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I. Introduction

A basic purpose of a zoning variance is to prevent the application of zoning regulations to a particular parcel of private property from resulting in the taking of property[1] in violation of the Fifth Amendment.[2] The variance acts as a constitutional "safety valve" to preserve the validity of the zoning laws.[3] In Pennsylvania, this safety valve may be closed in circumstances in which a landowner had notice of the zoning regulations at the time of transfer of title. However, because recent United States Supreme Court precedent provides that a taking may occur even when the landowner had such notice, the safety valve must remain open to prevent the invalidation of many applications of Pennsylvania zoning laws.

In Pennsylvania, two types of variances are available: the traditional[4] variance and the validity variance. A party seeking a traditional zoning variance must show an unnecessary hardship.[5] An

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1. *See, e.g.*, JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL § 5.14 (1st ed. 1998).

2. The Fifth Amendment provides in part, "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. The Fifth Amendment is applicable to the states through the Fourteenth Amendment. *See* U.S. CONST. amend. XIV. The purpose of the Takings Clause is to prevent the 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." Palazzolo v. Rhode Island, 533 U.S. 606, 616 (2001) (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

3. *See id.*

4. The qualifier "traditional" is used to distinguish this variance from a validity variance. For more background on the different variances, see *infra* Part II.

5. *See In re* Gro, 269 A.2d 876, 878 (Pa. 1970).

unnecessary hardship cannot be self-imposed.[6] Self-imposed hardships can arise through actual or constructive notice of preexisting zoning regulations upon acquisition combined with either a violation of the regulations or too much or too little consideration on the purchase of the property.[7] This combination prevents a property owner from obtaining a traditional variance under the self-imposed hardship rule in Pennsylvania. Although the strict application of the self-imposed hardship rule has been in decline in most jurisdictions for a number of years, vestiges of the doctrine remain in Pennsylvania.[8]

The validity variance, the second type of variance, applies when the zoning ordinance is valid in general but confiscatory as applied.[9] Here, the variance is issued not because the traditional requirements for a variance are met, but because the government may not impose zoning regulations that deny all reasonable use of the land.[10]

Prior to June 2001, it was not clear whether a taking could occur on the basis of facts that bar the traditional variance.[11] In *Palazzolo v. Rhode Island*,[12] the United States Supreme Court reversed Rhode Island's threshold bar to a landowner's takings claim when the landowner acquired title to the property subject to the regulations ("the notice rule") that allegedly created the taking.[13] The Court's rejection of the notice rule and suggestion that regulations do not become part of the

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6. *See id.* at 879.

7. *See, e.g.*, Marple Gardens, Inc. v. Zoning Bd. of Adjustment, 303 A.2d 239, 241 (Pa. Commw. Ct. 1973) (finding that financial hardship of using the property profitably as zoned, because of difficulties in the topography, after purchase with knowledge of the regulations is not grounds for variance); *see also Gro*, 269 A.2d at 880-81 (finding that consideration on purchase was too much to justify use as zoned but is not grounds for a variance); Best v. Zoning Bd. of Adjustment, 141 A.2d 606, 608 (Pa. 1958) (finding that financial hardship of maintaining property as zoned after purchase subject to the complained of regulations is not grounds for variance); ROBERT S. RYAN, PENNSYLVANIA LAND USE & PRACTICE § 6.2.13 (1998).

Of course self-imposed hardships may also arise by the actions of the landowner that create the hardship (or a predecessor in title), rather than the hardship impact of the regulations on the property. In this situation, it is not the notice rule that bars the variance and *Palazzolo* does not affect the analysis.

8. *See* Roeser Prof'l Builder, Inc. v. Anne Arundel County, 793 A.2d 545 (Md. 2002). Even if the application of the rule is not as strict as it once was in Pennsylvania, vestiges of the rule remain. *See, e.g.*, *In re* Gregor, 627 A.2d 308, 312 (Pa. Commw. Ct. 1993) ("The right to develop a nonconforming lot is not personal to the owner of the property at the time of enactment of the zoning ordinance but runs with the land, and a purchaser's knowledge of zoning restrictions alone is insufficient to preclude the grant of the variance unless the purchase itself gives rise to the hardship."); *see also supra* note 7.

9. *See* Pierce v. Zoning Bd. of Adjustment, 189 A.2d 138, 141 (Pa. 1963); *see also* RYAN, *supra* note 7, § 6.1.7.

10. *See Pierce*, 189 A.2d at 141; Ferry v. Kownacki, 152 A.2d 456 (Pa. 1959).

11. *See Pierce*, 189 A.2d at 141; *see also* RYAN, *supra* note 7, § 6.1.8.

12. 533 U.S. 606 (2001).

13. *See id.*

title to the property upon transfer requires that Pennsylvania courts apply validity variance analysis when the self-imposed hardship rule is invoked to bar a traditional variance.

A traditional variance cannot act as a constitutional safety valve when the self-imposed hardship rule is applied. Because the self-imposed hardship rule precludes the award of a traditional variance when the landowner had notice of the regulations at the time of acquisition, the rule prevents the traditional variance from alleviating situations in which a regulatory taking may otherwise occur. Therefore, validity variance analysis must be applied if Pennsylvania is to preserve the constitutionality of its zoning regulations when the self-imposed hardship rule is invoked to prevent a traditional variance.

In *Palazzolo*, the Supreme Court remanded the case[14] to the state trial court for consideration of the merits of the takings claim under the ad hoc factor analysis of *Penn Central Transportation Co. v. New York City*.[15] This ad hoc test looks primarily, but not exclusively, to three significant factors: the economic impact on the claimant, the extent to which the regulation interferes with investment backed expectations, and the character or extent of the government action.[16] The *Palazzolo* majority opinion did not address how to analyze post-regulation acquisition under investment-backed expectations.

The concurrences of Justices O'Connor and Scalia sharply disagreed on how post-regulation acquisition was to be analyzed under the investment-backed expectations factor on remand.[17] This unanswered question may determine whether post-regulation acquisition can play *any* role in *Penn Central* takings analysis, and thus whether such factors may even be considered in analyzing whether a validity variance is necessary after application of the self-imposed hardship rule.

This comment analyzes the application of Pennsylvania's self-imposed hardship rule after *Palazzolo*. Part II provides background on the application of the self-imposed hardship rule and validity variances. Part III reviews *Palazzolo*, focusing on the rejection of the notice rule as a bar to takings claims, and the rejection of the notion that regulations may inhere in the title to property upon transfer. Part IV analyzes the utility of Pennsylvania's self-imposed hardship rule in light of *Palazzolo*, and under the concurring Justices' divergent views of how notice of regulations shapes investment-backed expectations. Finally, Part V concludes that the self-imposed hardship rule may no longer provide the

14. *See id.* at 632.
15. 438 U.S. 104, 124 (1978).
16. *See id.*
17. *Compare Palazzolo*, 533 U.S. at 632-36 (O'Connor, J., concurring), *with id.* at 636-37 (Scalia, J., concurring).

final determination of whether a variance is necessary to preserve the constitutionality of a zoning ordinance.

II. Background on Pennsylvania's Self-Imposed Hardship Rule

In Pennsylvania, a party seeking a traditional zoning variance must show: (1) an unnecessary hardship that is unique or peculiar to the property exists, and (2) the proposed variance is not contrary to the public interest.[18] A hardship that is self-imposed cannot form the basis for an unnecessary hardship.[19] These self-imposed hardships arise in two main ways.

One type of self-imposed hardship is created when the property owner's actions put the land in violation of a particular zoning ordinance. This can occur in several ways, including subdividing a lot into parcels that do not meet the area requirements[20] or building structures in violation of a zoning ordinance.[21] If the owner later asks for a variance, claiming an unnecessary hardship based on the money that will be lost if the owner cannot build on the undersized lot or the burden that will entail the removal of the structure, the variance will be denied because the hardship was self-imposed.[22] This type of self-imposed hardship may arise with or without actual knowledge that the property owner is violating the zoning law because of constructive notice.[23]

A second type of self-imposed hardship occurs when land is purchased with notice of the zoning ordinance and intent to turn a profit by obtaining a variance.[24] To illustrate, a post-regulation purchaser of an undersized lot at a tax sale who believed that a single-family dwelling might be constructed thereon and intended to profit from the variance is considered to have created his or her own hardship and will not be not

18. *See, e.g.*, *In re* Gro, 269 A.2d 876, 878 (Pa. 1970); *see also* PA. STAT. ANN. tit. 53, § 10910.2(a) (West 2002).

19. *See Gro*, 269 A.2d at 879.

20. *See In re* Volpe, 121 A.2d 97 (Pa. 1956); *see also* Randolph Hills, Inc. v. Montgomery County Council, 285 A.2d 620 (Md. 1972).

21. *See* RYAN, *supra* note 7, § 6.2.11.

22. *See id.*

23. *See* Stratford Arms, Inc. v. Zoning Bd. of Adjustment, 239 A.2d 325 (Pa. 1968); Boyd v. Wilkins Township Bd. of Adjustment, 279 A.2d 363, 364 (Pa. Commw. Ct. 1971); *see also* RYAN, *supra* note 7, § 6.2.11.

24. *See Gro*, 269 A.2d 876; *In re* McClure, 203 A.2d 534 (Pa. 1964) (involving purchaser who paid excessive price for residentially zoned property with intention of seeking a variance); *see also In re* Mont-Bux, Inc., 12 Pa. D. & C.3d 266 (Ct. Com. Pl. Bucks County 1977), *aff'd*, 397 A.2d 860 (Pa. Commw. Ct. 1979) (adopting the opinion of the court below and holding property purchased at distress price with notice of the difficulties caused by the zoning was subject to the self-imposed hardship rule).

A purchaser could structure the transaction as contingent on obtaining a variance, but, if the seller's ownership was post-regulation, any hardship would be self-imposed.

entitled to a variance.[25] It is this type of self-imposed hardship that *Palazzolo* affects.

Despite these bars to traditional variances, Pennsylvania has, through validity variances, protected against regulatory takings caused by the application of zoning laws. The validity variance is granted not because the traditional requirements are met but because the government may not confiscate the property by denying all reasonable use of the land.[26] Thus, despite application of the self-imposed hardship rule, if the regulations are confiscatory, a validity variance must be granted.[27]

Because the validity variance is a last gasp for constitutionality, the analysis must be informed by federal takings jurisprudence.[28] Therefore the recent United States Supreme Court case of *Palazzolo* applies.

III. *Palazzolo*: The Supreme Court Rejects Rhode Island's Constructive Notice Rule

Prior to *Palazzolo*, Rhode Island barred constitutional takings claims when the owner acquired title to the land subject to the regulations that allegedly caused the taking.[29] In June of 2001, the United States Supreme Court rejected the notice rule bar to takings claims.

A. The Facts

In 1959, Shore Gardens, Inc. ("SGI"), of which Palazzolo was a shareholder, purchased a waterfront parcel of land in Rhode Island.[30] Palazzolo then proceeded to buy out his associates to become the sole

25. *See Mont-Bux*, 12 Pa. D. & C.3d at 275.

26. *See, e.g.*, Pierce v. Zoning Bd. of Adjustment, 189 A.2d 138, 141 (Pa. 1963); Ferry v. Kownacki, 152 A.2d 456, 458 (Pa. 1959); Jacquelin v. Horsham Township, 312 A.2d 124, 126 (Pa. Commw. Ct. 1973); *see also* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Nectow v. City of Cambridge, 277 U.S. 183 (1928) (limiting the holding of *Euclid* to zoning that does not deny an owner any practical use of his or her land); RYAN, *supra* note 7, § 6.1.7.

27. *See Pierce*, 189 A.2d at 141; *Ferry*, 152 A.2d at 458.

28. *See* RYAN, *supra* note 7, § 3.1.2 (noting that the Federal Constitution has played no significant role in Pennsylvania zoning law because Pennsylvania sets its own thresholds for invalidity of the zoning lower than takings jurisprudence). After *Palazzolo* the threshold is higher when the self-imposed hardship rule is invoked to deny a variance, without consideration of the validity variance.

29. *See* Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707 (R.I. 2000), *rev'd*, 533 U.S. 606 (2001). Ironically, the Supreme Court of Rhode Island started the current trend in the self-imposed hardship rule, that purchase with knowledge of restrictions either does not prohibit the granting of a variance or is at most a nondeterminative factor to consider in granting a variance, when in 1957 it rejected the notion that purchase with knowledge of restrictions constituted self-created hardship. *See* Roeser Prof'l Builder, Inc. v. Anne Arundel County, 793 A.2d 545 (Md. 2002).

30. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 613 (2001).

shareholder of the corporation.[31] Palazzolo made some early attempts at development but they were rejected for various reasons.[32] In 1971, Rhode Island enacted legislation protecting coastal wetlands.[33] This legislation had the effect of greatly limiting the development of nearly all of the coastal property owned by SGI.[34] In 1978, SGI's corporate charter was revoked for failure to pay income taxes and title to the property passed, by operation of state law, to Palazzolo as the corporation's sole shareholder.[35] He renewed his development efforts in 1983, but his applications for permits were rejected under the 1971 regulations.[36] His takings claim ensued.[37]

B. Rhode Island Bars Palazzolo's Takings Claim

The Superior Court of Rhode Island rejected Palazzolo's takings claim. The Rhode Island Supreme Court affirmed because: (1) the claim was not ripe, (2) Palazzolo had no right to challenge regulations predating his legal ownership of the property in 1978, and (3) there was undisputed evidence that $200,000 of development value remained on the upland parcel of the property.[38] The Rhode Island Supreme Court also concluded that Palazzolo could not recover under *Penn Central*[39] because he had no reasonable investment-backed expectations that were affected by the regulation because the regulation predated his ownership.[40] The Rhode Island Supreme Court regarded the date of legal acquisition as fatal to either a *Lucas v. South Carolina Coastal Council*[41] or *Penn Central* takings claim.[42] Palazzolo appealed and the United

31. *See id.*
32. *See id.* at 613-14.
33. *See* R.I. GEN. LAWS §§ 46-23-1 to -24 (2002).
34. *See Palazzolo*, 533 U.S. at 614-18.
35. *See id.* at 614. From an equitable perspective, it is interesting that Palazzolo was the sole shareholder, and thus personally responsible for paying the corporate taxes. Transfer of title, and thus Rhode Island's bar to the takings claim, could have been avoided by his own diligence.
36. *See id.* at 615.
37. *See id.* at 615-16.
38. *See id.* at 616.
39. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (listing three factors for consideration of whether a land use regulation rises to the level of a taking: (1) the economic impact on the claimant, (2) the extent to which the regulation interferes with investment-expectations, and (3) the character or extent of the government action).
40. *See Palazzolo*, 533 U.S. at 616.
41. 505 U.S. 1003 (1992) (holding that a regulation that deprives a property owner of all economically viable use of the property is a taking unless the state can prove that the regulation does no more to restrict use than what the state courts could do under background principles of property law or the law of private or public nuisance).
42. *See Palazzolo*, 533 U.S. at 616.

States Supreme Court granted certiorari.[43]

C. *United States Supreme Court Holds Bar to Takings Claim Unconstitutional*

The United States Supreme Court agreed that the *Lucas* claim was properly denied because construction was possible on the upland portion of the property.[44] However, the Court reversed Rhode Island's holding that the claim was not ripe and that the post-regulation acquisition of title was fatal to the takings claim.[45] The Court remanded the case for consideration of the merits of the takings claim under *Penn Central*.[46]

Justice Kennedy's majority opinion explicitly rejected a "sweeping rule . . . [where] a purchaser or a successive title holder . . . is deemed to have notice of an earlier enacted restriction and is barred from claiming that it effects a taking."[47] Justice Kennedy reasoned that the Takings Clause[48] allows a landowner to assert that a particular exercise of the state's regulatory power is so unreasonable or onerous as to compel compensation.[49] He noted that Rhode Island's strict constructive notice rule was unjustified under constitutional law,[50] traditional property law,[51]

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43. *See* Palazzolo v. Rhode Island, 531 U.S. 923 (2000) (granting certiorari).

44. *See Palazzolo*, 533 U.S. at 616.

45. *See id.*

46. *See id.*

47. *See id.* at 626. Justice Kennedy found this holding to be supported by *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). *Palazzolo*, 533 U.S. at 629.

48. U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation.").

49. *See Palazzolo*, 533 U.S. at 627. Note the similarity to a validity variance. *See supra* Part II.

50. Justice Kennedy reasoned that such a rule would allow the state to "put an expiration date on the Takings Clause." *See Palazzolo*, 533 U.S. at 627.

51. Justice Kennedy reasoned that such a rule would "work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation." *Id.*; *see also id.* at 627 (quoting *Nollan*, 483 U.S. at 834 ("[T]he prior owners must be understood to have transferred their full property rights in the conveying lot.")).

Interestingly, the United States Supreme Court's interpretation of *Nollan* suggests that the Pennsylvania Supreme Court was wrong in *In re Gro*, 269 A.2d 876 (Pa. 1970). The *Gro* court held that the self-imposed hardship rule was not unconstitutional as a restriction on the free alienability of property because of the party in interest rule. *Id.* at 880. The party in interest rule gives a potential purchaser standing to challenge the regulation prior to purchasing the property, thus supposedly preventing an unconstitutional restriction on the alienability of property. Such a holding has likely been unconstitutional since *Nollan*. Full property rights are transferred on conveyance. *See Nollan*, 483 U.S. at 834 n.2; *see also Palazzolo*, 533 U.S. at 629. It follows that property rights may not be taken by the state simply because the purchaser failed to exercise party in interest standing prior to acquisition. Some courts have recognized this fundamental requirement of property law. *See* Roeser Prof'l Builder, Inc. v. Anne Arundel County, 793 A.2d 545, 551 (Md. 2001).

and public policy.[52] The full property interest is transferred from one owner to the next, regardless of the regulatory regime in place at the time of acquisition,[53] and regulations do not become background principles of property law that inhere in the title by mere enactment or transfer of title.[54]

D. The Question Left Unanswered by the Majority

Although the *Palazzolo* majority opinion[55] rejected the use of the notice rule as a threshold bar to the takings claim under investment-backed expectations,[56] it did not explain how such facts were to be applied to investment-backed expectations.[57] The concurring Justices addressed this issue, but differed drastically in their opinions of how to analyze such facts.

Justice O'Connor wrote separately to address how notice of the regulations at acquisition should be analyzed under investment-backed expectations.[58] Justice O'Connor considered notice of the regulations a factor to be considered in shaping the reasonableness of investment-backed expectations.[59] According to Justice O'Connor, investment-backed expectations are only one non-dispositive factor to be considered in analyzing whether a regulation "goes too far."[60]

Justice O'Connor cautioned against adopting per se rules in

52. Justice Kennedy reasoned that the state may not "secure such a windfall for itself" by using transfer of title to strip away property rights. *Palazzolo*, 533 U.S. at 627. "The proposed rule is, furthermore, capricious in effect. The young owner, contrasted with the older owner, the owner with resources to hold contrasted with the owner with the need to sell, would be in different positions." *Id.* at 628.

53. *See supra* note 51.

54. *See Palazzolo*, 533 U.S. at 630.

55. Section II-A of the opinion was joined by Chief Justice Rehnquist and Justice Thomas. *See id.* at 610. Justice O'Connor wrote separately to explain how the post-regulation acquisition should be considered on remand. *See id.* at 632 (O'Connor, J., concurring). Justice Scalia wrote separately to express his disagreement with Justice O'Connor's recommended approach for remand. *See id.* at 636 (Scalia, J., concurring).

56. *See id.* at 626. Justice Kennedy rejected the theory that post-enactment purchasers cannot challenge a regulation under the Takings Clause because the states can shape and define property rights and investment backed expectations through prospective legislation. "The State may not put so potent a Hobbesian stick into the Lockean bundle." *Id.*

57. *See generally id.* Although the case was litigated as a *Lucas* categorical taking, the Court determined that the merits of the taking claim should be addressed on remand under *Penn Central*. *See id.* at 623-24.

58. *See id.* at 634 (O'Connor, J., concurring).

59. *See id.* (O'Connor, J., concurring).

60. *Id.* (O'Connor, J., concurring) (citing Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)). The other two factors are: (1) the economic impact on the claimant, and (2) the character and the extent of the regulations. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

weighing the relevant circumstances surrounding a takings claim.[61] Justice O'Connor wanted to use *Palazzolo* as a way of restoring balance to the *Penn Central* inquiry.[62] She also noted that there must be a balance between preventing the state from imposing a Hobbesian system of property rights,[63] and achieving fairness in takings jurisprudence by preventing windfalls to certain property owners.[64]

Justice Scalia wrote separately to express his disagreement with Justice O'Connor about how the regulatory regime at the time of acquisition should be considered in shaping investment-backed expectations.[65] Justice Scalia viewed the fact that a restriction existed at the time the purchaser took title as having no bearing upon the determination of whether a restriction is so substantial as to constitute a taking.[66] "The 'investment-backed expectations' that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional."[67] In Justice Scalia's opinion, potential windfalls to the purchaser who bought with notice of the regulations do not pose a problem.[68] In his view, the windfalls, if any, should go to the property owner rather than the government.[69]

Palazzolo stands for the notion that threshold bars to takings claims based on constructive notice will not be tolerated under the Fifth Amendment,[70] and regulations do not become part of the title to the property merely by the passage of title.[71] However, it is not clear how notice of regulations at acquisition shapes the investment-backed

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61. *See Palazzolo*, 533 U.S. at 635-36 (O'Connor, J., concurring).

62. *See id.* (O'Connor, J., concurring).

63. *See supra* notes 51, 56.

64. *Palazzolo*, 533 U.S. at 635 (O'Connor, J., concurring).

> If investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields too much power to redefine property rights upon passage of title. On the other hand if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost.

Id. (O'Connor, J., concurring). Note the similarity to Justice Kennedy's characterization of *Palazzolo* as preserving Lockean notions of property rights. *See id.* at 626.

65. *See id.* at 636 (Scalia, J., concurring).

66. *See id.* at 637 (Scalia, J., concurring).

67. *Id.* (Scalia, J., concurring).

68. *See id.* at 636 (Scalia, J. concurring) ("This can, I suppose, be called a windfall—though it is not much different from the windfalls that occur every day at stock exchanges or antique auctions, where the knowledgeable (or the venturesome) profit at the expense of the ignorant (or the risk averse).").

69. *See id.* at 637 (Scalia, J., concurring).

70. *See id.* at 626-27.

71. *See id.* at 627-30. So long as the regulations are not background principles of property law.

expectations of the property owner for purposes of a *Penn Central* takings claim. Nonetheless, because notice of the regulations at acquisition may not bar the takings claim, a constitutional safety-valve must not be sealed by the same expedient.

IV. Analysis of Pennsylvania's Self-Imposed Hardship Rule After *Palazzolo*

The United States Supreme Court's rejection of the notice rule as a bar to regulatory takings requires an end to the application of the self-imposed hardship rule in Pennsylvania to deny variances. If the takings claim may not be barred by notice of the regulations, the constitutional safety valve must be allowed to operate regardless of whether the property owner acted with notice of the regulations. The determination of whether a variance is necessary must focus on the effect of the regulations on the property and the property owner, rather than the on the regulatory regime in place at the time of acquisition of the property. Although the self-imposed hardship rule may still bar a traditional variance, the ultimate question of whether a variance is necessary cannot be determined by the rule.

A. The Relationship Between Regulatory Takings and Variances

The Takings Clause is intended to "prevent the 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."[72] Property owners start out with the unrestricted right to use their land as they see fit. Zoning regulations create a public good by imposing limitations on the use of private property.[73] This regulation can rise to the level of a taking[74] if it is not reasonably necessary for a substantial public purpose,[75] or if it has an unduly harsh impact upon the owner's use of the property.[76] Even regulations that serve a substantial public purpose, such as zoning,[77] may amount to a taking as they are applied to private

72. *Id.* at 618 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

73. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). *See generally* JUERGENSMEYER & ROBERTS, *supra* note 1, §§ 3.13-.20.

74. *See, e.g.*, Agins v. Tiburon, 477 U.S. 255, 260 (1980) (noting that zoning may effect a taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 138 n.36 (1978)); Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928) (holding that the zoning power, while broad, is not unlimited in that the zoning must substantially advance legitimate state interests).

75. Zoning meets the public purpose prong of this test. *See Palazzolo*, 533 U.S. at 627.

76. *See id.* at 634 (citing Yee v. Escondito, 503 U.S. 519, 523 (1992)).

77. *See id.*

property.[78]

Zoning plans permit variances to prevent unconstitutional takings when, owing to special conditions, a literal enforcement of the ordinance would result in an unnecessary hardship or when the regulation would be confiscatory without a variance.[79] The traditional standard generally prevents regulatory takings when the regulation would have an unduly harsh impact on the private property. However, the Supreme Court's recent holding requires a change to the way Pennsylvania applies its zoning law if the variance is to have the ability to act as a constitutional safety valve.

The fact that a property owner had notice of the regulation when the owner violated the zoning ordinance, or sought to obtain a variance after a speculative or distress purchase, prevents a traditional variance under the self-imposed hardship rule.[80] Even if the self-imposed hardship rule would bar a traditional variance under these factors, these factors do not bar a takings claim.[81] Thus, in order for a variance to serve its purpose as a constitutional safety valve, the validity variance must be granted if the regulations amount to a taking as applied.[82] This analysis must be informed by United States Supreme Court takings jurisprudence if it is to prevent an unconstitutional taking.[83]

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78. *See* Ferry v. Kownacki, 152 A.2d 456, 458 (Pa. 1959); Jacquelin v. Horsham Township, 312 A.2d 124, 126 (Pa. Commw. Ct. 1973); *see also In re* Key Realty Co., 182 A.2d 187, 190-99 (Pa. 1962) (Bell, C.J., concurring).

79. *See* JUERGENSMEYER & ROBERTS, *supra* note 1, § 5.14; RYAN, *supra* note 7, § 6.1.6. The existence of such a safety valve was a consideration in upholding the constitutionality of zoning. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 383 (1926).

80. *See, e.g.*, Boyd v. Wilkins Township Bd. of Adjustment, 279 A.2d 363 (Pa. Commw. Ct. 1971) (denying variance to property owners who unknowingly constructed porch in violation of side-yard requirements); *In re* Mont-Bux, Inc., 12 Pa. D. & C.3d 266 (Ct. Com. Pl. Bucks County 1977), *aff'd*, 397 A.2d 860 (Pa. Commw. Ct. 1979) (adopting the opinion of the court below denying variance after speculative purchase); *see also* RYAN, *supra* note 7, § 6.2.11. *But see, e.g.*, Myron v. City of Plymouth, 562 N.W.2d 21 (Minn. Ct. App. 1997) (rejecting notice rule as a bar to a variance, but denying taking claim in the basis of the notice rule).

81. Notice of the regulations does not bar the takings claim. *See Palazzolo*, 533 U.S. at 626-30. It seems safe to assume that building on one's own property or making a capitalistic purchase would in no way bar a takings claim.

82. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985).

> A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired . . . . Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred.

Id.

83. Pennsylvania has recognized the application of the United States Supreme Court's takings jurisprudence in determining the validity of municipal land use

A *Lucas* categorical taking occurs when a regulation deprives a property owner of all economically viable use of the property, and the regulations are more onerous than background principles of property law.[84] This analysis is not new to Pennsylvania zoning law. Validity variances are granted to prevent the destruction of all real value of the property.[85] This occurs when the property as zoned has no value or only distressed value.[86] Presumably, Pennsylvania's threshold for this variance involves a higher denominator than would be required for a *Lucas* taking and therefore would prevent *Lucas* takings.[87]

The real departure from current Pennsylvania zoning law occurs in the *Penn Central* taking. The *Penn Central* analysis looks primarily, but not exclusively, to three factors: the economic impact on the claimant, the extent to which the regulation interferes with investment-backed expectations, and the character or extent of the government action.[88]

The ad hoc equitable analysis applies even with notice of the regulations.[89] However, whether notice of those regulations factor into the analysis of investment-backed expectations was left unanswered by the Court.

B. *How Should Pre-Existing Regulations Be Analyzed in Determining Whether a Variance Is Necessary To Prevent a Regulatory Taking?*

The *Palazzolo* majority did not address how the existence of the regulations at the time of acquisition should be analyzed in determining whether the property owner had reasonable investment-backed expectations. However, the concurring opinions of Justices O'Connor and Scalia may be instructive as to how lower courts might view post-

ordinances. *See* United Artists' Theater Circuit, Inc. v. City of Philadelphia, 635 A.2d 612, 614 (Pa. 1993).

84. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992). It is safe to assume that zoning is not a background principle of property law in Pennsylvania, as the Supreme Court of Pennsylvania has recognized that zoning can rise to the level of a *Lucas* taking. *See* Ferry v. Kownacki, 152 A.2d 456, 458 (Pa. 1959).

85. *See Ferry*, 152 A.2d at 458.

86. *See id.*

87. The right of a landowner to obtain a validity variance to prevent compensation "swallowed" the concept articulated in *Nectow v. Cambridge*, 277 U.S. 183 (1928), that zoning is circumscribed by constitutional limitations. RYAN, *supra* note 7, § 3.62.

88. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

89. *See* Palazzolo v. Rhode Island, 533 U.S. 606 (2001). For purposes of this comment it must be assumed that *Palazzolo* was not a holding limited only to constructive notice through transfer of title by operation of law. *See id.* at 614. This fact alone could undermine nearly any application of the case if courts choose to construe the holding so narrowly. However, given Justice O'Connor's concern with preventing windfalls by doing away with the notice rule, *see id.* at 632-36 (O'Connor, J., concurring), and the lack of limiting language in Justice Kennedy's opinion, such a narrow holding was probably not intended by the Court.

regulation acquisition under investment-backed expectations, and thus how those expectations may be viewed in assessing the merits of a variance request. Although the character of a zoning ordinance probably favors the government because it likely provides reciprocal benefits to the property owner,[90] the economic impact on the claimant may not.[91] Furthermore, any speculative purchase of real estate likely carries with it some investment-backed expectation, as would any improvement to a property owner's house. The question is whether those investment-backed expectations are reasonable.[92]

Justice O'Connor's approach would allow tribunals[93] to use the post-regulation acquisition to shape the reasonableness of investment-backed expectations.[94] This approach is in line with *Penn Central*'s ad hoc equitable inquiry.[95] If a party seeks a variance that may prevent a regulatory taking, the variance cannot be barred simply by application of the notice rule.[96] However, under this approach, notice of the regulations could be a significant factor in the ad hoc equitable inquiry.[97] Thus, the equity of the circumstances may prevent the validity variance under Justice O'Connor's approach.

Through this equitable analysis, a knowing violator of zoning regulations will likely fail the *Penn Central* test for a taking, and, if so, will not be entitled to a validity variance. However, the situation may be different for a property owner who was merely on constructive notice of

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90. *See id.* at 627. *But see In re* Key Realty Co., 182 A.2d 187, 190 (Pa. 1962) (Bell, C.J., concurring) (stating that the challenged regulation is not providing a reciprocal benefit in that the claimant suffers the social costs of the apartment housing, but does not receive the private benefits of such zoning); Best v. Zoning Bd. of Adjustment, 141 A.2d 606, 614 (Pa. 1957) (Bell, C.J., dissenting in part).

91. For example, while side-yard requirements provide a public benefit that is usually reciprocal to the owner, the economic impact on the claimant for having to remove a structure inadvertently constructed in side-yard open space under the self-imposed hardship rule may be very significant. *See* Boyd v. Wilkins Township Bd. of Adjustment, 279 A.2d 363 (Pa. Commw. Ct. 1971).

92. Although Justice O'Connor sought to "restore balance" to the *Penn Central* inquiry, she recognized that investment-backed expectations historically have garnered strong consideration in the *Penn Central* analysis. *See Palazzolo*, 533 U.S. at 635-36 (O'Connor, J., concurring).

93. The author uses "tribunals" to refer to both zoning boards and the courts, as adjudicatory bodies. *See* BLACK'S LAW DICTIONARY 1512 (7th ed. 1999).

94. *See Palazzolo*, 533 U.S. at 635-36 (O'Connor, J., concurring).

95. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

96. *See Palazzolo*, 533 U.S. 606.

97. *Id.* at 635-36 (O'Connor, J., concurring) ("Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred."); *see also* Twigg v. Town of Kennebunk, 662 A.2d 914 (Me. 1995) ("[A] purchase with knowledge does not preclude the granting of a variance and, at most, is considered a nondeterminative factor in consideration of a variance.").

the zoning, violated the ordinance by mistake, and would otherwise suffer substantial financial detriment if he or she was forced to remove the nonconforming structure.[98]

The application of *Palazzolo* to the speculative purchaser, who would not get a variance under the self-imposed hardship rule, strikes at the core of the disagreement between Justices O'Connor and Scalia. Under Justice O'Connor's approach, the speculator would receive a validity variance only if equity so required. The tribunal could consider the fact that there was notice of the regulations, and the speculator was simply seeking to profit from a variance. However, Justice Scalia's approach would likely yield a different result.

Justice Scalia's approach does not recognize the regulations that were in place at the time of acquisition.[99] This is a slight departure from the ad hoc inquiry of *Penn Central*. However, it avoids the problem of forcing the purchaser to account for potentially unconstitutional regulations when purchasing the property. By not taking the regulations into account, as Justice Scalia suggests, the tribunal will not have to consider whether the purchaser was speculating on obtaining a variance or whether speculation on real estate and the potential unconstitutionality of the zoning regulations is somehow inequitable.[100] This approach also avoids analyzing the adequacy of consideration.[101] Justice Scalia's approach would eliminate the use of the self-imposed hardship rule to deny variances because the pre-existing regulations would have no effect on the reasonableness of the property owner's investment-backed expectations.

Justice Scalia's analysis would not prevent even knowing or mistaken zoning violators from receiving a variance if the regulations were unduly burdensome. The sole question under Justice Scalia's approach is whether the application of the zoning ordinance to the particular property rises to the level of a *Penn Central* taking.

This approach might yield windfalls to the speculative purchasers,

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98. *See* Boyd v. Wilkins Twp. Bd. of Adjustment, 279 A.2d 363 (Pa. Commw. Ct. 1971) (denying variance and requiring that the owner remove a porch mistakenly built into the side-yard open space).

99. *See Palazzolo*, 533 U.S. at 637 (Scalia, J., concurring).

100. Given the language in his concurrence in *Palazzolo*, Justice Scalia would likely disagree with the Pennsylvania approach, which seems to chastise capitalistic speculation on real estate: "The 'investment-backed expectations' that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional." *Id.* (Scalia, J., concurring). *Compare id.* (Scalia, J., concurring) *with In re* Gro, 269 A.2d 876 (Pa. 1970), *and* Harper v. Zoning Hearing Bd., 434 A.2d 381 (Pa. Commw. Ct. 1975).

101. *See, e.g.*, JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 4.4 (4th ed. 1998) ("As a general rule the courts do not review the adequacy of consideration. The parties make their own bargains.").

in that they could purchase property at distress prices and then seek a variance based on *Penn Central*.[102] Although some courts may be troubled with what seems like an inequity, they need not be. As Justice Scalia noted, it is far better to have these windfalls go to a savvy investor than a government entity that enacts unconstitutional regulations.[103]

It is important to understand that under either concurring Justice's approach, the municipality has the option of granting a variance or compensating the property owner for a taking. This promotes economic efficiency. If the variance is not worth the effect on the public, then the public must compensate the private property owner for the public good. This would not "in effect put an end to all zoning," as feared by the Pennsylvania Supreme Court.[104] The municipality will choose the compensation option over granting the variance only when the public benefit of the regulation exceeds the private costs of the taking to the property owner. Fairness to the private property owner will be achieved by compensating him or her for the government-mandated gift to the public and incentives will be created for the enforcement of only constitutional and economically efficient zoning ordinances. This efficiency benefit applies whether or not the purchaser was speculating on attaining a variance.

C. Palazzolo*'s Effect*

Despite the lack of clarity as to how post-regulation acquisition may be considered in shaping investment-backed expectations, and thus how the grant or denial of a validity variance must be analyzed after *Palazzolo*, it is clear that the self-imposed hardship rule is no longer the final determination of whether a variance is necessary. A regulatory taking may occur despite the factors that would bar the traditional variance under the self-imposed hardship rule. In order to preserve the constitutionality of Pennsylvania's zoning regulations, a validity variance must be considered, using constitutional takings jurisprudence, when the self-imposed hardship rule is applied to deny a traditional variance.

V. Conclusion

When the government restricts the use and enjoyment of private property through zoning, the value of the restricted private property is

102. *See In re* Mont-Bux, Inc., 12 Pa. D. & C.3d 266 (Ct. Com. Pl. Bucks County 1977), *aff'd*, 397 A.2d 860 (Pa. Commw. Ct. 1979) (adopting the opinion of the court below).

103. *See Palazzolo*, 533 U.S. at 636-37 (Scalia, J., concurring); *see also* Roeser Prof'l Builder, Inc. v. Anne Arundel County, 793 A.2d 545, 547, 552 (Md. 2002).

104. Best v. Zoning Board of Adjustment, 141 A.2d 606, 612 (Pa. 1957).

affected. The United States Supreme Court's rejection of the notice rule and the notion that regulations inhere in the transfer of title demand a change in the application of Pennsylvania zoning law. When the self-imposed hardship rule is invoked to prevent a traditional variance, a regulatory taking may still occur because the factors that prevent the traditional variance under the self-imposed hardship rule do not prevent a taking after *Palazzolo*. Thus, when the self-imposed hardship rule is used to deny a variance, the zoning hearing board or court must also consider whether a validity variance or compensation is necessary to preserve the constitutionality of the zoning ordinance. Only in this way can the constitutionality of the zoning be preserved when the self-imposed hardship rule is applied.