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 Court Of Appeal Of California, Second Appellate District

BRIEF OF AMICUS CURIAE SAN LEANDRO ROCK CO., INC., IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. INTEREST OF *AMICUS CURIAE*

The hurdles of restrictive statutory and regulatory law placed in front of property owners have grown higher and higher, to the point where the race can no longer be run for many. Case law has not kept up with these restrictive changes, and the equitable balance between private land use and public interest no longer exists. The story of Petitioners is not isolated. *Amicus curiae* San Leandro Rock Company (hereinafter "San Leandro Rock") is one more example of a property owner lost in the never-ending maze of land use regulation and unable to make economic use of its property as a result.[1]

San Leandro Rock is a small, family-owned business, located in an unincorporated area of the County of Alameda, California, and has been a member of the business community in the San Francisco area for almost a century. The primary business was always the operation of a quarry on the property at issue. The product of their enterprise exists throughout the area. The rock supplied by their quarry

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

This *amicus* brief is filed with the consent of the parties. Counsel for the Petitioners and Respondents have granted blanket consent for the filing of *amicus* briefs in these cases. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

helped to build the roads that we travel on, the buildings that we live and work in.

When the quarry was originally established, the surrounding area was rural and undeveloped. As the area grew, development came to the doorstep of the quarry. A major residential subdivision was developed and homes were built next door to the quarry. This development was authorized by government and welcomed by the new residents who eagerly occupied the new homes. However, the noise, dust and truck traffic common to all quarries became a nuisance to these new neighbors. The neighbors did not care that they had come to the quarry rather than the quarry coming to them. They did not care that they depended on roads and buildings made from the product of this quarry. Their life was disturbed by the quarry and they demanded that it be shut down. The County of Alameda (hereinafter "County") did not care that government had created this situation by allowing development next to the quarry. The County did not care about the history and contribution of the quarry. The County demanded that the quarry be shut down.

San Leandro Rock made a reasonable and necessary request in response – if the quarry was to be shut down, the income from the quarry would need to be replaced through some alternative use of the quarry property. An Alameda County elected official – County Supervisor, Joe Bort – promised the Lee family, owners of San Leandro Rock, that the property could be used for a residential subdivision if only the Lee family would quietly accede to the demands of their new neighbors. And accede they did.

San Leandro Rock ended quarry operations. They invested huge sums of money in "reclaiming" the property, making it look less "quarry-like" and suitable for future residential subdivision. This started to worry the neighbors, who decided that, not only did they not want a quarry; they also did not want more homes. They preferred to leave the quarry as open space, one of the final pieces of land needed to completely ring a nearby lake, Lake Chabot, with open space.

And then came Measure D. Measure D was a County initiative measure created by opponents of development in Eastern Alameda County, distant from San Leandro Rock. Before the measure went to the ballot, its proponents opened the door to all comers – anyone who opposed some development anywhere in Alameda County was welcomed into the fold and invited to add their opposition into Measure D. The neighbors of the San Leandro Rock Company added the quarry property to Measure D, explicitly banning residential subdivision, allowing only limited "agricultural" and "recreational" use, and added a healthy dose of additional restrictions designed to insure that the quarry would never be developed or re-opened as a quarry. The neighbors did not want to entrust county government with these restrictions – the restrictions were absolute and not subject to change by the officials in power. Measure D was passed by the voters in November of 2000, and any hope of developing the quarry property was lost.

San Leandro Rock Company was left with no options. San Leandro Rock could not use the property for a residential subdivision, causing San Leandro Rock to lose its investment in such use (the investment being its agreement to forego quarry revenue together with money actually invested in reclamation for subdivision purposes) and agricultural and recreational use was not economic (it is difficult to graze cattle or grow crops on rock). San Leandro Rock filed a lawsuit on November 5, 2002, alleging that the application of Measure D to the quarry property resulted in a taking without compensation. After service, the County immediately filed a series of motions to summarily end the case, primarily based on the argument that the Complaint fails to state a claim in that the case was not ripe for adjudication. The ripeness argument contended that a case could not be brought against the County until San Leandro Rock had submitted a development application to the County and the County had denied the application.

The Trial Court ruled in favor of San Leandro Rock, ultimately holding that "the facts alleged support the conclusion that no land use agency [in the County] has discretion to permit any economically viable uses [of the quarry property], and that all permissible uses [of the quarry property] are known to a reasonable degree of certainty. For that reason, the Court cannot conclude that Plaintiff's as-applied takings claim is not ripe for adjudication."

The County appealed this decision, contending that all takings claims must be preceded by a development application that has been acted upon. In

October of 2005, the California Court of Appeal ruled in favor of the County and directed the Trial Court to vacate its holding. The Court of Appeal concluded that the matter was not ripe because the County had not had "the opportunity to exercise its full discretion in considering [the landowner's] plans for the property in light of the measure."

San Leandro Rock petitioned the California Supreme Court for review. The Petition was denied.

In accordance with the Court of Appeal's decision, San Leandro Rock began an attempt to work with the County to discuss possible uses of the subject property. On June 27, 2006, after proceedings in the first lawsuit were final, San Leandro Rock sent a letter to the County. San Leandro Rock requested that the County work with San Leandro Rock to help define the application of Measure D to the subject property. San Leandro Rock noted that a prompt response from the County would be greatly appreciated, as the lack of economically viable use of the subject property was becoming a serious strain on San Leandro Rock. The County responded on August 16, 2006 with a letter that simply stated, "County Counsel and the Planning Department are preparing a detailed response to your questions regarding restrictions on and possible uses of the property. However, I would like you to be aware that due to vacation schedules in both offices, we are unable to prepare a more comprehensive response at this time. You should expect a response within approximately one month."

On December 1, 2006, five months after San Leandro Rock's first letter, and two and one-half months after the date of the County's promised response, San Leandro Rock sent a final letter to the County, reminding the County of its outstanding commitment to work with San Leandro Rock. The letter again stressed the financial difficulties being faced by San Leandro Rock. Another five months passed with no word from the County. On May 3, 2007, almost one year after first writing to the County, San Leandro Rock filed a second lawsuit. The County had proven to be uncooperative and had certainly not provided any input to indicate that economically viable uses of the subject property did somehow exist.

On June 14, 2007, after service of the new lawsuit, County Counsel sent a letter to San Leandro Rock stating that a response to San Leandro Rock's first letter would be forthcoming. In addition, County Counsel stated that a meeting would be arranged between San Leandro Rock and the County Planning Director and County Community Development Agency Director. The stated purpose of the meeting would be to discuss any questions that San Leandro Rock had about submitting a development application for the subject property.

On June 18, 2007, the County finally responded to San Leandro Rock's letter of June 27, **2006**. The letter confirmed that residential use was absolutely limited by Measure D to one primary unit and one secondary/accessory unit per parcel (a subdivision

was not permissible). The letter confirmed that a quarry could **not** be reopened on the subject property. The letter confirmed that the only other known reuse of quarries in the area had been for development of residential subdivisions.

On August 29, 2007, the County met with San Leandro Rock. The County confirmed that, if San Leandro Rock were to apply for a more than one primary and one secondary/accessory residential unit per parcel, extensive technical reports would be required with the application for the application to be accepted by the County for consideration. The County confirmed that the costs to San Leandro Rock for developing the required technical reports would be significant. The County confirmed that such an application for a multiple unit residential subdivision would then be denied by the County due to Measure D.

The second lawsuit remained ongoing while these discussions between San Leandro Rock and the County were occurring. After the conclusion of these discussions, the County filed a motion to dismiss (a demurrer) the case. In March of 2008, the motion was granted. The court stated that San Leandro Rock had to file a development application.

So, seven years after passage of Measure D, and after more than five years of litigation and negotiation, San Leandro Rock remains stuck. It knows that the property cannot be developed, but has been directed by the Court to invest a large sum of money

– money that San Leandro Rock cannot afford to spend – in a pointless, time-consuming application process with a known outcome.

II. SUMMARY OF ARGUMENT

Land use regulation and associated regulatory takings law has been evolving over the past ninety years, with the most significant changes occurring in the last thirty years. Land use regulation was originally intended solely to protect the integrity of neighborhoods. Over time, the purpose behind land use regulation has shifted and it is now overwhelmingly directed at the protection of wetlands, endangered species, air and water quality and so on. This evolutionary march began in New York in 1916 with the adoption of the county's first significant zoning ordinance. The goal of this ordinance was to prevent the spread of tenements into more affluent neighborhoods. Fulton, Guide to California Planning (1991), p. 7.

This was followed six years later with the first regulatory takings case to reach the United States Supreme Court – *Pennsylvania Coal Co. v. Mahon* (1922), 260 U.S. 393 [67 L. Ed. 322, 43 S. Ct. 158] (hereinafter *"Pennsylvania Coal"*). In *Pennsylvania Coal*, the United States Supreme Court held that in some cases government regulation could go too far and constitute a taking of private property without compensation. The *Pennsylvania Coal* court provided a foretelling warning: "We are in danger of forgetting

that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal, supra,* at 416.

However, over time, courts have been reluctant to find that regulation amounts to taking. In large part the courts have indicated a belief that no taking can occur if a property owner is allowed some economic use of property. Courts have also been reluctant to intervene in the regulatory process. Courts have required property owners to work with government to find some economically viable use for a property within the existing regulatory structure prior to filing a lawsuit for inverse condemnation. This was reflective of the fact that within these regulatory structures, the executive branch of government had substantial discretion to remedy inequities caused by the regulation when applied to a particular property. For example, if a zoning ordinance limited development on a parcel to commercial development and a property owner could satisfy the government that commercial development was not economically viable but residential development would be, government had the power to exercise discretion and apply a variance of its ordinance to allow residential development on the particular parcel at issue. Courts wanted to allow the executive branch of government to have an opportunity to exercise such discretion before intervening. For this reason, courts created a substantial body of law that developed a ripeness

doctrine unique to regulatory takings cases. This doctrine was unique in that it did not necessarily have any defined boundaries – a property owner might be required to submit an undefined number of development applications and receive several rejections before a court would be inclined to determine whether a regulatory taking had occurred. The courts viewed this multiple application process as an ongoing negotiation between the property owner and the government that needed to occur to help define the actual scope of a regulation as applied to a particular property. The necessity for this to occur prior to court intervention was entirely the result of the tremendous discretion placed into the hands of the executive branch of government in most land use regulations.

However, while courts were indicating reluctance to intervene in governmental regulation, the restrictive scope and nature of regulation began expanding dramatically. In the 1970s, new regulatory laws were enacted and directed at the protection of the environment – the federal Clean Air Act, Clean Water Act, Coastal Zone Management Act, National Environmental Policy Act, etc. These laws resulted in significant environmental benefits, but also placed heavy burdens on property owners. Many of these laws were very strict in nature and began to limit the discretion of the executive branch of government to address the concerns of the property owners.

This limitation on discretion resulted in modifications to the ripeness doctrine in regulatory takings cases. In some cases, multiple applications were not

required prior to court intervention – a single application could be sufficient.

Perhaps the most significant change in regulatory law in California began to be seen in the early 1980s. Groups interested in ensuring the limitation of property development began placing initiatives on the ballot that were highly restrictive in nature. These initiatives created laws that were very specific in defining land use and also precluded the application of discretion by the executive branch of government. In fact, these initiatives went one step further and also removed the discretion of the legislative branch of government to change the law, providing that the law could only be modified by subsequent initiative action by the voters. Fulton, *supra*, at p. 145.

It is this most recent development that is at the heart of the case of San Leandro Rock Measure D, the County initiative ordinance discussed above, is part of this new breed of restrictive land use ordinances that remove government from the equation. It was created to stop development on vast acreages in the Livermore area, some twenty five miles away from the quarry property. The quarry property was then targeted and added to the initiative after its creation.

Measure D may be one of the most restrictive land use regulations seen to date, with only the possibility of an absolute prohibition on any development of any type being more restrictive. It was designed to remove discretion from county government

– no variances could be granted. The law created by Measure D could only be changed by a subsequent initiative, and Measure D blatantly transferred the traditional role of the executive branch – the exercise of discretion to avoid a regulatory taking – into the hands of the judiciary. Section 1 of Measure D stated that " **. . . [t]he ordinance is designed to remove the County government from urban development outside the Growth Boundary**" (emphasis added). Additionally, section 3 of Measure D stated that "[n]otwithstanding their literal terms, the provisions of this ordinance do not apply to the extent, but only to the extent, that **courts** determine that if they were applied they would deprive any person of constitutional or statutory rights or privileges, or otherwise would be inconsistent with the United States or State constitutions or law." In other words, the explicit purpose of this ordinance was to remove the very discretion that is the fundamental reason for the ripeness doctrine that courts have traditionally applied to regulatory takings cases.

The California Court of Appeal decision involving San Leandro Rock reflects the problems with current ripeness doctrine which requires that at least one development application must be filed in all cases prior to the filing of any action for inverse condemnation. *County of Alameda v. Superior Court* (2005), 133 Cal.App.4th 558. In doing so, the Court of Appeal relied principally on three cases, one federal (United States Supreme Court) and two state (both First District Court of Appeal). The federal case is

Palazzolo v. Rhode Island (2001), 533 U.S. 606 [150 L. Ed. 2d 592, 121 S. Ct. 2448] (hereinafter "*Palazzolo*"). The two state cases are *Milagra Ridge Partners, LTD v. City of Pacifica* (1998), 62 Cal.App.4th 108 (hereinafter "*Milagra*") and *Shea Homes Limited Partnership v. County of Alameda* (2003), 110 Cal.App.4th 1246 (hereinafter "*Shea*").[2] The Court of Appeal held that these cases together stand for the proposition that at least one development application must be submitted by a property owner prior to the filing of regulatory takings claim in court. The Court of Appeal noted that it felt particularly bound by the *Shea* decision, which actually dealt with Measure D and found a purported as-applied regulatory takings claim to be unripe due to the failure of the property

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[2] While the Court of Appeal did rely principally on *Palazzolo*, *Milagra* and *Shea* in reaching its conclusion, it did refer to a number of other state and federal cases in its decision, including *Calprop Corp. v. City of San Diego* (2000), 77 Cal.4th 582; *Hensler v. City of Glendale* (1994), 8 Cal.4th 1; *Long Beach Equities, Inc. v. County of Ventura* (1991), 231 Cal.App.3d 1016; *Toigo v. Town of Ross* (1998), 7 Cal.App.4th 309; *Dodd v. Hood River County* (9th Cir. 1995), 59 F.2d 852; *MacDonald, Sommer & Frates v. Yolo County* (1986), 477 U.S. 340 [91 L. Ed. 2d 285, 106 S. Ct. 2561]; *Williamson Planning Comm'n v. Hamilton Bank* (1985), 473 U.S. 172 [87 L. Ed. 2d 126, 105 S. Ct. 3108]; and *Yee v. Escondido* (1992), 503 U.S. 519 [118 L. Ed. 2d 153, 112 S. Ct. 1522]. However, these cases only add to the confusion. They are simply extensions of *Milagra* as they all pre-date *Palazzolo* and all involve land use regulations that allowed for the exercise of discretion by government. None of these cases considered ripeness doctrine in light of the evolution of land use regulation.

owner to file a development application after the adoption of Measure D.

The case of San Leandro Rock supports the proposition that a development application is not an absolute prerequisite to the filing of an action for inverse condemnation. It demonstrates the need to advance case law to match advances in statutory law and to secure uniformity of decision and to settle an important question of law. While the Court of Appeal found *Palazzolo*, *Milagra* and *Shea* to be consistent, in fact they are not. As will be discussed in more detail below, *Palazzolo* was the first case to truly consider ripeness doctrine in light of the current state of land use regulation. *Palazzolo* noted that land use regulation had historically allowed a governmental agency to exercise discretion to avoid takings but that current land use regulation had become much more strict and the ability of a governmental agency to exercise discretion was becoming more limited. *Palazzolo* held that an application is not required as a prerequisite to the filing of a regulatory takings claim if there is **reasonable** degree of certainty as to the land's permitted use. *Palazzolo* at 533 U.S. 620.

Milagra, in turn, did not consider the evolution of land use regulation. *Milagra* focused on the ability of a governmental agency to exercise discretion and found that development applications would be required prior to the filing of a lawsuit to allow a governmental agency the opportunity to exercise discretion and avoid a taking.

Most problematic of all is the holding in the *Shea* case. *Shea* actually involved Measure D. Property owners in the area primarily impacted by Measure D (Livermore) had filed a number of legal challenges to Measure D. One property owner raised a very late as-applied takings claim. This claim was raised in oral argument, was not briefed and was not the principal legal challenge. However, since it was raised, the Court of Appeal was forced to respond to it, and issued a decision indicating that any as-applied regulatory takings claim under Measure D would have to be preceded by a development application. The *Shea* decision is directly in conflict with the holding in *Palazzolo*. The *Shea* decision is a classic example of bad facts making bad law.

The decision of the Court of Appeal in the San Leandro Rock case is similarly at odds with *Palazzolo*. The Court of Appeal is saying that one application is a prerequisite to any regulatory takings claims. Specifically, the Court of Appeal found that, since Measure D did allow for "agricultural" and "recreational" use of the quarry property, the County should be allowed to interpret the term "agricultural use" and that San Leandro Rock was not in a position to conclude how the County might interpret these terms or to understand whether such uses were economically viable on the quarry property. However, with *Palazzolo's* reference to reasonable certainty, it is clear that San Leandro Rock should be allowed to determine the likely interpretation of these terms, as

they are common usage and not technical in nature. If, as an issue of fact, San Leandro Rock has made a reasonable conclusion about the meaning of such a term and has found such uses to be uneconomic given the nature of its property, then, under *Palazzolo*, San Leandro Rock would be allowed to file its takings claim based on this conclusion without submitting an unnecessary development application. The Court of Appeal did not address the fact that San Leandro Rock's claims were based in part on the loss of its "reasonable investment-backed expectation."

III. ARGUMENT

A. The *Palazzolo* Case Clearly Established That a Development Application Is Not a Prerequisite to All Regulatory Takings Cases.

The United States Supreme Court decision in *Palazzolo* is a recognition of the trend towards more restrictive land use regulation. In some instances, the discretion of a regulatory authority may be proscribed to the extent that the outcome of a development application can be known with reasonable certainty prior to the submission of a development application. If the regulatory authority lacks the ability to rectify the application of a regulation in cases where the regulation does cause a hardship to the property owner that rises to the level of a taking, there is little point in requiring the submission of an application

that will only result in additional costs to the property owner and delay compensation in cases where a regulatory taking has in fact occurred. *Palazzolo* involved the regulation of a 20 acre coastal parcel of land in Rhode Island. The parcel was purchased by the plaintiff, Anthony Palazzolo in 1959 (it was originally purchased by a corporation owned by Mr. Palazzolo and subsequently transferred to his direct ownership). The parcel consisted of 18 acres of wetland and 2 acres of upland. In 1971, development of the parcel became subject to regulation by the Rhode Island Coastal Resources Management Council (hereinafter "Council"). In 1983, Mr. Palazzolo submitted an application to the Council to fill the entire parcel. This application was rejected by the Council due to the extensive impacts to wetlands. In 1985, Mr. Palazzolo submitted a new application to fill 11 acres of the parcel. The Council rejected this application, again due to the extensive wetland impacts. Mr. Palazzolo subsequently filed suit in inverse condemnation. *Palazzolo* at 533 U.S. 613-615.

The Rhode Island Supreme Court held that Mr. Palazzolo's claim was not ripe as he had not explored lesser development options, including reducing the amount of wetland impacts and/or limiting development to the 2 acre upland area which would clearly avoid the wetland impacts that were of concern to the Council. *Palazzolo* at 533 U.S. 616-618. The United States Supreme Court disagreed, noting that it was

clear that the Council lacked discretion to approve **any** fill of wetlands, and stated that the:

> 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.** *Palazzolo* at 533 U.S. 620 (emphasis added).

In *Palazzolo*, the Supreme Court recognized the unfairness of a ripeness standard that had a blind requirement for the submission of an application and a final agency determination prior to the filing of an action in inverse condemnation. Such a ripeness standard allowed a regulator to avoid challenge by keeping a property owner stuck in a pointless and endless approval process. *Palazzolo* substantially modified the ripeness doctrine by holding that a property owner is not obligated to file a development application and obtain a final decision on the application if the result of the application process is reasonably clear at the outset. This was perhaps most bluntly stated in the following quote:

> 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. **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 (emphasis added). *Palazzolo* at 533 U.S. 622.

The Supreme Court did not determine that Mr. Palazzolo's case was ripe because he had submitted some applications; rather, the Supreme Court determined that the case was ripe because the outcome of any application by Mr. Palazzolo was reasonably clear. If a regulatory scheme is so defined that it makes the outcome of a development application known prior to the application, an application is not required for the sake of process. One application is no longer an absolute prerequisite to a takings claim.

B. The *Milagra* Case Involved a Discretionary Decision

Milagra pre-dates *Palazzolo*. The plaintiff in *Milagra* purchased a forty-five acre parcel in 1979 or 1980. In 1985, the plaintiff submitted an application to the City of Pacifica for a 144 unit townhouse development. This application was denied. In 1994, the plaintiff submitted an application for a 64 unit single

family residential development to the City of Pacifica. The City approved development of 63 of the 64 requested units. However, due to some opposition to the development, the City submitted the matter to the voters for approval of the development. The voters rejected the development. The plaintiff then filed suit in inverse condemnation. *Milagra,* 62 Cal.App.4th at 112-115. The Court of Appeal held that the case was not ripe as the plaintiff had not submitted an application for development that was permissible under the zoning in effect at the time. The Court noted that current zoning would allow for some commercial and residential development, and in the event the allowable development was not economically viable, **the plaintiff could ask the City to exercise its discretion to grant a minor variance to allow the approval of development that would be economically viable**. *Milagra,* 62 Cal.App.4th at 119.

Milagra therefore involved a regulatory scheme that allowed the agency to exercise discretion, and this was critical to the Court's determination that the case was not ripe. The regulation at issue in *Milagra* is clearly distinguishable from the stricter regulations that are becoming more prevalent. It is notable that the *Palazzolo* court rejected a *Milagra* analysis, stating:

> [This] . . . case is quite unlike those upon which respondents [Rhode Island] 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. *Palazzolo* at 533 U.S. 620.

C. The *Shea* Case Was Different Procedurally and Factually From *Palazzolo* and *Milagra*

Shea does post-date *Palazzolo*. *Shea* involved two consolidated cases – one filed by Shea Homes and one filed by Trafalgar, Inc. (hereinafter "Trafalgar"). Both Shea Homes and Trafalgar were trying to develop large tracts of agricultural land in Livermore in eastern Alameda County prior to the passage of Measure D. When Measure D was passed, both Shea Homes and Trafalgar filed lawsuits against the County challenging Measure D. However, these legal challenges were all facial challenges to Measure D. Shea Homes and Trafalgar both alleged that Measure D violated the state constitutional requirement that all initiatives have a "single subject" and that Measure D violated California housing law. The Trial Court (the Alameda County Superior Court) granted judgment on the pleadings in favor of the County. *Shea*, 110 Cal.App.4th at 1253-1254. The Court of Appeal affirmed this ruling. *Shea*, 110 Cal.App.4th at 1259, 1266.

Trafalgar did also include a takings claim in its lawsuit – however, this was a facial takings claim. At the hearing on the County's Motion for Judgment on the Pleadings, Trafalgar apparently realized its error and requested, during the hearing, leave to amend to

allege an as-applied takings claim. However, Trafalgar did not present any detailed facts to support its request, and the Trial Court ruled that Trafalgar had not presented any evidence to indicate that it had a ripe as-applied takings claim. The Trial Court also entered judgment on the pleadings in favor of the County on this claim. On appeal, Trafalgar continued to only touch on the issue of an as-applied takings claim under Measure D. The issue was never meaningfully briefed. The limited briefing of the issue unfortunately mischaracterized *Palazzolo*, and the Court of Appeal affirmed the Trial Court's ruling, holding that Trafalgar had not presented any facts to indicate that it could allege denial of an application submitted after the passage of Measure D and therefore no ripe as-applied takings claim. *Shea*, 110 Cal.App.4th at 1266-1269. The end result was a decision that cited *Palazzolo* as precedent for the decision while in fact the *Shea* decision was in direct conflict with *Palazzolo*.

IV. CONCLUSION

It is clear that case law governing the ripeness doctrine is in conflict, certainly less than clear, and not consistent with the advance of statutory land use law. If the actual status of law is that property owners must submit expensive and quixotic development applications when faced with the Measure Ds of the world, then we have not learned from history, and eighty-three years after the *Pennsylvania Coal* decision, we remain "in danger of forgetting that a strong

public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." It is now thirty years after the advent of stricter land use regulation and twenty years after the development of initiatives that removed the ability of the government to exercise discretion. It is time to develop a new ripeness doctrine that addresses the evolution of land use regulation in a manner that responds to the fundamental concern of the *Pennsylvania Coal* decision.

San Leandro Rock supports the Petition for a Writ of Certiorari filed by Charles A. Pratt Construction Co., Inc., and respectfully requests that the Petition be granted. Clear guidance on the issue of ripeness is needed.

Dated: December 22, 2008

Respectfully submitted,

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