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NIGH THE WATER OF CHANGING TIDES: COASTAL ZONE MANAGEMENT AFTER LUCAS V. SOUTH CAROLINA COASTAL COUNCIL

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But look! here come more crowds, pacing straight for the water, and seemingly bound for a dive. Strange! Nothing will content them but the extremest limit of the land; loitering under the shady lee of yonder warehouses will not suffice. No. They must get just as nigh the water as they possibly can without falling in. And there they stand—miles of them—leagues.

—HERMAN MELVILLE, *MOBY DICK*
or *THE WHITE WHALE* (1851)

The South Carolina beach/dune system is now in a state of crisis. Over 57 miles of our beaches are critically eroding. This erosion is threatening the continued existence of the beach/dune system and thereby threatening life, property, the tourist industry, vital state and local revenue, marine habitat, and a national treasure.

The primary causes of this crisis include a persistent rise in sea level, poorly planned development which encroaches upon the beach/dune system and a lack of comprehensive beach management planning. This crisis will continue unabated unless the State makes a firm commitment to protect, preserve, restore, and enhance our beach/dune system. This resource is now in desperate need of the State's stewardship.¹

I. INTRODUCTION

Call us Ishmaels. The song of the sea allures us; its pull is irresistible.

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1. REPORT OF SOUTH CAROLINA BLUE RIBBON COMMITTEE ON BEACHFRONT MANAGEMENT *i* (1987) [hereinafter BLUE RIBBON COMMITTEE REPORT].

Dense masses of dwellings dot our nation's shores, and each new house creeps ever closer to the edge of the continent. There, the insatiable surge of humanity meets the uncontrollable tides of Neptune, neither betraying a hint of self-restraint or deference for the other. Hammers continually bang as the waves crash the shores with rhythmic and unrelenting indifference.

In 1988, 1177 people per shoreline mile populated the coastal areas of the United States.² Although the nation's 451 coastal counties account for only twenty percent of its total land area (eleven percent if Alaska is excluded),³ approximately 112 million people—nearly forty-five percent of the total population—inhabit these counties.⁴ And they will continue to come.⁵ Meanwhile, the results of this inevitable showdown between man and nature have been predictable, illustrated most recently by Hurricanes Hugo, Andrew, and Iniki.⁶ More importantly, these results seem destined

2. THOMAS J. CULLITON ET AL., U.S. DEP'T OF COMMERCE, 50 YEARS OF POPULATION CHANGE ALONG THE NATION'S COASTS, 1960-2010, at 7 (1990).

3. *Id.* at 3.

4. *See id.* at 4 tbl. 2.

5. *See, e.g., id.*

6. Just before midnight on September 21, 1989, Hurricane Hugo crashed into the South Carolina coast, packing 135 mile-per-hour winds and a seventeen-foot wall of water. The storm killed twenty-one people in the Carolinas and Virginia, left 200,000 people without power, and caused one billion dollars in damage in the Charleston area alone. *See, e.g.,* Ed Magnuson, *Winds of Chaos*, TIME, Oct. 2, 1989, at 16; Tom Morganthau et al., *Hugo is a Killer*, NEWSWEEK, Oct. 2, 1989, at 18; James N. Baker et al., *The Storm After Hugo*, NEWSWEEK, Oct. 9, 1989, at 40; *see also* Tom Morganthau et al., *Destruction in Paradise*, NEWSWEEK, Sept. 21, 1992, at 51 (recounting destruction caused by Hurricane Iniki's 144 to 180 m.p.h. winds); Janice Castro, *Mother Nature's Angriest Child*, TIME, Sept. 7, 1992, at 14 (recounting destruction caused by Hurricane Andrew's 164 m.p.h. winds).

Although it is certainly true that a storm of this magnitude could wreak havoc on even the most soundly developed shores, responsible land use can mitigate the damage. Conversely, a storm much smaller than Hurricane Hugo can ravage a poorly planned coastal development. "A relatively minor storm in early December, 1986, closely followed by the January 1, 1987, storm inflicted substantial damage to upland property (\$20 million) and left the coast of South Carolina severely damaged and highly vulnerable to future storms." BLUE RIBBON COMMITTEE REPORT, *supra* note 1, at iii. Moreover, severe winter northeasters can pack a fierce punch, second only to hurricanes in concentrated energy. WILLIAM J. NEAL ET AL., LIVING WITH THE SOUTH CAROLINA SHORE 20 (1984). Indeed, "[a] hurricane, rather compact and fast-moving, is sometimes less devastating than a slow, broad, winter storm." WALLACE KAUFMAN & ORRIN H. PILKEY JR., THE BEACHES ARE MOVING: THE DROWNING OF AMERICA'S SHORELINE 129 (1983). "Perhaps fifty such storms were severe enough to cause some degree of coastal damage along the South Carolina shoreline in the first 80 years of this century." NEAL, *supra*, at 20. The combined specter of hurricanes and winter storms represents a formidable threat to any coastline; "[r]arely a year goes by without a hurricane or

to repeat themselves, absent a dramatic overhaul of our collective approach to coastal land management.⁷

In 1972 Congress sought to abate this clash between man and nature by passing the Coastal Zone Management Act.⁸ Among other things, the Act encouraged “coastal states”⁹ to develop and implement “management programs to achieve wise use of the land and water resources of the coastal zone.”¹⁰ Congress urged that such programs should provide for

the management of coastal development to minimize the loss of life and property caused by improper development in flood-prone, storm surge, geological hazard, and erosion-prone areas and in areas likely to be affected by or vulnerable to sea level rise, land subsidence, and saltwater intrusion, and by the destruction of natural protective features such as beaches, dunes, wetlands, and barrier islands.¹¹

Since the passage of the Act every coastal state, including South Carolina, has responded by passing its own coastal zone management act.¹² Howev-

northeast eroding some part of the [South Carolina] shore.” *Id.*

7. The National Oceanic and Atmospheric Administration reports:

While direct causes of environmental quality problems are often difficult to document, evidence is mounting that many are the result of general coastal development patterns. Natural processes of coastal ecosystems are being disrupted, and the ecological and economic values of coastal areas threatened. Fundamental changes are occurring in the way natural systems work and look. As coastal population grows, many of the qualities that attracted people initially are diminishing.

. . . .

. . . . As many coastal areas grow more crowded, the short-comings of management actions that focus on site-by-site and permit-by-permit decisions, while failing to address the more ubiquitous problems of growth and development, become more obvious.

CULLITON, *supra* note 2, at 1.

8. Pub. L. No. 92-583, 86 Stat. 1280 (1972) (codified as amended at 16 U.S.C. §§ 1451-1464 (1988 & Supp. II 1990)). See generally Linda A. Malone, *The Coastal Zone Management Act and the Takings Clause in the 1990's: Making the Case for Federal Land Use to Preserve Coastal Areas*, 62 U. COLO. L. REV. 711 (1991) (discussing the federal Coastal Zone Management Act and cases that have interpreted it).

9. “Coastal states” is a defined term meaning any state “in, or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes,” including “Puerto Rico, the Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territories of the Pacific Islands, and American Samoa.” 16 U.S.C. § 1453(4) (1988).

10. *Id.* § 1452(2) (1988 & Supp. II 1990).

11. *Id.* § 1452(2)(b).

12. Natasha Zalkin, *Shifting Sands and Shifting Doctrines: The Supreme Court's*

er, the problem in South Carolina and other affected states has been complaints that the regulations constitute takings of private property without just compensation.¹³

Since its enactment in 1977, the South Carolina Coastal Zone Management Act (SCCZMA) has undergone a dramatic evolution. The Act began as mild regulation of coastal uses in 1977, swung to a vastly more intrusive land-use plan in 1988, and, with the 1990 amendments,¹⁴ has settled somewhere in between. The most controversial feature of the SCCZMA concerns the regulation of construction and reconstruction of dwellings on beachfront lots. The current version of the Act vests in the South Carolina Coastal Council a great deal of regulatory discretion regarding coastal dwelling construction. This system is the result of trial and error, forged from criticism and litigation, most notably, *Lucas v. South Carolina Coastal Council*.¹⁵

Lucas II is a landmark opinion of the United States Supreme Court that addresses a number of important constitutional issues and is subject to attack and defense on several fronts. This Note does not, however, attempt to treat all of the issues; rather its purpose is to trace the evolution of the South Carolina Beachfront Management Act and to present the Act in its current form as a model for state coastal zone management efforts. In addition, because both the South Carolina Supreme Court and the United States Supreme Court decided the *Lucas* case under the 1988 Act without consideration of the 1990 amendments,¹⁶ the Note assesses the Act's

Changing Takings Doctrine and South Carolina's Coastal Zone Statute, 79 CAL. L. REV. 205, 216 & n.46 (1991) (citing all state coastal zone management statutes). "Virtually all these states utilize some type of permit system geared toward restricting further development in fragile coastal regions." *Id.* at 216-17. In 1977 the South Carolina General Assembly passed the South Carolina Coastal Zone Management Act, S.C. CODE ANN. §§ 48-39-10 to -220 (Law. Co-op. 1987 & Supp. 1992). See Newman J. Smith, *Analysis of the Regulation of Beachfront Development in South Carolina*, 42 S.C. L. REV. 717 (1991).

13. See U.S. CONST. amend. V. The Fifth Amendment is applied to the states through the Due Process Clause of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 1. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897). See generally Harold N. Skelton, Comment, *Houses on the Sand: Takings Issues Surrounding Statutory Restrictions on the Use of Oceanfront Property*, 18 B.C. ENVTL. AFF. L. REV. 125 (1990) (discussing takings issues surrounding South Carolina and Massachusetts coastal zone management statutes).

14. Act of June 25, 1990, No. 607, 1990 S.C. Acts 2581 (codified as amended in scattered sections of S.C. CODE ANN. tit. 48, ch. 39 (Law. Co-op. Supp. 1992)).

15. 304 S.C. 376, 404 S.E.2d 895 (1991) [hereinafter *Lucas I*], *rev'd*, 112 S. Ct. 2886 [hereinafter *Lucas II*], *on remand*, 424 S.E.2d 484 (S.C. 1992) [hereinafter *Lucas III*].

16. See *Lucas I*, 304 S.C. at 377, 404 S.E.2d at 895; *Lucas II*, 112 S. Ct. at 2891-

constitutionality under the new rule of law governing regulatory takings as recently announced by the United States Supreme Court in *Lucas II*.¹⁷

II. THE EVOLUTION OF THE SOUTH CAROLINA BEACHFRONT MANAGEMENT ACT

A. *The Coastal Zone Management Act of 1977*

The 1977 version of the SCCZMA was the first step in the evolution of South Carolina's coastal land regulatory scheme,¹⁸ covering "[c]ritical [a]reas" along the coast—"beaches" and "primary ocean front sand dunes."¹⁹ Basically, the 1977 SCCZMA required permitting for any new dwelling construction or placement of erosion control devices in the critical areas.²⁰ The permitting process, however, was extremely lenient and offered easily exploited loopholes. Permits were uniformly granted, even after the Coastal Council tightened its standards. In short, the SCCZMA had no teeth. The proliferation of homes, seawalls, and other erosion control devices in the critical areas continued virtually unabated.²¹ In 1987, therefore, the Coastal Council appointed a Blue Ribbon Committee on Beachfront Management "to investigate the problems of beach erosion along the South Carolina coast and determine how the beaches and dunes should best be managed by the State for its citizens . . . [and] to propose long-term solutions to the identified problems."²²

The Blue Ribbon Committee found that "the beach/dune system along the coast . . . is extremely important to the people" because it performs a

92.

17. Much of the litigation that arose under the Act involved dwelling construction or reconstruction, but the Act was also intended to phase out the use of erosion control devices. *See generally* Smith, *supra* note 12 (discussing the SCCZMA). Although such devices seem to offer a satisfactory short-term solution to beachfront erosion, they actually worsen the long-term erosion problem and create a host of other problems by interfering with the natural processes of erosion and renourishment. *See, e.g.,* KAUFMAN & PILKEY, *supra* note 6, at 188-222; Paul J. Godfrey, *Barrier Beaches of the East Coast*, 19 OCEANUS 27 (1976); Smith, *supra* note 12, at 719-20; BLUE RIBBON COMMITTEE REPORT, *supra* note 1, at 2. However, because limitations placed on the use of erosion control devices have been less controversial and seem less likely to constitute a compensable regulatory taking of property than do the provisions regulating dwelling construction and reconstruction, this Note focuses predominantly on the latter.

18. *See generally* Smith, *supra* note 12, at 717-723 (analyzing the development of beachfront regulation in South Carolina).

19. S.C. CODE ANN. §§ 48-39-10(J) & -80 (Law. Co-op. 1987).

20. *Id.* § 48-39-130(A).

21. *See* Smith, *supra* note 12, at 719-20.

22. BLUE RIBBON COMMITTEE REPORT, *supra* note 1 (Statement of Erick B. Ficken, Chairman).

variety of functions, including providing a protective storm barrier, generating approximately two-thirds of the state's annual tourism revenue, providing critical habitat for various plants and animals (some threatened or endangered), and serving as a healthy retreat for citizens of the state.²³ Furthermore, the Committee found that unwise and under-regulated development along the coast contributed to the rapid deterioration of the beach/dune system. Approximately fifty-seven miles of South Carolina's beaches were identified as critically eroding. The Committee concluded that the SCCZMA did "not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to effectively protect the beach/dune system."²⁴ Therefore, the Committee recommended that the Coastal Council be given expanded jurisdiction to regulate coastal lands inland of the critical zone created by the SCCZMA.²⁵ In addition, the Committee promulgated a set of "Implementation Guidelines" directing the Coastal Council how best to exercise that jurisdiction.²⁶ These guidelines formed the basis of both the 1988 amendments to the SCCZMA—the Beachfront Management Act²⁷—and the 1990 amendments to that Act.²⁸

B. The Beachfront Management Act of 1988

The Beachfront Management Act of 1988 (1988 Act) did not change the uses permitted in the regulated areas under the SCCZMA; instead, it merely enlarged the regulated areas by extending them landward. The "forty-year retreat policy" established by the 1988 Act embodies the heart of the Committee's guidelines.²⁹ The theory of the retreat policy is to allow development to occur only at a distance of forty times the average annual

23. *Id.* at 1.

24. *Id.* at 1-2.

25. *Id.* at 3-4; see Smith, *supra* note 12, at 720.

26. BLUE RIBBON COMMITTEE REPORT, *supra* note 1, at 6-14.

27. No. 634, 1988 S.C. Acts 5130 (codified as amended in scattered sections of S.C. CODE ANN. tit. 48, ch. 39 (Law. Co-op. Supp. 1992)).

28. Act of June 25, 1990, No. 607, 1990 S.C. Acts 2581 (codified as amended in scattered sections of S.C. CODE ANN. tit. 48, ch. 39 (Law. Co-op. Supp. 1992)).

29. See S.C. CODE ANN. § 48-39-280 (Law. Co-op. Supp. 1992). Although the Committee recommended thirty years, the legislature implemented a forty-year retreat. According to the Committee,

"[a] retreat . . . will allow owners of structures sited too close to the beach to realize the economic life of their structures and adjust their plans over a reasonable . . . time period. This retreat must be based on sound state and local comprehensive beach management plans, which, when implemented, will result in the preservation, protection, restoration, and enhancement of our beach/dune system for the enjoyment of this and future generations."

BLUE RIBBON COMMITTEE REPORT, *supra* note 1, at *iv*.

erosion rate behind the most seaward sand dune. Thus, the beach/dune system is allowed to operate unimpeded in its natural flexible state, undergoing the normal cycles of erosion and accretion.³⁰

To implement the retreat, the 1988 Act established three parallel lines: the "baseline" and the "setback line" were established expressly,³¹ and the dead-zone line was established by implication.³² The location of the baseline depends upon the type of erosion zone in which the land is situated. In a "standard erosion zone" the baseline runs parallel to the coast along "the crest of an ideal primary oceanfront sand dune."³³ In an "inlet erosion zone" that has been "stabilized by jetties, terminal groins, or other structures" (hereinafter "stabilized inlet erosion zone"), the baseline is determined just as it would be in a standard erosion zone.³⁴ In an inlet erosion zone that has not been stabilized (hereinafter "non-stabilized inlet erosion zone"), the baseline is fixed at "the most landward point of erosion

30. BLUE RIBBON COMMITTEE REPORT, *supra* note 1, at *i-iv*; Smith, *supra* note 12, at 719-20; *see also* KAUFMAN & PILKEY, *supra* note 6, at 207-212. Kaufman and Pilkey demonstrate how man-made structures standing in the way of coast-line retreat impede and aggravate the natural erosion process. Erosion control devices, in particular, exacerbate rather than abate destruction when these devices are placed below the natural high tide line. By keeping the ocean from going "where it wants to go" these devices create more violent wave action, thereby accelerating erosion and increasing the destructive ability of tides. *Id.* at 207-212. Predictably, erosion control devices tend to follow development; when a property owner sees his valuable investment threatened by an advancing ocean, his natural instinct is to employ any means possible to protect that investment.

31. *See* S.C. CODE ANN. § 48-39-280(A) & (B) (Law. Co-op. Supp. 1989) (1990 amendment substantially similar). However, affected land owners could appeal both the baseline and the setback line once the lines were established. *Id.*

32. *See id.* § 48-39-300 (amended 1990).

33. *Id.* § 48-39-280(A)(1) (Law Co-op. Supp. 1989) (1990 amendment substantially similar). A standard erosion zone is "a segment of shoreline which is subject to essentially the same set of coastal processes, has a fairly constant range of profiles and sediment characteristics, and is not directly influenced by tidal inlets or associated inlet shoals." *Id.* § 48-39-270(6) (1990 amendment substantially similar). In cases "where the shoreline has been altered artificially by the construction of erosion control devices, groins, or any other manmade alterations, the baseline is where the crest of an ideal primary oceanfront sand dune for that zone would be located if the shoreline had not been altered." *Id.* § 48-39-280(A)(1) (1990 amendment substantially similar).

34. *Id.* § 48-39-280(A)(3) (1990 amendment substantially similar). However, in determining the baseline for a stabilized inlet erosion zone, unlike a standard erosion zone, the "actual location of the crest of an ideal primary oceanfront sand dune must be taken as the baseline, not the location had the inlet remained unstabilized." *Id.* "An inlet erosion zone is a segment of shoreline along or adjacent to tidal inlets which are directly influenced by the inlet and its associated shoals." *Id.* § 48-39-270(7) (1990 amendment substantially similar).

at any time during the past forty years.”³⁵ The setback line for all three erosion zones is located landward of the baseline at a distance of forty times the average annual erosion rate, but no less than twenty feet landward of the baseline, “even in cases where the shoreline has been stable or has experienced net accretion over the past forty years.”³⁶ The dead-zone line, which was subsequently eliminated by the 1990 amendments, was located twenty feet landward of the baseline.³⁷

The 1988 Act thus created four different areas or strips of land running parallel to the coastline, separated by the three lines. For convenience, these areas may be referred to as: (1) the “beach area”—the area seaward of the baseline; (2) the “dead zone”—the twenty-foot area from the baseline landward to the dead zone line; (3) the “setback area”—the area landward from the dead-zone line to the setback line;³⁸ and (4) the “safe area”—the area landward of the setback line. The 1988 Act regulated all of these areas except for the safe area; the farther seaward the respective area was, the more strictly it was regulated.

The 1988 Act allowed new construction in the setback area, but limited the entire structure to 5000 square feet,³⁹ even if only part of the structure were to be in the setback area.⁴⁰ No new construction was allowed in the dead zone or beach area.⁴¹ Replacement of habitable structures existing on July 1, 1988, the effective date of the 1988 Act, that were “destroyed beyond repair by natural causes or fire,” was allowed in the dead zone and the setback area, subject to some restrictions.⁴² However, such replacement

35. *Id.* § 48-39-280(A)(2) (Law. Co-op. Supp. 1989) (1990 amendment substantially similar).

36. *Id.* § 48-39-280(B) (1990 amendment substantially similar). The forty-year erosion rate was to be determined “by historical and other scientific means.” *Id.*

37. *Id.* § 48-39-300 (Law. Co-op. Supp. 1989) (amended 1990).

38. The setback area would have been identical to the dead zone if forty times the annual erosion rate on a particular piece of land were less than twenty feet. *See id.* § 48-39-280(B).

39. *Id.* § 48-39-300 (1990 amendment substantially similar). The 5000 square feet included “porches, decks, patios, and garages,” *id.*, and no “recreational amenities” could be built or rebuilt seaward of the setback line. *Id.*

40. *See Smith, supra* note 12, at 729 (“A 10,000 square foot building, therefore, cannot be built half-in and half-out of the setback area.”).

41. S.C. CODE ANN. § 48-39-300 (Law. Co-op. Supp. 1989) (1990 amendment substantially altered).

42. *Id.* § 48-39-290(B). Basically, if any part of the replacement structure was in the setback zone, the structure could not comprise more square footage or linear footage than the destroyed structure, *id.*, and the structure must have been moved as far landward as possible, but in no case farther seaward. *Id.* § 48-39-290(B)(1),(2),(3) & (5) (1990 amendments substantially similar). Also, the 1988 Act obligated the owner annually to renourish the beach in front of the property, *id.* § 48-39-290(B)(4), restricted the

was not allowed in the beach area.⁴³ Repairs to habitable structures existing on July 1, 1988 that were damaged, but not destroyed, by natural causes or fire could be made anywhere, subject to some restrictions.⁴⁴

The interplay between the different erosion zones, the lines, and the building restrictions caused a number of problems. Most notably, the method for establishing the baseline in non-stabilized erosion zones lent itself to anomalous results. Apparently because of the heightened potential for dramatic erosion in non-stabilized inlet erosion zones,⁴⁵ the 1988 Act set the baseline in these zones at “the most landward point of erosion at any time during the past forty years,”⁴⁶ rather than at “the crest of an ideal primary oceanfront sand dune,” as with standard erosion zones and stabilized inlet erosion zones.⁴⁷ Thus, the baseline in non-stabilized inlet erosion zones might be far landward of the actual primary oceanfront sand dune, particularly if the area had been subject to substantial storm erosion in the past forty years, followed by recent accretion.⁴⁸ Therefore, a lot that appears to be well protected by, and safely landward of, the dune system could actually be largely undevelopable under the 1988 Act.⁴⁹

Moreover, the area in which building was prohibited crept farther landward when the dead-zone line was fixed twenty feet landward of the baseline. Because of the nondiscretionary nature of the proscription against new construction in the dead zone and beach area, the potential for arguably more intrusive and potentially unconstitutional regulation became even greater. These and other potential problems apparently induced the South Carolina General Assembly to pass the 1990 amendments to the Act.

rebuilding of recreational amenities, *id.* §48-39-290(B)(7), and required the replaced structure to comply with “local zoning and building” requirements, *id.* § 48-39-290(B)(8) (1990 amendments eliminated these restrictions).

43. *Id.*

44. *Id.* § 48-39-290(A). Basically, the total square footage and coastal linear footage could not exceed that of the original the structure; the repaired structure could not be farther seaward than the original location; and all repairs had to comply with local zoning and building requirements. *Id.* (1990 amendments eliminated these restrictions).

45. For historical evidence of the land’s vulnerability to erosion in non-stabilized inlet erosion zones, see the discussion of the dramatic erosion and accretion cycles on David Lucas’s two lots, *infra* note 61.

46. S.C. CODE ANN. § 48-39-280(A)(2) (Law. Co-op. Supp. 1989) (1990 amendments substantially similar).

47. *Id.* § 48-39-280(A)(1) (1990 amendments substantially similar); *id.* § 48-39-280(A)(3) (1990 amendments substantially similar); *see also supra* notes 33-35 and accompanying text (discussing the method for determining the baseline in a standard erosion zone and both inlet erosion zones).

48. *See Smith, supra* note 12, at 725.

49. This was precisely the situation in *Lucas*. *See Lucas v. South Carolina Coastal Council (Lucas II)*, 112 S. Ct. 2886, 2889 (1992); *see also infra* note 61.

C. The 1990 Amendments to the Beachfront Management Act

The 1990 amendments to the Beachfront Management Act, among other changes, eliminated the dead zone, mollified the harsh rule of outright proscription against new construction in the beach area and former dead zone, and vested broad permitting discretion in the Coastal Council. In one of the most important changes, the 1990 amendments eliminated the dead zone by altering the lines on beachfront lots. The legislature rewrote section 48-39-290⁵⁰ to remove the language in the 1988 Act that had impliedly created the dead-zone line,⁵¹ thereby effectively eliminating any per se proscription against construction landward of the baseline. Thus, under the 1990 Act the three distinct areas of regulation are: (1) the beach area—the area seaward from the baseline; (2) the setback area—the area from the baseline landward to the setback line; and, (3) the safe area—the area landward from the setback line.

The only other outright proscriptions against construction in the 1988 Act were prohibitions on new construction, and reconstruction of destroyed structures, seaward of the baseline—*i.e.*, in the beach area.⁵² However, the 1990 Act authorized the Coastal Council to grant special permits for construction or reconstruction that would otherwise be prohibited,⁵³ including new construction or reconstruction seaward of the baseline.⁵⁴ The permitting section grants the Coastal Council the discretion necessary to avoid potentially unfair situations that could have arisen under the 1988 Act.

The special permit is not, however, as widely available as it might seem. Under the permitting section the Coastal Council may, at its discretion, grant a permit “if the structure is not constructed or reconstructed on a primary oceanfront sand dune or on the active beach.”⁵⁵ “Primary ocean front sand dunes’ means those dunes which constitute the front row of dunes adjacent to the Atlantic Ocean.”⁵⁶ However, the crest of the primary ocean front sand dune is also used to fix the baseline for lots in standard erosion zones and stabilized inlet erosion zones.⁵⁷ Therefore, the

50. *Id.* § 48-39-290(A) (Law. Co-op. Supp. 1992).

51. *Id.* § 48-39-300 (Law. Co-op. Supp. 1989) (“[N]o new habitable structures are allowed in the area from the baseline to twenty feet landward of the baseline.”) (amended 1990).

52. *See id.* §§ 48-39-290(B)(8), -300.

53. *Id.* § 48-39-290(D)(1) (Law. Co-op. Supp. 1992).

54. *Id.* § 48-39-290(A)(6).

55. *Id.* § 48-39-290(D)(1).

56. *Id.* § 48-39-10(I) (Law. Co-op. 1987).

57. *Id.* § 48-39-280(A)(1) (Law. Co-op. Supp. 1992). The 1988 Act and the 1990 amendments to this section prescribe substantially the same method by which the baseline is fixed in a standard erosion zone.

special permit is presumably not available to a landowner seeking to build seaward of the baseline in a standard erosion zone or in a stabilized inlet erosion zone, because building on, or seaward of, the primary oceanfront sand dune is prohibited.

The special permit is, however, potentially available to landowners who wish to build seaward of the baseline in non-stabilized inlet erosion zones. The baseline in such zones is fixed at the landward-most point of erosion over the past forty years, rather than on the crest of the primary ocean front sand dune. Depending on the historical data used to determine the forty-year erosion point, the baseline may be significantly landward of the primary ocean front sand dune. Without the availability of the special permit, a potentially large strip of land between the baseline and the primary oceanfront sand dune would otherwise be undevelopable under section 48-39-290(A).⁵⁸

The South Carolina legislature's decision indirectly to limit the availability of the special permit to property owners in the non-stabilized inlet erosion zones recognizes the possibility of ostensibly unfair results that may lead to meritorious takings challenges to the Act.⁵⁹ The problem with the regulatory scheme in non-stabilized inlet erosion zones under the 1988 Act, which did not allow the special permits, was, however, a problem of perception. If the baseline were set significantly landward of the primary oceanfront sand dune, the landowner would be restricted from building on a strip of land that might appear perfectly safe. Indeed, this was the case with David Lucas.

Lucas owned two oceanfront lots, separated by one lot, in a non-stabilized inlet erosion zone. All three oceanfront lots that bordered Lucas's lots had houses on them that were built before the Act was passed.⁶⁰ Therefore, it appeared to the casual observer that Lucas's lots must also be safe for development and that, consequently, the state was somehow singling out Lucas. However, the dramatic erosion history of the shoreline on which Lucas's lots sat was not readily apparent.⁶¹ The 1988 Act therefore

58. See *id.* § 48-39-290(A) (Law. Co-op. Supp. 1992).

59. One commentator has argued persuasively that, because of the checkered history of regulatory takings jurisprudence and because of the essentially subjective nature of the ad hoc judicial inquiry involved, whether a regulatory taking has occurred is generally determined by the particular tribunal's visceral sense of fairness. Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles* (pts. 1 & 2), 77 CAL. L. REV. 1299 (1989) [hereinafter Peterson I], 78 CAL. L. REV. 53 (1990) [hereinafter Peterson II].

60. *Lucas v. South Carolina Coastal Council* (*Lucas II*), 112 S. Ct. 2886, 2889 (1992).

61. In 1949 the lots were on the active beach; in 1957 they were landward of the primary oceanfront sand dune; in 1963 they were once again on the active beach, even

appeared unfair to landowners in Lucas's situation without reference to the historical showing the dramatic fluctuation of the shoreline. And, as Professor Peterson shows, in takings law a visceral sense of the unfair often results in a judicial sense of the unconstitutional.⁶² Therefore, the legislature amended the Act in 1990 to create some administrative discretion to avoid potential unconstitutional takings.

Lucas was decided under the 1988 Act; therefore, the case is of little utility insofar as current construction of the Act is concerned. However, the United States Supreme Court's rule in *Lucas II* will be important to all future regulatory takings cases, particularly those concerning coastal zone management. The fate of the amended Act will also be controlled by future judicial interpretations of the rule from *Lucas II*.

III. THE *LUCAS II* RULE OF REGULATORY TAKINGS: VARIATION ON A THEME OF NOTICE

The chief problem with the Act is, of course, the takings issue. As Justice Holmes stated in his seminal opinion on regulatory takings, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."⁶³ Unfortunately, the Supreme Court's body of case law on the subject is not quite so simple.⁶⁴ The question of precisely what constitutes a regulatory taking requires a case by case factual inquiry.⁶⁵

Observers of the South Carolina Beachfront Management Act did not have to wait long for the inquiry to begin. The first case to challenge the Act as an unconstitutional regulatory taking was *Lucas v. South Carolina Coastal Council*.⁶⁶ Moreover, *Lucas* provided the United States Supreme

farther seaward of the primary oceanfront sand dune than they had been in 1949; in 1968 they were still on the active beach, even further seaward of the primary oceanfront sand dune; in 1973 the primary oceanfront sand dune ran approximately across the middle of the lots, and the portions of the lots that were landward of the primary oceanfront sand dune were partially underwater (covered by a pond); and by 1988 they were once again completely landward of the primary oceanfront sand dune. *Id.* at 2905 (Blackmun, J., dissenting).

62. See Peterson I & II, *supra* note 59.

63. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

64. See Peterson I, *supra* note 59, at 1304 ("[I]t is difficult to imagine a body of case law in greater doctrinal and conceptual disarray.").

65. See, e.g., *Lucas II*, 112 S. Ct. at 2893; *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978) (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)).

66. 304 S.C. 376, 404 S.E.2d 895 (1991), *rev'd*, 112 S. Ct. 2886, *on remand*, 424 S.E.2d 484 (S.C. 1992). See generally C. Dan Wyatt, III, *Survey, Nuisance Exception*

Court with an opportunity to pontificate further on the timeless enigma suggested by Justice Holmes's famous dictum.⁶⁷ "[H]ow far is too far"?⁶⁸

A. Lucas I: *The South Carolina Supreme Court, Take One*

In 1986 David Lucas purchased two oceanfront lots in the "Beachwood East" subdivision of Wild Dunes on the Isle of Palms, a barrier island northeast of Charleston, South Carolina. Lucas paid \$975,000.00 for the lots, both of which were zoned for single-family residential use only.⁶⁹ The SCCZMA did not restrict development of the lots. When the South Carolina General Assembly passed the Beachfront Management Act in 1988, however, Lucas's lots were affected.⁷⁰ According to the Act, Lucas's lots were situated in a non-stabilized inlet erosion zone.⁷¹ The Coastal Council fixed the baseline at "the most landward point of erosion at any time during the past forty years."⁷² This point was landward of both of Lucas's lots, thereby rendering the lots undevelopable under the 1988 Act.⁷³ Although the 1988 Act provided aggrieved landowners with the opportunity to challenge the establishment of the baseline,⁷⁴ Lucas waived his right to do so.⁷⁵

Instead, Lucas filed suit against the Coastal Council in the South Carolina Court of Common Pleas, alleging that the Act had effected a taking of his land without just compensation.⁷⁶ Lucas prevailed at a bench trial and was awarded \$1,232,387.50.⁷⁷ The Coastal Council appealed, and the

to *Takings Doctrine Stretched past Traditional Limits*, 43 S.C. L. REV. 137 (1991) (providing a brief synopsis of *Lucas I* and arguing that the "South Carolina Supreme Court's holding in *Lucas* marks a significant break with prior cases that involve takings issues"); Skelton, *supra* note 13 (examining takings suits in the context of South Carolina and Massachusetts coastal zone management statutes); Zalkin, *supra* note 12 (providing a thorough legal and practical analysis and defense of the South Carolina Beachfront Management Act).

67. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

68. *Lucas II*, 112 S. Ct. at 2893.

69. *Id.* at 2889-90.

70. *Id.* at 2889.

71. *See id.* at 2889 n.1.

72. S.C. CODE ANN. § 48-39-280(A)(2) (Law. Co-op. Supp. 1989) (1990 amendment substantially similar).

73. *Lucas II*, 112 S. Ct. at 2889-90.

74. S.C. CODE ANN. § 48-39-280(E) (Law. Co-op. Supp. 1989) (1990 amendments substantially similar).

75. *See Lucas II*, 112 S. Ct. at 2889.

76. *Id.* at 2890.

77. *Id.*

South Carolina Supreme Court reversed the trial judge.⁷⁸

The South Carolina Supreme Court framed the issue simply: “[W]hether governmental regulation of the use of property, in order to prevent serious public harm, amounts to a ‘regulatory taking’ of property for which compensation must be paid.”⁷⁹ The court followed the United States Supreme Court’s line of cases emanating from *Mugler v. Kansas*⁸⁰ in holding that regulation of a harmful or noxious use of land could not constitute a taking for which just compensation was due.⁸¹ Because “‘all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community,’”⁸² when the state proscribes a harmful use, presumably nothing is taken from the landowner; his title cannot have comprised the right to use his property in a way that harms others.

The South Carolina court found that the 1988 Act indeed regulated harmful uses of land and proposed “to prevent serious public harm.”⁸³ Moreover, because Lucas failed to challenge or dispute the legislative findings that supported the express purposes of the Act, the court was bound by those findings.⁸⁴ Therefore, the court concluded that the 1988 Act did not constitute a regulatory taking of Lucas’s property, even if, as Lucas argued, the Act deprived him of “‘all economically viable use’ of his property.”⁸⁵

78. *Lucas v. South Carolina Coastal Council* (*Lucas I*), 304 S.C. 376, 404 S.E.2d 895 (1991), *rev’d*, 112 S. Ct. 2886.

79. *Id.* at 378, 404 S.E.2d at 896.

80. 123 U.S. 623 (1887); *see also* *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (prohibition against excavating gravel below the water table not a taking); *Miller v. Schoene*, 276 U.S. 272 (1928) (forced destruction of trees on individuals’ land to prevent infection of nearby apple orchards not a taking); *Hadachek v. Sebastian*, 239 U.S. 394 (1915) (prohibition on manufacture of bricks near residential area not a taking); *cf.* *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987) (act requiring that 50% of coal be left in ground as support for surface land not a taking); *Carter v. South Carolina Coastal Council*, 281 S.C. 201, 314 S.E.2d 327 (1984) (denial of landowner’s application for permit to raise level of marshland not a taking).

81. *Lucas I*, 304 S.C. at 383-84, 404 S.E.2d at 899.

82. *Id.* at 387, 404 S.E.2d at 901 (quoting *Keystone Bituminous Coal Ass’n*, 480 U.S. at 491-92 (quoting *Mugler*, 123 U.S. at 665)).

83. *Id.* at 382-83, 404 S.E.2d at 898.

84. *Id.* at 383, 404 S.E.2d at 898.

85. *Id.* The court apparently did not determine whether Lucas had been deprived of all economically viable use; rather, the court relied on the trial court’s determination to that effect.

B. Lucas II: *The United States Supreme Court*

Lucas petitioned the United States Supreme Court for writ of certiorari, which the Court granted.⁸⁶ The Court reversed the South Carolina Supreme Court and remanded the case for reconsideration under the new rule.⁸⁷ The Court in *Lucas II* tacitly eviscerated a long-standing proposition of takings jurisprudence and created yet another new test for alleged regulatory takings that deprive a landowner of all economically viable use.

The Court began its analysis by reviewing its checkered history of takings jurisprudence. After discussing the origins of the concept of regulatory takings,⁸⁸ the Court pointed out that it has established two "discrete categories of regulatory action" that are per se compensable takings: (1) "regulations that compel the property owner to suffer a physical 'invasion' of his property";⁸⁹ and (2) regulations that deny "all economically beneficial or productive use of land."⁹⁰ The first category is self-evident; physical appropriations have historically required compensation.⁹¹ The justification for the second category is that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."⁹² Because the Court relied on the trial court's findings that

86. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 436 (1991).

87. *Lucas v. South Carolina Coastal Council (Lucas II)*, 112 S. Ct. 2886, 2902 (1992). Justices O'Connor, White, and Thomas, and Chief Justice Rehnquist, joined Justice Scalia's opinion for the majority in announcing the new rule. Justices Blackmun and Stevens dissented from the majority, *id.* at 2904 (Blackmun, J., dissenting), *id.* at 2917 (Stevens, J., dissenting); Justice Kennedy concurred in the judgment, but did not support the new rule, *id.* at 2902-03 (Kennedy, J., concurring in the judgment); and Justice Souter voted to dismiss the writ of certiorari as improvidently granted, *id.* at 2925 (Statement of Souter, J.).

88. *Id.* at 2892-93.

89. *Id.* at 2893 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

90. *Id.* at 2893. This second category is, however, distinct from government regulation that merely incidentally burdens a landowner's use of his land, for which no compensation is due. *Id.* at 2894 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (recognizing that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law")). The Court further noted that a regulation which does not fall into either of the two discrete categories may still effect a taking for which just compensation is due if the regulation "does not substantially advance legitimate state interests." *Id.* (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). Obviously, the category inquiry depends upon the particular facts of a given situation.

91. *See id.* at 2892 (citing *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871)).

92. *Id.* at 2894 (citing *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 652

Lucas had been deprived of all economically viable use,⁹³ the opinion is concerned strictly with the constitutionality of regulations that fall into the second category.

At the heart of these two categories of government action are two similar, yet different, sources of state power: the power of eminent domain and the police power, respectively. In the traditional configuration, the power of eminent domain is the state's power physically to appropriate land for the benefit of society at large. When the state acts pursuant to its power of eminent domain, it must pay just compensation. The police power, however, gives the state the power, among other things, to regulate for the common protection of its citizens. Historically, when a state acted pursuant to its police power, the state was not required to pay just compensation. Under the common-law maxim *sic utere tuo ut alienum non laedas*, a landowner did not have the right to use his property in such a way as to harm others.⁹⁴ Therefore, when the government proscribed such a use, it was not taking anything.

However, this regulatory function of the police power presented potential abuses. The state might improperly use its police power to confer a benefit upon society at large at the expense of an individual landowner under the guise of regulating against a harmful use.⁹⁵ Therefore, as the law of regulatory takings developed, states were required to pay just compensation for improper exercises of the police power that rose to the level of a taking.

Finally, in the contemporary model, the line between the two powers began to disappear. States may now be required to pay just compensation even for proper exercises of the police power, if the regulation goes "too far."⁹⁶ While the government must pay compensation any time it invokes its power of eminent domain, the line between a compensable and a non-compensable exercise of the police power is rather elusive and is the object of a long and fruitless search for a pithy solution.

The takings inquiry should focus on why the government is acting. If the government is acting to acquire some right in order to create a benefit for its citizenry, then the government has invoked its power of eminent domain and should be required to pay just compensation. On the other hand, if the government is acting to prevent a harm, then it has invoked its police power and need not pay compensation. In such a case nothing is taken

(1981) (Brennan, J., dissenting)).

93. *Id.* at 2896.

94. *Lucas I*, 304 S.C. at 384, 404 S.E.2d at 899 (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492 n.22 (1987)).

95. *See Lucas II*, 112 S. Ct. at 2895.

96. *Id.* at 2893.

because, according to the maxim *sic utere tuo ut alienum non laedas*, the property owner never had the right to employ the harmful use. That which the property owner never had cannot have been taken from him.⁹⁷ In short, when the government protects, it need not pay compensation; but when the government merely creates without protecting, it must pay compensation.

The South Carolina Supreme Court, citing the United States Supreme Court's *Mugler* line of cases, followed the foregoing theory by holding that the government must pay compensation if it denies a landowner all economically viable use, unless the government is acting to prevent a harmful use.⁹⁸ Therefore, when the government acts to confer a benefit only, or solely to press private property "into some form of public service,"⁹⁹ compensation must be paid. Presumably an inquiry into the peculiar facts of a given case would expose a government regulation seeking to press private property into public use "under the guise of mitigating serious public harm."¹⁰⁰ Since Lucas did not challenge the assertion that the Act proscribed harmful uses, the South Carolina court was bound by the legislative findings;¹⁰¹ thus, the 1988 Act did not work a taking of Lucas's property.

The United States Supreme Court, however, was dissatisfied with this distinction between the benefit-conferring and harm-preventing roles of the state. The Court focused on the South Carolina court's treatment of the *Mugler* line of cases.¹⁰² The Court acknowledged that *Mugler* and its progeny "suggested" that regulation of harmful or noxious uses does not require compensation.¹⁰³ However, the Court explained, regulation of harmful uses was never truly an exception to the rule of compensation. Rather, it was merely

the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate
"Harmful or noxious use" analysis was, in other words, simply the progenitor of our more contemporary statements that "land-use

97. This theory is not inconsistent with takings law. In calculating just compensation, courts focus on the value to the owner of the property taken, not on the value to the body that is taking the property. *See City of N. Charleston v. Claxton*, 431 S.E.2d 610 (S.C. Ct. App. 1993); *Carolina Power & Light Co. v. Copeland*, 258 S.C. 206, 188 S.E.2d 188 (1972).

98. *Lucas I*, 304 S.C. at 383-87, 404 S.E.2d at 899-901.

99. *Lucas II*, 112 S. Ct. at 2895.

100. *Id.*

101. *Lucas I*, 304 S.C. at 382-83, 404 S.E.2d at 898.

102. *See Lucas II*, 112 S.Ct. at 2896-97.

103. *Id.* at 2897.

regulation does not effect a taking if it 'substantially advance[s] legitimate state interests'"¹⁰⁴

Therefore, in the post-*Lucas II* model, the "harmful or noxious use" analysis is merely a preliminary hurdle that any government regulation must pass if it in any way affects the value of private property.¹⁰⁵ The analysis is, in short, a threshold test of the validity of the state's exercise of its police power.

Having so disposed of the *Mugler* "noxious use" exception, the Court then explained why the exception was inappropriate to begin with. The Court focused on what it perceived as the impracticability of making the subjective distinction "between regulation that 'prevents harmful use' and that which 'confers benefits.'"¹⁰⁶ The Court reasoned that it is difficult to determine whether a particular regulation prevents a harmful use by one party or confers a benefit—in the form of eliminating the questioned use—on his neighbor. For example, the Court discussed the difficulty of determining in the present case whether the Act was designed "to prevent [Lucas's] use of [his land] from 'harming' South Carolina's ecological resources; or, instead, in order to achieve the 'benefits' of an ecological preserve."¹⁰⁷

Because of this difficulty, the Court was concerned with the "heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."¹⁰⁸ For this reason, "the legislature's recitation of a noxious-use justification cannot be the basis for departing from [the] categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed."¹⁰⁹ Therefore, "noxious-use logic cannot serve as a touchstone

104. *Id.* (citations omitted).

105. *See id.* at 2898-99 ("[P]revention of harmful use' was merely our early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value . . .").

106. *Id.* at 2899.

107. *Id.* at 2898. As a practical matter, the distinction seems a fairly worthless one; as long as the government is acting pursuant to its police powers to regulate against harms to society, it should not matter that incidental or even intentional ancillary benefits to society are also created. *See supra* notes 94-97 and accompanying text.

108. *Lucas II*, 112 S. Ct. at 2895.

109. *Id.* at 2899. The Court was apparently concerned that under the rule followed by the South Carolina Supreme Court a state could regulate private property rights into oblivion as long as it was doing so ostensibly to protect the public from some particular harm. However, it is not difficult for a court to look behind recited legislative purposes to see whether, in a given case, a government act is in fact designed to avert a stated public harm. Indeed, in takings cases the Court has long "eschewed any 'set formula' . . . preferring to 'engag[e] in . . . essentially ad hoc, factual inquiries.'" *Id.* at 2893. In *Lucas* neither the South Carolina Supreme Court nor the United States

to distinguish regulatory ‘takings’—which require compensation—from regulatory deprivations that do not require compensation.”¹¹⁰

Although many of the Court’s “prior opinions have suggested that ‘harmful or noxious uses’ of property may be proscribed by government regulation without the requirement of compensation,”¹¹¹ this is henceforth not necessarily true. Instead of directly overruling *Mugler* and its progeny, the *Lucas II* Court chose merely to recharacterize it.

The Court then announced its new rule, which is potentially a substantially narrower nuisance-type exception: “Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.”¹¹² In other words, a state “must identify background principles of nuisance and property law that prohibit” the restricted uses which antedate the landowner’s title.¹¹³ The Court reasoned that a use which constitutes a common-law nuisance, or is otherwise proscribed by the common law of a state, was never part of the landowner’s title; therefore, any prohibition on that use cannot have taken anything from the landowner.¹¹⁴ Conversely, uses that were not proscribed under pre-existing principles of nuisance and property law, but are nonetheless harmful to others, are presumably part of the landowner’s title.

The post-*Lucas II* rule for regulatory takings appears to be as follows: Any land-use regulation that affects the value of a landowner’s property must substantially advance legitimate state interests. If it does not, it is a taking. If the regulation does advance a state interest, then: If the regulation involves physical occupation of a landowner’s property, it is a taking; moreover, if the regulation denies a landowner all economically viable use, it is a taking, unless it proscribes a use that was previously impermissible “under relevant property and nuisance principles.”¹¹⁵ Otherwise, the regulation is not a taking and, therefore, does not require compensation.

Insofar as its proper place in the mosaic of regulatory takings jurisprudence is concerned, the Court’s opinion in *Lucas II* is, like its progenitors in this troubled area of law, enigmatic. If the new rule is narrowly

Supreme Court looked behind the legislative purposes because *Lucas* himself failed to challenge the legislative findings. See *Lucas I*, 304 S.Ct. at 379, 404 S.E.2d at 896; *Lucas II*, 112 S. Ct. at 2909 (Blackmun, J., dissenting).

110. *Lucas II*, 112 S. Ct. at 2899.

111. *Id.* at 2897.

112. *Id.* at 2899.

113. *Id.* at 2901-02.

114. *Id.* at 2901.

115. *Id.*

construed, it could dramatically hinder a state's ability to regulate the use of land. If, on the other hand, the new rule is broadly construed, it could result in a much more modest contraction of *Mugler* and its progeny. A narrow construction would allow the government to proscribe only those specific uses that would have been actionable under pre-existing principles of the common law of a given state; while a broad reading of the rule would allow for the expansive application of common-law principles of nuisance and general property law.

Even the lone kernel of guidance offered by the Court proves, upon closer inspection, to be of little utility: "The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so[.])."¹¹⁶ In this statement the Court appears to limit the interpretation of its rule to a narrow construction by indicating that traditionally accepted uses—presumably, such as building dwellings on oceanfront lots—are ordinarily not proscribed under any common-law property principles. However, the latter part of the sentence, which states that "changed circumstances or new knowledge" may make previously permissible uses impermissible, appears to allow broader application of common-law principles. This phrase, in spite of the preceding phrase, appears to invite creative extrapolation from established common-law principles. In an age of emerging technology, this single phrase could provide the fodder for a future wave of environmental and land-use litigation. In any case, this sentence will surely be the battleground on which such wars are waged.

C. Lucas III: *The South Carolina Supreme Court, Take Two*

On remand, the South Carolina Supreme Court, employing the new test announced by the United States Supreme Court, found that Lucas had indeed suffered a taking.¹¹⁷ The court did not indicate how narrowly or broadly the new test might be applied or what particular uses the state might be able to proscribe without incurring an obligation to pay compensation. The court stated only that, in this case, "Coastal Council has not persuaded us that any common law basis exists by which it could restrain Lucas's desired use of his land; nor has our research uncovered any such common law principle."¹¹⁸ The taking was, however, only temporary because Lucas had failed to apply for a permit under the 1990 Act. Therefore, the issue of a permanent taking was not ripe for adjudication.¹¹⁹ The court then remand-

116. *Id.* at 2901 (citing RESTATEMENT (SECOND) OF TORTS § 827, cmt. g (1977)).

117. *Lucas III*, 424 S.E.2d 484 (S.C. 1992).

118. *Id.* at 486.

119. *Id.* at 485-86. Oddly, the South Carolina Supreme Court stated that Lucas's

ed the matter to the trial court for a determination of the just compensation due Lucas for the taking.¹²⁰

Among the issues left to be sorted out in the wake of *Lucas II* is the constitutionality of other land-use regulatory schemes, including the current South Carolina Beachfront Management Act. Broad administrative discretion is available to the South Carolina Coastal Council in issuing special permits to landowners who might otherwise be prohibited from developing their lands, and the Council should be able to recognize when it needs to issue permits to avoid compensable takings. Situations like that in *Lucas* should therefore be scarce in the future under the South Carolina Act. However, the South Carolina Coastal Council likely will not be sheltered from litigation for long. Under the special permit statute,¹²¹ a condition of the permit requires that "if the beach erodes to the extent the permitted structure becomes situated on the active beach, the permittee agrees to remove the structure from the active beach if the council orders the removal."¹²² Quite possibly, a homeowner could be forced to destroy his home altogether if beach erosion overtakes the land.¹²³ Although landowners appear satisfied with this condition at present, when told they must raze their homes, undoubtedly some will seek recourse in the courts. The issue then will become whether the South Carolina common law comprises identifiable "background principles of nuisance and property law that prohibit the uses

temporary taking began with the enactment of the 1988 Act and continued "through the date of this Order," November 20, 1992, rather than terminating upon the passage of the 1990 amendments. *Id.* at 486. However, the United States Supreme Court clearly stated that the "unusual disposition [of the case] does not preclude Lucas from applying for a permit under the 1990 amendment for *future* construction." *Lucas II*, 112 S. Ct. at 2891. The South Carolina Supreme Court recognized that "[c]learly, Lucas has been only temporarily deprived of the use of his land *if he can obtain a special permit to construct habitable structures on his lots.*" *Lucas III*, 424 S.E.2d at 486 (emphasis added). Therefore, because the 1990 amendments allowed Lucas to apply for a permit, the temporary taking necessarily then ceased. *See* First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304, 320-21 (1987) (holding that invalidation of a regulation that takes property is not sufficient compensation; requiring monetary compensation for period running from enactment of regulation until its repeal); San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting) (stating that period of temporary regulatory taking runs from time regulation enacted until legislature either repeals or amends regulation).

120. *Lucas III*, 424 S.E.2d at 486. The case was terminated before trial pursuant to a settlement agreement.

121. S.C. CODE ANN. § 48-39-290(D) (Law. Co-op. Supp. 1992).

122. *Id.* § 48-39-290(D)(1).

123. In non-stabilized inlet erosion zones, this situation seems likely to occur eventually. For example, see the erosion and accretion history of Lucas's two lots, *supra* note 61 and accompanying text.

[a landowner then] intends in the circumstances in which the property is [then] found,"¹²⁴ on the active beach.

IV. THE PUBLIC TRUST, PURPRESTURE, AND NUISANCE: A PIECEMEAL APPROACH TO POST-*LUCAS* REGULATORY TAKINGS CHALLENGES TO THE SOUTH CAROLINA BEACHFRONT MANAGEMENT ACT

South Carolina recognizes several long-standing principles of common law that likely will be implicated in any future suit challenging the Coastal Council's authority to force removal of a house that becomes situated on the active beach through processes of erosion. Under the public trust doctrine, the state holds certain lands, coastal tidelands among them, in trust for the enjoyment and benefit of its citizens.¹²⁵ Any structural encroachment on these lands constitutes a purpresture, which, in South Carolina, constitutes a nuisance per se, and is thus removable at the will of the state.¹²⁶ Therefore, assuming that the South Carolina courts continue to recognize the vitality of these doctrines, as indicated in the discussion below, any takings challenge to a removal order from the Coastal Council pursuant to section 290(D) of the Beachfront Management Act should prove fruitless.

A. The Public Trust Doctrine: A Neo-Classic Concept in a Post-Modern World

*[I]t is impracticable to comprehend many rules of the modern law, in a scholarlike scientific manner, without having recourse to the ancient.*¹²⁷

Justinian wrote that "some things are in common by the law of nature; some are public; some universal; and some there are, to which no man can have a right."¹²⁸ Although the concept is ancient, it is no less vital today

124. *Lucas II*, 112 S. Ct. 2886, 2901-02 (1992).

125. See *infra* notes 131-187 and accompanying text. Indeed, states "with a seacoast [generally] have a highly developed body of law on the public trust doctrine." 4 WATERS AND WATER RIGHTS § 30.02(b), at 39 (Robert E. Beck ed., 1991).

126. See *infra* notes 188-199 and accompanying text. States across the country recognize the concept of purpresture. See, e.g., *Yokohama Specie Bank v. Unosuke Higashi*, 133 P.2d 487 (Cal. 1943); *Territory v. Kerr*, 16 Haw. 363 (1905); *People v. Steeplechase Park Co.*, 151 N.Y.S. 157 (App. Div. 1914), *rev'd in part on other grounds*, 113 N.E. 521 (N.Y. 1916).

127. 2 WILLIAM BLACKSTONE, COMMENTARIES *44.

128. THE INSTITUTES OF JUSTINIAN 67 (Thomas Cooper ed. & George Harris trans., 1812) ("*Quaedam enim naturali jure communia sunt omnium, quaedam publica, quaedam universitatis, quaedam nullius.*").

than in the sixth century. Indeed, as one writer has recently noted, "courts and commentators seeking a theory broadly applicable to environmental litigation have dusted off the ancient public trust doctrine from its origins in Roman law and British common law."¹²⁹ The public trust doctrine has been invoked in a variety of contexts,¹³⁰ but the doctrine seems particularly relevant to the present inquiry.

1. The Evolution of the Public Trust Doctrine
a. Res Omnium Communes: The Roman Concept

As a conceptual matter, Roman law recognized that certain geographic areas existed for public use. Under the Roman concept of property ownership, public use areas were incapable of becoming privately owned.¹³¹ As Professor Sohm discusses, these areas, or "things" by their Latin designations, were "*res extra commercium*" and were divided into three classes: "*res divini juris*," "*res publicae*," and "*res omnium communes*." *Res divini juris* were things that were dedicated to the gods, specially protected by the gods, or dedicated as burial grounds.¹³² *Res publicae* included all state property.¹³³ *Res omnium communes* embraced "the open air, the water of a natural stream, the sea, and the bed of the sea." These things were not "susceptible of human dominion" and, therefore, could not be privately owned.¹³⁴ As Justinian wrote:

Things common to mankind by the law of nature, are the air, running water, the sea, *and consequently the shores of the sea*; no man therefore is prohibited from approaching any part of the seashore, whilst he abstains from damaging farms, monuments, edifices, etc. which are not in common as the sea is.¹³⁵

129. Johanna Searle, Note, *Private Property Rights Yield to the Environmental Crisis: Perspectives on the Public Trust Doctrine*, 41 S.C. L. REV. 897, 897 (1990).

130. See, e.g., Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Searle, *supra* note 129.

131. RUDOLPH SOHM, *THE INSTITUTES: A TEXTBOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW* 302 (James C. Ledlie trans., 3d ed. 1970).

132. *Id.* at 302-03.

133. Initially *res publicae* included properties that benefitted only certain segments of society, such as schools, as well as those things "devoted to the common use of all," such as roads. By Justinian's time, however, the former were no longer considered part of the larger category of *res extra commercium*, but were treated under private law, or *res privatae*. The theory behind the change was that property which directly benefitted only certain members of society, and thus benefitted the rest of society only incidentally, were not truly public things. *Id.* at 303.

134. *Id.*

135. INSTITUTES OF JUSTINIAN, *supra* note 128, at 67 (emphasis added). See generally,

Of the three categories of “things,” *res omnium communes* most closely resembles the contemporary public trust doctrine.¹³⁶ As Professor Sax notes, this is the “source of modern public trust law.”¹³⁷ This right appears to be grounded in a two-fold sense of public obligation: to allow free access to waters for certain people, such as fishermen plying their trades, and to allow the public to enjoy the recreational benefits of rivers, streams, and oceans. One commentator has noted that the seashore was “regarded as owned by no one, the public having undefined rights of use and enjoyment.”¹³⁸ And although the purpose of the concept of *res omnium communes* seems clear, the rights that the doctrine grants the public are less clear. As the doctrine developed in English law, however, the nature of the rights initiated under the Roman doctrine became more defined.

b. Toward a More Contemporary Model: The English Version

Although the feudal system existed in England in some form prior to the Norman Conquest, the invasion resulted in the introduction of a “more highly organised type of feudal society . . . and the result . . . must have been to give a definite form to institutions which in England were thus far somewhat vague.”¹³⁹ The new system instituted feudal tenures. King William granted lands to the lords, who granted lands to tenants, and so forth. Each grant was accompanied by a mandatory oath of fealty. Under the oath, grantees “obliged themselves to defend their lord’s territories and titles against all enemies foreign and domestic.”¹⁴⁰ The King was the “universal lord and original proprietor of all the lands in his kingdom.”¹⁴¹ The system began as one in which the grantees participated voluntarily for

EUGENE F. WARE, *ROMAN WATER LAW* (1985) (collection of Roman laws concerning water). Justinian’s position was shared by others. Ulpian wrote: “The use of public streams is common to all, just the same as public roads and the shores of the sea.” *Id.* § 74. Celsus wrote: “I think that the shores over which the Roman people hold sway belong to the Roman people.” *Id.* § 75. Labeo wrote: “If that which has been built in a public place or has grown up in a public place is public, then also an island which is born in a public river ought to be public.” *Id.* § 106.

136. Searle, *supra* note 129, at 898 (stating that *res omnium communes* “include[s] property similar to that within the scope of the modern public trust”).

137. Sax, *supra* note 130, at 475.

138. ROBERT W. LEE, *THE ELEMENTS OF ROMAN LAW* 106 (1944).

139. THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 517 (5th ed. 1956).

140. 3 WILLIAM BLACKSTONE, *COMMENTARIES* *50.

141. *Id.* at *51.

purposes of self-security,¹⁴² but according to Blackstone it rapidly descended into a system not unlike slavery.¹⁴³

Aside from the tenants' military obligations to their lords, the chief difference between the rights of feudal tenants and those of modern property owners lies in the alienability and devisability of lands. The tenant, or vassal, could not transfer, mortgage, or devise by will his land. The tenant was merely a temporary occupant. However, as the relationship between grantor and grantee became less military and more agrarian, property rights began to evolve, for quite practical reasons, toward a more modern concept.¹⁴⁴

As private property rights developed in England and property was gradually distributed from the throne, certain restrictions on the use of private property evolved. Among these restrictions was the public trust doctrine. Under this doctrine, certain lands—much the same as those discussed by Justinian—were held in trust for the public benefit.

The king, by virtue of his proprietary interest, could grant the soil, so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy [n]or abridge. In every such grant there was an implied reservation of the public right, and so far as it assumed to interfere with it, or to confer a right to impede or obstruct navigation, or to make an exclusive appropriation of the use of navigable waters, the grant was void.¹⁴⁵

A grant that ran afoul of the public trust was, therefore, void to the extent that it ran afoul of the trust. Although the King could grant lands beneath navigable waters, such a grant had to be express (rights to the lands beneath navigable waters did not impliedly attach to rights to adjacent lands), and the holder of such an interest could not interfere with the public trust.¹⁴⁶

Moreover, the nature of the public trust in English common law was strikingly similar to the Roman model:

It is a title held in trust for the people of the State that they may enjoy

142. *Id.* at *50.

143. *Id.* at *53.

144. For a thorough discussion of this evolution, see *id.* at *44-102.

145. *People v. New York & Staten Island Ferry Co.*, 68 N.Y. 71, 76 (1877).

146. See *The Royal Fishery of the Banne*, 80 Eng. Rep. 540 (K.B. 1605); *Sir Henry Constable's Case*, 77 Eng. Rep. 218 (K.B. 1601); see also William A. Clineburg & John E. Krahmer, *The Law Pertaining to Estuarine Lands in South Carolina*, 23 S.C. L. REV. 7, 10-14 (1971) (tracing the historical development of estuarine land ownership under English common law).

the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. . . . The trust devolving upon the State for the public . . . cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, *except as to such parcels as are used in promoting the interests of the public therein*.¹⁴⁷

Over the next several centuries, England underwent a change in her system of relationships between her lands and their respective tenants, but her lawmakers, much like their Roman counterparts, were uncomfortable with unfettered abdication of control over the country's lands. The Roman concept of *res omnium communes* presented one way in which the system could be checked. The English common law adopted this concept and later passed it on to America in the form of the public trust doctrine.

c. Out of the Ash Heap: The Contemporary American Model

The United States Supreme Court's decision in *Illinois Central Railroad Co. v. Illinois*¹⁴⁸ is the "lodestar" of American public trust law.¹⁴⁹ In that case, the Illinois legislature had granted title to submerged lands under Lake Michigan to the Illinois Central Railroad. The Court held that the grant violated the public trust. In so holding the Court "wrote one of the very few opinions in which an express conveyance of trust lands has been held to be beyond the power of a state legislature."¹⁵⁰ The Court recognized the overriding importance to the American people of access to the shores of the

147. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452-53 (1892) (emphasis added). Although this characterization comes from an American case, it discusses the doctrine largely as it existed in the English common law.

148. 146 U.S. 387 (1892).

149. Sax, *supra* note 130, at 489; *see also* Shively v. Bowlby, 152 U.S. 1 (1894). In *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988), the Court described *Shively* as the "seminal case in American public trust jurisprudence." *Id.* at 473. *Shively* holds that the states hold "all the [tidal] lands below the high water mark" in trust for the enjoyment and benefit of the public. *Shively*, 152 U.S. at 11.

150. Sax, *supra* note 130, at 489. However, as Professor Sax notes, the Court did not actually prohibit the disposition of trust lands to private parties; its holding was much more limited. What a state may not do, the Court said, is to divest itself of authority to govern the whole of an area in which it has responsibility to exercise its police power. . . .

But the mere granting of property to a private owner does not *ipso facto* prevent the exercise of the police power, for states routinely exercise a great deal of regulatory authority over privately owned land.

Id.

oceans, Great Lakes, and other navigable waters. Accordingly, the state holds title to shorelands "in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein *freed from the obstruction or interference of private parties*."¹⁵¹ According to Professor Sax, "the Court determined that the states have special regulatory obligations over shorelands, obligations which are inconsistent with large-scale private ownership."¹⁵²

Similarly, later American cases have applied public trust law in different contexts, yet have maintained the integrity of the doctrine.¹⁵³ As Professor Sax observes, although "the historical scope of public trust is quite narrow,"¹⁵⁴ the doctrine is being consistently expanded as it is put to work for the protection of natural resources.

Thus, it seems that the delicate mixture of procedural and substantive protections which the courts have applied in conventional public trust cases would be equally applicable and equally appropriate in controversies involving air pollution, the dissemination of pesticides, the location of rights of way for utilities, and strip mining or wetland filling on private lands in a state where governmental permits are required.

Certainly the principle of the public trust is broader than its traditional application indicates.¹⁵⁵

Despite Professor Sax's assertion that the doctrine traditionally covers areas landward to "the low-water mark on the margin of the sea and the great lakes,"¹⁵⁶ if the doctrine is elastic enough to stretch to such a wide range of non-traditional uses, then surely it can creep out of the ocean as far landward as the primary oceanfront sand dune.¹⁵⁷

In light of the doctrine's historical development, applying the doctrine further landward does not stray from the early Roman ideal or from the British common-law version. The doctrine would be protecting the same basic uses and addressing the same basic concerns as in the time of Justinian

151. *Illinois Cent. R.R.*, 146 U.S. at 452 (emphasis added).

152. Sax, *supra* note 130, at 489.

153. For an example of one state's expansion of the public trust doctrine in recognition of emerging scientific knowledge and corresponding changing social values, see *National Audubon Soc'y v. Superior Court*, 658 P.2d 709, 719 (Cal. 1983) (en banc) (holding that the public trust is not limited to "the traditional triad of uses—navigation, commerce and fishing").

154. Sax, *supra* note 130, at 556.

155. *Id.* at 556-57.

156. *Id.* at 556.

157. South Carolina holds in trust for the public the seashore, at least as far landward as the high-water mark. See *infra* notes 159-186 and accompanying text.

or Blackstone. Indeed, the doctrine is not being expanded to accommodate new applications of public trust law; rather, our collective recognition of the truly delicate nature of our physical environment is causing a large scale reassessment of our relationship with, and reliance on, that environment. Consequently, one sees a change in what falls into a traditional configuration of the public trust doctrine. The public trust doctrine is being applied in increasingly unfamiliar, though not inappropriate, environs. In the words of the *Lucas II* Court, “new knowledge [is rendering] what was previously permissible no longer so.”¹⁵⁸

2. The Public Trust Doctrine and the South Carolina Coast

*State v. Pacific Guano Co.*¹⁵⁹ is the seminal case in South Carolina concerning the public trust doctrine and coastal waters. In *Pacific Guano Co.* the defendants owned land bordering certain “arms of the sea” in Beaufort County, South Carolina.¹⁶⁰ Upon discovering phosphate rock and phosphatic deposits in the tidal creeks, the defendants began to remove these materials.¹⁶¹ The state sued for an injunction claiming that the creek beds—land below the high-tide mark—are property of the state.¹⁶² The court reviewed English and American property law and finally adopted the English principle that the boundary of lands bordering navigable waters runs along the high-tide mark:

These are all channels in which the tide ebbs and flows, and as to such the well established rule is, that a grant of the shore gives title only to the high water mark Chancellor Kent says: “It is a settled principle of the English law that the right of owners of land bounded by the sea or on navigable rivers where the tide ebbs and flows, extends to high water mark; and the shore below common, but not extraordinary high water mark, belongs to the public.”¹⁶³

158. *Lucas v. South Carolina Coastal Council (Lucas II)*, 112 S. Ct. 2886, 2901 (1992) (citing RESTATEMENT (SECOND) OF TORTS § 827 cmt. g (1977)).

159. 22 S.C. 50 (1884).

160. *Id.* at 52.

161. *Id.* at 66-67.

162. *Id.* at 63-64.

163. *Id.* at 79-80; accord *State v. Pinckney*, 22 S.C. 484, 507 (1885) (following the “well established common law rule” stated in *Pacific Guano Co.*, that “a conveyance bounding ‘westerly by the beach,’ excludes the shore or land between low and high water mark”). But see *State v. South Carolina Phosphate Co.*, 22 S.C. 593 (Cir. Ct.—no date given). This circuit court order held that title to lands bordered by a navigable stream ran to the low water mark, rather than the high water mark. See *id.* at 601. *South Carolina Phosphate Co.* was apparently printed in the appendix of South Carolina Reports at the

In *Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co.*¹⁶⁴ and *Rice Hope Plantation v. South Carolina Public Service Authority*¹⁶⁵ the South Carolina Supreme Court reaffirmed the rule that title to lands between the high- and low-water mark of navigable waters rests in the State. However, *Rice Hope* left open the question of whether, or under what circumstances, the state may transfer the land between the high- and low-water marks:

We adhere to our opinion in the case of *Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co.*, . . . wherein it was said: "The title to land below high-water mark on tidal navigable streams, under the well-settled rule, is in the state, not for the purpose of sale, but to be held in trust for public purposes." But we do not deem it necessary or proper upon this appeal to determine under what circumstances and by what method, if any, title might be acquired by private owners, because any such ownership would be, in our opinion, subject to the dominant power of the government (State and Federal) to control and regulate navigable waters.¹⁶⁶

In *Hobonny Club, Inc. v. McEachern*,¹⁶⁷ however, the court directly addressed the issue. Private landowners owned a plantation in Beaufort County. When the state claimed ownership of all tidelands within the plantation, the landowners instituted a quiet-title action against the state to determine ownership of tidal lands between the high- and low-water marks. The owners traced their title "in a direct and unbroken chain to two grants from George the Second, King of England, to Joseph Bryan, one for five hundred (500) acres dated January 12, 1737, and the other to seven hundred

casual suggestion of Justice McGown of the South Carolina Supreme Court, the author of the *Pacific Guano* opinion, because he had cited the case in *Pacific Guano* for an unrelated proposition. See Clineburg & Krahmer, *supra* note 146, at 19-20. However, because the case is from the circuit court (South Carolina's trial court), and because it precedes *Pacific Guano Co.* and *Pinckney*, it appears to have been impliedly overruled and is, therefore, of little more than historical interest. See *id.* at 20 ("[I]t could be stated with some certainty that title to land between high and low water mark was in the State.").

164. 148 S.C. 428, 146 S.E. 434 (1928).

165. 216 S.C. 500, 59 S.E.2d 132 (1950).

166. *Id.* at 530, 59 S.E.2d at 145 (quoting *Cape Romain*, 148 S.C. at 438, 146 S.E. at 438) (citation omitted) (emphasis added); accord *State v. Hardee*, 259 S.C. 535, 539, 193 S.E.2d 497, 501 (1972) ("In the absence of specific language, either in the deed or on the plat, showing that it was intended to go below high water mark, the portion of the land between high and low water mark remains in the State in trust for the benefit of the public.").

167. 272 S.C. 392, 252 S.E.2d 133 (1979) (per curiam).

forty-four (744) acres dated May 24, 1744.”¹⁶⁸ The court recognized that “lands lying between the usual high water line and the usual low water line on tidal navigable watercourses enjoy a special or unique status, being held by the State in trust for public purposes.”¹⁶⁹ However, the court, resorting to the historical evolution of the doctrine, noted that “the government, and specifically the King of England, had the power to grant, and did in fact grant, tidelands to subjects, who exercised private ownership.”¹⁷⁰ Therefore, because the plats had been “incorporated by reference into the grants of 1737 and 1744 to Joseph Bryan,” the court held that the landowners’ title ran to the low-water mark.¹⁷¹

In *State v. Fain*,¹⁷² however, the South Carolina Supreme Court reached the opposite result. In *Fain*, an action brought by the State to quiet title, the defendants claimed ownership of man-made diked tidal areas that had been cultivated as rice fields. The defendants asserted “title to the disputed areas by virtue of a direct and unbroken chain to three contiguous grants of title from the King of England.”¹⁷³ The grants referred to attached plats, but the defendants could not produce the plats.¹⁷⁴ Therefore, because “a grant by the government to a subject is construed most strongly against the grantee and in favor of the grantor,”¹⁷⁵ the court held that defendants’ ownership stopped at the high-water mark, despite defendants’ evidence of grants and despite the fact that the area in dispute clearly had, at one time, been cultivated privately as rice fields.¹⁷⁶

The *Fain* rule was most recently reaffirmed by the South Carolina Court of Appeals in *Sanders v. Coastal Capital Ventures, Inc.*¹⁷⁷ In fact, no South Carolina case to date has held otherwise. Any speculation that *Hobonny Club* signalled an erosion of the public’s interest in coastal tidelands was therefore stemmed by *Fain*.

Not only does the state typically own the land from the high-water mark down, but if a landowner’s land erodes, and his property line is the high-

168. *Id.* at 393, 252 S.E.2d at 134.

169. *Id.* at 396, 252 S.E.2d at 135 (citing *Cape Romain*, 148 S.C. 428, 146 S.E. 434; *Rice Hope Plantation*, 216 S.C. 500, 59 S.E.2d 132).

170. *Id.* at 396, 252 S.E.2d at 136 (citing *Lane v. McEachern*, 251 S.C. 272, 162 S.E.2d 174 (1968) (per curiam)).

171. *Id.* at 397, 252 S.E.2d at 136. Otherwise, “the boundary of the property conveyed would have extended only to the usual high water line of the named waterways.” *Id.*

172. 273 S.C. 748, 259 S.E.2d 606 (1979) (per curiam).

173. *Id.* at 751, 259 S.E.2d at 607.

174. *Id.*

175. *Id.* at 752, 259 S.E.2d at 608.

176. *Id.* at 754, 259 S.E.2d at 609.

177. 296 S.C. 132, 370 S.E.2d 903 (Ct. App. 1988).

water mark, the owner loses ownership of all the land overtaken by erosion.¹⁷⁸ Moreover, even if the landowner obtains or retains some "interest in the submerged land, it nonetheless may be appropriated for public use . . . without compensation."¹⁷⁹ A landowner who privately owns lands that are otherwise protected by the public trust doctrine thus holds a substantially restricted, if undefined, quantity of property rights.¹⁸⁰

The result in *Hobonny Club, Inc. v. McEachern*¹⁸¹ is clearly atypical. Most landowners are unable to trace grants even from the South Carolina government, much less from the English crown.¹⁸² Indeed, the *Hobonny Club* court noted that "[t]he plats incorporated in the two grants to Joseph Bryan are exceptional."¹⁸³ Moreover, the rule remains intact that "[a] grant from the sovereign to a subject is construed strictly in favor of the government and against the grantee."¹⁸⁴ Therefore, few landowners can assert ownership to land below the high water mark. Even the landowners who can claim ownership may be subject to restricted use in the form of enforcement of the doctrine over private lands. As the South Carolina Supreme Court noted in *Rice Hope Plantation v. South Carolina Public Service Authority*,¹⁸⁵ "such ownership would be, in our opinion, subject to the dominant power of the government (State and Federal) to control and regulate navigable waters."¹⁸⁶

At the very least, the ocean is held in trust for the public, and the waters below the low-water mark are incapable of private ownership. Additionally, absent extraordinary circumstances, the shoreline up to the high-water mark also is incapable of private ownership. Although South Carolina courts have not addressed the issue, it is a small step to conclude that the beaches above the high-water mark, although capable of private

178. *Horry County v. Woodward*, 282 S.C. 366, 370, 318 S.E.2d 584, 586 (Ct. App. 1984).

179. *Horry County v. Tilghman*, 283 S.C. 475, 480, 322 S.E.2d 831, 834 (Ct. App. 1984).

180. The same landowner would, however, regain title to the submerged lands upon corresponding accretion of the property, under the "doctrine of reemergence," but only if he still owned title to the adjacent land. *See Woodward*, 282 S.C. at 375, 318 S.E.2d at 586-89.

181. 272 S.C. 392, 252 S.E.2d 133 (1979) (per curium).

182. Even if a landowner were able to trace to the crown, to the extent the grant runs afoul of the public trust doctrine, it may be revocable under the principles of *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892).

183. *Hobonny Club*, 272 S.C. at 398, 252 S.E.2d at 136.

184. *Id.* at 396, 252 S.E.2d at 135-36 (citing *State v. Hardee*, 259 S.C. 535, 539, 193 S.E.2d 497, 499 (1972)).

185. 216 S.C. 500, 59 S.E.2d 132 (1950).

186. *Id.* at 530, 59 S.E.2d at 145.

ownership, are subject to substantial restriction under the public trust doctrine because the public must have access to the sea.¹⁸⁷ Even absent this conclusion, the courts should have no trouble invoking viable and long-standing principles of the common law to hold that the state can require removal of structures that become situated below the high-water mark on the active beach.

B. Purpresture and Nuisance

If shorelands are held in trust for the benefit of the public by the government, then it follows that these shorelands are not susceptible to private development.¹⁸⁸ The concept of purpresture¹⁸⁹ perhaps best embodies this conclusion.

The leading South Carolina case addressing purpresture is *Sloan v. City of Greenville*.¹⁹⁰ Sloan, a citizen of Greenville, South Carolina, sued to enjoin the City and various city officials from issuing a permit allowing construction of a parking facility that would partially be suspended over two city streets.¹⁹¹ The court pointed out that the city streets had been dedicated to the City and thus were held “in trust, for the use and benefit of the general public.”¹⁹² Therefore, the streets were protected by the public trust doctrine, and

the City Council of the City of Greenville [was] without legal authority to grant to private individuals a building permit to construct a private garage building which [would] permanently overhang or encroach upon and over the streets here involved, because such would constitute an

187. *But see* Concerned Citizens of Brunswick County Taxpayers Ass’n v. State *ex rel.* Rhodes, 381 S.E.2d 810 (N.C. Ct. App. 1989).

188. Indeed, even those atypical tidelands that may be privately owned, as in *Hobonny Club, Inc. v. McEachern*, see *supra* notes 167-171 and accompanying text, may not be susceptible to private development. The traditional public trust doctrine, as well as the South Carolina version, suggests that the bundle of rights comprising ownership over these areas does not include such rights as exclusion and development.

189. The United States Supreme Court has described a “purpresture” as follows: By [the common] law the title to the shore of the sea, and of the arms of the sea, and in the soils under tide-waters is, in England, in the king, and, in this country, in the State. Any erection thereon without license is, therefore, deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a *purpresture*, which he may remove at pleasure, whether it tend to obstruct navigation or otherwise. *Weber v. Board of Harbor Comm’rs*, 85 U.S. (18 Wall.) 57, 65 (1873).

190. 235 S.C. 277, 111 S.E.2d 573 (1959).

191. *Id.* at 279-80, 111 S.E.2d at 574.

192. *Id.* at 283, 111 S.E.2d at 576.

unlawful encroachment upon a street which was dedicated to the public for street purposes only.¹⁹³

Although *Sloan* involved an invasion of the air space over public streets rather than an invasion of coastal tidelands, the South Carolina Supreme Court discussed the general concept of purpresture. The Court explained purpresture regarding lands held in trust for the public before applying the doctrine to the specific facts of *Sloan*. The court resorted to Georgia law to define purpresture:

“A ‘purpresture’ as defined at common law, and recognized in this and other States, is ‘when one encroacheth and makes that serviceable to himself which belongs to many,’ as “when there is a house builded or an inclosure made of any part of the King’s demesne, or of a highway, or a common street, or public water, or such like things,” or by “digging a ditch or making a hedge across (a highway), or laying logs of timber in it, or by doing any other act which will render it less commodious to the King’s subjects.””¹⁹⁴

Although some states “observe a distinction . . . between a nuisance and a purpresture,”¹⁹⁵ in South Carolina a purpresture is a “form of public nuisance of which cognizance has been taken by the courts of equity in England.”¹⁹⁶

In *Sloan* the City of Greenville argued that the garage should not constitute a purpresture because “numerous [other] encroachments over the sidewalks consisting of advertising signs and marquees” were already in existence.¹⁹⁷ However, the court held that “[t]he right to maintain an

193. *Id.* at 289, 111 S.E.2d at 579-80.

194. *Id.* at 284, 111 S.E.2d at 576-77 (emphasis added) (quoting *Southeastern Pipe-Line Co. v. Garrett*, 16 S.E.2d 753, 760 (Ga. 1941)).

195. *Id.* at 286-87, 111 S.E.2d at 578 (quoting 25 AM. JUR. *Highways* § 273 (1940)). Even in states that distinguish between a purpresture and a nuisance, in some instances the purpresture may be a nuisance. *See, e.g.*, *People v. Vanderbilt*, 26 N.Y. 287 (1863); *People v. Park & O.R.R.*, 18 P. 141 (Cal. 1888).

196. *Sloan*, 235 S.C. at 284, 111 S.E.2d at 577 (quoting *George W. Armbruster, Jr., Inc. v. City of Wildwood*, 41 F.2d 823, 828 (D.N.J. 1930)).

“Any unlawful encroachment upon or over a public highway, whether actually interfering with travel by the public or not, is a purpresture and a nuisance *per se*, and the jury are not at liberty to determine whether such encroachment amounts to a public nuisance by the measure of inconvenience the public may suffer from it.”

Id. at 285, 111 S.E.2d at 577 (quoting *Davis v. Spragg*, 79 S.E. 652, 653 (W. Va. 1913)).

197. *Id.* at 288, 111 S.E.2d at 579.

obstruction which unreasonably interferes with the enjoyment of a public right cannot be based upon custom and usage, nor can the maintenance of such an obstruction be justified by the existence of similar obstructions in the same locality.”¹⁹⁸ When a structure interferes with the public’s use of lands held in trust for the public’s enjoyment and benefit, the structure is a purpresture and a public nuisance under South Carolina law. Therefore, the structure may be removed at the will of the state, regardless of whether the structure is the type customarily placed on sites similar to the site in question.¹⁹⁹

V. CONCLUSION

In South Carolina the beaches, at least up to the high-water mark,²⁰⁰ are protected by the public trust doctrine. When private property erodes, the submerged lands, up to the high-water mark, become property of the state protected by the public trust doctrine. Any structure situated on lands protected by the doctrine is a purpresture and is removable at the will of the state. Therefore, when a landowner builds a house pursuant to a special permit under South Carolina Code section 290(D),²⁰¹ and the beach erodes to the extent that the house becomes situated on the active beach, then the Coastal Council will likely be able to order removal of the house without incurring an obligation to pay compensation. If the house is situated below the high-water mark, then clearly no compensation will be required. However, even if the house is above the high-water mark, compensation may not be required.

Not only do man-made structures impede access to protected areas, but, as emerging scientific data show, they also aggravate the erosion process.²⁰² It therefore requires but a modest expansion of the public trust doctrine, in recognition of “changed circumstances [and] new knowledge,” to hold that these “previously permissible [uses are] no longer so.”²⁰³ Although this may be an expansion of the precise scope of the doctrine, the

198. *Id.* at 288, 111 S.E.2d at 579.

199. Even in states that recognize a clear distinction between a purpresture and a public nuisance, a purpresture may still be removed at the will of the state. *See, e.g., Vanderbilt*, 26 N.Y. at 293.

200. Excepting such extraordinary situations as *Hobonny Club, Inc. v. McEachern*, 272 S.C. 392, 252 S.E.2d 133 (1979) (per curiam), and even then, as discussed above, grants by the state of lands below the high-water mark may be revocable under *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892).

201. S.C. CODE ANN. § 48-39-290(D) (Law. Co-op. Supp. 1992).

202. *See, e.g., KAUFMAN & PILKEY*, *supra* note 6; *Godfrey*, *supra* note 17.

203. *Lucas v. South Carolina Coastal Council (Lucas II)*, 112 S. Ct. 2886, 2901 (1992).

expansion is consistent with the doctrine's spirit and purpose. Just as the Romans believed that the public should have free access to the shore, or as the English believed that the public should be able to carry on commerce over navigable waters or have unobstructed recreational access to those waters, the American legal system of private property rights contemplates that navigable waters should be held in trust for the public. In order that the areas may be preserved for the public trust, they must be protected from destructive uses, no matter how beneficial the use seems in the short term.

The majority opinion in *Lucas II* seemed to be concerned, at least in part, with the protection of landowners' reasonable expectations of how they might use land that they purchase. The Court therefore held that any state restriction denying all economically viable use of land must "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."²⁰⁴ As such, the landowner would have at least constructive notice that the intended use is, or might be, proscribed, and he can be said to have purchased the land at his own risk.

The long-accepted principles of nuisance and property law discussed above—the public trust doctrine and *purpresture*—clearly prohibit situating a dwelling on the active beach below the high-water mark.²⁰⁵ Even if the dwelling were not originally situated on the beach, but were ultimately situated there as a result of erosion, the same result would obtain. The landowner would have lost title to the eroded, submerged land, and the dwelling would be situated on state land, protected by the public trust doctrine for the enjoyment and benefit of the public. Moreover, if applied expansively, these principles would prohibit the situation of a dwelling even above the high-water mark on the beach because the use would substantially interfere with access to the shoreline.²⁰⁶ If the goal is to draw the line for compensable takings at the landowner's reasonable expectations, then this result would appear to satisfy the spirit, as well as the letter, of the *Lucas II* Court's new rule. Certainly it is unreasonable to expect to build or maintain private dwellings on public beaches.

This analysis represents one example of how the rule of *Lucas II* might be applied to a challenge to a coastal land-use regulation. Although clearly

204. *Id.* at 2900.

205. Even if, as in *Hobonny Club*, the landowner were to own property down to the low-water mark, he would still be prohibited from placing a home between the high- and low-water marks because that use would dramatically interfere with the public access to the ocean for recreational or navigational purposes.

206. As the South Carolina Court of Appeals noted in *Horry County v. Tilghman*, 283 S.C. 475, 322 S.E.2d 831 (Ct. App. 1984), title to land situated in an area protected by the public trust doctrine does not necessarily comprise all the rights normally attendant to fee simple ownership. *Id.* at 480-81, 322 S.E.2d at 834.

the common law never recognized the erection of a seaside dwelling as a violation of fundamental property rights, “changed circumstances” and “new knowledge” may, in certain circumstances, make it so.