Paul Lopez:
Welcome to Housing Development.

Jim Tobin:
I'm Jim Tobin.

Paul Lopez:
And I'm Paul Lopez.

Jim Tobin:
Welcome, Paul.

Paul Lopez:
Hey, man. How's it going?

Jim Tobin:
I'm very excited.

Paul Lopez:
Yeah. I'm excited too. We got our first guest here.

Jim Tobin:
First guest today. It's very exciting. But before we get to that...

Tom Ward:
I'm right here, Jeff.

Jim Tobin:
I guess that would be appropriate. Let us introduce our esteemed colleague, Tom Ward, who runs our legal advocacy team. We're going to have him on and just a few more minutes to talk about the excellent news on Waters of the US.

Paul Lopez:
But first, a little bit of business here.

Jim Tobin:
Yeah, let's talk debt ceiling.

Paul Lopez:
Yeah, yeah, go ahead. A little bit of movement in the house.

Jim Tobin:
Yeah. Yeah, big vote this week. Last night in particular, Wednesday evening, the House of Representatives passed, by a large margin, over 300 votes, the debt ceiling compromise, I guess we'll call it, that Speaker McCarthy and President Biden crafted to avoid default on the US debt. Which is important for us for a couple of reasons.

Number one, we were worried about a default. When we are in this high interest rate environment and in uncertain recovery and a housing market that's does seem like we're right on the verge of turning the page on the over last year, we don't need this unforced error of the potential market turmoil, interest rate turmoil, international credit turmoil that this would bring. So A, we're happy that they've got a deal.

Number two, along with that deal came a couple VIGs, as they might say. And some that will have some impact on us.

And so for us, it's a smaller appropriations budget number over the next several years. And of course, many of our members interact with the appropriations process through the agencies, whether it's grant programs, whether it's workforce development, HUD, a variety of things. So we're going to have to work to get what crumbs are left. And it's more than crumbs.

But long-term issues out there. Fewer IRS agents. There's a lot of things that the house Republicans were able to win. And that's really what a lot of people are talking about now that it's a fait accompli that this will get eventually passed to the President and signed by the president, is who won. Right? That's the parlor game right now.

And I think the President went in with, we're not going to compromise at all. Clean debt ceiling. Anything less than that is a win for the Republicans. And certainly I think that that's what it looks like. They didn't get everything they wanted, but they certainly got more than the President wanted to give.

Paul Lopez:
What does the White House get, though? How did they declare victory?

Jim Tobin:
They declare victory by avoiding default, number one.

Paul Lopez:
Sure.

Jim Tobin:
That that's right, number one. But number two, when your talking point is, "Hey, this is less bad than it could have been." Yeah, you probably lost a little bit. But that's their big thing. It could have been a lot worse. Or these were things that were going to have to get done anyway. Everybody's going to put their spin on it, but by and large, the Republicans had a pretty good day.

Paul Lopez:
Does it get easier through the Senate? Or are we still a little iffy on how the Senate's going to play out?

Jim Tobin:
You got to get through 60 votes to make it filibuster proof. So they'll get to that number. The progressives and the ultra conservatives will revolt against it. But they'll ultimately get to their 60 votes.
The real question is how long do some folks drag this out on them? And make them down run this three or four day clock? Or can they move it Thursday, Friday, Saturday pretty quickly?

Paul Lopez:
That's a big gamble though, right?

Jim Tobin:
It is. I think the general feeling is that they've got money till the 5th, so they've got time to do this. But ultimately they'll get it to the President's desk in time.

Paul Lopez:
All right. So overall, we're announcing that this is good news, definitely for the economy.

Jim Tobin:
Definitely for the larger economy. Avoiding default is good.

Paul Lopez:
For housing?

Jim Tobin:
For housing. Rob and I have been talking about this for six months. He was terribly nervous it would [inaudible 00:03:39] the markets. We're going to avoid that, and that's important for our industry.

Paul Lopez:
Awesome. Yeah. That's fantastic news. And building off of that, we got some economic news these last couple weeks. Again, it's this kind of progressive drumbeat of things are getting better. Case-Schiller came out for the first time after, I think it was seven consecutive months of price declines. Home prices are now starting to tick up. Which means that we've hit a bottom and it looks like things are stabilizing and people are starting to feel good about housing as an investment again.

So right now, I think the prices went up seasonally 5.1%, which is fairly solid. And then adding to that, we got a good jobs report number. We're still at, right now, about 10.1 million open positions. But this being Washington, good news is sometimes bad news. That good news puts pressure on the Fed to continue to be like, "Okay, well, everyone thought May would be the last time that they raised interest rates." Now they're thinking, well, maybe now in June they might take it up a quarter just to keep things tampered down a bit.

So overall, I think that progressive drumbeat of good news, I think it's paying off for housing.

Jim Tobin:
Yeah. Agreed. Agreed. All right. Without further ado.

Paul Lopez:
Absolutely.

Jim Tobin:
Let's get to the news of the week. And welcome in Tom Ward. Tom, welcome to Housing Developments.

Tom Ward:
Thank you. Thank you both.

Paul Lopez:
Yeah, thank you. Yeah. So we kind of teased this up last week. Breaking news. The last time we did the podcast about Sackett and what the decision was. But play it out for us. We know that overall the decision was 9-0. But then underneath there was this kind of subset where the justices broke off into 5-4. Explain that a little bit.

Tom Ward:
Exactly. So they all agreed that the second wetland was not jurisdictional onto the Clean Water Act. All nine of them agreed to that. Five of them also agreed on what is the new test to find out whether a wetland and a water body comes under the Clean Water Act. The other four said that's the wrong test. But it doesn't matter. We got five. We got five with the test. That's the law of land.

So there was some disagreement, but in the end, it doesn't matter. We finally have a Supreme Court that has given us an answer on the Clean Water Act.

Jim Tobin:
So did it unwind the Significant Nexus test, essentially?

Tom Ward:
Yes.

Jim Tobin:
Explain what that 5-4 ruling, not only what it says, and then we'll talk about the downstream, pardon the pun. Oh, the downstream. I know. I'm sorry. I had to work that in there. The downstream effects from the regulatory side for our members. So first, the decision.

Tom Ward:
Right. Significant nexus. That was how the EPA had found that the Sackett wetland was jurisdictional. And the court said, all nine of them said, "No. That's done. That that is a done test. That is not the right test for determining jurisdiction on the Clean Water Act." So that is the one clear thing, that test no longer survives.

So now we've got a new test and I'll go through it real quickly. To find that a wetland is jurisdictional it's got to be adjacent to a water of the United States. Adjacent now is right next to. So you can't tell the difference between the water and the wetland. It used to be a little further away. EPA? A lot further away. But now it's all tied together. And then the water body has to have a continuous flow to a traditional navigable water.

So that is the test. And they said during oral arguments, we got to clarify this. And they did. They've made it pretty clear.
And that's all we were asking for from the beginning, right? Is clarity. Because right now the interpretation was so broad, you just didn't know what...

Tom Ward:
You could get anything.

Paul Lopez:
Exactly.

Tom Ward:
The EPA and the court could get anything right into their significant next steps.

Jim Tobin:
So play out a couple examples we've used over the years. Mississippi River. There's a levy, and next to it is a bayou.

Tom Ward:
Yes. Right.

Jim Tobin:
Is the bayou adjacent enough to be considered a...?

Tom Ward:
No. Not anymore.

Jim Tobin:
Wow.

Tom Ward:
Yes. That is a big deal. Always in the past, separated by a berm, it was still jurisdictional. So you, like you said, the levy and the wetland on the other side of it. That was always jurisdictional. This court said no. Said no. The wetland has to be part of the water of the United States. It's not a separate category. It's part of the water of the United States. And that would not be.

Jim Tobin:
So, play this out a little bit. If you're Louisiana, and I hate to keep picking on our dear friend, Randy. Your friend Randy Noelle's state. But play this out for me. It's probably a bad example in this case, but...

Tom Ward:
I'm not that familiar with the bayous in Louisiana.

Jim Tobin:
But bayous and swamps are really part of the flood mechanism in Louisiana. They absorb a lot of water and things like that. Does that mean you’re going to see the state stepping into the protection area now because the federal government’s leaving some of these areas?

Tom Ward:
I think that’s what we’re going to say. We’re going to see these states having to step up. And that’s kind of what Justice Alito said. They have primary jurisdiction. So they’re going to have to step up and start regulating these things if they want to. And they have the authority to. They have the police power. They can regulate the wetlands and the waters in their state. There’s no question about it.

Paul Lopez:
But the justices did show some concern that this may have been a little bit too open to interpretation. Right.

Tom Ward:
So Justice Kavanaugh especially. He was very unhappy with this new adjacency principle where they had to be tied together. He said, "No." It has been for so long that they were allowed to go further. He didn't say how far. But he said the other side of the berm has always been in. And now that's not in. And he was very unhappy about it.

Paul Lopez:
Interesting.

Jim Tobin:
So.

Paul Lopez:
Yeah. Go ahead.

Jim Tobin:
No, I was going to, so play it out for us. So we have the decision. What the practical implications to the Biden WOTUS rule, and then our members.

Tom Ward:
So we have already challenged the Biden WOTUS rule. So we've got court cases around the country challenging that. We are going to keep pushing to get that out.

But the other thing they use is what they call the pre-2015 regime for determining jurisdiction. But that also has significant nexus in it. So that can't be used either. So they're going to have to come out with some guidance.

But I'm already getting the emails from the members. I've got a permit in the pipeline. What happens? And right now it's a little bit of a gray area until we get some clarification from the government, what they're going to do. But we're going to keep pushing them on the lawsuits so they can't use these old rules. They're going to have to do something.
Paul Lopez:
And right now, that's the best thing that can happen, is the people who are having these issues reaching out to us and letting us know what's out there so that we have a better sense of what they're facing. So then we have better ways of challenging it. Correct?

Tom Ward:
Absolutely. We need to know what the corp and the EPA are telling those people on the ground. We need to see those emails and I know I've seen one already that says, "You got to give us some time. We're going to figure this out. That's where we are." But we'd like to see those messages from the corp because it will help with our litigation.

Jim Tobin:
Biden rule still in effect, though.

Tom Ward:
It is still in effect right this second. Until we get some court to say, no, that can't live. That cannot be.

Jim Tobin:
So that's the next step in this.

Tom Ward:
Yes.

Jim Tobin:
Okay. And so for our members. Patience, until we work through the post opinion timeframe.

Tom Ward:
Exactly. And again, we're pushing on the courts. After Rapanos, Jim, I know you remember.

Jim Tobin:
Yeah, I remember.

Tom Ward:
It was a long time before we got anything out of the government. I think it was six months to a year before we got. We don't want to wait that long this time. We don't trust them to say, "Oh, we're going to get it out quickly." So we're going to keep pushing them in the courts.

Jim Tobin:
Good. Good.

Paul Lopez:
But you did mention that it's now more leaning towards the state's responsibilities. Is there anything that we're seeing... Any states that are moving faster or slower? Or right now it's just...?
Tom Ward:
Yeah, we haven't seen any states yet pick up that slack.

Paul Lopez:
Right.

Tom Ward:
We haven't seen that yet. But I suspect they will. In some states this didn't matter. Because they were already regulating so much more anyway. This was just one layer of regulation that goes away. But they still have the state. In some states, they still have the state regulation, which was broader than this.

Paul Lopez:
Right.

Tom Ward:
But others, it makes a big difference.

Jim Tobin:
Right. Well, that sounds great.

Paul Lopez:
Well, Tom, thank you so much for being...

Jim Tobin:
Yeah, thanks for walking us through.

Tom Ward:
Thanks for having me.

Jim Tobin:
Yeah. Thanks for all your, more importantly, congratulations. Yeah. I know how hard your team works on all of this. So congrats on a big one for the industry.

Paul Lopez:

Tom Ward:
All right, man.

Jim Tobin:
I think that's about it.

Paul Lopez:
I think that's it.

Jim Tobin:
All right. Well, remember next week we'll hopefully see you, a lot of you in town here in Washington DC for the spring leadership meeting and the legislative conference.
But until our next podcast, I'm Jim Tobin.

Paul Lopez:
And I'm Paul Lopez. Thanks for listening. Bye.