Public Comment
SIGN IN SHEET
6:00 PM

August 15, 2017

The Public Comment Sessions at this meeting is limited to a total of 40 minutes, 4 minutes per person. Please be advised that citizens not utilizing their full four [4] minutes may not "donate" their remaining time to another speaker.

PLEASE PRINT

	FULL NAME	PURPOSE OF COMMENT
1	Tommy Woodall	NEGLIGENCE of DHEC
2	Joan Jennings	Zoning
3	Esther Lyle	Destination Oconee
4	Brian Ramey	Destination Oconee
5	Mike Crenshaw	Destination Oconee & Oconee being a destination
6	Jay [illegible]	FAIR OAK Fourth Quarter
7	Tom Markovich	2017-22 Scenic Highways
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Everyone speaking before Council will be required to do so in a civil manner. Council will not tolerate personal attacks on individual council members, county staff or any person or group. Racial slurs will not be permitted. Council's number one priority is to conduct business for the citizens of this county. All citizens who wish to address Council and all Boards and Commission appointed by Council should do so in an appropriate manner.

Council Secretary

Ms. Jean Jennings
215 Jay Jay Road
West Union, SC 29696

August 2, 2017

David A. Root, Esq.
Oconee County Attorney
415 S. Pine Street
Walhalla, SC 29691
Phone: 864 364 - 5332

Re: Zoning Law

Dear Mr. Root;

Thank you for responding to my previous inquiry. This letter is in response to the statutes and legal treatise that you provided in support of your theory of legal authority for zoning in your letter of June 22nd. It does appear to me that the courts are "all over the map" on this topic. In other words, there doesn't appear to be any definitive answer from the courts regarding zoning.

As you know, all acts of government that use the police powers of the state are supposed to be done for a "legitimate state purpose." The people have created states, constitutions, and governments for the sole purpose of protection of persons and property; how then can the seizing (taking) of a citizen's property be claimed to be a "legitimate state purpose"? I believe that the framers of our federal constitution made a huge error in including the phrase "for the general welfare" in the constitution because government today promotes this idea that their usurpation of power is for the general welfare. My concern is that government knows no bounds in its relentless pursuit of control, under the guise of promoting the interests of the people.

Let me point to Supreme Court cases you should find of interest. From Boyd v. United, 116 U.S. 616 at 635 (1885):

> "... It may be that it is the obnoxious thing in its mildest form; but illegitimate and unconstitutional practices get their first footing in that way; namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed .... It is the duty of the courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. ...."

From Downs v. Bidwell, 182 U.S. 244 (1901):

> "It will be an evil day for American Liberty if the theory of a government outside supreme law finds lodgement in our constitutional jurisprudence. No higher duty rests upon this Court than to exert its full authority to prevent all violations of the principles of the Constitution."

The following case is often quoted today. From Hale v. Henkel, 201 U.S. 43 at 89 (1906):

> "The individual may stand upon his Constitutional Rights as a CITIZEN. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an

investigation, ... He owes no duty to the State, since he receives nothing there from, beyond the protection of his life and property. His rights are such as existed by the Law of the Land (Common Law) long antecedent to the organization of the State, and can only be taken from him by due process of law, and in accordance with the Constitution. He owes nothing to the public so long as he does not trespass upon their rights."

The various issues of Hale v. Henkel have never been overruled. Since 1906, this case has been cited by Federal and State Appellate Court systems over 1,600 times! No other case has surpassed Hale v. Henkel in the number of times it has been cited by the courts.

In case you are tempted to dismiss these "old cases," here is a recent cite that has become widely known. From 1966 in Miranda v. Arizona, 384 US 436 p. 491:

"Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them."

To restate, the *only* purpose of government is the protection of people and property. Any other action by government is unlawful usurpation! It does not promote the general welfare of the people to have government steal their property, and make no mistake -- the takings under zoning are in fact theft under color of law. Zoning benefits the few who are powerful and/or connected enough to use government force to advance their agenda. For perspective, you might read The Law by Fredrick Bastiat which goes into detail on the subject of government force and abuse of power, and the use of government force to steal.

Under our constitution, which by the way does not grant the people any rights but rather secures their God-given rights which they had before the institution of government(s), the people have inalienable rights, rights that cannot be taken away by legislation, statutes, codes and zoning. In order for you to lawfully take a person's property under zoning ordinances or other schemes, it must be done with the consent of each individual property owner. It cannot legally be done with a "consensus" or even a majority vote of consent. The majority cannot vote away the property rights of the minority. If people don't have the right to control their property, then they don't own it.

I am including an article from *The Nerve* by a young lady named Hannah Hill. (By the way, her brother Jonathon Hill is a state representative from Anderson, and they have both been active in political circles for some time.) The sub-title of her article is: *When economic development becomes a state priority, citizens lose control.* As you consider your stance in this zoning matter, let me emphasize that it never was central planning (which includes zoning) that produced the freest, most prosperous nation on earth. It was never a small group of people making decisions for the whole. Rather, it was the individual making his own decisions (free market) and deciding his or her own course. Without property rights there is no freedom. This is why the founders considered property rights to be sacred!

Sincerely,

Jean Jennings

Enc. You're not the boss of us – article by Hannah Hill, pub. in The Nerve

You're not the boss of us

thenerve.org/youre-not-the-boss-of-us/

When economic development becomes a state priority, citizens lose control

By HANNAH HILL

As the Policy Council has been compiling this year's *Best and Worst of the General Assembly*, I couldn't help noticing a recurring theme: economic development-related bills.

Some are overt, like one that would create two new programs and a grant fund to further integrate economic development into the school system.

Others are not, such as the bill that offers a tax credit for purchasing South Carolina produce. The credit is capped, which means not everyone who applies will get it. Guess who doles it out? Not the departments of Agriculture or Revenue. It's the Coordinating Council for Economic Development, which is instructed to consider "factors related to the economic benefit of the state" when selecting the winners and losers – excuse me, the *recipients* — of the credit.

These are just a couple of examples from this year's bills. This is nothing new: Multiple state agencies have economic development missions. The economic development mentality permeates our government.

Economic development is a fine thing — in the private sector. It only becomes a problem when government uses its unique resources, force and tax dollars, to try to promote it. Inevitably, that leads to central planning.

Let's pretend you're the government and you want to develop an economy. First you must decide what success and prosperity look like, and that's your first mistake.

Next you consider your resources, determine which industries fit them best, and try to recruit them.

The industries you want might not want to come, however, because of unsuitable infrastructure or high taxes or regulatory burdens, or because other states are offering better deals. So you make exceptions for them. You give them tax breaks. Sure, you're using taxpayers' dollars to benefit one business, but that's OK because you're "creating jobs."

Then you realize that the businesses you're courting need workers who are educated a certain way for those jobs. Fine, you'll just take economic development into consideration when you plan for education. You'll gently push students into the right industry funnels. You'll ensure that "they are matched with available employment opportunities in industry sectors with critical workforce needs throughout the State." That language comes from a bill that passed the House this year 104-1.

This is central planning at its finest, and it's what our entire state government thinks it should be doing.

Once you start down that path, efficiency demands you take the next step, and the next, and the next. Each violates principles of good government – respect for free markets; broad-based, low taxes; and equal protection for all businesses, no matter their size.

As for education, the job of our schools is to enable students to pursue their own dreams, not their government's.

And you know what troubles me most of all? In a state that prides itself on its conservatism, I shouldn't be the only one saying this.

Oconee County
Attorney

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June 22, 2017

Ms. Jean Jennings
215 Jay Jay Road
West Union, SC 29696

Re: Zoning Law

Ms. Jennings,

As you requested during Tuesday evening's Council meeting, and as we discussed this afternoon, you will find herewith materials related to the legal basis for zoning and land use planning on the local (county) level.

I am sending you a copy of the South Carolina Local Government Comprehensive Planning Act, which establishes and outlines the legal authority and requirements for local governments to engage in land use planning and zoning, and I am also sending some portions of a land use planning and development legal treatise that gives a good overview of the development of zoning in the United States and the balance between governmental zoning actions and constitutional protections. As a word of caution, the materials from the treatise discuss a number of U.S. Supreme Court cases (some of which are still binding and some of which are not), and they show how zoning law has developed over time, but the treatise is not law itself, just a discussion of it.

As I stated over the telephone, these materials should provide you with the answers you sought from Council, but in the event they do not, please do not hesitate to contact me. Naturally, I cannot give you or any individual County citizen legal advice, as my only client is the County as a whole, but I gladly provide this service in response to your request to County Council made June 20, 2017.

Thank you for your interest and participation in local government.

Sincerely,

David A. Root

South Carolina Legislature

South Carolina Code of Laws
Unannotated

Title 6 - Local Government - Provisions Applicable to Special Purpose Districts and Other Political Subdivisions

CHAPTER 29

South Carolina Local Government Comprehensive Planning Enabling Act of 1994

ARTICLE 1

Creation of Local Planning Commission

SECTION 6-29-310. "Local planning commission" defined.

For purposes of this chapter, "local planning commission" means a municipal planning commission, a county planning commission, a joint city-county planning commission, or a consolidated government planning commission.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-320. Bodies authorized to create local planning commissions.

The city council of each municipality may create a municipal planning commission. The county council of each county may create a county planning commission. The governing body of a consolidated government may create a planning commission. Any combination of municipal councils and a county council or any combination of municipal councils may create a joint planning commission.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-330. Areas of jurisdiction; agreement for county planning commission to act as municipal planning commission.

(A) A municipality may exercise the powers granted under the provisions of this chapter in the total area within its corporate limits. A county may exercise the powers granted under the provisions of this chapter in the total unincorporated area or specific parts of the unincorporated area. Unincorporated areas of the county or counties adjacent to incorporated municipalities may be added to and included in the area under municipal jurisdiction for the purposes of this chapter provided that the municipality and county councils involved adopt ordinances establishing the boundaries of the additional areas, the limitations of the authority to be exercised by the municipality, and representation on the boards and commissions provided under this chapter. The agreement must be formally approved and executed by the municipal council and the county councils involved.

(B) The governing body of a municipality may designate by ordinance the county planning commission as the official planning commission of the municipality. In the event of the designation, and acceptance by the county, the county planning commission may exercise the powers and duties as provided in this chapter for municipal planning commissions as are specified in the agreement reached by the governing authorities. The agreement must specify the procedures for the exercise of powers granted in the chapter and shall address the issue of equitable representation of the municipality and the county on the boards and commissions authorized by this chapter. This agreement must be formally stated in appropriate ordinances by the governing authorities involved.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-340. Functions, powers, and duties of local planning commissions.

(A) It is the function and duty of the local planning commission, when created by an ordinance passed by the municipal council or the county council, or both, to undertake a continuing planning program for the physical, social, and economic growth, development, and redevelopment of the area within its jurisdiction. The plans and programs must be designed to promote public health, safety, morals, convenience, prosperity, or the general welfare as well as the efficiency and economy of the areas of jurisdiction. Specific planning elements must be based upon careful and comprehensive surveys and studies of existing conditions and probable future development and include recommended means of implementation. The local planning commission may make, publish, and distribute maps, plans, and reports and recommendations relating to the plans and programs and the development of its area of jurisdiction to public officials and agencies, public utility companies, civic, educational, professional, and other organizations and citizens. All public officials shall, upon request, furnish to the planning commission, within a reasonable time, such available information as it may require for its work. The planning commission, its members and employees, in the performance of its functions, may enter upon any land with consent of the property owner or after ten days' written notification to the owner of record, make examinations and surveys and place and maintain necessary monuments and marks on them; provided, however, that the planning commission shall be liable for any injury or damage to property resulting therefrom. In general, the planning commission has the powers as may be necessary to enable it to perform its functions and promote the planning of the political jurisdiction.

(B) In the discharge of its responsibilities, the local planning commission has the power and duty to:

(1) prepare and revise periodically plans and programs for the development and redevelopment of its area as provided in this chapter, and

(2) prepare and recommend for adoption to the appropriate governing authority or authorities as a means for implementing the plans and programs in its area:

(a) zoning ordinances to include zoning district maps and appropriate revisions thereof, as provided in this chapter;

(b) regulations for the subdivision or development of land and appropriate revisions thereof, and to oversee the administration of the regulations that may be adopted as provided in this chapter;

(c) an official map and appropriate revision on it showing the exact location of existing or proposed public streets, highways, and utility rights-of-way, and public building sites, together with regulations to control the erection of buildings or other structures or changes in land use within the rights-of-way, building sites, or open spaces within its political jurisdiction or a specified portion of it, as set forth in this chapter;

(d) a landscaping ordinance setting forth required planting, tree preservation, and other aesthetic considerations for land and structures;

(e) a capital improvements program setting forth projects required to implement plans which have been prepared and adopted, including an annual listing of priority projects for consideration by the governmental bodies responsible for implementation prior to preparation of their capital budget; and

(f) policies or procedures to facilitate implementation of planning elements.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-350. Membership, terms of office, compensation, qualifications.

(A) A local planning commission serving not more than two political jurisdictions may not have less than five nor more than nine members. A local planning commission serving three or more political jurisdictions shall have a membership not greater than four times the number of jurisdictions it serves. In the case of a joint city-county

planning commission the membership must be proportional to the population inside and outside the corporate limits of municipalities.

(B) No member of a planning commission may hold an elected public office in the municipality or county from which appointed. Members of the commission first to serve must be appointed for staggered terms as specified in the agreement of organization and shall serve until their successors are appointed and qualified. The compensation of the members, if any, must be determined by the governing authority or authorities creating the commission. A vacancy in the membership of a planning commission must be filled for the unexpired term in the same manner as the original appointment. The governing authority or authorities creating the commission may remove any member of the commission for cause.

(C) In the appointment of planning commission members the appointing authority shall consider their professional expertise, knowledge of the community, and concern for the future welfare of the total community and its citizens. Members shall represent a broad cross section of the interests and concerns within the jurisdiction.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-360. Organization of commission, meetings, procedural rules, records, purchases.

(A) A local planning commission shall organize itself electing one of its members as chairman and one as vice-chairman whose terms must be for one year. It shall appoint a secretary who may be an officer or an employee of the governing authority or of the planning commission. The planning commission shall meet at the call of the chairman and at such times as the chairman or commission may determine.

(B) The commission shall adopt rules of organizational procedure and shall keep a record of its resolutions, findings, and determinations, which record must be a public record. The planning commission may purchase equipment and supplies and may employ or contract for such staff and such experts as it considers necessary and consistent with funds appropriated.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-370. Referral of matters to commission; reports.

The governing authority may provide for the reference of any matters or class of matters to the local planning commission, with the provision that final action on it may not be taken until the planning commission has submitted a report on it or has had a reasonable period of time, as determined by the governing authority to submit a report.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-380. Funding of commissions; expenditures; contracts.

A local planning commission may cooperate with, contract with, or accept funds from federal government agencies, state government agencies, local general purpose governments, school districts, special purpose districts, including those of other states, public or electric authority agencies, or private individuals or corporations. It may expend the funds, and it may carry out such cooperative undertakings and contracts as it considers necessary.

HISTORY: 1994 Act No. 355, Section 1.

ARTICLE 3

Local Planning - The Comprehensive Planning Process

Editor's Note

2007 Act No. 31, Section 6, provides as follows:

"All local governments that have adopted a local comprehensive plan in compliance with the provisions of Article 3, Chapter 29, Title 6 of the 1976 Code shall review their local comprehensive plans to comply with the provisions of this act at the local government's next review of its local comprehensive plan as provided in Section 6-29-510(E) following the effective date of this act."

SECTION 6-29-510. Planning process, elements, comprehensive plan.

(A) The local planning commission shall develop and maintain a planning process which will result in the systematic preparation and continual re-evaluation and updating of those elements considered critical, necessary, and desirable to guide the development and redevelopment of its area of jurisdiction.

(B) Surveys and studies on which planning elements are based must include consideration of potential conflicts with adjacent jurisdictions and regional plans or issues.

(C) The basic planning process for all planning elements must include, but not be limited to:

(1) inventory of existing conditions;

(2) a statement of needs and goals; and

(3) implementation strategy with time tables.

(D) A local comprehensive plan must include, but not be limited to, the following planning elements:

(1) a population element which considers historic trends and projections, household numbers and sizes, educational levels, and income characteristics;

(2) an economic development element which considers labor force and labor force characteristics, employment by place of work and residence, and analysis of the economic base;

(3) a natural resources element which considers coastal resources, slope characteristics, prime agricultural and forest land, plant and animal habitats, parks and recreation areas, scenic views and sites, wetlands, and soil types. Where a separate board exists pursuant to this chapter, this element is the responsibility of the existing board;

(4) a cultural resources element which considers historic buildings and structures, commercial districts, residential districts, unique, natural, or scenic resources, archaeological, and other cultural resources. Where a separate board exists pursuant to this chapter, this element is the responsibility of the existing board;

(5) a community facilities element which considers water supply, treatment, and distribution; sewage system and wastewater treatment; solid waste collection and disposal; fire protection; emergency medical services; and general government facilities; education facilities; and libraries and other cultural facilities;

(6) a housing element which considers location, types, age, and condition of housing, owner and renter occupancy, and affordability of housing. This element includes an analysis to ascertain nonessential housing regulatory requirements, as defined in this chapter, that add to the cost of developing affordable housing but are not necessary to protect the public health, safety, or welfare and an analysis of market-based incentives that may be made available to encourage development of affordable housing, which incentives may include density bonuses, design flexibility, and streamlined permitting processes;

(7) a land use element which considers existing and future land use by categories, including residential, commercial, industrial, agricultural, forestry, mining, public and quasi-public, recreation, parks, open space, and vacant or undeveloped;

(8) a transportation element that considers transportation facilities, including major road improvements, new road construction, transit projects, pedestrian and bicycle projects, and other elements of a transportation network. This element must be developed in coordination with the land use element, to ensure transportation efficiency for existing and planned development;

(9) a priority investment element that analyzes the likely federal, state, and local funds available for public infrastructure and facilities during the next ten years, and recommends the projects for expenditure of those funds during the next ten years for needed public infrastructure and facilities such as water, sewer, roads, and streets.

The recommendation of those projects for public expenditure must be done through coordination with adjacent and relevant jurisdictions and agencies. For the purposes of this item, "adjacent and relevant jurisdictions and agencies" means those counties, municipalities, public service districts, school districts, public and private utilities, transportation agencies, and other public entities that are affected by or have planning authority over the public project. For the purposes of this item, "coordination" means written notification by the local planning commission or its staff to adjacent and relevant jurisdictions and agencies of the proposed projects and the opportunity for adjacent and relevant jurisdictions and agencies to provide comment to the planning commission or its staff concerning the proposed projects. Failure of the planning commission or its staff to identify or notify an adjacent or relevant jurisdiction or agency does not invalidate the local comprehensive plan and does not give rise to a civil cause of action.

(E) All planning elements must be an expression of the planning commission recommendations to the appropriate governing bodies with regard to the wise and efficient use of public funds, the future growth, development, and redevelopment of its area of jurisdiction, and consideration of the fiscal impact on property owners. The planning elements whether done as a package or in separate increments together comprise the comprehensive plan for the jurisdiction at any one point in time. The local planning commission shall review the comprehensive plan or elements of it as often as necessary, but not less than once every five years, to determine whether changes in the amount, kind, or direction of development of the area or other reasons make it desirable to make additions or amendments to the plan. The comprehensive plan, including all elements of it, must be updated at least every ten years.

HISTORY: 1994 Act No. 355, Section 1; 2007 Act No. 31, Section 2, eff May 23, 2007.

Effect of Amendment

The 2007 amendment, in subsection (D), in paragraph (5) deleted "transportation network," following "corridors", in paragraph (6) added the second sentence, added paragraph (8) pertaining to transportation elements, and added paragraph (9) pertaining to priority investment elements analyzing likely federal, state, and local funds available.

SECTION 6-29-520. Advisory committees; notice of meetings; recommendations by resolution; transmittal of recommended plan.

(A) In the preparation or periodic updating of any or all planning elements for the jurisdiction, the planning commission may use advisory committees with membership from both the planning commission or other public involvement mechanisms and other resource people not members of the planning commission. If the local government maintains a list of groups that have registered an interest in being informed of proceedings related to planning, notice of meetings must be mailed to these groups.

(B) Recommendation of the plan or any element, amendment, extension, or addition must be by resolution of the planning commission, carried by the affirmative votes of at least a majority of the entire membership. The resolution must refer expressly to maps and other descriptive matter intended by the planning commission to form the whole or element of the recommended plan and the action taken must be recorded in its official minutes of the planning commission. A copy of the recommended plan or element of it must be transmitted to the appropriate governing authorities and to all other legislative and administrative agencies affected by the plan.

(C) In satisfying the preparation and periodic updating of the required planning elements, the planning commission shall review and consider, and may recommend by reference, plans prepared by other agencies which the planning commission considers to meet the requirements of this article.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-530. Adoption of plan or elements; public hearing.

The local planning commission may recommend to the appropriate governing body and the body may adopt the plan as a whole by a single ordinance or elements of the plan by successive ordinances. The elements shall correspond with the major geographical sections or divisions of the planning area or with functional subdivisions of the subject matter of the comprehensive plan, or both. Before adoption of an element or a plan as a whole, the governing authority shall hold a public hearing with after not less than thirty days' notice of the time and place of the hearings has been given in a newspaper having general circulation in the jurisdiction.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-540. Review of proposals following adoption of plan; projects in conflict with plan; exemption for utilities.

When the local planning commission has recommended and local governing authority or authorities have adopted the related comprehensive plan element set forth in this chapter, no new street, structure, utility, square, park, or other public way, grounds, or open space or public buildings for any use, whether publicly or privately owned, may be constructed or authorized in the political jurisdiction of the governing authority or authorities establishing the planning commission until the location, character, and extent of it have been submitted to the planning commission for review and comment as to the compatibility of the proposal with the comprehensive plan of the community. In the event the planning commission finds the proposal to be in conflict with the comprehensive plan, the commission shall transmit its findings and the particulars of the nonconformity to the entity proposing the facility. If the entity proposing the facility determines to go forward with the project which conflicts with the comprehensive plan, the governing or policy making body of the entity shall publicly state its intention to proceed and the reasons for the action. A copy of this finding must be sent to the local governing body, the local planning commission, and published as a public notice in a newspaper of general circulation in the community at least thirty days prior to awarding a contract or beginning construction. Telephone, sewer and gas utilities, or electric suppliers, utilities and providers, whether publicly or privately owned, whose plans have been approved by the local governing body or a state or federal regulatory agency, or electric suppliers, utilities and providers who are acting in accordance with a legislatively delegated right pursuant to Chapter 27 or 31 of Title 58 or Chapter 49 of Title 33 are exempt from this provision. These utilities must submit construction information to the appropriate local planning commission.

HISTORY: 1994 Act No. 355, Section 1.

ARTICLE 9

Local Planning - Zoning

SECTION 6-29-710. Zoning ordinances; purposes.

(A) Zoning ordinances must be for the general purposes of guiding development in accordance with existing and future needs and promoting the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare. To these ends, zoning ordinances must be made with reasonable consideration of the following purposes, where applicable:

(1) to provide for adequate light, air, and open space;

(2) to prevent the overcrowding of land, to avoid undue concentration of population, and to lessen congestion in the streets;

(3) to facilitate the creation of a convenient, attractive, and harmonious community;

(4) to protect and preserve scenic, historic, or ecologically sensitive areas;

(5) to regulate the density and distribution of populations and the uses of buildings, structures, and land for trade, industry, residence, recreation, agriculture, forestry, conservation, airports and approaches thereto, water supply, sanitation, protection against floods, public activities, and other purposes;

(6) to facilitate the adequate provision or availability of transportation, police and fire protection, water, sewage, schools, parks, and other recreational facilities, affordable housing, disaster evacuation, and other public services and requirements. "Other public requirements" which the local governing body intends to address by a particular ordinance or action must be specified in the preamble or some other part of the ordinance or action;

(7) to secure safety from fire, flood, and other dangers; and

(8) to further the public welfare in any other regard specified by a local governing body.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-715. Church-related activities; zoning ordinances for single family residences.

(A) For purposes of this section, "church-related activities" does not include regularly scheduled worship services.

(B) Notwithstanding any other provision of law, no zoning ordinance of a municipality or county may prohibit church-related activities in a single-family residence.

HISTORY: 1994 Act No. 278, Section 2.

SECTION 6-29-720. Zoning districts; matters regulated; uniformity; zoning techniques.

(A) When the local planning commission has prepared and recommended and the governing body has adopted at least the land use element of the comprehensive plan as set forth in this chapter, the governing body of a municipality or county may adopt a zoning ordinance to help implement the comprehensive plan. The zoning ordinance shall create zoning districts of such number, shape, and size as the governing authority determines to be best suited to carry out the purposes of this chapter. Within each district the governing body may regulate:

(1) the use of buildings, structures, and land;

(2) the size, location, height, bulk, orientation, number of stories, erection, construction, reconstruction, alteration, demolition, or removal in whole or in part of buildings and other structures, including signage;

(3) the density of development, use, or occupancy of buildings, structures, or land;

(4) the areas and dimensions of land, water, and air space to be occupied by buildings and structures, and the size of yards, courts, and other open spaces;

(5) the amount of off-street parking and loading that must be provided, and restrictions or requirements related to the entry or use of motor vehicles on the land;

(6) other aspects of the site plan including, but not limited to, tree preservation, landscaping, buffers, lighting, and curb cuts; and

(7) other aspects of the development and use of land or structures necessary to accomplish the purposes set forth throughout this chapter.

(B) The regulations must be made in accordance with the comprehensive plan for the jurisdiction and be made with a view to promoting the purposes set forth throughout this chapter. Except as provided in this chapter, all of these regulations must be uniform for each class or kind of building, structure, or use throughout each district, but the regulations in one district may differ from those in other districts.

(C) The zoning ordinance may utilize the following or any other zoning and planning techniques for implementation of the goals specified above. Failure to specify a particular technique does not cause use of that technique to be viewed as beyond the power of the local government choosing to use it:

(1) "cluster development" or the grouping of residential, commercial, or industrial uses within a subdivision or development site, permitting a reduction in the otherwise applicable lot size, while preserving substantial open space on the remainder of the parcel;

(2) "floating zone" or a zone which is described in the text of a zoning ordinance but is unmapped. A property owner may petition for the zone to be applied to a particular parcel meeting the minimum zoning district area requirements of the zoning ordinance through legislative action;

(3) "performance zoning" or zoning which specifies a minimum requirement or maximum limit on the effects of a land use rather than, or in addition to, specifying the use itself, simultaneously assuring compatibility with surrounding development and increasing a developer's flexibility;

(4) "planned development district" or a development project comprised of housing of different types and densities and of compatible commercial uses, or shopping centers, office parks, and mixed-use developments. A planned development district is established by rezoning prior to development and is characterized by a unified site design for a mixed use development;

(5) "overlay zone" or a zone which imposes a set of requirements or relaxes a set of requirements imposed by the underlying zoning district when there is a special public interest in a particular geographic area that does not coincide with the underlying zone boundaries;

(6) "conditional uses" or zoning ordinance provisions that impose conditions, restrictions, or limitations on a permitted use that are in addition to the restrictions applicable to all land in the zoning district. The conditions, restrictions, or limitations must be set forth in the text of the zoning ordinance; and

(7) "priority investment zone" in which the governing authority adopts market-based incentives or relaxes or eliminates nonessential housing regulatory requirements, as these terms are defined in this chapter, to encourage private development in the priority investment zone. The governing authority also may provide that traditional neighborhood design and affordable housing, as those terms are defined in this chapter, must be permitted within the priority investment zone.

HISTORY: 1994 Act No. 355, Section 1; 2007 Act No. 31, Section 3, eff May 23, 2007.

Effect of Amendment

The 2007 amendment added paragraph (C)(7) relating to "priority investment zone".

SECTION 6-29-730. Nonconformities.

The regulations may provide that land, buildings, and structures and the uses of them which are lawful at the time of the enactment or amendment of zoning regulations may be continued although not in conformity with the regulations or amendments, which is called a nonconformity. The governing authority of a municipality or county may provide in the zoning ordinance or resolution for the continuance, restoration, reconstruction, extension, or substitution of nonconformities. The governing authority also may provide for the termination of a nonconformity by specifying the period or periods in which the nonconformity is required to cease or be brought into conformance, or by providing a formula where the compulsory termination of nonconformities may be so fixed as to allow for the recovery or amortization of the investment in the nonconformity.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-740. Planned development districts.

In order to achieve the objectives of the comprehensive plan of the locality and to allow flexibility in development that will result in improved design, character, and quality of new mixed use developments and preserve natural and scenic features of open spaces, the local governing authority may provide for the establishment of planned development districts as amendments to a locally adopted zoning ordinance and official zoning map. The adopted planned development map is the zoning district map for the property. The planned development provisions must encourage innovative site planning for residential, commercial, institutional, and industrial developments within planned development districts. Planned development districts may provide for variations from other ordinances and the regulations of other established zoning districts concerning use, setbacks, lot size, density, bulk, and other requirements to accommodate flexibility in the arrangement of uses for the general purpose of promoting and protecting the public health, safety, and general welfare. Amendments to a planned development district may be authorized by ordinance of the governing authority after recommendation from the planning commission. These amendments constitute zoning ordinance amendments and must follow prescribed procedures for the amendments. The adopted plan may include a method for minor modifications to the site plan or development provisions.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-750. Special development district parking facility plan; dedication.

In accordance with a special development district parking facility plan and program, which includes guidelines for preferred parking locations and indicates prohibited parking areas, the planning commission may recommend and the local governing body may adopt regulations which permit the reduction or waiver of parking requirements within the district in return for cash contributions or dedications of land earmarked for provision of public parking or public transit which may not be used for any other purpose. The cash contributions or the value of the land may not exceed the approximate cost to build the required spaces or provide the public transit that would have incurred had not the reduction or waiver been granted.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-760. Procedure for enactment or amendment of zoning regulation or map; notice and rights of landowners; time limit on challenges.

(A) Before enacting or amending any zoning regulations or maps, the governing authority or the planning commission, if authorized by the governing authority, shall hold a public hearing on it, which must be advertised and conducted according to lawfully prescribed procedures. If no established procedures exist, then at least fifteen days' notice of the time and place of the public hearing must be given in a newspaper of general circulation in the municipality or county. In cases involving rezoning, conspicuous notice shall be posted on or adjacent to the property affected, with at least one such notice being visible from each public thoroughfare that abuts the property. If the local governmental maintains a list of groups that have expressed an interest in being informed of zoning proceedings, notice of such meetings must be mailed to these groups. No change in or departure from the text or maps as recommended by the local planning commission may be made pursuant to the hearing unless the change or departure be first submitted to the planning commission for review and recommendation. The planning commission shall have a time prescribed in the ordinance which may not be more than thirty days within which to submit its report and recommendation on the change to the governing authority. If the planning commission fails to submit a report within the prescribed time period it is deemed to have approved the change or departure. When the required public hearing is held by the planning commission, no public hearing by the governing authority is required before amending the zoning ordinance text or maps.

(B) If a landowner whose land is the subject of a proposed amendment will be allowed to present oral or written comments to the planning commission, at least ten days' notice and an opportunity to comment in the same manner must be given to other interested members of the public, including owners of adjoining property.

(C) An owner of adjoining land or his representative has standing to bring an action contesting the ordinance or amendment; however, this subsection does not create any new substantive right in any party.

(D) No challenge to the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it, whether enacted before or after the effective date of this section, may be made sixty days after the decision of the governing body if there has been substantial compliance with the notice requirements of this section or with established procedures of the governing authority or the planning commission.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-770. Governmental entities subject to zoning ordinances; exceptions.

(A) Agencies, departments, and subdivisions of this State that use real property, as owner or tenant, in any county or municipality in this State are subject to the zoning and rules.

(B) A county or agency, department or subdivision of it that uses any real property, as owner or tenant, within the limits of any municipality in this State is subject to the zoning ordinances of the municipality.

(C) A municipality or agency, department or subdivision of it, that uses any real property, as owner or tenant, within the limits of any county in this State but not within the limits of the municipality is subject to the zoning ordinances of the county.

(D) The provisions of this section do not require a state agency, department, or subdivision to move from facilities occupied on June 18, 1978, regardless of whether or not their location is in violation of municipal or county zoning ordinances.

(E) The provisions of this section do not apply to a home serving nine or fewer mentally or physically handicapped persons provided the home provides care on a twenty-four hour basis and is approved or licensed by a state agency or department or under contract with the agency or department for that purpose. A home is construed to be a natural family or such similar term as may be utilized by any county or municipal zoning ordinance to refer to persons related by blood or marriage. Prior to locating the home for the handicapped persons, the appropriate state agency or department or the private entity operating the home under contract shall first give prior notice to the local governing body administering the pertinent zoning laws, advising of the exact site of any proposed home. The notice must also identify the individual representing the agency, department, or private entity for site selection purposes. If the local governing body objects to the selected site, the governing body must notify the site selection representative of the entity seeking to establish the home within fifteen days of receiving notice and must appoint a representative to assist the entity in selection of a comparable alternate site of structure, or both. The site selection representative of the entity seeking to establish the home and the representative of the local governing body shall select a third mutually agreeable person. The three persons have forty-five days to make a final selection of the site by majority vote. This final selection is binding on the entity and the governing body. In the event no selection has been made by the end of the forty-five day period, the entity establishing the home shall select the site without further proceedings. An application for variance or special exception is not required. No person may intervene to prevent the establishment of a community residence without reasonable justification.

(F) Prospective residents of these homes must be screened by the licensing agency to ensure that the placement is appropriate.

(G) The licensing agency shall conduct reviews of these homes no less frequently than every six months for the purpose of promoting the rehabilitative purposes of the homes and their continued compatibility with their neighborhoods.

(H) The governing body of a county or municipality whose zoning ordinances are violated by the provisions of this section may apply to a court of competent jurisdiction for injunctive and such other relief as the court may consider proper.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-775. Use of property obtained from federal government.

Notwithstanding the provisions of Section 6-29-770 of the 1976 Code or any other provision of law, a state agency or entity that acquires real property from the federal government or from a state instrumentality or redevelopment agency that received it from the federal government shall be permitted to use the property in the same manner the federal government was permitted to use the property. Further, the property in the hands of the state agency or entity shall be subject only to the same restrictions, if any, as it was in the hands of the federal government, and no county or municipality of this State by zoning or other means may restrict this permitted use or enjoyment of the property.

HISTORY: 2002 Act No. 298, Section 3.

Code Commissioner's Note-

Codified as Section 6-29-775 at the direction of the Code Commissioner.

SECTION 6-29-780. Board of zoning appeals; membership; terms of office; vacancies; compensation.

(A) As a part of the administrative mechanism designed to enforce the zoning ordinance, the zoning ordinance may provide for the creation of a board to be known as the board of zoning appeals. Local governing bodies with a joint planning commission and adopting a common zoning ordinance may create a board to be known as the joint board of appeals. All of these boards are referred to as the board.

(B) The board consists of not less than three nor more than nine members, a majority of which constitutes a quorum, appointed by the governing authority or authorities of the area served. The members shall serve for overlapping terms of not less than three nor more than five years or other than time until their successors are appointed. A vacancy in the membership must be filled for the unexpired term in the same manner as the initial appointment. The governing authority or authorities creating the board of zoning appeals may remove any member of the board for cause. The appointing authorities shall determine the amount of compensation, if any, to be paid to the members of a board of zoning appeals. None of the members shall hold any other public office or position in the municipality or county.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-790. Board of zoning appeals; officers, rules; meetings; notice; records.

The board shall elect one of its members chairman, who shall serve for one year or until he is re-elected or his successor is elected and qualified. The board shall appoint a secretary who may be an officer of the governing authority or of the zoning board. The board shall adopt rules of procedure in accordance with the provisions of an ordinance adopted pursuant to this chapter. Meetings of the board must be held at the call of the chairman and at such other times as the board may determine. Public

notice of all meetings of the board of appeals shall be provided by publication in a newspaper of general circulation in the municipality or county. In cases involving variances or special exceptions conspicuous notice shall be posted on or adjacent to the property affected, with at least one such notice being visible from each public thoroughfare that abuts the property. The chairman or, in his or her absence, the acting chairman, may administer oaths and compel the attendance of witnesses by subpoena. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or if absent or failing to vote, indicating that fact, and shall keep records of its examinations and other official actions, all of which must be immediately filed in the office of the board and must be a public record.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-825. Powers of board of appeals; variances; special exceptions; remand; stay; hearing; decisions and orders.

(A) The board of appeals has the following powers:

(1) to hear and decide appeals where it is alleged there is error in an order, requirement, decision, or determination made by an administrative official in the enforcement of the zoning ordinance;

(2) to hear and decide appeals for variance from the requirements of the zoning ordinance when strict application of the provisions of the ordinance would result in unnecessary hardship. A variance may be granted in an individual case of unnecessary hardship if the board makes and explains in writing the following findings:

(a) there are extraordinary and exceptional conditions pertaining to the particular piece of property;

(b) these conditions do not generally apply to other property in the vicinity;

(c) because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and

(d) the authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

(i) The board may not grant a variance, the effect of which would be to allow the establishment of a use not otherwise permitted in a zoning district, to extend physically a nonconforming use of land or to change the zoning district boundaries shown on the official zoning map. The fact that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance. Other requirements may be prescribed by the zoning ordinance.

A local governing body by ordinance may permit or preclude the granting of a variance for a use of land, a building, or a structure that is prohibited in a given district, and if it does permit a variance, the governing body may require the affirmative vote of two-thirds of the local adjustment board members present and voting. Notwithstanding any other provision of this section, the local governing body may overrule the decision of the local board of adjustment concerning a use variance.

(ii) In granting a variance, the board may attach to it such conditions regarding the location, character, or other features of the proposed building, structure, or use as the board may consider advisable to protect established property values in the surrounding area or to promote the public health, safety, or general welfare.

(3) to permit uses by special exception subject to the terms and conditions for the uses set forth for such uses in the zoning ordinance; and

(4) to remand a matter to an administrative official, upon motion by a party or the board's own motion, if the board determines the record is insufficient for review. A party's motion for remand may be denied if the board determines that the record is sufficient for review. The board must set a rehearing on the remanded matter without further public notice for a time certain within sixty days unless otherwise agreed to by the parties. The board must maintain a list of persons who express an interest in being informed when the remanded matter is set for rehearing, and notice of the rehearing must be mailed to these persons prior to the rehearing.

(B) Appeals to the board may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality or county. The appeal must be taken within a reasonable time, as provided by the zoning ordinance or rules of the board, or both, by filing with the officer from whom the appeal is taken and with the board of appeals notice of appeal specifying the grounds for the appeal. If no time limit is provided, the appeal must be taken within thirty days from the date the appealing party has received actual notice of the action from which the appeal is taken. The officer from whom the appeal is taken immediately must transmit to the board all the papers constituting the record upon which the action appealed from was taken.

(C) An appeal stays all legal proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board, after the notice of appeal has been filed with him, that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life and property. In that case, proceedings may not be stayed other than by a restraining order which may be granted by the board or by a court of record on application, on notice to the officer from whom the appeal is taken, and on due cause shown.

(D) The board must fix a reasonable time for the hearing of the appeal or other matter referred to the board, and give at least fifteen days' public notice of the hearing in a newspaper of general circulation in the community, as well as due notice to the parties in interest, and decide the appeal or matter within a reasonable time. At the hearing, any party may appear in person or by agent or by attorney.

(E) In exercising the above power, the board of appeals may, in conformity with the provisions of this chapter, reverse or affirm, wholly or in part, or may modify the order, requirements, decision, or determination, and to that end, has all the powers of the officer from whom the appeal is taken and may issue or direct the issuance of a permit. The board, in the execution of the duties specified in this chapter, may subpoena witnesses and in case of contempt may certify this fact to the circuit court having jurisdiction.

(F) All final decisions and orders of the board must be in writing and be permanently filed in the office of the board as a public record. All findings of fact and conclusions of law must be separately stated in final decisions or orders of the board which must be delivered to parties of interest by certified mail.

HISTORY: 1994 Act No. 355, Section 1; 2003 Act No. 39, Section 2, eff June 2, 2003.

Effect of Amendment:

The 2003 amendment rewrote this section.

SECTION 6-29-830. Contempt; penalty.

In case of contempt by a party, witness, or other person before the board of appeals, the board may certify this fact to the circuit court of the county in which the contempt occurs and the judge of the court, in open court or in chambers, after hearing, may impose a penalty as authorized by law.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-835. Appeal from zoning board of appeals to circuit court; pre-litigation mediation; filing requirements.

(A) A person who may have a substantial interest in any decision of the board of appeals or an officer or agent of the appropriate governing authority may appeal from a decision of the board to the circuit court in and for the county, by filing with the clerk of the court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within thirty days after the decision of the board is mailed.

(B) A property owner whose land is the subject of a decision of the board of appeals may appeal either:

(1) as provided in subsection (A); or

(2) by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with Section 6-29-915.

Any notice of appeal and request for pre-litigation mediation must be filed within thirty days after the decision of the board is postmarked.

(C) Any filing of an appeal from a particular board of appeals decision pursuant to the provisions of this chapter must be given a single docket number and the appellant

must be assessed only one filing fee pursuant to Section 8-21-310(11)(a).

HISTORY: 1994 Act No. 355, Section 1; 2003 Act No. 39, Section 3, eff June 2, 2003.

Effect of Amendment

The 2003 amendment added subsections (B) and (C) and designated the existing paragraph as subsection (A).

SECTION 6-29-825. Pre-litigation mediation; notice; settlement approval; effect on real property; unsuccessful mediation.

(A) If a property owner files a notice of appeal with a request for pre-litigation mediation, the request for mediation must be granted, and the mediation must be conducted in accordance with South Carolina Circuit Court Alternative Dispute Resolution Rules and this section. A person who is not the owner of the property may petition to intervene as a party, and the motion must be granted if the person has a substantial interest in the decision of the board of appeals.

(B) The property owner or his representative, any other person claiming an ownership interest in the property or his representative, and any other person who has been granted leave to intervene pursuant to subsection (A) or his representative must be notified and have the opportunity to attend the mediation. The governmental entity must be represented by at least one person for purposes of mediation.

(C) Within five working days of a successful mediation, the mediator must provide the parties with a signed copy of the written mediation agreement.

(D) Before the terms of a mediation settlement may take effect, the mediation settlement must be approved by:

(1) the local legislative governing body in public session; and

(2) the circuit court as provided in subsection (G).

(E) Any land use or other change agreed to in mediation which affects existing law is effective only as to the real property which is the subject of the mediation, and a settlement agreement sets no precedent as to other parcels of real property.

(F) If mediation is not successful or the mediated settlement is not approved by the local legislative governing body, a property owner may appeal by filing a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The petition must be filed with the circuit court within thirty days of:

(1) the report of an impasse as provided in the South Carolina Circuit Court Alternative Dispute Resolution Rules; or

(2) the failure to approve the settlement by the local governing body.

(G) The circuit court judge must approve the settlement if the settlement has a rational basis in accordance with the standards of this chapter. If the mediated settlement is not approved by the court, the judge must schedule a hearing for the parties to present evidence and must issue a written opinion containing findings of law and fact. A party may appeal from the decision:

(1) in the same manner as provided by law for appeals from other judgments of the circuit court; or

(2) by filing an appeal pursuant to subsection (F).

HISTORY: 2003 Act No. 39, Section 4, eff June 2, 2003.

SECTION 6-29-830. Notice of appeal; transcript; supersedeas.

(A) Upon the filing of an appeal with a petition as provided in Section 6-29-820(A) or Section 6-29-825(F), the clerk of the circuit court must give immediate notice of the appeal to the secretary of the board and within thirty days from the time of the notice, the board must file with the clerk a duly certified copy of the proceedings held before the board of appeals, including a transcript of the evidence heard before the board, if any, and the decision of the board including all findings of fact and conclusions.

(B) The filing of an appeal in the circuit court from any decision of the board does not ipso facto act as a supersedeas, but the judge of the circuit court may in his discretion grant a supersedeas upon such terms and conditions as may seem reasonable and proper.

HISTORY: 1994 Act No. 355, Section 1; 2003 Act No. 39, Section 5, eff June 2, 2003.

Effect of Amendment

The 2003 amendment, in subsection (A), inserted "with a petition as provided in Section 6-29-820(A) or Section 6-29-825(F)" preceding ", the clerk of circuit court", substituted "the appeal" for "it", inserted "duly" preceding "certified copy", and substituted "the board" for "it", in subsection (B) substituted "any" for "a" and "does" for "shall", and in subsections (A) and (B) made nonsubstantive changes.

SECTION 6-29-840. Determination of appeal; costs; trial by jury.

(A) At the next term of the circuit court or in chambers, upon ten days' notice to the parties, the presiding judge of the circuit court of the county must proceed to hear and pass upon the appeal on the certified record of the board proceedings. The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence. In the event the judge determines that the certified record is insufficient for review, the matter may be remanded to the zoning board of appeals for rehearing. In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law. In the event that the decision of the board is reversed by the circuit court, the board is charged with the costs, and the costs must be paid by the governing authority which established the board of appeals.

(B) When an appeal includes no issues triable of right by jury or when the parties consent, the appeal must be placed on the nonjury docket. A judge, upon request by any party, may in his discretion give the appeal precedence over other civil cases. Nothing in this subsection prohibits a property owner from subsequently electing to assert a pre-existing right to trial by jury of any issue beyond the subject matter jurisdiction of the board of appeals, such as, but not limited to, a determination of the amount of damages due for an unconstitutional taking.

HISTORY: 1994 Act No. 355, Section 1; 2003 Act No. 39, Section 6, eff June 2, 2003.

Effect of Amendment

The 2003 amendment added subsection (B), designated the existing paragraph as subsection (A), and made nonsubstantive changes.

SECTION 6-29-850. Appeal to Supreme Court.

A party in interest who is aggrieved by the judgment rendered by the circuit court upon the appeal may appeal in the manner provided by the South Carolina Appellate Court Rules.

HISTORY: 1994 Act No. 355, Section 1; 1999 Act No. 55, Section 10.

SECTION 6-29-860. Financing of board of zoning appeals.

The governing authority may appropriate such monies, otherwise unappropriated, as it considers fit to finance the work of the board of appeals and to generally provide for the enforcement of any zoning regulations and restrictions authorized under this chapter which are adopted and may accept and expend grants of money for those purposes from either private or public sources, whether local, state, or federal.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-870. Board of architectural review; membership; officers; rules; meetings; records.

(A) A local government which enacts a zoning ordinance which makes specific provision for the preservation and protection of historic and architecturally valuable districts and neighborhoods or significant or natural scenic areas, or portions or provides, or both, for the unique, special, or desired character of a defined district, corridor, or development area or any combination of it, by means of restriction and conditions governing the right to erect, demolish, remove in whole or in part, or alter the exterior appearance of all buildings or structures within the areas, may provide for appointment of a board of architectural review or similar body.

(B) The board shall consist of not more than ten members to be appointed by the governing body of the municipality or the governing body of the county which may restrict the membership on the board to duly professionally qualified persons as it may desire. The governing authority or authorities creating the board may remove any member of the board which it has appointed.

(C) The appointing authorities shall determine the amount of compensation, if any, to be paid to the members of a board of architectural review. None of the members may hold any other public office or position in the municipality or county.

(D) The board shall elect one of its members chairman, who shall serve for one year or until he is reelected or his successor is elected and qualified. The board shall appoint a secretary who may be an officer of the governing authority or of the board of architectural review. The board shall adopt rules of procedure in accordance with the provisions of any ordinance adopted pursuant to this chapter. Meetings of the board must be held at the call of the chairman and at such other times as the board may determine. The chairman or, in his or her absence, the acting chairman, may administer oaths and compel the attendance of witnesses by subpoena. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or if absent or failing to vote, indicating that fact, and shall keep records of its examinations and other official actions, all of which immediately must be filed in the office of the board and must be a public record.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-880. Powers of board of architectural review.

The board of architectural review has those powers involving the structures and neighborhoods as may be determined by the zoning ordinance. Decisions of the zoning administrator or other appropriate administrative official or matters under the purview of the board of architectural review may be appealed to the board where there is an alleged error in any order, requirement, decision, or decision.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-890. Appeal to board of architectural review.

(A) Appeals to the board may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality or county. The appeal must be taken within a reasonable time, as provided by the zoning ordinance or rules of the board, or both, by filing with the officer from whom the appeal is taken and with the board of architectural review notice of appeal specifying the grounds of it. The officer from whom the appeal is taken immediately must transmit to the board all the papers constituting the record upon which the action appealed from was taken. Upon a motion by a party or the board's own motion, the board may remand a matter to an administrative official if the board determines the record is insufficient for review. A party's motion for remand may be denied if the board determines that the record is sufficient for review. The board must set a rehearing on the remanded matter without further public notice for a time certain within sixty days unless otherwise agreed to by the parties. The board must maintain a list of persons who express an interest in being informed when the remanded matter is set for rehearing, and notice of the rehearing must be mailed to these persons prior to the rehearing.

(B) An appeal stays all legal proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board, after the notice of appeal has been filed with him, that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life and property. In that case, proceedings may not be stayed otherwise than by a restraining order which may be granted by the board or by a court of record on application, upon notice to the officer from whom the appeal is taken, and on due cause shown.

(C) The board must fix a reasonable time for the hearing of the appeal or other matter referred to it, and give public notice of the hearing, as well as due notice to the parties in interest, and decide the appeal or other matter within a reasonable time. At the hearing, any party may appear in person, by agent, or by attorney.

HISTORY: 1994 Act No. 355, Section 1; 2003 Act No. 39, Section 7, eff June 2, 2003.

Effect of Amendment

The 2003 amendment in subsection (A) added the last four sentences relating to remand procedures, in subsection (C) substituted "The hearing" for "It" and "appeal or other matter" for "same", and in subsections (A), (B), and (C) made nonsubstantive changes.

SECTION 6-29-900. Appeal from board of architectural review to circuit court; pre-litigation mediation; filing requirements.

(A) A person who may have a substantial interest in any decision of the board of architectural review or any officer, or agent of the appropriate governing authority may appeal from any decision of the board to the circuit court in and for the county by filing with the clerk of court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within thirty days after the affected party receives actual notice of the decision of the board of architectural review.

(B) A property owner whose land is the subject of a decision of the board of architectural review may appeal either:

(1) as provided in subsection (A); or

(2) by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with Section 6-29-915.

A notice of appeal and request for pre-litigation mediation must be filed within thirty days after the decision of the board is postmarked.

(C) Any filing of an appeal from a particular board of architectural review decision pursuant to the provisions of this chapter must be given a single docket number, and the appellant must be assessed only one filing fee pursuant to Section 8-21-310(11)(a).

HISTORY: 1994 Act No. 355, Section 1; 2003 Act No. 39, Section 8, eff June 2, 2003.

Effect of Amendment

The 2003 amendment added subsections (B) and (C) and designated the existing paragraph as subsection (A).

SECTION 6-29-910. Contempt; penalty.

In case of contempt by a party, witness, or other person before the board of architectural review, the board may certify the fact to the circuit court of the county in which the contempt occurs and the judge of the court, in open court or in chambers, after hearing, may impose a penalty as authorized by law.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-915. Pre-litigation mediation; notice; settlement approval; effect on real property; unsuccessful mediation.

(A) If a property owner files a notice of appeal with a request for pre-litigation mediation, the request for mediation must be granted and the mediation must be conducted in accordance with South Carolina Circuit Court Alternative Dispute Resolution Rules and this section. A person who is not the owner of the property may petition to intervene as a party, and the motion must be granted if the person has a substantial interest in the decision of the board of architectural review.

(B) The property owner or his representative, any other person claiming an ownership interest in the property or his representative, and any other person who has been granted leave to intervene pursuant to subsection (A) or his representative must be notified and have the opportunity to attend the mediation. The governmental entity must be represented by at least one person for purposes of mediation.

(C) Within five working days of a successful mediation, the mediator must provide the parties with a signed copy of the written mediation agreement.

(D) Before the terms of a mediation settlement may take effect, the mediation settlement must be approved by

(1) the local legislative governing body in public session; and

(2) the circuit court as provided in subsection (G).

(E) Any land use or other change agreed to in mediation which affects existing law is effective only as to the real property which is the subject of the mediation, and a settlement agreement sets no precedent as to other parcels of real property.

(F) If mediation is not successful or if the mediated settlement is not approved by the local legislative governing body, a property owner may appeal by filing a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The petition must be filed with the circuit court within thirty days of:

(1) the report of an impasse as provided in the South Carolina Circuit Court Alternative Dispute Resolution Rules; or

(2) the failure to approve the settlement by the local governing body.

(G) The circuit court judge must approve the settlement if the settlement has a rational basis in accordance with the standards of this chapter. If the mediated settlement is not approved by the court, the judge must schedule a hearing for the parties to present evidence and must issue a written opinion containing findings of law and fact. A party may appeal from the decision:

(1) in the same manner as provided by law for appeals from other judgments of the circuit court; or

(2) by filing an appeal pursuant to subsection (F).

HISTORY: 2003 Act No. 38, Section 9, eff June 2, 2003.

SECTION 6-29-920. Notice of appeal; transcript; supersedeas.

(A) Upon filing of an appeal with a petition as provided in Section 6-29-900(A) or Section 6-29-915(F), the clerk of the circuit court must give immediate notice of the appeal to the secretary of the board and within thirty days from the time of the notice, the board must file with the clerk a duly certified copy of the proceedings held before the board of architectural review, including a transcript of the evidence heard before the board, if any, and the decision of the board including its findings of fact and conclusions.

(B) The filing of an appeal in the circuit court from any decision of the board does not ipso facto act as a supersedeas, but the judge of the circuit court may in his discretion grant a supersedeas upon such terms and conditions as may seem reasonable and proper.

HISTORY: 1994 Act No. 355, Section 1; 2003 Act No. 38, Section 10, eff June 2, 2003.

Effect of Amendment

The 2003 amendment in subsection (A) inserted "with a petition as provided in Section 6-29-900(A) or Section 6-29-915(F) preceding", the clerk of circuit court", and in subsections (A) and (B) made clarifying and nonsubstantive changes.

SECTION 6-29-930. Determination of appeal; costs; trial by jury.

(A) At the next term of the circuit court or in chambers upon ten days' notice to the parties, the resident presiding judge of the circuit court of the county must proceed to hear and pass upon the appeal on the certified record of the board proceedings. The findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence. In the event the judge determines that the certified record is insufficient for review, the matter must be remanded to the board of architectural review for rehearing. In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law. In the event that the decision of the board is reversed by the circuit court, the board must be charged with the costs which must be paid by the governing authority which established the board of architectural review.

(B) When an appeal includes an issue triable of right by jury or when the parties consent, the appeal must be placed on the nonjury docket. A judge, upon request by any party, may in his discretion give the appeal precedence over other civil cases. Nothing in this subsection prohibits a property owner from subsequently electing to assert a pre-existing right to trial by jury of any issue beyond the subject matter jurisdiction of the board of architectural review, such as, but not limited to, a determination of the amount of damages due for an unconstitutional taking.

HISTORY: 1994 Act No. 355, Section 1; 2003 Act No. 38, Section 11, eff June 2, 2003.

Effect of Amendment

The 2003 amendment added subsection (B), designated the existing paragraph as subsection (A), and made nonsubstantive changes.

SECTION 6-29-950. Appeal to Supreme Court.

A party in interest who is aggrieved by the judgment rendered by the circuit court upon the appeal may appeal in the manner provided by the South Carolina Appellate Court Rules.

HISTORY: 1994 Act No. 355, Section 1; 1999 Act No. 55, Section 11.

SECTION 6-29-960. Enforcement of zoning ordinances; remedies for violations.

(A) The governing authorities of municipalities or counties may provide for the enforcement of any ordinance adopted pursuant to the provisions of this chapter by means of the withholding of building or zoning permits or both, and the issuance of stop orders against any work undertaken by an entity not having a proper building or zoning permit, or both. It is unlawful to construct, reconstruct, alter, demolish, change the use of or occupy any land, building, or other structure without first obtaining the appropriate permit or permit approval. No permit may be issued or approved unless the requirements of this chapter or any ordinance adopted pursuant to it are complied with. It is unlawful for other officials to issue any permit for the use of any land, building, or structure, or the construction, conversion, demolition, enlargement, movement, or structural alteration of a building or structure without the approval of the zoning administrator. A violation of any ordinance adopted pursuant to the provisions of this chapter is a misdemeanor. In case a building, structure, or land is or is proposed to be used in violation of any ordinance adopted pursuant to this chapter, the zoning administrator or other appropriate administrative officer, municipal or county attorney, or other appropriate authority of the municipality or county or an adjacent or neighboring property owner who would be specially damaged by the violation may in addition to other remedies, institute injunction, mandamus, or other appropriate action or proceeding to prevent the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use, or to correct or abate the violation, or to prevent the occupancy of the building, structure, or land. Each day the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use continues is considered a separate offense.

(B) In case a building, structure, or land is or is proposed to be used in violation of an ordinance adopted pursuant to this chapter, the zoning administrator or other designated administrative officer may in addition to other remedies issue and serve upon a person pursuing the activity or activities a stop order requiring that entity stop all activities in violation of the zoning ordinance.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-970. Conflict with other laws.

When the regulations made under authority of this chapter require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or

smaller number of stories or require a greater percentage of lot to be left unoccupied, or impose other more restrictive standards than are required in or under another statute, or local ordinance or regulation, the regulations made under authority of this chapter govern. When the provisions of another statute require more restrictive standards than are required by the regulations made under authority of this chapter, the provisions of that statute govern.

HISTORY: 1994 Act No. 355, Section 1.

ARTICLE 7

Local Planning - Land Development Regulation

SECTION 6-29-1110. Definitions.

As used in this chapter:

(1) "Affordable housing" means in the case of dwelling units for sale, housing in which mortgage, amortization, taxes, insurance, and condominium or association fees, if any, constitute no more than twenty-eight percent of the annual household income for a household earning no more than eighty percent of the area median income, by household size, for the metropolitan statistical area as published from time to time by the U.S. Department of Housing and Community Development (HUD) and, in the case of dwelling units for rent, housing for which the rent and utilities constitute no more than thirty percent of the annual household income for a household earning no more than eighty percent of the area median income, by household size for the metropolitan statistical area as published from time to time by HUD.

(2) "Land development" means the changing of land characteristics through redevelopment, construction, subdivision into parcels, condominium complexes, apartment complexes, commercial parks, shopping centers, industrial parks, mobile home parks, and similar developments for sale, lease, or any combination of owner and rental characteristics.

(3) "Market-based incentives" mean incentives that encourage private developers to meet the governing authority's goals as developed in this chapter. Incentives may include, but are not limited to:

(a) density bonuses, allowing developers to build at a density higher than is density zones typically permit, and greater density bonuses, allowing developers to build at a density higher than residential affordable units in development, or allowing developers to purchase density by paying into a local housing trust fund;

(b) relaxed zoning regulations including, but not limited to, minimum lot area requirements, limitations of multifamily dwellings, minimum setbacks, yard requirements variances, reduced parking requirements, and relaxed street standards;

(c) reduced or waived fees including those fees levied on new development projects where affordable housing is addressed, reimburse permit fees to builder upon certification that dwelling unit is affordable and waive up to one hundred percent of sewer/water tap-in fees for affordable housing units;

(d) fast-track permitting including, but not limited to, streamlining the permitting process for new development projects and expediting affordable housing developments to help reduce cost and time delays;

(e) design flexibility allowing for greater design flexibility, creating preapproved design standards to allow for quick and easy approval, and promoting infill development, mixed use and accessory dwellings;

(4) "Subdivision" means all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions for the purpose, whether immediate or future, of sale, lease, or building development, and includes all division of land involving a new street or change in existing streets, and includes re-subdivision which would involve the further division or relocation of lot lines of any lot or lots within a subdivision previously made and approved or recorded according to law; or, the alteration of any streets or the establishment of any new streets within any subdivision previously made and approved or recorded according to law, and includes combined areas of lots of record; however, the following exceptions are included within this definition only for the purpose of requiring that the local planning agency be informed and have a record of the subdivisions:

(a) the combination or recombination of portions of previously platted lots where the total number of lots is not increased and the resultant lots are equal to the standards of the governing authority;

(b) the division of land into parcels of five acres or more where no new street is involved and plats of these exceptions must be received as information by the planning agency which shall indicate that fact on the plats; and

(c) the combination or recombination of entire lots of record where no new street or change in existing streets is involved.

(5) "Traditional neighborhood design" means development designs intended to enhance the appearance and functionality of the new development so that it functions like a traditional neighborhood or town. These designs make possible reasonably high residential densities, a mixture of residential and commercial land uses, a range of single and multifamily housing types, and robust connectivity both within the new development and to surrounding roadways, pedestrian, and bicycle features.

(6) "Unnecessary local housing regulatory requirements" mean those development standards and procedures that are determined by the local governing body to be not essential within a specific priority investment zone to protect the public health, safety, or welfare and that may otherwise make a proposed housing development economically infeasible. Unnecessary local housing regulatory requirements may include, but are not limited to:

(a) standards or requirements for minimum lot size, building size, building setbacks, spacing between buildings, impervious surfaces, open space, landscaping, buffering, reforestation, road width, pavement, parking, sidewalks, paved paths, culverts and storm water drainage, and sizing of water and sewer lines that are excessive; and

(b) application and review procedures that require or result in extensive submittals and lengthy review periods.

HISTORY: 1994 Act No. 355, Section 1; 2007 Act No. 31, Section 4, eff May 23, 2007.

Effect of Amendment

The 2007 amendment added Item (1) defining "Affordable housing", Item (3) defining "Market-based incentives" and Item (6) defining "Traditional neighborhood design" and redesignated Item (1), "Land development" as Item (2) and Item (2), "Subdivision" as Item (4).

SECTION 6-29-1120. Legislative intent; purposes.

The public health, safety, economy, good order, appearance, convenience, morals, and general welfare require the harmonious, orderly, and progressive development of land within the municipalities and counties of this State. In furtherance of this general intent, the regulation of land development by municipalities, counties, or consolidated political subdivisions is authorized for the following purposes, among others:

(1) to encourage the development of economically sound and stable municipalities and counties;

(2) to assure the timely provision of required streets, utilities, and other facilities and services to new land developments;

(3) to assure the adequate provision of safe and convenient traffic access and circulation, both vehicular and pedestrian, in and through new land developments;

(4) to assure the provision of needed public open spaces and building sites in new land developments through the dedication or reservation of land for recreational, educational, transportation, and other public purposes; and

(5) to assure, in general, the wise and timely development of new areas, and redevelopment of previously developed areas in harmony with the comprehensive plans of municipalities and counties.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-1130. Regulations

(A) When at least the community facilities element, the housing element, and the priority investment element of the comprehensive plan as authorized by this chapter have been adopted by the local planning commission and the local governing body or bodies, the local planning commission may prepare and recommend to the governing body or bodies for adoption regulations governing the development of land within the jurisdiction. These regulations may provide for the harmonious development of the municipality and the county; for coordination of streets within subdivision and other types of land developments with other existing or planned streets or official map streets; for the size of blocks and lots; for the dedication or reservation of land for streets, school sites, drainage areas, and easements for utilities and other public services and facilities; and for the distribution of population and traffic which will tend to create conditions favorable to health, safety, convenience, appearance, prosperity, or the general welfare. In particular, the regulations shall prescribe that no land development plan, including subdivision plats, will be approved unless all land intended for use as building sites can be used safely for building purposes, without danger from flood or other inundation or from other menaces to health, safety, or public welfare.

(B) These regulations may include requirements as to the extent to which and the manner in which streets must be graded, surfaced, and improved, and water, sewers, septic tanks, and other utility mains, piping, connections, or other facilities must be installed as a condition precedent to the approval of the plan. The governing authority of the municipality and the governing authority of the county are given the power to adopt and to amend the land development regulations after a public hearing on it, giving at least thirty days' notice of the time and place by publication in a newspaper of general circulation in the municipality or county.

HISTORY: 1994 Act No. 355, Section 1; 2007 Act No. 31, Section 5, eff May 23, 2007.

Effect of Amendment

The 2007 amendment, in subsection (A), in the first sentence added ", the housing element, and the priority investment element" and substituted "have" for "has".

SECTION 6-29-1140. Development plan to comply with regulations; submission of unapproved plan for recording is a misdemeanor.

After the local governing authority has adopted land development regulations, no subdivision plat or other land development plan within the jurisdiction of the regulations may be filed or recorded in the office of the county where deeds are required to be recorded, and no building permit may be issued until the plat or plan bears the stamp of approval and is properly signed by the designated authority. The submission for filing or the recording of a subdivision plat or other land development plan without proper approval as required by this chapter is declared a misdemeanor and, upon conviction, is punishable as provided by law.

HISTORY: 1994 Act No. 355, Section 1.

SECTION 6-29-1145. Determining existence of restrictive covenant; effect.

(A) In an application for a permit, the local planning agency must require in the application or by written instructions to an applicant whether the tract or parcel of land is restricted by any recorded covenant that is contrary to, conflicts with, or prohibits the permitted activity.

(B) If a local planning agency has actual notice of a restrictive covenant on a tract or parcel of land that is contrary to, conflicts with, or prohibits the permitted activity:

(1) in the application for the permit;

(2) from materials or information submitted by the person or persons requesting the permit; or

(3) from any other source including, but not limited to, other property holders, the local planning agency must not issue the permit unless the local planning agency receives confirmation from the applicant that the restrictive covenant has been released by the deed or parcel of land by action of the appropriate authority or property holders or by court order.

(C) As used in this section:

(1) "actual notice" is not constructive notice of documents filed in local offices concerning the property, and does not require the local planning agency to conduct searches in any records other than files of restrictive covenants;

(2) "permit" does not mean an authorization to build or place a structure on a tract or parcel of land; and

(3) "restrictive covenant" does not mean a restriction concerning a type of structure that may be built or placed on a tract or parcel of land.

HISTORY: 2007 Act No. 45, Section 3, eff June 4, 2007, applicable to applications for permits filed on and after July 1, 2007; 2007 Act No. 113, Section 2, eff June 27, 2007.

Effect of Amendment

The 2007 amendment, in subsection (A), substituted "in the application or by written instructions to an applicant whether" for "if", rewrote subsection (B), and in subsection (C), added paragraph (1) defining "actual notice" and redesignated paragraphs (1) and (2) as paragraphs (2) and (3).

SECTION 6-29-1150. Submission of plan or plat to planning commission; record; appeal.

(A) The land development regulations adopted by the governing authority must include a specific procedure for the submission and approval or disapproval by the planning commission or designated staff. These procedures may include requirements for submission of sketch plans, preliminary plans, and final plans for review and approval or disapproval. Time limits, not to exceed sixty days, must be set forth for action on plans or plats, or both, submitted for approval or disapproval. Failure of the designated authority to act within sixty days of the receipt of development plans or subdivision plats with all documentation required by the land development regulations is considered to constitute approval, and the developer must be issued a letter of approval and authorization to proceed based on the plans or plats and supporting documentation presented. The sixty-day time limit may be extended by mutual agreement.

(B) A record of all actions on all land development plans and subdivision plats with the grounds for approval or disapproval and any conditions attached to the action must be maintained as a public record. In addition, the developer must be notified in writing of the actions taken.

(C) Staff action, if authorized, to approve or disapprove a land development plan may be appealed to the planning commission by any party in interest. The planning commission must act on the appeal within sixty days, and the action of the planning commission is final.

(D)(1) An appeal from the decision of the planning commission must be taken to the circuit court within thirty days after actual notice of the decision.

(2) A property owner whose land is the subject of a decision of the planning commission may appeal by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with Section 6-29-1155.

A notice of appeal and request for pre-litigation mediation must be filed within thirty days after the decision of the board is mailed.

(3) Any filing of an appeal from a particular planning commission decision pursuant to the provisions of this chapter must be given a single docket number, and the appellant must be assessed only one filing fee pursuant to Section 8-21-310(A)(1)(a).

(4) Where an appeal includes no issues triable of right by jury or when the parties consent, the appeal must be placed on the nonjury docket. A judge, upon request by any party, may in his discretion give the appeal precedence over other civil cases. Nothing in this subsection prohibits a property owner from subsequently electing to assert a pre-existing right to trial by jury of any issues beyond the subject matter jurisdiction of the planning commission, such as, but not limited to, a determination of the amount of damages due for an unconstitutional taking.

HISTORY: 1994 Act No. 355, Section 1; 2003 Act No. 58, Section 12, eff June 2, 2003.

Effect of Amendment

The 2003 amendment substituted "considered" for "deemed" in subsection (A), made nonsubstantive changes in subsection (C), added subsections (D)(2), (D)(3), and (D)(4), redesignated subsection (D) as (D)(1), and in newly designated (D)(1) substituted "must" for "may" and inserted "the" preceding "circuit court".

SECTION 6-29-1166. Pre-litigation mediation; notice; settlement approval; effect on real property; unsuccessful mediation.

(A) If a property owner files a notice of appeal with a request for pre-litigation mediation, the request for mediation must be granted, and the mediation must be conducted in accordance with South Carolina Circuit Court Alternative Dispute Resolution Rules and this section. A person who is not the owner of the property may petition to intervene as a party, and this motion must be granted if the person has a substantial interest in the decision of the planning commission.

(B) The property owner or his representative, any other person claiming an ownership interest in the property or his representative, and any other person who has been granted leave to intervene pursuant to subsection (A) or his representative must be notified and have the opportunity to attend the mediation. The governmental entity must be represented by at least one person for purposes of mediation.

(C) Within two working days of a successful mediation, the mediator must provide the parties with a signed copy of the written mediation agreement.

(D) Before the terms of a mediation settlement may take effect, the mediation settlement must be approved by:

(1) the local legislative governing body in public session; and

(2) the circuit court as provided in subsection (D).

(E) Any land use or other change agreed to in mediation which affects existing law is effective only as to the real property which is the subject of the mediation, and a settlement agreement sets no precedent as to other parcels of real property.

(F) If mediation is not successful or if the mediated settlement is not approved by the local legislative governing body, a property owner may appeal by filing a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The petition must be filed with the circuit court within thirty days of:

(1) the report of an impasse as provided in the South Carolina Circuit Court Alternative Dispute Resolution Rules; or

(2) the failure to approve the settlement by the local governing body.

(G) The circuit court judge must approve the settlement if the settlement has a rational basis in accordance with the standards of this chapter. If the mediated settlement is not approved by the court, the judge must schedule a hearing for the parties to present evidence and must issue a written opinion containing findings of law and fact. A party may appeal from the decision:

(1) in the same manner as provided by law for appeals from other judgments of the circuit court; or

(2) by filing an appeal pursuant to subsection (F).

HISTORY: 2003 Act No. 39, Section 13, eff June 2, 2003.

SECTION 6-29-1160. Recording unapproved land development plan or plat; penalty; remedies.

The county official whose duty it is to accept and record real estate deeds and plats may not accept, file, or record a land development plan or subdivision plat involving a land area subject to land development regulations adopted pursuant to this chapter unless the development plan or subdivision plat has been properly approved. If a public official violates the provisions of this section, he is, in each instance, subject to the penalty provided in this article and the affected governing body, private individual, or corporation has rights and remedies as to enforcement or collection as are provided, and may enjoin any violations of them.

HISTORY: 1994 Act No. 356, Section 1.

SECTION 6-29-1170. Approval of plan or plat not acceptance of dedication of land.

The approval of the land development plan or subdivision plat may not be deemed to automatically constitute or effect an acceptance by the municipality or the county or the public of the dedication of any street, easement, or other ground shown upon the plat. Public acceptance of the lands must be by action of the governing body customary in these transactions.

HISTORY: 1994 Act No. 356, Section 1.

SECTION 6-29-1180. Surety bond for completion of site improvements.

In circumstances where the land development regulations adopted pursuant to this chapter require the installation and approval of site improvements prior to approval of the land development plan or subdivision plat for recording in the office of the county official whose duty it is to accept and record the instruments, the developer may be permitted to post a surety bond, certified check, or other instrument readily convertible to cash. The surety must be in an amount equal to at least one hundred twenty-five percent of the cost of the improvement. The surety must be in favor of the local government to ensure that, in the event of default by the developer, funds will be used to install the required improvements at the expense of the developer.

HISTORY: 1994 Act No. 356, Section 1.

SECTION 6-29-1190. Transfer of title to follow approval and recording of development plan; violation is a misdemeanor.

The owner or agent of the owner of any property being developed within the municipality or county may not transfer title to any lot or parts of the development unless the land development plan or subdivision has been approved by the local planning commission or designated authority and an approved plat or plat recorded in the office of the county charged with the responsibility of recording deeds, plats, and other property records. A transfer of title in violation of this provision is a misdemeanor and, upon conviction, must be punished in the discretion of the court. A description by metes and bounds in the instrument of transfer or other document used in the process of transfer does not exempt the transaction from these penalties. The municipality or county may enjoin the transfer by appropriate action.

HISTORY: 1994 Act No. 356, Section 1.

SECTION 6-29-1200. Approval of street names required; violation is a misdemeanor; changing street names.

(A) A local planning commission created under the provisions of this chapter shall, by proper certificate, approve and authorize the name of a street or road laid out within the territory over which the commission has jurisdiction. It is unlawful for a person dividing out a new street or road to name the street or road on a plat, by a marking on a deed or instrument which conveys property, without getting the approval of the planning commission. Any person violating this provision is guilty of a misdemeanor and, upon conviction, must be punished in the discretion of the court.

(B) A commission may, after reasonable notice through a newspaper having general circulation in which the commission is created and exists, change the name of a street or road within the boundary of its territorial jurisdiction:

(1) when there is duplication of names or other conditions which tend to confuse the traveling public or the delivery of mail, orders, or messages;

(2) when it is found that a change may simplify marking or giving of directions to persons seeking to locate addresses; or

(3) upon any other good and just reason that may appear to the commission.

(C) On the name being changed, after reasonable opportunity for a public hearing, the planning commission shall issue its certificate designating the change, which must be recorded in the office of the register of deeds or clerk of court, and the name changed and certified is the legal name of the street or road.

HISTORY: 1994 Act No. 355, Section 1; 1997 Act No. 34, Section 1.

SECTION 6-29-1219. Land development plan not required to execute a deed.

Under this chapter, the submission of a land development plan or land use plan is not a prerequisite and must not be required before the execution of a deed transferring undeveloped real property. A local governmental entity may still require the grantee to file a plat of the tract the deed is recorded.

HISTORY: 2015 Act No. 144 (H.3672), Section 1, eff March 14, 2016.

ARTICLE 8

Educational Requirements for Local Governmental Planning or Zoning Officials or Employees

SECTION 6-29-1310. Definitions.

As used in this article:

(1) "Advisory committee" means the State Advisory Committee on Educational Requirements for Local Government Planning or Zoning Officials and Employees.

(2) "Appointed official" means a planning commissioner, board of zoning appeals member, or board of architectural review member.

(3) "Clerk" means the clerk of the local governing body.

(4) "Local governing body" means the legislative governing body of a county or municipality.

(5) "Planning or zoning entity" means a planning commission, board of zoning appeals, or board of architectural review.

(6) "Professional employee" means a planning professional, zoning administrator, zoning official, or a deputy or assistant of a planning professional, zoning administrator, or zoning official.

HISTORY: 2009 Act No. 38, Section 14, eff June 2, 2009.

SECTION 6-29-1320. Identification of persons covered by act; compliance schedule.

(A) The local governing body must:

(1) by no later than December 31st of each year, identify the appointed officials and professional employees for the jurisdiction and provide a list of these appointed officials and professional employees to the clerk and each planning or zoning entity in the jurisdiction; and

(2) annually inform each planning or zoning entity in the jurisdiction of the requirements of this article.

(B) Appointed officials and professional employees must comply with the provisions of this article according to the following dates and populations based on the population figures of the latest official United States Census:

(1) municipalities and counties with a population of 25,000 and greater: by January 1, 2006; and

(2) municipalities and counties with a population under 25,000: by January 1, 2007.

HISTORY: 2009 Act No. 38, Section 14, eff June 2, 2009; 2004 Act No. 287, Section 3, eff July 22, 2004.

Effect of Amendment

The 2004 amendment, in paragraph (B)(1), substituted "25,000 and greater" for "above 70,000".

SECTION 6-29-1330. State Advisory Committee; creation; members; terms; duties; compensation; meetings; fees charged.

(A) There is created the State Advisory Committee on Educational Requirements for Local Government Planning or Zoning Officials and Employees.

(B) The advisory committee consists of five members appointed by the Governor. The advisory committee consists of:

(1) a planner recommended by the South Carolina Chapter of the American Planning Association;

(2) a municipal official or employee recommended by the Municipal Association of South Carolina;

(3) a county official or employee recommended by the South Carolina Association of Counties;

(4) a representative recommended by the University of South Carolina's Institute for Public Service and Policy Research; and

(5) a representative recommended by Clemson University's Department of Planning and Landscape Architecture. Recommendations must be submitted to the Governor not later than the thirty-first day of December of the year preceding the year in which appointments expire. If the Governor rejects any person recommended for appointment, the group or association who recommended the person must submit additional names to the Governor for consideration.

(C) The members of the advisory committee must serve a term of four years and until their successors are appointed and qualify, except that for the members first appointed to the advisory committee, the planner must serve a term of three years; the municipal official or employee and the county official or employee must each serve a term of two years; and the university representative must each serve a term of one year. A vacancy on the advisory committee must be filled in the manner of the original appointment for the remainder of the unexpired term. The Governor may remove a member of the advisory committee in accordance with Section 1-3-240(B).

(D) The advisory committee's duties are to:

(1) compile and distribute a list of approved orientation and continuing education programs that satisfy the educational requirements in Section 6-29-1340;

(2) determine categories of persons with advanced degrees, training, or experience, that are eligible for exemption from the educational requirements in Section 6-29-1340; and

(3) make an annual report to the President Pro Tempore of the Senate and Speaker of the House of Representatives, no later than April fifteenth of each year, providing a detailed account of the advisory committee's:

(a) activities;

(b) expenses;

(c) fees collected; and

(d) determinations concerning approved education programs and categories of exemption.

(E) A list of approved education programs and categories of exemption by the advisory committee must be available for public distribution through notices in the State Register and posting on the General Assembly's Internet website. The list must be updated by the advisory committee as need arises.

(F) The members of the advisory committee must serve without compensation and must meet at a set location to which members must travel no more frequently than quarterly, at the call of the chairman selected by majority vote of at least a quorum of the members. Nothing in this subsection prohibits the chairman from using discretionary authority to conduct additional meetings by telephone conference if necessary. These telephone conference meetings may be conducted more frequently than quarterly. Three members of the advisory committee constitute a quorum. Decisions concerning the approval of education programs and categories of exemption must be made by majority vote with at least a quorum of members participating.

(G) The advisory committee may assess by majority vote of at least a quorum of the members a nominal fee to each entity applying for approval of an orientation or continuing education program. However, any fees charged must be applied to the operating expenses of the advisory committee and must not result in a net profit to the groups or associations that recommend the members of the advisory committee. An accounting of any fees collected by the advisory committee must be made in the advisory committee's annual report to the President Pro Tempore of the Senate and Speaker of the House of Representatives.

HISTORY: 2003 Act No. 39, Section 14, eff June 2, 2003; 2008 Act No. 278, Section 2, eff June 4, 2008.

Effect of Amendment.

The 2008 amendment, in subsection (B), in the introductory paragraph deleted "with the advice and consent of the Senate" from the end of the first sentence; and in paragraph (B)(5) deleted "or the Governor's appointment is not confirmed by the Senate" following "appointment".

SECTION 6-29-1348. Educational requirements; time-frame for completion; subjects.

(A) Unless expressly exempted as provided in Section 6-29-1350, each appointed official and professional employee must:

(1) no earlier than one hundred and eighty days prior to and no later than three hundred and sixty-five days after the initial date of appointment or employment, attend a minimum of six hours of orientation training in one or more of the subjects listed in subsection (C); and

(2) annually, after the first year of service or employment, but no later than three hundred and sixty-five days after each anniversary of the initial date of appointment or employment, attend no fewer than three hours of continuing education in any of the subjects listed in subsection (C).

(B) An appointed official or professional employee who attended six hours of orientation training for a prior appointment or employment is not required to comply with the orientation requirement for a subsequent appointment or employment after a break in service. However, unless expressly exempted as provided in Section 6-29-1350 upon a subsequent appointment or employment, the appointed official or professional employee must comply with an annual requirement of attending no fewer than three hours of continuing education as provided in this section.

(C) The subjects for the education required by subsection (A) may include, but not be limited to, the following:

(1) land use planning;

(2) zoning;

(3) boundaries;

(4) transportation;

(5) community facilities;

(6) ethics;

(7) public utilities;

(8) provision of communications facilities;

(9) parliamentary procedure;

(10) public hearing procedure;

(11) administrative law;

(12) economic development;

(13) housing;

(14) public buildings;

(15) building construction;

(16) land subdivision; and

(17) powers and duties of the planning commission, board of zoning appeals, or board of architectural review.

(D) In order to meet the educational requirements of subsection (A), an educational program must be approved by the advisory committee.

HISTORY: 2003 Act No. 39, Section 14, eff June 2, 2003.

SECTION 6-29-1350. Exemption from educational requirements.

(A) An appointed official or professional employee who has one or more of the following qualifications is exempt from the educational requirements of Section 6-29-1340:

(1) certification by the American Institute of Certified Planners;

(2) a masters or doctorate degree in planning from an accredited college or university;

(3) a masters or doctorate degree or specialized training or experience in a field related to planning as determined by the advisory committee;

(4) a license to practice law in South Carolina.

(B) An appointed official or professional employee who is exempt from the educational requirements of Section 6-29-1340 must file a certification form and documentation of his exemption as required in Section 6-29-1360 by no later than the first anniversary date of his appointment or employment. An exemption is established by a single filing for the tenure of the appointed official or professional employee and does not require the filing of annual certification forms and conforming documentation.

HISTORY: 2003 Act No. 39, Section 14, eff June 2, 2003.

SECTION 6-29-1360. Certification.

(A) An appointed official or professional employee must certify that he has satisfied the educational requirements in Section 6-29-1340 by filing a certification form and documentation with the clerk not later than the anniversary date of the appointed official's appointment or professional employee's employment each year.

(B) Each certification form must substantially conform to the following form and all applicable portions of the form must be completed:

EDUCATIONAL REQUIREMENTS

CERTIFICATION FORM

FOR LOCAL GOVERNMENT PLANNING OR ZONING

OFFICIALS OR EMPLOYEES

To report compliance with the educational requirements, please complete and file this form each year with the clerk of the local governing body no later than the anniversary date of your appointment or employment. To report an exemption from the educational requirements, please complete and file this form with the clerk of the local governing body by no later than the first anniversary of your current appointment or employment. Failure to timely file this form may subject an appointed official to removal for cause and an employee to dismissal.

Name of Appointed Official or Employee: _____

Position: _____

Initial Date of Appointment or Employment: _____

Filing Date: _____

I have attended the following orientation or continuing education program(s) within the last three hundred and sixty-five days. (Please note that a program completed more than one hundred and eighty days prior to the date of your initial appointment or employment may not be used to satisfy this requirement.):

Program Name Sponsor Location Date Held Hours of Instruction

Also attached with this form is documentation that I attended the program(s).

OR

I am exempt from the orientation and continuing education requirements because (Please initial the applicable response on the line provided):

____ I am certified by the American Institute of Certified Planners.

____ I hold a masters or doctorate degree in planning from an accredited college or university.

____ I hold a masters or doctorate degree or have specialized training or experience in a field related to planning as determined by the State Advisory Committee on Educational Requirements for Local Government Planning or Zoning Officials and Employees. (Please describe your advanced degree or specialty on the line provided.)

_____

____ I am licensed to practice law in South Carolina.

Also attached with this form is documentation to confirm my exemption.

I certify that I have satisfied or am exempt from the educational requirements for local planning or zoning officials or employees.

Signature: _____

(C) Each appointed official and professional employee is responsible for obtaining written documentation that either:

(1) is signed by a representative of the sponsor of any approved orientation or continuing education program for which credit is claimed and acknowledges that the filer attended the program for which credit is claimed; or

(2) establishes the filer's exemption.

The documentation must be filed with the clerk as required by this section.

HISTORY: 2003 Act No. 39, Section 14, eff June 2, 2003.

SECTION 6-29-1370. Sponsorship and funding of programs; compliance and exemption; certification as public records.

(A) The local governing body is responsible for:

(1) sponsoring and providing approved education programs; or

(2) funding approved education programs provided by a sponsor other than the local governing body for the appointed officials and professional employees in the jurisdiction.

(B) The clerk must keep in the official public records originals of:

(1) all filed forms and documentation that certify compliance with educational requirements for three years after the calendar year in which each form is filed; and

(2) all filed forms and documentation that certify an exemption for the tenure of the appointed official or professional employee.

HISTORY: 2003 Act No. 39, Section 14, eff June 2, 2003.

SECTION 6-29-1380. Failure to complete training requirements; false documentation.

(A) An appointed official is subject to removal from office for cause as provided in Section 6-29-350, 6-29-780, or 6-29-870 if he:

(1) fails to complete the requisite number of hours of orientation training and continuing education within the time allotted under Section 6-29-1340; or

(2) fails to file the certification form and documentation required by Section 6-29-1360.

(B) A professional employee is subject to suspension or dismissal from employment relating to planning or zoning by the local governing body or planning or zoning entity if he:

(1) fails to complete the requisite number of hours of orientation training and continuing education within the time allotted under Section 6-29-1340; or

(2) fails to file the certification form and documentation required by Section 6-29-1360.

(C) A local governing body must not appoint a person who has falsified the certification form or documentation required by Section 6-29-1360 to serve in the capacity of an appointed official.

(D) A local governing body or planning or zoning entity must not employ a person who has falsified the certification form or documentation required by Section 6-29-1560 to serve in the capacity of a professional employee.

HISTORY: 2005 Act No. 39, Section 14, eff June 2, 2005.

ARTICLE 11

Vested Rights

SECTION 6-29-1510. Citation of article.

This article may be cited as the "Vested Rights Act".

HISTORY: 2004 Act No. 287, Section 2, eff July 1, 2005.

SECTION 6-29-1520. Definitions.

As used in this article:

(1) "Approval" or "approved" means a final action by the local governing body or an exhaustion of all administrative remedies that results in the authorization of a site specific development plan or a phased development plan.

(2) "Building permit" means a written warrant or license issued by a local building official that authorizes the construction or renovation of a building or structure at a specified location.

(3) "Conditionally approved" or "conditional approval" means an interim action taken by a local governing body that provides authorization for a site specific development plan or a phased development plan but is subject to approval.

(4) "Landowner" means an owner of a legal or equitable interest in real property including the heirs, devisees, successors, assigns, and personal representatives of the owner. "Landowner" may include a person holding a valid option to purchase real property pursuant to a contract with the owner to act as his agent or representative for purposes of submitting a proposed site specific development plan or a phased development plan pursuant to this article.

(5) "Local governing body" means: (a) the governing body of a county or municipality, or (b) a county or municipal body authorized by statute or by the governing body of the county or municipality to make land-use decisions.

(6) "Person" means an individual, corporation, business or land trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any legal entity as defined by South Carolina law.

(7) "Phased development plan" means a development plan submitted to a local governing body by a landowner that shows the types and density or intensity of uses for a specific property or properties to be developed in phases, but which do not satisfy the requirements for a site specific development plan.

(8) "Real property" or "property" means all real property that is subject to the land use and development ordinances or regulations of a local governing body, and includes the earth, water, and air, above, below, or on the surface, and includes improvements or structures customarily regarded as a part of real property.

(9) "Site specific development plan" means a development plan submitted to a local governing body by a landowner describing with reasonable certainty the types and density or intensity of uses for a specific property or properties. The plan may be in the form of, but is not limited to, the following plans or approvals: planned unit development; subdivision plat; preliminary or general development plan; variance; conditional use or special use permit; plan; conditional or special use district zoning plan; or other land-use approval designations as are used by a county or municipality.

(10) "Vested right" means the right to undertake and complete the development of property under the terms and conditions of a site specific development plan or a phased development plan as provided in this article and in the local land development ordinances or regulations adopted pursuant to this chapter.

HISTORY: 2004 Act No. 287, Section 2, eff July 1, 2005.

SECTION 6-29-1530. Two-year vested right established on approval of site specific development plan; conforming ordinances and regulations; renewal.

(A)(1) A vested right is established for two years upon the approval of a site specific development plan.

(2) On or before July 1, 2005, in the local land development ordinances or regulations adopted pursuant to this chapter, a local governing body must provide for:

(a) the establishment of a two-year vested right in an approved site specific development plan; and

(b) a process by which the landowner of real property with a vested right may apply at the end of the vesting period to the local governing body for an annual extension of the vested right. The local governing body must approve applications for at least five annual extensions of the vested right unless an amendment to the land development ordinances or regulations has been adopted that prohibits approval.

(B) A local governing body may provide in its local land development ordinances or regulations adopted pursuant to this chapter for the establishment of a two-year vested right in a conditionally approved site specific development plan.

(C) A local governing body may provide in its local land development ordinances or regulations adopted pursuant to this chapter for the establishment of a vested right in an approved or conditionally approved phased development plan not to exceed five years.

HISTORY: 2004 Act No. 287, Section 2, eff July 1, 2005.

SECTION 6-29-1540. Conditions and limitations.

A vested right established by this article and in accordance with the standards and procedures in the land development ordinances or regulations adopted pursuant to this chapter is subject to the following conditions and limitations:

(1) the form and contents of a site specific development plan must be prescribed in the land development ordinances or regulations;

(2) the factors that constitute a site specific development plan sufficient to trigger a vested right must be included in the land development ordinances or regulations;

(3) if a local governing body establishes a vested right for a phased development plan, a site specific development plan may be required for approval with respect to each phase in accordance with regulations in effect at the time of vesting;

(4) a vested right established under a conditionally approved site specific development plan or conditionally approved phased development plan may be terminated by the local governing body upon its determination, following notice and public hearing, that the landowner has failed to meet the terms of the conditional approval;

(5) the land development ordinances or regulations amended pursuant to this article must designate a vesting point earlier than the issuance of a building permit but not later than the approval by the local governing body of the site specific development plan or phased development plan that authorizes the developer or landowner to proceed with investment in grading, installation of utilities, streets, and other infrastructure, and to undertake other significant expenditures necessary to prepare for application for a building permit;

(6) a site specific development plan or phased development plan for which a variance, regulation, or special exception is necessary does not confer a vested right until the variance, regulation, or special exception is obtained;

(7) a vested right for a site specific development plan expires two years after vesting. The land development ordinances or regulations must authorize a process by which the landowner of real property with a vested right may apply at the end of the vesting period to the local governing body for an annual extension of the vested right. The local governing body must approve applications for at least five annual extensions of the vested right unless an amendment to the land development ordinances or regulations has been adopted that prohibits approval. The land development ordinances or regulations may authorize the local governing body to:

(a) set a time of vesting for a phased development plan not to exceed two years; and

(b) extend the time for a vested site specific development plan or a total of five years upon a determination that there is just cause for extension and that the public interest is not adversely affected. Upon expiration of a vested right, a building permit may be issued for development only in accordance with applicable land development ordinances or regulations;

(8) a vested site specific development plan or vested phased development plan may be amended if approved by the local governing body pursuant to the provisions of the land development ordinances or regulations;

(9) a validly issued building permit does not expire or is not revoked upon expiration of a vested right, except for public safety reasons or as prescribed by the applicable building code;

(10) a vested right to a site specific development plan or phased development plan is subject to revocation by the local governing body upon its determination, after notice and public hearing, that there was a material misrepresentation by the landowner or substantial noncompliance with the terms and conditions of the original or amended approval;

(11) a vested site specific development plan or vested phased development plan is subject to later enacted federal, state, or local laws adopted to protect public health, safety, and welfare including, but not limited to, building, fire, plumbing, electrical, and mechanical codes and nonconforming structure and use regulations which do not provide for the grandfathering of the vested right. The issuance of a building permit vests the specific construction project authorized by the building permit to the building, fire, plumbing, electrical, and mechanical codes in force at the time of the issuance of the building permit;

(12) a vested site specific development plan or vested phased development plan is subject to later local governmental overlay zoning that imposes site plan-related requirements but does not affect allowable types, height as it affects density or intensity of uses, or density or intensity of uses;

(13) a change in the zoning district designation or land-use regulations made subsequent to vesting that affects real property does not operate to affect, prevent, or delay development of the real property under a vested site specific development plan or vested phased development plan without consent of the landowner;

(14) if real property having a vested site specific development plan or vested phased development plan is annexed, the governing body of the municipality to which the real property has been annexed must determine, after notice and public hearing in which the landowner is allowed to present evidence, if the vested right is effective after the annexation;

(15) a local governing body must not require a landowner to waive his vested rights as a condition of approval or conditional approval of a site specific development plan or a phased development plan; and

(16) the land development ordinances or regulations adopted pursuant to this article may provide additional terms or phrases, consistent with the conditions and limitations of this section, that are necessary for the implementation or determination of vested rights.

HISTORY: 2004 Act No. 287, Section 2, eff July 1, 2005.

SECTION 6-29-1550. Vested right attaches to real property; applicability of laws relating to public health, safety and welfare.

A vested right pursuant to this section is not a personal right, but attaches to and runs with the applicable real property. The landowner and all successors to the landowner who secure a vested right pursuant to this article may rely upon and exercise the vested right for its duration subject to applicable federal, state, and local laws adopted to protect public health, safety, and welfare including, but not limited to, building, fire, plumbing, electrical, and mechanical codes and nonconforming structure and use regulations which do not provide for the grandfathering of the vested right. This article does not preclude judicial determination that a vested right exists pursuant to other statutory provisions. This article does not affect the provisions of a development agreement executed pursuant to the South Carolina Local Government Development Agreement Act in Chapter 31 of Title 6.

HISTORY: 2004 Act No. 287, Section 2, eff July 1, 2005.

SECTION 6-29-1560. Establishing vested right in absence of local ordinances providing therefor; significant affirmative government acts.

(A) If a local governing body does not have land development ordinances or regulations or fails to adopt an amendment to its land development ordinances or regulations as required by this section, a landowner has a vested right to proceed in accordance with an approved site specific development plan for a period of two years from the approval. The landowner of real property with a vested right may apply at the end of the vesting period to the local governing body for an annual extension of the vested right. The local governing body must approve applications for at least five annual extensions of the vested right unless an amendment to the land development ordinances or regulations has been adopted that prohibits approval. For purposes of this section, the landowner's rights are considered vested in the types of land use and density or intensity of uses detailed in the development plan and the vesting is not affected by later amendment to a zoning ordinance or land-use or development regulation if the landowner:

(1) obtains, or is the beneficiary of, a significant affirmative government act that remains in effect allowing development of a specific project;

(2) relies in good faith on the significant affirmative government act; and

(3) incurs significant obligations and expenses in diligent pursuit of the specific project in reliance on the significant affirmative government act.

(B) For the purposes of this section, the following are significant affirmative governmental acts allowing development of a specific project:

(1) the local governing body has accepted conditions or issued conditions that specify a use related to a zoning amendment;

(2) the local governing body has approved an application for a rezoning for a specific use;

(3) the local governing body has approved an application for a density or intensity of use;

(4) the local governing body or board of appeals has granted a special exception or use permit with conditions;

(5) the local governing body has approved a variance;

(6) the local governing body or its designated agent has approved a preliminary subdivision plat, site plan, or plan of phased development for the landowner's property and the applicant diligently pursues approval of the final plat or plan within a reasonable period of time under the circumstances; or

(7) the local governing body or its designated agent has approved a final subdivision plat, site plan, or plan of phased development for the landowner's property.

HISTORY: 2004 Act No. 287, Section 2, eff July 1, 2005.

ARTICLE 13

Federal Defense Facilities Utilization Integrity Protection

Code Commissioner's Note

Redesignated as Article 13 at the direction of the Code Commissioner.

SECTION 6-29-1510. Short title.

This article may be cited as the "Federal Defense Facilities Distortion Integrity Protection Act".

HISTORY: 2006 Act No. 1, Section 1, eff October 26, 2004.

Code Commissioner's Note

Redesignated from Section 6-29-1510 to Section 6-29-1610 at the direction of the Code Commissioner.

SECTION 6-29-1520. Legislative purpose.

The General Assembly finds:

(1) As South Carolina continues to grow, there is significant potential for uncoordinated development in areas contiguous to federal military installations that can undermine the integrity and utility of land and airspace currently used for mission readiness and training.

(2) Despite consistent cooperation on the part of local government planners and developers, this potential remains for unplanned development in areas that could undermine federal military utility of lands and airspace in South Carolina.

(3) It is, therefore, desirous and in the best interests of the people of South Carolina to enact processes that will ensure that development in areas near federal military installations is conducted in a coordinated manner that takes into account and provides a voice for federal military officials in planning and zoning decisions by local governments.

HISTORY: 2006 Act No. 1, Section 1, eff October 26, 2004.

Code Commissioner's Note

Redesignated from Section 6-29-1520 to Section 6-29-1620 at the direction of the Code Commissioner.

SECTION 6-29-1525. Definitions.

(A) For purposes of this article, "federal military installations" includes Fort Jackson, Shaw Air Force Base, McEntire Air Force Base, Charleston Air Force Base, Beaufort Marine Corps Air Station, Beaufort Naval Hospital, Parris Island Marine Recruit Depot, and Charleston Naval Weapons Station.

(B) For purposes of this article, a "federal military installation overlay zone" is an "overlay zone" as defined in Section 6-29-720(C)(5) in a geographic area including a federal military installation as defined in this section.

HISTORY: 2006 Act No. 1, Section 1, eff October 26, 2004.

Code Commissioner's Note

Redesignated from Section 6-29-1525 to Section 6-29-1625 at the direction of the Code Commissioner.

SECTION 6-29-1530. Local planning department; investigations, recommendations and findings; incorporation into official maps.

(A) In any local government which has established a planning department or other entity, such as a board of zoning appeals, charged with the duty of establishing, reviewing, or enforcing comprehensive land use plans or zoning ordinances, that planning department or other entity, with respect to each proposed land use or zoning decision involving land that is located within a federal military installation overlay zone or, if there is no such overlay zone, within three thousand feet of any federal military installation, or within the three thousand foot Clear Zone and Accident Potential Zones Numbers I and II as prescribed in 32 C.F.R. Section 256, defining Air Installation Compatible Use Zones of a federal military airfield, shall:

(1) at least thirty days prior to any hearing conducted pursuant to Section 6-29-530 or 6-29-800, request from the commander of the federal military installation a written recommendation with supporting facts with regard to the matters specified in subsection (C) relating to the use of the property which is the subject of review; and

(2) upon receipt of the written recommendation specified in subsection (A)(1), make the written recommendations a part of the public record, and in addition to any other duties with which the planning department or other entity is charged by the local government, investigate and make written conclusions or findings with respect to each of the matters enumerated in subsection (C).

(B) If the base commander does not submit a recommendation pursuant to subsection (A)(1) by the date of the public hearing, there is a presumption that the land use plan or zoning proposal does not have any adverse effect relative to the matters specified in subsection (C).

(C) The matters the planning department or other entity shall address in its investigation, recommendations, and findings must be:

(1) whether the land use plan or zoning proposal will permit a use that is suitable in view of the fact that the property under review is within the federal military installation overlay zone, or, if there is no such overlay zone located within three thousand feet of a federal military installation or within the three thousand foot Clear Zone and Accident Potential Zones Numbers I and II as prescribed in 32 C.F.R. Section 256, defining Air Installation Compatible Use Zones of a federal military airfield;

(2) whether the land use plan or zoning proposal will adversely affect the existing use or usability of nearby property within the federal military installation overlay zone, or, if there is no such overlay zone, within three thousand feet of a federal military installation, or within the three thousand foot Clear Zone and Accident Potential Zones Numbers I and II as prescribed in 32 C.F.R. Section 256, defining Air Installation Compatible Use Zones of a federal military airfield;

(3) whether the property to be affected by the land use plan or zoning proposal has a reasonable economic use as currently zoned;

(4) whether the land use plan or zoning proposal results in a use which causes or may cause a safety concern with respect to excessive or burdensome use of existing streets, transportation facilities, utilities, or schools where objects of nearby property are used as a federal military installation;

(5) if the local government has an adopted land use plan, whether the zoning proposal is in conformity with the policy and intent of the land use plan given the proximity of a federal military installation; and

(6) whether there are other existing or changing conditions affecting the use of the nearby property such as a federal military installation which give supporting grounds for either approval or disapproval of the proposed land use plan or zoning proposal.

(D) Where practicable, local governments shall incorporate identified boundaries, easements, and restrictions for federal military installations into official maps as part of their responsibilities delineated in Section 6-29-340.

HISTORY: 2006 Act No. 1, Section 1, eff October 26, 2004.

Code Commissioner's Note

Redesignated from Section 6-29-1530 to Section 6-29-1630 at the direction of the Code Commissioner.

SECTION 6-29-1540. Application to former or closing military installations.

Nothing in this articles is to be construed to apply to former military installations, or approaches or access related districts, that are in the process of closing or redeveloping pursuant to base realignment and closure proceedings, including the former naval base facility on the Cooper River in and near the City of North Charleston, nor to the

planned uses of, or construction of facilities on or near, that property by the South Carolina State Ports Authority, nor to the construction and uses of transportation routes and facilities necessary or useful thereto.

HISTORY: 2005 Act No. 1, Section 1, eff October 28, 2004.

Code Commissioner's Note

Redesignated from Section 6-29-1540 to Section 6-29-1640 at the direction of the Code Commissioner.

Chapter 10

CONSTITUTIONAL LIMITATIONS ON LAND USE CONTROLS*

Analysis

I. INTRODUCTION

Sec.

II. FIFTH AMENDMENT TAKINGS

III. DUE PROCESS AND EQUAL PROTECTION

IV. FIRST AMENDMENT

V. COMMERCE CLAUSE, ANTITRUST, AND WASTE CONTROL

* For more detailed discussion and more extensive citations of authority of the issues covered in this chapter, see Juergensmeyer and Roberts, Land Use Planning and Development Regulation Law, Practitioner Treatise Series (3rd ed. 2012).

I. INTRODUCTION

§ 10:1 Introduction

A. *The Property Conflict in American Society*

Alexis de Tocqueville found "the love of property" "keener" in the United States than elsewhere, and observed that Americans "display less inclination toward doctrines that in any way threaten the way property is owned."[1] In the context of property in land, this affinity takes different forms, what Fred Bosselman calls multiple land ethics. Likely most prominent is the land ethic of opportunity, the view of land as things, parcels and interests, used to create wealth.[2] However, as Bosselman notes, other land ethics influence Americans' views of property. In tension with the ethic of opportunity is the land ethic of responsibility, which views parcels of property as interdependent parts of an ecological and social whole.[3] These conflicting land ethics result in intense conflict over the extent to which government may affect private property rights for the greater good of society. The battleground for this jurisprudential issue is the constitutional law of land use, not only the Fifth Amendment takings clause, but also guarantees of due process, equal protection, free speech, and religious freedom. Given that property is the oldest branch of the common law, the legal fundamentals of property ownership are surprisingly vague. Any law student would feel much more comfortable defining crime, tort, or contract than property, possession, or ownership.[4] Precise meanings for these property concepts do not in fact exist, and this complicates the resolution of land use conflicts between individual property rights and the social interest. The absence of consistent standards has made the constitutional protection of property susceptible to change, as different social and judicial outlooks have gained power over time. Justice Holmes' statement that "[e]very opinion tends to become a law"[5] has proved especially true concerning constitutional land use issues.

The endpoints on the line of opposing views in this area are a "proacquisitive position," which favors individual wealth, and a "prosocial position," which argues for su-

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[1] Alexis de Tocqueville, Democracy in America 814 (J. Mayer & M. Lerner, eds.1966).

[2] See Bosselman, Four Land Ethics: Order, Reform, Responsibility, Opportunity, 24 Envtl. L. 1429 (1994).

[3] See Humbach, Law and a New Land Ethic, 74 Minn. L. Rev 339 (1989).

[4] See, generally, Rose, Possession as the Origin of Property, 52 U. Chi. L. Rev. 73 (1985).

[5] *Lochner v. New York*, 198 U.S. 45, 76, 25 S. Ct. 539, 547, 49 L. Ed. 937 (1905) (Holmes, J., dissenting).

premacy of the common good. The proacquisitive position sees the value of land in what it can produce for the individual. Adherents sometimes describe this right as "inherent in human nature" or part of the "natural law." Differences exist among these adherents. Richard Epstein espouses a libertarian position arguing that the Fifth Amendment's just compensation requirement should protect against all government efforts of redistribution of personal or real property.[6] Justice Scalia rejects the libertarian view, favoring a utilitarian approach, and gives enhanced protection to real property over personal and intangible property.[7]

The prosocial position is a manifestation of the social function theory of ownership first popularized as a jurisprudential theory of ownership by Leon Duguit.[8] Under the social function theory, the ownership of property is not absolute or immutable but a changing concept, constantly redefined to permit ownership of property to fill whatever role society assigns it at a given time.[9] The individual has an obligation not to use property in violation of the public right. Economic losses may result, but the value of a parcel of land "has no economic value in the absence of the society around it."[10] As Justice Jackson put it, "not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them."[11] Private property rights exist because the law says they exist and the law controls because it has coercive power behind it.

The independence and interdependence of land parcels are other lenses through which to view the conflict over property. Some theorists begin with land as independent from society. They divide land into parcels for people to use. As Eric Freyfogle observes, if one views land as a commodity, then property is not the land or "the thing itself, but the owner's power over the thing."[12] So viewed, property "lose[s] its tethers with any particular spot on the landscape [and becomes] an imaginary ideal [where] an owner's legal rights transen[d] the details of place."[13]

Others see land in an ecologically and socially interdependent context. Wetlands, for example, are part of an ecosystem where they receive the water flowing from uplands, filter pollutants from the water, provide spawning grounds for fish, and prevent downstream floods by slowing water flows. Artificial parceling of adjacent wetlands creates rights in owners that are secondary to the primary natural function. Similarly, a building long a part of a neighborhood may become so much a feature of the built environment that its preservation justifies preventing the owner from leveling it.

Commentators have described these independent and interdependent positions, respectively, as those of a "transformative economy" and an "economy of nature."[14]

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[6] Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985).

[7] See Bosselman, Four Land Ethics: Order, Reform, Responsibility, Opportunity, 24 Envtl. L. 1425 (1994).

[8] Mirow, The Social Obligation Norm of Property: Duguit, Hayem, and Others, 12 Fla. J. Int'l L. 197 (2010).

[9] See Freyfogle, Context and Accommodation in Modern Property Law, 41 Stan. L. Rev. 1529 (1989).

[10] *Penn Central Transp. Co. v. City of New York*, 42 N.Y.2d 324, 397 N.Y.S.2d 914, 918, 366 N.E.2d 1271 (1977).

[11] *U.S. v. Willow River Power Co.*, 324 U.S. 499, 502, 65 S. Ct. 761, 764, 89 L. Ed. 1101 (1945).

[12] Freyfogle, The Owning and Taking of Sensitive Lands, 43 UCLA L. Rev. 77, 97 (1995).

[13] Id.

[14] Joseph Sax, Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council, 45 Stan. L. Rev. 1433, 1442 (1993).

They contrast anthropocentrism with biocentrism, and natural law with the law of nature. The division can be seen on the Supreme Court as well. Justice Scalia endorsed the former view in *Lucas v. South Carolina Coastal Council* quoting with approval Coke, who said "For what is land but the profits thereof?"[15] Justice Blackmun endorsed the latter view in *Sierra Club v. Morton*, by quoting John Donne: "No man is an Hand, intire of itselfe; every man is a piece of the Continent * * *."[16]

Expectations play an important role in defining property rights, but how expectations are shaped and how they are affected by new learning and changed circumstances is not clear. The history of property law is important in determining expectations of rights in land, but differences of opinion exist over what history shows. Some say that history supports freedom to use land without much in the way of legislative interference.[17] Under this view, landowners may do as they wish with their property limited only by the common law nuisance requirement that they do no harm to others.

Others say that legislative restrictions on land use that went well beyond the common law of nuisance were found with some frequency in colonial and the early post-Revolutionary times.[18] Chief Justice Rehnquist observed that "zoning and permitting regimes are a longstanding feature of state property law,"[19] and must shape a landowner's expectations beyond the limitations of nuisance law.

Whether one view among these several will dominate seems unlikely. The pendulum seems not to swing back and forth between these views but to swirl around the midpoint. Whether one view ought to dominate is a question that proponents of each view should ask themselves. Minimizing public rights may impair our cultural and historical resources and may devastate our natural resources, upsetting critical ecological balances. Minimizing private rights may mean destabilizing investment in land[20] and eroding individual liberties.[21] And yet, maximizing private rights may cause further inequality of wealth. Perhaps, "in a democratic society the existence of multiple ethics must be accepted."[22]

B. *Overview of the Constitutional Issues*

The most contentious and difficult constitutional land use issue involves the reach of the Fifth Amendment's provision that private property shall not be "taken for public use without just compensation." This clause is the basis for the regulatory takings doc-

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[15] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017, 112 S. Ct. 2886, 2894, 120 L. Ed. 2d 798 (1992).

[16] *Sierra Club v. Morton*, 405 U.S. 727, 760 n.2, 92 S. Ct. 1361, 1378, 31 L. Ed. 2d 636 (1972) (Blackmun, dissenting).

[17] See Pilon, Property Rights, Takings, and a Free Society, 6 Harv. J.L. & Pub. Pol'y 165 (1983).

[18] See Hart, Land Use Law in the Early Republic and the Original Meaning of the Takings Clause, 94 NW. U. L. Rev. 1099 (2000).

[19] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, 1494 (2002) (Rehnquist, C.J., dissenting).

[20] Rose, A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation, 53 Wash. & Lee L. Rev. 265, 297 (1996).

[21] See Ellickson, Liberty, Property, and Environmental Ethics, 21 Ecology L.Q. 397 (1994) urging accommodation.

[22] Bosselman, Four Land Ethics: Order, Reform, Responsibility, Opportunity, 24 Envtl. L. 1425, 1511 (1994).

trine used to identify police power actions affecting property that are the functional equivalent of physical appropriations. The question, as we will see, often becomes one of line drawing under the reasoning of Justice Holmes that "if regulation goes too far it will be recognized as a taking."[23]

Many constitutional land use concerns, however, do not fall on Holmes' Fifth Amendment scale, but implicate the 14th Amendment. Substantive due process looks to the benefits that a regulation confers on society to decide whether the regulation is within the scope of government authority and examines whether its goal is accomplished in a rational manner. Procedural due process oversees the methods of adjudicating rights of landowners, requiring that an opportunity be given to challenge deprivations of property before an impartial decisionmaker. Further, the guarantee of equal protection limits government regulation from irrational classifications, and has the most force when ordinances affect the rights of suspect classes or the exercise of fundamental rights of some in ways different from others.

First Amendment protections of free speech and religion also curtail the power of government to regulate land use. The First Amendment is especially relevant concerning ordinances that regulate signs, sex-oriented businesses, and religious uses.

II. FIFTH AMENDMENT TAKINGS

§ 10:2 Framing the Takings Issue

A. *Direct v. Indirect Government Actions as Takings*

The Fifth Amendment's requirement that property cannot be taken for a public use without just compensation, applied to the states through the 14th Amendment,[24] is the centerpiece of constitutional land use law. In this Chapter, we deal with when indirect government actions, physical invasions and regulatory impacts, implicate the takings clause. We deal with government initiated condemnation actions in Chapter 16.

The Supreme Court's opinions dealing with the question of when land use regulations constitute takings have not set a clear course and the area has often been depicted as muddled and ad hoc. While it remains ad hoc in its application, it is doctrinally less confusing than it once was. Furthermore, since the takings issue deals with one of the most contentious matters in American society, it is not surprising that the Supreme Court has struggled to establish useful guidelines. If the Court were to establish hard line rules, it is unlikely they would survive our inclination to avoid extremes. The Court's takings law also pays deference to our federal system by recognizing the important role states have in defining property. The complexity of the issue has drawn

[23] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L. Ed. 322 (1922).

[24] The Fifth Amendment's takings clause is today viewed as having been applied to the states through the 14th Amendment in *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897). *Dolan v. City of Tigard*, 512 U.S. 374, 383, 114 S. Ct. 2309, 2316, 129 L. Ed. 2d 304 (1996). Chicago, B. & Q. R.R., though, does not mention the Fifth Amendment. *Dolan*, 512 U.S. at 406, 114 S. Ct. at 2327 (Stevens, J., dissenting).

the attention of many writers and an enormous amount of literature exists addressing what is, or what ought to be, the law.[25]

This part of Chapter 10 focuses primarily on the regulatory takings issue by tracing its path through the major Supreme Court decisions, and then dealing with salient problem areas, such as the meaning of investment-backed expectations, the definition of property for purposes of a takings claim, the remedy available, and rules of ripeness. We treat the related topics of eminent domain, public use, and just compensation in Chapter 16.

The takings issue is concerned with whether, and if so when, the Fifth Amendment requirement that just compensation be paid when the government "takes" property should be applied when the government "regulates" property. The physical connotation of the word "take" argues against applying the clause to regulatory impacts. It also seems to be agreed that the founders intended to require compensation only for physical expropriations of property.[26] Yet, the Court has "not * * * read [the takings clause] literally,"[27] but, over the years, has interpreted the word "take" to include the effect of regulations in some instances. This has given rise to the doctrine of regulatory takings, or, in terms perhaps more familiar to the legal ear, the doctrine of constructive takings.[28]

The touchstone of the Fifth Amendment is to prevent government "from forcing some people to alone bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[29] The touchstone of the regulatory takings doctrine within the Fifth Amendment is "to identify regulatory actions that are functionally equivalent to a direct appropriation of or ouster from private property."[30] Under the doctrine courts must determine when a regulation that is otherwise a valid exercise of the police power should be converted into an exercise of the power of eminent domain. Since the Constitution does not prohibit the taking of property, crossing the line from the police power to the eminent domain power does not invalidate the regulation. Rather, it means that compensation is due.

B. *Inverse Condemnation*

Aptly named, the action in inverse condemnation is the procedural context in which the regulatory takings issue arises. Direct appropriations under the power of eminent domain occur by condemnation proceedings brought by the state against a property owner. These direct condemnation proceedings establish that the taking is for a public use or purpose and assess just compensation to be paid to the owner. In contrast, the takings issue explored here arises from the consequences of government action with respect to property, unaccompanied by an offer of compensation or an action

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[25] Two early, influential articles are Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation," 80 Harv. L. Rev. 1165 (1967) and Sax, Takings and the Police Power, 74 Harv. L. Rev. 36 (1964).

[26] See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 n.15, 112 S. Ct. 2886, 2893, 120 L. Ed. 2d 798 (1992).

[27] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 142, 98 S. Ct. 2646, 2668, 57 L. Ed. 2d 631 (1978) (Rehnquist, J., dissenting).

[28] Some courts speak of "constructive takings." See, e.g., *R.W. Docks & Slips v. State*, 244 Wis. 2d 497, 628 N.W.2d 781 (2001).

[29] *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569, 4 L. Ed. 2d 1554 (1960).

[30] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

to condemn. When a government dams a river, flooding upstream property, or zones land for open space so that no economically viable use can be made of it, no offer of compensation precedes the act. An owner who thinks the action has effected a taking and that compensation ought to be paid has the burden to initiate suit against the government.

C. *Judicial Takings*

There is some support for the proposition that judicial decisions can take property within the meaning of the Fifth Amendment.[31] No court has so held,[32] but a plurality of Supreme Court justices support the premise. In *Stop the Beach Renourishment Inc. v. Florida Dept. of Environmental Protection*,[33] the Court addressed, but did not decide, the question. In that case, property owners contended that the Florida Supreme Court had taken their property by construing the state's statutory and common law in such a way as to abolish a well established property right. The US Supreme Court found that the Florida court had not done so, but in dicta, a plurality of justices said that the Fifth Amendment is "concerned simply with the act, and not with the governmental actor . . . [and that it] would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat."[34] Justice Kennedy disagreed. In concurring, he opined that only the executive and legislative branches had the power to make the policy decisions as to when the state should spend its money. "[T]hese are matters for the political branches-the legislature and the executive-not the courts. Courts, unlike the executive or legislature, are not designed to make policy decisions about 'the need for, and likely effectiveness of, regulatory actions.'"[35] Justice Kennedy went on to suggest that a judicial decision that eliminated an established property right could violate due process. Two differences that flow from the approaches include the deference given to state court decisions and the remedy.[36]

§ 10:3 Physical Invasions as Takings

A. *The Loretto Per Se Test*

Governmentally induced physical invasions trigger special concern since the Court treats the right to exclude as the paramount property right.[37] The fact that land was invaded has been critical in numerous cases where takings have been found, such as where a government dam caused flooding of upstream property,[38] where military planes engaged in frequent, low-level flights over land wreaking havoc with the chicken farm below,[39] and where the government required the owner of a pond, which had

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[31] See Echeverria, Stop the Beach Renourishment: Why the Judiciary Is Different, 35 Vt. L. Rev. 475, 482–83 (2010); Barros, The Complexities of Judicial Takings, 45 U. Rich. L. Rev. 803, 855 (2011).

[32] See *Burton v. American Cyanamid Co.*, 775 F. Supp. 2d 1093, 1099 (E.D. Wis. 2011). See also Blumm and Dawson, The Florida Beach Case and the Road to Judicial Takings, 35 Wm. & Mary Envtl. L. & Pol'y Rev. 713, 770 (2011).

[33] *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010).

[34] 130 S. Ct. at 2601. See Byrne, Stop the Stop the Beach Plurality!, 38 Ecology L.Q. 619 (2011).

[35] 130 S. Ct. at 2613.

[36] See infra §§ 10:6 and 10:9.

[37] *See Kaiser Aetna v. U. S.*, 444 U.S. 164, 176, 100 S. Ct. 383, 391, 62 L. Ed. 2d 332 (1979).

[38] *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 20 L. Ed. 557 (1871).

[39] *U.S. v. Causby*, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946).

been made navigable by dredging, to allow entry to the boating public.[39] While the vast majority of cases relevant to land use law involve non-invasive regulations, regulations do sometimes result in physical invasions. For example, subdivision approvals that call for developers to provide land to be used for streets, parks, sidewalks, and schools may implicate the physical takings doctrine.

In *Loretto v. Teleprompter Manhattan CATV Corp.*,[41] the Court established a per se takings test for physical invasions. The City of New York required lessors of residential property to permit the installation of cable television facilities on their buildings. When a cable company installed a metal box on the roof of Loretto's apartment building and ran cable wires down its side, Loretto alleged a taking had occurred. The intrusion was minor. The boxes were small, the wires thin, and neither interfered with Loretto's use of her property. Nonetheless, the Court held that a permanent physical occupation of property by a third party pursuant to state authority is a taking, regardless of the scope or economic impact of the intrusion. Noting that the right to exclude is "one of the most treasured strands in an owner's bundle of property rights,"[42] the Court held that the fact that a permanent invasion has occurred is determinative. The strength of the public interest and the overall impact on the property's value are not relevant.

Labeling its ruling "narrow,"[43] the *Loretto* Court exempted temporary physical invasions from its per se test, using two cases decided shortly before *Loretto* as examples where the per se test was not applicable. In *Kaiser Aetna v. United States*,[44] the government imposed a navigational servitude on a once non-navigable pond made navigable with government permission. The servitude allowed public use of the pond. Noting the physical character of the invasion, albeit temporary, and the property owner's expectations of private use, on balance the Court found a taking. In *PruneYard Shopping Center v. Robins*,[45] no taking was found where state law required shopping center owners to allow third parties to exercise speech and petitioning rights. The Court found the invasion was temporary and limited in nature and that it did not seriously interfere with the owner's expectations.[46]

In *Nollan v. California Coastal Commission*,[47] the Court expanded the definition of permanent for purposes of the per se *Loretto* rule. There, the state coastal commission required the Nollans to deed an easement allowing the public to walk along the beachfront side of their ocean lot in return for permission to build a larger house. At first blush, *Loretto* appeared inapplicable since the invasion was not a permanent occupation. The Court, nonetheless, found *Loretto* applied. While acknowledged that the easement did not allow people permanently to station themselves on the land, it said a classic right of way easement to pass back and forth is permanent for purposes of the rule of *Loretto*.

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[39] *Kaiser Aetna v. U. S.*, 444 U.S. 164, 176, 100 S. Ct. 383, 391, 62 L. Ed. 2d 332 (1979).

[41] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).

[42] Loretto, 458 U.S. 419., quoting from *Kaiser Aetna, 444 U.S. at 179–180, 100 S. Ct. at 393.*

[43] 458 U.S. at 441, 102 S. Ct. at 3179.

[44] *Kaiser Aetna v. U. S.*, 444 U.S. 164, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979).

[45] *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980).

[46] If an invasion is not permanent, the *Penn Central* test controls. See discussion infra § 10:6.

[47] *Nollan v. California Coastal Com'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

A second aspect of *Nollan* acknowledged an exception to *Loretto* of great significance to land use regulations. Interpreted literally, *Loretto* raised the specter that conditions imposed in the permitting process that resulted in physical occupations, such as subdivision exactions of land for schools or roads, were per se takings. A straightforward application of the *Loretto* per se rule would have meant that a taking had occurred in *Nollan* without further inquiry, but the Court said that requiring the easement as a condition for issuing a land use permit would avoid the conclusion that a taking had occurred if the state could show that a nexus existed between the effects of the landowner's proposed development and the land that was being exacted for easement use.[48] The nexus was found wanting in *Nollan*, but the principle rescued many land use controls.[49]

The narrow nature of the *Loretto* per se test was confirmed by the Court in *Yee v. City of Escondido*.[50] There, the combination of state landlord-tenant law and a local rent control ordinance gave mobile home tenants the right to continue to occupy the land on which their homes sat at below market rents for so long as the terms of their leases were met and the landlord continued to use the land for rental purposes. Some lower courts had held these types of controls to be physical takings, but in *Yee* the Supreme Court disagreed and refused to give *Loretto* an expansive reading. "[R]equired acquiescence" of an owner was necessary to invoke the per se test and that was not present in *Yee* where the lessors had voluntarily opened their land to the lessees. Furthermore, the lessors were not required to rent in perpetuity. They could terminate the leases by changing the use.[51]

B. *Non-Trespassory Invasions*

Harm from a government operation that is nuisance-like, but does not result in a physical invasion, generally is not found to be a taking. For example, in cases where noise from airplane overflights caused harm to the use of the land below, a critical fact for the courts has been that the noise invaded the land from above. The Supreme Court found a taking in such a case in *United States v. Causby*.[52] Though the *Causby* opinion used nuisance language to describe the harm suffered, lower courts have seized on the fact that *Causby* involved overflights to deny compensation in cases where the noise came from adjacent land.[53]

Non-trespassory harm may be a taking if the harm is peculiar to the land, and not community wide in nature. In *Richards v. Washington Terminal Co.*,[54] a landowner complained of injury from smoke, dust, cinders, and gases emitted from an adjoining railroad. To the extent that the invasions were indirect or the harm general, the Court found no taking. The burden suffered was one shared in common with the community

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[48] See further discussion of the nexus test infra § 10.5.

[49] See, e.g., *Sparks v. Douglas County*, 127 Wash. 2d 901, 904 P.2d 738 (1995).

[50] *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992).

[51] Lower courts have, for the most part, adhered to a narrow reading of *Loretto*. See, e.g., *Hensberg v. County of Plumas*, 133 Cal. App. 4th 1, 34 Cal. Rptr. 3d 588 (2005); *Tuthill Ranch, Inc. v. U.S.*, 381 F.3d 1352 (Fed. Cir. 2004); *Kingsway Cathedral v. Iowa Dept. of Transp.*, 711 N.W.2d 6 (Iowa 2006); *CRV Enterprises, Inc. v. U.S.*, 626 F.3d 1241 (Fed. Cir. 2010). But see *Casitas Mun. Water Dist. v. U.S.*, 543 F.3d 1276, 1296 (Fed. Cir. 2008).

[52] *U.S. v. Causby*, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946).

[53] *Batten v. U. S.*, 306 F.2d 580 (10th Cir. 1962); *Branning v. U. S.*, 228 Ct. Cl. 240, 654 F.2d 88 (1981).

[54] *Richards v. Washington Terminal Co.*, 233 U.S. 546, 34 S. Ct. 654, 58 L. Ed. 1088 (1914).

...and not compensable. However, a taking was found with respect to harm suffered from a tunnel built by the railroad next to plaintiff's property, which used a fanning system that forced the gases and dust collected in the tunnel directly onto plaintiffs land.

An injured landowner unable to show a taking may have an action in tort.[56] Where vibrations from a highway construction project damaged a building to the point where it was not economically feasible to repair it, the Iowa supreme court held there was no taking.[57] The court recognized that a permanent invasion could create a servitude that would constitute a taking, but the activity creating the vibrations was temporary in nature. Still, the landowner, the court said, could sue in tort.

Some state courts, relying on state constitutions, find takings in a wider range of instances involving non-trespassory invasions than is true under the federal constitution. In large part this is based on provisions contained in nearly one-half of the states' constitutions that require compensation where land is "taken or damaged."[58] In *Thornburg v. Port of Portland*, for example, the court found a taking where airport noise came from adjacent land rather than from above.[59]

§ 10:4 Regulatory Impacts as Takings

A. *The Early Cases: Mugler and Pennsylvania Coal*

In the 1887 decision of *Mugler v. Kansas*,[60] the Supreme Court rejected the idea that an improper or excessive use of the police power became a taking. In *Mugler*, a state alcohol prohibition law rendered a brewery practically worthless. When the brewery owner argued that his property had been taken and that he should receive compensation, the Court labeled the argument an "inadmissible"[61] interpretation of the constitution. The view of the *Mugler* Court was that regulations under the police power were not burdened by a requirement of compensation. Rather, they were to be reviewed solely under the substantive due process standard that required the Court to uphold a law if it promoted a legitimate public end in a rational way. If the test was met, that was the end of the matter.

The Court's expansion of the takings clause to include regulations is generally viewed as having arisen in the 1922 decision, *Pennsylvania Coal v. Mahon*.[62] A Pennsylvania statute prohibited mining beneath residential areas in such a way as to cause mine subsidence. Subsidence or cave-ins from mining were common throughout the Pennsylvania anthracite coal region, and had led to numerous deaths and widespread property damage. When a coal company announced its intention to mine under the Mahons' house, they sought an injunction. The coal company claimed that the statute was an unconstitutional taking of mineral rights since the statute effectively prohibited it from excavating the coal that the company had expressly reserved to itself in conveying the land to the Mahons' predecessor in title.

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[56] *Hansen v. U.S.*, 65 Fed. Cl. 76 (2005) (exploring the overlap between a tort and a taking).

[57] *Kingsway Cathedral v. Iowa Dept. Of Transp.*, 711 N.W.2d 6 (Iowa 2006).

[58] See *Feits v. Harris County*, 915 S.W.2d 482, 484 n.4 (Tex. 1996) (listing 22 states in addition to Texas with such damage language).

[59] *Thornburg v. Port of Portland*, 244 Or. 69, 415 P.2d 750 (1966).

[60] *Mugler v. Kansas*, 123 U.S. 623, 8 S. Ct. 273, 31 L. Ed. 205 (1887).

[61] *Mugler* 123 U.S. at 664, 8 S. Ct. at 298.

[62] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

The Court agreed with the coal company. The majority opinion, written by Justice Holmes, showed the strong influence of its author's pragmatic view of private contract law: that contracts, and by extension the mineral rights that the coal company had reserved, are legal duties inextricably bound up with "the consequences of [their] breach."[62] To Holmes, contracts were legal relationships in which a party had simply but inextricably agreed either to perform or "suffer in this way or that by judgment of the court."[63] With this outlook, the Fifth Amendment takings issue resolved itself. Holmes considered the issue a "question of degree,"[64] and warned that "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[65] The famous, or perhaps infamous, test he established was that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[66] In this case the statute went too far since it made it commercially impracticable to mine certain coal that had been expressly reserved by contract to advance a purpose that Holmes regarded as predominantly private in nature.

Pennsylvania Coal left numerous problems in its wake. The generality of the "too far" test was one. Diminution in value, Holmes said, was one factor to be used to determine how far a regulation could go. However, it was not clear what the diminution was in *Pennsylvania Coal*. The Court also did not say what factors other than diminution in value are relevant. Holmes also did not cite, much less discuss, *Mugler*, leaving its validity unclear, and likely extending its life. In dissent, Justice Brandeis made it clear that he regarded *Mugler* as inconsistent with the Court's holding,[67] and *Mugler* has been cited favorably in some subsequent court opinions.

Some authors have suggested that *Pennsylvania Coal* was simply wrongly decided.[68] Others have argued that the decision does not rest on the takings clause but on substantive due process grounds, and that it only uses its takings language metaphorically.[69] Lending support to the argument that *Pennsylvania Coal* was a due process case is the fact that compensation, the mandated remedy of the Fifth Amendment, was neither sought nor awarded, and with good reason: the state was not a party to the case. Since both litigants were private, the entire discussion of the Fifth Amendment takings clause, some suggest, may be regarded as dictum.[70] Even treating the case as a taking, the issue of the appropriate remedy for a regulatory taking was left hanging for decades.[71]

These uncertainties over *Pennsylvania Coal* explain the references to "so-called regulatory takings" prevalent in opinions and articles. The confusion stems in large

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[62] Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 458 (1897).
[63] Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 458 (1897).
[64] *Pennsylvania Coal*, 260 U.S. at 415, 43 S. Ct. at 160.
[65] Pennsylvania Coal, 260 U.S. at 416, 43 S. Ct. at 160.
[66] Pennsylvania Coal, 260 U.S. at 416, 43 S. Ct. at 160.
[67] 260 U.S. at 418, 43 S. Ct. at 161.
[68] See Byrne, Ten Arguments for the Abolition of the Regulatory Takings Doctrine, 22 Ecology L.Q. 89 (1995).
[69] See Williams, Jr., Smith, Siemon, Mandelker and Babcock, The White River Junctions Manifesto, 9 Vt. L. Rev. 193, 208–14 (1984).
[70] Id., at 208–10.
[71] See infra § 10.9.

from the striking similarity of the takings test to the substantive due process test.[72] While the due process test applied in *Magler* did not consider the degree of loss suffered by the property owner to be relevant, that factor worked its way into the Court's later statements of the rule. In the 1894 decision of *Lawton v. Steele*, for example, the Court said the validity of a police power regulation depends on whether the measure promotes the public interest by a means reasonably necessary to accomplish the purpose, which "is not unduly oppressive upon individuals."[73] The subsequent *Pennsylvania Coal* decision restated the *Lawton* substantive due process test in takings language. The result has been a confusion of tongues and minds.[74] Determining whether courts have used, or ought to use, substantive due process or the takings clause to adjudicate disputes over allegedly excessive land use controls was long debated.[75] It is now settled: excessive police power measures affecting property rights are actionable under the Fifth Amendment takings clause.

The view of the 1920s Court with respect to the questions surrounding the regulatory takings doctrine of *Pennsylvania Coal* is difficult to judge since, in the years shortly after the case, the Court ignored it in several important decisions, preferring to deal with alleged regulatory excesses as substantive due process matters. A few years after *Pennsylvania Coal* the Court decided the landmark case of *Village of Euclid v. Ambler Realty Co.*,[76] holding that zoning on its face did not violate the substantive due process guarantee to be free from arbitrary state action. Though the opinion echoed Holmes' idea that the validity of police power measures involve questions of degree, saying that "[t]he line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation,"[77] it cited neither the takings clause nor *Pennsylvania Coal*.

Two years after *Euclid* the Court decided another land use case, again failing to cite *Pennsylvania Coal*. In *Nectow v. City of Cambridge*,[78] the Court looked at zoning as applied to a particular tract, and found it invalid on due process grounds. The Court held that the zoning of the tract for residential use did not, under the circumstances, promote the public interest.[79] Despite the lack of reference to the Fifth Amendment in the *Euclid* and *Nectow* opinions, on occasion, the Court has loosely referred to them as takings cases, further confusing the line between substantive due process and takings.[80] Some confusion occasionally appears in judicial decisions, yet it ought not. The Court has definitively held that claims of excessive regulation are cognizable under the Fifth Amendment.[81]

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[72] This issue is dealt with also infra § 10:12.

[73] *Lawton v. Steele*, 152 U.S. 133, 137, 14 S. Ct. 499, 501, 38 L. Ed. 385 (1894).

[74] See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 498 n.7, 101 S. Ct. 2882, 2887, 69 L. Ed. 2d 800 (1981).

[75] See infra § 10:12.

[76] *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926).

[77] 272 U.S. at 387, 47 S. Ct. at 118.

[78] *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed. 842 (1928).

[79] City of Cambridge, 277 U.S. at 188, 48 S. Ct. at 448. See infra § 10:12.

[80] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 131, 98 S. Ct. 2646, 2662, 57 L. Ed. 2d 631 (1978).

[81] *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

B. *The Modern Era: Penn Central, Agins, and Lingle*

The next important regulatory takings decision, *Penn Central Transportation Co. v. New York City*,[82] came in 1978, more than 50 years after *Pennsylvania Coal*. New York City declared Grand Central Station an historic landmark, requiring the owner to seek municipal permission to make changes in the structure. After the designation, Penn Central leased the airspace above the station to a developer who planned to build a 55-story office complex. When the railroad and its lessees sought a certificate of appropriateness from the city's landmark commission, permission was denied with the uncharitable characterization that the proposed tower was an "aesthetic joke." The railroad claimed its inability to build in the airspace was a taking.

The Court admitted that the takings issue was "a problem of considerable difficulty," and that there was no "'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[83] While the Court admitted the test involved "essentially ad hoc, factual inquiries," it attempted to be more concrete in its analysis than Holmes had been in *Pennsylvania Coal*. It listed three factors for consideration: (1) the economic impact on the claimant, (2) the extent to which the regulation interfered with investment-backed expectations, and (3) the character or extent of the government action.

In weighing these factors, the Court held that the landmarking did not effect a taking because it left the station exactly as it had been, it did not amount to a physical invasion of the property, and it did not interfere with the original investment-backed expectations of the owners. The railroad argued a total loss of use had occurred by focusing on the airspace alone. The Court, however, said the relevant measure was the whole parcel, and with respect to it, the record showed that the railroad was able to earn a reasonable return under its present use. The Court also said there was no proof of loss of all airspace. A smaller tower might be approved, and the transferable development rights available to the station owner mitigated the loss.

While *Penn Central's* ad hoc test can be faulted for lack of precision and predictability, the Court unnecessarily made matters worse in *Agins v. City of Tiburon*,[84] where it held that an ordinance designed to preserve open space did not constitute a facial taking of five acres of unimproved land by limiting the owner to building from one to five houses. The difficulty with *Agins* was not its result, which is easy to understand since the owners, not having submitted a plan for approval, made no showing that they suffered any significant loss. The problem with *Agins* was that in its general statement of takings principles, the Court, without acknowledging and apparently not realizing it, moved the substantive due process test of *Nectow* and *Euclid* into the Fifth Amendment, saying that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests [citing *Nectow*], or denies an owner economically viable use of his land [citing *Penn Central*]."[85] Digging the hole even deeper, the Court added that "[a]lthough no precise

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[82] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

[83] 438 U.S. at 124, 98 S. Ct. at 2659.

[84] *Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980) (overruled by, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)).

[85] 447 U.S. at 260, 100 S. Ct. at 2141.

rule determines when property has been taken * * *, the question necessarily requires a weighing of private and public interests."[86] With *Agins*, the Court's regulatory takings doctrine truly earned the sobriquet of muddled.

A major course correction occurred in 2005, when the Court overruled *Agins* in the unanimous decision of *Lingle v. Chevron, USA, Inc.*[87] In a refreshingly frank opinion, the Court admitted what critics had long contended, that the "substantially advances formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence."[88] The *Agins*' "substantially advances" means-end formula, said the Court, addresses a question that is a condition precedent to a takings claim, which is whether a regulation is effective in achieving a legitimate goal. If a law fails to promote a legitimate end, as was true for example in *Nectow*, it is invalid and it makes no sense to proceed to discuss whether compensation is due under the Fifth Amendment.

The "substantially advances" test does not answer the question of whether the regulation forces the property owner "alone [to] bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[89] A law could easily pass due process muster by substantially advancing a legitimate state interest, and yet unfairly make a landowner suffer the burden. Thus, the *Lingle* Court reasoned that it "reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is distributed among property owners."[90] *Lingle*'s importance lies in the doctrinal clarity it brings to the takings issue. It eliminates, or should eliminate, the confusion between due process and takings that has existed since the 1922 *Pennsylvania Coal* decision.

C. *The Takings Tests*

Lingle lays out an analytic framework to assess a potential takings claim. Assuming one can establish a constitutionally protected property interest, a takings claim must fall into one of three categories: (1) a physical takings claim under the *Loretto* doctrine, with an exception for legitimate land exactions imposed as conditions for development permission under *Nollan*,[91] (2) a regulatory takings claim under *Lucas*, requiring compensation for a total loss of economic value, unless excepted by background principles of property or nuisance law, or, (3), when the economic impact is less than total, a regulatory takings claim under *Penn Central*. These tests "share a common touchstone," the Court says, which is "to identify regulatory actions that are functionally equivalent to a direct appropriation of or ouster from private property."[92]

It has become common for courts and commentators to refer to the *Nollan-Dolan* doctrine as constituting an independent category of takings claims. *Lingle* also lists it as a separate test, and in its closing remarks, the Court refers to "a land-use exaction

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[86] 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106 (1980).

[87] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

[88] *Lingle*, 544 U.S. at 540, 125 S. Ct. at 2083.

[89] *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960).

[90] *Lingle*, 544 U.S. at 542, 125 S. Ct. at 2084.

[91] The Court spoke of four tests. As we explain below, one of the four was the *Nollan* exactions test, which we think is better viewed as a defense to a *Loretto* permanent physical occupation claim.

[92] Lingle, 544 U.S. at 548, 125 S. Ct. at 2087.

violating the standards set forth in *Nollan* and *Dolan*."[89] The exactions problem, however, cannot stand alone. The opinion makes clear that the genesis of *Nollan* (and its sequel *Dolan*) was an affirmative defense to a per se physical takings claim, and, for that reason, we list it as an exception to the *Loretto* test. In its analysis of *Nollan* and *Dolan*, the *Lingle* Court noted that in both cases "the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a per se physical taking."[91] The physical invasion is the taking, but the government's justification, if it meets the *Nollan* nexus, excuses the government from paying compensation.

The question of the standard of review the Court uses in regulatory takings claims is in a confused state because of the Court's *pre-Lingle* injection of due process considerations into the takings equation. In applying the *Penn Central* ad hoc test, the Court has used a deferential standard of review. This was true in *Penn Central* itself, where the Court deferred to New York City's goal of protecting historic landmarks and its method of achieving that goal and in *Agins*, where the Court accepted at face value the city's goal to preserve open space. Later in *Keystone*, the Court deferred to Pennsylvania's method of controlling surface subsidence from coal mining. Those cases, however, all involved the use of due process factors as part of the takings test. With *Lingle*, reviewing the means and ends of government action is no longer proper in a takings claim.

In an inverse condemnation action, the plaintiff accepts the validity of the government action and must show that the burden of the action falls disproportionately on her. The issue of deference to legislative action does not arise. It is the court's job to determine what the burden is and whether it is too severe in its impact on the plaintiff.

Intermediate scrutiny is used in a takings suit when the government attempts to show its action, which would otherwise be a per se taking under *Loretto* or *Lucas*, is exempt from the command to pay compensation. In these cases, the burden is placed on the state to satisfy the nexus defense to physical exactions under *Nollan*.[93] In a *Lucas* categorical taking case, once the plaintiff establishes a total economic loss, the burden switches to the government to show its regulation is justified under background principles of state property or nuisance law.[94] Though the *Lucas* Court did not speak in terms of levels of scrutiny, the switching of the burden and the Court's admonition that the state court provide an "objectively reasonable application of relevant precedents"[95] demonstrates that deference is not appropriate.

§ 10:5 Exactions: *Nollan* and *Dolan* Tests

Certain permanent physical occupations that would be takings under the *Loretto* doctrine [96] may be excused if the state can show that the land exaction is a condition for the granting of development permission and that, qualitatively and quantitatively, the exaction is reasonably necessary to prevent or counteract anticipated adverse pub-

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[89] Lingle, 544 U.S. at 548, 125 S. Ct. at 2087.

[91] Lingle, 544 U.S.at 546, 125 S. Ct. at 2086.

[93] See infra § 10:5.

[94] See infra § 10:6

[95] See *Lucas*, *505 U.S. at 1032, n.18*

[96] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).

beneficial effects of the proposed development. The leading case is *Nollan v. California Coastal Commission*,[99] where the Court ostensibly applied the now defunct "substantially advances" test of *Agins v. City of Tiburon*.[100] Though *Agins* is dead, the rule of *Nollan* is alive and well, but we find a close reading suggests it lives on only as an exception to *Loretto*'s physical takings test.[101] However, others continue to press the argument that *Lingle* and *Nollan* affirmed or created a separate takings test of much broader reach.[102]

When the Nollans, owners of a beachfront lot, sought permission to build a larger house, the state coastal commission conditioned the permit on the granting of an easement to allow the public to walk along the beachfront side of the lot. The state-asserted interest was to protect the public's ability to see the beach from the street, to prevent congestion on the beach, and to overcome psychological barriers to the use of the beach resulting from increased shoreline development. The Court had no quarrel with the legitimacy of the state's goals, but disagreed that the lateral access easement along the beachfront would promote them. Stressing the word "substantially" in the *Agins* formulation, the Court employed heightened scrutiny and found the interests asserted by the state would not have been substantially advanced by the easement sought. *Nollan's* conditions development permission on the owner dedicating property to public use it may only do so without paying compensation if there is a nexus between the land to be taken and the anticipated adverse public effects of the proposed development. The word "substantially" was given emphasis by the Court to make it clear that low-level, rational basis scrutiny is insufficient to test the strength of the nexus.

Even if a causal connection between the adverse impact of the development project and the condition is established, it still must be shown that the amount exacted is proportional to the anticipated impact of the development. That issue was dealt with in *Dolan v. City of Tigard*[103] where the owner of a plumbing and electric supply store sought a permit to double the store's size and pave the parking lot. For flood control reasons, the city required the owner to convey to it an affirmative easement on the portion of her lot lying within the 100-year floodplain adjacent to a creek and an easement on an additional 15-foot strip of land for a pedestrian and bicycle path. The two requirements amounted to approximately 10% of Dolan's property.

The *Dolan* Court held that once the *Nollan* nexus test is met, the state must show that the extent of the exaction is proportional. The *Dolan* Court agreed that the paving of the parking lot would increase stormwater runoff and exacerbate flooding problems, justifying the city in requiring some mitigation response by the owner. However, it was not clear to the Court why the city asked for an easement permitting the public to use Dolan's floodplain land. Physical access by the public generally was not necessary to control flooding. The Court agreed that the store's expansion might lead to more traffic, so that asking the owner to help the city cope with traffic problems made sense. Yet, the city had only found that the pedestrian/bicycle pathway *could offset* this increased demand. That was not good enough for the Court. The city needed to quantify the traf-

[99] *Nollan v. California Coastal Com'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

[100] See discussion supra § 10:4.

[101] See the discussion of *Lingle*, supra § 10:4.

[102] See discussion infra § 10:9.

[103] *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

fic increase, at least in some general way, to show that the pathway *would offset* some of the traffic.

Dolan adopted what it called a rule of "rough proportionality" to set "outer limits" as to how a city may achieve what the Court called the "commendable task of land use planning."[104] While the burden is on the government to show a degree of connection, the Court did not demand a "precise mathematical calculation, but [rather] some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[105] Though *Dolan's* phrasing of "rough proportionality" was new, the Court acknowledged that its test is the same as the dedication test followed by the vast majority of state courts.

In overruling *Agins*, the *Lingle* Court retained the holdings of *Nollan* and *Dolan* but disclaimed the "substantially advances" rationale used in those opinions. While recognizing that "it might be argued that [the *Agins]* formula played a role in [those] decisions * * *, the rule those decisions established is entirely distinct"[106] from *Agins'* "substantially advances" test. Rather, the Court says, those cases "involved dedications of property so onerous that, outside the exactions context, they would be deemed per se physical takings"[107] under the *Loretto* doctrine. Thus, whether an exaction is justified, and thus exempt from *Loretto's* per se takings rule, depends on whether the exaction is a condition for the granting of development permission and that, qualitatively and quantitatively, the exaction is reasonably necessary to prevent or counteract anticipated adverse public effects of the proposed development.

A number of courts have addressed whether *Nollan* and *Dolan's* intermediate scrutiny takings test should be extended to regulations that do not cause physical invasions, such as impact fees, with the majority holding in the negative.[108] Prior to Lingle, lower courts differed on the question. By tying *Nollan/Dolan* to *Loretto* and in disclaiming use of the "substantially advances test" to explain them, *Lingle* appears to answer that question in the negative.[109] Without a threatened physical invasion, there is nothing to trigger *Loretto*, and no need for the government to raise the *Nollan-Dolan* nexus defenses. One commentator criticizes the Court's focus on physical invasions as a "technicality in a modern world where value is fungible and economic considerations dominate our thinking."[110] Yet, the Court remains committed to the idea that the right to exclude is, as Justice O'Connor says in *Lingle*, perhaps the most fundamental of all property interests.[111]

A second reason that monetary charges do not raise takings issues is that nothing is taken for which the state could pay just compensation. As one court said, "applying the Takings Clause to regulations that merely require the payment of money is like saying the government can take money, but only if it pays it back. It is far more logical

[104] Dolan, 512 U.S. at 395, 114 S. Ct. at 2322.

[105] Dolan, 512 U.S. at 395, 114 S. Ct. at 2322.

[106] *Lingle*, 544 U.S. at 547, 125 S. Ct. at 2086.

[107] Lingle, 544 U.S. at 547, 125 S. Ct. at 2087.

[108] Finding *Nollan/Dolan* applicable to non-possessory exactions, see, e.g., *Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek*, 89 Ohio St. 3d 121, 729 N.E.2d 349 (2000); *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 50 Cal. Rptr. 2d 242, 911 P.2d 429 (1996).

[109] See *St. Johns River Water Management Dist. v. Koontz*, 77 So. 3d 1220 (Fla. 2011).

[110] Nelson, Lingle v. Chevron USA, Inc., 20 Harv. Envtl. L. Rev. 281, 290 (2006).

[111] See discussion supra § 10:3.

to conclude that a regulation of this sort"[112] violates due process by employing an irrational means and declare the fee void, than to let the government "take" the money and then require it to "pay" the money as compensation.[113]

Nollan and *Dolan* arose in adjudicatory settings, and the courts have grappled with whether the doctrine of those cases applies to legislative action as well. The legislative-adjudicatory question arises because exactions are imposed on development in two distinct settings that may call for different levels of review. As Chief Justice Rehnquist said in *Dolan*, the burden is on a challenger to prove the invalidity of a generally applicable law, but where an adjudicative decision is made, the burden switches to the government.[114] Where property owners must bargain on a case by case basis, in what is essentially an adjudicatory setting, the safeguards of the open legislative process are lost, and concern arises that the individual may be compelled to give more than a fair share.[115] Taking their cue from *Dolan's* emphasis on the fact that the case involved an adjudicative decision, most courts have found heightened scrutiny inapplicable to broad-based legislative conditions.[116] Other courts take the position that heightened scrutiny applies to legislative as well as adjudicative acts.[117]

Dolan's discussion of legislative versus adjudicatory action is, as was true in *Penn Central* and *Agins*, based on due process factors and the distinction may not survive *Lingle*. *Lingle* does not expressly deal with the question, but it does note that *Nollan* and *Dolan* involved adjudicatory actions. That, however, may not have been intended to limit those cases but to simply describe what happened in them. The case does say that the focus is to be on the burden the property suffers as opposed to the legitimacy of the law. Whether the exaction arises from legislative or adjudicatory action a landowner must give up an easement and thus suffers the same burden. The question remains open and likely will continue to be disputed until the Court answers it.

§ 10:6 The Economic Impact Test

In *Pennsylvania Coal v. Mahon*[118] and *Penn Central Transportation Co. v. City of New York*,[119] the Court treated the economic impact of a regulation as an important, if not the primary, factor in determining whether a taking had occurred. Those cases, however, provided little guidance as to how much of an economic impact was tolerable and how other factors should be considered. They also left unanswered the question as

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[112] *Small Property Owners of San Francisco v. City and County of San Francisco*, 141 Cal. App. 4th 1388, 47 Cal. Rptr. 3d 121, 130 n.8 (2006).

[113] *West Linn Corporate Park, L.L.C. v. City of West Linn*, 349 Or. 58, 85, 240 P.3d 29, 44 (2010).

[114] *Dolan*, 512 U.S. at 391, n.8, 114 S. Ct. at 2320.

[115] See Reznik, Note: The Distinction Between Legislative and Adjudicative Decisions in *Dolan v. City of Tigard*, 75 N.Y.U. L. Rev. 242 (2000).

[116] See e.g., *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008). A complete listing of cases can be found in the Practitioner's Edition of this work: Juergensmeyer and Roberts, Land Use Planning and Development Regulation Law (3rd ed. 2012).

[117] *Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek*, 89 Ohio St. 3d 121, 729 N.E.2d 349 (2000) (impact fees). A complete listing of cases can be found in the Practitioner's Edition of this work: Juergensmeyer and Roberts, Land Use Planning and Development Regulation Law (3rd ed.2012).

[118] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 163, 67 L. Ed. 322 (1922), discussed supra § 10:4.

[119] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 discussed supra § 10:4.

to whether the nuisance or nuisance-like character of a use justified a total deprivation of economic value or use.

A. *Categorical Taking by Total Economic Deprivation: Lucas*

In 1992, the Supreme Court established a categorical rule for economic impact cases in *Lucas v. South Carolina Coastal Council*.[120] The owner of two beachfront lots was unable to build due to the application of a setback rule adopted to deter sand dune loss and beach erosion. Accepting the state trial court's finding that the lots subject to the regulation were valueless, the Court held that where a regulation deprives real property [121] of all economically viable use a taking occurs unless the state can prove that the regulation does no more to restrict use than what the state courts could do under background principles of property law or the law of private or public nuisance.[122]

Lucas rejected case law that suggested that regulations causing serious public harm, but falling short of being common law nuisances, could not be takings. *Mugler v. Kansas*, the 1887 case where the Supreme Court dismissed out of hand a takings claim brought by the owner of a brewery who was shut down when the state went dry and went on to hold that the ordinance did not violate due process, has sometimes been viewed as espousing the rule that a regulation that prevents serious public harm is not a taking. This is sometimes labeled the "nuisance-like exception." The Court applied the notion in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, saying that the "state has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity."[123] *Keystone* also spoke of "uses of property that are tantamount to public nuisances" and found a statute preventing mining coal so as to cause subsidence was not a taking, in part, because it prevented a serious public harm.

Lucas rejected the idea that a regulation preventing serious public harm that approached, but did not constitute, a common law nuisance, was immunized from a takings claim. Thus, *Lucas* reaffirmed the age old principle that no one has a property right to commit a nuisance or to breach other background principles of property law. Regulations that fall short of either of those findings and that deprive an owner of all economic use are takings.

To take advantage of the *Lucas* categorical rule, one must show a total loss. In *Palazzolo v. Rhode Island*,[124] the Court rejected the argument that a 93.7% diminution in value was a categorical taking. The property owner alleged that his property, most of which was wetlands, had a value of $3,150,000 if developed with 74 single-family homes. However, as restricted by the state's wetlands laws, the claimant could only build one home, leaving his parcel with a value of $200,000, or, as he put it, "a few crumbs of value." These "few crumbs," however, were sufficient to render *Lucas* inapplicable, as the Court found that the right "to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle.'"[125]

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[120] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

[121] The *Lucas* categorical rule only applies to real property. 505 U.S. at 1028, 112 S. Ct. at 2900.

[122] 505 U.S. at 1027, 112 S. Ct. at 2899.

[123] *Keystone*, 480 U.S. 470, 492 n.20.

[124] *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001).

[125] 121 S. Ct. at 2465.

The invocation of *Lucas* may depend upon whether one must show a deprivation of all economically viable use or of all value. A regulation, for example, might prohibit all developmental use of land but not deprive the land of all value. The problem lies in whether, when, and how to distinguish between "use" and "value," concepts that are so closely intertwined. Courts, including the Supreme Court in *Lucas*, have used the terms interchangeably in takings cases.[126] The *Lucas* Court also assumed the land to be valueless. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court said that anything less than a "complete elimination of value" requires a *Penn Central* analysis.[127] Where unimproved land cannot be developed due to regulation, but the land has more than token value for recreational or some other use, *Lucas*' categorical rule will not apply.[128]

Establishing a prima facie *Lucas* taking is realistically only possible if the court treats the portion of the land affected by the regulation as the denominator by which to measure the loss. If, however, as is usually the case, the whole parcel rule is used,[129] a categorical taking will not be found. Defining the relevant portion of land to measure loss then is effectively outcome-determinative in many, if not most, cases.

The *Lucas* Court's "categorical" rule is not really categorical. As is true with the so-called "categorical" *Loretto* rule regarding permanent physical occupations, *Lucas* uses the term as a burden switching tool. A prima facie case is made where a law denies all economically beneficial use or value and no "case-specific inquiry into the public interest advanced in support of the restraint [occurs]."[130] However, when the property owner shows a total deprivation of all economically beneficial use, the burden switches to the government, which must show that property or nuisance law justifies the restriction to avoid paying compensation.

B. *Background Principles*

Where a total deprivation of economically beneficial use occurs, the state can insulate itself from paying compensation only if the prohibition "inhere[s] in the title itself, in the restrictions that background principles that the State's law of property and [private or public] nuisance already place upon land ownership."[131] Read narrowly, this means that legislatures cannot impose new limitations that effect total economic deprivations unless the state courts could impose the same limit under the common law. Some justices have suggested, however, that land use zoning and permitting regimes qualify as background principles.[132] Furthermore, the test is not limited to a backward look at what the state courts have held in specific cases pursuant to the common law. The principles, not holdings, of state law control, and the power of the courts under the common law is not fixed. Thus, the *Lucas* Court acknowledged that new prohibitions may be imposed if deemed necessary by virtue of changed circumstances or new knowledge. The Lucas Court reserved its right to review state court interpretations of

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[126] Unless specifically noted otherwise, we also use the terms interchangeably.

[127] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002).

[128] *Tahoe-Sierra*, 122 S. Ct. at 1483.

[129] See discussion infra § 10:8.

[130] *Lucas*, 505 U.S. at 1015, 112 S. Ct. at 2895.

[131] 505 U.S. at 1029, 112 S. Ct. at 2900.

[132] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 344, 122 S. Ct. 1465, 1490, 152 L. Ed. 2d 517 (2002) (Rehnquist, C.J., dissenting).

state property law, saying that state courts can only engage in "objectively reasonable application[s] of relevant precedents."[132] The burden is on the claimant to prove the existence of the right alleged to have been taken.

The Supreme Court applied the rule in *Stop the Beach Renourishment Inc. v. Florida Dept. of Environmental Protection*,[134] where coastal property owners contended that the state supreme court's interpretation of Florida's law relating to beach ownership effected a taking. The issue arose due to the state's beach restoration program implemented in response to the loss of dry sand due to erosion. On restored beaches, the statute established a fixed erosion control line. The sand added by restoration, generally seaward from the statutory line, created new land, which, under the statute, belongs to state. Beachfront property owners claimed that under the state's common law, the boundary between public and private ownership of tidal lands was the ordinary high tide mark and that new land created by the state landward of the ordinary high tide line belonged to the private owners, giving them direct access to the ocean. When the state's fixed line fell landward of the ordinary high tide line, the beachfront property owners lost the right to claim title to the new land and lost direct access to the water. The Florida court held that under the common law, these claimed rights were superseded by the state's right to fill submerged land. In a unanimous decision, the US Supreme Court found the state court's ruling consistent with the background principles of state property law.

In another case, the Court declined review of an Oregon Supreme Court opinion, which recognized a public right of access on private beach property based on the doctrine of custom, precluding the conclusion that public entry was a taking.[135] The Court also let stand the Hawaii Supreme Court's ruling that private property owners must allow native Hawaiians to enter private land to exercise native gathering rights.[136]

In other decisions construing background principles, the Colorado Supreme Court held that its doctrine of nuisance law could preclude the spread of radioactive contamination,[137] and the Federal Circuit has found that the federal navigation servitude is a background principle under *Lucas*.[138] State courts have differed, as they presumably are entitled to do, on whether filling wetlands violates their background principles.[139]

The role that statutes play as background principles is unclear. Some contend that statutes may only qualify as background principles to the extent that they codify state common law (by which they mean judicially developed rules), while others contend that statutes may reflect newly developed principles responding to changing circumstances. Expanding the scope further, Chief Justice Rehnquist observed that "zoning and per-

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[132] *Lucas*, 505 U.S. at 1032, n.18, 112 S.Ct. at 2902.

[134] *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 130 S. Ct. 2592, 177 L. Ed. 2d 184 1605 (2010).

[135] *Stevens v. City of Cannon Beach*, 317 Or. 131, 854 P.2d 449 (1993).

[136] *Public Access Shoreline Hawaii by Rothstein v. Hawai'i County Planning Com'n by Fujimoto*, 79 Haw. 425, 903 P.2d 1246 (1995). But see *Severance v. Patterson*, 2012 WL 1058341 (Tex. 2012).

[137] *State, Dept. of Health v. The Mill*, 887 P.2d 993 (Colo. 1994).

[138] *Palm Beach Isles Associates v. U.S.*, 208 F.3d 1374 (Fed. Cir. 2000).

[139] Compare *K & K Const., Inc. v. Department of Natural Resources*, 217 Mich. App. 56, 551 N.W.2d 413 (1996), decision rev'd on other grounds, 456 Mich. 570, 575 N.W.2d 531 (1998).

...ating regimes are a longstanding feature of state property law,"[140] indicating that ...limiting background principles to the common law is too narrow an approach.

In *Palazzolo v. Rhode Island*, the Court held that "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title,"[141] but the Court acknowledged a role for statutes when it said that it had "no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here."[142] Prior to *Palazzolo*, a number of state courts had found that restrictions embodied in statutes that pre-dated a challenger's acquisition of title were background principles that defeated a takings claim.[143] To the extent that those decisions rest on the idea that the mere passage of title converts a statute into a background principle, they are no longer valid.

C. *The Penn Central Multifactor, Ad Hoc Test*

If a regulation's economic effect is less than total, the *Penn Central* multi-factor ...test is used to determine whether a taking has occurred. Under *Penn Central*, as discussed above,[144] economic impact is but one factor to consider. Other factors include the extent to which the regulation interferes with investment-backed expectations and the character or extent of the government action. *Penn Central* did not indicate the relative weight of these factors, choosing instead to speak of takings cases as "ad hoc factual inquiries." As the Court said in the oft-quoted case of *Armstrong v. United States*, "these inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[145]

Penn Central is the test most likely to be applied to a regulatory takings claim. Claims rarely qualify for the more landowner-favorable rules of *Lucas* or *Loretto* (with the exception of cases raising the *Nollan* nexus defense). *Penn Central* also has been endorsed by the Court in its most recent takings cases.[146] Not only is it the most likely to be used by a court, it is rare for a property owner to prevail under it. Professor Ely sums up *Penn Central*'s test by observing that its "indeterminate factors provide little guidance to individuals and, in practice, are heavily balanced in favor of the government and against compensation."[147]

(1) Economic Impact

The economic impact factor, other than where it is shown to be a total diminution in value, is critical to a claim but not determinative. Standing alone, partial economic

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[140] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, 1484, 152 L. Ed. 2d 517 (2002) (Rehnquist, C.J., dissenting).

[141] *Palazzolo v. Rhode Island*, 533 U.S. 606, 629, 121 S. Ct. 2448, 2464, 150 L. Ed. 2d 592 (2001).

[142] Palazzolo, 533 U.S. 606.

[143] See infra § 10:7.

[144] Supra § 10:4.

[145] *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960).

[146] *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 529, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

[147] See Ely, Jr., "Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners, 2005 Cato Sup. Ct. Rev. 39 (2005), text accompanying notes 35–38 and 70–71.

loss does not result in a taking. In *Palazzolo v. Rhode Island*,[148] the Court rejected the argument that a 93.7% diminution in value was a categorical taking. While there is no absolute number, to aid the claimant's case at all, the diminution, as *Palazzolo* illustrates, must be close to total. Comparing *Lucas* and *Penn Central*, one court concluded that the latter provides "an avenue of redress for a landowner whose property retains value that is slightly greater than de minimis, * * * [but the results of cases demonstrate] that the level of interference must be very high."[149]

One such case is *Florida Rock Industries, Inc. v. United States*, where the Court of Federal Claims found a taking relying primarily on a 73% deprivation in value.[150] More often than not, a percentage of loss is not calculated in written opinions. To most appellate courts, the lack of a record proving a percentage loss will be assumed to be insubstantial and treated as dispositive or the case will be remanded.

(2) Character of the Government Action

The "character or extent of the government action" factor has been read by many courts to open up the inquiry into an assessment of the "purpose and importance of the public interest,"[151] which then must be weighed against the loss. Whether this is what the *Penn Central* Court intended is doubtful. After stating the "character" factor, the Court gave as an example the temporary physical invasion that occurred in *United States v. Causby*.[152] The matter soon became muddled. In *Agins v. City of Tiburon*, the Court said "the question [of when a taking has occurred] necessarily requires a weighing of private and public interests."[153] Shortly after, but without citing to, *Agins*, the Court began to speak of the "multifactor balancing test prescribed by this Court's recent Takings Clause decisions."[154] Until *Lingle*, the Supreme Court retained what appeared to be a standard that integrated the balancing aspect of *Agins* with the *Penn Central* factors. Lower courts followed suit.

Lingle, in overruling the *Agins'* substantially advances test, eliminates evaluation of the legitimacy of the regulation, and a judicial balancing of interests should follow it to the dustbin of Supreme Court errors. In *Lingle*, the Court did not refer to a multifactor balancing test. Rather, when reciting the *Penn Central* factors, the *Lingle* Court gave a physical invasion as its example of the character factor. Just as the challenger cannot argue an illegitimate regulatory purpose or use of irrational means in presenting its case, the government ought not be able to argue the importance of its regulation's purpose in defense. By extricating due process from the takings question, the Court seems to have returned to its position in *Pennsylvania Coal v. Mahon*, where it said that "a strong public desire to improve the public condition is not enough to warrant achieving it by a shorter cut than the constitutional way of paying for the

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[148] *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001).

[149] *Animas Valley Sand and Gravel, Inc. v. Board of County Com'rs of County of La Plata*, 38 P.3d 59 (Colo. 2001).

[150] *Florida Rock Industries, Inc. v. U.S.*, 45 Fed. Cl. 21 (1999).

[151] *Loveladies Harbor, Inc. v. U.S.*, 28 F.3d 1171, 1176 (Fed. Cir. 1994).

[152] *Penn Central*, 438 U.S. at 124.

[153] *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980), overruled in Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

[154] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).

change."[155] *Lingle's* emphasis on physical invasions is in accord with *Pennsylvania Coal*, which the Court has characterized as a case involving "a physical restriction"[156] of land.

Nuisance law may be used to measure the strength of the public interest.[157] For example, in *Rose Acre Farms, Inc. v. United States*,[158] the court reasoned that *Lingle* did not diminish consideration of the strength of the public interest in health and safety regulations. The court held that a government restriction on egg sales, which caused the loss of egg-laying chickens that tested positive for the presence of salmonella bacteria, was not a regulatory taking. While the court couched its decision in *Penn Central* terminology, the decision may be better explained as holding that endangering the health and safety is a nuisance.

The balancing conundrum stems from the awkward transition that courts face in moving from the police power to the eminent domain power in regulatory takings cases. At bottom, the issue of balancing returns to the blend of substantive due process and takings law. *Lingle* goes a long way towards separating the two, but it is likely that some mixing will continue so long as the *Penn Central* test remains vague.

§ 10:7 Investment-Backed Expectations

Investment-backed expectations entered takings lexicon in *Penn Central*, where the Court listed it as one factor to consider under its ad hoc approach to takings determinations. Though the term was new, the Court traced its source to *Pennsylvania Coal v. Mahon*. While some initially saw in this concept "new support for landowner takings claims, * * *, the factor has become, instead, a shield for government."[159] Use of the expectations test has its critics, who point out that limiting a landowner's use under the concept of expectations runs counter to property rights as natural rights.[160] The idea, however, finds support in utilitarian theory,[161] and the Court recently reaffirmed it as part of the takings inquiry in *Palazzolo v. Rhode Island*.[162] Interference with investment-backed expectations does not constitute a taking by itself. Economic loss still must be considered.

The Court has not defined "investment-backed expectations," but some guidance as to its meaning can be gleaned from the Court's applications. In *Penn Central*, the Court found that the railroad's belief that it could use the airspace above the railroad terminal did not qualify as a "distinct investment-backed expectation." It was sufficient for takings purposes, held the Court, that the railroad's primary expectation of using Grand Central Station as a railroad terminal and office building, established by 65 years of use, was unaffected by the landmark designation. That the railroad built the

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[155] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S. Ct. 158, 160, 67 L. Ed. 322 (1922).

[156] *Andrus v. Allard*, 444 U.S. 51, 67, 100 S. Ct. 318, 327 n.22, 62 L. Ed. 2d 210 (1979).

[157] See § 14:1 et seq. infra.

[158] *Rose Acre Farms, Inc. v. U.S.*, 559 F.3d 1260 (Fed. Cir. 2009), cert. denied, 130 S. Ct. 1501, 176 L. Ed. 2d 109 (2010).

[159] Daniel R. Mandelker, The Nexus Rule in Investment-Backed Expectations at 21, in Taking Sides on Takings Issues: Public and Private Perspectives (T. Roberts ed.2002).

[160] See, e.g., Eagle, The Rise and Fall of "Investment-Backed Expectations," 32 Urb. Law. 447 (2000).

[161] See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967).

[162] *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001).

station with columns to support a 20-story tower did not give rise to an expectation to build a 50-story tower.

In *Pennsylvania Coal*, expectations played a role where the state's anti-subsidence statute abrogated an express contractual reservation of the right to remove coal free from liability for damage to the surface. The fact that *Pennsylvania Coal* was a private dispute where the surface owner bought the land with notice of the prior severance of the mineral rights suggests a high degree of expectation on both sides to the contract that the coal could be removed without liability for surface damage.

A year after *Penn Central*, in *Kaiser Aetna v. United States*,[160] the Court applied the concept, this time referring to "reasonable", as opposed to "distinct," investment-backed expectations.[161] There, a developer dredged a non-navigable pond to create a private marina. With consent of the government's Corps of Engineers, the developer cut a channel to the ocean. Ten years later, when a dispute arose between the Corps and the marina, the Corps advised the marina that since the once non-navigable pond had been rendered navigable, it was subject to public use as an incident of the navigational servitude. Noting the physical character of the invasion, albeit temporary, and the property owner's expectations of private use based on the initial government consent or acquiescence, the Court found imposition of the navigation servitude would be a taking.

Lucas says that a landowner's reasonable expectations are used to determine the relevant parcel by which to measure deprivation of value.[165] Whether expectations are to be used beyond that is disputed.[166] Under *Lucas* the landowner can shift the burden to the state with a showing of total economic deprivation, and in contrasting total and partial economic deprivation cases, the *Lucas* majority acknowledges that investment-backed expectations are "keenly relevant" to the latter.[167] The negative inference is that expectations, if not irrelevant, then at least are less relevant to the former. While *Palazzolo* held that constructive notice of the law in force upon acquisition of title is not an automatic bar to a *Lucas* or a *Penn Central* takings claim, it did not eliminate use of expectations in determining the force of the state's background principles defense. Indeed, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, Chief Justice Rehnquist observed that "zoning and permitting regimes [dating back to colonial times] are a longstanding feature of state property law and part of a landowner's reasonable investment-backed expectations."[168]

In applying the expectations test under *Penn Central*, one writer has concluded the factor that most often used to deny takings claims based on expectations is purchasing after the enactment of the challenged law. "Beyond that," he says, "there is no readily identifiable pattern to state court investment-backed expectations decisions,

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[160] *Kaiser Aetna v. U. S.*, 444 U.S. 164, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979).

[161] Kaiser Aetna, 444 U.S. at 175, 100 S. Ct. at 390.

[165] 505 U.S. at 1019, 112 S. Ct. at 2895 n. 7.

[166] Expectations not to be considered, see *Cane Tennessee, Inc. v. U.S.*, 62 Fed. Cl. 703 (2004) and *Palm Beach Isles Associates v. U.S.*, 208 F.3d 1374 (Fed. Cir. 2000). To be considered, see *Good v. U.S.*, 189 F.3d 1355 (Fed. Cir. 1999) and *Gazza v. New York State Dept. of Environmental Conservation*, 89 N.Y.2d 603, 657 N.Y.S.2d 555, 679 N.E.2d 1035 (1997).

[167] 505 U.S. at 1019, 112 S. Ct. at 2895 n. 8.

[168] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, 1495, 152 L. Ed. 2d 517 (2002) (Rehnquist, C.J., dissenting).

except that they tend to evolve, with each new set of facts, to challenge the reasonableness of the claimant's investment-backed expectations."[169]

A. *Purchase Price as Basis of Expectation*

Courts have generally refrained from allowing the purchase price of land to qualify as an investment-backed expectation. An example is the case of *Haas & Co. v. City of San Francisco*,[170] where a developer acquired land in the Russian Hill neighborhood of San Francisco and proposed to erect two apartment buildings, one of 25 stories, the other of 31. The land was zoned to allow high-rises and sat amid low-rise buildings. Perhaps foreseeably, neighbors' objections sparked a "battle for Russian Hill,"[171] and ultimately the land was downzoned to a 40-foot height limit, consistent with neighboring uses. The land had been purchased for $1.6 million, was worth $2 million zoned for high-rises, and valued at $100,000 when zoned at the 40-foot limit. These "disappointed expectations" based on what was paid for the land did not create a taking.[172] In effect, the deal was what it seemed, "too good to be true." As the *Lucas* Court said, one buys property with the understanding that it is subject to the police power of the state and "necessarily expects the use of his property to be restricted, from time to time, by various newly enacted measures."[173]

B. *Notice of Pre-Existing Law, Foreseeability, and Regulatory Risk*

Constructive notice of the law in force upon acquisition of title, though it is not an automatic bar to a takings claim, is a factor in the assessment of reasonable expectations. Even where a law does not pre-date acquisition of ownership, foreseeability of impending change and knowledge of the regulatory climate may so diminish expectations as to defeat a takings claim.

Prior to *Palazzolo*, a number of lower federal and state courts had held that a landowner cannot complain of a taking based on restrictions to which the land was subject at the time of purchase. They reasoned that the hardship was self-imposed and that allowing recovery would confer a windfall benefit. Courts based their holdings in part on *Lucas v. South Carolina Coastal Council*,[174] where the Court said that the state need not pay an owner compensation if the "proscribed use interests were not part of [the owner's] title to begin with,"[175] and that owners' understandings of the state's power over land are shaped by the "'bundle of rights' they acquire when they obtain title to property."[176]

In *Palazzolo v. Rhode Island*,[177] the Court rejected this reading of *Lucas*. The *Palazzolo* Court held that a takings claim is not barred by the mere fact that the

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[169] Brenner, Playing the Expectations Game: When Are Investment-Backed Land Use Expectations (Un)Reasonable in State Courts?, 38 Urb. Law. 81, 110 (2006).

[170] *William C. Haas & Co., Inc. v. City and County of San Francisco*, Cal., 605 F.2d 1117 (9th Cir. 1979).

[171] See Robert C. Ellickson and A. Dan Tarlock, Land-Use Controls, Cases and Materials 334 to 338 (1981) for a description of the struggle.

[172] *Haas*, 605 F.2d at 1121.

[173] *Lucas*, 505 U.S. at 1027, 112 S. Ct. at 2886.

[174] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

[175] 505 U.S. at 1027, 112 S. Ct. at 2889.

[176] See *M & J Coal Co. v. U.S.*, 47 F.3d 1148, 1153 (Fed. Cir. 1995).

[177] *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001).

claimant took title after the regulations of which he complains were enacted. The state had argued that its wetlands statutes, upon enactment, became background principles of property law which could ban all economically viable use of land without triggering the need to compensate post-enactment titleholders. The Supreme Court said it need not consider when new legislation might be deemed a background principle of law that would defeat a takings claim. It sufficed, the Court said, to hold that a "regulation that would otherwise be unconstitutional absent compensation is not transformed into a background principle * * * by mere virtue of the passage of title."[178]

While *Palazzolo* holds that the mere passage of title does not automatically bar a takings claim, the claimant's notice of existing regulations is likely a factor to be considered. Justice O'Connor, concurring in *Palazzolo*, said that the Court's "holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. Indeed, [she said,] it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance."[179]

In some instances, due to existing law or other circumstances, a court may find that the claimant knew or should have known when she bought the land that development likely would not be permitted.[180] In *Good v. United States*,[181] for example, the court found the "regulatory climate" that existed when property was acquired put the claimant on notice that development might not be allowed.

§ 10:8 Defining Property and the Relevant Parcel

State law creates and defines property.[182] The Constitution protects property, whether it be real or personal, tangible or intangible. In construing the protection afforded property, the Supreme Court often uses the Hofeldian bundle of rights theory of property [183] and holds that the "destruction of one strand of the bundle does not constitute a taking because the aggregate must be viewed in its entirety."[184] In the context of alleged regulatory takings of real property, the choice of a broad or narrow approach will often be outcome determinative. Choosing only the portion of land affected by a regulation increases the prospects of a total diminution in value. That, in turn, invokes the *Lucas* categorical takings rule. Defining the relevant unit of property is a process bound up with the overall test of when "fairness and justice" require that compensation be paid.[185] The Supreme Court's approach has been to employ a broad view,[186] often characterized as the "whole parcel" approach.

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[178] 121 S. Ct. at 2464.

[179] 121 S.Ct at 2466. See, e.g., *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010), cert. denied, 131 S. Ct. 2455, 179 L. Ed. 2d 1210 (2011).

[180] *Kirby Forest Industries, Inc. v. U.S.*, 467 U.S. 1, 104 S. Ct. 2187, 81 L. Ed. 2d 1 (1984).

[181] *Good v. U.S.*, 189 F.3d 1355 (Fed. Cir. 1999).

[182] *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972).

[183] See Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16 (1913).

[184] *Andrus v. Allard*, 444 U.S. 51, 66, 100 S. Ct. 318, 327, 62 L. Ed. 2d 210 (1979).

[185] The entitlement approach to property under procedural and substantive due process, which severely limits landowner claims, does not apply to Fifth Amendment takings. See infra § 10:12. See also Mandelker, Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation, 5 Wash. U. J. L. & Pol'y 61, 66 (2000).

The Whole Parcel Rule

Hoping to take advantage of the categorical *Lucas* rule and avoid the *Penn Central* multi-factor test, landowners generally ask courts to adopt the position that the relevant parcel is solely the land for which the permit is sought. The courts, however, generally have refused to do so. Instead, in most cases, courts have measured economic impact by reference to the whole parcel.[187]

The Supreme Court began with a narrow approach in *Pennsylvania Coal*. While the majority did not specifically discuss the segmentation issue, it appeared to treat the coal that had to be left in place to comply with the statute as the relevant measure for its "too far" test. In dissent Justice Brandeis objected to this segmentation of the parcel.[188] For the majority, however, looking only at the affected coal may have been deemed fair since the case arose in the context of a private dispute where the surface owner bought the land with notice of the prior severance. This suggests a high degree of expectation on both sides to the contract that the coal could be removed. In the later case of *Keystone Bituminous Coal v. DeBenedictis*, the Court viewed *Pennsylvania Coal* as having used a broader approach to defining property. Thus, *Keystone* read the statement of Justice Holmes that the statute had made it "commercially impracticable to mine certain coal" to reflect a finding that the company's mining operations as a whole could not be conducted profitably if the coal affected by the Kohler Act had to be left in place.[189]

In the modern takings era that began with *Penn Central*, the Court has broadly defined the relevant parcel of property for regulatory takings cases involving economic impact. In *Penn Central*, the railroad claimed a total economic loss of its airspace above Grand Central Station by application of the landmark designation. The railroad, however, was wrong to limit the focus to the airspace above the terminal, for, as the Court said, "'Making' jurisprudence does not divide a single parcel into discrete segments, [but] focuses on the nature and extent of the interference in the parcel as a whole."[190] Viewing the whole parcel, the loss of the airspace still left the railroad with a reasonable use of the existing building.

In *Keystone*, where the Court faced a statute virtually identical to the one invalidated in *Pennsylvania Coal*, it rejected the coal companies' plea to use the coal that had to be left in place (the "support estate") as the measuring unit. Without saying so, the *Keystone* majority adopted Justice Brandeis' dissenting view in *Pennsylvania Coal*. The Court thought it unreasonable to allow the coal companies to claim a total loss where only 2% of their coal was required to be left in place. No evidence existed to show that mining would be unprofitable. The support estate, though a separate property right under state law, had no value apart from ownership of the surface or mineral estate, and thus the Court refused to focus on it alone.

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[187] *Andrus v. Allard*, 444 U.S. 51, 66, 100 S. Ct. 318, 327, 62 L. Ed. 2d 210 (1979).

[188] See, e.g., *Coast Range Conifers, LLC v. State ex rel. Oregon State Bd. of Forestry*, 339 Or. 136, 117 P.3d 990 (2005) (40 acre tract used as denominator rather than the nine acres which could not be logged to protect bald eagle habitat). For a complete listing, see Juergensmeyer and Roberts, Land Use Planning and Development Regulation Law §10.8 (Practitioner's Edition 3rd ed.2012).

[189] 260 U.S. 393, 419, 43 S. Ct. 158, 161 (Brandeis, dissenting).

[190] *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987).

[191] 438 U.S. at 130–31, 98 S. Ct. at 2662.

The Court has suggested that the broad approach has its limits. In a *Lucas* footnote, the Court voiced disapproval of what it styled the "extreme" approach used by the New York Court of Appeals' in the *Penn Central* case. The state court had looked to all the land owned by the railroad in the vicinity of Grand Central Station as the relevant property unit.[191] *Lucas* did not disapprove of the Court's own combination of surface and air rights *Penn Central*.

The Court injected some doubt as to the strength of the whole parcel rule when, in *Palazzolo v. Rhode Island*,[192] it referred to this *Lucas* footnote as an indication of "discomfort with the logic of the [whole parcel] rule."[193] But less than a year later, the Court strongly endorsed the whole parcel approach in a case rejecting temporal segmentation.[194]

The Court confirmed the whole parcel approach in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[195] but does not likely mean that the broadest characterization of property always will be used. A rigid rule does not fit with the spirit of *Tahoe-Sierra* that takings be judged by specific reference to the facts of each case, attempting to determine when fairness and justice require compensation. As the *Lucas* Court said, the question may be answered by examining "how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land * * *."[196]

B. *Temporal Segmentation: Moratoria*

Interim development controls that temporarily freeze land development raise the segmentation issue in the temporal context. The general rule is that one is guaranteed a reasonable use over a reasonable period of time, and that the mere loss of the present right to use land is not a taking. A statement by the Court in *First English Evangelical Lutheran Church v. County of Los Angeles*[197] to the effect that temporary takings that deny all use are no different than permanent takings led some to argue that a temporary denial of all use was a categorical *Lucas* taking of the entire present right to use property. The fact that *First English* involved a moratorium, while irrelevant to the holding in the case, fueled the argument. While the lower courts refused to treat moratoria as per se takings, landowners pressed the argument in the Supreme Court.

The Supreme Court flatly rejected this reading of *First English*, holding, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[198] that a moratorium prohibiting all use of land did not effect a facial taking. *First English*, the Court said, was strictly a remedy case. Not only did *First English* not decide that moratoria

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[191] *Lucas*, 505 U.S. at 1016, n.7, 112 S. Ct. at 2894.

[192] *Palazzolo v. Rhode Island*, 533 US. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001).

[193] Palazzolo, 121 S. Ct. at 2465.

[194] See discussion infra part B of this section.

[195] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002).

[196] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7, 112 S. Ct. 2886, 2894, 120 L. Ed. 2d 798 (1992).

[197] *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 318, 107 S. Ct. 2378, 2388, 96 L. Ed. 2d 250 (1987), discussed infra § 10:9 in detail.

[198] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002).

...ere takings, but, to the extent that *First English* addressed the issue, it suggested ...t landowners must tolerate normal delays in the land use permitting process with- ...out compensation.[199]

Tahoe-Sierra also rejected the landowners' reading of *Lucas*. Treating the fact that *Lucas* involved a permanent restriction as irrelevant, the landowners argued that a moratorium that denies all economically viable use is a categorical *Lucas* taking. In *Tahoe-Sierra*, however, the Court said that the permanence of the regulation in *Lucas* was critical to the premise of the opinion that the takings clause protected against the "obliteration of value."[200] The mere fact that one is delayed for a period of time does not rise to that level of severity. Regulations are only to be converted into constructive tak- ings in instances where they are truly excessive, and these instances, *Lucas* and *Ta- hoe-Sierra* say, will be extremely rare. Since *Tahoe-Sierra*, as was true before, courts generally uphold moratoria unless there is evidence of bad faith or foot-dragging.

§ 10:9 The Compensation Remedy

A. *Invalidation or Compensation*

One might think the remedy for a Fifth Amendment taking is obvious: just com- pensation. The answer is, indeed, compensation for direct condemnations and inverse condemnation actions based on physical invasion. Yet, a question debated for many years was whether regulatory takings required or at least allowed a compensation award. It was not until 1987 that the answer came when, in *First English Evangelical Lutheran Church v. County of Los Angeles*,[201] the Court held that the remedy for a reg- ulatory taking, as with a physical taking, is compensation. In so holding, the Court put to rest the long debated issue of whether the "regulatory taking" theory used by the Court in *Pennsylvania Coal* was grounded in the Fifth Amendment's takings clause or in the 14th Amendment. If grounded in the former, compensation would be the manda- tory and sole remedy. If the latter, invalidation would be a constitutionally adequate remedy.

Prior to *First English* several state courts and many commentators had viewed the police power and the eminent domain powers as different in kind, not simply in degree. Under this view, an overreaching exercise of the police power was invalid on substan- tive due process grounds but was not, by its overreaching, converted into an exercise of eminent domain. This view was consistent with *Pennsylvania Coal*, which was a case between private parties where the remedy was to deny injunctive relief, not to order that compensation be paid. Thus, the "takings" language of the *Pennsylvania Coal* was considered "metaphorical."[202]

While local governmental bodies and agencies are clearly liable, it has been sug- gested that states may have 11th Amendment immunity from takings clause liability. Several states have argued that the Supreme Court's expansion of states' sovereign

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[199] Tahoe-Sierra Preservation Council, Inc., 535 U.S. 302. See also Frank Michelman, Takings, 1987, 88 Colum. L. Rev. 1600, 1621 (1988).

[200] 535 U.S. 302, 122 S. Ct. 1465, 1483, 152 L. Ed. 2d 517 (2002).

[201] *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

[202] See discussion of the metaphor theory in *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197, 105 S. Ct. 3108, 3122, 87 L. Ed. 2d 126 (1985).

immunity in cases like *Alden v. Maine* [203] confirm that it trumps the Fifth Amendment in state and federal court. However, the courts to address the matter hold, in *post-Alden* decisions, that the Fifth Amendment abrogates state sovereign immunity in state court.[204] These holdings make sense given that allowing immunity in state and federal courts would effectively nullify the Fifth Amendment's takings clause as applied to the states.[205]

The rightly maligned *Agins v. City of Tiburon* [206] opinion increased the already existing confusion regarding the remedy for a taking. By saying that an ordinance that does not substantially advance a legitimate state interest is a taking, the natural inference is that the injured party can, indeed must, seek compensation. However, government cannot acquire property in such a manner by simply paying for it. Did *Agins* mean, then, that invalidation is a proper remedy or that invalidation is an alternative takings remedy? As the *Lingle* Court noted in overruling *Agins*, the "the notion that such a regulation [that does not substantially advance a legitimate state interest] nevertheless 'takes' private property for public use merely by virtue of its ineffectiveness or foolishness is untenable."[207] As Chief Justice Rehnquist has said:

> This basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of an otherwise proper interference amounting to a taking.[208]

The remedy for an act that violates due process is invalidation. The difference between a due process violation and a Fifth Amendment taking is not mere semantics. First, heightened scrutiny applies to some takings claims, but not to due process claims. Second, when an ordinance is declared void, compensation cannot be the remedy since there is no taking.

When an ordinance is invalidated as an improper exercise of the police power, the harm sustained for the period the ordinance applied to the property is not compensable under the Fifth Amendment. As Chief Justice Rehnquist's quoted language above points out, a pre-condition to finding a taking and awarding compensation is that there has been "an otherwise *proper interference*" with property rights. Unauthorized government actions cannot be takings because they do not meet the public use or public purpose requirement of the Fifth Amendment. Before it was overruled, *Agins* fostered confusion on this point with its statement that an ordinance that does not substantially advance a state interest is a taking.

A regulation that is invalid under state law can be remedied pursuant to state law. The government or its agents may be liable in damages under some theory, like

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[203] *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999).

[204] See, e.g., *Manning v. N.M. Energy, Minerals & Natural Resources Dept.*, 140 N.M. 528, 144 P.3d 50 (2006). For more extensive discussion, see Juergensmeyer and Roberts, Land Use Planning and Development Regulation Law §10.9 (Practitioner's Edition 3rd ed. 2012).

[205] See Seamon, The Asymmetry of State Sovereign Immunity, 76 Wash. L. Rev. 1067, 1080 (2001).

[206] *Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980) abrogated by, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

[207] *Lingle*, 544 U.S. at 543, 125 S. Ct. 2084.

[208] *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 314–315, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

state tort law. Such a regulation might also be a violation of due process, which would lead to invalidation and possibly damages under the federal civil rights statute.[208]

It has been argued that invalidation, not compensation, is the proper remedy when an exaction or other condition imposed on a landowner as the price for acquiring a development permit violates the *Nollan/Dolan* test.[210] Bringing a facial takings claim challenging an affordable housing set-aside, the plaintiff developer in *Alto Eldorado Partnership v. County of Santa Fe* [211] argued that *Lingle* created a new takings test applicable in the context of unconstitutional conditions, which authorized a court to invalidate a condition found improper under *Nollan/Dolan*. The court rejected the argument finding it "akin to the now-defunct 'substantially advances' theory previously available to challenge any regulatory taking."[212]

B. *Permanent or Temporary Taking: The State's Choice*

A court cannot use the Fifth Amendment to invalidate a law that takes property so long as it promotes a public purpose, since the Constitution does not proscribe the taking of property. A court can only award compensation. Even then, the government, as defendant in the inverse condemnation action, not the court, decides whether the compensation should be paid on the basis of a permanent taking or a temporary taking. The government has the option of keeping the regulation in place and paying compensation for a permanent taking, or rescinding the excessive regulation and paying only for the period of the take.

Compensation is due for the period of time that the taking endured, and the beginning point in calculating compensation depends on whether the challenge is facial or as-applied. With a facial challenge, the date of enactment starts the compensation meter running since by definition it is the mere enactment of the law that effects the taking. With an as-applied challenge, the enactment date does not start the meter running because the landowner suffers no harm from enactment alone. The beginning date generally will be when the action is ripe and the statute of limitations begins to run.[213]

In order for a takings claim to be ripe, an owner must obtain a final decision as to what uses will be allowed by following the local permitting processes.[214] The time that passes in obtaining a final decision is not compensable since subjecting a landowner to a permitting process does not effect a taking.[215] If the government elects to rescind the regulation when the court finds that it has gone "too far," the date of rescission is the taking's ending point. If the government elects to keep the law in place, the question is moot since the taking becomes permanent.

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[208] See discussion of 42 U.S.C.A. § 1983 infra at §§ 10:23 to 10:29.

[209] See discussion supra, § 10:5.

[211] *Alto Eldorado Partnership v. County of Santa Fe*, 634 F.3d 1170 (10th Cir. 2011), cert. denied, 132 S. Ct. 246, 181 L. Ed. 2d 141 (2011).

[212] 634 F.3d at 1178.

[213] See, generally, Stein, Pinpointing the Beginning and Ending of a Temporary Regulatory Taking, 70 Wash. L. Rev. 953 (1995).

[214] *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

[215] *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127, 106 S. Ct. 455, 458, 88 L. Ed. 2d 419 (1985).

It is often assumed that the compensation required by the Fifth Amendment means money, but the Court has not held that to be the case. In dealing with non-traditional, constructive takings, non-monetary compensation might be adequate in some cases. Transferable development rights, for example, may qualify as a constitutional form of compensation.[216]

C. *Measuring Compensation*

In the regulatory context, a distinction is drawn between permanent and temporary takings. Where the regulation permanently renders property worthless, courts generally adopt the market value test, which provides that the measure of just compensation is the market value of the property at the time of the taking. When a regulation diminishes but does not destroy the market value of property a "modified market value" test has been used.[217]

Where government elects to rescind the regulation and pay compensation for only a temporary taking, various measures of damages have been used. Rental return is probably the most frequently used. It requires the calculation of the rent the parties would have negotiated for the period of the taking. Other methods include use of the option price, where compensation that equals the market value of an option to buy the land during the take is awarded, and before and after valuation. Lost profits are not recoverable.[218]

D. *Injunctive or Declaratory Relief*

Injunctive relief generally is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, since a suit for compensation can be brought against the sovereign subsequent to the taking.[219] However, if a court finds a taking for a private use, injunctive or declaratory relief is proper.[220] In the unusual situation where monetary relief would be ineffective, the Court has found that equitable and declaratory relief may be in order. In *Eastern Enterprises v. Apfel*,[221] coal companies sued to avoid having to pay money into a miners retirement fund. Finding the act's imposition of retroactive liability to constitute a taking, a four justice plurality found equitable relief appropriate. The plurality thought it made no sense to have the coal company comply with the law by paying money into the fund (and thus complete the taking) only to turn around and order the fund to give the money back to the coal company as compensation. As Justice Kennedy pointed out in his concurrence, this feature itself suggests that majority erred in viewing the problem through the lens of the takings clause rather than the due process clause. This exception allowing injunctive relief is possibly applicable in the land use context if the Court were to find that impact fees were subject to a Fifth Amendment takings analysis.[222]

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[216] *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 750, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997) (Scalia, J. concurring). See supra § 9:9 for a discussion of transferable development rights.

[217] See detailed discussion infra § 16:16.

[218] For more extensive discussion of compensation issues, see Juergensmeyer and Roberts, Land Use Planning and Development Regulation Law, Ch. 16 (Practitioner's Edition 3rd ed 2012).

[219] *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984). See n.2 supra, § 10:8A.

[220] *Stanwood v. City of Dallas*, 940 F.2d 925 (5th Cir. 1991).

[221] *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998).

[222] See discussion supra § 10:5.

Chapter 3

LAND USE CONTROLS: HISTORY, SOURCES OF POWER, AND PURPOSES

Analysis

I. INTRODUCTION

II. THE HISTORY OF LAND USE CONTROLS

III. SOURCES OF POWER

IV. PURPOSES

V. ALTERNATIVES

I. INTRODUCTION*

§ 3:1 Introductory Note

Public and private land use controls have a long history in Anglo/American law, dating back to at least Elizabethan times. Modern public controls, our emphasis in this book, date back to the early 20th century. While zoning, the division of land into areas according to use, building height and bulk, remains the core tool of land use control, its inability to deal with the explosion of land use development which began in the last quarter of the 20th century and gradual recognition of the environmental effects of intense development led to the adoption of new controls and significant changes in zoning itself. Though this chapter focuses primarily on zoning, other land use controls are covered in other chapters, such as the planning process, building codes, subdivision control law, and growth management systems. These are often so intertwined with zoning that drawing a clear division between them is difficult. Thus, much of what is said here relates not solely to zoning but to the land use control power in general.

Alternatives to zoning have been suggested over the years. The Model Land Development Code integrates zoning and subdivision controls and provides state oversight of local control of developments of regional impact. Drawbacks from the parochial effects of localism have prompted greater use of state and regional controls. Finally, and more fundamentally, use of the regulatory power to limit land use has been challenged. Some critics would simply, or essentially, omit government from the field, while others would zone using the power of eminent domain in combination with the police power.

II. THE HISTORY OF LAND USE CONTROLS

§ 3:2 Pre-20th Century

Land use regulations date back to colonial America, and earlier.[1] In the earliest days, colonists treated land as a community resource to be used in the public interest. For example, a 1632 Cambridge, Massachusetts ordinance provided that no buildings could be built in outlying areas until vacant spaces within the town were developed. Roofs had to be covered with slate or board rather than thatch. Heights of all buildings

* For more detailed discussion and more extensive citations of authority of the issues covered in this chapter, see Juergensmeyer and Roberts, Land Use Planning and Development Regulation Law, Practitioner Treatise Series (3rd ed. 2012).

[1] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, 1494, 152 L. Ed. 2d 517 (2002) (Rehnquist, C.J., dissenting).

to be the same. Lots were forfeited if not built on in six months. Finally, buildings could only be erected with the consent of the mayor.[2]

The Cambridge ordinance is typical of laws found throughout colonial America. They restricted the location of dwellings, imposed affirmative obligations of use, compelled the fencing of agricultural land, required owners of wetlands to share the cost of drainage projects, and allowed the public to hunt on private land.[3] Over the following centuries, land use ordinances were enacted to deal with specific problems. For example, they excluded certain kinds of buildings and uses from particular areas of the city, such as wooden buildings, horse stables, and cemeteries, and imposed bulk requirements providing for setbacks and yards, and set height limits.

§ 3:3 Comprehensive Zoning

Zoning became prevalent in the 20th century. New York City enacted the first comprehensive zoning ordinance in 1916. It was comprehensive in the sense that it classified uses and created zones for all uses, which zones were then mapped, and it included height and bulk controls. Four years after enactment, the ordinance was upheld in *Lincoln Trust Co. v. Williams Building Corporation*.[4]

Zoning proved enormously popular and spread rapidly. By the time the Supreme Court upheld its constitutionality in 1926 in *Village of Euclid v. Ambler Realty Co.*,[5] some 564 cities and towns had enacted zoning.[6] After the *Euclid* decision, so-called Euclidean or use zoning swept the country. The zoning was Euclidean in two senses—the kind of zoning adopted was similar to that used in the Village of Euclid—and the landscape was divided into a geometric pattern of use districts.

While the Euclidean origins of most present-day zoning ordinances can be recognized, there have been many changes. Most notably, they allow for a flexibility in the development approval process not present in early ordinances. Basic use zoning and the flexibility devices used today are discussed in Chapter 4.

§ 3:4 Early Constitutional History of Zoning

A. Pre-Comprehensive Zoning Cases

The Supreme Court decided a number of land use cases on its way to sustaining comprehensive zoning. From 1885 to 1922, the Court upheld a San Francisco ordinance restricting the hours of operation of laundries in certain locations,[7] but invalidated another ordinance prohibiting laundries in wooden buildings unless permission was obtained from the Board of Supervisors, where it was applied exclusively against Chinese.[8] The Court upheld an ordinance designating certain areas of a city for prostitu-

[2] The ordinance is reprinted in Gallagher, Report of Committee on Zoning and Planning, 18 NIMLO Mun. L. Rev. 373 (1955).

[3] Hart, Colonial Land Use Law and Its Significance for Modern Takings Doctrine, 109 Harv. L. Rev. 1252 (1996).

[4] Lincoln Trust Co. v. Williams Bldg. Corporation, 229 N.Y. 313, 128 N.E. 209 (1920).

[5] *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926).

[6] *See supra* § 2:7.

[7] *Barbier v. Connolly*, 113 U.S. 27, 5 S. Ct. 357, 28 L. Ed. 923 (1884); *Soon Hing v. Crowley*, 113 U.S. 703, 5 S. Ct. 730, 28 L. Ed. 1145 (1885).

[8] *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886).

tion,[9] a Massachusetts statute setting height limitations in Boston,[10] and an ordinance precluding further burials in existing cemeteries.[11] The Court also invalidated an ordinance allowing neighbors to establish setback lines,[12] upheld an ordinance excluding stables from a commercial district,[13] upheld a Los Angeles regulation that precluded the operation of an existing brickyard within an area zoned to exclude them,[14] upheld an ordinance prohibiting signs in residential neighborhoods unless neighbors consented,[15] held invalid race-based zoning,[16] upheld an ordinance that precluded the storage of oil and gasoline within 300 feet of a dwelling house,[17] and invalidated a state statute that banned underground coal mining where it would cause subsidence of homes.[18]

In sum, during this turn of the century era, the Court found that the police power was "one of the most essential powers of government-one that is the least limitable. * * * There must be progress, [said the Court,] and if in its march private interests are in the way, they must yield to the good of the community."[19] Regulations, however, did have a constitutional limit, and if they went "too far," they would be recognized as takings.[20]

B. *Constitutional Parameters of Comprehensive Zoning:* Euclid *and* Nectow

While the string of late nineteenth and early 20th century cases noted above demonstrated the Court's view that the police power could be used to impose significant limitations on land use, there was still some doubt as to the validity of a comprehensive land use control system. In the early 1920s, several state courts addressed the issue, and, though most had upheld comprehensive zoning, some found it invalid, generally on the basis that it interfered with the free market.[21]

In 1926 the Court handed down the seminal land use decision of *Village of Euclid v. Ambler Realty Co.*,[22] where against a facial attack it upheld the general validity of an ordinance that set use, height, and bulk restrictions for an entire town. Key to the case was the use of a deferential standard of judicial review of municipal zoning. Urbanization, said the Court, had brought a set of problems that justified governmental intervention to protect the public. While there could be differences of opinion on the separation of residential, commercial, and industrial use in specific situations, as a general proposition the separation of uses made sense. Furthermore, said the Court, if all that

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[9] *L'Hote v. City of New Orleans*, 177 U.S. 587, 20 S. Ct. 788, 44 L. Ed. 899 (1900).

[10] *Welch v. Swasey*, 214 U.S. 91, 29 S. Ct. 567, 53 L. Ed. 923 (1909).

[11] Laurel Hill Cemetery v. City and County of San Francisco, 216 U.S. 358, 30 S. Ct. 301, 54 L. Ed. 515 (1910).

[12] *Eubank v. City of Richmond*, 226 U.S. 137, 33 S. Ct. 76, 57 L. Ed. 156 (1912).

[13] *Reinman v. City of Little Rock*, 237 U.S. 171, 35 S. Ct. 511, 59 L. Ed. 900 (1915).

[14] *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S. Ct. 143, 60 L. Ed. 348 (1915).

[15] Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 37 S. Ct. 190, 61 L. Ed. 472 (1917).

[16] *Buchanan v. Warley*, 245 U.S. 60, 38 S. Ct. 16, 62 L. Ed. 149 (1917).

[17] Pierce Oil Corp. v. City of Hope, 248 U.S. 498, 39 S. Ct. 172, 63 L. Ed. 381 (1919).

[18] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

[19] *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S. Ct. 143, 60 L. Ed. 348 (1915).

[20] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L. Ed. 322 (1922). See infra §§ 10.1 et seq. for discussion of constitutional issues.

[21] *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 390, 47 S. Ct. 114, 119, 71 L. Ed. 303, (1926), discussing state court cases.

[22] *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926).

could be said of a law was that it was "fairly debatable, the legislative judgment must be allowed to control."[23]

The Court tempered the reach of *Euclid* two years later in *Nectow v. City of Cambridge*,[24] when it held a zoning ordinance invalid as applied to a particular parcel because it found that the public good was not promoted by the zoning classification. In the end, though, it was the deferential review of *Euclid* rather than the closer scrutiny of *Nectow* that created the climate that allowed comprehensive zoning to flourish.[25]

C. *The Current Generation of Cases*

After setting constitutional guidelines for zoning in the 1920s, for almost fifty years the Court did not address zoning issues. Since the early 1970s, however, the Court has acted on a wide array of land use and zoning controls under the First Amendment's speech clause, the Fifth Amendment's takings clause, the 14th Amendment's due process and equal protection clauses, and the commerce clause. These developments are covered in detail in Chapter 10.

III. SOURCES OF POWER

§ 3:5 In General

Public land use controls, including zoning, subdivision regulation, building codes and growth controls, are exercises of the police power. Though broad, this power to enact laws to promote the health, safety, morals, and general welfare is limited by the federal and state constitutions. State legislatures can delegate their power to regulate land use and by and large have done so. In the early years, almost complete power was delegated to local governments, but over the past few decades, a number of state legislatures have limited local rule and instituted statewide controls.

Among local governments, the delegated police power is distributed to municipal corporations—cities, villages and towns—and to counties. These terms generally are used inter-changeably in this book to refer to any political subdivisions that have land use control power. Limited purpose governments, such as utility districts and school districts, are seldom given the power to zone or otherwise regulate land use.

Though the source of power to control land use in most states is by way of a zoning enabling act, the power may come from other sources. In a number of states, the state constitution provides for home rule to distribute state power to local governments. Home rule power is also sometimes granted by legislation. Land use control power can also be implied from a law generally authorizing the exercise of the police power by local government. Rarely, land use control power may also be based on a doctrine of inherent powers, meaning that the mere creation of a political subdivision confers power to do the kinds of things local governments need to do, such as zone.

Generally, the power to zone is delegated to the legislative bodies of local governments. When the source is the enabling act, the power is sometimes divided among legislative and administrative bodies, such as planning commissions and boards of ad-

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[23] 272 U.S. at 388, 47 S. Ct. at 118.

[24] *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed. 842 (1928).

[25] See discussion infra § 10:12.

justment.[26] In many states, the people retain the power of initiative and referendum and may use them to control land use.

Finally, many states have enabling acts establishing or authorizing land use control systems for special situations, such as airport zoning, flood plain zoning, historic districting, landmark preservation, or watershed management. The following sections cover these matters in more detail.

§ 3:6 Standard Zoning Enabling Act

The popularity of Euclidean zoning was aided significantly by the fact that there was a good model: the Standard State Zoning Enabling Act (SZEA). Released in 1924, the SZEA resulted from the work of an Advisory Committee appointed by Herbert Hoover, then Secretary of Commerce.[27] Few model or uniform laws have enjoyed such widespread adoption or influence. All 50 states eventually adopted enabling acts substantially patterned on the Standard Act. Many regard the Act as outdated and some commentators suggest radical reform, but the basic provisions still apply in many states.

The first three sections of the SZEA state the purposes of zoning and define its scope.[28]

> Section 1. Grant of Power.—For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.
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> Sec. 2. Districts.—For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.
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> Sec. 3. Purposes in View.—Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air, to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration among other things, to the character of the district and its peculiar suitability for particular uses, and

[26] Boards of Adjustment are frequently called Boards of Appeal.

[27] See Edward M. Bassett, Zoning: The Laws, Administration, and Court Decisions During the First Twenty Years 28–29 (1940).

[28] Dep't of Commerce (1926). The Act, with official commentary, is reprinted in full in 8 Zoning and Land Use Controls § 53.01[1] (P. Rohan and E. Kelly eds. 1987).

with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

Subsequent sections provide a procedure for adopting zoning and making amendments, including provision for protest by neighbors. The Act calls for the establishment of a zoning or planning commission, which makes recommendations on zoning. The Act also permits the establishment of a Board of Adjustment to hear appeals from enforcement of the ordinance, to hear and decide special exceptions (i.e., special permits) and to grant variances. Finally, the Act contains provisions for enforcement of the regulations.

The American Planning Association, which began a "Growing Smart" Project in 1994 to update the standard planning and zoning enabling acts of the 1920s,[29] has a created the Growing Smart Legislative Guidebook with various model statutes.[30] The Association has published drafts of model smart growth codes covering such topics as mixed-use, town centers, affordable housing density bonuses, a unified development permit review process, transferable development rights, cluster development, and pedestrian overlay districts.[31] Despite the SZEA's shortcomings, many states still use it, although they have enacted piecemeal modifications over the years.

In addition to ultra vires challenges to zoning enactments that fall outside the scope of the enabling act,[32] zoning can also be held invalid if the procedures established by the enabling act are not followed.

§ 3:7 Inherent and Implied Powers

Local governments, as creatures of the state, lack inherent powers, and judicial construction of local powers granted by state legislatures generally has been tight.[33] With this history of limited construction of municipal powers, it is not surprising that the power to zone is usually not implied from typical legislation conferring general police power on a municipality.[34]

Dillon's Rule, which limited municipal powers, prevailed in state courts throughout the country from the mid-nineteenth to mid-20th century and is still used in a few states today.[35] The rule provides that "a municipal corporation possesses and can exercise the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable."[36] While the "fairly implied" lan-

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[29] The Department of Commerce published the Standard City Planning Enabling Act in 1928.

[30] The Guidebook provides commentary with legislative alternatives and suggestions for implementation. See http://www.planning.org/growingsmart/.

[31] See http://www.planning.org/research/smartgrowth/.

[32] See infra § 3:13.

[33] See, generally, Sands, Libonati, and Martinez, Local Government Law § 4:01; Briffault, Our Localism: Part I-The Structure of Local Government Law, 90 Colum. L. Rev. 1 (1990).

[34] *M.S.W., Inc. v. Board of Zoning Appeals of Marion County*, 29 Kan. App. 2d 139, 24 P.3d 175 (2001) (municipality has no inherent power to enact zoning laws).

[35] Schefer v. City Council of City of Falls Church, 279 Va. 588, 691 S.E.2d 778, 780–81 (2010); Arnwine v. Union County Bd. of Educ., 120 S.W.3d 804, 807 (Tenn. 2003).

[36] John F. Dillon, Commentaries on the Law of Municipal Corporations, § 237 (5th ed. 1911), as quoted in *Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37, 442 S.E.2d 45 (1994).

guage would have lent itself to reading grants broadly, the courts treated Dillon's Rule to dictate narrow construction.

This narrow view of local authority has been relaxed by court giving a broad reading of state enabling acts,[37] and by the establishment of home rule authority.[38] Enabling acts themselves frequently authorize liberal interpretation. One statute provides, for example, that:

> It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect * * *.[39]

Though Dillon's Rule has been formally rejected in most states,[40] it still lurks behind the scenes to strike on occasion. Applying the above statute, which expressly authorizes broad construction, the North Carolina supreme court invalidated a city's stormwater utility ordinance, finding that the city exceeded the grant of authority.[41]

§ 3:8 Charter

A charter is the basic document of a local government, akin to a constitution. The state legislature can confer power on a city in a charter, including zoning power.[42] Sometimes home rule powers [43] can be obtained only by adopting a charter, that is, the zoning enabling act governs unless there is a charter.

§ 3:9 Home Rule

While local governments lack inherent powers, in many states a degree of independence exists by virtue of home rule powers conferred by state constitution or state statute.[44] The courts of the various states are not in agreement as to whether home rule power authorized by state constitution or legislation is a source of zoning power.[45] In California and Ohio,[46] for example, power to make and enforce local regulations is

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[37] *Almquist v. Town of Marshan*, 308 Minn. 52, 248 N.W.2d 819 (1976).

[38] *Home Builders Ass'n of Lincoln v. City of Lincoln*, 271 Neb. 353, 711 N.W.2d 871 (2006) (Dillon's rule does not apply to a city operating under home rule charter.); *South Carolina State Ports Authority v. Jasper County*, 368 S.C. 388, 628 S.E.2d 824 (2006). See also § 3:9.

[39] N.C. Gen. Stat. § 160A-4.

[40] Briffault, Our Localism: Part I-The Structure of Local Government Law, 90 Colum. L. Rev. 1, 8 (1990).

[41] *State v. Jones*, 359 N.C. 832, 539 S.E.2d 638 (1999).

[42] Society Created to Reduce Urban Blight (SCRUB) v. Zoning Bd. of Adjustment of City of Philadelphia, 729 A.2d 117 (Pa. Commw. Ct. 1999).

[43] See infra § 3:9.

[44] *Condominium Ass'n of Commonwealth Plaza v. City of Chicago*, 389 Ill. App. 3d 32, 358 Ill. Dec. 390, 924 N.E.2d 536 (2010).

[45] Baker and Rodriguez, Constitutional Home Rule and Judicial Scrutiny, 86 Denv. U. L. Rev. 1337 (2009).

[46] Brougher v. Board of Public Works of City and County of San Francisco, 205 Cal. 426, 271 P. 487 (1928).

...ted as authorizing zoning, whereas in New York, the constitutional power of ...alities to enact local laws does not authorize zoning.[47]

...Even where zoning power is authorized by home rule, it only applies to local matters not in conflict with state law.[48] Conflict with zoning enabling legislation is possible, particularly on procedural issues. Due to a great state interest in procedural uniformity, the latter typically controls. A state requirement that cities adopt plans has been held to be of such statewide concern that home rule cities must comply.[49] Local zoning measures often implicate substantial state interests. Thus, the Colorado Supreme Court rejected, as a home rule measure, an affordable housing mitigation ordinance that addressed a matter of mixed local and statewide concern.[50]

§ 3:10 Initiative and Referendum

In a few states, the people can enact legislation through use of the initiative, and in many states, can revoke legislative acts by referendum.

The initiative and referendum are discussed in detail in Chapter 5.

§ 3:11 Special Enabling Acts

Authority for some kinds of zoning may be provided by a separate enabling act. Airport zoning and flood plain zoning, both of which were stimulated by federal legislation, are two examples. Enabling acts have also been amended, or special acts passed, to permit the creation of districts to preserve historic and architecturally significant areas.[51]

Peculiar aspects of airport operations have led to the passage in many states of specific airport zoning enabling legislation.[52] Airport zoning has also been encouraged by the federal government, which has helped fund airport construction provided that uses adjacent to the airport are so regulated as to preclude interference with airport operation.

A state's participation in the National Flood Insurance Program requires that certain regulatory measures be adopted to exclude or limit building on flood plains.[53] While some local governments implement these requirements through general zoning enabling legislation, a number of states have specific flood plain legislation.[54]

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[47] See *DJL Restaurant Corp. v. City of New York*, 96 N.Y.2d 91, 725 N.Y.S.2d 622, 749 N.E.2d 186 (2001).

[48] Riepo Realty & Development Co. v. City of Parma, 58 Ohio St. 3d 101, 564 N.E.2d 426 (1990).

[49] *City of Los Angeles v. State of California*, 138 Cal. App. 3d 526, 187 Cal. Rptr. 893 (1982). But see *Moore v. City of Boulder*, 29 Colo. App. 248, 484 P.2d 134 (App. 1971) (low cost housing a matter of purely local concern).

[50] Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30 (Colo. 2000).

[51] See, e.g., Mass. Gen. Laws Ann. ch. 40C, § 2; Mo. Ann. Stat. § 89.040.

[52] See e.g., Cal. Gov't Code §§ 50485 to 50485.14. See also infra § 4.29 for discussion on zoning for airports.

[53] 42 U.S.C.A. §§ 4001 et seq. See infra § 11:16.

[54] See, e.g., Ala. Code §§ 11-19-1, et. seq.

§ 3:12 Geographical Reach

A. *Extraterritorial Zoning*

The Standard Zoning Enabling Act did not provide for extraterritorial zoning. The act also only empowered municipalities to zone. Counties were excluded, and without county power to zone, the fringes of city areas could be developed without zoning control. The power to zone eventually was extended to counties in most states, but extraterritorial concerns persisted.

Some states grant the power to zone extraterritorially.[55] Such power is frequently conferred only on larger cities and is limited in terms of miles from the city.[56] It may be permitted only where the county does not zone or where the county approves. In metropolitan areas, overlapping extraterritorial jurisdiction is usually solved by limiting power to points equidistant between the municipalities exercising the power. Regionalization of zoning in metropolitan areas remains a major problem, and the prospective loss of zoning power is one of the major reasons why municipalities in metropolitan areas resist metropolitan government. The extraterritorial impact of a local exclusionary ordinance is discussed in Chapter 6.

B. *Annexation and Prezoning*

If extraterritorial zoning power is lacking, problems can arise upon annexation. Previous zoning regulations usually terminate upon annexation, leaving the land unzoned.[57] While the area can now be zoned, uses inconsistent with the plan for the area may become vested in the time that it takes to implement new zoning.

The Standard Zoning Enabling Act created no mechanism for zoning territory in advance of annexation, and states have handled the problem in a variety of ways. In California, cities are permitted to prezone territory to be annexed so that the zoning ordinance takes effect immediately upon annexation.[58] A zoning ordinance also may be part of the annexation ordinance.[59] Interim zoning also has been used. In other states, statutes provide that upon annexation the area, if already zoned, will retain that classification for a period of time.[60] Ordinances sometimes provide that upon annexation the territory is automatically zoned to the most restrictive zone available under the zoning ordinance, pending reclassification.

IV. PURPOSES

§ 3:13 In General

The purposes for which zoning may be enacted are as broad as the source of power from the state allows. Whether by enabling act or home rule, the power may extend to the full limits of the police power of the state, or it may be more limited.

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[55] Wis. Stat. § 62.23(7a). See *Village of DeForest v. County of Dane*, 211 Wis. 2d 804, 565 N.W.2d 296 (Ct. App. 1997).

[56] See, e.g., Ark. Code Ann. § 14-56-413.

[57] Ben Lomond, Inc. v. City of Idaho Falls, 92 Idaho 595, 448 P.2d 209 (1968).

[58] Cal. Gov't Code § 65859.

[59] *Beshore v. Town of Bel Air*, 237 Md. 395, 206 A.2d 678 (1965).

[60] Ohio Rev. Code §§ 303.18, 519.08.

Section 1 of the Standard Act broadly grants the power to zone to municipalities "for the purpose of promoting health, safety, morals, or the general welfare of the community." Section 3, set out above,[61] then lists various "purposes in view." Official commentary to the act observes that Section 1 "defined and limited the powers" conferred, while Section 3 "contain[ed] a direction from the [legislature] as to the purposes * * * [and] constitut[ed] the 'atmosphere' under which zoning [was] to be done."[62] The New York Court of Appeals has read Section 1 as merely providing the "constitutional predicate" for zoning, and not as conferring the full police power of the state. To be valid, a zoning ordinance must be authorized, expressly or implicitly, by Section 3.[63]

Zoning may be invalid because it is beyond the power conferred by the enabling act.[64] The general language of the SZEA has led some courts to judge ultra vires challenges by reference to a reasonableness test that is the same as that used to determine whether an act is beyond the police power. This finds support not only in the fact that Section 1 of the SZEA provides a grant of power in language that equals the full reach of the police power, but in the long list of "purposes in view" of Section 3. Additional leeway exists since most courts will imply powers that are fairly related, or incident, to powers expressly granted.[65]

Courts have upheld numerous ordinances that lack precise grounding in the "purposes in view" list. In *Golden v. Planning Board of Town of Ramapo*,[5] the court found that an ordinance that limited growth based on the availability of public services and infrastructure for an 18 year period was within the Standard Act's language that permits zoning "to avoid undue concentration of population [and] to facilitate the adequate provision of transportation, water, sewerage, schools, [and] parks, * * *."[66] Single-use zoning covering an entire municipality has been upheld even though a narrow reading of the enabling act arguably requires multiple districts.[67] Conditional zoning has also been upheld despite the lack of express language authorizing such a technique.[68]

Where a zoning ordinance is unrelated to the achievement of land use objectives, it will be invalidated. For example, a moratorium imposed on cellular telephone antennas enacted for the health of a village's residents was found to be outside the enabling act where there was not a scintilla of evidence to support the claim of a health hazard.[69] Revocation of a permit to operate a nursing home to "quell community opposition"[70] or to prevent riots[71] also has been held outside the enabling act.

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[61] See supra § 3:6.

[62] SZEA, § 3, n. 21.

[63] *Golden v. Planning Bd. of Town of Ramapo*, 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972).

[64] An ordinance may be sustained under another source of power. See, e.g., *T.J.R. Holding Co., Inc. v. Alachua County*, 617 So. 2d 798 (Fla. 1st DCA 1993).

[65] *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182, 193 (1989).

[5] *Golden v. Planning Bd. of Town of Ramapo*, 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972).

[66] SZEA § 3.

[67] *Valley View Village v. Proffett*, 221 F.2d 412, 416 (6th Cir. 1955). See discussion infra § 6:9 for contrary authority.

[68] *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989).

[69] Cellular Telephone Co. v. Village of Tarrytown, 209 A.D.2d 57, 624 N.Y.S.2d 170 (1995).

[70] *Belle Harbor Realty Corp. v. Kerr*, 35 N.Y.2d 507, 364 N.Y.S.2d 160, 323 N.E.2d 697 (1974).

[71] *DeSena v. Guide*, 24 A.D.2d 165, 265 N.Y.S.2d 239 (1965).

Regardless of the breadth of the delegated power, zoning for a particular purpose may be invalid because the exercise of power constitutes an act that is beyond the scope of the police power. For example, if zoning is exercised to lower the market value of property so that a governmental body can acquire it more cheaply by eminent domain, exercise of the power for that purpose would be unconstitutional.[72]

In the sections that follow, some of the purposes of zoning are considered in further detail. A particular zoning action often effectuates several purposes and the purposes often overlap.

§ 3:14 Preservation of Property Values

The preservation of property values is often cited as an important, if not primary, purpose of zoning. While preservation is not an explicitly stated purpose, the Standard Zoning Enabling Act does speak of "conserving values." While none would likely quarrel with the preservation of value as a legitimate factor in zoning, it cannot stand alone. Value is a consequence of action or inaction, and it is the action or inaction that matters. Nonetheless, some courts say that is an independent interest. In a leading case in the area of aesthetic controls, the Wisconsin Supreme Court stated that "[a]nything that tends to destroy property values of the inhabitants of the village necessarily adversely affects the prosperity, and therefore the general welfare, of the entire village,"[73] is within the reach of the zoning power. The court's statement goes too far, and fails to recognize that one must ask what it is that affects value, and whether the regulation of that activity or occurrence is valid. That which causes the value to go down might be a commercial use in a residential neighborhood or the building of an architecturally unusual structure. It also might be the fact that a controversial radio talk show host wants to move into the neighborhood or that a nonmainstream religious group wishes to establish a place of worship in a neighborhood where other religious uses are located. The former, but not the latter two, could be restricted.[74]

Courts ought not allow a goal to preserve property values to obscure an unarticulated illegitimate motive. The Michigan Supreme Court recognized this when it held that the "conservation of property values is not by itself made a proper sole objective for the exercise of police power under the statute."[75] The court proceeded to invalidate an ordinance specifying a minimum house size enacted solely to preserve the value of existing homes.

The mere fact that zoning depresses values of particular buildings or parcels does not render it invalid.[76] Similarly, the zoning of a parcel can be valid though the value of neighboring property is adversely affected by the zoning.[77] In any event, to the extent zoning is effective, the sum total of real property values in a city should be increased by orderly rather than haphazard development.

The "maintenance of property values" purpose is sometimes used to support zoning that preserves the property tax base and to justify controls designed to preserve or

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[72] See, e.g., *Robyns v. City of Dearborn*, 341 Mich. 495, 67 N.W.2d 718 (1954).

[73] State ex rel. Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217, 224 (1955).

[74] See infra §§ 10:12, 10:14, and 10:18.

[75] *Elizabeth Lake Estates v. Waterford Tp.*, 317 Mich. 359, 26 N.W.2d 788, 792 (1947).

[76] Parking Ass'n of Georgia, Inc. v. City of Atlanta, Ga., 264 Ga. 764, 450 S.E.2d 200 (1994).

[77] *Fritts v. City of Ashland*, 348 S.W.2d 712 (Ky. 1961).

promote aesthetics, or historic or natural areas. These matters are discussed separately.[78]

§ 3:15 Preservation of Character and Aesthetics

The Standard Act indicates that the zoning should take into consideration the character of the district. "Character" is a vague and loaded term. It may refer to the physical appearance of an area to justify architectural or other aesthetic controls.[79] It also may be "code" language to reflect "snob zoning," to exclude housing for persons of low and moderate income. The validity of such exclusionary ordinances is explored in Chapter 6.

Some ordinances indicate that zoning is to stabilize neighborhoods. Though the phrase is not in the Standard Act, perhaps the "character" language implies that zoning should not upset the status quo. Neighbors unhappy with a proposed zoning change often argue that they have a right to have the zoning affecting them remain unchanged. They do not. While zoning should provide some stability, it is not a guarantee against change.[80]

The vagueness of the "character of a district" is apparent in zoning ordinances deemed to promote aesthetics, typically the regulation of signs and the imposition of architectural controls.[81]

§ 3:16 Traffic Safety

The Standard Act provides that regulations should be made to lessen congestion in the streets and to facilitate adequate provision of transportation.[82] The location and dimension of streets are typically not controlled by zoning. However, there are several aspects of zoning related to traffic. This purpose is used to argue against nonresidential development in residential areas because of the danger to children in street crossing. The purpose is also effectuated by front yard and setback requirements, so that vision will not be impaired at street corners. Density controls, such as minimum lot sizes, can be used to lessen the amount of traffic generating activity.[83]

Off-street parking requirements are also justified to promote public safety and to maintain the traffic capacity of streets.[84] While generally held valid,[85] off-street parking requirements have been opposed because they add expense to construction and limit use of a lot for its primary purpose.[86] Subject to constitutional limitations,[87] municipalities may require the dedication of land for streets as a condition for the granting of

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[78] See infra §§ 12:1 et seq.

[79] See infra §§ 12:1 et seq.

[80] *Lamb v. City of Monroe*, 358 Mich. 136, 99 N.W.2d 586 (1959).

[81] §§ 12:1 et seq. covers aesthetic and sign regulation in detail.

[82] Jarvis Acres, Inc. v. Zoning Commission of Town of East Hartford, 163 Conn. 41, 301 A.2d 244 (1972).

[83] Plaza Realty & Inv. Co. v. City of Ladue, 362 Mo. 1025, 246 S.W.2d 771 (1952).

[84] *Grace Baptist Church v. City of Oxford*, 81 N.C. App. 678, 345 S.E.2d 242 (1986).

[85] *Stroud v. City of Aspen*, 188 Colo. 1, 532 P.2d 720 (1975).

[86] See Zoning: Residential Off-Street Parking Requirements, 71 A.L.R.4th 529.

[87] See infra § 9:8.

development permission. Such dedications relate to the purpose of lessening congestion in the streets caused by the development.

Traffic relates to zoning in at least two other ways. First, a substantial increase in traffic along a street may be a change of condition making a rezoning of a residential area proper. Second, parking is a use of land which, when not on public streets or areas, is a use of land subject to zoning regulation.

§ 3:17 Public Health

Over the years shifts occur in the conceptualization of the purposes sought to be accomplished by land use regulation. For example, "public health" has always been in the litany of police power purposes but for decades the implementation of regulations designed to protect public health were largely confined to measures such as limitation of uses in wooden building in order to reduce fire hazards or to regulate street design and location in order to encourage traffic safety. Today, thanks to the smart growth and new urbanism movements, public health is being interpreted to justify regulations designed to accomplish such goals as reduction of obesity and other sedentary life style grounded diseases by requiring—or at least encouraging—bike paths, neighborhood playgrounds, and mixed use friendly urban design to discourage automobile usage and encourage walking. This recent development is discussed in greater detail in Chapter 9.

§ 3:18 Regulation of Competition

The regulation of competition is often said to be an improper purpose of zoning,[88] but care must be taken not to overstate the matter. In one case, when a city amended its zoning ordinance to allow new types of dry cleaners using particular solvents, it delayed the effective date of the ordinance to give existing businesses a chance to adjust to the new competition. Deeming the purpose improper, the court invalidated the portion of the ordinance that delayed the effective date of the new zoning.[89] Reasoning that zoning should not be used to create a monopoly, some courts also have held zoning invalid if it does not provide space for the establishment of future competitive businesses.[90] On the other hand, the mere act of districting has some effect on competition,[91] and the fact that the control of competition was a factor in the zoning of an area will not necessarily be fatal. An ordinance excluding small retailers from operating in a planned commercial zone in which large operations in the same retail business were allowed was held legitimate since its purpose was to preserve economic viability of the downtown business district, rather than to serve any impermissible private anticompetitive purpose.[92] We discuss potential federal antitrust liability in Chapter 10.

The big box phenomenon has led to the adoption of various anti-big box measures such as architectural controls, size limitations,[93] minimum wage and benefits' laws,[94]

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[88] See, e.g., *Coleman v. Southwood Realty Co.*, 271 So. 2d 742 (Miss. 1973).

[89] *Wyatt v. City of Pensacola*, 196 So. 2d 777 (Fla. 1st DCA 1967).

[90] *In re White*, 195 Cal. 516, 234 P. 396 (1925).

[91] *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991).

[92] *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 59 Cal. Rptr. 3d 442, 159 P.3d 33 (2007).

[93] See infra § 4:13D, discussing big box retailers in the context of building size.

exclusions. Unsurprisingly, adversely affected big box stores object to and often challenge such regulations. In *Wal-Mart Stores, Inc. v. City of Turlock*,[95] the anti-competitive effect of an ordinance banning discount superstores did not lead to its invalidation. The court found it was rationally related to the public welfare inasmuch as it was designed to protect against urban and suburban decay, increased traffic, and reduced air quality.[96]

If the exclusionary effect of an ordinance is incidental to an otherwise legitimate zoning purpose, it will be held valid.[97] The desire to achieve stability and balance in the provision of services is a legitimate goal, even though competition is suppressed.[98] Furthermore, a zoning ordinance enacted pursuant to a comprehensive plan is more likely to survive attack.[99]

The improper regulation of competition argument is often used to attack spacing requirements between such uses as gasoline stations and bars.[100] Similarly, spacing requirements may be upheld for gasoline stations on the grounds of an undesirable increase of traffic or fire hazards, or even on the ground that there are already a sufficient number of stations in the area to serve the public need.[101]

§ 3:19 Fiscal Zoning to Increase Tax Base

Fiscal zoning to increase the tax base, provide for employment, or otherwise plan the local economy has met with mixed reaction in the courts. In some states the enabling act provides that protecting or enhancing the tax base is a purpose of zoning.[102] In those states with the SZEA, which has no express provision regarding tax considerations, the purpose might be inferred from the "conserving values" clause.[103] A non-fiscal purpose also may be found to support zoning that is alleged to be fiscally motivated.[104]

A number of courts have recognized the desire to stimulate the local economy as a valid purpose of zoning. In one case, a court upheld a rezoning based on the county's findings that the result would lead to the employment of eighty-seven people from the community and would produce tax revenues constituting 25% of the city's budget.[105]

For many courts, the goal of increasing the tax base and providing employment opportunities is not fatal, but it cannot stand alone. There must be other legitimate

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[94] George Lefcoe, The Regulation of Superstores: The Legality of Zoning Ordinances Emerging from the Skirmishes Between Wal-Mart and the United Food and Commercial Workers Union, 58 Ark. L. Rev. 833 (2006).

[95] *Wal-Mart Stores, Inc. v. City of Turlock*, 138 Cal. App. 4th 273, 41 Cal. Rptr. 3d 420 (2006).

[96] See also *In re Wal-Mart Stores, Inc.*, 167 Vt. 75, 702 A.2d 397 (1997); Hernandez v. City of Hanford, 2007 WL 1629830 (Cal. 2007).

[97] See *In re Wal-Mart Stores, Inc.*, 167 Vt. 75, 702 A.2d 397 (1997).

[98] *In re Wal-Mart Stores, Inc.*, 167 Vt. 75. The vast majority of states hold that one whose goal is to prevent competition with an existing business lacks standing to challenge a zoning action. *Earth Movers of Fairbanks, Inc. v. Fairbanks North Star Borough*, 865 P.2d 741, 744 (Alaska 1993) (collecting cases).

[99] *Ensign Bickford Realty Corp. v. City Council*, 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977).

[100] *Mazo v. City of Detroit*, 9 Mich. App. 354, 156 N.W.2d 155 (1968).

[101] *Van Sicklen v. Browne*, 15 Cal. App. 3d 122, 92 Cal. Rptr. 786 (1971).

[102] Utah Code Ann. § 10-9a-102.

[103] See supra § 3:14.

[104] *Putney v. Abington Tp.*, 176 Pa. Super. 463, 108 A.2d 134 (1954).

[105] See *Watson v. Town Council of Town of Bernalillo*, 111 N.M. 374, 805 P.2d 641 (Ct. App. 1991).

reasons.[106] Some courts, however, roundly condemn fiscal zoning, declaring it to be "totally violative of all the basic principles of zoning."[107]

Fiscal considerations often explain the use of exclusionary zoning devices, such as minimum lot sizes. The validity of such measures is discussed in Chapter 6.

§ 3:20 Promotion of Morals

It is unusual for zoning ordinances to rely expressly on morals as a purpose, and the degree to which such a purpose is permissible is uncertain. Section 1 of the Standard Act provides that local government has the power to promote morals through zoning, but Section 3 does not list morals as an express purpose. Some early cases that authorized the banning of billboards did so on the barely credible rationale that immoral activities could be conducted behind them.[108] This presumably was a makeweight argument for courts that accepted, but were unwilling to acknowledge, the fact that aesthetics was the real purpose. This was necessary since aesthetics was once deemed an improper, or inadequate, purpose for which to exercise the police power.[109]

Some zoning ordinances provide that liquor stores and bars must be a certain distance from schools and churches. In one case, a town actually created an overlay "inebriate" district.[110] Other ordinances regulate the location of sexually oriented businesses. These are arguably based, at least in part, on a morals purpose, as well as directed at the secondary effects of such uses. Municipalities that regulate adult uses on "morals" grounds run some risk of running into First Amendment violations if the measure suppresses protected speech.[111]

§ 3:21 Managing Growth

The Standard Act makes no reference to timing and sequencing controls used today to manage growth. Enabling act problems can be encountered with respect to both short and long-term timing controls.

A. *Short-Term Controls: Interim Zoning*[112]

When an area is not zoned or is zoned but under comprehensive study for rezoning, a significant time delay may occur from the beginning of the planning process to the ultimate adoption of the zoning ordinance.[113] Meanwhile, developers can emasculate the proposed controls by developing in a manner inconsistent with the proposed ordinance. In order to prevent such development, legislative bodies use temporary or interim zoning to freeze or stringently limit land use. The need for speedy enactment of the interim control means that standard procedural safeguards of notice, hearing, referral to planning commissions and the like are usually not possible.

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[106] *Griswold v. City of Homer*, 925 P.2d 1015, 1023 (Alaska 1996).

[107] Concerned Citizens for McHenry, Inc. v. City of McHenry, 76 Ill. App. 3d 738, 395 N.E.2d 944, 950 (1979).

[108] St. Louis Gunning Advertisement Co. v. City of St. Louis, 235 Mo. 99, 137 S.W. 929 (1911).

[109] See infra §§ 12:1 et seq.

[110] Jachimek v. Superior Court In and For County of Maricopa, 169 Ariz. 317, 819 P.2d 487 (1991).

[111] See discussion infra § 10:18B.

[112] See related discussion infra §§ 8.28 and 9.5.

[113] See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002).

The SZEA did not provide for temporary or interim zoning. In earlier years, some courts invalidated interim zoning for lack of express authority.[114] Other courts, recognizing that proper zoning cannot be done quickly, found implied authority for interim ordinances and upheld it where the time delay was reasonable.[115] Several states now authorize interim zoning by special legislation.[116] The acts generally limit the period of time during which the interim ordinances are effective.

B. *Long-Term Growth Management*

As is true with the short-term problem of stopping development pending completion of a planning process, municipalities face long-term growth concerns. During the 1960s and 1970s, the objectives of land use control expanded to include consideration of a community's appearance, open space preservation and phased growth. At this time, zoning came under attack as being inflexible, as discouraging innovation, and inadequately dealing with environmental and housing affordability issues. New mechanisms were introduced to implement long-term growth management plans. For instance, in the leading case of *Golden v. Planning Board of Town of Ramapo*,[117] the New York Court of Appeals found that the state's enabling act, patterned after the SZEA, authorized controls on the timing and sequencing of development. A number of states specifically authorize growth management, which is covered in detail in Chapter 9.

§ 3:22 Zoning to Lower Condemnation Costs

Where zoning limits the use of land to fewer uses than those for which the market creates a demand, the value of the land is reduced. The effect of zoning on land is taken into account in determining just compensation in eminent domain proceedings.[118] If government yields to the temptation to use zoning to depress values to lower future condemnation costs, the zoning will be held invalid.[119] Since courts do not generally inquire into motives, the circumstances surrounding the zoning must be considered before concluding that the purpose of zoning was to lower values rather than some legitimate purpose. An improper purpose may be evidenced when land that is rezoned is coextensive with land to be condemned, as distinguished from zoning that affects a large number of landowners or is part of a comprehensive rezoning.[120]

Zoning and condemnation proceedings that are substantially concurrent may reveal an improper purpose. When a court suspects that zoning is being used to depress values, it may hold the zoning invalid on other grounds without giving the real basis for its decision. For example, if an "island" is rezoned for agricultural uses in an area the government intends to acquire as an airport, the court may hold it invalid spot zoning.

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[114] *Alexander v. City of Minneapolis*, 267 Minn. 156, 125 N.W.2d 583 (1963); *State ex rel. Kramer v. Schwartz*, 336 Mo. 932, 82 S.W.2d 63 (1935).

[115] Miller v. Board of Public Works of City of Los Angeles, 195 Cal. 477, 234 P. 381 (1925).

[116] See, e.g., Colo. Rev. Stat. § 30-28-121; Utah Code Ann. § 10-9a-504.

[117] *Golden v. Planning Bd. of Town of Ramapo*, 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972).

[118] See infra § 16:12.

[119] *U.S. v. 480.00 Acres of Land*, 587 F.3d 1297 (11th Cir. 2009).

[120] *Kissinger v. City of Los Angeles*, 161 Cal. App. 2d 464, 327 P.2d 10 (1958).

Official maps, which restrict the right to build in the pathway of planned streets, parks and other public sites, and setback provisions [121] imposed so that streets can be widened without the necessity of paying for buildings, are examples of other regulations that may limit costs of acquisition in some circumstances.[122]

V. ALTERNATIVES

§ 3:23 Alternatives to Euclidean Zoning and the Standard Act

The Standard Zoning Enabling Act (SZEA) remains the basic enabling act in many states, but it, and its planning counterpart, the Standard Planning Enabling Act, are criticized as outdated. Many shortcomings in zoning enabling laws have been cured or improved upon by piecemeal changes to the SZEA.[123] There have been efforts at more revolutionary change, some more successful than others. As noted earlier, some call for deregulation, preferring to allow land use to be determined by market forces, limited only by the common law of nuisance.[124] Other alternatives are explored in the following sections.

The American Planning Association began a "Growing Smart" Project in 1994 to update the standard planning and zoning enabling acts. This led to the creation of the Growing Smart Legislative Guidebook with various model statutes.[125] The Association has published drafts of model smart growth codes covering such topics as mixed-use development, town centers, affordable housing with density bonuses, a unified development permit review process, transferable development rights, cluster development, and pedestrian overlay districts.[126]

§ 3:24 The Model Land Development Code

A major effort to modernize the land development process at one fell swoop began in 1963 when the Ford Foundation financed an American Law Institute effort to develop a model code for land development. Completed in 1976,[127] the Model Land Development Code (MLDC) deals with the physical development of land, so as to maximize social and economic objectives.[128] The MLDC is based on the same assumptions underlying the Standard State Zoning Enabling Act, (SZEA) and its companion, the Standard City Planning Enabling Act (SPEA), which provides powers for planning, control of subdivisions, official maps and regional planning. These assumptions are, first, that government should control privately initiated development rather than be the primary development agency itself as it is in some countries, and, second, that local government should exercise most of the control.

Nevertheless, the MLDC offers significant changes to the land development process. The drafters thought that changes were needed since land use was being regulat-

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[121] See infra § 6:13.

[122] Regarding official maps, see infra § 7:9.

[123] See, e.g., Liebmann, The Modernization of Zoning: Enabling Act Revision as a Means to Reform, 25 Urb. Law. 1 (1993).

[124] See supra § 3:1. See also Kmiecik, Abolish Zoning, 31 Syracuse L. Rev. 719 (1980).

[125] The Guidebook provides commentary with legislative alternatives and suggestions for implementation. See http://www.planning.org/growingsmart/.

[126] http://www.planning.org/research/smartgrowth/.

[127] American Law Institute, A Model Land Development Code (1976).

[128] Model Land Development Code, Art. 3, Commentary at 111–112.

AGENDA
OCONEE COUNTY COUNCIL MEETING
August 15, 2017
6:00 PM

Council Chambers, Oconee County Administrative Offices
415 South Pine Street, Walhalla, SC

Call to Order

Public Comment Session *[Limited to a total of forty (40) minutes, four (4) minutes per person.]*

Council Member Comments

Moment of Silence

Invocation by County Council Chaplain

Pledge of Allegiance to the Flag of the United States of America

Approval of Minutes

- July 18, 2017 Regular Meeting

Presentation to Council

- Destination Oconee report / Ms. Janet Hartman, Manager

Administrator Report & Agenda Summary

Public Hearings for the Following Ordinances

Third Reading of the Following Ordinances

Second Reading of the Following Ordinances

Ordinance 2017-19 "AN ORDINANCE TO DEVELOP A JOINTLY OWNED AND OPERATED INDUSTRIAL/BUSINESS PARK IN CONJUNCTION WITH PICKENS COUNTY, SUCH INDUSTRIAL/BUSINESS PARK TO BE, AT THE TIME OF ITS INITIAL DEVELOPMENT, GEOGRAPHICALLY LOCATED IN PICKENS COUNTY AND TO INCLUDE CERTAIN PROPERTY NOW OR TO BE OWNED BY A COMPANY KNOWN TO THE COUNTY AT THIS TIME AS "PROJECT EXODUS" OR ITS ASSIGNEE, AND ESTABLISHED PURSUANT TO SOUTH CAROLINA CODE OF LAWS 1976, SECTION 4-1-170 ET SEQ., AS AMENDED; TO PROVIDE FOR A WRITTEN AGREEMENT WITH PICKENS COUNTY PROVIDING FOR THE EXPENSES OF THE PARK, THE PERCENTAGE OF REVENUE ALLOCATION, AND THE DISTRIBUTION OF FEES IN LIEU OF AD VALOREM TAX; AND MATTERS RELATED THERETO."

First Reading of the Following Ordinances

Ordinance 2017-20 "AN ORDINANCE AUTHORIZING THE EXECUTION AND DELIVERY OF A REAL PROPERTY LEASE AGREEMENT BETWEEN OCONEE COUNTY AS LESSOR AND THE FOOTHILLS ALLIANCE AS LESSEE; AND OTHER MATTERS RELATED THERETO."

Ordinance 2017-21 "AN ORDINANCE GRANTING CERTAIN EASEMENT RIGHTS TO DUKE ENERGY CAROLINAS, LLC FOR THE PURPOSE OF LOCATING AND MAINTAINING ELECTRIC AND/OR COMMUNICATION FACILITIES ON COUNTY-OWNED PROPERTY; AND OTHER MATTERS RELATED THERETO."

Ordinance 2017-22 "AN ORDINANCE AMENDING ARTICLE III OF CHAPTER 26 OF THE OCONEE COUNTY CODE OF ORDINANCES IN CERTAIN LIMITED REGARDS AND PARTICULARS ONLY, NAMELY AS TO THE ELIMINATION OF THE SCENIC HIGHWAY COMMITTEE AND THE SUBSTITUTION OF THE PLANNING COMMISSION TO CARRY OUT ALL DUTIES AND FUNCTIONS FORMERLY BELONGING TO THE SCENIC HIGHWAY COMMITTEE; AND OTHER MATTERS RELATED THERETO."

Ordinance 2017-23 [TITLE ONLY] "AUTHORIZING THE ISSUANCE AND SALE OF A NOT EXCEEDING $530,000 GENERAL OBLIGATION REFUNDING BOND (KEOWEE FIRE TAX DISTRICT), SERIES 2017, OF OCONEE COUNTY, SOUTH CAROLINA FOR THE PURPOSE OF REFUNDING THE COUNTY'S GENERAL OBLIGATION BOND (KEOWEE FIRE TAX DISTRICT), SERIES 2007; FIXING THE FORM AND DETAILS OF THE BOND; PROVIDING FOR THE PAYMENT OF THE BOND; AUTHORIZING THE COUNTY ADMINISTRATOR TO DETERMINE CERTAIN MATTERS RELATING TO THE BOND; PROVIDING FOR THE DISPOSITION OF THE PROCEEDS OF THE BOND; AND OTHER MATTERS RELATING THERETO."

First & Final Reading for the Following Resolutions

Discussion Regarding Action Items

Conditional acceptance of roads located in Phase 1 of the Shadowood subdivision

It is the recommendation of both staff and the Transportation Committee that Council conditionally accept into the Oconee County Public Road System those roads located in Phase 1 of the Shadowood subdivision. The question of final acceptance of the roads will be brought before Council upon: (1) completion of Phase 2 of the Shadowood development; (2) the County's receipt of Final Plans for both Phase 1 and 2, showing all required elements for such Final Plans as contained in the Oconee County Code of Ordinances; (3) the County's receipt of as-built drawings for the roads located in Phase 2, evidencing compliance with Oconee County road design and construction standards; (4) deeded right-of-ways for the roads to be accepted; and (5) satisfaction of all other requirements as contained in the Oconee County Code of Ordinances and as the County Administrator may deem necessary or advisable.

2017 Edward Byrne Memorial JAG Grant Notification

Oconee County Sheriff's Department may receive an allocation of $20,920 from the Bureau of Justice Assistance. The grant program requires the notification of intent be made available for the County Council and the public to review and comment on the proposed use of funds. The Sheriff's Department plans to use the funds from this program to purchase

- Potential upgrades to the Sheriff's mobile command center
- Upgrades to WatchGuard mobile video systems
- Uniform and Equipment upgrade for Sheriff's Honor Guard
- Weapons upgrade for SWAT entry team

Board & Commission Appointments *(IF ANY)* [Seats listed are all co-terminus seats]

Building Codes Appeal Board..... 1 At Large Seat
Conservation Bank Board.....District II
Board of Zoning Appeals.....District V
Agricultural Advisory Board.....District III

Unfinished Business *[to include Vote and/or Action on matters brought up for discussion, if required]*

[None scheduled.]

New Business *[may include items which may be scheduled for final action at a future meeting, if required]*

Possibility of closing non-essential County offices on August 21, 2017 around noon for Solar Eclipse

Council Committee Reports

[None scheduled.]

Executive Session

[upon reconvening Council may take a Vote and/or take Action on matters brought up for discussion in Executive Session, if required]

For the following purposes, as allowed for in § 30-4-70(a) of the South Carolina Code of Laws:

[1] "to receive legal advice regarding a contractual matter in relation to the design and construction of a "speculative building" within the Golden Corner Commerce Park, to include discussion of funding and collateral issues in relation thereto."
[2] "to receive legal advice and discuss employment / personnel matters related to work force reduction and the Treasurer's office."

First Reading of the Following Ordinances

ORDINANCE 2017-24 [Title Only] "AN ORDINANCE AUTHORIZING THE TRANSFER OF COUNTY-OWNED REAL PROPERTY, LOCATED WITHIN THE GOLDEN CORNER COMMERCE PARK, COMPRISING APPROXIMATELY 20 ACRES, TO THE OCONEE ECONOMIC ALLIANCE FOR THE PURPOSE OF CONSTRUCTION OF A "SPECULATIVE BUILDING" FOR INDUSTRIAL OR BUSINESS USE IN ORDER TO PROMOTE INCREASED OPPORTUNITIES FOR ECONOMIC GROWTH AND DEVELOPMENT WITHIN THE COUNTY; AND OTHER MATTERS RELATED THERETO."

First & Final Reading for the Following Resolutions

RESOLUTION 2017-12 "A RESOLUTION MAKING APPLICATION TO THE STATE FISCAL ACCOUNTABILITY AUTHORITY OF SOUTH CAROLINA FOR APPROVAL OF THE ISSUANCE BY OCONEE COUNTY, SOUTH CAROLINA, OF ITS SPECIAL SOURCE REVENUE BONDS IN AN AGGREGATE PRINCIPAL AMOUNT OF NOT EXCEEDING $3,500,000, PURSUANT TO THE PROVISIONS OF SOUTH CAROLINA CODE ANNOTATED, TITLE 4, CHAPTER 1 AND 29 (1976), AS AMENDED."

Adjourn

Assisted Listening Devices [ALD] are available to accommodate the special needs of citizens attending meetings held in Council Chambers.
ALD requests should be made to the Clerk to Council at least 30 minutes prior to the meeting start time.
County Council, Committee, Board & Commission meeting schedules, agendas are posted at the Oconee County Administration Building & are available on the County Council Website.

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
ORDINANCE 2017-19

AN ORDINANCE TO DEVELOP A JOINTLY OWNED AND OPERATED INDUSTRIAL/BUSINESS PARK IN CONJUNCTION WITH PICKENS COUNTY, SUCH INDUSTRIAL/BUSINESS PARK TO BE, AT THE TIME OF ITS INITIAL DEVELOPMENT, GEOGRAPHICALLY LOCATED IN PICKENS COUNTY AND TO INCLUDE CERTAIN PROPERTY NOW OR TO BE OWNED BY A COMPANY KNOWN TO THE COUNTY AT THIS TIME AS "PROJECT EXODUS" OR ITS ASSIGNEE, AND ESTABLISHED PURSUANT TO SOUTH CAROLINA CODE OF LAWS 1976, SECTION 4-1-170 ET SEQ., AS AMENDED; TO PROVIDE FOR A WRITTEN AGREEMENT WITH PICKENS COUNTY PROVIDING FOR THE EXPENSES OF THE PARK, THE PERCENTAGE OF REVENUE ALLOCATION, AND THE DISTRIBUTION OF FEES IN LIEU OF AD VALOREM TAX; AND MATTERS RELATED THERETO.

WHEREAS, Pickens County ("Pickens County") and Oconee County ("Oconee County") each a "County" and together the "Counties," are authorized under Article VIII, Section 13 of the South Carolina Constitution and Chapter 1 of Title 4, Code of Laws of South Carolina 1978, as amended (the "Act") to jointly develop an industrial or business park within the geographical boundaries of one or more of the member counties; and

WHEREAS, a company known to the Counties at this time as "Project Exodus" (the "Company") has requested that Pickens County assist the Company with respect to its economic development project in Pickens County (the "Project"), in order to facilitate certain incentives offered to the Company by the County, by placing the Project in a joint county industrial and/or business park (the "Park") pursuant to Section 4-1-170 of the Act by and through a joint industrial and business park agreement with respect to the Park with Oconee County (the "Park Agreement"); and

WHEREAS, Pickens County has asked that Oconee County, by and through the Oconee County Council, enter into the Park Agreement and to cause the Project property described on Exhibit A attached hereto to be included in the Park; and

NOW, THEREFORE, BE IT ORDAINED BY THE OCONEE COUNTY COUNCIL:

SECTION I. Pursuant to the Act, Oconee County is hereby authorized to execute and deliver a written agreement to develop jointly an industrial and business park (the "Park") with Pickens County. The form, terms and provisions of the Park Agreement presented at this meeting and filed with the Clerk of the County Council be and they are hereby approved and all of the terms, provisions and conditions thereof are hereby incorporated herein by reference as if

the Park Agreement were set out in this Ordinance in its entirety. The Chairman of County Council and the Clerk to County Council be and they are authorized, empowered and directed to execute, acknowledge and deliver the Park Agreement to Pickens County in the name and on behalf of Oconee County. The Park Agreement is to be in substantially the form now before the meeting and hereby approved, or with such minor changes therein as shall be approved by the officials of Oconee County executing the same, their execution thereof to constitute conclusive evidence of their approval of any and all changes or revisions therein from the form of the Park Agreement now before the meeting; and as shall not be materially adverse to Oconee County.

SECTION II. The premises of the Park is to be located initially within the boundaries of Pickens County; however, premises may be added within Oconee County in accordance with the Park Agreement and the provisions of the Act.

SECTION III. To the extent permitted under South Carolina law, the maximum tax credits allowable by Section 12-6-3360 of the Code of Laws of South Carolina, 1976, as amended or any successor statute, will apply to any business enterprise locating in the Park.

SECTION IV. Any business enterprise locating in the Park shall pay a fee-in-lieu of *ad valorem* taxes as provided for in the Park Agreement, Article VIII Section 13 of the South Carolina Constitution and the Act. Payments shall be made by a business or industrial enterprise on or before the due date for taxes for a particular year. Penalties for late payment will be at the same rate and at the same times as for late tax payment. Any late payment beyond said date will accrue interest at the rate of statutory judgment interest. Oconee County, acting by and through the Oconee County Tax Collector, shall maintain all liens and rights to foreclose upon liens provided for counties in the collection of *ad valorem* taxes for Park properties located within Oconee County.

SECTION V. The user fee paid in lieu of *ad valorem* taxes shall be paid to the county treasurer for the County in which the Park property is located. That portion of the fees from the Park properties located in Oconee County allocated pursuant to the Park Agreement to Pickens County shall be paid by the Oconee County Treasurer to the Pickens County Treasurer within fifteen (15) business days following the end of the calendar quarter of receipt for distribution to the Pickens County Taxing Entities in accordance with the Park Agreement.

SECTION VI. The administration, development, promotion, and operation of the various portions of the Park shall be the responsibility of the respective County in which each such portion of the Park is located. Provided, that to the extent any Park property is owned by a private developer, the developer may be responsible for development expenses set forth in the Park Agreement.

SECTION VII. In order to avoid any conflict of laws for ordinances between the Counties, the regulations or laws applicable to the various portions of the Park shall be those of the County in which such portion of the Park is located. Nothing herein shall be taken to supersede any state or federal law for regulation.

SECTION VIII. The Oconee County Sheriff's Department will have jurisdiction to make arrests and exercise all authority and power within the portions of the Park located within

Oconee County. Fire, sewer, water and EMS service will be provided by the service district or other political unit within whose jurisdiction the various portions of the Park are located.

SECTION IX. Should any section of this Ordinance be, for any reason, held void or invalid by any court or regulatory body of competent jurisdiction, it shall not affect the validity of any other section hereof which is not itself void or invalid.

SECTION X. The Park Agreement may not be terminated except by concurrent ordinances of Pickens County Council and Oconee County Council.

SECTION XI. This Ordinance shall be effective after third and final reading.

[Remainder of Page Left Blank]

Ordained this _____ day of _____, 2017

OCONEE COUNTY, SOUTH CAROLINA

By:_____
Edda Cammick, Chairwoman of County Council
Oconee County, South Carolina

(SEAL)

ATTEST:

By:_____
Katie Smith, Clerk to County Council
Oconee County, South Carolina

First Reading: July 18, 2017
Second Reading: August 15, 2017
Third Reading: _____ _____, 2017
Public Hearing: _____ _____, 2017

STATE OF SOUTH CAROLINA	)	
	)	AGREEMENT FOR THE DEVELOPMENT
COUNTY OF OCONEE	)	OF A JOINT-COUNTY INDUSTRIAL
COUNTY OF PICKENS	)	AND BUSINESS PARK

THIS AGREEMENT (the "Agreement") is made and entered into as of this _____ day of _____, 2017, by and between the County of Pickens, State of South Carolina ("***Pickens County***") and the County of Oconee, State of South Carolina ("***Oconee County***") for the purpose of establishing and developing a joint-county industrial and business park.

W I T N E S S E T H:

WHEREAS, Pickens County and Oconee County (individually, a "***County***," and together, the "***Counties***") are bodies politic and corporate and political subdivisions of the State of South Carolina (the "***State***") and are each authorized and empowered by the provisions of Section 13 of Article VIII of the South Carolina Constitution and Section 4-1-170 of the South Carolina Code of Laws of 1976, as amended, (the "***Code of Laws***") to establish and develop a joint-county industrial and business park with one or more other counties within the geographical boundaries of one or more of such counties in order to promote economic development and provide additional employment opportunities within the State; and

WHEREAS, the Counties are contiguous counties which, pursuant to Ordinance No. _____, enacted by Pickens County Council on August __, 2017, and Ordinance No. 2017-___ enacted by Oconee County Council on August __, 2017, have each determined that, consistent with the foregoing purposes, there should be developed in Pickens County and Oconee County a Joint-County Industrial and Business Park (the "***Park***"), to be located upon property more particularly described in Exhibit A (Pickens) and Exhibit B (Oconee) hereto; and

WHEREAS, as a consequence of the establishment of the Park, Section 13 of Article VIII of the South Carolina Constitution provides that all property having a situs within the Park shall be exempt from all *ad valorem* taxation, but that the owners or lessees of any property situated in the Park shall be required to pay an amount equal to the property taxes or other in-lieu-of payments that would have been due and payable except for the exemption provided therein; and

WHEREAS, the Counties have, as required by Section 4-1-170 of the Code of Laws agreed as to the rights and obligations of each with regard to all expenses and management relating to the Park, the manner by which revenue generated by the Park will be allocated, and the manner in which revenue will be distributed to each of the taxing entities located within the Counties.

NOW, THEREFORE, for and in consideration of the premises and mutual promises contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties do hereby agree as follows:

1. Statutory Authority; Binding Effect. This Agreement is entered into under the authority granted to the Counties pursuant to Section 13 of Article VIII of the South Carolina Constitution and Section 4-1-170. This Agreement shall serve as the written agreement specified

in Section 4-1-170 and sets forth the entire agreement between the Counties and is intended to be binding on the Counties, their successors and assigns.

2. Location of the Park.

(a) As of the original execution and delivery of this Agreement, the Park initially consists of property located in Pickens County, as more particularly described on Exhibit A (Pickens) attached hereto (the "***Property***"), which is now or will be owned and/or operated by a company known to the Counties at this time as Project Exodus (the "***Project***"). It is specifically recognized and agreed that the Park may from time to time consist of non-contiguous properties within each County. The boundaries of the Park may be enlarged or diminished from time to time as authorized by resolutions of the county councils of the Counties provided that in so enlarging or diminishing such boundaries, the Park shall consist of the Property as so enlarged or diminished.

(b) In the event that the Counties determine by duly adopted resolutions of their respective county councils to enlarge or diminish the boundaries of the Park, this Agreement shall be deemed to have been amended as of the date and time at which such resolutions are adopted, and there shall be attached hereto a revised Exhibit A (Pickens) or a revised Exhibit B (Oconee) which shall contain a legal description of the boundaries of the Park within Oconee County or Pickens County, as the case may be, as enlarged or diminished, together with a copy of the resolutions of the Oconee County Council and the Pickens County Council pursuant to which such enlargement or diminution was authorized.

3. Fee in Lieu of Taxes. In accordance with Section 13 of Article VIII of the South Carolina Constitution, any and all real and personal property located in the Park whether or not titled in the name of either County shall be exempt from *ad valorem* taxation; provided, however, the owners or lessees of any property situated in the Park shall hereby be required to pay an amount equal to the *ad valorem* property taxes or other in-lieu-of payments that would have been due and payable if the property were not located within the Park, such in-lieu-of payments to be due and payable at the same time as *ad valorem* taxes are due.

4. Allocation of Expenses. Pickens County and Oconee County shall bear expenses incurred in connection with the Park, including, but not limited to, expenses relating to the planning, site preparation, development, construction, infrastructure, operation, maintenance, advertising and promotion of the Park, or the recruitment of industries, in the following proportions:

If the property is located in the portion of the Park within Pickens County:

A. Pickens County - 100%
B. Oconee County - 0%

If the property is located in the portion of the Park within Oconee County:

A. Pickens County - 0%
B. Oconee County - 100%

5. Allocation of Revenues. Pickens County and Oconee County shall receive an allocation of all revenues generated by the Park property through payment of fees-in-lieu of *ad valorem* property taxes or from any other source directly related to the Park in the following proportions:

If the property is located in the portion of the Park within Pickens County:

A. Pickens County - 99%
B. Oconee County - 1%

If the property is located in the portion of the Park within Oconee County:

A. Pickens County - 1%
B. Oconee County - 99%

With respect to such fees generated from properties located in the Pickens County portion of the Park, that portion of such fees allocated to Oconee County shall thereafter be paid by the Treasurer of Pickens County to the Treasurer of Oconee County within fifteen (15) business days following the end of the calendar quarter of receipt for distribution. With respect to such fees generated from properties located in the Oconee County portion of the Park, that portion of such fees allocated to Pickens County shall thereafter be paid by the Treasurer of Oconee County to the Treasurer of Pickens County within fifteen (15) business days following the end of the calendar quarter of receipt for distribution.

6. Issuance of Bonds. The Counties may issue joint development bonds to fund and/or defray the expenses incurred in the development of the Park and shall have the power to enter jointly into leases and other contracts which are necessary or desirable for the development of the Park.

7. Allocation of Revenue Within Each County.

(a) Any and all revenues derived from the Park other than in respect of payment in-lieu-of *ad valorem* property taxes shall be distributed directly to Pickens County and Oconee County according to the proportions established in Paragraph 5, respectively, and shall and may be expended in any manner deemed appropriate by the County Council of each such County.

(b) Any and all revenues generated by the Park with respect to payments in-lieu-of *ad valorem* property taxes shall be distributed to the Counties according to the proportions established by Paragraph 5, respectively. All such revenue allocable to a County shall be distributed within that County to the entities which levy taxes or have taxes levied on their behalf in such County (herein respectively referred to as the "***Pickens County Taxing Entities***" and the "***Oconee County Taxing Entities***") in accordance with the one or more ordinances enacted or to be enacted by the County Council of each of the Counties (including the respective ordinances of the Counties which authorized the execution and delivery of this Agreement), and to no others.

8. Fees in Lieu of Ad Valorem Taxes and Special Source Revenue Credits. It is hereby agreed that the entry by Pickens County or Oconee County into any one or more fee in lieu of *ad valorem* tax agreements pursuant to Title 4 or Title 12 of the Code of Laws, or any successor or comparable statutes ("***Negotiated FILOT Agreements***"), or special source revenue credit agreements pursuant to Sections 4-1-170 and 4-1-175 thereof, Section 4-29-68 of the Code of Laws and Article VIII, Section 13 of the South Carolina Constitution, or any successor or comparable statutes or constitutional provisions ("***SSRC Agreements***"), with respect to Park properties located in the portion of the Park within either of the Counties, and the terms of such Negotiated FILOT Agreements and SSRC Agreements, shall be at the sole discretion of the County in which the Park property is located.

9. Assessed Valuation. In accordance with Section 4-1-170 of the Code of Laws, for the purpose of calculating the bonded indebtedness limitation and for the purpose of computing the index of tax paying ability of each County pursuant to Section 59-20-20(3) Code of Laws, allocation of the assessed value of all property located within the Park to each County and to each of the Pickens County Taxing Entities and Oconee County Taxing Entities, respectively, within each County shall be identical to the allocation of revenue distributed to each County in accordance with Paragraphs 5 and 7 above.

10. Applicable Ordinances and Regulations. Any applicable ordinances and regulations of Pickens County including zoning, health and safety, and building code requirements shall apply to the Park properties located in the portion of the Park within Pickens County, unless any such property is within the boundaries of a municipality in which case, the municipality's applicable ordinances and regulations shall apply. Any applicable ordinances and regulations of Oconee County including zoning, health and safety, and building code requirements shall apply to the Park properties located in the portion of the Park within Oconee County, unless any such property is within the boundaries of a municipality in which case, the municipality's applicable ordinances and regulations shall apply.

11. Law Enforcement Jurisdiction. Jurisdiction to make arrests and exercise all authority and power within the boundaries of the Park properties located within the portion of the Park in Pickens County is vested with the Sheriff's Department of Pickens County. Jurisdiction to make arrests and exercise all authority and power within the boundaries of the Park properties located within the portion of the Park in Oconee County is vested with the Sheriff's Department of Oconee County. If any of the Park properties located in either Pickens County or Oconee County are within the boundaries of a municipality, then jurisdiction to make arrests and exercise law enforcement jurisdiction is vested with the law enforcement officials of the municipality.

12. Governing Law. This Agreement has been entered into in the State of South Carolina and shall be governed by, and construed in accordance with, South Carolina law.

13. Severability. In the event and to the extent (and only to the extent) that any, or any part of, provision of this Agreement shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable the remainder of that provision or any other provision or part of a provision of this Agreement, all of which are hereby deemed severable.

14. Counterpart Execution. This Agreement may be executed in multiple counterparts.

15. Term; Termination. This Agreement shall extend for a term through December 31, 20___, or such later date as shall be specified in any amendment hereto. Notwithstanding the foregoing provisions of this Agreement or any other provision in this Agreement to the contrary, this Agreement shall not expire and may not be terminated to the extent Pickens County or Oconee County has outstanding, contractual commitments, covenants or agreements to any owner or lessee of Park property, including, but not limited to, the Project, as any agreement containing such commitments or covenants may be amended, modified or supplemented from time to time, or other incentives requiring inclusion of property of such owner or lessee within the boundaries of a joint county industrial or business park created pursuant to Article VIII, Section 13(D) of the South Carolina Constitution and Title 4, Chapter 1 of the Code, unless the county in which such property is located shall first obtain (i) the consent in writing of such owner or lessee and (ii) include the property of such owner or lessee as part of another joint county industrial or business park created pursuant Article VIII, Section 13(D) of the South Carolina Constitution and Title 4, Chapter 1 of the Code, which inclusion is effective as of the termination of this Agreement.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, Oconee County and Pickens County have caused this Agreement to be duly executed by their duly authorized officials as of the day and year first above written.

PICKENS COUNTY, SOUTH CAROLINA

By:_____
Roy Costner, Chairman of County Council
Pickens County, South Carolina

(SEAL)

ATTEST:

By:_____
Crystal Alexander, Clerk to County Council
Pickens County, South Carolina

OCONEE COUNTY, SOUTH CAROLINA

By:_____
Edda Cammick, Chairwoman of County Council
Oconee County, South Carolina

(SEAL)

ATTEST:

By:_____
Katie Smith, Clerk to County Council
Oconee County, South Carolina

EXHIBIT A (PICKENS)

Pickens County Park Properties

Real property described as having tax parcel number 4087-12-97-7380

EXHIBIT B (OCONEE)

Oconee County Park Properties

None

AGENDA ITEM SUMMARY
OCONEE COUNTY, SC

COUNCIL MEETING DATE: August 15, 2017
COUNCIL MEETING TIME: 6:00 p.m.

ITEM TITLE [Brief Statement]:

First Reading of Ordinance 2017-20 "AN ORDINANCE AUTHORIZING THE EXECUTION AND DELIVERY OF A REAL PROPERTY LEASE AGREEMENT BETWEEN OCONEE COUNTY AS LESSOR AND THE FOOTHILLS ALLIANCE AS LESSEE; AND OTHER MATTERS RELATED THERETO."

BACKGROUND DESCRIPTION:

Ordinance 2017-20 will authorize the County Administrator to execute and deliver a Real Property Lease Agreement between Oconee County as Lessor and The Foothills Alliance as Lessee in relation to the certain County-owned property located at 102 Lura Lane, Walhalla, South Carolina. The "Lease Premises" will be used for various programs centered around providing support to those impacted by physical and/or psychological abuse and trauma.

SPECIAL CONSIDERATIONS OR CONCERNS [only if applicable]:

None

FINANCIAL IMPACT [Brief Statement]:

Check Here if Item Previously approved in the Budget.

Approved by: _____ **Finance**

COMPLETE THIS PORTION FOR ALL GRANT REQUESTS:

Are Matching Funds Available: / No

If yes, who is matching and how much:

Approved by: _____ **Grants**

ATTACHMENTS

None

STAFF RECOMMENDATION [Brief Statement]:

It is staff's recommendation that Council take first reading of Ordinance 2017-20.

Council has directed that they receive their agenda packages a week prior to each Council meeting, therefore, Agenda Items Summaries must be submitted to the Administrator for his review/approval no later than 12 days prior to each Council meeting. It is the Department Head / Elected Officials responsibility to ensure that all approvals are obtained prior to submission to the Administrator for inclusion on an agenda.

A calendar with due dates marked may be obtained from the Clerk to Council.

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

ORDINANCE 2017-20

AN ORDINANCE AUTHORIZING THE EXECUTION AND DELIVERY OF A REAL PROPERTY LEASE AGREEMENT BETWEEN OCONEE COUNTY AS LESSOR AND THE FOOTHILLS ALLIANCE AS LESSEE; AND OTHER MATTERS RELATED THERETO.

WHEREAS, Oconee County, South Carolina (the "County") is a body politic and corporate and a political subdivision of the State of South Carolina and is authorized by the provisions of Title 4, Chapter 9 of the Code of Laws of South Carolina 1976, as amended, to lease real property and to make and execute contracts; and

WHEREAS, the County desires to execute and enter into a Real Property Lease Agreement (the "Lease") with The Foothills Alliance ("Lessee") in relation to certain real property, including all improvements thereon, located at 102 Lura Lane, Walhalla, South Carolina, as shown on Exhibit "A" attached hereto (the "Premises"); and

WHEREAS, Lessee endeavors to use the Premises for various programs centered around providing support to those impacted by physical and/or psychological abuse and trauma; and

WHEREAS, the Premises are suitable for the uses proposed by Lessee; and

WHEREAS, the Oconee County Council (the "Council") has reviewed the form of the Lease, attached hereto as Exhibit "B," and determined that it is in the best interest of the County and its residents and citizens for the County to execute and enter into the Lease, and the Council wishes to approve the same and to authorize the County Administrator to execute and deliver the Lease and all related agreements and documents necessary or incidental thereto.

NOW THEREFORE, be it ordained by Council in meeting duly assembled that:

Section 1. Lease Approved. The Lease is hereby approved, and the County Administrator is hereby authorized to execute and deliver the Lease in substantially the same form as Exhibit "B," attached hereto.

Section 2. Related Documents and Instruments; Future Acts. The County Administrator is hereby authorized to negotiate such documents and instruments which may be necessary or incidental to the Lease and to execute and deliver any such documents and instruments on behalf of the County.

Section 3. Severability. Should any term, provision, or content of this Ordinance be deemed unconstitutional or otherwise unenforceable by any court of competent jurisdiction, such determination shall have no effect on the remainder of this Ordinance.

Section 4. General Repeal. All ordinances, orders, resolutions, and actions of the Oconee County Council inconsistent herewith are, to the extent of such inconsistency only, hereby repealed, revoked, and superseded.

Section 5. Effective Date. This Ordinance shall become effective and be in full force and effect from and after public hearing and third reading in accordance with the Code of Ordinances of Oconee County, South Carolina.

ORDAINED in meeting, duly assembled, this _____ day of _____, 2017.

ATTEST:

_____	_____
Clerk to Oconee County Council	Edda Cammick
Katie Smith	Chair, Oconee County Council

First Reading: August 15, 2017
Second Reading: _____
Third Reading: _____
Public Hearing: _____

EXHIBIT A

See Attached

EXHIBIT B

To Be Provided

EXHIBIT B

REAL PROPERTY LEASE AGREEMENT

between

THE COUNTY OF OCONEE, SOUTH CAROLINA

as Lessor

and

THE FOOTHILLS ALLIANCE

as Lessee

REAL PROPERTY LEASE AGREEMENT

THIS REAL PROPERTY LEASE ("Lease") is made and entered into by **THE COUNTY OF OCONEE, SOUTH CAROLINA**, as lessor ("Lessor") and **THE FOOTHILLS ALLIANCE** as lessee ("Lessee"), dated as of _____, 2017 (the "Lease Commencement Date").

RECITALS:

WHEREAS, Lessor is the owner of that certain real property, including all improvements thereon, located at 102 Lura Lane, Walhalla, South Carolina, as shown and designated as on the Boundary Survey prepared by Stephen Edwards, PLS #19881, dated June 26, 2017, and recorded in Plat Book _____ at Page _____, records of Oconee County, said survey being attached hereto as Exhibit "A" (the "Premises"); and

WHEREAS, Lessor desires to lease to Lessee and Lessee desires to lease from Lessor the Premises; and

WHEREAS, Lessee desires to lease the Premises from Lessor for various programs centered around providing support to those impacted by physical and/or psychological abuse and trauma.

NOW, THEREFORE, in consideration of the mutual covenants and promises of the parties, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree that the foregoing recitals are true and correct and incorporated herein by this reference, and further agree as follows:

ARTICLE 1 - DEMISE OF PREMISES

Section 1.1. Premises. Lessor, for and in consideration of the rents, covenants, and conditions herein set forth, does hereby lease to Lessee, and Lessee does hereby lease from Lessor, the Premises, subject to all easements, restrictions, rights of way, and encroachments of record and subject to the terms, conditions, and provisions hereof.

Section 1.2. Quiet Enjoyment. Lessor covenants and agrees that Lessee, upon paying the rent herein provided and observing and keeping the covenants, conditions, and terms of this Lease on Lessee's part to be kept or performed, shall lawfully and quietly hold, occupy, and enjoy the Premises during the "Term" (as hereinafter defined) of this Lease without hindrance of Lessor or any person claiming under Lessor. Notwithstanding the foregoing, Lessee's rights established under this Lease are subject to Lessor's rights to use the Premises as provided herein. Lessor hereby retains the right to enter upon and inspect the Premises at reasonable times and upon reasonable notice; and, Lessor further reserves the right to enter upon the Premises, without prior notice, in the event of an emergency condition or situation, as reasonably determined by Lessor.

ARTICLE 2 - LEASE TERM

Section 2.1. Lease Term. The term of this Lease (the "Term") shall commence on the Lease Commencement Date and shall continue through the day immediately preceding the tenth (10^{th}) anniversary of the Lease Commencement Date, unless earlier terminated as provided herein.

Section 2.2. Reversion. At the expiration or earlier termination of this Lease, whether by default, eviction, or otherwise, all improvements/infrastructure existing upon the Premises shall, without compensation to Lessee or any other party, then become or remain, as the case may be, the sole property of Lessor or Lessor's designee, free and clear of all claims to or against them by Lessee or any third person attributable to Lessor or Lessee, and all claims, liens, security interests, and encumbrances, other than those claims that are attributable to any act or omission of Lessor or

created hereafter in accordance with the terms of this Lease. All alterations, improvements, additions, and utility installations which may be made on the Premises shall be the property of Lessor and shall remain upon and be surrendered with the Premises at the expiration or earlier termination of this Lease. Notwithstanding the foregoing, any machinery or equipment owned by Lessee or any sublessee, other than that which is permanently affixed to the Premises so that it cannot be removed without material damage to the Premises, shall remain the property of Lessee or any sublessee, as may be applicable, and may be removed; provided, however, that Lessee removes or causes its removal prior to the expiration of the Lease or prior to the effective date of termination of the Lease, whichever is applicable.

ARTICLE 3 - RENT, TAXES, AND UTILITIES

Section 3.1. Rent. In consideration for use of the Premises, Lessee shall pay Lessor the sum of ten dollars ($10.00) upon execution of the Lease as rent for the full Term of the Lease.

Section 3.2. Taxes. Lessee shall be responsible for any and all taxes, fees, assessments, and charges, if any, that are attributable to the Premises and the improvements and activities located thereon during the Term.

Section 3.3. Utilities. Lessee shall be responsible for all charges incurred for water, heat, gas, electricity, trash disposal, and any and all other utilities used by Lessee at Premises.

Section 3.4. No Security Deposit. No security deposit is required hereunder.

Section 3.5. Costs. It is the intent of the parties, except as otherwise provided in this Lease, that Lessee pay all costs, charges, insurance premiums, taxes, utilities, expenses, and assessments arising during the Term of every kind and nature incurred for, against, or in connection with the Premises.

ARTICLE 4 - USE OF PREMISES

Section 4.1. Permitted Uses. Lessor shall allow Lessee, its agents, employees, successors, assigns, and sublessees to use the Premises for various programs centered around providing investigation and support to those impacted by physical and/or psychological abuse and trauma, including child abuse prevention, education, and counseling; child advocacy; and sexual trauma services for both children and adults (collectively, the "Permitted Uses"). Lessee and its sublessees, successors, and assigns shall only use the Premises for the Permitted Uses unless written consent for any other purpose is given by the Lessor, which consent shall not be unreasonably withheld.

ARTICLE 5 – HAZARDOUS MATERIALS

Section 5.1. Throughout the Term, Lessee and Lessee's employees, agents, sublessees, invitees, licensees, and contractors shall not cause, permit, or allow any substances, chemicals, materials, or pollutants (whether solid, liquid, or gaseous) deemed to be toxic or hazardous or the manufacture, storage, transport, or disposal of which is regulated, governed, restricted, or prohibited by any federal, state, or local agency or authority, or under any federal, state, or local law, ordinance, rule, or regulation related to the environment, health, or safety (collectively, "Environmental Laws"), including, without limitation, any oil, gasoline, petroleum, petroleum by-products, hazardous substances, toxic substances, hazardous waste, asbestos, or asbestos containing materials (collectively, "Hazardous Materials"), to be handled, placed, stored, dumped, released, manufactured, used, transported, or located on, in, under, or about the Premises. Notwithstanding the foregoing, Lessee shall not be prohibited from handling, placing, storing,

using and transporting Hazardous Materials that are required to be used by Lessee consistent with the Permitted Uses, so long as such materials are handled, used, stored and transported in accordance with applicable laws and regulations.

Section 5.2. Lessee shall give Lessor immediate written notice of any problem, spill, discharge, threatened discharge, or discovery, or claim thereof, of any Hazardous Materials on or about the Premises.

ARTICLE 6 – IMPROVEMENTS

Section 6.1. Improvements and Alterations. Lessee shall not undertake to materially improve, alter, or change the exterior or interior of the Premises without prior written consent of Lessor. All alterations, additions, and improvements made in or to the Premises shall, unless otherwise provided by written agreement, be the property of Lessor and remain and be surrendered with the Premises, and Lessee waives all claim for damages to or loss of any property belonging to the Lessee that may be left in or upon the Premises, or which is attached thereto and/or becomes a fixture.

ARTICLE 7 – MAINTENANCE

Section 7.1. Maintenance, Repairs, and Upkeep Provided by Lessee. Lessee shall be responsible for all necessary repairs and maintenance to the exterior and interior of the Premises, including all structural, mechanical, electrical, plumbing, and building envelope components of the Premises. Lessee shall ensure that the interior and exterior of the Premises, including all landscaping, are kept in clean and sanitary condition and are neat and orderly in appearance. Lessee shall be responsible for any abuse or destruction of the Premises not due to ordinary wear and tear.

Section 7.2. As Is Condition of the Premises. The Premises is presented to Lessee by Lessor without representation or warranty as to the condition of the Premises in general, or as to Lessee's contemplated uses specifically, and Lessee is accepting the Premises as is, with all faults.

ARTICLE 8 – LIENS

Section 8.1. Prohibition of Liens. Lessee shall not suffer, create, or permit any mechanic's liens or other liens to be filed against the Premises, or any part thereof, by reason of any work, labor, services, or materials supplied or claimed to have been supplied to Lessee.

ARTICLE 9 – CONDEMNATION

Section 9.1. Condemnation. In the event the entire Premises shall be appropriated or taken under the power of eminent domain by any public or quasi-public authority, this Lease shall terminate and expire as of the date of such taking or conveyance made in lieu thereof and Lessor and Lessee shall thereupon be released from any further duties or obligations hereunder. If a portion of the Premises is taken, or conveyance made in lieu thereof, then Rent shall be equitably apportioned according to the portion of Premises so taken, and Lessee shall, at its own expense, restore the remaining portion of Premises to operate as a Permitted Use. All compensation awarded or paid upon such a total or partial taking of Premises shall belong to and be the property of Lessor without any participation by Lessee; provided, however, Lessee shall have the right to pursue a

collateral action seeking recovery of its costs and expenses associated with the termination of the Lease.

ARTICLE 10 - ASSIGNMENT AND SUBLETTING

Section 10.1. Limitation on Assignment and Subletting. Lessee may not sell, assign, sublease, convey, or transfer all or substantially all of Lessee's interest in this Lease and the leasehold estate created hereby, without the prior written consent of Lessor, which consent will not be unreasonably withheld or delayed. Any assignment, sublease, conveyance, or transfer of Lessee's interest in this Lease shall be subject to compliance with the provisions of this Lease. In the event of an assignment, sale, or transfer of all, or substantially all, of Lessee's interest in this Lease, any such assignee, buyer, or transferee shall be required to assume in writing all of the Lessee's obligations and shall be bound by all of the terms of this Lease.

ARTICLE 11 – INSURANCE AND INDEMNITY

Section 11.1. Comprehensive Liability Insurance. Lessee shall maintain a policy of Comprehensive General Liability (CGL) insurance, including public liability, bodily injury, and property damage, written by a company licensed to do business in the State of South Carolina, covering the use and activity contemplated by this Lease with combined single limits of no less than One Million and 00/100 ($1,000,000) Dollars per occurrence and One Million and 00/100 ($1,000,000) Dollars aggregate, with Two Million and 00/100 ($2,000,000) Dollars umbrella coverage, by the terms of which Lessor and Lessee, and any holder of a mortgage on the Premises or Lessee's leasehold interest, are named as insureds and are indemnified against liability for damage or injury to property or persons (including death) entering upon or using the Premises, or any structure thereon or any part thereof. Such insurance policy or policies shall be stated to be primary and noncontributing with any insurance which may be carried by Lessor. A certificate of said insurance, together with proof of payment of the premium thereof shall be delivered to Lessor, and renewal certificates and proof of payment of premium therefor shall be delivered to Lessor not less than fifteen (15) days prior to the renewal date of any such insurance policies during the Term. Such insurance shall be cancelable only after thirty (30) days' prior written notice to Lessor and Lessee, and any holder of a mortgage on the Premises. In the event Lessee fails to timely pay any premium when due, Lessor shall be authorized to do so, and may charge all costs and expenses thereof, including the premium, to Lessee, to be paid by Lessee as additional rent hereunder.

Section 11.2. Fire and Property Insurance. Lessor shall, at its cost and expense and at all times during the Term, maintain in force a policy of insurance insuring the Premises and any improvements/infrastructure thereon against loss or damage by such perils as are covered under its policy with the South Carolina Insurance Reserve Fund.

Section 11.3. Waiver of Subrogation. Lessee and all parties claiming under it releases and discharges Lessor from all claims and liabilities arising from or caused by any casualty or hazard covered or required hereunder to be covered in whole or in part by the casualty and liability insurance to be carried on the Premises or in connection with any improvements/infrastructure on or activities conducted on the Premises, and waives any right of subrogation which might otherwise exist in or accrue to any person on account thereof, and shall evidence such waiver by endorsement to the required insurance policies, provided that such release shall not operate in any case where the effect is to invalidate or increase the cost of such insurance coverage (provided that in the case of

increased cost, Lessor shall have the right, within thirty (30) days following written notice, to pay such increased cost, thereby keeping such release and waiver in full force and effect).

Section 11.4. Additional Insurance: Lessor will not be responsible for any loss to personal property of Lessee, or Lessee's, guests, invitees, licensees, sublessees, or others entering the Premises, due to fire, theft, or any other damages, including any acts of nature. Lessor will maintain coverage as indicated in Section 11.2, but Lessee understands that such insurance does not cover personal property due to loss and that it is the Lessee's responsibility to obtain insurance to cover such property.

Section 11.5. Indemnification. Lessee hereby agrees to indemnify, protect, defend, and hold Lessor and its officers, Council members, employees, agents, attorneys, successors, and assigns harmless from and against any and all losses, damages, actions, fines, penalties, demands, damages, liability, and expense, including attorneys' fees and costs through litigation and all appeals, in connection with the loss of life, personal injury, and damage to property, resulting (in whole or in part) from the negligence or intentional misconduct of Lessee, its employees, agents, or sublessees and arising from or out of (i) any occurrence in, upon, at or about the Premises and/or (ii) the occupancy, use, or construction upon and maintenance of the Premises. Nothing contained herein shall be construed to make Lessee liable for any injury or loss primarily caused by the gross negligence or willful misconduct of Lessor or any agent or employee of Lessor.

Section 11.6. Insurance Requirements for Sublessees. Lessee shall require its sublessees to carry customary insurance required of lessees in similar properties and activities. Lessee shall require its sublessees to include Lessor and Lessee as additional insureds on their commercial general liability policies (or equivalent policies). Lessee shall obtain a waiver of subrogation endorsement in all policies in favor of Lessor and Lessee.

ARTICLE 12 - DAMAGE AND DESTRUCTION

Section 12.1. Damage to or Destruction of Project - Insurance. In the event the Premises is damaged or destroyed, in whole or in part, so as to make it unusable for the purposes intended, to the extent insurance is available and it is commercially reasonable to do so, Lessor agrees to rebuild the Premises in substantially the same form as it existed at the time of the damage or destruction, within one year from the date of damage or destruction.

ARTICLE 13 - DEFAULTS AND REMEDIES

Section 13.1. Defaults. Each of the following events shall be a default by Lessee and a breach of this Lease and constitute an "Event of Default":

(a). Abandonment. Abandonment of the Premises, or the improvements/infrastructure now or hereafter constructed thereon, where such abandonment continues for a period of one hundred and twenty (120) consecutive days. Such abandonment shall not include any time that the Premises are vacated due to a casualty.

(b). Attachment or Other Levy. The subjection of any right or interest of Lessee in the Premises to attachment, execution, or other levy, or to seizure under legal process, if not released within sixty (60) days, after written notice of same.

(c). Default of Performance Under this Lease. The failure of Lessee to observe or perform

any of its material covenants, conditions, or agreements under this Lease; or the material breach of any warranties or representations of Lessee under this Lease.

(d). Insolvency; Bankruptcy. An assignment by Lessee for the benefit of creditors, or the filing of a voluntary or involuntary petition by or against Lessee under any law for the purpose of adjudicating Lessee a bankrupt; or for extending time for payment, adjustment or satisfaction of Lessee's liabilities; or reorganization, dissolution, or arrangement on account of, or to prevent bankruptcy or insolvency; unless, in case of such that are involuntary on Lessee's part, the assignment, proceedings, and all consequent orders, adjudications, custodies and supervisions are dismissed, vacated, or terminated within sixty (60) days after the assignment, filing or other initial event.

Section 13.2. Notice and Right to Cure. Lessee shall have sixty (60) days to cure a default after written notice is given by Lessor to Lessee, specifying the nature of the default; provided, however, that if after exercise of due diligence and its best efforts to cure such default Lessee is unable to do so within the sixty (60) day period, then the cure period may be extended, upon written agreement by Lessor, for a such reasonable time as may be deemed necessary by Lessor to cure the default.

Section 13.3. Remedies. If any default by Lessee shall continue uncured by Lessee upon expiration of the applicable cure period, Lessor may exercise any one or all of the following remedies in addition to all other rights and remedies provided by law or equity, from time to time, to which Lessor may resort cumulatively or in the alternative:

(a). Termination of Lease in its Entirety. Lessor may, at Lessor's election, terminate this Lease upon thirty (30) days written notice to Lessee. Thereafter, all of Lessee's rights in the Premises and in and to all improvements/infrastructure located thereon shall terminate upon termination of this Lease. Promptly upon any such termination, Lessee shall surrender and vacate the Premises and any other improvements/infrastructure located thereon, and Lessor may re-enter and take possession of the Premises and all improvements/infrastructure located thereon. Termination under this paragraph shall not relieve Lessee from any claim for damages previously accrued, or then accruing, against Lessee.

(b). Re-entry Without Termination. Lessor may, at Lessor's election, re-enter the Premises and improvements/infrastructure located thereon, and without terminating this Lease, at any time, relet the Premises and improvements/infrastructure thereon, or any part(s) of them, for the account, and in the name of Lessee or otherwise, all upon rates and terms determined by Lessor, without hereby obligating Lessor to relet the Premises or make an effort to relet either or both of them in whole or in part, at any time. Any reletting may be for the remainder of the Term or for any longer or shorter period. Lessor shall have the further right, at Lessor's option, to make such reasonable and necessary alterations, repairs, replacements, and/or restorations which shall not operate or be construed to release Lessee from liability hereunder. No act by or on behalf of Lessor under this provision shall constitute a termination of this Lease unless Lessor gives Lessee written notice of termination.

(c). Lessee's Personal Property. Lessor may, at Lessor's election, use Lessee's personal property and trade fixtures or any of such property and fixtures left on the Premises after termination or expiration of this Lease without compensation and without liability for use or damage, or Lessor may store them for the account and at the cost of Lessee. The election of one remedy for any one item shall not foreclose an election of any other remedy for another item, or for the same item at a later time.

(d). Appointment of Receiver. Lessor may, if Lessor elects to file suit to enforce this Lease

and/or protect its rights hereunder, in addition to the other remedies provided in this Lease and by law, have the appointment of a receiver of the Premises and the improvements/infrastructure thereon.

Section 13.4. Remedies Cumulative. Suit or suits for the recovery of such damages, or any installments thereof, may be brought by Lessor from time to time at its election, and nothing contained herein shall be deemed to require Lessor to postpone suit until the date when the term of this Lease would have expired nor limit or preclude recovery by Lessor against Lessee of any sums or damages which, in addition to the damages particularly provided above, Lessor may lawfully be entitled by reason of any default hereunder on the part of Lessee. All of the remedies hereinbefore given to Lessor and all rights and remedies given to it at law and in equity shall be cumulative and concurrent.

Section 13.5. Lessee's Liability After Default. If Lessee shall default in the performance of any of its obligations under this Lease, Lessor, without thereby waiving such default, may (but shall not be obligated to) perform the same for the account and at the expense of Lessee, without notice in a case of emergency, and in any other case only if such default continues after the expiration of the curing period applicable under this Lease. Any reasonable expenses incurred by Lessor in connection with any such performance, and all reasonable attorneys' fees (subject to §15-77-300 of the South Carolina Code of Laws, 1976, *as amended*), including appellate, bankruptcy, and post-judgment proceedings involved in collecting or endeavoring to collect the rent or any additional rent or any part thereof or enforcing or endeavoring to enforce any rights against Lessee or Lessee's obligations hereunder, shall be due and payable upon Lessor's submission of an invoice therefor. All sums advanced by Lessor on account of Lessee under this Section, or pursuant to any other provision of this Lease, and all rent, if delinquent or not paid by Lessee and received by Lessor when due hereunder, shall bear interest at the rate of twelve percent (12%) per annum from the due date thereof until paid and the same shall be and constitute additional rent and be due and payable upon Lessor's demand therefor.

Section 13.6. Holdover. If Lessee remains in possession of the Premises or any part thereof after the expiration or earlier termination of this Lease, Lessee shall become a Lessee at sufferance. Notwithstanding that Lessor may allow Lessee to continue in possession after the expiration or earlier termination of this Lease, neither that nor the provisions of this Section shall constitute a waiver of any of Lessor's rights under this Section or this Lease.

ARTICLE 14 - SURRENDER AND REMOVAL

Section 14.1. Surrender of Possession. Upon the expiration of the Term or any earlier termination thereof, Lessee shall surrender to Lessor possession of the Premises and all improvements/infrastructure constructed located and installed thereon. If Lessee is not then in default under any of the covenants and conditions hereof, Lessee may remove, or cause to be removed, all personal property and equipment of Lessee, other than permanent fixtures, from the Premises prior to the expiration or effective date of termination of this Lease; thereafter all such personal property and equipment not removed shall belong to Lessor without the payment of any consideration.

Section 14.2. Lessee's Quitclaim. Upon the expiration of the Term, or any earlier termination of this Lease, Lessee agrees to execute, acknowledge, and deliver to Lessor, if requested by Lessor, a proper instrument in writing, releasing and quitclaiming to Lessor all right, title and interest of Lessee in and to the Premises and all improvements/infrastructure thereon.

ARTICLE 15 – GENERAL PROVISIONS

Section 15.1. Conditions and Covenants. All of the provisions of this Lease shall be deemed as running with the land, and construed to be "conditions" as well as "covenants" as though the words specifically expressing or imparting covenants and conditions were used in each separate provision.

Section 15.2. Survival. All representations and warranties of Lessee or Lessor under this Lease shall survive the expiration or sooner termination of this Lease for acts occurring prior to expiration or termination of this Lease.

Section 15.3. No Waiver of Breach. No failure by either Lessor or Lessee to insist upon the strict performance by the other of any covenant, agreement, term, or condition of this Lease, or to exercise any right or remedy consequent upon a breach thereof, shall constitute a waiver of any such breach or of such covenant, agreement, term, or condition. No waiver of any breach shall affect or alter this Lease, but each and every covenant, condition, agreement, and term of this Lease shall continue in full force and effect with respect to any other then existing or subsequent breach.

Section 15.4. Unavoidable Delay - Force Majeure. If either party shall be delayed or prevented from the performance of any act required by this Lease by reason of acts of God, strikes, lockouts, labor troubles, inability to procure materials, restrictive governmental laws or regulations, or other cause, without fault and beyond the reasonable control of the party obligated (financial inability excepted), performance of such act shall be excused for the period of the delay; and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay.

Section 15.5. Notices. Unless otherwise specifically provided in this Lease or by law, any and all notices or other communications required or permitted by this Lease or by law to be served on, given to, or delivered to any party to this Lease shall be writing and shall be deemed duly served, given, delivered and received when personally delivered (including confirmed overnight delivery service to the party to whom it is directed), or in lieu of such personal delivery, when three (3) business days have elapsed following deposit thereof in the United States mail, first-class postage prepaid, certified, return receipt requested, addressed to:

LESSOR:

Oconee County
415 South Pine Street
Walhalla, SC 29691
Attn: County Administrator

with a copy to:

Oconee County
415 South Pine Street
Walhalla, SC 29691
Attn: County Attorney

LESSEE:

Tracy Whitten Bowie
Foothills Alliance
216 E. Calhoun St.
Anderson, SC 29621

with a copy to:

Ginger Eaton
4007 Clemson Blvd.
Anderson, SC 29621.

Either party may change its address for the purpose of this paragraph by giving written notice of such change to the other party in the manner provided in this paragraph.

Section 15.6. Gender. The use herein of (1) any gender includes all others, and (2) the singular number includes the plural and vice-versa, whenever the context so requires.

Section 15.7. Captions. Captions in this Lease are inserted for convenience of reference only and do not define, describe, or limit the scope or the intent of this Lease or any of the terms hereof.

Section 15.8. Waiver; Amendment. No modification, waiver, amendment, discharge, or change of this Lease shall be valid unless the same is in writing and signed by the party against which the enforcement of such modification, waiver, amendment, discharge, or change is or may be sought.

Section 15.9. Attorney's Fees. If either party retains an attorney to enforce or interpret this Lease, the prevailing party shall be entitled to recover, in addition to all other items of recovery permitted by law, reasonable attorneys' fees and costs incurred through litigation, bankruptcy proceedings and all appeals. This provision is subject to §15-77-300 of the South Carolina Code of Laws, 1976, *as amended.*

Section 15.10. Time. Time is of the essence of each obligation of each party hereunder.

Section 15.11. Governing Law. This Lease shall be construed and enforced in accordance with the laws of the State of South Carolina, without regard to conflict of law principles.

Section 15.12. Binding Effect. Subject to any provision of this Lease that may prohibit or curtail assignment of any rights hereunder, this Lease shall bind and inure to the benefit of the respective heirs, assigns, personal representatives, and successors of the parties hereto.

Section 15.13. Execution of Other Instruments. Each party agrees that it shall, upon the other's request, take any and all steps, and execute, acknowledge and deliver to the other party any and all further instruments necessary or expedient to effectuate the purpose of this Lease.

Section 15.14. Severability. If any term, provision, covenant, or condition of this Lease is held by a court of competent jurisdiction to be invalid, void, or unenforceable or is otherwise challenged and determined to be invalid, illegal, or incapable of being enforced as a result of any rule of law or public policy issued by an administrative or judicial forum that is not subject to further appeal or is not actually appealed, the remainder of the provisions shall remain in full force and effect and shall in no way be affected, impaired, or invalidated. In such event or if an opinion of counsel is provided to the effect that this Lease is not so enforceable, the parties hereto shall negotiate in good faith to modify this Lease so as to effect the original intent of the parties as closely as possible and to comply with applicable law, regulations, or published governmental interpretations thereof, in an acceptable manner to the end that the transactions contemplated hereby are fulfilled to the extent possible.

Section 15.15. Counterparts. This Lease may be executed in one or more counterparts, each of which shall be deemed an original and when taken together will constitute one instrument.

Section 15.16. Estoppel Certificate. Either party shall execute, acknowledge, and deliver to the other party, within twenty (20) days after requested by the other party, a statement in writing certifying, if such is the case, that this Lease is unmodified and in full force and effect (or if there have been modifications that the same is in full force and effect as modified); the date of the commencement of this Lease; any alleged defaults and claims against the other party; and such other information as shall be reasonably requested.

Section 15.17. Memorandum of Lease. Lessor and Lessee shall execute and acknowledge a memorandum of this Lease for the purpose of recordation. The memorandum of this Lease shall be in the form attached hereto as Exhibit "B" and incorporated herein by reference.

Section 15.18. Dispute Resolution; Waiver of Trial by Jury. Any conflict, dispute or grievance (collectively, "Conflict") by and between Lessor and Lessee shall be submitted to mediation before initiating court proceedings. The mediator selected to conduct the mediation must be mutually

agreed upon by Lessor and Lessee. Unless the parties otherwise agree, the mediator must be certified in South Carolina state and federal courts and have experience in matters forming the basis of the Conflict. The site for the mediation shall be Oconee County, South Carolina, and the mediation hearing shall be held within thirty (30) days of the selection of the mediator, unless otherwise agreed. Each party shall bear its own expenses associated with the mediation and the parties shall split the fees and expenses of the mediator evenly. Failure to agree to the selection of a mediator or failure to resolve the Conflict through mediation will entitle the parties to pursue other methods of dispute resolution, including without limitation, litigation. Notwithstanding any other provision contained herein, nothing in this Agreement shall be construed as requiring either party to participate in mediation prior to initiating court proceedings in which a temporary restraining order or preliminary injunction is sought. In such situations, the parties shall conduct mediation within thirty (30) days after the hearing on such motions or within such other time as is prescribed by the Court.

LESSOR AND LESSEE MUTUALLY, EXPRESSLY, IRREVOCABLY, AND UNCONDITIONALLY WAIVE TRIAL BY JURY FOR ANY PROCEEDINGS ARISING OUT OF OR IN CONNECTION WITH THIS LEASE, OR ARISING OUT OF ANY CONDUCT OR COURSE OF DEALING OF THE PARTIES, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS OF ANY PERSONS. THIS WAIVER IS A MATERIAL INDUCEMENT OF LESSEE AND LESSOR TO ENTER INTO THIS LEASE.

SIGNATURE PAGE TO FOLLOW

IN WITNESS WHEREOF, this Lease has been executed on the respective dates set forth below.

IN THE PRESENCE OF:

LESSOR:

THE COUNTY OF OCONEE, SOUTH CAROLINA

_____

_____

By:_____
Name:_____
Title:_____

LESSEE:

THE FOOTHILLS ALLIANCE

_____

_____

By:_____
Name:_____
Title:_____

EXHIBIT A

PREMISES (SEE ATTACHED)

EXHIBIT B

MEMORANDUM OF LEASE

STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)

MEMORANDUM OF LEASE

THIS MEMORANDUM OF LEASE is made as of the ____ day of _____ 2017, between **THE COUNTY OF OCONEE, SOUTH CAROLINA**, hereinafter referred to as "Lessor" and **THE FOOTHILLS ALLIANCE**, hereinafter referred to as "Lessee."

1. Lessor and Lessee entered into a certain Lease Agreement, dated _____ (the "Lease Commencement Date").

2. The property demised under the Lease consists of certain land located in the County of Oconee, State of South Carolina, and more particularly shown on Exhibit "A," together with all improvements now or hereafter erected thereon.

3. The term of the Lease (the "Term") shall commence on the Lease Commencement Date. The last day of the Term shall be the day immediately preceding the tenth (10^{th}) anniversary of the Lease Commencement Date.

4. The Lease is on file at the offices of the County Administrator for the County of Oconee, South Carolina at 415 S. Pine Street Walhalla, South Carolina 29691.

5. All of the terms, conditions, provisions and covenants of the Lease are incorporated herein by reference as though set forth at length, and the Lease and this Memorandum of Lease shall be deemed to constitute a single document.

IN WITNESS WHEREOF, Lessor and Lessee have caused this Memorandum of Lease to be executed and delivered as of the day and year first above written.

IN THE PRESENCE OF:

LESSOR:

THE COUNTY OF OCONEE, SOUTH CAROLINA

_____ By:_____
Name:_____
_____ Title:_____

LESSEE:

THE FOOTHILLS ALLIANCE

_____ By:_____
Name:_____
_____ Title:_____

STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)

PROBATE

PERSONALLY appeared before me the undersigned witness and made oath that s/he saw the within named LESSOR by its duly authorized officer sign, seal and as its act and deed, deliver the within-written Memorandum of Lease for the uses and purposes therein mentioned and that s/he, with the other witness whose signature appears above witnessed the execution thereof.

SWORN to before me this _____
day of _____, 2017.

_____
Witness

_____
Notary Public of South Carolina
My commission expires: _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)

PROBATE

PERSONALLY appeared before me the undersigned witness and made oath that s/he saw the within named LESSEE by its duly authorized officer sign, seal and as the act and deed of LESSEE, deliver the within-written Memorandum of Lease for the uses and purposes therein mentioned and that s/he, with the other witness whose signature appears above witnessed the execution thereof.

SWORN to before me this _____
day of _____, 2017.

_____
Witness

_____
Notary Public of South Carolina
My commission expires: _____

EXHIBIT A
(TO MEMORANDUM OF LEASE)

LEASE PREMISES

BOUNDARY SURVEY FOR

OCONEE COUNTY

TOWN OF WALHALLA, OCONEE COUNTY, SOUTH CAROLINA

STEPHEN R. EDWARDS & ASSOCIATES, INC.
1432 W. MAIN ST. · WEST UNION, S.C. · 29696
(864) 718-1130

DATE: 06-26-2017 JOB NUMBER: 17-145

SCALE: 1"=60'

LOCATION MAP
no scale

SOUTH CAROLINA PROFESSIONAL ENGINEER
No. 19880
STEPHEN R. EDWARDS

SOUTH CAROLINA CERTIFICATE OF AUTHORIZATION
STEPHEN R. EDWARDS & ASSOC. INC.
NO. C02104

I HEREBY STATE TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF, THE SURVEY SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE MINIMUM STANDARDS MANUAL FOR THE PRACTICE OF LAND SURVEYING IN SOUTH CAROLINA, AND MEETS OR EXCEEDS THE REQUIREMENTS FOR A CLASS B SURVEY AS SPECIFIED THEREIN; ALSO THERE ARE NO VISIBLE ENCROACHMENTS, PROJECTIONS, OR SETBACKS AFFECTING THE PROPERTY OTHER THAN THOSE SHOWN.

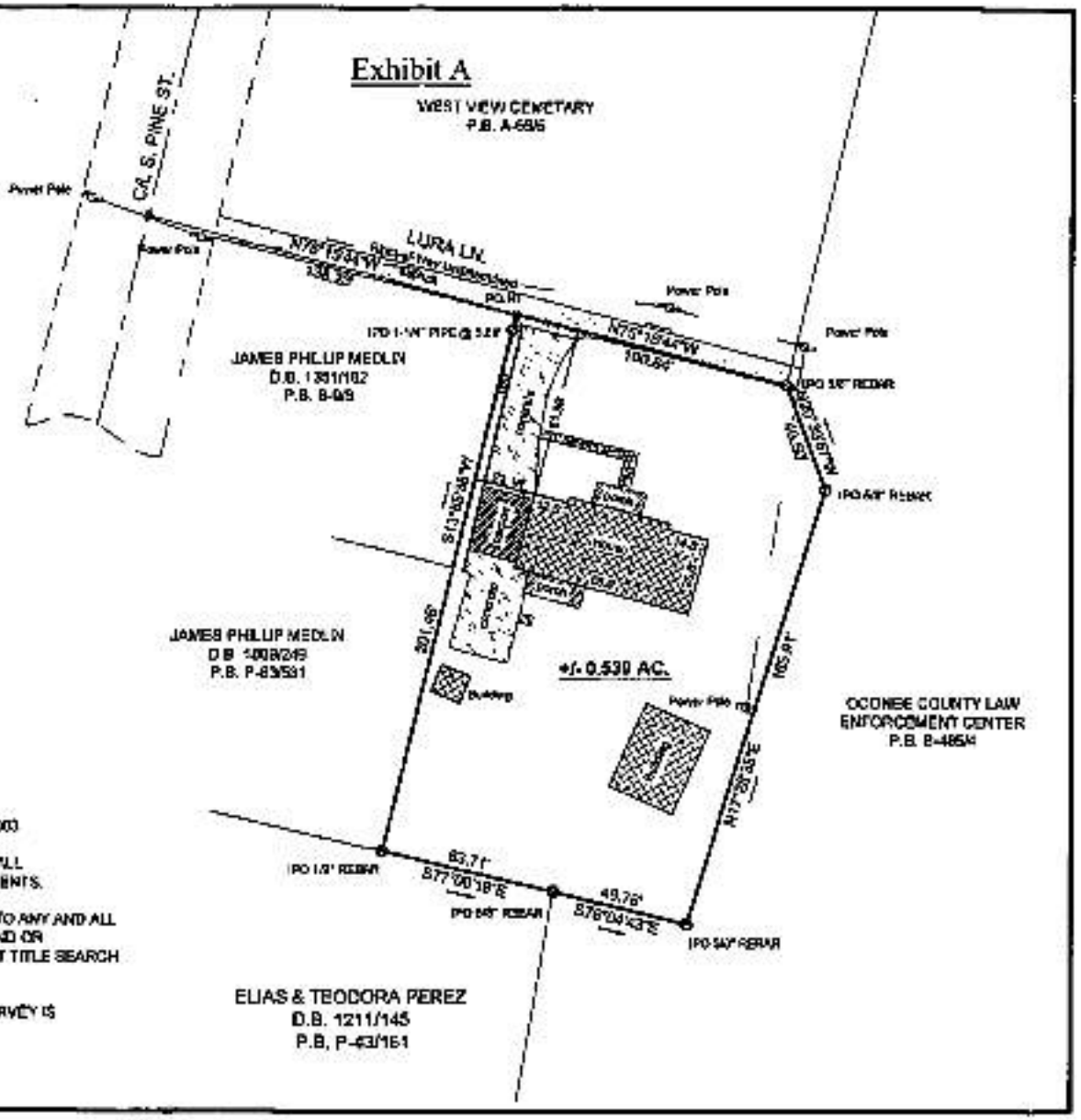
Stephen R. Edwards

STEPHEN R. EDWARDS P.L.S. NO. 19881

EXEMPTION FROM REVIEW PROCESS

THIS PLAT IS A RESURVEY OF AN EXISTING PARCEL OF RECORD WITH NO CHANGES TO EXISTING PROPERTY LINES.

Exhibit A



NOTES

1) REFERENCES
-D.B. 2010 PG 38
-P.B. B-147 PG. 5
-TAX MAP NUMBER: 500-19-01-003

2) ACREAGE SHOWN INCLUDES ALL RIGHT-OF-WAYS AND OR EASEMENTS.

3) THIS PROPERTY IS SUBJECT TO ANY AND ALL EASEMENTS, RIGHT-OF-WAYS AND OR RESTRICTIONS THAT A CURRENT TITLE SEARCH MAY DISCLOSE.

4) ANY WARRANTY FOR THIS SURVEY IS NON-TRANSFERABLE.

AGENDA ITEM SUMMARY
OCONEE COUNTY, SC

COUNCIL MEETING DATE: August 15, 2017
COUNCIL MEETING TIME: 6:00 pm

ITEM TITLE [Brief Statement]:

First Reading of Ordinance 2017-21: "AN ORDINANCE GRANTING CERTAIN EASEMENT RIGHTS TO DUKE ENERGY CAROLINAS, LLC FOR THE PURPOSE OF LOCATING AND MAINTAINING ELECTRIC AND/OR COMMUNICATION FACILITIES ON COUNTY-OWNED PROPERTY; AND OTHER MATTERS RELATED THERETO."

BACKGROUND DESCRIPTION:

Ordinance 2017-21 will authorize the County Administrator to execute an Easement Agreement with Duke Energy Carolinas, LLC ("DEC") for the purpose of installation and operation of electric/communication lines necessary for transmitting and distributing electrical energy and for communication purposes of DEC at 223 Kenneth Street, Walhalla, South Carolina.

SPECIAL CONSIDERATIONS OR CONCERNS [only if applicable]:

None

FINANCIAL IMPACT [Brief Statement]:

____ Check Here if Item Previously approved in the Budget. No additional information required.

Approved by : _____ **Finance**

COMPLETE THIS PORTION FOR ALL GRANT REQUESTS:

Are Matching Funds Available: Yes / No

If yes, who is matching and how much:

Approved by : _____ **Grants**

ATTACHMENTS

None

STAFF RECOMMENDATION [Brief Statement]:

It is staff's recommendation that Council take first reading of Ordinance 2017-21.

Council has directed that they receive their agenda packages a week prior to each Council meeting, therefore, Agenda Items Summaries must be submitted to the Administrator for his review/approval no later than 12 days prior to each Council meeting. It is the Department Head / Elected Officials responsibility to ensure that all approvals are obtained prior to submission to the Administrator for inclusion on an agenda.

A calendar with due dates marked may be obtained from the Clerk to Council.

STATE OF SOUTH CAROLINA
OCONEE COUNTY

ORDINANCE 2017-21

AN ORDINANCE GRANTING CERTAIN EASEMENT RIGHTS TO DUKE ENERGY CAROLINAS, LLC FOR THE PURPOSE OF LOCATING AND MAINTAINING ELECTRIC AND/OR COMMUNICATION FACILITIES ON COUNTY-OWNED PROPERTY; AND OTHER MATTERS RELATED THERETO.

WHEREAS, Oconee County, a body politic and corporate and a political subdivision of the State of South Carolina (the "County"), is the owner of a parcel of land located at 223 Kenneth Street, Walhalla, South Carolina, TMS: 500-24-01-001, containing approximately 9.47 acres ("County Property"); and

WHEREAS, Duke Energy Carolinas, LLC ("DEC") wishes to acquire from the County, and the County wishes to grant to DEC, certain easement rights for, generally and without limitation, the construction, operation, and maintenance of electric and/or communication facilities on the County Property; and

WHEREAS, the form, terms, and provisions of the easement as contained in the "Easement" agreement now before the Oconee County Council ("Council"), a copy of which is attached hereto as Exhibit "A," are acceptable to Council for the purpose of giving effect to the easement rights; and

WHEREAS, while the Easement is considered a "floating" easement, it will generally encompass an area being thirty (30) feet wide for the overhead portion of DEC facilities and twenty (20) feet wide for the underground portion of DEC facilities together with an area ten (10) feet wide on all sides of the foundation of any DEC enclosure/transformer, vault, or manhole, all as generally shown on the attached Exhibit "B"; and

WHEREAS, Section 4-9-30(2) of the Code of Laws of South Carolina authorizes the County to transfer or otherwise dispose of interests in real property.

NOW, THEREFORE, be it ordained by Council, in meeting duly assembled, that:

1. Council hereby approves the easement, subject to and in conformity with the provisions of the Easement agreement.

2. The Administrator of the County ("Administrator") shall be, and hereby is, authorized to execute and deliver the Easement agreement on behalf of the County in substantially the same form as attached hereto as Exhibit "A," or with such changes as are not materially adverse to the County and as the Administrator shall approve, upon the advice of legal counsel, such Administrator's approval to be deemed given by his execution of the Easement agreement.

3. The Administrator shall be, and hereby is, authorized to execute and deliver any and all other documents or instruments on behalf of the County related to the easement in a form and substance acceptable to the Administrator, on advice of legal counsel to the County.

4. Should any portion of this Ordinance be deemed unconstitutional or otherwise unenforceable by any court of competent jurisdiction, such determination shall not affect the

remaining terms and provisions of this Ordinance, all of which are hereby deemed separable.

5. All orders, resolutions, ordinances, and enactments of the Council inconsistent herewith are, to the extent of such inconsistency only, hereby repealed, revoked, and rescinded.

6. This Ordinance shall take effect and be in full force and effect from and after third reading and enactment by the Oconee County Council.

ORDAINED in meeting, duly assembled, this _____ day of _____, 2017.

ATTEST:

_____	_____
Katie Smith	Edda Cammick
Clerk to Oconee County Council	Chair, Oconee County Council

First Reading: August 15, 2017
Second Reading: _____
Third Reading: _____
Public Hearing: _____

Exhibit A

EASEMENT

Prepared By: Angelica Hall
Return To: Duke Energy
Attn: Nancy Shallcross
425 Fairforest Way
Greenville, SC 29607

SOUTH CAROLINA
OCONEE COUNTY

THIS EASEMENT ("Easement") is made this _____ day of _____, 20_____ ("Effective Date"), from OCONEE COUNTY, SOUTH CAROLINA, ("GRANTOR," whether one or more), to Duke Energy Carolinas, LLC, a North Carolina limited liability company ("DEC"); its successors, licensees, and assigns.

WITNESSETH:

THAT GRANTOR, for and in consideration of the sum of ONE DOLLAR ($1.00), the receipt and sufficiency of which are hereby acknowledged, does hereby grant unto DEC, its successors, lessees, licensees, transferees, permittees, apportionees, and assigns, the perpetual right, privilege, and easement to go in and upon the land of GRANTOR situated in City of Walhalla, Oconee County, South Carolina, Parcel No. 500-24-01-001, containing 9.47 acres, more or less, described in a deed from WEST UNION REALTY, L.L.P., a South Carolina Limited Liability Partnership to OCONEE COUNTY, SOUTH CAROLINA, dated December 21, 2006, recorded in Deed Book 1554, Pages 276-277, and shown on plat dated December 4, 2006, and recorded in Plat Book B181, Page 1, Oconee County Register of Deeds, (the "Property"), LESS AND EXCEPT any prior out-conveyances, and to construct, reconstruct, operate, patrol, maintain, inspect, repair, replace, relocate, add to, modify and remove electric and/or communication facilities thereon including but not limited to, supporting structures such as poles, cables, wires, guy wires, anchors, underground conduits, enclosures/transformers, vaults and manholes, and other appurtenant apparatus and equipment (the "Facilities") within an easement area being thirty (30) feet wide for the overhead portion of said facilities and twenty (20) feet wide for the underground portion of said facilities together with an area ten (10) feet wide on all sides of the foundation of any DEC enclosure/transformer, vault or manhole (the "Easement Area"), for the purpose of transmitting and distributing electrical energy and for communication purposes of DEC and Incumbent Local Exchange Carriers. The centerline of the Facilities shall be the center line of the Easement Area.

The right, privilege and easement shall include the following rights granted to DEC: (a) ingress and egress over the Easement Area and over adjoining portions of the Property (using lanes, driveways and paved areas where practical as determined by DEC); (b) to relocate the Facilities and Easement Area on the Property to conform to any future highway or street relocation, widening or improvement; (c) to trim and keep clear from the Easement Area, now or at any time in the future, trees, limbs, undergrowth, structures or other obstructions, and to trim or clear dead, diseased, weak or leaning trees or limbs outside of the Easement Area which, in the opinion of DEC, might interfere with or fall upon the Facilities; (d) to install guy wires and anchors extending beyond the limits of the Easement Area; and (e) all other rights and privileges reasonably necessary or convenient for DEC's safe, reliable and efficient installation, operation, and maintenance of the Facilities and for the enjoyment and use of the Easement Area for the purposes described herein.

TO HAVE AND TO HOLD said rights, privilege, and easement unto DEC, its successors, licensees, and assigns, forever, and GRANTOR, for itself, its heirs, executors, administrators, successors, and assigns, covenants to and with DEC that GRANTOR is the lawful owner of the Property and the Easement Area in fee and has the right to convey said rights and Easement.

IN WITNESS WHEREOF, this EASEMENT has been executed by GRANTOR and is effective as of the Effective Date herein.

OCONEE COUNTY

By: _____
T. Scott Moulder, Oconee County Administrator

Witnesses:

_____
(Witness #1)

_____
(Witness #2)

ATTEST:

_____
Clerk

(Affix Official Seal)

SOUTH CAROLINA, _____ COUNTY

I, _____, a Notary Public of _____ County, South Carolina, certify that _____ personally appeared before me this day and acknowledged the due execution of the foregoing EASEMENT.

Witness my hand and notarial seal, this _____ day of _____, 20____.

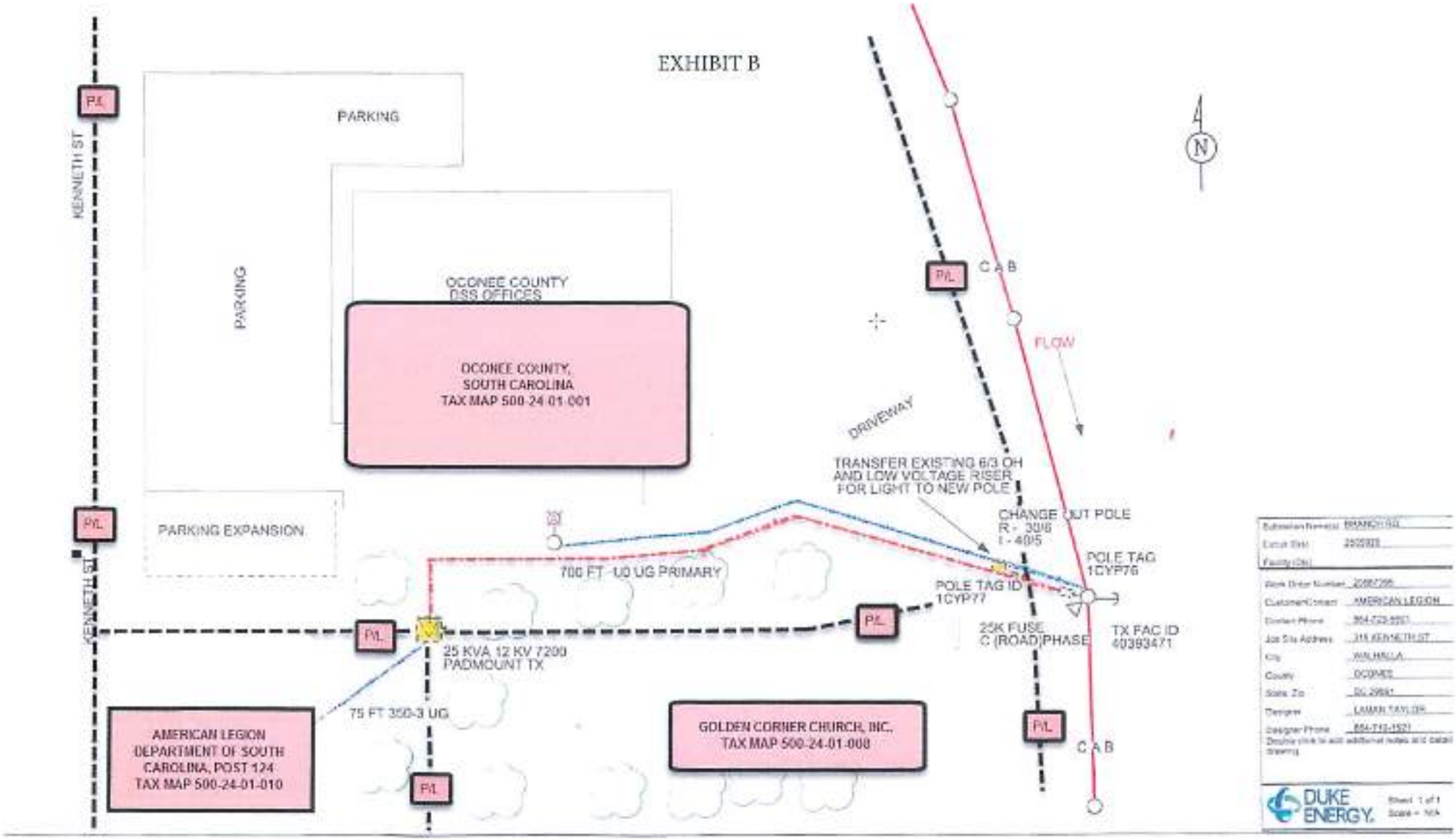
_____
Notary Public

My commission expires: _____

USP: 80 T FUSE E. MAIN ST AND KENNETH ST USP: STATION BREAKER USP: BRANCH RD RETAIL USP: 32735489 USP:		Safety Reminders / Adverse Conditions ?: WORK WILL BE DONE OFF ROAD ?: OFF ROAD PARKING ?: ?:	Work Zone General Comments: Double click to edit

REMEMBER: Work zone area conditions may have changed for this job! Everyone is responsible for verifying the above safety information is correct prior to any work being performed each day.

EXHIBIT B



AGENDA ITEM SUMMARY
OCONEE COUNTY, SC

COUNCIL MEETING DATE: August 15, 2017
COUNCIL MEETING TIME: 6:00 p.m.

ITEM TITLE [Brief Statement]:

First Reading of Ordinance 2017-22 "AN ORDINANCE AMENDING ARTICLE III OF CHAPTER 26 OF THE OCONEE COUNTY CODE OF ORDINANCES IN CERTAIN LIMITED REGARDS AND PARTICULARS ONLY, NAMELY AS TO THE ELIMINATION OF THE SCENIC HIGHWAY COMMITTEE AND THE SUBSTITUTION OF THE PLANNING COMMISSION TO CARRY OUT ALL DUTIES AND FUNCTIONS FORMERLY BELONGING TO THE SCENIC HIGHWAY COMMITTEE; AND OTHER MATTERS RELATED THERETO."

BACKGROUND DESCRIPTION:

Ordinance 2017-22 will revise Article III of Chapter 26, entitled *A Program To Designate Oconee County's Scenic Highways; Established,* for the primary purpose of eliminating the Scenic Highway Committee and placing the essential duties and functions of that committee with the Oconee County Planning Commission.

SPECIAL CONSIDERATIONS OR CONCERNS [only if applicable]:

None

FINANCIAL IMPACT [Brief Statement]:

___Check Here if Item Previously approved in the Budget.

Approved by: _____**Finance**

COMPLETE THIS PORTION FOR ALL GRANT REQUESTS:

Are Matching Funds Available: / No

If yes, who is matching and how much:

Approved by: _____ **Grants**

ATTACHMENTS

None

STAFF RECOMMENDATION [Brief Statement]:

It is staff's recommendation that Council take first reading of Ordinance 2017-22.

Council has directed that they receive their agenda packages a week prior to each Council meeting, therefore, Agenda Items Summaries must be submitted to the Administrator for his review/approval no later than 12 days prior to each Council meeting. It is the Department Head / Elected Officials responsibility to ensure that all approvals are obtained prior to submission to the Administrator for inclusion on an agenda.

A calendar with due dates marked may be obtained from the Clerk to Council.

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

ORDINANCE 2017-22

AN ORDINANCE AMENDING ARTICLE III OF CHAPTER 26 OF THE OCONEE COUNTY CODE OF ORDINANCES IN CERTAIN LIMITED REGARDS AND PARTICULARS ONLY, NAMELY AS TO THE ELIMINATION OF THE SCENIC HIGHWAY COMMITTEE AND THE SUBSTITUTION OF THE PLANNING COMMISSION TO CARRY OUT ALL DUTIES AND FUNCTIONS FORMERLY BELONGING TO THE SCENIC HIGHWAY COMMITTEE; AND OTHER MATTERS RELATED THERETO.

WHEREAS, Oconee County, South Carolina (the "County"), a body politic and corporate and a political subdivision of the State of South Carolina (the "State"), acting by and through its governing body, the Oconee County Council (the "County Council"), has adopted multiple ordinances for the effective, efficient governance of the County, which, subsequent to adoption, are codified in the Oconee County Code of Ordinances (the "Code of Ordinances"), as amended, from time to time; and

WHEREAS, the County, acting by and through the County Council, is authorized by Section 4-9-30(9) and Chapter 29 of Title 6 of the South Carolina Code, 1976, as amended, among other sources, to impose land use restrictions and development standards in the unincorporated areas of the County; and

WHEREAS, Article III of Chapter 26 of the Code of Ordinances establishes a program to designate highways located in Oconee County as Scenic Highways; and

WHEREAS, County Council recognizes that there is a need to revise the law of the County to meet the changing needs of the County and that there is a need to amend, specifically, Article III of Chapter 26 of the Code of Ordinances in order to eliminate the Scenic Highway Committee and place the essential duties and functions of that committee with the Oconee County Planning Commission; and

WHEREAS, County Council has therefore determined to modify Chapter 26 of the Code of Ordinances, and to affirm and preserve all other provisions of the Code of Ordinances not specifically or by implication amended hereby.

NOW, THEREFORE, it is hereby ordained by the Oconee County Council, in meeting duly assembled, that:

1. Article III of Chapter 26 of the Code of Ordinances, entitled *A PROGRAM TO DESIGNATE OCONEE COUNTY'S SCENIC HIGHWAYS; ESTABLISHED*, is hereby revised, rewritten, and amended to read as set forth in Exhibit "A," which is attached hereto and

incorporated herein by reference. (The changes to Article III of Chapter 26 are shown in "redline" form in the version attached hereto as Exhibit "B.")

2. Should any part or provision of this Ordinance be deemed unconstitutional or unenforceable by any court of competent jurisdiction, such determination shall not affect the rest and remainder of this Ordinance, all of which is hereby deemed separable.

3. All ordinances, orders, resolutions, and actions of County Council inconsistent herewith are, to the extent of such inconsistency only, hereby repealed, revoked, and rescinded.

4. All other terms, provisions, and parts of the Code of Ordinances not amended hereby, directly or by implication, shall remain in full force and effect.

5. This Ordinance shall take effect and be in full force and effect from and after third reading and enactment by County Council.

ORDAINED in meeting, duly assembled, this _____ day of _____, 2017.

ATTEST:

_____	_____
Katie D. Smith,	Edda Cammick
Clerk to Oconee County Council	Chair, Oconee County Council

First Reading: August 15, 2017
Second Reading: _____
Third Reading: _____
Public Hearing: _____

EXHIBIT A

Sec. 26-151. - Oconee County Scenic Highways.

Highways located within Oconee County, South Carolina and found to be of special value to the citizens may be designated as Scenic Highways pursuant to the rules, regulations, and criteria set forth below.

Sec. 26-152. - Definitions.

The following words, terms and phrases, when used in this article shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning.

Highway means all those roads, streets and highways within the federal, state or Oconee County Highway System.

Intrinsic qualities means those significant tangible and intangible resources found within a scenic corridor that are known to be distinct within the region. "Intrinsic qualities" include:

(1) *Scenic:* The composition of features that are regionally representative, associative or inspirational. These features are memorable, distinct, visually impressive, and continuous across the view.

(2) *Historic:* Landscapes and structures that educate and stir an appreciation for the legacy of Oconee County's past.

(3) *Cultural:* Activities or objects that represent unique and distinctive expressions of community life, customs or traditional ways and identify a place, region or culture.

(4) *Recreational:* Passive and active leisure activities directly dependent on the scenic qualities of the area and usually associated with outdoor recreation as we seek to refresh and renew our spirits.

(5) *Natural:* Relatively undisturbed and visually pleasing natural areas and/or ecologically sensitive landscapes representing natural occurrences including landforms, water, vegetation and wildlife characteristics.

(6) *Archaeological:* Sites, artifacts or structures recognized by the scientific or academic communities as being representative of past human life and activities.

Scenic Highway means a Highway or segment of a Highway receiving a designation as such pursuant to the provisions contained in this article and based on it deserving such recognition due to scenic vistas, cultural or historical significance, or other criteria specified by county council. All Scenic Highways shall be divided into two route categories:

(1) Highways with limited development visible from the Highway, yet still retaining special characteristics worthy of preservation, shall be designated a Category I Scenic Highways .

(2) Highways with little or no development visible from the Highway lying outside primary growth areas, shall be designated a Category II Scenic Highways.

Sec. 26-153. - Designation process.

(a) Applications shall be submitted in writing to the Community Development Department by a sponsoring agency. Such agencies shall include, but are not limited to, a civic club, chamber of commerce, convention and visitor bureau, business, industry, municipal government, county government, or other organization. Submitted materials shall include a "Scenic Highway Corridor Management Plan" (see section 26-155, Appendix A).

(b) Upon receipt of an application for the designation of a Highway as a Scenic Highway, the Oconee County Community Development Director or his designee shall forward the application to the staff liaison for the Planning Commission, who shall then place review of the application on the next appropriate Planning Commission agenda.

(c) The Planning Commission shall review applications for compliance with the criteria for designating a Scenic Highway established in this article (see section 26-156, Appendix B). Upon completion of the review, the Planning Commission shall by vote determine a recommendation regarding the designation of the subject Highway. The Planning Commission's recommendation shall be forwarded to county council. In the event county council determines the proposed highway merits designation as a Scenic Highway, it shall so indicate its decision by resolution.

(d) Any highway proposed for designation as a Scenic Highway that is rejected for designation by county council, may not be proposed again for a period of one-year from the date of publication of the decision.

Sec. 26-154. - Regulations.

(a) It shall be unlawful for any person other than the owner, owner's agent, or other individual with the full knowledge and consent of the owner of a property situated along the right-of-way of a designated and properly identified Scenic Highway to dig, pull up, gather, remove, cut, maim, break, or injure in any way a public or private property, to include any injury done by fires intentionally set, and to include any injury done to any wild, cultivated, or ornamental plants, shrubs, and trees. These provisions shall not apply where the acts hereby prohibited are done by or under the instructions of county or state authorities lawfully in charge of such public roads, highways or lands, or by a utility in the lawful pursuit of installation or maintenance of their facilities. Violation of this provision of this article shall be punishable by a fine not to exceed $500.00 dollars.

(b) The sponsoring organization or group submitting an application to the County for designation of a Highway as a Scenic Highway shall be responsible for the removal of trash along the portion of the Highway so designated as a Scenic Highway no fewer than three times each year. Permits and/or required notifications related to any and all activities inside a right-of-way shall be the responsibility of the sponsoring organization or group. Any individual taking part in trash removal duties, or any other activities related to the standards of this article, shall comply with any and all standards and practices utilized by the entity responsible for maintenance of the Highway.

(c) A member of the county staff shall be designated by the county administrator to review the status of all county designated Scenic Highways every two years. In the event it is

determined that a route fails to meet the criteria established in this article, a report shall be made to the Planning Commission, which shall recommend a course of action to county council. Such recommendations include, but are not limited to, re-classification to a lower category and/or re-designation.

(d) Regulations contained in this section shall apply equally to both Category I and Category II Scenic Highways; however, Category II Scenic Highways shall receive preference in the pursuit of funding to be utilized in maintaining and enhancing the intrinsic values leading to their designation.

(e) All county rules and regulations concerning Scenic Highways shall apply immediately to a nominated Highway until a determination is made as to whether or not the Highway shall be designated a Scenic Highway. A determination of this issue must be made within six months of the county receiving an application.

Sec. 26-155. - Appendix A.

A Scenic Highway Corridor Management Plan shall include the following components:

(1) A detailed description of the section of the Highway to be designated, including two or more of the intrinsic qualities as defined in this article; a specification as to how the Highway in question fits the criteria; an identification of any problem areas that may impact the Scenic Highway designation.

(2) A marked map clearly indicating the section of the Highway the applicant is proposing for designation.

(3) Photographs or videos of areas which the applicant considers to be of intrinsic value or significance.

(4) Letters of support from citizens, businesses, civic groups, and other organizations.

(5) A maintenance plan outlining proposed litter collection activities.

(6) Any additional proposed actions intended to enhance and maintain the Highway if awarded designated.

Sec. 26-156. - Appendix B.

Criteria for designating a Highway as a Scenic Highway.

(a) The Planning Commission shall consider the following in determining whether a Highway should be designated as a Scenic Highway.

(1) Intrinsic qualities (as defined by this article).

(2) Additional amenities and support (such as but not limited to):

(a) Hospitality features.

(b) Length of route.

(c) General support for proposed route.

(d) Financial commitment.

(e) Role in regional/statewide strategy.

(f) Protective easements, zoning overlays, or other land use restrictions.

(3) Features negatively impacting the Scenic qualities of the Highway, (such as but not limited to):

(a) Junkyards/litter.

(b) Dilapidated/unattractive structures.

(c) Excessive advertising.

(d) Heavy traffic uses.

(e) Mining/lumbering scars.

(f) Heavy industry.

(g) Parallel and visible utilities along Highway.

(h) Landfills/other pollutants visible from route.

(4) Feasibility of maintenance plan and responsibilities.

EXHIBIT B

Sec. 26-151. -- Oconee County Scenic Hhighways.

Highways located within Oconee County, South Carolina and found to be of special value to the citizens may be designated as ~~Oconee County~~ Scenic Highways pursuant to the rules, regulations, and criteria set forth below.

~~(Ord. No. 2007-21, § I, 10-21-2008)~~

~~**Editor's note**— Please see Code Comparative Table for ordinances, not codified, affected by this Code section.~~

Sec. 26-152. - Definitions.

The following words, terms and phrases, when used in this article shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning.

~~*Committee* means the Oconee County Scenic Highway Committee as described in this document.~~

Highway means all those roads, streets and highways within the federal, state or Oconee County Highway System.

Intrinsic qualities means those significant tangible and intangible resources found within a scenic corridor that are known to be distinct within the region. "Intrinsic qualities" include:

(1) *Scenic:* The composition of features that are regionally representative, associative or inspirational. These features are memorable, distinct, visually impressive, and continuous across the view.

(2) *Historic:* Landscapes and structures that educate and stir an appreciation for the legacy of Oconee County's past.

(3) *Cultural:* Activities or objects that represent unique and distinctive expressions of community life, customs or traditional ways and identify a place, region or culture.

(4) *Recreational:* Passive and active leisure activities directly ~~dependant~~dependent on the scenic qualities of the area and usually associated with outdoor recreation as we seek to refresh and renew our spirits.

(5) *Natural:* Relatively undisturbed and visually pleasing natural areas and/or ecologically sensitive landscapes representing natural occurrences including landforms, water, vegetation and wildlife characteristics.

(6) *Archaeological:* Sites, artifacts or structures recognized by the scientific or academic communities as being representative of past human life and activities.

Scenic ~~H~~highway means a ~~H~~highway or segment of a ~~H~~highway receiving a designation as such pursuant to the provisions contained in this article and based on it deserving such of recognition due to scenic vistas, cultural or historical significance, or other criteria specified by county council. All ~~S~~scenic ~~H~~highways shall be divided into two route categories:

(1) Highways Routes with limited development visible from the Highway ~~roadway~~, yet still retaining special characteristics worthy of preservation, shall be designated a Category I Scenic Highways ~~Route~~.

(2) Highways ~~Routes~~ with little or no development visible from the Highway roadway lying outside primary growth areas, shall be designated a Category II Scenic Highways. ~~Route~~.

~~(Ord. No. 2007-21, § II, 10-21-2008)~~

Sec. 26-153. - Designation process.

(a) Applications shall be submitted in writing to the Community Development Department ~~planning department~~ by a sponsoring agency. Such agencies shall include, but are not limited to, a civic club, chamber of commerce, convention and visitor bureau, business, industry, municipal government, county governments, or other organization. Submitted materials shall include a "Scenic Highway Corridor Management Plan" (see section 26-156, Appendix A).

(b) Upon receipt of an application for the designation of a ~~road or h~~Highway as ~~an Oconee County~~ Scenic Highway, the Oconee County Community Development Director or his designee shall forward the application to the staff liaison for the Planning Commission, who shall then place review of the application on next appropriate Planning Commission agenda.~~Planning Director or his/her designee shall contact the committee, which shall schedule a meeting to review the application. Meetings of the committee shall be public meetings, and shall be advertised at least 14 days in advance in a newspaper of general circulation.~~

(c) The Planning Commission ~~committee~~ shall review applications for compliance with the criteria for designating a Sscenic H~~h~~ighway established in this article (see section 26-157, Appendix B). Upon completion of the review, the Planning Commission ~~committee~~ shall by vote determine a recommendation regarding the designation of the subject H~~h~~ighway. The Planning Commission's recommendation shall be ~~reviewed by the planning commission, which shall~~ forwarded ~~a report~~ to county council. In the event county council determines the proposed highway merits designation as a Sscenic H~~h~~ighway, it shall so indicate its decision by resolution.

(d) Any highway proposed for designation as a Sscenic H~~h~~ighway that is ~~denied a positive recommendation by the committee, or~~ rejected for designation by county council, may not be proposed again for a period of one-year from the date of publication of the decision.

~~(Ord. No. 2007-21, § III, 10-21-2008)~~

Sec. 26-154. - Regulations.

(a) It shall be unlawful for any person other than the owner, owner's agent, or other individual with the full knowledge and consent of the owner of a property situated along the right-of-way of a designated and properly identified ~~county~~ Sscenic H~~h~~ighway to dig, pull up, gather, remove, cut, maim, break, or injure in any way a public or private property, to include any

injury done by fires intentionally set, and to include any injury done to ; any wild, cultivated, or ornamental plants, shrubs, and trees. These provisions shall not apply where the acts hereby prohibited are done by or under the instructions of county or state authorities lawfully in charge of such public roads, highways or lands, or by a utility in the lawful pursuit of installation or maintenance of their facilities. Violation of this provision of this article shall be punishable by a fine not to exceed $500.00 dollars.

(b) The sponsoring organization or group submitting an application to the County for designation of a road Highway as an Oconee County Scenic Highway shall be responsible for the removal of trash along the portion of the Hhighway so designated as a Sscenic Hhighway no fewer than three times each year. Permits and/or required notifications related to any and all activities inside a right-of-way shall be the responsibility of the sponsoring organization or group. Any individual taking part in trash removal duties, or any other activities related to the standards of this article, shall comply with any and all standards and practices utilized by the entity responsible for maintenance of the Highwayroadway.

(c) A member of the county staff shall be designated by the county administrator to review the status of all county designated Sscenic Hhighways every two years. In the event it is determined that a route fails to meet the criteria established in this article, a report shall be made to the Planning Commissioncommittee, which who shall recommend a course of action to county council. Such recommendations include, but are not limited to, re-classification to a lower category, and/or [r]e-designation.

(d) Regulations contained in this section shall apply equally to both Category I and Category II Scenic Highways; however, Category II Scenic Highways shall receive preference in the pursuit of funding to be utilized in maintaining and enhancing the intrinsic values leading to their designation.

(e) All county rules and regulations concerning Sscenic Hhighways shall apply immediately to a nominated road or hHighway until a determination is made as to whether or not the road or hHighway shall be designated a Sscenic Hhighway. A determination of this issue must be made within six months of the county receiving an application.

(Ord. No. 2007-21, § IV, 10-21-2008)

Sec. 26-155. - Oconee County Scenic Highway Committee.

The committee shall consist of seven members, each having primary residency in the county. The committee members shall serve at the pleasure of the organization that appoints the member. The following organizations shall appoint one member each to the committee:

(1) Keep Oconee Beautiful Association (KOBA).

(2) Concerned Citizens for Conservation.

(3) The Oconee County Arts and Historical Commission.

(4) Upstate Forever (Oconee Chapter).

(5) Oconee Alliance.

~~In addition, county council shall appoint two members at large from resident property owners in the county.~~

~~In the event that any organization named above fails to provide a representative willing or able to take part in the committee as needed, county council may replace the organization with a similar entity; also, any organization may terminate its position on the committee by sending a letter of resignation to county council, who will appoint a similar replacement.~~

~~(Ord. No. 2007-21, § V, 10-21-2008)~~

Sec. 26-15~~5~~6. - Appendix A.

A Sscenic Hhighway Ccorridor Management Pplan shall include the following components:

(1) A detailed description of the section of the ~~road or h~~Highway to be designated, including two or more of the intrinsic qualities as defined in this article;~~.~~ a specification as to ~~Specify~~ how the Highway ~~road~~ in question fits the criteria; ~~.~~ Ian identification of ~~dentify~~ any problem areas that may impact the Sscenic Highway designation.

(2) A marked map clearly indicating the section of the ~~road or h~~Highway the applicant is proposing for designation.

(3) Photographs or videos of areas which the applicant considers to be of intrinsic value or significance.

(4) Letters of support from citizens, businesses, civic groups, and other organizations.

(5) A maintenance plan outlining proposed litter collection activities.

(6) Any additional proposed actions intended to enhance and maintain the H~~h~~ighway if awarded designated.

~~(Ord. No. 2007-21, App. A, 10-21-2008)~~

Sec. 26-15~~6~~7. - Appendix B.

Criteria for designating a ~~road or h~~Highway as a~~n Oconee County~~ Scenic Highway.

(a) The Planning Commission ~~committee~~ shall consider the following in determining whether a ~~road or~~Highway ~~highway~~ should be designated as a Sscenic H~~h~~ighway.

(1) Intrinsic qualities (as defined by this article).

(2) Additional amenities and support (such as but not limited to):

(a) Hospitality features.

(b) Length of route.

(c) General support for proposed route.

(d) Financial commitment.

(e) Role in regional/statewide strategy.

(f) Protective easements, zoning overlays, or other land use restrictions.

(3) Features negatively impacting the Sscenic qualities of the H~~h~~ighway, (such as but not limited to):

(a) Junkyards/litter.

(b) Dilapidated/unattractive structures.

(c) Excessive advertising.

(d) Heavy traffic uses.

(e) Mining/lumbering scars.

(f) Heavy industry.

(g) Parallel and visible utilities along Highway. ~~roadway.~~

(h) Landfills/other pollutants visible from route.

(4) Feasibility of maintenance plan and responsibilities.

~~(Ord. No. 2007-21, App. B, 10-21-2008)~~

AGENDA ITEM SUMMARY
OCONEE COUNTY, SC

COUNCIL MEETING DATE: August 15, 2017
COUNCIL MEETING TIME: 6:00 p.m.

ITEM TITLE [Brief Statement]:

First Reading [TITLE ONLY] of Ordinance 2017-23 "AUTHORIZING THE ISSUANCE AND SALE OF A NOT EXCEEDING $530,000 GENERAL OBLIGATION REFUNDING BOND (KEOWEE FIRE TAX DISTRICT), SERIES 2017, OF OCONEE COUNTY, SOUTH CAROLINA FOR THE PURPOSE OF REFUNDING THE COUNTY'S GENERAL OBLIGATION BOND (KEOWEE FIRE TAX DISTRICT), SERIES 2007; FIXING THE FORM AND DETAILS OF THE BOND; PROVIDING FOR THE PAYMENT OF THE BOND; AUTHORIZING THE COUNTY ADMINISTRATOR TO DETERMINE CERTAIN MATTERS RELATING TO THE BOND; PROVIDING FOR THE DISPOSITION OF THE PROCEEDS OF THE BOND; AND OTHER MATTERS RELATING THERETO."

BACKGROUND DESCRIPTION:

Ordinance 2017-23 will authorize the issuance and sale of a general obligation refunding bond, not to exceed $530,000, on behalf of Keowee Fire Tax District for the purpose of refunding / refinancing the 2007 general obligation bond at a more favorable interest rate.

SPECIAL CONSIDERATIONS OR CONCERNS [only if applicable]:

None

FINANCIAL IMPACT [Brief Statement]:

___ Check Here if Item Previously approved in the Budget.

Approved by: _____ **Finance**

COMPLETE THIS PORTION FOR ALL GRANT REQUESTS:

Are Matching Funds Available: / No

If yes, who is matching and how much:

Approved by: _____ **Grants**

ATTACHMENTS

None

STAFF RECOMMENDATION [Brief Statement]:

It is staff's recommendation that Council take first reading of Ordinance 2017-23 in title only.

Council has directed that they receive their agenda packages a week prior to each Council meeting, therefore, Agenda Items Summaries must be submitted to the Administrator for his review/approval no later than 12 days prior to each Council meeting. It is the Department Head / Elected Officials responsibility to ensure that all approvals are obtained prior to submission to the Administrator for inclusion on an agenda.

A calendar with due dates marked may be obtained from the Clerk to Council.

AGENDA ITEM SUMMARY
OCONEE COUNTY, SC

COUNCIL MEETING DATE: August 15, 2017
COUNCIL MEETING TIME: 6:00 PM

ITEM TITLE [Brief Statement]:
2017 Edward Byrne Memorial JAG Grant Notification

BACKGROUND DESCRIPTION:

Oconee County Sheriff's Department may receive an allocation of $20,920 from the Bureau of Justice Assistance. The grant program requires the notification of intent be made available for the County Council and the public to review and comment on the proposed use of funds. The Sheriff's Department plans to use the funds from this program to purchase

- Potential upgrades to the Sheriff's mobile command center
- Upgrades to WatchGuard mobile video systems
- Uniform and Equipment upgrade for Sheriff's Honor Guard
- Weapons upgrade for SWAT entry team

SPECIAL CONSIDERATIONS OR CONCERNS [only if applicable]:
Comments should be directed to Chief Deputy Kevin Davis at 864-638-4118 or in writing to the Oconee County Sheriff's Department.

FINANCIAL IMPACT [Brief Statement]:

_____ Check Here if Item Previously approved in the Budget. No additional information required.

Approved by : _____ Finance

COMPLETE THIS PORTION FOR ALL GRANT REQUESTS:
Are Matching Funds Available: Yes / **No**
If yes, who is matching and how much:

Approved by : KRW Grants

ATTACHMENTS
Public Notice

STAFF RECOMMENDATION [Brief Statement]:
No action needed.

Council has directed that they receive their agenda packages a week prior to each Council meeting, therefore, Agenda Items Summaries must be submitted to the Administrator for his review/approval no later than 12 days prior to each Council meeting. It is the Department Head / Elected Officials responsibility to ensure that all approvals are obtained prior to submission to the Administrator for inclusion on an agenda.

A calendar with due dates marked may be obtained from the Clerk to Council.

Submitted or Prepared By:

Department Head/Elected Official

Approved for Submittal to Council:

T. Scott Moulder, County Administrator

Council has directed that they receive their agenda packages a week prior to each Council meeting, therefore, Agenda Items Summaries must be submitted to the Administrator for his review/approval no later than 12 days prior to each Council meeting. It is the Department Head / Elected Officials responsibility to ensure that all approvals are obtained prior to submission to the Administrator for inclusion on an agenda.

A calendar with due dates marked may be obtained from the Clerk to Council.

Public Notice

The County of Oconee may receive $20,920.00 from the Edward Byrne Memorial Justice Assistance Grant program, administered by the U.S. Bureau of Justice Assistance, Office of Justice Programs.

> The purpose of this program is to assist local units of government in reducing crime and improving public safety through grants that increase resources available to law enforcement agencies. The Oconee County Sheriff's Office intends to use the funds, which do not require county match money, to purchase potential upgrades to the Sheriff's mobile command center, upgrades to WatchGuard mobile video systems, uniform and equipment upgrade for Sheriff's Honor Guard and weapons upgrade for SWAT entry team.

If anyone wishes to make recommendations or comments about how these funds should be spent, please contact the Sheriff's Office in one of the following ways:

Call Chief Deputy Kevin Davis at (864) 638-4118 or write to:

Chief Deputy Kevin Davis
Oconee County Sheriff's Office
415 S. Pine Street
Walhalla, SC 29691

Boards & Commissions	State / OC Code Reference	Reps [DX-At Large]	Co-Terminus	Term Limits	4 Year Term	Meeting Date to Appoint	Edda Cammick 2015-2018 District I	Wayne McCall 2017-2020 District II	Paul Cain 2015-2018 District III	Julian Davis 2017-2020 District IV	Glenn Hart 2017-2020 District V	2015-2018 At Large	2017-2020 At Large
Aeronautics Commission	2-262	5 - 2	YES	2X	YES	Jan - March	Randy Renz [2]	David Bryant [1]	Edward Perry [2]	Marion Lyles [1]	Ronald Chiles [2]	A. Brightwell [1]	Michael Gray [<1]
Ag. Advisory Board	2016-17	5 - 2	YES	n/a	YES	Jan - March	Debbie Sewell [<1]	Doug Hollifield [<1]	OPEN	Ed Land [<1]	Vickie Willoughby [<1]	Kim Alexander [<1]	Rex Blanton [<1]
Arts & Historical Commission	2-321	5 - 2	YES	2X	YES	Jan - March	Bette Boreman [1]	Libby Imbody [1]	Mariam Noorai [1]	Tony Adams [1]	Stacy Smith	Shawn Johnson [1]	Janet Gorman [1]
Board of Zoning Appeals	38-6-1	5 - 2	YES	2X	YES	Jan - March	Allen Medford [2]	Gwen Fowler [1]	Bill Gilster [1]	Marty McKee [<2]	OPEN	Josh Lusk [1]	Charles Morgan [<1]
Building Codes Appeal Board		5 - 0	YES	2X	YES	Jan - March	George Smith [1]	Matt Rochester [1]	Bob DuBose [2]	**Kevin Knight**	Kenneth Owen		
Conservation Bank Board	2-381	Appointed by Category Preferred		2X	YES	Jan - March	Shea Airey [2]	OPEN	Jennifer Moss [1]	Marvin Prater [2]	Frank Ables [1]	Richard Cain [2]	Frances Rundlett [1]
Destination Oconee Action Committee	n/a	5 - 2	n/a	n/a	n/a	n/a	David Washburn	Luther Lyle [2]	Al Shadwick	Matthew Smith [1]	Bob Hill [2]	Robert Moore	Hal Welch [2]
PRT Commission [members up for reappointment due to initial stagger]	6-4-25 2-381	Appointed by Industry		2X	YES	Jan - March	Shane Smith[1]; Andrew Conkey [1]; Kevin Evans [1]			**Becky Wise [2], Rick Lacey [2], Mike Wallace [2]**			Darlene Greene
Scenic Highway Committee	26-151	0 - 2	YES	2X	YES	Jan - March						Scott Lusk [1]	Staley Powell [1]
Library Board	4-9-35 / 18-1	0 - 9	YES	2X	YES	Jan - March	M. McMahan [P, 1.15]; M. Jacobson [P, 1.15]; W. Caster [2, 1.15]			B. Brackett [1.17]; A. Griffin [1.17]; K. Holleman [P[1.17]]; L. Martin [P[1.17]]; A. Suddeth [2]; C. Morrison[1.17]			
Planning Commission	6-29-310 32-4	5 - 2	YES	N/A	YES	Jan - March	Brad Kisker	Andrew Gramling [1]	David Owensby	Frankie Pearson [1]	Stacy Lyles [1]	Gwen McPhail	Mike Johnson
Anderson-Oconee Behavioral Health Services Commission	2-291	0 - 7	YES	2X	3 yr	N/A	Steve Jenkins [1], Harold Alley [1], Louie Holleman [1], Wanda Long [1], Priscilla Taylor [1], Joan Black [1], Jere DuBois [1] BHS contacts Council w/ recommendations when seats open						
Capital Project Advisory Committee (end 1.17)	[redacted]												
Oconee Business Education Partnership	N/A	N/A	NO	N/A	NO	January	Mr. Julian Davis, District IV						
Oconee Economic Alliance	N/A	N/A	NO	N/A	NO	January	Mr. Paul Cain, Council; Mr. Scott Moulder, Administrator; Mr. Sammy Dickson						
Ten At The Top [TATT}				NO	NO	January	Mr. Dave Eldridge						
ACOG BOD				N/A	NO	January	Council Rep: Ms. Cammick [yearly]; 2 yr terms Citizen Rep: Bob Winchester, Minority Rep: Bennie Cunningham						
Worklink Board						N/A	Worklink contacts Council w/ recommendations when seats open [Current: B. Dobbins]						

[#] - denotes term. [<2] denotes a member who has served one term and less than one half of an additional term making them eligible for one additional appointment.

[SHADING = reappointment requested - questionnaire on file]

Denotes Individual who DOES NOT WISH TO BE REAPPOINTED

Bold Italics TEXT denotes member ineligible for reappointment - having served or will complete serving max # of terms at the end of their current term.

AGENDA ITEM SUMMARY
OCONEE COUNTY, SC

COUNCIL MEETING DATE: August 15, 2017
COUNCIL MEETING TIME: 6:00

ITEM TITLE [Brief Statement]:

ORDINANCE 2017-24 [Title Only] "AN ORDINANCE AUTHORIZING THE TRANSFER OF COUNTY-OWNED REAL PROPERTY, LOCATED WITHIN THE GOLDEN CORNER COMMERCE PARK, COMPRISING APPROXIMATELY 20 ACRES, TO THE OCONEE ECONOMIC ALLIANCE FOR THE PURPOSE OF CONSTRUCTION OF A "SPECULATIVE BUILDING" FOR INDUSTRIAL OR BUSINESS USE IN ORDER TO PROMOTE INCREASED OPPORTUNITIES FOR ECONOMIC GROWTH AND DEVELOPMENT WITHIN THE COUNTY; AND OTHER MATTERS RELATED THERETO."

BACKGROUND DESCRIPTION:

Ordinance 2017-24 will authorize the County Administrator to transfer approximately 20 acres of real property located within the Golden Corner Commerce Park to the Oconee Economic Alliance ("Alliance") in order to enable the Alliance to apply directly to Santee Cooper for funding to construct a "speculative building" on the subject property. The County will maintain reversionary interests in the subject land, and a binding memorandum of understanding will be entered into between the County and the Alliance that addresses details related to design, construction, marketing, and transfer of the subject building and parcel.

SPECIAL CONSIDERATIONS OR CONCERNS [only if applicable]:

None

FINANCIAL IMPACT [Brief Statement]:

_____ Check Here if Item Previously approved in the Budget. No additional information required.

Approved by : _____ **Finance**

COMPLETE THIS PORTION FOR ALL GRANT REQUESTS:

Are Matching Funds Available: Yes / No

If yes, who is matching and how much:

Approved by : _____ **Grants**

ATTACHMENTS

None

STAFF RECOMMENDATION [Brief Statement]:

It is staff's recommendation that Council pass First Reading in title only of Ordinance 2017-24.

Council has directed that they receive their agenda packages a week prior to each Council meeting, therefore, Agenda Items Summaries must be submitted to the Administrator for his review/approval no later than 12 days prior to each Council meeting. It is the Department Head / Elected Officials responsibility to ensure that all approvals are obtained prior to submission to the Administrator for inclusion on an agenda.

A calendar with due dates marked may be obtained from the Clerk to Council.

AGENDA ITEM SUMMARY
OCONEE COUNTY, SC

COUNCIL MEETING DATE: August 15, 2017
COUNCIL MEETING TIME: 6:00

ITEM TITLE [Brief Statement]:

RESOLUTION 2017-12 "A RESOLUTION MAKING APPLICATION TO THE STATE FISCAL ACCOUNTABILITY AUTHORITY OF SOUTH CAROLINA FOR APPROVAL OF THE ISSUANCE BY OCONEE COUNTY, SOUTH CAROLINA, OF ITS SPECIAL SOURCE REVENUE BONDS IN AN AGGREGATE PRINCIPAL AMOUNT OF NOT EXCEEDING $3,500,000, PURSUANT TO THE PROVISIONS OF SOUTH CAROLINA CODE ANNOTATED, TITLE 4, CHAPTER 1 AND 29 (1976), AS AMENDED."

BACKGROUND DESCRIPTION:

Resolution 2017-12 will authorize the County Administrator to petition the South Carolina State Fiscal Accountability Authority to approve the County's issuance of Special Source Revenue Bonds in an amount not to exceed $3,500,000 for the purpose of securing funding from Santee Cooper under its Economic Development Revolving Loan Program in order to construct a "speculative building" at the Golden Corner Commerce Park, and other matters directly related thereto.

SPECIAL CONSIDERATIONS OR CONCERNS [only if applicable]:

None

FINANCIAL IMPACT [Brief Statement]:

_____ Check Here if Item Previously approved in the Budget. No additional information required.

Approved by : _____ Finance

COMPLETE THIS PORTION FOR ALL GRANT REQUESTS:

Are Matching Funds Available: Yes / No

If yes, who is matching and how much:

Approved by : _____ Grants

ATTACHMENTS

None

STAFF RECOMMENDATION [Brief Statement]:

It is staff's recommendation that Council pass Resolution 2017-12.

Council has directed that they receive their agenda packages a week prior to each Council meeting, therefore, Agenda Items Summaries must be submitted to the Administrator for his review/approval no later than 12 days prior to each Council meeting. It is the Department Head / Elected Officials responsibility to ensure that all approvals are obtained prior to submission to the Administrator for inclusion on an agenda.

A calendar with due dates marked may be obtained from the Clerk to Council.

STATE OF SOUTH CAROLINA
OCONEE COUNTY

RESOLUTION R2017-12

A RESOLUTION MAKING APPLICATION TO THE STATE FISCAL ACCOUNTABILITY AUTHORITY OF SOUTH CAROLINA FOR APPROVAL OF THE ISSUANCE BY OCONEE COUNTY, SOUTH CAROLINA, OF ITS SPECIAL SOURCE REVENUE BONDS IN AN AGGREGATE PRINCIPAL AMOUNT OF NOT EXCEEDING $3,500,000, PURSUANT TO THE PROVISIONS OF SOUTH CAROLINA CODE ANNOTATED, TITLE 4, CHAPTER 1 AND 29 (1976), AS AMENDED.

WHEREAS, Oconee County, South Carolina (the "County"), acting by and through its County Council (the "Council"), is authorized and empowered under and pursuant to the provisions of the South Carolina Constitution (the "Constitution") and Section 4-1-175 and Section 4-29-68 of the South Carolina Code of Laws 1976, as amended (the "Code"), to issue special source revenue bonds; and

WHEREAS, the County is authorized and empowered under and pursuant to the provisions of Article VIII, Section 13 of the Constitution, in conjunction with Sections 4-1-170, 4-1-175 and 4-29-68 of the Code, to jointly develop joint county industrial and business parks with other counties wherein the area comprising the parks and all property having a situs therein is exempt from all ad valorem taxation but, instead, pays fees in lieu of tax (the "Park Revenues"); and, to issue special source revenue bonds secured by such Park Revenues for the purpose of paying the cost of designing, acquiring, constructing, improving, or expanding the infrastructure serving the issuer or the project, and for improved or unimproved real estate used in the operation of a manufacturing or commercial enterprise, which property is determined by the issuer to enhance the economic development of the issuer, and costs of issuance of the bonds; and

WHEREAS, the County has entered into, and may continue to enter into, various agreements for the development of joint county industrial and business parks (collectively, the "Park Agreements") pursuant to Section 13 of Article VIII of the Constitution of the State and Section 4-1-170 of the Code; and

WHEREAS, Section 4-29-140 of the Code provides that no bond shall be issued pursuant to the provisions of Title 4, Chapter 29 of the Code until the proposal of the County to issue the bonds shall receive the approval of the State Fiscal Accountability Authority of South Carolina ("SFAA"); and

WHEREAS, in order to enhance the continued economic development of the County, the County intends to design, acquire and construct a building for industrial or business use, such design, acquisition and construction to include, without limitation, site preparation, landscaping and

streetscaping, and design, acquisition, construction and improvement of any or all access roads, drives, sidewalks, parking areas, utilities and other infrastructure serving or relating to such building (collectively, the "Project"); and

WHEREAS, in furtherance thereof, the County proposes to issue, subject to the approval of the SFAA, one or more series of special source revenue bonds in an amount not to exceed $3,500,000 (the "Bonds") in order to defray all or a portion of the costs of the Project and pay costs of issuance of the Bonds; and

WHEREAS, it is now deemed advisable by the County Council of the County to file with the SFAA, in compliance with Section 4-29-140 of the Code, the Petition of the County requesting approval by the SFAA of the proposed issuance of the Bonds;

NOW, THEREFORE, BE IT RESOLVED by the County Council of Oconee County, South Carolina as follows:

Section 1. Findings and Determinations. It is hereby found, determined and declared as follows:

(a) The Project constitutes "infrastructure" as such term is referred to in Section 4-29-68 of the Code, and the issuance of the Bonds in one or more series in the aggregate principal amount not to exceed $3,500,000 to defray all or a portion of the costs of the Project and costs of issuance of the Bonds will serve the purposes and in all respects conform to the provisions and requirements of the Constitution and the Code.

(b) It is expected that the Project will result in the stimulation of the economy of the County, and that the completion or acquisition of such Project will promote increased opportunities for economic growth and development within the County.

(c) A reasonable estimate of the cost of the Project, including necessary expenses incidental thereto, is $3,500,000.

(d) Pursuant to Section 4-29-60 of the Code, the Council finds that: (i) the Project will subserve the purposes of Title 4, Chapter 29 of the Code; (ii) it is anticipated that the Project will benefit the general public welfare of the County by providing services, employment or public benefits not otherwise provided locally; (iii) the Project will give rise to no pecuniary liability of the County or charge against the County's general credit or taxing power; (iv) the principal amount of the Bonds required to finance a portion of the costs of the Project and costs of issuance of the Bonds are not expected to not exceed $3,500,000; (v) the amount necessary in each year to pay the principal of and the interest on the Bonds will be set forth in one or more ordinances to be enacted by the County Council prior to the issuance of the Bonds; (vi) the County may establish a reserve fund in connection with the retirement of the Bonds; and (vii) the County will make arrangements so that the costs of maintaining the Project in good repair, and the costs of keeping the Project properly insured, if any, are paid.

Section 2. Submission of Petition. There be and is hereby authorized and directed the submission on behalf of the County a Petition requesting the approval by the SFAA of the proposal of the County to issue the Bonds pursuant to the within referenced provisions of the Code. The Petition, which constitutes and is hereby made a part of this authorizing Resolution, shall be in substantially the form attached hereto as Exhibit A.

Section 3. Execution of Petition. The County Administrator is hereby authorized and directed to execute the Petition in the name and on behalf of the County; and the Clerk to County Council of the County is hereby authorized and directed to attest the same and thereafter to submit an executed copy of this Resolution to the SFAA in Columbia, South Carolina.

Section 4. Effect of Resolution. All orders and resolutions and parts thereof in conflict herewith are to the extent of such conflict hereby repealed, and this Resolution shall take effect and be in full force from and after its adoption.

RESOLVED in meeting, duly assembled, this ____ of _____, 2017.

ATTEST:

_____	_____
Katie Smith	Edda Cammick
Clerk to Oconee County Council	Chair, Oconee County Council

EXHIBIT A

STATE OF SOUTH CAROLINA)
)
OCONEE COUNTY)

TO THE STATE FISCAL)
ACCOUNTABILITY AUTHORITY) PETITION
OF SOUTH CAROLINA)

This Petition of Oconee County, South Carolina (the "County"), pursuant to Title 4, Chapter 29 of the South Carolina Code of Laws, 1976, as amended (the "Code"), and specifically Section 4-29-140 thereof, respectfully shows:

1. The County Council of Oconee County (the "County Council") is the governing body of the County and as such is the "governing board" of the County referred to in Title 4, Chapter 29 of the Code.

2. Title 4, Chapter 29 of the Code, among other things, empowers the County, subject to obtaining the approval of the State Fiscal Accountability Authority of South Carolina ("SFAA"), pursuant to Section 4-29-140 of the Code, to issue special source revenue bonds for the purpose of paying the cost of designing, acquiring, constructing, improving or expanding infrastructure as referred to in Section 4-29-68(A)(2) of the Code and to secure the payment of such bonds from payments in lieu of taxes (the "Park Revenues") received and retained by the County under Section 13 of Article VIII of the Constitution of the State.

3. The County is authorized and empowered under and pursuant to the provisions of Article VIII, Section 13 of the Constitution, in conjunction with Section 4-1-170, 4-1-175 and 4-29-68 of the Code, to jointly develop joint county industrial and business parks with other counties wherein the area comprising the parks and all property having a situs therein is exempt from all ad valorem taxation but, instead, pays Park Revenues; and, to issue special source revenue bonds secured by such Park Revenues for the purpose of paying the cost of designing, acquiring, constructing, improving, or expanding the infrastructure serving the issuer and for improved or unimproved real estate used in the operation of a manufacturing or commercial enterprise in order to enhance the economic development of the issuer and costs of issuance of the bonds.

4. The County has entered into, and may continue to enter into, various agreements for the development of joint county industrial and business parks (collectively, the "Park Agreements") pursuant to Section 13 of Article VIII of the Constitution of the State and Section 4-1-170 of the Code.

5. In order to enhance the continued economic development of the County, the County intends to design, acquire and construct a building for industrial or business use, such design,

acquisition and construction to include, without limitation, site preparation, landscaping and streetscaping, and design, acquisition, construction and improvement of any or all access roads, drives, sidewalks, parking areas, utilities and other infrastructure serving or relating to such building (collectively, the "Project").

6. In furtherance thereof, the County proposes to issue in one or more series, subject to the approval of the SFAA, special source revenue bonds (the "Bonds") in the aggregate principal amount of not exceeding $3,500,000 in order to defray all or a portion of the costs of the Project and pay costs of issuance of the Bonds.

7. Pursuant to Section 4-29-60 of the Code, the County Council has made the requisite findings that: (i) the Project will subserve the purposes of the Title 4, Chapter 29 of the Code; (ii) it is anticipated that the Project will benefit the general public welfare of the County by providing public benefits not otherwise provided locally; (iii) the Project will give rise to no charge against the County's general credit or taxing power; (iv) the principal amount of the Bonds required to finance a portion of the Project and costs of issuance of the Bonds is expected to not exceed $3,500,000; (v) the amount necessary in each year to pay the principal of and the interest on the Bonds will be set forth in one or more ordinances to be enacted by the County Council before the issuance of the Bonds; (vi) the County may establish a reserve fund in connection with the retirement of the Bonds; and (vii) the County will make arrangements so that the costs of maintaining the Project in good repair, and the costs of keeping the Project properly insured, if any, are paid.

8. Pursuant to Section 4-29-140 of the Code, the County sets forth the following information:

(a) It is expected that the Project will result in the stimulation of the economy of the County, and that the completion of such Project will promote increased opportunities for economic growth and employment within the County.

(b) The cost of the Project is estimated to be approximately $3,500,000.

(c) The Bonds will be issued pursuant to ordinances to be enacted by the County Council. The Bonds, together with the interest thereon, will be payable solely from and secured by a pledge of a portion of the Park Revenues received and retained by the County under the Park Agreements, which shall be irrevocably pledged to the payment of the principal of and interest on the Bonds. The Bonds may also be secured by a mortgage granted by the County upon real or personal property the acquisition of which, by construction or purchase, is financed by the issuance of the Bonds. The Bonds, and the interest thereon, shall be (i) payable solely from all or a specifically described part of the Park Revenues; (ii) not secured by, or in any way entitled to, a pledge of the full faith, credit, or taxing power of the County; (iii) not an indebtedness of the County within the meaning of any state constitutional provision or statutory limitation but payable solely from a special source that does not include revenues from any tax or license; and (iv) not a pecuniary liability of the County or a charge against the County's general credit or taxing power.

Upon the basis of the foregoing, the County respectfully requests that the SFAA:

1. Accept the filing of this Petition;

2. Conduct such review as it considers advisable;

3. Approve the proposal of the County to execute and deliver the Bonds pursuant to the Code to defray all or a portion of the costs of the Project and costs of issuance of the Bonds; and

4. Cause notice of its approval to be published in the manner set forth in Section 4-29-140 of the Code.

Respectfully submitted,

OCONEE COUNTY, SOUTH CAROLINA

By: _____
County Administrator
Oconee County, South Carolina

(SEAL)

ATTEST:

_____
Clerk to Oconee County Council
Oconee County, South Carolina

Dated: _____ __, 2017

DESTINATION OCONEE

Realizing the future of Oconee County

Committee Report to Council

August 15, 2017

This report summary is to serve as a comprehensive response to the directive from County Council to analyze the Destination Oconee plan.

Destination Oconee: *Realizing the Future of Oconee County*

Destination Oconee is a comprehensive marketing approach and community branding strategy with a strong emphasis on economic development. The goals of Destination Oconee are to capitalize on the abundance of our natural resources and uniqueness of our downtowns; creating a strong "sense of place" and a distinct, cohesive destination; to create vibrant, thriving communities where people want to work, live, play, and invest. Considered a road map for the future, Destination Oconee identifies a number of recommendations and key areas to place attention and focus. The citizen led committee feels for Oconee County to have continued successes, we must revitalize our downtowns to create that unique sense of place; improve access to our key tourism sites and capitalize on the abundance of our natural resources, while still protecting them.

Background

The Destination Oconee Plan was developed over the course of many months and numerous meetings and interviews with various local residents, business owners, local stakeholders, government entities, non-profits and representatives from the South Carolina National Heritage Corridor. The plan began as an initiative to brand and market the county's outdoor recreation but grew into a much larger approach that blended elements of both tourism and economic development while focusing on collaboration. While we are fortunate to be surrounded with the natural beauty and resources that attract many to our area, many of the stakeholders noted the need for proactive planning and cooperation among the county and cities for continued success. A large portion of the Destination Oconee plan centers on community development; which includes creating stronger nucleuses in our downtowns and promoting both business and leisure opportunities.

The Destination Oconee Plan was unanimously endorsed by Oconee County Council in July of 2015. At that time, they committed to hire a full time staff person whose responsibility was the implementation of the plan and its' key recommendations. In addition, County Council voted to appoint a citizen led "Action Committee" comprised of seven members, whose purpose was to work with the staff person to analyze the Destination Oconee document, prioritize the recommendations within it and suggest possible funding options for Council to consider.

In March of 2016, Janet Hartman was hired as the Manager of Destination Oconee. As the Destination Oconee plan has a strong economic development component, it was natural for this position to be placed within the Oconee Economic Alliance. On April 21, 2016, the Destination Oconee Action Committee held their first organizational meeting. The individuals appointed to the Action Committee were Dave Washburn (District I), Luther Lyle (District II), Al Shadwick (District III), Matthew Smith (District IV), Bob Hill (District V), Hal Welch (Member at Large), and Robert Moore (Member at Large).

The committee met over the course of eleven months to become more educated on each of the plan's key recommendations, to better understand and determine the needs to implement specific initiatives within each of the key recommendations. Each month, a specialist presented information directly related to one of the key recommendations in the plan. Those specialists included representatives from the Oconee Economic Alliance, Oconee PRT, Oconee Community Development office, the Convention Visitors Bureau, the City of Walhalla and the Appalachian Council of Governments.

Key Recommendations

The 12 key recommendations listed within the adopted plan are as follows:

1. Support the development of Sanctuary Pointe Resort and the SC Great Outdoor Center at Exit 1
    a. Letter of support written January 2016, along with letters from Oconee Economic Alliance and Mountain Lakes CVB
    b. On-going support has and will continue to be provided as needed
    c. ***Completed**
2. Identify a person or organization to oversee the implementation of "Destination Oconee"
    a. Manager hired March 2016
    b. Position placed under the Oconee Economic Alliance
    c. ***Completed**
3. Conduct Street Audits in Downtowns
4. Pass a Design Review Committee Ordinance
5. Create a 3-year Action Plan for Managing Growth
6. Adopt a Scenic Overlay Ordinance for Cherokee Foothills National Scenic Byway
7. Adopt a Downtown Overlay Ordinance for Westminster, Seneca and Walhalla
8. Adopt a more detailed County and City Signage Ordinance
9. Conduct a Condition Assessment of the public access, structures and signage at lakes, waterfalls, rivers, scenic vistas and other key natural attractions
10. Develop a plan for improving public access and experiences at lakes, waterfalls, scenic vistas and other natural resources
11. Execute all marketing recommendations outlined in the plan
12. Identify sources and commit funding to support tourism projects

Priority Ranking of Key Recommendations

With two of the above twelve recommendations having been completed and one being specifically related to funding, the committee was charged with prioritizing the other nine recommendations. The following is the priority ranking from the County Council appointed Destination Oconee "Action Committee":

1. Adopt a Downtown Overlay Ordinance for Westminster, Seneca and Walhalla
2. Conduct a Condition Assessment of the public access, structures and signage at lakes, waterfalls, rivers, scenic vistas and other key natural attractions
3. Develop a plan for improving public access and experiences at lakes, waterfalls, scenic vistas and other natural resources
4. Conduct Street Audits in Downtowns
5. Adopt a more detailed County and City Signage Ordinance
6. Adopt a Scenic Overlay Ordinance for Cherokee Foothills National Scenic Byway
7. Pass a Design Review Committee Ordinance
8. Execute all marketing recommendations outlined in this plan
   * The committee specifically noted their lower ranking of this recommendation due to the fact that many of the marketing initiatives were already in motion and will be ongoing. However, the committee points out continued success generated by marketing will not be possible without committed funding.
9. Create a 3-year Action Plan for Managing Growth

The committee agreed on the importance of strengthening the downtowns to create that "sense of place", to improving the overall attractiveness and to enhance the economic climate within each. As the county continues to have economic development successes with business expansions and recruitment, it was determined that there is a need to put greater emphasis on community development to help attract and retain talent for business while enhancing the quality of life.

The committee also ranked assessing and improving the public access areas and infrastructure high on the list. They felt the county needs to concentrate on these areas to be able to provide quality amenities and services for residents and visitors alike. Many of the identified public access areas are in need of improvements not only aesthetically but also to make them safer and ADA compliant. It is a well-known fact that people want to visit and spend time at our parks, lakes and other key attractions. It is also known that people who have a bad experience will likely not return and share that bad experience with many others. The committee feels strongly that Oconee County needs to proactively invest in maintaining its tourism assets.

Funding Options

Once the rankings were completed, a preliminary list of projects was presented to the committee for review and discussion, along with a list of potential funding options. The different funding options considered were:

County Hospitality Tax

- Dedicated source of revenue for tourist related infrastructure and capital projects
- Implemented through ordinance by the County (3 readings and public hearing)
- County can levy up to 2% in the unincorporated areas
- SC Department of Revenue projects $735,000 annually (very conservative estimate and does not take into consideration new developments coming online in 2017-2018, such as Hartwell Village)

Capital Project Sales Tax

- List of projects proposed by commission appointed by County Council
- Referendum question to appear on ballot for voters to decide
- Vote to be held during a general election (November 2018)
- Estimated $5M annually

Increase Accommodations Tax

- Potential of 3-4 new hotels to be built in Oconee County in next few years
- Accommodations tax from new hotels beginning 2018 dedicated to Destination Oconee projects for a period of years
- Based on numbers from new Hampton Inn; projected revenue $30,000-$50,000/hotel per year

Grant Opportunities

- Research and seek grants for specific projects
- Revenue projections vary on grants available
- Typically local match is needed

After reviewing all the information presented to them, the Destination Oconee "Action Committee" members instructed the Destination Oconee staff person to complete the project list and to include cost estimates for all projects. The project list is divided into flagship/capital projects and immediate/priority need projects.

The Destination Oconee "Action Committee" members voted to make a recommendation to County Council to consider the implementation of a county wide Hospitality Tax, within the unincorporated areas of the county, to fund the immediate and priority need items identified on the Destination Oconee project list, included in this document and to assist with ongoing maintenance efforts of existing recreation assets. In addition, the Committee recommends County Council consider funding future flagship/capital projects with other funding options identified in the Destination Oconee report.

Project List

The following detailed project list was completed with estimated costs assigned to them. These amounts are estimates until such a time a project is moving forward and an exact bid is necessary.

Destination Oconee Committee
Project List

Flagship Projects	
Fall Creek Landing Improvements (Master Plan Pending)	
Trail Systems	
Palmetto Trail Completion/Walhalla Terminus	$500,000.00
Destination Mountain Bike Trails-Stumphouse	$500,000.00
Countywide Greenway connecting all three major downtowns ($500,000/mile x 30 miles)	$15,000,000.00
Connector Trail to Green Crescent (Future)	
Recreation/Sport Tourism Amenities based on needs assessment for each District	$2,000,000.00
Total Flagship Projects	**$18,000,000.00**
Immediate Need	
High Falls Master Plan Pending (Park Expansion)	
ADA Day Use Restroom-High Falls Park	$215,000.00
ADA Day Use Restroom/Park office-Chau Ram Park	$200,000.00
High Falls Campground Upgrades (New electrical/plumbing, full hook up, site upgrades)	$250,000.00
New Patio Deck Pavilion/Restrooms-High Falls Park	$250,000.00
Trailhead parking/ maintenance upgrades-Needs assessment needed	$250,000.00
Lake Access upgrades-Needs assessment needed	$500,000.00
River Access upgrades-Needs assessment needed	$250,000.00
South Cove swim area upgrades	$50,000.00
Wayfinding Signage - plan completed, DOT approved	$100,000.00
County-wide Buy Local - Think Oconee ($50,000/year x 5)	$250,000.00
Gateway Signage - eight entrances to the County and one at Oconee Airport	$270,000.00
Municipality Support (matching grants for Master Plans, redevelopment projects, etc.)	$200,000.00
Priority Need	
Tennis/Pickleball Courts-South Cove	$150,000.00
Shoreline Restoration Plan-South Cove/High Falls	$100,000.00
Two courtesy docks/One multi-slip dock-South Cove	$100,000.00
Courtesy dock-High Falls	$30,000.00
Kayak Launch-South Cove/High Falls	$20,000.00
Playground shade structure-South Cove/High Falls	$40,000.00
Expanded trail system-Chau Ram Park	$100,000.00
Gateway Entrances - I-85 Exit 1 and Exit 4	$500,000.00
Seneca Creek Access Improvements-Lake Hartwell Access	$750,000.00
Recreation Building renovations-South Cove	$60,000.00
Total Immediate & Priority Need	**$4,705,000.00**
Total Project List	**$22,705,000.00**

2016 – 2017 Accomplishments

While there is still much work to be done to accomplish the goals of the Destination Oconee plan, the program has seen initial successes. The plan has been embraced by the community, has completed successful downtown initiatives, spearheaded a popular buy local initiative, increased engagement on social media and has fostered the acceptance of the new branding.

- Introduction of Destination Oconee initiative
  - County embraced the logo
  - County vehicles rebranded with the logo
  - Planning sessions held with municipalities
  - Cities embraced the logo
  - Civic group and community organization presentations made
  - Formation of Action Committee
  - Collaboration with County PRT, planning department/shared planner
  - Social media presence increased
- Construction of Gateway signs
  - Secured $76,600 in grant dollars to fund new signs
  - Worked with architect on sign design
  - Applied for DOT encroachment permit
  - Awarded construction contract
  - Supervised project and coordinated final design and landscape
  - New signs placed at county entrances Hwy 123 from Clemson and Hwy 11N
  - County signs replaced at Hwy 107 and Hwy 123 from Georgia
  - Submitted packet for grant reimbursement
- Placement of Interactive photo kiosks
  - Placed first stationary kiosk at South Cove Park
  - Created mobile photo kiosks, partnered with local tourism partners and events for use (Chattooga Belle Farm, Jazz on the Alley, local festivals, etc.)
  - Encouraged interaction with visitors through social media
- Creation of Wayfinding signage plan
  - Toured county for placement/replacement of tourism assets signs
  - Created county wide plan
  - Developed consistent design for signage
  - Received DOT approval for county wide sign plan
  - Coordinated placement within city limits with each municipality
- Creation of County-wide buy local campaign
  - Developed branding and logo for Think Oconee initiative
  - Introduced campaign to community with various promotional materials
    - Distributed 4600 reusable shopping bags, 9200 decals, and 7500 koozies
  - Promoted initiatives though social media and various public events and mediums
  - Coordinated with local merchants for holiday/local spending
  - Supported local Farmers Market with promotional materials and marketing
  - Broadened campaign beyond buy local to recycling and litter initiatives
  - Spearheaded the Great Oconee Clean Up in April 2017
    - 200 volunteers, 2,300 lbs. of litter collected
  - Issued Downtown Clean Up Challenge to municipalities in July 2017
    - 4 cities participated: 145 volunteers, 3,500 lbs. of litter collected
    - Awarded $500 to 3 cities and $5,000 beautification grant to winner

- Municipality support provided
    - Met with each municipality, offered support and resources for development initiatives
        - Walhalla
            - Provided guidance for creation of Downtown Development Corporation
            - Conducted street audit
            - Developed Façade Grant Program
                - Recently awarded 3 grants totaling $4,992
            - Assisted in creating Design Guidelines
            - Assisted in updating and amending current zoning and signage ordinance
            - Created Business Incentive Program
            - Conducted Strategic Planning session for City Council
            - Presented ED 101 to City Council
        - Westminster
            - Created Commercial Building Improvement program
            - Supported Local Development Corporation
            - Explored various downtown improvement projects
            - Presented ED 101 to City Council
        - Seneca
            - Collaborated with Downtown Merchants Association on various marketing initiatives; Downtown Go-Around and Passport to Seneca
            - Conducted street audit
            - Facilitated City of Seneca and Downtown Merchants follow up discussion
            - Presented ED 101 to City Council
        - West Union
            - Presented ED 101 to Town Council
- Conducted a Condition Assessment of public access areas
    - Created an inventory listing of all public access points in the county
    - Identified all points on county map
    - Performed a preliminary assessment of current condition

In closing, it is important to know that Destination Oconee is a long-term plan, one that will take many years to complete. In fact, we will never be finished. We will need to continue to plan for the future, while investing in ourselves. As there will continue to be growth and development within the county, continued improvements and changes will need to be addressed.

Oconee County is truly blessed in so many ways from its people and businesses to its rich history and outdoor amenities. The future of Oconee is bright and this Destination Oconee plan is the type of catalyst to help our area reach its full potential.

The Destination Oconee committee and staff would like to thank County Council for their support of the Destination Oconee plan and their strong consideration concerning how to implement the plan fully and to keep the momentum going.


OCONEE
SOUTH CAROLINA
LAND BESIDE
THE WATER

Destination Oconee Action Committee

– David Washburn	District I
– Luther Lyle	District II
– Al Shadwick	District III
– Matthew Smith	District IV
– Bob Hill	District V
– Hal Welch	At Large
– Robert Moore	At Large

Destination Oconee Goals

- to capitalize on the abundance of our natural resources
- to promote the uniqueness of our downtowns
- to create a strong "sense of place" and a distinct, cohesive destination
- to focus on quality of life as the driving force

Clemson Entrance Hwy 123

Hwy 11 N From Pickens County

Hwy 107 & Hwy 123
Georgia State Line

DOWNTOWN STREET AUDITS

Walhalla

Seneca


THINK
Oconee
Oconee County, South Carolina


THINK
Oconee


THINK
Oconee
County, South Carolina

- 5 organizations
- 200 volunteers
- 2300 lbs. litter
- On going efforts
- Downtown Challenge

Downtown Clean Up Challenge

4 Cities

144 volunteers

3500 pounds of litter

Westminster
Downtown Clean Up Challenge Winner

Destination Oconee Committee
Project List

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