SUPREME COURT OF NEW JERSEY

THOMAS GRIEPENBURG and CAROL GRIEPENBURG, Plaintiffs-Respondents, v. TOWNSHIP OF OCEAN, STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and STATE OF NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS, Defendants-Petitioners,	Docket No. 073290 On Petition for Certification for Review of the Final Judgment of the Superior Court of New Jersey Appellate Division Docket No. A-5640-11T4 Civil Action

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS-RESPONDENTS

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INTRODUCTION AND SUMMARY OF ARGUMENT

More than 200 years ago, Lord Coke summarized the common law of property at the time of our nation's founding when he asked rhetorically, "[w]hat is the land but the profits thereof?" *See* 1 Edward Coke, *The Institutes of Laws of England*, ch. 1 § 1 (1797) (1st Am. Ed. 1812). The United States has hewn closely to this famous dictum from its beginnings. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993) ("[A]n essential principle" of American law is that "[i]ndividual freedom finds tangible expression in property rights."). And in protecting property rights against government overreach, the United States Supreme Court held nearly a century ago that "[t]he general rule at least is that while property may be regulated to a certain extent, *if regulation goes too far* it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (emphasis added).

This is a case where regulation went too far.

Plaintiffs-Respondents Thomas and Carol Griepenburg own approximately 31 acres of land (the property) in the Township of Ocean (Ocean). *Griepenburg v. Township of Ocean*, No. L-1420-07, 2013 WL 4554621, at *1 (N.J. Super. App. Div. Aug. 29, 2013). The property is contiguous and is located on the south side of County Route 532, directly east of the Garden State Parkway. *Id.*

Except for the Griepenburgs' residence covering approximately two acres in the eastern-most section of the property, the majority of the property is undeveloped woodland. *Id.* The property does not contain any environmentally distinct features and no threatened or endangered species are located on the property or have been sighted on the property. *Id.* Prior to rezoning in 2006, the property was located in two different zones, C-3 Commercial and R-2 Residential. *Id.* The desired commercial

uses included retail space, offices, medical facilities, and hotels. *Id.* Prior to rezoning, plaintiffs had entertained offers to sell their property for use as a hotel site. *Id.*

Beginning in 2004, Ocean became interested in concentrating development in a town center and slowing development outside the center. *Id.* Ocean requested that the State Planning Commission change its planning area boundaries in the State Development & Redevelopment Plan (State Plan) to redesignate the area near and including the Griepenburgs' property from "developed suburban" to "environmentally sensitive." *Id.* at *2.

On September 21, 2006, Ocean adopted Ordinance 2006-34 (ordinance) which establishes the boundaries, design regulations, and standards for a new environmental conservation zone (EC Zone), including a requirement that development within the zone not surpass more than one unit per twenty acres. *Id.* The ordinance states: "It is the intent of this area to act as the low density environs of the center. Given the environmentally sensitive characteristics for the area, only very low intensity uses are allowed. Protection of the area is the principle objective of the EC district." *Id.* Other than Ocean's *ipse dixit*, the ordinance offers nothing to substantiate the environmentally sensitive characteristics of the new EC zone. *Id.* Ocean later adopted two ordinances that made minor amendments to Ordinance 2006-34. *Id.*

The Griepenburgs' property falls within this new EC zone. *Id.* Since they own 31 acres and their home sits on the property, the new zoning precludes any further development plans for the property. *Id.* The land surrounding the subject property consists mostly of residential lots that do not meet that 1:20 ratio. *Id.* The Griepenburgs challenged the enactment of the ordinances that rezone their property. *Id.* at *1. They, along with the owner of 26 acres directly north of Route 532 (across the street from the Griepenburgs' property), filed identical seven-count complaints alleging

that Ocean had illegally denied use of their land via the downzoning, which effected a regulatory taking, and an illegal spot zoning. *Id.* They cited state and federal law to support their legal causes of action. *Id.*

When Ocean purchased the property north of Route 532, that owner dismissed its case and the Griepenburgs were left to continue on with this litigation. *Id.* After a four-day trial, the trial court concluded that Ocean did not act unlawfully when it passed its ordinances that rendered the Griepenburgs' property undevelopable. *Id.* at *3. In the trial court's eyes, Ocean had engaged in proper "smart growth and planning." *Id.* The court further concluded that Ocean reasonably restricted development to one unit per twenty acres so as to achieve protections of the open space it wanted protected. *Id.* The trial court then granted summary judgment in favor of Ocean on the Griepenburgs' takings claims because the Griepenburgs did not apply for a variance before bringing suit, rendering the claims premature. *Id.*

The appellate division reversed. *Id.* at *1. The court found the ordinances invalid as applied to plaintiffs' property because the downzoning effected by the ordinances was not required to serve the stated purposes of the ordinances and did not reflect reasonable consideration of existing development in the areas where their property was located. *Id.* at *5-*7. The court concluded that in light of the existing development surrounding the Griepenburgs' property, Ocean Township did not show that the limitation of development to one unit per twenty acres achieved the stated purpose of the ordinances; instead, the limitation was arbitrary, unreasonable, and illegal. *Id.* at *6. If Ocean wanted to preserve open space, then it had to pay the Griepenburgs fair-market value for their property to fulfill that goal. *Id.*

Although it "sometimes is difficult to fix boundary stones between the private right of property and the police power," *see Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 355 (1908), this is not one of those "difficult" cases.

Ocean's ordinances went too far because they downzoned the Griepenburgs' commercially and residentially zoned property to an effectively undevelopable environmentally sensitive zoned property without evidence to support such a determination. 2013 WL 4554621, at *6. Ocean thereby left the Griepenburgs with more than twenty-nine acres of property that they could not develop, despite the fact that they had planned on developing the formerly valuable property.

This Court should affirm the decision below.

ARGUMENT

I

THE TAKINGS CLAUSE PROTECTS INDIVIDUALS FROM BEARING PUBLIC BURDENS THAT SHOULD BE BORNE BY THE GENERAL PUBLIC

The Fifth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897), provides that "private property [shall not] be taken for public use, without just compensation." The Supreme Court of the United States has repeatedly observed that the purpose of this provision is "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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Ocean's downzoning of the property would make the Griepenburgs bear the burden of protecting open space on behalf of the entire community. If Ocean wants the Griepenburgs' land, it must pay for it.

Ocean never put on evidence to support its purported concern about "environmentally sensitive" areas, and development of the Griepenburgs' property. *Griepenburg*, 2013 WL 4554621, at *6. Instead, Ocean first decided that it wanted open space, and then created the means to acquire that open space by designating it "environmentally sensitive." Downzoning the Griepenburgs' property without evidence supporting an environmental justification for that downzoning, and in light of the development in the area, is unreasonable and arbitrary. *See Bailes v. Township of East Brunswick*, 380 N.J. Super. 336, 348 (App. Div. 2005) (downzoning of permitted densities from one unit per one or two acres to one unit per six acres was unreasonable and arbitrary in light of already-existing development in the township, and not justified by any environmental need). Thus, the lower appellate court correctly declared the ordinances invalid.

The government cannot pass a regulation that limits a party's land use in order to protect open space and then rely upon environmental protection as a post-hoc justification for the taking. *See Bam, Inc. v. Bd. of Police Comm'rs*, 9 Cal. Rptr. 2d 738, 740 (Cal. App. 2 Dist. 1992) ("[f]indings are not supposed to be a post hoc rationalization for a decision already made"). Throughout the country, the courts have steadfastly refused to allow local governments to force individual property holders to bear the costs of maintaining open space on behalf of the general public.[1]

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[1] The government cannot make an individual property owner supply public goods, the needs for which he is not responsible for creating. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841 (1987) ("The Commission may well be right that [beach access along the coast] is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization.").

For example, several Pennsylvania court decisions invalidated lot-size and unit-density restrictions based on the lack of a substantial relationship between the restriction as applied and the asserted purpose for the restriction. *See, e.g.*, *Hock v. Bd. of Sup'rs of Mount Pleasant Twp.*, 622 A.2d 431, 434-35 (Pa. Commw. Ct. 1993) (three-acre minimum held unreasonable as applied, and thus unconstitutional, since not supported by desire to protect farmland, concerns over soil or topography, or desire to protect rural character of township); *Borough of Edgewood v. Lamanti's Pizzeria*, 556 A.2d 22, 24 (Pa. Commw. Ct. 1989) (contiguous 30-acre area necessary for restaurant held unreasonable as applied to plaintiff's property, and thus unconstitutional, because of lack of evidence supporting that this rule was necessary to protect health, safety, or welfare); *Hopewell Twp. Bd. of Sup'rs v. Golla*, 452 A.2d 1337, 1343-44 (Pa. 1982) (allowing maximum of five one and one-half lots regardless of size of tract held unreasonable and therefore unconstitutional because limitation is not justified by public interest in preserving farmland).

In *Hock*, the landowner owned 33.3 acres of land in an "Open Space" zoning district and sought approval to develop four one-acre lots. The township was divided into several zoning districts; three permitted single-family dwellings as of right and one permitted them as a conditional use. *Hock*, 622 A.2d at 432-33. The Open Space district required a minimum lot size of three acres and two hundred feet of frontage per lot containing a single-family dwelling. *Id.* The Pennsylvania appellate court rejected the restriction as applied to the landowner because preserving farmland, agriculture, rural nature of the community, and controlling pollution—the stated rationales of the Open Space zoning scheme—bore no rational relationship to the minimum-lot size requirement challenged in the case. *Id.* at 434-35.

Hock invalidated a zoning ordinance far less stringent than the zoning ordinances in this case, which allows only one unit per twenty acres. In both cases, the government sought to regulate in order to preserve open space under the guise of other rationales. In *Hock*, the government claimed the need to protect farmland and agriculture, and to combat pollution; here, the government points to environmental impacts. Government may choose to preserve open space, in an above-board and constitutional manner—*i.e.*, by paying for it. *Nollan*, 483 U.S. at 842 (holding that if state wants easement across private property for public purpose, state must pay for it).

II

THE GRIEPENBURGS' CLAIMS ARE RIPE

Should this Court disagree and conclude that the ordinances are valid, then it follows that the ordinances effect an uncompensated taking of the Griepenburgs' property. Ocean argues that the Griepenburgs must apply for a zoning variance before they bring their takings claim. That is incorrect as a matter of law for the reasons articulated below.

A. Federal Law Does Not Require Exhaustion of Remedies Where a Final Decision Exists and Administrative Procedures Will Not Change the Result

When the impact of a law on property use is known to a "reasonable degree of certainty" or where the government has no meaningful discretion to reduce a land use law's impact, a "final decision" exists, and a takings claim is ripe for review on the merits. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001). Courts exempt property owners from remedial requirements that would simply delay entrance into court. *See DLX, Inc. v. Kentucky*, 381 F.3d 511, 518-19 (6th Cir. 2004) (property owner need not exhaust remedial procedures and declaratory relief in order to raise a takings claim); *see also Rumber v. District of Columbia*, 487 F.3d 941, 944 (D.C. Cir. 2007) (a

federal takings claimant is not required to pursue state remedial procedures); *Associacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 18 (1st Cir. 2007) (requiring a claimant to pursue "general remedial provisions . . . as a prerequisite to a federal takings claim effectively would impose an exhaustion requirement" that federal law does not demand).

In short, a Fifth Amendment takings claim is ripe for litigation even if there is some available, potential state administrative remedy. *DLX*, 381 F.3d at 519; *see also Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 739 (1997). This is consistent with exhaustion doctrine over a broad class of constitutional rights. *See generally*, *Patsy v. Fla. Bd. of Regents*, 457 U.S. 496, 518 (1982) (there is no requirement to exhaust administrative remedies before bringing a 42 U.S.C. § 1983 claim).

A landowner need not pursue "unfair or repetitive" administrative procedures. *Palazzolo*, 533 U.S. at 621 ("Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures . . . ."). While there is no bright line for this standard, it at least means that "the requirements [for] ripeness . . . cannot be so extended as to become more exhaustive than the substantive issues presented by the taking claim itself." *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 386 (1988). In other words, a property owner need not litigate the merits of the takings claim at the administrative level as a condition of taking his claim to court. *See, e.g.*, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698-99 (1999) (landowner need not show denial of all use at agency level by submitting progressively less intense development applications).

B. The Griepenburgs Need Not Apply for a Variance

The ordinances themselves identify, to a reasonable degree of certainty, the impacts on the Griepenburgs' ability to use their property. *Palazzolo*, 533 U.S. at 620. After all, it cannot be disputed that the ordinances redesignated the Griepenburgs' formerly developable property into a preservation area. *See Griepenburg*, 2013 WL 4554621, at *6. Indeed, this outright prohibition against development is exactly what Ocean intended the ordinances to do: to preserve and conserve the natural resources of the area by requiring low-density development where the Griepenburgs' property lies. *Id.* at *2 (citing the statement of legislative intent contained within the ordinances that gave rise to this litigation).

Therefore, there is nothing speculative about how the ordinances apply to the use of the Griepenburgs' property: it bars any development. If the matter ended there, the legal prohibition on Griepenburgs' property use claim would clearly be justiciable. *Bayou Des Familles Dev. Corp. v. United States*, 130 F.3d 1034, 1040 (Fed. Cir. 1997) (denial of a permit was ripe "because the denial was based on an unchanging fact—the inclusion of [taking claimant's] lands as part of a national park protection zone").

But Ocean claims that the Griepenburgs must avail themselves of the township's administrative variance process. As already shown, that is incorrect according to federal takings law; and, as discussed in the Griepenburgs' brief in opposition to Ocean's petition for certification at pages 17-20, it is incorrect as a matter of state law, as well. *See also TWC Realty P'ship v. Zoning Bd. of Adjustment of Twp. of Edison*, 315 N.J. Super. 205, 212 (Ch. Div. 1998), *aff'd*, 321 N.J. Super. 216 (App. Div. 1999) (requirement to exhaust administrative remedies does not reflect hard and fast rule where matter primarily involves legal issues).

Ocean complains that the sky will fall if any development occurs on the Griepenburgs' property, but then asserts that the board of adjustment could grant a variance so as to allow the very same development that Ocean said will make the sky fall. Ocean's claim that a variance is technically available cannot be squared with its policy decisions, reflected in the ordinances, which would render a variance a near impossibility. Federal law and New Jersey law recognize that the Griepenburgs need not apply for a zoning variance where that process would be useless. If this Court concludes that the ordinances are valid, then the Court must also conclude that the Griepenburgs' takings claims are ripe and remand the case so as to allow the Griepenburgs to demonstrate the amount of compensation that Ocean owes them for taking their property.

CONCLUSION

This Court should affirm the appellate division's decision invalidating the ordinances. Alternatively, if this Court determines the ordinances are a reasonable restriction as applied to the Griepenburgs' property, then the Court should further determine that the ordinances result in a taking of the Griepenburgs' property without the payment of just compensation. If the Court reaches that conclusion, then it is respectfully suggested that the Court should remand for a trial on the amount of just compensation due to the Griepenburgs.

DATED: April 18, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, an original and eight (8) copies of the BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS-RESPONDENTS, were sent via Federal Express to be filed with the following:

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