LAND-USE PLANNING & ZONING

Land-use Planning & Zoning:
Comprehensive Plan – Amendment

Martin County v. Section 28 Partnership, Limited,
772 S.2d 616 (Fla. Dist. App. 4th 2000)

The Martin County legislative policy of maintaining rural and agricultural land uses, as adopted in its Growth Management Comprehensive Plan in the late 1980s, withstood a ten-year attempt to change it significantly to accommodate an office, shopping center, and housing development equivalent to the creation of a new village. The policy was supported by abundant factual and professional opinion evidence that linked the non-urban land uses with protection of environmentally sensitive county areas.

• Judicial review of a substantive-due-process challenge to governmental decisions about land-use planning must be conducted under the rational-basis test. Such a review is inextricably intertwined with the fairly-debatable standard because "a legislative act of the government will not be considered arbitrary and capricious if it has 'a rational relationship with a legitimate general welfare concern.'" *Martin County,* 772 S.2d at 620 (quoting *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1214 (11th Cir. 1995) (quoting *Corn v. City of Lauderdale Lakes,* 997 F.2d 1369, 1388 (11th Cir. 1993))).

• This opinion reinforces local government powers, previously grounded in supportive judicial opinions about the State's growth-management policies, to block urban growth and sprawl from spilling over its borders from more urbanized areas. The facts from this classic challenge of conflicting interests demonstrate how the precedents may be applied to new arguments, although the proponent's burden of proof remains that of presenting sufficient evidence of error that no court could consider the government's decision to be even fairly debatable.

FACTS

To fathom the essence of this lengthy conflict, a summary will appear after this factual section as assembled from the trial and appellate cases.

The Section 28 Partnership (Partnership) had assembled 636 acres of rurally/agriculturally zoned land that bordered on two sides of the Jonathan Dickinson State Park, the geological headwaters of the Loxahatchee River, which the United States Park Service has designated as a National Wildlife and Scenic River. The State Park was fifteen times larger than the partnership's one-mile-square site. The third side of the site bordered upon a high-density residential project in neighboring Palm Beach County.

The Partnership's last modified development request submitted to the county sought to (1) double the number of residential dwellings currently allowable under the site's existing zoning, (2) create a retail shopping center and office space not allowable by existing regulations, and (3) provide a golf course and clubhouse as another new land use. Logically, the parties might have been able to negotiate an acceptable development at a somewhat higher development density than that originally zoned by manipulating the many zoning variables involved in such a large project. Unfortunately, these were not the only changes needed for permit/development approval. The Partnership wanted the County to reverse its major, legislative policy decision that denied utility services to this rural portion of the County. The Partnership proposed amending the Comprehensive Plan to create an Urban Services District into which utility services would be provided by Palm Beach County. From the Partnership's viewpoint, this requested amendment was potentially beneficial to Martin County, because services would not be its burden.

SUMMARY: ESSENCE OF CONFLICT

The County was faced with a development decision that placed its future public policy in the balance. Its growth-management decisions were shaped to resist sprawl and new population pressures arising from its southern county neighbors to maintain a small-town atmosphere and protect environmentally sensitive park and river lands. In opposition to that policy, the Partnership's objective of creating a new, small town center with retail, office, and residential uses would have been very profitable

for such a massive financial investment, and not so different from other proposals that typically conflict with existing planning ordinances. In its favor, this project would have created fewer buildings per acre (the density factor) than that found across the line in Palm Beach County, and the utility services would not have imposed upon Martin County. However, the proximity of an urban settlement adjacent to the park and river could not be denied or minimized, despite the attempts to do so.

Which interest should have received the greater weight when the government was reaching a decision? Could this proposal be legally rejected when, just across the county line, an invisible and artificial border, there was a significant settlement more intense in its use of land than that proposed? Would a denial be legally unreasonable because it was not based upon sound planning principles? Would denial be arbitrary and capricious, especially in light of the fact that utility services were not going to burden Martin County? These questions were bundled into a substantive-due-process claim against the County.

COURT'S ANALYSIS

A second appeal of the Partnership's claim was necessary because the fairly-debatable standard was not utilized on retrial. Apparently, the Partnership did not completely appreciate that its burden was to prove that the County's decision was not based upon "a rational relationship with a legitimate general welfare concern." *Martin County*, 772 S.2d at 620. It had to show a decision "so unreasonable and arbitrary as to not be even 'fairly debatable.'" *Id.* This is an evidentiary burden different from that raised by the constitutional-due-process standard — one that requires substantially greater evidence than simply meeting the mandated permit requirements found within the County's Comprehensive Plan and Land Development Regulations.

The inextricable intertwining of substantive due process and the amendment of the plan were enunciated in the prior appeal of this dispute. *Martin County v. Section 28 Partn., Ltd.*, 676 S.2d 532, 537 (Fla. Dist. App. 4th 1996). This 1996 decision was followed by *Gardens Country Club, Incorporated v. Palm Beach County*, 712 S.2d 398, 404 (Fla. Dist. App. 4th 1998), which held that substantive-due-process claims that dispute legislative acts are analyzed under the rational-basis test. Amendments to a comprehensive plan are legislative acts and, therefore, must not be made arbitrarily or capriciously. *Corn v. City of Lauderdale*

Lakes, 997 F.2d 1369, 1388 (11th Cir. 1993). Courts will defer to the government's decision unless the proponent is able to prove factually, outside of constitutional grounds, that reasonable people could not support the decision. *Martin County v. Yusem*, 690 S.2d 1288, 1295 (Fla. 1997).

Did the County have a rational basis for denying the request for the plan amendment? Yes, it did, because it presented overwhelming evidence that the denial was related to the County's legitimate governmental interests in planning, economic, environmental, and fiscal responsibility. Professional opinions supported the County's efforts to prevent urban sprawl into isolated, wilderness-type areas, to maintain non-urban transitional zones adjacent to the State park and river, and to confine development to existing serviced areas like the City of Stuart. There was additional convincing evidence from a County expert witness who challenged the economic viability of the Partnership project. Thus, upon a careful review of the evidence using the defined judicial-review standards, it was clear to the court that the government's interests in maintaining the status quo were sustained by denying the plan's amendment and the project. Thus, the trial court's ruling in favor of the Partnership was erroneous and had to be reversed.

RESEARCH REFERENCES

- *Section 28 Partn., Ltd. v Martin County*, 642 S.2d 609, 612 (Fla. Dist. App. 4th 1994) (holding that the request to amend the comprehensive plan by creating an "Adjacent County Urban Service Area" was a legislative decision because it established a new policy for Martin County).
- Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning* vol. 1, § 14 (West 2001).
- Kenneth H. Young, *Anderson's American Law of Zoning* ch. 23 (4th ed., Clark Boardman Callaghan 1997).
- Christopher C. Sanders, Student Author, *Recent Developments*, 26 Stetson L. Rev. 1025 (1997) (discussing *Martin County v. Section 28 Partn., Ltd.*, 676 S.2d 532 (Fla. Dist. App. 4th 1996)).

James J. Brown, Professor

Land-use Planning & Zoning: Comprehensive Plan – In Compliance

Baker v. Metropolitan Dade County,
774 S.2d 14 (Fla. Dist. App. 3d 2000)

This case offers new perspectives on old rules involving (1) the ability of objectors to bring a judicial appeal when they have not complied with Florida Statutes Section 163.3215; (2) the definition and interpretation of "fundamental fairness" as applied by county governing boards; and (3) the significance of a Comprehensive Land Use Plan. Readers should note a new trend, illustrated by this case, that, when county-land-use plans are weighed in the balance between flexible and strict application, courts more often than not now lean toward strict compliance.

BACKGROUND

Baker relies on the rule established in *Jesus Fellowship, Incorporated v. Miami-Dade County,* 752 S.2d 708 (Fla. Dist. App. 3d 2000), that, when an applicant seeks an exception to a county's comprehensive-land-use plan, he needs only to show (1) that the proposal is consistent with the county's plan, (2) that the exceptions are authorized in the district in which the unusual use will be located, and (3) that the requested changes meet with the applicable standards of review. If the landowner meets this three-pronged test, the zoning board must approve the application unless the opposition can show that the exception is adverse to the interest.

FACTS AND PROCEDURE

The landowner possessed four adjacent lots that formed a large, rectangular tract of undeveloped land. Lot one was zoned commercial; lots two and three residential; and lot four, although zoned residential, was actually part of the Oleta River and was protected from development. The County's comprehensive plan and development regulations provided that lot one was for business or office purposes and lots two, three, and four were restricted to low- or medium-density residential use.

The landowner proposed a large self-storage facility for lot one, which facility actually would be expanded beyond lot one, and submitted a site plan that included parking and landscaping sufficient to support the expanded storage facility for lots two and

three. The landowner requested (1) a special exception for the self-storage facility, (2) six variances for parking, setback, and street requirements, and (3) an exception to the county-land-use plan that would permit a commercial use in a residential zone. The landowner conceded inconsistency with the plan, but argued that the plan should not be strictly applied. The County zoning board approved the proposal, ignoring the protesting objectors who immediately filed suit. The circuit court affirmed the government's decision, which subsequently was quashed on appeal.

ISSUES AND ANALYSIS

On certiorari review, the Third District Court of Appeal limited its analysis to (1) whether the lower court followed procedural due process, and (2) whether it applied the correct law. In determining whether the correct law was applied, the court considered three issues: (1) whether the landowner's proposed use was consistent with the county's comprehensive-land-use plan, (2) whether the unusual uses sought by the landowner were specifically authorized as exceptions in the zoning district in which they were located, and (3) whether the proposed variances met the applicable zoning-code standards of review.

Did the Lower Court Follow Procedural Due Process?

Before this case, adversely-affected parties challenging the decision of a local zoning board had to exhaust the administrative procedures of the local regulations before turning to the courts. Fla. Stat. § 163.3215 (2001). Intended as a means to reduce litigation, the adversely affected, meaning the adjacent, neighbors, ordinarily were given sufficient opportunities to meet with the government to find satisfactory compromises. However, in *Baker*, the court stated that, if the County staff *itself* fully recognized the inconsistency of the proposed use and approved it anyway, the aggrieved party could proceed to a judicial appeal because exhausting the administrative procedures would be frivolous.

The landowner in *Baker* objected to litigating the protester's objections because the sole method available for challenges to development orders was to file a complaint with the local government board. *Id*. The landowner unsuccessfully relied on *Poulos v. Martin County*, 700 S.2d 163, 165–166 (Fla. Dist. App. 4th 1997) (holding that the time limits imposed by Section 163.3125

preclude judicial challenges by certiorari review). The unhappy objectors were given their day in court based on the reasoning in *Village of Key Biscayne v. Tesaurus Holdings, Incorporated,* 761 S.2d 397, 398 (Fla. Dist. App. 3d 2000). The court explained that it would be redundant to require the objectors to do what they had already done — appeal to the same board that had considered the matter and ruled against them. Therefore, *Baker* establishes the new rule that objectors need not follow statutory procedure by complaining to the county board, but may go directly to the court through certiorari review when the county already knows the plan is inconsistent and approves it anyway.

May County Boards Approve Inconsistent Uses on the Basis of Fundamental Fairness?

Allowing the County board to find for the landowner on the basis of "fundamental fairness," when his proposal had not been authorized as a special exception, would violate the separation-of-powers doctrine. *Baker,* 774 S.2d at 19–20 n. 14 (citing *City of Miami Beach v. Weiss,* 217 S.2d 836, 837 (Fla. 1969)). Only courts can decide an issue on the basis of "fundamental fairness."

Before this decision, the zoning board believed it was imbued with quasi-judicial power that enabled it to change plan designations on whatever basis it saw fit, including "fundamental fairness." The Miami-Dade County Code seemed to support that belief: "The Comprehensive Development Master Plan shall not be construed to preempt considerations of *fundamental fairness* that may arise from a strict application of the Plan." *Baker*, 774 S.2d at 19 (quoting Miami-Dade County Code (Fla.) § 2-114(c)(2) (1999) (emphasis added)). However, the Third District disagreed and held that "fundamental fairness" questions are judicial questions, and Section 2-114(c)(2) did not empower the zoning board to decide any issue on that basis. Rather, the cited code Section reflected only the county's desire to be sure that, in the event of a court review, the issue of fundamental fairness would not be overlooked. Fundamental-fairness questions are judicial in nature, and lie solely "within the jurisdiction of the courts." *Id*. at 19.

Similarly, in *Machado v. Musgrove,* 519 S.2d 629, 634 (Fla. Dist. App. 3d 1987), Dade County property owners argued that the County's land-use plan should be flexibly rather than rigidly applied. The decision clarified that courts could decide the reasonableness of a comprehensive plan. Here, the court went one

step further and interpreted *Machado* to mean that courts can determine *only* reasonableness on the basis of fundamental fairness.

The Significance of a Comprehensive Land-use Plan

In deciding for the landowner, the zoning board reasoned that, because lot four was underwater and therefore unusable, the board could prevent an inequity by allowing the expanded commercial use of the three remaining lots. However, the court pointed out that lot four always had been zoned residential (although underwater) and that it was illogical to suggest that, because a residential lot could not be developed, it would cure the perceived injustice to allow two adjacent residential lots to be used for commercial development. In an aside to the landowner, and providing evidence that it was not wholly unsympathetic to his plight, the appellate court suggested a possible remedy that would be a logical exception: To have the number of residential units that might have been developed on a residential lot transferred to an adjacent lot.

The Growth Management Act specifically provided for future land use, including coastal zone protection, and mandated that no private development could take place unless it was consistent with local, regional, and state comprehensive plans. Fla. Stat. § 163.3161 (2001). In this case, lot four was described as "the river's mangrove fringe" and was therefore protected from development. That fact may have played a part in the court's decision.

RESEARCH REFERENCES

- Michael E. Libonati & John Martinez, *Sands & Libonati Local Government Law* vol. 3, § 16.35 (West Supp. 2001).
- Joni Armstrong Coffey, *Practical Aspects of Quasi-judicial Hearings: Basic Tools and Recent Fine-Tuning*, 30 Stetson L. Rev. 931 (2001).

Carol Cole McCrory

Land-use Planning & Zoning: Federal Preemption

Florida East Coast Railway Company v. City of West Palm Beach,
266 F.3d 1324 (11th Cir. 2001)

Federal legislation does not preempt a city's zoning ordinances when the ordinances are applied against a railroad lessee and do not regulate rail transportation.

FACTS

Florida East Coast Railway (FEC) owns 24.5 acres of property on 15th Street, an area of West Palm Beach (the City) zoned as a multi-family, high-density residential district. On the property are office buildings, warehouses, switching tracks, and two tracks for loading and unloading. Rinker was FEC's largest customer and used FEC to transport its aggregate from Miami to Rinker plants throughout Florida, including its plant on 7th Street in the City. In mid-1999, FEC and Rinker began to discuss a property exchange: FEC's 15th-Street yard for Rinker's 7th-Street plant, even though the 15th-Street yard was not zoned for the distribution of aggregate. Nonetheless, FEC and Rinker negotiated a lease agreement and a trackage agreement whereby FEC would lease to Rinker twenty-one acres of the 15th-Street yard and a side track. Once the aggregate entered the leased portion of the 15th-Street yard, FEC's involvement ended. Rinker unloaded, reloaded, and dispatched the trucks full of aggregate.

In mid-February, "West Palm Beach issued Cease and Desist Orders to FEC and Rinker for operating a business that did not conform to the City's pre-existing zoning ordinance" and issued a "notice of violations of Section 18-7 of the City Ordinances for unlawfully operating a business without an occupational license." *Fla. E. Coast Ry. Co.*, 266 F.3d at 1327. After a hearing, a magistrate judge found that a violation of the zoning-and-occupational-license ordinance had occurred and that the companies must cease or pay fines. *Id.* FEC then sought a declaratory judgment that the City's actions were preempted by the Interstate Commerce Commission Termination Act (ICCTA) and that the City could not impose its zoning and occupational license requirements on Rinker's operations.

COURT'S ANALYSIS

Presumption against Preemption

There is a presumption against preemption when the state acts in a field that the states have traditionally occupied. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Additionally, "'[i]f the statute's terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no preemption may be inferred.'" *Fla. E. Coast Ry. Co.*, 266 F.3d at 1328 (quoting *Gade v. Natl. Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 116–117 (1992)).

The ordinances in this case were deemed to be entitled to this presumption of validity because the City was "acting under the traditionally local police power of zoning and health and safety regulation." *Id*. at 1329. The court noted that "[t]he Supreme Court has [also] recognized the authority of local governments to establish guidelines for the use of property through such zoning ordinances." *Id*. The court found that the alleged encroachment upon federal jurisdiction did not occur because the City was not legislating in a field dominated historically by federal law. Thus, there was a considerable burden placed on the appellant.

Non-preemption of West Palm Beach Ordinances

The text of the federal statute states that "the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b) (1994). The court found that, although this language appears to be all-inclusive, in fact it has limitations. "First, the 'State Law' which is to be pre-empted is not defined." *Fla. E. Coast Ry. Co.*, 266 F.3d at 1330. Historically, when Congress intends the preemption to be expansively applied, Congress uses broad language to identify the preempted state law. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990). Second, the provision refers to only state law. By referring only to state law, Congress did not clearly include municipal laws, like those of the City. "[B]ecause municipal law is not expressly pre-empted, its effects must be closely examined." *Fla. E. Coast Ry. Co.*, 266 F.3d at 1331.

The court also considered the fact that the provision specifically regulated rail transportation. Thus, laws that attempted to manage or govern rail transportation would be preempted, but laws that had only a remote or incidental effect on rail transportation would be allowed. The court held that, based on

this understanding of the ICCTA,

> existing zoning ordinances of general applicability, which are enforced against a private entity leasing property from a railroad for non-rail transportation purposes, are not sufficiently linked to rules governing the operation of the railroad so as to constitute laws "with respect to regulation of rail transportation."

Id.

The FEC argued that the ICCTA defined transportation to include facilities related to "the movement of . . . property . . . by rail, regardless of ownership or an agreement concerning use." 49 U.S.C. § 10102(9)(A) (1994). The FEC stated that whether the activities at the 15th-Street yard were carried on by FEC or by Rinker should have no bearing on the case. The court disagreed, stating that Rinker's activities fell under the statutory definition of services because the activities involved the receipt, storage, handling, and interchange of property. Under the statute, once the court determined that Rinker was carrying on services, the court was then able to consider ownership or control of the property as a factor in deciding whether Rinker's activities were "rail transportation."

Legislative Intent

The court also found that the City's ordinances did not frustrate the purpose of federal railroad regulation. In defining what the legislative purpose was, the court pointed to the attention that the Legislature paid to removing direct economic regulation by the states as opposed to merely incidental effects that occur in the exercise of traditional local police powers. The court noted that there was no evidence that Rinker would be burdened with a "patchwork of regulation" based on the enforcement of the zoning ordinances. *Fla. E. Coast Ry. Co.*, 266 F.3d at 1339. Most importantly, the zoning ordinances "do not impede the interstate functioning of the railroad industry." *Id.*

RESEARCH REFERENCES

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 5, § 15.20 (Beth A. Buday & Victoria A. Bracher eds., 3d ed., Clark Boardman Callaghan 1996).
- Eugene McQuillin, *The Law of Municipal Corporations* vol. 8, §§ 25.05, 25.34 (3d ed., West 2000).

- C. Dallas Sands, Michael E. Libonati & John Martinez, *Local Government Law* vol. 1, § 7.07 (West 2001).

Addie Patricia Asay

Land-use Planning & Zoning: Takings

A.A. Profiles, Incorporated v. City of Fort Lauderdale, 253 F.3d 576 (11th Cir. 2001)

A government that changes a zoning classification without sufficient legal grounds may be held liable for causing a permanent taking of private property. Liability will result, despite a judicial determination of temporary taking and causation for damages, when the property owner subsequently loses title and possession of the rezoned site. The appropriate measure of damages will be the loss of market value caused by the City-Council action.

This ruling came as a surprise to the City, which entered this nearly final stage of a legal saga that commenced in May 1980, under the certain belief that only a temporary taking had been found as a result of the City Council's decision to change the zone classification on A.A. Profiles' [Profiles] organic-waste-recycling, wood-pulping business. *A.A. Profiles, Inc. v. City of Fort Lauderdale,* 850 F.2d 1483 (11th Cir. 1988) [hereinafter *Profiles I*]. Profiles received unanimous approval from the City Council in 1979 to start a wood-chipping business. Thereafter, Profiles purchased the appropriately zoned acreage for $3,290,000 and spent $267,280 in construction to meet City conditions for receiving the approval. After being in business a short time, the Council started public hearings for aggrieved local residents in May 1980, and thereafter enjoined the business operations for ten months. After that time, the Council changed the zoning classification and, in practical effect, prohibited continuation of Profiles's previously legal business activity. Profiles's journey through the federal court system is well chronicled in *Profiles I*. It is worth noting, however, that Profiles's first mortgage reached final foreclosure after the Council rezoned the area. Thus, Profiles was still the "owner" of the property at the time of the final zoning decision. This appeal is a result of the federal district trial, commenced in 1996, on the issue of City's liability and the damages resulting from its actions.

ISSUES AND ANALYSIS

Is Profiles entitled to damages when it was undercapitalized, doomed to failure, and thus would have suffered no loss from rezoning under the formula articulated in *Wheeler v. City of Pleasant Grove*, 833 F.2d 267 (11th Cir. 1987) [hereinafter *Wheeler III*], commonly referred to as the *Wheeler III* formula? The City attempted to relitigate the taking issue by collaterally challenging any monetary loss, but the appellate court bluntly stated that the district court was not free to relitigate whether a taking occurred. *A.A. Profiles, Inc.*, 253 F.3d at 582 [hereinafter *Profiles II*]. The court reaffirmed the taking holding in *Profiles I* as the law of the case while pointing out that the duplicative nature of the facts presented by the City at retrial could not establish that the original finding of a taking was clearly erroneous. Thus, the ruling must stand. *Id.*

The proper measure of damages is the significant issue and rule from this decision. One measure is the modified-market-value test that accounts for the diminution in value due to a partial taking. *Id.* at 583–584. "Generally, the proper method is to subtract the market value of the property as encumbered by the regulation from the market value of the property without the offending regulation in place." *Id.* at 584 (citing *U.S. v. 101.88 Acres of Land*, 616 F.2d 762, 769 (5th Cir. 1980)). A second measure, known as the market-value test, provides just compensation by measuring the market value at the time of the taking. *Id.* at 583. "[F]air market value takes into consideration '[t]he highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future . . . to the full extent that the prospect of demand for such use affects the market value.'" *Id.* (quoting *U.S. v. 320.0 Acres of Land*, 605 F.2d at 762, 781 (5th Cir. 1979)).

In *Wheeler III*, the court developed the third method that applies when a temporary taking has occurred. There, the court concluded that "a property owner's losses for a temporary taking are in the 'form of an injury to the property's potential for producing income or an expected profit.'" *Id.* at 584 (quoting *Wheeler III*, 833 F.2d at 271). Therefore, "the proper measure of compensation was 'the market rate return computed over the period of the temporary taking on the difference between the property's fair market value without the regulatory restriction and its fair market value with the restriction.'" *Id.* (quoting *Wheeler III*, 833 F.2d at 271). This was the measure applied in *Profiles I*.

This third method was rejected in the instant case because Profiles, unlike the property owner in *Wheeler III*, lost not only all of its income, but also its title and possession. Profiles's ability to derive any economic value from the property after the court's taking finding was zero; thus, Profiles suffered a permanent impact, not a temporary one. *Profiles II*, 253 F.3d at 584. Therefore, the court ruled that the second measure, the market-value test, was the correct measure of damages when a permanent loss of property rights and interests resulted from a government's action.

Because the expert-appraisal evidence used in the district court was not a part of the record on appeal, the court could not determine what diminution of value was caused by the City's action. The case was remanded for fact-finding on this point with this guidance:

> the district court must limit its inquiry, however, to the value of the property as of the day of the taking. That is, Profiles' precarious financial state and the later foreclosure are relevant only to the extent that they could have affected the property's market value.

Id. at 585.

COMMENTARY

This decision should provide a caveat to local-government attorneys about the unpredictability of litigation. Confidently, the City re-entered the federal-court system with an Eleventh Circuit Court of Appeals determination of a temporary taking. It is logical to assume that, if there was a finding of City liability, it would have been for the loss of business profits up to the moment of the *Profiles I* determination. Loss of business profits for a seven-year period (1981 petition filed; 1988 Eleventh Circuit ruled) would have been, assumably, substantially less than the land cost of over three-million dollars. The City's assumption proved to be unwarranted before this Eleventh Circuit bench that looked at facts *after* the prior ruling to reject that ruling's applicability, and, thereby, exposed the government to substantial damages liability.

RESEARCH REFERENCES

- *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981) (*Wheeler I*).

- *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437 (11th Cir. 1984) (*Wheeler II*).
- *Wheeler v. City of Pleasant Grove*, 833 F.2d 267 (11th Cir. 1987) (*Wheeler III*).
- Eugene McQuillin, *The Law of Municipal Corporations* vol. 11A, §§ 32.92.20–32.92.30 (3d ed., West 2000).

James J. Brown, Professor

Land-use Planning & Zoning: Takings

Palazzolo v. Rhode Island,
121 S. Ct. 2448 (2001)

The landmark precedents of takings jurisprudence received another set of interpretations in this potentially direction-altering decision. As announced in this long opinion, the subtle refinements in two of the appellate test factors applied in determining whether compensation is warranted for regulations limiting the use of land (i.e., inverse condemnation) are precedent shattering, yet logical or illogical, depending upon your reading of the texts in those landmark decisions. The Justices' divergent interpretations of existing law as applied to these facts are wide, so any reconciliation will have to await future disputes. Here is what the case does provide, however:

FINALITY

A final decision from a local government is ripe for consideration by a court when all ordinary procedural processes have been satisfied. The procedures must include those in which the governing body may exercise its full discretion on a development application, thereby defining as clearly as possible the full extent of the land-use restrictions' impact upon the property. This ruling interprets *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736–738 (1997).

- Background principles of state land law: The majority rejects this previously clear test factor from *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978), that land buyers who acquire title over which the state has previously restricted land uses and development do so with knowledge that potentially destroys their claim of having a reasonable expectation of development on the subject site. This

new ruling nullifies the "with notice and knowledge" government defense and opens the door to a state perpetually having to defend every land-use regulation. This ruling also elevates the speculative rights of successor-inheritors to assert a "taking" under regulations their ancestors could not perfect for ripeness or other reasons.

- Total taking value: The potential use of the whole property, not a fraction of it, remains unchanged as the basis for measuring the damage claim to determine whether the regulation has deprived the applicant of all beneficial uses.

FACTS

The litigation focus is an area of Rhode Island known for boating and fishing along the shore of intertidal Winnapaug Pond. The pond's waters connect to the Block Island Sound and eventually to the Atlantic Ocean. Eighteen acres of separately-owned, undeveloped wetland parcels were assembled through various transactions and were platted into a subdivision in the early 1960s. Because the land is salt marsh, it is subject to tidal flooding and, thus, potentially usable only after installing bulk-heading and landfill of up to six feet in some places. Although intended for eventual development, no maps of the wet and dry portions of the total site were ever submitted; however, the plan maps that were submitted lacked clarity, precision, and sensitivity to the concerns of the Coastal Resources Management Council (CRMC).

Beginning in 1961, Palazzolo submitted four applications for development, each requiring a landfill of 11.4 acres of wetlands. The last three of the four applications sought a development of a private beach club; however, these applications did not include residential developments on the platted lots. Palazzolo, who traced his title back to the first parcel purchases in 1959, became sole owner of all parcels upon the dissolution of the corporate title holder in 1978. Palazzolo claimed a loss of potential subdivision profits in the amount of $3.1 million due to a regulation by the Coastal Resources Management Program (CRMP) prohibiting landfill on the wetlands.

Protecting state waters and wetlands from any human activity that degrades them is a policy within the State's program plan. Palazzolo's damage claim, for which no evidence was tendered at trial or on appeal, was founded upon the compensa-bility of takings under the Fifth and Fourteenth Amendments.

Without a trial on the alleged facts of lost profits or on the number of homes that could be erected upon the dryland portions of the acreage, their probative value became a basis for judicial disagreement.

MAJOR ISSUES AND ANALYSIS

The procedural structure of this opinion follows a dissection and refutation of the Rhode Island Supreme Court opinion, wherein no taking was found. The dissection can be grouped into three major parts and will be the format followed below. Minor discursive diversions into tangential issues or discussions will not be explored. The Rhode Island opinion was reversed on the first two major issues, the facts and law of which will need a state judicial reexamination. The third issue was deemed to be correctly decided in favor of the State.

Final Decision: Ripeness

Did the Court receive a final decision of the local officials in order for a definitive resolution to be rendered? Was the dispute fully ripened for high-court review as enunciated in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172, 186 (1985)? Palazzolo's conflict was interpreted to be ripe under a refinement of the ripeness jurisprudence that emanated from *Williamson County* and *MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340 (1986). These cases impose a burden and duty upon the applicant and local agency of exploring alternative avenues of use under the regulations before an applicant has a legal right to have a takings claim considered judicially.

The refinement of this burden focused on the local government's inability to find any more room in its regulations for accommodating the needs of the development applicant.

> While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.

Palazzolo, 121 S. Ct. at 2459. Only a beach-club proposal was presented to the CRMC. Because lesser-use developments, such as a limited number of residential lots, were never presented,

there was a possibility that "some" wetland development might have been acceptable to the CRMC. Such a possibility might have been a landfill of fewer acres. But this was never realistic under the existing statute and regulations that prohibited any landfill except the one granted by special exception for a "compelling public purpose." *Id*. (citing CRMP § 130A(2)).

Would the CRMC have had the discretion to grant an exception, thereby coming within the ripeness jurisprudence of these leading precedents? No, wrote Justice Kennedy, because the CRMC lacked any discretion. Filling of wetlands was clearly a prohibited act regardless of the size or use of the site. The claim was thus ripe for the Court's review, but not in Justices Ginsburg, Souter, or Breyer's views. Justice Ginsburg found no finality in the facts, because Palazzolo never presented a development plan for the dry portion, an area never surveyed or mapped, and thus, whatever use could or could not have occurred was purely speculative. *Id*. at 2474 (Ginsburg, Souter & Breyer, JJ., dissenting). This view paralleled the Rhode Island Supreme Court's finding that the case was "not ripe" because no plan was presented for the seventy-four-lot subdivision as platted, or anything less than that. *Palazzolo v. State*, 746 A.2d 707, 714 (R.I. 2000).

Background Principles of State Property Law

What background principles of state law were applicable when the applicant took title to the land? Because the prohibition on wetlands landfill was a statutory fact of life when Palazzolo became the sole title owner, were these statutes the controlling "background principles of state law" as this concept was formulated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992)? At that moment, knowing the state law, were Palazzolo's expectations for the property's development and use "reasonable investment backed expectations" under the three questions formulated in *Penn Central*? States and their governing entities define property use rights by regulatory enactment, such as defining new public nuisances. When it is evident that the property buyer could not have had any reasonable expectation of development under existing law and rules upon title vesting, then this key element in the *Penn Central* equation is satisfied.

This aspect was made very clear in Justice O'Connor's concurring opinion. She wrote that the proper analysis of a takings claim under *Penn Central* should involve exploring the

three well-known questions, and particularly a balancing of the varied issues inherent to the factor of "interference with investment-baked expectations." *Palazzolo*, 121 S. Ct. at 2466 (O'Connor, J., concurring). Fundamental to such an analytical inquiry is the concern with the buyer's reasonableness when fully aware of the state's regulatory regime over the site. In other words, was the expectation of development reasonable once the existing regulatory principles governing that land were known?

Rhode Island Supreme Court Justice Lederberg ignored reasonableness and simply concluded, without precedent, that "all subsequent owners take the land subject to the pre-existing limitations and without the compensation owed to the original affected owner." *Palazzolo*, 746 A.2d at 716–717. Justice Kennedy ignored that statement and issue, probably because the state-supreme-court opinion did not analyze the three questions of the *Penn Central* test. *Palazzolo*, 121 S. Ct. at 2475 (Ginsburg, Souter & Breyer, JJ. dissenting) (acknowledging Palazzolo's failure to plead the *Penn Central* case until this final appeal). Instead, Justice Kennedy changed the focus of the background law issue by: (1) making an incorrect statement of the law of two precedents, and (2) concentrating on the property transmission rights of present and future title holders.

The incorrect statement arose when Justice Kennedy merged the holdings from *Lucas* and *Penn Central* and wrote an alleged rule statement: "A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Id.* at 2462 (majority). Such a rule does not exist, but this error is somewhat corrected in Justice O'Connor's analysis of the application of these two cases in takings disputes. In addition, Justice Kennedy opined that, if a current title holder cannot ripen or perfect a takings claim, then successors cannot either.

> The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. . . . A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken.

Id. at 2463.

Justice Kennedy also stated that, so long as the regulation

affects a taking, the acquiring of title with knowledge of the regulation does not transform the right to challenge the law as defined by *Lucas*. "That claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Id.* at 2464. Unfortunately, it is this type of statement by the majority that may have lasting precedential impact for states protecting their natural resources. Justice Kennedy concluded that this was the basis for the fundamental error in the Rhode Island Supreme Court opinion. Acquiring property with knowledge, by itself, was sufficient in the State court's mind to bar the takings claim; no analysis under *Penn Central* was entertained. Although the State court reviewed the facts de novo and restated them from the materials gleaned from litigant files, it presented them in a different light as compared to the trial court record. *Palazzolo v. Coastal Resource Mgt. Council*, 1995 WL 941370 at **1–2 (R.I. Jan. 5, 1995). That difference may have produced the incorrect conclusion on the background-law issue in the takings analysis, as noted in the Commentary below.

The meaning of this new rule interpretation is critical. A state or local government agency that prohibits all landfill on wetlands as a means for preserving water resources does not create new background principles of state land law; thus, such an enactment will not deprive "regulation knowledgeable" buyers of their right to perfect a takings claim. If the state intends to preserve water resources on wetlands, it will have to consider using its power of eminent domain. *Palazzolo*, 121 S. Ct. at 2463. If the states take Justice Kennedy literally, protection of water resources becomes a matter of pure legislative budgeting and real-estate appraisal, not public policy and police power. Unfortunately, Justice Kennedy's opinion contains a statement that clouds the seeming certainty of the ruling: "[W]e have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here." *Id.* at 2464.

Justice Scalia concurred but not in Justice O'Connor's explanation; Justice Stevens dissented from the majority on this issue, pointing out that the right to compensation for a taking is measured from the moment of taking in the hands of that particular owner. *Id.* at 2469 (Stevens, J., dissenting in part and concurring in part) (citing *Danforth v. U.S.*, 308 U.S. 271, 284 (1939)). However, such a new interpretation will present courts with regulatory taking claims by the thirtieth land title owner in

the chain of title. *Palazzolo,* 121 S. Ct. at 2472, 2477 (Breyer, J. dissenting). Justice Stevens also pointed out that the state had begun to regulate the filling of all wetlands as early as 1971, and that such control was exercised to prevent a substantial public harm from occurring. *Id.* at 2470 (Stevens J., dissenting in part and concurring in part). "The title Palazzolo took by operation of law in 1978 was limited by the regulations then in place to the extent that such regulations represented a valid exercise of the police power." *Id.* at 2471 (Stevens J., dissenting in part and concurring in part).

Total Deprivation of All Economically-beneficial Uses

Has the owner been deprived of all economically-beneficial uses when, although the wetlands cannot be developed, the upland portion can maintain a one-residence building? In the lower courts, Palazzolo never presented a claim that separated the two distinct geological parcels (wet and dry). Yet, in this appeal, such an attempt was made for the first time as an effort to nullify the State's parcel "as a whole" defense. *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 497 (1987). Because the parcel as a whole presumably had some value for one building, there was no governmental deprivation of all economic uses. *Palazzolo,* 121 S. Ct. at 2465.

COMMENTARY

This commentator is apprehensive about the potential impact of *Palazzolo* on states' takings jurisprudence because of the new interpretative slant placed upon federal precedents that have shaped state decisions. The majority's holdings concerning the ripeness of development applications for judicial review and the "property aspects" of the background principles of state land law contain language that could undermine carefully supported governmental-policy practices designed to serve the public interest, such as natural resource protection. Thus, this Digest has been presented in sufficient detail to alert our readers of its importance. Here are some of its distressing aspects.

A misplaced and lost record was the basis for the eventual trial decision. Issues were raised in the two appeals that were never litigated at trial. Palazzolo's standing was doubtful to some justices because the corporation, as record title owner, was more likely the only timely possessor of any claim to a regulatory taking. Final decisions on use of the acreage were never explored

administratively before the CRMC. Further, the conflict entered the judicial system as an administrative-agency-proceeding appeal, not a takings appeal. Because takings conflicts would have been outside the jurisdiction of the CRMC, such issues were not analyzed and the record certified to the trial judge was noted "lost or misplaced." *Coastal Resource Mgt.*, 1995 WL 941370 at *1.

"The record of this disorganized litigation does not disclose that the defendant ever answered the plaintiff's complaint, but the parties have always . . . regarded this action as an administrative appeal and not a claim for damages for inverse condemnation." *Id.* at *6. The trial judge could not make a ruling on the issue of "denial of all beneficial uses" on appeal from the decision of an administrative agency does not, and did not here, address that issue. The cause of action was inappropriate to the issue now raised. The judge never addressed federal precedents; furthermore, the State precedents that were cited provided for the recovery of damages for inverse condemnation in State judicial proceedings as a precondition to pursuing any federal takings claim. *E.g. Santini v. Lyons,* 448 A.2d 124, 129 (R.I. 1982); *Milardo v. Coastal Resources Mgmt. Council of R.I.*, 434 A.2d 266, 270 (R.I. 1981). But no State judicial proceedings were ever pursued by Palazzolo. Concluding that the claim was ripe for constitutional analysis is extremely hard to see.

The critical conclusion that the CRMC lacked any discretion to grant any part of Palazzolo's application is fundamental to Justice Kennedy's conclusions. This is a major flaw in so incomplete a development scheme as this Rhode Island conflict presents. The CRMC factual record required the weighing of environmental concerns over all others to determine whether the project was in the public interest. Strangely, that record was not analyzed. Such analysis would have shown that the CMRC permit denial involved the discretion of weighing all facts and was not arbitrary and capricious. Facts such as these strongly suggest that the Supreme Court has rendered an opinion that is based upon unstable grounds. If anything supports the old statement that bad cases make bad law, this is probably one prime example.

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Land-use Planning & Zoning: Variance

Costco Wholesale Corporation v. Orange County,
780 S.2d 198 (Fla. Dist. App. 5th 2001),
cert. granted, 791 S.2d 1100 (Fla. 2001)

FACTS AND PROCEDURAL POSTURE

Costco Wholesale Corporation (Costco) sought to transfer its existing package-store liquor licenses to two new locations that were less than 5,000 feet away from other package stores. Although Orange County Zoning Code Section 38-1414 required a distance of 5,000 feet between package stores, the Orange County Zoning Department recommended to the Planning and Zoning Commission (P & Z) that the 5,000-foot restriction be repealed. During the zoning director's presentation, he noted that the restriction served only to prevent new package stores from locating within three miles of an existing package store and did not further any public health, safety, moral, or welfare purpose. The regulation is extreme, when comparing to those in other Florida jurisdictions, considering the greatest distance required outside Orange County is a 1,500-foot restriction in Dade County. Additionally, the Orange County Sheriff's Office reported that repealing the restriction would cause no problems for the County.

Although the P & Z recommended repeal, the Board of County Commissioners (Board) failed to repeal the Code Section. When Costco requested a variance from Orange County, the Board focused on protecting the economic interests of existing package-store owners. One commissioner stated that the Board needed to support the local retailers, and another stated that the Board needed to safeguard those who have licenses. After the Board denied Costco's request for a variance, Costco filed for declaratory and injunctive relief, which the trial court denied. The trial court reasoned that the power to ban alcohol sales

necessarily includes the power to set distance between package stores. However, the Fifth District Court of Appeal reversed, holding that particular restriction to be an unconstitutional use of the government's police power.

LEGAL ANALYSIS

When a zoning ordinance is challenged, the court must first decide whether the ordinance has a substantial relationship to the public health, safety, morals, or welfare. Although Orange County may have the power to ban alcohol sales completely, that ban and any lesser regulation must have a reasonable relationship to the public health, safety, morals, and welfare. If it does not, then the challenged statute is unconstitutional. Therefore, the issue on appeal was whether the facts in the record were sufficient to meet the substantial-relationship test. The only evidence introduced at trial was the transcript of the P & Z and Board hearings and testimony from Ed Williams, a former Planning Director for Orange County. The transcript demonstrated that the Board focused on the economic impact a variance might have on existing package-store owners. Therefore, the court found that the main reason for the ordinance was to protect existing package-store owners from competition. However, providing an economic benefit to a few (helping only existing package-store owners) is not a basis upon which a county's police powers can be used to enforce zoning regulations, unless there is a reason that substantially relates to the public health, safety, morals, and welfare of the community.

Williams' expert testimony was the evidence P & Z used to prove that the reason for the regulation was substantially related to public health, safety, morals, and welfare. He testified that, in his opinion, the 5,000-foot restriction protected residential-property value, prevented on-site consumption of alcohol, and decreased the risk of intoxicated drivers. This testimony lacked factual support such as statistics or police records, and was speculative and insufficient proof of a substantial relationship. Considering that the subject of the expert's opinions was of no consequence to the Board during the initial hearing, it is difficult to argue that it should have been of consequence to the trial court.

Furthermore, there was evidence contradicting the expert's opinion. First, if the County wanted to protect the value of residential property, then the ordinance should have required a

reasonable distance between package stores and residential neighborhoods. Because the ordinance focused on the distance between individual package stores, it had no logical relation to the protection of residential-property values. Moreover, the distance between package stores is irrelevant to the issue of off-site alcohol consumption. An off-site consumption license places a duty on the licensee to prevent on-site consumption. Finally, when there are more package stores available, people may not have to drive as far to get to the store, which could help decrease drunk-driving accidents.

Because the County failed to meet its burden, the court reversed the trial court. There must be a legitimate factual basis justifying the government's disparate treatment of its citizens before a court will find a substantial relationship. A contradicted expert opinion without factual support will not prove that a regulation bears a substantial relationship to the public health, safety, morals, and welfare.

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