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An Overview of Land Use Regulation in South Carolina

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AN OVERVIEW OF LAND USE REGULATION IN SOUTH CAROLINA

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I. INTRODUCTION

South Carolina is one of the fastest growing and most rapidly changing states in the nation. Its population now exceeds four million and continues to increase at the rate of approximately 140 people per day.[1] By 2025, there will be over one million more residents of the State.[2]

South Carolina's open spaces - forests, fields, pastures, and farmlands -are being developed at the rate of about 200 acres per day.[3] This rate of development ranks the state fourth in the country on a per capita basis, but even more remarkable is that South Carolina, although one of the smallest states (fortieth in size), trails only nine states in the total amount of land that is being developed.[4]

These two forces - population increase and development rates - have made growth and land use one of the top issues in South Carolina. A poll conducted in 2000 by the University of South Carolina Institute for Public Service and Policy Research revealed that in the State's cities and towns, growth is the number one concern, ranking ahead of education.[5] South Carolinians living in unincorporated areas ranked growth second only to education as the most important issue.[6] The poll showed strong support

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[1] U.S. Census Bureau, *U.S. Census Report for 2000*, http://quickfacts.census.gov/qfd/states/45000.html (accessed Apr. 7, 2003).

[2] *Id.* This is based on the conservative assumption that the State's population will continue to grow at the same rate of 140 people per day. In all likelihood, growth will occur at a higher rate.

[3] U.S. Department of Agriculture, *1997 National Resources Inventory* (revised Dec. 2000) (available at http://www.strom.clemson.edu/publications/london/conversion.pdf) (accessed Apr. 7, 2003).

[4] *Id.*

[5] *Id.*

[6] *Id.*

throughout the State for more active regulation of land use, better land use planning, and more funding for parks and open space. The results were as follows: (1) requiring local land use plans (seventy-nine percent); (2) restricting the type of growth in certain areas (seventy-two percent); (3) designating areas for growth (seventy-one percent); (4) establishing greenbelts around cities (seventy-five percent); and (5) buying land to preserve open space (seventy percent).[7]

Four out of five South Carolinians agree with the following statement: "Protection of the environment should be given priority, even at the risk of slowing down economic growth."[8] Not surprisingly, elected leaders are responding to this strong public sentiment. At the State level, the South Carolina Conservation Bank Act passed the General Assembly in 2002 and will provide, beginning in 2004, major funding for conservation projects.[9] The South Carolina Historic Rehabilitation Incentives Act, which also became law in 2002, provides tax incentives to preserve and protect important historic structures in the State.[10] These two statutes are voluntary in nature, providing funding and incentives to property owners who have decided, free of any governmental regulation or directive, to protect their lands and buildings. The General Assembly has been considerably less inclined to enact laws that directly regulate the use of land,[11] gladly deferring this matter to local governments.

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[7] *Id.* at 14 - 15.

[8] *Id.* at 13.

[9] 2002 S.C. Gen. Assembly act no. 200, § 1, eff. Apr. 10, 2002, as codified at S.C.Code Ann. §§ 48-59-10 through 48-59-140 (Supp. 2002).

[10] 2002 S.C. Gen. Assembly act no. 229, § 2, eff. May 1, 2002, as codified at S.C.Code Ann. § 12-6-3535.

[11] The legislature has enacted a number of environmental laws, such as the South Carolina Pollution Control Act, S.C.Code Ann. §§ 48-1-10 through 48-1-350, the South Carolina Hazardous Waste Management Act, S.C.Code Ann. §§ 44-56-10 through 44-56-840, and the South Carolina Solid Waste Policy and Management Act, S.C.Code Ann. §§ 44-96-10 through 44-96-470, all of which are administered by the South Carolina Department of Health and Environmental Control (DHEC). The overriding objective of these laws is to protect and improve environmental quality, but they often indirectly affect land use - for example, by not allowing particular uses within a certain distance of a river or residence. Efforts are often undertaken to use these laws as grounds for asking DHEC to act as a "super zoning board" and resolve what are essentially land use disputes. The DHEC Board and the Administrative Law Judge Division (ALJ), however, have consistently held that the agency's responsibility is to determine if the facility meets the regulatory requirements, not to make land use decisions. *See*, e.g., *Cross Keys Against National Garbage Organization v. DHEC*, Order No. 00-ALJ-07-0373-CC, 17 (ALJ Div., July 19, 2001) ("While DHEC's authority is broad, in the absence of a duty related to the health and welfare of the public, neither DHEC nor the [ALJ] Division is

Throughout the State, local governments are responding to public demands for action. In Anderson County, for example, citizens now have the right to petition and vote on whether to adopt zoning in their communities.[12] Greenville County approved new rural zoning classifications,[13] while Pickens County adopted a buffer protection ordinance for its three major lakes.[14] Sweeping revisions have been approved for the comprehensive land use plans in Richland and Charleston Counties, but only after a long and rancorous debate.[15] The controversy promises only to intensify as the Counties begin the difficult task of implementing the plans.[16] Facing an annual growth rate of eight percent two years ago, the Town of Mount Pleasant established in 2001 a seven year "Residential Building Permit Allocation Program" that seeks to achieve an average growth rate of three percent per year.[17] The Isle of Palms and Edisto Island communities have imposed limits on the size of residences.[18] There are many other examples.[19]

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charged with the responsibility of establishing the land use mix within an area. Land use decisions are primarily the responsibility of zoning authorities who exercise wide discretion in decision making, and jurisdiction over zoning disputes vests in the circuit court"); *aff'd*, DHEC Board Order (Jan. 14, 2002).

Occasionally, the General Assembly has enacted laws that directly regulate land use. *See*, e.g., South Carolina Coastal Zone Management Act, S.C.Code Ann. §§ 48-39-10 through 48-39-360 (Supp. 2002) (requiring state permits for alteration of certain "critical areas" in the coastal zone) and the South Carolina Mountain Ridge Protection Act of 1984, S.C.Code Ann. §§ 48-49-10 through 48-49-80 (1987 & Supp. 2002) (limiting the height of certain structures on the state's mountain ridges).

[12] Anderson County Code Ordin. (S.C.), ch. 70, § 10:1(A) (current through Apr. 2002).

[13] Greenville County Code Ordin. (S.C.), ch. 50, art. 4, §§ 5:2 and 5:3 (current through Dec. 2002) (available at http://livepublish.municode.com/16/lpext.dll?f=templates&fn=main-j.htm&vid=13105; www.greenvilleplanning.com/land_development/zoning.htm) (accessed Apr. 7, 2003).

[14] Pickens County Ordin. (S.C.), 304 (Mar. 4, 2002).

[15] *See generally* Shelley Hill, *Richland County Releases First Part of Growth Plan*, The State Newsp. A1 (Dec. 3, 2002); *Richland to Announce Changes in Land-Use Plan*, The State Newsp. B1 (Feb. 5, 2003).

[16] *Id.*

[17] Town of Mt. Pleasant, *The 2003 State of the Town Address*, ¶ 4 (Feb. 11, 2003) (available at http://www.townofmountpleasant.com/Meetings/ANNOUNCE/2003sota address.shtml) (accessed Apr. 7, 2003).

[18] *See* Smart Growth Network, Smart Growth News, *Isle of Palms' House Size Caps Reflect Trend in Charleston-Area's Barrier Islands*, http://smartgrowth.org/news/bystate.asp?state=SC&res=800 (accessed Feb. 24, 2003) (quoting David Quick, *IOP Council Passes House Size Restrictions*, Charleston Post & Courier A1 (Nov. 27, 2002)).

As growth and development continue to accelerate in South Carolina, we can expect to see even more of these kinds of local ordinances and programs. To assist elected officials, planners, and interested citizens in their consideration of such measures, this article provides an overview of land use regulation in South Carolina. The following topics are discussed: statutory framework (section II); the "takings" issue (section III); non-conforming uses and vested rights (section IV); the unnecessary hardship variance (section V); judicial review (section VI); and a brief discussion of how smart growth can be achieved in South Carolina (section VII).

II. STATUTORY FRAMEWORK

The Local Government Comprehensive Planning Enabling Act of 1994 (CPA)[20] was a widely welcomed addition to the Code because it repealed a hodgepodge of old planning laws and reorganized and consolidated the rest into one basic statute.[21] The CPA is now the cornerstone of all land use planning and regulatory programs in the State.

A. Duties and Responsibilities of Local Planning Commissions

The CPA gives local governments in South Carolina the authority to establish planning commissions.[22] If established, these commissions have certain powers and responsibilities. They have "the function and duty . . . to undertake a continuing planning program for the physical, social, economic growth, development, and redevelopment of the area within [their] jurisdiction."[23] In addition, these commissions must prepare comprehensive land use plans that address the following elements: (1) population; (2) economic development; (3) natural resources; (4) cultural resources; (5) community facilities; (6) housing; and (7) land use.[24] The commission must review these plans at least every five years and update them at least every ten years.[25]

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[19] An outstanding source of information on current land use disputes and issues throughout the country is the Urban Land Institute's list serve, *Smart Growth*, SmartGrowth1@list.uli.org (accessed Apr. 7, 2003).

[20] S.C.Code Ann. § 6-29-310 through 6-29-1200 (Supp. 2002).

[21] 1994 S.C. Gen. Assembly act no. 355, § 1, eff. May 3, 1994 repealed ch. 27 of tit. 4, ch. 23 of tit. 5, §§ 6-7-310 through 6-7-1110, and act 129 of 1963.

[22] S.C.Code Ann. § 6-29-320.

[23] *Id.* at § 6-29-340(A).

[24] *Id.* at § 6-29-510(D).

[25] *Id.* at § 6-29-510(E).

The planning commissions are required to prepare and recommend to the local governing authority measures for implementing the plan, such as zoning ordinances, subdivision regulations, landscaping ordinances, and capital improvement programs.[26] The local governing authority may, after receiving a favorable recommendation from the planning commission[27] and holding a public hearing, adopt the land use plan in whole or in part or reject it.[28]

B. Requirements Pertaining to Zoning Ordinances

Few subjects are as controversial and hotly disputed in South Carolina as zoning - the governmental power to decide "what can go where," such as by designating areas of a community where only residential uses are allowed.[29] As the South Carolina Supreme Court recently explained:

> Some citizens view zoning as a requisite in today's world, necessary to control disparate uses of land, promote orderly development and conserve natural resources. To others, zoning raises the specter of an overbearing government bent on destroying individual property rights and independent spirits.[30]

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[26] S.C.Code Ann. § 6-29-340(B) (Supp. 2002).

[27] *See McClanahan v. Richland County*, 567 S.E.2d 240, 242 (S.C. 2002) (County Council cannot approve land use plan unless Planning Commission recommends it).

[28] S.C.Code Ann. § 6-29-530.

[29] In its landmark decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the U.S. Supreme Court upheld zoning as an appropriate extension of government's inherent authority to enact laws to protect public health, safety, and welfare. The S.C. Supreme Court also recognizes this authority. *See*, e.g., *Rush v. City of Greenville*, 143 S.E. 2d 527, 530 - 531 (S.C. 1965) ("The authority of a municipality to enact zoning ordinances, restricting the use of privately owned property, is founded on the police power."). For a general discussion of zoning, *see* Philip Slayter & Charlie Tyer, *Local Officials Guide to Zoning* (2d ed., U. of S.C. Inst. of Pub. Affairs, 2000).

[30] *I'On, LLC v. Town of Mount Pleasant*, 526 S.E. 2d 716, 721 (S.C. 2000). A good example of the widely divergent views on zoning is the recent advisory referendum on zoning in Laurens County, S.C. An opponent said that zoning "takes every bit of ownership away from the owner. It's like breaking into somebody's house through legal means," while a proponent stated, "not everybody is a good neighbor or a good corporate neighbor. In order to protect what you have, you must have zoning." *Citizens Speak Out About Zoning, The Laurens Co. Advertiser* 1, (Sept. 18, 2002). The voters soundly defeated the referendum.

The power to zone property is "exclusively for the legislature."[31] Through the CPA, the General Assembly delegated this power to local governments. The governing authority first must adopt the land use element of the plan and then it "may adopt a zoning ordinance to help implement [it]."[32] Such an ordinance "shall create zoning districts" and within each district the local governing authority may regulate the following: (1) use of buildings, structures, and land; (2) size, location, height, orientation, erection, construction, alteration, demolition, or removal of buildings and other structures; (3) density of development (which refers to the number of units or structures per acre); (4) areas and dimensions of land, water, and air space to be occupied by buildings and structures and the size of yards, courts, and other open spaces; (5) amount of off-street parking and restrictions on vehicular access; and (6) "other aspects," including, but not limited to, tree preservation, landscaping, buffers, lighting, and curb cuts.[33]

The zoning ordinance may provide for the continuation of non-conforming uses or for the termination of such uses by specific deadlines.[34]

The CPA authorizes the use of a wide variety of techniques in the zoning ordinance, such as cluster developments, floating zones, performance zoning, planned developments, and overlay zones.[35] The statute also allows the use of "planned development districts" that provide for variations from the use, lot size, density, and other requirements of the underlying zoning district in order to achieve "improved design, character, and quality of new mixed use developments and preserve natural and scenic features of open spaces."[36] The CPA sets forth extensive requirements governing the procedures for enacting and amending zoning ordinances.[37]

The South Carolina Supreme Court recently handed down two important decisions relating to the CPA. In *I'On, L.L.C. v. Town of Mount Pleasant*,[38] the Court held that zoning cannot be adopted or repealed

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[31] *Beard v. South Carolina Coastal Council*, 403 S.E. 2d 620, 622 (S.C. 1991), *cert. denied*, 502 U.S. 863 (1991).

[32] S.C.Code Ann. § 6-29-720(A) (Supp. 2002).

[33] *Id.* at § 6-29-720(A).

[34] *Id.* at § 6-29-730.

[35] *Id.* at § 6-29-720(C).

[36] *Id.* at § 6-29-740.

[37] *Id.* at § 6-29-760.

[38] 526 S.E.2d 716, 721 (S.C. 2000).

through ballot referenda, but only through the procedures set forth in the CPA. The Court emphasized the importance of making planning and zoning decisions through a careful, deliberate process:

> Such a system [deciding zoning matters by referendum] ultimately could nullify a carefully established zoning system or master plan developed after debate among many interested persons and entities, resulting in arbitrary decisions and patchwork zoning with little rhyme or reason.[39]

The Court again considered the CPA in *Greenville County v. Kenwood Enterprises, Inc.*,[40] which involved Greenville County's ordinance regulating the location of sexually oriented businesses.[41] Only about half of the County is zoned, but the ordinance was adopted as a stand-alone regulation with countywide application. The business owners argued that the ordinance was invalid because it had not been adopted pursuant to the procedures and requirements of the CPA. The Court rejected this argument, holding that the County had authority under the general police powers statute[42] to enact the ordinance and that the CPA does not impair or affect such authority. The Court also dismissed the owners' reliance on *I'On*:

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[39] 526 S.E.2d at 71. The community-based zoning program in Anderson County, S.C., where citizens can petition for and then vote on zoning (*see* discussion *supra* at n. 12) appears not to run afoul of *I'On* because the vote is non-binding on the County Council, which reserves the right to modify or reject the zoning plan.

[40] 577 S.E.2d 428 (S.C. 2003).

[41] *See also* discussion *infra* at section VII, G.

[42] S.C.Code Ann. § 4-9-25 (1976), which provides:

> All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

> *I'On* does not stand for the proposition that *any* ordinance affecting land use must be part of the comprehensive plan and enacted pursuant to the Comprehensive Planning Act. Instead, *I'On* simply held that land use regulation cannot be effected via the referendum and initiative process. Thus, *I'On* is not dispositive.[43]

Kenwood, in short, is a significant victory for local governments in South Carolina.

C. Duties and Responsibilities of Local Boards of Zoning Appeals

The CPA authorizes the establishment of local boards of zoning appeals and gives them three basic powers: (1) to permit uses by special exception in accordance with the terms and conditions of the zoning ordinance; (2) to hear and decide appeals from enforcement decisions by local officials; and (3) to hear and decide appeals for a variance from the requirements of the zoning ordinance "when strict application of the provisions of the ordinance would result in unnecessary hardship."[44] A variance cannot be granted unless the board makes all of the following findings: (1) there are "extraordinary and exceptional conditions pertaining to the particular piece of property;" (2) "these conditions do not generally apply to other property in the vicinity;" (3) application of the ordinance "would effectively prohibit or unreasonably restrict the utilization of the property;" and (4) the variance "will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance."[45]

In granting a variance, the board may impose such conditions as it deems advisable to protect property values in the surrounding area or to promote public health, safety, and welfare.[46]

The board of zoning appeals does not have the authority to grant a "use variance" (allowing a use not permitted in the zoning district - in essence, a rezoning), to allow the physical expansion of a non-conforming use, or to change the boundaries of a zoning district.[47] Only the local

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[43] 577 S.E.2d 428, at *5 (S.C. 2003) (emphasis in original).
[44] S.C.Code Ann. § 6-29-800(A) (Supp. 2002).
[45] *Id.* at § 6-29-800(A)(2).
[46] *Id.* at § 6-29-800(A)(2)(d)(ii).
[47] *Id.* at § 6-29-800(A)(2)(d)(i).

governing body may grant use variances.[48] (The CPA, however, allows the local governing body to require a two-thirds affirmative recommendation from the board of zoning appeals before considering a use variance.)[49]

Any "aggrieved person" or the local governmental entity or official may appeal to the board of zoning appeals.[50] An appeal stays the activity in question unless there is an "imminent peril to life and property."[51] The board may affirm, reverse, or modify the determination or decision in question in a written order that must set forth findings of fact and conclusions of law.[52] The board also may remand the case to the administrative official if "the record is insufficient for review."[53]

Decisions of the boards of zoning appeals may be appealed to circuit court. The scope of judicial review is very limited. No new evidence may be admitted and "the court shall determine only whether the decision of the board is correct as a matter of law."[54]

D. Land Development Regulations

Article 7 of the CPA authorizes local governments to establish land development regulations for subdivisions, roads, utilities, and other facilities in order to promote "the harmonious, orderly, and progressive development of land within the municipalities and counties of the State."[55] These regulations address such issues as setbacks from roads and adjoining properties, number of parking spaces, landscaping and buffers, height of buildings, and so forth. Where zoning addresses the issue of

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[48] S.C.Code Ann. § 6-29-800(A)(2)(d)(i) (Supp. 2002).

[49] *Id.*

[50] *Id.* at § 6-29-800 (B).

[51] *Id.*

[52] *Id.* at § 6-29-800(D). *See also Massey v. City of Greenville*, 532 S.E.2d 885, 889 (S.C. App. 2000) stating as follows:

> Written findings of fact and conclusions of law should be promulgated and either signed by the Board or ratified on the record by the Board before written notice of the Board's decision is given to the applicant. Such a procedure will avoid confusion as to when the thirty days to file an appeal commence, and provide an adequate record of the Board's action for judicial review.

[53] S.C.Code Ann. § 6-29-800(A)(4).

[54] *Id.* at § 6-29-840.

[55] *Id.* at § 6-29-1120.

whether the use is allowed, development standards address the issue of *how* the use is established.

After land development regulations are adopted, property owners may not file or record any subdivision plats without the written approval of the local designated authority.[56] No lot or tract within the subdivision may be conveyed until the plat is approved.[57]

The local authority must act within sixty days after submission of a subdivision plat or development plan for approval.[58] Failure to act within that time is deemed to constitute approval.[59] Landowners may appeal the local authority's decision to the planning commission[60] and then to the courts.[61]

E. Siting of Public Facilities and Infrastructure

An extremely important factor that affects the patterns of development in an area is the location of public facilities and infrastructure. Developers are understandably attracted to places that have good roads, good schools, and public water and sewer services. Communities, therefore, can make great progress in effectively managing growth by controlling where these facilities and services are located.

The CPA makes it clear that local zoning ordinances apply to public agencies and entities that use real property within the locality's jurisdiction.[62] Thus, for example, a new school could not be built in the community unless it complied with the zoning ordinance.

In the many parts of South Carolina that lack zoning but have adopted comprehensive plans, section 6-29-540 of the CPA sets forth a public process that must be followed before most projects can proceed.[63] The

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[56] S.C.Code Ann. §§ 6-29-1140, 1160 (Supp. 2002). A "subdivision" is defined as "all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions for the purpose, whether immediate or future, of sale, lease, or building development." *Id.* at § 6-29-1110(1). Exempted from this definition is the division of land into parcels of five acres or more where no new road is involved. Plats for such developments, however, have to be submitted to the planning commission as information.

[57] *Id.* at § 6-29-1160.

[58] *Id.* at § 6-29-1150(A).

[59] *Id.*

[60] *Id.* at § 6-29-1150(C).

[61] *Id.* at § 6-29-1150(D).

[62] *Id.* at § 6-29-770(A) - (C).

[63] *Id.* at § 6-29-540. There are several exemptions: (1) telephone; (2) sewer and gas utilities; (3) electrical suppliers, utilities and providers whose plans have been approved

plan for the project must be submitted to the local planning commission to determine whether it is compatible with the comprehensive plan. If the commission finds that the project is not compatible, the finding must be presented to the project owner or manager. The latter, however, can still proceed with the project provided a statement of intent to do so and the reasons for the decision are published in a newspaper of general circulation at least thirty days prior to awarding bids or beginning construction.[64] Thus, section 6-29-540 does not establish any substantive mandate that major public projects be consistent with local comprehensive plans. Rather, it seeks to ensure public awareness of the fact that a project in conflict with the plan is about to begin. The public can then decide whether to become involved in the local political process and try to have the project stopped or modified.

III. THE "TAKINGS" ISSUE

Both the Fifth amendment to the U.S. Constitution and article I, section 13 of the South Carolina Constitution provide that private property cannot be taken for public use without just compensation.[65] Landowners often claim that zoning ordinances and other land use regulations result in a "taking" of their property in violation of these provisions.

In these so-called "regulatory takings" cases,[66] the threshold inquiry is the impact of the regulation on the economic value of the land in question. If the regulation allows no productive or economically beneficial use of land, the U.S. Supreme Court's decision in *Lucas v. South Carolina Coastal Council*[67] applies. In these cases, the property owner is entitled to compensation unless the government can establish that the uses prohibited

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by the local governing body or a state or federal agency; and (4) electrical suppliers, utilities, and providers authorized under chs. 27 or 31 of tit. 58, or ch. 49 of tit. 33 of the Code.

[64] S.C.Code Ann. § 6-29-540 (Supp. 2002).

[65] U.S. CONST. amend. 5; S.C. CONST. art. I, § 13.

[66] Scholars have devoted considerable attention to the subject of regulatory takings, and only a brief summary is presented here. *See*, e.g., American Bar Association, *Taking Sides on Takings Issue: The Public and Private Perspectives* (American Bar Association 2002); Robert Meltz, Dwight Merriam, & Richard Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* (American Bar Association 1999); William A. Fischel, *Regulatory Takings: Law, Economics and Takings* (Harvard University Press 1995); Eric T. Freyfogle, *Regulatory Takings, Methodically*, 31 Env. Law. Rptr. 10313 (2001).

[67] 505 U.S. 1003 (1992).

by the regulation would not be allowed under the State's "background principles of nuisance and property law."[68] The government may also be able to avoid compensation by showing that the owner had no "reasonable, investment-backed expectation" that the property could be developed.[69] The *Lucas* rule, however, is limited to "the extraordinary circumstance when no productive or economically beneficial use of land is permitted."[70] Moreover, the deprivation must be permanent for *Lucas* to apply.[71]

In the vast majority of cases, the regulation will not result in a complete elimination of the land's economic value. In these cases, the Court has declined to establish any set formula for determining whether a taking has occurred, choosing instead to engage in "essentially ad hoc, factual inquiries."[72] These inquiries include: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation interferes with the owner's reasonable investment-backed expectations;

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[68] 505 U.S. at 1031 - 1032. The South Carolina Supreme Court recently issued its second opinion in a total deprivation case to which *Lucas* applies. *McQueen v. South Carolina Coastal Council*, 2003 WL 1957496 (S.C. Apr. 28, 2003) (Op. no. 25642). The case involves a property owner's application for a state permit to fill in, and place bulkheads on, two lots that are mostly inundated by tidal waters. The lots in their present condition have no economic value. On remand from the United States Supreme Court, the Court held that the public trust doctrine is one of South Carolina's "background principles" of property law and prohibits the filling in of tidelands. Hence, the State is not required to compensate the owner "for the denial of permits to do what he cannot otherwise do." *Id.* at 3.

[69] *See Westside Quik Shop, Inc. v. Stewart*, 534 S.E.2d 270, 306 (S.C. 2000) ("Moreover, even where he is deprived of all economically viable use of his property, an owner must still have reasonable, investment-backed expectations to establish a taking") (following *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999)). However, another panel of the Federal Circuit later rejected the statement in *Good* as dictum and held that in a complete deprivation case, "the property owner is entitled to a recovery without regard to consideration of investment-backed expectations." *Palm Beach Associates v. United States*, 231 F.3d 1354, 1364 (Fed. Cir. 2000). In *McQueen v. South Carolina Coastal Council*, 2003 WL 1957496, 3, at n. 5 (S.C. Apr. 28, 2003) (Op. no. 25642), the South Carolina Supreme Court recognized the split of authority but found it unnecessary to decide the issue in view of its ruling on the "background principle" question.

[70] 505 U.S. at 1017. In *Palazollo v. Rhode Island*, 533 U.S. 606, 616 (2001), the Court stated that *Lucas* would apply where the regulation leaves the property owner with only a "token interest." The Court did not specifically define this term but indicated its meaning in rejecting the owner's assertion that a 94% loss of value was sufficient to invoke *Lucas*.

[71] *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331 - 332 (2002) (temporary moratorium imposed by the Tahoe Regional Planning Agency on development around Lake Tahoe not subject to the *Lucas* test).

[72] *Lucas*, 505 U.S. at 1015.

(3) the character or extent of the government action; (4) the relationship or nexus between the use or activity that is restricted and the social problem sought to be addressed by the regulation; (5) whether and the extent to which the regulation unfairly singles out or disproportionately burdens a targeted group of landowners; and (6) whether the regulation substantially advances legitimate governmental interests.[73]

Basic land use regulations have fared well under the Takings Clause. As one commentator summarizes the case law:

> . . . traditional police power restrictions, including zoning controls on land use and development, generally are permissible forms of uncompensated regulation, since the government can fairly be said to be acting as intermediary between private interests to provide a mutually beneficial environment.[74]

Justice Scalia himself, the author of *Lucas*, has written: "Traditional land-use regulation (short of which totally destroys the economic value of property) does not violate [the Takings Clause]."[75]

Land use regulation often has an adverse impact on property value, but this fact alone is almost never sufficient to result in a taking. *See*, e.g., *Village of Euclid v. Ambler Realty Co.*;[76] *Greenville County v. Kenwood Enterprises, Inc.*;[77] *Hampton v. Richland County*;[78] and *Lenardis v. City of Greenville*.[79]

Government has run afoul of the Takings Clause when it has attempted to use measures that are more intrusive and aggressive than traditional

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[73] *See also Rick's Amusement v. State of South Carolina*, 570 S.E.2d 155 (S.C. 2001) (recognizing factors evaluated in regulatory takings cases).

[74] Edward H. Ziegler, *Partial Regulatory Takings: A Property Rights Perspective* 255, in *Taking Sides on Taking Issues* (American Bar Association 2002).

[75] *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part).

[76] 272 U.S. 365 (1926) (75% reduction in value not a taking).

[77] 577 S.E.2d 428 (S.C. 2003) (no taking where ordinance prohibits only operation of sexually oriented business and does not restrict operation of other businesses at site).

[78] 357 S.E.2d 463, 465 (S.C. App. 1987), *cert. dismissed*, 370 S.E.2d 714 (S.C. 1988) (property owner not entitled to have his property zoned for its most profitable use).

[79] 450 S.E.2d 597, 598 (S.C. App. 1994) ("Moreover, an adverse economic impact on an individual property owner is not the controlling inquiry in a zoning case, for the interests of the individual are subordinate to the public good.").

zoning. For example, in *Dolan v. City of Tigard*,[80] the U.S. Supreme Court held that the City effected a taking by requiring the landowner, as a condition to receiving a building permit, to dedicate portions of her property for a storm water system and public greenway. Similarly, in *Nollan v. California Coastal Commission*,[81] the Court struck down the state agency's condition on a building permit that required the owner to grant a public right-of-way to walk along the beachfront. In both cases, the Court found that there was no substantial nexus between the required dedication and the proposed development.

For many years, a debate has raged in South Carolina over efforts by "private property rights" advocates to enact legislation that would change the definition of what constitutes a "taking" under State law and make it considerably easier for landowners and developers to prevail in actions based on traditional zoning and land development ordinances.[82] Those efforts have been consistently thwarted by a strong coalition of state agencies, local governments and environmental organizations fearful that the legislation would discourage, if not paralyze, planning and regulatory programs throughout the State.[83]

As the 2002 session of the General Assembly began, it appeared that yet another battle would take place, but this time the property rights advocates disarmed and accepted a compromise that has been incorporated in a new law called the South Carolina Land Use Dispute Resolution Act (LUDRA).[84] The most notable fact about LUDRA is that it does not change the definition of a "taking," deferring that question to the judicial

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[80] 512 U.S. 374 (1994).

[81] 483 U.S. 825 (1987).

[82] *See*, e.g., S.C. H. 3591, Sess. 112, 1997 - 1998 (Mar. 4, 1997) (requiring compensation where a law or regulation imposes an "inordinate burden" on private property) and S.C. S. 528, Sess. 114, 2001 - 2002 (Mar. 29, 2001) (establishing an "unnecessary hardship" standard for compensation). The bills are discussed in F. Patrick Hubbard, *"Takings Reform" and the Process of State Legislative Change in the Context of a "National Movement,"* 50 S.C.L. Rev. 93 (1998); and Courtney P. Stevens, *Another Try at Takings Legislation in South Carolina: An Analysis of South Carolina Senate Bill 528 and the Fight for Property Rights*, 54 S.C.L. Rev. 241 (2002).

[83] The opponents also pointed out the fiscal impact of the legislation. For example, a 1998 study estimated that the bill would cost taxpayers $126 million per year. Stevens, *Another Try at Takings, supra* n. 82 (referring to Fishkind Assocs., *The Fiscal Impact Of The South Carolina Private Property Rights Protection Act, H. 3591* (Feb. 5, 1998)).

[84] S.C. S. 204, Sess. 115, 2003 - 2004 (to modify S.C.Code Ann. §§ 1-23-630; 6-29-800; 6-29-820; 6-29-825; 6-29-830; 6-29-840; 6-29-890; 6-29-900; 6-29-915; 6-29-920; 6-29-930; 6-29-1150; and 6-29-1155; to add *id.* at §§ 1310 - 1380) (eff. June 2, 2003).

branch. Rather, the focus is on improving and expediting the process for adjudicating takings claims by landowners.

LURDA amends the CPA by allowing a property owner whose land is the subject of a decision by the board of zoning appeals, board of architectural review or planning commission to file a notice of appeal with the circuit court, accompanied by "a request for pre-litigation mediation."[85] The request must be granted,[86] and the government entity must be represented at the mediation.[87] A non-owner may be granted leave to intervene in the mediation if the person has a "substantial interest" in the decision of the local entity.[88]

Mediation is an informal process in which a third-party mediator facilitates face-to-face settlement discussions between the parties.[89] The mediator has no authority but seeks to guide the parties toward a resolution of the dispute on their own terms. Mediation has proved to be a highly effective and relatively inexpensive way of resolving disputes.[90] The parties to a dispute can - and often do - jointly agree to mediate a dispute, but LURDA goes a step further and gives landowners the right to compel a mediation with the government.[91] Obviously, the General

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[85] S.C.Code Ann. §§ 6-29-820(B)(2) (Supp. 2003) (for decisions by boards of zoning appeals); 6-29-900(B)(2) (for decisions by boards of architectural review); 6-29-1150(D)(2) (for decisions by planning commissions).

[86] *Id.* at §§ 6-29-825(A) (for decisions by boards of zoning appeals); 6-29-915(A) (for decisions by boards of architectural review); 6-29-1155(A) (for decisions by planning commissions).

[87] *Id.* at §§ 6-29-825(B) (for decisions by boards of zoning appeals); 6-29-915(B)(for decisions by boards of architectural review); 6-29-1155(B) (for decisions by planning commissions). The S.C. Supreme Court has issued rules governing mediation and arbitration proceedings in certain counties. S.C. Supreme Court, Circuit Alternative Dispute Resolution Rules (2003). LURDA requires that all mediations be conducted in accordance with these rules. S.C.Code Ann. §§ 6-29-825(A) (for decisions by boards of zoning appeals); 6-29-915(A) (for decisions by boards of architectural review); 6-29-1155(A) (for decisions by planning commissions).

[88] S.C.Code Ann. §§ 6-29-825(A) (for decisions by boards of zoning appeals); 6-29-915(A) (for decisions by boards of architectural review); 6-29-1155(A) (for decisions by planning commissions).

[89] *See generally* Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflicts* (2d ed. 1999).

[90] *See*, e.g., Jeanne M. Brett, Zoe I. Barsness & Stephen B. Goldberg, *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers,* Negotiation Journal 259 (July 1996)(reporting a 78% settlement rate).

[91] S.C.Code Ann. §§ 6-29-820(B)(1) (for decisions by boards of zoning appeals); 6-29-900(B)(1) (for decisions by boards of architectural review); 6-29-1150(D)(1) (for decisions by planning commissions). A few counties in South Carolina, however, have

Assembly hopes that landowners will exercise this right and that mediation will become the principal means for resolving landowner claims against local governments.

If the dispute is resolved through mediation, the settlement must be approved by both the local legislative governing body and the circuit court before it can become effective.[92] LURDA makes it clear that a settlement applies only to the property in question and has no precedential value.[93]

If (1) the case is not mediated, (2) the mediation is not successful or (3) the settlement reached in the mediation is not approved, the resident presiding judge must hear the case at the next term of court.[94] LURDA makes no change in the scope of judicial review of the local entity's decision,[95] but it does give the landowner the right to include in the appeal claims that are beyond the subject matter jurisdiction of the local entity, "such as, but not limited to a determination of the amount of damages due for an unconstitutional taking," and to have those claims resolved by a jury.[96]

IV. NON-CONFORMING USES AND VESTED RIGHTS

A frequently litigated issue is whether uses or activities that do not comply with a particular ordinance - so-called "non-conforming uses" - may be allowed to continue because they were "vested" prior to enactment of the ordinance. It is an easy issue when the use was well established

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adopted mandatory mediation programs, which may require the mediation of landowner claims.

[92] S.C.Code Ann. §§ 6-29-825(D) (Supp. 2003) (for decisions by boards of zoning appeals); 6-29-915(D) (for decisions by boards of architectural review); 6-29-1155(D) (for decisions by planning commissions).

[93] *Id.* at §§ 6-29-825(E) (for decisions by boards of zoning appeals); 6-29-915(E) (for decisions by boards of architectural review); 6-29-1155(E) (for decisions by planning commissions).

[94] *Id.* at §§ 6-29-825(E) (for decisions by boards of zoning appeals); 6-29-915(E) (for decisions by boards of architectural review); 6-29-1155(E) (for decisions by planning commissions).

[95] *Id.* at §§ 6-29-825(E) (for decisions by boards of zoning appeals); 6-29-915(E) (for decisions by boards of architectural review); 6-29-1155(E) (for decisions by planning commissions).

[96] *Id.* at §§ 6-29-840(B) (for decisions by boards of zoning appeals); 6-29-930(B) (for decisions by boards of architectural review); 6-29-1150(D)(4) (for decisions by planning commissions). LURDA also adds a new article to the CPA, which establishes educational requirements for local government planning and zoning officials and employees. *Id.* at §§ 6-29-1310 through 1340.

before the ordinance is adopted and the owner simply wants to continue doing the same thing. The issue becomes difficult when the use and the ordinance are emerging around the same time.

An instructive case on vested rights is *Vulcan Materials Company v. Greenville County Board of Zoning Appeals*.[97] In 1989, Vulcan began to evaluate the possibility of mining granite in southern Greenville County, which at the time was unzoned. It leased three tracts of land from three different owners in the area and by 1992, it had spent almost $1 million extracting and analyzing hundreds of samples from these tracts. By the mid-1990s, Vulcan finalized its mining development plan, conducted archeological, wetlands, and protected species surveys, and applied to DHEC for a mining permit and for air and wastewater discharge permits. It entered into an agreement with the contractor on a nearby highway project to remove the overburden from the quarry site. This work was accomplished in 1994 and 1995.[98]

In early 1996, strong community opposition to the mining operation developed. In response to the public outcry, Greenville County Council zoned the area surrounding and including the mining site as residential. The County Zoning Administrator refused to issue Vulcan a certificate of occupancy, without which the mine could not operate. Vulcan appealed to the County Board of Zoning Appeals, which affirmed the Administrator's decision.

The circuit court reversed, and the South Carolina Court of Appeals affirmed. The Court of Appeals explained the concept of "vested rights" as follows:

> Acts of a landowner in development of his land, in order to require a finding that he has acquired a vested right to continue development as a nonconforming use, should *rise beyond mere contemplated use or preparation* . . . .[99]
> [The] right to utilize one's property to conduct a lawful business becomes entitled to constitutional protection against otherwise valid legislative restrictions as to locality by city's zoning ordinance, or becomes "vested" within the full meaning of that term when, prior to enactment of such restrictions, owner has in good faith substantially entered

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[97] 536 S.E.2d 892 (S.C. App. 2000).

[98] *Id.* at 894.

[99] 536 S.E.2d at 901 (quoting 101A C.J.S. *Zoning & Land Planning* § 161 (1979)) (emphasis in original).

> on performance of a series of acts necessary to accomplishment of the end intended . . . .[100]

Applying these principles to the case, the Court had little difficulty in concluding that Vulcan's right to conduct a mining operation at the site "vested" prior to the property being zoned: "Vulcan expended nearly $2 million to find granite on the 585 acre Princeton site, arranged for the removal of 15 acres of overburden to expose the granite for extraction, and was merely awaiting a mine operating permit from DHEC when the restrictive zoning stopped the development."[101]

The County Board of Zoning Appeals surprisingly advanced the novel proposition that a person cannot acquire a vested right in unzoned property. The Court of Appeals rejected this argument, holding that "[i]f we adopted the Board's view, unzoned property could be zoned on a whim and without any consideration to property owners' rights."[102]

The Court in *Vulcan* discussed and distinguished several of the South Carolina cases on vested rights. In *City Ice Delivery Co. v. Zoning Board of Adjustment*,[103] it was undisputed that the owner had the right to construct a food store before the property was zoned residential. After the zoning became effective, the owner sought a permit to add gasoline pumps at the store.[104] The Court held that, in the absence of a showing that the county knew of the developer's proposed plan to sell gasoline, the owner did not have a vested right to install the pumps.[105] In *Whitfield v. Seabrook*,[106] the developer was issued a permit for an apartment project before the site was zoned single family residential, but the permit required construction to begin prior to the ordinance's effective date. The developer failed to do so. The Court held the building permit in and of itself was insufficient to establish a vested right; that right could be acquired only by beginning construction.[107]

In *F.B.R. Investors v. County of Charleston*,[108] a developer purchased a tract for multi-family housing and decided to develop the tract in two

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[100] 536 S.E.2d at 901 (quoting 101A C.J.S. *Zoning & Land Planning* § 64 (1979)).
[101] *Id.*
[102] *Id.*
[103] 203 S.E.2d 381 (S.C. 1974).
[104] *Id.*
[105] *Id.* at 383 - 384.
[106] 190 S.E.2d 743 (S.C. 1972).
[107] *Id.* at 475.
[108] 402 S.E.2d 189 (S.C. App. 1991).

phases. As work on the first phase was nearing completion, but before the developer incurred any substantial expenses on the second phase, the latter was down-zoned to prohibit multi-family use.[109] The Court held that the developer did not have a vested right on the second phase because no building permits were issued, no construction had taken place, and no substantial expenditures had been incurred.[110]

Other notable vested rights cases in South Carolina include: *Heilker v. Zoning Board of Appeals for the City of Beaufort*;[111] *DeStefano v. City of Charleston*;[112] *Conway v. City of Greenville*;[113] *Pure Oil Division v. City of Columbia*;[114] *Nuckles v. Allen*;[115] *Kerr v. City of Columbia*;[116] *Scott v. Carter*;[117] *Lake Frances Properties v. City of Charleston*;[118] *Daniels v. City of Goose Creek*;[119] and *Friarsgate, Inc. v. Town of Irmo*.[120]

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[109] 402 S.E.2d 189 (S.C. App. 1991).

[110] *Id.* at 191.

[111] 552 S.E.2d 42 (S.C. App. 2001) (outdoor display of merchandise is not a "use" protected against application of new highway corridor ordinance but rather a "practice" that can be regulated by the ordinance).

[112] 403 S.E.2d 648 (S.C. 1991) (owner laid out road, installed utilities, and incurred expenses but this was in preparation of selling property on the market rather than pursuant to a comprehensive development plan; held, no vested right).

[113] 173 S.E.2d 648 (S.C. 1970) (portion of 10 acre tract was used in owner's construction business prior to entire tract being annexed into city and zoned residential; held, owner had vested right to use entire tract for construction even though two family residences also were located on tract).

[114] 173 S.E.2d 140 (S.C. 1970) (property owner substantially changed its position by demolishing buildings, incurring expenses, and signing lease agreement for construction of gas station, in reliance on zoning ordinance in effect at the time of application for permit; held, owner had vested right and was entitled to permit for station. Vested rights doctrine is not limited to cases where permit is actually issued.).

[115] 156 S.E.2d 633 (S.C. 1967) (original owner received approval from local authority to construct 2 motels on property and then entered into sales agreement to sell portion of tract for one of the motels to plaintiff; plaintiff received building permit for motel; building permit was then rescinded; held, original owner acquired vested right to construct motels on property, and plaintiff "stands in the position of a successor in title" to original owner).

[116] 102 S.E.2d 364 (S.C. 1958) (property originally zoned by town for commercial use; owner entered into contract to lease property for service station and took out a loan to build station; property was annexed into City of Columbia and re-zoned residential; held, owner had vested right to build service station).

[117] 257 S.E.2d 719 (S.C. 1979) (plaintiff entered into contract to purchase property that was zoned for multi-family and spent $79,500 on the project; plaintiff applied for building permit the day after local government initiated proceeding to rezone property; a divided Supreme Court held that plaintiff had a vested right).

Note: Footnotes 118 through 120 are on following page.

Finally, a statute that is directly related to the vested rights doctrine, the South Carolina Local Government Development Agreement Act,[121] should be noted. This law is aimed at providing more certainty and less risk to developers and communities in planning, designing, and developing projects that involve at least twenty-five acres of highland.[122] It authorizes local governments to enter into development agreements that specify how and where the project will be built and protects the developer against the application of new or modified ordinances.[123]

Even if a vested right is established, the owner's worries are not necessarily over. The CPA gives local governments the authority to require that the use be brought into conformity or terminated by specified deadlines, using amortization formulas if it desires.[124] Alternatively, it may "provide for the continuance, restoration, extension, or substitution of nonconformities."[125]

Local governments approach nonconformities in different ways. The Greenville County zoning ordinance, for example, simply allows all non-conforming uses to continue.[126] But when an ordinance requires non-conforming uses to be terminated, litigation frequently ensues. The South Carolina Supreme Court has recognized that "the intention of all zoning laws, as regards a nonconforming use of property, is to restrict and gradually eliminate the nonconforming use."[127] Applying this principle,

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[118] 561 S.E.2d 627 (S.C. App. 2002) (owner acquired property when it was zoned multi-family and subsequently installed infrastructure; contract to sell property to multi-family developer fell through after property was rezoned to single family; held, no vested right to multi-family use where infrastructure would support both uses and owner never sought or obtained building permits).

[119] 431 S.E.2d 256 (S.C. App. 1993) (plaintiff purchased lot that was zoned commercial but did not take any steps toward developing property; held, no vested right).

[120] 349 S.E.2d 891 (S.C. App. 1986) (owner completed market research and financial studies, prepared development plan, cleared a portion of tract, obtained permit for one of the 14 buildings, and began constructing foundations for buildings; a divided Court of Appeals held that the owner did not have a vested right to complete the entire project).

[121] S.C.Code Ann. §§ 6-31-10 through 6-31-160 (Supp. 2002).

[122] *Id.* at § 6-31-40.

[123] *Id.* at § 6-31-10(B)(6).

[124] *Id.* at § 6-29-730.

[125] *Id.*

[126] Greenville County Code Ordin. (S.C.), app. A, § 6.2 (current through Apr. 2002).

[127] *Christy v Harleston*, 223 S.E.2d 861, 865 (S.C. 1976).

the courts have been generally supportive of local regulation of non-conforming uses.[128]

One case where the local government was not successful is *James v. City of Greenville,*[129] where the City of Greenville's zoning ordinance required the termination of all non-conforming uses within one year. The South Carolina Supreme Court held that the ordinance resulted in an unconstitutional taking of the owner's trailer park. The Court stated "that notwithstanding a zoning ordinance, one's property may continue to be used for the same purpose it was being used at the time of the passage of a zoning ordinance."[130] This sweeping statement, however, is inconsistent with both the CPA and other decisions of the Court.

V. THE "UNNECESSARY HARDSHIP" VARIANCE

As noted above, the CPA allows the local board of zoning appeals to grant a variance where strict application of the zoning ordinance would result in an "unnecessary hardship" on the landowner.[131] In *Hodge v. Pollock,*[132] the South Carolina Supreme Court stated that the purpose of this provision is "to permit modification of an otherwise legitimate restriction in the exceptional case where, due to unusual conditions, it becomes more burdensome than was intended, and may be modified without impairment of the public purpose."[133] In that case, the Court

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[128] *See*, e.g., *Centaur, Inc. v. Richland County*, 392 S.E.2d 165 (S.C. 1990) (upholding 2 year amortization period for elimination of all non-conforming sexually oriented businesses); *Collins v. City of Spartanburg*, 314 S.E.2d 332 (S.C. 1984) (upholding 5 year amortization period for elimination of non-conforming storage yards); *Restaurant Row Associates v. Horry County*, 489 S.E.2d 641 (S.C. App. 1997), *aff'd as modified*, 516 S.E.2d 442 (S.C. 1999), *cert. denied*, 528 U.S. 1020 (1999) (upholding denial of variance to requirement that non-conforming adult use be discontinued in 6 years); *Gurganious v. City of Beaufort,* 454 S.E.2d 912 (S.C. App. 1995) (upholding ordinance that required destroyed non-conforming uses to be rebuilt in one year); *Historic Charleston Foundation v. Krawcheck*, 443 S.E.2d 401 (S.C. App. 1994) (upholding board of adjustment's decision allowing a non-conforming use to be replaced by a "more appropriate" non-conforming use); *Bailey v. Rutledge*, 354 S.E.2d 408 (S.C. App. 1987) (upholding board of adjustment's denial of variance to add a room to a non-conforming day care center).

[129] 88 S.E.2d 661 (S.C. 1955).

[130] *Id.* at 667.

[131] S.C.Code Ann. § 6-29-800 (A)(2)(a) - (d) (Supp. 2002); *see* discussion *supra* at section II, C.

[132] 75 S.E.2d 752 (S.C. 1953).

[133] *Id.* at 754.

overturned the granting of a variance to the City's setback requirement because the evidence showed that the developer could simply redesign the building.

More recently, in *Restaurant Row Associates v. Horry County*,[134] the Court clarified and restated the applicable rules: (1) granting the variance is "an exceptional power which should be sparingly exercised and can be validly used only where a situation falls fully within the specified conditions;" (2) applicants do not have to show that without the variance there is no feasible conforming use of the property. Thus, "the unnecessary hardship standard is not the same, or as demanding as, a takings analysis;" (3) a claim "cannot be based upon conditions created by the owner nor can one who purchases property after enactment of a zoning regulation complain that a nonconforming use would work an unnecessary hardship upon him [or her];" (4) there "must be proof that a particular property suffers a singular disadvantage through the operation of a zoning regulation;" (5) "[l]astly, financial hardship does not automatically constitute unnecessary hardship."[135]

Applying these principles to the case, the Court upheld the denial of a variance from the setback and amortization requirements of Horry County's adult entertainment zoning ordinance.[136] Indeed, in the reported case law, most of the applicants for "unnecessary hardship" variances have been unsuccessful.[137]

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[134] 516 S.E.2d 442 (S.C. 1999).

[135] *Id.* at 445 - 447.

[136] *Id.* at 449.

[137] *See*, e.g., *Rush v. City of Greenville,* 143 S.E.2d 527 (S.C. 1965) (variance should not be granted where owner purchased property that was zoned residential and then subdivided property and sold sections so as not to be able to comply with ordinance's requirements); *Georgetown County Bldg. Official v. Lewis*, 351 S.E.2d 584 (S.C. App. 1986) (owner not entitled to variance from 50-foot road frontage requirement when this requirement was in effect when he purchased property); *Ex parte LaQuinta Motor Inns, Inc.*, 310 S.E.2d 438 (S.C. App. 1983) (affirming denial of variance for a higher sign when owner knew or should have known about the height restriction when it purchased property). *But see Dolive v. J.E.E. Developers, Inc.*, 418 S.E.2d 319 (S.C. App. 1992) (owner entitled to variance when state beachfront law made it impossible to comply with city's on-site parking requirement).

VI. SCOPE OF JUDICIAL REVIEW

A. Standing

The doctrine of standing seeks to ensure that only true, bona fide controversies are resolved by the courts.[138] The following requirements must be shown to establish standing: (1) the plaintiff must suffer "an injury in fact," that is, one that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury must be fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[139]

Standing is usually not an issue in land use litigation because the plaintiff is typically the person whose property is the subject of the regulation or governmental action in question. But where the plaintiff is not the owner, standing can pose a major, if not fatal, obstacle to judicial redress. For example, in *Beaufort Realty Co., Inc. v. Beaufort County*,[140] the Court of Appeals held that the South Carolina Coastal Conservation League, a nonprofit conservation group, lacked standing to challenge the local zoning administrator's determination that projects on two coastal islands were exempt from the development standards ordinance because the group presented no evidence as to how its members had suffered or would suffer any injury as a result of the determination.[141] The South Carolina courts are more inclined to confer standing where the issue is of great public importance.[142]

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[138] *See generally* Laurence H. Tribe, *American Constitutional Law* vol. 1, § 3-14 (3d ed. 2000).

[139] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

[140] 551 S.E.2d 588 (S.C. App. 2001).

[141] The court also held that "the filing of the plats and the alleged harm to League members is not causally related." 551 S.E.2d at 590. This is a perplexing holding because the county's position was that all the developer was required to do was file the plats, after which the projects could proceed free of the development standards ordinance. The Coastal Conservation League's position was that the projects were not exempt from the ordinance. Thus, it is hard to understand how there could be no causal relationship between the filing of the plats and the harm alleged in the complaint.

[142] *See*, e.g., *Baird v. Charleston County*, 511 S.E.2d 69, 75 (S.C. 1999) (holding that "a court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance"); *Sloan v. School District of Greenville County*, 537 S.E.2d 299 (S.C. App. 1999) (taxpayer has standing to challenge alleged violation of competitive bidding law where issue is of immense public importance). *Compare Citizens for Lee County v. Lee County*, 416 S.E.2d 641 (S.C. 1992), where the

B. Judicial Deference

The courts narrowly and cautiously review land use decisions by local governments. The judicial role is not to "become city planners" but to "only correct injustices when they are clearly shown."[143] As the South Carolina Supreme Court explained in *Knowles v. City of Aiken*:[144]

> While the landowner here and some other residents of the area do not embrace this choice of zoning, other residents in close proximity applaud this zoning. While the landowner may not agree and may be able to convince this Court not to agree with the City's zoning choice, that is not the issue before us. We cannot insinuate our judgment into a review of the City's decision. Rather, we must leave the City's decision undisturbed if the propriety of that decision is "fairly debatable."[145]

Applying this deferential standard, the courts have upheld local zoning and land use decisions in numerous cases.[146] Local governments,

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Supreme Court held that the plaintiff did not have standing to challenge the failure to follow the competitive bidding law in leasing a County landfill to a private entity. The Court of Appeals in *Sloan* distinguished *Lee County* because the plaintiff there was not a taxpayer and no expenditure of public funds was involved. *See also Beaufort County v. Trask*, 563 S.E.2d 660, 664 (S.C. App. 2002) (taxpayer does not have standing absent "some overriding public purpose or concern . . . .").

[143] *Talbot v. Myrtle Beach Board of Adjustment*, 72 S.E.2d 66, 70 (S.C. 1952). *See also Heilker v. Beaufort Board of Zoning Appeals*, 552 S.E.2d 42 (S.C. App. 2001) ("The local zoning boards, and not the courts, are the primary entities responsible for the planning and development of our communities.").

[144] 407 S.E.2d 639, 642 (S.C. 1991).

[145] *Id.*

[146] *See*, e.g., *Sea Island Scenic Parkway Coalition v. Beaufort County Board of Adjustments and Appeals*, 471 S.E.2d 142 (S.C. 1996) (affirming approval by Board of Zoning Appeals to remove trees from property); *Town of Scranton v. Willoughby*, 412 S.E.2d 424 (S.C. 1991) (upholding City ordinance that required all mobile homes to be located in designated mobile home districts); *Bob Jones University, Inc. v. City of Greenville*, 133 S.E.2d 843 (S.C. 1963), *appeal dismissed*, 378 U.S. 581 (1964) (upholding City Council's decision to rezone tract from residential to retail); *Talbot v. Myrtle Beach Board of Adjustment*, 72 S.E.2d 66, 72 (S.C. 1952) (affirming denial of variance to construct restaurant in residential zone; the Court stated that "if there is to be zoning, the dividing line must be somewhere" (quoting 58 Am. Jur. 968, § 42)); *Bear Enterprises v. County of Greenville*, 459 S.E.2d 883 (S.C. App. 1995) (upholding County

however, have not always been successful. In *Rushing v. City of Greenville*,[147] for example, the property owners' lots were zoned residential and surrounded by lots that had been zoned or rezoned for commercial use. The City Council refused the owners' request for rezoning to allow commercial uses, and the lower court affirmed. The South Carolina Supreme Court reversed, holding that the City's refusal was "patently unreasonable" because the surrounding properties were already heavily developed commercial uses.[148]

VII. OTHER IMPORTANT ISSUES

This section briefly discusses several other important issues related to land use regulation in South Carolina: annexation; exclusionary zoning; spot zoning; pending ordinance doctrine; community appearance; sexually oriented businesses; pre-emption; estoppel; and impact fees.

A. Annexation

South Carolina's annexation law is a major factor that influences how and where land is developed in the State. Annexation - the legal means by which cities expand their boundaries - can take place in only two ways in the State. One way is where after public notice and a hearing, seventy-five percent of the property owners owning at least seventy-five percent of the assessed valuation of the property in the area to be annexed consent to the annexation.[149] The other way requires no public process, but all of the property owners in the area must consent.[150] In both cases, the property to be annexed must be "contiguous."[151]

South Carolina has one of the most restrictive annexation laws in the country, essentially giving property owners veto authority over annexation

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Council's decision refusing to rezone area from "rural suburban" to residential mobile home park); *Lenardis v. City of Greenville*, 450 S.E.2d 597 (S.C. App. 1994) (upholding City Council's decision refusing to rezone property from office to commercial); *Petersen v. City of Clemson*, 439 S.E.2d 317 (S.C. App. 1993) (upholding City Council's decision to rezone tract from residential to planned, mixed use development); *Hampton v. Richland County*, 357 S.E.2d 463 (S.C. App. 1987) (upholding County Council's decision to rezone property to C-1 rather than to C-3).

[147] 217 S.E.2d 797 (S.C. 1975).

[148] *Id.* at 799.

[149] S.C.Code Ann. § 5-3-150(1) (Supp. 2002).

[150] *Id.* at § 5-3-150(3).

[151] *Id.* at § 5-3-305.

efforts.[152] It is the reason, for example, that the City of Spartanburg's northern boundary has remained the same since the City was incorporated in 1831.[153] The contiguity requirement imposes another formidable restriction. Even if seventy-five percent of the property owners do not object, the land must be contiguous to the municipality. For years, cities often met this requirement by annexing a thin and frequently lengthy sliver of property along a road or river in order to reach the target tract. The General Assembly recently stepped in and changed the definition of "contiguous" to curtail this practice,[154] making it even more difficult for cities to grow. As South Carolina's population continues to expand and its land continues to be rapidly developed, annexation issues will become even more important.

B. Exclusionary Zoning

Zoning and land use regulation can be perniciously used to implement schemes that discriminate against persons because of their race, income level, disabilities, and other factors. There has been considerable litigation on this issue in other states, primarily in the northeast,[155] but to date the

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[152] In North Carolina, on the other hand, a city can annex any area that is urban in character, whether or not the property owners agree. N.C. Gen. Stat. § 160A-36(c) (providing that the "area to be annexed must be developed for urban purposes" and defining that term).

[153] Interview with Planning Department, City of Spartanburg, S.C. (Feb. 25, 2003).

[154] "Contiguous" is now defined as:

> . . . property which is adjacent to a municipality and shares a continuous border. Contiguity is not established by a road, waterway, right-of-way, easement, railroad, track, marshland, or utility line which connects one property to another; however, if the connecting road, waterway, easement, railroad track, marshland, or utility line intervenes between two properties, which but for the intervening connector would be adjacent and share a continuous border, the intervening connector does not destroy contiguity.

S.C.Code Ann. § 5-3-305 (Supp. 2001).

[155] Without a doubt the leading case in the country is *Southern Burlington County NAACP v. Mount Laurel Township*, 67 N.J. 151 (1975) and 92 N.J. 158 (1983), the so-called Mt. Laurel litigation, in which the N.J. Supreme Court held that the town's zoning ordinance had the effect of excluding moderate to low income families and therefore violated the "general welfare" requirements of the state constitution. The Mayor of Mt. Laurel had made no secret of his intent, uttering this infamous comment to the African-American citizens of the community: "If you people cannot afford to live in our town, then you will have to move." *See* D.L. Kirp, J.P. Dwyer & L.A. Dwyer, *Our Town: Race, Housing and the Soul of America* (1997). The decision eventually led to passage of

subject has received the attention of South Carolina's appellate courts in only a few cases.[156]

C. Spot Zoning

"Spot zoning" refers to the "process of singling out a small parcel of land for use classification totally different from that of the surrounding area, for the benefit of owners of such property and to detriment of other owners."[157] Such zoning, even if proven, is not necessarily invalid. The courts next evaluate "certain additional factors" and "the particular circumstances of each case" in determining whether to uphold or strike down the zoning.[158] There is little reported case law in South Carolina on spot zoning; thus, the courts have not yet had an opportunity to explain fully how this evaluation should be conducted.[159]

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the N.J. Fair Housing Act, which establishes a statewide program to confront exclusionary zoning and affordable housing issues.

[156] *See*, e.g., *Bannum, Inc. v. City of Columbia*, 516 S.E.2d 439 (S.C. 1999) (reversing denial of "special exception" permit for halfway house for persons recently released from federal prison where there was no evidence in the record that this use would increase traffic in the area - the purported justification for the Board's decision; real reason was obviously fear among neighbors about "these types of people" living in area); and *City of Charleston v. Sleepy Hollow Youth, Inc.*, 530 S.E.2d 636 (S.C. App. 2000) (genuine issues of material fact existed as to whether County's objection to a group home for emotionally disabled children was the result of discrimination violative of federal Fair Housing Act).

[157] *Bob Jones Univ. v. City of Greenville*, 133 S.E.2d 843, 848 (S.C. 1963), *appeal dismissed*, 84 S.Ct. 1913 (1964) (rezoning that merely expands an already existing commercial area is not "spot zoning").

[158] *Knowles v. City of Aiken*, 407 S.E.2d 639, 641 (S.C. 1991).

[159] Whether the zoning is consistent with the local comprehensive plan is clearly one of the factors. *Talbot v. Myrtle Beach Board of Adjustment*, 72 S.E.2d 66, 71 (S.C. 1952). In North Carolina, the analytical approach has been clearly explained:

> Spot zoning is defined, in pertinent part, as a zoning ordinance or amendment that "singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to . . . relieve the small tract from restrictions to which the rest of the area is subjected." The practice [of spot zoning] may be valid or invalid, depending on the facts of the specific case. In order to establish the validity of such a zoning ordinance, the finder of fact must answer two questions in the affirmative: (1) did the zoning activity constitute spot zoning as our courts have defined that term; and (2) if so, did the zoning authority make a clear showing of a reasonable basis for the zoning. Factors relevant to the reasonableness inquiry include, but are not necessarily limited to, the size of the tract in

D. Pending Ordinance Doctrine

Sherman v. Reavis[160] adopted the "pending ordinance doctrine" in South Carolina, which gives local governments the authority to deny permission for a land use that contravenes a pending and later enacted zoning ordinance. The ordinance is "legally pending when the governing body has resolved to consider a particular scheme of rezoning and has advertised to the public its intentions to hold public hearings on the rezoning."[161]

E. Mobile Homes

Can local governments regulate mobile homes differently from other types of residences?[162] The issue is of no small importance in South Carolina, which leads the nation in the percentage of residents who live in this type of housing.[163] The South Carolina Supreme Court addressed the question in *Bibco Corp. v. City of Sumter*,[164] where the City ordinance

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> question; the compatibility of the disputed zoning action with an existing zoning plan; the benefits and detriments resulting from the zoning for the owner of the parcel, his neighbors and the surrounding community; and the relationship between the uses envisioned under the new zoning and the uses currently present in the adjacent tracts.

Good Neighbors of South Davidson v. Town of Denton, 559 S.E.2d 768, 771 (N.C. 2002) (citations and footnotes omitted).

[160] 257 S.E.2d 735 (S.C. 1979).

[161] *Id.* at 737. *See also Continental Southeastern Group v. City of Folly Beach*, 348 S.E.2d 837 (S.C. 1986) (pending ordinance doctrine does not apply where City has voted against rezoning and no further action had been taken, thereby showing a lack of resolve to adopt a zoning scheme).

[162] There are three basic types of single family homes. Mobile homes, also known as manufactured housing, are built entirely in a factory and shipped to the site where they are anchored to the ground by steel straps. *See* Robert T. Packard, *Encyclopedia of American Architecture* 326 (2d ed., McGraw-Hill, Inc. 1995). Modular homes are also entirely made in a factory, but they are shipped to the site in sections where they are assembled and installed on a permanent foundation. *See Dictionary of Architecture and Construction* 319 (Cyril M. Harris ed., McGraw-Hill, Inc. 1975). Stick-built (platform frame or balloon frame) homes are constructed piece-by-piece on the owner's land. *Id.* at 369.

[163] U.S. Dept. of Housing and Urban Dev., *Summary of U.S. Housing Market Conditions* tbl. 3, http://www.huduser.org/periodicals/ushmc/fall02/summary_2.html (accessed Feb. 27, 2003).

[164] 504 S.E.2d 112 (S.C. 1998).

required all mobile homes to be located only in the "General Residential" district. The plaintiff made two basic arguments: (1) the ordinance was pre-empted by the federal law which requires uniform construction and safety standards for mobile homes,[165] and (2) the ordinance violated the Equal Protection Clause[166] because it allowed modular homes in any residential district.

The Court rejected these arguments and upheld the ordinance, noting decisions in other states that have relied on the protection of property values, the regulation of density, and sewage and waste problems as a basis for regulating mobile homes differently from other residential structures.[167] *See also Town of Scranton v. Willoughby*,[168] where the Court upheld an ordinance requiring all mobile homes to be located in a designated mobile home district.

F. Community Appearance

In *Peterson Outdoor Advertising v. City of Myrtle Beach*,[169] the Court upheld the City's "community appearance" ordinance, stating that local governments have the authority to enact regulations based on aesthetic considerations. The City and the local Board, however, did not follow the specific criteria in the ordinance in reviewing the plaintiff's application for two billboards. The City could not reject the application on the grounds that the billboards "did not look good" and would result in "too much clutter."[170]

G. Sexually Oriented Businesses

Local governments and the courts continue to grapple with the difficult issues associated with the regulation of sexually oriented businesses. Two basic principles have to be considered and balanced in these cases: (1) businesses providing non-obscene, sexually explicit material are entitled to protection under the First Amendment[171] and (2) local governments have the right to regulate these businesses in a content-neutral manner

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[165] 42 U.S.C. §§ 5401 - 5426 (2000).
[166] U.S. Const. amend XIV, § 1.
[167] 412 S.E.2d 424 (S.C. 1991).
[168] 306 S.C. 421 (S.C. 1992).
[169] 489 S.E.2d 630 (S.C. 1997).
[170] *Id.* at 633.
[171] *Young v. American Mini Theatres*, 427 U.S. 50, 70 (1976).

because of their secondary negative impacts.[172] This regulation typically takes the form of zoning (where sexually oriented businesses can be located only in certain zoning districts) or licensing requirements (where the business must apply for and obtain a local license) or both.[173] Courts will uphold zoning restrictions if they are designed to prevent harmful secondary effects and they allow reasonable avenues of communication.[174]

A licensing program is more "constitutionally perilous"[175] because it can operate as an impermissible prior restraint on speech. The program must (1) impose clear and adequate standards for officials to apply in rendering a decision to grant, deny or revoke a license and (2) provide procedural safeguards.[176] Greenville County's sexually oriented business ordinance ran afoul of the latter requirement because it did not provide for prompt judicial review of the local government's decision.[177] The County later decided to abandon its licensing program and to regulate only the location of sexually oriented businesses. The South Carolina Supreme Court recently upheld those regulations.[178]

H. Pre-emption

The pre-emption doctrine prohibits local governments from adopting regulations and ordinances that are "inconsistent and irreconcilable" with state law. The South Carolina Supreme Court's oft-quoted statement in *McAbee v. Southern Railway Co.*[179] explains the governing principle: "Mere differences in detail do not render them conflicting. If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand."[180]

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[172] *See*, e.g., *Harkins v. Greenville County*, 533 S.E.2d 886 (S.C. 2000), *cert. denied*, 531 U.S. 1125 (2001) (following *Young v. American Mini Theatres*, 427 U.S. 50 (1976) and *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1996)).

[173] The leading case is *Centaur, Inc. v. Richland Co.*, 392 S.E.2d 165 (S.C. 1990), where the S.C. Supreme Court upheld a county ordinance that included both licensing requirements and location restrictions. The ordinance has served as a model for other communities in the State.

[174] *Harkin*, 533 S.E.2d at 890.

[175] *Id.* at 893 n. 2.

[176] *Id.* at 890.

[177] *Id.*

[178] *Kenwood*, 577 S.E.2d 428.

[179] 164 S.E. 444 (S.C. 1932).

[180] *Id.* at 445. During the 2002 session of the General Assembly, efforts were undertaken to pre-empt the authority of local governments to regulate certain activities more stringently than state laws or regulations. A bill passed by the House of

The South Carolina Supreme Court recently applied this principle in considering the prohibition in a local ordinance against establishments that allow the on-premises consumption of beer or wine from operating between the hours of 2 a.m. and 6 a.m. on Mondays through Saturdays.[181] The state liquor licensing law prohibits Sunday sales of beer and wine. The Court held that state law did not pre-empt the local ordinance:

> While the ordinance differs in scope from [section] 61-4-120 (the ordinance prohibits operation from 2 a.m. to 6 a.m. on Mondays through Saturdays while the statute prohibits sales from midnight on Saturday through sunrise on Monday), the two are neither inconsistent nor irreconcilable.[182]

I. Estoppel

The doctrine of estoppel can arise in land use and zoning cases. For example, in *Abbeville Arms v. City of Abbeville*,[183] the property on which the plaintiff had an option was mistakenly designated on the official zoning map as high density residential, which would allow a multi-family project. Relying on the map and a letter from the Zoning Administrator confirming the accuracy of the map, the plaintiff spent over $90,000 in preparing the property for a multi-family project. The property, in fact, was zoned for medium density residential, which did not permit multi-family use. The Court held that all essential elements of the doctrine of estoppel were present: (1) the plaintiff's lack of knowledge and inability to know the truth and (2) the plaintiff's reliance and prejudicial change of

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Representatives (S.C. H. 3555, Sess. 115 (Apr. 2, 2003)) would prohibit more stringent hog and chicken farm regulations (S.C.Code Ann. (proposed) § 4-9-31 (2003)), while the Senate Judiciary Committee approved an amendment to the bill that allowed local governments to regulate hog farms, but not chicken and cattle farms, more stringently than the State. S.C. S. 3555, Sess. 115, Committee on the Judiciary, Proposed Amendment JUD3555.014, § 6-1-3000(B) (May 27, 2003). No further action was taken on the legislation during the 2002 session.

[181] *Denene, Inc. v. City of Charleston*, 574 S.E.2d 196 (S.C. 2002).

[182] *Id.* at 215. *Accord McKeown v. Charleston County Board of Zoning Appeal*, 553 S.E.2d 484 (S.C. App. 2001) (local ordinance prohibiting beer and wine stores from locating within 500 feet of a residence is not pre-empted by state law which allows, but does not require, consideration of proximity to residential areas in determining whether to grant liquor license).

[183] 257 S.E.2d 716 (S.C. 1979).

position. Thus, the Court required the City to issue a building permit for the multi-family project. Other cases pertaining to estoppel include: *Grant v. City of Folly Beach*;[184] *Greenville County v. Kenwood Enterprises, Inc.*;[185] and *Landing Development Corp. v. City of Myrtle Beach.*[186]

J. Impact Fees

Impact fees are aimed at assisting communities in addressing the fiscal "impact" of growth. They are typically one-time, lump sum charges by which a community recovers some or all of the capital costs of providing new or expanded public facilities needed to serve development.[187] Rarely do impact fees apply to the costs of operating and maintaining these facilities. Such costs are typically recovered through on-going service and user fees.

For many years, impact fees were used primarily to cover the easily quantifiable costs of water and sewer infrastructure. More recently, some local governments have extended the fees to services that not only are more difficult to quantify but also benefit users other than the new residents or businesses, such as schools, roads, and police and fire protection. The controversies associated with these programs were largely responsible for the enactment in 1999 of a comprehensive state law, the South Carolina Development Impact Fee Act (DIFA).[188]

The DIFA's basic principle is that "[a] governmental entity may not impose an impact fee, regardless of how it is designated, except as

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[184] 551 S.E.2d 229 (S.C. 2001) (holding that City was not estopped from enforcing flood ordinance and prohibiting residential use of ground floor despite issuance of building permit for downstairs apartment where owner could have easily obtained information about flooding limits).

[185] 577 S.E.2d 428 (holding that mistaken interpretation of court ruling cannot serve as a basis for estoppel).

[186] 329 S.E.2d 423 (S.C. 1985) (holding that City was estopped from not allowing owner to rent properties where Zoning Director confirmed rentals were allowable and business licenses had been issued).

[187] *See generally* F. Kaid Benfield, Matthew D. Raimi & Donald D. T. Chen, *Once There Were Greenfields: How Urban Sprawl Is Undermining America's Environment, Economy and Social Fabric* 109 - 110 (NRDC 1999). The S.C. Supreme Court has upheld the constitutionality of impact fees, concluding that they are "charges" primarily benefiting those required to pay rather than taxes. *Hagley Homeowners Assn. v. Hagley Water Sewer and Fire Auth.*, 485 S.E. 2d 92 (S.C. 1997).

[188] S.C.Code Ann. §§ 6-1-910 through 6-1-2010 (Supp. 2002). Service and user fees are addressed in article 3 of title 6 of the Code of Laws.

provided in this article."[189] Water and wastewater utilities are exempt from most of the DIFA's requirements, but they are required to have a capital improvements plan, to issue a report explaining how the fee was established and will be collected, and to follow certain procedures.[190]

In general, only governmental entities that have adopted a comprehensive plan pursuant to the CPA or a capital improvement plan in accordance with section 6-1-960 of the DIFA may impose an impact fee.[191] An impact fee that results in "greater than incidental benefits" to property owners or developers other than the payor is prohibited.[192] The DIFA imposes requirements on, among other things, the procedures for establishing impact fees, the provisions that must be incorporated in impact fee ordinances, and the amount of the fees. The statute is required reading for any local government or special purpose district interested in impact fees.

VIII. ACHIEVING SMART GROWTH IN SOUTH CAROLINA

Probably the single most notable fact about the CPA is the scope of authority granted to local governments.[193] The basic legislative message is: "Here's all the authority you need. Now you decide if you want to exercise it."[194] Not surprisingly, the response from local governments has

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[189] S.C.Code Ann. § 6-1-930(A)(1) (Supp. 2002). "Impact fee" is defined as "a payment of money imposed as a condition of development approval to pay a proportionate share of the cost of system improvements needed to serve the people utilizing the improvements." *Id.* at § 6-1-920(8). The definition goes on to exclude fees relating to the administrative, plan review and inspection costs associated with permits required for development; connection or hookup charges; amounts collected from a developer who has agreed to be financially responsible for the construction or installation of capital improvements; and service and user fees. *Id.*

[190] *Id.* at § 6-1-1080.

[191] *Id.* at § 6-1-930(A)(1).

[192] *Id.* at § 6-1-930(D). "Incidental benefits" are "benefits which accrue to a property as a secondary result or as a minor consequence of the provision of public facilities to another property." *Id.* at § 6-1-920(12).

[193] Joel Russell, an attorney and consultant who has worked on land use issues throughout the country for over 25 years, states that the CPA is one of the nation's most progressive state planning authorization laws. Speech, Upstate Forever Conference, *The "Z Word": A Discussion of Zoning in the Upstate* (Greenville, S.C., May 16, 2002) (copy of transcript on file with the author).

[194] In one case, the S.C. Supreme Court held that the City's tree protection ordinance exceeded the scope of authority granted in the planning statute that preceded the CPA

covered the entire spectrum, ranging from no action in some of the rural counties to the enactment of extensive controls, such as in several of the coastal communities.

One thing is certain - South Carolina will continue to grow. The great challenge facing the State is not whether growth will occur, but how and where it will occur. "Smart Growth" - the term that is now widely used to describe economically sustainable, environmentally sensitive, and socially equitable patterns of development[195] - should be the goal in South Carolina. Land use regulation is certainly one of the essential elements of smart growth, and one can safely predict more local regulation as the state continues to grow. But regulation alone will not achieve smart growth. For example, the fact that a tract of land is zoned industrial or commercial means nothing if the property owner has no interest in selling it for that purpose.

Smart growth provides a large toolbox of many measures and policies[196] that are beyond the scope of this article but warrant at least

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(S.C.Code Ann. § 14-350.16 (1976)). *Dunbar v. City of Spartanburg*, 221 S.E.2d 848 (S.C. 1976). The General Assembly, however, later corrected the problem, amending the law to give local governments such authority.

[195] There is now a wide and outstanding array of books and articles on the subject of smart growth. *See*, e.g., John R. Nolan, *Well Grounded: Using Local Land Use Authority to Achieve Smart Growth* (2001); Douglas Porter, *The Practice of Sustainable Development* (2000); F. Kaid Benfield, Matthew D. Raimi and Donald D.T. Chen, *Once There Were Greenfields: How Urban Sprawl Is Undermining America's Environment, Economy and Social Fabric* (NRDC 1999); Eben Fodor, *Better, Not Bigger: How To Take Control of Urban Growth and Improve Your Community* (New Society Publishers 1999). There are numerous websites devoted to the issues. *See*, e.g., Smart Growth America, www.smartgrowthamerica.org; U.S. Environmental Protection Agency, www.epa.gov; and the Urban Land Institute, www.uli.org (all accessed Apr. 7, 2003).

[196] The U.S. Environmental Protection Agency (EPA) lists the following 10 directives for smart growth:

1. Mix Land Uses
2. Take Advantage of Compact Building Design
3. Create a Range of Housing Opportunities and Choices
4. Create Walkable Neighborhoods
5. Foster Distinctive, Attractive Communities with a Strong Sense of Place
6. Preserve Open Space, Farmland, Natural Beauty, and Critical Environmental Areas
7. Strengthen and Direct Development Towards Existing Communities
8. Provide a Variety of Transportation Choices
9. Make Development Decisions Predictable, Fair and Cost Effective
10. Encourage Community and Stakeholder Collaboration in Development Decisions.

serious consideration by every community in South Carolina, such as: (1) Parks and Open Space programs, where the government acquires lands for parks, greenways, and open spaces to be used and enjoyed by the public; (2) Purchase of Development Rights (PDR) programs, where a local government agency purchases the development rights on certain lands through legal agreements known as conservation easements.[197] The lands are either environmentally significant or located in areas where growth is not desired. PDR programs are entirely voluntary and the purchase price is negotiated between the property owner and the local agency on a case-by-case basis. The land continues to be privately owned, but the community is now assured that it will not be developed;[198] (3) Transfer of Development Rights (TDR) programs, in which the local government designates areas where growth is not desired (sending areas) and areas where growth is desired (receiving areas) and then puts the market to work by allowing developers to purchase development rights in the sending areas and transferring them to, and thereby achieving higher densities in, the receiving areas;[199] (4) Service Boundaries, where the government designates those areas where it will provide certain services, notably, roads, water, sewer, and schools. It is a "kinder and gentler" approach than direct regulation and can be highly effective in managing growth because developers typically build their projects where services and infrastructure exist; (5) Incentive Programs, where the government gives developers incentives through expedited permitting, reduced taxes or "density bonuses" for doing "good things" such as building mixed use

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U.S. EPA, *Smart Growth: About Smart Growth*, http://www.epa.gov/smartgrowth/about_sg.htm (Oct. 24, 2002) (accessed Apr. 7, 2003).

[197] A conservation easement is a legal agreement between the landowner and the local agency (or private land trust) in which the landowner permanently relinquishes most or all of his or her rights to develop the property. *See generally* Janet Diehl & Thomas S. Barrett, *The Conservation Easement Handbook* (1988). Where the easement is donated or sold for less than full fair market value, there can be significant tax advantages associated with such transactions. *See generally* Stephen J. Small, *Preserving Family Lands, Book III* (2002). The Land Trust Alliance has a wealth of information about conservation easements and other methods of preserving lands. *See generally* Land Trust Alliance, http://www.lta.org/ (accessed May 3, 2003).

[198] By far the most significant local open space protection program in South Carolina is in Beaufort County, where the voters overwhelmingly approved a $40 million bond to protect lands through either acquisition or conservation easements. *See* Beaufort County Code Ordin. (S.C.), ch. 94, art. III (current through Dec. 2002).

[199] *See generally* Rick Pruetz, *Saved By Development: Preserving Environmental Areas, Farmland and Historic Landmarks With Transfer of Development Rights* (Arje Press 1997).

communities, redeveloping abandoned sites, and preserving open space; and (6) Affordable Housing Programs that are aimed at making housing more affordable in the urban areas and thus reducing sprawling development on "cheap land" in the countryside.

The State has an important role as well. Smart growth will not be achieved in South Carolina if the State's role is only passive and "hands off." This is not to say that the State should pre-empt the field and begin making all land use decisions in Columbia. That would be both politically impossible and bad policy. But there is a broad middle ground where many sensible and effective measures can be found. A good place to start is a law that is already on the books - the South Carolina Comprehensive Infrastructure Development Act.[200] This statute, passed in 1997, created a new division within the South Carolina Budget and Control Board called the Division of Regional Development (DRD) and gave it responsibility "for the creation of a state infrastructure development plan, for the coordination of regional infrastructure development plans, and for the coordination of state programs and resources that impact or affect infrastructure development."[201] The statute defines the term "infrastructure" as "the basic facilities, services, and installations needed for the functioning of government, including, but not limited to, water, sewer, and public sector communications,"[202] but there is a whopping exemption - transportation is not included.[203] The law directs the ten Regional Councils of Government (COGs)[204] to develop regional infrastructure plans in cooperation with the DRD, and the DRD must consider those plans in creating the statewide infrastructure plan.

To be the sure, the law is weak and has few teeth. The exemption of transportation is a massive loophole. Local governments - key players in regional planning - are not required to do anything; rather, they are merely "encouraged" to cooperate with each other and to assist the Regional COGs in developing the regional infrastructure plans. State regulatory agencies only have to "consider and determine" whether the activities authorized by their permits and licenses are consistent with the state plan

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[200] S.C.Code Ann. §§ 11-42-10 through 11-42-90 (Supp. 2002).

[201] *Id.* at § 11-42-50.

[202] *Id.* at § 11-42-30(6).

[203] *Id.*

[204] *Id.* at § 6-7-110 (1976) (authorizing the 10 Regional COGs in South Carolina and listing the counties that belong to each). These COGs receive state and federal funds to assist local governments in their areas perform studies, draft ordinances, and prepare plans.

and regional plans. They can still go ahead and authorize an inconsistent activity.

The worst news of all, however, is that the Budget and Control Board has dissolved the DRD.[205] Nonetheless, the law is still on the books and is a step in the right direction toward recognizing the critical importance of regional planning in South Carolina.[206] It can be the foundation for a stronger and more effective statewide program. Indeed, in 1999, a bill introduced in the General Assembly by Senator Phil Leventis would have done exactly that.[207] Sen. Leventis convened a broad-based, statewide group to discuss and debate the legislation. The bill never made it out of committee, but the dialogue was productive and hopefully similar legislation will soon be considered again by the General Assembly.

Governor Mark Sanford, who began his term in 2003, declared in his first State of the State address that maintaining and improving the State's quality of life is one of the top priorities of his administration.[208] This was soon followed by the report from the Governor's "Quality of Life Task

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[205] Interview with Philip Slayter, Consultant, S.C. Budget and Control Board (Feb. 13, 2003). The Board has the authority under S.C.Code Ann. § 1-11-22 (1976) to organize its staff as it deems appropriate "notwithstanding any other provision of law."

[206] For an outstanding and compelling discussion on why a regional approach is essential to smart growth, *see* Peter Calthorpe & William Fulton, *The Regional City* (Island Press 1999). The authors write:

> In today's global economy, it is regions, not nations, that vie for economic dominance throughout the world. In addition, our understanding of ecology has matured rapidly, as we have come to realize that the region is also the basic unit in environmental terms. Because of the interconnected nature of ecosystems, we are hooked together with our neighboring communities whether we like it or not.

Id. at 16 - 17.

[207] S.C. S. 945, Sess. 113 (referred to Committee on Finance Jan. 11, 2000). This legislation, popularly known as the "smart growth bill," contained the following major elements: (1) no exemption for transportation (*id.* (proposed) at S.C.Code Ann. § 11-42-30(6)); (2) an additional broad definition of "sustainable development planning," which included natural resource conservation, redevelopment of blighted lands, walkable communities, affordable housing, and alternative transportation (*id.* (proposed) at § 11-42-30(14)); and (3) authority for the DRD to provide technical and financial assistance to local governments on "sustainable development planning" issues (*id.* (proposed) at § 11-42-50). Even this bill had its shortcomings. It did not require "sustainable development plans," still would not have required local governments to do anything, and did not require state permitting decisions to be consistent with regional and local plans.

[208] Gov. Mark Sanford, Speech, *2003 State of the State Address* (Columbia, S.C., Jan. 22, 2003) (available at http://www.state.sc.us/governor/speeches/speech.html).

Force," which contains over thirty "smart growth" recommendations.[209] That is good news because managing growth, protecting the environment and providing economic opportunities for all of our state's citizens - the essential elements of a high quality of life - will require hard work and commitment at all levels of government.

[209] S.C. Quality of Life Task Force, *Quality of Life Task Force Report* (Feb. 6, 2003) (available at http://www.state.sc.us/governor/reports/Quality%20of%20Life%20Task%20Force%20Report-FINAL.pdf) (accessed May 3, 2003). Some of the recommendations include: (1) increased funding for the Conservation Bank Act (*id.* at 5); (2) support of farmland protection initiatives (*id.* at 5); (3) eliminating the minimum acreage requirement for new schools (*id.* at 5); (4) requiring major projects to be consistent with local land use plans (*id.* at 5); (5) designating "priority investment areas" for future development (*id.* at 5); (6) promoting affordable housing (*id.* at 5); (7) removing legal impediments to traditional neighborhood design (*id.* at 5); (8) providing incentives for infill and redevelopment projects (*id.* at 6); and (9) reforming the State's annexation laws (*id.* at 6).