Environmental Law & Property Rights

Does the Takings Clause Have an Expiration Date?

*By Michael James Barton & Brandon Simmons**

Overview

In the last Term, the United States Supreme Court declined to review two property rights cases: *Guggenheim v. City of Goleta*,[1] from the United States Court of Appeals for the Ninth Circuit, and *CRV Enterprises v. United States*,[2] from the United States Court of Appeals for the Federal Circuit. Some observers expected the Court to grant the petitions for certiorari for these cases because both appellate decisions appeared to depart from the Court's opinion in *Palazzolo v. Rhode Island,* which held that a claim brought under the Takings Clause of the Fifth Amendment could not be dismissed for lack of standing merely because the property owner had purchased the property after it became subject to the regulation effecting the alleged taking.[3] Observers may have had additional hope that the Court would grant certiorari in *Guggenheim* and *CRV Enterprises* because of the circuits that decided the two cases: the Federal Circuit and Ninth Circuit have been described as having the worst and second-worst reversal rates, respectively, among the federal courts of appeal.[4] Instead, the Court denied both petitions for certiorari, thus leaving unanswered the question: does the Takings Clause have an expiration date?

Background: *Palazzolo v. Rhode Island*

We begin with a discussion of *Palazzolo,* the precedent on which the petitioners' briefs in both *Guggenheim* and *CRV Enterprises* relied. In *Palazzolo*, the Court reviewed a decision by the Rhode Island State Supreme Court, in which that court decided that the plaintiff lacked standing to challenge a regulation because at the time the plaintiff acquired the property in question, it was already burdened by the challenged regulation.[5]

The regulation at issue in *Palazzolo* had been promulgated by the Rhode Island Costal Resources Management Council. The council, in an effort to protect the state's coastal properties, passed a number of regulations, including one that restricted development on a piece of land later purchased by Palazzolo. The state supreme court determined that because the property was subject to the regulation at the time of Palazzolo's purchase, the purchase price reflected whatever diminution in value the regulation caused and therefore Palazzolo paid, or should have paid, a lower purchase price, foreclosing any basis for a claim under the Takings Clause. The Supreme Court described the effect of the Rhode Island Supreme Court's decision in stark terms and struck it down: "[The Rhode Island Supreme Court would] put an expiration date on the Takings Clause . . . . *This ought not to be the rule*."[6]

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Guggenheim v. City of Goleta

In 1997, Daniel Guggenheim and others purchased property in an unincorporated part of Santa Barbara County, California. In 2002, the City of Goleta was incorporated, and Guggenheim's land fell within the borders of the incorporated city. At incorporation, Goleta adopted the county's laws, including an existing rent control ordinance to which Guggenheim's property had previously been subjected by the county. One month after incorporation, Guggenheim challenged Goleta's rent control ordinance, claiming that it violated the Takings Clause. The federal district court issued summary judgment for Goleta in 2006, but on appeal, a panel of the Ninth Circuit reversed and remanded. In a 2-1 opinion written by Judge Jay Bybee, the three-judge panel decided that although calculating the diminution in value of a taking under the *Penn Central*' test might prove problematic where the property was subject to the challenged regulation when the plaintiff purchased it, Guggenheim had standing to challenge the regulation under *Palazzolo*. Thus, Guggenheim's challenge would not be rejected merely because the challenged regulation was in effect at the time of his purchase.[8]

However, the Ninth Circuit granted en banc rehearing, and a divided en banc court overruled the earlier three-judge panel's holding. The en banc court found the challenged ordinance to be immune from Guggenheim's attack because the ordinance was in effect at the time of Guggenheim's purchase. The Ninth Circuit sidestepped the Supreme Court's decision in *Palazzolo* by cabining it to its specific factual and procedural setting. The Ninth Circuit's interpretation of *Palazzolo* is so narrow as to render it inoperative; as Judge Carlos Bea wrote in a dissent signed by Chief Judge Alex Kozinski and Judge Sandra Ikuta, the Ninth Circuit's ruling "flouts the Supreme Court's holding in *Palazzolo*."[9]

Under the Ninth Circuit's legal analysis, a government entity theoretically could impose unconstitutional regulatory power, and over time—as titles eventually transfer—fewer and fewer owners would have standing to challenge the regulation. This cannot be: a violation of the Fifth Amendment does not cease to be a violation merely because property changes hands. The Supreme Court establishes in *Palazzolo* that an unconstitutional regulation cannot be laundered into a constitutional regulation by the transfer of title of the regulated property.[10]

CRV Enterprises v. United States

CRV Enterprises owns land that includes a narrow strip of navigable water in Stockton, California. From World War II until 1990—prior to CRV's interest in the land—a wood-preserving plant operated on the land's southern shore. In 1992, the EPA found chemicals from the plant's operations on the land and added the property to its Superfund National Priorities List. In 1999, after seven years of review and several

draft reports, the EPA finally issued a final Record of Decision and ordered the waterway capped and access to it restricted. Three years later, CRV purchased the property, which under California state law included the *littoral rights.* In 2003, CRV filed an inverse condemnation claim against the United States alleging that the EPA's action was a taking. However, since the EPA had not begun its remediation, both sides agreed to a dismissal of the suit without prejudice on ripeness grounds.[11]

In 2006, the EPA installed a sand cap and log boom that physically obstructed CRV's access to the waterway. EPA employees posted "NO ENTRY" signs on the land. CRV Enterprises sued to challenge the federal government's interference with its private property, but the suit was dismissed by the United States Court of Federal Claims on the basis that the Record of Decision was in place at the time CRV purchased the property. The United States Court of Appeals for the Federal Circuit decided that CRV lacked standing to assert a claim under the Takings Clause because it did not own the subject property at the time of the alleged regulatory taking.[12]

The Federal Circuit focused considerable attention on the temporal ordering: that the EPA's Record of Decision preceded CRV's acquisition of the property. However, under *Palazzolo* such regulatory action does not escape constitutional review simply because the government's action occurred prior to the plaintiff's purchase of the land.

Briefs of Amicus Curiae

Both petitions of certiorari attracted the attention of a diverse group of property rights advocates, concerned academics, attorneys, and others. The Cato Institute, the Reason Foundation, the Claremont Institute's Center for Constitutional Jurisprudence, the National Federation of Independent Businesses, and notable law professors from George Mason University, Chapman University, and New York University signed or were amici to either one or both briefs. These briefs centered on the very question that the petitioners believed had been settled under *Palazzolo*: does the Takings Clause have an expiration date? Since the Supreme Court denied certiorari in both of these cases, it seems the answer to a question that had appeared well-settled is now less certain.[13]

The Implications of Not Heeding *Palazzolo*

The potential costs of abandoning *Palazzolo* extend beyond jurisprudential concerns. Under the law of the Federal Courts of Appeals for the Ninth and Federal Circuits, there would be two distinct and unequal classes of landowners: one who purchased property prior to a regulatory taking, and another who purchased property after a regulatory taking. The former class would not have the fundamental property right in question. But the latter class also might suffer because any potential buyer of their property would take into account the value of the right to challenge pre-existing regulations and demand that the sale price be discounted by that amount.

The law of the Ninth and Federal Circuits could lead to significant, uncompensated, and unrecognized takings from small investors, property owners, and retirees who lack the resources to employ sophisticated sales transactions to avoid losing the right to challenge regulations. Large corporations might be able to avoid suffering a similar fate because they could potentially retain their right to challenge regulations by transferring ownership via stock purchases and other types of transactional structures to avoid changing corporate ownership during a sale. Thus, like many property rights abuses, the potential property rights deprivations looming under the law of the Ninth and Federal Circuits would fall disproportionately on the less wealthy and less powerful.

Next Steps

Activists and policy makers should consider whether to improve state law protections against regulatory takings by using the same approach employed in many states after the *Kelo* decision: citizens might work through their legislatures to pass appropriate laws.[14,15] Lawyers who are concerned about property rights could publicize cases implicating *Palazzolo* and work with plaintiffs to continue to petition the Court to bring comfort to those that would rely on *Palazzolo*'s protections.

Endnotes

1 Guggenheim v. City of Goleta, 582 F.3d 996 (9th Cir. 2009).

2 CRV Enters. v. United States, 626 F.3d 1241 (Fed. Cir. 2010).

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

4 Roy E. Hofer et al., *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, Landslide, Vol. 2, No. 3, Jan./Feb. 2010.

5 Palazzolo v. State, 746 A.2d 707 (R.I. 2000).

6 *Palazzolo,* 533 U.S. at 608 & 609 (emphasis added).

7 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

8 Guggenheim v. City of Goleta, 582 F.3d 996 (9th Cir. 2009).

9 *Id.* at 1133.

10 *Palazzolo,* 533 U.S. at 629.

11 CRV Enters. v. United States, 626 F.3d 1241 (Fed. Cir. 2010).

12 *Id.*

13 *See*, *e.g.*, Brief of the Cato Institute as Amicus Curiae in Support of Petitioner, Guggenheim v. City of Goleta, 582 F.3d 996 (9th Cir. 2009) (No. 10-1125); Brief of the Cato Institute et al. as Amici Curiae in Support of Petitioner, CRV Enters. v. United States, 626 F.3d 1241 (Fed. Cir. 2010) (No. 10-1151).

14 Kelo v. New London, 545 U.S. 469 (2005).

15 Inst. for Justice, 50 State Report Card: Tracking Eminent Domain Reform Legislation Since *Kelo*, *available at* http://www.castlecoalition.org/index.php?option=com_content&task=view&id=57 (In the wake of the *Kelo* decision, forty-three states have passed laws aimed at curbing eminent domain abuse laws).