Another Try at Taking Legislation in South Carolina: An Analysis of South Carolina Senate Bill 528 and the Fight for Property Rights

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ANOTHER TRY AT TAKINGS LEGISLATION IN SOUTH CAROLINA: AN ANALYSIS OF SOUTH CAROLINA SENATE BILL 528 AND THE FIGHT FOR PROPERTY RIGHTS

I. INTRODUCTION

Regulatory takings are at issue in the fight for property rights legislation in South Carolina. Landowners want to have the freedom to use their land as they wish. Although this is a reasonable desire, a landowner should not have absolute power to use his land in ways contrary to regulations enacted for the greater good of society.

Regulatory takings are unintentional takings of private property resulting from regulations that are primarily intended to benefit society.¹ Physical interference is usually absent, but the property is taken “by action ‘other than acquisition of title, occupancy, or physical invasion.’”² The regulation typically affects the “private property by limiting, conditioning, or qualifying its use.”³ “A regulatory taking occurs when a law benefiting the public has become an unintentional taking by judicial fiat, usually because the law has destroyed or excessively burdened a landowner’s use of property.”⁴

South Carolina Senate Bill 528 (Senate Bill 528), the “South Carolina Private Property Rights Protection Act,”⁵ was introduced on March 29, 2001, referred to the Senate Judiciary Committee, and has been debated in the public over the past year.⁶ Senate Bill 528 was proposed during the 2002 legislative session and was sent to the Senate Judiciary Committee in search of alternatives.⁷ The proposed alternatives continued to be unacceptable; therefore, the bill was still pending at the end of the legislative session, and it essentially died.⁸ Any new legislation in favor of private property rights will have to be proposed during the next legislative session.⁹

2. Id. (citation omitted).
3. Id.
4. Id.
7. Telephone Interview with Paula Benson, Senior Staff Counsel, S. C. Senate Judiciary Committee (Sept. 6, 2002); see also A Message from Senator Larry A. Martin, available at http://www.scstatehouse.net/lammessage2.htm.
8. Id.
However, the Private Property Rights Task Force will be asking for suggestions from the parties in the fall of 2002 and will be meeting to try and reach a consensus on a piece of legislation to be introduced in January of 2003. Therefore, the issues raised by Senate Bill 528 continue to require consideration and discussion. The Bill’s unnecessary hardship standard was too broad and overstepped the constitutional standard, so proposed bills in the future should avoid its mistakes.

The Bill was aimed at providing an “inexpensive and expedited” procedure to private property owners so that they could challenge governmental restrictions on their real property. At the same time, the Bill was intended to “preserv[e] the important and legitimate exercise of governmental regulatory and land use programs.” It recognized that government action affecting private property can sometimes result in “unnecessary hardships” on the property owner that do “not ris[e] to the level of a[n] constitutional taking.” These hardships, while not takings, may be unfair to the private property owner. The Bill’s provisions recognized that, regardless of whether there is actually an unconstitutional taking or not, equity and fairness warrant relief to the owner of the imposed property.

In effect, Senate Bill 528 would have made it easier for a private property owner to challenge a government action or regulation. However, should it be easier to challenge the government action or regulation? What happens when policies of private property rights and the environment, historic preservation, or other community interests are in conflict? What happens when the state or county passes a land use ordinance in favor of the environment or historic preservation and the private property owner challenges it as an unnecessary hardship or a taking?

South Carolina has a rich environment in need of protection. From the wetlands and marshes of the lowcountry to the foothills of the Appalachians, the land of South Carolina is being consumed to build shopping centers, hotels, and factories. Takings must be considered contemporaneously with environmental initiatives and land use laws.

This Comment argues that takings legislation, such as that proposed by Senate Bill 528, would have an adverse impact on the positive efforts of environmental, historic, growth management, and community initiatives because it would enable the private property owner to challenge regulations more readily and recover money as a result of government actions or regulations. Then, the government may become more reluctant to take environmental measures because of the fear of expensive, compensatory pay-
outs to private property owners. The government and public interest in promoting environmental and community well-being is certainly important enough to give careful consideration to the threshold that a property owner must meet in order to challenge a law that advances a valid community or public concern. South Carolina Senate Bill 528's unnecessary hardship standard went beyond the constitutional standard and was too broad.

Part II of this Comment will lay out the background of takings law and how the constitutional standard has evolved in modern cases. Furthermore, Part II will highlight the history of the takings debate in South Carolina and offer analysis of previous attempts at state takings legislation. Part III will analyze the most recent bill, South Carolina Senate Bill 528, under some of the same scrutiny imposed on the previous bills from environmental, economic, and community perspectives. In addition, Part III will offer some current issues involved in the takings debate. Part IV will conclude the analysis.

II. BACKGROUND

Takings involve constitutional and property concepts intertwined with considerations of public policy. A brief outline of the takings concepts and a look at some important takings cases will assist in the analysis of Senate Bill 528 to help make clear the potential impact the Bill could have had on communities.

A. Takings Generally

The Fifth Amendment of the United States Constitution states, “nor shall private property be taken for public use, without just compensation.”16 This clause limits the exercise of governmental power of taking property. It does not prohibit the exercise of such power but imposes a condition on its use.17 The takings clause ensures that the private property owner is compensated if a taking occurs.18 The government must have the fundamental right to “take” property because it “is an attribute of sovereignty and is essential to the existence of government.”19

There are three means by which a government “takes” property. First, under eminent domain, the state takes property because the property serves a public use or purpose, and the state must give compensation.20 Secondly, the state can take property under the police power when the property is harmful.21

16. U.S. CONST. amend. V.
17. 26 AM. JUR. 2D Eminent Domain § 3 (1996).
18. Id.
19. Id.
20. Id. § 2.
21. Id. § 6.
Under this power, there is no right to just compensation. Finally, a regulatory taking occurs when the government imposes a regulation on one's land to serve a public health, moral, or safety issue, and the property owner is unable to use the land in the way he or she intended. If the government goes "too far" while implementing a regulation restricting the use of private property, the private property owner must be compensated. However, there are no bright lines to determine when a regulation goes too far and constitutes a compensable taking. These regulatory takings are the issues contemplated by Senate Bill 528.

"[A]ny government action imposing burdens on owners of private property" may cause takings claims to arise. Typically, takings are alleged when the property is subject to zoning regulations or a permit has been denied for the property's development. However, the mere fact that a governmental regulation has an effect on private property does not make it a compensable taking.

B. Takings Jurisprudence: The Constitutional Standard

In order to understand more fully the takings standards in Senate Bill 528, the following cases illustrate how the constitutional standard for takings evolved and how it now stands and applies to a regulatory takings action. Regulatory takings cases have attempted to construct tests to further define the limits on regulations enacted by the government. In addition to an unnecessary hardship standard, Senate Bill 528 had incorporated this constitutional standard to decide whether a taking occurred.

1. Nollan v. California Coastal Commission

The Nollans originally leased seaside property with the option to buy. The option was conditioned on their promise to demolish the house on the property and replace it. To fulfill this condition, they needed a permit from the California Coastal Commission. They were granted the permit, but it was

22. Id.
24. Id.
25. Id.
27. ROBINSON, supra note 26, § 3.04(1)(a), at 3-18.
28. Id.
31. Id. at 828.
32. Id.
33. Id.
subject to another condition that they grant an easement across a portion of their property for better public access to a park and a public beach area. The Nollans argued that the Commission could not impose the requirement unless it showed evidence that their proposed development would adversely affect public access to the beach. The Commission, after holding a hearing on the issue, reaffirmed the permit condition. In response, the Nollans filed a petition arguing that the condition violated the Fifth Amendment Takings Clause. They eventually appealed their case to the United States Supreme Court on this issue.

The Court stated “a ‘permanent physical occupation’ has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.” The court compared the Nollans’ easement to the cable lines at issue in Loretto v. Teleprompter Manhattan CATV Corp. and observed that “the right to exclude [others is] ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’” Under the rule of Loretto a “permanent physical occupation of property” by the government is a “taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only a minimal economic impact on the owner.”

The Nollan court reaffirmed that “land-use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests’ and does not ‘den[y] an owner economically viable use of his land.’” A broad range of governmental purposes will qualify as “legitimate state interest[s].” The Commission had argued that the purposes for the condition on the Nollans’ permit were acceptable purposes to satisfy the requirement of legitimate state interest. It was imposed to “protect[] the public’s ability to see the beach,” “prevent[] congestion on the public beaches,” and “assist[] the public in overcoming the ‘psychological barrier’ to using the beach,” a barrier which is “created by a developed shorefront.”

34. Id.
35. Id.
36. Nollan, 483 U.S. at 829.
37. Id.
38. Id. at 831.
39. Id. at 832.
40. 458 U.S. 419 (1982).
41. Nollan, 483 U.S. at 831 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982)).
42. Loretto, 458 U.S. at 434-35.
44. Id. at 834-35.
45. Id. at 835.
46. Id.
However, the Court found that the imposed condition on the building permit did not have the "essential nexus" required between the condition and the original purpose of the building restriction. In finding that the Commission's argument had little merit, the Court stated "[i]t is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house." The Commission's condition on the Nollans' building permit was held to be a taking with the Court reasoning that it is "inclined to be particularly careful . . . where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective."

2. *Dolan v. City of Tigard*

*Dolan* addressed a question left unanswered by the Supreme Court in *Nollan*. In *Nollan* the Court did not decide what is the "required degree of connection [needed] between the exactions imposed by the city and the projected impacts, of the proposed development." In *Dolan* the city of Tigard adopted a "Community Development Code" (CDC) to comply with Oregon's comprehensive land-use management program. Provisions in the CDC included open space and landscaping requirements, pedestrian and bicycle path requirements, and improvements to the drainage plan near a local creek. When Dolan applied for a permit to redevelop her property in the Central Business District, the permit was granted subject to all the provisions in the CDC. She pursued relief from these conditions all the way to the U.S. Supreme Court.

To decide if these conditions were a regulatory taking, the Court used the *Nollan* test of "whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city." The Court found the required essential nexus in this case and proceeded to analyze "whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed

47. *Id.* at 837.
48. *Id.* at 838.
49. *Nollan*, 483 U.S. at 841.
51. *Id.* at 377.
52. *Id.*
53. *Id.* at 377-78.
54. *Id.* at 379.
55. *Id.* at 386 (quoting *Nollan v. Cal. Coastal Comm'N*, 483 U.S. 825, 837 (1987)).
development." The Court adopted the "rough proportionality" test to evaluate this required relationship. Under this test, the Court ruled that the city did not meet its burden of proving that the conditions to the permit were roughly proportional to the impact of the proposed development. In other words, the Court determined that the conditions on the permit, if fulfilled, would not solve the problems. For example, "the city [had] never said why a public greenway, as opposed to a private one, was required in the interest of flood control." "The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done."

3. Lucas v. South Carolina Coastal Council

In this case Lucas purchased residential lots on the South Carolina coast, and, at the time, they were not subject to any regulatory condition that would prevent their development. The State of South Carolina subsequently enacted the Beachfront Management Act, which prevented Lucas from building on his lots. Lucas subsequently filed suit claiming that the act was a taking of his property entitling him to compensation because it rendered his property valueless.

The Court began its analysis by elaborating on its prior holding in Agins v. City of Tiburon that "the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'" The Court continued, "[w]e think . . . that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good . . . he has suffered a taking." The Court emphasized that the state could only escape payment of compensation "'where the State seeks to sustain regulation that deprives land of all economically beneficial use,'" if the state could show that the use interests proscribed by the regulation "were not part of his title to begin

57. Id. at 391.
58. Id.
59. Id. at 393.
60. Id. at 396.
62. Id. at 1006-07.
63. Id. at 1007.
64. Id. at 1009.
67. Id. at 1019.
A limitation must be in the title to land itself, and "[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself."  

4. **Palazzolo v. Rhode Island**

Palazzolo owned protected wetlands property on the coast of Rhode Island. Twenty-six years after purchasing it, he desired to build a private beach club on it, proposing to "fill [eleven] acres of the property with gravel to accommodate [fifty] cars with boat trailers, a dumpster, port-a-johns, picnic tables, barbecue pits of concrete, and other trash receptacles." To carry out this plan he needed a special exception from the Rhode Island Coastal Resources Management Council (Council), and the exception would be granted only for "compelling public purpose[s]" that benefit the public as a whole. The Council denied the exception and Palazzolo filed an action claiming that the wetlands regulations had taken his property without just compensation.

Palazzolo alleged that the Council's denial of the exception "deprived him of 'all economically beneficial use' of his property." The Rhode Island court used a rule combining the holdings of *Lucas v. S.C. Coastal Council* and *Penn Central Transp. Co. v. New York City* and held: "A purchaser or a successive title holder like [Palazzolo] is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." However, the United States Supreme Court disagreed and ruled that an enactment made effective before the transfer of title does not "become[ ] a background principle of property law which cannot be challenged by those who acquire title after the enactment." The landowner can challenge a governmental regulation even if he or she bought the property after the

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68. *Id.* at 1027.
69. *Id.* at 1029.
71. *Id.* at 611.
72. *Id.* at 611. Palazzolo was not the original purchaser. In order to purchase the land in 1959 he and some associates formed a corporation. After purchasing the property, Palazzolo bought out the other shareholders and became the sole shareholder. In 1978 the company's corporate charter was revoked because corporate income taxes had not been paid and the property passed to Palazzolo. *Id.* at 613-14.
73. *Id.* at 615.
74. *Id.* at 615. The wetlands regulation went into effect in 1971. *Id.* at 614.
75. *Id.* at 615.
77. 505 U.S. 1003.
78. 438 U.S. 104.
79. **Palazzolo**, 533 U.S. at 626.
80. *Id.* at 629-30.
regulation was enacted. His or her notice of the regulation does not preclude a takings challenge.

Therefore, the Court proceeded to analyze Palazzolo's claim that the wetlands regulations deprived him of all economically beneficial use of his property. The parties agreed that the property "retains $200,000 in development value under the State's wetlands regulations." Nevertheless, Palazzolo claimed that he suffered a total taking and contended that the state had left him with only "a few crumbs of value." The Court observed that "a State may not evade the duty to compensate on the premise that the landowner is left with a token interest," but "[t]his is not the situation of [Palazzolo]." The Court held that Palazzolo was not totally deprived of all economically beneficial use because the property still "retains significant worth for construction of a residence." Therefore, there was no taking of his property requiring just compensation.

C. Why the Constitutional Standard Is Important in South Carolina

At present, South Carolina has not enacted state takings legislation. Any takings claims that arise are analyzed according to the constitutional standard described by the decisions of the United States Supreme Court. Though Senate Bill 528 would have relieved a landowner for an unnecessary hardship that was imposed on him by a state regulation, the constitutional standard would still be available. The state courts would analyze takings claims in South Carolina with rules delineated in Nollan, Dolan, Lucas and Palazzolo. The challenged regulations would be analyzed for their rough proportionality to the legitimate state interest, and the landowner would be asked to show that he had lost all economically beneficial use of his property before he was compensated.

The recent South Carolina Supreme Court decision of McQueen v. South Carolina Coastal Council shows the use of the constitutional standard in state takings cases. McQueen bought two lots in Cherry Grove, one in 1961 and

81. Id. at 630.
82. Id. at 631.
83. Id.
84. Id.
85. Palazzolo, 533 U.S. at 632.
91. See Dolan, 512 U.S. at 391.
92. See Nollan, 483 U.S. at 834-35.
93. See Lucas, 505 U.S. at 1019; Palazzolo, 533 U.S. at 631.
the other in 1963.95 In 1991, he desired to build bulkheads on the lots to prevent further erosion; therefore, he applied to the South Carolina Coastal Council (Council) for permits.96 After some confusion, he was required to resubmit his permit applications, and they were both “denied because the proposed bulkheads were located within the tidelands critical area, so that any backfill would result in filling of tidal wetlands, adversely affecting the environment.”97 McQueen appealed to two appellate bodies, both of which upheld the permit denials.98 The Coastal Zone Management Appellate Panel found that the permit denial was not a taking of McQueen’s property because he had “no distinct investment-backed expectations, as evidenced by his failure to take action to prevent the erosion of his property.”99 However, the master-in-equity found that the permit denial did deprive McQueen of all his investment-backed expectations; therefore, the denial was a taking of his property.100

The South Carolina Supreme Court, reciting language from Lucas,101 stated that “[t]he government ‘takes’ property for public use when it regulates the property in a manner which denies the owner all economically beneficial use of his property.”102 The elements of recovery on a regulatory takings claim must establish that “1) there was a denial of economically viable use of the property as a result of the regulatory imposition; 2) the property owner had distinct investment-backed expectations; and 3) the interest taken was vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.”103 Here, the South Carolina Supreme Court said the permit denial “deprive[s] [the property owner] of all economically viable use of his property.”104 The court then considered the Council’s factual argument that McQueen had failed to take measures to prevent erosion of his property and found this argument persuasive on the second prong of the regulatory takings test.105 “Without the requirement of investment-backed expectations, a property owner could obtain a windfall by claiming a taking in the face of new regulations, without any real intent to

95. Id. at 67, 530 S.E.2d at 629.
96. Id. at 67, 530 S.E.2d at 630.
97. Id. at 68, 530 S.E.2d at 630.
98. Id. The Coastal Zone Management Appellate Panel found that the permits McQueen was seeking were prohibited by a South Carolina statute which “provides that the creation of residential lots for private gain is not justification for filling in wetlands and that permit applications for this purpose should be denied.” Id. (citing S.C. CODE ANN. REGS. 30-12 (G)(2)(a) (Supp. 1998)).
99. Id.
100. McQueen, 340 S.C. at 68, 530 S.E.2d at 630. The South Carolina Court of Appeals agreed with the master that there was a taking, but remanded the issue of compensation. The South Carolina Supreme Court granted the Council’s petition for certiorari. Id.
102. McQueen, 340 S.C. at 69, 530 S.E.2d at 630.
103. Id. at 69, 539 S.E.2d at 630-31.
104. Id. at 69, 539 S.E.2d at 631.
105. Id. at 73-74, 539 S.E.2d at 633.
The court found McQueen's "prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate[d] a distinct lack of investment-backed expectations." Since McQueen had failed to show that he had investment-backed expectations, the court found that the denial of his permit applications did not constitute a taking.

D. The History of the Takings Debate in South Carolina

Takings has been an issue in South Carolina for a number of years. In the late nineties, several takings bills were introduced but never passed. Since 1995, a team of developers and other interest groups, such as the South Carolina Farm Bureau and South Carolina Timber Producers Association, have pushed takings legislation in South Carolina. Each bill was subtly different but all seemed to result in extremely high costs to the taxpayers and communities and a harsh negative effect on the ability of communities to plan their growth.

1. Legislative Considerations of Past Takings Legislation

Proposals for private property rights legislation between 1995 and the present have been diverse. The first proposed bills expanded private property owners' rights and offered expedited and less costly judicial processes for enforcement of those rights. During the 1995-1996 legislative session, South Carolina Senate Bill 121 enunciated that a taking occurs when a regulation has the effect of "reduce[ing] the fair market value of real property to less than fifty percent of its fair market value." Later that session, South Carolina

106. Id. at 74, 539 S.E.2d at 633.
107. Id. at 76, 539 S.E.2d at 634-35.
108. McQueen, 340 S.C. at 77, 530 S.E.2d at 635.
111. Hearings, supra note 6.
114. See Hubbard, supra note 109, at 126-27.
115. Id. at 122.
House Bill 3790 and South Carolina Senate Bill 839 outlined assessment requirements for the entity enacting the regulation and awarded compensation if the effect of the regulation was a "substantial diminution of the total value of the real property." During the 1997-1998 legislative session, South Carolina House Bill 3591 (House Bill 3591) was introduced. In its original form, it preserved the constitutional standard as the test for takings. In addition, it appeared to give more flexibility for resolving regulatory takings disputes by incorporating methods such as exhaustion of administrative remedies, mediation, and a time limit of 180 days before a party may commence suit for compensation. The Bill was later completely amended, and the body of the Bill was replaced with the body of the Florida Harris Act. The Bill as amended granted a "new right to compensation that went far beyond the constitutional right for regulatory takings." Its "inordinately burdened" standard was a much broader right to compensation.

Professor Hubbard's 1998 South Carolina Law Review article thoroughly addresses the possible reasons for the diversity of proposals from takings reformers, concluding that the diversity is due to the unclear goals of the reformers. Professor Hubbard outlines three propositions to explain the diversity:

1) The proponents of reform were not in agreement about the goals of reform...
2) The proponents of reform agreed on goals but were flexible about the details in any given bill in order to deal with political realities and achieve these goals incrementally.
3) The proponents of reform were more interested in the symbolic goal of achieving some type of property rights reform than changing any substantive or procedural takings rules.

122. Hubbard, supra note 109, at 123.
123. Id. at 123-24.
125. Hubbard, supra note 109, at 125.
126. Id.
127. Id. at 126-27.
128. Id.
2. Discussion of South Carolina House Bill 3591 and Florida’s Harris Act

In its final form, House Bill 3591 was virtually identical to a bill in Florida, the Harris Act. The intent of both was "to broaden the circumstances under which the property owner can obtain relief from government regulation." Under House Bill 3591 the property owner must show that he is "inordinately burdened" by the governmental regulation. The Bill afforded the government agencies alternatives to paying cash to the property owner, such as variances or exceptions, as compromises. As of 1998, Florida’s caselaw had not yet decided exactly what an “inordinate burden” was. Caselaw in South Carolina would also have needed to define inordinate burden, which could take time and money.

“Florida and South Carolina are profoundly different in some important respects.” What works for one state may not work for the other. One major difference is that Florida is a much larger state than South Carolina; therefore, it already had laws in place for planning and growth management and standards of conservation by the time the Harris Act was enacted. In addition, the majority of Florida’s laws cannot be challenged under the Harris Act because it only applies to laws enacted after 1995. Even so, as of 1998, Florida’s experience with the Harris Act included multiple claims challenging master plans, and a chilling effect was causing less enactment and enforcement of laws because of fear of litigation.

In comparison, South Carolina has few laws regarding growth management, planning and zoning, and conservation. Some areas in South Carolina are just beginning to enact zoning and comprehensive plans for growth. The state has not set aside any money for payment of claims under a property rights bill. Most of South Carolina’s land is not protected;

130. Hubbard, supra note 109, at 124, 132; see FLA. STAT. ANN. § 70.001 (West Supp. 2001).
132. Id.
133. Id.
134. Id. (explaining that it would take time for case law to delineate exactly what an "inordinate burden" is).
135. Id.
136. Id.
137. Murley, supra note 131.
138. Id.
139. Id.
140. See CHARLESTON, S.C., ZONING CODE art. 6, § 54-603 (2002). Charleston has a zoning ordinance and land development plan “to encourage the arrangement of buildings, structures, open space … in a manner that will promote the public health, safety, convenience and welfare.” Id. See also Richland County Vision, available at http://www.richlandonline.com/vision.html.
141. Murley, supra note 131.
therefore, under a bill like House Bill 3591, planning for growth would be nearly impossible. The anticipated chilling effect would reduce the proposal of laws intended to protect the environment and plan for the future. “In South Carolina as in Florida, growth management is not a choice but a necessity,” and it can work on managing its growth, “unless [it is] prematurely burden[ed] . . . with half a law that was meant to be part of a comprehensive framework for managing growth.”

South Carolina has had its own road to takings reform because of its unique circumstances. It has characteristics that differentiate it from other states, so takings reform should be unique to the state. It is not appropriate to merely mirror a bill from a state that has a completely different set of circumstances.

3. Concerns of Historic Preservation Groups Under South Carolina House Bill 3591

Historic preservation advocates also had objections to House Bill 3591 and state takings legislation. Many towns and cities in South Carolina have implemented historic preservation ordinances to protect historic sites in their areas. When protected by these ordinances, the historic properties have increased in value and are used to increase tourism and help with the economic development of surrounding areas. Advocates of historic preservation alleged that South Carolina House Bill 3591 would establish a barrier to communities considering adopting historic preservation zoning ordinances. Under House Bill 3591, “a developer who wanted to tear down an antebellum home and build a multi-story apartment building in a locally protected historic district could argue that he was ‘inordinately burdened’ and demand payment because he had lost the ability to get the higher economic return from the apartment building.” House Bill 3591 would likely have caused communities not to adopt historic preservation ordinances because of the fear of successful challenges that the community would have been unable to afford. The fear of costs would prevent the historic areas from being protected, thus decreasing the benefits with which they could have enriched the community.

142. Id.
143. Murley, supra note 131 (identifying the fact that the passage of South Carolina House Bill 3591 would stymie any efforts South Carolina could undertake in the future for growth management because they would either fail or be litigated at a high expense).
144. Hubbard, supra note 109, at 139-40.
146. Memorandum, supra note 145.
147. Id.
148. Id.
149. Id.
4. With Whose Property Rights are We Really Concerned?

Arguments arose about exactly whose property rights were being protected under state takings bills—the landowners’ rights or the surrounding property owners’ rights.\textsuperscript{150} The past bills made clear that they did not protect any “impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner under this section.”\textsuperscript{151} If the developer is given a variance, he will build his shopping center, and the surrounding property owners are not protected when the value of their property decreases because of it. Opponents of the bills see them as standing for the proposition that “all property rights are equal, but some are more equal than others.”\textsuperscript{152} Previous takings bills have been opposed for taking power away from local governments and local councils and putting it in the hands of lawyers and judges.\textsuperscript{153} The outcome was negatively viewed because the public would not be able to participate in the local government decision-making process.\textsuperscript{154} If a judge is deciding local planning issues, the public will have little say in the matter.\textsuperscript{155} The judge will make decisions about what is best for the community.

5. Economic Considerations of Past Takings Legislation

Florida economists and a panel of South Carolina planners, appraisers, assessors, developers and attorneys prepared a study to estimate the economic impact that House Bill 3591 would have had on the state and its citizens.\textsuperscript{156} The study found that the Bill would have created a loss to South Carolina’s economy, affecting landowners and the government.\textsuperscript{157} The government’s more substantial loss would have turned into higher taxes, lower services, or both.\textsuperscript{158} Therefore, the citizens of South Carolina would have lost the most if the Bill had passed. The study estimated that the Bill would have “cost South Carolina’s economy over $126,000,000” in the first year following implementation, and that was stated to be a conservative estimate.\textsuperscript{159} Of that $126 million, taxpayers would pay $83 million “in the form of litigation costs, awards to landowners, and administrative costs.”\textsuperscript{160} Landowners’ costs would

\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} FISHKIND & ASSOCs., \textit{The Fiscal Impact of the South Carolina Private Property Rights Protection Act}, H. 3591 (Feb. 5, 1998) [hereinafter \textit{Fiscal Impact Study}].
\textsuperscript{157} Id. at iii.
\textsuperscript{158} Id. at v.
\textsuperscript{159} Id. at iii–iv.
\textsuperscript{160} Id. at iii.
have been about $44 million for litigation, which would most likely exceed their awards in court. The Act would likely have caused communities to stop enacting zoning and land use regulations in order to avoid potential costs of the Act. The lack of planning and zoning, which would make areas more desirable to visit and live in, would thereby compound the loss to the economy by decreasing tourism and causing development with otherwise unnecessary infrastructure costs. Zoning laws can increase property values by putting limits on development; therefore, lack of zoning will likely decrease property values, adding again to the economic loss triggered by the Bill.

III. ANALYSIS OF THE MOST RECENT TAKINGS BILL: SOUTH CAROLINA SENATE BILL 528

A. The State of the State with Respect to Takings

State takings legislation in the form of Senate Bill 528 would have the effect of expanding the protections of private property owners to protect them not only against physical invasions of property, but also against hardships imposed by land use regulations and environmental regulations. This additional protection exceeds the constitutional standard for takings. Takings is not a short battle between conflicting interests. Before such protection is enacted, there needs to be a long term consideration of the future of the state as a whole, not as individual against individual. Takings should be considered on a larger scale, encompassing a broader view of lifestyle in the state and how we as a society want to move into the future.

South Carolina Governor Jim Hodges has enunciated that South Carolina needs to concentrate more on land conservation and historic preservation. Governor Hodges stated at the Governor's Summit on Growth in Myrtle Beach in 2001 that "[w]e want to promote and preserve open space and be dedicated to preserving our historic assets." Governor Hodges also observed that regional planning for growth and land use is better than statewide planning because it has the effect of keeping control within the cities and counties.

Environmental protections and decisions on how to manage growth in South Carolina need to be more concrete before state takings legislation should

161. Id. at iii, v.
162. FISCAL IMPACT STUDY, supra note 156, at iii.
163. Id. at iv.
164. Id.
167. Id.
168. Id. at B5.
become effective. South Carolinians should decide how the state and citizens are going to manage these issues as they arise. If regulations are in place before takings legislation takes effect, then landowners and prospective purchasers of land will have notice that their land is going to be affected by the regulations, weakening their challenge to implementation. They ideally will have adjusted their intentions and ideas for developing their land according to the long range plans of the state. They should anticipate future enactments tailored to furthering South Carolina’s environmental, historic preservation, and growth management initiatives.169

Under *Palazzolo*170 the regulation is not immune from being an unconstitutional taking solely because a landowner had notice of the regulation affecting the land when he purchased it.171 However, “[t]he goal should be to ensure that public monetary relief does not provide an incentive for continuing resistance to necessary and appropriate social change.”172 A takings bill may encourage the landowners to selfishly resist change, so they can make money through compensation. Ideally, there should be a balance between individual interests and the common good.

B. Environmental Group Concerns

Environmental groups, municipalities, and other groups were opposed to Senate Bill 528. To sum up the feeling of environmentalists in the state toward takings legislation, Nancy Stone-Collum of the South Carolina Coastal Conservation League said “the constitutional standard is just fine.”173 The groups viewed the takings legislation as a virtual blank check from the state to developers, corporations, agricultural and timber interests, homebuilders, and realtors.174 Takings legislation would have resulted in the developers getting paid “not to sprawl, pollute, and otherwise damage [the] quality of life [in the area].”175 At the crux of much debate were the Comprehensive Land Use Plans, and the accompanying zoning laws necessary to implement them, because developers hoped to protect themselves from the effects of such plans through takings legislation.176 A few areas in South Carolina have passed or are considering comprehensive plans to control urban sprawl and to protect rural areas and farms.177 The comprehensive plans consider issues such as quality of

171. *Id.* at 629-30.
175. *Id.*
176. *Id.* at 6-7.
life of the residents, traffic problems, environmental protection, and communities' needs, in addition to property rights and costs, which, when considered together, amount to the communities' visions of the future.\textsuperscript{178} According to Nancy Stone-Collum, the Legislative Director at the South Carolina Coastal Conservation League, ""[i]f this bill becomes law, taxpayers will have two choices . . . [they] could fight developers in court, or just pour [their] hard-earned cash straight into [the developers'] pockets."\textsuperscript{179}

\textbf{C. Political Considerations}

Senate Bill 528 was promoted as a mechanism to protect small landowners from government intrusion; however, on closer inspection, the list of bill supporters shows that big business developers were the groups pushing for the takings legislation.\textsuperscript{180} The big businesses "are simply trying to reduce the regulations they operate under."\textsuperscript{181}

At this time, South Carolina's population is growing quickly and our landscape is threatened by urban sprawl. "Good planning and effective strategies to protect rural areas and wildlife habitat have never been more important."\textsuperscript{182} The planning for growth will be impeded if takings legislation like Senate Bill 528 are passed. The cities and counties of South Carolina would be burdened with litigating takings claims, paying off the developers, and compromising their intentions by granting variances and allowing such exceptions as a factory hog farm on a riverbank.\textsuperscript{183}

Proponents of the Bill praised it for keeping a grip on the government's powers over property owners. They viewed it as an assurance that the government would not overstep its bounds. However, the Bill would have given property owners the license to do whatever they wanted with their land, unless someone were to pay them through just compensation. It put the government between a rock and a hard place. The government, in trying to uphold an ordinance's purpose, would have had to pay enormous sums of money or would be forced to let the developer violate the ordinance—neither of which follows the intent of the ordinance.\textsuperscript{184}

A poll of South Carolinians in 2000 showed that less than half would agree to government restrictions on new developments.\textsuperscript{185} Environmental experts

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\textsuperscript{178} Taking Too Much, supra note 113, at 6-7.  \\
\textsuperscript{179} Id. at 14.  \\
\textsuperscript{181} Id.  \\
\textsuperscript{182} Id.  \\
\textsuperscript{183} Id.  \\
\textsuperscript{184} See Richard Miniter, Real-Estate Broker From Hell, READER'S DIG., Feb. 2001, 114-17.  \\
\textsuperscript{185} Mike Ramsey, Poll Shows Little Support for Slowing Growth, THE STATE (Columbia, S.C.), Dec. 11, 2000, at A6.  \\
\end{flushleft}
attribute this low number to residents’ rural or urban location in the state. In urban areas, growth management is obviously a larger consideration, while in rural areas, growth management is “not an issue.” There are other polls that have shown slightly higher numbers of residents who would be in support of growth regulations. The bottom line is that some, not all, residents of South Carolina see a problem with growth, and some, not all, residents would be willing to pay higher taxes for the government to buy undeveloped land for the purpose of protecting it from development.

Under Senate Bill 528, that is exactly what the government would have had to do, except the public would not be prepared for the taxes that would be required. The takings bill would have, in effect, raised the price of land to a premium because the landowners would be able to show unnecessary hardship and be paid compensation. Land-use restrictions that do not rise to the level of an unconstitutional taking may create an unnecessary hardship on the landowner under Senate Bill 528. Therefore, the government would have to buy the land, rather than regulate it, in order to keep it undeveloped.

D. The “Fine Print” of South Carolina Senate Bill 528

Senate Bill 528 provided for a step-by-step process through which the private property owner could challenge and receive relief for the taking or unnecessary hardship imposed on his property. The process included notice provisions for the government, settlement negotiations provisions, and a requirement for approval of the settlement agreement. If a private property owner chose to reject a settlement offer, the Bill provided for judicial determination of the issue of taking or unnecessary hardship imposed.

Property rights in South Carolina are becoming an increasingly important issue. Growing populations need places to live, work, and play. As the population grows, citizens want to preserve their quality of life and want to stop the expansion of hog farm operations, strip clubs in their neighborhoods, and standstill traffic on their roads. The big business developers and industrialists can afford to take their problems to court and litigate their takings claims. However, others in the state, such as ordinary property owners, may be unable to afford this expensive and difficult challenge.

186. ld.
187. ld.
188. ld.
189. ld.
191. ld. §§ 28-4-50 to -100.
192. ld.
193. See Hearings, supra note 6.
195. ld.
Thus, the constitutional standard that protects property owners is sufficient, but the appeals process is flawed . . . . [T]here is a basis for a compromise on the property rights issue: No change in the constitutional standard for how a taking is defined, but an improved appeals process by which aggrieved property owners can seek relief.196

This attitude does not wish to harm the ordinary private property owner and favors enacting and enforcing laws that work to preserve our state lands and quality of life. The constitutional standard, as set forth in the cases Nollan,197 Dolan,198 Lucas,199 and Palazzolo,200 is appropriate to achieve both ends.

1. The Constitutional Standard

The constitutional standard achieves the appropriate ends because it weighs the effect of the challenged regulation against its purpose. The standard scrutinizes the regulation itself and ensures that it is pointed toward a legitimate state interest. If the regulation does advance a legitimate state interest, the standard analyzes the harm done to the property owner. If the harm done is not roughly proportional to the legitimate state interest, then the regulation has effected a taking of property and the state must pay for it. The property owner must show that the regulation interfered with his or her investment-backed expectations and that the land was left with no economically viable use.

2. South Carolina Senate Bill 528 in Detail

This section analyzes the specific language of the Bill and outlines potential consequences of its language as applied to specific hypothetical situations. It further compares the constitutional standard with the Bill’s unnecessary hardship standard, which would cast a larger safety net for property owners. Examination of the Bill’s settlement procedure will show that, though it would have likely expedited the process, it was flawed when combined with the unnecessary hardship standard for compensation.

The Bill’s proposed standard for just compensation is set out in § 28-4-40(A):

“When a specific action of a governmental entity has the effect of a constitutional taking of real property or has

196. Id.
resulted in an unnecessary hardship on the use of the real property, the property owner of that real property is entitled to relief . . . which relief may include, but does not necessarily require, compensation for the actual loss of the fair market value of the real property caused by the action of government.\textsuperscript{201}

This “unnecessary hardship” standard is lower than the constitutional standard. The constitutional standard requires the property owner to show he has suffered an unconstitutional taking, which triggers the legitimate state interest test and the test for loss of all economically viable use and investment-backed expectations. This unnecessary hardship standard would have only required the landowner to show that he suffered a “disadvantage by operation of a governmental action so that application of the government statute, regulation, ordinance, or other action results in a restriction more burdensome than intended or . . . effectively prohibits or unreasonably restricts the utilization of the property.”\textsuperscript{202} It would take time for case law to define the limits of “unreasonable” and “more burdensome,” but a private landowner whose land is affected by an ordinance would most likely be able to show an unnecessary hardship much more easily than an unconstitutional taking.

For instance, if a developer owned land in a scenic area and the town enacted a five-story building height limitation, then the developer could potentially have been paid for the “unreasonable” restriction of his property if he intended to build a twenty story building on his land. In the alternative, the developer could get a variance to build a twelve story building, against the wishes of the citizens of the town. The citizens in effect lose either way because either the building violates the ordinance and disrupts the height limitation or the developer is paid for his supposed economic loss. Under the constitutional standard, the regulation of building height would be tested and most likely found to be a legitimate state interest, since scenic preservation usually qualifies.\textsuperscript{203} Furthermore, the height restriction would be roughly proportional to this state interest, since enforcing the height restriction would achieve the desired goal of scenic preservation.\textsuperscript{204} Under the constitutional standard, it is not a frivolous regulation enacted to reach a fictional goal.

Senate Bill 528 stated “[n]othing in this chapter shall be considered to prevent the exercise of the police powers of any governmental entity to adopt or modify lawful zoning ordinances or comprehensive land use plans consistent with the provisions of this chapter.”\textsuperscript{205} That may be true, but the statement itself is empty. It merely says that the governmental entities may enact zoning

\textsuperscript{204} See Dolan v. City of Tigard, 512 U.S. 374 (1994).
ordinances and comprehensive land use plans, but the same is true in the Bill’s absence. The statement appeared to give protection to the governmental entities, but it said no more than what they already could do. The Bill would have just made it easier to challenge the lawful ordinances and plans successfully. Its provisions would have created conflict and would likely have slowed down any community plans for the future.

In sections 28-4-40(D)(1) and (D)(2), the Bill purported to protect regulations and ordinances when a private property owner successfully challenges governmental action against his property. If the government were to strike a settlement agreement with the property owner that

"would have the effect of a . . . variance or [] exception to the application of a regulation or ordinance as it would otherwise apply to the subject real property, the governmental entity must ensure the relief granted protects the public interest served by the regulations at issue and is the appropriate relief necessary to prevent the governmental action from taking or imposing an unnecessary hardship on the real property."

This provision seemed to have protected the public interest in making the ordinance in the first place, but it is unclear how an exception to the ordinance would still protect the public interest when, at the same time, it does not impose the ordinance on the property because of an unnecessary hardship to the owner. The two seem to be in direct conflict. In addition, it is unclear who would have decided whether the settlement would fulfill both conditions of the settlement. The Bill could have left open the possibility for cutting corners on the requirement that the settlement relief continue to protect the public interest. The concept sounds good but may not have been realistic.

Under section 28-4-50(D)(2), if someone were to have decided that the settlement agreement would “have the effect of contravening the application of a statute as it would otherwise apply to the subject real property,” then the issue would have gone to court. A judge would have had an opportunity to approve or disapprove of the settlement, which was thought “to ensure that the relief granted protects the public interest served by the statute at issue and is the appropriate relief necessary to prevent . . . a taking or the imposition of an unnecessary hardship on the real property.” The judge would be deciding, for the whole community, what to do with the land. It seems that the county council or planning board would be the best for making the local decisions, especially since the public and members of the community would have more input. However, the Bill gives the judge the final decision. A single

207. Id. § 28-4-50 (D)(1).
208. Id. § 28-4-50 (D)(2).
209. Id.
adjudication of a settlement agreement’s validity is not overly taxing on the judicial system, but this legislation would have allowed a deluge of claims to arise. In addition, a judge may not have the public interest at heart. The judge, as an individual, will decide what the community needs, which is contrary to how public enactments should work.

If the property owner rejected the settlement offer, he would have filed a claim so that the Administrative Law Judge could have determined whether the governmental action resulted in a taking of the private property or if it imposed an unnecessary hardship on the property.210 Again an individual judge would have made the decision with no input from the public. In the case of a governmental action to protect wetlands or another environmental concern, the agency enacting the regulation or ordinance would have to participate in litigation. Therefore, the public, whose interest was forefront, would now have been the recipient of the bill for litigation in the form of higher taxes.

Senate Bill 528 addressed unconstitutional takings of, and unnecessary hardships imposed on, private property. It centered on the fact that the property owner is entitled to relief in the form of a variance, exception, or cash compensation. The developer would have won under this Bill even if there were no unconstitutional taking of his or her property, as long as there was an unnecessary hardship imposed on his or her property. The developer would have received either money or an exception to use the property however he or she wants. If he or she could show an unconstitutional taking under the standards set forth by the United States Supreme Court, he or she deserves the relief, so the Bill’s additional protection would be redundant.211 The broad definition of the unnecessary hardship standard goes too far beyond the constitutional standard.

For example, if a community wanted to adopt zoning laws to curb the effects of urban sprawl or development in the area, the citizens would have a hard time passing the ordinances. Their reasons for attempting to manage sprawl may be laudable, such as decreasing pollution or traffic in a congested area or school area, or increasing the size of a park, or injecting green space into a certain area for the first time. However, under this Bill, if the developer alleged that he could not erect his new shopping center in an area covered by the new plan, he might have shown the requisite unnecessary hardship. The developer would be paid for the hardship or would be given a variance to build the shopping center anyway. Either of those results would have been undesirable from the citizen’s perspective. The citizen’s taxes might have increased to fund the large payoff to the developer, or the citizen might have to deal with even more traffic and pollution. Therefore, enactment of the community zoning law would have caused the exact opposite result of what it was intended to do. It is a twisted turn of events, costing the taxpayers, whose

interests were at heart originally, the most in the form of cash and decreased quality of life.

E. Can South Carolina Senate Bill 528 or Future Proposals Be Cured? 212

Many interest groups’ voices and opinions on the Bill have been heard at public hearings on private property rights in South Carolina. 213 A primary change that would likely increase the acceptability of the Bill would be the removal of the unnecessary hardship standard from the analysis, leaving the constitutional standard. The removal would level the playing field between private property owners and opponents of the Bill because it would have given the appropriate protections to the regulations. The constitutional standard would be a way to sufficiently protect all interests because the Bill, as written, presumed that the private property owner’s rights are always unjustifiably violated by regulations, leaving the regulations with virtually no chance to be enforced.

Another possible modification to the Bill could be a provision instructing the private property owner to give written notice of his claim, settlement offer, and ripeness decision to the public interest groups, individuals, and organizations that have expressed an interest. With that change, it seems that the interested groups would be prepared to defend the claim and would be kept abreast of developments on the issue. In addition, an exhaustion provision could be added so that the complaining private property owner would exhaust all remedies before going to court. This would ensure that his claim is ripe, that the final decision has been made with respect to the use of his property, and that he did not go to court before he investigated whether or not an alternative remedy could be reached.

A mediation provision would be a possible alternative remedy. Through mediation, perhaps a compromise or settlement could be reached, rather than going through the costly process of court proceedings. A provision preventing the complaining property owner from taking his claim to court until after a settlement is offered and rejected and after mediation fails could help avoid unnecessary litigation.

Furthermore, the word “variance” should be omitted from the Bill in order to preserve an ordinance or regulation’s purpose and to avoid a violation of it even if a taking occurs. For example, consider the building height restrictions hypothetical mentioned above. If the limit was ten stories and the property owner wanted to build twenty-five, the property owner may obtain a variance, compromising the height restriction. The preferable outcome would be for the property owner to be compensated under the constitutional standard rather than to be given a variance. However, this approach would still have caused exorbitant expenses.

212. For information on proposed drafts of Senate Bill 528, see Real Property Rights Task Force, at http://www.scstatehouse.net/proptask.htm (last visited Oct. 17, 2002).
213. Hearings, supra note 6.
F. General Observations Regarding Takings Legislation and the Perspectives

A public hearing in front of the Private Property Rights Task Force on private property rights in the South Carolina State House, raised a number of observations, as proponents and opponents of takings legislation expressed their views and shared their stories.\textsuperscript{214} Proponents of Senate Bill 528 stated, often in conclusory terms, that “we deserve protection” and “our rights are being trampled on.”\textsuperscript{215} However, no one gave evidentiary support for their rhetorical statements. The proponents came across as short-sighted. In contrast, opponents to the Bill cited specific examples of possible outcomes that would result under the Bill and the negative impacts of the outcomes.\textsuperscript{216} The opponents clearly enunciated their concerns and supported them with examples.

It becomes clear that no one opposes private property rights nor wants to take them away. Opponents of the Bill think it is an incorrect protection of private property rights and should be amended to be more effective and balanced in its protections. Senate Bill 528 did not achieve the proper balance between private rights and necessary regulations. Although the private property owner has rights, they are not absolute ones that he may exercise to the detriment of society. To draft acceptable state takings legislation, we must become more aware of the changing times and growth in our area. We must look into the future to view how our current decisions will impact us and future generations.

IV. CONCLUSION

South Carolina is a beautiful state with a rich environment and lush landscapes. The South Carolina Private Property Rights Protection Act as Senate Bill 528 would have changed the look and feel of the state. It sounded like a good proposition, protecting the private property owner, but who were we really protecting? Big corporate developers would have claimed unnecessary hardship incessantly when and if South Carolina citizens wanted to do something about managing growth or preserving the environment and community well-being in the state. Our pockets would have been empty and our land would have been covered with buildings and parking lots. The untouched, pristine areas are fast disappearing. We must catch them before they are gone. Senate Bill 528 would cause an unnecessary hardship on the public and the environment if implemented, at everyone’s cost. Proposed legislation in the future must avoid its mistakes.

\textit{Courtney P. Stevens}

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\item \textsuperscript{214} Id. at 213. Members of the task force are Senator Larry A. Martin, Senator Luke A. Rankin, Senator Maggie Glover, and Senator James H. Ritchie, Jr.
\item \textsuperscript{215} Id.
\item \textsuperscript{216} Id.
\end{itemize}