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ESSAY

THE NORTH CAROLINA MOUNTAIN RIDGE PROTECTION ACT

MILTON S. HEATH, JR.†

In 1983 North Carolina enacted the Mountain Ridge Protection Act, the nation's first comprehensive statute regulating construction on mountain ridges. Professor Heath, one of the principal draftsmen of the Act, discusses the legislative history of the Act and analyzes its major provisions. His comments should prove helpful to courts interpreting the Act and to legislatures considering similar legislation.

The construction of a ten-story condominium project atop Little Sugar Mountain in Avery County initiated a chain of events that culminated in the enactment in 1983 of a state law restricting tall building construction along North Carolina's mountain ridges.¹ The law creates a regulatory framework that governs the construction of most buildings over forty feet high at any site within one hundred vertical feet of the crest of a high mountain ridge.² Mountain area counties and cities were allowed to select from three options under the Act: a total prohibition on construction, a more flexible permit system, or a referendum on the question of opting out of the Act. They also were given a number of more detailed choices within these basic options.³ The setting in which the Ridge Law was enacted traces a familiar pattern of events in the development of resource protection legislation—a singular incident that initially draws only local attention, but thereafter becomes the focus of concern

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1. 1983 N.C. Adv. Legis. Serv. ch. 676 (codified at N.C. GEN. STAT. §§ 113A-205 to -214 (1983)). The limited literature on the Ridge Law includes: Buxton, *Mountaintop Construction in North Carolina Sparks Controversy*, APPALACHIA, Jan.-Apr. 1984, at 15; Note, *North Carolina's Ridge Law; No View From the Top*, 63 N.C.L. REV. 197 (1984); J. Horton, *Citizens' Guide to the Ridge Law* (Feb. 1984) (available at the Center for Improving Mountain Living, Cullowhee, North Carolina); M. Heath, *North Carolina Mountain Ridge Protection Law Legislative History Documents* (Oct. 1983) (available in Institute of Government Library, University of North Carolina at Chapel Hill); M. Heath, *Questions and Answers on the North Carolina Ridge Protection Law of 1983* (July 1983) (available at Institute of Government Library, University of North Carolina at Chapel Hill).

2. See N.C. GEN. STAT. § 113A-206(6) (1983) for the definition of a protected high mountain ridge (*infra* note 54 and accompanying text).

3. See *infra* notes 24-30 and accompanying text.

among many who readily imagine themselves caught up in similar circumstances or who perceive the broader implications of the original incident.⁴

North Carolina broke new ground in statutory control of ridgetop construction by enacting the Ridge Law. It is true that city zoning ordinances commonly contain building height restrictions;⁵ scattered state laws outside North Carolina address aspects of mountain preservation or protection;⁶ and New York long ago enshrined the protection of its Adirondack Mountains in the state constitution.⁷ The North Carolina Mountain Ridge Protection Act, however, is the first state statute to regulate a significant aspect of development throughout a state's mountain region. This Essay will trace the legislative evolution of the Act and will examine the Act in its larger context of land-use planning and regulation.

4. Another North Carolina example is the development of phosphate mining near Pamlico Sound in southeastern North Carolina during the mid-1960s. An early warning of attendant problems arose when neighbors of the mine discovered that their artesian wells had dried up because of heavy pumping of ground water to depressurize the mine pit. State ground water consultants later warned that the ground water aquifer under the mine might be contaminated by salt water intrusion, which could jeopardize the region's principal drinking water source. These and related concerns eventually prompted the General Assembly to enact the Water Use Act of 1967, ch. 933, 1967 N.C. Sess. Laws 1236 (codified as amended at N.C. GEN. STAT. §§ 143-215.11 to -215.22 (1983)), the Mining Registration Act of 1969, ch. 1204, 1969 N.C. Sess. Laws 1394, repealed by Sunset Law, ch. 712, 1977 N.C. Sess. Laws 901, and the Mining Act of 1971, ch. 545, 1971 N.C. Sess. Laws 466 (codified as amended at N.C. GEN. STAT. §§ 74-46 to -68 (1981 & Cum. Supp. 1983)). See Heath, *The North Carolina General Assembly of 1967*, POPULAR GOV'T, Sept. 1967, at 1-2 (water-use laws); Heath & Wicker, *Water Resources*, POPULAR GOV'T, Oct. 1967, at 39-43; Jadlocki, *The Development of Surface Mining Legislation in North Carolina Since 1967*, POPULAR GOV'T, June 1972, at 1.

5. The Standard State Zoning Enabling Act and most state zoning enabling laws authorize ordinances that regulate building height. See, e.g., N.C. GEN. STAT. § 153A-340(1) (1983) (county enabling law); *id.* § 160A-381 (1982) (city and town enabling law). See also 2 R. ANDERSON, AMERICAN LAW OF ZONING § 9.51, at 215-16 (2d ed. 1976). Residential single-family zones commonly limit buildings to 35 feet or 2½ stories; height limits for commercial and multifamily zones usually are higher. *Id.* Several western North Carolina cities have these height limits in their zoning ordinances. See, e.g., CANTON, N.C. CODE § 9-4041 (1984) (35-foot limit on single-family dwellings, 50-foot limit on general residence and business); MORGANTON, N.C. CODE § 4005(B) (1981) (35-foot limit on residential property); MT. AIRY, N.C. ZONING ORDINANCES art. IX (1983) (35-foot limit on large residential lots, 50-foot limit on smaller residential and business lots).

6. The Vermont Land Use and Development Law lists elevations over 1500 feet and watersheds with steep slopes as factors to be considered in evaluating applications for development permits. VT. STAT. ANN. tit. 10, § 6086(a)(1)(A)(i), (iii) (Supp. 1983). Massachusetts law authorizes cities and towns in Berkshire County to develop regulations to protect watersheds and scenic quality in certain areas above 1500 feet in elevation. MASS. ANN. LAWS ch. 131, § 39A (Michie/Law. Co-op 1981). Specific mountain regions such as the Mt. Si and Little Mt. Si Conservation Areas in Washington, Mt. Monadnock and Mt. Washington in New Hampshire, and Mt. Greylock in Massachusetts, have received individual statutory protection. See WASH. REV. CODE ANN. §§ 43.51.940 to -.945 (1983); N.H. REV. STAT. ANN. §§ 227-D, 227-B (1977); MASS. ANN. LAWS ch. 58, § 13 (Michie/Law. Co-op 1978 & Supp. 1984).

7. The New York Constitution requires the Adirondack Forest Preserve to be preserved as "forever . . . wild forest lands." N.Y. CONST. art. XIV, § 1. The "forever wild" provision has been interpreted liberally by the courts to achieve its protective purposes. See *People ex rel. Turner v. Kelsey*, 180 N.Y. 24, 72 N.E. 524 (1904). Exceptions to the provision have not been liberally granted. On several occasions it has been necessary to amend the New York Constitution to allow such minimal intrusions on the Forest Preserve as 20 miles of ski trails, 10 acres for a village landfill, and 50 miles of road relocations to eliminate dangerous curves and grades. See N.Y. CONST. art. XIV, § 1 (McKinney 1969) (historical note).

I. LEGISLATIVE FINDINGS

One concise paragraph of legislative findings captures the basic concerns that prompted the enactment of the Ridge Law.

Legislative findings.—The construction of tall or major buildings and structures on the ridges and higher elevations of North Carolina's mountains in an inappropriate or badly designed manner can cause unusual problems and hazards to the residents of and to visitors to the mountains. Supplying water to, and disposing of the sewage from, buildings at high elevations with significant numbers of residents may infringe on the ground water rights and endanger the health of those persons living at lower elevations. Providing fire protection may be difficult given the lack of water supply and pressure and the possibility that fire will be fanned by high winds. Extremes of weather can endanger buildings, structures, vehicles, and persons. Tall or major buildings and structures located on ridges are a hazard to air navigation and persons on the ground and detract from the natural beauty of the mountain.⁸

The aesthetic objections of both residents and tourists to high-rise, ridgetop construction were obvious from the early developmental stages of the bill.⁹ Less publicized concerns of local builders and public service professionals emphasized practical considerations, such as the difficulty of providing adequate fire protection to some buildings and of constructing high-rise, ridgetop buildings that could withstand high winds and water damage.¹⁰

The Ridge Law's legislative findings bring the Act within the line of authority that has sustained land-use regulation as a valid exercise of the police power—not only under the most recent, liberalized test of aesthetic regulation,¹¹ but also under earlier formulations, which sustained regulations combining aesthetic purposes and more traditional police power objectives.¹²

8. N.C. GEN. STAT. § 113A-207 (1983). This language was contained in Senate Bill 188 as originally introduced, and was retained in all later versions of the senate bill that eventually was adopted. See S. 188, 1983 N.C. Gen. Assembly (editions 2-7) (available at Institute of Government Library, University of North Carolina at Chapel Hill). Findings listed in the similar language of the house bill served as criteria for reviewing permit applications, rather than as a preamble to the bill. See H.R. 438, 1983 N.C. Gen. Assembly § 1(b) (available at Institute of Government Library, University of North Carolina at Chapel Hill).

9. *Public Hearings on S. 188 and H.R. 438*, 1983 N.C. Gen. Assembly (May 11, 1983) (available at Institute of Government Library, University of North Carolina at Chapel Hill).

10. Evidence supporting these practical objections appears in reports concerning the Little Sugar Mountain site. See *Durham Morning Herald*, Jan. 15, 1984, at 7B, col. 1; *Charlotte Observer*, Jan. 9, 1984, at 1A, col. 1.

11. A recent analysis concludes that a majority of jurisdictions now hold that aesthetic considerations alone can constitutionally justify a state's exercise of its police power. See Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 UMKC L. REV. 125 (1980). As one leading zoning text noted, the modern trend is "to dispense with reasons other than aesthetic ones for the exercise of the police power." 1 A. RATHKOPF & D. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 14.01[2], at 14-11 (4th ed. 1983). North Carolina recently adopted a version of this view in *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982). See Note, *State v. Jones: Aesthetic Regulation—From Junkyards to Residences*, 61 N.C.L. REV. 942 (1983). See generally Note, *supra* note 1 (discussing constitutionality of the Ridge Law).

12. See, e.g., *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979). In *Perlmutter v. Greene*, 259 N.Y. 327, 182 N.E. 5 (1932), Judge Pound eloquently expressed this

II. LOCAL OPTIONS

The 1983 General Assembly vigorously debated ridgetop building regulation for more than three months. Two competing proposals framed the debate: the Hayden Bill (House Bill 438),¹³ which would have given mountain counties and cities enabling authority to adopt their own ridge ordinances; and the Thomas Bill (Senate Bill 188),¹⁴ which would have prohibited construction of tall buildings on high mountain ridges unless a local governing body made written findings, after a public hearing, that the Act's restrictions were unnecessary in that jurisdiction.

The subject's mere introduction in the General Assembly reflected the unwillingness of western counties to use their existing zoning powers to adopt county-wide building height regulations.¹⁵ Zoning remains political anathema in many parts of the region.¹⁶ Some counties might have developed per-

traditional view: "Beauty may not be queen but she is not an outcast beyond . . . protection or respect. She may at least shelter herself under the wing of safety, morality, or decency." *Id.* at 329, 182 N.E. at 6. See generally 1 R. ANDERSON, *supra* note 5, § 7.23; 1 A. RATHKOPF & D. RATHKOPF, *supra* note 11, § 14.01[1], at 14-1 to -11. In North Carolina, regulations that combined aesthetic and traditional regulatory objectives were sustained as early as 1924. In *Turner v. City of New Bern*, 187 N.C. 541, 122 S.E. 469 (1924), the supreme court upheld a city ordinance that prohibited lumber yards within an established residential area of New Bern. The court stressed that the ordinance was designed to provide protection "not solely for aesthetic reasons, but by reason of menace from fire and disturbances by noises incident to the unloading of motor trucks and great barges." *Id.* at 547, 122 S.E.2d at 473. The court expressed its approval of the then-emerging view.

[T]he scope of the city government is not restricted to its primitive uses of the protection of life and limb and for the accommodation of business, but can embrace the preservation of the attractions as a place of residence, though a regulation for the latter purpose alone cannot be sustained except upon compensation under the right of eminent domain.

Id. at 543-44, 122 S.E. at 471.

13. H.R. 438, 1983 N.C. Gen. Assembly (available at Institute of Government Library, University of North Carolina at Chapel Hill).

14. S. 188, 1983 N.C. Gen. Assembly (available at Institute of Government Library, University of North Carolina at Chapel Hill). The original Thomas bill provided a simple opt-out scheme, under which its building restrictions would have become effective one hundred twenty days after its ratification in counties or cities that had not adopted ordinances providing for the building standards set in sections two and three of the Thomas bill. See S. 188, § 4, 1983 N.C. Gen. Assembly (edition 1) (available at Institute of Government Library, University of North Carolina at Chapel Hill). Senate Bill 188 went through a series of committee substitutes, and by the third substitute, a much more complex opt-out arrangement had evolved. See S. 188, 1983 N.C. Gen. Assembly (edition 4) (available at Institute of Government Library, University of North Carolina at Chapel Hill). A local government could (1) be covered by a provision completely prohibiting building, (2) adopt an ordinance providing for the standards set forth in sections two and three of the bill, or (3) exempt itself from the Act after meeting a complex set of procedural requirements. These procedural requirements consisted of holding a public hearing after at least ten days' newspaper notice; making findings by ordinance that the Act should not apply within the jurisdiction, taking into consideration a number of specified factors; and preserving the evidence from the hearing for at least one year for public inspection.

15. N.C. GEN. STAT. § 153A-340(1) (1983) (grant of county zoning power). As of February 29, 1984, only two counties in western North Carolina, Ashe and Madison, had enacted county-wide zoning ordinances. Buncombe, Henderson, Polk, and Wilkes counties had zoned portions of their land. (Information supplied by N.C. Dep't of Natural Resources and Community Dev. (NRCD) field offices).

16. A single purpose zoning ordinance—one that only contained building height regulations—might have been a theoretical possibility, but such an ordinance probably would not satisfy the statutory requirement that zoning be "made in accordance with a comprehensive plan." *Id.* § 153A-341.

manent ordinances regulating ridgetop construction in reliance on their general police powers.¹⁷ Indeed, some ordinances that imposed temporary moratoria on such construction had been adopted or were being considered early in 1983.¹⁸ Nevertheless, the affected local governments preferred specific statutory authority for such actions. This preference prompted their support for a ridge law.

Another comprehensive approach to the issue, a mountain area management bill similar to the North Carolina Coastal Area Management Act,¹⁹ was subject to similar opposition from the western political leaders. In 1975 these leaders had rejected decisively the mountain management concept;²⁰ if their views on the subject had mellowed somewhat since 1975, they had not mellowed enough for this to be a viable option.

As the 1983 legislative session progressed into April and May, doubts grew whether House Bill 438 or Senate Bill 188 could muster sufficient support to be enacted.²¹ Legislators began to consider possible compromises involving various local options. One such compromise was adopted by the House Committee on Water and Air Resources as a committee substitute for Senate Bill 188. It would have given the local governing body of each mountain area county the option of adopting a local ridge ordinance containing stringent restrictions on ridgetop construction or coming under the absolute prohibition on ridgetop construction.²²

The house committee compromise stimulated one last meeting of the mountain legislative caucus. Under the leadership of house speaker Liston Ramsey of Madison County, the caucus designated Asheville representative Martin Nesbitt as their spokesman to draft and present a floor amendment that added a third option for the affected local governments: to hold a referendum on opting out of the Ridge Law. With this change and the nearly unanimous support of mountain legislators, the house passed the version of the bill that was to become law with senate concurrence.²³

17. See *supra* notes 11-12 and accompanying text.

18. Avery and Watauga adopted moratorium ordinances before the Ridge Law was enacted. (Information supplied by NRCD field offices).

19. N.C. GEN. STAT. §§ 113A-100 to -128 (1983).

20. UNIV. OF N.C. AT CHAPEL HILL INST. OF GOV'T, NORTH CAROLINA LEGISLATION 1975, at 123 (discussing mountain area management bills proposed in 1975 but never reported out of committee).

21. Senate Bill 188 went through a series of clarifying committee substitutes before it passed the Senate. See S. 188, 1983 N.C. Gen. Assembly (editions 1-5) (available at Institute of Government Library, University of North Carolina at Chapel Hill). The bill then was sent to the house, where it was referred to the Committee on Water and Air Resources for consideration along with the Hayden Bill. Following a public hearing, both bills were referred to a subcommittee, which held a series of heavily attended meetings. At these meetings, subcommittee members often were outnumbered and outtalked by interested mountain area representatives and senators who were not subcommittee members. This prompted subcommittee chairman Diamont to remark on one occasion, "This is one weird committee!"

22. *Id.* (edition 6). The stringent conditions required of the ordinance were that permits for ridgetop construction had to be denied if a project failed to provide for adequate sewer facilities, for a water supply adequate for fire protection and residents' use, for compliance with sedimentation control, and for adequate protection of the natural beauty of the mountains. *Id.* § 1, at 4-5.

23. *Id.* (edition 7) (house committee edition substituted June 23, 1983).

The Ridge Law gave local governments several options. First, a county or city could choose between a total prohibition on construction or a more flexible permit system that allowed regulated ridge construction. If the governing body did not adopt a permit ordinance by January 1, 1984, that was effective by that date, the total prohibition automatically became effective.²⁴

Second, a county can eliminate the 3000-foot elevation requirement and expand the coverage of the Act to all ridges over 500 feet above an adjacent valley floor. This action can be taken by ordinance and can apply in a county with a permit system or a flat prohibition.²⁵ Cities are not given this choice but they can apply their ridge ordinances to other ridges within their jurisdiction if they determine that this result is "reasonably necessary to protect against some or all of the hazards or problems set forth in [the legislative findings of the Act.]"²⁶

Finally, a county or city that initially was covered by the Act could have opted-out of the Act in a binding referendum. The referendum must have been held by May 8, 1984, the date of the spring primary. The referendum could have been called by the local governing body or by an initiative petition signed by fifteen percent of the registered voters.²⁷

Once these initial options are considered, there are three further possibilities: a city or county that has opted-out can opt back in, through a referendum held by May 13, 1986;²⁸ a county that opts-out carries its city along with it, but any of these cities can thereafter opt back in through a separate referendum held by May 13, 1986;²⁹ or a city or county may opt back in under the Act and choose the permit procedure after the county has opted out, if the county had chosen that procedure in the first place.³⁰

Sixteen western counties to date have chosen to remain under the state-law prohibition,³¹ while eight counties have passed permit ordinances that regulate construction.³² On the ridge height issue, eight counties chose to remove the 3000-foot elevation requirement and protect all ridges rising 500 feet above an adjacent valley floor.³³ One town, Beech Mountain, adopted a municipal ordinance and the town of Banner Elk asked its county (Watauga) to

24. N.C. GEN. STAT. §§ 113A-208(a), 209(a) (1983).

25. *Id.* § 113A-206(6).

26. *Id.* § 113A-208(d).

27. *Id.* § 113A-214(a). The initiative petition must have been filed with the county board of elections at least 60 days before the referendum date. *Id.*

28. *Id.* § 113A-214(b).

29. *Id.* § 113A-214(d).

30. *Id.* § 113A-214(c).

31. The counties following the state-law prohibition are Ashe, Buncombe, Burke, Clay, Graham, Henderson, Macon, McDowell, Mitchell, Polk, Rutherford, Swain, Watauga, Wilkes, Yancey, and Yadkin counties. Interview with Mark Sullivan, Division of Land Resources, North Carolina Dep't of Natural Resources and Community Development, in Chapel Hill, North Carolina (1984) (citing departmental field reports).

32. Alleghany, Avery, Caldwell, Haywood, Jackson, Madison, Surry, and Transylvania counties have passed permit ordinances. *Id.*

33. Alleghany, Ashe, Burke, Caldwell, Henderson, Surry, Wilkes, and Yadkin counties protect ridges 500 feet above adjacent valley floors. *Id.*

enforce the county ordinance inside the town. Only one county, Cherokee, chose to hold an opt-out referendum in conjunction with the spring 1984 primary, but the referendum was unsuccessful; consequently, Cherokee County is under the state-law prohibition.³⁴

Developers seeking to challenge the Act might advance two constitutional arguments. First, they might claim the Act violates the North Carolina Constitution's prohibition of local legislation "(a) [r]elating to health, sanitation and the abatement of nuisances . . . [or] (j) [r]egulating labor, trade, mining or manufacturing."³⁵ Second, they might argue that the Act violates the equal protection clause of the United States Constitution³⁶ or the "law of the land" clause of the North Carolina Constitution,³⁷ because of its varied effects on owners of land in different counties or at different elevations. These issues need not be examined here in detail. The unsuccessful effort to raise similar questions concerning the Coastal Area Management Act³⁸ suggests that an attack on the Ridge Law also would fail. Moreover, in the long history of litigation concerning the local legislation prohibition,³⁹ the courts never have established that land-use regulations fall within any of the prohibited classes of local legislation.⁴⁰

III. KEY DEFINITIONS: TALL BUILDINGS AND PROTECTED MOUNTAIN RIDGES

A. Tall Buildings and Structures

The definition of "tall buildings and structures" is rather complex and can best be appreciated by considering separately the basic definition and the several exceptions and qualifications that follow. The basic definition is as follows:

"Tall buildings or structures" include any building, structure or unit within a multiunit building with a vertical height of more than 40 feet measured from the top of the foundation of said building, structure or unit and the uppermost point of said building, structure or unit; provided, however, that where such foundation measured from the natural finished grade of the crest or the natural finished grade of the high side of the slope of a ridge exceeds 3 feet, then such measurement in excess of 3 feet shall be included in the 40-foot limitation

34. *Id.*

35. N.C. CONST. art. II, § 24(1)(a) & (j). See Note, *supra* note 1, at 207-08.

36. U.S. CONST. amend. XIV, § 1. See Note, *supra* note 1, at 217-20.

37. N.C. CONST. art. I, § 19 (guaranteeing, *inter alia*, equal protection of the laws). See Note, *supra* note 1, at 214-16.

38. N.C. GEN. STAT. §§ 113A-100 to -128 (1983). See *Adams v. North Carolina Dep't of Natural and Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978) (rejecting challenge to Coastal Area Management Act based on N.C. CONST. art. II, § 24). See also Glenn, *The Coastal Area Management Act in the Courts: A Preliminary Analysis*, 53 N.C.L. REV. 303, 306-14 (1974) (discussing whether act violates N.C. CONST. art. II, § 24).

39. See Ferrell, *Local Legislation in the North Carolina General Assembly*, 45 N.C.L. REV. 340, 398-99 (1967).

40. See Note, *supra* note 1, at 200 n.28, 207-08.

described herein; provided, further, that no such building, structure or unit shall protrude at its uppermost point above the crest of the ridge by more than 35 feet.⁴¹

House Bill 438 originally contained a definition of "tall buildings and structures" that included a forty-foot height limitation.⁴² None of the early versions of Senate Bill 188 used these definition techniques; rather, they simply prohibited construction of units taller than three stories or thirty-five feet, with listed exceptions.⁴³ The enacted definition used the forty-foot height limit of House Bill 438, rather than the thirty-five-foot or three-story limit of the senate bill. It added the clarifying reference to "a unit within a multiunit building" to the house language and changed the baseline of measurement from "the average lowest elevation of the foundation of footing" (the form that it had in House Bill 438) to "the top of the foundation."⁴⁴

The first proviso resolves the complication introduced by a building, located on a slope, with a foundation wall that juts out of the ground above the high side of the slope. Supporters of the Ridge Law were concerned that failure to place some limits on this kind of construction would create a loophole that would allow developers to circumvent the law by "building on stilts." The purpose of the first proviso was to close this loophole by providing that, if the foundation wall rises more than three feet above the high side of the slope, the builder must subtract the excess from the forty-foot height limit. For example, if the foundation wall rose by four feet above the slope, the building height could be only thirty-nine feet.

The second proviso reflects a trade-off made in the house committee when the committee agreed to change the baseline for measuring tall buildings from the ground level to the foundation wall level. In return for this change, which usually would benefit builders, the committee added an absolute cap on building height of thirty-five feet above the crest of the hill.⁴⁵

The following structures are excluded from the building height limitations:

- (a) Water, radio, telephone or television towers or any equipment for the transmission of electricity or communications or both.
- (b) Structures of a relatively slender nature and minor vertical projections of a parent building, including chimneys, flagpoles, flues, spires, steeples, belfries, cupolas, antennas, poles, wires, or windmills.
- (c) Buildings and structures designated as National Historic Sites on

41. N.C. GEN. STAT. § 113A-206(3) (1983).

42. H.R. 438, §§ 1, 2, 1983 N.C. Gen. Assembly (available at Institute of Government Library, University of North Carolina at Chapel Hill).

43. S. 188, §§ 2, 3, 1983 N.C. Gen. Assembly (editions 1-5) (available at Institute of Government Library, University of North Carolina at Chapel Hill).

44. Another variation of the baseline language that was considered by the house committee and included in one committee draft was the phrase: "the average finished grade or level of the ground adjoining the building or structure." S. 188, 1983 N.C. Gen. Assembly (edition 6) (available at Institute of Government Library, University of North Carolina at Chapel Hill).

45. The definition of "ridge" in the Act makes it plain that the building height limit applies not only to construction on the crest of the hill, but also within 100 vertical feet of the crest. See N.C. GEN. STAT. § 113A-206(5) (1983).

the National Archives Registry.⁴⁶

The first exception—utility and communications towers—was included in all versions of Senate Bill 188 after the original bill.⁴⁷ The second exception—minor or slender projections such as steeples, poles, and chimneys—was added after questions about similar matters were raised in house committee. It was modelled on language in the Raleigh zoning ordinance.⁴⁸ The third exception—historic sites—also was added in house committee at the behest of developers who were concerned about the status of particular buildings under the Act.

B. Application of the Definition of Tall Buildings and Structures

Having defined “tall buildings and structures,” the General Assembly then addressed two related issues: the distinction between original construction and later modifications, and the application of the definition to existing buildings. The Act consistently refers to “construction” as the activity that is being regulated. Construction is defined to include “reconstruction, alteration or expansion.”⁴⁹ The definition was derived from the house bill, which originally included “repair” with the listed construction activities.⁵⁰ At the public hearing on Senate Bill 188 and House Bill 438, property owners and developers objected that this would prohibit routine maintenance, such as replacing shingles.⁵¹ The house committee eliminated the reference to “repairs” in response to these objections.⁵²

Another concern expressed at the public hearing involved the potential application of the Act to existing buildings. In response to this concern the senate committee added North Carolina General Statutes section 113A-210. This section classifies existing buildings and structures into two groups: conforming and nonconforming. No reconstruction, alteration, or expansion may aggravate or intensify a violation by a nonconforming unit or create a new violation by a conforming unit.

The developers of the Little Sugar Mountain condominiums tried to persuade the committee to consider an amendment that would have grandfathered the right to complete pending construction.⁵³ Because Senator

46. *Id.* § 113A-206(3).

47. A more limited exception for utilities modelled after the approach of the Coastal Area Management Act had been included in H.R. 438, 1983 N.C. Gen. Assembly, but this approach did not survive review by the house committee.

48. RALEIGH, N.C. CODE OF ORDINANCES § 2064(b) (1978).

49. N.C. GEN. STAT. § 113A-206(4) (1983).

50. H.R. 438 §§ 1(e)(2), 2(e)(2), 1983 N.C. Gen. Assembly (available at Institute of Government Library, University of North Carolina at Chapel Hill).

51. *Public Hearing on S. 188 and H.R. 438*, 1983 N.C. Gen. Assembly (May 11, 1983) (available at Institute of Government Library, University of North Carolina at Chapel Hill).

52. N.C. GEN. STAT. § 113A-206(4) (1983).

53. The proposed amendment would have incorporated a line of decisions that supports vested rights to complete construction initiated prior to restrictive changes in laws or ordinances. See 1 A. RATHKOPF & D. RATHKOPF, *supra* note 11, § 50.03, at 50-25.

Thomas expressed objections to the proposed amendment, however, it never was introduced formally.

C. *Protected Mountain Ridges*

The Ridge Law contains a definition of "protected mountain ridges" that identifies the elevation above which ridgetop construction will be regulated. This definition was the subject of vigorous debate.

"Protected mountain ridges" are all mountain ridges whose elevation is 3000 feet and whose elevation is 500 or more feet above the elevation of an adjacent valley floor; provided, however, that a county may elect to eliminate the requirement for an elevation of 3000 feet, and such election shall apply both to an ordinance adopted under G.S. 113A-208 and the prohibition against construction under G.S. 113A-209; provided, further, that such ordinance shall be adopted pursuant to the procedures of G.S. 113A-208.⁵⁴

Two concepts were considered throughout the legislative debates on the Ridge Law: a minimum elevation above mean sea level and a minimum elevation above adjacent valley floors. The first five versions of Senate Bill 188⁵⁵ proposed only the elevation-above-mean-sea-level test, while House Bill 438 proposed a combination of the two concepts. The original senate bill prohibited construction of tall buildings at elevations above 2750 feet, a figure that was increased to 2950 feet in subsequent versions.⁵⁶ House Bill 438 authorized the adoption of ordinances regulating construction of tall buildings at elevations of 2500 feet or more and on ridges with an average elevation at least 500 feet above an adjacent valley floor. Thus, all construction above 2500 feet would be regulated, *and* any construction on ridges rising 500 or more feet above the valley floor also would be regulated.

When the House Committee on Water and Air Resources reported its own substitute version of Senate Bill 188 to the house floor,⁵⁷ it proposed a single elevation test—that any construction of tall buildings on ridges rising 500 or more feet above an adjacent valley floor be regulated.⁵⁸ A floor amendment appended the requirement that the "protected ridges" also must lie at an elevation of 3000 feet above sea level unless a county elects otherwise.

In its enacted form, the Act contains a dual elevation test limited to ridges that both lie above 3000 feet and are 500 feet or more above an adjacent valley floor. In deference to the wishes of some mountain areas for more extensive coverage, however, the Act also allowed any county to eliminate the 3000-foot

54. N.C. GEN. STAT. § 113A-206(6) (1983).

55. S. 188, 1983 N.C. Gen. Assembly (editions 1-5) (available at Institute of Government Library, University of North Carolina at Chapel Hill).

56. *Id.* (editions 2-5).

57. *Id.* (edition 6).

58. *Id.* The sixth edition of the house bill couched this test for the first time in the form of a definition of "protected mountain ridges." All previous versions of the bill simply prohibited or regulated construction of tall buildings above specified elevations. *Id.* (editions 1-5).

requirement for ridges within its jurisdiction and to adopt the 500-foot test exclusively.⁵⁹

Although the Act literally refers to an elevation of "3000 feet," a practical and sensible construction would be "3000 feet or higher." The North Carolina Department of Natural Resources and Community Development (NRCD) employed this construction as it identified and mapped the protected mountain ridges. Ridge Law supporters considered seeking a clarifying amendment at the October 1983 special legislative session, but decided that this was not necessary. Presumably, the NRCD interpretation would be entitled to some measure of judicial deference.⁶⁰

D. "Ridges" and "Crests"

Not content to adopt the "I-know-one-when-I-see-one" approach, the General Assembly defined both "ridges" and "crests" in the Ridge Law.⁶¹ The definitions originated in House Bill 438 and were added to Senate Bill 188 by the house committee.

The Act directs the Secretary of NRCD to identify, map, draw, or otherwise describe the protected mountain ridges.⁶² Tentative maps were to be filed with county and city governing boards by November 1, 1983, and permanent maps were to be filed by January 1, 1984; both deadlines were met.

The mapping requirement fits the classic model of legislative delegation of complex, technical decision making to an administrative agency. At house committee meetings, NRCD mapping experts used relief and topographic maps to illustrate how they expected to apply House Bill 438's definition of "protected mountain ridges" within sample counties. This explanation helped the committee and other interested legislators appreciate the bill's effect on their constituents; it also brought to the surface some questions of interpretation concerning the measurement of elevations. Thereafter, refinements of the bill's basic definition were proposed and debated at later house committee meetings, but were not adopted because a consensus could not be reached on the proper wording to replace the original definitions. The committee eventually committed the task of applying these definitions to the mapmakers, whose decisions on elevations of ridges⁶³ would be conclusive in the absence of fraud.

59. N.C. GEN. STAT. § 113A-206(6) (1983).

60. See *Hatteras Yacht Co. v. High*, 265 N.C. 653, 144 S.E.2d 821 (1965) (sustaining a long-standing Internal Revenue Code interpretation by the Commissioner).

61. N.C. GEN. STAT. § 113A-206 (1983) provides:

(5) "Ridge" means the elongated crest or series of crests at the apex or uppermost point of intersection between two opposite slopes or sides of a mountain, and includes all land within 100 feet below the elevation of any portion of such line or surface along the crest.

(7) "Crest" means the uppermost line of a mountain or chain of mountains from which the land falls away on at least two sides to a lower elevation or elevations.

The Act does not specify how to measure the 100-foot vertical drop from the crest of a ridge; presumably, an altimeter or some other reliable method of measurement could be used.

62. *Id.* § 113A-212(b).

63. Delegation of analogous powers to the Coastal Resources Commission by the Coastal Area Management Act was sustained in *Adams v. North Carolina Dep't of Natural and Economic*

IV. REMEDIES AND ENFORCEMENT

The Ridge Law draws on a variety of contemporary regulatory concepts for enforcement. It incorporates by reference the criminal sanctions, civil penalties, and equitable remedies that apply to the enforcement of county ordinances—both for direct violations of the Act and for local ordinance violations. The Act contains broad statutory citizen-suit provisions that enlarge traditional remedies. It authorizes not only injured parties, but any citizen residing in a county where a violation occurs, or in an adjoining county, to bring a civil action against an alleged violator.⁶⁴ Although legislation has authorized civil suits in federal courts and some state courts to redress environmental grievances,⁶⁵ this has not heretofore been the case in North Carolina.⁶⁶ Available sanctions include any combination of damages, injunctions, and enforcement orders. Double damages may be awarded if actual damages are five hundred dollars or less. Equitable relief may be based on actual or threatened injury, and reasonable attorneys' fees and expert witness' fees may be awarded in appropriate cases.⁶⁷

In counties and cities that choose to adopt ridge ordinances, and in adjoining counties, citizens may bring suit to contest the ordinance for failing to meet the Act's requirements. The State of North Carolina, however, may neither sue to contest an ordinance nor sue to challenge a violation of the Act or a ridge ordinance.⁶⁸

In counties that come under the construction prohibition, neither the county nor its cities may authorize construction of a tall building or structure on a protected mountain ridge⁶⁹ nor authorize utility service to a violating structure.⁷⁰ The reach of these prohibitions is worth emphasizing. For example, a county health department sanitarian cannot grant a septic tank permit to

Resources, 295 N.C. 683, 696-702, 249 S.E.2d 402, 408-413 (1978). See also Glenn, *supra* note 38, at 314-327.

64. N.C. GEN. STAT. § 113A-211(6) (1983).

65. See, e.g., Clean Water Act, 33 U.S.C. § 1365 (1982); Clean Air Act, 42 U.S.C. § 7604 (Supp. 1981); Environmental Protection Act of 1970, MICH. COMP. LAWS (MICH. STAT. ANN. § 14.528(202) (Callaghan 1980)). See generally W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW, § 1.13, at 75-89 & § 2.16, at 184-86 (1977).

66. In 1971 a bill passed the North Carolina House of Representatives but died in the Senate that would have given any person standing to sue in state courts to require environmental agencies to enforce their own standards for protection of environmental quality (though not to sue polluters directly for violation of environmental standards). H.R. 1209, 1971 N.C. Gen. Assembly (available at Institute of Government Library, University of North Carolina at Chapel Hill). A similar bill met the same fate in 1973. H.R. 24, 1973 N.C. Gen. Assembly (available at Institute of Government Library, University of North Carolina at Chapel Hill).

67. The enforcement and penalties section of the Act, N.C. GEN. STAT. § 113A-211 (1983), was modelled after the analogous section of the North Carolina Sedimentation Pollution Control Act of 1973, *id.* § 113A-66. Specifically, the double damages and witness' fees and attorneys' fees provisions were derived from the Sedimentation Act, as was the general array of available civil remedies.

68. *Id.* § 113A-208(g).

69. *Id.* § 113A-209(b).

70. *Id.* § 113A-209(c).

a building that violates the Act; the sanitarian who does so could be prosecuted for violating the Act, ordered to deny the permit, or be held liable for damages or other civil relief in a citizen suit. A county building inspector also would be subject to the same restrictions on the issuance of building permits.⁷¹

V. STATE-LOCAL RELATIONSHIPS

Much of North Carolina's environmental legislation in the early 1970s relied heavily on state action for its implementation—particularly the statute concerning water pollution control, oil pollution control, air pollution control, pesticides control, and surface mining regulation.⁷² The next round of environmental laws, including the Coastal Area Management Act,⁷³ the Sedimentation Pollution Control Act,⁷⁴ and the Ground Absorption Sewage Disposal Act,⁷⁵ tended to encourage greater involvement of local governments as rule-makers or enforcers⁷⁶—probably because these statutes occupied the interface between land-use⁷⁷ and environmental protection, and because of growing political resistance to state intervention.

The Ridge Law has extended the trend towards greater local involvement. First, the Act gives counties and cities a broad array of local options concerning ridgetop building regulation—ranging from no regulation, to a local permit system, to absolute prohibitions on construction. This local government discretion far exceeds that granted in previous environmental legislation. Second, the Act limits the State's role to providing technical assistance in identifying and mapping the protected mountain ridges.⁷⁸ Third, it creates a barrier against any further state involvement beyond this limited area of technical assistance. The mapping section provides that any other state assistance to cities and counties (such as model studies, plans, and ordinances) shall be "upon request."⁷⁹ The provision concerning local permit systems further limits the State's role by withholding authorization for "the State of North Carolina or any of its agencies to bring a civil action to contest [a local ridge]

71. By 1985, every North Carolina county is required to have a building permit system. *Id.* § 153A-351(a1).

72. *Id.* §§ 143-211 to -215.114; *id.* §§ 143-434 to -470; *id.* §§ 74-24.1 to -89. Of these statutes, the only one that contemplates any significant local role in administration, the air pollution control law, allows the North Carolina Environmental Management Commission in its discretion to permit local air pollution control programs. *Id.* § 143-215.112.

73. *Id.* §§ 113A-50 to -71.

74. *Id.* §§ 113A-100 to -184.

75. *Id.* §§ 130A-333 to -345.

76. All of these statutes gave local government greater discretion in deciding whether and how to become involved in administration, rule-making, and enforcement than the statutes noted *supra* note 72.

77. Land-use planning and regulation is a field that traditionally has been delegated to local governmental units. *See* N.C. GEN. STAT. §§ 153A-320 to -390 (1983); *see also id.* §§ 160A-360 to -459 (1982 & Cum. Supp. 1983).

78. *Id.* § 113A-212 (1983).

79. *Id.* § 113A-212(a). It is likely that this provision was intended to mean "by request *only*," and it has been so interpreted by NRCD in carrying out its role under the Act. Conversations with Martin Nesbitt, member of North Carolina House of Representatives (June 1983); conversations with James Summers, then Deputy Secretary of NRCD (Aug. 1983).

ordinance, or for a violation of this [Act] or of an ordinance adopted pursuant to this [Act].”⁸⁰

The North Carolina General Assembly broke new ground in statutory control of ridgetop construction by enacting this legislation; it did so in a manner that charts a significant role for local governments and a limited role for the executive branch of state government. This may be the distinctive legacy of the Mountain Ridge Protection Act.

80. N.C. GEN. STAT. § 113A-208(g) (1983).