

June 29, 2001

SUPREME COURT RETURNS WLF TAKINGS CASE TO SOUTH CAROLINA

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

The U.S. Supreme Court has granted the petition for certiorari filed by the Washington Legal Foundation (WLF) in a case where WLF is representing a farmer whose land was rendered worthless by a state wetlands regulation.

In a one-sentence order, the Court granted WLF's petition for certiorari, vacated the South Carolina Supreme Court's judgment, and remanded to that court for further proceedings in light of the U.S. Supreme 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 regulation goes into effect. For that reason, the South Carolina Supreme Court should readily find a taking in this case, where the owner acquired the property 15 years *before* the wetlands regulation was enacted.

This case arose when WLF's client, Sam McQueen, a farmer, tried to build on residential 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 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 become a legally protected wetland. The agency has stubbornly maintained this position ever since.

McQueen was forced to file a lawsuit. He asserted that OCRM had not validly denied the permits. He also pointed out that if OCRM's denial were valid, his land would be stripped of all economically beneficial use and, therefore, the federal Constitution would require OCRM to compensate him for the property that its wetlands regulation had taken for public use. To support his position, McQueen cited *Lucas v. South Carolina Coastal Council*, a case where the U.S. Supreme Court decided that the Constitution nearly always requires compensation when an owner can show that a government regulation has totally deprived his property of all economically beneficial use. The South Carolina 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

the trial court's decision to award McQueen compensation, labeling the government's action "a textbook taking."

But in a decision issued last year, the Supreme Court of South Carolina reversed. While admitting that "[i]t is uncontested the permit denial at issue here deprives respondent of all economically beneficial use of his property," the court ruled that OCRM owed McQueen no compensation because the regulation had not interfered with McQueen's "distinct investment-backed expectations." The court defended that surprising conclusion based on McQueen's "prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations . . ." A month later the court denied McQueen's petition for rehearing, paving the way for WLF's appeal to the U.S. Supreme Court.

In the petition for writ of certiorari filed with the U.S. Supreme Court, WLF had urged review for four reasons. First, WLF argued that that decision creates a nationwide conflict among seven decisions handed down by federal appellate courts and state supreme courts. Second, WLF contended that the South Carolina Supreme Court's decision is inconsistent with the U.S. Supreme Court's decisions in *Lucas* and other cases interpreting the Constitution. Third, WLF pointed out that the issue in the case—whether a property owner is entitled to compensation when he proves that a regulation deprives him of all economically beneficial use of his property without also having to prove that the regulation frustrates his distinct or investment-backed expectations—is a recurring issue of national importance that only the Court can finally resolve. Finally, WLF pointed out several reasons why the Court ought to hear *this* case, rather than awaiting another opportunity to address the issue raised by Mr. McQueen.

"We are gratified that the Supreme Court has allowed Mr. McQueen to seek relief in the South Carolina Supreme Court," said Shawn Gunnarson, WLF's Senior Counsel for Litigation Affairs. "Once that court has an opportunity to review the U.S. Supreme Court's decision in *Palazzolo*, we feel confident that South Carolina will be ordered to pay the compensation to which Mr. McQueen is entitled."

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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