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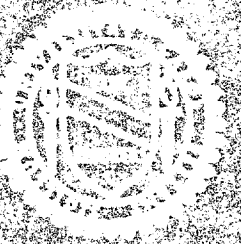

Public Rights and Coastal Zone Management

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PUBLIC RIGHTS AND COASTAL ZONE MANAGEMENT

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Until recently, the coastal zone of the nation was considered a limitless resource to be freely used by man for recreation and profit. Settlement and industrialization resulted in uncoordinated use of the coastal areas and in degradation, filling, diking and draining of many of the coastal wetlands. The pressures of conflicting use patterns have finally resulted, however, in the realization that governmental management is necessary to preserve the essential characteristics of these fragile and beautiful areas. Ecologists have also called attention to the irreplaceable value of the principal ecosystem of the coastal zone, the estuary, with its associated beaches and marshlands.

An estuary has been defined as a "semi-enclosed coastal body of water which has a free connection with the open sea."[1] There is usually some tidal action within an estuary, causing sea water to be mixed with fresh water from land drainage.[2] Estuaries exist at the mouths of rivers, behind barrier islands, and along coastal bays where the land meets the sea and there is a fresh water inflow.[3] The maintenance of the estuary as an ecosystem depends on protecting three essential parameters: the shape of the estuary, the water properties of the estuary and the circulation of water in the estuary.[4] The shape of the estuary refers to its size, its form, and the character and topography of its bottom.[5] The water properties include the chemical content, salinity, temperature, and transparency of the water.[6] The circulation pattern within the estuary

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[1]E. ODUM, FUNDAMENTALS OF ECOLOGY 352 (3d ed. 1971). For a readable guide to estuarine ecology *see* J. TEAL & M. TEAL, LIFE AND DEATH OF THE SALT MARSH (1969). *See also* ESTUARIES (G. Lauff ed. 1967).

[2]E. ODUM, *supra* note 1, at 352.

[3]Butman, *Land Use—Estuarine Interactions: Some Considerations*, in PAPERS ON NATIONAL LAND USE POLICY ISSUES PREPARED FOR THE UNITED STATES SENATE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, 92d Cong., 1st Sess. 163 (1971) [hereinafter cited as PAPERS].

[4]*Id.* at 165.

[5]*Id.* at 166.

[6]*Id.* at 165-66.

is determined by the direction and speed of currents and how fast estuarine water is replenished by new river water and replaced by seawater.[7]

Professor Pritchard has classified estuaries into four types: the drowned river valley such as Chesapeake Bay on the Atlantic coast of the United States; the fjord-type estuary, which consists of deep coastal indentures gouged out by glaciers, such as occur in Norway, British Columbia and Alaska; the bar-built estuary, characterized by shallow basins enclosed by a chain of barrier islands and broken at intervals by inlets, such as is typical along the coast of North Carolina; and estuaries produced by tectonic processes, characterized by coastal indentures produced by geological faulting or local subsidence, such as San Francisco Bay.[8] Professor Odum would add a fifth type of estuary, the river delta, such as the mouth of the Mississippi or the Nile.[9]

The physical characteristics of an estuary make it an ideal place for the formation of the salt marsh, which is an integral part of the estuarine system. The salt marsh is typically formed at the border of the estuary where sediment that has been eroded from the continent settles out from the water, causing the bay bottom to rise to the level of low tide. The marsh grows vertically upward and laterally outward to cover virtually the entire area of sediment deposit.[10] A drainage system develops in the form of small creeks that follow the previous channels of the bay, and the entire area is regularly innundated by the tides. The major plants characteristic of the salt marsh in North America are cord grass (*Spartina alterniflora*) and marsh hay (*Spartina patens*), although mud algae and phytoplankton are also important.[11]

Although experts formerly considered estuaries a "wasteland,"[12] they now recognize that because of the kinds and variety of producer organisms in the salt marsh and because of the tidal action that removes waste and transports food and nutrients, the estuary is one of the most highly productive areas on earth. Because of the unique abundance of

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[7] *Id.* at 165.

[8] Pritchard, *What Is An Estuary: Physical Viewpoint*, in ESTUARIES (G. Lauff ed. 1967).

[9] E. ODUM, *supra* note 1, at 352-54.

[10] Tripp, *The Ecological Importance of a Salt Marsh*, in PAPERS 169.

[11] *Id.*

[12] Examples of this attitude can be found in case law. Typical is Oldfield v. Stoico Homes, Inc., 26 N.J. 246, 139 A.2d 291 (1958) where the court, in construing a condition contained in a deed to wetland property, chose a fee simple subject to a condition subsequent rather than a fee simple determinable so as to encourage draining of the marsh. The court found a public policy in favor of draining and filling salt marshes.

nutrients and the sheltered condition of the estuary, many species of fish inhabit it during their entire life cycle. Ocean species of finfish and shellfish use the estuaries either as a nursery ground or as a zone of passage to fresh water rivers.[13] Approximately ninety percent of the total harvest taken by commercial fishermen in the United States is dependent on the estuaries.[14] The salt marshes are essential to coastal fisheries since at least sixty species of fish are dependent on the estuarine ecosystem at some stage in their life cycle.[15] These include shrimp, flounder, menhaden, bluefish, anchovies, and striped bass.[16] In addition, many species of birds and mammals could not exist without the estuaries. This area is inhabited by ducks, herons, egrets, rails, ospreys, raccoons, muskrats, and deer.[17] The estuarine environment is also essential as a resilient buffer zone that protects the land against erosion from storm waves and saves the expense of erecting artificial barriers to protect coastal structures and cropland.[18] The marshes are essential for the maintenance of coastal navigation. In their natural state, marshes trap and hold sediment that would otherwise be deposited in harbors and navigation channels.[19]

Legal and institutional innovations are needed to protect estuarine and coastal resources. The purpose of this article is to examine the principal legal aspects of coastal zone resource management. After reviewing present law relating to public rights in the lands and waters of the coastal zone and existing patterns of legislation for coastal resource preservation, suggestions will be advanced for the creation of a coastal zone management agency and development of a plan for managing coastal resources. In order to provide meaningful analysis without unduly prolonging the length of this article, discussion will center on the law of one particular jurisdiction, the State of North Carolina.[20] The

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[13]E. ODUM, *supra* note 1, at 356.

[14]Tripp, *supra* note 10, at 172. *See also* 3 FISH & WILDLIFE SERV., U.S. DEP'T OF THE INTERIOR, NATIONAL ESTUARY STUDY, H. R. DOC. No. 286 Part II, 91st Cong., 2d Sess. 115-116 (1970).

[15]Tripp, *supra* note 10, at 172.

[16]*Id.*

[17]*Id.* at 170.

[18]*Id.* at 173.

[19]*Id.*

[20]The Pamlico-Albemarle-Currituck Sound estuarine area of North Carolina is the second largest estuarine complex on the east coast of the United States. It consists of four major river systems which flow into a huge shallow basin separated from the ocean by North Carolina's Outer Banks, a series of barrier islands broken by inlets through which salt water can mix with the fresh

principles developed, however, may be applied by analogy to other coastal states.

I. PUBLIC RIGHTS IN THE COASTAL ZONE

In the contemporary concern over the development of coastal zone management programs, it is easy to overlook the fact that a body of law already exists that provides substantial public rights in the land and water resources of the estuaries and the coastal zone. Many of the relevant legal doctrines date from medieval English and even Roman times.[21] These rights should properly form the point of departure for any coastal zone management program. Public rights can be derived either through state ownership of submerged lands or by reason of several state law doctrines that are not dependent upon ownership.

A. Public Rights Derived from State Ownership

1. *Federal Law.* In order to understand the extent of existing public rights in the lands and waters of the coastal zone, it is first necessary to discuss the problem of legal title to the beds of the rivers, sounds, and seas of this area, because to the extent such lands are owned by the state, their resources can be managed for the benefit of the public. Some of the law bearing on this issue can be regarded as relatively settled. As between the states and the federal government, it has long been established that the states own tidelands and the beds of bays, navigable rivers, and lakes.[22] By the Submerged Lands Act,[23] Congress in 1953 confirmed the states' title to the beds of the marginal seas along a belt that extends three miles[24] seaward from the ordinary low water

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water that drains from the land. The salinity levels of the sounds vary greatly, ranging from almost fresh water in Currituck Sound to virtual seawater in Core Sound. Tidal action is about three feet near the inlets but is barely noticeable in the further reaches of the sounds. Habitat within the ecosystem includes hardwood swamps in low areas within the flood plain of fresh water streams, extensive salt marsh complexes, mud flats, vegetated shallows and the open waters of the sounds. The area thus supports a wide variety of high value fish and wildlife resources and has been only slightly modified by man. 3 FISH & WILDLIFE SERV., *supra* note 14, at 113-18.

[21]*See* Comment, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970).

[22]Borax Consol., Ltd. v. City of Los Angeles, 296 U.S. 10 (1935); Shively v. Bowlby, 152 U.S. 1 (1894); Barney v. City of Keokuk, 94 U.S. 324 (1876); Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

[23]43 U.S.C. §§ 1301-15 (1970).

[24]As to the Gulf coast of Florida and Texas the grant extended three marine leagues, approxi-

mark.[25] More important for the purpose of determining the extent of public rights, however, is the question of the ownership of submerged lands as between the state and private parties. For this purpose, it is necessary to understand the origin of the doctrine of state ownership of submerged land.

Analysis of the law of ownership of these lands must begin with English common law. About the time of the Magna Carta, it became established as common law that title to lands over which the tides ebbed and flowed was in the King. Such lands were held by the King in *jus publicum*, in trust for the common use and benefit of the public.[26] This concept of sovereign ownership of the tidelands and the related public trust doctrine became a part of American law at the formation of the Union.

However, the Supreme Court of the United States has modified and extended the doctrine. The Court first established that upon the formation of the United States, the original thirteen states succeeded to the ownership rights in submerged lands formerly held by the British Crown.[27] The test adopted by the Supreme Court to determine the extent of such ownership rights was the concept of "navigability."[28] The definition of "navigable" has caused some difficulty. Navigability for title purposes was originally believed to depend upon whether the waters were affected by the ebb and flow of the tides. *Martin v. Waddell*,[29] the first case dealing with state ownership of the beds of navigable waters considered by the Supreme Court, involved tidelands, and title to lands under Raritan Bay, New Jersey, was held to have passed to the state

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mately ten and one-half miles. United States v. Louisiana, 363 U.S. 1, 36-65 (1960); United States v. Florida, 363 U.S. 121 (1960).

[25]Significant boundary questions between the states and the federal government still remain, however, particularly as to the seaward boundary of the states. Litigation is pending in the United States Supreme Court between the federal government and all the Atlantic coast states to establish offshore boundaries. *See* Krueger, *The Background of the Doctrine of the Continental Shelf and the Outer Continental Shelf Lands Act*, 10 NAT. RES. J. 442, 454-55 (1970).

[26]The history and development of the English doctrine is recounted in Comment, 79 YALE L.J., *supra* note 21, at 764-74. In addition, *see* 2 A. SHALOWITZ, SHORE AND SEA BOUNDARIES 518-19 (1964). *See also* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

[27]Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842). When the colonies formed the American Union, they did not surrender any property rights in submerged lands, but did grant to the United States the power to regulate commerce with foreign nations and among the several states. U.S. CONST. art. I, § 8.

[28]Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842).

[29]41 U.S. (16 Pet.) 367 (1842).

upon the formation of the American Union.[30] Moreover, the Supreme Court in 1825 had held that federal admiralty and maritime jurisdiction did not extend to the Missouri River because it was above the ebb and flow of the tide.[31] In 1851, however, the Court rejected the ebb-and-flow test for purposes of determining admiralty jurisdiction and held all navigable-in-fact waters constituting a link in interstate or foreign commerce to be within the admiralty and maritime jurisdiction of the United States, whether or not those waters were affected by tides.[32]

The next landmark Supreme Court case involving the concept of navigability was decided in 1870. In *The Daniel Ball*,[33] which involved the power of the federal government to regulate commerce on a relatively small inland river, the Court clearly adopted the "navigable-in-fact" test and gave it a new function. It stated that for commerce clause purposes inland waters must be regarded as navigable-in-fact "when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[34]

In 1876, the Court finally clarified the relationship between the test of navigability for the purposes of federal admiralty jurisdiction and the extent of federal power to regulate interstate commerce and the test of navigability to determine title of submerged lands. *Barney v. City of Keokuk*[35] involved the ownership of lands under the Mississippi River in Iowa. Although no tidelands were involved, the Court held the river to be navigable for title determination purposes, and ownership was found to be in the State of Iowa.[36] The Court used the same test of navigability that it had used in *The Daniel Ball* and made it clear that this test is the American rule.[37] The new navigable-in-fact test was, however, an extension rather than a complete rejection of the ebb-and-flow test, since the latter still applied to title determination questions

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[30] *Id.* at 416.

[31] The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825). Shalowitz contends that the Supreme Court incorrectly inferred from English law that ebb and flow was the test of navigability. He believes that in England the concept of navigable waters included rivers and lakes not affected by the action of the tides. *See* 2 A. SHALOWITZ, *supra* note 26, at 519.

[32] The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 454 (1851).

[33] 77 U.S. (10 Wall.) 557 (1870).

[34] *Id.* at 563.

[35] 94 U.S. 324 (1876).

[36] *Id.* at 338.

[37] *Id.*

involving the tidelands.[38] When either of these two tests are met, state title extends beyond the channels actually used for navigation to the lands beneath the shallows at the limits of the waters;[39] in the case of tidelands, title extends to the line of mean high tide,[40] while in the case of inland navigable waters under the navigable-in-fact test, title extends to the mean high water mark.[41]

Thus it can be maintained that at the time North Carolina became part of the American Union as one of the thirteen original states it acquired title (1) to tidelands below the ordinary high water mark, including marshlands and shallows, and (2) to land to the mean high water mark beneath inland waters that were navigable-in-fact at that time.[42] These lands were held in trust for the people of the state.

2. *State Law.* Although federal law determines the extent of the submerged lands each state acquired upon its admission to the Union, the subsequent disposition of such lands is a matter of state law.[43] Thus in order to determine the present extent of any state's ownership of submerged lands it is necessary to explore the law of the particular state from the time it became a state to the present. Since the law of each state has developed separately, an analysis must be made on a state-by-state basis. This article will consider primarily the law of North Carolina.

In general, there are two ways in which title to state-owned public trust lands could have passed into private ownership pursuant to state

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[38]*Id. See* Shively v. Bowlby, 152 U.S. 1, 43 (1894); Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 435-36 (1892).

[39]United States v. Turner, 175 F.2d 644, 647 (5th Cir.), *cert. denied*, 338 U.S. 851 (1949).

[40]Borax Consol., Ltd. v. City of Los Angeles, 296 U.S. 10, 26-27 (1935). There are some exceptions to this general rule. Pre-statehood grants by the Crown in the case of the colonies or by the United States in the case of the territories are valid. In some New England states, private owners took title under colonial ordinances to coastal lands to the low-tide mark or one hundred rods of tideland, whichever was less. *See* discussion in 1 WATERS AND WATER RIGHTS § 37.2(C), at 207 (R. Clark ed. 1967).

[41]Barney v. City of Keokuk, 94 U.S. 324, 336 (1876).

[42]New states entering the Union subsequent to the adoption of the Constitution were admitted on an "equal footing" with the original states and thus acquired the same ownership rights in the tidelands and in the lands under inland navigable waters. Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845). The legal test for determining state ownership of submerged lands at the time of admission to the Union is a matter of federal not state law. United States v. Oregon, 295 U.S. 1, 14, 27 (1935); United States v. Utah, 283 U.S. 64, 75 (1931); United States v. Holt State Bank, 270 U.S. 49, 55 (1926).

[43]Shively b. Bowlby, 152 U.S. 1 (1894); Barney v. City of Keokuk, 94 U.S. 324 (1876); Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845).

law: (1) an express conveyance or grant made by the state to a private owner pursuant to state law or (2) legal error, when the state has regarded waters as non-navigable and has held the bed to be private property even though the waters were navigable under the federal test for title and bed title was actually acquired by the state upon its admission to the Union.[44] In the latter case, title would pass into private ownership through erroneous state judicial doctrine.[45]

(a) *State Transfer of Public Trust Land.* Unlike some states,[46] North Carolina has never made any general transfer of its public trust lands to private individuals. Throughout the history of the state, however, particular tracts of such lands have been sold or granted to private owners in accordance with state law. The extent of such grants is unclear, however, because of the ambiguity of the statutes under which the grants have been made.

Until 1959 the principal means for acquiring state lands was through compliance with the entry-and-grant laws.[47] The initial entry statute of 1777 provided that in surveys of land on navigable waters the waters were to form one side of the survey.[48] However, navigability was not defined. In *Tatum v. Sawyer*,[49] the North Carolina Supreme Court interpreted this statute to mean that lands under navigable waters were not subject to entry, and in *Wilson v. Forbes*,[50] the court stated that the term "navigable waters" as found in the entry-and-grant statute included inland non-tidal waters as well as waters affecetd by the ebb and flow of the tide. The court declined, however, to define the term "navigability."[51] In 1825-26, the Literary Board of North Carolina was given

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[44]C. MEYERS & A. TARLOCK, WATER RESOURCE MANAGEMENT 793 (1971). Title could also pass into private ownership through fraud. *Id.*

[45]*Id.*

[46]The General Assembly of Georgia has enacted legislation purporting to grant to owners of the abutting land all the non-navigable tidewaters in the state and, in the case of navigable tidewaters, to extend the title of the abutting owner to the low water mark. GA. CODE ANN. § 85-1309 (1970). The effect of this grant is in dispute. *See* Note, *Regulation and Ownership of the Marshlands: The Georgia Marshlands Act*, 5 GA. L. REV. 563, 574-75 (1971).

[47]A comprehensive review of the history of these laws can be found in Rice, *Estuarine Land of North Carolina: Legal Aspects of Ownership, Use and Control*, 46 N.C.L. REV. 779 (1968) [hereinafter cited as Rice].

[48]Ch. 1, § 9 [1777] N.C. Sess. L., 24 THE STATE RECORDS OF NORTH CAROLINA 45-46 (W. Clark ed. 1905).

[49]9 N.C. 226 (1822).

[50]13 N.C. 30 (1828).

[51]*Id.* at 35.

control over all vacant and unappropriated "swamp lands,"[52] but entry of such lands was prohibited except in the case of lands under fifty acres located between the lines of previously granted lands.[53] The term "swamp lands" was not defined, however, although some public trust lands were undoubtedly involved. In 1830-31, the North Carolina General Assembly opened to entry marshlands in which the quantity of land in any one marsh did not exceed two thousand acres and the lands involved had not previously been surveyed by the state.[54] Thus, although the prohibition against entry of land under inland and tidal navigable waters was still operative, it was possible after the passage of these two amendments to enter and obtain title to either of the two categories of marshland.

In 1837 the North Carolina entry-and-grant law was reorganized, especially as it pertained to swamplands. In order to implement a legislative policy of draining and reclaiming vacant and unappropriated swamplands to provide funds for the common schools, the Literary Board was given wide powers. The Board's control over the disposition of such lands was reaffirmed.[55] It was also provided that all deeds granted prior to 1837 had to be registered in the county where the land was located; any deed not registered within twelve months was null and void, and title reverted to the state.[56] Swamplands of not more than fifty acres situated between previously entered land and swamplands not exceeding two thousand acres which had not yet been surveyed by the state were still open for entry and grant. In addition, the Literary Board was given the power to survey and reclaim swamplands and sell them at public auction.[57] Moreover, the 1837 law omitted the methods provided in the 1777 act for surveying lands bordering on navigable waters. This oversight was corrected in 1846-47,[58] but it has been held that from 1837 until 1847, only lands beneath tidal waters were exempt from entry.[59] In 1881, the Literary Board was replaced by the Board of Education, which succeeded to all the powers formerly exercised by the

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[52]Ch. 1, [1826] N.C. Sess. L. 3.

[53]Ch. 6, [1826] N.C. Sess. L. 5; Ch. 6, [1827] N.C. Sess. L. 13.

[54]Ch. 12, [1830] N.C. Sess. L. 15.

[55]Ch. 23, § 3, [1836-37] N.C. Sess. L. 131.

[56]Ch. 23, § 10, [1836-37] N.C. Sess. L. 134.

[57]Ch. 23, § 5, [1836-37] N.C. Sess. L. 132.

[58]Ch. 36, § 1, [1846-47] N.C. Sess. L. 97.

[59]Hatfield v. Grimsted, 29 N.C. 138 (1846); Resort Dev. Co. v. Parmele, 235 N.C. 689, 71 S.E.2d 474 (1952).

Board.[60] The dual system of sale and entry and grant remained in effect until 1959, when the North Carolina General Assembly abolished the entry and grant system in favor of a procedure of direct sale and lease of state lands. The 1959 State Lands Act[61] provides that lands under waters navigable-in-fact or beneath the Atlantic Ocean within three miles of the coast may not be conveyed; only easements may be acquired by private parties.[62] "Swamp lands," however, may still be sold in fee.[63]

It is evident, therefore, that some public trust lands have been sold or granted by the state and can be validly claimed by private parties.[64] The present extent of private claims to public trust land is unclear. North Carolina attempted to solve the problem in 1965 by requiring registration on or before January 1, 1970, of all claims of title to any part of the bed lying under navigable waters and any right of fishery in navigable waters superior to that of the general public.[65] At this writing the claims filed have been sorted and plotted on maps, but their validity has not been determined.[66] It would seem that this registration statute offers at best only a partial solution to the problem. It is doubtful whether failure to register a claim could constitutionally divest an otherwise valid title.[67] Moreover, the statute employs the ambiguous term "navigable waters" as the criterion for claims that had to be registered.

It is thus probable that the validity of private claims to public trust lands, whether tidal marshes or lands under navigable waters, can only

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[60]Ch. 200, [1881] N.C. Sess. L. 371.

[61]N.C. GEN. STAT. § 146-1 (1964).

[62]*Id.* §§ 146-3, -12 (1964).

[63]Id. §§ 146-3, -4 (1964).

[64]There are also other bases under which ownership claims may be made. Title may be asserted under a grant from the Crown or a Lord Proprietor during the colonial or pre-colonial period, but the validity of such a claim is questionable. *See* Comment, *Defining Navigable Waters and the Application of the Public-Trust Doctrine in North Carolina*, 49 N.C.L. REV. 888, 907-08 (1971) [hereinafter cited as *Defining Navigable Waters*]. Claims based on adverse possession are also doubtful. *See* State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969). Express legislative grants have been recognized as valid, however. *See* Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 177 S.E.2d 513 (1970). Very few such grants have been made. Rice 805-06. Finally, the state has a long established practice of leasing submerged lands for the cultivation of shellfish. Such leases are valid, but the ownership of the land remains in the state. *See id.* at 794-95, 803-04.

[65]N.C. GEN. STAT. § 113-205 (1966). This act was amended in 1971 to restrict the scope of the registration requirement to coastal waters. *Id.* § 113-205 (Supp. 1971).

[66]Interview with Dr. Thomas Linton, Commissioner, North Carolina Bureau of Sport and Commercial Fisheries, in Raleigh, N.C., May 18, 1972.

[67]*See* discussion in Rice 795.

be settled on a case-by-case basis that considers the law in effect at the time of the grant or sale in question. It is clear, however, that the private claimant to tidal marshes has a heavy burden of proof. In *State v. Brooks*,[68] the North Carolina Supreme Court stated that the private party must carry the burden of showing a " 'connected chain of title from the sovereign to (them) for the identical lands claimed by (them).' "[69] Any missing link in the chain of title will invalidate the claim.[70] It is doubtful whether many private claimants to marshland will be able to meet this strict test.[71]

(b) *Judicial Treatment of the Title Test.* In order to determine the present extent of state ownership of submerged lands, it is also necessary to look at the state test for title in order to determine whether lands originally owned by the state have passed into private ownership through judicial construction. Two writers have extensively analyzed the law of North Carolina regarding the issue of navigability to determine title to submerged lands, and they have come to different conclusions. Professor Rice,[72] after a thorough review of the North Carolina cases, concluded that the common law tidal ebb-and-flow test has been rejected by the North Carolina Supreme Court and that the navigable-in-fact rule has become the single test of navigability. He defines the test as "navigability in fact by any form of vessel or water transport common to the times."[73] Earnhardt, on the other hand, partially rejects

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[68]279 N.C. 45, 181 S.E.2d 553 (1971).

[69]*Id.* at 50, 181 S.E.2d at 556.

[70]*Id.* at 53, 181 S.E.2d at 557.

[71]Another factor in determining title is the extent of changes in boundaries or water levels due to drainage and land fill operations, accretion, erosion, reliction and avulsion. The legal issues involved are to be determined according to the law of the particular state within which the property is located. Shively v. Bowlby, 152 U.S. 1 (1894). If the state has expressly or impliedly acquiesced in the filling of public trust lands, it may be estopped from asserting any public rights in the lands. *See* City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970). North Carolina and most other states follow the general rule that when the location of the margin of a stream or other body of water which constitutes the boundary of a tract of land is gradually changed by accretion, erosion or reliction, the margin as changed remains the boundary line of the tract. Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 304, 177 S.E.2d 513, 517 (1970). But title to land raised from navigable waters vests in the littoral or riparian owner when he does the filling himself with the permission of the state or when the fill is for the purpose of reclaiming lands lost by natural causes. N.C. GEN. STAT. § 146-6 (1964).

[72]*See* Rice: *Defining Navigable Waters*. Studies have also been made of the laws of other states on this issue. *See* Clineburg & Krahmer, *The Law Pertaining to Estuarine Lands in South Carolina*, 23 S.C.L. REV. 7 (1971); Note, 5 GA. L. REV., *supra* note 46; Comment, *Maryland's Wetlands: The Legal Quagmire*, 30 MD. L. REV. 240 (1970).

[73]Rice 802.

Rice's conclusion and states that the navigable-in-fact test may be supplemental to the ebb-and-flow rule.[74]

Although the North Carolina law cannot be regarded as settled on this issue, Earnhardt's view is probably correct. The navigable-in-fact test was adopted to protect the state's title to the beds of inland navigable waters unaffected by the tides; the ebb-and-flow rule was rejected only insofar as it would preclude state ownership of lands under inland navigable waters. Tidal ebb and flow is still determinative of ownership of the tidelands of the foreshore and the salt marshes unless there has been a valid grant or conveyance by the state. Navigability-in-fact is the test for title of inland non-tidal waters.

This conclusion is supported by the recent decision of the North Carolina Supreme Court in *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*,[75] which was decided subsequent to Rice's article. In that case the court was called upon to determine the dividing line between the property of the state and that of the littoral private owner. The lands involved were shorelands fronting on the Atlantic Ocean. The court held that with respect to the "foreshore," which it defined as "the 'strip of land between high-and-low-tide lines,' "[76] private property ends at the mean high tide mark.[77] The court called this a "long established rule."[78]

It is undeniable, therefore, that the ebb-and-flow test still has validity in North Carolina. The critical question is whether this rule is the applicable test for title for all tidelands or has been limited in North Carolina to ocean front lands. Although no certain answer can be given until the matter is clarified by the North Carolina Supreme Court, there are strong indications that the ebb-and-flow test for title is applicable to all tidal areas. In *Carolina Beach* the court did not distinguish between ocean-front tidelands and other tidelands,[79] and such a distinction would be very difficult to apply in practice. Moreover, in reaffirming the mean-high-tide rule, the court cited a federal case, *Borax Consoli-*

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[74] *Defining Navigable Waters* 907.

[75] 277 N.C. 297, 177 S.E.2d 513 (1970).

[76] *Id.* at 301, 177 S.E.2d at 516.

[77] The court cited the decision of the United States Supreme Court in Borax Consol., Ltd. v. City of Los Angeles, 296 U.S. 10 (1935), in which it was held that mean high tide is the average height of all the high waters at that place over a period of 18.6 years. *Id.* at 26-27.

[78] 277 N.C. at 302, 177 S.E.2d at 516.

[79] The decision only involved oceanfront beachlands, however.

dated, Ltd. v. Los Angeles.[80] This decision, in which the United States Supreme Court defined the mean-high-tide rule, involved tidelands situated in the inner bay of San Pedro, now a part of Los Angeles Harbor.[81] Furthermore, it is difficult to believe that the North Carolina Supreme Court has adopted a legal test for ownership that is more restrictive than the common law test. The whole thrust of both federal and North Carolina law has been to adopt a more expansive test for title than that of English law. As early as 1828, the North Carolina Supreme Court rejected the ebb-and-flow test as inapplicable to inland waters and stated that such waters are navigable for title purposes if they are wide and deep enough for "sea vessel" navigation.[82] Yet the ebb-and-flow test was applied to tidal waters in 1846.[83] In *State v. Glen,*[84] the court affirmed the rejection of the ebb-and-flow test as the exclusive test of navigability,[85] but in a summary of the law, clearly stated a dual test of navigability for title purposes. The "sea vessel" test applied to inland waters, but the tidal test still applied to the "the shore . . . between the high and low water" and to "all the bays and inlets on our coast, where the tide from the sea ebbs and flows."[86]

Decisions subsequent to *Glen* have modified this dual test somewhat but have kept it essentially intact. In *Home Real Estate & Insurance Co. v. Parmele,*[87] the court was called upon to determine the ownership of two tracts of salt marsh beneath the waters of a tidal sound. The court applied the "sea vessel" test of navigability and held that the lands were not covered by navigable waters.[88] This case has been called the "first clear repudiation" of the common law ebb-and-flow test,[89] but this is incorrect. The decision is consistent with *Glen* in that the rejection of the tidal test is to emphasize that it is not the sole test of navigability. But navigability by sea vessels was only one branch of the legal test for title to submerged lands, and in *Home Real Estate & Insurance Co.*, the court clearly reaffirmed the ebb-and-flow test for

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[80]296 U.S. 10 (1935).
[81]*Id.* at 12.
[82]Wilson v. Forbes, 13 N.C. 30, 35 (1828). *See also* Collins v. Benbury, 25 N.C. 277 (1842).
[83]Hatfield v. Grimsted, 29 N.C. 139 (1846).
[84]52 N.C. 321 (1859).
[85]*Id.* at 325.
[86]*Id.* at 333.
[87]214 N.C. 63, 197 S.E. 714 (1938).
[88]*Id.* at 68, 197 S.E. at 718.
[89]Rice 800.

title and stated that "title to tidelands is in the state."[90] The particular parcels of tidelands involved were held to be in private ownership only because they had been validly conveyed in fee by the state. The area was held to be non-navigable only as a matter of interpretation of the relevant statutory pattern which allowed grants and sales of marshland but prohibited conveyances of lands under navigable waters. In the face of direct statutory authorization giving the Literary Board and the Board of Education the power to sell marshland, the court was compelled to hold the area involved non-navigable under the statute.[91] The *Home Real Estate & Insurance Co.* case should not be interpreted, therefore, as a complete rejection of the tidal test for determining state public trust ownership of submerged lands.

The next significant North Carolina case, *Resort Development Co. v. Parmele*,[92] reinterpreted the sea vessel navigation branch of the dual test of public trust state ownership of submerged lands. The court stated that the test of navigability was whether the waters are "navigable in fact" and omitted the requirement in prior cases of sea vessel navigability.[93] Applying this test, the court stated that the area involved, marshlands covered at high tide, was navigable-in-fact, presumably because the waters adjoining the marshlands were capable of being used by pleasure and commercial vessels.[94] The court's holding, however, was based on the ebb-and-flow test and clearly assumes that with regard to the tidelands, the common law ebb-and-flow test for title survived the rejection of the tidal test in the early cases involving non-tidal bays and sounds.[95] The court held that title to the marshlands was in the state and could not have been granted by it under the laws existing in 1841, the year in which the land was purported to be conveyed into private ownership.[96] The difference in the result of *Home Real Estate & Insurance Co.* and *Resort Development Co.* can be explained not on the basis of different approaches to the continuing validity of the ebb-and-flow test,

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[90] 214 N.C. at 68, 197 S.E. at 718.

[91] *Id.* at 69-70, 197 S.E. at 718-19. This was also the reason why the non-navigable marshlands in Kelly v. King, 225 N.C. 709, 36 S.E.2d 220 (1945), were held to be privately owned.

[92] 235 N.C. 689, 71 S.E.2d 474 (1952).

[93] *Id.* at 695, 71 S.E.2d at 479. The case is notable because it confuses the navigation for title cases with the easement for navigation cases. *See* Rice 800.

[94] 235 N.C. at 691, 695, 71 S.E.2d at 476, 479; *see Defining Navigable Waters* 905.

[95] 235 N.C. at 696-97, 71 S.E.2d at 480. The early case of Wilson v. Forbes, 13 N.C. 30 (1828), "rejected" the tidal test, but the court assumes that the tidal test was in effect in 1841.

[96] 235 N.C. at 697, 71 S.E.2d at 480.

but because they involved different statutory limitations on the transfer of public trust lands into private ownership.

A third Parmele case, *Parmele v. Eaton*,[97] was decided by the North Carolina Supreme Court in 1954. This case also involved tidal marsh, and the court rejected the ebb-and-flow test and held that navigability-in-fact is the rule in effect in North Carolina.[98] The case is interesting because the court held non-navigable a portion of the same marsh that was held navigable in *Resort Development Co.* Again, however, the seeming contradiction can be explained by the fact that the grants to the private owners involved were made at different times under different statutes. In *Resort Development Co.*, the statute in effect at the time of the grant was interpreted to limit grants of lands under navigable waters under the common law rule,[99] while in *Parmele v. Eaton* the statutory limitation concerned grants of lands under waters navigable-in-fact.[100] The rejection of the tidal test in *Eaton* is thus merely a matter of statutory construction and is not a rejection of the test of state ownership in the absence of a valid grant by the state. In *Eaton*, as in *Home Real Estate & Insurance Co.*, title to the tidal marshes was held to be in private hands because of a statutorily valid conveyance by the state.[101]

The North Carolina Supreme Court has thus adopted legal doctrine that is protective of the public trust lands owned by the state under the federal test upon the formation of the Union. In the absence of a valid transfer or grant by the state, the tidelands and lands under waters navigable-in-fact are owned by the state. In no case has the North Carolina Supreme Court rejected the theory that title to lands over which the tide ebbs and flows, whether oceanfront or non-oceanfront, was originally in the state irrespective of navigability-in-fact. In no case has the North Carolina Supreme Court rejected the theory that title to land under waters navigable-in-fact was originally in the state, whether affected by the tides or not. Thus a dual test of state title to submerged lands prevails, and there has been no judicial abandonment of the public trust in North Carolina.

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[97] 240 N.C. 539, 83 S.E.2d 93 (1954).

[98] *Id.* at 548, 83 S.E.2d at 99. A federal case, Swan Island Club, Inc. v. White, 114 F. Supp. 95 (E.D.N.C. 1953), *aff'd*, 209 F.2d 698 (4th Cir. 1954), also employed the navigable-in-fact test. This doctrine has also received statutory sanction. N.C. GEN. STAT. § 146-64(4) (1964).

[99] 235 N.C. at 696-97, 71 S.E.2d at 480.

[100] 240 N.C. at 548, 83 S.E.2d at 99.

[101] *Id.*

B. Public Rights Not Derived from State Ownership.

It is obvious that important public rights are derived from state ownership of the lands and waters of the coastal zone. To the extent of its ownership, the state can protect and preserve these areas for the public good.[102] State ownership, however, is not the only source of public rights. State law has long recognized several legal doctrines that provide public rights in privately owned lands.

1. *The Public Trust Doctrine.* The history and background of the public trust doctrine has been analyzed at length by several writers,[103] and detailed treatment of the subject is not necessary here. At common law the doctrine operated as a source of public rights and as a restraint upon the English sovereign's ownership of the sea and lands over which the tide ebbed and flowed.[104] Upon the formation of the American Union, the original states succeeded to the ownership of these lands as well as the restraints upon that ownership, as did the other states upon their admission to the Union.[105] As stated above, the United States Supreme Court, through its "rejection" of the ebb-and-flow test for navigability, actually expanded the original public trust ownership of the states to include not only tidelands but waters that are navigable-in-fact.[106] The individual states as sovereigns, however, are free to convey public trust lands[107] and to define the extent of the public rights in such lands,[108] although the trust cannot be completely extinguished.[109]

North Carolina has accepted the public trust doctrine. In *Shepard's Point Land Co. v. Atlantic Hotel,*[110] the Supreme Court of North Carolina quoted with approval the United States Supreme Court decision in *Illinois Central Railroad v. Illinois*[111] that the state has title to sub-

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[102]Private owners of lands riparian or littoral to navigable waters, however, have a right of access to navigable water and the right to construct a pier or wharf as a means of passage from the uplands to the water, but this right is only an easement and cannot be used to interfere with the right of a member of the public to use navigable waters for recreational purposes. *See* Capune v. Robins, 273 N.C. 581, 160 S.E.2d 881 (1968); N.C. GEN. STAT. § 146-12 (1964).

[103]Especially, *see* 1 WATERS AND WATER RIGHTS §§ 33-44 (R. Clark ed. 1967); Sax, *supra* note 26; Comment, 79 YALE L. J., *supra* note 21.

[104]*See* discussion in Comment, 79 YALE L.J., *supra* note 21, at 768-69.

[105]Shively v. Bowlby, 152 U.S. 1 (1894).

[106]Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 435-36 (1892).

[107]*Id.* at 452.

[108]*Id.*

[109]*Id.* at 453.

[110]132 N.C. 366, 44 S.E. 39 (1903).

[111]146 U.S. 387 (1892).

merged lands, but it is a title of a different character than that which it holds in other lands. It is a title held in trust for the people of the state so that they may navigate, fish, and carry on commerce in the waters involved.[112] Although the extent of the public trust ownership of North Carolina is confused and uncertain,[113] the most reasonable interpretation of the cases is that the Supreme Court of North Carolina has affirmed original state ownership of tidelands (whether marshland or oceanfront) and lands under all waters navigable-in-fact,[114] but has upheld grants and conveyances of public trust lands, especially marshlands, because of the statutory distinction in effect during most of the state's history between navigable waters and non-navigable swamplands and marshlands.[115]

Assuming the validity of this analysis, the question then presented is whether a valid grant or conveyance of public trust lands by the state to a private party has the effect of completely extinguishing the public rights that existed in those lands by virtue of the trust, or whether the trust remains as a public easement on private property. The North Carolina Supreme Court has not directly answered this question, although it did approve the statement of the United States Supreme Court in the *Illinois Central* case that the state can no more abdicate its trust over such property than it can abandon its police powers and the preservation of the peace.[116] Furthermore, the generally recognized rule in other jurisdictions and among legal scholars is that the grantee of the state cannot obtain a better title than his grantor and that private persons obtain and hold such lands subject to the trust.[117] The private owner's title is thus severely restricted in that his use of the property must be compatible with the rights of the public and cannot violate the trust. What is a violation of the trust is an *ad hoc* judicial determination depending on the facts of the particular case[118] and the extent of the public trust according to state law. Some courts have allowed dredging

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[112]Shepard's Point Land Co. v. Atlantic Hotel, 132 N.C. 366, 372, 44 S.E. 39, 42 (1903).

[113]*See* text accompanying notes 72-101 *supra*.

[114]*See* text accompanying notes 72-86 *supra*.

[115]*See* text accompanying notes 91-101 *supra*.

[116]Shepard's Point Land Co. v. Atlantic Hotel, 132 N.C. 366, 373, 44 S.E. 39, 42 (1903).

[117]*See* Township of Grosse Ile v. Dunbar & Sullivan Dredging Co., 15 Mich. App. 556, 167 N.W.2d 311 (1969); 1 WATERS AND WATER RIGHTS § 36.4, at 197 (R. Clark ed. 1967); *Defining Navigable Waters* 916.

[118]Township of Grosse Ile v. Dunbar & Sullivan Dredging Co., 15 Mich. App. 556, ____, 167 N.W.2d 311, 316 (1969).

and filling of such lands,[119] but recent decisions in some states have enjoined filling on privately owned lands as inconsistent with public rights.[120]

The California Supreme Court recently defined the scope of public rights in privately held trust land. In *Marks v. Whitney*,[121] the court, after declaring that privately held tidelands are burdened with a public easement for trust purposes, stated that the easement has been traditionally defined to include "the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes."[122] The court also indicated that the public trust is a flexible doctrine that encompasses changing public needs. One of the most important aspects of the trust is the "preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and the climate of the area."[123]

It is unclear whether the North Carolina Supreme Court would accept such a broad characterization of the public trust doctrine. It is probable, however, that at least the traditionally defined public easement burdens privately held trust lands in North Carolina.[124] If so, the controversy over title to these lands[125] is less significant. Public rights exist and should be maintained regardless of public or private ownership.

2. *Public Rights in Waters Over Non-Public Trust Lands.* In states following the ebb-and-flow and commercial navigability-in-fact tests for public trust lands, a question may arise concerning the right of the public to use, particularly for recreational purposes, waters that are non-navigable for title purposes, but which can be used by small boats. A minority of states follow the English common law rule that the public has no rights to use such waters for recreational purposes against the

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[119]*See* Alameda Conservation Ass'n v. City of Alameda, 264 Cal. App. 2d 284, 70 Cal. Rptr. 264, *cert. denied*, 394 U.S. 906 (1968).

[120]Township of Grosse Ile v. Dunbar & Sullivan Dredging Co., 15 Mich. App. 556, 167 N.W.2d 311 (1969); Wilbour v. Gallagher, 77 Wash. 2d 306, 462 P.2d 232 (1969), *cert. denied*, 400 U.S. 878 (1970); *see* Comment, *Private Fills in Navigable Waters: A Common Law Approach*, 60 CALIF. L. REV. 225 (1972).

[121]6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

[122]*Id.* at 259, 491 P.2d at 380, 98 Cal. Rptr. at 794.

[123]*Id.* at 259-60, 491 P.2d at 380, 98 Cal. Rptr. at 794.

[124]*See* State v. Twiford, 136 N.C. 603, 48 S.E. 586 (1904).

[125]*See* text accompanying notes 72-101 *supra*.

owner's objection.[126] Most states, however, allow public use of such waters even though the bed is in private ownership. The extent of the public right depends on the legal theory adopted. Public rights have been upheld for policy considerations,[127] as an incident of state ownership of the overlying waters,[128] because the beds of waters suitable for recreation are impressed with a public trust for that purpose,[129] and because of a public easement of recreation and navigation.[130]

North Carolina has adopted the public easement theory. In a series of cases involving obstructions to navigation, the North Carolina Supreme Court affirmed the public's right to use waters beyond those that are navigable for title or public trust purposes;[131] the court developed another concept of navigability for the purpose of determining when obstructions for navigation should be abated. The broadest formulation of this test was in *State v. Twiford*,[132] in which the court quoted with approval the statement that a public easement exists if water is navigable for pleasure boating even though no craft has been put upon it for trade or agriculture. In later cases, however, especially those in which the North Carolina Supreme Court announced the navigable-in-fact test for title, the public easement cases were confused with the title cases,[133] and the court has not since clarified the distinction between these two different concepts of navigability.

3. *Public Rights and Interests in Uplands in the Coastal Zone.* Much of the land in the coastal zone of North Carolina is in state or federal ownership. Obviously, these lands can be administered with a view toward protecting the resources of the area in the interest of the public. When lands are privately held, no rights of public use can

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[126]The cases are collected in Comment, *Water Recreation—Public Use of "Private" Waters*, 52 CALIF. L. REV. 171, 172 (1964).

[127]Curry v. Hill, 460 P.2d 933 (Okla. 1969).

[128]State Game & Fish Comm'n v. Louis Fritz Co., 187 Miss. 539, 193 So. 9 (1940); State v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945); Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).

[129]Kerley v. Wolfe, 349 Mich. 350, 84 N.W.2d 748 (1957); Branch v. Oconto County, 13 Wis. 2d 595, 109 N.W.2d 105 (1961).

[130]Bohn v. Albertson, 107 Cal. App. 2d 738, 238 P.2d 128 (1951); *see* Fairchild v. Kraemer, 11 App. Div. 2d 232, 204 N.Y.S.2d 823 (1960).

[131]For a good discussion *see* Rice 803.

[132]136 N.C. 603, 48 S.E. 586 (1904).

[133]*See* Swan Island Club v. White, 114 F. Supp. 95 (E.D.N.C. 1953); Parmele v. Eaton, 240 N.C. 539, 83 S.E.2d 93 (1954); Resort Dev. Co. v. Parmele, 235 N.C. 689, 71 S.E.2d 474 (1952); Rice 800.

be created by the state without compensation.[134] However, land use regulations and restrictions can be adopted to prevent undesirable development.[135] Furthermore, common law doctrines may provide a basis for public rights on certain privately owned uplands such as beaches and shorelands. In *State ex rel. Thornton v. Hay*,[136] the Supreme Court of Oregon held that by reason of the common law doctrine of custom,[137] the public had acquired an easement to use the dry sand area between high tide and the line of visible vegetation on all the beaches along the Oregon coast.[138] As a result, private owners are prohibited from enclosing the beach, building improvements, or doing anything to interfere with free public access for recreational purposes.[139] The court also declared a policy in favor of the creation of prescriptive easements in beach land for public recreational use.[140] The California Supreme Court employed a third common law doctrine to find public recreational rights in shorelands. In *Gion v. City of Santa Cruz*,[141] it was held that five years of uninterrupted recreational use by the public constituted an implied dedication by the owners to the public for such use.[142] These common law doctrines have not yet been applied to beach lands in North Carolina.[143]

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[134]U.S. CONST. amend. V. The prohibition against taking private lands without compensation has been held to apply to the states by reason of the fourteenth amendment. Chicago, B. & O. R.R. v. Chicago, 166 U.S. 226, 235-41 (1897). Most state constitutions contain a similar provision.

[135]Zoning regulations have been upheld even though they may diminish the value of one's property. Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *cert. denied*, 371 U.S. 36 (1962); *In re* Parker, 214 N.C. 51, 56, 197 S.E. 706, 710 (1938). For a complete discussion of the line between regulation and taking *see* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

[136]254 Ore. 584, 462 P.2d 671 (1969).

[137]The court, paraphrasing Sir William Blackstone, set out six requirements of custom: (1) long and general usage, (2) without interruption, (3) peaceable and free, (4) reasonable, (5) certain and (6) uniform. *Id.* at 595-97, 462 P.2d at 677.

[138]*Id.* at 587, 462 P.2d at 673.

[139]*Id.* at 587-88, 462 P.2d at 673.

[140]*Id.* at 594, 462 P.2d at 676.

[141]2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970) (per curiam).

[142]*Id.* at 43, 465 P.2d at 59, 84 Cal. Rptr. at 171; *see* Note, *Public Access to Beaches*, 22 STAN. L. REV. 564 (1970).

[143]The doctrine of dedication, which is the intentional appropriation of land by the owner to some public use, is a part of the law of North Carolina. Spaugh v. City of Charlotte, 239 N.C. 149, 79 S.E.2d 748 (1954). However, a dedication to the public must be accepted by a duly constituted governmental authority. Oliver v. Ernul, 277 N.C. 591, 178 S.E.2d 393 (1971). Prescriptive easements are also recognized in North Carolina, but the use must be open, adverse, under claim of right and without consent of the owner. Colvin v. Tallassee Power Co., 199 N.C. 353,

II. Governmental Authority In The Coastal Zone

A. *Existing Patterns of Legislation*

Authority over the coastal zone environment is presently divided among many different agencies of the federal, state and local governments. Typically, agencies and units of government exercise authority that is limited both geographically and substantively. Thus, counties and municipalities have primary control over land-use regulations and solid waste disposal, and separate state agencies are responsible for administering programs for water and air pollution control, water use, highways and transportation, and the sale and lease of state-owned lands. The natural consequence of this fragmented pattern of control is a lack of coordination in governmental decisionmaking and ignorance of the significance and complexity of coastal zone problems.[144]

In recent years, however, coastal states have enacted statutes specifically directed toward estuarine and wetland conservation.[145] North Carolina recently enacted comprehensive legislation to protect sand dunes and marshlands. The Board of Water and Air Resources is authorized to establish a shoreland protection line and to adopt regulations for protection in any county that had not done so by December 31, 1971.[146] Any person who wishes to carry out any excavation or filling project in any estuarine waters, tidelands, marshlands or state-owned lakes must obtain a permit from the Department of Conservation and Development.[147] The permit can be denied if there will be an adverse effect on the use of the water by the public, the value and enjoyment of the property of any riparian owners, the public health, safety and welfare, the conservation of public and private water supplies, or on wildlife and fisheries resources.[148] The Director of the Department of Conservation and Development also has authority after holding public hearings to adopt orders protecting specific marshlands as well as contiguous

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154 S.E. 678 (1930). The common law doctrine of custom is probably the most useful concept for the protection of public rights in the dry sand area of the beaches. *See* discussion in State *ex rel.* Thornton v. Hay, 254 Ore. 584, 595-99, 462 P.2d 671, 676-78 (1969).

[144]*See* Ducsik, *The Crisis in Shoreline Recreation Lands*, in Papers 107, 128.

[145]*See* E. Bradley & J. Armstrong, A Description and Analysis of Coastal and Shoreland Management Programs in the United States (Univ. of Michigan Sea Grant Technical Report No. 20, 1972).

[146]N.C. Gen. Stat. § 104B-16 (1972).

[147]*Id.* § 113-229(a) (Supp. 1971).

[148]*Id.* § 113-229(e) (Supp. 1971).

uplands,[149] but at this writing the authority has not been used.[150] The General Assembly of North Carolina has also appropriated funds for the acquisition of estuarine lands threatened with development[151] and has authorized the preparation of a long range plan for estuarine conservation and management.[152]

Controls adopted in other states vary greatly. Florida law authorizes cities or counties to designate bulkhead lines along or offshore from tidal lands, beyond which no filling or bulkheading is allowed. These bulkhead lines are subject to the approval of the Trustees of the Internal Fund, composed of the Governor and six state cabinet officers.[153] In addition, the 1972 Florida legislature passed several bills establishing statewide land-use planning that requires local governments to adopt regulations guiding development in critical areas and with respect to developments of regional impact.[154] This legislation is, of course, applicable to the Florida coastal zone. Georgia prohibits alteration of any marshland within the estuarine area of the state without a permit from the Coastal Marshlands Protection Agency.[155] Maryland prohibits dredging or filling on state-owned wetlands without a permit from the Board of Public Works and authorizes the promulgation of rules and regulations governing the alteration of private wetlands.[156] Maine,[157] Massachusetts,[158] Rhode Island,[159] and Connecticut[160] also regulate development and alteration of coastal marshlands. Delaware has a unique law that entirely prohibits heavy industry and offshore gas, liquid or solid bulk product transfer facilities along the entire coast of the state.[161] Other manufacturing uses and the expansion of nonconforming industrial uses are allowed only after a permit has been obtained from the

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[149] *Id.* § 113-230 (Supp. 1971).

[150] Interview with Dr. Thomas Linton, *supra* note 66.

[151] Heath, *Estuarine Conservation Legislation in the States*, 5 LAND & WATER L. REV. 351, 357 (1970).

[152] Ch. 1164, [1969] N.C. Sess. L. 1343-44.

[153] FLA. STAT. ANN. §§ 253.122.123 (1962).

[154] Fla. Sess. L. Serv. ch. 72-295, 72-300, 72-317 (1972).

[155] GA. CODE ANN. § 45-140(a) (Supp. 1971); *see* Note, 5 GA. L. REV., *supra* note 46.

[156] MD. ANN. CODE art. 66c, §§ 721-22 (1970); *see* Comment, 30 MD. L. REV., *supra* note 72.

[157] ME. REV. STAT. ANN. tit. 12, §§ 4701-09 (Supp. 1970).

[158] MASS. GEN. LAWS ANN. ch. 130, § 27A (1972); *see* F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 205-26 (1971).

[159] R.I. GEN. LAWS ANN. §§ 2-1-13 to -24 (Supp. 1971).

[160] CONN. GEN. STAT. ANN. §§ 22-7h to-70 (Supp. 1972).

[161] DEL. CODE ANN. tit. 7, § 7001 (1971). For a good analysis of this legislation *see* Note, *Legislation—The Delaware Coastal Zone Act*, 21 BUFFALO L. REV. 481 (1972).

State Planner.[162] An application for a permit must be accompanied by an environmental impact statement evaluating the effect of the proposed use on the natural resources, water quality, fisheries, wildlife, and aesthetics of the area.[163] Any person aggrieved by a decision of the State Planner can appeal to a ten-member State Coastal Zone Industrial Control Board.[164] Washington, through a 1971 law, requires local governments having jurisdiction over shorelines of statewide significance to adopt a master program for the regulation of the shorelines in accordance with guidelines issued by the state.[165]

The federal government has not yet enacted a law dealing with the protection of the coastal zone, but the Rivers and Harbors Act prohibits excavating or filling navigable waters of the United States without a permit from the United States Army Corps of Engineers.[166] In *Zabel v. Tabb*,[167] the Fifth Circuit held that a permit under the Rivers and Harbors Act can be withheld to protect the ecology of the area involved under the authority of the Fish and Wildlife Coordination Act[168] and the National Environmental Policy Act of 1969.[169]

B. *Future Controls: Comprehensive Coastal Zone Management*

Although in most states special legislation relating to the coastal zone has only recently been enacted, new and even more comprehensive laws are being developed. The impetus for a more complete approach is coming largely from the federal government. At this writing the United States Senate has passed a bill to establish a national program for the management, beneficial use, protection, and development of the land and water resources of the nation's coastal zone,[170] and almost identical legislation has been passed in the House of Representatives.[171] Although the details of the program will not be clear until a final bill

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[162]DEL. CODE ANN. tit. 7, § 7005 (1971).

[163]*Id.* tit. 7, § 7002(c).

[164]*Id.* tit. 7, § 7007(b).

[165]WASH. REV. CODE ANN. app. § 90.286x (Supp. 1971), *as amended* Wash. Legislative Serv. ch. 53 (1972).

[166]33 U.S.C. § 403 (1970).

[167]430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

[168]16 U.S.C. §§ 661-66c (1970).

[169]42 U.S.C. §§ 4331-47 (1970).

[170]S. 3507, 92d Cong., 2d Sess. (1972); 118 CONG. REC. S 6672 (daily ed. Apr. 25, 1972). President Nixon has also proposed tax incentives to limit development in the coastal wetlands. *See* THE PRESIDENT'S 1972 ENVIRONMENTAL PROGRAM 95 (Council on Environmental Quality 1972).

[171]H. R. 14146, 92d Cong., 2d Sess. (1972); 118 CONG. REC. H 7087 (daily ed. Aug. 2, 1972).

has been agreed upon and passed, the general thrust of the federal effort can be predicted. The states will continue to have primary responsibility for coastal zone protection,[172] but Federal money will be provided to coastal states for the development and operation of coastal zone management programs,[173] and the states will be assisted in the acquisition and operation of estuarine sanctuaries.[174] The federal legislation will specify in general the components of state management programs,[175] and to be eligible for continued federal aid, each management program must be approved by the Secretary of Commerce.[176] A state must adopt an adequate institutional structure for the administration of its program with the authority to effectuate the controls established.[177]

It is thus likely that all of the coastal states of the nation will soon be enacting comprehensive coastal zone management legislation under the watchful eye of the federal government. This alone, however, does not ensure the success of the project. Unless the new laws are well conceived and carried out, the coastal zone management program will go the way of other federal-state programs for environment protection such as the Federal Water Pollution Control Act of 1965,[178]which has been universally criticized as inadequate.[179] Since the pending federal bills leave the details of coastal zone management to the states, it will be on this level that the battle will be won or lost. It is the purpose of this article to suggest appropriate policies to guide state action.

1. *Protection of Existing Public Rights.* The point of departure in the coastal zone management program of any state should be the recognition that under traditional common law principles, important

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[172]S. 3507, 92d Cong., 2d Sess. § 302(h) (1972); H.R. 14146, 92d Cong., 2d Sess. § 302(h) (1972).

[173]S. 3507, 92d Cong., 2d Sess. § 305(a) (1972); H.R. 14146, 92d Cong., 2d Sess. § 305(a) (1972).

[174]S. 3507, 92d Cong., 2d Sess. § 313(a) (1972); H.R. 14146, 92d Cong., 2d Sess. § 312(a) (1972).

[175]S. 3507, 92d Cong., 2d Sess. § 305(b) (1972); H.R. 14146, 92d Cong., 2d Sess. § 305(b) (1972).

[176]S. 3507, 92d Cong., 2d Sess. §§ 306(c)-(d) (1972); H.R. 14146, 92d Cong., 2d Sess. §§ 306(c)-(d) (1972).

[177]S. 3507, 92d Cong., 2d Sess. § 305(b)(6) (1972); H.R. 14146, 92d Cong., 2d Sess. § 305(b)(6) (1972).

[178]33 U.S.C. §§ 1151-75 (1970).

[179]Especially, *see* Barry, *The Evolution of the Enforcement Provisions of the Federal Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103 (1970); Hines, *Controlling Industrial Water Pollution: Color the Problem Green*, 9 B.C. IND. & COM. L. REV. 553 (1968).

public rights exist in the lands and waters of the coastal area. These rights, which the public possesses by reason of state ownership of submerged lands, the public trust doctrine, custom, and public easement, are at present only vaguely defined and sporadically enforced.[180] As part of the program for coastal zone management, each state should legislatively define and assert existing public rights in the coastal area, declare a policy of protecting such rights and direct the attorney general or some other appropriate official to strictly construe and enforce the rights of the public.

2. *Objectives, Policies and Goals.* Ideally, the development of a coastal zone management program should be accompanied by the formulation of certain objectives, policies and goals, and the program should be implemented according to them. Once these have been agreed upon, the planning and decision-making process can be structured so as to attain them.

Unfortunately, goal-setting is not an easy task. Theorists on planning and decisionmaking point out that a planning strategy that attempts to derive explicit objectives as a first step in the process are doomed to failure.[181] Moreover, in the management of coastal zone resources, no single goal will be judged acceptable; several conflicting objectives will be identified, and the debate on goal-setting will center on the importance to be given to particular objectives when they come into conflict.[182] Another difficulty is the lack of data with respect to the interactions of the natural, economic and social systems of the coastal zone.[183] In addition, the scientific development of goals and objectives for planning is relatively new,[184] and existing governmental units and agencies responsible for the coastal zone often have different and conflicting policy objectives.[185]

Attempts are now underway to remedy this problem and to develop objectives to guide decisionmaking in the coastal zone. For example, in North Carolina research is being conducted by Professor Hufschmidt

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[180] *See* R. DEWSNUP, PUBLIC ACCESS RIGHTS IN WATERS AND SHORELANDS 47-54 (1971).

[181] Hufschmidt, Knox & Parker, *A Policy Analysis Approach: Objectives, Alternative Development Strategies and Econometric Models*, in COASTAL ZONE RESOURCE MANAGEMENT 104, 109 (J. Hite & J. Stepp eds. 1971).

[182] *Id.* at 107.

[183] Kissin, *Analysis*, in COASTAL ZONE RESOURCE MANAGEMENT 121, 124 (J. Hite & J. Stepp eds. 1971).

[184] Hufschmidt, Knox & Parker, *supra* note 181, at 111.

[185] *Id.* at 107.

of the University of North Carolina to develop an approach and methodology to guide decisionmaking in the coastal zone.[186] Professor Hufschmidt and his associates have reviewed the prior experience of North Carolina governmental units in developing goals statements.[187] They plan to prepare a preliminary set of goals from existing federal and state legislation, to develop patterns of management of the coastal zone in conformity with the different sets of objectives, and to apply techniques of systems analysis, including econometric models, physical models, simulation and mathematical programming methods, to the objective sets.[188] A comprehensive development and management strategy would be evolved, with investments scheduled over time and with environmental data monitored.[189]

The development of such sophisticated policy-analysis techniques will, however, take many years. The crucial question is whether the passage of legislation providing for management of the coastal zone should await a more precise formulation of policy objectives and systems analysis. Obviously, it should not. Since law seldom operates as a neutral rule or doctrine but is usually the embodiment of societal policies and objectives, failure to enact new laws merely perpetuates outdated policy objectives that are either affirmatively furthered or implicitly accepted by existing law. Existing law in large measure still reflects the idea that coastal wetlands are wastelands that should be drained and developed.[190] Furthermore, the lack of a coastal management law reflects in large measure implicit approval of the economic theory that decisions regarding the allocation of coastal resources are to be made by the "invisible hand" of the private market, which puts a premium on short-term private profit and which undervalues public goods and long range needs.[191] These old policies must be immediately reversed without waiting for the refinement of decision-making techniques.

The new policy of the law that should be the guiding principle of the coast zone management progam is that land and water use should

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[186] *Id.* at 104-05.

[187] 1970-71 UNIV. OF N.C. SEA GRANT PROBLEM ANN. REP. 27.

[188] Hufschmidt, Knox & Parker, *supra* note 181, at 108-109.

[189] *Id.* at 112-13.

[190] With the enactment in many states of laws controlling development in the coastal wetlands, some shift in legal policy is evident, but most of the laws regulating man's activities in the coastal zone are still merely intended to protect and serve individual and group interests in dealing with each other. *See* Ducsik, *supra* note 144, at 108.

[191] *Id.* at 129-32.

be controlled and guided so that it does not exceed the capability of the land for development based on ecological considerations.[192] This principle of land-use planning accommodates both environmental and developmental values. Land capability considerations would include such factors as geology, hydrology, historic sites, scenic vistas, air quality, unique natural areas, ecosystems, population distribution and settlement patterns.[193] The lands and waters of the coastal zone should be classified according to this principle. This would result in the designation of some areas as able to sustain generalized land use; while other areas would be considered too fragile or unique for any development; still others would be suitable for limited developmental purposes.

The importance of this new policy objective cannot be underestimated. It is a rejection of the narrow view of land as just another commodity that is of value only to the extent of its market price. The new idea of land is that it is an irreplaceable and limited resource that must not be impaired.[194] A corollary of this proposition is that the traditional view that the sole purpose of land use regulation is to preserve and maximize economic value is no longer valid; the new purpose of land and water use regulation is to preserve resources.[195]

3. *The Institutional Structure.* There will be understandable competition among existing state agencies and their administrators for the responsibility for coastal zone management. The most critical consideration, however, is not what agency should be chosen, but rather how to ensure that the coastal zone management agency has the powers and the tools to carry out the program. It is obvious that in order to be effective, the agency must not be fashioned according to the traditional model of the regulatory body which makes *ad hoc* decisions in accordance with standards set out by the state legislature.

The primary function of the coastal zone agency must be the development of the land and water capability data and the adoption, after full opportunity for public participation, of a comprehensive but flexible coastal land-use plan. This planning function can serve not only to guide

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[192]This policy is an integral part of the recently enacted Vermont Environmental Control Law which establishes a system of state-wide land use planning. VT. STAT. ANN. tit. 10, §§ 6001-91 (Supp. 1971).

[193]These considerations are used in Vermont. *See*, F. BOSSELMAN & D. CALLIES, *supra* note 158, at 72; *cf.* R. WILKINSON, SKETCH PLAN FOR A LAND USE GUIDANCE SYSTEM 29-31 (1971).

[194]*Id.* at 315-16.

[195]*Id.* at 317-18.

decisionmaking *but also as a vehicle for coordinating the decisions and activities of the other state and local traditional regulatory agencies that operate in the coastal zone.* At present these agencies are "mission-oriented" and often act at cross purposes. By requiring all agency decisions to conform to the land capability plans of the coastal zone management agency, this problem would be alleviated. For example, a water pollution control agency in issuing a discharge permit—even as to a point upstream on a river that enters the coastal zone—should be required to consider whether it would infringe minimum water quality parameters adopted as part of the plan for the coastal zone. Operating agencies should, of course, have a voice in the formulation of the plan, particularly in their area of expertise, but once it has been adopted by the management agency, they should be required to conform to it.

The coastal zone management agency also must have the power to control land-use decisions in the coastal area, but not in the traditional regulatory sense. It must have the power to work with private developers so that land use will not infringe the capacity of the land to accept development. It should also have the power of eminent domain to acquire lands where development is undesirable and cannot be prohibited without infringing on private property rights. The coastal zone management agency should also have the power to borrow money and issue bonds so that it may construct and maintain public facilities, such as wastewater treatment plants and solid waste recycling systems.

4. *The Role of Local Government.* The pending federal legislation to establish a national policy for coastal zone management will require the states to exercise some control over local control of land and water uses, but will largely leave each state free to develop a method for doing this.[196] In most of the municipalities and some counties of the coastal zone, local regulation of land use has been in existence for many years, and it would not be desirable or politically feasible to by-pass this system. Perhaps the best solution to the problem is that recommended by the American Law Institute.[197] As it points out, fully ninety percent of the land-use decisions currently being made by local governments have no major effect on the state or national interest.[198] These decisions should continue to be made on the local level, subject only to administrative review by the coastal zone management agency. Only the re-

[196]S. 3507 Cong., 2d Sess. § 306(e) (1972); H.R. 92d Cong., 2d Sess. § 306(e) (1972).

[197]MODEL LAND DEVELOPMENT CODE (Tent. Draft No. 3, 1971).

[198]*Id.*, Commentary at 5.

maining ten percent of the land use decisions, those of national, regional or state importance, should be directly controlled by the coastal zone management agency. Even as to these decisions, the determination in most cases could be made in the first instance by the local government or by a regional board with appeals handled by the state-level commission.[199] But the problem of distinguishing decisions of only local significance from those of regional or national significance is not an easy one. The American Law Institute has proposed three criteria for defining decisions of national or regional concern: (1) land-use decisions which affect geographical areas in which future development is an issue of statewide concern because of natural resources or the characteristics of development that have already occurred; (2) major developments such as airports, major highways, public utility transmission lines which by their very nature become matters of state concern; and (3) some types of development which have only a local impact if undertaken on a small scale but are of state concern when undertaken on a large scale.[200]

5. *The Problem of Taking of Private Property Rights.* An overriding problem of any state coastal zone management program is that of operating within the constitutional prohibition against taking property for a public use without just compensation.[201] Some restrictions on use will undoubtedly be so severe that interests in land will have to be acquired by the agency through purchase or eminent domain in order to avoid infringing constitutional rights. The vast bulk of decisions, however, should not present such a problem. Several different approaches can be used to obviate the taking issue. First, when regulation is for the purpose of protecting existing public rights under the public trust doctrine, custom, or the doctrine of a public easement for recreation, the taking issue should not arise.[202] Second, tests developed by the United States Supreme Court and state courts have upheld regulatory provisions that result in greatly diminishing the value of private property, if the regulation is essential to promote public health or safety.[203] Third, the line between taking and regulation has never been clearly defined by the courts, and new theories have been proposed to accom-

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[199] *Id.*, Commentary at 6.

[200] *Id.*, Commentary at 5-6.

[201] U.S. CONST. amend. V.

[202] This can be a powerful theory for upholding the constitutionality of both present and future legislation limiting development in the coastal wetlands. *See* text accompanying notes 124-25 *supra*; Note 5 GA. L. REV., *supra* note 46 at 582.

[203] *See* cases cited notes 134-35 *supra*.

modate management of natural resources and the constitutional prohibition. Professor Sax has argued that present law is anomalous and inconsistently applied and has proposed a new law of takings that would allow compensation only if the governmentally imposed constraint discriminates among equally situated property owners or if it presents property owners from engaging in profitable uses that do not have substantial spillover effects conflicting with public rights.[204] Fourth, if compensation must be paid, it may be possible to acquire an interest in the land less than complete title, such as an easement or development rights, if this is equitable.[205] Fifth, money could be raised to compensate affected persons by taxing those whose property value is increased by the coastal land-use plan or by a small ad valorem tax on all private property in the state.[206]

III. CONCLUSION

Land and water use planning for the purpose of protecting resources is a new departure for American law and presents new challenges. Because of the unique character of the coastal zones of the nation, it is appropriate to begin to construct a management program in that area. The new coastal zone legislation should, however, take into account the substantial rights possessed by the public under traditional legal principles. These rights have been poorly enforced in the past. In addition, a coastal zone agency should be created to manage the coastal area so as not to exceed the environmental limits of development. The agency must not be constructed according to the traditional model of the specialized, regulatory administrative agency. It should have a planning function as well as a regulatory purpose, and it should be integrated, with broad powers in many different areas. In this way, order can be brought forth out of the chaos that now characterizes governmental and private decisionmaking affecting the coastal zone.

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[204]Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

[205]F. BOSSELMAN & D. CALLIES, *supra* note 158, at 324.

[206]*See* R. WILKINSON, *supra* note 193, at 34-35.

APPENDIX:

A BILL TO BE ENTITLED AN ACT RELATING TO MANAGEMENT OF THE COASTAL ZONE OF NORTH CAROLINA†

Section 1. Short Title. This Act shall be known as the Coastal Zone Management Act of 1973.

Section 2. Legislative Findings and Goals.

(1) *Legislative Findings.* The legislature finds that many of North Carolina's most valuable resources are found in the coastal areas of the state. Coastal and estuarine waters and marshlands are responsible for almost ninety percent of North Carolina's commercial fisheries' harvest. North Carolina's coast is also very rich in sport fisheries resources and has extremely high value for other recreational activities. The coastal zone encompasses unique and fragile ecosystems which must be preserved. It is the policy of this state, and indeed, by the recent ratification by its citizens of Article XIV, section 5[1] of the Constitution, a mandate to this legislature, that means be provided for the conservation of these resources—economic, biological, recreational.

In recent years the coastal zone has been subject to increasing pressures which are the result of the often conflicting needs of a society expanding in industrial development, in population, and in the recreational aspirations of its citizens. Unless these pressures are rationalized and channeled by co-ordinated management schemes, the very features of the coast which make it productive economically, attractive for recreation purposes, and ecologically rich will be destroyed. The legislature therefore finds that an immediate and pressing necessity exists to establish a comprehensive plan for the protection, preservation, orderly development, and management of the coastal region of North Carolina.

In the implementation of this plan, the public's opportunity to enjoy the physical and recreational qualities of natural shorelines of the state shall be preserved to the greatest extent feasible; water resources shall be managed in order to reverse the deterioration of water quality and to provide optimum utilization of water resources; land resources shall be managed in order to guide growth and development and to minimize damage to the natural environment; and private property rights shall be preserved in accord with the constitution of this state and of the United States.

(2) *Goals of the Coastal Zone Management System.* The goals of the coastal zone management system are as follows:

(a) To insure that the development of the land and water resources of the coastal zone proceeds in a manner consistent with the capability of the land and waters for development and use based on ecological considerations;

(b) To insure the orderly and balanced use of our coastal resources on behalf of the people of North Carolina and the nation;

(c) To establish clear-cut policies, guidelines, and standards for all potential uses of the coastal zone;

(d) To develop institutional arrangements to accomplish the above objectives which focus responsibility, provide viable means for implementation and review, and assure response to public will and purpose.

Section 3. Definitions. As used in this Act:

(1) *Authority* means: The Coastal Zone Authority created by Section 5 of this Act.

(2) *Coastal Zone* means: That area of land and waters from the most inland extent of

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†Marianne K. Smythe, a second year law student at the School of Law of the University of North Carolina at Chapel Hill, was the co-draftsman of this bill. Peter Glenn, Assistant Professor of Law at the University of North Carolina at Chapel Hill offered many helpful suggestions, as did John C. Boger, a second year law student.

[1]This new section of the North Carolina Constitution will be voted upon by the people on November 7, 1972. If approved, it will become effective on January 1, 1973.

substantial maritime influences seaward to the territorial limit.

(3) *Commission* means: The State Coastal Resources Planning Commission created by Section 4 of this Act.

(4) *Critical Area* means: Those areas of critical state concern designated by the Commission, pursuant to the provisions of Section 7 of this Act.

(5) *Development* means:

(a) Any use involving, requiring, or consisting of the construction or exterior alteration of a structure; dredging; filling; drilling; dumping; removal of sand, gravel or minerals; bulkheading; driving of pilings; clearing of land as an adjunct of construction; alteration or removal of sand dunes; alteration of the shore or bank of any river, creek, stream, lake, pond, or canal.

(b) The following uses shall not be deemed to be development under this Section:

(i) work by a highway or road agency or railroad company for the maintenance or improvement of an existing road or railroad track, if the work is carried out on land within the boundaries of the right-of-way;

(ii) work by any utility and other persons engaged in the distribution and transmission of gas, water, or electricity for the purpose of inspecting, repairing, renewing, or constructing on established rights-of-way any sewers, mains, pipes, cables, utility tunnels, powerlines, towers, poles, tracks, and the like;

(iii) the use of any land for the purpose of planting or harvesting plants, crops, trees, and other agricultural or forestry products, raising livestock, or for other agricultural purposes where no dredging or filling is involved;

(iv) work for the maintenance, renewal, alteration, or improvement of any structure if the work affects only the interior or the color of the structure or the exterior decoration of the structure;

(v) the construction of an accessory building customarily incident to an existing structure if the work does not involve filling, dredging, or the alteration of any sand dune.

(6) *Development of regional impact* means: Developments defined by the rules promulgated by the Commission pursuant to Section 8.

(7) *Legislature* means: The General Assembly of North Carolina.

(8) *Local government* means: Any county, incorporated city, or town which contains within its boundaries any lands or waters subject to this chapter.

(9) *Local permit-granting authority* means: Whichever body is designated by the applicable zoning ordinance to have the authority to grant special use permits and variances for the local government. In the absence of special authority the elected legislative officials of the local government shall be deemed the applicable permit-granting authority.

(10) *Person* means: An individual, citizen, partnership, corporation, association, organization, business trust, estate, trust, public or municipal corporation, or agency of the state or local government unit, or any other legal entity however designated.

(11) *Rule* means: A statement, policy, or requirement of general application adopted by the Coastal Resources Planning Commission pursuant to the authority given said Commission by Sections 7 and 8 of this Act.

(12) *Statement* means: The comprehensive document for coatsal zone management prepared by the Coastal Zone Planning Commission pursuant to Section 6.

Section 4. State Coastal Resources Planning Commission.

(1) *Creation:* The legislature hereby establishes a council to be designated the Coastal Resources Planning Commission.

(2) *Composition:* The Coastal Resources Planning Commission shall consist of eighteen (18) members appointed or designated as follows:

(a) The Secretary of the Department of Natural and Economic Resources and two

(2) other members of the Department to be chosen by the Secretary;

(b) The Secretary of the Department of Administration and two (2) other members of that Department to be chosen by the Secretary;

(c) The Secretary of the Department of Human Resources and one (1) other member to be chosen by the Secretary;

(d) The Secretaries, or Commissioners, of

(i) the Department of Agriculture;

(ii) the Department of Transportation and Highway Safety;

(iii) the Department of Commerce; and

(iv) the Department of Art, Culture, and History;

(e) One member from each house of the North Carolina General Assembly to be appointed by the Governor;

(f) One member from each of the four multi-county planning districts of the coastal zone to be appointed by the lead regional agency of each district.

(g) The legislature recommends that those Secretaries or Commissioners empowered to designate additional members of the Commission select officials with particular interest or expertise in matters relating to coastal concerns.

(h) The Governor shall appoint and fix the salary of an executive director of the Commission who shall serve at his pleasure.

(3) *Duties of the Commission:*

(a) To prepare and adopt a Statement for Coastal Zone Management in accordance with the provisions of Section 6 of this Act;

(b) To designate by rule areas of critical state concern pursuant to Section 7 of this Act;

(c) After the adoption of the Statement to reconstitute itself at five year intervals to examine the implementation and administration of the Statement and to adopt any necessary amendments to the Statement pursuant to the provisions of Section 6 of this Act.

Section 5. Coastal Zone Authority.

(1) There is hereby created and established within the Department of Natural and Economic Resources an Authority to be known as the Coastal Zone Authority.

(2) *Composition*: The Coastal Zone Authority shall consist of a chairman and six (6) members appointed by the Governor as follows:

(a) One who shall, at the time of appointment, be actively connected with and have experience in commercial or sport fisheries resources;

(b) One who shall, at the time of appointment, be actively connected with industrial production and have experience in the field of industrial air, water, and noise pollution control;

(c) One who shall, at the time of appointment, have special training and expertise in marine and coastal ecology;

(d) One who shall, at the time of appointment, have special training and expertise in the problems of land-use planning;

(e) Three (3) members interested in the orderly development and conservation of coastal resources, appointed from the public at large, provided that no such public member shall be an employee, officer, or representative of any industry, business, or political subdivision which may fall under the jurisdiction or be directly affected by the authority created by this Act.

(3) The members shall serve in staggered terms of office of six (6) years. In the event of a vacancy the Governor shall appoint a successor of like qualification who shall then serve the remainder of his predecessor's term. At the expiration of each member's term, the Governor shall replace the member with a new member of like qualifications. A member who has served one term

may serve one other term provided that the terms are not consecutive. The initial terms shall be determined by the Governor in accordance with customary practice, but one of the three public members shall be appointed for two years, another for four years, and a third for six years.

(4) The office of a member of the Coastal Zone Authority is declared to be an office that may not be held concurrently with any other elective or appointive office, under the authority of Article VI, § 9 of the North Carolina Constitution.

(5) *Compensation:* The members of the Authority shall receive the usual and customary *per diem* payment allowed for the other members of Boards and Commissions of the State and as fixed in the Biennial Appropriation Act, and, in addition, the members shall receive subsistence and travel expenses according to the prevailing state practices and as allowed and fixed by statute for such purposes, which said travel expenses shall also be allowed while going to or from any place of meeting or when on official business of the Authority. The *per diem* payments made to each member of the Authority shall include the necessary time spent in traveling to and from their place of residence within the State to any place of meeting or while traveling on official business of the Authority.

(6) The Duties of the Authority are as follows:

(a) To appoint hearing officers pursuant to subsection (7) below;

(b) To issue or deny permits for development pursuant to the provisions of Sections 7 and 8 of this Act;

(c) To conduct or cause to be conducted investigation of proposed developments in order to obtain sufficient evidence to enable a balanced judgment to be rendered concerning the issuance of a permit to build such developments;

(d) To designate the form and content of permits to develop to be submitted to the Authority pursuant to the provisions of Sections 7 and 8 of this Act;

(e) With prior approval of the Governor and Council of State, to acquire by purchase, gift, condemnation, or otherwise, lands or any interest in any lands;

(f) To keep a list of interested persons who wish to be notified of proposed developments in the coastal zone and to so notify these persons in accordance with the provisions of this Act. A reasonable registration fee, to defray the cost of handling and mailing notices, may be charged to any person who registers with the Authority pursuant to this Section;

(g) Upon a vote of the majority of the Authority to designate itself as Hearing Officer in any case.

(7) Hearing Officers:

(a) Qualifications: The Coastal Zone Authority shall have the power to designate up to eight (8) full-time hearing officers. The hearing officers shall be attorneys with knowledge of and experience with the rules of evidence. On petition of the Authority, supported by reasonable evidence that six (6) hearing officers are insufficient to handle the burden of conducting hearings pursuant to the provisions of this Act, the Governor is empowered to appoint additional hearing officers as may be necessary.

(b) Duties: The hearing officers shall conduct hearings and submit recommendations to the Authority pursuant to the provisions of Sections 7 and 8 of this Act. In addition the hearing officers shall obtain such evidence, reports, and technical information from any person as may in their judgment be necessary to provide the Authority with complete recommendations pursuant to Sections 7 and 8 of this Act.

(8) In order to carry out the provisions of this Act, the Authority may employ such clerical, technical, and professional personnel with such qualifications as the Authority may prescribe, in accordance with the State Personnel Regulations and Budgetary Laws, and is hereby authorized to pay such personnel from any funds made available to it through grants and appropriations made to itself or to any other agency of the State for the benefit of the Authority. The Authority may, with the approval of the Governor, employ such consultants as it deems necessary and may

compensate same for services received.

(9) The Attorney General shall act as attorney for the Authority and shall initiate actions in the name of, and at the request of, the Authority, and shall represent the Authority in hearing of any appeal from or other review of any order of the Authority.

Section 6. State Coastal Land and Water Use Statement.

(1) The State Coastal Resources Planning Commission shall prepare a Statement (in words, maps, illustrations, or other media of communiation) setting forth objectives, policies, and guidelines relating to public and private development of lands and waters within the coastal zone. In preparing such Statement and any amendment thereto, the Commission shall to the extent feasible:

(a) Consult with and obtain the comments of any federal, state, regional, or local agency having any special expertise with respect to any environmental impact;

(b) Consider all plans, studies, surveys, inventories, and systems of classification made or being made by federal, state, regional, or local agencies, by private individuals, or by organizations dealing with the coastal zone;

(c) Conduct or support such further research, studies, surveys, and interviews as are deemed necessary;

(d) Utilize all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data;

(e) Seek the active participation of officials of the local governments and regional planning groups and councils of government for the particular areas involved.

(2) The Statement shall include the following:

(a) The designation of all lands of the coastal zone which have not been designated as areas of critical state concern pursuant to section 7 as *urban-developmental* or *rural*. Such designation shall be based upon studies of the ecological, physical, social, economic, and governmental conditions and trends and shall aim at guiding development in a coordinated manner so as to maximize the quality of life of the people and to minimize adverse environmental and ecological effects. The designation shall be accompanied by rules stating those uses of land which will not be permitted in areas designated *rural*. Such rule shall specify what uses shall not be permitted in areas designated *rural*. The State shall not exercise under this Act any control over the use of lands designated *urban-developmental* except as provided in section 8. Local governments shall have full power to control land use pursuant to the laws of this state in areas designated *urban-developmental* and in areas designated *rural*, provided that laws, ordinances, and practices of local governments shall not allow any use to be carried on in a *rural* area where use is not permitted by the Statement;

(b) Provision for the protection of present common law and statutory public rights in the lands and waters of the coastal zone including, where appropriate, provision for public access to publicly owned areas;

(c) Provision for economic development of the coastal zone including, but not limited to, the location and design of industries, port facilities, commerce, and other developments;

(d) Provision for recreational and tourist facilities and parklands;

(e) Provision for the transportation and circulation pattern for the coastal zone including major thoroughfares, transportation routes, and other public utilities and facilities;

(f) Provision for the preservation and conservation of natural resources including, but not limited to, water quality and use, scenic vistas, and fish and wildlife protection;

(g) Provision for the preservation and enhancement of the historic, cultural, and scientific aspects of the coastal zone;

(h) Any other provision deemed necessary or appropriate to effectuate the policy of this act.

(3) Before adopting the Statement, the Commission shall hold public hearings in Manteo, Morehead City, and Wilmington at which public and private parties shall have the opportunity to present their comments and views. Copies of the Statement shall be made available for public inspection at the county seat of each county affected at least thirty (30) days before the date on which hearings are scheduled to begin.

(4) Following such public hearings, the Commission shall adopt the Statement together with any changes it may deem appropriate.

(5) The Statement shall be submitted to the General Assembly on or before January 1, 1975.

(6) The Statement shall be effective

(a) on approval with or without modification by concurrent resolution of both houses of the General Assembly; or

(b) on the expiration of ninety (90) legislative days on or at the end of the regular session of the General Assembly, whichever is earlier.

(7) Subsection 2(a) of this Section shall be of binding effect on all state agencies and units of local government. Local zoning and subdivision regulation shall be exercised only insofar as it is consistent with this part of the Statement. The other parts of the Statement shall not be binding but shall be used to guide the decision-making of all state agencies and units of local government with jurisdiction over the coastal zone.

(8) After the Statement becomes effective, the Commission shall reconvene at five-year intervals to examine the implementation and administration of the Statement and to consider whether the Statement should be amended. The Commission shall, after public hearings in Manteo, Morehead City, and Wilmington, propose any necessary amendments to the General Assembly. Such amendments shall become effective pursuant to the procedure in subsection (6) of this section.

Section 7. Areas of Critical State Concern.

(1) Within one (1) year after the effective date of this Act, the State Coastal Resources Planning Commission shall by rule designate particular geographic areas of the Coastal Zone as areas of critical state concern and specify the boundaries thereof. In the rule designating an area of critical state concern, the State Coastal Resources Planning Commission shall state the reasons why the particular areas are of critical concern for the state.

(2) Prior to adopting any rule under this Section, the Commission shall consult with local governments and multi-county regional planning authorities and shall hold a public hearing in each county in which lands to be affected are located, giving notice thereof to interested state agencies, any citizen or group which has filed a request to be notified pursuant to section 5(11), and each owner or claimed owner of such lands by certified or registered mail at least twenty-one (21) days prior thereto.

(3) Upon adoption of such rule or any rule amending, modifying, or repealing the same, the Chairman shall cause a copy thereof, together with a plan of the lands affected and a list of the owners or claimed owners of such lands, to be recorded in the register of deeds office in the county where the land is located and shall mail a copy of such order and plan to each owner or claimed owner of such lands affected thereby.

(4) An area of critical state concern shall be designated for:

(a) Beaches, dunelands, marshlands as defined in N.C. GEN. STAT. § 113-230(n)(3) and estuarine waters as defined in N.C. GEN. STAT. § 113-230(n)(2);

(b) Areas containing or having a significant impact upon environmental, historical, or natural resources of regional or statewide importance;

(c) Areas containing unique or fragile ecosystems which are not capable of withstanding uncontrolled development;

(d) Areas such as waterways to which the public has certain rights under state law;

(e) Areas such as flood plains and dunelands which, if subjected to uncontrolled development, will increase the likelihood of flood damage and erosion which may necessitate large expenditures of public funds;

(f) An area significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment.

(5) After the effective date of any rule designating areas of critical state concern, prior to undertaking any development in any such area, the developer shall first obtain a permit from the Coastal Zone Authority pursuant to the following procedure:

(a) The developer shall file with the Authority an application for a permit in accordance with the form and content designated by the Authority, stating specifically that the proposed development will take place in an area of critical state concern;

(b) Within thirty (30) days of receipt of the application, the Authority shall conduct a hearing in the courthouse of the county in which the development will be located.

(c) *Notice:* At least three weeks prior to the hearing, notice of the hearing shall be sent by regular mail to any person registered with the Authority pursuant to Section 5 (11).

In addition, at least two weeks prior to the hearing, notice of the hearing shall be posted at three prominent places on the site of the proposed development and shall be displayed in the courthouse in which the hearing is to take place.

Notice of the hearing shall state that the proposed development is to take place in an area designated as of critical state concern.

(d) Any interested person may present evidence at the hearing concerning whether the permit should or should not be granted. The officer in charge of the hearing is empowered to make reasonable rules limiting the time or manner of presentation of evidence. Where appropriate, the officer is empowered to issue subpoenas requiring the attendance of witnesses and the production of evidence, to administer oaths, and to take testimony as may be necessary in conformity with the provisions of this Act. The officer shall keep minutes or a record of the hearing in such manner as he determines to be desirable and feasible. A copy of the record shall be furnished to any party to the hearing upon request therefor and payment of the reasonable cost thereof.

(e) Within a week of the close of the hearing, the hearing officer shall certify and file with the Authority recommendations, findings of fact, and a proposed order.

(f) Within sixty (60) days of receipt of the hearing officer's report, except as provided below, the Authority shall render a decision as to the issuance of the permit. In doing so the Authority shall consider whether and the extent to which the development

(i) will significantly infringe on the legal rights of the public;

(ii) exceeds the capacity of the area to absorb development without changing its essential character;

(iii) is likely to result in the necessity for significant expenditures of public funds;

(iv) will have a significant adverse effect on wildlife or natural ecosystems or on an historical site of regional or state importance;

(v) is being built in an area where transportation facilities, water supply, or waste treatment facilities are inadequate;

(vi) if the development is likely to generate employment, whether it will be located in an area with the capacity to provide adequate housing for potential employees.

In reaching its decision, the Authority shall not be limited to evidence presented at the hearing but may consider such additional evidence as may be presented to it subsequent to the hearing which it deems necessary to reach a decision. In any case in which the Authority does consider additional evidence, it must notify all parties to the hearing that additional evidence is being considered, state the nature of the evidence, and give any party two weeks in which to send a written reply, rebuttal, or comment. When necessary, at the discretion of the Authority, the time in which the Authority shall render a decision may be extended an additional two weeks beyond the sixty days provided in this Part.

(g) By majority vote, the Authority shall deny a permit if, in its judgment, using the above criteria, the proposed development is inadvisable or undesirable. The Authority may condition the grant of a permit upon the applicant's amending his proposal to take whatever measures are reasonably necessary to protect the public interest with respect to the factors enumerated in subsection (f) above. Every decision of the Authority shall be in writing accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise and separate statement of the ultimate conclusions upon each material issue of fact without recital of evidence.

(6) *Judicial Review:* Decisions of the Authority are reviewable pursuant to the provisions of Section 9 of this Act. Any person presenting evidence pursuant to subsection 5(d) above shall be deemed a party to the hearing with standing to appeal. Pending final disposition of any appeal, no action shall be taken which would be unlawful in the absence of a permit issued under this Section.

Section 8. Permits for Developments of Regional Impact. Because large scale developments are likely to be of sufficient magnitude to create problems in or significantly effect areas of statewide or regional importance, the Legislature hereby establishes a permit-granting procedure which shall be followed in all cases where developments of regional impact are proposed.

(1) *Definition of development of regional impact.* A development is of regional impact if any of the following characteristics are true: It

(a) Proposes to make use of an area of ____ acres or more; or

(b) Will provide, upon completion the employment of ____ individuals; or

(c) Will provide ____ number of housing units; or

(d) May be reasonably expected to affect the ambient air quality of an area covering ____ square miles; or

(e) Will need to utilize over ____ gallons of water per day; or

(f) Will require minimum parking space for ____ numbers of vehicles.

(2) *Procedure for obtaining a permit to build a development of regional impact.* Prior to undertaking any development of regional impact, the developer shall file an application for a permit with the Authority. The permit shall be in accordance with the form and content designated by the Authority pursuant to Section 5. Upon receipt of application, if the applicant so requests, the Authority shall conduct an investigation to determine whether the proposed development falls within the meaning of "development of regional impact" as defined by subsection (1) of this Section. Within sixty (60) days of receipt of the application, the Authority must issue, in writing, a binding opinion as to whether the development is of regional impact. There is *no* appeal from this decision of the Authority.

(a) If the Authority deems the development to be of regional impact, the following procedures shall be adhered to:

(i) within thirty (30) days of its decision that the proposed development is of regional impact, the Authority shall conduct a hearing in the courthouse of the county in which the development will be located.

(ii) *notice*: At least three weeks prior to the hearing, notice of the hearing shall be sent by certified mail to any local government which may reasonably be expected to be significantly affected by the proposed development.

Notice shall also be sent by regular mail to any person registered with the Authority pursuant to Section 5(11) at least two weeks prior to the hearing.

In addition, at least two weeks prior to the hearing, notice of the hearing shall be posted at three prominent places on the site of the proposed development, and shall be displayed in the courthouse in which the hearing is to take place.

Notice of the hearing shall state that the proposed development has been certified by the Coastal Zone Authority as having regional impact.

(iii) any interested person may present evidence at the hearing concerning whether the permit should or should not be granted. The hearing officer in charge of the hearing is empowered to make reasonable rules limiting the time or manner of

presentation of evidence. Where appropriate, the hearing officer is empowered to issue subpoenas requiring the attendence of witnesses and the production of evidence, to administer oaths, and to take testimony as may be necessary in conformity with the provisions of this Act. The officer shall keep minutes or a record of the hearing in such manner as he determines to be desirable and feasible. A copy of the record shall be furnished to any party to the hearing upon request therefor and payment of the reasonable cost thereof.

(iv) within a week of the close of the hearing, the hearing officer shall certify and file with the Authority recommendations, findings of fact, and a proposed order.

(v) within sixty (60) days of receipt of the hearing officer's report, the Authority shall render a decision as to the issuance of the permit. In reaching its decision, the Authority shall consider whether and the extent to which:

—the beneficial effects of the development to the locale for which it is proposed are outweighed by adverse effects to other areas;

—the transportation facilities, water supply, and waste treatment facilities are adequate.

—if the development is likely to generate employment, the capacity of the area in question to provide adequate housing for potential employees;

—the probability that at the time the development work begins the developer will have adequate financing to complete the development according to plans and specifications.

In addition, after the adoption by the General Assembly of the Statement as provided in Section 6 above, whether the proposed development is in conformity with the land use specifications of said Statement.

In reaching its decision, the Authority shall not be limited to evidence presented at the hearing but may consider such additional evidence as may be presented to it subsequent to the hearing which it deems necessary to reach a decision. In any case in which the Authority does consider additional evidence, it must notify all parties to the hearing that additional evidence is being considered, state the nature of the evidence, and give any party two weeks in which to send a written reply, rebuttal, or comment. When necessary, at the discretion of the Authority the time in which the authority shall render a decision may be extended an additional two weeks beyond the sixty days provided in this Part.

(b) By majority vote, the Authority shall deny a permit if, in its judgment, the above criteria are not met. The Authority may condition the grant of a permit upon the applicant's amending his proposal to take whatever measures are reasonably necessary to protect the public interest with respect to the factors enumerated in 2(a)(v) of this Section. Every decision of the Authority shall be in writing accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise and separate statement of the ultimate conclusions upon each material issue of fact without recital of evidence.

(3) *Judicial Review:* Decisions of the Authority are appealable pursuant to the provisions of Section 9 of this Act. Any person presenting evidence pursuant to 2(a)(iii) of this Section shall be deemed a party to the hearing with standing to appeal. Pending final disposition of any appeal, no action shall be taken which would be unlawful in the absence of a permit issued under this Section.

Section 9. Judicial Review. Any person given standing to appeal by Sections 7 and 8 of this Act may obtain judicial review of the Authority's decision pursuant to the provisions of article 33 of the General Statutes, chapter 143. The Authority shall be named as a defendant to the action. In addition, any person presenting evidence in support of the Authority's decision at the hearing which is the subject of appeal may be joined as a defendant to the action. Nothing in this chapter

shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made available under this Section.

Section 10. Enforcement and Penalties.

(1) Any person who violates any provision of this Act, or any regulation adopted by the Authority, or who violates any determination or order of the Authority pursuant to this Act, shall be liable to a penalty not to exceed $____ for said violation and an additional penalty of not to exceed $____ for each day during which violation continues, which may be recovered in a civil action, and such person may be enjoined from continuing such violation as herein provided. Any person who violates this Act, or an order or other determination of the Authority under this Act, and causes the death of fish, wildlife, or aquatic life shall, in addition to other penalties provided by this Act, be liable to pay the State an additional sum for the reasonable value of the fish, wildlife, or aquatic life destroyed. Any money so recovered shall be divided between the Wildlife Resources Commission and the Bureau of Commercial and Sport Fisheries for use in restoring the wildlife, aquatic life, and or fish balance.

(2) The Solicitor of the county in which the violation occurred, or the Attorney General, shall bring actions brought under this Act in the name of the people of North Carolina.

(3) At the discretion of the court, up to one-half of the fine levied (with the exception of that recovered for wildlife and for fish destruction) may be paid to any person or persons giving substantial information from which conviction results.

(4) It shall be a misdemeanor to violate this Act or regulations thereunder, or knowingly to submit any false information under this Act or regulations adopted thereunder. It shall be the duty of all state and local law enforcement officers to enforce such Act and regulations, and all such officers shall have authority to issue citations for such violations.

(5) The citizens of this state are encouraged to keep a vigilant watch on the activities taking place in the coastal region. Any citizen or group of citizens who reasonably believe a violation of the provisions of the Act is taking place or has taken place may file a complaint in writing with state or local law enforcement officers, whichever is appropriate, stating with specificity what act or acts the complainant believes is taking place in violation of the Act. If the name or names of the alleged violators are known or may be reasonably discovered, a copy of said complaint must be sent to alleged violators by the local or state law enforcement offices. The officers must conduct a preliminary investigation within twenty-one (21) days to determine if probable cause exists to issue a citation to alleged violators. Specious, frivolous, or malicious complaints shall be treated as a misdemeanor, and any person who knowingly files such complaint may be subject to a fine not exceeding $500, imprisonment not exceeding six (6) months, or both. Valid complaints initiated by private citizens may be rewarded as provided in subsection (3) of this Section.

Section 11. Coordination with the Federal Government. All state agencies shall keep informed of federal and interstate agency plans, activities, and procedures within their area of expertise that affect the coastal zone. Where federal or interstate agency plans, activities, or procedures conflict with state policies, all reasonable steps shall be taken by the state to preserve the integrity of its policies.

Section 12. Coordination with State and Local Governments. All state agencies, counties, and public and municipal corporations shall review administrative and management policies, regulations, plans, and ordinances relative to lands under their respective jurisdictions adjacent to the shorelines and coastal regions of the state so as to achieve a use policy on said lands consistent with the policy of this Act, the guidelines, rules, and Statement. Local governments shall, in developing use regulations of such areas, take into consideration any recommendations, rules, and guidelines developed by the Coastal Resources Planning Commission, as well as those of any other state agencies or units of local government. The Coastal Zone Authority shall work in cooperation with said agencies, counties, and municipal and public corporations. In instances where the spheres of interest overlap and policies differ, the Authority and the agency, county, or municipal or public corporation whose policy conflicts with the Authority's are empowered to make agreements concerning the harmonious settlement of such conflict in the best interests of the conservation and

best utilization of the coastal resources of the state. In the event that the Authority and any agency, county, or municipal or public corporation cannot agree, the Governor is empowered to resolve the differences.

Section 13. Protection of Landowners' Rights. Nothing in this Act authorizes any governmental agency to adopt a rule or regulation or to issue any order that constitutes a taking of property without the payment of full compensation in violation of the constitution of this state or of the United States.

Section 14. Appropriation. A sum of $____ is appropriated from the general revenue fund to the Department of Administration for the purposes of paying salaries and other administrative expenses.

Section 15. Severability. If any provision of this Act, or its application to any person or circumstance is held invalid, the remainder of the Act, or the application of the provisions to other persons or circumstances, is not affected.

Section 16. Effective Date. This Act shall become effective on ratification.