is the land but the profits thereof[?]' 1 E. Coke, Institutes, ch. 1, § 1 (1st Am. ed. 1812)." *Lucas*, 505 U.S. at 1017. Lord Coke was referring, of course, not to a mere money return but the productive *use* of property.[13] Surely this

> implies that return on investment may be a significant criterion of post-regulation, economically beneficial use, and that a nondevelopment use may be considered not an economically viable use.

William S. Walter, *Appraisal Methods and Regulatory Takings: New Directions for Appraisers, Judges, and Economists*, 73 Appraisal J. 331, 341 (1995). With the development of the relevant facts, the court below should have been able to

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[13] Coke was discussing estates of land at 17th Century common law, in which context a "profit" signified a specific beneficial use of the land, i.e., its employment in "vesture, herbage, trees, [or] mines." 1 E. Coke, Institutes of the Laws of England, ch.1, § 1(4)(g) (1st Am. ed. 1812). An accurate contemporary paraphrase of Coke would therefore be, "for what is the land but the beneficial use thereof?"

determine whether Mr. Palazzolo had been denied a reasonable return on his property in terms of its remaining uses and value.

The advantage to a court in determining whether a claimant has received a reasonable return on a property as a yardstick for determining whether there has been a denial of economically viable use is that it can result in a more objective analysis than can a focus on "expectations." This is especially true when, as here, the analysis of expectations can become mired in allegations of "notice" of the regulations by the claimant. Furthermore, courts have had significant experience in analyzing the fairness of rate of return in the context of both due process and takings analyses. *See*, *e.g.*, *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989). While the review process is by no means simple there is at least substantial judicial experience in such economic review, and an advantage over speculating on subjective expectations. Indeed, there may be little alternative if a proper balance between the need to accommodate economic regulations and the importance of adhering to the purpose of the Takings Clause is to be maintained.

C. The Conversion of a Substantial Portion of Mr. Palazzolo's Property into a Nature Reserve Has the Same Effect as a Physical Invasion

As Justice Brennan explained in his dissent in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981):

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property . . . . From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal

> condemnation or increasing electricity production through a dam project that floods private property.

Id. at 652 (Brennan, J., dissenting), *accord Lucas*, 505 U.S. at 1018.[14]

Traditionally, when government has sought to preserve property as a wildlife refuge it has condemned and paid for the interests that it has taken. There is a long and continuing tradition for government to condemn scenic and related easements. As this Court noted in *Lucas*:

> The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation.

505 U.S. at 1018-19. This Court in *Lucas*, of course, discussed the existence of such servitudes in the context of finding that there is an equivalence between regulations that take away economically viable use of property and physical invasions.

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[14] On another occassion, Justice Brennan considered a distinction between "physical and nonphysical intrusions" to be "outmoded." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 447 (1982) (Brennan, J., dissenting). *See also Bridge Company v. United States*, 105 U.S. 470, 502 (1881) (Field, J., dissenting) ("There are many ways of taking property other than by occupation or appropriation, which are within the constitutional inhibition. If its beneficial use and enjoyment are prevented under the sanction of law, it is taken from him as effectually as though the title were condemned."); *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1572 (Fed. Cir. 1994) ("The fact that the source of any particular taking is a regulation rather than a physical entry should make no difference—the nature of legal interests defining the property affected remains unchanged."), *cert. denied*, 513 U.S. 1109 (1995).

The consideration should be no different in this case, where Mr. Palazzolo has lost the use of his wetlands so that it may be preserved for habitat and scenery.

As with physical invasions, it also should make no difference that only part of Mr. Palazzolo's property, albeit a very substantial part, has been taken. Just as a physical invasion of only a small portion of a property is compensable, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, the functional equivalent (i.e., denial of economically viable use) on a significant portion of the property should also be compensable. *Lucas*, 505 U.S. at 1016 n.7. *See also* John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535, 1557 (1994) (suggesting a test wherein "any identifiable segment of land is a parcel for purposes of regulatory taking analysis if prior to regulation it could have been put to at least one economically viable use, independent of the surrounding land segments"); *Machipongo Land and Coal Company v. Commonwealth of Pennsylvania*, 719 A.2d 19 (Penn. App. 1998) (adopts Fee test). *See also Boise Cascade Corporation v. Board of Forestry*, 935 P.2d 411 (Ore. 1997) (a landowner who was prohibited from logging 56 acres on a 64-acre tract because of a spotted owl nest stated a claim for a regulatory taking); *American Savings and Loan Association v. County of Marin*, 653 F.2d 364 (9th Cir. 1981) (taking claim stated when regulation denies use of portion of parcel).

Indeed, there is ample precedent in support of the doctrine that there can be a regulatory taking of something less than the total parcel of real property. *See*, *e.g.*, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (holding that compensation would be available for a temporary taking), and *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990) (finding that an alleged taking of a reverter on an easement was justiciable under the Tucker Act). Ultimately, a taking of the reverter was found by the Federal Circuit in *Preseault.*

Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996). *See also Hodel v. Irving*, 481 U.S. 704 (1987) (taking of rights of descent and devise); *Babbitt v. Youpee*, 519 U.S. 234 (1997) (same). Finally, in a case of note, the Federal Circuit upheld an award of $60 million, plus interest, for a taking of a coal deposit, despite allegations that the right to farm the surface remained. *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1174 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991).

In short, because the effect to Mr. Palazzolo of sterilizing all use of 18 acres of his property is no different from the effect of physically invading that property, this Court should find that he has stated a claim for a regualtory taking.

D. Under the Balancing Test of *Penn Central*, Mr. Palazzolo Has Stated a Claim for a Regulatory Taking of His Property

Before this Court developed the "economically viable use" test in *Agins* it had formulated what has become known as the three part test of *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 124. This test requires that courts weigh (1) the regulation's economic impact; (2) the regulation's interference with distinct investment-backed expectations; and (3) the character of the government action. *Id.*

It is important to recognize, of course, that this test was formulated against a backdrop of a plaintiff who already had a viable railroad terminal in operation on the property and where the claimant also had several other valuable parcels in the vicinity—parcels that could have received permission to develop in excess of current zoning regulations. While the restriction at issue in *Penn Central* was severe, it was not even close to the overall percentage of impact caused by the restriction here.

Nevertheless, if a court were to analyze Mr. Palazzolo's situation in light of the factors articulated in *Penn Central* it should be clear that he has stated a claim for a regulatory taking.

1. Mr. Palazzolo Has Suffered a Severe Adverse Economic Impact

The regulation's impact on Mr. Palazzolo, as noted above, has been extreme. He alleges that the value of his property, without the regulatory denials, would be $3,150,000. The state suggests it may allow a use of the property it values at $200,000. In other words, Mr. Palazzolo claims to have lost 93.7% of his property's value.[15] Alternatively, the court below could have recognized that the $200,000 represents an inadequate return on investment when compared to the value of the property in 1978. Lastly, Mr. Palazzolo is precluded from using at least 18 acres of his approximately 20 acre parcel, a state of affairs with an obvious negative economic impact. Any way of looking at this, the courts below should have been able to determine that Mr. Palazzolo suffered a massive and severe economic impact.

2. Mr. Palazzolo's Investment Backed Expectations Have Been Severely Curtailed

The court below, as noted, believed that because Mr. Palazzolo had acquired his property in 1978, several years after the imposition of the relevant CRMP regulations, that he had no reasonable investment backed expectations to use his property. But it is not at all clear why an acquirer of real property, especially one who acquires property by operation of law, should be held not to have had the reasonable expectation of acquiring *all* the legal rights of the prior owner.

Furthermore, this Court has held that the mere existence of a permitting requirement does not preclude the economically viable use of the property. *See United States v. Riverside*

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[15] As suggested by this Court in *Lucas*, such a severe diminution in use and value might well constitute, by itself, a regulatory taking. 505 U.S. at 1019 n.8. The Federal Circuit has adopted the doctrine of partial regulatory takings and the Court of Federal Claims has applied it. *See Florida Rock*, 18 F.3d 1560 (establishing rule for circuit).

Bayview Homes, 474 U.S. at 127. The courts below never adequately explored whether it would have been reasonable for a person in Mr. Palazzolo's position to expect that he could develop homes on the property like those found in nearby areas or, if use were denied, to receive just compensation.

Finally, it is unreasonable for the court below to charge Mr. Palazzolo with knowledge that the very real effect of the regulations would be to allow the transfer to the government of substantial interests in his real property at no cost. It is too inconsistent with the purpose of the Takings Clause—to ensure that "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

3. The Character of the Government Action and the Purpose of the Regulations Suggest a Taking Has Occurred

The state denied Mr. Palazzolo's beach club application because the property, in its undeveloped state, currently serves an assortment of public purposes. The beach club would not serve a "compelling public purpose." Although the State of Rhode Island refrained from exercising its condemnation power in this case, the regulations and the reasons given for the permit denial make clear the character of the government action was to obtain Mr. Palazzolo's property for express public purposes. The regulation goes so far as to preclude uses that would benefit "individual or private interests." This was acquisition of private property for public use in all but name.

Because, as Justice Holmes said, government cannot take a "shorter cut than the constitutional way of doing things," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 416, Mr. Palazzolo should not have to bear the entire burden of protecting these wetlands. Thus, under the balancing test of *Penn Central*, Mr. Palazzolo has stated a claim for a regulatory taking.

CONCLUSION

For the reasons stated above, this Court should hold (1) that Mr. Palazzolo's claim for regulatory taking was ripe, (2) that the existence of wetlands permitting regulations in 1978 does not preclude him from pursuing a regulatory taking claim based upon the application of those regulations, and (3) the potential existence of minimal use and value in property does not obviate a regulatory takings claim based upon an alleged denial of economically viable use.

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