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.

REPLY BRIEF OF PETITIONER

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PROOF OF SERVICE

I certify that I have served the Reply Brief of Petitioner on all counsel of record by depositing three (3) copies of it in the United States Mail, postage prepaid, on July 23, 2002, addressed as follows:

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INTRODUCTION

The Department respectfully submits this Reply to the Brief of Respondent. In addition, this brief addresses, to the extent necessary, the briefs of Respondent's amici, Pacific Legal Foundation and the Homebuilders Association of South Carolina, et al.

Nothing in Respondent's brief or in the briefs of Respondent's amici refutes the conclusion that the Court should reverse the decision of the Court of Appeals on three independent grounds: (1) Respondent failed to carry his burden of demonstrating that his claim met the test for a "denial of all economically viable use" under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); (2) Respondent's claim is barred by background principles of South Carolina property and nuisance law; and (3) as the Court correctly ruled in its initial decision in this case, Respondent's lack of reasonable investment-backed expectations bars his claim.

After the Department filed its opening brief, the U.S. Supreme Court, on April 23, 2002, issued an important new takings decision in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 (2002). While Respondent and his *amici* barely mention the Court's decision, it provides significant support for the Department's appeal, as discussed in detail below.

ARGUMENT

I. RESPONDENT'S CHARACTERIZATIONS OF THE FACTS ARE MISLEADING.

Respondent's depiction of the record is misleading in several important respects. First, Respondent contends that "[b]y the time McQueen could afford to prepare his property for development," the Coastal Zone Management Act made it unlawful to fill

tidelands without a permit. Respondent's Brief (hereinafter "Resp. Br.") at 3, citing S.C. Code Ann. § 48-39-130(c) (1977 & Supp. 2001). This statement glosses over the fact that the Coastal Zone Management Act was adopted in 1977 -- fourteen years before McQueen applied for a permit. Even more significantly, this statement ignores the fact that McQueen took no action, prior to seeking permission to fill tidelands in 1991, to protect the property from the natural process of erosion -- even as neighboring property owners took the initiative to protect their properties by obtaining permission to construct bulkheads along the eroding edges of their properties.

Second, Respondent argues that prior to Hurricane Hugo the tidal waters had "gently nibbled away" at his land, and that only the hurricane caused McQueen's land to become "severely eroded." Resp. Br. at 4. The record belies the contention that Hurricane Hugo was the singular event that caused severe erosion of the property. In 1968, overflights indicated that McQueen's properties were both in "good shape." R. at 334. However, by 1974, the 53rd Avenue lot had already "eroded some" and the District Conservationist no longer deemed it to be in "good shape." R. at 335. By 1983, overflights showed that the 53rd Avenue lot (and all other lots without bulkheads) were "eroding at a faster rate." Id. By 1989, prior to Hurricane Hugo, neither the 48th Avenue lot nor the 53rd Avenue lot were considered to be in good condition. Id. Finally, the District Conservationist noted, in 1994, that both lots were severely eroded from a "combination" of altered water flow caused by bulkheads on both sides of the lots and surface water from adjacent houses, and, almost as an afterthought, that "the floodwater of Hugo obviously did some damage as well." Id. Moreover, as the Department's amici

point out in their Brief at 3-4, McQueen testified as the sole witness in support of his case, and he admitted that he had no idea whether there was more high ground in 1989 than there was in 1994. See R. at 212.

Third, McQueen's contention that his property remained "suitable" for building single-family homes in 1991 is based solely on his speculation that he might "build a house sometime," and otherwise lacks support in the record. See Resp. Br. at 4; R. at 209. McQueen's initial rejection -- because of municipal setback requirements -- of the permit issued by the Department in 1992, suggests that municipal building rules may have independently barred development of the property, at least by the early 1990's, if not before. R. 195, 208. See also R. at 199 (site visits in 1991 and 1993 indicated the "majority of the lots are tidelands"). More significantly, as late as the administrative hearing in 1994, McQueen admitted that he was not in a position to proceed with development of his property, even had the Department issued the necessary permits. *See* R. at 206.[1]

II. MCQUEEN HAS NOT DEMONSTRATED A COMPLETE OBLITERATION OF PROPERTY VALUE NECESSARY TO ESTABLISH A TAKING UNDER LUCAS.

McQueen's claim under Lucas should be denied because he failed to carry his burden of demonstrating that the Department's regulations eliminated the value of the property. McQueen points to no convincing legal or factual ground for rejecting this

1 McQueen objects to the three questions posed by the Court following the remand from the U.S. Supreme Court. See Resp. Br. at 8, note 7. The U.S. Supreme Court directed this Court to reconsider its prior ruling in light of Palazzolo v. Rhode Island, 535 U.S. 606 (2001), and, as the Department explained in its Opening Brief, Palazzolo bears on each of the questions posed by the Court. See Department Brief at 9, 24-27, 34-38. Thus, the Court has acted well within its authority in requesting briefing on these questions.

conclusion. In addition, McQueen offers no meaningful response to the Supreme Court's decision in Tahoe-Sierra, which strongly supports the Department's position.

As a preliminary matter, the Court should reject McQueen's attempt to insulate the court of appeals' decision from review in this Court by characterizing the interpretation of Lucas as a factual issue rather than a legal issue. Resp. Br. at 10-11. The question before the Court is whether a Lucas-type taking can be established by demonstrating that the regulation bars use, i.e., development, of the property, or whether, instead, Lucas requires a showing that the property's economic value has been destroyed. Brief in Opposition at 13; see also Brief Amicus Curiae of the Pacific Legal Foundation. This presents a straightforward legal issue, not a factual issue. Accordingly, contrary to McQueen's position, the lower court's conclusion about the scope of the Lucas test is not eligible for the kind of deferential review appropriately applied to findings of fact. The issue of the scope of the Lucas test is a legal question which this Court should resolve de novo.

Turning to the merits, McQueen argues that the Lucas test should be read as turning on whether a regulation prohibits use, not on whether it eliminates value. Resp. Br. at 16-20. As explained in the Department's opening brief, the better reading of the Lucas decision is that elimination of value, not prohibition of use, is the key measure of a taking under Lucas. This conclusion is supported, in particular, by the fact that Lucas involved a regulation that, according to the findings of the trial court in that case, literally rendered the property "valueless," and by the Supreme Court's repeated emphasis on the significance of a regulation's effect on value under the Lucas test.

However, whatever the merits of the parties' differing interpretations of the Lucas opinion, the U.S. Supreme Court in Tahoe-Sierra has authoritatively resolved the debate about the scope of the Lucas test in the Department's favor. The test for a Lucas-type taking, the Court said in Tahoe-Sierra, is whether a regulation results in "the permanent obliteration of the value of a fee simple estate." 122 S.Ct. at 1483 (emphasis added).[2]

The Supreme Court ruled in Tahoe-Sierra that a 32-month moratorium on development did not a constitute taking under Lucas. This ruling squarely rests on the Court's conclusion that the basic inquiry under Lucas is whether the regulation eliminates value. The Court described Lucas as upholding the conclusion that Lucas had been deprived of "all economically beneficial uses" of his land, based on a showing that the statute "'wholly eliminated the value'" of Lucas' fee simple estate. 122 S.Ct. at 1483 (emphasis added). The Court said that its holding in Lucas was "limited to 'the extraordinary circumstances when no productive or economically beneficial use of land is permitted.'" Id., citing 505 U.S. at 1019. "The emphasis on the word 'no' in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%." Id. Thus, the Court concluded, under Lucas, "[a]nything less than a 'complete elimination of value', or 'a total loss'" would not support a finding of a taking under Lucas. Id. (emphasis added.). Under this standard, the Court said, only a "permanent obliteration of the value of a fee simple estate constitutes a categorical taking." Id. (emphasis added.) [3]

2 By arguing that prohibition on use, not destruction of value, is the critical factor in a Lucas case, Respondent is simply repeating the argument of the dissenters in Tahoe-Sierra. See 122 S.Ct. at 1493-1494 (Rehnquist, C.J., dissenting).

3 In a decision issued on July 19, 2002, the U.S. Court of Appeals for the Federal Circuit stated that "[t]he Tahoe Court emphasized that," in order to establish a taking under Lucas, a claimant must show that he has

Applying this reading of Lucas, the Court in Tahoe-Sierra concluded that the moratorium did not effect a Lucas taking. The parties did not dispute that the moratorium prohibited development for nearly three years. However, given that the moratorium was only for a limited period, the properties retained significant value for potential future development. Under these facts, the Court ruled, the plaintiffs had not met the test for a Lucas taking. "Logically," the Court said, "a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." 122 S.Ct. at 1484. In other words, absent proof that a regulation renders property "valueless," a claimant cannot establish a taking under Lucas.

Applying this interpretation of the Lucas standard, as the Department explained in its opening brief, McQueen failed to demonstrate the kind of "permanent obliteration" of value necessary to establish a taking under Lucas.

Despite the obvious relevance of Tahoe-Sierra to this issue, McQueen addresses the decision only briefly in a footnote referring cryptically to "the breadth of its dicta" and suggesting that the Court's "narrow" holding is confined to temporary moratoria. Brief in Opposition at 21. n.12. This attempt to avoid the dispositive force of the Tahoe-Sierra precedent is mistaken and misleading. The Court's discussion of the use vs. value distinction was critical to its determination that the moratorium, even though it prohibited development, did not result in a taking under Lucas. Moreover, the Court described the use vs. value distinction in broad terms. Therefore, the Court's analysis necessarily

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"been permanently deprived of all economic value associated with the property." Boise Cascade Corp. v. United States, 2002 WL 1586329 (Fed. Cir., July 19, 2002), at *9.

applies to many different kinds of regulatory programs, including the type of program at issue in this case.

Respondent is correct that the Court in Tahoe-Sierra described its holding as "narrow," but that characterization was principally based on the fact that the plaintiffs were asserting a Lucas claim. 122 S.Ct. at 1470. This case is narrow in the same sense that the Tahoe-Sierra case was narrow because the plaintiff in this case also is seeking recovery under Lucas.[4]

Contrary to the argument of the Pacific Legal Foundation, the U.S. Supreme Court decision in City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999), does not contradict Tahoe-Sierra and demonstrate the "irrelevance of value" in takings analysis. Amicus Br. at 10. The property at issue in that case was indeed purchased by the government during the course of the litigation, but that fact had no bearing on the resolution of the taking claim, which only sought compensation for the period of delay from the date of the taking until the property was purchased.

In its opening brief, the Department explained that McQueen's property might well have value, perhaps significant value, based on its potential use as private recreational open space. Brief of Petitioners at 12-13. McQueen seeks to rebut this

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4 McQueen cites various decisions of this Court as well as other courts that recite the Lucas "denial of all economically beneficial use" standard, implying that use of the word "use" by itself demonstrates that destruction of value cannot be the linchpin of Lucas analysis. But to the extent this phraseology is ambiguous, the ambiguity has now been resolved by the holding in Tahoe-Sierra that the Lucas test turns on value, not use. The decision in Del Monte Dunes at Monterey Ltd. v. City of Monterey, 95 F.3d 1422, 1432-33 (9th Cir. 1996), aff'd, 526 U.S. 687 (1999), did embrace Respondent's use-not-value approach, but the U.S. Supreme Court did not adopt the same approach in it decision in that case and, in any event, the decision has been superseded by Tahoe-Sierra. The decision in Lake Nacimento Ranch Co. v. County of San Luis Obispo, 841 F.2d 872, 877 (9th Cir. 1988), which also pre-dates Tahoe-Sierra, provides McQueen the weakest possible support because the court rejected the taking claim even under its expansive reading of Lucas.

argument by citing portions of the trial record, which, according to his interpretation, demonstrate that the property is not available for private recreational use. First, McQueen quotes testimony by Mark Caldwell to the effect that this area of tidelands helps support the production of shrimp, crabs, and other shellfish, which in turn supports recreational activities in the coastal waters adjacent to the property. But this testimony does not support McQueen's argument because it does not prove that McQueen (or some purchaser from McQueen) could not also make private recreational use of the property itself.

Second, McQueen refers to his own testimony to the effect that an unspecified "they" would not permit him or "Alex," described as a "conservationist," to land a boat on the property.Br. Resp. at 13. However, there is no indication in the record that the "they" referred to in this testimony were employees of the Department. The Department is not in a position to speculate whether a representative of some governmental entity, acting on some basis unknown to the Department, might have taken the action described by McQueen. But the Department's permitting requirements only apply to proposals to "fill, remove, dredge, drain or erect any structure on or in any way alter any critical area." See Section 48-39-130(C) (1977 & Supp. 2001). The regulations specifically exempt "... fishing, ... boating or other recreation ..." from the permit requirements. See Section 48-39-130(D)(2); see also 48-30-5(A)(2). In short, McQueen's anecdotal argument is rebutted by the fact that the Department's regulations explicitly impose no constraint on private recreational boating in or adjacent to the coast.[5]

5 A claim of a "total" taking under Lucas also can be defeated by a showing that, even if a regulation presently bars all economically valuable use of the property, the property has a positive value based on market demand for the property because of the possibility that the regulations may change in the future.

McQueen cites Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978), in an attempt to establish that evidence of restrictions on development can help support a taking claim. The argument may or may not be well taken (an issue this Court need not decide), but it is beside the point. The question in this case is whether McQueen has established a taking under Lucas. The Court has no reason to address whether McQueen might have established a taking on some other theory, such as under the Penn Central test. In this respect, this case is similar to the Tahoe-Sierra case, in which the Court was only presented with, and only considered, a claim under Lucas, and declined to speculate how the plaintiffs might have fared if they had pursued a claim under Penn Central. See 122 S.Ct. at 1478 & n. 16. See also Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (rejecting a Lucas categorical claim but remanding a Penn Central claim).[6]

In a list ditch effort to establish that impact on property value is "largely irrelevant" in taking, analysis, McQueen cites Phillips v. Washington Legal Foundation, 524 U.S. 156, 169 (1998), for the proposition that "[e]ven the complete absence of economic value does not bar an owner from bringing a takings claim." Br. Opp. at 21. McQueen's theory, at least in the context of takings challenges to use restrictions (as opposed to physical occupations), is contradicted by numerous Supreme Court

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See Florida Rock Industries, Inc. v. United States, 18 F.3d 1560, 1567 (Fed. Cir. 1994), cert. denied, 513 U.S. 1109 (1995) (reversing finding of a taking under Lucas based on evidence that property had significant market value based on possibility that regulatory regime for wetlands might be altered). In other words, the present ability to sell property for value, even if the property cannot currently be developed, also represents an "economically viable use" of the property.

6 McQueen also cites (Resp. Br. at 20) various other Supreme Court precedents, which pre-date Lucas, for the proposition that whether a regulation prohibits use is a relevant consideration in takings analysis. Again, the point may be well taken, but these precedents are irrelevant to the issue of what kind of showing is necessary to establish a taking under Lucas.

precedents that emphasize the importance of economic impact in takings analysis. See, e.g., Penn Central, 438 U.S. at 123 ("The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.) (emphasis added). Phillips is a very narrow decision, which only held that the interest earned on lawyers', trust accounts represents the "property" of the client whose funds generated the interest. Phillips did not decide whether use of the interest to fund legal services for the poor, which has no actual adverse economic impact on the lawyers' clients, could result in a taking.[7]

Finally, McQueen makes only a weak effort in addressing the factual record, to contest that he failed to carry his burden of demonstrating that the property is valueless and to explain away the strong suggestions in the record that the property might, in fact, have significant value. Br. Resp. at 21-24. McQueen seeks to respond to the lack of appraisal evidence and to the fact that neighboring property owners might have purchased the land for private open space with a rehash of the erroneous argument that prohibition on use, rather than elimination of value, is the critical issue in a Lucas case. Br. Resp. at 21-24. McQueen also repeats the argument that neither McQueen nor anyone else could make private recreational use of the property, but, again, that argument is not supported by the record and is contradicted by the Department's regulations.

7 As the Department explained in its opening brief (at 14, n.14), the Department has repeatedly contested the legal conclusion that McQueen suffered a sufficient destruction of property value to establish a denial of all economically viable use. McQueen contends (Br. Opp., at 14) that the Department "admitted" in its opposition to the petition for certiorari filed in the U.S. Supreme Court that McQueen had met this legal test. In fact, the Department simply acknowledged the "superficial" resemblance between the "facts" of Lucas and the facts of this case, but did not make any concession about what legal conclusion should be

Finally, McQueen contends that the assessed value of the property for tax purposes is irrelevant because a taxpayer can allegedly seek a reduced assessment based on a new regulatory constraint only by filing a formal protest. Br. Resp. at 24. But the important point is that the assessed value of the property has obviously been increased far above the original purchase price of $4200, presumably to reflect the property's increased market value, notwithstanding the Department's regulations and the other significant constraints on coastal development.

III. MCQUEEN'S TAKING CLAIM MUST BE REJECTED BECAUSE HE HAS NO RIGHT TO DESTROY COASTAL WETLANDS UNDER THE SOUTH CAROLINA PUBLIC TRUST DOCTRINE.

Respondent's claim also should be rejected on the ground that he has no protected property right to fill coastal tidelands under the longstanding South Carolina public trust doctrine, which represents a "background principle" of property and nuisance law within the meaning of the U.S. Supreme Court's decision in Lucas.

A. The Claim is Barred Under a Background Principle of Property Law.

Respondent does not dispute that the public trust doctrine represents a longstanding feature of South Carolina property law or that he sought to fill and destroy tidelands. Nor does he dispute the correlative principle that uplands, when they erode over time and become tidelands, become subject to the public trust. See Horry County v. Woodward, 282 S.C. 366, 370, 318 S.E.2d 584, 586 (S.C.App. 1984) ("lands gradually encroached upon by water cease to belong to the former riparian or littoral owner."). Instead, he offers a host of erroneous interpretations of South Carolina case law in an

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drawn from these facts. The Department has repeatedly argued that McQueen has not presented sufficient

effort to show that his proposed tideland filling somehow does not implicate the public trust doctrine. This effort is mistaken and the Court should reject it.

First, Respondent contends that the public trust doctrine does not bar this claim because, under the doctrine of *stare decisis*, the Court must follow its prior ruling on this issue in Lucas v. South Carolina Coastal Council, 424 S.E.2d 484 (S.C. 1992). Resp. Br. at 25-26. This argument is based on a gross misreading of this Court's Lucas ruling. The Beachfront Management Act at issue in Lucas prohibited construction on dry uplands. By contrast, the regulation at issue in this case involves restrictions on the filling and destruction of tidelands. The public trust doctrine is a legal principle that specifically applies to tidelands. Thus, the conclusion in Lucas that background principles of South Carolina law did not bar that claim involving upland property has no bearing on the Department's contention in this case involving tidelands that the public trust doctrine does bar the claim. No one disputes that McQueen, like Lucas, could have built habitable structure on his property, when it was still uplands, if he had taken the initiative to protect the property. As Judge Connor explained in his dissent below, "McQueen was not prohibited from building a house. He was prohibited from backfilling marsh, which he would not have had to do at all had he been a responsible landowner." [9]

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evidence to meet the Lucas test.

9 Respondent implies that background principles of South Carolina law actually *support* the destruction of tidelands. This suggestion is baseless. The cases Respondent cites, Forest Land Co. v. Black, 216 S.C. 255, 263-64, 57 S.E.2d 420, 424-425 (S.C. 1950) and City Council of Charleston v. Werner, 38 S.C. 488, 495-96, 17 S.E. 33, 35-36 (S.C. 1893), are not on point. In Forest Land Co., the Court declined to find that motorboat waves, which allegedly caused erosion, were a nuisance. In Werner, an owner of non-coastal property was required by the City of Charleston to fill a "low lot" on her property. The case did not involve tidelands and in any event the decision hardly supports a taking claim because the Court ruled that the city could impose this requirement on a property owner "*even at the expense of private rights.*" 17 S.E. at 36 (emphasis added).

Second, McQueen contends that the Department's reliance on the public trust doctrine is barred under the doctrine of collateral estoppel. Resp. Br. at 27-29. This argument relies entirely on certain "evidence" concerning prior litigation that the Court, by order dated May 30, 2002, refused to allow McQueen to add to the record in this case. Thus, the "collateral estoppel" argument is nothing more than an attempt to make an end around the Court's order and it should be rejected on that basis. Worse yet, Respondent now seeks to rely on a 1963 court order, and a plat purportedly approved by that order, which were not even submitted to the Court with Respondent's unsuccessful motion. The Court should reject the collateral estoppel argument out of hand.[10]

Third, Respondent argues that because this Court recognized that the U.S. Supreme Court's Lucas decision effectively overruled Carter v. South Carolina Coastal Council, 281 S.C. 201, 314 S.E.2d 327 (S.C. 1984), the Department is barred from relying on the public trust doctrine as a defense to this taking claim. Resp. Br. at 30-31. This argument is based on a misreading of Carter, Lucas, and this Court's initial ruling in this case. In Carter, this Court ruled that "the ... [State] may properly regulate the use of property where uncontrolled use would be harmful to the public interest; and ... [this] regulation, even though it prohibits a beneficial use, will not necessarily be deemed a

10 In any event, the collateral estoppel argument is wrong on the merits. First, the contention that the prior litigation determined that McQueen's property should be treated as uplands is beside the point. The Department does not dispute that McQueen's property was largely uplands at some point in the last several decades. The Department's public trust defense rests on the rule that uplands become subject to the public trust when they erode away and become tidelands. It is irrelevant for the purpose of this argument how the uplands originally became uplands, and McQueen does not argue otherwise.

Second, the prior litigation did not produce a final legal ruling capable of having collateral estoppel effect. So far as can be determined from the materials submitted with Respondent's unsuccessful motion, the August 1, 1968 Order upon which Respondent relies was superseded by a Supplemental Order dated December 23, 1969, approving a final settlement of the case. The 1969 order, which vacated the 1968 order, did purport to represent a resolution of the case on the merits. Furthermore, McQueen, who

(taking) in the constitutional sense." 281 SC at 204, 314 S.E.2d at 329, citing Brecciaroli v. Connecticut Commissioner of Environmental Protection, 168 Conn. 349, 362 A.2d 948, 951 (1975), in turn citing Mugler v. Kansas, 123 U.S. 627, 668-69 (1887). This Court, in its initial ruling in this case, recognized that Lucas repudiated the reasoning of Carter by concluding that, in order to avoid a finding of a taking, "the State 'must do more than proffer ... the conclusory assertion that [the land uses in question] violate a common-law maxim such as '[use your property in such a manner as not to injure that of another.]'" 340 S.C. at 73, 530 S.E.2d at 633, citing Lucas, 505 U.S. at 1031. Reliance on the public trust doctrine, however, is not precluded by Lucas. Indeed, to the contrary, the Supreme Court in Lucas, even while it was rejecting the generic harm-prevention defense to a taking claim, explicitly affirmed that a taking claim cannot succeed where the claimant does not possess the alleged property right to begin with under background principles of property and nuisance law.

The public trust doctrine, the background principle that applies in this case, is far more circumscribed than the relatively free-ranging harm-prevention defense of Carter. The Carter defense represented an expansive exception to regulatory takings doctrine that could potentially justify many kinds of regulation relating to different types of private property interests. By contrast the public trust doctrine is a relatively narrow, but longstanding common law doctrine that requires the State, as the owner and trustee of the jus publicum, to protect tidelands from destruction. The public trust doctrine applies only to those portions of real property that lie below the high water mark.

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acquired his property in 1961 and 1963, was not a party to this litigation and was not subject to either order.

Fourth, contrary to Respondent's contention,the Department has not waived the public trust doctrine as a defense in this case. Resp. Br. at 31-32. The Department has consistently asserted that "background principles" bar Respondent's claim and, therefore, Respondent has been on notice from the beginning of this litigation of the Department's position that he lacks a protected property right to destroy tidelands. The public trust doctrine merely represents a specific legal argument in support of a position the Department has maintained from the beginning of this case. Moreover, this case is now before the Court at the direction of the U.S. Supreme Court for reconsideration in light of Palazzolo v. Rhode Island, 533 U.S. 606 (2001), which discussed Lucas at length and elaborated on the concept of background principles. Accordingly, it is appropriate on remand from the U.S. Supreme Court to consider whether the public trust doctrine is the sort of limitation on McQueen's title derived from South Carolina's "legal tradition" which bars this claim. See Palazzolo, 533 U.S. at 630. Finally, the public trust doctrine is not susceptible to waiver on the same basis as other defenses. The Court has long recognized that the State can divest itself, and the public at large, of public trust resources only through express language, see Cape Romain Land & Improvement Co. V. Georgia-Carolina Canning Co, 148 S.C. 428, 146 S.E.2d 434, 436 (1928), and upon a determination that the public interest will be protected. See Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995). An asserted litigation waiver does not meet the established prerequisites for divesting the public of its rights in tidelands.

Respondent next argues that the public trust doctrine is too “controversial” and “confused” to represent a background principle, given that the Court's public trust jurisprudence supposedly contains two "parallel but irreconcilable lines of decisions.” Resp. Br. at 32-37. The alleged controversy and confusion, according to McQueen, derives from one line of cases recognizing that tidelands are subject to the public trust and another line of cases recognizing that tidelands represent “land.” The only controversy or confusion is the product of McQueen’s imagination.

This Court in State v. Hardee, 259 S.C. 535,193 S.E.2d 497 (S.C. 1972), made the scope and application of the public trust doctrine perfectly clear. The Court "adhered,” 259 S.C. at 592, 193 S.E.2d at 500, to the rule announced in Cape Romain Land & Improvement Co. v. Georgia Carolina Canning Co., 146 S.E. 434 (1928) -- that is, that "in the case of a tidal navigable stream, the boundary line is high-water mark . . . and the portion of land between high and low water mark remains in the state in trust for the benefit of the public interest." Hardee, 193 S.E.2d at 499, 500, citing Cape Romain, 146 S.E. at 436, and State v.Pacific Guano, 22 S.C. 50 (1884). The Court also observed that the rule in Cape Romain had been reaffirmed in Rice Hope Plantation v. S.C. Pub. Ser. Auth., 59 S.E.2d 132 (S.C. 1950), overruled on other grounds, McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (S.C. 1985). See Hardee, 259 S.C. at 542, 193 S.E.2d at 500. Finally, the Court cited a scholarly article which rejected the argument that Cape Romain had "introduced uncertainty into the law," Hardee, 259 S.C. at 541,193 S.E.2d at 500 (citation omitted). The article concluded that Cape Romain had actually

"reaffirmed longstanding rules of the common law." Hardee, 259 S.C. at 541, 193 S.E.2d at 500 (citation omitted).

Respondent's characterization of Beaufort County v. Jasper County, 220 S.C. 469, 68 S.E.2d 421 (S.C. 1951), Pacific Guano Co. and Lane v. McEachern, 251 S.C. 272, 162 S.E.2d 174 (1968), as representing a "separate and irreconcilable line" of decisions on the public trust doctrine is misleading. Respondent has gleaned from these three cases the entirely unremarkable principle that land under water is land and now attempts to dress them up as a wholly divergent line of cases regarding the scope of the public trust doctrine. As a legal matter, these three decisions simply hold that the State can only deed away public trust lands if it uses express language and makes a determination that the public interest will be protected. This holding is entirely consistent with the ruling in Hardee that lands below the high water mark are subject to the public trust. See Hardee, 259 S.C. at 540-41, 193 S.E.2d at 499-500. The argument that there are two irreconcilable lines of public trust jurisprudence in South Carolina is simply incorrect.

Respondent's contention, based on Frampton v. Wheat, 27 S.C. at 288, 3 S.E. 462 (1887), that "the public trust doctrine [does] not extend to tidal wetlands," is similarly incorrect. Resp. Br. at 37. Frampton simply recognizes, like other Court precedents on the public trust issue, that the State can grant private rights in public trust lands when it does so expressly and in furtherance of the public interest. The language from Frampton quoted by Respondent is followed by a citation to Pacific Guano, which recites the settled principle of English law that "the right of owners of land bounded by the sea or on navigable rivers where the tide ebbs and flows, extends to the high water mark; and the

shore below common, but not extraordinary high water mark, belongs to the public." 22 S.C. at 80. The Court in Pacific Guano also stated, "[t]his is another rule of the common law, [which].... has not, so far as we can understand, undergone any modification whatever in this country . . . . [T]he rule as to boundaries on navigable tide waters or arms of the sea is well established in England and America." Id. In short, there is no confusion whatsoever in this Court's jurisprudence regarding the public trust doctrine -- it undeniably applies to tidelands such as McQueen's, and it always has.

Sixth, Respondent also suggests that the public trust doctrine does not bar this claim because the doctrine does not extend beyond the protection of navigation and fisheries. Resp. Br. at 37-40. As an initial matter, it is hardly clear how this argument can assist McQueen, because filling and destroying tidelands obviously interferes with the use and productivity of tidelands for navigation and fishing.

In any event, as the Department explained in its opening brief, the public rights in tidelands also encompass the public right to the protection of the vegetation and wildlife in the area covered by the public trust. While the public trust doctrine may have originally focused on navigation and fisheries, the public trust, in South Carolina as well as most other states, now clearly protects a wider array of public interests. As the U.S. Supreme Court affirmed in Lucas, "changed circumstances or new knowledge may make what was previously permissible no longer so." 505 U.S. at 1030. McQueen's proposed filling and destruction of tidelands will destroy all the public values and interests associated with the existence of tidelands. The Department has clearly established that McQueen's proposed use of tidelands violates the South Carolina public trust doctrine.

Furthermore, once the Department has established that public trust lands are at issue (and this is not in dispute), McQueen very arguably has the burden of demonstrating that his proposed use of public trust lands will serve the public interest. See In the Matter of Water Use Permit Applications, 9 P.3d 409, 472 (Haw. 2000) ("Under the public trust . . . permit applicants have the burden of justifying their proposed uses in light of protected public rights in the resources." Cf. Hardee, 259 S.C. at 540, 193 S.E.2d at 499 ("The [State of South Carolina] comes into court with a presumption of title and if the appellant is to prevail she would have to recover upon the strength of her own title of which she must make proof."). Respondent has not even attempted, much less succeeded, in carrying this burden. [11]

Respondent also relies on Kaiser Aetna v. United States, 444 U.S. 164 (1979), which he describes as a "closely analogous case" that supports his claim for compensation. Resp. Br. at 40. In fact, Kaiser Aetna is readily distinguishable from this case and provides no support for McQueen's claim. Kaiser Aetna involved the question of whether the federal government could require the owner of a private pond adjacent to navigable waters to grant the public free access to the pond. The Supreme Court ruled that the government could not do so without paying compensation under the Fifth Amendment. But Kaiser Aetna involved a limitation on the '"right to exclude," which

11 The filling of tidelands is also treated differently from other activities because it is especially harmful to the environment. Thus, the Department's regulations provide that "[d]redging and filling in wetlands can always be expected to have adverse environmental consequences; therefore, the Department discourages dredging and filling. There are cases, however, where such unavoidable environmental effects are justified if legitimate public needs are met." S.C. Code of Regs. § 30-12(G)(1). Requiring an applicant to show that filling tidelands furthers a legitimate public need implements the Department's responsibility as the trustee of public trust lands. In South Carolina, "[t]he creation of commercial and residential lots strictly for private gain is not a legitimate justification for the filling of wetlands." 23A S.C. Code Ann. Reg. 30-12(G)(2).

the Court described as "one of the most essential sticks in the bundle of property rights that are commonly characterized as property." Id. at 176. This case, on the other hand, involves a restriction on the use of property, which is not subject to the same exacting review under the Takings Clause. See Tahoe Sierra, 122 S.Ct. at 1478-1480 (discussing the distinctions between physical-occupation takings claims and claims based on use restrictions). In addition, Kaiser Aetna involved property which, but for the federal government's regulatory mandate, unquestionably was private property not subject to public access based on the navigational servitude. By contrast, the tidelands at issue in this case were unquestionably already subject to the public trust doctrine when the Department made its regulatory decision. Vaughan v. Vermilion Corp., 444 U.S. 206 (1979), cited by Respondent (Resp.Br. at 40), highlights the importance of this distinction because the Court stated in that case that Kaiser Aetna does not apply to a case involving destruction of "pre-existing natural navigable waterway[s]." See Id. at 208-209.[12]

Finally, Respondent contends that the public trust doctrine should not be recognized as a background principle under Lucas because other similarly situated landowners were permitted to bulkhead their lots. See also PLF Brief at 14-15.[13] In fact, McQueen does not stand in the same position as most of his neighbors because they installed bulkheads before their properties had seriously eroded and did not seek permission to destroy public trust lands. As Judge Connor correctly concluded, "[t]he

12 Respondent cites United States v. Riverside Bayview Homes, 474 U.S. 121, 129 n.4 (1985), for the proposition that allegedly overbroad regulation of "submerged property" may constitute a taking. But the cited passage from Riverside Bayview Homes simply paraphrases, and does not go beyond, the ruling in Kaiser Aetna.

13 PLF makes the related argument, unsupported by any evidence, that whereas the Department denied McQueen's permit to fill coastal tidelands the Department routinely grants other owners permission to fill tidelands. This assertion is contradicted by the Department's regulations and simply has no basis in fact.

record below contains no evidence any of McQueen's neighbors asked for permits to backfill marsh. Rather, prior to the point in time when their property would need backfill, they apparently requested and received permits for bulkheads and retaining walls."[14]

B. **The Claim is Barred Because the Proposed Filling Constitutes a Nuisance**.

The fact that McQueen's proposed filling of tidelands would destroy public rights in trust lands also supports the conclusion that this claim is independently barred under background principles of South Carolina nuisance law.

As the Department explained in its opening brief, a nuisance is defined under the Restatement (Second) of Torts 821B (1979) as "an unreasonable interference with a right common to the general public," and destruction of tidelands represents a nuisance under this definition because it would plainly "interfere with a right common to the public." Brief of Petitioner at 24. This contention is powerfully supported by a decision handed down by the Pennsylvania Supreme Court on May 30, 2002, after the Department filed its opening brief. See Machipongo Land & Coal Co., Inc. v. Commonwealth, 799 A.2d 751, 775 (2002). In that case the Pennsylvania Supreme Court rejected a coal company's taking claim based on a regulation barring coal mining in certain areas in order to prevent water pollution from acid mine drainage. The court ruled that, under Pennsylvania common law, the public has a right to unpolluted waters. Therefore, the court ruled,

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14 Respondent also suggests (Resp. Br. at 41) that the public trust doctrine does not represent a background principle because private parties cannot bring suit to enforce public trust rights. The premise of this argument is inaccurate. See Akau v. Olahana Corp., 652 P.2d 1130, 1133 (Haw. 1982) ("[c]laims of harm to public trust property is another area where courts are expanding standing [to private individuals]"), citing Besig v. Friend, 463 F.Supp. 1053 (N.D. Cal. 1979); Marks v. Whitney, 491 P.2d 374 (Cal. 1971); Paepcke v. Public Building Comm'n, 263 N.E.2d 11 (Ill. 1970).

relying explicitly the Restatement definition of a nuisance, the proposed mining constituted a nuisance and could properly be prohibited without compensation under the Takings Clause. Because the nature of public rights in South Carolina tidelands are similar to the rights of Pennsylvanians to unpolluted waters, Machipongo is four-square authority for the conclusion that McQueen's claim is barred under background principles of South Carolina nuisance law.

IV. RESPONDENT'S CLAIM IS BARRED BY HIS LACK OF REASONABLE INVESTMENT-BACKED EXPECTATIONS.

McQueen contends that he should not be barred from receiving a financial award many times greater than his original purchase price "merely" because his expectations may be "unreasonable." Brief in Opposition at 46. This contention is contradicted by precedent as well as basic standards of "fairness and justice." McQueen's lack of reasonable investment expectations provides a third, independent basis for rejecting his taking claim.

A. McQueen's Argument That Expectations Are Irrelevant in Calculating "Just Compensation" Supports the Conclusion That Expectations Must Be Considered in Determining Liability.

McQueen takes the position – and the Department agrees – that longstanding takings precedent precludes consideration of the reasonableness of a claimant's investment expectations, assuming a taking has been established, in calculating the amount of just compensation. But if McQueen is correct (and he is), this concession logically supports the conclusion that a lack of reasonable investment expectations must be considered in determining liability under Lucas.

In asserting that the reasonableness of a claimant's investment expectations is irrelevant in a Lucas case both for the purpose of determining liability and in calculating compensation, McQueen takes an extreme and untenable position. As described in the Department's opening brief, in Palm Beach Isles Associates v. United States, 208 F.3d 1374 (Fed.Cir. 2000), a panel of the Federal Circuit (incorrectly and in disregard of Federal Circuit precedent) ruled that investment expectations can be ignored in determining liability under Lucas. But the panel in Palm Beach Isles believed that expectations at least had to be considered in setting compensation. See 231 F.3d 1354, 1363 (on application for rehearing) ("This 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 taken into account in determining damages due the owner."). By adopting the portion of Palm Beach Isles he favors (the ruling on liability), but rejecting the portion of Palm Beach Isles he does not favor (the ruling on compensation), McQueen takes a position that is even more extreme than the relatively extreme Palm Beach Isles decision.

McQueen's position is patently unreasonable. Unless investment expectations are considered at some stage in takings analysis, claimants who lack reasonable investment expectations could use the Takings Clause to reap grossly unfair windfalls at public expense. According to McQueen's viewpoint, he is constitutionally entitled to an enormous public payment, even though he paid very little for the property, made no effort to develop the property for many years, and sat idly by as the property eroded. More generally, under this theory real estate speculators would be entitled to full "fair

market" compensation even if they purchased property at a deep discount and with knowledge of the regulatory restrictions in place, or indeed even if they purchased the property for the express purpose of manufacturing lucrative taking claims.

Accordingly, it is essential to a reasonable reading of the Takings Clause that the reasonableness of a claimant's expectations must somehow be considered in evaluating a claim under Lucas. However, McQueen is correct that, under established precedent and longstanding principles of takings law, there is no room for considering expectations in setting compensation. If expectations cannot be considered in setting compensation, then they must be considered in determining liability.

B. McQueen's Lack of Investment-Backed Expectations Bars His Taking Claim.

McQueen has pointed to no precedent and offered no analysis to rebut the conclusion that McQueen's lack of reasonable investment-backed expectations is a relevant consideration under Lucas and supports rejection of this claim. In fact, particularly, in light of the U.S. Supreme Court's recent Tahoe-Sierra decision, it is clear that this claim must be rejected based on the lack of reasonable investment expectations.

Tellingly, McQueen, in the section of his brief addressing the expectations issue, does not even cite the U.S. Supreme Court's decision in Palazzolo, much less discuss its relevance to this issue. This omission is extraordinary because the U.S. Supreme Court specifically directed this Court to reconsider its earlier ruling, that McQueen's claim was barred by a lack of reasonable investment expectations, in light of Palazzolo. Thus, McQueen leaves unanswered the Department's explanation in its opening brief of how Palazzolo supports (and certainly does not contradict) the Court's earlier holding that

McQueen's lack of reasonable investment expectations supports rejection of his Lucas claim.[15] Brief of Petitioners at 34-38.

McQueen's opposition brief also ignores the more recent Tahoe-Sierra decision, which is enormously significant for the resolution of this issue because it destroys the analytic foundation for the argument that expectations should be disregarded in a Lucas case. As the Department explained in its opening brief, the basic argument for disregarding expectations in a Lucas case has been as follows: (1) investment expectations are not considered in a taking case based on a physical occupation; (2) a so-called "categorical" taking under Lucas is equivalent to a physical occupation of private property; and (3) therefore, investment expectations should not be considered in a Lucas case. The Supreme Court contradicted this reasoning in Tahoe-Sierra by rejecting the notion that use restrictions should be equated with physical occupations. The Court addressed the issue of whether use restrictions can be equated with physical occupations in the course of explaining why decisions involving temporary physical occupations do not support the conclusion that temporary use restrictions produce a taking under Lucas. See 122 S.Ct. at 1478-80. But the Court's description of the "longstanding distinction" between physical occupations and use restrictions applies with equal force in the context of deciding whether the rule regarding investment expectations in a physical-occupation case can be transferred to a case involving use restrictions. The basic principle

15 In section III of his brief (mislabeled as section IV), McQueen contends that the Court's ruling in Palazzolo that preacquistion notice of a regulatory restraint does not categorically bar a taking claim "suggests" that McQueen's lack of reasonable investment backed expectations, including his delay in responding to the erosion problem, should not bar this claim. However, as the Department explained in its opening brief (at 35-38), a majority of the justices in Palazzolo clearly indicated that a lack of reasonable investment expectations is a relevant factor in taking analysis which, based on the facts of the particular case, can support rejection of a taking claim, including a claim under Lucas.

articulated in Tahoe-Sierra is that physical occupations affect private property interests in a very different way from use restrictions, and that the rules applicable to one type of taking claim are not transferable to the other. As the Court said, "we do not apply our precedent from the physical takings context to regulatory takings claims." 122 S.Ct. at 1479.

The opinion in Tahoe-Sierra also reinforces in another way the conclusion that the Lucas decision should not be read to foreclose consideration of a claimant's investment expectations. As described in the Department's opening brief, Justice Kennedy supported the judgment in Lucas but filed a separate concurring opinion, emphasizing that "[w]here 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. In Tahoe-Sierra the Court went out of its way to specifically observe that Justice Kennedy had concurred in Lucas "on the basis of the regulation's impact on 'reasonable, investment-backed expectations.'" 122 S.Ct. at 143 n. 24.

Rather than address either of the U.S. Supreme Court's most recent and pertinent precedents, McQueen seeks to reargue the meaning of the Lucas decision. However, as discussed in the Department's opening brief , Lucas supports, and at a minimum does not contradict, the conclusion that the reasonableness of a claimant's investment expectations is relevant in a case under Lucas. More importantly, this Court has already concluded that Lucas, which was issued prior to the Court's earlier decision in this case, does not

bar consideration of investment expectations. McQueen has offered no convincing reason why the Court should repudiate its earlier reading of Lucas.

McQueen is also mistaken in his effort to explain away the controlling Federal Circuit precedent on the expectations issue established by Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999). Contrary to McQueen's position (Br. Opp., at 45 n.18), South Corp. v. United States, 690 F.2d 1368 (Fed.Cir. 1982), strongly supports the proposition that a panel of the Federal Circuit is bound to follow precedent set by an earlier panel, unless and until the prior panel decision has been revised en banc. See Id. at 1370. ("To proceed without precedent, deciding each legal principle anew, would for too long deprive the bar and the public of the stability and predictability essential to the effort of a free society to live under a rule of law."). In any event, it is black letter law in the Federal Circuit that the holdings of one panel are binding on subsequent panels. See, e g., Texas American Oil Corp. v. United States, 44 F.3d 1557, 1561 (Fed. Cir. 1995) (en banc) ("This court applies the rule that earlier decisions prevail unless overruled by the court en banc, or by other controlling authority such as intervening statutory change or Supreme Court decision.); YBM Magnex, Inc. v. Int'l Trade Comm'n, 145 F.3d 1317, 1319 n. 2 (Fed.Cir. 1998) (in the event of "an apparent conflict in statements of Federal Circuit law, the earlier statement prevails unless or until it has been overruled in banc). Because, as the Department explained in its opening brief (at 38-41), the holding in Good on the expectations issue was issued prior to the contrary ruling in Palm Beach Isles, Good is the governing precedent on the expectations issue in the Federal Circuit.

Contrary to McQueen's view, the Federal Circuit decision in Rith Energy v. United States, 247 F.3d 1355, 1362 (Fed. Cir.), application for rehearing denied, 270 F.3d 1347 (Fed. Cir. 2001), cert. denied, 2002 USLW 237431 (June 28, 2002), does not lend legitimacy to the ruling in Palm Beach Isles. While the initial panel decision in Rith referred in dictum to the decision in Palm Beach Isles, see 247 F.3d at 1362, McQueen fails to observe that the panel in Rith subsequently issued a comprehensive opinion on rehearing. The opinion on rehearing, which was issued following the Supreme Court decision in Palazzolo, makes no mention of Palm Beach Isles and adopts an expansive interpretation of the role of investment expectations in takings analysis.[16]

McQueen's contention that consideration of investment expectations in a Lucas case would produce "harsh and unfair results" has the argument exactly backwards. According to McQueen, "An owner forced to submit to a confiscatory regulation should not be deprived of the compensation guaranteed by the Constitution merely because a court has determined that his 'expectations' are unreasonable." In other words, in McQueen's view, the Takings Clause creates an absolute right to compensation from the public, and it is irrelevant whether a claimant has reasonable investment expectations (as in Lucas) or whether the claimant lacks such expectations (as in this case). This strict, categorical view would compel the courts to take the unreasonable approach of treating very different cases as if they were exactly the same. It also would impose a "harsh and unfair" financial liability on the taxpaying public in favor of completely undeserving takings claimants seeking windfalls at public expense.

16 McQueen also relies on Dodd v. Hood River County, 136 F.3d 1219, 1228 (9th Cir. 1998), but the cited language in that decision represents pure dictum.

McQueen offers no meaningful rebuttal to the conclusion that a straightforward application of the investment expectations factor supports rejection of McQueen's Lucas claim on this record. Instead, McQueen makes a general assault on the "investment expectations" factor on the ground that it is "vacuous" and "an empty vessel." But this argument flies in the face of the fact that the reasonableness of a claimant's investment expectations is a well-established factor in regulatory takings generally. See Penn Central, 438 U.S. at 123. Thus, the Court obviously must reject McQueen's broadside attack on the legitimacy of this factor in takings analysis. Furthermore, the expectations factor is hardly so difficult to apply as McQueen suggests. The expectations factor simply requires the careful consideration of a reasonably well-defined legal factor in light of the specific facts of each case.[17]

Finally, McQueen's reliance on the Federal Circuit plurality decision in Preseault v. United States, 100 F.3d 1525, 1540 (Fed. Cir. 1996) (en banc) is mistaken. Far from supporting McQueen's position, Preseault refutes his position. The excerpt from Preseault quoted by McQueen discusses the relevance of investment expectations in a taking claim based on a physical occupation of private property. Br. Opp. at 48. As discussed above, U.S. Supreme Court precedent, and the recent decision in Tahoe-Sierra in particular, emphasize the fundamental distinction between takings claims based on

17 McQueen's only argument on the investment expectations issue is that he paid (a small amount) for the property and has paid some property taxes over the years. However, as the Florida Court of Appeals recently ruled in an analogous case, Florida Department of Environmental Protection v. Burgess, 772 So.2d 540, 543 (Fla. App. 2000), review denied, 791 So2d 1095 (Fla.), cert. denied, 1095 S.Ct. 615 (2001), protected investment expectations cannot be established simply by showing that the claimant "bought the land as an undefined 'investment' with no specific (or even general) expectation of developing or improving the property." The court continued, "The frustration of speculative economic gain is not protected by the Takings Clause." Id. See generally Andrus v. Allard, 444 U.S. 51, 66 (1979) ("The interest in anticipated gains has traditionally been viewed as less compelling than other property-related investments.")

physical occupations and takings claims based on use restrictions. These precedents strongly support the conclusion that investment expectations must be disregarded in a physical-occupation case but that investment expectations are highly relevant in a case involving use restrictions. The Federal Circuit in Preseault, in accord with U.S. Supreme Court precedent, articulated precisely this point. After explaining that expectations are irrelevant in a physical occupation case, the court continued:

> The issue of title and ownership expectations must be distinguished from the question that arises when the Government restrains an owner's use of property, through zoning or other land use controls, without disturbing the owner's possession. Placing restraints on an owner's use of her property invokes the regulatory takings issue, rather than the question of the Government's physical occupation of private property, and both factually and legally raises significantly different issues. In the regulatory taking cases the owner's reasonable investment-backed expectations have been held to be relevant to the question of whether a regulatory imposition goes too far in constraining the owner's lawful uses of the property. Id. (emphasis added).

Far from being a precedent in support of McQueen's position, Preseault strongly supports the Department's position that McQueen's lack of reasonable investment expectations supports rejection of this claim.

V. RESPONDENT'S "NEW" ARGUMENTS ARE MERITLESS.

Respondent offers two ostensibly "new" arguments for affirming the judgment of the Court of Appeals. The Court should reject both arguments.

First, Respondent contends that the U.S. Supreme Court's decision in Palazzolo "suggests" that the Court should reconsider its earlier conclusion that McQueen's lack of reasonable investment-backed expectations bars this claim. Resp. Br. at 48. There is no basis for this suggestion. As the Department explained in its opening brief, the only specific, relevant ruling in Palazzolo was the rejection of the "single, sweeping" rule that

a lack of investment-backed expectations (preacquisition notice of a regulatory constraint in particular), automatically bars a taking claim. At the same time, a majority of the justices explicitly concluded that a lack of reasonable investment-backed expectations represents a "relevant factor" which, depending upon the facts of the case, can support rejection of a taking claim. Palazzollo does not call upon this Court to reject its prior ruling. In fact, the decision supports this Court's prior ruling. This Court did not rely in its initial ruling on a mechanical rule in rejecting McQueen's claim based on his lack of investment-backed expectations. In any event, the Court is certainly now in a position to conduct the kind of nuanced analysis of the factual record contemplated by Palazzolo. As the Department explained in its opening brief, a number of factual and legal points (independently, and certainly in combination) support the conclusion that this claim founders on McQueen's lack of reasonable investment-backed expectations, including the fact that the longstanding South Carolina public trust doctrine helps define the reasonableness of McQueen's expectations, McQueen's failure to take the initiative to protect the property from erosion, the extensive history of regulation of coastal development, and McQueen's nearly thirty-year neglect of the property after he purchased it.

Second, making the legal equivalent of a hail mary pass, McQueen contends that the Department's regulations have effected a kind of physical occupation of the property by prohibiting him from filling the tidelands and thereby causing him to suffer "periodic flooding." The short answers to this argument are that McQueen caused the flooding of the property through his own inaction and the Department is regulating the use of the

property, not effecting any type of physical appropriation. The Department's refusal to permit McQueen to fill and destroy tidelands does not remotely fit the narrow definition of a physical occupation. See Tahoe-Sierra, 122 S.Ct. at 1479 (describing physical appropriations as "relatively rare" and "easily identified").

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Department's opening brief, the Court should reaffirm its prior decision reversing the court of appeals.

July 23, 2002

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