
Harold N. Skelton
HOUSES ON THE SAND: TAKINGS ISSUES SURROUNDING STATUTORY RESTRICTIONS ON THE USE OF OCEANFRONT PROPERTY

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And everyone that heareth these sayings of mine, and doeth them not, shall be likened unto a foolish man, which built his house upon the sand, and the rain descended, and the floods came, and the winds blew, and beat upon that house; and it fell; and great was the fall of it.

Matthew 7:26

I. INTRODUCTION

The place where the ocean’s power meets the mass of the continent is a unique and fragile environment. The coastal zone is a dynamic system of moving sand and water vital to the quality of life along the seaboards. Beaches and near-shore sand systems absorb the erosive force of ocean tides and waves. They are also a first natural line of defense against the extraordinary energy of ocean storms. The sand system bears the brunt of these storms, buffering their severe winds and tides before they reach populated inland areas.4

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* Articles Editor, 1990–1991, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.
1 "‘Coastal zone’ means all coastal waters and submerged lands seaward to the State’s jurisdictional limits and all lands and waters in the counties of the State which contain any one or more of the critical areas.” S.C. CODE ANN. § 48-39-10 (Law. Co-op. 1976). The same section defines “critical area” as coastal waters, tidelands, beaches, and primary ocean-front sand dunes. Id.
2 Georgia law states: “The General Assembly finds and declares that coastal sand dunes, beaches, sandbars, and shoals comprise a vital natural resource system, known as the sand sharing system, which acts as a buffer to protect real and personal property from the damaging effects of floods, winds, tides, and erosion . . . ” GA. CODE ANN. § 12-5-231 (1982), cited in Pendergrast, The Georgia Shore Assistance Act, 17 NAT. RESOURCES LAW. 397 (1984).
3 Id.
Thousands of acres of salt marsh provide protection for wildlife, and generate the tons of organic material, microorganisms, and crustaceans on which near-shore marine life ultimately depends for food. The marshes are also essential barriers between the ocean and fresh water aquifers on which many inland communities depend. Finally, the coastal zone represents an unparalleled recreational resource, providing days tinctured with sun, clean sand and water, and pristine air. Those privileged to dwell in the coastal environment recognize its sublime beauty and inestimable value.

The qualities that make the coastal zone an important resource make it one of the most desirable areas in which to live. But the incessant change that lends the coast its drama also brings peril to its residents. The day-to-day forces of wind and tide constantly reshape the littoral geography. A storm of any magnitude can work changes sufficient to render sections of the coast unrecognizable. Those who build on the shore soon come to realize that their tenure there is limited to a grace period granted by these natural forces.

Recognizing the dangers of erosion and storm or finding their properties imminently threatened, many littoral proprietors take steps to protect their holdings. Others, less fortunate, face the

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5 Chatham, Mass., Wetlands Protection Regulations § 2.06(1) (Oct. 29, 1986).
6 Id.
7 Id.
8 South Carolina statutes provide:
The General Assembly finds that: (1) The beach/dune system along the coast of South Carolina is extremely important to the people of this State and serves the following functions . . . (d) provides a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being . . . .

9 See W. KAUFMAN & O. PILKEY, supra note 4, at 224.
10 “Littoral” is an adjective meaning “of or existing on a shore.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 763 (New College ed. 1978).
11 For a discussion of the effects of winds, tides and storms on barrier island geography, see S. LEATHERMAN, BARRIER ISLAND HANDBOOK 47–74 (1980). For a more general discussion, see W. KAUFMAN & O. PILKEY, supra note 4, at 65–83.
12 Some of the devices proprietors may erect in an effort to protect their holdings are:

(a) seawall: a special retaining wall designed specifically to withstand normal wave forces;
(b) bulkhead: a retaining wall designed to retain fill but not withstand wave forces or an exposed shoreline;
(c) revetment: a sloping structure built along a scarp or in front of a bulkhead to protect the shoreline or bulkhead from erosion;
(d) groin: shore protective structure consisting of a long pile of rip-rap extending from the beach backshore into the surf zone, perpendicular to the shoreline.

See S. LEATHERMAN, supra note 11, at 89–104.
necessity of rebuilding after calamity strikes. The conflict thus engendered is the subject of this Comment.

Littoral proprietors affected by restrictive regulations may bring "takings" suits against the governmental bodies that promulgate the regulations. These suits allege that when governments prevent owners from building protective barriers on their properties or prevent them from rebuilding ruined structures, the government's actions amount to uncompensated takings of private property in violation of the fifth and fourteenth amendments to the United States Constitution. This Comment sets out a framework and method for examining littoral takings suits to determine whether they can be successful.

Section II of this Comment describes recent events in Chatham, Massachusetts, and along South Carolina's Outer Banks. These events are presented as paradigms for the types of events and conflicts discussed in the remainder of the Comment. Section III discusses the common-law doctrine of reasonable use, and its relationship to analysis of takings claims in a littoral context. Section IV of this Comment discusses the relevant aspects of takings jurisprudence. Finally, Section V draws conclusions about the viability of littoral takings claims by analyzing the paradigms presented in light of the law developed.

II. TWO RECENT COASTAL DISASTERS

A. Chatham, Massachusetts

On January 2, 1987, a severe northeasterly storm combined with an unusually high tide to breach the barrier beach protecting Chatham Harbor and the headlands of the Town of Chatham, Mass-

13 See infra notes 48–56 and accompanying text for examples of the destruction wrought by Hurricane Hugo in September of 1989.
14 See infra notes 34–39, 57–59 and accompanying text.
15 See infra notes 40–41, 62 and accompanying text for descriptions of circumstances giving rise to two takings suits.
16 See infra notes 81–84.
17 "Headland" is a noun meaning "a point of land, usually high and with a sheer drop, extending out into a body of water; promontory." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 607 (New College ed. 1978).
sachusetts from the Atlantic Ocean. The breach and its subsequent widening and north-south oscillation replicated patterns of change in Nauset Beach that recur in cycles of 140 to 150 years.

To the historical observer, the barrier beaches protecting central Cape Cod represent an evolving system of shifting geologic features. From decade to decade, sand stripped from northerly beaches is deposited to form new barriers to the south. Beaches thinned in this way are eventually breached. The new inlets widen and shift, yielding to the erosive force of tide and wind. As changing land forms redirect the energy of sea and storm, the beaches respond in a constant cyclical evolution. The current breach, locally referred to as “New Inlet,” mirrors a previous “new inlet” that developed in 1846.

Chatham’s Nauset Beach is typical of the land forms enclosing thousands of miles of the coastal United States. These shifting sand forms protectively envelop the more geologically durable coastal mainland. The malleable beaches provide an absorbent buffer between populated headlands and the unimpeded energy of the open ocean and its storms. Although breaches are expected and predictable in areas like Chatham, the effects of a breach can be extensive and devastating.

The Chatham breach opened a section of the barrier beach that lay about a kilometer across Chatham Harbor from the inner shore. On the mainland, opposite the opening, stood an enclave of expensive waterfront homes owned by long-time summer and year-round residents. By January of 1988, a year after the initial breach, New

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19 See id. at 13–15.
20 Id. at 3.
21 Id. at 3–5.
22 Id.
23 See id. at 15, 18.
24 See id. at 4, 14.
25 See generally S. Leatherman, supra note 11, at 1–18. These land forms include barrier islands, bay barriers, tombolos, and barrier spits. The land form protecting Chatham Harbor takes the form of a double barrier spit. Id. at 10.
27 Id. at 31.
28 United States Geological Survey: Chatham Quadrangle, Barnstable County, Massachusetts, 7.5 minute series (topographic).
Inlet had grown to over a mile in width. The now-unimpeded force of the winter Atlantic and its northeasterly storms pounded through the opening. Erosion of the inner shore accelerated tremendously. Homeowners who before the breach had crossed seventy-five yards of sandy beach to reach the harbor found their homes perched precariously on the edge of the sea.

The affected property owners petitioned the Town of Chatham to allow them to build protective barriers, called revetments, in an effort to protect their homes. Although sympathetic to the plight of the homeowners, the town denied them the necessary construction permits because the anticipated revetments would have violated a state environmental-protection regulation.

In relevant part, the Massachusetts Wetlands Protection Regulations prohibit any alteration of a coastal sand dune that could (1) affect the ability of waves to remove sand from the dune, (2) modify the dune so as to increase the potential for storm or flood damage, or (3) interfere with the lateral movement of the dune. While the regulations permit certain minimal alterations to existing structures, they explicitly prohibit the construction of coastal engineering devices. Because several of the threatened houses were situated on coastal dunes, the Town of Chatham denied their owners permission to build revetments.

On January 21, 1988, the progress of the ocean's assault on the once-stable Chatham headlands could be measured in inches per minute. On January 22, neighbors and town officials watched as a...
four-bedroom house belonging to New Jersey judge Benjamin Galanti slid into the sea.\textsuperscript{41} In the following weeks an adjacent house had to be moved to the rear of its lot as the sea continued to consume the shoreline properties at an alarming rate.\textsuperscript{42}

The town’s refusal to allow protective construction may have amounted to an uncompensated public taking of private property, violating the fourteenth amendment to the Constitution. The affected residents filed a suit seeking ten million dollars in damages from the state.\textsuperscript{43} Because the plaintiffs had not exhausted their administrative appeals, and because, in any event, the state would not be held responsible for “acts of God,” a Massachusetts Superior Court judge dismissed the homeowners’ suit.\textsuperscript{44}

\textbf{B. South Carolina’s Outer Banks}

Born in the Caribbean in mid-September, 1989 as a tropical disturbance, hurricane Hugo intensified to a class four hurricane\textsuperscript{45} during its slow march to the northwest. By September 21 Hugo was poised off the South Carolina coast. The National Weather Service accurately predicted the midnight landfall\textsuperscript{46} of one of the most powerful storms to strike the North American continent in this century.\textsuperscript{47}

Just before midnight on September 21, the temporarily deserted barrier island community of Isle of Palms, South Carolina felt the vengeance of Hugo’s 135 mile-per-hour winds, and five foot storm surge.\textsuperscript{48} By the time Hugo’s destructive force had passed the island and roared into Charleston Harbor to descend on the city of Charles-

\textsuperscript{41} Id.
\textsuperscript{42} Howe, Judge Dismisses Suit Filed By Chatham Homeowners, Boston Globe, May 28, 1988, at 72, col. 1.
\textsuperscript{44} Howe, \textit{supra} note 42, at 72, col. 1.
\textsuperscript{45} The National Hurricane Center in Miami, Florida rates the weakest hurricanes “class one” and the strongest “class five.” W. KAUFMAN & O. PILKEY, \textit{supra} note 4, at 134.
\textsuperscript{47} In this century only the Labor Day storm in 1935 and Hurricane Camille in 1969 have been rated class five at the time they made landfall. W. KAUFMAN & O. PILKEY, \textit{supra} note 4, at 134. Hurricane Hugo had been downgraded from class five to class four at the time it struck the South Carolina coast. Nonetheless, as a class four hurricane it was still among the most powerful storms to strike the North American continent in the past 100 years. Telephone conversation with the National Hurricane Center in Miami, Florida (Jan. 6, 1990).
\textsuperscript{48} Parker & Booth, \textit{supra} note 46, at 1, col. 6. A “storm surge” is a super-elevated mound of water that sweeps across the coastline near the area where a hurricane passes or makes landfall. S. LEATHERMAN, \textit{supra} note 11, at 59.
ton, a swath of devastation lay in its wake. The following week, their return delayed by fears of civil disorder, the 8,000 residents of this wealthy year-round coastal community came home to a scene of awesome destruction.\textsuperscript{49} Hugo demolished as many as twenty percent of the island's homes.\textsuperscript{50} Flooding heavily damaged others filling them with mud and sewage.\textsuperscript{51} Few homes were unaffected.\textsuperscript{52}

On the Isle of Palms and neighboring Sullivans Island, Hugo's mighty wind ripped houses in half.\textsuperscript{53} The wind lifted other houses from their foundations, carried them yards, and dumped them capriciously on the grounds of neighboring estates.\textsuperscript{54} In a few instances Hugo obliterated houses entirely, leaving nothing but pieces of heavy mechanical equipment to mark the places where they had been.\textsuperscript{55}

Fifty miles to the north, the community of Pawleys Island had fared little better. On September 27, resident Luke Ellerbe surveyed the flattened beach where Hurricane Hugo had flung one of his four houses into the other three.\textsuperscript{56} The Washington Post reported Ellerbe's frustration and anger over the fact that South Carolina's recently enacted comprehensive coastal-management laws will probably restrict his ability to rebuild on the property.\textsuperscript{57} Passed in 1988, the law generally prohibits construction in a so-called "erosion zone" encompassing an area from the tide line to twenty feet landward of the first coastal sand dune.\textsuperscript{58} The law prohibits rebuilding of any houses within the zone that are deemed two-thirds destroyed.\textsuperscript{59}

The Post reported that Ellerbe depends on rental proceeds from his houses to provide substantial retirement income.\textsuperscript{60} He occupies one house and rents the others for as much as $1,250 a week during the tourist season.\textsuperscript{61} Ellerbe purchased the houses in 1948 for $15,000.\textsuperscript{62} He had them on the market, before Hugo, for $3.5 mil-

\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{57} See id.
\textsuperscript{59} Brisbane, \textit{supra} note 56, at A3, col. 1.
\textsuperscript{60} Id. at A3, col. 2.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
Ellerbe plans to remove the demolished house and consider building two more where it had stood. His plans, though, may be frustrated. While a building inspector has yet to make the determination, it appears that Ellerbe's property lies in the "erosion zone" where rebuilding is to be prohibited.

From Daufuskie Island near the Georgia border, north through Hilton Head, St. Helena, Edisto, Sullivans, Isle of Palms, and Pawleys, the Outer Banks of South Carolina set the stage for a flood of litigation sure to follow Hugo's night visit. Littoral proprietors, deprived of the right to rebuild their homes and businesses, will bring suit against South Carolina. They will claim that state enforcement of the coastal-management laws would amount to a regulatory taking of their property without compensation, in violation of their constitutional rights. Littoral proprietors like Luke Ellerbe may be expected to mount a vigorous constitutional challenge against the new coastal-management laws.

III. THE REASONABLE USE DOCTRINE

The reasonable use doctrine is a common-law doctrine used to settle disputes between landowners who have common interests in the control of water. Disputes to which the doctrine has been applied arise in several different contexts. Originally, the doctrine was used to adjudicate suits brought by landowners when a neighboring proprietor altered land contours or built devices that diverted damaging surface water onto the plaintiff's

63 Id.
64 Id.
66 Id. (the "erosion zone" is informally referred to as the "dead zone").
68 In August, 1989, a property owner on the Isle of Palms, South Carolina, was awarded $1.2 million by a state court after he sued the state over the South Carolina Beachfront Management Act. The court ruled that the state could not deprive the owner of the right to build on the property without paying compensation. South Carolina has appealed the decision, and the outcome of the appeal is pending. Applebome, After Hugo, a Storm Over Beach Development, N.Y. Times, Sept. 24, 1989, at A1, col. 3 (national ed.).
68 One court defined "surface water" as follows:
Surface water means the water from rains, springs, or melting snows which lies or flows on the surface of the earth but does not form part of a well-defined body of water or a natural watercourse. It does not lose its character as surface water merely
The doctrine also has been applied to resolve complaints engendered when a littoral proprietor erects a protective structure, causing accelerated damage to a neighboring beach-front parcel. Finally, in some parts of the country, the doctrine is fundamental in allocating water use rights among competing riparian proprietors.

Grounded in the tort law of nuisance, the reasonable use doctrine is inherently flexible. It requires balancing a proprietor’s interest in a particular use of property against the consequences of that use to neighbors and the surrounding community. When the utility to a proprietor of an anticipated use outweighs its detriment to the community, the reasonable use doctrine establishes the proprietor’s right to that use. If a proprietor’s anticipated use amounts to a public nuisance, however, the doctrine will prohibit it.

As with any pliant legal construct, the reasonable use doctrine gains its flexibility at the cost of simplicity. Effective application of the doctrine requires a complex calculus to balance competing rights and interests. The following are among the factors considered in determining whether or not a use is reasonable:

1. whether the defendant has secured a license for the use and whether the licensing conditions have been met;
2. the purpose of the defendant’s use;
3. the suitability of the use to the watercourse;

because some of it may be absorbed by or soaked into the marshy or boggy ground where it collects.


See, e.g., Bassett v. Salisbury Mfg. Co., 43 N.H. 569, 577 (1862) (“Any interference by one land-owner with the natural drainage, injurious to the land of another, and not reasonable, is unjustifiable.”).

See Lummis v. Lilly, 385 Mass. 41, 46, 429 N.E.2d 1146, 1149 (1984) (“There is no sound reason for imposing the obligation of reasonable use on riparian owners, while permitting littoral owners to use their property without any limitations.”).

See, e.g., Evans v. Merriweather, 3 Ill. 492 (1842). “Each riparian proprietor is bound to make such a use of running water as to do as little injury to those below him as is consistent with a valuable benefit to himself. The use must be a reasonable one.” Id. at 496.


Id.

Id.; Restatement (Second) of Torts § 850A (1965).


Pendergrast, 293 N.C. at 216, 236 S.E.2d at 796. In Pendergrast the North Carolina Supreme Court adopted the reasonable use rule recognizing that the rule imposes liability when harmful interference with the flow of surface water is unreasonable and causes substantial damage. The court further recognized that, analytically, a cause of action for unreasonable interference with the flow of surface water is a private nuisance action. Id.
(4) the economic value of the use;
(5) the social value of the use;
(6) the amount and extent of harm the use causes;
(7) the practicality of avoiding the harm by adjusting the use or method of use of one owner or the other;
(8) the practicality of adjusting the quantity of water used by each owner;
(9) the protection of existing values of water uses, land, investment, and enterprise; and,
(10) the justice of requiring the user who is causing harm to bear the loss.77

Obviously, not all of these factors are relevant in every context. Nonetheless, from state to state, and regardless of context, the determining factors have remained substantially consistent.78 Evaluating the relevant factors in light of the circumstances of a particular case involves a factual determination. For that reason, the evaluation is a task for the jury or other trier of fact.79

The reasonable use doctrine can be useful in analyzing littoral takings claims because if an anticipated use is unreasonable by the doctrine's standards, then prohibition of the use as a nuisance presents no constitutional issue. Conversely, if the anticipated use is reasonable, a strong presumption exists that a landowner has a right to the use.80 Statutory prohibition of a reasonable use presents the elements of an interesting takings suit. Thus, the reasonable use doctrine can be used as an initial test of the viability of a potential

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78 See, e.g., Lummis, 385 Mass. at 46-47, 429 N.E.2d at 1150. Factors that bear on the reasonableness of a particular use of water include: whether the defendant secured a license for the use; whether the defendant met the conditions of the license; the purpose of the defendant's use; the suitability of the use to the watercourse; the economic value of the use; the extent and amount of harm caused by the use; the practicality of avoiding the harm by adjusting the quantity of water used by each owner; the protection of the existing values of water uses, land, investments, and enterprise; and the justice of requiring the owner causing the harm to bear the loss. Id.; see also Enderson v. Kelehan, 226 Minn. 163, 168, 32 N.W.2d 286, 289 (1948). Property owners act reasonably with regard to surface water drainage if there is necessity for such drainage; if care is taken to avoid harming the land receiving the drained water; if the benefit to the land drained outweighs the gravity of harm to the land receiving the drainage; and if, where feasible, drainage is accomplished by improving the natural drainage system. Id.; Pendergrast, 298 N.C. at 217, 236 S.E.2d at 797. Determining reasonableness of use involves considering the extent and character of the harm to plaintiff; the social value the law attaches to the type of use that is invaded; the suitability of the use to the locality; and the burden on the plaintiff to minimize the harm. Id.
79 Annotation, supra note 67, at 435. RESTATEMENT (SECOND) OF TORTS § 850A comment a (1965); Lummis, 385 Mass. at 46, 429 N.E.2d at 1149-50.
80 See supra notes 75-76 and accompanying text.
takings action. Only when an anticipated use is reasonable can a landowner mount a takings suit with any likelihood of success.

IV. Takings Issues

The federal government, the state governments, and municipal governments through the states, have the power to regulate private property use in order to advance legitimate governmental interests. The fifth amendment to the United States Constitution, however, prohibits the federal government from taking private property for public use without compensating the owner. The fourteenth amendment extends the taking prohibition to the states. When regulation of private property use becomes so burdensome as to amount to a taking, the law requires the regulator to compensate the owner for the value of the property taken.

A. The Basic Elements of a Takings Cause of Action

There are two essential elements to a takings cause of action. The plaintiff must have an interest in property, and the government, or an agent of the government, must interfere with that interest. Without these two elements, no cause of action exists and no takings suit will succeed.

For the purpose of takings jurisprudence, the term "property" is construed to include both tangible property and intangible property rights. The term encompasses the full array of rights inherent in an individual's relationship to a physical or legal entity. Governmental interference can range from mild regulation of peripheral property rights to outright physical occupation of land.

81 See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).
82 The fifth amendment reads in part: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V; see also Pennsylvania Coal, 260 U.S. at 415.
83 The fourteenth amendment reads in part: "[N]or shall any State deprive any person of ... property, without due process of law ..." U.S. CONST. amend. XIV, § 1; see also Chicago, Burlington and Quincy R.R. v. Chicago, 166 U.S. 226, 239 (1897) (holding in part that the fourteenth amendment extends the prohibition against uncompensated public taking of private property to the states).
84 Pennsylvania Coal, 260 U.S. at 415.
87 See id.
Establishing the elements of a takings cause of action is relatively easy when claims involve governmental appropriations or invasion of real or personal property. The Supreme Court has recognized causes of action where a municipality built a street across a railroad right-of-way, where a municipal ordinance required landlords to permit the installation of an electronic device on tenement rooftops, and where military airplanes persistently violated private airspace.

Establishing a cause of action is slightly harder when claims involve regulation of intangible property rights. Nonetheless, courts readily recognize takings conflicts when government regulates any nontrivial property interest to a proprietor’s detriment. For example, the Supreme Court has recognized causes of action in suits alleging infringement of such intangible property interests as the right to alter an individual historic landmark, the right to develop real estate for industrial use, and the right to offer goods for sale.

B. The Two Avenues of Takings Jurisprudence

Viewed broadly, there are two ways to win a takings suit. The first is to prove that a regulatory statute or ordinance serves no legitimate public purpose. This avenue of takings jurisprudence has been termed the “poison-purpose” approach. The poison-purpose approach usually will be ineffective when coastal-management regulations foreclose a littoral proprietor’s right to construct defensive barriers or rebuild a damaged or demolished structure. The purposes

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88 See Chicago, Burlington and Quincy R.R., 166 U.S. at 230.
90 See United States v. Causby, 328 U.S. 256, 258 (1945) (taking found when frequent overflights by military aircraft prevented continuing use of property as poultry farm).
93 See Andrus v. Allard, 444 U.S. 51, 64 (1979) (no taking found when federal law prohibited sale of certain Native American artifacts held as inventory by antiquities dealer).
94 See Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (no taking found when “open-space” zoning ordinance limited number of houses developer was permitted to build).
of coastal-management regulations include protecting human life, avoiding rescue costs, avoiding the costs of building and maintaining protective structures, protecting coastal wetlands, and preserving the aesthetic quality of the seacoast.\textsuperscript{97}

There is no doubt that specific instances of coastal-management regulations with illegitimate purposes exist.\textsuperscript{98} Generally, however, the regulations serve to further legitimate governmental interests. Further, the judiciary customarily defers to the legislature when questions of legislative purpose are at issue.\textsuperscript{99} For these reasons littoral proprietors will find it difficult to win takings suits by arguing that coastal-management regulations serve no legitimate public purpose.

The second way to prevail in a takings suit is to demonstrate that even if a regulation serves a legitimate governmental purpose, it burdens a private property interest so heavily that the regulation amounts to a taking.\textsuperscript{100} This avenue of takings jurisprudence is referred to as the "excessive burden" approach in this Comment. Proprietors utilizing the excessive burden approach argue that regulation is so burdensome that it amounts to an act of eminent domain, and as such must be compensated.\textsuperscript{101}


\textsuperscript{98} Nollan v. California Coastal Commission, 483 U.S. 825 (1987), is a much-cited example of a recent Supreme Court decision that rested on one permutation of the "poison-purpose" reasoning. The Court found that the California Coastal Commission's imposition of an access easement requirement on appellant’s rebuilding permit did not serve to further the purposes of the permit requirement and therefore amounted to a violation of appellant’s rights under the takings clauses of the fifth and fourteenth amendments. \textit{Id. at} 837.


The . . . law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the . . . requirement . . . . It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. \textit{Id. at} 487–88.

\textsuperscript{100} See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (statute forbidding mining of coal so as to cause subsidence of, and damage to, surface structures found excessively burdensome to coal operator’s previously existing contract and property rights).

\textsuperscript{101} \textit{Id. at} 413. Eminent domain is the power to take private property for public use by the state, municipalities, and private persons or corporations authorized to exercise functions of a public character. The right of eminent domain is the right of the state to reassert, either temporarily or permanently, its domain over any portion of the soil of the state on account of public exigency and for the public good. Thus, in time of war or insurrection, the proper authorities may possess and hold any part of the territory of the state for the common safety; and in time of peace the legislature may authorize the appropriation of the same to public
There is no set formula for determining when a regulation becomes so burdensome as to effect a taking. The result of a takings analysis based on excessive burden depends largely on the circumstances of the particular case under consideration. The Supreme Court has recognized the ad hoc aspect of the excessive burden approach to takings jurisprudence. In spite of its ambiguity, plaintiffs in littoral takings suits most likely will utilize the excessive burden approach because the poison-purpose approach to a littoral takings claim is likely to prove a dead end. The remainder of this section provides an analytic structure that resolves some of that ambiguity.

C. A Way to Think About Excessive Burden Analysis

Given the ad hoc nature of takings jurisprudence generally, it is not surprising that there are nearly as many approaches to analyzing takings claims based on excessive burden as there have been cases alleging it. One way to bring a degree of order to the amorphous body of case law on the subject is to think of any governmental infringement of private property rights as a taking. Having taken private property for public purposes, the Constitution imposes an obligation on the government to compensate the owner for the value of the property.

The government can escape its obligation to pay compensation under either of two circumstances. When a prohibited use amounts to a public nuisance, the government need not compensate for prohibiting the use. The government can prevent a proprietor from using property in a way that causes affirmative harm without incurring an obligation to compensate. Recall that in suits between private

purposes, such as the opening of roads, construction of defenses, or providing channels for trade or travel. BLACK'S LAW DICTIONARY 470 (5th ed. 1979).


103 United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) ("Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case.").

104 Pennsylvania Coal, 260 U.S. at 416 (the burden imposed by regulation "is a question of degree—and therefore cannot be disposed of by general propositions").


106 See supra notes 81–84 and accompanying text.

individuals a land use that amounts to a nuisance will fail to satisfy the requirements of the reasonable use doctrine. The reasonable use doctrine does not recognize any right on the part of a proprietor to use land in a manner that creates a nuisance. Similarly the common law recognizes the government's right to prevent a private landowner from using property in any way that would create a nuisance. Unreasonable, nuisance-creating uses of land fail a critical threshold test. The government can prohibit such uses without incurring any obligation to compensate the proprietor.

The government can also avoid compensating owners for the value of property taken if the proprietors derive sufficient benefit from a regulation to offset its costs. Proprietors may benefit in various ways from the general effects or specific provisions of a regulatory statute or ordinance. If these “reciprocal benefits” are sufficient to offset the costs that the regulation imposes on the affected proprietors, then further compensation is not required. Unlike the nuisance exception, the presence of adequate reciprocal benefit is not an exception to the government’s obligation to compensate when it takes private property for public purposes. Rather, reciprocal benefit analysis recognizes that the required compensation need not take the form of a settlement check issued by the government to proprietors.

1. A Threshold Test: Nuisance or Reasonable Use?

In jurisdictions that rely on the reasonable use doctrine to adjudicate disputes over the control of water, owners who make unreasonable use of property are liable to parties injured by the use. In a civil action, an injunction prohibiting the unreasonable use will issue in favor of the injured party. The offending party also will be required to pay for the injured party's damages. When a use is reasonable, however, the reasonable use doctrine establishes an owner's right to the use. Anyone wishing to foreclose a proprietor's reasonable use will be obliged to pay the owner to forego the use;

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108 Penn Central, 438 U.S. at 147 (Rehnquist, J., dissenting) (citing Pennsylvania Coal 260 U.S. at 415).
109 See infra notes 180–188 and accompanying text.
112 Id.
they will have to purchase the owner’s right to use the property reasonably.

The nuisance exception to the prohibition against uncompensated takings is a direct analogue to the reasonable use rule in the realm of public law. When governmental regulation interferes with a reasonable use of property, the government is obliged to pay the owner to forego the use.113 When a prohibited use amounts to a public nuisance, however, the government can prohibit the use without providing compensation.114 Thus, if a plaintiff’s excessive burden takings suit is to succeed, the plaintiff must first prove that the use foreclosed by regulation is a reasonable use, not a public nuisance.

Defining nuisance, then, becomes a primary task. At the outset, it is important to recognize and reject an obvious, but tautological, possibility. In defending takings suits, advocates for the regulator may be tempted to define any use of property that violates a statute or ordinance authorized by a legitimate public purpose as a nuisance. Violating any governmental act that survives the “poison-purpose” test would be, by this definition, a nuisance. Any such use could be prohibited without compensation.

At least one Supreme Court Justice has explicitly recognized the illegitimacy of this circular definition.115 Justice Rehnquist rejected the tautology and reached a broader definition: when a prohibited use is dangerous to the safety, health, or welfare of the community, the use amounts to a public nuisance.116 Courts that find such affirmative danger will not require the regulator to compensate even if diminution in value to the proprietor is extreme.117

Takings cases decided in favor of the regulator on the grounds that a regulated use was a public nuisance fall into two general classes. In the first are cases in which proprietors deliberately devoted their property to uses considered directly inimical to the health or morals of the public.118 In *Mugler v. Kansas*,119 for example, a

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113 *See supra* notes 104–110 and accompanying text.
114 *Mugler v. Kansas*, 123 U.S. 623, 669 (1887); *see also* Pennsylvania Coal Co. v. Mahon, 260 U.S. 413, 417 (1922) (Brandeis, J., dissenting).
116 *Id.*
117 *See, e.g.*, *Powell v. Pennsylvania*, 127 U.S. 678, 682 (1887) (because oleo margarine found to be an “impure food product,” no compensation required when Pennsylvania pure food statute rendered manufacturing plant commercially useless); *see infra* notes 119–21 and accompanying text.
118 *See Mugler v. Kansas*, 123 U.S. 623, 624 (1887) (alcoholic beverages); *Powell*, 127 U.S. at 678 (impure food product).
119 123 U.S. 623 (1887).
brewer brought an unsuccessful takings suit against the state of Kansas when the state enforced a prohibition on the manufacture and sale of alcoholic beverages to close down the brewer's business.\textsuperscript{120} The Supreme Court declined to require the state to compensate owners for losses sustained "by reason of their not being permitted, by a noxious use of their property, to inflict injury on the community."\textsuperscript{121}

Cases in which normally accepted activities are prohibited because they are inappropriate in particular settings constitute a second class of nuisance cases.\textsuperscript{122} These cases commonly arise in disputes about zoning, where residential areas have grown up around previously existing industrial uses.\textsuperscript{123} The "second-class" nuisance cases are characterized by hazards incident to normally accepted uses that impose danger on the health or material well-being of the community. In \textit{Goldblatt v. Town of Hempstead},\textsuperscript{124} for example, a town exercised its police power to pass an ordinance that required a proprietor to close an open, water-filled gravel quarry that attracted neighborhood children.\textsuperscript{125} The Supreme Court recognized a presumption that any exercise of the police power is reasonable unless the plaintiff proves otherwise.\textsuperscript{126} Because the proprietor had failed to introduce any evidence tending to prove that using the property as a gravel quarry did not create a nuisance, the Court declined to require the town to compensate the quarry owner.\textsuperscript{127}

In this second class of nuisance cases, as long as the proprietor is not denied all economic benefit from the property, the regulator is not required to provide compensation.\textsuperscript{128} This holds true even when regulations foreclose the most profitable use of the property.\textsuperscript{129} Theoretically, if a regulation extinguishes all economic benefit, courts will require some compensation.\textsuperscript{130} The case law indicates, however,

\textsuperscript{120} Id. at 654--55.
\textsuperscript{121} Id. at 669.
\textsuperscript{122} See infra notes 123--35 and accompanying text.
\textsuperscript{123} See, e.g., Goldblatt v. Town of Hempstead, 369 U.S. 590 (1961) (no taking when previously existing gravel quarry closed down because of danger to suburban residents); Hadachek v. Sebastian, 239 U.S. 394 (1915) (no taking when previously existing brickyard closed down as source of irritants to suburban community).
\textsuperscript{124} 369 U.S. 590 (1961).
\textsuperscript{125} Id. at 595.
\textsuperscript{126} Bibb v. Navajo Freight Lines, 359 U.S. 520, 529 (1958) (state exercises of police power presumed valid when challenged under the due process clause of the fourteenth amendment).
\textsuperscript{127} Goldblatt, 369 U.S. at 595.
\textsuperscript{128} Id. at 592; see also Hadachek v. Sebastian, 239 U.S. 394, 412 (1915).
\textsuperscript{129} Goldblatt, 369 U.S. at 592.
\textsuperscript{130} Hadachek, 239 U.S. at 418.
that courts have relied on rather improbable findings of remaining value to deny compensation to affected proprietors.\textsuperscript{131}

A third class of cases aids in defining the parameters of the nuisance exception. Cases in which generally acceptable uses of property are prohibited in order to enhance or affirmatively benefit the public health and welfare are distinct from nuisance cases. It may be difficult to determine where the line between nuisance and enhancement lies. Nonetheless, as with most legal questions of degree, some cases clearly fall on the enhancement side of the line. \textit{Penn Central Transportation Co. v. New York City} is an enhancement example.\textsuperscript{132}

In that case, the Supreme Court recognized that an ordinance prohibiting construction of an office tower atop a historically significant mid-Manhattan building was designed to promote the general welfare.\textsuperscript{133} It is reasonable to infer from that finding that the Court did not consider the proposed use a nuisance. Indeed, in his dissent to \textit{Penn Central}, Justice Rehnquist made this inference explicit by characterizing the ordinance as one designed not to prohibit a nuisance, but to affirmatively enhance public welfare.\textsuperscript{134}

The fact that a prohibited use is reasonable, and thus does not represent a nuisance, does not resolve the issue of whether the regulator is obligated to pay compensation to the affected proprietor. Rather, the nuisance test is a threshold inquiry.\textsuperscript{135} When a prohibited use is determined to be a nuisance, further takings analysis becomes unnecessary. If a prohibited use is found reasonable, however, the plaintiff’s claim for compensation requires further analysis. The net

\textsuperscript{131} See, \textit{e.g.}, \textit{Goldblatt}, 369 U.S. at 594 (lacking evidence to contrary, court concludes that value remains in gravel mine closed by municipal ordinance); \textit{Hadachek}, 239 U.S. at 412 (court finds value remaining in regulated brickyard because brick clay can be removed to alternate location for manufacture into bricks).


\textsuperscript{133} \textit{Penn Central}, 438 U.S. at 125. In \textit{Penn Central} the Court concluded that New York City’s historic preservation ordinance did not work a taking under the circumstances of the case. The Court reached its conclusion not because the proposed alteration would have created a nuisance, but because the ordinance permitted continued beneficial use of the site, and afforded the appellant valuable development opportunities at other sites. \textit{Id.} at 138.

\textsuperscript{134} See \textit{id.} at 146 (Rehnquist, J., dissenting).

\textsuperscript{135} See \textit{id.} at 144–47 (Rehnquist, J., dissenting). Justice Rehnquist recognized that the government need not compensate a proprietor when it prohibits a use that amounts to a public nuisance. Thus, a finding in a takings case that a prohibited use is a nuisance is tantamount to a decision favoring the regulator. Therefore, determining whether or not a prohibited use is a nuisance becomes a critical threshold in takings analysis. \textit{Id.}
cost of regulation to the property owner becomes the single remain­
ing inquiry.¹³⁶

2. Net Cost Analysis

An anticipated use that survives the nuisance threshold test is a rea­sonable use.¹³⁷ When governmental regulation prohibits a reason­able use, the affected proprietor is entitled to compensation.¹³⁸ Com­pensation can take one of two forms. The government may compen­sate the owner in money for the value of the property taken. Alter­natively the general effects or specific provisions of the regu­latory statute or ordinance may adequately compensate the owner’s loss.¹³⁹

The purpose of net cost analysis is to determine whether, in a given instance, the benefits accruing to a proprietor through regu­lation adequately offset the costs the regulations impose on the proprietor.¹⁴⁰ The inquiry is essentially a cost/benefit analysis in which a number of different factors contribute to determining the values on each side of the equation.¹⁴¹

The first part of the analysis involves a number of factors that contribute to the overall cost of regulation. The immediate economic cost¹⁴² of governmental action or regulation represents the sum of three separate factors: the value of property lost or destroyed,¹⁴³ diminution in the value of property,¹⁴⁴ and the value of lost oppor­tunity.¹⁴⁵ When the state physically appropriates property, the owner loses all of its value. This kind of appropriation is typical when the government takes property by eminent domain in order to facili­tate public works. Property destruction also may result from gov­ernmental invasions that fall short of appropriation. For example, when repeated overflights of military aircraft cause livestock to panic

¹³⁶ Id. at 147.
¹³⁷ See supra notes 111–14 and accompanying text.
¹³⁸ See supra notes 104–10 and accompanying text.
¹³⁹ See Penn Cent., 438 U.S. at 147–50 (Rehnquist, J., dissenting).
¹⁴⁰ See id. at 147.
¹⁴¹ See infra notes 143–77 and accompanying text.
¹⁴² The author apologizes for the imprecision of the term “immediate economic costs” in a context in which all the relevant costs are economic. The term is meant to designate those costs that are readily quantifiable and result in an immediate change in the financial position of the person subject to regulation.
¹⁴³ United States v. Causby, 328 U.S. 256, 259 (1945).
and die, the owner loses the value of the livestock.\textsuperscript{146} The value of property lost through state appropriation, or destroyed as a result of invasive state action, is one factor that contributes to immediate economic cost.

A second factor determining immediate economic cost is diminution in the value of property due to governmental action or regulation.\textsuperscript{147} The Supreme Court has considered cases in which the importance of diminution costs varied greatly. For example, when a municipality built a public street across a railroad right-of-way, diminution in the value of the plaintiff’s property was very slight.\textsuperscript{148} On the other hand, when a federal law prohibited the sale of certain Native American artifacts, diminution amounted to almost the whole value of the inventory belonging to a dealer in such antiquities.\textsuperscript{149}

Finally, the value of lost opportunity is properly included in assessing the immediate economic cost of governmental actions and regulations.\textsuperscript{150} For example, when regulation prevents a developer from building rental property, the value of existing or reasonably ascertainable leases represents an opportunity cost of the prohibition to the developer.\textsuperscript{151}

Pinpointing the cost of lost opportunity is complicated by the difficulty of finding a rational cut-off point for such costs.

When regulation prevents the "best" or "most profitable" use of property, the courts will weigh that fact as a factor in cost assessment.\textsuperscript{152} It is not clear, however, that the factor has significant independent effect on the decisions in takings cases. In those cases involving substantial reasons for the court to find for the plaintiff, a finding that governmental action interfered with the best use telegraphs a decision in the plaintiff’s favor.\textsuperscript{153} When the court has independent reasons for finding no compensable taking, however,

\begin{footnotesize}
\begin{enumerate}
\item 146 See United States v. Causby, 328 U.S. 256, 259 (1945).
\item 147 See, e.g., Chicago, Burlington and Quincy R.R. v. Chicago, 166 U.S. 226, 241 (1897) (basis of suit is claimed diminution in value of railroad property after municipality constructed road across right-of-way); Andrus v. Allard, 444 U.S. 51, 64 (1979) (basis of suit is claimed diminution in value of inventory belonging to dealer in antiquities when federal law prohibits sale of certain Native American artifacts).
\item 148 Chicago, Burlington and Quincy R.R., 166 U.S. at 241 (municipality constructed public street across railroad right-of-way).
\item 149 See Andrus v. Allard, 444 U.S. 51, 54 (1979) (antiquities dealer prohibited from offering certain Native American artifacts for sale).
\item 151 See id.
\item 152 E.g., Agins v. City of Tiburon, 477 U.S. 255, 262 (1980); Penn Central, 438 U.S. at 120; United States v. Causby, 328 U.S. 256, 259 (1945).
\item 153 See Causby, 328 U.S. at 256 (chronic invasion of private airspace found a compensable taking).
\end{enumerate}
\end{footnotesize}
the fact that regulation prohibits best use has little offsetting influence.\(^{154}\)

The court's ambivalence about denial of best use may be attributable to the fact that "best use" has no independent meaning. When "best use" means "most profitable use," the analysis logically is subsumed under consideration of the immediate economic costs of lost opportunity.\(^{155}\) When factors other than loss of potential profits come into play, it may make sense to consider denial of best use as part of the cost of prohibiting an existing use or a primary expectation about future use.\(^{156}\)

Foreclosure of an existing use,\(^{157}\) or a primary investment-backed expectation about future use,\(^{158}\) by governmental action or regulation is a factor that disposes the courts to look favorably on a plaintiff's taking claim.\(^{159}\) The courts have considered this factor in many takings cases, and while it is influential, it is not dispositive of the takings claim.\(^{160}\) In fact, the influence of this factor may be greatest in reverse. A finding that regulation does not interfere with present use telegraphs a decision favoring the regulator.\(^{161}\) Similarly, when regulations do not interfere with primary investment-backed expectations, courts are unlikely to find a compensable taking.\(^{162}\)

An established tenet of takings analysis is that extinguishing a "single strand" in a "full bundle" of property rights does not, in itself, amount to a compensable taking.\(^{163}\) Courts are disposed to find in favor of proprietors, however, if regulation leaves property with no remaining economically viable use.\(^{164}\) The court's rationale is that when no economically viable use remains, the regulation is tantamount to a physical appropriation.\(^{165}\)

\(^{154}\) See Penn Central, 438 U.S. at 120.

\(^{155}\) See supra notes 150–152 and accompanying text.

\(^{156}\) See infra notes 161–165 and accompanying text.

\(^{157}\) See Causby, 328 U.S. at 256 (repeated overflights of military aircraft prevent continuing use of property as poultry farm).


\(^{159}\) See Keystone, 480 U.S. at 470; Causby, 328 U.S. at 256.

\(^{160}\) See, e.g., Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (no taking when historic preservation ordinance forecloses anticipated construction of office tower atop Grand Central Station); see supra note 123.

\(^{161}\) Penn Central, 438 U.S. at 136.

\(^{162}\) Keystone, 480 U.S. at 485.

\(^{163}\) Andrus v. Allard, 444 U.S. 51, 65–66 (1979); see also Keystone, 480 U.S. at 470 (statute foreclosed right to mine certain coal); Penn Central, 438 U.S. at 104 (ordinance foreclosed right to develop air space).

\(^{164}\) Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915) (citing Ex parte Kelso, 147 Cal. 609, 82 P. 241, (1905)).

\(^{165}\) See Keystone, 480 U.S. at 516 (Rehnquist, J., dissenting) ("Our decisions establish that governmental action short of any physical invasion may constitute a taking because such
Allocation of risk is the final factor in assessing the cost that regulation imposes on proprietors. In *Keystone Bituminous Coal Ass’n v. DeBenedictis*, coal proprietors purchased the so-called “support estate” from surface landowners. Controlling this interest enabled the coal proprietors to mine without regard for surface damage resulting from subsidence. In effect, mine owners purchased the right to expose surface proprietors to the risk of damage incident to subsidence. Assuming a willing seller and buyer in a voluntary exchange, the economic value of the risk was reflected accurately in the purchase price of the support estate.

When the Pennsylvania Subsidence Act foreclosed the mine owner’s rights to extract coal without regard to subsidence damage, the value they had exchanged for that right was lost to them. In *Keystone Bituminous*, the Supreme Court recognized this cost, but did not find it compelling. Regulated proprietors fared better in *Pennsylvania Coal Co. v. Mahon*. Justice Holmes concluded his analysis of that case by recognizing the injustice of depriving the coal operators of the value they had exchanged in order to insulate themselves from subsidence risk. Even in dissent, Justice Brandeis recognized the costs that risk reallocation imposed on the plaintiffs. Justice Brandeis would have invoked the nuisance exception to the taking prohibition, however, to uphold the regulatory act in spite of risk costs to the coal companies.

The risk factor will not always be explicit, as it was in the cases just discussed. Implicit risk factors are frequently overlooked in takings analysis. For example, in *Hadachek v. Sebastian*, there was no intimation that suburban home buyers were unaware of the presence of an operating brickyard in the vicinity of their houses.
Presumably, the buyers paid a lower purchase price for their property in recognition of this unsavory neighbor. When regulation closed the brick kilns, the brick company essentially absorbed the cost of these negative premiums. The Court's analysis never considered this cost, perhaps because the nuisance exception rendered it moot.\(^{177}\) Nonetheless, \textit{Hadachek} presents an example of the cost that implicit risk reallocation may impose on a proprietor affected by governmental regulation.

Immediate economic costs and the costs associated with preventing best use, foreclosing existing uses, extinguishing discreet property rights, and reallocating risk represent the total cost of governmental regulation to affected proprietors.\(^{178}\) Assuming that an anticipated use is reasonable, and has therefore survived the nuisance threshold test, the government will be obligated to compensate affected proprietors in an amount equal to the total cost imposed on them by regulation.\(^{179}\) When proprietors realize some benefit from regulation along with the costs imposed, however, the government's obligation to compensate is reduced by an amount equivalent to the value of those benefits.\(^{180}\)

Generally, two types of benefits are possible. A regulatory ordinance or statute may include specific provisions designed to help offset the costs of regulation.\(^{181}\) In \textit{Penn Central Transportation Co. v. New York City},\(^{182}\) for example, a historic preservation ordinance contained provisions allowing owners of historic buildings to transfer development rights to other area properties.\(^{183}\) These transferable development rights had quantifiable economic value, which the Court

\(^{177}\) See id. (municipal ordinance forcing closure of previously existing brickyard held not a taking because use amounted to public nuisance).

\(^{178}\) The factors are not always clearly delineated in the caselaw. Nonetheless, an examination of the leading takings cases supports this point.

\(^{179}\) See supra notes 104–110 and accompanying text.


Even where the government prohibits a non-injurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross section of land and thereby "secure[s] an average reciprocity of advantage." \textit{Pennsylvania Coal Co. v. Mahon}, 260 U.S. at 415. It is for this reason that zoning does not constitute a 'taking.' While zoning at times reduces \textit{individual} property values . . . it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another. Id. (footnote omitted).

\(^{181}\) See infra notes 181–184 and accompanying text.


\(^{183}\) See id.
set off against the cost to the developer of the restrictions the law imposed on its historic site.\textsuperscript{184}

An ordinance or statute may also benefit a property owner indirectly as a member of the community affected by regulation.\textsuperscript{185} In assessing the value of indirect benefits, courts must consider how diffuse the benefits of a regulation are, and thus, how meaningful to any given individual. For example, closing down a brick kiln may have a salutary effect on the atmosphere as a whole, but individuals living immediately downwind experience a significant improvement in the quality of their lives.

The benefits of historic preservation\textsuperscript{186} or density restrictions\textsuperscript{187} are widely distributed throughout the community. The owner of several major area hotels, however, is in a position to reap special benefit from a setting of particular architectural and historical interest. Presumably, people will be attracted to hotels in such areas. Similarly, a residential developer is well situated to profit from density restrictions that render neighborhoods more desirable and drive prices up. These are situations in which regulated proprietors are in a unique position that enables them to recapture significant gain from otherwise diffuse benefits. It is only by retaining substantial economic interests in the regulated areas, however, that these proprietors reap greater benefits than the community at large.

Some regulations benefit a much narrower community than those just discussed. An example is when a mine safety regulation requires leaving a wall of coal at the mine perimeter to guard against flooding.\textsuperscript{188} This industrial safety regulation has significant economic cost. It also produces measurable benefit in the form of fewer mine disasters. In this example, the regulated proprietor is also the sole beneficiary of the regulation. The regulation amounts to a requirement that the proprietor purchase the safety advantage the regulation is designed to produce. The proprietor is "paying" exactly what the safety advantages "cost;" reciprocal benefits that precisely offset costs are inherent in this type of regulation. Affected proprietors will have weak takings claims indeed.

\textsuperscript{184} Id. at 137.
\textsuperscript{185} Agins v. City of Tiburon, 477 U.S. 255, 262 (1980); Penn Central, 438 U.S. at 134–35.
\textsuperscript{186} See Penn Central, 438 U.S. at 104 (community benefits of historic preservation include fostering civic pride, protecting and enhancing city’s attraction to tourists, stimulating business and industry, and promoting use of historic sites for education and pleasure).
\textsuperscript{187} See Agins, 477 U.S. at 255 (zoning plan benefits appellant as well as public by assuring careful, orderly development and provision for open-space areas).
\textsuperscript{188} Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531, 533 (1914).
In sum, any form of reciprocal benefit may help offset the costs a regulation imposes on proprietors, thus weakening proprietor’s takings claims. Benefits may take the form of statutory provisions conferring specific advantages on proprietors affected by regulation. Alternatively, regulated proprietors may be in a position to realize particular advantages from the effects of regulations designed to benefit the community at large.

To this point we have determined that in order to establish a takings cause of action a plaintiff must have an interest in property and the government, or an agent of the government, must interfere with that interest. Having established a cause of action, takings plaintiffs can proceed in two ways. The plaintiff can attempt to prove that regulation serves no legitimate public purpose. In the alternative, the plaintiff can try to show that regulation is so burdensome that it amounts to an act of eminent domain and, as such, must be compensated. In most instances, plaintiffs in littoral takings suits will rely on the excessive burden approach because the poison-purpose route is likely to prove unproductive.

The suggested approach to excessive burden analysis assumes that any governmental infringement of private property rights is a taking which the government is obligated to compensate. There are two circumstances, however, under which the government can escape its obligation to compensate. The government need not compensate proprietors for prohibiting uses of property that amount to public nuisances. Even when the government prohibits reasonable anticipated uses, however, it need not pay compensation if the general effects or specific provisions of a regulation adequately compensate the regulated proprietor’s losses. The dual objects of excessive burden takings jurisprudence, then, are to determine whether a prohibited use constitutes a public nuisance, and if it does not, to determine whether adequate compensation for regulatory loss inheres in the effect or provisions of the regulation.

V. Do or Die: Elements in the Success or Failure of a Littoral Takings Suit

Thus far, this Comment has established that plaintiffs pressing a littoral takings claim based on excessive burden face three essential tasks: they must demonstrate the existence of facts sufficient to establish a colorable cause of action, they must prove that their anticipated use does not amount to a public nuisance, and they must show that the net cost of regulation imposes an excessive burden on
their interests. This section shows how the elements identified as necessary to these proofs play out in the factual context of typical littoral takings claims.

A. Establishing a Takings Cause of Action

The first step in analyzing a littoral takings claim is to determine whether a colorable cause of action exists. The plaintiff has the burden of putting forth facts that, if true, establish the elements of a takings suit.189 Thus, the plaintiff must show that a governmental act infringes a private property interest that the plaintiff holds. 190

It is not difficult to put forth sufficient factual allegations to establish a colorable takings cause of action either when coastal-management laws prohibit rebuilding private homes destroyed by hurricanes, or when regulations prohibit littoral proprietors from constructing erosion barriers. An unregulated fee simple owner has the right to use the land for residential purposes and to take necessary steps to protect that land from natural hazards. Governmental regulations that prohibit exercise of these private property interests create the necessary elements of a takings conflict.

After establishing a cause of action, a plaintiff’s attorney would examine the regulatory ordinance or statute. If it contained an indication of questionable governmental purpose, the plaintiff’s attorney would mount a “poison-purpose” argument. 191 A successful argument would establish that a regulatory act bore no rational relationship to furthering any legitimate governmental purpose. At the plaintiff’s request, an injunction would issue barring enforcement of the act. 192 The court also might award damages for costs incurred during the time the regulation was enforced. 193

This Comment suggests, however, that littoral takings plaintiffs are not likely to succeed by pressing a “poison-purpose” argument. 194 Thus, the outcome of most littoral takings suits will turn on three

189 In this respect, takings claims are like other civil actions. See, e.g., FED. R. CIV. P. 56 (order for summary judgment shall issue if filings, taken together, show there is no issue as to any material fact and that moving party is entitled to judgment as a matter of law).

190 The language of the fifth and fourteenth amendments makes it clear that there must be a public taking of private property for a takings conflict to arise. See U.S. CONST. amend. V; U.S. CONST. amend. XIV.

191 See Plater, supra note 96, at 661.


194 See supra notes 94–99 and accompanying text.
issues: first, the plaintiff must prove that a prohibited use is not a
nuisance; second, the plaintiff must show that under the circum-
cstances, regulation is excessively burdensome; finally, the plaintiff
must demonstrate the absence of reciprocal benefit adequate to offset
the costs the regulation imposes.

B. Nuisance

In order to establish a taking based on excessive burden, a plaintiff
must begin by proving that a prohibited use does not amount to a
public nuisance.\textsuperscript{195} If an anticipated use is a public nuisance, the
government will be free to prohibit the use without compensating
the owner.\textsuperscript{196} Unfortunately, there is no bright-line test for deter-
mining nuisance. Rather, nuisance spans a broad spectrum.

In discussing nuisance this Comment has established three points
on the spectrum. At one extreme it identified cases involving deliber­
ate acts directly inimical to the morals, health, or safety of the
public.\textsuperscript{197} At the middle of the nuisance spectrum were cases involv­
ing acts that only became nuisances because they were carried on in
inappropriate settings. These cases presented dangers to the com­

munity, but the dangers were passive, incidental effects of activities
otherwise accepted as useful and necessary.\textsuperscript{198} Finally, delimiting the
end of the nuisance spectrum, were cases in which acts were pro­
hibited, not to eliminate a nuisance, but in order affirmatively to
enhance the common welfare.\textsuperscript{199}

This section discusses the ramifications of nuisance analysis on
littoral takings claims. The section begins by considering nuisance
analysis as it affects the claims of proprietors prevented from re-
building damaged coastal structures. The section concludes by con­
sidering the effect of nuisance analysis on the claims of proprietors
foreclosed by coastal-management laws from constructing coastal
barriers.

Homeowners on South Carolina’s Outer Banks face the prospect
of rebuilding their ruined homes. The reconstruction lacks the char­
acteristics of “first-class” nuisance. A community’s views on residen-

\textsuperscript{195} See supra notes 111–136 and accompanying text.
\textsuperscript{196} Pennsylvania Coal Co. v. Mahon, 260 U.S. 413, 417 (Brandeis, J., dissenting); Mugler
\textsuperscript{197} See supra note 117 and accompanying text.
\textsuperscript{198} See supra note 123 and accompanying text.
of proposed alterations to historic landmark found not a taking, not because alteration would
create nuisance, but because developer adequately compensated for loss).
tial development are quite distinct from its outlook on, for example, the distribution of controlled substances or impure foods. Society encourages home ownership, but does not countenance these latter dangerous activities. Had the homes represented patently noxious uses of property injurious to the public welfare, regulators could have ordered the homes destroyed as soon as the danger had been recognized. 200 That the structures were allowed to stand until destroyed by natural disaster demonstrates the regulator’s recognition that residential use of beach front property is not a “first-class” nuisance. 201

Whether the residential use of littoral property like that foreclosed by South Carolina’s coastal-management act fits the definition of a “second-class” nuisance is a more difficult problem. Littoral residences may have substantial impact on the coastal environment. Like the uses in Hadachek and Goldblatt, 202 rebuilding ruined structures in the “dead zone” 203 may appear to be a case of a generally acceptable use becoming a nuisance when it is carried on in an inappropriate place.

The fact that littoral residential use presents an insignificant danger to the health or material well being of the community, however, tends to undermine this interpretation. As long as littoral residents are not allowed to protect their properties with coastal engineering structures, the costs of littoral residential development are largely confined to the deterioration of coastal aesthetics and an increased burden on a community’s infrastructure.

It is important to recognize, however, that the relevant measure of these costs to the community is the marginal cost of littoral residential use over residential use in other areas. Because aesthetics may suffer wherever a community allows residential development, the aesthetic cost of littoral development is a weak ground for denying littoral proprietors the right to rebuild their homes. 204 Likewise,

200 Pennsylvania Coal, 260 U.S. at 417 (Brandeis, J., dissenting); Mugler, 123 U.S. at 669.
201 Clearly there are many reasons, fairness and political considerations among them, why regulators would be reluctant to raze their constituents’ houses. Such reluctance could be expected to be vitiated substantially if littoral proprietors could be considered to be deliberately devoting their properties to uses directly inimical to the health or morals of the public. See supra notes 118-21 and accompanying text.
202 See supra note 123.
203 See supra note 58.
204 Regulators leave themselves open to charges of arbitrary and capricious legislation if they attempt to justify coastal management regulations solely on aesthetic grounds. Who is to say that a private residence nestled in the dunes is more or less of an aesthetic burden than a condominium development in a cornfield?
all residential development increases the burden on a community’s infrastructure. Undeniably, littoral residents require more frequent and more costly rescue operations. Because their property is generally more valuable than similar property inland, however, coastal residents pay proportionately more of the taxes that support the services on which they rely.

The costs of littoral residential use are diffuse and widely distributed. It is unlikely that littoral residential use would imminently endanger the interests of a clearly identifiable segment of the community to the extent described in Goldblatt or Hadachek.

Reconstruction of damaged houses along the South Carolina shore does not square with any ordinary concept of public nuisance. Thus, courts probably will analyze takings suits arising out of hurricane Hugo’s aftermath under the assumption that the underlying motive of the South Carolina coastal-management laws is to secure an affirmative benefit for the citizens of South Carolina. In all likelihood these homeowners’ claims will pass the nuisance threshold test. Net cost analysis will be necessary to determine their outcome.

Littoral proprietors who wish to erect erosion barriers, on the other hand, are likely to have difficulty overcoming the initial nuisance threshold. While erecting erosion barriers like those anticipated by the Chatham homeowners does not arise to the level of “first-class” nuisance, such use may square well with what we have labeled “second-class” nuisance. Protective devices erected on one part of the coast can cause accelerated erosion on other parts.205 For that reason, the devices may present a danger to communities in the downstream littoral drift. The danger is an incidental effect of an activity that in another location might be perfectly acceptable. The mere fact that a hazard is not deliberate, however, will not have much influence in the courts.206 When regulators predicate prohibitions on the threat of downstream erosion, littoral proprietors will have to rebut a presumption of nuisance in order to be heard on their takings claims.207

Rebutting the presumption that a proposed erosion barrier would create a nuisance may be difficult, considering the capricious nature of littoral erosion and accretion. A small group of littoral proprietors

205 Howe, supra note 42, at 72, col 2. For a general discussion of the effects of protective devices, see W. Kaufman & O. Pilkey, supra note 4, at 207–12, and S. Leatherman, supra note 11, at 89–104.
206 See supra notes 122–131 and accompanying text.
207 See supra notes 111–136 and accompanying text.
hampered by limited financial and technical resources for litigation might find rebutting a presumption of nuisance impossible. Thus, whether or not a barrier would in fact be a nuisance, littoral proprietors may find their rights to defend their property foreclosed and that, as a result, they lack standing to bring a takings claim.

It is essential for proprietors whose rights to defend their properties have been foreclosed to overcome the nuisance exception. These proprietors must show that because of geography or barrier design, a proposed defensive structure poses no threat to others. If they carry this burden, then they should find themselves in the more comfortable position, regarding the nuisance exception, of those proprietors who are prevented from rebuilding. If they are unable to prove that their proposed use will not create a nuisance, however, analysis of their claims will be truncated and the outcome will favor the regulator.208

C. Net Cost Analysis: Is the Burden on the Property Owner Excessive?

Economic costs of rebuilding prohibitions and prohibitions against the construction of protective devices are often substantial. Prohibitions against protective structures can make it impossible for littoral proprietors to avoid property loss. Proprietors prevented from rebuilding face severe diminution losses. Additionally, either class of plaintiff may incur significant opportunity costs if their property has been used to produce income.

The magnitude of economic cost depends on the particular situation of the regulated property. Losses may be very high, even amounting to a property's full value, where severe erosion is occurring and protective measures are prohibited. On the other hand, some properties merely will be threatened by potential erosion. Others will suffer minor erosion, the negative effects of which are primarily aesthetic. In these cases, the value of property lost due to prohibitions against defensive structures will be moderate to nonexistent.

Where damaged structures cannot be repaired or rebuilt, diminution in property value is likely to be extreme. Waterfront homes are some of the most valuable and desirable properties along the nation's seaboard.209 While undeveloped property is beautiful and

208 Id.
209 W. KAUFMAN & O. PILKEY, supra note 4, at 224.
may be useful for sunbathing, bird watching, fishing and other activities, buyers are unlikely to pay a substantial premium for those privileges alone. To a great extent, the value of shore property is a product of what can be built on it.

Finally, shore property can bring very substantial rental premiums, especially during the summer months. Destroyed or imminently threatened houses cannot be rented. Thus, regulation may impose substantial opportunity losses on owners who derive income from their littoral holdings.

Prohibitions against rebuilding or the construction of protective devices may interfere significantly with littoral proprietors’ present or expected uses of property. When a house is destroyed or imminently threatened, it will be unfit for habitation. The inability to rebuild or repair a house, or to protect property from erosion, precludes further residential use. Interference with a prior existing use is not dispositive of the takings claim, but courts may consider it an onerous burden to proprietors. At the very least, interference with a prior existing use precludes a court from justifying an uncompensated taking on the theory that original use is unimpaired. The degree of interference with an existing use will vary with the circumstances of each case. Some properties will be affected or threatened by erosion only slightly. Regulations will not interfere with present or expected uses of these properties. Such interference imposes no significant cost on these owners.

Regulations also may extinguish all economically feasible remaining uses of property. The clearest example is when unchecked erosion actually destroys a piece of real estate. When the land no longer exists, no court will be able to find a remaining use for it. Remaining use analysis is less obvious when rebuilding is prohibited, but the land itself is unaffected. A court might find the proprietors’ remaining privileges—to sunbathe, swim, and fish from their piece of seashore—are economically feasible remaining uses. Nonetheless, a court at all sympathetic to proprietors would have to recognize that remaining use is severely curtailed when regulations prohibit reconstruction.

210 See, e.g., Brisbane, supra note 57, at 3A, col. 2.
211 See supra notes 150–155 and accompanying text.
212 That courts may reach such a conclusion is clear from the decision of the Supreme Court in Andrus v. Allard, 444 U.S. 51 (1979). The Andrus Court found the possibility of charging admission to view Native American artifacts a reasonable remaining use of inventory held for sale by a dealer in antiquities, when sale of such artifacts was foreclosed by a federal statute. Id. at 66.
The final factor in cost analysis is risk acceptance. It is tempting to argue that littoral proprietors knew or should have known of the risks of building on the shore and that they are, therefore, entitled to little sympathy. This argument, however, begs the question. Proprietors are not bringing suit to recover the costs of disaster damage. By building at the seashore, they demonstrated a willingness to risk economic losses due to natural events. Rather, they are trying to recover the costs imposed by restrictive regulations that prohibit them from protecting or reconstructing their properties.\textsuperscript{213} If regulations were not in effect when proprietors purchased and developed their properties, the risk that they would later be adopted ordinarily would not be reflected in purchase prices. Therefore, affected proprietors can make a strong argument that there is no inherent justice in requiring them to bear the costs of regulation.\textsuperscript{214}

In fact, the risk factor should not be an issue in takings suits involving rebuilding prohibitions. If development preceded regulation, then "regulatory risk" was not a factor and cannot be used to weaken plaintiffs' cases. If regulations were in effect and reflected a legitimate governmental purpose, then construction should not have been permitted. No doubt there could be cases that fall into the interstices; perhaps when property was purchased for development and regulations were adopted before development was complete. These cases would have to be analyzed by applying risk principles to the specific situation.

Acceptance of risk could be an important, even a dispositive factor, in one situation. A proprietor might purchase a lot for development knowing in advance that regulations permit development but prohibit constructing defensive devices.\textsuperscript{215} The purchase price for the lot would be decreased to reflect the prohibition. If such property is swept away by erosion, and regulations prohibit defense, the pro-

\textsuperscript{213} Confusing these two types of risk could lead to the unwarranted assumption that insurance might have an impact on takings analysis. Insurance might compensate a littoral proprietor for property damage resulting from natural events. It would not compensate for destruction of property value resulting from governmental regulation. Thus, insurance has no direct influence on the adjudication of takings claims.

\textsuperscript{214} A counter-argument is that if proprietors recognize and compensate for the risk that their property may be destroyed, they also could be expected to recognize and compensate for the risk that their property may be regulated. The risk of destruction is empirically quantifiable. Assessing the risk of regulation, however, depends on accurately reading the intangibles of social and political climate at a given place and time. Nevertheless, this counter-argument gains strength as coastal management regulations become more commonplace.

\textsuperscript{215} Section 48-39-300 of the South Carolina Code of Laws is one example of a regulation with this effect. See S.C. CODE ANN. § 48-39-300 (Law. Co-op. 1976)
Proprietor should have no standing in a taking action against the regulator.

Proprietors affected by prohibitions against rebuilding and constructing protective barriers will realize certain benefits along with the costs. Particular ordinances or statutes may contain provisions for compensation. When this is the case, the value of compensation would help to offset costs. Moreover, assuming a regulation furthers legitimate governmental purposes, it would generate indirect benefits. To the extent that a regulation effectively enhances the coastal environment, society-at-large benefits. Coastal residents are in a position to capture particular benefit. To the extent that rebuilding is prohibited, the immediate environment becomes less crowded. Newly undeveloped land provides better access to the ocean. Views may improve. Birds may move into the area in greater numbers improving bird-watching and hunting opportunities. In coastal towns, traffic problems may be ameliorated. A very substantial increase in the value of existing housing is likely to result from the dwindling supply.

These particular benefits, however, are only available to those who remain in residence on the coast. Most of these will be proprietors fortunate enough to have avoided the regulatory prohibitions or at least the destructive forces of nature at the shore. Those who suffered serious disaster losses probably will have to resettle in less expensive inland areas. The government's failure to compensate thus may be compounded by foreclosing to these proprietors the opportunity to live in a coastal environment improved at their expense.

VI. CONCLUSION

This Comment has developed a framework and method for examining takings suits engendered when coastal-management statutes or ordinances prevent littoral proprietors from protecting their properties from erosion, or from rebuilding damaged or destroyed structures. Two factors are critical in determining the outcome of the suits described. The first is the determination of whether an owner's anticipated use amounts to a public nuisance. If a proposed use is unreasonable, and thus amounts to a nuisance, then an owner

216 No statute the author has examined contains such a provision. The Boston Globe, however, reported that a proposal was made to the selectmen of the Town of Chatham to compensate affected littoral proprietors by providing alternate lots in the town. Longcope, Sea Prepares Bitter Lesson for Cape Homeowners, Boston Globe, Feb. 12, 1988, at 42, col. 4.
will not be able to successfully press a takings claim. While there is no bright-line test for nuisance, the essential element of nuisance is the presence of an affirmative danger to the health, welfare or morals of a community. Merely denying the community a positive benefit is not enough to create a nuisance.

The second critical factor in determining the outcome of a littoral takings suit is the net cost of regulation to the affected proprietor. When an owner's anticipated use survives the nuisance threshold test, and is thus a reasonable use, the government incurs an obligation to compensate the owner for the value of the property taken or the property right infringed. This compensation need not be in the form of money. Rather, the regulatory statute or ordinance may, either directly or indirectly, tend to compensate the owner's loss.

Considering the variety of factors that must be considered in analyzing a takings claim, it is clear that no single assessment will serve for all, or even for most, cases. This Comment clarifies the necessary considerations and explains the connections between them. It will enable those contemplating pressing or defending a littoral takings suit to assess the steps necessary to maximize the likelihood that they will succeed.