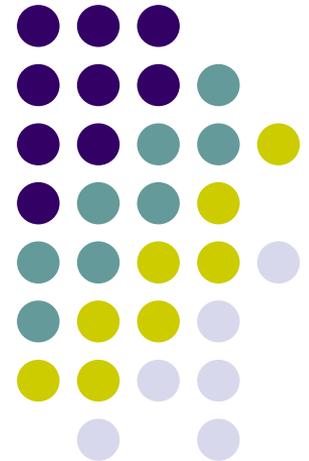


# Property Rights & Environmental Policy

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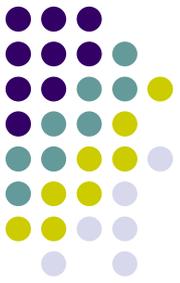


# Property Rights & Public Interests

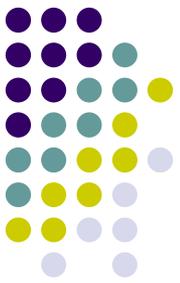


- What Are Private Property Rights?
  - Where Do They Come From?
- What is a private property "taking?"
  - Where in U.S. law are we protected from government takings?
  - Who decides if a Taking has occurred?
- Which Environmental Policies/Laws Most Directly Conflict with Private Property Rights & Suggest "Takings"?

# What Are Property Rights & Where Do They Come From?



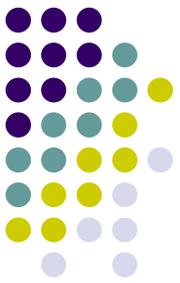
- Right to Own Property
  - Right to use property as one sees fit (economic use)
  - Right to exclude others from access to property
  - Right to sell property to others
  - Right to otherwise dispose of property
- Rights conferred by government
  - Constitution
  - Legislation



# What is a Property “Taking?”

- Legal Term: when government physically seizes private property for public use
  - Origins with British occupation of colonial America
    - Quartering Act
- Fifth Amendment to the Constitution
  - “...nor shall private property be taken for public use, without just compensation.”
- Who determines when a “takings” has occurred?
  - Courts
  - Legislature

# What is a “Regulatory” Taking? -- Property Rights Advocate View



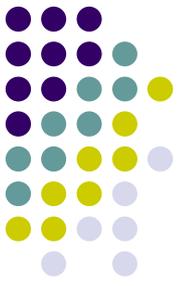
- Any time government rules interfere with any use of private property – in entirety, partial, or temporary
  - zoning regulations & building moratoria
  - Wetlands protection
  - Endangered Species protection
- If private property is serving a public good, then the public should pay for it.
  - Private Property Owners should not have to pay the costs for (subsidize) Public Benefits.
    - Shouldn't private property owners be compensated for providing endangered species habitat on their land?

# What is a “Regulatory” Taking? – Environmentalism View



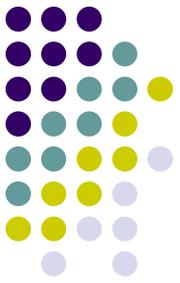
- There is no such thing
- If a private property owner’s use of his/her property imposes a cost on the public, then the private property owner should be accountable.
  - Private Property Owners should not benefit by imposing/shifting costs to the Public.
    - Should we pay private property owners for not polluting ground water?
    - Should we pay private property owners for not reducing flood storage by filling wetlands?

# Property Rights Advocates Agenda



- 1980s
  - Federal court cases fail
  - Grass-Roots organizing
- Early-mid 1990s
  - Media & Electoral Politics
    - Who supports? Who opposes?
  - Attempts at federal legislation fail
- Late 1990s
  - Attempts at state legislation ?
    - 20 states have “symbolic” forms of regulatory takings legislation
    - Oregon repeal

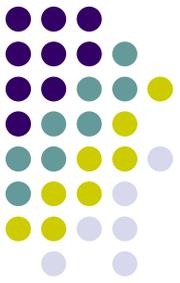
# What is a “Regulatory Taking?” – U.S. Supreme Court



- Lucas v. South Carolina (1992)
- Dolan v. Tigard (1994)
- Palazollo v. Rhode Island (2001)
- Tahoe v. Tahoe (2002)

# Lucas v. South Carolina ..

## Background

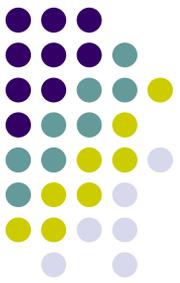


- Can the government “take” a property by means other than physical appropriation?
  - Specifically: by regulation
- 1986 Lucas buys 2 parcels on barrier island
  - Intend to build 2 homes, similar to those on adjacent lots
- 1988 S. Carolina passes Beachfront Management Act
  - Prohibits construction
- Lucas sues in state court
  - Court affirms a taking denying all viable use
  - Awards \$1.2 million



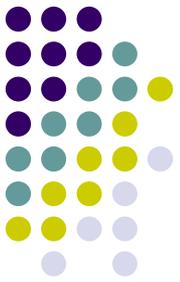
# Lucas v. South Carolina

- State Supreme Court Reverses
  - Based on case law: when a regulation is designed to prevent "harmful or noxious uses" of property akin to public nuisances, no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value.
- U.S. Supreme Court Rules in Favor of Lucas (6-3)
  - Regulations that deny the property owner all "economically viable use of his land" constitute one of the discrete categories of regulatory deprivations that require compensation without the usual case specific inquiry into the public interest advanced in support of the restraint.



# Dolan v. Tigard

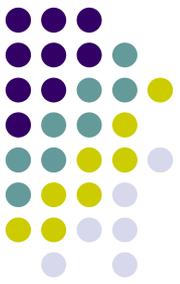
- How far can government go in requiring “compensation & mitigation” from property owners whose projects impact public interests?
- 1973 Oregon passes comprehensive land use planning regulations
  - All cities and towns must draft plans, including flood control, drainage, etc.
  - Tigard ~ 30,000 people
- Florence Dolan owns electric supply store
  - Files to expand store and parking
  - City makes Permits contingent:
    - dedication of land to flood storage/public greenway
      - Deeded to the city
    - bicycle path
    - traffic control
  - Dolan Appeals permit



# Dolan v. Tigard

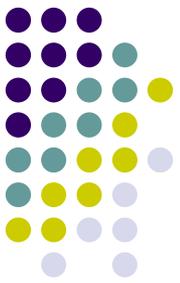
- Board of Appeals Affirms Decision
- Oregon Appeals Court & Oregon Supreme Court Affirms Decision

# Dolan v. Tigard

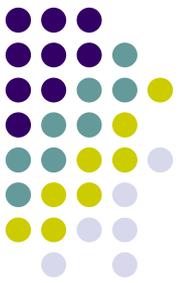


- US Supreme Court Overturns
  - On the one hand:
    - One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
    - [on the bike path/greenway]: Such public access would deprive petitioner of the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

# Dolan v. Tigard



- U.S. Supreme Court Overturns:
  - On the other:
    - On the other side of the ledger, the authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).
    - "Government 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." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).
    - A land use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). [n.6]



# Dolan v. Tigard

- Bottom Line:
  - No proportionality between impact and mitigation
  - Must be a reasonable connection
    - Public greenway does not address floodplain or traffic impact
    - Dedication of land for bicycle path is not related to traffic
      - Sidewalks, traffic lights, etc. would be appropriate

# PALAZZOLO v. RHODE ISLAND:

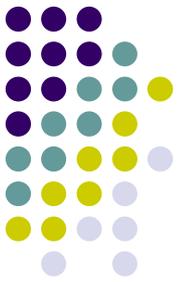
## Background



- How far can government go in regulating property before sufficient property value is “lost” for a takings claim?
- Can property owners who acquire property with pre-existing regulatory constraints make a takings claim?
- 20 Acres of waterfront – corporate owned
  - Mostly salt marsh subject to tidal flooding

# PALAZZOLO v. RHODE ISLAND:

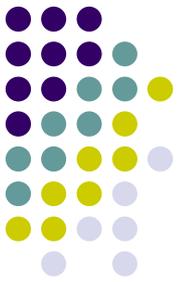
## Background



- Numerous permit requests to develop the property span 3 decades
  - 74 house lots – beach club
  - *All denied*
- 1978 corporation dissolves and property went to sole shareholder
- 1986 plan to fill 11 acres of salt marsh to accommodate beach club project:
  - “...50 cars with boat trailers, a dumpster, port-a-johns, picnic tables, barbecue pits of concrete, and other trash receptacles.”

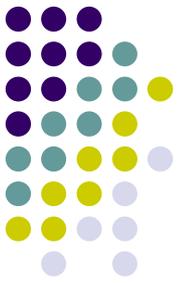
# PALAZZOLO v. RHODE ISLAND:

## Background



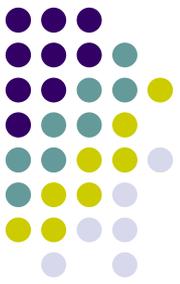
- Plan denied
  - Serves no compelling public interest
    - Standard of RI Coastal Resources. Mngmt Program
  - Upland portion of property would allow one house lot valued at \$200,000
- Claim: owner is entitled to full economic value of the property
  - \$3.15 million value (74 house lots) is denied
  - \$200,000 for remaining upland lot is “trivial” = a taking per *Lucas*

# PALAZZOLO v. RHODE ISLAND: Ruling & Implications



- U.S. Supreme Court (June 2001, 5 to 4)
  - Takings
    - Entire parcel serves as basis of takings claim (as presented to court)
    - \$200,000 is not “trivial”
    - ∴ case does not meet requirements of *Lucas v. South Carolina Coastal Council*
  - Process
    - A takings claim remains viable even if the property was acquired with knowledge of regulatory constraints

# TAHOE-SIERRA PRESERVATION COUNCIL, INC., ET AL. v. TAHOE REGIONAL PLANNING AGENCY ET AL.



- Are time delays incurred in environmental regulation regulatory takings?
- Tahoe Regional Planning Agency (TRPA) imposed 3 year moratorium on development while it completed a master plan
  - Property owners claim that they were temporarily denied all economic value in their property
    - Seek compensation
- Supreme Court (5-4)
  - Normal delay in permitting are necessary
    - Government should not be rushed
  - No single property owner was burdened or disadvantaged

# Implications for Environmental Policy



- Environmental regulation is a necessary means for protecting the public interest
  - Private property rights are not all-powerful
  - Environmental regulations are a proper exercise of governmental police powers
- Government must be careful to match regulatory constraints on private actions to actual harms to public interest
- The threshold for invoking constitutional protections against a taking is high
  - a regulation must remove *all* economic value