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OUT OF FOCUS: THE FUZZY LINE BETWEEN REGULATORY "TAKINGS" AND VALID ZONING-RELATED "EXACTIONS" IN NORTH CAROLINA AND FEDERAL JURISPRUDENCE

Albert M. Benshoff*

I. INTRODUCTION

The line between a "taking" and an "exaction" is unclear to property owners and legal practitioners. For most of the century, the courts have wrestled with this problem, yet the state of the law is still confused at best. Justice Brennan expressed the problem well in his dissent in First English Evangelical Lutheran Church v. Los Angeles County:1

It is no answer [to the problem of defining a regulatory taking] to say that "[a]fter all, if a policeman must know the Constitution, then why not a planner?" To begin with, the court has repeatedly recognized that it itself cannot establish any objective rules to assess when a regulation becomes a taking. How then can it demand that land planners do any better? However confusing some of our criminal procedure cases may be, I do not believe they have been as open-ended and standardless as our regulatory takings cases are. As one commentator concluded: "The chaotic state of taking law makes it especially likely that availability of the damages remedy will induce land-use planning officials to stay well back of the invisible line that they dare not cross."

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Justice Brennan went on to describe the unique constitutional dilemma facing land use planners:

[N]ot every missed call by a policeman gives rise to civil liability; police officers enjoy individual immunity for actions taken in good faith. Moreover, municipalities are not subject to civil liability for police officers routine judgment errors. In the land regulation context, . . . I am afraid that any decision by a competent regulatory body may . . . give rise to liability. . . .

This comment defines the current state of North Carolina and federal law while seeking to provide some practical guidance to the regulatory groups mentioned above.

II. DEFINITIONS

A. What is a Taking?

The law of a “taking” is based on the Fifth Amendment to the U.S. Constitution, which provides in part, “nor shall private property be taken for public use, without just compensation.” The Fourteenth Amendment makes the Takings Clause applicable to


3. Id. (citations omitted).


5. U. S. CONST. amend. V.

6. Id. The text of the Fifth Amendment reads:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Id. The North Carolina Constitution has a similar provision. See infra note 85.

7. U. S. CONST. amend. XIV, § 1. Section 1 states:

All persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor
the states.\(^8\) When local governments enact land use regulations under their police power authority,\(^9\) a taking may be found when such regulation deprives a property owner of all reasonable uses of the property.\(^10\)

B. Exaction Defined

An “exaction” is a requirement that a property owner either give up a property right or pay a fee, or both, in order to be able to use the property in a certain way.\(^11\) An exaction may have a substantial effect on the value of property.\(^12\) If such exaction is not grounded in an important public purpose,\(^13\) or if there is no rational basis or “nexus” between the stated government objective and the exaction,\(^14\) a taking of property without compensation may be found. As one North Carolina land use law scholar defines exactions:


\[^{17}\] Id.

\[^{18}\] Id.

\[^{19}\] Id.


The two legal concepts are not distinct, but rather, they exist on a continuum. It is of keen interest, for example, for property owners to know the extent of the property rights they must give up in order to develop their property. On the opposite side, the government needs to know how far it can go in abating nuisances or requiring dedications of or payments for improvements to properties and infrastructures. Without some form of exaction, the government’s only recourse is to acquire an interest in the property or pay for the improvements.

III. Conceptual and Analytical Framework of the Taking Clause

A. Takings Based on Application vs. Language of a Zoning Ordinance

Facial takings of property occur where the text of a zoning ordinance is so restrictive that the property owner can realize no economic return from her property. The property owner may bring a facial challenge opposing the restrictions based on the taking clause.

Zoning or other land use regulations may not be a facial taking, yet they still could result in a taking when applied to a particular piece of property. The typical example is a zoning ordinance which divides a community into districts. The same zoning district may or may not invoke a taking, depending on the characteristics and use of the property to which it is applied. For example, a zoning district allowing no lots smaller than one acre when applied to existing lots of smaller size may prevent land owners from developing their property in any economical way. Such “down zoning” has also been found by some courts to exclude entirely certain socio-economic groups from a community by some state courts. Zoning to protect natural resources or to protect people from natural disasters has been found to be an unconstitu-

18. See Mandelker, supra note 4, 2.0.1., at 21.
19. Id.
20. Id.
tional taking where the property owner has been deprived of all "reasonable" economic return from her property.\textsuperscript{22} These distinctions are discussed more extensively in sections IV through VII.

\textbf{B. Categories of Regulatory Takings}

The earliest category of taking was the "physical occupation" of real property by government.\textsuperscript{23} This doctrine was recognized through the latter part of the nineteenth century.\textsuperscript{24} Gradually, the physical occupation doctrine was expanded to include takings base solely on land use regulations.\textsuperscript{25} By the late twentieth century, the doctrine of regulatory takings has blossomed to include at least three kinds of regulatory takings.\textsuperscript{26}

One category of takings cases involves a land use regulation adopted to assist in a government enterprise.\textsuperscript{27} Examples include zoning districts which assist in the operation of airports,\textsuperscript{28} and land fills.\textsuperscript{29} To provide a clear zone for aircraft operation,\textsuperscript{30} or to lessen the negative effects of the operation of a land fill on a residential neighborhood,\textsuperscript{31} a zoning district which restricts height

\begin{itemize}
  \item \textsuperscript{22} See, e.g., Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992); First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987).
  \item \textsuperscript{23} Mandelker, supra note 4, § 2.0.2 at 21. See, e.g., Loretto v. TelePromter Manhattan CATV Corp., 458 U.S. 419 (1982).
  \item \textsuperscript{24} See Mandelker, supra note 4, at 14.
  \item \textsuperscript{25} See, e.g., Goldblatt v. Hempstead, 369 U.S. 590 (1962) (upholding ordinance effectively closing plaintiff's quarry); Miller v. Schoene, 276 U.S. 272 (1928) (upholding the granting of no compensation for the destruction of a grove of cedar trees on the order of the State of Virginia to prevent blight reaching apple trees); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding a comprehensive zoning ordinance for the first time); Hadachek v. Sebastian, 239 U.S. 394 (1915) (upholding a regulation effectively closing a brick mill); Mugler v. State of Kansas, 123 U.S. 623 (1887) (upholding a state law closing a brewery).
  \item \textsuperscript{26} Mandelker, supra note 4, § 2.0.3 at 21.
  \item \textsuperscript{27} A government enterprise is one in which government operates a service or business in lieu of or in cooperation with the private sector. Municipal electric utilities are one example.
  \item \textsuperscript{29} There exist various industrial zoning districts applied to rural or agricultural lands, see Wake County, N.C., Annotated Zoning Ordinance, § 1-1-12 (1991).
  \item \textsuperscript{30} Mandelker, supra note 4, § 2.0.3 at 21.
  \item \textsuperscript{31} Id.
\end{itemize}
and land uses in the former case and land uses in the latter can be enacted. A land owner may argue that the land use regulation is a taking because he is deprived of the use of the land without compensation.32

A related category of land use regulations involves a “public benefit” paid for by a private land owner.33 The classic example is the designation of an historic landmark which limits the owners use of the property, yet which is deemed to benefit the entire community.34

The third and most common type of land use regulation defines zones for diverse land uses in order to mitigate conflicts between incompatible land uses. Comprehensive zoning ordinances enacted by municipalities and counties are the typical North Carolina example.35 Under this category, land owners complain when their land is either not zoned for a use which is as intensive as the landowner would like, or is re-zoned by the zoning authority to a less intense use (i.e. “down zoning”).36

C. Theories Under the Fifth Amendment Taking Clause

The taking (or takings) clause is the final clause of the Fifth Amendment of the U.S. Constitution. It states “nor shall private

32. In the alternative, a municipality could exercise its eminent domain authority under N.C. GEN. STAT. § 40A et seq. A land owner can also seek relief under the doctrine of inverse condemnation. PATRICK HETRIX & JAMES MCLLAUGHLIN, WEBSTER’S REAL ESTATE LAW IN NORTH CAROLINA §§ 401-08 (1988 & supp. 1991).
33. MANDEKER, supra note 4, § 2.0.4 at 22.
34. See Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (upholding a city’s refusal to allow Penn Central to build an office tower on top of historic Penn Station, finding no taking). Contra United Artists Theater Circuit, Inc. v. Philadelphia Historical Comm’n, 595 A.2d 6 (Pa. 1990) (finding a taking where a city required theater owners to maintain the exterior and interior of the theater at owner’s expense). The cases can be distinguished on the grounds that the New York ordinance did not require that the interior of the building be preserved and that the owners could transfer the office tower density to a nearby site, thus avoiding a taking.
35. N.C. GEN. STAT. § 160A-360 et seq. The North Carolina courts have defined the sufficiency of zoning ordinances in a circular manner; if all of the community is zoned according to the same zoning ordinance, the “comprehensive plan” is met. In other words, a “comprehensive plan” is a plan which zones an entire city according to the same zoning ordinance, instead of just a portion of the city. Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432 (1971).
36. “Down zoning” is an ambiguous land use planning term of art generally meaning zoning to a less intense use. See MANDEKER, supra note 4, § 2.0.5, at 22.
property be taken for public use without just compensation.” The meaning and interpretation of this clause has been the source of an extensive body of legal literature. A few of the principal theories of the taking clause are mentioned briefly below. It is not the purpose of this paper to expound on the following theories, rather it may be helpful to see how they have been used, or discarded, by the courts in the sections that follow.

The leading proponent of the enterprise-arbitration theory is Professor Joseph Sax.37 Sax proposes that all takings be analyzed on the basis of the reasons for the government regulation leading to the taking. Under this theory all takings resulting from government enhancement of government controlled enterprises are viewed as constitutional takings requiring compensation. A regulation severely restricting uses around an airport is an example.38 All economic losses resulting from government regulations based on the police power, no matter how severe, are not compensable.39 This theory has not been followed by either the federal or the North Carolina courts.

A classic theory is the harm-benefit theory.40 In short, this theory would uphold all land use regulations that prevent harm, but find unconstitutional all those which confer a public benefit.41 For example, a zoning ordinance preventing a steel mill from locating in an established residential neighborhood would be upheld as preventing a public harm, while an ordinance requiring preservation of an historic structure would be deemed an unconstitutional taking as conferring a benefit on the public at large. While some U.S. Supreme Court decisions have discredited this theory,42 it still makes up an part of the balancing test followed by most jurisdictions.43

38. MANDELKER, supra note 4, § 2.0.7 at 23.
39. Sax, supra note 37, at 37.
40. MANDELKER, supra note 4, § 2.0.8, at 24.
43. The North Carolina courts also follow this test. For a discussion of the North Carolina court’s ends-means test, see infra notes 81-93 and accompanying text.
Both the United States and North Carolina Supreme Courts have held that a very important factor in taking cases is whether or not the land owner has been denied all economic use of her land. This doctrine is known as the economic loss theory. The basic premise of this theory is that a taking is worked through the application of a zoning ordinance where a property owner is denied all "reasonable" use of her land. The theory then shifts the focus of analysis from a question of a taking to what is a reasonable use of a specific property at given time. This leads the courts to a subjective judgment as to whether the zoning ordinance allows any reasonable use. The courts have not consistently used or applied the economic loss theory. The most common approach has been the one followed by the United States Supreme Court: If a property owner must give up some real property, no matter how little, or how briefly, the government has worked a taking and owes the property owner some compensation. The North Carolina courts follow the federal courts in this area. This analysis ultimately does not answer the takings muddle, it merely redefines some terms and shifts the scope of the analysis.

In 1922 Justice Holmes held that a taking does not occur via a land use regulation when that regulation confers an "average reciprocity of advantage" on the regulated. Where a property is both "burdened" and "benefitted" no taking occurs if the benefit and burden cancel each other out. Any given zoning designation both benefits and burdens a given parcel of real estate. For example, a typical urban North Carolina "single family residential" zoning district allows a maximum density of approximately four dwelling units per acre. Property owners are burdened because they cannot use their property in any other way than residential, except within very narrow limits. Benefits are obtained as all of the

46. MANDELKER, supra note 4, § 2.0.9, at 26.
49. Id. See also MANDELKER, supra note 4, § 2.10, at 27.
50. CARY, N.C., CODE OF ORDINANCES, 5 R-12 Appendix A (1992); RALEIGH, N.C., CODE OF ORDINANCES § 10-2017 (1992). In both districts only a few
property owners are burdened in the same way. Thus a neighbor cannot legally erect a nuisance or create a noxious use on her property.

The fifth and most important test is the balance test. Most jurisdictions, including North Carolina, balance the harm suffered by the individual property owner against public purposes advanced by the land use regulation to determine if a land use regulation is a taking.

All five theories have their limitations. None is a perfect model of reality. The federal and North Carolina courts have chosen to use and discard pieces of all the theories. In any given opinion, pieces of these theories will be juxtaposed in an arbitrary fashion. These theories should be thought of as a menu of options for legal analysis and not as a rigorous analytical framework. Their more important use in this article is to provide a basic analytical framework with which to examine the following cases. The balance of the article covers the evolution of the law of takings in North Carolina, with references to seminal United States Supreme Court decisions which shaped our law. The following cases are not categorized by the five theories discussed supra, but the reader may discern judicial allusions to the theories in all of the following cases.

IV. NORTH CAROLINA LAW BEFORE 1987

Several landmark cases settled North Carolina law in this area prior to the modern North Carolina and United States Supreme Court rulings. These cases are discussed briefly in this section. From the advent of zoning to the present the North Carolina courts have consistently interpreted questions of regulatory takings along the lines of the following cases and as discussed further in Section V.

ancillary uses are permitted in addition to single family homes, such as swimming pools, tennis courts and day care homes. More intensive uses, such as tennis and swim clubs and day care centers, are not permitted.

51. Mandelker, supra note 4, § 2.11, at 28.
54. See Euclid v. Ambler Realty, 272 U.S. 365 (1926); Nectow v. City of Cambridge, 277 U.S. 183 (1928)
55. See infra text and accompanying notes 107-278.
In 1962 the North Carolina Supreme Court held, in *Helms v. city of Charlotte*,\(^56\) that the city of Charlotte could not use zoning to totally eliminate the value of a property.\(^57\) Like many land use cases, the facts of *Helms* are confusing.

In February, 1957 Charlotte legally adopted a zoning ordinance revision changing the zoning of the plaintiffs property from industrial to “Residential-1.”\(^58\) The then-owner of the property obtained a permit from the city to bury oil tanks on the property. The owner sold the property to the plaintiff in July, 1957. The plaintiff then obtained a new or updated permit from the city and proceeded to bury oil tanks and bring in six vertical feet of fill at a cost of $5,500. Then the plaintiff applied for a building permit so that he could erect a small office building on the property. The city refused to issue a building permit for a use not in compliance with the zoning ordinance. The city also refused to rezone the lot from residential back to industrial.\(^59\)

The plaintiff sued, contending that the ordinance destroyed all practical use of his property,\(^60\) as it could not be profitably developed for a residence.\(^61\) At trial it was established that the residential zoning reduced the value of the plaintiff’s property by two thirds. In order to comply with the building code the only house that could physically fit onto the lot would have to be constructed with a different sized foundation and roof for every room. The trial court found that no regulatory taking had occurred, as a residence could be built.\(^62\)

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57. *Id.* at 653, 122 S.E.2d at 821.
58. *Id.*
59. *Id.*
60. *Id.* at 653, 122 S.E.2d at 821. In July, 1957, five months after the property had been rezoned to residential uses, the plaintiff received a permit from Charlotte to install oil tanks and other improvements at a cost of $5,500. The permit was issued due to the error of a city official. *Id.* The supreme court held that “a municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting the violation.” *Id.* at 652, 122 S.E.2d at 821 (quoting Raleigh v. Fisher, 232 N.C. 629, 635, 61 S.E.2d 897, 902, (1950)).

Changes to the law of vested rights may mean that this is no longer good law. A substantial investment by a property owner prevents a local government from changing the zoning to render the investment a non-conforming use. This issue has not yet been litigated under the revised statutes. *See* N.C. GEN STAT. § 160A - 385.1 (Supp. 1993).
62. *Id.*
The supreme court adopted the rule on when a taking occurs almost verbatim from a treatise:

[Z]oning cannot render private property valueless . . . if the application of a zoning ordinance has the effect of completely depriving an owner of the beneficial use of his or her property by precluding all practical uses[,] or the only use to which it is reasonably adapted, the ordinance is invalid . . . A zoning of land for residential purposes is unreasonable and confiscatory and therefore illegal where it is practically impossible to use the land in question for residential purposes.63

According to the court, the issue was the value, either real or practical, of the lots as zoned.64 In light of its holding the court ruled that the trial court did not make its factual findings within the proper legal framework.65 The trial court should have determined whether the property zoned for residential uses, “would be practical, desirable and of reasonable value. In short the court did not find that the lot had any reasonable value for residential use and such use was practical.”66 The court remanded the case for a determination of whether the property was usable at all for residential purposes after it was rezoned from industrial to residential.67 If the property had no “value or reasonable use”68 a taking had occurred.

In 1969 the court of appeals revisited the issue in considering Roberson’s Beverage v. City of New Bern,69 a case with similar facts. In 1947 the plaintiff built a soft-drink bottling plant and warehouse on the property.70 The plaintiff then used the property legally under the zoning ordinance for the next twenty years.71 In 1968 the City of New Bern changed the zoning of the plaintiff’s bottling plant from business or commercial use to residential (in part) and office or institutional.72

63. Id. at 653, 122 S.E.2d at 822 (quoting 8 CLARK A. NICHOLS ET. AL., MCQUILLIN: MUNICIPAL CORPORATIONS, § 25.45, at 152-53 (3d ed. 1987)).
64. Id. at 656, 122 S.E.2d at 824.
65. Id.
66. Id.
67. Id. at 657, 122 S.E.2d at 825.
68. Id.
70. Id. at 633, 171 S.E.2d at 5.
71. Id. at 634, 171 S.E.2d at 5.
72. Id. (the city of New Bern rezoned the plaintiff’s property from one zone to two, in effect “split zoning” the property).
The trial court declared New Bern’s zoning ordinance to be invalid, unenforceable and void as it related to the property in question and enjoined the city from enforcing the ordinance with respect to the plaintiff’s property.\(^73\) The trial court’s holding was based on a finding that the plaintiff’s property had no practical use or reasonable value and was unsuitable for the uses allowed under the new zones.\(^74\) The trial court concluded that “the ordinance as it relates to the subject property tends to destroy all its practical use and value and . . . render[s] it practically valueless and . . . deprive[s] the owner of its beneficial use . . . the ordinance is unreasonable and confiscatory and therefore illegal.”\(^75\)

The court of appeals held that the plaintiff had to establish that the property was rendered valueless.\(^76\) The court also reiterated the long held judicial presumption as to the validity of zoning ordinances.\(^77\) The appellate court reversed the trial court, holding that a showing of diminution in value of property caused by the application of a zoning ordinance does not constitute a taking.\(^78\) The court also reiterated the general philosophy of the North Carolina Supreme Court in regard to regulatory takings, quoting the words of former Chief Justice Barnhill:

> Each person holds his property with the right to use the same in such manner as will not interfere with the rights of others, or the public interest or requirement. It is held in subordination to the rights of society. He may not do with it as he pleases any more than he may act in accordance with his personal desires. The

\(^73\) Id. at 636, 171 S.E.2d at 6.
\(^74\) Id.
\(^75\) Id.
\(^76\) Id. at 637, 171 S.E.2d at 6.
\(^77\) Id. at 637, 171 S.E.2d at 7. The court of appeals relied on long-established North Carolina precedent in a quotation reproduced in full:

> The presumption is that a zoning ordinance is valid and a constitutional exercise of the police power. The burden to show otherwise rests upon the property owner who asserts that it is invalid. Evidence that an ordinance has made property less valuable is an insufficient ground, standing alone, for invalidating it. “When the most that can be said against such ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere.” Under such circumstances the courts may not substitute their judgment for that of the legislative body as to the wisdom of the legislation.

\(^78\) Id. at 640, 171 S.E.2d at 9.
interests of society justify restraints upon individual conduct and also upon the use to which property may be devoted. The provisions of the Constitution are not intended to so protect the individual in the use of his property as to enable him to use it to the detriment of the public. When the uses to which the individual puts his property conflict with the interest of society the right of the individual is subordinated to the general welfare and incidental damage to the property resulting from governmental activities or laws passed in promotion of the public welfare is not considered a taking of the property for which compensation must be made. 79

Ten years later, the supreme court revisited the takings issue, further refining and expanding the takings test in A-S-P Associates v. City of Raleigh. 80 The takings test in A-S-P remains the test used by the North Carolina courts to this day. 81

The A-S-P test was reiterated and expanded in Responsible Citizens v. City of Asheville 82 to include the United States Supreme Court’s analysis from Penn Central Transportation Co. v. New York City. 83 The subject of the dispute was the application of Asheville’s flood plain ordinance to the plaintiff’s property. Asheville adopted a “flood hazard” ordinance that regulated both the uses of flood plain land and the type of new construction allowed there. New or substantially improved existing buildings were required to be built so as to prevent or minimize flood damage. 84

At trial the court determined that the plaintiffs were not entitled to relief on their claim that the ordinance effected a taking of

79. Id. (quoting In re Appeal of Parker, 214 N.C. 51, 59, 197 S.E. 706 (1938)). In Parker, Justice Barnhill did note the existing uses — an office building and bottling plant. The Justice noted the admittedly great diminution of value but did not find it to be so severe as to work a taking. Id.


81. See, e.g., County of Hoke v. Byrd, 107 N.C. App. 658, 421 S.E. 2d 800 (1992). The Court of Appeals used the ASP test in its 1992 decision to decide whether the county’s junkyard regulating ordinance worked an unconstitutional taking.

82. 308 N.C. 255, 302 S.E.2d 204 (1983).

83. Id at 266-67, 302 S.E.2d at 211-12 (quoting Penn Central Transportation Co. v. New York City, 438 U.S. 104, 125 (1978)). See infra notes 95-100 and accompanying text.

84. Responsible Citizens, 308 N.C. at 257-302, 302 S.E.2d at 206-08. The court quoted the ordinance at length as follows:

The provisions of the ordinance which plaintiffs attack require, in general, that new construction and substantial improvements made to properties in the flood hazard districts be built so as to prevent or minimize flood damage.
Specifically, plaintiffs challenge Article 6, Section B; Article 7, Section B; Article 8, Section B, Subsections 1-5; and Article 10, Section B, of the ordinance.

Article 6, Section B, provides:

**REQUIREMENTS**

1. All new construction and substantial improvements shall be anchored to prevent flotation, collapse or lateral movement of the structure.
2. All new construction and substantial improvements shall be constructed with materials and utility equipment reasonably resistant to flood damage as defined in N.C. Building Code.
3. All new construction and substantial improvements shall be constructed by methods and practices which reasonably minimize flood damage.
4. All new and replacement water supply systems, either private or public, shall be designed and installed to minimize, to the greatest extent practicable, infiltration of flood waters into the system.
5. All new and replacement sanitary sewerage systems, either private or public, shall be designed and installed to minimize, to the greatest extent practicable, infiltration of flood waters into the systems and discharge from the systems into the flood waters.
6. On-site waste disposal systems shall be located or constructed to avoid impairment of them or contamination from them during flooding.
7. Any alteration, repair, reconstruction or improvements to a structure, on which the start of construction was begun after the effective date of this Ordinance, shall meet the requirements of “new construction” as contained in this Ordinance. This article applies to all property in the flood hazard districts. Flood hazard districts are divided into two types, “floodway districts” and “flood fringe districts.” Plaintiffs here have property in each type of flood hazard district.

Article 7, Section B, which applies in general to property in floodway districts, provides:

**REQUIREMENTS**

1. Within a designated FLOODWAY District, all fill, encroachments, new construction or substantial improvement shall be prohibited, except as otherwise provided herein as a Permitted use or Conditional Use.
2. The construction, reconstruction or improvement of any portion of a new or existing mobile home park, the expansion of an existing mobile home park, the placement, replacement, location and relocation of a mobile home within a FWD are prohibited.
3. Residential uses of buildings and lands within the Floodway District are prohibited.

Article 8, Section B, which applies in general to property in flood fringe districts, Subsections 1-5, provides:

**REQUIREMENTS**

1. Permits are required for all grading and construction work within a FFD. Applications shall be made pursuant to ARTICLE 4 SECTION C of this Ordinance.
their property without just compensation in violation of Article one, Section nineteen of the North Carolina Constitution and the

(2) The construction, reconstruction or improvement of any portion of a new or existing mobile home park, the expansion of an existing mobile home park, the placement, replacement, location and relocation of a mobile home within a FFD are prohibited.

(3) New construction or substantial improvement of any residential structure within a FFD shall have the lowest habitable floor (including basement) elevated to at least two feet above the Regulatory Flood Elevation and utilities shall be floodproofed as provided by Article 10 Section A of this Ordinance.

(4) New construction or substantial improvement of any commercial, industrial or other non-residential building shall either have the lowest floor (including basement) elevated to at least one foot above the Regulatory Flood Elevation and utilities shall be floodproofed as provided by Article 10 Section A of this Ordinance or shall be floodproofed up to at least the Regulatory Flood Elevation pursuant to Article 10 Section B of this Ordinance and shall have utilities floodproofed pursuant to Article 10 Section A.

(5) Outside storage of materials of inventories for allowable uses within the Flood Fringe District and not otherwise prohibited by the Ordinance shall be allowed.

Article 10, Section B, provides:

FLOODPROOFING BUILDINGS

New construction or substantial improvements of any commercial, industrial, or other nonresidential structure, together with the attendant utilities, shall be floodproofed in one of the following ways:

(a) Elevation of the lower floor, including basement above the level of the base or regulatory flood elevation at the specific site;

(b) Be floodproofed so that below the base flood level the structure is water tight with walls substantially impermeable to the passage of water, with structural components having the capacity of resisting hydrostatic and hydrodynamic loads and the effects of buoyancy;

(c) An alternative method of floodproofing structures shall be to construct nonresidential buildings in such a manner that water shall be allowed to pass into or through the structure with no substantial risk that the building will thereby be endangered or be susceptible to collapse or substantial damage. (The owners of such structure shall be advised that improvements made under this provision shall receive a specified rating for insurance purposes and that no subsidized insurance will be available for goods, inventories, materials or equipment contained in the building below the base flood elevation.) However, before this method of floodproofing is utilized the proposed use or construction shall be approved by the Board of Adjustment as set forth in Article 4 of this Ordinance.

(d) An acceptable combination of methods (a)-(c).

Id.
Fifth Amendment of the United States Constitution. Prior to consideration by the court of appeals the owners petition of discretionary review was allowed by the supreme court.

Justice Meyer used the previous North Carolina Supreme Court holdings, particularly Helms v. City of Charlotte and A-S-P Associates v. Raleigh and the United States Supreme Court’s holding in Penn Central Transportation Co. v. City of New York, to refine and reaffirm the court’s position on the taking issue. Quoting from Justice Brock’s opinion in A-S-P Associates v. Raleigh, Justice Meyer repeated the takings test:

“Several principles must be borne in mind when considering a due process challenge to governmental regulation of private property on grounds that it is an invalid exercise of the police power. First, is the object of the legislation within the scope of the police power? Second, considering all the surrounding circumstances and particular facts of the case is the means by which the governmental entity has chosen to regulate reasonable?”

In short, then, the court is to engage in an “ends-means” analysis in deciding whether a particular exercise of the police power is legitimate. The court first determines whether the ends sought, i.e., the object of the legislation, is within the scope of the power. The court then determines whether the means chosen to regulate are reasonable. Justice Brock stated that this second inquiry is really a “two-pronged” test. That is, in determining if the means chosen are reasonable the court must answer the following: “(1) Is

85. The North Carolina Constitution states in full:
No person shall be taken, imprisoned, or dispossessed of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.


86. Justices Frye and Martin took no part in this decision. Note their dissent in Finch, infra notes 151-160 and accompanying text.

89. 438 U.S. 104 (1978). For further discussion on this issue, see infra notes 95-101 and accompanying text.
the statute in its application reasonably necessary to promote the accomplishment of a public good and (2) is the interference with the owners right to use his property as he deems appropriate reasonable in degree?90

Justice Meyer went on to explain that the supreme court’s opinion had not changed. He reiterated that: “[T]he mere fact that an ordinance results in the depreciation of the value of an individual’s property or restricts to a certain degree the right to develop it as he deems appropriate is not sufficient reason to render the ordinance invalid.”91

The court held that Asheville’s flood hazard ordinance was reasonably necessary to further the public goal of preventing or reducing flood damage, reasonable as to the means chosen to attain the goal and reasonable in the degree to which it interfered with the use of plaintiff’s property. The current use of property was not interfered with and the owners were not prohibited from making improvements so long as they did so in a manner that minimized or prevented damage from flooding. The ordinance was not unconstitutional as a “taking” of property without just compensation.92

As to the plaintiff’s argument that the flood hazard ordinance violated the equal protection clause on the theory that it burdened only persons who owned property in the flood hazard district for the benefit of those owning property outside of the district, the court held that the ordinance was not unconstitutional.93 The court found that owners in the district were benefited by increased protection from flooding and by the availability of federal flood insurance and other assistance.94

The Responsible Citizens opinion was influenced by Justice Brennan’s opinion in Penn Central Transportation Co. v. City of

90. Responsible Citizens, 308 N.C. at 261-62, 302 S.E.2d at 208 (quoting A.S.P. Assoc., 298 N.C. at 214, 302 S.E.2d at 448-49 (citations omitted)).

See also Zopfi v. City of Wilmington, 273 N.C. 430, 160 S.E.2d 325 (1968); Helms v. City of Charlotte, 255 N.C. 647, 122 S.E.2d 817 (1962).


93. Id. at 267-68, 302 S.E.2d at 212.

New York. Brennan wrote that the focus of the analysis was the "character of the action and nature and extent of the interference with property rights." Penn Central arose from the application of New York State's Landmark Preservation Law to the plaintiff's property, the Grand Central Terminal in New York City. The law prevented the plaintiff from developing a skyscraper above the terminal. The plaintiff sued, claiming that the designation of Grand Central Terminal as a "historic landmark" worked a taking in violation of the Fifth and Fourteenth Amendments.

Justice Brennan could not articulate a precise test to determine if a taking had occurred, holding instead to a weighing of factors unique to the case in question. He stated:

The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court recognized that the "Fifth Amendment's guarantee . . . [is] designed 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," this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."

Thus Justice Brennan made no pretense of formulating a test to provide guidance to land use regulators:

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 governmental action. A "taking" may more readily be found when

96. Id. at 105.
97. Id.
98. Id. at 123 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960) and United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958)) (and citing Goldblatt v. Hempstead, 369 U.S. 590 (1960); United States v. Caltex, Inc. 344 U.S. 149, 156 (1952)).
the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. 99

The test is thus an ad hoc one. Justice Brennan went on to list four factors to be considered in every takings case: 1) the economic impact of the government regulation; 2) the character of the taking, noting especially any physical invasion of private property; 3) the destruction of, or adverse impact on, property rights; and 4) the acquisition of resources to permit or facilitate a public use of private property. 100 These factors must be applied to the facts of every case to see whether a taking can be found. This application is not based on any stated, measurable criteria, but is rather a question of how the estate claimed to be taken is defined and the convictions of the individual justices. Until 1987, the United States Supreme Court found no takings unless the government actually physically invaded a property interest. 101 The next section discusses the more conservative approach of the North Carolina Supreme Court.

Up to this point in the evolution of takings law the North Carolina courts adopted a de facto presumption that a zoning ordinance is constitutional unless the challengers can show that all economic use of their property has been eliminated. This test has rarely if ever been met. As the A-S-P decision and the following sections show, the enormously influential decision of Justice Brennan in Penn Central created a test that was much more difficult for challengers to overcome than those articulated in Helms and Roberson’s Beverages.

V. TAKING CLAUSE JURISPRUDENCE IN THE NORTH CAROLINA COURTS - THE LATEST CASES

In Finch v. City of Durham 102 the plaintiff sued the City of Durham claiming that a rezoning of the plaintiffs property from office and institutional (O-I) 103 to R-10 104 zoning constituted an

99. Id. at 123-24 (emphasis added) (citations omitted).
100. Id.
103. The zoning ordinance provides, in relevant part:
   1. Specific Office-institutional District Regulations.

The following regulations shall apply in all Office-institutional districts:
unconstitutional taking under the state and federal constitutions.\textsuperscript{105} The supreme court followed the ends-means test of \textit{A-S-P Associates v. Raleigh}.\textsuperscript{106}

Consideration of the particular facts of this case is important, as the ends-means test is an ad hoc test, based on the facts of each case. The facts showed that the plaintiff owned 2.6 undeveloped and unimproved acres at the southeast corner of Interstate 85 and Hillandale Road.\textsuperscript{107} Prior to 1979 the plaintiff's property was zoned R-10.\textsuperscript{108} In 1979 the plaintiff successfully petitioned for the property to be rezoned to O-I.\textsuperscript{109} Also in 1979, the plaintiff began to lease the property for $15,000 per year (with an option to purchase) from the owner.\textsuperscript{110} In 1984 a motel developer offered to buy the property from the plaintiff, provided that it could be developed as a motel.\textsuperscript{111} In March, 1985, the local neighborhood association petitioned the city to rezone the plaintiff's property to R-10, in an effort to prevent non-residential development of the property.\textsuperscript{112} On April 2, the Durham Planning and Zoning Commission recommend to the city council that the property be rezoned to R-10.\textsuperscript{113} On April 29, or twenty-seven days after the planning commission's recommendation, the plaintiff began to exercise his option to purchase the 2.6 acres.\textsuperscript{114} The City Council rezoned the

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\textbf{Permitted Uses.}

2. Land shall be used and buildings erected, altered, enlarged, or used only for one or more of the uses indicated in the O-I column of the Table of Permitted Uses and subject to such conditions as may be referred to in the Special Requirements column of said table.\textsuperscript{4}

\textbf{DURHAM, N.C., ZONING ORDINANCE, § 24-7 B (1960, Amend. 1990).}

104. \textit{Finch, 325 N.C. at 358, 204 S.E.2d at 12.} The land uses permitted in R-10 are single family houses, athletic fields, cemeteries, mausoleums, childcare centers, churches, clubs or private lodges, noncommercial community buildings, family care homes, parking lots, public buildings, libraries, museums, art galleries, parks, recreational facilities, public or private swimming pools and schools. \textit{Id.}

105. \textit{Id. at 357-58, 304 S.E.2d at 11-12.}

106. \textit{298 N.C. 207, 258 S.E.2d 444 (1979).} For a discussion of the \textit{A-S-P} case, see \textit{supra} notes 80-84 and accompanying text.

107. \textit{Finch, 325 N.C. at 355, 304 S.E.2d at 10.}

108. \textit{Id.}

109. \textit{Id. at 356, 384 S.E.2d at 11.}

110. \textit{Id.}

111. \textit{Id.}

112. \textit{Id.}

113. \textit{Id.}

114. \textit{Id.}
plaintiff's property from O-1 to R-10 on May 6.\textsuperscript{115} Despite the city's rezoning action, the plaintiff purchased the property on June 26 for $165,000 and in July entered into a contract to sell the property for $500,000 to the motel developer.\textsuperscript{116}

At trial the jury found that the rezoning ordinance was an invalid taking, but that the plaintiff suffered no damages. The trial judge granted plaintiffs' motion for judgment notwithstanding the verdict\textsuperscript{117} to award damages.\textsuperscript{118} The plaintiff was also awarded attorneys fees and costs.\textsuperscript{119} Both parties appealed.\textsuperscript{120}

Before the court of appeals could hear the case, the supreme court granted discretionary review \textit{ex mero motu}.\textsuperscript{121}

In his opinion for the majority\textsuperscript{122} Justice Meyer applied the ends-means test. The court stressed that, "the mere fact that an ordinance results in the depreciation of the value of an individuals property or restricts to a certain degree the right to develop it as he seems appropriate is not sufficient reason to render the ordinance invalid"\textsuperscript{123} and cited authority to show that in other jurisdictions "even a one hundred percent diminution in property value does not necessarily constitute a taking."\textsuperscript{124} However, in North Carolina the "cases speak in terms of 'practical use' and 'reasonable value' following the rezoning. . . ."\textsuperscript{125}

In applying the ends-means test, the court emphasized the "investment backed expectations" of the plaintiff.\textsuperscript{126} One relevant factor in analyzing these expectations is the timing of the acquisition of property in relation to the regulatory action.\textsuperscript{127} The court

\textsuperscript{115.} Id.
\textsuperscript{116.} Id. at 357, 384 S.E.2d at 11-12.
\textsuperscript{118.} Finch 325 N.C. at 362, 384 S.E.2d at 14.
\textsuperscript{119.} Id.
\textsuperscript{120.} Id.
\textsuperscript{122.} Justices Frye and Webb joined in Chief Justice Exum's dissent.
\textsuperscript{123.} Finch, 325 N.C. at 364, 384 S.E.2d at 15 (quoting A.S.P., 298 N.C. at 218, 258 S.E.2d at 451).
\textsuperscript{124.} Finch, 325 N.C. at 366, 384 S.E.2d at 16.
\textsuperscript{125.} Id. North Carolina courts at least impliedly examine what is left after the regulation is applied in order to judge whether a taking has occurred.
\textsuperscript{126.} Id. at 366-67, 384 S.E.2d at 16-17.
\textsuperscript{127.} Id.
repeated the rule of investments occurring after a regulation is enacted: "[W]here an investor knows of a pending ordinance change proposed by a city planning board to a city council, the investor has no valid claim that he relied upon the prior ordinance in guiding his investment decision." In this case, the plaintiff exercised his option to purchase the property on April 29, twenty-seven days after the plaintiff "knew of the recommendation by the Durham Planning and Zoning Commission to rezone the property to R-10." The court concluded that the plaintiff's expectations of investment return were in fact based on a speculative risk that the Durham City Council would not rezone the property to prohibit the proposed ... project.

As the outcome of the ends-means test is dependent on the facts of a given case and the judicial interpretation of those facts, it is necessary to examine how the court has applied the test in each case. In Finch, the court first asked if a nexus existed between the goals of the rezoning ordinance and the rezoning ordinance itself. The rule by which the validity of the zoning ordinance was judged is well settled under North Carolina law. As the court in Finch stated, "A zoning ordinance will be declared invalid only where the record demonstrates that it bears no substantial relation to the public health ... or the public welfare ... ." Furthermore, the court noted that "the burden of proof of establishing the invalidity of a zoning ordinance is on the complaining party."

The court held that the city's goal to protect residential neighborhoods by maintaining a clear dividing line between residential and commercial uses was valid because if even one commercial use was allowed south of I-85, "a domino effect tends to occur in that commercial areas grow into strip areas which contribute to the degeneration of a residential neighborhood."

The plaintiff presented no evidence to the contrary. The court found that the plaintiff's promises of limited impacts from the proposed motel development were not enough: "Durham ... cannot

129. Finch, 325 N.C. at 367, 384 S.E.2d at 17.
130. Id.
131. Id. (quoting Graham v. City of Raleigh, 55 N.C. App. 107, 110, 284 S.E.2d 742, 744 (1981), disc. rev. denied, 305 N.C. 299, 290 S.E.2d 702 (1982)).
133. Id. at 368, 384 S.E.2d at 18.
be expected to base zoning decisions on the promises of one potential developer.” The court stated that “the O&I zoning would have permitted any hotel to develop on the property.” The court concluded that the rezoning ordinance met the first part of the ends-means test, stating “a sufficient nexus exists between the goals of the rezoning ordinance and the ordinance itself, . . . and the ordinance has sufficient foundation in reason and bears a substantial relation to the public welfare.”

The second part of the ends-means test, whether the means chosen to regulate were reasonable, requires analyzing whether the rezoning ordinance deprives the plaintiff of all practical use of the property and renders it of no reasonable value. “The burden is on the plaintiffs to make such a showing.” The court found that “[the] evidence fails to support the notion that plaintiff’s property had no practical use or reasonable value.” The court cited three reasons for reaching this conclusion. First, the testimony of the plaintiff’s experts was “equivocal.” The experts testified that the property had no reasonable value compared to the purchase price of $165,000, yet the experts also testified that a church might pay $100,000 to $200,000 for the property. The plaintiff testified that he had been approached by a day care center which offered to buy the property for $100,000 to $150,000. Next, the plaintiff never submitted a rezoning request or a “proposed development plan” to the city. The evidence showed that the planning department staff recommended two more intense zoning districts than R-10 for the subject property: Limited Office and Institutional (O-I-L) and medium density cluster residential development. Finally, the plaintiff did not

134. Id. The court does not mention it, but this type of arrangement also raises the issue of contract zoning, which is illegal in North Carolina. See Blades v. Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1971); Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432 (1970).
137. Id. at 368-69, 384 S.E.2d at 18.
138. Id. at 369, 384 S.E.2d at 18.
139. Id. at 370, 384 S.E.2d at 19.
140. Id.
141. Id.
142. Id.
143. Id.
144. Id. The latter use, medium density cluster residential, was characterized as “ideal” by the city’s Associate Director of Current Planning.
show that the property could not be developed under R-10. The plaintiff only showed a potential loss. The plaintiff showed no evidence of seeking contributions from adjacent property owners who could have benefited from improvements the developer would have to make to the site prior to development.\footnote{145}

The court defined the real gravamen of the plaintiff's complaint as "the available uses and value of [the] property under the R-10 zoning are not comparable to its value for motel use under O-I, in either market appeal or . . . price."\footnote{146} Expressed another way, the plaintiff's real argument according to the court was that the R-10 zoning does not guarantee a certain return on investment; therefore, it is neither a practical nor a reasonable use of the property. The court stated emphatically that this argument has no basis in North Carolina law: "[A] rezoning ordinance [that] results in some substantial depreciation of the value of the plaintiff's property or restricts their right to develop it as they wish is [not] invalid."\footnote{147}

The court concluded that the rezoning ordinance met the second part of the ends-means test because the "plaintiff's own evidence [showed] that several uses permitted under R-10 zoning could be made of the property, such as residential, day care, or church . . ." and that the "plaintiffs' evidence showed that the property could have been sold as undeveloped for between $20,000 and $25,000 at the time of the trial."\footnote{148} Finally, the court held that "the rezoning of plaintiffs' property does not amount to a taking under the North Carolina Constitution or the United States Constitution."\footnote{149} The judgment of the trial court was reversed, and the case was remanded to the superior court.\footnote{150}

\footnote{145. Id. In order to develop the property into six R-10 lots, Chesterfield Street would have to be opened and improved at a cost of $121,000. Chesterfield Street exists only on paper. It borders the east side of the plaintiff's property. If Chesterfield Street were opened, the adjacent property owner could build 7 R-10 lots on his property. At least theoretically, the plaintiff and the neighboring property owner could have shared the costs of improving Chesterfield Street. The plaintiff's six lots were estimated to be worth $81,000. Thus, under this scenario, the plaintiff would not recover the price paid for the property. However, it is not true that the property has no value.}

\footnote{146. Id.}

\footnote{147. Id. at 371, 384 S.E.2d at 19. See also Responsible Citizens, 308 N.C. 255, 265, 302 S.E.2d 204, 210 (1983).}

\footnote{148. Finch, 325 N.C. at 371, 384 S.E.2d at 19.}

\footnote{149. Id. at 371-72, 384 S.E.2d at 19-20.}

\footnote{150. Id. at 374, 384 S.E.2d at 19-20.}
Writing for the dissent, Chief Justice Exum agreed with the majority that the ends-means test was the correct legal test, yet disagreed that it had been correctly applied by the majority. Exum wrote that the key to the proper application of the test is the understanding of the terms "reasonable" and "practical" as they relate to the value of the subject property.

According to the dissent, the issue was "whether there is evidence in the case which . . . is sufficient to support the jury's determination that the rezoning deprived plaintiffs of all practical use of their property so it had no reasonable value." Exum supported the jury's finding at trial, agreeing with plaintiffs' evidence showing that "none of the possible [R-10] uses were reasonable, practical or beneficial because there was very little, if any, market for these uses." The dissent believed that the majority's holding that the plaintiff should have tried to persuade the city to rezone the property before suing was unnecessary: "[A]n unsuccessful partition to rezone should not be a prerequisite to the plaintiffs' challenge to the present zoning ordinance as an unconstitutional taking."

To the dissent, the plaintiffs' witnesses' testimony validly established that the property had no "practical value" or any "beneficial use". The witnesses established that the property before rezoning was worth $550,000 and that after rezoning it was worth $20,000 to $25,000. Thus the plaintiffs' evidence carried the burden of proof for summary judgment, having presented sufficient evidence from which the jury could conclude "that the rezoning had deprived plaintiffs of all practical use of the property so that it had no reasonable value."

To the dissent there was enough evidence to make out a jury question, but not enough evidence to reach a conclusion as a matter of law on the issue of damages. The dissent concluded that the proper outcome of the court's deliberations should have been

151. Id. at 380, 384 S.E.2d at 22. Justices Frye and Webb concurred in the dissent. Justice Frye also wrote a separate dissenting opinion, which is not discussed in this article.
152. Id. at 381, 384 S.E.2d at 23.
153. Id.
154. Id. at 382, 384 S.E.2d at 24.
155. Id.
156. Id. at 385-86, 384 S.E.2d at 26-27.
157. Id. at 383, 384 S.E.2d at 24.
158. Id. at 386, 384 S.E.2d at 27 (emphasis in original).
159. Id.
to affirm the trial court’s entry of judgment as to a taking, but to vacate the plaintiffs’ motion for judgment notwithstanding the verdict on the question of damages and order a new trial to consider the question of damages.\textsuperscript{160}

In \textit{Finch}, both the majority and the dissent focused on what was left to the plaintiffs after the promulgation of the regulation. Analyzing the same facts, the majority found that an eighty-eight per cent\textsuperscript{161} decrease in value was not enough to find a taking. The dissent held that a jury could conclude that a large decrease in the remainder of the estate was a regulatory taking. The only certainty that can be gleaned from this decision is that there is no certainty as to what constitutes a taking, and that the North Carolina courts are reluctant to find a purely regulatory taking.

\textit{Summey Outdoor Advertising v. County of Henderson}\textsuperscript{162} held that a sign control ordinance\textsuperscript{163} which rendered thirty-two of the plaintiff’s outdoor advertising signs non-conforming did not constitute an unconstitutional taking.\textsuperscript{164} The ordinance regulated the height, size, number of sides and faces per sign, distance from the road and distance from other signs of all off-premise signs\textsuperscript{165} not located on interstate, federal or primary highways.\textsuperscript{166} The ordinance allowed “existing nonconforming signs to be brought into compliance or removed within five years.”\textsuperscript{167} No direct monetary compensation was provided for the removal of signs after the end

\begin{itemize}
\item \textsuperscript{160} \textit{Id.} at 388, 384 S.E.2d at 27.
\item \textsuperscript{161} Eighty-eight per cent is the difference between the purchase price paid by plaintiffs of $165,000 and the value after rezoning of $20,000. The percentage difference between the potential sales price of $550,000 and $20,000 is 96.4%.
\item \textsuperscript{162} 96 N.C. App. 533, 386 S.E.2d 439 (1989).
\item \textsuperscript{163} The General Assembly has considered many and passed several bills restricting local government’s authority to regulate signs using the police power. \textit{See} N.C. GEN. STAT. § 136-131.1 (1987 & Supp. 1990) The General Assembly enacted a law requiring just compensation for the removal of billboards on federal primary highways by local authorities. As originally adopted in 1981, this section was to expire in 1985. In 1982, 1983, 1987 and 1988 the General Assembly adopted amendments to this section extending the effective date of this section. In 1989 the General Assembly passed a bill extending the date to 1994. There is no reason to believe that the General Assembly will not continue to extend the effective date of this section indefinitely.
\item \textsuperscript{164} \textit{Summey}, N.C. App. at 543, 386 S.E.2d at 445.
\item \textsuperscript{165} \textit{Id.} at 535, 386 S.E.2d at 441. Off-premise signs are those signs “not advertising a business located on the same lot or parcel as the sign.” \textit{Id.}
\item \textsuperscript{166} \textit{Id.} at 535-37, 386 S.E.2d at 441-42.
\item \textsuperscript{167} \textit{Id.} at 536, 386 S.E.2d at 441.
\end{itemize}
of the five year "amortization period." Among other issues, the plaintiff claimed that the ordinance was an oppressive and arbitrary violation of due process of law under a takings theory and on general due process grounds.

The court of appeals used the ends-means test to analyze whether a taking had occurred. At the beginning of its analysis the court repeated the rule on depreciation of value due to regulation, stating that a loss of value is not a sufficient reason to hold the ordinance invalid. In applying the facts to the ends-means test the court found the sign ordinance to be within the scope of the state's police power. The court found the ordinance to be reasonable, stating that "size, height, location, state of repair and manner of display restrictions in outdoor advertising signs are reasonably necessary to promote traffic safety, prevent fire hazards or obstructions of light, air and visibility."

The court concluded that the ordinance did not unreasonably interfere with plaintiff's "right to use the property as he deems fit." The plaintiff was not prevented from owning and operating outdoor advertising signs. The plaintiff could obtain permits for all of his outdoor advertising signs so long as the signs complied with the restrictions. The ordinance placed no unreasonable restrictions on the plaintiff. Finally, the court held that the cost of complying with the ordinance could not be equated with any inference with the plaintiff's right to use the property (signs). Therefore, the court of appeals affirmed the trial court's decision.

168. Id.
169. Id. at 541, 386 S.E.2d at 444.
171. Id. (citing A.S.P., Assoc. v. City of Raleigh, 298 N.C. 207 218, 258 S.E.2d 444, 451 (1979)).
172. See supra text accompanying note 90 (providing the entire text of the ends-means test).
173. Summey, 96 N.C. App. at 542, 386 S.E.2d at 445.
174. Id.
175. Id.
176. Id.
177. Id. Under § 402.8A of the ordinance the maximum size of signs was limited to 380 square feet. "Sign structures" were allowed to have two sides per structure, with one face per side. Sign structures had to be set back 25 feet from paved roads or 35 feet from the centerline of unpaved roads. Signs had to located at least 1,000 feet from each other. Id.
178. Id.
The most important North Carolina case in this area is *Batch v. Town of Chapel Hill*. In *Batch*, the plaintiff maintained that the town’s requirement that she dedicate right of way for a road as a condition of subdivision approval would severely diminish the value of her property and was an uncompensated taking. While the trial court granted summary judgment for the plaintiff, Dr. Deidre Batch, and the court of appeals partially affirmed, the supreme court reversed the case on discretionary review.

The answer to any takings issue case depends on the particular facts of the case and *Batch* is no exception. In 1983, the Town of Chapel Hill validly adopted a thoroughfare plan under the authority of N.C. Gen. Stat. § 160A-174. The plan showed that


181. Id.

182. Id.

183. The North Carolina Legislature has defined a city’s ordinance making ability as follows:

(a) A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances.

(b) A city ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordinance is not consistent with State or federal law when:

1. The ordinance infringes a liberty guaranteed to the people by the State or federal Constitution;
2. The ordinance makes unlawful an act, omission or condition which is expressly made lawful by State or federal law;
3. The ordinance makes lawful an act, omission, or condition which is expressly made unlawful by State or federal law;
4. The ordinance purports to regulate a subject that cities are expressly forbidden to regulate by State or federal law;
5. The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation;
6. The elements of an offense defined by a city ordinance are identical to the elements of an offense defined by Stat or federal law. The fact that a State or federal law, standing alone, makes a given act, omission, or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition.
a Laurel Hill Parkway was to be built south of Chapel Hill, crossing land that the plaintiff ultimately purchased in 1984. In 1986 Batch attempted to subdivide the 20.16 acres she purchased into eleven residential lots. The eleven lots as developed would have surrounded two cul-de-sacs to be built on the property, and construction of the proposed parkway by the town would have significantly interfered with the use of at least four of the anticipated lots. The Town Council denied the plaintiff’s request to subdivide following the recommendations of both the Planning Department staff and the Planning Board. In denying Batch’s subdivision, the Town Council passed a resolution stating that the proposed subdivision did not have streets which coordinate with existing and planned streets and highways.

Sitting as an appellate court on a writ of certiorari, the superior court found no genuine issue of material fact concerning the town’s rationale for denying the subdivision permit, and issued summary judgment for the plaintiff. The superior court rejected the town council’s rationale for rejecting the application and found that the plaintiff’s application was denied because the plaintiff refused to accede to the town’s demands for dedication of a right-of-way for Laurel Hill Parkway and Old Lystra Road. The trial court found that the denial of the subdivision application was unconstitutional. The court of appeals affirmed, stating, “the town’s denial of Dr. Batch’s permit amounted to an unconstitutional taking . . . . The imposition of the ‘Parkway condition,’ i.e., what it found to be a compulsory dedication requirement, exceeded the statutory authority granted to the [t]own . . . in N.C. Gen. Stat. § 160A-174.” The court of appeals affirmed summary judgment for the “Parkway condition” but reversed and remanded summary judgment for the “Old Lystra Road condition.”

185. Id.
186. Id. at 5, 387 S.E.2d at 657.
187. Id. at 7-8, 387 S.E.2d at 659-60.
188. Id.
189. Id. at 9, 387 S.E.2d at 660.
190. Id. See supra proposed subdivision plat map. The town planning staff and planning board members wanted Batch to dedicate and improve the western half of the Old Lystra Road right-of-way bordering the east side of her property.
191. Id.
192. Id. at 10-11, 387 S.E.2d at 661-662.
193. Id. at 11, 387 S.E.2d at 662.
The supreme court took issue with the trial court's decision to grant summary judgment for the plaintiff. "The sole question before the trial court regarding this... proceeding was whether the decision of the Town Council... was based upon findings of fact supported by competent evidence and whether such findings support the conclusions reached by the town." The court stated that if even one of the town council's conclusions was accurate, summary judgment should not follow.

The court noted that at the town council meeting the proposed subdivision map was overlaid with the proposed parkway map. "This evidence alone is sufficient to support the findings contained in the second reason for the town's denial of the permit the court found." The court concluded its consideration of whether the town properly denied the subdivision application for failure to comply with the thoroughfare plan by stating: "The Chapel Hill ordinance expressly requires that subdivision plans for streets and driveways shall be in compliance with and coordinate to Chapel Hill's transportation plan. We hold that the failure to comply with this ordinance is a sufficient basis to support the council's refusal to approve plaintiffs subdivision plan."

The next issue considered by the Court was whether the Town had the authority to impose street dedication and improvement requirements and whether the town's resolution denying the permit was unconstitutionally vague. The court found that the General Assembly had granted municipalities the authority to coordinate the development of streets:

194. Id. at 12, 387 S.E.2d at 662.
195. Id.
196. Batch, 326 N.C. at 12-13, 387 S.E.2d at 662-663. The Town Council's resolution stated, "The Council finds that the development, as proposed... [d]oes not have streets which coordinate with existing and planned streets and highways as required by Sections 7.7.1 and 6.5.1 of the Development Ordinance." Id. at 7, 387 S.E.2d at 659.
198. Batch, 326 N.C. at 13, 387 S.E.2d at 663.
Under N.C.G.S. § 160A-372, a town is clearly authorized to require a developer to take future as well as present road development into account when designing a subdivision. A requirement that a subdivision design accommodate future road plans is not necessarily tantamount to compulsory dedication. Rather, such a requirement might legitimately compel a developer to anticipate planned road development in some logical manner when designing a proposed subdivision.\footnote{199}

Thus the court found that denying the plaintiffs subdivision permit for failing to take future road plans into account was not unconstitutionally vague.\footnote{200}

In rejecting her claim the North Carolina Supreme Court stated that the plaintiff's federal claim had no effect on the court's holding.\footnote{201} Its decision was based solely upon adequate and independent state grounds, without resort to federal law.\footnote{202} This statement established that the court's opinion was based solely on

\footnote{199. \textit{Id.} The governing statute reads in relevant part: 

A subdivision control ordinance may provide for the orderly growth and development of the city; for the coordination of streets and highways within proposed subdivisions with existing or planned streets and highways and with other public facilities- for the dedication or reservation of . . . rights-of-way or easements for street and utility purposes including the dedication of rights-of-way pursuant to G.S. 136-10 or G.S. 136-11; and for the distribution of population and traffic in a manner that will avoid congestion and overcrowding and will create conditions essential to public health, safety, and the general welfare. The ordinance may include requirements that the final plat show sufficient data to determine readily and reproduce accurately on the ground the location, bearing, and length of every street and alley line, lot line, easement boundary line, and other property boundaries, including the radius and other data for curved property lines, to an appropriate accuracy and in conformance with good surveying practice. . . .

The ordinance may require a combination of partial payment of funds and partial dedication of constructed streets when the governing body of the city determines that a combination is in the best interests of the citizens of the area to be served.

\textit{N.C. GEN. STAT.} § 160A-372 (1987).}

\footnote{200. \textit{Batch}, 326 N.C. at 14, 387 S.E.2d at 663.}


\footnote{202. \textit{Batch}, 326 N.C. at 15, 387 S.E.2d at 664. \textit{See} Michigan v. Long, 463 U.S. 1032 (1983). In \textit{Michigan v. Long}, the United States Supreme Court overturned a Michigan Supreme Court ruling based on the state court's interpretation of federal law. As the state court's interpretation of federal law was in error and}
state law and thus could not be overturned by the United States Supreme Court as a flawed interpretation of federal law.

Batch is important for the proposition that the supreme court will uphold exactions authorized by the General Assembly. Note that there was no dissent in Batch. Also, it is important that the supreme court was careful to provide the United States Supreme Court no grounds for review. Given the federal high Court's recent holdings in takings law, a case such as this could be reversed on appeal.203

Between the time that the court of appeals and the North Carolina Supreme Court heard Batch, the North Carolina Court of Appeals heard another exactions case, Franklin Road Properties v. City of Raleigh.204 The court of appeals again applied the ends-means test to determine if an exaction required in order to obtain a building permit was lawful.205

As in all applications of the ends-means test, the specific facts of the case must be exposited in order to understand how the court applied the facts to the ends-means test. In March, 1983, the plaintiff in Franklin Road requested two variances from the City of Raleigh in order to develop a three building office condominium project on Jones-Franklin Road on land zoned Office & Institutional III (O&I III).206 One variance was to decrease the mini-

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203. See infra part VII.
204. 94 N.C. App. 731, 381 S.E.2d 487 (1989)
205. Id. at 736, 381 S.E.2d at 491.
206. Id. at 732, 381 S.E.2d at 438. The city ordinance at issue in this case reads as follows:

(a) Approval If the use requires a site plan, as set forth in 102132.2, approval of a preliminary site plan is required by either the administrative staff or the City Council; see 10-2132.2(b) and (c). If the use requires a plot plan, as set forth in 10-2132.1, administrative approval is required. All general uses, conditional uses, and special uses, allowed in the Office and Institution-3 District are listed in the Schedule of Permitted Uses in Zoning Districts, 10-2071. Some of the uses permitted in the District include the following: (1) General uses.
   — Bank
   — Cemetery
   — Church, synagogue or religious education building
   — Civic club
   — Funeral home
   — Hospital (medical/psychiatric/veterinary)
   — Library, art gallery or museum - governmental
   — Parking lot, deck, garage
— Radio and television studio
— Recreational uses - governmental
— School (elementary, middle, and high) including colleges, technical and vocational institution, and specialty school but excluding private or parochial school
— Utility services and substations

(2) Conditional uses.
See 10-2072 for provisions applicable to each conditional use.
— Dance, recording, music studio
— Day care facility (child or adult)
— Governmental building and grounds
— Home occupation located in dwellings established prior to application of this zoning district

(c) Office agency and studio of a professional or business agent, or political, labor, or service association listed as allowed in the Schedule of Permitted Land Uses in Zoning Districts, 102071.
— Private or parochial school (elementary, middle, and high)
— Recreational use - restricted to membership profit and not for profit
— Unit ownership condominium)

Cross References: Office center and unit ownership (condominium) developments are conditional uses; however, their regulation as are set forth in Articles F and G of this chapter and not in 10-2072.

(3) Special Uses
See 10-2144 for special uses approved by the Board of Adjustment.
— Airfield, landing strip, and heliport
— Limited home business located in dwellings established prior to application of this zoning district
— Nonresidential related service, including eating establishments without drive-thru service or drive-in service

(4) Other professional or service offices, studios or agencies not otherwise listed as allowed in the office district by the Schedule of Permitted Land Uses in Zoning Districts, 102071
— Manufacturing- specialized

(b.) See 10-214S for special uses approved by the Raleigh City Council.
— Outdoor stadium, outdoor theater, outdoor race track with more than two hundred and fifty (250) seats; outdoor movie
— Telecommunications tower

(c) Prohibited Uses
Except for improvements made pursuant to Part 10 chapter 3 of this Code, any use not explicitly allowed in the Office and Institution-3 District by the Schedule of Permitted land Uses in Zoning Districts 10-2071 is prohibited. The enumeration of expressly prohibited uses shall not be deemed exclusive or all-inclusive. Prohibited uses include:
— Adult establishments
— Any retail store or shop for public customers, including an artist studio, eating establishment, beauty shop, tailor shop that is not otherwise specified.
mum allowed building setback from the road right-of-way to less than 50 feet. The second variance was to allow parking in the reduced setback. The city council granted both variances and approved the plaintiffs development plan, called a "site plan." When the plaintiff applied for building permits in order to begin construction, the city department of inspection refused to issue the permits until the plaintiff agreed to dedicate land to widen and pave part of Jones-Franklin Road.

The plaintiff filed a complaint seeking as one of the causes of action that two zoning ordinance sections in Raleigh's City Code, §§ 10-2063 and 10-3018, be declared in violation of Article


207. Franklin Road, 94 N.C. App. at 732, 381 S.E.2d at 487.
208. Id.
209. Id.
210. Id. at 732-33, 381 S.E.2d at 488-89.
211. This section is part of the Zoning Ordinance. The relevant ordinance text is:

(2) Yard
The minimum district yard setbacks, unless otherwise required by this Code, are front yard 50 feet protective yard when the yard setback adjoins any residential district, dwelling, congregate care or congregate living structure or if the setback adjoins a street right-of-way and immediately across this street is a residential district, dwelling, congregate care or congregate living structure

50 feet protective yard when the yard setback adjoins a street right-of-way and immediately across this street is a residential district, dwelling, congregate care or congregate living structure


212. This is the Subdivision Ordinance. The section reads as follows:
Whenever a tract of land included within any proposed subdivision or site plan embraces any part of a freeway, expressway, collector street, major access corridor as defined in section 10-2002, major or minor thoroughfare so designated on the current city comprehensive plan or thoroughfare plan after such plan or part of it has been adopted by the proper authority, such part of such proposed public way shall be platted and dedicated in the location and the width indicated on the city plan but no tract shall be required to plat more than one hundred and ten (110) feet of right-of-way, excluding slope easements.

one, section nineteen, of the North Carolina Constitution and Fourteenth Amendment of the United States Constitution.\textsuperscript{213} The plaintiff also sought damages for the unlawful taking of his property without payment of just compensation as required by law.\textsuperscript{214} The trial court granted the City of Raleigh’s motion for summary judgment.\textsuperscript{215}

Writing for a unanimous court, Judge Wells opined that the plaintiff was estopped from attacking the validity of the zoning ordinance as the plaintiff had accepted the variances granted by the council under section 10-2063 (b).\textsuperscript{216} Judge Wells repeated the rule as “the acceptance of benefits under a statute or ordinance precludes an attack upon it.”\textsuperscript{217} The result of accepting benefits from and then attacking a land use regulation is that, “[a] party may, by . . . her conduct, be estopped to assert both statutory and constitutional rights.”\textsuperscript{218}

In considering whether the application of the subdivision was an unconstitutional taking, the court of appeals defined “exaction”\textsuperscript{219} as a preface to stating that, “not all exactions are unconf-

\begin{itemize}
\item 213. Franklin Road, 94 N.C. App. at 733, 381 S.E.2d at 489.
\item 214. Id.
\item 215. Id.
\item 216. This section, in relevant part:
\begin{quote}
(b) Upon the council's approyal of a thoroughfare plan for the city and upon the definite location of a thoroughfare of any type, all yard spaces and building setback lines shall be calculated from the new right-of-way lines established pursuant to the approved thoroughfare plan; provided that when the calculation of yard spaces and building setback lines from the new thoroughfare right-of-way lines appears to the council to deprive the owner of property abutting the thoroughfare right-way of the reasonable use of his property, the council may grant a variance from the standard requirements of the zoning and subdivision ordinances upon certain conditions and may authorize the issuance of building permits consistent with such variances and conditions.
\end{quote}
\item 217. Franklin Road, 94 N.C. App. at 734-35, 381 S.E.2d at 489-90 (quoting Goforth Properties, Inc. v. Town of Chapel Hill, 71 N.C. App. 771, 323 S.E.2d 427 (1984)).
\item 218. Id. at 735, 381 S.E.2d at 490 (quoting Goforth, 71 N.C. App. at 773, 323 S.E.2d at 429).
\item 219. Id. at 736, 381 S.E.2d at 490. They defined “exaction” as a condition of development permission that requires a public facility or improvement to be provided at the developer's expense. \textit{Id.}
\end{itemize}
stitutional takings. The court then repeated the ends-means test found in Batch v. Town of Chapel Hill. Finally, the court held that the subdivision ordinance as applied by the city was an exaction. Therefore, summary judgment was not the appropriate remedy. The court remanded the takings issue for further consideration by the trial court. The court of appeals believed that this case presented the same issue as the court had considered in Batch v. Chapel Hill. The court believed that it was compelled to issue the same ruling as it had in Batch. This case would doubtless come out differently today, since the North Carolina Supreme Court’s opinion ultimately reversed Batch.

The final case recently considered by the N.C. Supreme Court is River Birch Associates v. City of Raleigh. In River Birch a Raleigh developer attempted to obtain approval to build dwellings on three acres previously reserved by the developer as open space in order to win approval of the development from the city council. The developer and plaintiff’s initial application for subdivision and site plan approval showed 144 townhouses on 19.6 acres. Of the total 19.6 acres, three acres were labeled as “common open space.” The City of Raleigh Zoning Ordinance requires that ten per cent of the area of a townhouse development be reserved as

220. Id. (quoting Batch v. Town of Chapel Hill, 92 N.C. App. 601, 613, 376 S.E.2d 22, 30 (1989) and Richard D. Drucker, “Taking” Found for Beach Access Dedication Requirement, 30 LOCAL Gov’t LAW BULLETIN 2 (Inst. of Gov’t) (1987)).

221. Id. at 736, 381 S.E.2d 491. The statement of the “ends-means” test by the court of appeals in Batch is worth repeating for the brevity of the formulation. In toto it is:

To determine whether an exaction amounts to an unconstitutional taking, the court shall: (1) identify the condition imposed; (2) identify the regulation which caused the condition to be imposed; (3) determine whether the regulation substantially advances a legitimate state interest. If the regulation substantially advances a legitimate state interest, the court shall then determine (4) whether the condition imposed advances that interest; and (5) whether the condition imposed is proportionally related to the impact of the development.) Batch, 92 N.C. App. at 621, 376 S.E.2d at 34.

222. Franklin Road, 94 N.C. App. at 737, 381 S.E.2d at 491. See N.C.R. Civ. P. 56.

223. Id.

224. Id.

225. See supra notes 194-202 and accompanying text.


227. Id. at 103-104, 388 S.E.2d at 539-40.

228. Id. at 104, 388 S.E.2d at 540. This was a typical development requiring subdivision and site plan approval. It was not a planned unit development. As of
“open space.”229 The plaintiffs developed and sold townhouses in eight sections. Each individual section contained at least ten per cent open space, not including the three acres reserved as “common open space.”230 Before selling any property, a subdivision plat of each section was approved by the City and recorded by the Wake County Register of Deeds.231 The covenants prepared by the developer “specifically stated that common area is to be held by the Home Owners Association for the common use and enjoyment of the subdivision home owners.”232 The covenants did not refer to the three acre parcel.233

The first seven sections of town houses were developed in accord with the plans approved by the city, until only the three acre parcel of “common open space” remained.234 In December of 1985 the plaintiff filed a new site plan depicting twenty-nine town houses (later reduced to twenty-four) on the three acre parcel in controversy. The proposed development was called Marsh Creek Townes.235 The following September, the city council refused to process the site plan application because the three acre parcel was set aside as “common recreation area for the [townhouse development] subdivision plan approved by the City.”236 The city requested that the developer convey the three acres to the home-owners association.237

The developer then filed suit against the city, claiming that section 10-3073238 of the city code exceeded the city’s statutory

this writing, Raleigh has not approved a planned unit development although one is currently being considered by the city council.

229. Id.
230. Id.
231. Id.
232. Id.
233. Id.
234. Id. at 105, 388 S.E.2d at 540.
235. Id. at 105, 388 S.E.2d at 541.
236. Id.
237. Id. at 106, 388 S.E.2d at 541.
238. That code section outlines the requirements for townhouse developments and reads, in relevant part:

(a) A preliminary plat of a proposed townhouse development and a final plat of the development shall be submitted pursuant to the provisions of this chapter in conformity with subsection

(b) A site plan shall show the location of the buildings, streets, alleys, walks, parking areas, recreation areas and facilities, numbered and dimensional residential sites. When developments are required by this Code to have common areas, such as cluster unit developments, . . . , the
authority and that the refusal of the city to process the Marsh site plan shall also show the common areas to be conveyed to a nonprofit corporate homeowners' association, the members of which shall be all of the owners of the residential sites within the development. . . . , the following requirements shall be complied with:

(1) Residential sites. The site plan shall number and show the locations and dimensions of residential sites within the development. A residential site shall be that property intended for conveyance to a fee-simple owner after the construction thereon of a single family residence.

(2) Common areas. All areas which are shown on the site plan other than public streets and residential sites, shall be shown and designated as common areas, the fee-simple title to which shall be conveyed by the developer to the homeowners' association. Such common areas shall not be subsequently subdivided or conveyed by the homeowners' association. However, nothing herein shall prevent the mortgaging and hypothecating of common properties, provided the rights of the mortgagee are subordinated to the rights of the homeowners and association. Furthermore nothing herein shall prevent the exchanging of common properties for other properties when:

—written notice of the exchange is given to each member of the association except in cases where the exchange is done to eliminate an encroachment; and

—after the notice is given, if required, the homeowners association approves the exchange; and

—the exchanged properties and other considerations are of like value and utility; and

—the acreage and configuration of the remaining open space equals (including property to be received by the association in such exchange) or exceeds the requirements of this Code; and

—the exchange is approved by the planning director.

Common areas used exclusively for open space area in excess of the required minimum may be located on separate lots owned by the homeowners' association provided the common area is approved by the city at the same time as the adjoining townhouse development and at least fifty (50) per cent of the separated lot adjoins or is directly opposite the townhouse development.

(3) Covenants and restrictions. The developer shall file with the application for preliminary approval, a declaration of covenants and restrictions governing the common areas, if any are required by this Code, the homeowners' association, and residential sites. The restrictions shall contain (but not be limited to) provisions for the following:

—e. Easements over the common areas, if any, for access, ingress, and egress from and to public streets and walkways and easements for enjoyment of the common areas, as well as for parking, shall be granted to each owner of a residential site.
Creek Townes application denied the plaintiff all use of its property, and "thus ... constituted a taking." 239

At trial, the court held that the application of the subdivision ordinance (section 10-3073) to the plaintiff's property did not "work" a taking. 240 The plaintiff appealed, and before the court of appeals could hear the case the supreme court assumed jurisdiction on its own initiative, ex mero motu. 241

On appeal the plaintiffs raised two related constitutional issues. The first assertion was that the city's refusal to process the Marsh Creek Townes application was a "violation of due process under Article 1, § 19 of the N.C. Constitution ... and of the fourteenth amendment of the U.S. Constitution." 242 In a unanimous opinion written by Justice Meyer, the supreme court held:

[W]here a developer submits a project plan for approval and undertakes the development of the property according to the approved preliminary plan, a city may refuse to consider a subsequent stage of the overall project that fails to take into account the prior development as proposed and undertaken in the prior stages of development. 243

The plaintiff argued that the city was exercising its "police power to further the narrow private interests of the Homeowners Association members," 244 and that the city was required to approve the subdivision because all of the requirements of the city code were met. 245

The court agreed that the city's police power must be used for public instead of private purposes, but found no abuse of that power. 246 The court held that the developer had not met the city's requirements, stating "the project [Marsh Creek Townes] fails the


239. River Birch, 326 N.C. at 106, 388 S.E.2d at 541.
240. Id. at 107, 388 S.E.2d at 542.
241. Id. at 103, 388 S.E.2d at 539. The supreme court acted pursuant to N.C. Gen. Stat. § 7A-31(a) and N.C. R. App. P. 15(e)(2). Note that this case has the same procedural posture as Finch, see supra notes 117-121 and accompanying text.
242. Id. at 115, 388 S.E.2d at 546-547. See N.C. Const. art. 1, § 19. Supra note 85 and accompanying text. The U.S. Const. amend. XIV is discussed supra note 7 and accompanying text.
243. Id.
244. Id.
245. Id. at 116, 388 S.E.2d at 547.
246. Id.
approval process because it differs significantly from the prior preliminary plan as approved and undertaken by the developer.”247

Also, the court held that the city can use its authority to ensure compliance with its established standards.248 The court stated that “one such standard is that a final approved plat shall comply substantially with the prior [preliminary] approved plat.”249

Thus, the developer is bound by the preliminary plat it submitted and built. The court went on to say, “Section 10-3013 (b)250 requires preliminary plats to show . . . the [b]oundary line of the proposed development, the lot lines, parcels of land to be dedicated to public use . . . Thus, the City’s refusal to process the . . . proposal is not an abuse of police power; rather, this refusal is the result of enforcement of established standards.”251

The court also found that the developer was estopped from attacking the validity of the subdivision ordinance because he received significant benefits under that ordinance, such as the ability to increase density “to greater than otherwise allowed under the zoning ordinance. Raleigh explicitly ties this right to subdivision approval.”252 The court held that, “having substantially undertaken the development according to the approved preliminary plan, [developer] indicated its assent to the condition that development be according to the approved preliminary plan “reserving three acres as common open space.”253 In conclusion, the court found that the developer could not “attack a condition of its own making which the City . . . accepted.”254

The plaintiff’s second assignment of error was that the city ordinances requirement that the parcel in dispute be transferred

247. Id.
248. Id.
249. Id.
251. River Birch, 326 N.C. at 117, 388 S.E.2d at 548.
252. Id. at 119, 388 S.E.2d at 549. The ordinance provision reads, in relevant part:

[T]he developers of residential projects land under unified control . . . may reduce the size of individual lots and provide different housing styles such as townhouses . . . as permitted by these regulations and the zoning ordinance by receiving subdivision approval in accordance with this chapter.

253. River Birch, 326 N.C. at 119, 388 S.E.2d at 549.
254. Id.
to the homeowners association constituted a "taking of land." The court used a two part test to determine if a taking had occurred. The first prong of the test was the ends-means test, asking if there is a rational relationship between the ends sought and the means taken. The second prong was the determination of "whether the property has a practical use and a reasonable value," after the regulation is applied.

As to the first part of the test, the court found, "The objective of preserving open space is within the scope of a municipality's police power." The Raleigh subdivision ordinance "is part of a comprehensive plan of development that applies uniformly to all property owners and from which all property owners, including developers, will benefit." The court concluded that Raleigh's ordinance was a reasonable means to provide for open space as authorized by section 160A-402 of the General Statutes because the ordinance ensures that open space will exist and be main-

255. Id. at 120, 388 S.E.2d at 549.
256. Id. at 121, 388 S.E.2d at 550. See supra notes 86-91 and accompanying text. See also Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); infra notes 336-338 and accompanying text (applying the "rational nexus" test).
257. River Birch, 326 N.C. at 121, 388 S.E.2d at 550 (quoting Finch, 325 N.C. 352, 364, 384 S.E.2d 8, 15 (1989)).
258. Id. (citing Agins v. City of Tiburon, 447 U.S. 255 (1980)).
259. Id. (citing supra at notes 51-53 and accompanying text.
260. This section of the General Statutes gives municipalities broad powers to take action to preserve open space. It reads:

The General Assembly finds that the rapid growth and spread of urban development in the State is encroaching upon, or eliminating, many open areas and spaces of varied size and character, including many having significant scenic or esthetic values, which areas and spaces if preserved and maintained in their present open state would constitute important physical, social, esthetic, or economic assets to existing and impending urban development. The General Assembly declares that it is necessary for sound and proper urban development and in the public interest of the people of this State for any county or city to expend or advance public funds for, or to accept by purchase, gift, grant, bequest, devise, lease, or otherwise, the fee or any lesser interest or right in real property so as to acquire, maintain, improve, protect, limit the future use of, or otherwise conserve open spaces and areas within their respective jurisdictions as defined by this Article.

The General Assembly declares that the acquisition of interests or rights in real property for the preservation of open spaces and areas constitutes a public purpose for which public funds may be expended or advanced.

tained in the future. In final answer to the question of whether the subdivision ordinance met the ends-means test, the court held that "a city ordinance providing for conveyance of open space to an association of home owners living within the subdivision is reasonably related to the purpose of preserving open space."

As to whether the subdivision ordinance denied the reasonable value and practical use of the parcel, the plaintiff attempted to define the estate taken as just the three acres of "common open space," which, it argued, was entirely taken. The court disagreed, finding that the appropriate estate was the entire 19.6 acres. The court noted that the developer received substantial benefits by obtaining preliminary approval for the whole 19.6 acres, including an increase in density which enabled the developer to make "substantial profits." The court reasoned, "[w]here the subdivider creates the specific need for the parks, it is not unreasonable to charge the subdivider with the burden of providing them." As to the second prong of the test, the court concluded that the "denial of a project application which would violate the valid condition of a previously approved and substantially undertaken proposal works no taking of the three-acre area."

This general philosophy of the North Carolina law of regulatory takings has been in rough accord with modern federal decisions. A majority of the North Carolina Supreme Court as led

261. River Birch, 326 N.C. at 121, 388 S.E.2d at 550. Note that the city is exchanging a slight increase in residential density for open space at for no initial outlay of public funds. Perpetual maintenance is assured, at least for as long as the Homeowners Association exists. Whether the entire development provides a net revenue gain to the city is another question, and one which is beyond the scope of this inquiry.

262. Id.

263. Id. This attempt to define a small estate for takings purposes has precedent in takings law. See, e.g., Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) (support estate); First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987) (temporal estate). But see Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) (all of plaintiff's property in the vicinity of Grand Central Terminal considered to be one estate.)


265. Id.

266. Id. at 122, 388 S.E.2d at 551 (citing Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182, 187-88 (Mont. 1964)).

267. Id.

by Justice Meyer has upheld all zoning ordinances and related exactions promulgated under the General Statutes and/or through validly adopted ordinances. The court has not so far overturned the legislative judgement of a city council or county commission. Absent any clear signals from the United States Supreme Court, this body of precedent should mean that the law is settled in North Carolina. It is not. The United States Supreme Court has begun to express displeasure with the Penn Central doctrine. Starting with the trio of U.S. Supreme Court cases decided in 1987 discussed in the next section, the federal courts began to overturn long established notions of takings. Also, the General Assembly has recently considered numerous bills to limit development related exactions and to find that property owners rights are vested vis a vis zoning changes. The General Assembly has adopted a few minor bills in the area of “vested rights” but has done nothing to change the basics of the holdings discussed in this section. To date, the North Carolina courts have not changed their position in response to the current federal holdings in this area, which are discussed infra.

VI. THE 1987 U.S. SUPREME COURT TRILOGY OF TAKING CLAUSE DECISIONS

In 1987, three important decisions issued by the United States Supreme Court signaled the beginning of a shift in the way in which the Court views regulatory takings.269 The outlines and ramifications of this shift are still unclear.270 Potentially, these changes are the most profound since the Supreme Court found comprehensive zoning ordinances to be constitutional in the 1920s.271

In Keystone Bituminous Coal Assoc. v. DeBenedictis,272 the Court reversed Justice Holmes’ seminal decision on the law of reg-


271. See Euclid v. Ambler Realty, 272 U.S. 365 (1926) (rejecting a regulatory takings claim against a municipal zoning ordinance). See also Nectow v. City of Cambridge, 277 U.S. 183 (1928) (overturning a zoning ordinance for want of the proper findings of fact, but the constitutionality of zoning ordinances was upheld).

ulatory takings espoused in *Pennsylvania Coal v. Mahon*.\(^\text{273}\) Since *Mahon* laid the basis for the analytical framework of much of modern takings law, it deserves a brief explanation in order to better understand the implications of *Keystone*.

The Pennsylvania statutes under attack as facially invalid on regulatory takings grounds in both *Mahon* and *Keystone* were very similar. The Kohler Act was at issue in *Mahon*. The Kohler Act forbade the mining of anthracite coal in such a way as to cause the subsidence of human habitation or within 150 feet of any habitation, except where the surface estate and the underground coal were owned by the same person.\(^\text{274}\)

The Pennsylvania Bituminous Mine Subsidence and Land Conservation Act (PBMSA) was at issue in *Keystone*.\(^\text{275}\) The PBMSA prohibited coal mining that caused subsidence damage to pre-existing public buildings, dwellings and cemeteries.\(^\text{276}\) Pursuant to its PBMSA authority, the Pennsylvania Department of Environmental Resources (DER) promulgated implementing regulations requiring that 50% of the coal beneath protected structures be kept in place to provide surface support.\(^\text{277}\) Section "6 of the PBMSA [authorized] the DER to revoke mining permit[s] if the removal of coal [caused] damage to a structure or area protected by § 4 and the operator [did] not within six months ... [satisfy] a claim."\(^\text{278}\)

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273. 260 U.S. 393 (1922).
277. That section of the Pennsylvania Act reads:

In order to guard the health, safety and general welfare of the public, no owner, operator, lessor, lessee, or general manager, superintendent or other person in charge of or having supervision over any bituminous coal mine shall mine bituminous coal so as to cause damage as a result of the caving-in, collapse or subsidence of the following surface structures in place on April 27, 1966, overlying or in the proximity of the mine.

(1) Any public building or any noncommercial structure customarily used by the public, including but not limited to churches, schools, hospitals, and municipal utilities or municipal public dwelling service operations,

(2) Any dwelling used for human habitation; and

(3) Any cemetery or public burial ground; unless the current owner of the structure consents and the resulting damage is fully repaired or compensated."

52 PA. CONS. STAT. ANN. § 1406.4.
Except for *de minimis* differences, the two statutes differ only in their application. The later statute applied to all structures in all the coal fields of western Pennsylvania; the Kohler Act was limited primarily to towns around Scranton. The Holmes Court found that the Kohler Act worked as a taking and was unconstitutional; the Stevens Court found just the opposite. In order to ascertain whether there was a taking, Justice Holmes devised the "diminution in value test."

Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law . . . some values are enjoyed under an implied limitation and must yield to the police power . . . the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution . . . [T]he question depends upon the particular facts.

Again, a few pages later, Holmes pithily opined that the standard by definition was an *ad hoc* one: "[T]his is a question of degree and therefore cannot be disposed of by general propositions." The North Carolina rule on takings mentioned *supra* seems to be in general accord with the doctrine of diminution of value.

In *Keystone* Justice Stevens repeated modern Supreme Court formulations of the test for regulatory takings — that it is a determination that the public must pay for the property taken, which "necessarily requires a weighing of private and public interests." Justice Stevens also noted that, "although a comparison of values before and after [a regulatory action] is relevant, . . . it is by no means conclusive." Justice Stevens also quoted *Mahon* on determining the line between a regulatory taking and a rea-

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280. See *infra* notes 295-302 and accompanying text.
283. *Id.* at 415. In his well-reasoned dissent Justice Brandeis said Justice Holmes was really misapplying the "average reciprocity of advantage test." *Pennsylvania Coal*, 260 U.S. at 422. Some commentators have also analyzed Holmes' underlying rationale as being this test. See Epstein, *supra* note 270.
284. See generally *supra* notes 102-268 (entire spectrum of North Carolina decisions); see also *supra* notes 98-101 and accompanying text (Penn Central holding).
286. *Id.* at 490 (quoting Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).
sonable exercise of government power and concluded that "the question depends upon the particular facts."\(^\text{287}\)

If the decision on whether a regulatory taking has occurred is an ad hoc one, it should depend entirely on the weight a sitting court gives to the factors it chooses to examine. In Mahon, in terms of the public benefit, Holmes found that as a single private house was affected there was a limited public interest.\(^\text{288}\) No question of personal safety was involved, as the statute provided for notice before any mining could cause subsidence.\(^\text{289}\) As to the private costs inflicted by the statute, Holmes found that without the right to mine, coal has no value. "To make it commercially impracticable to mine ... coal has the same effect for constitutional purposes as appropriating ... it."\(^\text{290}\)

Holmes believed that the state's taking of the support estate was analogous to the government taking a street right-of-way without paying for it.\(^\text{291}\) The public should only receive the rights it pays for and neglect to purchase subsurface rights meant that the surface owners should bear the loss.\(^\text{292}\) Holmes concluded that the "act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities ... where the right to mine ... coal has been reserved."\(^\text{293}\)

In Keystone Justice Stevens examined a very similar statute and set of facts, yet came to opposite conclusions on almost every point. Procedurally, both cases involved a facial challenge of unconstitutionality,\(^\text{294}\) yet Stevens found that the plaintiff lost no profit and that no mines were closed as a result of the statute. In analyzing the same factors as Holmes, Stevens held:

First, unlike the Kohler Act, the character of the governmental action involved here leans heavily against finding a taking; ... Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare. Second, there is no record in this case to support a finding, similar to the one the Court made in

\(^{287}\) \textit{Id.} at 474.
\(^{288}\) \textit{Pennsylvania Coal}, 260 U.S. at 413-14.
\(^{289}\) \textit{Id.} at 414.
\(^{290}\) \textit{Id.}
\(^{291}\) \textit{Id.} at 415. Pennsylvania recognizes three estates in real property: the surface estate, the subsurface estate (or mineral rights) and the support estate. Holmes found that the entire support estate was taken. If a support estate is not recognized, the extent of the taking is markedly diminished.
\(^{292}\) \textit{Id.} at 415.
\(^{293}\) \textit{Id.} at 414.
\(^{294}\) \textit{Keystone}, 480 U.S. at 495.
Pennsylvania Coal, that the Subsidence Act makes it impossible for petitioners to profitably engage in their business . . . “[n]one of the indicia of a statute enacted solely for the benefit of private parties identified in Justice Holmes opinion are presented here. First, Justice Holmes explained that the Kohler Act was a private benefit statute since it ordinarily does not apply to land when the surface is owned by the owner of the coal.” The Subsidence Act, by contrast, has no such exception. The current surface owner may only waive the protection of the Act if the DER consents.

As to the diminution in value, the Keystone court held that there was “no showing of diminution in value sufficient . . . to satisfy the heavy burden placed upon one alleging a regulatory taking.” Contrast Holmes' finding in Pennsylvania Coal: “[The] Kohler Act made mining of certain coal commercially impracticable . . .”

In the face of such a clear opinion and based on such similar facts and statutes, how could Stevens have reached such a contradictory result? One commentator suggested that Stevens assumed away Holmes' opinion as mere dicta.

"[U]ncharacteristically, Justice Holmes provided the parties with an advisory opinion discussing 'the general validity of the Act.'" Once free of the constraints of stare decisis, Justice Stevens considered the three real property estates (surface, support and mineral or sub-surface) to be one estate. By revising the definition of the property taken, Stevens could find that only some of the entire estate had been lost, instead of all of the support estate as Holmes held. Possibly the most telling reason was that Stevens believed that times had changed and that the law needed to keep up with current land use controls. “The Subsidence Act is a prime example that circumstances may so change in time . . . as to clothe

295. Id. at 485-486 (quoting Pennsylvania Coal, 260 U.S. at 414) (citation omitted).
296. Id. at 493 (quoting Pennsylvania Coal, 260 U.S. at 393).
297. Epstein, supra note 270, at 15.
298. Keystone, 480 U.S. at 483. The question as to whether Holmes' opinion was advisory is still controversial. The Commonwealth of Pennsylvania intervened as an amicus to argue the validity of the statute.
299. This approach to regulatory takings was in accord with modern doctrine. A “clear” definition of the evolved rule is found in Penn Central. “In deciding whether a particular governmental action has effected a taking, this Court focuses . . . both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the ‘landmark site.’” Penn. Central Transp. Co. v. City of New York, 438 U.S. 104, 130-131 (1978).
with a [public] interest what at other times . . . would be a matter of purely private concern.

The second and third cases in the 1987 trilogy at least in part reversed the Supreme Court’s trend of holding that there is no regulatory taking unless property is physically invaded. First English Evangelical Lutheran Church v. Los Angeles County (First English) was the first modern case in which the Supreme Court held that a regulatory taking through a zoning ordinance requires compensation.

In 1957 the plaintiff in First English built a camp for the handicapped called Lutherglen. Lutherglen was located beside a stream in a mountain canyon outside Los Angeles. In 1978 a flood destroyed the camp. The county adopted an “interim ordinance prohibiting the construction or reconstruction of any building or structure in an interim flood protection area that included . . . Lutherglen” in January, 1979. The California Supreme Court refused to hear an appeal on October 17, 1985, six years and ten months from the date of adoption of the “interim ordinance.

The plaintiffs appealed to the United States Supreme Court on a claim of regulatory taking, seeking a remedy of monetary damages. The county argued that if a taking was found, the correct relief would be to invalidate the ordinance, but order no damages, “until the ordinance was finally declared unconstitutional, and then only for any period after that declaration for which the county seeks to enforce [the interim ordinance]."
Writing for the majority, Chief Justice Rehnquist\(^{309}\) held that "where the government's activities have already worked a taking of all use of the property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."\(^{310}\) The analysis used to determine that there was a taking was the same used to find the government liable for temporary takings where the government moved into actual physical possession of leased property for a term of years.\(^{311}\) Once a taking was found, any temporary characterization was irrelevant to the majority. "Temporary takings which ... deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."\(^{312}\)

The majority rejected the defendant's argument that the proper remedy was to find the ordinance invalid, stating: "It is important to recognize that temporary takings which ... deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."\(^{313}\)

The majority reversed the judgment of the lower court and remanded the case to see if a taking had occurred, and if so, what the proper computation of damages might be.\(^{314}\)

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\(^{309}\) Id. at 305. (Joining Chief Justice Rehnquist were Justices Brennan, Marshall, Powell, White and Scalia. Justice Stevens wrote the dissent, in which Justices Blackmun and O'Connor joined.)

\(^{310}\) Id. at 321.

\(^{311}\) Id. at 318. In First English, the court cited United States v. Dow, 357 U.S. 17, 26 (1958), which in turn cited a string of World War II era cases for the proposition that the government must compensate even a temporary appropriation of private property.

\(^{312}\) First English, 482 U.S. at 318.

\(^{313}\) Id. at 319.

\(^{314}\) Id. at 322. The measure of damages for temporary takings is apparently well established. "Where property is taken as the result of government action for a temporary period of time, rather than permanently, the measure of compensation is not the fair market value of the property, but what the property is fairly worth during the time for which it is held or encumbered: in other words, the fair rental value of the property for the period it was held, or encumbered." Finch, 325 N.C. at 376, 384 S.E.2d at 21 (citing 27 Am. Jur. 2d Eminent Domain § 351 (1966); 29A C.J.S. Eminent Domain § 142 (1965); see Annotation, Elements and Measure of Compensation in Eminent Domain for Temporary Use and Occupancy, 7 A.L.R. 2d 1297 (1949)). Justice Brennan articulated a similar rule in San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981) (Brennan, J., dissenting):

The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a 'taking, the government entity
Speaking for the dissenters, Justice Stevens distinguished a temporary physical taking, which may require compensation, from a regulatory taking for which no taking will be found unless a major portion of the property is destroyed.315 Delay in approving development plans or issuing building permits were viewed as mere "incidents of ownership."316 Any "temporary diminution in the value of property" should not automatically activate the compensation requirement of the Takings Clause, "absent extraordinary delay."317

The key issue is whether the majority correctly applied the doctrine of temporary physical takings to temporary regulatory takings. Stevens' principal point was that the former could not be stretched to encompass the latter.318 In dissent, Stevens wrote:

The diminution of value inquiry is unique to regulatory takings. Unlike physical invasions, which are relatively rare and easily identifiable without making any economic analysis, regulatory programs constantly affect property values in countless ways, and only the most extreme regulations can constitute takings.319

Under what circumstances, if any, the dissent would find a regulatory taking is unclear. The defense's theory, that there should never be compensation for a temporary regulatory taking was overturned by a majority of six Justices. This may open the door for more findings of a regulatory taking in the future.

The final 1987 case, Nollan v. California Coastal Commission,320 involved the state government’s requirement that issuing a permit to replace an old beach house with a newer dwelling depended on granting the public access to the beach.321 The Supreme Court found that such an exaction would not be a taking only if there was a "rational nexus" between the subject of the permit and the state's easement.322

must pay just compensation for the period commencing on the date the regulation first effected the 'taking, and ending on the date the government entity chooses to rescind or otherwise amend the regulation.

Id.

315. First English, 482 U.S. at 329.
316. Id. at 333-34.
317. Id. at 332-33.
318. Epstein, supra note 283.
319. First English, 482 U.S. at 329.
321. Id. at 827-828.
322. Id. at 837.
The plaintiff leased property with an option to buy. A 504-square-foot beach house was on the property. In order to replace the dwelling with a two-story, three-bedroom, 1,674-square-foot residence with a 817-square-foot garage plaintiff was required to obtain a coastal development permit from the California Coastal Commission. The commission granted the permit on condition that the plaintiffs give a “lateral easement” across the beach side of the lot between the mean high tide line and the plaintiffs sea-wall. The easement extended across forty-three other ocean front lots (out of a total of sixty) in the subdivision. The ultimate purpose of the easement was to link two separate units of the California state parks system. Historically, the public had been allowed to travel along the beach by both the original owners (who first leased the lot to the plaintiff) and later the plaintiff.

The plaintiff refused to accept the condition of the permit and ultimately built a new dwelling without the permit. The plaintiff also “filed a . . . petition for a writ of . . . mandamus with the superior court, in which he argued that imposition of the access condition violated the Takings Clause of the Fifth Amendment as incorporated against the States by the Fourteenth Amendment.” The court found for the plaintiff on statutory grounds, thus not reaching the constitutional question. The court of appeals reversed. The Nollans then appealed to the U.S. Supreme Court, raising only the constitutional question.

Writing for the majority, Justice Scalia found that a taking had occurred, based on the plaintiff's loss of the property right of exclusion. The majority explained this holding in the following terms: “As to property reserved by its owner for private use, the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property.”

323. Id.
324. Id. at 828.
325. Id.
326. Id. at 858.
327. Id. at 828-30.
328. Id. at 829.
329. Id.
330. Id. at 830.
331. Id. at 831.
332. Id.
In other words, the majority found that the right of individuals to pass over the plaintiffs' property equaled a permanent physical occupation. Where a government action results in a permanent physical occupation, the Supreme Court has "uniformly found a taking . . . without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." Having decided that requiring the uncompensated conveyance of an easement would violate the Fourteenth Amendment, Justice Scalia then examined the question of whether requiring the conveyance as a condition of receiving a permit removes the regulation from the ambit of a taking. The majority articulated the test in this case as follows: "[The] 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." The Court applied the test and held that the lack of nexus between the condition [lateral easement] and the original purpose of the building restriction [to protect the public's ability to see the beach, to help the public to overcome a psychological barrier to using the beach and preventing congestion of the beach] converts that purpose . . . [to] the obtaining of an easement . . . without payment of compensation.

The dissent disagreed with almost every point in the majority's analysis. In the primary dissent, Justice Brennan wrote that the majority was "simply wrong that there is no reasonable relationship between the permit condition and the specific type of

334. Id. at 832.
335. Id. at 831-32 (quoting Loretto, 458 U.S. at 434-35).
336. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987). Justice Scalia's exact words were: "Given then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome." Id. Epstein, supra note 203 at 35, believes that Justice Scalia invented what he terms a "theory of unconstitutional conditions."
337. Id. at 834 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).
338. Id. at 837.
339. See id. at 826 (outlining the Court's vote). Justice Brennan wrote the longest and most closely reasoned dissent. Justice Marshall joined in Justice Brennan's dissent. Justice Blackmun filed a brief dissent. Justice Stevens also filed a dissent, in which he was joined by Justice Blackmun. Stevens' primary point in his dissent was that Justice Brennan's dissent was much improved over his dissent in San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981). The San Diego dissent is discussed supra at note 314.
burden on public access created by the appellant’s proposed development . . . . [T]his record reveals rational public action by any conceivable standard.”  

First, Justice Brennan believed that the public’s view of the beach is related to the size of the building, and that it is a rational public purpose to provide access across the beach so that people on the road may see the public on the beach. Second, this dissent believed that the majority was in error in assuming that the “fit between the burden and the exaction” only comprised visual access. Brennan held that the Nollans’ new house also blocked physical access along the beach as the mean high tide line fluctuated seasonally.

Also, Justice Brennan argued that the majority’s takings analysis was incorrect, saying that the California exaction did not interfere with the plaintiff’s investment-backed expectations. “[P]hysical access to private property in itself creates no takings problem if it does not unreasonably impair the value or use of [the] property.” According to Justice Brennan, the plaintiffs made “no tenable claim” that their enjoyment or use of the property was diminished.

Moreover, the dissent contended that the California regulation was a conditional, as opposed to a unilateral, government action. Government was not interfering with existing property rights, but rather responding to the plaintiff’s request to intensify coastal development. As such, the dissent argued, the average “reciprocity of advantage” test applied — the plaintiff got a bigger, more valuable house, while the government affirmed public beach access; access which the plaintiffs could also use.

Justice Brennan next maintained that the plaintiffs’ “claim of economic injury is flawed because it rests on the assumption of entitlement to the full value of their new development.” The plaintiffs should have had no expectation to be able to exclude the public as the California Constitution “states that no one possess-

340. Id. at 314.
342. Id. at 850.
343. Id. at 850-51.
344. Id. at 853.
345. Id. at 855 (quoting Prune Yard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980)).
347. Id. at 855.
348. Id. at 856 (quoting Pennsylvania Coal, 260 U.S. at 415 (1922)).
349. Id. at 857.
ing the frontage of any navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose.\textsuperscript{350} Also, owners and lessees of the property had allowed the public to cross the property since the turn of the century.\textsuperscript{351} The plaintiffs were on "notice when requesting a new development permit that a condition of approval would be a provision ensuring [the] public lateral access to the shore."\textsuperscript{352} Thus the plaintiffs had no investment-backed expectations and the permit condition did not take their property without compensation.\textsuperscript{353} In the opinion of the dissent the defense had proven that the right to exclude was not one of the plaintiffs' property rights.\textsuperscript{354}

The overall effect of these three cases is still controversial. They may be no more than an aberration in the tangled skein of takings law. On the other hand, they may signal a new trend toward a new approach to assessing regulatory takings. The new precedent that these cases establish should be carefully considered by students of this area of the law.

The holdings of the individual cases offer little guidance. The Supreme Court typically establishes the test of a taking, but then remands the case to a lower court to determine if, under the unique facts of the case, a taking has occurred. \textit{First English} did find a regulatory taking with no physical invasion of property for the first time since 1922.\textsuperscript{355} Also, for the first time, damages were deemed appropriate for a temporary regulatory taking. Some commentators believe that \textit{Nollan} created an entirely new test for regulatory takings. One view is that Justice Scalia "abandoned the rational basis test of prior land use cases from \textit{Euclid} to \textit{Agins} in favor of a standard demanding intermediate scrutiny of government restrictions."\textsuperscript{356} Others, including the North Carolina Supreme Court, appear to view the rational nexus test of \textit{Nollan} as merely another formulation of the existing tests. The only certainty is that the courts will continue to wrestle with this question. New opinions may do little to clarify the ultimate direction

\begin{itemize}
\item \textsuperscript{350} Id. (quoting \textsc{California Const.} art. X, § 4 (Justice Scalia chose not to address the state constitutional question, pointing out that it had been raised neither by the coastal commission nor the state in the lower courts.)).
\item \textsuperscript{351} Id. at 858.
\item \textsuperscript{352} Id.
\item \textsuperscript{353} Id. at 859-60.
\item \textsuperscript{354} Id.
\item \textsuperscript{355} See \textsc{Pennsylvania Coal v. Mahon}, 260 U.S. 393 (1922).
\item \textsuperscript{356} Epstein, \textsc{supra} note 270 at 38.
\end{itemize}
of the Supreme Court. For example, the next section discusses a new holding that can be interpreted as a profound change in takings jurisprudence.

VII. **LUCAS v. SOUTH CAROLINA COASTAL COUNCIL**

The United States Supreme Court next ventured into this area of the law with the long awaited decision in *Lucas v. South Carolina Coastal Council*.\(^{357}\) Before turning to the federal decision a brief look at the South Carolina Supreme Court’s decision is useful both as a forecast (in which the opposite decision was reached) to the arguments of the federal justices and as a cautionary example of what not to do in the new environment for the analysis of regulatory takings that the Rehnquist court is unveiling one case at a time.

A single recitation of the facts will suffice, as the two courts view of the facts was not markedly different. In 1986 the plaintiff, David H. Lucas, purchased two ocean front lots in the Beachwood East Subdivision of the Wild Dunes development, Isle of Palms, Charleston County, South Carolina for $975,000.\(^{358}\) The lots were separated by an existing single family dwelling; other single family dwellings existed along the stretch of beach where Lucas property was located. Evidence at trial tended to show that the lots were underwater at extremely high tides and during storms. The whole area had been inundated as recently as 1973.\(^{359}\) At the time of the trial the width of the beach was 300 feet.\(^{360}\)

In 1988, the S.C. General Assembly passed the Beachfront Management Act (Act),\(^{361}\) limiting construction in the beach and dune “critical area” seaward of a “set-back line”.\(^{362}\) In the area in controversy, the base-line was established by an analysis of historical shoreline locations. The required setback for residences is forty times the annual erosion rate.\(^{363}\) Plaintiff’s properties were east or seaward of the baseline.\(^{364}\) The plaintiff was prohibited by

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362. Id.
the Act from constructing any permanent structures save a walkway and small deck on his lots. The trial court found a taking, awarding Lucas $1,232, 387.50 as "just compensation for the regulatory taking." The South Carolina Supreme Court reversed this ruling, in a three-to-two decision.

At the South Carolina Supreme Court Lucas conceded that the Act is properly and validly designed to preserve the beaches and that the preservation of the public resource is a "laudable goal." As such the court declared that it was "in no position to

365. Id.
366. Id.
367. Id.
368. Id. The Court quoted ALL of the Acts findings and policy sections: SECTION 1. The General Assembly finds that:

(1) The beach/dune system along the coast of South Carolina is extremely important to the people of this State and serves the following functions:
(a) protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner;
(b) provides the basis for a tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of the state's economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues;
(c) provides habitat for numerous species of plants and animals, several of which are threatened or endangered. Waters adjacent to the beach/dune system also provide habitat for many other marine species;
(d) provides a natural health environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being.
(2) Beach/dune system vegetation is unique and extremely important to the vitality and preservation of the system.
(3) Many miles of South Carolina's beaches have been identified as critically eroding.
(4) Chapter 39, Title 48, Code of Laws of South Carolina, 1976, Coastal Tidelands and Wetlands, does not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to effectively protect the integrity of the beach/dune system. Consequently, without adequate controls, development has been unwisely sited too close to the system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development.
(5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened
structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beach front property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beach front property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.

(6) Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.

(7) Inlet and harbor management practices, including the construction of jetties which have not been designed to accommodate the long shore transport of sand, can deprive downdrift beach/dune systems of their natural sand supply. Dredging practices which include disposal of beach quality sand at sea also can deprive the beach/dune system of much-needed sand.

(8) It is in the state's best interest to protect and to promote increased public access to South Carolina's beaches for out-of-state tourists and South Carolina residents alike.

(9) Present funding for the protection, management, and enhancement of the beach/dune system is inadequate.

(10) There is no coordinated state policy for post-storm emergency management of the beach/dune system.

(11) A long-range comprehensive beach management plan is needed for the entire coast of South Carolina to protect and effectively manage the beach/dune system, thus preventing unwise development and minimizing man's adverse impact on the system. (Emphasis added).

Section 2 of the Act reads:

SECTION 2. In recognition of its stewardship responsibilities, the policy of South Carolina is to:

(1) protect, preserve, restore, and enhance the beach/dune system, the highest and best uses of which are declared to provide:

(a) a barrier and buffer from high tides, storm surge, hurricanes, and normal erosion;

(b) a public area which serves as a major source of state and local revenue;

(c) habitat for indigenous flora and fauna;

(d) a place which harbors natural beauty;

(2) create a comprehensive, long-range beach management plan and require local comprehensive beach management plans for the protection, preservation, restoration, and enhancement of the beach/dune system. These plans must promote wise use of the state's beach front to include a gradual retreat from the system over a forty-year period;
question the legislative scheme or purpose" of the Act.\footnote{369} By failing to attack the legislative findings, the court deemed that Lucas had conceded his case.

The court stated that it too was bound by the legislative findings. Lucas sole theory of recovery was that a “regulatory taking” occurred because he was deprived of “all economically viable use” of his property and was thus due compensation.\footnote{370} The court noted that the United States Supreme Court had not settled on a rule of takings, but instead analyzed “factors” to determine if a regulatory taking existed. The court used the factors from \textit{Keystone Bituminous Coal Association v. DeBenedictis} in its analysis.\footnote{371} “[T]he [United States] Supreme Court has time and again held that when a state merely regulates use, and acts to prevent a serious public harm, there is no ‘taking’ for which compensation is due.”\footnote{372} As he did not challenge the government’s motives, the court held that Lucas conceded that this “nuisance-like exception” applied.\footnote{373}

The South Carolina Supreme Court majority noted that Lucas’ argument was tailored to Justice Rehnquist’s dissent in

\footnote{369. \textit{Lucas}, 404 S.E.2d at 896.}
\footnote{370. \textit{Id.} at 898.}
\footnote{372. \textit{Id.} at 900.}
\footnote{373. \textit{Id.} at 900.}
Justice Toal interpreted Rehnquist’s dissent as holding “that in no case has the Court accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation.” Justice Toal noted that “Lucas’ argument tracks the position of Justice Rehnquist’s dissent in Keystone.” The South Carolina majority cited local case law to uphold their reaffirmation of the takings test from Keystone. The majority did not recognize the adverse United States Supreme Court authority of First English and Nollan.

The minority opinion from South Carolina is a forecast of the federal majority’s argument. The dissent noted that by the logic of Keystone, “[n]o matter how valueless a person’s property [became after a regulatory taking], if the taking was pursuant to a valid exercise of the police power it could never be compensated. [T]his could become an exception which would swallow the rule.”

Next, the minority interpreted the rule of Keystone to require the court to review the public purpose of a challenged regulation first. Then, the regulation may be found unconstitutional because the public purpose for which it was enacted may be deemed illegitimate or insufficient. Alternatively, the regulation may prevent a nuisance and, as such, require no compensation. In the third recognized alternative, the court finds that no nuisance is abated; a legitimate state interest is advanced, but compensation is required because it can be shown that all economically viable use of the regulated property has been lost.

The minority found that the Beachfront Management Act advanced a valid state interest, but in doing so it deprived Lucas of all economic use of his property. The test is “a comparison of the value that has been taken . . . with the value that remains in the property.” Under this test, the “Act’s prohibition against the erection of any habitable structure caused the value of the lots

375. Id.
376. Id. at 901 (citing Keystone, 480 U.S. at 503 (Rehnquist J., dissenting)).
377. Lucas, 404 S.E.2d at 901 (citing Carter v. South Carolina Coastal Council, 314 S.E.2d 327 (1984)).
378. See supra notes 301-338 and accompanying text.
380. Lucas, 404 S.E.2d at 906.
381. Id.
382. Id. at 907 (citing Keystone, 480 U.S. at 499 (Rehnquist, J., dissenting)).
Six members of the United States Supreme Court found that there had been a taking. The Court upheld the Nollan and Keystone tests for a taking. "[W]here regulation denies all economically beneficial or productive use of land" a taking will be found. However, the Court did little to clarify this test, or to describe the measurement of the estate allegedly taken or the amount of the taking. The Court then balanced the "average

383. *Id.* at 907. The dissent would not have awarded any monetary damages until Lucas had been denied a special permit to build on his lots. In 1988 (between the briefing and the oral arguments) the legislature amended the act to provide a variance procedure to allow some structures seaward of the baseline.

384. The majority was comprised of Justices Scalia, White, O'Connor, Thomas and the Chief Justice. Justice Kennedy concurred separately. In a separate statement Justice Souter opined that *certiorari* had been improvidently granted. Justices Blackmun and Stevens dissented.


387. In his now famous *dicta* in footnote 7, Scalia described what *may* become the law on quantifying the estate taken:

Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme—and, we think, unsupportable—view of the relevant calculus, see *Penn Central Transportation Co. v. City of New York* where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the taking claimant's other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. Compare *Pennsylvania Coal Co. v. Mahon* (law restricting subsurface extraction of coal held to effect a taking), with *Keystone Bituminous Coal Assn. v. DeBenedictis* (nearly identical law held not to effect a taking). The answer to this difficult question may lie in how the owners reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect
reciprocity of advantage” test from Pennsylvania Coal against the requirement that “land ... be left ... in its natural state,” and found that the latter “carries with [it] a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.” The Court found the latter to be unacceptable.

Lucas’ failure to challenge the purposes of the Beach Management Act brings the case within the line of Supreme Court cases sustaining against due process and takings clause challenges the state’s use of its police powers to enjoin a property owner. The Court admitted that many of its previous decisions suggested that government can ban “harmful or noxious uses” of property. However, the majority held that the principle should be that the “restrictions [are] reasonably related to the implementation of a policy ... expected to produce a widespread public benefit and applicable to all similarly situated property.”

Speaking rhetorically, the Court asked who can say whether a given regulation is “benefit conferring” or “harm preventing.” The Court rejected the established benefit-harm analyses of taking issues, saying in essence that the legislatures of the various states are unable to distinguish between a “benefit conferring” and a “harm preventing” statute. “Whether Lucas’ construction of single family residences on his parcels should be described as

...to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the “interest in land” that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act lefty each of Lucass beachfront lots without economic value.

Lucas, 112 S. Ct. at 2894 n. 7 (citations omitted).

388. Id. (citing Pennsylvania Coal, 260 U.S. at 415).

389. Lucas, 112 S. Ct. at 2895.


391. Lucas, 112 S. Ct. at 2897.

392. Id.

393. Id.

394. Id. at n. 10.

bringing ‘harm’ to South Carolina’s adjacent ecological resources thus depends principally upon whether the describer believes that the State’s use interest in nurturing those resources is so important that any competing adjacent use must yield.”396 By the Court’s reasoning, a finding by a state legislature that a certain private land use causes “harm” should be given very little weight in justifying a regulation. The Court may also have rejected the established benefit-harm test for less severe takings, making it easier for governments to avoid paying compensation for partial takings.397

Justice Scalia articulated a new test to determine whether or not a taking had occurred: “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 owners estate shows that the prescribed use interests were not part of his title to begin with.”398 Under this test the only regulations which take all economic use of a property that do not require compensation are those which “inhere in the title itself, in the restrictions . . . the states law of property and nuisance already place upon land ownership.”399 On remand, the South Carolina courts were to determine damages if they could not find any South Carolina property law extant in 1986 (before plaintiff bought the lots) which could have affected the plaintiff’s right to build on the lots.400

The Court directs inquiry under the newly articulated test to state nuisance law and particularly to the Second Restatement of Torts in a “total taking inquiry.”401 The “total taking” test requires an analysis of five factors. The first is the degree of harm to public lands and resources, or adjacent private property, posed by the [land owner’s] proposed activities.402 The second factor is “the social value of the land owner’s activities and their suitability

396. Id. at 2898.
398. Lucas, 112 S. Ct. at 2899.
399. Id. at 2900.
400. Id. at 2902.
401. Id. at 2901 (Justice Scalia lists the relevant Restatement sections as 826, 827, 828, 830 and 831). As examples of a pre-existing property right that could lead to a finding of no taking Scalia mentions an easement that could be enforced at common law, or the common law navigational servitude the government holds over submerged lands. Id.
402. See Restatement (Second) of Torts §§ 826, 827 (1988).
to the locality in question.\textsuperscript{403} The third factor is the relative ease with which the alleged harm can be avoided through measures undertaken by the plaintiff and the government.\textsuperscript{404} The fourth factor is the length of time similarly situated property owners have used their property. Long use by others is indicative of a lack of any common law prohibition.\textsuperscript{405} The final factor is whether other similarly situated landowners were permitted to continue.\textsuperscript{406}

Another important aspect of this case is that the court ignored recently articulated ripeness holdings to hear this case before the plaintiff had exhausted administrative appeals at the local and state levels.\textsuperscript{407} As the South Carolina Supreme Court gave its opinion on the merits and not on ripeness grounds, the majority decided that Lucas claim was ripe because he had been precluded “both practically and legally” from construction on his lots during the period that the Beachfront Management Act was in effect before it was amended to allow construction inside the setback line.\textsuperscript{408} The dissent also maintained that Lucas’ claim was not justiciable, as he had suffered no injury in fact.\textsuperscript{409}

Writing in dissent, Justice Blackmun stated that there was no taking of “all economic uses” of property as the plaintiff still had reasonable use of the property, for example, bird watching, camping, picnicking and other similar activities.\textsuperscript{410} The majority opinion stated quite clearly that in this context reasonable use of the property means reasonable economic use.\textsuperscript{411} “The trial court appeared to believe that the property could be considered ‘valueless’ if it was not available for its most profitable use.”\textsuperscript{412}

\textsuperscript{403} Lucas, 112 S. Ct. at 2901. See Restatement (Second) of Torts §§ 828, 831 (1988).
\textsuperscript{404} See Restatement (Second) of Torts §§ 827(e), 828(c), 830 (1988).
\textsuperscript{405} See Restatement (Second) of Torts § 827 cmt. g (1988).
\textsuperscript{406} Lucas, 112 S. Ct. at 2901.
\textsuperscript{407} Id. at 2892. (Justice Blackmun maintains that the majority ignored their own rule, articulated a few days before in Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992). Justice Scalia distinguished Lujan on the grounds that it was dismissed at summary judgment because the plaintiff did not address the facts in sufficient depth and detail).
\textsuperscript{408} Id. at 2891. No evidence was presented that Lucas attempted to build during the two years the Act prevented him from doing so. See supra note 382 for a discussion of the 1990 amendments to the Beachfront Management Act.
\textsuperscript{409} Lucas, 112 S. Ct. at 2907 (Blackmun, J., dissenting).
\textsuperscript{410} Id. at 2908.
\textsuperscript{411} Id. at 2899-2900.
\textsuperscript{412} Id. at 2908.
ever, Justice Blackmun reasoned, if the property is not valueless, the majority’s decision was based on an error in fact. 413

Justice Blackmun also took exception to the majority’s finding that the legislature’s judgment as to the importance of the diminution of harm should be discounted. In the past courts have held that “the existence of facts supporting legislative judgment is to be presumed.” 414 The well established rule had been that plaintiffs challenging the constitutionality of a statute must provide “some factual foundation of record” that contravenes the legislature’s findings. 415 Rather than follow the traditional rule, in takings cases the majority decided that the state has the burden of convincing the courts that the legislative findings are not in error. This shifts the burden of proof from the plaintiff as “the state now has the burden of showing the regulation is not a taking.” 416

Justice Blackmun also found fault with the new scheme for ascertaining whether a complete regulatory taking had occurred. The majority apparently abandoned the “case-specific inquiry into the public interest advanced” so that, if a complete taking is found, the public interest is not to be considered at all. 417 “When the government regulation prevents the owner from any economically valuable use of his property, the private interest is unquestionably substantial, but we have never before held that no public interest can outweigh it.” 418 In overturning the Mugler 419 line of cases, according to Justice Blackmun, the majority announced an incorrect new per se rule. “No precise rule determines when property has been taken” but instead that “the question necessarily requires a weighing of public and private interest;” therefore, rendering the public interest irrelevant if all value is taken. 420 In profound disagreement over the meaning of prior case law, Justice Blackmun said that the line of cases from Mugler through First English was based on “whether the government interest was suffi-
cient to prohibit the activity, given the significant private cost" not "the availability of some residual valuable use."421

Also, Justice Blackmun pointed out what is still the crux of the difficulty — how to define or segment the estate to determine whether a taking has occurred. Blackmun noted that there is "no 'objective' way to determine what" the estate should be.422 Is the estate the entire property or is it just one of the property rights from the "bundle of sticks"?423 Without being able to answer these questions, basing a takings test on the common law of nuisance clarifies little.

Ultimately even the Court cannot embrace the full implications of its per se rule: it eventually agrees that there cannot be a categorical rule for a taking based on economic value that wholly disregards the public need asserted. Instead, the Court decides that it will permit a State to regulate all economic value only if the State prohibits uses that would not be permitted under background principles of nuisance and property law.424 Because common law nuisances are subject to interpretation, are value-laden and are ultimately defined by the state courts, the majority has not really developed a certain nor a "value free basis" by which to judge takings.425

Justice Stevens' dissent also noted that Lucas' claim was neither ripe nor justiciable. He believed that the majority strained to hear an unripe claim, overturning the long settled rule of judicial restraint. To him, case precedent mandated that the court exercise restraint and refuse to hear Lucas' case until his case was ripe. "The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it."426

In addition, Justice Stevens believed that a "categorical rule" that complete regulatory takings must be compensated was in error.427 He argued that the rule of Pennsylvania Coal — that the

421. Id. at 2911. At least for the time being, Blackmun's assessment of the basis on which the prior cases was decided is incorrect. The North Carolina courts seem to follow the majority rule and examine the residual estate, even though they adopt decisions such as Penn Central which Justice Scalia eschews. See supra notes 114-279 and accompanying text.
422. Id. at 2913.
423. Id.
424. Id. at 2912.
426. Id. at 2918 (quoting Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-47 (1936)).
427. Id.
takings analysis is always a "question of degree and therefore cannot be disposed of by a general proposition" — should be followed.428 Justice Stevens argued that the "categorical rule" is arbitrary. For example, a land owner recovers nothing where a regulation takes ninety-five per cent of the value of property, yet the same owner recovers when the regulation takes just five percent more.429 Also, the definition of property rights is elastic; if property is defined broadly, there is no taking. If property is defined narrowly, a taking can always be found.430

Justice Stevens went on to refute what he believed to be the majority's three central arguments. First, if a "total deprivation of feasible use is, from a land owner's point of view, the equivalent of a physical appropriation[,]" then, also from a land owner's point of view, a diminution in value of fifty per cent is a taking of fifty per cent.431 "Thus, the landowners perceptions of the regulation cannot justify the Court's new rule."432 Next, Justice Stevens argued, as "total takings" are relatively rare, the new rule will not affect the ability of government to "go on."433 Finally, Justice Stevens argued that the majority's suggestion "that regulations that leave the owner . . . without economically beneficial . . . use . . . carry with them a heightened risk that private property is being pressed into some from of public service" does not justify a per se rule.434 Justice Stevens reasoned that there is no correlation between a "singling out" and a "total taking" as a regulation can single out a property owner without depriving her of anything, just as a regulation can deprive a land owner of property rights without singling one out.435 To Justice Stevens the important point is the specificity of the expropriating act.436

Justice Stevens also attacked the nuisance exception to the categorical rule as unworkable. He asked if all governmental prohibitions should be compensable. For example, should banning the use of a harmful substance such as asbestos be compensable?437 To Justice Stevens, adopting the nuisance exception froze

428. Id. (quoting Pennsylvania Coal, 260 U.S. at 416).
429. Id. at 2919.
430. Id.
431. Id. at 2920.
432. Id.
433. Id.
434. Id. at 2920.
436. Id.
437. Id. at 2921.
the evolution of the common law, with potentially negative effects.\footnote{438}

Finally, Justice Stevens maintained that the South Carolina Beachfront Management Act comported with the established rule of takings. To Justice Stevens, the established rule is comprised of three factors: "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations."\footnote{439} In \textit{Lucas}, the Court ignored the first, and, in Justice Stevens' opinion, the most important factor. The purpose of the just compensation clause is to prevent the government from forcing individuals to bear public burdens. In order to ascertain the distribution of burdens, the Court has looked to whether all property owners are equally burdened — "the generality of [the] regulation[.]\"\footnote{440} Justice Stevens concluded that the South Carolina effort was significantly general:

\begin{quote}
[T]he generality of the Beachfront Management Act is significant. The Act does not target particular landowners, but rather regulates the use of the coastline of the entire state. Indeed, South Carolina's Act is best understood as part of a national effort to protect the coastline, one initiated by the Federal Coastal Zone Management Act of 1972. Pursuant to the Federal Act, every coastal State has implemented coastline regulations. Moreover, the Act did not single out owners of undeveloped land. The Act also prohibited owners of developed land from rebuilding if their structures were destroyed and what is equally significant, from repairing erosion control devices.\footnote{441}
\end{quote}

Thus, Justice Stevens found that the Act was not unconstitutional as it was sufficiently general in that it imposed "substantial burdens on owners of developed and undeveloped land alike."\footnote{442} To Justice Stevens this equitable distribution of financial burdens shows that Lucas' investment backed expectations were not reasonable as other property owners faced equal, if not greater, financial burdens.\footnote{443} For example, renourishing a beach on an annual basis, or allowing erosion control devices to deteriorate until

\footnote{438. \textit{Id.}}
\footnote{441. \textit{Id.} at 2924 (citations omitted).}
\footnote{442. \textit{Id.}}
\footnote{443. \textit{Id.}}
dwellings were swept out to sea, are financial burdens just as extreme as those faced by Lucas.  

The ultimate meaning of Lucas for land use specialists is far from settled. It will doubtless bring another wave of decisions. It is too soon to tell whether it means a major change in the law of takings, or whether it is merely a narrow exception. The possible ramifications of Lucas, and its affect on North Carolina law, are discussed in the next section.

VIII. CONCLUSION

What then does all this mean for property owners, government officials and attorneys in North Carolina? Few, if any, concrete rules can be gleaned from the confusing and contradictory case law of the diverse jurisdictions. If any trend is apparent, it is that the North Carolina courts are reluctant to follow the federal courts and that they will phrase the issues as much as possible to establish and maintain local control over land use decisions.

The North Carolina ends-means test focuses on the relationship between the regulation and the reasonableness of the result. At least by implication, the courts focus on the estate that is left after the alleged regulatory taking. This conservative approach appears to be in accord with Lucas and its predecessors.

Typical North Carolina land-use regulations also appear to be unaffected by Lucas because of the long-settled doctrine that a regulatory taking occurs if all uses are eliminated. The North Carolina Supreme Court held in 1962 in Helms that a regulation that renders private property "valueless" or "has the effect of completely depriving an owner of the beneficial use of his property by precluding all practical uses or the only use to which it is reasonably adapted" is a regulatory taking.

In addition, the Lucas court did not overrule previous holdings that some diminution in value is not in and of itself a taking. However, this still skirts the basic question of the meaning of "valueless". Put another way, the North Carolina courts have not articulated a rule stating how stringent a regulation must be before it effects a taking.

If the North Carolina Supreme Court continues to decide taking claims on adequate and independent state grounds, as it did in Batch, then the U.S. Supreme Court may not have the opportu-
nity to rule on state taking law. Another option to avoid finding a total taking is the state law of inverse condemnation. If state claims must be exhausted before the federal courts will entertain federal constitutional claims, then a “total taking” should generate relief under the state law of inverse condemnation before the federal claims are reached.

North Carolina should remain relatively unaffected by the United States Supreme Court’s trend as illustrated in the line of cases from *Keystone* to *Lucas*, as discussed above. However, if these four cases are the beginning of a more pronounced trend toward a more conservative view of private property rights, then the law of North Carolina may be affected.

Viewed as a whole, the opinions of Chief Justice Rehnquist and Justice Scalia in *Keystone, First English, Nollan, Penn Central* and *Lucas* have assembled at least the skeleton of a framework on which to base future regulatory taking holdings. The factors raised by these cases were insignificant in the past. Now they may be of great import. *First English* advanced the notion that government must provide damages for “temporary takings.” This is a new (since 1987) remedy that gives land owners compensation for the period between enacting the regulation and the court’s determination that all value of a property has been taken. *Nollan* requires that there be an apparent causal connection or “rational nexus” between a regulation and the governmental purpose used to justify the regulation. What is “rational” or “apparent” is unclear and would seem to turn on both the facts of an individual case and the ideological bent of individual judges. *Nollan, Keystone* and others not discussed here raise interesting questions about the segmentation of property rights. If the total ownership rights in a piece of real property are analogous to a “bundle of sticks,” and if any “stick” is eliminated through a regulatory taking, has there been a taking? There are almost endless ways to define and divide property rights. Depending on who makes the definition, it can be either very easy or very difficult to find a taking. In his dissent in *Penn Central*, Chief Justice Rehnquist characterized New York’s historic preservation ordinance as singling out a few property owners (owners of historic land marks) to bear the costs of historic preservation that the public should accept. Rehnquist said that this type of regulation gives no “average reciprocity of advantage” to the property owner in that there were no common benefits and burdens and thus is not analogous to zoning or other constitutional land use regulations.
Also, in his *Penn Central* as well as his *Keystone* dissents, Rehnquist laid the groundwork for the “nuisance exception” in *Lucas*. The prior decisions held that it was a valid exercise of the police power to control public nuisances. In these cases Rehnquist wrote that the nuisance exception should only apply to illegal uses of property, or uses that are dangerous to others. The majority found a nuisance exception; but Rehnquist would not since neither coal mining (*Keystone*) nor railroading (*Penn Central*) is illegal. In *Lucas* Scalia expanded on these earlier dissents to hold that the state could not regulate the property unless a formal already adjudicated nuisance was found, or their was an existing common law exception to existing property rights.

Additionally, *Lucas* shifts the burden of proof from the property owner to the government. In the past, the property owner had to prove that the regulation was unreasonable, that it “took” the property owner’s land. *Lucas* shifts the burden to the government to prove that the property owner has “enough” property rights left. At the very least, this facet of *Lucas* will make the promulgation of environmental regulations much more difficult. North Carolina follows the traditional rule as to the burden of proof. This change alone would work profound changes in the state’s law.

Finally, the *Lucas* court showed a barely concealed disdain for the findings of the South Carolina legislature. If the federal courts are to discount legislative findings of fact and policy, then the legislature’s burden to establish a rational basis for regulation has been greatly expanded. The United States Supreme Court has decried judicial activism and interference in legislative affairs. This facet of the *Lucas* opinion appears to raise the specter of just those perceived evils.

It is still too early too tell whether *Lucas* is a narrow exception, applicable only to the most extreme regulatory takings or another bold stroke in rewriting the American law of regulatory taking and a major expansion of private property rights. North Carolina’s case law seems to be little affected, for the time being.

However, it is not too soon for the local practitioner to take the federal decisions into account. Future land use regulations should be drafted conservatively; with care not to stray into one of the “takings” outlined in this comment. At a minimum, all land use regulations should include some variance procedure so that a property owner subject to a “total taking” may be accorded some relief. Otherwise, the jurisdiction may find the entire regulatory
scheme thrown out by the courts as did South Carolina. For the first time in generations, property rights advocates have an increased number of theories and precedents on which to base challenges to regulatory taking.