North Carolina's Ridge Law: No View from the Top

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NOTES

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North Carolina's mountains have long been a getaway retreat, valued for their breathtaking views, recreational opportunities, and "away-from-it-all" atmosphere. Recently, however, the mountains have attracted a growing number of tourists and second-home buyers from outside of the region,[1] spawning a construction boom that has threatened these attractions.[2] The likely impacts of this boom[3] and the possibilities of regulating development have been subjects of controversy among local residents, vacationers, developers, and state and local lawmakers. The controversy climaxed in the winter of 1982-83 with the construction of a stark ten-story condominium atop one of the region's tallest peaks.[4]

In response to this controversial construction, the North Carolina General Assembly enacted the Mountain Ridge Protection Act[5] in July, 1983 to preserve the natural beauty and inherent attractiveness of the mountains.[6] This legislation may be viewed as a step toward the enactment of statewide land-use controls, and therefore raises several issues regarding the limits of state and local governmental powers. After a brief discussion of the Act's legislative background, this Note will focus on the Act's significance as a method of state-level regulation and discuss its implications on local autonomy. Finally, the Note will analyze potential constitutional challenges to the Act.

In 1982, after leveling the peak of Little Sugar Mountain in Avery County, an out-of-state developer commenced construction of Sugar Top, a ten-story condominium. Billing Sugar Top as "one of the most extraordinary structures in the United States,"[7] the developer sold seventy-five percent of the

1. Durham Sun, Apr. 4, 1983, at 6C, col. 4. From 1970 to 1980 newcomers comprised 70% of the population growth in the 15 westernmost counties of North Carolina. The statewide average was 50%. During the same period, the amount of acreage used for agriculture decreased in the mountain counties three times faster than in the state as a whole, and even faster when compared to the State's nonmountain regions. *Id.*

2. Charlotte Observer, Jan. 23, 1983, at 1D, col. 2. In 1982 over 600 houses and condominiums were sold in the 10 square mile ski resort belt of Avery and Watauga counties. *Id.*

3. Although some people argue that the construction boom will create jobs in the area and attract more tourists, others believe that the boom's long-term effect will be to ruin the area's natural attractiveness and discourage vacationers. *See* Durham Sun, May 12, 1983, at 4C, col. 1; Charlotte Observer, *supra* note 2.

4. *See generally,* Durham Sun, *supra* note 1; Fayetteville Observer, Mar. 7, 1983, at 13A, col. 1 (1st ed.); Charlotte Observer, *supra* note 2.

5. 1983 N.C. Adv. Legis. Serv. 177 (codified at N.C. GEN. STAT. §§ 113A-205 to -214 (1983)).

6. *Id.*

7. Charlotte Observer, *supra* note 2 (quoting Don Tomlin, President of U.S. Capital Corp.). Sugar Top is a 741,000 square foot structure of concrete, glass, and steel. The estimated construction cost was $22 million. The developer, U.S. Capital Corporation, has worked primarily in Myrtle Beach, South Carolina, Hilton Head, South Carolina, and Gulf Shores, Alabama. *Id.* U.S. Capital's president, Don Tomlin, stated: "From a purely aesthetic point of view [Sugar Top] is a magnificent presence. The people (who have bought units) think it's beautiful." *Id.*

three hundred twenty units before the scheduled completion date.[8] The purchasers, many of whom were second-home buyers from Florida,[9] paid between $115,000 and $150,000 for each unit.[10] In addition to its attractiveness as a vacation resort, the development promised an economic boost to a depressed area of the State.[11]

Local residents, however, viewed Sugar Top as a symbol of external exploitation of their land, "motivat[ing] property owners, politicians, state officials and even other developers to see that it [would] never happen again."[12] In mid-March of 1983 the State legislature began considering bills that would give municipal and county officials a choice between accepting state-imposed construction height restrictions on mountain ridges and adopting their own restrictions.[13] The House bill provided localities the additional option of not adopting any restrictions, the sponsors apparently recognizing the widespread sentiment that construction restrictions were a matter of local prerogative requiring minimal state involvement,[14] and that some local governments might welcome increased development. The bill was supported by mountain residents, local governments, and environmental groups, and opposed by developers, builders, and landowners.[15] After months of debate, the legislature ratified the amended bill on July 5, 1983.

The Mountain Ridge Protection Act ("Ridge Law") provides several options for regulating the construction of "tall buildings"[16] on "protected moun-

8. *Id.*

9. Fayetteville Observer, *supra* note 4.

10. Charlotte Observer, *supra* note 2.

11. Sugar Top and 2 low-rise resorts on Sugar and Beech mountains promised an increased tax base and the creation of 350 jobs. *Id.*

12. *Id.* In response to the construction of Sugar Top, the North Carolina Sierra Club adopted a resolution on January 8, 1983, urging state support for land-use planning which would ensure that development projects would be compatible with the local environment and values. The Club's Blue Ridge group made mountain ridge protection its highest priority in 1983. *Id.* Also in response to Sugar Top, the Commissioners of Watauga and Avery counties approved moratoria on construction of high-rise buildings. Winston-Salem J., Mar. 20, 1983, at 1B, col. 1. For additional local responses, see Fayetteville Observer, *supra* note 4; Charlotte Observer, *supra* note 2.

13. Winston-Salem J., *supra* note 12; Office of State Management Systems, *Bill History as of 7/22/83* (available in North Carolina Law Review Office) [hereinafter cited as *Bill History*]. For the full series of draft bills, see S. 188, 1983 N.C. Sess. (eds. 1-7) (available in the North Carolina Law Review Office); H.R. 438, 1983 N.C. Sess. (available in Institute of Government Library, University of North Carolina at Chapel Hill).

14. Winston-Salem J., *supra* note 12.

15. Durham Sun, *supra* note 3. The most controversial provisions concerned local exemption, civil remedies, elevations, and building height restrictions. *See generally* Durham Morning Herald, June 18, 1983, at 3A, col. 1; Durham Morning Herald, May 12, 1983, at 4C, col. 1; Durham Morning Herald, Apr. 14, 1983, at 6D, col. 1; Winston-Salem J., *supra* note 12; Charlotte Observer, *supra* note 2; *Bill History*, *supra* note 13. For a legislative history of the Ridge Law, see Heath, *The North Carolina Mountain Ridge Protection Act*, 63 N.C.L. REV. 183 (1984).

16. The Act defines "tall buildings" as,

> any building, structure or unit within a multiunit building with a vertical height of more than 40 feet measured from the top of the foundation of said building, structure or unit and the uppermost point of said building, structure or unit; . . . provided, further, that no such building, structure, or unit shall protrude at its uppermost point above the crest of the ridge by more than 35 feet. "Tall buildings or structures" do not include:

tain ridges"[17] in twenty-four counties.[18] One option allowed the locality to adopt an ordinance requiring developers to acquire a permit before constructing tall buildings on protected ridges.[19] Before passing an ordinance, however, a county must have conducted studies of the ridges, articulated objectives for the ordinance, considered plans for achieving those objectives, and conducted a public hearing.[20] For counties that failed to adopt an ordinance by January 1, 1984, the second option—total prohibition of tall buildings on "protected mountain ridges"—automatically took effect.[21] A third option allowed counties to pass more restrictive ordinances, covering construction on *all* ridges more than 500 feet above the adjacent valley floor,[22] or on other ridges reasonably needing protection "against some or all of the hazards or problems set forth in G.S. 113A-207['s legislative findings]."[23] This option also enabled

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a. Water, radio, telephone or television towers or any equipment for the transmission of electricity or communications or both.

b. Structures of a relatively slender nature and minor vertical projections of a parent building, including chimneys, flagpoles, flues, spires, steeples, belfries, cupolas, antennas, poles, wires, or windmills.

c. Buildings and structures designated as National Historic Sites on the National Archives Registry.

N.C. GEN. STAT. § 113A-206(3) (1983).

17. The Act defines "ridge" to include all land within 100 feet of any portion of the crest of a mountain. *Id.* § 113A-206(5). "Protected mountain ridges" are defined as "all mountain ridges whose elevation is 3000 feet and whose elevation is 500 or more feet above the elevation of an adjacent valley floor." *Id.* § 113A-206(6).

18. Telephone interview with Mark Sullivan, Planner, Division of Land Resources, North Carolina Department of Natural Resources and Community Development (Nov. 9, 1983) [hereinafter cited as Sullivan Interview]. Because of the Act's definition of "protected mountain ridges," only the 24 counties containing protected ridges are subject to the Act. The counties with protected ridges are Alleghany, Ashe, Avery, Buncombe, Burke, Caldwell, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, Macon, Madison, McDowell, Mitchell, Polk, Rutherford, Surry, Swain, Transylvania, Watauga, Wilkes, and Yancey. All cities in those counties also are covered by the Act. M. Heath, Questions and Answers on the North Carolina Ridge Protection Law of 1983, at Question 3 (July, 1983) (available in Institute of Government Library, University of North Carolina at Chapel Hill).

Counties and cities are given virtually identical powers by North Carolina planning and development legislation. *Compare* N.C. GEN. STAT. § 153A-340 (1983) ("[F]or the purpose of promoting health, safety, morals, or the general welfare a county may regulate and restrict, (1) the height, number of stories, and size of buildings and other structures . . . .") *with id.* § 160A-381 (1982) ("[F]or the purpose of promoting health, safety, morals, or the general welfare of the community, a city is hereby empowered to regulate and restrict the height, number of stories and size of buildings and other structures . . . .")

19. N.C. GEN. STAT. § 113A-208 (1983). To receive a permit under the Act, an applicant must provide for adequate sewer systems, water supply systems, and sedimentation control, and give adequate consideration "to protecting the natural beauty of the mountains, as determined by the local governing body." *Id.* Conditions may be added to the permit to ensure proper operation, mitigation of recognized problems, protection of natural areas or public health, and well-designed, safe, and appropriate construction. *Id.* § 113A-208(c).

20. *Id.* § 113A-208(a), (f).

21. *Id.* § 113A-209.

22. *Id.* § 113A-208(a). The third option allowed a local government to ignore the 3000 foot elevation requirement in the definition of protected ridges. *Id.* § 113A-206(6).

23. *Id.* § 113A-208(d). The legislature found that "tall or major buildings and structures on the ridges and higher elevations of North Carolina's mountains constructed in an inappropriate or badly designed manner can cause unusual problems and hazards to the residents of and visitors to the mountains." *Id.* § 113A-207. The commonly cited problems included provision of water and sewer service, fire protection, vulnerability to high winds, interference with navigation, and detraction from the natural beauty of the mountains. *Id.*

eleven additional counties to include themselves within the Act's restrictions.[24] Finally, a city or county could have "opted-out" of the Act's coverage by conducting a referendum on or before May 8, 1984.[25] A county or city that "opted-out" could later decide to "opt-in" by conducting a similar referendum before May 13, 1986.[26]

The Ridge Law is the legislature's first step toward land-use control in the mountains and only its second enactment of regional land-use controls in the State. Thus, the Ridge Law may "pave the way for the first comprehensive land protection planning in the North Carolina mountains,"[27] or in the State as a whole. In addition, the Ridge Law represents the first state-level imposition of land-use restrictions for primarily aesthetic purposes.[28] Although the

24. M. Heath, *supra* note 18, at Question 4. The additional counties are Alexander, Catawba, Cleveland, Davidson, Gaston, Iredell, Montgomery, Randolph, Stanley, Stokes, and Yadkin. *Id.*

25. N.C. GEN. STAT. § 113A-214(a) (1983).

26. *Id.* § 113A-214(b).

27. Charlotte Observer, *supra* note 2. Legislation for a comprehensive mountain area management act (MAMA) was introduced during the 1974 and 1975 terms, but never was enacted. The Institute of Government, the University of North Carolina at Chapel Hill, *North Carolina Legislation 1975: A Summary of Legislation in the 1975 General Assembly of Interest to North Carolina Public Officials* 123 (1975) (S. 973, H.R. 1379, 1973-74 N.C. Legislature were rejected and S. 467, H.R. 596, 1975 N.C. Sess. were left in committee) [hereinafter cited as *North Carolina Legislation 1975*]. The proposed legislation would have established a comprehensive state and local program, requiring local planning in accordance with state guidelines and state review of development permits for identified areas of environmental concern. If a county chose not to adopt a plan, the State would have devised a plan for that particular county. After mixed public support for MAMA at public hearings in Asheville and Raleigh, supporters decided not to push the bill "in hopes of finding a more favorable legislative environment in 1977." *North Carolina Legislation 1975*, *supra*. The bill never was reintroduced.

Despite the State's limited involvement under the Ridge Law, some are convinced that the Ridge Law will lead to broad-scale, regional, land-use planning. "It's like the first step we made on the coast. We got into dune protection and dredge-and-fill (laws), and that led to CAMA." Charlotte Observer, *supra* note 2 (quoting Joe Grimsley, Secretary of North Carolina Dep't of Natural Resources and Community Development).

28. Historically, the State has allowed *local* governments to restrict land uses for aesthetic purposes, notably by the creation of historic preservation districts and commissions. *See infra* notes 95-97 and accompanying text; N.C. GEN. STAT. §§ 160A-395 to -399.13 (1982). State-level participation in historic preservation, however, does not go beyond maintaining a survey of historic properties, creating policies for historic preservation, and providing technical assistance to local governments. *Id.* § 121-8 (1981 & Supp. 1983). Other state-level aesthetic controls, such as the prohibition of billboards, are nonexistent.

Most state-level land-use controls in other jurisdictions focus on environmental problems—the protection of wetlands or floodplains or the preservation of agricultural land—that transcend municipal or county boundaries. *See* D. MANDELKER, LAND USE LAW ch. 12 (1982). *See also* CAL. PUB. RES. CODE §§ 22000 to 22080 (West 1977) (commission established to protect the Ventura-Los Angeles Mountain and Coastal Zone); GA. CODE ANN. §§ 12-5-210 to -312 (1981 & Supp. 1983) (coastal wetland statute); IOWA CODE ANN. § 455B.276 (West Supp. 1983) (floodplain regulation statute); ME. REV. STAT. ANN. tit. 5, §§ 3301-3306A (1979 & Supp. 1983) (statewide comprehensive planning for "human and physical resource development and utilization," capital improvements and intergovernmental coordination planning, as an addition to municipal planning powers); *Id.* at tit. 5, §§ 3310-3314 (state register of critical areas to be specially considered in state planning activities); N.H. REV. STAT. ANN. § 422-B:1 to :18 (1983) (permits for construction of structures in territory surrounding public airports that is not locally zoned); N.J. STAT. ANN. §§ 13:9A-1 to :10 (West 1979 & Supp. 1983) (coastal wetland statute); OR. REV. STAT. § 197.405 to .430 (1983) (designation of areas of critical state concern in which certain developmental activities are prohibited or regulated); 19 PA. CONS. STAT. ANN. §§ 801-805 (Purdon Supp. 1983) (state control over Appalachian Trail to supercede local planning and zoning); VT. STAT. ANN. tit. 10, §§ 6001-6092 (1973 & Supp. 1983) (permit from one of nine district commissions required for construction of large developments and for other development in specified environmentally sensi-

legislative findings suggest other justifications for the building height restrictions,[29] the Act's primary concern is preserving the scenic beauty of the mountains.[30]

Land-use planning and zoning traditionally have been handled at the local level,[31] with minimal interference or guidance by the state. More recently, however, many states have recognized that some land-use problems transcend local boundaries and are controllable only at the regional or state level. These states are beginning to reclaim some of the zoning and land-use powers previously granted to the cities and counties.[32]

Despite this activity in other states, North Carolina has had very limited involvement in land-use and development controls, at least outside of the coastal zone. Particularly in the mountain region, residents have resisted state-imposed, comprehensive planning on at least two occasions.[33] Whether the local resistance is derived from a fear that land development controls would prevent economic development, a disdain for the impositions on freedom involved in any kind of land-use control, or a general distrust of state government, the residents have legitimate concerns over the land on which they live and, less often, own.[34] Any attempt to regulate land use in the region must consider these concerns.

Before passing the Coastal Area Management Act (CAMA)[35] and the

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tive area—comprehensive statewide plan to supplement local planning); WIS. STAT. ANN. §§ 87.30-.31 (West 1972 & Supp. 1983) (floodplain regulation statute).

29. *See supra* note 23.

30. Public reaction to Sugar Top indicates that the main concern was spoliation of mountain scenery. Durham Sun, *supra* note 3. One lifetime resident of Norwood Hollow, a small town located at the foot of Sugar Mountain, stated: "I hated to see the ski slopes come in, but it didn't bother me as much [as Sugar Top] because they didn't change the shape of things . . . . [t]hat thing'll be seen for miles and miles." Charlotte Observer, *supra* note 2 (quoting Claude Norwood). One argument for imposing controls at the state level was the visibility of mountaintops from adjacent counties. Durham Morning Herald, May 12, 1983, at 4C, col. 1. One representative of the North Carolina General Assembly said that the height restriction was intended to allow one to "stand in the valley floor, look up and see the crest." Durham Morning Herald, June 18, 1983, at 3A, col. 1 (quoting Rep. Joe Mavretic). Although the legislature mentioned health and safety considerations, *see supra* note 23, as support for the Act, the correlation between these justifications and building height is attenuated; for example, pumping water or driving a firetruck up a mountain present the same difficulties whether a building is 100 or 200 feet tall.

31. *See* N.C. GEN. STAT. § 153A-340 (1983); *id.* § 160A-381 (1982).

32. *See supra* note 28.

33. In 1974 residents resisted comprehensive mountain area management. *See supra* note 27. The Ridge Law also has met local resistance. Telephone interview with Milton Heath, Institute of Government, University of North Carolina at Chapel Hill, Oct. 24, 1983 [hereinafter cited as Heath Interview]. Professor Heath has indicated that a major difference between the Coastal Area Management Act (CAMA) and the mountain legislation is that the people influencing the mountain legislation emphasized local control, trying to keep the State as uninvolved as possible. *Id.* Under the Ridge Law, the Department of Natural Resources and Community Development provides only supplementary assistance to local governments. The State is required to map out the "protected mountain ridges;" beyond this administrative function, the State provides assistance only upon request. N.C. GEN. STAT. § 113A-212 (1983).

34. *See* Durham Sun, *supra* note 1. "The biggest problem is the local people do not control their county. And that's a pathetic thing." *Id.* (quoting Cloyd Bolick, local landowner and lifetime resident). Absentee owners in 9 Western counties control at least 48% of the land; in Swain County, outside individuals, corporations, and government agencies control 94% of the land. *Id.*

35. N.C. GEN. STAT. § 113A-100 to -128 (1983).

Land Policy Act of 1974,[36] North Carolina adopted a "hands-off" approach to land-use regulation. The Land Policy Act, however, recognized a state role in planning and offered planning assistance to all local governments that requested it.[37] CAMA, on the other hand, recognized that land-use laws might need to go beyond their traditional role of mediating "between conflicting uses of land and [providing] for physical development" and protect "the environmental integrity and productivity of land as a limited resource."[38] Because environmental problems transcend county boundaries and make it impossible for a single county or municipality to combat them effectively, North Carolina adopted a comprehensive system of planning for the twenty counties within the coastal region.[39]

CAMA illustrates a growing tendency among environmentally-concerned states to protect areas of critical state interest by regulating development at the

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36. *Id.* §§ 113A-150 to -159.

37. *Id.*

38. Schoenbaum, *The Management of Land and Water Use in the Coastal Zone: A New Law is Enacted in North Carolina*, 53 N.C.L. REV. 275, 276-77 (1974). For a discussion of early state land-use controls, see F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971).

39. CAMA resulted from concern about the coastal ecosystem's deterioration, which had been caused primarily by the pollution of estuarine waters, the filling of salt marshes, and the destruction of dunes and maritime forests. Schoenbaum, *supra* note 38, at 276; *see also* Rice, *Estuarine Lands of North Carolina: Legal Aspect of Ownership, Use and Control*, 46 N.C.L. REV. 779 (1968); Comment, *Estuarine Pollution: The Deterioration of the Oyster Industry in North Carolina*, 49 N.C.L. REV. 921, 922 (1971); R. Bode & W. Farthing, Coastal Area Management in North Carolina: Problems and Alternatives, 4-6 (Feb. 11, 1974) (available at the N.C. Law Center).

Designated CAMA counties must adopt land-use plans in accordance with state guidelines; if a county fails to produce a plan, the State will impose one. N.C. GEN. STAT. §§ 113A-106 to -112 (1983). Before commencing any development involving construction, dredge or fill operations, or land alteration in state-designated "area[s] of environmental concern," a developer must procure a permit. *Id.* § 113A-118. For a "major development"—a development that requires approval from another state or federal agency, occupies an area greater than 20 acres, contemplates drilling for or evacuation of natural resources, or occupies a large structure, *id.* § 113A-118(d)(1)—the Coastal Resources Commission must allow a period for interested parties and other state agencies to comment on the application before granting a permit. *Id.* § 113A-119. Permission for a "minor development"—a development other than a "major development," *id.* § 113A-118(d)(2)—is administered locally. *Id.* § 113A-121. The Act prescribes when permits are to be granted or denied, *id.* § 113A-120, and how appeals are to be handled, *id.* §§ 113A-121.1 to -123.

By dividing authority between the state and the local governments, North Carolina became a leader in allowing greater local participation in coastal zone management. Schoenbaum, *supra* note 38, at 283, 292 (many other states use local governments merely as administrators of state programs or directives, rather than as active participants in the process). New York, for example, binds local governments with state-adopted land-use regulations. N.Y. ENVTL. CONSERV. LAW §§ 51-0701 to -0713 (McKinney Supp. 1983). Until 1976 California did not require local government plans to include coastal considerations. CAL. PUB. RES. CODE § 30103 (Deering 1977). *See* D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION, 246-54 (1976 & Supp. 1978).

For discussion and comparison of state statutory frameworks for coastal zone mangement, see D. MANDELKER, *supra*, ch. VI; Ausness, *Land Use Controls in Coastal Areas*, 9 CAL. W.L. REV. 391, 404-13 (1973); Bryden, *The Impact of Variances: A Study of Statewide Zoning*, 61 MINN. L. REV. 769 (1977) (administration of Minnesota Shoreland Management Act); Note, *Assimilating Human Activity into the Shoreland Environment: The Michigan Shoreland Protection and Management Act of 1970*, 62 IOWA L. REV. 149 (1976); Note, *State Land Use Regulation—A Survey of Recent Legislative Approaches*, 56 MINN. L. REV. 869, 889-911 (1972) [hereinafter cited as Note, *State Land Use Regulation Survey*]; Note, *The Wetlands Controversy: A Coastal Concern Washes Inland*, 52 NOTRE DAME LAW. 1015 (1977).

state level.[40] Although the federal Coastal Zone Management Act[41] provided incentives for state protection of coastal regions, some states have protected other areas without direct federal incentive. New York, for example, has enacted a "comprehensive" zoning[42] plan to regulate the development of both public and private lands in its six-million acre Adirondack Park.[43] New Jersey has preempted local control of its Hackensack Meadowlands by creating a special agency to oversee the area's development and protection.[44]

Other states use varying schemes to retain control over development in the entire state or in special areas to be designated throughout the state.[45] In

40. Most states have enacted selective protective measures aimed at portions of the state, rather than comprehensive state regulation. Most often, the legislation designates areas of critical concern for which the state either establishes developmental guidelines for local governments or requires a state development permit. *See generally* MODEL LAND DEV. CODE §§ 281-288 (Proposed Official Draft 1975); R. HEALY & J. ROSENBERG, LAND USE AND THE STATES (2d ed. 1979); R. LINOWES & D. ALLENSWORTH, THE STATES AND LAND-USE CONTROL (1975); D. MANDELKER, *supra* note 39, at ch. III (comparison of the ALI Model Code and the legislation currently in effect); D. MANDELKER & R. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS, 1207-70 (1979); Callies, *Land Use and Critical Areas: Preservation and Development Compromise in England and Australia*, 5 COLUM. J. ENVTL. L. 265 (1979) (comparison of foreign innovation in regional or national land development controls); Pelham, *Regulatory Areas of Critical State Concern: Florida and the Model Code*, 18 URB. L. ANN. 3 (1980) (description of Florida's selective system of land development control); Rose, *From the Legislatures: State Government Role in Land Use Planning and Control is Growing*, 2 REAL EST. L.J. 809 (1974); Note, *State Land Use Regulation Survey*, *supra* note 39.

41. 16 U.S.C. §§ 1451-1464 (1982). The Coastal Zone Management Act (CZMA) provides technical and financial assistance to states with federally-approved coastal management programs. For an analysis of CAMA in relation to CZMA, see Schoenbaum, *supra* note 38, at 279-83.

42. A "comprehensive plan" is defined as a "long-range policy guide for development of the city [or region] as a whole;" it usually includes "a land use plan, a thoroughfare plan, a community facilities plan and a public improvements plan," and often incorporates plans for conservation of natural resources, recreation, and community protection from fires, floods, or other hazards. D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 17 (1975).

43. Adirondack Park Agency Act, N.Y. EXEC. LAW §§ 801-819 (McKinney 1982) [hereinafter cited as APAA]. The courts have upheld the Adirondack plan despite a home-rule provision in New York's Constitution. A home-rule provision gives local governments direct planning and zoning authority; such a provision generally is recognized as stronger authority than the more common alternative, a delegation of power from the legislature (enabling legislation). *See* Wambat Realty Corp. v. State, 41 N.Y.2d 490, 362 N.E.2d 581, 393 N.Y.S.2d 949 (1977). In *Wambat Realty Corp.* plaintiff's subdivision proposal was permitted by the local zoning board but denied by the Adirondack Park Agency. Plaintiff challenged the Agency as an unconstitutional suspension of the home-rule zoning and planning powers expressly granted to local governments by the New York Constitution. The court denied relief after concluding that preservation of the Adirondack Park was a substantial state concern not intended to be exempt from state control. *Id.* *See also* D. HAGMAN, *supra* note 42, §§ 33-40; Note, *Home Rule: Constitutionally Granted Planning and Zoning Powers vs. State Concern for Preservation of the Adirondacks*, 16 URB. L. ANN. 389, 392-93 (1979).

44. N.J. STAT. ANN. § 13:17 (West 1979 & Supp. 1983).

45. *See, e.g.*, CAL. PUB. RES. CODE §§ 22,000-22,080 (Deering Supp. 1978) (commission established to protect the Ventura-Los Angeles Mountain and Coastal Zone); COLO. REV. STAT. § 24-65.1-101 to -65.1-502 (1982) (permits for development of areas of state interest and conduct of activities of state interest); ME. REV. STAT. ANN. tit. 5, §§ 3301-3314 (1979 & Cum. Supp. 1983) (comprehensive plan for "human and physical resource development and utilization," capital improvements, and intergovernmental coordination planning, in addition to municipal planning powers; state register of critical areas); MINN. STAT. ANN. §§ 116G.01 to .14 (West 1979 & Cum. Supp. 1983) (permits for development in critical areas); NEV. REV. STAT. §§ 321.640 to .770 (1981) (state assistance in critical area planning upon request of governor or local government); OR. REV. STAT. § 197.005 to .850 (1983) (statewide directives, coordination, and review of local comprehensive planning—special emphasis on critical areas); WIS. STAT. ANN. § 144.26 (West Cum. Supp.

1971 Hawaii became the first state to enact a statewide system of land-use control, requiring all land to be classified as urban, conservation, rural, or agricultural, with specific development and use limitations for each zone.[46] The Vermont legislature has divided the state into nine regions, establishing a commission in each to ensure that proposed developments comply with state criteria.[47] Florida, on the other hand, has chosen a more selective statewide system,[48] requiring state oversight only in "areas of critical state concern"[49] or over "developments of regional impact."[50] Florida followed the American Law Institute Model Land Development Code, which operates on the premise that most land-use decisions are of local significance and should be made locally;[51] for the limited issues of significant state interest, however, the Model Code recommends a combination of state and local policy-making and implementation.[52] Unlike North Carolina's CAMA, however, the Model Code's areas or developments of state interest may be located anywhere in the state, not only in predesignated regions.

Although some may advocate a comprehensive, state-level mechanism for protecting North Carolina's mountains and other sensitive areas to ensure that local policies or inaction do not destroy areas of statewide importance, such legislation undoubtedly would be opposed by others.[53] An incremental approach designed to achieve the same result through piecemeal regional controls might be the best approach to avoid these political barriers. One possible

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1983) (shorelands protection combining state and local authority); WYO. STAT. §§ 9-8-101 to -302 (1977) (statewide and local land-use planning with state assistance in critical area planning).

46. HAWAII REV. STAT. § 205 (1976 & Cum. Supp. 1982). For an evaluation of Hawaii's land-use control programs, see Lowry, *Evaluating State Land Use Control: Perspectives and Hawaii Case Study*, 18 URB. L. ANN. 85 (1980). Lowry sets forth four arguments supporting a greater state role in land development control: the insufficient sensitivity of local governments to the environmental consequences of their actions; the statewide importance of resources such as coastal wetlands and agricultural lands; the lack of attention to regional concerns resulting from fragmentation of local authority; and the decreased vulnerability of state decisionmaking to local political forces.

47. VT. STAT. ANN. tit. 10, §§ 6001-6091 (1973 & Cum. Supp. 1983). *See* D. MANDELKER, *supra* note 39, ch. VII (features, process, and implications of Vermont's system).

48. FLA. STAT. § 380.05 to .06 (Cum. Supp. 1983). For a discussion of the two approaches to state regulation of critical areas—regulation of a particular "geographic region legislatively designated on an ad hoc basis, and comprehensive statewide mechanisms for administrative designation and regulation of critical areas"—see Pelham, *supra* note 40, at 4-15. *See also* Finnell, *Saving Paradise: The Florida Environmental Land and Water Management Act of 1972*, 1973 URB. L. ANN. 103 (1973).

49. FLA. STAT. § 380.05 (Cum. Supp. 1983). "Critical areas" is commonly used to describe areas for which preservation and protection is vital, usually for environmental or historical reasons.

50. *Id.* § 380.06. "Developments of Regional Impact" is used in the American Law Institute Model Land Development Code to refer to a development that because of its "nature or magnitude . . . or the nature or magnitude of its effect on the surrounding environment, is likely in the judgment of the Agency to present issues of state or regional significance." MODEL LAND DEV. CODE § 7-301(1) (Proposed Official Draft 1975).

51. MODEL LAND DEV. CODE Article 7 comment at 285-86 (Proposed Official Draft 1975).

52. MODEL LAND DEV. CODE § 7-101 note 1 (Proposed Official Draft 1975). The Model Code recognizes the difficulty of defining in advance the matters that should be of state or regional interest. For a critique of the Model Code, see D. MANDELKER, *supra* note 39, ch. III.

53. *See supra* note 33 and accompanying text.

consequence of such legislation, however, would be a lack of uniformity or cohesiveness.

The Ridge Law can be viewed as a necessary step in an incremental approach to statewide land-use controls.[54] Because it involves significant land-use restrictions, however, it almost certainly will be challenged in the courts. Plaintiffs can challenge the Act on a number of constitutional grounds. The first of these is that the State may not reclaim powers it previously has granted to localities. Second, opponents of the Act will argue that the State may not selectively impose restrictions on its lands, because such restrictions are unconstitutional local legislation. Third, opponents will argue that the aesthetic controls imposed by the Ridge Law are not within the police power of the State.[55] Fourth, opponents will argue that the restrictions imposed by the Ridge Law constitute a "taking" of private property. Finally, nonresident landowners will argue that, by restricting the use of their land without including them in the referendum process, North Carolina has deprived them of property without due process of law and has denied them equal protection of the law.

To determine whether regional land-use controls imposed at the state level are within the state's powers, the origin of the state's regulatory power must be examined. North Carolina's Constitution provides that all local government powers are delegated by the State legislature.[56] Nothing in the legislation delegating planning and zoning powers, however, implies that the powers granted are exclusively local, and, although regulatory power is not expressly reserved by the State, several factors suggest that the State retains concurrent power.

First, provisions in the enabling legislation imply that when county or city land-use regulations conflict with other statutes or ordinances, the most restrictive law governs.[57] The enabling legislation specifically refers to restrictions on building heights,[58] implying that statutes (state legislation)[59] also might regulate building heights.

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54. *See supra* note 27.

55. For a recent analysis of aesthetic land-use control in North Carolina and elsewhere, see Note, *State v. Jones: Aesthetic Regulation — From Junkyards to Residences?*, 61 N.C.L. REV. 942 (1983).

56. The North Carolina Constitution provides that:

> The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.

N.C. CONST. art. VII, § 1. Several state constitutions, such as New York's, delineate local powers more specifically. *See generally* Note, *supra* note 43.

57. N.C. GEN. STAT. § 153A-346 (1983); *id.* § 160A-390 (1982). These provisions are necessary because of the conflicting jurisdiction of state, county, and municipal governments. The Ridge Law follows the spirit of this law by providing for more restrictive local ordinances. N.C. GEN. STAT. § 113A-208 (1983).

58. *Id.* § 153A-346; *id.* § 160A-390.

59. "Statute" applies to acts of the national or state legislature, while "ordinance" refers to municipal laws. BLACK'S LAW DICTIONARY, 1264, 989 (5th ed. 1979).

Second, caselaw favors state reservation or reclamation of land-use control power. Although the North Carolina courts have not addressed this issue in a land-use context, annexation cases and dicta in other cases suggest such a reservation.[60] "The authority of cities and towns as instrumentalities for the administration of local government may be enlarged, abridged or withdrawn at the will or pleasure of the legislature."[61] This view—that states may abolish or reclaim local government authority—also is accepted outside of North Carolina;[62] both New York[63] and Florida[64] have upheld the primacy of state law in a land-use context.

Finally, in determining whether the Ridge Law itself is a proper exercise of the State's powers vis-a-vis local powers, one must note the State's limited role under the Act. Local governments may avoid the state-imposed prohibitions by rejecting the Act by referendum or by passing overriding ordinances that satisfy state guidelines.[65] In addition, counties may enact more stringent

60. Except when restricted by the Constitution, regulation of annexation by municipal corporations is within the state's legislative powers. Texfi Indus. v. City of Fayetteville, 301 N.C. 1, 7, 269 S.E.2d 142, 147 (1980); Lutterloh v. City of Fayetteville, 149 N.C. 65, 69, 62 S.E. 758, 760 (1908); Abbot v. Town of Highlands, 52 N.C. App. 69, 74-75, 277 S.E.2d 820, 824 (1981).

61. Rhodes v. City of Asheville, 230 N.C. 134, 140, 52 S.E.2d 371, 376 (1949) (municipal airport is a proprietary function of government for which the government is liable in tort); Town of Murphy v. C.A. Webb & Co., 156 N.C. 402, 405, 72 S.E. 460, 461 (1911) (by act of state legislature, town has right to issue bonds without a vote of the populace).

62. *See* Hunter v. City of Pittsburgh, 207 U.S. 161 (1907). In this annexation case, the annexed community was denied its challenge to the state-approved annexation. "The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State . . . . The State, therefore, at its pleasure may modify or withdraw all such powers . . . ." *Id.* at 178. *See also* Bostic v. City of West Columbia, 268 S.C. 386, 234 S.E.2d 224 (1977); State Theatre Co. v. Smith, 276 N.W.2d 259 (S.D. 1979).

63. *See* Wambat Realty Corp. v. State, 41 N.Y.2d 490, 362 N.E.2d 581, 393 N.Y.S.2d 949 (1977) (Despite constitutional home-rule provision, New York's regulatory scheme for the Adirondack mountain region involved matters of state concern, beyond "the property, affairs or government of a local government," and therefore was within the State's power.)

64. *See* Cross Key Waterways v. Askew, 351 So. 2d 1062 (Fla. Dist. Ct. App. 1977), *aff'd*, 372 So. 2d 913 (Fla. 1978). In *Cross Key Waterways* Florida's statewide land-use development control system was held to be within the state's constitutional powers. Particular standards and procedures for identifying "areas of critical state concern" for which state administrative regulations would supersede local controls, however, were found inadequate. The statute was amended to correct this inadequacy. FLA. STAT. ANN. § 380.05(2), *amended by* 1979 Fla. Laws 390, 392-99; 1981 Fla. Laws 1013, 1127. Recognizing the state-local authority, the court of appeals in *Cross Key Waterways* stated:

> The primacy of local government jurisdiction in land development regulation has traditionally been, in this country, a corollary of the people's right of access to government. In a sense, therefore, the jurisdictional claim of local governments in these matters is based on historical preferences stronger than law. Yet it is clear that counties and municipalities . . . have no constitutionally vested jurisdiction in the regulation of the "earth, water, and air" within their confines. The power exercised or withheld by those governments is the state's power, appropriately delegated . . . . The jurisdiction of every county, charter or non-charter, is subject to qualification by law.

251 So. 2d at 1065.

65. N.C. GEN. STAT. §§ 113A-208, -214(a) (1983). Despite these options, one may argue that the time limits of the Act have precluded counties from avoiding the Act's restrictions. Sullivan Interview, *supra* note 18. Compliance with the Act's requirement that counties pass overriding ordinances by January 1, 1984 was nearly impossible since the final mapping by the State of areas included under the Ridge Law was not due for completion until that date. *Id.* As of the January 1, 1984 deadline, three counties, Avery, Henderson, and Watauga, had adopted ordinances more

building height restrictions than the Act requires.[66] The Act itself merely professes to supplement other local regulation.[67]

North Carolina's constitutional limitation on local or special legislation also might threaten the Ridge Law.[68] The North Carolina Constitution provides that "[t]he General Assembly shall not enact any local, private, or special act or resolution: (a) Relating to health, sanitation, and abatement of nuisances; . . . [or] (j) Regulating labor, trade, mining, or manufacturing."[69] It could be argued that the Ridge Law is local legislation since it applies only to a portion of the State. Furthermore, the Act can be characterized as relating to health or nuisance abatement,[70] or as regulating trade.[71]

Assuming the Ridge Law does fall into one of the prohibited categories, it is valid only if construed as a general rather than a local law. If it applies "to fewer than all counties" and the restricted counties do "not rationally differ from the excepted counties in relation to the purpose of the act,"[72] the Ridge Law is invalid. Thus, to satisfy the local legislation restriction of the North

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restrictive than the state statute with two of these prohibiting virtually all structures taller than forty feet. Raleigh News and Observer, Jan. 8, 1984, at 5D, col. 1. Only one county, Cherokee, scheduled a referendum, for May 8, 1984, *id.*, and the voters favored coverage under the Act by a margin of 1926 to 535. Asheville Citizen, May 10, 1984, at 29, col. 1 (unofficial vote count).

Even if a county missed its opportunity to pass its own ordinance under the Ridge Law, thereby making the State's restrictions operative, other enabling legislation permits a locality to restrict building heights at any time. *See supra* note 18. If local ordinances are passed, the more restictive law will govern. N.C. GEN. STAT. § 153A-346 (1983) (counties); *id.* § 160A-390 (1982) (cities).

66. *See supra* notes 16-26 and accompanying text.

67. N.C. GEN. STAT. § 113A-213 (1983).

68. For a thorough discussion of North Carolina's law concerning state "legislation minutely regulating the affairs of individual local governments" see Ferrell, *Local Legislation in the North Carolina General Assembly*, 45 N.C.L. REV. 340 (1967). For a partial update on local legislation in relation to CAMA, see Glenn, *The Coastal Area Management Act in the Courts: A Preliminary Analysis*, 53 N.C.L. REV. 303, 306-14 (1974).

69. N.C. CONST. art. II, § 24(1).

70. The legislative findings in the Ridge Law specifically mention the health hazards relating to water and sewage, and the interference with air navigation. N.C. GEN. STAT. § 113A-207 (1983). For elaboration of what is and what is not included as health-related or nuisance-abating legislation, see Glenn, *supra* note 68, at 307-10.

71. N.C. GEN. STAT. § 113A-207 (1983). Even though restriction of building heights only indirectly regulates trade by infringing upon a developer's ability to build what he desires, both indirect and direct regulation have been prohibited under the local legislation constitutional provision. *See* Glenn, *supra* note 68, at 308; *see also* Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972) (statute authorizing referendum for liquor-by-the-drink in Mecklenburg County held invalid as a local act).

72. Smith v. County of Mecklenburg, 280 N.C. 497, 507, 187 S.E.2d 67, 73 (1972). In Adams v. North Carolina Dep't of Natural and Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978), the North Carolina Supreme Court held that the CAMA is not a "local act" since the county distinction was made on a rational basis and was not underinclusive. The court considered the legislative findings regarding the "unique, fragile and irreplaceable nature of the coastal zone" and concluded that the CAMA addresses the "special and urgent environmental problems found in the coastal zone." *Id.* at 691-93, 249 S.E.2d at 408. The court rejected plaintiff's assertion that the environmental problems of the mountains and the Piedmont also deserved legislative attention, concluding that it was "not a valid constitutional objection to the Act in light of [the court's] finding that the coastal area is sufficiently unique to warrant specific legislative attention." *Id.* at 693, 249 S.E.2d at 408. Thus, the constitution does not require a regulation to reach every class to which it might be applied, if it " 'strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs.' " *Id.* (quoting Silver v. Silver, 280 U.S. 117 (1929)).

Carolina Constitution, the Act must differentiate between counties with "protected mountain ridges" and those without "protected mountain ridges" on a rational basis.

Although the Act does not expressly state its purpose, it commonly is considered aesthetic.[73] Since "local legislation" analysis does not consider the validity of the purpose[74] but only the means imposed to achieve it, and mountain beauty can be preserved only in mountain counties, the Act undoubtedly imposes a rational distinction for aesthetic purposes. If, however, the purpose of the Ridge Law is not aesthetic—if the purpose is the prevention of hazardous construction or the promotion of state land-use planning—a rational distinction would be more difficult to demonstrate. In holding CAMA constitutional, the supreme court found CAMA's purpose of treating "the special and urgent environmental problems found in the coastal zone" justifiably limited to the coastal area.[75] Although the environmental problems of the mountains are less substantial, this decision illustrates the court's willingness to find a purpose under which a classification may be justified. Considering the court's history of deference to legislative actions,[76] the court should uphold the Ridge Law against a local legislation claim.

The third potential constitutional claim that can be raised to challenge the Ridge Law is that the Act constitutes a taking of private property without just compensation.[77] Since the Act prohibits the construction of tall buildings, it

73. *See supra* note 30 and accompanying text.

74. For discussion of whether aesthetics is a valid purpose for state legislation, see *infra* notes 96-97 and accompanying text. In local legislation cases, the North Carolina courts tend to assume that legislation affecting health or trade has a valid public purpose. Analysis of the local legislation issue instead emphasizes the rationality of the distinction between affected and nonaffected localities. For a discussion of the North Carolina courts' treatment of local legislation, see Ferrell, *supra* note 68, at 360-402.

75. Adams v. North Carolina Dep't of Natural and Economic Resources, 295 N.C. 683, 693, 249 S.E.2d 402, 408 (1978). *See supra* note 72.

76. Invalidation of legislation as unconstitutional by North Carolina courts is limited to acts that are "plainly and clearly" unconstitutional. Any reasonable doubts are resolved in the legislature's favor. Adams v. North Carolina Dep't of Natural and Economic Resources, 295 N.C. 683, 689, 249 S.E.2d 402, 406 (1978); McIntyre v. Clarkson, 254 N.C. 510, 119 S.E.2d 888 (1961); Glenn v. Board of Educ., 210 N.C. 525, 187 S.E. 781 (1936). "In passing upon the constitutionality of a legislative act it is not for this Court to judge its wisdom and expediency. These matters are the province of the General Assembly." *Adams*, 295 N.C. at 690, 249 S.E.2d at 406.

77. "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The fifth amendment's prohibition of "taking" has been applied to the states through the fourteenth amendment. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980); Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897). A "taking" claim is one of the traditional challenges to land-use controls. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922). *See also* Glenn, *supra* note 68, at 328-29; Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37-46 (1964).

Although no Ridge Law-type acts have been challenged on taking grounds, a few decisions of other states have upheld regional land-use controls against taking challenges. Denial of a development permit under the California Coastal Zone Act was not considered a taking, even though permission for the development had been granted by a local government before passage of the Act. Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied*, 429 U.S. 1083 (1977). The New York Adirondack Park Agency Act's regional land-use restrictions, based on aesthetic, open space, and environmental considerations, were held not to be a taking of private property. Horizon Adirondack Corp. v. State, 88 Misc. 2d 619, 388 N.Y.S.2d 235 (N.Y. Ct. Cl. 1976). Similarly, a New York ordinance

might prohibit property owners from fully exercising their property rights. Although the right to develop property is considered a property right,[78] it is well settled that a mere diminution of the property's value or a partial restriction on development will not invalidate an otherwise valid ordinance.[79] In *Responsible Citizens v. City of Asheville*[80] the North Carolina Supreme Court held that a land-use ordinance is invalid only if it deprives the landowner of all practical use of his property and leaves the property with no reasonable value, or if it constitutes an unlawful exercise of the police power.[81] This test requires an ordinance to withstand both the literal taking test relating to deprivation of property and a due process test to ensure the lawful exercise of the police power.[82]

A law satisfies the taking component of the *Responsible Citizens* test if it allows any practical use of the affected property or renders the property of some reasonable value.[83] In *Responsible Citizens*, an ordinance imposed certain specifications on new construction and mandated substantial improvements on property located in a flood hazard district. The North Carolina Supreme Court found no taking under the United States or North Carolina constitutions since the existing use of the property was not affected and new construction that satisfied the ordinance's flood damage prevention require-

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requiring additional setbacks for riverfront buildings survived a taking challenge. *In re* Grinspan v. Adirondack Park Agency, 106 Misc. 2d 501, 434 N.Y.S.2d 90 (N.Y. Sup. Ct. 1980).

The result of a successful taking challenge would be either the repeal of the challenged law, a payment for the value of the property taken, or a repeal with pro rata damages for the period of deprivation. Inverse condemnation proceedings, in which a landowner sues to recover damages for what has in fact been an uncompensated taking by a public entity, recently have been the subject of controversy. California abolished this condemnation claim, concluding that invalidation or amendment of the confiscatory regulation to restore the landowner's beneficial use of his property is his exclusive remedy. Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980). In San Diego Gas & Elec. v. City of San Diego, 450 U.S. 621 (1981), the United States Supreme Court avoided deciding whether denial of an inverse condemnation proceeding is constitutional by dismissing the case for lack of a determination by the lower court of whether a taking had occurred at all. A dissent by Justice Brennan, joined by Justices Stewart, Marshall, and Powell, and a concurrence by Justice Rehnquist, indicate that the Supreme Court would hold the denial of an inverse condemnation remedy to be unconstitutional and require compensation for at least the period during which the confiscatory regulation was in effect. *Id.* at 633-34 (Rehnquist, J., concurring); *id.* at 653-60 (Brennan, J., dissenting).

78. "The term ['property'] is said to extend to every species of valuable right and interest. More specifically, ['property' has been defined as] ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it." BLACK'S LAW DICTIONARY 1095 (5th ed. 1979). "Real property" includes "[l]and, and generally whatever is erected or growing upon or affixed to land." *Id.* at 1096.

79. *E.g.*, Penn Central Transp. v. City of New York, 438 U.S. 104, 131 (1978); Hadacheck v. Sebastian, 239 U.S. 394, 409 (1915); Responsible Citizens v. City of Asheville, 308 N.C. 255, 265, 302 S.E.2d 204, 210-11 (1983).

80. 308 N.C. 255, 302 S.E.2d 204 (1983).

81. *Id.* at 263-64, 302 S.E.2d at 209-10.

82. To determine whether a particular exercise of the police power is legitimate, a court will use an "ends-means" analysis, determining, first, whether the purpose of the legislation is within the scope of the power and, second, whether the method of achieving that object is reasonable. *Id.* at 261, 302 S.E.2d at 208.

83. *See id.* at 263-64, 302 S.E.2d at 210; Helms v. City of Charlotte, 255 N.C. 647, 653, 122 S.E.2d 817, 822 (1961).

ments was permitted.[84] Citing the United States Supreme Court's holding in *Penn Central Transportation Co. v. City of New York*,[85] the court stated that no taking occurs if an ordinance places "conditional affirmative duties on the landowner to meet certain requirements if he or she wishes to engage in new construction or alterations."[86]

Thus, the Ridge Law taking issue is reduced to whether the denial of use of a mountaintop landowner's property is so great as to deprive the landowner of all practical use and reasonable value. Although this test necessarily is dependent on the particular affected tract, a few general observations are helpful. Although the Act prohibits construction of buildings taller than forty feet within one hundred feet of certain mountaintops,[87] it does not prohibit all construction; any property owner may construct a building less than forty feet tall. Thus, no property owner can claim a complete denial of use.

Whether the remaining use is practical and of reasonable value depends on several factors. If a particular locality passed an ordinance overriding the state prohibition on tall buildings and enacting permit requirements,[88] the resulting law would satisfy the *Responsible Citizens* test as prescribing "conditional affirmative duties."[89] If tall buildings are banned and a landowner can demonstrate that the expense of constructing a low-rise building would be higher than the expected use or revenue value, however, there might be a taking. The case would turn on issues of fact regarding construction expenses and estimated value.

Although the *Responsible Citizens* taking language favors municipalities and counties, the due process component raises more difficult issues, especially if the Ridge Law's purpose is aesthetic. Although the taking test does not vary with the purpose of the regulation, the due process test does vary. To determine whether the government's action constituted a due process violation, the court in *Responsible Citizens* applied the same test applied in *A-S-P Associates v. City of Raleigh*[90]—whether the object of the legislation is within the scope of the police power and whether, considering the surrounding circumstances and particular facts, the means applied to achieve that object are reasonable.[91] The second part of this inquiry can be further refined to whether the statute in its application is "reasonably necessary" to promote the accomplishment of a public good and whether the interference with a landowner's right to use his property is reasonable.[92]

All of the stated purposes of the Ridge Law are within the scope of the

84. *Responsible Citizens*, 308 N.C. at 264-65, 302 S.E.2d at 211.
85. 438 U.S. 104 (1978).
86. *Responsible Citizens*, 308 N.C. at 267, 302 S.E.2d at 211.
87. N.C. GEN. STAT. §§ 113A-206(3), -206(6) (1983).
88. *See id.* § 113A-208.
89. *Responsible Citizens*, 308 N.C. at 267, 302 S.E.2d at 211.
90. 298 N.C. 207, 258 S.E.2d 444 (1979).
91. *Responsible Citizens*, 308 N.C. at 261, 302 S.E.2d at 208; *A-S-P Assocs.*, 298 N.C. at 214, 258 S.E.2d at 448-49.
92. *Responsible Citizens*, 308 N.C. at 261-62, 302 S.E.2d at 208; *A-S-P Assocs.*, 298 N.C. at 214, 258 S.E.2d at 449.

police power.[93] If a court determines that safe construction was the Act's purpose, it certainly would fall within the State's traditional power to regulate for the health, safety, morals, or general welfare of the population.[94] Similarly, if the Act is found to exist for the economic purpose of preserving the mountain economy, the Act is within the State's general welfare power. A combined purpose of aesthetics and other considerations also would be within the police power; in *A-S-P Associates* the purpose of a Raleigh ordinance creating a historic overlay district was upheld as preserving educational, cultural, and economic values as well as aesthetics.[95] Finally, even if the purpose of the Act is deemed wholly aesthetic, it is valid under *State v. Jones*,[96] a 1982 case in which the North Carolina Supreme Court concluded that an ordinance adopted solely for aesthetic purposes can be valid.[97]

Although all the stated purposes are valid, the North Carolina "justifiable means" test varies with the recognized purposes of a regulation; thus, it may be more difficult to satisfy. At one point in *A-S-P Associates*, the court adopted the two-pronged requirement that the statute as applied be "reasonably necessary to promote the accomplishment of a public good" and that its "interference with owner's right to use his property as he deems appropriate [be] reasonable in degree."[98] At another point in the decision, however, the court stated that determining reasonableness "necessarily involves a balancing

93. Regulation of land use traditionally has been acceptable, under the state's police powers, for the promotion of public health, safety, morals, or the general welfare. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

94. Generally, restrictions on building heights have been validated under the police power of the state; it is no longer seriously disputed that for reasons of fire safety and circulation of air and sunlight, a city may reasonably limit the height of its buildings. *See infra* note 113.

95. *A-S-P Assocs.*, 298 N.C. at 216, 258 S.E.2d at 450.

96. 305 N.C. 520, 290 S.E.2d 675 (1982).

97. Until *Jones*, North Carolina courts, like those in many other states, believed that land-use controls enacted solely for aesthetic purposes bore no relation to the state's police power or were too subjective to apply without caprice. This attitude has been changing rapidly. *See id.* at 523-30, 290 S.E.2d at 677-81; Note, *supra* note 55 (recent discussion of the history and implications of *Jones*); Note, *Leaving the Scene: Aesthetic Considerations in Act 250*, 4 VT. L. REV. 163, 171-76 (1979) (concise treatment of police power as related to land-use controls for aesthetic purposes).

The United States Supreme Court never has expressly upheld land-use regulation solely for aesthetic purposes. Dicta in several cases, however, suggest that the Court would uphold such regulation. In Berman v. Parker, 348 U.S. 26 (1954), an owner's action to enjoin a condemnation, the Court recognized "the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Id.* at 33. More recently, the Court called it "far too late to contend" that aesthetics is not a "substantial governmental goal." Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981). Justice Rehnquist, in his dissenting opinion, went so far as to say that under the majority's decision in *Berman* "the aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community . . ." *Id.* at 570 (Rehnquist, J., dissenting). In another case, although the permissibility of New York's objective in preserving structures and areas with cultural, architectural, or historic significance was disputed; the Court referred to its recognition "in a number of settings, that States or cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city." Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 129 (1978).

98. *A-S-P Assocs.*, 298 N.C. at 214, 258 S.E.2d at 448-49. The court applied this test and found the means reasonable as the "only feasible manner in which the historic aspects of the entire district can be maintained." *Id.* at 218, 258 S.E.2d at 450-51. Under the second prong the court found it "most important" that the affected property owners were "not prohibited . . . from erecting new structures." *Id.* at 218, 258 S.E.2d at 451.

of the diminution in value of an individual's property and the corresponding gain to the public."[99] These standards are not always compatible. Although an ordinance might withstand the two-prong *A-S-P Associates* test by promoting its purpose in a rational manner without depriving the property owner of the property's reasonable use, it could fail the stricter balancing test if the public gain is small compared to the property owner's loss. In the two cases applying *A-S-P Associates*, *Jones* applies only the balancing test[100] and *Responsible Citizens* applies only the two-pronged test.[101] Although these cases do not state when each standard should be applied, they imply that in cases involving aesthetic regulation the court will balance public gain and private loss,[102] while in nonaesthethic regulation cases it will apply the two-pronged test.

The Ridge Law has both aesthetic and nonaesthetic purposes. Although its original impetus and commonly accepted objective was the preservation of mountain scenery[103]—an aesthetic purpose—the legislative findings and the Act's probable effect imply additional objectives. Protection of structures from high winds and destruction by fire were mentioned in the legislative findings.[104] Another potential nonaesthetic purpose is the positive effect of scenic preservation on the region's economy. Although the Ridge Law's primary purpose is debatable, aesthetic control is at least one of its purposes. Because *Jones* characterized *A-S-P Associates* as applying the two-prong balancing test and because the ordinance in *A-S-P Associates* was "not *primarily* concerned with aesthetics,"[105] the Ridge Law, whether or not primarily aesthetic regulation, probably will be subject to the same balancing test.

In weighing the diminution in value of an individual's property, the court in *Jones* stressed "whether the regulation results in confiscation of the most substantial part of the value of the property or deprives the property owner of the property's reasonable use."[106] Compared to the *Responsible Citizens* taking standard,[107] the *Jones* test requires a lesser showing of deprivation by the property owner. Thus, even if the regulation cannot be shown to take all practical use and reasonable value, proof of the deprivation of reasonable use and substantial value would be sufficient to constitute a violation of due process. If the balancing test is applied faithfully, and the public benefit is determined to

99. *Id.* at 218, 258 S.E.2d at 451. Although the court mentioned the balancing test, the court did not apply the test in *A-S-P Assocs.*

This balancing test for determining whether a taking has occurred was first adopted in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), and has been widely applied since. For a discussion of the development and application of this test, see Glenn, *supra* note 68, at 327-33.

100. *Jones*, 305 N.C. at 530-31, 290 S.E.2d at 681.

101. *Responsible Citizens*, 308 N.C. at 261-62, 302 S.E.2d at 208.

102. The court in *Jones* characterized *A-S-P Assocs.* as applying the balancing test, even though the purpose of the historical preservation law was not primarily aesthetic. *Jones*, 305 N.C. at 530, 290 S.E.2d at 681.

103. *See supra* note 30 and accompanying text.

104. *See supra* note 23.

105. *Jones*, 305 N.C. at 526, 290 S.E.2d at 678 (emphasis added).

106. *Id.* at 530, 290 S.E.2d at 681.

107. *See supra* text accompanying notes 81, 83.

be minimal, even less than the deprivation of reasonable use and substantial value could violate due process.

Because the Ridge Law does not prohibit construction at any location, landowners will not face a complete deprivation of their property rights.[108] If the high construction costs of low-rise buildings cause profits to be substantially less than those that would be generated by a high-rise, however, and if the court finds no other reasonable use of the property, the deprivation side of the balance might be difficult to outweigh.

Under *Jones*, the public benefits to be weighed include the importance of the legislation's purpose, the manner of regulation, and the "corollary benefits to the general community such as protection of property values, promotion of tourism, indirect protection of health and safety, preservation of the character and integrity of the community, and promotion of the comfort, happiness, and emotional stability of area residents."[109] Although an aesthetic purpose might be entitled to less weight than the more traditional public purposes, the Ridge Law also cites these other purposes.[110]

The manner of regulation cannot be considered unreasonable; a mountain view can be protected only by eliminating its obstruction.[111] With the Ridge Law, the State has restricted construction without prohibiting all uses of private property.[112] In addition, the Act permits counties and cities to consider their particular problems and needs to determine the best method of protecting their mountains. Finally, building height restrictions generally have been considered reasonable.[113] Although building height restrictions rarely have been justified on aesthetic grounds alone, the limited precedent should be of little consequence since both the purpose and method of aesthetic regulation are widely recognized.

Some of the benefits inherent in preserving the mountain scenery are of the kind envisioned in *Jones*.[114] In an area that depends heavily on its scenic beauty,[115] preservation of the community's character and integrity is the most substantial benefit. As evidenced by the general outrage over the construction

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108. *See supra* text accompanying note 87.

109. *Jones*, 305 N.C. at 530, 290 S.E.2d at 681.

110. The application of the balancing test to aesthetic regulation and the two-pronged reasonableness test to laws passed for other purposes suggests that North Carolina courts may be more willing to validate regulations enacted for traditional health and safety purposes. *See supra* notes 98-102 and accompanying text.

111. *See supra* note 98.

112. *Id.*

113. *See* Welch v. Swasey, 214 U.S. 91 (1909). *See generally*, D. MANDELKER & R. CUNNINGHAM, *supra* note 40, at 399-415; Annot., 8 A.L.R.2d 963 (1949) (summary of cases validating building height restrictions).

114. *See supra* text accompanying note 109.

115. North Carolina's mountain region is "noted across the nation as a recreational area;" tourism is "basic to the regional economy." In the seven-county region with Asheville as its center, "local residents accounted for only a fraction of the $1.3 billion recorded in retail sales [in 1980]. A large portion of those sales were generated by the hundreds of thousands of tourists who visit the region every year." Urban Institute & Dept. of Geography and Earth Sciences, University of North Carolina at Charlotte, *Land of Sky Urban Center: An Economic Atlas* 5 (1983).

of Sugar Top,[116] regulation of such "eyesores" promotes the comfort and happiness of local residents. The effect on tourism, however, is debatable. Some assert that allowing unrestricted development would have increased the potential flow of tourists to an area the economy of which is largely dependent on tourism;[117] others contend that allowing uncontrolled development would have decreased tourism by ruining the area's dominant attraction, its mountain scenery.[118] Because the relative merits of both contentions are debatable, the courts should defer to the judgment of the legislature.[119]

Thus, the due process balancing test, like the taking test, depends on "the facts and circumstances of each case."[120] Given the important public purposes of preserving mountain scenery, allaying the safety concerns of mountain residents and vacationers, and preserving the region's economic base, and the reasonable means and corollary benefits of the Ridge Law, private loss would have to be substantial to prove a due process violation, even under the less burdensome balancing test.

A final constitutional challenge to the Act might be the allegation by a nonresident landowner that procedural due process has been violated[121] by depriving him of a property interest without notice or an opportunity to defend.[122] Since the Ridge Law was enacted without representation of out-of-state landowners, and procedures for passing overriding ordinances or referenda do not include this class of landowner,[123] nonresidents arguably are denied due process. Because the Ridge Law may lead to three possible legislative outcomes, each resulting from a different governmental procedure,[124] the procedural due process claims against each will be considered separately.

Under the first scenario, the state-legislated ban on tall buildings is effec-

116. *See generally* Winston-Salem J., *supra* note 12; Fayetteville Observer, *supra* note 4; Charlotte Observer, *supra* note 2.

117. *See* Charlotte Observer, *supra* note 2. It could be argued that since unregulated development is cheaper and easier for developers, construction would continue at a rapid pace, creating a large supply of tourist opportunities. This large supply would keep vacation prices low, attracting more tourists. Controls on development, under this argument, would make development so expensive that little would occur; the low supply of vacation opportunities, together with the high demand, would make vacations prohibitively expensive for most tourists.

118. *See* Durham Sun, *supra* note 3; Charlotte Observer, *supra* note 2.

119. *See A-S-P Assocs.*, 298 N.C. at 226, 258 S.E.2d at 449.

120. *Jones*, 305 N.C. at 531, 290 S.E.2d at 681.

121. Under the United States Constitution, this claim would be based on the proposition that no state shall "deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1. The comparable language in the North Carolina Constitution is that "[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. CONST. art. 1, § 19. "Law of the land" is synonymous with the federal constitution's "due process of law" clause. *In re* Moore, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976).

Due process traditionally has been a ground for challenging land-use regulation in North Carolina. *See, e.g., Jones*; *A-S-P Assocs.*; State v. Joyner, 286 N.C. 366, 211 S.E.2d 320, *appeal dismissed*, 422 U.S. 1002 (1975).

122. *See, e.g.*, Smith v. Keator, 285 N.C. 530, 206 S.E.2d 203 (1974).

123. *See* N.C. GEN. STAT. §§ 113A-208, -214 (1983).

124. *See supra* text accompanying notes 16-26.

tive because no local government action is taken.[125] Although an out-of-state landowner might try to argue that his constitutional rights have been denied since he is not represented in the legislature, it is well-established that the notice and hearing requirements of procedural due process do not apply to legislative actions.[126] Rather, the rights arise only when the government is acting on matters not of general concern, but in an adjudicatory capacity.[127] Because land-use regulation traditionally has been enacted by the legislative branch and affects a large group of citizens, designation of the Ridge Law as legislative undoubtedly is appropriate; in a land-use context, only individual actions such as conditional use or subdivision permits have been considered adjudicatory.[128] Thus, a procedural due process claim against the state-imposed ban would fail.

The second Ridge Law scenario involves an overriding local government ordinance regulating tall buildings by requiring permits.[129] Although this type of regulation traditionally is considered a legislative action,[130] the statute specifically requires a public hearing before passage of an ordinance.[131] Even if not constitutionally mandated, a public hearing is statutorily required and arguably must comply with a due process test.

If due process is to be accorded the out-of-state property owner, the notification procedure must be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action."[132] North Carolina courts, however, are hesitant to override legislative judgment where a "constitutionally adequate" means of notice has been prescribed by statute.[133] The Ridge Law requires that a public hearing for consideration of an ordinance be advertised in a newspaper of general circulation throughout the affected area at least ten days prior to the hearing.[134] Because the North Carolina Supreme Court has upheld a similar provision in the context of both a local zoning amendment and a municipal annexation procedure,[135] it also

125. *See* N.C. GEN. STAT. § 113A-209 (1983).

126. Bi-Metallic Inv. Co. v. Colorado, 239 U.S. 441, 445 (1915). "The constitution does not require all public acts be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard." *Id. See also* Hunter v. City of Pittsburgh, 207 U.S. 161 (1907) (annexation is a political question for the legislature); Texfi Indus. v. City of Fayetteville, 301 N.C. 1, 7, 269 S.E.2d 142, 147 (1980) (annexation is legislative issue).

127. Bi-Metallic Inv. Co. v. Colorado, 239 U.S. 441, 445 (1915).

128. *See, e.g.*, Scott v. Greenville County, 716 F.2d 1409, 1420 n.16 (4th Cir. 1983) (self-classification by county council of action as "legislative" would not be binding on court if action is usually adjudicatory); Horn v. Ventura County, 24 Cal. 3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979) (subdivision approval was adjudicatory function; other planning decisions less extensive than rezoning, such as conditional use permits, are not insulated from due process requirements).

129. N.C. GEN. STAT. § 113A-208 (1983).

130. Most states grant the power to enact ordinances regulating building heights to municipal or county governments. *See, e.g., supra* note 18.

131. N.C. GEN. STAT. § 113A-208(f) (1983).

132. Texfi Indus. v. City of Fayetteville, 301 N.C. 1, 9, 269 S.E.2d 142, 148 (1980).

133. *Id.* at 9-10, 269 S.E.2d at 148.

134. N.C. GEN. STAT. § 113A-208(f) (1983).

135. *See* Texfi Indus. v. City of Fayetteville, 301 N.C. 1, 9-10, 269 S.E.2d 142, 148 (1980) (annexation notice requirement upheld); Helms v. City of Charlotte, 255 N.C. 647, 122 S.E.2d 817

would uphold the Ridge Law's notice requirement as being "constitutionally adequate." Thus, even if the hearing is presumed to be adjudicatory, a due process challenge will stand only if the statutory provisions are not followed by the county or municipality.

In the third scenario, a local government, by referendum, elects to escape Ridge Law coverage altogether.[136] A nonresident landowner might argue that, since the Act provides for a referendum of only registered voters,[137] he has been deprived of his opportunity to be heard.[138] Not only are nonresident landowners prohibited from voting on the referendum, they may not sign a petition calling for a referendum.[139] Thus, the outside landowner is denied a voice in the referendum procedure.

In North Carolina voting rights attach to an individual's place of residence. Residence is defined as that place "in which [an individual's] habitation is fixed, and to which, whenever he is absent, he has the intention of returning."[140] Thus, because a person may have only one residence at any given time,[141] it can be assumed that neither a nonresident property owner nor a part-year resident, even though directly affected by the Ridge Law, will qualify to vote in a Ridge Law referendum.[142] Although these parties may

(1961) (statute requiring published notice "once a week for two successive calendar weeks in a newspaper published in such municipality" valid against due process challenge). Since *Texfi Indus.*, however, North Carolina's annexation laws have been amended to require mailed notice of the public hearing to all property owners within the area to be annexed. *See* N.C. GEN. STAT. § 160A-49 (Supp. 1983).

136. 1983 N.C. Adv. Legis. Serv. 181 (codified at N.C. GEN. STAT. § 113A-214 (1983)).

137. *Id.*

138. In a California case, this argument was sustained in a similar situation. *See* Taschner v. City Council of Laguna Beach, 31 Cal. App. 3d 48, 65-66, 107 Cal. Rptr. 214, 228 (1973) (city height ordinance enacted by initiative and subsequent vote, without notice to or hearing for all affected property owners, held to violate due process). The holding in *Taschner*, however, was overruled in Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 597, 557 P.2d 473, 480-81, 135 Cal. Rptr. 41, 48 (1976) (notice and hearing provisions do not apply to ordinance enacted by initiative).

139. N.C. GEN. STAT. § 113A-214(a) (1983) ("The binding referendum shall be held either as a result of a resolution passed by the governing body of the jurisdiction or as a result of an initiative petition signed by fifteen percent (15%) of the registered voters in the jurisdiction. . . .") Because nonresidents may not register to vote, they may not sign an initiative petition.

140. N.C. GEN. STAT. § 163-57(1) (1982). "Residence" is the same as "domicile" under North Carolina voting law. Hall v. Wake County Bd. of Elections, 280 N.C. 600, 187 S.E.2d 52 (1972); State *ex rel.* Owens v. Chaplin, 228 N.C. 705, 47 S.E.2d 12 (1948).

141. If a person intends to change his residence or votes elsewhere, the law considers that person to have abandoned residence in the original county or state. N.C. GEN. STAT. § 163-57(4), (6) (1982).

142. If one temporarily changes residence with intentions of returning, such as a part-year resident, he does not lose his original residency. *Id.* § 163-57(2). A part-year resident could argue, however, that each home is his part-year residence and that he therefore should be entitled to reregister and vote in each place while residing there. Frequent reregistration may be possible if residency can be shown, since durational residency requirements have been held to violate the equal protection clause. *See, e.g.*, Andrews v. Cody, 327 F. Supp. 793 (M.D.N.C. 1971), *aff'd*, 405 U.S. 1034 (1972).

A nonresident, by definition, does not qualify to vote. *See* N.C. GEN. STAT. § 163-57 (1982) (suggesting that residency is the sole criterion for voter registration). The Ridge Law, however, includes as a "resident" of a county any person "doing business or maintaining an office" within the county, *id.* § 113A-206(2) (1983), creating an apparent inconsistency with the voting statutes. The Ridge Law's definition of "resident," however, probably was intended to afford property

have other opportunities to voice their opinions,[143] the denial of the right to vote appears to be a flagrant due process violation. Nevertheless, since this type of deprivation affects a class of citizens rather than a particular individual, it generally has been challenged under the equal protection clause, rather than the due process clause.

To assert an equal protection challenge, a plaintiff must prove that the challenged law creates a distinction between two groups of citizens that is not rationally related to the law's purpose. Normally, a rational relation between the classification and the purpose is sufficient to withstand a constitutional challenge.[144] When a fundamental right or a suspect class is concerned, however, the government must prove that the distinction is necessary to a compelling state interest.[145] Whether the rational basis or the compelling state interest (strict scrutiny) test is applied often determines the outcome of the case.[146]

The first question in the equal protection analysis is whether nonresident property owners' rights to vote in municipal special elections affecting their property are fundamental. Although the right to vote has been characterized as a fundamental right,[147] its efficacy in a particular situation "requires consideration of the facts and circumstances behind the challenged law, the interest which the state claims to be protecting, and the interest of those who are disadvantaged by the classification."[148]

The United States Supreme Court has not addressed whether nonresident property owners may be excluded from participation in a municipal referendum affecting their property; the Court, however, has recognized that the right to vote may not be a fundamental right of nonresidents, even though it is fundamental for residents. The Court has determined that the right to participate in the political process may be limited to those who live within the municipal borders.[149] In its most recent related case, *Holt Civic Club v. City of*

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owners standing to challenge actions taken pursuant to a Ridge Law ordinance rather than standing to vote in a referendum. The referendum provision refers to "registered voters" and not to "residents." *Id.* § 113A-214.

143. Nothing precludes part-year residents, nonresident landowners, or developers from "lobbying," conducting educational campaigns, or even initiating an initiative petition to call for a referendum. Additionally, there is an opportunity to be heard in the public hearings that are required before passage of an ordinance under the Act. N.C. GEN. STAT. § 113A-208(f) (1983). Finally, one "doing business or maintaining an office within a county," as a "resident" under the Act, may challenge an ordinance as not in compliance with the Act. *Id.* at §§ 113A-206(2), -208(g).

144. *See* Texfi Indus. v. City of Fayetteville, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980).

145. *Id.*

146. For a complete equal protection analysis of municipal voting rights cases, see Note, *State Restrictions on Municipal Elections: An Equal Protection Analysis*, 93 HARV. L. REV. 1491, 1492 (1980).

147. *See, e.g.*, Hill v. Stone, 421 U.S. 289 (1975); Dunn v. Blumstein, 405 U.S. 330 (1972); Reynolds v. Sims, 377 U.S. 533 (1964).

148. Texfi Indus. v. City of Fayetteville, 301 N.C. 1, 12, 269 S.E.2d 142, 150 (1980).

149. *See, e.g.*, Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978); Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Pope v. Williams, 193 U.S. 621 (1904). For a catalog of the leading cases on equal protection and voting rights in North Carolina, see Lloyd v. Babb, 296 N.C. 416, 435-40, 251 S.E.2d 843, 856-59 (1979)

Tuscaloosa,[150] the Court applied the rational basis test to a state law subjecting residents of a small unincorporated community to the neighboring city's police and sanitary regulations and criminal jurisdiction without permitting the residents to participate in the city's political processes.[151] The Court concluded that the statute was reasonably related to a legitimate state purpose.

> No decision of this Court has extended the "one man, one vote" principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions. On the contrary, our cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders.[152]

Although the Court did not say that it never would extend the right to vote to nonresidents, its strong language suggests this result. Furthermore, the cases considered by the Court generally have involved nonresidents immediately outside its borders. Given its refusal to extend voting rights to these neighboring nonresidents, the Court undoubtedly would be unwilling to extend voting rights to more distant property owners.

In *Holt* the Court stated that, in certain special interest elections, a state may restrict voting rights within the community to residents with the requisite special interest.[153] Thus, it might be argued that the state also may extend voting rights to specially interested nonresidents. The Court, however, did not suggest that a state must extend such rights.

The rationale for permitting residency restrictions was stated in *Dunn v. Blumstein*,[154] an earlier case in which the Court applied a strict scrutiny test. The Court invalidated a Tennessee statute requiring a person to live in the state for one year and in the county of registration for three months before he could vote. Although the Court struck down this duration requirement, it stated that a "uniformly applied requirement of bona fide residence may be *necessary to preserve the basic conception of a political community*, and therefore could withstand close constitutional scrutiny."[155] Because the dictum indicates that such a residency requirement would withstand even a strict scrutiny test, the question of which test to apply is insignificant. Thus, since these cases recognize the longstanding validity of residency requirements even

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(no denial of equal protection to presume that student who leaves home to go to college is not domiciled in place of college; but presumption rebutted by showing of intent to make college community home, at least while in school, and of no intent to return to parents' home).

The Court has upheld voting schemes giving weighted votes or limiting the right to vote to property owners, when the elections involved special government districts, with limited powers, that disproportionately affected property owners. *See* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973). For a discussion of the validity of limiting voting rights to property owners, see DeYoung, *Governing Special Districts: The Conflict Between Voting Rights and Property Privileges*, 1982 ARIZ. ST. L.J. 419, 430-52 .

150. 439 U.S. 60 (1978).

151. *Id.* at 70-71.

152. *Id.* at 68-69.

153. *Id.* at 69.

154. 405 U.S. 330 (1972).

155. *Id.* at 343-44 (emphasis added).

under strict scrutiny, only exceptional circumstances would invalidate such a requirement.

Several North Carolina cases have recognized that the right of nonresidents to vote in a referendum is not fundamental, and therefore have subjected voting restrictions against interested nonresidents only to the rational basis test. In *Thompson v. Whitley*,[156] plaintiffs challenged the North Carolina annexation statutes under which municipalities with less than five thousand residents could annex adjacent areas without a vote of the residents to be annexed. The United States District Court for the Eastern District of North Carolina rejected plaintiffs' claim that the fundamental right to vote required a "compelling state interest" for the distinction to be valid.[157] The court, stating that the right to vote in a referendum does not relate directly to the fundamental right to participate in representative government, applied the rational basis test.[158] Two later annexation cases also applied a rational basis test to hold that annexation without consent does not violate the equal protection clause.[159] Although the annexation issue arguably is different from the issues involved in interpreting the Ridge Law, these annexation cases illustrate the courts' inclination toward upholding the validity of legislative action in the voting rights area.

Although the United States Supreme Court and the North Carolina courts have not addressed whether a rational basis or strict scrutiny test should be applied to the Ridge Law's referendum provision, the Colorado Supreme Court has answered this question in a situation similar to the Ridge Law. In *Millis v. Board of County Commissioners of Larimer County*[160] the court upheld a statute allowing in-state nonresident property owners to vote on referenda creating and delineating the powers of a special water district, but denying the right to out-of-state nonresident property owners.[161] The court applied the rational basis test and concluded that the equal protection claim was without merit. Because Colorado residents were more likely to be concerned about the environment, urban development, and an adequate water supply in Colorado, they were entitled to a greater voice in the district.[162]

In light of the applicable judicial decisions regarding equal protection, the

156. 344 F. Supp. 480 (E.D.N.C. 1972).

157. *Id.* at 483-84.

158. *Id.*

159. *In re* Annexation Ordinance #D-21927 Adopted by City of Winston-Salem, N.C., December 17, 1979-AREA I, 303 N.C. 220, 278 S.E.2d 224 (1981); Texfi Indus. v. City of Fayetteville, 301 N.C. 1, 269 S.E.2d 142 (1980) (right of corporation to vote in annexation proceeding affecting corporation's property not fundamental, since voting rights historically applied only to individuals; annexation law withstands rational basis test).

160. 626 P.2d 652 (Colo. 1981).

161. "The fact that a nonresident owns land in this state does not create a fundamental right to political participation in decisions which affect that land." *Id.* at 658.

162. *Id.* The court referred to an earlier unreported case in the United States District Court for the District of Colorado, Millis v. High Drive Water Dist., No. 75-M-1021 (D. Colo. Jan. 18, 1978), *aff'd mem.*, 439 U.S. 802 (1978), which validated the ordinance under the United States Constitution. *Id. Millis v. Board of County Comm'rs* came to the same conclusion under the Colorado Constitution.

voting rights of nonresident property owners would not be deemed fundamental. The Ridge Law referendum does not relate directly to participation in representative government any more than annexation. Nor are the interests of nonresident property owners "necessary to preserve the basic conception of a political community;"[163] they often run counter to the best interests of the community. The Ridge Law, for instance, was passed in response to outside property owners' activities that directly conflicted with the local residents' values.[164] To allow nonresident property owners to vote would threaten the interests that the law was intended to protect and directly contradict the rationale underlying residence requirements as stated in *Dunn.*

Further, although a referendum may exempt the area from any restrictions on tall buildings, a result beneficial to the development rights of property owners, the result of a failure to "opt-out" would not be any more restrictive than would enactment of the Ridge Law without a referendum. Thus, the effects of denying nonresidents the vote are no harsher than the effects of denying all citizens the right to vote. Additionally, there are no restrictions on the nonresidents' opportunities to lobby for their position during the referendum process; thus, there is no complete denial of the right to be heard. In light of *Holt, Millis,* and the North Carolina annexation cases, it is apparent that North Carolina would apply the rational basis test.

Appliction of the rational basis test requires a determination of whether the Ridge Law's distinction between residents and nonresidents is rationally related to a legitimate government purpose. Given the legitimate purpose of protecting the natural beauty of the mountains,[165] it might be argued, as in *Millis,* that residents of the area have a greater interest in protecting the area's natural resources and thus are entitled to preferential treatment.[166] Since *Millis* deemed it rational to distinguish between classes of nonresident property owners, it would be even more rational to distingush between residents and nonresidents. Also, given the dictum in *Dunn* that residency requirements have long been upheld and would pass a strict scrutiny test,[167] the Ridge Law's referendum process certainly would survive the more lenient rational basis scrutiny.

In conclusion, it is likely that the Ridge Law will withstand the constitutional challenges discussed in this Note unless the particular facts are extreme. The Ridge Law's impact, however, could be either immense or negligible. It may signal a trend toward state aesthetic land-use controls. Although previous state land-use controls have been targeted at environmental concerns,[168] the Ridge Law is the first to go beyond these concerns to regulate aesthetic interests. While the limited state-imposed controls may have been the only

163. *Dunn,* 405 U.S. at 343-44.

164. *See supra* notes 7-11 and accompanying text.

165. *See supra* notes 95-97 and accompanying text.

166. *Millis,* 626 P.2d at 658.

167. *See supra* notes 154-56 and accompanying text.

168. *See supra* notes 38-39, 75-76 and accompanying text. CAMA was passed primarily as an environmental protection act.

politically feasible approach because of public sentiment against regulation,[169] the public may become more receptive to land-use regulation as it adapts to the restrictions. By designating the entire mountain region as an area of crucial state concern, the state could extend development standards to all parts of the region. Alternatively, with state-level regulation of both the coastal and mountain regions, the State may decide to pass legislation allowing for the designation of critical areas anywhere in North Carolina.[170] This would eliminate the allegations that coastal and mountain regulation is local legislation and give the State more flexibility to intervene in other areas of state concern.

Passage of the Ridge Law, however, is more likely an isolated event, remedying a genuine concern of area residents and landowners. Although one county held a referendum, and three others passed ordinances more stringent than the state-prescibed standards, the localities appear satisfied with the effect of the Ridge Law, wanting no more and no less intervention.[171] Thus, it appears that more stringent state-level controls would not be either politically advisable, likely, or fair unless it can be demonstrated that the problems of the mountain counties have more than local significance. Although CAMA was justifiable because of environmental effects beyond the immediate area, the case for state intervention in the mountain region is more difficult. Even though tourism is increasingly important to North Carolina's economy, and the economic development of the mountain region might justify more state intervention, the Ridge Law's effects on the region's economy will have to be determined before any such intervention occurs.

The Mountain Ridge Protection Act is a positive step toward controlling mountain area development. Because of the highly political nature of state-local relations, however, the inherent limitations of the Ridge Law, and the traditional antiregulation sentiment of the region's residents, the Act's impact as a catalyst for more comprehensive state land development controls will not be great.

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169. *See supra* notes 33-34 and accompanying text.

170. This legislation might be like that of other states, notably Florida. *See supra* notes 48-52 and accompanying text.

171. Raleigh News and Observer, *supra* note 65. Watauga, Avery, and Henderson counties adopted ordinances stricter than the State law. *Id.* The voters of Cherokee County, in a referendum on May 8, 1984, opted for inclusion under the Ridge Law. Asheville Citizen, *supra* note 65.