Case No. 01-748

IN THE SUPREME COURT OF OHIO
STATE OF OHIO ex rel.,
R.T.G., INC., et al.,

Appellees-Cross Appellants,

v.

STATE OF OHIO, et al.,
On Appeal from the Franklin
County Court of Appeals,
Tenth Appellate District

Appellants-Cross Appellees.
Court of Appeals
Case No. 98AP-1015

REPLY BRIEF OF AMICUS CURIAE THE OHIO ENVIRONMENTAL COUNCIL, IN SUPPORT OF THE STATE OF OHIO

BETTY D. MONTGOMERY
OHIO ATTORNEY GENERAL

Mark G. Bonaventura (OH 0009655)
(Counsel of Record)
John P. Bartley (OH 0039190)
Assistant Attorneys General
1930 Belcher Drive, D-2
Columbus, Ohio 43224
(614) 265-6870/fax (614) 268-8871

Counsel for Appellants-Cross Appellees

Kristopher M. Huelsman (OH 0062756)
(Counsel of Record)
SCHOTTENSTEIN, ZOX & DUNN
CO., L.P.A.
41 South High Street, Suite 2600
Columbus, Ohio 43215-6106
(614) 462-2700/fax (614) 462-5135
Counsel for Amicus Curiae
The Ohio Environmental Council

Mark S. Stemm (OH 0023146)
J. Kenneth Thien (OH 0071633)
Porter, Wright, Morris & Arthur LLP
41 South High Street

Columbus, Ohio 43215
(614) 227-2092 / fax (614) 227-2100

Counsel for Appellees-Cross Appellants,
STATE OF OHIO, ex rel., R.T.G., INC., et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

STATEMENT OF FACTS

ARGUMENT

Proposition of Law No. I:
The property as a whole rule requires rejection of Relators' takings claims because numerous ongoing or potential surface uses are undisturbed by the regulatory restrictions, relators have had the opportunity to exploit a substantial portion of their coal interests, and the regulatory restrictions on mining do not affect portions of the property outside the unsuitable for mining designation and above the 820 foot elevation.

A. U.S. Supreme Court precedent before and subsequent to Lucas rejects relators' attempt to focus on its coal interests alone as a basis for a takings claim.

B. A property use restriction such as the one at issue is not the legal equivalent of a physical intrusion by the government.

C. The relevant property for takings analysis includes previously developed contiguous portions of the property.

D. The Lucas and Penn Central decisions criticizing the New York Court of Appeals decision in the Penn Central matter fail to support relators' takings claims in this case.

E. The U.S. Supreme Court's recent decision in Palazzolo confirms the property as a whole rule.

F. The U.S. Supreme Court's decision in Concrete Pipe unanimously applied the property as a whole rule and rejected segmenting property for the purpose of supporting a takings claim.

G. The U.S. Supreme Court's decision in Dolan holds that the entire contiguous property must be evaluated, not a portion of it as proposed by relators, for purposes of a takings claim.

H. The mining restrictions at issue do not offend notions of fairness because the regulation only affects a partial dimunition in value and, in fact, a net benefit can actually accrue to relators because other owners in the community must comply with the same requirements.

I. No authority exists to support the notion that the property as a whole rule violates the Equal Protection clause of the constitution or that any distinctions made by the rule are without a rational basis.

J. Relators position urging rejection of the property as a whole rule is contrary to established precedent and would be a revolutionary change in the law. 13

Authorities in Support of Proposition of Law No. I

*Penn Central Transportation v. City of New York (*1978), 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 6314,

Keystone Bituminous Coal Assn. v. DeBenedictis (1987), 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472

Lucas v. South Carolina Coastal Council (1992), 505 U.S. 1003 , 112 S. Ct. 2886, 120 L. Ed. 2d 798

Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust (1993), 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539

Dolan v. City of Tigard (1994), 512 U.S. 374, 385 n.6, 114 S. Ct. 2309, 129 L. Ed. 2d 304i

Loretto v. Teleprompter Manhattan CATV Corp. (1982), 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868

Pennsylvania Coal v. Mahon, (1922) 260 U.S. 393, 412, 43 S. Ct. 158, 67 L. Ed. 322

Palazzolo v. Rhode Island (2001), 121 S.Ct. 2448, 150 L. Ed. 2d 592, 2001 U.S. LEXIS 49101

Machipongo Land & Coal Co. v. Commonwealth of Pennsylvania (Pa. Commw. Ct. 1998), 719 A. 2d 1911

Agins. v. City of Tiburon, 447 U.S. 255, 262 (1980)

Andrus v. Allard (1979), 444 U.S. 51, 100 S. Ct. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798

Proposition of Law No. II.

The U.S. Supreme Court's *Palazzolo* decision established that pre-acquisition notice of a regulatory restriction, if not dispositive, is relevant in takings analysis and supports a determination that a sufficient investment-backed expectation in the property is lacking.

Authorities in Support of Proposition of Law No. II

Palazzolo v. Rhode Island (2001), 121 S.Ct. 2448, 150 L. Ed. 2d 592, 2001 U.S. LEXIS 49101

Lucas v. South Carolina Coastal Council (1992), 505 U.S. 1003 112 S. Ct. 2886, 120 L. Ed. 2d 798

CONCLUSION

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Federal Cases

State Cases

The Ohio Environmental Council ("OEC") respectfully submits this reply brief to relators' initial merit brief, and in support of the position of the State of Ohio, and urges the Court to reject the takings claims in this case.

INTRODUCTION

To avoid burdening the Court with duplicative argument, this brief focuses primarily on (1) the "property as whole" issue and (2) and the relevance of a claimant's investment-backed expectations following the U.S. Supreme Court ruling in *Palazzolo v. Rhode Island* (2001), 121 S.Ct. 2448, 150 L. Ed. 2d 592, 2001 U.S. LEXIS 4910 OEC anticipates that the State and the States' other *amici* will address the other issues raised by this case in comprehensive fashion.

Briefly, however, with respect to the nuisance defense, OEC simply observes that the appellees-cross appellants have failed to even cite much less address the principal case relied upon by OEC, *Cline v. American Aggregates Corporation* (1984), 15 Ohio St.3d 384, 474 N.E.2d 324[1], in which this Court rejected the English rule absolving a landowner of legal responsibility for interfering with percolating ground water. Furthermore, relators have failed to respond to OEC's explanation (OEC's merit brief, at 44-46) for why the Court of Appeals erred in failing to recognize that background principles of Ohio nuisance law bar these claims.

The Court should reject these takings claims at the threshold on the ground that the relators lack a property right to engage in mining activity which threatens the villages' water supplies.

Also, with respect to the statute of limitations issue, OEC observes that the relators' argument that a 21-year limitations period should apply to this action depends upon the argument that the alleged regulatory taking is equivalent to a physical appropriation of property, in the context of the property as a whole issue. As OEC discussed in its opening brief and as discussed below, a use restriction is *not* equivalent to a physical appropriation. Accordingly, the premise of the relators' statute of limitations argument is wrong and the argument should be rejected.

Furthermore, the relators' imaginative new characterization of the Rossiters as "agents" for RTG (relators' initial brief, at 49), and of Mr. Haught as the agent of the Trust, cannot save their position on the statute of limitations issue. To the extent the Rossiters were simply acting as agents for RTG, then RTG is the real party in interest; this argument by Relators simply suggests that the Rossiters have no actual basis for participating in this lawsuit, and certainly does not excuse their failure to file within the limitations period. Similarly, even if Mr. Haught, in addition to representing his own interests, also served in some sense as the agent for the Trust, the Trust, as the real party in interest, was required to file within the limitation period (or have someone file on its behalf). Contrary to the relators' position (relators' initial brief, at 49, n.31), and as explained on OEC's opening brief (at 22-23), Rule 15(C) does not excuse a violation of the statute of limitations under the circumstances of this case. A mistake apparently was made in this case (application of a statute of limitations is *always* the result of a mistake), but it is not the type of narrow mistake as to a party's true identity which can justify relation back under Rule 15(C).

STATEMENT OF FACTS

Amicus OEC incorporates fully the statement of facts as set forth in its Merit Brief and as represented by the Appellant, Cross-Appellee, State of Ohio in its Merit Briefs filed in this appeal.

ARGUMENT Proposition of Law No. I:

The property as a whole rule requires rejection of Relators' takings claims because numerous ongoing or potential surface uses are undisturbed by the regulatory restrictions, relators have had the opportunity to exploit a substantial portion of their coal interests, and the regulatory restrictions on mining do not affect portions of the property outside the unsuitable for mining designation and above the 820 foot elevation.

These takings claims should be rejected because, considering the relators' property as a whole, relators cannot demonstrate the kind of drastic economic loss from regulatory restrictions necessary to establish a constitutional entitlement to monetary payment from the public under the Fifth Amendment. As OEC explained at length in its opening brief, while the relators were restricted in their ability to exploit certain coal deposits, they did not suffer a taking of their property as a whole, given that: (1) the restrictions left numerous ongoing or potential surface uses of the property undisturbed (OEC's merit brief, at 33-34), (2) the relators have already had the opportunity to exploit a substantial portion of their coal interests (OEC's merit brief at 35-37),

and (3) and the unsuitable for mining designation does not affect (a) those portions of the property outside the sections covered by the designation (OEC's merit brief at 37-38), and (b) those portions above the elevation of 820 feet (OEC's merit brief at 38-39).

In their attempt to establish takings claims, the relators argue that the property as a whole rule should be disregarded. Instead, they contend, in somewhat contradictory fashion (see, e.g., relators' initial brief, at 12), that the Court should focus its analysis on either the relators' "coal estates" or, more narrowly, on the portion of the relators' coal estate subject to the unsuitable for mining designation. It is not clear that the first definition can even help the relators, and RTG in particular. Even if the analysis focuses solely on the coal estate, the State has restricted some portions of the coal estate, but it has allowed other portions to be exploited and the State will permit other portions to be exploited in the future. In any event, whatever ambiguity may exist in the relators' position on the parcel issue, it is contrary to controlling precedent.

OEC's opening brief described the governing principles in comprehensive fashion, discussing the leading U.S. Supreme Court precedents and distinguishing or explaining the decisions upon which relators attempted to rely below and upon which they continue to pin their hopes before this Court. In this reply brief, OEC will confine itself to identifying the relators' specific misstatements or distortions of the law.

A. U.S. Supreme Court precedent before and subsequent to *Lucas* rejects relators' attempt to focus on its coal interests alone as a basis for a takings claim

Relators place enormous emphasis on the fact that Pennsylvania law recognizes the right to exploit coal as a distinct property interest which is capable of being separately held and transferred. But, for takings purposes, this is beside the point. Modern law recognizes innumerable divisible elements of the traditional fee estate, but the U.S. Supreme Court has forcefully and repeatedly rejected the idea that an owner can pull one legal stick from his or her bundle of property rights and claim a taking of the stick alone. See OEC opening brief, at 30 (discussing *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987), 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472and *Penn Central Transportation v. City of New York (*1978), 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631see also *Andrus v. Allard* (1979), 444 U.S. 51, 100 S. Ct. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798

In *Penn Central*, the U.S. Supreme Court insisted that the claim that the airspace had been taken had to be analyzed in the context of the company's entire contiguous land holding. In an attempt to avoid the force of this precedent, relators argue that the decision should be confined to the air rights context. However, numerous subsequent Supreme Court and lower court decisions have recognized that *Penn Central* articulates a broader principle. Furthermore, contrary to relators' assertion (initial brief, at 23), "air rights" are every bit as much a distinct, identifiable property interest in the world of New York real estate development as are coal mining interests in the mining industry of rural Pennsylvania. If aboveground air rights have to be considered together with surface uses for the purpose of takings analysis, so too below ground coal uses have to be considered together with surface uses. (see also *Keystone Bituminous Coal Assn*, 480 U.S. at 498, "our takings jurisprudence forecloses reliance on legalistic distinctions", to define the relevant parcel.)

In a related vein, relators invoke (initial brief, at 13) the concept of "background principles" of state property law as the basis for artificially segmenting the property. However, "background principles," a concept first articulated by the Supreme Court in *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003 *,* 112 S. Ct. 2886, 120 L. Ed. 2d 798, refers to those principles of state nuisance or property law which limit the inherent right of an owner to engage in a particular activity. If a regulation simply parallels a background principle, the *Lucas* Court said, there is no taking because the landowner never had the right to engage in the activity to begin with. The concept of background principles has no relevance to the parcel issue.

Finally, relators seek to bolster their mistaken legalistic approach to the parcel issue by quoting footnote 7 of *Lucas*. For a variety of reasons, this language simply will not bear the weight relators try to place on it. *Lucas* itself involved an alleged regulatory taking as result of a complete prohibition on development of several coastal lots; there was no parcel issue raised or decided in *Lucas*. Thus, whatever meaning can be derived from footnote 7 of *Lucas* is pure dictum. Furthermore, the suggestion that *Lucas* somehow undermined or cast doubt on the parcel rule is contradicted by several Supreme Court decisions *subsequent* to *Lucas* which strongly endorsed the property as a whole rule. See *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust* (1993), 508 U.S. 602, 644, 113 S. Ct. 2264, 124 L. Ed. 2d 539; *Dolan v. City of Tigard* (1994), 512 U.S. 374, 385 n.6, 114 S. Ct. 2309, 129 L. Ed. 2d 304

B. A property use restriction such as the one at issue is not the legal equivalent of a physical intrusion by the government.

Relators next attempt to bolster their approach to the parcel issue by analogizing a regulatory taking to a taking resulting from a government-imposed physical occupation of private property. In the case of a physical-occupation taking, they point out, an actual occupation will be found to result in a taking regardless of what portion of the property is affected by the occupation. The same rule, they contend, should apply in the case of a regulatory taking.

This argument rests in part on a non-sequitur. The relators highlight the fact that in *Lucas* the Court analogized a so-called categorical regulatory taking to a physical occupation. Then, relying on the fact that they have asserted a *Lucas* categorical claim in this case, they contend that they should be permitted to pursue their taking claim focusing only on the restricted portion of the property and ignoring the property as a whole. But this argument assumes the very matter in issue. Under *Lucas*, a claimant can claim a taking only if he can demonstrate a denial of all economically viable use of the property. The ability of a claimant to make such a claim depends upon how the relevant property is defined in relation to the regulatory restriction. Contrary to the relators' viewpoint, a takings claimant cannot make the parcel issue go away simply by presenting a claim and labeling it a *Lucas* categorical claim.

The proposed analogy also is flawed because the U.S. Supreme Court has made it crystal clear that the narrow rule for physical-occupation takings is separate and distinct from the rules governing takings challenges to use restrictions. In *Loretto v. Teleprompter Manhattan CATV Corp.* (1982), 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868, the seminal case in this area, the Court drew a sharp distinction between these two varieties of takings claims. The Court said that it "has often upheld substantial regulation of an owner's use of his own property..." Id. at 425. "At the same time," the Court continued, "we have long considered physical intrusion by government to be a property restriction of an unusually serious character for the purpose of the takings clause." Id. See also id. at 430 ("More recent cases confirm the distinction between a permanent physical occupation...and a regulation that merely restricts the use of property.")

The Court explained that the stringent standard for physical occupations was based not only on legal tradition but also the nature of the government action. The Court said that a physical occupation is perhaps the most serious form of invasion of an owner's property interests," id. at 435, because such an occupation is qualitatively more severe than a regulation of the *use* of property...." Id. at 436 (emphasis in original). Furthermore, the Court justified a categorical approach to physical occupations based in part on practical considerations, in order to "avoid otherwise difficult line-drawing problems." Id. To be sure, line-drawing problems could likewise be eliminated for regulatory use restrictions by jettisoning the property as a whole rule and declaring every restriction of a discrete portion of a property of a taking. In that event, as Justice Holmes observed, and as takings advocates perhaps intend, "[g]overnment hardly could go on." *Pennsylvania Coal v. Mahon*, (1922) 260 U.S. 393, 412, 43 S. Ct. 158, 67 L. Ed. 322 Existing

precedent, including the clear distinction between alleged physical takings and alleged regulatory takings, simply does not support that extreme result.

C. The relevant property for takings analysis includes previously developed contiguous portions of the property

The relators resist (initial brief at 20) the notion that the relevant property in this case should include those contiguous portions of the property which have previously been developed, indicating that there is no authority for this approach. This argument is, in fact, belied by numerous decisions. In *Penn Central*, for example, the company had previously developed the surface as a railroad terminal, but that did not prevent the Supreme Court from considering the terminal site along with the air rights above in evaluating whether the air rights had been taken. In *Dolan*, the Supreme Court said that a restriction on Mrs. Dolan's ability to develop the flood plain on her property would not be a taking, given the fact that she had already constructed her store on another portion of the property.

D. The *Lucas* and *Penn Central* decisions criticizing the New York Court of Appeals decision in the Penn Central matter fail to support relators' takings claims in this case.

The relators argue (initial brief at 24) that their position is bolstered by the fact that the U.S. Supreme Court in *Penn Central* declined to follow the New York Court of Appeals' approach to the parcel issue and the Court in *Lucas* specifically criticized the approach of the New York court. In fact, this argument lends no support to the relators' case. The New York court concluded that the relevant property for the purpose of takings analysis should include not only the site of the railroad terminal but also several other hotel properties owned by the company in the vicinity. Applying the same approach to this case would mean that the relators' mining property should be defined based on all of their different mining operations throughout the surrounding region, not simply on the basis of the single contiguous coal mining property which has been the focus of this case. Thus, criticism of the approach of the New York Court of Appeals, even if entirely justified, provides no support for segmenting the relators' contiguous holdings.

E. The U.S. Supreme Court's recent decision in *Palazzolo* confirms the property as a whole rule.

The relators also briefly refer (initial brief, at 26) to the recent U.S. Supreme Court decision in *Palazzolo* and suggest that this decision undermines the property as a whole rule. This reading of *Palazzolo* is incorrect. In fact, the decision turned on an application of the property as a whole rule which should apply a fortiori in this case. The case involved a property of about 20 acres, consisting mostly of restricted wetlands and one valuable upland lot available for development. The Supreme Court rejected the *Lucas* claim, reasoning that the owner's ability to make a valuable economic use of a small portion of the 20 acres precluded the claim. Because the relators in this case can make greater use of the property as a whole in this case, than could Mr. Palazzolo, the actual holding in *Palazzolo* supports rejection of the claim in this case based on the property as a whole rule.

The Court also observed that the claimant's counsel had attempted, for the first time at the Supreme Court level, to challenge the definition of the relevant parcel. The Court rejected the effort as untimely and also recognized that the argument was contrary to the "rule" that "the extent of the deprivation effected by a regulatory taking is measured against the value of the parcel as a whole." 112 S. Ct. at 2886. To be sure, the Court said that we have at times expressed discomfort with the logic of this rule, id., but declined to explore the issue in this case. Fairly read, *Palazzolo* simply recognizes the existence of the parcel as whole rule and leaves it in place.

F. The U.S. Supreme Court's decision in *Concrete Pipe* unanimously applied the property as a whole rule and rejected segmenting property for the purpose of supporting a takings claim.

Relators contend that the unanimous U.S. Supreme Court's application of the property as whole rule in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust* (1993), 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539, should be disregarded because that decision has "absolutely no relation" to a taking claim involving real property. While it is correct that the case did not involve regulation of real property, there is not the slightest indication in the Court's decision that the regulatory context affected the analysis of the parcel issue. The Court rejected the plaintiff's effort to segment the property, not because real property was not involved, but because segmentation is inconsistent with basic takings principles. As the Court said, "we rejected this analysis years ago in *Penn Central*" a real property case, obviously " where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable." 508 U.S. at 644.

G. The U.S. Supreme Court's decision in *Dolan* holds that the entire contiguous property must be evaluated, not a portion of it as proposed by relators, for purposes of a takings claim.

Relators criticize OEC (initial brief, at 29) for relying on the U.S. Supreme Court's decision in *Dolan v. City of Tigard* (1994), 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304, terming the footnote in *Dolan* "innocuous" and contending that OEC is espousing a viewpoint embraced only by the dissenters in that case. This response flatly misreads the relevant passage of the majority opinion. The issue the Court was addressing was whether a prohibition on development in the floodplain would effect a taking of Mrs. Dolan's property. The Court said "no," pointing to that fact that Mrs. Dolan had developed and could continue to use a portion of the property for commercial purposes: "There can be no argument that the permit conditions would deprive petitioner of "economically beneficial us[e]" of her property as she currently operates a retail store on the lot. Petitioner assuredly is able to derive some economic use from her property." 512 U.S. at 385 n.6. Implicit in this statement is a clear recognition that the restriction on the use of the floodplain would have to be evaluated in relation to the entire contiguous property. *Dolan* contradicts and requires rejection of relators' view that the relevant property can be defined simply by looking to the portion of a property subject to regulatory restrictions.

H. The mining restrictions at issue do not offend notions of fairness because the regulation only affects a partial dimunition in value and, in fact, a net benefit can actually accrue to relators because other owners in the community must comply with the same requirements.

The relators also present a policy-based fairness argument in favor of their position on the parcel issues. Quoting from the trial court decision in *Machipongo Land & Coal Co. v. Commonwealth of Pennsylvania* (Pa. Commw. Ct. 1998), 719 A. 2d 19, (now on appeal to the Pennsylvania Supreme Court), relators present the hypothetical of a ban on development that applies to 10 acres of property held by owner A and to 10 acres of property held by owner B. If owner A owns only the 10 acres subject to the ban, she presumably has suffered a compensable taking. On the other hand, if owner B owns a total of 100 acres, application of the parcel as a whole rule would result in a finding of no taking. The relators characterize this result as absurd. Initial brief, at 30. In fact, there is nothing absurd about it.

First, the regulations in this hypothetical actually affect the two owners and the two properties quite differently. Assuming the reduction in property value as a result of regulation were proportional to the acreage affected by the restriction, the ban on development would destroy 100% of the value of the property owned by owner A, but would affect only 10% of the value of

the property held by owner B. From the standpoint of the basic fairness concerns that undergird takings doctrine, there is obviously a reasonable basis for treating a 100% destruction of an investment differently than a 10% diminution in value.

Second, and more fundamentally, unlike a total ban on development, which obviously can impose a significant economic burden, a restriction of the use of a portion of a property does not necessarily impose any significant net burden on the owner of that property. If the regulation applicable to owner B applies to other owners in the community, owner B will often receive economic benefit from his neighbors' compliance with the regulation. The benefit will counter-balance and quite possibly outweigh the detriment he suffers as a result of the regulation. As the U.S. Supreme Court observed in *Keystone*, 480 U.S. at 491, "While each of us is burdened somewhat by... restrictions [on the use of property], we, in turn, benefit greatly from the restrictions that are placed on others." See also *Agins. v. City of Tiburon*, 447 U.S. 255, 262 (1980) (owners subject to comprehensive zoning scheme "share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that [the] owners' might suffer.") Because these kinds of "reciprocal" regulatory effects are commonplace, the parcel as a whole rule is critical to forestalling takings claims based on the kinds of reasonable burdens we all must bear "to secure the advantage of living and doing business in a civilized society." *Andrus*, 444 U.S. at 67.

I. No authority exists to support the notion that the property as a whole rule violates the Equal Protection clause of the constitution or that any distinctions made by the rule are without a rational basis.

Realtors make the somewhat bizarre argument that the U.S. Supreme Court's established property as a whole rule violates the Equal Protection Clause. So far as we know, the Equal Protection Clause has never been regarded as a source of power to constrain the substantive scope of correlative provisions of the Bill of Rights. The application of different constitutional principles is replete with distinctions depending on the status of the individual plaintiff or the interest at stake; while government action is always subject to challenge under the Equal Protection Clause, we doubt that the Equal Protection Clause can be viewed as imposing an independent constraint on the meaning of other provisions of the Constitution. In any event, for the reasons discussed, the distinctions resulting from application of the property as whole rule have, at a minimum, a rational basis.

J. Relators position urging rejection of the property as a whole rule is contrary to established precedent and would be a revolutionary change in the law.

Finally, the relators attempt to belittle the criticism of their radical new approach to the parcel issue by calling it a "'sky is falling' jermiad", and of a type which has supposedly proven to be overblown before. There is no doubt that the recent fascination with the Takings Clause on the part of some courts and some judges and justices has generated enormous concern, among environmentalists, representatives of local and state governments, watchdogs of the public fisc, as well as religious leaders and others concerned about the implications of the takings agenda for the future of civil society. While the Supreme Court has given takings claims a somewhat more sympathetic hearing in recent years, it is also true that the Court has not effected any major changes in established doctrine.

On the other hand, it is fair to observe that jettisoning the property as a whole rule, which courts at all levels have repeatedly articulated and applied, would, in fact, work a revolutionary change in the law. Taking the approach that any restricted portion of a larger property is fair game for a taking claim, it is difficult to imagine how any of the most commonplace and well established regulatory programs, including ordinary planning and zoning regulations, could survive review under the Takings Clause. Extraordinary new financial burdens would be imposed on

governments already facing daunting fiscal challenges. A massive transfer of wealth would be accomplished as taxpayers would be forced to "compensate" relatively well heeled landowners for exercising restraints which have heretofore been regarded as a civic duty. A great deal of the nation's regulatory authority would effectively be transferred from the purely democratic branches to the courts, saddling the courts with responsibilities they are relatively less well-equipped to exercise. The sky might not fall, but, apart from that, the relators' radical thinking on the parcel issue has precious little to recommend it.

Proposition of Law No. II:

The U.S. Supreme Court's *Palazzolo* decision established that pre-acquisition notice of a regulatory restriction, if not dispositive, is relevant in takings analysis and supports a determination that a sufficient investment-backed expectation in the property is lacking.

OEC recognizes that *Palazzolo v.Rhode Island* (2001), 121 S. Ct. 2448, 150 L. Ed. 2d 592, 2001 U.S. LEXIS 4910, represents an important new legal development relevant to this case. However, the relators and their *amici* significantly overstate the Court's holding and its significance for this case. The only question the U.S. Supreme Court decided in *Palazzolo* was whether the preexistence of the regulatory restriction, without regard to any other considerations, precluded a finding of a taking. The Court rejected such a categorical rule.

On the one hand, *Palazzolo* clearly rejects the obverse categorical rule, that is, that pre-acquisition notice of regulatory restrictions is completely irrelevant to takings analysis. Justice O'Connor, who cast the fifth and decisive vote to overrule the Rhode Island Supreme Court, in a separate concurring opinion, adopted the view that pre-acquisition notice must be a relevant factor in takings analysis, articulating what she described as her "understanding" of how the notice issue should be dealt with on remand in that case. Significantly, four other justices who either dissented or dissented in part from the majority opinion, wrote or joined in opinions expressly endorsing Justice O'Connor's understanding. Because Justice O'Connor's views necessarily qualify the scope of the Court's opinion, and because five justices explicitly embraced her position, *Palazzolo* establishes that pre-acquisition notice, if not a dispositive factor in takings analysis, is certainly a relevant factor.

In this case, the fact that the relators had notice of the regulatory regime supports the conclusion that they lack sufficient investment-backed expectations to support a taking claim. A lack of investment backed expectations is, at a minimum, a crucial consideration in takings analysis, including in a case brought under *Lucas*. See 121 S.Ct. at 2457, citing Justice Kennedy's concurring opinion in *Lucas*, 505 U.S. at 1045, stating that "[w]here a taking is alleged from regulations which deprive the property of *all value,* the test must be whether the deprivation is contrary to reasonable, investment-backed expectations." Given the relators' modest initial stake in the property, and their advance knowledge of the regulatory restrictions, they lack sufficient investment-backed expectations to support these claims.

CONCLUSION

For the foregoing reasons, the Ohio Environmental Council respectfully urges this Court to consider relators pre-acquisition notice and to apply the property as a whole rule to reverse the Court of Appeals in so far as it upheld relators takings claims, and to affirm the Court of Appeals to the extent it rejected relators' takings claims.

Respectfully submitted,
Kristopher M. Huelsman (0062756)
SCHOTTENSTEIN, ZOX & DUNN CO., LPA
41 South High Street, Suite 2600

Columbus, Ohio 43215-6106
Telephone: (614) 462-2700
Facsimile: (614) 462-5135

Counsel for Amicus Curiae
The Ohio Environmental Council

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument was served via U.S. Mail this 9th day of October, 2001 upon the following:
Mark G. Bonaventura
John P. Bartley
Assistant Attorneys General
1930 Belcher Drive, D-2
Columbus, Ohio 43224

Mark S. Stemm
J. Kenneth Thien
Porter, Wright, Morris & Arthur LLP
41 South High Street
Columbus, Ohio 43215

Timothy J. Dowling, Esq.
Community Rights Counsel
1726 M. Street, Suite 703
Washington, D.C. 20036

R. S. Radford, Esq.
Pacific Legal Foundation
10360 Old Placerville Rd., Suite 100
Sacramento, CA 95827

_____
Kristopher M. Huelsman

Footnote:

[1] The relators' taking claim presupposes that, if the relators can overcome the property as a whole hurdle, the *Lucas* categorical rule can be applied in straightforward fashion to a partial interest in property, such as a coal estate. It is far from clear that this is correct. The *Lucas* Court, which was addressing an alleged taking of the fee, emphasized that the rule it was articulating addressed the problem of regulations which render property "economically idle". *Lucas*, 505 U.S. at 1019. A regulation which effects a "total" taking of a partial interest in property, but which leaves other potential uses of the property unaffected, very arguably presents a different case. For example, if a firm enters into a lease to construct a gas station or a fast food restaurant at a particular location, but the zoning is subsequently amended to preclude the planned use (while allowing many other economically remunerative uses to proceed), has there

been a taking of the leasehold under *Lucas*? Resolving this case based on the parcel issue would make it unnecessary for this Court to decide this issue.