

No. 26-107

IN THE
Supreme Court of the United States

GARNELL WALLS,

Petitioner,

v.

PRINCE GEORGE'S COUNTY, MARYLAND, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Fourth Circuit Decision affirming the U.S. District Court's dismissal of Walls' Case on the basis that it was not ripe, is one that is appropriate for Supreme Court review.

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OPINIONS BELOW

On appeal from the United States District Court for the District of Maryland, at Greenbelt: Deborah L. Boardman, District Judge. (8:23-cv-01359-DLB) The United States Court of Appeals for the Fourth Circuit case no. 25-1121 affirmed the district court's dismissal of his case concluding that Walls' claim is not ripe for review, because he has not plausibly alleged that the County reached a final decision whether he can build an interim well and septic system on his property.

JURISDICTION

Respondents agree with Petitioner's statement of jurisdiction.

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

The constitutional provision involved is U.S. Const. amend. V. The statutory provisions involved include 28 U.S.C. § 1254, 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(3), and 42 U.S.C. § 1983. Rule provisions involved include Fed. R. Civ. P. 12(b)(6) and U.S. Sup. Ct. R. 10.

STATEMENT OF THE CASE

Contrary to Petitioner's assertions, the Courts below did not demand legislative exhaustion by Petitioner and this Petition has nothing to do with legislative exhaustion. This straightforward case involves the efforts of Petitioner Garnell Walls to construct a single-family home on a parcel of property he owns in Prince George's County, Maryland.

The property is in the County's sewer designation category five (5) – expected future public sewer. Because of his sewer category designation and by operation of the County's 2018 Water and Sewer Plan ("The Plan"), Walls is required to either connect to a public sewer line or obtain a waiver from the requirement and instead utilize an "interim septic system."

Because no public sewer lines in close proximity to Walls' property currently exist, he allegedly sought from the County's Department of Permitting and Inspections Enforcement ("DPIE") a waiver of the requirement that he connect to a public sewer line and, instead, allow him to use an interim septic system. Walls made one informal inquiry to DPIE concerning his property and its eligibility for an interim septic system (waiver). DPIE, through a letter dated February 28, 2022, advised Walls, at the time, that given the current sewer designation category and other factors impacting Walls' property, that it did not believe that Walls would qualify for a waiver from DPIE without first obtaining a sewer category change via a legislative amendment process. The purpose of the letter was to provide Walls with information and states that it is "not certain where in the development review stages you were at the time of (your) inquiry or response." JA¹⁰⁷⁸. The letter provides advice about the processes to be followed to develop the property as Walls' desired. It concluded by stating "Thank you for the opportunity to review and address your concerns." JA⁰⁷⁹. No mention is made of an application filed seeking a waiver from the requirement to connect to public sewer lines.

1. "JA" refers to the Joint Appendix filed at the Fourth Circuit.

Walls did not heed the advice of DPIE as articulated in its letter of February 28, 2022. Rather than actually apply for a waiver and obtain a formal approval or denial of a waiver application, or seek to change his sewer category designation to make him almost certainly eligible for one, Walls instead chose to file suit. In this action, he alleges only that the County has, through regulation alone, violated the Takings Clause of the Fifth Amendment and has rendered his property worthless. He is wrong.

REASONS FOR DENYING THE PETITION

INTRODUCTION

There is no reason to grant certiorari. Two (2) common threads run through cases in which this Court has chosen to grant the petition for the Writ of Certiorari. The case may involve the protections of a person's life, liberty and property, to which protections the person is entitled under the Fourteenth Amendment and the Bill of Rights. Alternatively, the case may involve the resolution of a fundamental principle of Federal law, such as the rights and liabilities of ocean carriers for lost or destroyed cargo under Admiralty law or the correct measure of damages in a trademark infringement case. Neither of these common threads appears in this case making it a poor vehicle to resolve the questions posed by Petitioner.

The importance of this case is lost as the Petitioner in his complaint has failed to satisfy the dual requirements for Article III justiciability—ripeness and standing. Petitioner has failed to do the most basic action necessary to put this case in a posture for a court to even review whether a regulatory taking has occurred. He failed

to apply for the waiver to a Water and Sewer Plan’s prohibition on grant of interim well and septic permits—a permit which would have allowed him minimal use of his property which had no activity for four (4) decades, and the factual record does not support any argument that he has suffered a concrete injury as a result of the mere passage of the Water and Sewer Plan.

I. THE COURT BELOW CORRECTLY RULED THAT THIS CASE IS NOT RIPE FOR REVIEW

The ripeness requirement is designed “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 732–33 (1998) citing to *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–49 (1967).

This Court’s ruling in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), established the appropriate test for whether certiorari should be granted. This Court held in *Palazzolo* has made it expressly clear that a landowner may not establish a taking before a land-use authority has the opportunity, “using its own reasonable procedures, to decide and explain the reach of a challenged regulation.” *Id.* at 620. Under the Court’s ripeness rules, where the challenged regulation affords regulatory agencies full discretion concerning development plans for the property, the landowner must take “reasonable and necessary steps” to allow that discretion to be fully exercised, “including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have

been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established.” *Id.* at 620–21; *see also* *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 736–39 (1997); *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 190–94 (1985); *MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 348–53 (1986).

Not only is the Court, by its ruling in *Palazzolo*, requiring a final decision of the administrative body authorized to make decisions regarding the challenged enactment policy, the Court is also requiring, as we will explain *infra*, standing, a concrete particularized and imminent injury, of the type not present in this case and which therefore argues against a grant of certiorari.

The final-decision requirement does not require a categorical administrative-exhaustion requirement. Once the regulatory agency has adopted a definitive position and further administrative proceedings cannot materially clarify or modify the permissible uses of the property, the landowner does not have to pursue futile procedures. *Pakdel v. City & Cty. of S. F.*, 594 U.S. 474, 478–80 (2021); *Palazzolo*, 533 U.S. at 620–21.

Moreover, the final decision requirement is an essential bar to Petitioner’s claims based on what this Court correctly assesses as a legislative or administrative entity’s need for a high degree of discretion in easing the restrictions of the regulations they administer. *See Palazzolo*, 533 U.S. at 620. And, having not even applied for the waiver, it is not clear that the DPIE or the County Council, for that matter, lacked any discretion to permit any development or arrive at reasonable degree of

certainty as to the permissible uses of the property. *Id.* at 620. This Court in *Pakdel* reiterated the stance “that a plaintiff’s failure to properly pursue administrative procedures may render a claim unripe *if* avenues still remain for the government to clarify or change its decision. *Pakdel*, 594 U.S. at 480, citing *Williamson Cty.*, 473 U.S. at 192–194. Having failed to make an application for the interim well and septic system or apply for the legislative amendment to the Plan, Petitioner cannot show that he pursued the administrative claims or alleged that there remains no opportunity for the County government to clarify or change its position.

Additionally, the Fifth Amendment forbids the taking of private property for public use without just compensation. This Court has long recognized that this constitutional guarantee is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Penn Cent. v. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). A permanent deprivation of all use is a taking of the parcel as a whole, but a temporary restriction causing a diminution in value is not, for the property will recover value when the prohibition is lifted. This Court noted, in its holding in *Lucas v. S. C. Coastal Council*, 505 U.S. 1003 (1992), that this rule was carved out for the “extraordinary case” in which a regulation permanently deprives property of all use; the default rule remains that a fact specific inquiry is required in the regulatory takings context. The Court’s regulatory takings jurisprudence is characterized by “essentially ad hoc, factual inquiries,” *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S.

302, 306 (2002), citing to *Penn Cent.*, 438 U.S. at 124, designed to allow “careful examination and weighing of all the relevant circumstances,” *Palazzolo*, 533 U.S. at 636 (O’CONNOR, J., concurring). Justice O’CONNOR in her concurring opinion was persuaded that the better approach to claims that a regulation has effected a temporary taking “requires careful examination and weighing of all the relevant circumstances.” *Palazzolo* at 636.

This Court’s polestar remains the principles set forth in *Penn Cent.* and other cases that govern partial regulatory takings. An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner’s interest. *See Restatement (First) of Property* §§ 7–9 (1936). Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner’s use of the entire area is a taking of “the parcel as a whole,” whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use because the property will recover value as soon as the prohibition is lifted. Cf. *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980). “Mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are ‘incidents of ownership. They cannot be considered as a ‘taking’ in the constitutional sense.” *Id.*, quoting *Danforth v. United States*, 308 U.S. 271, 285 (1939)

In *Williamson Cty.*, the landowner submitted its development plan but did not seek variances that would

have allowed it to develop the property, notwithstanding the [Regional Planning] Commission's finding that the plat failed to comply with the density requirements of the zoning ordinance or subdivision regulations. Since the landowner failed to apply for variances, there was no conclusive determination by the Commission whether it would allow [landowner] to develop the subdivision in the manner [landowner] proposed. 473 U.S. at 193. Whether a regulatory taking occurred requires analysis of the "economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations." *Id.* at 191. The Supreme Court held that this analysis is impossible to perform until the government agency has reached "a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." 13 *Bus. & Com. Litig. Fed. Cts.* § 149:30 (5th ed. 2024).

In the instant matter, Petitioner has alleged no set of facts which pointedly show is that the Plan by itself has actually permanently and totally stripped the property of all its value, and without just compensation. The record is bare as to any facts or allegations that after passage of the Water and Sewer Plan or upon a waiver request diminishing the land's value, he sought compensation. Petitioner's claims should not be addressed in a petition for certiorari as Petitioner failed to give the County Council the opportunity to use its reasonable procedures through the waiver request process. The County was not given any opportunity by Walls to review his request and upon the DPIE's denial to request a legislative amendment to the Plan enabling him to construct his interim well and septic system.

Petitioner's claim of a taking derives from the fact that in August 2021, Petitioner learned that installation of an interim well and septic system was prohibited by the Plan, and that he would need to obtain a waiver from DPIE to install such a system. JA078–79. Walls alleges that he applied for the required interim permit but also admitted, as part of the record, that no such application was submitted. JA100. He did inquire about the waiver and he learned from staff at the Department of Permitting Inspections and Enforcement (DPIE) that its Director likely did not have the legal authority to approve such a waiver given the implementation of the Plan. JA088, JA105, JA111. Petitioner was advised by staff to seek a water and sewer category amendment from the County Council and was provided the application, instructions and fee scheduled to complete the process. JA079, JA092–97. Rather than make an actual application for an amendment to the Plan which is the next administrative step, Petitioner chose instead to file suit claiming that a taking has occurred (JA054–80). However, no action was taken by him or the County government such that standing to make a viable claim has been established, meaning his claim is not ripe as no final decision on his waiver application was ever issued.

Respondents contend that Petitioner, by his own inaction, is forestalled from arguing that his property was diminished in value or that the regulatory body issued a final decision, as he failed to take any proactive steps to seek the county council Plan amendment, or prove to the fact finder below that diminution occurred or was inevitable or that connecting to the neighboring water and sewer was indeed a total diminution of the value of the property, and not just cost prohibitive. Absent the

Petitioner affirmatively seeking a final decision from the Council via a water and sewer category change to the Plan, or alleging findings sufficient to evince a total diminution of the property's value, the complaint fails as there can be no proof of a regulatory taking.

Moreover, Petitioner has failed to allege that the County has reached a “definitive” position on Petitioner’s property. As set forth above, the County still may permit Walls to install an interim well and septic system by granting him a water and sewer category amendment. “[A] Fifth Amendment claim is premature until it is clear that the Government has both taken property *and* denied just compensation. Although [this Court] often refer to this consideration as ‘prudential ripeness,’ [it has] recognized that it is not, strictly speaking, jurisdictional.” *Horne v. Dep’t of Agric.*, 569 U.S. 513, 525–26 (2013) citing *Lucas*, 505 U.S. at 1013 and *Stop the Beach Renourishment, Inc. v. Fla Dep’t of Env’tl. Prot.*, 560 U.S. 702, 729 n.10 (2010). See also *Suitum*, 520 U.S. at 733–34 (characterizing *Williamson Cty.* as imposing “two independent prudential hurdles to a regulatory takings claim”). See *Seguin v. City of Sterling Heights*, 968 F.2d 584, 587 (6th Cir. 1992) (explaining *Williamson Cty.* ripeness test consists of “two distinct” requirements); *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990) (stating *Williamson Cty.* ripeness “involves two independent prerequisites”). The District Court, in a well prepared and reasoned oral decision, correctly cited *Williamson Cty.* and its progeny (to include *Pakdel*) for the proposition that Walls was required to plead that he had received a final determination on his interim septic system.

Here, the District Court properly recognized that DPIE's letter of February 28, 2022, was not a letter of final determination addressing Walls waiver application. JA168:24–JA184:5. In fact, Walls conceded that it was not. JA177:5-6. The District Court also properly found that plaintiff failed to plausibly allege that obtaining a final letter of determination from DPIE on his (alleged) waiver application would have been futile. JA179:18-24.

The record makes clear that a waiver process was in place for a grant of an interim permit and that connecting to a neighboring planned community in a few years would give him water and sewer services. The record provides that Petitioner Walls never applied for the waiver and argues without evidence in his oppositions below that the time and cost associated with connecting to the neighboring planned community's water and sewer was too much and therefore satisfies this Court's definition of a regulatory taking. Respondents contend that there is no legal precedent for that view and that this case falls squarely within the Court's ruling that a temporary restriction coupled with the absence of any diminution in value of the property, forecloses any claim of taking. *Tahoe-Sierra Pres. Council*, 535 U.S. at 331–32; *Palazzolo*, 533 U.S. at 630–32. Moreover, even if it was considered a taking, the government action does not prevent many other types of uses of the entire property that could have value for the owner. This case “requires careful examination and weighing of all the relevant circumstances” which was done by the state and federal courts below and that the Fourth Circuit Court of Appeals correctly decided that this matter was not ripe for adjudication as no final decision by the government was alleged.

II. THERE IS NO SPLIT OF AUTHORITY OR ANY REASON TO WARRANT REVIEW

“A petition for a writ of certiorari [is discretionary and] will be granted only for compelling reasons.” Rule 10. The Court considers petitions for writ of certiorari review where “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort...” Rule 10(a).

Some of the cases upon which Petitioner relies as creating the split and which require legislative amendment (*Nat’l Brick Co. v. Chicago*, 92 Ill. App. 2d 192, 196 (1968); *Reilly v. Chicago*, 24 Ill. 2d 348, 350 (1962); *Taylor v. Vill. of N. Palm Beach*, 659 So. 2d 1167, 1173–74 (Fla. Dist. Ct. App. 1995); *City of Jacksonville Beach v. Prom*, 656 So. 2d 581, 582–83 (Fla. Dist. Ct. App. 1995); and *Thorp v. Town of Lebanon*, 225 Wis. 2d 672, 696 (Ct. App. 1999)) agree with the Fourth Circuit’s decision. Hence, by Petitioner’s own account, the Fourth Circuit’s decision is consistent with other courts.

Four of the seven cases upon which Petitioner relies to support his argument that most courts don’t require a legislative process prior to seeking just compensation for a regulatory taking are from intermediate courts (*In re Quality of Service Standards for Regulated Telecommunication Services*, 204 Mich. App. 607, 610 (1994); *Leone v. County of Maui*, 128 Haw. 183, 196 (Ct. App. 2012); *Howard v. County of San Diego*, 184 Cal. App. 4th 1422, 1426 (2010) and *Paris v. Mayfield Village*, 14 Ohio App. 3d 450, 452 (1984)).

Also, four of the decisions (*Ward v. Bennett*, 79 N.Y.2d 394, 400–01 (1992); *Rinker v. City of Fairfax*, 238 Va. 24, 27, 30 (1989); *Paris v. Mayfield Village*, 14 Ohio App. 3d 450, 452 (1984) and *In re Quality of Service Standards for Regulated Telecommunication Services*, 204 Mich. App. at 610) are about three decades old and predate *Palazzolo* or *Pakdel*. None of these courts have considered the finality requirement as this Court has now defined it. A conflict among decisions that predate this Court’s current legal framework is not a conflict that warrants this Court’s intervention. See *Lawrence v. Chater*, 516 U.S. 163, 167, 168 (1996) (per curiam).

III. THE PETITION FAILS TO RAISE ISSUES OF PECULIAR GRAVITY OR GENERAL IMPORTANCE

Jurisdiction of the Supreme Court to review judgments of the Courts of Appeals by certiorari is to be exercised entirely at the discretion of the Court which ordinarily will not grant the Writ except in cases of peculiar gravity, general importance or in order to secure uniformity of decision. 36 C.J.S. § 204(2). Certiorari will be granted only in cases involving principles the settlement of which is important to the public as distinguished from the parties. 32 Am. Jur. 2d Fed Practice and Procedure § 784; *Rice v. Sioux City Park Mem’l Cemetery Inc.*, 349 U.S. 70 (1955). A petition for certiorari will be denied where the case, however important to the parties, involved no question of public or general interest nor any conflict between the decisions of state and federal courts of different circuits. *Hamilton Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1915). Certiorari is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance. *Lau Ow Bew v. United States*, 144 U. S. 47, 58

(1892); *In re Woods*, 143 U.S. 202 (1892); *Am. Constr. Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 383 (1893); *Forsyth v. Hammond*, 166 U.S. 506, 514 (1897); *Denver v. N. Tr. Co.*, 229 U. S. 123, 133 (1913). Where the Court decides an issue of public importance, it does so in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply managerial or administrative. *Monrosa v. Carbon Black Exp.*, 359 U.S. 180 (1959).

Here the controversy is one that does not lend itself to resolution via this Court under its rules for granting certiorari when there is an issue of such gravity or import that a legal determination must proceed from it. This would be the case here but for the failures of the Petitioner to 1) understand that, in order for the Water and Sewer Plan to result in a taking of his land, he needed to proceed to achieve the final decision by the policy makers and to actually apply for the waiver through the legislative amendment process, which even he agrees was not even started. And 2) he had ownership of the land for 40 years and did not allege that the Water and Sewer Plan itself amounts to a taking by virtue of its passing, when during the entire ownership term he was unable to show in the record any history of his plans to use or develop the property for its highest and best use such and that the Plan by itself is an unconstitutional taking. And 3) even were the Water and Sewer Plan to amount to an unconstitutional taking he failed to allege at any time below that he has engaged the process for seeking compensation and was denied. The law does not prohibit takings by a government; it does prohibit takings without compensation. It requires that once a taking is proven, and that still is at issue here, the government shall compensate the property owner.

These mundane issues are so fact sensitive and involves only the one landowner and not the general public, that it fails the test of peculiar gravity or general importance.

CONCLUSION

Petitioner Walls, in failing to allege facts sufficient to support the Article III justiciability either under the ripeness standard, or in failing to allege that he has sustained concrete, particularized injury which is imminent and not hypothetical, fails to meet the basic test for Article III justiciability and as such is not a proper vehicle for what constitutes final decision ripeness and the petition for a writ of certiorari should be denied.

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