Grover Fugate

Palazzolo v. Rhode Island: An Overview and Implications for the Future

Biography

Grover Fugate graduated from the University of Connecticut in 1976, with a degree in Natural Resource Management. After graduation Mr. Fugate worked as and urban forester for a private company in Connecticut. In 1978, Mr. Fugate went to work for the Department of Forestry, Government of Newfoundland and Labrador, as Forester, in charge of project planning. In 1979, Mr. Fugate was promoted to Land Use Planner, with the Department of Agriculture, where he worked on a farm land preservation program. While working with the Department of Agriculture, Mr. Fugate completed another undergraduate program in Public Administration from Memorial University of Newfoundland.

In 1981, Mr. Fugate was promoted to Regional Resource Planner, with the Crown Lands Branch, Government of Newfoundland and Labrador, where he worked to developed the Province's Integrated Resource Management Planning process. In 1984, Mr. Fugate completed his MBA from Memorial with a program specialization in resource policy analysis.

In 1985, Mr. Fugate was promoted to Director of Shore Zone Management with the Department of Development, Government of Newfoundland and Labrador, to work on the planning for the Province's offshore oil development. During this period Mr. Fugate was also a lecturer at the Department of Part-time Studies and Extension, Memorial University.

In 1986, Mr. Fugate transferred to Rhode Island to assume the duties of the Executive Director of the Coastal Resources Management Council. The council is an independent state agency, set up to be the principle planning and management agency for the state=s coastal areas. Mr. Fugate's current duties include, the day to day administration of the Rhode Island Coastal Resource Management Program for the State of Rhode Island. As part of his duties Mr. Fugate is the council=s and states representative to a number of boards, commissions, task forces, and other coastal related organizations. Mr Fugate also is a guest lecture at the University of Rhode Island and Roger Williams University and a trainer at the Coastal Resources Center for Integrated Coastal Management.

He is the recipient of several citations from the Governor and the Legislature for his work in Coastal Management and Community Service.

Mr. Fugate has published articles on various issues in coastal and natural resource management.

Presentation Abstract

BACKGROUND—THE PALAZZOLO FACTS.

Anthony Palazzolo was president and sole shareholder of Shore Gardens, Inc. (SGI) when it acquired a parcel of land in 1959 in the Misquamicut section of the town of Westerly, Rhode Island for roughly $8,000. The parcel is located on the inland side (the inter-coastal or bay side—not the ocean side) of a barrier beach, between the crest of the beach strip (a road called Atlantic Avenue runs along this crest) and the shore of a 460-acre salt-water coastal estuary called Winnapaug Pond. Between 1959 and 1961, SGI sold off eleven individual subdivided house-lots to various purchasers. These subdivided lots were carved out of the upland (non-marshy) area of the larger parcel and could be (and in fact were) built upon with little alteration to the land.

After this series of transactions, SGI retained the status of record owner of the remaining area—a 20-acre remnant, 18 acres of which was occupied by tide-flowed marshland, a substantial amount of which is under the waters of Winnapaug Pond. The balance of this 18 acres, if not permanently under water, is subject to daily tidal inundation; "ponding" in small pools occurs throughout this wetland acreage. The area serves as a refuge and feeding ground for fish, shellfish, and birds, provides a buffer against flooding, and absorbs and filters run-off into the pond.

From 1965 through 1977, state regulations governing alterations to coastal wetlands grew stricter, evolving into a virtual absolute prohibition as of 1977. The RI Coastal Council was given responsibility for administering this prohibition and related regulations.

SGI's corporate charter was revoked by the Rhode Island Secretary of State in 1978, and Palazzolo became the automatic successor to whatever property SGI previously owned.

In March 1983, Palazzolo filed an application with the Coastal Council, seeking approval to fill the full 18 acres of salt marsh. No particular purpose

was specified. That application was rejected by the Coastal Council. In January 1985, Palazzolo filed another application to fill the wetlands on the property so he could create a recreational beach facility. This application was likewise denied by the Coastal Council.

This lawsuit eventually followed. Palazzolo sought damages in the amount of $3,150,000 (plus interest), based on the value he claimed the land would have after filling the wetlands and developing the property as seventy-four lots for single-family homes, each served by its own septic system. After a Rhode Island trial judge found that the denial of Palazzolo's application was not a taking for which compensation was owed (and indeed that the development would have been a public nuisance), Palazzolo appealed to the Rhode Island Supreme Court and then the United States Supreme Court.

WHAT THE SUPREME COURT SAID
The United States Supreme Court discussed four issues—and ruled on three of those issues—in deciding that Palazzolo had not yet shown that the environmental regulations constituted a taking. The four issues are:
ripeness—a process issue concerning whether a claim is ready;
value—the extent of loss necessary to automatically win a takings claim;
parcel —whether to consider the developer's entire contiguous holdings in assessing the impact of government actions; and
sequence—whether a person who acquires land subsequent to a regulation can claim a taking.

First, the U.S. Supreme Court reversed the Rhode Island Supreme Court's holding that the landowner's takings claim was not ripe (i.e., ready to be adjudicated); second, the Court affirmed the court's holding that the landowner failed to establish a deprivation of all economic value of his property, third, the Court refrained from ruling on the parcel issue, noting it was not properly presented, and fourth, the Court reversed the state court's invocation of a per se rule that a pre-acquisition regulation automatically bars a taking claim.

ANALYSIS
How do these rulings fare from an environmental perspective?

Ripeness. The outcome on ripeness was fact-specific and the Court made no adverse change to existing law. The conclusion that Palazzolo's claim was ripe was unavoidable under the facts as they were viewed by the Court: the State would allow no development in the wetlands and one house on the

uplands. Read thus, there was no administrative step left for Palazzolo to take. This is completely in keeping with prevailing ripeness requirements.

Indeed the Court reaffirmed that, where ambiguities do exist, the ripeness defense is as applicable as ever: "A landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation." Thus, the ripeness defense lives on in situations where there is ambiguity as to the nature and extent of either the regulations or the land. Vague or incomplete applications on the part of developers will still not support takings claims. Nor will it be sufficient for a developer to make a cursory run at the agency process before turning to court. Existing law remains intact.

There was even one favorable advance beyond the status quo in this area. Justice Kennedy, writing for the Court, extended an explicit invitation to State legislatures and courts to fashion their own independent reasonable rules on ripeness which the Supreme Court would be bound to respect. Thus, States can reinforce the mandate that a developer must make a meaningful and informative application (and, where necessary, multiple applications.) This invitation merits the attention of environmental organizations.
As national precedent, the Palazzolo decision on ripeness is a very small net plus for the environment.

Value. This was the primary point of attack by the Pacific Legal Foundation (PLF). PLF had complained that the regulation left Palazzolo with mere "crumbs," "dribs" or "smidgeons" of value, and that the Lucas decision should be expanded to allow takings claims to arise whenever there are substantial reductions in property value due to regulation. On this, their main thrust, PLF lost totally and unanimously. The Court's opinion should be interpreted as reaffirming the public's authority to impose significant restrictions on the use of private land.
Count this as a solid plus for the environment.

Whole Parcel. The Court's refusal of Palazzolo's invitation to revisit the whole parcel rule leaves in place favorable precedent. For example, in Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602 (1993), the court reiterated: "the relevant question . . . is whether the property taken is all, or only a portion of the parcel in question," holding that only a taking of the whole parcel would give rise to environmental liability. The "whole parcel" principle remains intact to thwart attempts by developers

to manipulate their holdings so as to contrive the appearance of an actionable taking.
This status quo leaves intact good law for environmentalists.

Sequence. The Supreme Court rejected the convenient bright-line rule adopted by the Rhode Island Supreme Court and a number of other courts that only regulations imposed after a plaintiff's investment in property can constitute a taking of that property.

To quote Professor John Echeverria of Georgetown University Law School,

> On the positive side, however, the Court's decision does not preclude consideration of pre-acquisition notice as a factor in takings analysis. Indeed, in light of Justice O'Connor's crucial concurring opinion, the case is best read as endorsing consideration of pre-acquisition notice as a relevant factor in takings cases. This likely means that most long established environmental and land use regulations will be largely immune from takings challenges. And they should become increasingly immune from challenge as properties change hands and additional time passes.
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> Justice O'Connor insisted that pre-acquisition notice must be a relevant factor in takings analysis in order to avoid potential "windfalls." It seems very likely following Palazzolo, at least as a matter of practice, if not strict legal rule, that investors who have purchased restricted lands at a deep discount, or who have engaged in other strategic behavior in an attempt to manufacture a taking claim in light of pre-existing regulatory restrictions, will continue to be barred from recovering . . ..

The line drawn by the Supreme Court is the correct one, and Attorney General Whitehouse in arguing the case conceded as much. The Attorney General felt that the Penn Central standard the Court adopted could avoid harsh and unjust results in unusual circumstances, while still keeping rascals at bay. We believe, provided it is approached with sensitivity and understanding by bench and bar alike, this is the fair and proper outcome.
Count this as a wash for the environment. The "bright line" rule was unsustainable in light of its potential for unfair results.

CONCLUSION

In the final analysis, the Court's reluctance to adopt per se rules means that the Palazzolo decision will do little to change the actual outcomes of specific lawsuits. It will force judges and lawyers alike to do the hard work of sifting through the particularized facts of each case. Although Palazzolo initially caused a ripple of anxiety throughout the environmental community (largely because of immediate and high speed "spin" from property rights activists), balanced land use planning and control should actually gain legal ground against takings challenges. Our task now as environmental advocates is to explain this, not only to courts, but to regulators and, most importantly, to the people of this environmentally blessed country.

Analysis provided by Attorney General Sheldon Whitehouse and Assistant Attorney General Mike Rubin.