THE LAW OF LAKE LURE

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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.[2]

Part I: Introduction

Professor Corbridge's 1984 prophesy was precisely on point, particularly with regard to the recreational opportunities provided by Lake Lure. Increasing use of the lake for a wide variety of activities, ranging from canoeing and fishing to pleasure boating and water skiing, has resulted in increasing conflict between these uses. Left unregulated, it is inevitable that a classic "tragedy of the commons" will result.[3]

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[2] Corbridge, "Surface Rights in Artificial Watercourses," 24 *Natural Resources Journal* 887, 927 (1984), *citing* U.S. Department of Agriculture, Forest Service, *Forest Resource Report No. 22, An Assessment of the Forest and Range land Situation in the United States* 66-72 (1981).

[3] In his seminal work "The Tragedy of the Commons," 162 *Science* 1243 (1968), Garrett Hardin noted that it was not in the economic best interest of any single user of a common range to preserve the range. Any preservation of the range resulting from the actions of a single user would result only in more of the range remaining available for use by others. It was in the economic best interest of every user of the common range to maximize utilization before the resources of the range were consumed by other users. The result, a "tragedy of the commons," could only be avoided if use of the range by all users was regulated. Hardin's conclusions are as applicable to Lake Lure as they

To avoid such a tragedy, the Town of Lake Lure and the Lake Lure Marine Commission will be required to regulate activities occurring both on Lake Lure and on shoreline areas. Following a review of the history of the lake (Part II of this report), the regulatory authority of the Town of Lake Lure and the Lake Lure Marine Commission is discussed in Parts III and IV, respectively. The recommendations of the Lake Advisory Committee (established by the Town of Lake Lure in 1992) regarding the regulatory needs of Lake Lure are discussed in Part V.

Promulgating such regulations has (and will) result in a numerous objections and criticisms. Given that Lake Lure is owned by the Town of Lake Lure, nonresidents may object to any lake use limitations that favor recreational use by residents of the Town. Such objections may arise under the Privileges and Immunities Clause, the Equal Protection Clause or the Commerce Clause of the U.S. 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, it has been argued that any assertion of regulatory authority by either the Town of Lake Lure or the Lake Lure Marine Commission would be a violation of North Carolina's public trust doctrine. This spurious argument is refuted in Part VIII. Conclusions are presented in Part IX.

Part II: Factual background

A. Creation of Lake Lure

Development of a world-class resort in western North Carolina was the vision of Dr. Lucius B. Morse. The resort envisioned by Dr. Morse was to be developed by Chimney Rock Mountains, Inc.[4] The centerpiece of this resort was to be a lake created by impounding the Rocky Broad River at Tumbling Shoals. This lake was to become Lake Lure.[5]

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are to the range that was the subject of his article.

[4] Dr. Morse was President of Chimney Rock Mountains, Inc. *The Lake Lure Development in Western North Carolina* 26 (stock prospectus, circa 1925) [hereinafter cited as *Lake Lure Development*].

[5] The lake was named "Lake Lure" by Elizabeth Parkenson (Betty) Morse, Dr. Morse's wife.

As a first step in the development of the resort, Chimney Rock Mountains, Inc. spent approximately $600,000 to acquire 220 tracts of land.[6] In total, Chimney Rock Mountains, Inc. acquired "about 8,000 acres or twelve square miles, including the valley in which Lake Lure lies and the hills and mountains above[.]"[7]

The dam that impounded Lake Lure was constructed by the Carolina Mountain Power Company, "all of whose common stock [was] owned by the Chimney Rock Mountains, Incorporated."[8] In return for this stock, Chimney Rock Mountains, Inc. "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[.]"[9]

The remainder of the "8,000 acres or twelve square miles" continued in the ownership of Chimney Rock Mountains, Inc.[10] Development of the resort was funded by a $1,000,000 first mortgage with the Bird Mortgage Company of Asheville, North Carolina.[11] This mortgage, which was secured by

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[6] Powers, L.L., *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* 1 (undated) [hereinafter cited as Powers, *Development of Lake Lure*]. Acquisition of this acreage, which was facilitated by Guilford Nanney (a local resident), took more than a year to complete. Powers, L.L., *The Development of Chimney Rock Park and Lake Lure* 1 (September, 1988). *Accord*, Powers, L.L., *Development of Chimney Rock Park, Bottomless Pools and Lake Lure* 1 (November, 1988).

[7] *Lake Lure Development*, *supra* note 4 at 5. *Accord* Powers, *Development of Lake Lure*, *supra* note 6 at 1.

[8] *Lake Lure Development*, *supra* note 4 at 22.

[9] *Lake Lure Development*, *supra* note 4 at 22. 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, N.C. lying below 995 feet above sea level as based upon the official bench marks of the United States Geological Survey." Deed (6 June 1925), *recorded in* State of North Carolina, County of Rutherford, Office of the Registrar of Deeds, book 134 at 115.

[10] Despite offers ranging from $1,000 to $4,000 per acre, Chimney Rock Mountains, Inc. 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 4 at 22. It is Powers' recollection, however, that "[s]ome lots were sold and ten or twelve new houses were under construction or completed" at the time of the stock market crash on 24 October 1929. Powers, *Development of Lake Lure*, *supra* note 6 at 1. Nonetheless, it is also Power's recollection that "no lake front property was sold with the privilege of using the lake." *Id.* at 10 (summarizing events following a letter of 9 March 1936 from Lee Powers to Francis J. Heazel, Attorney at Law).

[11] Powers, *The Development of Chimney Rock Park and Lake Lure*, *supra* note 6 at 2. This mortgage may have been held by the Standard Mortgage Company of Asheville, North Carolina. Powers, *Development of Lake Lure*, *supra* note 6 at 1.

the remaining property,[12] was acquired by the United States Fidelity and Guaranty Company of Baltimore, Maryland.[13]

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. This mortgage was secured by the 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.[14]

Construction of the dam was completed in late 1926[15] with the full impoundment of Lake Lure being completed in 1927.[16] At ordinary water levels, Lake Lure covers approximately 720 acres and has a shoreline of approximately 27 miles.

B. Separation of property interests

As discussed in the preceding section, Lake Lure was developed by the Carolina Mountain Power Company. The land on which the dam was constructed as well as "all of the inundated area of Lake Lure" were conveyed to the Carolina Mountain Power Company by Chimney Rock Mountains, Inc.[17] From the very beginning, ownership of the bed of Lake Lure was separate from ownership of upland, littoral properties.[18]

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[12] Powers, *Development of Lake Lure*, *supra* note 6 at 1.
[13] Powers, *The Development of Chimney Rock Park and Lake Lure*, *supra* note 6 at 2. *Accord*, Powers, *Development of Chimney Rock Park, Bottomless Pools and Lake Lure*, *supra* note 6 at 1, Powers, L.L., *Lake Lure's Purchase of the Electric Power Facility and the Lake* 1 (December, 1988) and Powers, L.L., *Lake Lure Acquires the Hydroelectric Power Plant and the Lake* 1 (February, 1989).
[14] Powers, *Development of Lake Lure*, *supra* note 6 at 1.
[15] "The contractors have undertaken to complete the dam by September 11, 1926[.]" *Lake Lure Development*, *supra* note 4 at 9.
[16] Powers, *Development of Lake Lure*, *supra* note 6 at 1.
[17] *See* text accompanying notes 6-9, *supra*.
[18] An attempt to reconcile the different ownership interests may have been made in 1927. On 7 February 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 (7 February 1927), *recorded in* the State of North Carolina, County of Rutherford, Office of the Registrar of Deeds, book 135 at 30. 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 did not have 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 of 14 March 2003 from Jim Proctor, Mayor, Town of Lake Lure to Sandra King, Russell, King & Johnson, P.A., Asheville, NC.

This separation was reaffirmed after the stock market collapse of 24 October 1929 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 that had been secured by the property owned by Chimney Rock Mountains, Inc. One of the first acts of the Lureland Realty Company was an unsuccessful attempt to purchase the bed of Lake Lure.[19] By January of 1942, the Lureland Realty Company had disposed of all of the property that had been owned by Chimney Rock Mountains, Inc.[20]

Stroud & Company continued to operate the Carolina Mountain Power Company. On 12 August 1931, the assets of the Carolina Mountain Power Company were transferred to the Carolina Mountain Corporation.[21] William C. Rommell, President of Stroud & Company, operated the Carolina Mountain Corporation from 1931 until Lake Lure was acquired by the Town of Lake Lure in 1965.[22]

C. Acquisition of Lake Lure by the Town of Lake Lure

The Town of Lake Lure had been operating the recreational facilities located at the lake for almost thirty years before Lake Lure was acquired by the Town from the Carolina Mountain Corporation.[23] This acquisition was facilitated by legislation enacted by the North Carolina General Assembly in 1963 that authorized the Town of Lake Lure to issue revenue bonds for the purpose of acquiring Lake Lure.

The authority of the Town of Lake Lure to issue such bonds was challenged in *Keeter v. Town of Lake Lure*, 264 N.C. 252, 141 S.E.2d 634 (N.C., 1965). On 28 April 1965, the North Carolina Supreme Court affirmed the authority of the Town of Lake Lure to issue revenue bonds for the purpose of

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[19] Powers, *Development of Lake Lure*, *supra* note 6 at 2.
[20] *Id.*
[21] Letter of 14 March 2003 from Jim Proctor, Mayor, Town of Lake Lure to Sandra King, Russell, King & Johnson, P.A., Asheville, NC. The Carolina Mountain Corporation, a Delaware corporation, may have been established by Stroud & Company as a mechanism to allow continued operation of the hydroelectric generating system.
[22] Powers, *Development of Lake Lure*, *supra* note 6 at 3, 7. In his memoirs, Mr. Powers remembers Mr. Rommell as operating the Carolina Mountain Power Company. In fact, it appears that Mr. Rommell was operating 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.
[23] These operations was based on a year-to-year lease arrangement between the Town of Lake Lure and the Carolina Mountain Corporation. Powers, *Development of Lake Lure*, *supra* note 6 at 2.

acquiring Lake Lure. The bonds were issued immediately thereafter with the acquisition being completed on 26 July 1965.[24]

Property that once belonged to the Carolina Mountain Corporation was now the property of the Town of Lake Lure. 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."[25] This property, which comprises the bed of Lake Lure, lies within the limits of the Town of Lake Lure.[26]

[24] Powers, *Development of Lake Lure*, *supra* note 6 at 7.
[25] Deed and Bill of Sale (22 July 1965), *recorded in* State of North Carolina, County of Rutherford, Office of the Registrar of Deeds, book 283 at 651.
[26] 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 was excluded subsequently following the initiation of litigation. E-mail message of 30 July 2004 from Jim Proctor, Mayor, Town of Lake Lure to the author.

Part III: Authority of the Town of Lake Lure, North Carolina

The Town of Lake Lure was 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 of Lake Lure, the lake because the property of the Town in 1965.[27]

In terms of the regulation of activities occurring on Lake Lure, it is essential to understand the authority that the North Carolina General Assembly has vested in the Town of Lake Lure. As a political subdivision of the State of North Carolina, the Town of Lake Lure "is a creature of the legislature and has only those powers delegated to it by statute or in its charter."[28] On this point, the Supreme Court of North Carolina concluded: "It is a well-established principle that municipalities, as creatures of the State, can exercise only that power which the legislature has conferred upon them."[29] The court went on to note that "[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 simply convenient, but only those which are indispensable, to the accomplishment of the declared objects of the corporation."[30]

Express powers

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[27] Acquisition of Lake Lure by the Town of Lake Lure is discussed in Part II.C, *infra*.

[28] Letter of 10 April 2000 from Reginald L. Watkins, Senior Deputy Attorney General, Civil Division and Robert O. Crawford, III, Special Deputy Attorney General, Transportation Division, Office of the Attorney General, State of North Carolina to William C. Coward, Coward, Hicks & Siler, P.A., Cashiers, North Carolina 2 (hereinafter cited as 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*, 232 N.C. 42, 47, 59 S.E.2d 195, 199 (North Carolina, 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." Bell, "Dillon's Rule Is Dead; Long Live Dillon's Rule!" *Local Government Law Bulletin*, No. 66 (Chapel Hill, North Carolina: Institute of Government, University of North Carolina at Chapel Hill, 1995) (footnote omitted).

[29] *Bowers, et al. v. City of High Point*, 339 N.C. 413, 417, 451 S.E.2d 284, 287 (North Carolina 1994). "The law is well-settled that 'a municipality has only such powers as the legislature confers upon it.' " *Homebuilders Association of Charlotte, Inc. v. The City of Charlotte*, 336 N.C. 37, 41-42, 442 S.E.2d 45, 49 (North Carolina 1994), *quoting Koontz v. City of Winston-Salem*, 280 N.C. 513, 520, 186 S.E.2d 897, 902 (North Carolina 1972).

[30] *Bowers*, 339 N.C. at 417, 451 S.E.2d at 287-288, *quoting Moody v. Transylvania County*, 271 N.C. 384, 386, 156 S.E.2d 716, 717 (North Carolina 1967). *Accord* 56 *American Jurisprudence 2d*, Municipal Corporations, §194 (1971).

Of particular relevance to Lake Lure, the Town is authorized to acquire and hold real property.[31] Of greater importance to the regulation of activities occurring on Lake Lure is the delegation by the General Assembly 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.' "[32] 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." NCGS §160A-174(a) (General ordinance-making power)

- 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[.]" NCGS §160A-175(a) (Enforcement of ordinances)

- The authority to "restrict, regulate or prohibit the sale, possession, storage, use, or conveyance of any explosive, corrosive, inflammable, or radioactive substances[.]" NCGS §160A-183 (Regulation of explosive, corrosive, inflammable, or radioactive substances)

- 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." NCGS §160A-184 (Noise regulation)

- 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." NCGS §160A-185 (Emission of pollutants or contaminants)

- 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." NCGS §160A-189 (Firearms)[33]

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[31] In relevant part, NCGS §160A-11 (Corporate powers) 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[.]

This authority is restated in NCGS §160A-240.1 (Power to acquire property):

> 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.

[32] *Town of Atlantic Beach v. Young*, 307 N.C. 422, 427, 298 S.E.2d 686, 690 (North Carolina 1983), *citing S.S. Kresge Co. v. Tomlinson and Arlan's Department Store v. Tomlinson*, 275 N.C. 1, 165 S.E. 2d 236 (1968) and *State v. Warren*, 252 N.C. 690, 694, 114 S.E. 2d 660, 664 (1960). *Accord* 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 *North Carolina Law Review* 1510, 1513 note 28 (2004).

[33] In addition, the Town has the authority to The authority to "regulate, restrict, or prohibit the sale, possession or

- 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." NCGS §160A-193(a) (Abatement of public health nuisances)

- 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." NCGS §160A-194 (Regulating and licensing businesses, trades, etc.)

- The authority to "impose a curfew on persons of any age less than 18." NCGS §160A-198 (Curfews)

- 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; (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." NCGS §160A-353 (Powers)[34]

- Finally, to exercise "all municipal powers, functions, rights, privileges, and immunities of every name and nature whatsoever." NCGS § 160A-11 (Corporate powers)

Necessarily implied powers

With regard to necessarily implied powers, two provisions of the North Carolina General Statutes are of particular relevance. NCGS §160A-12 (Exercise of corporate power) 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.

Similar authority is contained in NCGS §160A-177 (Enumeration not exclusive):

> The 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.

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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." NCGS §160A-190 (Pellet guns)

[34] "Recreation" is defined in NCGS §160A-352 to mean "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."

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As noted above, political subdivisions of the State of North Carolina have the authority to exercise those powers that are "necessary or fairly implied or incident to the powers expressly conferred[.]"[35] In essence, "the provisions of chapter 160A and of city charters ... shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect."[36]

Rule of construction

In NCGS §160A-4 (Broad construction), 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[37] and of city charters[38] 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.

The provisions of NCGS §160A-4 led the North Carolina Supreme Court to conclude: "We 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.' "[39] The Office of the North Carolina Attorney General is in agreement: "[T]he 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."[40]

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[35] Advisory Opinion No. 458, *supra* note 28. In addition, political subdivisions are authorized to exercise those powers that are " essential to the declared objects and purposes of the corporation." *Id.*

[36] *Homebuilders Association of Charlotte, Inc.*, 336 N.C. at 43-44, 442 S.E.2d at 49-50.

[37] NCGS Chapter 160A (§160A-1 to §160A-676).

[38] The Charter for the Town of Lake Lure was ratified by the North Carolina General Assembly in 1987. *See* General Assembly of North Carolina, 1987 Session, Ratified Bills, Chapter 194, House Bill 282 – An Act to Revise and Consolidate the Charter of the Town of Lake Lure.

[39] *Homebuilders Association of Charlotte, Inc.*, 336 N.C. at 44, 442 S.E.2d at 50, *quoting River Birch Association v. City of Raleigh*, 326 N.C. 100, 109, 388 S.E.2d 538, 543 (1990) and *citing Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 443, 358 S.E.2d 372, 374 (1987), *Smith v. Keator*, 285 N.C. 530, 534, 206 S.E.2d 203, 205-06, *appeal dismissed*, 419 U.S. 1043 (1974), *Town of West Jefferson v. Edwards*, 74 N.C. App. 377, 385, 329 S.E.2d 407, 412-13 (1985) and *City of Durham v. Herndon*, 61 N.C. App. 275, 278, 300 S.E.2d 460, 462 (1983).

[40] Advisory Opinion No. 458, *supra* note 28 at 2, *citing Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 517 S.E.2d 874 (1999) and *Homebuilders Association of Charlotte, Inc. v. City of Charlotte*, *supra*. The provisions of NCGS §160A-4 "require that grants of powers to cities and counties be construed to include other

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 of discretion."[41] With regard to the exercise of such discretionary powers, the North Carolina Supreme Court concluded:

> In 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. City of Raleigh v. Norfolk Southern Railway Co., 275 N.C. 454, 168 S.E. 2d 389 (1969). 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." Mitchell v. Financing Authority, 273 N.C. 137, 144, 159 S.E. 2d 745, 750 (1968); S. S. Kresge Co. v. Tomlinson and Arlan's Dept. Store v. Tomlinson, 275 N.C. 1, 165 S.E. 2d 236 (1968).[42]

In essence, the Town of Lake Lure has both 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 of Lake Lure will not be set aside unless they are "so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion."

Part IV: Authority of the Lake Lure Marine Commission

A. The legislative mandate

Establishment of the Lake Lure Marine Commission was authorized by Senate Bill 89, introduced in the North Carolina General Assembly by Sen. Walter H. Dalton on 18 February 2003. Following introduction by Sen. Dalton, the bill was referred to the Senate Committee on State Government, Local Government and Veterans' Affairs and was reported favorably on 14 May 2003. Senate Bill 89 was then referred to the Senate Committee on Finance and was reported favorably on 28 May 2003. The bill was approved unanimously by the North Carolina Senate on 29 May 2003.[43]

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powers that are 'reasonably expedient' to exercise those grants." Bell, *supra* note 28 at 2.

[41] Advisory Opinion No. 458, *supra* note 28 at 2, *citing Sykes v. Belk*, 278 N.C. 106, 122, 179 S.E.2d 439, 449 (1971).

[42] *Town of Atlantic Beach*, 307 N.C. at 428, 298 S.E.2d 690.

[43] Forty-six Senators voted in favor of Senate Bill 89, one Senator did not vote and there was three excused

Senate Bill 89 was then sent to the North Carolina House of Representatives where it was referred to the House Committee on Finance. The bill was reported favorably by the House Finance Committee on 24 June 2003 and was approved unanimously by the House of Representatives on 8 July 2003.[44] The ratified bill was then sent to Governor Michael F. Easley who signed the bill into law on 20 July 2003.

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 (14 May 2003) and the time it was signed into law by Governor Easley (20 July 2003).[45]

Senate Bill 80 added Article 6A to Chapter 77 (Rivers, Creeks and Coastal Waters) of the North Carolina General Statutes. Sec. 77-81 authorizes the Board of Commissioners of the Town of Lake Lure to create the Lake Lure Marine Commission (LLMC). Once created by the Town of Lake Lure, 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." NCGS §77-81. The Lake Lure Board of Commissioners is to be the governing board of the LLMC absent action by the Board of Commissioners to the contrary. NCGS §77-82. Article 6A contains typical administrative provisions regarding compensation, budgetary and accounting procedures (NCGS §77-83), organization of the LLMC (NCGS §77-84), LLMC meetings (NCGS §77-84), the administrative powers of the LLMC (NCGS §77-85), filing and publication requirements (NCGS §77-86) and enforcement of the regulations promulgated by the LLMC (NCGS §77-88).

B. Regulation of activities occurring on Lake Lure

The regulatory authority of the LLMC is defined in NCGS §77-87. In general, the LLMC is authorized to "make regulations applicable to Lake Lure[46] and its shoreline area[47] concerning all

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absences.

[44] One hundred and sixteen Representatives voted in favor of Senate Bill 89, three Representatives did not vote and there was one excused absence.

[45] The initial bill introduced by Sen. Dalton did not contain substantive provisions. Consequently, it was not included in the content analysis.

[46] Defined in NCGS §77-80(4) as "the body of water along the Broad River in Rutherford County, impounded by

matters relating to or affecting the use of Lake Lure." NCGS §77-87(a).[48] This broad grant of authority is subject to certain limitations.[49] 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." NCGS §77-87(a).

Article 6A contains specific procedural requirements applicable to the LLMC.[50] Regulations promulgated by the LLMC are unenforceable "unless adequate notice of the regulation has been posted in or on Lake Lure or its shoreline area." NCGS §77-87(c). "[N]otices, 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." NCGS §77-87(c). Somewhat more stringent notice requirements are applicable to regulations affecting only a portion of Lake Lure.[51] It is interesting to note that anyone challenging a regulation of the LLMC on the basis of inadequate notice bears the burden of proving lack of adequate notice. NCGS §77-87(f).

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the dam at Tumbling Shoals, and lying below the 995-foot contour line above sea level."

[47] Defined in NCGS §77-80(5) as "the area submerged by the dam at Tumbling Shoals, lying below 955 feet above mean sea level of the normal full pond elevation of 992 feet above mean sea level, on Lake Lure."

[48] The terms *matters*, *relating*, *affecting* and *use* are not defined in Article 6A.

[49] 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." NCGS §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" is subject to "the provisions of Chapter 113 of the General Statutes and rules promulgated under that Chapter as to property within North Carolina." NCGS §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.

[50] These provisions to not apply to rules and regulations promulgated by the LLMC relating to the internal governance of the LLMC. NCGS §77-87(f)

[51] "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 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." NCGS §77-87(c)

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 of Lake Lure). NCGS §77-87(c). It should be noted that this provision imposes a filing requirement only. It does not require LLMC regulations be reviewed by 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.

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." A violation of these regulations is a Class 3 misdemeanor. NCGS §77-87(b).

Part V: The Lake Use Study – Lake Use Criteria, Findings and Proposals

The Town of Lake Lure established the Lake Advisory Committee (LAC) on 24 March 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.
6. Boat use regulations, no-wake zones and navigational aids.

Advice and recommendations regarding these issue areas have 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 has increased, the importance of these issue areas has also increased, particularly with regard to the potential liability of the Town of Lake Lure for injuries occurring on Lake

Lure.

With regard to the first issue area, the Town of Lake Lure has adopted *Lake Structures Regulations*. In general, these *Regulations* apply to the construction or alteration of lake structures which are 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."[52] The *Lake Structures 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."[53] As discussed in greater detail in the Part VII, it has been argued that these *Regulations* are an impermissible burden on the littoral rights held by lakeside property owners.

[52] Town of Lake Lure, North Carolina, *Lake Structures Regulations*, §94.02 (20 October 1998).
[53] *Id.* at §94.15(A). *See also* §94.12: "No dredging or filling of the lake shall be allowed except by specific authorization of Town Council."

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 that would be required by the operation of different types of watercraft.

In determining the carrying capacity of Lake Lure, the LAC was guided by studies and recommendations made by both the U.S. Army Corps of Engineers (the Corps) and the U.S. Environmental Protection Agency (EPA). The Corps recommends the following minimum lake area acreage per boat:

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

For planning purposes, the Corps recommends a generalized minimum area of six acres per boat. 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% of the time while commercial operators (including boat rental facilities) use their boats approximately 50% of the time. Based on the Corps' recommendations noted above, the LAC has proposed to limit the number of boats in use at any given time to 120. Applying the EPA boat use projections, this limit would be achieved through implementation of a permit allotment plan based on time of use:

Type of Boater	Boat Permits	Time in Use %	Boats in Use
Individual	1,000	10%	100
Commercial 1[54] Commercial 2[55] Commercial 3[56]	36	50%	18
Commercial 4[57]	12	20%	2
TOTAL			120

With regard to the issuance of such permits, the LAC has 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 has recommended that permit costs increase on a boat-by-boat basis for individuals seeking multiple permits.

Many of the recommendations of the LAC are embodied in proposed Ordinance No 01-12-11. Section One of the proposed Ordinance would amend §85.61 of the Lake Lure Code of Ordinances by adding the following provisions:

> *(B) Commercial Operations*
>
> *(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.*[58]

[54] "Livery – boat rentals with on operator provided – marinas, house rentals with boats, realtors that rent boats and resorts/inns."
[55] "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."
[56] "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."
[57] "Service/Realtor – boats used by contractors, real estate brokers, boat repair companies."
[58] *See* text accompanying note 54, *infra*.

(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.[59]

(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.[60]

(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.[61]

(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.

(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.

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

[59] *See* text accompanying note 55, *infra.*
[60] *See* text accompanying note 56, *infra.*
[61] *See* text accompanying note 57, *infra.*

(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.

The recommendations of the LAC and the provisions of proposed Ordinance No. 01-12-11 have been the subject of considerable debate. It has been argued, 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. It has also been argued that permit fee requirements and issuance priorities favoring noncommercial uses of Lake Lure over commercial uses may impose impermissible burdens on interstate commerce. These issues are addressed in the following section.

Others have argued 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. These issues are addressed in Parts VII and VIII, respectively.

Part VI: Differential requirements

A. Background

As discussed in the preceding section, the carrying capacity of Lake Lure requires that the number of boats using the lake at any given time be limited to 120. To achieve this goal, the Lake Advisory Committee (LAC) has recommended that the total number of both commercial and noncommercial permits be limited. The LAC has also recommended that residents of the Town of Lake Lure be afforded a preference in obtaining available commercial and noncommercial permits and that use of Lake Lure during peak use periods by nonresidents be restricted.

In essence, the LAC recommendations would impose differential requirements on (a) commercial and noncommercial users of Lake Lure and (b) residents and nonresidents of the Town of Lake Lure. Those who oppose such differential requirements have raised a number of objections. With regard to the requirements of the U.S. Constitution, opponents of the LAC recommendations have argued 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.[62]

These objections are without merit. As discussed more fully below, there are no requirements or limitations arising under the U.S. Constitution that would prohibit implementation of the LAC recommendations.

B. Constitutional issues

The Privileges and Immunities Clause

The Privileges and Immunities Clause is contained in Article IV, clause 2 of the U.S. Constitution: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Does this clause prohibit the Town of Lake Lure from favoring residents over nonresidents in the issuance of permits to operate boats on Lake Lure?[63]

The Supreme Court answered this question in 1978 in a case involving differential fee requirements for elk hunting licenses issued by the State of Montana.[64] The fee differential was

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[62] There are other constitutional provisions that also may be applicable. The Connecticut Supreme Court ruled in *Leydon v. Town of Greenwich*, 777 A.2d 552 (Conn. 2001), that nonresident beach access restrictions violated both the First Amendment to the U.S. Constitution and parallel state constitutional provisions. Other courts addressing the issue have reached precisely the opposite conclusion. For example, in *Daly v. Harris*, 215 F.Supp.2d 1098 (D. Hawaii 2002), 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.'" 215 F.Supp.2d at 1106 (footnote omitted), *quoting Swank v. Smart*, 898 F.2d 1247, 1251 (7th Cir. 1990). *Leydon* and *Daly* are discussed in Cordaro, "A High Water Mark: The Article IV, Section 2, Privileges and Immunities Clause and Nonresident Beach Access Restrictions," 71 *Fordham Law Review* 2525 (2003). In addition, the Due Process Clause may be applicable to state regulatory functions. *See*, for example, *Pennsylvania Game Commission v. Marich*, 542 Pa. 226, 232-233, 666 A.2d 253, 257 (Penn. 1995) (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").

[63] "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." Sullivan, "In Defense of Resident Hiring Preferences: A Public Spending Exception to the Privileges and Immunities Clause," 86 *California Law Review* 1335, 1337 footnote 5 (1998), *citing United Building and Construction 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). The *United Building and Construction Trades Council* decision is discussed in Seamon, Note, "The Market Participant Test in Dormant Commerce Clause Analysis – Protecting Protectionism? 1985 *Duke Law Journal* 697, 724-728 (1985).

[64] For the 1975 season, residents of the State of Montana could obtain an elk hunting license of $4.00. The only

challenged by nonresident hunters on the grounds that it violated the Privileges and Immunities Clause. In *Baldwin v. Fish and Game Commission*,[65] 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."[66] Recreational hunting of elk in Montana by nonresidents did not fall into the category of "fundamental rights" intended to be protected by the Privileges and Immunities Clause.[67] In fact, recreational activities of all types do not appear to fall within the "fundamental rights" category.[68]

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 the States" (prohibited absent

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license available to nonresidents cost $151.00. For the 1976 season, the resident and nonresidenct license fees increased to $9.00 and $225.00, respectively. 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 Law Review* 1311, 1321 footnotes 101, 102 (1999).

[65] 436 U.S. 371 (1978).

[66] *Corfield v. Coryell*, 6 F.Cas. 546, 551 (C.C.E.D. Penn. 1823). As Foutz has 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." 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 *Tulane Law Review* 1524, 1525 footnote 9 (1979), *citing Corfield*, 6 F.Cas. at 551-552. 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." Wildenthal, Note, "State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV," 41 *Stanford Law Review* 1557, 1561 (1989).

[67] "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." 436 U.S. at 388. *Accord* Davis, Note, "*Carlson v. State* and the Privileges and Immunities Clause: The Alaska Wrinkle in Nonresident Fishing Fee Differentials," 21 *Alaska Law Review* 91, 101 footnote 67 (2004) ("[S]port hunting is not sufficiently basic to the livelihood of the nonresident to merit protection under the Privileges and Immunities Clause."), *citing* Coggins and Glicksman, 3 *Public Natural Resources Law* 18:13 (2003) ("Commercial wildlife harvesting is a constitutionally protected endeavor, but sport hunting is not."). Miller had noted that "[a] majority of jurisdictions have held that elk hunting is merely a recreational activity rather than a fundamental right." Miller, Note, "*Conservation Force, Inc. v. Manning*: When Hunting Means Business," 7 *Great Plains Natural Resources Journal* 71, 76 (2003) (citations omitted).

[68] Foutz, *supra* note 66 at 1531 footnote 51, *citing* Tribe, *American Constitutional Law* 37 footnote 80 (Supp. 1979) as well as *Corfield*, *supra* and *McCready v. Virginia*, 94 U.S. 391 (1876), two cases sustaining prohibitions on noncommercial harvesting of oysters from state waters by nonresidents. The Court of Appeals in *Hawaii Boating Association* reached a similar conclusion: "The 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." 651 F.2d at 666. The "case law" to which the Court of Appeals made reference was *Baldwin*, 436 U.S. at 388, which was deemed to be "equally applicable to, and dispositive of, the instant case." 651 F.2d at 667.

substantial justification).[69] 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 that are held in trust for the state's own citizens.[70] Access by nonresidents to such recreational activities is not "basic to the maintenance of well-being of the Union."[71] In fact, a total exclusion of nonresident hunters may have been justified.[72] One commentator has characterized the holding in *Baldwin* as follows:

> As 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. ... [S]tates 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.[73]

The Equal Protection Clause

In relevant part, the Equal Protection Clause of the U.S. Constitution, Amendment XIV, section 1, states: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws."

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[69] 436 U.S. at 383. "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 clause, 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." Davis, *supra* note 67 at 101, *quoting* 16B *American Jurisprudence*, Constitutional Law 758 (second edition, 1998). *Accord*, Wildenthal, *supra* note 66 at 1592.

[70] The older cases on which this conclusion is based are summarized at 436 U.S. 384-385.

> In 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. *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1 (1928); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923); *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911). Nor does a State's control over its resources preclude the proper exercise of federal power. *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265 (1977); *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976); *Missouri* v. *Holland*, 252 U.S. 416 (1920). 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. *Toomer* v. *Witsell*, 334 U.S. 385 (1948).

436 U.S. at 285-386 (emphasis added).

[71] 436 U.S. at 388. As Miller has 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 67 at 76, *citing Baldwin*, 436 U.S. at 391.

[72] 436 U.S. at 386-387.

[73] Foutz, *supra* note 66 at 1531-1532 (footnotes omitted, emphasis in original). For example, in his analysis of *Baldwin*, Foutz noted the decision of the Supreme Court in *Doe v. Bolton*, 410 U.S. 179 (1973), 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. 410 U.S. at 200. Presumably, the restriction on use by nonresidents could have been sustained if Georgia had been able to demonstrate that overcrowding resulted. Foutz, *id.* at 1527.

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.[74] To withstand an Equal Protection Clause challenge such as the one raised by the plaintiffs in *Baldwin*, a state statute need only have a rational basis.[75] In *Baldwin*, the Court saw no irrationality, concluding that the Montana statute was "not unnecessarily related to the preservation of a finite resource."[76] Furthermore, given the plaintiffs' argument that the statutory scheme could have been written to better reflect actual costs to the State of Montana resulting from recreational elk hunting by nonresidents, the Court responded that "a

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[74] 436 U.S. at 389.

[75] Exceptions to this rule involve certain "suspect classifications" that are subject to "strict scrutiny" (or some other type of heightened analysis) and that will be sustained 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. Board of Education*, 347 U.S. 483 (1954)), sex (*Mississippi University 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). Exceptions to the requirement of "strict scrutiny" are discussed in Wildenthal, *supra* note 66 at 1572 footnotes 102-105. 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 63 at 1338 footnote 14, *citing Laborers Local Union No. 374 v. Felton Construction Co.*, 654 P.2d 67, 72 (1982). *See also Hawaii Boating Association v. Water Transportation Facilities Division, Department of Transportation, State of Hawaii*, 651 F.2d 661, 664 (9th Cir. 1981) ("strict scrutiny" rejected in favor of a rational basis test in challenge to resident/nonresident differential regarding mooring fees) and *Clajon Production Corporation v. Petera*, 70 F.3d 1566, 1580 (10th Cir. 1995) (challenge to state regulation of nonresident hunters not subject to "strict scrutiny" analysis, sustained "under a rational basis review.").

[76] 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 66 at 1524-1525. With regard to fee differentials applicable to boating, the decision in *Hawaii Boating Association*, *id.*, is of particular relevance:

> The 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 non-residents 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." *Baldwin v. Montana Fish and Game Comm'n.*, 436 U.S. 371, 391, 98 S. Ct. 1852, 1864, 56 L. Ed. 2d 354 (1978). We agree with the trial judge that Hawaii's classification is not "irrational."

651 F.2d at 666. *See also Red River Service Corporation v. City of Minot*, 146 F.3d 583, 590 (8th Cir. 1998) ("legislation is presumed valid if the classification drawn by the legislation is rationally related to a legitimate state interest"), *citing City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

statutory classification impinging upon no fundamental interest ... need not be drawn so as to fit with precision ... [its] legitimate purposes."[77]

In a decision of particular relevance to the LAC recommendations, the distinction between commercial and noncommercial use of a water resource was addressed in *The Great American Houseboat Company v. U.S. Forest Service*, 780 F.2d 741 (9th Cir. 1986). At issue were U.S. Forest Service regulations applicable to the operation of houseboats on Lake Shasta. One of the arguments advanced by the plaintiff was that the regulatory distinction between commercial and noncommercial houseboats constituted a violation of the Equal Protection Clause.

Plaintiff's Equal Protection Clause challenge was unsuccessful. "The distinction between commercial and personal use for purposes of permit issuance on its face is rational and not a violation of equal protection.[78] The Court of Appeals went on to rule that the "commercial/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."[79]

The Commerce Clause

Article I, section 8, clause 3 of the U.S. Constitution authorizes Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]" Those who

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[77] 436 U.S. at 390, *quoting Hughes v. Alexandria Scrap Corporation*, 426 U.S. 794, 813 (1976).

> 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. *FCC v. Beach Communications, Inc.*, [508 U.S. 307,] 124 L. Ed. 2d 211, 113 S. Ct. 2096, 2101-03 (1993). Under this deferential standard of review – which is a "paradigm of judicial restraint," 113 S. Ct. at 2101 – we have no difficulty in upholding the judgment of the district court.

Clajon Production Corporation, 70 F.3d at 1580, *supra* note 15.

[78] 780 F.2d 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") and *Parsons v. County of Del Norte*, 728 F.2d 1234, 1237 (9th Cir.) ("where fundamental rights are not substantially burdened [a] regulation will be upheld unless there is no rational basis for its enactment"), *cert. denied*, 469 U.S. 846 (1984).

[79] *Id.*, *citing County Board of Arlington County, Virginia v. Richards*, 434 U.S. 5, 7 (1977) ("the Constitution does not outlaw ... social and environmental objectives, nor does it presume distinctions ... to be invidious") and *Sakamoto v. Duty Free Shoppers Ltd.*, 764 F.2d 1285, 1289 (9th Cir. 1985) (government action resulting in alleged economic discrimination need only have a rational relationship to a legitimate government interest). *See also Hawaii Boating Association*, 651 F.2d at 665-66, *quoting Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371, 391 (1978) (there is no duty to have a licensing structure identical for residents and non-residents or "to justify to the penny any cost differential ... [imposed] in a purely recreational ... setting").

oppose the LAC recommendations have argued that differential treatment of residents and nonresidents imposes an impermissible burden on interstate commerce.

To understand the invalidity of this argument, it is essential to understand the limitations imposed by the "dormant" Commerce Clause.[80] Wildenthal explains the scope of the "dormant" Commerce Clause as follows:

> The 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.[81]

An initial question is whether the Commerce Clause would apply to any challenge resulting from implementation of the LAC recommendations. As has been pointed out by a number of commentators, 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:

> [T]he 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 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. See Carlson v. State, Commercial Fisheries Entry Comm'n*, 919 P.2d 1337, 1340-41 (Alaska 1996). *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. See Baldwin*, 436 U.S. at 388 (holding that elk-hunting license fee discrimination against nonresidents did not offend the Privileges and Immunities Clause because elk hunting is not a fundamental right).[82]

The Court also "might sidestep application of the dormant Commerce Clause to recreational hunting or

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[80] 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 63 at 700, *citing Wilson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 253 (1829).

[81] Wildenthal, *supra* note 66 at 1564 footnote 45, *citing Kassel v. Consolidated Freightways Corporation*, 450 U.S. 662 (1981), *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978), *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959) and *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

[82] Coenen, "State User Fees and the Dormant Commerce Clause," 50 *Vanderbilt Law Review* 795, 805 footnote 57 (1997) (emphasis added).

fishing fee differentials on the theory that hunting and fishing does not involve 'commerce' within the meaning of the Clause."[83]

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

The Supreme Court confronted a similar situation in litigation involving per-passenger fees that were charged by airports handling both intrastate and interstate flights. In *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972), the Court upheld such fees because they were imposed for use of a "facility provided at public expense"[84] 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."[85] Of particular relevance is the Court's conclusion that the fees did not raise "dormant" Commerce Clause issues because "both interstate and intrastate flights are subject to the same charges."[86]

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[83] Coenen, *id.*, *citing* cases in which courts have concluded that unharvested game is not an article of commerce (*Shepherd v. State Department of Fish and Game*, 897 P.2d 33, 42 (Alaska 1995), *Clajon Production Corporation v. Petera*, 854 F.Supp. 843, 860 n.323 (D. Wyo. 1994), *affirmed*, 70 F.3d 1566, 1571 n.11 (10th Cir. 1995) and *Terk v. Ruch*, 655 F.Supp. 205, 215 (D. Colo. 1987) as well as *LCM Enterprises v. Town of Dartmouth*, 14 F.3d 675, 678 (1st Cir. 1994) (district court found no standing for plaintiffs to challenge town's discriminatory boat-mooring fee under the Commerce Clause "because they used their boats only for recreational purposes and did not engage in any commercial activity that would be affected by the use fee"). 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 Association v. Douglas*, 541 F.Supp. 1287, 1306 (E.D. Va. 1982) ("The Court is not convinced that the Commerce Clause 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.") and *Davrod Corporation v. Coates*, 971 F.2d 778, 790 (1st Cir. 1992) (upholding state statute restricting commercial fishing boat length against commerce clause challenge) as well as *McCready v. Virginia*, *supra* note 68 and *Carlson v. State, Commercial Fisheries Entry Commission*, 919 P.2d 1337 (Alaska 1996). However, *see also Atlantic Prince, Ltd. v. Jorling*, 710 F.Supp. 893, 902 (E.D.N.Y. 1989) (invalidating state statute restricting commercial boat length on dormant commerce clause grounds).

[84] 405 U.S. at 714.

[85] *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.*

[86] 405 U.S. at 717. *See also Northwest Airlines, Inc. v. County of Kent, Michigan*, 510 U.S. 355 (1994): "To 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

Furthermore, even if the differential requirements did have greater impacts on interstate commerce than on intrastate commerce, such impacts would not be a *per se* violation of the "dormant" Commerce Clause. In such situations, the Court utilizes a "two-tiered" approach.[87]

> 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." [*Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)] 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.'" [*Oregon Waste Systems, Inc., v. Department of Environmental Quality of the State of Oregon*, 511 U.S. 93; 99 (1994), *quoting Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)][88]

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 there was 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[.]"[89]

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commerce." 510 U.S. at 369, *citing Evansville-Vanderburgh Airport Authority District*, 405 U.S. at 716-717. In an analogous case, a Commerce Clause challenge to certain Ohio fishing regulations was rejected 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) ("The statute and regulations in issue here cannot be interpreted as favoring local enterprise and intentionally discriminating against interstate commerce.").

[87] Coenen, *supra* note 82 at 808, *citing Ferndale Laboratories, Inc. v. Cavendish*, 79 F.3d 488, 494 (6th Cir. 1996).

[88] *Id.* (footnotes inserted into quotation).

[89] *Id.* at 814-815, *citing 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 preclusion of discrimination in sales of state-made cement might undermine state discrimination in other areas including education), *Vlandis v. Kline*, 412 U.S. 441, 453-54 (1973) ("the 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 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), *affirmed* 414 U.S. 1057 (1973) and *Starns v. Malkerson*, 326 F.Supp. 234, 241 (D. Minn. 1970) (upholding higher tuition for nonresident students of a public university), *affirmed* 401 U.S. 985 (1971). Coenen also notes that "lower courts have concluded without difficulty that discriminatory policies in charging tuition pose no dormant commerce clause problems." *Id. citing Harris v. Hall*, 572 F.Supp. 1054, 1058 (E.D.N.C. 1983) (rejecting a commerce clause challenge to school district tuition charge imposed only on

C. Example: Fee differentials in North Carolina

There are multiple examples of resident/nonresident fee differentials that have been implemented in North Carolina. The Wildlife Resource Commission, for example, charges nonresidents twice as much as residents for a state fishing license.[90] Furthermore, certain types of fishing licenses are not available to nonresidents.[91]

With regard to use of Lake Lucas, the City of Asheboro, North Carolina has imposed the following fee differentials:[92]

	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

Part VII: Do Lakeside Property Owners Possess Rights to Access and Use Lake Lure?

Those who have opposed 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 have asserted these arguments appear to be unfamiliar with the law applicable to riparian and littoral rights. They also appear to be unfamiliar with the unique legal history of Lake Lure.

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nondomiciliaries), *Landwehr v. Regents of University of Colorado*, 396 P.2d 451, 453 (Colo. 1964) (rejecting a challenge to university tuition for nonresidents that is three times larger than tuition paid by residents, without citation to authority, on ground that there is "no basis whatever for the contention ... that the statute violates [the Commerce Clause]") and *Hawaii Boating Association*, 651 F.2d at 665 (in rejecting commerce clause challenge to landing-berth boat fees, suggested the permissibility of imposing differential tuition). *See also* Heinzerling, "The Commercial Constitution," 1995 *Supreme Court Review* 217, 258 (1995) ("The benefits of public institutions such as schools, universities and libraries ... have all, traditionally and uncontroversially been distributed according to place of residency") and *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."), *citing Arredondo v. Brockette*, 482 F. Supp. 212, 218 (S.D. Tex. 1979) and *Spatt v. State of New York*, 361 F. Supp. 1048, 1053 (E.D.N.Y. 1973), *affirmed* 414 U.S. 1058 (1973).

[90] Residents are charged $15.00 while nonresidents are charged $30.00. For short term fishing licenses, residents are charged $5.00 while nonresidents are charged $10.00. http://www.ncwildlife.org (viewed 9 June 2004).

[91] Combination Hunting and Fishing licenses, County fishing licenses, Comprehensive fishing licenses and Sportsman fishing licenses are not available to nonresidents. *Id.*

[92] http://www.ci.asheboro.nc.us/Budget/budget_ordinance_2003-4.html (viewed 6 June 2004).

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Though the terms are frequently substituted for one another, a distinction needs to be drawn between "riparian" rights and "littoral" rights.[93] 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:[94]

> 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 ut currere solebat* [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.

In essence, riparian rights are rights associated with the use of water in rivers or streams adjacent to a landowner's property. Similar rights associated with the use of water contained in lakes or ponds adjacent to a landowner's property are referred to as "littoral" rights.[95] Littoral rights in general include (1) the "right to have the water remain in place and to retain, as much as possible, its natural character[,]" (2) the "right of access[,]" (3) "[s]ubject to reasonable restrictions, the right to wharf out to the navigable portion of a body of water[,]" and (4) "[t]he right of free use of the water immediately adjoining the property for the transactions of such business associated with his wharves or other such structures."[96]

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

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[93] *Accord*, *Weeks v. North Carolina Department of Natural Resources and Community Development*, 97 N.C.App 215, 216 note 1, 388 S.E.2d 228, 229 note 1 (1990) ("Although the terms 'riparian' and 'littoral' are often used interchangeably, plaintiff is a littoral proprietor.").

[94] Kent, 3 *Commentaries on American Law* §439. New York, NY: O. Halsted (1826). 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[.]" Blackstone, II *Commentaries on the Laws of England* 18. Chicago, IL: Callaghan and Company (1884).

[95] The term derives from the Latin *litus* meaning shore.

[96] Farnham, Waters and Water Rights §62 (1904), *cited in* Kalo, Hindreth, Rieser, Christie and Jacobson *Coastal and Ocean Law* 42 (2002) (footnote omitted). *Accord West v. Slick*, 313 N.C. 33, 61, 326 S.E.2d 601, 617 (N.C. 1985) ("in exercise of his right of access," littoral owner may "construct a pier in order to provide passage from the upland to the sea").

rights. Finally, assuming *arguendo* that littoral rights might exist, such rights are subject to regulation by both the Town of Lake Lure and the LLMC.

A. Littoral rights do not attach to artificial lakes.

As Dellapenna has noted, "[i]t is almost axiomatic that riparian [and littoral] rights do not attach to artificial waterbodies."[97] This conclusion reflects the general rule that neither riparian nor littoral rights "attach to artificial courses and conditions."[98]

Reaching a similar conclusion, Corbridge cites the decision of the Wisconsin Supreme Court in *Mayer v. Grueber*, 29 Wis.2d 168, 138 N.W.2d 197 (1965):[99]

> 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*[100] *is his to use as he sees fit*, provided, of course, that the use is lawful."[130] *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.[131] 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.[132] 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*[.]"[133]
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> [130] [*Mayer v. Grueber*, 29 Wis.2d] at 176, 138 N.W.2d at 204.
> [131] *Id.* at 177-78, 138 N.W.2d at 204-05.
> [132] *Id.* at 172, 138 N.W.2d at 200.
> [133] *Publix Super Markets, Inc. v. Pearson*, 315 So.2d 98, 99 (Fla. Dist. Ct. App. 1975), *cert. denied*, 330 So.2d 20 (1976). *See also United States v. 1,629.6 Acres of Land*, 335 F.Supp. 255 (.D. Del. 1971); *Thompson v. Enz*, 379 Mich. 667, 154 N.W.2d 473 (1967); *Bollinger v. Henry*, 375 S.W.2d 161 (Mo. 1964); *Drainage Dist. No. 1 of Lincoln County v. Suburban Irrigation Dist.*, 139 Neb. 333, 297 N.W. 645 (1941); *Fox River Flour & Paper Co. v. Kelley*, 70 Wis. 287, 35 N.W. 744 (1887). [Remainder of footnote omitted.]

Given that all land use decisions are factually specific, exceptions to this rule have emerged.[101] For example, littoral rights have been asserted successfully in artificial lakes when lakeside property

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[97] Dellapenna, "Introduction to Riparian Rights," §6.02(2) at 154 *in* Beck (ed.), 1 *Waters and Water Rights*, Charlottesville, VA: The Michie Company (1991).
[98] Evans, "Riparian Rights in Artificial Lakes and Streams," 16 *Missouri Law Review* 93, 106 (1951), *citing* Tiffany, 3 *Real Property* §767 (3rd edition 1939) and Washburn, 3 *Real Property* §1294 (6th edition 1902).
[99] Corbridge, *supra* note 2 at 907 (emphasis added).
[100] The importance of the "single owner" rule is discussed *infra*, text accompanying notes 109 and 110.
[101] Many of these exceptions are discussed in Dellapenna, *supra* note 97 at 156-157. Caselaw through the middle of the 20th century is summarized in Evans, *supra* note 98. *See also* Shannonhouse, "Some Principles of Water Law in the Southeast," 13 *Mercer Law Review* 345, 349-350 (1962).

owners contributed land for the construction of the lake.[102] Littoral rights have also been asserted successfully if the creation of such rights was the expectation of the parties at the time the artificial lake was constructed.[103] In other cases, owners of dams have been precluded 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.[104] Finally, littoral rights have been asserted successfully when *navigable* watercourses have been impounded to create artificial lakes.[105]

None of the exceptions to the general rule appear to be applicable to Lake Lure.[106] As discussed below, there was no expectation that littoral rights would attach to lakeside properties when Lake Lure was constructed. Sale of lakeside properties did not include rights to the use of Lake Lure. Furthermore, upland landowners did not contribute land for the construction of Lake Lure nor was the Rocky Board River navigable prior to construction of the lake.[107]

B. The unique legal history of Lake Lure precludes the assertion of littoral rights.

As more fully discussed in Part II, Chimney Rock Mountains, Inc. conveyed all of the land that was to become the bed of Lake Lure to the Carolina Mountain Power Company on 6 June 1925. Construction of the dam was completed in late 1926 with the full impoundment of Lake Lure being completed in 1927. On 12 August 1931, both the land and the lake were transferred to the Carolina Mountain Corporation

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[102] Evans, *supra* note 98 at 94-96 (discussion of *Kray v. Muggli*, 84 Minn. 90, 86 N.W. 882 (1901)).
[103] Dellapenna, *supra* note 97 at 155.
[104] *See generally* Evans, *supra* note 98 at 93-99 and Andes, "Divvying Atlantis: Who Owns the Land Beneath Navigable Manmade Reservoirs?" 15 *UCLA Journal of Environmental Law and Policy* 83, 98-100 (1996).
[105] Corbridge, *supra* note 2 at 910, 912-914. When a *non-navigable* watercourse is impounded, however, littoral rights do not attach to the resulting artificial lake. *Id.* at 918-919, *citing Fairchild v. Kraemer*, 11 A.D.2d 232, 204 N.Y.S.2d 823 (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]." 11 A.D.2d at 236, 204 N.Y.S.2d at 826.
[106] As discussed in Part II, note 26, 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.
[107] The test for determining the navigability of waters was established by the Supreme Court in *The Daniel Ball*, 77 U.S. 557 (1870):

> Those 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.

77 U.S. at 563. 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, 11 (1971).

(following foreclosure by Stroud & Company) and remained the property of the Carolina Mountain Corporation until 26 July 1965 when the property was acquired by the Town of Lake Lure.

This history, particularly the fact that Lake Lure has always had a single owner, is of particular importance to the alleged existence of littoral rights. As Corbridge has noted regarding artificial waterbodies, assertions of both riparian and littoral rights are "commonly denied" based on "one or more" of three rationales:[108]

> (1) the state only recognizes riparian [or littoral] rights where bottomland is owned;[176] (2) no riparian [or littoral] rights are recognized in artificial water;[177] 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.[178] This last approach is consistent with the treatment accorded by the courts to similarly situated *natural* waters.[179]

[176] *See, e.g., Mayer v. Grueber*, 29 Wis.2d 168, 138 N.W.2d 197 (1965).
[177] *See, e.g., Caflisch v. Clymer Power Corp.*, 125 Misc. 243, 211 N.Y.S. 338 (N.Y. Sup. Ct. 1925. [Remainder of footnote omitted.]
[178] *See, e.g. Wyandich Club v. Davis*, 33 A.D. 598, 53 N.Y.S. 993 (1898); *Lembeck v. Nye*, 47 Ohio St. 336, 24 N.E. 686 (1890); *Miller v. Lutheran Conference Camp Ass'n*, 331 Pa. 241, 200 A. 646 (1938); *Public Utilities Comm'n v. East Providence Water Co.*, 48 R.I. 376, 394, 136 A. 447, 454 (1927). *Cf. Brasher v. Gibson*, 101 Ariz. 326, 419 P.2d 505 (1966), *but cf. Hood v. Selfkin*, 88 R.I. 178, 143 A.2d 683, 686 (1958). *See generally* Annot., 57 A.L.R.2d 569, 592 (1958).
[179] *See, e.g. Osceola County v. Triple E Dev. Co.*, 90 So.2d 600 (Fla. 1956).

In his summary of the caselaw applicable to artificial waterbodies, Dellapenna discusses the importance of "a single owner" in determining whether littoral rights exist:[109]

> Whether to recognize riparian rights in an artificial lake or reservoir has proven more troublesome to courts than the question of whether to recognize riparian rights in an artificial watercourse. *If the artificial lake is entirely on a single owner's land,*[447] *courts have little hesitancy in treating it as entirely the owner's property even if the lake abuts, but does not encroach upon, the land of neighbors.*[448]

[447] *Votava v. Material Service Corporation*, 74 Ill.App.3d 208, 392 N.E.2d 768 (1979).
[448] *Publix Super Markets, Inc. v. Pearson*, 315 So.2d 98 (Fla.App.1975), *cert. denied*, 330 So.2d 20 (Fla. 1976); *Black v. Williams*, 26 Ill.App.3d 37, 324 N.E.2d 443 (1975); *Mayer v. Grueber*, 29 Wis.2d 168, 138 N.W.2d 197 (1965).

[108] Corbridge, *supra* note 2 at 915 (emphasis in original).
[109] Dellapenna, *supra* note 97 at 156 (emphasis added).

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The conclusions reached by both Corbridge and Dellapenna are directly applicable given that Lake Lure has always had a single owner, first the Carolina Mountain Power Company (1925-1931), then the Carolina Mountain Corporation (1931-1965), then the Town of Lake Lure (1965 to present).

In terms of the assertion of alleged littoral rights, the importance of Lake Lure having a single owner throughout its history cannot be overstated. As Shannonhouse has 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.*"[110]

As noted above, littoral rights may attach if that was the expectation of property owners when an artificial lake was constructed. With regard to such expectations when Lake Lure was created, however, it is important to note that the prospectus for Chimney Rock Mountains, Inc. includes 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.[.]"[111] It would appear from this that there was never an expectation that lakeside property owners would have a littoral right to access or use Lake Lure. Any such use would have been a privilege afforded (upon payment of an appropriate fee) by the Carolina Mountain Power Company, a subsidiary of Chimney Rock Mountains, Inc.[112] In essence, "private ownership of the lake ... deprived the abutting land of any lake privileges."[113]

This conclusion was reaffirmed in 1963 when the North Carolina General Assembly enacted the 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

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[110] Shannonhouse, *supra* note 101 at 354, *citing* 93 *Corpus Juris Secundum*, Waters §105 (1956) (emphasis added).
[111] *Lake Lure Development, supra* note 4 at 21. *Accord* Powers, *Development of Lake Lure, supra* note 6 at 3 (privileges "for using the lake in any capacity depended entirely upon the cooperation of the Carolina Mountain Power Company").
[112] 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 6 at 10 (summarizing events following a letter of 9 March 1936 from Lee Powers to Francis J. Heazel, Attorney at Law).
[113] *Id.* at 11 (summarizing events following a letter of 9 March 1936 from Lee Powers to Francis J. Heazel, Attorney at Law).

docks and boathouses are subject to removal upon the request of the private owner of the lake."[114] Furthermore, immediately after Lake Lure had been acquired by the Town of Lake 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."[115]

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 permission for such use was granted by the Carolina Mountain Power Company (1927-1931), by the Carolina Mountain Corporation (1931-1965)[116] or by the Town of Lake Lure following acquisition of the lake by the Town in 1965.

Against this background, it is important to note that littoral rights could have been acquired by adverse possession. In *Lake Drummond Canal and Water Company v. Burnham*, 147 N.C. 41, 60 S.E. 650 (N.C. 1908), the North Carolina Supreme Court concluded that a use easement for an artificial

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[114] House Bill 588, *quoted in Keeter v. Town of Lake Lure*, 264 N.C. at 260, 141 S.E.2d at 640 (emphasis added). This language was also included in the court's decision as a factual finding:

> From 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 v. Town of Lake Lure, 264 N.C. at 265, 141 S.E.2d at 644 (emphasis added).

[115] Wilson, J.P., Statement to the Press Regarding the Town Buying the Lake (26 July 1965), *quoted in* Powers, *Development of Lake Lure*, *supra* note 6 at 8. *See also Hyatt v. Town of Lake Lure*, Case No. 04-1102 (4th Cir. 2004). In a case involving the authority of the Town to impose conditions on the construction of seawalls along the shoreline of Lake Lure, the Court of Appeals noted that "by building her seawall too far into the Lake, and filling behind it, [the plaintiff] had also encroached upon the Town's property." Slip op. at 3-4.

[116] The Town of Lake Lure, which operated the recreational facilities located at the lake from 1936 until the lake was acquired by the Town in 1965, was essentially acting as an agent of the Carolina Mountain Corporation during this period. *See* Part II.C, note 23.

waterbody may be "established by reason of adverse possession or continuous invasion of another's rights."[117] The requirements had been summarized in *Felton v. Simpson*, 33 N.C. 84, 85 (1850):

> When one continues in the uninterrupted possession of land for thirty years or enjoys the use of a franchise for twenty 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 twenty years, a grant of the 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.

In essence, claims of adverse possession are defeated if the property use at issue was allowed (e.g., was "granted"). *Drummond Canal and Water Company*, 147 N.C. at 48, 60 S.E. at 650. On this point, the court in *Drummond Canal and Water Company* quoted the decision in *Mason v. R.R.*, 6 L.R., Q.B. 577, 586 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." 147 N.C. at 49, 60 S.E. at 653.

The presumption in North Carolina, however, is that use is permissive. This "permissive presumption" rule "creates a presumption that use is permissive until the contrary is shown[.]"[118] Because of this presumption, it is "difficult to establish adverse use" in North Carolina.[119]

Nonetheless, it is conceivable that littoral rights could have been established by the owner of property adjoining Lake Lure 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 (1965-1984) knew of the

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[117] 147 N.C. at 47-48, 60 S.E. at 652, *citing Gould on Waters* §§ 161, 340 (3rd edition); 3 *Fernman on Waters* 2400, 2435, 2436, 2437; *Arkwright v. Gell*, 5 M. & W. 202; *Mason v. R.R.*, 6 L.R., Q.B. 577, 586; *Greatrex v. Heyward*, 8 Exch. 290.

[118] Carmichael, Comment, "Sunbathers versus Property Owners: Public Access to North Carolina Beaches," 64 *North Carolina Law Review* 159, 166 (1985), *citing Dickinson v. Pake*, 284 N.C. 576, 580, 201 S.E.2d 897, 900 (1974), *Speight v. Anderson*, 226 N.C. 492, 39 S.E.2d 371 (1946), *Darr v. Carolina Aluminum Co.*, 215 N.C. 768, 3 S.E.2d 434 (1939), *Perry v. White*, 185 N.C. 79, 116 S.E. 84 (1923), *Nash v. Shute*, 184 N.C. 383, 114 S.E. 470 (1922), *State v. Norris*, 174 N.C. 808, 93 S.E. 950 (1917) and *Snowden v. Bell*, 159 N.C. 497, 75 S.E. 721 (1912).

[119] Carmichael, *id.*

adverse use and (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 of Lake Lure did something to indicate that the adverse use was not permissive.[120] However, as discussed below, the existence of such rights is of little consequence given the authority of both the Town of Lake Lure and the LLMC to regulate any littoral rights that may have been established through adverse possession.

D. Assuming *arguendo* that littoral rights have been acquired through adverse possession, such rights are subject to regulation by both the Town of Lake Lure and the LLMC.

It has been asserted by those who oppose the recommendations of the LAC that any regulation of littoral rights could constitute a taking of those rights for which the payment of compensation would be required. Simply stated, such assertions are without merit. As discussed in Parts III and IV, respectively, both the Town of Lake Lure 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 does not own the water.[121]

As property rights, however, both riparian and littoral rights are "incomplete" types of rights[122] "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.[123] First, "because their exercise may intrude on a public common, they are subject to several

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[120] The twenty year period could only have 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 have run.

[121] 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, termed an incorporeal hereditament rather than a corporeal right because the flow of water itself cannot be owned or possessed." Dellapenna, Part II: Riparianism, in *Waters and Water Rights* 85, 380 (Beck ed., 1991) (footnotes omitted). *Accord*, Matthews, "Water is not 'Real' Property," 85 *Water Resources Impact* 19 (1991), *citing* O'Brien, "New Conditions for Old Water Rights: An Examination of the Sources and Limits of State Authority," 35 *Rocky Mountain Mineral Law Institute* 24-1 (1988).

[122] Dellapenna, *id.* at 515, *citing* Tarlock, *Law of Water Rights and Resources* 3.203, at 3-96 to 3-97 (1989).

[123] Sax, "The Constitution, Property Rights and the Future of Water Law," 61 *University of Colorado Law Review*

original public prior claims, such as the navigation servitude and the public trust, and to laws protecting commons, such as water pollution laws."[124] Second, "their original definition, limited to beneficial or reasonable and non-wasteful uses, imposes limits beyond those that constrain most property rights."[125] Third, "insofar as water rights (unlike most other property rights) are granted by permit, they are subject to constraints articulated in the permits."[126] In essence, "water is not like real property, and using traditional property rights concepts should be avoided when discussing water."[127]

Nonetheless, as with the taking of a corporeal property right, the taking of riparian or littoral rights *may* require the payment of compensation.[128] The obligation to provide compensation arises when the exercise of a state's police power constitutes "a taking in the constitutional sense." As discussed by the Supreme Court in *Lucas v. South Carolina Coastal Council*,[129] 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. ... (At 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,"[130]

257, 260 (1990) (emphasis added).

[124] *Id.* This limitation is reflected in North Carolina caselaw. *See*, for example, *Weeks v. North Carolina Department of Natural Resources and Commercial Development*, 97 N.C. App. 215, 226, 388 S.E.2d 228, 234, *discretionary review denied*, 326 N.C. 601, 393 S.E.2d 890 (1990) (littoral rights are "subordinate to public trust protections").

[125] Sax, *supra* note 123 at 260. *Accord*, Matthews, *supra* note 121 at 19-20.

[126] Sax, *supra* note 123 at 260 (footnote omitted). *Accord*, Matthews, *supra* note 121 at 20.

[127] Matthews, *supra* note 121 at 19. *Accord*, Lauer, "The Riparian Right as Property – Recognized Limitations Upon the Riparian Right" in *Water Resources and the Law* 211, Ann Arbor, MI: Michigan University Law School (1958).

[128] "A state cannot take vested property rights, whether corporeal or incorporeal, without paying 'just compensation'[.]" Dellapenna, *supra* note 121 at 380 (footnote omitted). *Accord*, Matthews, *supra* note 121 at 20, *citing* Huffman, "Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrine at Work," 3 *Journal of Land Use and Environmental Law* 171 (1987).

[129] 505 U.S. 1003 (1992).

[130] *Lucas*, 505 U.S. at 1015, *citing Loretto v. Telepromoter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982) (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) (imposition of navigation servitude on privately owned marina will result in actual physical invasion of marina and requires Government to pay compensation) and *United States v. Causby*, 328 U.S. 256, 264-65 and note 10 (1946) (physical invasion of airspace may constitute taking). *See also Nollan v. California Coastal Commission*, 483 U.S. 825, 831-32 (1987) (taking occurs to extent of occupation without regard to whether action achieves important public benefit or has only minimal impact on the owner) and Sax, *supra* note 123 at 262.

and 2) compensation is also required when the effect of a governmental regulation "denies *all* economically beneficial or productive use of land."[131]

In the second situation, diminution of value cases, the courts have been "extremely deferential" to state regulators in determining each case's merits. Diminution in value of up to ninety percent of the value of the property has been sustained as not requiring the payment of compensation.[132] After *Lucas*, the percentage may have increased to ninety-five percent of the value of the property.[133] 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."[134]

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[131] *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 v. California Coastal Commission*, 483 U.S. at 831-32, *Keystone Bituminous Coal Association 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) and *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 295-96 (1981) (sustaining legislation requiring amelioration of impacts of strip mining). The Court went on to conclude 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 v. City of Tiburon*, 447 U.S. at 260.

[132] Sax, *supra* note 123 at 262-63 and note 18, *citing United States v. Riverside Bayview Homes*, 474 U.S. 121, 127 (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.") and *Keystone Bituminous Coal Association v. DeBenedictis*,, 480 U.S. at 513 (Rehnquist, C.J., dissenting) (suggesting that test should be whether regulation completely extinguishes value of property).

[133] As the Court stated:

> It 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 more strange 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 note 8.

[134] *Id.*, 505 U.S. at 1019 (footnote omitted, emphasis in original). North Carolina courts have reached the same conclusion. *See Shell Island Homeowners Association, Inc. v. Tomlinson*, 134 N.C. App. 217, 230, 517 S.E.2d 406, 415 (Ct. App. N.C. 1999) ("plaintiffs' complaint [does 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 Investments, Inc. v. Guilford County Board of Adjustment*, 133 N.C. App. 426, 431, 515 S.E.2d 715, 719 (Ct. App. N.C. 1999) (*quoting Guilford County Department of Emergency Services v. Seaboard Chemical Corporation*, 114 N.C. App. 1, 11-12, 441 S.E.2d 177, 183, *discretionary review denied*, 336 N.C. 604, 447 S.E.2d 390 (N.C. 1994), for the proposition that "An interference with property rights amounts to a taking where the plaintiffs are deprived of 'all economically beneficial or productive use.'") and *Williams v. Town of Spencer*, 129 N.C. App. 828, 832, 500 S.E.2d 473, 475 (Ct. App. N.C. 1998) (a taking of property had not occurred where "petitioners are not deprived of 'all economically beneficial or productive use' of their land").

THE LAW OF LAKE LURE

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 Constitution[135] and with North Carolina caselaw.[136] Any number of cases have upheld the constitutionality of legislation regulating water rights to protect natural resources. As Sax has noted, "legislation that constrains uses of property to achieve environmental protection goals is firmly within the police power, as is legislation that constrains property use in order to conserve scarce natural resources by requiring more efficient use."[137]

Such regulation of water rights (in general) and of both riparian and littoral rights (in specific) has seldom been seen to constitute a "taking" requiring the payment of compensation.[138] The claims of water rights owners for compensation have been denied routinely and these denials have been sustained upon appeal.[139] Furthermore, unlike many other law, regulation of water rights may be applied retroactively.

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[135] "No property right can be exempted from the full exercise of the police power." Sax, *supra* note 123 at 261 and note 7, *citing* Tribe, *American Constitutional Law* 9-10, at 618 (1988).

[136] As noted in *Slavin v. Town of Oak Island*, 160 N.C. App. 57, 584 S.E.2d 100 (Ct. App. N.C.), *discretionary review denied*, 357 N.C. 659, 590 S.E.2d 271 (N.C. 2003), "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[.]"'" 160 N.C. App. at 61, 584 S.E.2d at 102, *quoting Capune v. Robbins*, 273 N.C. 581, 588, 160 S.E.2d 881, 886 (N.C. 1968), *quoting Bond v. Wool*, 107 N.C. 139, 148, 12 S.E. 281, 284 (N.C. 1890).

[137] Sax, *supra* note 123 at 262 and note 12, *citing United States v. Riverside Bayview Homes*, 474 U.S. at 121, *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. at 264, *Agins v. City of Tiburon*, 447 U.S. at 255 and *State v. Dexter*, 202 P.2d 906, 908 (Wash.), *affirmed,* 338 U.S. 863 (1949) (sustaining a mandatory reforestation requirement, the court concluded that state is not "required by the constitution of the United States to stand idly by while its natural resources are depleted. ... Where 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.").

[138] "[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*, 160 N.C. App. at 61, 584 S.E.2d at 102.

[139] "The 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 123 at 259 note 4, *citing Town of Chino Valley v. City of Prescott*, 638 P.2d 1324, 1329-30 (Ariz. 1981), *appeal dismissed*, 457 U.S. 1101 (1982) (Arizona Groundwater Management Act of 1980 did not "deny appellants due process of law and does not require that they be paid compensation for any possible diminution of their rights which they may have had under the doctrine of reasonable use.") and *Baeth v. Hoisveen*, 157 N.W.2d 728, 733 (N.D. 1968) (sustaining state statute that required permit for use of ground water). *See also* Sax, "Property Rights in the U.S. Supreme Court: A Status Report," 7 *UCLA Journal of Environmental Law and Policy* 139, 145-47 (1988).

"It is not unconstitutional for regulation to constrain pre-existing uses or rights that were legal when initiated. Retroactivity is not the test of compensability."[140]

It must be noted, of course, that 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."[141]

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 the "public servitudes" (such as the public trust) that existed prior to the initiation of the right. As Sax has noted, "there 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 a servitude and a trust in favor of the public."[142] Specifically with regard to the regulation of riparian water rights, Dellapenna has concluded that "the public trust might itself be enough to uphold almost any conceivable regulated riparian statute."[143] Application of the public trust doctrine is discussed in the following section.

E. Example: *Slavin v. Town of Oak Island*

The decision in *Slavin v. Town of Oak Island*, *supra*, provides an excellent example of the limited nature of littoral rights.[144] 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 had adopted in

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[140] Sax, *supra* note 123 at 260. With regard to land use cases, for example, "valid 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 Hempsted,* 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) ("In no case does the owner of property acquire immunity against exercise of 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.") and *Erie R.R. Co. v. Board of Public Util. Commission*, 254 U.S. 394, 409-14 (1921) (Holmes, J.) (public and private rights should be balanced when regulations were challenged and public rights should prevail).

[141] *Goldblatt v. Town of Hempsted*, 369 U.S. at 594.

[142] Sax, *supra* note 123 at 269 (footnote omitted).

[143] Dellapenna, *supra* note 121 at 517.

[144] *See generally* Fork, *supra* note 32.

order to protect both turtle habitat and newly replenished sand dunes.[145] One provision of the Beach Access Plan restricted beach access to "designated public access points."[146] Plaintiffs challenged this provision, arguing that their littoral rights afforded them "a right of direct access to the ocean."[147] Plaintiffs also argued that the Beach Access Plan "constituted a taking of [plaintiffs' littoral rights] in violation of the federal and state constitutions."[148]

In a decision that would be particularly relevant to Lake Lure should any littoral rights be found to exist, the North Carolina Court of Appeals rejected the plaintiffs' arguments:[149]

> While 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. *See Capune v. Robbins*, 273 N.C. 581, 588, 160 S.E.2d 881, 886 (1968); *Bond v. Wool*, 107 N.C. 139, 148, 12 S.E. 281, 284 (1890). A littoral property owner's right of access to the ocean is a qualified one, *Capune*, 273 N.C. at 588, 160 S.E.2d at 886, and is subject to reasonable regulation, *Weeks*, 97 N.C. App. at 225-226, 388 S.E.2d at 234. 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.
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> 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.'" *Capune*, 273 N.C. at 588, 160 S.E.2d at 886 (*quoting Bond*, 107 N.C. at 148, 12 S.E. at 284). In *Weeks*, this Court held that appurtenant littoral rights are "subordinate to public trust protections." *Weeks*, 97 N.C. App. at 226, 388 S.E.2d at 234. 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.

Part 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 *Gwathney v. North Carolina*.[150] Certain individuals who oppose implementation of the LAC recommendations have argued that those recommendations are inconsistent with both the public trust doctrine and the *Gwathney*

[145] 160 N.C. App. at 58, 584 S.E.2d at 101.
[146] 160 N.C. App. at 59, 584 S.E.2d at 101.
[147] *Id.*
[148] *Id.*
[149] 160 N.C. App. at 60-61, 584 S.E.2d at 102.
[150] 342 N.C. 287, 464 S.E.2d 674 (1995).

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 *Gwathney* decision.

A. Background of the Doctrine:

The public trust doctrine developed primarily from Roman Law.[151] Gaius[152] included a discussion of rights in his *Institutes*. Some rights, he 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*)."[153]

The concept of public right (*publici juris*) contained in the *Institutes* of Justinian[154] 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,

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[151] *Accord*, Wilkinson, "The Headwaters of the Public Trust: Thoughts on the Source and Scope of the Traditional Doctrine," 19 *Environmental Law* 425, 429 (1989). Wilkinson notes 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* being 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 ensure to all members of the Moslem community the availability of water") and American Indian beliefs. *Id.* at 429, notes 21-24. Scott has noted that "the seminal principles from which the doctrine is derived purport to date to ancient Greece and Rome[.]" Scott, "The Expanding Public Trust Doctrine: A Warning to Environmentalists and Policy Makers," 10 *Fordham Environmental Law Journal* 1, 3-4 (1998).

[152] *Circa* 120 – post 178 A.D.

[153] *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." *Sweet's Law Dictionary* as cited in *Black's Law Dictionary* 1397 (4th edition 1968). "The word 'public' in this sense means pertaining to the people, of 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." *Blacks Law Dictionary* 1397 (4th edition 1968), *citing*, *State v. Lyon*, 63 Okla. 285, 165 P. 419, 420 (Oklahoma 1917).

[154] 535 A.D.

Justinian concluded in *Institutes* II that "[b]y the law of nature these things are common to mankind – the air, running water, the sea, and consequently the shores of the sea."[155]

The principles of Roman Law propounded by both Gaius and Justinian were incorporated into the Magna Charta in 1215[156] and became a part of the common law of England. As Wilkinson has 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."[157] Wilkinson also noted that there is conflicting authority over whether the Crown could convey *jus publicum* lands.[158]

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[155] "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." Brower, *Access to the Nation's Beaches: Legal and Planning Perspectives* 21 (Raleigh, NC: North Carolina State University, UNC Sea Grant Publication No. UNC-SG-77-18, 1978), *citing* Owens and Brower, *Public Use of Coastal Beaches* 15-26 (Raleigh, NC: North Carolina State University, UNC Sea Grant Publication No. UNC-SG-76-08, 1976).

[156] The appearance of the public trust doctrine in the Magna Charta was summarized in *Arnold v. Mundy*, 6 N.J.L 1 (New Jersey 1821):

> [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, 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.

6 N.J.L. at 70-75, *quoted in* Rasband, "The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines," 32 *Land and Water Law Review* 1, 22, note 76 (1997). As discussed by Rasband, the accuracy of this summary is open to question.

[157] Wilkinson, *supra* note 151 at 430-431 (footnotes omitted). *Accord* Ausness, "Water Rights, the Public Trust Doctrine, and the Protection of Instream Uses," 1986 *University of Illinois Law Review* 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 151 at 15, *citing Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842) (additional references omitted).

[158] "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 151 at 431, note 31.

THE LAW OF LAKE LURE

In 1715, the common law of England was adopted in North Carolina.[159] This legislation is now codified at N.C. Gen. Stat. §4-1:[160]

> *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 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.*

In general, two themes run through the decisions in cases involving the public trust doctrine. First, the doctrine serves as a restraint on alienation,[161] precluding states from alienating property "common to all mankind" that is held in trust by the state.[162] At issue in *Illinois Central R.R. v. Illinois*,[163] for example, was an attempt by the state legislature to convey virtually the entire Chicago waterfront to

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[159] "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.'" *Gwathney*, 342 N.C. at 296, 464 S.E.2d at 679, *citing State v. Willis*, 255 N.C. 473, 474, 121 S.E.2d 854, 854 (1961) and *State v. Lackey*, 271 N.C. 171, 155 S.E.2d 465 (1967).

[160] "The 'common law' referred to in N.C. Gen. Stat. § 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." *Gwathney*, 342 N.C. at 296, 464 S.E.2d at 679, *citing State v. Vance*, 328 N.C. 613, 403 S.E.2d 495 (1991) and *Steelman v. City of New Bern*, 279 N.C. 589, 184 S.E.2d 239 (1971). Rasband has described the public trust doctrine at the time of the American Revolution as follows:

> By 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 proof.

Rasband, *supra* note 156 at 11.

[161] "Traditionally, the public trust 'functioned as a restraint on the states' abilities to alienate public trust lands.'" Carmichael, *supra* note 118 at 176, *quoting District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1082-1083 (D.C. Cir. 1984). "The traditional role of the public trust doctrine has been to restrain governmental activities that impair public rights[.]" Ausness, *supra* note 157 at 414 (footnotes omitted). Scott has noted, however, that caselaw is inconsistent regarding the extent to which alienation is prohibited:

> Some 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 151 at 22 (footnotes omitted). The inconsistent interpretation of the public trust doctrine over time is discussed in Scott at 24-36.

[162] "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 v. Mundy*, *supra*.

[163] 146 U.S. 387 (1892).

the railroad.[164] Invalidating the conveyance, the Supreme Court reaffirmed the validity of the public trust doctrine: "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."[165]

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.[166] For example, in upholding use restrictions intended to protect riverine resources, the Court of Appeals in *Morse v. Oregon Division of State Lands*[167] noted: "These 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.*"[168]

The most significant public trust doctrine case to date has been *National Audubon Society v. Superior Court*,[169] 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. The California Supreme Court restated the public trust doctrine as "an affirmation of the duty of the state to protect the peoples' 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."[170] The state was

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[164] 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 156 at 63. *Accord* Ausness, *supra* note 157 at 412 and Wilkinson, *supra* note 151 at 452.

[165] 146 U.S. at 453. The rule in North Carolina is somewhat different. *See* text accompanying notes 30 to 37, *infra*.

[166] 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 157 at 426, *citing National Audubon Society v. Superior Court*, 33 Cal.3d 419, 445, 658 P.2d 709, 189 Cal. Rptr. 346 (Calif.), *cert. denied*, 464 U.S. 977 (1983).

[167] 581 P.2d 520 (Ore.App. 1978).

[168] 581 P.2d at 524 (emphasis added).

[169] 33 Cal.3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (Calif.), *cert. denied*, 464 U.S. 977 (1983).

[170] 33 Cal.3d at 441.

held to have an affirmative and continuing duty to evaluate the impact of water allocations on trust resources and to protect those resources whenever feasible.[171] "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.*"[172]

B. Description of the public trust doctrine in North Carolina:

As noted above, the common law of England was adopted in North Carolina over sixty years prior to the American Revolution. By adopting the common law, the State also adopted the public trust doctrine.[173]

Following the Revolution, the State of North Carolina "became the owner of lands beneath navigable waters[.]"[174] In *Gwathney*, the North Carolina Supreme Court addressed two public trust doctrine issues: First, what was the appropriate definition of "navigable" waters? Second, what was the authority of the State to convey "lands beneath navigable waters"?

Definition of "navigable" waters

With regard to the appropriate definition of "navigable" waters, the petitioners argued that waters should be considered navigable if they were, in fact, used for navigation. The State of North Carolina argued that waters were navigable if they were subject to the ebb and flow of the tides.[175]

The answer was of significant importance because the State Board of Education between 1926 and 1945 had conveyed marshlands owned by the state that were located between the high and low water marks in the Middle Sound area of New Hanover County. In 1987, pursuant to N.C. Gen. Stat. §146-20.1(b), the Division of Fisheries, Department of Natural Resources had issued "resolution letters purporting to validate

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[171] 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 157 at 426.
[172] 33 Cal.3d at 425-426 (emphasis added).
[173] "North Carolina accepted the public trust doctrine in *Shepard's Point Land Co. v. Atlantic Hotel* [132 N.C. 517, 44 S.E. 39 (1903)] in which the Supreme Court of North Carolina quoted the decision in *Illinois Central* with approval [132 N.C. at 525-28, 44 S.E. at 41-42]. Carmichael, *supra* note 118 at 177.
[174] *Gwathney*, 342 N.C. at 293, 464 S.E.2d at 677.
[175] The "ebb and flow" test was the navigability test that arose under the common law of England.

the plaintiffs' titles to the marshlands [which] were accompanied in each case by a purported reservation of public trust rights in those same marshlands."[176]

Of particular importance (and apparently assumed in *Gwathney*) is the fact that the "lands beneath navigable waters" referred to lands owned by the State of North Carolina. 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 submerged land* underlying navigable waters, including estuarine marshland, and a concept embracing asserted inherent public rights in these lands and waters."[177]

In essence, the plaintiffs argued that the public trust doctrine applied only to state-owned lands underlying waters that were navigable in fact while the State argued that the public trust doctrine applied to state-owned lands underlying waters that were subject to the ebb and flow of the tides. 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.[178] This conclusion was affirmed by the North Carolina Supreme Court.

State authority to convey public trust doctrine lands

As noted above, the Supreme Court in *Illinois Central R.R. v. Illinois*[179] suggested that it was not possible for a state to convey lands to which the public trust applied.[180] This rule has not been followed in all of the states.[181]

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[176] 342 N.C. at 291, 464 S.E.2d at 676.
[177] 342 N.C. at 293, 464 S.E.2d at 677-678, *quoting* Kalo and 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 *North Carolina Law Review* 565, 572 (1986) (emphasis added). *Accord*, North Carolina Department of Justice, Advisory Opinion No. 346 (20 January 1998) (the public trust doctrine applies to "the state's navigable waters").
[178] 342 N.C. at 291, 464 S.E.2d at 677.
[179] 146 U.S. 387 (1892).
[180] "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." 146 U.S. at 453.
[181] With regard to the authority to states to convey such lands, Corbridge has noted that in many states the public trust doctrine "established 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 2 at 898. With regard to the restraint on alienation, Ausness concluded that the public trust doctrine "protects the

The North Carolina Supreme Court addressed this issue in *Gwathney*, concluding that it was within the authority of the General Assembly to convey public trust doctrine lands. 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*:

> Navigable 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.[182]

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 ... was mere *obiter dictum*, unsupported by our laws or our Constitution, and is hereby expressly disapproved."[183]

The court also cited *State ex rel. Rohrer v. Credle*:

> Navigable 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.[184]

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

> The 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.[185]

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, public trust doctrine lands may not be

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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 157 at 408, *citing* Sax, "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention," 68 *Michigan Law Review* 471, 484 (1970) and Comment, "The Public Trust Doctrine Expansion and Integration: A Proposed Balancing Test," 23 *Santa Clara Law Review* 211, 211 (1983) (emphasis added).

[182] 136 N.C. 603, 609, 48 S.E. 586, 588 (1904).

[183] 342 N.C. at 302, 464 S.E.2d at 683.

[184] 322 N.C. 522, 527, 369 S.E.2d 825, 828 (1988), *citing Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 44 S.E. 39 (1903).

[185] 342 N.C. at 302-303, 464 S.E.2d at 683 (emphasis added).

conveyed by the General Assembly.[186]

C. Applicability of the Public Trust Doctrine to Lake Lure:

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

> The 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.' " [*State v. Twilford*,] 136 N.C. [603,] 608-09, 48 S.E. [586,] 588 (*quoting Attorney General v. Woods*, 108 Mass. 436, 440 (1871)). 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.[187]

Neither of the conditions precedent to application of the public trust doctrine would apply to Lake Lure. At no time was the bed of the lake owned by the State of North Carolina.[188] Furthermore, the lake could not have been navigable "in its natural condition" because it is an artificial waterbody.

Nonetheless, Lake Lure is owned by the Town of Lake Lure and held in trust for the benefit of the citizens of the Town of Lake Lure.[189] As a result, the public trust doctrine may be as applicable to the Town

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[186] "[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." 342 N.C. at 293, 464 S.E.2d at 678, *citing Atlantic & North Carolina R.R. Co. v. Way*, 172 N.C. 774, 776-78, 90 S.E. 937, 938-40 (1916). "[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*, 339 N.C. 588, 590, 453 S.E.2d 147, 149 (1995). However, this presumption is overcome by a special grant from the General Assembly expressly conveying lands underlying navigable waters in fee simple and without reservation of any public trust rights." 342 N.C. at 304, 464 S.E.2d at 684, citing *Ward v. Willis*, 51 N.C. 183, 185-186 (1858) (per curiam). "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*. 342 N.C. at 304, 464 S.E.2d at 684 (emphasis added).

[187] 342 N.C. at 301, 464 S.E.2d at 682 (emphasis added). *Accord*, North Carolina Department of Justice, Advisory Opinion No. 346, *supra* note 177, *citing Gwathney* 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).

[188] It has been argued by those who opposed the LAC recommendations 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 *Gwathney* 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.

of Lake Lure (regarding Lake Lure) as it was applicable to the State of North Carolina (regarding the Middle Sound area of New Hanover County).[190]

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. The Town would also have a fiduciary obligation to protect the assets of the trust, specifically the lake itself.[191]

It is well established that the police power may be exercised by both the State of North Carolina and political subdivisions of the State 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 *State of North Carolina v. Stewart*[192] 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."[193]

The need to exercise the police power to protect the assets of the trust was addressed by the Washington Supreme Court in a case involving the regulation of personal water craft. In *Weden v. San Juan County*,[194] the court concluded that a county ordinance prohibiting such craft was consistent with Washington's public trust doctrine. Specifically, the court ruled that "it would be an odd use of the public

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[189] This conclusion is reflected in the decision of the Court of Appeals in *Hyatt v. Town of Lake Lure*: "The Town has both *the right* and *the duty* to protect the environment and prevent overuse of the Lake." Slip op. at 10 (emphasis added). Consequently, it may be advisable to amend the language of proposed Ordinance No. 01-12-11 to state unequivocally that the Town of Lake Lure holds Lake Lure in trust for the benefit of the citizens of the Town. The proposed Ordinance is discussed in Part V.

[190] 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. It may be appropriate to consider similar legislation for real property held in trust by political subdivisions of the state.

[191] As Andes has noted, "it is settled that states' responsibilities for navigable waters constitutes a fiduciary trust." Andes; *supra* note 104 at 87, *citing Illinois Central R.R. Co.*, 146 U.S. at 453.

[192] 40 N.C. App. 693, 253 S.E.2d 638 (Ct. App. N.C. 1979).

[193] 40 N.C. App. at 695, 253 S.E.2d at 640, *citing Baldwin v. Montana Fish and Game Commission.*, 436 U.S. 371, 56 L.Ed. 2d 354, 98 S.Ct. 1852 (1978) and *State v. Lassiter*, 13 N.C. App. 292, 185 S.E. 2d 478 (1971), *cert. denied*, 280 N.C. 495, 186 S.E. 2d 514, *appeal dismissed*, 280 N.C. 724, 186 S.E. 2d 926 (1972).

[194] 958 P.2d 273 (Wash. 1980).

trust doctrine to sanction an activity that actually harms and damages the waters and wildlife of this state."[195]

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 of Lake Lure to liability based on a breach of trust theory. Andes has noted that public trust responsibilities "are serious and subject to equally serious judicial scrutiny."[196] This conclusion is summarized by Ausness:[197]

> [C]ourts can enforce the public trust doctrine against the government itself.[240] Standing requirements are generally not very restrictive,[241] 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.[242] This inquiry may lead to outright reversal of a legislative or administrative decision;[243] 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.[244]
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> [240] Berland, "Toward the True Meaning of the Public Trust," 1 Sea Grant Law Journal 83, 120-21 (1976).
> [241] *See generally* Note, "Public Trust in Public Waterways, 7 *Urban Law Annual* 219, 234-243 (1974).
> [242] *See generally* Sax, "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention," 68 *Michigan Law Review* 471, 557-565 (1970).
> [243] *See, e.g., Gould v. Greylock Reservation Commission*, 350 Mass. 410, 215 N.E.2d 114 (1966), *Neptune City v. Avon-by-the-Sea*, 61 N.J. 296, 294 A.2d 47 (1972) and *Priewe v. Wisconsin State Land & Improvement Co.*, 93 Wis. 534, 67 N.W. 918 (1896).
> [244] *See, e.g., National Audubon Society v. Superior Court of Alpine County*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *cert. denied*, 464 U.S. 977 (1983), *United Plainsmen Association v. North Dakota State Water Conservation Commission*, 247 N.W.2d 457 (N.D. 1976) and *Muench v. Public Service Commission*, 261 Wis. 492, 53 N.W.2d 514 (1952).

D. Example: *State 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. During the summer months, the Tommy Bartlett Water

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[195] 958 P.2d at 284, *quoted in* Christie, "Marine Reserves, the Public Trust Doctrine and Intergenerational Equity," 19 *Journal of Land Use & Environmental Law* 427, 432 (2004).
[196] Andes, *supra* note 104 at 87, *citing Arizona Center 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 Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Idaho 1983) and Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," *supra* note 181.
[197] Ausness, *supra* note 157 at 435. (The footnotes have been modified in order to make them complete in the context of the excerpt.)

Show performs water ski exhibitions on one portion of the lake. 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 Lake Delton for the exclusive use of the Water Show during performance periods. In essence, the ordinance zoned the lake, with one area being reserved for performances, and required a license before such performances could be offered to the public. The only license applicant was the Tommy Bartlett Water Show.

The ordinance was challenged by the Wisconsin Department of Natural Resources as violating Wisconsin's public trust doctrine. The Department of Natural Resources also asserted that the ordinance violated both the Due Process Clause and the Equal Protection Clause of the U.S. Constitution.

In *State v. Village of Lake Delton*,[198] the state's challenges were rejected. Dismissing the argument that the ordinance violated the public trust doctrine, the court concluded:

> [N]o 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.[199]

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."[200]

To determine whether the ordinance violated the Wisconsin public trust doctrine, the court applied a two-part test:[201] First, did the ordinance serve a legitimate public purpose? Second, if so, did the ordinance employ reasonable means to accomplish that the purpose? Answering both of these questions in the affirmative, the public trust doctrine challenge raised by the Department of Natural Resources was rejected.

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[198] 93 Wis.2d 78, 286 N.W.2d 622 (Ct. App. Wisc. 1979).
[199] 93 Wis.2d at 97, 286 N.W.2d at 632, *citing Milwaukee v. State*, 193 Wis. 423, 214 N.W. 820 (1927) and *Merwin v. Houghton*, 146 Wis. 398, 131 N.W. 838 (1911).
[200] 93 Wis.2d at 111-112, 286 N.W.2d at 640, *citing Angelo v. Railroad Commission*, 194 Wis. 543, 554, 217 N.W. 570 (1928) and *Rossmiller v. State*, 114 Wis. 169, 181, 89 N.W. 839 (1902).
[201] 93 Wis.2d at 102, 286 N.W.2d at 635.

The court also rejected the state's Equal Protection and Due Process challenges: "Finally, 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."[202]

Part IX: Conclusions

Both the Town of Lake Lure and the Lake Lure Marine Commission 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 if it could be proven that the injuries were the result of the Town's negligence.

Exercise of 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 have the effect of converting Lake Lure from the property of the Town of Lake Lure 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.

What the *Gwathmey* decision does do is to reinforce 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

[202] 93 Wis.2d at 104, 286 N.W.2d at 635.

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*, 283 U.S. 336 (1931), Justice Oliver Wendell Holmes was referring 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." As with the Delaware, Lake Lure is a treasure. Also as with the Delaware, use of the treasure must be both protected and preserved.