THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
The Honorable John L. Breeden, Jr., Master-in-Equity

Case No. 94-CP-26-3154

Sam B. McQueen, ... Respondent,

v.

South Carolina Coastal Council, n/k/a South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, ... Petitioner.

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding the South Carolina Department of Health and Environmental Control's regulation deprived McQueen of all economically valuable use of his property?

2. If not, do background principles within South Carolina property or nuisance law absolve the State from compensating McQueen?

3. If not, may a court use investment-backed expectations to determine McQueen's damages?

STATEMENT OF THE CASE

On October 21, 1994, Sam McQueen commenced this action against the South Carolina Department of Health and Environmental Control -- Office of Ocean and Coastal Resource Management [the "Department"], challenging the Department's denial of his application to bulkhead and fill coastal wetlands. By order of the Honorable Charles W. Whetstone, the matter was transferred to the non-jury trial roster on February 9, 1995. By order of the Honorable R. Markley Dennis, Jr., the matter was referred to Judge Breeden, with finality, on April 18, 1995. Judge Breeden heard this matter on January 5, 1996, and issued an Order on March 7, 1996. The Department filed a Motion for Reconsideration on March 19, 1996, and an Order denying that Motion was issued on July 29, 1996. On September 4, 1996, the Department filed and served a Notice of its Intent to Appeal.

On January 12, 1998, the South Carolina Court of Appeals issued its opinion, No. 2779. McQueen v. South Carolina Coastal Council, 329 S.C. 588, 496 S.E.2d 643 (Ct. App. 1998). The Department filed a Petition for Rehearing with the Court of Appeals, which was denied on February 24, 1998. The Department then filed a Petition for Writ of Certiorari with this Court on July 17, 1998, which this Court granted on March 18, 1999. This Court issued its opinion, No. 25108, on April 17, 2000. McQueen v. South Carolina Coastal Council, 340 S.C. 65, 530 S.E.2d 628 (2000). McQueen filed a Petition for Writ of Certiorari with the United States Supreme Court. The United States Supreme Court granted certiorari, vacated, and remanded the case to this Court on June 29, 2001. McQueen v. South Carolina Dept. of Health & Environ. Control, 533 U.S. 943, 121 S.Ct. 2581, 150 L.Ed.2d 742 (2001).

On January 10, 2002, this Court issued an Order requesting briefing on three issues. McQueen filed a Motion to Amend that Order on February 20, 2002, and the Department filed a Petition to File Late Return and a Return to Respondent's Motion on March 8, 2002. On March 22, 2002, this Court granted the Department's request to file a late return, denied McQueen's Motion to Amend, and vacated its Order issued January 10, 2002, substituting three new questions for briefing.

STATEMENT OF FACTS

Sam McQueen is the owner of two lots in the Cherry Grove section of North Myrtle Beach, Horry County, South Carolina. McQueen purchased lot 37, Block Q-1 (hereinafter 53rd Avenue lot), in 1961, for $2,500, and then in 1963, purchased lot 13, Block L-1 for $1,700 (hereinafter 48th Avenue lot). (R. 209). Both lots were originally created by fill and are located on salt water canals. For thirty years, McQueen made no effort to develop the lots, or to protect them from erosion. Starting in the 1960's, a process of erosion began to convert the lots from dry land back into marsh and mudflats, subject to the ebb and flow of the tides. (R. 210-13). As of the date of the alleged taking (September 1993), significant portions of both of the lots were below the high water

mark, and the Department had classified them as "predominantly critical area[s]." (R. 147).

In July 1991, McQueen applied to the United States Army Corps of Engineers (USACOE) and the Department for permits to build bulkheads and to fill the tidal wetlands. In accordance with a joint permitting process between the Department and the USACOE, the Department ordinarily received notice of the applications from the USACOE. As a result of some confusion on the part of the USACOE, the Corps issued a Joint Public Notice to the Department for just the 53rd Avenue lot.

Based on this public notice, the Department only acted on the application for the 53rd Avenue lot. The Department issued a permit for the 53rd Avenue lot with the condition that McQueen construct the bulkhead 75 feet from the street. McQueen, however, who had applied for a 90-foot setback, rejected the Department's permit and filed an administrative appeal. After McQueen discovered the Department had taken no action on the 48th Avenue lot, he agreed to reapply to the Department for permits to bulkhead and backfill both lots. McQueen submitted the new applications, and the Department issued them for public notice on June 17, 1993.

In the new applications, McQueen requested permission to place approximately 100 cubic yards of fill material in the tidelands area on the 53rd Avenue lot, and approximately 200 cubic yards of fill material in the tidelands area on the 48th Avenue lot. In addition, McQueen sought to construct bulkheads 90 feet from the road on the 53rd Avenue lot and 102 feet from the road on the 48th Avenue lot. On September 13, 1993, the Department denied both applications on the grounds that the proposed bulkheads were located within the tidelands, and that the backfill would destroy tidelands and have an adverse impact on the coastal environment.

McQueen appealed the denial of the permits to the Coastal Zone Management Appellate Panel and an administrative hearing was conducted before Robert J. Moran Jr., on January 21, 1994. Based on the record created during the hearing, the Coastal Zone Management Appellate Panel affirmed the denial of the permits. The Panel concluded that 23A S.C. Code Ann. Regs. 30-12 (G)(2)(a) (Supp. 1998) required rejection of McQueen's application to construct bulkheads and fill the lots. In addition, the Panel concluded that denial of the permits did not constitute a taking because McQueen lacked the requisite investment-backed expectations.

Pursuant to S.C. Code Ann. § 48-39-180 (Supp. 2000), McQueen sought judicial review of the Panel's decision. In 1996, the special master-in-equity, appointed by the Circuit Court, concluded, contrary to the Panel's determination, that the permit denials resulted in a taking without just compensation. Based on this determination, and on limited evidence of the property's fair market value for development, the court awarded McQueen $100,000 in compensation.

The Department then appealed to the Court of Appeals. The Court agreed -- over a strong dissent -- that McQueen had suffered a "textbook taking," McQueen v. South Carolina Coastal Council, 329 S.C. 588, 594, 496 S.E.2d 643, 650 (Ct. App. 1998), stating that this case "epitomizes a remarkable similitude" to Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). McQueen, 496 S.E.2d at 648. However, the Court concluded that there was insufficient evidence to support the Circuit Court's determination as to the amount of compensation, and remanded the case.

In July 1998, the Department filed a Petition for Writ of Certiorari with this Court. In

March 1999, the Court granted the petition on the question of whether the state's action constituted a taking of McQueen's property. The Department argued, among other things, that McQueen had not demonstrated a denial of all economically viable use of the property, that the claim was precluded under background principles of South Carolina law, and that McQueen's lack of investment-backed expectations barred the claim.

In April 2000, this Court issued its opinion in McQueen v. South Carolina Coastal Council, 340 S.C. 65, 530 S.E.2d 628 (2000). This Court referred to several potential grounds for reversing the judgment of the Court of Appeals, but ultimately relied upon the fact that McQueen lacked the requisite investment-backed expectations to support his claim. Id. at 73-75. McQueen filed a writ of certiorari to the United States Supreme Court, which granted the writ. McQueen v. South Carolina Dept. of Health & Environ. Control, 533 U.S. 943, 121 S.Ct. 2581, 150 L.Ed.2d 742 (2001). Without commenting on the merits of the case, the United States Supreme Court vacated this Court's holding, and remanded for reconsideration in light of its decision in Palazzolo v. Rhode Island, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001).

INTRODUCTION AND SUMMARY OF ARGUMENT

As a preliminary matter, the United States Supreme Court's order vacating this Court's prior decision and remanding the case does "not create an implication that [this Court] should change its prior determination." Hughes Aircraft Co. v. United States, 140 F.3d 1470, 1473 (Fed. Cir. 1998), overruled on other grounds, 234 F.3d 558 (2000). The courts have consistently recognized that "GVR" orders do not necessarily call for a different result upon reconsideration following remand. See, e.g., United States v. M.C.C. of Fla., Inc., 967 F.2d 1559, 1562 (11th Cir. 1992) (stating that, following a GVR order, the court to which the case has been remanded is "free to adopt any or all" of its prior judgment); United States v. Nat'l Soc'y of Prof'l Eng'rs, 555 F.2d 978, 982 (D.C. Cir. 1977) (rejecting as "speculative reconstruction," the implication that a court should reverse its prior disposition of a case because the Supreme Court remanded the case). The effect of such an order is consistent with the basic function of a GVR order, which is to provide the court that issued the decision an opportunity to consider whether a subsequent United States Supreme Court decision might potentially require a different analysis or result. Typically courts decline to alter their original rulings following a GVR order. See Arthur D. Hellman, "Granted, Vacated, and Remanded" -- Shedding Light on a Dark Corner of Supreme Court Practice, 67 Judicature 389, 401 (1984) (concluding that in a majority of cases vacated and remanded by the Supreme Court, the courts adhere to their original decisions).

In Palazzolo, the United States Supreme Court vacated the judgment of the Rhode Island Supreme Court and remanded the case for further proceedings. 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001). The Court ruled that Palazzolo's taking claim was not automatically barred "by the mere fact that title was acquired after the date of the state-imposed restriction." Id. at 630. Palazzolo acquired the property through a closely-held corporation prior to the enactment of the Rhode Island coastal regulations. About twenty years later, after the coastal regulations had been put in place, the corporation's charter was revoked for non-payment of taxes, and the property passed, by operation of law, to Palazzolo personally. The Rhode Island Supreme Court ruled that, because Palazzolo acquired the property in his personal capacity with notice of the regulations, he was barred from pursuing the taking claim. The United States Supreme Court disagreed,

rejecting only what it called the "single, sweeping rule" that "[a] purchaser or successive title holder like petitioner is deemed to have notice of an earlier enacted restriction and is barred from claiming that it effects a taking." Id. at 626.

However, the United States Supreme Court agreed with the Rhode Island Supreme Court that Palazzolo had failed to establish a Lucas-type taking. The Court said that, in order to establish a categorical taking under Lucas, a claimant must demonstrate that a restriction eliminates all economically beneficial use of the property, that is, that the property is left with no, or only "nominal," value. Because Palazzolo still retained valuable property, the Court ruled that he could not satisfy this test. The United States Supreme Court then remanded the case to the Rhode Island courts to determine whether, in the alternative, Palazzolo might be able to establish a taking under Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646. 57 L.Ed.2d 631 (1978).

While it is not apparent from the decision in Palazzolo, the State of Rhode Island presented the argument that Palazzolo's claim was independently barred under "background principles" of Rhode Island law, including the common law, public trust, and nuisance doctrines. Palazzolo v. Coastal Res. Mgmt. Council, 1997 WL 1526546 (R.I. 1997). The Rhode Island Supreme Court rejected the taking claim on several different grounds, without reaching the question of whether background principles based on state common law also might bar the claim. Because the Rhode Island Supreme Court did not specifically address background principles of state common law, the United States Supreme Court had no occasion to directly address the subject.

The United States Supreme Court's ruling in Palazzolo does not suggest, much less require, that this Court should arrive at a different outcome than it did in its initial decision in this case. To the contrary, Palazzolo supports the Department's position on all the legal issues raised by this Court's March 22, Order. Accordingly, this Court should reaffirm its previous disposition of this case on the following three alternative grounds.

First, McQueen has not demonstrated that he has been denied "all economically viable" use of the property and, therefore, he has failed to establish a taking under Lucas. The key issue in applying Lucas is whether the regulation eliminated all (or nearly all) of a property's economic value. McQueen's contention that he can no longer build on the property, standing alone, does not establish that the property is valueless. Accordingly, he has not demonstrated a denial of all economically viable use of his property.

Second, McQueen's taking claim is barred under "background principles" of South Carolina property and nuisance law. More specifically, the lands at issue are subject to the public trust doctrine and, under the clear precedents of this Court, a landowner has no right to destroy public trust lands. In addition, destruction of public rights in public trust lands constitutes a public nuisance. Thus, because McQueen's intended property use would violate principles of state property and nuisance law, there was no taking in this case.

Finally, this Court has posed the question whether McQueen's lack of investment-backed expectations might be relevant in determining McQueen's damages. The Department submits that the answer to this question is "no," for two related reasons. First, under well established principles of takings law, the anticipated effects (positive or negative) of a government action that results in a taking must generally be disregarded in determining the amount of any "just compensation" which may be due. Second, investment expectations are not relevant in calculating damages because they are relevant, instead, in

determining liability, i.e., whether or not a taking occurred in the first place. If this Court accepts the position that investment-backed expectations are relevant to the issue of liability, the Court should conclude, in accordance with its earlier ruling in this case, that the investment expectations factor bars this taking claim, and for this third, independent reason, reverse the judgment of the Court of Appeals.

ARGUMENT

I. MCQUEEN FAILED TO DEMONSTRATE THAT HE HAS BEEN DENIED ALL ECONOMICALLY BENEFICIAL USE OF HIS PROPERTY

Under Lucas, a "total" taking occurs when a regulation leaves the property either valueless or with only "nominal" value. See Palazzolo, 533 U.S. at 631. Thus, in Palazzolo, the Court concluded that an alleged 93% reduction in the value of the property did not amount to a total taking. See Rith Energy, Inc v. United States, 270 F.3d 1347, 1349 (Fed. Cir. 2001) (on petition for rehearing) (91% reduction in value insufficient to establish a total taking). McQueen did not establish a taking under this test.

The Lucas Court emphasized that the property's economic value, rather than the opportunity to develop the property, is the linchpin of the "total" takings analysis. In order to establish a taking under Lucas, the owner must show that the regulation eliminates all or essentially all of the property's economic value. While a severe restriction on use may reduce a property's value, evidence of such a restriction is insufficient, by itself, to demonstrate that the property has been rendered valueless. This understanding of the Lucas rule is supported by the Court's specific and repeated emphasis on the fact that the coastal regulation rendered Lucas's property "valueless." Lucas, 505 U.S. at 1007, 1009, 1020, 1026. See id. at 1017 (asking rhetorically, "[w]hat is property but the profits thereof?" (quoting E. Coke, Institutes, ch. 1, § 1 (1st Am. Ed. 1812)). In other words, as long as a parcel of property has real economic value -- including, for example, resale value -- an owner can "profit" from the property and cannot claim a total taking. It makes no difference for this purpose whether the property's economic value derives from the opportunity to develop the property or from some other economically valuable use, such as private recreation. See, e.g., Wyer v. Bd. of Envtl. Prot., 747 A.2d 192 (Me. 2000) (holding that denial of permission to build a single family home on a lot subject to state sand dune protection law did not effect a taking given the significant economic value of the property for private recreational use);see also State of Fla. v. Burgess, 772 So.2d 540, 543 (Fla. Ct. App. 2000) (rejecting argument that economically valuable private recreational uses of property are insufficient to take a claim out of the Lucas category).

In this case, the Court of Appeals misapplied the Lucas taking analysis. The Court of Appeals concluded that McQueen demonstrated a total taking because the Department's denial of his application frustrated his ability to build single family residences on his property. The proper inquiry, under Lucas, however, is not whether the owner can develop the property, but whether the property retains actual economic value in the marketplace. When evaluated under the correct legal test, it is clear that the record does not support McQueen's claim that his property lacks all economic value. Thus, this Court should reverse the Court of Appeals' legal error.

Furthermore, McQueen failed to meet his burden of proof and establish that the Department's regulations were so draconian in their effect that they amounted to a total

taking under Lucas. See Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994) (stating that, in general, "the burden properly rests on the party challenging the regulation to prove that it constitutes…[a violation] of property rights"); see also Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach, 337 S.C. 380, 523 S.E.2d 193 (Ct.App. 1999). In fact, McQueen never attempted to demonstrate that the coastal regulation deprived him of all economically viable use of the property. McQueen did not present appraisal evidence relating to the actual market value of the property in its current, regulated condition, and the current record is devoid of any evidence that his property has been rendered valueless or close to valueless.

On the contrary, the record contains ample evidence that the lots could be used for private recreation and enjoyment, and that the property might well have real economic value based on these uses. (R. 146-47, 199-200.) McQueen also failed to address the possibility that neighboring property owners might have purchased the lots in order to enlarge their properties for their own personal use. Cf. Wyer, 747 A.2d at 192. Thus, McQueen has failed to show that the property is valueless, or has only nominal value, as required to establish a categorical claim under Lucas.

Although some evidence was presented that McQueen might have sold one or both of the lots for $50,000, this information is plainly insufficient to demonstrate a Lucas-type taking. This evidence, which was elicited on cross-examination, consists only of the following:

Q: Do you remember what the purchase price was?
A: Yes. Is that important?
Q: Well, you've said we've taken from you, so I need to know how much.
A: Well, I've been paying taxes on them and I've had the opportunity to sell those lots for over $50,000.00.
Q: Okay. But do you remember what you put in them?
A: Well, one of them I bought in '61, I paid $2,500.00,….And the one I bought in '63, well, I believe it's $1,700. or $1,750.

R. 209. This testimony does not demonstrate that McQueen was denied all economically viable use of the property. It is at best ambiguous as to whether the offer of "over $50,000.00" reflected the fact that the property could not be filled. If the offer was made based on the understanding that the property could not be filled, then this testimony undermines McQueen's taking claim because it would demonstrate that the properties have substantial value in the marketplace, far in excess of the original purchase prices. This evidence is equally inconclusive, even if the offers were premised on the erroneous assumption that the lots could be filled, because the evidence does not establish in any way that the regulatory restrictions rendered McQueen's property valueless.

The only other information in the record regarding the property's value -- real property tax information -- shows that the current tax assessment value for each of the two lots is $22,800. McQueen v. South Carolina Coastal Council, 329 S.C. 588, 496 S.E.2d 643 (Ct. App. 1998). On their face, these assessments, which reflect about a ten-fold increase in the value of the property relative to the original purchase prices, appear to preclude a claim that McQueen has been denied all economically viable use of the property. To the extent it can be determined from the record, these assessments appear to represent the value of the property subject to the restrictions at issue here. (R. 120, 204.) Even if the

tax assessments reflect the value of the property for development, this does not contradict the fact that the lots may have real value for non-development uses, including recreational use.

Again, McQueen bore the burden of proof, and the patent ambiguity of the record on the valuation issue is fatal to his claim. McQueen presented no direct evidence at the hearing in this case concerning the value of the property either before or after imposition of the regulatory prohibition. The record in this case stands in stark contrast to the record in Lucas, where the property owner offered detailed, expert testimony as to the "before" and "after" values of his property. Lucas v. South Carolina Coastal Council, 304 S.C. 376, 404 S.E.2d 895, 907 (1991) (Harwell, J., dissenting). Because McQueen failed to carry his burden on the issue of denial of all economically viable use of the property, the Court should reverse the Court of Appeals' ruling that McQueen suffered a total taking under Lucas.

II. BACKGROUND PRINCIPLES OF PROPERTY AND NUISANCE LAW BAR MCQUEEN'S TAKING CLAIM

The public trust doctrine, a longstanding background principle of South Carolina's property law, prohibited McQueen, at least absent proper public authorization, from filling, and thereby destroying, the tidelands on his property. In addition, public nuisance law independently bars the destruction of public trust land. Therefore, McQueen has not suffered a compensable taking, and his taking claim fails regardless of whether he has been deprived of all economically viable use of his land.

A. A Takings Claim Fails Where a Claimant Lacks a Property Interest Under a State's Background Principles of Property and Nuisance Law

In Pennsylvania Coal v. Mahon, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed.2d 322 (1922), Justice Holmes described the concept of "regulatory takings," stating that "while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking." In determining whether a regulation "goes too far," a court must first "determine whether the proscribed activity is a 'stick' in the [property owner's] bundle of property rights. Rick's Amusement Inc. v. State, 2001 WL 1167790 (S.C. Sept. 10, 2001) (internal citations omitted). See Lucas, 505 U.S. at 1027 (stating that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with"). A restriction does not "go too far," if it limits a use right that a property owner never had as a "stick" in her "bundle." In other words, to prove a taking under the Fifth Amendment, a property owner must demonstrate that a restriction deprives her of a use right that is part of her title. Palazzolo, 533 U.S. at 629.

Property owners do not have the right to use their property in a manner that conflicts with background principles of state property and nuisance law because such "proscribed use interests were not part of [their] title to begin with." Lucas, 505 U.S. at 1027. Specifically, the Lucas Court stated that:

regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are

now expressly prohibited purposes was always unlawful, and . . . it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.

Id. at 1029-30. Thus, no taking occurs when background principles of property or nuisance law bar the prohibited land use.

"'As a general proposition[,] the law of real property is, under our Constitution, left to the individual States to develop and administer,'" Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 484, 108 S.Ct. 791, 98 L.Ed.2d 877 (1988), quoting Hughes v. Washington, 389 U.S. 290, 295 (1967) (Stewart, J., concurring). Thus, it is state law, not federal law, which defines the scope of "background principles." See Lucas, 505 U.S at 1027 (stating that our takings jurisprudence is "guided by the understandings of our citizens regarding the content of and the state's power over, the 'bundle of rights' that they acquire when they obtain title to property."); see also Palazzolo, 533 U.S. at 630 (explaining that background principles of property and nuisance law are among "those common, shared understandings of permissible limitations derived from a State's legal tradition.") (emphasis added). In Lucas, for example, the Supreme Court remanded on the issue of whether background principles of state law would have barred Lucas' claim, noting that the "question . . . is one of state law to be dealt with on remand." Lucas, 505 U.S. at 1031.

B. The Public Trust Doctrine Is A Background Principle of Property Law That Bars McQueen From Destroying Land Falling Below the High Water Mark

The public trust doctrine is a longstanding background principle of South Carolina's property law that encumbers McQueen's use of his property. Because his property is so encumbered, McQueen did not suffer a taking when the Department denied his permit to destroy public trust lands.

1. The Public Trust Doctrine Has Long Been A Background Principle of South Carolina's Property Law

Generally stated, the public trust doctrine provides that the state holds title to property below the high water mark, in trust, for the benefit of its citizens. See State v. Hardee, 259 S.C. 535, 193 S.E.2d 497 (1972). The origins of the public trust doctrine date back to Roman times. See Institutes of Justinian 2.1.1 ("By the law of nature these things are common to mankind-the air, running water, the sea and consequently the shores of the sea."). The doctrine was incorporated into English common law, and after the American Revolution, the public trust "vested in the original States within their respective borders. . . ." Shivley v. Bowlby, 152 U.S. 1, 57, 14 S.Ct. 548, 38 L.Ed. 331(1894).

Since the late 1800's, this Court has repeatedly affirmed the vitality of the public trust doctrine. See, e.g., Sierra Club v. Kiawah Resort Assoc., 318 S.C. 119, 456 S.E.2d 397 (1995); Hardee, 259 S.C. at 535; State v. Pacific Guano Co., 22 S.C. 50 (1884). In South Carolina, the property below the high water mark is included in the public trust, and is held by the state for the benefit of its citizens. See Kiawah Resort Assoc., 318 S.C. at 127-28 (observing that, in South Carolina, the land below the high water mark is part of the public trust); Hardee, 259 S.C. at 535 (holding that land below the high water mark is held in trust for the benefit of the public); Pacific Guano Co., 22 S.C. at 50 (holding that land over which the tides "ebb and flow" is held by the state for public use).

The public trust doctrine is premised on the idea that "'some things are considered too important to society to be owned by one person.'" Kiawah Resort Assoc., 318 S.C. at 127-28 (quoting Gregg L. Spyridon & Sam A. LeBlanc, The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action, 6 Tul. Envtl. L.J. 287 (1993)). The doctrine protects the public's right to "enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." Illinois Cent. R. Co., 146 U.S. at 452. In addition, courts have recognized a "diverse" range of public rights in public trust lands that do not rest on the navigability of the waters, Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476, 108 S.Ct. 791, 98 L.Ed.2d 877 (1988), including the right "to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks." Kiawah Resort Assoc., 318 S.C. at 127-28 (internal citations omitted). Owners of property impressed by the public trust cannot use their property in a manner that impairs those trust interests. Id.

The public trust doctrine does not, however, completely extinguish private property rights in public trust lands. Rather, it requires that property owners use such lands in a manner that is consistent with the public trust. Kiawah Resort Assoc., 318 S.C. at 128. One commentator has described the nature of the competing ownership rights in public trust lands as follows:

the public has the right to use and enjoy the land and water -- the res of the trust . . . This is the so-called jus publicum. On the other hand, since according to one source, fully one-third of public trust property is in private rather than public hands, private property rights exist in many such lands and waters. This is called the jus privatum.

David L. Callies et al., Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis)use of Landowner's Investment Backed Expectations, 64 ALI-ABA 191, 203 (2001).

An owner of the jus privatum, has a number of qualified rights in public trust lands. For example, such an owner may "make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public." Illinois Cent. R. Co., 146 U.S. at 446; Kiawah Resort Assoc., 318 S.C. at 128 (an owner of public trust land can build docks on public trust land, but only if the construction does not "impair marine life, water quality, or public access to the area."). While South Carolina can grant jus publicum rights to private parties, it can only do so through legislation. Lowcountry Open Land Trust v. State, 347 S.C. 96, 553 S.E.2d 778 (2001).

2. McQueen's Property is Encumbered by the Public Trust Doctrine

McQueen's property is subject to the public trust doctrine because the area that McQueen wishes to fill and bulkhead is tidelands. These tidelands fall below the high water mark, and thus McQueen's property is part of the public trust.

McQueen has previously implied that the tidelands within his lots are not part of the public trust because they were created by avulsion -- a sudden change in the shoreline due to a known cause. This attempt at misdirection fails. Whether avulsion or erosion has caused a shoreline to recede is relevant only to the question of where the property owner's boundary is, not to the question of whether the public trust doctrine encumbers the

property itself. In other words, lands subject to tidal influence after an avulsive event become public trust lands even though the common law provides that the property owner's boundary line may not change. See Dycus v. Sillers, 557 So.2d 486, 500 (Miss. 1990) (noting that "the public right to waters formed by an avulsion is as great as any other public waters"); People v. Steeplechase Park Co., 143 N.Y.S. 503 (N.Y. Sup. Ct. 1913), modified on other grounds, 113 N.E. 521 (N.Y. 1916) (holding that "where the shore recedes as the result of avulsion the boundary of the littoral proprietor may not change, [but] the public has the same right of passage over the new foreshore as it had over the old -- else an avulsion might cut off the public right of passage altogether."); see generally Joseph J. Kalo, The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina, 78 N.C. L. Rev. 1869, 1885 n.79 (commenting that Steeplechase Park demonstrates that after an avulsion "the littoral owner may own the foreshore and adjacent submerged lands, but the littoral owner's title to such areas is burdened by public trust rights"). Thus, regardless of how far McQueen's title extends into the submerged lands adjacent to his property, the public trust inheres in all of his lands falling below the high water mark and the title to those lands is significantly encumbered. See Horry County v. Tilghman, 283 S.C. 475, 322 S.E.2d 831 (Ct. App. 1984) (holding that even if a claimant had title in submerged lands, that property interest remained subject to public use for navigational purposes).

In any event, McQueen has failed to establish that the saltwater intrusion into his property resulted from avulsion, rather than gradual erosion. See United States v. Wilson, 707 F.2d 304, 307 (7th Cir. 1982) (holding that the party who bears the burden of proof also bears the burden of proving that a change in a river's boundaries resulted from avulsion, not accretion). To the contrary, the record is replete with evidence that the change in the shoreline was the result of gradual erosion -- or, as this Court put it, thirty years of neglect, -- and not an avulsive event. McQueen, 340 S.C. at 68. Therefore, as a factual matter, McQueen's property line did move inward.

Thus, the Court should ignore McQueen's legally irrelevant and factually inaccurate contentions regarding avulsion and conclude that the tidelands on McQueen's property are unequivocally encumbered by the public trust.

3. McQueen Has No Right To Fill Public Trust Lands Under Principles of South Carolina's Property Law and, Therefore, He Has Suffered No Taking

To determine whether McQueen suffered a taking, this Court must examine the inherent limitations on McQueen's title. See McQueen v. South Carolina Coastal Council, 340 S.C. 65, 70, 530 S.E.2d 628, 631 (2000) (disagreeing with the Court of Appeals' conclusion that "the right to add a bulkhead and fill were [McQueen's] at the time of purchase" and stating, "[w]e do not think this is a valid assumption."). In this case, the public trust doctrine denies McQueen an unfettered right to fill and destroy tidelands for development purposes, and, therefore, bars him from recovering for a regulatory taking. Owners of the jus privatum in public trust lands have no right to use their land in a manner that interferes with the public trust values. By definition, destroying public trust lands interferes with public trust values because doing this completely defeats the public's use rights in the jus publicum. Destroying public trust land is simply not one of the limited rights a private owner possesses under the public trust doctrine. Therefore, the Department's denial of McQueen's permit applications does not constitute a taking

because prohibiting the destruction of public trust land is well within the state's authority under the public trust doctrine, a background principle of South Carolina property law. Applying the public trust doctrine as a background principle of property law to bar McQueen's claim is consistent with a number of other post-Lucas decisions from other jurisdictions. See, e.g., Karam v. New Jersey, 308 N.J. Super. 225, 241 (1998), aff'd., 157 N.J. 187 (1999) (holding there was no regulatory taking when the state denied petitioner a permit to build a dock, in part, because the restriction imposed by New Jersey "fell within its police powers under the public trust doctrine"); Coastal Petroleum v. Chiles, 701 So.2d 619, 624 (Fla.App. 1997) (holding that the public trust doctrine barred recovery for a regulatory taking, reasoning that the doctrine permitted the legislature "to protect the lands held in trust for all the people").

C. McQueen Also Has Suffered No Taking Because a Violation of the Public Trust Also Constitutes a Nuisance

As discussed supra in Part II.A, a regulation does not result in a taking if the proscribed use activity can properly be prohibited under background principles of state property or nuisance law. Because a violation of the public trust doctrine also represents a common law public nuisance, background principles of nuisance law independently bar McQueen's claim.

A public nuisance is defined, among other things, as "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B (1979). The public trust doctrine creates and protects a variety of rights common to the general public. See supra Part II.A. Because McQueen's proposed destruction of public trust resources interferes with these rights, the land use for which he is seeking a permit would amount to a public nuisance under common law principles. See Burgess v. Tamiano, 370 F.Supp. 247 (D. Me. 1973) (destruction of fishery by oil pollution constituted a public nuisance because it invaded "public rights which are held by the State of Maine in trust for the common benefit of the people"); Gillen v. City of Neenah, 219 Wis.2d 806, 821 (Wis. 1998) (under Wisconsin law, every violation of the public trust doctrine is also a public nuisance); P.R.I.C.E., Inc. v. Keeney, No. CV-94-0542469, 1998 WL 417591, at *2-4 (Conn. Super. Ct. July 10, 1998) (permitting plaintiffs to maintain a public nuisance action where they "alleged an interference with a public right, namely, the enjoyment of the public trust in the Quinebaug River and… the public harm alleged is the unlawful impairment of their rights in the public trust"). Thus, McQueen's proposed land use -- filling tidelands -- is not a compensable use right under background principles of nuisance law.

D. Palazzolo Supports The Rejection of McQueen's Taking Claim Based on Background Principles of South Carolina Property and Nuisance Law

As discussed in the Introduction and Summary of Argument, the United States Supreme Court in Palazzolo did not address directly the application of the kind of background principles at issue in this case -- longstanding common law property and nuisance rules. Nonetheless, the Court in Palazzolo did discuss the concept of background principles, and, to the extent that it did so, its discussion fully supports the Council's position that South Carolina property and nuisance law bar McQueen's claim.

First, the Court affirmed the basic teachings of Lucas on background principles rooted in

common law property and nuisance law. The Court stated "that a landowner's ability to recover for a government deprivation of all economically beneficial use of property is not absolute but instead is confined by limitations on the use of land which 'inhere in the title itself.'" Palazzolo, 533 U.S. at 629 (quoting Lucas, 505 U.S. at 1029). "This is so, the Court reasoned, because the landowner is constrained by those 'restrictions that background principles of the State's law of property and nuisance already place upon land ownership.'" Id. (quoting Lucas, 505 U.S. at 1029). Because the public trust doctrine's prohibition on destroying tidelands undeniably represents a "common shared understanding" of a permissible limitation on land use that is derived from South Carolina's legal tradition, to use the Palazollo Court's background principles phraseology, the land use restrictions being imposed here are per se reasonable as they merely forbid a use that was never part of McQueen's title. Palazzolo, 533 U.S. at 630. Accordingly, insofar as it describes how common law property and nuisance rules can operate to bar a taking claim, Palazzolo confirms that McQueen's claim is barred by the public trust doctrine.

Second, the Court in Palazzolo observed that the issue of whether a regulation imposes land use restriction derived from "background principles" should "turn on objective factors, such as the nature of the land use proscribed." Id. (emphasis added). In other words, if a claimant's proposed activity, viewed objectively, fits within a category of land uses long understood as impermissible based on background principles, then regulation of those proposed activities, in a way that is consistent with those principles, does not amount to a taking.

The public trust doctrine, one of the sources of the land use restriction at issue in this case, plainly turns on the application of objective factors. McQueen's proposed activity (filling tidelands) fits squarely within a category of land use (destroying public trust lands) that has long been understood as impermissible under South Carolina's legal tradition. Application of the public trust doctrine depends on whether a proposed activity is on public trust lands, and whether it would destroy public trust values. Accordingly, when the Council made explicit the inherent limitation on McQueen's title by denying the permit applications, its action easily passed muster under Palazzolo.

Finally, Palazzolo confirms the reasonableness of the conclusion that the public trust doctrine bars this taking claim. The Court considered a number of factors in determining whether pre-acquisition notice of a statutory enactment could categorically bar a taking claim. In this case, of course, the claim is barred by a longstanding common law principle. Nonetheless, the Palazzolo Court's discussion of these factors supports the conclusion that the public trust doctrine bars this claim.

The Palazzolo Court stated that it would be inappropriate to bar a taking claim based on pre-acquisition notice because the judicial outcomes would be "capricious in effect," meaning, "[t]he young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions." Palazzolo, 533 U.S. at 628. By contrast, the South Carolina public trust doctrine affects all coastal property owners in the same way. The public trust doctrine inheres in all property below the high water mark and limits (and has always limited) all private property interests along the coast. Regardless of when they acquired title, all shoreline property owners are equally restricted by the public trust doctrine. "A regulation or common-law rule cannot be a background principle for some owners but

not for others." Id. at 630.
The Court also stated that automatically barring a taking claim based on pre-acquisition notice 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. at 627. By contrast, application of the public trust doctrine does not strip McQueen of any rights that inhered in his title. The public trust doctrine has encumbered McQueen's lots for hundreds of years before his acquisition of the property. Lastly, Palazzolo is plainly distinguishable on its facts from this case because Palazzolo did not cause his legal predicament through his own inaction. By contrast, McQueen sat idly by while his property eroded and reverted back into public trust lands. Under longstanding public trust principles, the consequences of this process of erosion for the character of McQueen's private property rights were readily foreseeable. Any reduction in the value of McQueen's property was the direct result of his own failure to protect his property from natural forces.
For all of the foregoing reasons, McQueen's taking claim is barred by the reasonable application of the public trust doctrine.
III. MCQUEEN'S TOTAL TAKING CLAIM IS BARRED BY HIS LACK OF REASONABLE INVESTMENT-BACKED EXPECTATIONS

Investment-backed expectations should not be considered in estimating the amount of damages in a takings case, for two reasons. First, the general rule in takings law is that the anticipated effects of a government action that results in a taking must be disregarded in determining the amount of "just compensation" payable under the Takings Clause. Second, investment-backed expectations are not relevant in determining damages because they are relevant, instead, to the question of liability, that is, whether the government action results in a taking or not. Therefore, in its prior decision, this Court correctly relied on McQueen's lack of investment-backed expectations in order to reject his claim, and the Court should reaffirm that decision here.
A. Investment-Backed Expectations Are Not Relevant in Calculating Damages

Assuming a claimant has established a taking, the amount of "just compensation," to which the claimant is entitled, does not vary based on the owner's investment-backed expectations. The basic test for setting just compensation is "fair market value" -- the amount a willing purchaser would pay a willing seller in an arm's length transaction. See 4 Julius Sackman, Nichols on Eminent Domain, §§ 12.01 - .02 (2001 ed.) (citing numerous cases). A variety of factors may be relevant in estimating fair market value, including the physical character of the property, its location, and the effect of other regulatory restrictions on the permissible uses of the property. However, with respect to the specific regulation or other government action that effected the taking, the possible impact of the action on the value of the property must be disregarded for the purpose of calculating fair market value. See 8 Julius Sackman, Nichols on Eminent Domain, § 14E.05 [3] ("the normal rule in condemnation is that the market value of the property to be acquired is determined disregarding any positive or negative influence of the public project on that market value.") (emphasis in original); 4 Julius Sackman, Nichols on Eminent Domain, § 12.02[1] .
This general rule makes sense. Condemnation law deals with the governmental power to

unilaterally require individuals to sell their property to the government to use on behalf of the public. The law of "inverse condemnation," including regulatory takings, deals with cases where the government may be deemed to have purchased private property for public use, even though government officials may not have originally intended to exercise their eminent domain powers. In either case, when a taking occurs, the government must pay fair market value for what it has acquired. Given this basic understanding of the function of an award of "just compensation," it cannot reasonably be said, for example, that an owner's awareness that the government might take the action that results in the taking could influence the amount of "just compensation" which must be paid. If the government has actually taken property, it must pay fair market value, no more and no less.

The Department is not aware of a single precedent -- with one exception -- which supports the idea that investment-backed expectations might be relevant in calculating the amount of just compensation payable upon a finding of a regulatory taking. The exception is an opinion authored by Judge Plager of the U.S. Court of Appeals for the Federal Circuit in Palm Beach Isles Associates v. United States, 208 F.3d 1374 (Fed. Cir. 2000); 231 F.3d 1354 (Fed. Cir. 2000) (order on rehearing). In that case, the court concluded that an owner's lack of investment-backed expectations should be irrelevant in determining whether a regulation effects a Lucas-type taking -- a conclusion the Department strongly disputes, as discussed in subsection (B), below. The court went on to state that "[t]his does not mean that use restrictions are irrelevant to the takings calculus, even in categorical takings cases. Once a taking has been found, the use restrictions on the property are one of the factors that are to be taken into account in determining damages due the owner." Id. at 1363 (citing 4 Julius Sackman, Nichols on Eminent Domain, § 12C.03 [1]). However, Judge Plager misreads the Nichols treatise. The discussion at the cited pages addresses various cases, in which the government exercised the power of eminent domain in order to acquire property for some public project, and the question arose whether zoning and other preexisting regulatory restrictions on the property should be taken into account in setting the level of compensation. This discussion does not support the novel idea that a regulatory restriction, which itself results in a taking, should be considered in setting the level of compensation.

Apart from its lack of support, this novel standard for setting compensation would be completely unworkable. Under current law, once a particular government action has been found to effect a taking, then the property's actual fair market value must be estimated. See 4 Julius Sackman , Nichols on Eminent Domain, § 12.01. While hardly easy, this is a relatively straightforward and predictable calculation. On the other hand, if fair market value had to be discounted in every case based on the claimant's investment plans or his awareness of the regulatory environment in which he was operating, the calculations would become impossibly complex and unpredictable.

The upshot of current law on calculating "just compensation" is that regulatory takings law produces all or nothing outcomes. If the claimant can show a taking, she is entitled to full compensation based on the property's fair market value (and the government is entitled, in return, to the title to the property it has taken); if there is no taking, the claimant recovers no compensation. There is nothing remarkable about this result, for, as Justice Scalia stated in Lucas, "[t]akings law is full of these 'all-or-nothing' situations."

505 U.S. at 1019 n. 8:
B. A Claimant's Lack of Investment-Backed Expectations Can Preclude a Finding of a Regulatory Taking, Including in a Lucas-Type Case

Although investment-backed expectations are not relevant in calculating damages, they should be considered in determining liability, that is, whether a taking has occurred or not. In its prior decision, this Court concluded that investment expectations are relevant at the liability stage, and that ruling was correct. None of the pertinent precedents is inconsistent with this conclusion, and, in fact, these precedents, including Palazzolo in particular, affirmatively support the conclusion that investment expectations are relevant in determining liability. Based on the facts of this case, the investment expectations factor supports the determination that McQueen did not suffer a taking, providing a third, independent basis for reversing the judgment of the Court of Appeals.
1. The Relevant Precedents Support the Conclusion that Investment Expectations Are Relevant in Determining Whether a Taking Has Occurred

First, Lucas does not foreclose consideration of investment expectations in a "total" takings case because the role of investment expectations was not raised in that case. Mr. Lucas purchased two vacant lots for development purposes for $975,000 in 1986. Two years later, the South Carolina legislature enacted the Beachfront Management Act, which had the effect of making the property, according to the findings of the trial court, "valueless." There was no question that Lucas possessed investment-backed expectations, and that the South Carolina legislature had severely frustrated those expectations. There was obviously no reason for the Court to address how a "total" taking claim might fare, if the facts were entirely different and the owner could not demonstrate that she possessed investment-backed expectations, or that the government had frustrated such expectations.
Second, Lucas not only does not foreclose consideration of investment expectations, it affirmatively supports their relevance in a "total" taking case. The Lucas Court described its new "categorical" rule as referring to "categories" of government regulations, which are "compensable without case?specific inquiry into the public interest advanced in support of the restraint." 505 U.S. at 1015 (emphasis added). However, the "investment expectations" factor has long been recognized as a separate factor with "particular significance" in takings analysis. See Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). Because the quoted language from Lucas says only that the "public interest" served by a regulation is not relevant in a "total" takings case, and pointedly does not mention the investment expectations factor, Lucas does not foreclose consideration of investment expectations in a "categorical" taking case. See Good v. United States, 189 F.3d 1355, 1361 (Fed. Cir. 1999), cert. denied, 529 U.S. 1053 (2000) ("A Lucas-type taking . . . is categorical only in the sense that thcourts do not balance the importance of the public interest advanced by the regulation against the regulation's impact on property rights."); see also Sea Cabins on the Ocean IV Homeowners Association, Inc. v. City of North Myrtle Beach, 345 S.C. 418, 430, 548 S.E.2d 595, 607 (2001) (stating that the Lucas categorical rule only identifies a category of cases "which are compensable takings without case-specific inquiry into the public interest advanced in support of the action").
Justice Kennedy's concurring opinion supports this reading of Lucas. Justice Kennedy

explicitly stated that investment-backed expectations should be a relevant factor in a "total" taking case: "Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations." Lucas, 505 U.S. at 1034 (emphasis added).

This understanding of the scope of the Lucas "categorical" rule reflects the issue the Supreme Court actually addressed in Lucas. The question in the case was whether South Carolina could defend against Lucas' taking claim, even though the coastal law eliminated all of the property's economic value, on the ground that the regulation was designed to advance the public interest by preventing public harms. See Mugler v. Kansas, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887). The Supreme Court held that the strength of the public interest served by regulation is insufficient to support rejection of a taking claim, at least when a total taking is alleged. Because this was the only relevant issue Lucas decided, the "categorical" rule announced in Lucas should be interpreted as only addressing this issue. See Good, 189 F.3d at 1367 ("[T]he Supreme Court reasoned that in categorical cases, there should be no inquiry into the character of the governmental action or the balance between the property owner's right to use the property and the public interest asserted by the regulation.") (emphasis in original).

In sum, as this Court has already properly concluded, Lucas permits -- and, at a minimum, does not prohibit -- consideration of investment expectations in Lucas-type case.

The United States Supreme Court's recent decision in Palazzolo also supports the conclusion that investment expectations are a relevant factor in a Lucas-type case and, at a minimum, does not preclude consideration of investment expectations.

The only specific, relevant holding in Palazzolo is the Court's rejection of the "single, sweeping" rule that preacqusition notice of a regulatory constraint automatically bars a taking claim. The Court's holding does not foreclose consideration of investment expectations as a factor, which, based on the particular facts of a case, may support the conclusion that no taking has been established. See Rith Energy Inc. v. United States, 270 F.3d 1347, 1351 (Fed. Cir. 2001) (order on application for rehearing) (post-Palazzolo decision concluding that investment expectations are a relevant factor in takings analysis). In its prior decision in this case, this Court reached the conclusion, based on a detailed assessment of the facts, that the investment expectations factor supported rejection of McQueen's taking claim. The holding in Palazzolo is not inconsistent with, and does not call for revision of, this Court's prior ruling.

Furthermore, Palazzolo provides affirmative support for the conclusion that investment expectations should be regarded as a relevant factor in regulatory takings analysis. Five Justices embraced the position that reasonable investment-backed expectations, though not an absolute bar to a taking claim, is a relevant factor in a takings case. See 533 U.S. at 629 (O'Connor, J.) (concurring opinion) (emphasis added) ("Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial . . . ."); see also id. at 642-45 (Stevens, J.); id. at 654 n.3 (Ginsburg, J., joined by Justices Souter and Breyer); id. at 655-56 (Breyer, J.). When at least five justices of the Supreme Court have embraced a specific position on a disputed issue, even if that position is not reflected in a majority opinion, the majority viewpoint has powerful persuasive force. See Commonwealth Edison Co. v. United States, 271 F.3d 1327 (Fed. Cir. 2002) (en banc) (following an interpretation of the Takings Clause adopted by

Justice Kennedy, who authored a concurring opinion, and by four dissenters in Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed. 451 (1998)).

Finally, Palazzolo supports the conclusion that investment expectations are a relevant factor, not only in takings analysis generally, but in the context of a Lucas case specifically. Justice Kennedy, the author of the opinion for the Court in Palazzolo, stated that "we have observed, with certain qualifications . . . that a regulation which 'denies all economically beneficial or productive use of land,' will require compensation under the Takings Clause." 533 U.S. at 617 (emphasis added). This statement is followed by a citation to Lucas as well as a "see also" reference to his concurring opinion in Lucas, in which he stated that, where a total taking is alleged, "the test must be whether the deprivation is contrary to reasonable investment-backed expectations." Id. Thus, the Palazzolo majority opinion, authored by Justice Kennedy, more than suggests that investment expectations are relevant in a Lucas case.

The other, separate opinions in Palazzolo also support the conclusion that investment expectations are relevant in a Lucas case. Justice O'Connor, in her concurring opinion, did not directly address the role of pre-acquisition notice in a Lucas case, but focused on how the case should proceed on remand under Penn Central. However, Justice O'Connor's reason for concluding that pre-acquisition notice should be a factor in a Penn Central case is fully transferable to a Lucas case. Justice O'Connor said that, if pre-acquisition notice were irrelevant in a taking case, "then some property owners may reap windfalls and an important indicium of fairness is lost." Id. at 635. Justice O'Connor's concern about potential windfalls applies with even greater force in a Lucas-type case because an owner who bought property subject to very stringent restrictions is likely to have paid a highly discounted price and, therefore, in a subsequent takings action brought under Lucas, is likely to be seeking an especially large windfall. Cf. Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1187 (Fed. Cir. 1994) ("In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss. In economic terms, it could be said that the market had already discounted for the restraint, so that a purchaser could not show a loss in his investment attributable to it.").

A simple hypothetical case, derived from the facts in Palazzolo, illustrates the literal impossibility of a categorical rule barring consideration of investment expectations in a Lucas-type case. Palazzolo involved a property of about 20 acres, consisting of wetlands and a few acres of uplands. The Supreme Court ruled that the owner had not suffered a total denial of all economic use sufficient to establish a taking under Lucas. While the Court recognized that the State's refusal to allow filling of the wetlands limited the profit Palazzolo could make from the property, it ruled that the property's value based on the remaining development potential took the case out of the Lucas category. Imagine, however, if following the remand in Palazzolo, Palazzolo transferred the wetland acres (but not the upland portion) to another individual or private firm. Could the new owner then successfully sue under Lucas, despite the fact that it acquired the wetlands with notice of the restriction and perhaps for the express purpose of manufacturing a taking claim? If Palazzolo's hypothetical transferee could sue under the Takings Clause, then it would be a simple matter for property owners, who lack viable Lucas-type takings claims, to rearrange their property interests in order to manufacture claims, and thereby receive the economic benefit of a claim they otherwise would not possess. The law

simply cannot permit such an unjust and illogical result. See id. at 654 (Breyer, J., dissenting). The reason this hypothetical claimant cannot pursue a taking claim is that he lacks the reasonable investment-backed expectations necessary to support the claim. Investment backed expectations must matter, including in a Lucas-type case.
Therefore, Palazzolo, like Lucas, supports (and, at a minimum, does not preclude) the common sense conclusion that, depending upon the facts of the particular case, investment expectations are a relevant factor in a regulatory takings case, including a Lucas-type case.
Finally, the U.S. Court of Appeals for the Federal Circuit, in Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999), cert. denied, 529 U.S. 1053 (2000), relied on heavily, and properly, by this Court in its prior decision, held that the investment-backed expectations factor can defeat a taking claim, including a Lucas claim. Good represents good law in the Federal Circuit, and this Court should continue to follow that decision. Unfortunately the case law on this subject in the Federal Circuit has become somewhat complicated since this Court's earlier ruling, as we explain below.
In Good, the Federal Circuit ruled that, "[f]or any regulatory takings claim to succeed, the claimants must show that the government's regulatory restraint interfered with his investment-backed expectations in a manner that requires the government to compensate him." Id. at 1360 (emphasis added). The trial court had rejected the taking claim on the grounds that the regulation did not effect a "total taking" claim under Lucas and the claimant lacked sufficient investment-backed expectations to support a claim under Penn Central. On appeal, the claimant challenged the finding that the regulation did not effect a total taking under Lucas, and also argued that a lack of investment- backed expectations cannot be considered in a Lucas case. The claimant urged the appeals court to disavow its earlier statement in Loveladies Harbor v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994), that an owner's investment expectations are relevant in a Lucas case. The Federal Circuit resolved the appeal by concluding that, regardless of the nature of the taking claim, investment expectations are always a potentially relevant factor and, based on the particular facts of the case, can preclude a finding of a taking. The Federal Circuit's holding was consistent with, and supported by, a previous decision reaching the same conclusion. See Avenal v. United States, 100 F.3d 933 (Fed. Cir. 1996) (holding that government action which destroyed the value of the claimants' lease did not effect a taking because the claimants' lacked reasonable investment-backed expectations). Good and Avenal therefore support this Court's conclusion that McQueen's failure to demonstrate any genuine interference with reasonable investment-backed expectations bars his claim under Lucas.
Subsequently, within a few weeks of this Court's initial ruling in this case, a panel of the Federal Circuit adopted a different view on the investment expectations issue. See Palm Beach Isles Associates v. United States, 208 F.3d 1374 (Fed.Cir. 2000); see also 231 F.3d 1354 (Fed.Cir. 2000) (order on rehearing). The panel concluded that a court is categorically prohibited from considering investment-backed expectations in a Lucas case. For the reasons discussed above, this conclusion is not supported by, much less dictated, by the United States Supreme Court decisions in Lucas and Palazzolo. Furthermore, the panel ruling in Palm Beach Isles improperly disregarded governing Federal Circuit precedent and, therefore, does not represent sound precedent within the Federal Circuit itself.

The Palm Beach Isles panel, in its initial decision, read the Federal Circuit's decisions in Loveladies Harbor and Florida Rock Indus. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), as establishing a categorical rule barring consideration of investment expectations in a Lucas case. 208 F.3d at 1370. The panel reasoned that it was obligated to ignore the contrary holding in the subsequently decided Good decision, on the ground that the Good panel should have followed the earlier, binding circuit precedent set by Loveladies Harbor and Florida Rock. 208 F.3d at 1379 n. 3. However, this analysis was plainly incorrect. Loveladies Harbor stated that investment expectations are relevant in a Lucas case, see 28 F.3d at 1179, and, therefore, supported the holding in Good. Furthermore, as the Palm Beach Isles panel acknowledged in its subsequent order on rehearing, see 231 F.3d at 1359, the statement in Florida Rock concerning investment-backed expectations was dictum. Tracking the reasoning in Palm Beach Isles, Good was authoritative precedent on this issue within the Federal Circuit, and, rather than ignoring that decision, the panel in Palm Beach Isles should have treated Good as binding precedent, and followed it.

Upon rehearing, the Palm Beach Isles panel issued a supplemental order abandoning its prior reasoning, but adopted a new rationale for arriving at the same outcome. 231 F.3d 1354 (Fed. Cir. 2000). After acknowledging that neither Florida Rock nor Loveladies Harbor established binding precedent on the expectations issue, the panel concluded that it was still free to ignore Good, but for the new reason that the relevant statements on this issue in Good were dictum as well. In addition, the court concluded that Avenal did not address the issue, ostensibly because the claimant in the case had not asserted a Lucas-type claim. Given its conclusion that there was no binding circuit precedent on the issue, the panel then proceeded to decide, purportedly for the first time in the Federal Circuit, whether investment expectations should be a relevant factor in a Lucas-type case. The panel concluded on rehearing, as it had initially, that consideration of investment expectations is prohibited in a Lucas case. The Federal Circuit subsequently denied an application for rehearing en banc. See 231 F.3d 1365 (Fed. Cir. 2002).

The panel's supplemental order was in error because the panel was, in fact, obligated to follow the binding circuit precedent on the issue established by Good and Avenal. See Palm Beach Isles Associates v. United States, 231 F.3d 1365 (Fed. Cir. 2000) (Gajarsa, J., dissenting from order declining suggestion for rehearing en banc) (stating that "The Palm Beach panel, in direct conflict with Supreme Court precedent and prior holdings of this court, belies the law of accepted regulatory takings analysis."). Because the Palm Beach Isles panel disregarded circuit precedent on the issue, the panel's decision is not an authoritative ruling within the Federal Circuit and subsequent panels of the Federal Circuit can, and should, disregard it. See South Corp v. United States, 690 F.2d 1368 (Fed. Cir. 1982).

Furthermore, and more importantly for the purpose of this Court, the analysis in the Palm Beach supplemental order is simply wrong on the merits. The panel's argument boils down to this: since investment expectations are irrelevant in a case involving an alleged "categorical" taking based on physical occupation of private property, and since an alleged "categorical" regulatory taking based on denial of all economically viable use is analogous to a taking based on physical occupation, then investment expectations must be irrelevant in a categorical regulatory taking case. The premise of the panel's argument is wrong. The United States Supreme Court has described a physical occupation taking as

subject to analysis under a "categorical" rule. Lucas, 505 U.S. at 1015. But, as discussed in Subpart III.A, the Court has used the term "categorical" to mean only that the public interest served by the government action cannot be considered in the takings analysis. There is no absolute bar to considering investment-backed expectations in a categorical physical-occupation taking case. Indeed, in several cases, the Federal Circuit itself has rejected physical-occupation takings claims on the ground that the claimants lacked sufficient investment-backed expectations to support their claims. See California Housing Securities, Inc. v. United States, 959 F.2d 955 (Fed. Cir. 1992) (rejecting savings and loan institution's taking claim based on physical seizure of institution's assets by the Resolution Trust Company pursuant to federal regulations designed to safeguard institution's assets); see also Golden Pacific Bancorp. v. United States, 15 F.3d 1066 (Fed. Cir. 1994).

In addition, even if it were correct that investment expectations cannot be considered in analyzing a physical-occupation taking claim, see Nollan v. California Coastal Commission, 483 U.S. 825, 833 n.2 (1987) (arguably supporting this view), it does not follow that the same rule should apply to a taking claim based on a regulatory use restriction. As explained by the United States Supreme Court in Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419, 102 S.Ct. 3164, 74 L.Ed.2d 868 (1982), there is a fundamental difference between physical occupations and use restrictions. The Court said, on the one hand, it "has often upheld substantial regulation of an owner's use of his property," id. at 425, and, on the other, "we have long considered physical intrusion by government to be a property restriction of an unusually serious character for the purpose of the takings clause." Id. The Court also cited several recent cases "confirm[ing] the distinction between a . . . physical occupation . . . and a regulation that merely restricts the use of property." Id. at 428, citing United States v. Causby, 328 U.S. 256 (1946); United States v. Central Eureka Mining Co., 357 U.S. 155 (1958); see also City of Monterey v. Del Monte Dunes, 526 U.S. 687, 702-03 (1999) (holding that the heightened standard of review applicable to physical exactions involving physical occupation does not apply to regulatory restrictions on the use of property). Given the sharp distinction the United States Supreme Court has consistently drawn between physical occupations and use restrictions, there is no reason to conclude that, even if expectations were irrelevant in a physical-occupation taking case, the same rule should apply in a regulatory use case. See Rith Energy Inc. v. United States, 270 F.3d at 1351 (distinguishing between takings claims based on regulatory use restrictions, in which investment expectations are relevant, and takings claims based on physical occupations, in which they are not).

For the reasons set out above, this Court should continue to rely on Good as persuasive authority.

2. McQueen's Taking Claim Should Be Rejected Because He Failed to Demonstrate that the Department's Permitting Decision Frustrated Reasonable Investment-Backed Expectations

Based on the facts of this case, the investment expectations factor supports rejection of this taking claim. The Court should reaffirm the portion of its earlier decision arriving at this conclusion.

First, McQueen lacks sufficient investment-backed expectations to support this claim because, as of the time of the alleged taking, McQueen's rights in these lands were

subject to the limitations imposed by the South Carolina public trust doctrine. As discussed above in Section II, the public trust doctrine represents a "background principle" of South Carolina property law, which imposes inherent limitations on McQueen's title. Because McQueen lacked a compensable property right to fill these lands in violation of the public trust, his taking claim fails at the first stage of regulatory takings analysis. However, assuming for the sake of argument that McQueen possessed a compensable property right, the longstanding public trust doctrine helps define, at a minimum, McQueen's investment-backed expectations. See R.W. Docks & Slips v. State of Wisconsin, 628 N.W.2d 781 (Wisc.), cert. denied, 121 S.Ct. 217 (2001) (rejecting taking claim based on denial of permission to fill portion of lake subject to the public trust, on the ground that the owner was not legally entitled to an investment-backed expectation of being able to violate the public trust). McQueen could not, in light of the South Carolina public trust doctrine, have possessed an investment-backed expectation of being able to fill these tidelands.

Second, McQueen cannot show that any expectations he had were frustrated by government action because his voluntary decision not to protect his property from erosion is the primary reason he is now barred from filling the tidelands on his property. When the Department's regulations went into effect, McQueen could have developed the two lots without filling any tidelands and he also could have built a structure along the high tide line to prevent erosion of the property. See McQueen, 496 S.E.2d at 650 (Conner, J., concurring in part an dissenting in part) ("erosion on the lots began around 1974, [and] as late as 1989 was still not characterized as severe'"). McQueen failed to exercise his right to protect his property from erosion, even as many of his neighbors facing the same threat took the initiative to protect their properties. Id. at 651; R. 334. Thus, McQueen's properties continued to erode over a period of several decades, with the result that significant portions of each lot reverted to tidelands. As discussed above, under the well-established South Carolina law regarding accretion and erosion of coastal properties, this physical transformation meant that these lands once again became subject to the public trust. It also meant that lands formerly available for development became subject to the Department's restrictions on filling of coastal tidelands. As this Court said in its initial decision, McQueen's "prolonged neglect of the property and the failure to seek development permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations." McQueen, 530 S.E.2d at 634-35.

Furthermore, to the extent that the present record allows for the possibility that some portion of one or both lots was subject to the ebb and flow of the tide when the Department's regulations went into effect, there already was a well-established tradition of regulatory controls over such lands, in addition to the public trust doctrine. As the Court observed in its initial decision, McQueen "purchased beachfront property that has been the subject of at least some development regulation for over a century." McQueen, 530 S.E.2d at 634 (citing Rivers and Harbors Act of 1899, 33 U.S.C. 403). Under Palazzolo, even if the pre-existence of this federal statutory scheme is not an absolute bar to the taking claim, it is certainly a relevant factor to be considered, along with other evidence, in deciding whether a taking has occurred.

Finally, the lengthy period of time between McQueen's purchase of the lots (in 1961 and 1963) and the date of the alleged taking (in 1993) also supports the conclusion that McQueen lacks sufficient investment-backed expectations to support a taking claim.

McQueen bought his two lots for a total of $4,200, and then, decade after decade, took no action to develop the property. From this evidence it is difficult to discern what specific investment expectation, if any, McQueen can assert. See McNulty v. Town of Indiatlantic, 727 F.Supp. 604 (M.D. Fla. 1989) (owner's 15-year delay in attempting to develop property weighs against owner's claim that he possessed investment-backed expectations). The Department's adoption and enforcement of coastal protection laws and regulations has clearly increased the value of coastal development sites, both by preserving the coast's scenic and ecological values and by restricting available development opportunities. If McQueen were permitted to assert a taking in this case, he would be seeking, not "just compensation," but an enormous windfall at public expense. See McQueen, 530 S.E.2d at 633 ("Without the requirement of investment-backed expectations, a property owner could obtain a windfall by claiming a taking in the face of new regulations, without any real intent to develop."). This consideration also supports the conclusion that McQueen lacks sufficient investment expectations to support this claim.

For all of the foregoing reasons, McQueen lacked the investment-backed expectations necessary to support this taking claim.

CONCLUSION

The Court should reaffirm its prior decision to reverse the decision of the Court of Appeals.

Respectfully submitted,

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