

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 ANTHONY PALAZZOLO, :
4 Petitioner :
5 v. : No. 99-2047
6 RHODE ISLAND, ET AL. :
7 - - - - - x
8 Washington, D.C.
9 Monday, February 26, 2001
10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United
12 States at 1:00 p.m.
13 APPEARANCES:
14 JAMES S. BURLING, ESQ., Sacramento, California;
15 on behalf of the Petitioner
16 SHELDON WHITEHOUSE, ESQ., Attorney General, State of
17 Rhode Island, Providence, Rhode Island; on
18 behalf of the Respondents
19 MALCOLM L. STEWART, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington,
21 D.C.; as amicus curiae, supporting Respondents
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P R O C E E D I N G S

(1:00 p.m.)

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

ORAL ARGUMENT OF JAMES S. BURLING

ON BEHALF OF PETITIONER

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

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

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

MR. BURLING: That is correct, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 MR. BURLING: To 200,000.

2 QUESTION: Some -- or that what you think is
3 equivalent to Lucas zero, because it might have been worth
4 3 million. We'll have a record here in findings and all
5 kinds of argument about what the value of the house would
6 have been, the value of the place would have been, how do
7 we know? What --

8 MR. BURLING: I think, Your Honor, the best way
9 of telling is looking at the State's opposition to the
10 petition for cert where they say in there that they would
11 gladly allow Mr. Palazzolo to build a single family home
12 --

13 QUESTION: Twice in the brief in opposition they
14 acknowledge that the CMRC would have approved a single
15 home site, which would have netted greater proceeds i.e.
16 \$200,000 at less risk, they say that on page four, and
17 again at say, page 19, they say specifically the Council
18 would be happy to have petitioner situate a single home
19 thus allowing petitioner to realize \$200,000. So I, you
20 know, I thought that was not in the case when we took it.

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

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

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

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

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

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

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

16 QUESTION: Williams used nuisance?

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

24 QUESTION: Because they were going to have
25 portable toilets?

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

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

11 MR. BURLING: Not precisely, Your Honor. The
12 baseline of our claim is that Mr. Palazzolo can make no
13 use whatsoever of any of his wetland. Now, the issue of
14 --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 MR. BURLING: The State Supreme Court did not in
17 this case base its decision on the existence of a
18 nuisance. Indeed the finding of nuisance was appealed to
19 the State Supreme Court and that could be found at pages
20 12 to 14 of Mr. Palazzolo's brief to the State Supreme
21 Court, but the issue was never reached --

22 QUESTION: They never reached it.

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

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

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

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

8 MR. BURLING: Correct. Correct.

9 QUESTION: And that was turned down.

10 MR. BURLING: Correct.

11 QUESTION: For what reason?

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

15 QUESTION: Specificity in what respect?

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

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

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

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

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

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

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

12 MR. BURLING: Yes, Your Honor.

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

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

1 there is --

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

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

9 QUESTION: Small compared to the 18 acres.

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

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

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

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

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

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

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

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

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

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

8 MR. BURLING: There are two answers to that,
9 Your Honor, a theoretical one and a practical one to this
10 case. Theoretically, in defining what background
11 principles, I would suggest that we go back as far in time
12 as before there was an existence of pervasive regulation.
13 But that rather theoretical issue is one that this Court
14 does not need to fully address because as we pointed out
15 in our brief and as I said previously, as of the early
16 1960s there was absolutely no requirement for a litigant
17 to obtain a permit to fill wetland. We also know in the
18 century and a half before that that there was a right, not
19 only to fill wetland but to fill tidelands which are those
20 lands that are under water all the time.

21 QUESTION: Were those rights still extant in
22 1985?

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

25 QUESTION: So what's your answer? What?

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

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

5 MR. BURLING: Yes, Your Honor. They existed in
6 1985 because the imposition of a permitting requirement
7 that was adopted in 1971, as I said earlier, does not
8 effect the background principles of property law. It does
9 not change the title. It simply requires a landowner to
10 go through more of a permitting process. It requires a
11 landowner to be more careful about what that landowner is
12 trying to do. But it --

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

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

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

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

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

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

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

22 QUESTION: You say not precisely, you would not
23 have any problem with saying that there's a taking if you
24 have a set-back requirement of 900 yards on a lot that is
25 901 yards wide. Would that trouble you to say that that's

1 a taking?

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

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

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

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

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

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

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

1 feet wide?

2 MR. BURLING: Absolutely, Your Honor.

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

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

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

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

25 QUESTION: But would you look to the reasons for

1 the state regulation ?

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

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

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

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

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

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

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

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

25 MR. BURLING: Government regulates all the time

1 that it's reasonable to --

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

4 MR. BURLING: You are correct, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 QUESTION: General Whitehouse.

17 ORAL ARGUMENT OF SHELDON WHITEHOUSE

18 ON BEHALF OF RESPONDENTS

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

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

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

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

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

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

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

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

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

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

17 GENERAL WHITEHOUSE: No, Your Honor.

18 QUESTION: Well, it's too late now.

19 GENERAL WHITEHOUSE: Well --

20 QUESTION: Well, you didn't say --

21 GENERAL WHITEHOUSE: Sorry, Your Honor.

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

24 GENERAL WHITEHOUSE: Yes.

25 QUESTION: You do say a portion of the site

1 would have been approved as a single home site.

2 GENERAL WHITEHOUSE: Correct.

3 QUESTION: Which is true.

4 GENERAL WHITEHOUSE: Which is true.

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

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

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

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

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

8 QUESTION: Is it -- is it your position, General
9 Whitehouse, if someone has, say a section of land, a
10 square mile, either -- a square mile. And picks out a
11 10-acre plot at one edge of that and applies for zoning
12 use and claims that it's denied, he claims to have been
13 denied all economic use. That the fact that he has a
14 remaining everything square mile minus 10 acres means that
15 that has to be taken into consideration, too?

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

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

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

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

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

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

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

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

1 that this case was unripe on two grounds, and the first
2 ground was that there had been no application for the
3 74-unit subdivision. And that to us makes perfect sense
4 because in the Rhode Island courts, unlike in this Court,
5 the petitioner presented that 74-unit subdivision as a
6 proposal and not as a claim of value for determining the
7 size of the taking. And so that is very likely responsive
8 to the argument made to that court that this was a
9 proposal, and even if it was not responsive to that, I
10 would argue, even if they were asserting a proposition of
11 Rhode Island ripeness law that we want in Rhode Island to
12 have people when they come and apply for a use or come and
13 make a takings claim for a particular use to have applied
14 for that same use at some point. And in this case --

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

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

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

9 QUESTION: How do we --

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

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

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

15 GENERAL WHITEHOUSE: Yes.

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

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

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

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

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

8 QUESTION: Pondward.

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

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

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

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

17 QUESTION: Yes, you have answered it.

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

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

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

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

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

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

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

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

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

9 GENERAL WHITEHOUSE: It would be very, very
10 hard.

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

13 GENERAL WHITEHOUSE: It would be very, very
14 hard. There is testimony, Your Honor, that it's worth
15 \$7,000 an acre as an amenity value to the existing
16 uplands.

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

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

23 QUESTION: Okay. I mistook you then.

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

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

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

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

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

21 GENERAL WHITEHOUSE: Correct.

22 QUESTION: But the question is, what property?

23 QUESTION: What property?

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

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

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

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

17 QUESTION: I thought you said a moment ago --

18 GENERAL WHITEHOUSE: From the administrative
19 record.

20 QUESTION: -- that the wetlands had a value of
21 \$7,000 an acre?

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

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

1 GENERAL WHITEHOUSE: From the trial record.

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

7 GENERAL WHITEHOUSE: Correct.

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

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

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

8 QUESTION: I will agree with you. Let's say in
9 your example that they say, well, the appropriate parcel
10 is the wetland plus one acre. And the Government says,
11 no, it's the wetland plus the remaining 10,000 acres minus
12 the wetland. Perhaps neither of those is acceptable, but
13 perhaps we would look to the usage in the area to
14 determine, you know, what are the -- what's the range of
15 developable parcels about which we can assume the
16 Government was regulating? Maybe in Texas it would be
17 10,000 acres, maybe in Manhattan it would be the one acre.
18 But don't we have to look to some criterion of usage to
19 determine what is a reasonable basis for defining a parcel
20 in order to make the calculation?

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

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

3 GENERAL WHITEHOUSE: That's what you got.

4 QUESTION: Yeah.

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

16 QUESTION: Could you address --

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

20 GENERAL WHITEHOUSE: I didn't mean.

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

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

1 single owner, if there's a heavily burdened portion of
2 that parcel and then over time it gets whittled down to --
3 you should be able to look back to some point in time,
4 arguably the owner, at the time that the challenged
5 regulation went into effect and define the parcel thusly
6 --

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

9 GENERAL WHITEHOUSE: Yes.

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

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

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

5 QUESTION: Period.

6 GENERAL WHITEHOUSE: Period.

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

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

25 QUESTION: Do you know --

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

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

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

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

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

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

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

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

9 ORAL ARGUMENT OF MALCOLM L. STEWART

10 AS AMICUS CURIAE,

11 SUPPORTING RESPONDENTS

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

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

25 QUESTION: He's relying on the just compensation

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

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

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

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

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

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

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

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

25 QUESTION: Well, why and what principle governs?

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

6 QUESTION: It didn't sound like it today.

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

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

12 MR. STEWART: Right, merely because the property
13 retains a value greater than zero. And the explication in
14 the body of the petition of that third question presented
15 made it clear that Mr. Palazzolo was not claiming the
16 wetlands portion are a -- constitute a separate parcel and
17 the value of that is zero. Rather the basis of the
18 takings claim as it came to the Court in the cert petition
19 was that the parcel as a whole had a value of only
20 \$200,000 and that that value was so small in comparison to
21 the purported 3 million dollar figure as to amount to a
22 total deprivation of economically beneficial use.

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

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

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

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

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

1 figure means. Petitioner's appraiser, in arriving at the
2 3 million dollar figure, looked at a nearby tract,
3 presumably on uplands, and said that lot sold for \$125,000
4 and he said the lots that could be constructed out of
5 wetlands are -- could be made comparable to that. And if
6 you sold 74 of them at \$125,000 each, you would come up
7 with a figure of a little over 9 million dollars. He
8 deducted the expenses that he thought would be incurred in
9 actually doing the fill and came up with a net of 3
10 million --

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

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

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

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

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

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

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

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

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

3 QUESTION: You're going to do that completely
4 100 percent, what do you do about the gas station?

5 MR. STEWART: I'm not sure that I understood the
6 --

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

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

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

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

1 QUESTION: What goes into that ordinarily?

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

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

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

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

22 QUESTION: Thank you, Mr. Stewart.

23 Mr. Burling, you have seven minutes remaining.

24 REBUTTAL ARGUMENT OF JAMES S. BURLING

25 ON BEHALF OF PETITIONER

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

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

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

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

25 QUESTION: I thought the decision we were

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

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

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

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

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

5 MR. BURLING: Either way, Your Honor, the
6 200,000 figure does include a so-called \$7,000 per acre
7 attribution from the wetlands that cannot be used. I am
8 not sure that that is a legitimate way of looking at the
9 value of this property. If that remaining wetland
10 belonged to the State, if it had been taken by the State,
11 which is indeed what we assert here, the value to the
12 upland owner would be the same, whether or not title
13 allegedly belonged to the owner or not. They're talking
14 about the valley from a nice view. What we are saying is
15 that nice view has been taken by the State. And so the
16 true value of what the upland is, if you do not add in
17 this attribution is probably significantly less than that,
18 indeed in the trial transcript, in the testimony of Thomas
19 Andolfo at pages 662 to -- 682 to 683 is where this
20 \$200,000 value comes from, it talks about a few dollars
21 being spent to improve the road, and then primarily the
22 rest of the value will come from this attribution of the
23 remaining area.

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

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

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

21 QUESTION: Why not?

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

1 property was worth at the end of the day.

2 QUESTION: Suppose he would pay \$200,000?

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

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

8 MR. BURLING: Oh, yes.

9 QUESTION: The value is 200,000.

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

15 QUESTION: No, no, I'm trying to figure out,
16 Lucas versus Penn Central. Why isn't that enough? Take
17 everything in your favor, you admit the property is worth
18 200,000, and then there's some testimony here that if, if,
19 if, if, if, if, if, it might have been sold for 3 million,
20 okay, it still has 200,000 left, why isn't that good
21 enough? Go to Penn Central if you want some recovery.

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

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

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

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

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

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