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The Law of Lake Lure

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THE LAW OF LAKE LURE

GEORGE WILLIAM SHERK[†]

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With the growing demand for water-based recreational opportunities, conflicts over the right to use the surface of artificial watercourses likely will arise with increasing frequency in the future.¹

I. INTRODUCTION

With regard to the recreational opportunities provided by Lake Lure, Professor James N. Corbridge, Junior's 1984 prophecy was precisely on point. Increasing use of the lake for a wide variety of activities, ranging from canoeing and fishing to pleasure boating and water skiing, resulted in increasing conflict between these uses. Left unregulated, a classic "tragedy of the commons" will inevitably result.²

To avoid such a tragedy, the Town of Lake Lure (Town) and the Lake Lure Marine Commission (LLMC) must regulate activities occurring both on Lake Lure and on shoreline areas. Following a review of the history of the lake in Part II of this article, Parts III and IV, respectively discuss the regulatory authorities of the Town and the LLMC.

1. James N. Corbridge, Jr., *Surface Rights in Artificial Watercourses*, 24 NAT. RESOURCES J. 887, 927 (1984) (internal citations omitted).

2. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1243-48 (Dec. 13, 1968). In this seminal work, Garrett Hardin noted that it was not in the economic best interest of any single user of a common range to preserve the range. *Id.* at 1244. Any preservation of the range resulting from the actions of a single user would result only in more of the range remaining available for others to use. It was in the economic best interest of every user of the common range to maximize utilization before other users consumed the resources of the range. *Id.* The result, a "tragedy of the commons," could only be avoided if use of the range by all users was regulated. See *id.* at 1247-48. Hardin's conclusions are as applicable to Lake Lure as they are to the range that was the subject of his article.

The recommendations of the Lake Advisory Committee, established by the Town in 1992 regarding the regulatory needs of Lake Lure, are discussed in Part V.

Promulgating such regulations has and will result in numerous objections and criticisms. Given that the Town owns Lake Lure, nonresidents may object to any lake use limitations favoring recreational use by residents of the Town. Such objections may arise under the Privileges and Immunities, Equal Protection, or Commerce Clauses of the United States Constitution. As discussed in Part VI, it is highly unlikely that any such objections would be successful.

Lakeside property owners may object to such regulations as violating the littoral rights normally associated with the ownership of lakeside property. However, as discussed in Part VII, the unique legal history of Lake Lure precludes the assertion of littoral rights.

Finally, some argue that any assertion of regulatory authority by either the Town or the LLMC violates North Carolina's public trust doctrine. Part VIII refutes this spurious argument. Part IX presents conclusions.

II. FACTUAL BACKGROUND

A. CREATION OF LAKE LURE

Dr. Lucius B. Morse envisioned a world-class resort in western North Carolina developed by Chimney Rock Mountains, Incorporated.³ A lake created by impounding the Rocky Broad River at Tumbling Shoals formed the centerpiece of this resort. This lake became Lake Lure.⁴

As a first step in the development of the resort, Chimney Rock Mountains, Incorporated spent approximately \$600,000 to acquire 220 tracts of land.⁵ In total, Chimney Rock Mountains, Incorporated acquired "about 8000 acres or twelve square miles, including the valley in which Lake Lure lies and the hills and mountains above."⁶

3. Dr. Morse served as the President of Chimney Rock Mountains, Incorporated. *THE LAKE LURE DEVELOPMENT IN WESTERN NORTH CAROLINA 11* (stock prospectus, circa 1925) [hereinafter *LAKE LURE DEVELOPMENT*].

4. Elizabeth Parkenson (Betty) Morse, Dr. Morse's wife, named the lake "Lake Lure". *Memoirs*, Lee L. Powers, *The Development of Chimney Rock Park and Lake Lure 1* (Sept. 1988) (on file with author).

5. Lee L. Powers, *Development of the Lake Lure Summer Resort in 1923 and Purchase of the Lake and Hydro-Electric Plant by the Town of Lake Lure, July 26, 1965*, at 1 (n.d.) (on file with author) [hereinafter *Powers, Development of Lake Lure*]. Acquisition of this acreage, facilitated by Guilford Nanney, a local resident, took more than a year to complete. Powers, *supra* note 4, at 1. See also Lee L. Powers, *Development of Chimney Rock Park, Bottomless Pools and Lake Lure 1* (Nov. 1988) (on file with author).

6. *LAKE LURE DEVELOPMENT*, *supra* note 3, at 5.

Carolina Mountain Power Company constructed the dam that impounded Lake Lure, "all of whose common stock [was] owned by the Chimney Rock Mountains, Incorporated."⁷ In return for this stock, Chimney Rock Mountains, Incorporated "deeded to the Power Company the land and easements for the site of the dam and power house all of the inundated area of Lake Lure and ground for transmission lines to Turner's Dam."⁸

The remainder of the 8000 acres or twelve square miles continued in the ownership of Chimney Rock Mountains, Incorporated.⁹ A \$1,000,000 first mortgage with the Bird Mortgage Company of Asheville, North Carolina funded development of the resort.¹⁰ The United States and Guaranty Company of Baltimore, Maryland¹¹ acquired this mortgage, secured by the remaining property.¹²

The Carolina Mountain Power Company financed construction of the dam that impounded Lake Lure through a \$550,000 first mortgage with Stroud & Company of Philadelphia, Pennsylvania.¹³ Property owned by the Carolina Mountain Power Company, including the land on which the dam was constructed as well as the land inundated by Lake Lure secured the mortgage.¹⁴

7. *Id.* at 22.

8. *Id.* at 23. The property conveyed included "all property which will be submerged by the erection of a dam across the Broad River at a site known as Tumbling Shoals, Chimney Rock Township, Rutherford County, North Carolina lying below 995 feet above sea level as based upon the official bench marks of the United States Geological Survey." Deed, State of North Carolina, County of Rutherford: Office of the Register of Deeds book 134, at 115 (June 6, 1925) (on file with author).

9. Despite offers ranging from \$1000 to \$4000 per acre, Chimney Rock Mountains, Incorporated does not appear to have sold any of the remaining property at the time. As noted in the stock prospectus, "[i]t is the policy of the Company not to accept such offers as it wishes to complete plans for the development of its entire estate before selling any land." LAKE LURE DEVELOPMENT, *supra* note 3, at 22. It is Powers' recollection, however, that at the time of the stock market crash on October 24, 1929, "[s]ome lots were sold and ten or twelve new houses were under construction or completed." Powers, Development of Lake Lure, *supra* note 5, at 1. Nonetheless, it is also Powers' recollection that "no lake front property was sold with the privilege of using the lake." Letter from Lee Powers, to Francis J. Heazel, Attorney at Law 2 (Mar. 9, 1936) (on file with author).

10. Powers, *supra* note 4, at 2. The Standard Mortgage Company of Asheville, North Carolina may have held this mortgage. Powers, Development of Lake Lure, *supra* note 5, at 1.

11. Powers, The Development of Chimney Rock and Lake Lure, *supra* note 4, at 2. See also Lee L. Powers, Lake Lure Acquires the Hydroelectric Power Plant and the Lake 1 (Feb. 1989) (on file with author); Lee L. Powers, Lake Lure's Purchase of the Electric Power Facility and the Lake 1 (Dec. 1988) (on file with author).

12. Powers, Development of Lake Lure, *supra* note 5, at 1.

13. Powers, Lake Lure's Purchase of the Electric Power Facility and the Lake, *supra* note 11, at 1.

14. Powers, Development of Lake Lure, *supra* note 5, at 1-2.

Construction of the dam was completed in late 1926¹⁵ with the full impoundment of Lake Lure completed in 1927.¹⁶ At ordinary water levels, Lake Lure covers approximately 720 acres with a shoreline of less than 20 miles.¹⁷

B. SEPARATION OF PROPERTY INTERESTS

As discussed in the preceding section, the Carolina Mountain Power Company developed Lake Lure. Chimney Rock Mountains, Incorporated conveyed the land on which the dam was constructed as well as “all of the inundated area of Lake Lure” to the Carolina Mountain Power Company.¹⁸ From the very beginning, ownership of the bed of Lake Lure was separate from ownership of upland, littoral properties.¹⁹

The stock market collapse of October 24, 1929 reaffirmed this separation when both the Standard Mortgage Company and Stroud & Company foreclosed their mortgages. Following the foreclosures, the Standard Mortgage Company established the Lureland Realty Company to dispose of the property secured by Chimney Rock Mountains, Incorporated’s property. One of the first acts of the Lureland Realty Company was an unsuccessful attempt to purchase the bed of Lake Lure.²⁰ By January 1942 the Lureland Realty Company disposed of all of the property owned by Chimney Rock Mountains, Incorporated.²¹

Stroud & Company continued to operate the Carolina Mountain Power Company. On August 12, 1931, the Carolina Mountain Power

15. “The contractors have undertaken to complete the dam by September 11, 1926...” LAKE LURE DEVELOPMENT, *supra* note 3, at 9.

16. POWERS, DEVELOPMENT OF LAKE LURE, *supra* note 5, at 1.

17. TOWN OF LAKE LURE, LAKE ADVISORY COMM., LAKE USE SURVEY (unpublished survey 2001), at http://www.ci.lake-lure.nc.us/lake_use_survey.htm.

18. See *supra* text accompanying notes 5-8.

19. An attempt to reconcile the different ownership interests may have occurred in 1927. On February 7, 1927, the Carolina Mountain Power Company conveyed a portion of its property interests back to Chimney Rock Mountains, Inc. This conveyance included “[t]he right to use the lake impounded by the dam of the Power Company located upon the said real estate for boating, bathing, fishing, hunting, skating and all aquatic sports and amusement purposes.” Deed, State of North Carolina, County of Rutherford: Office of the Register of Deeds book 135, at 30 (Feb. 7, 1927) (on file with author). The validity of this conveyance is open to question. As noted above, the property owned by the Carolina Mountain Power Company had been used to secure a \$550,000 first mortgage with Stroud & Company of Philadelphia, Pennsylvania. Absent consent by Stroud & Company as the lien holder, the Carolina Mountain Power Company lacked the authority to transfer any of the property covered by the mortgage. The record contains nothing to suggest that Stroud & Company consented to the transfer. Letter from Jim Proctor, Mayor, Town of Lake Lure, to Sandra King, Russell, King & Johnson, P.A., (Mar. 14, 2003) (on file with author).

20. Powers, Development of Lake Lure, *supra* note 5, at 1-2.

21. *Id.* at 2.

Company transferred its assets to the Carolina Mountain Corporation.²² William C. Rommell, President of Stroud & Company, operated the Carolina Mountain Corporation from 1931 until the Town acquired Lake Lure in 1965.²³

C. ACQUISITION OF LAKE LURE BY THE TOWN OF LAKE LURE

The Town operated recreational facilities located at the lake for almost thirty years before the Town acquired Lake Lure from the Carolina Mountain Corporation.²⁴ Legislation enacted by the North Carolina General Assembly in 1963 authorizing the Town to issue revenue bonds for the purpose of acquiring Lake Lure facilitated this acquisition.²⁵

Keeter v. Town of Lake Lure challenged the authority of the Town to issue such revenue bonds. On April 28, 1965, the North Carolina Supreme Court affirmed the authority of the Town to issue revenue bonds for the purpose of acquiring Lake Lure.²⁶ The Town issued bonds immediately thereafter, and completed acquisition of the lake on July 26, 1965.²⁷

Property that once belonged to the Carolina Mountain Corporation now belonged to the Town. This included:

all of that property which has been, or at any time hereafter may be, submerged by the dam erected across the Broad River at the site known as Tumbling Shoals, Chimney Rock Township, Rutherford County, North Carolina, lying below 995 feet above sea level, as based upon the official bench marks of the United States Geological Survey.²⁸

22. Letter from Jim Proctor to Sandra King, *supra* note 19. Stroud & Company possibly established the Carolina Mountain Corporation, a Delaware corporation, as a mechanism to allow continued operation of the hydroelectric generating system.

23. See Powers, Development of Lake Lure, *supra* note 5, at 2. In his memoirs, Mr. Powers remembers Mr. Rommell as operating the Carolina Mountain Power Company. In fact, it appears that Mr. Rommell operated the Carolina Mountain Corporation. Given both the similarity of names and the fact that the Carolina Mountain Corporation continued the operations of the Carolina Mountain Power Company, the error in Mr. Powers' recollection is understandable.

24. These operations were based on a year-to-year lease arrangement between the Town of Lake Lure and the Carolina Mountain Corporation. *Id.*

25. 1963 N.C. Sess. Laws 437, *reprinted in Keeter v. Town of Lake Lure*, 141 S.E.2d 634, 640 (N.C. 1965).

26. *Keeter*, 634 S.E.2d at 645.

27. Powers, Development of Lake Lure, *supra* note 5, at 7.

28. Deed & Bill of Sale, State of North Carolina, County of Rutherford: Office of the Register of Deeds book 283, at 651 (July 22, 1965) (on file with author).

This property, which comprises the bed of Lake Lure, lies within the limits of the Town.²⁹

III. AUTHORITY OF THE TOWN OF LAKE LURE, NORTH CAROLINA

The Town incorporated in 1927. As incorporated, the boundaries of the Town included the entirety of Lake Lure. In addition to being located entirely within the Town, the lake became the property of the Town in 1965.³⁰

In order to comprehend the regulation of activities occurring on Lake Lure, an understanding of the authority that the North Carolina General Assembly vested in the Town is necessary. As a political subdivision of the State of North Carolina, the Town "is a creature of the legislature and has only those powers delegated to it by statute or in its charter."³¹ On this point, the Supreme Court of North Carolina concluded: "[i]t is a well-established principle that municipalities, as creatures of the State, can exercise only that power which the legislature has conferred upon them."³² The court went on to note:

[t]he authority of municipalities has been described as: (1) the powers granted in express terms; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) those essential to the accomplishment of the declared objects of the corporation—not

29. There is one possible exception to this conclusion. Littoral property presently used as a recreational vehicle park was included originally within the limits of the Town of Lake Lure but subsequently excluded following the initiation of litigation. E-mail from Jim Proctor, Mayor, Town of Lake Lure, to George Sherk, the author (July 30, 2004, 11:17AM) (on file with author).

30. See discussion *infra* Part II C.

31. Advisory Opinion 458: Town of Highlands – Proposed Agreement for Condemnation of Bowery Road (SR 1604, Macon County) (Apr. 10, 2000), 2000 N.C. AG LEXIS 28, at 3 [hereinafter Advisory Opinion No. 458]. "It is a well-established rule that a municipal corporation, being a political subdivision of the state, can exercise only such powers as are granted in express terms, or those necessary or fairly implied or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation." *Id.* at 3, (citing Stephenson v. City of Raleigh, 59 S.E.2d 195, 199 (N.C. 1950)) "Local governments in North Carolina are creatures of the state legislature. ... North Carolina is not a 'home rule' state: its local governments exist by legislative benevolence, not by constitutional mandate." A. FLEMING BELL, II, DILLON'S RULE IS DEAD; LONG LIVE DILLON'S RULE!, at 1 (Local Gov't Law Bulletin No. 66, Institute of Gov't, Univ. of North Carolina at Chapel Hill, Mar. 1995)

32. Bowers v. City of High Point, 451 S.E.2d 284, 287 (N.C. 1994). "The law is well-settled that 'a municipality has only such powers as the legislature confers upon it.'" Homebuilders Ass'n of Charlotte v. City of Charlotte, 442 S.E.2d 45, 49 (N.C. 1994) (internal citations omitted).

simply convenient, but only those which are indispensable, to the accomplishment of the declared objects of the corporation.³³

Express powers

Of particular relevance to Lake Lure, North Carolina Law authorizes the Town to acquire and hold real property.³⁴ Of greater importance to the regulation of activities occurring on Lake Lure is the General Assembly's delegation of "a part of its police power which may be exercised 'to protect or promote the health, morals, order, safety and general welfare of society.'"³⁵ These police powers include the following:

- The authority to "define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and [to] define and abate nuisances."³⁶
- The authority to "impose fines and penalties for violation of its ordinances, and [to] secure injunctions and abatement orders to further insure compliance with its ordinances."³⁷
- The authority to "restrict, regulate or prohibit the sale, possession, storage, use, or conveyance of any explosive, corrosive, inflammable, or radioactive substances."³⁸

33. *Bowers*, 451 S.E.2d at 287-88 (internal citations omitted).

34. In relevant part, North Carolina General Statute section 160A-11 provides as follows:

The inhabitants of each city heretofore or hereafter incorporated by act of the General Assembly or by the Municipal Board of Control shall be and remain a municipal corporation by the name specified in the city charter. Under that name they ... may acquire and hold any property, real and personal, devised, bequeathed, sold, or in any manner conveyed, dedicated to, or otherwise acquired by them, and from time to time may hold, invest, sell, or dispose of the same. . . .

N.C. GEN. STAT. § 160A-11 (2003) (General Corporate Powers). This authority is restated in North Carolina Statute § 160A-240.1:

A city may acquire, by gift, grant, devise, bequest, exchange, purchase, lease, or any other lawful method, the fee or any lesser interest in real or personal property for use by the city or any department, board, commission or agency of the city. In exercising the power of eminent domain a city shall use the procedures of Chapter 40A.

N.C. GEN. STAT. § 160A-240.1 (2003) (Power to acquire property).

35. *Town of Atlantic Beach v. Young*, 298 S.E.2d 686, 690 (N.C. 1983) (internal citations omitted).

36. N.C. GEN. STAT. § 160A-174(a) (2003).

37. *Id.* § 160A-175(a).

38. *Id.* § 160A-183.

- The authority to “regulate, restrict, or prohibit the production or emission of noises or amplified speech, music, or other sounds that tend to annoy, disturb, or frighten its citizens.”³⁹

- The authority to:

regulate, restrict, or prohibit the emission or disposal of substances or effluents that tend to pollute or contaminate land, water, or air, rendering or tending to render it injurious to human health or welfare, to animal or plant life or to property, or interfering or tending to interfere with the enjoyment of life or property.⁴⁰

- The authority to “regulate, restrict, or prohibit the discharge of firearms at any time or place within the city except when used in defense of person or property or pursuant to lawful directions of law-enforcement officers, and may regulate the display of firearms on the streets, sidewalks, alleys, or other public property.”⁴¹

- The “authority to summarily remove, abate, or remedy everything in the city limits, or within one mile thereof, that is dangerous or prejudicial to the public health or public safety.”⁴²

- The authority to “regulate and license occupations, businesses, trades, professions, and forms of amusement or entertainment and prohibit those that may be inimical to the public health, welfare, safety, order, or convenience.”⁴³

- The authority to “impose a curfew on persons of any age less than 18.”⁴⁴

- The authority to

(2) Set apart lands and buildings for parks, playgrounds, recreational centers, and other recreational programs and facilities;

(3) Acquire real property, either within or without the corporate limits of the city ... for parks and recreation programs and facilities by gift, grant, purchase, lease, exercise of the power of eminent domain, or any other lawful method;

39. *Id.* § 160A-184.

40. *Id.* § 160A-185.

41. *Id.* § 160A-189. In addition, the Town has the authority to “regulate, restrict, or prohibit the sale, possession or use within the city of pellet guns or any other mechanism or device designed or used to project a missile by compressed air or mechanical action with less than deadly force.” *Id.* § 160A-190.

42. *Id.* § 160A-193(a).

43. *Id.* § 160A-194.

44. *Id.* § 160A-198.

(4) Provide, acquire, construct, equip, operate, and maintain parks, playgrounds, recreation centers, and recreation facilities, including all buildings, structures, and equipment necessary or useful in connection therewith;

(5) Appropriate funds to carry out the provisions of this Article;

(6) Accept any gift, grant, lease, loan, bequest, or devise of real or personal property for parks and recreation programs.⁴⁵

• Finally, to exercise "all municipal powers, functions, rights, privileges, and immunities of every name and nature whatsoever."⁴⁶

Necessarily implied powers

With regard to necessarily implied powers, two provisions of the North Carolina General Statutes are of particular relevance. North Carolina General Statute section 160A-12 provides that:

All powers, functions, rights, privileges, and immunities of the corporation shall be exercised by the city council and carried into execution as provided by the charter or the general law. A power, function, right, privilege, or immunity that is conferred or imposed by charter or general law without directions or restrictions as to how it is to be exercised or performed shall be carried into execution as provided by ordinance or resolution of the city council.⁴⁷

North Carolina General Statute section 160A-177 contains similar authority that states, "[t]he enumeration in this Article or other portions of this Chapter of specific powers to regulate, restrict or prohibit acts, omissions, and conditions shall not be deemed to be exclusive or a limiting factor upon the general authority to adopt ordinances conferred on cities by G.S. 160A-174."⁴⁸

As noted above, political subdivisions of the State of North Carolina possess the authority to exercise those powers that are "necessary or fairly implied or incident to the powers expressly conferred."⁴⁹ In essence, "the provisions of chapter 160A and of city charters ... shall be construed to include any additional and supplementary powers that

45. *Id.* § 160A-353. "Recreation" is defined as "activities that are diversionary in character and aid in promoting entertainment, pleasure, relaxation, instruction, and other physical, mental, and cultural development and leisure time experiences." *Id.* § 160A-352.

46. *Id.* § 160A-11.

47. *Id.* § 160A-12.

48. *Id.* § 160A-177.

49. Advisory Opinion No. 458, *supra* note 31, at 3 (internal citations omitted). In addition, political subdivisions are authorized to exercise those powers that are "essential to the declared objects and purposes of the corporation." *Id.*

are reasonably necessary or expedient to carry them into execution and effect.”⁵⁰

Rule of construction

In North Carolina General Statute section 160A-4, the General Assembly established a rule of construction for the authority delegated to cities and towns:

It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter ^[51] and of city charters ^[52] shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect: Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State.⁵³

The provisions of North Carolina General Statute section 160A-4 led the North Carolina Supreme Court to conclude: “[w]e treat this language as a ‘legislative mandate that we are to construe in a broad fashion the provisions and grants of power contained in Chapter 160A.’”⁵⁴ The Office of the North Carolina Attorney General agreed: “the powers granted to municipal corporations in Chapter 160A are to be broadly construed to include any additional or supplementary powers that are necessary or expedient to carry them into execution, and that are consistent with state or federal law and the State’s public policy.”⁵⁵

Furthermore, cities and towns have broad discretion in determining how to exercise their statutory authority. “The courts will not interfere with the exercise of discretionary powers unless the action is so clearly unreasonable as to amount to an oppressive and manifest abuse

50. *Homebuilders Ass’n of Charlotte, Inc.*, 442 S.E.2d at 50.

51. N.C. GEN. STAT. §§ 160A-1 to 160A-676 (2003).

52. The Charter for the Town of Lake Lure was ratified by the North Carolina General Assembly in 1987. See An Act to Revise and Consolidate the Charter of the Town of Lake Lure, H.B. 282, 1987 Leg. Sess. ch. 194 (N.C. 1987), <http://www.ncga.state.nc.us/EnactedLegislation/SessionLaws/PDF/1987-1988/SL1987-194.pdf> (last visited May 1, 2005).

53. *Id.* § 160A-4.

54. *Homebuilders Ass’n of Charlotte, Inc.*, 442 S.E.2d at 50 (internal citations omitted).

55. Advisory Opinion No. 458, *supra* note 31, at 2. The provisions of North Carolina General Statute section 160A-4 “require that grants of powers to cities and counties be construed to include other powers that are ‘reasonably expedient’ to exercise those grants.” Bell, *supra* note 31, at 2.

of discretion.⁵⁶ With regard to the exercise of such discretionary powers, the North Carolina Supreme Court concluded:

[i]n reviewing the validity of [an] ordinance this Court will look to see if the police power has been exercised within the constitutional limitations imposed by both the state and federal constitutions. This review will not include an analysis of the motives which prompted the passage of this ordinance because, "so long as an act is not forbidden, the wisdom of the enactment is exclusively a legislative decision."⁵⁷

In essence, the Town maintains express authority to regulate activities occurring on Lake Lure as well as any additional and supplementary powers that are reasonably necessary or expedient to the exercise of the Town's express authority. Furthermore, the Town has significant discretion in the exercise of its authority. Actions taken to protect or promote the health, morals, order, safety and general welfare of the Town will not be set aside unless they are so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion.

IV. AUTHORITY OF THE LAKE LURE MARINE COMMISSION

A. THE LEGISLATIVE MANDATE

The North Carolina General Assembly authorized establishment of the LLMC with Senate Bill 89, introduced in the North Carolina General Assembly by Senator Walter H. Dalton on February 18, 2003.⁵⁸ After Senator Dalton introduced the bill, it was referred to the Senate Committee on State Government, Local Government, and Veterans' Affairs, which reported favorably on the bill on May 14, 2003.⁵⁹ Senate Bill 89 was then referred to the Senate Committee on Finance, which reported favorably on the bill on May 28, 2003.⁶⁰ The North Carolina Senate unanimously approved the bill was approved on May 29, 2003.⁶¹

56. Advisory Opinion No. 458, *supra* note 31, at 2 (citing *Sykes v. Belk*, 179 S.E.2d 439, 449 (1971)).

57. *Town of Atlantic Beach v. Young*, 298 S.E.2d 686, 690 (N.C. 1983).

58. An Act to Establish the Lake Lure Marine Comm'n, S. 89, 2003 Leg. Sess. ch. 77 (N.C. 2003), <http://www.ncga.state.nc.us/Sessions/2003/Bills/Senate/PDF/S89v4.pdf>.

59. North Carolina General Assembly, 2003-2004 Sess., Senate Bill 89, Lake Lure Marine Comm'n: History,

<http://www.ncga.state.nc.us/gascripts/BillLookup/BillLookup.pl?Session=2003&BillID=S89> (last visited May 1, 2005).

60. *Id.*

61. Forty-six Senators voted in favor of Senate Bill 89, one Senator did not vote and there were three excused absences. North Carolina General Assembly, 2003-2004 Sess., North Carolina Senate, Roll Call Legislative Sess. Day 70 (May 29, 2003), <http://www.ncga.state.nc.us/gascripts/voteHistory/RollCallVoteTranscript.pl?Session=2003&sChamber=S&RCS=532> (last visited May 1, 2005).

Senate Bill 89 was then sent to the North Carolina House of Representatives where it was referred to the House Committee on Finance. The House Finance Committee reported favorably on the bill on June 24, 2003 and the House of Representatives unanimously approved the bill on July 8, 2003.⁶² The ratified bill was then sent to Governor Michael F. Easley who signed the bill into law on July 20, 2003.⁶³

A content analysis of the language of Senate Bill 89 indicates no substantive changes in the language of the bill between the time it was reported by the Senate Committee on State Government, Local Government, and Veterans' Affairs (May 14, 2003) and the time Governor Easley signed it into law (July 20, 2003).⁶⁴

Senate Bill 89 added to Article 6A to Chapter 77 (Rivers, Creeks and Coastal Waters) of the North Carolina General Statutes. Section 77-81 authorizes the Board of Commissioners of the Town to create the LLMC. Once created by the Town, the LLMC "shall enjoy the powers and have the duties and responsibilities conferred upon it by the Lake Lure municipal ordinance, subject to the provisions of this Article and the laws of the State of North Carolina."⁶⁵ The Lake Lure Board of Commissioners is the governing board of the LLMC absent action by the Board of Commissioners to the contrary.⁶⁶ Article 6A contains typical administrative provisions regarding compensation, budgetary, and accounting procedures,⁶⁷ organization of the LLMC and LLMC meetings,⁶⁸ the administrative powers of the LLMC,⁶⁹ filing and publication requirements,⁷⁰ and enforcement of the regulations promulgated by the LLMC.⁷¹

B. REGULATION OF ACTIVITIES OCCURRING ON LAKE LURE

North Carolina General Statute section 77-87 defines the regulatory authority of the LLMC. In general, the LLMC is authorized to "make

62. One hundred sixteen Representatives voted in favor of Senate Bill 89, three Representatives did not vote, and there was one excused absence. *Id.* at Roll Call, Legislative Sess. Day 93 (July 8, 2003), at <http://www.ncga.state.nc.us/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2003&sChamber=H&RCS=898>.

63. North Carolina General Assembly, 2003-2004 Sess., Senate Bill 89, Lake Lure Marine Comm'n: Vote History, at <http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2003&BillID=S89> (last visited Apr. 29, 2005).

64. The initial bill introduced by Senator Dalton contained no substantive provisions. Consequently, the bill was not included in the content analysis.

65. N.C. GEN. STAT. § 77-81 (2003).

66. *Id.* § 77-82.

67. *Id.* § 77-83.

68. *Id.* § 77-84.

69. *Id.* § 77-85.

70. *Id.* § 77-86.

71. *Id.* § 77-88.

regulations applicable to Lake Lure^[72] and its shoreline area^[73] concerning all matters relating to or affecting the use of Lake Lure.⁷⁴ This broad grant of authority is subject to certain limitations.⁷⁵ With regard to the operation of vessels on Lake Lure (and apparently *only* with regard to the operation of vessels), the LLMC is authorized to "request that the Wildlife Resources Commission pass local regulations ... in accordance with the procedure established by appropriate State law."⁷⁶

Article 6A contains specific procedural requirements applicable to the LLMC.⁷⁷ LLMC may not enforce regulations "unless adequate notice of the regulation has been posted in or on Lake Lure or its shoreline area."⁷⁸ Notices, signs, or markers "communicating the essential provisions" of regulations applying generally to the "waters of Lake Lure or its shoreline area, or both" must be posted "in at least three different places throughout the area [as well as being] printed in a newspaper of general circulation in Rutherford County."⁷⁹ LLMC must adhere to somewhat more stringent notice requirements when it promulgates regulations affecting only a portion of Lake Lure.⁸⁰ Any-

72. Defined as "the body of water along the Broad River in Rutherford County, impounded by the dam at Tumbling Shoals, and lying below the 995-foot contour line above sea level." *Id.* § 77-80(4).

73. Defined as "the area submerged by the dam at Tumbling Shoals, lying below 995 feet above mean sea level of the normal full pond elevation of 992 feet above mean sea level, on Lake Lure." *Id.* § 77-90(5).

74. *Id.* § 77-87(a). The terms *matters*, *relating*, *affecting*, and *use* are not defined in Article 6A.

75. The regulatory authority of the LLMC is limited by "restrictions in any municipal ordinance, and by other supervening provisions of law" and by the "provisions of general or special acts or of regulations of State agencies promulgated under the authority of general law." *Id.* § 77-87(a). Furthermore, the authority of the LLMC to [l]ease, rent, purchase, construct, otherwise obtain, maintain, operate, repair, and replace ... any of the following: boat docks, navigation aids, waterway markers, public information signs and notices, and other items of real and personal property designed to enhance public recreation, public safety on the waters of Lake Lure and its shoreline area, or protection of property in the shoreline area subject, however, to the provisions of Chapter 113 of the General Statutes and rules promulgated under that Chapter as to property within North Carolina.

Id. § 77-85(a)(6). Chapter 113 (Conservation and Development) establishes the North Carolina Department of Environment and Natural Resources and defines the authority of both the Department and its subdivisions. *See id.* § 113-8.

76. *Id.* § 77-87(a).

77. These provisions do not apply to rules and regulations promulgated by the LLMC relating to the internal governance of the LLMC. *Id.* § 77-87(f).

78. *Id.* § 77-87(c).

79. *Id.*

80.

When an ordinance providing regulations for a specific area is proposed, owners of the parcel of land involved as shown on the county tax listing, and the owners of land within 500 feet of the proposed area to be regulated, as

one challenging a regulation of the LLMC on the basis of inadequate notice bears the burden of proving lack of adequate notice.⁸¹

Copies of regulations promulgated by the LLMC must be filed with the Secretary of State, the clerk of the superior court of Rutherford County, the Executive Director of the North Carolina Wildlife Resources Commission, and the Federal Energy Regulatory Commission licensee for Lake Lure (if other than the Town).⁸² This provision only imposes a filing requirement. The provision does not require the Secretary of State, the Superior Court of Rutherford County, the Executive Director of the North Carolina Wildlife Resources Commission, or the Federal Energy Regulatory Commission to review LLMC regulations.

As noted above, the LLMC has broad authority to promulgate "regulations applicable to Lake Lure and its shoreline area concerning all matters relating to or affecting the use of Lake Lure."⁸³ A violation of these regulations results in a Class 3 misdemeanor.⁸⁴

V. THE LAKE USE STUDY – LAKE USE CRITERIA, FINDINGS AND PROPOSALS

The Town established the Lake Advisory Committee (LAC) on March 24, 1992. The resolution establishing the LAC authorized the Committee to "advise and make recommendations" regarding six issue areas:

1. Revisions to policy regulating the construction and use of structures on Lake Lure.
2. Enforcement of regulations to create a safer environment for all who use the lake.
3. A community network that could handle warning and clean-up operations before and after major storms.
4. The various ways of improving fishing on Lake Lure.
5. Silt removal, dredging and other methods that could be used to improve the eco-system of the lake.

shown on the county tax listing, shall be mailed a notice of the proposed classification by first-class mail at the last addresses listed for such owners on the county tax abstracts. ... Notice shall also be given by a sign, uniform waterway marker, posted notice, or other effective method of communicating the essential provisions of the regulation in the immediate vicinity of the location in question.

Id.

81. *Id.* § 77-87(f).

82. *Id.* § 77-87(d)(1)-(4).

83. *Id.* § 77-87(a).

84. *Id.* § 77-87(b).

6. Boat use regulations, no-wake zones and navigational aids.⁸⁵

Advice and recommendations regarding these issue areas increased in importance in proportion to the increased popularity of Lake Lure. As both commercial and noncommercial use of the lake by residents and visitors alike increased, the importance of these issue areas also increased, particularly with regard to the potential liability of the Town for injuries occurring on Lake Lure.

With regard to the first issue area, the Town adopted the Lake Structures Regulations (Regulations). In general, the Regulations apply to the construction or alteration of lake structures, defined as a "pier, dock, boathouse, slip, ramp, swimming float, sea wall or similar facility whether fixed or floating or a combination thereof, used primarily as a stationary facility."⁸⁶ The Regulations establish both permit requirements and standards for the construction of such structures. The Regulations also prohibit a number of activities including "[a]ny activity such as dredging or filling which alters the shoreline other than as required by action of the Town Council."⁸⁷ As discussed in greater detail in Part VII, some argue that these Regulations impermissibly burden lakeside property owners' littoral rights.

The sixth issue area identified in the 1992 resolution (boat use regulations, no-wake zones, and navigational aids) has been the subject of ongoing study. The 2001 Lake Use Study prepared by the LAC addressed the carrying capacity of Lake Lure in terms of the number of acres of lake required for the operation of different types of watercraft.⁸⁸

In determining the carrying capacity of Lake Lure, the LAC received guidance from studies and recommendations made by both the United States Army Corps of Engineers (Corps) and the United States Environmental Protection Agency (EPA). The Corps recommends the following minimum lake area acreage per boat:⁸⁹

Low Power Craft (less than 10 horsepower)	4 acres per boat
High Power Craft (more than 10 horsepower)	9 acres per boat
Boats towing water skiers or other devices	12 acres per boat

85. Town of Lake Lure, North Carolina, Lake Advisory Comm., at <http://www.ci.lake-lure.nc.us/LakeAdvisoryComm.htm> (last visited May 1, 2005).

86. LAKE LURE, N.C., LAKE STRUCTURES ORDINANCE § 94.02 (2004), <http://www.ci.lake-lure.nc.us/LakeStructureOrd.htm> (last updated Dec. 2004).

87. *Id.* § 94.15(A). See also *id.* § 94.12 (stating "[n]o dredging or filling of the lake shall be allowed except by specific authorization of Town Council.>").

88. See TOWN OF LAKE LURE, LAKE ADVISORY COMM., LAKE USE SURVEY, *supra* note 17.

89. See generally *id.*

For planning purposes, the Corps recommends a generalized minimum area of six acres per boat.⁹⁰ Applying this generalized minimum area recommendation to Lake Lure’s 720 acres yields a maximum carrying capacity of 120 boats.

Data from EPA suggest that private owners use their boats approximately 10 percent of the time while commercial operators (including boat rental facilities) use their boats approximately 50 percent of the time.⁹¹ Based on the Corps’ recommendations noted above, the LAC proposed to limit the number of boats in use at any given time to 120.⁹² Applying EPA’s boat use projections, implementation of a permit allotment plan based on time of use would achieve this limit:

Type of Boater	Boat Permits	Time in Use %	Boats in Use
Individual	1,000	10%	100
Commercial 1 ⁹³	36	50%	18
Commercial 2 ⁹⁴			
Commercial 3 ⁹⁵			
Commercial 4 ⁹⁶	12	20%	2
TOTAL			120

With regard to the issuance of such permits, the LAC also proposed (a) that residents of Lake Lure have a preference, (b) that permits for residents be less expensive than permits for nonresidents, and (c) that nonresident permits be limited during peak use periods. In addition, the LAC recommended that permit costs increase on a boat-by-boat basis for individuals seeking multiple permits.

Proposed Ordinance No. 01-12-11 embodies many of the recommendations of the LAC. Section one of the proposed Ordinance amended section 85.61 of the Lake Lure Code of Ordinances by adding the following provisions:

(B) Commercial Operations

90. *Id.*
 91. *Id.*
 92. *Id.*
 93. Livery – boat rentals with on operator provided – marinas, house rentals with boats, realtors that rent boats and resorts/inns.
 94. Resort/Camp – boats at lodging or camp facilities available to patrons for some or no additional charge that are operated by trained staff that would need an operator’s license.
 95. Ski Schools/Fishing Guides – boats that shall not be associated with a specific camp resort public or private and are used to provide a service to transients and residents.
 96. Service/Realtor – boats used by contractors, real estate brokers, boat repair companies.

(1) Commercial water vessels shall be defined as all water vessels used in connection with any type of business, trade or commerce. Includes but not limited to: boat rentals, marinas, house rentals (that are required to pay occupancy tax) with boats, realtors, resorts, inns, camps, ski schools, fishing guides, contractors, boat repair companies, etc.

(2) There will be four categories of commercial operations. Applicants will state which category applies.

(a) Livery - boat rentals with no operator provided - marinas, house rentals (that are required to pay occupancy tax) with boats, real estate agents that rent boats and resorts/inns. All commercial operations in this category must have its home base of operation within the corporate limits of Lake Lure or on the shoreline of Lake Lure. The real estate property value (as listed by the Rutherford County Tax Dept.) of the commercial operation must be in excess of \$100,000 or in an area zoned for commercial use.^[97]

(b) Resort / Camp - boats at lodging or camp facilities available to patrons for some or no additional charge that are operated by trained staff. All commercial operations in this category must have its home base of operation within the corporate limits of Lake Lure or on the shoreline of Lake Lure. The real estate property value (as listed by the Rutherford County Tax Dept.) of the commercial operation must be in excess of \$100,000.^[98]

(c) Ski Schools / Fishing Guides - boats that are not associated with a specific camp or resort (public or private) and are used to provide a service not otherwise listed to the public. Boat owner must be a resident or a business with the controlling partner or president of a corporation that is a resident.^[99]

(d) Service / Realtor - boats used by building contractors, real estate agents and boat repair companies. Boat owner must be a resident or a business with the controlling partner or president of a corporation that is a resident. Nonresident contractors and boat repair companies hired by residents of Lake Lure may apply to the Lake Lure Town Council for conditional use permits.^[100]

(3) All commercial operators must complete a boating safety class. (web course approved - six months grace period the first year). For this purpose commercial operators shall include all boat operators that use boats for a business, but not boat operators using rental boats for their personal use.

97. See *infra* text accompanying note 93.

98. See *infra* text accompanying note 94.

99. See *infra* text accompanying note 95.

100. See *infra* text accompanying note 96.

(4) Commercial operations must acknowledge that they have at least \$500,000.00 of liability insurance.

(5) All commercial water vessels more than 100 horsepower must have either a cell phone or 2-way radio on board. Commercial operators shall report to authorities violations of state and local regulations as well as any disabled vessel or accident.¹⁰¹

Section Two of the proposed ordinance would amend section 85.51, Paragraph (2) of the Lake Lure Code of Ordinances by adding the following provision:

(E) Permits

(4) Town council may establish peak periods of the year during which restrictions may be placed on the issuance of certain classes of water vessel permits. Peak periods will be listed in the schedule of permit fees.¹⁰²

The recommendations of the LAC and the provisions of Proposed Ordinance Number 01-12-11 have been the subject of considerable debate. Some argue, for example, that permit fee requirements and issuance priorities favoring residents of Lake Lure over nonresidents may violate constitutional equal protection and due process requirements. Some also argue that permit fee requirements and issuance priorities favoring noncommercial uses of Lake Lure over commercial uses may impose impermissible burdens on interstate commerce. The following section addresses these issues.

Others argue that regulating boat use on Lake Lure either impermissibly interferes with the littoral rights of lakeside property owners or violates North Carolina's public trust doctrine. Parts VII and VIII respectively address these issues.

VI. DIFFERENTIAL REQUIREMENTS

A. BACKGROUND

The carrying capacity of Lake Lure requires limiting the number of boats using the lake at any given time to 120. To achieve this goal, the LAC recommended limiting the total number of both commercial and noncommercial permits. The LAC also recommended affording residents of the Town a preference in obtaining available commercial and noncommercial permits and restricting nonresident use of Lake Lure during peak use periods by nonresidents.

101. Proposed Ordinance Number 01-12-11.

102. *Id.*

In essence, the LAC recommendations impose differential requirements on (a) commercial and noncommercial users of Lake Lure and (b) residents and nonresidents of the Town. Those who oppose such differential requirements raise a number of objections. With regard to the requirements of the United States Constitution, opponents of the LAC recommendations argue that such differential requirements violate both the Equal Protection Clause and the Privileges and Immunities Clause and also impose impermissible burdens on interstate commerce in violation of the Commerce Clause.¹⁰³

These objections are without merit. As discussed more fully below, no requirements or limitations arising under the United States Constitution prohibit the implementation of the LAC recommendations.

B. CONSTITUTIONAL ISSUES

The Privileges and Immunities Clause

The Privileges and Immunities Clause contained in Article IV, clause 2 of the United States Constitution states, “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”¹⁰⁴ Does this clause prohibit the Town from favoring residents over nonresidents in the issuance of permits to operate boats on Lake Lure?¹⁰⁵

103. Other constitutional provisions may apply. The Connecticut Supreme Court ruled that nonresident beach access restrictions violated both the First Amendment to the United States Constitution and parallel state constitutional provisions. *Leydon v. Town of Greenwich*, 777 A.2d 552, 573, 575 (Conn. 2001). Other courts addressing the issue reached precisely the opposite conclusion. For example, in *Daly v. Harris*, the court rejected a First Amendment challenge to differential fees charged for entrance to the Hanauma Bay Conservation District, concluding that “[t]he contemplated conversation and association for the purposes of engaging in such conversation, though literally speech and association, do not advance ‘knowledge, the transformation of taste, political change, cultural expression, and the other objectives, values and consequences of the speech that is protected by the First Amendment.’” *Daly v. Harris*, 215 F.Supp.2d 1098, 1106 (internal citations omitted). See also Susan M. Cordaro, *A High Water Mark: The Article IV, Section 2, Privileges and Immunities Clause and Nonresident Beach Access Restrictions*, 71 FORDHAM L. REV. 2525, 2526, 2534 (2003) (discussing the *Leydon* and *Daly* cases). In addition, the Due Process Clause may be applicable to state regulatory functions. See *Pa. Game Comm’n v. Marich*, 666 A.2d 253, 257 (Pa. 1995) (holding that even though “hunting is not a property or liberty interest to which the full panoply of due process protections attach ... the Commission [does not have] absolute discretion in revoking hunting and trapping licenses.”).

104. U.S. CONST. art. IV, § 2, cl. 2.

105.

The Privileges and Immunities Clause ... speaks in terms of *state* citizenship. While this wording may seem to mean that cities escape the strictures of the Clause, the Supreme Court has cleared up any confusion on this matter, and has held that the Clause indeed does apply to cities. ... A potential Privileges and Immunities violation by a city is therefore legally equivalent to a violation by a State.

A 1978 United States Supreme Court case involving differential fee requirements for Montana elk hunting licenses provides an answer to this question.¹⁰⁵ Nonresident hunters challenged the fee differential on the grounds that it violated the Privileges and Immunities Clause. In *Baldwin v. Fish and Game Commission*,¹⁰⁷ the Court rejected this challenge. The Privileges and Immunities Clause, the Court ruled, was intended to protect fundamental rights, those rights “which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments.”¹⁰⁸ Recreational hunting of elk in Montana by non-residents did not fall into the category of “fundamental rights” intended to be protected by the Privileges and Immunities Clause.¹⁰⁹ In

Patrick Sullivan, *In Defense of Resident Hiring Preferences: A Public Spending Exception to the Privileges and Immunities Clause* 86 CAL. L. REV. 1335, 1337 n.5 (1998) (internal citations omitted) (citing *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 214 (1984) (rejecting a New Jersey Supreme Court ruling that the Privileges and Immunities Clause does not apply to municipal ordinances)). Richard H. Seamon, Note, *The Market Participant Test in Dormant Commerce Clause Analysis – Protecting Protectionism?*, 1985 DUKE L.J. 697, 724-28 (1985) (discussing the *United Building* decision).

106. For the 1975 season, residents of the State of Montana could obtain an elk hunting license for \$4.00. The only license available to nonresidents cost \$151.00. For the 1976 season, the resident and nonresident license fees increased to \$9.00 and \$225.00, respectively. Gene Matthew Eckel, Note, *The New Standard Applicable to State Taxation of a Nonresident – An Analysis of the Supreme Court’s Treatment of the Privileges and Immunities Clause in Lunding v. New York Tax Appeals Tribunal*, 32 CREIGHTON L. REV. 1311, 1321 n.101-02 (1999).

107. *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371 (1978).

108. *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823). As Foutz noted, in deciding *Corfield*,

Justice Washington declined to enumerate these rights, but placed them under the following headings: Protection by the government; enjoyment of life and liberty; right to acquire, possess, and sell property; right to pursue and obtain other happiness and safety; right to travel; right to claim benefit of writ of habeas corpus; right to institute court actions; right to an exemption from higher taxes than are paid by citizens of other states; right to vote.

Thomas Keasler Foutz, Note, *Constitutional Law – Privileges and Immunities Clause, Article IV, Section 2 – Nonresidents are not Guaranteed Equal Access to a State’s Recreational Resources*, 53 TUL. L. REV. 1524, 1525 n.9 (1979) Because of the limitation of the Privileges and Immunities Clause to fundamental rights, “[t]he relatively few cases invalidating state laws under the clause have thus tended to involve restrictions on out-of-state access to a state’s domestic private economy.” Bryan H. Wildenthal, Note, *State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV*, 41 STAN. L. REV. 1557, 1561 (1989).

109. “Whatever rights or activities may be ‘fundamental’ under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by nonresidents in Montana is not one of them.” *Baldwin*, 436 U.S. at 388. See also Sarah H. Davis, Note, *Carlson v. State and the Privileges and Immunities Clause: The Alaska Wrinkle in Nonresident Fishing Fee Differentials* 21 ALASKA L. REV. 91, 102 n.67 (2004) (stating “sport hunting is not sufficiently basic to the livelihood of the nonresident to merit protection under the Privileges and Immunities Clause.”); Miller noted that “[a] majority of jurisdictions have held that elk hunting is merely a recreational activity rather than a fundamental right.” Michael Miller, Note, *Conservation Force, Inc. v. Manning: When Hunting Means Business*, 7 GREAT PLAINS NAT. RESOURCES J. 71, 76 (2003).

fact, recreational activities of all types do not appear to fall within the "fundamental rights" category.¹¹⁰

In reaching its decision, the Court ruled that differential requirements based on residency fall into two categories, those that merely reflect individual differences between states (permitted) and those that "hinder the formation, the purpose, or the development of a single Union of those States" (prohibited absent substantial justification).¹¹¹ Differential residency requirements regarding recreational elk hunting fall into the first category. After all, the Court ruled, states have no obligation to share with other states natural resources such as wildlife held in trust for the state's own citizens.¹¹² Access by nonresidents to such recreational activities is "not basic to the maintenance of well-being of the Union."¹¹³ In fact, a state might justify a total exclusion of nonresident hunters.¹¹⁴ One commentator characterized the holding in *Baldwin* as follows:

110. Foutz, *supra* note 108, at 1531 n.51. See also *Corfield*, 6 F.Cas. at 552, 554; *McCready v. Virginia*, 94 U.S. 391 (1876) (sustaining prohibitions on noncommercial harvesting of oysters from state waters by nonresidents). See also *Haw. Boating Ass'n v. Water Transp. Facilities Div.*, 651 F.2d 661, 666-67 (9th Cir. 1981) (stating, "[t]he district court's conclusion—that the right of access, at equal rates, to mooring privileges at a recreational boat harbor is not 'fundamental'—is supported by the case law." The "case law" to which the court of appeals referred to was *Baldwin*, which the court deemed to be "equally applicable to, and dispositive of, the instant case.").

111. *Baldwin*, 436 U.S. at 383. See also *Davis*, *supra* note 109, at 101 (stating:

[a] state's restriction of nonresident activity triggers the Privileges and Immunities Clause if "the activity in question is sufficiently basic to the livelihood of the nation as to fall within the purview of the clauses, and if it is not closely related to the advancement of a substantial state interest." The first part of the test looks at the fundamental nature of the activity; once the activity has been determined to be fundamental, the state has the burden of showing a substantial interest and a reasonable fit.).

See also *Wildenthal*, *supra* note 108, at 1592.

112. As the Court stated in *Baldwin*:

[i]n more recent years, however, the Court has recognized that the States' interest in regulating and controlling those things they claim to "own," including wildlife, is by no means absolute. States may not compel the confinement of the benefits of their resources, even their wildlife, to their own people whenever such hoarding and confinement impedes interstate commerce. . . . Nor does a State's control over its resources preclude the proper exercise of federal power And a State's interest in its wildlife and other resources must yield when, *without reason*, it interferes with a nonresident's right to pursue a livelihood in a State other than his own, a right that is protected by the Privileges and Immunities Clause.

Baldwin, 436 U.S. at 385-86 (emphasis added) (internal citations omitted).

113. *Id.* at 388. As Miller noted, "[a] state may prefer its own residents over nonresidents or condition the enjoyment of nonresidents as it sees fit when it is regulating a recreational activity." Miller, *supra* note 109, at 76.

114. *Baldwin*, 436 U.S. at 387.

[a]s natural resources in this country become increasingly scarce, the Court's holding in *Baldwin* that access to recreational activity is not protected by the privileges and immunities clause may take on added significance. ... states may not only charge nonresidents a higher fee, they may someday, as the majority has implied, even *exclude* nonresidents from access to state recreational resources.¹¹⁵

The Equal Protection Clause

In relevant part, the Equal Protection Clause of the United States Constitution, amendment XIV, section 1, states: "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws."¹¹⁶ The plaintiffs in *Baldwin* also challenged the Montana elk hunting license fee differential as violating this provision.

The Court rejected the plaintiffs' equal protection challenge as well, concluding that recreational elk hunting was not a basic right requiring equal regulation of residents and nonresidents.¹¹⁷ To withstand an Equal Protection Clause challenge such as the one raised by the plaintiffs in *Baldwin*, a state statute need only satisfy the rational basis test.¹¹⁸ In *Baldwin*, the Court saw no irrationality, concluding that the Montana statute was "not unreasonably related to the preservation

115. Foutz, *supra* note 108, at 1531-32 (emphasis in original) (internal citations omitted). For example, in his analysis of *Baldwin*, Foutz noted the decision of the Supreme Court in *Doe v. Bolton*, a case in which the Court struck down a Georgia statute that prohibited nonresidents from obtaining abortions in public hospitals. The basis for the Court's decision was Georgia's inability to demonstrate that use of public hospitals by nonresidents resulted in overcrowding of those facilities. *Id.* at 1527. Presumably, the restriction on use by nonresidents could have been sustained if Georgia had been able to demonstrate that overcrowding resulted.

116. U.S. CONST. amend. XIV, § 1.

117. *Baldwin*, 436 U.S. at 389.

118. Exceptions to this rule involve certain "suspect classifications" that are subject to "strict scrutiny" (or some other type of heightened analysis) and that the court will sustain only upon a showing of substantial justification. "Suspect classifications" include: race (*Palmore v. Sidoti*, 466 U.S. 429 (1984), *Loving v. Virginia*, 388 U.S. 1 (1967), *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)); sex (*Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982), *Craig v. Boren*, 429 U.S. 190 (1976)); alienage (*Bernal v. Fainter*, 467 U.S. 216 (1984), *Sugarman v. Dougall*, 413 U.S. 634 (1973), *Graham v. Richardson*, 403 U.S. 365 (1971)); and legitimacy (*Pickett v. Brown*, 462 U.S. 1 (1983), *Trimble v. Gordon*, 430 U.S. 762 (1977), *Levy v. Louisiana*, 391 U.S. 68 (1968)). Foutz, *supra* note 108, at 1572. With regard to the distinction between residents and nonresidents in the regulation of boating on Lake Lure, however, "state residency is not a 'suspect classification' such that it would trigger strict scrutiny review. ... Accordingly, cities may enact resident preferences without violating the Fourteenth Amendment as long as the preferences are rationally related to a legitimate state interest...." Sullivan, *supra* note 105, at 1338 n.14. See also *Haw. Boating Ass'n v. Water Transp. Facilities Div.*, 651 F.2d 661, 664 (9th Cir. 1981) (rejecting "strict scrutiny" in favor of a rational basis test in challenge to resident/nonresident differential regarding mooring fees); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1580 (10th Cir. 1995) (sustaining a challenge to state regulation of nonresident hunters under a rational basis review).

of a finite resource."¹¹⁹ Furthermore, given the plaintiffs' argument that the legislature could have written the statutory scheme to better reflect actual costs to the State of Montana resulting from recreational elk hunting by nonresidents, the Court responded that "a statutory classification impinging upon no fundamental interest ... need not be drawn so as to fit with precision ... [its] legitimate purposes...."¹²⁰

In a decision of particular relevance to the LAC recommendations, the court in *The Great American Houseboat Company v. United States* addressed the distinction between commercial and noncommercial use of a water.¹²¹ The plaintiff challenged the United States Forest Service regulations applicable to the operation of houseboats on Lake Shasta. The plaintiff argued that the regulatory distinction between commercial and noncommercial houseboats constituted a violation of the Equal Protection Clause.

The plaintiff's Equal Protection Clause challenge did not succeed. "The distinction between commercial and personal use for purposes of permit issuance on its face is rational and not a violation of equal protection."¹²² The court of appeals went on to rule that the "commer-

119. *Baldwin*, 436 U.S. at 390. "[B]ecause Montana's efforts to allocate access to hunting were rationally related to a substantial regulatory interest of the state, the licensing scheme did not violate the equal protection clause. *Foutz*, *supra* note 108, at 1524-25. With regard to fee differentials applicable to boating, the decision in *Hawaii Boating Association* is of particular relevance:

[t]he district court found no evidence supporting the conclusion that the [resident/nonresident mooring fee] cost differential was "arbitrary" or "irrational." The court found that the fee structure was rationally related to a valid legislative goal, *i.e.* equalizing costs attendant to maintaining and constructing small boat harbors and noted that "Residents have recently contributed to the state's economy through employment and state taxes, while nonresidents have not." As the Supreme Court has stated: "We perceive no duty on the State to have its licensing structure parallel or identical for both residents and nonresidents, or to justify to the penny any cost differential it imposes in a purely recreational, noncommercial, nonlivelihood setting. Rationality is sufficient..." We agree with the trial judge that Hawaii's classification is not "irrational."

Haw. Boating Ass'n, 651 F.2d at 666. See also *Red River Serv. Corp. v. City of Minot*, 146 F.3d 583, 590 (8th Cir. 1998) (stating "legislation is presumed valid if the classification drawn by the legislation is rationally related to a legitimate state interest.").

120. *Baldwin*, 436 U.S. at 390.

Moreover, the state need not articulate its actual objective behind the scheme or submit evidence to support the rationality of the regulation, provided that we can conceive of facts which reasonably justify the classification at issue....Under this deferential standard of review - which is a "paradigm of judicial restraint,"- we have no difficulty in upholding the judgment of the district court.

Clajon Prod. Corp., 70 F.3d at 1580.

121. *Great American Houseboat Co. v. United States*, 780 F.2d 741, 748 (9th Cir. 1986).

122. *Id.* at 748, (citing *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) (a statutory classification will not be set aside "if any state of facts reasonably may be conceived to justify it"); *Parsons v. County of Del Norte*, 728 F.2d 1234, 1237 (9th Cir. 1984) ("where

cial/personal use distinction served the legitimate statutory purpose of allowing the Forest Service to regulate and accommodate multiple uses on Shasta Lake and to avoid overcrowding of the Lake and a degrading of the quality of the recreational experience there.¹²³

The Commerce Clause

Article I, section 8, clause 3 of the United States Constitution authorizes Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹²⁴ Those who oppose the LAC recommendations argued that differential treatment of residents and nonresidents imposes an impermissible burden on interstate commerce.

To understand the invalidity of this argument, one must understand the limitations imposed by the “dormant” Commerce Clause.¹²⁵ Wildenthal explains the scope of the “dormant” Commerce Clause as follows:

[t]he term “dormant commerce clause” has been used to distinguish the clause’s impact as a bar to burdensome state regulation of commerce from its facial purpose of conferring on Congress the power to regulate commerce. Once Congress has validly enacted a law regulating commerce, any conflicting state legislation obviously must fall as a result of the supremacy clause. . . . When Congress has not acted, however, the congressional commerce power, in its “dormant” state, has still been construed as limiting state-imposed “burdens” on the free flow of interstate commerce.¹²⁶

An initial question is whether the Commerce Clause applied to any challenge resulting from implementation of the LAC recommendations. A number of commentators pointed out that the decisions of the Supreme Court are both unclear and inconsistent. With regard to resident/nonresident fee differentials for hunting and fishing licenses, this lack of clarity and inconsistency led one commentator to conclude:

the Court’s prior decisions do not conclusively establish the constitutionality or unconstitutionality of discriminatory hunting and fishing license fees under the dormant Commerce Clause ... Perhaps the Court will find the Commerce Clause wholly inapplicable in some or

fundamental rights are not substantially burdened [a] regulation will be upheld unless there is no rational basis for its enactment”).

123. *Id.* See also *Haw. Boating Ass’n*, 651 F.2d at 666.

124. U.S. CONST. art. I, § 8, cl. 3.

125. Chief Justice John Marshall “coined the term ‘dormant’ to describe the power of the clause, even in the absence of conflicting federal statutes, to preempt state regulation affecting interstate commerce.” Seamon, *supra* note 105, at 699-700 (citing *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 253 (1829)).

126. Wildenthal, *supra* note 108 at 1564 n.45.

all of these cases. For example, *the Court ... might conclude that the Privileges and Immunities Clause provides the exclusive basis for challenging all state laws that overtly discriminate between individual residents and nonresidents, including those laws that concern recreational hunting and fishing fees....If the Court did find such laws subject to only Privileges and Immunities Clause challenge, it presumably would uphold them on the ground that they do not infringe "fundamental" interests.*¹²⁷

The Court also "might sidestep application of the dormant Commerce Clause to recreational hunting or fishing fee differentials on the theory that hunting and fishing does not involve 'commerce' within the meaning of the Clause."¹²⁸

Assuming that the "dormant" Commerce Clause applies, it is important to remember that the LAC based its recommendations on residency in the Town, not residency in the State of North Carolina. As a result, the differential requirements apply equally to both intrastate commerce and interstate commerce.

The Supreme Court confronted a similar situation in litigation involving airports handling both intrastate and interstate flights that charged per-passenger fees. In *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Incorporated*, the Court upheld such fees because they were imposed for use of a "facility provided at public expense"¹²⁹ and concluded that "a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike."¹³⁰ Of particular relevance, the Court concluded that the fees did not raise "dormant" Commerce

127. Dan T. Coenen, *State User Fees and the Dormant Commerce Clause*, 50 VAND. L. REV. 795, 805 n.57 (1997).

128. *Id.* at 806 n.57 (citing cases in which courts have concluded that unharvested game is not an article of commerce). Coenen also notes that "the holdings of some courts suggest that state discrimination in fixing fees for even *commercial* fishing licenses is immune from commerce clause attack" because the setting of such fees does not involve economic activity subject to regulation pursuant to Congress's commerce power." *Id.* (citing *Tangier Sound Watermen's Ass'n v. Douglas*, 541 F.Supp. 1287, 1306 (E.D. Va. 1982) ("[T]he Court is not convinced that the Commerce [C]ause reaches a State law whose effect is to prohibit a nonresident commercial crabber from catching crabs in Virginia. Plaintiffs have not established that unharvested crabs are articles of commerce."); *Davrod Corp. v. Coates*, 971 F.2d 778, 790 (1st Cir. 1992) (upholding state statute restricting commercial fishing boat length against commerce clause challenge); *McCready*, 94 U.S. at 396; *Carlson v. State*, 798 P.2d 1269, 1277 (Alaska 1990)). *But see* *Atlantic Prince, Ltd. v. Jorling*, 710 F.Supp. 893, 902-03 (E.D.N.Y. 1989) (invalidating state statute restricting commercial boat length on dormant commerce clause grounds).

129. *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 714 (1972).

130. *Id.* "A permissible charge to help defray the cost of the facility is therefore not a burden [on interstate commerce] in the constitutional sense." *Id.*

Clause issues because “both interstate and intrastate flights are subject to the same charges.”¹³¹

Furthermore, even if the differential requirements had greater impacts on interstate commerce than on intrastate commerce, such impacts would not violate the “dormant” Commerce Clause *per se*. In such situations, the Court utilizes a “two-tiered” approach.¹³²

Under this mode of analysis, the court first determines whether the challenged policy “regulates evenhandedly with only ‘incidental’ effects on interstate commerce, or discriminates against interstate commerce. After the court has made this initial characterization choice, it then applies the operative legal test: “If a restriction on commerce is discriminatory, it is virtually *per se* invalid. By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless ‘the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.’”¹³³

Consequently, the differential requirements would not appear to violate the “dormant” Commerce Clause since the requirements apply equally to both intrastate commerce and interstate commerce.

Even if regulations created an “incidental effect” on interstate commerce, such an effect would not violate the “dormant” Commerce Clause. Coenen draws an analogy between “charges” or “prices” for use of publicly-owned recreational facilities (including camp site rentals) and the tuition differential between in-state and out-of-state students at publicly-funded institutions of higher education. As with tuition, “charges” or “prices” for recreational activities are “traditionally thought to be fixable in ways that favor state residents.”¹³⁴

131. *Id.* at 717. See also *Northwest Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 369 (1994) (stating “[t]o recapitulate, a levy is reasonable under *Evansville* if it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce.”). In an analogous case, the court rejected a Commerce Clause challenge to certain Ohio fishing regulations in part because “the statute does not distinguish in-state fishermen from out-of-state fishermen.” *Reynolds v. Buchholzer*, 87 F.3d 827, 830 (6th Cir. 1996) (holding “[t]he statute and regulations in issue here cannot be interpreted as favoring local enterprise and intentionally discriminating against interstate commerce.”).

132. Coenen, *supra* note 125, at 808.

133. *Id.*

134. *Id.* at 814-15. Coenen cites *Martinez v. Bynum*, 461 U.S. 321, 333 (1983) (the “Constitution permits a State to restrict eligibility for tuition-free education to its bona fide residents”); *Reeves, Inc. v. Stake*, 447 U.S. 429, 442 (1980) (“Commerce Clause’s preclusion of discrimination in sales of state-made cement would logically undermine state discrimination in other areas including education”); *Vlandis v. Kline*, 412 U.S. 441, 453-54 (1973) (“[t]he State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take

C.EXAMPLE: FEE DIFFERENTIALS IN NORTH CAROLINA

There are multiple examples of resident/nonresident fee differentials implemented in North Carolina. The Wildlife Resource Commission, for example, charges nonresidents twice as much as residents for a state fishing license.¹³⁵ Furthermore, certain types of fishing licenses are not available to nonresidents.¹³⁶

With regard to use of Lake Lucas, the City of Asheboro, North Carolina has imposed the following fee differentials:¹³⁷

	City Resident	Non-Resident
Annual Fishing Permit	\$35.00	\$50.00
Annual Launch Fee	\$100.00	\$135.00
Boat Rental Spaces	\$60.00	\$110.00

VII. DO LAKESIDE PROPERTY OWNERS POSSESS RIGHTS TO ACCESS AND USE LAKE LURE?

Those who oppose the recommendations of the LAC have argued at various times that implementation of the recommendations would violate the riparian or littoral rights of the owners of property adjoining Lake Lure. As discussed herein, those who asserted these arguments appear unfamiliar with the law applicable to riparian and littoral

advantage of the in-state rates"); *Sturgis v. Washington*, 368 F.Supp. 38, 42 (W.D. Wash. 1973) ("upholding ... higher tuition for nonresident students of a public university"); *Starns v. Malkerson*, 326 F.Supp. 234, 241 (D. Minn. 1970) (upholding higher tuition for nonresident students of a public university). *Id.* at 807, n.1. Coenen also notes that "lower courts have concluded without difficulty that discriminatory policies in charging tuition pose no dormant commerce clause problems." *Id.* at 807. See also Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 258 (1995) (stating that "[t]he benefits of public institutions such as schools, universities and libraries ... have all, traditionally and uncontroversially, been distributed according to place of residency"); *Fenster v. Schneider*, 636 F.2d 765, 768 (D.C. Cir. 1980) ("Federal courts ... have used a rational basis standard of review in cases, like this one, where higher tuition is charged to non-residents attending local schools.").

135. The Wildlife Resource Commission charges residents \$15.00 and charges non-residents \$30.00. For short term fishing licenses, the Wildlife Resource Commission charges residents \$5.00 and nonresidents \$10.00. North Carolina Wildlife Res. Comm'n, *Hunting/Trapping/Fishing Licenses for Residents*, at http://www.ncwildlife.org/pg01_License/pg1a1_view&print.htm (last visited Mar. 25, 2005).

136. Combination hunting and fishing licenses, county fishing licenses, comprehensive fishing licenses, and sportsman fishing licenses are not available to nonresidents. See *id.*

137. ASHEBORO, N.C., BUDGET ORDINANCE § 1 (June 19, 2003), http://www.ci.asheboro.nc.us/Budget/budget_ordinance_2003-4.html (last visited Mar. 25, 2005).

rights. They also appear unfamiliar with the unique legal history of Lake Lure.

Though the terms are frequently substituted for one another, a distinction needs to be drawn between “riparian” rights and “littoral” rights.¹³⁸ Both relate to the common law right of landowners whose property adjoins a water resource to make a “reasonable use” of the resource. Chancellor Kent, in his *Commentaries on American Law*, provided an excellent summary of riparian rights:

Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere* [water runs, and ought to run, as it has used to run] is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate.¹³⁹

In essence, riparian rights are rights associated with the use of water in rivers or streams adjacent to a landowner’s property. “Littoral” rights refer to similar rights associated with the use of water contained in lakes or ponds adjacent to a landowner’s property.¹⁴⁰ Littoral rights in general include:

- (1) The right to have the water remain in place and to retain, as nearly as possible, its natural character.
- (2) The right of access...
- (3) Subject to reasonable restrictions, the right to wharf out to the navigable portion of a body of water.

138. *Weeks v. North Carolina Dep’t of Natural Res. & Cmty. Dev.*, 388 S.E.2d 228, 229 n.1 (N.C. Ct. App. 1990) (stating “[a]lthough the terms ‘riparian’ and ‘littoral’ are often used interchangeably, plaintiff is a littoral proprietor.”).

139. JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 45 (1828). As restated by Sir William Blackstone, “water is a moveable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein....” SIR WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 18 (Harper & Brothers 1858).

140. The term derives from the Latin *litus* meaning shore.

(4) The right of free use of the water immediately adjoining the property for the transaction of such business associated with his wharves or other such structures.¹⁴¹

In terms of the management of Lake Lure, it is important to understand that lakeside property owners do not possess littoral rights. As discussed below, littoral rights in general do not attach to artificial lakes. Furthermore, the unique legal history of Lake Lure precludes the assertion of littoral rights. Finally, assuming *arguendo* that littoral rights might exist, such rights are subject to regulation by both the Town and the LLMC.

A. LITTORAL RIGHTS DO NOT ATTACH TO ARTIFICIAL LAKES

"It is almost axiomatic that riparian [and littoral] rights do not attach to artificial waterbodies."¹⁴² This conclusion reflects the general rule that neither riparian nor littoral rights "attach to artificial courses and conditions."¹⁴³

Reaching a similar conclusion, Corbridge cites the decision of the Wisconsin Supreme Court in *Mayer v. Grueber*.

Affirming a trial court holding for the plaintiff, the Wisconsin Supreme Court noted, "in the case of artificial bodies of water, all of the incidents of ownership are vested in the owner of the land. *An artificial lake located wholly on the property of a single owner*¹⁴⁴ *is his to use as he sees fit, provided, of course, that the use is lawful.*" *In order to obtain surface rights, the neighboring [littoral] land owner would have to acquire them by grant or prescription, neither of which was present in this case. In fact Mrs. Mayer had advised the defendants, prior to their purchase of the property, that the Mayers asserted the rights to exclusive use of the land. Other courts have reached the same conclusion in these circumstances, relying on the principle that "[a]s a general proposition, it has been held that riparian [and littoral] rights do not ordinarily attach to artificial water bodies or streams...*¹⁴⁵

141. JOSEPH KALO ET AL., COASTAL AND OCEAN LAW: CASES AND MATERIALS 42-43 (2d ed. 2002). See also *West v. Slick*, 326 S.E.2d 601, 617 (N.C. 1985) (stating "[t]he littoral owner may, however, in exercise of his right of access, construct a pier in order to provide passage from the upland to the sea.").

142. Joseph W. Dellapenna, *Chapter 6, Introduction to Riparian Rights*, in 1 WATERS AND WATER RIGHTS 6-§ 6.02(e) (Robert E. Beck ed., 1991).

143. Alvin E. Evans, *Riparian Rights in Artificial Lakes and Streams*, 16 MO. L. REV. 93, 106 (1951) (citing 3 TIFFANY, REAL PROPERTY §767 (3d ed. 1939); 2 WASHBURN, REAL PROPERTY §1294 (6th ed. 1902)).

144. See discussion of the importance of the single owner rule, *infra* text accompanying notes 109 and 110.

145. Corbridge, *supra* note 1, at 907 (citing *Mayer v. Grueber*, 138 N.W.2d 197 (1965) (emphasis added) (internal citations omitted)).

Given that all land use decisions are factually specific, exceptions to this rule have emerged.¹⁴⁶ For example, lakeside property owners successfully asserted littoral rights in artificial lakes when they contributed land for the construction of the lake.¹⁴⁷ Lakeshore property owners also successfully asserted littoral rights if the parties expected to create such rights at the time they constructed the artificial lake.¹⁴⁸ In other cases, courts precluded owners of dams from removing them or from draining an artificial lake on a variety of legal theories including (a) detrimental reliance and estoppel, (b) easement (or quasi-easement) by implication, and (c) reciprocal rights.¹⁴⁹ Finally, plaintiffs successfully asserted littoral rights when defendants impound *navigable* watercourses to create artificial lakes.¹⁵⁰

None of the exceptions to the general rule appears applicable to Lake Lure.¹⁵¹ As discussed below, no expectation existed that littoral rights attached to lakeside properties when Carolina Mountain Power Company built Lake Lure. Sale of lakeside properties did not include rights to the use of Lake Lure. Furthermore, upland landowners contributed no land for the construction of Lake Lure, and the Rocky Board River was not navigable prior to construction of the lake.¹⁵²

146. Many of these exceptions are discussed in Dellapenna, *supra* note 142, § 6-102(e); see also Royal G. Shannonhouse, *Some Principles of Water Law in the Southeast*, 13 MERCER L. REV. 344, 349-50 (1962). See generally Evans, *supra* note 143 (citing case law through the middle of the 20th century).

147. Evans, *supra* note 143 at 94-96 (discussing *Kray v. Muggli*, 86 N.W. 882 (1901)).

148. Dellapenna, *supra* note 142, § 6.02(e).

149. See Roy H. Andes, *Divvying Atlantis: Who Owns the Land Beneath Navigable Man-made Reservoirs?*, 15 UCLA J. OF ENVTL. L. & POL'Y 83, 98-100 (1996). See also Evans, *supra* note 143, at 93-99.

150. Corbridge, *supra* note 1, at 910, 912-14. When a *non-navigable* watercourse is impounded, however, littoral rights do not attach to the resulting artificial lake. *Id.* at 918-19, (citing *Fairchild v. Kraemer*, 11 A.D.2d 232, 204 (N.Y. App. Div. 1960) (An artificial boat basin on Long Island, "having been artificially created out of the private lands of plaintiff and his predecessors in title, and having been made navigable by artificial means, would remain private property, and the waters thereof would not be subject to any public right or easement thereon [citations omitted].")).

151. As discussed in *supra* note 29, an exception to the exceptions may be property presently used as a recreational vehicle park located where the Rocky Board River flows into Lake Lure.

152. The Supreme Court determined the test for navigability in *The Daniel Ball* [t]hose rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

The Daniel Ball, 77 U.S. 557, 563 (1870). Because the federal government has paramount authority over navigation, the navigability test is a question of federal, not state law. *Utah v. United States*, 403 U.S. 9, 10 (1971).

B. THE UNIQUE LEGAL HISTORY OF LAKE LURE PRECLUDES THE ASSERTION OF LITTORAL RIGHTS

As more fully discussed in Part II, Chimney Rock Mountains, Incorporated conveyed all of the land to become the bed of Lake Lure to the Carolina Mountain Power Company on June 30, 1925.¹⁵³ Carolina Mountain Power Company completed construction of the dam in late 1926, and completed the full impoundment of Lake Lure in 1927.¹⁵⁴ On August 12, 1931, the Carolina Mountain Power Company transferred both the land and the lake to the Carolina Mountain Corporation (following foreclosure by Stroud & Company), the land and the lake remained the property of the Carolina Mountain Corporation until July 26, 1965 when the Town acquired the property.¹⁵⁵

This history, particularly the fact that a single owner has always owned Lake Lure, is of particular importance to the alleged existence of littoral rights. As Corbridge noted regarding artificial waterbodies, assertions of both riparian and littoral rights are "commonly denied" based on "one or more" of three rationales:

(1) the state only recognizes riparian [or littoral] rights where bottomland is owned; (2) no riparian [or littoral] rights are recognized in artificial water; and (3) it would amount to trespass to allow riparian [or littoral] rights when the bottom of the artificial waterbody is *wholly* owned by one person. This last approach is consistent with the treatment accorded by the courts to similarly situated *natural waters*.¹⁵⁶

In his summary of the case law applicable to artificial waterbodies, Dellapenna discusses the importance of "a single owner" in determining whether littoral rights exist:

Whether to recognize riparian rights in an artificial lake or reservoir has proven more troublesome to courts than whether to recognize riparian rights in an artificial watercourse. *If the artificial lake is entirely on the land of a single owner, courts have little hesitancy in treating it as entirely the property of that owner, even if the lake abuts, but does not encroach upon, the land of neighbors.*¹⁵⁷

153. See LAKE LURE DEVELOPMENT, *supra* note 3, at 19-22. See also *supra* note 8 and accompanying text.

154. See Powers, Development of Lake Lure, *supra* note 5, at 1.

155. See Letter from Jim Proctor to Sandra King, *supra* note 22; Powers, Development of Lake Lure, *supra* note 5, at 7.

156. Corbridge, *supra* note 1, at 915 (internal citations omitted) (emphasis in original).

157. Dellapenna, *supra* note 142, § 6.02(e) (internal citations omitted) (emphasis added).

Corbridge's and Dellapenna's conclusions directly apply given that a single owner has always owned Lake Lure, first the Carolina Mountain Power Company (1925-1931), then the Carolina Mountain Corporation (1931-1965), then the Town of Lake Lure (1965 to present).¹⁵⁸

In terms of the assertion of alleged littoral rights, one cannot overstate the importance of Lake Lure having a single owner throughout its history. As Shannonhouse noted, the owner of the entire bed of a lake "has the exclusive right to use the water overlying his land and to exclude therefrom all others, *including other littoral owners*."¹⁵⁹

As noted above, littoral rights may attach if that was the expectation of property owners during the construction of the artificial lake. With regard to such expectations when Lake Lure was created, however, it is important to note that the prospectus for Chimney Rock Mountains, Incorporation included as a source of income "[t]he concessions from various amusement enterprises of the better sort, such as public bathing beaches, fishing and boating privileges, etc."¹⁶⁰ It appears that an expectation that lakeside property owners would possess a littoral right to access or use Lake Lure never existed. Any such use would constitute a privilege afforded (upon payment of an appropriate fee) by the Carolina Mountain Power Company, a subsidiary of Chimney Rock Mountains, Incorporated.¹⁶¹ In essence, "private ownership of the lake ... deprived the abutting land of any lake privileges."¹⁶²

In 1963, the North Carolina General Assembly reaffirmed this conclusion when it enacted legislation that authorized the Town of Lake Lure to issue revenue bonds for the purpose of acquiring Lake Lure. Section 1(c) of House Bill 588 noted "[t]hat many homes are located on the shores of the lake and have docks and boathouses but *the deeds to such homes convey no right to use Lake Lure* and the docks and boathouses are subject to removal upon the request of the private owner of the lake."¹⁶³ Furthermore, immediately after the Town acquired Lake

158. LAKE LURE DEVELOPMENT, *supra* note 3, at 21; Powers, Development of Lake Lure, *supra* note 5, at 3, 7; Letter from Jim Proctor to Sandra King, *supra* note 22.

159. Shannonhouse, *supra* note 146, at 354 (citing 93 C.J.S. *Waters* §105 (1956) (emphasis added)).

160. LAKE LURE DEVELOPMENT, *supra* note 3, at 21. See also Powers, Development of Lake Lure, *supra* note 5, at 3 ("[p]rivileges for using the lake in any capacity depended entirely upon the cooperation of the Carolina Mountain Power Company").

161. As noted in Part II, C, the Town of Lake Lure operated the recreational facilities located at the lake for the Carolina Mountain Power Company. The 1936 agreement between the Town and the Power Company provided for the payment of fees "for fishing and also for operating a private boat or boats on the lake." Powers, Development of Lake Lure, *supra* note 5, at 10 (summarizing events following a letter of Mar. 9, 1936 from Lee Powers to Francis J. Heazel, Attorney at Law).

162. *Id.* at 9.

163. 1963 N.C. Sess. Laws 437 §1(c) (emphasis added), *quoted in Keeter*, 141 S.E.2d at 640. The court included the following language as a factual finding:

Lure, Mayor J. Paul Wilson announced that "[t]he long established policy of the Carolina Mountain Power Company requiring signed application permits for the erection of docks and boathouses will be continued and fully enforced by the Town."¹⁶⁴

C. LAKE ACCESS AND USE RIGHTS MAY BE ACQUIRED THROUGH ADVERSE POSSESSION

It does not appear from the historic record that owners of littoral properties were ever granted rights to access and use Lake Lure. From its inception, use of Lake Lure was allowed only when the Carolina Mountain Power Company (1927-1931), the Carolina Mountain Corporation (1931-1965)¹⁶⁵ or the Town of Lake Lure, following acquisition of the lake by the Town in 1965, granted permission.¹⁶⁶

Against this background, it is important to note that individuals could acquire littoral rights by adverse possession. In *Lake Drummond Canal and Water Company v. Burnham*, the North Carolina Supreme Court concluded that a use easement for an artificial waterbody may be "established by reason of adverse possession or continuous invasion of another's rights."¹⁶⁷ The court summarized the requirements previously articulated in *Felton v. Simpson*:

When one continues in the uninterrupted possession of land for 30 years, or enjoys the use of a franchise for 20 years, a grant is presumed. So if one erects a dam and ponds back water upon the land of another, and is allowed to keep it there for 20 years, a grant of the

[f]rom the unchallenged findings of fact by the trial judge, and from the declarations by the General Assembly in Ch. 437, 1963 Session Laws, it is shown that the town of Lake Lure is a *sui generis* municipality. The judge's findings of fact are to this effect: A privately owned lake known as Lake Lure is situate within its corporate boundaries. The town and surrounding area are primarily resort and recreational in nature. *Many houses are located on the shores of the lake with docks and boathouses which are located there by permission of the private owner of the lake, and are subject to removal upon request by the private owner of the lake.* The ownership of the lake carries with it the right to regulate the level of the waters of the lake, and it seems by an appreciable lowering of the waters of the lake the docks and boathouses could be left some distance from the waters of the lake, and their use and the recreational use of the houses on the shores of the lake could be gravely impaired, if not destroyed.

Keeter 141 S.E.2d at 644 (emphasis added).

164. Press Release, J. Paul Wilson, Mayor of Lake Lure, Statements to the Press Regarding the Town Buying the Lake (July 26, 1965), reprinted in Powers, Development of Lake Lure, *supra* note 5, at 8.

165. The Town of Lake Lure, which operated the recreational facilities located at the lake from 1936 until the Town acquired the lake in 1965, essentially acted as an agent of the Carolina Mountain Corporation during this period. See Powers, Development of Lake Lure, *supra* note 5, at 2-6.

166. *Id.* at 8.

167. *Lake Drummond Canal & Water Co. v. Burnham*, 60 S.E. 650, 652 (N.C. 1908).

easement or privilege of doing so is presumed, and so in many similar cases. But to make this doctrine applicable two things are necessary—there must be a thing capable of being granted, and there must be an adverse possession or assertion of right, so as to expose the party to an action, unless he had a grant; for it is the fact of his being thus exposed to an action and the neglect of the opposite party to bring suit, that is seized upon, as the ground for presuming a grant in favor of long possession and enjoyment, upon the idea that this adverse state of things would not have been submitted to, if there had not been a grant.¹⁶⁸

In essence, claims of adverse possession are defeated if the owner allowed use of the property at issue (e.g., “granted”).¹⁶⁹ On this point, the court in *Lake Drummond Canal and Water Company* quoted the decision in *Mason v. Railway* for the proposition “[t]he equitable doctrine of prescription depends upon the presumption of a grant, and equity will only presume a grant when certain well-defined conditions are present, one of which is an adverse claim to the property of which the right is alleged to have risen.”¹⁷⁰

North Carolina, however, presumes that use is permissive. This “permissive presumption rule ... creates a presumption that use is permissive until the contrary is shown.”¹⁷¹ Because of this presumption, it is “difficult to establish adverse use” in North Carolina.¹⁷²

Nonetheless, it is conceivable that owners of property adjoining Lake Lure could establish littoral rights if: (a) the property owner used Lake Lure continuously for twenty years; (b) the Carolina Mountain Corporation (1931-1965) or the Town of Lake Lure (1965-1985) knew of the adverse use; (c) neither the Carolina Mountain Corporation nor the Town of Lake Lure did anything to prevent the adverse use; and (d) either the Carolina Mountain Corporation or the Town did something to indicate that the adverse use was not permissive.¹⁷³ However, as discussed below, the existence of such rights is of little consequence given the authority of both the Town and the LLMC to regulate any littoral rights established through adverse possession.

168. *Id.* at 652-653 (quoting *Felton v. Simpson*, 11 N.C. (1 Ired. Eq.) 84, 85 (1850)).

169. *Id.* at 652.

170. *Id.* at 653.

171. Alice Gibbon Carmichael, Comment, *Sunbathers Versus Property Owners: Public Access to North Carolina Beaches*, 64 N. C. L. REV. 159, 166 (1985) (citing *Dickinson v. Pake*, 201 S.E.2d 897, 900 (1974); *Speight v. Anderson*, 39 S.E.2d 371 (1946); *Darr v. Carolina Aluminum Co.*, 3 S.E.2d 434 (1939); *Perry v. White*, 116 S.E. 84 (1923); *Nash v. Shute*, 114 S.E. 470 (1922); *State v. Norris*, 93 S.E. 950 (1917); *Snowden v. Bell*, 75 S.E. 721 (1912)).

172. *Id.*

173. The twenty year period could only run during ownership of the Lake by the Carolina Mountain Corporation or the Town of Lake Lure. Ownership of Lake Lure by the Carolina Mountain Power Company ended long before a twenty year period could run.

D. ASSUMING *ARGUENDO* THAT LITTORAL RIGHTS WERE ACQUIRED THROUGH ADVERSE POSSESSION, SUCH RIGHTS ARE SUBJECT TO REGULATION BY BOTH THE TOWN AND THE LLMC

Those who oppose the recommendations of the LAC assert that any regulation of littoral rights could constitute a taking of those rights, requiring payment of compensation. Simply stated, such assertions are without merit. As discussed in Parts III and IV, respectively, both the Town and the LLMC have sufficient authority to regulate any littoral rights that might exist. Furthermore, because of the nature of both riparian and littoral rights, such regulation almost never results in a "taking" of those rights.

Initially, it must be understood that both riparian and littoral rights are types of property rights. As noted above, these rights are usufructuary rights, in that the owner holds a right to the use of the water but not the water.¹⁷⁴

As property rights, however, both riparian and littoral rights are "incomplete" types of rights:¹⁷⁵ "Water rights *are* property, but they have no higher or more protected status than any other sort of property. . . . In fact water rights have *less* protection than most other property rights" for at least three reasons.¹⁷⁶ First, "because their exercise may intrude on a public common, they are subject to several original public prior claims, such as the navigation servitude and the public trust, and to laws protecting commons, such as water pollution laws."¹⁷⁷ Second, "their original definition, limited to beneficial or reasonable and non-wasteful uses, imposes limits beyond those that constrain most property rights."¹⁷⁸ Third, "insofar as water rights (unlike most other property rights) are granted by permit, they are subject to constraints articulated in the permits."¹⁷⁹ In essence, "water is not like real prop-

174. Both riparian and littoral rights can be defined as a right in the water rather than as ownership of the water as such. Such rights are "a kind of real property right, termed an incorporeal hereditament rather than a corporeal right because the flow of water itself cannot be owned or possessed." Dellapenna, *supra* note 142, § 7.02(a). (internal citation omitted). See also O. Paul Matthews, *Water is not "Real" Property*, 85 J. CONTEMP. WATER RES. & EDUC. 19, 19 (1991), <http://www.ucowr.siu.edu/updates/85/index.html> (citing K.M. O'Brien, *New Conditions for Old Water Rights: An Examination of the Sources and Limits of State Authority*, 31 ROCKY MTN. MIN. L. INST. 24-1 to 24-35 (1988)).

175. See Robert E. Beck, *Chapter 4, The Legal Regimes, in WATERS AND WATER RIGHTS* § 4.01 (Robert E. Beck ed. 1991) (discussing water rights generally).

176. Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 260 (1990).

177. *Id.* North Carolina case law also reflects this limitation. See, e.g., *Weeks*, 388 S.E.2d at 234 (holding littoral rights are "subordinate to public trust protections").

178. Sax, *supra* note 176, at 260. See also Matthews, *supra* note 174, at 19-20.

179. Sax, *supra* note 176, at 260 (internal citation omitted). See also Matthews, *supra* note 174, at 20.

erty, and using traditional property rights concepts should be avoided when discussing water."¹⁸⁰

Nonetheless, as with the taking of a corporeal property right, the taking of riparian or littoral rights *may* require the payment of compensation.¹⁸¹ The obligation to provide compensation arises when the exercise of a state's police power constitutes "a taking in the constitutional sense."¹⁸² As discussed by the Supreme Court in *Lucas v. South Carolina Coastal Council*,¹⁸³ there are two situations where this obligation arises: 1) in situations where regulations "compel the property owner to suffer a physical 'invasion' of his property. . . . ([A]t least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation,"¹⁸⁴ and 2) compensation is also required when the effect of a governmental regulation "denies *all* economically beneficial or productive use of land."¹⁸⁵

In the second situation, diminution of value cases, the courts have been "extremely deferential" to state regulators in determining each case's merits.¹⁸⁶ Courts found that diminution in value of up to ninety

180. Matthews, *supra* note 174, at 19. See also Theodore E. Lauer, *The Riparian Right as Property*, in *WATER RESOURCES AND THE LAW* 211 (1958).

181. "[T]he state cannot take vested property rights, whether corporeal or incorporeal, without paying 'just compensation.'" Dellapenna, *supra* note 142, § 8.03(a) (internal citations omitted). See also Matthews, *supra* note 174, at 20 (citing J.L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrine at Work*, 3 J. LAND USE & ENVTL. L. 171-212 (1987)).

182. Sax, *supra* note 176, at 261.

183. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1991).

184. *Id.* at 1015, (citing *Loretto v. Telepromoter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982) (holding that permanent physical occupation authorized by government is taking without regard to public interests that it may serve); *Kaiser Aetna v. United States*, 444 U.S. 164, 178-80 (1979) (finding that the imposition of navigation servitude on privately owned marina will result in actual physical invasion of marina and requires the government to pay compensation); *United States v. Causby*, 328 U.S. 256, 264-65 n.10 (1946) (concluding that the physical invasion of airspace may constitute taking); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831-32 (1987) (determining that a taking occurs when the extent of occupation without regard to whether action achieves important public benefit or has only minimal impact on the owner)). See also Sax, *supra* note 176, at 262-63.

185. *Lucas*, 505 U.S. at 1015 (emphasis added) (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (sustaining local efforts to protect open space); *Nollan*, 483 U.S. at 831-32; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987) (making its determination of whether compensation is required, Court will consider several factors including economic impact of regulation, extent to which regulation interferes with investment backed expectations, and character of government action); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-97 (1981) (sustaining legislation requiring amelioration of impacts of strip mining)). The Court concluded that "the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'" *Lucas*, 505 U.S. at 1016 (quoting *Agins*, 447 U.S. at 260).

186. Sax, *supra* note 176, at 263.

percent of the value of the property does not require payment of compensation.¹⁸⁷ After *Lucas*, the percentage may have increased to ninety-five percent of the value of the property.¹⁸⁸ In essence, "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."¹⁸⁹

Regulation of both riparian and littoral rights may be essential in order to protect public health and safety, to protect the environment and to conserve natural resources. Such regulation is consistent with the police power found in the Constitution¹⁹⁰ and with North Carolina case law.¹⁹¹ Any number of cases has upheld the constitutionality of legislation regulating water rights to protect natural resources. As Sax noted, "legislation that constrains uses of property to achieve environmental protection goals is firmly within the police power, as is legisla-

187. *Id.* at 263 n.18 (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-27 (1985) (sustaining provisions of Clean Water Act intended to protect wetlands, Court concluded that "the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. ... Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred."); *Keystone Bituminous Coal Ass'n*, 480 U.S. at 513-14 (Rehnquist, J., dissenting) (suggesting that test should be whether regulation completely extinguishes value of property)).

188. As the Court stated:

[i]t is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no stranger than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these 'all-or-nothing' situations.

Lucas, 505 U.S. at 1019-20 n.8.

189. *Id.* at 1019 (internal citation omitted) (emphasis in original). North Carolina courts have reached the same conclusion. See *Shell Island Homeowners Ass'n, Inc. v. Tomlinson*, 517 S.E.2d 406, 415 (N.C. Ct. App. 1999) (holding plaintiffs' complaint did not "allege that plaintiffs have lost all economically beneficial or productive use of their property; rather, plaintiffs have merely asserted that they have 'experienced a significant reduction in use/value of the Hotel,' which is insufficient to support a taking claim."); *JWL Inv., Inc. v. Guilford County Bd. of Adjustment*, 515 S.E.2d 715, 719 (N.C. Ct. App. 1999) (upholding the proposition that "[a]n interference with property rights amounts to a taking where the plaintiffs are deprived of 'all economically beneficial or productive use.'"); *Williams v. Town of Spencer*, 500 S.E.2d 473, 475 (N.C. Ct. App. 1998) (holding a taking of property had not occurred where "petitioners are not deprived of 'all economically beneficial or productive use' of their land").

190. "[N]o property right can be exempted from the full exercise of the police power." Sax, *supra* note 176, at 261, n.7 (citing L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 9-10, at 618 (1988)).

191. As noted in *Slavin v. Town of Oak Island*, "the North Carolina Supreme Court [has] stated that a littoral property owner's right of access to adjacent water is 'subject to such general rules and regulations as the Legislature, in the exercise of its powers, may prescribe.'" *Slavin v. Town of Oak Island*, 584 S.E.2d 100, 102 (N.C. Ct. App. 2003) (quoting *Capune v. Robbins*, 160 S.E.2d 881, 886 (N.C. 1968)).

tion that constrains property use in order to conserve scarce natural resources by requiring more efficient use."¹⁹²

Courts seldom find such regulation of water rights (in general) and of both riparian and littoral rights (in specific) to constitute a "taking" requiring the payment of compensation.¹⁹³ Courts routinely deny claims of water rights owners for compensation and appellate courts sustain such denials upon appeal.¹⁹⁴ Furthermore, unlike many other laws, regulation of water rights may be applied retroactively: "[i]t is not unconstitutional for regulation to constrain pre-existing uses or rights that were legal when initiated. Retroactivity is *not* the test of compensability."¹⁹⁵

The distinction between reasonable regulation of the use of property (not requiring compensation) and the taking of property (requiring compensation) is not readily discernible. "There is no set formula to determine where regulation ends and taking begins."¹⁹⁶

Given the limitations on water rights discussed herein, particularly the "incomplete" nature of such rights, it may be more difficult for a claimant to sustain a claim for the taking of a water right because of

192. Sax, *supra* note 176, at 262, n. 12 (citing *Riverside Bayview Homes*, 474 U.S. at 121; *Hodel*, 452 U.S. at 264; *Agin*, 447 U.S. at 255; *State v. Dexter*, 202 P.2d 906, 908 (Wash. 1949), *aff'd*, 338 U.S. 863 (1949) (sustaining a mandatory reforestation requirement, the court concluded that a state is not "required by the constitution of the United States to stand idly by while its natural resources are depleted. ... [W]here natural resources can be utilized and at the same time perpetuated for future generations, what has been called 'constitutional morality' requires that we do so.")).

193. "[I]t is well-established that the littoral right of access to adjacent water is a qualified right. Plaintiffs' contention that the Town [of Oak Island] may not, without compensation, in any way limit their right to access to the ocean is inconsistent with the qualified nature of that right." *Slavin*, 584 S.E.2d at 102.

194. "[T]he United States Supreme Court has been deferential toward state regulation that adversely impacts on property rights, routinely denying the owners compensation. Every major change in western water law, despite adverse effects on existing claims of right, has been sustained as valid, non-compensable regulation." Sax, *supra* note 176, at 259 n.4. See also Joseph L. Sax, *Property Rights in the U.S. Supreme Court: A Status Report*, 7 UCLA J. ENVTL. L. & POL'Y 139, 145-47 (1988).

195. Sax, *supra* note 176, at 260. With regard to land use cases, for example, "[v]alid preexisting uses have been subject to rezoning and owners have been required to change their use to conform to the new law." *Id.* at 265 (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962) (sustaining an ordinance regulating dredging and pit excavations; the Court concluded that "every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional."); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 83 (1946) ("[I]n no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with existing laws. ... The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights."); *Erie R.R. Co. v. Bd. of Pub. Util. Comm'n*, 254 U.S. 394, 409-14 (1921) (requiring the balance of public and private rights when regulations were challenged; public rights should prevail).

196. *Goldblatt*, 369 U.S. at 594.

the "public servitudes" (such as the public trust) that existed prior to the initiation of the right. As Sax noted, "[t]here is a tradition that recognizes a pre-existing right of the State in the flow of its rivers. Private diversions, at least those in tidal or navigable waters and affected tributaries, have always been subject to servitude and a trust in favor of the public."¹⁹⁷ Specifically with regard to the regulation of riparian water rights, Dellapenna concluded that the public trust might itself be enough to uphold almost any conceivable regulated riparian statute.¹⁹⁸ The following section discusses the application of the public trust doctrine.

E. EXAMPLE: *SLAVIN V. TOWN OF OAK ISLAND*

The decision in *Slavin v. Town of Oak Island* provides an excellent example of the limited nature of littoral rights.¹⁹⁹ In *Slavin*, owners of oceanfront properties located within the municipal boundaries of the Town of Oak Island challenged the Beach Access Plan that the Town adopted in order to protect both turtle habitat and newly replenished sand dunes.²⁰⁰ One provision of the Beach Access Plan restricted beach access to "designated public access points."²⁰¹ Plaintiffs challenged this provision, arguing that their littoral rights afforded them "a right of direct access to the ocean."²⁰² Plaintiffs also argued that the Beach Access Plan "constituted a taking of [plaintiffs' littoral rights] in violation of the federal and state constitutions."²⁰³

In a decision of relevance to Lake Lure, should a court find that littoral rights exist, the North Carolina Court of Appeals rejected the plaintiffs' arguments:

[w]hile we agree that North Carolina law recognizes a littoral property owner's right of access to adjacent water, plaintiffs misinterpret the nature of that right. A littoral property owner's right of access to the ocean is a qualified one and is subject to reasonable regulation. Plaintiffs, however, do not argue that the Access Plan is an unreasonable regulation of their littoral property rights. Rather, plaintiffs insist that defendant may not limit their right of access to the ocean at all without compensating plaintiffs.

197. Sax, *supra* note 176, at 269 (internal citation omitted).

198. Dellapenna, *supra* note 174, § 7.05(b).

199. See generally Brian C. Fork, *A First Step in the Wrong Direction: Slavin v. Town of Oak Island and the Taking of Littoral Rights of Direct Beach Access*, 82 N.C. L. REV. 1510 (2004) (discussing the qualified nature of littoral rights).

200. *Slavin*, 584 S.E.2d at 101.

201. *Id.*

202. *Id.*

203. *Id.*

In *Capune*, the North Carolina Supreme Court stated that a littoral property owner's right of access to adjacent water is "subject to such general rules and regulations as the Legislature, in the exercise of its powers, may prescribe for the protection of the public rights in rivers or navigable waters." In *Weeks*, this Court held that appurtenant littoral rights are "subordinate to public trust protections." Thus, it is well-established that the littoral right of access to adjacent water is a qualified right.

Plaintiffs' contention that the Town may not, without compensation, in any way limit their right of access to the ocean is inconsistent with the qualified nature of that right. Accordingly, we conclude that defendant is entitled to judgment as a matter of law, and the trial court's order granting summary judgment in favor of defendant was proper.²⁰⁴

VIII. DO EITHER THE PUBLIC (IN GENERAL) OR LAKESIDE PROPERTY OWNERS (IN SPECIFIC) HAVE A RIGHT TO USE LAKE LURE UNDER THE PUBLIC TRUST DOCTRINE?

In 1995, the North Carolina Supreme Court addressed the public trust doctrine in *Gwathmey v. North Carolina*.²⁰⁵ Certain individuals who oppose implementation of the LAC recommendations argue that those recommendations are inconsistent with both the public trust doctrine and the *Gwathmey* decision. As discussed below, such opposition is groundless. In fact, the LAC recommendations fulfill the requirements of the public trust doctrine and are entirely consistent with the *Gwathmey* decision.

A. BACKGROUND OF THE DOCTRINE

The public trust doctrine developed primarily from Roman Law.²⁰⁶ Gaius included a discussion of rights in his *Institutes*.²⁰⁷ Some rights,

204. *Id.* at 102 (internal citations omitted).

205. *Gwathmey v. North Carolina*, 464 S.E.2d 674, 688 (N.C. 1995).

206. Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 429 (1989). (noting that the concept of public waters being reserved or protected for public use has numerous historic antecedents including Spanish law, the thirteenth century codification LAS SIETE PARTIDAS seen as the "Spanish antecedent for the public trust doctrine;" French law, an eleventh century French law provided that "the public highways and byways, running water and springs, meadows, pastures, forest, heaths and rocks ... are not to be held by lords, ... nor are they to be maintained ... in any other way than that their people may always be able to use them;" Chinese law, the codification of water laws prepared during the Ch'in Dynasty, 249-207 B.C., included the statement that "private water ownership never appeared and the individual duties in water undertakings would eventually lead to and enhance public welfare;" African law, Nigerian law provides that "[a]ll inhabitants of Nigeria ... enjoy a right of free navigation in tidal and other large inland waterways;" Islamic beliefs, "the fundamentals of Islamic water law purport to

Gaius wrote, are of divine right (*divini juris*) and some are of human (*humani juris*); of those that are of human right, some things are of public right (*publici juris*), and some things are things of individuals (*res singulorum*).²⁰⁶

The concept of public right contained in the *Institutes* of Justinian²⁰⁹ was based in part on the *Institutes* of Gaius. According to Justinian, written law was composed of *ius civile* (the "law of [Roman] citizens") and *ius gentium* ("the law of nations"). Civil law was divided into "public law" (*publici juris*) when it related to the state or official worship and "private law" (*juris privati*) when it dealt with the legal interrelations of the citizens. With regard to development of the public trust doctrine, Justinian concluded in *Institutes* Book II that "the following things are by natural law common to all – the air, running water, the sea, and consequently the sea-shore."²¹⁰

In 1215, the Magna Charta incorporated principles of Roman Law propounded by both Gaius and Justinian²¹¹ and became a part of the

ensure to all members of the Moslem community the availability of water;" and American Indian beliefs). Geoffrey Scott noted that "the seminal principles from which the doctrine is derived purport to date to ancient Greece and Rome." Geoffrey R. Scott, *The Expanding Public Trust Doctrine: A Warning to Environmentalists and Policy Makers*, 10 *FORDHAM ENVTL. L. J.* 1, 3-4 (1998).

207. Gaius wrote the *Institutes* around 161 A.D. ALAN WATSON, *THE SPIRIT OF ROMAN LAW* 42 (1995).

208. See FRANCIS DE ZULUETA, *THE INSTITUTES OF GAIUS* 67 (1946). *Publici juris*, "as applied to a thing or right, means that it is open to or exercisable by all persons. It designates things which are owned by 'the public;' that is, the entire state or community, and not by any private person. When a thing is common property, so that anyone can make use of it who likes, it is said to be *publici juris*; as is the case of light, air, and public water." BLACK'S LAW DICTIONARY 1397 (4th ed. 1968). "The word 'public' in this sense means pertaining to the people, or affecting the community at large; that which concerns a multitude of the people; and the word 'right,' as so used, means a well-founded claim; an interest; concern; advantage; benefit." *Id.*

209. JUSTINIAN, *THE INSTITUTES OF JUSTINIAN*, at B2 (J.B. Moyle, trans., Oxford Univ. Press 5th ed. 1913).

210. *Id.* at D2. "Roman law held the seashores to be publicly owned, open to the common use of all citizens with the government being the supervisor or trustee for these public rights. Much the same concept was adopted by the English courts well prior to the American Revolution." DAVID J. BROWER, *UNC SEA GRANT PUBL'N NO. UNG-SG-77, ACCESS TO THE NATION'S BEACHES: LEGAL AND PLANNING PERSPECTIVES* 21 (Feb. 1978).

211. The appearance of the public trust doctrine in the Magna Charta was summarized in *Arnold v. Mundy*:

[I]n Magna Charta, which is said to be nothing more than a restoration of the ancient common law, we find this usurpation [granting several fisheries] broken down and prohibited in future. That charter, as passed in the time of king John enacts, "that where the banks of rivers had first been defended in his time, (that is, when they had first been fenced in, and shut against the common use, in his time) they should be from thenceforth laid open." And, by the charter of Henry III. which is but an amplification and confirmation of the former, it is enacted, "that no banks shall be defended (that is, shut against the common use) from henceforth, but such as were in defence in the time of king Henry our grandfather,

common law of England. As Wilkinson noted, “[t]he common law distinguished between the *jus privatum*, which the Crown could transfer to individuals in fee ownership, and the *jus publicum*, which the Crown held in trust for the public.”²¹² Wilkinson also noted that conflicting authority exists over whether the Crown could convey *jus publicum* lands.²¹³

In 1715, North Carolina adopted the common law of England.²¹⁴ North Carolina General Statute section 4-1 codified this adoption:²¹⁵

All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive

by the same places and the same bounds as they were wont to be in his time.” By this charter, it has been understood, and the words fairly import, that all grants of rivers, and rights of fishery in rivers or arms of the sea, made by the kings of England before the time of Henry II. were established and confirmed, but that the right of the crown to make such royal grants, and by that means to appropriate to individuals what before was the common right of all, and the means of livelihood for all, for all future time, was wholly taken away.

Arnold v. Mundy, 6 N.J.L. 1, 73 (1821). See also James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1, 22, 23 n.76 (1997). As discussed by Rasband, the accuracy of the *Arnold* court’s summary is open to question.

212. Wilkinson, *supra* note 206, at 430-31 (internal citation omitted). See also Richard Ausness, *Water Rights, the Public Trust Doctrine, and the Protection of Instream Uses*, 1986 U. ILL. L. REV. 407, 409-411 (1986). Scott characterized this distinction as follows: “[The public trust doctrine] stipulates that for the purpose of delimiting a government’s relationship to ownership of the earth resources there are two classifications of property: (1) that which is capable of transfer, in usual and ordinary course, to private ownership; and (2) that which is not and is to be held by government in a public trust for its constituents.” Scott, *supra* note 206, at 15 (citing *Martin v. Waddell*, 41 U.S. (16 Pet.) 367(1842) (additional citations omitted)).

213. “Compare *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842) (‘the question must be regarded as settled in England against the right of the king since Magna Charta to make such a grant.’) with 4 R. Clark, [WATERS AND WATER RIGHTS (1970)] at 101 (‘Statements found in the American cases which assume that the King could not grant the beds of navigable waters, the *jus privatum*, in to private ownership are wrong.’).” Wilkinson, *supra* note 206, at 431, n.31.

214. “At least after 1715, the common law of England was applicable in North Carolina only to the extent it was deemed ‘compatible with our way of living.’” *Gwathmey*, 464 S.E.2d at 679 (citing *State v. Willis*, 121 S.E.2d 854, 854 (1961)).

215. “The ‘common law’ referred to in N.C.G.S. § 4-1 has been held to be the common law of England as of the date of the signing of the American Declaration of Independence.” *Id.* Rasband described the public trust doctrine at the time of the American Revolution as follows:

[b]y the time of the American Revolution ... the understanding that the crown had granted most of the foreshore had been replaced with a different concept: what has been called the prima facie theory. Under that theory, the crown was presumed to own and never to have parted with the foreshore or fishery. An individual could acquire title to the foreshore or its associated resources by custom, prescription, or grant, but the foreshore was prima facie in the crown and would remain the crown’s absent express prof.

Rasband, *supra* note 211, at 11.

of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.²¹⁶

In general, two themes run through the decisions in cases involving the public trust doctrine. First, the doctrine serves as a restraint on alienation,²¹⁷ precluding states from alienating property "common to all mankind" held in trust by the state.²¹⁸ In *Illinois Central Railroad Company v. Illinois*,²¹⁹ for example, the state legislature attempted to convey virtually the entire Chicago waterfront to the railroad.²²⁰ Invalidating the conveyance, the Supreme Court reaffirmed the validity of the public trust doctrine: "[t]he State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties ... than it can abdicate its police powers

216. *Gwathmey*, 464 S.E.2d at 679.

217. "The traditional role of the public trust doctrine has been to restrain governmental activities that impair public rights..." Ausness, *supra* note 212, at 414. "Traditionally, the public trust 'functioned as a restraint on the states' abilities to alienate public trust lands.'" Carmichael, *supra* note 171, at 201 (quoting *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1082-83 (D.C. Cir. 1984)). Scott noted, however, that case law is inconsistent regarding the extent of the prohibition on alienation:

[s]ome courts have concluded that the government cannot dispose of public trust property and that any attempt to do so is voidable or void *ab initio*. To these persons the public trust doctrine may be a simple immutable principle or a means to democratize a check on a corrupt executive or legislature. Others have concluded that trust property can pass into private hands, while remaining quiescently impressed with the trust which can awaken any time it is in the public interest. Still others have held that government may transfer trust property so long as the grantee will place it into public service by executing a trust purpose through private initiative. Finally, some have held that trust property may, in circumstances not fully delimited, pass unfettered into the private domain.

Scott, *supra* note 208, at 22 (internal citations omitted). See also Scott *supra* note 208, at 24-36 (discussing the inconsistent interpretation of the public trust doctrine over time).

218. "The sovereign power itself ... cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right." *Arnold*, 6 N.J.L. at 78.

219. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892).

220. In 1869, the legislature granted approximately 1,000 acres of the Chicago waterfront (including all of the Chicago harbor) to the railroad. In 1873, the legislature revoked the grant and the state attorney general sought to have it declared invalid. Rasband, *supra* note 211, at 63; Ausness, *supra* note 212, at 412; Wilkinson, *supra* note 206, at 452.

in the administration of government and the preservation of the peace."²²¹

Second, the public trust doctrine imposes a fiduciary duty of the trustee to protect the assets of the trust for the beneficiaries of the trust. With regard to such duties, the public trust doctrine is quite similar to the laws applicable to any trustee managing the assets of any trust.²²² For example, in upholding use restrictions intended to protect riverine resources, the Court of Appeals in *Morse v. Oregon Division of State Lands*²²³ noted: "[t]hese resources, after all, can only be spent once. Therefore, the law has historically and consistently recognized that rivers and estuaries once destroyed or diminished may never be restored to the public and, accordingly, has required *the highest degree of protection from the public trustee.*"²²⁴

The most significant public trust doctrine case to date has been *National Audubon Society v. Superior Court*,²²⁵ the Mono Lake decision. At issue was the authority of the State of California to allow the City of Los Angeles to divert flows from the watershed of the lake.²²⁶ The California Supreme Court restated the public trust doctrine as "an affirmation of the duty of the state to protect the people's common heritage in streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."²²⁷ The court held that the state had an affirmative and continuing duty to evaluate the impact of water allocations on trust resources and to protect those resources whenever feasible.²²⁸ "In our opinion, the core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters. This authority applies to the waters tributary to Mono Lake and bars [Los Angeles] or any other party from claiming a vested right to divert waters once it becomes clear that such diversions *harm the interests protected by the public trust.*"²²⁹

221. *Illinois*, 146 U.S. at 453. The rule in North Carolina is somewhat different. See *infra* text accompanying notes 244-252.

222. The principles applicable to the "authority and duties of the state as trustee of trust resources ... applied to rights in flowing waters just as they did to other trust property." Ausness, *supra* note 212, at 426.

223. *Morse v. Or. Div. of State Lands*, 581 P.2d 520 (Or. Ct. App. 1978).

224. *Id.* at 524 (emphasis added).

225. *Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983).

226. *Id.*

227. *Id.* at 724.

228. In his interpretation of this decision, Ausness concluded "that the public trust doctrine imposes a duty of continuing supervision over the taking and use of appropriated water." Ausness, *supra* note 212, at 426.

229. *Nat'l Audubon Soc'y*, 658 P.2d at 712 (emphasis added).

B. DESCRIPTION OF THE PUBLIC TRUST DOCTRINE IN NORTH CAROLINA

As noted above, North Carolina adopted the common law of England over sixty years prior to the American Revolution.²³⁰ By adopting the common law, North Carolina also adopted the public trust doctrine.²³¹

Following the Revolution, North Carolina "became the owner of lands beneath navigable waters."²³² In *Gwathmey*, the North Carolina Supreme Court addressed two public trust doctrine issues. First, what was the appropriate definition of "navigable" waters?²³³ Second, what was the authority of the State to convey "lands beneath navigable waters"?²³⁴

Definition of "navigable" waters

With regard to the appropriate definition of "navigable" waters, the petitioners argued that the court should consider the waters navigable if people, in fact, used those waters for navigation.²³⁵ The State of North Carolina argued that waters were navigable if they were subject to the ebb and flow of the tides.²³⁶

The answer was of significant importance because the State Board of Education between 1926 and 1945 conveyed marshlands owned by the state located between the high and low water marks in the Middle Sound area of New Hanover County.²³⁷ In 1987 pursuant to North Carolina General Statute section 146-20.1(b), the Division of Fisheries, Department of Natural Resources issued "resolution letters purporting to validate the plaintiffs' titles to the marshlands [which] were accompanied in each case by a purported reservation of public trust rights in those same marshlands."²³⁸

Of particular importance (and stated in *Gwathmey*) is the fact that the "lands beneath navigable waters" referred to lands owned by the State of North Carolina.²³⁹ As noted by the court, "looming over any discussion of the ownership of estuarine marshes is the 'public trust' doctrine – a tool for judicial review of state action affecting *State-owned*

230. See *Gwathmey*, 464 S.E.2d at 679.

231. "North Carolina accepted the public trust doctrine in *Shepard's Point Land Co. v. Atlantic Hotel* in which the Supreme Court of North Carolina quoted the decision in *Illinois Central* with approval." Carmichael, *supra* note 171, at 177 (internal citations omitted).

232. *Gwathmey*, 464 S.E.2d at 677.

233. *Id.* at 677-78.

234. *Id.* at 682.

235. See *id.* at 677.

236. The "ebb and flow" test was the navigability test that arose under the common law of England. *Id.* at 678-79.

237. *Id.* at 676.

238. *Id.*

239. *Id.* at 677.

submerged land underlying navigable waters, including estuarine marshland, and a concept embracing asserted inherent public rights in these lands and waters.²⁴⁰

In essence, the plaintiffs argued that the public trust doctrine applied only to state-owned lands underlying waters navigable in fact while the State argued that the public trust doctrine applied to state-owned lands underlying waters subject to the ebb and flow of the tides.²⁴¹ The trial court ruled for the plaintiffs, concluding that the test for determining navigability (and therefore application of the public trust doctrine) was whether the waters were navigable in fact.²⁴² The North Carolina Supreme Court affirmed this conclusion.²⁴³

State authority to convey public trust doctrine lands

As noted above, the Supreme Court in *Illinois Central Railroad v. Illinois*²⁴⁴ suggested that a state could not convey lands to which the public trust applied.²⁴⁵ Not all of the states have followed this rule.²⁴⁶

The North Carolina Supreme Court addressed this issue in *Gwathmey*, concluding that it was within the authority of the General Assembly to convey public trust doctrine lands.²⁴⁷ In reaching this conclusion, the court made reference to a number of earlier decisions that appeared to reach a contrary result. For example, the court cited *State v. Twiford*: “[n]avigable waters are free. They cannot be sold or monopolized. They can belong to no one but the public and are reserved for free and unrestricted use by the public for all time. Whatever monopoly may obtain on land, the waters are unbridled yet.”²⁴⁸

240. *Id.* at 677-78 (quoting Monica Kivel Kalo & Joseph J. Kalo, *The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust*, 64 N.C. L. REV. 565, 572 (1986) (emphasis added). See also Op. N. C. Att'y Gen., No. 346 (1998) (the public trust doctrine applies to “the state’s navigable waters”).

241. *Gwathmey*, 464 S.E.2d at 677-78.

242. *Id.* at 677.

243. *Id.* at 688.

244. Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892).

245. “The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties ... than it can abdicate its police powers in the administration of government and the preservation of the peace.” *Id.* at 453.

246. With regard to the authority to states to convey such lands, Corbridge noted that in many states the public trust doctrine “establish[ed] the principle that transferees from a state of bottomlands underlying navigable waters take qualified title, subject to a varying range of overriding public rights to use the surface.” Corbridge, *supra* note 1, at 898. With regard to the restraint on alienation, Ausness concluded that the public trust doctrine “protects the public’s interest in certain critical resources by treating the public’s interest as a property right which the state cannot *wholly* alienate.” Ausness, *supra* note 212, at 408 (emphasis added).

247. *Gwathmey*, 464 S.E.2d at 683.

248. *North Carolina v. Twiford*, 48 S.E. 586, 588 (N.C. 1904).

After quoting this language, the court concluded that, “[t]o the extent that this statement in *Twiford* can be read expansively to indicate that the General Assembly does not have the power to convey lands underlying navigable waters in fee, it too was mere *obiter dictum*, unsupported by our laws or our Constitution, and is hereby expressly disapproved.”²⁴⁹

The court also cited *North Carolina v. Credle*.

[n]avigable waters ... are subject to the public trust doctrine, insofar as this Court has held that where the waters covering land are navigable in law, those lands are held in trust by the State for the benefit of the public. A land grant in fee embracing such submerged lands is void.²⁵⁰

After quoting this language, the court reached the following conclusion:

[t]he first sentence is entirely consistent with our opinion in this case. The second sentence is true in the sense that a land grant in fee pursuant to the general entry laws and conveying such submerged lands is void. However, we hereby expressly reject any construction of the second sentence in the above quotation from *Credle* that would support the proposition that the General Assembly is powerless to convey lands lying beneath navigable waters free of public trust rights when it does so by special legislative grant. To construe the second sentence so broadly would conflict with the long-established rule of *Ward v. Willis*, 51 N.C. 183 (1858) (per curiam), that fee simple conveyances – without reserving rights to the people under the public trust doctrine – of lands beneath navigable waters pursuant to special legislative grants are valid.²⁵¹

In essence, the General Assembly may dispose of public trust doctrine lands if it does so expressly “by special legislative grant.” Absent such a grant, the General Assembly may not convey public trust doctrine lands.²⁵²

249. *Gwathmey*, 464 S.E.2d at 683.

250. *North Carolina v. Credle*, 369 S.E.2d 825, 828 (1988) (citing *Shepard's Point Land Co. v. Atlantic Hotel*, 44 S.E. 39 (1903)).

251. *Gwathmey*, 464 S.E.2d at 683 (emphasis added).

252. “[T]his Court has recognized the public interests inherent in navigable waters and qualified the State’s ability to part with title to lands submerged by navigable waters with a *presumption* that legislative enactments do not indicate a legislative intent to authorize the conveyance of lands beneath navigable waters.” *Id.* at 678.

[I]n North Carolina, the public trust doctrine operates as a rule of construction creating a presumption that the General Assembly did not intend to convey lands in a manner that would impair public trust rights. ‘Unless clear and specific words state otherwise, terms are to be construed so as to cause no interference with the public’s dominant trust rights, for the presumption is that the sovereign did not intend to alienate such rights.’ *RJR Technical Co. v. Pratt*, 453 S.E.2d 147, 149 (N.C. 1995). However, this presumption is overcome by a

C. APPLICABILITY OF THE PUBLIC TRUST DOCTRINE TO LAKE LURE

Initially, the public trust doctrine as discussed in *Gwathmey* applies only to lands owned by the State of North Carolina that are navigable in their natural condition:

[t]he controlling law of navigability as it relates to the public trust doctrine in North Carolina is as follows: "If water is navigable for pleasure boating it must be regarded as navigable water, though no craft has ever been put upon it for the purpose of trade or agriculture. The purpose of navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation." In other words, if a body of water *in its natural condition* can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose. Lands [owned by the State of North Carolina] lying beneath such waters that are navigable in law are the subject of the public trust doctrine.²⁵³

Neither of the conditions precedent to application of the public trust doctrine apply to Lake Lure. At no time did the State of North Carolina own the bed of the lake.²⁵⁴ Furthermore, the lake could not have been navigable "in its natural condition" because it is an artificial waterbody.

special grant from the General Assembly *expressly* conveying lands underlying navigable waters in fee simple and without reservation of any public trust rights.

For the foregoing reasons, we conclude that *the General Assembly is not prohibited by our laws or Constitution from conveying in fee simple lands underlying waters that are navigable in law without reserving public trust rights. The General Assembly has the power to convey such lands, but under the public trust doctrine it will be presumed not to have done so. That presumption is rebutted by a special grant of the General Assembly conveying the lands in question free of all public trust rights, but only if the special grant does so in the clearest and most express terms.*

Id. at 684 (emphasis added).

253. *Id.* at 682 (emphasis added). See also Op. N. C. Att'y Gen. No. 346, *supra* note 240 (citing *Gwathmey* for the proposition that North Carolina's public trust doctrine applies "if a body of water *in its natural condition* can be navigated by watercraft" (emphasis added)).

254. Those who oppose the LAC recommendations argue that the mere fact that pleasure boats operate on Lake Lure means that the public trust doctrine applies. This argument either reflects a fundamental misunderstanding of the *Gwathmey* decision or is an attempt to bootstrap a right of access to Lake Lure where no right of access exists. The operation of pleasure boats on the lake does not have the effect of transferring title to the bed of Lake Lure to the State of North Carolina. See *Gwathmey*, 464 S.E.2d at 682 (stating that lands beneath navigable waters are the subject of the public trust doctrine).

Nonetheless, the Town owns Lake Lure and holds it in trust for the benefit of the citizens of the Town.²⁵⁵ As a result, the public trust doctrine may apply to the Town (regarding Lake Lure) as it was applicable to the State of North Carolina (regarding the Middle Sound area of New Hanover County).²⁵⁶

Assuming that the public trust doctrine does apply to Lake Lure, then the Town would be prohibited from conveying any portion of the lake absent some form of a "special grant" by the Town Council.²⁵⁷ The Town would also have a fiduciary obligation to protect the assets of the trust, specifically the lake itself.²⁵⁸

The State of North Carolina and political subdivisions of the State may exercise police power as needed to protect public resources held in trust for the citizens of the respective jurisdictions. With regard to the protection of North Carolina's wildlife, for example, the Court of Appeals ruled in *North Carolina v. Stewart*²⁵⁹ that "[a]s the State's wildlife population is a natural resource of the State held by it in trust for its citizens, the enactment of laws reasonably related to the protection of such wildlife constitutes a valid exercise of the police power vested in the General Assembly."²⁶⁰

The Washington Supreme Court addressed the need to exercise the police power to protect the assets of the trust, in a case involving the regulation of personal water craft. In *Weden v. San Juan County*,²⁶¹ the court concluded that a county ordinance prohibiting such craft complied with Washington's public trust doctrine.²⁶² Specifically, the court ruled that "it would be an odd use of the public trust doctrine to sanction an activity that actually harms and damages the waters and wildlife of this state."²⁶³

If the public trust doctrine is applicable, the opposite side of the coin is that a failure to protect Lake Lure could subject the Town to liability based on a breach of trust theory. Andes noted that public trust

255. It may be advisable to amend the language of proposed Ordinance Number 01-12-11 to state unequivocally that the Town holds Lake Lure in trust for the benefit of the citizens of the Town. The proposed Ordinance is discussed in Part V *infra*.

256. It is interesting to note that "[t]itle to real property held by the State and subject to public trust rights may not be acquired by adverse possession." N.C. Gen. Stat. §1-45-1 (2003). It may be appropriate to consider similar legislation for real property held in trust by political subdivisions of the state.

257. See *supra* note 252.

258. As Andes noted, "it is settled that states' responsibilities for navigable waters constitutes a fiduciary trust." Andes, *supra* note 149, at 87.

259. *North Carolina v. Stewart*, 253 S.E.2d 638 (N.C. Ct. App. 1979).

260. *Id.* at 640 (citing *Baldwin*, 436 U.S. 371; *North Carolina v. Lassiter*, 185 S.E. 2d 478 (N.C. 1971)).

261. *Weden v. San Juan County*, 958 P.2d 273 (Wash. 1998).

262. *Id.* at 284.

263. *Id.* See also Donna R. Christie, *Marine Reserves, the Public Trust Doctrine and Intergenerational Equity*, 19 J. LAND USE & ENVTL. L. 427, 432 (2004).

responsibilities "are serious and subject to equally serious judicial scrutiny."²⁶⁴ Ausness summarized this conclusion:

courts can enforce the public trust doctrine against the government itself. Standing requirements are generally not very restrictive, and courts seem willing to engage in a searching inquiry when called upon to determine whether a particular legislative or administrative action is consistent with public trust obligations. This inquiry may lead to outright reversal of a legislative or administrative decision; more often the court requires that the legislature or agency reevaluate its decision, either in a more broad-based forum or by a process that properly considers trust interests.²⁶⁵

D. EXAMPLE: *WISCONSIN V. VILLAGE OF LAKE DELTON*

Lake Delton, an artificial waterbody, is located entirely within the boundaries of the Village of Lake Delton and the Town of Delton, Wisconsin.²⁶⁶ During the summer months, the Tommy Bartlett Water Show performs water ski exhibitions on one portion of Lake Delton.²⁶⁷ In order to facilitate these performances as well as to protect both the performers and the general public, the Village and the Town enacted an ordinance reserving the performance area of the lake for the exclusive use of the Water Show during performance periods.²⁶⁸ In essence, the ordinance zoned the lake, reserving one area being for performances, and requiring a license before performers could offer such performances to the public. The Tommy Bartlett Water Show was the only license.²⁶⁹

The Wisconsin Department of Natural Resources challenged the ordinance, alleging it violated Wisconsin's public trust doctrine.²⁷⁰ The Department of Natural Resources also asserted that the ordinance violated both the Due Process Clause and the Equal Protection Clause of the United States Constitution.²⁷¹

In *Wisconsin v. Village of Lake Delton*,²⁷² the court rejected the state's challenges. Dismissing the argument that the ordinance violated the

264. Andes, *supra* note 149, at 87 (citing *Arizona Ctr. for Law v. Hassell*, 837 P.2d 158, 168-69 (Ariz. Ct. App. 1991) (invalidating statutes that relinquished state ownership of submerged lands for unquantified consideration); *Kootenai Env'tl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Idaho 1983); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 475 (1970).

265. Ausness, *supra* note 212, at 435 (internal citations omitted).

266. *Wisconsin v. Village of Lake Delton*, 286 N.W.2d 622, 625 (Wis. Ct. App. 1979).

267. *Id.*

268. *Id.* at 626.

269. *Id.*

270. *Id.* at 624.

271. *Id.* at 635.

272. *Id.* at 622.

public trust doctrine, the court concluded: “no single public interest in the use of navigable waters, though afforded the protection of the public trust doctrine, is absolute. Some public uses must yield if other public uses are to exist at all. The uses must be balanced and accommodated on a case by case basis.”²⁷³

The Court of Appeals also concluded that “[t]he rights of the public to use navigable waters are not absolute, but are subject to state and local police power to insure that such rights are exercised in a safe and orderly manner.”²⁷⁴

To determine whether the ordinance violated the Wisconsin public trust doctrine, the court applied a two-part test:²⁷⁵ First, did the ordinance serve a legitimate public purpose?²⁷⁶ Second, if so, did the ordinance employ reasonable means to accomplish that the purpose?²⁷⁷ Answering both of these questions in the affirmative, the court rejected the public trust doctrine challenge raised by the Department of Natural Resources.

The court also rejected the state’s Equal Protection and Due Process challenges: “[f]inally, we cannot accept the state’s assertion that the town and village were exclusively and improperly motivated to enact this ordinance by the desire to benefit a single, private, commercial corporation, or that the ordinance offends the due process and equal protection clauses of the United States Constitution.”²⁷⁸

IX. CONCLUSIONS

Both the Town and the LLMC have more than sufficient authority to regulate activities occurring on Lake Lure. Such regulations could include permit requirements (with associated fees) for both recreational and commercial uses as well as limitations on the number of vessels using the lake. These regulations could also restrict certain types of activities (*e.g.*, commercial or nonresidential) during certain times of the year as needed to allow use of the lake by the citizens of the Town. While the Town’s authority may be limited to those areas of Lake Lure located within the boundaries of the Town, the authority of the LLMC extends to the entirety of Lake Lure and its shoreline area.

However, with this authority comes potential liability. Situations could arise where the Town of Lake Lure, as the owner of Lake Lure, could be liable for injuries suffered on the lake a claimant could prove that injuries resulted from the Town’s negligence.

273. *Id.* at 632.

274. *Id.* at 639.

275. *Id.* at 635.

276. *Id.*

277. *Id.*

278. *Id.*

Exercise such authority is not restricted by the assertion of littoral rights for the simple reason that such rights do not exist. At no time in its history did ownership of lakeside property carry with it a right of access to Lake Lure. Even if such rights did exist, or had been acquired by adverse possession, regulation of those rights is clearly within the authority of both the Town and the LLMC.

Finally, the public trust doctrine as restated in the *Gwathmey* decision does not convert Lake Lure from the property of the Town into the property of the State of North Carolina. The *Gwathmey* decision in no way restricts the authority of either the Town or the LLMC.

The *Gwathmey* decision reinforces the obligation of a trustee to protect the assets of the trust. In *Gwathmey*, the trustee was the State of North Carolina and the assets of the trust were lands submerged below navigable waters belonging to the State. With regard to Lake Lure, the trustee is the Town of Lake Lure and the primary asset of the trust is the lake itself. The obligation of the Town to protect Lake Lure is no different from the obligation of the State to protect state trust resources expressed in *Gwathmey*.

In *New Jersey v. New York*, Justice Oliver Wendell Holmes referred to the Delaware River when he wrote: “[a] river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it.”²⁷⁹ As with the Delaware, Lake Lure is a treasure. Also as with the Delaware, use of the treasure must be both protected and preserved.

279. *New Jersey v. New York*, 283 U.S. 336, 342 (1931).

