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WLF TO SEEK SUPREME COURT REVIEW IN LANDMARK TAKINGS CASE

(McQueen v. South Carolina Dep't of Health and Env'tl. Control)

The Washington Legal Foundation (WLF) is preparing a petition for certiorari to be filed with the U.S. Supreme Court in a case where WLF represents a property owner whose land was rendered worthless by state wetlands regulations.

WLF's legal challenge comes under the Fifth Amendment's Takings Clause, which provides, "nor shall private property be taken for public use, without just compensation." In particular, WLF's claim is that the government must pay compensation whenever its regulation deprives private property of all economically viable use and that the absence of reasonable or distinct investment-backed expectations is irrelevant to that claim.

This case arose when WLF's client, Sam McQueen, a farmer and longtime citizen of South Carolina, sought to develop two lots of residential coastal property that he had bought in the early 1960s. In 1991 he applied for permits with the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (OCRM) to build a bulkhead and to backfill the land in preparation for building single-family homes. Through bureaucratic ineptitude, one of the permit applications was lost and OCRM instructed McQueen to reapply. In 1993 McQueen resubmitted permit applications, which OCRM ultimately denied on the ground that the land had become a protected wetland. OCRM doggedly maintained this position through subsequent administrative proceedings, despite a recommendation by its own hearing officer that the government grant a permit to develop one of the two lots.

Having exhausted his administrative remedies, McQueen sought relief from the South Carolina Court of Common Pleas. There McQueen raised two arguments. First, he asserted that OCRM had not validly denied the permits. Second, he pointed out that if OCRM's denial were valid, then his land would be stripped of all economically beneficial use and, therefore, the federal Constitution required South Carolina to compensate him for the private property that its wetlands regulation had taken for public use. In support of his position, McQueen cited *Lucas v. South Carolina Coastal Council*, a case where the U.S. Supreme Court had held that the Constitution nearly always requires compensation when an owner can show that a government regulation has deprived entirely his property of all economically viable use. The court found that

OCRM had validly denied the permit applications but agreed with McQueen that the state owed him compensation to the tune of \$100,000.

The South Carolina Court of Appeals affirmed most of the lower court's decision. The court of appeals labeled the government's action "a textbook taking" and agreed that McQueen deserved compensation because the state regulation essentially confiscated his land.

However, the Supreme Court of South Carolina reversed. While acknowledging that "[i]t is uncontested the permit denial at issue here deprives respondent of all economically viable use of his property," the court ruled that the state owed McQueen no compensation at all because the regulation had not interfered with McQueen's "distinct investment-backed expectations." It arrived at this amazing conclusion based solely on the fact that McQueen delayed applying for development permits. "His prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations." A month later the court denied McQueen's petition for rehearing, thus paving the way for WLF's appeal to the U.S. Supreme Court.

"This is a bellwether Takings case with implications for every landowner in America," said Shawn Gunnarson, WLF's Senior Counsel for Litigation Affairs. "The U.S. Supreme Court's decisions prohibit the government from regulating land to the point of confiscation unless it pays the owner for his loss, but that is precisely what South Carolina has done here. Given the importance of the issue and substantial confusion among the lower courts, we believe that this case presents an unusually strong candidate for Supreme Court review."

The Washington Legal Foundation is a nonprofit public interest law and policy center with supporters nationwide. It devotes a significant portion of its resources to defending and promoting the principles of free enterprise and individual rights.

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