

FEDERAL SUPREME COURT MAJORITY "FINDS"  
NEW TAKINGS LAW

By Edward J. Sullivan  
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Edward J. Sullivan is a partner with the Portland office of Preston Gates & Ellis LLP specializing in planning, administrative, and state and local government law. He also teaches planning law at Northwestern College of Law and Portland State University. He has participated as an editor and author in all four of the Oregon State Bar Continuing Legal Education publications on Land Use. He is a member of the Oregon Bar, District of Columbia, and the Washington Bar. Mr. Sullivan was Washington County (Oregon) Counsel and Legal Counsel to the Governor of Oregon before entering private practice in 1978. Mr. Sullivan has written widely on municipal and planning law topics throughout his more than 30 years of practice. He is the Chair of the International Municipal Lawyers Association Section on Land Development, Planning and Zoning and Co-Chair of the Subcommittee on Comprehensive Planning and Growth Management of the Land Use, Planning and Zoning Committee for the American Bar Association Section on State and Local Government.

In Palazzolo v. Rhode Island, 121 S.Ct. 2448, 2001 U.S. LEXIS 4910 (June 28, 2001), the federal Supreme Court considered whether state coastal wetlands regulations effected a "taking" under the Fifth and Fourteenth Amendments. The final result was a remand to the state courts to determine whether a taking had occurred in light of another piece of newly minted regulatory takings doctrine and the "factors" contained in Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). The opinion was written by Justice Kennedy, but the Court was split along now-familiar lines.

The property at issue was purchased in 1959 by a corporation in which plaintiff was a shareholder. The property was divided into 80 lots, of which 74 remained, on 20 acres. After three development attempts (all of which required significant amounts of fill to wetlands) were rejected in the 1960s, defendant passed coastal protection laws, making it more difficult to develop the wetlands area. In the 1970s, the charter of the corporation was revoked for failure to pay state corporate income taxes and, as plaintiff had bought out the other shareholders, the land passed to plaintiff by operation of law in 1978. Plaintiff made another attempt to develop the land in 1983 and 1985, again unsuccessfully as the new state law required that a

"special exception" under which plaintiff must demonstrate a "compelling public purpose" for the development that would benefit the public, as opposed to individual or private interests. Plaintiff appealed his 1985 denial, but was unsuccessful, and later filed an inverse condemnation action in state court, alleging that the state had deprived him of all beneficial economic use of the property. Plaintiff claimed \$3,150,000, representing an appraiser's estimate of the value of the 74-lot subdivision on the site. The trial court rejected these claims, and the Rhode Island Supreme Court affirmed, finding that the claim unripe, that plaintiff had no right to challenge wetlands regulations adopted before he succeeded to ownership of the land in 1978, and that plaintiff retained a viable economic use of the land as there was undisputed evidence that there was \$200,000 in development value from one or more upland sites on which residential uses could be constructed. Moreover, that court also determined that plaintiff could not bring a Penn Central claim because he had no reasonable investment-backed expectations in the land calculated as of the time of his acquisition in 1978.

Justice Kennedy's majority opinion began its analysis by stating that the Fifth and Fourteen Amendments apply not only to physical invasions of land by government but also to regulations that go "too far," thereby effecting a regulatory taking by depriving a property owner all viable economically beneficial or productive use of the land. However, even if a regulation does not go that far, a taking may still be found under the three factors of the Penn Central test. Those three factors are: (1) the economic effect of the regulation on the landowner, (2) the extent to which that regulation interferes with reasonable investment-backed expectations, and (3) the character of the governmental act. The Court stated that these factors are "informed" by the "purpose" of the takings clause, i.e., to prevent the government from "forcing some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole." See Armstrong v. United States, 304 U.S. 40, 49 (1960).

As to ripeness, the state claimed there was no final decision as to what development would be permitted on the site. While submission of a grandiose plan may leave open a question as to whether a lesser level of development would be allowed, the majority found that this was not the case here because the nature and the application of the regulations at issue, i.e., that development be justified by a "compelling public purpose" was unrelated to the extent or intensity of development on the 20 wetland acres proposed to be developed. The lack of discretion to permit development at all or the reasonable certainty regarding the extent of the development allowed made the case ripe for adjudication. In this case, it was clear that no fill would be allowed for any ordinary land use, such as a beach club or residential subdivision, both of which had been proposed earlier by plaintiff. In that event, there could be no development in any of the wetland areas. The "compelling public

purpose" standard did not apply to the upland development 200 or more feet from the wetlands, however. While there was some doubt as to just how much land outside the wetlands could be developed, the majority found an adequate basis for a Penn Central claim to be litigated. The majority indicated it was aware that plaintiff may not be entitled to a 74-lot subdivision and that both state and local permits must be pursued; however, it found this contingency was a case of determining the fair market value of the land, as opposed to barring the filing of any claim. The Rhode Island Supreme Court had relied on Williamson County v. Hamilton Bank, 473 U.S. 172 (1985) (as opposed to state ripeness or exhaustion principles). However in its interpretation of Hamilton Bank, the Court found the matter to be ripe and no further application required.

The Court then turned to the state's second defense that there were no reasonable investment-backed expectations as of the time plaintiff succeeded to ownership in 1978, as the current wetland development rules were in place at that time, and plaintiff was deemed to have notice of the same. In response, the majority said the state "may not put so potent a Hobbesian stick into the Lockean bundle," i.e., that the state may regulate the improvement of property through reasonable legislative exercises, however:

The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title.

Thus, the majority indicated its belief that future generations "ought" to be able to challenge "unreasonable limitations on the use and value of land." The state's proposed rule would, according to the majority, "work a crucial alteration to the nature of property," allowing the government to "secure a windfall for itself," and would be "capricious in effect" by allowing longer-term landowners to challenge regulations a more recent owner could not. Moreover, the majority stated that it would be illegal and unfair to bar a claim by a recent landowner because a predecessor-in-interest could not, or did not, ripen the claim. Further, the majority stated that it would not conflate background principles of property law with the issue of investment-backed expectations of landowners. The former are shared by all and do not depend upon when title is acquired.

Having rejected the first two grounds of the state court opinion, the Court turned to whether a Penn Central claim could be maintained. The majority agreed

with the state court that all economically beneficial use of the land was not deprived and rejected plaintiff's contention, made for the first time before the federal Supreme Court, that the uplands parcel was a separate parcel. The Court noted that "some" of its cases use the "parcel as a whole" rule in evaluating takings claim, as in the Penn Central case, but also indicated some "discomfort" with the rule in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016-17, n. 7 (1992). However, as the question was not presented below, the majority declined to reach the issue and remanded the case for review under the three Penn Central factors.

Justice O'Connor concurred, but emphasized that the rejection of the per se test under which a regulatory enactment would be measured as valid depending upon when plaintiff acquired the property did not mean that the temporal relationship was meaningless. Instead, Justice O'Connor believed that this question was relevant under the multi-factor Penn Central analysis. She agreed that the "purpose" of the takings clause was set forth by the majority's citation from Armstrong v. United States, but also noted that Penn Central used "essentially *ad hoc* factual inquiries," two of which were the extent to which the regulation interfered with distinct investment-backed expectations and the character of the governmental action. In a footnote, Justice O'Connor suggested that Justice Scalia would interpret Penn Central to remove any consideration of the temporal relationship in regulatory takings claims under his "government as thief" analogy and indicated this need to respond to Justice Scalia as her reason for writing separately. Justice O'Connor's opinion on investment-backed expectations being a viable part of a Penn Central analysis was joined in by the dissenters, so it effectively constitutes the decision of the Court.

Justice Scalia also concurred, but specifically indicated that he disagreed with Justice O'Connor's understanding of the use of the Penn Central test on remand. He stated he was not offended by the prospect of a sharp developer invalidating an excessive regulation (and presumably winning compensation thereby) and then developing the property to its maximum potential with the offending regulation removed and making a larger profit. He analogized this activity to the stock market or antique auctions, where the knowledgeable or venturesome buyer prevails over the ignorant or risk-averse purchaser. He expressed his belief that the government that caused the unfairness should not benefit from its unconstitutional action and concluded that when a landowner takes title has no bearing on whether the regulation amounted to a taking.

Justice Stevens concurred in part and dissented in part, focusing on the relationship of the time of acquisition and the effect of the challenged regulation. Justice Stevens stated that a taking occurred at a particular moment in time, which is important in assessing the compensation that must be given to the person from whom the property is taken. Thus, he joined with that portion of the

Court's opinion, stating that the claim was ripe. However, where the 1971 regulations had caused a taking, plaintiff was not the owner of the land at the time the claim accrued. Plaintiff's standing is not dependent on notice of the regulations, but on whether he has the right to claim compensation for property taken from someone else. In this case, plaintiff may seek to enjoin the regulations, but may not claim damages. In any event, plaintiff's claim that the taking occurred in 1986 with the denial of the last application must be seen in light of what plaintiff acquired in 1978—i.e., an expectancy only that he could apply for a permit to fill the wetlands. Thus, he dissented from a rule that allows a right of compensation to one other than the victim of an illegal and unconstitutional taking. He noted that this right had no limiting principle or statute of limitations. He concluded:

Perhaps my concern is unwarranted, but today's decision does raise the spectre of a tremendous—and tremendously capricious—one-time transfer of wealth from society at large to those individuals who happen to hold title to large tracts of land at the moment this legal question is permanently resolved.

Justice Stevens also concluded that whether there was a right to fill wetlands is a question of state law and again stated that a successor property owner had no right to claim a taking. Thus, he would affirm the state court decision.

Justice Ginsburg, joined by Justices Souter and Breyer, dissented. They found no final decision as to the use of the 20-acre site under Hamilton Bank and thus found the claim to be unripe. They pointed out plaintiff never did seek to develop any nonwetland use of the area, or any use, for that matter, that did not involve a substantial fill. The dissenters found the record ambiguous as to what uses could be made of the entire parcel and stated the majority's result was unfair to the state because plaintiff could pursue other concededly allowable upland development. Further, the dissenters suggested plaintiff had pursued only a Lucas claim—that there was no economically beneficial use of the land—and not a Penn Central claim below. The defeat of the Lucas claim and the failure to press the Penn Central claim should have caused dismissal, noting that the Penn Central claim was asserted only after plaintiff secured new counsel. The dissenters also observed that another new claim was added on review, *viz.*, that even if there were some use of the 20 acres (i.e., one house) there could still be a taking presumably because the regulation had gone "too far." However, the dissenters found that claim was also defeated by showing that \$200,000 worth of value remained and that this "floor" of value was sufficient to defeat any Lucas claim. In any event, these new claims were characterized by these dissenters as a "bait and switch" operation. They found the nature and extent of the permitted development on this site

to be ambiguous and thus not supportive of a Penn Central claim because the case was unripe.

Justice Breyer dissented separately, agreeing with Justice Ginsburg's opinion, but adding that he also agreed with the majority that the time of acquisition is not dispositive of any takings claim. However, he also agreed with Justice O'Connor that these factors may play a role under Penn Central. He also pointedly stated he could not see any basis for a takings claim asserted on a remainder parcel created by manipulation of property boundaries to be consistent with the stated purpose of the takings clause as "justice and fairness."

The Supreme Court is not final because it is right, but right only because it is final. As with Dred Scott v. Sanford and Bush v. Gore, the constitutional traditions of this country accept these final decisions, no matter how unpalatable or incorrect. So it is here.

On the ripeness issue, the Court found no per se taking, but stated that there was a sufficient understanding that no wetlands fill or development allowed to obviate further need for applications, a result that may well breed more Penn Central trials, where the application of these factors has been notoriously unclear.

On the issue of the temporal relationship between the regulation and property acquisition, it is unclear in a future case whether the Court will agree with Justice O'Connor or Justice Scalia, the other members of the majority not speaking to the issue. If the majority follows Justice O'Connor, as it now appears, then the investment-backed expectations factor of Penn Central may include consideration of what a reasonable person might consider paying for property or what the plaintiff did consider in so doing. If it follows Justice Scalia's vision of the government as a wrongdoer or thief, then there will be clever landowners who may profit from the Supreme Court's latest gloss on the takings clause, regardless of the justice and fairness of these positions.

As to the disposition of the case on remand, there is little direction given to state or lower federal courts from the Supreme Court, which seems more willing to save its discussion of the substance of the takings clause (except where here the time of acquisition and the effect of the regulation were discussed) from a "Monday morning quarterback" position.

There are some interesting observations to be made from this decision, however:

1. The majority of the Court has adopted the "justice and fairness" dicta of Armstrong v. United States as the ostensible purpose of the takings clause over the text of the Fifth Amendment.

2. The Agin's tests are given less consideration because there was no challenge to the public purpose of the wetlands regulations, and it was obvious that there was some viable economic use of the land. Instead, the Court stated Penn Central is the appropriate vehicle for evaluating regulations that allegedly go "too far," but do not deprive all beneficial economical use.

3. The "parcel as a whole" rule of Penn Central is in some doubt, so that a landowner bringing a regulatory taking claim may involve lands that are the remainder of a parcel of a larger parcel, but which, because of wetland habitat or other considerations, may not be available for development.

4. The language used in the various opinions bring interesting analogies and expressions that convey deeper views of the members of the Court. Justice Scalia's fulminations regarding the government as a wrongdoer or thief that should not profit from its malefactions, Justice Ginsburg's "bait and switch" description of how counsel characterized the client's case before that Court and Justice Stevens' noting that a taking occurs at a discrete point in time are all strong expressions that bespeak an intellectually divided court. But the most interesting analogy is that of Justice Kennedy's majority opinion, stating that the state of Rhode Island attempted to place a "Hobbesian stick into a Lockean bundle." A little more talk like this could lead us to a better understanding of the political theory underlying our federal Constitution, which might be a productive discussion.

Palazzolo v. Rhode Island, 121 S.Ct. 2448, 2001 U.S. LEXIS 4910 (June 28, 2001).