No. _____

IN THE

Supreme Court of the United States

CHARLES A. PRATT CONSTRUCTION CO., INC.,
Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate Dist., Div. 6

PETITION FOR A WRIT OF CERTIORARI

MICHAEL M. BERGER*
**Counsel of Record*
GIDEON KANNER
MANATT, PHELPS & PHILLIPS
11355 West Olympic Blvd.
Los Angeles, CA 90064
(310) 312-4000

WILLIAM S. WALTER
679 Monterey Street
San Luis Obispo, CA 93401
(805) 541-6601

Counsel for Petitioner
Charles A. Pratt Construction Co., Inc.

QUESTIONS PRESENTED

1. In *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1978), the Court held that claims that government land regulation effect a regulatory taking in violation of the 5th Amendment must be decided *ad hoc* based on their individual facts.

Question: Consistent with this constitutional baseline, can the California courts hold ***as a matter of law*** that regulations ***cannot*** be a taking even though they allow no more than 20% of a parcel (and likely far less than that) to be put to viable private use?

2. In *Williamson County Reg. Plan. Commn. v. Hamilton Bank,* 473 U.S. 172, 186 (1985), the Court held that a regulatory taking claim was not ripe for litigation until the regulator had reached a "final" determination of what use would be allowed on the property.

Question: When (a) a property owner undergoes an eight year administrative process, including environmental evaluation of ten different ways to use the property, but (b) the regulatory agency rejects all alternatives, then (c) has there been sufficient basis for an evidentiary showing that no reasonable use will be allowed, in order to demonstrate "finality" for 5th Amendment ripeness purposes?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties are listed in the caption:

- Petitioner Charles A. Pratt Construction Co., Inc. was the Plaintiff and Appellant below;
- Respondent California Coastal Commission was the Defendant and Respondent below.

Pursuant to S. Ct. Rule 29.6, Petitioner states that Charles A. Pratt Construction Co., Inc. has no parent corporation and no publicly held corporation owns more than 10% of its stock.

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Constitutional Provisions

Statutes

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page

Rules

PETITION FOR A WRIT OF CERTIORARI

Charles A. Pratt Construction Co., Inc. petitions for a writ of certiorari to review a final judgment of the Court of Appeal of the State of California, Second Appellate District, Division Six.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Six is published at 162 Cal.App.4th 1068, 76 Cal.Rptr.3d 466, and is reproduced as Appendix A. The denial of rehearing is Appendix D. The opinion affirms a judgment of the Superior Court of the State of California for the County of San Luis Obispo, reproduced in Appendix B. The California Supreme Court's Order denying review (by a split vote) is reproduced in Appendix C.

JURISDICTION

The California Court of Appeal entered judgment on May 8, 2008, and denied a timely petition for rehearing (with a slight modification to the opinion) on June 9, 2008. The California Supreme Court denied review on August 20, 2008, although Justices Joyce

Kennard and Marvin Baxter voted to grant review.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, 5th Amendment:

". . . nor shall private property be taken for public use without just compensation."

U.S. Constitution, 14th Amendment:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

Pertinent portions of the California Coastal Act, Cal. Pub. Res. Code § 30000 *et seq.* are reproduced in Appendix E.

INTRODUCTION

Two decades ago, Justice Stevens had this comment about the Court's takings decisions:

> "[E]ven the wisest of lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence." (*Nollan v. California Coastal*

Commn., 483 U.S. 825, 866 [1987] [dissenting opinion].)

Notwithstanding decisions since then, the Court has refrained from establishing clear, bright line rules. (*Palazzolo v. Rhode Island*, 533 U.S. 606, 617 [2001] ["we have given some, but not too specific, guidance"]; *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg. Plan. Agency*, 535 U.S. 302, 326 [2002] ["we still resist the temptation to adopt *per se* rules"].)

Rather, the Court has held that — for almost all cases — the required process is the *ad hoc* factual analysis described in *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1978) although, as the Court conceded recently "each [of the *Penn Central* factors] has given rise to vexing subsidiary questions . . . ." (*Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 [2005].)

Parties and lower courts can live with an *ad hoc* standard as long as there are *some* reliable guidelines for its application. This case shows the need for something more than the current *laissez faire ad hoc*ery. It was not subject to dispute that the regulations applied by Respondent California Coastal Commission would allow *no more than* 20% of Petitioner Pratt Construction Co.'s 124-acre property to be put to productive private use. Beyond that,

Pratt's appraiser opined that the regulations could actually limit use of the subject 124-acre tract to as little as *1120 square feet.* The California courts held *as a matter of law* that this severe restriction *could not* be a taking and granted summary judgment to the Coastal Commission without trial. (App. 22, 27.)

If, as the Court seems determined, *Penn Central* is to remain the takings touchstone,[1] then a manageable *ad hoc* factual test should be enforced by the Court and applied by lower courts after trials based on contested evidence, not merely on a subjective and unsupported judicial impression of what the regulatory impact on the landowner may be without an evidentiary trial. Otherwise, the judicial system simply morphs into Joseph Story's unfair and apocryphal world where justice is measured by the length of the Chancellor's foot. (See, e.g., *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332-333 [1999]; *Lochnar v. Thomas*, 517 U.S. 314, 323 [1996].)

---

[1] See *Tahoe-Sierra*, 535 U.S. at 326, n. 23, referring to *Penn Central* as "our polestar" (quoting Justice O'Connor's concurring opinion in *Palazzolo*, 533 U.S. at 633); *Lingle*, 544 U.S. at 538 ("regulatory takings challenges are governed by the standards set forth in *Penn Central* . . . .").

Beyond that foundational substantive issue, this case also presents an issue resulting from the continuing confusion wrought by the ripeness rules of *Williamson County Reg. Plan. Commn. v. Hamilton Bank,* 473 U.S. 172, 186 (1985).[2] The question here is how to determine when a regulatory body has reached a "final" decision about the use that property owners will be allowed to make of their land. Here, Pratt was put through nearly a decade of administrative review, including an environmental impact analysis of ten possible uses for the property. In rejecting them all, the Coastal Commission asserted that it could not accept any of the ten alternatives and that it could not suggest any modifications because "revisions that would be necessary . . . are so extensive . . . denial . . . is the *only* appropriate course. . . ." (19 AR 3176; emphasis added.)

In contrast to the flexible, *ad hoc* approach adopted for determining whether a taking has occurred, lower courts have transmogrified the flexible, three-factor *Penn Central* analysis into rigid rules regarding the number of

---

[2] Recent examples of confusion caused by a different aspect of *Williamson County* appear in Petitions for Certiorari in *Braun v. Ann Arbor Charter Township*, No. 08-250 and *Agripost, LLC v. Miami-Dade County, Florida*, No. 08-567, currently pending before the Court.

development applications that need to be made and rejected before a "final" decision can be said to have been reached, even when the administrative action makes clear after a lengthy examination of alternatives that no economically viable use would be approved. At that point, reapplications become pointless.

In this case, the "one" application involved a detailed review process that lasted the better part of a decade and included environmental analysis that examined ten different ways to use the subject property. The Coastal Commission rejected them all. In light of the reasons given for the denial, that should suffice. (Compare *Palazzolo*, 533 U.S. at 620.) But not in California.

The federal constitutional issues were raised in the complaint and in subsequent briefing in all state courts, and were expressly ruled on by the Court of Appeal. (App. 16-21)

STATEMENT OF THE CASE

The 124-acre parcel of land in this case represents the last portion of undeveloped land in a part of San Luis Obispo County, California, known as Cabrillo Estates, a residential project begun in 1963. Eighty-one acres of this parcel were designated by Pratt as Unit II of Tract 308 in 1973, and planned for 149 homes, a plan the County approved in concept.

After Unit I of Tract 308 was completed, Pratt submitted (in 1990) a proposal for this parcel. Instead of 149 homes, Pratt sought only 41. Pratt also purchased an additional 43 acres and added them to the tract. The new acreage would be left undeveloped. County processing took nearly a decade (including an Environmental Impact Report [EIR] that examined ten alternative uses for the 124 acres), and the County Board of Suprervisors approved the project in 1999.

The project left 100 of the 124 acres (i.e., 80%) undeveloped, although the County's formal plan only demanded that 60% be undeveloped.[3] Nonetheless, several parties filed administrative appeals to the Coastal Commission.[4]

After a de novo hearing, the Coastal Commission rejected Pratt's permit. In doing so, the Commission had before it all of the data examined by the County, including the EIR and

---

[3] The County's plan, called a Local Coastal Program, had been approved by the Coastal Commission, as required by law. (Cal. Pub. Res. Code § 30600.5.)

[4] The Coastal Commission has appellate jurisdiction over most land use permits issued by cities and counties in California's coastal zone. (Cal. Pub. Res. Code § 30603.)

the ten alternative developments that had been considered and analyzed. In rejecting development, the Coastal Commission concluded that it could not accept any of the ten alternatives and that it could not simply suggest modifications to any of them because "revisions that would be necessary . . . are so extensive . . . denial . . . is the *only* appropriate course. . . ." (19 AR 3176; emphasis added.) By affidavit, Pratt's appraiser opined that the restrictions on any new proposal could limit development to as little as 1120 square feet of the 124 acres. (14 CT 3948.)

The Coastal Commission's findings made clear that no development would be permitted, even though the Commission told Pratt to go through the motions of making additional plan applications to the County. Among other things, the Commission concluded the following. *First*, the property cannot be served by bringing in water from off-site, even though the local water service provider had contracted to do so. *Second*, the Commission viewed this property as a scenic backdrop for coastal property, i.e., that it served as some sort of ecological wallpaper for others to enjoy — but only as long as it had no houses built on it. *Third*, some 80% of the property constituted Environmentally Sensitive Habitat Area (ESHA) within the meaning of the California Coastal Act. *None* of that property, plus a

buffer zone around it, can be developed for productive private use. (E.g., Cal. Pub. Res. Code § 30240; *Bolsa Chica Land Trust v. Superior Court*, 71 Cal.App.4th 493, 508, 83 Cal.Rptr. 850 [1999]; *Sierra Club v. California Coastal Commn.*, 12 Cal.App.4th 602, 615, 15 Cal.Rptr. 779 [1993].) *Fourth*, the Commission sought to "preserve" the property for species that had never been seen on it. How can a rational landowner overcome that by repeated applications?

In short, as the Coastal Commission staff report for this project candidly put it, "development" would be "habitat degradation." (19 AR 3190.) That should be "final" enough to trigger litigation.

Pratt sued to overturn the Commission's ruling or, failing that, to obtain just compensation for the taking of its property for public use. The trial court denied all relief as a matter of law through judgment on the pleadings and summary judgment. (App. B.) The Court of Appeal affirmed (App. A) and the California Supreme Court denied review, with two Justices dissenting (App. C).

REASONS FOR GRANTING THE WRIT

I.

THERE IS CONFUSION IN THE LAW AS TO THE BASIC STANDARDS TO ESTABLISH A REGULATORY TAKING. LOWER COURTS AND LITIGANTS NEED THIS COURT'S GUIDANCE.

It would be easy to cite treatises and law reviews attesting to the absence of standards in regulatory taking law and the need for guidance from the Court.

Easy, but not necessary. The Court's own opinions make the point clearly, and decisions like the one below show the need for guidance.

> "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.'" (*Palazzolo*, 533 U.S. at 617 [quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)].)

> "The rub, of course, has been — and remains — how to discern how far is 'too far.'" (*Lingle*, 544 U.S. at 538.)

"[W]e have 'generally eschewed' any set formula for determining how far is too far, choosing instead to engage in 'essentially ad hoc, factual inquiries.'" (*Tahoe-Sierra*, 535 U.S. at 326 [quoting *Lucas v. South Carolina Coastal Council*, 438 U.S. 1003, 1005 [1992], which, in turn, quoted *Penn Central*, 438 U.S. at 124].)

"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." (*Palazzolo,* 533 U.S. at 617.)

"[O]ur regulatory takings jurisprudence cannot be characterized as unified . . . ." (*Lingle*, 544 U.S. at 538.)

"Indeed, we still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine 'a number of factors' rather than a simple 'mathematically precise' formula." (*Tahoe-Sierra*, 535 U.S. at 326.)

> "Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings." (*Tahoe-Sierra*, 535 U.S. at 326, n. 23 [quoting with approval from *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring)].)
>
> "The temptation to adopt what amount to *per se* rules must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context." (*Tahoe-Sierra*, 535 U.S. at 326, n. 23 [quoting with approval from *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring)].)
>
> "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 . . . ." (*Palazzolo*, 533 U.S. at 617.)

The Court has thus created a rule that provides no road map to those who have to either live with it or apply it. Property owners thus have to litigate through the last court of

last resort that will hear them in order to learn whether they have even properly drafted a complaint alleging a 5th Amendment claim. There has been enough litigation of this sort during the last three decades for the law to have progressed beyond elementary pleading.

The result of the Court's reluctance to provide guidance has led to anarchy. A prominent text summed up this Court's regulatory taking decisions as belonging to "the gastronomic school of jurisprudence; that is, this is an area where government acts according to gut feeling in the individual case, instead of by rule of law." (1 Norman Williams, Jr. & John M. Taylor, American Land Planning Law 103 [2003 rev. ed.].)

> "In these decisions, the Court has said again and again that there is no one formula for deciding the taking issue, and thus the Court has simply decided each case 'on the merits.' Translated into plain English, this is a frank admission . . . that cases are decided with little guide to predictability for future decisions." (*Id.* at 102.)

Without a "guide to predictability for future decisions," lower courts are adrift in the proverbial rudderless boat on an uncharted sea,

and thus free to measure justice by the size of their own feet. As Professor Eagle put it, "[w]hile recourse to a totality-of-the-circumstances test permits the Court almost unlimited latitude in decision making, it gives little guidance to the federal and state courts that must apply it." (Steven J. Eagle, Tahoe Sierra *and Its Implications for Takings Law*, in Taking Sides on Takings Issues: The Impact of *Tahoe-Sierra*, ch. 1B at 22 [Thomas E. Roberts, ed. 2003].) A recent decision of the Court of Appeals for the Federal Circuit described this Court's test as a "gestalt approach" (*Bass Enterprises Prod. Co. v. United States*, 381 F.3d 1360, 1370 [Fed. Cir. 2004]) — a judicially polite way of saying there are no rules.

Commentators from both ends of the political spectrum have called for the Court to discard the *Penn Central* test.[5] Both have

[5] E.g., John D. Echeverria of Georgetown's Environmental Policy Center not only wrote an amicus brief for environmental organizations in *Tahoe-Sierra* urging the Court to overrule *Penn Central*, he published an article with a revealing title. (John D. Echeverria, *Is The* Penn Central *Three Factor Test Ready For History's Dustbin?* 52 Land Use L. & Zoning Digest 3 [2000].) Professor Richard Epstein of the University of Chicago filed an amicus brief in the same case on behalf of the Institute for Justice asking the Court to do likewise.

explained the shortcomings of the *Penn Central* mode of analysis, basing their conclusions on the three decades of experience that lower courts and litigants have had with it.

Nonetheless, the Court seems determined to maintain the *Penn Central* test as "the default rule . . . in the regulatory taking context . . . ." (*Tahoe-Sierra*, 535 U.S. at 332.) If that is to be the case, lower courts and litigants are in desperate need of guidance in how to apply it.

Here, for example, there is no dispute that existing regulations prevent the use of at least 80% of the property (and probably substantially more — something that, if permitted, a trial would have revealed). The Coastal Commission found that 80% of the property was undevelopable ESHA. Both the Coastal Act and cases decided under it preclude private use of that property plus a protective buffer around it. (Cal. Pub. Res. Code § 30240; *Bolsa Chica Land Trust v. Superior Court*, 71 Cal.App.4th 493, 508, 83 Cal.Rptr. 850 [1999]; *Sierra Club v. California Coastal Commn.*, 12 Cal.App.4th 602, 615, 15 Cal.Rptr. 779 [1993].) Perversely, the court below felt free to invert that statistic and to proclaim as a matter of law that no taking could have occurred because "[a]ssuming Pratt's claim is true, that leaves 20 percent of

the 121-acre tract, over 24 acres, available for development." (App. 17.)[6]

The anarchy is demonstrated by the conflict of the conclusion below with the long-running Florida Rock litigation in the Court of Federal Claims and the Federal Circuit Court of Appeals.[7] In the final chapter of that litigation, the court concluded that Corps of Engineers regulations that reduced the value of the property by 73.1% — a similar, but lesser, restriction than the 80+% here — established a taking that required compensation. (*Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 36 [1999].)

The lower courts, and the government agencies and property owners served by them, need guidance. It should be apparent that the

---

[6] This was a pure assumption made without evidence, based on a supposition that if 80% of the property was undevelopable ESHA, the remainder must be available for development. Evidence (including the proferred affidavit of an appraiser showing that current regulations could restrict development to a scant 1120 square feet of this 124-acre tract) would have shown otherwise.

[7] See, e.g., (all cases bearing the name *Florida Rock Indus., Inc. v. United States*), 18 F.3d 1560 (Fed. Cir. 1994); 21 Cl. Ct. 161 (1990); 791 F.2d 893 (Fed. Cir. 1986); 8 Cl. Ct. 160 (1985).

Court's desire to refrain from establishing firm rules has not served well. It allows so much flexibility to lower courts that this constitutional field is left with no real standards at all. The result is a continuous roiling of the litigation waters below, with a steady stream of academic criticism and certiorari petitions to this Court.

If *Penn Central* is to remain the "polestar," as the Court seems intent on maintaining it, then the *ad hoc* factual examination required by it needs to be enforced. Courts like the one below cannot be allowed to pronounce *ex cathedra* that the severe land use regulation before them is not severe enough to warrant constitutional condemnation — or even a trial to determine the actual impact.

In *Tahoe-Sierra*, the Court concluded that *Penn Central*'s *ad hoc* rule is the "default" rule for regulatory takings. (535 U.S. at 332.) Just so. But if "*ad hoc*" is to be the rule, then it must require trial as part of "the default rule" to determine the factual impact of the regulation in question. Otherwise, it isn't *ad hoc* and it isn't a rule — it is more in the nature of judicial whim on the part of lower court judges.

Since the Court re-entered the regulatory takings realm in 1978 with *Penn Central*,[8] it has shied away from providing clear rules defining regulatory takings. Instead, as quoted above, the Court has provided the lower courts, the bar, and the citizenry with a series of generalities that provide no guidance. It is time for a change. If there are to be no black letter rules, then there needs to be a clear requirement that evidence of the *ad hoc* situation be provided to, and passed on by, a trier of fact. There is no way to make rational *ad hoc* decisions than to root them in facts.

II.

THE CALIFORNIA COURTS' ANALYSIS CONFLICTS WITH THIS COURT'S SETTLED REGULATORY TAKING DECISIONS. IF THE UNDERLYING PRECEPTS ARE TO BE CHANGED, THAT CHANGE MUST COME HERE, NOT FROM AN INTERMEDIATE STATE COURT.

The California Court of Appeal justified the Coastal Commission's regulatory action by asserting there was a valid basis for it: "it is the lack of water, not a regulation, that causes the harm." (App. 19.) That is foundationally

---

[8] The Court had absented itself after deciding *Pennsylvania Coal Co. v. Mahon* in 1922.

wrong because the protection afforded the rights of property owners by the 5th Amendment cannot be undone by focusing on the good intentions of the regulator.

Valid regulations, enacted for benign, or even beneficent, purposes require compensation if their impact on private property violates the 5th Amendment. (*First English*, 482 U.S. at 315 [5th Amendment designed "to secure compensation in the event of *otherwise proper interference* . . ."] [emphasis added]; *McDougal v. County of Imperial*, 942 F.2d 668, 676 [9th Cir. 1991] [rejecting notion that "any legitimate purpose automatically trumps the deprivation of all economically viable use, such that whenever a regulation has a health or safety purpose, no compensation is ever required."].)

Indeed, the California rationale would eliminate constitutional liability for all regulations — overturning, in the process, each of this Court's decisions to the contrary. It could, for example be said that it is the presence of endangered species, not a regulation protecting them, that causes harm to private property. Yet such regulations result in liability. (*City of Monterey*, 526 U.S. 687.) Or it could be said that it is the need for coastal access, not a regulation demanding it, that causes harm to private property. Yet access regulations can still cause a taking. (*Nollan*,

483 U.S. 825.) Or it could be said that it is the danger to coastal resources, not regulations protecting them, that causes harm to private property. Yet those regulations, too, can cause a taking. (*Lucas*, 505 U.S. 1003.)

In short, to prevail in a regulatory taking case, the Coastal Commission needs to do more than simply assert (as it did below) that its actions are consistent with the general public interest as expressed in the Coastal Act:

> "We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common law maxim . . . . As we have said, a 'State, by *ipse dixit*, may not transform private property into public property without compensation . . . .' [Citation.]" (*Lucas*, 505 U.S. at 1031.)

In regulatory taking cases, it is the *impact* of the regulations that is at the heart of the *ad hoc* analysis, not the worthiness of the justification. Good intentions do not trump the constitution. (*First English*, 482 U.S. at 315.) Impermissible government action is *ultra vires*

and void. (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 [1952] [wartime seizure of steel mills voided].) That is why it is the regulation, not the rationalization, that is of controlling importance. (E.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 [1982]; *Kaiser Aetna v. United States*, 444 U.S. 164, 174 [1979] [government regulations pursuing commendable goals were nonetheless takings].)

The ease with which the California courts used their belief in the rectitude of the regulatory purpose to prevent a trial on the impact of the regulation on the property owner demonstrates strongly the need for this Court's intervention. Belief in the righteous basis for regulatory action cannot eliminate the rights of the regulated — at least their right to present evidence of the impact of the regulation. Not if *Penn Central* is to retain any meaning at all.

III.

ENOUGH IS ENOUGH. HOW MUCH PROCESS MUST A PROPERTY OWNER SUFFER BEFORE AN AGENCY'S POSITION IS DEEMED "FINAL" ENOUGH FOR JUDICIAL REVIEW ON THE MERITS?

Due process can be denied by too much as well as not enough process — indeed, it can drown any semblance of due process of law. Years ago, Fred Bosselman, dean of the national land use bar, queried whether "our system of land use and environmental regulation [can] become so Byzantine as to deny due process of law to the participants through the sheer complexity of the system." (Quoted in Donald Hagman & Dean Misczynski, Windfalls for Wipeouts 12 [1978].)

This case shows how Bosselman's fears have materialized. This Court had a valid goal when it sought to restrict review of local government decisions to those in which the agency had reached a "final" determination of how a property owner would be allowed to make use of land. Premature adjudication serves no one. (See *Williamson*, 473 U.S. at 186; *Palazzolo*, 533 U.S. at 618.) However, some lower courts have used the Court's pragmatic desire for "finality" to launch a quest for some sort of holy

grail, thus putting off finality indefinitely, rather than viewing the facts — *ad hoc* — to determine whether enough process had been had. Just as the Court disagreed with contrary conclusions by the Rhode Island courts in *Palazzolo*, 533 U.S. at 619, the decision below cannot stand.

This case is a paradigm for two reasons.

First, during the administrative process leading up to the Coastal Commission's ruling, Pratt had spent the better part of a decade intensively working with County officials to process a development plan. As part of that process, an EIR was prepared by the County (and subjected to full probing at public hearings) that analyzed ten different alternatives for using this property. The project that is the subject of this litigation was the preferred choice by both the County Board of Supervisors and Pratt.

When the County's permit issuance was appealed to the Coastal Commission, the Commission had before it the entire record of County proceedings, including the EIR. The Commission not only rejected the permit the County had approved, it rejected the other alternatives as well. It did this by concluding that there was no way it could suggest to modify the project (e.g., by using or slightly

altering one of the alternatives) because "revisions that would be necessary . . . are so extensive . . . denial . . . is the *only* appropriate course. . . ." (19 AR 3176; emphasis added.)

Notwithstanding the Coastal Commission's suggestion that some alternative must be available that could be approved (see App. 18), the facts belie that suggestion. The reasons given by the Commission for denial will not change. The water available on site will not increase.[9] The extent of the ESHA will not decrease. The utility of the property as a scenic background for the already-developed part of the community will not change. As the Court held in *Palazzolo*, once it is clear that the reasons for denial will not change, there is no need to waste time making additional applications merely for the sake of making applications:

> "Ripeness doctrine does not require a landowner to submit applications

---

[9] Please recall that the water service company for San Luis Obispo County had assured Pratt and the County that it could provide adequate water for the project. The Coastal Commission simply did not like the idea of bringing water from off-site (although the County had approved) and the courts gave short shrift to the water company's promise. (App. 19.)

for their own sake." (533 U.S. at 622.)[10]

In this context, rigid application of a multiple application rule makes no more sense than it did in *Palazzolo*. The Coastal Commission's views on private development of this property are clear. The rejection of all ten alternatives analyzed in the EIR removes any doubt. In the ripeness framework of *Williamson County*, where the idea is to allow sufficient consideration of alternatives to be able to conclude that sufficient finality has been reached to allow a court to conduct a 5th Amendment analysis, it should make no difference whether the various alternatives were considered seriatim, as part of technically separate permit applications, or as part of one comprehensive analysis of the property, as here. The point is to find the answer, not to engage in process for its own sake.

Second, the Coastal Commission has only administrative appellate jurisdiction over this

---

[10] The Court of Federal Claims has applied this rule for years against the federal government. (E.g., *Formanek v. United States*, 18 Cl. Ct. 785, 792 [1989]; *Beure-Co. v. United States*, 16 Cl. Ct. 42, 49 [1988]; *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 386 [1988].)

property, not plenary land use control. The latter is held by San Luis Obispo County. The only time the Coastal Commission has even the potential of reviewing the use of this property is if the County grants a development permit and some project opponent appeals, as happened here. (Cal. Pub. Res. Code § 30603[a].) In no event does Pratt have the ability to present an application directly to the Coastal Commission. (Cal. Pub. Res. Code§ 30603.)

Thus, unlike *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), it is virtually impossible for Pratt to receive repeated plan rejections from the Coastal Commission. As noted above, however, the scrutiny given by the Commission in this one intense experience was the equivalent of multiple plan applications and rejections. If the Commission cannot be called to account in this situation, then the Court may as well issue it a certificate of 5th Amendment immunity, because it is unlikely that any compensation case will ever ripen against it. [11]

---

[11] The Commission's most famous case, of course was *Nollan*, 483 U.S. 825, which it lost on 5th Amendment grounds, but no compensation was sought there.

"Ripeness" should not be a game. To Pratt and other land developers, it feels as though that is what it has become for regulators.[12] After three decades of planning efforts, on projects that reduced the proposed density of the project from 149 homes to 41 homes and from a design that virtually covered the property with houses to one that leaves 80% of it undeveloped, the courts below held that this case was still not ripe. On the contrary, litigation may be the only thing it *is* ripe for.

As *Palazzolo* put it, the point of a ripeness investigation is to make sure that the regulator's intentions with regard to the property are known with a "reasonable degree of certainty . . . ." (533 U.S. at 620.) Not "complete" certainty; a "reasonable degree" thereof. The law cannot demand more. It is not, after all, science. Pragmatic evaluation must be the hallmark. The facts here show

---

[12] Justice Brennan described a famous incident in which a prominent government lawyer waxed exuberant over the gaming aspects of the system and the ability to keep property owners running like hamsters on a wheel. (*San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 655, n. 22 [1981] [dissenting opinion].) Since Justice Brennan brought the games to light, public acknowledgement has gone to ground. But the games remain afoot.

that rigid enforcement of a "more than one" application rule will neither answer the ripeness question nor achieve a just result.

The Coastal Commission's hostility to development of this parcel is clear in the staff report which, among other things, equates "development" with "habitat degradation" (19 AR 3190) and views the Pratt property as some variety of ecological wallpaper for others to enjoy as "an open space backdrop" (19 AR 3202) for their own homes. It also sought to "preserve" habitat for species never seen on the property. (Compare *City of Monterey*, 526 U.S. at 695 [city sought to create habitat for butterfly not found on the property].)

If the concept of ripeness in regulatory taking cases is to have any meaning, it must be grounded in pragmatism and freed of rigidity. As this case shows, the record of a single permit consideration can be sufficient to prove a "final" determination of what use will be allowed on the property.

CONCLUSION

It has been three decades since the Court created the *Penn Central* mode of *ad hoc* factual examination of each regulatory taking case. The Court has steadfastly refused to

provide more specific guidance on how to conduct such an *ad hoc* review. As a result, lower courts have taken advantage of the vacuum and adopted what some informed observers have called a "gastronomic" process and others a "gestalt" process. Whatever called, the process leaves litigants adrift, with no clue how cases will come out. More to the point, it leaves lower courts with the ability to revert to the Chancellor's foot standard of justice.

If the Court's *ad hoc* approach is to have any meaning, then there is no room for decisions like the one below that, without a trial, decided as a matter of law that regulatory action stripping a property owner of *at least* 80% of the use of valuable land — and probably far more, as a trial would have shown — cannot be a taking.

That cannot make sense under an *ad hoc* rule. Certiorari is needed in order to make as much sense as possible out of the *Penn Central* factors.

Certiorari is also needed to restore flexibility to ripeness determinations. Whereas the Court has insisted on *ad hoc* evaluation of whether a taking has occurred, the lower courts have read the Court's ripeness decisions as providing a hard, *per se* line in the sand: to achieve

ripeness, the property owner must make more than one development application. Rigidity is no more help on this issue than under the *Penn Central* analysis. This case shows the need for flexibility and provides a prime opportunity for the Court to provide it.

Respectfully submitted,

MICHAEL M. BERGER*
*Counsel of Record
GIDEON KANNER
MANATT, PHELPS & PHILLIPS. LLP
11355 West Olympic Blvd.
Los Angeles, CA 90064
(310) 312-4000
Counsel for Petitioner

41334590.1