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COURT DECLINES REVIEW IN PROPERTY RIGHTS CASE *(Esplanade Properties v. City of Seattle, No. 02-1304)*

The U.S. Supreme Court this week declined to hear a case that raises the issue of whether property owners generally are entitled to compensation when government environmental regulations prevent them from making any economically productive use of their property. The one-sentence order declining review was a setback for the Washington Legal Foundation (WLF), which filed a brief urging the Court to hear the case and overturn a lower-court decision declining to award compensation.

The case, *Esplanade Properties v. City of Seattle*, involved an effort by the City of Seattle to prevent further development of its waterfront. WLF argued that if Seattle wishes to prevent development, the costs should be borne by all citizens rather than by a few unlucky landowners.

"The Fifth Amendment requires the government to provide compensation when it takes private property for its own use," said WLF Chief Counsel Richard Samp in response to the Court's order. "The government should not be permitted to avoid compensation by simply prohibiting any use of property rather than actually taking title," Samp said. WLF has pledged to pursue the right-to-compensation issue in similar property rights cases.

Although the Supreme Court held in 1992 in *Lucas v. South Carolina Coastal Council* that the Fifth Amendment generally requires that property owners be compensated when they are prohibited from making economically productive use of the property, State and local governments have been finding increasing numbers of methods of avoiding the *Lucas* rule. They often seek to invoke an exception to the *Lucas* compensation rule: they argue that development of the property in question is barred by "background principles of property law" (such as the law of nuisance) and thus that no compensation is required.

The "background principle of property law" being relied on by Seattle is the "public trust doctrine." According to Seattle and environmental groups across the country, the "public trust doctrine" prohibits any development that would have a negative impact on rivers, lakes, the ocean, or other waterways.

In this case, Esplanade Properties sought to build single-family homes along the waterfront in Seattle harbor. Although the area was zoned for single-family homes, Seattle rebuffed all efforts to acquire a construction permit. Seattle officials expressed concern that too much of the tidelands along Seattle harbor had already been developed and that further development would be harmful for the environment. Because of zoning requirements, denial of the request to build residential housing meant that Esplanade could not make any economically productive use of its property.

Esplanade filed suit to recover the lost value of its property, claiming that Seattle's regulations violated its rights under the Fifth Amendment's Takings Clause. Both the district court and the U.S. Court of Appeals for the Ninth Circuit in San Francisco dismissed Esplanade's claims, holding that the "public trust doctrine" prohibited Seattle from allowing development of the property even if it had wanted to. WLF is asking the Supreme Court to review that decision.

In its brief, WLF argued that the public trust doctrine, as originally understood, was intended only to prevent interference with navigation and fishing rights. WLF argued that the doctrine has no application to Esplanade's property, which is completely dry except at high tide. Although Washington has expanded the public trust doctrine in recent years to encompass environmental concerns, those types of concerns do not constitute "background principles of property law" that permit government to bar development without paying compensation, WLF argued. WLF argued that compensation should be required when the environmental rules now being applied to Esplanade were not applied to similarly situated property owners, who were allowed to develop their tideland property and who are not being asked to remove existing developments. WLF argued that the Takings Clause prohibits the government from singling out a handful of property owners for uncompensated regulation when most other property owners are not affected.

Esplanade bought its property in 1992, well after Seattle had tightened its regulation of waterfront development. The lower courts held that Esplanade's Fifth Amendment claims should be barred because it was on notice of those tighter regulations at the time of purchase. WLF disagreed, arguing that Esplanade should be placed in the same position as prior owners of its property and that Esplanade's chain of title dates to 1906, when Seattle was actively encouraging tideland development.

WLF is a public interest law and policy center with supporters in all 50 States, including many in the State of Washington. WLF devotes a significant portion of its resources to protecting private property rights. WLF filed its brief on behalf of itself and the Allied Educational Foundation.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its website, www.wlf.org.