

No. 40717-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KARL J. THUN and VIRGINIA THUN, husband and wife; THOMAS
PAVOLKA; VIRGINIA LESLIE REVOCABLE TRUST; and WILLIAM AND
LOUISE LESLIE FAMILY REVOCABLE TRUST,

Appellants,

v.

CITY OF BONNEY LAKE, a municipal corporation,

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

This lawsuit asserts a regulatory takings claim. Karl and Virginia Thun, Thomas Pavolka, the Virginia Leslie Revocable Trust and the William and Louise Leslie Family Revocable Trust (sometimes collectively referred to as “Thun”) together own 37 acres of vacant land at the western entrance to the City of Bonney Lake (the “City”). On the eve of Thun’s development of the land for a 575 unit condominium project, the City downzoned 30 of the 37 acres from high density residential (C-2 allowing 20 residential units per acre) to essentially open space (RC-5 allowing only one residential unit for each five acres). Under RC-5, no more than 6 residential dwellings may be constructed on the combined property. Thun’s regulatory takings claim is narrow and focused. It is based upon the profound economic impact this extreme reduction in residential density had on their property.

Prior to commencing this regulatory takings lawsuit, the Thun parties sued the City claiming their development rights for high density residential use were vested by reason of an application for development. The trial court agreed. The Court of Appeals disagreed, and the Supreme Court in a 5-4 decision affirmed the Court of Appeals. *Abbey Road Group, LLC v. Bonney Lake*, 167 Wn.2d 242, 218 P.3d

180 (2009). Thun also appealed the downzoning to the Growth Management Board without success.

While the Supreme Court decision was pending, Thun filed this action alleging violation of substantive due process¹ and a regulatory takings claim by reason of the density downzone. Although downzones are not uncommon, the Thun downzone was extreme. It resulted in a 99% decrease in allowable density with a corresponding 99% decrease in property value. Among the stated purposes of the downzone were to preserve the magnificent tree lined view for visitors entering the City from the West and provide valuable wildlife habitat and open space.

The City requested and received a stay, claiming the taking action was not “ripe” until the Supreme Court decided Thun’s “vested rights” claim. When that issue was finally decided against Thun, the stay was removed. The City then moved for summary judgment on procedural grounds, claiming that Thun’s takings claim still was not ripe. The City argued that Thun was first required to apply for a development permit to clarify the extent of development permitted under the RC-5 zoning.

Thun responded that the case is already ripe for adjudication because a development permit under RC-5 zoning is not necessary to

¹ Thun later voluntarily dismissed the substantive due process claim. (CP 432-32.)

determine the extent of the density limits imposed by the RC-5 zone. The RC-5 zone regulations unambiguously state that the maximum residential density allowed is 1 dwelling unit per 5 acres. BLMC 18.20.050(A). The RC-5 zoning regulations make no provision for a variance from the maximum allowed residential density. To the contrary, the Bonney Lake Municipal Code expressly prohibits any variance from the maximum allowed residential density or allowable uses set in any zoning district. BLMC 14.110.010(A).

The invariable density restriction imposed by the challenged regulation was confirmed by the undisputed evidence. Thun submitted a declaration from a qualified land planner stating that the allowable uses and densities under the new zoning were clear on the face of the ordinance. Application for a permit will not clarify the extent of development permitted by the RC-5 zoning or change the maximum allowable uses and density. The density limits created by the challenged regulation cannot be waived or varied through the exercise of administrative discretion (unlike many environmental regulations). In his deposition, the City's Planning Director confirmed this fact, stating clearly and repeatedly that there was no way for an applicant to obtain a greater density. No evidence to the contrary was presented.

Thun agrees with the with the rule on ripeness as clearly stated in *Saddle Mountain Minerals v. Joshi*, 152, Wn.2d 242, 252, 95 P.3d 1236 (2004): “Where a landowner has not sought a variance or waiver from the land use restriction, a taking claim is not ripe.” In this case, however, there was no variance for which Thun could apply to increase the maximum density allowed on the downzoned property. There being no question as to the densities permitted under the challenged regulation (the density downzone), which is the only inquiry required in a “ripeness” analysis, the ripeness requirement of a final decision was satisfied. As the U.S. Supreme Court has directed

Once the permissible uses of the property are known to a reasonable degree of certainty the ripeness doctrine requires nothing further from the landowner.

Palazzolo v. Rhode Island, 533 U.S. 606, 620, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001).

Recognizing that its ripeness challenge was in trouble, the City shifted grounds. It argued that application for a permit served a purpose other than clarifying densities allowed under the challenged ordinance. Application might revisit other land use regulations, apart from the regulation being challenged, which would limit development.

Without conceding the City’s point, Thun answered that other regulatory limits, if any, were irrelevant to the ripeness analysis.

Ripeness only asks the question: Do we know with reasonable certainty the residential density limits imposed on Thun's property by the challenged ordinance? Limits that other regulations may impose on development are relevant only to the separate and later economic impact analysis which is part of any regulatory taking claim. (See discussion of "Penn Central factors" at pages 19-20.) The question of economic impact is to be addressed at the trial on the merits; it is not decided during the procedural ripeness inquiry.

Nonetheless, the trial court erroneously conflated the separate doctrines of ripeness and economic impact. The trial court said:

... you need to determine if there is any viable economic use of the land. I don't think that's been done.

(VTP at 19.) After a truncated oral argument, a written order was filed two days later granting the City's motion. The court did not explain why it considered Thun's takings claim to be unripe. Thun's motion for reconsideration was later denied without oral argument and without explanation of the basis for the court's ruling.

Thun surmises that the trial court misunderstood the procedural doctrine of ripeness as applied to regulatory takings claims and erroneously confused fitness for review (ripeness) with the review itself (economic impact). Ripeness is a procedural issue answered before trial. It does not deal with the merits of the claim. The ripeness

requirement merely ensures that the jury will know with reasonable certainty the use limitations imposed by the challenged ordinance – in this case, the maximum allowable density applied to Thun’s property. Once this threshold inquiry is answered and the case is ripe, the jury then proceeds to determine one of the ultimate questions, which is the economic impact of the regulation on the property. Economic impact is answered during trial, with the aid of expert testimony, to include appraisers, land use planners, engineers and developers. It is not a procedural issue. It goes to the merits of the takings claim itself.

The trial court improperly summarily rejected the merits of Thun’s takings claim on a summary judgment motion that should only have addressed the threshold question of ripeness. Compounding its error, the trial court totally disregarded Thun’s evidence that the downzone left Thun with no economically feasible use of the property.

II. ASSIGNMENTS OF ERROR AND ISSUES

The trial court erred in entering summary judgment dismissing Thun’s takings claim for lack of ripeness. This error presents the following issue:

Bonney Lake radically reduced the allowable residential density on Thun’s property. If no administrative relief is available to recover any of the lost density, is Thun’s takings claim ripe for trial?

III. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

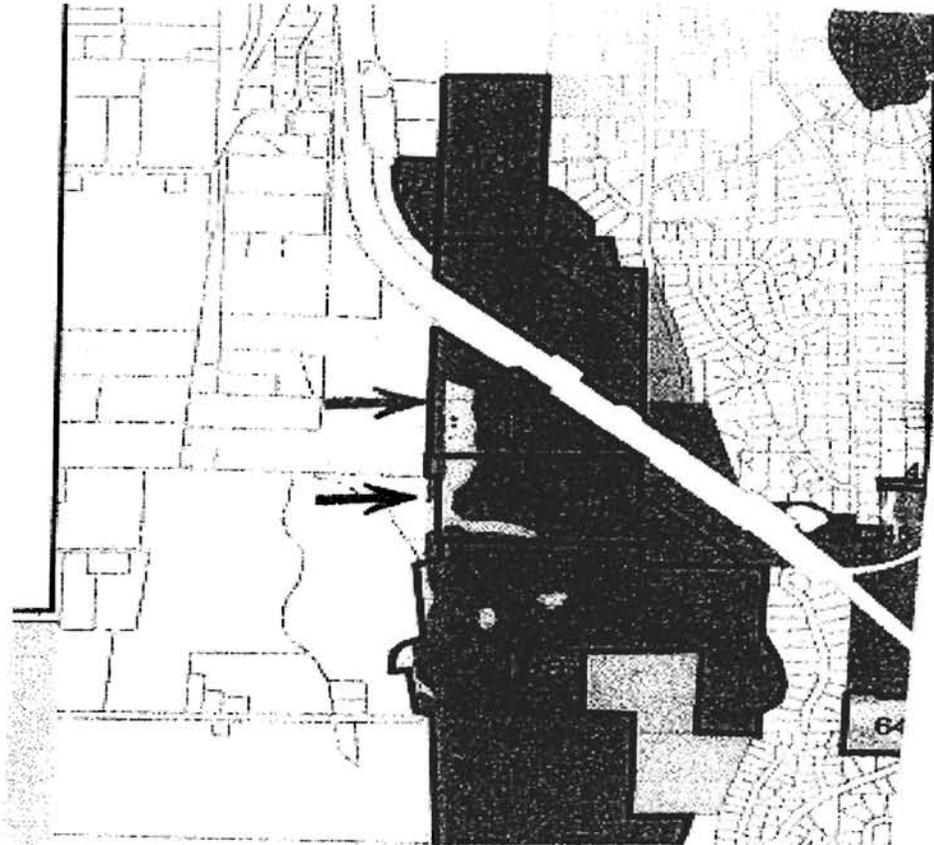
Though this appeal requires the Court to address only the question of ripeness, the facts supporting the merits of Thun's takings claim – that the extreme density downzone had an extreme impact on the property – provides helpful background. Those facts are set forth below. Again, the merits of Thun's claim are not before the Court. The question is whether Thun's claim is ripe for a trial.

If the merits were before the Court on summary judgment, it must be acknowledged that Thun is the only party that presented evidence to the trial court regarding the economic impact of the extreme downzone. (*See* CP 475-543.) Thun's undisputed evidence cannot be disregarded on summary judgment. *Fitzpatrick v. Okanagan City*, ___ Wn.2d ___, ___ P.3d ___. 2010 WL 3432591 (September 2, 2010). In any event, the following facts led to Thun's takings claim.

The Thun Parcels

Karl and Virginia Thun, and Thomas Pavolka (collectively "Thun") own a 25 acre tract of wooded land located adjacent to SR 410 at the west entrance to the City of Bonney Lake (the "City"). The Thun property is shown on the map below as parcel number 19. It consists of two legal parcels, purchased by Thun in 1994 for investment purposes. Prior to September 13, 2005, both parcels were

zoned C-2 (commercial). One of the parcels became zoned C-2 in 1963 when it was annexed into the City. The other parcel became zoned R-1 in 1976 when annexed into the City and was rezoned C-2 by the City in 2000 on its volition. (CP 475-76.)



The Leslie Parcels

Plaintiffs Virginia Leslie Revocable Trust and William and Louise Leslie Family Revocable Trust (collectively “Leslie”) own a 12 acre parcel of wooded land located immediately adjacent to the Thun property at the west entrance to the City. The Leslie parcel is shown as parcel 18 (except for the northerly portion of parcel 18) on the above map. The Leslie parcel has been in the family for over 80 years and held for investment purposes. The Leslie parcel became zoned C-2 in 1976 when annexed into the City. (CP 476-77.)

C-2 Zoning

C-2 zoning allows residential density the same as the R-3 zone. The R-3 zone (high density residential) allows residential density with a minimum of ten and a maximum of 20 dwelling units per acre. (CP 477; 459 [BLMC 18.26.050(F)], 463 [BLMC 18.18.050(B)].)

Purchase and Sale Agreements

In March 2005, the Thun and Leslie parties entered into Purchase and Sale Agreements agreeing to sell their parcels to Reich Land Construction (“Reich”). (CP 477.) Over the next six months Reich spent over \$100,000 developing plans to construct a 575 unit condominium project on the property. At a preapplication meeting with the City Planning Department on June 15, 2005, City officials identified

the major issues which Reich could expect to encounter in obtaining project approval. Downzoning was not mentioned. (CP 492-93.)

Application Made for Development Permit

On September 13, 2005, Reich submitted to the City an application for a site development permit, accompanied by engineering and landscape plans, and geotechnical, hydrogeologic, wetland, traffic, and storm drainage reports. No significant problems appeared to exist. (CP 477, 493-94.) Reich followed up with a further geotechnical report on October 7, 2005, from engineers previously used by the City as consultants. Assuming removal during construction of a small steep isolated ridge running north and south through the property, the geotechnical report concluded that:

It is our opinion that the proposed condominium structures may be constructed on the existing and future graded site slopes. (*Id.*)

City Adopts Ordinance Downzoning Parcels

Later in the day on September 13, 2005, the City adopted Ordinance No. 1160 (the "Ordinance"). (CP 482-85.) The Ordinance downzoned the Thun and Leslie properties from C-2 (allowing 20 units per acre) to RC-5 Residential/Conservation (allowing not more than one unit for each five acres). The RC-5 Ordinance contains no provisions for waivers or variances which would increase density above

one unit for each five acres. In fact, the City's Code expressly prohibits any variance under any zoning district that would increase residential densities beyond the maximum allowed. More specifically, BLMC 14.110.010(A)² provides that "a variance may not be granted from ... (3) the maximum residential density pertaining to zoning districts."³ The City's Planning Director stated repeatedly that there is no way for an applicant to obtain a greater density. (CP 575-76.)

Ordinance Only Applied to Thun and Leslie

On its face the Ordinance also covered other properties (shown as parcels 12, 13, 14, 15, and 19 on the map on page 8 above). However, the City Council was told at the time of adoption of the Ordinance that it only applied to Thun and Leslie since the other properties had "vested" development applications.⁴ (CP 478.)

City Now Claims Ordinance Only Applies to 30 out of 37 Acres

The Ordinance on its face contains no legal description of the

² A copy of the Ordinance is attached as Appendix A. The regulatory standards for RC-5 are attached as Appendix B. BLMC Chapter 14.110 governing variances is attached as Appendix C.

³ The permitted uses in the RC-5 zone are also clearly defined. BLMC 18.20.020 to .040. Likewise, the uses authorized in the C-2 zone, which continues to apply to a small portion of Thun's property, are clearly defined. BLMC 18.26.020 to .040. As is the case with maximum allowed density, Bonney Lake expressly prohibits variances from the limits imposed on uses in any zone. BLMC 14.110.010(A)(2). Thus, the full range of possible uses on the Thun and Leslie properties is fully known and the City is without discretion to expand the allowable uses.

⁴ If a governing body adopts zoning regulations that are aimed at a particular individual, its actions are adjudicative in nature. In such cases, the court will apply a

properties downzoned. The City now claims that the Ordinance covers all of Leslie's parcel, all of Thun's one parcel, and all but seven acres of Thun's other parcel (which the City claims is still C-2). Pierce County's GIS shows the remaining C-2 area as only 5.8 acres, some of which may include highway (SR 410) right-of-way. (CP 478.)

Purposes of Ordinance

The City has given a variety of reasons for enacting the Ordinance. Other than stopping development of the Thun and Leslie parcels, reasons stated by the City (CP 280) include the following:

- (1) The current entry to Bonney Lake is magnificent because one arrives at the top of the plateau and finds the small City framed by tall trees. This imparts a pleasant sense of arrival. This gateway effect is lost if development is continuous from Sumner to Bonney Lake.
- (2) As the Natural Environment Element [of the Comprehensive Plan] explains, the steep slopes along the west edge of the Bonney Lake plateau provide valuable wildlife habitat and open space.

The City also claims the Ordinance is intended to protect steep slopes. It points to a Pierce County map (CP 271) showing the entire

more rigorous review and require a higher level of justification. *See Dolan v. City of*

west side of the City as “Potential Landslide Area.”⁵ However, over the years first Pierce County and later the City approved construction of hundreds of homes in the area, including most recently Sky Island, Panorama Heights, and Panorama West. (CP 555.) No application for development in the area has ever been turned down because of steep slopes. (CP 558, 573.) Over the years a number of geotechnical studies have been submitted to the City, all concluding that the slopes are stable and present no danger of sliding. (CP 552, 554.)

The City admits that it has a Critical Areas Ordinance under which the City relies exclusively on geotechnical reports to determine if steep slopes present a danger. (CP 559.) In adopting the Ordinance challenged here, the City was presented with no studies which indicated the Critical Areas Ordinance was inadequate or that the Thun property was unstable. In fact, Reich’s application showed that as a result of the proposed development the slopes on the Thun property would not exceed 12% at the maximum. (CP 492, 479.) Such slopes would not even generate a need for a geotechnical report under the City’s Critical Areas Ordinance. (*Id.*)

Tigard, 512 U.S. 374, 391, 114 S.Ct. 2309, 129 L.ed.2d 304 (1994).

⁵ Sweeping generalizations concerning critical areas to justify governmental action were severely criticized in *Isla Verde Int’l v. City of Camas*, 146 Wn. 2d 740, 761-764, 49 P.3d 867 (2002) (discussing steep slopes). The Court required a site specific analysis to justify development limitations. There, the Court of Appeals found that an open space

Downzoning Ordinance Destroyed Value

Site development costs for Reich's proposed condominium project would have been approximately \$3,837,747. The costs were based on City required improvements, including sewer, water, and roadway improvements. The density allowed by C-2 zoning made the project feasible by spreading the cost over 575 units. (CP 493, 517.)

Many of the same costs would be required for any development of the property. However, the costs would now have to be spread over only six residential units (the maximum allowed under RC-5 zoning for the 30 acres downzoned), plus whatever commercial development could fit on the portion which remained C-2. Those costs would be prohibitive for any allowed uses of the Thun and Leslie properties. If a developer paid nothing for the Thun and Leslie lands (as rezoned), development of those properties would still be economically unfeasible. (CP 494-95, 517.) Thun's consultant prepared two different versions of development of the RC-5 property, with six lots in each approach (large lots and clustered development). (CP 495, 530, 532.) Development costs for the large lots would be \$420,000 per lot, for lots which would be worth only \$255,000 when finished. (*See* CP

ordinance imposed an unconstitutional taking. The Supreme Court affirmed on other grounds (i.e., the ordinance was a prohibited fee under RCW 82.02.020.

533-34.) Development costs for the clustered lots would be \$331,000 each, for lots worth only \$125,000 each when finished. (*See Id.*)

Procedural History

Thun and Leslie did not immediately resort to a takings claim following the extreme downzone of their property. Thun and Leslie very appropriately sought other remedies first. Thun and Leslie:

- appealed the City's application of the down-zoning ordinance to Thun's and Leslie's properties, claiming that their development application had created a vested right to the C-2 zoning. The hearing examiner ruled that nothing short of application for a building permit would create a vested right (CP 160, 198-222);
- appealed the hearing examiner's decision to the Pierce County Superior Court, which reversed the hearing examiner (CP 122-34);
- contested the subsequent appeal to the Court of Appeals, which reversed the trial court (CP 36-51);
- appealed the Court of Appeals decision to the State Supreme Court, which affirmed. In arguing to this Court for a stay of proceedings, the City argued:

The Supreme Court's decision in *Abbey Road* will be a 'final government decision' on the

permissible uses of Plaintiff's property—a prerequisite to an inverse condemnation lawsuit. (CP 225 at lines 13-14); and

- challenged the ordinance before the Growth Management Hearings Board, claiming the ordinance was inconsistent with the Growth Management Act. The Board upheld the ordinance, finding that the City's adoption of the ordinance was not "clearly erroneous" under a standard which presumed the validity of the ordinance (CP 177-96).

Thun filed this action on March 13, 2008. (CP 1-10.) The action was stayed on September 5, 2008, until November 20, 2009, when the stay was lifted. (CP 235-36.) The City moved for summary judgment on procedural grounds on March 12, 2010. (CP 237-430.) The motion was granted April 20, 2010. (CP 594-95.) A motion for reconsideration was denied May 7, 2010. (CP 652.)

IV. SUMMARY OF ARGUMENT

Thun's takings claim is narrowly focused on the severe economic impact the radical density downzone had on their property. The residential density limits imposed by RC-5 zoning are unambiguous and cannot be varied by the City under any of its permitting processes. Since no administrative relief is available to

recover any lost density and, since the ripeness doctrine does not require a landowner to submit permit applications for their own sake, Thun's takings claim is ripe for a trial on the merits.

V. ARGUMENT

A. Scope of Review

The City moved for summary judgment alleging that Thun's "takings claim must be dismissed because it is not ripe for review." (CP 237.) The trial court granted summary judgment on that basis. An appellate court reviews summary judgment decisions *de novo*, engaging in the same inquiry as the trial court *Saddle Mountain Minerals*, 152 Wn.2d at 248. All facts, and inferences therefrom, are treated in the light most favorable to the nonmoving party. *Id.*

Significantly, the merits of Thun's takings claim has not been litigated. The sole issue on appeal is whether Thun's claim is ripe for adjudication. Correct application of the law on ripeness, however, first requires a general understanding of regulatory takings law.

B. Regulatory Takings Law – Washington Follows Federal Law – A Summary

1. Federal law

Governmental police powers authorize adoption of regulations for the health, safety, and welfare of the public. In general, the government need not compensate a citizen harmed by the exercise of

the police power. But there are limits. If exercise of the police power becomes confiscatory, a citizen may be entitled to compensation under the “takings” clause of the Fifth Amendment.⁶ Determining when the line is crossed—when exercise of the police power constitutes a “taking”—is an evolving concept of constitutional law.

a) Before 1970 – *Mahon*

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922), the U.S. Supreme Court began its development of the concept of regulatory takings. Pennsylvania’s laws prohibited coal mining that produced severe ground subsidence, which made it commercially impossible to mine coal in certain areas. The Court rejected the notion that the constitutional requirement of just compensation was limited to traditional exercises of eminent domain (formal condemnation proceedings). Instead, the Court noted that regulatory activity can “go too far,” having such an impact on property that it is the functional equivalent of an exercise of eminent domain. *Id.* at 415-16. The Court did not lay out clear standards as to when a regulatory action “goes too far.” It did, however, hold that, on the *Mahon*, facts the government had “gone too far.” *Id.*

⁶ The Fifth Amendment also applies to States through the Fourteenth Amendment.

b) After 1970 – *Penn Central Transportation Co*

In 1978 the U.S. Supreme Court refined “takings” law in *Penn Central Transportation Co. v. New York City*, 38 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). In that case, Grand Central Station was declared a landmark under New York City’s historic preservation ordinance. Penn Central, the owner, proposed to “preserve” the original station while building a 55-story building over it. The city denied the construction permit. *Id.* at 109-115. The Court rejected Penn Central’s takings claim, explaining that the city ordinance served a valid public purpose and, so far as the Court could ascertain, Penn Central could still make a reasonable return on its investment by retaining the station as it was. Responding to Penn Central’s argument that the ordinance would deny it the value of its “pre-existing air rights” to build above the terminal, the Court held that it must consider the impact of the ordinance upon the property as a whole, not just upon “air rights.” *Id.* at 130-31 In any event, the air rights could be sold to others. The Court also applied a multi-factor test for evaluating a claim that specific government action has “taken” property. Courts must consider and balance three factors:

- (1) the economic impact of the regulation on the property;

- (2) the extent to which the regulation interferes with investment-backed expectations; and
- (3) the character of the governmental action (whether it furthers an important interest and could have been accomplished by less intrusive means).

Id. at 123-24. These are called the “*Penn Central* factors.”

c) 1990 – 1999 – *Lucas*

In 1992, the Supreme Court further refined federal regulatory takings law in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). In that case, Lucas bought two South Carolina beachfront lots intending to develop them. Before he initiated any development of the lots, the state enacted legislation to protect its beaches, which prevented development of the lots. The parties stipulated that the parcels had no remaining economic value. The Court held that a regulation which “denies all economically beneficial or productive use of land” is categorically a taking unless the government can show that the proposed uses of the property are prohibited by nuisance laws or other preexisting limitation on the use of the property. *Id.* at 1018-19. The Court explained, however, if there was no such categorical taking, one should use the

usual case-specific Penn Central balancing approach for determining takings. *Id.* at 1016-19.

d) 2000 – *Lingle*

Finally, the Court in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 5288, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005), gave its most recent clarification of federal regulatory takings law. *Lingle* involved a limitation by Hawaii on the contractual rights of oil companies. In holding that the regulation constituted a “taking” the Court clarified some confusion that had crept into constitutional analysis of taking. The Court held that there were only two tests for a regulatory taking; that is the *Lucas* test (total loss of all economically feasible use); or the *Penn Central* test (weighing three factors). *Id.* at 538.⁷

2. Regulatory takings in Washington

Article I, Section 16 of the Washington Constitution prohibits the taking of private land for public use without payment of just compensation. Washington’s test for evaluating takings claims under its constitution was set forth in *Guimont v. Clarke*, 121 Wn. 2d 586, 854 P.2d 1 (1993). The court held there that a taking occurred when the legislature overregulated trailer court operators.

The court in *Guimont* patterned its analysis after that of the U.S.

⁷ Thun contends there is both a Lucas and Penn Central takings.

Supreme Court in *Lucas* and *Penn Central*. It did add a threshold question, which some argue is already included in the *Penn Central* analysis. That is, whether the regulation seeks less to prevent harm than to impose a requirement of providing an affirmative public benefit. *Id.* at 603. If the answer is yes, one proceeds to *Lucas* and *Penn Central*. *Id.* at 603-04.

C. Ripeness – A Procedural Prerequisite

In bringing a regulatory takings claim, courts have required a showing of ripeness. In regulatory taking claims, as elsewhere, the ripeness doctrine serves as a gatekeeper to the court system by dictating when a claim may be brought.

1. The ripeness doctrine in general

In general, ripeness addresses the conditions that must exist before a dispute is sufficiently mature to enable a court to decide a case on the merits. It is a question of timing. When a claimant brings his claim prematurely, it is unripe and thus unfit for adjudication.⁸

⁸ Another procedural prerequisite to constitutional claims is that the plaintiff exhaust his administrative remedies. Though the two concepts are sometimes confused, exhaustion of remedies is different than ripeness. The U.S. Supreme Court explained the difference in *Williamson County Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985):

The question whether administrative remedies must be exhausted is conceptually distinct ... from the question whether an administrative action must be final before it is judicially reviewable. While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek

Both constitutional and prudential principles support the ripeness doctrine. First, courts are constitutionally limited to “cases and controversies.” If a claim is brought before a true dispute has formed, it is not ripe.⁹ Second, as a prudential matter, a court should not adjudicate a case if the record before it is incomplete. By avoiding premature adjudication, the ripeness doctrine prevents courts from becoming entangled in abstract disagreements. *See* Trying To Halt The Procedural Merry-Go-Round: The Ripeness of Regulatory Takings Claims after *Palazzolo v. Rhode Island*, 46 St. Louis U. L.J. 833, 836-37 (Summer 2002). *See also* *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 734 n.7, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997).

2. The ripeness doctrine in regulatory takings cases – the “final decision” requirement

Prudential ripeness principles serve the same function in regulatory takings cases as in other contexts. The doctrine prevents the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements:

Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract

review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

⁹ The City does not claim there is no “case or controversy.” The case law discussed here deals only with “prudential ripeness.”

disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a two fold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Suitum, 520 U.S. at 743 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967), overruled on other grounds, *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977)).

The history of prudential ripeness in regulatory takings cases is traced in *Suitum*. *Id.* at 735-38. The common theme in that history¹⁰ is that it is premature to evaluate the impact of a regulation until the administrative agency has arrived at a final, definitive position regarding how it will apply the “regulation at issue” to the particular land in question. Thus, if the challenged regulation leaves a high degree of discretion in the administrative agency to soften or waive its impact, the developer must ask that such discretion be exercised.¹¹ *Id.* at 738-39. *Conversely*, if there is no question about how the “regulation at issue” applies to the particular land in question, and if

¹⁰ Prudential ripeness in regulatory takings cases does not have a long history. It started less than 40 years ago with the advent of environmentally based land use regulations granting wide discretion to administrative agencies in applying open space and other environmental laws.

¹¹ A typical example of such a discretionary process is a wetlands or other critical areas ordinance variance. *See* discussion at pages 40-42, *infra*.

the administrative agency has no discretion to mitigate the impact of the regulation, the finality requirement is met. *Id.* No formal process or document is needed to confirm the finality.

In 2001, the Supreme Court further clarified its regulatory takings ripeness doctrine. In *Palazzolo v. Rhode Island*, the Court explained that the so-called “final decision” requirement for ripeness does not involve a process, mindlessly applied. The requirement is satisfied if the permissible uses of property under the regulation at issue are reasonably clear:

While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.

Palazzolo, 533 U.S. at 620 (attached as Appendix D).

Palazzolo makes clear that the term “final decision,” in the regulatory takings context, does not necessarily have the same meaning when the term is used in other, more familiar legal contexts. The term “final decision” is often used in determining when a judicial or administrative decision is appealable, or a statute of limitations begins to run. The analysis for determining whether there is a “final decision” is fairly straightforward and involves little or no exercise of

discretion. The purpose in that context is to bring finality to adjudicative proceedings.

In a regulatory takings analysis, the term “final decision” has a different meaning and different purpose. The words mean that the impact of a harmful decision cannot be mitigated by the exercise of administrative discretion. The point at which that occurs depends on the circumstances. It may be at the point, as is the case here, when the legislative body passed an ordinance applying a certain zoning designation to certain property. In other cases, where the challenged regulations provides a discretionary process to obtain variances or waivers from the land use restrictions, the “final decision” may not occur until after a variance application is submitted and reviewed by the municipality in the normal review process. The purpose of the requirement is to ensure that administrative remedies, if they exist, have been pursued.

Ripeness cases stand for the important principle that

a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the

opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established.

Palazzolo, 533 U.S. at 620-621 (emphasis added). *See also, Saddle Mountain Minerals*, 152 Wn.2d at 252; *Orion*, 103 Wn.2d at 456.

Our ripeness jurisprudence imposes obligation on landowners because “[a] court cannot determine whether a regulation goes ‘too far’ unless it knows how far the regulation goes.” Ripeness does not require a landowner to submit applications for their own sake.

Palazzolo, 533 U.S. at 622 (citations omitted). This holding is consistent with the analytical framework enunciated in *Suitum*, which is that the ripeness question requires courts “to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Suitum*, 520 U.S. at 473.

3. Ripeness is not concerned with other land use regulations – finality further explained

The land development process typically involves compliance with a host of land use regulations, many of them local to the municipality and some imposed by state and federal agencies. Zoning is usually only one of the regulations relevant to development approval. Various environmental regulations may be equally as important. For example, a property may have limited development potential because of the presence of wetlands or steep slopes. But that inquiry is not

part of a ripeness analysis as defined by the courts if those regulations are not challenged in the takings claim.

In a ripeness analysis there is only one relevant question. That is, can the limits on development created by the challenged regulation be waived or varied through the exercise of administrative discretion? If the answer is yes, the challenge may not be ripe. If the answer is no, the decision of the permitting authority as to application of the challenged regulation is deemed final and the challenge is ripe. *See Suitum*, 520 U.S. at 739 (“the demand for finality is satisfied by Suitum’s claim, however, there being no question here about how the ‘regulations at issue’ [apply] to the particular land in question”).

The final decision requirement for ripeness only asks what can be developed in light of the restrictions imposed by the challenged regulation (here, the RC-5 zone residential density limit), not what further development restrictions might be imposed by the many other land use regulations which might be applicable. The issue was discussed in *Palazzolo*. There, the government argued that knowledge of the limits on development created by the challenged wetlands regulations was not sufficient to satisfy the ripeness requirement. To satisfy that requirement, the government argued, required the owner to apply for permission to develop a 74 lot subdivision, even though

the challenged wetlands regulations prevented such development. The government argued that such application would serve the purpose of discovering other regulatory preconditions for development that could not be met. The Court said:

It is difficult to see how this concern is relevant to the inquiry at issue here. Petitioner was informed by the council he could not fill the wetlands; it follows of necessity he could not fill and build 74 single-family dwellings upon it. Petitioners' submission of this proposal would not have clarified the extent of development permitted by the wetlands regulations, which is the inquiry required under our ripeness decision.

Palazzolo, 533 U.S. at 624-25.

4. Ripeness should not to be conflated with economic impact

Two separate questions are involved in a regulatory takings analysis. They should not be fused.

The first question, the ripeness question, addresses the limits of development legally permitted under the challenged regulation. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986). More importantly, the question is whether variances exist which can mitigate the limits of development under the challenged regulation. If so, the variances might have to be applied for in order for the case to be considered "ripe" for adjudication. *Saddle Mountain Minerals*, 152 Wn.2d at 252.

The second question is: once the limits on development created by the challenged regulation are known, what is the economic impact on development. *Id.* This question looks to the merits of the claim as a whole and is considered when the Penn Central balancing test, or the Lucas test, is applied.

The first question is the only one relevant to the ripeness issue. The question is answered before trial. It is a procedural requirement. The second question—economic impact—is not relevant to the ripeness issue. It is answered during trial, with the possible aid of expert testimony. It goes to the merits of the takings claim.

The procedural order and application of the two questions was explained in *Saddle Mountain Minerals*, 152 Wn.2d at 252:

Where a landowner has not sought a variance or waiver from the land use restriction, a taking claim is not ripe. Before a property owner can raise a taking claim, the government entity charged with implementing the regulation must reach a final decision regarding the application of the regulations to the property at issue. Then, the court must ascertain the remaining value of the regulated property to determine the amount of economic impact caused by the regulation. The question of remaining value is a question of fact determined by the jury.

At trial, the developer has the burden of showing that development has been economically impacted by reason of the challenged regulation. The government may attempt to show that

development has not been seriously impacted, regardless of the challenged regulation, or that development is economically impacted due solely to unrelated regulations. But that is for a trial on the merits, which Thun has been denied.

D. Thun's Claim is Ripe.

- 1. No variances are authorized to lessen or relax the density limitation imposed by the downzone, so the RC-5 zoning decision is final.**

Prior to the extreme downzone, the Thun and Leslie properties could be developed at a residential density of 20 dwelling units per one acre of land. (CP 477.) With the adoption of Ordinance No. 1160 (Appendix A), applying RC-5 zoning to the Thun and Leslie properties, the residential development under RC-5 is now limited to one dwelling unit per five acres. (Appendix B, BLMC 18.20.050(A).) The downzone thus eliminated the development potential for the combined properties of 575 condominium units and limited the maximum residential development potential on the combined properties to 6 dwelling units. The extreme downzone – the strict limitation on allowed density – is the heart of Thun's takings claim. Thun challenges the regulatory application of this extreme downzone to their property. Thun claims this action was a taking of their property for which the Constitution requires payment of just compensation.

Given the regulatory act challenged – the density downzone – the question of ripeness necessarily depends on whether the City provides a process through which a variance from or waiver of the strict density limitations can be obtained. If a variance process is available, the ripeness doctrine may require Thun and Leslie to apply for a variance. If a waiver or variance is not authorized, the case is ripe for adjudication. The relevant provisions of the City’s Code are clear on their face. There is no variance available to Thun.

The regulations implementing the RC-5 zone are set forth in Chapter 18.20 of the Bonney Lake Municipal Code. (Appendix B). BLMC 18.20.050(A) expressly and unequivocally states that the maximum residential density allowed is 1 dwelling unit per 5 acres. Nowhere in Title 18.20 or anywhere else in the Bonney Lake Code is a variance or waiver from this maximum density authorized. To the contrary, the Bonney Lake Municipal Code provisions that provide for variances (Chapter 14.110) expressly prohibits variances for both the maximum allowed residential density established in any zoning district or the uses authorized. (BLMC 14.110.010(A), Appendix C.)

There is no regulatory or administrative process that will provide relief from or relax the density limitation being challenged. As a result, adoption of Ordinance No. 1160 applying RC-5 zoning to the Thun and

Leslie properties constitutes a final decision on the RC-5 density limits applied to these properties. This takings challenge is ripe.

2. The permitting process required for construction on the Thun and Leslie properties is unrelated to the question of ripeness.

Ripeness does not require a landowner to submit applications for their own sake.

Palazzolo, 533 U.S. at 622.

There is no disputing that BLMC 14.110.010(A)(3) prohibits any variance or waiver from the density restrictions imposed by the RC-5 zoning designation. In apparent recognition of this fact, the City attempted to obfuscate the ripeness inquiry and argued that Thun must obtain development permits under RC-5 as a prerequisite to litigation. The only permits identified by the City included a short plat for any residential construction and a building permit for any commercial construction. (CP 266-67.) None of the identified permitting processes, however, provide discretionary authority for the City to waive or relax the use and density limitations on the Thun property. Thus, they provide no mechanism to lessen the impact of the extreme downzone.

The City properly identified the Short Plat, or Short Subdivision,

permit¹² as the permit that would be required to actually divide the Thun and Leslie properties into the maximum 6 residential lots allowed under the RC-5 zone. The short plat process is fairly perfunctory and does no more than divide the Thun and Leslie properties into separate lots. There is no public hearing and the City's planning official has little discretion in approving and conditioning Short Plats. Chapters 14.20, 14.40, 14.50 and 17.36 to .52 BLMC. Significant to this appeal, there is no mechanism in the short plat process which will allow for an increase of the maximum density allowed in any zoning district or change the uses allowed in the zone. Rather, the short plat criteria expressly require compliance with the applicable zoning code. BLMC 17.48.010. Thus, the short plat process will not further clarify or modify the residential density limits imposed by the RC-5 zone.

The building permit process, which was the other permit identified by the City, applies the building codes to the buildings to be constructed. Building permits are issued by the City's building official and involve little discretion. Chapters 14.20, 14.30, and 15 BLMC. Like the short plat process, the building permit process cannot result in density above the maximum allowed in zoning designation, whether

¹² A Short Subdivisions is the division of property into nine or less lots. BLMC 17.36.030(C). A Short Plat is actually a map that pictorially depicts the Short Subdivision. BLMC 17.36.030(B). The two terms, however, are often used interchangeably.

residential or commercial. See Chapter 15 BLMC. Likewise, the site plan review process, which accompanies the building permit process, cannot result in increased density. The site plan review process might influence the location of a stormwater pond or private roadway; however, there is no mechanism in the site plan review process by which density limitations may be relaxed. To the contrary, a certificate of occupancy for a building permit will not issue unless compliance with the applicable zoning is demonstrated. BLMC 15.04.090(1).¹³

The City has failed to identify any discretionary process to mitigate the economic impact of the extreme downzone. The question then is, why should Thun be required to make application for development permits (short plat and building permits) under the challenged regulation (R-5 zoning) when there is no evidence the development permit process will provide relief from the density limitations challenged. The R-5 zoning ordinance is clear. No variances of residential density or authorized uses are allowed.

¹³ The City also stated that environmental review under the State Environmental Policy Act (SEPA), chapter 41.23C RCW as incorporated into Chapter 16.04 BLMC, was required and that its critical areas ordinances might serve to further limit development even beyond the density restrictions imposed by the RC-5 zone. (CP 584.) Of course these environmental review processes could never serve to increase the maximum allowable residential density on the properties. Rather, the environmental regulations could result in an even less dense development or even denial of any development. Thus, these review processes cannot provide relief or alleviate the harm created by the RC-5 density restrictions. In any event, Thun is not challenging applicable environmental regulations. Thus, they are not relevant to the ripeness analysis.

Our ripeness jurisprudence imposes obligation on landowners because “[a] court cannot determine whether a regulation goes ‘to far’ unless it knows how far the regulation goes.” Ripeness does not require a landowner to submit applications for their own sake.

Palazzolo, 533 U.S. at 622 (citations omitted).

The Court need look no further to determine that adoption of Ordinance No. 1160 applying RC-5 zoning to the Thun and Leslie properties constitutes a final decision on the RC-5 density limits applied to these properties and that the case is ripe. Since no variances are allowed, the ordinance itself tells the Court exactly how far the density limitation of the RC-5 zone goes.

Thun did not, however, rely solely on the clear language of the Bonney Lake Code. In addition, a declaration was submitted from a qualified land planner that: (1) such an application would serve no purpose, and (2) no use authorized by the rezone would be economically feasible:

There is no reason I know of that a developer would need to go through an application process to figure out the essential elements of what can be done on property zoned RC-5. The permitted uses and particularly the maximum permitted residential density are clear on the face of the zoning ordinance. There is no opportunity under the Bonney Lake Municipal Code to obtain a variance from the maximum authorized density, so the application process cannot yield a greater density.

.....

In my professional opinion, development of either option would not be economically feasible given the large development costs which would have to be spread over six building sites, whether large lots or clustered. This is true even if the remaining C-2 zoned portion of the Thun property is developed. The Pierce County geographical information system indicates that only 5.8 acres remain zoned C-2. Off-site and on-site development costs of this small C-2 portion of land would again render development economically unfeasible. In summary, a developer could get the Thun land for free and it would still be economically unfeasible to develop. Given the anticipated development costs, I would be astonished to see a developer propose a small development of single family residences for the Thun property, either with large lots or clustered, and whether with or without compatible neighborhood commercial uses on the commercial piece.

(CP 494-95.)

Finally, the City's Planning Director confirmed in his deposition that none of the permitting and review processes cited by the City will allow Thun and Leslie to achieve a higher density than the maximum allowed in the RC-5 zone (1 dwelling unit per 5 acres). The Planning Director testified:

Q The RC5 allows one unit upon every five acres; is that correct?

A That's correct.

Q And if somebody makes application, you can't give them six units for five acres?

A No, you cannot apply variance to density.

Q There is no variances in terms of the density?

A Correct.

....

Q So the maximum density you are going to get is—and we have been through this I guess, and whether you cluster them or uncluster them it doesn't make any difference, you are still only going to get a maximum of one unit for every five acres?

A Correct.

Q Okay. And there is no variances under RC5 that would allow more than one unit for five acres?

A Variances do not apply to density, only to dimensional standards.

Q Only to what?

A Dimensional standards, setbacks, heights.

....

Q And so I am going to get five lots, whether I cluster them or whatever I do on the thing?

A Uh-huh.

....

Q You say over here in Paragraph 23, "Nothing short of an improved short plat or an issued building permit for the commercial site would give a clear picture of what could be constructed on the property."

Isn't it clear that whether you cluster them or however you cut it, you are not going to increase the density, allowed density for that property?

A That's clear, yes.

....

Q And Paragraph 25 you say, "In addition, the City would be open to receiving an innovative proposal, such as an RCW 36.70B.170 development agreement approved by the city council.

That doesn't increase your density, does it?

A No, it does not.

Q So what you are saying is that if Mr. Thun or Leslie or somebody applied for a development proposal on that property you would follow the code.

A That's correct.

Q You would follow the RC5 and that's what you would give them?

A That's correct.

Q And that's the best you could give them?

A That's correct.

....

Q I know I have done this a half a dozen times, and I will ask you once more if you will be patient with me.

Again, no matter what they propose, they are not going to get more than one unit for five acres?

A Under today's zoning, that's correct.

(CP 575-76.)

Ignoring the expert opinion and the Planning Director's critical admission that no variance is available, the trial court said:

It seems to me that ultimately you have to determine what else you can do with the property.

(VTP at 9.)

The answer is that any reasonably knowledgeable person would know what can be done with the property under R-5 zoning simply by reading the ordinance. The City is without discretion, in any process, to waive the strict density limits imposed under the zoning. The evidence was clear and uncontradicted in this regard.

While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.

Palazzolo, 533 U.S. at 620. The trial court was required “to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Suitum*, 520 U.S. at 743. The trial court improperly imposed on Thun the significant hardships of delay and submitting to yet another expensive permit process, even though the process cannot change the residential density limitation that is the subject of the takings challenge.

Again, the ability for the municipality to exercise discretion to lessen the impact of the challenged regulation is critical to put ripeness at issue. For example, a typical case where ripeness is at

issue is found in claims involving wetlands or other critical areas ordinances. A local wetlands ordinance may prohibit development within any wetland and/or prohibit development within a defined regulatory buffer intended to protect the wetland. Local ordinances with such development restrictions in critical areas, however, typically include a variance process that might excuse strict application of the regulation to allow reasonable development under certain conditions. *See, e.g., Presbytery of Seattle v. King County*, 114 Wn. 320, 787 P.2d 907, *cert. denied*, 498 U.S. 911 (1990)(landowner failed to seek variance under wetlands ordinance which would allow otherwise prohibited development upon demonstration in the application process that ordinance “would deny all reasonable uses of the property.”)

Bonney Lake provides such a variance process for application of its critical areas ordinances. *See* BLMC 16.20.145. The variance criteria are highly discretionary and the variance may only be granted if the Hearing Examiner, considering the evidence presented at a public hearing, can make certain specific findings. (e.g., that the provisions of the critical areas ordinance would deny all reasonable use of the applicant’s property.) BLMC 16.20.145; Chapter 14.70. Through this variance process, the City retains discretion to remedy or alleviate the harsh impacts its critical areas ordinances might have on development

of certain property. If this lawsuit challenged the limitations imposed on the Thun and Leslie properties by the critical areas ordinances, then they would be required to make application for a critical areas ordinance variance before the takings claim would be ripe.¹⁴

Again, Bonney Lake does not provide any such discretionary process that will allow an increase in the maximum residential density set by the RC-5 zone or modify the uses allowed on the Thun and Leslie properties. The decision to apply the RC-5 zone to the Thun and Leslie properties (Ordinance 1160) was final and the takings claim asserted in this lawsuit is ripe.

3. The trial court erroneously collapsed ripeness and the merits of the takings claim.

At the oral argument, the trial court stated:

I go back to Peste¹⁵ that says you need to determine if there is any viable economic use of the land. I don't think that's been done.

(VTP at 19.)

The answer is twofold. First, economic impact is a trial issue. It is not part of the procedural requirement of ripeness. Ripeness asks only if what can be done under the challenged regulation is clear, not

¹⁴ The qualified land planner testified that Bonney Lake's critical areas ordinance would not unreasonable interfere with the previously planned 575-unit condominiums. (CP 494-94.) Regardless, Thun does not challenge application of the critical areas ordinance to their properties as a takings.

¹⁵ *Peste v. Mason County*, 113 Wn. App. 456, 136 P.3d 140 (2006).

whether it is economically viable. Only after the ripeness question is answered should the court proceed to determining the economic impact the challenged regulation has on the property. “The question of remaining value is a question of fact determined by the jury.” *Saddle Mountain Minerals*, 152 Wn.2d at 252.

The trial court, in effect, required Thun to meet the *Lucas* test (that the property has no remaining economic value) and establish a categorical or *per se* taking in order to satisfy the ripeness requirement. Of course no such requirement exists in the law. The merits of Thun’s case will be analyzed under the Penn Central balancing test and factors, which “necessarily entails complex factual assessments of the purposes and economic effects of government actions. *Guimont*, 121 Wn.2d at 601, *quoting Yee v. Escondido*, 503 U.S. 519, 523, 112 S.Ct. 1522, 1526, 118 L.Ed.2d 153, 162 (1992).

Second, the only evidence before the trial on economic impact was that furnished by Thun in the form of a sworn expert declaration (CP 490-541), which was uncontradicted. Thus, summary judgment on that basis was wholly inappropriate. *See Fitzpatrick v. Okanogan County*.

Thun’s taking claim is based upon the extreme downzone that resulted when the property was downzoned from C-2 (allowing 20 units

per acre) to RC-5 Residential/Conservation (allowing not more than 1 unit for each 5 acres). Thun's damages arise from the radical decrease in allowed density. None of the identified permitting processes will allow Thun to increase the density on the property. None of the permitting processes that the City identified will provide relief from the regulation being challenged. The allowed uses under the challenged regulation are not subject to discretion and are fully known. As such, Thun's claim is ripe for adjudication now. "Once the permissible uses of the property are known to a reasonable degree of certainty the ripeness doctrine requires nothing further from the landowner." *Palazzolo*, 533 U.S. at 620.

The trial court's heavy reliance on *Peste v. Mason County* was misplaced. *Peste* is factually and procedurally distinguishable from this case. In that case, Peste applied to Mason County for an upzone from RR20 to RR5. The Board of County Commissioners held hearings and then denied Peste's request. 133 Wn.2d at 462-63. Peste raised no constitutional takings issues before the Board, nor did Peste present any evidence that it had been deprived of any economically viable use of the property. *Id.* at 469.

Peste appealed the Commissioners' decision to the superior court under the Land Use Petition Act (LUPA), claiming the

Commissioners' decision to deny the requested upzone was unreasonable and unconstitutional. Since this was an administrative appeal, the appeal was on the record created before the Commissioners and no further evidence or testimony was considered by the trial court. *Id.* at 466. The trial court affirmed the Commissioners' decision as supported by the evidence and consistent with the applicable regulations. The trial court also held that Peste had waived constitutional issues by failing to raise them before the Commissioners. *Id.* at 463, 469.

The Court of Appeals affirmed, but did address the constitutional issues. The *Peste* court complained that "the limited record makes it difficult to conduct a thorough analysis,"¹⁶ but plowed ahead "despite Peste's lackluster briefing of its constitutional claims."¹⁷ It analyzed Peste's "takings" claim by observing there are "two types of takings challenges to land use regulations: "facial" challenges and "as applied" challenges. 133 Wn. App. at 471.

A "facial challenge," said the court, required the landowner to show that the mere enactment of the regulation denies the owner of all economically viable use of the property. *Id.* at 472. The *Peste* court

¹⁶ 133 Wn. App. at 475.

¹⁷ 133 Wn. App. at 469, fn.10.

held that a facial challenge failed because “Peste presented no evidence that the County’s adoption of its CP and DRs deprives it of all economically viable use of the Section 21 property.” *Id.*

The court then analyzed the possibility of an “as applied” challenge.¹⁸ Such a challenge does not require proof of loss of all economical use. However, the adverse economic impact must outweigh legitimate state interests. *Id.* at 473. Put another way, Peste was required to present evidence to demonstrate a takings under the Penn Central balancing test. As no evidence was submitted of any adverse economic impacts, there was nothing on which to base an “as applied” challenge.

Rather than simply hold that Peste’s “as applied” challenge failed for lack of evidence, the court suggested that Peste explore residential development opportunities within the confines of the RR20 zoning. After reviewing the record, the court recognized that the Mason County Board of County Commissioners had discretion under the existing zoning to increase the allowed density and afford Peste the opportunity for a financially viable development plan. The *Peste* court stated the following about the record:

¹⁸ Thun's takings claim is an “as applied” challenge. Thun does not claim that the RC-5 zoning will cause a takings when applied to all properties. Rather, Thun argues that application of this extreme downzone to the Thun and Leslie properties is a taking under the Penn Central factors and the Lucas test.

Mason County Board and Commission staff testimony indicates that Peste's residential development options under the current RR 20 designation are more opportunistic than Peste asserts and that clustered residential development is available to Peste on its RR 20 properties.

133 Wn. 2d at 476, n. 12.

Thun obtained copies of the briefing submitted to the *Peste* court to obtain a better understanding of what the court meant when it stated that the "options under the current RR 20 designation are more opportunistic." Mason County's brief attached copies of the Mason County Board and Commission Staff testimony, which testimony was very revealing.¹⁹ Under the RR20 designation, the Mason County Code allowed landowners, upon application for a "performance subdivision", to potentially double the allowed density if homes were clustered and open space was properly designated. (CP 616, 620, 638, Thus, unlike Bonney Lake's RC-5 zoning, the Mason County Code granted the Mason County Planning Staff discretion to soften the density limit of the RR20 designation. (CP 603-04, 625-49.)

In the *Peste* court's opinion, the development options (i.e., increasing density) available to the Pestes under RR20 called into

¹⁹ With its reconsideration motion, Thun submitted to the trial court copies of Mason County Zoning Ordinance (CP 616-32) and Minutes of Mason County Planning Advisory Commission Minutes (referred to by the Peste court in footnote 12)(CP 634-49) The Minutes were attached to Mason County's appellate briefs submitted to the *Peste* court. (CP 613-14.)

question: “(1) whether a need exists for less oppressive solutions, and (2) Pestes claimed inability to alter its current rezone request and apparent long term residential development plans to comply with the RR20 designation and still have a financially viable development plan.” 133 Wn.2d at 476.

The *Peste* court concluded by affirming the trial court and finding the Board’s decision reasonable because (1) the location and characteristics of the property; (2) the County’s seven year amendment process to comply with the GMA; and (3) the availability of other development options for the property. *Id.* at 478.

In summary, *Peste* held that a takings challenges was not “ripe” because the Pestes had failed to pursue other residential development options under RR20 that could potentially increase density. Since the regulatory agency had the discretion under RR20 zoning to increase density and allow residential development which might be financially viable, the case was not ripe until the agency was requested to exercise that discretion. Given those facts, the *Peste* holding is consistent with *Palazzolo*.

In this case, there is no opportunity under any permitting process for Thun to increase the residential density allowed on their property. The RC-5 zoning allows a maximum of one dwelling unit per

five acres and that maximum density cannot be varied or relaxed – the City has no discretion on this issue. Because there is no opportunity for discretion or variance, Thun’s takings claim – which claim is founded upon the extreme downzone of the properties – is ripe.

VI. CONCLUSION

Thun’s takings claim was dismissed not because it lacked merit, but because the trial court misunderstood the ripeness doctrine as applied to a regulatory takings claim. As a result, Thun’s claim, which ripened in 2005 when the allowable density on the property was drastically reduced, has been placed in limbo. Thun has been directed to apply for a permit which cannot clarify the density limits imposed by the downzone. The effort would serve no purpose, particularly since Thun believes that no development of the property under R-5 zoning would be economically feasible. It is incumbent upon the City to identify a discretionary process that, if invoked, could serve to lessen the harmful impacts of the density downzone. It has failed to do so.

It could be that Thun will ultimately lose on the merits. It could be the City will prove that development has not been seriously impacted. It could be that the public purpose in restricting use of the property trumps private property concerns. But those are matters for a trial on the merits and resolution of the merits “necessarily entails

complex factual assessments of the purposes and economic effects of government actions.” *Guimont*, 121 Wn.2d at 601, *quoting Yee*, 503 U.S. at 523. “The question of remaining value is a fact question for the jury.” *Saddle Mountain Minerals*, 152 Wn.2d at 252. In any event, those possibilities do not render Thun’s takings claim unripe.

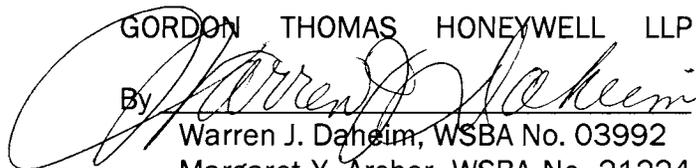
The Thun parties have waited five years for an opportunity to tell their story in court before a jury of twelve. The ripeness doctrine also requires the Court to evaluate the hardship to the parties of withholding court consideration. The trial court failed to consider the hardship caused to Thun by this further delay – especially when no good reason has been shown for any further delay. Applying to the City for development under the challenged regulation will not shine any light on what can be developed under the challenged regulation. That is the whole point of ripeness in a regulatory takings claim. Only a misreading of the law could argue otherwise. Evaluated under the correct legal standards, Thun’s claim is clearly ripe for adjudication.

Dated this 17th day of September, 2010.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By



Warren J. Dahnheim, WSBA No. 03992

Margaret Y. Archer, WSBA No. 21224

Attorneys for Appellants

APPENDIX A

**AN ORDINANCE OF THE CITY OF BONNEY LAKE,
WASHINGTON REZONING VARIOUS STEEP SLOPES TO
BE CONSISTENT WITH THE COMPREHENSIVE PLAN**

WHEREAS, the Growth Management Act requires that comprehensive plans and development regulations be consistent, and

WHEREAS, in 2003 the City identified 65 "inconsistency areas" between its comprehensive plan and zoning; and

WHEREAS, the City resolved most of the inconsistencies in 2004 by changing the Comprehensive Plan to match the Zoning; and

WHEREAS, this ordinance concerns certain inconsistency areas which the City is resolving by changing the Zoning to match the Comprehensive Plan; and

WHEREAS, some of the inconsistencies are proposed to be resolved separately through applying appropriate zoning for the Downtown and by further changes to the Comprehensive Plan; and

WHEREAS, SEPA has been complied with; and

WHEREAS, following public hearings on June 1 and June 15, 2005, the Bonney Lake Planning Commission recommended that the Bonney Lake City Council approve the rezones set forth in this ordinance; and

WHEREAS, the proposed zoning reclassifications comply with the criteria stated in BLMC 18.52.030; and

WHEREAS, the Bonney Lake City Council has determined that the interests of the people of the City of Bonney Lake will be best served by these rezones; and

WHEREAS, further purposes for these particular rezones are to 1) supplement the critical areas code in managing areas that are steep and prone to geologic instability; 2) protect tree cover on areas that due to steepness cannot be densely developed without clear-cutting and terracing; 3) protect the magnificent entry to Bonney Lake on SR 410; and 4) comply with RCW 36.70A.160 which requires the City to identify open space corridors within and between urban growth areas.

**NOW THEREFORE THE CITY COUNCIL OF THE CITY OF BONNEY LAKE,
WASHINGTON DO ORDAIN AS FOLLOWS:**

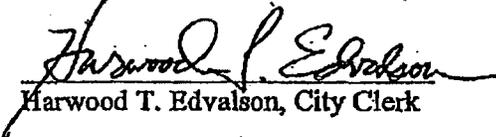
Section 1. The real properties depicted on Exhibit A attached hereto are hereby rezoned to RC-5 Residential/Conservation District.

Section 2. This ordinance shall take effect after its passage and five days after its publication as required by law.

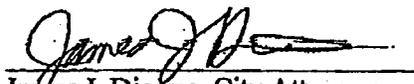
[The Mayor having not signed this ordinance which was passed by the City Council the 13th day of September, 2005, it became valid ten days after the date of adoption by the City Council.]

Robert Young, Mayor

ATTEST:


Harwood T. Edvalson, City Clerk

APPROVED AS TO FORM:


James J. Dionne, City Attorney

Passed: September 13, 2005
Valid: September 23, 2005
Published: September 28, 2005
Effective: October 3, 2005

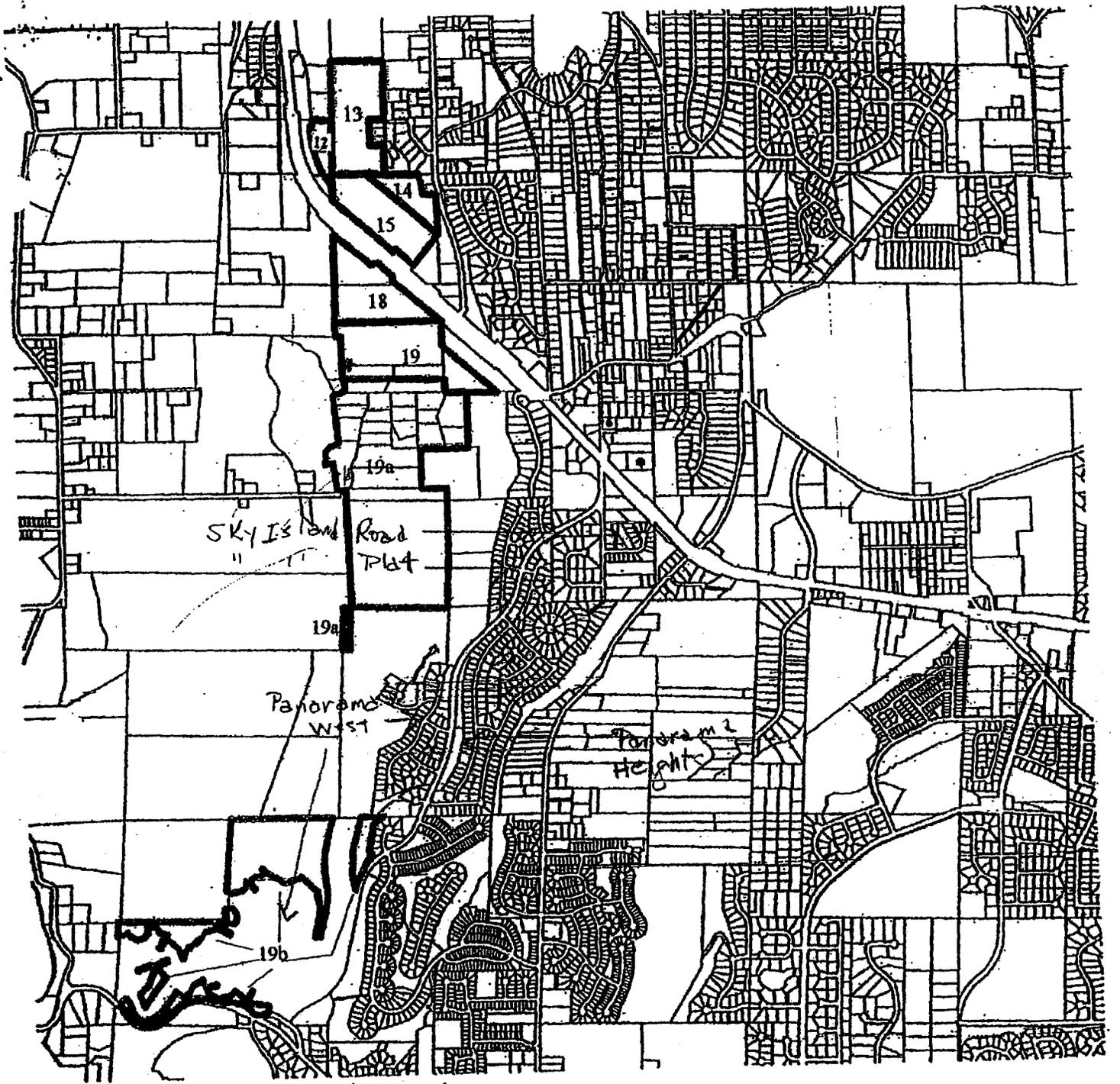


Exhibit A to Ordinance No. 1160

**Proposed Rezones to
make zoning consistent
with the Comprehensive Plan**



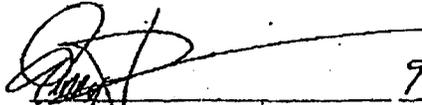
0 1000 2000 3000 4000 5000 Feet

BONNEY Lake

CITY CLERK'S AFFIDAVIT OF PUBLICATION

I, Virginia Phelan, being a duly appointed representative of the City Clerk's Office for the City of Bonney Lake attest that the notice, of which the attached is a printed copy as it was published in the regular issue of the Tacoma News Tribune- the City's legal newspaper on the date of publication- was published 1 time(s), commencing on the 28TH day of September 2005.

Adopted Ordinance
Ordinance 140734 Ordinance of the City of Bonney
Lake, Washington, adopted by the City Council on
September 19, 2005 and amended by Ordinance 140735
on September 19, 2005 and Ordinance 140736 on
September 19, 2005.
The full text of this ordinance adopted by the Bonney
Lake City Council is located in a public file at
20008 Bonney Lake Blvd, P.O. Box 1400, Bonney
Lake, WA 98390, or may be viewed from the
Internet at: <http://www.bonneylakecity.com>



Signature Date 9-28-05

VIRGINIA PHELAN

Printed Name

DEPARTMENT ASSISTANT

Title

APPENDIX B



Chapter 18.20 RC-5 RESIDENTIAL/CONSERVATION DISTRICT*

Sections:

- 18.20.010 General intent.
- 18.20.020 Uses permitted outright.
- 18.20.030 Accessory structures and uses.
- 18.20.040 Conditional uses.
- 18.20.050 Setback and bulk regulations.
- 18.20.060 Off-street automobile parking and loading requirements.
- 18.20.070 Repealed.

*Prior legislation: Ords. 515 and 515C.

18.20.010 General intent.

The purpose of the residential/conservation zone is protect lands with sensitive areas, agricultural uses or natural resource production, or to act as a buffer between such lands and higher density uses, as well as providing an urban reserve designation for areas without full urban services. This designation is intended to ensure that development occurs at a maximum residential density of one unit per five acres which will not hinder future conversion of developable land to urban level development. (Ord. 740 § 7, 1997).

18.20.020 Uses permitted outright.

The following uses may be permitted unconditionally in an RC-5 district subject to the off-street parking requirements, bulk regulations and other provisions and exceptions set forth in this title:

A. Residential Uses.

1. Single-family residences;
2. Accessory dwelling units.

B. Educational Uses.

1. Elementary school.

C. Cultural, Religious, Recreational, and Entertainment Uses.

1. Parks, open space and trails;
2. Churches of less than 250 seats; provided the requirements of BLMC

18.22.040 are met.

D. Resource Management Uses.

1. Agriculture, orchards, and horticultural nurseries;
2. Forestry and tree farms;
3. Raising of livestock, small animals and fowl; provided the requirements of BLMC 18.22.060 are met;
4. Stables and riding schools;
5. Roadside produce stands;
6. Kennels.

E. Transportation, Communication, Utilities.

1. Public utility facility; provided the requirements of BLMC 18.22.050 are met;

2. Wireless communications facilities are permitted as principal or accessory uses provided the requirements of Chapter 18.50 BLMC are met. (Ord. 1137 § 4, 2005; Ord. 747 § 1, 1997; Ord. 746 § 5, 1997; Ord. 740 § 7, 1997).

18.20.030 Accessory structures and uses.

The following accessory residential uses are permitted on a lot in this district:

A. Accessory Structures.

1. Swimming pool, if enclosed with a six-foot fence;
2. Awnings or canopies;
3. Walls or fences; provided the requirements of BLMC 18.22.020 are met;
4. Flagpoles;
5. Outside fireplaces;
6. Accessory greenhouses;
7. Accessory barns, sheds and tool rooms; provided they are part of a permitted use;
8. Private docks, mooring facilities and boathouses; provided the project complies with shoreline management regulations and the provisions of BLMC 18.22.070;
9. Garage or carport.

B. Accessory Uses.

1. State-licensed family day care homes;
2. State-licensed adult family homes;
3. Home occupations; provided the criteria in BLMC 18.22.010 is met;
4. Bed and breakfast houses; provided the criteria in BLMC 18.22.030 are met;
5. Roadside produce stands. (Ord. 740 § 7, 1997).

18.20.040 Conditional uses.

The following conditional uses are permitted on a lot in this district:

A. Cultural, Religious, Recreational, and Entertainment Uses.

1. Golf courses and golf driving ranges;
2. Outdoor recreation facilities and sports fields. (Ord. 740 § 7, 1997).

18.20.050 Setback and bulk regulations.

The following bulk regulations shall apply to the uses permitted in this district subject to the provisions for yard projections included in BLMC 18.22.080:

A. Maximum density: one residential unit per five acres; provided the lots may be clustered to preserve open space. Where lots smaller than five acres are created, a tract of sufficient size to equal the difference between the acreage of the lot or lots and the minimum density requirements shall be designated and recorded as an agricultural or open space tract.

B. Minimum Front Setback.

1. From State Highway 410: 55 feet from the right-of-way line;
2. From other streets: 30 feet from right-of-way.

C. Minimum side yard: a total of 15 feet for both side yards, with a minimum of five feet for one side yard.

D. Minimum rear setback: 20 feet; provided, that a separated garage or accessory building may be built within 10 feet of the rear property line.

E. Maximum height: 35 feet, except where the director of planning and community development waives this limit (see BLMC 14.20.020(F)) based on:

1. Need of the specific proposed use;

2. Conformance to the comprehensive plan and the intent of this title. (Ord. 1099 § 20, 2005; Ord. 988 § 2, 2003; Ord. 740 § 7, 1997).

18.20.060 Off-street automobile parking and loading requirements.

For off-street automobile parking requirements, see Residential Development Standards, BLMC 18.22.100. (Ord. 740 § 7, 1997).

18.20.070 Planned unit development.

Repealed by Ord. 1131. (Ord. 740 § 7, 1997).



This page of the Bonney Lake Municipal Code is current through Ordinance 1281, passed July 8, 2008.

Disclaimer: The City Clerk's Office has the official version of the Bonney Lake Municipal Code. Users should contact the City Clerk's Office for ordinances passed subsequent to the ordinance cited above.

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Code Publishing Company
Voice: (206) 527-6831
Fax: (206) 527-8411
Email: cpc@codepublishing.com

APPENDIX C

**Chapter 14.110
VARIANCES**

Sections:

14.110.010 Procedure.

14.110.010 Procedure.

A. Unless otherwise specified in this code, a variance is a Type 4 permit. The purpose of variances is, under certain circumstances as set forth in the variance criteria, to grant flexibility in the administration of any the provisions of this development code, BLMC Titles 16 through 19; provided, that a variance cannot be granted from:

1. Administrative provisions including procedures and fees;
2. The lists of permitted or conditional uses pertaining to zoning districts;
3. The maximum residential density pertaining to zoning districts;
4. The provisions of Chapter 16.04 BLMC, SEPA.

B. See the following for exceptions or additions to the approval criteria contained in this section:

1. BLMC 16.08.060 (shoreline variances);
2. BLMC 16.20.145 (critical areas code);
3. BLMC 17.20.040(F) (extension of cul-de-sacs);
4. BLMC 17.24.100 (plat standards);
5. BLMC 18.32.050 (adult entertainment separation requirements);
6. BLMC 18.34.050(F) (height of water tanks in the PF zone).

C. Unless another section of the BLMC provides additional or separate criteria, a variance shall not be granted unless all the following criteria are met:

1. The variance is consistent with the purpose and intent of the relevant city ordinances and the comprehensive plan;
2. The variance does not constitute a grant of special privilege which would be inconsistent with the permitted uses, or other properties in the vicinity and zone in which the subject property is located;
3. The variance is necessary because of special circumstances relating to the size, shape, topography, location or surroundings of the subject property, and such variance will provide use rights and privileges permitted to other properties in the vicinity, located in the same zone as the subject property and developed

under the same land use regulations as the subject property requesting the variance;

4. The granting of the variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the subject property is situated;

5. Alternative development concepts in compliance with the existing code have been evaluated and undue hardship would result if such adherence to code provision is required;

6. The variance granted is the minimum necessary to accommodate the permitted uses proposed by the application; and

7. The basis for the variance request is not the result of deliberate actions of the applicant or property owner. (Ord. 1325 § 4, 2009; Ord. 988 § 2, 2003).

This page of the Bonney Lake Municipal Code is current through Ordinance 1359, passed July 27, 2010.

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(<http://www.codepublishing.com/>)

APPENDIX D



Supreme Court of the United States
 Anthony PALAZZOLO, Petitioner,
 v.
 RHODE ISLAND et al.
 No. 99-2047.

Argued Feb. 26, 2001.
 Decided June 28, 2001.

Landowner brought inverse condemnation action against the Rhode Island Coastal Resources Management Council (CRMC), alleging that the CRMC's denial of his application to fill 18 acres of coastal wetlands and construct beach club constituted a taking for which he was entitled to compensation. After bench trial, the Rhode Island Superior Court, Washington County, entered judgment for CRMC. The Rhode Island Supreme Court, 746 A.2d 707, affirmed, and landowner petitioned for certiorari. The United States Supreme Court, Justice Kennedy, held that: (1) claims were ripe for adjudication; (2) acquisition of title after the effective date of the regulations did not bar regulatory takings claims; and (3) Lucas claim for deprivation of all economic use was precluded by undisputed value of portion of tract for construction of residence.

Affirmed in part, reversed in part and remanded.

Justices O'Connor and Scalia filed concurring opinions.

Justice Stevens filed opinion concurring in part and dissenting in part.

Justice Ginsburg filed dissenting opinion, in which Justices Souter and Breyer joined.

Justice Breyer filed dissenting opinion.

West Headnotes

[1] Constitutional Law 92 ↪ 3855

92 Constitutional Law

92XXVII Due Process
92XXVII(A) In General
92k3848 Relationship to Other Constitutional Provisions; Incorporation
92k3855 k. Fifth Amendment. Most Cited Cases
 (Formerly 92k280)
 The Takings Clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment. U.S.C.A. Const.Amend. 5, 14.

[2] Eminent Domain 148 ↪ 2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In general. Most Cited Cases
 (Formerly 148k2(1))
 Taking occurs when the government encroaches upon or occupies private land for its own proposed use. U.S.C.A. Const.Amend. 5.

[3] Eminent Domain 148 ↪ 2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In general. Most Cited Cases
 (Formerly 148k2(1))
 Even a minimal permanent physical occupation of real property by government requires compensation under the Takings Clause. U.S.C.A. Const.Amend. 5.

[4] Eminent Domain 148 ↪ 2.10(1)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.10 Zoning, Planning, or Land Use; Building Codes
148k2.10(1) k. In general. Most Cited Cases
 (Formerly 148k2(1.2))
 Regulation which denies all economically beneficial

(Cite as: 533 U.S. 606, 121 S.Ct. 2448)

or productive use of land will require compensation under the Takings Clause. U.S.C.A. Const.Amend. 5.

[5] Eminent Domain 148 ↪ 2.10(1)148 Eminent Domain148I Nature, Extent, and Delegation of Power

148k2 What Constitutes a Taking; Police and Other Powers Distinguished

148k2.10 Zoning, Planning, or Land Use; Building Codes

148k2.10(1) k. In general. Most Cited Cases

(Formerly 148k2(1.2))

Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. U.S.C.A. Const.Amend. 5.

[6] Eminent Domain 148 ↪ 3148 Eminent Domain148I Nature, Extent, and Delegation of Power

148k3 k. Constitutional and statutory provisions. Most Cited Cases

Purpose of the Takings Clause is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. U.S.C.A. Const.Amend. 5.

[7] Eminent Domain 148 ↪ 277148 Eminent Domain

148IV Remedies of Owners of Property; Inverse Condemnation

148k277 k. Conditions precedent to action; ripeness. Most Cited Cases

Final decision requirement for ripeness of a regulatory takings claim is not satisfied when a developer submits, and a land use authority denies, a grandiose development proposal, leaving open the possibility that lesser uses of the property might be permitted. U.S.C.A. Const.Amend. 5.

[8] Eminent Domain 148 ↪ 277148 Eminent Domain

148IV Remedies of Owners of Property; Inverse Condemnation

148k277 k. Conditions precedent to action; ripeness. Most Cited Cases

While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened. U.S.C.A. Const.Amend. 5.

[9] Eminent Domain 148 ↪ 277148 Eminent Domain

148IV Remedies of Owners of Property; Inverse Condemnation

148k277 k. Conditions precedent to action; ripeness. Most Cited Cases

A landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. U.S.C.A. Const.Amend. 5.

[10] Eminent Domain 148 ↪ 277148 Eminent Domain

148IV Remedies of Owners of Property; Inverse Condemnation

148k277 k. Conditions precedent to action; ripeness. Most Cited Cases

A takings claim based on a law or regulation which is alleged to go too far in burdening property is not ripe until ordinary processes have been followed to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law; as a general rule, the extent of the restriction on property is not known and a regulatory taking has not yet been established until processes have been followed. U.S.C.A. Const.Amend. 5.

[11] Eminent Domain 148 ↪ 277148 Eminent Domain

148IV Remedies of Owners of Property; Inverse

533 U.S. 606, 121 S.Ct. 2448, 52 ERC 1609, 150 L.Ed.2d 592, 69 USLW 4581, 69 USLW 4605, 32 Env'tl. L. Rep. 20,516, 01 Cal. Daily Op. Serv. 5439, 2001 Daily Journal D.A.R. 6685, 14 Fla. L. Weekly Fed. S 458, 2001 DJCAR 3358

(Cite as: 533 U.S. 606, 121 S.Ct. 2448)

Condemnation

148k277 k. Conditions precedent to action; ripeness. Most Cited Cases

Government authorities may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision that would render a takings claim ripe for judicial determination. U.S.C.A. Const.Amend. 5.

[12] Eminent Domain 148 ↪277

148 Eminent Domain

148IV Remedies of Owners of Property; Inverse Condemnation

148k277 k. Conditions precedent to action; ripeness. Most Cited Cases

Takings claim was ripe for judicial determination once state coastal agency interpreted its regulations as precluding any filling or development of marshlands and determined that proposed use did not qualify for special exception, as limitations on development resulting from wetlands regulations were clear and there was no indication that agency would have accepted any application for development that occupied smaller area of marshlands.

[13] Eminent Domain 148 ↪277

148 Eminent Domain

148IV Remedies of Owners of Property; Inverse Condemnation

148k277 k. Conditions precedent to action; ripeness. Most Cited Cases

Landowner's failure to submit application to develop only upland portion of property did not render unripe claim that denial of permission to develop beach club on tract, which was primarily marshland, was taking, where there was no uncertainty as to upland's permitted uses and development value of uplands was uncontested.

[14] Eminent Domain 148 ↪131

148 Eminent Domain

148II Compensation

148II(C) Measure and Amount

148k129 Taking Entire Tract or Piece of Property

148k131 k. Value of land. Most Cited Cases

Eminent Domain 148 ↪134

148 Eminent Domain

148II Compensation

148II(C) Measure and Amount

148k129 Taking Entire Tract or Piece of Property

148k134 k. Value for special use. Most Cited Cases

When a taking has occurred, under accepted condemnation principles the owner's damages will be based upon the property's fair market value, which will turn in part on restrictions on use imposed by legitimate zoning or other regulatory limitations; mere allegation of entitlement to the value of an intensive use will not avail the landowner if the project would not have been allowed under other existing, legitimate land use limitations. U.S.C.A. Const.Amend. 5.

[15] Eminent Domain 148 ↪277

148 Eminent Domain

148IV Remedies of Owners of Property; Inverse Condemnation

148k277 k. Conditions precedent to action; ripeness. Most Cited Cases

Where the state agency charged with enforcing a challenged land use regulation entertains an application from an owner and its denial of the application makes clear the extent of development permitted, and neither the agency nor a reviewing state court has cited non-compliance with reasonable state law exhaustion or pre-permit processes, federal ripeness rules do not require the submission of further and futile applications with other agencies. U.S.C.A. Const.Amend. 5.

[16] Eminent Domain 148 ↪64

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k64 k. Persons entitled to question power. Most Cited Cases

Acquisition of title by landowner after effective date of the state-imposed restrictions is not ipso facto fatal to regulatory takings claim on basis that landowner was on notice of those restrictions. U.S.C.A. Const.Amend. 5.

(Cite as: 533 U.S. 606, 121 S.Ct. 2448)

[17] Zoning and Planning 414 ↪ 1014**414 Zoning and Planning****414I In General****414k1013 Matters Subject to Regulation****414k1014 k. In general. Most Cited Cases**

(Formerly 414k11.1)

The right to improve property is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions.

[18] Eminent Domain 148 ↪ 152(1)**148 Eminent Domain****148II Compensation****148II(D) Persons Entitled and Payment****148k151 Persons Entitled****148k152 In General****148k152(1) k. In general. Most Cited****Cases****Eminent Domain 148 ↪ 153****148 Eminent Domain****148II Compensation****148II(D) Persons Entitled and Payment****148k151 Persons Entitled****148k153 k. Vendor or purchaser. Most****Cited Cases**

In a direct condemnation action, or when a State has physically invaded the property without filing suit, any award goes to the owner at the time of the taking, and that the right to compensation is not passed to a subsequent purchaser. U.S.C.A. Const.Amend. 5.

[19] Eminent Domain 148 ↪ 2.1**148 Eminent Domain****148I Nature, Extent, and Delegation of Power****148k2 What Constitutes a Taking; Police and Other Powers Distinguished****148k2.1 k. In general. Most Cited Cases**

(Formerly 148k2(1))

A regulation that otherwise would be an unconstitutional taking absent compensation is not transformed into a background principle of the State's law, which cannot be challenged by those who acquire title after the enactment, by mere virtue of the passage of title. U.S.C.A. Const.Amend. 5.

[20] Eminent Domain 148 ↪ 69**148 Eminent Domain****148II Compensation****148II(A) Necessity and Sufficiency in General**

148k69 k. Necessity of making compensation in general. Most Cited Cases

Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest. U.S.C.A. Const.Amend. 5.

[21] Eminent Domain 148 ↪ 2.27(2)**148 Eminent Domain****148I Nature, Extent, and Delegation of Power****148k2 What Constitutes a Taking; Police and Other Powers Distinguished****148k2.27 Environmental Protection****148k2.27(2) k. Wetlands and coastal****protection. Most Cited Cases**

(Formerly 148k2(10))

Regulation which precluded use of fill on wetlands and thus development of beach club on wetlands portion of 18-acre tract, but which permitted landowner to build substantial residence on uplands portion of tract, leaving parcel with \$200,000 in development value, did not deprive landowner of all economic use of entire parcel so as to support Lucastakings claim. U.S.C.A. Const.Amend. 5.

[22] Certiorari 73 ↪ 64(1)**73 Certiorari****73II Proceedings and Determination****73k63 Review****73k64 Scope and Extent in General****73k64(1) k. In general. Most Cited****Cases**

Argument that was not pressed in state courts or presented in petition for certiorari, that wetlands portion of tract was distinct parcel from remaining portion of same tract for purposes of asserting Lucastakings claim for deprivation of all economic use, would not be considered when raised in brief.

**2451Syllabus^{FN*}

(Cite as: 533 U.S. 606, 121 S.Ct. 2448)

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

*606 In order to acquire the waterfront parcel of Rhode Island land that is here at issue, petitioner and associates formed Shore Gardens, Inc. (SGI), in 1959. After SGI purchased the property petitioner bought out his associates and became the sole shareholder. Most of the property was then, and is now, salt marsh subject to tidal flooding. The wet ground and permeable soil would require considerable fill before significant structures could be built. Over the years, SGI's intermittent applications to develop the property were rejected by various government agencies. After 1966, no further applications were made for over a decade. Two intervening events, however, become important to the issues presented. First, in 1971, the State created respondent Rhode Island Coastal Resources Management Council (Council) and charged it with protecting the State's coastal properties. The Council's regulations, known as the Rhode Island Coastal Resources Management Program (CRMP), designated salt marshes like those on SGI's property as protected "coastal wetlands" on which development is greatly limited. Second, in 1978, SGI's corporate charter was revoked, and title to the property passed to petitioner as the corporation's sole shareholder. In 1983, petitioner applied to the Council for permission to construct a wooden bulkhead and fill his entire marshland area. The Council rejected the application, concluding, *inter alia*, that it would conflict with the CRMP. In 1985, petitioner filed a new application with the Council, seeking permission to fill 11 of the property's 18 wetland acres in order to build a private beach club. The Council rejected this application as well, ruling that the proposal did not satisfy the standards for obtaining a "special exception" to fill salt marsh, whereby the proposed activity must serve a compelling public purpose. Subsequently, petitioner filed an inverse condemnation action in Rhode Island Superior Court, asserting that the State's wetlands regulations, as applied by the Council to his parcel, had taken the property without compensation in violation of the Fifth and Fourteenth Amendments. The suit alleged the Council's action deprived him of "all economically beneficial use" of his property, resulting in a total taking requiring compensation under Lucas v.

South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798, and sought \$3,150,000 in damages, a figure derived from an appraiser's estimate as to the value of a 74-lot **2452 residential subdivision on the property. The court ruled against *607 petitioner, and the State Supreme Court affirmed, holding that (1) petitioner's takings claim was not ripe; (2) he had no right to challenge regulations predating 1978, when he succeeded to legal ownership of the property; (3) he could not assert a takings claim based on the denial of all economic use of his property in light of undisputed evidence that he had \$200,000 in development value remaining on an upland parcel of the property; and (4) because the regulation at issue predated his acquisition of title, he could have had no reasonable investment-backed expectation that he could develop his property, and, therefore, he could not recover under Penn Central Transp. Co. v. City of York, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631

Held:

1. This case is ripe for review. Pp. 2457-2462.

(a) A takings claim challenging application of land-use regulations is not ripe unless the agency charged with implementing the regulations has reached a final decision regarding their application to the property at issue. Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 105 S.Ct. 3108, 87 L.Ed.2d 126. A final decision does not occur until the responsible agency determines the extent of permitted development on the land. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 351, 106 S.Ct. 2561, 91 L.Ed.2d 285. Petitioner obtained such a final decision when the Council denied his 1983 and 1985 applications. The State Supreme Court erred in ruling that, notwithstanding those denials, doubt remained as to the extent of development the Council would allow on petitioner's parcel due to his failure to explore other uses for the property that would involve filling substantially less wetlands. This is belied by the unequivocal nature of the wetland regulations at issue and by the Council's application of the regulations to the subject property. The CRMP permits the Council to grant a special exception to engage in a prohibited use only where a "compelling public purpose" is served. The proposal to fill the entire property was not accepted under Council regulations and did not qualify for the

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special exception. The Council determined the use proposed in the second application (the beach club) did not satisfy the "compelling public purpose" standard. There is no indication the Council would have accepted the application had the proposed club occupied a smaller surface area. To the contrary, it ruled that the proposed activity was not a "compelling public purpose." Although a landowner may not establish a taking before the land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation, *e.g., MacDonald, supra*, at 342, 106 S.Ct. 2561, once it becomes clear that the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened. Here, the Council's decisions make plain that *608 it interpreted its regulations to bar petitioner from engaging in any filling or development on the wetlands. Further permit applications were not necessary to establish this point. Pp. 2458-2459.

(b) Contrary to the State Supreme Court's ruling, petitioner's claim is not unripe by virtue of his failure to seek permission for a use of the property that would involve development only of its upland portion. It is true that there was uncontested testimony that an upland site would have an estimated value of \$200,000 if developed. And, while the CRMP requires Council approval to develop upland property lying within 200 feet of protected waters, the strict "compelling public purpose" test does not govern proposed land uses on property in this classification. Council officials testified at trial, moreover, that they would have allowed petitioner to build a residence on the upland parcel. Nevertheless, this Court's ripeness jurisprudence **2453 requires petitioner to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use. The State's assertion that the uplands' value is in doubt comes too late for the litigation before this Court. It was stated in the certiorari petition that the uplands were worth an estimated \$200,000. The figure not only was uncontested but also was cited as fact in the State's brief in opposition. In this circumstance ripeness cannot be contested by saying that the value of the nonwetland parcels is unknown. See *Lucas, supra*, at 1020, and n. 9, 112 S.Ct. 2886. Nor is there genuine ambiguity in the record as to the extent of permitted development on petitioner's property, either on the wetlands or the uplands. Pp. 2460-2461.

(c) Nor is petitioner's takings claim rendered unripe, as the State Supreme Court held, by his failure to apply for permission to develop the 74-lot subdivision that was the basis for the damages sought in his inverse condemnation suit. It is difficult to see how this concern is relevant to the inquiry at issue here. The Council informed petitioner that he could not fill the wetlands; it follows of necessity that he could not fill and then build 74 single-family dwellings there. Petitioner's submission of this proposal would not have clarified the extent of development permitted by the wetlands regulations, which is the inquiry required under the Court's ripeness decisions. Pp. 2461-2462.

2. Petitioner's acquisition of title after the regulations' effective date did not bar his takings claims. This Court rejects the State Supreme Court's sweeping rule that a purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking. Were the Court to accept that rule, the post-enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be *609 the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land. The State's notice justification does not take into account the effect on owners at the time of enactment, who are prejudiced as well. Should an owner attempt to challenge a new regulation, but not survive the process of ripening his or her claim (which, as this case demonstrates, will often take years), under the State's rule the right to compensation may not be asserted by an heir or successor, and so may not be asserted at all. The State's rule also would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself. See, *e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164, 101 S.Ct. 446, 66 L.Ed.2d 358. The rule is, furthermore, capricious in effect. The young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings Clause is not so quixotic. A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an in-

533 U.S. 606, 121 S.Ct. 2448, 52 ERC 1609, 150 L.Ed.2d 592, 69 USLW 4581, 69 USLW 4605, 32 Env'tl. L. Rep. 20,516, 01 Cal. Daily Op. Serv. 5439, 2001 Daily Journal D.A.R. 6685, 14 Fla. L. Weekly Fed. S 458, 2001 DJCAR 3358

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strument to accord with the duty to compensate for what is taken. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834, n. 2, 107 S.Ct. 3141, 97 L.Ed.2d 677, is controlling precedent for the Court's conclusion. Lucas, 505 U.S., at 1029, 112 S.Ct. 2886, did not overrule Nollan, which is based on essential Takings Clause principles. On remand the state court must address the merits of petitioner's Penn Central claim, which is not barred by the mere fact that his title was acquired after the effective date of the state-imposed restriction. Pp. 2462-2464.

3. The State Supreme Court did not err in finding that petitioner failed to establish a deprivation of all economic use, **2454 for it is undisputed that his parcel retains significant development value. Petitioner is correct that, assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest. This is not the situation in this case, however. A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property "economically idle." Lucas, supra, at 1019, 112 S.Ct. 2886. Petitioner attempts to revive this part of his claim by arguing, for the first time, that the upland parcel is distinct from the wetlands portions, so he should be permitted to assert a deprivation limited to the latter. The Court will not explore the point here. Petitioner did not press the argument in the state courts, and the issue was not presented in his certiorari petition. The case comes to the Court on the premise that petitioner's entire parcel serves as the basis for his takings claim, and, so framed, the total deprivation argument fails. Pp. 2464-2465.

*610 4. Because petitioner's claims under the Penn Central analysis were not examined below, the case is remanded. Pp. 2457, 2465.

746 A.2d 707, affirmed in part, reversed in part, and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined, and in which STEVENS, J., joined as to Part II-A. O'CONNOR, J., *post*, p. 2465 and SCALIA, J., *post*, p. 2467 filed concurring opinions. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 2468. GINSBURG, J., filed a dissenting opinion, in which SOUTER and BREYER, JJ., joined, *post*, p.

2472. BREYER, J., filed a dissenting opinion, *post*, p. 2477.

James S. Burling, Sacramento, CA, for petitioner.

For U.S. Supreme Court briefs, see:2000 WL 1742033 (Pet.Brief)2001 WL 22908 (Resp.Brief)2001 WL 57593 (Reply.Brief)

*611 Justice KENNEDY delivered the opinion of the Court.

Petitioner Anthony Palazzolo owns a waterfront parcel of land in the town of Westerly, Rhode Island. Almost all of the property is designated as coastal wetlands under Rhode Island law. After petitioner's development proposals were rejected by respondent Rhode Island Coastal Resources Management Council (Council), he sued in state court, asserting the Council's application of its wetlands regulations took the property without compensation in violation of the Takings Clause of the Fifth Amendment, binding upon the State through the Due Process Clause of the Fourteenth Amendment. Petitioner sought review in this Court, contending the Supreme Court of Rhode Island erred in rejecting his takings claim. We granted certiorari. 531 U.S. 923, 121 S.Ct. 296, 148 L.Ed.2d 238 (2000).

I

The town of Westerly is on an edge of the Rhode Island coastline. The town's western border is the Pawcatuck River, which at that point is the boundary between Rhode *612 Island and Connecticut. Situated on land purchased from the Narragansett Indian Tribe, the town was incorporated in 1669 and had a precarious, though colorful, early history. Both Connecticut and Massachusetts contested the boundaries—and indeed the validity-of Rhode Island's royal charter; and Westerly's proximity to Connecticut invited encroachments during these jurisdictional squabbles. See M. Best, *The Town that Saved a State—Westerly* 60-83 (1943); see also W. McLoughlin, *Rhode Island: A Bicentennial History* 39-57 (1978). When the borders of the Rhode Island Colony were settled by compact in 1728, the town's development was more orderly, and with some historical distinction. For instance, **2455 Watch Hill Point, the peninsula at the southwestern tip of the town, was of strategic importance in the Revolutionary War and the War of 1812. See Best, *supra*, at 190; F. Denison, *Westerly*

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and its Witnesses 118-119 (1878).

In later times Westerly's coastal location had a new significance: It became a popular vacation and sea-side destination. One of the town's historians gave this happy account:

“After the Civil War the rapid growth of manufacture and expansion of trade had created a spending class on pleasure bent, and Westerly had superior attractions to offer, surf bathing on ocean beaches, quieter bathing in salt and fresh water ponds, fishing, annual sail and later motor boat races. The broad beaches of clean white sand dip gently toward the sea; there are no odorous marshes at low tide, no railroad belches smoke, and the climate is unrivalled on the coast, that of Newport only excepted. In the phenomenal heat wave of 1881 ocean resorts from northern New England to southern New Jersey sweltered as the thermometer climbed to 95 and 104 degrees, while Watch Hill enjoyed a comfortable 80. When Providence to the north runs a temperature of 90, the mercury in this favored spot remains at 77.” Best, *supra*, at 192.

*613 Westerly today has about 20,000 year-round residents, and thousands of summer visitors come to enjoy its beaches and coastal advantages.

One of the more popular attractions is Misquamicut State Beach, a lengthy expanse of coastline facing Block Island Sound and beyond to the Atlantic Ocean. The primary point of access to the beach is Atlantic Avenue, a well-traveled 3-mile stretch of road running along the coastline within the town's limits. At its western end, Atlantic Avenue is something of a commercial strip, with restaurants, hotels, arcades, and other typical seashore businesses. The pattern of development becomes more residential as the road winds eastward onto a narrow spine of land bordered to the south by the beach and the ocean, and to the north by Winnapaug Pond, an intertidal inlet often used by residents for boating, fishing, and shell-fishing.

In 1959 petitioner, a lifelong Westerly resident, decided to invest in three undeveloped, adjoining parcels along this eastern stretch of Atlantic Avenue. To the north, the property faces, and borders upon, Winnapaug Pond; the south of the property faces Atlantic

Avenue and the beachfront homes abutting it on the other side, and beyond that the dunes and the beach. To purchase and hold the property, petitioner and associates formed Shore Gardens, Inc. (SGI). After SGI purchased the property petitioner bought out his associates and became the sole shareholder. In the first decade of SGI's ownership of the property the corporation submitted a plat to the town subdividing the property into 80 lots; and it engaged in various transactions that left it with 74 lots, which together encompassed about 20 acres. During the same period SGI also made initial attempts to develop the property and submitted intermittent applications to state agencies to fill substantial portions of the parcel. Most of the property was then, as it is now, salt marsh subject to tidal flooding. The wet ground and permeable soil would require considerable fill—as much as six feet in some *614 places—before significant structures could be built. SGI's proposal, submitted in 1962 to the Rhode Island Division of Harbors and Rivers (DHR), sought to dredge from Winnapaug Pond and fill the entire property. The application was denied for lack of essential information. A second, similar proposal followed a year later. A third application, submitted in 1966 while the second application was pending, proposed more limited filling of the land for use as a private beach club. These latter two applications were referred to the Rhode Island Department of **2456 Natural Resources, which indicated initial assent. The agency later withdrew approval, however, citing adverse environmental impacts. SGI did not contest the ruling.

No further attempts to develop the property were made for over a decade. Two intervening events, however, become important to the issues presented. First, in 1971, Rhode Island enacted legislation creating the Council, an agency charged with the duty of protecting the State's coastal properties. 1971 R.I. Pub. Laws, ch. 279, § 1 *et seq.* Regulations promulgated by the Council designated salt marshes like those on SGI's property as protected “coastal wetlands,” Rhode Island Coastal Resources Management Program (CRMP) § 210.3 (as amended, June 28, 1983) (lodged with the Clerk of this Court), on which development is limited to a great extent. Second, in 1978, SGI's corporate charter was revoked for failure to pay corporate income taxes; and title to the property passed, by operation of state law, to petitioner as the corporation's sole shareholder.

533 U.S. 606, 121 S.Ct. 2448, 52 ERC 1609, 150 L.Ed.2d 592, 69 USLW 4581, 69 USLW 4605, 32 Env'tl. L. Rep. 20,516, 01 Cal. Daily Op. Serv. 5439, 2001 Daily Journal D.A.R. 6685, 14 Fla. L. Weekly Fed. S 458, 2001 DJCAR 3358

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In 1983, petitioner, now the owner, renewed the efforts to develop the property. An application to the Council, resembling the 1962 submission, requested permission to construct a wooden bulkhead along the shore of Winnapaug Pond and to fill the entire marshland area. The Council rejected the application, noting it was “vague and inadequate for a project of this size and nature.” App. 16. The agency also found that “the proposed activities will have significant impacts*615 upon the waters and wetlands of Winnapaug Pond,” and concluded that “the proposed alteration ... will conflict with the Coastal Resources Management Plan presently in effect.” *Id.*, at 17. Petitioner did not appeal the agency's determination.

Petitioner went back to the drawing board, this time hiring counsel and preparing a more specific and limited proposal for use of the property. The new application, submitted to the Council in 1985, echoed the 1966 request to build a private beach club. The details do not tend to inspire the reader with an idyllic coastal image, for the proposal was to fill 11 acres of the property with gravel to accommodate “50 cars with boat trailers, a dumpster, port-a-johns, picnic tables, barbecue pits of concrete, and other trash receptacles.” *Id.*, at 25.

The application fared no better with the Council than previous ones. Under the agency's regulations, a landowner wishing to fill salt marsh on Winnapaug Pond needed a “special exception” from the Council. CRMP § 130. In a short opinion the Council said the beach club proposal conflicted with the regulatory standard for a special exception. See App. 27. To secure a special exception the proposed activity must serve “a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests.” CRMP § 130A(1). This time petitioner appealed the decision to the Rhode Island courts, challenging the Council's conclusion as contrary to principles of state administrative law. The Council's decision was affirmed. See App. 31-42.

Petitioner filed an inverse condemnation action in Rhode Island Superior Court, asserting that the State's wetlands regulations, as applied by the Council to his parcel, had taken the property without compensation in violation of the Fifth and Fourteenth Amendments. See *id.*, at 45. The suit alleged the Council's action deprived him of “economically, beneficial use” of his property, *ibid.*, resulting in a

total taking*616 requiring compensation under Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). He sought damages in the amount of \$3,150,000, a figure derived from an appraiser's estimate as to the value of a 74-lot residential subdivision. The State countered with a host of defenses. After a bench trial, a justice of the Superior Court ruled against petitioner,**2457 accepting some of the State's theories. App. to Pet. for Cert. B-1 to B-13.

The Rhode Island Supreme Court affirmed. 746 A.2d 707 (2000). Like the Superior Court, the State Supreme Court recited multiple grounds for rejecting petitioner's suit. The court held, first, that petitioner's takings claim was not ripe, *id.*, at 712-715; second, that petitioner had no right to challenge regulations predating 1978, when he succeeded to legal ownership of the property from SGI, *id.*, at 716; and third, that the claim of deprivation of all economically beneficial use was contradicted by undisputed evidence that he had \$200,000 in development value remaining on an upland parcel of the property, *id.*, at 715. In addition to holding petitioner could not assert a takings claim based on the denial of all economic use, the court concluded he could not recover under the more general test of Penn Central Transp. Co. v. City New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). On this claim, too, the date of acquisition of the parcel was found determinative, and the court held he could have had “no reasonable investment-backed expectations that were affected by this regulation” because it predated his ownership, 746 A.2d, at 717; see also Penn Central, *supra*, at 124, 98 S.Ct. 2646.

We disagree with the Supreme Court of Rhode Island as to the first two of these conclusions; and, we hold, the court was correct to conclude that the owner is not deprived of all economic use of his property because the value of upland portions is substantial. We remand for further consideration of the claim under the principles set forth in Penn Central.

*617 II

[1][2][3] The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, Chicago, B. & O.R. Co. v. Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897), prohibits the government from taking private property for

533 U.S. 606, 121 S.Ct. 2448, 52 ERC 1609, 150 L.Ed.2d 592, 69 USLW 4581, 69 USLW 4605, 32 Env'tl. L. Rep. 20,516, 01 Cal. Daily Op. Serv. 5439, 2001 Daily Journal D.A.R. 6685, 14 Fla. L. Weekly Fed. S 458, 2001 DJCAR 3358

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public use without just compensation. The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use. Our cases establish that even a minimal “permanent physical occupation of real property” requires compensation under the Clause. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' well-known, if less than self-defining, formulation, “while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.” Id., at 415, 43 S.Ct. 158.

[4][5][6] Since Mahon, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking. First, we have observed, with certain qualifications, see infra, at 2463-2464, that a regulation which “denies all economically beneficial or productive use of land” will require compensation under the Takings Clause. Lucas, 505 U.S., at 1015, 112 S.Ct. 2886; see also id., at 1035, 112 S.Ct. 2886 (KENNEDY, J., concurring); Agins v. City of Tiburon, 447 U.S. 255, 261, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. Penn Central, supra, at 124, 98 S.Ct. 2646. These inquiries are informed by the purpose of the *618 Takings Clause, which is to prevent the government**2458 from “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960).

Petitioner seeks compensation under these principles. At the outset, however, we face the two threshold considerations invoked by the state court to bar the claim: ripeness, and acquisition which postdates the

regulation.

A

In Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), the Court explained the requirement that a takings claim must be ripe. The Court held that a takings claim challenging the application of land-use regulations is not ripe unless “the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.” Id., at 186, 105 S.Ct. 3108. A final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of “all economically beneficial use” of the property, see Lucas, supra, at 1015, 112 S.Ct. 2886, or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred, see Penn Central, supra, at 124, 98 S.Ct. 2646. These matters cannot be resolved in definitive terms until a court knows “the extent of permitted development” on the land in question. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 351, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986). Drawing on these principles, the Rhode Island Supreme Court held that petitioner had not taken the necessary steps to ripen his takings claim.

The central question in resolving the ripeness issue, under Williamson County and other relevant decisions, is whether petitioner obtained a final decision from the Council determining the permitted use for the land. As we have noted, SGI's early applications to fill had been granted at one point, *619 though that assent was later revoked. Petitioner then submitted two proposals: the 1983 proposal to fill the entire parcel, and the 1985 proposal to fill 11 of the property's 18 wetland acres for construction of the beach club. The court reasoned that, notwithstanding the Council's denials of the applications, doubt remained as to the extent of development the Council would allow on petitioner's parcel. We cannot agree.

[7] The court based its holding in part upon petitioner's failure to explore “any other use for the property that would involve filling substantially less wetlands.” 746 A.2d, at 714. It relied upon this Court's observations that the final decision requirement is not

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satisfied when a developer submits, and a land-use authority denies, a grandiose development proposal, leaving open the possibility that lesser uses of the property might be permitted. See *MacDonald, supra*, at 353, n. 9, 106 S.Ct. 2561. The suggestion is that while the Council rejected petitioner's effort to fill all of the wetlands, and then rejected his proposal to fill 11 of the wetland acres, perhaps an application to fill (for instance) 5 acres would have been approved. Thus, the reasoning goes, we cannot know for sure the extent of permitted development on petitioner's wetlands.

This is belied by the unequivocal nature of the wetland regulations at issue and by the Council's application of the regulations to the subject property. Winnapug Pond is classified under the CRMP as a Type 2 body of water. See CRMP § 200.2. A landowner, as a general rule, is prohibited from filling or building residential structures on wetlands adjacent to Type 2 waters, see *id.*, Table 1, p. 22, and § 210.3(C)(4), but may seek a special exception from the Council to engage in a prohibited use, see *id.*, § 130. The Council is permitted to allow the exception, **2459 however, only where a "compelling public purpose" is served. *Id.*, § 130A(2). The proposal to fill the entire property was not accepted under Council regulations and did not qualify for the special exception. The Council determined the use proposed*620 in the second application (the beach club) did not satisfy the "compelling public purpose" standard. There is no indication the Council would have accepted the application had petitioner's proposed beach club occupied a smaller surface area. To the contrary, it ruled that the proposed activity was not a "compelling public purpose." App. 27; cf. *id.*, at 17 (1983 application to fill wetlands proposed an "activity" conflicting with the CRMP).

[8]*Williamson County*'s final decision requirement "responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer." *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 738, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997). While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened. The

case is quite unlike those upon which respondents place principal reliance, which arose when an owner challenged a land-use authority's denial of a substantial project, leaving doubt whether a more modest submission or an application for a variance would be accepted. See *MacDonald, supra*, at 342, 106 S.Ct. 2561 (denial of 159-home residential subdivision); *Williamson County, supra*, at 182, 105 S.Ct. 3108 (476-unit subdivision); cf. *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) (case not ripe because no plan to develop was submitted).

[9][10][11] These cases stand for the important principle that a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development *621 plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established. See *Suitum, supra*, at 736, and n. 10, 117 S.Ct. 1659 (noting difficulty of demonstrating that "mere enactment" of regulations restricting land use effects a taking). Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision. *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999).

[12] With respect to the wetlands on petitioner's property, the Council's decisions make plain that the agency interpreted its regulations to bar petitioner from engaging in any filling or development activity on the wetlands, a fact reinforced by the Attorney General's forthright responses to our questioning during oral argument in this case. See Tr. of Oral Arg. 26, 31. The rulings of the Council interpreting the regulations at issue, and the briefs, arguments, and candid statements by counsel for both sides, leave no doubt on this point: On the wetlands there can be no fill for any ordinary land use. There can be no fill for

533 U.S. 606, 121 S.Ct. 2448, 52 ERC 1609, 150 L.Ed.2d 592, 69 USLW 4581, 69 USLW 4605, 32 Env'tl. L. Rep. 20,516, 01 Cal. Daily Op. Serv. 5439, 2001 Daily Journal D.A.R. 6685, 14 Fla. L. Weekly Fed. S 458, 2001 DJCAR 3358

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its own sake; no fill for a beach club, either rustic or upscale; no fill for a subdivision; no fill for any likely or foreseeable use. And with no fill there can be no structures and no development on the wetlands. Further permit applications were not necessary to establish this point.

****2460** As noted above, however, not all of petitioner's parcel constitutes protected wetlands. The trial court accepted uncontested testimony that an upland site located at the eastern end of the property would have an estimated value of \$200,000 if developed. App. to Pet. for Cert. B-5. While Council approval is required to develop upland property which lies within 200 feet of protected waters, see CRMP § 100.1(A), the strict "compelling public purpose" test does not govern proposed land uses on property in this classification.^{*622} see *id.*, § 110, Table 1A, § 120. Council officials testified at trial, moreover, that they would have allowed petitioner to build a residence on the upland parcel. App. to Pet. for Cert. B-5. The State Supreme Court found petitioner's claim unripe for the further reason that he "has not sought permission for any ... use of the property that would involve ... development only of the upland portion of the parcel." 746 A.2d, at 714.

[13] In assessing the significance of petitioner's failure to submit applications to develop the upland area it is important to bear in mind the purpose that the final decision requirement serves. Our ripeness jurisprudence imposes obligations on landowners because "[a] court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes." MacDonald, 477 U.S., at 348, 106 S.Ct. 2561. Ripeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use.

The State asserts the value of the uplands is in doubt. It relies in part on a comment in the opinion of the Rhode Island Supreme Court that "it would be possible to build at least one single-family home on the upland portion of the parcel." 746 A.2d, at 714. It argues that the qualification "at least" indicates that additional development beyond the single dwelling was possible. The attempt to interject ambiguity as to the value or use of the uplands, however, comes too late in the day for purposes of litigation before this

Court. It was stated in the petition for certiorari that the uplands on petitioner's property had an estimated worth of \$200,000. See Pet. for Cert. 21. The figure not only was uncontested but also was cited as fact in the State's brief in opposition. See Brief in Opposition 4, 19. In this circumstance ripeness cannot be contested by saying that the value of the nonwetland parcels is unknown. See Lucas, 505 U.S., at 1020, and n. 9, 112 S.Ct. 2886.

***623** The State's prior willingness to accept the \$200,000 figure, furthermore, is well founded. The only reference to upland property in the trial court's opinion is to a single parcel worth an estimated \$200,000. See App. to Pet. for Cert B-5. There was, it must be acknowledged, testimony at trial suggesting the existence of an additional upland parcel elsewhere on the property. See Tr. 190-191, 199-120 (testimony of Dr. Grover Fugate, Council Executive Director); see also *id.*, at 610 (testimony of Steven Clarke). The testimony indicated, however, that the potential, second upland parcel was on an "island" which required construction of a road across wetlands, *id.*, at 610, 623-624 (testimony of Mr. Clarke)-and, as discussed above, the filling of wetlands for such a purpose would not justify a special exception under Council regulations. See *supra*, at 2458-2459; see also Brief for Respondents 10 ("Residential construction is not the basis of such a 'special exception'"). Perhaps for this reason, the State did not maintain in the trial court that additional uplands could have been developed. To the contrary, its post-trial memorandum identified only the single parcel that petitioner concedes retains a development value of \$200,000. See State's Post-Trial Memorandum in No. 88-0297 (Super.Ct. R. I.), pp. 25, 81. The trial court accepted the figure. So there is no genuine ambiguity in the record as to the extent of permitted development^{**2461} on petitioner's property, either on the wetlands or the uplands.

Nonetheless, there is some suggestion that the use permitted on the uplands is not known, because the State accepted the \$200,000 value for the upland parcel on the premise that only a Lucas claim was raised in the pleadings in the state trial court. See Brief for Respondents 29-30. Since a Penn Central argument was not pressed at trial, it is argued, the State had no reason to assert with vigor that more than a single-family residence might be placed on the uplands. We disagree; the State was aware of the applicability of

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Penn Central. The issue whether the Council's decisions *624 amounted to a taking under Penn Central was discussed in the trial court, App. to Pet. for Cert. B-7, the State Supreme Court, 746 A.2d, at 717, and the State's own post-trial submissions, see State's Post-Trial Supplemental Memorandum 7-10. The state-court opinions cannot be read as indicating that a Penn Central claim was not properly presented from the outset of this litigation.

A final ripeness issue remains. In concluding that Williamson County's final decision requirement was not satisfied, the State Supreme Court placed emphasis on petitioner's failure to "appl[y] for permission to develop [the] seventy-four-lot subdivision" that was the basis for the damages sought in his inverse condemnation suit. 746 A.2d, at 714. The court did not explain why it thought this fact significant, but respondents and *amici* defend the ruling. The Council's practice, they assert, is to consider a proposal only if the applicant has satisfied all other regulatory preconditions for the use envisioned in the application. The subdivision proposal that was the basis for petitioner's takings claim, they add, could not have proceeded before the Council without, at minimum, zoning approval from the town of Westerly and a permit from the Rhode Island Department of Environmental Management allowing the installation of individual sewage disposal systems on the property. Petitioner is accused of employing a hide the ball strategy of submitting applications for more modest uses to the Council, only to assert later a takings action predicated on the purported inability to build a much larger project. Brief for the National Wildlife Federation et al. as *Amici Curiae* 9.

[14] It is difficult to see how this concern is relevant to the inquiry at issue here. Petitioner was informed by the Council that he could not fill the wetlands; it follows of necessity that he could not fill and then build 74 single-family dwellings upon it. Petitioner's submission of this proposal would not have clarified the extent of development permitted by the wetlands regulations, which is the inquiry required *625 under our ripeness decisions. The State's concern may be that landowners could demand damages for a taking based on a project that could not have been constructed under other, valid zoning restrictions quite apart from the regulation being challenged. This, of course, is a valid concern in inverse condemnation cases alleging injury from wrongful refusal to permit

development. The instant case does not require us to pass upon the authority of a State to insist in such cases that landowners follow normal planning procedures or to enact rules to control damages awards based on hypothetical uses that should have been reviewed in the normal course, and we do not intend to cast doubt upon such rules here. The mere allegation of entitlement to the value of an intensive use will not avail the landowner if the project would not have been allowed under other existing, legitimate land-use limitations. When a taking has occurred, under accepted condemnation principles the owner's damages will be based upon the property's fair market value, see, e.g., Olson v. United States, 292 U.S. 246, 255, 54 S.Ct. 704, 78 L.Ed. 1236 (1934); 4 J. Sackman, Nichols on Eminent Domain § 12.01 (rev.3d ed.2000)-an inquiry which will turn, in part, on restrictions on use imposed by legitimate zoning **2462 or other regulatory limitations, see *id.*, § 12C.03[1].

[15] The state court, however, did not rely upon state-law ripeness or exhaustion principles in holding that petitioner's takings claim was barred by virtue of his failure to apply for a 74-lot subdivision; it relied on Williamson County. As we have explained, Williamson County and our other ripeness decisions do not impose further obligations on petitioner, for the limitations the wetland regulations imposed were clear from the Council's denial of his applications, and there is no indication that any use involving any substantial structures or improvements would have been allowed. Where the state agency charged with enforcing a challenged land-use regulation entertains an application from an owner and its denial of the application makes clear the extent of development*626 permitted, and neither the agency nor a reviewing state court has cited noncompliance with reasonable state-law exhaustion or pre-permit processes, see Felder v. Casey, 487 U.S. 131, 150-151, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988), federal ripeness rules do not require the submission of further and futile applications with other agencies.

B

[16] We turn to the second asserted basis for declining to address petitioner's takings claim on the merits. When the Council promulgated its wetlands regulations, the disputed parcel was owned not by petitioner but by the corporation of which he was sole share-

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holder. When title was transferred to petitioner by operation of law, the wetlands regulations were in force. The state court held the postregulation acquisition of title was fatal to the claim for deprivation of all economic use, 746 A.2d, at 716, and to the Penn Central claim, 746 A.2d, at 717. While the first holding was couched in terms of background principles of state property law, see Lucas, 505 U.S., at 1015, 112 S.Ct. 2886, and the second in terms of petitioner's reasonable investment-backed expectations, see Penn Central, 438 U.S., at 124, 98 S.Ct. 2646, the two holdings together amount to a single, sweeping, rule: A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking.

The theory underlying the argument that postenactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. See, e.g., Phillips v. Washington Legal Foundation, 524 U.S. 156, 163, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998). So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.

[17]*627 The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. See Pennsylvania Coal Co., 260 U.S., at 413, 43 S.Ct. 158 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law"). The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend**2463 any action

restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Nor does the justification of notice take into account the effect on owners at the time of enactment, who are prejudiced as well. Should an owner attempt to challenge a new regulation, but not survive the process of ripening his or her claim (which, as this case demonstrates, will often take years), under the proposed rule the right to compensation may not be asserted by an heir or successor, and so may not be asserted at all. The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself. See *628Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980) ("[A] State, by *ipse dixit*, may not transform private property into public property without compensation"); cf. Ellickson, Property in Land, 102 Yale L.J. 1315, 1368-1369 (1993) (right to transfer interest in land is a defining characteristic of the fee simple estate). The proposed rule is, furthermore, capricious in effect. The young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings Clause is not so quixotic. A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken.

[18] Direct condemnation, by invocation of the State's power of eminent domain, presents different considerations from cases alleging a taking based on a burdensome regulation. In a direct condemnation action, or when a State has physically invaded the property without filing suit, the fact and extent of the taking are known. In such an instance, it is a general rule of the law of eminent domain that any award goes to the owner at the time of the taking, and that the right to compensation is not passed to a subsequent purchaser. See Danforth v. United States, 308 U.S. 271, 284, 60 S.Ct. 231, 84 L.Ed. 240 (1939); 2 Sackman, Eminent Domain, at § 5.01[5][d][i] ("It is

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well settled that when there is a taking of property by eminent domain in compliance with the law, it is the owner of the property *at the time of the taking* who is entitled to compensation"). A challenge to the application of a land-use regulation, by contrast, does not mature until ripeness requirements have been satisfied, under principles we have discussed; until this point an inverse condemnation claim alleging a regulatory taking cannot be maintained. It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.

*629 There is controlling precedent for our conclusion. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), presented the question whether it was consistent with the Takings Clause for a state regulatory agency to require oceanfront landowners to provide lateral beach access to the public as the condition for a development permit. The principal dissenting opinion observed it was a policy of the California Coastal Commission to require the condition, and that the Nollans, who purchased their home after the policy went into effect, were "on notice that new developments would be approved only if provisions were made for lateral beach access." *Id.*, at 860, 107 S.Ct. 3141 (Brennan, J., dissenting). A majority of the Court rejected the proposition. "So long as the Commission could not have deprived the prior owners of the **2464 easement without compensating them," the Court reasoned, "the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id.*, at 834, n. 2, 107 S.Ct. 3141.

It is argued that *Nollan*'s holding was limited by the later decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). In *Lucas* the Court observed that a landowner's ability to recover for a government deprivation of all economically beneficial use of property is not absolute but instead is confined by limitations on the use of land which "inhere in the title itself." *Id.*, at 1029, 112 S.Ct. 2886. This is so, the Court reasoned, because the landowner is constrained by those "restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Ibid.* It is asserted here that *Lucas* stands for the proposition that any new regulation, once en-

acted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment.

[19] We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here. It suffices to say that a regulation that otherwise*630 would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title. This relative standard would be incompatible with our description of the concept in *Lucas*, which is explained in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition, see *id.*, at 1029-1030, 112 S.Ct. 2886. A regulation or common-law rule cannot be a background principle for some owners but not for others. The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed. See *id.*, at 1030, 112 S.Ct. 2886 ("The 'total taking' inquiry we require today will ordinarily entail ... analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities"). A law does not become a background principle for subsequent owners by enactment itself. *Lucas* did not overrule our holding in *Nollan*, which, as we have noted, is based on essential Takings Clause principles.

For reasons we discuss next, the state court will not find it necessary to explore these matters on remand in connection with the claim that all economic use was deprived; it must address, however, the merits of petitioner's claim under *Penn Central*. That claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction.

III

As the case is ripe, and as the date of transfer of title does not bar petitioner's takings claim, we have before us the alternative ground relied upon by the Rhode Island Supreme Court in ruling upon the merits of the takings claims. It held that all economically beneficial use was not deprived because the uplands portion of the property can still be improved. On this

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point, we agree with the court's decision. Petitioner accepts the Council's contention and the state trial *631 court's finding that his parcel retains \$200,000 in development value under the State's wetlands regulations. He asserts, nonetheless, that he has suffered a total taking and contends the Council cannot sidestep the holding in *Lucas* "by the simple expedient of leaving a landowner a few crumbs of value." Brief for Petitioner 37.

[20][21] Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest. This is not the situation of the landowner **2465 in this case, however. A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property "economically idle." *Lucas, supra*, at 1019, 112 S.Ct. 2886.

[22] In his brief submitted to us petitioner attempts to revive this part of his claim by reframing it. He argues, for the first time, that the upland parcel is distinct from the wetlands portions, so he should be permitted to assert a deprivation limited to the latter. This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation Law,"* 80 Harv. L.Rev. 1165, 1192 (1967). Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, see, e.g., *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); but we have at times expressed discomfort with the logic of this rule, see *Lucas, supra*, at 1016-1017, n. 7, 112 S.Ct. 2886, a sentiment echoed by some commentators, see, e.g., Epstein, *Takings: Descent and Resurrection*, 1987 S.Ct. Rev. 1, 16-17 (1987); Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L.Rev. 1535 (1994). Whatever the merits of these criticisms, we will not explore the point here. Petitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari. The case comes to us on the premise that petitioner's entire *632 parcel serves as the basis for his takings claim, and, so framed, the total deprivation argument fails.

For the reasons we have discussed, the State Supreme Court erred in finding petitioner's claims were unripe and in ruling that acquisition of title after the effective date of the regulations barred the takings claims. The court did not err in finding that petitioner failed to establish a deprivation of all economic value, for it is undisputed that the parcel retains significant worth for construction of a residence. The claims under the *Penn Central* analysis were not examined, and for this purpose the case should be remanded.

The judgment of the Rhode Island Supreme Court is affirmed in part and reversed in part, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice O'CONNOR, concurring.

I join the opinion of the Court but with my understanding of how the issues discussed in Part II-B of the opinion must be considered on remand.

Part II-B of the Court's opinion addresses the circumstance, present in this case, where a takings claimant has acquired title to the regulated property after the enactment of the regulation at issue. As the Court holds, the Rhode Island Supreme Court erred in effectively adopting the sweeping rule that the preacquisition enactment of the use restriction *ipso facto* defeats any takings claim based on that use restriction. Accordingly, the Court holds that petitioner's claim under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Ante*, at 2464.

The more difficult question is what role the temporal relationship between regulatory enactment and title acquisition *633 plays in a proper *Penn Central* analysis. Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance. **2466 Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed ex-

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pectations is one of a number of factors that a court must examine. Further, the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.

The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee is “ ‘designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’ ” *Penn Central, supra*, at 123-124, 98 S.Ct. 2646 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)). The concepts of “fairness and justice” that underlie the Takings Clause, of course, are less than fully determinate. Accordingly, we have eschewed “any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.” *Penn Central, supra*, at 124, 98 S.Ct. 2646 (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962)). The outcome instead “depends largely ‘upon the particular circumstances [in that] case.’ ” *Penn Central, supra*, at 124, 98 S.Ct. 2646 (quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168, 78 S.Ct. 1097, 2 L.Ed.2d 1228 (1958)).

We have “identified several factors that have particular significance” in these “essentially ad hoc, factual inquiries.” *Penn Central*, 438 U.S., at 124, 98 S.Ct. 2646. Two such factors are “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered *634 with distinct investment-backed expectations.” *Ibid*. Another is “the character of the governmental action.” *Ibid*. The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis. *Id.*, at 127, 98 S.Ct. 2646 (“[A] use restriction on real property may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial public purpose, [citations omitted], or perhaps if it has an unduly harsh impact upon the owner’s use of the property”); see also *Yee v. Escondido*, 503 U.S. 519, 523, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) (Regulatory takings cases “necessarily entail[] complex factual assessments of the purposes and economic effects of government actions”). *Penn*

Central does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required.

The Rhode Island Supreme Court concluded that, because the wetlands regulations predated petitioner’s acquisition of the property at issue, petitioner lacked reasonable investment-backed expectations and hence lacked a viable takings claim. 746 A.2d 707, 717 (2000). The court erred in elevating what it believed to be “[petitioner’s] lack of reasonable investment-backed expectations” to “dispositive” status. *Ibid*. Investment-backed expectations, though important, are not talismanic under *Penn Central*. Evaluation of the degree of interference with investment-backed expectations instead is *one* factor that points toward the answer to the question whether the application of a particular regulation to particular property “goes too far.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

Further, the state of regulatory affairs at the time of acquisition is not the only factor that may determine the extent of investment-backed expectations. For example, the nature and extent of permitted development under the regulatory regime vis-a-vis the development sought by the **2467 claimant may also shape legitimate expectations without vesting any kind of development right in the property owner. We *635 also have never held that a takings claim is defeated simply on account of the lack of a personal financial investment by a postenactment acquirer of property, such as a donee, heir, or devisee. Cf. *Hodel v. Irving*, 481 U.S. 704, 714-718, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987). Courts instead must attend to those circumstances which are probative of what fairness requires in a given case.

If investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title. On the other hand, if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost.^{FN*} As I understand it, our decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of the *Penn Central* in-

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quiry. It simply restores balance to that inquiry. Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking *636 has occurred. As before, the salience of these facts cannot be reduced to any "set formula." *Penn Central*, 438 U.S., at 124, 98 S.Ct. 2646 (internal quotation marks omitted). The temptation to adopt what amount to *per se* rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context. The court below therefore must consider on remand the array of relevant factors under *Penn Central* before deciding whether any compensation is due.

FN* Justice SCALIA's inapt "government-as-thief" simile is symptomatic of the larger failing of his opinion, which is that he appears to conflate two questions. The first question is whether the enactment or application of a regulation constitutes a valid exercise of the police power. The second question is whether the State must compensate a property owner for a diminution in value effected by the State's exercise of its police power. We have held that "[t]he 'public use' requirement [of the Takings Clause] is ... co-terminous with the scope of a sovereign's police powers." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). The relative timing of regulatory enactment and title acquisition, of course, does not affect the analysis of whether a State has acted within the scope of these powers in the first place. That issue appears to be the one on which Justice SCALIA focuses, but it is not the matter at hand. The relevant question instead is the second question described above. It is to this inquiry that "investment-backed expectations" and the state of regulatory affairs upon acquisition of title are relevant under *Penn Central*. Justice SCALIA's approach therefore would seem to require a revision of the *Penn Central* analysis that this Court has not undertaken.

Justice SCALIA, concurring.

I write separately to make clear that my understanding of how the issues discussed in Part II-B of the Court's opinion must be considered on remand is not Justice O'CONNOR's.

The principle that underlies her separate concurrence is that it may in some (unspecified) circumstances be "[un]fai[r]," and produce unacceptable "windfalls," to allow a subsequent purchaser to nullify an unconstitutional partial taking (though, inexplicably, not an unconstitutional total taking) by the government. *Ante*, this page. The polar horrible, presumably, is the situation in which a sharp real estate developer, realizing (or indeed, simply gambling on) the unconstitutional excessiveness of a development restriction that a naive landowner assumes to be valid, purchases property at what it would be worth subject to the restriction, and then develops it to its full value (or resells it at its full value) after getting the unconstitutional restriction invalidated.

This can, I suppose, be called a windfall-though it is not much different from **2468 the windfalls that occur every day at stock exchanges or antique auctions, where the knowledgeable (or the venturesome) profit at the expense of the ignorant (or the risk averse). There is something to be said (though in my view not much) for pursuing abstract "fairness" by requiring part or all of that windfall to be returned to the naive original owner, who presumably is the "rightful" owner of it. But there is nothing to be said for giving *637 it instead to the *government*-which not only did not lose something it owned, but is both the *cause* of the miscarriage of "fairness" and the only one of the three parties involved in the miscarriage (government, naive original owner, and sharp real estate developer) which *acted unlawfully*-indeed *unconstitutionally*. Justice O'CONNOR would eliminate the windfall by giving the malefactor the benefit of its malefaction. It is rather like eliminating the windfall that accrued to a purchaser who bought property at a bargain rate from a thief clothed with the indicia of title, by making him turn over the "unjust" profit *to the thief*.^{FN*}

FN* Contrary to Justice O'CONNOR's assertion, *ante*, at 2467, n., my contention of governmental wrongdoing does not assume that the government exceeded its police powers by ignoring the "public use" requirement of the Takings Clause, see *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). It is wrong for the government to take property, *even* for public use, without

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tendering just compensation.

In my view, the fact that a restriction existed at the time the purchaser took title (other than a restriction forming part of the “background principles of the State’s law of property and nuisance,” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992)) should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking. The “investment-backed expectations” that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional. Which is to say that a *Penn Central* taking, see *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), no less than a total taking, is not absolved by the transfer of title.

Justice STEVENS, concurring in part and dissenting in part.

In an admirable effort to frame its inquiries in broadly significant terms, the majority offers three pages of commentary on the issue of whether an owner of property can challenge*638 regulations adopted prior to her acquisition of that property without ever discussing the particular facts or legal claims at issue in this case. See *ante*, at 2462-2464. While I agree with some of what the Court has to say on this issue, an examination of the issue in the context of the facts of this case convinces me that the Court has oversimplified a complex calculus and conflated two separate questions. Therefore, while I join Part II-A of the opinion, I dissent from the judgment and, in particular, from Part II-B.

I

Though States and local governments have broad power to adopt regulations limiting land usage, those powers are constrained by the Constitution and by other provisions of state law. In adopting land-use restrictions, local authorities must follow legally valid and constitutionally sufficient procedures and must adhere to whatever substantive requirements are imposed by the Constitution and supervening law. If a regulating body fails to adhere to its procedural or substantive obligations in developing land-use restrictions, anyone adversely impacted by the restrictions may challenge their validity in an injunctive action. If the application of such restriction to a property owner

would cause her a “direct and substantial injury,” *e.g.*, **2469 *Chicago v. Atchison, T. & S.F.R. Co.*, 357 U.S. 77, 83, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1958), I have no doubt that she has standing to challenge the restriction’s validity whether she acquired title to the property before or after the regulation was adopted. For, as the Court correctly observes, even future generations “have a right to challenge unreasonable limitations on the use and value of land.” *Ante*, at 2463.

It by no means follows, however, that, as the Court assumes, a succeeding owner may obtain compensation for a taking of property from her predecessor in interest. A taking is a discrete event, a governmental acquisition of private property for which the State is required to provide just compensation. Like other transfers of property, it occurs at a *639 particular time, that time being the moment when the relevant property interest is alienated from its owner.^{FN1}

^{FN1}. A regulation that goes so “far” that it violates the Takings Clause may give rise to an award of compensation or it may simply be invalidated as it would be if it violated any other constitutional principle (with the consequence that the State must choose between adopting a new regulatory scheme that provides compensation or forgoing regulation). While some recent Court opinions have focused on the former remedy, Justice Holmes appears to have had a regime focusing on the latter in mind in the opinion that began the modern preoccupation with “regulatory takings.” See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414, 43 S.Ct. 158, 67 L.Ed. 322 (1922) (because the statute in question takes private property without just compensation “the act cannot be sustained”).

Precise specification of the moment a taking occurred and of the nature of the property interest taken is necessary in order to determine an appropriately compensatory remedy. For example, the amount of the award is measured by the value of the property at the time of taking, not the value at some later date. Similarly, interest on the award runs from that date. Most importantly for our purposes today, it is the person who owned the property at the time of the taking that is entitled to the recovery. See, *e.g.*, *Danforth v. United States*, 308 U.S. 271, 284, 60 S.Ct. 231, 84

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L.Ed. 240 (1939) (“For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment”). The rationale behind that rule is true whether the transfer of ownership is the result of an arm's-length negotiation, an inheritance, or the dissolution of a bankrupt debtor. Cf. United States v. Dow, 357 U.S. 17, 20-21, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958).^{FN2}

^{FN2}. The Court argues, *ante*, at 2463, that a regulatory taking is different from a direct state appropriation of property and that the rules this Court has developed for identifying the time of the latter do not apply to the former. This is something of an odd conclusion, in that the entire rationale for allowing compensation for regulations in the first place is the somewhat dubious proposition that some regulations go so “far” as to become the functional equivalent of a direct taking. Ultimately, the Court's regulations-are-different principle rests on the confusion of two dates: the time an injury occurs and the time a claim for compensation for that injury becomes cognizable in a judicial proceeding. That we require plaintiffs making the claim that a regulation is the equivalent of a taking to go through certain prelitigation procedures to clarify the scope of the allegedly infringing regulation does not mean that the injury did not occur before those procedures were completed. To the contrary, whenever the relevant local bodies construe their regulations, their construction is assumed to reflect “what the [regulation] meant before as well as after the decision giving rise to that construction.” Rivers v. Roadway Express, Inc., 511 U.S. 298, 312-313, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994).

*640 II

Much of the difficulty of this case stems from genuine confusion as to when the taking Palazzolo alleges actually occurred. According to Palazzolo's theory of the case, the owners of his Westerly, Rhode Island, property possessed the right to fill the wetland portion of the property at some point in the not-too-distant past.^{FN3} In **2470 1971, the State of Rhode

Island passed a statute creating the Rhode Island Coastal Resources Management Council (Council) and delegating the Council the authority to promulgate regulations restricting the usage of coastal land. See 1971 R.I. Pub. *641 Laws, ch. 279, § 1 *et seq.* The Council promptly adopted regulations that, *inter alia*, effectively foreclosed petitioner from filling his wetlands. See *ante*, at 2456; cf. App. to Brief for Respondents 11-22 (current version of regulations). As the regulations nonetheless provided for a process through which petitioner might seek permission to fill the wetlands, he filed two applications for such permission during the 1980's, both of which were denied. See *ante*, at 2456.

^{FN3}. This point is the subject of significant dispute, as the State of Rhode Island has presented substantial evidence that limitations on coastal development have always precluded or limited schemes such as Palazzolo's. See Brief for Respondents 11-12, 41-46. Nonetheless, we must assume that it is true for the purposes of deciding this question.

Likewise, we must assume for the purposes of deciding the discrete threshold questions before us that petitioner's complaint states a potentially valid regulatory takings claim. Nonetheless, for the sake of clarity it is worth emphasizing that, on my view, even a newly adopted regulation that diminishes the value of property does not produce a significant Takings Clause issue if it (1) is generally applicable and (2) is directed at preventing a substantial public harm. Cf. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (owner of a powerplant astride an earthquake fault does not state a valid takings claim for regulation requiring closure of plant); *id.*, at 1035, 112 S.Ct. 2886 (KENNEDY, J., concurring in judgment) (explaining that the government's power to regulate against harmful uses of property without paying compensation is not limited by the common law of nuisance because that doctrine is “too narrow a confine for the exercise of regulatory power in a complex and interdependent

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society”). It is quite likely that a regulation prohibiting the filling of wetlands meets those criteria.

The most natural reading of petitioner's complaint is that the regulations in and of themselves precluded him from filling the wetlands, and that their adoption therefore constituted the alleged taking. This reading is consistent with the Court's analysis in Part II-A of its opinion (which I join) in which the Court explains that petitioner's takings claims are ripe for decision because respondents' wetlands regulations unequivocally provide that there can be “no fill for any likely or foreseeable use.” *Ante*, at 2459.^{FN4} If it is the regulations themselves of which petitioner complains, and if they did, in fact, diminish the value of his property, they did so when they were adopted.

^{FN4}. At oral argument, petitioner's counsel stated: “I think the key here is understanding that no filling of any wetland would be allowed for any reason that was lawful under the local zoning code. No structures of any kind would be permitted by Mr. Palazzolo to construct. So we know that he cannot use his wetland.” Tr. of Oral Arg. 14.

To the extent that the adoption of the regulations constitute the challenged taking, petitioner is simply the wrong party to be bringing this action. If the regulations imposed a compensable injury on anyone, it was on the owner of the property at the moment the regulations were adopted. Given the trial court's finding that petitioner did not own the property at that time,^{FN5} in my judgment it is pellucidly clear *642 that he has no standing to claim that the promulgation of the regulations constituted a taking of any part of the property that he subsequently acquired.

^{FN5}. See App. to Pet. for Cert. A-13 (“[T]he trial justice found that Palazzolo could not have become the owner of the property before 1978, at which time the regulations limiting his ability to fill the wetlands were already in place. The trial justice thus determined that the right to fill the wetlands was not part of Palazzolo's estate to begin with, and that he was therefore not owed any compensation for the deprivation of that right”).

His lack of standing does not depend, as the Court seems to assume, on whether or not petitioner “is deemed to have notice of an earlier-enacted restriction,” *ante*, at 2462. If those early regulations changed the character of the owner's title to the property, thereby diminishing its value, petitioner acquired only the net value that remained after that diminishment occurred. Of course, if, as respondents contend,**2471 see n. 3, *supra*, even the prior owner never had any right to fill wetlands, there never was a basis for the alleged takings claim in the first place. But accepting petitioner's theory of the case, he has no standing to complain that preacquisition events may have reduced the value of the property that he acquired. If the regulations are invalid, either because improper procedures were followed when they were adopted, or because they have somehow gone “too far,” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922), petitioner may seek to enjoin their enforcement, but he has no right to recover compensation for the value of property taken from someone else. A new owner may maintain an ejectment action against a trespasser who has lodged himself in the owner's orchard but surely could not recover damages for fruit a trespasser spirited from the orchard before he acquired the property.

The Court's holding in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), is fully consistent with this analysis. In that case the taking occurred when the state agency compelled the petitioners to provide an easement of public access to the beach as a condition for a development permit. That event—a compelled transfer of an interest in property—occurred *after* the petitioners had become the owner of the property and unquestionably diminished the *643 value of petitioners' property. Even though they had notice when they bought the property that such a taking might occur, they never contended that any action taken by the State before their purchase gave rise to any right to compensation. The matter of standing to assert a claim for just compensation is determined by the impact of the event that is alleged to have amounted to a taking rather than the sort of notice that a purchaser may or may not have received when the property was transferred. Petitioners in *Nollan* owned the property at the time of the triggering event. Therefore, they and they alone could claim a right to compensation for the injury.^{FN6} Their successors in interest, like petitioner in this case, have no standing to bring such a claim.

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FN6. In cases such as *Nollan* in which landowners have notice of a regulation when they purchase a piece of property but the regulatory event constituting the taking does not occur until after they take title to the property—I would treat the owners' notice as relevant to the evaluation of whether the regulation goes “too far,” but not necessarily dispositive. See *ante*, at 2465-2467 (O'CONNOR, J., concurring).

III

At oral argument, petitioner contended that the taking in question occurred in 1986, when the Council denied his final application to fill the land. Tr. of Oral Arg. 16. Though this theory, to the extent that it was embraced within petitioner's actual complaint, complicates the issue, it does not alter my conclusion that the prohibition on filling the wetlands does not take from Palazzolo any property right he ever possessed.

The title Palazzolo took by operation of law in 1978 was limited by the regulations then in place to the extent that such regulations represented a valid exercise of the police power. For the reasons expressed above, I think the regulations barred petitioner from filling the wetlands on his property. At the very least, however, they established a rule that such lands could not be filled unless the Council *644 exercised its authority to make exceptions to that rule under certain circumstances. Cf. App. to Brief for Respondents A-13 (laying out narrow circumstances under which the Council retains the discretion to grant a “special exception”). Under the reading of the regulations most favorable to Palazzolo, he acquired no more than the right to a discretionary determination by the Council as to whether to permit him to fill the wetlands. As his two hearings before that body attest, he was given the opportunity to make a presentation and receive such a determination. Thus, the Council properly **2472 respected whatever limited rights he may have retained with regard to filling the wetlands. Cf. *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 121 S.Ct. 1446, 149 L.Ed.2d 391 (2001) (holding, in a different context, that, if a party's only relevant property interest is a claim of entitlement to bring an action, the provision of a forum for hearing that action is all that is required to vindicate that property interest); *Lopez v. Davis*, 531 U.S. 230, 121

S.Ct. 714, 148 L.Ed.2d 635 (2001) (involving a federal statute that created an entitlement to a discretionary hearing without creating any entitlement to relief).^{FN7}

FN7. This is not to suggest that a regulatory body can insulate all of its land-use decisions from the Takings Clause simply by referencing long-standing statutory provisions. If the determination by the regulators to reject the project involves such an unforeseeable interpretation or extension of the regulation as to amount to a change in the law, then it is appropriate to consider the decision of that body, rather than the adoption of the regulation, as the discrete event that deprived the owner of a pre-existing interest in property. But, if that is petitioner's theory, his claim is not ripe for the reasons stated by Justice GINSBURG in her dissenting opinion, *post* this page. As I read petitioner's complaint and the Court's disposition of the ripeness issue, it is the regulations themselves that allegedly deprived the owner of the parcel of the right to fill the wetlands.

Though the majority leaves open the possibility that the scope of today's holding may prove limited, see *ante*, at 2464 (discussing limitations implicit in “background principles” exception); see also *ante*, at 2465-2467 (O'CONNOR, J., concurring) (discussing importance of the timing of regulations*645 for the evaluation of the merits of a takings claim); *post*, at 2477 (BREYER, J., dissenting) (same), the extension of the right to compensation to individuals other than the direct victim of an illegal taking admits of no obvious limiting principle. If the existence of valid land-use regulations does not limit the title that the first postenactment purchaser of the property inherits, then there is no reason why such regulations should limit the rights of the second, the third, or the thirtieth purchaser. Perhaps my concern is unwarranted, but today's decision does raise the spectre of a tremendous-and tremendously capricious-one-time transfer of wealth from society at large to those individuals who happen to hold title to large tracts of land at the moment this legal question is permanently resolved.

IV

In the final analysis, the property interest at stake in

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this litigation is the right to fill the wetlands on the tract that petitioner owns. Whether either he or his predecessors in title ever owned such an interest, and if so, when it was acquired by the State, are questions of state law. If it is clear-as I think it is and as I think the Court's disposition of the ripeness issue assumes-that any such taking occurred before he became the owner of the property, he has no standing to seek compensation for that taking. On the other hand, if the only viable takings claim has a different predicate that arose later, that claim is not ripe and the discussion in Part II-B of the Court's opinion is superfluous dictum. In either event, the judgment of the Rhode Island Supreme Court should be affirmed in its entirety.

Justice GINSBURG, with whom Justice SOUTER and Justice BREYER join, dissenting.

A regulatory takings claim is not ripe for adjudication, this Court has held, until the agency administering the regulations at issue, proceeding in good faith, "has arrived at a final, definitive position regarding how it will apply [those *646 regulations] to the particular land in question." Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 191, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Absent such a final decision, a court cannot "kno[w] the nature and extent of permitted development" under the regulations, and therefore cannot say "how far the regulation[s] g[o]," **2473 as regulatory takings law requires. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348, 351, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986). Therefore, even when a landowner seeks and is denied permission to develop property, if the denial does not demonstrate the effective impact of the regulations on the land, the denial does not represent the "final decision" requisite to generate a ripe dispute. Williamson County, 473 U.S., at 190, 105 S.Ct. 3108.

MacDonald illustrates how a highly ambitious application may not ripen a takings claim. The landowner in that case proposed a 159-home subdivision. 477 U.S., at 342, 106 S.Ct. 2561. When that large proposal was denied, the owner complained that the State had appropriated "all beneficial use of its property." Id., at 352, n. 8, 106 S.Ct. 2561; see also id., at 344, 106 S.Ct. 2561. This Court concluded, however, that the landowner's claim was not ripe, for the denial of the massive development left "open the possibility that some development [would] be permitted." Id., at

352, 106 S.Ct. 2561. "Rejection of exceedingly grandiose development plans," the Court observed, "does not logically imply that less ambitious plans will receive similarly unfavorable reviews." Id., at 353, n. 9, 106 S.Ct. 2561.

As presented to the Rhode Island Supreme Court, Anthony Palazzolo's case was a close analogue to MacDonald. Palazzolo's land has two components. Approximately 18 acres are wetlands that sustain a rich but delicate ecosystem. See 746 A.2d 707, 710, and n. 1 (R.I.2000). Additional acres are less environmentally sensitive "uplands." (The number of upland acres remains in doubt, see ibid., because Palazzolo has never submitted "an accurate or detailed survey" of his property, see Tr. 190 (June 18-19, 1997).) Rhode Island's administrative agency with ultimate permitting authority*647 over the wetlands, the Coastal Resources Management Council (CRMC), bars residential development of the wetlands, but not the uplands.

Although Palazzolo submitted several applications to develop his property, those applications uniformly sought permission to fill most or all of the wetlands portion of the property. None aimed to develop only the uplands. ^{FN1} Upon denial of the last of Palazzolo's applications, Palazzolo filed suit claiming that Rhode Island had taken his property by refusing "to allow any development." App. 45 (Complaint ¶ 17).

^{FN1}. Moreover, none proposed the 74-lot subdivision Palazzolo advances as the basis for the compensation he seeks. Palazzolo's first application sought to fill all 18 acres of wetlands for no stated purpose whatever. See App. 11 (Palazzolo's sworn 1983 answer to the question why he sought to fill uplands) ("Because it's my right to do if I want to look at it it is my business."). Palazzolo's second application proposed a most disagreeable "beach club." See ante, at 2456 ("trash bins" and "port-a-johns" sought); Tr. 650 (June 25-26, 1997) (testimony of engineer Steven M. Clarke) (to get to the club's water, *i.e.*, Winnapaug Pond rather than the nearby Atlantic Ocean, "you'd have to walk across the gravel fill, but then work your way through approximately 70, 75 feet of marsh land or conservation grasses"). Neither of the CRMC applications supplied a

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clear map of the proposed development. See App. 7, 16 (1983 application); Tr. 190 (June 18-19, 1997) (1985 application). The Rhode Island Supreme Court ultimately concluded that the 74-lot development would have been barred by zoning requirements, apart from CRMC regulations, requirements Palazzolo never explored. See 746 A.2d 707, 715, n. 7 (2000).

As the Rhode Island Supreme Court saw the case, Palazzolo's claim was not ripe for several reasons, among them, that Palazzolo had not sought permission for "development only of the upland portion of the parcel." 746 A.2d, at 714. The Rhode Island court emphasized the "undisputed evidence in the record that it would be possible to build at least one single-family home on the existing upland area, with no need for additional fill." *Ibid*.

Today, the Court rejects the Rhode Island court's determination that the case is unripe, finding no "uncertainty as to *648 the [uplands'] permitted use." *Ante*, at 2460. The Court's conclusion is, in my view, both inaccurate and inequitable. It is inaccurate**2474 because the record is ambiguous. And it is inequitable because, given the claim asserted by Palazzolo in the Rhode Island courts, the State had no cause to pursue further inquiry into potential upland development. But Palazzolo presses other claims here, and at his behest, the Court not only entertains them, but also turns the State's legitimate defense against the claim Palazzolo originally stated into a weapon against the State. I would reject Palazzolo's bait-and-switch ploy and affirm the judgment of the Rhode Island Supreme Court.

* * *

Where physical occupation of land is not at issue, the Court's cases identify two basic forms of regulatory taking. *Ante*, at 2457. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), the Court held that, subject to "certain qualifications," *ante*, at 2457, 2464, denial of "all economically beneficial or productive use of land" constitutes a taking. 505 U.S., at 1015, 112 S.Ct. 2886 (emphasis added). However, if a regulation does not leave the property "economically idle," *id.*, at 1019, 112 S.Ct. 2886, to establish the alleged taking the landowner may pursue the multifactor in-

quiry set out in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-125, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

Like the landowner in *MacDonald*, Palazzolo sought federal constitutional relief *only* under a straightforward application of *Lucas*. See *ante*, at 2456; App. 45 (Complaint ¶ 17) ("As a direct and proximate result of the Defendants' refusal to allow *any* development of the property, there has been a taking" (emphasis added)); Plaintiff's Post Trial Memorandum in No. 88-0297 (Super.Ct., R.I.), p. 6 ("[T]his Court need not look beyond the *Lucas* case as its very lucid and precise standards will determine whether a taking has occurred."); *id.*, at 9-10 ("[T]here is *NO USE* for the property whatsoever Not one scintilla of evidence was proffered *649 by the State to prove, intimate or even suggest a theoretical possibility of *any* use for this property-never mind a beneficial use. Not once did the State claim that there *is*, in fact, some use available for the Palazzolo parcel."); Brief of Appellant in No. 98-0333, pp. 5, 7, 9-10 (hereinafter Brief of Appellant) (restating, verbatim, assertions of Post Trial Memorandum quoted above).

Responding to Palazzolo's *Lucas* claim, the State urged as a sufficient defense this now uncontested point: CRMC "would [have been] happy to have [Palazzolo] situate a home" on the uplands, "thus allowing [him] to realize 200,000 dollars." State's Post-Trial Memorandum in No. 88-0297 (Super.Ct., R. I.), p. 81; see also Brief of Appellees in No. 98-0333A, p. 25 (hereinafter Brief of Appellees) (Palazzolo "never even applied for the realistic alternative of using the entire parcel as a single unitary home-site"). The State did present some evidence at trial that more than one lot could be developed. See *infra*, at 2476-2477. And, in a supplemental post-trial memorandum addressing a then new Rhode Island Supreme Court decision, the State briefly urged that Palazzolo's claims would fail even under *Penn Central*. See *ante*, at 2461. The evidence of additional uses and the post-trial argument directed to *Penn Central*, however, were underdeveloped and unnecessary, for Palazzolo himself, in his pleadings and at trial, pressed only a *Lucas*-based claim that he had been denied *all* economically viable use of his property. Once the State demonstrated that an "economically beneficial" development was genuinely plausible, *Lucas*, 505 U.S., at 1015, 112 S.Ct. 2886, the State had established the analogy to *MacDonald*: The record now showed

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“valuable use might still be made of the land.” 477 U.S., at 352, n. 8, 106 S.Ct. 2561; see Brief of Appellees 24-25 (relying on *MacDonald*). The prospect of real development shown by the State warranted a ripeness dismissal of Palazzolo's complaint.

****2475** Addressing the State's *Lucas* defense in *Lucas* terms, Palazzolo insisted that his land had “no use ... as a result of *650 CRMC's application of its regulations.” Brief of Appellant 11. The Rhode Island Supreme Court rejected Palazzolo's argument, identifying in the record evidence that Palazzolo could build at least one home on the uplands. 746 A.2d, at 714. The court therefore concluded that Palazzolo's failure to seek permission for “development only of the upland portion of the parcel” meant that Palazzolo could not “maintain a claim that the CRMC ha[d] deprived him of all beneficial use of the property.” *Ibid.*

It is true that the Rhode Island courts, in the course of ruling for the State, briefly touched base with *Penn Central*. Cf. *ante*, at 2461. The critical point, however, underplayed by the Court, is that Palazzolo never raised or argued the *Penn Central* issue in the state system: not in his complaint; not in his trial court submissions; not-even after the trial court touched on the *Penn Central* issue-in his briefing on appeal. The state high court decision, raising and quickly disposing of the matter, unquestionably permits us to consider the *Penn Central* issue. See *Raley v. Ohio*, 360 U.S. 423, 436-437, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959). But the ruling below does not change the reality essential here: Palazzolo litigated his takings claim, and it was incumbent on the State to defend against that claim, only under *Lucas*.

If Palazzolo's arguments in this Court had tracked his arguments in the state courts, his petition for certiorari would have argued simply that the Rhode Island courts got it wrong in failing to see that his land had “no use” at all because of CRMC's rules. Brief of Appellant 11. This Court likely would not have granted certiorari to review the application of *MacDonald* and *Lucas* to the facts of Palazzolo's case. However, aided by new counsel, Palazzolo sought-and in the exercise of this Court's discretion obtained-review of two contentions he did not advance below. The first assertion is that the state regulations take the property under *Penn Central*. See Pet. for Cert. 20; Brief for Petitioner 47-50. The second

argument is that the regulations *651 amount to a taking under an expanded rendition of *Lucas* covering cases in which a landowner is left with property retaining only a “few crumbs of value.” *Ante*, at 2464 (quoting Brief for Petitioner 37); Pet. for Cert. 20-22. Again, it bears repetition, Palazzolo never claimed in the courts below that, if the State were correct that his land could be used for a residence, a taking nonetheless occurred.^{FN2}

^{FN2}. After this Court granted certiorari, in his briefing on the merits, Palazzolo presented still another takings theory. That theory, in tension with numerous holdings of this Court, see, e.g., *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 643-644, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993), was predicated on treatment of his wetlands as a property separate from the uplands. The Court properly declines to reach this claim. *Ante*, at 2465.

In support of his new claims, Palazzolo has conceded the very point on which the State properly relied to resist the simple *Lucas* claim presented below: that Palazzolo can obtain approval for one house of substantial economic value. Palazzolo does not merely accept the argument that the State advanced below. He now contends that the evidence proffered by the State in the Rhode Island courts supports the claims he presents here, by demonstrating that *only* one house would be approved. See Brief for Petitioner 13 (“[T]he uncontradicted evidence was that CRMC ... would not deny [Palazzolo] permission to build one single-family home on the small upland portion of his property.” (emphasis deleted)); Pet. for Cert. 15 (the extent of development permitted on the land is “perfectly clear: one single-family home and nothing more”).

As a logical matter, Palazzolo's argument does not stand up. The State's submissions**2476 in the Rhode Island courts hardly establish that Palazzolo could obtain approval for *only* one house of value. By showing that Palazzolo could have obtained approval for a \$200,000 house (rather than, say, two houses worth \$400,000), the State's submissions established only a floor, not a ceiling, on the value of permissible*652 development. For a floor value was all the State needed to defeat Palazzolo's simple *Lucas*

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claim.

Furthermore, Palazzolo's argument is unfair: The argument transforms the State's legitimate defense to the only claim Palazzolo stated below into offensive support for other claims he states for the first time here. Casting away fairness (and fairness to a State, no less), the Court indulges Palazzolo's bait-and-switch maneuver. The Court concludes that "there is no genuine ambiguity in the record as to the extent of permitted development on ... the uplands." *Ante*, at 2460-2461. Two theories are offered to support this conclusion.

First, the Court asserts, it is "too late in the day" for the State to contend the uplands give the property more than \$200,000 in value; Palazzolo "stated" in his petition for certiorari that the property has "an estimated worth of \$200,000," and the State cited that contention "as fact" in its Brief in Opposition. *Ante*, at 2460. But in the cited pages of its Brief in Opposition, the State simply said it "would" approve a "single home" worth \$200,000. Brief in Opposition 4, 19. That statement does not foreclose the possibility that the State would *also* approve another home, adding further value to the property.

To be sure, the Brief in Opposition did overlook Palazzolo's change in his theory of the case, a change that, had it been asserted earlier, could have rendered insufficient the evidence the State intelligently emphasized below. But the State's failure to appreciate that Palazzolo had moved the pea to a different shell hardly merits the Court's waiver finding. The only precedent cited for the waiver, a footnote in *Lucas*, is not remotely on point. *Ante*, at 2460. The landowner in *Lucas* had invoked a "finding" of fact by the state court, and this Court deemed the State's challenge to that finding waived because the challenge was not timely raised. 505 U.S., at 1020-1022, n. 9, 112 S.Ct. 2886. There is nothing extraordinary about this Court's deciding a case on the findings made by a *653 state court. Here, however, the "fact" this Court has stopped the State from contesting—that the property has value of *only* \$200,000—was never found by any court. That valuation was simply asserted, inaccurately, see *infra* this page and 2477, in Palazzolo's petition for certiorari. This Court's waiver ruling thus amounts to an unsavory invitation to unscrupulous litigants: Change your theory and misrepresent the record in your petition for certiorari; if the respondent

fails to note your machinations, you have created a different record on which this Court will review the case.

The Court bolsters its waiver finding by asserting that the \$200,000 figure is "well founded" in the record. *Ante*, at 2460. But, as earlier observed, an absence of multiple valuation possibilities in the record cannot be held against the State, for proof of more than the \$200,000 development was unnecessary to defend against the *Lucas* claim singularly pleaded below. And in any event, the record does not warrant the Court's conclusion.

The Court acknowledges "testimony at trial suggesting the existence of an additional upland parcel elsewhere on the property" on which a second house might be built. *Ante*, at 2460. The Court discounts that prospect, however, on the ground that development of the additional parcel would require a new road forbidden under CRMC's regulations. *Ibid*. Yet the one witness on whose testimony the Court relies, Steven M. Clarke, himself concluded that it *would* be "realistic to apply for" development at more than one location. **2477 Tr. 612 (June 25-26, 1997). Clarke added that a state official, Russell Chateaufeuf, "gave [Clarke] supporting information saying that [multiple applications] made sense." *Ibid*. The conclusions of Clarke and Chateaufeuf are confirmed by the testimony of CRMC's executive director, Grover Fugate, who agreed with Palazzolo's counsel during cross-examination that Palazzolo might be able to build "on two, perhaps three, perhaps four of the lots." *Id.*, at 211 (June 20-23, 1997); see also Tr. of Oral Arg. 27 ("[T]here *654 is ... uncertainty as to what additional upland there is and how many other houses can be built.").

The ambiguities in the record thus are substantial. They persist in part because their resolution was not required to address the claim Palazzolo presented below, and in part because Palazzolo failed ever to submit an accurate survey of his property. Under the circumstances, I would not step into the role of supreme topographical factfinder to resolve ambiguities in Palazzolo's favor. Instead, I would look to, and rely on, the opinion of the state court whose decision we now review. That opinion states: "There was undisputed evidence in the record that it would be possible to build *at least* one single-family home on the existing upland area." 746 A.2d, at 714 (emphasis

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added). This Court cites nothing to warrant amendment of that finding.^{FN3}

FN3. If Palazzolo's claim were ripe and the merits properly presented, I would, at a minimum, agree with Justice O'CONNOR, *ante*, at 2465-2467 (concurring opinion), Justice STEVENS, *ante*, at 2471 (opinion concurring in part and dissenting in part), and Justice BREYER, *post* this page and 2478 (dissenting opinion), that transfer of title can impair a takings claim.

* * *

In sum, as I see this case, we still do not know "the nature and extent of permitted development" under the regulation in question, MacDonald, 477 U.S., at 351, 106 S.Ct. 2561. I would therefore affirm the Rhode Island Supreme Court's judgment.

Justice BREYER, dissenting.

I agree with Justice GINSBURG that Palazzolo's takings claim is not ripe for adjudication, and I join her opinion in full. Ordinarily I would go no further. But because the Court holds the takings claim to be ripe and goes on to address some important issues of substantive takings law, I add that, given this Court's precedents, I would agree with Justice O'CONNOR that the simple fact that a piece of property has changed hands (for example, by inheritance) does not *655 always and *automatically* bar a takings claim. Here, for example, without in any way suggesting that Palazzolo has any valid takings claim, I believe his postregulatory acquisition of the property (through automatic operation of law) by itself should not prove dispositive.

As Justice O'CONNOR explains, under Penn Central Transp. Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), much depends upon whether, or how, the timing and circumstances of a change of ownership affect whatever reasonable investment-backed expectations might otherwise exist. Ordinarily, such expectations will diminish in force and significance—rapidly and dramatically—as property continues to change hands over time. I believe that such factors can adequately be taken into account within the Penn Central framework.

Several *amici* have warned that to allow complete

regulatory takings claims, see Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), to survive changes in land ownership could allow property owners to manufacture such claims by strategically transferring property until only a nonusable portion remains. See, e.g., Brief for Daniel W. Bromley et al. as *Amici Curiae* 7-8. But I do not see how a constitutional provision concerned with " 'fairness and justice,' " **2478 Penn Central, *supra*, at 123- 124, 98 S.Ct. 2646 (quoting Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)), could reward any such strategic behavior.

U.S.R.I.,2001.

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No. 40717-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KARL J. THUN and VIRGINIA THUN, husband and wife; THOMAS
PAVOLKA; VIRGINIA LESLIE REVOCABLE TRUST; and WILLIAM AND
LOUISE LESLIE FAMILY REVOCABLE TRUST,

Appellants,

v.

CITY OF BONNEY LAKE, a municipal corporation,

Respondents.

CERTIFICATE OF SERVICE

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DIVISION II

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THIS IS TO CERTIFY that on this 17th day of September, 2010, I
did serve true and correct copies of the following:

1. BRIEF OF APPELLANT; and
2. CERTIFICATE OF SERVICE.

via ABC Legal Messengers (or other method indicated below) by
directing delivery to and addressed to the following:

<u>Attorneys for City of Bonney Lake</u>	<u>Attorneys for City of Bonney Lake</u>
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Dated this 17th day of September, 2010, at Tacoma, Washington.



Cheryl M. Koubik
Legal Assistant to Margaret Y. Archer