No. 08-668

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Brief in Opposition is liberally salted with Respondent California Coastal Commission's assertions of what it refers to as the "facts" (e.g., pp. 5, 11) as well as disparagement of the presentation in the Petition as having "no evidence" (e.g., pp. 7, 11) behind it.

The Brief in Opposition thus highlights the problem that calls for the Court's review: *there has been no trial to establish the facts* and the courts below turned what should have been an evidentiary trial into assumptions supposedly made as a matter of law. Building on those deficiencies in the lower courts' rulings, the Commission's brief substitutes self-serving prose and misdirected invective toward Petitioner's counsel in place of a due process proceeding in which the facts of the controversy — not just counsel's argumentation — are presented as proper evidence to an impartial trier of fact.

In light of the standard the Court has established for deciding regulatory taking cases (i.e., "*ad hoc*" factual determinations [see Pet., pp. 10-18]), an inquiry into

evidence is essential. Lower courts that are hostile to private property rights fail or refuse to understand that basic notion, thus showing the need for corrective action by this Court.

As shown in the Petition, the Court's decisions hold that each regulatory taking case must be decided "*ad hoc*" on its own facts. (E.g., *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 [1978].) Of necessity, *that* can only be done after trial, with the presentation and evaluation of evidence.

That *ad hoc* approach operates in both of the issues presented here:

- First, it is key in the determination of whether a taking has occurred, because an *ad hoc* standard cannot rationally be applied until the full factual record of the specific case at issue can be examined at trial.

- Second, it is also the key in the finality/ripeness determination required by *Williamson County Reg. Plan. Agency v. Hamilton Bank*, 473 U.S. 172 (1985). Just as the substantive facts will vary from case to case, so too the procedural aspects will

vary and need to be examined on their own. The finality/ripeness question is whether it can be said with a "reasonable degree of certainty" (*Palazzolo v. Rhode Island*, 533 U.S. 606, 620 [2001]) — not absolute, but reasonable, certainty — that the regulator has made its "final" decision known. Reasonableness determinations are inherently fact based.

I.

AD HOC FACTUAL ANALYSIS REQUIRES AN *AD HOC* FACTUAL EXAMINATION OF EVIDENCE AT TRIAL.

The Commission evidently understands how out of sync it is to say (a) that the test to determine whether there has been a regulatory taking is the *ad hoc* mode of analysis described in *Penn Central*, but then (b) decide the matter without having a trial to determine *ad hoc* what those facts are. Thus, the Commission baldly asserts (p. 9) that there was no application of *Penn Central* below.

That simply defies the record. The Court of Appeal explained the *Penn Central* test

(App. 16) and then used the same dual mode of decision that the Rhode Island Supreme Court tried unsuccessfully to use in *Palazzolo*, where, it held that the matter was not ripe, but if it were ripe, the owner would have lost on the merits. (See *Palazzolo*, 533 U.S. at 616.) Here, the court below found lack of ripeness and then also found no taking 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.)

This Court saw through that ploy in *Palazzolo* (finding ripeness and remanding for a determination of whether a taking occurred), and it should do so here as well. Beyond that, the Court needs to clearly direct lower courts that the way to make *ad hoc* factual determinations is to hold trials.

The legal problem with the conclusion below is that it *assumes as a matter of law* that leaving 20% of the property "available" (whatever that actually signifies in the absence of any evidence) means there *could be* no *Penn Central* taking. The more real problem — in the *ad hoc* factual world of *Penn Central* — is that the abstract assertion that Pratt has 20% of the land

"available for development" has not been proved.

All that the record currently shows is that at least 80% of the property was definitely *precluded* from development. Instead of demanding proof of what *could* be developed, the court below simply inverted that prohibition and *assumed* that the remaining 20% must be *available* for private use. [1] But there is no evidence of that. No one disputed that 80% (at least) of the land could not be used. But no such agreement existed as to the remaining 20%. That is why Pratt has insisted throughout that a trial is needed to determine the actual impact of the regulations and the

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[1] That is the Coastal Commission's mantra here, as well. See, e.g., Br. in Opp., p. 15, where the Commission asserts that "Pratt still has about 24 acres that it potentially can develop." Pratt's complaint alleges that it cannot do so, and its post-trial efforts to show the trial court the County's refusal to process further applications aptly demonstrate the futility of seeking more "process" from the government agencies. A trial, with evidence, would prove that. But the courts below would not allow trial.

actual (as opposed to conjectural) utility of such a development.

Trial would put the parties to their proof. And that is the point. Embedded in the decision below is the *assumption* that 20% of Pratt's land can still be put to productive private use, though no one can tell how. The point of citing the appraiser's affidavit (denigrated by the Coastal Commission at Br. in Opp., p. 6) was simply to show that the 20% solution was neither automatic nor undisputed. That appraisal testimony raised a question that could have been resolved by trial, had there been one.[2]

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[2] Some of the Commission's factual assertions disregard reality. For example, the Commission asserts that it is "not true that Tract 1873 has been in the regulatory process for 30 years" (Br. in Opp., p. 19), as though that somehow disproves that the bulk of the *property* in that proposed tract is part of the Pratt ownership that has been the subject of development proposals for more than 30 years. Both the Court of Appeal's opinion (App. 2-3) and the Commission's Brief in Opposition (p. 1) show the County's conceptual approval of 149 homes on 81 of these 124 acres in 1973 — 36 years, by our calendar.

To the same effect is the Commission's discussion of *Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21 [1999].) In the Petition, Pratt contrasted *Florida Rock*'s finding of a taking caused by a 73.1% reduction in value, with the ruling below that there was no taking as a matter of law when at least 80% of the property has been rendered undevelopable. (Compare Pet., p. 16 with Br. in Opp., p. 11.)

But the Commission's argument that those two percentages are not comparable proves too much. A blanket prohibition of development on *at least* 80% of Pratt's property at least raises a question of fact as to its economic impact — the key *Penn Central* factor. The Commission's *assumption* that there is not sufficient impact to cause a taking is something that requires evidentiary proof, not counsel's argument in a brief, or a bald assertion by a lower court. *Florida Rock* was decided after multiple and extensive trials.

The Commission's assertion that Pratt "did not argue" the *Penn Central* issue below (p. 10) again defies the record. Pratt devoted a substantial section of its Court of Appeal brief to the argument that the

Commission's actions had "such a severe impact under the *Penn Central* formulation that compensation is mandated." (AOB 39 *et seq*.) The same *Penn Central* issue presented here was also raised in Pratt's Petition for Review to the California Supreme Court. (Pet. for Rev., p. 2.)

II.

THE DECISION BELOW — AS A MATTER OF LAW — CONFLICTS WITH SETTLED DECISIONS OF THIS COURT

In a brief phrase, the court below eliminated the basis for much of this Court's regulatory taking jurisprudence. The court below found there *could be no taking* because "it is the lack of water, not a regulation, that causes the harm." (App. 19.) That is contrary to numerous decisions of this Court (discussed at Pet., pp. 19-21) holding that takings could be found because of regulations based on the possible impact of development on endangered species or coastal access or natural resources. In each case, the Court could have said that it was the presence of the resource or the species, not the regulation, that caused the potential

problem. It could have, but it did not. It recognized that the impact of the regulation could violate the constitutional protection of private property and mandate public acquisition in order to protect the resource for the public benefit. As the Court summarized in *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 543 (2005), "the Takings Clause presupposes that the government has acted pursuant to a valid public purpose." Thus, the fact — if proved at trial — that "lack of water" provided a reason for the government action merely fortifies the takings claim by showing a public purpose for the action. It cannot eliminate the claim. Besides, the regulatory body concerned with such matters — the County — found no fault with water availability and approved Pratt's proposal.[3]

The Commission's response evades the issue, asserting either that the court below did no such thing, or Pratt did not raise the

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[3] The Commission's comment that Pratt did not present issues relating to the County's action (Br. in Opp., p. 7) is as irrelevant as it is bewildering. The County approved the project. Pratt's dispute was with the Commission.

issue in the California Supreme Court, or that water allocation is an important issue. (Br. in Opp., pp. 21-22.)

Wrong. First, the court below said what it said. That cannot be taken back at this point. And what it said is contrary to the theory of this Court's decisions. Second, Pratt raised this precise issue, arguing below, for example that "the Court of Appeal's rationale would eliminate constitutional liability for all regulations — overturning, in the process, each of the U.S. Supreme Court's decisions to the contrary." (Pet. for Rev., p. 21.)

III.

THE GAME ELEMENT MUST BE REMOVED FROM RIPENESS DECISIONS

The Commission's defense of the decision below distorts the Petition. Pratt is not "asserting that it should be excused from the finality requirements" of *Williamson County* (Br. in Opp., p. 16). Pratt's position is that it satisfied any rational meaning of the concept of finality, and that multiple project applications and rejections are not

the only way to demonstrate fulfillment of that requirement.

Even the truncated record considered below shows that, during the nearly decade-long process that Pratt endured with the County planners before a plan was finally approved at that level, Pratt and the County considered ten alternative ways to use the subject property. On administrative appeal, *the Coastal Commission rejected all ten alternatives*. In the Commission's own words, none of the ten was even close enough to approve with minor modifications because "revisions that would be necessary . . . are so extensive . . . denial . . . is the *only* appropriate course. . . ." (19 AR 3176; emphasis added.)

Thus, Pratt seeks not to be excused from finality, but a holding from this Court that finality can be reached in different ways, depending on the *ad hoc* factual circumstances of each case. Nothing in the Court's ripeness jurisprudence mandates multiple applications "for their own sake." (*Palazzolo*, 533 U.S. at 622.) Making multiple unsuccessful development applications is merely one way to demonstrate finality. Here, one lengthy and

extensive review of ten different ways to develop a single parcel of property should suffice *at least* to require a trial to determine whether that rejection of multiple alternatives shows either finality or the futility of proceeding further.[4]

In rejecting Pratt's development, the Commission made extensive findings demonstrating its hostility to developing this property, starting with equating "development" with "habitat degradation." (19 AR 3190) The Commission also found (1) it is important to maintain the Pratt property as a scenic backdrop for other homes already developed between this property and the ocean, on the evident theory that bare land is more attractive than looking at homes on someone else's property; (2) that subdivision of a small

[4] The Commission's argument about the coastal permitting process (Br. in Opp., p. 17) is purely diversionary. It was the courts below that made an issue of the fact that the Commission had only reviewed Pratt's development plans once. (App. 20.) In this *ad hoc* context, that should not matter. The Coastal Commission seems now to agree, calling the issue "trivial." (Br. in Opp., p. 17.)

parcel in this part of the coast into as few as three home sites would set a bad developmental precedent; (3) that the property must be reserved for endangered species which had never been seen on it; and (4) that water could not be imported to support development. If the Coastal Commission wants to dispute any of those allegations or to demonstrate why they should not matter, the place to do that is at trial. As a matter of complaint allegations, these charges should suffice to put at issue the question of finality.

Otherwise, ripeness determination turns into a game consisting of the regulatory body suggesting that no matter what the property owner does, there is *always* something else that should have been done or that the regulator might do in the future if only the property owner asks in the right way.

The point is simply this: nearly a quarter-century after *Williamson County*, virtually all regulators have learned to evade its holding by *saying* that they are always open to alternative development

ideas[5] — whether that is actually true or not. In the context of *Penn Central*'s *ad hoc* factual examination rule, coupled with *Williamson County*'s desire for a "reasonable degree" of certainty (see *Palazzolo*, 533 U.S. at 620),[6] the *proof* of finality should depend upon evidence, not the mere assertion by an interested litigant that it retains discretion that might be exercised to permit development, regardless of historical evidence to the contrary.

Until this Court clearly requires that all such issues be decided on their merits, its *ad hoc* factual rule laid down in *Penn Central* and reiterated numerous times since then, will be reduced to nice words on paper and nothing more.

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[5] And they are advised to do so in most cases. See, e.g., Douglas T. Kendall, Timothy J. Dowling & Andrew W. Schwartz, Takings Litigation Handbook 88 (2000) (advising government lawyers to stress to courts that their clients retain discretion to allow use and might so exercise it).

[6] "Reasonableness" is always a question of degree. (See, e.g., *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418 [2003].)

CONCLUSION

Certiorari is necessary and Pratt prays that it be granted.

Respectfully submitted,

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