Litigation Update

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SOUTH CAROLINA SUPREME COURT RECONSIDERS MAJOR TAKINGS CASE

(*McQueen v. South Carolina Coastal Council*)

The Washington Legal Foundation (WLF) filed a brief with the South Carolina Supreme Court urging it to rule that a categorical taking occurred when South Carolina refused to allow any development on two lots owned by WLF's client, Sam McQueen; consequently, he is entitled to just compensation under the Fifth Amendment of the U.S. Constitution for the regulatory taking.

This case was remanded to the South Carolina Supreme Court by the U.S. Supreme Court last summer when the High Court had granted WLF's petition for certiorari 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 readily find a taking in this case, where the owner acquired the property 15 years *before* the wetlands regulation was enacted.

However, the South Carolina Supreme Court subsequently ordered the parties to brief other issues which WLF contends are irrelevant to the case in an apparent attempt to side-step the key issue upon which the case was remanded by the U.S. Supreme Court. In particular, the South Carolina Supreme Court has asked for briefing on issues that implicate the "public trust doctrine," an issue that has been aggressively advocated by environmental groups in recent years. The public trust doctrine basically allows the government to require private property to be left in its natural state to serve certain environmental values, such as beach protection, without providing compensation.

This case arose when WLF's client, Sam McQueen, a farmer, tried to build on two small 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 legally protected wetland.

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 cited *Lucas v. South Carolina Coastal Council*, a case where the U.S. Supreme Court decided 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. The South Carolina court found that OCRM had validly denied the permit applications but agreed with McQueen that the state owed him compensation of $50,000 for each of the two lots. 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 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," even though Mr. McQueen was in no financial position to develop the properties until recently.

In the petition for writ of certiorari filed with the U.S. Supreme Court, WLF had urged review contending that the South Carolina Supreme Court's decision was inconsistent with the U.S. Supreme Court's decisions in *Lucas* and other cases interpreting the Takings Clause. As noted, the Court granted review and remanded the case to the South Carolina Supreme Court to rehear the case in light of *Palazzollo.*

In its 50-page brief, WLF argued that Mr. McQueen should be entitled to just compensation because the state has denied him all economically viable use of his property while requiring him to pay taxes on the two lots. In fact, Mr. McQueen was not even allowed to permit his friend to park a small boat on the lot. And yet all of Mr. McQueen's adjacent neighbors have been allowed to build homes on their property.

While WLF argued that, under controlling precedent, Mr. McQueen is entitled to just compensation, an array of environmental activists have filed briefs opposing WLF and its client. These activists include 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.

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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.