The Coastal Society

TCS Bulletin
Volume 23 (2) 2001

Palazzolo v. Rhode Island

Yet Another Minor Earthquake in the Law of Regulatory Takings

by Marc R. Poirer

In June of 2001 the Supreme Court of the United States, in *Palazzolo v. Rhode Island*,[1] rejected a clear rule concerning owners' expectations that had been developed by lower courts to sort out regulatory takings claims, and remanded to the Rhode Island courts for consideration under a traditional ad hoc, fact specific test. The case evidences the continued splintering of judicial opinion on touchy regulatory takings issues. Different aspects of the opinion cut both ways in terms of the amount of leeway land use regulations have before they may face substantial takings challenges.

Mr. Palazzolo's claim was a classic one for regulatory takings in the land use area. He argued that the Rhode Island Coastal Resources Management Council would deny his request to fill tidal wetlands that he owned and wanted to develop (as it had in the past for other proposals), that he had been deprived of all economically viable use, and that he was therefore entitled to compensation for what amounted to a taking of his property. The case was complicated by the details of the property ownership. A corporation created and controlled by Mr. Palazzolo owned the property from 1959 to 1978, when the corporate charter was revoked and the title passed by law to Mr. Palazzolo. Both the corporation and Mr. Palazzolo had previously made several half-hearted stabs at developing the 20 acres, and six lots had been sold off at an early date.

The most important issue decided in *Palazzolo* concerns the often encountered situation where a property owner acquires property only after a regulatory scheme is in place. In the past decade a number of state supreme courts have developed a rule that "post-regulation acquisition" automatically bars a property owner from making a regulatory taking claim.[2] So had some decisions within the Federal Circuit, whose decisions govern all claims for regulatory takings against the federal government, including (of importance to coastal regulators and policymakers) wetlands fill permit denials and other Corps of Engineers actions affecting coasts, rivers and harbors.[3] The basic concept of the "post-regulation acquisition" rule (or "post-enactment purchase" or "preacquisition notice," as it is also known) is that an owner who bought property knew

Palazzolo, *continued on page 5*

TABLE OF CONTENTS

TCS Turns 25

John Duff, TCS President-Elect

As the Coastal Society turns 25, it seems appropriate to reflect upon the organizational accomplishments of the past and hopes for the future.

As you will note from the articles and Chapter News reports, TCS continues to benefit from the talent and energy of its student members. Increasingly, students are turning to the organization as a means of developing professional relationships that will serve them well as they enter the myriad fields related to coastal stewardship: anthropology, biology, economics, education, fishery management, geography, geology, law, oceanography, public health, public policy, sociology and a host of others.

The organization's long-standing members represent a wealth of experience and information that can serve as a foundation for our new members. The folks who formed TCS twenty-five years ago play a significant role in domestic and international ocean and coastal management today. They serve

TCS Turns 25, *continued on page 5*

Message From the President

The Quest for Ocean Policy

Several year's ago a personal mentor wrote, "There is only so much time in a life, only so much energy - do something with hope for results." Over the years, I've thought a lot about that phrase – in fact, I quoted it in the last President's message. The world events of the last few months have bought it to mind again.

Time and energy are often things we can't control – a life can be cut short, an illness can sap our strength. But results – that's a different animal. As long as there is the time and energy, we can influence results – often for the common good. In a writing titled *The Mistress of Vision* (1913), the British Poet Francis Thompson wrote:

> All things by immortal power,
> Near and Far
> Hiddenly
> To each other linked are,
> That thou canst not stir a flower
> Without troubling a star.

Simple words but packed with truth.

So what of results? I must admit that on the afternoon of September 11th as I stood before a class of bewildered students talking about beach ownership and sand rights, I wondered about results, about the relevance of the discussion in the backdrop of a world out of balance. The discussion seemed trivial – at least for the moment. But time passes, and the sense of urgency that comes from personal or national crisis fades. And to some degree that's good – getting back to the nitty gritty of life and of profession. But the question of results should remain constant. When all is said and done does the nitty gritty add up to the result we want? In this world where all things are "hiddenly" linked and the results of our actions potentially profound, how do we "stir a flower."

In the last two years our nation has embarked on a mission regarding the state of our oceans. By deliberate action we have entered a period of reflection regarding the results of our actions on coastal and marine ecosystems.

In May 2000, The Pew Oceans Commission was formed with a grant from the Pew Charitable Trusts. The Commission includes national leaders in science, fishing, conservation, business, and government. Its mission is to focus on threats to living resources in U.S. waters and to recommend measures needed to restore and sustain the health of the marine environment. Over the past 17 months, the commission has held regional meetings around the country and has contracted for a series of science reports on issues such as marine pollution, aquaculture, introduced species, coastal development, fishing, and marine protected areas. The commissioners will issue a final report in late 2002.

In August 2000, legislation was signed that created a national Commission on Ocean Policy. Its mission is to bring together ocean and coastal experts, policy makers, environmental groups and industry representatives to take a comprehensive look at America's ocean and coastal policies. Much like the Pew Commission, the Oceans Commission will hold public hearings around the country and will meet with the governors of coastal states. After an 18-month review, the commissioners will issue a final report recommending "a coordinated and comprehensive national ocean policy." The commission's final report could have an impact similar to that of its predecessor, the Stratton Commission, which recommended the establishment of the National Oceanic and Atmospheric Administration and the Coastal Zone Management Act.

Over the next few months, the two commissions will be looking for common ground on ocean management. They will be focused on results.

Walter Clark

For information on the Pew Commission, contact:

The Pew Oceans Commission
2101 Wilson Blvd, Suite 550
Arlington, VA 22201
Phone:(703) 516-0624
Fax: (703) 516-9551

Or visit the commission's web site at:

http://www.pewoceans.org

Christophe Tulou has been named as the commission's Executive Director. Christophe is a former Sea Grant fellow and during a 10-year tenure on Capitol HIll, worked for the House Merchant Marine Fisheries Committee. He most recently served as secretary of the Delaware Department of Natural Resources and Environmental Control.

For information on the U.S. Commission on Ocean Policy, contact:

The Commission on Ocean Policy
c/o Ocean.US Office
2300 Clarendon Blvd., Suite 1350
Arlington, VA 22201-3667

Or visit the commission's web site at:

http://www.oceancommission.gov

On November 13,2001, Dr. Thomas Kitsos was appointed Executive Director of the Commission, Dr. Kitsos comes to the Oceans Commission from the Department of Interior, where he served as Acting Director of the Minerals Management Service (MMS). Prior to his service at MMS, Kitsos had a 20-year career in the U.S. House of Representatives, his last position being Chief Counsel for the Committee on Merchant Marine and Fisheries□

From the Editor's Desk...

You may be reading this from an e-version of the TCS BULLETIN or you may have the hard copy version in front of you right now. In either case, you may be asking "*where has the BULLETIN been*?"

This issue of TCS Bulletin represents Issue 2 for 2001. It is late. Here's why. After years of dutiful service to the organization in her capacity as Bulletin Editor, Laura Cantral stepped down to make geographic and occupational adjustments in her life that no longer afforded her the time to edit and produce the BULLETIN. The organization is indebted to her for the time and energy she has poured into the BULLETIN during her tenure as editor. When Laura stepped down, the organization found itself in a sort of communication limbo with no immediate successor in sight. At the same time, the Board of Directors was engaged in a discussion regarding the role of the BULLETIN and its value to TCS members. That discussion culminated in a decision to publish the BULLETIN quarterly rather than semi-annually. Now TCS was faced with the prospect of publishing four time a year rather than two at the very moment that it found itself without an editor/publisher.

After some discussion with the Board, I threw my hat into the ring and offered to pick up where Laura left off. Last fall, I submitted a proposal to edit and produce the BULLETIN for 2001's Issue 2 and four quarterly issues to be distributed in 2002. The Board voted, the paperwork was processed and by December there was an agreement. [As a matter of full disclosure let me note that I recused myself (in my capacity as a Board member) from the decision-making process. And I will continue to recuse myself from decisions regarding funding of the BULLETIN as long as I serve in the role as Editor.]

So here's the plan. Four quarterly issues of the BULLETIN will be produced in 2002 and distributed through parallel systems. The e-system will allow much faster distribution and allow members to access a .pdf formatted document that they can read on their computers or print out and read in hand. At the same time, we will continue to mail the BULLETIN to members since we cannot ensure that the e-system will accommodate everyone's needs.

As we move forward we will solicit your views on the BULLETIN in terms of its value to you as a member. Let us know what you think about the substance and style of the BULLETIN as well as the timeliness of the respective distribution systems. Our hope is to make the BULLETIN an effective and efficient means of communication with and among our membership.

As always, we welcome your views and observations. If you've got an article or idea that you would like us to consider for publication, please send it along. In the meantime, we hope that our effort to increase our contact with you will prove fruitful.

John Duff

Wanted

Articles
Notices
Bright Ideas

As The Coastal Society reflects upon 25 years of service to coastal communities, we would like to hear from those of you who have been involved with the organization over the years.

In the coming months and issues, TCS BULLETIN will publish articles about the work of the organization and its membership (because in truth, the organization is its membership).

If you have an article that illustrates the role that TCS members have played in coastal governance, please send it along. We are also interested in articles about contemporary coastal matters. Information about upcoming conferences as well as education and training opportunity notices are always welcome. Finally, TCS BULLETIN would like to highlight innovative approaches to coastal and ocean resource stewardship. If you are involved in, or know about, a truly "bright idea" that promises to improve coastal resource management efforts, let us know.

Remember, sound governance of our ocean and coastal resources wasn't just the concept behind the formation of The Coastal Society, it is a principle of historic importance.

He has plundered our Seas,
he has ravaged our coasts ...
he has destroyed the lives of our people.

Declaration of Independence, 1776.

Submissions can be made to jduff@usm.maine.edu or Coastalsoc@aol.com

The TCS BULLETIN is published by The Coastal Society to provide information about coastal issues and events. The Coastal Society is an organization of private sector, academic, and government professionals and students dedicated to actively addressing emerging coastal issues by fostering dialogue, forging partnerships, and promoting communication and education.

Contributions to the BULLETIN are encouraged. Inquiries about the BULLETIN or the Society should be addressed to:

The Coastal Society
Post Office Box 25408
Alexandria, Virginia, 22313-5408
703.768.1599(phone)
703.768.1598(fax)
coastalsoc@aol.com.

Supreme Court Settles State Border Dispute

Maine-New Hampshire Boundary Defined

by Sandy Guay

On May 29, 2001, the United States Supreme Court unanimously rejected New Hampshire's most recent attempt to claim title to the Piscataqua River and Seavy Island, the location of the Portsmouth Naval Shipyard. In this latest bid for control of the river and Portsmouth Harbor, New Hampshire argued that its inland river boundary with Maine ran not in the channel of the river, but rather along the northern bank, i.e. along Maine's shoreline. Had New Hampshire been successful in this claim the entire river out to Portsmouth Harbor would now be considered part of that state. Instead, the Court has made clear, once and for all, that the true boundary runs up the middle of the Piscataqua's main navigable channel.

At the easternmost edge of the border between the two states, the Piscataqua River constitutes a fluid boundary line. From time to time over the past 250 years, disputes about this important border segment have flared between these two New England neighbors. That this enduring dispute has continued to resurface for so many years is indicative of the great significance Portsmouth Harbor holds for each of these two states. In its most recent incarnation, the quarrel centered on the fate of the Portsmouth Naval Shipyard, located on Seavy Island.

As in past disputes, there were several reasons for New Hampshire's recent battle for ownership of the shipyard. For one, the shipyard is a major employer with some 3,500 employees, 1,300 of whom reside in New Hampshire. Workers at the shipyard currently pay state income taxes in the range of $5 million a year to Maine based on the location of the workplace. New Hampshire workers, who reside in a state that has no income tax, complain that they are unfairly taxed. In hopes of getting the Shipyard designated as in New Hampshire they called on their state politicians to raise an argument that harkens back to the time the border was defined in a colonial grant

Employee dissatisfaction with payment of state income taxes was not the only factor in this dispute, in all probability not even the driving force behind New Hampshire's most recent efforts. Indeed, work at the Naval shipyard has been slowing down for the past several years as the Department of Defense downsizes its presence there. However, as the Navy moves its work force out, the ensuing void is expected to soon be filled by business parks, office buildings, banks, hotels, and other projects fueled by private investment. It is this tremendous untapped economic potential of the picturesque harbor island that has drawn the attention of private and corporate developers, stirred the fiscal imagination of both states, and likely propelled New Hampshire to once again lay claim to the harbor.

However, even as interesting as these economic conflicts are, many find the real intrigue in this perpetual dispute to be its colorful historical background.

The original territorial dispute arose in the early 18th century between the provinces of New Hampshire and Massachusetts, with the two provinces unable to reach an agreement as to the southern location of New Hampshire's border. In 1731, New Hampshire finally brought the matter to King George II, who in turn referred the dispute to the Board of Trade. In 1735, the Board of Trade recommended the matter be resolved by a commission made up of 20 appointees selected from the other New England colonies and New York, New Jersey, Rhode Island and Nova Scotia.

The commission rendered its opinion in 1735: "That the Dividing Line shall pass up thro the Mouth of Piscataqua Harbour and up the Middle of the River . . .And that the Dividing Line shall part the Isles of Shoals and run thro the Middle of the Harbour between the islands to the Sea on the Southerly Side." When both sides appealed the commission's opinion, the King referred the appeal to the Privy Council for Hearing Appeals from the Plantations. Based on the recommendation of the Privy Council, in 1740 King George II decreed that the States accept the commission's original opinion. Therefore, when the Union was formed, and later, when Maine was separated from Massachusetts, the boundary existed as decreed. This boundary remained unchallenged until approximately 135 years later when New Hampshire sued the state of Maine as to the meaning of the language in the 1740 decree.

New Hampshire's 1975 challenge to the decree centered around lobster fishing rights and the location of the lateral marine boundary separating the States between the mouth of Porstmouth Harbor and the entrance to Gosport Harbor in the Isles of Shoals. For one thing, Maine had strict lobster regulations requiring a lobster fisherman to be licensed. Furthermore, these licenses were only available to Maine residents. In 1976, after New Hampshire filed suit against Maine, the two states settled, coming to an agreement as to the meaning of King George II's 1740 decree that benefited both states. This agreement, submitted to the Supreme Court for final entry, defined the decree's term "Middle of the River" to mean " a line . . . most usually followed by those navigating the river," or the middle of the navigational channel. In 1977, the Supreme Court entered a consent decree that "proposes a wholly permissible final resolution of the controversy both as to facts and law," and finally defining the "Middle of the River" as "the middle of the main channel of navigation of the Piscataqua River."

Despite the finality of the entry of this consent agreement, in 2000, New Hampshire, in its attempt to gain ownership of Seavy Island, once again sought to redefine the meaning of the 1740 decree by arguing that the 1977 "Middle of the River" language was simply an arbitrary location made as an agreement of convenience. The Supreme Court rejected New Hampshire's argument on several grounds. First, the Court did not accept the State's assertion that the 1976 settlement agreement was entered into without "a searching historical inquiry." Next, the Court found that the State was basing its current argument on documents that were equally available in the 1976 litigation. Thus, the Court said, if New Hampshire had a valid historical argument, it should have been raised prior to the two states entering into their consensual agreement.

Therefore, on May 29, 2001, the Supreme Court held that the State of New Hampshire was "judicially estopped" from asserting that, contrary to the 1977 consent decree, the boundary

now ran along the Maine shoreline. In other words, where New Hampshire had taken a legal position in the 1976 litigation, it could not take a contrary position now simply because its interests have changed. The Court found this to be especially true where, as here, alteration of this prior position would be detrimental to Maine, who by settlement had previously acquiesced to New Hampshire's point of view.

New Hampshire's recent argument expanded upon some of the language and concepts in the 1977 decree. The State argued that the 1977 consent decree did not settle the entire controversy, as it only fixed the lateral marine boundary and not the internal Piscataqua River boundary. New Hampshire also raised new arguments that during the decades preceding and following the 1740 decree, that state had exercised sole jurisdiction over all shipping and military activities in Portsmouth Harbor. For its part, Maine provided its own evidence of jurisdictional control of the Harbor. However, Maine primarily argued that where both the 1740 decree and the 1977 consent judgement affirmatively divided the Piscataqua at the middle of its navigational channel, New Hampshire should now be barred from asserting otherwise. On May 29, 2001, the Supreme Court agreed with Maine's position deciding, perhaps finally, that the States' boundary lies in the middle of the river's navigational channel and not along the Maine shoreline. As a result, the perhaps inopportunely named Portsmouth Naval Shipyard, is decidedly located in Kittery, Maine.

Sandy Guay is a third year law student at the University of Maine Law School.

TCS Turns 25,

continued from page 1

in the ranks of the National Oceans Commission, the National Marine Fisheries Service, state coastal management programs, private and public educational institutions, private industry and non-governmental organizations.

AS TCS celebrates its 25th anniversary, the organization will work to span the boundaries (and the generations) to build a stronger coastal community. The biennial meeting in Galveston (see registration info. pages TCS 1-4) will serve as an ideal opportunity to tell the story of where we've been and contemplate where the future will take us.

In the coming months, we will also work to document the work of the organization and its members over the years.

TCS hopes that you can come join us in Galveston in May and/or join our conversation about the prospects of the organization's future. ■

Palazzolo,

continued from page 1

or should have known about the risk of pre-existing regulation and could have protected herself by not buying the property or by buying at a discounted price. To force the government to pay compensation for burdensome regulation under such a scenario makes the government pay for a risk the property owner took.[4]

The "post-regulation acquisition" rule may well have been spurred by a reading *of Lucas v. South Carolina Coastal Council*,[5] which is still one of the most important regulatory takings cases in the land use area. One of the key holdings in *Lucas* was that a property owner's claim of a regulatory taking must be met with an "antecedent inquiry" based on the idea that property is held subject to the background limitations of nuisance and property law.[6] As Justice Scalia pointed out in *Lucas*, a property owner does not have a right to overflow a lake so as to injure the neighbors, to build a nuclear plant on a geological fault, or to obstruct a navigable river (at least without the permission of the federal government, which manages the navigation servitude).[7] Legislation that simply reflects such "background limitations" on property cannot be a taking because the property owner never had the right to that particular use in the first place. So says *Lucas*.[8] The "background limitation" doctrine of *Lucas* has triggered a legal history boomlet as environmentalists dig back into English history to discover traditional background limitations of hunting, fishing, draining fens, occupying shorelands – all arguably predecessors of modern environmental law use regulations. *See*, *e.g.*, Hope M. Babcock, *Should* Lucas v. South Carolina Coastal Council *Protect Where the Wild Things Are? Of Beavers, Bob-o-Links, and Other Things that Go Bump in the Night*, 85 IOWA L. REV. 849 (2000); Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 STANFORD ENVTL. L.J. 247 (1996). Arguments about the scope of the public trust doctrine and customary beach use also can become exceedingly important. See, e.g., National Ass'n of Home Builders v. New Jersey Department of Environmental Protection, 64 F. Supp. 2d 354 (D.N.J. 1999) (state requirement of dedication of a riverside walkway and lateral access to it not a taking as to lands that were once submerged and therefore remain subject to a public trust); Stevens v. City of Cannon Beach, 854 P.2d 449 (Ore. 1993) (denial of permission to build sea wall on privately owned dry sand beach not a taking because of state custom of public use of dry sand beach).

Some courts began to carry out this inquiry into background principles – which can categorically eliminate a regulatory taking claim – with regard to other types of expectations of the property owner. To be sure, a consideration of the owner's distinct investment-backed expectations has always been one of the important factors that must be considered in a regulatory takings claim, under the *Penn Central* test.[9] But some courts began to treat this fact as decisive on its own, indeed sometimes articulating it as part of the antecedent inquiry into background principles.[10]

continued next page

There seemed to be precedents for this approach. In particular, *Ruckelshaus v. Monsanto*[11] stated that a right to compensation for loss of trade secret protection, in an environmental regulatory scheme, changed as the statute was amended. During a period where private parties could not expect trade secret protection because of the way the statute was written, they were not entitled to compensation. When the statute was amended, private parties acquired a property right the loss of which entitled them to compensation. *Ruckelshaus* thus takes a positivist view of property. That is, the scope of the property right derives from the statute and can be altered by amending the statute. This positivist view of property is reflected in other important decisions as well.[12]

On the other side of the ledger lies *Nollan v. California Coastal Commission*,[13] another of the key regulatory takings decisions. *Nollan* is principally a case about exactions.[14] But Justice Scalia, writing for the Court, also stated, in an important footnote, that "the Nollans' rights [are not] altered because they acquired the land well after the Commission began to implement its policy."[15] Some other federal decisions have suggested the same result.[16]

Neither the *Ruckelshaus* nor the *Nollan* position is palatable when taken to the extreme. We probably don't want to say that the government could by statute declare a right to regulate a broad range of property uses out of existence and that these losses would not be challengeable by any owner who purchased her property after this law were in place. On the other hand, as the Supreme Court said long ago, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[17]

To get back to *Palazzolo*, the Rhode Island Supreme Court indicated that if it were to reach the merits of the case, it would find that Mr. Palazzolo had acquired the property after the coastal wetland regulatory scheme was in place and that he therefore would have no takings claim.[18] The Supreme Court rejected this rule. "A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensation for what is taken."[19] The Court relied on *Nollan*, and rejected as a misinterpretation of *Lucas* the view than any new regulation once enacted "becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment."[20] It is important to appreciate that the Court's decision in *Palazzolo* does not dismiss preexisting regulations altogether as a source of argument against a regulatory takings claim. The Court reiterated that:

> The right to improve property ... is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. ... The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through the passage of time or title.[21]

Justice O'Connor's concurring opinion is explicit on this point, and she wrote it to express her point of view on this specific issue. "Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance."[22] She goes on at some length, stressing that the Court's decision seeks to "restore balance" to the inquiry of how preexisting regulations inform legitimate expectations about property rights.[23] O'Connor's lengthy concurring opinion will no doubt be mined in future legal arguments over the significance of post regulation acquisition on expectations. One recent commentator opined that in light of Justice O'Connor's crucial opinion, "most long-established environmental and land use regulations will be largely immune from takings challenges[, a]nd they should become increasingly immune from challenge as properties change hands and additional time passes."[24]

Justice Scalia dissociated himself from the rest of the majority and specifically from Justice O'Connor. In a short, grumpy opinion, he said that post regulation acquisition "should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking."[25] His is an extreme view of the *Nollan* position: as to some property interests the legislature may not alter them at all without compensation. In contrast to my characterization of *Ruckelshaus* as legal positivism, such an extreme reading of *Nollan* partakes of natural law. There just are certain property rights, discernible by the courts though not created by them or by legislatures. Legislatures may not refine or tinker with these property rights without paying for them.

It is time for a head count. In addition to Justice O'Connor herself, Justice Breyer wrote a short separate dissent in *Palazzolo* specifically to state his agreement with Justice O'Connor.[26] The other Justices' dissents also state that they agree with Justices O'Connor and Breyer.[27] That means at least five votes for "it all depends" as the approach to the significance of post regulation acquisition. I would add Justice Kennedy to this group. Though he wrote the majority opinion in *Palazzolo*, he also authored a concurring opinion in *Lucas* which spelled out succinctly the idea that legislative actions can contribute to our subsequent background understanding of property.[28] By my count, then, there are six votes for a moderate interpretation of *Palazzolo*'s holding on post regulation acquisition in future cases. Only three current Justices – Scalia, Thomas and Rehnquist – would be likely to adopt Justice Scalia's hard line approach in a future case. Put another way, we are still two justices away from a revolution in property jurisprudence.

For the time being, though, even after *Palazzolo*, most of the cases that relied on preexisting regulations to find no taking are intact or can be rescued, so long as they appear to have performed an appropriate balancing of the fact of the preexisting regulations as one part of the expectation factor of the *Penn Central* ad hoc test. Indeed, this is what the Supreme Court's order requires the Rhode Island courts to do on remand. Nor does *Palazzolo* even mean that the positivist view of property articulated in *Ruckelshaus* has been discarded. One easy distinction to draw is that *Ruckelshaus* is about personal property, while *Nollan* is about real property or land. One authority suggests that the kind of interest protected against legislative tinkering on a strict reading of *Nollan* is no broader than the traditional and basic right of one who physically occupies property to exclude others.[29] On the other hand, *Palazzolo* may create considerable leeway for judges on the Court of Federal Claims and the Federal Circuit – where takings claims against the federal government are heard – to develop

a relatively conservative approach to post-regulation acquisition. Those courts are widely viewed as being disproportionately populated with conservative judges, especially on issues of property rights.

There is no room here to do more than mention some of the other issues addressed (or presented but ultimately not yet addressed) in *Palazzolo*. It contains an important holding on the transferability of takings claims to subsequent property owners. The Court finds that a takings claim is not restricted to the owner at the time of the taking, but may accrue to a successor owner.[30] This finding might have been necessary to the case because technically the property at issue was owned by a corporation set up by Mr. Palazzolo until 1978. Rhode Island's coastal wetlands statute was enacted in 1971. Mr. Palazzolo's claim seems to be about the generic impossibility of developing his wetlands, rather than about some specific proposal made recently. So it may be that the original injured party was the corporation, from which Mr. Palazzolo later acquired both the property and the claim. The holding has potential ramifications, as it seems to reverse federal law and the law of most states on the transferability of takings claims.[31] It will hardly open the floodgates to litigation, however. Regulatory takings claims will still be limited by statutes of limitations.[32] The holding may also be limited by future cases to certain classes of property transfers. The Court says that "It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership *where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.*" [33] Perhaps this is limiting language. The law of states like Minnesota and New Jersey, whose courts have some experience with transferable takings claims, may provide some useful guidance here.

The Rhode Island Supreme Court's controlling holding in the opinion below decided that Mr. Palazzolo's claim was not ripe because he had not fully presented a development proposal, and had not sought permission for any less ambitious development proposals.[34] The United States Supreme Court disagreed, finding that under the circumstances Mr. Palazzolo's claim was ripe.[35] The Court gives short shrift to the requirement from *MacDonald* that less grandiose proposals may be required to be presented to the regulatory agency before the property owner may go to court.[36] Essentially, the Court is satisfied that there was at least one final application, although it was not the proposal on which the compensation request was based. In addition, Rhode Island law made clear that any further applications involving coastal wetlands would be equally futile.[37] The Court finds this level of effort by the owner to be enough. In other words, *Palazzolo* articulates a futility exception to the ripeness requirement of takings doctrine.[38] The facts of the case are so peculiar, however, that the effect of this determination on ripeness doctrine in takings is probably limited.

The Rhode Island Supreme Court ruled in the alternative that Mr. Palazzolo had not lost all value of his property because he still had an upland portion he could develop.[39] To be sure the value of the developed upland property was estimated to be $200,000, a far cry from the more than $3,000,000 Mr. Palazzolo claimed he lost because he could not fill his wetlands. Nevertheless, the Rhode Island court said he had not been deprived of all economic value of the property, and therefore had to try to make his claim under the ad hoc *Penn Central* test instead of relying on the *Lucas* per se rule for a taking when property is deprived of all economic use.[40] The United States Supreme Court, in the briefest of holdings, stated, "On this point, we agree with the court's decision."[41] This is an important holding. It confirms that the *Lucas* per se test for compensation will be available only when there really is a loss of all economic use, not just loss of most economic use or nearly all economic use.

Mr. Palazzolo tried to salvage his "loss of all use" claim in his brief by reframing the loss as one hundred percent of the use of wetlands. The Court refused to reach the claim, which will be presented to the Rhode Island courts on remand.[42] Mr. Palazzolo is here engaging in what Professor Margaret Radin has called "conceptual severance."[43] By isolating the interest he lost from other interests he still has, he makes the impact of the regulation upon him seem enormous. One such classic claim was rejected (but by a 5-4 vote) in *Keystone Bituminous Coal Ass'n v. DeBenedictis.*[44] The coal companies claimed they had lost 100% of a technically separate right to cause subsidence; the state argued they could still take most of their coal out of the ground, as they only were required to leave enough of it behind to support the surface. Here the question will be whether Mr. Palazzolo has lost the use of 100% of his tidal wetlands or something like 93% of his overall property. It may be even less loss percentagewise, since the predecessor corporation sold several lots off the original parcel.

On these kinds of facts the remanded "conceptual severance" issue blends into the so-called "denominator" issue. That issue asks "how many acres to include in the 'before' picture."[45] Where a developer severs a larger parcel into pieces, one of which is mostly or all unbuildable because of wetlands regulations, it might seems that he has created a 100% loss for himself, and that the relevant question ought to be how severe the loss is as a portion of the original, larger parcel. A number of cases have addressed the issue,[46] though not yet the Supreme Court.[47]

Another important issue surfaced in the trial court decision in 1995[48] and may become relevant again on remand. That is whether protection of wetlands is part of the background principle of nuisance law in Rhode Island. If so, the regulation may be immune from a takings challenge regardless fo the impact it has on the property owner. Also, the state argued that its regulation was immune under the public trust doctrine. That defense has not been addressed by a court in this state. Overall, *Palazzolo* does little to help define what may count as a regulatory taking or how to proceed to make a claim. It eliminates one bright line rule on post acquisition expectations, and reverses another on the transferability of takings claims. Ultimately, it falls back on the tried and true but oh so vague *Penn Central* balancing test to resolve the controversy on remand.[49] *Palazzolo* is moreover a close decision and a fragmented one, with a majority opinion garnering five votes (six for one part), two concurring opinions, a concurring and dissenting opinion, and two dissenting opinions. This kind of spread makes it even harder to read the cards as to the future direction of the Court's regulatory takings jurisprudence.

---

[1] Palazzolo v. Rhode Island, 121 S.Ct. 2448 (2001).

[2] *E.g.*, Hunziker v. State, 519 N.W.2d 367 (Iowa 1994) (law protecting archaeological sites was in place at time of property acquisition; no taking); Gazza v. New York State Dep't of Envtl. Conservation, 679 N.E. 2d 1035, 1037 - 1039 (N.Y. 1997) (state statute protecting tidal wetlands was a background limitation on property purchases after the restrictions were in place; no taking); Grant v. South Carolina Coastal Council, 461 S.E. 2d 388, 391 (S.C. 1995) (prohibition on fill without a permit was not a taking where regulatory scheme was in place before purchase of property); City of Virginia Beach v. Bell, 498 S.E.2d 414, 417 - 418 (Va. 1998).

[3] *See, e.g.*, Good v. United States, 39 Fed. Cl. 81, 108 n.48, 109 - 114 (1997), *aff'd*, 189 F.3d 1355 (Fed. Cir. 1999) (rejecting regulatory takings challenge to denial of wetlands dredge and fill permit

continued on page 20

Does that Beach House Come with a Vote?

John A. Duff

Introduction

The phrase "one person, one vote" has been used for almost forty years to characterize the level of democracy that has been achieved in the United States. Today, however, some state and local governments are considering the merits of expanding voting rights in a way that swings the suffrage pendulum beyond universality to multiplicity. Prosperous times have increased the number of Americans with beach homes (and other vacation properties) in states where they do not hold legal residency. Those second-home owners feel they may be bearing the burden of taxation without having a voice in local voting matters. The questions arises: should a non-resident beachfront property owner, whose taxes pay for the local schools and police, have a voice in decisions related to local matters? The question pits two fundamental American governance principles against one another: "one person, one vote" versus "taxation without representation is tyranny."

The link between property ownership and governance may justify some means of affording property owners a voice in that governance, but that means need not to be in the form of voting rights. This article suggests that municipalities and states considering property-based voting rights expansion ought to refrain from instituting such a system.

The earliest principles of democratic theory arose in Athens, where the word (from the Greek '*demokratia'*) was simply an illustration of the concept of "the rule of the people." And while "the people" referred to were male Athenians – a subset of the larger community to be ruled – a sense of equality stemmed from this notion of democracy since rights were not tied to wealth. Property has long been linked to political voice in post-Athenian versions of democracy. From the political bargain struck in the *Magna Carta* in 1215 through the democratic revolutions of eighteenth, nineteenth, and twentieth centuries, real estate amounted to real power. For example, as political power continued on its devolution from monarchy to the people in 17th and 18th century England, the question of who among the people ought to acquire that power became increasingly linked to property. As historian Richard Pipes says of that period and place, "[i]t now came to be widely believed that inasmuch as politics were a function of property, only the owners of property had a legitimate right to participate in politics."[1]

Like many English common law and governance concepts that survived the transition from English colonies to United States, the notion of property-linked voting rights was embraced by America's founders. In the foundational analytical work on American democracy, Alexis de Tocqueville clearly identified the role of property in the rules of governance. "Everywhere[,] voting rights were restricted within certain limits and ***subject to some property qualification***."[2]

The Emergence of Non-resident Voting Rights

While the seemingly constant move towards universal suffrage might be seen as an effective decapitation of the past-employed property-based voting rights system in the United States, the specter of a hydra-like creature looms on the horizon. In municipalities and states around the country, consumerism fed by affluence has increased the number of individuals who own vacation homes in states other than their primary residence. These non-resident property owners often pay significant real estate taxes on these second homes, and as a result, increasingly seek some voice in the governments levying those taxes and regulating their property. As a result, non-resident property owners' have embarked on various efforts around the country to acquire voting rights.

While the state and federal constitutions have long safeguarded the evolving (and now commonly referred to 'universal') suffrage from erosion, new questions have arisen as to how much suffrage can be tolerated rather than how much ought to be guaranteed. While proponents of democracy might first blanch at the notion of "too much" suffrage, multiple voting rights tied to property ownership may in fact lead to an erosion of democracy in that wealth and property will be re-introduced into the voting rights calculus of self government.

The Move Towards Multiple Suffrage

Some examples, cited below, illustrate the efforts of non-resident property owners to increase their suffrage portfolios.

Colorado

In 1995, the Town of Mountain Village, Colorado promulgated a provision in its town charter granting non-resident property owners the right to vote in municipal elections and on matters of local concern. Town residents who had opposed that provision filed an equal protection claim against the town arguing that the non-resident voting provision diluted their residence-based voting authority and in so doing violated the US Constitution. The plaintiff-residents lost at both the federal district court level and on appeal to the Circuit Court of Appeals for the Tenth Circuit.[3]

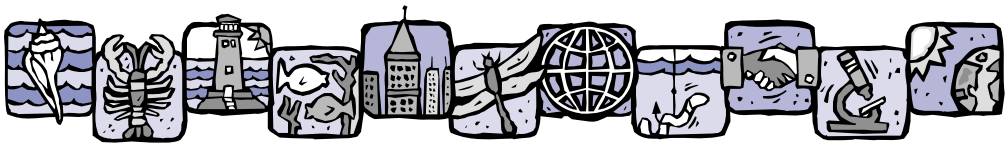
Conference and Hotel Registration

The Coastal Society 2002 Conference

CONVERGING CURRENTS: SCIENCE, CULTURE AND POLICY AT THE COAST

18th International Conference • May 19-22, Moody Gardens Hotel, Galveston, TX

A Tapestry of Natural Elements and Human Designs



The Coastal Society 2002 Conference

CONVERGING CURRENTS: SCIENCE, CULTURE AND POLICY AT THE COAST

18th International Conference • May 19-22, Moody Gardens Hotel, Galveston, TX • A Tapestry of Natural Elements and Human Designs

Conference Registration

Last Name: _____ First Name: _____

Affiliation (check one): ❒ Student ❒ University ❒ Government ❒ Private

Mailing Address: _____

City: _____ State: _____ Zip: _____ Country: _____

Phone: _____ Fax: _____ E-mail: _____

Your registration fee includes all plenary sessions, all concurrent sessions, Sunday Welcome Reception, Monday Poster Reception, Tuesday Aquarium Reception, all luncheons and breaks, and TCS-18 Proceedings. Sunday's workshops and field trips require an extra fee.

CONFERENCE FEES	Before April 26	After April 26	Number	Amount
• Registration/Member	$250	$280		
• Registration/Non-member	$295	$325		
• One Day Registration	$125	$125		
• Registration/Student *	$90	$90		
• One Day Student Registration	$30	$30		
• Extra Lunch Tickets (Mon, Tues, Wed)	$30	$30		
• Extra Sunday Reception Ticket	$30	$30		
• Extra Monday Reception Ticket	$35	$35		
• Extra Aquarium Reception Ticket	$40	$40		
WORKSHOPS				
• Science-Based Collaborative Stakeholder Processes	$55	$55		
• Community Culture and the Environment	$55	$55		
• Managing Multiple Disciplines	$25	$25		
• Young Coastal Leaders'	$25	$25		
FIELD TRIPS				
• Constructing New Wetlands: Galveston Bay Boat Tour	$25	$25		
• Galveston's Migratory Birds	$25	$25		
• Galveston Bay by Canoe	$25	$25		
TCS NEW MEMBERSHIP (check one): ❒ $35 U.S. ❒ $40 non-U.S. ❒ $15 Student*				
		TOTALS:		

**Student registration and/or membership requires copy of student ID or advisor's signature!*

Important Note Regarding Proceedings! This year the TCS-18 Proceedings will be published only in a CD-ROM format. They will NOT be available in book format.

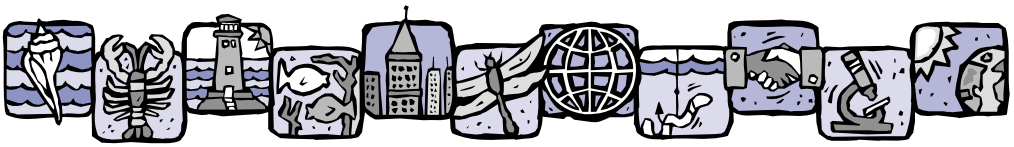
PAYMENT OPTIONS:

❒ Check (Please make payable to The Coastal Society. All checks must be in U.S. funds drawn on a U.S. bank. International registrants please use International or U.S. Postal Money Order. Purchase Orders in U.S. funds will also be accepted.)

❒ Credit Card: ❒ Visa ❒ MasterCard Name on Card: _____

Acct #: _____ Exp.Date: _____ Signature: _____

SUBMIT FORM AND PAYMENT TO: Elaine L. Knight; South Carolina Sea Grant Consortium; 287 Meeting Street, Charleston, SC 29401
Phone: (843) 727-6406; Fax: (843) 727-2080; *Elaine.knight@scseagrant.org*



The Coastal Society 2002 Conference

CONVERGING CURRENTS: SCIENCE, CULTURE AND POLICY AT THE COAST

18th International Conference • May 19-22, Moody Gardens Hotel, Galveston, TX • A Tapestry of Natural Elements and Human Designs

Invitation

Gathering on the Gulf

The Coastal Society will be meeting on the Gulf Coast this Spring and would like you to join us. Come to Galveston and meet with friends and colleagues from around the globe to discuss matters related to coastal management and governance. The conference theme, Converging Currents, represents the many factors that come together at the coast to form a rich tapestry of natural elements and human endeavors.

25th Anniversary of The Coastal Society

During its 25 years of representing those involved with coastal and marine issues, The Coastal Society has sought to promote communication and education on emerging issues. From the birth of the profession of coastal management to a generation of managers in the new millennium, the Society has been the connection in a network of private sector, academic and government professionals and students. The conference will end on Wednesday with a grande finale looking back and thinking ahead.

Conference Location, Travel & Accommodations

Location:

- **Moody Gardens Hotel**
  Seven Hope Boulevard
  Galveston, Texas 77554
  Phone: Toll free for reservations
  1-888-388-8484
  Phone: For reservations locally
  and guest calls (409) 741-8484
  Fax: (409) 603-4937
  4/26/02 Cutoff for conference rate

Lodging:

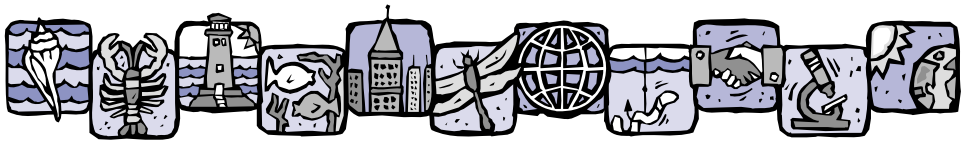
Nestled among a tropical garden overlooking majestic pyramids and the crystalline waters of Offats Bayou sits the Moody Gardens Hotel. The hotel is part of a recreational-educational complex that provides one of the most exotic and unique meeting experiences in Texas. Guests can enjoy white sand beaches and blue lagoons or visit the Rainforest Pyramid with its more than 1,700 species of exotic plants and animals. Also on site is the Aquarium at Moody Gardens – one of the world's largest, with 1.5 million gallons in a 130,000-square-foot pyramid. And if that isn't enough, the grounds offer America's first IMAX 3D Theater. For more information, visit Moody Gardens at their website *www.moodygardens.com*

Galveston:

During your visit to Moody Gardens you will want to explore the rest of Galveston Island. Just minutes away, enjoy 32 miles of sandy beaches, the Lone Star Flight Museum, the Mary Moody Northern Mansion, Bishop's Palace, Ashton Villa, the Texas Seaport Museum, the Tall Ship Elissa and the Railroad Museum. And of course, the Strand Historic District offers year-round entertainment with an array of shops, restaurants, pubs and art galleries in a Victorian setting. For more information on Galveston visit *www.galvestoncvb.com*

Travel:

Galveston Island is conveniently located just 50 miles south of Houston on interstate 45. Accessible to Houston's major airports, the island is 40 minutes from the William P. Hobby Airport and 90 minutes from the George Bush Intercontinental Airport. For those driving from Houston to Moody Gardens, take interstate 45 South to Galveston, exit 61st and turn right. Proceed to Seawall Blvd and turn right. Follow Seawall Blvd. to 81st and turn right. Turn right on Jones Rd. and then left on Hope Blvd. Follow the signs to Moody Gardens. Limousine service is available to Galveston from both Houston airports. For information contact Galveston Limousine Services at 1-800-640-4826 or visit their website at *www.galvestonlimo.com*



The Coastal Society 2002 Conference

CONVERGING CURRENTS: SCIENCE, CULTURE AND POLICY AT THE COAST

18th International Conference • May 19-22, Moody Gardens Hotel, Galveston, TX • A Tapestry of Natural Elements and Human Designs

Hotel Registration

Hotel Registration for
Moody Gardens Hotel,
Galveston Texas
Toll free reservation —
1-888-388-8484,
Reservations locally —
(409)741-8484

When making your reservation by phone, inform us that you are with The Coastal Society's Conference. To receive the conference rate, you must register by April 26, 2002. Conference rates are: $123 per night (single/double/triple/quad) plus 15% tax. In making reservations we request that you either: (1) enclose a check or money order covering the first night's stay (plus tax), or (2) provide your credit card number including expiration date. If you must cancel your reservation, we appreciate your courtesy in contacting our reservations department no later than 4 PM, 48 hours prior to your arrival date. Otherwise, a cancellation penalty will apply.

YOUR INFORMATION:

Group Name: *The Coastal Society* _____

Name (print): _____ Phone: _____

Address: _____

City: _____ State: _____ Zip: _____

Arrival date/time: _____ Departure date/time: _____

Sharing room with: 1) _____

2) _____

3) _____

I prefer: ❒ King ❒ Queen/Queen ❒ Non-Smoking ❒ Smoking

METHOD OF PAYMENT:

❒ Check/Money Order enclosed

❒ Credit Card

❒ Visa ❒ MasterCard ❒ Discover ❒ AmEx ❒ Diners Club

❒ I authorize Moody Gardens Hotel to charge my account one night's deposit plus 15% tax.

Credit Card Number: _____

Expiration Date: _____

Signature: _____

Note: All reservations are subject to availability. Credit card must be presented at check-in for payment unless advance arrangements have been made.
Check-in time is 4:00 pm. Check-out time is 12 noon.

Please fax or mail this form to the address below.

- **Moody Gardens Hotel**, Seven Hope Boulevard, Galveston, Texas 77554
  1-888-388-8484 toll free; (409) 741-8484 reservations locally; (409) 603-4937 fax)

SUBMIT BY APRIL 26, 2002

Michigan

In 1995, Michigan re-adjusted its property tax system in a way that afforded most residents with a tax cut while property located in vacation community areas saw a tax increase. "It's taxation without representation" claimed a retired businessman who has vacationed in northern Michigan for decades.[4] But the state of Michigan and the county in which his vacation home are located were unsympathetic to his plea. And an attorney with the National Voting Rights Institute in Boston familiar with the situation, backed up the state, noting that wealth may be able to buy a second home but that it ought not be allowed to buy a second vote, "It would really end up giving greater voting rights to the people who are well-off enough to afford vacation homes."[5]

Cape Cod, Massachusetts and Elsewhere

In 2000, non-resident property owners in Wellfleet, Massachusetts mounted an effort to gain a stronger voice in municipal meetings and decision-making in light of property tax increases that they deemed discriminatory in nature. Coverage of that scenario pointed out that the Wellfleet residents were watching other non-resident movements throughout the country in an effort to determine their future strategy.[6]

Striking a Balance Between American Ideals

"Taxation without representation is tyranny!" cried colonial Americans, signaling an intolerance for English rule in which they had no voice and paving the way for independence and the establishment of the American democratic system of government. Today that gospel-like notion of American liberty is raised as non-resident property owners around the country claim that they ought to have a right in the manner in which their lives are governed as their second homes are taxed and regulated. But does non-resident property ownership rise to the same level of individual interest that was sought to be protected in the colonial era?

There is little if any indication that the founders, even those with multiple homesteads, ever claimed revolving citizenship based on where they might lay their head down on a given evening. And in the tremendous growth and expansion era of the United States from the late eighteenth through mid-nineteenth centuries, individuals may have often cited their state residency over their national residency in order of importance. None, however, seemed to have claimed multiple voting rights based on multiple dwellings. And as Tocqueville pointed out one hundred and sixty years ago, residency has always played a key role in the voting qualification criteria. Residency garnered voting rights.[7] And that qualification, residency, has endured. The residency requirement constitutes the requisite consideration in the democracy contract. An individual gains a voice in the governance of his/her affairs in exchange for his/her residency in the community to be governed. Should multiple state citizenships/residencies be recognized with their attendant voting rights?

Today, some multiple property owners demand multiple voting rights even though their residency/citizenship (and therefore arguably their loyalty to a state) is limited to a single entity. Does an individual with two, three or four homes have the same level of contact with those communities that a less prosperous (single property or non-property) individual has? Likely not.

Conclusion

There is no doubt a legitimate concern raised by individuals whose substantial property interests are taxed and regulated by governments in which they lack a vote. However, democracy in America is not some single-attribute system in which a vote is the exclusive form of a voice. Since an individual may only reside in one town/state at any time, no individual could obtain more than one vote. And individuals are required to declare one state of residency for tax and voting purpose so that they cannot claim residency-for-the-moment as they may temporarily move from one state to another over the course of a year.

[1] Pipes, R., PROPERTY AND FREEDOM, at 37 (Vintage 2000).

[2] Alexis de Tocqueville, DEMOCRACY IN AMERICA, Vol. I, Part I, Chapter 4 , p. 58 (1850 ed. translated) (Harper Perennial 1988)(emphasis added).

[3] *May v. Town of Mountain Village*, 132 F.3d 576 (10th Cir. 1997).

[4] John Flesher, *Part time residents feel taxed by law*, THE GRAND RAPIDS PRESS (Aug. 13, 2000).

[5] Id. (quoting attorney Brenda Wright).

[6] Ellen Barry, *Second-home citizens on Cape and beyond, seasonal residents fight to be heard*, The Boston Globe (August 31, 2000).

[7] Id.

Everyone Deserves A Day at the Beach

Using the Public Trust Doctrine to Assure That Mobility Impaired Individuals Can Have Access to the Public Shoreline

by Rosemary Fowles

The Americans with Disabilities Act (ADA) was enacted in 1990 to extend civil rights to people with disabilities. A survey conducted in 1986 found that many disabled individuals experience an isolated life, lacking many of the social pleasures enjoyed by the non-disabled. A response to the survey was to enact the ADA and prohibit architectural barriers in public accommodations that tend to deny access to the disabled. While removing barriers is enough in some cases, affirmative steps are often necessary to ensure that disabled persons have access to areas that the general public has always enjoyed, e.g., the shoreline.

A seminal article on the Public Trust Doctrine suggested that public trust rights could be used as an approach to obtain effective judicial intervention in environmental cases. In light of the objectives of the ADA, the Public Trust Doctrine also seems like an ideal conduit for assuring access to the shoreline for wheelchair bound persons and others for whom walking across rocks and sand may be a problem.

Public Trust Doctrine and Shoreline Access

The Public Trust Doctrine is a legal principle that governs the manner in which certain property rights are held in trust by the state for the benefit of the public. The extent of the trust's boundary along coastal waters and the rights afforded to the public varies among the states. For most states, the title to the public trust land resides in the state and extends seaward from the mean high tide line. In a minority of states, private ownership may extend to the mean low tide line with certain rights reserved for the public (e.g. fishing, commerce and navigation).

A few states have indicated that the public has additional rights to the dry sand area in the form of easements over certain stretches of the shore. In North Carolina, for example, the public has certain rights between the mean high tide line and the vegetation line. In New Jersey, the state has made an effort to secure some rights to the dry sand area for its citizens as well. Yet while all states have secured some rights to use the shore for their citizens, the access to and from the shoreline area has proven difficult. In many instances, states have negotiated with private landowners to ensure that the public not only has a right to use the shore, but the means to reach it. The question which now must be answered is: what degree of access must be afforded in order to comply with the ADA?

Americans with Disabilities Act

The purpose of the ADA was to enable disabled persons to enjoy the same privileges and duties afforded to all United States citizens. Title II of the ADA prohibits state and local entities from discriminating against the disabled in the provisions of public services and programs as well as major life activities. It requires the public entity to make programs accessible to the disabled except where doing so would result in a fundamental alteration in the nature of the program or cause an undue financial burden. Could the denial of access to public trust lands or beaches likely be deemed a violation of the ADA?

The degree of modification necessary to comply with the ADA has been the subject of many court cases under the ADA. Most courts interpret the "reasonable modification" requirement to mandate moderate yet not unduly burdensome alterations. As an example, one city was required to install ramps and relocate ball games to fields accessible to a wheelchair participant. But requiring a day care center to provide one-on-one full time care to a disabled child has been found to be and undue burden. Given that the traditional public trust interest uses of the shoreline have been carefully protected by the courts, it does not seem unreasonable that local and state governments should work to ensure access for the disabled to public trust lands and public beaches.

The ADA mandates that reasonable accommodations are made so the disabled may enjoy certain basic rights held by all citizens. Some states have identified public trust land interests as falling within the category of rights that ought to be ADA-protected. Some jurisdictions have approached the challenge in a variety of ways. For example, many Massachusetts coastal communities have expanded access to their beaches. In 1996, a wooden ramp with railings was constructed over a dune at Duxbury Beach. Other towns supply special mats to enhance a wheelchair's mobility over sand, and some provide surf chairs. In Scituate, concrete ramps have been installed that are wide enough for wheelchairs. One area installed a five-foot wide wooden walkway that can be lifted out in the off season.

Several types of wheelchairs are currently available to enable the disabled to maneuver across a sandy surface. These chairs range from "all-terrain" type carts to amphibian models. The National Committee on Accessibility (NCA), an organization committed to encouraging the recreational opportunities for the disabled, recently conducted a study on the efficacy of various wheelchairs and accessories to enhance access to beach areas. Some of the chairs had wide balloon wheels while others were designed to be pushed into water and then paddled like a canoe. The organization also studied surface treatment alternatives. These can range from the more familiar boardwalk to mesh-like surfaces that are flush with the ground.

The availability of a specially designed chair or a surface treatment that could accommodate regular wheelchairs could fall within the 'reasonable modification' requirement of the ADA. Disabled persons are members of the public. Efforts need to be taken to ensure that their rights as beneficiaries under the Public Trust Doctrine are respected. Reasonable modifications ought to be included in any state or local government's plan to provide access to public trust lands. Increased access to these areas would address the needs of the disabled and would enhance the public trustees' ability to meet their trust responsibilities.

Rosemary Fowles is a third year law student at the University of Maine Law School.

Dean John A. Knauss Marine Policy Fellowships National Sea Grant College Program

For the 21st century, the Knauss Marine Policy Fellowship Program is committed to advancing marine-related educational and career goals of participating students and to increasing partnerships between universities and government.

Eligibility

Any student who, on May 1, 2002, is in a graduate or professional program in a marine or aquatic-related field at a United States accredited institution of higher education may apply to the NSGO through their local Sea Grant program. Applicants from states not served by a Sea Grant program should obtain further information by contacting the Knauss Fellows Program Manager at the NSGO.

Length of Assignment

The length of assignment is one-year (non-renewable). The inclusive dates of the official fellowship are February 1- January 31; however, these dates can be slightly adjusted to accommodate academic semester needs.

How to Apply

Interested students should discuss this fellowship with their local Sea Grant Program Director. Applications must be submitted with signature to the local Sea Grant program by the deadline set in the announcement (usually early to mid-April). Each Sea Grant program may select and forward to the NSGO no more than five (5) applicants selected according to criteria used by the NSGO in the national competition.

Selected applications are to be received in the NSGO from the sponsoring Sea Grant program, no later than 5:00 pm EST on May 1, 2002. The competitive selection process and subsequent notification to the Sea Grant programs will be completed by June 14, 2002.

The Selection Criteria Will Include:

1. Quality of the applicant's personal education and career goal statement.
2. Endorsement of the applicant's Sea Grant program director, and support of the applicant's major professor and second letter of reccomendation.
3. Strength of academic performance and diversity of educational background including extracurricular activities, awards and honors (from the curriculum vitae and transcripts).
4. Experience in marine or aquatic-related fields, oral and written communication skills, and interpersonal abilities.

Selection of Finalists

Applicants will be individually reviewed and ranked, according to the criteria outlined above, by a panel appointed by the Director of the NSGO with input from the Sea Grant Association and the National Sea Grant Review Panel. The panel will include representation from the Sea Grant Association and the current, and possibly past, class of Fellows. Once the entire class is selected, based on the criteria listed, the Knauss Program Manager will group the top-ranked applicants in each category, legislative and executive, based upon the applicant's stated preference and/or judgement of the panel based upon material submitted. Academic discipline and geographic representation may be considered by the National Sea Grant Office to provide overall balance. The number of fellows assigned to the Congress will be limited to 10.

For Further Information

Please contact your nearest Sea Grant program (see the list of Sea Grant programs for telephone numbers), or contact:
Ms. Nikola Garber
Knauss Program Manager, National Sea Grant College Program, R/SG, NOAA
1315 East-West Highway,
Silver Spring, MD 20910
Tel. (301) 713-2431 ext. 124
e-mail: nikola.garber@noaa.gov

CONFERENCES

APRIL /MAY

Native American Fish & Wildlife Society
2002 National Conference
Apr. 29-May 2, 2002
Anchorage, Alaska
http://www.nafws.org

The Coastal Society
TCS 18 Biennial Meeting
Converging Currents:
Science, Policy and Culture at the Coast
May 19 – 22, 2002
Galveston, TX
http://www.thecoastalsociety.org/tcs18/index.html
(see TCS18 Conference registration insert in this issue).

JUNE/JULY

Coastal Zone Canada
Managing Shared Waters:
Towards Sustainable Transboundary
Coastal Ecosystems
June 23 – 28, 2002
Hamilton, Ontario CANADA
http://www.pollutionprobe.org/managing.shared.waters/index.htm

National Marine Educators Association Annual Meeting
July 22-26, 2002,
at Connecticut College in New London, CT
http://www.oceanology.org/SENEME/NMEA2002/nmea2002.html

AUGUST/SEPTEMBER

American Fisheries Society
Annual Meeting
Turning the Tide
132nd AFS Annual Meeting
Baltimore, MD Aug. 18-22, 2002
http://www.fisheries.org/annual2002/

The American Shore and Beach Preservation
Association 2002 Annual Conference
September 15-18, 2002
Portland, Oregon
http://www.asbpa.org/2002conf.html

ATMOSPHERIC DEPOSITION HANDBOOK

NOTICE OF AVAILABILITY

EPA's Office of Air and Radiation (OAR) and Office of Water (OW) collaboratively developed the attached technical handbook *Frequently Asked Questions about Atmospheric Deposition: A Handbook for Watershed Managers (EPA-453/R-01-009, September 2001)* . The handbook answers basic questions about air deposition and sources, how its significance can be assessed through existing information, monitoring and modeling, and how the information can be used in a management strategy. It also provides extensive references for additional resources. Publishing this handbook was one of our commitments for education and outreach in the *Air-Water Interface Work Plan* of January 2001.

Addressing water quality impacts from atmospheric deposition of toxics and nitrogen is an increasingly important challenge for the Environmental Protection Agency (EPA) and our partners in managing water resources. These pollutants can adversely impact both human health and the environment. Atmospheric deposition is a major contributor to the overall loading of mercury to U.S. waters. As many of you know, mercury is the most frequently listed reason for fish consumption advisories. As of December 1999, 41 States had issued fish advisories for mercury. Additionally, atmospheric deposition of nitrogen contributes to eutrophication in a significant number of our coastal watersheds. Roughly 10–40% of the nitrogen that reaches East and Gulf Coast estuaries is transported and deposited via the atmosphere.

We encourage you to promote awareness and use of this handbook.

It will also be available on the web at:

http://www.epa.gov/oar/oaqps/gr8water/ and
http://www.epa.gov/owow/oceans/airdep/.

Questions about this handbook should be directed to:

Gail Lacy, OAR (919) 541-5261, lacy.gail@epa.gov or
Debora Martin, OW (202) 260-2729, martin.debora@epa.gov

Duke Student Chapter Looks Ahead

by Jennifer N. Latus
NationalTCS-Duke Student Chapter Liaison

Officers and members of the Duke University chapter of The Coastal Society have taken an active role in developing a strong foundation for the future of student membership within theorganization.Six students attended The Coastal Zone Conference
2001 in Cleveland, OH. Three officers—Jenn Latusek, National TCS-Duke Student Chapter Liaison; Lydia Munger, Events Coordinator; and Becca Newhall, Secretary—as well as members Bill Barnhill, Sarah Dixon, and Larissa Nojek, attended the Young Leaders in Coastal Management Workshop and the following presentations and events of the week. Some members attended The Coastal Society breakfast where Ms. Munger provided the board with insight into the Duke chapter events including by-law
composition and adoption, professional speaker presentations, and outreach and assistance for development of new student chapters.

A mentor program between TCS professionals and the Duke students is forecasted among the new projects. This endeavor will link TCS members with students of similar geographical,
vocational, and/or organizational interests. Thus, the young members will be able to obtain insight into job opportunities and professional development.

Finally, Duke, as the first student chapter, is focusing upon additional scholar chapter development throughout the country. Young professionals need places where they may gather tools and information to proceed along their particular areas of interest and expertise within coastal and ocean management.
They must also have access to a network that will allow them to present their views on both management issues and the future of coastlines and oceans. The Coastal Society provides such a forum to accomplish these goals.

(reprinted from TCS website)

Cascadia Chapter News
The Cascadia Regional Chapter of The Coastal Society focuses on the coasts and inland marine waters of British Columbia, Washington, Oregon, and Northern California.
The Chapter has developed its own web site!
Link to it via http://www.thecoastalsociety.org/cascadia/

UW Chapter News

Rebecca A. Ellis,TCS UW Chapter President
Monika T. Thiele, TCS UW Chapter Vice President

SETTING THE FOUNDATION
FOR AN INTERDISCIPLINARY STUDENT CHAPTER

Fueled by active student interest, strong support by the Cascadia Regional Chapter, and close affiliation with the University of Washington's School of Marine Affairs, the UW student chapter has now been officially recognized. Goals of this new chapter include facilitating an exchange between student and national TCS members, between student chapters, and between numerous academic programs and student organizations at UW (such as Ocean/Aquatic Sciences, Urban Planning, Public Policy, Law, International Studies, etc.).

Current activities include sponsorship of a keynote speaker, TCS member Leigh Espy, for the up-coming *Maritime International Student Symposium on Pacific Management* hosted by UW's Marine Affairs Student Association. Abstracts include student work from UW, WSU, Oregon State University, Simon Fraser, and The University of British Columbia. We have also begun dialogue with the Duke and East Carolina University Student TCS Chapters through our collaboration on the Young Coastal Leader's Workshop at the TCS-18 Conference in May.

Our active member recruitment campaign will be launched at the beginning of UW's spring quarter in April 2002. Kick-off meetings will be held in coordination with the School of Marine Affairs' spring lecture series on the future of ocean governance and sustainability. Continued growth will capture a diverse range of activities and marine-related discussions through the University of Washington.

For more info please visit:
http://students/washington.edu/tcsuw/

News from the Board

TCS Board Gains New Faces

Beginning in 2002, The Coastal Society's Board of Directors will be enhanced by a number of newly elected members and ex-officio members. Two new board members, Larry Hildebrand and Paul Ticco were elected in the 2001 fall elections. Ex-officio members of the board participate in their respective capacities as committee chairs and chapter presidents.

New Board Members

Larry Hildebrand

has been involved in coastal and ocean planning and management issues in Canada and around the world, for over 23 years. Larry has been employed by the Canadian federal government in Halifax, Nova Scotia since 1978 and has worked with three federal departments - Fisheries and Oceans Canada, Natural Resources Canada, and Environment Canada. He is currently the Manager of Sustainable Communities and Ecosystems for Environment Canada-Atlantic Region where he is responsible for developing policy for, programming in supholds a B.Sc.(Honours) in marine biology and a Master of Environmental Studies from Dalhousie University, and in his abundant spare time, is completing a Ph.D. in coastal and ocean governance at the University of Wales in Cardiff, U.K.

Paul Ticco

began his career in coastal management complaining about and then picking up trash from a beach in Wildwood, NJ at the age of seven. He is the Assistant Director of the Virginia Graduate Marine Science Consortium, and a Research Professor in the College of Arts and Sciences at the University of Virginia. He also currently serves as the coordinator of Virginia's Dean John A. Knauss National Marine Policy Fellows, as a consultant to NOAA's NERRS program, and has past experience as a coastal and marine policy analyst with the University of Virginia's Center for Ocean Law and Policy, the University of Delaware's Center for the Study of Marine Policy, and the Woods Hole Oceanographic Institution. Dr. Ticco has served in the U.S. federal government as a Coastal Program Specialist in NOAA's Office of Ocean and Coastal Resources Management, and in state government as Chief of the Comprehensive Planning Assistance Division of Maryland's Chesapeake Bay Critical Area Commission. Dr. Ticco received a B.S. in Aquatic Ecology/Natural Resource Policy from the University of Michigan School of Natural Resources, a M.A. in Marine Affairs from the University of Virginia Department of Environmental Sciences, and a Ph.D. in Marine Policy from the University of Delaware Graduate College of Marine Studies.

Ex-Officio Members of the TCS Board

Ariel A. Cuschnir

joins the Board as an ex-officio member in his capacity as the Chair of the TCS Education Committee. Ariel is currently a Sr. Manager at the Louis Berger Group, Inc. in Washington, D.C. He manages multi-disciplinary environmental projects worldwide, in fields such as Integrated Coastal Zone Management (ICZM), environmental impact assessments of coastal areas, and ecological restoration. Prior to his environmental consulting work, Dr. Cuschnir conducted scientific research for Tel Aviv University, Hebrew University, the University of California (Los Angeles), and the Bishop Museum, Honolulu, Hawaii. Dr. Cuschnir initiated his academic education in Argentina, and subsequently received his B.S. (Biology), M.S. (Marine Ecology), and Ph.D. (Marine Ecology), from Tel Aviv University in Israel.

Amy M. Owsley

serves on the board as an ex-officio member in her capacity as the Chair of the TCS Membership Committee. Amy no doubt will be making herself known to the TCS community as she brings energy and initiative to the organization's ongoing efforts to build and sustain a strong TCS membership.

Robert F. Goodwin

has been a long-standing member and supporter of TCS. Currently Bob's service to the board is in his capacity as the President of the organization's Cascadia Chapter. Bob is a valued member of the Washington Sea Grant program. His efforts to establish a TCS chapter on the left coast have prompted other regions and universities to do the same.

Jennifer N. Latusek

is an ex-officio member of the board as Duke University Chapter President. Duke University students continue to bring new ideas and energy to the organization. There is no doubt that Jennifer will continue the work of her predecessors in strengthening the nutually beneficial relationship bewteen Duke and TCS.

Kerry P. Pate

joins the ranks of ex-officio members in his role as East Carolina Chapter President. Kerry will be directing the efforts of the most recent addition to the growing number of TCS chapters.□

TCS Board of Directors

OFFICERS

President
Walter Clark
1811 Park Drive
Raleigh, NC 27605
(919) 515-1895-phone
(919) 515-7095-fax
walter_clark@ncsu.edu
Term: 1/1/01 - 12/31/02

Treasurer
Will Hall (through 3/02)

Past President
Megan D. Bailiff
1721 Calle Delicada
La Jolla, CA 92037
(858) 456-9064-phone
(858) 232-5224-cell
(858) 456-9064-fax-call first
meganbailiff@hotmail.com
Term: 1/1/01 - 12/31/02
Nominating Committee Chair

President-Elect
John Duff
Marine Law Institute
U Maine Law School
246 Deering Avenue
Portland, ME 04102-2898
(207) 228-8290-phone
(207) 780-4239-fax
jduff@usm.maine.edu
Term:1/1/01-12/31/02
Special ProjectsCommittee Chair

Secretary
Robert H. Boyles, Jr.
SC Dept of Natural Resources
217 Fort Johnson Road
Charleston, SC 29422-2559
(843) 762-5002-phone
(843) 762-5001-fax
boylesr@mrd.dnr.state.sc.us
Term: 1/1/01 - 12/31/03
Communications Committee Chair

PROFESSIONAL SERVICES

TCS Office
Judy Tucker
CAE, Executive Director
1201 Lyndale Drive
Alexandria, VA 22308-1036
(703) 768-1599-phone
(703) 768-1598-fax
coastalsoc@aol.com
(703) 765-2914-home

Tax Preparation
Chas Rannells
Swart, Lalande & Associates, PC
9300 Grant Avenue, Suite 103
Manassas, VA 20110
(703) 361-6126-phone
(703) 368-7495-fax
crannells@slacpa.com

EX-OFFICIO BOARD MEMBERS

Education Committee Chair
Ariel A. Cuschnir
The Louis Berger Group, Inc.
1819 H Street, NW, Suite 900
Washington, DC 20006
(202) 331-7775, X482-phone
acuschnir@louisberger.com

Bulletin Editor
John Duff
(see President-Elect)

Membership Committee Chair
Amy M. Owsley
Director of Community Planning
Eastern Shore Land Conservancy
POB 169
Queenstown, MD 21658
(410) 827-9756 ext. 168-phone
(410) 827-5765-fax
aowsley@eslc.org

DIRECTORS

Darrell D. Brown
US EPA, Coastal Mgmt. Branch
1200 Pennsylvania Avenue, NW
Room 7214A, Mail Code 4504T
Washington, DC 20460
(202) 566-1256-phone
(202) 566-1336-fax
brown.darrell@epamail.epa.gov
Term: 1/1/2000 - 12/31/02

Joelle Y. Gore
NOAA/NOS/OCRM
1305 East West Highway,
SSMC4, N/ORM3
Silver Spring, MD 20910
(301) 713-3117 X 177-phone
(301) 713-4367-fax
joelle.gore@noaa.gov
Term: 1/1/01 - 12/31/03

Chad E. Nelsen
122 S. El Camino Real
San Clemente, CA 92672
(949) 492-8170-phone
(949) 492-8142-fax
cnelsen@surfrider.org
Term: 1/1/01 - 12/31/03

Michael F. Eng
US Institute for
Env.Conflict Resolution
110 South Church Ave.,Ste.3350
Tucson, AZ 85701
(520) 670-5299-phone
(520) 670-5530-fax
eng@ecr.gov
Term: 1/1/2000 - 12/31/02

Michael E. Henderson
Office of Marine
& Aviation Operations
SSMC-3, #12746(OMAOx4)
1315 East-West Highway
Silver Spring, MD 20910
(301) 713-3418 X104-phone
(301) 713-154-fax
michael.henderson@noaa.gov
Term: 1/1/02 - 12/31/03

Paul C. Ticco
VA Graduate Marine Science
Consortium, University of Virginia
Madison House - 170 Rugby Road
Charlottesville, VA 22903
(434) 924-5746-phone
(434) 982-3694-ffax
pct6e@virginia.edu
Term: 1/1/02 - 12/31/04

James D. Giattina
Gulf of Mexico Program
Building 1103, Room 203
Stennis Space Ctr., MS 39529-6000
(228) 688-2711-phone
(228) 688-2709-fax
giattina.jim@epa.gov
Term: 1/1/01 - 12/31/02

Larry Hildebrand
Environment Canada
16th Flr.,Queen Sq.,45 Alderney Dr.
Dartmouth, Nova Scotia B2Y 2N6
CANADA
(902) 426-2131-phone
(902) 426-6348-fax
larry.hildebrand@ec.gc.ca
Term: 1/1/02 - 12/31/04

Cascadia Chapter President
Robert F. Goodwin
Washington Sea Grant Program
School of Marine Affairs, HF-05
University of Washington
Seattle, WA 98195
(206) 685-2452-phone
(206) 543-1417-fax
goodrf@u.wahsington.edu

Duke Student Chapter President
Jennifer N. Latusek
910 Constitution Drive, APT 822
Durham, NC 27705
(252) 259-8812-phone
E-MAIL: jnl4@duke.edu

East Carolina Chapter President
Kerry P. Pate
1070 Northbridge Drive
Charleston, SC 29407
kerrypate@yahoo.com

continued from page 7

entirely on the basis of lack of reasonable expectations, since regulatory scheme was in place at time of acquisition).

[4] As the Federal Circuit put it, "[T]he 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." Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994).

[5] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[6] *See* M & J Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir. 1995) (laying out procedure for "antecedent inquiry" into background principles for federal courts).

[7] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029- 1030 (1992).

[8] This argument about the confusion between background limitations and property owners' expectations is developed in R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449 (2001).

[9] Even while holding that regulatory takings inquiries are inevitably ad hoc and highly fact specific, the Supreme Court articulated three relevant factors: the economic impact of the regulation on the claimant; the extent of interference of the regulation with distinct investment-backed expectations; and the character of the government action. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

[10] *E.g.*, Hunziker v. State, 519 N.W.2d 367 (Iowa 1994) (law protecting archaeological sites was in place at time of property acquisition; no taking); Gazza v. New York State Dep't of Envtl. Conservation, 679 N.E. 2d 1035, 1037 - 1039 (N.Y. 1997) (state statute protecting tidal wetlands was a background limitation on property purchases after the restrictions were in place; no taking); Grant v. South Carolina Coastal Council, 461 S.E. 2d 388, 391 (S.C. 1995) (prohibition on fill without a permit was not a taking where regulatory scheme was in place before purchase of property); City of Virginia Beach v. Bell, 498 S.E.2d 414, 417 - 418 (Va. 1998) (owner acquired beach property after enactment of coastal protection statute and ordinance, although related corporation owned the property prior to regulation; no taking) .

[11] 467 U.S. 986, 1005 (1984).

[12] "[T]he existence of a [protected] property interest is determined by reference to 'existing rules of understandings that stem from an independent source such as state law.'" Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998) (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 546, 577 (1972)).

[13] Nollan v. California Coastal Commission, 483 U.S. 825 (1987).

[14] The Commission could not without compensation condition permission to build a new beachfront house on an agreement to allow the public to cross the Nollans' private beach so as to help create a public beach walkway. The condition sought to be imposed did not substantially advance a legitimate state interest; it had no "essential nexus" with any difficulty caused by the activity to be permitted.

[15] *Id*. at 833 n.2 at 834.

[16] *E.g.*, Preseault v. United States, 100 F.3d 1525, 1538 (Fed. Cir. 1996) (longstanding general federal regulation of railroads does not diminish expectations of owner of lands underlying railroad rights-of-way).

[17] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

[18] Palazzolo v. Rhode Island, 746 A.2d 707, 716 (R.I. 2000), *rev'd*, 121 S.Ct. 2448 (2001).

[19] Palazzolo v. Rhode Island, 121 S.Ct. 2448, 2463 (2001).

[20] *Id.*

[21] *Id.* at 2462 (citations omitted).

[22] *Id.* at 2465 (O'Connor, J., concurring).

[23] *Id.* at 2467.

[24] John D. Echeverria, *A Preliminary Assessment of* Palazzolo v. Rhode Island, 31 ENVTL. L. REP. 11112, 11114 (2001).

[25] Palazzolo v. Rhode Island, 121 S.Ct. 2448, 2467 at 2468 (Scalia, J., concurring).

[26] *Id.* at 2477 (Breyer, J., dissenting).

[27] *Id.* at 2472, 2477 n. 3 (Ginsburg, J., dissenting); *id.* at 2468, 2471 n.6 (Stevens, J., dissenting).

[28] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring).

[29] John D. Echeverria, *A Preliminary Assessment of* Palazzolo v. Rhode Island, 31 ENVTL. L. REP. 11112, 11118 (2001).

[30] Palazzolo v. Rhode Island, 121 S.Ct. 2448, 2463 - 2464 (2001).

[31] *See, e.g.*, United States v. Dow, 357 U.S. 17 (1958); Danforth v. United States (1939). *But see* Karam v. New Jersey Dept' of Envtl. Protection, 705 A.2d 1221, 1229 (N.J. Super. App. Div. 1998) (subsequent owner may bring takings action); Vern Reynolds Construction, Inc. v. City of Champlin, 539 N.W. 2d 614 (Minn. App. 1995) (under certain circumstances, subsequent owner may bring takings action).

[32] *See generally* Marc R. Poirier, *Regulatory Takings* § 10A.17[6], in ENVIRONMENTAL PRACTICE GUIDE (Matthew Bender rev. 1999) (section on standing in regulatory takings claims).

[33] Palazzolo v. Rhode Island, 121 S.Ct. 2448, 2463 (2001) (emphasis supplied).

[34] Palazzolo v. Rhode Island, 746 A.2d 707, 713 - 14 (R.I. 2000), *rev'd*, 121 S.Ct. 2448 (2001). The Rhode Island court relied especially on the leading takings ripeness cases, MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986) and Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

[35] Palazzolo v. Rhode Island, 121 S.Ct. 2448, 2458 - 2462 (2001). Justice Stevens joined this part of the opinion, *id.* at 2468 (Stevens, J., concurring), making the tally 6 -3 on the ripeness holding.

[36] MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 353 n.9 (1986).

[37] Palazzolo v. Rhode Island, 121 S.Ct. 2448, 2459 - 61 (2001).

[38] *See also* Suitum v. Tahoe Regional Planning Agency, 520

U.S. 725 (1997); Cienega Gardens v. United States, 265 F.3d 1237 (Fed. Cir. 2001).

[39] Palazzolo v. Rhode Island, 746 A.2d 707, 715 (R.I. 2000), *rev'd o.g.*, 121 S.Ct. 2448 (2001).

[40] This per se test for a regulatory taking when an owner loses all economic value of the property was articulated and applied in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[41] Palazzolo v. Rhode Island, 121 S.Ct. 2448, 2464 (2001).

[42] *Id.* at 2464 - 2465.

[43] Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM L. REV. 1667, 1676 (1988).

[44] 480 U.S. 470, 500 - 502 (1987).

[45] Marc R. Poirier, *Regulatory Takings* § 10A.06[4] at 10A-25, in ENVIRONMENTAL PRACTICE GUIDE (Matthew Bender rev. 1999).

[46] *See, e.g.*, District Intown Properties Ltd.. Partnership v. District of Columbia, 198 F.3d 874 (D.C. Cir. 1999), *cert. denied*, 121 S.Ct. 34 (2000) (discussing factors, finding larger parcel to be the relevant parcel, and finding no taking); Forest Properties, Inc. v. United States, 177 F.3d 1360, 1365 (Fed. Cir.), *cert. denied*, 120 S.Ct. 373 (1999) (finding larger parcel to be the relevant parcel, and finding no taking); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) (finding the smaller parcel relevant on a test looking at all the facts, and finding a taking); Ciampitti v. United States, 22 Cl. Ct. 310, 318 (1991) (articulating factors to assess the relevant parcel); Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981) (substantial potential for development remained – no taking); K & K Construction, Inc. v. Department of Natural Resources, 575 N.W. 2d 531, 535 - 538 (Mich. 1998), *cert. denied*, 525 U.S. 819 (1998) (in denial of wetlands fill permits relevant parcel consisted of at least three lots – discussing factors); Zealy v. City of Waukesha, 548 N.W.2d 528, 532 - 534 (Wis. 1996) (in challenge to wetlands zoning ordinance, parcel at issue is the entire parcel).

[47] *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 - 1017 n.7 (1992).

[48] Palazzolo v. Coastal Resources Mgmt. Council, No. 86-1496, 1995 WL 941370 (R.I. Super. Jan 5., 1995).

[49] The Rhode Island Supreme Court will order remand to the Superior Court, although it has first asked the parties to fried for issues relevant on remand: the need for a survey of the part of Palazzolo's property below the mean high water line; the intial purchase price for the property; the proceeds and other consideration from the sale of six parcels from the original property; and the relevance of Rhode Island's version of the public trust doctrine, as described in Greater Providence Chamber of Commerce v. State of Rhode Island, 657 A.2d 1038 (R.I. 1995). Palazzolo v. Rhode Island, 2001 WL 1530186 (No. 98-333-A, Sept. 25, 2001). *See also* McQueen v. South Carolina Coastal Council, 530 S.E.2d 620 (S.C. 2000)*, vac. & rem. sub nom.* McQueen v. South Carolina Dept. of Health and Envtl. Control, 121 S.Ct. 2581 (2001) (remand of regulatory takings case for reconsideration in light of *Palazzolo*).

Professor Poirier teaches Environmental Law, Coastal and Ocean Law, Administrative Law, Property, and Takings Doctrine at Seton Hall University School of Law in Newark, New Jersey.

APPLICATION FOR MEMBERSHIP

Last Name | First | Middle Initial | Job Title

*check for preferred mailing address

Business Address* | Zip

Home Address* | Zip

Daytime Telephone | E-mail

Primary Interest (e.g. Marine Biology, Coastal Engineering, Interested Citizen, Fisheries, Information Exchange, Law and Policy)

Occupation

Class Membership:

- ■ Regular ..... $35.00 U.S.
- ■ Regular (Non-U.S. Address) ..... 40.00 U.S.
- ■ Student ..... 15.00 U.S.
- ■ Library ..... 50.00 U.S.
- ■ Institution ..... 250.00 U.S.

Please mail this form and check to:
The Coastal Society
PO Box 25408
Alexandria, Virginia 22313-5408

Signature: _____ Today's Date: _____

The Coastal Society is an organization of private sector, academic, and government professionals and students dedicated to actively addressing emerging coastal issues by fostering dialogue, forging partnerships, and promoting communication and education.

P. O. Box 25408
Alexandria, Virginia 22313-5408

6-6-46697-440

Nonprofit
Organization
U.S. Postage
PAID
Portland, ME 04101
Permit No. 370