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# Takings Watch

*CRC's Monthly Update on Regulatory Takings*

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## GOOD AND BAD NEWS FROM *PALAZZOLO V. RHODE ISLAND*

On June 28, 2001, the U.S. Supreme Court produced a mixed bag of rulings in *Palazzolo v. Rhode Island*, a takings challenge to Rhode Island's efforts to protect coastal wetlands from development. The six opinions contain a bit of good news, a bit of bad news, and a substantial amount of mush that unfortunately will engender confusion and embolden aggressive developers. Below is a brief summary. The opinions are available at http://www.communityrights.org/Palazzololistofopinions.html.

The best news for local governments is that the Court clearly confined the *Lucas per se* rule of takings liability. Although the Court noted that the government may not avoid a *Lucas* taking by leaving the landowner with "a token interest," it held that Palazzolo was not deprived of all economic use under *Lucas* because he may build a house on his 20-acre parcel.

The Court's treatment of the procedural question of ripeness should have little impact on future cases. The Court ruled that the case is ripe, but it reaffirmed its holdings in *Williamson County* and *McDonald* that a regulatory takings case is not ripe until "a court knows 'the extent of permitted development' on the land in question." The Court found no ambiguity in the record regarding the extent of permitted development: one single family home and nothing more. It rejected the State's contention that Palazzolo might be able to build more than one house in large measure because the State failed to make this point in its opposition to certiorari. Although the State also argued that the case was unripe due to Palazzolo's failure to apply for the 74-unit subdivision that formed the heart of his takings claim at trial, the Court ruled that this failure goes only to damages, not ripeness. This ruling seems limited to the facts of this case.


The bad news from Palazzolo is that the Court rejected what it termed the "sweeping rule" that a claimant's acquisition of title after enactment of the challenged regulation automatically bars a takings claim, stating that "[f]uture generations, too, have a right to challenge unreasonable limitations on the use and value of land." The Court expressed concern that the process of ripening a claim might prevent the owner at the time of enactment from bringing a claim. Moreover, a blanket rule against recovery would create unfair results for older property owners and those who need to sell, as opposed to those with the resources to hold title. The Court did make clear, however, that background principles under *Lucas* are not limited to common law and that it was possible that the Rhode Island statute might be a background principle. It described background principles "in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition." Justice O'Connor wrote separately to emphasize that the timing of a takings claimant's acquisition is relevant to the *Penn Central* analysis. Significantly, all four dissenters agreed with Justice O'Connor on this issue.

The mush of *Palazzolo* is in dicta. For example, in disposing of the *Lucas* claim, the Court declined to address Palazzolo's argument that the wetland portion of the property should be considered separately from the upland portion. In leaving the issue open, the Court stated that some of its prior rulings indicate that takings analysis requires consideration of the parcel as a whole, but it noted that it has "expressed discomfort with the logic of this rule." The Court failed to note that the parcel-as-a-whole rule is compelled by longstanding precedent.

QUOTE OF THE MONTH

"In reaching this conclusion [to uphold a temporary planning moratorium designed to protect Lake Tahoe], we preserve the ability of local governments to do what they have done for many years — to engage in orderly, reasonable land-use planning through a considered and deliberative process. To do otherwise would turn the Takings Clause into a weapon to be used indiscriminately to penalize local communities for attempting to protect the public interest."

*Tahoe-Sierra Preservation Council, Inc.*
*v.*
*Tahoe Regional Planning Agency*
216 F.3d 764, 782
(9th Cir. 2000)
CERT. GRANTED
(June 29, 2001)

## EYE ON WASHINGTON

One of the hottest topics in our nation's capital is judicial selection. The Senate Judiciary Committee recently held hearings to explore the role of ideology in the Senate's consideration of judicial nominees. Senator Charles Schumer argued for Senate opposition to any nominee whose views fall outside the mainstream, but others expressed concern about new ideological litmus tests. Those of us interested in the takings issue should keep an eye on this debate. Community Rights Counsel and others soon will issue a report that documents how improper judicial activism under the Takings Clause and other constitutional provisions threatens environmental safeguards and other community protections. The report urges President Bush to remain true to his pledge to appoint judges who will interpret the law, not make it up as they go along according to their own policy preferences. That way, we stand a better chance that future judges will apply the narrow text of the Takings Clause in a way that allows for appropriate community protections.

## OUTRAGE OF THE MONTH

Last month's Takings Watch reported that Senator Jeffords's decision to become an Independent tolled the death knell for federal takings legislation being pushed by developer lobbyists. But don't take our word for it. Disturbing confirmation came in a recent Washington Post report that a "lobbyist for the Louisiana Home Builders Association who, on his way to see Sen. Mary Landrieu (D-La.), popped his head into Jeffords's office and shouted he wanted to kill the senator." According to the Post, this and other death threats have prompted the Capitol Police to provide Senator Jeffords with extra security. It was bad enough when the National Association of Home Builders described its bill as a "hammer to the head" of state and local officials. If you need death threats to promote legislation, chances are you're pushing a bad bill.

For briefs, cases, and updates to the *Takings Litigation Handbook*, sign on to CRC's *Filing Cabinet* at www.communityrights.org/FCregister.html.

## ON THE HORIZON

Two cases — both involving state bans on mining designed to protect water resources — present to the highest courts of Pennsylvania and Ohio the key issue of how to define the relevant parcel in takings cases. In *Machipongo Land & Coal Co. v. Commonwealth of Pennsylvania*, No. 112 MAP 2000, the Commonwealth Court ruled that a mining ban on 373 acres of land designed to protect the Goss Run Watershed is a taking even though the ban applied to only six percent of the claimants' land. Defying decades of Supreme Court rulings directing courts to consider the claimant's parcel as a whole, the lower court defined the relevant parcel to include only the portion of the claimant's land affected by the mining ban. In *State of Ohio ex re. R.T.G., Inc. v. State of Ohio*, Case No. 01-748, the appeals court applied the parcel-as-a-whole rule to reject a takings challenge where the claimants hold both mining rights and surface rights to the property. It found a taking, however, with respect to three parcels in which the claimants allegedly hold only mining rights. As to these parcels, the court rejected the State's argument that the proposed mining would constitute a nuisance because it would degrade or destroy a sole-source aquifer that serves as a public drinking water supply for area residents. Rulings in these two cases should help clarify how to define the relevant parcel in takings challenges to curbs on harmful mining. Community Rights Counsel has filed amicus briefs on behalf of municipalities in both cases.