"TAKING" BY REGULATION AND THE NORTH CAROLINA COASTAL AREA MANAGEMENT ACT

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FOREWORD

This report was written by the author while in residence at the Institute of Government, University of North Carolina during the summer of 1975. The author, Professor of Law at Boston University, expresses his gratitude for the opportunity to undertake this project and for the support of the Institute of Government and the Sea Grant Program of the University of North Carolina. Special appreciation extends to Professor Milton S. Heath, Jr., who both arranged the opportunity to do the report and provided valuable counsel and commentary during the course of the project.

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". . . the court shall determine whether such order so restricts the use of his property as to deprive him of the practical uses thereof, being not otherwise authorized by law, and is therefore an unreasonable exercise of the police power because the order constitutes the equivalent of taking without compensation."

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I. Introduction

The ambitious goal of the 1974 North Carolina Coastal Area Management Act (CAMA)[1] is the development and implementation of a comprehensive coastal area land and water use program "for the protection, preservation, orderly development and management of the coastal area of North Carolina."[2] Recent experience in other states in which comprehensive coastal, shoreland and other critical area land use regulation has been enacted and implemented indicates that pursuit of this goal will inevitably generate both general and site-specific controversies over the scope and limits of public authority to regulate uses of privately-owned lands.[3] These controversies will ultimately be cast in legal terms as claims that specific limitations or constraints imposed on private uses of property are so restrictive as to constitute the equivalent of constitutionally prohibited "takings" of private property for a public purpose without compensation.

"Taking" litigation involves, as one court recently stated in a case involving the constitutional validity of a shoreland zoning ordinance, "a conflict between the public interest in stopping the despoilation of natural resources, which our citizens have taken as inevitable and for granted, and an owner's asserted right to use his property as he wishes."[4]

That conflict is nowhere greater than it is in the coastal area where there are well-established public property rights and interests in waters, lands and resources whose value is highly dependent upon adjacent privately-owned lands and their uses. Protection, conservation and preservation of these public resources frequently requires strict control over the use and development of the private land. At the same time, increasing market pressures and prices promote both the intensive use of land suitable for development and the alteration of marshlands and other natural areas to make them suitable for development.

Cases that arise under the CAMA and similar statutes in other states will frequently turn, in light of the matters noted above, on factual and legal considerations that are not common to all land use regulation "taking" cases. Thus, for example, it is often necessary under an act such as the CAMA to prohibit the filling or alteration of marshlands and other critical coastal area lands, thereby limiting the use of the regulated lands to those uses for which they are suited in their natural state. Such restrictions effectively preclude the conversion of the land into land which is suitable for profitable residential, commercial or industrial development rather than, as in zoning regulation, merely proscribe some potential developmental uses.

A second important feature of coastal area land use regulation cases will be the fact that the objective or purpose of regulation will often be the protection, preservation and conservation of waters, lands and resources in which substantial public property rights and interests exist. Unlike most zoning regulation, which has the purpose of protecting general public welfare interests, regulation under the CAMA will often be for the purpose of protecting public property rights and interests

against harm or diminution caused by the uncontrolled development of private lands that exist in direct relationship to the waters, lands and resources in which the public property rights and interests exist. Recent judicial decisions and legal commentaries indicate that this fact itself may be the pivotal factor in "taking" cases that arise under the CAMA.[5]

These special features of coastal area land use regulation are an overlay on the difficult, confusing and controversial area of "taking" law. Yet the total body of law must be explored and understood because it is of immense day-to-day practical significance to the North Carolina Coastal Resources Commission, local officials, property owners and the general public. The ultimate resolution of "taking" and related issues under the CAMA, and possibly the ultimate determination of the success or failure of the CAMA in the attainment of some of its most critical goals, lies in the end with the courts;[6] on the other hand, full judicial consideration of the issues heavily depends on the administration of the act with a sensitivity to both the issues that may arise in the course of judicial review and the importance of developing a complete hearing record with respect to those issues.[7]

The principal purpose of this study, therefore, is to explore the law of "taking" and related legal principles as they pertain to the CAMA and its administrative implementation and enforcement. The ultimate objective is to provide at least a measure of clarification and guidance in an area of the law that generally defines what is constitutionally permissible and impermissible in land and water use regulation. The broad questions considered in this endeavor include: (1) when, other than in cases of public land ownership, will public rights and interests

exist with respect to lands subject to regulation under the act?; (2) when, if ever, will regulation not potentially raise the "taking" issue?; (3) under what circumstances, if any, are the courts likely to require government compensation for the adverse effects of regulation on the use of privately-owned lands?

II. The CAMA and the "Taking" Issue

The thrust of the CAMA is to require, rather than merely to authorize or encourage, the development of a comprehensive coastal area land use program. It enlists and coordinates state and local action by directing the twenty coastal counties to formulate comprehensive land use plans[8] that are consistent with state planning guidelines on the "objectives, policies, and standards to be followed in public and private use of land and water areas within the coastal area."[9] At a later stage, state promulgated criteria must be followed in the implementation and enforcement of a permit program for areas of environmental concern.[10]

Although the CAMA places heavy reliance on local government, the state-level Coastal Resources Commission (CRC) established by the act plays the lead role in the act's implementation.[11] Primary permit authority over major developments and proposed activities in areas of environmental concern is vested in the CRC.[12] The CRC also exercises appellate administrative review jurisdiction over local agency permit determinations in other matters.[13] Equally important is that it is the CRC that designates areas of environmental concern,[14] promulgates guidelines and criteria for, and exercises approval powers over, local land use plans and implementation programs.[15] Thus, the CRC is highly influential in all stages and in all respects in the CAMA's administration, a fact that is of major significance in the "taking" context.

The "taking" issue will be posed under the CAMA when some person who claims title to a property interest in land subject to regulation challenges the regulation, the denial of a permit, or the granting of a permit with stringent conditions as a deprivation of property rights

without compensation. It is likely that most, if not all, such cases will actually involve permit actions of the CRC rather than direct challenges to regulations implemented by the special use permit system since the final determination of how any regulation affects the use of any particular land is based under a special use permit system on evidence presented in the permit application hearing.[16] Moreover, it is possible under the CAMA that a variance to use land in a manner that is clearly not otherwise a use for which a permit could be granted under applicable CAMA regulations may be available in some circumstances and, therefore, a direct challenge to the regulation may be inappropriate until such a variance has been sought and denied.[17]

The CAMA itself reflects the anticipation that "taking" claims arising under the act will almost invariably be based on an unfavorable action taken with respect to a permit application. It does not preclude, but it makes no special provision for, challenges to generally applicable regulations on the ground that the effect of a particular regulation is to so restrict specific land as to constitute the equivalent of a "taking" without compensation. On the other hand, the act does establish two procedures for the judicial determination of claims based upon unfavorable final decisions and orders in permit application proceedings. The first such procedure is of general application while the second pertains exclusively to cases involving land located within an area of environmental concern. The former provides for judicial review but does not specify the standard or test to be applied by the superior court on review;[18] the latter declares, however, that the superior court shall expeditiously "determine whether such order so restricts the use of his property as to deprive him of the practical uses thereof, being not otherwise authorized

by law, and is therefore an unreasonable exercise of the police power because the order constitutes the equivalent of a taking without compensation."[19] (Emphasis added).

It is not at all likely, however, that the standard applied by the courts will differ from one type of case to another. The special standard for determining what actions are compensable in cases involving areas of environmental concern is no stricter than the standard generally applied in North Carolina. In fact, it appears that the General Assembly intended to codify the prevailing test or standard established by the North Carolina Supreme Court in Helms v. City of Charlotte,[20] wherein the court reviewed an amended zoning ordinance and its effects on the property of the petitioner with an eye toward whether "the application of the zoning ordinance has the effect of completely depriving the owner of the beneficial use of his property by precluding all practical uses or the only use to which it is reasonably adapted. . . ."[21]

Perhaps the most significant feature of the "taking" test stated in section 113A-123(b) of the CAMA is its inclusion of the clause "being not otherwise authorized by law". Except for this clause, the subsection is virtually identical to, and was modeled on, a similar "taking" procedure provision of the Coastal Wetlands Act.[22] The intention of the draftsmen and the General Assembly appears to have been to statutorily call attention to the fact that privately-owned coastal area lands exist in a direct relationship to well-established public property rights and interests in coastal area waters, lands and resources and to require the court to determine if the existence of that relationship itself supports noncompensable restriction of at least some uses of some lands. This reading of the statute is also confirmed by Professor Milton S. Heath's legislative

history of the CAMA.[23]

Section 113A-123(b), in language not included in the preceding quotation from the act, additionally requires that the superior court specifically determine if the petitioner is actually the owner of, or has a property interest in, the land affected by the permit application decision or order. This is, of course, a threshold requirement that must be satisfied before it is appropriate for the court to determine whether the order constitutes the equivalent of an otherwise unauthorized "taking" without compensation.[24] Unfortunately, the specific language of the subsection, in attempting to state a seemingly obvious but often overlooked foundation requirement, does not make it clear that even ownership of land does not give rise to a legally protectable property right or interest in any or all uses to which the land might be devoted. Thus, for example, there is no right incident to ownership to use land in a manner that is injurious to the property, person or rights of others and any such use may be remedied under the common law or prohibited by public regulation.[25]

This statutory ambiguity or oversight does not, of course, foreclose the state from defending against a "taking" challenge to a CRC decision or order on the ground that the CRC's action only precludes a use or uses that are merely permissible under some circumstances rather than rightful incidents of ownership.[26] Indeed, the "being not otherwise authorized by law" clause provides an independent statutory basis for such a defense. The point is simply that the omission creates the risk that both the courts and legal counsel may quite understandably fall into the trap of literalism and, therefore, fail to focus on what may actually be the critical issue in some cases.

Reflection on the preceding discussion of the CAMA, and the analysis of section 113A-123(b) in particular, places the "taking" issue as it pertains to the act in sharper focus. It becomes clear, for instance, that the issues in "taking" litigation are several rather than singular. More specifically, the truly ultimate character of the "taking" issue becomes readily apparent; it is a residual issue that is not properly reached unless and until it has been ascertained that the petitioner has a legally protectable right or interest in property and its use that has been prohibited or restricted by a regulation that may not be imposed without compensation. Only after these determinations have been made is it appropriate to move on to the ultimate question of whether the restriction is so severe that it deprives the petitioner of the practical uses of the regulated property and, therefore, constitutes the equivalent of a "taking" without compensation.

These observations direct the course of the balance of this study. Thus, specific discussion of the ultimate "taking" test is deferred despite the fact that the purported purpose of the study is to consider that issue in the context of the CAMA. Instead, the study first surveys the public and private property rights and interests that are protected and affected by the CAMA in order to provide a fuller understanding and background for the subsequent discussion of the "taking" issue and other legal aspects of coastal land area regulation.

III. Interests Protected and Affected by Coastal Area Land Use Regulation

A. Preliminary Observations

"Property" is often discussed during casual conversation in absolute and possessory terms. The hackneyed "possession is nine-tenths of the law" is a phrase that obscures the fact that the subject area of rights and interests in property is substantially more complex than informal discussion usually suggests. Rights and interests in property are, in fact, pluralistic and divisible rather than singular and indivisible. This fact itself is a complicating dimension of the law of property that is of great significance with respect to coastal area lands and the regulation of their use. Equally significant is the fact that most rights are relative rather than absolute.

The purpose of this section is to identify the public and private rights and interests in coastal area lands. While it would not be necessary to do this in a general discourse on "takings", it is an essential component of any close study of the issue in the context of a specific state statute such as the CAMA. It is important, for example, to be able to determine what private rights and interests will be affected by a regulation and its enforcement. Equally important is the capacity to ascertain the existence, nature and locus of property rights and interests that may be adversely affected in the absence of regulation of a private use. Finally, the existence and nature of public rights and interests in coastal area lands and waters may be of major significance in determining whether or not public regulation of private uses of land

may be successfully challenged as an exercise of the police power that results in an uncompensated "taking."

B. Public Rights and Interests[27]

State ownership of lands in coastal and other areas encompasses several different categories of lands. "State lands" are defined in the North Carolina general statutes to include --

> . . . all land and interest therein, title to which is vested in the State of North Carolina, or in any state agency, or in the State to the use of any agency, and specifically includes all vacant and unappropriated lands, swamp lands, submerged lands, lands acquired by the state by virtue of being sold for taxes, escheated lands, and acquired lands.[28]

The General Statutes separately define these specifically identified categories of lands as well as "allocated state lands"[29] and reflect the fact that all private land titles that remove land from one or another of these categories derive from and must be affirmatively proven to exist against the sovereign.[30]

North Carolina cases recognize that state ownership of land may be categorized in another way that is particularly significant in the discussion of coastal area property rights and interests. Some lands are held in a proprietary capacity while others are held in trust for the benefit and use of the public; the former are classified as jus privatum and the latter as jus publicum lands.[31] As to jus publicum lands, which include submerged lands lying beneath North Carolina's territorial and navigable waters, the state is the trustee and is responsible for managing such lands for the benefit of the public.[32] Thus, there is a rule in both common law and statute that such lands may not be granted or otherwise conveyed out of state control except in very limited situations.[33]

Moreover, specifically permitted littoral or riparian owners' uses of the shore adjacent to their lands are subject to the exercise of public navigation, fishing and possibly other rights that are the object of protection by the trust.[34]

The extent to which other state public lands committed to uses by the public rather than to use for government buildings, facilities or functions are affected with a jus publicum character has never been clearly determined in North Carolina. However, other states treat parks, reservations and other common use lands as public trust lands that are not subject to disposition or changes in use without at least strict requirements being met[35] and it has been held in North Carolina that a municipality may not abandon an established public park to an inconsistent public use--a parking area--without legislative authorization.[36] That decision is a reflection of precedents in other states, and the court relied in citation and quotation on such cases in emphasizing the special public use character and purposes of public parks.[37]

The 1972 Conservation of Natural Resources Amendment to the North Carolina Constitution directly recognizes the change-in-use element of the public trust concept in providing for the dedication of park, recreation, conservation and open space lands to public use.[38] Lands may be dedicated by counties, cities, towns and the state, or by gift thereto, to such uses and, by three-fifths approval of the General Assembly, made a part of the State Nature and Historic Preserve. A change in use thereafter can be affected only by a three-fifths majority in each house of the General Assembly.

Other significant coastal area land interests of the public involve the swamp or marsh lands which have long been accorded special statutory status and treatment.[39] These lands, defined in law as those that are "too wet for cultivation except by drainage", which are part of a swamp of more than 2,000 acres or part of a lesser swamp surveyed by the state are presumed to be in state ownership and were closed from entry and grant beginning in 1825.[40] Unsurveyed swamps of 2,000 acres or less could be entered and granted; surveyed, drained and reclaimed swamp lands of less than 2,000 acres could be sold.[41] In 1959, swamp and other state lands were placed under a new system of state lands administration in which, subject to some restrictions, all state-owned swamp lands became salable or leasable.[42]

Yet another significant subject area is newly created land in navigable waters. Newly created natural or manmade islands are state-owned vacant and unappropriated lands.[43] New fast land raised above mean high water by filling also becomes state-owned vacant and unappropriated land unless it is created pursuant to a state permit, reclaimed after being lost through erosion or other natural forces, produced by state or federal agency harbor or channel dredging, or formed as a result of the construction of a pier, jetty or seawall.[44]

State-owned lands also include allocated lands which, under the General Statutes, are those state-owned lands that are not classifiable as vacant and unappropriated lands, submerged lands, swamp lands or lands acquired by virtue of being sold for taxes.[45] These are, in essence, lands committed by the state and its agencies to public uses. In this regard, the General Statutes list thirteen purposes for which the Department of Administration may acquire lands by purchase, gift or

condemnation in carrying out its duties in serving these and other needs.[46] Among these purposes are acquisition for public parks and forestry purposes, historic site preservation, public accesses to water, estuarine area preservation and development, waterways development, and protection of areas of environmental concern.[47] These uses, in contrast to construction and operation of parking facilities[48] and penal facilities location, construction and operation,[49] are of the type that may be subject to the public trust principles applicable to parks and other common use lands or of the kind that will qualify the acquired lands for the State Nature and Historic Preserve.

State land ownership is not, of course, the exclusive embodiment of public rights and interests in coastal area lands and waters. Wild or naturally existing fish and wildlife are ferae naturae public resources owned by the state in trust for the general public.[50] Shellfish are included within the class and the trust,[51] except that planted shellfish are considered to be domitae naturae, or domestic, and are the personal property of the planter.[52] The public nature of the fishery is the reason for the common law and statutory prohibition against the acquisition of exclusive fishery rights[53] as well as the reason for the paramount status given to fishery, with navigation, in territorial and navigable waters in even those situations where private title or use rights have been acquired in lands beneath the water.[54]

More broadly, public interests in coastal area land and water uses include non-proprietary public health, safety, morals and welfare concerns about the appropriate use of private property. These interests and their protection are the object of zoning,[55] subdivision control,[56] and other traditional types of land use regulation that are implemented

through the exercise of the general police power. In addition, North Carolina now explicitly recognizes conservation, recreation, forest, wetland, estuary, historic site, open space, scenic and related "common heritage" interests in North Carolina's lands and waters as legitimate public interests for purposes of legislation and regulation.[57]

C. Private Rights and Interests

In many respects, the discussion of public rights and interests in coastal area lands defines the private rights and interests by implication. Thus, for example, it establishes that privately-owned land bordering navigable waters is bounded by the mean high water mark;[58] that such lands are subject to changes in their boundaries by the natural processes of accretion and erosion;[59] that good and valid title to new land created by filling water-covered lands may be acquired where the filling is by permit, caused by the activities of persons other than the owner, or to reclaim lands lost due to natural causes;[60] that littoral and riparian owners have a right of access to adjacent navigable waters;[61] and that such owners have a property right in the nature of an easement to construct a wharf or pier from the front of their lands to the line of low water.[62] These are all legally protectable rights or interests in property, but it has been seen that the littoral and riparian rights that exist between the high and low water marks co-exist with and are subordinate to competing public property rights and interests in that area.[63]

There are unusual benefits of coastal land ownership, but there are also special risks or burdens. The matter of natural erosion has already been noted. So, also, accretion may be a burden to one property owner

because of filling that occurs around a pier or wharf, but a benefit to another who gains new land at no cost in money or interference with other uses. In addition, littoral or riparian ownership is subject to such burdens as the deprivation or limitation of access to navigable waters where land lost to the public domain is used for the purpose of constructing a seawall for the public purpose of general protection of the shoreline against erosion.[64] Similar results have been reached by courts concerning injury to littoral or riparian property caused by public agencies' navigation maintenance and improvement projects.[65]

In broader terms, the property rights and interests of land owners in coastal areas are otherwise the same as those held by property owners in other areas. A private property owner is basically entitled to the use and enjoyment of the owned property, including all reasonable uses thereof.[66] The construction of buildings, conduct of lawful enterprises, and other uses or activities that produce economic and other benefits to the owner of land are, along with the right to exclude other possession and use and the right of disposition, major incidents of the ownership of property.[67]

D. Conflicts and Interdependence Among Property Rights and Interests

Property rights and interests are not, of course, absolute and unlimited. The reasonable use concept is itself an expression of this fact since it establishes that all persons are entitled to the reasonable use and enjoyment of their property. It is clear, however, that what one person considers to be a desirable and "reasonable" use of his or

her property may severely limit the uses to which a neighbor may devote adjoining or nearby property. And even when the first use does not actually preclude certain uses of neighboring land, it may nevertheless substantially interfere with the actual use and enjoyment of that land. In the extreme case, it may not be possible to continue to farm land in the vicinity of an industrial plant that emits air pollutants that settle on and destroy growing crops. In the less extreme case, it may be possible to continue a residential use in the same vicinity, but only if damage to exterior paint and shrubbery is tolerated and the windows of the house are kept closed. In both instances, however, it is clear that one owner's use of property substantially interferes with the use and enjoyment of the property of another.

Not surprisingly, the common law of nuisance establishes that all persons are legally entitled to the reasonable use and enjoyment of their property and, in effect, declares that a use that interferes with the reasonable use and enjoyment of another's property is not a reasonable use to which the offender is legally entitled.[68] Some uses are declared to be nuisances per se, but the resolution of most conflicts between landowners, or between public law enforcement agencies and landowners in the case of an alleged public nuisance, is the result of a case-by-case, interest-balancing process in which a number of subsidiary principles are employed in determining which of two conflicting uses should prevail or the terms on which they will be permitted to continue to co-exist.[69]

These basic principles, which effectively define property rights as relative rather than absolute, serve not only as the basis for common law remedies but as the foundation for a wide range of civil and criminal statutes regulating conduct that is injurious to property, persons or

the public's health, safety or welfare.[70] They are, for example, the basis for the adoption and enforcement of sanitary and building codes through the exercise of the general police power for public health and safety protection.[71] And, as is the case at common law, the prohibition of uses that pose the threat of injury to public health or safety may be accomplished without the payment of compensation since such uses are not reasonable uses of property to which an owner is legally entitled.[72]

Zoning and related land use control measures, on the other hand, have as their object the fostering of appropriate and orderly use and development of land as well as, in some respects, the control of nuisances.[73] Such regulation is also based on the exercise of the broad police power, but it is regulation which has been characterized as being different in kind than regulation that is specifically directed toward health and safety or property protection goals.[74] That distinction is grounded in early case law concerning regulatory "takings" and is one which is particularly significant for coastal area land use regulation.[75]

Distinctions aside, the purposes for which the state may regulate the use of privately-owned lands are wide-ranging. With respect to uses common to the coastal land and water area, the courts have recognized as appropriate matters for public regulation the control of wetlands filling and alteration,[76] dune and beach destruction and alteration,[77] removal of sand and gravel from the beach and shore,[78] construction in areas subject to flooding,[79] land uses that cause sedimentation in navigable waters,[80] and water pollution.[81] In addition, North Carolina, along with other states, has explicitly recognized in its Constitution that natural resources conservation and other similar interests are legitimate public concerns or subjects for legislative regulation.[82]

Public regulation for these varied purposes is itself, of course, the product of a recognition that land and water uses are interdependent. Such legislation is the ultimate expression of a legislative awareness that private uses of lands and waters are matters in which the public has a substantial interest. In the coastal area in particular, it is clear that the interest of the public may not be merely an interest in assuring appropriate uses of lands, but an interest in the protection, preservation and conservation of land, water and other resources in which public property rights and interests exist. Recent judicial decisions in other states indicate that where that is the case, the existence of such rights and interests may be determinative in "taking" case challenging a CRC permit action.[83]

IV. The "Taking" Issue in Critical Area Land Use Regulation

A. Preliminary Observations

The restrictive effects of contemporary land use regulation programs have been repeatedly and severely tested by "taking" litigation throughout the country during the past decade.[84] The challenge to natural resources protection, preservation, and conservation legislation and its administrative implementation has been particularly strong and persistent in view of the fact that the objectives of such regulation are often attainable only by limiting the uses of lands subject to regulation to those for which they are suited in their natural state. Such regulations have been both invalidated and sustained, the earlier decisions of the decade tending toward finding that a "taking" had occurred and the later decisions of the period tending to sustain strict regulations against the "taking" challenge.[85]

It is important to note at the outset that there are actually several grounds on which legislative regulations and their administrative implementation might be constitutionally attacked. Thus, in an 1844 decision in which it broadly defined the public interests for which legislatures might properly decide to exercise the police power and the latitude of the legislatures to determine the measures to be employed in protecting those interests, the United States Supreme Court stated the following general principles concerning the constitutional limits of the

police power:

> To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.[86]

The continued vitality of this tripartite test was confirmed in 1962 in Goldblatt v. Town of Hempstead.[87]

The contemporary "taking" litigation indicates that the first criterion of Lawton v. Steele and Goldblatt v. Town of Hempstead is fully satisfied in generally applicable modern natural resources protection, preservation and conservation legislation. Even in those early cases in which the landowner prevailed on the ultimate "taking" question, the courts concluded that the legislation at issue had been enacted for a valid and legitimate public purpose.[88] In North Carolina, there is little case law in point, but the recent Conservation of Natural Resources Amendment to the North Carolina Constitution affirms that these are valid and legitimate public purposes for legislation.[89]

The second criterion is a factor in at least some of the recent cases, but the extent to which it has been significant has varied and is, in many opinions, difficult to determine. One case in which it appears to have been a significant consideration is Commissioner of Natural Resources v. Volpe.[90] In that case, a "taking" challenge to the denial of a wetlands fill permit was remanded for the taking of evidence and presentation of arguments on matters not previously considered by the trial court; one point specified for consideration was whether or not the absolute prohibition of filling in any area of the affected marshland was reasonably necessary for the accomplishment of the fish

and wildlife protection, preservation and conservation objectives of the wetlands permit statute.[91]

The third criterion of Lawton v. Steele and Goldblatt v. Town of Hempstead is the one on which classic "taking" litigation is focused. The issue posed in such litigation is, of course, one that is of a largely factual nature.[92] Its resolution is guided, however, by legal principles that have been evolved by the Supreme Court and the state courts. Unfortunately, a reading of the cases and the literature concerning what constitutes a "taking" immediately makes it apparent that there are theories rather than a theory of "taking" law.[92a] It is this phenomenon that explains and underlies the apparent change in the judicial perception of and the courts' reaction to stringent natural resources protection regulation during the course of the past decade.

B. The "Taking" Law Background for Critical Area Land Use Regulation

The changing pattern in the judicial determination of "taking" challenges to natural resources protection, preservation and conservation legislation and its administrative implementation establishes that the mere fact that a severe restriction on land use is imposed is not itself sufficient to render a regulation or a permit action a "taking" without compensation. Confirmation of this is also to be found in the somewhat confusing array of United States Supreme Court opinions of the past century.[93] Thus, one must look further to ascertain the criteria that determine whether a regulatory "taking" of property without compensation has occurred.

On further exploration in "taking" law, it becomes evident that the apparent change in judicial perception of natural resources and other critical areas protection regulation over the course of the past decade lies in the history and confusion of "taking" law. Within that body of law, there are two main streams represented by two Supreme Court cases, Mugler v. Kansas[94] and Pennsylvania Coal Company v. Mahon.[95] These cases, being based upon interpretations of the Due Process Clause of the Fifth Amendment to the Constitution of the United States, quite predictably have their own parallels in the case law of North Carolina and the other several states.[96]

Mugler v. Kansas, decided in 1887, adopted the then long-standing view that the police power may be used to regulate and prohibit uses of property without compensation unless, as in the compensable exercise of the power of eminent domain, the regulatory purpose is to appropriate or commit private land to a public use.[97] Thus, Mr. Justice Harlan wrote for the Court that:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests.[98]

That view of the law of regulatory "taking" prevailed until 1922 when Mr. Justice Holmes wrote, over the strong dissent of Mr. Justice Brandeis who defended the rule of Mugler, that:

> Government could hardly go on if to some extent values incident to property could not be diminished without paying for every change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police

> power. But obviously 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 diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.[99]

When compensation must be paid was a question that Mr. Justice Holmes said "depends upon the particular facts" in each case,[100] but that in any event "the general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[101]

The dichotomy between Mugler and Pennsylvania Coal is readily apparent. The first adheres to the view that the police power and the eminent domain power are different in kind while the second expresses the view that they are different only in degree.[102] Under the former, the constitutional inquiry focuses on the character of the regulation in determining if there has been an eminent domain "taking" in the guise of police power regulation. The latter rejects the earlier view that the degree to which valid police power regulation impairs the value of property is irrelevant, and adopts the view that the degree of value impairment or diminution is the final or endline determinant of the constitutional validity of any otherwise valid and appropriate exercise of the police power.

The true meaning of Pennsylvania Coal Company v. Mahon has been a source of puzzlement and debate since its publication in 1922.[103] One, among many, of the reasons for this is that Mr. Justice Holmes' opinion in that case did not mention or distinguish -- let alone overrule -- Mugler v. Kansas. Thus, both decisions retain legal vitality and are

regularly cited and applied by both the Supreme Court and the state courts. It is this fact that explains and underlies the apparent trend toward greater judicial acceptance of the view that stringent natural resources and other critical areas protection, preservation and conservation regulations are sustainable against a "taking" challenge; what has occurred over the course of the past decade is a shift from deciding such "taking" contests under Pennsylvania Coal Company v. Mahon to determining them under Mugler v. Kansas alone or as qualified by Pennsylvania Coal Company v. Mahon.[104] That shift is by no means unprecedented; the latter view of police power regulation conforms more closely to what the Supreme Court itself has done in practice since 1922.[105]

The muddle of the Supreme Court "taking" law is best evidenced by its decisions in Miller v. Schoene[106] and Goldblatt v. Town of Hempstead.[107] In the former case, which was decided just six years after Pennsylvania Coal, a local ordinance requiring the destruction of red cedar trees infected with cedar rust that also threatened harm to apple trees in nearby orchards was sustained against a "taking" challenge in an opinion that relied on Mugler and totally ignored Pennsylvania Coal. In the latter case, the Court upheld a local ordinance that prohibited the continued use of a thirty-eight acre tract of land located in an urban area as a sand and gravel quarry; the opinion directly relied upon and extensively quoted Mugler v. Kansas, but made a ritual bow to Pennsylvania Coal Company v. Mahon.

The Goldblatt opinion, quoting directly from Mr. Justice Harlan's opinion in Mugler, stated that:

> . . . the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which

> property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to public interests. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not -- and, consistently with the existence and safety of organized society, cannot be -- burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.[108]

Then, despite apparent disposition of the matter in reliance on the uncompromising view of Mugler v. Kansas, the Supreme Court, citing Pennsylvania Coal, stated that "this is not to say, however, that governmental action in the form of regulation may not be so onerous as to constitute a taking which constitutionally requires compensation."[109]

The Goldblatt reference to Pennsylvania Coal Company v. Mahon is not troublesome if it is read to mean only that compensation is required when a regulation is for the purpose of deriving some previously unavailable or legally unsecured public benefit from the regulated land rather than preventing its use in a manner that is injurious to others and the regulation is "so onerous" or "unduly oppressive" that it constitutes, in the words of Mr. Justice Harlan in Mugler v. Kansas, "a taking or appropriation of property for the public benefit."[110] This seems to be the most sensible and internally consistent reading of Goldblatt in light of its reliance on Mugler and its recognition of the continued vitality of Pennsylvania Coal. Such a reading would also reflect the established view, largely developed in the zoning cases, that all land

is subject to regulation to some degree for the benefit of the public -- rather than to protect the public against actually injurious uses of property -- but that such regulation may not deprive the owner of all practical uses of the land without compensation.[111] These cases state, in effect, that regulation that is of the kind that exacts a public benefit from private property is itself permissible unless it is so burdensome or oppressive that it constitutes the exercise of the compensable eminent domain power in the guise of noncompensable police power regulation.[112]

Unfortunately, Mr. Justice Clark's opinion in Goldblatt went beyond the matter discussed above and, therefore, some doubt is cast upon the proffered interpretation of Goldblatt. That doubt is not based on any apparent rejection of the analysis itself, but on the confusion that is engendered by further comments on the standards of Pennsylvania Coal Company and illustration of those standards by reference to a case decided before Pennsylvania Coal under the rule of Mugler v. Kansas.[113]

The Supreme Court's "taking" law and its confusion are mirrored in the law of the several states, including the law of North Carolina. The reason for this is, of course, that the Constitution of the United States and its Due Process Clause interpretation apply to the states under the Fourteenth Amendment.[114] In addition, the Supreme Court's interpretations of the meaning and application of the Due Process Clause are high authority in the state courts' interpretation of the states' due process and equivalent "law of the land" constitutional provisions.[115]

The North Carolina Supreme Court, in 1906, adopted the basic principles of Mugler v. Kansas in a lengthy opinion that extensively surveyed and quoted from the then leading state court decisions in other states as

well as the opinion of Mr. Justice Harlan.[116] In its own observations, the court stated:

> The police power, by virtue of which this legislation is vindicated and justified, is no new or unusual exercise of the sovereign will. It had its origin in the most ancient maxims of jurisprudence. All property was originally acquired subject to regulation in its use by those cardinal principles embodied in the maxim, "The safety of the people is the supreme law," and the other maxim "So use your own as not to injure another." This was the original condition imposed on the right of property in things, that it should be enjoyed subject to reasonable conditions when considered necessary to promote the general good of society. . . .[117]

Thereafter, the opinion cited and quoted with favor from both influential state court decisions from other jurisdictions and Mugler in support of the dual propositions that police power prohibition or control of injurious uses of private property is the exercise of a power that is different in kind than the power of eminent domain and, unlike eminent domain, is not a power whose exercise entitles the owner to compensation.

The principle established in North Carolina law in Durham v. Cotton Mills has never been rejected by the North Carolina Supreme Court, but it was seldom reasserted after the publication of Pennsylvania Coal. Then, in 1970, the North Carolina Supreme Court in Horton v. Gulledge,[118] a case in which an ordinance was struck down because its regulatory means or remedies were devastatingly excessive in light of the purpose to be served by regulation, stated in an opinion by Justice Lake that:

> It is quite true that the police power of the State. . . extends to the prohibition of a use of private property which may reasonably be deemed to threaten the public health, safety, or morals or the general welfare and that, when necessary to safeguard such public interest, it may be exercised, without payment of compensation to the owner, even though the property is thereby rendered substantially worthless.[119]

The authority cited for the court's statement was the venerable Mugler v. Kansas.

There also exists in North Carolina law a distinct influence of Pennsylvania Coal Company v. Mahon. In fact, the North Carolina Supreme Court in Horton v. Gulledge quoted, just prior to the quotation that appears above, Mr. Justice Holmes' admonition that "°w!e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for change."[120] That quotation followed by the statement of the rule of Mugler strongly suggests, however, that the lesson of Horton is that excessive zeal in the pursuit of the public good is not constitutionally tolerable, but that the prohibition or control of an injurious use by means reasonably necessary to the attainment of the legislative purpose of regulation may not be challenged as excessively zealous.

Horton v. Gulledge, as interpreted above, is not the rule, however, with respect to general zoning and similar regulation in North Carolina. There, it appears that the exercise of the police power for traditional zoning-type purposes appears to be viewed as regulation to secure a general public benefit rather to protect against injury inflicted in the use of private property.[121] Such regulation is permissible in the general exercise of the police power, e. g., eminent domain need not be used in all cases in which the purpose is to derive some public benefit from the manner in which property is or is not used, but such regulation may not, under Helms v. City of Charlotte,[122] be so burdensome or onerous as to deprive the owner of all practical use of the land subject to regulation. The "practical use" standard is, it will be recalled, the standard for "taking" cases under section 113A-123(b) of the CAMA and,

more generally, is one of the several common tests that have been developed by the state courts in applying the general principles of Pennsylvania Coal Company v. Mahon.[123]

C. Contemporary Judicial Views of Critical Area Land Use Regulation

In no other area is the significance of following one rather than the other line of "taking" law greater than it is in coastal and other critical area land use regulation. Such regulation must necessarily prohibit or severely restrict both intensive development and alteration of the natural character of lands subject to regulation if the purposes of regulation are to be attained. Thus, as the early natural resources protection "taking" cases of the past decade indicate, determination of "taking" challenges under the rule of Pennsylvania Coal Company v. Mahon may seriously threaten the ability of the state to regulate the use of private land for what has come to be acknowledged as a valid and important public purpose. On the other hand, as the more recent cases in which greater emphasis is placed on the principles enunciated in Mugler v. Kansas demonstrate, the evaluation of such regulation from the protection-against-injury perspective frequently results in a decision sustaining the regulation.

The paradigm of the earlier cases is the Maine Supreme Judicial Court's decision in State v. Johnson.[124] There, the court declared that Pennsylvania Coal expressed the "guiding principle" and found a "taking" had been effected by the denial of a permit to fill a salt water marsh. The case was decided on a record that indicated that the marsh in its natural state was "valueless" to the owner, but as filled land it would

be suitable for development in the manner of adjacent filled land and the greater than one-third of the owner's area that had already been filled. In sustaining the "taking" challenge, the court acknowledged the state's substantial interest in preserving coastal marsh land in its natural and productive state, but opined that:

> As distinguished from conventional zoning for town protection, the area of Wetlands representing a "valuable natural resource of the State," of which appellants' holding is but a minute part, is of state-wide concern. The benefits from its preservation extend beyond town limits and are state-wide. The cost of its preservation should be publicly borne. To leave appellants with commercially valueless land in upholding the restriction presently imposed, is to charge them with more than their just share of the cost of this state-wide conservation program, granting fully its commendable purpose.[125]

Among the prior state court decision relied upon by the Maine court in reaching its decision were two flood plain zoning cases[126] and the Massachusetts wetlands permit case of Commissioner of Natural Resources v. Volpe.[127] Reliance on the former was dubious in light of facts in each that indicated that the lands regulated were not well suited to regulation and/or that the principal uses permitted by the ordinances -- parks and recreation -- were classic public benefit uses.[128] Reliance on Commissioner of Natural Resources v. Volpe by the Maine court and other courts seems to be misplaced reliance both in light of the decision itself and subsequent developments in Massachusetts law.

Volpe is best seen as the decision of a court that was convinced of the public importance of controlling the rampant destruction of valuable and productive coastal wetlands, but troubled by the implications of Pennsylvania Coal with respect to the viability of public regulation that necessarily had to prohibit or severely curtail development uses of such lands. It adopted, as did the Maine court, zoning regulation as

the analog of wetlands dredge and fill regulation and, therefore, immediately placed itself in the position of having to determine the validity of the regulation in terms of Pennsylvania Coal Company v. Mahon. Despite the existence of established judicial acceptance of Mugler v. Kansas in Massachusetts law,[129] the court, as one of the first in the country to deal with a "taking" challenge to restrictive modern natural resources protection regulation, did not clearly perceive the legal significance of the fact that the purpose of regulation was to prohibit an injurious use of private land rather than to burden or limit the use of the land for the purpose of deriving a public benefit from the land and its use.

It seems, in retrospect, that both the Massachusetts court and legal counsel in Volpe adopted the zoning analog largely because the applicable, or apparently applicable, precedents were cases involving challenges to local flood plain and wetland zoning ordinances. Thus, the court's opinion extensively considered the local flood plain zoning ordinance cases later relied upon in State v. Johnson.[130] In addition, the Massachusetts court itself had dealt only one year earlier with wetlands development control through local zoning in MacGibbon v. Town of Duxbury,[131] a fact that may have predisposed both the court and counsel to approach the state-wide regulation involved in Commissioner of Natural Resources v. Volpe from the zoning perspective despite the fact that MacGibbon did not raise the points at issue in Volpe and, therefore, was not even mentioned or discussed therein.

Despite its adoption of the zoning analog, the Massachusetts court--contrary to the suggestion in State v. Johnson -- did not actually decide the "taking" issue. Rather, it remanded the case for the taking of further evidence and presentation of legal argument on fact and law

questions that had not been considered in the initial trial of the dispute; some of the specific questions evidenced concerns more appropriate to the rule of Mugler than the principles of Pennsylvania Coal; others suggest that the court was in search of ways in which to sustain the permit denial even under Pennsylvania Coal Company v. Mahon.

The groping questions and frustration of the court in Commissioner of Natural Resources v. Volpe continued to plague the Massachusetts court until 1972 when, in Turnpike Realty v. Town of Dedham,[132] the court sustained a flood plain zoning by-law against a "taking" challenge. During that seven year interim, the court had wrestled with some of the troublesome features of natural resources land use regulation, but had continued to avoid direct resolution of the ultimate "taking" issue.[133] Also during that period, the law journals were bursting with analyses of the constitutional "taking" constraint on strict public regulation of wetlands and flood plain filling and alteration.[134] By the 1970's, the courts no longer faced such cases without the aid of reflective counsel on the difficult issues presented in such cases. The time was ripe for judicial reassessment of natural resources protection regulation and the legal principles that governed such regulation.

In Turnpike Realty v. Town of Dedham, the Massachusetts System Judicial Court sustained a local flood plain zoning ordinance and its restriction of the petitioner's land without specific citation to or discussion of either Mugler, Pennsylvania Coal, or, even, Volpe. On the other hand, the court emphasized that the purposes of flood plain zoning were not merely to protect those who would expose themselves to danger and expense by developing and occupying flood prone land, "but also [to protect] other people in the community from the harmful effects of

flooding. . .[and to protect the] substantial public interest in avoiding public works and disaster relief expenditures connected with flooding."[135] The court relied heavily upon the 1959 case of Vertalas v. Water Resources Commission[136] in which the Connecticut Supreme Court applied the principles of, but did not cite to, Mugler v. Kansas in upholding police power regulation of flood plain development without compensation. Quoting Vertalas, the Massachusetts court stated: "The police power regulates use of property because uncontrolled use would be harmful to the public interest. Eminent domain, on the other hand, takes private property because it is useful to the public."[137] At the same time, the Massachusetts court made only a passing reference to the 1964 Connecticut case, Dooley v. Town Planning and Zoning Commission of Fairfield,[138] one of the two flood plain "taking" cases on which it had so heavily relied in Volpe. As to the other case on which it had earlier relied, the Massachusetts Supreme Judicial Court, as have other courts, emphasized that that case had actually been decided on the ground that the ordinance at issue was less oriented to flood plain control than to preserving open land for public park and recreation uses for which the power of eminent domain must be exercised.[139]

The handling of the Connecticut precedents in Turnpike Realty presaged similar action of the Connecticut Supreme Court in the recent wetlands filling permit case of Brecciaroli v. Connecticut Commissioner of Environmental Protection[140] in which the denial of a permit to fill was upheld against a "taking" challenge. Both the Massachusetts and the Connecticut courts seem, although they make no specific reference to it, to be applying the principles of Mugler v. Kansas as the principal test

of constitutional validity. Both, however, retain vestiges of the diminution of value test of Pennsylvania Coal Company v. Mahon. The Massachusetts court did not cite or discuss Pennsylvania Coal, preferring to note Goldblatt v. Town of Hempstead and its apparent precedential value in indicating that the degree of value and use impairment may be extreme and still withstand constitutional attack.[141] Ultimately, the court noted that the petitioner had not been deprived of a wide variety of natural uses of the land subject to regulation and simply declared that "we are unable to conclude, even though the judge found that there was a substantial diminution in the value of the petitioner's land, that the decrease was such as to render it an unconstitutional deprivation of its property."[142]

The Connecticut court, which did cite and discuss Pennsylvania Coal Company v. Mahon, similarly gave emphasis to Goldblatt v. Town of Hempstead, but concluded that the petitioner had not demonstrated such severe diminution in value as to result in a "practical confiscation" of the land subject to regulation.[143] In fact, the court emphasized that a permit denial precludes only the use applied for and does not determine if a permit for filling a lesser area might be granted or, alternatively, whether a permit for some other regulated use might be allowed or, finally, if there might be some unregulated use of practical significance that might be permissible.[144] In that light, the court readily concluded that the petitioner had not satisfied the burden of showing, as required by Vertalas v. Water Resources Commission, that the petitioner "has been finally deprived . . . of the reasonable and proper use of his property . . . ."[145]

The implicit revival and application of the doctrine of Mugler v. Kansas conjoined with a narrowly confined residual application of Pennsylvania

Coal Company v. Mahon also finds expression in the 1972 Wisconsin Supreme Court decision in Just v. Marinette County.[146] Again, without specific reference to or discussion of Mugler, the "taking" challenge--this time to a shoreland zoning ordinance that prohibited filling in a zone adjacent to a lake--was rejected largely on the ground that the use of a wetland area for filling and subsequent development is injurious in that it imposes the costs of development on the public through harm to and diminution of the value of public property rights and interests in the adjacent waters and lands.[147] As to Pennsylvania Coal, it was acknowledged to be a limitation on the exercise of the police power, but it was doubly confined in its application by resort to the basic different in kind rationale of Mugler v. Kansas and by the establishment of the proposition that an owner has no absolute and unlimited property right in a use and value that is dependent on a change in the essential natural character of the land.[148]

In explaining its decision, the Wisconsin Supreme Court observed that:

> The Justs argue their property has been severely depreciated in value. But this depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.[149]

Similarly, the court stated that:

> It seems to us that filling a swamp not otherwise commercially usable is not in and of itself an existing use, which is prevented, but rather is the preparation for some future use which is not indigenous to a swamp. Too much stress is laid on the right of an owner to change commercially valueless land when that change does damage to the rights of the public.[150]

The Wisconsin Supreme Court concluded that ownership of property does not embrace an "absolute and unlimited right to change the essential natural character of . . . land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."[151] This principle seems equally applicable to functionally significant coastal dunes, beaches, vegetation-stabilized slopes, marshlands, flood plains, aquifer recharge and other such areas whose misuse would cause injury to others or their rights.[152]

The New Hampshire Supreme Court recently adopted and made more explicit the Just v. Marinette County rationale in its decision in Sibson v. State (III).[153] The trial court had rejected the "taking" challenge primarily on the ground that the petitioner had realized a profit in excess of his original purchase cost by the prior filling and residential development of two of the total of six acres in the salt marsh tract. On appeal, the New Hampshire Supreme Court declined to decide the appeal on that ground and addressed the argument by counsel for the state that the rule of Pennsylvania Coal Company v. Mahon be rejected outright in favor of the rationale of Mugler v. Kansas.

The court's opinion, after noting that the prevention-of-harm rule of noncompensable regulation "finds support in cases apparently ignored in the cases purporting to follow the rule of Pennsylvania Coal Co. v. Mahon, reviewed its own precedent of State v. Griffin[154] as well as Mugler v. Kansas and the influential 1861 decision of the Massachusetts Supreme Judicial Court in Commonwealth v. Alger.[155] The court also noted "some erosion" of Mr. Justice Holmes' test even in zoning cases, but preserved its application for cases in which the regulation burdened

private property to secure a public benefit from its use.[156] As to cases in which the purpose of regulation is to prevent a use of property that causes harm, however, the court adopted the view that police power regulation is different in kind than eminent domain appropriation of land to a public use and held that "[t]he state is sustained in these cases unless the public interest is so clearly of minor importance as to make the restriction of individual rights unreasonable."[157]

In applying the rule that it expressed, the New Hampshire Supreme Court declared that "[t]he importance of wetlands to the public health and welfare would clearly sustain the denial of the permit to fill plaintiffs' marshland even were their rights the substantial property rights inherent in a current use of an activity on their land."[158] But the opinion of the court went beyond this declaration, and also adopted the view of Just v. Marinette County concerning the actual effect of the permit denial on plaintiffs' rights in the property affected by regulation. Thus, the court stated that "the rights of the plaintiffs in this case do not have the substantial character of a current use" and further observed that "[t]he board has not denied plaintiffs' current uses of their marsh but prevented a major change in the marsh that plaintiffs seek to make for speculative profit."[159] Then, quoting directly from Just v. Marinette County, the court declared that "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."[160]

What emerges from these recent cases is a judicial recognition of the fact that flood plain, wetland and similar regulations do not find--as initially asserted in State v. Johnson and Commissioner of Natural

Resources v. Volpe--their analog in zoning regulation, but in the pre-zoning cases in which the objective of regulation was to prevent private uses of land that harm or "take" the rights of others in the pursuit of the profitable use of land.[161] The residual preservation of the application of Pennsylvania Coal in the cases other than Just v. Marinette County and Sibson v. State appears to be for the purpose that is better articulated in Sibson v. State as the proscription of regulation that is unreasonably burdensome relative to the harm that is to be prevented by regulation. That is not, of course, the ultimate "taking" question; it is more appropriately considered in the context of the second criterion of Lawton v. Steele--and Horton v. Gulledge in North Carolina--concerning the rational or reasonable relationship of the regulatory means to the public interest or purpose to be served by the regulation.

The tortuous working-out of the principles to be applied in cases involving "taking" challenges to state and local regulation of development in critical natural areas has, in the final analysis, resulted in a dramatic change in the overall perspective of state courts on the validity of such challenges. Limitation of the zoning analog to application in cases which are actually analogous in the public interests and purposes to be served by public regulation, and adoption of the different in kind, prevention-of-harm analysis of Mugler v. Kansas, has permitted the courts to avoid the anamolous result of finding that resource protection is of critical importance and that uncontrolled development severely threatens public resources as well as more general public interests, but that prevention of such uncontrolled development constitutes a "taking."

The principles that have been articulated and refined in recent cases reflect the existence of the interim opportunity for serious

reflection by both jurists and legal scholars. The teachings of the last decade and the recent cases are both readily transferable to the situation in North Carolina and legally adoptable under the twin authorities of Horton v. Gulledge and Helms v. City of Charlotte. What path is actually followed is, of course, a matter that must ultimately be determined by the North Carolina Supreme Court.

V. Public Trust Property and the Regulation of Coastal Area Land Uses

A. Preliminary Observations

Public regulation of privately-owned lands and their use is almost automatically and universally assumed to rest solely on the exercise of the sovereign police power. The principal exception that has broad recognition involved regulation of those lands, waters and resources in which the state has exclusive title, dominion and control.[162] These lands, waters and resources include, but are not exclusively comprised of, those which are held in trust by the sovereign for the common benefit and use of the public.

Regulation based on the existence of public trust property rights and interests does not, however, pertain in only those situations in which title resides in the state. Thus, it has been firmly established in even those states in which title to the foreshore has been generally granted to littoral or riparian owners that the private rights and interests incident to that title are subject to paramount public trust property rights and interests "both on account of the qualified reservation under which the grant was made, and the peculiar nature and character, position and relations of the estate, and the great public interests associated with it. . . ."[163] And in both vintage and recent judicial decisions, it has been determined that the proximate relationship of private to public trust land renders the private land subject to a greater degree of regulation in its use than might otherwise be appropriate.[164]

These and other cases raise the question of whether the public trust embraces or is the source of an inherent and independent sovereign power that co-exists with the general police power as a basis for the regulation of at least some uses of some private lands. Several recent legal commentaries suggest that this may be so,[165] but the general issue has not yet been subjected to close analysis in either the legal literature or court opinions.

The general thesis that an inherent and independent sovereign regulatory power is an incident of the public trust reflects a view that the trust is more than a repository of a class of public rights and interests protectable by general police power regulation. It builds on the fact that the trust founded on common law property principles is recognized as an inherent attribute of sovereignty that operated, despite its lack of express mention in a state's constitution or statutes, as a limitation on the power of the state to dispose of trust property[166] and as a basis for seeking judicial redress for conduct that injures or diminishes the corpus of the trust.[167]

Careful consideration of this thesis has special warrant for North Carolina. The greatest significant of such an independent regulatory power would be in the coastal area since the public trust exists primarily with respect to navigable waters, the lands beneath them and the resources they contain. Among the several states, the existence of the power would, therefore, be no more important than in North Carolina which is blessed with vast and varied marine, estuarine and riverine waters, lands and resources.

Examination of whether or not there is an independent regulatory power based in the public trust is also fully justified by existing

North Carolina constitutional, statutory and common law rules. Judicial decisions recognize the public trust in lands beneath tidal and navigable non-tidal waters,[168] fish and wildlife resources,[169] and in public lands devoted to general public use.[170] Legislative recognition of the public trust or a special public interest in these and other resources is found in a number of sections of the General Statutes.[171] Moreover, the recent Conservation of Natural Resources Amendment to the North Carolina Constitution establishes an affirmative state policy "to conserve and protect its lands for the benefit of all its citizenry" and declares for that purpose that "it shall be a proper function of the State of North Carolina and its political subdivisions . . . in every . . . appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, openlands and places of beauty."[172]

The provisions of the CAMA not only support, but virtually require close consideration of the independent power thesis. Thus, section 113A-123(b) directs, with respect to judicial resolution of "taking" claims, that:

> . . . the court shall determine whether such order so restricts the use of his property as to deprive him of the practical uses thereof, <u>being not otherwise authorized by law</u>, and is therefore an unreasonable exercise of the police power because the order constitutes the equivalent of a taking without compensation.[173] [Emphasis supplied]

The unusual emphasized clause, which differentiates this statutory provision from that of the Coastal Wetlands Act on which it was otherwise patterned,[174] clearly suggests that it was the view of the General Assembly that there is at least an independent substantive basis, and possibly an independent regulatory power, for the non-compensable restriction

of some uses of some coastal area private lands. That this was intended is confirmed by Professor Milton S. Heath, Jr. in his comprehensive legislative history of the CAMA.[175]

The inherent and independent public trust regulatory power thesis has strong appeal. In coastal areas, its recognition would have the effect of formalizing the occasional judicial expression of the view that private lands situated in proximate relationship to public trust waters, lands and resources are, because of their locus, subject to regulation that is different in kind and degree than private lands in general.[176] Recognition of the fact that such private lands are subject to or affected by the existence of public trust property rights and interests would also go far toward dealing in law with the fact that legal boundary line delimiting property interests in coastal areas ignores natural processes and the interdependence of lands, waters and resources at the land-water interface.[177] Legal acceptance of the view that there is a reciprocity of public and private property rights or interests that extend landward as well as seaward across that interface would substitute for the artificial line-drawing that encourages uncontrolled private development a legal recognition of interdependence that is the necessary foundation for rational land and water use management.

The effort herein is, therefore, to ascertain: (1) if there exists an inherent and independent sovereign power to regulate some uses of some privately-owned lands based upon the existence of public property rights and interests in proximate resources; (2) when, if such authority exists, will coastal area land and water use regulation rest on this rather than the general police power; (3) what, if such authority exists and is exercised, is the effect of use of this power as the basis for

regulation on the maintainability of a "taking" challenge raised under the CAMA; and (4) what, if such an independent sovereign power does not exist, is the significance of the public trust in resources proximate to private land regulated in its use through the exercise of the general police power.

B. The Existence of a Public Trust Property Power for Private Land Use Regulation

The proposition that there exists an inherent and independent regulatory power that rests on the base of the property rights and interests subject to the public trust and its protection is not without foundation or lacking in parallel. The foundation of the public trust is in principles of the common law of property and it is well-established that the trusteeship of lands, waters and resources is an inherent attribute of state sovereignty.[178] In this respect, the public trust parallels the general police power which is also viewed as inherent in the very concept of sovereignty.[179]

The public trust parallels the police power in yet another important respect. It may, like the police power, be implemented by judicial enforcement or legislative regulation.[180] And, in the case of judicial enforcement, neither the public trust nor the police power is limited as a basis for the protection of legitimate public interests by a requirement that statutory authorization for legal action exist.[181] Similarly, neither the public trust nor the police power is limited as a basis for legislative regulation by the fact that a state's constitution does not expressly acknowledge its existence and provide for its exercise. Both are, again, "inherent" attributes of sovereignty.

A third significant parallel between the public trust and the police power is that each is future as well as present oriented. Neither is limited in its use to the redress of actual injuries or the regulation of immediately threatened conduct. Thus, in the land use area, the police power may be used for zoning and comprehensive regulation to assure appropriate and orderly patterns of development or the conservation of valuable natural, historic, cultural and aesthetic resources;[182] the public trust may be similarly relied upon as a basis for conservation and management of public trust property rights and interests.[183]

The fourth public trust and police power parallel is that the public trust is coming to be recognized, along with the police power, as a dynamic and flexible instrument that is adaptable to changes in social and economic conditions. Despite strong argument to the contrary, the United States Supreme Court long ago put to rest the proposition that the police power extended only to the regulation of noxious uses and nuisances and precluded now common forms of zoning regulation.[184] In the same vein, recent state court decisions have considered and rejected the argument that the public trust may be employed only to protect the beneficial uses of navigation, fishing and commerce in navigable waters--the traditional and historical objects of the trust--and have adopted the view that the trust is sufficiently dynamic and flexible to afford protection of public recreation and other use interests in lands and waters subject to the trust.[185]

Although an inherent and independent sovereign property-based regulatory power has not been practiced upon by the legislatures or explicitly recognized by the courts, there is what may be a fifth parallel--or a variation on the second parallel--that is instructive. General

police power regulation of private uses of land was itself once highly particularistic and problem-focused, but such regulation long ago grew and broadened. Today, generally applicable regulation of land uses for a variety of public purposes is accepted without question and will be enforced with respect to all land of a particular class even when the suitability for regulation and the degree of public interest in regulation varies somewhat from one parcel to another within the class.[186] Regulation based upon the public trust may be viewed as presently at the first stage in development in that it is characterized by case-by-case, issue-by-issue action.[187] But, as the historical evolution of general police power regulation of private land use suggests, this fact by no means limits the potential for the development and recognition of a broader regulatory power based on the existence of the public trust.[188]

C. Toward a Definition of the Scope of an Independent Regulatory Power

That there is a public trust of property rights and interests of which the state, as sovereign, is trustee for the benefit of the public is beyond question. United States Supreme Court decisions concerning the essential attributes of state sovereignty firmly establish that all original and admitted states are owners in trust for the benefit of the public of tidal and navigable non-tidal waters, the lands beneath them and their living and non-living resources.[189] Further, it is generally held that land devoted to public uses such as public parks and reservations are held in trust by states and municipalities for the benefit of the general public.[190]

It is a different matter, however, to precisely define the public rights and interests protected by the sovereign trust. An early Supreme Court decision differentiated public trust lands from those capable of private ownership in terms of early English precedents describing the former as those that were too wet for cultivation and improvement and the latter as those that were manoriable.[191] But the line for the convenient demarcation of the boundary between such lands was established in England and accepted in this country as the line of mean high water,[192] thus making swamplands defined by statute in North Carolina as "lands too wet for cultivation except by drainage" partially within the public domain and partially subject to private ownership.[193]

The critical issue, given the framework of public and private ownership interests, is whether privately-owned lands that are not generally thought to be directly subject to public trust property rights and interests are in some way affected with a public interest grounded in the trust. Among the significant situations in which the issue will be posed are the regulation of development in swamp, marsh, beach and dune areas lying above the mean high water line of the marine, estuarine and riverine waters of the state.

In Just v. Marinette County, the Wisconsin Supreme Court found that a shoreland zoning regulation that prohibited the filling of land along and back from a lakeshore was grounded in the public trust in navigable waters and implemented the "active public trust duty of the state. . . not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty."[194] In a later case, the same court declared as to Just "that this court . . . utilized the public trust doctrine to defend state action where that doctrine was

used as the foundation for the state's legitimate concern in enacting a law for the purpose of preserving and protecting navigable waters and public rights therein from the degradation and deterioration which results from uncontrolled use and development of shorelines."[195] It was in that context, according to the Wisconsin Supreme Court, that it had declared in Just that "[l|ands adjacent to or near navigable waters exist in a special relationship to the state. . . and are subject to the state public trust powers. . . ."[196]

Other than Just, there is relatively little recent precedent concerning the effect of the public trust property rights and interests on lands located by or near public trust lands and waters. It is not unreasonable, however, to view the relationship of littoral or riparian lands to public lands as two-way rather than one-way. The law in fact recognizes that the formal boundary line at the land-water interface imperfectly and unsatisfactorily defines the real advantage, value and interest of littoral ownership and, therefore, establishes that littoral or riparian ownership embraces property rights or interests that extend beyond the mean high water boundary line of private ownership. Just represents the view that the formal boundary line is also an imperfect and unsatisfactory definition of the limit of public property rights and interests in light of the critical interdependence of lands, waters and resources at the land-water interface.

On the other hand, strong historical precedent is not lacking. There is a firm foundation for the view that the public trust affects private lands and their uses in the judicial opinions of Chief Justice Lemuel Shaw, the distinguished jurist who both authored almost all of the early coastal law opinions of the Massachusetts Supreme Judicial

Court and strongly influenced the decisions of the Supreme Court and the courts of other states in property and "taking" law.

In the landmark case of Commonwealth v. Alger,[196a] a decision that strongly influenced the "taking" law of the U.S. Supreme Court, North Carolina and other states,[197] the Massachusetts Supreme Judicial Court held that harbor line regulations that had the effect of prohibiting the extension of a wharf to the seaward limit of the privately-owned Massachusetts foreshore were reasonable and not of the kind for which compensation must be paid. Chief Justice Shaw wrote for the court that:

> . . . in the exercise of the more general power of government so to restrain the injurious use of property, it seems to apply more significantly and directly to real estate thus situated on the sea-shore, separating the upland from the sea, to which the public have a common and acknowledged right, so that such estate should be held to somewhat more restrictive regulations in its use, than interior or upland estate remote from places in which the public have a common right.[198]

Again quoting from the opinion of Chief Justice Shaw in Commonwealth v. Alger:

> . . . all real estate derived from the government is subject to some restraint for the general good, whether such restraint be regarded as a police regulation or of any other character, . . . [but] the sea-shore estate, though held in fee by the riparian proprietor, both on account of the qualified reservation under which the grant was made, and the peculiar nature and character, position and relations of the estate, and the great public interests associated with it, is more especially subject to some reasonable restraints. . .[199] (Emphasis added).

Chief Justice Shaw's opinion was partially devoted to an explanation of the court's decision in Commonwealth v. Tewksbury[200] in which, five years earlier, it had been held that a statute prohibiting a littoral owner's removal of sand, gravel and stones from the beach was not a "taking" of property without compensation. In that case, the "taking" claim was rejected, the court, per Chief Justice Shaw, stating that

"such a law is not a taking of property for public use, within the meaning of the constitution, but is a just and legitimate exercise of the power of the legislature to regulate and restrain such particular use of property as would be inconsistent with, or injurious to, the rights of the public."[201] In reaching its decision, the court noted the severe wind and water erosion that had occurred on a spit of barrier beach as a result of timber cutting, and observed that "protection and preservation of beaches, in situations where they form the natural embankments to public ports and harbors, and navigable streams, is obviously of great public importance."[202]

The necessity to explain the earlier decision in Commonwealth v. Tewksbury was occasioned by the argument in Commonwealth v. Alger that the earlier case sustained the prohibition against the removal of materials from the beach as legislation protecting other landowners, rather than the public and its rights, against injuries caused by the unreasonable use of land. That theory of the earlier case was used by counsel as the basis for arguing that the restriction of wharf construction afforded no protection to private property rights of others and, therefore, was an invalid exercise of legislative power.[203] Commonwealth v. Alger expressly rejected that interpretation of the court's prior decision and, moreover, declared that the protection of common or public rights for which the sovereign is the trustee permits a greater degree of regulation than might otherwise be permissible because the land and uses subject to regulation exist in direct relationship to public trust lands and waters.[204] Thus, the statutes in both cases were held to be valid and non-compensable regulations of private land uses that were, as the court stated in

Commonwealth v. Tewksbury, "inconsistent with, or injurious to, the rights of the public."[205]

It is interesting to note with respect to how far inland the effect of the public trust property rights and interests extend that Commonwealth v. Tewksbury apparently involved regulations affecting the removal of material from the beach area above the mean high water line. Further, the court's opinion described, and was clearly influenced by, an actual situation in which a narrow spit of land sheltering the harbor of a Massachusetts town was severely eroded by water and wind after being shorn of its soil-stabilizing trees, thereby threatening continued navigation and requiring the restoration of the beach by artificial means at substantial public expense.[206] That example strongly suggests that the direct effect of public trust property rights and interests on private lands and their uses is to be determined in its extent by whether the regulated use is one which "would be inconsistent with, or injurious to, the rights of the public"[207] rather than by the fixed boundary between private and public ownership.

Determination of the inland extent of the influence of the public trust on private lands and their uses is, therefore, largely a matter of fact rather than law. But at least some guidelines do exist based upon what is known about the interrelationships among lands, waters and other resources. Thus, for example, the Massachusetts court was well aware in 1846 of the effects of near-shore environment destabilization that is of the type which is restricted under North Carolina's beach and dune protection laws.[208] Present knowledge concerning the dependency of estuarine and marine life on the fertile and productive coastal marshes

dispels, on the other hand, the view--which had judicial sanction much later than 1846--that the marsh is a wasteland that is suitable only for drainage and reclamation. In these and other similar situations, the relation of the public trust property rights and interests to private lands and their uses is sufficiently clear that general regulation for the purpose of protecting the public rights and interests is an entirely appropriate and legitimate exercise of legislative power.[209]

Some may find formal recognition of reciprocal rather than undirectional property rights and interests across the land-water boundary line repugnant to notions concerning the sanctity of private property. But property rights have never been recognized to be absolute and unlimited.[209a] The law of nuisance itself limits the use of land to those uses that are reasonable in relation to the rights and interests of others, including the rights and interests of the public in property. That is, in fact, the legal foundation for Chief Justice Shaw's opinions in Commonwealth v. Alger and Commonwealth v. Tewksbury as well as the opinions of the North Carolina Supreme Court sustaining regulations prohibiting or restricting private uses of land that are injurious to the property, person or rights of others.[210] The effect of the formal recognition of reciprocity of property rights and interests across the land-water boundary line is, in this perspective, a useful reconceptualization of the law of nuisance as it pertains to public and private property rights and interests in coastal area lands, waters and resources.

D. The Alternative: Public Trust Protection Under the Police Power

Whether or not the North Carolina Supreme Court or any other court will recognize the existence of an independent and inherent public trust property power for the regulation of privately-owned lands is a question about which only speculation is possible. The courts might well find, instead, that administration of the public trust is merely one of the many purposes for which the general police power may be exercised. Such a view would reflect the common tendency to define the police power in terms that are so broad as to identify it as the foundation for virtually all forms of government activity and regulation that are not conducted pursuant to specifically enumerated powers and constraints.[211] Thus, even management of state lands and other properties and resources is generally stated to rest on the exercise of the police power.[212] And, although no court has been specifically requested to determine if regulations pertaining to public trust resources are based on the exercise of an independent public trust power, the decided cases usually state that the existence of the trust and the performance of trustee responsibilities are legitimate public concerns for which the police power may be exercised.[213]

In the final analysis, however, it may make little difference in practice if the courts hold that the public trust property rights and interests are merely a proper subject or basis for police power regulation rather than a source of an independent regulatory power. It is the fact that such distinct rights and interests exist and, therefore, even make it plausible to discuss the existence of a separate power that is

most significant. This fact alone makes it clear, regardless of the characterization of the regulatory power employed, that there is a vast difference in kind between zoning-type regulation for the purposes of securing public benefits or promoting the general public welfare and regulation for the purpose of protecting trust property rights and interests against damage and diminution caused by private uses of lands that are subject, or in direct relationship, to public trust lands, waters and resources. The latter is the performance through regulation of what courts increasingly characterize as an affirmative duty of the state as trustee[214] while the former is the undertaking through regulation of what is merely an appropriate and constitutionally permissible governmental activity.[215]

The difference between the two bases for land use regulation are significant. Regulation of private land uses for the purposes of protecting, preserving, conserving or managing public property rights and interests exposed to damage and diminution by private uses of land is in the nature of noxious use and nuisance regulation which is generally sustained against a "taking" challenge on the ground that there is no legally protectable property right to conduct or maintain a noxious use or a nuisance.[216] Zoning-type regulation, on the other hand, is generally subjected to closer scrutiny since its objective is the harmonization of individual and public interests in, or affected by, otherwise lawful and permissible uses of land rather than the control or elimination of uses that would be unreasonable uses under common law nuisance principles. Indeed, the ultimate "taking" test in some jurisdictions is cast in terms of deprivation of "any reasonable use" rather than "any practi-

cal use" as it is in Helms v. City of Charlotte.[217]

The critical difference in kind between the two bases for land use regulation is also apparent when considered in terms of the consequences of each type of regulation. Regulation for the purposes of protecting, preserving, conserving or managing public trust lands, waters and other resources has as its objective the restriction of the ability of private landowners to burden or "take" public property rights and interests. Thus, it has been stated with respect to the filling of wetlands for purposes of development that "[t]he wetlands owner thus does not use only his own tract, but demands, as a condition of developing his property, that the ocean users tolerate a change in their use of the ocean."[218] Zoning-type regulation, on the other hand, may be broadly viewed as externally imposing burdens on private landowners in order that the general public may realize benefits to which it is not otherwise entitled.[219] The contrast is striking; in the first instance, the regulatory objective is to protect existing beneficial public property rights and interests from injury or harm resulting from the uncontrolled pursuit of individual self-interests; in the second case, the regulatory objective is to burden private property and its use to a not unreasonable degree in order to secure a greater public benefit or good.

Such differences in kind have long been recognized by the courts. They were, in fact, the original basis for distinguishing compensable from noncompensable police power regulations.[220] Until at least the time of Pennsylvania Coal Company v. Mahon, compensation for the regulatory restriction of private land uses was required under Mugler v. Kansas only when an encroachment similar in effect to a physical occupation or interference denied the landowner the enjoyment of otherwise

lawful uses of property in order that a public benefit might thereby be secured.[221] Moreover, it remains clear that the difference in kind criterion survived Pennsylvania Coal and its emphasis of difference in degree; both the United States Supreme Court and the highest state courts continue to cite and rely on Mugler v. Kansas in rejecting "taking" challenges.[222] Most such cases seem confusing in that they cite and quote from both Pennsylvania Coal and Mugler, but they can be understood and rationalized if read to indicate that the difference in degree analysis of Pennsylvania Coal is an outer limit test that is applied in only those cases that are found in a threshold difference in kind analysis to be of the type that do not involve noncompensable regulation.[223]

It is readily apparent, therefore, that the critical significance of public trust property rights and interests is not so much that they may be the source of an independent regulatory power, but that they exist and are an appropriate subject for protection, preservation, conservation and management through at least the police power. Such regulation has been correctly characterized and sustained in recent and well-considered state court decisions as different in kind than common zoning regulation that must be evaluated under the Pennsylvania Coal difference in degree test applicable to regulation for the purpose of securing a public benefit in private land and its use. While North Carolina is not among the states in which the opportunity has arisen for drawing that distinction in a coastal area or other natural resources regulation case, the opinions of the North Carolina Supreme Court recognize that regulation does differ in kind and that the uses of the police power, unlike the power itself, are not generic.[224] In the context of

those cases, the existence of public trust property rights and interests is of critical significance in determining the police power regulation "taking" issue even if a separate public-property based power of regulation is not judicially recognized.

VI. Noncompensable and Compensable Land Use Regulation Under The CAMA

A. Preliminary Observations

North Carolina is one among many states in which the courts have not been called upon to address and rule upon the "taking" issue in the context of natural resources and critical areas protection, preservation and conservation regulation. The existence of the CAMA and the proposal of mountain area management legislation[225] makes it inevitable, however, that the difficult legal questions with which other states' courts have wrestled during the past decade will also be raised in the near future in North Carolina litigation. There can be no doubt that the North Carolina Supreme Court itself will be called upon to resolve the legal issues that underlie the "conflict between the public interest in stopping the despoilation of natural resources, which our citizens until recently have taken as inevitable and for granted, and an owner's asserted right to use his property as he wishes."[226]

The preceding analysis and discussion of the CAMA, public and private interests in the coastal areas, traditional "taking" law principles, and developing trends in judicial application of "taking" law principles sets the background against which constitutional challenges to CRC decisions and orders will be considered and decided. With respect to all but the developing trends -- which the North Carolina courts have not had the opportunity to consider -- there is clear evidence in North Carolina cases that North Carolina's law does not significantly differ from that of the several states in which the "taking" issue had been

raised and decided in the natural resources and critical areas land use regulation context. On the other hand, there is no direct evidence in the North Carolina cases upon which to predict the course that the North Carolina Supreme Court will chart in applying these common and basic legal principles in the particular context of restrictive regulation of private land uses in the coastal area. It seems safe to assume, however, that the experiences and reflections of other states' courts in resolving "taking" challenges to regulations not unlike those mandated by the CAMA will inform and affect the development of the law in North Carolina. The purpose in this part is, therefore, to more closely examine how existing North Carolina law, as informed and influenced other courts' decisions, will apply in "taking" litigation arising under the CAMA.

Since the study of "taking" law within the context of a specific statute or problem area is as much an exercise to determine what <u>is not</u> a "taking" as it is an effort to ascertain what <u>is</u> a "taking", the first major element of this part seeks to identify those types of regulation that will not be compensable if the North Carolina Supreme Court follows other courts' developing methodology for the application of traditional "taking" law principles. Thereafter, the focus shifts to the examination of how existing North Carolina case law will apply in the remaining, or residual, category of cases in which it is appropriate to determine "whether such order so restricts the use of his property as to deprive him of the practical uses thereof. . . and is therefore an unreasonable exercise of the police power because the order constitutes the equivalent of a taking without compensation."[227] The focus in the first major element of this part may be viewed as being on those cases in which, in

terms of section 113A-123(b) of the CAMA, the petitioner cannot establish the existence of a protectable interest in property or the regulation is not compensable because it is "otherwise authorized by law". The second part examines, in turn, the standards to be applied under existing North Carolina precedents and the CAMA in determining when a regulation that does not come within the first broad category is so restrictive as to constitute the equivalent of a "taking" without compensation.

It seems useful at this point to reemphasize that the objective in this part is to identify what is not, as well as what is, a "taking" without compensation. In this light, it is possible to identify four categories of regulations, three of which are noncompensable and one of which is compensable. The first two noncompensable regulation categories are (1) regulation based on the exercise of paramount public property rights or interests in the land subject to regulation and (2) regulation for the purpose of protecting the rights of others against the injurious use of private property. The third category of noncompensable regulation consists of cases that do not fall within the first two categories, but in which the regulation is not so restrictive as to deprive the owner of the practical use of the land subject to regulation. The single compensable category is comprised of cases which do not fall within the first two classes of noncompensable regulation and in which the effect of the regulation is so severe as to preclude the owner's practical use of the regulated land. The first two types of noncompensable regulation constitute those which, in terms of section 113A-123(b) of the CAMA, are "otherwise authorized by law"; the last two categories,

one noncompensable and the other compensable, each consist of cases placed within them on the basis of a case-by-case analysis of the facts in terms of the "taking" criteria of section 113A-123(b) and Helms v. City of Charlotte.

B. Noncompensable Regulation

The emphasis in this section is on delimiting those types of coastal area land use regulations which are noncompensable as a matter of law rather than as a matter of fact. Thus, the focus is on the first two types of noncompensable regulation: regulation based on the exercise of paramount public property rights and interests in lands in which the "taking" claimant asserts a co-existing private property right or interest and regulation for the purpose of prohibiting or controlling uses of private property that are injurious to others or their property.

There are two central assumptions that run through both this and the next section. The first concerns the obvious condition that governmental control of private land uses must be for a purpose that is valid in law and in fact. Thus, paramount public property rights and interests may not be relied upon as a basis for governmental action that is clearly unrelated to the public rights and interests or the purposes for which they are held in trust.[228] Similarly, a legislative determination or statement that the purpose of regulation is to protect persons or property against injurious uses of private property is not one for which a court will substitute its independent judgment, but it will be set aside if it "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."[229]

The second, and equally important, assumption concerns the interest of the "taking" claimant rather than the state. As noted earlier, the mere fact that a person challenges a governmental regulation of the use of land is often too readily taken to establish that a substantial property right or interest of the claimant has been affected by regulation. Close analysis may indicate, however, that such an interest does not exist or cannot be established as against the state.

The burden of proof as to whether there is a private property right or interest that has been affected by regulation is on the petitioner in either a title or a "taking" action to which the state is a party.[230] At least two recent cases illustrate the significance of the petitioner being unable to establish the existence of a property interest on which a "taking" claim could be based,[231] and the difficulty of demonstrating good and valid title to coastal area swamp and marsh lands is amply illustrated in North Carolina cases.[232] Further, of course, it is almost impossible in North Carolina to establish the existence of private title to submerged foreshore lands lying beneath tidal and navigable non-tidal waters of the state.[233]

Even proof of title in the petitioner is not, of course, conclusive evidence that the particular regulation adversely affects a legally protectable interest in the land. At this point, this analysis is of course moving toward or into the consideration of the two types of regulation that are noncompensable as a matter of law. Thus, even Just v. Marinette County and Sibson v. State (III) may be viewed within the framework of this section as cases that are either in the first category, if analyzed in terms of the existence of an independent regulatory power based on the public trust, or in the second category, if analyzed

in terms of regulation under the police power for the purpose of prohibiting or controlling the injurious use of private property.[234]

The classic cases in the first category concern littoral and riparian lands. Such lands are of a special character in private property law which recognizes their unique orientation to the water by establishing that the owners of these lands are entitled to water access and other similar benefits of the land-water interface.[235] These benefits that extend beyond the actual boundary of the land exist to the exclusion of other private persons and are recognized in law as legally protectable property rights or interests.[236] On the other hand, North Carolina law clearly establishes that some such rights or interests are subject to impairment or destruction without compensation because a dominant public property right or interest co-exists with those littoral or riparian rights that extend into the foreshore area.

An example of this situation is found in the case of the statutorily acknowledged exclusive right of a littoral or riparian owner to erect a wharf or a pier, or to create new land in the foreshore by filling, beyond the mean high water boundary of private ownership.[237] These are property rights or interests that are legally protectable against damage or interference by others.[238] But these rights or interests are subordinate to the rights of the general public to navigate and fish -- and possibly to engage in other activities -- in tidal waters and non-tidal navigable waters of the state.[239] Thus, the legally recognized private littoral or riparian rights may not be exercised in such a manner as to interfere with or diminish the dominant public use rights protected by the state trusteeship of these waters and their lands or resources.[240]

From a more active public trust perspective, it is also established that the private littoral or riparian rights are, in effect, defeasible. Thus, it is not necessary to compensate a private owner for either erosion or accretion that occurs at the land-water boundary where the cause is a governmental project involving the exercise of trustee powers and responsibilities to improve or maintain public navigation[241] or to protect or preserve fishery or other resources in which a public trust interest exists.[242] Likewise, it has been held that construction of a seawall for the purpose of protecting the shoreline of a town to which the General Assembly had granted title in the foreshore did not entitle the littoral owner to compensation for either the resulting limitation of access to the water or for the use of foreshore lands that had once been owned and occupied by the littoral owner prior to their erosion and conversion into lands lying below mean high water.[243]

It is also recognized in the case law that general regulation for the purpose of protecting public trust property rights in waters, lands and resources is both permissible and noncompensable relative to littoral and riparian ownership rights.[244] Some cases have been noted in other parts of this study in which the courts have actually stated that such regulation is not only permissible, but may be mandated by the affirmative duty of the state as trustee for the benefit of the public to protect, preserve and conserve public trust waters, lands and resources.[245] Such regulation proceeds from the same base as litigation to restrain or redress conduct that injures or diminishes protected public rights, but substitutes general for case-by-case regulation in order to achieve greater efficiency and fairness in the administration of the trust and the law.[246]

Finally, there is the thesis that public trust property rights and interests in the coastal area waters, lands and resources are reciprocal to littoral or riparian rights and are the source of an independent governmental power to regulate privately-owned lands that exist in direct relationship to property that is subject to the protection of the public trust. That thesis and its legal foundations and implications were explored at length in the preceding part of the study. Further, it was there noted that North Carolina case law provides as sound a basis for advancing the thesis as the law of any other state, but that it provides no clear indication of whether or not the North Carolina Supreme Court is likely to recognize such an independent regulatory power. These matters need not be reviewed at this point; it is sufficient to note that, if the thesis is given legal recognition by the North Carolina Supreme Court, regulation under the power for the purpose of protecting and preserving public trust resources from injurious uses of private lands would constitute a separate class of noncompensable regulation.

The second, and more general, category of noncompensable regulation rests on the principles of Mugler v. Kansas and its North Carolina case law counterparts. The central proposition of these cases is that police power regulation for the purposes of controlling or prohibiting uses of property that are injurious to the rights of others--including the public--is different in kind than exercise of the eminent domain power and is, therefore, noncompensable.[247] This principle finds its most recent expression in North Carolina law in Horton v. Gulledge;[248] earlier statements of the rule in North Carolina cases were made both before and after the 1922 decision of the United States Supreme Court in Pennsylvania Coal Company v. Mahon.[249]

The rule expressed in Mugler has its greatest significance for purposes of general land use regulation -- as opposed to the regulation of more specific classes of uses -- in coastal and other areas in which substantial public property rights and interests exist and may be affected by uncontrolled uses of private lands. Many of the categories of waters, lands and resources identified by the CAMA as appropriate for designation by the CRC as areas of environmental concern are comprised of lands, waters, and resources in which substantial public property rights and interests exist.[250] Some of these exist in direct relationship to privately-owned lands, the uncontrolled development of which may also directly and substantially damage public property rights and interest in proximate waters, lands and resources.[251] Still others are areas in which uncontrolled private development may result in serious injury, or substantially increase the threat of such injury, to public health or safety or to the rights of others.[252] Under Mugler and its North Carolina counterparts, such injurious uses of private lands may be restricted or, when reasonably necessary to achieve the protective purposes of regulation, prohibited by general regulation without the payment of compensation.[253]

The restriction or prohibition of injurious private land uses by regulation is, as noted earlier, merely a general governmental means for enforcing the principle that land ownership does not entitle the owner to devote his property to unreasonable uses.[254] The power of regulation is not unlimited, however, under either Mugler v. Kansas or North Carolina case law. While the legislative body has wide discretion in defining what uses are injurious to the rights of others, the courts will review legislative determinations for the purpose of ascertaining whether they

are irrational, unreasonable or arbitrary.[255] And while similar discretion is vested in the legislative body to determine the means of regulation required to attain the purposes of regulation, the courts will also exercise judicial review to determine whether the means employed exceed those which are reasonably necessary in light of the regulatory purpose and available regulatory alternatives.[256] Review on the latter basis has come to be exercised most sparingly, but Horton v. Gulledge suggests that where regulation is extremely severe and less viable alternatives exist that the severe form of regulation may not be utilized in at least the first instance.[257]

Judicial review on either of the above-stated grounds is not, of course, review for the purpose of determining if there has been a confiscatory "taking" by regulation. Rather, the issue is whether or not the regulation is an exercise of legislative authority that exceeds that which is permitted by the police power and, therefore, fails one of the first two tests for police power regulations established by Lawton v. Steele and Goldblatt v. Hempstead.[258] These tests, as well as what has come to be considered the ultimate "taking" test, are constitutional due process limitations on police power regulation and may, therefore, be broadly viewed as first and second level "taking" criteria.[259] On the other hand, their focus is on factors that are common to the analysis of cases under both Mugler v. Kansas and Pennsylvania Coal Company v. Mahon rather than the confiscatory "taking" issue that remains for determination under the latter, but not the former, when a regulation passes muster under the two shared tests of constitutional validity.

Severe restriction of the use of private property will often be, of course, the only sufficient and available means for accomplishing some coastal area water, land and resource protection and conservation objectives. Partial destruction of an Outer Banks sand dune or its vegetation may ultimately result in injury to other property, both public and private, that differs in temporal and physical particulars, but not in kind, from the damage that would be caused by initial total destruction.[260] And the central, and initially troublesome, characteristic of coastal wetland and flood plain regulation is that the purposes of regulation in both cases are virtually unattainable unless all developmental uses of the land subject to regulation are prohibited.[261] For such cases, Horton v. Gulledge and the recently decided wetlands and flood plain cases of other jurisdictions indicate that severe restrictions will be sustained because the public interest is substantial and such restrictions are in fact those which are reasonably necessary for protection of that interest.

It is almost certain, of course, that the argument will be made in at least some cases that strict regulation is not reasonably necessary to accomplish the protective objectives of regulation because the land that has been made subject to the restriction is limited in area and, therefore, insignificant in relation to the whole of, for example, the vast coastal marsh and swamp lands of North Carolina. Although this view on regulation was not made express in State v. Johnson,[262] the Maine Supreme Judicial Court's emphasis of the evidence concerning previous development in the area and its expression of the view that it was unjust to burden the petitioner's minute share of the total wetlands of the state[263] suggests, sub silentio, that the court's view was that

destruction of the small wetland area would be of no practical consequence. The great problem, on the other hand, is that incremental conversion of fertile and productive coastal wetland areas into developable land has led to the loss over the past years of an aggregately large amount of coastal wetland acreage.[264]

The more recent cases establish a totally different perspective on the matter by emphasizing that the purpose of regulation is to restrict or prohibit unreasonable and injurious uses that, in effect, are a "taking" of the public and private rights on which the uses have an adverse impact. In cases such as Just v. Marinette County,[265] Sibson v. State (III),[266] and Brecciaroli v. Connecticut Commissioner of Environmental Protection,[267] the emphasis is on the principle that one is not entitled to legal protection or compensation for regulation of a use of private land that injures the rights of others. This emphasis shifts the focus from the effect of the regulation on the land to the effect of uncontrolled development on the rights of others. That shift in focus yields in turn, a full and adequate response to the rough balancing of interest concern that is implicit in State v. Johnson; the question is no longer whether the burden sustained in the particular case is warranted by the marine resources protection that will be realized by restricting the specific parcel of coastal marsh, but whether the development of that marsh will damage or diminish the rights of others. If the answer to the latter question is affirmative, it is appropriate to regulate such development without payment of compensation because it is not a reasonable and legally protectable use that is being prohibited by the regulation. The rough balancing of interests that is implicit in State v. Johnson is inappropriate in this perspective except as it constitutes an element of

judicial review for the purpose of determining whether the means employed by the regulation are reasonably necessary to the attainment of the regulatory purpose. The difference in approach -- and result -- is, in the final analysis, the difference between viewing such cases in terms of Pennsylvania Coal Company v. Mahon and Mugler v. Kansas.

C. Compensable Regulation

The subject considered in this section is not actually "compensable regulation", but "potentially compensable regulation". The general class of cases to be considered are those which the previously discussed principles do not totally insulate from "taking" challenges as cases in which the regulation is, in the words of section 113A-123(b) of the CAMA, "otherwise authorized by law". This general class, however, is itself divisible into two subclasses of cases, one for which compensation is not constitutionally required and one for which regulation is impermissible without the payment of compensation.

The determination of which cases do, and which do not, require compensation is a determination of whether a regulation is, or is not, so restrictive as to constitute a "taking" without compensation. Thus, the subject matter of this section is the set of principles upon which the courts will determine whether a restrictive regulation will be invalidated as a "taking" or upheld because the effect of the regulation is not so severe as to constitute the equivalent of a "taking". These principles are to be found in Helms v. City of Charlotte[268] and section 113A-123(b) of the CAMA.

Both Helms and the CAMA state the "taking" test in terms of regulation depriving the owner of the practical uses of private land. It is important,

however, to realize that the test of the constitutionality of governmental regulation of the use of private property is more complex under the standards articulated in Lawton v. Steele and Goldblatt v. Town of Hempstead.[269] The significance of constant awareness of this fact quickly becomes evident on a closer examination of Helms, an examination that indicates that the attempt to restate the rule of Helms in section 113A-123(b) of the CAMA falls short of stating the full "taking" test of North Carolina law.

The focus on the existence or nonexistence of a residual practical use of land subject to regulation suggests that there is a simple and singular sorting criterion for distinguishing valid from invalid exercises of the police power. The apparent emphasis indicates that if some practical use remains for the regulated land that a court need not, and will not, inquire further into the facts in determining the "taking" issue. It has recently been suggested, however, that the practical uses test of Helms is a more complex balancing test rather than absolute standard, and that "the question of whether a use remaining after regulation is practical will be determined by measurement of the degree of harm to the landowner caused by the regulation and the concomitant degree of public benefit afforded by the regulation."[270]

The key to the analysis of Helms lies in the fact that the North Carolina Supreme Court accepted the correctness of the trial judge's finding that a residence, albeit "unsightly and out-of-line", could be constructed on the petitioner's land which had been rezoned from an industrial to a residential use classification.[271] Despite this fact, the case was remanded for the taking of evidence on a number of factual matters that had not been considered in the initial trial of the case

but which the North Carolina Supreme Court thought to be germane to the question of whether the residence that could be built "would be practical, desirable and of reasonable value."[272] Among the additional factors identified for consideration were several that were specific to the site and several that concerned the site locale.

The remand of Helms was for the consideration of factors that at least partially support the view that the North Carolina Supreme Court has adopted a balancing of interests approach in evaluating the validity of governmental regulation of the use of private land. The concern of the court was with both the suitability of the site itself for the construction of a residence and the suitability of land so located for a residential use in light of other uses in the area. As to the former, the total land area was substantially less than the minimum lot size established by the Charlotte zoning ordinance for residential uses and the actual usable area was less than one-half the minimum lot size because the site was bisected by a creek. These factors, together with applicable setback and minimum floor area requirements, effectively required that the petitioner seek and obtain several variances in order to build even an "unsightly and out-of-line" house on the land.[273]

The site-specific factors identified for consideration on remand do not themselves establish that a balancing test was employed by the court in Helms. Indeed, they may be interpreted to pertain only to the question of whether there was a practical residential use of reasonable value, i.e., whether the market value of the residence and the land would exceed the cost of construction and -- although not mentioned by the court -- the land.[274] The site-locale factors that were specified for

consideration by the trial court suggest, on the other hand, that a balancing analysis is required under Helms.

With respect to the general locale, the North Carolina Supreme Court took note of evidence in the record that the street on which the property fronted was frequently used by commercial truck traffic. In addition, the court mentioned that the evidence demonstrated that the land area to the easterly side of the site had already been developed for business uses and that the area to the westerly side, although not developed for business uses for seven or eight blocks, was occupied by the city cemetery and its office. The land to the south was undeveloped, but consisted primarily of low, open grassland.[275] In remanding the case, the court's opinion stated, relative to these factors, that "[t]here is also the consideration as to whether an unsightly and out-of-line residence would be less injurious to nearby property than a business establishment."[276]

The use sought by the petitioner was a commercial use for the burial of several oil tanks on the site, a use which the petitioner contended was of greater utility to him and of greater value in the real estate market. A close reading of the court's opinion suggests that the court was directing the trial court to balance the deprivation of this use, and the limitation of the land to a residential use of lesser value, against the interests that would actually be served by enforcing the zoning ordinance with respect to the regulated land. While the court was prepared to give great weight to the legislative determination that the rezoning was in the public interest,[277] the ultimate concern of the court was whether the amended ordinance as applied to the petitioner's land actually served, or possibly even disserved, the otherwise valid

public objectives of regulation. It is clear that the North Carolina Supreme Court was employing a balancing analysis in this regard.

The conclusion to which the foregoing analysis of Helms leads is that the practical uses standard is not a bottom-line balancing test, but that the balancing of public benefit against private burden related to the question of whether the second criterion of constitutionality announced in Lawton v. Steele and reaffirmed in Goldblatt v. Town of Hempstead is satisfied on the facts of the particular case that is before the court. The question posed is not whether the regulation is unduly oppressive or confiscatory in the absolute sense; it seems clear from Helms and other North Carolina decisions that severe restriction of the use of private land will be legally tolerated if there is a substantial and valid public purpose for regulation and the particular land is of the type that is suitable for and intended to be regulated.[278] Rather, the concern of the court, and the second criterion of Lawton and Goldblatt, was whether the regulation as applied is rationally related, or reasonably necessary, to the attainment of what is generally and otherwise a legitimate regulatory purpose. If the answer to this latter question is affirmative and some practical use of reasonable value remains after regulation, it seems that Helms requires that the "taking" challenge be dismissed.

Thus viewed, Helms does establish a simple and singular bottom-line practical uses test for the determination of the "taking" issue. Before that ultimate factual issue is reached, however, it is necessary under Helms to determine, in accordance with Lawton and Goldblatt, that the regulation is for a valid and legitimate public purpose and that its

application in the case at issue is not irrational or unreasonable in light of that purpose. As noted by one author, the effect of the regulation on the use or market value of the property is an appropriate factor for consideration with respect to even this question, but only as a test that tends to confirm or disconfirm what the analysis of other factors suggests.[279]

This reading of Helms is interpretative rather than literal, but it is consonant with Pennslyvania Coal and its interpretation by federal and state courts. It is interpretative in that it bifurcates what is expressed in Helms as a single, practical use test. But a literal focus on a singular test is a misreading of the true import of Helms just as a singular focus on diminution of value is a misreading of the true import of Pennsylvania Coal on its facts[280] and as subsequently applied.[281] As in most other decisions that seem to have a one-dimensional and ultimate issue focus, Helms must be understood as apparently adopting that focus because, as was the fact in Helms, the case was presented to the court in the briefs of counsel in that manner.[282] In this light, the opinion must be seen as one that was intuitively and commendably responsive to, but not discretely expressive of, legal and factual nuance.

The consonance of Helms with the cases that apply Pennsylvania Coal is found in its unstated adherence to the principle that some uses are properly restricted or prohibited in some areas but not in others.[283] Similarly, it fits well with the fact that in some cases the diminution of uses and value may be nearly total and still withstand a "taking" challenge[284] while in other cases substantially less severe limitations on use and value may be struck down.[285] It effectively focuses the qualitative analysis of the regulation versus its effects within the

second criterion of Lawton and Goldblatt and, for the majority of cases that survive that test, limits the quantitative inquiry to whether a practical use remains for the land subject to regulation.

In light of this reading of Helms, there are two questions that must be explored. It will ultimately be necessary to consider what constitutes a practical use for purposes of applying section 113A-123(b) of the CAMA and Helms, but it is essential to first look into the factors that are appropriate for consideration in the balancing analysis that precedes the determination of the ultimate practical use question. Each is most usefully considered in terms of the facts at issue in Helms.

The factors commonly considered by the courts in the first-stage balancing analysis are closely related to those considered under Mugler v. Kansas and, in North Carolina law, under Horton v. Gulledge.[286] The principal categories of factors are whether the land is suitable for a use permitted by the regulation and whether the challenged restriction is, in light of available alternatives and the purpose of regulation, reasonably necessary to the attainment of the regulatory purpose.[287] The effect of the regulation on the value of the land subject to regulation is, as noted above, another relevant factor, but its proper role at this stage is merely to provide external market evidence that tends to confirm or disconfirm conclusions suggested by the analysis of the other factors.

A review of Helms in these terms demonstrates the connection of the site-specific concerns of the court with the first category of factors that are commonly considered in the first-stage balancing analysis. The apparent unsuitability of the petitioner's land for a residential use,

even assuming that all necessary variances could be obtained, obviously troubled the court. When the site-locale was additionally considered, it appeared to the court that the purposes of the generally applicable ordinance might not actually be served by the restriction imposed on the use of the land of the petitioner. Thus, the amended zoning regulation as applied to the property of the petitioner posed doubts concerning its validity in terms of both categories of factors, doubts that tended to be confirmed by resort to market value as an external evidentiary criterion against which to test conclusion suggested by the analysis of the other factors.

Indeed, Helms in the larger perspective strongly resembles those cases in which zoning ordinances and amendments have been invalidated by the courts because the effect of the restriction is to create a restricted use "island" in the midst of less restricted prior or pre-existing uses.[288] This fact, which emerges from the site-locale analysis that is the focus of the second principal category of factors commonly considered by the courts, may be itself enough to invalidate the application of an ordinance to a particular locus. When coupled, as in Helms, with the fact that the site is not physically well-suited for a use permitted by the regulation, it is certainly a firm basis for invalidation. In this light, the extraordinary feature of Helms is the high fidelity of the North Carolina Supreme Court to the presumption in favor of the validity of legislative acts; by remanding the case for further hearing, the court displayed a degree of adherence to the principle that sharply distinguishes the court from many others that state the rule but nevertheless substitute their own judgment sub silentio.[289]

Implicit in the Helms opinion is a reluctance of the court to set aside the trial court finding that there was a practical use of the petitioner's land for a residential purpose, i.e., a purpose permitted by the amended ordinance. That reluctance both tends to confirm that Helms employs a two-level analysis in which the practical use criterion is an ultimate or bottom-line test and indicates that little more than a marginal use may be considered to be a practical use in at least those cases in which the public interest in regulation is substantial, the petitioner's land is suitable to regulation for that purpose, and strict regulation is the only appropriate means for attainment of that purpose.[290] What actually constitutes a practical use for purposes of the Helms test is, however, actually undefined since the North Carolina Supreme Court has not spoken to the question since its 1961 decision in Helms.

Although the "practical uses" test of North Carolina law remains uninterpreted to date, it is useful to consider the test in the context of the recent natural resources and critical areas regulation decisions of other states' courts. Many of these cases -- all except Sibson v. State -- sustained regulations under both of the alternative tests of Mugler and Pennsylvania Coal or under Pennsylvania Coal alone. The "practical use" or equivalent reasonable use issue in each of these cases was, in effect, whether private lands could be restricted by regulation to the nondevelopmental uses to which they are suited in their natural state. The opinions in the cases acknowledge that it is not proper to restrict the regulated land to essentially public park and recreation uses for which the eminent domain power is more appropriately employed, but hold, on the other hand, that practical or reasonable uses

include the wide variety of private natural-state uses for which the regulated lands are inherently suited.[291]

These cases represent a rejection of the view expressed in State v. Johnson that development of land is the sine qua non of practical or reasonable use for purposes of the "taking" analysis. The effect of a regulation as a "taking" under the principles of Pennsylvania Coal will apparently not be found to exist under the recent decisions unless (1) the first-stage balancing analysis reveals that the specific land is not of the type which is suitable in its natural state for the purposes intended to be served by regulation[292] or (2) the permit restricts uses for which the land is physically suited in its natural state as well as prohibiting developmental uses that are dependent on altering the natural character of the land.[293]

Such extreme or severe regulation is, of course, more difficult to accept under Pennsylvania Coal Company v. Mahon than Mugler v. Kansas. By and large, however, regulation of such severity in coastal areas will be for the purpose of protecting against injurious uses that, because of their spillover or external effects, are effectively a "taking" of the property or rights of others. Nevertheless, it is instructive to note that courts have recently found that nondevelopmental uses for which regulated land is valuable or important are residual practical or reasonable uses that satisfy the zoning-type regulation "taking" test under the principles of Pennsylvania Coal. This is in keeping with the Supreme Court's disposition in Goldblatt v. Town of Hempstead and the generally observed phenomenon that, even under Pennsylvania Coal, regulation of private land use for a very strong public purpose will generally be sustained despite the fact that its effect is so severe that the land subject to regulation has only minimal use or value for the private landowners.[294]

VII. Concluding Observations

In retrospect, judicial frustration rather than hostility seems to be the common characteristic of the early natural resources and critical area protection "taking" cases of the past decade. These much lamented and criticized decisions unfailingly acknowledged the legitimacy and importance of public regulation to safeguard ecologically critical lands from imminent and irreversible despoilation and to protect other lands and resources from avoidable harm or destruction. At the same time, however, the courts were confronted with the reality that the only effective means for serving these substantial public purposes would often be the restriction of privately-owned land in such a manner as to preclude rather than limit traditional development uses. Both the purposes to be served and the "taking" claims of landowners were extremely compelling.

When these situations were presented to the courts in terms of the initially adopted zoning regulation analog, the results were what might well be predicted in light of Pennsylvania Coal Company v. Mahon and its emphasis of economic exploitation as the sunnum bonum of a right in property. Court decisions in the latter part of the past decade have recognized, however, that zoning-type public-benefit regulation and its legal limitations are not the appropriate analog for most natural resources and critical natural area land use controls. In addition, these cases more closely examined the nature of rights in such property in terms that might well lead to more frequent decisions favorable to strict regulation even under Pennsylvania Coal. With these insights, the courts not only began to develop a new pattern of results in their

decisions, but evidenced a diminished judicial frustration by their return in decision-writing to the traditional calm and deliberate style that was noticeably lacking in the early, somewhat apocalyptic, "taking" cases.

The fact that North Carolina's courts have not been drawn into or participated in this process of identifying and refining the legal principles applicable in "taking" challenges to restrictive natural resources and critical areas protection regulation may be differently viewed depending on whether one is an optimist or a pessimist. The latter might contend that the fact that the North Carolina Supreme Court has not yet had to confront and resolve the difficult issues and conflicts posed in such litigation indicates that North Carolina is behind other states in actively protecting its valuable natural areas. The optimist, on the other hand, may find solace in the fact that North Carolina may now proceed to more actively implement the CAMA and other significant natural resources and environmental protection measures with a greater sense of confidence and direction that is a product of the enlightenment and guidelines provided by the experience in other state "laboratories" within the federal system.

The basic approach of this study has actually been that of the meliorist rather than either the pessimist or optimist. While attempting to be objective in the statement and analysis of both the interests at stake and the law, the study has concentrated on exploring the analytical approaches and methods of the courts that have struggled with and searched for the means for addressing and resolving what initially seemed to be irreconcilable conflicts and unanswerable questions. These efforts are beginning to be fruitful, not in the fashioning of new legal principles

but in the rediscovery and knitting of long-established constitutional law doctrines and rules of property law. Since these same doctrines and rules find expression in the law of North Carolina, and the coastal area lands and waters of North Carolina have not yet been as severely impacted as those of the more urbanized coastal regions of the country, these developing analytical approaches and methods have great significance for coastal area management under the CAMA. This basis for optimism, leavened by an awareness that the direction in which North Carolina law will develop is yet uncertain, suggests that at least the time for meliorism is not yet past.

FOOTNOTES

1. N.C. Gen. Stat. § 113A-100 to 128.

2. N.C. Gen. Stat. § 113-102.

3. See, e.g., State v. Johnson, ___ Me. ___, 265 A.2d 711 (1970); Commissioner of Natural Resources v. Volpe, 349 Mass. 104, 206 N.E.2d 666 (1965); Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972); Sibson v. State, ___ N.H. ___, 336 A.2d 239 (1975); Potomac Sand & Gravel Co. v. Mandel, 266 Md. 358, 293 A.2d 241 (1972), cert. denied, 409 U.S. 1040 (1973); Turnpike Realty Co. v. Town of Dedham, _____ Mass. _____, 284 N.E.2d 891 (1972), cert. denied, 409 U.S. 1108 (1973); Brecciaroli v. Connecticut Commissioner of Environmental Protection, _____ Conn. _____, _____ A.2d _____ (1975); Turner v. County of Del Norte, 24 Cal. App. 3d 311, 101 Cal. Reptr. 93 (1972).

4. Just v. Marinette County, 56 Wis. 2d 7, 14-15, 201 N.W.2d 761, 767 (1972).

5. Ibid. See also Sibson v. State, _____ N.H. _____, 336 A.2d 239 (1975); Turnpike Realty Co. v. Town of Dedham, _____Mass. _____, 284 N.E.2d 891 (1972), cert. denied, 409 U.S. 1108 (1973); Brecciaroli v. Connecticut Commissioner of Environmental Protection, _____ Conn. _____, _____A.2d _____ (1975).

6. The matter is well put in Commissioner of Natural Resources v. Volpe, 349 Mass. 104, 206 N.E.2d 666 (1965), in which the court stated: "In this conflict between the ecological and the constitutional, it is plain that neither is to be consumed by the other. It is the duty of the department of conservation to look after the interests of the former,

and it is the duty of the courts to stand guard over constitutional rights." See also Raleigh v. Norfolk Southern Railway Co., 275 N.C. 454, 158 S.E.2d 837 (1969).

7. See generally Bosselman, Callies & Banta, THE TAKING ISSUE 284-93 (1973).

8. N.C. Gen. Stat. § 113A-109.

9. N.C. Gen. Stat. § 113A-107 (a).

10. N.C. Gen. Stat. § 113A-117.

11. N.C. Gen. Stat. § 113A-104.

12. N.C. Gen. Stat. §§ 113A-112(a) & 112(a).

13. N.C. Gen. Stat. § 113A-121(d).

14. N.C. Gen. Stat. § 113A-113.

15. N.C. Gen. Stat. §§ 113A-110(f) & 117(c).

16. Jarrell v. Board of Adjustment, 258 N.C. 476, 128 S.E.2d 879 (1963). The Massachusetts cases titled MacGibbon v. Board of Appeals, 347 Mass. 690, 200 N.E.2d 254 (1964) and 356 Mass. 635, 255 N.E.2d 347 (1970) are best understood in these, rather than "taking", terms; they are an object lesson in what happens when an adequate record and complete findings are not made in special permit proceedings. On the significance of the special permit as an approach to regulation and the "taking" issue, see Just v. Marinette County and Brecciaroli v. Connecticut Commissioner of Environmental Protection, note 3, supra.

17. N.C. Gen. Stat. § 113A-120(c).

18. N.C. Gen. Stat. §113A-123(a).

19. N.C. Gen. Stat. 113A-123(b).

20. 255 N.C. 647, 122 S.E.2d 817 (1961).

21. 255 N.C. at 653, 122 S.E.2d at 820.

22. N.C. Gen. Stat. § 113-230(f) & (g).

23. Heath, A Legislative History of the Coastal Area Management Act, 53 N.C.L.Rev. 345, 396 (1974).

24. Cf. Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 177 S.E.2d 513 (1970).

25. See generally, Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria, 44 So.Cal.L.Rev. 1, 16-17 (1970); Watts v. Pama Mfg. Co., 256 N.C. 611, 124 S.E.2d 809 (1962).

26. The constitutional safeguard relied upon in "taking" cases presupposes that the claimant has a property right that is affected by regulation. Omission of that threshold criterion in a statutory statement of the constitutional test could not change the basic constitutional requirement which is in the nature of a standing to sue requirement. Cf. Lee v. Board of Adjustment, 226 N.C. 107, 37 S.E.2d 128 (1946).

27. The analysis of public rights and interests in this part draws upon the more extensive surveys in Rice, Estuarine Lands of North Carolina: Legal Aspects of Ownership, Use and Control, 46 N.C.L.Rev. 779 (1967); Schoenbaum, Public Rights and Coastal Zone Management, 51 N.C.L.Rev. 1 (1972); and Note, Defining Navigable Waters and the Application of the Public-Trust Doctrine in North Carolina: A History and Analysis, 49 N.C.L.Rev. 888 (1971).

28. N.C. Gen. Stat. § 146-64(b).

29. N.C. Gen. Stat. § 146-21.

30. N.C. Gen. Stat. § 146-79 thus establishes a presumption that, any action to which the state is a party, title which is contested is in the state until good and valid title is proven by the claimant. See generally State. v. Brooks, 279 N.C. 45, 181 S.E.2d 553 (1971).

31. Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892); Shively v. Bowlby, 152 U.S. 1 (1894); State v. Glenn, 52 N.C. 321 (1859); Shepard's Point Land Co. v. Atlantic Hotel, 132 N.C. 517, 46 S.E. 748 (1903).

32. Illinois Central R. R. Co. v. Illinois, 146 U.S. 387 (1892); Shively v. Bowlby, 152 U.S. 1 (1894); Swan Island Club, Inc. v. White, 114 F.Supp. 95 (E.D.N.C. 1953), aff'd sub. nom. Swan Island Club, Inc. v. Yarborough, 209 F.2d 698 (4th Cir. 1954).

33. Illinois Central R. R. Co. v. Illinois, 146 U.S. 387 (1892); Home Real Estate Loan & Ins. Co. v. Parmele, 214 N.C. 63, 197 S.E. 714 (1938).

34. See generally, Capune v. Robbins, 273 N.C. 581, 160 S.E.2d 881 (1968); Home Real Estate Loan & Ins. Co. v. Parmele, 214 N.C. 63, 197 S.E. 714 (1938).

35. See, e. g., Lowell v. City of Boston, 322 Mass. 709 (1948) and Town of Brookline v. MDC, 357 Mass. 435 (1970). See generally Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, 68 Mich.L.Rev. 471 (1970).

36. Wishart v. City of Lumberton, 254 N.C. 94, 118 S.E.2d 35 (1951). See also Spicer v. City of Goldsboro, 266 N.C. 577, 39 S.E.2d 526 (1946).

37. 254 N.C. at 96, 118 S.E.2d at 36.

38. Constitution of North Carolina, Art XIV, § 5.

39. The history of the law in this area is surveyed in Rice, note 27 supra. See also, N.C. Gen. Stat. §§ 113-229 and 230.

40. N.C. Gen. Stat. § 146-64(8). See generally, Rice, note 27, supra.

41. State Board of Educ. v. Roanoke R.R. & Lumber Co., 158 N.C. 313, 73 S.E.2d 994 (1912); Home Real Estate Loan & Ins. Co. v. Parmele, 214 N.C. 63, 197 S (1938).

42. N.C. Gen. Stat. § 146-3.

43. N.C. Gen. Stat. § 146-6(d).

44. N.C. Gen. Stat. § 146-6(a)(c).

45. N.C. Gen. Stat. § 146-21.

46. N.C. Gen. Stat. § 146-22.1.

47. N.C. Gen. Stat. § 146-22.1 (5),(6),(8),(12), § (13).

48. N.C. Gen. Stat. § 146-22.1(2).

49. N.C. Gen. Stat. §146-22.1(7).

50. Geer v. Connecticut, 161 U.S. 519 (1896); McCready v. Virginia, 94 U.S. 391 (1887); Toomer v. Whitsell, 334 U.S. 385 (1948); Moore v. Bell, 191 N.C. 305, 131 S.E. 724 (1926); Daniels v. Homer, 139 N.C. 219, 51S.E. 992 (1905). See also N.C. Gen. Stat. § 113-131.

51. Ibid.

52. Coos Bay Oyster Co. v. State, 219 Ore. 588, 348 P.2d 39 (1959). Grant v. United States, 192 F.2d 482 (4th Cir. 1952).

53. Bell v. Smith, 171 N.C. 116, 87 S.E. 987 (1916) Cf. Collins v. Benbury, 25 N.C. 277 (1842).

54. Shephards Point Land Co. v. Atlantic Hotel, 132 N.C. 517, 44 S.E. 39 (1903); Lenoir County v. Crabtree, 158 N.C. 358, 74 S.E. 105 (1912).

55. In re Appeal of Parker, 214 N.C. 51, 197 S.E.706 (1938); Zopfi v. City of Wilmington 273 N.C. 430, 160 S.E.2d 325 (1968). See also N.C. Gen. Stat. §§ 153A-340 (county) and 160A-381 (municipal).

56. N.C. Gen. Stat. §§ 153A-330 (county) and 160A-371 (municipal).

57. Constitution of North Carolina, Art. XIV, § 5.

58. Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 177 S.E.2d 513 (1970).

59. Ibid. See also State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971) and Jones v. Turlington, 243 N.C. 681, 93 S.E.2d 75 (1956).

60. N.C. Gen. Stat. § 146-6(a) - (c).

61. Bond v. Wool, 107 N.C. 139, 12 S.E.281 (1890); Jones v. Turlington, 243 N.C. 681, 92 S.E.2d 75 (1956); Capune v. Robbins, 273 N.C. 581, 160 S.E.2d 881 (1968).

62. N.C. Gen. Stat. § 146-6(e). See also Shepard's Point Land Co. v. Atlantic Hotel, 132 N.C. 517, 44 S.E. 39 (1903); Bond v. Wool, 107 N.C. 139, 12 S.E. 281 (1890).

63. See generally, Capune v. Robbins, 273 N.C. 581, 160 S.E.2d 881 (1968).

64. Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 177 S.E.2d 513 (1970).

65. See, e.g., Crocker v. Champlin, 202 Mass. 442, 89 N.E. 130 (1909); Colberg v. State, 67 Cal. 2d 408, 62 Cal. Reptr. 401, 432 P.2d 3 (1967).

66. See, e.g., State v. Brown, 250 N.E. 54, 108 S.E.2d 74 (1959); Southern Public Utilities Co. v. City of Charlotte, 179 N.C. 151, 101 S.E. 619 (1919).

67. Hildebrand v. Southern Bell Telephone Co., 248 N.C. 637, S.E.2d (1958).

68. Morgan v. High Penn Oil Co., 238 N.C. 185, 77 S.E.2d 682 (1953); Watts v. Pama Mfg. Co., 256 N.C. 611, 124 S.E.2d 611 (1962).

69. Ibid.

70. See, e. g., State v. Brown, 221 N.C. 301, 20 S.E.2d 286 (1942).

71. Lutz Industries v. Dixie Home Stores, 242 N.C. 332, 88 S.E.2d 333 (1955); State v. Walker, 265 N.C. 482, 144 S.E.2d 419 (1965); Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970).

72. Durham v. Cotton Mills, 141 N.C. 615, 54 S.E. 462 (1906). See generally Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria, 44 So.Cal.L.Rev. 1, 17-18 (1970).

73. In re Appeal of Parker, 214 N.C. 51, 197 S.E. 706 (1938).

74. Ibid. See also Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

75. Zoning is a relatively recent phenomenon. Its use for general land use planning and management by communities based on other than nuisance control factors received its approval in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The principal earlier case is Mugler v. Kansas, 123 U.S. 623 (1887).

76. See e. g., Commissioner of Natural Resources v. Volpe, 349 Mass. 104, 206 N.E.2d 666 (1965); Sibson v. State, _____ N.H. _____, 336 A.2d 239 (1975); Brecciaroli v. Connecticut Commissioner of Environmental Protection, _____ Conn. _____, _____ A.2d _____ (1975). See also N.C. Gen. Stat. §§ 113-229 & 230.

77. Spiegle v. Beach Haven, 46 N.J. 479, 218 A.2d 129 (1966). See also N.C. Gen. Stat. §§ 104B-3 to 16.

78. See, e. g., Commonwealth v. Tewksbury, 52 Mass. 55 (1846); Potomac Sand & Gravel Co. v. Mandel, 266 Md. 358, 293 A.2d 241 (1972), cert. denied, 409 U.S. 1040 (1973). See also N.C. Gen. Stat. §§ 104B-3 to 16 and 113-230.

79. See, e. g., Turnpike Realty Co. v. Town of Dedham, _____ Mass. _____ 284 N.E.2d 891 (1972), cert. denied, 409 U.S. 1108 (1973); Turner v. County of Del Norte, 24 Cal. App. 3d 311, 101 Cal Reptr. 93 (1972); Iowa Natural Resources Council v. Van Zee, 261 Iowa 1287, 158 N.W.2d 111 (1968). See also N.C. Gen. Stat. § 143-355(c).

80. See, e. g., State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 414 (1974). See also N.C. Gen. Stat. §§ 113A-50 to 66.

81. See, e. g., Stanley v. Department of Conservation and Development, 284 N.C. 15, S.E.2d (1973). See also N.C. Gen. Stat. §§ 143-211 et. seq.

82. Constitution of North Carolina, Art. XIV, § 5.

83. See, e. g., Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972); Sibson v. State, _____ N.H. _____, 336 A.2d 239 (1975); Brecciaroli v. Connecticut Commissioner of Environmental Protection, _____ Conn. _____, _____A.2d _____ (1975).

84. See cases cited in note 2, supra.

85. Compare, e. g., State v. Johnson and Commissioner of Natural Resources v. Volpe, note 2, supra, with Just v. Marinette County, Turnpike Realty Co. v. Town of Dedham, Sibson v. State, and Brecciaroli v. Connecticut Commissioner of Environmental Protection, note 2, supra.

86. Lawton v. Steele, 152 U.S. 133, 137 (1844).

87. 369 U.S. 590, 595 (1962).

88. See, e. g., State v. Johnson and Commissioner of Natural Resources v. Volpe, note 2, supra.

89. Constitution of North Carolina, Art. XIV, § 5 Cf. Stanley v. Dept. of Conservation and Development, 284 N.C. 15, 199 S.E.2d 641 (1973).

90. 349 Mass. 104, 206 N.E.2d 666 (1965).

91. 349 Mass. at 111-112, 206 N.E.2d at 67-72.

92. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); Goldblatt v. Town of Hampstead, 369 U.S. 590, 594 (1962).

92a. See Bosselman, Callies & Banta, THE TAKING ISSUE (1973); Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964); Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971); Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L.Rev. 1165 (1967); Plater, the Takings Issue in the Natural Setting: Floodlines and the Police Power, 52 Tex. L.Rev. 201 (1974); Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria, 44 So. Cal. L. Rev. 1 (1970); Dunham, Flood Control Via the Police Power, 107 U.Pa. L. Rev. 1098 (1959).

93. For a discussion of these decisions, see any one or more of the analyses noted in note 92a, supra. Among the confusing classics are Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

94. 123 U.S. 623 (1887).

95. 260 U.S. 393 (1922).

96. See, e. g., Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970) and Helms v. City of Charlotte, 255 N.C. 647, 122 S.E.2d 817 (1961).

97. For a classic and authoritative early analysis of the law, see Commonwealth v. Alger, 61 Mass. 53 (1851). Other early precedents are reviewed in Durham v. Cotton Mills, 141 N.C. 615, 54 S.E. 462 (1906).

98. 123 U.S. at 668-69.

99. 260 U.S. at 413.

100. Ibid.

101. Id. at 416.

102. Bosselman, Callies & Banta, THE TAKING ISSUE 134 (1973).

103. See generally the analyses noted in note 92a, supra.

104. See note 85, supra.

105. See, e. g., Goldblatt v. Town of Hempsted, 369 U.S. 590 (1962) and the discussion of that case in Bosselman, Callies & Banta, THE TAKING ISSUE 257 (1973).

106. 276 U.S. 272 (1928).

107. 369 U.S. 590 (1962).

108. Id. at 593.

109. Id. at 594.

110. 123 U.S. at 668.

111. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); In re Appeal of Parker, 214 N.C. 51, 197 S.E. 706 (1938).

112. Ibid. See also Helms v. City of Charlotte, 255 N.C. 647, 122 S.E.2d 817 (1961).

113. The case referred to was Hadacheck v. Sebastian, 239 U.S. 394 (1915) in which a diminution of value from $800,000 to $60,000 was sustained, but under the rule of Mugler v. Kansas.

114. See, e. g., Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897). But some commentators express the view that state courts generally tend to lag behind federal courts and apply older and more rigid federal constitutional standards to state statutes and regulations than would the federal courts. See, e. g., Note, State and Local Wetlands Regulation: The Problem of Taking Without Just Compensation, 58 Va. L.Rev. 876 (1972).

115. State v. Ballance, 229 N.C. 764, 57 S.E.2d 731 (1949); Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970).

116. Durham v. Cotton Mills, 141 N.C. 615, 54 S.E. 462 (1906).

117. 141 N.C. at 637, 54 S.E. at 461.

118. 277 N.C. 353, 177 S.E.2d 885 (1970).

119. 277 N.C. at 362, 177 S.E. at 891.

120. Ibid.

121. See N.C. Gen. Stat. §§ 153A-340 and 160A-381. See also In re Appeal of Parker, 214 N.C. 51, 197 S.E. 706 (1968); Helms v. City of Charlotte, 255 N.C. 647, 122 S.E.2d 817 (1961); Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972).

122. 255 N.C. 647, 122 S.E.2d 817 (1961).

123. See generally, Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria, 44 So. Cal.L.Rev. 1, 30 (1970).

124. _____ Me., _____, 265 A.2d 711 (1970).

125. _____ Me., _____, 265 A.2d at 716.

126. Dooley v. Town Planning and Zoning Commission of Town of Fairfield, 151 Conn. 304, 197 A.2d 770 (1964) and Monis County Land Impr. Co. v. Parissipany-Troy Hills Twsp., 40 N.J. 539, 193 A.2d 232 (1963).

127. 349 Mass. 104, 206 N.E.2d 666 (1965).

128. See discussion in Turnpike Realty Co. v. Town of Dedham, _____ Mass. _____, 284 N.E.2d 891 (1972), cert. denied 409 U.S. 1108 (1973) and Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

129. See, e. g., Boston Real Estate Board v. Dept. of Public Utilities, 334 Mass. 477, 136 N.E.2d 251 (1956).

130. 349 Mass. at 108-109, 206 N.E.2d at 670.

131. MacGibbon v. Board of Appeals, 347 Mass. 690, 200 N.E.2d 254 (1964).

132. _____ Mass. _____, 284 N.E.2d 891 (1972), cert. denied 409 U.S. 1108 (1973).

133. MacGibbon v. Board of Appeals, 356 Mass. 635, 255 N.E.2d 347 (1970); Golden v. Board of Selectmen, 358 Mass. 519, 265 N.E.2d 573 (1970).

134. See, e. g., Sax (74 Yale L.J.), note 92a supra at 72-73; Binder, Taking Versus Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands, 25 U.Fla.L.Rev. 1 (1972); Waite, Ransoming the Maine Environment, 25 Maine L.Rev. 103 (1971); Note, State and Local Wetlands Regulation: The Problem of Taking Without Just Compensation, 58 V. L. Rev. 876 (1972).

135. _____ Mass. _____, 284 N.E.2d at 899.

136. 146 Conn. 650, 153 A.2d 822 (1959).

137. _____ Mass. _____, 284 N.E.2d at 899.

138. _____ Mass. _____, 284 N.E.2d at 900.

139. _____ Mass. _____, 284 N.E.2d at 900.

140. _____Conn. _____, _____ A.2d _____ (1975).

141. _____Mass. _____, 284 N.E.2d at 900.

142. Ibid.

143. _____Conn. _____, _____A.2d _____ (1975).

144. Ibid.

145. Ibid.

146. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

147. 56 Wis. 2d at 17, 201 N.W.2d at 768.

148. 56 Wis. 2d at 18, 201 N.W.2d at 771.

149. 56 Wis. 2d at 23, 201 N.W. 2d at 771.

150. 56 Wis. 2d at 22, 201 N.W. 2d at 770.

151. 56 Wis. 2d at 17, 201 N.W. 2d at 768.

152. As to external or spillover effects of private uses of land, see generally Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971).

153. _____ N.H. _____, 336 A.2d 239 (1975).

154. 69 N.H. 1, 39 A. 260 (1896).

155. 61 Mass. 53 (1851).

156. _____ N.H. _____, 336 A.2d at 242.

157. _____ N.H. _____, 336 A.2d at 242.

158. _____N.H. _____, 336 A.2d at 242-43.

159. _____N.H. _____, 336 A.2d at 243.

160. _____N.H. _____, 336 A.2d at 243.

161. See, e. g., Mugler v. Kansas, 123 U.S. 623 (1887). See generally, Bosselman, Callies & Banta, THE TAKING ISSUE (1973).

162. Shively v. Bowlby, 152 U.S. 1 (1894); Toomer v. Witsell, 334 U.S. 385 (1948).

163. Commonwealth v. Alger, 61 Mass. 53, 95 (1851).

164. Ibid. See also Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1962).

165. See, e. g., Large, This Land is Whose Land? Changing Concepts of Land as Property, 1973 Wis. 1. Rev. 1039, 1067-70; Glenn, The Coastal Area Management Act in the Courts: A Preliminary Analysis, 53 N.C.L.Rev. 301, 335-36 (1974); Comment, Can New York's Tidal Wetlands Be Saved? A Constitutional and Common Law Solution, 39 Albany L. Rev., 451, 484-88 passim (1975).

166. Illinois Central R. R. Co. v. Illinois, 146 U.S. 387 (1892).

167. See, e. g., Maryland Dept. of Natural Resources v. Amerada Hess Corp., 350 F.Supp. 1060 (D. Md. 1972); State v. Bowling Green, 4 ELR 20730 (Ohio Sup. Ct. 1974).

168. Ibid. See also Capune v. Robbins, 273 N.C. 581, 160 S.E.2d 881 (1968).

169. McCready v. Virginia, 94 U.S. 391 (1877).

170. See notes 35-37, supra.

171. See, e. g., N.C. Gen. Stat. §§ 146-3(1) (submerged lands) and 113-131 (fish and wildlife).

172. Constitution of North Carolina Art. XIV, § 5.

173. N.C. Gen. Stat. § 113A-123(b).

174. N.C. Gen. Stat. § 113-230(f) & (g).

175. Heath, A Legislative History of the Coastal Area Management Act, 53 N.C.L.Rev. 345, 396 (1974).

176. See, e. g. Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972); Sibson v. State, _____N.H. _____, 336 A.2d 239 (1975).

177. Littoral and riparian rights do extend beyond that boundary. See generally, notes 58-63, supra. As to the interdependence of lands and waters in general, see Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971). And as to coastal area cross-boundary interdependent interests see, e. g., Schoenbaum, note 27, supra, and Note, State and Local Wetlands Regulation: The Problem of Taking Without Just Compensation, 58 Va. L. Rev. 574 (1972).

178. See cases cited in note 32, supra.

179. Lawton v. Steele, 152 U.S. 133 (1844); State v. Whitlock, 149 N.C. 542, 63 S.E. 123 (1908); State v. Brown, 170 N.C. 714, 86 S.E. 1042 (1914).

180. See, e. g., Maryland Dept. of Natural Resources v. Amerada Hess Corp., 350 F.Supp. 1060 (D. Md. 1972); State v. Bowling Green, 4 ELR 20730 (Ohio Sup. Ct. 1974). Cf. State v. Brown, 221 N.C. 301, 20 S.E.2d 286 (1942) (police power).

181. Ibid. See also State v. Warren, 252 N.C. 690, 114 S.E.2d 660 (1960) (police power).

182. See, e. g., Elizabeth City v. Aydlett, 201 N.C. 602, 161 S.E.2d 78 (1931); State v. Warren, 252 N.C. 690, 114 S.E.2d 660 (1960).

183. See, e. g., Toomer v. Witsell, 334 U.S. 385 (1948); Maryland Dept. of Natural Resources v. Amerada Hess Corp., 350 F. Supp. 1060 (D. Md. 1972); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W. 2d 761 (1972); State v. Cramer, 167 Wash. 2d 159, 8 P.2d 1004 (1932); Daniels v. Homer, 139 N.C. 219, 51 S.E.2d 992 (1905).

184. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

185. Borough of Neptune v. Borough of Avon-by-the-Sea, 61 N.J. 296, 274 A.2d 47 (1972); Marks v. Whitney, 6 Cal. 3d 251, 98 Cal. Reptr. 791, 491 P.2d 374 (1971).

186. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); In re Appeal of Parker, 214 N.C. 51, 197 S.E. 706 (1938).

187. Cf. Freund, STANDARDS OF AMERICAN LEGISLATION, ch. II (1917).

188. The police power is broad, flexible and adaptable to changing economic and social conditions and the developing interests of the public. Elizabeth City v. Aydlett, 201 N.C. 602, 161 S.E. 78 (1931).

189. See cases cited in notes 31-33 and 50-51, supra.

190. See cases cited in note 35-37, supra.

191. Shively v. Bowlby, 152 U.S. 1(1893).

192. Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10 (1935); Hughes v. Washington, 389 U.S. 290 (1967); Capune v. Robbins, 273 N.C. 581, 160 S.E.2d 881 (1968).

193. N.C. Gen. Stat. § 146-64 (6).

194. 56 Wis. 2d 7, 18, 201 N.W. 2d 761, 768 (1972).

195. State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 414 (1974).

196. 56 Wis. 2d at 18-19, 20. N.W.2d at 769.

196a. 61 Mass. 53 (1851).

197. See, e. g., Durham v. Cotton Mills, 141 N.C. 615, 54 S.E. 462 (1906). See also Sweet v. Rechel, 159 U.S. 380 (1895); Mugler v. Kansas, 123 U.S. 623 (1887).

198. 61 Mass. at 94-95.

199. 61 Mass. at 95.

200. 52 Mass. 55 (1846).

201. 52 Mass. at 57.

202. 52 Mass. at 58.

203. Commonwealth v. Alger, 61 Mass. 53 (1851).

204. 61 Mass. at 95.

205. 52 Mass. at 57.

206. 52 Mass. at 58.

207. 52 Mass. at 57.

208. N.C. Gen. Stat. § 104A-3 to 16.

209. See generally Clark, COASTAL ECOSYSTEMS: ECOLOGICAL CONSIDERATIONS FOR MANAGEMENT OF THE COASTAL ZONE (1974) for a discussion of coastal ecosystems.

209a. See generally Sax (74 Yale L.J.), note 92a supra at 51-4.

210. Durham v. Cotton Mills, 141 N.C. 615, 54 S.E. 462 (1906); State v. Walker, 265 N.C. 482, 144 S.E.2d 419 (1965); Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970).

211. Elizabeth City v. Aydlett, 201 N.C. 602, 161 S.E. 78 (1931).

212. See, e. g., Toomer v. Witsell, 334 U.S. 385 (1948); Commissioner of Natural Resources v. Volpe, 349 Mass. 104, 206 N.E.2d 666 (1965).

213. See, e. g., Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

214. See, e. g., Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972); State v. Bowling Green, 4 E.L.R. 20730 (Ohio Sup. Ct. 1974); State Department of Environmental Protection v. Jersey Central Power and Light Co., 133 N.Y. Super. 375, 336 A.2d 750 (1975); Maryland Dept. of Natural Resources v. Amerada Hess Corp., 350 F. Supp. 1060 (D. Md. 1972).

215. Zopfi v. City of Wilmington, 273 N.C. 430, 160 S.E.2d 325 (1968). See also N.C. Gen. Stat. §§ 150A-340 (county) & 160A-381 (municipal).

216. Mugler v. Kansas, 123 U.S. 623 (1887); Durham v. Cotton Mills, 141 N.C. 615, 54 S.E. 462 (1906); Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970).

217. 255 N.C. 647, 122 S.E.2d 817 (1961). Cf. Van Alstyne, note 92a supra, footnote 38 for discussion of other formulations of the same general standard.

218. Bosselman, Callies & Banta, THE TAKING ISSUE 159 (1973). See also Plater, note 92a supra at 245 and Sax (81 Yale L.J.), note 92a supra at 153-54.

219. Blades v. City of Raleigh, 280 N.C. 531, S.E.2d 35 (1972). See also Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

220. Mugler v. Kansas, 123 U.S. 623 (1887); Durham v. Cotton Mills, 141 N.C. 615, 54 S.E. 462 (1906).

221. See Pumpelly v. Green Bay Co., 80 U.S. 166 (1871). See generally Sax (74 Yale L.J.), note 92a supra at 39, 46-48.

222. See, e. g., Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Sibson v. State, _____ N.H. _____, 336 A.2d (1975); Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970).

223. See, e. g., Turnpike Realty Co. v. Town of Dedham, _____ Mass. _____, 284 N.E.2d 891 (1972), cert. denied 409 U.S. 1108 (1973); Turner v. County of Del Norte, 24 Cal. App. 3d 311, 101 Cal. Reptr. 93 (1972); Brecciaroli v. Connecticut Commissioner of Environmental Protection, _____ Conn. _____, _____A.2d _____(1975).

224. Durham v. Cotton Mills, 141 N.C. 615, 54 S.E. 462 (1906); Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970).

225. 1975 Sen. Bill 467; 1975 House Bill 596.

226. Just v. Marinette County, 56 Wis. 2d 7, 14-15, 201 N.W.2d 761, 767 (1972).

227. N.C. Gen. Stat § 113A-123(b).

228. See, e. g., Michaelson v. Silver Beach Impr. Assn., 342 Mass. 251, 173 N.E.2d 273 (1961).

229. In re Appeal of Parker, 214 N.C. 51, 197 S.E.2d 706 (1938), quoted with approval in Helms v. City of Charlotte, 225 N.C. 647, 122 S.E.2d 817 (1961).

230. See e. g., N.C. Gen. Stat. § 113A-123(b).

231. Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 177 S.E.2d 513 (1970); Snow v. Highway Commission, 262 N.C. 169, 136 S.E.2d 678 (1964).

232. State v. Brooks, 279 N.C. 45, 181 S.E.2d 553 (1971).

233. Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 177 S.E.2d 513 (1970); Capune v. Robbins, 273 N.C. 581, 160 S.E.2d 881 (1968); Shepard's Point Land Co. v. Atlantic Hotel, 132 N.C. 517, 46 S.E. 748 (1903).

234. See text accompanying note 146-160, supra.

235. See notes 59-62, supra.

236. See, e. g., O'Neal v. Robinson, 212 N.C. 83, 192 S.E. 688 (1937).

237. Gaither v. Albemarle Hospital, 235 N.C. 431, 70 S.E.2d 680 (1952). All foreshore uses are appurtenant rights which are exclusive and non-severable according to Shepard's Point Land Co. v. Atlantic Hotel, 132 N.C. 517, 46 S.E. 748 (1903).

238. See note 63, supra.

239. Capune v. Robbins, 273 N.C. 581, 160 S.E.2d 881 (1968); Home Real Estate Loan & Ins. Co. v. Parmele, 214 N.C. 63, 197 S.E. 714 (1938).

240. Ibid.

241. See note 65, supra.

242. Bell v. Smith, 171 N.C. 116, 87 S.E. 987 (1916).

243. Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 177 S.E.2d 513 (1970).

244. See notes 34 and 76-81, supra.

245. See note 185, supra.

246. Toomer v. Witsell, 334 U.S. 385 (1948); Maryland Dept. of Natural Resources v. Amerada Hess Corp., 350 F. Supp. 1060 (D.Md. 1972); Corsa v. Tawes; 149 F. Supp. 771 (D. Md. 1957), affirmed 355 U.S. 37 (1958).

247. Mugler v. Kansas, 123 U.S. 623 (1887); Durham v. Cotton Mills, 141 N.C. 615, 54 S.E. 462 (1906).

248. 277 N.C. 353, 177 S.E.2d 885 (1970).

249. Durham v. Cotton Mills, 141 N.C. 615, 54 S.E. 462 (1906); State v. Hall, 224 N.C. 314, 30 S.E.2d 158 (1944); State v. Gordon, 225 N.C. 241, 34 S.E.2d 414 (1945).

250. See, e. g., N.C. Gen. Stat. § 113A-113(b)(2), (4)(i), (4)(iv), (4)(viii) (5). Note: this list is not intended to be exclusive or, necessarily, without some exceptions.

251. See, e. g., N.C. Gen. Stat. § 113A-113(b)(1), (3),(4)(ii), (4)(iii), (4) (v), (5), (6), (7). Note: this list is not intended to be exclusive or, necessarily, without some exceptions.

252. See, e. g., N.C. Gen. Stat. § 113A-113(3)(i), (6). Note: this list is not intended to be exclusive.

253. See note 247, supra.

254. See discussion accompanying note 68, supra.

255. Lawton v. Steele, 152 U.S. 133 (1894); In re Appeal of Parker, 214 N.C. 51, 197 S.E.2d 706 (1938).

256. Ibid.

257. The court, however, reserved the question of whether the more severe restriction or regulation might be allowed if the less restrictive alternative ultimately failed to work because of landowner non-cooperation. 277 N.C. at 363, 177 S.E.2d at 892.

258. See discussion accompanying notes 86 & 87, supra.

259. See generally, Van Alstyne, note 92a supra at 27-37. See also, Plater, note 92a supra at 245-51.

260. See generally Clark, note 209 supra.

261. See discussion accompanying notes 4 & 85, supra.

262. _____Me. _____, 265 A.2d 711 (1970).

263. _____Me. _____, 265 A.2d at 716.

264. See Binder, Taking Versus Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands, 25 U.Fla. L. Rev. 1, 25-30 (1972) for a survey of literature on wetlands destruction.

265. 57 Wis. 2d 7, 201 N.W.2d 761 (1972).

266. _____N.H. _____, 336 A.2d 239 (1975).

267. _____ Conn. _____, _____A.2d _____ (1975).

268. 255 N.C. 647, 122 S.E.2d 817 (1961).

269. See discussion accompanying notes 86 & 87, supra.

270. Glenn, The Coastal Area Management Act in the Courts: A Preliminary Analysis, 53 N.C.L. Rev. 303, 333 (1974).

271. 255 N.C. at 657, 122 S.E.2d at 824.

272. Ibid.

273. 255 N.C. at 656-657, 122 S.E.2d at 823-24.

274. 255 N.C. at 657, 122 S.E.2d at 824.

275. 255 N.C. at 656, 122 S.E.2d at 823.

276. 255 N.C. at 657, 122 S.E.2d at 824.

277. 255 N.C. at 651, 122 S.E.2d at 820.

278. See, e. g., Horton v. Gulledge, 277 N.C. 353, 652-53, 177 S.E.2d 885, 891-92 (1970).

279. Van Alstyne, note 92a supra at 34.

280. Mr. Justice Holmes indicated that the effect of regulation on value is one factor that is significant. Pennsylvania Coal Co. v. Mahon, 260 U.S. 413, 416 (1922).

281. See generally Van Alstyne, note 92a supra at 30.

282. The briefs in Helms for both petitioner and respondent addressed the constitutional issue concerning the effect of regulation through the single, all-encompassing question of "was there a 'taking'?" In fact, procedural issues were the main focus of the case; the "taking" issue was posed, but was not extensively covered in the briefs.

283. 255 N.C. 647, 650-651, 122 S.E.2d 817, 818.

284. See, e. g., Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Horton v. Gulledge, 277 N.C. 353, 362-63, 177 S.E.2d 885, 891-92 (1970). See generally Van Alstyne, note 92a supra at 37, 39. As to whether the diminution test has been relevant in protection-against-injury case law, see Michelman, note 92a supra at 1191.

285. See generally Van Alstyne, note 92a supra at 37, 39.

286. Id. at 27-37.

287. Ibid.

288. See, e. g., Hamer v. Ross, 59 Cal.2d 776, 31 Cal. Reptr. 335, 382 P.2d 375 (1963) and Vanesick v. City of Detroit, 337 Mich. 549, 60 N.W.2d 952 (1953).

289. 1 Anderson, AMERICAN LAW OF ZONING § 2.19 at 80 (1968); Van Alstyne, note 92a supra at 31.

290. 1 Anderson, AMERICAN LAW OF ZONING § 2.22 at 93 (1968); Van Alstyne, note 92a supra at 37, 39.

291. See, e. g., Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972); Sibson v. State, _____N.H. _____, 336 A.2d 239 (1975); Brecciaroli v. Connecticut Commissioner of Environmental Protection, _____Conn. _____, _____A.2d _____ (1975).

292. Even in Just v. Marinette County, the court took care to note that [t]his is not a case of an isolation swamp unrelated to a navigable lake or stream, the change of which would cause no harm to public rights." 56 Wis.2d at 18-19, 201 N.W.2d at 769,

293. See, e. g., Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951). See also Morris County Land Impr. Co. v. Parissipany-Troy Hills Twsp., 40 N.J. 539, 193 A.2d 232 (1963) and Dooley v. Town Planning & Zoning Commission of Town of Fairfield, 151 Conn. 304, 197 A.2d 770 (1964).

294. See notes 283-4, supra.