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SOUTH CAROLINA SUPREME COURT REJECTS PROPERTY RIGHTS CLAIM IN MAJOR TAKINGS CASE (*McQueen v. South Carolina Coastal Council*)

In a decision that will have a major impact on property owners in South Carolina and elsewhere, the Supreme Court of South Carolina has ruled that even though a land use regulation has the effect of destroying all economic value of private property, the government is not subject to the Takings Clause of the Fifth Amendment because the property is allegedly held in the "public trust." In so ruling, the Court accepted arguments made by regulators and activist environmental groups, and rejected arguments made by the Washington Legal Foundation (WLF) on behalf of the property owner that the Fifth Amendment and U.S. Supreme Court precedent requires just compensation when a regulation destroys all economic value and use of the property. The ruling came after a remand of the case by the U.S. Supreme Court in 2001.

"The South Carolina Supreme Court decision sets a dangerous precedent for all property owners," said Paul Kamenar, WLF's Senior Executive Counsel. "Henceforth, private property can be taken without just compensation so long as the regulators claim the property is held for the benefit of the public under the so-called 'public trust' doctrine. WLF will again appeal this adverse decision to the U.S. Supreme Court," Kamenar added.

The original adverse ruling was vacated by the U.S. Supreme Court in 2001 and remanded to the South Carolina Supreme Court when the High Court granted WLF's petition for certiorari in the *McQueen* case following the Court's decision in *Palazzolo v. Rhode Island*. *Palazzolo* held that an owner does not lose his constitutional right to compensation merely by acquiring property *after* a restrictive property development regulation goes into effect. For that reason, the South Carolina Supreme Court should have readily found that a taking occurred in this case, especially where the owner acquired the property 15 years *before* the wetlands regulation at issue was enacted.

However, in an unusual move, the South Carolina Supreme Court subsequently ordered the parties to brief issues that were never raised in the case in an apparent attempt to side-step the key point upon which the case was remanded by the U.S. Supreme Court. In particular, the

South Carolina Supreme Court had asked for briefing on issues that implicated the so-called "public trust doctrine," a doctrine that has been aggressively advocated by environmental groups in recent years to defeat takings claims.

The public trust doctrine allows the government to regulate private property along navigable waterways to prevent interference with navigation or fishing. But the property in this case are two residential lots in the middle of a neighborhood. Extending the "public trust" doctrine from the water's edge to residential lots will give regulators enormous confiscatory powers. Based on a government report, the recent decision may affect more than 370,000 acres of private property that fits the same definition of a "tideland" relied on by the court to find that McQueen had not suffered a taking. Because of the court's ruling, thousands of South Carolinians now face the possibility of total confiscation without the compensation guaranteed them by the Fifth Amendment.

This case arose when WLF's client, Sam McQueen, a farmer, tried to build on two quarter-acre residential lots that he had purchased in Myrtle Beach 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 put up bulkheads for erosion control and to backfill his land in preparation for building two single-family homes. OCRM denied the permits in 1993 on the ground that the land had now become a wetland, even though the entire neighborhood had been developed.

McQueen filed suit, asserting that the denial of the development permits stripped the land of all economically beneficial use; therefore, the Fifth Amendment would require OCRM to compensate him for the property that has been effectively taken by the wetlands regulation. To support his position, McQueen relied on *Lucas v. South Carolina Coastal Council*, a case where the U.S. Supreme Court rebuked the South Carolina Supreme Court and ruled that the Fifth Amendment nearly always requires compensation when an owner can show that a government regulation has totally deprived his property of all economically beneficial use. In its first decision, the South Carolina Supreme Court denied the claim on questionable grounds that Mr. McQueen lacked investment-backed expectations to develop his property. In its second decision, the Court adopted the "public trust" rationale supported by activists including the Sierra Club, National Wildlife Federation, and the local League of Women Voters. Briefs in support of WLF's position were filed by the National Association of Home Builders and the Pacific Legal Foundation.

WLF's brief was prepared with the *pro bono* assistance of Shawn Gunnarson of White & Case, LLP, in Washington, D.C., and local counsel Ronald Norton of Conway, South Carolina. WLF's petition to the U.S. Supreme Court is expected to be filed by June.

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For further information, contact Paul Kamenar, WLF Senior Executive Counsel, at 202-588-0302. WLF's brief can be found on its website at www.wlf.org.