LANDLOCKED ON THE COAST FOR 40 YEARS, ANTHONY PALAZZOLO HAS BATTLED R.I. OVER PROPERTY RIGHTS, ALL THE WAY TO THE SUPREME COURT

Anthony Flint, GLOBE STAFF

WESTERLY, R.I. - Buying property at the beach to make some money for his family - that's all it was, back in 1959, when junkyard owner Anthony Palazzolo purchased 18 acres on Winnapaug Pond that had been zoned for a residential subdivision years before.

Sure, it was mostly wetlands, but everybody was filling and dredging back then, including the government. A breachway was cut just down Atlantic Avenue, next to the newly minted Misquamicut State Beach.

But then the world changed, and protecting coastal ecosystems became the law of the land. So a simple real estate deal turned into a 40-year battle, which the son of Sicilian immigrants took all the way to the US Supreme Court.

Four decades - half his life - and still not enough time for the odyssey to end. In its decision last year, the Supreme Court ruled that Palazzolo, now 82, had a right to argue that the state had effectively taken his land by not letting him build on it, requiring compensation under the US Constitution. But the case was sent back to the Rhode Island courts for yet another review using a different set of standards.

It was hardly the knockout blow he had hoped for, but Palazzolo, the great East Coast hope of the national property rights movement, fights on. A regular guy caught in one of the most complex areas of law today, he continues to spend his retirement steeped in land-use law, freely quoting Supreme Court rulings as he kicks away broken crab shells on the sandy marshland that has, quite unintentionally, defined his life.

"I never got one penny off this land. All I got is tax bills," he said on a recent walk through the property, gulls skimming over the shallow, salty water before him. "You think those guys fighting the Revolutionary War wanted us to have to ask the next person, "Can I do this with my land?' [Expletive]. They were tough."

An unabashed New Deal Democrat, Palazzolo is an unlikely champion of the property rights cause, which is generally associated with conservatives and wide-open spaces in the West. He appreciates the government lending a hand to people in need - but not when they give others the runaround, he said.

Property rights arguments are being invoked across the country, particularly as local and state governments experiment with
initiatives to control development in the name of "smart growth." Today, both '70s-era environmental regulations and planning techniques such as the "urban growth boundary" in Portland, Ore., are prompting landowners to say their property has effectively, and unfairly, been taken.

"I'm just the vehicle, you know," Palazzolo said. "This isn't just about me, or even about this land. What happens to me will happen to everyone in Rhode Island. They could go downtown and take a bank building down because it blocks the sun.

"It just doesn't make sense, you know, in terms of street smarts," Palazzolo said.

Peppering his arguments with obscenities, Palazzolo is the grandfather at the Thanksgiving table who argues a point so forcefully, so colorfully, it's easier just to agree with him. With a face as creased as an old catcher's mitt, he is a cross between John Updike and Anthony Quinn, slouching slightly, his salt-and-pepper hair showing no signs of receding. He displays no weariness and at times seems to enjoy the fight as an intellectual exercise. Except that it's gone on for so long.

"He was 37 when he bought this land - he was my age," said his son, Anthony Palazzolo Jr., a lawyer who patiently corrects his father when he doesn't get the legal terms precisely right. "Look at him," the son said, nodding to Palazzolo Sr. a few steps ahead, hands thrust in corduroys, a weathered cap on his head. "Half a lifetime, and he's still going."

There have been many twists and turns between the time Anthony Palazzolo bought those 18 acres and the Supreme Court ruling, but the basic facts are these: Building proposals for the land were rejected by various agencies before and after the passage of state coastal wetlands regulations in 1971.

Finally, Palazzolo demanded Rhode Island pay him $3 million for the property, alleging that the regulations constituted a regulatory "taking." The Fifth Amendment of the US Constitution says that the government shall not take property for public purposes without just compensation.

Palazzolo argued that he was backed into a corner and could gain nothing from the land - a "wipeout" as defined by the Supreme Court's Lucas case in 1992, in which an owner was barred from using his land.

The state argued, among other things, that Palazzolo still had one lot on which he could legally build.

Justice Anthony Kennedy, writing the majority opinion, said Palazzolo had a right to press his case, even though he was on "notice" that the wetlands regulations were in place. That in itself was significant in the world of property rights law: Taking title to land after regulations are in place doesn't prohibit anyone from making a takings claim.
But the justices did not see a total wipeout in economic value, and sent the case back to Rhode Island for review under a more demanding series of tests used when land has most of its value taken away, from the 1978 case of Grand Central Station, owned by Penn Central Transportation Co.

Clarifying why a proposal to build over Grand Central Station was denied, the justices said that future cases should be evaluated for the economic impact of the regulation in question, the expectations that the landowner had, and the "character" of the governmental action.

Because an application for a septic system on the one buildable lot has since been rejected, Palazzolo argues he's got more proof than ever that he's been economically wiped out. His current lawyer, Michael Malamut of the New England Legal Foundation, says there was a regulatory taking either under the Lucas or Grand Central Station case standards; he hopes the Supreme Court will take the case back, though once the high court deals with a case it seldom gets a second chance.

"What's at stake here is whether Tony will be able to realize the dream of his retirement," Malamut said. "But from a public policy perspective, a number of constitutional questions remain open. It is being very closely watched."

Rhode Island Attorney General Sheldon Whitehouse, who argued the case at the Supreme Court and who ran unsuccessfully for governor this year, said the battle is about protecting Winnapaug Pond from inappropriate and damaging development. Comparing Palazzolo to Don Quixote, he promises the state will fight him for as long as it takes.

"We wouldn't dream of being party to a settlement that endorses something that has been found to be a public nuisance and that threatens the survival of one of Rhode Island's coastal ponds," Whitehouse said.

"These are not people you can sit down and talk with," said Palazzolo, picking over a salad at the Westerly Friendly's. - "They just keep rubbing my nose in it."

His land won't be developed at this point, he said. It will probably be open space forever. The question is who will pay for that.

Being back in the state court system doesn't bother Palazzolo, even after he's stood in front of TV cameras on the steps of the Supreme Court. But he concedes it would have been more satisfying if the high court had issued a clearer ruling, to make his a truly landmark case. In the months leading up to the Supreme Court ruling, he had a Web site named after him. He was touted as the Rosa Parks of property rights.

And then, a muddled ruling, eclipsed in significance a few months later by a case out of Lake Tahoe that more clearly sided with...
government's rights to control development.

Having secured some measure of fame, Palazzolo is left with the education of the experience - immersed in a staggeringly complicated realm that judges and lawyers have trouble navigating. It provides little solace.

"I wanted to build a nice project," Palazzolo said. "The kids had to go to school. We had to eat. It wasn't like this, the way it is now - I wouldn't have bought the frigging land."

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SIDEBAR: GIVE AND TAKE The case of Anthony Palazzolo of Westerly, R.I., came at the end of a quarter-century of rulings by the US Supreme Court, which has wrestled with the notion that some land-use and environmental regulations are so severe they are equivalent to a government taking of land, requiring "just compensation" under the US Constitution's Fifth Amendment. The rulings spell out the tests that property owners need to meet to establish that a taking has occurred, all the while respecting government's need to have rules and regulations on how land is developed.

* Penn Central v. New York City (1978) established an ad-hoc, case-by-case test considering economic impact, the landowner's expectations for making money, and the character of the government action, to determine if a regulatory taking has occurred.

* First English Church v. County of Los Angeles (1987) established that property owners will receive compensation when a regulation becomes a taking.

* Nollan v. California Coastal Commission (1987) held that any time the government imposes a condition or restriction on development, it must clearly serve the government's expressed goals.

* Lucas v. South Carolina Coastal Council (1992) established that a regulation that denies a property owner of all economically viable use - a complete wipeout - is virtually always a taking.

* Dolan v. City of Tigard (1994) held that an exaction, imposed on a developer as a condition of approval, must be roughly proportionate to the impact of the development.

* Palazzolo v. Rhode Island (2001) established that a property owner is not barred from making a regulatory-takings claim just because the regulation was in effect when he took title to the property.

* Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency (2002) established the need for government to use land-use planning tools, including temporary moratoriums, and confirmed the case-by-case approach for reviewing property rights cases established in Penn Central.