No. 99-2047

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY PALAZZOLO
Petitioner

v.

THE STATE OF RHODE ISLAND, ex rel.
PAUL J. TAVARES, General Treasurer
COASTAL RESOURCES MANAGEMENT COUNCIL
Respondents.

BRIEF FOR RESPONDENTS

Filed January 3rd, 2001

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

QUESTIONS PRESENTED

1. Whether an as-applied regulatory takings claim is ripe even when the land owner has: (1) never applied to undertake any activity on the buildable less-regulated, more-valuable portion of the property; (2) never applied to obtain any approval from the agency having initial jurisdiction over the development plan that serves as the basis of his claim of value; (3) nor applied to obtain any approval from the defendant agency for such development.

2. Whether a takings claimant has established deprivation of all economically viable use of his parcel when the claimant can build at least one residence on the property, thereby giving the property itself a fair market value of at least $200,000 (1986 dollars), far in excess of his monetary investment, and when, furthermore, the denied use was not itself economically viable.

3. Whether a land owner possesses the inherent right to fill coastal marshland, regardless of the severity of the adverse environmental and health effects on neighboring property owners and on his own successors, even when a comprehensive state regulatory program substantially restricting such filling in that very kind of coastal marshland predated the land owner's acquisition of the property.

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STATEMENT OF THE CASE [1]

This is a regulatory takings claim brought by Anthony Palazzolo ("Palazzolo") based upon the Rhode Island Coastal Resources Management Council's ("the Coastal Council's") denial of his application to fill all or most of eighteen acres of coastal inter-tidal marshland on a larger piece of property that also includes buildable upland. The State and its Coastal Council defend on ripeness grounds that, *inter alia*, he compromised the record by completely evading the jurisdiction of state public health agencies, he failed to file an application for the whole parcel, and he never filed a true and meaningful application. Palazzolo's challenge also fails substantively since he retains substantial beneficial use and economic value in his property, and the forbidden uses are barred by background principles of state law and would not have been economically viable in any event.

I. THE LAND

The nature of the Palazzolo parcel must be understood for a proper decision. The Atlantic Ocean, beating against the New England shore beyond the shelter of Long Island, has raised up beaches of sand

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[1] The undersigned provide this key to record citations: Tr.=trial transcript; PA=Appendix to the Petition for Writ of Certiorari; JA=Joint Appendix; JL1=Joint Lodging Number 1; JL2=Joint Lodging Number 2; RA=Respondents' Appendix (attached herein); Ex.=Exhibit. Plaintiff's exhibits are numbered while the defendants' exhibits are lettered. Unless otherwise indicated by the context, all citations to the Rhode Island General Laws are to the version of the General Laws in effect in 1983, when Palazzolo first applied to the Coastal Council for permission to fill a portion of Winnapaug Pond.

and a spine of buildable upland running along the shoreline. Behind the barrier of beach and upland are salt marshes and coastal ponds,[2] such as Winnapaug Pond.[3] The nature of the soil, a mucky peat, and tidal inundation render salt marshes unbuildable without massive alteration.[4] Behind the marshes and coastal ponds, the ground rises again to solid upland.

Development in the vicinity of Palazzolo's parcel reflects these natural conditions. The upland ridge between the Misquamicut beachfront and the marshes is readily buildable. Atlantic Avenue runs along this ridge, and private lots with summer cottages radiate from both sides of the roadway. *See* Ex. FF to JJ, S, Tr. 394-95, 659-60. *See also* Test. of Council Director Fugate, RA 36 (development "confined pretty well exclusively to the upland portion or the dry land portion that

[2] The contrast between the beach area and the marsh is particularly apparent on the 1939 and 1963 aerial photographs. JL1, tabs 1 & 2. *See also Annicelli v. Town of South Kingstown*, 463 A.2d 133, 137 (R.I. 1983) (describing the significance of Rhode Island's barrier beaches); Mark D. Bertness, *The Ecology of Atlantic Shorelines* (1999).

[3] Winnapaug Pond is comprised of 446 acres of open water plus 146 acres of salt marsh, including the eighteen acres that occupy most of the Palazzolo parcel. *See* Test. of Biologist Reis, Tr. 495; Engineer's 1985 Field Report at 3, RA 68; Biologist's 1985 Field Report at 2, RA 55.

[4] *See* Engineer's 1985 Report, JA 23 ("The highly compressible nature of mucky peat (among other poor engineering characteristics) makes the soil complex undesirable for a . . . base . . ."); *see also* Test. of Appraiser Andolfo, JA 104 ("[T]he development costs are extraordinary . . . [N]ot . . . financially feasible . . . ."); *see also* color photographs, JL1, tab 8 (depicting inundation of the site with Atlantic Avenue cottages in the background).

immediately abuts [the road].").[5] Aside from some very minor encroachments,[6] the Winnapaug marshlands on all the pond-side properties remain in their natural unfilled condition.[7]

The Palazzolo site begins on the spine of upland and descends northward from Atlantic Avenue into the salt marshes. The disparity between upland and marsh is evident: Palazzolo's upland acreage[8] is high and dry; by contrast, his marshland is subject to twice-daily tidal flooding and includes substantial portions below mean

[5] *See also* aerial photographs at JL2, items 2-7 (showing that the vacation homes are virtually all built on the uplands along Atlantic Avenue).

[6] *See* Test. of Council Director Fugate, RA 36 ("[t]he development that has occurred in that area, except for two remnant structures or several remnant structures... has been all along the dry land area immediately abutting Atlantic Avenue.").

[7] Palazzolo's Statement of the Case suggests that Palazzolo's fill plans were consistent with neighborhood patterns: "Like the neighboring homes, the only way to develop Palazzolo's site is to raise the grade with fill." Pet. Br. 3. In fact, at most, only three out of the scores of homes in the vicinity were possibly built on fill in the marshlands and even these examples were uncertain. *See* Tr. 201, 204-05, 249-54. *See also* aerial photographs at JL2, items 2-7 (showing that the vacation homes are virtually all built on the uplands along Atlantic Avenue). As Palazzolo himself acknowledges, RA 79, there is no instance of fill for intensive subdivision ever being permitted in Winnapaug Pond's coastal marshlands.

[8] Palazzolo's submissions to this Court ignore the fact that two pieces of upland area were identified at trial. The existence of the second area of upland within Palazzolo's territory is discussed further at Statement of the Case V.C, *infra*.

high tide.[9] *See* PA A-3; n. 39, *infra.* Ponding in small pools occurs throughout these marshes. PA A-3.

Winnapaug Pond with its marshland serves as a common amenity to all the surrounding upland properties, providing scenic and recreational qualities that underpin premium real estate values for the buildable upland. Test. of Appraiser Coyle, Tr. 382, 389-93; JL1, tab 1 (aerial photograph); CRMP § 330; R.I. Gen. Laws § 46-23-1 (1980 Reenactment). The Pond's salt marshes absorb wastes that would otherwise overwhelm the pond; provide food and shelter[10] for an abundance of recreational and commercial fish and shellfish, which add to the attraction of pond-side living; and, by biologic and chemical processes too complicated to detail here, nourish and balance the pond.[11] More directly, the marshes protect the upland portions of the abutting properties from storm damage and absorb and contain tidal inundation. *See* 1985 Engineer's Report at 4, 6, 7, RA 68.

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[9] We discuss *infra* at nn. 59, 60 the title issues presented by Palazzolo's ownership of the marshland acreage.

[10] Sheltered from the rough Atlantic seashore, the marshes are a natural nursery for sea fauna. Test. of Biologist Reis, JA 80-81, 84. *See also* William J. Mitsch & James G. Gosselink, *Wetlands* 539 (1986) ("Wetlands are among the most productive ecosystems that are found anywhere on the planet. In terms of gross and net primary productivity, salt marshes rank high . . ..").

[11] Test. of Biologist Reis, JA 82 ("[t]he salt marshes provide primary production. They provide nutrients and lock up organic carbon into plant matter which then provides the basis for the food chain . . . up to the smaller fish, and then of course the larger fish. They are very important habitat . . . for those species, which are at the top of the food chain which provide commercial and recreational importance.").

II. THE POTENTIAL HARM

Salt ponds are fragile mechanisms, with limited ability to absorb wastes.[12] Large areas of the salt ponds are poorly flushed, which makes them valuable as fish and shellfish nurseries, but also particularly susceptible to the twin threats of bacterial contamination and eutrophication.[13]

Bacterial contamination, such as from failing septic systems, has obvious impacts on public health. Eutrophication can kill a pond.[14] Both bacterial

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[12] *See* Virginia Lee & Stephen Olsen, *Eutrophication and Management Initiatives for the Control of Nutrient Inputs to Rhode Island Coastal Lagoons*, 8 Estuaries 191 (1985); *Eutrophic Shallow Estuaries and Lagoons* (Arthur J. McComb ed., 1995).

[13] *See* Boyce Thorne-Miller et al., *Variations in the Distribution and Biomass of Submerged Macrophytes in Five Coastal Lagoons in Rhode Island, USA*, 26 Botanica Marina 231 (1985); *nn. 11 & 12, supra.*; Br. Amici Curiae Dr. John Teal et al. *See also* Frank Postma et al., *Nutrient and Microbial Movement from Seasonally-used Septic Systems*, 55 J. Envtl. Health 5 (1992).

[14] Eutrophication, largely caused by septic systems, occurs when nitrogen causes oxygen levels to fall below the minimum required by fish and shellfish to survive. Eventually, waters become weed-choked and murky, the bottom becomes coated with black organic sediments, and anoxic conditions occur that can lead to the generation of toxic levels of malodiferous hydrogen sulfide. Test. of Biologist Reis, JA 83 ("Eutrophication is a condition where nutrients cause excess growth within the pond . . . causing anoxia, which is a lack of oxygen. [T]he shellfish at the bottom of the pond, and many of the fish in the water column, would be killed."). *See also* Scott W. Nixon, *Nutrients and Coastal Waters: Too Much of a Good Thing?*, 36 Oceanus 38 (1993); Nat'l Ass'n of Science, *Clean Coastal Waters: Understanding and Reducing the Effects of Nutrient Pollution* (2000).

contamination and eutrophication are hazardous to the high-quality economically productive and attractive resources of Winnapaug Pond.[15] Palazzolo's proposals put the Pond at serious risk.[16]

It was to safeguard against such harms, as well as health hazards, flooding[17] and direct habitat destruction, that Rhode Island developed its environmental programs.

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[15] *See* Glenn D. Anderson & Steven F. Edwards, *Protecting Rhode Island's Coastal Salt Ponds: An Economic Assessment of Downzoning to Protect These Coastal Amenities*, 14 Coastal Zone Mgmt. J. 67 (1986).

[16] Individual sewage disposal systems, ISDS, are the largest contributor of "nitrogen" in the salt ponds. Test. of Biologist Reis, JA 86-87, 89 ("Q. Above and beyond the filling itself, did you consider what impact 74 ISDS or septic systems would have? A. I did perform some nutrient loading calculations. . . . [T]hat high level of loading would cause the eutrophication in the pond and the symptoms that go along with that."). The Superior Court found the proposal a public nuisance in part because of nitrate contamination. PA B-11.

[17] Another problem with development of the Palazzolo marshland is that it is a "high hazard area for construction" on a federally designated flood-plain. Test. of Council Director Fugate, Tr. 179; *see also* Test. of Engineer Caito, Tr. 311-12. Filling such an area displaces excess water and forces flooding elsewhere, Test. of Engineer Caito, Tr. 312-13, and the fill is inherently less stable than natural upland in flood conditions. Test. of Council Director Fugate, Tr. 180 ("subject to movement"); Test. of Engineer Clarke, Tr. 567-68 ("we'd have leach fields all over the place."). There are strict federal flood control regulations regarding the filling of land in such zones (whether wetland or otherwise). Test. of Engineer Caito, Tr. 312; Test. of Engineer Clarke, Tr. 566-68; *see also* FEMA Flood Control Manual, Ex. DDD, Tr. 645-46. Palazzolo has obtained *none* of these approvals.

III. RHODE ISLAND'S REGULATORY PROGRAMS

From colonial times, by common law and constitution, Rhode Island has protected public rights to tidal wetlands and private property interests long dependant upon these wetlands. Protections included the law of nuisance, *see, e.g., Payne & Butler v. Providence Gas Co.*, 77 A. 145, 152-531 (R.I. 1910) (destruction of shell-fish bed by pollution constitutes nuisance), the public trust doctrine, *see, e.g., Dawson v. Broome*, 53 A. 151, 154-58 (R.I. 1902), and "the right of fishery, and the privileges of the shore." R.I. Const. art. 1 § 17; *Jackvony v. Powel*, 21 A.2d 554, 554-58 (R.I. 1941). More recently, comprehensive regulatory programs codify and derive from these longstanding public protections.

A. Sewage Regulation

1. At the time of Palazzolo's applications. Since 1977, the Rhode Island Department of Environmental Management ("DEM") has reviewed applications for individual sewage disposal systems ("ISDS") (generally, septic tanks) to protect public natural resources and public health.[18] At the time Palazzolo applied to fill the pond, as well as today, an ISDS system could be installed only upon DEM issuance of an ISDS permit, and then only upon DEM inspection.[19]

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[18] *See* 1977 R.I. Pub. Laws ch. 182, §§ 2, 3, 16 (originally codified in relevant part as R.I. Gen. Laws § 42-17.1-2(*l*) (1977 Reenactment & Supp. 1978) and R.I. Gen. Laws §§ 46-12-3(j), 46-12-3(k), 46-12-3(m) (1970 Reenactment & Supp. 1978)).

[19] *See* R.I. Gen. Laws §§ 46-12-3(j), 46-12-3(k), 46-12-3(*l*) (1980 Reenactment & Supp. 1983); Deposition Test. of ISDS Chief Chateauneuf, at 10-12, 23-24, 32-33, Ex. W, Tr. 429-30; *see also Rules & Regulations Establishing Minimum Standards Relating to Location, Design, Constr. & Maint. of Individual Sewage Disposal Sys.* § SD 2.16 (1980), Ex. W-3, Tr. 429-30, 620. The relevant provisions of § 46-12-3 were slightly amended and redesignated as §§ 46-12-3(j), -3(k), and -3(*l*) in 1983. *See* 1983 R.I. Pub. Laws ch. 149, § 1. These

Obviously, an ISDS is necessary for a habitable dwelling in any area not served by a municipal sewer system.

2. Historical background. Prior to the transfer of regulatory power to the DEM, *see* 1977 R.I. Pub. Laws ch. 182, §§ 2, 16, the Rhode Island Department of Health ("RIDOH") had similar authority over septic systems. 1966 R.I. Pub. Laws ch. 261, § 4 (enacting R.I. Gen. Laws §§ 46-12-3(j) to 46-12-3(k)); *see Annicelli v. Town of South Kingstown*, 463 A.2d 133, 136 (R.I. 1983) (property owner obtaining ISDS permit from RIDOH prior to applying for municipal building permit).

This enactment was, in turn, preceded by a series of regulatory regimes, dating back to the early years of the last century, regulating sewage disposal.[20] *See, e.g., Bd. of Purification of Waters v. City of East Providence*, 133 A. 812, 814 (R.I. 1926). Due to public health concerns, sewage disposal requirements have not been found to constitute takings by the State or by municipal regulation. *See, e.g., Milardo v. Coastal Res.*

provisions remained unchanged through 1985, when Palazzolo renewed his Coastal Council application. *See* R.I. Gen. Laws § 46-12-3 (1980 Reenactment & Supp. 1985).

[20] *See* 1920 R.I. Pub. Laws ch. 1914, § 2 (creating Board of Purification of Waters ("BPW")); 1921 R.I. Pub. Laws ch. 2090 (expanding BPW and its powers); 1935 R.I. Pub. Laws ch. 2250, §§ 110, 115 (transferring functions of BPW to Division of Purification of Waters within RIDOH); R.I. Gen. Laws § 46-12-2 & compiler's note (1956) (substituting term "Division of Sanitary Engineering" for "Division of Purification of Waters" "in accordance with present usage"); 1963 R.I. Pub. Laws ch. 89, § 2 (creating Division of Water Pollution Control within RIDOH).

Mgmt. Council, 434 A.2d 266, 269 (R.I. 1981) (state denial of ISDS permit not a taking); *Sundin v. Zoning Bd. of Review*, 200 A.2d 459, 461 (R.I. 1964) (delay of development due to lack of adequate sewage disposal not a confiscation).

B. Coastal Regulation

1. At the time of Palazzolo's applications. The Coastal Council was created in 1971, 1971 R.I. Pub. Laws ch. 279 (enacting R.I. Gen. Laws §§ 46-23-1 to 46-23-12), as "the principal mechanism for management of the state's coastal resources." R.I. Gen. Laws § 46-23-1 (1970 Reenactment & Supp. 1971). From the start, Rhode Island singled out the coastal zone for comprehensive and coordinated long-range planning and management, R.I. Gen. Laws §§ 46-23-1, 42-23-6(A) (1970 Reenactment & Supp. 1971); *see Santini v. Lyons* 448 A.2d 124, 127 (R.I. 1982), and established the Coastal Council as the final arbiter of development in or adjacent to the coastal zone, *after* other agencies provided any necessary preliminary permits.[21]

[21] The "Coastal Council goes last" policy is quite strong, finding expression in the Coastal Council's procedural rules, *see* Management Procedures § 4.2(4), RA 22-23, and in the Coastal Council's substantive regulations as well. *See* CRMP § 300.1(2); *see also id.* § 300.3(B), RA 19-20. Simply put, one cannot even approach the Coastal Council for a non-sewered subdivision unless one has in hand ISDS approvals from DEM. *See* CRMP § 300.6, "Sewage Treatment and Disposal." RA 20. In addition to the Coastal Council assent and ISDS approval, Palazzolo would need an approval letter from the municipality confirming that the subdivision met municipal zoning and subdivision code requirements. Management Procedures § 4.2(4), RA 22-23. He would also need water quality certification approval from DEM pursuant to the requirements of sections 401 and 404 of the Federal Water Pollution Control Act Amendments of 1972 (as amended),

The Coastal Resources Management Program ("CRMP" or "the Plan") provides that all alterations and projects proposed for tidal waters or areas contiguous to shoreline features shall require a Coastal Council assent (*i.e.*, permit). CRMP § 100.1. Under the Plan, filling in the coastal wetlands themselves is generally prohibited absent a "special exception." *See* CRMP §§ 100, 110 & Table 1, 130. Residential construction is not the basis of such a "special exception." *See* CRMP § 130; JA 72-73. Upland areas within 200 feet of coastal wetlands, however, are not similarly subject to a prohibition on filling and residential construction. CRMP §§ 100.1(A), Table 1A, 110.1. A landowner may apply for a "variance", which is more freely available. *See* CRMP § 120.

2. Historical background. The General Assembly enacted earlier protections for the "coastal wetlands" of the State in 1965. *See* 1965 R.I. Pub. Laws ch. 140, § 1 (enacting R.I. Gen. Laws § 2-1-13 (repealed effective

33 U.S.C. §§ 1341, 1344 (1982). *See* R.I. Gen. Laws §§ 46-12-1(n), 46-12-2(b), 46-12-5 (1980 Reenactment & Supp. 1983) (authorizing DEM to implement federal clean water laws); *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 704-08 (1994) (discussing application of § 401); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985) (discussing application of § 404, 33 U.S.C. § 1344). In addition, Palazzolo would need to obtain approval from the Army Corps of Engineers and other federal agencies under both section 404, 33 U.S.C. § 1344, and section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403 (1982). *See PUD No. 1*, 511 U.S. at 722-23 (concerning § 10 permits); *see also* Test. of Council Director Fugate, JA 66-67. Thus, even had the Coastal Council assented, Palazzolo was still a long way from putting dirt into these marshlands.

1993, *see* 1992 R.I. Pub. Laws ch. 133, art. 14, § 3)). The Department of Agriculture & Conservation[22] was the permitting body for activities in such areas. A coastal wetland was defined as "any salt marsh bordering on the tidal waters of [Rhode Island], whether or not the tide water reach the littoral areas through natural or artificial water courses, and such uplands contiguous thereto, but extending no more than fifty (50) yards inland therefrom." 1965 R.I. Pub. Laws ch. 140, § 1 (enacting R.I. Gen. Laws § 2-1-14, (repealed effective 1993, *see* 1992 R.I. Pub. Laws ch. 133, art. 14, § 3)). Uses were restricted to activity that would not be detrimental to the salt marsh. *Id.* § 1 (enacting R.I. Gen. Laws § 2-1-13). The legislature also enacted the "Intertidal Salt Marshes Act," subjecting to criminal penalties any person who "dumps or deposits mud, dirt, or rubbish upon, or who excavates and disturbs the ecology of, intertidal salt marshes or any part of one, without first obtaining a permit." 1965 R.I. Pub. Laws ch. 26, § 1 (paragraph enacting R.I. Gen. Laws § 11-46.1-1).

Even in 1965, coastal regulation was not new to Rhode Island. Enactments dating back to 1876 (and supplanted by the Coastal Council enabling act only in 1971) controlled and managed "the public tide-waters." 1876 R.I. Acts & Resolves ch. 556, §§ 3-4, 7. *See also, e.g.*, R.I. Gen. Laws ch. 118, §§ 3-6, 10-12, 14 (1896); 1918 R.I. Pub. Laws ch. 1669, § 2; 1935 R.I. Pub. Laws ch. 2250, §§ 60, 64; 1939 R.I. Pub. Laws ch. 660, §§ 100, 101.

[22] These functions were transferred to the Department of Natural Resources in 1965, *see* 1965 R.I. Pub. Laws ch. 137, § 1, and the Department of Natural Resources was renamed the Department of Environmental Management in 1977. 1977 R.I. Pub. Laws ch. 182, § 2.

Although the administering authority varied in these successive statutes, each granted to the respective agency the authority to permit encroachments into the public tide-waters, and prohibited all filling not so permitted.[23] For example, more than a century ago, the Board of Harbor Commissioners was given the "general care and supervision of all the . . . tide-waters within the state, with authority to prosecute for and to cause to be removed all unauthorized obstructions and encroachments therein," R.I. Gen. Laws ch. 118, § 10 (1896), including "the depositing of mud, dirt, and other substances" into the public tide-waters, *id.* §11, and any such unauthorized encroachment upon the public tide waters was "deemed to be a public nuisance." *Id.* § 14. "Tide-waters" included "flats," *id.* § 7, as well as open water areas. *Cf.* R.I. Gen. Laws ch. 112, §§ 1, 8-11, 13 (1938), RA 1-3.

Nor did this type of control originate with the advent of the Board of Harbor Commissioners in 1876. Authority over lands lying below the mean high tide line had been actively exercised by the State (or colony) from its earliest settlement.[24] The ultimate foundation of the State's authority over tide-waters is the long

[23] *Dawson v. Broome*, 53 A. 151, 152 (R.I. 1902), chronicles an applicant's request for permission to fill tidal wetlands.

[24] *See generally* Dennis W. Nixon, *Evolution of Public and Private Rights to Rhode Island's Shore*, 24 Suffolk U.L. Rev. 313, 313 (1990) ("From the earliest days of the Colony of Rhode Island and Providence Plantations, the shore has maintained this unique legal status, with colonial and now state officials charged with balancing the rights of the public and private property owners."); Joseph K. Angell, *A Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof* 162 (photo. reprint 1983) (1826).

established principle of Rhode Island law that the State holds a fee interest in such lands. *See Dawson*, 53 A. at 156, 157.

IV. OWNERSHIP AND DEVELOPMENT OF THE PARCEL

Palazzolo became owner of the site in 1978. The parcel was owned before then by Shore Gardens, Inc. ("SGI"), which acquired the property in 1959.[25] Almost immediately, SGI recorded with the Town of Westerly a subdivision plat representing eighty individual lots, some of these platted "under the waters of Winnapaug Pond." PA A-3. SGI sold off eleven lots, in six transactions, yielding at least three or four fully built residences.[26] "These [developed] lots were apparently in the upland area of the parcel and could be built upon with little alteration to the land." PA A-2. In 1969, SGI reacquired five of the eleven lots previously deeded out. *Id.* Palazzolo succeeded in ownership to all of SGI's remaining properties in 1978.

V. APPLICATIONS WITH RESPECT TO THE PARCEL

A. The "Harbors & Rivers" Applications

In 1962, 1963, and 1966, SGI made three separate applications to the State Division of Harbors and Rivers for its assent to filling what is now the Palazzolo site.

[25] Palazzolo now concedes that he did not become the "owner" of the property under state law until SGI's corporate charter was revoked in 1978. *See* Pet. Br. 5, 23, 24, 43, 48.

[26] The trial court stated that Palazzolo "sold six parcels to various parties who constructed homes on them." PA B-2. Palazzolo admits to "three or four at least." JA 79.

Tr. 60-61, 124, 182-83. The 1962 and 1963 SGI applications contemplated a general filling of the entire wetlands section of the parcel. *See* Application of March 29, 1962, Ex. M, Tr. 191-93, 196; Application of May 16, 1963, Ex. 14, Tr. 142-43. The earlier SGI application proposed off-shore dredging in the open waters of Winnapaug Pond for the fill material, *see* Ex. M, Tr. 191-93, 196, while the second proposed dredging much closer to shore, if not completely within the marshlands themselves. *See* 1963 Application Ex. 14, Tr. 142-43. The 1966 SGI application contemplated filling in the area closest to Winnapaug Pond for the purported purpose of establishing a beach.[27] Application of April 29, 1966, Ex. 14, Tr. 142-43. The state Department of Natural Resources originally assented to, then, based on their adverse impacts, denied these applications on November 17, 1971. *See* Ex. 14, Tr. 142-43. The Army Corps of Engineers followed suit with respect to SGI's parallel application for a federal permit on November 23, 1971, based largely on adverse environmental impacts. *See* RA 47.

B. The Coastal Council Applications

Palazzolo made two applications to fill the property. These are the subject of this dispute. The 1983 application sought permission to construct a bulkhead on the shore of the pond and to fill the entire eighteen-acre wetlands portion of the parcel. *See* JL1, tab 5; *see also* Tr. 144; Tr. of Hr'g Regarding Coastal Council Applic. File No. 83-3-55 (Aug. 18, 1983), at 23, Ex. DD, Tr. 443-44. The application did not seek to alter the

[27] During this time period, the matter took a brief detour to the Rhode Island Superior Court. *See Palazzolo v. Lees*, RA 6-8.

upland areas,[28] and did not state any purpose for the filling.[29]

The 1983 application, "nearly identical to the application submitted in 1963," PA A-5, was rejected by the Coastal Council. JA 18. A 1985 application to fill the marsh for a beach club, "nearly identical to the 1966 application," PA A-5, was denied by the Coastal Council. *See* JA 24. Palazzolo appealed this denial pursuant to the state administrative procedures act, R.I. Gen. Laws §§ 42-35-1 to 42-35-18 (1984 Reenactment & Supp. 1986), and that appeal was denied by the Superior Court. JA 31-42.

[28] At the administrative hearing Palazzolo testified:

> Q. No doubt you propose to sell those lots?
> A. No, . . . you said that.
> Q. And you don't propose to sell lots off this subdivision?
> A. Not necessarily.
> Q. Do you propose to build on this property?
> A. Not necessarily.
> Q. What is the purpose of filling it, then?
> A. Because it's my right to do if I want to to [sic] look at it it [sic] is my business.
> . . .
> Q. Do you know whether it would pass a perk test [a percolation test necessary for septic tanks]?
> A. It is not necessary at this time. It would be necessary if I said I wanted to build houses. I am not saying that.

JA 11, RA 24. Thus, "the Council just had a vague notion that Palazzolo wanted to fill the area." JA 63.

[29] The application said "proposal to restore property line, protect and prevent further erosion, to fill property to elvation [sic] 6.5 Ft., to prepare property for use as designated by zoning regulations." JL1, tab 5.

C. Development Potential

1. Buildable upland. There was uncontradicted testimony, accepted by both courts below, that a particular portion of the parcel would have been approved as "at least" a single home-site, PA A-11; PA B-11, with a value (as of 1986) close to $200,000. PA A-13; PA B-9. Moreover, the State's appraisal expert showed that this would have netted greater proceeds, at less risk, than the $55,000 to be realistically hoped for by attempting the expensive and uncertain process of filling and subdividing.[30]

2. Possibility of approval for more. The record shows that another upland area on the parcel might also have been amenable to development with a variance as well. Test. of Council Director Fugate, RA 36-39; Test. of Engineer Clarke, RA 42; supported by maps in evidence showing a rise, see Ex. AA, Tr. 471-72, and high elevations in the area, see Ex. EEE, Tr. 650-51. It remains unclear how many lots the Coastal Council would have approved if Palazzolo had submitted a proper application incorporating the upland sections of his parcel.

VI. THE DECISIONS BELOW

In the 1980s, Palazzolo filed two separate civil actions challenging the State's denials. First, Palazzolo

[30] *Compare* Test. of Appraiser Andolfo, JA. 101, appraising Palazzolo's parcel for subdivision purposes at $55,000 *with* Test. of Appraiser Andolfo, JA 103-04, appraising Palazzolo's parcel for single house purposes at $194,000. This testimony leaves no doubt that the appraisal and the court decisions crediting that appraisal were based on the underlying value of the parcel—*not*, as intimated by Palazzolo, *see* Pet. Br. 38, 40-41, the gross sale price of the house once built.

appealed under the State administrative procedures act resulting in a superior court decision upholding the agency. JA 31-42. Next, Palazzolo brought the instant takings claim in two successive complaints.

A. Superior Court. Presented with Palazzolo's seventy-four-unit residential development scheme, the trial court found that the filling and septic contamination resulting from the plan would constitute a public nuisance, PA B-11, and further ruled that the home-site's land value of $200,000 in 1986 dollars provided "beneficial use of the subject property." PA B-10, *see also* PA B-12 ("plaintiff has not lost all or even a substantial use of the subject property"). Although Palazzolo proceeded solely under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the superior court also found that Palazzolo did not meet the "investment-backed expectations test" of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), due to pervasive wetlands regulation known to him when he acquired the property. PA B-12.

B. Supreme Court. The Rhode Island Supreme Court held Palazzolo's claim lacked ripeness because he had failed ever to explore the possibility of developing the upland portions of his parcel. PA A-11. Although the court deemed its ripeness ruling "dispositive of the case," the court also "briefly" discussed the merits. PA A-12. The court explicitly endorsed the finding that the property retained economically viable use, noting that "*at least* one single-family home" could be built. PA A-11 (emphasis supplied). The court found Palazzolo's denominator assertion -- that the seventy-four-lot proposal would

yield $3,150,000 -- to be "grandiose," PA A-11, "speculative," PA A-13, and "unrealistically optimistic." PA A-13 n.7. The decision was silent on the trial court's nuisance finding. The court also upheld the finding that Palazzolo's knowledge of the regulatory limitations on his property deprived him of *Penn Central*'s "reasonable investment-backed expectations" for such a development scheme. PA A-18.

SUMMARY OF ARGUMENT

Palazzolo's regulatory takings claim suffers from a multiplicity of dispositive defects. The Rhode Island Supreme Court correctly held that his complaint lacks ripeness on two separate grounds, and accurately explained why, even if ripe, Palazzolo had failed to prove a valid takings claim under this Court's decisions in *Lucas* or *Penn Central*. Moreover, the trial judge's undisturbed finding, not addressed by the Rhode Island Supreme Court, that Palazzolo's development proposal would have constituted a public nuisance, and the existence of other similarly dispositive defenses raised by the State below but not reached by the courts (*i.e.*, state public trust doctrine), confirm the justness and correctness of the judgment of the state courts.

1. Palazzolo's as-applied takings claim lacks ripeness. The minimum requirement for an as-applied takings claim is a "meaningful application" for development that provides the relevant governmental authority with a record for determining both the extent to which development is permitted and the site-specific reasons why any further development would be barred under existing law. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 n.8 (1986). Palazzolo's

evasive, vague, incomplete, redundant, and grandiose applications fall far short of that standard. He has created a record that leaves unexplored the full extent of residential development permissible on his entire parcel, and that fails to establish the economic viability of the uses that he claims he was denied. Indeed, never before in the annals of this Court's takings law has a landowner demanded compensation for the government's denial of an application to engage in an activity that was not the subject of his claim for just compensation.

2. Equally lacking in merit is Palazzolo's claim that he has been denied all "economically viable use" of his property, within the meaning of this Court's *per se* takings test set forth in *Lucas*. The undisputed factual finding of the lower courts is that Palazzolo's parcel retains substantial economic value for residential use of at least $200,000. *See* PA A-12 to 13; PA B-5, B-9. Palazzolo failed to make the applications necessary to determine whether additional upland areas within his parcel may be susceptible to residential development, so the lower courts' judgment is very conservative. The state supreme court also correctly disputed Palazzolo's exaggerated allegations of lost profits of $3,150,000, which were wholly untethered to any realistic assessment of the actual costs of developing the parcel in the manner he proposed. *See* PA A-13 n.7. For that same reason, Palazzolo has failed to establish that any of the specific uses he was denied were themselves "economically viable."

3. The Rhode Island Supreme Court correctly concluded that when Palazzolo acquired the parcel in 1978, an absolute "right to fill wetlands was not part of the title he acquired." PA A-15. Any such inherent

right to fill coastal marshland property is denied by background principles of state law, as expressed in Rhode Island's comprehensive Coastal Resources Management Program ("CRMP"), longstanding common law and constitutional principles regarding public rights in tidal areas, and a series of antecedent regulatory programs. For this reason, Rhode Island's restrictions on Palazzolo's development would not be a taking under *Lucas* even if they had deprived him of all economically viable use of his property.

4. Finally, Palazzolo's newly-discovered reliance on *Penn Central* is misplaced. Not only did Palazzolo fail to raise this argument in the lower courts, but the state courts also correctly explained why, in all events, any such argument would lack merit. Palazzolo lacks the "interference with reasonable investment-backed expectations" needed to sustain such a takings claim. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). When Palazzolo acquired his property in 1978, he could not possibly have harbored any reasonable expectation that he could develop the property in the manner he subsequently proposed. Not only did the pre-existing law clearly and precisely bar massive filling activities for such purposes, but the State had previously denied virtually identical applications filed by a preceding owner with which Palazzolo was closely affiliated.

ARGUMENT

I. PALAZZOLO'S AS-APPLIED REGULATORY TAKINGS CLAIM WAS NOT RIPE

The threshold premise of Palazzolo's claim of state court error in its ruling is his contention that "'[t]he

type and intensity of development legally permitted' on [his] 18-plus acres of land is perfectly clear: one single-family home and nothing more." Pet. Br. 11 (citation omitted). Palazzolo's premise is simply wrong. Although Palazzolo and affiliated entities have made multiple applications to fill coastal wetlands portions of his parcel, *see* Argument I.C., *infra*, the intensity of legally permitted development on his parcel is *not* known, let alone "perfectly clear." The failure to file a true and meaningful application[31] is what has compromised this record. The faults in Palazzolo's applications are that they (1) do not ask for permission to build the project he claims he was denied (and thereby evade state procedures and omit essential information), (2) do not contemplate the "whole parcel" of his land, and (3) are redundant and grandiose.

A. Palazzolo Failed to Apply for the Subdivision Proposal He Claims to Have Been Denied

Palazzolo failed to ripen his claim by deliberately obscuring the reasons why he sought to fill the coastal wetlands on his parcel. The applications for

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[31] To be "meaningful an application . . . must be essentially complete, must realistically describe the desired use, and must be reasonably current." *Gilbert v. City of Cambridge*, 932 F.2d 51, 63 n.15 (1st Cir. 1991). *See, e.g., S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990) (a property owner must give "indication . . . of how [it] might intend to develop the property if permitted to do so."); *Unity Ventures v. County of Lake*, 841 F.2d 770, 776 (7th Cir. 1988) ("a formal application . . . with adequate documentation about the density of the proposed development."). *See also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 n.8 (1986) ("The implication is not that future applications would be futile, but that a meaningful application has not yet been made.").

development made by Palazzolo presumed no residential development at all. The first (1983) application was just for permission to fill the entire eighteen-acre wetland of parcel with fill. JA 10. At the Coastal Council, Palazzolo specifically denied any intent to try to construct the very seventy-four-unit residential development that is now the basis of his takings claim. *See* n. 28, *supra*. The second (1985) application was to fill most of the wetland (approximately twelve acres) for what was vaguely described as a project to construct a "beach." JA 25.

Hiding his purpose allowed Palazzolo to achieve four strategic advantages. First, Palazzolo dodged the necessary applications for ISDS and other permits required by state law prior to seeking the Coastal Council's permission to fill the coastal wetlands on his parcel. The permit process for septic systems in coastal wetlands would have clarified the costs of constructing the necessary septic systems (sharply contested at trial, JA 51-55) and removed any lingering doubt as to the "grandiose," PA A-11, "speculative," PA A-13, and "unrealistically optimistic," PA A-13 n.7, nature of his subdivision proposal. Second, an administrative record on sewage would have allowed even better documentation of the adverse environmental spillover effects, such as the effects which led to the trial court's undisturbed finding that the proposal would constitute a "public nuisance." PA B-11. Palazzolo would be hard pressed to allege a taking for a permit denial based on sewage hazard to public waters and public health. *See Bd. of Purification of Waters v. City of East Providence*, 133 A. 812, 814 (R.I. 1926) (no property right exists to discharge sewage into public waters). Third, not seeking permission for the subdivision allowed him to

finesse the "public trust" issue of on whose land he was actually proposing to build. *See* nn. 59, 60, *infra*. Fourth, by leaving the uplands out of his application, but retaining them in the proposal that he claims as his value, Palazzolo is able to imply that the uplands themselves have adequate economic value only as part of a seventy-four lot parcel-wide subdivision scheme. Argument I.B, *infra*. (Here the "whole parcel," *id.*, and "meaningful application" problems converge.)

This maneuver also allowed Palazzolo to claim in the lower courts, and before this Court, "lost value" of $3.15 million, Pet. Br. 41, that is fanciful and unfounded.[32] Now Palazzolo characterizes his takings claim as relying only on the denial of the 1985 "beach" application and not on the 1983 application at all. Pet. Br. 8 n.3-4, 15 n.7. However, in the lower courts, the only subject of his claim of economic deprivation was his plan to fill the entire eighteen acres for an intensive residential subdivision development,[33] and it remains

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[32] Palazzolo's assertion of a $3,150,000 value to his development scheme is close to imaginary. No one outside his litigation team has ever given it any credence whatsoever. It was found by the Rhode Island Supreme Court to be grandiose, speculative and unrealistically optimistic, Statement of the Case VI.B, *supra*; the superior court thought so little of the $3,150,000 price tag that it ignored it outright; the government's witness found the project a "great folly," Test. of Appraiser Andolfo, JA 101; much of it would be constructed on state land, *see* nn. 59, 60 & public trust discussion in text, *infra*; its numerous assumptions, *see* JL1, tab 7, 22-23 are untested by the refiner's fire of a true application process, and there is no reason to believe it would have received necessary federal approvals. *See* n. 21, *supra*.

[33] *See, e.g.*, Test. of Palazzolo, RA 81 (Q. "But your claim [of a taking] before this Court today is based on residences and not a beach club, isn't that correct? A. Correct.").

the central basis of his financial allegations before this Court. Palazzolo has made no record whatsoever as to any economic value of the "beach."[34]

It does not seem unreasonable for the Rhode Island Supreme Court to require that Palazzolo must have at least applied for the development that serves as the subject of his as-applied takings claim. [35]

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[34] Nor is this surprising. As described by a government expert witness at trial, that proposal suffered from a total lack of practical purpose and logical link to the amount of contemplated fill. *See* Test. of Engineer Clarke, Tr. 650 ("[I]n order to get into the water, you'd have to walk across the gravel fill, but then work your way through approximately 70, 75 feet of marsh land or conservation grasses to get to the water. And that's why I call it a so-called beach, because I have never experienced that on a beach before."). With the natural seashore of Misquamicut Beach across the road, this hardly seems like much of an attraction, and Palazzolo has never argued it had economic viability. The filling alone would likely cost in the millions of dollars. JL1, tab 9.

[35] Rhode Island courts are not ordinarily confined to ripeness rules developed by this Court, whether constitutional or prudential in derivation. This Court's Article III precedent is controlling only in federal court and cannot compel the assertion of jurisdiction by state courts. *See* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 Wis. L. Rev. 39, 135-70. *Cf. Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262 n.8 (1977) ("Illinois may choose to close its courts", suggesting that state and federal judiciaries operate independently in fashioning such rules). Nor did the Rhode Island court limit its analysis to this Court's precedent and federal law. The court repeatedly relied on its own state supreme court precedent in several respects, stressing "the principle that th[e] Court 'will not render advisory opinions or function in the abstract.'" PA A-9 (quoting *R.I. Ophthalmological Soc'y v. Cannon*, 317 A.2d 124, 130-31 (R.I. 1974)). The court further relied on Palazzolo's failure to comply with state administrative law requirements. PA A-12 n.6.

B. Palazzolo's Applications Exclude His Whole Parcel's Valuable, Dry Upland Areas

"The relevant question . . . is whether the property taken is all, or only a portion of the parcel in question." *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993). Palazzolo's applications only address the wetlands portion of his site.[36] *See* JL1, tab 5 (1983 application); Ex. 8, Tr. 67, 330-31 (1985 application). His parcel does not consist only of coastal wetlands, but upland areas as well, and the state wetlands restrictions complained of do *not*

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[36] Palazzolo's 1983 application to the Coastal Council was clearly limited to the alteration (filling) of the wetland portion of his parcel. *See* 1983 Application, JL1, tab 5 ("proposal to restore property line, protect and prevent further erosion [&] to fill property to elvation [sic] 6.5 Ft., to prepare property for use as designated by zoning regulations"). As this application makes no reference to the construction of any "residential buildings . . . for human habitation," CRMP § 300.3, Palazzolo limited the Council's scope of review to a request for approval under § 300.10. *See* CRMP § 300.10, "Filling in Tidal Waters" (requiring a water quality certification from the Department of Environmental Management and assent from the Army Corps of Engineers as a prerequisite to receiving the Coastal Council's permission to fill below the mean high water mark). Again, Palazzolo's 1985 application was limited to the depositing of fill in the wetland portion of his parcel. *See* 1985 Application, Ex. 8, Tr. 67, 330-31 ("To place . . . fill . . . to establish a private beach club."). For the same reasons as above, Palazzolo necessarily was seeking approval under § 300.10. *See* CRMP § 300.10, "Filling in Tidal Waters." Palazzolo specifically was not seeking approval for any proposed activity with respect to the upland portion of his land. *See* 1985 Application, Ex. 8, Tr. 67, 330-31 ("There will be no filling of the existing high areas (roadway and small island to the west side of the area.)").

prevent building on upland portions of his parcel.[37] Not only does Palazzolo fail to encompass the whole parcel, but its limit to his highly-regulated wetlands suggests strategic behavior.[38]

Palazzolo made two applications to fill all or substantially all of his coastal wetlands, yet we still do not know the extent of upland, dry portions of his property.[39] Palazzolo acknowledges that at least one portion of his property includes upland, allowing him to build "one single-family home." Pet. Br. 14-15, 18. The record is not sufficient to support Palazzolo's further contention that the Coastal Council would permit "one single-family home and nothing more." Pet. Br. 13. The Supreme Court left open the possibility of more. PA A-11 ("at least" one single family home). Trial court testimony revealed that there might be additional upland portions on Palazzolo's eighteen

[37] *See* Statement of the Case III.B.1.

[38] *See Tabb Lakes, Ltd., v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993) (limiting quantum of land considered to be wetlands creates "ipso facto" taking).

[39] The wetland boundary of Palazzolo's site is also obscure; there is "a substantial amount of land" under the waters of Winnapaug Pond, PA A-3, and "additional land is subject to daily tidal inundation and ponding." *Id.* Indeed, the record strongly suggests that the majority of the acreage is below the mean high water mark. JL2, item 1 (showing elevations; all elevations below 1.72 are below mean high tide line). *See also* n.9, *supra*. Mean high water mark is significant both because it is indicative of the aquatic nature of the property -- and therefore the adverse spillover effects associated with its development -- and because it means that Palazzolo's title in the property is limited by state ownership. *See* nn. 59, 60, *infra*.

acres that would support three or four additional lots.[40] Indeed, the State even proposed an offer of judgment at trial based on testimony suggesting that as many as eight of the lots on the parcel contained developable uplands. *See* Tr. 209-10, 258-60.

What the Coastal Council would conclude if it had an application that allowed it to consider upland portions of the acreage is not, of course, clear. But the very purpose of the judicial ripeness requirement is to allow for those determinations to be made in the first instance by the regulatory agency and not based on judicial speculation. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 190-191 (1985).

C. Palazzolo's Filings Were "Exceedingly Grandiose" and Redundant

"[R]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *MacDonald, Sommer, & Frates v. Yolo County*, 477 U.S. 340, 353 n.9 (1986). Despite Palazzolo's suggestions that he has exhausted himself in applications to the point of

[40] Government witnesses at trial testified both to the possibility of further upland portions of the property for which a "special exception" was not required for residential development, and to how Palazzolo's lack of a survey for that purpose precluded the Coastal Council from knowing for sure. *See, e.g.*, Test. of Council Director Fugate, RA 36 ("There may, and again, because we don't have an accurate or detailed survey, there may be other upland portions that are immediately adjacent to Atlantic Avenue, but that can't be determined."); Tr. 209 ("there may be other upland areas on the backside of those houses along Atlantic Avenue that might have sufficient upland. . . ."); Test. of Engineer Clarke, RA 42, 44 ("the site has two upland areas" and "realistic to apply for those locations").

futility, in point of fact he applied only for his "beach" and "erosion control," hiding the seventy-four-lot subdivision proposal. Even though Palazzolo never applied for any intermediate use, and even though he avoided any application including his buildable uplands, nevertheless, the record we have just discussed supports the likelihood of some less grandiose beneficial use. Before the possibility of some intermediate use is ruled out, applicants should meet some burden of coming forward in good faith, candidly disclosing their intentions, and using the whole parcel of their property.[41]

To the extent that Palazzolo references or relies on SGI's applications from the 1960s, they add little to his case, having been found to be "nearly identical" with his 1980s applications. Statement of the Case ("Statement") V.B, *supra*. As found by the courts below, the application denials predating his ownership of the property are not proof of futility, but of dramatically inhibited reasonable investment-backed expectations. *See* PA B-12 ("he knew"); PA A-18 ("he had no reasonable investment-backed expectations that he could develop a 74-lot subdivision"); *See* Argument IV, *infra*. Under *Lucas*, since the state supreme court "rested its judgment on ripeness grounds," *Lucas*, 505 U.S. at 1011, the fact that *Palazzolo* "may yet be able to secure permission to build on his property," *id.*, should "preclude review." *Id.*

[41] The paucity of the record is due to the applicant's stratagems, and should not be held against the State, lest strategic filing behavior be encouraged. This problem is emerging since *Lucas*. *See, e.g., Forest Properties, Inc. v. United States*, 39 Fed. Cl. 56, 72-75 (1997), *aff'd*, 177 F.3d 1360 (Fed. Cir.), *cert. denied sub nom. RCK Properties, Inc. v. United States*, 528 U.S. 951 (1999).

Our final observation on ripeness is that a court is entitled to congruity[42] between the issue presented on the merits and the issue presented for ripeness determination. If an applicant drastically narrows his argument to achieve a "ripe" question (for instance that mere refusal to allow him to fill wetlands is a taking),[43] that is the question he should address on the merits. Palazzolo tries to fly in under the ripeness radar with just such a narrow claim, and then once in, implicate numerous unripe issues. He cannot have it both ways.

II. PALAZZOLO'S CLAIM THAT HE HAS BEEN DENIED ALL "ECONOMICALLY VIABLE USE" OF HIS PARCEL LACKS MERIT

Palazzolo's sole argument to the courts below was that the Coastal Council's denial amounted to a *per se*

[42] For this same reason, Palazzolo's reliance *see* Pet. Br. 18, on the Texas Supreme Court's decision in *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999) is misplaced. In that case, the landowner's application coincided with his claim of value, and his ripeness question and his question on the merits converged "[b]ecause the proper owners in *Mayhew* were willing in essence to concede that permission for less intensive development might be granted, while at the same time denying that such permission would avert a regulatory taking." Pet. 17. (emphasis removed). Palazzolo makes no such concession and cannot similarly claim ripeness.

[43] To the extent Palazzolo hints at a facial challenge to Rhode Island's Coastal Resources Management Plan, he would run squarely into a "rational basis" for the protection of coastal wetlands under the Due Process Clause, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938), and a substantial advancement of legitimate state interests under *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

taking under *Lucas*.[44] Palazzolo, however, cannot establish what *Lucas* requires: that the Coastal Council deprived him of all "economically viable use of his land." 505 U.S. at 1016. First, he cannot show that there is no economically viable use remaining. The parcel was bought for a "total initial investment of $13,000," PA B-12,[45] has a minimum permitted value of $200,000 in 1986 dollars, PA B-5; PA A-12 to A-13, and may be amenable to further development. Statement V.C. That is not an elimination of all (or nearly all) value. Second, Palazzolo cannot show that his proposed uses were themselves "economically viable." Argument II.B, *infra*. A governmental agency cannot be fairly deemed to have denied a landowner

[44] Plaintiff's Post-Trial Mem. 6 ("This Court need not look beyond the *Lucas* case"); Br. of Appellant 5 (same). There are some key factual differences from *Lucas* Lucas 's property went from $975,000 to "valueless," *Lucas*, 505 U.S. at 1006, 1007; Palazzolo's from $13,000 to at least $200,000. PA B-12, B-5. Lucas's regulation was imposed after acquisition, 505 U.S. at 1008; Palazzolo's pre-existed his acquisition of the parcel. Statement III.B, IV, *supra*. Lucas's proposed use was a single-family residence, "what the owners of immediately adjacent parcels had already done," 505 U.S. at 1008; Palazzolo proposes an unprecedented incursion on the pond he and his neighbors share to install a seventy-four-lot subdivision. *See* n.7, *supra*.

[45] The record is once again less than crystal clear on this point, and once again Palazzolo is to blame. By only advancing a *Lucas* argument below, he avoided *Penn Central*'s "economic impact" analysis and the relevant record as to his investment and return. We know that SGI owned the property at the times of the investment of $13,000, and sold off a number of lots, but the amount of the sales was never made a matter of record, and so the "total initial investment" calculated by the Superior Court did not offset any profits from lots sold. PA B-12.

economically viable use if the use denied is not economically viable in the first instance.[46]

A. Palazzolo's Parcel Retains Substantial Economic Value for Residential Use

In *Lucas*, this Court announced a *per se* regulatory takings test applicable only in extreme and "relatively rare" circumstances, 505 U.S. at 1018, when the government by regulation "denies an owner economically viable use of his land." *Id.* at 1016 (citation and internal quotation marks omitted). The Court concluded that only "deprivation of *all* economically feasible use" is the constitutional equivalent of a physical appropriation of the property by the government. *Id.* at 1017 (emphasis supplied). "[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his parcel economically idle, he has suffered a taking." *Id.* at 1019 (emphasis supplied).[47] This accorded with earlier

[46] Non-viable uses should be a rarity, were it not for the incentive takings litigation provides landowners to engage in strategic behavior to manufacture a "taking." This problem dissipates when the proposed use is put through the refiner's fire of a true and meaningful development application for the whole parcel.

[47] The Court in *Lucas* specifically accepted the "all-or-nothing" character of the *per se* categorical takings test being adopted, 505 U.S. at 1019 n.8 ("[i]t is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full"), noting that the *Lucas* "categorical formulation" does not preclude a landowner from seeking to establish a taking under a different analysis, such as the multi-factor approach in *Penn Central*. Palazzolo expressly disavowed in the lower courts any reliance on any takings test other than the *Lucas per se* test. *See* note 44, *infra*.

language that regulation can be a taking only when it "totally destroys the economic value of property." *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part).

By Palazzolo's own acknowledgment, he can make economically viable use of his parcel. Pet. Br. 13. "[T]he uncontradicted evidence was that [the Coastal Council] . . . *would not* deny [Palazzolo] permission to build one single-family home" on his parcel. *Id.* (emphasis in original). This is certainly "one step short of a complete deprivation" of use, *Lucas*, 505 U.S. at 1019 n.8, indeed, a long step short.

Because of the ripeness problems, *supra*, the record can only suggest that the Coastal Council may permit as many as three or four more upland lots. *See* Argument I.B, *supra*. Having never formally pursued or been denied upland development, Palazzolo cannot fairly contend before this Court that it has been "taken." We have already discussed the "undisputed evidence . . . that had [Palazzolo] developed the upland portion of the site, its value would have been $200,000," PA A-12 to A-13; PA B-5 (trial court finding), and that this was a minimum value for the parcel. PA A-11 ("at least" one home site). It is this Court's long-established practice not to disturb such factual findings when upheld by both lower courts[48] and there is no reason here to doubt the validity of their findings. Whatever the upper limits of economically "productive,"

[48] *See, e.g., NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 97 n.15 (1984); *Rogers v. Lane*, 458 U.S. 613, 623 (1982); *United States v. Dickinson*, 331 U.S. 745, 751 (1947); *United States v. Commercial Credit Co.*, 286 U.S. 63, 67 (1932); *United States v. Chem. Found.*, 272 U.S. 1, 14 (1926); *Baker v. Schofield*, 243 U.S. 114, 118 (1917); *Towson v. Moore*, 173 U.S. 17, 24 (1899).

"beneficial," or "viable" use of Palazzolo's whole parcel may be, there is no serious issue that at least some residential development, possessing substantial value, would be permitted.[49]

To the extent the Court wishes to assess value in terms of a ratio rather than an absolute number, it should consider the problems with Palazzolo's improbable "denominator" of $3,150,000. *See* n.32, *supra*; n.50, *infra*. It may also wish to consider his "total initial investment" in this property of $13,000. PA B-12.

B. Palazzolo Failed to Establish That His Development Uses Were Themselves "Economically Viable"

As we have shown, Argument I.A; nn.32, 34 *supra*, there is also no plausible record to support that Palazzolo's speculative development proposals were "economically viable." The government's appraisal expert ultimately concluded that Palazzolo would have to expend "in excess of four million dollars in construction costs"[50] for a "net overall value of

[49] Contrary to Palazzolo's characterization of the decision of the state supreme court, Pet. Br. 38-41, that court never intimated that so long as the parcel retains some market value above zero, it necessarily possesses economically viable use. The issue presented to the court in this case was whether use of the parcel, which would give the parcel at least a value of $200,000 (as of 1986), was a *Lucas per se* taking. The state supreme court nowhere intimated that it was assuming that Palazzolo could only receive some nominal value above zero.

[50] Government experts described the scope of the task of filling in approximately eighteen acres of coastal marshland with eight feet of fill. *See* Test. of Engineer Clarke, Tr. 554, 594-99; *see also* Preparation and Development Costs, JL1, tabs 9-10. With so much

$55,000." JA 101. In what must be deemed an understatement, he described such an undertaking as a "great folly." JA 101. The "beach" proposal fares no better. *See* n.34 & accompanying text, *supra*. In short, no agency or court in these proceedings has ever given the economic viability of Palazzolo's projects the slightest credence, and the record underlying the judicial skepticism is equally damning.

Because Palazzolo has neither established that his property is valueless under the regulations, nor established an economically viable proposal, his claim lacks merit.

III. PALAZZOLO'S CLAIMS ARE BARRED BY RESTRICTIONS THAT PREDATE HIS ACQUISITION

Under *Lucas*, even a regulation that deprives a landowner of all economically viable use is not unconstitutional "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027. This Court further stated, "[a]ny limitation so severe cannot be newly

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acreage below mean high water mark, the construction would have required at least 250,000 cubic yards of fill and the dredging out over 60,000 cubic yards of existing muck. *See* Test. of Engineer Clarke, Tr. 554, 594-599; *see also* Test. of Engineer Caito, Tr. 264, 274-77, 279-81. The engineering and appraisal experts considered the feasibility of various septic systems, the limitations imposed by local zoning laws, the requirement that construction, for the most part, would have to be on stilts, the type of infrastructure needed, and market prices prevailing at the time. *See* Test. of Engineer Clarke, Tr. 554, 562-77, 603, 606; Test. of Appraiser Andolfo, Tr. 661, 667-73; JL1, tabs 9 and 10.

legislated or decreed (without compensation) but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029.

The Supreme Court of Rhode Island affirmed the trial court's finding that "the right to fill the wetlands was not part of Palazzolo's estate to begin with," PA A-13, and itself found that "when Palazzolo became the owner of this land in 1978, state laws and regulations already substantially limited his right to fill wetlands. Hence, the right to fill wetlands was not part of the title he acquired." PA A-15. This is a state law determination entitled to this Court's respect. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (constitutional property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law"). This determination is also well-founded.

A. Antecedent "Background Principles of State Law" Are Significant Under *Lucas*

Sequence matters. This Court's opinion in *Lucas* referred to limitations on land use that were "*newly* legislated or decreed," 505 U.S. at 1029 (emphasis supplied). (In *Lucas* the acquisition of the property preceded the regulation applied.) *Lucas* distinguished between regulatory action that does and does not "proscribe a productive use that was *previously* permissible under relevant property and nuisance principles." *Id.* at 1029-30 (emphasis supplied). Indeed, the very term "background" in "background principles" has an obvious temporal element, by

focusing on those "social, historical, and other *antecedents* . . . of an event or experience." *Random House Webster's Unabridged Dictionary* 151 (2d ed. 1997) (emphasis supplied). Thus, as an opening proposition, the Rhode Island Supreme Court was plainly correct in rejecting Palazzolo's "argument that the time of acquisition is irrelevant" to regulatory takings analysis. PA A-16.[51] As this Court expressly acknowledged in *Lucas*, common law principles may, "because of changed circumstances or new knowledge . . . make what was previously permissible no longer so." 505 U.S. at 1031 (quoting Restatement (Second) Torts § 827 cmt. g).

Palazzolo's contrary view is based on an erroneous and extreme image of property.[52] According to

[51] Palazzolo wrongly posits, Pet. Br. 22-23, that this Court in *Nollan v. California Coastal Comm'n.*, 483 U.S. 825, 833 n.2 (1987), previously ruled that the timing of an individual's acquisition of property is wholly irrelevant to the "background principles" of law inquiry under *Lucas*. The Court in *Nollan*, however, cannot be fairly deemed to have answered a legal issue not posed until *Lucas* five years later. The Court's rationale in *Nollan* arose from circumstances where the government, by permit exaction, sought to appropriate a permanent easement for the public across the landowner's beachfront property, which the Court deemed the legal equivalent of the government's "permanent physical occupation" of the land. *Nollan*, 483 U.S. at 832. The *Lucas* Court answered the question whether notice is relevant by agreeing that an otherwise *per se* taking may be defeated by "background principles." 505 U.S. at 1029. The only remaining issue concerns how those "background principles" are defined, which was an issue not addressed in *Nollan*.

[52] Indeed his absolutist property views are at odds even with Locke, who recognized "Man['s] . . . uncontroleable Liberty, to di[s]po[s]e of his Per[s]on or Po[ss]e[ss]ions," John Locke, *Two Treatises of Government* 168 (photo. reprint 1992) (1698) (spelling and capitalization in original except as indicated). Palazzolo's extreme view also sharply diverges from that of Blackstone, who acknowledged that man in his natural state had "the ab[s]olute and uncontroled power of doing whatever he plea[s]es," 1 William Blackstone, *Commentaries on the Laws of England* 121 (photo. reprint 1979) (1765) (spelling in original except as indicated), but also recognized that "every man, when he enters into [s]ociety, gives up a part of his natural liberty, as the price of [s]o valuable a purcha[s]e." *Id.* Indeed, said Blackstone, "the principal aim of [s]ociety is to protect individuals in the enjoyment of tho[s]e ab[s]olute rights . . . which could not be pre[s]erved in peace without . . . [s]ocial communities." *Id.* at 120 (spelling in original except as indicated). *Cf. Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting) ("the advantage of living and doing business in a civilized community").

Palazzolo, allowing background principles of law to change over time would be "Antithetical" to the "History and Structure of the Constitution" because government could "Acquire the Right to Use and Develop Property Without Paying Just Compensation."[53] Pet. Br. 24. Palazzolo's fundamental mistake is his assumption that whenever the government *restricts* a landowner from using his parcel in a particular way the government has, in effect,

[53] The history of American law is one of change however. As described by Oliver Wendell Holmes more than a century ago: "The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." Oliver Wendell Holmes, *The Common Law* (1881), *reprinted in* 3 *The Collected Works of Justice Holmes* 115 (Sheldon M. Novick ed., Univ. of Chicago Press 1995). Even the expansion of takings law by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1992), beyond "direct appropriation," *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871), would seem to be one such development in constitutional law.

acquired the right to use the property in that same manner itself. That is simply not so.[54]

B. The Relevant "Background Principles of State Law" Under *Lucas* Are Not Confined to Those Supplied By Common Law Doctrine

Lucas leaves ambiguous the extent to which "background principles" must derive from the common law, to the complete exclusion of other

[54] Palazzolo's zero-sum, binary proposition that everything he is not permitted to do is necessarily transferred to the State, is inconsistent with law and logic. First, there is a public interest apart from the State's proprietary or governmental interests, as reflected in doctrines such as nuisance, public trust, and rights of the shore that are "background principles" to title in land in Rhode Island. Second, there are situations, exemplified by the "tragedy of the commons," *see* Garrett Hardin, *The Tragedy of the Commons*. 162 Science 1243 (1968), where the State's only interest is as a neutral arbiter of conflicts that nature, and neighbors, present. There is reciprocity of advantage where common amenities are protected (such as, to all of its neighbors, the scenic, recreational and other amenities of Winnapaug Pond), or where "independent pursuit by each decision-maker of its own self interest leads to results that leave all decision-makers worse off." Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1211 (1977) (describing tragedy of the commons). Takings law that did not respect well-settled statutes would disrupt the well-settled and investment-backed expectations of nearby property owners, and at the extreme would require payment for every such limited use. "[W]ere the exerci[s]e of every virtue to be enforced by the propo[s]al of particular rewards, it were impo[ss]ible for any [s]tate to furni[s]h [s]tock enough for [s]o profu[s]e a bounty." 1 William Blackstone, *Commentaries on the Laws of England* 56 (photo. Reprint 1979) (1765) (spelling in original except as indicated). And with so profuse a bounty, who would not bluff their desire to exercise the virtue enforced?

sources of law. Before this Court, Palazzolo apparently contends that the only relevant law is the common law of easements and nuisance.[55] *See* Pet. 6. We disagree. We think the better view is that *Lucas* takings can appropriately be limited by other sources of law, particularly (as here) statutory and regulatory provisions that derive from background common law principles.[56]

Certainly, *Lucas* did not foreclose that background principles extend beyond the common law. The majority did not say that the limitation that "inheres in the title itself" cannot be "legislated," but that it could not be "*newly* legislated." 505 U.S. at 1029 (emphasis supplied). The Court also did not refer just to nuisance law, but to relevant background principles "of the State's law of *property*" as well. *Id.* at 1029 (emphasis

[55] Even if the only relevant background principle were nuisance law, the judgment below should still ultimately be affirmed. The trial court held that Palazzolo's proposed use of the property amounted to a common law nuisance under Rhode Island law. *See* PA B-11.

[56] As stated by Justice Kennedy in his concurring opinion in *Lucas*, "[t]he common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society." 505 U.S. at 1035 (Kennedy, J., concurring in the judgment). For instance, some statutory and regulatory schemes codify and otherwise derive from common law principles, to the benefit of property owners, by providing an orderly forum for advance approval of development proposals, rather than requiring applicants to proceed at their own risk of injunction and abatement. To the extent the State enforces common law principles by regulation, property owners further benefit by uniformity and certainty of protection, rather than protection hinging on who has neighbors with the temperament and funds to commence a nuisance, public trust or other common law action.

supplied). Many sources of law may shape and define private property rights. See nn. 59, 60, *infra* (public trust doctrine). Certainly no one could seriously maintain that state law grounded in a state's *constitution*, but not in its common law, was irrelevant to the background principles inquiry. *See, e.g.*, R.I. Const. art. 1, § 17 (rights of fishery and shore).

We have no expression by this Court that legal rules based on the common law are superior to those based on statute. After all, "the great office of statutes is to remedy defects in the common law as they developed, and to adopt it to the changes of time and circumstances." *Munn v. Illinois*, 94 U.S. 113, 134 (1876). *Cf. United States v. Causby*, 326 U.S. 256, 260 (1945) ("It is ancient doctrine that at common law ownership of land extended to the periphery of the universe. . . . But that doctrine has no place in the modern world.").[57]

[57] The highest courts of states to address the issue readily agree with the common sense proposition that common law principles cannot be the exclusive source of "background principles" of law relevant under *Lucas*. *See, e.g., Hunziker v. State*, 519 N.W.2d 367, 371 (Iowa 1994); *Soon Duck Kim v. City of New York*, 681 N.E.2d 312, 318 (N.Y. 1997); *Wooten v. South Carolina Coastal Council*, 510 S.E.2d 716, 718 (S.C. 1999); *City of Virginia Beach v. Bell*, 498 S.E.2d 414, 420 (Va. 1998). Even the cases cited by Palazzolo, Pet. Br. 32, do not support his legal theory that the only relevant source for discerning "background principles" is common law doctrine. While those cases do not endorse the notion that all land use restrictions imposed by pre-existing statutes and regulations automatically bar a *Lucas per se* taking, none support Palazzolo's claim that such pre-existing laws are *not* a relevant factor to be considered at all. Indeed, in quoting from the cases, Palazzolo omits the second half of the sentence from the Colorado Supreme Court's opinion in *Cottonwoods Farms v. Bd. of County Comm's. of County of Jefferson*, 763 P.2d 551, 555 (Colo. 1988), in which the state court adds that a "majority of courts have held that the fact of prior purchase with knowledge of applicable zoning regulations . . *does constitute a factor* to be considered in evaluating the claims of invalidity" (emphasis supplied). *See also Karam v. N. J. Dep't of Envtl. Prot.*, 705 A.2d 1221, 1229 (N. J. Super. Ct. App. Div. 1998) ("plaintiffs could not have reasonably expected that they would be immune from all changes in the law during that period.").

Statutes build upon and develop the common law based upon the very "changed circumstances or new information" that this Court acknowledged in *Lucas* could be the legitimate basis of changes in the common law itself. 505 U.S. at 1031 (quoting Restatement (Second) of Torts § 827 cmt. g). Most simply put, "[f]or almost a century now, legislators – with judicial acquiescence – have taken over the task of refining and specifying the range of acceptable landowner practices, once defined only by judicially administered trespass and nuisance law on a case-by-case basis." Carol Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 Wash. & Lee L. Rev. 265, 281 (1996). Thus, "it is particularly misleading to look simply to common-law judicial definitions of nuisance as the basis for modern property rights." *Id.*

The statutes and regulations at issue illustrate this historical relationship. Long before the Rhode Island legislature enacted the Rhode Island Coastal Resources Management Act of 1971, 1971 R.I. Pub. Laws ch. 279, land use development in the coastal marshes was restricted. *See* Section C, *infra*. The 1971 statute, as supplemented by the Coastal Council's Coastal Resources Management Program, simply implemented those longstanding principles[58] in a comprehensive and

[58] Palazzolo treats the public purpose of the State's regulations as enhancing his taking claim. The public nature of the State's goals in regulating wetlands cuts in several directions. First, a public purpose is necessary for there to be a compensable taking at all:

consistent fashion. The overlap is plain in this very case: the trial court, found the use Palazzolo claims was taken from him by regulation to be so harmful as to be barred by the state's common law public nuisance doctrine. PA B-11.

C. Under *Lucas*, Background Principles Supplied By State Law Defeat Any Takings Claim

The state supreme court was correct that under Rhode Island law at the time of Palazzolo's purchase "the right to fill wetlands was not part of the title he acquired." PA A-15. The state court properly relied on the comprehensive state coastal management program existing at the time of Palazzolo's acquisition, whose plain terms made clear at that time that state law would bar the massive filling of coastal wetlands he later proposed.

In this case, the constitutional, statutory, and common law pedigree of the state's regulatory program compels the Rhode Island Supreme Court's decision. This is not an instance in which a state has dramatically and suddenly changed law to the frustration of settled expectations of property owners.

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property cannot be taken except for public purposes. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984); *City of Newport v. Newport Water Corp.*, 189 A. 843, 846 (R.I. 1937). The fact that a taking demands a public purpose does not prove the converse. Indeed, under the *Penn Central* test, public purposes such as preventing harm to the public health and safety will make a regulatory taking *less* likely. *Penn Central*, 438 U.S. at 124. Last, *Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980), inquires whether the regulatory regime substantially advances a legitimate state interest. Where it does, the regulation is more likely to withstand a takings challenge. *Id.*

As described *supra* Statement III.B, the 1971 statute applied to Palazzolo's parcel in this case is directly traceable to a series of state statutory programs in existence for decades before then, and is even more deeply rooted in state common law and constitutional principles which, throughout Rhode Island's history, restricted the very kind of injurious fill activities Palazzolo sought to undertake. The extent of these historical restrictions shows that filling of coastal wetlands "has long been the source of public concern and the subject of governmental regulation" in Rhode Island. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984).

First, and most obviously, the trial court below expressly found that Palazzolo's proposed uses would amount to a nuisance under the common law because of the serious harm from such a development. PA B-10, B-11. Interfering with wetlands is clearly subject to the law of nuisance under Rhode Island law. *See Citizens for Preservation of Waterman Lake v. Davis*, 420 A.2d 53, 59-60 (R.I. 1980). *Cf. Payne & Butler v. Providence Gas Co.*, 77 A. 145, 153 (R.I. 1910) (interference with shellfish beds deemed a nuisance); R.I. Gen. Laws ch. 118 § 14 (1896) (fill in navigable waters subject to law of nuisance). Nuisance uses are not compensable. *Mugler v. Kansas*, 123 U.S. 623, 668-69, 670-71 (1887).

Second, layers of state constitutional and common law dramatically restrict filling and other private rights in tidal wetlands. Rhode Island's constitution protects the public's "right of fishery, and the privileges of the shore." R.I. Const. art. 1 § 17; *see Jackvony v. Powel*, 21 A.2d 554, 554-58 (R.I. 1941); *Clarke v. City of Providence*, 15 A. 763, 765-66 (R.I. 1888). This section was in the state's original 1843 constitution, which incorporated

rights dating back to our Royal Charter of 1663 (granting "our loving subjects . . . liberty . . . upon said coast"). Rhode Island Royal Charter of 1663, *repealed by* R.I. Const. of 1843, *available at* http://www.state.ri.us/rihist/richart.htm. *See also* R.I. Const. art. 1 § 16 (exempting from state takings clause the regulation of tidal wetlands).

These constitutional rights are of such force that the question usually argued is whether the State even has the power under the constitution to authorize private landowners to fill in tidal wetlands. *See, e.g., Jackvony*, 21 A.2d at 556 (public "'rights,' beyond the power of the general assembly to destroy"); *Clarke v. City of Providence*, 15 A. at 764, 765-66. Even in cases where the Rhode Island Supreme Court approved of the State's power to relinquish the public's trust rights, *see, e.g., Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1041-44 (R.I. 1995), this has only emphasized that these are not rights belonging to the landowner.

Rights recognized by the common law overlap with those enshrined in the state constitution. Rhode Island endorses the public trust doctrine,[59] *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1259-60 (R.I. 1999), granting the state a fee interest in tidal wetlands.[60] The public trust doctrine has been codified in harbors and rivers laws and regulations, such as was exercised over SGI's 1960's applications. Under both the common law and regulatory practice dating back centuries, Rhode Island law has never recognized full title of riparian owners in tidal lands, and there is no right to fill. *Dawson v. Broome*, 53 A. 151, 157 (R.I. 1902). The State holds the property in public trust, and may give riparian owners permission to fill. *Id.* at 156.

Finally, if a true and meaningful application for a seventy-four-lot subdivision had been filed, it would

[59] "Under the public-trust doctrine, 'the state holds title to all land below the high water mark in a proprietary capacity for the benefit of the public.'" *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1259 (R.I. 1999) (citation omitted). "'In this state, at common law, the fee of the soil in tide waters below high-water mark is in the state.'" *Dawson v. Broome*, 53 A. at 156 (quoting *Bailey v. Burges*, 11 R.I. 330, 331 (1876)). *See also, e.g., Gerhard v. Bridge Comm'rs*, 5 A. 199, 200 (R.I. 1886) ("as trustee for public purposes"). The various harbor and river agencies granting leave to fill tidal wetlands (including the entity that denied SGI's applications in the 1960s) did not restrict a property right of the owner to fill (as none existed), but rather gave permission or acquiescence of the State yielding the public's rights in such areas. *See Dawson*, 53 A. at 156. The connection we assert among common law, statute, and regulation, *supra* at Argument III.B, was closed further by legislation establishing fill in public trust lands not authorized by the state to be "deemed to be a public nuisance." R.I. Gen. Laws ch. 118, § 14 (1898), *quoted in Dawson*, 53 A. at 155.

[60] The antecedent state law of public trust, even though not reached by the state courts, applies without question to Palazzolo's land below the high tide mark. *Allen v. Allen*, 32 A. 166, 166 (R.I. 1895) (applying the public trust doctrine to a "thatch bed," *i.e.*, salt marsh). *Cf.* Alfred Redfield, *Development of a New England Salt Marsh*, 42 Ecological Monographs 201 (1972) (explaining the meaning of the term "thatch"). As a riparian owner, Palazzolo would have certain very limited property rights, which would not support a takings claim for the denial of such filling. 32 A. at 166 ("These [private riparian rights] do not amount to seisin in fee, but are in the nature of franchises or easements."); *accord Rhode Island Motor Co. v. City of Providence*, 55 A. 696 (R.I. 1903). The riparian owner has only "a sort of inchoate or potential title by virtue of his right to fill out under leave of the state." *Dawson v. Broome*, 53 A. at 157. In *Gerhard v. Bridge Comm's.*, 5 A. 199 (R.I. 1886), the riparian landowner sought "just compensation" based on the State's physical invasion of such land, namely constructing the pier of a bridge. The court refused, noting that the soil on which the pier rested belonged to the State. *Id.* at 200.

have implicated the sewage control authority of the State. Even good and clear title does not confer on a Rhode Island landowner a property right to emit sewage. *Bd. of Purification of Waters v. City of East Providence*, 133 A. 812, 814 (R.I. 1926). These legal doctrines are all underpinned by ancient equitable maxims recognized in Rhode Island: "Sic utere tuo ut alienum non laedas," *Horton v. Old Colony Bill Posting Co*, 90 A. 822, 837 (R.I. 1914), and "salus populi est suprema lex" *R.I. Dep't of Mental Health, Retardation & Hosps. v. R.I. Council 94, AFSCME*, 692 A.2d 318, 325 (R.I. 1997).

The depth, consistency and antiquity of the background principles of state law applicable in this case support the state court's conclusion that those state law principles, carried forward into the regulations complained of, preclude any claim under *Lucas*. Under Rhode Island law, the title that Palazzolo obtained when he acquired the parcel in 1978 did not include the inherent right to develop the property by filling the parcel's coastal wetlands.[61]

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[61] Alternatively, Palazzolo could not maintain a viable takings claim under *Lucas* even if the restrictions imposed by Rhode Island went beyond historically-rooted background principles. Just as the lack of reasonable investment-backed expectations may be "so overwhelming" as to be dispositive of a takings claim under *Penn Central, Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984), it may be likewise preclusive of a claim under *Lucas*. *See Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994); *Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999), *cert. denied*, 120 S.Ct.1554 (2000). As described in Argument IV, *infra*, the clarity and settled character of the state law restrictions on development at the time of Palazzolo's acquisition deprived him of any reasonable investment-backed expectations that he could develop the parcel in the manner he later proposed, regardless of their roots in background principles of state law.

IV. *PENN CENTRAL'S* ANALYSIS DOES NOT SUPPORT PALAZZOLO'S TAKINGS CLAIM

Although Palazzolo expressly confined his takings challenge to his claim of a *per se* taking under *Lucas*,[62] the Rhode Island Supreme Court nevertheless described how Palazzolo would not have succeeded had he relied on the test set forth in *Penn Central*. *See* PA A-17. Under *Penn Central*, the three factors relevant to the judicial inquiry are "the economic impact of the regulation on the claimant," "the character of the governmental action," and "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. The Rhode Island Supreme Court addressed only the "investment-backed expectations" factor,[63] *see* PA A-17, A-18, and concluded that Palazzolo's "lack of reasonable investment-backed expectation is dispositive" of any possible takings claim. PA A-17. The court relied on the trial court's finding to that

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[62] *See* n. 44, *supra*.

[63] In some circumstances, the force of just one of the three factors can be so overwhelming as to be dispositive of the takings inquiry. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), the Court held that the "character of the governmental action" -- there a "permanent physical occupation" of private property by a sovereign -- was enough to justify a finding that an unconstitutional taking had occurred. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984), the Court held that consideration of the government's "interference with reasonable investment-backed expectations" was sufficient to dispose of a takings challenge. And, of course, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court focused exclusively on the "economic impact" of the challenged regulation.

effect, which was rooted in the further finding that when Palazzolo acquired the parcel, "there were already regulations in place limiting [his] ability to fill the wetlands for development." *Id.*

In 1978, when Palazzolo acquired the parcel, Rhode Island had in place a comprehensive program for land use management in the coastal areas where Palazzolo's parcel was located. The Coastal Resources Management Program identified, in clear and precise terms, the very kind of property Palazzolo owned and the restrictions necessary on development in such areas based on the sheer fragility of the surrounding ecosystem. *See* Statement III.B; *supra;* PA A-17. There was absolutely no suggestion in the existing regulatory scheme that the kind of massive filling contemplated by either Palazzolo's 1983 or 1985 proposal would be permitted for an intensive residential subdivision, "erosion control," or the so-called "beach."

Wholly apart from the proper scope of "background principles" of law under the *Lucas per se* takings test, there can be no doubt of the validity of the state court's conclusion that such pre-existing legal restrictions can defeat the reasonableness of a landowner's investment backed expectations.[64] *See* PA A-17. The challenged regulatory program preceded his ownership, and

[64] Any reliance Palazzolo places, *see* Pet. Br. 3, on the Town of Westerly's zoning of the relevant parcel for subdivision development is entirely misplaced. The town's action cannot limit the sovereign power of either the State or the federal government to impose their own restrictions on development. Moreover, in Rhode Island, a developer does not obtain a vested right until a building permit has been issued and construction has begun. *Shalvey v Zoning Bd. of Review*, 210 A.2d 589, 593-94 (R.I. 1965); *Tantimonaco v. Zoning Bd. of Review*, 232 A.2d 385, 387 (R.I. 1967); *see also Lanmar Corp. v. Rendine*, 811 F. Supp. 47, 51 (D.R.I. 1993).

simply made plain what landowners, including Palazzolo, had long known about their limited ability to fill coastal marshland. Indeed, Palazzolo's predecessor corporation, SGI, had sought and been denied permission to do just what he then proposed in nearly identical new filings.[65]

Neither of the other two *Penn Central* factors would support a finding of a taking here. Palazzolo's "economic impact" claim is based on a speculative allegation of lost profits mightily disbelieved by the courts below (*see supra* n.32; Statement VI.B, *supra*). The "character" of the governmental action at issue here, moreover, involves the very kind of governmental action sustained in *Penn Central*. "[T]he [development restriction] neither exploits [Palazzolo's] parcel for [governmental] purposes nor facilitates nor arises from any entrepreneurial operations of the [State]." *Penn Central*, 438 U.S. at 135. "This is no more an appropriation of property by government than is a zoning law . . . ." *Id.*

Indeed, the law challenged in this case provides the very kind of "reciprocity of advantage" (because it "applies to a broad cross section of land") that the *Penn*

[65] One *amicus* posits that this Court's taking analysis in *Lucas* and other recent court decisions refine and effectively supersedes the analysis previously set forth by the Court in *Penn Central*. *See* Br. *Amicus Curiae* of Board of County Commissioners of La Plata County. Because we do not believe that the Court need reach that issue to dispose of this case, we do not address that distinct argument ourselves, other than to note it as an alternative basis for rejecting Palazzolo's *Penn Central* theory. Likewise, it is being suggested by the same *amicus* that Rhode Island's sovereign immunity provides an alternative basis for upholding the judgment below. *Alden v. Maine*, 527 U.S. 706 (1999), represents an important new legal development that the State could not fairly have been required to anticipate in the context of this case.

Central dissent acknowledged was sufficient to defeat a regulatory takings claim. *See id.* at 147 (Rehnquist, J., dissenting). Palazzolo, like other landowners in the area, has been both benefited and burdened by the development restrictions. All have investment-backed expectations about what can and can not be done in the heavily regulated wetlands. [66] All are to a degree interdependent. By enforcing long-settled state law through the regulatory process, the state protects those expectations, and averts the "tragedy of the commons" that otherwise would threaten the resource with total destruction, to the detriment of everyone, including Palazzolo.

CONCLUSION

The judgment of the Supreme Court of Rhode Island should be affirmed.

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[66] Somewhat ironically, Palazzolo's initial complaint in this case acknowledges the dependency of his parcel's value on strict enforcement by the government of permit restrictions, and the interdependency of neighbors' values on enforcement and compliance with regulations. *See* Complaint ¶¶ 8, 9, 13, 18, RA 27-28, 29, 30:

> [T]he town has continued to issue building permits to other abutters along the pond causing more sewerage to be dumped into the pond which increases the damage to Palazzolo's said land.
>
> . . . .
>
> The Defendants, by their refusal to correct or to allow the Plaintiff to correct the problems caused by the discharge and dumping of sewerage and other materials into the pond have deprived Plaintiff of all beneficial use of his property and have taken the same without paying just compensation therefor.

Respectfully submitted.

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