RECORD
AND
BRIEFS

Supreme Court, U.S.
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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,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF RHODE ISLAND

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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INTERESTS OF THE AMICUS CURIAE

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as *amicus curiae* in support of the petitioner. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 200,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. NAHB, therefore, is concerned with any judicial decision that calls into question the remedy available to its members under the Fifth Amendment when land use regulators take private property for public use without the payment of just compensation.

NAHB has been before the Court as an *amicus curiae* or as "of counsel" to the landowner in a number of cases involving the rights of landowners to use their property and the remedy to be applied when those rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987)[2], *Lucas v. South Carolina*

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[1]No person or entity other than NAHB made any monetary contribution to the preparation or submission of this brief.

[2]The Court's opinion cited NAHB's brief. 483 U.S. at 840.

Coastal Council, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

SUMMARY OF ARGUMENT

The lower courts greet constitutional property rights cases with hostility.[3] When takings claims are presented to federal judges, their knee-jerk reaction is to cite this Court's ripeness opinions as an easy avenue for dismissal. Between 1990-98, for example, 83% of takings cases with a reported opinion from a U.S. district court were dismissed without ever reaching the merits. During that same time period, property owners who could afford to continue litigation before one of the U.S. Circuit Courts of Appeal saw 64% of their takings claims sacrificed on the ripeness altar. See John Delaney and Duane Desiderio, *Who Will Clean Up The Ripeness Mess? A Call For*

[3]See, e.g., *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994) ("Federal courts are not boards of zoning appeals. This message, oft-repeated, has not penetrated the consciousness of property owners who believe that federal judges are more hospitable to their claims than are state judges. Why they should believe this we haven't a clue; *none has ever prevailed in this circuit*....") (emphasis supplied); *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989) (court perceives its role as "the Grand Mufti of local zoning boards" and dismisses takings case); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988) (takings claim is merely a "garden-variety zoning dispute dressed up in the trappings of constitutional law").

Reform So Takings Plaintiffs Can Enter The Federal Courthouse, 31 THE URB. LAW. 195, 203-204 (1999).[4]

Because federal courts have abdicated their responsibility to decide constitutional property rights cases, the takings clause is unfortunately unique. Except for the rare occasion when this Court agrees to hear a takings case, no other provision in the Bill of Rights depends almost entirely on the state court system to flesh-out its substantive meaning and requirements.

But state courts, following the federal courts' example, routinely sidestep the merits of takings claims as well. Here, for example, the Supreme Court of Rhode Island declined a thorough analysis of Mr. Palazzolo's request for just compensation simply because the wetland regulations at issue pre-dated his acquisition of the subject property. The Rhode Island courts believed that Mr. Palazzolo could not reasonably expect to develop his property because he must have known it would be regulated. But in today's regulatory climate, with hundreds of thousands of federal, state and local statutes and regulations purporting to protect the environment, who doesn't acquire property with the expectation that it will be regulated? Can anyone, from here on in, ever assert a viable regulatory takings

[4]The federal courts' avoidance of takings claims is a common subject of analysis. See also Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91 (1994); Timothy Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1 (1992); Brian Blaesser, *Closing the Federal Courthouse Door on Property Owners*, 2 HOFSTRA PROP. L.J. 73 (1988).

claim? Under the reasoning of the Rhode Island courts, the answer is no.

Additionally, the Rhode Island courts determined that Mr. Palazzolo's takings claim is not ripe because he did not submit enough applications requesting permission to use his land. Mr. Palazzolo (and his corporate predecessor-in-interest) submitted four land use applications. Regulators denied them all, but the Rhode Island courts wanted more before it would deem the case ripe. How many more is anyone's guess.

Too frequently, lower courts rely on the date of acquisition and finality questions presented here as a quick and simple dodge out of the substantive and fact-intensive issues surrounding takings claims. The approach taken by the Rhode Island courts here—and innumerable other federal and state courts—relegates the takings clause "to the status of a poor relation." *Dolan v. City of Tigard,* 512 U.S. 374, 392 (1994). This case begs the Court to restore the takings clause to its rightful, equal place among the other protections in the Bill of Rights. To achieve this restoration, NAHB respectfully urges the Court to rule as follows:

- The date of statutory or regulatory enactment can not preclude the courts from deciding *whether* a land use agency has committed a taking in the first instance. The date of regulatory enactment may be a factor in determining the amount of just compensation due to a property owner, but it should not negate the very existence of a takings claim.
- When a citizen applies to use his property, his takings claim should ripen after (1) regulators have denied one "meaningful" application, and (2) he seeks a single waiver or variance that allows relief from the denial—

unless (3) following such procedures would be futile in terms of receiving the requested relief. Denial of a single land use application does not mean that a taking has in fact occurred. Rather, denial of one application should simply mean that a takings claim is ripe for a court to decide on the merits.

ARGUMENT

I. THE MERE EXISTENCE OF A REGULATION, ABSENT FURTHER REVIEW, SHOULD NOT END THE REQUIRED CONSTITUTIONAL ANALYSIS OF A TAKINGS CLAIM.

In concluding that Mr. Palazzolo suffered no regulatory taking, the court below found that because "there were already regulations in place limiting [the Petitioner's] ability to . . . develop[ ]" his property, he could have no investment-backed expectations and therefore suffered no taking. *Palazzolo v. Rhode Island*, 746 A.2d 707, 717 (R.I. 2000). The court below quoted with favor the Federal Circuit's opinion in *Good v. United States*, with particular emphasis on the finding that, "In view of the regulatory climate that existed when [the landowner] acquired the subject property, [the landowner] could not have had a reasonable expectation that he would obtain approval . . . to develop the land." *Id.* (quoting *Good,* 189 F.3d 1355, 1361-62 (Fed. Cir. 1999)).

Once the regulations in question were adopted, the court below declared, the State of Rhode Island had removed from the title to the property "the right to fill wetlands," thus leaving Mr. Palazzolo with no further right to develop his land. *Palazzolo*, 746 A.2d at 710. The mere enactment of the regulations were enough to extinguish

property rights in the parcel, precluding any possible recovery for a taking.

A. The Rhode Island Supreme Court's Cursory Analysis Effectively Writes Out Of Existence The Concept Of Regulatory Takings.

The seemingly simple proposition laid out by the Rhode Island Supreme Court - if you acquire property under regulatory burden your investment-backed expectations cease to exist - has devastating results. For what parcel of land in the United States today does not fall under the rubric of some regulatory scheme? "Between 1968 and 1978 Congress passed more regulatory statutes than it had in the nation's previous 179 years."[5]

As previously noted, courts are extremely reluctant to resolve the merits of takings claims, and have effectively used the ripeness hurdle to keep cases from their courtrooms. When that evasion won't work, what better way to get the plaintiff out of the courthouse than by telling her, "sorry, your property is regulated, and therefore you have no takings claim."

Courts have already shown such plaintiffs out the courthouse door.[6] Many have followed the "logic" in

[5]Paul Weiland, *Unfunded Environmental Mandates: Causes, Burdens, and Benefits*, 22 HARV. ENVTL. L. REV. 283, 287 (1998).

[6]See *McQueen v. South Carolina*, 530 S.E.2d 628 (S.C. 2000); *City of Virginia Beach v. Bell*, 498 S.E.2d 414, 417 (Va.), *cert. denied*, 525 U.S. 826 (1998); *Kim v. City of New York*, 681 N.E.2d 312, 314-16 (N.Y.), *cert. denied*, 522 U.S. 803 (1997); *Grant v. South Carolina Coastal Council*, 461 S.E.2d 388, 391

Good, where the court concluded that, "In light of the growing consciousness of and sensitivity toward environmental issues, [the landowner] must also have been aware that standards could change to his detriment." *Good,* 189 F.3d at 1363. Some might say this 'test' requires citizens to become regulatory psychics, peering into their crystal balls to divine how their property might be regulated so they might take whatever steps were necessary to protect their distinct, investment-backed expectations. Or, as the Supreme Court of Rhode Island appears to have done to Mr. Palazzolo's land, this 'test' may simply add a new clause to every deed in America reading, "Property subject to uncompensated regulatory seizure at any time – purchase at your own risk."

One legal commentator has described this regulatory nullification of property rights as follows:

> If we accept the premise that enactment of one piece of legislation puts a property owner "on notice" that more restrictive regulations might be enacted in the future as well, we find ourselves faced with a *reductio ad absurdum* – the exsitence of the first regulation will defeat any claims the owner might have regarding the sanctity of the property interest in the future. By merely enacting one regulation (even a relatively non-intrusive one that is clearly a legitimate exercise of the police power), the government opens a path for eventual, incremental taking of the entire property interest without payment of compensation.

(S.C. 1995); *Hunziker v. State*, 519 N.W.2d 367, 371 (Iowa 1994), *cert. denied*, 514 U.S. 1003 (1995).

Lynda Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 114 (1995).

Here, the Supreme Court of Rhode Island even added a novel twist. In noting that this Court recognized the limitations "that background principles of the State's law of property and nuisance already place upon land ownership," *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992), the Court below declared that governmental regulations have exactly the same effect. "[W]here the regulation predated the landowner's acquisition of the property, 'the bundle of rights which [the landowner] acquired upon obtaining title to the property did not include the right to develop the lots without restrictions.'" *Palazzolo,* 746 A.2d at 716 (citation omitted).

The end result is that any owner acquiring property already regulated has no possibility of a takings claim. "Regardless of whether the government physically takes property in the form of an easement or promulgates regulations restricting the property's use, all subsequent owners take the land subject to the pre-existing limitations and without the compensation owed to the original owner." *Id.* at 716-717.

By equating physical and regulatory takings, the *Palazzolo* court failed to note one substantial difference: an owner acquiring property knows the specific parameters of a physical taking and can easily factor its impact into his investment-backed expectations. An owner acquiring property under a regulatory scheme will often not know the parameters of these regulations *until they are actually applied to his property*. While there is surely some element of risk involved in any land purchase, the degree

of uncertainty in any regulatory scheme is vastly more difficult to ascertain than one involving a physical taking.

The vast majority of regulatory takings claims arise in the context of as-applied challenges, because the full impact of a regulation can usually be quantified only when it is applied to a particular parcel. "Even after [the agency] has issued a jurisdictional declaratory statement . . . it remains to be determined whether the permit will be granted . . . [for] no taking occur[s] until [the agency] deni[es the applicant's] permit application." *Vatalaro v. Department of Envtl. Conservation*, 601 So.2d 1223, 1229 (Fla. App. 1992). Indeed the Ninth Circuit has recognized that an owner acquiring property after the adoption of a regulatory scheme may have an as-applied challenge available to address any injury suffered. See *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468 (9th Cir. 1994).

By treating the ability to develop land as a privilege under the exclusive domain of the state, the Supreme Court of Rhode Island appears to have forgotten the words of this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987): "[T]he right to build on one's property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a 'governmental benefit.'"

If the holding of the court below stands, there will be no constitutional relief for property owners stripped of their rights by application of a regulation, no matter how severe the consequences. The Fifth Amendment will apply almost exclusively to physical appropriation of property. Justice Holmes oft-quoted statement, "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393,

415 (1922), will take its place in present day constitutional analysis as simply another great dissent.

B. Investment-Backed Expectations Are Best Utilized In Determining The Amount Of Just Compensation.

As this case and others indicate, courts can tie property owners in knots over the degree to which distinct, investment-backed expectations must be negatively impacted by a regulation in order for a taking to be found at all, much less in order to prove some level of compensation. As Judge Smith of the Federal Court of Claims has described, this debate can often reach absurd heights:

> 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 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 Indus. v. United States, 45 Fed. Cl. 21, 23 – 24 (1999).

This almost surreal legal battle underscores why takings jurisprudence would be better served if distinct,

investment-backed expectations played two roles rather than one: as a simple threshold requirement, where proof of deprivation of economically viable use of property would be enough to show a taking; then as a central component of the debate over compensation, where each side would be free to battle over how much – if anything – should actually be awarded.

Such a two-step analysis makes use of the investment backed expectations concept where it works best – as a tool to assess the amount of just compensation.

Rather than forcing plaintiffs to show the 'death' of all investment-backed expectations to prove governmental *liability* for a takings claim, a plaintiff should be required to show only the existence of distinct, investment-backed expectations and evidence indicating the degree to which they have been frustrated. The government, at this threshold stage, could present evidence challenging the degree of impact, or the validity of the expectations in the first place.

However, instead of battling over percentages of loss and the full impact of the regulation upon the property, here a court would need only ascertain that 1) distinct investment-backed expectations exist, and that 2) they have been frustrated because the property owner has been denied the ability to put his land to economically viable uses.

Should the takings claim also meet the remaining *Penn Central* tests and any other applicable hurdles, only then would the court turn its attention to the actual, compensable amount that is due and owing to the property owner.

Such an analysis would greatly simplify the initial review of a regulatory takings claim. Rather than fight over what is essentially the specific degree of loss up front,

the parties would only reach such a level of detail when all other factors have been addressed.

Of course, this Court would need to set some guidelines as to what 'quantifiable degree' of loss triggers further analysis.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court found that physical appropriation of a tiny fraction of a building for installation of cable television equipment was a taking. While such a specific, stringent standard need not be adopted here, this Court must suggest some reasonable parameters.

In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), this Court found that no taking had occurred, in part, because the plaintiff's "primary expectation concerning the use of the parcel" was not frustrated. *Id.* at 136. Conversely, where a plaintiff's "primary expectations" for his property are indeed frustrated, it is reasonable to expect that his investment-backed expectations have also been frustrated. In the present case, Mr. Palazzolo's inability to develop his property for residential use – his primary expectation – has been frustrated. Utilizing the proposed test, this evidence should be enough to show sufficient impact on investment-backed expectations to pass the initial threshold test for a regulatory takings claim. Detailed analysis of actual loss of compensable value would take place only after a court found all other applicable takings tests fully satisfied.[7]

[7] The difference between deprivation of use leading to a taking, and computation of loss of value for purposes of calculating compensation is one of the issues which has bedeviled other courts, which consistently confuse the two. See e.g, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 780-81 (9th Cir. 2000)("The central confusion centers on the relationship between the 'use' of property and its 'value.' Clearly, the economic value of property provides strong evidence of the availability of "economically beneficial or productive uses" of that property. . . Many cases treat the "use" and "value" interchangeably, or speak only of the effect of a regulation on the property's value.") Cf. *Tahoe Regional Planning Agency*, 520 U.S. 725, 749 ("[T]he relevant issue is the extent to which use or development of the land has been restricted.")(Scalia, J., concurring)

Frustration of primary expectation of use is but one possible factor in a threshold review of investment-backed expectations, but certainly a reasonable one well-grounded in existing precedent. With this Court's guidance, other similar threshold tests focusing on deprivation of use could be established which would further assist courts nationwide in more effectively analyzing investment-backed expectations in the manner proposed here.

Meeting this threshold would not, of course, guarantee recovery. Once a court finds a taking, the parties would engage in a substantially more detailed presentation of evidence indicating the specific degree of loss, taking into account actual valuations, market realities, and the degree of risk involved. Even when a fully-compensable physical taking was found in *Loretto*, the actual loss per building was largely insignificant due to the tiny amount of property involved. Such an outcome is even more likely in the considerably more speculative and uncertain world of land development. But whatever the actual award, the court would focus on investment-backed expectations as a

central issue only after a claim has reached the compensation stage of review.

By clarifying the role of investment-backed expectations during the first stage of a takings claim, this Court will simplify the process of review of a regulatory takings claim and remove the more detailed analysis of loss to the compensation stage where it more properly belongs.

II. ADDITIONAL RE-APPLICATIONS, FOLLOWING SOME UNKNOWN NUMBER OF REGULATORY DENIALS, SHOULD NOT BE REQUIRED TO RIPEN A TAKINGS CLAIM.

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997), was the last time the Court considered the "prudential ripeness principles"[8] for a takings claim. The case at bar presents a question unanswered by *Suitum*: When a landowner's initial application to use property is denied, do the prudential ripeness elements require the submission of additional applications—and an unknown number of denials—before a takings claim becomes fit for judicial review? *See Id.* at 738, n. 12.

The "ripeness mess" traces its genesis to *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473

[8]520 U.S. at 733. The Seventh Circuit understands *Suitum* as "distinguishing *Williamson*'s prudential ripeness requirements from ripeness requirements drawn from Article III limitations on judicial power." *Forseth v. Village of Sussex,* 199 F.3d 363, 368 n. 7 (7th Cir. 2000). See also *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1012-1013 (1992) (takings ripeness requirements are "prudential" in nature).

U.S. 172 (1985). See Michael M. Berger, *The Ripeness Mess in Federal Courts, Or How The Supreme Court Converted Federal Judges Into Fruit Peddlers,* INST. ON PLANNING, ZONING AND EMINENT DOMAIN 7-1 (1991). *Williamson County* established a two-part ripeness test for takings claims. First, regulators must deliver a final decision "regarding how [a landowner] will be allowed to develop its property that represents a definitive position...inflict[ing] an actual, concrete injury on the property owner." 473 U.S. at 191, 192. Second, a property owner must exhaust available state remedies that would provide adequate compensation for a taking. *Id.* at 194-95.[9]

[9]If this Court did not grant *certiorari,* Mr. Palazzolo would likely be forever precluded from having a federal court review the merits of his takings claim. While the Court "has frequently acknowledged the importance of having federal courts open to enforce and determine federal rights," *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 293 (1997) (O'Connor, J., concurring), the doors of the federal courthouse are slammed shut on nearly all takings claimants. This is because lower courts construe *Williamson County* prong 2—the state compensation prong—as requiring property owners to litigate their takings claims in state court *first* under a state law inverse condemnation theory. Once state court litigation is completed, federal courts avoid deciding constitutional property rights claims under the preclusive doctrines of *res judicata* or collateral estoppel. See, e.g., *Dodd v. Hood River County,* 136 F.3d 1219, 1227 (9th Cir), *cert. denied,* 525 U.S. 923 (1998) (following state court litigation on inverse condemnation under Oregon law, "it was fair and efficient for the district court to decide the Dodds are precluded from relitigating" their takings claim in federal court); *Wilkinson v. Pitkin County Bd. of Comm'rs,*

Mr. Palazzolo's situation implicates *Williamson County* prong 1—the final decision prong. He (or his corporate predecessor-in-interest) submitted four applications between 1962-1985 to fill wetlands on his property. Every time, state environmental regulators denied the applications. Every time, the regulators would have permitted the construction of only one home on the parcel's upland portion. See *Palazzolo,* 746 A.2d at 710-711. Despite the four permit denials, the Supreme Court of

142 F.3d 1319, 1325 n.4 (10th Cir. 1998) (*Williamson County* prong 2 "may, in actuality, almost always result in preclusion of federal claims....It is difficult to reconcile the ripeness requirement of *Williamson* with the laws of [issue and claim preclusion])." The system is further stacked against takings claimants because municipal defendants can tactically *remove* Fifth Amendment cases to federal court when it suits their purposes. See *City of Chicago v. International College of Surgeons,* 522 U.S. 156 (1997). Illogically, however, *Williamson* prong 2 is interpreted as requiring plaintiffs to always initiate suit in state court. In any event, "the synergy between the preclusion doctrines and current ripeness rules is that property owners are *forced* to litigate their constitutional takings claims in state court, without ever receiving a federal adjudication on the merits." Delaney and Desiderio, *supra* at 2-3, 31 THE URB. LAW. at 200-201 (emphasis in original). See also Michael Berger, *Supreme Bait & Switch: The Ripeness Ruse In Regulatory Takings,* to be printed in 3 WASH. U.J.L. & POLICY 99 (2000) ("When property owners follow *Williamson County* and first sue in state court, they are met in some federal circuits with the argument that the state court litigation, far from *ripening* the federal cause of action, instead has *extinguished* it. Under these courts' reasoning, the state proceedings are *res judicata*, and thus bar the pursuit of the now-ripened federal action") (emphasis in original).

Rhode Island decided that Mr. Palazzolo's takings claim was unripe because he never received a "final decision" on how he could use his land. The court so ruled because Mr. Palazzolo never re-applied for "less ambitious," "less grandiose" development plans. *Id.* at 714.

A. *Macdonald* Did Not Establish A Categorical Re-Application Requirement.

The Rhode Island courts divined a categorical need for re-applications from *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986), where the Court wrote:

> [A]ppellant has submitted one subdivision proposal and has received the Board's response thereto [*i.e.*, a denial]. Nevertheless, appellant still has yet to receive the Board's "final, definitive position regarding how it will apply the regulations at issue to the particular land in question."

Id. at 352-353 (quoting *Williamson County*, 473 U.S. at 191). The *MacDonald* Court further opined that the takings claim before it was unripe because regulators did not provide a "final and authoritative determination of the type and intensity of development legally permitted on the subject property." *Id.* at 349.

"*MacDonald* suggest[s] that the *Williamson County* 'final decision' requirement *might sometimes* require multiple proposals or variance applications before a landowner's case will be considered ripe." *Suitum,* 520 U.S. at 738, n.12 (emphasis added). This is a far cry from the unconditional requirement, imposed by the Supreme Court of Rhode Island and other courts, that multiple applications are *always* required to ripen takings claims. In fact, four Justices dissented in *MacDonald* because they

feared the majority opinion could be interpreted as a re-application mandate. Justice White wrote: "Nothing in our cases...suggests that the decisionmaker's definitive position may be determined only from explicit denials of property owner applications for development. Nor do these cases suggest that repeated applications and denials are necessary to pinpoint that decision." *MacDonald,* 477 U.S. at 359 (White, J., dissenting.) Thus, the dissent expressly refused to "import[] a re-application requirement into the 'final decision' analysis." *Id.*[10]

B. The Re-Application Standard Defies Consistent Application By The Lower Courts.

MacDonald's four dissenting Justices were prescient. The judiciary's treatment of the re-application gloss on ripeness is "riddled with obfuscation and inconsistency." Testimony of Professor Daniel R. Mandelker on H.R. 1534, *reprinted at* 31 THE URB. LAW. 234, 236 (Spring 1999) (hereafter, "Mandelker Testimony"). The poster child for re-application reform is probably *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* 526 U.S. 687 (1999). "The city, in a series of repeated rejections, denied proposals to develop the property, each time

[10]The Court "noted probable jurisdiction" in *MacDonald* to address the "importan[t]...question [of] whether a monetary remedy in inverse condemnation is constitutionally required in appropriate cases involving regulatory takings...." 477 U.S. at 348. While that was the question it wanted to decide, it became sidetracked with ripeness issues.

imposing more rigorous demands on the developers." *Id.* at 694.[11]

While the property owners in *Del Monte* ultimately overcame the city's ripeness objections after nine years of

[11]Professor Mandelker summed-up the endless carousel of roundabout negotiations that the *Del Monte* property owners faced before they litigated the merits: "In 1981, the property owners submitted a subdivision proposal to build 344 residential units. The plan was rejected, and city planners informed that a plan for 264 units would be reviewed favorably. The owners then submitted a plan for 264 units; city planners rejected it, and informed that a plan for 224 units would be reviewed favorably. The owners then submitted a plan for 224 units; city planners rejected it, and informed that a plan for 190 units would be reviewed favorably. The owners then submitted a plan for 190 units; city planners rejected it, and the owners appealed to the city council. The city council found the plan 'conceptually satisfactory,' and granted a conditional 18-month use permit to commence construction for the project. Subsequently, the developer worked with planning board staff to meet the city council's conditions for the 190-unit development. Staff recommended approval of the site plan, but the planning board overrode staff's recommendation and issued a denial. The property owners then appealed this decision to the city council, which this time denied the site plan for 190 units. Meanwhile, a sewer moratorium was imposed, a request to extend the special use permit was rejected, and the permit expired. The local officials thus expected the developer to start from square one. Following this Kafkaesque process, the federal district court dismissed a takings claim for lack of ripeness, but the appellate court then reversed. *See* 920 F.2d at 1502-1506." Mandelker Testimony, *reprinted at* 31 THE URB. LAW. at 237-38.

negotiation and litigation, the land use labyrinth they navigated is not unique. Consider the following:

- *Forseth v. Village of Sussex,* 20 F.Supp.2d 1267, 1272 (E.D. Wisc. 1998), *aff'd in part, rev'd in part,* 199 F.3d 363, 366 (7th Cir. 2000): Three subdivision plats submitted. Plaintiff should have pursued a variance from an "offensive condition" that required him to convey a two-acre strip of land to the adjoining land owner—who also happened to be the Village Board President voting on the application—for the President's own private use at considerably less than fair market value.
- *Good v. United States,* 39 Fed. Cl. 81, 101-103 (1997), *aff'd,* 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied,* 120 S.Ct. 1554 (2000): Over a nine year period, eight applications were submitted to federal and state agencies to build a subdivision. Although the U.S Army Corps of Engineers ultimately denied the application for a wetlands permit, the decision was not "final" under *Williamson County* and *MacDonald* because "neither the Clean Water Act nor Corps regulations limit plaintiff's ability to submit a new application reflecting a different, less intensive plan."
- *2BD Ltd. Partnership v. County Comm'rs for Queen Anne's County,* 896 F. Supp. 518 (D.Md. 1995), *aff'd, remand,* 162 F.3d 1158 (4th Cir. 1998): In addition to seeking federal and state permits to build a travel plaza, plaintiff submitted at least three site plan applications to local officials for approval.
- *Schulze v. Milne,* 849 F. Supp. 708, 709 (N.D. Cal. 1994), *aff'd in part, rev'd in part on other grounds,* 98 F.3d 1346 (9th Cir. 1996): Property owners submitted a total of 13 revised plans to renovate their home. Each

plan was "in compliance with all applicable zoning laws," yet local officials "refused to approve the plan, and instead informed plaintiffs that there were additional requirements, not found in any zoning or other statutes, which plaintiffs had yet to meet."

- *Southview Assocs. v. Bongartz,* 980 F.2d 84, 92 (2d Cir. 1992), *cert. denied,* 507 U.S. 987 (1993): Takings claim unripe because landowner did not "attempt to modify the location of the units or otherwise seek to revise its application." Court provided no indication of how many re-applications would be necessary, or what type of development regulators would approve, before the takings claim would ripen.
- *Kaiser Dev. Co. v. City and County of Honolulu,* 649 F. Supp. 926, 940, 941 n. 19, 942 n. 21 (D. Hawaii 1986), *aff'd,* 898 F.2d 112 (9th Cir. 1990), *cert. denied,* 499 U.S. 947 (1991): After "beat[ing] their heads against a stone wall" and receiving "several final rejections" to develop beachfront land, takings claim nonetheless dismissed as unripe because "potentially profitable uses," for which the landowner never applied, existed on the property—such as agriculture, private riding academies, private recreation camps, a cemetery, private utilities, and aquaculture.

The American Planning Association (APA) understands that this judicial disarray sends a clarion call for this Court to clarify takings ripeness requirements. Accordingly, the APA, whose national membership largely includes land use planning professionals that work for governmental bodies, has urged the Court to dispense with the re-application concept:

> It must be recognized that the reapplication requirement invites local government to create a

> more complicated and time consuming review and approval process. It is, in fact, an open invitation for some local governments to do mischief. Unscrupulous officials can and often do easily assert, after the fact, that they "would have been willing" to consider an intensity of use or an alternative type of use that the landowner never proposed. This is plainly unfair and an abuse of the reapplication rule and is why such a rule is unrealistic and should no longer be required to demonstrate ripeness for adjudication.

Brief of *Amicus Curiae* American Planning Ass'n in Support of Respondent, *Suitum v. Tahoe Regional Planning Agency,* No. 96-243, at 13 (hereafter "APA *Suitum* Brief").

In short, all too often the re-application process causes landowners to "pass[] through procedural purgatory" only to "wend[] [their] way to procedural hell." *Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal,* 135 F.3d 275, 284 (4th Cir. 1998). This Court now has the opportunity to clarify *MacDonald* and reconsider the statements which lead some to mistakenly believe that an unknown number of re-applications and denials is always necessary to yield a ripe takings claim.

C. The Court Should Adopt The "One Meaningful Application" Standard, Modified By A Futility Exception.

There is nothing ambivalent about Rhode Island's treatment of Mr. Palazzolo's applications. The record lacks evidence that would lead him to believe he would have received a permit to fill *any* amount of wetlands. Nor should he be required to blindly guess whether a

hypothetical future application for some lesser amount of fill would receive administrative approval. When the applications to fill 18 acres were denied, his injury became concrete enough, and the administrative decision became sufficiently final, for the limited purpose of ripening his constitutional grievance. Accordingly, "[t]he demand for finality is satisfied by [Mr. Palazzolo's] claim,...there being no question here about how the 'regulations apply to the particular land in question.' " *Suitum,* 520 U.S. at 739 (quoting *Williamson County,* 473 U.S. at 191).

Under *Williamson County,* a final decision arises when the "*initial* decisionmaker" delivers a "definitive position on the issue that inflicts an actual, concrete injury ...." 473 U.S. at 192 (emphasis supplied). Accordingly, as-applied regulatory takings claims have been considered unripe where a property owner did not: (1) submit initial development plans for approval in the first instance;[12] (2) submit to an available process to obtain a permit that may allow development[13]; or (3) once an initial application has

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[12]See *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980) (because property owners "ha[d] not submitted a plan for development of their property as the [challenged] ordinances permit[ted], there [was] as yet no concrete controversy regarding the application of the specific zoning provisions").

[13]See *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1011-13 (1992) (had a "special permit procedure" to the Coastal Council, for the purpose of determining permanent deprivations of viable land uses, been available to petitioner, he would have been required to pursue those avenues for a ripe takings claim)

been denied, apply for a variance or waiver from applicable land use regulations.[14]

All of these avenues require some regulatory body to act in an adjudicative capacity. In each situation, the parties present evidence (often in the context of a public hearing). Thereafter, an administrative agency is called upon to issue some judgment, determination, or decree relevant to the factual findings it made. *See* BLACK'S LAW DICTIONARY at 39 (5th ed. 1979) (definition of "adjudication").[15]

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[14]A variance permits a land use that is otherwise prohibited. See *Hodel v. Virginia Surface Mining and Reclamation Ass'n,* 452 U.S. 264, 297 (1981) (as-applied claim unripe because "[t]here is no indication in the record that appellees ha[d] availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting...a variance from the [applicable provisions of the Act]"; *Williamson County,* 473 U.S. at 193 (the developer must "resort to the procedure for obtaining variances ... [and obtain] a conclusive determination by the Commission whether it would allow" the proposed development).

[15]For example, a variance "provides relief from the application of a land use regulation....For this reason, the granting of a variance is an adjudicatory function' ....Given the rationales for the ripeness doctrine, the final decision prong *must be limited to adjudicatory relief.* In essence, the ripeness doctrine requires that the land use agency adjudicate the permissible uses of a given parcel of property." Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases,* 10 J. LAND USE & ENVT'L L. 91, 111 (1994) (emphasis supplied).

For ripeness purposes, full completion of one land use adjudication process—namely, submission of an application, then pursuit of an available variance, and denial of each—would amply satisfy any reviewing court's pragmatic need for ripeness[16]. Denial of that application and/or variance causes an injury to the landowner on *that* request, and would not lead reviewing courts to "entangl[e] themselves in abstract disagreements...." *Abbott Labs. v. Gardner,* 387 U.S. 136, 148-49 (1967). Initial denial would not mean that a taking has in fact occurred, but simply that a reviewing court can conduct its typical review to determine whether the administrative record for that particular decision supports the finding of a taking on the merits.

While a *re*-application would yield a second final decision and a second distinct injury, it would not further perfect the regulators' "definitive position" from denial of the first application and variance. See *Williamson County,* 473 U.S. at 193. A landowner's pursuit in Round 2 (or Rounds 3 or 4 or 5) would do nothing to "formalize[]...[the] effects" he feels in a "concrete way" from denials in Round 1. See *Abbott Labs.,* 387 U.S. at 148-49. See also *Franklin v. Massachusetts,* 505 U.S. 788,

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[16] NAHB submits that denial of an application, followed by denial of a variance, is sufficient for finality purposes to ripen a takings claim. Often, however, the doctrine of exhaustion of administrative remedies will require a property owner to pursue further avenues reasonably available under local ordinances, such as an appeal for review by a city council or a board of zoning appeals. See *Williamson County*, 473 U.S. at 192 (discussing differences between doctrines of finality and exhaustion of administrative remedies).

797 (1992) ("[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties").

Admittedly, under the proposed standard, issues will likely arise as to whether a particular application is "meaningful."[17] In the takings arena, however, any ripeness standard will likely require future litigation to flesh-out its meaning. Setting a single application/variance benchmark will lend much needed certainty to landowners, regulators and courts who, right now, have no objective starting point for determining when "enough is enough" for prudential ripeness purposes. Indeed, NAHB's suggested standard furthers the Court's instruction that the finality element for ripeness must be interpreted "in a pragmatic way." *Abbott Labs. v. Gardner*, 387 U.S. at, 149-50 (1967). Moreover, a body of precedent is developing to explain the one meaningful application requirement and the courts are becoming accustomed to

[17]Regardless of the re-application issue, the property owner's claim in *MacDonald* was arguably unripe because he did not even submit a single "meaningful" application to develop his parcel. "The Board found numerous reasons why appellant's tentative subdivision map was neither 'consistent with the General Plan of the County ... nor with the specific plan of the County ... embodied in the Zoning Regulations for the County." *MacDonald,* 477 U.S. at 342. The County rejected the tentative subdivision map because it failed to provide basic elements for a viable and safe land use plan, such as access to a public street, sewer and water hook-ups, and police protection. *Id.* at 343. How could MacDonald's tentative subdivision map have been "meaningful" when it was inconsistent with the county's master plan for land use, and did not provide the most basic public services?

the standard. See *Eastern Minerals Int'l, Inc. v. United States*, 36 Fed. Cl. 541, 548 (1996); *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1232 (9th Cir.), *cert. denied*, 513 U.S. 870 (1994); *Unity Ventures v. County of Lake*, 841 F.2d 770, 775 (7th Cir. 1988); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, *amended,* 830 F.2d 968 (9th Cir. 1987), *cert. denied,* 484 U.S. 1043 (1988).

While submission of one meaningful application is a useful guidepost to initiate the ripeness inquiry, there may be situations where submitting an application or pursuing a variance would be a futile act. Justice White recognized that while a "landowner must pursue reasonably available avenues that might allow relief, it need not take...patently fruitless measures." *MacDonald*, 477 U.S. at 359. The First Circuit applies a futility exception "where the degree of hardship that would be imposed by waiting for the permit process to run its course is so substantial and severe, and the prospects of obtaining the permit so unlikely, that the property may be found to be meaningfully burdened and the controversy concrete enough to warrant immediate judicial intervention." *Gilbert v. City of Cambridge,* 932 F.2d 51, 61 n. 12 (1st Cir. 1991). *See also* APA Suitum Brief at 21 ("the 'futility' exception should *always* apply after one application has been made for a land use approval or administrative relief....") (original emphasis).

A California appellate case best reflects the need for a futility exception in the regulatory takings context. In *Healing v. California Coastal Comm'n,* 22 Cal. App. 4th 1158, 27 Cal. Rprtr. 758 (Cal. App. 2d 1994), the Coastal Commission denied a permit for a one-story, three bedroom home, "where it had not received a recommendation from a non-existent board as to whether the property should be restricted from development under

a non-existent program for acquisition and set-asides of lots in the Santa Monica mountains." Mandelker Testimony, reprinted in 31 THE URB. LAW. at 238. The state argued that the property owner's takings claim was unripe for failure to pursue these unavailable procedures. The court, however, ultimately found the claim ripe and remarked:

> It is in the nature of our work that we see many virtuoso performances in the theaters of bureaucracy, but we confess a sort of perverse admiration for the Commission's role in this case. It has soared beyond both the ridiculous and the sublime and presented a scenario sufficiently extraordinary to relieve us of any obligation to explain why we are reversing the judgment. To state the Coastal Commission's position is to demonstrate its absurdity.

Healing, 27 Cal Rprtr. at 764. But see *Shelter Creek Dev. Corp. v. Oxnard,* 838 F.2d 375, 379 (9th Cir. 1988) (requiring application under an *unavailable* ordinance).

To summarize, NAHB respectfully urges the Court to adopt a futility exception to the one meaningful application/variance standard. On a case by case basis, a property owner would bear the burden to convince a court that it would be "patently fruitless" under all of the circumstances to submit an application or pursue a variance. Such an approach would be fully consistent with the Court's recognition that the very nature of takings claims raises "essentially ad hoc, factual inquiries." *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 127 (1978).

III. CONCLUSION

NAHB respectfully requests this Court to rule that Mr. Palazzolo should not be (1) precluded from litigating the merits of his takings claim simply because the regulations at issue pre-dated the acquisition of his property, and (2) required to re-submit some additional number of land use applications to ripen his takings claim.

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Respectfully submitted.

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