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McQueen v. South Carolina Coastal Council: Presenting the Question of the Relevance of the Public Trust Doctrine to the Total Regulatory Takings Analysis

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McQUEEN V. SOUTH CAROLINA COASTAL COUNCIL: PRESENTING THE QUESTION OF THE RELEVANCE OF THE PUBLIC TRUST DOCTRINE TO THE TOTAL REGULATORY TAKINGS ANALYSIS

I. INTRODUCTION

The recent remand of the South Carolina Supreme Court case *McQueen v. South Carolina Coastal Council*[1] presents an unresolved issue involving the relationship between the public trust doctrine and regulatory takings law. After the *McQueen* case was appealed from the South Carolina Supreme Court, the U.S. Supreme Court remanded the case to the South Carolina Supreme Court[2] to be heard in light of the U.S. Supreme Court's recent decision in *Palazzolo v. Rhode Island*.[3]

Part II of this Note outlines the twisted path the *McQueen* case has taken in the shadows of the *Palazzolo* and *Lucas v. South Carolina Coastal Council*[4] decisions and explains the relationship between the public trust doctrine and regulatory takings law. Part III discusses the public trust doctrine as viewed by other states and details South Carolina's current view of the doctrine. Part IV analyzes how the public trust doctrine relates to regulatory takings actions, particularly those involving tidelands. Part V then revisits the *McQueen* case, questioning whether the State of South Carolina can successfully defend a takings claim by using the public trust argument. Finally, Part VI opines that the State should prevail in the *McQueen* case and argues that any other result would have a negative effect on coastal tidelands.

II. ATTEMPTING TO APPLY THE PUBLIC TRUST DOCTRINE TO REGULATORY TAKINGS LAW

A. McQueen v. South Carolina Coastal Council

In 1991, Sam McQueen applied to the South Carolina Coastal Council[5] for permits to backfill wetlands and to build bulkheads to prevent further erosion

1. 340 S.C. 65, 530 S.E.2d 628 (2000).
2. McQueen v. S.C. Dep't of Health and Envtl. Control, 121 S. Ct. 2581 (2001).
3. 121 S. Ct. 2448 (2001).
4. 505 U.S. 1003 (1992).
5. "The South Carolina Coastal Council is now known as the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management." *McQueen*, 340 S.C. at 67 n.1, 530 S.E.2d at 629 n.1.

on two lots in Cherry Grove, South Carolina.[6] McQueen had purchased one lot in 1961 and the other in 1963, and the two lots lay adjacent to a man-made, saltwater canal.[7] Over the course of thirty years, considerable erosion had occurred on the property.[8] In 1993, the Coastal Council denied McQueen's request for permits to bulkhead and backfill his property "because the proposed bulkheads were located within 'the tidelands critical area, so that any backfill [would] result[] in the filling of tidal wetlands.'"[9]

McQueen sought review of the Coastal Council's decision before the Coastal Zone Management Appellate Panel; the Panel upheld the denials of both permits, finding that the permits "were prohibited by S.C.Code Ann.Regs. 30-12(G)(2)(a) . . ., which provides that the creation of residential lots for private gain is not justification for filling in wetlands and that permit applications for this purpose should be denied."[10] McQueen then appealed to the circuit court, which referred the case to a master-in-equity.[11] The master-in-equity found that a taking had occurred without just compensation because the denials had deprived McQueen of "all economically beneficial use" of his property.[12] The court of appeals affirmed, holding that "McQueen ha[d] suffered a textbook taking."[13]

On appeal, the South Carolina Supreme Court reversed the court of appeals' decision and held that no taking had occurred.[14] To make this determination, the supreme court applied the *Penn Central Transportation Co. v. New York City*[15] test, which requires the landowner to establish the following:

> (1) there was a denial of economically viable use of the property as a result of the regulatory imposition;

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6. McQueen v. South Carolina Coastal Council, 329 S.C. 588, 591-92, 496 S.E.2d 643, 645-46 (Ct. App. 1998).

7. *Id.* at 591, 496 S.E.2d at 645.

8. *Id.* at 592, 496 S.E.2d at 645.

9. *Id.*

10. *Id.* at 592, 496 S.E.2d at 646.

11. *Id.*

12. *McQueen*, 329 S.C. at 592-93, 496 S.E.2d at 646.

13. *Id.* at 600, 496 S.E.2d at 650.

14. McQueen v. South Carolina Coastal Council, 340 S.C. 65, 77, 530 S.E.2d 628, 635 (2000).

15. 438 U.S. 104 (1978). In *Penn Central*, the U.S. Supreme Court discussed several factors that should be considered in determining whether a regulatory taking has occurred:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the government action.

Id. at 124 (citation omitted).

> (2) the property owner had distinct investment-backed expectations; and
> (3) the interest taken was vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.[16]

The South Carolina Supreme Court found that the second element dealing with investment-backed expectations was the crucial issue in this case because "[w]ithout the requirement of investment-backed expectations, a property owner could obtain a windfall by claiming a taking in the face of new regulations, without any real intent to develop."[17] The court held that McQueen's "prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate[d] a distinct lack of investment-backed expectations," and therefore there was not a regulatory taking.[18] In finding that no taking had occurred, the court seemed to place a great deal of significance on McQueen's neglect of his property and his failure to actively take steps to protect or develop it.[19]

The U.S. Supreme Court granted certiorari and vacated the judgment, remanding the case to the South Carolina Supreme Court to be reheard in light of its recent decision in *Palazzolo*.[20]

B. Palazzolo*: Clarifying* Lucas *and Reversing* McQueen

In *Palazzolo*, a landowner sued the State of Rhode Island after he was denied permits to fill wetlands in order to develop his property.[21] The landowner argued that the State's denial was based on regulations that were enacted after he purchased his property and that he therefore suffered a regulatory taking.[22] Unlike *McQueen*, *Palazzolo* was only a partial regulatory takings case; the landowner was not deprived of all economically beneficial use of his property because the uplands portion of the property still had development potential.[23] Much of the U.S. Supreme Court's decision in *Palazzolo* involved a complex, fact-specific discussion of standing,[24] and that

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16. *McQueen*, 340 S.C. at 69, 530 S.E.2d at 630-31 (quoting Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994)).

17. *Id.* at 74, 530 S.E.2d at 633.

18. *Id.* at 76-77, 530 S.E.2d at 634-35.

19. *Id.* at 70, 530 S.E.2d at 631. "In the instant case, [McQueen] neglected his property for thirty years, allowed the land to revert to wetlands, and now expects the State of South Carolina to pay him the going rate for high ground—a twenty-fold return on his initial investment." *Id.*

20. McQueen v. S.C. Dep't of Health and Envtl. Control, 121 S. Ct. 2581 (2001).

21. Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2455 (2001).

22. *Id.* at 2454-56, 2462-64.

23. *Id.* at 2464-65.

24. *Id.* at 2458-64.

portion of the opinion has no relevance to the remand of the *McQueen* case. However, the Court's holding that the *Penn Central* test[25] should be applied when the regulation in question does not deprive the landowner of all economically beneficial use of the property is of great importance.[26]

Apparently, the South Carolina Supreme Court erred when it applied the three-part *Penn Central* test[27] in *McQueen*; therefore the court misinterpreted the landmark U.S. Supreme Court case *Lucas v. South Carolina Coastal Council*.[28] The *Lucas* decision established that the *Penn Central* test[29] should be applied only to determine if there has been a partial regulatory taking; in determining whether a total taking has occurred, the proper inquiry is whether the "regulation denies all economically beneficial or productive use of land."[30] In *McQueen*, the State conceded that the permit denial deprived McQueen of all economically beneficial use of his property.[31] Therefore, the South Carolina Supreme Court erred by applying the *Penn Central* test;[32] the court should not even have considered whether McQueen had investment-backed expectations because *McQueen* was not a partial regulatory takings case.[33]

C. Lucas: *Introducing the Idea of Background Principles of State Law*

In *Lucas*, the U.S. Supreme Court stated: "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[34] Thus, the only way the state can defend a complete taking without compensation is by showing that the landowner did not have a pre-existing right to use his property due to "background principles of the State's law of property and nuisance . . . ."[35]

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25. *See supra* notes 15-16 and accompanying text.
26. *Palazzolo*, 121 S. Ct. at 2464-65.
27. *See supra* notes 15-16 and accompanying text.
28. 505 U.S. 1003 (1992).
29. *See supra* notes 15-16 and accompanying text.
30. *Lucas*, 505 U.S. at 1015, 1017-18.
31. McQueen v. South Carolina Coastal Council, 340 S.C. 65, 69, 530 S.E.2d 628, 631 (2000) ("It is uncontested the permit denial at issue here deprives [McQueen] of all economically viable use of his property.").
32. *See supra* notes 15-16 and accompanying text.
33. For an in-depth discussion of why the South Carolina Supreme Court was wrong in *McQueen*, see Nikki Lee, Note, McQueen v. South Carolina Coastal Council: *Misinterpreting* Lucas, 52 S.C. L. REV. 815, 816 (2001) (arguing that because McQueen was deprived of all economically viable use of his property, he should have been entitled to compensation without further analysis unless background principles of common law would have prevented him from building bulkheads and filling his property).
34. *Lucas*, 505 U.S. at 1027.
35. *Id.* at 1029.

In *Lucas*, the U.S. Supreme Court remanded the case to the South Carolina Supreme Court with instructions to make such a determination, stating as follows:

> The question . . . is one of state law to be dealt with on remand. We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*. . . . South Carolina must identify background principles of nuisance and property law that prohibit the uses [Lucas] now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.[36]

Identifying the principles of law that preclude McQueen from using his land as he wishes is precisely what the South Carolina Supreme Court addressed in its original hearing of *McQueen*, and the court will have to address this issue with respect to the public trust doctrine in the future.

D. The Public Trust Doctrine as a Background Principle of State Law

In *McQueen*, the South Carolina Supreme Court considered whether background principles of state law barred McQueen from filling his lots.[37] The State argued that *Carter v. South Carolina Coastal Council*[38] represented a background principle of state nuisance and property common law.[39] In *Carter*, the supreme court held that denying a permit to fill wetlands "was not a taking because '[a]n owner of land has no absolute and unlimited right to change the [essential] natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.'"[40] However, the *McQueen* court held that *Lucas* partially overruled *Carter* with the following statement:

> [R]egulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, *by requiring land to be left substantially in its natural state*—carry with them a

36. *Id.* at 1031-32.
37. *McQueen*, 340 S.C. at 70-73, 530 S.E.2d at 631-33.
38. 281 S.C. 201, 314 S.E.2d 327 (1984).
39. *McQueen*, 340 S.C. at 71, 530 S.E.2d at 631.
40. *Carter*, 281 S.C. at 205, 314 S.E.2d at 329.

> heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.[41]

However, it appears that on remand the State may have another background principle argument that could bar a landowner from filling wetlands on his property—the public trust doctrine. In a footnote in the *McQueen* decision, the South Carolina Supreme Court noted that amici curiae had argued numerous other potentially applicable background principles of the law.[42] The most significant of these arguments was the public trust doctrine, which states generally that "the state owns the property below the high water mark of a navigable stream [and that] this property is part of the public trust."[43] Despite the argument's promise, the court declined to address it for two reasons—the State's failure to argue the issue in the lower courts, and the supreme court's decision to reverse on other grounds, namely McQueen's lack of investment-backed expectations.[44]

Now that the case has been remanded to the South Carolina Supreme Court to be reheard in light of *Palazzolo*, the public trust doctrine may be the State's only remaining significant argument. Presumably, the State has lost its argument that McQueen had no investment-backed expectations because it conceded that McQueen suffered a total loss of all economically beneficial use of the land.[45] Furthermore, with its ruling in the *Lucas* case, the supreme court has rejected the aforementioned background principle described in *Carter*.[46] Thus, given that the public trust doctrine may be the State's final hope for achieving a favorable outcome in *McQueen,* the State must effectively argue that the public trust doctrine trumps the private interests in the land.[47]

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41. *McQueen*, 340 S.C. at 73, 530 S.E.2d at 633 (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1018 (1992)) (emphasis in original).

42. *Id.* at 70 n.2, 530 S.E.2d at 631 n.2.

43. *Id.*, 530 S.E.2d at 631 n.2 (citing Sierra Club v. Kiawah Resort Assocs., 318 S.C.119, 127-28, 456 S.E.2d 397, 402 (1995); State v. Hardee, 259 S.C. 535, 541, 193 S.E.2d 497, 500 (1972); State v. Pacific Guano Co., 22 S.C. 50, 75 (1884)).

44. *Id.*

45. *See supra* note 31 and accompanying text.

46. *See supra* notes 37-41 and accompanying text.

47. If the public trust argument is denied in the rehearing of *McQueen*, destruction of the wetlands in question will not occur directly; rather, McQueen will be compensated for the value of his property. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 141 (1978) ("The Fifth Amendment provides in part: 'nor shall private property be taken for public use, without just compensation'") (citation omitted). However, such compensation could have highly undesirable, indirect results from an environmental standpoint. For example, compensating McQueen in this case could lead to the repeal or amendment of regulations that prevent filling tidelands in order to avoid compensating similarly-situated landowners. Thus, the supreme court's decision as to whether the public trust doctrine is a background principle of state common law could be crucial to the future of South Carolina's tidelands.

III. THE PUBLIC TRUST DOCTRINE

A. Other States' Views of the Public Trust Doctrine

The public trust doctrine is a common law property concept which provides that certain lands and waters, including tidelands and navigable waters, are held in trust for the public and can be used only for the public's interest.[48] This ancient doctrine has its roots in Roman law, which "recognized that all persons were entitled to the use of natural resources, including the air, running water, the sea and the seashore, so long as each person's use did not interfere with the rights of another."[49] This principle was subsequently adopted by English common law, which determined that lands held in public trust included all lands below where "'the sea flows and ebbs,'" thus introducing a tidality standard.[50] American courts generally followed the English tidality-based public trust doctrine and also extended the doctrine to include non-tidal navigable fresh waters.[51]

The purpose of the modern public trust doctrine was perhaps best explained by the California Supreme Court in *National Audubon Society v. Superior Court of Alpine County*:

> [T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.[52]

The current status of the public trust doctrine with regard to tidal wetlands is described in the 1988 U.S. Supreme Court decision *Phillips Petroleum Co. v. Mississippi*.[53] In this case, Phillips Petroleum had title to several tracts of land, including forty-two acres of tidal wetlands, which could be traced back to pre-statehood Spanish land grants.[54] Mississippi argued that the states were given ownership of all tidelands upon entering the Union, regardless of the

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48. Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of* Lucas v. South Carolina Coastal Council *on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 36 (1995).

49. Paul Sarahan, *Wetlands Protection Post-*Lucas*: Implications of the Public Trust Doctrine on Takings Analysis*, 13 VA. ENVTL. L.J. 537, 558 (1994).

50. *Id.* at 558 (quoting The Royal Fisheries of the Banne, 80 Eng. Rep. 540, 541 (1604)).

51. *Id.* at 558-59.

52. Nat'l Audubon Soc'y v. Superior Court of Alpine County, 685 P.2d 709, 724 (Cal. 1983).

53. 484 U.S. 469 (1988).

54. *Id.* at 472.

tidelands' navigability.[55] Phillips Petroleum countered that the proper test for application of the public trust doctrine was one of navigability rather than of tidality.[56] The Mississippi Supreme Court held that the public trust encompassed all lands subject to the ebb and flow of the tide, including non-navigable tidewaters.[57]

The U.S. Supreme Court affirmed on appeal, holding that upon entry into the Union, states received ownership of all lands subject to the ebb and flow of the tides.[58] The Court then elaborated on the purpose behind holding tidelands in public trust:

> [S]everal of our prior decisions have recognized that the States have interests in lands beneath tidal waters which have nothing to do with navigation. For example, this Court has previously observed that public trust lands may be used for fishing—for both "shell-fish [and] floating fish." On several occasions the Court has recognized that lands beneath tidal waters may be reclaimed to create land for urban expansion. Because of the State's ownership of tidelands, restrictions on the planting and harvesting of oysters there have been upheld. It would be odd to acknowledge such diverse uses of public trust tidelands, and then suggest that the sole measure of the expanse of such lands is the navigability of the waters over them.[59]

Phillips is also an important case as it reaffirms the notion that states have "the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."[60] Thus, each state has the ability to determine the scope of its public trust doctrine, and different public interests can be protected by the doctrine in different states.[61] Therefore, in discussing the relevance of the public trust doctrine to *McQueen*, it is important to analyze the scope of South Carolina's public trust doctrine and the interests that it seeks to protect.

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55. *Id.*
56. *Id.* at 472-73.
57. *Id.*
58. *Id.* at 476.
59. *Phillips Petroleum Co.*, 484 U.S. at 476 (citations omitted).
60. *Id.* at 475 (citing Shively v. Bowlby, 152 U.S. 1, 26 (1894)).
61. *See* Sarahan, *supra* note 49, at 561-62.

B. *The Public Trust Doctrine in South Carolina*

While there are relatively few cases dealing with the public trust doctrine in South Carolina,[62] the majority of these cases deal with tidal wetlands in the coastal regions.[63] However, the cases discussing tidelands typically focus on the extent of State ownership,[64] the ability of the State to convey the tidelands,[65] or the tidelands' navigability;[66] therefore, few are particularly relevant to the present discussion.

The first South Carolina case dealing with the public trust doctrine was *State v. Pacific Guano Co.*[67] *Pacific Guano* was a trespass action where the defendants raised an adverse possession defense to their use of a navigable tidal stream, claiming that the stream beds were part of a grant from the State.[68] The South Carolina Supreme Court recognized the public trust doctrine for the first time, stating:

> The state had in the beds of these tidal channels not only title as property, the *jus privatum*, but something more, the *jus publicum*, consisting of the rights, powers, and privileges derived from the British crown, and belonging to the governing head, which she held in a fiduciary capacity for general and public use; in trust for the benefit of all the citizens of the state, and in respect to which she had trust duties to perform. The absolute rule heretofore referred to, limiting land owners bounded by such streams to the high water mark, unless altered by law or modified by custom, accords with the view that the beds of such channels below low water mark are not held by the state simply as vacant

62. For a comprehensive discussion of South Carolina cases dealing with the public trust doctrine, see Kenneth R. Moss, *The Public Trust Doctrine in South Carolina*, 7 S.C. ENVTL. L.J. 31, 42-51 (1998).

63. *Id.* at 42.

64. *See id.* at 43-44.

65. *See, e.g.*, Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 396, 252 S.E.2d 133, 135-36 (1979) (holding that the government had the power to grant tidelands to subjects who exercised private ownership and that unless there is a plat clearly showing a grant of land below the high water mark, the boundary of the property conveyed extends only to the high water mark); State v. Fain, 273 S.C. 748, 752, 259 S.E.2d 606, 608 (1979) (holding that there must be specific language either in the deed or in the plat to satisfy the requisite intent necessary to prove a state's grant of tidelands).

66. *See, e.g.*, Heyward v. Farmers Mining Co., 42 S.C. 138, 153, 19 S.E. 963, 972 (1894) (holding that the proper test for navigability is whether a stream is capable of valuable commerce).

67. 22 S.C. 50 (1883).

68. *Id.* at 70-71.

> lands, subject to grant to settlers in the usual way through the land office.[69]

Subsequent South Carolina cases affirmed that the public trust includes land below the high water mark of tidal, navigable streams.[70] The case that most accurately and succinctly expresses the public trust doctrine with regard to tidelands is *Cape Romain Land & Improvement Co. v. Georgia Carolina Canning Co.*,[71] where the South Carolina Supreme Court stated that "[t]he title to land below [the] high-water mark on tidal navigable streams, under the well-settled rule, is in the State, not for the purpose of sale, but to be held in trust for public purposes."[72] *Cape Romain* is still good law in South Carolina today; in the recent case *Lowcountry Open Land Trust v. State*, the court stated that "[t]he State of South Carolina holds presumptive title to all tidelands within its borders, which are held in trust for the benefit of the public."[73]

One limitation of the public trust doctrine is that it does not bar any modifications to or use of tidelands; this limitation is clearly evidenced by the fact that docks are commonly constructed over coastal marshes for private rather than public use.[74] Instead, the doctrine simply presumes that title to tidelands belongs to the State[75] and that the public has the right to use the areas between the high and low water marks.[76]

In order to establish private ownership of tidelands, the claimant must show that he, or the person from whom he acquired title, possessed a grant from either the State or the British crown.[77] A grant of private ownership must include "specific language, either in the deed or on the plat, showing that [the grant] was intended to go below the high water mark."[78] The State presumptively holds title to this public trust land, and the individual claiming title has the burden of rebutting the presumption.[79]

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69. *Id.* at 83-84 (citations omitted).

70. *See, e.g.*, Cape Romain Land & Improvement Co. v. Georgia Carolina Canning Co., 148 S.C. 428, 438, 146 S.E. 434, 438 (1928) (declaring certain lands to be for the public benefit).

71. 148 S.C. 428, 146 S.E. 434 (1928).

72. *Id.* at 438, 146 S.E. at 438.

73. No. 3388, 2001 S.C. App. LEXIS 121, at *6 (S.C. Ct. App. Sept. 10, 2001).

74. *See* Heyward v. Farmers' Mining Co., 42 S.C. 138, 158, 19 S.E. 963, 973 (1894) (disallowing the construction of a dock that affected the navigability of a watercourse).

75. *See* Coburg Dairy, Inc. v. Lesser, 309 S.C. 252, 253, 422 S.E.2d 96, 97 (1992) (stating that the state is the presumptive owner of marshlands).

76. *See, e.g.*, Lowcountry Open Land Trust, 2001 S.C. App. LEXIS 121, at *6 (holding that "[t]he State of South Carolina holds presumptive title to all tidelands within its borders, which are held in trust for the benefit of the public.").

77. State v. Pacific Guano Co., 22 S.C. 50, 74 (1883).

78. Hobonny Club v. McEachern, 272 S.C. 392, 396, 252 S.E.2d 133, 135 (1979) (quoting State v. Hardee, 259 S.C. 535, 543, 193 S.E.2d 497, 501 (1972)).

79. State v. Fain, 273 S.C. 748, 752, 259 S.E.2d 606, 608 (1979).

In the recent case *Sierra Club v. Kiawah Resort Associates*,[80] the South Carolina Supreme Court elaborated on some of the policy considerations involved in the public trust doctrine. For the first time, the court held that the State can never lose control of lands held for the public trust "except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."[81] Furthermore, the court noted that in order to determine whether to allow private use of public trust land, it is necessary to consider whether the private use would substantially impair the public's interest in the land.[82] When such an analysis involves tidelands, relevant factors include the effects on "marine life, water quality, [and] public access to the area."[83] Importantly, the court further stated that the Coastal Council is charged with the duty of administering public trust lands in coastal areas.[84] For reasons which will be discussed below,[85] *Sierra Club* likely sheds the most light on the applicability of the public trust doctrine to regulatory takings law.

IV. RELATING THE PUBLIC TRUST DOCTRINE TO THE REGULATORY TAKINGS ANALYSIS WITH REGARD TO TIDELANDS

The public trust doctrine appears to qualify as a background principle of state property law that can be used as a defense to a total regulatory taking.[86] However, courts have addressed this issue sparingly, especially in the context of the public trust doctrine's being used as a defense to a total takings claim vis-á-vis tidelands. No South Carolina court has addressed this question precisely, but the few decisions offered by other jurisdictions indicate that the public trust doctrine should be recognized as a background principle in South Carolina regulatory takings jurisprudence.

In *Rith Energy, Inc. v. United States*, the federal government denied a Tennessee plaintiff's mining permit application based on the mining's potential adverse impacts on soil.[87] The plaintiff sued, alleging a regulatory taking;[88] on appeal the U.S. Court of Federal Claims found for the defendant and held that the Tennessee Water Control Quality Act served as a background principle of state law as established in *Lucas*.[89] The Act provides that "the waters of the state, including its groundwaters, as property of the state, [were] held in public

80. 318 S.C. 119, 456 S.E.2d 397 (1995).
81. *Id.* at 128, 456 S.E.2d at 402 (quoting Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892)).
82. *Id.*
83. *Id.*
84. *Id.*
85. *See infra* Part IV.
86. *See supra* notes 34-35.
87. Rith Energy, Inc. v. United States, 44 Fed. Cl. 108, 111-12 (1999).
88. *Id.* at 109.
89. *Id.* at 114.

trust, and subject to a right of 'the people of Tennessee, as beneficiaries of this trust . . . to unpolluted waters.'"[90] Since this Act essentially codified the public trust doctrine, the Federal Claims Court's decision indicates that the public trust doctrine itself would serve as a suitable background principle.

In *Tulare Lake Basin Water Storage District v. United States*, the public trust doctrine was unsuccessfully raised by the federal government as a defense to a total regulatory taking.[91] However, crucial to the failure of the public trust doctrine defense was the fact that, in California, the State Water Resources Control Board (SWRCB), not the U.S. Court of Federal Claims, determined the scope of the doctrine.[92] More importantly, the court stated that "[t]here is, in the end, no dispute that . . . plaintiffs' contract rights [were] subject to the doctrine [] of . . . public trust."[93] The public trust defense failed because the role of determining the doctrine's applicability to tidelands was vested in the SWRCB, not the federal government.[94] Therefore, South Carolina should have the power to defend regulatory takings claims using this doctrine.

California courts have long been receptive to the idea that the public trust doctrine can be used as a defense so as to prevent the government from having to compensate a landowner for a regulatory taking. For example, in *National Audubon Society v. Superior Court of Alpine County*, the California Supreme Court stated that "the determination that the property [is] subject to the trust, despite its implication as to future uses and improvements, [is] not considered a taking requiring compensation."[95] The court reasoned that the public trust doctrine is not merely an affirmation of the State's power to use lands for the public benefit; additionally, it "is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."[96]

Furthermore, the *Lucas* decision itself indicates that the public trust doctrine is the type of principle that the U.S. Supreme Court envisioned when it explained the concept of background principles of common law. The *Lucas* Court explained that one of the inquiries that a total takings analysis should involve is "the degree of harm to public lands and resources . . . posed by the claimant's proposed activities."[97] Chief Justice Toal, in *Sierra Club*, identified this exact inquiry as the key question in determining whether public trust lands should be permitted to be used privately.[98] Justice Toal's reasoning indicates

90. *Id.* (quoting TENN. CODE. ANN. § 69-3-102(a) (1995)).

91. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 324 (2001).

92. *Id.* at 322.

93. *Id.* at 324.

94. *See id.*

95. Nat'l Audubon Soc'y v. Superior Court of Alpine County, 685 P.2d 709, 723 n.22 (Cal. 1983).

96. *Id.* at 724; *see supra* note 52 and accompanying text.

97. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030-31 (1992).

98. Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995).

that the public trust doctrine should be accepted as a background principle of common law by South Carolina courts.

In an article discussing *Lucas*'s impact on wetlands and barrier island beaches, Professor Hope M. Babcock identifies several arguments that states have presented to the courts concerning why the public trust doctrine should bar a regulatory takings claim.[99] First, when dealing with public trust lands, private interests are subservient to public interests, as evidenced by the state's inability to alienate public trust lands in favor of private interests.[100] Thus, "[t]he land in question is not, like ordinary private land held in fee simple absolute, subject to development at the sole whim of the owner, but is impressed with a public trust, which gives the public's representatives an interest and responsibility in its development."[101] Second, the public trust interest in the land originated before the private interest did.[102] Therefore, the landowner has no title to the land in the first place, and the Fifth Amendment's Takings Clause affords him no protection because he cannot claim a property right which he never possessed.[103]

In another scholarly article, Paul Sarahan argues that using the public trust doctrine as a defense in regulatory takings actions will not lead to inequitable results.[104] Because a landowner purchases land "with, at least, constructive knowledge" that tidelands are subject to the public trust, denying him recovery for a regulatory taking would not be an unfair or unexpected result.[105]

Thus, based on the holdings of courts in other jurisdictions, statements made by the South Carolina Supreme Court, and scholarly commentary, it appears that South Carolina courts will accept the public trust doctrine as a defense to regulatory takings actions dealing with tidelands. Moreover, South Carolina's public trust doctrine does not appear to be substantially different from the public trust doctrine in other jurisdictions,[106] which further indicates that South Carolina courts will likely follow other jurisdictions' applications of the doctrine to total regulatory takings cases.

However, both the *McQueen* case and Professor Babcock's article raise an interesting issue: what results if the landowner undoubtedly owned title to land that had been solid ground, but which later reverted to wetlands?[107] Do these

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99. Babcock, *supra* note 48, at 56-58.

100. *Id.* at 56-57.

101. *Id.* at 57 (quoting Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 367 (Mass. 1979)).

102. *Id.*

103. *Id.* at 57-58 (citations omitted).

104. *See* Sarahan, *supra* note 49, at 564.

105. *Id.*

106. *Compare* Lowcountry Open Land Trust v. State, No. 3388, 2001 S.C. App. LEXIS 121, at *6 (S.C. Ct. App. Sept. 10, 2001) (holding that "[t]he State of South Carolina holds presumptive title to all tidelands within its borders, which are held in trust for the benefit of the public.") *with* Fafard v. Conservation Comm'n of Barnstable, 733 N.E.2d 66, 70 (Mass. 2000) (defining the public trust as land between the high and low water marks).

107. *See supra* Part II.A; Babcock, *supra* note 48, at 57-58.

lands become part of the public trust when they revert to tidelands? If so, can the public trust doctrine still be used as a defense to prevent compensation when a complete regulatory takings occurs?

V. *MCQUEEN* REVISITED: CAN THE PUBLIC TRUST DOCTRINE BE USED AS A DEFENSE TO A TOTAL REGULATORY TAKINGS CLAIM WHEN PRIVATELY-OWNED PROPERTY HAS REVERTED TO TIDELANDS?

In *McQueen*, the property in question did not contain any public trust lands (tidelands) when it was purchased thirty years prior to the institution of the takings claim.[108] The two lots were created by fill and were located adjacent to man-made saltwater canals.[109] However, due to erosion and McQueen's failure to take any preventive measures, a portion of the land reverted to wetlands.[110] Therefore, it is first crucial to determine whether these tidelands are part of the public trust.

Employing a strict interpretation of the public trust definition in South Carolina, McQueen's lots are part of the public trust. Since South Carolina's adoption of the public trust doctrine, the state's courts have held that lands between the high and low water marks are part of the public trust.[111] If there is to be an exception to this rule in a case such as *McQueen*, then South Carolina courts are free to make such a ruling.[112] However, current jurisprudence on the public trust doctrine has not indicated that such an exception will be made.

Protecting newly-formed wetlands that have encroached onto private property by including them as part of the public trust is supported by the same policy considerations that justify applying the public trust doctrine to tidelands in general. Tidelands are generally afforded protection due to the crucial ecological functions they perform.[113] These functions include: protecting water quality by filtering sediments, pollutants, and excess nutrients out of the water; preventing flooding by collecting runoff; preventing erosion; providing rearing grounds and food for commercially important fish species; serving as a home to endangered flora and fauna; and serving as a habitat for aquatic life and migratory waterfowl.[114] Additionally, in *Sierra Club v. Kiawah Resort Associates*, the South Carolina Supreme Court recognized the importance of considering factors such as the wetlands' effect on water quality and marine life when making the determination of whether to allow private use of public trust

108. McQueen v. South Carolina Coastal Council, 340 S.C. 65, 70, 530 S.E.2d 628, 631 (2000).

109. *Id.* at 67, 530 S.E.2d at 630.

110. *Id.* at 70, 530 S.E.2d at 631.

111. State v. Pacific Guano Co., 22 S.C. 50, 83-84 (1884).

112. *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 475 (1987) (granting states "the authority to define the limits of the lands held in public trust . . . as they see fit").

113. Sarahan, *supra* note 49, at 538-39.

114. *Id.*

lands.[115] Therefore, regardless of whether tidelands are newly formed or have been in existence for centuries, they still play a crucial ecological role. Thus, the policy underlying the public trust doctrine supports the notion that newly-formed tidelands should be afforded the protections of the public trust doctrine.

Private use of tidelands like those in *McQueen* arguably should be allowed considering that their size is minimal relative to the total size of all tidelands in South Carolina and that the impact on tidelands' total ecological role likely would be minimal. However, the adoption of this viewpoint by the South Carolina Supreme Court would certainly have deleterious environmental ramifications. In this day of rampant coastal development and with waterfront property at an absolute premium, areas around coastal tidelands are constantly being enveloped by urban sprawl.[116] Because the coastline is increasingly threatened by this urban sprawl, protecting the tidelands is more crucial now than it ever has been. While the ecosystem as a whole would probably not be affected by allowing McQueen to bulkhead and fill his two lots or by compensating McQueen for the value of his property, allowing this result would almost certainly trigger similar results in other cases, ultimately leading to more serious consequences.

If newly-formed wetlands were not part of the public trust when a landowner purchased his land, then public interests cannot be considered when determining whether the wetlands should be used for private purposes. However, this argument can be rebutted by the fact that a landowner who purchases land adjacent to tidelands has, at a minimum, constructive knowledge of both the public trust doctrine and the "water's inherent tendency to change its borders."[117] Thus, the landowner assumes the risk that his land may revert to tidelands, and he therefore has the duty to prevent the tidelands from encroaching on his property. If he fails in this duty, he is economically punished in that his land becomes impressed with the public trust.[118]

Although holding that McQueen's lands are part of the public trust and denying him compensation seems like an unduly harsh result, this result is not unfair considering McQueen purchased his property subject to the public trust doctrine and to the inherent risk of tidelands' changing their boundaries. Furthermore, the South Carolina Supreme Court apparently did not feel that such a result would be unduly harsh; the court seemed largely to base its decision on the fact that McQueen "neglected his property for thirty years, allowed the land to revert to wetlands, and [then] expect[ed] the State of South Carolina to pay him the going rate for high ground—a twenty-fold return on his

115. *See supra* note 83 and accompanying text.

116. *See* Jeffrey Allen, *The Changing Landscape of the South Carolina Coast: How Do We Measure It?*, 2 INSIGHT 13, 13-14 (Dec. 1998), *available at* http://www.strom.clemson.edu/insight/insight2-4.pdf (last visited Jan. 23, 2002).

117. Sarahan, *supra* note 49, at 564 (footnote omitted).

118. *Id.*

initial investment."[119] Therefore, denying McQueen compensation for a regulatory taking does not seem unduly harsh but instead seems perfectly fair. On the contrary, allowing McQueen to recover would be an unduly harsh result for the State because a careless landowner would benefit from his own carelessness.

VI. CONCLUSION

Tidelands that have spread onto private property should be considered part of the public trust for the following two reasons: tidelands generally have beneficial ecological effects and the landowner has the opportunity to prevent such encroachment from occurring.[120] Allowing a landowner to recover for a taking seems akin to allowing him to benefit from lands that have been dedicated to the public trust. Therefore, the question of whether to allow a landowner to be compensated for a regulatory taking in such a situation requires an analysis similar to that used to determine if public trust lands can be used for private purposes. Under *Sierra Club*, the proper test in South Carolina is whether the private use substantially impairs the public's interest in public trust lands, considering factors such as marine life, water quality, and public access.[121]

In the rehearing of *McQueen*, the South Carolina Supreme Court may address many of the questions posed in this Note.[122] In analyzing the issues, the court should take a broad view of the public trust doctrine like many other jurisdictions have done and should consider the many public policy factors underlying the doctrine. The court should also ponder the ramifications the decision could have on the future of the public trust doctrine, regulatory takings law, and coastal tidelands. Finding the public trust doctrine to be a background principle barring McQueen from maintaining a takings claim would produce a just result—McQueen would not receive an economic windfall after neglecting his property for many years. Holding to the contrary would have a deleterious environmental impact, as the State would be committed to

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119. McQueen v. South Carolina Coastal Council, 340 S.C. 65, 70, 530 S.E.2d 628, 631 (2000).

120. *See supra* Part V.

121. Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995).

122. The case's outcome will depend largely on whether the State is allowed to argue that the public trust doctrine is a background principle of common law. In the South Carolina Supreme Court's original hearing of *McQueen*, the State was not allowed to present such arguments because they were not made in the lower courts. *McQueen*, 340 S.C. at 70 n.2, 530 S.E.2d at 631 n.2. However, it is crucial to note that the court ruled in favor of the State based on McQueen's lack of investment-backed expectations. *Id.* at 77, 530 S.E.2d at 635. Now that this portion of the decision has been reversed by *Palazzolo v. Rhode Island*, the court may be inclined to hear the State's public trust argument. This inclination is evidenced by the court's apparent hostility toward McQueen due to his apparent neglect of his land. *Id.* at 70, 530 S.E. 2d at 631.

compensating other landowners in similar situations.[123] Furthermore, coastal tidelands would become more susceptible to private use due to a weakening of the public trust doctrine. This issue will undoubtedly arise again in South Carolina, and it is crucial that the South Carolina Supreme Court enunciate a firm expansion of the public trust doctrine to preserve the character of the South Carolina coast.

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123. Having to compensate landowners in similar situations would be an extremely undesirable result, especially considering the high values of coastal property. However, the State would be unlikely to concede a total taking of all economically beneficial value as it did in *McQueen*, thus leaving itself the opportunity to argue lack of investment-backed expectations or another partial regulatory takings defense. *See supra* note 16 and accompanying text.

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