

IN THE SUPREME COURT OF THE STATE OF MISSOURI

No. SC87968

DIANNA REAGAN, et al.,
Respondents/Cross-Appellants,

v.

SAINT LOUIS COUNTY,
Appellant/Cross-Respondent.

After an Opinion by the Circuit Court of St. Louis County,
21st Judicial Circuit
Honorable Kenneth Romines, Division 10

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION
AND MISSOURI CITIZENS FOR PROPERTY RIGHTS
IN SUPPORT OF RESPONDENTS/CROSS-APPELLANTS**

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NATURE AND INTEREST OF AMICI

This brief amicus curiae is filed pursuant to Missouri Supreme Court Rule 84 (f)(2), upon the consent of all parties. As outlined more fully below, Amici share a common interest in ensuring that courts adopt legal rules that are sensitive to private property rights and those rights' important role in promoting economic freedom.

Amicus Curiae Pacific Legal Foundation (PLF) is a Sacramento-based nonprofit public interest law firm with offices in the states of Washington, Florida, and Hawaii. Since 1973, PLF has defended the rights of individuals to make reasonable use of their private property in federal and state courts across the nation. On four occasions, PLF attorneys have been before the United States Supreme Court, arguing on the behalf of individuals whose right to use their property was unlawfully denied by government agencies. Most importantly, PLF attorneys were counsel of record in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), a regulatory takings precedent relied on by the appellate court below, and one that will continue to be relevant to this Court's review. PLF has participated as amicus curiae in many constitutional takings cases in both federal and state courts. *See Manning v. N.M. Energy, Minerals & Natural Resources Dept.* —P.3d—, 2006 WL 1787124 (N.M. 2006); *Sheffield Development Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004).

PLF attorneys have published numerous articles evaluating the regulatory takings doctrine and the United States Supreme Court precedent in that area, both of which are at issue in this matter. *See, e.g.*, J. David Breemer, *Playing the Expectations Game: When Are Investment-Backed Land Use Expectations (Un)reasonable in State Courts*, 38 Urb. Law. 81 (2006); James S. Burling, *Private Property Rights and the Environment After Palazzolo*, 30 B.C. Envtl. Aff. L. Rev. 1 (2002).

PLF's scholarship came into play in the instant matter, as the Missouri Appellate Court cited to a law review article by PLF attorneys in analyzing the plaintiff's investment-backed expectations. *See Reagan v. County of St. Louis*, 2006 WL 1867195, at * 4, n.7 (Mo. App. E.D. 2006) (citing J. David Breemer and R. S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations after Palazzolo, and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck*, 34 S.W. U.L. Rev. 351 (2005)). Other courts have cited PLF articles in attempting to understand the regulatory takings doctrine, and particularly the investment-backed expectations aspect. *See Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 36 (1st Cir. 2002) (citing R.S. Radford & J. David Breemer, *Great Expectations: Will Palazzolo v. Rhode Island Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. Envtl. L. J. 449 (2001)). In implicating the "reasonable investment-backed expectations" test in takings law, this case falls within an area in which PLF attorneys have judicially recognized

expertise.

Amicus Missouri Citizens for Property Rights (Missouri Citizens) is a group formed to advocate for amendments to Article I and Article VI of the state constitution that will limit the ability of the government to take or damage private property for private purposes or without just compensation. Among other changes, the amendments supported by Missouri Citizens would apply the state constitutional protection against any uncompensated taking and damaging of property to situations where government “indirectly” takes or damages property.

QUESTION ADDRESSED BY AMICI

The case at hand requires this Court to address an issue of first impression, namely, what standards are courts to apply in determining whether a land use regulation has caused an unconstitutional partial regulatory taking.¹ The court below and the parties have recognized that the issue will likely involve consideration of the takings claimant’s “reasonable investment-backed expectations.” *See Reagan*, 2006 WL 1867195, at * 4.

¹ A “partial” regulatory takings is one that occurs “where the regulatory taking . . . did not deny the landowner all use of the property.” *Clay County ex rel. County Comm’n of Clay County v. Harley and Susie Bogue, Inc.*, 988 S.W.2d 102, 107 (Mo. App. W.D.1999).

The investment-backed expectations doctrine is subject to considerable confusion among the courts, and not susceptible to a simple answer. *Philip Morris*, 312 F.3d at 36. Indeed, because courts have approached the issue from a factual perspective, and resolved it under different and sometimes inconsistent criteria, the door is open for this Court to select from among those “reasonable expectations” criteria that other courts have found relevant. This requires familiarity with the experience of other courts on the expectations issue, as it has evolved over the last thirty years in regulatory takings jurisprudence.

Amici have conducted considerable research into the judicial approach, at both the state and federal level, toward reasonable investment-backed expectations. In their brief, amici seek to pass on that knowledge to this Court, so that it may arrive at a balanced approach to the expectations test. While the parties will likely argue the expectations issue, as it pertains to the facts at hand, it is unlikely they will offer the Court a comprehensive overview of the most accepted approaches to the reasonable expectations inquiry. Amici will do so.

Amici will further contend that when the Court applies the most basic reasonable expectations criteria to the facts here, the Court will conclude that, on balance, the inquiry favors Respondent Dianna Reagan. This would of course tend to buttress her claim that she has suffered a partial taking of her property, but Amici do not go so far as to argue that a partial taking has

actually occurred; they leave that to the parties. Instead, the focus of Amici's participation is on a fair approach to reasonable land use expectations, one that is sensitive to the need to protect the traditions and benefits of robust property rights.

INTRODUCTION

The United States Supreme Court's decisions emphasize that the determination of whether an unconstitutional partial regulatory taking has occurred hinges on a balancing test, including:

The economic impact of the regulation on the claimant, and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.

Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978).

This brief addresses only the second factor, "the extent to which the regulation has interfered with distinct investment backed expectations." Such individualized treatment is warranted because the investment-backed expectations inquiry is perhaps the least understood, but most important criteria in the *Penn Central* test. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532-35 (1998) (plurality upholds plaintiff's takings claim largely on investment-backed expectations grounds); *Philip Morris*, 312 F.3d at 48-50

(Selya, J., concurring) (reading Supreme Court precedent to establish investment-backed expectations as a dispositive takings consideration).

The inquiry into whether a regulation has improperly interfered with a property owner's investment-backed expectations typically hinges on the *reasonableness* of those expectations prior to application of a challenged regulation. Nevertheless, courts have not arrived at a consensus on the proper method for determining when land use expectations are indeed reasonable.

In this case, this Court has a first-impression opportunity to establish criteria for determining reasonable investment-backed expectations, as that doctrine applies to takings analysis under the Missouri Constitution. This Court should adopt a balanced approach that considers the nature of the subject property, the government's treatment of the property, and the regulatory scheme, as they existed prior to application of the challenged regulation. Any conflict or doubt as to the outcome of the reasonable expectations inquiry should be resolved in favor of the property owner, given that development occurs in all circumstances, and constitutional protections against takings are designed to protect property owners.

ARGUMENT

I

REASONABLE EXPECTATIONS MAY DEPEND ON ZONING AT THE TIME OF PURCHASE, THE GOVERNMENT'S TREATMENT OF THE PROPERTY, AND SURROUNDING DEVELOPMENT; ANY CONFLICT FAVORS THE LANDOWNER

A review of Supreme Court jurisprudence and important lower court decisions demonstrates that the following considerations have developed into especially relevant reasonable investment-backed expectations factors: (1) the regulatory scheme at the time of purchase and, particularly, whether the land owner acquired the property prior to enactment of the challenged regulation; (2) how the government has treated the property, and (3) the nature of any development surrounding the regulated property. When fairly understood, these considerations form the basis for a balanced and equitable test for the reasonableness of a property owner's development expectations.

A. When a Landowner Purchases Property Prior to the Enactment of a Challenged Regulation, That Owner's Expectations Are More Reasonable

The most common method for analyzing the reasonableness of a takings claimant's development expectations analysis is to focus on the timing of the claimant's acquisition of the property. Under this approach, courts consider whether the landowner acquired the property before or after the enactment of the regulation now restricting the use of the property. *Mayhew v. Town of*

Sunnyvale, 964 S.W.2d 922, 936 (1998) (“Knowledge of existing zoning is to be considered in determining whether the regulation interferes with investment-backed expectations.”). If the landowner acquired the property after the regulation, courts may discount the owner’s expectations; but if the owner bought prior to regulation, his land use or development expectations are more reasonable.

But while important, the “timing of the purchase” factor is not alone determinative of investment-backed expectations or takings outcomes. *See Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987) (rejecting the dissent’s argument that, because the Nollans had acquired their property after implementation of a public access program, they could not claim any expectation of a right to exclude others, when they were required to convey a public access easement in return for a building permit); *Palazzolo*, 533 U.S. at 627-30 (holding that a landowner who acquired property after the enactment of a restrictive land use regulation could still challenge that restriction as a total or partial regulatory taking).² *Id.*

² The *Palazzolo* Court declared:

Were we to accept the State’s rule [that acquisition after regulation defeats a takings claim], the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge
(continued...)

In her concurring *Palazzolo* opinion, Justice O'Connor specifically emphasized that the timing of purchase alone does not determine whether the landowner's expectations are reasonable. *Palazzolo*, 533 U.S. at 632-33 (O'Connor, J., concurring). State courts have reached similar conclusions. *See State ex rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345, 352-53 (Ohio 2002); *Stansbury v. Jones*, 812 A.2d 312, 334 n.15 (Md. Ct. App. 2002) (citing *Palazzolo* for proposition that "the new owner could have asserted any rights the prior owner could have asserted"); *Moroney v. Mayor and Council of Borough of Old Tappan*, 633 A.2d 1045, 1048 (N.J. Super. Ct. App. Div. 1993).

Nevertheless, while purchase timing may not be dispositive of reasonable investment-backed expectations, courts tend to find that the reasonable expectations exist when an owner acquired the regulated property prior to the enactment of the challenged regulation. *See, e.g., Friedenborg v. New York State Dept. of Environmental Conservation*, 3 A.D.3d 86, 97-98 (N.Y. Ct. App. 2003); *Kasperek v. Johnson County Bd. Of Health*, 288 N.W. 2d 511, 518 (Iowa 1980) (holding that landowners had reasonable expectations of developing consistent with existing zoning); *Florida Rock Industries, Inc.*

² (...continued)

unreasonable limitations on the use and value of land.

533 U.S at 627.

v. United States, 45 Fed. Cl. 21, 39-40 (Fed. Cl. 1999) (reasonable expectation of quarrying where regulatory barriers did not exist at the time of purchase).

**B. The Government's Prior Treatment of the Property
May Give Rise to Reasonable Expectations**

The government's treatment of the property prior to the application of the challenged regulation may also inform a landowner's reasonable expectations. The representations of planning officials are particularly indicative of the government's treatment (and expectations), but other actions, such as taxation, can also be relevant.

**1. Government Representations
May Raise Expectations**

In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the United States was held liable for a taking by demanding a public boating access easement from a developer who was previously granted permission to dredge a private boating channel without any access condition. *Id.* at 180. Although the decision revolved around the fundamental nature of the owner's right to exclude others, the government's representations also played a role, particularly in justifying the owner's expectation of exclusive rights. The Court explained:

[T]he [prior] *consent* of individual officials representing the United States . . . can lead to the fruition of a number of expectancies embodied in the concept of “property”

Id. at 179. Thus, *Kaiser Aetna* illustrates that encouraging representations from government officials on the possible uses of property are particularly relevant to the treatment aspect of expectations analysis.

Lower courts have also recognized the relevance of the government’s representations. *See, e.g., Sheffield Development Corp.*, 140 S.W.3d at 678 (“[The takings claimant’s] expectations were based in large part, and legitimately so, on its efforts to deal with the City Evidence of [the claimant’s] dealings with the City is not, as the City argues, an improper basis to estop the City, but proof of the reasonableness of [the claimant’s] expectations.”).

2. Tax Treatment May Inform Expectations

Beyond positive representations, the government’s treatment of property for tax purposes may inform the landowners’s reasonable expectations. *Arnell v. Salt Lake County Board of Adjustment*, 112 P.3d 1214, 1224, n.14 (Ut. Ct. App. 2005). If the government taxes an owner’s property for a particular use, demonstrating that it expects the property could be so used, a landowner should also have reasonable expectations of engaging in the use for which the property is taxed.

C. The Nature of Surrounding Development May Be Relevant

Finally, after considering the timing of purchase and government treatment of the regulated property, reasonable expectations analysis may look to “the nature and extent of permitted development under the regulatory regime vis-a-vis the development sought by the claimant.” *Palazzolo*, 533 U.S. at 634 (O’Connor, J., concurring); *see also*, Rathkopf, *The Law of Zoning and Planning*, § 6.03, at 6-12 (1989). This criteria derives from, and is understood by reference to, the Court’s decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029-31 (1992).

In *Lucas*, the Court held that the government may avoid liability for a land use restriction that is otherwise deemed to be a taking only if the restriction simply codifies long-standing common law property principles, such as nuisance prohibitions. *Id.* at 1029-30. *Lucas* emphasized that such restrictive and noncompensable “background principles” typically will not apply in a case where the takings claimant is denied a use that is freely enjoyed by his neighbors:

[T]he fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

Id. at 1031.

Justice O'Connor's *Palazzolo* concurrence restated the foregoing *Lucas* principles in the investment-backed expectations context in noting that reasonable expectations may hinge to some degree on "nature and extent of permitted development" in the area. *Palazzolo*, 533 U.S. at 634 (O'Connor, J., concurring). In other words, courts should consider the pattern of actual development surrounding the regulated property, and a landowner will normally have more reasonable expectations when his planned development accords with prevailing trends. *Lucas*, 505 U.S. at 1031; *see also*, *Arnell v. Salt Lake County Board of Adjustment*, 112 P.3d at 1224, n.14. This "surrounding development" criteria is to be weighed along with other factors.

**D. Conflicts Should Be Resolved
in Favor of the Property Owner**

If and when the criteria for determining reasonable expectations point to different results, or where there is doubt as to reasonableness, courts should favor the landowner's building expectations. This is so for two reasons, one practical and the other legal. First, as a practical reality, local governments have allowed nonindustrial development to occur in all sorts of geographic and regulatory circumstances. One need only walk the streets of any developed area to see that particular types of construction, like commercial buildings, are permitted in many different zones.

Missouri jurisprudence demonstrates the frequency and varied contexts in which local governments have allowed nonindustrial development; this case

itself provides an example, showing that an office building has already been constructed next to a residential area, one-eighth of a mile from Ms. Reagan's site. Transcript (Tr.), at 113, ll. 12-25; at 114, ll. 1-16. Indeed, that jurisprudence illustrates that Missouri courts have themselves regularly sanctioned development, even that which seems inconsistent with the regulatory scheme, such as commercial use in residential zones. *Huttig v. City of Richmond Heights*, 372 S.W.2d 833 (Mo. 1963) (a municipality's refusal to rezone residential property as commercial was arbitrary); *Renick v. City of Maryland Heights*, 767 S.W.2d 339, 341 (Mo. App. 1989) (refusal to allow office use in residential zone held arbitrary); *Despotis v. City of Sunset Hills*, 619 S.W.2d 814, 820-21 (Mo. App. 1981) (refusal to zone for commercial use held arbitrary); *Loomstein v. St. Louis County*, 609 S.W.2d 443, 447 (Mo. App. 1980) (same).

Given the contexts in which development has been allowed and protected, the rational starting presumption for a purchaser of real estate in a developed area is not the development will be barred, but that it will be possible. At the least, it is *not unreasonable* for a Missouri purchaser of property to expect that property in a developed area may be used for any nonindustrial, nonnuisance, commercial use, when it is properly conditioned. *Florida Rock*, 18 F.3d 1560, 1571 (C.A. Fed. 1994) ("Marketplace decisions should be made under the working assumption that the Government will neither prejudice private citizens, unfairly shifting the burden of a public good

onto a few people, nor act arbitrarily or capriciously.”). Courts should recognize this by resolving any doubts as to the reasonableness development expectations in favor of the landowner.

The purpose of constitutional takings standards, such as those encompassed in Article I, Section 28, of the Constitution of Missouri, further supports tilting the scales toward the property owner when the outcome of the reasonable expectations inquiry is uncertain. Constitutional property protections are not in existence to shield the government from liability, but to guard the individual land owner from government overreaching. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (Takings Clause 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.”) (emphasis added); *Odegard Outdoor Advertising, LLC v. Board of Zoning Adjustment of Jackson County*, 6 S.W.3d 148, 149 (Mo. 1999) (Missouri takings provisions reflect that “[t]he right to own private property is a bedrock principle.”). Indeed, the purpose of constitutional government is to protect property. *See The Federalist*, No. 54, at 339 (J. Madison) (C. Rossiter ed. 1961) (“Government is instituted no less *for protection of the property* than of the persons of individuals.”) (emphasis added).

The reasonable investment-backed expectations doctrine was itself originally articulated to “emphasize the rights of property owners . . . suggesting that courts apply this new factor to *strengthen the position of the property owner* against governmental regulation.” Robert M. Washburn, “*Reasonable Investment-Backed Expectations*” As a Factor in Defining Property Interests, 49 Wash. U.J. Urb. & Contemp. L. 63, 71 (1996) (emphasis added). Because constitutional government, constitutional takings provisions, and the standards implementing those provisions are designed to strengthen the individual owner relative to the government, courts should err on the side of protecting property rights when conducting regulatory takings analysis. See Marc Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L.J. 663, 720 (1996) (“Historically the Takings Clause was designed to protect private citizens from governmental interference with property rights. Therefore, it makes sense for courts, at least initially, to tip the scales slightly in the plaintiff’s favor.”).

II

THE FACTS OF THIS CASE INDICATE THAT MS. REAGAN HAD REASONABLE INVESTMENT-BACKED EXPECTATIONS

The reasonable-investment-backed expectations factors identified above support Ms. Reagan’s expectation of building an office building on the industrially zoned property she purchased. First, Ms. Reagan acquired her

property for office use when it was zoned for that purpose, and had been for forty-five years or so. Because the zoning at the time of purchase supports Ms. Reagan's plans of developing an office for her business, it cannot be said that her investment-backed expectations were unreasonable; to the contrary, her acquisition of the property when office use was allowed lends significant credence to her expectations. *See, e.g., Friedenborg*, 3 A.D.3d at 97-98; *Formanek v. United States*, 26 Cl. Ct. 332, 340 (Cl. Ct. 1992) (property owner had reasonable expectation of industrial use); *Florida Rock*, 45 Fed. Cl. at 39-40 (reasonable expectation of quarrying where regulatory barriers did not exist at the time of purchase).

Second, the government's treatment of the property justified Ms. Reagan's expectation of developing an office building. Prior to Ms. Reagan's purchase, County officials represented that office use was a "permitted and appropriate use" of the property. Tr. at 63, ll. 19-25; at 64, ll. 1-17; at 257, ll. 17-23; Supp. L.F., at 87). The County also represented to Ms. Reagan that zoning for the property would not be changed from its M-1 Industrial classification. (Supp. L.F. at 416). The County argues that the representations of County officials do not give rise to reasonable expectations, but this is clearly wrong, for "[w]hile the *consent* of individual officials . . . cannot 'estop' [the government], it *can lead to the fruition of a number of expectancies embodied in the concept of "property. . . ."* *Kaiser Aetna*, 444 U.S. at 179 (emphasis added). Here, Ms. Reagan's office building

expectations “were based in large part, and legitimately so, on [her] efforts to deal with the [government]” and its officials’ positive representations. *Sheffield*, 140 S.W.3d at 678.

The County’s positive oral representations on building an office structure were likely reinforced by the tax treatment it accorded the property. When Ms. Reagan purchased the property, it was taxed for industrial use, and she apparently paid taxes on the property at this rate for several years. Thus, in word and deed, the County treated the property as developable for office use, and Ms. Reagan could form reasonable expectations of such use from this treatment.

The only factor that is arguably unsupportive of Ms. Reagan’s intent to engage in office use is the “the nature and extent of permitted development under the regulatory regime vis-a-vis the development sought by the claimant.” *Palazzolo*, 533 U.S. at 634 (O’Connor, J., concurring), because her property was near a residential area. Yet, this “surrounding development” factor is not determinative of expectations. *Id.* Indeed, in this case, such a consideration is outweighed by the nature of the regulatory regime in place at the time of purchase and the government’s treatment of the property, each of which justified Ms. Reagan’s reasonable expectation of using the property for an office structure.

This is not a case where a property owner speculated on property or hoped to engage in some novel or dangerous use of land. The property had

been zoned for industrial use for decades when Ms. Reagan bought it for commercial office purposes, and County officials gave reason to believe that office use would be permitted. Ms. Reagan invested based on these reasonable expectancies. By downzoning her property after she purchased and invested in it for office use, the County has destroyed Ms. Reagan's reasonable investment-backed expectations.

CONCLUSION

For the foregoing reasons, the Court should adopt a reasonable expectations test that considers the regulations in place at the time of purchase, the government's treatment of property as suitable for development, and the nature of surrounding uses, resolving any doubt in favor of the landowner. The Court should apply the test here to hold that Ms. Reagan had reasonable investment-backed expectations.

DATED: November____, 2006.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief contains all the information required by Rule 55.03 and complies with the type-volume limitation of Rule 84.06(b). This Brief was prepared in WordPerfect 12 and contains approximately 3,990 words according to the word count of the word processing system used to prepare this Brief. Pursuant to rule 84.06(g), I hereby certify that a 3.5 inch diskette, which was scanned for viruses and is virus free, contains the full text of this Brief and has been submitted for filing with this brief.

/s/ Cynthia Clark Campbell
CYNTHIA CLARK CAMPBELL

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2006, one copy of BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND MISSOURI CITIZENS FOR PROPERTY RIGHTS IN SUPPORT OF RESPONDENTS/CROSS-APPELLANTS, in the form specified by Rule 84.06(a) together with one copy of the disk required by Rule 84.06(g) were sent first-class mail, postage prepaid, to:

Mr. Kevin L. Fritz
Mr. Michael C. Seamands
Lashly & Baer, P.C.
714 Locust Street
St. Louis, MO 63101

Patricia Redington
County Counselor
Christopher J. McCarthy
Associate County Counselor
41 South Central Avenue
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Clayton, MO 63105

/s/ Cynthia Clark Campbell
CYNTHIA CLARK CAMPBELL