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THE COASTAL AREA MANAGEMENT ACT IN THE COURTS: A PRELIMINARY ANALYSIS

PETER G. GLENN[†]

I. INTRODUCTION

Elsewhere Professor Thomas Schoenbaum has expressed a somewhat optimistic appraisal of the Coastal Area Management Act of 1974.¹ In his view the Act will result in reasonably effective and environmentally sensitive regulation of land and water uses in the twenty coastal area counties.² Early in 1974 few persons believed that legislation such as this would emerge from the North Carolina General Assembly. Professor Milton Heath's description of the legislative history of the Act indicates the nature of the political difficulties which attended its birth.³ It is the thesis of this article that, before Professor Schoenbaum's optimism can be confirmed, some of the policy battles described by Professor Heath will be fought again, but this time in the courts rather than in the General Assembly. Because of the economic stakes involved in the regulation of land and water uses in the coastal area, it is likely that the validity of the Act will be tested in the courts by potential land developers.

The Act creates a mechanism for coordinated state and local regulation of land and water areas of the coastal area which have been denominated by the Coastal Resources Commission as "areas of environmental concern," and requires the formulation of general land use plans for each of the twenty coastal counties.⁴ However, aside from the

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1. N.C. GEN. STAT. §§ 113A-100 to -128 (1974 Advance Legislative Service, pamphlet no. 3).

2. Schoenbaum, *The Management of Land and Water Uses in the Coastal Zone: A New Law is Enacted in North Carolina*, 53 N.C.L. REV. 275 (1974).

3. Heath, *The Legislative History of the Coastal Area Management Act*, 53 N.C.L. REV. 345 (1974).

4. For a description of the process of designating "areas of environmental concern" see Schoenbaum, *supra* note 2, at 285-86.

State and local cooperation is one of the key features of the Act. Indeed, it is arguable that a desire to provide for substantial local government participation in coastal area management is one of the few legislative policy choices which is clear on the face of the Act. Essentially, the State government, acting through the Coastal Resources Commission, designates the "areas of environmental concern" and adopts "guidelines"

broadly expressed policy goals stated in section 113A-102,⁵ the more explicitly defined exceptions to regulation expressed in section 113A-103(5)(b)⁶ and standards limiting the designation of "areas of environmental concern" set forth in section 113A-113,⁷ the Act is virtually free of legislative direction on the substance of regulatory policy.

For the purposes of this article, the significance of the Act's lack of substantive content is that it is difficult to describe potential litigation issues except in broad terms. Lawsuits dealing with the application of the Act to particular land probably will focus on questions of fact bearing on the ultimate issue of the reasonableness of the regulation or order being contested. At this point one can only speculate

for the coastal area and for the county land use plans. N.C. GEN. STAT. §§ 113A-106 to -107 (1974 Advance Legislative Service, pamphlet no. 3). Local governments are given the responsibility for adopting county land use plans and are entitled to serve as limited permit-letting agencies.

The General Assembly's decision to create a management system involving substantial local government participation is significant from three perspectives. First, it seems clear that this feature of the Act was essential to its passage. See Heath, *supra* note 3, at 362-66. Secondly, it can be argued that the necessity for the Act was created in part by the failure of local governments in eastern North Carolina to utilize the planning, zoning and subdivision regulation powers previously granted to them by the General Assembly. See, e.g., N.C. GEN. STAT. §§ 160A-360 to -455 (1972), as amended, (Supp. 1974). Thus it is arguable that the most important feature of the Act is not that the General Assembly has taken a single-mindedly preservationist position with respect to the coastal region, but that it has created a system in which planning and some regulation are *certain* to be accomplished. Thirdly, utilization of the local governments as agencies for the accomplishment of some of the purposes of the Act has a bearing on the reasonableness of the western boundary of the coastal area as defined by the Act. See text accompanying notes 44-45 *infra*.

5. N.C. GEN. STAT. § 113A-102(b) (1974 Advance Legislative Service, pamphlet no. 3), establishes four basic goals which can be summarized by stating that the Act is designed to create a system for rational decision-making which considers environmental as well as economic and social factors. However, despite statutory references to "ecological considerations," "preservation" and "esthetic values," it is not clear that in this section the General Assembly has stated that preservation or environmental protection is to be a *preferred* policy. This same section makes references to "economic values," "capability for development," "economic development" and "transportation patterns."

6. Nine exceptions to the general definition of "development" are set forth in section 113A-103(5)(b). See Heath, *supra* note 3 at 384-93 for a discussion of the legislative history of these provisions. Road and highway maintenance, railroad and utility maintenance, construction of certain utility installations, agricultural and forestry activities except where excavation or filling is involved, "emergency" maintenance, construction of "accessory" buildings and activities for which certain commitments were made prior to passage of the Act are excepted. Moreover, the Commission is instructed to adopt rules defining "minor maintenance and improvements" which are to be exempt from the permit requirements of the Act.

7. Section 113A-113 requires that the Coastal Resources Commission designate "areas of environmental concern" from within seven designated categories of land and water. The Act contains no other substantive guidance for the Commission to assist it in designating such areas.

about the nature of the details of the actual implementation of the Act. However, these limitations do not preclude an examination of some of the ways in which the Act might be attacked on its face.

The Act applies to only twenty North Carolina counties.⁸ Within that area it requires the preparation of county land use plans and mandates a permit-letting process for certain development on land and water areas designed as "areas of environmental concern."⁹ The permit-letting process might result in denials of permission for intensive or highly remunerative development. Such permit denials are likely to result in claims that the underlying regulation as applied to the land involved constitutes an unconstitutional "taking" of property rather than a reasonable exercise of the police power. If successful, such "takings" claims may trigger an exercise of eminent domain by the Department of Administration.¹⁰

Coastal area landowners affected by this process might question the fairness of the Act. For example, coastal area development projects will be treated differently than similar projects elsewhere in the State. A state agency may deny a coastal area developer permission to build a condominium while similar projects are constructed under local regulations in a Piedmont county and are permitted without the necessity for public permission in a scenic mountain valley in a western county. By what standards are sections of the coastal area selected for regulation and on what basis is development permission denied? And, when permission to develop is denied in the coastal area, landowners possibly will feel that they are being asked to devote their land to public use by retaining it in its natural state. This certainly appears to be "confiscatory," but, if such a constitutional claim is successfully presented to a court, the Act permits condemnation of the property interest.

Attorneys for coastal area landowners probably will consider attacking the Act on a number of grounds. Some such attacks could invalidate the Act or substantially weaken it. It is the purpose of this article to sketch the dimensions of some legal arguments which are likely to be made in connection with four such attacks on the Act. First, does the Act violate the State constitutional prohibition against

8. N.C. GEN. STAT. §§ 113A-103(2)-(3) (1974 Advance Legislative Service, pamphlet no. 3). See Heath, *supra* note 3, at 368-71.

9. N.C. GEN. STAT. §§ 113A-110, 116-128 (1974 Advance Legislative Service, pamphlet no. 3).

10. *Id.* § 113A-123(c).

local legislation? Second, is the Act invalid because it delegates power to the Coastal Resources Commission without sufficient standards, thus violating the constitutional prohibition against delegation of legislative power to non-legislative bodies? Third, does the Act's definition of an invalid taking through regulation adequately protect landowners from unconstitutional regulation while leaving the Commission free to carry out an effective program of regulation? Fourth, is the Act's provision for acquisition of property interests in the event of a taking by regulation consistent with the requirement that compulsory acquisitions of property be for a public use?¹¹

II. IS THE ACT INVALID LOCAL LEGISLATION?

Article II, section 24(1) of the North Carolina constitution forbids the General Assembly from enacting any "local, private or special act . . . (a) relating to health, sanitation and the abatement of nuisances . . . (e) relating to non-navigable streams . . . (j) regulating labor, trade, mining or manufacturing." Article XIV, section 3 of the constitution defines "general laws" as those "enacted for classes defined by population or other criteria."

If the Act is characterized as falling into one of the categories enumerated in Article II, section 24(1), it is valid only if it is a general law. The Act establishes a class: the twenty counties designated by the Governor as lying within the "coastal area" as defined by the Act.¹² This class is defined by criteria other than population. The validity of the classification will depend upon whether the class is held to be rationally related to the purpose of the Act.¹³

A textual analysis of the Act indicates that it relates to or regulates matters for which the constitution mandates a general law. To the extent that the Act is intended to minimize water pollution¹⁴ it seems to relate to "health and sanitation" and to the "abatement of nuisances."¹⁵ The regulation of coastal waters and estuaries by the

11. This list of issues is not intended to be exhaustive. The purpose of this article is to engage in a preliminary examination of those issues that, if resolved adversely to the State, might render the Act totally invalid or ineffective.

12. N.C. GEN. STAT. §§ 113A-103(2)-(3) (1974 Advance Legislative Service, pamphlet no. 3).

13. See text accompanying notes 43-45 *infra*.

14. See N.C. GEN. STAT. § 113A-102(b) (1974 Advance Legislative Service, pamphlet no. 3).

15. This depends on whether the word "abatement" can be construed to include prevention of nuisances,

Coastal Resources Commission pursuant to the Act¹⁶ certainly includes regulation of "non-navigable streams." Also, the expressed goal of the Act to coordinate "economic development . . . including . . . construction, creation and design of industries, port facilities, commercial establishments and other developments"¹⁷ with other demands on the land and water resources presupposes regulation of "trade, mining or manufacturing." However, textual analysis must be coupled with an understanding of the meaning imported to section 24 by the courts before a firm conclusion can be reached. This caution is dictated by the fact that the Act can be characterized as legislation only *indirectly* dealing with the matters enumerated in section 24(1): its direct effect is simply to establish a system of government decisionmaking. Moreover the Act is potentially applicable to substantive matters beyond those listed in section 24(1).

In 1967 Professor Joseph S. Ferrell published the definitive article on the local legislation prohibition in North Carolina.¹⁸ His analysis of the cases decided to that date persuaded him that the North Carolina Supreme Court's decisions "contain no guidance for determining what is not a regulation of trade or health or an abatement of a nuisance. Neither ha[s] the court . . . articulated policies sufficient for analysis to determine what objectives of government must be implemented uniformly throughout the territorial extent of the state."¹⁹ Professor Ferrell noted that the meaning of the constitutional language "relating to non-navigable streams" had not been litigated.²⁰

The post-1967 cases offer no additional guidance on the scope of the "health" or "non-navigable streams" clauses,²¹ and the mean-

16. N.C. GEN. STAT. § 113A-102(b) (1974 Advance Legislative Service, pamphlet no. 3).

17. *Id.* § 113A-102. The Act defines development to include "removal of minerals." *Id.* § 113A-103(5)(a).

18. Ferrell, *Local Legislation in the North Carolina General Assembly*, 45 N.C.L. REV. 340 (1967).

19. *Id.* at 401.

20. *Id.* at 400.

21. Most of the post-1967 article II, section 24 cases deal with the "trade" provision. See *Smith v. County of Mecklenburg*, 280 N.C. 497, 187 S.E.2d 67 (1972); *Whitney Stores, Inc. v. Clark*, 277 N.C. 322, 177 S.E.2d 418 (1970); *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967); *Food Fair, Inc. v. City of Henderson*, 17 N.C. App. 335, 194 S.E.2d 213 (1973). In *Gaskill v. Costlow*, 270 N.C. 686, 155 S.E.2d 148 (1967), the court held that an act of the 1963 General Assembly applicable only to the Town of Beaufort which established an exception for Beaufort in connection with obligations to provide sewage service to newly annexed territory was a local act relating to health and sanitation. This holding was consistent with earlier cases holding that sewer-system matters related to "health."

ing of the trade clause has been articulated with only slightly more specificity. The leading case on the scope of the trade clause is *Smith v. County of Mecklenburg*²² which dealt with the constitutionality of a statute authorizing an election to determine whether the sale of liquor-by-the-drink would be allowed in Mecklenburg County.

In *Smith*, a unanimous court held the enabling statute invalid as a local act relating to trade. The court quoted from its opinion in *High Point Surplus Co. v. Pleasants*,²³ in which it said, "Trade within the meaning of Article II, Section 29 of our Constitution is a business venture for profit and includes any employment or business embarked in for gain or profit."²⁴ *Smith* concluded that "any restaurateur who elected to purchase, sell and serve alcoholic beverages in the manner prescribed by the Mecklenburg Act would be embarking upon a business venture for gain or profit."²⁵

Interestingly, like the Coastal Area Act, the Mecklenburg liquor referendum statute did not *directly* regulate any business activity. The Mecklenburg statute provided for the adoption of a "comprehensive plan for the administration, sale and enforcement of mixed beverages by the drink in the County."²⁶ The statute then provided for an election to determine whether the comprehensive plan would become effective. However, the court chose to characterize the Mecklenburg Act as one regulating trade.²⁷ This approach is consistent with the inference that the General Assembly intended to permit by-the-drink liquor sales if the voters approved.

It is less certain that the General Assembly which enacted the Coastal Area Act had a clear intention that any ventures for profit are to be affected in any particular way by operation of the Act. The potential impact of the Act is quite broad; it might result in denial of a permit to a landowner to build a residence for himself—not trade according to the court's definition—or it might result in the denial of a permit to construct a motel—certainly trade within the definition.

This breadth of potential application suggests an analogy to *State v. Chestnutt*.²⁸ *Chestnutt* involved a statute which made it unlawful "for any person, firm, or corporation to engage in, promote,

22. 280 N.C. 497, 187 S.E.2d 67 (1972).

23. 264 N.C. 650, 142 S.E.2d 697 (1965).

24. *Id.* at 655-56, 142 S.E.2d at 702.

25. 280 N.C. at 509, 187 S.E.2d at 75.

26. *Id.* at 499, 187 S.E.2d at 69.

27. *Id.* at 506, 187 S.E.2d at 73.

28. 241 N.C. 401, 85 S.E.2d 297 (1955).

or in anywise participate in any motorcycle or other motor vehicle race or races on Sunday in Wake County, North Carolina.”²⁹ The statute was not addressed directly, solely or specifically to commercial racing, but rather comprehended both commercial and non-commercial activity. The court held that this statute did not fall within the trade category. In the later case of *Orange Speedway, Inc. v. Clayton*³⁰ the *Chestnutt* case was distinguished. The statute involved in *Clayton* required the promoters of motor vehicle races for profit to purchase insurance and was thus viewed by the court as directly relating to trade.

Chestnutt's apparent holding, that an act does not regulate trade if it is broad enough to encompass both commercial and non-commercial activity, might comfort supporters of the Coastal Area Act were it not for the fact that in *Smith* the court appeared to be slightly uncomfortable with *Chestnutt*. In *Smith* Chief Justice Bobbitt was very careful to point out that the defendants in *Chestnutt* appealed “solely on the ground that the act regulated labor and trade. . . .”³¹ This emphasis engenders speculation that, if the court had been asked to characterize the statute at issue in *Chestnutt* as one relating to health or the abatement of nuisances, it might have done so.

So too with the Coastal Area Act. If the Act is held not to regulate trade or mining on the grounds that the statutory definition of development comprehends more than mining or profit-motivated activity, opponents will certainly charge that it relates to the abatement of nuisances or to sanitation. There is little helpful case law. Although the Coastal Act is not a local zoning act, it deals with the same general problem—governmental regulation of land uses. The supreme court has twice refused to consider whether local acts granting special zoning powers are unconstitutional.³² However in *Chadwick v. Salter*,³³ described by Professor Ferrell as “the most peculiar” local legislation case,³⁴ the court invalidated an act directing the sheriff of Carteret County to remove and sell livestock running at large on Shackleford Banks in violation of the 1957 Sand Dune Protection Act. The

29. *Id.* at 402, 85 S.E.2d at 298.

30. 247 N.C. 528, 101 S.E.2d 406 (1958).

31. 280 N.C. at 510, 187 S.E.2d at 76 (emphasis by the court).

32. *Fox v. Board of Comm'rs*, 244 N.C. 497, 94 S.E.2d 482 (1956); *Vance S. Harrington & Co. v. Renner*, 236 N.C. 321, 72 S.E.2d 838 (1952).

33. 254 N.C. 389, 119 S.E.2d 158 (1961).

34. Ferrell, *supra* note 18, at 398.

court characterized the Carteret County livestock act as relating to the abatement of a nuisance and thus invalid.

It seems most likely that the Coastal Area Act will be held to be the type of statute required to be a general law. It definitely, although indirectly, relates to non-navigable streams. If *Chestnutt* can be avoided, the Act possibly will be held to regulate trade as well since *Smith* suggests that a statute creating a decision-making process which in turn will affect commercial activity will be characterized as regulating trade. Finally, although *Chadwick's* precedential value is minimal, it suggests that legislation for the protection of dunes may be characterized as relating to the abatement of a nuisance; it is difficult to imagine why the word "abatement" in the constitutional text should not be construed broadly to encompass preventive as well as post facto regulation.

A holding that the Coastal Area Act falls into one of the categories required to be treated by general law would be very satisfying if either (1) the major policy underlying article II, section 24 were to promote rational legislative consideration of certain questions by requiring action only when most or all members of the General Assembly are forced to consider the interests of their own constituents, or (2) the policy were to promote equality of treatment without regard to irrelevant territorial differences. Professor Ferrell's analysis of the history of the local legislation prohibition, however, convinced him that these were not the major concerns underlying the constitutional provision.³⁵ Rather, he concluded that the major impetus for the prohibition was a desire to improve the legislative process by freeing the legislators from the burden of considering hundreds of bills relating to minor matters of purely local concern.³⁶ In short, the major policy consideration was that of promoting legislative housekeeping. Indeed, Professor Ferrell states: "In view of the legislative history [of the provision], it is ironic that it has come to regulate not the trivial and inconsequential, but acts having some significance from both state and local points of view."³⁷

It is arguable that, despite the teachings of legislative history, the supreme court regards the provision as relating to the validity of statutes of "some significance" which involve territorial differentiations. If, as *Smith* indicates, the ultimate constitutional determina-

35. See *id.* at 342-60.

36. *Id.* at 358.

37. *Id.* at 400-01.

tion involves an analysis of the rationality of a territorial classification based on population or other criteria, it would seem that the current policy basis for the restriction relates to more than the prevention of legislative trivia; the major policy may be to require legislative rationality at least to the extent that geographic areas of the state are treated similarly unless relevant differences in geography, economics or population permit a reasonable differentiation. The ultimate goal might be to encourage legislative thoughtfulness and responsibility. If this is perceived by the court to be an objective of the constitutional provision, it would not be surprising if the court broadly defined the matters enumerated in section 24(1) in order to bring more cases within the ambit of the provision, thus providing opportunities to focus attention on the more important question of whether a classification involving less than the entire territory of the state is reasonably related to the legislative purpose.

This conclusion would suggest that matters of land use regulation should be treated as enactments relating to health, sanitation, the abatement of nuisances, and trade. There seems to be little reason why, in the abstract, there should be any significant differential in the powers or procedures of governments regulating land use activities in various parts of the State unless the General Assembly finds that there are substantial differences in geography, or economic or social conditions which are relevant to the differences in powers or procedures.³⁸ If this reasoning is even implicitly recognized by the court, it seems likely that the critical question with respect to the Act will not be whether it can be characterized as relating to one or more of the categories enumerated in article II, section 24 but whether the twenty county classification is reasonable.

That the characterization issue is subordinate to the classification question is suggested by the structure of the court's opinion in *Smith*. In that opinion the court first discussed the classification test. It relied on *McIntyre v. Clarkson*³⁹ as the genesis of the rational classification test in North Carolina. This test, long applied in other jurisdictions, was stated by the court in *Smith* as follows: "[a local act is] an act applying to fewer than all counties, in which the affected coun-

38. *But see* *City of Durham v. Manson*, 21 N.C. App. 161, 204 S.E.2d 41 (1974), which held that a local act giving the City of Durham "quick take" condemnation power was not violative of article II, section 24: "It is our view that no part of Section 24 prohibits the enactment of local legislation of the character such as that which is now before us." *Id.* at 168, 204 S.E.2d at 45.

39. 254 N.C. 510, 119 S.E.2d 888 (1961).

ties do not rationally differ from the excepted counties in relation to the purpose of the act."⁴⁰ As the test is stated, the crucial litigation question is that of defining the purpose of the legislation. If the purpose of the Coastal Area Act is perceived to be the protection of the unique ecosystems of the coastal zone, a classification based solely on relevant ecological considerations seems rationally related to the purpose. If, on the other hand, the purpose of the Act is perceived to be the creation of a new relationship between state and local governments with respect to land use regulation, then it is difficult to see how a classification limited to twenty eastern counties is rationally related to its goal. Such a classification would appear to be quite underinclusive.

Supporters of the Act might argue that the purpose of the Act is a combination of the two goals stated above. That is, the purpose is rational management of the unique coastal area through state and local government cooperation. The fact that the coastal zone is a unique and exceptionally fragile ecosystem has been recognized not only in North Carolina but throughout the nation.⁴¹ Traditionally, regulation of land uses has been a function of local government. Thus the purpose can easily be seen as accomplishing the recently articulated goal of protecting the coastal ecosystem through a process which recognizes the traditional role of local government.⁴²

Throughout the legislative process, concern was expressed about the difficulty of developing rational criteria to define the western boundary of the coastal area.⁴³ Of the several alternatives considered, most involved drawing a western boundary line consistent with ecological or geographic determinants. Such an exercise proved to be unworkable because of the difficulty of locating the boundary and because of conflicting scientific opinions on the merits of one location over another. Likewise, the selection of counties on the basis of a totally unscientific (and probably totally political) judgment would have been unsatisfactory. Instead, the General Assembly fixed the western boundary of the coastal area by reference to two factors, each of which is

40. 280 N.C. 497, 507, 87 S.E.2d 67, 73 (1972).

41. Congress has encouraged state management programs for these areas. See Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64 (Supp. II, 1972).

42. In fact, the federal coastal area legislation requires that local government boundaries be used in defining the coastal area. See Schoenbaum, *supra* note 2, at 283. In North Carolina land use regulation has traditionally been a local responsibility. See, e.g., N.C. GEN. STAT. §§ 160A-360 to -455 (1972).

43. See Heath, *supra* note 3, at —.

relevant to its purpose. First, county lines, easily recognized and encompassing the territory (and thus the constituency) of the local government units responsible for much of the management program, serve as the western boundary. But these county lines are fixed by reference to criteria related to the environmental protection aspects of the Act. The crucial ecological concerns here are those relating to the fragile estuarine system in which fresh and salt water mix. The Act defines the coastal sounds as the limits of seawater encroachment on certain tributary rivers under normal conditions. For ease of location those limits of encroachment were defined in the Act by reference to nearby points of confluence of the river and some other stream. With the exception of counties lying entirely west of the points of confluence, any counties adjoining, adjacent to, intersected by or bounded by the Atlantic Ocean or a coastal sound as so defined were to be designated as coastal area counties.⁴⁴ This compromise, adopted after extensive legislative consideration, appears to be based on criteria which the General Assembly might reasonably have found to be related to the purpose of the Act. This is all the State constitution requires.

As Professor Heath has indicated, the Act underwent extensive and searching consideration in the General Assembly.⁴⁵ It is a carefully considered statute designed to accomplish an important state purpose through cooperation between the state government and the local governments whose territory encompasses unique, valuable and fragile resources. As such, it should be held valid under the local legislation provision.

Assuming that the Act passes muster under article II, section 24, will it necessarily be held valid under the equal protection clause of the United States Constitution or the "law of the land" clause of the State constitution insofar as it distinguishes between landowners in the twenty coastal area counties and landowners in the eighty other counties of the state? There is no doubt that owners of land in areas of environmental concern will be treated differently than other landowners. Because their land has been determined, through a rule-making procedure, to be especially ecologically important or sensitive, they will be required to secure permits from a State agency before undertaking development.

Generally, the federal courts have not applied the equal protec-

44. N.C. GEN. STAT. § 113A-103(3) (1974 Advance Legislative Service, pamphlet no. 3).

45. See generally, Heath, *supra* note 3.

tion clause to territorial classifications.⁴⁶ The equal protection clause protects persons rather than places. This is not an entirely satisfying answer; the Act has the effect of treating people differently because of the locus of their property. However, in this sense the Act is not uncommon; state delegations of power to local governments often result in such different treatment.

Assuming, *arguendo*, that the federal courts would examine the territorial classification of the Act from the perspective of the equal protection clause, it seems most likely that the so-called "minimal scrutiny" or "rational basis" test would be applied. It is clear that the classification established by the Act is not "suspect."⁴⁷ Moreover, it is unlikely that any interest impinged here could be characterized as "fundamental":⁴⁸ the effect of the Act on people is to require that their development plans be tested against police power regulations. Landowners in the coastal zone counties theoretically have been susceptible to similar regulations for years.⁴⁹

Application of the "rational basis test" in effect requires a federal court to undertake an analysis very similar to that suggested in examining the validity of the Act under the local legislation prohibition of the State constitution. The result should be the same: the territorial classification is rationally based on the purposes of the legislation.⁵⁰

III. DOES THE ACT INVALIDLY DELEGATE LEGISLATIVE POWER?

The Act delegates three important powers to the Coastal Resources Commission.⁵¹ The Commission is responsible for the prep-

46. See, e.g., *Solsburg v. Maryland*, 346 U.S. 545 (1954).

47. A recent statement of the traditional "minimal scrutiny" test is as follows: "if, upon judicial hypothesis, any state of facts might be conceived of which would indicate a rational . . . basis for the ordinance, it must be sustained." *Boraas v. Village of Belle Terre*, 476 F.2d 806, 813 (2d Cir. 1973), *rev'd*, 416 U.S. 1 (1974). However, if a statute creates a suspect classification such as race, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967), or alienage, e.g., *In re Griffiths*, 413 U.S. 717, 721 (1973), the statute must be justified by a showing that the state's purpose is "substantial," "overriding," "compelling" or "important." *Id.* at 722 n.9.

48. Statutes which impinge on "fundamental" interests, such as the right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969), or the right to vote, *Dunn v. Blumstein*, 405 U.S. 330 (1972), must be justified by more than a minimal, hypothetical relationship to a legitimate state purpose. The Court has not held that the right to use property free of police power regulations of a particular type is a "fundamental" interest.

49. Planning, zoning and subdivision regulation powers are available to North Carolina counties and cities. N.C. GEN. STAT. §§ 153A-320 to -375 (1974); *id.* §§ 160A-360 to -455 (1972).

50. The Supreme Court recently applied the "minimal scrutiny" or "rational basis" test to a zoning regulation in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

51. The Coastal Resources Commission is established by N.C. GEN. STAT. § 113A-

aration, adoption and amendment of "state guidelines for the coastal area."⁵² Also, it is responsible for designating "areas of environmental concern."⁵³ Finally, it acts as a permit-letting agency for major development projects as defined by the Act.⁵⁴

In the performance of the first two of these functions the Commission will be acting in an administrative rule-making capacity.⁵⁵ In acting as a permit-letting authority, the Commission will be engaged in administrative adjudication. It is possible that aggrieved coastal area landowners will contend that in connection with one or more of these functions the General Assembly has delegated to the Commission "legislative" power which the State constitution requires to be exercised only by the General Assembly.

The so-called "non-delegation doctrine" in North Carolina is based on interpretations of article I, section 6, and article II, section 1, of the State constitution. These provisions require that the legislative, executive and judicial powers be kept separate and distinct, and that the legislative power of the State be vested in the General Assembly. An attempt by the General Assembly to delegate legislative power to an executive agency would violate these two provisions.

This is not a simple doctrine.⁵⁶ The exigencies of twentieth century government require that state legislatures delegate to administrative agencies power that might be characterized as "policy-making power" and therefore legislative in nature. The key to an intelligent application of this doctrine is an understanding that, while delegations of power to administrative agencies are necessary, such transfers of power should be closely monitored to insure that the decision-making by the agency is not arbitrary and unreasoned and that the agency is not asked to make important policy choices which might just as easily be made by the elected representatives in the legislature.

As the non-delegation doctrine has traditionally been stated by state courts, the central inquiry is whether the transfer of power to

104 (1974 Advance Legislative Service, pamphlet no. 3). The Commission consists of fifteen members appointed by the Governor. Three of the fifteen are designated as at-large members. The other twelve must be connected with or experienced in an area of interest deemed to be relevant to coastal area problems—marine ecology, coastal forestry, the financing of coastal land development or local government in the coastal area.

52. *Id.* §§ 113A-106 to -108.

53. *Id.* §§ 113A-113 to -115.

54. *Id.* §§ 113A-118 to -122.

55. *Id.* §§ 113A-107(e), -113(a).

56. See generally 1 F. COOPER, *STATE ADMINISTRATIVE LAW* ch. 3 (1965); 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 2.07-.13 (Supp. 1970).

the agency includes adequate "guiding standards"⁵⁷ to govern the exercise of the power. While statutory standards certainly are relevant to whether the power delegated might be exercised arbitrarily and while the absence of standards might be indicative of legislative abdication of its policy-making function, the "standards" test has been subjected to considerable criticism. This test involves an inconsistent and superficial examination of verbal formulae without any significant effort to explain results in terms of underlying policy.⁵⁸

The opinions of the North Carolina Supreme Court on questions of delegation focus on the adequacy of standards. In an early case, *Durham Provision Co. v. Daves*,⁵⁹ the court articulated certain general principles regarding questions of delegation: the General Assembly may not abdicate its powers to make laws;⁶⁰ however, the constitution does not preclude the General Assembly from establishing policies and standards and leaving to agencies the determination of facts to which the policy is to apply.⁶¹

These principles have been applied by the court in a considerable number of cases,⁶² but a review of some of the major cases indicates varying approaches by the court. *Carolina-Virginia Coastal Highway v. Coastal Turnpike Authority*⁶³ considered whether a statute granting the Municipal Board of Control the power to create a municipal corporation to construct a toll road was an unlawful delegation of legislative power. The statute authorized the Board to determine whether the proposed toll road was "in the public interest."⁶⁴ There was virtually no other substantive standard governing incorporation. In invalidating the statute, the court characterized the determination of whether a toll road is "in the public interest" as a question involving "vital public policy requiring the exercise of discriminating legislative

57. See 1 F. COOPER, *supra* note 56, at 54-70.

58. See generally 1 F. COOPER, *supra* note 56; 1 K. DAVIS, *supra* note 56. Professor Davis observes: "on few subjects are state court opinions characteristically so empty of effective thinking; the typical opinion strings together some misleading legal clichés and announces the conclusion." *Id.* at 102.

59. 190 N.C. 7, 128 S.E. 593 (1925).

60. *Id.* at 11, 128 S.E. at 594, quoting T. COOLEY, CONSTITUTIONAL LIMITATIONS 137 (6th ed. 1890).

61. 190 N.C. at 10-11, 128 S.E. at 594.

62. E.g., *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970); *State Educational Assistance Authority v. Bank of Statesville*, 276 N.C. 576, 174 S.E.2d 551 (1970); *Harvell v. Scheidt*, 249 N.C. 699, 107 S.E.2d 549 (1959); *Carolina-Virginia Coastal Highway v. Coastal Turnpike Authority*, 237 N.C. 52, 74 S.E.2d 310 (1953); *Cox v. City of Kinston*, 217 N.C. 391, 8 S.E.2d 252 (1940).

63. 237 N.C. 52, 74 S.E.2d 310 (1953).

64. *Id.* at 56, 63, 74 S.E.2d at 313, 318.

statecraft—particularly so in view of the existence of our statewide system of highways . . . and the recently created 'North Carolina Turnpike Authority' with power and authority to lay out, construct and operate turnpikes and toll roads on a statewide basis."⁶⁵

The result in *Coastal Highway* seems correct. In view of the importance of the question of a coherent transportation network, the statute's lack of policy standards is quite surprising. Moreover the Municipal Board of Control, the agency to which the power was transferred, had no particular expertise in making highway-location decisions. Thus the statute presented the possibility of arbitrary and unreasoned decisions and an abdication of legislative direction on state policy.

A different result was reached under a similar statute in *North Carolina Turnpike Authority v. Pine Island, Inc.*⁶⁶ A statute empowered the Authority to construct turnpikes at locations within the State "determined by the Authority and approved by the State Highway Commission."⁶⁷ The Commission was required to certify that a turnpike project would not be injurious to the roads within the State highway system.⁶⁸ The Authority decided to construct an Outer Banks Turnpike, the Commission issued a certificate evidencing its approval and the Authority sought a declaratory judgment on the constitutionality of the statute.

The court held that with respect to the location of the turnpikes the statute delegated power with "reasonable standards which are as specific as the circumstances permit."⁶⁹ The court found a similar Indiana case persuasive. That case suggested that the standards in question were no broader than the standards used in delegations to state highway commissions⁷⁰ and that the locations would of necessity be selected from the standpoint of generating sufficient toll revenue to finance the project, a factor which would operate as a standard.⁷¹

Pine Island did not distinguish *Coastal Highway*. One can surmise that a specialized agency acting only with the approval of another specialized agency was less susceptible to arbitrary decision-making, in the court's view, than was the Municipal Board of Control. It

65. *Id.* at 63, 74 S.E.2d at 318.

66. 265 N.C. 109, 143 S.E.2d 319 (1965).

67. *Id.* at 111, 143 S.E.2d at 321.

68. *Id.*

69. *Id.* at 115, 143 S.E.2d at 323.

70. *Id.* at 114, 143 S.E.2d at 323.

71. *Id.*

is clear, however, that the difference in results is not explicable in terms of standards. The only discernible difference between the two cases is the express public interest standard in *Coastal Highway*. There was no standard governing the Authority's determination in *Pine Island* except the requirement of approval by the Commission.

In *State Education Assistance Authority v. Bank of Statesville*⁷² the delegation of decisionmaking power was to the agency authorized to issue bonds to finance student loans. Here the delegation issue before the court was whether the statute provided sufficient standards for making student loans.⁷³ By interpreting the statute to permit the Authority to make only such student loans as would qualify for federal assistance under federal interest subsidy and guaranty programs,⁷⁴ sufficient standards were found in federal legislation rather than in the State statute.

The result in *Education Assistance Authority* was reached by analyzing the purpose of the State statute and recognizing that the General Assembly intended the State loan program to be consistent with the federal programs. In order to achieve these goals it was necessary to avoid making the State program so rigid that it could not adapt to changes in the federal assistance program.⁷⁵ Thus the General Assembly did not abdicate its responsibilities; nor did it delegate power which could be exercised arbitrarily. The court was sensitive to the practical problems facing the General Assembly and indicated its willingness to look beyond the face of the statute for the adequate guiding standards.

*Martin v. North Carolina Housing Corp.*⁷⁶ is the most recent major pronouncement by the court on the non-delegation doctrine. The Housing Corporation was established as a public agency to provide housing for low income persons. A taxpayer alleged that the statute unconstitutionally delegated legislative power to the Corporation to determine what persons and families would be eligible for its assistance. The statute permitted the Corporation to determine eligibility by taking into consideration without limitation, such factors as indicia of economic status.⁷⁷ Despite the fact that the list of five factors was ex-

72. 276 N.C. 576, 174 S.E.2d 551 (1970).

73. *Id.* at 582, 174 S.E.2d at 556.

74. *Id.* at 589-92, 174 S.E.2d at 560-63.

75. *Id.* at 592, 174 S.E.2d at 562.

76. 277 N.C. 29, 175 S.E.2d 665 (1970).

77. *Id.* at 55, 175 S.E.2d at 680.

pressly made both non-exhaustive ("without limitation") and non-specific ("such factors as") the court summarily upheld the validity of the statute. The opinion includes no discussion of the issue.

It is extremely difficult to generalize from the North Carolina cases about the state of the non-delegation doctrine. For purposes of analysis of the Coastal Area Act, it may be significant that the comprehensive and important programs established by the General Assembly that were questioned in *Martin* and *Education Assistance Authority* survived the non-delegation doctrine attack despite the fact that it was theoretically possible in both cases for the General Assembly to have drafted more specific standards. It may also be significant that in the cases in which the legislation was upheld, the agency to which power was delegated was a specialized agency with presumptive expertise in the subject matter of the statutory program.

Like the agencies in *Pine Island*, *Martin*, and *Education Assistance Authority*, the Coastal Resources Commission is an agency created for a single purpose. Moreover, the Commission's composition gives assurance of some degree of familiarity with the nature of the problems with which it has been asked to deal.⁷⁸ And the Act that gives the Commission its power, like the statutes in *Martin* and *Education Assistance Authority*, is an important, comprehensive and carefully considered enactment. The Act's emphasis on close state and local cooperation results not only in a number of procedural safeguards against arbitrary decisionmaking but also insures that for critical matters the regulatory agency will have the benefit of input from informed and interested persons.

Nonetheless, the guiding standards set forth in the Act are not very specific and a plausible argument can be made that they are constitutionally inadequate. Perhaps the most extreme example of the absence of standards is the delegation of power to formulate guidelines for the coastal area. The statutory language relevant to the Commission's obligation to establish state guidelines is as follows: "The Commission shall be responsible for the preparation, adoption, and amendment of State guidelines."⁷⁹

State guidelines for the coastal area shall consist of statements of objectives, policies, and standards to be followed in public and

78. N.C. GEN. STAT. § 113A-194 (1974 Advance Legislative Service, pamphlet no. 3); see note 51 *supra*; Heath, *supra* note 3, at 364-66.

79. N.C. GEN. STAT. § 113A-107(b) (1974 Advance Legislative Service, pamphlet no. 3).

private use of land and water areas within the coastal area. Such guidelines shall be consistent with the goals of the coastal area management system as set forth in G.S. § 113A-102. They shall give particular attention to the nature of development which shall be appropriate within the various types of areas of environmental concern that may be designated by the Commission⁸⁰

The statute obligates the Commission to submit proposed guidelines to the coastal area local governments and to other private and governmental agencies deemed by it to have relevant expertise in advance of adoption of the final guidelines, and copies of the proposed guidelines are to be made available to the public.⁸¹

The language of the Act clearly suggests that the Commission is to *establish* "objectives, policies and standards" respecting the appropriate use of land and water resources in the coastal area. The Act establishes few explicit standards to guide the Commission in establishing the guidelines. However, this is a power which must be exercised in accordance with the procedures established by the new Administrative Procedure Act⁸² and by the Coastal Area Act,⁸³ which provide some assurance that the Commission will make reasoned decisions. Moreover, it can be argued that some additional but implicit standards can be identified.

The guidelines are to be consistent with the purposes of the Act set forth in section 113A-102. To be sure, those purposes are rather broadly defined; it is difficult, however, to imagine how the General Assembly could have articulated purposes with greater specificity in an Act designed to create a system for decisionmaking with respect to a wide variety of economic, social, and environmental concerns.⁸⁴ Moreover, one of the purposes of the Act is to integrate the various special permit procedures previously established for development activities in the coastal area.⁸⁵ The standards of those earlier regula-

80. *Id.* § 113A-107(a).

81. *Id.* § 113A-107(c).

82. N.C. GEN. STAT. ch. 150A (1974 Advance Legislative Service, pamphlet no. 5). The Administrative Procedure Act requires that agencies must hold hearings in the course of rulemaking and "offer any person an opportunity to present data, views and arguments." Notice of such hearings must include "[a] statement of the terms or substance of the proposed rule." *Id.* § 150A-12(a).

83. See text accompanying note 81 *supra*.

84. The purposes of the Act were deliberately stated in general terms. The major object of the Act is the creation of a special land use management system which will resolve some of the policy conflicts generated by increasing development pressures in the coastal area. See note 5 *supra*.

85. N.C. GEN. STAT. § 113A-125 (1974 Advance Legislative Service, pamphlet no. 3); see Schoenbaum, *supra* note 2, at 292.

tory efforts, together with the expressed purposes of the Act, establish some boundaries for the standards, objectives, and policies which are to be established in the guidelines. Those boundaries can be further defined by reference to the statutes delegating to cities and counties the power to engage in planning, zoning and subdivision regulation, in which the General Assembly has established permissible objectives with respect to land use regulation.⁸⁶ This entire collection of policy statements can be considered together with other legislative pronouncements such as those regarding air and water quality control⁸⁷ and highway location⁸⁸ to establish a mosaic of legislative determinations which, may be taken together to establish "standards" for the promulgation of guidelines. Thus in establishing the guidelines the Commission will not be operating in a vacuum. Its task is to develop a coherent set of standards for decisionmaking with respect to a unique area of the State. It will do so in the context of the various regulatory powers previously defined by the General Assembly. In view of the difficulty of the task, it is unlikely that the Commission, composed of persons familiar with the coastal area, many of whom are representatives of the local governments in the coastal area, will not be able to perform this task more efficiently than and at least as responsibly as the General Assembly.

In addition to these implicit standards, arbitrariness is avoided because the procedures established by the Act for the development of the guidelines are designed to give all interested parties an opportunity to present their views to the Commission. The preparation of the guidelines is a process which will be carried on in public with a number of opportunities for the General Assembly, the local governments, landowners, and other interested members of the public to monitor the process. Under these circumstances the opportunities for arbitrary or ill-informed decisionmaking seem quite minimal.

If the court accepts the arguments that the nature of the subject matter makes it unlikely that the General Assembly could effectively have stated more specific standards governing the process of establishing guidelines, and that the Commission will be acting in the open with input from the public and from local governments, and will be acting against the background of a number of legislative policy statements

86. N.C. GEN. STAT. §§ 153A-320 to -347 (1974); *id.* §§ 160A-360 to -407 (1972).

87. *Id.* §§ 143-211, -215 to -269 (1974).

88. *E.g., id.* § 136-45.

embodied in land and water regulation legislation, it seems unlikely that a non-delegation attack will succeed here. Certainly in this regard, the situation presented by the Act is no less constitutional than those presented to the court in *Pine Island*, *Education Assistance Authority* and *Martin*.

Turning to another delegation issue raised by the Act, the statutory language governing the power of the Commission to designate areas of environmental concern is as follows:

The . . . Commission shall by rule designate geographic areas of the coastal area as areas of environmental concern and specify the boundaries thereof, in the manner provided in this Part The Commission may designate as areas of environmental concern any one or more of the following, singly or in combination: [There follows a list of seven types of land and water areas within which areas of environmental concern may be designated] Additional grounds for designation of areas of environmental concern are prohibited unless enacted into law by an act of the General Assembly.⁸⁹

The areas of environmental concern are to be designated by a rule making procedure which follows public hearings in the counties in which the lands proposed to be so designated are located.⁹⁰

While it is clear that the Commission has no power to designate as an area of environmental concern land which does not fall into one of the seven listed categories, the Act offers little guidance to the Commission in choosing which of those land and water areas to so designate.

Like the establishment of state guidelines, the designation of areas of environmental concern will take place in accordance with the procedures established by the Coastal Area Act and by the Administrative Procedure Act. Interested persons will have an opportunity to be heard. The decisionmaking process will be subject to public scrutiny. Also, since the task requires specific knowledge of the coastal lands and waters, this is particularly a type of decision which the Commission is at least as well equipped to make as the General Assembly.

Moreover, *Pine Island* and *Martin* both suggest that the Act should not be vulnerable here. *Pine Island* suggests that the power to designate highway locations—roughly analogous to the designation of areas of environmental concern—is a fit subject for delegation. In

89. *Id.* § 113A-113(a)-(b) (1974 Advance Legislative Service, pamphlet no. 3).
90. *Id.* § 113A-115.

that case the only effective standards were the implied financial incentive and the check provided by the requirement of Highway Commission approval. Here, the specialized agency will be operating in an open process with ample opportunity for local governments and coastal area landowners to express approval. Moreover, here there are rather stringent standards *confining* the Commission's choice to within the seven categories. A comparison to the non-exclusive and exemplary list of factors in *Martin* suggests that the court will hold that in the Act the General Assembly has established acceptable guiding standards for the designation of areas of environmental concern.

A third delegation issue is raised by the permit-letting power that is granted to the Commission. The statute sets forth eight standards which govern the process of granting or denying permits. Some of the standards leave the Commission with considerable discretion: permits may be denied when the proposed development would result in "major or irreversible damage"⁹¹ to certain resources or interests, would "unreasonably endanger life or property"⁹² or (piling delegation on delegation) would be "inconsistent with the state guidelines or local land use plans."⁹³

The procedures for consideration of permit applications are quite formal. Hearings are to be preceded by notice, full and complete records are to be kept, procedures applicable in civil actions in superior court are to be followed insofar as practicable, and decisions are to be supported by competent, material, and substantial evidence.⁹⁴

It is the permit-letting process which is most likely to engender litigation. In this arena, economic expectations will be forced to compete most directly with environmental concerns. Here the impact of arbitrary and capricious decisionmaking is most likely to be felt; despite the requirement for a public hearing, these proceedings may not attract as much public attention as will the Commission's rule-making proceedings. It can be argued therefore that it is with respect to this process that the need for adequate guiding standards is most acute.

The adequacy of the standards governing the permit-letting process established by the Act probably is determined by *Humble Oil & Refining Co. v. Board of Aldermen*⁹⁵ in which the court upheld against a

91. *Id.* § 113A-120(a)(4).

92. *Id.* § 113A-120(a)(6).

93. *Id.* § 113A-120(a)(8).

94. *Id.* § 113A-122.

95. 284 N.C. 458, 202 S.E.2d 129 (1974).

non-delegation challenge the standards of the Chapel Hill zoning ordinance which governed the issuance of special use permits by the town's governing board. Similar questions had previously been presented to the court in *Jackson v. Board of Adjustment*⁹⁶ and *Keiger v. Board of Adjustment*.⁹⁷ In *Jackson* the court struck down Guilford County's delegation to its zoning board of the power to grant special use permits upon a finding by the board that "the granting of the special exception will not adversely affect the public interest."⁹⁸ The court found that the "public interest" standard constituted "the power to make a different rule of law, case by case"⁹⁹ because the standard made the "determinative factor" for the grant or denial of a permit or exception "the opinion of [the] . . . board" as to the desirability or undesirability of the activity for which the exception was sought.¹⁰⁰

Two years later in *Keiger*, the court considered whether the special use permit procedures of the Winston-Salem zoning ordinance violated the non-delegation doctrine. The court held that a denial of a special use permit application on the ground that the proposed use would not be in accord with the "purpose and intent" of the ordinance was an exercise of legislative power by the Winston-Salem Board of Adjustment.¹⁰¹

The Winston-Salem ordinance provided that special use permit application decisions were to be based on "the information submitted, the findings of the City-County Planning Board, the purpose and intent of this ordinance and the public interest."¹⁰² Relying on *Jackson*, Judge Exum in the Superior Court ruled that the phrase "and the public interest" should be disregarded.¹⁰³ Petitioners appealed from Judge Exum's affirmance of the zoning board's denial of their application on the ground that a delegation of decision-making power to the zoning board based on "the purpose and intent of this ordinance" was an unconstitutional delegation of legislative power.

The supreme court agreed. It examined the "purpose and intent" clause of the zoning ordinance and found that the purposes set forth there were essentially the purposes stated in the zoning enabling act.¹⁰⁴

96. 275 N.C. 155, 166 S.E.2d 78 (1969).

97. 278 N.C. 17, 178 S.E.2d 616 (1971).

98. 275 N.C. at 159, 166 S.E.2d at 81.

99. *Id.* at 165, 166 S.E.2d at 85.

100. *Id.*

101. 278 N.C. at 22-23, 178 S.E.2d at 619-20.

102. *Id.* at 21, 178 S.E.2d at 619.

103. *Id.* at 19, 178 S.E.2d at 617.

104. *Id.* at 22-23, 178 S.E.2d at 619-20.

These, said the court, were the purposes for which the General Assembly delegated power to Winston-Salem's legislative body, the Board of Aldermen.

In the exercise of this grant of power by the Board of Aldermen, the 14.5-acre site was included in a B-3 zone, where, according to the Ordinance, the construction of a mobile home park is a conditional permissible use. Precise conditions were set forth by the Board of Aldermen as requirements for the granting of a special or conditional use permit by the Board of Adjustment. Petitioners complied with these requirements. It would constitute an unlawful delegation of the legislative power vested by the General Assembly in the Board of Aldermen of Winston-Salem to allow the Board of Adjustment to deny such permit on the ground *it* did not consider the use *specified in the Ordinance as a conditional permissible use* to be in accord with the "purpose and intent" of the Ordinance. We perceive no substantial difference between the denial of a permit on the ground the conditional use is adverse to the public interest and the denial thereof on the ground the conditioned use is not in accord with the "purpose and intent" of the Ordinance.¹⁰⁵

These cases set the stage for attacks on the adequacy of the standards governing the Chapel Hill special use permit procedure. The Chapel Hill ordinance required that a special use permit be granted only when the granting agency made four findings.¹⁰⁶ The required findings included the following: "that the use [if located where proposed] will not materially endanger the public health or safety . . . [and] will be . . . in general conformity with the plan of . . . Chapel Hill."¹⁰⁷ It can be argued that these two required findings are functionally identical to the standards struck down in *Jackson* and *Keiger* as requiring the *opinions* and therefore the policy preferences of the permit granting agency. However, direct attacks on the adequacy of these standards were twice rejected by the court of appeals in 1972.¹⁰⁸

Subsequently, the Board of Aldermen denied a special use permit for Humble Oil Company to build a gas station on Chapel Hill's major commercial street. Humble attacked the denial and was successful in persuading the supreme court that Chapel Hill's process of considering special use permit applications was procedurally deficient.

105. *Id.* at 23, 178 S.E.2d at 620.

106. CHAPEL HILL, N.C., ZONING ORDINANCE § 4(B) (1973).

107. *Id.*

108. *Carter v. Town of Chapel Hill*, 14 N.C. App. 93, 187 S.E.2d 583 (1972); *Keenan v. Board of Adjustment*, 13 N.C. App. 688, 187 S.E.2d 496 (1972).

In an opinion written by Justice Sharp, the court held that in permit-letting procedures of this type "the party whose rights are being adjudicated" is entitled to "all essential elements of a fair trial" including the right to cross-examine and that the findings of the permit-letting agency in support of a denial must be supported by "competent, material and substantial evidence."¹⁰⁹

Humble had additionally attacked the Chapel Hill ordinance as having insufficient standards to govern the permit-letting process. After articulating its "substantial evidence" test the court dealt with the non-delegation attack as follows:

Some of the ordinance requirements are specific; others, not susceptible of exact definition, are necessarily stated in general terms. In our view the ordinance achieves reasonable specificity. Safeguards against arbitrary action by zoning boards in granting or denying special use permits are not only to be found in specific guidelines for their action. Equally important is the requirement that in each instance the board (1) follow the procedures specified in the ordinance; (2) conduct its hearings in accordance with fair-trial standards; (3) base its findings of fact only upon competent, material and substantial evidence; and, (4) in allowing or denying the application, it state the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision.¹¹⁰

The significance of the *Humble Oil* opinion for an analysis of the Act is that the procedures outlined in section 113A-120 to govern permit letting are substantially identical to the procedures mandated in *Humble Oil* and that, in terms of specificity, the findings required by the Act are no less satisfactory than those required by the Chapel Hill ordinance.¹¹¹ It seems likely therefore that the court will reject a non-delegation attack on the Commission's exercise of the permit-letting authority.

The question of delegation of legislative power is not a legal issue

109. 284 N.C. at 470, 202 S.E.2d at 138.

110. *Id.* at 471, 202 S.E.2d at 138.

111. In both cases the decision-makers are required to make findings which are reflections of informed opinion as to what the public interest requires. The Chapel Hill ordinance requires a finding that the proposed use will not "materially endanger the public health or safety." Section 113A-120(6) requires that a denial must be based on a finding that the development would occur "in such a manner as to unreasonably endanger life or property." The words "materially" and "unreasonably" both admit to considerable elasticity; both standards are very much like general statements describing typical legislative police power judgments. If the Chapel Hill standards, coupled with an adequate procedure, are acceptable to the court, it is likely that the standards of section 113A-120 will also be acceptable.

which is susceptible to fully satisfactory analysis. One has the sense in reading the cases that prediction of the outcome of any dispute framed in terms of this issue is nearly impossible. The court itself has recognized that the line between legislative and administrative powers is unclear and imprecise. However, the recent cases dealing with the subject suggest some tentative conclusions. It appears that the court has been responsive to and has approved legislation which has been carefully drawn to minimize the possibility of arbitrary administrative decisionmaking and administrative decisionmaking which involves the formulation of major policies for the state; although the test of constitutionality is couched in terms of adequacy of standards, it is difficult to explain the results in *Pine Island* and *Martin* in terms of standards alone. If the underlying policies are perceived to be prevention of arbitrariness and a sense that where possible the General Assembly should articulate policy, it would appear that the delegations of power to the Coastal Resources Commission are constitutional. The Act deals with subject matter which is not susceptible to precise formulations of policy by a legislative body; the Commission, aided by professional staff, is in a better position to make the factual determinations required for a coordinated coastal area policy within the parameters established by the General Assembly. Moreover, the Act is replete with safeguards against arbitrary action; the courts, the local governments, the General Assembly and the public will be watching with care the actions of the Commission.

IV. THE TAKINGS ISSUE

Proposals for environmentally sensitive land use regulation often generate strong political opposition based on fear that such regulation will destroy or substantially diminish property values. This, it is said, is confiscation. In connection with coastal area regulation this fear is understandable; the goals of such regulation might necessarily require the preservation of dunes, beaches and wetlands in, or near, their natural states. The constitutional doctrine which reflects societal unwillingness to tolerate uncompensated "confiscation" is the complex and somewhat mystifying "takings" doctrine, which, in its various formulations, attempts to define the outer limits of permissible uncompensated regulation.

Unlike most land use regulation measures, the Act attempts to codify a test for determining when a regulatory order passes beyond the permissible bounds of the police power and becomes an invalid tak-

ing. The statutory test requires that a court determine whether an order (presumably a development permit denial) so restricts the use of property so as to deprive the landowner of "the practical uses thereof."¹¹² The key to understanding this test is the phrase "practical uses." Although the test appears to focus only on the extent to which some uses—presumably remunerative ones—are left to the landowner, it is more likely that the words "practical uses" are actually a shorthand reference to a balancing test which would have been applied by the North Carolina courts in the absence of any statutory guidance.¹¹³ This balancing test probably will permit rather extensive regulation under the Act.

The modern doctrine defining the takings issue in terms of a balance between the extent of harm to a landowner and the degree of police power protection afforded the public finds its origins in Mr. Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*.¹¹⁴ There the question was the constitutionality of Pennsylvania's Kohler Act which prohibited the extraction of anthracite coal in such a manner to cause subsidence of surface property where the surface was improved for residential use or for city streets.¹¹⁵ The coal company had sold its estate in the surface of land, reserving the right to mine coal and a contractual commitment from the vendees permitting the company to mine so as to cause subsidence on notice to the surface owner. The Kohler Act would have precluded such mining.

Over a strong dissent by Mr. Justice Brandeis, Mr. Justice Holmes held the Kohler Act unconstitutional. While conceding that nearly all police power regulations deprive landowners of some value, Holmes held that a constitutional line must be drawn or else government could accomplish the appropriation of property in the guise of regulation. The police power, said Holmes, "must have its limits . . . [O]ne factor for consideration in determining such limits is the extent of diminution [of value]."¹¹⁶ Holmes noted that the effect of the Kohler Act was to leave the coal company without any effective rights of ownership in its estate in the coal in place. This clearly was an important factor in his determination that the Pennsylvania statute was unconstitutional.

112. N.C. GEN. STAT. § 113A-123(b) (1974 Advance Legislative Service, pamphlet no. 3).

113. See text accompanying notes 126-41 *infra*.

114. 260 U.S. 393 (1922).

115. *Id.* at 412-13, 414-15.

116. *Id.* at 413.

Pennsylvania Coal might be thought to stand for the simple proposition that, when the entire use-value of property ownership is destroyed by government regulation, the regulation is invalid. However, the opinion is more usefully understood to articulate a balancing test in which the extent of loss of the attributes of ownership by the landowner is weighed against the degree to which the general public is protected from harmful activity by the regulation in question. Just as it is clear that Holmes saw the Kohler Act as leaving the owner of the coal with literally no attributes of ownership, it is clear that he saw the purpose of the Act as being of limited public scope and importance. "The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice."¹¹⁷

That the Supreme Court's approach to the takings issue has not rested solely on a diminution of value analysis but rather on a balancing test is indicated both by its older cases, such as *Hadacheck v. Sebastian*¹¹⁸ in which a nearly ninety percent reduction in value was permitted and by its most recent pronouncement in *Goldblatt v. Town of Hempstead*,¹¹⁹ which held that a quarry owner failed to meet the burden of proving that an ordinance prohibiting excavation below the water table was invalid as a taking of his thirty-eight acre tract of land. The Court said: "There is no set formula to determine where regulation ends and taking begins."¹²⁰ It quoted from its opinion in *Mugler v. Kansas*¹²¹ for the proposition that "[A] prohibition simply upon the use of property for purposes that are declared, by valid leg-

117. *Id.* at 413-14.

118. 239 U.S. 394 (1915).

119. 369 U.S. 590 (1962). For useful discussions of the history of the development of the takings doctrine in the Supreme Court see F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 114-38 (1973); Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36, 37-46 (1964).

120. 369 U.S. at 594.

121. 123 U.S. 623 (1887). This opinion, written by the first Mr. Justice Harlan, reflects a view of the taking problem which is somewhat different than the Holmes case-by-case balancing test. *Mugler* involved the validity of a prohibition of the manufacture and sale of liquor as applied to a brewery enacted prior to enactment of the statute. Mr. Justice Harlan found the statute valid in an opinion which emphasized the fact that the state was merely regulating "noxious" conduct and literally was not appropriating or taking any property interests. Emphasis here was on the constitutional terms "taking" and "property." Property does not include the right to injure the public; a regulation is not an appropriation. This highly conceptualized approach to the problem may have modern adherents. See *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

isolation, 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.'"¹²² The Court also cited *Pennsylvania Coal* for the proposition that a comparison of values before and after regulation is relevant but "by no means conclusive."¹²³

Goldblatt examined the ordinance in question: "[To] evaluate its reasonableness we therefore need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance."¹²⁴ The record in the case was insufficiently complete to enable the Court to satisfactorily weigh the various factors. However, the Court clearly suggested that even if the public benefit was seen as *de minimis*, it was possible that the impact on the landowner also was *de minimis*; in such circumstances the ordinance would have been held valid.¹²⁵

Within a year of the United States Supreme Court's opinion in *Goldblatt*, apparently restating the notion of federal law that an examination of diminished value alone would not be conclusive,¹²⁶ the North Carolina Supreme Court decided *Helms v. City of Charlotte*,¹²⁷ which appears to establish a balancing test and apparently is the source of the "practical uses" test set forth in the Act.¹²⁸ *Helms* in-

122. 369 U.S. at 593, quoting 123 U.S. at 668-69.

123. 369 U.S. at 594.

124. *Id.* at 595.

125. *Id.* at 595-96.

126. Commentators who have examined carefully the opinions of the Supreme Court on the taking issue find it difficult to articulate a single doctrinal test which is applied by that Court. Professor Joseph Sax developed the impression "that the Court has settled upon no satisfactory rationale for the cases and operates somewhat haphazardly, using any or all of the available, often conflicting theories without developing any clear approach to the constitutional problem." Sax, *supra* note 119, at 46. The available theories are described quite concisely in Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1127-30 (1964). Professor Arvo Van Alstyne has noted that "[J]udicial efforts to chart a usable test for determining when police power measures impose constitutionally compensable burdens have, on the whole, been notably unsuccessful. With some exceptions, the decisional law is largely characterized by confusing and incompatible results, often explained in conclusory terminology, circular reasoning and empty rhetoric." Van Alstyne, *Taking or Damaging By Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 2 (1971). For purposes of analysis of the Act, the importance of the doctrinal confusion in this area is that it indicates that state and federal constitutional law has not adopted a diminution of value test as the sole and controlling factor in setting limits on the police power.

127. 255 N.C. 647, 122 S.E.2d 817 (1961).

128. See text accompanying note 113 *supra*. The text of section 113A-123(b) of the Act is, with slight exceptions, identical to the language of the Coastal Wetlands Act,

volved the validity of an amendment to the zoning ordinance of the city of Charlotte. Mr. Helms purchased two lots which had been placed in an industrial district until an amendment in 1957 restricted the lots to residential uses. The surface of the lots was six to eight feet below the grade level of the abutting street. Mr. Helms sought and received a permit to bury oil tanks on the lot by filling the lots to street level. Subsequently he applied for a permit to construct a small office building on the lots in which he intended to operate an oil distribution business. The permit was denied.¹²⁹ Mr. Helms then sought a declaratory judgment that the ordinance reclassifying his lots was invalid. The superior court held the ordinance valid despite finding that the lots were worth one-third as much for residential use as for industrial use. The superior court also found that Mr. Helms could build a conforming (albeit small) residence on the lots.¹³⁰

On appeal the State supreme court remanded the case with direction that the trial court "hear evidence and determine whether or not the lots in question are, under all the circumstances, practical and of any reasonable value for residential use."¹³¹ The important point in the *Helms* case itself is that the court was unwilling to conclude that an "unsightly and out of line" residence on the lots which might have been built in conformity with the zoning ordinance was nonetheless a reasonable or practical use; the court did not, on the state of the record, however, hold the ordinance invalid.¹³² Instead it held that the trial court had not properly defined its scope of inquiry in answering the question: "[Is] it practical to use the lots for residential purposes

N.C. GEN. STAT. § 113-230(f) (Supp. 1974). See Heath *supra* note 3, at 395-96.

The discussion in the remainder of this section is predicated on two propositions: (1) the judgment that *Helms* sets forth a balancing test as opposed to a single-focus value diminution test; and (2) the assumption that in drafting the Act (and the Coastal Wetlands Act) the General Assembly intended to codify the approach of the court in *Helms* rather than repudiate or modify it. The first proposition is a matter of case analysis on which attorneys can and will differ. The second proposition is an historical judgment which to my knowledge is not supported by written documentation, but by an assumption that if the legislative draftsmen had intended to modify the *Helms* test they would have done so with greater clarity.

129. 255 N.C. at 649, 122 S.E.2d at 819.

130. *Id.* at 649-50, 122 S.E.2d at 819-20.

131. *Id.* at 657, 122 S.E.2d at 825.

132. The court disagreed with the trial judge on whether the lots were sufficiently large to permit lawful residential construction. *Id.* Presumably the case could have been decided on this ground alone; if no residential use was legally possible, all use attributes of ownership would have been destroyed by the ordinance. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). However, the court accepted for purposes of discussion the trial court's finding that the lots were of legally sufficient size for residential use. 255 N.C. at 657, 122 S.E.2d at 824.

and do they have any reasonable value for residential use under zoning regulations, the building code and other pertinent circumstances?"¹³³

The court indicated that this question could be answered only by an evaluation of many factors.¹³⁴ These factors included: (a) the nature of the neighborhood surrounding the lots; (b) the character of the traffic on the nearby street; (c) the effect on the neighborhood of requiring that the only use of Helms' land be a house of "unique design"; (d) the possibility of variances from area and set-back requirements; (e) the market value of any residence constructed on the lots; and, significantly, (f) "whether an unsightly and out-of-line residence would be less injurious to nearby property than a business establishment."¹³⁵

The list of factors to be considered suggests that although the ultimate question is whether the uses remaining after regulation are practical and of reasonable value, the words "practical" and "reasonable" take their content from all of the surrounding circumstances, including an assessment of the degree to which the regulation in fact protects the public from harmful activity. To borrow the analysis suggested in *Goldblatt*, it might be said that in *Helms* the public benefit was *de minimis* while the burden on the landowner was substantial.¹³⁶

There can be no doubt that the focus of *Helms* is on the nature of the uses permitted the landowner after regulation. This is understandable. *Pennsylvania Coal* teaches that regulation cannot so deprive the landowner of the use attributes of ownership to become, in effect, an appropriation of his property. However there are some indications in the text of the *Helms* opinion that the court believes that the question of the permissible degree of regulatory burden on a landowner can be measured only by reference to the degree to which the regulation serves the public interest.

The court quoted from *McQuillin on Municipal Corporations* for the proposition that in a particular case "the preference of the public interest over the private interest" must be determined on a case-by-case basis.¹³⁷ Later in the opinion the court referred to the factors

133. 255 N.C. at 656, 122 S.E.2d at 824.

134. *Id.*

135. *Id.* at 656-57, 122 S.E.2d at 824.

136. See text accompanying note 123 *supra*.

137. 255 N.C. at 651, 122 S.E.2d at 820, quoting 8 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS 96-97 (1949).

which must be considered in determining whether a residential use of the property is practical. The first is the nature of the surrounding land uses.¹³⁸ This factor is relevant not only to the potential value of a residence on the lots in question but also to whether the zoning regulation actually will protect the neighborhood from an incompatible use. Finally, the court made this consideration explicit by noting that the trial court should consider "whether an unsightly and out of line residence would be less injurious to nearby property than a business establishment."¹³⁹

On the basis of this language it can be argued strongly that the practical uses test of *Helms* is a balancing test in which 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. If the courts read the language of the Act as referring to the *Helms* approach and read *Helms* as a balancing test, it is likely that a regulatory order under the Act will survive a takings challenge despite the fact that the landowner is left with no highly remunerative uses if the order is an otherwise reasonable exercise of the police power in aid of important public objectives. An order which prohibits intensive and environmentally harmful uses of marshlands may not deprive a landowner of practical uses of the land: considering the negative public consequences of such uses,¹⁴⁰ the precluded uses may not be characterized as "practical."

There can be little doubt that both the language of the Act and the *Helms* opinion dictate that landowners must be left with land uses which have a reasonable value. This does not mean that a landowner is entitled to the highest and best use of his land. But, as in *Pennsylvania Coal*, the regulation cannot deprive the landowner of all of the use attributes of ownership. Between these two extremes there is a sliding scale on which the reasonableness of the uses remaining after regulation will be measured by an analysis of the nature of the land involved, its relation to surrounding land, the purpose of the regula-

138. 255 N.C. at 656, 122 S.E.2d at 824.

139. *Id.* at 657, 122 S.E.2d at 824.

140. The proposition that coastal area beaches, dunes, marshes and estuaries are essential to the total ecology of the coastal area in preventing flooding and erosion and in providing for the growth of marine life (including valuable fish) has been well explored in the legal literature. E.g., Schoenbaum, *Public Rights and Coastal Zone Management*, 51 N.C.L. REV. 1, 4 (1972); Note, *State and Local Wetlands Regulation: The Problem of Taking Without Just Compensation*, 58 VA. L. REV. 876, 877-78 (1972).

tion and the degree to which the purpose of the regulation might be achieved by less drastic means.¹⁴¹

Analysis of these factors in the context of wetlands regulation is not encouraging for those who hope for strong environmentally oriented regulation. Many of the cases considering stringent wetlands regulations have found an invalid taking.¹⁴² Nevertheless, some cases have upheld strong wetlands control, and it is arguable that increased sensitivity to the ecological importance of the marshes may result in increasing judicial approval of strong public protection of those land areas. The major difficulty with wetlands regulation is that, if we continue to perceive property rights as the equivalent of development rights and constitutionally to protect the right of a landowner to recover an economic return from land which is inherently unsuited to intensive development, we are defining ourselves into a constitutional corner. It is very difficult to imagine very many remunerative uses of beaches, dunes, and wetlands which do not require substantial changes in the nature of the land to the considerable detriment of the public interest in a productive coastal ecosystem.

One commentator has suggested a list of remunerative activities which might be conducted on wetlands without much risk of environmental damage. These include: use of the marshlands for school biology class field trips; permitting tourists to view the marshes from walkways constructed over the land; economic use of the marshland to insure a supply of migratory birds for hunting, thus relieving hunters from the costs of importing wild fowl; charging access fees for non-power boats; charging rental fees to commercial laboratories and television production crews for locations; charging fishermen for the economic value of marsh enrichment; and, charging neighboring land-

141. The idea that the possibility of less severe regulation has a bearing on the "takings" question is suggested by the language in *Helms* directing the trial court to consider the possible effect of zoning variances on its analysis of the problem. 255 N.C. at 656-57, 122 S.E.2d at 824. Presumably the court meant to suggest that variances from the lot size, set-back or side-yard requirements might permit the city to accomplish its basic objective—residential zoning—without imposing such a burden on Mr. Helms. Cf. *Horton v. Gullidge*, 277 N.C. 353, 177 S.E.2d 885 (1970).

142. E.g., *Candlestick Properties, Inc. v. San Francisco Bay Conservation Dev. Comm'n*, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970); *Dooley v. Town Plan & Zone Comm'n*, 151 Conn. 304, 197 A.2d 770 (1964); *State v. Johnson*, 265 A.2d 711 (Me. 1970); *Turnpike Realty Co. v. Town of Dedham*, — Mass. —, 284 N.E.2d 891 (1972); *cert. denied*, 409 U.S. 1108 (1973); *Commissioner of Natural Resources v. S. Volpe & Co.*, 349 Mass. 104, 206 N.E.2d 666 (1965); *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963).

owners for an unobstructed view of the marshlands.¹⁴³

This list is a good but unimpressive try, particularly when read from the standpoint of a wetlands owner who believes that his property rights include his right to realize an economic return from rather intensive development. From this perspective, few of these suggested uses appear to be "practical" or of reasonable value. On the other hand, the list of uses is quite realistic if we look at the nature of the marshlands. Are such lands really suited for any remunerative development without undergoing rather substantial changes in identity through dredging, filling and grading? If not, are such intensive uses fully practical in the sense intended by *Helms* when it is considered that the dredging, filling and grading will inevitably have a very negative effect on the totality of a fragile ecosystem?¹⁴⁴ Because of these unique ecological characteristics, wetlands may be not only unsuitable for intensive development but also may be subject to the public trust doctrine.¹⁴⁵ If so, it can be argued that property rights in such lands do not include the right to make changes in the character of the land required by intensive commercial, industrial, or residential development. Thus such uses could not be characterized as practical and the calculus of determining whether a landowner has been deprived of "all practical uses so as to constitute a taking" of property must necessarily reflect the limited use rights previously available to the owner.¹⁴⁶

The Act includes a rather interesting phrase which suggests that the General Assembly intended that some permit denials under the procedures outlined by the Act would derive their authority from the public trust doctrine or from some other source independent of the Act.

143. Wilkes, *Constitutional Dilemmas Posed by State Policies Against Marine Pollution—The Maine Example*, 23 ME. L. REV. 143, 152 (1971).

144. See Large, *This Land is Whose Land? Changing Concepts of Land As Property*, 1973 WIS. L. REV. 1039, for a discussion of the idea that environmental goals may require that we discontinue considering land as a commodity, the value of which is measured in terms of economic return on intensive development and begin to consider land as an essential resource. That speculative values may not be appropriate for consideration in a "takings" case is suggested by *Steel Hill Dev., Inc. v. Town of Sanbornton*, 469 F.2d 956 (1st Cir. 1972), in which 510 acres of land owned by a developer was re-zoned to impose 3 and 6 acre minimum lot size requirements. The court upheld the ordinance. "Lastly, we find little merit to appellant's contentions that the zoning ordinance has resulted in a taking of appellant's property without just compensation. . . . [A]ppellant still has the land and buildings for which it paid \$290,000. The estimated worth, had [appellant's] original plans been approved, is irrelevant." *Id.* at 963 (emphasis added).

145. See generally Schoenbaum, *supra* note 140; Comment, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970).

146. See *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972),

The Act requires the superior court to determine whether the order deprives the owner of the land of the "*practical uses thereof, being not otherwise authorized by law, . . .*"¹⁴⁷ The italicized phrase apparently is intended to refer to the word "order" earlier in the sentence so that the practical use test is not to be applied to "orders" otherwise "authorized by law." This is not a clear statutory phrase; the syntax is virtually unintelligible. However, the statute should be read to make all of its provisions effective and the most sensible reading of this phrase is that when the Commission denies a permit by way of enforcement of the public trust doctrine (or from some other source of authority) the practical use test is not strictly applicable, at least in the sense that such an order is not a taking.

Just v. Marinette County,¹⁴⁸ a 1972 wetlands regulation case, suggests that perspectives on the practical uses of wetlands similar to those expressed above will receive judicial recognition. *Just* involved the validity of a county shoreland zoning ordinance as applied to land fronting on a navigable lake in Wisconsin. The land was classified as wetlands and the result of this classification was to require a conditional use permit to fill more than five hundred square feet of the land.¹⁴⁹ The landowners contended that the regulation constituted a taking. The Wisconsin Supreme Court disagreed in an opinion which expresses a novel view of property rights in fragile ecosystems.

After stating some traditional formulations of the takings doctrine and apparently accepting a balancing test as the operative doctrine, the court said, "This case causes us to re-examine the concepts of public benefit in contrast to public harm and the scope of an owner's right to use of his property."¹⁵⁰ The court characterized the case before it as one in which the purpose of the regulation was to prevent a harmful use of land rather than to secure a benefit for the public, a dichotomy which has been used by courts and commentators to distinguish between public power regulations and exercises of eminent domain. It then expressed its understanding of the "interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation,

147. N.C. GEN. STAT. § 113A-123(b) (1974 Advance Legislative Service, pamphlet no. 3) (emphasis added).

148. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

149. *Id.* at 14, 201 N.W.2d at 766.

150. *Id.* at 16, 201 N.W.2d at 767.

fishing, and scenic beauty.”¹⁵¹ From this premise the court seems to have assumed, perhaps properly, that virtually any change in the natural character of wetlands is harmful to the ecosystem and concluded, from that assumption, that regulation, which in effect requires that such land be left in its natural condition does not deprive the landowner of any property interest.

Is the ownership of a parcel of land so absolute that a man can change its nature to suit any of his purposes? . . . An 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 . . . [W]e think it is not an unreasonable exercise of [the police power] to prevent harm to public rights by limiting the use of private property to its natural uses.”¹⁵²

The implications of this analytical approach are that the uses of land for which a landowner may expect constitutional protection are only those uses which may be made of land without detriment to the public. In short, it is arguable that *Just* stands for the proposition that since filling of shorelands cannot be accomplished without “upsetting the natural environment,”¹⁵³ filling is not a use activity which is one of the protected “bundle of sticks” comprising property. Thus, in such a case private property rights are not implicated by the regulation. Indeed the court gave short shrift to the landowner’s claim of diminution in value. “While loss of value is to be considered in determining whether a restriction is a constructive taking, value based on changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.”¹⁵⁴

The *Just* case is useful to supporters of strong regulation under the Act insofar as it suggests that takings law should recognize that certain types of land and water resources are so fragile and so important to the overall balance of an essential ecosystem that virtually any intensive use will have adverse public consequences. If this perspective is accepted, it is difficult to characterize intensive development of the wetlands as practical uses. The only practical uses of wetlands under this formulation are those which do not inevitably cause a legislatively proscribed ecological imbalance.

Although the analysis of the Wisconsin court in *Just* is not incon-

151. *Id.* at 16-17, 201 N.W.2d at 768.

152. *Id.* at 17, 201 N.W.2d at 768.

153. *Id.* at 18, 201 N.W.2d at 768.

154. *Id.* at 23, 201 N.W.2d at 771.

sistent with the language of the Act or the North Carolina court's approach in *Helms*, there is nothing in current North Carolina law which clearly points to an acceptance of that analysis here. Indeed the language of the Act and the *Helms* opinion may reflect a perspective on the scope of property rights which is considerably more traditional with greater emphasis being placed on the landowner's right to make a remunerative use of property.

From the environmentalist standpoint the greatest dangers presented by the "practical use" language of the Act are (1) that it will be read as establishing a takings test which focuses *only* on the extent to which a landowner's property interests are affected by the regulation and (2) that in analyzing the extent of value diminution, courts will assume that landowners have an inherent property right to receive some economic return even if the use proposed will inevitably have harmful effects on other portions of the ecosystem. The antecedent of the Act's takings test is *Helms*. A careful analysis of that opinion should indicate that the word "practical" is to be given a meaning in a given case under a balancing test which weighs the harm to the landowner against the benefit to the public. Thus the test requires more than the answer to the single question whether the landowner can make some use of the land. Also, a sensitive appreciation of the nature of the wetlands themselves and their importance to the coastal ecosystem and all of its values, aesthetic, economic and social, should permit courts to apply the balancing test with a firm understanding that the public interest in this type of regulation is so strong, and the resources involved so fragile, that few highly remunerative uses of wetlands can be deemed practical unless the word "practical" means, in part, harmful to the public interest.

Creative advocacy, including a careful presentation of all relevant ecological and economic factors, will be crucial in "takings" litigation under the Act. The apparently limited focus of the language of the Act should not obscure the fact that the takings doctrine requires that a strong and persuasive presentation of the public interest involved in wetlands regulation be made in every case.

V. THE "PUBLIC USE" ISSUE

The Act provides that after a judicial determination that a regulatory order constitutes a "taking" of the land involved in a permit-letting proceeding, the Department of Administration may acquire the fee or lesser interest in the land by eminent domain and hold it for the

purposes set forth in the Act.¹⁵⁵ This process of compulsory acquisition is limited by three conditions: (1) the Commission must request that the Department of Administration acquire the land; (2) the Department must find that sufficient funds are available for the acquisition; and (3) the consent of the Governor and the Council of State must be obtained.¹⁵⁶

It is possible that the purchase of land under this power will be attacked as unconstitutional on the ground that the condemnation is not for a public use or purpose. The State is precluded from exercising the power of eminent domain except for such public purposes.¹⁵⁷ In view of the 1972 amendment to the State constitution known as the "environmental bill of rights" which specifically authorizes land acquisition for environmental purposes, this argument seems unpersuasive. Moreover it is clear that the United States Constitution will not preclude this type of compulsory acquisition of property interests.

Article XIV, section 5 of the State constitution, the "environmental bill of rights," provides as follows:

It shall be the policy of this state to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, open lands and places of beauty.¹⁵⁸

155. N.C. GEN. STAT. § 113A-123(c) (1974 Advance Legislative Service, pamphlet no. 3) does not refer to purposes set forth in any particular section of the Act but rather to the "purposes set forth in this Article." Presumably the purposes would be those stated in section 113A-102 which are consistent with the constitutional purposes stated in article XIV, section 5 of the State constitution.

156. N.C. GEN. STAT. § 113A-123(c) (1974 Advance Legislative Service, pamphlet no. 3).

157. The public use limitation is customarily derived from the "law of the land" clause of the State constitution. N.C. CONST. art. I, § 19. *See, e.g.,* State Highway Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972); State Highway Comm'n v. Thornton, 271 N.C. 227, 156 S.E.2d 248 (1967).

158. N.C. CONST. art. XIV, § 5. Possibly the second paragraph of this provision might be read to limit, by implication, the meaning of the word "acquire" in the quoted paragraph. The second paragraph establishes a procedure for the acquisition of property "by purchase or gift" and special dedication of that property to constitute part of the "State Nature and Historic Preserve" by special resolution of the General Assembly. It is not entirely clear what function this section is intended to accomplish. Perhaps its purpose is to provide a means of assuring private donors of property that the State, as donee, will hold the gift for environmental protection purposes. Nonetheless, the first

There can be little debate that the acquisition of land within a duly designated area of environmental concern to be held by the State for the purposes set forth in the Act is specifically authorized by the language of this provision of the constitution whether the lands so acquired are considered to be "park, recreation [or] scenic areas" or whether the eminent domain procedure so authorized is considered to be an "appropriate way to preserve . . . forests, wetlands, estuaries, beaches, historical sites, open lands [or] places of beauty." Of course, the power of eminent domain is an inherent attribute of sovereignty for which no specific constitutional authorization is required.¹⁵⁹ The importance of the environmental section of the constitution is that it is a clear direction of the people of the State to the legislature and to the courts that acquisitions of land for preservation of environmental values are considered to be proper State functions.

It is important here to recognize that the Act does not permit the State to acquire land for resale to private parties to accomplish some developmental purpose. The acquisitions permitted under the Act are solely in aid of the accomplishment of public objectives: no incidental private benefit is possible.¹⁶⁰ The land which is subject to the possibility of eminent domain proceedings under the Act is by definition land which has been denominated as part of an area of environmental concern.¹⁶¹ The acquisition is possible only after the Commission

phrase of the second paragraph is: "To accomplish the aforementioned public purposes, the State . . . may acquire by purchase or gift" In the first paragraph the word "acquire" is used without limitation. The words "by purchase or gift" used in the second paragraph might mean that compulsory acquisition is not intended to be a means of accomplishing the objectives stated in the first paragraph. Moreover, the word "purchase" can be read to include eminent domain acquisitions. This is an overly technical argument to be made in connection with a constitutional text.

159. *E.g.*, *Town of Morgantown v. Hutton & Bourbonnais Co.*, 251 N.C. 531, 112 S.E.2d 111 (1960).

160. Some incidental private benefit or participation will not in itself result in a characterization that an exercise of eminent domain is not for a public use. *See* *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970); *State Highway Comm'n v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967). However the court recently has indicated that it is mindful of the possibility that the power of eminent domain might be used for a primarily private purpose. *See* *Stanley v. Department of Conservation & Dev.*, 284 N.C. 15, 35-36, 199 S.E.2d 641, 654-55 (1973); *Mitchell v. Industrial Dev. Authority*, 273 N.C. 137, 158-59, 159 S.E.2d 745, 760 (1968); Note, *Constitutional Law—Public Purpose—Restricting Revenue Bond Financing of Private Enterprise*, 52 N.C.L. Rev. 859 (1974). These problems are not raised by the Act. The Act permits only a simple taking in the name of the State without potential for even incidental benefit to private persons.

161. Section 113A-120(c) applies only when a finding has been made under section 113A-123(b) that a final decision or order of the Commission is an invalid exercise of the police power. The final orders reviewable under section 113A-123(b) are only those

has determined that the objectives of the Act require that development permission be denied and it has been judicially determined that the objectives of the Act cannot be accomplished through regulation without compensation. The procedure is hedged with safeguards established by the General Assembly, and the State constitution specifically declares this form of land acquisition to be an appropriate governmental function. There is no apparent reason for the State courts to conclude that the acquisitions of land pursuant to the procedures established by the Act are not for a "public use."

The United States Constitution also allows this type of compulsory acquisition of property. *Berman v. Parker*¹⁶² sanctions exercises of the eminent domain power under the federal constitution for broadly defined public purposes. There, Mr. Justice Douglas, speaking for a unanimous Court, likened the scope of the eminent domain power to the scope of the police power and concluded that the compulsory acquisition of a fee interest in non-blighted property within a District of Columbia redevelopment project area was for a permissible "public use."¹⁶³ Justice Douglas' opinion reflects great judicial deference to legislative judgments that the quality of the human environment requires that the government intervene in the marketplace by acquiring land and redeveloping it:

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. . . . [T]he concept of the public welfare is broad and inclusive. . . . [T]he values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.¹⁶⁴

Berman v. Parker's expansive view of the public use limitation of the fifth amendment indicates that the federal courts are likely to find that the "public use" question will be governed by the General Assembly's determination to permit acquisitions of land within areas of environmental concern to be held for the purposes set forth in the Act.

under part 4 of the Act, the permit-letting procedure which applies only to development projects "in any area of environmental concern" N.C. GEN. STAT. § 113A-118(a) (1974 Advance Legislative Service, pamphlet no. 3).

162. 348 U.S. 26 (1954).

163. *Id.* at 32.

164. *Id.* at 32-33.

Thus the Act's provision for exercise of the eminent domain power by the Department of Administration under the circumstances set forth in the Act is unlikely to be held violative of either the State or federal constitution.

VI. CONCLUSION

The Coastal Area Management Act is a most significant bit of legislation. While it is unclear that the Act will be implemented to effectively put an end to ad hoc and harmful spoilation of our coastal resources, it is nonetheless a hopeful beginning point for a new era of land and water use regulation which involves explicit sensitivity to ecological as well as economic factors and which involves State government in a regulatory partnership with the county and city governments. The constitutionality of this important legislation certainly will be tested, and it is to be hoped the questions involved will be litigated effectively.

Although I am personally sympathetic with the purposes of the Act, I began my inquiries into the issues described in this essay with considerable skepticism. In particular I feared that the Act would be held invalid as "local legislation" and that it would be vulnerable to a non-delegation doctrine attack. My mind has been changed on these matters, in large part because I have become greatly impressed with the Act as a sensitively drawn political compromise, which treats a difficult subject matter with care and attention. Holdings that this is invalid "local legislation" or that certain power delegations to the Commission are constitutionally impermissible are not, in my view, required by North Carolina precedent. More importantly, however, such decisions might substantially limit the ability of the General Assembly to deal with other complex subjects relevant to sections of a large and diverse state.

While the "takings" clause of the Act is certainly not unconstitutional, its interpretation and application are yet to be tested. The ultimate effectiveness of the Act probably will depend upon judicial interpretations of the "practical uses" test. Environmentalists must hope for vigorous and thoughtful advocacy which will persuade the courts to use the "practical uses" test as an invitation to engage in a sensitive process of balancing private harm against public benefit with a full appreciation of the importance of the fragile coastal ecosystem to the quality of life of all North Carolinians.

If these constitutional questions are answered favorably to the Act—as I believe they should—North Carolinians can hope that we have a chance to preserve the unique features of our coast without unnecessary and undesirable interference with useful economic development.

