IN THE SUPREME COURT OF THE UNITED STATES

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ANTHONY PALAZZOLO, :

Petitioner :

v. : No. 99-2047

RHODE ISLAND, ET AL. :

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Washington, D.C.

Monday, February 26, 2001

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

JAMES S. BURLING, ESQ., Sacramento, California; on behalf of the Petitioner

SHELDON WHITEHOUSE, ESQ., Attorney General, State of Rhode Island, Providence, Rhode Island; on behalf of the Respondents

MALCOLM L. STEWART, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, supporting Respondents

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in number 99-2047. Anthony Palazzolo versus Rhode Island. Mr. Burling.

ORAL ARGUMENT OF JAMES S. BURLING

ON BEHALF OF PETITIONER

MR. BURLING: Mr. Chief Justice, may it please the Court:

According to local land use regulations there are two uses to which Mr. Palazzolo's property can be put, residential and a beach club. In 1983 Mr. Palazzolo applied to fill all 18 acres of his property which would have made the property suitable for either use. When that was denied, he applied for a lesser scaled-back permit application to fill 11 and a half acres for a beach club.

QUESTION: Now when you say local regulations that's a zoning authority of the town.

MR. BURLING: That is correct, Your Honor.

QUESTION: What is that zoning authority, the zoning board?

MR. BURLING: That is the Town of Westerly's zoning authority, Your Honor.

QUESTION: All right. I just want to ask a few questions to make sure that we take this case on the

assumption, and both parties agree on that assumption, that the only development that would be allowed is perhaps a single residence on the high ground.

QUESTION: So far as the '83 denial, it seems to me that was the skimpiest kind of showing, I don't see any zoning authority accepting a proposal to just fill the marsh without any further specified use. I don't really count that very heavily in your favor. So far as the beach club is concerned, that's a bit different. Do you read the opinion by Judge Israel and then the opinion by Judge Williams and the opinion by the Supreme Court of Rhode Island as, particularly the latter, as proceeding on the assumption that the one lot with the residence on the high ground would be the only permitted development? Can we take the case on that assumption.

MR. BURLING: That is correct, Your Honor. We know from the reasons given by the Coastal Resource Management Council, CRMC, for its denial of the 1985 application, that it found that a beach club would not serve the compelling public interest standard that the CRMC has for approving applications.

QUESTION: Was it that beach club or any beach club? Because that beach club was just about 11 acres of paving with a Port-a-John and a dumpster and a couple trash cans. Is the State going to tell us, oh, well, we

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might have approved some other use? Are we going to hear that from the State, do you think?

MR. BURLING: I do not believe they will, Your Honor, because they have never made that allegation or statement previously in this case with regard to any kind of beach club use being allowed. Now, this beach club, which by the way was unpaved and did have very minimal structures, Mr. Palazzolo believed that that would have less of an environmental impact than having structures with sanitation facilities and things of that nature. We know quite clearly what uses he could and could not do with the property. At trial, for example, it was brought out that no residential structures of any kind would meet the public purpose requirement of CRMC.

QUESTION: I thought that the record showed that the Rhode Island courts concluded that Mr. Palazzolo could have built quote, at least one house on the upland portion of the property, the CRMC director testified he might have built as many as four, and that the residual property would have had a value of about $157,000 if given as open land.

MR. BURLING: Your Honor, if I may try to clarify the record a bit on that, we do readily admit that the State has said that it would gladly allow Mr. Palazzolo to apply for one homesite on the small upland

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area on the property, a 40 by 90-foot -- 40 by 80-foot turn around, 50 by 80-foot turn around, excuse me, at the end of the 1500-foot roadway. That would be allowed. There was some initial testimony at trial regarding other wetland uses, excuse me, other upland uses perhaps, but later on at trial that became clear that any other upland on this property could only be reached by filling wetland to access it. And at trial the CRMC executive director made it quite clear that there were no residential structures could meet the compelling public purpose. I think we're going in this case --

QUESTION: They wouldn't let you build the house or not? I thought -- was there testimony at trial that you could have built up to four houses, the CRMC director said, I don't have the exact words, but I take it he might be able to build as many as four.

MR. BURLING: And later on in testimony by CRMC's biologist show that to reach any other upland on the property wetlands would have to be filled, and that would not be in the public interest. It would not meet the compelling public interest there.

QUESTION: So there's a finding by them that you couldn't build four? In other words -- what I'm trying to get at is, you're saying that the value of the property was reduced to near zero.

MR. BURLING: To 200,000.

QUESTION: Some -- or that what you think is equivalent to Lucas zero, because it might have been worth 3 million. We'll have a record here in findings and all kinds of argument about what the value of the house would have been, the value of the place would have been, how do we know? What --

MR. BURLING: I think, Your Honor, the best way of telling is looking at the State's opposition to the petition for cert where they say in there that they would gladly allow Mr. Palazzolo to build a single family home --

QUESTION: Twice in the brief in opposition they acknowledge that the CMRC would have approved a single home site, which would have netted greater proceeds i.e. $200,000 at less risk, they say that on page four, and again at say, page 19, they say specifically the Council would be happy to have petitioner situate a single home thus allowing petitioner to realize $200,000. So I, you know, I thought that was not in the case when we took it.

MR. BURLING: That is correct, Your Honor.

QUESTION: We might not have taken it had I thought it was in the case.

MR. BURLING: Your Honor, I couldn't agree with you more.

QUESTION: Is it also the case that in order to build more, whatever the more might be, beach house, residential development, whatnot, there would have to be filling of the wetland; is that correct?

MR. BURLING: That is absolutely correct, Your Honor.

QUESTION: Now, what is the significance of the finding, and I think it was in Judge Israel's opinion, but I could be wrong about which one it was, that any such filling would have been a nuisance at common law for the simple reason that it would in effect have eliminated the use of the wetland for fin and shellfish breeding and so on, what's the significance of the nuisance finding?

MR. BURLING: Judge Williams' decision is the one that talked about nuisance.

QUESTION: Williams used nuisance?

MR. BURLING: Yes, your Honor. And he was referring to the consequences from the 18-acre fill, and specifically if you look at the language of his decision, he talks about the impacts caused by nitrate pollution. Nitrates come from septic systems, however, as I said earlier, Mr. Palazzolo's beach club application would involve no septic systems --

QUESTION: Because they were going to have portable toilets?

MR. BURLING: That is correct, your Honor. Specifically to avoid any problems with septic systems or nitrates.

QUESTION: No, but I'm -- I don't want to reduce the case to something silly, but I mean is the takings claim predicated on the right that in measuring the taking, we should measure it on the assumption that he was somehow reasonably bound to be allowed to build a beach club with nothing but portable sanitation, is that in effect the kind of baseline for the claim?

MR. BURLING: Not precisely, Your Honor. The baseline of our claim is that Mr. Palazzolo can make no use whatsoever of any of his wetland. Now, the issue of --

QUESTION: But what is the basis upon which you claim that you have or should have a right to fill the wetland.

MR. BURLING: Traditionally in Rhode Island one owning riparian property has always had the right to fill the wetland. Indeed, as our reply brief points out, this has been the law in Rhode Island for a century and a half. As the Supreme Court said below at pages A3 to A4, that as of the early 1960s there was not even a permit requirement to fill wetland.

QUESTION: All right, now, let's assume that at

some point the State says, well, this is causing damage, it's either going to cause pollution because of nitrates or it's going to interfere with the fisheries because things breed in the shallow waters and so on, is it your position, in effect, that if the State decides to regulate, to prohibit wetland filling, that it therefore is engaging in a taking of every piece of wetland that a landowner might otherwise wish to fill?

MR. BURLING: This would have to be looked at on a case-by-case basis.

QUESTION: No, but is that the assumption of your claim here that you used to have a right to fill any wetland, and regardless of what the reason for the State saying you no longer can do that, that is a taking.

MR. BURLING: Not precisely, Your Honor, because if the State is able to prove that the particular application before it would cause a nuisance and by nuisance talking about a genuine nuisance not something decreed anew, not something that has always been unlawful.

QUESTION: But, with respect, in other words, you're saying if it could prove the nuisance then there would have been no change from the prior law.

MR. BURLING: That is correct, Your Honor, if you --

QUESTION: All right, now let's assume that it

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would never have been understood to be a nuisance at the prior law because nobody ever paid any attention to that and they now say, well, we don't want nitrates to go up, we want fish to breed and so on, and that's the reason, is that the predicate for the taking claim?

MR. BURLING: When talking about what is and what is not a nuisance, it is important not to simply say that the law of nuisance is coterminus with the police power, in this case it's not only that it was not a nuisance beforehand, but also that the State has not proven that the proposals by Mr. Palazzolo would indeed constitute a nuisance. It is not enough simply to say that we have new knowledge today and it is therefore a nuisance, the inquiry must be more searching than that.

QUESTION: Let me ask you a different question, would it be a predicate for the taking claim for a State to pass a statute saying all dwellings, all public accommodations must have modern plumbing with septic systems, would that -- and in the past that wasn't necessary, so it naturally reduces the value of the land because it makes it more difficult, more expensive to develop. Would that be a predicate for a taking claim?

MR. BURLING: Probably not, but again, we must look at the individual circumstances of the case. Why are the septic systems being required? If it is to prevent a

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genuine health and safety risk then I would have to concur that that would be a regulation passed to protect public health and safety and it may rise to the level of a nuisance.

QUESTION: What I'm getting -- no, I'm sorry. All I'm getting at is, it sounds suspiciously to me as though that, at least, is what was involved or could have been involved whether it was stated or not when the State said, no, we're not going to let you build a beach club without any plumbing. And if the alternative was pollution by any plumbing system that went in because of runoff from the septic system or a beach club with no plumbing at all, and in effect modern outhouses, that seems to me a weak basis for a takings claim and if that's not we're concerned with I want you to explain it to me.

MR. BURLING: The State Supreme Court did not in this case base its decision on the existence of a nuisance. Indeed the finding of nuisance was appealed to the State Supreme Court and that could be found at pages 12 to 14 of Mr. Palazzolo's brief to the State Supreme Court, but the issue was never reached --

QUESTION: They never reached it.

MR. BURLING: They never reached it. This case is not based on the existence of a nuisance or the lack of a nuisance.

QUESTION: Can I ask about the beach club, I thought after the beach club application you came up with another application that was just -- just to fill.

MR. BURLING: No, Your Honor. The beach application was the last application.

QUESTION: Was the second one. The first was just to fill without any specification.

MR. BURLING: Correct. Correct.

QUESTION: And that was turned down.

MR. BURLING: Correct.

QUESTION: For what reason?

MR. BURLING: It was turned down because it lacked specificity and because of some general concerns that it would impact the environment. But the --

QUESTION: Specificity in what respect?

MR. BURLING: The plans needed to have more detail in them, contour lines and things of that nature.

QUESTION: Well, he didn't say why he wanted to do the fill, did he? He said I want to fill this.

MR. BURLING: In the application -- in the application, he did not indicate why he wanted to do the fill. He wanted to move this on in a multistep process.

QUESTION: Why does he have to show why he wanted to do the fill? I mean the only change was the fill, he said I've got a swampland in front of me, I'd

rather be able to walk on it. Does he have to say he's going to use it for a beach club?

MR. BURLING: He does not, and we do not think so, Your Honor.

QUESTION: Do you know of any zoning authority in the United States that would allow a major filling without knowing what structure was going to be put on it? I mean, I just don't think we -- I don't think we need to get in that because I think the Supreme Court of Rhode Island did reach the issues that you wish to present to us.

MR. BURLING: Yes, Your Honor.

QUESTION: I think I have some question, they did say that the owner hasn't sought permission for any use that would involve substantially less filling, but having left us with that lingering doubt they then rush into the merits.

MR. BURLING: That is correct, Your Honor. I don't think this case needs to turn on the 18-acre application, indeed it was not even part of the complaint. I think the key here is understanding that no filling of any wetland would be allowed for any reason that was lawful under the local zoning code. No structures of any kind would be permitted by Mr. Palazzolo to construct. So we know that he cannot use his wetland. For that reason,

there is --

QUESTION: What portion of his, 18 acres is it? What portion is wetland and what portion upland?

MR. BURLING: The 18 acres is all wetland. The upland portion is the small road that I referred to earlier with the turn around. There may be an isolated island of upland, the amount unspecified how much, but it is fairly small, that is surrounded by wetland.

QUESTION: Small compared to the 18 acres.

MR. BURLING: And indeed small compared to the total size of that road and the turn around on that as well.

QUESTION: Can we assume 20 acres of which 18 is wetlands?

MR. BURLING: The court never concluded that it was 20 acres, and it is probably less than that. But I can not be more specific than that. Since we know what uses can and cannot be made with the property, the primary question that is of concern to us is whether or not the existence of regulations in 1978 when Mr. Palazzolo acquired the property is sufficient to deny him the ability to challenge the, either the application of those regulations or challenge the impact of those regulations upon him if he contends that that is a regulatory taking. We certainly know that Shore Gardens, Incorporated had,

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from 1971 until the time it was dissolved in 1978, the right to apply for permits and the right to bring a takings claim if those permits were denied.

To suggest that the State can deny a permit and refuse somebody even the right to seek just compensation because they acquired the property from a predecessor is contrary to what this Court had held earlier in Nollan which I don't need to repeat the entire cite, except this Court did say briefly, so long as the commission could not have deprived prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

QUESTION: May I ask one very brief question? In your opinion, when did the taking occur in this case?

MR. BURLING: The taking occurred in 1986 when the permit was denied. The taking was simply not in existence until that time because as we also pointed out in our brief, this Court has held in Preseault that the existence of a permitting requirement in and of itself does not generally take property. One expects that the Government in good faith will allow a permit to be granted or will at least consider that permit fairly.

And one further expects that in the event that a permit is denied, at the time of denial a litigant has the

right to seek a just compensation remedy if the litigant can prove that there has been a taking.

QUESTION: Mr. Burling, if rights to land use pass from owner to owner like that, how far back does the chain go? I mean it seems to me that there's no logical stopping place until you get back to Roger Williams and the 17th century settlement. So where do we draw the line?

MR. BURLING: There are two answers to that, Your Honor, a theoretical one and a practical one to this case. Theoretically, in defining what background principles, I would suggest that we go back as far in time as before there was an existence of pervasive regulation. But that rather theoretical issue is one that this Court does not need to fully address because as we pointed out in our brief and as I said previously, as of the early 1960s there was absolutely no requirement for a litigant to obtain a permit to fill wetland. We also know in the century and a half before that that there was a right, not only to fill wetland but to fill tidelands which are those lands that are under water all the time.

QUESTION: Were those rights still extant in 1985?

MR. BURLING: That's the key here, Your Honor. The question is --

QUESTION: So what's your answer? What?

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MR. BURLING: I believe, obviously the answer is, yes, those rights still do exist.

QUESTION: No, no, not still do exist. Did they exist in 1985?

MR. BURLING: Yes, Your Honor. They existed in 1985 because the imposition of a permitting requirement that was adopted in 1971, as I said earlier, does not effect the background principles of property law. It does not change the title. It simply requires a landowner to go through more of a permitting process. It requires a landowner to be more careful about what that landowner is trying to do. But it --

QUESTION: May I ask the extent to which it affects the reasonable investment expectations of someone who buys property with regulations already in existence, so that when you buy the property you know to develop this it's going to be a tough uphill battle, because I know what's on the books and I know how they've treated them.

MR. BURLING: You certainly, when you buy property and it's subject to regulation, you have the expectations that it's going to be more of a difficulty to develop that property, but I do not believe that that affects the background principles of the very property itself, the regulation that you are challenging in a takings case cannot still affect background principles

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that you have no right to bring that takings challenge in the first place.

QUESTION: Why doesn't the same argument apply to a normal zoning set-back requirement?

MR. BURLING: It would not, unless you are arguing that that zoning set-back requirement itself is so onerous that it takes property. Now that is normally not the case.

QUESTION: But that's a different question. The ultimate question of the taking, it seems to me is separate from the question of what background principles are supposed to apply to define how you calculate the taking, and I suppose that if the background principle of filling wetland cannot be tampered with in effect by new wetland regulation then the background principle of being able to build the property line cannot be tampered with by a setback requirement. I mean, is that correct, so far as calculating the basis for a taking.

MR. BURLING: Not precisely, Your Honor, because land is always subject nowadays especially to some degree of regulation.

QUESTION: You say not precisely, you would not have any problem with saying that there's a taking if you have a set-back requirement of 900 yards on a lot that is 901 yards wide. Would that trouble you to say that that's

a taking?

MR. BURLING: That would be a taking, Your Honor.

QUESTION: What about a reasonable set-back requirement? Don't build within 10 feet of the property line on a lot that may be no wider than 60 feet. That would be a reasonable set-back requirement, wouldn't it?

MR. BURLING: A reasonable set-back requirement is acceptable.

QUESTION: All right. Why isn't a reasonable coastal zone limitation on filling acceptable? Why does that have to be taken as a per se pull back on preexisting property rights and as such the baseline for a taking?

MR. BURLING: The property interest that may be affected by a reasonable coastal regulation or a reasonable set-back is not necessarily a taking. But when it comes to --

QUESTION: So is there -- why isn't there then a question here as to whether this set of fill regulations is reasonable or unreasonable?

QUESTION: Could I understand what you're saying -- what you mean by the word reasonable? I mean let's take a 60-yard setback, a 60-foot set-back requirement, I guess that's reasonable as opposed to 900-yard ones. Would that be a taking of a lot that happens to be only 61

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feet wide?

MR. BURLING: Absolutely, Your Honor.

QUESTION: And would it be a reasonable set-back requirement, I suppose it would, but you'd still say it would be a taking.

MR. BURLING: So we better redefine reasonable, Your Honor. If the set-back is so much that it destroys the economically viable use of the property, that would be unreasonable, that would be a taking.

QUESTION: So what is reasonable then is going to be determined in relation simply to the economics of what came before and what came after. I don't think you want to take that position.

MR. BURLING: When we're talking about the reasonableness of the set-back, I think the best analysis I have seen is one adopted by a lower Pennsylvania Court in a case we cited in our reply brief called Machipongo, based on an article by fee in the Chicago law review. That sets a standard that you look at the amount of area put in that particular set-back, and if that area is so large, then that area by itself would be an economically viable use of property if you could put it to some use regardless of the surrounding property, that might indeed be a taking.

QUESTION: But would you look to the reasons for

the state regulation ?

MR. BURLING: As with the requirement that you do not commit a nuisance, of course, but simply saying that --

QUESTION: And do you look to the reasons for the State regulation for anything short of common law nuisance. In other words, is common law nuisance then going to be the baseline?

MR. BURLING: In Lucas this Court found that something that has not always been unlawful is a lawful use of the property and that as we -- no, we certainly may learn new things --

QUESTION: Regardless of what we may in the meantime have learned.

MR. BURLING: No, Your Honor, in Lucas this Court also said that new knowledge, such as building that reactor on the nuclear fault is the new knowledge and to prohibit that certainly would not be a taking.

QUESTION: Mr. Burling, it is not your submission that those actions by the Government are only takings which are unreasonable? Surely the Government --

MR. BURLING: That is correct, Your Honor.

QUESTION: -- can make a reasonable taking, can't it?

MR. BURLING: Government regulates all the time

that it's reasonable to --

QUESTION: Whether it's reasonable has nothing at all to do with whether it's a taking, does it?

MR. BURLING: You are correct, Your Honor.

QUESTION: Then I guess you're going to have to come up with some other criterion, I fed you the word reasonable because I thought that probably was what we were going to end up talking about, but you're going to have to come up with some other criterion for what passes muster and what doesn't pass muster. And you've said to us that it's not a purely economic calculation, and you've said to us that it's not purely a matter of using existing nuisance law as a baseline. So if it's not going to be some concept of reasonable regulation that looks to the reasons why the Government did it and when it did it, what are we going to look at to draw this line which I think you assume has to be drawn.

MR. BURLING: As quickly as I can say before I reserve my time for rebuttal, this case, in determining whether there has actually been a taking here should be remanded to the Rhode Island court. The Rhode Island court found that simply some value left was not a taking. So what the Court must look at is truly not simply whether this falls outside the exceptional circumstance of Lucas and say, if it falls out the exceptional circumstance

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there is no taking. It must look at the before and after position of the property. It must look at the fair market value, the uses of the property, the aerial extent of the property that can be used and those other things that an investor would look at --

QUESTION: How about the reasons for the regulation, should the Court look at that?

MR. BURLING: If the Court, not in the first analysis, but if the Court is not able to determine that there has been a denial of economically viable use, then in a Penn Central analysis which I think is the next place that the Court should look at, certainly the character of the Government regulation is one of those things that this Court said in Penn Central should be looked at.

QUESTION: (Inaudible) map of this property, because we talk about this property and the uses to which it could be put. I didn't see in the record a map showing exactly what Mr. Palazzolo's property was.

MR. BURLING: I believe, Your Honor, that in the joint lodging that there is a map of some sort of the property at tab 5 and you can see it on tab 6.

QUESTION: This would solve the problem about how much -- whether there was room, in what they call the upland for one house or three or four.

MR. BURLING: No, Your Honor, those maps are not

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very precise. What we simply -- on determining how much land must be subject to that requirement of how much you can build --

QUESTION: Are you telling me we have no exact map of the property in question?

MR. BURLING: There is no map that shows precisely where wetlands are and uplands are, but we will rest on the State's assertion in its opposition to the petition as Justice Souter pointed out earlier that the State would allow one home to be built on the upland area.

QUESTION: Mr. Burling, you've had a number of questions, I'm going to extend your time by five minutes, I'll extend respondent's time by five minutes.

MR. BURLING: Thank you, Your Honor. I will reserve the rest of my time for rebuttal. Thank you.

QUESTION: General Whitehouse.

ORAL ARGUMENT OF SHELDON WHITEHOUSE

ON BEHALF OF RESPONDENTS

GENERAL WHITEHOUSE: Thank you, Mr. Chief Justice and may it please the Court:

I would like to open by addressing two questions that Justice Souter raised. The first is a rather technical one having to do with the effect on the pond of the nuisance and the cause. And I would refer you, Your Honor, in the petition for writ of certiorari to page

appendix B10 in which the Rhode Island Superior Court found that the 12 percent loss of the total salt marsh filtering in the Winnapaug Pond will have a significant detrimental impact on the existing salt marsh and went on from there to reach the nuisance conclusion. It did not have to do with the ISDS system and that was based on testimony that was in the record about the fact that there are nitrates and things that wash into this pond and the wetland itself is the mechanism that filters those nitrates out. And so simply the removal and filling of those wetlands per se was the basis --

QUESTION: The Supreme Court of Rhode Island did not rely on that?

GENERAL WHITEHOUSE: They didn't speak to it one way or the other, Mr. Chief Justice.

QUESTION: Can we take the case on the assumption that the only likely permitted use of the property in question is to build one residence on the upland area leaving the 18 or so wetlands area unimproved.

GENERAL WHITEHOUSE: I do not believe Justice Kennedy that that would be consistent with the decisions of either the Rhode Island Superior Court, or the Rhode Island Supreme Court, which both indicated that there were additional economically viable uses available and they did not refer to those as the building of a house.

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QUESTION: It seems to me odd then that they would get to the question of a Lucas taking, et cetera.

GENERAL WHITEHOUSE: Well, there are three categories of information here. There is the established, and what we referenced Your Honor in our memorandum in opposition, there was the established, and established in the Superior Court, proposition that at least one house worth at least $200,000 can be built. Then there is the uncertainty as to what additional upland there is and how many other houses can be built.

QUESTION: Did you reference that in your brief in opposition? I mean that might have made a big difference as to whether we wanted to take this case. Did you make any reference to the fact that there was uncertainty as to how much additional use could be made of the property?

GENERAL WHITEHOUSE: No, Your Honor.

QUESTION: Well, it's too late now.

GENERAL WHITEHOUSE: Well --

QUESTION: Well, you didn't say --

GENERAL WHITEHOUSE: Sorry, Your Honor.

QUESTION: I want the answer to that, that's why I read the part that Justice Scalia cited earlier.

GENERAL WHITEHOUSE: Yes.

QUESTION: You do say a portion of the site

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would have been approved as a single home site.

GENERAL WHITEHOUSE: Correct.

QUESTION: Which is true.

GENERAL WHITEHOUSE: Which is true.

QUESTION: But you don't say whether other things might also have been approved.

GENERAL WHITEHOUSE: Correct, because that's the uncertainty area.

QUESTION: But he's right though in saying that, in reading it, one might have thought that what we're talking about is it's been established that this could be used just for a single home and that's it. And now the argument comes back when it's fully argued, well, it maybe could have been up to four homes, maybe they could have done other things, he never applied, et cetera. What are we supposed to do?

GENERAL WHITEHOUSE: It has been established that it can be used as at least one single family home, and that was what I intended to refer to. And it has not been established, because of the unripeness problems in this case, what further development might be permissible. And to get back to the question about Lucas, that's significant, because the Court addressed the valuelessness issue and found that there was substantial value there. And if Lucas is seen as a pure valuelessness case then

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that would appear to settle the question. But there's also discussion in Lucas about what Justice Scalia called the deprivation fraction, and that would appear to require a more complex analysis than was required in Lucas where you had the finding of valuelessness from the court below as opposed to the finding from the courts below here of value. And where that founders --

QUESTION: Is it -- is it your position, General Whitehouse, if someone has, say a section of land, a square mile, either -- a square mile. And picks out a 10-acre plot at one edge of that and applies for zoning use and claims that it's denied, he claims to have been denied all economic use. That the fact that he has a remaining everything square mile minus 10 acres means that that has to be taken into consideration, too?

GENERAL WHITEHOUSE: Yes, I think it is, Your Honor.

QUESTION: I don't think our cases support that.

GENERAL WHITEHOUSE: Well, the most recent -- I would go back to, for instance, at the earliest expression the Penn Central case, which used the term parcel-as-a-whole and from which the parcel-as-a-whole discussion has emerged and then most recently in Justice Scalia's concurring opinion in the Suitum decision, you referred to the relevant property as the aggregation of

all the owners property subject to the regulation at least those that are contiguous.

QUESTION: We don't generally get our law out of concurring opinions.

GENERAL WHITEHOUSE: That's correct, Your Honor. But I believe --

QUESTION: But in the Chief's hypothetical, what if he then sells off all except the 10-acre plot and then reapplies, and the 10-acre plot is again denied to development, then there's been a taking. It's such a silly result. There is not in the first case, because he hasn't yet sold off the rest of the one square mile, but if he sells off the rest of the one square mile, and makes the very same application, gets the very same result, then there's been a taking. That seems to me very strange.

GENERAL WHITEHOUSE: We always face in these takings cases, the problem of whether it is the regulation itself that has effected the taking or whether property interests have been arranged in such a way as to create a valuelessness portion. And I think without knowing more about the facts behind an example like that, it could fall into either category. And I think that's why it's an important distinction. I'd like to focus a moment on the ripeness issues that the Rhode Island Supreme Court raised. And the first has to do, they found obviously

that this case was unripe on two grounds, and the first ground was that there had been no application for the 74-unit subdivision. And that to us makes perfect sense because in the Rhode Island courts, unlike in this Court, the petitioner presented that 74-unit subdivision as a proposal and not as a claim of value for determining the size of the taking. And so that is very likely responsive to the argument made to that court that this was a proposal, and even if it was not responsive to that, I would argue, even if they were asserting a proposition of Rhode Island ripeness law that we want in Rhode Island to have people when they come and apply for a use or come and make a takings claim for a particular use to have applied for that same use at some point. And in this case --

QUESTION: Even when they've made it clear we are not going to allow you to fill this for anything unless the public at large benefits from it. I mean, why do you have to keep coming back, would you approve this, no, we will never approve any fill. Oh, would you approve this, no we will never approve any fill. Why does he have to keep coming back?

GENERAL WHITEHOUSE: The critical word, Your Honor, in your question was this, and the question if this is the wetland then you're correct. But if this is his property, then you have to look because ripe -- the

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takings determination looks at value, you have to look at what remaining value there is. Somebody can insist on applying for apartment buildings, amusement parks, everything in the world in a residential development and be told no, over and over and over again. And there can still be value in that property, it's just never been applied for. And that's the case here. There is value in this property.

QUESTION: How do we --

QUESTION: You mean the part that's not wetland?

GENERAL WHITEHOUSE: The part that's not wetland, absolutely and the part that is --

QUESTION: Let me ask you a question about the geography, I've been looking at tab six.

GENERAL WHITEHOUSE: Yes.

QUESTION: Is the uplands -- is the wetlands between the uplands and the ocean? In other words would a person with a house in the uplands have the same view of the ocean if something were built in the wetlands?

GENERAL WHITEHOUSE: Let me start at the ocean. You start at the Atlantic Ocean and you come up the beach, and at the top of the beach is Atlantic Avenue. On the other side of Atlantic Avenue, the predecessor parcel to this parcel began, and the prior owner Edgemere Realty, who has nothing to do with this case, sold off all the

lots along Atlantic Avenue, which would be consistent with the pattern of development that the aerial photographs show.

QUESTION: On both sides of Atlantic Avenue or just on the seaward side?

GENERAL WHITEHOUSE: They only owned on the pondward side --

QUESTION: Pondward.

GENERAL WHITEHOUSE: -- and they sold off that first layer of development that is consistent with the development pattern up and down that area. Then comes SGI, and it owns the land behind that on the pondward side, and they make 11 sales, five of which come back, six net sales, four of those sales now have houses standing on them. At that point, SGI fails to file its proper papers with the secretary of state's office, the property transfers by operation of law to Mr. Palazzolo and now he applies only to fill the remaining wetlands in what is really a third generation remainder of a parcel. And there is no evidence coming out of the administrative proceedings because of the way in which the filing was made about where the value is. All of the value testimony in this case comes out of the case in the superior court.

QUESTION: Well, do you think cases like Williamson County and some of the other leave the States

completely free to exact whatever they want in what you might call procedural requirements for zoning.

GENERAL WHITEHOUSE: No, I do not think so. I think examples like what the Court saw in Del Monte Dunes suggest that there can be overbearing by state regulators. And Your Honor, to the extent that there is a sort of general rule about prior regulation being a bar, I think that there are some of these cases, neither in Del Monte Dunes nor in MacDonald that this Court inquire as to the order in which the acquisition and the regulation occurred. In every other case, you have a prior regulation and a subsequent acquisition. And I think the reason is because they were looking at what the agency was actually doing. Were they obstructing? Were they being a nuisance? Was there futility? And there, I think it's a separate question. Does that answer your question?

QUESTION: Yes, you have answered it.

QUESTION: Do you think at some point the State or the governmental agency has the obligation to come forward and say what it will allow?

GENERAL WHITEHOUSE: That may be, if you have a situation in which the entire parcel is put before that agency, so that it can make a sensible decision. In a nutshell, Your Honor, the ripeness problem in this case isn't an exhaustion of remedies type ripeness problem, we

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do not assert that Mr. Palazzolo has left something undone procedurally in this case.

We assert that he only put his most heavily burdened property into the administrative process and there was and could be no inquiry as to what value there was. And that to us seems a recipe for the prospect of manufacturing takings, if you can isolate the portion of your property that is not valuable or that is not buildable and apply only as to that and not show the regulators or discuss with the regulators property that you can perfectly well build on, you put them in an impossible situation.

QUESTION: Well, what other property? I mean property in New York, you know, property adjacent? You know some of the theories of, what is it, the denominator is in these taking cases, some of those theories, in fact urged by your brother in this case, say that the test is whether the area that remains after what has been taken has any, in isolation, valuable use. If you apply that kind of a theory, it wouldn't matter whether you applied only for the portion that they've denied the permit on.

GENERAL WHITEHOUSE: But in this case the record below and the findings of the courts is that there is valuable use there and perhaps a good deal of valuable use.

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QUESTION: Not the swampland, not the part he wanted to fill. You acknowledge that there is no feasible economic use of the part that is not filled.

GENERAL WHITEHOUSE: I would argue that he would almost certainly never be permitted to fill it for residential subdivision purposes.

QUESTION: And that -- or for any other purpose, do you think, for any other purpose?

GENERAL WHITEHOUSE: It would be very, very hard.

QUESTION: Any other purpose that would enable any feasible economic use. Well, it's --

GENERAL WHITEHOUSE: It would be very, very hard. There is testimony, Your Honor, that it's worth $7,000 an acre as an amenity value to the existing uplands.

QUESTION: So you're making it essential to your case that in determining the taking, we must look at the whole parcel and cannot restrict ourself to the wetlands portion, whose development has been forbidden.

GENERAL WHITEHOUSE: Well, I think -- I'm trying to make a narrower point, Your Honor.

QUESTION: Okay. I mistook you then.

GENERAL WHITEHOUSE: Which is that for ripeness purposes, which is what I was intending to be talking

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about, the parcel that is brought forward to the regulators should be the whole parcel so that they can make an assessment of what the value is, and when you can't, you leave the numerator and the denominator uncertain.

QUESTION: But the two questions are the same, what you need for ripeness depends on what you need to find a taking, and if all you need to find a taking is that the wetlands couldn't be used for anything, then it didn't matter that he applied for nothing but the wetlands. I think the two are connected.

GENERAL WHITEHOUSE: If the test of a taking is the value that is left in the property after the application of the challenged regulation, then you have to know that value. It is ipso facto always going to be 100 percent as to the burden part of the parcel. And that's precisely our point here. There's a whole parcel violation that underlies the ripeness problem.

QUESTION: You have to know the value of the property.

GENERAL WHITEHOUSE: Correct.

QUESTION: But the question is, what property?

QUESTION: What property?

QUESTION: If the property is only the wetlands all you have to know is --

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GENERAL WHITEHOUSE: And we know that it isn't in this case.

QUESTION: Then you're saying in my hypothesis of an entire section of land, a developer fences off 10 acres, that when he's turned down for 10 acres saying no use at all, that not only is there no, but it's not even ripe. He has to come back for some proposal for developing the rest of the land.

GENERAL WHITEHOUSE: Well, ripeness is a somewhat discretionary doctrine, and there may be facts in which it can become ripe, as this Court did in Lucas, can find and ripen a case in which there hasn't been a formal application made for the use. But in this case the Rhode Island court was presented with a very difficult situation, it was presented with a case in which the record contained nothing about the value of the property.

QUESTION: I thought you said a moment ago --

GENERAL WHITEHOUSE: From the administrative record.

QUESTION: -- that the wetlands had a value of $7,000 an acre?

GENERAL WHITEHOUSE: But that wasn't determinable from the administrative record.

QUESTION: Oh, that's determined from the trial record?

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GENERAL WHITEHOUSE: From the trial record.

QUESTION: Isn't the problem here, I mean we probably would all agree that your first proposition that you may not simply isolate from the parcel, the one unusable portion, define that as a separate parcel, call it a 100 percent taking and go home free.

GENERAL WHITEHOUSE: Correct.

QUESTION: At the other extreme there's got to be some limit to the parcel that you use for defining value or somebody with, you know, a hundred square miles can have, in effect, no way of ever proving a taking even though by most of our lights the taking might be extensive on some portion. And our problem is, how do you define parcel? Is there any way to do it. I'm not sure that it's raised by this case, but I mean we're getting into it, is there any way to do it other than by some reference to normal commercial usage in the area. What -- when people, for example, characteristically define -- apply for subdivision regulations -- for subdivision approval, what is the size of the land that they tend to group as one parcel and apply for approval for? Don't we have to look to some standard of what is standard commercial usage to know how to define, how reasonably to define a parcel?

GENERAL WHITEHOUSE: Let me first -- I'm not sure that I would agree with your premise, first. If

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somebody owns a 10,000-acre ranch and they're forbidden from building in a wetland on the corner of that ranch and they isolate that wetland through a variety of corporate devices and then claim that they've had a taking, I would say that first that is not a taking because the entity's interests should be looked at entirely, certainly as Justice --

QUESTION: I will agree with you. Let's say in your example that they say, well, the appropriate parcel is the wetland plus one acre. And the Government says, no, it's the wetland plus the remaining 10,000 acres minus the wetland. Perhaps neither of those is acceptable, but perhaps we would look to the usage in the area to determine, you know, what are the -- what's the range of developable parcels about which we can assume the Government was regulating? Maybe in Texas it would be 10,000 acres, maybe in Manhattan it would be the one acre. But don't we have to look to some criterion of usage to determine what is a reasonable basis for defining a parcel in order to make the calculation?

GENERAL WHITEHOUSE: I think that the argument could become so extravagant that you got to the point of having to define those parcels. But I think the ordinary definition will come from the chain of title of the property.

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QUESTION: A parcel is what you thought it was reasonable to buy.

GENERAL WHITEHOUSE: That's what you got.

QUESTION: Yeah.

GENERAL WHITEHOUSE: And in the long run, I mean, this case presents an interesting situation, if all of the upland ends up getting sold off by Mr. Palazzolo, and now he's left with nothing but his wetlands, now we do face that question very directly because there isn't the unripeness of the value determination, we're there. And I think in that circumstance because of what the takings clause is about, you have to be able to look to the history of that parcel. We can't have a situation in which you can whittle your way down to the only thing you can't build on and then claim it as a taking.

QUESTION: Could you address --

QUESTION: Everything's been whittled down from Lord Fairfax, I mean, in Virginia anyway, nobody would be able to make a takings claim.

GENERAL WHITEHOUSE: I didn't mean.

QUESTION: That's a very extravagant proposition. Of course the property's been -- everything's been whittled down.

GENERAL WHITEHOUSE: I guess what I'm trying to say is that a particular parcel, once defined within a

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single owner, if there's a heavily burdened portion of that parcel and then over time it gets whittled down to -- you should be able to look back to some point in time, arguably the owner, at the time that the challenged regulation went into effect and define the parcel thusly --

QUESTION: I'm curious on a different issue which, if we get to it, I'm having trouble with.

GENERAL WHITEHOUSE: Yes.

QUESTION: And that is does a takings claim run with the land? And I'd like to hear what you have to say about that. What I found difficult is both sets of briefs had pretty good arguments and I can see the horribles that seem to occur either way. The gas station with the land dumped on it, on the one hand, or the people going out and buying old claims at the other. And so I wondered, on your opinion, would it work to say it does run with the land but no one can recover more than his investment back expectation, that is to say if somebody goes and buys cheap, land with an already existing taking claims, they will not benefit from that because they could not recover more in fairness than what they paid for the land minus the value of the land for all other purposes. Now, I want to see if that's a, I mean there's some suggestion of that, but I want to know how to decide that issue just in

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case we get to it. And it is a very hard issue, in my opinion.

GENERAL WHITEHOUSE: My argument would be that it does not run with the land.

QUESTION: Period.

GENERAL WHITEHOUSE: Period.

QUESTION: All right. What do you do with the gas station where some old map is around and because the person didn't check the title perfectly or didn't know what to do, lo and behold he wakes up and he discovers 400 cubic yards of dirt thrown all over his property making it unusable and they say oh, three generations back there was a map filed somewhere that said maybe the city would have ability to do that. You know what I'm talking about, that seemed a very appealing hypothetical.

GENERAL WHITEHOUSE: Yeah, yeah. My argument is that you have to look at the timing of the acquisition, you have to look at who owned it, you have to look at the State law of whether things are transferable in that kind of transfer or not. I'm not saying you can never go back and in-house we've been talking about what, you know, what would have happened if Mrs. Suitum had died at the last minute. Would her estate not arguably -- it would be fair to have a claim under those circumstances.

QUESTION: Do you know --

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GENERAL WHITEHOUSE: And I think the best way to argue that is under Penn Central. And this was a Lucas case and that's why the court didn't quite get to it.

QUESTION: May I ask you when, in your -- your opponent says the taking occurred in 1986. When, in your opinion, did the State prevent the wetlands from being filled? When did the legal obstacle to filling arrive?

GENERAL WHITEHOUSE: Really, You Honor, since time immemorial. I have to disagree with my brother's assertion that there was a right to fill in Rhode Island.

QUESTION: When do you think that ended or do you think there never was one?

GENERAL WHITEHOUSE: Never was one. Never has been. And the cases that he searched for the alternative proposition, Yates versus Milwaukee and the series of Rhode Island decisions are all cases that involve a harbor line. And the way this law works as the Court knows, is that you have no right to fill out, it's the State's property, and it's subject to the State's control and regulation. And one way the State lets you know that you can and gives its assent is by establishing a harbor line. And when it establishes that harbor line then you can build out to it. But always, always, always -- there's one other point, which is that you do have a common law right to wharf out or build out into the wetlands as

against your neighbor, as against the rest of the world. But you don't as against the State because the State from the very first day in Rhode Island has owned all of its wetlands in fee. And still does to this day.

The public trust doctrine is alive and well in Rhode Island. My time is up.

QUESTION: Thank you, General Whitehouse. Mr. Stewart, we'll hear from you.

ORAL ARGUMENT OF MALCOLM L. STEWART

AS AMICUS CURIAE,

SUPPORTING RESPONDENTS

MR. STEWART: Mr. Chief Justice, and may it please the Court:

As this Court stated in Armstrong versus United States, the just compensation clause was designed to bar a government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. And petitioner's regulatory takings claim necessarily depends upon the proposition that he has been unfairly singled out to bear a disproportionate share of the burdens attendant on the provision of public benefits or the prevention of public harms. In our view the record entirely fails to bear out that assertion.

QUESTION: He's relying on the just compensation

clause and Armstrong isn't the only case construing the just compensation clause.

MR. STEWART: No, that's correct. And certainly this Court in Lucas made clear that even when there is no exercise of eminent domain authority or physical occupation of the land there may be a taking if the burden imposed by regulatory limitations on land use has the same practical effect as a direct appropriation.

QUESTION: The case is somewhat like Lucas, it seems to me, in that other landowners who got there first were left alone and then the wetlands people got into the act. Or am I wrong in that construction?

MR. STEWART: I think that's incorrect. At least, in our view, the record in this case strongly supports the assertion that filling of wetlands has been a very rare practice in this part of Rhode Island. Now it's true that it wasn't until comparatively recently that statutory permit requirements were imposed as a prerequisite to the fill of wetlands. But the record doesn't suggest that extensive filling of wetlands has occurred.

Now, my understanding is that even as to the dry land in this area it is only a short distance above the water table, and therefore even to construct a house on dry beach land you need fill, but it's not fill of

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wetlands and it doesn't have the same environmental consequences as wetlands fill. And the point we'd like to stress is that the requirements imposed most recently by the CRMP and informally by its predecessors are generally applicable limitations on the ways in which wetlands properties can be used and they secure a reciprocity of advantage to landowners in the vicinity. So it's easy to say on the one hand that the Coastal Resources Management Plan hurts Mr. Palazzolo in one sense, in that it limits the use he can make of the wetlands portion of his property, but at the same time the fact that those prohibitions are imposed on his neighbors as well tends to benefit Mr. Palazzolo insofar as his tract also includes an uplands area, because presumably the prevention of filling by neighbors preserves the quality of the environmental resources in the area, most notably Winnapaug Pond and in practical effect the restrictions function as a sort of density restriction that is --

QUESTION: How do we know what size of the property to look at in looking at this takings claim? Can we look just at the wetlands which is what his application dealt with?

MR. STEWART: I don't think we can, Justice O'Connor and for one reason, I think --

QUESTION: Well, why and what principle governs?

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MR. STEWART: I think the short answer is that as the case comes to this Court I think the petitioner has really given up any claim that the wetlands portion of the property constitutes a separate parcel because the third question presented was --

QUESTION: It didn't sound like it today.

MR. STEWART: I agree that the argument has -- the point has been raised at oral argument, but the third question presented in the cert petition was --

QUESTION: Whether the remaining permissible uses of regulated property are economically viable.

MR. STEWART: Right, merely because the property retains a value greater than zero. And the explication in the body of the petition of that third question presented made it clear that Mr. Palazzolo was not claiming the wetlands portion are a -- constitute a separate parcel and the value of that is zero. Rather the basis of the takings claim as it came to the Court in the cert petition was that the parcel as a whole had a value of only $200,000 and that that value was so small in comparison to the purported 3 million dollar figure as to amount to a total deprivation of economically beneficial use.

I think even if the point hadn't been weighed, there would be strong arguments for regarding this all as a single parcel. It was bought together, it was platted

together, and the State's appraiser testified, and his testimony was credited by the trier of fact, that the presence of wetland areas even if they couldn't be separately developed would enhance the value of a home constructed on the uplands area, in the sense that a house constructed on a 20-acre parcel is going to be more valuable than a house constructed on a two-acre plot, because you have open space, you have a feeling of privacy and seclusion. I think it's also important to recognize that the original investment in this property was something less than $13,000, that is -- I say something less because SGI purchased a larger parcel for $13,000 and partly in 1959 and partly in 1969 sold portions of it for prices that aren't revealed in the record.

So if Mr. Palazzolo or his predecessor, SGI, put in $13,000 and now has something worth $200,000 he's hardly had anything taken from him.

QUESTION: Well, I really think that's irrelevant and that's -- Justice Breyer suggested there should be a cap, that assumes the Government doesn't have to be reasonable on an ongoing basis, I think that's just wrong.

MR. STEWART: Well, the other point we would make about the 3 million dollar figure is, it's very important to realize exactly what the 3 million dollar

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figure means. Petitioner's appraiser, in arriving at the 3 million dollar figure, looked at a nearby tract, presumably on uplands, and said that lot sold for $125,000 and he said the lots that could be constructed out of wetlands are -- could be made comparable to that. And if you sold 74 of them at $125,000 each, you would come up with a figure of a little over 9 million dollars. He deducted the expenses that he thought would be incurred in actually doing the fill and came up with a net of 3 million --

QUESTION: Mr. Stewart, supposing I bought an acre of land out in Tysons Corner for $15,000 in 1959. Now it's appraised at a million dollars and the Government comes on and says, well, look, you only paid 15,000 for that, we ought to take that into consideration deciding whether it's been -- what's been taken.

MR. STEWART: I agree, if Mr. Palazzolo could ever identify a point in time at which the property was worth 3 million dollars, then we would have a very different case.

QUESTION: We're not taking it on the assumption it's worth 3 million, certainly not the proof because it hasn't been proven. But my hypothesis to you is, it is my property at 1 acre is now appraised at a million dollars.

MR. STEWART: The point I was making is in your

hypothetical the land would have actually been valued at 1 million dollars in the real world today. But if you look at the methodology that was addressed by Mr. Palazzolo's appraiser, he took as his starting point the price that was paid for a comparable lot in 1988. Now obviously that price was paid in an environment where wetlands development in this region is subject to substantial restrictions.

So in effect what the appraiser was determining was, if Mr. Palazzolo could develop his property to the hilt and everybody else around him remained subject to extensive restrictions on development, his property would dramatically appreciate in value. Even if we assume that the appraiser was correct in that hypothesis, it can't form the basis of a takings claim. Mr. Palazzolo is essentially asking to have the benefit that arises as a result of the imposition of development restrictions on neighbors without accepting the same development restrictions on his own --

QUESTION: That just has to do with admissibility of comparable-value testimony. What is your position on the question Justice Breyer asked regarding the rights of successive owners?

MR. STEWART: I think at least in general our position would be that a person who takes with notice of

an existing restriction on land use can't show a taking by virtue of the application of that restriction.

QUESTION: You're going to do that completely 100 percent, what do you do about the gas station?

MR. STEWART: I'm not sure that I understood the --

QUESTION: You know, in the briefs they have -- I don't want to go into it, it's too long. But the person sold his gas station, years ago, and at that time there was a map somewhere in city council, and it showed that the highway that went by was subject to some kind of support, and years later the third owner finds one day his gas station is under dirt because they said it's time to have the support. And he wanted to claim that -- if you're not familiar with it -- take my word there could be very unfair things that happen as a result of an absolute rule.

MR. STEWART: And think that the word unfair is crucial here that there could be circumstances --

QUESTION: That what you replied to Justice Kennedy by saying that the claim, a valid right takings claim, or a valid takings claim does not run with the land, no matter what.

MR. STEWART: I think I said ordinarily a person who takes with notice of an existing --

QUESTION: What goes into that ordinarily?

QUESTION: Think of this, there is a poor little widow woman who owns it and she can't possibly develop it or deal with it and she puts it on the market. And somebody comes along and knows the regulation is there but says, look, that regulation is going to have to be applied in a reasonable manner, I'm going to pay you X amount for this property and then challenge it. I mean what's the matter with that?

MR. STEWART: I mean, certainly if the person could challenge it if the nature of the challenge was, this is an unreasonable regulation, it's not lawful. But if the challenge was, this is reasonable but it forces me to bear a disproportionate share of the burdens and therefore I'm entitled to be compensated, we don't think that there would be any equities --

QUESTION: Well, the buyer takes it expecting to have to make a Penn Central type takings challenge.

MR. STEWART: I mean, again, the purpose of the regulatory takings doctrine is to identify those situations in which an individual has been --

QUESTION: Thank you, Mr. Stewart.

Mr. Burling, you have seven minutes remaining.

REBUTTAL ARGUMENT OF JAMES S. BURLING

ON BEHALF OF PETITIONER

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MR. BURLING: Thank you, Mr. Chief Justice. A few points to rebut was just said, I think that when we look at what property has been taken and what property has not been taken, we're talking about, are we only going to look at the wetlands or are we only going to look at the upland? Our case is submitted on the idea that there are many ways of determining whether or not there has been a denial of economically viable use and whether or not there has been a taking. It may be that in some cases we're dealing simply with a large parcel and we're looking at that time devaluation of that parcel. Some cases it may be that we're dealing, as here, with a situation where some of the land is carved out and you're told you can use some of it but the vast majority of that you cannot.

The problem of what happened in the court below is that they did not go through any sort of realistic analysis of whether or not there's been a taking, simply finding that there was some value left at the end of the day therefore it doesn't fit within Lucas is --

QUESTION: Which part are we talking about? Because the court below, immediately below, said the claim wasn't ripe.

MR. BURLING: Excuse me, Your Honor, I didn't hear the first part of your question.

QUESTION: I thought the decision we were

reviewing was one that was on ripeness, not that there's no claim. The first court, the court of first instance said this is a nuisance --

MR. BURLING: There are three independent grounds of the decision below, one ground, of course, is that the case is not ripe and I think we've talked about that, the other that he bought the property on notice of the existence of the regulation, and third the court did look at the fact that there was some value left in finding that the existence of some value took the case outside of the Lucas situation and therefore it did not need to consider further whether or not there had been a denial of economically viable use. So the court below did reach all three of these issues and provide them this independent grounds for the taking below.

There was some discussion previously about what the value was and that the administrative agency did not discuss the value of the case. This, of course, is an issue for a trial court and it is what trial courts determine all the time. Evidence was submitted as to the value of the property, rebuttal evidence was also submitted by the State as to the value of the property --

QUESTION: Mr. Burling, may I ask you a very brief question on the valuing, your third question, the value greater than zero, does that mean we should just

assume there's a value greater than zero because the uplands has value, or do we assume for the purpose of the case that the wetlands also have value that enhances the value of the uplands?

MR. BURLING: Either way, Your Honor, the 200,000 figure does include a so-called $7,000 per acre attribution from the wetlands that cannot be used. I am not sure that that is a legitimate way of looking at the value of this property. If that remaining wetland belonged to the State, if it had been taken by the State, which is indeed what we assert here, the value to the upland owner would be the same, whether or not title allegedly belonged to the owner or not. They're talking about the valley from a nice view. What we are saying is that nice view has been taken by the State. And so the true value of what the upland is, if you do not add in this attribution is probably significantly less than that, indeed in the trial transcript, in the testimony of Thomas Andolfo at pages 662 to -- 682 to 683 is where this $200,000 value comes from, it talks about a few dollars being spent to improve the road, and then primarily the rest of the value will come from this attribution of the remaining area.

QUESTION: Well, under your view of the case, if you lose because there's $200,000 worth of value and we

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hold that Lucas bars you, then some later purchasers could just purchase the 18 or so acres of wetlands and sue.

MR. BURLING: A later purchaser of those 18 acres, after attempting to go through the permitting process, may indeed be able to sue if, as the question said earlier, this area is within the economically viable size of development in the area. I think that is one way of looking at it, we certainly know that there are three home sites on fill in the -- immediately adjacent to Mr. Palazzolo's property. Home sites that are very small as the record reflects. And if there are 18 acres of developable property on site, then indeed that should be looked at separately. But that is something I do not think this Court needs to fully determine, what -- what the situation would be in that hypothetical, because in this case we know that Mr. Palazzolo can make no use of his wetland, and we know that his -- the value of the upland should not be enough to simply take this case out of a determination of whether there has been economically viable use.

QUESTION: Why not?

MR. BURLING: Because in looking at economically viable use, an appropriate way of looking at it would be what would an investor, looking at the property before it is regulated, be willing to pay if he knew what that

property was worth at the end of the day.

QUESTION: Suppose he would pay $200,000?

MR. BURLING: If an investor would pay $200,000 for this property, that is a different case from what has been alleged below.

QUESTION: I thought we were agreeing that the value of the 18 --

MR. BURLING: Oh, yes.

QUESTION: The value is 200,000.

MR. BURLING: And if an investor, knowing that before the regulations are imposed, that that is all the value of the property, then indeed there may be a different circumstance, that is why this case needs to be remanded.

QUESTION: No, no, I'm trying to figure out, Lucas versus Penn Central. Why isn't that enough? Take everything in your favor, you admit the property is worth 200,000, and then there's some testimony here that if, if, if, if, if, if, if, it might have been sold for 3 million, okay, it still has 200,000 left, why isn't that good enough? Go to Penn Central if you want some recovery.

MR. BURLING: Because no reasonable investor would put 3.1 million dollars --

QUESTION: No, absolutely right. My question is why isn't $200,000 enough to take it out of the total

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takings case, reduce value to zero, namely Lucas, and to throw it in the box, legal box marked Penn Central.

MR. BURLING: Your Honor, we do not believe it is enough to take it out of that box. We believe that a nonzero value is not in and of itself enough to avoid an inquiry under Lucas. Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, thank you, Mr. Burling. The case is submitted.

(Whereupon, at 2:10 p.m., the case in the above-entitled matter was submitted.)

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