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NOTE: Palazzolo's One-Two Punch to the Wetlands Takings Doctrine: Are Massachusetts Wetlands at Risk?

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LEXISNEXIS SUMMARY:
... The Palazzolo Court ruled in favor of the property owner on both of these issues With respect to the investment-backed expectations prong, the Court held that a landowner who purchased land with notice that the use of the land was limited by wetlands restrictions prior to his purchase was not barred from seeking compensation for a regulatory taking. ... The Court referred to rare situations in which a prior landowner would not be able to fulfill the ripeness requirements for a challenge to an unconstitutional wetlands regulation, and a subsequent owner would be burdened with the regulations that were in place at the time he acquired the land. ... Massachusetts' superior courts could see an influx of wetlands owners seeking compensation under a takings claim where the landowner has not applied for a specific development; yet under Palazzolo, the developer could claim that she knows the amount of development permissible on her land to a "reasonable degree of certainty. ...

TEXT:
[*781]

i. Introduction

The recent Supreme Court case of Palazzolo v. Rhode Island n1 resulted in a two-part holding that may have a significant impact on regulatory takings claims, specifically affecting those arising from wetlands restrictions. n2 The two-part holding of Palazzolo concerns both the ripening of regulatory takings claims and the investment-backed expectations prong of the Penn Central Transportation Co. v. New York City n3 regulatory takings test. n4 The Palazzolo Court ruled in favor of the property owner on both of these issues n5 With respect to the investment-backed expectations prong, the Court held that a landowner who purchased land with notice that the use of the land was limited by wetlands restrictions prior to his purchase was not barred from seeking compensation for a regulatory taking. n6 As for the ripeness issue, the Court held that a petitioner's wetlands regulatory takings claim is ripe for judicial review once the "permissible uses of the property are known to a reasonable degree of certainty." n7

This Note discusses the background of the investment-backed expectations and ripeness doctrines and the possible future of Massachusetts wetlands in light of the two-part holding of Palazzolo. [*782] Further, this Note addresses situations in which a portion of the landowner's property is subject to regulation, as opposed to situations in which the landowner is deprived of all economically beneficial use of her land. n8 Part II outlines the investment-backed expectations and ripeness doctrines in the context of wetlands cases prior to the Palazzolo decision. n9 Part III discusses

the Palazzolo case and its holding. n10 Part IV analyzes how the Palazzolo holding contradicts Massachusetts laws and prior court rulings. n11 Parts V and VI look to the possible future of Massachusetts wetlands after the Palazzolo decision. n12

II. Background

A. The Origin of Regulatory Takings

The United States Constitution guarantees that an individual's property will not be "taken" by the state or federal governments without compensation or due process of law. n13 These provisions of the U.S. Constitution do not prohibit the government from taking land; they merely state that to do so, the government must adhere to due process of law and provide adequate compensation. n14 The Takings Clause literally applies to instances in which an individual is per se entitled to compensation for the government's physical invasion of her property. n15 However, the Takings Clause has been interpreted to require that an individual must be compensated where the government has infringed upon a landowner's [*783] property rights, even without conducting a physical invasion of the property. n16

B. The Birth of Investment-Backed Expectations in Regulatory Takings

The early defining case recognizing that a land regulation could be so extensive as to constitute a taking was Pennsylvania Coal Co. v. Mahon. n17 Since Penn. Coal, the courts and scholars have grappled with the task of defining a test n18 that would determine when a regulatory taking has occurred. n19 In deciding whether a regulatory taking has occurred, courts have consistently deemed it necessary to address the economic impact of the regulation on the private landowner. n20

The notion of a property owner's investment-backed expectations as a factor in a takings analysis was first brought to light in a 1967 Harvard Law Review article by Professor Frank I. Michelman. n21 In 1978, the Supreme [*784] Court specifically addressed the issue of investment-backed expectations in Penn Central Transportation Co. v. New York City, as one of the distinct prongs in the regulatory takings analysis. n22 In Penn Central, the Court upheld an historic landmark regulation preventing Grand Central Station from constructing a tower on top of the structure. n23 Justice Brennan specifically stated that a private landowner is not able to claim that regulations on "particular segments" of the property are so egregious as to justify a taking, but that the property owner's regulated interest should be examined in reference to the entire property. n24 Later in the opinion, Justice Brennan noted that the owners of Grand Central Station were not being deprived of their "primary expectation" and stressed that the landmark regulation still allowed Grand Central to fully function as a railroad station. n25 Connecting Justice Brennan's argument that the regulated property interest should be looked at as a whole n26 with the conclusion that Grand Central was not being deprived of its primary function, allowed Justice Brennan to "neatly" conclude that Grand Central's primary investment-backed expectation was not frustrated by the New York statute. n27

Although Justice Brennan did not specifically define investment-backed expectation in Penn Central, he did find it necessary to ground the doctrine [*785] in existing precedent. n28 At the same time that Justice Brennan applied the theory of investment-backed expectations to the earlier takings case of Penn. Coal, he also limited the context in which a petitioner could assert investment-backed expectations by applying the theory to Penn Central. n29 Justice Brennan noted that the Pennsylvania Coal case was a taking without just compensation because the statute negated the very objective that the prior landowners had attempted to achieve by retaining the mining rights under the property that they conveyed. n30 In Penn Central, however, Justice Brennan denied Grand Central's claim that confiscation of the interest in airspace property above the station constituted a taking, and in reference to Grand Central's investment-backed expectations claim, stated that "the submission that appellants may establish a "taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." n31

In Justice Brennan's discussion of investment-backed expectations in Penn Central, he never discussed what role

investment-backed expectations would play in a situation in which the landowner acquired land with notice of a presently active regulation on the land. In essence, Justice Brennan was leaving open the question of whether or not the theory of a purchaser's investment-backed expectations could be used as a weapon to supercede such firmly rooted theories as estoppel or vested rights. n32

A year after the Penn Central decision, the theory of investment-backed expectations was substantially transformed simply by the restatement of the name of the theory itself. n33 In Kaiser Aetna v. United States, n34 Justice Rehnquist restated the theory as "reasonable investment-backed [*786] expectations." n35 Over a period of merely twelve years, the name of investment-backed expectations had changed dramatically from Professor Frank I. Michelman's nominal designation of a "distinctly perceived, sharply crystallized, investment-backed expectation." n36 The simple addition of the word "reasonable" to the name of the theory made it more difficult for a property owner to assert that his investment-backed expectations had been frustrated. n37 The modification changed investment-backed expectations from an inquiry into the private property owner's subjective plans for the use of her land to a judicial determination of the "validity of a claimant's expectations." n38

The Supreme Court next addressed investment-backed expectations in the context of an exaction for land use in the case of Nollan v. California Coastal Commission. n39 In this case, beach front property owners were on constructive notice that a proposal to rebuild their houses would require them to forfeit an easement across their property for public use. n40 The Court rejected Justice Brennan's notion that the petitioner's investment-backed expectations could not have been reasonable given their constructive notice, n41 and ruled that the statute was in violation of the Takings Clause because the condition did not protect a valuable governmental benefit. n42 The lower courts have not readily followed the proposition that a purchaser who takes land with constructive notice of a government's limiting regulations still has reasonable investment-backed expectations to bring a takings claim. n43

In the seminal case of Lucas v. South Carolina Coastal Council, n44 the [*787] Court stated that a landowner who acquired land with restrictive regulations already in place - that deprived the landowner of all economically beneficial use of the land - was not entitled to compensation under the Takings Clause unless the regulation went "beyond what the relevant background principles [of property and nuisance] would dictate." n45 In relation to categorical takings, the Court stated:

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think [the state] may resist compensation only 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. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. n46

The majority in Lucas saw pre-enacted statutes as limiting a post-enactment purchaser's "legal" property rights included in his title. n47 Thus, if the use was not included in the property owner's title before he took the land, the "logical" result would be that he would be unable to seek compensation for confiscation of this use after he had acquired title. n48 The Lucas Court asserted that states have the ability to impose restrictions upon the property owner's bundle of property rights through "restrictions that background principles of the state's law of property and nuisance already place upon land ownership." n49

Although the theory that state background principles restricting parts of the owner's bundle of property rights differs from the investment-backed expectations theory - the former relies upon legal principles while the latter relies on equitable principles - many courts have used the two theories interchangeably when evaluating the reasonableness of the "investment-backed expectations" prong of the Penn Central analysis for a post-enactment landowner seeking compensation under the Takings Clause. n50 [*788] The reason for this is that the application of either theory yielded the same result, since either theory was effective in preventing post-enactment purchasers from seeking compensation

for the loss of a use due to pre-existing regulations. n51 Although the concepts are different, they tend to work together because a post-enactment purchaser who has knowledge that his bundle of property rights is constitutionally subject to restriction by statute could not reasonably expect to obtain compensation for the impacts resulting from the statute. n52

C. Wetlands and the Investment-Backed Expectations Prong

Courts have recognized that the protection of wetlands constitutes a legitimate state interest. n53 Restrictions upon the development of wetlands have been imposed to serve numerous vital environmental functions. n54 The regulation of wetlands has time and again been established as within the state's police power to regulate health and safety. n55

As courts have recognized that the protection of wetlands constitutes a legitimate public objective, they have also held that such regulations are "inherent limitations on [a landowner's] property not subject to attack under the Takings Clause." n56 In the case of Algeria v. Keeney, n57 the post-enactment purchaser's expectations to develop his wetlands were deemed [*789] unreasonable in light of the state's "pervasive wetlands regulations." n58 Courts have held that, in the realm of wetlands regulation, a landowner who purchases land subject to such regulation is knowingly taking on the risk that an application to develop the wetlands will most likely be denied. n59 Hence, such a post-enactment purchaser of wetlands could hardly assert that her investment-backed expectations to develop the wetlands were reasonable in light of the existing regulations.

D. Ripeness/Exhaustion

In order for a takings claim to be heard in court, the case must be ripe for judicial review. n60 A challenge to a regulation is not ripe for judicial review until "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulation to the property at issue." n61 A plaintiff's challenge to a land use restriction cannot ripen until all administrative opportunities to obtain the desired result have been exhausted. n62 Although the exhaustion doctrine is closely related to the ripeness doctrine, they are theoretically different. n63 A takings claim is not necessarily ripe - meaning that a final decision has been rendered - simply because the petitioner has "exhausted all available administrative remedies." n64

The purpose for these judicially created doctrines is to maintain an appropriate separation of governmental powers and to give the administrative agencies the opportunity to remedy the situation and prevent overburdening the court system. n65 Although ripeness issues are usually addressed in the federal court system, many state courts have adopted the federal courts' insistence on a "final decision" by the administrative [*790] agency, in order for the challenge to be "ripe." n66

In 1985, the Supreme Court attempted to clarify the ripeness doctrine with the case of Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City. n67 In Williamson, the landowner, Hamilton Bank, challenged a zoning ordinance that restricted the amount of lots that it could create within its acreage. n68 Hamilton Bank filed the suit in the United States District Court for the Middle District of Tennessee after its lot proposal was rejected by the Williamson County Regional Planning Commission. n69 The plaintiff alleged that the Commission had taken its property without providing just compensation because the denial of its proposal resulted in a loss of over one million dollars. n70 The plaintiff also alleged that it had suffered economic loss from a temporary taking that occurred between the time of the Commission's initial rejection of its plan and the time the plaintiff filed the complaint. n71 However, the expert witnesses for both parties indicated that the Commission's objections to the plaintiff's plan could be overcome by a planning design that reduced the amount of units to be developed. n72 After a partial victory by the plaintiff at trial, and a complete victory on appeal, the case was granted certiorari in order to address the issue of the existence or nonexistence of a temporary taking. n73

The Supreme Court declined to resolve the issue concerning temporary taking since it found the case was not ripe for review. n74 Although the Commission had rejected the plaintiff's initial proposal, the plaintiff could have sought a variance from the Board of Zoning Appeals that would have resolved five of the Commission's eight objections. n75

Thus, the Court [*791] found that since plaintiff had not applied for any variances, it could not claim that the "Commission's disapproval of the preliminary plat n76 was equivalent to a final decision [required for ripeness] that no variances would be granted." n77

The Supreme Court again addressed the ripeness issue in the context of regulatory takings in 1986 with MacDonald, Sommer & Frates v. County of Yolo. n78 In MacDonald, the petitioner developer was denied an application for a 159-lot subdivision. n79 Without applying for a subdivision that was less offensive to the county planning commission, the developer immediately sued for a taking. n80 The Court ruled that the developer's case was not ripe. n81 The Court made their intentions perfectly clear when they stated that a "rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable review." n82

The MacDonald case was the first time the Supreme Court recognized the futility exception. n83 In order for a petitioner to obtain the futility exemption, he has the burden of proving the local government agency does not have the discretion to allow the requested development, or it is clear that they will not allow it. n84 In this situation, the petitioner is not required to prove that she has exhausted all administrative remedies, and her case is deemed ripe for judicial review. n85

E. Ripeness: An Administrative Tool to Protect Wetlands

Ripeness is one of the most well known procedural tools used against private landowners seeking compensation for a regulatory taking. n86 Hence, [*792] it is not surprising that the ripeness argument is often raised by municipalities who do not wish to have their wetlands regulations challenged in court. n87 The fact that some states require a reapplication from the initial denial of a plan in order for a claim to become ripe gives municipalities a loophole in which they are able to make the application process for a regulation challenger extremely aggravating and expensive. n88 Since planning boards rarely conclude that no development of any kind would ever be allowed on a petitioner's lot, the board can usually argue that the petitioner can reapply - taking more time and money - for a less intrusive plan, and failure to do so will render the claim unripe. n89

In the past eleven years, the Supreme Court and the lower courts have limited municipalities' ability to defeat wetlands takings claims using the ripeness doctrine. n90 The absurd behavior of the municipality in the case of City of Monterey v. Del Monte Dunes at Monterey, Ltd. n91 prompted the Supreme Court to affirm the Ninth Circuit's decision to take away some of a municipality's power in rendering a "final decision" for ripeness purposes. n92 In Del Monte Dunes, n93 the developer had applied for development of ocean front property five separate times and each subsequent plan was substantially scaled down (or modified consistent with the planning commission's suggestions) from the previous proposal. n94 After the developer brought suit, the municipality argued that it had not rendered a "final" decision concerning the development of the property since the municipality only "identified one level of development the City [would] not permit without establishing the type and intensity of the development the City [would] permit." n95 The Ninth Circuit ruled that the [*793] municipality had rendered a final decision through the conditions that were included in the municipality's previous denials, and stated that to force "appellants to persist with this protracted application process to meet the final decision requirement would implicate ... concerns about disjointed, repetitive and unfair procedures." n96 Hence, it is evident from the strong language in the Ninth Circuit's opinion that abuse of the ripeness doctrine by municipalities will not be tolerated. n97

Lower courts have also put limits on the finality requirement of the Takings Clause by requiring that a landowner must merely obtain one rejection from one meaningful application for a development project and a variance in order to ripen their takings claim. n98 In Southern Pacific Transportation Co. v. City of Los Angeles, the court used the language from MacDonald to define a "meaningful" application as one that is not "exceedingly grandiose." n99 The court's reasoning for requiring denial of a "meaningful" application to ripen a claim was to show that the municipality does not intend to allow "reasonable development." n100 Although the "one meaningful application" doctrine was originally used to aid petitioners in ripening their claims, it could also be used by municipalities in preventing a claim from ripening. n101 The reasoning behind this is that the "one meaningful application" doctrine protects municipalities

from landowners seeking compensation under the Takings Clause for "grandiose" developments that "could not have been constructed under other, valid zoning restrictions quite apart from the [allegedly unconstitutional] regulation being challenged." n102

F. Ripeness and the Investment-Backed Expectations Prong as One: The Interrelation

At first glance the doctrines of ripeness and investment-backed expectations seem to be separate and distinct, yet they are actually [*794] interrelated in the context of takings issues. n103 The fact of the matter is that one's investment-backed expectations cannot be evaluated if an administrative agency has not yet "arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." n104 The weakening of the ripeness doctrine alone could have severe environmental impacts, but when a court takes the teeth out of both doctrines, the environmental consequences of developers seeking application approvals may be disastrous. n105

III. The Palazzolo Case

A. Background

In Palazzolo v. Rhode Island, n106 the land at issue consisted of three adjoining coastal parcels in the town of Westerly, Rhode Island. n107 At the time of purchase, the portions of the parcels bordering on Winnapaug Pond were salt marsh subject to tidal flooding. n108 In 1959, Anthony Palazzolo, a lifelong Westerly resident, decided to invest in the three undeveloped parcels through a corporation named Shore Garden's Inc. (SGI). n109 Subsequent to SGI's purchase, Mr. Palazzolo bought out the other shareholders and became its sole owner. n110

During the first decade of SGI's ownership, the corporation made multiple unsuccessful requests to state agencies to permit development of the land, which required filling a substantial part of the parcels. n111 In 1962, the Rhode Island Division of Harbors and Rivers denied SGI's request to dredge from Winnapaug Pond and fill the entire property due to lack of "essential information," which was required as a matter of procedure. n112 A year later, SGI proposed an amendment to the 1962 proposal, and in 1966 [*795] SGI proposed a limited filling of the land for use as a private beach club. n113 Both proposals were referred to the Rhode Island Department of Natural Resources and were initially approved. n114 However, the Department later rescinded that approval, stating that the proposals would have detrimental impacts on the environment. n115 In 1971, Rhode Island passed legislation creating the Coastal Resources Management Council (CRMC), n116 which was charged with protecting the properties of the state's coast. n117 The CRMC designated salt marshes similar to the land bordering Winnapaug Pond on Mr. Palazzolo's property as "protected coastal wetlands." n118 In 1978, SGI's corporate charter was revoked and title to the property passed to Mr. Palazzolo. n119

In 1983, Mr. Palazzolo tried, for the first time in his individual capacity, to develop the wetlands portion of his property, and brought a request to the CRMC for permission to "construct a wooden bulkhead along the shore of Winnapaug Pond and to fill the entire marshland area." n120 The CRMC rejected his application on both procedural n121 and substantive n122 grounds. Mr. Palazzolo applied to the CRMC for a second time in 1985, requesting to fill eleven acres of his wetlands in order to accommodate a private beach club. n123 The CRMC rejected the request, stating that Mr. Palazzolo did not meet the "special exception" required for the type of private endeavor he proposed. n124

After Mr. Palazzolo's final application to the CRMC, he brought an inverse condemnation action in the Rhode Island Superior Court of Washington County alleging that the CRMC's application of the wetlands statute constituted a regulatory taking in "violation of the Fifth and [*796] Fourteenth Amendments" to the United States Constitution. n125 Although he was still able to build on a substantial upland portion of his property, Mr. Palazzolo asserted that the regulation deprived him of all "economically beneficial use" n126 of his property, and he sought $ 3,150,000 in compensation. n127 The superior court ruled against Mr. Palazzolo and he subsequently appealed to the Rhode Island Supreme Court. n128 The Rhode Island Supreme Court affirmed the superior court's decision, holding that Mr.

Palazzolo's claim was: (1) not ripe for review, n129 (2) not per se entitled to compensation for a regulatory taking, n130 and (3) not entitled to compensation, since he took the land with knowledge of the regulations and could not have had any reasonable investment-backed expectations. n131

In examining Mr. Palazzolo's appeal on the ripeness issue de novo, the Rhode Island Supreme Court found that his claim was unripe for two different reasons. n132 First, although he asserted a taking for the denial of a plan to fill wetlands in [*797] order to develop a seventy-four lot subdivision, Mr. Palazzolo had never submitted such a plan for an administrative decision. n133 In his previous applications he sought to fill his wetlands in order to construct a beach club, and in his other applications he sought to fill his wetlands without giving any information about what he intended to do with the filled lands. n134 Second, in reference to Mr. Palazzolo's previously denied applications, he never sought to obtain a permit for a less ambitious development of his property. n135 The Rhode Island Supreme Court reasoned that all of Mr. Palazzolo's proposals to fill his wetlands were virtually identical, and that in order to satisfy the application for the "less ambitious development" requirement, the subsequent applications must be "substantially different from the original application." n136

In its de novo review of Mr. Palazzolo's "reasonable investment-backed expectations," the Rhode Island Supreme Court agreed with the superior court's ruling that, since the wetlands regulations were in place before Mr. Palazzolo took the land, he never owned the right to fill his wetlands. n137 The court further agreed that since Mr. Palazzolo did not have the right to fill his wetlands, and knew of this fact prior to his acquisition of the property, he could not have had any "reasonable investment-backed expectations" that he could fill his wetlands after taking possession. n138 The court ruled that without any "reasonable investment-backed expectations" Mr. Palazzolo could not sustain a regulatory takings claim, and the Penn Central analysis did apply. n139

The United States Supreme Court, after granting certiorari in late 2000, reversed in part, affirmed in part, and remanded the case. n140 The Court ruled that: (1) Mr. Palazzolo was not deprived of all economically beneficial use; n141 (2) the case was ripe for review; n142 and (3) Mr. Palazzolo's notice of the wetlands restrictions prior to his acquisition of the property did not bar his regulatory takings claim. n143

[*798]

B. Analysis of the Investment-Backed Expectations Holding in Palazzolo

When analyzing the issue of Mr. Palazzolo's knowledge of the wetlands regulations prior to his acquisition of the property, the Court focused solely on the dangers of allowing a municipality to "put an expiration date on the Takings Clause." n144 The Court's main concern was for the property rights of private landowners such as Mr. Palazzolo. n145 After briefly addressing the proposition from Phillips v. Washington Legal Foundation n146 that the state, in fact, does define an individual's property rights, the Court discussed the retroactive application of restrictive regulations precluding property owners from seeking compensation under a regulatory takings theory. n147

The Court justified its holding concerning the prior notice of regulations by focusing on the ripeness issue. n148 The Court referred to rare situations in which a prior landowner would not be able to fulfill the ripeness requirements for a challenge to an unconstitutional wetlands regulation, and a subsequent owner would be burdened with the regulations that were in place at the time he acquired the land. n149 Yet, in discussing the "injustice" that could occur if a prior owner of land was unable to fulfill the ripeness requirement prior to a conveyance, the Court gave no credence to the fact that earlier in its opinion the requirements for ripeness in such land-use regulation cases had been softened. n150

The Court further reasoned that its decision concerning Mr. Palazzolo's investment-backed expectations was derived from controlling precedent in Nollan v. California Coastal Commission. n151 However, the Court did not [*799] address the fact that the Nollan decision concerning investment-backed expectations has been widely rejected by lower courts. n152 Furthermore, as Justice Stevens discusses in his dissenting opinion, the situation in Nollan was

easily distinguishable from Mr. Palazzolo's situation. n153 In Nollan, the regulation the Nollans had notice of prior to purchasing their property required them to provide a public easement across their property as a condition for a development permit. n154 Hence, "that event - a compelled transfer of an interest in property [as a condition for a development permit] - occurred after the petitioners had become the owners of the property and unquestionably diminished the value of petitioners' property." n155 In Palazzolo, the triggering event for economic injury was the enactment of the wetlands regulation while the property was in the possession of SGI. n156 Hence, Mr. Palazzolo never experienced a taking because "the matter of standing to assert a claim for just compensation is determined by the impact of the event that is alleged to have amounted to a taking." n157

C. The Criticism of the Investment-Backed Expectations Ruling in Palazzolo

Contrary to the majority's assertion in Palazzolo, Justice Stevens argued that a municipality would not be putting an expiration date on a takings claim by refusing to give compensation to a person who acquires the land after the regulatory statute had been enacted. n158 The landowner who was in possession of the land at the time the legislation was put into place is the actual party who has suffered injury, and is the individual who deserves compensation. n159 Hence, a subsequent purchaser never gets a takings claim [*800] that could expire. n160

Justice Stevens explained in his dissent that a subsequent purchaser's right to challenge the constitutionality of a wetlands regulation is never put aside simply because of a conveyance, but the right to damages still belongs to the person who was subject to the injury. n161 Therefore, the majority's contention that barring a post-enactment purchaser from seeking compensation for an unconstitutional wetlands regulation by putting an "expiration date on the Takings Clause" n162 was extreme, if not incorrect. By allowing the subsequent purchaser to seek compensation through a takings claim, Justice Stevens argued, the Court is in fact creating standing for a subsequent purchaser and giving him the ability to collect damages for injuries that were actually suffered by the prior owner. n163 The subsequent purchaser has technically already been compensated for the land regulations due to the fact that his purchase price would have been adjusted at the time of purchase to reflect the presence of the regulations, regardless of the constitutionality of the regulations. n164

Although Palazzolo on its face looks like a win-win situation for private property owners, it could actually result in multiple windfalls to the detriment of unknowing sellers who do not know their legal options. n165 Palazzolo gives real estate purchasers the ability to purchase regulated wetlands, challenge the regulation, and actually receive profit for successfully litigating a regulatory takings claim that did not belong to them in the first place. n166 The decision may result in situations where an unknowing landowner sells land at a discounted price to a real estate savvy purchaser who is "gambling that the newly restricted property" will eventually be worth much more. n167

The alternative to this potential gamble is to bar compensation for postenactment [*801] purchasers who take wetlands with notice of restrictions. Some believe that this conclusion is the fair approach since the buyer went into the purchase and sales agreement with "eyes wide open and can hardly claim to be surprised about the restrictions." n168 Others believe that barring compensation to post-enactment purchasers is too drastic and would create an unfair windfall to the state. n169 However, most would agree that the selfless motivations of a state in promoting the environment by restricting wetlands is much more meritorious than a private property owner's pecuniary motivation to maximize the value of his land at the expense of the environment.

D. Analysis and Criticism of the Ripeness Decision in Palazzolo

The Court refined the "final decision" requirement of ripeness claims by refusing to require that a petitioner seek multiple applications in order to ripen a claim. n170 The Court used the language from Del Monte Dunes in stating that "government authorities ... may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision." n171 However, the actual party that was playing unfairly in this instance was Mr. Palazzolo himself, who attempted to "hide the ball" from the Court by first claiming that he had ripened his claim by applying for less drastic - and less costly - construction, and later claiming that he was entitled to compensation that was monetarily

consistent with his subsequent claim that he was the victim of an unconstitutional taking for denial of a massive 74-lot subdivision plan. n172

The Court could have easily dismissed Mr. Palazzolo's claim as unripe, since he had never actually petitioned the CRMC to fill his wetlands for use as a 74-lot subdivision. n173 Nevertheless, the Court fashioned a new rule, [*802] stating that "once ... the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." n174 Although most commentators say that the final decision requirement was "refined" by the Palazzolo decision, n175 it appears that the Court simply disregarded the requirement completely.

The standard of a "reasonable degree of certainty" appears to further mystify the ripeness doctrine. n176 Who is to determine when the "permissible use of the property" is determined to a "reasonable degree of certainty?" n177 Undoubtedly, a municipality and a petitioner would rarely agree on when permissible use is determined to a "reasonable degree of certainty;" however, there is much less room for argument concerning when a final decision has been rendered. Hence, the ripeness decision of Palazzolo appears to create more problems than it solves.

E. Palazzolo's Investment-Backed Expectations Decision; The Effect on the Common Law and the Legislature in Reference to Wetlands

Prior to Palazzolo, the property owner's notice of the wetlands regulations prior to purchase was the main deterrent against a landowner deciding whether to bring a takings claim in the first instance. n178 Given that fewer and fewer landowners will be deterred from bringing regulatory takings claims for wetlands regulations that they knew were in place when they purchased their land, more and more wetlands regulations could be invalidated or subject the state to compensation claims. n179 Therefore, municipalities and courts will be put in more situations where they will be forced to second-guess legislation that, in the clear majority of cases, has been put in place for the benefit of the community and environment. n180 [*803] This is not necessarily a bad result. However, it could tend to overly burden the decision processes of legislatures since they will be less willing to enact wetlands protection statutes that they may see as necessary but possibly controversial. n181

The hidden danger of Palazzolo is the effect it will have on the enforcement of land regulations that are already in place. n182 A municipality is less likely to enforce wetlands regulations with the same vigor that it has done in the past due to the fear that such enforcement could result in costly litigation. n183 Hence, private property owners will be able to push the development envelope further with the assurance that the municipality will be hesitant to step in due to its fear of litigation.

F. Palazzolo's Ripeness Decision: The Effect on a Municipality's Wetlands Regulations in General

Legislatures are faced with a lose-lose situation when it comes to the ripeness decision of Palazzolo. On the one hand, a municipality could leave its statutes as they are, but if the "regulations are unequivocal, and the application of those regulations is such that an invitation to apply for development is disingenuous, further application need not be pursued for the claim to be ripe." n184 Or the municipality could weaken its statutes and not foreclose the chance of getting a lesser offensive plan approved. n185 Of course, the obvious risk that a local legislature would encounter by weakening their wetlands regulations would be an increase of applications to build in wetlands areas that should be preserved for the good of the [*804] environment. n186

IV. Palazzolo's Impact in Massachusetts

A. Massachusetts Wetlands Legislation in Light of Palazzolo's Ripeness Holding

Due to the high regard in which Massachusetts holds its wetlands, n187 many procedural safeguards have been put into place in order to ensure that its wetlands are preserved. Massachusetts' application process for permits to build in designated wetlands is known for its opposition to permit seekers. n188 The most notable procedural obstacle that an

applicant faces is the two-track appeal process, which could take many years to complete at great financial cost to the applicant. n189 Concerning the two-track appeal process, the Massachusetts Wetlands Protection Act (WPA) specifies that municipal conservation commissions are given the task of approving or disapproving all development projects on or near areas that are designated as wetlands. n190 An appeal from a decision of a municipality's conservation commission must be filed in the superior court and be heard at an administrative proceeding with the Department of Environmental Protection (DEP). n191 In cases where an applicant is forced to proceed through all the judicial and administrative appeal procedures, a wetlands development proponent would face:

1) a Commission proceeding; 2) judicial review in Superior Court n192 of the bylaw decision; 3) appeal to the Appeals Court (possibly followed by further appellate review by the Supreme Judicial Court); 4) a DEP [*805] administrative proceeding on the WPA decision; 5) review by a DEP administrative law judge (and subsequent approval of that decision by the Commissioner); 6) judicial review of the WPA decision in Superior Court; and 7) appeal of that decision to the Appeals Court (possibly followed by further appellate review by the Supreme Judicial Court). n193

This two-track appeal process has been subject to much ridicule by many property rights advocates. n194

The Palazzolo ripeness decision could possibly affect the Massachusetts legislative system concerning the appeal of a conservation commission's decisions. One section of the majority opinion in the Palazzolo case, addressing the ripeness issue, reiterates the Del Monte Dunes holding by stating, "government authorities ... may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision." n195 However, the majority in Palazzolo takes the argument for property rights advocates a step further when it states that the "ripeness doctrine does not require a landowner to submit applications for their own sake." n196

Thus far, the Del Monte Dunes decision does not seem to have substantially impacted the Massachusetts legislature in reference to the appeal process of conservation commission decisions. n197 However, since it has only been three years since the Supreme Court decided Del Monte Dunes, it may be too early to determine if that decision will serve to whittle away at Massachusetts' appellate procedure. Nevertheless, the fact that the Supreme Court referred to the Del Monte Dunes decision again in the past year does not bode well for environmental advocates in Massachusetts.

If the Massachusetts wetlands appellate process is adversely faced with the Palazzolo ripeness decision, that process could face the risk of being watered down to be more favorable to landowners seeking appellate review [*806] of local conservation commission decisions. In particular, the Massachusetts dual appellate track for wetlands appeals may face destruction in light of Palazzolo's ripeness decision. A landowner could argue that requiring a petitioner to seek appellate review through both a superior court and an administrative hearing in front of the DEP is "repetitive and unfair." n198 Due to the extended amount of time in which this dual track appellate process takes, property rights advocates are likely to claim that the municipality is merely requiring such an appellate system simply to "avoid a final decision." n199 Furthermore, since both the superior courts and the DEP appear to be equally competent governmental entities, a court may find that requiring a petitioner to appeal to both could be seen as requiring a "landowner to submit applications for their own sake." n200

B. Palazzolo's Contradiction to Massachusetts Rulings on Post-enactment Purchaser's Takings Claims

Palazzolo's investment-backed expectations ruling is completely contradictory to past Massachusetts rulings on wetlands regulations that were in place prior to the present landowner's acquisition. n201 This could potentially result in significant changes for Massachusetts' private property owners and courts.

In all of the Massachusetts cases concerning takings compensation owed to post-enactment wetlands property owners, the courts have consistently held that the owners' property interests are limited by the background principles of state law - as it was stated in the landmark takings case of Lucas. n202 If one of these rights had been restricted by the

institution of a regulation, a subsequent property owner never acquired ownership of that right at the time of purchase and thus could not have sought compensation from the government for a property right that he had never possessed. n203 Although none of the Massachusetts investment-backed expectations cases declare that the post-enactment landowner's knowledge of the wetlands [*807] regulations is dispositive of their right to compensation, n204 there are also no cases that allow compensation for a situation in which a landowner purchases property with knowledge of the regulations. Thus, notice of a wetlands regulation prior to purchase should be considered more than just a mere factor in determining a property owners investment-backed expectations. n205

Massachusetts addressed the issue of a post-enactment buyer who seeks damages for wetlands regulations in 1996 with Leonard v. Town of Brimfield n206 and FIC Homes of Blackstone, Inc. v. Conservation Commission of Blackstone. n207 In the first of these cases, Leonard, the Supreme Judicial Court determined that the post-enactment purchaser could not have had reasonable investment-backed expectations despite the fact that the landowner did not have actual notice of the wetlands regulation. n208 The landowner in Leonard purchased land located in a flood plain zone, which required an application for a special permit for construction of her lots. n209 The court determined that since the zoning map was available for viewing at the building inspector's office prior to her purchase, the property owner had constructive knowledge that the majority of her land was located within a flood plain district. n210 Thus the property owner never acquired the right to develop in the flood plain without a special permit, and the government was not required to compensate her for a right she never owned. n211

Later in 1996, the Appeals Court of Massachusetts decided FIC Homes of Blackstone, and again rejected a wetlands property owner's regulatory takings claim. n212 In that case, it was an undisputed fact that the property owners actually knew that the lots in question were unbuildable because of the pre-enacted wetlands regulations. n213 FIC Homes of Blackstone [*808] purchased the land in 1992 when it was already subject to a wetlands by-law that required a set-back of 100 feet from a wetlands resource. n214 FIC Homes of Blackstone filed a notice of intent to build a house and driveway that would be located within the 100-foot buffer zone. n215 The court stated that the property owners could not have reasonably expected to build on this portion of their property since they knew that it was subject to regulations at the time they purchased it. n216

Using the same reasoning as Leonard, the FIC Homes of Blackstone court wrote that "in order to rise to the level of an unconstitutional regulatory taking, the investment-backed expectations frustrated by government regulation must be "reasonable and predicated on existing conditions' ... not merely a "unilateral expectation or an abstract need.'" n217 Since it was undisputed that the landowners had notice of the wetlands regulations, the court put more emphasis on the property owners' unreasonable "expectations" as opposed to focusing on the argument that they should not be able to seek compensation for a lost right that they never acquired. n218

C. Palazzolo's Ripeness Ruling as Compared to Previous Massachusetts Wetlands Ripeness Rulings

The Palazzolo decision's most drastic language pertaining to the ripeness doctrine is the Court's statement that "once it becomes clear that ... the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." n219 Unfortunately, this holding appears to directly clash with previous holdings in Massachusetts.

In the case of Daddario v. Cape Cod Commission, n220 the Massachusetts Supreme Judicial Court set forth a rule that could be seen as directly contradictory to the ripeness ruling in Palazzolo. n221 Although the case did not involve wetlands, the ripeness principles derived from it can be easily [*809] related to wetlands cases since both agricultural districts n222 and wetlands districts are mainly regulated to protect the environment. n223 In Daddario, the landowner sought a special permit from the Cape Cod Commission to develop his land, which required removing gravel and sand in an area that was calculated at approximately thirty-two acres. n224 The Commission denied the developer's request; however, they indicated that they would approve a modified plan that only required the removal of sand and gravel from twenty-five acres. n225 After the Commission denied the developer's plan, he did not attempt to revise his plan, but instead immediately appealed to the land court, which granted him the ability to develop subject to certain conditions.

n226 On appeal, the SJC reversed and remanded the case, stating that, since the developer refused to seek out less extensive development, his claim was not ripe for review. n227 The court reasoned that the developer could not assert a takings claim on a "final" decision where he does not know the "nature and extent of development that the Commission will permit." n228 In effect, the SJC fashioned a rule requiring that, in order to ripen a claim, a permit applicant must reapply after he receives an initial denial from a commission. n229

Given the fact that Massachusetts courts require reapplication in order to ripen a takings claim, and Palazzolo simply requires that the permissible use of the property must be known to a "reasonable degree of certainty," the Massachusetts ripeness doctrine favoring municipalities may face some difficulties in the future. n230 As stated above, Mr. Palazzolo had never applied to build a seventy-four lot subdivision. n231 Therefore, in the eyes of the Supreme Court, not only is reapplication not necessary to ripen a wetlands takings claim, but apparently an initial application is unnecessary [*810] as well. n232 Massachusetts' superior courts could see an influx of wetlands owners seeking compensation under a takings claim where the landowner has not applied for a specific development; yet under Palazzolo, the developer could claim that she knows the amount of development permissible on her land to a "reasonable degree of certainty." n233 However, in order to really know the permissible extent of development to a reasonable degree of certainty, one must at least reapply for a scaled down version of an initially denied proposal instead of going to the courts and claiming compensation for a proposal that the town conservation commission has never even seen. n234 The Palazzolo ripeness doctrine may not seem radical on its face, but when the Supreme Court applied it to the specific facts of Mr. Palazzolo's case, it demonstrated the extent of how extreme the doctrine could be taken. n235

V. Looking Forward

A. The Future of Massachusetts Wetlands Due to Palazzolo's Weakening of the Ripeness Doctrine

Any changes that may occur concerning ripening claims and Massachusetts wetlands will most likely appear in the legislature before they appear in the court system. n236 Since the dual-track appeal process for Massachusetts wetlands claims has already created controversy for being too biased in favor of municipalities, the Palazzolo decision intensifies the controversy by strengthening the position of property rights advocates. n237 In the future, due to the Palazzolo decision, the Massachusetts wetlands appeal process may be condensed into a process that is less time consuming and less expensive than the present form.

The advantages that Massachusetts may lose from the legislatively created appeal process may ultimately be protected through the judicial process. The Palazzolo Court set forth a rule that a wetlands takings claim is ripe once the extent of permissible development is known to a [*811] "reasonable degree of certainty." n238 Given that reasonableness is an objective standard, it is up to the court to decide what is in fact reasonable. Thus, given the high regard in which Massachusetts holds its wetlands, n239 it is quite possible that Massachusetts courts will conclude that reapplication is, in fact, required for the petitioner to know the extent of permissible development to a reasonable degree of certainty. A Massachusetts court may use the Palazzolo decision against itself to find that a petitioner is required to reapply after an initial denial - not to "submit applications for their own sake" - but to flesh out the permissible use of the property to a "reasonable degree of certainty." n240

B. The Future of Massachusetts Wetlands Due to Palazzolo's Weakening of the Investment-Backed Expectations Prong

Since Massachusetts was the first state in the nation to protect wetlands through a specific statutory provision, it is obvious that Massachusetts holds the preservation of wetlands as a serious priority. n241 Hence, it is unlikely that the Massachusetts legislature or courts will allow themselves to be bullied by post-enactment purchasers who claim that their investment-backed expectations are reasonable because of the recent Palazzolo decision. n242 One way in which Massachusetts may attempt to preserve its valuable wetlands in light of the recent Palazzolo decision is to transfer the development rights (TDR) of post-enactment purchasers who assert reasonable investment-backed expectations under

Palazzolo to non-wetlands areas. n243 The majority opinion in Penn Central found that TDRs were valuable tools that could be utilized to both "mitigate whatever financial burdens the law has imposed" on the applicant, and preserve [*812] valuable landmark structures. n244 Massachusetts could use TDRs to protect its wetlands as New York used them to protect their historical landmarks. n245

VI. Conclusion

Massachusetts has not yet directly addressed the situation where post-enactment purchasers of wetlands assert that they have reasonable investment-backed expectations under Palazzolo. n246 Massachusetts has addressed Palazzolo's landowner-biased ripeness holding, but has thus far declined to follow it in favor of the petitioner. n247 Since "approximately 46,000 acres of coastal and 8,000 acres of inland wetlands have been registered [as of 2002] in 42 coastal n248 and 11 inland n249 communities," n250 the threat that the Palazzolo decision may impose on the conservation of wetlands in Massachusetts could severely affect multiple communities. [*813] However, given the Massachusetts courts' previous ill treatment of post-enactment purchasers of wetlands attempting to claim that they have reasonable investment-backed expectations, and the high regard in which Massachusetts holds its wetlands, n251 it is most likely that the Massachusetts courts and legislature will not give up without a fight. A reasonable prediction is that Massachusetts will most likely use such devices as TDRs or find some other way n252 to distinguish the Palazzolo decision out of existence in order to preserve its precious wetlands.

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawForeign & International ProtectionsGeneral OverviewEnvironmental LawNatural Resources & Public LandsWetlands ManagementReal Property LawInverse CondemnationGeneral Overview

FOOTNOTES:

n1. 533 U.S. 606 (2001).

n2. See id. at 618-32.

n3. 438 U.S. 104, 124 (1978) (stating that one factor for courts to consider in a regulatory takings claim is extent to which regulation has interfered with distinct investment-backed expectations).

n4. See Palazzolo, 533 U.S. at 616.

n5. See id. at 630.

n6. See id.

n7. Id. at 620.

n8. See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 n.8 (1992) (holding that landowners' investment-backed expectations need not be addressed where owners have been deprived of all economically beneficial uses of land).

n9. See infra notes 13-105 and accompanying text.

n10. See infra notes 107-86 and accompanying text.

n11. See infra notes 187-235 and accompanying text.

n12. See infra notes 236-52 and accompanying text.

n13. See U.S. Const. amend. XIV, 1. This amendment prohibits states from "depriving any person of life, liberty, or property, without due process of law." Id. (emphasis added). According to the Fifth Amendment, "nor shall private property be taken [by the federal government] for public use without just compensation." U.S. Const., amend. V.

n14. See Norman Redlich et al., Understanding Constitutional Law 199 (2d ed. 1999). See also Steven J. Eagle, Just Compensation for Permanent Takings of Temporal Interests, 10 Fed. Circuit B.J. 485, 486 (2001) (recognizing that eminent domain is an implicit right delegated to state and federal governments through the U.S. Constitution).

n15. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982). The Court in this case showed just how literally the Takings Clause could be interpreted. See id. (finding that an invasion by a one-half

inch cable installed on a rental property constituted a per se taking).

n16. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1992). "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Id. See also Redlich et al., supra note 14, at 200.

n17. See Penn. Coal, 260 U.S. at 415.

n18. The Court in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 n.8 (1992), stated that the investment-backed expectations factors from Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978), need only be discussed where a petitioner is asserting a takings claim due to a regulation that does not deprive the landowner of all economically beneficial use.

n19. See Abraham Bell & Gideon Parchomovsky, Takings Reassessed, 87 Va. L. Rev. 277, 278 (2001). "Takings jurisprudence is replete with inconsistent distinctions that provide scant guidance for courts and policymakers." Id.

n20. See generally Daniel R. Mandelker, Land Use Law, 18-39 (4th ed.1997 & Supp. 2000) (noting that even though land may not be physically taken, the economic viability of the land due to a government-imposed restriction is an important factor in a takings analysis)

n21. See Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1233 (1967). In referring to investment-backed expectations, Michelman states:

The test poses not nearly so loose a question of degree; it does not ask "how much," but rather ... it asks "whether or not": whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation.

Id. (emphasis added). In writing his article, Michelman was not seen as an overzealous private property rights advocate; rather, he viewed as being more concerned with protecting individuals who felt they were "victims of unprincipled exploitation." See R. S. Radford & J. David Breemer, Great Expectations: Will Palazzolo v. Rhode Island Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?, 9 N.Y.U. Envtl. L.J. 449, 453-54 (2001) (citing Michelman, supra at 1230).

n22. See Penn Cent., 438 U.S. at 124. Justice Brennan designed a three prong test to be applied in a regulatory takings analysis: "the [1] economic impact of the regulation on the claimant and, particularly, [2] the extent to which the regulation has interfered with the distinct investment-backed expectations are, of course, relevant considerations ... so too, is the [3] character of the governmental action." Id. (emphasis added).

n23. See id. at 138.

n24. See id. at 130-31. The Court found that:

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.

Id. (emphasis added).

n25. See Penn Cent., 438 U.S. at 136.

[Grand Central's] designation as a landmark not only permits but contemplates that the appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel.

Id. (emphasis added).

n26. See id. at 131.

n27. See Steven J. Eagle, The Rise and Rise of "Investment-Backed Expectations," 32 Urb. Law. 437, 441 (2000).

n28. See Radford & Breemer, supra note 21, at 455-57.

n29. See id. See also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (finding taking without just compensation). In Penn Coal, the coal company sold their surface rights but reserved the right to mine coal under the property. See id. at 412. After the transaction, Pennsylvania enacted the Kholer Act which forbade "the mining of anthracite coal in such a way as to cause the subsidence of, among other things, any structure used as a human habitation." See id. at 412-13.

n30. See Radford & Breemer, supra note 21, at 455-56.

n31. Penn Cent., 438 U.S. at 130. Grand Central actually anticipated a 20-story office tower to be built at the time of the station's construction. See id. at 115 n.15. "The Terminal's present foundation included columns, which were built into it for the express purpose of supporting the proposed 20-story tower." Id.

n32. See Eagle, supra note 27, at 441-42.

n33. See Steven J. Eagle, The Regulatory Takings "Notice Rule": Sources and Implications, SF64 ALI-ABA 365, 375-76 (2001); Radford & Breemer, supra note 21, at 460-61; Eagle, supra note 27, at 442.

n34. 444 U.S. 164 (1979).

n35. Id. at 175.

n36. Michelman, supra note 21, at 1233.

n37. See Radford & Breemer, supra note 21, at 460-61.

n38. See id.

n39. 483 U.S. 825 (1987).

n40. See id. at 829.

The Commission ... had similarly conditioned 43 out of 60 coastal development permits along the same tract of land, and that of the 17 not so conditioned, 14 had been approved when the Commission did not have administrative regulations in place allowing imposition of the condition, and the remaining 3 had not involved shorefront property.

Id.

n41. See id. at 857-58.

n42. See id. at 834, 841.

n43. For a list of cases rejecting the Nollan decision see Eagle, supra note 27, at 444 n.47 and Radford & Breemer, supra note 21, at 469-70 n.128.

n44. 505 U.S. 1003 (1992) (agreeing with landowner that he was deprived of all economically beneficial use of his land). Most scholars find this case relevant because of its discussion of deprivation of all economically beneficial use of land in the context of what constitutes a categorical taking, as opposed to its implications of investment-backed expectations. See Redlich et al., supra note 14, at 209.

n45. Lucas, 505 U.S. at 1030.

n46. Id. at 1027 (emphasis added).

n47. See id.

n48. See id.

n49. Id. at 1029. The Court has stated before that "property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972). See also Eagle, supra note 33, at 372 (discussing sources of property rights).

n50. See Eagle, supra note 33, at 367-69.

n51. See Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001). When criticizing the "injustice" that would occur if post enactment purchasers were barred from seeking compensation under a takings cause of action, the Court stated that the two theories (state background principles restricting an owners bundle of property rights, and investment-backed expectations) "amount to a single sweeping rule: A purchaser or a successive title holder like petitioner [post-enactment purchaser] is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." Id.

n52. See id.

n53. The court in Lopes v. City of Peabody stated "there is no doubt that flood control and the prevention of pollution of surface and ground water (and great ponds) are legitimate State interests." 629 N.E.2d 1312, 1316 (Mass. 1994).

n54. See Mandelker, supra note 20, at 480.

As transitional "marshy" areas between land and bodies of water, wetlands help preserve water quality by slowing water flow and allowing sediment to settle. They also stabilize water tables by retaining water during dry periods and holding it back during floods. Wetlands are important resources for environmental diversity and

provide an important habitat for many forms of wildlife.

Id.

n55. See id. at 479.

n56. See id. at 485 n.32 (citing FIC Homes of Blackstone, Inc. v. Conservation Comm'n, 673 N.E.2d 61 (Mass. App. Ct. 1996); Gazza v. N.Y. Dep't of Envtl. Conservation, 679 N.E.2d 1035 (N.Y. 1997)). See also Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997) (noting that inherent limitations include statutory restriction).

n57. 687 A.2d 1249 (R.I. 1997).

n58. Id. at 1254.

n59. See id. at 1253-54. "In this case, plaintiff purchased the property knowing that its wetlands were subject to regulations. Therefore, we are led to conclude that plaintiff accepted the risk that the development plans he preferred would be disapproved." Id.

n60. See Mandelker, supra note 20, at 342. Although the issue of ripeness touches many different areas of the law, this Note focuses only on ripeness in the context of land use restrictions.

n61. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985).

n62. See Mandelker, supra note 20, at 342.

n63. See id. See also Douglas T. Kendall et al., Choice of Forum and Finality Ripeness: The Unappreciated

Hot Topics in Regulatory Takings Cases, 33 Urb. Law. 405, 430 (2001). "The ripeness doctrine is concerned with finality, while the exhaustion doctrine is remedial." Id.

n64. William R. Quinlan et al., Defending Against the Takings Claim: A Practical Guide for Municipalities, 29 Stetson L. Rev. 659, 666 (Winter 2000).

n65. See Mandelker, supra note 20, at 342.

n66. See Robert Meltz, Wetland Regulation and the Takings Issue, SC80 ALI-ABA 183, 188 n.15 (1998). See also Williamson County, 473 U.S. at 194 n.13 (holding that "because the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied").

n67. 473 U.S. 172, 186 (1985).

n68. See id. at 182.

n69. See id.

n70. See id.

n71. See id. at 183.

n72. See id. at 182. See also MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 353 n.9 (1986). The Court held that a rejection of a "grandiose" plan is not ripe for judicial review if a "less ambitious" plan would be accepted by the local government entity. See id.

n73. See Williamson, 473 U.S. at 182-85.

n74. See id. at 185. See generally Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002). The Court has very recently decided that a temporary taking of a segment of an individual's property will not result in a categorical taking. See id. at 1483-86.

n75. See Williamson, 473 U.S. at 188.

n76. A plat is defined as "a map or plan, especially of a piece of land divided into building lots." Webster's New World Dictionary 1090 (2d ed. 1980).

n77. Williamson, 473 U.S. at 190 (emphasis added).

n78. 477 U.S. 340 (1986).

n79. See id. at 342.

n80. See id. at 351-52.

n81. See id.

n82. Id. at 353 n.9. See generally Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496 (9th Cir. 1990). A municipality's discretion to require a developer to seek approval of an additional less offensive plan in order to ripen his claim is limited to avoid a municipality's abuse of their discretion. See id. at 1506.

n83. See Kendall et al., supra note 63, at 425 (quoting MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 350 n.7 (1986) (stating that "[a] property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain [a final] determination").

n84. See id.

n85. See Mandelker, supra note 20, at 344.

n86. See Quinlan et al., supra note 64, at 660. "Generally one of the most difficult tasks for plaintiffs in a takings case is proving to a court that the case is "ripe' for adjudication." Id.

n87. See id. at 660-61.

n88. See Mandelker, supra note 20, at 343 (citing Tiogo v. Town of Ross, 82 Cal. Rptr. 2d 649 (Cal. Ct. App. 1998); Port Clinton Assocs. v. Bd. of Selectmen, 587 A.2d 126 (Conn. 1991); Daddario v. Cape Cod Comm'n, 681 N.E.2d 833 (Mass. 1997); Joyce v. Multnomah County, 835 P.2d 127 (Or. Ct. App. 1992); Killington, Ltd. v. State, 668 A.2d 1278 (Vt. 1995)).

n89. See Quinlan et al., supra note 64, at 662.

N90. See Palazzolo v. Rhode Island, 533 U.S. 606, 618-26 (2001); Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496, 1501-07 (9th Cir. 1990), aff'd 526 U.S. 687, 694 (1999).

n91. 526 U.S. 687 (1999).

n92. See id. at 694-99; Del Monte Dunes, 920 F.2d at 1499. Before the developer brought suit, he proposed plans for the development of 344, 264, 224, 190 and again for 190 residential units. See id. at 1499.

n93. Del Monte Dunes, 920 F.2d at 1496.

n94. See id. at 1499.

n95. Id. at 1502.

n96. Id. at 1506.

n97. See Del Monte Dunes, 526 U.S. at 694; Del Monte Dunes, 920 F.2d at 1506.

n98. See S. Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 503 (9th Cir. 1990), cert. denied 502 U.S. 943 (1991).

n99. Id. (citing MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 353 n.9 (1986)).

n100. Id.

n101. See generally East Cape May Associates v. New Jersey, 693 A.2d 114, 121-22 (N.J. Super. Ct. App. Div. 1997). Since the developer in East Cape May had not conversed with the Department of Environmental Protection concerning the possible alternatives for his plan, meaningful applications were not thoroughly discussed and his takings claim had not ripened. See id.

n102. Palazzolo v. Rhode Island, 533 U.S. 606, 624-25 (2001).

n103. See Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 191 (1985).

n104. Id.

n105. See infra notes 144-86 and accompanying text.

n106. 533 U.S. 606 (2001).

n107. See id. at 613.

n108. See id.

n109. See id.

n110. See id. at 613.

n111. See Palazolo, 533 U.S. at 613-14. Approximately six feet of fill needed to be installed in some areas before any substantial development could be initiated. See id.

n112. Id. at 614. See generally R.I. Gen. Laws 46-6.1-4 (2001). ""Dredged material' shall mean material excavated from the waters of the state, including rock, gravel, sand, clay, silt, mud, organic material, and material discarded by humans." Id.

n113. See Palazzolo, 533 U.S. at 614.

n114. See id.

n115. See id.

n116. See generally R.I. Gen. Laws 46-23-2 (1996).

n117. See Palazzolo, 533 U.S. at 614.

n118. Id. The permissible amount of development on protected property designated as wetlands is extremely limited. See id.

n119. See id.

n120. Id.

n121. The CRMC stated that the application was "vague and inadequate for a project of this size and nature." Id.

n122. The CRMC stated that Mr. Palazzolo's project would have detrimental effects on the "waters and wetlands of Winnapaug Pond." Palazzolo v. Rhode Island, 533 U.S. 606, 614-15 (2001).

n123. See id. at 615. The proposal was to fill the eleven acres with gravel in order to accommodate such things as cars, trash receptacles, and concrete barbeque pits. See id.

n124. Id.

n125. Id. at 615.

n126. The notion of a per se taking for a deprivation of "all economically viable use" came from the Supreme Court case of Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1020-26 (1992). In order to build two beachfront homes, Mr. Lucas bought two lots on an island that did not require application for the state's coastal building permit at the time of purchase. See id. at 1006-07. Subsequent to his purchase, the State enacted regulations that prevented any building on his lot. See id. at 1007. The Supreme Court ruled that where all economically beneficial use has been taken from a landowner, compensation is per se required. See id. at 1020-26.

n127. See Palazzolo, 533 U.S. at 615-16. The figure of $ 3,150,000 was based on the profits that Mr. Palazzolo claimed he would receive from filling the entire wetlands and dividing the land into seventy-four lots for the construction of a single family home subdivision. See Palazzolo v. Rhode Island, 746 A.2d 707, 711 (R.I. 2000).

n128. See Palazzolo, 533 U.S. at 616.

n129. See Palazzolo, 746 A.2d at 714. Mr. Palazzolo claimed that his property was taken when he applied for a seventy-four lot subdivision. See id. However, he never actually specifically applied for a seventy-four lot subdivision. See id.

n130. See id. at 715. Mr. Palazzolo still had $ 200,000 development value in the remaining upland portion of his property. See id.

n131. See id. at 715-17. The court clarified that although Mr. Palazzolo was the sole shareholder of SGI until 1978, he did not own the corporation's property until the corporation's charter was revoked in 1978 and the land passed to him. See Palazzolo v. Rhode Island, 746 A.2d 707, 715 (R.I. 2000) (citing R.I. Hosp. Trust Co. v. Doughton, 270 U.S. 69 (1926) ("the owner of the shares of stock in a company is not the owner of the corporation's property")). Therefore, in 1978, Mr. Palazzolo acquired the land with notice of the CRMC's wetlands regulations enacted in 1971. See Palazzolo, 533 U.S. at 614.

n132. See Palazzolo, 746 A.2d at 713-14.

n133. See id. at 714.

n134. See id.

n135. See id.

n136. Id. at 714 n.6.

n137. Id. at 717.

n138. Palazzolo, 746 A.2d at 717.

n139. See id. See also Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

n140. See Palazzolo v. Rhode Island, 533 U.S. 606, at 632 (2001).

n141. See id. at 631-32.

n142. See id. at 625-26. The Court ruled that when similar developmental proposals have been rejected and it is clear that the present proposal would also be denied, "federal ripeness rules do not require the submission of further and futile applications with other agencies." Id. at 626.

n143. See id. at 626-30.

n144. Id. at 627.

n145. See Palazzolo, 533 U.S. at 626-30.

n146. 524 U.S. 156 (1998). When analyzing takings jurisprudence, the Court stated that "the existence of a property interest is determined by reference to "existing rules or understandings that stem from an independent source such as state law.'" Id. at 164. (citing Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) (emphasis added)).

n147. See Palazzolo, 533 U.S. at 626-30.

n148. See id. at 627-28.

n149. See id. at 628. The Court stated that a "challenge to the application of a land-use regulation, by contrast, does not mature until ripeness requirements have been satisfied ... until this point an inverse condemnation claim alleging a regulatory taking cannot be maintained." Id.

n150. Id. at 625-26. The Court stated that in situations where past similar proposals have been rejected, and it has become "clear" that the petitioner's present proposal will be rejected, the petitioner does not have to submit "further and futile applications" in order to ripen his claim. Id.

n151. 483 U.S. 825 (1987). Nollan involved a situation where the beach-front property owners challenged a commission's decision that made it a condition that they provide a public easement across their property in order to obtain a rebuilding permit. See id. at 828-29. The Court stated that "so long as the Commission could not have deprived the 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." Id. at 834 n.2.

n152. See supra note 43.

n153. See Palazzolo, 533 U.S. at 642-43 (Stevens, J., dissenting).

n154. See Nollan, 483 U.S. at 829.

n155. Palazzolo, 533 U.S. at 642-43 (Stevens, J., dissenting).

n156. See id. (Stevens, J., dissenting).

n157. Id. at 643 (Stevens, J., dissenting) (emphasis added).

n158. See id. at 641 (Stevens, J., dissenting).

n159. See Gregory M. Stein, Who Gets the Takings Claim? Changes in Land Use Law, Pre-Enactment Owners, and Post-Enactment Buyers, 61 Ohio St. L.J. 89, 89 (2001). Stein addresses the issue of who owns the takings claim (seller or buyer) in the following illustration: "Anton [pre-enactment owner] suffered a loss when he attempted to sell the property and discovered that buyers were reducing their offers to reflect the state's recently enacted restrictions on the use of the land." Id.

n160. See id. at 120-22.

n161. See Palazzolo, 533 U.S. at 638-39 (Stevens, J., dissenting).

n162. Palazzolo, 533 U.S. at 627.

n163. See generally id. at 638-45 (Stevens, J., dissenting) (discussing a subsequent purchaser's ability to collect damages).

n164. See Stein, supra note 159, at 120-22.

n165. See Marcia Coyle, Landowners Win Right to Attack Rules: Decision is a Blow to Environmental Organizations, 23 No. 47 Nat'l L. J. A10 (July 16, 2001). Environmental scholar John Echeverria of Georgetown University Law Center stated that "it would be unreasonable to grant full market compensation to investors who bought swampland and other restricted properties for a song. The idea was knowledgeable investors would have discounted the value of the property based on the restrictions." Id.

n166. Justice O'Connor briefly touched on this point in her concurring opinion. Palazzolo, 533 U.S. at 635 (O'Connor, J., concurring). See also Coyle, supra note 165, at A10.

n167. See Stein, supra note 159, at 99-100.

n168. Coyle, supra note 165, at A10.

n169. See id. In the Coyle article, William H. Mellor of the Institute for Justice states that if the Court ruled against Palazzolo on the investment backed expectations question, "the result would have been a windfall for the state and a chilling effect on legitimate land transactions." Id.

n170. See Dwight H. Merriam & Bryan W. Wenter, Palazzolo Promotes Property Rights, 24 Zoning and Plan. L. Rep. 45, 49 (2001).

n171. Palazzolo, 533 U.S. at 621 (citing City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S.

687, 698 (1999) (emphasis added).

n172. See Palazzolo, 533 U.S. at 624 (citing Brief of Amici Curiae National Wildlife Federation et al. at 9, Palazzolo v. Rhode Island, 533 U.S. 606 (2001)). See generally MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 353 n.9 (1986). "Rejection of exceedingly grandiose development plan does not logically imply that less ambitions plans will receive similarly unfavorable review." Id.

n173. See Palazzolo v. Rhode Island, 746 A.2d 707, 713 (R.I. 2000) (citing Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (denying ripeness when owners alleged that zoning change was a taking but had not sought permission to develop the land)).

n174. Palazzolo, 533 U.S. at 620.

n175. See, e.g., Merriam & Wenter, supra note 170, at 53-54 (stating that "on the ripeness issue, the Court fashioned a refinement of the "final decision' ripeness requirement").

n176. See Palazzolo, 533 U.S. at 620.

n177. Id.

n178. See Merriam & Wenter., supra note 170, at 53.

n179. See Coyle, supra note 165, at A1-A10. William H. Mellor of the Institute for Justice states that there may be "an increase in lawsuits from the people already owning properties who now realize they can challenge constraints." Id. at A10.

n180. For competing opinions on this result of the Palazzolo decision, see Merriam & Wenter, supra note 170, at 53-54. For example, James S. Burling of the Pacific Legal Foundation writes, "today's ruling by the U.S.

Supreme Court sends a clear message to state and federal regulators across the country that, no matter how well-intentioned their environmental goals, they cannot simply put a freeze on the use of private property without giving the owner a fair price for it." Id. at 51-52. The Director of the Environmental Policy Project at Georgetown University Law Center, John D. Echeverria, writes, "the most disturbing aspect of the Palazzolo decision is the majority's apparent endorsement of free-wheeling "partial' taking tests that could lead the courts into constant second guessing of legislative judgments." Id. at 52. See also Coyle, supra note 165, at A10. William H. Mellor of the Institute for Justice states that "the more important point is that for future transactions, the restrictions won't create unreasonable impediments to transfers of land." Id.

n181. See Erwin Chemerinski, Expanding the Protection of the Takings Clause, 37 Trial 70, 72 (2001). Chemerinski predicts that it will soon be known "whether Palazzolo is the start of a major revival of judicial protection of economic liberties. But even by itself, the decision is an important victory for plaintiffs bringing takings claims, and it will make it easier to challenge zoning laws and environmental regulations." Id.

n182. See Frank J. Murray, Court Gives Landowner a Partial Win, Wash. Times, June 29, 2001, at A3.

n183. See Coyle, supra note 165, at A10. Vicki Been of New York University School of Law states that the increased litigation will result in the "risk that those governments [whose land regulations are being challenged] will seek to avoid the cost of litigation by weakening environmental regulations and allowing development that shouldn't proceed." Id.

n184. Merriam & Wenter, supra note 170, at 49.

n185. See id.

n186. See id.

n187. See generally Mass. Regs. Code tit. 310, 10.55(1) (2001).

n188. See generally H. Hamilton Hackney & Alexander C.B. Barnard, Bogged Down in Wetlands Appeals: Proposal for Reform, 45 Boston B. J. 6 (2001) (noting that overlapping appeal procedures make development of

wetlands an extremely cumbersome task for a petitioner); Mass. Gen. Laws ch. 131, 40 (2001) (outlining the extensive procedural steps involved in developing on or near wetlands).

n189. See Hackney & Barnard, supra note 188, at 6.

n190. See id.

n191. See id.

n192. In superior court, a petitioner also bears the burden of showing that the commission's decision is not supported by "substantial evidence" and is, therefore, "arbitrary and capricious." See id. at 18. In Lovequist v. Conservation Commission of Dennis, the Supreme Judicial Court found more than ample reasoning to deny the petitioner's plan to build a bridge across a bog. 393 N.E.2d 858, 865 (Mass. 1979). The court found "substantial evidence" on the effects that dredging for the bridge would have on the ground water supply, thus justifying the commission's denial of the petitioner's claim. Id.

n193. Hackney & Barnard, supra note 188, at 18-19.

n194. See id. at 6.

Because local wetlands bylaws and the WPA typically protect similar (if not identical) interests, little is gained from overlapping state and local regulatory programs, and indeed this dual-track appeal process creates opportunities for project opponents to use procedural delays to defeat (or force the imposition of draconian conditions on) otherwise appropriate development projects.

Id. at 6.

n195. Palazzolo v. Rhode Island, 533 U.S. 606, 621 (2001) (citing City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698 (1999)).

n196. Id. at 622.

n197. But see Commonwealth v. Blair, No. Civ. A. 98-27586, WL 2000 875903 at 6 (Mass. Super. Ct. June 6, 2000) (adopting the Del Monte Dunes decision in a limited sense by stating that "the [wetlands] regulatory means must be "roughly proportional' to furthering the state interest).

n198. Hackney & Barnard, supra note 188, at 6. See also Mass. Gen. Laws ch. 131, 40 (2001); Palazzolo, 533 U.S. at 621 (citing Del Monte Dunes, 526 U.S. at 698).

n199. Palazzolo, 533 U.S. at 621 (citing Del Monte Dunes, 526 U.S. at 698).

n200. Palazzolo, 533 U.S. at 622.

n201. See, e.g., Leonard v. Town of Brimfield, 666 N.E.2d 1300 (Mass. 1996) (holding that post-enactment purchaser could not have had reasonable investment-back expectations despite fact that landowner did not have actual notice of wetlands regulation); FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone, 673 N.E.2d 61 (Mass. App. Ct. 1996), cert. denied 676 N.E.2d 55 (Mass. 1997) (finding that porpoerty owners could not have reasonably expected to build on regulated portion of property since they knew it was subject to regulations at time of purchase).

n202. See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027-28 (1992).

n203. See FIC Homes, 673 N.E.2d at 70; Leonard, 666 N.E.2d at 1303.

n204. See FIC Homes, 673 N.E.2d at 70; Leonard, 666 N.E.2d at 1303.

n205. See contra Palazzolo v. Rhode Island, 533 U.S. 606, 617, 630 (2001) (holding that a post-enactment purchaser's notice of the wetlands regulation is not dispositive of his regulatory takings claim and should be

considered as a factor in analyzing his investment-backed expectations).

n206. 666 N.E.2d 1300 (Mass. 1996).

n207. 673 N.E.2d 61 (Mass. App. Ct. 1996).

n208. See Leonard, 666 N.E.2d at 1303.

n209. See id. at 1302.

n210. See id. at 1303.

n211. See id. "The government is not required to compensate an individual for denying him the right to use that which he has never owned." Id. (quoting Flynn v. Cambridge, 418 N.E.2d 335 (1981)).

n212. See FIC Homes, 673 N.E.2d at 71.

n213. See id. at 70 (stating that "the price FIC paid for the entire thirty-eight-lot parcel should have reflected the limitations imposed by the wetlands by-law").

n214. See id. at 64.

n215. See id.

n216. See id. at 70.

n217. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980)). See also FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone, 673 N.E.2d 61, 70 (Mass. App. Ct. 1996) (quoting Leonard v. Brimfield, 666 N.E.2d 1300 (Mass. 1996).

n218. FIC Homes, 673 N.E.2d at 70. The court put more emphasis on the "investment-backed expectations" prong from Penn Central, 438 U.S. at 124, than the "background principles restricting private property owners interests" theory from Lucas, 505 U.S. at 1029. FIC Homes, 673 N.E.2d at 70.

n219. Palazzolo v. Rhode Island, 533 U.S. 606, 620 (2001).

n220. 681 N.E.2d 833 (Mass. 1997).

n221. See id. at 836-37.

n222. See id. at 838. Under Falmouth's local by-laws, land within an agricultural district "allows for community service, agriculture and community uses." Id.

n223. See id. at 835. The Commission initially denied the project because it "would not enhance or protect open space on the site in a way that respects the importance of [the] sensitive and natural resources of Cape Cod." Id.

n224. See Daddario, 681 N.E.2d at 835, 837.

n225. See id. at 837.

n226. See id. at 835.

n227. See id. at 836.

n228. Id.

n229. See Mandelker, supra note 20, 38.3 (Supp. 2000).

n230. Palazzolo v. Rhode Island, 533 U.S. 606, 620 (2001). Contra Daddario v. Cape Cod Comm'n, 780 N.E.2d 124, 128-29 (Mass. App. Ct. 2002). After the SJC remanded Daddario, it was appealed again to the Massachusetts Appeals Court, which concurred with the SJC that the petitioner's case was not ripe despite the new ripeness holding in Palazzolo. See id.

n231. See supra notes 170-77 and accompanying text.

n232. See Palazzolo v. Rhode Island, 746 A.2d 707, 714 (R.I. 2000). On remand, no instruction was given to the Rhode Island Superior Court in order to evaluate the ripeness of Mr. Palazzolo's case. See Palazzolo v. Rhode Island, 785 A.2d 561 (R.I. 2001).

n233. Palazzolo, 533 U.S. at 620.

n234. See generally id. See also Daddario v. Cape Cod Comm'n, 681 N.E.2d 833, 836 (Mass. 1997).

n235. See Palazzolo,746 A.2d at 714.

n236. See generally Hackney & Barnard, supra note 188, at 6, 9 (noting that dual-track appeal process has been criticized for its repetitive and unfair nature).

n237. See id.; Mass. Gen. Laws ch. 131 40 (2001).

n238. Palazzolo, 533 U.S. at 620.

n239. See generally Mass. Regs. Code tit. 310, 10.55 (1)(2001).

n240. Palazzolo, 533 U.S. at 620, 622.

n241. The Jones Act of 1963 was the first statutory provision protecting wetlands in the nation. See Alexandra D. Dawson, Massachusetts Wetlands and Floodplains Revisited, 4 W. New Eng. L. Rev. 623, 623 n.1 (1983). See generally Mass. Regs. Code tit. 310, 10.55 (1)(2001).

n242. Since Massachusetts has always considered wetlands to be an extremely important resource, Massachusetts courts may utilize the background principles reasoning from the Court in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992), as opposed to the notice-focused "investment-backed expectations" theory from Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). By using the justification of Massachusetts's unfettered interest in protecting wetlands, the courts may claim that the post-enactment purchaser's takings claim - even though it is ripe - is restricted by the state's firmly rooted background principles concerning the protection of its wetlands. See Lucas, 505 U.S. at 1030.

n243. See Mandelker, supra note 20, at 494.

n244. See Penn Cent., 438 U.S. at 137 (holding that plaintiff could not claim that they were completely denied the ability to build within their air rights, since the rights were transferable to at least eight parcels within the vicinity of Grand Central Station).

n245. See Mandelker, supra note 20, at 494. "State legislation authorized a TDR program to implement land use regulations for the preservation of land in New Jersey Pinelands." Id.

n246. See Rith Energy, Inc. v. United States, 270 F.3d 1347, 1350-51 (Fed. Cir. 2001) (refusing to interpret Palazzolo as holding that a pre-enacted restrictive statute was irrelevant to a petitioner's investment-backed expectations). In rejecting the petitioner's takings claim, the Court of Appeals for the Federal Circuit held that although Palazzolo did say that a pre-enacted statute does not bar a post-enactment purchasers takings claim, a pre-enacted statute is a very important factor to consider in evaluating a petitioners investment-backed expectations. See id.

n247. See Daddario v. Cape Cod Comm'n, 780 N.E.2d 124, 128-29 (Mass. App. Ct. 2002) (sustaining the SJC's prior lack of ripeness ruling after a remand and subsequent appeal, despite the interceding Palazzolo ripeness holding).

n248. The Massachusetts DEP's Bureau of Resource Protection lists the following cities and towns as having registered coastal wetlands:

Barnstable, Bourne, Brewster, Chatham, Chilmark, Cohasset, Dennis, Duxbury, Eastham, Edgartown, Essex, Falmouth, Gay Head, Gloucester, Hanover, Harwich, Hingham, Ipswich, Marion, Marshfield, Mashpee, Nantucket, Newbury, Newburyport, Norwell Oak Bluffs, Orleans, Pembroke, Plymouth, Provincetown, Quincy, Rowley, Salisbury, Sandwich, Tisbury, Truro, Wareham, Wellfleet, Westport, West Tisbury, Weymouth [and] Yarmouth.

Bureau of Resource Protection, Wetlands and Waterways Program, at http://www.state.ma.us/dep/brp/ww/files/commlist.htm (last visited Mar. 18, 2003) [hereinafter BRP Wetlands & Waterways].

n249. The inland communities consist of "Dedham, Dover, Marlborough, Millis, Needham, Newton, Norfolk, Walpole, Waltham, Wellesley [and] Westwood." Id.

n250. "Eastham, Hingham, Orleans, Sandwich [and] Truro" are subject to both inland and coastal regulations. Id.

n251. The preamble to the Massachusetts's regulations of bordering vegetated wetlands states that "bordering vegetated wetlands are likely to be significant to public or private water supply, to ground water

supply, to flood control, to storm damage prevention, to prevention of pollution, to the protection of fisheries and wildlife habitat." Mass. Regs. Code tit. 310, 10.55 (1) (2001).

n252. Representatives from the Massachusetts DEP for the Boston area (who asked to remain anonymous) have stated that, if faced with the situation, they would distinguish Palazzolo's unique facts from a post-enactment purchaser of wetlands who seeks compensation under a regulatory takings claim. The DEP would claim that Palazzolo's facts are unique since the wetlands regulations were enacted when he was the sole shareholder of the corporation that owned the restricted land. Hence, he did own the land before the regulations were in place even though he technically acquired the land after SGI's corporate charter was revoked and after the wetlands regulations were enacted.