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Community Rights Report

CRC's Monthly Newsletter

Community Rights Counsel

Community Rights Counsel
1301 Connecticut Avenue, NW, Suite 502, Washington, DC 20036; www.communityrights.org

FEATURE CASE

A Blast from the Past: Victory on Remand in *Palazzolo* Due to Background Principles of State Common Law

On July 5, the Rhode Island Superior Court concluded that Anthony Palazzolo -- who became famous when the U.S. Supreme Court ruled his way and reinstated his regulatory takings claim in 2001 -- failed on remand to show that the state's wetland protections worked a taking of his land. Palazzolo alleged that the state took his property by denying a permit to fill and develop about 18 acres of tidal salt marsh situated on the south side of Winnapaug Pond in the town of Westerly. (To see just how wet the site is, go to: http://www.communityrights.org/legalresources/recentsupremecourtopinions/Palazzoloaerialview1.asp).

After taking evidence for 11 days to supplement the previous seven-day bench trial held in 1997, the court found that the area to the south of the pond is nearly devoid of development and subject to daily tidal inundation. Except for one small upland area, as much as six feet of fill would be needed to develop the property.

The Superior Court then concluded that background principles of state law preclude takings liability. First, clear and convincing evidence shows that Palazzolo's proposed development would constitute a public nuisance by increasing pond nitrogen levels, which "would almost certainly result in an ecological disaster to the pond," substantially damaging both water quality and wildlife habitat. Winnapaug Pond is used for fishing, boating, and shell fishing, and is especially fragile due to its size and shallow depth. Its marshes provide valuable habitat to birds, fish, and other wildlife.

Applying the background principles defense to takings liability discussed in *Lucas v. South Carolina Coastal Comm'n* (U.S. 1992), the court concluded that state nuisance law inheres in Palazzolo's title and thus already precluded him from pursuing the proposed development. Therefore, the application of state wetland regulations to prevent the proposed development did not take any property interest ever held by Palazzolo.

Moreover, the court ruled that the proposed development implicates the public trust doctrine under state common law, which protects tidal waters and vests in the state title to all land below the high-water mark, to be held for the benefit of the public. Fully half of Palazzolo's property lies below the mean high-water mark. The Superior Court observed that the public trust doctrine is expressly mentioned in the state constitution and received recent endorsement by the Rhode Island Supreme Court.

Although the public trust doctrine applies to only half of Palazzolo's parcel, the court concluded that the doctrine significantly impairs his reasonable expectations under the multifactor *Penn Central* analysis, which the court applied as an alternative ground for denying the takings claim. The court defined the relevant parcel as the 18 acres currently owned by Palazzolo, excluding six lots that had been previously sold off. Regarding the character of the government action, the court noted that the wetland protections were not aimed at Palazzolo, but instead applied broadly to all owners of tidal salt marsh property. In response to Palazzolo's assertion that the permit denial cost him more than $3 million, based on a proposed 50-lot subdivision, the court found that high development costs would have caused Palazzolo to suffer an economic loss. In other words, Palazzolo "will be better off financially by selling the site in its current undeveloped state" in view of his ability to build one residence on the small upland portion of the site. The site offered very limited reasonable expectations of development due to the public trust doctrine, as well as Palazzolo's modest investment, obvious engineering difficulties in developing the site, and several other factors.

In response to Palazzolo's claim that the state wetland protections had left him with mere "crumbs," the court observed that the land retained a fair market value of about $200,000, which would yield some, albeit a modest, return on investment, and that the development proposals would result in a net economic loss.

Kudos to Michael Rubin and his colleagues in the Rhode Island Attorney General's office for securing (yet another) victory in this case.

QUOTE OF THE MONTH

"Despite wishful thinking on Palazzolo's part, he paid a modest sum to invest in a proposed subdivision that he must have known from the outset was problematic at best. Constitutional law does not require the state to guarantee a bad investment."

Palazzolo v. Rhode Island, C.A. No. WM 88-0297 (R.I. Super Ct. July 5, 2005)

EYE ON WASHINGTON

Judge John G. Roberts

[A longer version of this op-ed by CRC's Doug Kendall ran in the July 24 *Washington Post*]:

The nomination of John Roberts raises important questions about the future of the Supreme Court. But as a progressive environmentalist, I would rather have Roberts and genuine questions than another one of the judges on President Bush's short list and a lot of bad answers.

Roberts is a conservative. In his short tenure as an appellate judge, he has written some troubling judicial opinions, including one in a very important Endangered Species Act case that suggests he has an unduly restrictive view of congressional power under the all-important commerce clause of the Constitution -- the basis for federal protections for the environment, workers and civil rights.

But there are critical differences between Roberts and the others on Bush's short list. Unlike Judge Michael Luttig of the 4th Circuit, who once opened an opinion by rewriting the preamble of the Constitution to create a more limited government than the Constitution actually establishes, Roberts has a fairly limited judicial record that is devoid of rhetorical excess. In contrast to Judge Janice Rogers Brown of the D.C. Circuit, who made a name for herself by delivering bombastic speeches that thrill the libertarian right, Roberts made his reputation largely on his undisputed skills as a litigator representing clients in cases before appellate courts and the Supreme Court.

I have particular knowledge about one of these cases, having worked on it on behalf of several *amici*. In 2002, the Court agreed to hear a challenge to a carefully crafted consensus plan to save Lake Tahoe from the damaging effects of overdevelopment. Facing the prospect of a devastating defeat, the Tahoe Regional Planning Agency did a very smart thing: It hired the best conservative Supreme Court advocate it could find. That advocate was Roberts, and he wrote the best legal brief I've ever read in a takings case. His argument resulted in a surprising and broad Supreme Court victory that stopped the takings movement in its tracks.

Does this prove that Roberts is a fan of environmental safeguards? No. But his work on the Tahoe case does demonstrate that he has the ability to see both sides of a divisive issue. This is a critical quality for a Supreme Court justice. Roberts' combination of intellect, skill, and open-mindedness should temper anxiety about his nomination.

Roberts is not the Supreme Court justice I would choose. But before Senate hearings begin, I'm open to the possibility that he will not be what I most fear.

OUTRAGE OF THE MONTH

Down By the Old Mainstream: The Bernstein Imbroglio

Several weeks ago, George Mason University law professor David Bernstein falsely accused CRC and Earthjustice of fabricating quotations, and then recklessly claimed that a nationally renowned legal journalist, Stuart Taylor, mindlessly plagiarized the allegedly fabricated quotes. The charges concerned a CRC-Earthjustice report on Janice Rogers Brown, who serves on the D.C. Circuit and is often mentioned as a future nominee to the U.S. Supreme Court. Our report criticized Judge Brown's expansive view of regulatory takings law and her support for the widely criticized *Lochner* ruling. Bernstein leveled his false allegations on a popular legal blog called The Volokh Conspiracy.

When Bernstein realized he had committed what he now calls a "blatant error of fact," he immediately apologized to Mr. Taylor, and after a comical, day-long series of revisions, he finally coughed up an apology to CRC and Earthjustice, attributing the false accusations to jet lag and the early hour of his posting. He notably failed, however, to explain why he would make such reckless allegations at 3 a.m. But even after he apologized for maligning CRC, he continued to malign us, characterizing our report as "deceptive" and insisting that Judge Brown's positions on *Lochner* and other matters are not disqualifying.

Bernstein evidently has had a change of heart. He recently told the National Journal that Judge Brown "has certainly expressed more sympathy for Lochner than is currently respectable in mainstream legal circles." Welcome aboard, Dave. We couldn't have said it better ourselves.