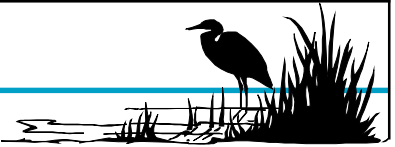


# Coastal Features



VOLUME 10, ISSUE 1

SPECIAL EDITION

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## THE SUPREME COURT'S PALAZZOLO DECISION ITS BARK IS WORSE THAN ITS BITE

by  
Sheldon Whitehouse, Attorney General of Rhode Island  
& Michael Rubin, Ass't Att'y General \*

### THE BOTTOM LINE.

Despite the spin of the "property rights" movement, the U.S. Supreme Court's recent (June 28) decision in the case of *Palazzo v. RI* is good for protection of our natural resources.

The bottom line of the decision is that the Supreme Court did **not** find a taking. Instead, the Court sent the case arising from the state coastal protection agency's denial of a landowner's application to fill salt marshes back to the Rhode Island courts where the taking claim of the landowner for monetary damages will almost certainly ultimately be rejected.

On the underlying legal issues, the State of Rhode Island (and its allies who filed 10 *amicus* briefs) partly won outright; in other areas, the ruling was consistent with Rhode Island's position. Where Rhode Island won outright, the court was implicitly unanimous; where the "property rightsers" claim victory, the vote was 5 to 4 (with the Justices grouped in the identical configuration as in *Bush v. Gore*.)

### WHAT THE SUPREME COURT SAID.

The United States Supreme Court discussed four issues and ruled on three of those issues in deciding that Palazzo had not yet shown that the environmental regulations constituted a taking. The four issues are:

- (1) ripeness a process issue concerning whether a claim is ready;
- (2) value the extent of loss necessary to automatically win a takings claim;
- (3) parcel whether to consider the developer's entire contiguous holdings in assessing the impact of government actions; and
- (4) sequence whether a person who acquires land subsequent to a regulation can claim a taking.

*First*, the U.S. Supreme Court reversed the Rhode Island Supreme Court's holding that the landowner's takings claim was not ripe (*i.e.*, ready to be adjudicated); *second*, the Court affirmed the court's holding that the landowner failed to establish a deprivation of all economic value of his property, *third*, the Court refrained from ruling on the parcel issue, noting it was not properly presented, and *fourth*, the Court reversed the state court's invocation of a *per se* rule that a pre-acquisition regulation automatically bars a taking claim.

### ANALYSIS.

How do these rulings fare from an environmental perspective?

This special edition of *Coastal Features* was prepared in response to the recent U.S. Supreme Court decision in *Palazzo v. Rhode Island*. In *Palazzo*, landowner Anthony Palazzo argued that CRMC's denial of his application to fill eighteen acres of coastal wetlands and construct a beachclub constituted a Fifth Amendment "taking" for which he was entitled to monetary compensation. Amendment 5 of the United States Constitution states, in pertinent part: "nor [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The ongoing dispute between property rights advocates and state agencies has intensified due to the fact that the issues surrounding a "takings" in RI have yet to be settled. These two articles consider the impact the decision has had for environmentalists and gives a history of the law of takings in the U.S.

(continued from page 1)

*Ripeness.* The outcome on ripeness was fact-specific and the Court made no adverse change to existing law. The conclusion that Palazzolo's claim was ripe was unavoidable under the facts as they were viewed by the Court: the State would allow no development in the wetlands and one house on the uplands. Read thus, there was no administrative step left for Palazzolo to take. This is completely in keeping with prevailing ripeness requirements.

Indeed the Court reaffirmed that, where ambiguities do exist, the ripeness defense is as applicable as ever: "A landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation." Thus, the ripeness defense lives on in situations where there is ambiguity as to the nature and extent of either the regulations or the land. Vague or incomplete applications on the part of developers will still not support takings claims. Nor will it be sufficient for a developer to make a cursory run at the agency process before turning to court. Existing law remains intact.

There was even one favorable advance beyond the *status quo* in this area. Justice Kennedy, writing for the Court, extended an explicit invitation to State legislatures and courts to fashion their own independent reasonable rules on ripeness which the Supreme Court would be bound to respect. Thus, States can reinforce the mandate that a developer must make a meaningful and informative application (and, where necessary, multiple applications.) This invitation merits the attention of environmental organizations.

As national precedent, the Palazzolo decision on ripeness is a very small net plus for the environment.

*Value.* This was the primary point of attack by the Pacific Legal Foundation (PLF). PLF had complained that the regulation left Palazzolo with mere "crumbs," "dribs" or "smidgeons" of value, and that the Lucas decision should be expanded to allow takings claims to arise whenever there are substantial reductions in property value due to regulation. On this, their main thrust, PLF lost totally and unanimously. The Court's opinion should be interpreted as reaffirming the public's authority to impose significant restrictions on the use of private land.

Count this as a solid plus for the environment.

*Whole Parcel.* The Court's refusal of Palazzolo's invitation to revisit the whole parcel rule leaves in place favorable precedent. For example, in *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), the court reiterated: "the relevant question . . . is whether the property taken is all, or only a portion of the parcel in question," holding that only a taking of the whole parcel would give rise to environmental liability. The "whole parcel" principle remains intact to thwart attempts by developers to manipulate their holdings so as to contrive the appearance of an actionable taking.

This *status quo* leaves intact good law for environmentalists.

*Sequence.* The Supreme Court rejected the convenient bright-line rule adopted by the Rhode Island Supreme Court and a number of other courts that only regulations imposed *after* a plaintiff's investment in property can constitute a taking of that property

To quote Professor John Echeverria of Georgetown University Law School,

On the positive side, however, the Court's decision does not *preclude* consideration of pre-acquisition notice as a factor in takings analysis. Indeed, in light of Justice O'Connor's crucial concurring opinion, the case is best read as endorsing consideration of pre-acquisition notice as a relevant factor in takings cases. This likely means that most long established environmental and land use regulations will be largely immune from takings challenges. And they should become increasingly immune from challenge as properties change hands and additional time passes.

Justice O'Connor insisted that pre-acquisition notice must be a relevant factor in takings analysis in order to avoid potential "windfalls." It seems very likely following *Palazzolo*, at least as a matter of practice, if not strict legal rule, that investors who have purchased restricted lands at a deep discount, or who have engaged in other strategic behavior in an attempt to manufacture a taking claim in light of pre-existing regulatory restrictions, will continue to be barred from recovering . . .

The line drawn by the Supreme Court is the correct one, and Attorney General Whitehouse in arguing the case conceded as much. The Attorney General felt that the Penn Central standard the Court adopted could avoid harsh and unjust results in unusual circumstances, while still keeping rascals at bay. We believe, provided it is approached with sensitivity and understanding by bench and bar alike, this is the fair and proper outcome.

Count this as a wash for the environment. The “bright line” rule was unsustainable in light of its potential for unfair results.

## CONCLUSION

In the final analysis, the Court’s reluctance to adopt *per se* rules means that the *Palazzolo* decision will do little to change the actual outcomes of specific lawsuits. It will force judges and lawyers alike to do the hard work of sifting through the particularized facts of each case. Although *Palazzolo* initially caused a ripple of anxiety throughout the environmental community (largely because of immediate and high speed “spin” from property rights activists), balanced land use planning and control should actually gain legal ground against takings challenges. Our task now as environmental advocates is to explain this, not only to courts, but to regulators and, most importantly, to the people of this environmentally blessed country.

### BACKGROUND: THE PALAZZOLO FACTS.

Anthony Palazzolo was president and sole shareholder of Shore Gardens, Inc. (SGI) when it acquired a parcel of land in 1959 in the Misquamicut section of the town of Westerly, Rhode Island for roughly \$8,000. The parcel is located on the inland side (the inter-coastal or bay side—**not** the ocean side) of a barrier beach, between the crest of the beach strip (a road called Atlantic Avenue runs along this crest) and the shore of a 460-acre salt-water coastal estuary called Winnapaug Pond. Between 1959 and 1961, SGI sold off eleven individual subdivided house-lots to various purchasers. These subdivided lots were carved out of the upland (non-marshy) area of the larger parcel and could be (and in fact were) built upon with little alteration to the land.

After this series of transactions, SGI retained the status of record owner of the remaining area—a 20-acre remnant, 18 acres of which was occupied by tide-flowed marshland, a substantial amount of which is under the waters of Winnapaug Pond. The balance of this 18 acres, if not permanently under water, is subject to daily tidal inundation; “ponding” in small pools occurs throughout this wetland acreage. The area serves as a refuge and feeding ground for fish, shellfish, and birds, provides a buffer against flooding, and absorbs and filters run-off into the pond.

From 1965 through 1977, state regulations governing alterations to coastal wetlands grew stricter, evolving into a virtual absolute prohibition as of 1977. The RI Coastal Council was given responsibility for administering this prohibition and related regulations.

SGI’s corporate charter was revoked by the Rhode Island Secretary of State in 1978, and Palazzolo became the automatic successor to whatever property SGI previously owned.

In March 1983, Palazzolo filed an application with the Coastal Council, seeking approval to fill the full 18 acres of salt marsh. No particular purpose was specified. That application was rejected by the Coastal Council. In January 1985, Palazzolo filed another application to fill the wetlands on the property so he could create a recreational beach facility. This application was likewise denied by the Coastal Council.

This lawsuit eventually followed. Palazzolo sought damages in the amount of \$3,150,000 (plus interest), based on the value he claimed the land would have after filling the wetlands and developing the property as seventy-four lots for single-family homes, each served by its own septic system. After a Rhode Island trial judge found that the denial of Palazzolo’s application was not a taking for which compensation was owed (and indeed that the development would have been a public nuisance), Palazzolo appealed to the Rhode Island Supreme Court and then the United States Supreme Court.

\*Sheldon Whitehouse argued the *Palazzolo* case in the U.S. Supreme Court; Michael Rubin was trial counsel and assisted throughout.

## PALAZZOLO: AN AMENDMENT TO “TAKINGS” IN THE UNITED STATES?

by  
Megan Higgins\*

According to Rhode Island General Law 1956 § 46-23-1(c), CRMC was created to serve “as the principal mechanism for management of the state’s coastal resources.” The CRMC enabling statute allows for some overlapping regulation by the Department of Environmental Management (DEM) and local zoning authorities, as it does not have similar “exclusivity” language. It is not intended for the CRMC to exclusively regulate all aspects of shoreline activities. CRMC has the (often times challenging) responsibility of balancing a private landowner’s right to develop with the public’s interest to enjoy natural areas.

In the instant case, Palazzolo is faced with opposition to fill and build upon wetlands at the state level (wetlands regulations administered by CRMC). At the Superior Court level, Palazzolo considered RI Const. Art. 1, § 16: “Private property shall not be taken for public uses, without just compensation. The powers of the state and of its municipalities to regulate and control the use of land and waters in furtherance of the preservation, regeneration, and restoration of the natural environment, and in furtherance of the protection of the rights of the people to enjoy and freely exercise the rights of fishery and the privileges of the shore, as those rights and duties are set forth in Section 17, shall be an exercise of the police powers of the state, shall be liberally construed, and shall not be deemed to be a public use of private property.”<sup>2</sup> This is the fundamental legal premise of which CRMC regulates land both publicly and privately.

Anthony Palazzolo allegedly owns eighteen acres of undeveloped salt marshes (i.e. “wetlands”), along with a few additional acres on developable upland areas in Westerly, Rhode Island. The property consists of twelve percent of the total salt marsh filtering into the Winnapaug Pond, an area along the landward side of Atlantic Avenue just opposite Misquamicut Beach.

In 1959, Shore Gardens, Inc. (SGI) acquired the site in question. Palazzolo had been president of SGI from July 29, 1959 until February 27, 1978, at which time the Rhode Island Secretary of State revoked SGI’s corporate charter. During his tenure as president of SGI, Palazzolo, along with fellow shareholders Natale and Elizabeth Urso, transferred three adjoining parcels of land in Westerly to SGI. In 1960, Natale Urso transferred his interest in SGI to Palazzolo, rendering Palazzolo sole shareholder. Between 1959 and 1961, several of the upland lots of developable land were sold. In 1969, SGI was the record owner of seventy-four of the original eighty lots and remains the record owner today, even though its corporate charter was revoked. All taxes on the property are currently assessed by SGI.

Since 1961, Palazzolo has filed several applications with state agencies seeking permission to alter the property. Palazzolo has been denied in each instance; therefore, he appealed the decision of the agencies seeking compensation under the Fifth Amendment. The Rhode Island Supreme Court affirmed the Rhode Island Superior Court’s decision stating that (1) Palazzolo’s claim was not ripe for review; (2) Palazzolo has not demonstrated that he has been deprived of all beneficial use of his property; and (3) he had no reasonable investment-backed expectations that he could develop a seventy-four-lot subdivision on the property.<sup>3</sup>

At various times, specifically 1962, 1963, and 1966, Palazzolo applied to the Division of Harbors and Rivers (DHR) of the Department of Natural Resources (DNR) for authorization to fill the wetlands, to dredge the pond and use the dredge to fill the subject property. Each time the state agency denied his application due to insufficiency of essential information.

Permission to dredge or fill, at that time, was mandated under Section 10 of the Rivers and Harbors Act, which permitted any excavating or filling of navigable waters pending approval by the U.S. Army Corps of Engineers. Prior to 1965, however, it was not necessary to apply for a permit to place fill on a coastal salt marsh. In 1965, Rhode Island adopted the Inter Tidal Coastal Management Act allowing for the state to restrict uses of coastal wetlands, provided that restrictions be recorded in the Land Evidence Records by the director of DNR.

The Rhode Island Superior Court found that development of the area would have a significant detrimental impact on the existing salt marsh.<sup>4</sup> The Rhode Island Supreme Court held that where there has been no physical invasion of property, there can only be a per se taking if the owner has been deprived of all beneficial and reasonable use of his land.

The U.S. Supreme Court granted Palazzolo’s request for a writ of certiorari on October 10, 2000. Palazzolo was heard before the United States Supreme Court Justices on February 26, 2001 seeking \$3.1 million from the State of Rhode Island because state officials (specifically Coastal Resources Management Council) would not allow him to build a beach club on his property. The high court reviewed whether regulations that predate an individual’s ownership of property can lead to a takings

claim requiring compensation under the Fifth Amendment of the U.S. Constitution.

Under review was the Rhode Island Supreme Court's ruling that a claim by the owner of a property that includes 18 acres of wetlands was not ripe for judicial review because of a failure to apply for "less ambitious" uses for his property after CRMC rejected his earlier proposals to fill wetlands and to build a beach club.<sup>5</sup>

The court was presented with the following questions:

- (1) Whether a regulatory takings claim is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property;
- (2) Where a land-use agency has authoritatively denied a particular use of property and the owner alleges that such denial per se constitutes a regulatory taking, whether the owner must file additional applications seeking permission for "less ambitious uses" in order to ripen the takings claim; and
- (3) Whether the remaining permissible uses of regulated property are economically viable merely because the property retains a value greater than zero.

A decision from the highest court on the above-mentioned issues was made on June 28, 2001. The U.S. Supreme Court held, in a 5-4 decision, that: (1) claims were ripe for adjudication; (2) acquisition of title after the effective date of the regulations did not bar regulatory takings claims; and (3) Lucas claim for deprivation of all economic use was precluded by undisputed value of portion of tract for construction of residence.<sup>6</sup>

The law of takings in the United States, pursuant to the Fifth Amendment of the United States Constitution, was extended beyond physical takings in 1922 with the seminal case *Pennsylvania Coal Co. v. Mahon*.<sup>7</sup> In *Mahon*, Justice Holmes introduced the concept of regulatory takings—a conundrum that continues to exist today. In *Mahon*, the court struck down the Kohler Act, a Pennsylvania statute that prohibited coal companies from mining in such a manner as to cause subsidence of overlying structures.<sup>8</sup>

According to Justice Holmes, whether a regulation went "too far" was to be determined by balancing the regulatory burdens imposed on the individual with the interests of the regulating community. The court held that "while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking."<sup>9</sup> The question of "too far" was based on one "of degree," where a police power action will, at some point, cross over some invisible line (measured in terms of economic impact upon the owner) and cease to be a valid police power action, becoming instead a "regulatory taking" for which compensation is constitutionally mandated.<sup>10</sup>

In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, the Court held (by a narrow majority) that a taking had not occurred based on its determination that "the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare."<sup>11</sup> The dispute in *Keystone* involved a Pennsylvania statute regulating the coal industry, requiring fifty percent of the coal beneath certain structures be left in place in order to minimize the risk of subsidence.<sup>12</sup> Coal companies contended that such a requirement takes private property without compensation, by substantially eliminating one of three estates in land recognized under Pennsylvania property law.<sup>13</sup>

The Court in *Keystone*, in finding that mining coal was a public nuisance, noted that "in acting to protect the public interest in health, the environment, and the fiscal integrity of the area" the Commonwealth is "exercising its police power to abate activity akin to a public nuisance."<sup>14</sup> The legitimate state interest prevailed in shielding a regulation from a takings challenge.

The Court in *Keystone* distinguished the case before it from *Mahon* on two grounds: (1) the existence of a legitimate public purpose (as opposed to the private interest at stake in *Mahon*), and (2) the lack of "undue interference" with the petitioner's "investment-backed expectations" (as opposed to the complete destruction of the petitioner's mining interests in *Mahon*).<sup>15</sup>

The law of "total takings" is set forth in the 1992 case *Lucas v. South Carolina Coastal Council* in which a regulation "takes" property when the landowner is left with no economically beneficial use of the land.<sup>16</sup> In fact, that is what happened to David Lucas. After developing a waterfront residential project, Lucas purchased the remaining two lots on his own account, intending to build upscale single-family residences on them.<sup>17</sup> Before Lucas could commence construction, however, the South Carolina Coastal Council moved the beach line (seaward of which construction was prohibited) so that the Lucas lots were now in a construction-free zone. Both the original line, the new line, and the coastal protection statute by which authority to Council acted were designed to further a host of health, safety, but primarily welfare purposes largely unique to coastal areas.<sup>18</sup>



The United States Supreme Court looked at the history of takings, including the South Carolina Supreme Court's "harmful or noxious use" test, in holding that the tests used by a number of courts is the same as advancing a legitimate state interest. The rule that the Court announced is narrow: a regulation that removes all productive or economically beneficial use from a parcel of land is a taking requiring compensation under the Fifth Amendment.<sup>19</sup> It is a taking regardless of how or when the property was acquired, and furthermore, regardless of the public purpose or state interest which generated the regulation (i.e. the classic definition of a "per se" rule).

Unless the landowner had no right to economically use his property in the first place: "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."<sup>20</sup>

State courts are obligated to apply judicial principles set forth in the trilogy of takings cases. First, a taking of all economically beneficial use (not all use, or all value) requires compensation, whether regulatory or physical. If regulatory, it makes no difference what motivates the regulator. The Lucas rule is categorical, or "per se." There are only two exceptions to this categorical rule: nuisance and background principles of state property law. Second, partial takings depend on the nature of the governmental interest in passing the regulation in question (health and safety are more important than welfare), the economic effect on the landowner, and most important, the landowner's legitimate, investment-backed expectations.

In conclusion, the Takings Clause must be interpreted so as to find an acceptable balance between the property rights of landowners (in this instance Palazzolo) and the ability of local communities (Westerly) to conserve what is probably the community's most valuable resource—land (or wetlands). The town's interests, in turn, are overseen by CRMC, the state agency with authority to regulate coastal wetlands.

This is not the last time that Rhode Islanders will hear about Palazzolo, however. The case has been remanded to the RI Supreme Court to decide on the elements of Penn Central, in which a court must balance the government's legitimate interests in imposing restrictions with the harm suffered by individuals.<sup>21</sup> The United States Supreme Court held that "petitioner's [Palazzolo's] Penn Central claim...is not barred by the mere fact that his title was acquired after the effective date of the state-imposed restriction."<sup>22</sup>

The Penn Central balancing test was never an issue that was raised at the trial level. Therefore, the RI Supreme Court must grapple with the following two issues that have presented themselves since the US Supreme Court's ruling:

- (1) Whether the "raise or waive" rule, which denies litigants the right to raise new issues on appeal, is applicable; and
- (2) Whether an issue that was raised at the trial court level (i.e. nuisance) may be addressed by the RI Supreme Court on remand and, furthermore, whether the RI Supreme Court can then remand to the RI Superior Court for closer examination.

Rhode Islanders will anxiously await a determination on the above mentioned issues of Palazzolo to see if the ruling will be in favor of property-rights advocates or the state. On the other hand, the Court's actions will resolve the jurisdictional quandry of whether the raise or waive rule is strictly a matter of judicial discretion. Case history has revealed that the RI Supreme Court, as well as the First Circuit, hold that the raise or waive rule is "founded upon important considerations of fairness, judicial economy, and practical wisdom"; therefore, an exception to this rule merits an extraordinary situation.<sup>23</sup>

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<sup>1</sup> Anthony Palazzolo v. State of Rhode Island, by and through its General Treasurer, Paul J. Tavares, et al. C.A. No.: 88-0297, slip op. (Wash. Cty. Super. Ct. Oct. 24, 1997) (Williams, J.).

<sup>2</sup> Anthony Palazzolo v. State of Rhode Island, by and through its General Treasurer, Paul J. Tavares, et al., 746 A.2d 707, 717 (2000).

<sup>3</sup> See Supra note 1.

<sup>4</sup> See *Supra* note 2 at 714 (note 6).

<sup>5</sup> Anthony Palazzolo v. State of Rhode Island, by and through its General Treasurer, Paul J. Tavares, et al., 2001 WL 721005.

<sup>6</sup> Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

<sup>7</sup> *Id.* at 415.

<sup>8</sup> *Id.*

<sup>9</sup> Lynda J. Oswald, "The Role of the 'Harm/Benefit' and 'Average Reciprocity of Advantage' Rules in a Comprehensive Takings Analysis," 50 VNLR 1447, 1461-62 (1997) (citing Mahon, 260 U.S. at 413: "When [diminution in value caused by police power regulation] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.").

<sup>10</sup> Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987).

<sup>11</sup> *Id.* at 474-477.

<sup>12</sup> *Id.* at 478-479.

<sup>13</sup> *Id.* at 488.

<sup>14</sup> *Id.* at 485.

<sup>15</sup> Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992).

<sup>16</sup> *Id.* at 1006-1008.

<sup>17</sup> *Id.* at 1007-1009.

<sup>18</sup> See Lucas, 505 U.S. at 1016-1019.

<sup>19</sup> *Id.* at 1027.

<sup>20</sup> Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

<sup>21</sup> Palazzolo, 2001 WL at \*3.

<sup>22</sup> See National Ass'n of Social Workers v. Harwood, 69 F.3d 622, 627. See also Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 59 v. Superline Transp. Co., 953 F.2d 17, 21 (1st Cir.1992) ("If any principle is settled in this circuit, it is that, absent the most extraordinary circumstances, legal theories not raised squarely in the lower court cannot be broached for the first time on appeal."), McCoy v. Massachusetts Inst. of Technology, 950 F.2d 13, 22 (1st Cir. 1991) (collecting cases), *cert. denied*, 504 U.S. 910, 112 S.Ct. 1939, 118 L.Ed.2d 545 (1992), State v. Lyons, 725 A.2d 271 (R.I. 1999), State v. Breen, 767 A.2d 50 (R.I. 2001)).



*Coastal Features* is published by the RI Coastal Resources Management Council. It is financed in part by a grant from the National Oceanic and Atmospheric Administration pursuant to the Coastal Zone Management Act, as amended. This issue of *Coastal Features* was edited by Kevin R. Cute. To comment on any article or to make address changes please contact the CRMC.

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Photo courtesy  
of Michael Rubin

The Palazzolo site at Winnapaug Pond, a coastal salt pond in the town of Westerly, RI. Note the patchwork of salt marsh and pools in the area. An adjacent barrier beach, just out of sight to the right of the main road shown in the photo, separates the pond from the Atlantic Ocean.

This Special Edition of *Coastal Features*, CRMC's quarterly newsletter, replaces the Fall, 2001 issue. The next printing of *Coastal Features*, will be the Winter 2001-2002 issue.

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