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Michael J. Mortimer
Virginia Polytechnic Institute and State University

Harry L. Haney Jr.
Virginia Polytechnic Institute and State University

Jonathan J. Spink
Virginia Polytechnic Institute and State University

WHEN WORLDS COLLIDE: SCIENCE AND POLICY AT ODDS IN THE REGULATION OF VIRGINIA'S PRIVATE FORESTS

MICHAEL J. MORTIMER[1], HARRY L. HANEY, JR.,[2] AND JONATHAN J. SPINK[3]

The regulation of forestry practices in the Commonwealth of Virginia has recently been in flux. While current statewide forestry regulations are relatively innocuous and stable, particularly when compared to the sweeping forest practice acts of California or Oregon, the local ordinances in Virginia remain few and scattered.[4] Nonetheless, it appears that times may be changing.[5] Local governments are very much interested in increasing their respective roles in the regulation of forestry within their respective jurisdictions,[6] particularly in the wake of the *Dail v. York County*[7] decision two years ago. This decision made it less likely that local governments will be constrained in the issuance of forestry-related ordinances.

Why the concern with forests and forest regulations in Virginia? The answer lies in the value and nature of forest ownership in Virginia. Nearly half a million private forest landowners control approximately eighty-seven percent, or 13.4 million acres, of the 15.4 million acres of commercial forestland in the Commonwealth.[8]

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[1]Michael J. Mortimer, J.D., Ph.D. is an Assistant Professor of Forest Law and Policy in the Department of Forestry at the Virginia Polytechnic Institute and State University, and a former Assistant Attorney General for the State of Montana. The authors gratefully acknowledge funding from the USDA Forest Service, Southern Research Station, New Orleans, La. supporting this research.

[2]Harry L. Haney, Jr., Ph.D. is the Garland Gray Professor of Forestry in the Department of Forestry at the Virginia Polytechnic Institute and State University.

[3]Jonathan J. Spink was previously a graduate research assistant in the Department of Forestry at the Virginia Polytechnic Institute and State University.

[4]Jonathan J. Spink, Survey and Analysis of Forestry-Related Regulations in the Southern United States, (2001) (unpublished master's thesis, Virginia Polytechnic Institute and State University). The author points out that a recent study surveying Virginia counties and municipalities revealed that there are currently twenty-one different sets of local forest management ordinances, and that the vast majority of local municipalities do not have in place any type of forestry management regulations.

[5]*See* U.S. FOREST SERVICE, U. S. DEPT. OF AGRIC., S. FOREST RESOURCE ASSESSMENT, SOCIO-3, 48, 72 (2001) [hereinafter SOCIO-3] The actual number of forest management regulations in Virginia rose from forty-four in 1992 to seventy-seven in 2000, while across the southern United States such regulations more than doubled during the same period.

[6]*See* VIRGINIA ASSOCIATION OF COUNTIES, 2001 LEGISLATIVE AGENDA, *Silvicultural Practices* (2001).

[7]528 S.E.2d 447 (Va. 2000).

[8]Thomas W. Birch et al., *Characterizing Virginia's Private Forest Owners and Their Forest Lands*, USDA FOREST SERVICE, NE RESEARCH STATION, RESEARCH PAPER NE-

These lands directly contribute $1.3 billion annually to the economy of Virginia, while the overall use and value of the Commonwealth's forest resources contribute $30.5 billion annually.[9] Timber products remain the most valuable agricultural cash crop in Virginia, returning more than $345 million to the Commonwealth's private landowners annually.[10]

Within this economic and demographic context, the effects of regulating forest landowners and their role in the economy is apparent, since any forestry regulation tends to have direct and constrictive impacts on property rights. Compliance can burden the landowner with extra costs, reducing the economic value of the land.[11] Specific types of regulations will be discussed later in this article, but, in summary, it has become more common for regulations to stray from traditional police power restrictions, such as reforestation, and focus instead upon production of public benefits such as aesthetics and wildlife habitat. The latter regulations, which place higher burdens on the landowner and return uncertain benefits to the public, run a higher risk of being overturned than do the historic types of forest regulations.[12]

Fortunately, protection of private property rights from undue governmental interference is couched within federal and state constitutions.[13] The federal guarantees against government takings provided by the Fifth Amendment, and applied to the states via the Fourteenth Amendment, are largely duplicated in the Virginia Constitution. The Virginia legislature affords broader protection for

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707 AT 1 (1998).

[9]VIRGINIA DEPARTMENT OF FORESTRY, VIRGINIA'S FORESTS: OUR COMMONWEALTH (2001).

[10]*Id.* Based upon 1999 data.

[11]Paul V. Ellefson & Patrick D. Miles, *Protecting Water Quality in the Midwest: Impact on Timber Harvesting Costs*, 2 N. J. APPLIED FORESTRY 57 (1985); Peter Lickwar et al., *Costs of Protecting Water Quality During Harvesting on Private Forestlands in the Southeast*, 16 S.J. APPLIED FORESTRY 13 (1992); Harry L. Haney, Jr. & David A. Cleaves, *Potential Cost of Forestry Regulation in the South*, 1992 FOREST FARMER 8; Laurie J. Hawks et al., *Forest Water Quality Protection: A Comparison of Regulatory and Voluntary Programs*, 91 J. FORESTRY 48 (1993); Russell K. Henley et al., *State Regulation of Private Forest Practices: What accomplishments at What Costs?* 13 W. WILDLANDS 23 (1988); SOCIO-3, *supra* note 5.

[12]*See generally*, H.D. Warren, *Constitutionality of Reforestation or Forest Conservation Legislation*, 13 A.L.R. 2d 1095 (1950). Forest regulation of private property has historically focused upon questions of reforestation. These "seed tree laws" stemmed in large part from late nineteenth and early twentieth century fears of timber shortages, and "cut and run" tactics on both private and public lands. For example, in *State v. Dexter*, 202 P.2d 906, 908 (Wash. 1949), *judgment affirmed* 338 U.S. 863, (1949), the court noted that: Fifteen years ago we commented upon the problem of our vanishing forests and the problems of reforestation of the vast areas of our state from which the timber had already been removed, and the necessity of planting 'denuded areas, to remedy, in part at least, the wasteful practices of the past. [Citation omitted].

[13]U.S. CONST. amend. V, XIV; VA. CONST., art. 1, § 1.

the landowner, however, by allowing two kinds of actions: takings claims for complete takings and damage claims for partial takings.[14]

To obtain redress from either a complete taking or damages from a partial taking under the Virginia Constitution forest landowners must satisfy a number of requirements. In elucidating these requirements several Virginia cases have recently addressed the specifics under which they are available.[15] Perhaps of greater import, the United States Supreme Court in *Palazzolo v. Rhode Island*,[16] recently altered the mechanics of how and when a compensated taking may be redressed. *Palazzolo* contradicted the Virginia Supreme Court's prior holdings on regulatory takings, specifically, the damage claims.[17] In light of this Supreme Court decision, forest owners have increased hope for compensation since *Pazazzolo* expands the class of landowners who qualify for damage claims. Consequently, local governments wishing to increase their regulation of private forestlands are likely to encounter courts that are more willing to label their actions as damage, thus necessitating compensation under the Virginia Constitution.

Part I of this article will address the current state of regulatory takings in Virginia, focusing on the most recent developments with the Virginia Supreme Court. Part II will discuss *Palazollo's* impact on the state of regulatory takings claims in Virginia. Part III will examine how the takings question fits with Virginia forest regulation and the resultant effects on forest landowners. Finally, Part IV will present several policy issues revolving around forest regulation, private property ownership, and environmental concerns in Virginia.

PART I

Inverse condemnation, or regulatory takings, are terms used to describe the government enactment of a regulation whose terms and conditions diminish or eliminate the value of private property subject to that regulation.[18] Noted historical examples include such prohibitions as bans on development adjacent to a body of water.[19]

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[14] *Id.*

[15] *See* Lambert v. City of Norfolk, 61 S.E. 776 (Va. 1908); Bd. of Supervisors of Prince William County v. Omni Homes, Inc., 481 S.E.2d 460 (Va. 1997)[hereinafter *Omni Homes*]; City of Virginia Beach v. Bell, 498 S.E.2d 414 (Va. 1998) [hereinafter *Bell*].

[16] 533 U.S. 606 (2001).

[17] *Id.*

[18] Paul V. Ellefson & Patrick D. Miles, *Protecting Water Quality in the Midwest: Impact on Timber Harvesting Costs*, 2 N. J. APPLIED FORESTRY 57 (1985).

[19] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (involving construction restrictions on beachfront property) [hereinafter *Lucas*]; *Palazzolo*, 533 U.S. at 606 (developing beachfront property); Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 216 F.3d 764 (9th Cir. 2000), *aff'd* 535 U.S. 302 (2002) (stating requirements for development in watersheds feeding Lake Tahoe).

Regulatory takings are distinguished from physical takings, in that there is no physical occupation or possession of the property by the government condemner.[20] Rather, the effects are indirect, impacting property values and incidents of ownership.[21]

An enormous body of case law and academic discussion has developed over the course of the last fifteen years in response to the inherent difficulties of fashioning appropriate legal tests to determine when a taking has been triggered, and when triggered, appropriate remedies.[22] These discussions, however, have largely focused on the federal takings clause, what it guarantees, and its various applications to state regulatory situations.

At the state level, jurisprudence and scholarly discussion have been somewhat limited due to the vagaries of state constitutions. Within the last several years, however, the Virginia Supreme Court addressed regulatory takings claims from the perspective of the Virginia Constitution.[23] The Virginia Constitution provides a greater level of protection to private property by virtue of the following language:

> ...No person shall be deprived of his life, liberty or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or *damaged* for public uses, without just compensation, the term "public uses" to be defined by the General Assembly.[24]

This enhanced protection provides opportunities to challenge regulations that eliminate something less than the entire amount or scope of the property's value.

This tenet has been well recognized by the Virginia judiciary. In 1908, for example, the Virginia Supreme Court undertook an analysis of the damage clause of the 1902 constitution. The court held that, when rights appurtenant to the use and enjoyment of private property were abrogated, a public taking resulted.[25] In other words:

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[20] *Lucas*, 505 U.S. at 1015-16.

[21] *See id.*

[22] *See generally* Robert Meltz et al, THE TAKINGS ISSUE (1999).

[23] *See Lambert*, 61 S.E. at 776; *Omni Homes*, 481 S.E. 2d at 460; *Bell*, 498 S.E. 2d at 414.

[24] VA. CONST., art. 1, § 11 (emphasis added).

[25] *Lambert*, 61 S.E. at 776.

> A direct, special injury must depreciate the value of the owner's property. These elements "concurring" his property is damaged within the meaning of the constitutional amendment; and to the extent of such diminished value, beyond damages sustained by the public at large from the improvement, the property owner is under the constitutional amendment entitled to compensation.[26]

The *Lambert* court emphasized that private property could indeed be damaged by the acts of municipal governments without compensation prior to the enactment of this particular provision of the 1902 Constitution.[27] For over a century, courts have acknowledged that the Virginia Constitution provides a landowner with compensation, in the event of "damage" or devaluation of private property, to a far greater degree than that required by the United States Supreme Court's interpretation of the United States Constitution.

However, questions remain as to the implementation of the constitutional guarantee in specific situations. For example, under what factual and procedural circumstances can a landowner claim that a regulation has devalued his property, such that compensation is forthcoming? Fortunately, nearly a century after *Lambert*, the Virginia Supreme Court appears to have settled many of these questions. In 1997, the court determined the merits of a dispute between Prince William County and a private residential developer in *Omni Homes*.[28] Faced primarily with a Fifth Amendment claim under the United States Constitution, the court nonetheless addressed takings and damage claims brought under the Virginia Constitution.[29] The court rejected the state takings claim due to the disputed regulation's failure to deprive the plaintiff's property of all economic value. As for the damage claim, the court determined that the plaintiff's developmental right had not been damaged.[30] The plaintiff was denied recovery for damages, but only because the Court found no detrimental impacts to the plaintiff's property.[31] By not rejecting the possibility of damage compensation, the court reiterated the

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[26] *Id.* at 779.
[27] *Id.* at 777.
[28] *Omni Homes*, 481 S.E.2d 460 (Va. 1997).
[29] *Id.*
[30] *Id.* at 476.
[31] *Id.*

damage guarantee provided by Article I, § 11 of the Virginia Constitution.[32]

Omni Homes settled most inverse condemnation principles as to both the takings question and the damages question. One major question remained unresolved: how does the timing of the offending regulation affect the right or ability to claim a complete or partial taking? In other words, does a party's purchase/inheritance of property subsequent to promulgation of regulation affect his ability to claim damages? The Virginia Supreme Court addressed that question the following year in a regulatory takings case involving wetland development.[33] The court, applying the United States Supreme Court's holding in *Lucas,*[34] determined that the timing of the takings claim in relation to the timing of promulgation was a crucial question. The court focused on whether or not the injured landowner had acquired the property subsequent to the enactment of the offending regulations. Finding that a regulation preceding purchase barred a takings claim, the court held:

> [T]he restriction on the lots was in the chain of title at the time of the [plaintiff] Bell's acquisition and likewise when Bell and his wife deeded the property to the Bell Land Trust. Thus, Bell, and now the Trustee, acquired the property with full knowledge of the risk involved in attempting to develop it.[35]

This rationale suggested that the property could not logically have been taken, since the complaining landowner had never actually held the property right he now claimed was diminished. In other words, a landowner cannot miss what he never had.

The court then appended a timing requirement to Virginia's common law of inverse condemnation, which is summarized graphically in Figure 1 below:

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[32] *Id.*

[33] *See Bell*, 498 S.E.2d 414 (Va. 1998).

[34] *Lucas*, 505 U.S. 1003 (1992).

[35] *Bell*, 498 S.E.2d at 419.

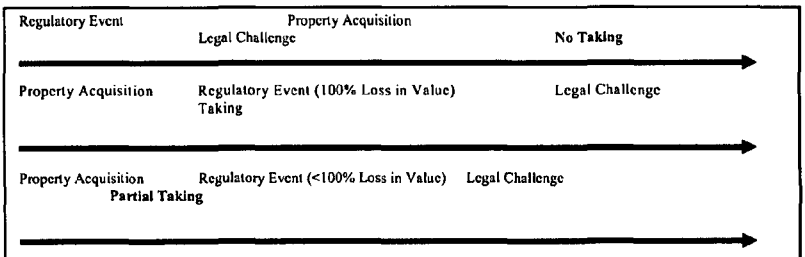

Figure 1. The effect of timing requirements on Virginia's law of inverse condemnation.

At least one commentator disagrees with this assessment of *Omni Homes*, claiming instead that the Virginia Supreme Court has, to date, refrained from addressing a damage claim as illustrated above.[36] The disagreement alleges that the court explicitly chose to avoid addressing the partial takings or damage issue in the *Omni Homes* case, and therefore, the issue remains obscure or narrowly interpreted.[37] That argument, however, misinterprets the *Omni Homes* holding. To the contrary, the court specifically addressed Article 1 saying that:

> Property is damaged for Virginia constitutional purposes when an appurtenant right connected with the property is directly and specially affected by a public use and that use inflicts a direct and special injury on the property which diminishes its value.[38]

The court's holding clarifies that, for a damage claim, the abrogation of only one property right is necessary, and that the loss need not be total as is required for a takings claim.[39] Failure to recognize or accept the implications of this holding denies the potential effects this decision could have on local regulation.

In summary, Virginia's Constitution and courts have recognized three elemental principles: (1) that private property may be damaged by public laws and regulation; (2) that such damage, under certain circumstances, is compensable; and (3) that a landowner, with knowledge of the law or regulation prior to

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[36]Gifford R. Hampshire, *Regulatory Takings with a Virginia Focus?* EMINENT DOMAIN—STATE AND FEDERAL, A VIRGINIA LAWYER'S PRACTICE HANDBOOK, 25 (1998).

[37]*Id.*

[38]*Omni Homes*, 481 S.E.2d 460, 467 (Va. 1997) (citing City of Lynchburg v. Peters, 157 S.E. 769, 772 (Va. 1931).

[39]*Omni Homes*, 481 S.E.2d at 460.

acquiring the property, cannot later allege damage in the face of the regulations.

PART II

Palazzolo v. Rhode Island,[40] was the culmination of cases brought by a land developer in Rhode Island, who hoped to turn a section of shoreline into what the plaintiff described as a "beach club." The United States Supreme Court addressed a number of issues surrounding regulatory takings, but of greatest import to the Virginia situation was the court's handling of timing in an inverse condemnation claim.

Like the Virginia's Supreme Court in *Omni Homes*, the Rhode Island Supreme Court, relying upon *Lucas*,[41] firmly held that once restrictive regulations were in effect, a landowner could not acquire such encumbered property and subsequently claim a taking.[42] The court held that, "when Palazzolo became the owner of this land in 1978, state laws and regulations already substantially limited his right to fill wetlands. Hence, the right to fill wetlands was not part of the title he acquired."[43] Further, "he had no inherent development rights derived from any rights that existed prior to his acquiring title to the land in 1978."[44]

Upon appellate review, however, the United States Supreme Court was unwilling to endorse the timing rationale adopted in Virginia and Rhode Island. To many state court justices' surprise, the Court held the converse:

> Were we to accept [Rhode Island's] rule, the post-enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.[45]

The Court reasoned, "The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is

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[40]533 U.S. 606 (2001).
[41]505 U.S. 1003 (1992).
[42]*See* Palazzolo v. State, 746 A.2d 707 (R.I. 2000).
[43]*Id.* at 716.
[44]*Id.* at 717.
[45]Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001).

stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself."[46] In conclusion, the Court determined that "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title."[47]

The difficulty associated with the ripeness of takings claims occurring long after the enactment of the offending regulation was also of import to the Court:

> A challenge to the application of a land-use regulation, by contrast, does not mature until ripeness requirements have been satisfied, under principles we have discussed; until this point an inverse condemnation claim alleging a regulatory taking cannot be maintained. It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.[48]

Of note, in no other area of land-use regulation may such a point be more salient. Forest landowners, managing on a rotational basis, may defer harvesting timber on the property for ten, twenty, or even fifty years after enactment of the regulation, and therefore lack the necessary ripeness to press a claim against the government. Additionally, it is quite likely that the property may be transferred during that time period—a source of consternation for the *Palazollo* Court.

As a result, the *Omni Homes* decision has been tacitly jeopardized. The Supreme Court's interpretation of its own holding in *Lucas* illustrates flaws in the *Omni Homes* decision, where the Virginia Supreme Court held that purchase subsequent to regulation bars a takings claim. According to *Palazzalo*, a landowner may indeed challenge a preexisting regulation after acquisition of the regulated real property.

Forest landowners stand to benefit from this holding. The large volume of private forest ownership in Virginia is illustrated by the following: average private forestland ownership is twenty-nine acres,[49] is owned by nearly 440,000 landowners,[50] and includes 1.3

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[46]*Id.* at 627.
[47]*d.* at 629-30.
[48]*Id.* at 628.
[49]Thomas W. Birch, *Private Forest-land Owners of the United States, 1994*, USDA

million acres held in parcels of less than ten acres.[51] Timber production has been the most common management objective cited for private ownership of timberlands.[52] This fact was borne out in 1994 when seventy percent of the forested acres were owned by persons with experience in harvesting timber, while a mere thirteen percent of the forest land was held by landowners never intending to harvest timber.[53]

The implications of the *Omni Homes* rule, as originally cast are alarming for a forest ownership pattern of this type. With so many small landowners, land dispositions and acquisitions can be accomplished much quicker and more frequently than when land is held in fewer, larger, more expensive, and/or contiguous parcels. The number of landowners that may acquire property already subject to local regulation is therefore increased. With the *Palazzolo* ruling, however, landowners acquiring pre-regulated property, of the type in *Dail v. York County*, may once again avail themselves of the inverse condemnation remedy. Of course, only time will tell how Virginia courts will digest *Palazzolo*.

PART III

The regulation of forestry practices, like many areas of environmental regulation, can occur at a number of levels and in a number of ways. Private forest landowners in Virginia are regulated primarily via two mechanisms.

The first set of regulations occur at the state level. If the national variety of state-level forest practice regulations were placed on a continuum, with the complete absence of regulation at the right and intensive regulation at the left, Virginia would be somewhere near the center, representing a fairly balanced approach.[54]

Such statewide forest practice regulations are administered by the Virginia Department of Forestry,[55] and cover a range of management requirements. Premiere purposes among those regulations are maintenance of water quality[56] and timber reservation

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FOREST SERVICE, N.E. EXPERIMENTAL STATION, RESOURCES BULLETIN NE-134 (1996).

[50]Birch, *supra* note 8.

[51]Michael T. Thompson and Tony G. Johnson, *A Forested Tract-Size Profile of Virginia's NIPF Landowners*, USDA FOREST SERVICE, RESEARCH PAPER SRS-1, S. RESEARCH STATION (1996).

[52]Birch, *supra* note 8, at 5.

[53]*Id.* at 6.

[54]California, Oregon, and Washington are representative of states with comprehensive and often onerous forest management acts, while Ohio, Kentucky, and Montana are examples of states with relatively minimal regulation of private forest landowners.

[55]VA. CODE ANN., § 10.1-1181 *et seq.* (Michie 2001).

[56]*Id.* § 10.1-1181.1-.6.

for regeneration purposes.[57] Unlike some states at the extreme left end of the continuum, notably California and Oregon, Virginia has no state-wide requirements for such things as aesthetic or visual design of timber harvest units and logging road location,[58] tree retention and harvest management requirements for wildlife habitat,[59] nor old-growth tree preservation.[60] By limiting its forest practice regulations to relatively secure police power areas closely associated with prevention of offsite public nuisance harms (water quality) and relatively defensible public welfare goals (post-harvest tree regeneration), Virginia has largely avoided the difficulties associated with regulations that merely provide public benefits.[61]

At the local level, however, a different situation exists. County and local municipalities have regulated forest practices within their respective jurisdictions in a variety of manners and intensities. The nature of such local forest regulation contrasts with state level regulation in several ways. First, the subject areas of regulation differ greatly. The state largely regulates in the water quality and reforestation areas. On the other hand, county and local regulations address such areas as minimum acreage required to allow harvesting,[62] buffer zones alongside residential areas[63] and certain public highways,[64] mandatory pre-harvest plans,[65] restrictions on clearcutting,[66] and mandatory bonds guaranteeing reforestation.[67]

Second, local regulations differ in the intensity to which they control areas already regulated by the state. For example, the Virginia Department of Forestry's Best Management Practices (BMP) suggests a fifty-foot harvest restriction buffer near streams.[68]

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[57]*Id.* § 10.1-1162-67.

[58]CAL. PUB RES. CODE § 4551.5 (2001); Z'Berg-Nejedly Forest Practices Act, CAL CODE REGS. tit. 14, § 4, 4.5 (2000).

[59]*Id.*; WASH. REV. CODE § 76.09 (2000); WASH. ADMIN. CODE § 222 (2000).

[60]CAL CODE REGS, tit. 14, § 1038, 1104.1 (2001).

[61]*See* RICHARD A. EPSTEIN, TAKINGS, ch. 9 (1985); FREDERICK W. CUBBAGE ET AL., FOREST RESOURCE POLICY 356-57 (1993); Warren *supra* note 12.

[62]WARREN COUNTY, VA., ZONING ORDINANCE ch. 180 (2000); YORK COUNTY, VA., CODE § 24.1-419 (1997).

[63]WARREN COUNTY, VA., ZONING ORDINANCE ch. 180 (2000).

[64]ISLE OF WIGHT COUNTY, VA., CODE § 4200 (1999).

[65]MIDDLESEX COUNTY, VA., CODE, DRAGON RUN CONSERVATION DISTRICT (1995); LOUDON COUNTY, VA., ZONING ORDINANCE § 4-1600 (1998); NEW KENT COUNTY, VA., ORDINANCE § 9.91 *et seq.* (2000); FAIRFAX COUNTY, VA., CODE ch. 118 (1999); FREDERICK COUNTY, VA., CODE ch. 79 (1992); Epstein, *supra* note 61.

[66]WARREN COUNTY, VA., ZONING ORDINANCE ch. 180 (2000); YORK COUNTY, VA. CODE § 24.1-419 (1997); ISLE OF WIGHT COUNTY, VA., CODE § 4200 (1999).

[67]WARREN COUNTY, VA., ZONING ORDINANCE ch. 180 (2000); NEW KENT COUNTY, VA., ORDINANCE § 9.91 *et seq.* (2000).

[68]VIRGINIA DEPARTMENT OF FORESTRY, FORESTRY BMP GUIDE FOR VIRGINIA (1997). Best Management Practices (BMP) are designed to mitigate the addition of pollutants, which in the case of forestry is sediment, from reaching a stream or other water body.

All existing local regulations addressing riparian buffers exceed that number,[69] some buffers by as much as ten times.[70]

Local forest regulation is less desirable than regulation at the state level for a variety of reasons. First, regulation on a county or local level, at least in Virginia, has the potential for chaotic results, particularly since forest landownership boundaries rarely follow municipal boundaries. If each county in Virginia passed its own forestry ordinance, this alone would result in ninety-five different sets of county regulations, and forty more if followed by Virginia's independent cities. Such an outcome cannot be labeled fatalistic speculation. Already Virginia forest landowners are subject to twenty-one differing sets of local forest management ordinances,[71] comprising seventy-seven individual forest management standards.[72] State-level regulation, on the other hand, advances uniformity and predictability, by establishing regulatory authority under one government body. Presumably, this central decision-maker has the resources, expertise, and experience to regulate forest management practices.[73] Such a central regulating body could harness the expansion of arbitrary or ill-conceived local ordinances.

In an effort to address such problems, and to provide a predictable regulatory environment for the forest resource community, the Virginia General Assembly enacted Senate Bill 592.[74] This bill, popularly known as the "Right to Forestry" bill, was signed into law in 1997.[75] It generally preempted local regulation of forestry, or silvicultural activities, if certain conditions were met. The law specifically provided that:

> Not withstanding any other provision of law, silvicultural activity, as defined in §10.1-1181, that is conducted in accordance with the silvicultural best management practices developed and enforced by the State Forester pursuant to §10.1-1105 and ... is located on property defined as real estate devoted to forest use under §58.1-3230 or in a district established pursuant to Chapter 43 (§15.2-4400 et seq.) of Title 15.2 shall

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[69]Of the six counties or cities requiring riparian buffers, all six exceed state recommendations.

[70]ISLE OF WIGHT COUNTY, VA., CODE § 4200 (1999).

[71]Spink, *supra* note 4.

[72]SOCIO-3, *supra* note 5.

[73]Frederick W. Cubbage, *Public Regulation of Private Forestry*, 89 J. FORESTRY 31, 34 (1991).

[74]S.B. 592, 1997 Gen. Assem. (Va. 1997).

[75]Signed by the governor January 28, 1997, effective July 1, 1997.

> not be prohibited or unreasonably limited by a local government's use of its police, planning and zoning powers. Local ordinances and regulations pertaining to such silvicultural activity shall be reasonable and necessary to protect the health, safety and welfare of citizens residing in the locality.[76]

The state leveled the regulatory playing field to a great degree by requiring the use of BMP as a means of ensuring a certain level of stewardship and care on the part of forestry operators. By linking regulation and quality forest practices, challenges based upon even rigid interpretations of the takings doctrine would likely fail. Moreover, by creating incentives for landowners and operators to comply with BMP, the state used a carrot, rather than a stick, to foster greater land management care when harvesting timber. The very real fear of local regulation should have prompted even reluctant loggers to consider adhering to state BMP standards. All this was for naught however, for the Virginia Supreme Court was not convinced by the state's attempt at forest regulation preemption.[77]

Before addressing the court's ruling, it is important to understand the relationship between state police powers, takings, and forestry regulations. There are some types of forest regulations that are clearly legitimate exercises of police powers, since they are designed to prevent what might otherwise be a common law nuisance or other tort, or are clearly related to preventing an identifiable public harm.[78] For example, laws that regulate sediment delivery to streams, or require certain fire hazard mitigations are designed to protect not only a resource, but the rights and properties of the public in general.[79]

Other forms of forest regulation are less defensible. For example, certain laws, such as those that require replanting (as distinguished from regeneration) of harvested land, visual or aesthetic

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[76]VIRGINIA CODE ANN. § 10.1-1126.1 (Michie 2001).

[77]*See* Dail v. York County, 528 S.E.2d 447, 451 (Va. 2000).

[78]For example, Oregon adopted forest management regulations that prohibit timber harvesting on certain high risk private lands to address dangerous mass failures (landslides). The purpose of the regulations is as follows: "The purpose of the shallow, rapidly moving landslides and public safety rules is to reduce the risk of serious bodily injury or death caused by shallow, rapidly moving landslides directly related to forest practices. These rules consider the exposure of the public to these safety risks and include appropriate practices designed to reduce the occurrence, timing, or effects of shallow, rapidly moving landslides." OR. ADMIN. R. 629-623-0000 (2001).

[79]For example, Montana's Fire Hazard Reduction law requires that landowners conducting timber-harvesting activities on their land provide for the reduction of timber slash within fixed time periods. The nexus with preventing off-site harm to the property and person of other landowners is obvious.

corridors, or retention of particular trees for wildlife habitat, clearly do nothing to abate a nuisance or other offsite harm. As such, this form of regulation, while arguably providing some public benefit, does not prevent public harm.[80] Thus, this latter form of regulation is less likely to survive constitutional scrutiny. For example, the Oregon Court of Appeals recently held that a state-wide harvesting prohibition zone, around spotted-owl (a federal endangered species) nests located on private land, provided the foundation for a regulatory takings claim.[81] The state reasserted principles found within *Lucas*, namely that the harvesting regulation merely prevented a public nuisance, and therefore, was immune to a takings claim.[82] The Oregon Court of Appeals differed:

> The state offers no authority for the proposition that knocking down a bird's nest on one's property has ever been considered a public nuisance.[83]
>
> * * *
>
> It does not follow, as the state seems to posit, that any act taken by the state to protect *ferae naturae* on private property is the equivalent to an abatement of a public nuisance, or alternatively, any act by a private party to destroy *ferae naturae* on private property constitutes a public nuisance.[84]

However, the balance in analyzing the competing forces between private and public goods remains elusive.[85] How far should the regulation go, what scientific evidence exists for its enactment, and does it indeed prevent a public nuisance? Virginia Senate Bill 592 was a cogent attempt at achieving that balance. It combined a respect for private property with a desire to further resource protection, giving a central authority with expertise in the field the task of acting as the sole regulator.[86]

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[80]For example, the California Board of Forestry and Fire Protection voted in 2001 to require a timber harvest plan or an environmental assessment prior to harvesting any "old-growth" tree, and further, a pending 2002 California ballot initiative (SA01RF0040, Amdt. #1-S) which would completely prohibit the harvesting of heritage or "old-growth" trees on private property, bearing no relationship to the prevention of a definable public or private harm.

[81]Boise Cascade v. Oregon, 991 P.2d 563 (Or. App. 1999), *appeal denied*, 18 P.3d 1099 (Or. 2000), *cert denied* 532 U.S. 923 (2001).

[82]*Id.* at 569.

[83]*Id.* at 570.

[84]*Id.* at 571.

[85]FREDERICK W. CUBBAGE, THE PUBLIC INTEREST IN PRIVATE FORESTS: DEVELOPING REGULATIONS AND INCENTIVES IN CREATING A FORESTRY FOR THE 21ST CENTURY (Kathryn A. Kohm & Jerry F. Franklin, eds., 1997).

[86]*See* SB 592, 1997 Gen. Assem. (Va. 1997).

The various forms of local regulation that currently exist lack such a defensible argument. As such, they are more likely to be attacked by landowners claiming that the ordinances have damaged or taken their property's value.[87] The more draconian nature of these local forest management laws, coupled with their inherent vulnerability, may tend to create a difficult and expensive situation for both landowners and local governments.

The merits of Senate Bill 592 were examined by the Virginia Supreme Court, compounding the challenges directly associated with the type of regulation and the form of the regulator in *Dail v. York County*.[88] The case came before the court based upon two joint landowners' claim that the local regulation of their forested property prevented them from harvesting timber as they desired.[89] The specific facts are noteworthy, as they vividly illustrate some of the problems posed by local regulation.

The landowners, Anne Dail and her son James, had intended to harvest the timber located on her thirty-seven acre tract in York County.[90] Aware of the passage of Senate Bill 592, the Dails notified the county of their intention to harvest and their intention to rely upon the language of the new law.[91] The county disagreed with the application of Senate Bill 592, and ordered the Dails to cease any operations pending resolution of the matter, or continue at risk of censure.[92] The Dails argued at the trial level that they had complied with the Virginia Code that exempted them from local regulations should they follow BMP.[93] The property in question had been zoned *R-R*.[94] Rural-residential and forestry activities were permitted by the county without the need to apply for any special use permit in that instance. In other areas, a permit would be required.[95]

York County, however, had in place a forestry regulation governing timber harvesting anywhere in the county[96] including property in *R-R* zones. That regulation, one of the most rigorous of any in the Commonwealth,[97] contained several substantive land management

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[87]*See* Paul V. Ellefson et al., *State Forest Practice Regulatory Programs: An Approach to Implementign Ecosystem Management in the United States*, 21 ENVTL. MGMT. 421, 429-30 (1997).

[88]528 S.E.2d 447 (Va. 2000).

[89]*Id.*

[90]*Id.* at 448.

[91]*Id.*

[92]*Id.*

[93]*Id.*

[94]Rural-Residential.

[95]YORK COUNTY, VA., CODE § 24.1-419 (1997).

[96]*Id.*

[97]State forester James Garner was quoted in 1998 as assessing the York County forestry ordinance as one of the most restrictive forest ordinances in Virginia before the state law took effect in 1997, and that even after 1997 the law "still ranks right up there in terms of

requirements, as well as a procedural requirement for the development of and compliance with a forest plan prior to any harvest.[98] The substantive land management requirements included: (1) a minimum of five acres required to conduct forestry operations;[99] (2) protection of all heritage, memorial, and specimen trees;[100] (3) fifty foot no-harvest buffers along all public roads, and twenty-five foot no-harvest buffers along all other sides of the property;[101] (4) streamside management zones of at least 50 feet, in which harvesting was limited;[102] and (5) reforestation requirement.[103]

Additionally, the Dail property was subject to both a Watershed Management Area Overlay,[104] and an Environmental Management Overlay.[105] These additional regulations prohibited timber harvesting within 200 feet of a stream in the case of the former,[106] and prohibited clearcutting on private land in the case of the latter.[107]

Procedurally, the county required preparation and submission of a forest management plan detailing: the geographic location of the harvest site and the presence of any cultural, historical or environmentally sensitive features; a narrative description of all harvesting procedures; a reforestation plan; and a depiction of all buffer zones.[108] The plan then required approval by the Virginia Department of Forestry and the county zoning officer.[109]

Such requirements, however, inject arbitrary and even unfounded hurdles into the permitting process. For example, the Virginia Department of Forestry could be required by the county to approve or disapprove forest management plans that may fail to embody state-wide forestry requirements, and fail to encompass or comply with the Department of Forestry's own watershed BMP. Further, the regulation places a burden upon the landowner to garner approval from a separate bureaucracy that itself possesses no organic authority to require a forest management plan from the landowner.[110]

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restriction." *Battle Over Trees Cuts Both Ways*, THE WASHINGTON POST, Apr. 18, 1998, at G14.

[98] YORK COUNTY, VA., CODE § 24.1-419(b) - (c) (1997).

[99] *Id.* at (a).

[100] *Id.* at (e).

[101] *Id.* at (f).

[102] *Id.* at (g).

[103] *Id.* at (h), (i).

[104] YORK COUNTY, VA., CODE § 24.1-376 (1997).

[105] *Id.* at § 24.1-372.

[106] *Id.* at (e).

[107] YORK, VA., COUNTY CODE § 24.1-419(e)(5) (1997).

[108] *Id.*

[109] *Id.*

[110] The Department of Forestry's general authority to regulate forestry activity in Virginia is expressed in specific legislative delegations of statutory authority. Approvals or disapproval of a forest management plan is not counted among the enumerated delegations and

Additionally, the local zoning officer, who in many cases would be untrained as a forester, would be scrutinizing a plan before approving or disapproving it that required a scientific and expensive environmental assessment and a detailed description of technical timber harvesting methods and procedures. The zoning officer could disapprove such a plan for the failure of the applicant to comply with any part of the applicable regulations. Should that occur, harvesting would be prohibited.[111]

Finally, York County zoning ordinances defining "development" as any land-disturbing activity have been interpreted to include timber harvesting.[112] That interpretation, based upon a county finding that timber harvesting changes the character of the land, requires an impact assessment when such harvesting occurs in a watershed management area in addition to the above-mentioned requirements.[113] The assessment is not limited to analyzing timber harvesting effects in the riparian buffer established by the watershed management area, but includes the entirety of the harvest area as well.[114] In other words, though the requirements of the watershed management area substantively restrict timber harvesting only in the riparian corridor, the assessment must nonetheless be prepared prior to permitting harvesting on any of the contiguous parcels, regardless of size and character. Among the requirements of the assessment is an analysis of "how the reduction in tree canopy and the disturbance to the under story will not cause the rate and quality of runoff to exceed pre-development (pre-timbering) levels."[115]

Practically, that cannot be accomplished, because timber harvesting typically produces some effect on the rate and quality of runoff. A change in rate or quality of flow, however, is not synonymous with a harmful change, but York County makes no distinctions. These requirements create a new substantive standard and burden for landowners—one that may be scientifically and economically impossible to meet. Again, this is a clear demonstration of the problems associated with the devolvement of regulatory authority to local governments.

The Virginia Supreme Court, in piecing together this fractured relationship between state and county forest regulations, misapprehended the role of the county forest management plan. While Virginia Senate Bill 592 clearly prohibited timber-permitting

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requirements of the Department.

[111] YORK COUNTY, VA., CODE § 24.1-419(b) (1997).

[112] Letter from J. Mark Carter, York County Zoning Administrator, to William Day (November 9, 2001) (on file with the authors).

[113] *Id.*

[114] *Id.*

[115] *Id.*

requirements by counties,[116] the court determined that the county's management plan approval requirement failed to constitute such a prohibited "permit:"

> Allowing proposed activity to be reviewed for compliance implies that the review process encompasses more than simply a review of a proposed plan of activity. The statutory review process includes a component of evaluation and decision regarding compliance. Describing this decision as an "approval" in the Forestry Ordinance is consistent with authorizing the zoning administrator to make such a determination regarding compliance, and does not create a permit requirement.[117]

Perhaps the court should have simply consulted Merriam-Webster, wherein "permit" is defined as "a written warrant or license granted by one having authority."[118] Even a common understanding of the term "permit" demands the logical conclusion that an application to a body of authority for approval or disapproval is an inherent component. The approval of the application, which is legally required to carry out a proposed and regulated activity, is a permitting arrangement. Only judicial prestidigitation or a preoccupation with form over substance could account for the contrary outcome.

Further, in the natural resource management field, it is exceedingly common for an applicant, seeking authority for some activity, be it mining, logging, or other, to submit a prepared application to a governmental regulatory body for approval or disapproval of the management activity. The *Dail* court's decision appears to be premised on the notion that a permit implies merely notice filing or the rote approval of an application. The court must also have determined that an application coupled with something other than rote review and approval is not a permit. This interesting, but hardly well reasoned, dichotomy does not seem sufficient to evade what the legislature clearly intended to prohibit—local governance of forestry operations.

Nonetheless, in *Dail*, the court held that the application approval process was not a permit, and therefore did not violate the state law. The Dails raised other challenges, including the

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[116] VA. CODE ANN. § 10.1-1126.1(B) (Michie 2001).
[117] Dail v. York County, 528 S.E.2d 447, 450 (Va. 2000).
[118] MERRIAN-WEBSTER, http://www.m-w.com.

clearcutting prohibition in the Environmental Management Overlay Ordinance.[119] Again, the court, unfamiliar with much of the subject matter into which it waded, found that complete prohibition of a silvicultural activity did not violate state law, stating that a county may not "prohibit or unreasonably limit" silvicultural activity.[120] The court did not investigate the definition of silvicultural activity in the state law, wherein it states:

> Silvicultural activity means any forest management activity, including but not limited to the harvesting of timber, the construction of roads and trails for forest management purposes, and the preparation of property for reforestation.[121]

Nor did the court consult the Dictionary of Forestry, which though not containing a definition of "silvicultural activity," defines "silvicultural system" as:

> A planned series of treatments for tending, harvesting, and re-establishing a stand—note the system name is based upon the number of age classes (coppice, even-aged, two-aged, un-even-aged) or the regeneration method (*clearcutting*, seed tree, shelterwood, selection, coppice, coppice with reserves) used.[122]

The court's misapprehension of the intent and meaning of the state law consequently ratified York County's efforts to do exactly what the state had intended to prevent. By finding that the county regulation banning clearcutting was a "limitation," rather than a "prohibition," the court ignored the plain fact that York County prohibited clearcutting.[123] The ordinance does not merely establish restrictions or limitations on that particular silvicultural technique—it outlaws its use entirely. The textual caveat that the zoning administrator may allow "selected thinning"[124] is irrelevant. Selected thinning is not synonymous with clearcutting, and though perhaps appearing to prevent an outright ban, fails to do so with sufficient technical language.

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[119] *Dail*, 528 S.E.2d at 451.

[120] VA. CODE ANN. § 10.1-1181 (2001).

[121] VA. CODE ANN. § 10.1-1126.1 (2001).

[122] THE SOCIETY OF AMERICAN FORESTERS, THE DICTIONARY OF FORESTRY 167 (John A. Helms, ed., 1998) (emphasis added).

[123] *Dail*, 528 S.E.2d at 451; *see also* YORK COUNTY, VA., CODE § 24.1-376 (1997).

[124] YORK COUNTY, VA., CODE § 24.1-376 (1997).

Finally, the Dails claimed the visual buffer requirements of the county regulation conflicted with state law, and therefore, were invalid.[125] This represented perhaps the weakest argument offered by the Dails, but perhaps in other scenarios, represents the most effective argument in the context of a regulatory taking claim. A buffer strip preventing no nuisance-type harm to the public would likely lack constitutional merit to stand. While several other buffer requirements were in fact linked to water quality, the visual buffers challenged were merely aesthetic in nature, and served no anti-nuisance purpose at common law. For instance, if a landowner cut all the trees on his property, no remedy would exist at common law for his neighbor to oppose the cutting or claim scenic damages. If trees on the neighbor's property were more susceptible to fire, insect infestation, or wind damage due to the harvest, then such a regulation might be legitimate.[126] There is no evidence, however, that the York County regulation was designed or rationally related to those latter goals.

Be that as it may, *Dail* did not raise a regulatory takings claim, and thus the court lacked the opportunity to address that issue. In this decision, the Virginia Supreme Court reinforced the ability of local counties and municipalities to continue regulating forestry activities. Predictably, the Virginia Association of Counties has advocated greater authority and autonomy in the regulation of forest management activities, including broader permitting requirements.[127]

But what was the fate of the Dail property? What effects did the York County Regulations have on forestry management? The regulations imposed upon the property can effectively be broken into the two categories discussed earlier: those that typify an exercise of police powers, and those that merely provide public benefits at private expense. Forestry regulations that indeed serve a common-law, anti-nuisance purpose represent a valid exercise of police powers, and would avoid taking or damage claims like the Dail's.[128] A streamside management zone buffer, if rationally designed to ensure water quality for downstream watershed users, is such an example. Designed to prevent actionable, off-site harms to other property owners, it would likely satisfy a common law anti-nuisance test.

The other buffer requirements are another matter. It is inconceivable how an argument might be fashioned that a visual buffer was in any way preventing off-site tortious harms to other

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[125] *Dail*, 528 S.E.2d at 585-87.

[126] *See* Boise Cascade v. Oregon, 991 P.2d 563 (Or. App. 1999), *appeal denied*, 18 P.3d 1099 (Or. 2000), *cert denied* 532 U.S. 923 (2001).

[127] VIRGINIA ASSOCIATION OF COUNTIES, *supra* note 6.

[128] EPSTEIN, *supra* note 61, at 107-25.

residents. During the legal dispute in *Dail*, the York County Attorney argued that the law at issue was legal, reasonable and designed to address safety issues as well as aesthetic and environmental issues.[129] While that legal position was necessary to justify the county's ordinances, the substantive merits of the statement are questionable, and tend to confirm the fifty-year-old fears of the dissenting justice in *State v. Dexter*:

> The development of the doctrine of the "the police power" has passed all constitutional barriers, so that now all that is necessary to introduce and enforce any repressive measure is to use a high-sounding, plausible preamble, and the courts will then approve, regardless of the fact that personal liberties are taken from the individual.[130]

The regulations cannot conveniently be lumped into one mass. Although the York County Attorney may have been quite accurate in his appraisal of the streamside management zone regulation, he offered inadequate justification for the visual buffer. The James City County Development Manager was quoted as glibly noting that "[l]ogging can cause erosion, make a property less attractive for development and even cause small but distinct climate changes by robbing an area of shade," in order to justify the York County regulations.[131] Unfortunately, such a shallow characterization is akin to our forestry forebearers' claims of nearly a century ago that cutting trees reduced rainfall.[132] The city manager's remarks are of dubious scientific merit, lack a totality of context, and more importantly, bear no relationship to the private property principles at stake.

The visual buffer, designed to provide an aesthetic service to the community at large, affected nearly ten percent of the Dail property.[133] This ten-percent reduction in harvestable acreage carried an equivalent timber value of $6,642 for the owners.[134] While the regulation by no means diminished the entire value of the parcel, it is important to note that stumpage values received by Virginia's landowners have ripple effects within the Virginia economy. In this

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[129]*Battle Over Trees Cuts Both Ways*, THE WASH. POST, Apr. 18, 1998, at G14.

[130]State v. Dexter, 202 P.2d 906, 912 (Wash. 1949) (Simpson, J., dissenting).

[131]*Battle Over Trees Cuts Both Ways*, *supra* note 129.

[132]*See generally*, SAMUEL T. DANA & SALLY K. FAIRFAX, FOREST AND RANGE POLICY 41 (2d. ed. 1980) (1956).

[133]Memorandum from Jess Crawford, Consulting Forester, to Michael Mortimer (Jan. 7, 2002) (on file with authors).

[134]*Id.*

case, the value of stumpage the Dails were prohibited from harvesting would have a value-added worth of $235,126.[135] While those few travelers passing by the Dails' rural property may have received some intangible aesthetic benefit from the presence of a tree buffer obscuring the signs of timber harvesting, the economic impacts, both to the Dails and to the larger Virginia economy, dwarf that esoteric sum.

Where are Virginia's forest regulations post-*Dail*? As stated above, they are in flux. Though Virginia has in place what appear to be adequate regulations to prevent watershed degradation and to ensure adequate reforestation, the door has been opened for the creation of local forestry regulations in any imaginable form. Legislation introduced in Virginia's 2002 Session sought to capitalize on this situation,[136] threatening to create far more policy problems than it might ever resolve.

PART IV

Apart from the immediate legal and economic implications for forest landowners provided by the remedies of inverse condemnation and Article I damage claims, forest regulation presents larger policy implications for Virginia's forests and forest landowners. Forest regulation, by making the retention and management of forested land less profitable,[137] creates a situation where forest landowners will often consider alternative uses and management schemes for the property.[138] Faced with daunting forest regulation, it is the rare landowner who will resign himself or herself to maintaining the property in a forested, though unmanaged condition. Additionally, one would expect a chilling effect on new investment for timber management purposes with such regulated private forested land.

It is easy to predict the outcome—relatively large contiguous blocks of forestland risk conversion to residential developments, commercial facilities, or other non-forest land uses. Land conversion, of course, is a familiar phenomenon and not necessarily a harbinger of a particular problem. In this case, however, it has been

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[135]*See* VA. DEPT. OF FORESTRY, VIRGINIA'S FORESTS: OUR COMMONWEALTH (1997). This figure is based upon calculations performed by the Virginia Department of Forestry in its 1997 report, but updated for the Department's pending report. *See Virginia Forest Facts, at* http://www.dof.state.va.us/resinfo/facts.htm.

[136]H.D. 791, 2002 Sess. (Va. 2002) (amending and reenacting 10.1-1126.1 of the Code of Virginia, relating to harvesting timber in urban areas).

[137]*See* VA. DEPT. OF FORESTRY, VIRGINIA'S FORESTS: OUR COMMONWEALTH (1997).

[138]SOCIO-3, *supra* note 5.

established that the single most serious and enduring risk to forests and forest habitat in the southern United States is the urbanization of forested land.[139] The proliferation of local forestry regulations has been identified as a contributing factor to that urbanization.[140] In that context, the risks and problems posed by loss of Virginia's forestland must in part be attributed to the structure of incentives and regulations faced by private forest landowners. For example, one need only turn again to the situation in York County. It possesses one of the more rigorous local forest management ordinances in the Commonwealth.[141]

York County is also geographically located in one of the areas identified as at the highest risk for the loss of forest cover due to urbanization.[142] Nonetheless, the county has chosen to end preferential tax treatment previously afforded forest landowners. The carrot is missing, and the stick is all that remains.[143] Loss of incentive for landowners to maintain a forested condition, coupled with aggressive land-use regulation, begs the question: what is the intent of York County regarding forested land? York County's comprehensive policy of forestland retention appears flawed at best, and negligent at worst. The various pieces together create a hostile environment for both the retention and recruitment of forest cover. This is an undesirable result for York County and other urbanizing counties and likely will result in loss of both economic and environmental amenities provided by York County forests. Timber harvesting alone returns in excess of $400,000 annually to county landowners,[144] and it represents $14,729,267 in value added to the Virginia economy at large.[145]

As mentioned earlier, the United States Forest Service has recently released a report detailing the status of private forestland in the southern United States.[146] While part of that report assessed forest regulations and the potential impact of those regulations,[147]

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[139]*Id.* at Summary.

[140]*Id.*

[141]*Battle Over Trees Cuts Both Ways*, *supra* note 129.

[142]U.S. FOREST SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE, SOUTHERN FOREST RESOURCE ASSESSMENT, SOCIO-1, § 5 (2001).

[143]York County previously afforded agricultural, horticultural and forest landowners the opportunity for real property tax relief. *See* VA. CODE ANN. § 58.1-3230 *et seq.* Tax structure is recognized as a key incentive for promoting forest landowners to keep their lands in forest, rather than other uses. *Id.*; U.S. FOREST SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE, SOUTHERN FOREST RESOURCE ASSESSMENT at SOCIO-4.

[144]VIRGINIA DEPT. OF FORESTRY, 1998-1999 VIRGINIA COUNTY HARVEST VOLUME AND VALUE.

[145]VA. DEPT. OF FORESTRY, VIRGINIA'S FORESTS: OUR COMMONWEALTH (1997); Memorandum from Jess Crawford, Consulting Forester, to Michael Mortimer (Jan. 7, 2002).

[146]U.S. FOREST SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE, SOUTHERN FOREST RESOURCE ASSESSMENT (2001).

[147]*Id.* at SOCIO-3.

another assessed the largest threats to forest cover and identified geographically those regions most susceptible to the loss of forest cover.[148] The report identified, among others, the coastal Virginia region encompassing York County. This finding should be expected, as York County is one of the fastest growing regions of Virginia,[149] and the sixth most densely populated county in the state.[150] Finally, nearly two thirds of the remaining forests in York County are currently on public land,[151] thus prioritizing the need for careful consideration of the fate of private forestland within both the county and the region.

What is surprising is the apparent disconnect between the policy steps taken in an effort to ensure the retention of forest cover and the actual effects of those steps.[152] It is, however, easy to understand the problem. Forest management and policy, like any other scientific endeavor, requires technical knowledge and skill.[153] County and city bureaucracies seldom possess adequate budgets to address exigent urban forestry concerns such as hazard trees and power line pruning, let alone the staff and budget required to comprehensively address regional forest and timber concerns. That task is best left to centralized organizations capable of looking at the larger picture, such as state-level agencies and universities, whose job it is to address such problems.[154]

Since the transfer of forested property remains unfettered, while residential and commercial pressures are increasing, forested land that is unable to be economically managed will be converted to another use. With population densities near 530 persons per square mile,[155] the continued likelihood of commercial timber management in York County is nearly zero.[156] This problem is compounded by the York County ordinance which may intend to preserve some semblance of forest cover. The result is perversely the opposite.

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[148] *Id.* at SOCIO-1.

[149] CHARTING THE COURSE TO 2015, THE YORK COUNTY COMPREHENSIVE PLAN 6 (adopted Oct. 6, 1999).

[150] *Id.*

[151] *See Va. Dept. of Forestry, at* http://www.state.vipnet.org/dof/R2/york.htm.

[152] This is particularly ironic considering one of York County's planning goals is to "retain natural physical features, forests, and woodland areas throughout the development process." *See* CHARTING THE COURSE TO 2015, THE YORK COUNTY COMPREHENSIVE PLAN 41 (adopted Oct. 6, 1999).

[153] SOCIETY OF AMERICAN FORESTERS, PUBLIC REGULATION OF PRIVATE FOREST PRACTICES, A POSITION OF THE SOCIETY OF AMERICAN FORESTERS (2002).

[154] *Id.*

[155] U.S. CENSUS BUREAU, STATE AND COUNTY QUICK FACTS, YORK COUNTY, VA. (2000), *at* http://quickfacts.census.gov/qfd/states/51/51199.html.

[156] David N. Wear, et al., *The Effects of Population Growth on Timber Management and Inventories in Virginia*, 118 FOREST ECOLOGY AND MGMT. 107 (1999).

Short of forbidding the conversion of forested land to any other use, localities like York County must understand the ramifications of their regulatory schemes. At the state level, policy-makers must be aware of the effect of county regulations on the forests that the public claims to revere and its representatives seek to preserve. The inability to sustain forest cover and forest management may lead to fragmented wildlife habitats, difficulty in managing existing forest fuel loads, and increased difficulty in fighting forest fires.[157]

Lest this article be accused of simply being a diatribe opposing forest regulation in any form, let us offer two caveats to the arguments herein. First, this article presents something other than simply a repackaging of the much-heralded cry of the "zoning oppressed." The *Dail* case and the broader local forest regulation difficulties in Virginia are not about zoning. In fact, the actions proposed by the Dails were in compliance with the zoning type in which their land was located. This discussion is primarily concerned with the deliberate and focused land use regulation of a particular class of landowners, targeted only because of the nature of the property they own, which is merely touching tangentially on planning or zoning. It is imperative that policy-makers understand not only what such ordinances intend to accomplish, but also the means and mechanism established to do so and the potential for unintended consequences.[158]

Neither does this discussion urge a blanket end to forest regulation, prompting a forestry "race to the bottom" as timber investors flock to the wild, lawless forests of Virginia. Rather, this article demands that forest regulations be thoughtful, effective, and mindful of the property rights they will undoubtedly confront.

Finally, any argument for uniform state regulation in this article has analogs throughout the law. Why else would Congress exercise its considerable power under the Commerce Clause of the United States Constitution if not to prevent provincial regulatory impediments to the flow of commerce, ostensibly passed by individual jurisdictions, with the safety and welfare of the people of each state in mind? It is easy to see parallels to the situation in Virginia where the forest industry is integral to the state economy.

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[157] *Id.*

[158] SOCIETY OF AMERICAN FORESTERS, *supra* note 153.

CONCLUSION

The United States Supreme Court's ruling in *Palazzolo* should prompt changes in the manner in which inverse condemnation claims are addressed in Virginia. This change may provide forested landowners and others with new opportunities to challenge the body of local forestry regulations that have arisen. In turn, this change may create a greater awareness of the problems generated by local forest regulation and suggest policy changes necessary to prevent losses to landowners' rights, the Virginia economy, and lastly, to the forestlands and forest-related values of the Commonwealth.

Regulation of forest practices represents a complex relationship among science and policy, lawmaker and court. Where feasible, such decisions are best relegated to the combination of forest professional, and comprehensive, constitutional regulatory schemes. For if not, the resultant land use conflicts and environmental outcomes may not be what any participant would have.

The Virginia Department of Forestry noted of York County that:

> Much of York County now faces the challenge of caring for trees in an urban environment, however traditional forestry for timber production is still being carried out in areas of western York County and on some of the governmental land holdings. A healthy forest resource either rural or urban will return investment costs many times over and in many different ways. With proper management and conservation the forests of York County can remain a renewable and sustainable resource for the residents of York County and the Commonwealth of Virginia.[159]

York County, however, appears to have charted a course of neither proper management nor conservation of its forest resources. The future will demonstrate whether Virginia's constitutional guarantees and the holding in *Palazzolo* will serve to correct that course.

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[159] *Va. Dept. of Forestry Data*, *supra* note 151.