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RHODE ISLAND

Palazzolo v. Rhode Island, C.A. No. WM 88-0297, 2005 R.I. Super. LEXIS 108, (R.I. July 5, 2005) (holding that the denial of Palazollo's permit to develop tidal lands was not a taking due to anticipatory nuisance, the limitations resulting from the Public Trust Doctrine, and failure to satisfy the Penn Central test).

Anthony Palazzolo brought an inverse condemnation action against Rhode Island's Coastal Resources Management Council ("CRMC"). Palazollo sought to fill 18 acres of saltwater marsh to construct a residential development. In 1976, the CRMC adopted a plan prohibiting all filling of coastal wetlands without a special exception. Upon denial of his permit request, Palazollo brought suit alleging that the CRMC's action constituted a taking for which he was entitled to compensation. At the initial bench trial in 1997, the Superior Court of Rhode Island entered judgment for the state. On appeal, the Rhode Island Supreme Court affirmed, holding that the appeal was not ripe for decision because Palazollo had never properly submitted a development application to the CRMC. On writ of certiorari, the U.S. Supreme Court reversed and found that the case was ripe for review. The Court remanded the case back to the Superior Court of Rhode Island with instructions to perform an analysis under *Penn Central v. City of New York*.

Palazollo's property was located on the south side of a tidal saltwater pool. Much of the site was subject to daily tidal inundation, and surveys indicated that approximately one-half of the property lay below mean high water. In order to develop the site into the proposed subdivision, Palazollo needed to remove the mucky peat on the surface and add as much as six feet of fill in some areas. Evidence at trial indicated that the filling of Palazollo's site would have resulted in 12% less salt marsh and a reduction of pollutant and nitrogen filtering by the pond's salt marsh ecosystem.

At issue in the initial trial and in this appeal was whether the contemplated development would constitute a nuisance and whether such a finding precluded Palazollo's takings claim. The trial court originally found that the loss of the marsh filtering effect and the loss of wildlife habitat would amount to a nuisance. On remand, the Superior Court of Rhode Island considered whether the original nuisance holding was law of the case or was still an open issue. Because the record had been expanded with an additional two weeks of evidence presentation, the court chose not to invoke the law of the case and reviewed the issue de novo. Under Rhode Island state law, a public nuisance is an unreasonable interference with a right common to the general public or behavior that unreasonably interferes with the health, safety, peace, comfort or convenience of the general public. Claims can be brought for an-

ticipatory nuisances when it is clearly established that the nuisance would necessarily arise from the contemplated activity. The trial court held that Palazollo's development would constitute a public nuisance as a result of the significant and negative effects that the development would have on the pond. Under the takings claim test of *Lucas v. South Carolina*, nuisance law prohibits *ab initio* a takings claim. Therefore, the denial of Palazollo's permit did not constitute a taking.

Second, the Superior Court considered whether Palazollo was subject to the public trust doctrine ("doctrine"). The doctrine mandates that the state hold title to all land below the high-water mark in a proprietary capacity for the benefit of the public. Although the doctrine can be limited by legislative decree, the Superior Court found that there had been no such express or implied legislative transfer of the state's public trust rights. Accordingly, the court found that the doctrine barred Palazollo from ever filling or developing the portion of the site that was below mean high water. Although the doctrine did not completely bar Palazollo's recovery, it did constitute a factor in his investment-backed expectations for the purposes of a partial takings claim.

The court then turned to the application of a Penn Central analysis to Palazollo's partial takings claim. The court first considered whether the government singled out Palazollo (by denying his permit) and therefore forced him to bear a burden that should have been born by the larger taxpaying public. After noting that the government need not compensate property owners every time it enacted regulations to promote the general welfare, health and safety of the public, the court found that the regulatory scheme was not directed at Palazollo in particular and it had an identical impact on all property owners of tidal salt marsh.

Second, the court conducted a thorough analysis regarding the economic impact of the regulations on Palazollo and determined that Palazollo was actually receiving more economic benefit by the regulations due to the high costs of developing his proposed subdivision. Regardless of the diminution of Palazollo's parcel size, the unique factors of this case did not create any adverse economic impact on Palazollo.

Finally, the court turned to Palazollo's reasonable investment-backed expectations, a subject to which the Supreme Court ordered particular attention on remand. The court held that Palazollo's investment-backed expectations were not reasonable and therefore he failed to satisfy the third prong of the Penn Central test. Palazollo was aware or should have been aware that the property was subject to the doctrine. He was aware of the engineering difficulties surrounding the site, as well as state regulations regarding the dredging and filling of tidal waters. Although he may have made a bad business decision, the purpose of the takings clause is not to compensate such decisions.

Thus, the court held that no taking had occurred and Palazollo was not entitled to compensation because (1) his proposed development would have constituted a nuisance, (2) the regulation was not directed at Palazollo in particular, (3) the economic impact of the regulations were actually beneficial to Palazollo, and (4) Palazollo failed to satisfy the third prong of the Penn Central test because his investment-backed expectations were not reasonable.

Michelle Young

TEXAS

Cummins v. Travis County Water Control and Improvement Dist., 175 S.W.3d 34 (Tex. App. 2005) (holding private ownership of land adjacent to a public reservoir did not include vested riparian rights, was subject to state regulation under the public trust, and such regulations did not constitute a compensable exercise of condemnation power).

The Cumminses own land adjacent to and overlooking Lake Travis. The Travis County Water Control and Improvement District (“District”) controls the water and shoreline of Lake Travis. After the District denied the Cumminses’ application to build a boat dock on the lake, the Cumminses brought this action for declaratory judgment to use and enjoy their land as waterfront property. They challenged the validity of District’s regulations protecting areas around a water intake used to supply public drinking water from Lake Travis. The district court dismissed the claims on summary judgment and found the Cumminses lacked riparian rights to the shoreline of Lake Travis. Consequently, they were not entitled to construct a boat dock on state-owned land held for the public trust under District regulations. The Cumminses appealed to the Texas State Court of Appeals.

On appeal, the court delineated the test establishing a landowner’s riparian rights to a body of water adjacent to his land. The court stated a waterfront property owner must: (1) trace his title to a sovereign grant prior to 1895 or obtain a certificate of adjudication from the state of Texas, and (2) establish that the land, as granted by deed, borders a natural lake with a normal flow of water. Because the Cumminses did not adjudicate their right, they did not have riparian rights enabling construction of a boat dock. Furthermore, they could not trace their title prior to 1895, nor was the land adjacent to a natural body of water because Lake Travis, a reservoir, constituted an artificial waterbody.

Furthermore, the court justified the District’s denial of the application because Texas state law entitled the District to regulate land submerged under water to protect public health and safety under the public trust doctrine. Therefore, the owners of land abutting a waterway do not have title to submerged land, only a right of access based on