SUPREME COURT OF THE UNITED STATES

No. 99–2047

ANTHONY PALAZZOLO, PETITIONER *v.*
RHODE ISLAND ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

[June 28, 2001]

JUSTICE GINSBURG, with whom JUSTICE SOUTER and JUSTICE BREYER join, dissenting.

A regulatory takings claim is not ripe for adjudication, this Court has held, until the agency administering the regulations at issue, proceeding in good faith, "has arrived at a final, definitive position regarding how it will apply [those regulations] to the particular land in question." *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City,* 473 U. S. 172, 191 (1985). Absent such a final decision, a court cannot "kno[w] the nature and extent of permitted development" under the regulations, and therefore cannot say "how far the regulation[s] g[o]," as regulatory takings law requires. *MacDonald, Sommer & Frates* v. *Yolo County,* 477 U. S. 340, 348, 351 (1986). Therefore, even when a landowner seeks and is denied permission to develop property, if the denial does not demonstrate the effective impact of the regulations on the land, the denial does not represent the "final decision" requisite to generate a ripe dispute. *Williamson County*, 473 U. S., at 190.

MacDonald illustrates how a highly ambitious application may not ripen a takings claim. The landowner in that case proposed a 159-home subdivision. 477 U. S., at 342. When that large proposal was denied, the owner complained that the State had appropriated "all beneficial use

of its property." *Id.*, at 352, n. 8; see also *id.*, at 344. This Court concluded, however, that the landowner's claim was not ripe, for the denial of the massive development left "open the possibility that some development [would] be permitted." *Id.*, at 352. "Rejection of exceedingly grandiose development plans," the Court observed, "does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *Id.*, at 353, n. 9.

As presented to the Rhode Island Supreme Court, Anthony Palazzolo's case was a close analogue to *MacDonald*. Palazzolo's land has two components. Approximately 18 acres are wetlands that sustain a rich but delicate ecosystem. See 746 A. 2d 707, 710, and n. 1 (R. I. 2000). Additional acres are less environmentally sensitive "uplands." (The number of upland acres remains in doubt, see *ibid.*, because Palazzolo has never submitted "an accurate or detailed survey" of his property, see Tr. 190 (June 18–19, 1997).) Rhode Island's administrative agency with ultimate permitting authority over the wetlands, the Coastal Resources Management Council (CRMC), bars residential development of the wetlands, but not the uplands.

Although Palazzolo submitted several applications to develop his property, those applications uniformly sought permission to fill most or all of the wetlands portion of the property. None aimed to develop only the uplands.[1] Upon

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[1] Moreover, none proposed the 74-lot subdivision Palazzolo advances as the basis for the compensation he seeks. Palazzolo's first application sought to fill all 18 acres of wetlands for no stated purpose whatever. See App. 11 (Palazzolo's sworn 1983 answer to the question why he sought to fill uplands) ("Because it's my right to do if I want to to look at it it is my business."). Palazzolo's second application proposed a most disagreeable "beach club." See *ante*, at 5 ("trash bins" and "port-a-johns" sought); Tr. 650 (June 25–26, 1997) (testimony of engineer Steven M. Clarke) (to get to the club's water, *i.e.*, Winnapaug Pond rather than the nearby Atlantic Ocean, "you'd have to walk across the gravel fill, but then work your way through approximately 70, 75 feet of

denial of the last of Palazzolo's applications, Palazzolo filed suit claiming that Rhode Island had taken his property by refusing "to allow any development." App. 45 (Complaint ¶17).

As the Rhode Island Supreme Court saw the case, Palazzolo's claim was not ripe for several reasons, among them, that Palazzolo had not sought permission for "development only of the upland portion of the parcel." 746 A. 2d, at 714. The Rhode Island court emphasized the "undisputed evidence in the record that it would be possible to build at least one single-family home on the existing upland area, with no need for additional fill." *Ibid.*

Today, the Court rejects the Rhode Island court's determination that the case is unripe, finding no "uncertainty as to the [uplands'] permitted use." *Ante*, at 12. The Court's conclusion is, in my view, both inaccurate and inequitable. It is inaccurate because the record is ambiguous. And it is inequitable because, given the claim asserted by Palazzolo in the Rhode Island courts, the State had no cause to pursue further inquiry into potential upland development. But Palazzolo presses other claims here, and at his behest, the Court not only entertains them, but also turns the State's legitimate defense against the claim Palazzolo originally stated into a weapon against the State. I would reject Palazzolo's bait-and-switch ploy and affirm the judgment of the Rhode Island Supreme Court.

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marsh land or conservation grasses"). Neither of the CRMC applications supplied a clear map of the proposed development. See App. 7, 16 (1983 application); Tr. 190 (June 18–19, 1997) (1985 application). The Rhode Island Supreme Court ultimately concluded that the 74-lot development would have been barred by zoning requirements, apart from CRMC regulations, requirements Palazzolo never explored. See 746 A. 2d 707, 715, n. 7 (2000).

Where physical occupation of land is not at issue, the Court's cases identify two basic forms of regulatory taking. *Ante*, at 7–8. In *Lucas* v. *South Carolina Coastal Council,* 505 U. S. 1003 (1992), the Court held that, subject to "certain qualifications," *ante*, at 7, 20, denial of "*all* economically beneficial or productive use of land" constitutes a taking. 505 U. S., at 1015 (emphasis added). However, if a regulation does not leave the property "economically idle," *id.*, at 1019, to establish the alleged taking the landowner may pursue the multifactor inquiry set out in *Penn Central Transp. Co.* v. *New York City,* 438 U. S. 104, 123–125 (1978).

Like the landowner in *MacDonald*, Palazzolo sought federal constitutional relief *only* under a straightforward application of *Lucas*. See *ante*, at 6; App. 45 (Complaint ¶17) ("As a direct and proximate result of the Defendants' refusal to allow *any* development of the property, there has been a taking" (emphasis added)); Plaintiff's Post Trial Memorandum in No. 88–0297 (Super. Ct., R. I.), p. 6 ("[T]his Court need not look beyond the *Lucas* case as its very lucid and precise standards will determine whether a taking has occurred."); *id.*, at 9–10 ("[T]here is *NO USE* for the property whatsoever. . . . Not one scintilla of evidence was proffered by the State to prove, intimate or even suggest a theoretical possibility of *any* use for this property– never mind a beneficial use. Not once did the State claim that there *is*, in fact, some use available for the Palazzolo parcel."); Brief of Appellant in No. 98–0333, pp. 5, 7, 9–10 (hereinafter Brief of Appellant) (restating, verbatim, assertions of Post Trial Memorandum quoted above).

Responding to Palazzolo's *Lucas* claim, the State urged as a sufficient defense this now uncontested point: CRMC "would [have been] happy to have [Palazzolo] situate a home" on the uplands, "thus allowing [him] to realize

200,000 dollars." State's Post-Trial Memorandum in No. 88–0297 (Super. Ct., R. I.), p. 81; see also Brief of Appellees in No. 98–0333A, p. 25 (hereinafter Brief of Appellees) (Palazzolo "never even applied for the realistic alternative of using the entire parcel as a single unitary home-site"). The State did present some evidence at trial that more than one lot could be developed. See *infra*, at 8–9. And, in a supplemental post-trial memorandum addressing a then-new Rhode Island Supreme Court decision, the State briefly urged that Palazzolo's claims would fail even under *Penn Central*. See *ante*, at 14. The evidence of additional uses and the post-trial argument directed to *Penn Central*, however, were underdeveloped and unnecessary, for Palazzolo himself, in his pleadings and at trial, pressed only a *Lucas*-based claim that he had been denied *all* economically viable use of his property. Once the State demonstrated that an "economically beneficial" development was genuinely plausible, *Lucas*, 505 U. S., at 1015, the State had established the analogy to *MacDonald:* The record now showed "valuable use might still be made of the land." 477 U. S., at 352, n. 8; see Brief of Appellees 24–25 (relying on *MacDonald*). The prospect of real development shown by the State warranted a ripeness dismissal of Palazzolo's complaint.

Addressing the State's *Lucas* defense in *Lucas* terms, Palazzolo insisted that his land had "no use . . . as a result of CRMC's application of its regulations." Brief of Appellant 11. The Rhode Island Supreme Court rejected Palazzolo's argument, identifying in the record evidence that Palazzolo could build at least one home on the uplands. 746 A. 2d, at 714. The court therefore concluded that Palazzolo's failure to seek permission for "development only of the upland portion of the parcel" meant that Palazzolo could not "maintain a claim that the CRMC ha[d] deprived him of all beneficial use of the property." *Ibid.*

It is true that the Rhode Island courts, in the course of

ruling for the State, briefly touched base with *Penn Central*. Cf. *ante*, at 14. The critical point, however, underplayed by the Court, is that Palazzolo never raised or argued the *Penn Central* issue in the state system: not in his complaint; not in his trial court submissions; not—even after the trial court touched on the *Penn Central* issue—in his briefing on appeal. The state high court decision, raising and quickly disposing of the matter, unquestionably permits us to consider the *Penn Central* issue. See *Raley* v. *Ohio*, 360 U. S. 423, 436–437 (1959). But the ruling below does not change the reality essential here: Palazzolo litigated his takings claim, and it was incumbent on the State to defend against that claim, only under *Lucas*.

If Palazzolo's arguments in this Court had tracked his arguments in the state courts, his petition for certiorari would have argued simply that the Rhode Island courts got it wrong in failing to see that his land had "no use" at all because of CRMC's rules. Brief of Appellant 11. This Court likely would not have granted certiorari to review the application of *MacDonald* and *Lucas* to the facts of Palazzolo's case. However, aided by new counsel, Palazzolo sought—and in the exercise of this Court's discretion obtained—review of two contentions he did not advance below. The first assertion is that the state regulations take the property under *Penn Central*. See Pet. for Cert. 20; Brief for Petitioner 47–50. The second argument is that the regulations amount to a taking under an expanded rendition of *Lucas* covering cases in which a landowner is left with property retaining only a "few crumbs of value." *Ante*, at 21 (quoting Brief for Petitioner 37); Pet. for Cert. 20–22. Again, it bears repetition, Palazzolo never claimed in the courts below that, if the State were correct that his land could be used for a residence, a taking none-

theless occurred.[2]

In support of his new claims, Palazzolo has conceded the very point on which the State properly relied to resist the simple *Lucas* claim presented below: that Palazzolo can obtain approval for one house of substantial economic value. Palazzolo does not merely accept the argument that the State advanced below. He now contends that the evidence proffered by the State in the Rhode Island courts supports the claims he presents here, by demonstrating that *only* one house would be approved. See Brief for Petitioner 13 ("[T]he uncontradicted evidence was that CRMC . . . would not deny [Palazzolo] permission to build one single-family home on the small upland portion of his property." (emphasis deleted)); Pet. for Cert. 15 (the extent of development permitted on the land is "perfectly clear: one single-family home and nothing more").

As a logical matter, Palazzolo's argument does not stand up. The State's submissions in the Rhode Island courts hardly establish that Palazzolo could obtain approval for *only* one house of value. By showing that Palazzolo could have obtained approval for a $200,000 house (rather than, say, two houses worth $400,000), the State's submissions established only a floor, not a ceiling, on the value of permissible development. For a floor value was all the State needed to defeat Palazzolo's simple *Lucas* claim.

Furthermore, Palazzolo's argument is unfair: The argument transforms the State's legitimate defense to the only claim Palazzolo stated below into offensive support

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[2] After this Court granted certiorari, in his briefing on the merits, Palazzolo presented still another takings theory. That theory, in tension with numerous holdings of this Court, see, *e.g.*, *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602, 643–644 (1993), was predicated on treatment of his wetlands as a property separate from the uplands. The Court properly declines to reach this claim. *Ante*, at 22.

for other claims he states for the first time here. Casting away fairness (and fairness to a State, no less), the Court indulges Palazzolo's bait-and-switch maneuver. The Court concludes that "there is no genuine ambiguity in the record as to the extent of permitted development on . . . the uplands." *Ante*, at 13–14. Two theories are offered to support this conclusion.

First, the Court asserts, it is "too late in the day" for the State to contend the uplands give the property more than $200,000 in value; Palazzolo "stated" in his petition for certiorari that the property has "an estimated worth of $200,000," and the State cited that contention "as fact" in its Brief in Opposition. *Ante*, as 13. But in the cited pages of its Brief in Opposition, the State simply said it "would" approve a "single home" worth $200,000. Brief in Opposition 4, 19. That statement does not foreclose the possibility that the State would *also* approve another home, adding further value to the property.

To be sure, the Brief in Opposition did overlook Palazzolo's change in his theory of the case, a change that, had it been asserted earlier, could have rendered insufficient the evidence the State intelligently emphasized below. But the State's failure to appreciate that Palazzolo had moved the pea to a different shell hardly merits the Court's waiver finding. The only precedent cited for the waiver, a footnote in *Lucas*, is not remotely on point. *Ante*, at 13. The landowner in *Lucas* had invoked a "finding" of fact by the state court, and this Court deemed the State's challenge to that finding waived because the challenge was not timely raised. *Lucas*, 505 U. S., at 1020–1022, n. 9. There is nothing extraordinary about this Court's deciding a case on the findings made by a state court. Here, however, the "fact" this Court has stopped the State from contesting– that the property has value of *only* $200,000– was never found by any court. That valuation was simply asserted, inaccurately, see *infra*, at 9, in

Palazzolo's petition for certiorari. This Court's waiver ruling thus amounts to an unsavory invitation to unscrupulous litigants: Change your theory and misrepresent the record in your petition for certiorari; if the respondent fails to note your machinations, you have created a different record on which this Court will review the case.

The Court bolsters its waiver finding by asserting that the $200,000 figure is "well founded" in the record. *Ante*, at 13. But, as earlier observed, an absence of multiple valuation possibilities in the record cannot be held against the State, for proof of more than the $200,000 development was unnecessary to defend against the *Lucas* claim singularly pleaded below. And in any event, the record does not warrant the Court's conclusion.

The Court acknowledges "testimony at trial suggesting the existence of an additional upland parcel elsewhere on the property" on which a second house might be built. *Ante*, at 13. The Court discounts that prospect, however, on the ground that development of the additional parcel would require a new road forbidden under CRMC's regulations. *Ibid.* Yet the one witness on whose testimony the Court relies, Steven M. Clarke, himself concluded that it *would* be "realistic to apply for" development at more than one location. Tr. 612 (June 25–26, 1997). Clarke added that a state official, Russell Chateauneuf, "gave [Clarke] supporting information saying that [multiple applications] made sense." *Ibid.* The conclusions of Clarke and Chateauneuf are confirmed by the testimony of CRMC's executive director, Grover Fugate, who agreed with Palazzolo's counsel during cross-examination that Palazzolo might be able to build "on two, perhaps three, perhaps four of the lots." *Id.*, at 211 (June 20–23, 1997); see also Tr. of Oral Arg. 27 ("[T]here is . . . uncertainty as to what additional upland there is and how many other houses can be built.").

The ambiguities in the record thus are substantial. They persist in part because their resolution was not

required to address the claim Palazzolo presented below, and in part because Palazzolo failed ever to submit an accurate survey of his property. Under the circumstances, I would not step into the role of supreme topographical factfinder to resolve ambiguities in Palazzolo's favor. Instead, I would look to, and rely on, the opinion of the state court whose decision we now review. That opinion states: "There was undisputed evidence in the record that it would be possible to build *at least* one single-family home on the existing upland area." 746 A. 2d, at 714 (emphasis added). This Court cites nothing to warrant amendment of that finding.[3]

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In sum, as I see this case, we still do not know "the nature and extent of permitted development" under the regulation in question, *MacDonald*, 477 U. S., at 351. I would therefore affirm the Rhode Island Supreme Court's judgment.

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[3] If Palazzolo's claim were ripe and the merits properly presented, I would, at a minimum, agree with JUSTICE O'CONNOR, *ante*, at 1–5 (concurring opinion), JUSTICE STEVENS, *ante*, at 6–7 (opinion concurring in part and dissenting in part), and JUSTICE BREYER, *ante*, at 1–2 (dissenting opinion), that transfer of title can impair a takings claim.