

July 29, 2003

U.S. SUPREME COURT PETITIONED TO REVIEW MAJOR PROPERTY RIGHTS CASE

(McQueen v. South Carolina Coastal Council)

A petition for writ of certiorari was filed this week with the United States Supreme Court urging it to review and reverse a major takings ruling by the South Carolina Supreme Court. The South Carolina Supreme Court had ruled a few months ago that Washington Legal Foundation's (WLF) client, Sam McQueen, was not entitled to compensation for a land use regulation that had the effect of denying him all economic value of his property. The petition, drafted *pro bono* by the Washington, D.C. office of White & Case, LLP, urged the High Court to hear the case to review the question of whether the South Carolina Supreme Court's novel application of the so-called "public trust doctrine" excuses the State from compensating property owners because of confiscatory land use regulations. This marks the second time a petition for writ of certiorari was filed in this case.

The original adverse ruling by the South Carolina Supreme Court was vacated by the U.S. Supreme Court in 2001 after WLF successfully petitioned the Court for review. The case was remanded to the South Carolina Supreme Court to rehear the case in light of the U.S. Supreme Court's decision in *Palazzolo v. Rhode Island*. *Palazzolo* held that an owner does not lose his constitutional right to compensation merely by acquiring property *after* a restrictive property development regulation goes into effect. For that reason, the South Carolina Supreme Court should have readily found that a taking occurred in this case, especially where the owner in this case acquired the property 15 years *before* the wetlands regulation at issue was enacted.

However, in an unusual move, the South Carolina Supreme Court subsequently ordered the parties to brief issues that were never raised in the case in an apparent attempt to side-step the key point upon which the case was remanded by the U.S. Supreme Court. In particular, the South Carolina Supreme Court had asked for briefing on issues that implicated the public trust doctrine, a doctrine that has been aggressively advocated by environmental groups in recent years to defeat takings claims.

The public trust doctrine allows the government to regulate private property along navigable waterways to prevent interference with navigation or fishing without compensating the property owners for the loss of the use of their property due to the regulations. But the property in this case are two residential lots in the middle of a fully-developed neighborhood.

Extending the "public trust" doctrine from the water's edge to residential lots will, if upheld, give regulators enormous confiscatory powers. Based on a government report, the recent decision may affect more than 375,000 acres of private property that fits the same definition of a "tideland" relied on by the court to find that McQueen had not suffered a taking. Because of the court's ruling, thousands of South Carolinians now face the possibility of total confiscation without the compensation guaranteed them by the Fifth Amendment.

This case arose when WLF's client, Sam McQueen, a farmer, tried to build on two quarter-acre residential lots that he had purchased in Myrtle Beach in the early 1960s. In 1991 he applied for permits with the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (OCRM) to put up bulkheads for erosion control and to backfill his land in preparation for building two single-family homes. OCRM denied the permits in 1993 on the ground that the land had now become a wetland, even though the entire neighborhood had been developed.

McQueen filed suit, asserting that the denial of the development permits stripped the land of all economically beneficial use; therefore, the Fifth Amendment would require OCRM to compensate him for the property that has been effectively taken by the wetlands regulation. To support his position, McQueen relied on *Lucas v. South Carolina Coastal Council*, a case where the U.S. Supreme Court rebuked the South Carolina Supreme Court and ruled that the Fifth Amendment nearly always requires compensation when an owner can show that a government regulation has totally deprived his property of all economically beneficial use. In its first decision, the South Carolina Supreme Court denied the claim on questionable grounds that Mr. McQueen lacked investment-backed expectations to develop his property. In its second decision, the Court adopted the "public trust" rationale supported by activists including the Sierra Club, National Wildlife Federation, and the local League of Women Voters. WLF's position was supported by the National Association of Home Builders and the Pacific Legal Foundation.

WLF's brief was drafted *pro bono* by Shawn Gunnarson, an associate in the Washington, D.C. office of White & Case, LLP. Ronald Norton of Conway, South Carolina, is McQueen's local counsel. A decision by the Supreme Court as to whether it will hear case is expected to be made by October 2003.

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For further information, contact Paul Kamenar, WLF Senior Executive Counsel, at 202-588-0302. WLF's brief can be found on its website at www.wlf.org.