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## Takings and the notice defense: Palazzolo v Rhode Island, 2001

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**Takings and the notice defense:**  
***Palazzolo v Rhode Island, 2001***  
**Roger Bernhardt**

**Takings claim challenging land use regulation restricting development of property is permissible even though landowner had notice of regulation when he acquired title.**

*Palazzolo v Rhode Island* (US Sup Ct, June 28, 2001, No. 99–2047) 2001 Daily Journal DAR 6685, 2001 Recorder CDOS 5439

Rhode Island (state) created a coastal resources management council (council) to regulate and protect the state’s coastal properties. The council enacted regulations that greatly limited development on coastal wetlands, including salt marshes. Anthony Palazzolo (owner) succeeded to ownership of a parcel that, apart from an upland portion, consisted of wetlands salt marsh. He applied to the council for permission to fill 11 of the property’s 18 wetland acres to build a private beach club. When the council rejected his application, he filed an inverse condemnation action, arguing that the state had taken his property without compensation and deprived him of all economically beneficial use of his land. The owner alleged damages of \$3.15 million based on an appraiser’s estimate of the value of a 74-lot residential subdivision.

The state supreme court affirmed the lower court’s holding that (1) the owner’s claim was not ripe; (2) he had no right to challenge regulations that predated his ownership of the property; and (3) his takings claim, predicated on denial of all economic use of the property, was flawed because the upland section of the property still had development value.

The United States Supreme Court affirmed in part and reversed in part. In reversing 5-4, the Court found that the owner’s claim had met the ripeness test. Contrary to the state courts’ finding, the Court held that the owner had obtained a final decision from the council determining the permitted use for the property. Under the council’s interpretation of the regulations, the owner was barred from engaging in *any* filling or development of the wetlands. Furthermore, that the owner had not actually applied for permits to develop the 74 lots was not fatal to ripeness because there was “no indication that any use involving any substantial structures or improvements would have been allowed.” 2001 Daily Journal DAR at 6690. Likewise, as to the upland portion of the owner’s property (which apparently had development potential), the Court found that the owner was “required to explore development opportunities . . . only if there is uncertainty as to the land’s permitted use.”

The Court also rejected the state’s view that its regulatory enactments “define property rights and reasonable investment-backed expectations, and, therefore, later owners cannot claim any injury from lost value. After all, they . . . took title with notice of the limitation.” 2001 Daily Journal DAR at 6691. The Court observed (2001 Daily Journal DAR at 6691):

A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken. . . . [Moreover, i]t would be . . . unfair to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.

The Court, however, affirmed the state court's judgment that the owner had failed to establish deprivation of *all* economically beneficial use of his property. See *Lucas v South Carolina Coastal Council* (1992) 505 US 1003, 120 L Ed 2d 798, 112 S Ct 2886. The Court took cognizance of the "significant" development potential of the property's upland portion—characterized by the owner as "a few crumbs of value"—finding that the "entire parcel serves as the basis for his takings claim, and, so framed, the total deprivation argument fails." 2001 Daily Journal DAR at 6692. Accordingly, the Court remanded, directing the state court to consider the owner's claim as a partial taking under *Penn Cent. Transp. Co. v New York City* (1978) 438 US 104, 57 L Ed 2d 631, 198 S Ct 2646.

►**THE EDITOR'S TAKE:** Supreme Court decisions on land use matters tend to be somewhat like the pronouncements of Delphic oracles, requiring a second level of high priests to fathom what the first level really said. The six opinions among the nine Justices on the three issues in this case will leave the rest of us as confused as ever on most takings questions.

On two of the issues, the Court does not seem to have made significant changes. On the "denominator" issue—*i.e.*, what to do when some part of the land retains value even though the value of the rest of it has been destroyed—we are in the same position as we were. That different standards apply when the taking is total (the *Lucas* test) or partial (the *Penn Central* test) was always so, and this case does not tell us how a landowner can convert a partial taking into a total taking by adroitly subdividing her land.

Likewise, the Court's "ripeness" analysis is probably of only slight comfort to property owners. Local governments will—at least henceforth—not often make the mistake Rhode Island made in telling the owner in effect to not bother submitting more plans because he wouldn't be able to develop his property in any event.

But on what now seems to be referred to as the "notice" issue—whether an owner loses her right to challenge a regulation because she knew of its existence when she purchased the property—there has been a significant development. *None* of the nine Justices appear to have supported the state's defense that an owner can challenge only those regulations that were enacted after her acquisition of title. However, the Court splits all over the place on the consequences of that rejection: Kennedy, Rehnquist, Thomas, and (with extra vigor) Scalia just say that this notice factor does not matter; O'Connor, with the grudging concurrence of Breyer and, to a lesser degree, Ginsburg and Souter, holds that, while it does matter somewhat, it is still not an automatic bar; and Stevens (with Ginsburg and Souter) opines that it matters in damage actions, but not in actions for injunctive relief. While this multiplicity of opinions makes it rather hard to predict outcomes in future situations, it appears that local governments do not have a categorical defense when the takings challenge is made by a successor to the person who owned the land at the time the regulation was enacted.

The notice defense—surprising as it may have seemed to a "property rights" lawyer—had been gaining acceptance among state supreme courts. See, *e.g.*, *Gazza v New York State Dep't of Env't'l Conserv.* (1997) 657 NYS2d 555, 679 NE2d 1035; see also Stein, *Who Gets The Takings Claim? Changes In Land Use Law, Pre-Enactment Owners, and Post-Enactment Buyers*, 61

Ohio St LJ 89 (Feb. 2000). And, in combination with the application of harsh ripeness requirements, such a rule could easily have been the death of takings challenges.

In most cases, a local government that sees development heading its way will attempt to put some restrictions in place before the developers get there. Usually, it is the agricultural owners—the farmers and ranchers then owning the land while it is in acreage—who feel the effect of these regulations first, through an immediate reduction in the market value of their land. A successful challenge to the restriction will require not merely showing that market value has dropped, but that some particular development plan of the owner has been rejected. Ordinarily, an agricultural owner is unable to satisfy this threshold ripeness requirement because, almost by definition, such person is not a developer. Therefore, the land will usually be sold to a developer who then generates a development proposal to take to the local government (thereby satisfying the ripeness requirement when the proposal is turned down). But if the notice rule could then bar the developer from suing because he purchased with notice of the restriction, it becomes the perfect Catch 22 defense: The farmer couldn't sue because it was too soon, and the developer couldn't sue because it was too late.

So, the Court's rejection of the notice defense is not awe-inspiring. A 5–4 majority, one way or the other, still holds that the fact of purchase with notice has at least some relevance in the taking equation. But the decision does put some muscle behind property owners' threats of litigation, and must inevitably give local planning officials some concerns about how much they can get away with in the never-ending land use battle. —*Roger Bernhardt*