

Allen Jernigan

Coping With *Palazzolo*: Using Background Principles Of State Property Law And Other State Law Concepts To Defeat Takings Claims

Biography

University of North Carolina at Chapel Hill, Bachelor of Arts with Honors 1980, Juris Doctor 1983. Admitted to practice in North Carolina 1983. Special Deputy Attorney General responsible for supervising the Air & Natural Resources Section of the Environmental Division of the North Carolina Attorney General's Office. Employed by the Environmental Division or its predecessor since 1983.

The Air & Natural Resources Section advises and represents the North Carolina Department of Environment and Natural Resources on air quality and natural resources issues, including litigation in state and federal courts. These subject areas include: submerged lands, coastal development, marine fisheries, public trust doctrine, outer continental shelf and ocean policy, military activities and air pollution control. Duties include serving as lead counsel on submerged lands, air quality, and natural resources issues. Member U.S. Supreme Court, U.S. Court of Appeals for District of Columbia and Fourth Circuit Bars; Tulane Environmental Law Journal Advisory Board; Multi-State Working Group on ISO 14001 Implementation, and Carolinas Air Pollution Control Association.

Presentation Abstract

On June 28, 2001, the United States Supreme Court rocked the 'takings' world with its split decision in *Palazzolo v. Rhode Island*, 533 U.S. ____, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001). In that case, Anthony Palazzolo brought an inverse condemnation action challenging the Rhode Island Coastal Resources Management Council's denial of his application to fill a tract of salt marsh as a 'taking' of his property without compensation, in violation of the Fifth and Fourteenth Amendments. The Supreme Court reversed the Rhode Island Supreme Court's rejection of Palazzolo's claim and remanded for determination of whether the restriction unreasonably interfered with his investment-backed expectations. In so doing, the Supreme Court upset what had seemed to be established tenets of takings jurisprudence by: (1) finding that Palazzolo's claim was ripe for review, even though he had not applied to develop the upland part of the property, and

(2) holding that he could maintain a takings claim, even though he obtained title after the regulations limiting his ability to fill the wetlands were in place. The Court did conclude that Palazzolo had not been denied all economically beneficial use of his property, because there was evidence that he could build at least a \$200,000 house on an upland portion of the property.

The presentation will address potential defenses to takings claims under the *Palazzolo* decision. Application of State law limitations on use which should not effect a taking will be reviewed, such as the public trust doctrine, custom and other potential 'background principles' of State property and nuisance law, which in the Court's words, "inhere in the title itself." In addition, the presentation will discuss State administrative law, such as the requirement for exhaustion of administrative remedies, as a 'ripeness' defense to inverse condemnation claims.