

IN RE: PETITIONS FOR SPECIAL HEARING \* BEFORE THE  
AND ZONING VARIANCE - SW/S \*  
Dunglow Road, 20' E of the c/l \* DEPUTY ZONING COMMISSIONER  
of Morningson Road \* OF BALTIMORE COUNTY  
(3000-3002 Dunglow Road) \* Case No. 90-52-SPHA  
12th Election District  
7th Councilmanic District  
  
James M. Seigel, et ux \*  
Petitioners \*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Petitioners herein request a special hearing to approve Lots 1 and 2 of the subject property as separate building lots with undersized lot areas and that the overall density of the subdivision will not be affected, and variances to permit a lot width of 54 feet in lieu of the required 55 feet and a side yard setback of 5 feet in lieu of the required 10 feet for Lot 1, and a lot width of 53.5 feet in lieu of the required 55 feet and a side yard setback of 5 feet in lieu of the required 10 feet for Lot 2, all as more particularly described in Petitioner's Exhibit 1.

The Petitioners, by James M. Seigel, appeared, testified, and were represented by Michael Marino, Esquire. Also appearing on behalf of the Petitions was Keith A. Randlett on behalf of the Emerald Development Corporation. The following individuals appeared as Protestants: Charles R. and Betty Lee Hall, Sr., Daniel T. Mulheran, Marian O. Garrity, Doris J. Hoover, Lucille P. Wade, Terence McDonough, James E. Grumbach, and Roy Staten. The Protestants were represented by Louis L. DePazzo, Esquire.

Testimony indicated that the subject property, known as 3000 and 3002 Dunglow Road, consists of two lots totalling .236 acres zoned D.R. 5.5 which the Petitioners purchased approximately 10 years ago. Lot 1 is improved with a two-story brick dwelling and attached garage with a stone parking area, while Lot 2 is presently unimproved. Testimony indicated

ORDER OF THE ZONING COMMISSION

Date

By

*12/1/89*  
*By Betty Lee Hall, Sr.*

*12/1/89*  
*#6*

*RECEIVED*

We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. See *San Diego Gas & Electric Co. v. San Diego*, 450 U. S., at 652 (Brennan, J., dissenting). "[F]or what is the land but the profits thereof?" 1 E. Coke, Institutes ch. 1, §1 (1st Am. ed. 1812). Surely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," *Penn Central Transportation Co.*, 438 U. S., at 124, in a manner that secures an "average reciprocity of advantage" to everyone concerned. *Pennsylvania Coal Co. v. Mahon*, 260 U. S., at 415. And the functional basis for permitting the government, by regulation, to affect property values without compensation—that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *id.*, at 413—does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. See, e.g., *Annicelli v. South Kingstown*, 463 A. 2d 133, 140-141 (R.I. 1983) (prohibition on construction adjacent to beach justified on twin grounds of safety and "conservation of open space"); *Morris County Land Improvement Co. v. Parsippany-Troy Hills Township*, 40 N. J. 539, 552-553, 193 A. 2d 232, 240 (1963) (prohibition on filling marshlands imposed in order to preserve region as water detention basin and create wildlife refuge). As Justice Brennan explained: "From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property." *San Diego Gas & Elec. Co.*, *supra*, at 652 (Brennan, J., dissenting). The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation. See, e.g., 16 U. S. C. §410ff-1(a) (authorizing acquisition of "lands, waters, or interests [within Channel Islands National Park]

(including but not limited to scenic easements)"); §460aa-2(a) (authorizing acquisition of "any lands, or lesser interests therein, including mineral interests and scenic easements" within Sawtooth National Recreation Area); §§ 3921-3923 (authorizing acquisition of wetlands); N. C. Gen. Stat. §113A-38 (1990) (authorizing acquisition of, *inter alia*, "scenic easements" within the North Carolina natural and scenic rivers system); Tenn. Code Ann. §§ 11-15-101 — 11-15-108 (1987) (authorizing acquisition of "protective easements" and other rights in real property adjacent to State's historic, architectural, archaeological, or cultural resources).

We think, in short, that there are good reasons for our frequently expressed belief that 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.<sup>6</sup>

## B

The trial court found Lucas's two beachfront lots to have been rendered valueless by respondent's enforcement of the coastal-zone construction ban.<sup>7</sup> Under Lucas's theory of the case, which rested upon our "no economically viable use" statements, that finding entitled him to compensation. Lucas believed it unnecessary to take issue with either the purposes behind the Beachfront Management Act, or the means chosen by the South Carolina Legislature to effectuate those purposes. The South Carolina Supreme Court, however, thought otherwise. In its view, the Beachfront Management Act was no ordinary enactment, but involved an exercise of South Carolina's "police powers" to mitigate the harm to the public interest that petitioner's use of his land might occasion. 304 S. C., at 384, 404 S. E. 2d, at 899.

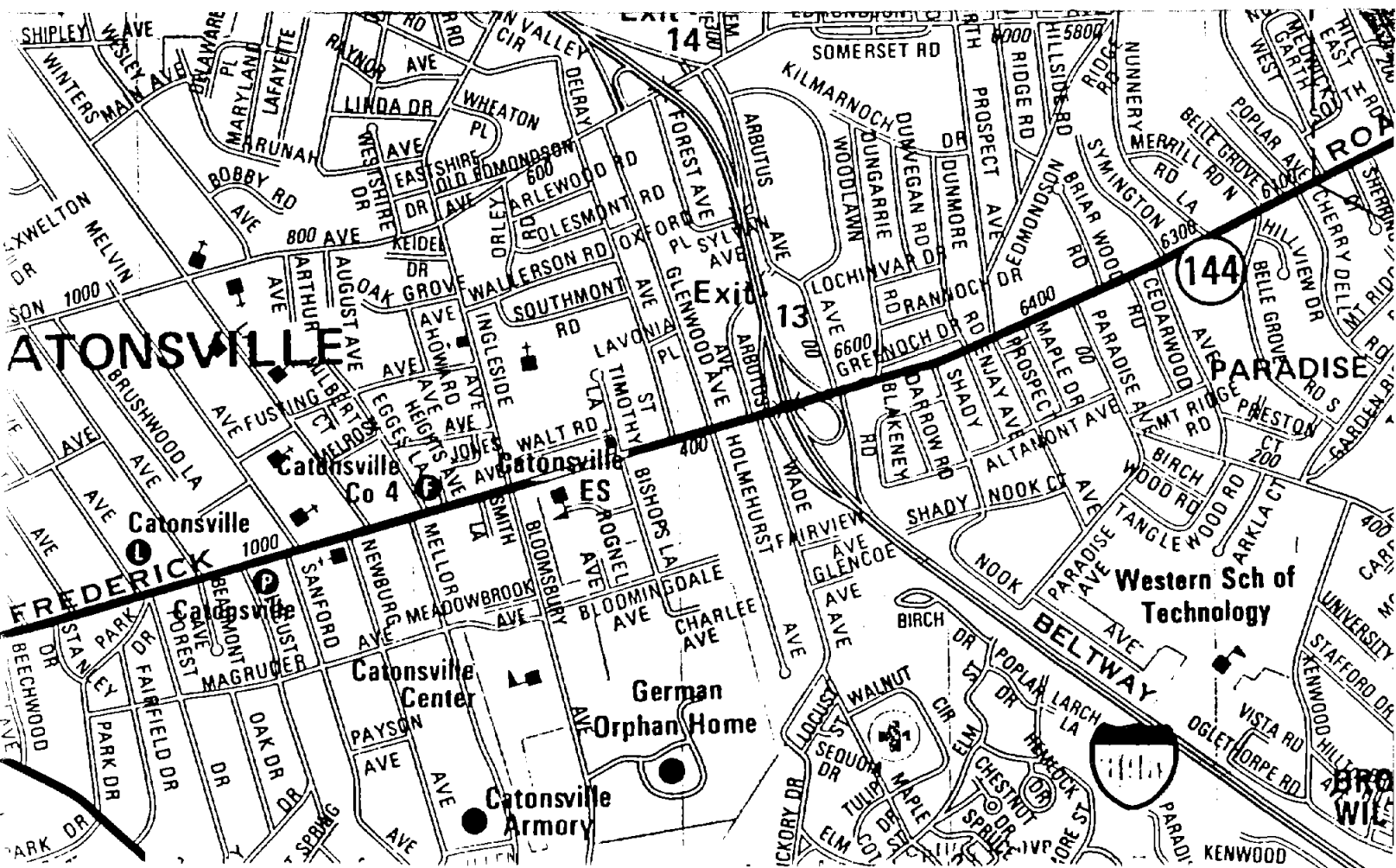
JUSTICE STEVENS criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary", in that "[t]he landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." *Post*, at 4. This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally. *Penn Central Transportation Co. v. New York City*, 438 U. S. 104, 124 (1978). 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.

JUSTICE STEVENS similarly misinterprets our focus on "developmental" uses of property (the uses proscribed by the Beachfront Management Act) as betraying an "assumption that the only uses of property cognizable under the Constitution are developmental uses." *Post*, at 5, n. 3. We make no such assumption. Though our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land, there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 436 (1982) (interest in excluding strangers from one's land).

<sup>6</sup>This finding was the premise of the Petition for Certiorari, and since it was not challenged in the Brief in Opposition we decline to entertain the argument in respondent's brief on the merits, see Brief for Respondent 45-50, that the finding was erroneous. Instead, we decide the question presented under the same factual assumptions as did the Supreme Court of South Carolina. See *Oklahoma City v. Tuttle*, 471 U. S. 808, 816 (1985).

(nearly identical law held not to effect a taking); see also *id.*, at 515-520 (REHNQUIST, C.J., dissenting); Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. Cal. L. Rev. 561, 566-569 (1984). The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i. e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.

880,000 FT



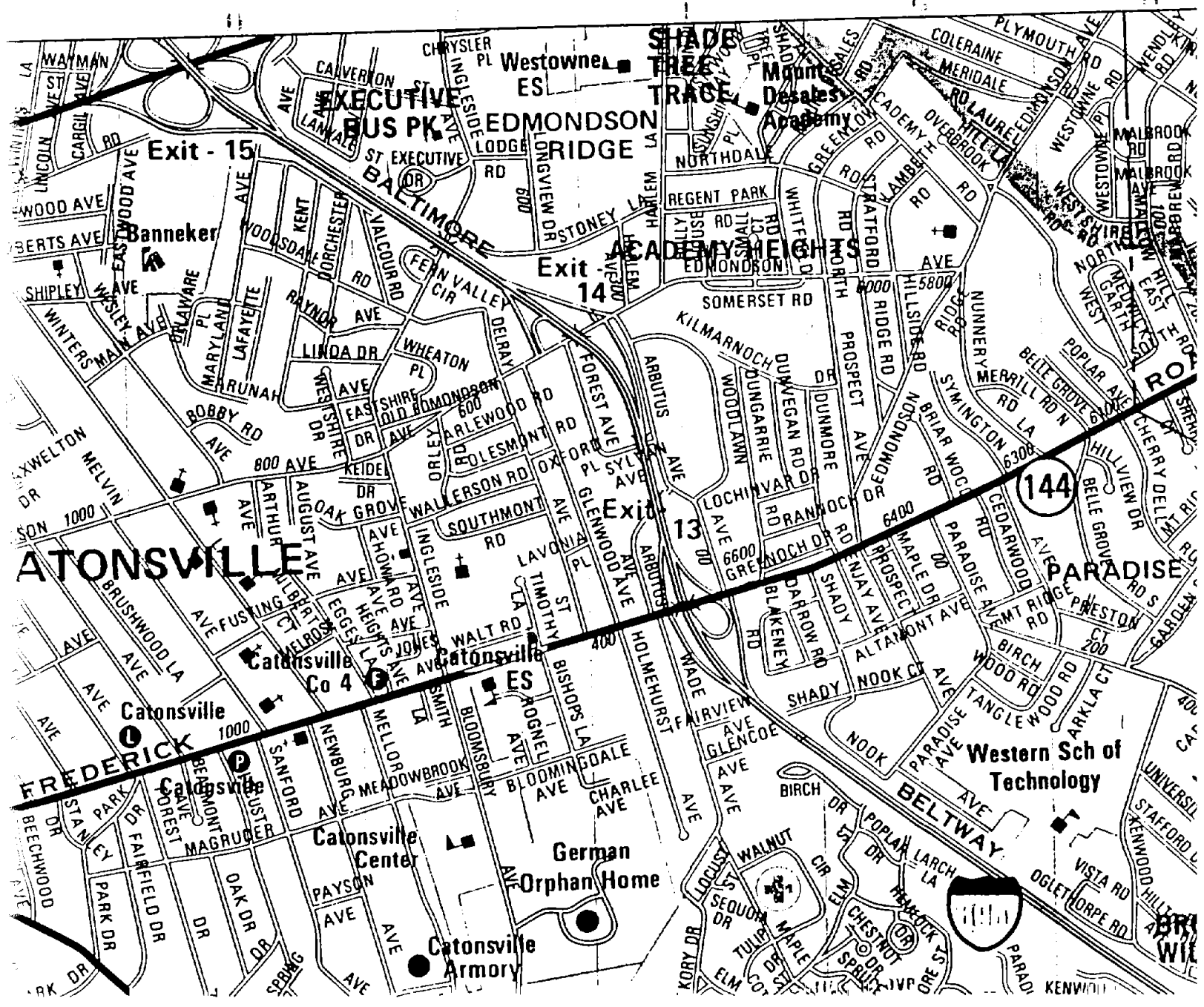


165 WINTERS LA 85,900 87,140 .000 30Y F 910412 87587 650 BU 01 1  
SNOWY/NICK TO # BN:00005, LOUISE A #MARGARTEN&CO  
CU: CTY: US:RESID CL:REST UN: TX:01100450260  
REMARKS:GR:1.50 DESC: LOT 1461  
SEARCH COMPLETE 16 MATCHING LISTINGS  
REPORT TYPE(1,2,1,CH OR 02)

*4h #2E*  
*CB*

Joins Map 33

880,000 FT





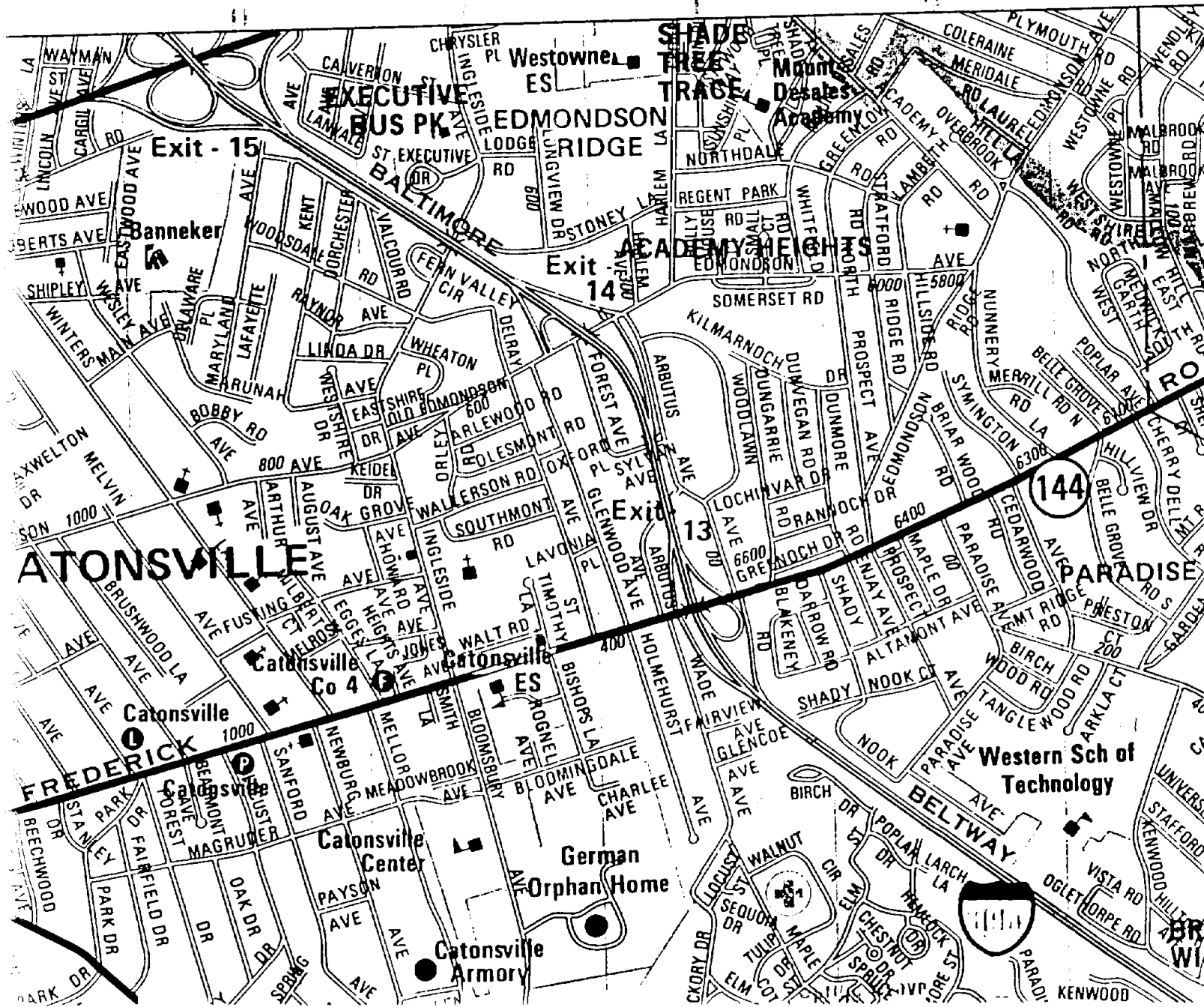
PROPERTY: W ARUNAH AV ZIP: 0 LAND VAL: 23450  
TAX ID : R00123153850 SEC/BLOCK/LOT: 7027 / / IMPV VAL: 64200  
LEGAL DES: TOTL VAL: 87650  
TAX MAP: 00095 LEGAL DES: ASSESS VAL: 35060  
GRID : 00020 LEGAL DES: TRANS DATE: 07/18/77  
PARCEL : 00227 LOT SIZE : 40.00 80.00 120.00 106.50  
OWNER : BENNETT CYRIL P SUB: CATONSVILLE HED LIBER: 5778  
OWNER 2: BENNETT ALICE L  
ADDRESS: 01105 ARUNAH AV FOLIO: 388  
ADDRESS: LAST ASSESS 9011 ZONING:  
ADDRESS: BALTIMORE, MD USE CODE: 04 LAND USE: RFS10  
ADDRESS: 21228

PROPERTY: W ARUNAH AV  
TAX ID : 000123153849 SEC/BLOCK/LOT:  
TAX MAP: 00095 LEGAL DES:  
GRID : 00020 LEGAL DES:  
PARCEL : 00227 LOT SIZE : 20.00 20.00 120.00 120.00  
OWNER : BENNETT CYRIL F  
OWNER 2: BENNETT ALICE L  
ADDRESS: 01105 ARUNAH AV  
ADDRESS:  
ADDRESS: BALTIMORE, MD  
ADDRESS:  
ZIP: 21228  
IMPV VAL: 8100  
TUTL VAL: 3240  
ASSESS VAL:  
TRANS DATE: 07/15/77  
SUB: CATUNSVILLE HE1 LIBER: 5778  
LAST ASSESS 9011  
USE CODE: 04  
FOLIO: 388  
ZONING:  
LAND USE: RESID

cc gl 28

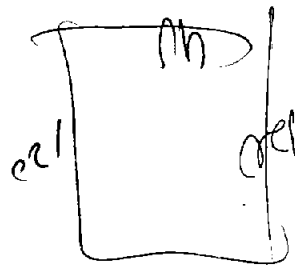
Joins Map 33

880,000 FT





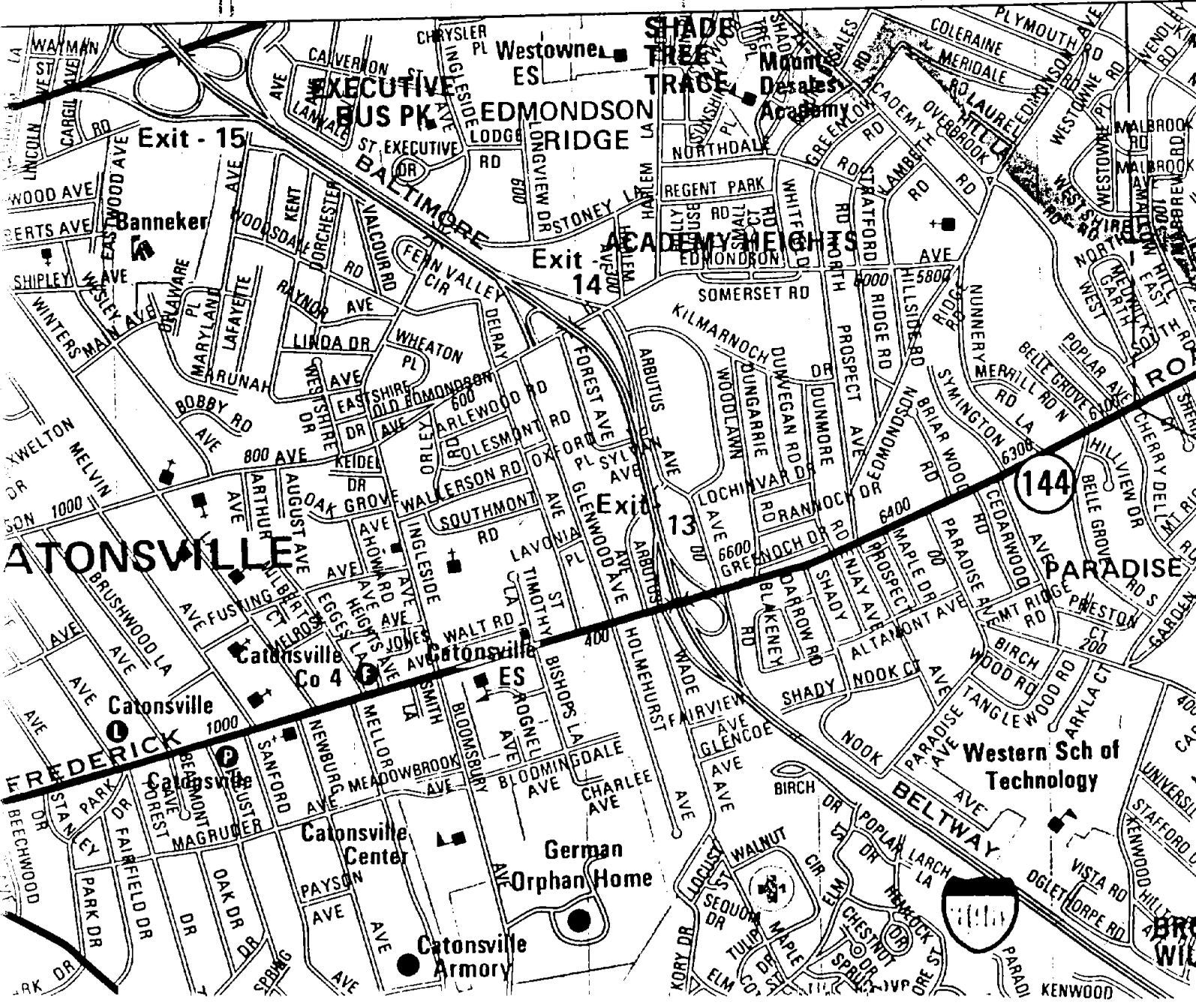
PROPERTY: 501 VALCOUR RD ZIP: 0 LAND VAL: 21600  
TAX ID : 800109350301 SEC/BLOCK/LOT: /015 / / IMPV VAL: 52050  
LEGAL DES: TOTL VAL: 73650  
TAX MAP: 00095 LEGAL DES: ASSESS VAL: 29460  
GRID : 00020 LEGAL DES: TRANS DATE: 06/28/88  
PARCEL : 00227 LOT SIZE : 40.00 40.00 120.00 120.00 TRANS \$\$ : 79900  
OWNER : HENN JOHN J, JR SUB: CATONSVILLE HET LIBER#7902  
OWNER 2: HENN KATHLEEN MARIE  
ADDRESS: 00501 VALCOUR RD FOLIO: 670  
ADDRESS: LAST ASSESS 9011 ZONING:  
ADDRESS: BALTIMORE, MD USE CODE: 04 LAND USE: RESID  
ADDRESS: 21228  
OWNER OCC



Sub #2 H  
**MICROFILMED**

Joins Map 33

880,000 FT



By neglecting to dispute the findings enumerated in the Act<sup>10</sup> or otherwise to challenge the legislature's purposes, petitioner "conced[ed] that the beach/dune area of South Carolina's shores is an extremely valuable public resource; that the erection of new construction, *inter alia*, contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm." *Id.*, at 382-383, 404 S. E. 2d, at 898. In the court's view, these concessions brought petitioner's challenge within a long line of this Court's cases sustaining against Due Process and Takings Clause challenges the State's use of its "police powers" to enjoin a property owner from activities akin to public nuisances. See *Mugler v. Kansas*, 123 U. S. 623 (1887) (law prohibiting manufacture of alcoholic beverages); *Hadacheck v. Sebastian*, 239 U. S. 394 (1915) (law barring operation of brick mill in residential area); *Miller v. Schoene*, 276 U. S. 272 (1928) (order to destroy diseased cedar trees to prevent infection of nearby orchards); *Goldblatt v. Hempstead*, 369 U. S. 590 (1962) (law effectively preventing continued operation of quarry in residential area).

It is correct that many of our prior opinions have suggested that "harmful or noxious uses" of property may be

<sup>10</sup> The legislature's express findings include the following:

"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:

"(a) protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner;

"(b) provides the basis for a tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of the state's economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues;

"(c) provides habitat for numerous species of plants and animals, several of which are threatened or endangered. Waters adjacent to the beach/dune system also provide habitat for many other marine species;

"(d) provides a natural health environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being.

"(2) Beach/dune system vegetation is unique and extremely important to the vitality and preservation of the system.

"(3) Many miles of South Carolina's beaches have been identified as critically eroding.

"(4) . . . [D]evelopment unwisely has been sited too close to the [beach/dune] system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development.

"(5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.

"(6) Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.

"(8) It is in the state's best interest to protect and to promote increased public access to South Carolina's beaches for out-of-state tourists and South Carolina residents alike." S. C. Code § 48-39-250 (Supp. 1991).

proscribed by government regulation without the requirement of compensation. For a number of reasons, however, we think the South Carolina Supreme Court was too quick to conclude that that principle decides the present case. The "harmful or noxious uses" principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power. See, e.g., *Penn Central Transportation Co.*, 438 U. S., at 125 (where State "reasonably conclud[es] that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land," compensation need not accompany prohibition); see also *Nollan v. California Coastal Commission*, 483 U. S., at 834-835 ("Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest[,] [but] [t]hey have made clear . . . that a broad range of governmental purposes and regulations satisfy these requirements"). We made this very point in *Penn Central Transportation Co.*, where, in the course of sustaining New York City's landmarks preservation program against a takings challenge, we rejected the petitioner's suggestion that *Mugler* and the cases following it were premised on, and thus limited by, some objective conception of "noxiousness":

"[T]he uses in issue in *Hadacheck*, *Miller*, and *Goldblatt* were perfectly lawful in themselves. They involved no 'blameworthiness, . . . moral wrongdoing or conscious act of dangerous risk-taking which induc[ed] society] to shift the cost to a pa[rticular] individual.' Sax, Takings and the Police Power, 74 Yale L. J. 36, 50 (1964). These cases are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property." 438 U. S., at 133-134, n. 30.

"Harmful or noxious use" analysis was, in other words, simply the progenitor of our more contemporary statements that "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' . . . ." *Nollan*, *supra*, at 834 (quoting *Agins v. Tiburon*, 447 U. S., at 260); see also *Penn Central Transportation Co.*, *supra*, at 127; *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 387-388 (1926).

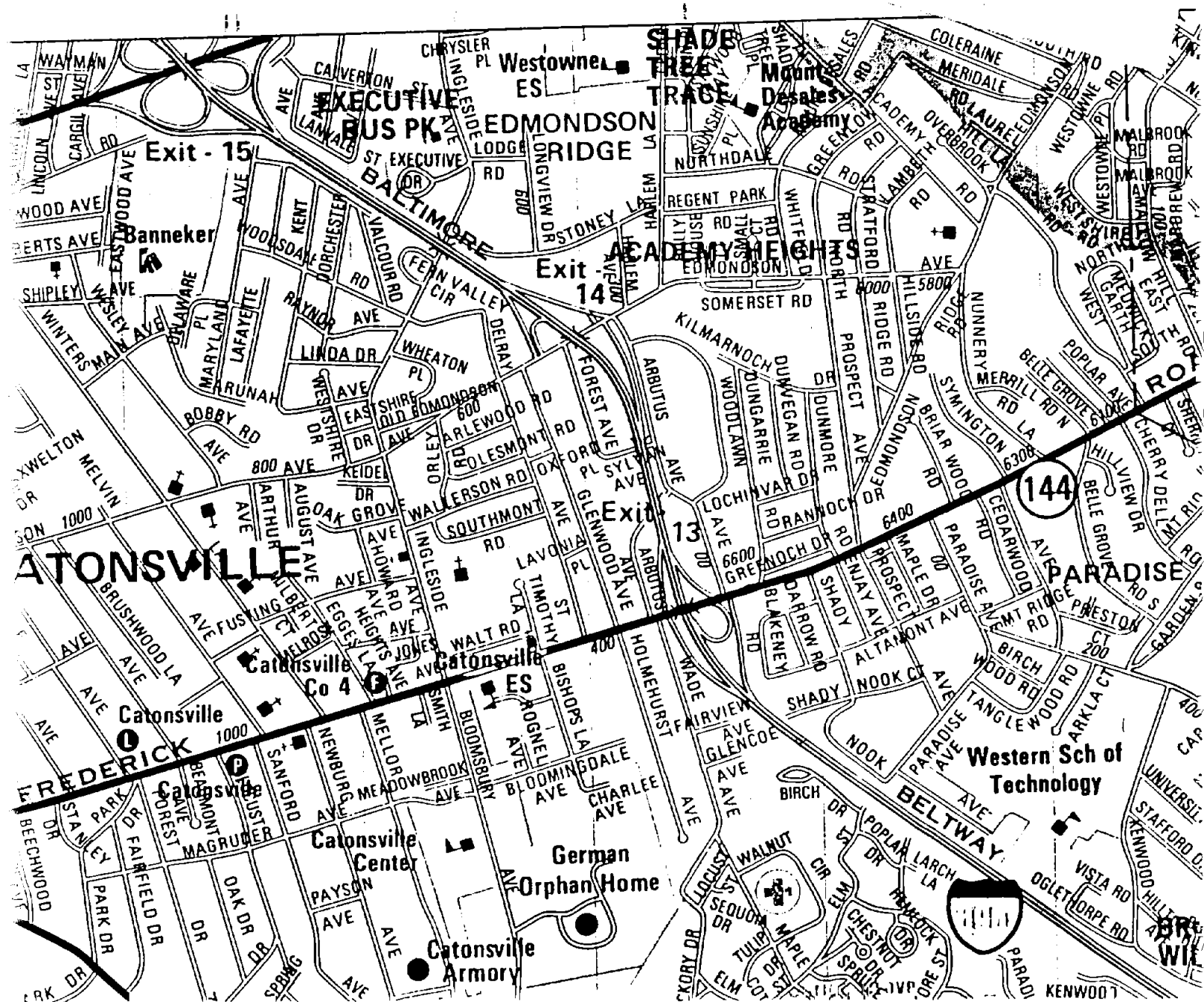
The transition from our early focus on control of "noxious" uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between "harm-preventing" and "benefit-conferring" regulation is often in the eye of the beholder. It is quite possible, for example, to describe in *either* fashion the ecological, economic, and aesthetic concerns that inspired the South Carolina legislature in the present case. One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve.<sup>11</sup> Compare, e.g.,

<sup>11</sup> In the present case, in fact, some of the "[South Carolina] legislature's 'findings'" to which the South Carolina Supreme Court purported to defer in characterizing the purpose of the Act as "harm-



PROPERTY: 211 S ARUNAH AV  
TAX ID : BC0119390370 SEC/BLOCK/LOT: 7027 / / LAND VAL: 22500  
LEGAL DES: IMPV VAL: 54800  
TAX MAP: 00095 LEGAL DES: TOTL VAL: 77300  
GRID : 00020 LEGAL DES: ASSESS VAL: 30920  
PARCEL : 00227 LOT SIZE : 40.00 40.00 120.00 120.00 TRANS DATE: 05/16/89  
OWNER : MARTINAK CHARLES H, JR SUB: CATONSVILLE HET LIBER: 8175  
OWNER 2: MARTINAK MARY BETH  
ADDRESS: 00911 ARUNAH AV  
ADDRESS: FOLIO: 455  
ADDRESS: BALTIMORE, MD LAST ASSESS 9011 ZONING:  
ADDRESS: USE CODE: 04 LAND USE: RESID  
OWNER OCC 21228

11/12





Arumet:

|      |            |                                                                            |
|------|------------|----------------------------------------------------------------------------|
| 1114 | Diggs      | 20 x 104 + 20 + 104 + 20 x 95 + 40 x 72 + 119 x 54 + 117 x 137 x 163 x 114 |
|      | Crosby     | 51 x 20 x 120 x 123 + 40 x 120                                             |
| 909  | Clark      | 80 x 120 + 60 x 120                                                        |
|      | Conroy     | 40 x 120 + 40 x 120.                                                       |
| 1004 | Hartman    | 60 x 120                                                                   |
| 1001 | Masello    | 80 x 120                                                                   |
|      | Singer     | <del>40 x 120</del>                                                        |
|      | Stanhope   | <del>40 x 120</del>                                                        |
| 1105 | Bennett    | 20 x 120 + 40 x 120                                                        |
| 1003 | Tate       | <del>40 x 120</del>                                                        |
|      | Mueller    | 47 x 121 x 120 x 111                                                       |
| 907  | Cult       | 60 x 120<br>80 x 120                                                       |
| 908  | Libby      | 60 x 121                                                                   |
| 1106 | Cleabarger | 40 x 120                                                                   |
| 1107 | Borden     | 100 x 120                                                                  |
| 1200 | King       | 65 x 120                                                                   |
| 1201 | Houston    | 55 x 65 x 120 x 120                                                        |
| 1206 | Clark      | 60 x 120                                                                   |
| 1207 | Strat      | 80 x 120                                                                   |

# Lafayette Ave:

|     |              |                                    |                |            |      |
|-----|--------------|------------------------------------|----------------|------------|------|
| 404 | Haaf.        | 80 X 120                           | 80 X 120       | ( 9600 )   |      |
| 405 | Baker        | 40 + 80 = 120 X 120                | 120 X 120      | ( 14,400 ) |      |
| 409 | Sass         | 105 X 120 ( 105 X 118 X 151 X 98 ) | 105 X 120 + -  | ( 12,600 ) |      |
| 410 | Sass         | 100 X 120                          | 100 X 120      | ( 12,000 ) |      |
| 411 | Hart         | 80 X 120                           | 80 X 120       | ( 9600 )   |      |
| 412 | Ambrose      | 20 + 20 = 40 X 120                 | 40 X 120       | ( 4800 )   | * 40 |
| 413 | Koontz       | 60 X 120                           | 60 X 120       | ( 7200 )   |      |
| 414 | Walker       | 60 X 120                           | 60 X 120       | ( 7200 )   |      |
| 418 | Freeman      | 60 X 120                           | 60 X 120       | ( 7200 )   |      |
| 420 | Swimm        | 60 X 120                           | 60 X 120       | ( 7200 )   |      |
| 422 | Staples      | 60 X 115                           | 60 X 115       | ( 6900 )   |      |
| 423 | Witt         | 65 X 120                           | 65 X 120       | ( 7800 )   |      |
| 428 | Brooks       | 40 + 60 + 20 + 40 = 160 X 120      | 160 X 120      | ( 19,200 ) | 3.   |
| 430 | Trueitt      | 85 + 60 = 145 X 120                | 145 X 120      | ( 17,400 ) |      |
| 464 | Williams     | 40 X 120 (land)                    | 40 X 120       | ( 4800 )   | * 40 |
| 503 | Smith        | 40 X 74 X 120 X 124                |                |            |      |
| 508 | Mutastano    | 60 X 120                           | 60 X 120       | ( 7200 )   |      |
| 511 | Cipalski     | 50 X 120                           | 50 X 120       | ( 6000 )   |      |
| 513 | Schuman      | 40 + 40 + 60 = 140 X 120           | 140 X 120      | ( 16,800 ) |      |
| 715 | Prevosto     | 40 + 100 = 140 X 120               | 140 X 120      | ( 16,800 ) |      |
| 717 | Mgloy        | 60 X 120                           | 60 X 120       | ( 7200 )   |      |
| 719 | Chelutant    | 80 X 120                           | 80 X 120       | ( 9600 )   |      |
|     | Lithicum     | 82 X 120                           | 82 X 120       | ( 9840 )   |      |
|     | Markowsk.    | 10 X 30 X 30                       |                |            |      |
|     | Kelley       | 25 + 60 = 85 X 120                 | 85 X 120       | ( 10,200 ) |      |
|     | Barto County | Other-side Calcutan                | 398 X 416 X 21 |            |      |

Valcour

503

Hiebler

40 x 120

501

Henn

40 x 120

506

Nickolas

40 x 111

570 -

Mike

40 x 109

573

Leshea

40 x 120

# Kent Ave

|     |         |    |      |      |      |
|-----|---------|----|------|------|------|
| 448 | Kentz   | 40 | X100 | -    | 8988 |
| 462 | William | 47 | X120 |      |      |
| 574 | Edson   | 40 | X120 |      |      |
| 520 | Pfall   | 40 | X120 | + 11 | X120 |

16

4 und

Linda

$$\begin{array}{r} 16 \\ 19 \\ \hline 35 \end{array}$$

Maryland.

601  
422

Forbes.  
Higgins

40 x 120  
40 x 120

*Claridge v. New Hampshire Wetlands Board*, 125 N.H. 745, 752, 485 A.2d 287, 292 (1984) (owner may, without compensation, be barred from filling wetlands because landfilling would deprive adjacent coastal habitats and marine fisheries of ecological support), with, e.g., *Bartlett v. Zoning Comm'n of Old Lyme*, 161 Conn. 24, 30, 282 A.2d 907, 910 (1971) (owner barred from filling tidal marshland must be compensated, despite municipality's "laudable" goal of "preserv[ing] marshlands from encroachment or destruction"). Whether one or the other of the competing characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate. See Restatement (Second) of Torts §822, Comment g, p. 112 (1979) ("[p]ractically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference"). A given restraint will be seen as mitigating "harm" to the adjacent parcels or securing a "benefit" for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors. See Sax, *Takings and the Police Power*, 74 Yale L. J. 36, 49 (1964) ("[T]he problem [in this area] is not one of noxiousness or harm-creating activity at all; rather it is a problem of inconsistency between perfectly innocent and independently desirable uses"). Whether Lucas's construction of single-family residences on his parcels should be described as bringing "harm" to South Carolina's adjacent ecological resources thus depends principally upon whether the describer believes that the State's use interest in nurturing those resources is so important that any competing adjacent use must yield.<sup>12</sup>

When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to

preventing," 304 S. C. 376, 385, 404 S. E. 2d 895, 900 (1991), seem to us phrased in "benefit-conferring" language instead. For example, they describe the importance of a construction ban in enhancing "South Carolina's annual tourism industry revenue," S. C. Code § 48-39-250(1)(b) (Supp. 1991), in "provid[ing] habitat for numerous species of plants and animals, several of which are threatened or endangered," § 48-39-250(1)(c), and in "provid[ing] a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being," § 48-39-250(1)(d). It would be pointless to make the outcome of this case hang upon this terminology, since the same interests could readily be described in "harm-preventing" fashion.

JUSTICE BLACKMUN, however, apparently insists that we *must* make the outcome hinge (exclusively) upon the South Carolina Legislature's other, "harm-preventing" characterizations, focusing on the declaration that "prohibitions on building in front of the setback line are necessary to protect people and property from storms, high tides, and beach erosion." *Post*, at 6. He says "[n]othing in the record undermines [this] assessment," *ibid.*, apparently seeing no significance in the fact that the statute permits owners of existing structures to remain (and even to rebuild if their structures are not "destroyed beyond repair," S. C. Code Ann. § 48-39-290(B)), and in the fact that the 1990 amendment authorizes the Council to issue permits for new construction in violation of the uniform prohibition, see S. C. Code § 48-39-290(D)(1) (Supp. 1991).

<sup>12</sup> In JUSTICE BLACKMUN's view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm-preventing justification for its action. See *post*, at 5, 13-17. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation. A *fortiori* the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. The South Carolina Supreme Court's approach would essentially nullify *Mahon*'s affirmation of limits to the noncompensable exercise of the police power. Our cases provide no support for this: None of them that employed the logic of "harmful use" prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land. See *Keystone Bituminous Coal Assn.*, 480 U. S., at 513-514 (REHNQUIST, C.J., dissenting).<sup>13</sup>

Where the State seeks to control regulation that deprives an owner of all economically beneficial use, we think it may reserve compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the prescribed use interests were not part of his title to begin with.<sup>14</sup> This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon*, 260 U. S., at 413. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale), see *Andrus v. Allard*, 444 U. S. 51, 66-67 (1979) (prohibition on sale of

<sup>13</sup> E.g., *Mugler v. Kansas*, 123 U. S. 623 (1887) (prohibition upon use of a building as a brewery; other uses permitted); *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531 (1914) (requirement that "pillar" of coal be left in ground to safeguard mine workers; mineral rights could otherwise be exploited); *Reinman v. Little Rock*, 237 U. S. 171 (1915) (declaration that livery stable constituted a public nuisance; other uses of the property permitted); *Hadacheck v. Sebastian*, 239 U. S. 394 (1915) (prohibition of brick manufacturing in residential area; other uses permitted); *Goldblatt v. Hempstead*, 369 U. S. 590 (1962) (prohibition on excavation; other uses permitted).

<sup>14</sup> Drawing on our First Amendment jurisprudence, see, e.g., *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U. S. 872, 878-879 (1990), JUSTICE STEVENS would "[l]ook to the generality of a regulation of property" to determine whether compensation is owing. *Post*, at 12. The Beachfront Management Act is general, in his view, because it "regulates the use of the coastline of the entire state." *Post*, at 14. There may be some validity to the principle JUSTICE STEVENS proposes, but it does not properly apply to the present case. The equivalent of a law of general application that inhibits the practice of religion without being aimed at religion, see *Oregon v. Smith*, *supra*, is a law that destroys the value of land without being aimed at land. Perhaps such a law—the generally applicable criminal prohibition on the manufacturing of alcoholic beverages challenged in *Mugler* comes to mind—cannot constitute a compensable taking. See 123 U. S., at 655-656. But a regulation specifically directed to land use no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions. JUSTICE STEVENS' approach renders the Takings Clause little more than a particularized restatement of the Equal Protection Clause.

# Woods Lake

|      |             |                                        |
|------|-------------|----------------------------------------|
| 708  | Thurston    | 105 X 148 X 114. + 60 X 55 X 120 X 121 |
| 711  | Nealy       | 40 X 120 + 85 X 49 X 120 X 106         |
| 705  | Bartels     | 60 X 120                               |
| 710  | Fischer     | 60 X 120                               |
| 712  | Rial        | 60 X 120                               |
| 713  | Watts       | 60 X 120                               |
| 714  | Greene      | 60 X 120                               |
| 715  | Cornwell    | 60 X 120                               |
| 716  | Abel        | 60 X 102                               |
| 800  | Stanton     | 83 X 120                               |
| 801  | Hynes       | 52 X 31 X 121 X 108                    |
| 802  | Mc Dwyer    | 66 X 32 X 120 X 105                    |
| 803  | Kriek       | 44 X 79 X 122 X 122                    |
| 804  | Smith       | 50 X 115                               |
| 805  | Collins     | 70 X 34 X 122 X 127                    |
| 806  | McKadden    | 50 X 83 X 120 X 115                    |
| 807  | Mack        | 83 X 132                               |
| 904  | Frank       | 82 X 120 + 41 X 120 + 20 X 120         |
| 905  | Thompson    | 41.64 X 126-                           |
| 906  | Rigdon      | 20 X 120                               |
| 907  | DeMuth      | 62 X 123                               |
| 1000 | Bartholomew | 40 X 120                               |
| 1002 | Cook        | 40 X 120                               |
| 1005 | Doyle       | 40 X 120                               |
| 1006 | Friedman    | 40 X 120                               |
| 1010 | Brady       | 40 X 120                               |
| 1012 | Cicci       | 20 X 120                               |
| 504  | Alleman     | 60 X 22.40                             |

7200

5750

5166

# Dorchester Rd.

|     |                       |                     |          |
|-----|-----------------------|---------------------|----------|
| 500 | Serio                 | 40 X 54 X 120 X 129 |          |
| 502 | Delaseyes             | 40 X 120            | 6191     |
| 503 | Doty                  | 40 X 120            | 40 X 120 |
| 507 | Frantz                | 60 X 120            |          |
| 508 | Fousels               | not on              |          |
| 509 | Mungelli              | 60 X 120            |          |
| 515 | Poling                | 60 X 120            |          |
| 700 | Wright                | 75 X 23 X 232 X 215 |          |
| 703 | Albrecht              | 80 X 120            |          |
| 708 | Kabit2                | 60 X 120            | Geo      |
| 708 | Delawater             | 80 X 120            | Rd       |
| 712 | Metcalf               | 60 X 120            |          |
| 719 | Nurd                  | 100 X 120           |          |
| 721 | Warner                | 100 X 120           |          |
| 722 | Ebbett                | 80 X 120            |          |
| 822 | Wiskar                | 60 X 120            |          |
|     | Timberline Enterprise | 40 X 120            |          |
|     | Mallampalli           | 100 X 120           |          |
|     | Wesley                | 35 X 60 X 120 X 120 |          |
|     | Alexander             | 80 X 120            |          |

# Delaware

|      |          |                      |
|------|----------|----------------------|
| 415  | Duffan   | 60 x 120             |
| 417  | Rushneck | 60 x 120             |
| 423  | Graves   | 80 x 120             |
| 425  | McGeehan | 80 x 120             |
| 429  | Blowford | 40 x 85 x 122 x 10   |
| 1201 | Dunbar   | 45 x 101             |
| 1203 | Perry    | 60 x 66 x 101 x 129  |
|      | Cowley   | 105 x 80 x 165 x 128 |
|      | Forde    | 80 x 120             |

eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.<sup>15</sup>

Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S., at 426—though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title. Compare *Scranton v. Wheeler*, 179 U. S. 141, 163 (1900) (interests of "riparian owner in the submerged lands . . . bordering on a public navigable water" held subject to Government's navigational servitude), with *Kaiser Aetna v. United States*, 444 U. S., at 178-180 (imposition of navigational servitude on marina created and rendered navigable at private expense held to constitute a taking). We believe similar treatment must be accorded confiscatory regulations, *i. e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.<sup>16</sup>

On this analysis, the owner of a lake bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon

discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. See Michelman, Property, Utility, and Fairness, Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1239-1241 (1967). In light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth (and Fourteenth) amendments, *Board of Regents of State Colleges v. Roth*, 408 U. S. 564, 577 (1972); see, *e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U. S. 986, 1011-1012 (1984); *Hughes v. Washington*, 389 U. S. 290, 295 (1967) (Stewart, J., concurring), this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional. When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.<sup>17</sup>

The "total taking" inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, see, *e.g.*, Restatement (Second) of Torts §§ 826, 827, ~~the social value of the claimant's activities and their suitability to the locality in question~~, see, *e.g.*, *id.*, §§ 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, see, *e.g.*, *id.*, §§ 827(e), 828(c), 830. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so, see Restatement (Second) of Torts, *supra*, § 827, comment *g*). So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the "essential use" of land, *Curtin v. Benson*, 222 U. S. 78, 86 (1911). The question, however, is one of state law to be dealt with on remand. We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*. As we have said, a "State, by *ipse dixit*, may not transform private property into public property without compensation . . ." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U. S. 155, 164 (1980).

<sup>15</sup> After accusing us of "launch[ing] a missile to kill a mouse," *post*, at 1, JUSTICE BLACKMUN expends a good deal of throw-weight of his own upon a noncombatant, arguing that our description of the "understanding" of land ownership that informs the Takings Clause is not supported by early American experience. That is largely true, but entirely irrelevant. The practices of the States prior to incorporation of the Takings and Just Compensation Clauses, see *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226 (1897)—which, as JUSTICE BLACKMUN acknowledges, occasionally included outright physical appropriation of land without compensation, see *post*, at 22—were out of accord with any plausible interpretation of those provisions. JUSTICE BLACKMUN is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all, see *post*, at 23, and *n. 23*, but even he does not suggest (explicitly, at least) that we renounce the Court's contrary conclusion in *Mahon*. Since the text of the Clause can be read to encompass regulatory as well as physical deprivations (in contrast to the text originally proposed by Madison, see Speech Proposing Bill of Rights (June 8, 1789), in 12 J. Madison, The Papers of James Madison 201 (C. Hobson, R. Rutland, W. Rachal, & J. Sisson ed. 1979) ("No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation"), we decline to do so as well.

<sup>16</sup> The principal "otherwise" that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of "real and personal property, in cases of actual necessity, to prevent the spreading of a fire" or to forestall other grave threats to the lives and property of others. *Bowditch v. Boston*, 101 U. S. 16, 18-19 (1880); see *United States v. Pacific Railroad*, 120 U. S. 227, 238-239 (1887).

<sup>17</sup> Of course, the State may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation. See *First English Evangelical Lutheran Church*, 482 U. S., at 321. But "where the [regulation has] already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Ibid*.

nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions. Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.

The Supreme Court of South Carolina erred, in my view, by reciting the general purposes for which the state regulations were enacted without a determination that they were in accord with the owner's reasonable expectations and therefore sufficient to support a severe restriction on specific parcels of property. See 304 S. C. 376, 383, 404 S. E. 2d 895, 899 (1991). The promotion of tourism, for instance, ought not to suffice to deprive specific property of all value without a corresponding duty to compensate. Furthermore, the means as well as the ends of regulation must accord with the owner's reasonable expectations. Here, the State did not act until after the property had been zoned for individual lot development and most other parcels had been improved, throwing the whole burden of the regulation on the remaining lots. This too must be measured in the balance. See *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 416 (1922).

With these observations, I concur in the judgment of the Court.

JUSTICE BLACKMUN, dissenting.

Today the Court launches a missile to kill a mouse.

The State of South Carolina prohibited petitioner Lucas from building a permanent structure on his property from 1988 to 1990. Relying on an unreviewed (and implausible) state trial court finding that this restriction left Lucas' property valueless, this Court granted review to determine whether compensation must be paid in cases where the State prohibits all economic use of real estate. According to the Court, such an occasion never has arisen in any of our prior cases, and the Court imagines that it will arise "relatively rarely" or only in "extraordinary circumstances." Almost certainly it did not happen in this case.

Nonetheless, the Court presses on to decide the issue, and as it does, it ignores its jurisdictional limits, remakes its traditional rules of review, and creates simultaneously a new categorical rule and an exception (neither of which is rooted in our prior case law, common law, or common sense). I protest not only the Court's decision, but each step taken to reach it. More fundamentally, I question the Court's wisdom in issuing sweeping new rules to decide such a narrow case. Surely, as JUSTICE KENNEDY demonstrates, the Court could have reached the result it wanted without inflicting this damage upon our Taking Clause jurisprudence.

My fear is that the Court's new policies will spread beyond the narrow confines of the present case. For that reason, I, like the Court, will give far greater attention to this case than its narrow scope suggests—not because I can intercept the Court's missile, or save the targeted mouse, but because I hope perhaps to limit the collateral damage.

I

A

In 1972 Congress passed the Coastal Zone Management Act. 16 U. S. C. § 1451 *et seq.* The Act was designed to provide States with money and incentives to carry out Congress' goal of protecting the public from shoreline

the Act, Congress directed States to enhance their coastal programs by "[p]reventing or significantly reducing threats to life and the destruction of property by eliminating development and redevelopment in high-hazard areas."<sup>1</sup> 16 U. S. C. § 1456b(a)(2) (1988 ed., Supp. II).

South Carolina began implementing the congressional directive by enacting the South Carolina Coastal Zone Management Act of 1977. Under the 1977 Act, any construction activity in what was designated the "critical area" required a permit from the Council, and the construction of any habitable structure was prohibited. The 1977 critical area was relatively narrow.

This effort did not stop the loss of shoreline. In October 1986, the Council appointed a "Blue Ribbon Committee on Beachfront Management" to investigate beach erosion and propose possible solutions. In March 1987, the Committee found that South Carolina's beaches were "critically eroding," and proposed land-use restrictions. Report of the South Carolina Blue Ribbon Committee on Beachfront Management i, 6-10 (March 1987). In response, South Carolina enacted the Beachfront Management Act on July 1, 1988. S.C. Code § 48-39-250 *et seq.* (Supp. 1990). The 1988 Act did not change the uses permitted within the designated critical areas. Rather, it enlarged those areas to encompass the distance from the mean high watermark to a setback line established on the basis of "the best scientific and historical data" available.<sup>2</sup> S.C. Code § 48-39-280 (Supp. 1991).

B

Petitioner Lucas is a contractor, manager, and part owner of the Wild Dune development on the Isle of Palms. He has lived there since 1978. In December 1986, he purchased two of the last four pieces of vacant property in the development.<sup>3</sup> The area is notoriously unstable. In roughly half of the last 40 years, all or part of petitioner's property was part of the beach or flooded twice daily by the ebb and flow of the tide. Tr. 84. Between 1957 and 1963, petitioner's property was under water. *Id.*, at 79, 81-82. Between 1963 and 1973 the shoreline was 100 to 150 feet onto petitioner's property. *Ibid.* In 1973 the first line of stable vegetation was about halfway through the property. *Id.*, at 80. Between 1981 and 1983, the Isle of Palms issued 12 emergency orders for sandbagging to protect property in the Wild Dune development. *Id.*, at 99. Determining that local habitable structures were in imminent danger of collapse,

<sup>1</sup>The country has come to recognize that uncontrolled beachfront development can cause serious damage to life and property. See Brief for Sierra Club, et al. as *Amici Curiae* 2-5. Hurricane Hugo's September 1989 attack upon South Carolina's coastline, for example, caused 29 deaths and approximately \$6 billion in property damage, much of it the result of uncontrolled beachfront development. See Zalkin, *Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute*, 79 Cal. L. Rev. 205, 212-213 (1991). The beachfront buildings are not only themselves destroyed in such a storm, "but they are often driven, like battering rams, into adjacent inland homes." *Ibid.* Moreover, the development often destroys the natural sand dune barriers that provide storm breaks. *Ibid.*

<sup>2</sup>The setback line was determined by calculating the distance landward from the crest of an ideal oceanfront sand dune which is forty times the annual erosion rate. S.C. Code § 48-39-280 (Supp. 1991).

<sup>3</sup>The properties were sold frequently at rapidly escalating prices before Lucas purchased them. Lot 22 was first sold in 1979 for \$96,660, sold in 1984 for \$187,500, then in 1985 for \$260,000, and, finally, to Lucas in 1986 for \$475,000. He estimated its worth in 1991 at \$650,000. Lot 24 had a similar past. The record does not indicate who purchased the properties prior to Lucas, or why none of the purchasers held on to the

the Council issued permits for two rock revetments to protect condominium developments near petitioner's property from erosion; one of the revetments extends more than halfway onto one of his lots. *Id.*, at 102.

## C

The South Carolina Supreme Court found that the Beach Management Act did not take petitioner's property without compensation. The decision rested on two premises that until today were unassailable—that the State has the power to prevent any use of property it finds to be harmful to its citizens, and that a state statute is entitled to a presumption of constitutionality.

The Beachfront Management Act includes a finding by the South Carolina General Assembly that the beach/dune system serves the purpose of "protect[ing] life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner." §48-39-250(1)(a). The General Assembly also found that "development unwisely has been sited too close to the [beach/dune] system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property." §48-39-250(4); see also §48-39-250(6) (discussing the need to "afford the beach/dune system space to accrete and erode").

If the state legislature is correct that the prohibition on building in front of the setback line prevents serious harm, then, under this Court's prior cases, the Act is constitutional. "Long ago it was recognized that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491-492 (1987) (internal quotations omitted); see also *id.*, at 488-489, and n. 18. The Court consistently has upheld regulations imposed to arrest a significant threat to the common welfare, whatever their economic effect on the owner. See e.g., *Goldblatt v. Hempstead*, 369 U.S. 590, 592-593 (1962); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Gorieb v. Fox*, 274 U.S. 603, 608 (1927); *Mugler v. Kansas*, 123 U.S. 623 (1887).

Petitioner never challenged the legislature's findings that a building ban was necessary to protect property and life. Nor did he contend that the threatened harm was not sufficiently serious to make building a house in a particular location a "harmful" use, that the legislature had not made sufficient findings, or that the legislature was motivated by anything other than a desire to minimize damage to coastal areas. Indeed, petitioner objected at trial that evidence as to the purposes of the setback requirement was irrelevant. Tr. 68. The South Carolina Supreme Court accordingly understood petitioner not to contest the State's position that "discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm," 304 S.C. 376, \_\_\_, 404 S.E. 2d 895, 898 (1991), and "to prevent serious injury to the community." *Id.*, at \_\_\_, 404 S.E. 2d, at 901. The court considered itself "bound by these uncontested legislative findings . . . [in the absence of] any attack whatsoever on the statutory scheme." *Id.*, at \_\_\_, 404 S.E. 2d, at 898.

Nothing in the record undermines the General Assembly's assessment that prohibitions on building in front of the setback line are necessary to protect people and property

legislative determination cannot be disregarded in the absence of such evidence, see, e.g., *Euclid*, 272 U.S., at 388; *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257-258 (1931) (Brandeis, J.), and because its determination of harm to life and property from building is sufficient to prohibit that use under this Court's cases, the South Carolina Supreme Court correctly found no taking.

## II

My disagreement with the Court begins with its decision to review this case. This Court has held consistently that a land-use challenge is not ripe for review until there is a final decision about what uses of the property will be permitted. The ripeness requirement is not simply a gesture of good-will to land-use planners. In the absence of "a final and authoritative determination of the type and intensity of development legally permitted on the subject property," *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986), and the utilization of state procedures for just compensation, there is no final judgment, and in the absence of a final judgment there is no jurisdiction. See *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 633 (1981); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

This rule is "compelled by the very nature of the inquiry required by the Just Compensation Clause," because the factors applied in deciding a takings claim "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 190, 191 (1985). See also *MacDonald, Sommer & Frates*, 477 U.S., at 348 ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes") (citation omitted).

The Court admits that the 1990 amendments to the Beachfront Management Act allowing special permits preclude Lucas from asserting that his property has been permanently taken. See *ante*, at 5-6. The Court agrees that such a claim would not be ripe because there has been no final decision by respondent on what uses will be permitted. The Court, however, will not be denied: it determines that petitioner's "temporary takings" claim for the period from July 1, 1988, to June 25, 1990, is ripe. But this claim also is not justiciable.<sup>4</sup>

From the very beginning of this litigation, respondent has argued that the courts:

"lack[] jurisdiction in this matter because the Plaintiff has sought no authorization from Council for use of his property, has not challenged the location of the baseline or setback line as alleged in the Complaint and because no final agency decision has been rendered concerning use of his property or location of said baseline or setback line."

Tr. 10 (answer, as amended). Although the Council's plea has been ignored by every court, it is undoubtedly correct.

Under the Beachfront Management Act, petitioner was entitled to challenge the setback line or the baseline or

<sup>4</sup>The Court's reliance, *ante*, at 7, on *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 168 (CA4 1991), cert. pending No. 91-941, in support of its decision to consider Lucas' temporary taking claim ripe is misplaced. In *Esposito* the plaintiffs brought a facial challenge to the mere enactment of the Act. Here, of course, Lucas has brought an as-applied challenge. See Brief for Petitioner 16. Facial challenges are ripe when the Act is passed, applied challenges require a final decision on the merits of the property in question.

erosion rate applied to his property in formal administrative, followed by judicial, proceedings. S.C. Code §48-39-280(E) (Supp 1991). Because Lucas failed to pursue this administrative remedy, the Council never finally decided whether Lucas' particular piece of property was correctly categorized as a critical area in which building would not be permitted. This is all the more crucial because Lucas argued strenuously in the trial court that his land was perfectly safe to build on, and that his company had studies to prove it. Tr. 20, 25, 36. If he was correct, the Council's final decision would have been to alter the setback line, eliminating the construction ban on Lucas' property.

That petitioner's property fell within the critical area as initially interpreted by the Council does not excuse petitioner's failure to challenge the Act's application to his property in the administrative process. The claim is not ripe until petitioner seeks a variance from that status. "[W]e have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985). See also *Williamson County*, 473 U.S., at 188 (claim not ripe because respondent did not seek variances that would have allowed it to develop the property, notwithstanding the Commission's finding that the plan did not comply with the zoning ordinance and subdivision regulations).<sup>5</sup>

Even if I agreed with the Court that there were no jurisdictional barriers to deciding this case, I still would not try to decide it. The Court creates its new taking jurisprudence based on the trial court's finding that the property had lost all economic value.<sup>6</sup> This finding is almost certainly erroneous. Petitioner still can enjoy other attributes of ownership, such as the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. State courts frequently have recognized that land has economic value where the only residual economic uses are recreation or camping. See, e.g., *Turnpike Realty Co. v. Dedham*, 362 Mass. 221, 284 N.E.2d 891 (1972); *Turner v. County of Del Norte*, 24 Cal App. 3d 311, 101 Cal. Rptr. 93 (1972), cert. denied, 409 U.S. 1108 (1973); *Hall v. Board of Environmental Protection*, 528 A.2d 453 (Me. 1987). Petitioner also retains the right to alienate

the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house.

Yet the trial court, apparently believing that "less value" and "valueless" could be used interchangeably, found the property "valueless." The court accepted no evidence from the State on the property's value without a home, and petitioner's appraiser testified that he never had considered what the value would be absent a residence. Tr. 54-55. The appraiser's value was based on the fact that the "highest and best use of these lots . . . [is] luxury single family detached dwellings." *Id.*, at 48. The trial court appeared to believe that the property could be considered "valueless" if it was not available for its most profitable use. Absent that erroneous assumption, see *Goldblatt*, 369 U.S., at 592, I find no evidence in the record supporting the trial court's conclusion that the damage to the lots by virtue of the restrictions was "total." Record 128 (findings of fact). I agree with the Court, *ante*, at 14, n. 9, that it has the power to decide a case that turns on an erroneous finding, but I question the wisdom of deciding an issue based on a factual premise that does not exist in this case, and in the judgment of the Court will exist in the future only in "extraordinary circumstance[s]." *Ante*, at 12.

Clearly, the Court was eager to decide this case.<sup>7</sup> But eagerness, in the absence of proper jurisdiction, must—and in this case should have been—met with restraint.

### III

The Court's willingness to dispense with precedent in its haste to reach a result is not limited to its initial jurisdictional decision. The Court also alters the long-settled rules of review.

The South Carolina Supreme Court's decision to defer to legislative judgments in the absence of a challenge from petitioner comports with one of this Court's oldest maxims: "the existence of facts supporting the legislative judgment is to be presumed." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). Indeed, we have said the legislature's judgment is "well-nigh conclusive." *Berman v. Parker*, 348 U.S. 26, 32 (1954). See also *Sweet v. Rechel*, 159 U.S. 380, 392 (1895); *Euclid*, 272 U.S., at 388 ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control").

Accordingly, this Court always has required plaintiffs challenging the constitutionality of an ordinance to provide "some factual foundation of record" that contravenes the legislative findings. *O'Gorman & Young*, 282 U.S., at 258. In the absence of such proof, "the presumption of constitutionality must prevail." *Id.*, at 257. We only recently have reaffirmed that claimants have the burden of showing a state law constitutes a taking. See *Keystone Bituminous*

<sup>5</sup>Even more baffling, given its decision, just a few days ago, in *Lujan v. Defenders of Wildlife*, \_\_\_ U.S. \_\_\_ (1992), the Court decides petitioner has demonstrated injury in fact. In his complaint, petitioner made no allegations that he had any definite plans for using his property. App. to Pet. for Cert. 153-156. At trial, Lucas testified that he had house plans drawn up, but that he was "in no hurry" to build "because the lot was appreciating in value." Tr. 28-29. The trial court made no findings of fact that Lucas had any plans to use the property from 1988 to 1990. "[S]ome day" intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." \_\_\_ U.S., at \_\_\_ (slip op. 8). The Court circumvents *Defenders of Wildlife* by deciding to resolve this case as if it arrived on the pleadings alone. But it did not. Lucas had a full trial on his claim for "damages for the temporary taking of his property from the date of the 1988 Act's passage to such time as this matter is finally resolved," *ante*, at 7, n. 3, quoting the Complaint, and failed to demonstrate any immediate concrete plans to build or sell.

<sup>6</sup>Respondent contested the findings of fact of the trial court in the South Carolina Supreme Court, but that court did not resolve the issue. This Court's decision to assume for its purposes that petitioner had been denied all economic use of his land does not, of course, dispose of the issue on remand.

<sup>7</sup>The Court overlooks the lack of a ripe and justiciable claim apparently out of concern that in the absence of its intervention Lucas will be unable to obtain further adjudication of his temporary-taking claim. The Court chastises respondent for arguing that Lucas's temporary-taking claim is premature because it failed "so much as [to] commen[t]" upon the effect of the South Carolina Supreme Court's decision on petitioner's ability to obtain relief for the 2-year period, and it frets that Lucas would "be unable (absent our intervention now) to obtain further state-court adjudication with respect to the 1988-1990 period." *Ante*, at 6. Whatever the explanation for the Court's intense interest in Lucas' plight when ordinarily we are more cautious in granting discretionary review, the concern would have been more prudently expressed by vacating the judgment below and remanding for further consideration in light of the 1990 amendments. At that point, petitioner could have brought a temporary-taking claim in the state courts.

The Court recognizes that "our prior opinions have suggested that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation," *ante*, at 17, but seeks to reconcile them with its categorical rule by claiming that the Court never has upheld a regulation when the owner alleged the loss of all economic value. Even if the Court's factual premise were correct, its understanding of the Court's cases is distorted. In none of the cases did the Court suggest that the right of a State to prohibit certain activities without paying compensation turned on the availability of some residual valuable use.<sup>12</sup> Instead, the cases depended on whether the government interest was sufficient to prohibit the activity, given the significant private cost.<sup>13</sup>

These cases rest on the principle that the State has full power to prohibit an owner's use of property if it is harmful to the public. "[S]ince no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Keystone Bituminous Coal*, 480 U.S., at 491, n. 20. It would make no sense under this theory to suggest that an owner has a constitutionally protected right to harm others, if only he makes the proper showing of economic loss.<sup>14</sup> See *Pennsyl-*

vania *Coal Co. v. Mahon*, 260 U.S. 393, 418 (1922) (Brandeis, J., dissenting) ("Restriction upon [harmful] use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put").

## B

Ultimately even the Court cannot embrace the full implications of its *per se* rule: it eventually agrees that there cannot be a categorical rule for a taking based on economic value that wholly disregards the public need asserted. Instead, the Court decides that it will permit a State to regulate all economic value only if the State prohibits uses that would not be permitted under "background principles of nuisance and property law."<sup>15</sup> *Ante*, at 26.

Until today, the Court explicitly had rejected the contention that the government's power to act without paying compensation turns on whether the prohibited activity is a common-law nuisance.<sup>16</sup> The brewery closed in *Mugler* itself was not a common-law nuisance, and the Court specifically stated that it was the role of the legislature to determine what measures would be appropriate for the protection of public health and safety. See 123 U.S., at 661. In upholding the state action in *Miller*, the Court found it unnecessary to "weigh with nicety the question whether the infected cedars constitute a nuisance according to common law; or whether they may be so declared by statute." 276 U.S., at 280. See also *Goldblatt*, 369 U.S., at 593; *Hadacheck*, 239 U.S., at 411. Instead the Court has relied in the past, as the South Carolina Court has done here, on legislative judgments of what constitutes a harm.<sup>17</sup>

sentence, but in no way suggest that the public interest is irrelevant if total value has been taken. The Court has indicated that proof that a regulation does not deny an owner economic use of his property is sufficient to defeat a facial taking challenge. See *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 295-297 (1981). But the conclusion that a regulation is not on its face a taking because it allows the landowner some economic use of property is a far cry from the proposition that denial of such use is sufficient to establish a taking claim regardless of any other consideration. The Court never has accepted the latter proposition.

The Court relies today on dicta in *Agins*, *Hodel*, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Keystone Bituminous Coal v. DeBenedictis*, 480 U.S. 470 (1987), for its new categorical rule. *Ante*, at 10. I prefer to rely on the directly contrary holdings in cases such as *Mugler* and *Hadacheck*, not to mention contrary statements in the very cases on which the Court relies. See *Agins*, 447 U.S., at 260-262; *Keystone Bituminous Coal*, 480 U.S., at 489 n. 18, 491-492.

<sup>12</sup>*Miller v. Schoene*, 276 U.S. 272 (1928), is an example. In the course of demonstrating that apple trees are more valuable than red cedar trees, the Court noted that red cedar has "occasional use and value as lumber." *Id.*, at 279. But the Court did not discuss whether the timber owned by the petitioner in that case was commercially saleable, and nothing in the opinion suggests that the State's right to require uncompensated felling of the trees depended on any such salvage value. To the contrary, it is clear from its unanimous opinion that the *Schoene* Court would have sustained a law requiring the burning of cedar trees if that had been necessary to protect apple trees in which there was a public interest: the Court spoke of preferment of the public interest over the property interest of the individual, "to the extent even of its destruction." *Id.*, at 280.

<sup>13</sup>The Court seeks to disavow the holdings and reasoning of *Mugler* and subsequent cases by explaining that they were the Court's early efforts to define the scope of the police power. There is language in the earliest taking cases suggesting that the police power was considered to be the power simply to prevent harms. Subsequently, the Court expanded its understanding of what were government's legitimate interests. But it does not follow that the holding of those early cases—that harmful and noxious uses of property can be forbidden whatever the harm to the property owner and without the payment of compensation—was repudiated. To the contrary, as the Court consciously expanded the scope of the police power beyond preventing harm, it clarified that there was a core of public interests that overrode any private interest. See *Keystone Bituminous Coal*, 480 U.S., at 491, n. 20.

<sup>14</sup>Indeed, it would be extraordinary to construe the Constitution to require a government to compensate private landowners because it denied them 'the right' to use property which cannot be used without risking injury and death." *First Lutheran Church*, 210 Cal. App. 3d, at 1366, 258 Cal. Rptr., at \_\_\_\_.

<sup>15</sup>Although it refers to state nuisance and property law, the Court apparently does not mean just any state nuisance and property law. Public nuisance was first a common-law creation, see Newark, *The Boundaries of Nuisance*, 65 L. Q. Rev. 480, 482 (1949) (attributing development of nuisance to 1535), but by the 1800s in both the United States and England, legislatures had the power to define what is a public nuisance, and particular uses often have been selectively targeted. See Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 999-1000 (1966); J.F. Stephen, *A General View of the Criminal Law of England* 105-107 (2d ed. 1890). The Court's references to "common-law" background principles, however, indicate that legislative determinations do not constitute "state nuisance and property law" for the Court.

<sup>16</sup>Also, until today the fact that the regulation prohibited uses that were lawful at the time the owner purchased did not determine the constitutional question. The brewery, the brickyard, the cedar trees, and the gravel pit were all perfectly legitimate uses prior to the passage of the regulation. See *Mugler v. Kansas*, 123 U.S. 623, 654 (1887); *Hadacheck v. Los Angeles*, 239 U.S. 394 (1915); *Miller*, 276 U.S., at 272; *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). This Court explicitly acknowledged in *Hadacheck* that "[a] vested interest cannot be asserted against [the police power] because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions." 239 U.S., at 410 (citation omitted).

<sup>17</sup>The Court argues that finding no taking when the legislature prohibits a harmful use, such as the Court did in *Mugler* and the South Carolina Supreme Court did in the instant case, would nullify *Pennsylvania Coal*. See *ante*, at 17. Justice Holmes, the author of *Pennsylvania Coal*, joined *Miller v. Schoene*, 276 U.S. 272 (1928), six years later. In *Miller*, the Court adopted the exact approach of the South Carolina Court: It found the cedar trees harmful, and their destruction not a taking, whether or not they were a nuisance. Justice Holmes apparently believed that such an approach did not repudiate his earlier opinion. Moreover, this Court already has been over this ground five years ago, and at that point rejected the assertion that *Pennsylvania Coal* was inconsistent with *Mugler*, *Hadacheck*, *Miller*, or the others in the string of "noxious use" cases, recognizing instead that the nature of the State's action is critical in takings analysis. *Keystone Bituminous Coal*, 480 U.S., at 490.

Pen. & W. 462, 465 (Pa. 1830)). See also *State v. Dawson*, 3 Hill 100, 103 (S.C. 1836)).<sup>22</sup>

Although, prior to the adoption of the Bill of Rights, America was replete with land use regulations describing which activities were considered noxious and forbidden, see Bender, *The Takings Clause: Principles or Politics?*, 34 Buffalo L. Rev. 735, 751 (1985); L. Friedman, *A History of American Law* 66-68 (1973), the Fifth Amendment's Taking Clause originally did not extend to regulations of property, whatever the effect.<sup>23</sup> See *ante*, at 8. Most state courts agreed with this narrow interpretation of a taking. "Until the end of the nineteenth century . . . jurists held that the constitution protected possession only, and not value." Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. Cal. L. Rev. 1, 76 (1986); Bosselman 106. Even indirect and consequential injuries to property resulting from regulations were excluded from the definition of a taking. See Bosselman 106; *Callender v. Marsh*, 1 Pick. 418, 430 (Mass. 1823).

Even when courts began to consider that regulation in some situations could constitute a taking, they continued to uphold bans on particular uses without paying compensation, notwithstanding the economic impact, under the rationale that no one can obtain a vested right to injure or endanger the public.<sup>24</sup> In the *Coates* cases, for example, the Supreme Court of New York found no taking in New York's ban on the interment of the dead within the city, although "no other use can be made of these lands." *Coates v. City of New York*, 7 Cow. 585, 592 (N.Y. 1827). See also *Brick Presbyterian Church v. City of New York*, 5 Cow. 538 (N.Y. 1826); *Commonwealth v. Alger*, 7 Cush. 53, 59, 104 (Mass. 1851); *St. Louis Gunning Advertisement Co. v. St. Louis*, 235 Mo. 99, 137 S.W. 929, 942 (1911), appeal dismissed, 231 U.S. 761 (1913). More recent cases reach the same result. See *Consolidated Rock Products Co. v. Los Angeles*, 57 Cal.2d 515, 370 P.2d 342, appeal dismissed, 371 U.S. 36 (1962); *Nassr v. Commonwealth*, 394 Mass. 767, 477 N.E.2d 987 (1985); *Eno v. Burlington*, 125 Vt. 8, 209 A.2d 499 (1965); *Turner v. County of Del Norte*, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972).

<sup>22</sup>Only the constitutions of Vermont and Massachusetts required that compensation be paid when private property was taken for public use; and although eminent domain was mentioned in the Pennsylvania constitution, its sole requirement was that property not be taken without the consent of the legislature. See Grant, *The "Higher Law" Background of the Law of Eminent Domain*, in 2 *Selected Essays on Constitutional Law* 912, 915-916 (1938). By 1868, five of the original States still had no just compensation clauses in their constitutions. *Ibid*.

<sup>23</sup>James Madison, author of the Taking Clause, apparently intended it to apply only to direct, physical takings of property by the Federal Government. See Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J., 694, 711 (1985). Professor Sax argues that although "contemporaneous commentary upon the meaning of the compensation clause is in very short supply," 74 Yale L.J., at 58, the "few authorities that are available" indicate that the clause was "designed to prevent arbitrary government action," not to protect economic value. *Id.*, at 58-60.

<sup>24</sup>For this reason, the retroactive application of the regulation to formerly lawful uses was not a controlling distinction in the past. "Nor can it make any difference that the right is purchased previous to the passage of the by-law," for "[e]very right, from an absolute ownership in property, down to a mere easement, is purchased and holden subject to the restriction, that it shall be so exercised as not to injure others. Though, at the time, it be remote and inoffensive, the purchaser is bound to know, at his peril, that it may become otherwise." *Coates v. City of New York*, 7 Cow. 585, 605 (N.Y. 1827). See also *Brick Presbyterian Church v. City of New York*, 5 Cow. 538, 542 (N.Y. 1826); *Commonwealth v. Tewksbury*, 11 Metc. 55 (Mass. 1846); *State v. Paul*, 5 R.I. 185 (1858).

In addition, state courts historically have been less likely to find that a government action constitutes a taking when the affected land is undeveloped. According to the South Carolina court, the power of the legislature to take unimproved land without providing compensation was sanctioned by "ancient rights and principles." *Lindsay v. Commissioners*, 2 S.C.L. 38, 57 (1796). "Except for Massachusetts, no colony appears to have paid compensation when it built a state-owned road across unimproved land. Legislatures provided compensation only for enclosed or improved land." Treanor, 94 Yale L.J., at 695 (footnotes omitted). This rule was followed by some States into the 1800s. See Horwitz 63-65.

With similar result, the common agrarian conception of property limited owners to "natural" uses of their land prior to and during much of the 18th century. See *id.*, at 32. Thus, for example, the owner could build nothing on his land that would alter the natural flow of water. See *id.*, at 44; see also, e.g., *Merritt v. Parker*, 1 Cox 460, 463 (N.J. 1795). Some more recent state courts still follow this reasoning. See, e.g., *Just v. Marinette County*, 56 Wis.2d 7, 201 N.W.2d 761, 768 (1972).

Nor does history indicate any common-law limit on the State's power to regulate harmful uses even to the point of destroying all economic value. Nothing in the discussions in Congress concerning the Taking Clause indicates that the Clause was limited by the common-law nuisance doctrine. Common law courts themselves rejected such an understanding. They regularly recognized that it is "for the legislature to interpose, and by positive enactment to prohibit a use of property which would be injurious to the public." *Tewksbury*, 11 Metc., at 57.<sup>25</sup> Chief Justice Shaw explained in upholding a regulation prohibiting construction of wharves, the existence of a taking did not depend on "whether a certain erection in tide water is a nuisance at common law or not." *Alger*, 7 Cush., at 104; see also *State v. Paul*, 5 R.I. 185, 193 (1858); *Commonwealth v. Parks*, 155 Mass. 531, 532, 30 N.E. 174 (1892) (Holmes, J.) ("[T]he legislature may change the common law as to nuisances, and may move the line either way, so as to make things nuisances which were not so, or to make things lawful which were nuisances").

In short, I find no clear and accepted "historical compact" or "understanding of our citizens" justifying the Court's new taking doctrine. Instead, the Court seems to treat history as a grab-bag of principles, to be adopted where they support the Court's theory, and ignored where they do not. If the Court decided that the early common law provides the background principles for interpreting the Taking Clause, then regulation, as opposed to physical confiscation, would not be compensable. If the Court decided that the law of a later period provides the background principles, then regulation might be compensable, but the Court would have to confront the fact that legislatures regularly determined which uses were prohibited, independent of the common law, and independent of whether the uses were lawful when the owner purchased. What makes the Court's analysis unworkable is its attempt to package the law of two incompatible eras and peddle it as historical fact.<sup>26</sup>

<sup>25</sup>More recent state court decisions agree. See, e.g., *Lane v. Mt. Vernon*, 38 N.Y.2d 344, 342 N.E.2d 571, 573 (1976); *Commonwealth v. Baker*, 160 Pa. Super. 640, 53 A.2d 829, 830 (1947).

<sup>26</sup>The Court asserts that all early American experience, prior to and after passage of the Bill of Rights, and any case law prior to 1897 are "entirely irrelevant" in determining what is "the historical compact recorded in the Takings Clause." *Ante*, at 22, n. 15. Nor apparently are we to find this compact in the early federal taking cases, which clearly

## V

The Court makes sweeping and, in my view, misguided and unsupported changes in our taking doctrine. While it limits these changes to the most narrow subset of government regulation—those that eliminate all economic value from land—these changes go far beyond what is necessary to secure petitioner Lucas' private benefit. One hopes they do not go beyond the narrow confines the Court assigns them to today.

I dissent.

JUSTICE STEVENS, dissenting.

Today the Court restricts one judge-made rule and expands another. In my opinion it errs on both counts. Proper application of the doctrine of judicial restraint would avoid the premature adjudication of an important constitutional question. Proper respect for our precedents would avoid an illogical expansion of the concept of "regulatory takings."

## 1

As the Court notes, *ante*, at 5, South Carolina's Beachfront Management Act has been amended to permit some construction of residences seaward of the line that frustrated petitioner's proposed use of his property. Until he exhausts his right to apply for a special permit under that amendment, petitioner is not entitled to an adjudication by this Court of the merits of his permanent takings claim. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U. S. 340, 351 (1986).

It is also not clear that he has a viable "temporary takings" claim. If we assume that petitioner is now able to build on the lot, the only injury that he may have suffered is the delay caused by the temporary existence of the absolute statutory ban on construction. We cannot be sure, however, that that delay caused petitioner any harm because the record does not tell us whether his building plans were even temporarily frustrated by the enactment of the statute.<sup>1</sup> Thus, on the present record it is entirely possible that petitioner has suffered no injury-in-fact even if the state statute was unconstitutional when he filed this lawsuit.

It is true, as the Court notes, that the argument against deciding the constitutional issue in this case rests on prudential considerations rather than a want of jurisdiction. I think it equally clear, however, that a Court less eager to decide the merits would follow the wise counsel of Justice Brandeis in his deservedly famous concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 341 (1936). As he explained, the Court has developed "for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Id.* at 346. The second of those rules applies directly to this case.

"2. The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it."

permitted prohibition of harmful uses despite the alleged loss of all value, whether or not the prohibition was a common-law nuisance, and whether or not the prohibition occurred subsequent to the purchase. See *supra*, pp. 13-14, 18-19, and n. 16. I cannot imagine where the Court finds its "historical compact," if not in history.

<sup>1</sup> In this regard, it is noteworthy that petitioner acquired the lot about 18 months before the statute was passed; there is no evidence that he ever sought a building permit from the local authorities.

*Liverpool, N.Y. & P.S.S. Co. v. Emigration Commissioners*, 113 U. S. 33, 39, [citing five additional cases]. "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States*, 196 U. S. 283, 295." *Id.*, at 346-347.

Cavalierly dismissing the doctrine of judicial restraint, the Court today tersely announces that "we do not think it prudent to apply that prudential requirement here." *Ante*, at 7. I respectfully disagree and would save consideration of the merits for another day. Since, however, the Court has reached the merits, I shall do so as well.

## II

In its analysis of the merits, the Court starts from the premise that this Court has adopted a "categorical rule that total regulatory takings must be compensated," *ante*, at 21, and then sets itself to the task of identifying the exceptional cases in which a State may be relieved of this categorical obligation. *Ante*, at 21-22. The test the Court announces is that the regulation must do no more than duplicate the result that could have been achieved under a State's nuisance law. *Ante*, at 24. Under this test the categorical rule will apply unless the regulation merely makes explicit what was otherwise an implicit limitation on the owner's property rights.

In my opinion, the Court is doubly in error. The categorical rule the Court establishes is an unsound and unwise addition to the law and the Court's formulation of the exception to that rule is too rigid and too narrow.

## The Categorical Rule

As the Court recognizes, *ante*, at 9, *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (1922), provides no support for its—or, indeed, any—categorical rule. To the contrary, Justice Holmes recognized that such absolute rules ill fit the inquiry into "regulatory takings." Thus, in the paragraph that contains his famous observation that a regulation may go "too far" and thereby constitute a taking, the Justice wrote: "As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions." *Id.* at 416. What he had "already...said" made perfectly clear that Justice Holmes regarded economic injury to be merely one factor to be weighed: "One fact for consideration in determining such limits is the extent of the diminution [of value]. So the question depends upon the particular facts." *Id.* at 413.

Nor does the Court's new categorical rule find support in decisions following *Mahon*. Although in dicta we have sometimes recited that a law "effects a taking if [it]...denies an owner economically viable use of his land," *Agins v. Tiburon*, 447 U. S. 255, 260 (1980), our rulings have rejected such an absolute position. We have frequently—and recently—held that, in some circumstances, a law that renders property valueless may nonetheless not constitute a taking. See, e.g., *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U. S. 304, 313 (1987); *Goldblatt v. Hempstead*, 369 U. S. 590, 596 (1962); *United States v. Caltex*, 344 U. S. 149, 155 (1952); *Miller v. Schoene*, 276 U. S. 272 (1928); *Hadachek v. Sebastian*, 239 U. S. 394, 405 (1915); *Mugler v. Kansas*, 123 U. S. 623, 657 (1887); cf. *Ruckelshaus v. Monsanto Co.*, 467 U. S. 986, 1011 (1984); *Connolly v. Pension Benefit Guaranty Corporation*, 475 U. S. 211, 225 (1986). In short, as we stated in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U. S. 470, 490 (1987), "'Although a comparison of values before and after' a regulatory action 'is relevant,

the dwelling has existed on Lot 1 for over 40 years and that said dwelling is located 5 feet from the side property line. Lot 2, which consists of .118 acres, has remained vacant since the original lot lines were drawn as part of the Dundalk Highlands subdivision as indicated on the plat filed with the Land Records of Baltimore County in May 1926, a copy of which was introduced as Petitioner's Exhibit 3. Petitioner testified he is desirous of selling Lot 2 to the Emerald Development Corporation who proposes to construct a two-story, three bedroom home which, in the Petitioners' opinion, will be in keeping with the character and quality of the neighborhood. Testimony presented by Petitioners noted that the house can be constructed in strict compliance with all setback requirements other than side yard. The only variance required is as to the lot width. Petitioners contend that to require strict compliance with result in undue hardship to them as the lot was created as a 50-foot wide lot in 1926. Further, Petitioners noted that a number of the lots in the surrounding neighborhood are 50 feet wide.

The Protestants, in addition to their general opposition to Petitioners' request, were concerned about the quality and integrity of the proposed dwelling for Lot 2. Many of the Protestants have resided in the area for more than 40 years and their testimony evidenced the pride they have in their property. After discussions between the Protestants and the Petitioners, certain modifications were made and an agreement was reached between the parties in the event the request was granted.

Subsequent to the hearing, a plan was submitted detailing the exterior design and a sample of the proposed brick, which is red Glen-Gery Brick, AA Matt. Said plan has been incorporated into the file and identified as Petitioner's Exhibit A. Additionally, a landscaping plan was

CRB-300  
Date 10/14/89  
By Betty J. Subukman

"It is true, that, when the defendants . . . erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. [T]he supervision of the public health and the public morals is a governmental power, 'continuing in its nature,' and 'to be dealt with as the special exigencies of the moment may require;' . . . 'for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.'" *Id.*, at 669.

Under our reasoning in *Mugler*, a state's decision to prohibit or to regulate certain uses of property is not a compensable taking just because the particular uses were previously lawful. Under the Court's opinion today, however, if a state should decide to prohibit the manufacture of asbestos, cigarettes, or concealable firearms, for example, it must be prepared to pay for the adverse economic consequences of its decision. One must wonder if Government will be able to "go on" effectively if it must risk compensation "for every such change in the general law." *Mahon*, 260 U. S., at 413.

The Court's holding today effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property. Until today, I had thought that we had long abandoned this approach to constitutional law. More than a century ago we recognized that "the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Munn v. Illinois*, 94 U. S. 113, 134 (1877). As Justice Marshall observed about a position similar to that adopted by the Court today:

"If accepted, that claim would represent a return to the era of *Lochner v. New York*, 198 U. S. 45 (1905), when common-law rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance. The Due Process Clause does not require such a result." *PruneYard Shopping Center v. Robins*, 447 U. S. 74, 93 (1980) (concurring opinion).

Arresting the development of the common law is not only a departure from our prior decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution—both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners. Thus, when the Nation came to understand that slavery was morally wrong and mandated the emancipation of all slaves, it, in effect, redefined "property." On a lesser scale, our ongoing self-education produces similar changes in the rights of property owners: New appreciation of the significance of endangered species, see, e.g., *Andrus v. Allard*, 444 U. S. 51 (1979); the importance of wetlands, see, e.g., 16 U. S. C. § 3801 *et seq.*; and the vulnerability of coastal lands, see, e.g., 16 U. S. C. § 1451 *et seq.*, shapes our evolving understandings of property rights.

Of course, some legislative redefinitions of property will effect a taking and must be compensated—but it certainly cannot be the case that every movement away from common law does so. There is no reason, and less sense, in such an absolute rule. We live in a world in which changes in the

economy and the environment occur with increasing frequency and importance. If it was wise a century ago to allow Government "the largest legislative discretion" to deal with "the special exigencies of the moment," *Mugler*, 123 U. S., at 669, it is imperative to do so today. The rule that should govern a decision in a case of this kind should focus on the future, not the past.<sup>5</sup>

\* \* \*

The Court's categorical approach rule will, I fear, greatly hamper the efforts of local officials and planners who must deal with increasingly complex problems in land-use and environmental regulation. As this case—in which the claims of an individual property owner exceed \$1 million—well demonstrates, these officials face both substantial uncertainty because of the ad hoc nature of takings law and unacceptable penalties if they guess incorrectly about that law.<sup>6</sup>

Viewed more broadly, the Court's new rule and exception conflict with the very character of our takings jurisprudence. We have frequently and consistently recognized that the definition of a taking cannot be reduced to a "set formula" and that determining whether a regulation is a taking is "essentially [an] ad hoc, factual inquiry[.]" *Penn Central Transportation Co. v. New York City*, 438 U. S. 104, 124 (1978) (quoting *Goldblatt v. Hempstead*, 369 U. S. 590, 594 (1962)). This is unavoidable, for the determination whether a law effects a taking is ultimately a matter of "fairness and justice," *Armstrong v. United States*, 364 U. S. 40, 49 (1960), and "necessarily requires a weighing of private and public interests." *Agins*, 447 U. S., at 261. The rigid rules fixed by the Court today clash with this enterprise: "fairness and justice" are often disserved by categorical rules.

### III

It is well established that a takings case "entails inquiry into [several factors:] the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *PruneYard*, 447 U. S., at 83. The Court's analysis today focuses on the last two of these three factors: the categorical rule addresses a regulation's "economic impact," while the nuisance exception recognizes that ownership brings with it only certain "expectations." Neglected by the Court today is the first, and in some ways, the most important factor in takings analysis: the character of the regulatory action.

The Just Compensation Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne

<sup>5</sup> Even measured in terms of efficiency, the Court's rule is unsound. The Court today effectively establishes a form of insurance against certain changes in land-use regulations. Like other forms of insurance, the Court's rule creates a "moral hazard" and inefficiencies. In the face of uncertainty about changes in the law, developers will overinvest, safe in the knowledge that if the law changes adversely, they will be entitled to compensation. See generally Farber, *Economic Analysis and Just Compensation*, 12 Int'l Rev. of Law & Econ. 125 (1992).

<sup>6</sup> As the Court correctly notes, in regulatory takings, unlike physical takings, courts have a choice of remedies. See *ante*, at 25, n. 17. They may "invalidate the excessive regulation" or they may "allo[w] the regulation to stand and orde[r] the government to afford compensation for the permanent taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U. S. 304, 335 (1987) (STEVENS, J., dissenting); see also *id.*, at 319-21. In either event, however, the costs to the government are likely to be substantial and are therefore likely to impede the development of sound land-use policy.

"It is true, that, when the defendants . . . erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. [T]he supervision of the public health and the public morals is a governmental power, 'continuing in its nature,' and 'to be dealt with as the special exigencies of the moment may require; . . . for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.'" *Id.*, at 669.

Under our reasoning in *Mugler*, a state's decision to prohibit or to regulate certain uses of property is not a compensable taking just because the particular uses were previously lawful. Under the Court's opinion today, however, if a state should decide to prohibit the manufacture of asbestos, cigarettes, or concealable firearms, for example, it must be prepared to pay for the adverse economic consequences of its decision. One must wonder if Government will be able to "go on" effectively if it must risk compensation "for every such change in the general law." *Mahon*, 260 U. S., at 413.

The Court's holding today effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property. Until today, I had thought that we had long abandoned this approach to constitutional law. More than a century ago we recognized that "the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Munn v. Illinois*, 94 U. S. 113, 134 (1877). As Justice Marshall observed about a position similar to that adopted by the Court today:

"If accepted, that claim would represent a return to the era of *Lochner v. New York*, 198 U. S. 45 (1905), when common-law rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance. The Due Process Clause does not require such a result." *PruneYard Shopping Center v. Robins*, 447 U. S. 74, 93 (1980) (concurring opinion).

Arresting the development of the common law is not only a departure from our prior decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution—both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners. Thus, when the Nation came to understand that slavery was morally wrong and mandated the emancipation of all slaves, it, in effect, redefined "property." On a lesser scale, our ongoing self-education produces similar changes in the rights of property owners. New appreciation of the significance of endangered species, see, e.g., *Andrus v. Allard*, 444 U. S. 51 (1979); the importance of wetlands, see, e.g., 16 U. S. C. § 3801 *et seq.*; and the vulnerability of coastal lands, see, e.g., 16 U. S. C. § 1451 *et seq.*, shapes our evolving understandings of property rights.

Of course, some legislative redefinitions of property will effect a taking and must be compensated—but it certainly cannot be the case that every movement away from common law does so. There is no reason, and less sense, in such an absolute rule. We live in a world in which changes in the

economy and the environment occur with increasing frequency and importance. If it was wise a century ago to allow Government "the largest legislative discretion" to deal with "the special exigencies of the moment," *Mugler*, 123 U. S., at 669, it is imperative to do so today. The rule that should govern a decision in a case of this kind should focus on the future, not the past.<sup>5</sup>

\* \* \*

The Court's categorical approach rule will, I fear, greatly hamper the efforts of local officials and planners who must deal with increasingly complex problems in land-use and environmental regulation. As this case—in which the claims of an individual property owner exceed \$1 million—well demonstrates, these officials face both substantial uncertainty because of the ad hoc nature of takings law and unacceptable penalties if they guess incorrectly about that law.<sup>6</sup>

Viewed more broadly, the Court's new rule and exception conflict with the very character of our takings jurisprudence. We have frequently and consistently recognized that the definition of a taking cannot be reduced to a "set formula" and that determining whether a regulation is a taking is "essentially [an] ad hoc, factual inquiry." *Penn Central Transportation Co. v. New York City*, 438 U. S. 104, 124 (1978) (quoting *Goldblatt v. Hempstead*, 369 U. S. 590, 594 (1962)). This is unavoidable, for the determination whether a law effects a taking is ultimately a matter of "fairness and justice," *Armstrong v. United States*, 364 U. S. 40, 49 (1960), and "necessarily requires a weighing of private and public interests." *Agins*, 447 U. S., at 261. The rigid rules fixed by the Court today clash with this enterprise: "fairness and justice" are often disserved by categorical rules.

### III

It is well established that a takings case "entails inquiry into [several factors:] the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *PruneYard*, 447 U. S., at 83. The Court's analysis today focuses on the last two of these three factors: the categorical rule addresses a regulation's "economic impact," while the nuisance exception recognizes that ownership brings with it only certain "expectations." Neglected by the Court today is the first, and in some ways, the most important factor in takings analysis: the character of the regulatory action.

The Just Compensation Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne

<sup>5</sup>Even measured in terms of efficiency, the Court's rule is unsound. The Court today effectively establishes a form of insurance against certain changes in land-use regulations. Like other forms of insurance, the Court's rule creates a "moral hazard" and inefficiencies: In the face of uncertainty about changes in the law, developers will overinvest, safe in the knowledge that if the law changes adversely, they will be entitled to compensation. See generally Farber, *Economic Analysis and Just Compensation*, 12 Int'l Rev. of Law & Econ. 125 (1992).

<sup>6</sup>As the Court correctly notes, in regulatory takings, unlike physical takings, courts have a choice of remedies. See *ante*, at 25, n. 17. They may "invalidate the excessive regulation" or they may "allow[] the regulation to stand and order[] the government to afford compensation for the permanent taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U. S. 304, 335 (1987) (STEVENS, J., dissenting); see also *id.*, at 319-21. In either event, however, the costs to the government are likely to be substantial and are therefore likely to impede the development of sound land-use policy.

by the public as a whole." *Armstrong*, 364 U.S., at 49. Accordingly, one of the central concerns of our takings jurisprudence is "prevent[ing] the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893). We have, therefore, in our takings law frequently looked to the generality of a regulation of property.<sup>7</sup>

For example, in the case of so-called "developmental exactions," we have paid special attention to the risk that particular landowners might "b[e] singled out to bear the burden" of a broader problem not of his own making. *Nollan*, 483 U.S., at 835, n. 4; see also *Pennell v. San Jose*, 485 U.S. 1, 23 (1988). Similarly, in distinguishing between the Kohler Act (at issue in *Mahon*) and the Subsidence Act (at issue in *Keystone*), we found significant that the regulatory function of the latter was substantially broader. Unlike the Kohler Act, which simply transferred back to the surface owners certain rights that they had earlier sold to the coal companies, the Subsidence Act affected all surface owners—including the coal companies—equally. See *Keystone*, 480 U.S., at 486. Perhaps the most familiar application of this principle of generality arises in zoning cases. A diminution in value caused by a zoning regulation is far less likely to constitute a taking if it is part of a general and comprehensive land-use plan, see *Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926); conversely, "spot zoning" is far more likely to constitute a taking, see *Penn Central*, 438 U.S., at 132, and n. 28.

The presumption that a permanent physical occupation, no matter how slight, effects a taking is wholly consistent with this principle. A physical taking entails a certain amount of "singling out."<sup>8</sup> Consistent with this principle, physical occupations by third parties are more likely to effect takings than other physical occupations. Thus, a regulation requiring the installation of a junction box owned by a third party, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), is more troubling than a

regulation requiring the installation of sprinklers or smoke detectors; just as an order granting third parties access to a marina, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), is more troubling than an order requiring the placement of safety buoys in the marina.

In analyzing takings claims, courts have long recognized the difference between a regulation that targets one or two parcels of land and a regulation that enforces a state-wide policy. See, e.g., *A.A. Profiles, Inc. v. Ft. Lauderdale*, 850 F.2d 1483, 1488 (CA11 1988); *Wheeler v. Pleasant Grove*, 664 F.2d 99, 100 (CA5 1981); *Trustees Under Will of Pomeroy v. Westlake*, 357 So.2d 1299, 1304 (La. App. 1978); see also *Burrows v. Keene*, 121 N.H. 590, 432 A.2d 15, 21 (1981); *Herman Glick Realty Co. v. St. Louis County*, 545 S.W.2d 320, 324-325 (Mo. App. 1976); *Huttig v. Richmond Heights*, 372 S.W.2d 833, 842-843 (Mo. 1963). As one early court stated with regard to a waterfront regulation, "If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be much more formidable." *Commonwealth v. Alger*, 61 Mass. 53, 102 (1851).

In considering Lucas' claim, the generality of the Beachfront Management Act is significant. The Act does not target particular landowners, but rather regulates the use of the coastline of the entire State. See S.C. Code §48-39-10 (Supp. 1990). Indeed, South Carolina's Act is best understood as part of a national effort to protect the coastline, one initiated by the Federal Coastal Zone Management Act of 1972. Pub. L. 92-583, 86 Stat. 1280, codified as amended at 16 U.S.C. §1451 *et seq.* Pursuant to the Federal Act, every coastal State has implemented coastline regulations.<sup>9</sup> Moreover, the Act did not single out owners of undeveloped land. The Act also prohibited owners of developed land from rebuilding if their structures were destroyed, see 1988 S.C. Acts 634 §3,<sup>10</sup> and what is equally significant, from repairing erosion control devices, such as seawalls, see S.C. Code §48-39-290(B)(2) (Supp. 1990). In addition, in some situations, owners of developed land were required to "renouris[h] the beach . . . on a yearly basis with an amount . . . of sand . . . not . . . less than one and one-half times the yearly volume of sand lost due to erosion." 1988 S.C. Acts 634 §3, p. 5140.<sup>11</sup> In short, the South Carolina Act imposed substantial burdens on owners of developed and undeveloped land alike.<sup>12</sup> This generality indicates that the Act is not an effort to expropriate owners of undeveloped land.

Admittedly, the economic impact of this regulation is dramatic and petitioner's investment-backed expectations are substantial. Yet, if anything, the costs to and expectations of the owners of developed land are even greater: I doubt, however, that the cost to owners of developed land of renourishing the beach and allowing their seawalls to deteriorate effects a taking. The costs imposed on the

<sup>7</sup> This principle of generality is well-rooted in our broader understandings of the Constitution as designed in part to control the "mischief of faction." See *The Federalist* No. 10, p. 43 (G. Wills ed. 1982) (J. Madison).

An analogous concern arises in First Amendment law. There we have recognized that an individual's rights are not violated when his religious practices are prohibited under a neutral law of general applicability. For example, in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879-880 (1990), we observed:

"[Our] decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion proscribes (or prescribes)'" *United States v. Lee*, 455 U.S. 252, 263, n. 3 (1982) (STEVENS, J., concurring in judgment). . . . In *Prince v. Massachusetts*, 321 U.S. 158 (1944), we held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding. We found no constitutional infirmity in "excluding [these children] from doing there what no other children may do." *Id.*, at 171. In *Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion), we upheld Sunday-closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In *Gillette v. United States*, 401 U.S. 437, 461 (1971), we sustained the military Selective Service System against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds."

If such a neutral law of general applicability may severely burden constitutionally protected interests in liberty, a comparable burden on property owners should not be considered unreasonably onerous.

<sup>8</sup> See *Levmore, Takings, Torts, and Special Interests*, 77 Va. L. Rev. 1333, 1352-1354 (1991).

<sup>9</sup> See Zaikin, *Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute*, 79 Cal. L. Rev. 205, 216-217, nn. 46-47 (1991) (collecting statutes).

<sup>10</sup> This provision was amended in 1990. See S.C. Code §48-39-290(B) (Supp. 1990).

<sup>11</sup> This provision was amended in 1990; authority for renourishment was shifted to local governments. See S.C. Code §48-39-350(A) (Supp. 1990).

<sup>12</sup> In this regard, the Act more closely resembles the Subsidence Act in *Keystone* than the Kohler Act in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and more closely resembles the general zoning scheme in *Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926) than the specific landmark designation in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

owners of undeveloped land, such as petitioner, differ from these costs only in degree, not in kind.

The impact of the ban on developmental uses must also be viewed in light of the purposes of the Act. The legislature stated the purposes of the Act as "protect[ing], preserv[ing], restor[ing] and enhanc[ing] the beach/dune system" of the State not only for recreational and ecological purposes, but also to "protect life and property." S. C. Code § 48-39-260(1)(a) (Supp. 1990). The State, with much science on its side, believes that the "beach/dune system [acts] as a buffer from high tides, storm surge, [and] hurricanes." *Ibid.* This is a traditional and important exercise of the State's police power, as demonstrated by Hurricane Hugo, which in 1989, caused 29 deaths and more than \$6 billion in property damage in South Carolina alone.<sup>13</sup>

In view of all of these factors, even assuming that petitioner's property was rendered valueless, the risk inherent in investments of the sort made by petitioner, the generality of the Act, and the compelling purpose motivating the South Carolina Legislature persuade me that the Act did not effect a taking of petitioner's property.

Accordingly, I respectfully dissent.

#### Statement of JUSTICE SOUTER.

I would dismiss the writ of certiorari in this case as having been granted improvidently. After briefing and argument it is abundantly clear that an unreviewable assumption on which this case comes to us is both questionable as a conclusion of Fifth Amendment law and sufficient to frustrate the Court's ability to render certain the legal premises on which its holding rests.

The petition for review was granted on the assumption that the state by regulation had deprived the owner of his entire economic interest in the subject property. Such was the state trial court's conclusion, which the state supreme court did not review. It is apparent now that in light of our prior cases, see, e.g., *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U. S. 470, 493-502 (1987); *Andrus v. Allard*, 444 U. S. 51, 65-66 (1979); *Penn Central Transportation Corp. v. New York City*, 438 U. S. 104, 130-131 (1978), the trial court's conclusion is highly questionable. While the respondent now wishes to contest the point, see Brief for Respondent 45-50, the Court is certainly right to refuse to take up the issue, which is not fairly included within the question presented, and has received only the most superficial and one-sided treatment before us.

Because the questionable conclusion of total deprivation cannot be reviewed, the Court is precluded from attempting to clarify the concept of total (and, in the Court's view, categorically compensable) taking on which it rests, a concept which the Court describes, see *ante*, at 11 n. 6, as so uncertain under existing law as to have fostered inconsistent pronouncements by the Court itself. Because that concept is left uncertain, so is the significance of the exceptions to the compensation requirement that the Court proceeds to recognize. This alone is enough to show that there is little utility in attempting to deal with this case on the merits.

The imprudence of proceeding to the merits in spite of these unpromising circumstances is underscored by the fact that, in doing so, the Court cannot help but assume

something about the scope of the uncertain concept of total deprivation, even when it is barred from explicating total deprivation directly. Thus, when the Court concludes that the application of nuisance law provides an exception to the general rule that complete denial of economically beneficial use of property amounts to a compensable taking, the Court will be understood to suggest (if it does not assume) that there are in fact circumstances in which state-law nuisance abatement may amount to a denial of all beneficial land use as that concept is to be employed in our takings jurisprudence under the Fifth and Fourteenth Amendments. The nature of nuisance law, however, indicates that application of a regulation defensible on grounds of nuisance prevention or abatement will quite probably not amount to a complete deprivation in fact. The nuisance enquiry focuses on conduct, not on the character of the property on which that conduct is performed, see 4 Restatement (Second) of Torts § 821B (1979) (public nuisance); *id.*, § 822 (private nuisance), and the remedies for such conduct usually leave the property owner with other reasonable uses of his property, see W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 90 (5th ed. 1984) (public nuisances usually remedied by criminal prosecution or abatement), *id.*, § 89 (private nuisances usually remedied by damages, injunction or abatement); see also, e.g., *Mugler v. Kansas*, 123 U. S. 623, 668-669 (1887) (prohibition on use of property to manufacture intoxicating beverages "does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use . . . for certain forbidden purposes, is prejudicial to the public interests"); *Hadacheck v. Sebastian*, 239 U. S. 394, 412 (1915) (prohibition on operation of brickyard did not prohibit extraction of clay from which bricks were produced). Indeed, it is difficult to imagine property that can be used only to create a nuisance, such that its sole economic value must presuppose the right to occupy it for such seriously noxious activity.

The upshot is that the issue of what constitutes a total deprivation is being addressed by indirection, and with uncertain results, in the Court's treatment of defenses to compensation claims. While the issue of what constitutes total deprivation deserves the Court's attention, as does the relationship between nuisance abatement and such total deprivation, the Court should confront these matters directly. Because it can neither do so in this case, nor skip over those preliminary issues and deal independently with defenses to the Court's categorical compensation rule, the Court should dismiss the instant writ and await an opportunity to face the total deprivation question squarely. Under these circumstances, I believe it proper for me to vote to dismiss the writ, despite the Court's contrary preference. See, e.g., *Welsh v. Wisconsin*, 466 U. S. 740, 755 (1984) (Burger, C.J.), *United States v. Shannon*, 342 U. S. 288, 294 (1952) (Frankfurter, J.).

A. CAMDEN LEWIS, Columbia, S.C. (LEWIS, BABCOCK & HAWKINS, GERALD M. FINKEL, FINKEL, GOLDBERG, SHEFTMAN & ALTMAN, and DAVID J. BEDERMAN, on the briefs) for petitioner; C.C. HARNESS III, Charleston, S.C. (T. TRAVIS MEDLOCK, S.C. Atty. Gen., KENNETH P. WOODINGTON, Sr. Asst. Atty., and RICHARD J. LAZARUS, on the briefs) for respondent.

<sup>13</sup>Zalkin, 79 Cal. L. Rev., at 212-213.







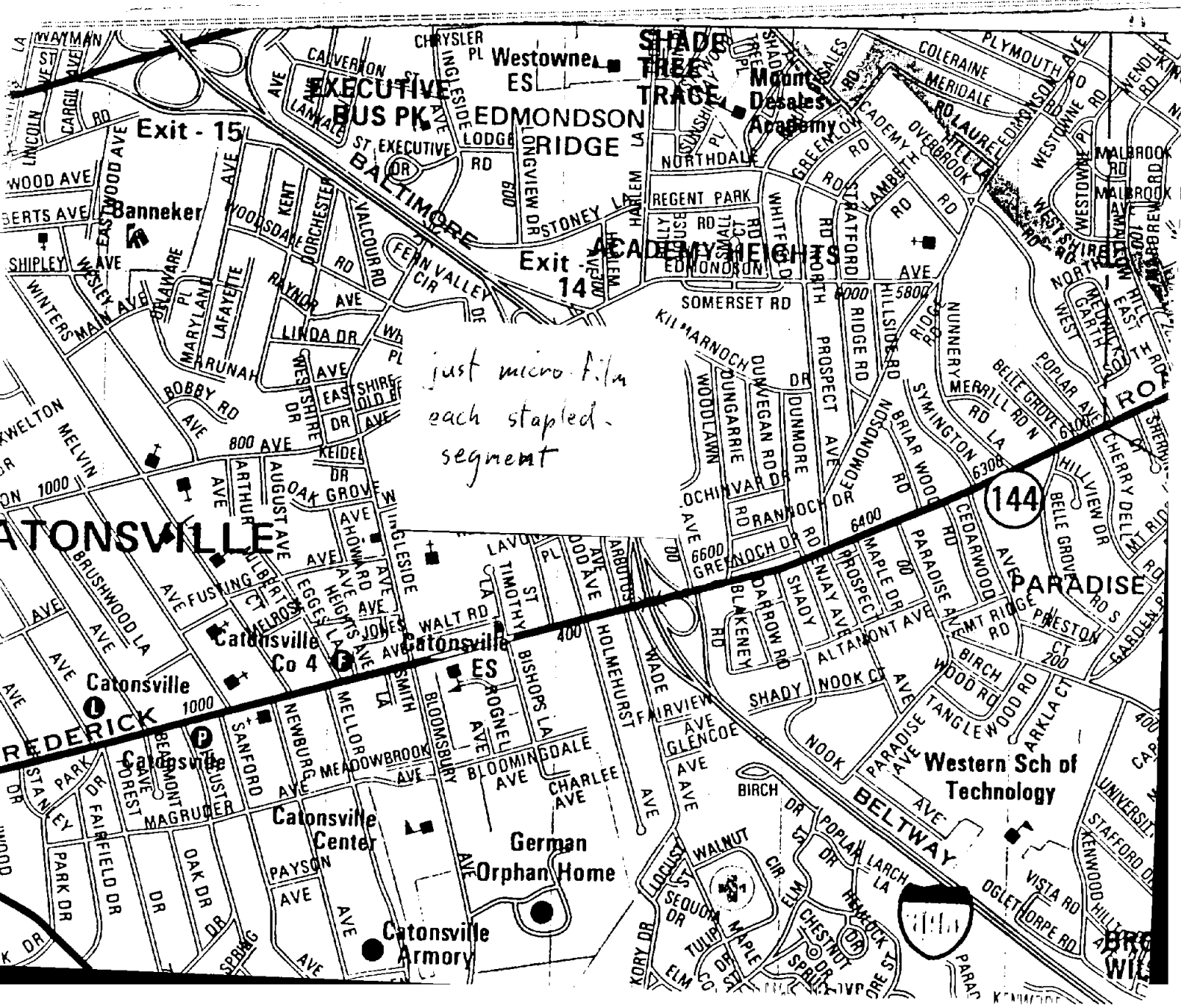
PROPERTY: 136 W WESLEY AV 7111 0 20400  
TAX ID : BC0112510220 SEC/BLOCK/LOT: / / / IMPV VAL: 68160  
LEGAL DES: 0950 N EDMONDSON AV 1001 JAL: 91560  
TAX MAP: 00101 LEGAL DES: 36670  
GRID : 00001 LEGAL DES: TRANS DATE: 01/14/91  
PARCEL : 01485 LOT SIZE : 50.00 50.00 145.00 145.00 TRANS # : 108000  
OWNER : TEMPLE MARSHALL A SUB: WS WESLEY AV LIBER: 8699  
OWNER 2: TEMPLE DEBORAH M  
ADDRESS: 00136 WESLEY AV FOLD: 04  
ADDRESS: LAST ASSES 9011 ZONING:  
ADDRESS: BALTIMORE, MD USE CODE: 04 LAND USE: RES10  
OWNER OCC 21228

PROPERTY: 140 W WESLEY AV 7111 0 LAND VAL: 20400  
TAX ID : BC0111350361 SEC/BLOCK/LOT: / / / IMPV VAL: 51910

138 WESLEY AVE 108,180 110,858 01 1 \* MERONILE MGE  
SN: FRANCE JR JH BN: WATSON, HERBERT W TX: 0119510700  
SU: CTY: US: RES10 CL: RES1 UN:

136 WESLEY AVE 108,000 110,495 .000 30Y F 910124 8699/ 100 BC 01 1  
SN: FRANCE JR JH # BN: TEMPLE, M A \* HARGARTEN & CO  
SU: CTY: US: RES10 CL: RES1 UN: TID: 10220  
SEARCH COMPLETE 7 MATCHING LISTINGS  
REPORT TYPE (L, Z, F, CH OR R?)

MICROFILMED  
UB 212 2 A





PROPERTY: 1006 N ARUNAH AV ZIP: 0 LAND VAL: 22500  
TAX ID : BC0109350305 SEC/BLCK/LOT: 7022 / / IMPV VAL: 51330  
LEGAL DES: COR DELAWARE PL TOL VAL: 73850  
TAX MAP: 00095 LEGAL DES: ASSESS VAL: 29540  
GRID : 00020 LEGAL DES: TRANS DATE: 11/01/88  
PARCEL : 00227 LOT SIZE : 40.03 40.00 124.60 124.67 TRANS \$: 85000  
OWNER : CLEVINGER DANNY L SUB: CATONSVILLE HET LIBER: 8014  
OWNER 2: CLEVINGER TAMMY L  
ADDRESS: 01006 ARUNAH AV FOLIO: 156  
ADDRESS: LAST ASSESS 9011 ZONING:  
ADDRESS: BALTIMORE, MD USE CODE: 04 LAND USE: RESID  
ADDRESS: 21228  
OWNER OCC

forwarded to the Protestants' Counsel and a copy submitted to the Zoning Commissioner's Office for incorporation into the case file. Said plan has been marked as Petitioner's Exhibit B.

An area variance may be granted where strict application of the zoning regulations would cause practical difficulty to the Petitioner and his property. McLean v. Soley, 270 Md. 208 (1973). To prove practical difficulty for an area variance, the Petitioner must meet the following:

- 1) whether strict compliance with requirement would unreasonably prevent the use of the property for a permitted purpose or render conformance unnecessarily burdensome;
- 2) whether the grant would do substantial injustice to applicant as well as other property owners in the district or whether a lesser relaxation than that applied for would give substantial relief; and
- 3) whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

Anderson v. Bd. of Appeals, Town of Chesapeake Beach, 22 Md. App. 28 (1974).

After due consideration of the testimony and evidence presented, it is clear that practical difficulty or unreasonable hardship would result if the relief requested in the Petition for Special Hearing and Zoning Variance were not granted. It has been established that the requirements from which the Petitioner seeks relief would unduly restrict the use of the land due to the special conditions unique to this particular parcel. In addition, the relief requested will not be detrimental to the public health, safety, and general welfare.

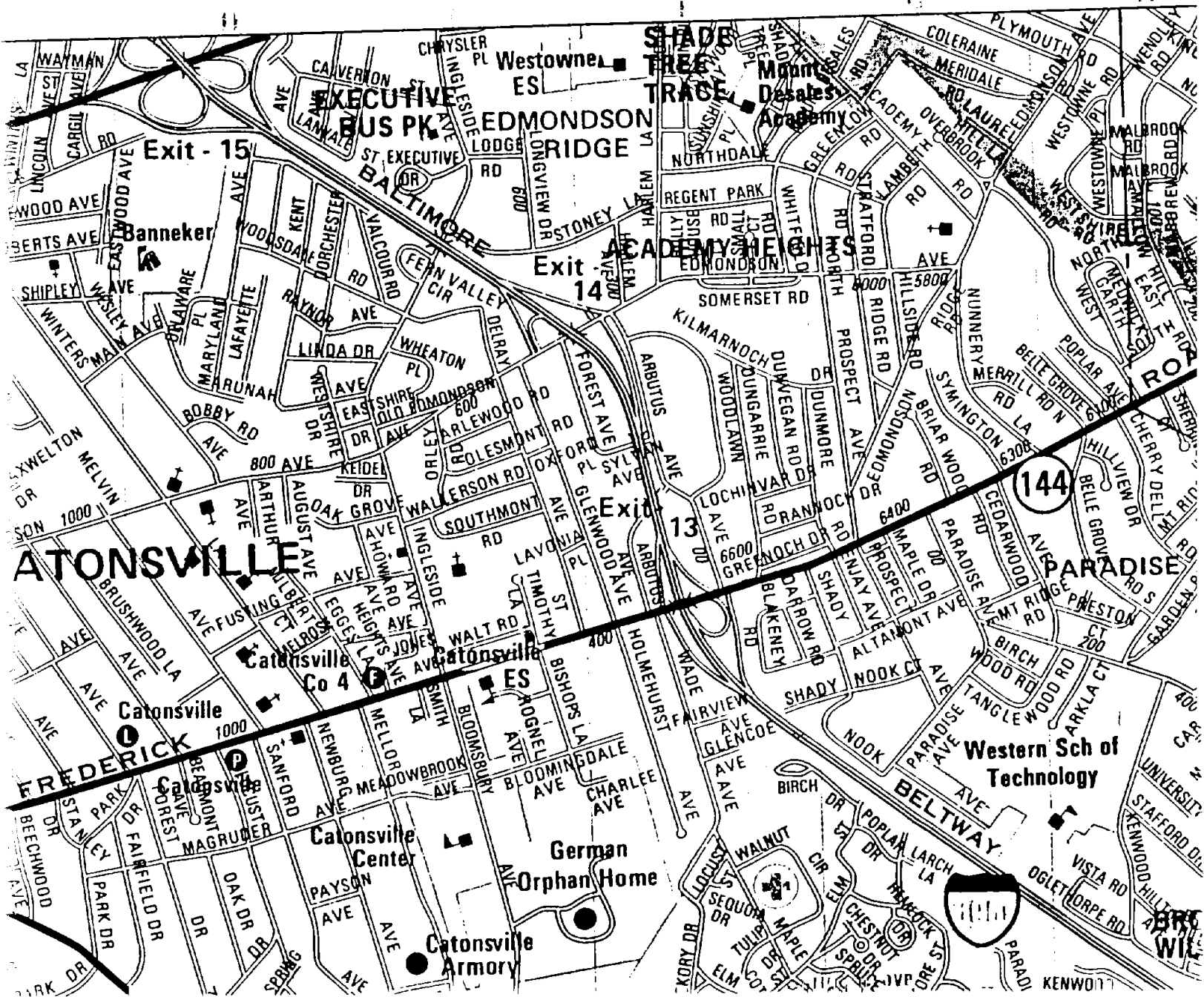
Pursuant to the advertisement, posting of the property, and public hearing on these Petitions held, and for the reasons given above, the special hearing and variance should be granted.

MICROFILMED

Call Ex 2B

Joins Map 33

880,000 FT





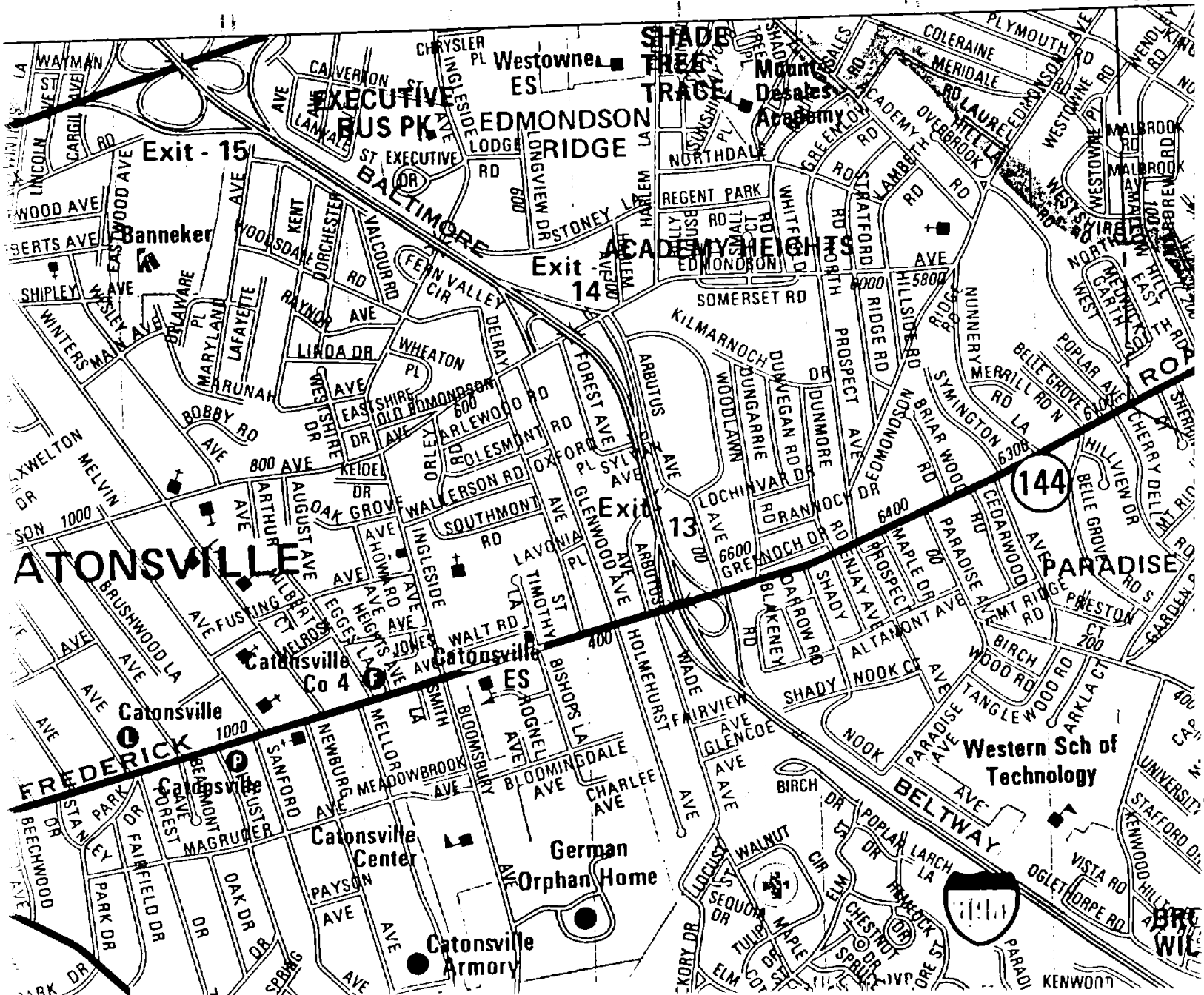
144

MICROFILMED

Cooper Ech 2B

Joins Map 33

880,000 FT



PROPERTY: 502 DORCHESTER RD ZIP: 0 LAND VAL: 24340  
TAX ID: BC0110451890 SEC/BLCK/LOT: /014 / / IMPV VAL: 58580  
LEGAL DES: TOTL VAL: 82920  
TAX MAP: 00095 LEGAL DES: ASSESS VAL: 33160  
GRID: 00020 LEGAL DES: TRANS DATE:  
PARCEL: 00227 LOT SIZE: 80.00 80.00 120.00 120.00  
OWNER: JOZWIAK ROBERT J SUB: CATONSVILLE HEJ LIBER:  
OWNER 2: JOZWIAK GAIL L  
ADDRESS: 00502 DORCHESTER RD FOLIO:  
ADDRESS: LAST ASSESS 9011 ZONING:  
ADDRESS: BALTIMORE, MD USE CODE: 04 LAND USE: RESID  
ADDRESS: 21228  
OWNER OCC

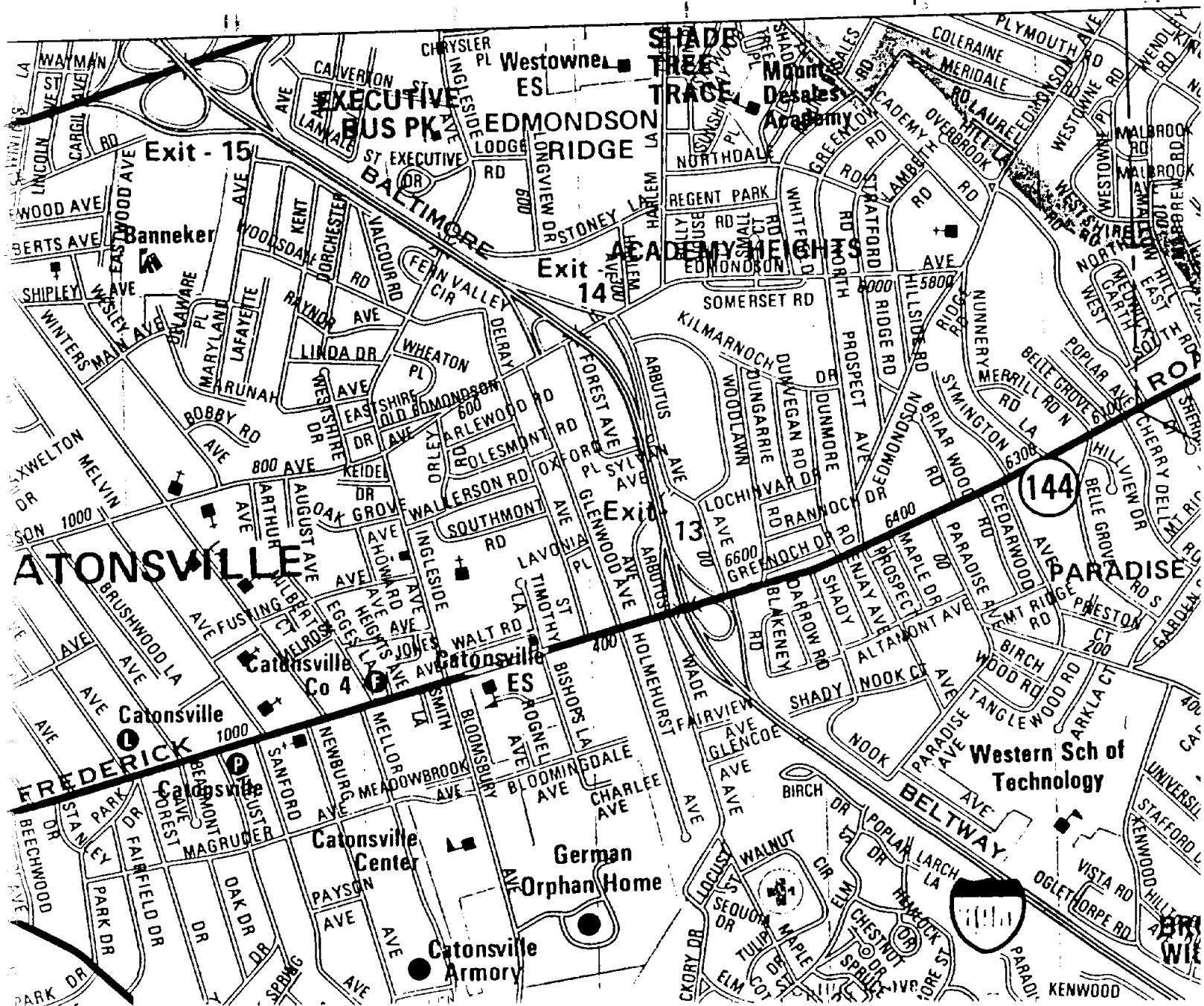
PROPERTY: 502 DORCHESTER RD ZIP: 0 LAND VAL: 21600  
TAX ID: BC0123153804 SEC/BLCK/LOT: /014 / / IMPV VAL: 57170  
LEGAL DES: TOTL VAL: 78770  
TAX MAP: ASSESS VAL: 31500  
GRID: TRANS DATE: 06/05/91  
PARCEL: TRANS \$: 95500

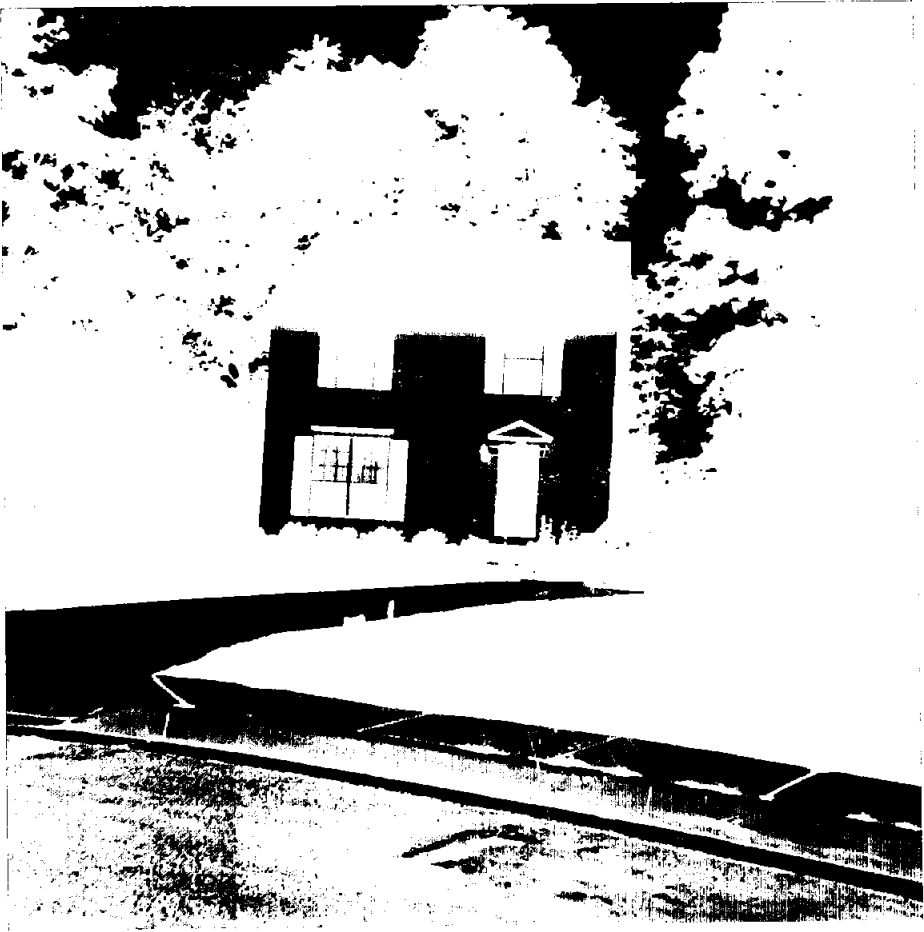
OWNER OCC

Deputy #2C

Joins Map 33

880,000 FT



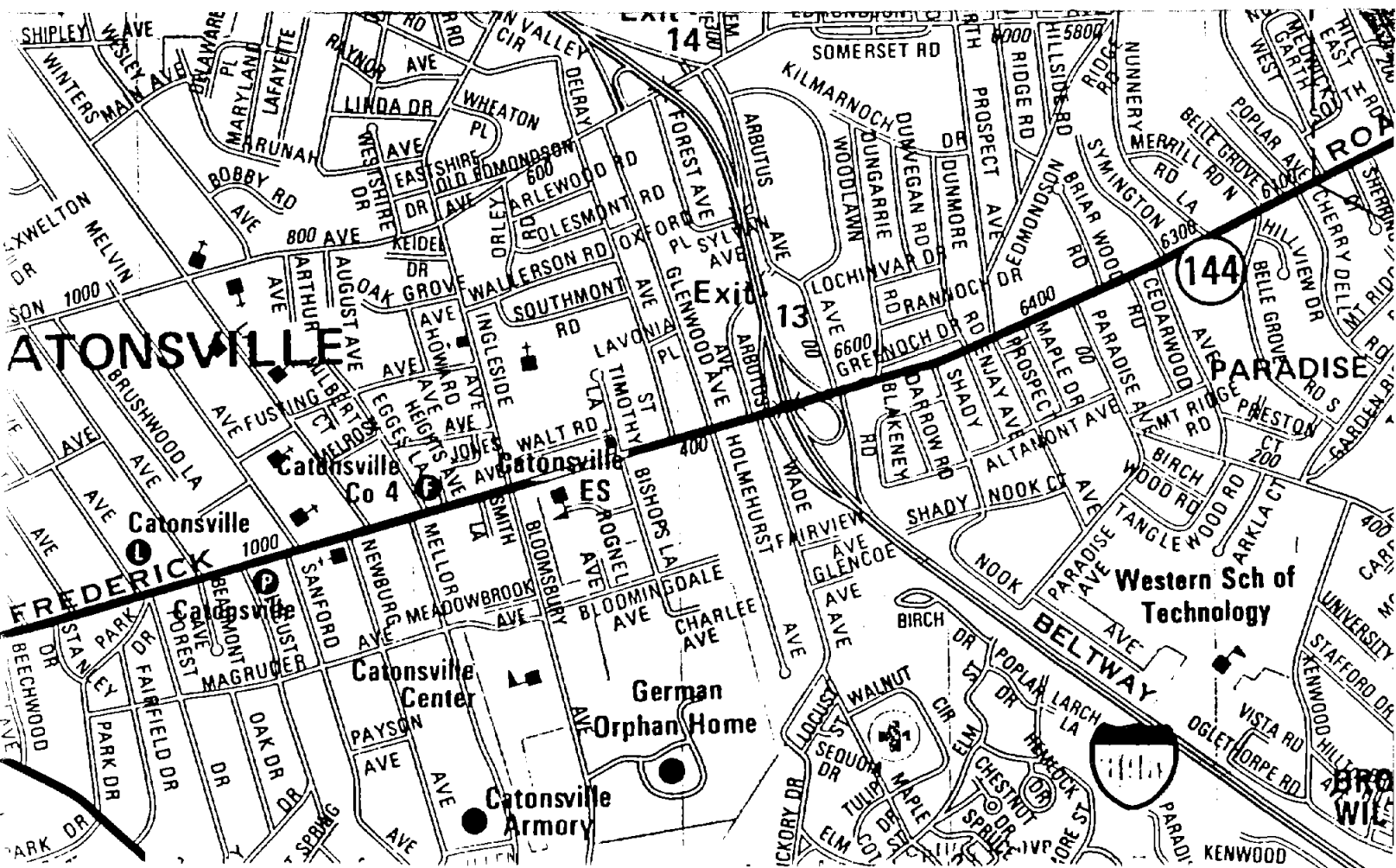




PROPERTY: S ARUNAH AV ZIP: 0 LAND VAL: 24340  
TAX ID : BC0114650072 SEC/BLOCK/LOT: /027 / / IMPV VAL: 58820  
LEGAL DES: TOTL VAL: 83160  
TAX MAP: 00095 LEGAL DES: ASSESS VAL: 33260  
GRID : 00020 LEGAL DES: TRANS DATE:03/01/91  
PARCEL: 00227 LOT SIZE : 80.00 80.00 120.00 120.00 TRANS \$\$ : 112000  
OWNER : NASELLO BLANCHE SUB: CATUNSVILLE HEI LIBER:8723  
ADDRESS: 01001 ARUNAH AV FOLIO: 555  
ADDRESS: LAST ASSESS 9011 ZONING:  
ADDRESS: BALTIMORE, MD USE CODE:04 LAND USE: RESID  
ADDRESS: 21228  
OWNER OCC

=====

880,000 FT

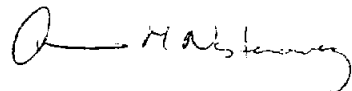


THEREFORE, IT IS ORDERED by the Deputy Zoning Commissioner for Baltimore County this 14th day of December, 1989 that the Petition for Special Hearing to approve Lots 1 and 2 of the subject property as separate building lots with undersized lot areas and that the overall density of the subdivision will not be affected, and the Petition for Zoning Variance to permit a lot width of 54 feet in lieu of the required 55 feet and a side yard setback of 5 feet in lieu of the required 10 feet for Lot 1, and a lot width of 53.5 feet in lieu of the required 55 feet and a side yard setback of 5 feet in lieu of the required 10 feet for Lot 2, in accordance with Petitioner's Exhibits 1 and A, be and are hereby GRANTED, subject, however, to the following restrictions which are conditions precedent to the relief granted:

1) The Petitioner may apply for his building permit and be granted same upon receipt of this Order; however, Petitioner is hereby made aware that proceeding at this time is at his own risk until such time as the 30-day appellate process from this Order has expired. If, for whatever reason, this Order is reversed, the Petitioner would be required to return, and be responsible for returning, said property to its original condition.

2) Petitioner shall use the red Glen-Gery Brick, Range AA Matt, or a red brick similar to the sample submitted and as described in Petitioner's Exhibit A.

3) Prior to the issuance of any permits, the landscaping plan marked Petitioner's Exhibit B shall be submitted for approval by the Baltimore County Landscape Planner. In the event the plan is modified by the Landscape Planner, the modified plan shall be submitted to the Deputy Zoning Commissioner for final approval.



ANN M. NASTAROWICZ  
Deputy Zoning Commissioner  
for Baltimore County

AMN:bjs

Checked by \_\_\_\_\_  
Date 12/14/89  
By Debbie J. Hukman

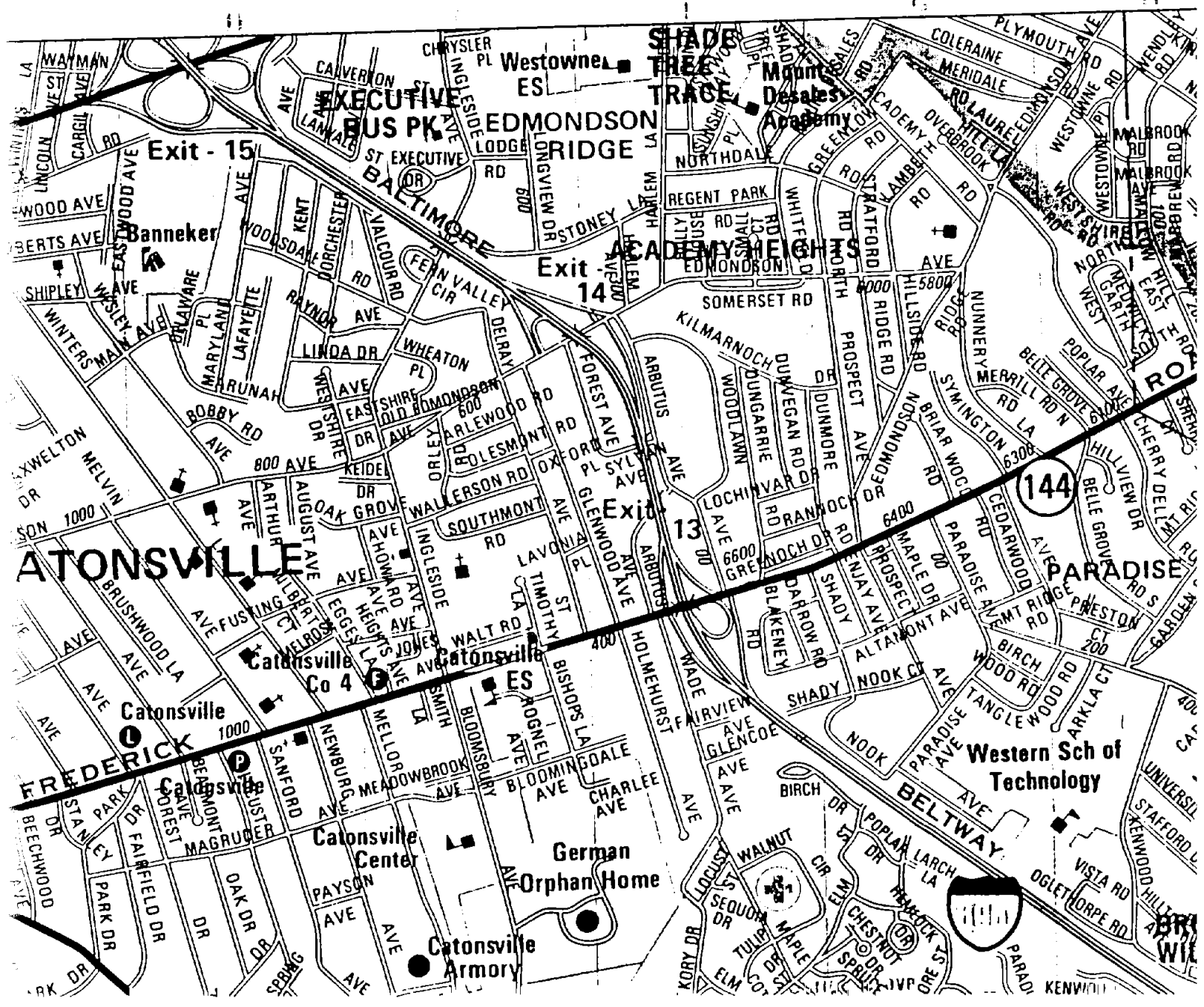


165 WINTERS LA 85,900 87,140 .000 30Y F 910412 87587 650 BU 01 1  
SNOWY/NICK TO # BN:000DE, LOUISE A #MARGARTEN&CO  
CU: CTY: US:RESID CL:REST UN: TX:01100450260  
REMARKS:GR:1.50 DESC: LOT 1461  
SEARCH COMPLETE 16 MATCHING LISTINGS  
REPORT TYPE(1,2,1,CH OR 0?)

*4h #2E*  
*CS*

Joins Map 33

880,000 FT





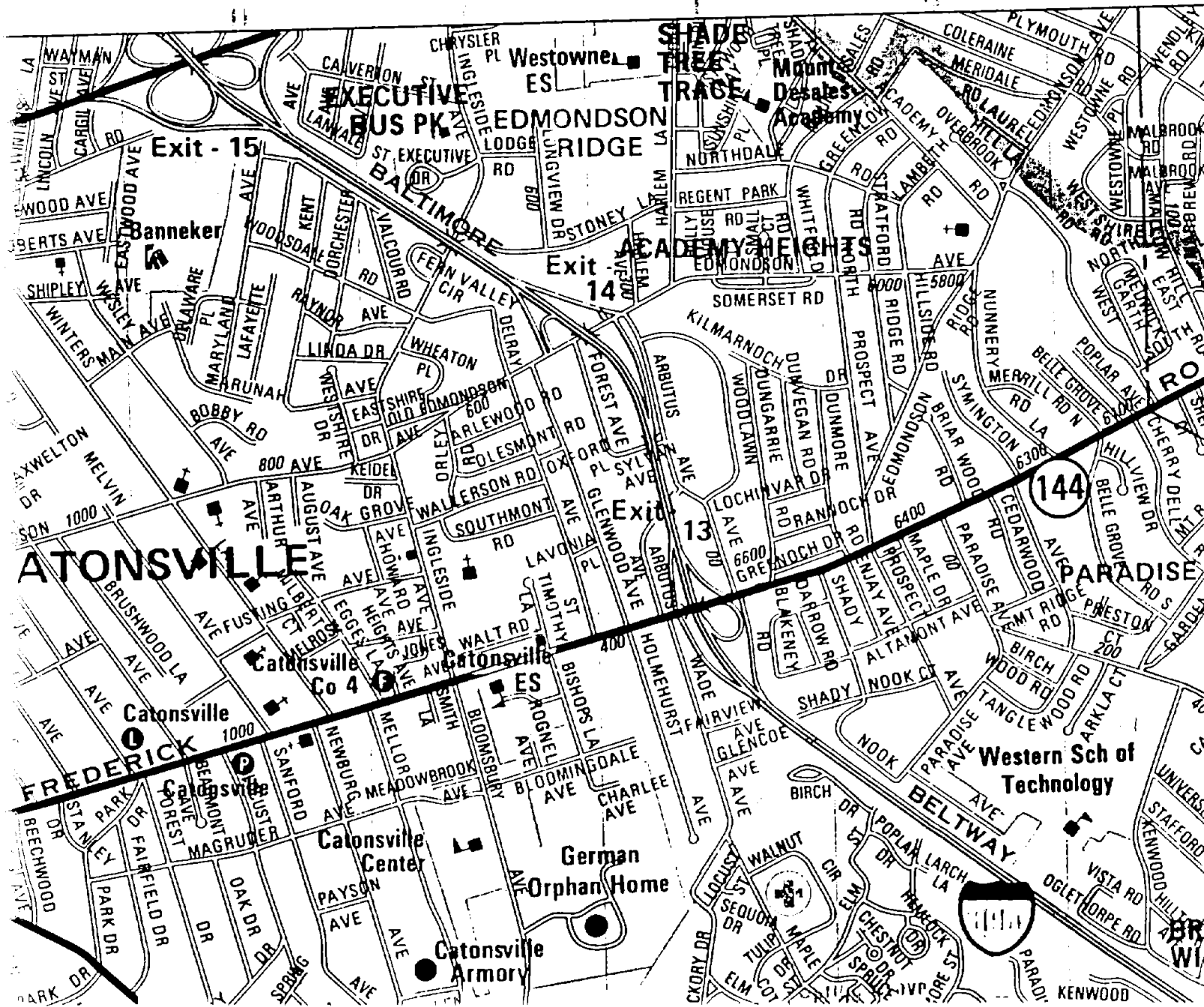
PROPERTY: W ARUNAH AV ZIP: 0 LAND VAL: 23450  
TAX ID : R00123153850 SEC/BLOCK/LOT: 7027 / / IMPV VAL: 64200  
LEGAL DES: TOTL VAL: 87650  
TAX MAP: 00095 LEGAL DES: ASSESS VAL: 35060  
GRID : 00020 LEGAL DES: TRANS DATE: 07/18/77  
PARCEL : 00227 LOT SIZE : 40.00 80.00 120.00 126.50  
OWNER : BENNETT CYRIL P SUB: CATONSVILLE HED LIBER: 5778  
OWNER 2: BENNETT ALICE L  
ADDRESS: 01105 ARUNAH AV FOLIO: 388  
ADDRESS: LAST ASSESS 9011 ZONING:  
ADDRESS: BALTIMORE, MD USE CODE: 04 LAND USE: RFS10  
ADDRESS: 21228

PROPERTY: W ARUNAH AV  
TAX ID : 000123153849 SEC/BLOCK/LOT:  
TAX MAP: 00095 LEGAL DES:  
GRID : 00020 LEGAL DES:  
PARCEL : 00227 LOT SIZE : 20.00 20.00 120.00 120.00  
OWNER : BENNETT CYRIL F  
OWNER 2: BENNETT ALICE L  
ADDRESS: 01105 ARUNAH AV  
ADDRESS:  
ADDRESS: BALTIMORE, MD  
ADDRESS:  
ZIP: 21228  
IMPV VAL: 8100  
TUTL VAL: 3240  
ASSESS VAL:  
TRANS DATE: 07/15/77  
SUB: CATUNSVILLE HE1 LIBER: 5778  
LAST ASSESS 9011  
USE CODE: 04  
FOLIO: 388  
ZONING:  
LAND USE: RESID

cc gl 28

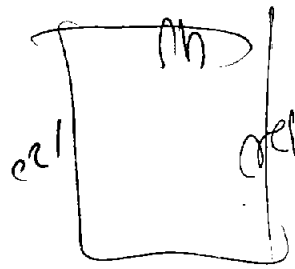
Joins Map 33

880,000 FT





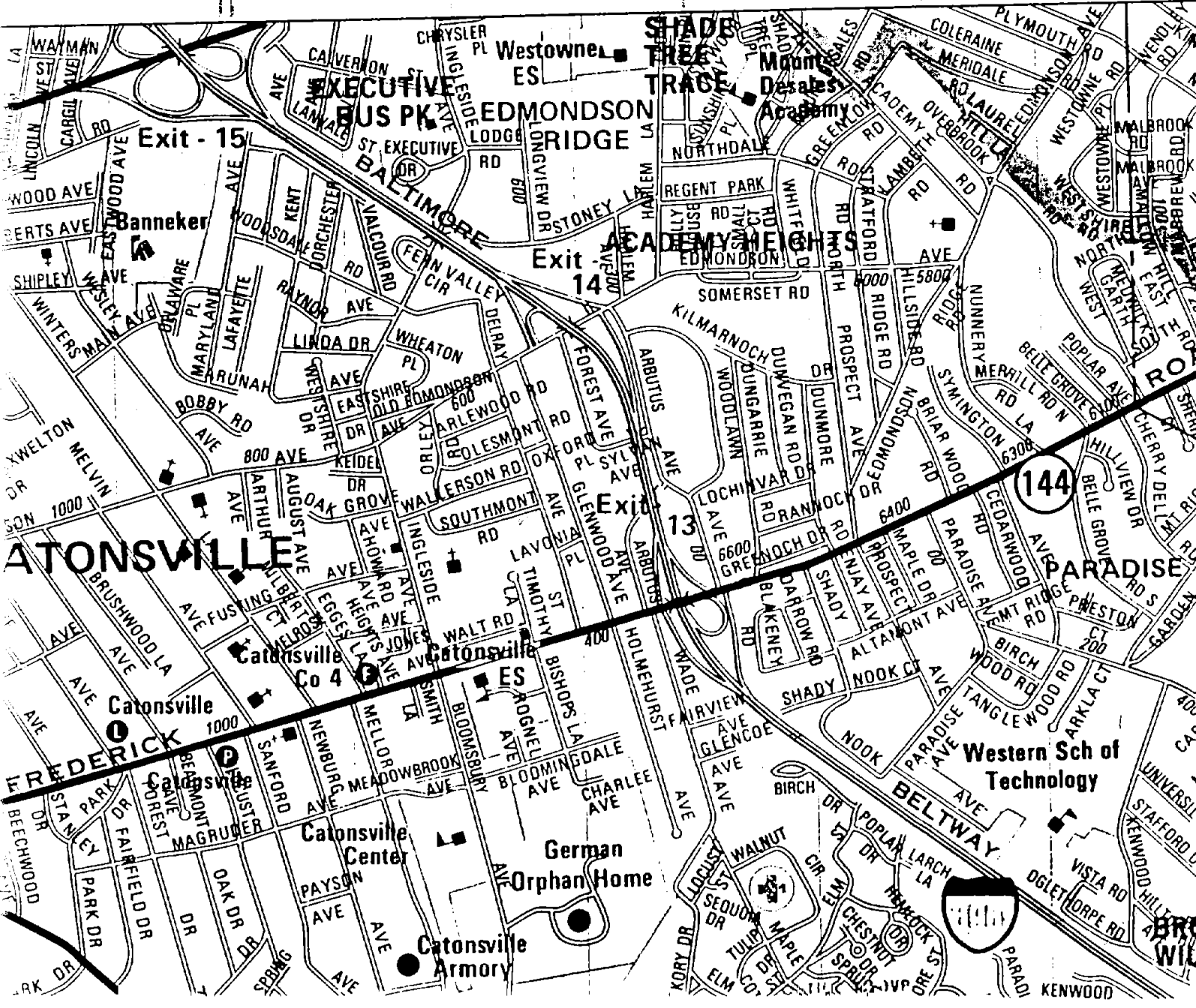
PROPERTY: 501 VALCOUR RD ZIP: 0 LAND VAL: 21600  
TAX ID: BC0109350301 SEC/BLOCK/LOT: /015 / / IMPV VAL: 52050  
LEGAL DES: TOTL VAL: 73650  
TAX MAP: 00095 LEGAL DES: ASSESS VAL: 29460  
GRID: 00020 LEGAL DES: TRANS DATE: 06/28/88  
PARCEL: 00227 LOT SIZE: 40.00 40.00 120.00 120.00 TRANS \$\$: 79900  
OWNER: HENN JOHN J, JR SUB: CATONSVILLE HET LIBER: 7902  
OWNER 2: HENN KATHLEEN MARIE  
ADDRESS: 00501 VALCOUR RD FOLIO: 670  
ADDRESS: LAST ASSESS 9011 ZONING:  
ADDRESS: BALTIMORE, MD USE CODE: 04 LAND USE: RESID  
ADDRESS: 21228  
OWNER OCC



Sub #2 H  
**MICROFILMED**

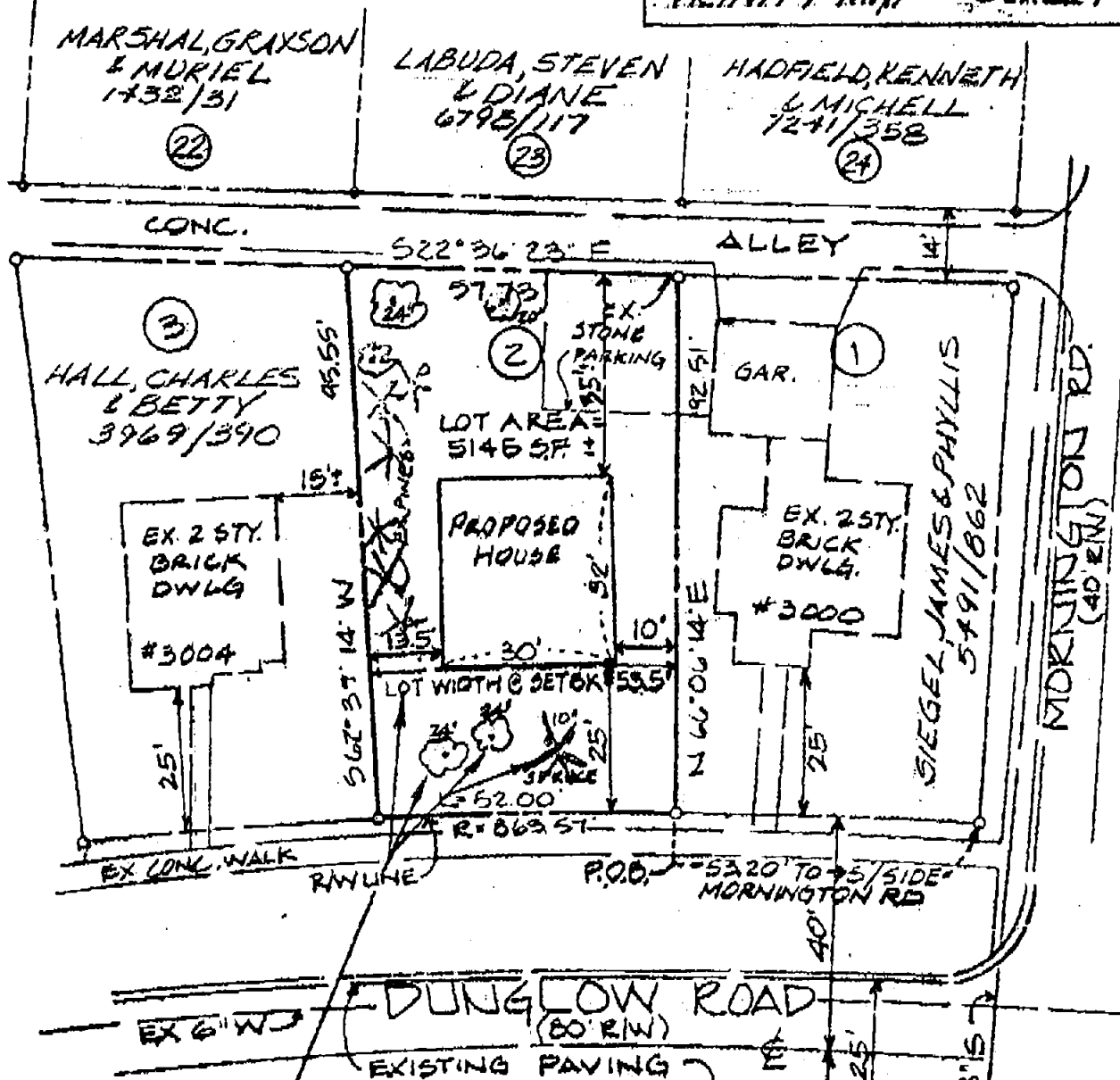
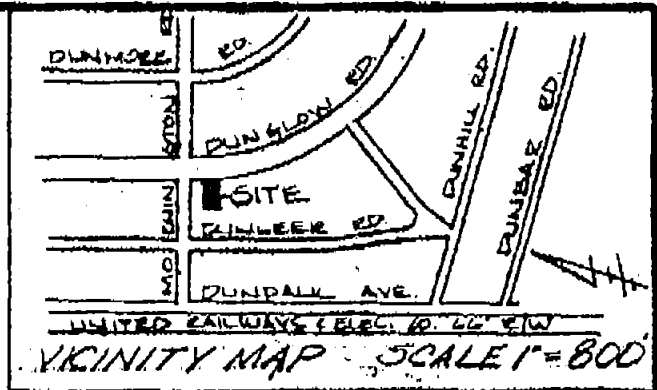
Joins Map 33

880,000 FT





EXISTING ZONING: DR-5.5  
PUBLIC WATER & SEWER



**LANDSCAPING NOTE:**

ANY TREES REMOVED FOR HOME CONSTRUCTION SHALL BE REPLACED IN LIKE KIND ON THE PROPERTY FROM NURSERY STOCK AND BE 6' MIN. HEIGHT. AT LEAST ONE TREE IN FRONT YARD SHALL BE AN ORNAMENTAL. FOUNDATION PLANTING SHALL CONSIST OF A BALANCED BLEND OF YEW, AZALEA, AND/OR BLOODEDENDRON.



*Leonard T. Bohager* 4-11-89  
Leonard T. Bohager MD Reg. No. 10859 Date

**MCKEE & ASSOCIATES, INC.**  
CIVIL ENGINEERS - LAND SURVEYORS  
Shawan Place - 5 Shawan Road  
Hunt Valley, MD 21030  
301-527-1255

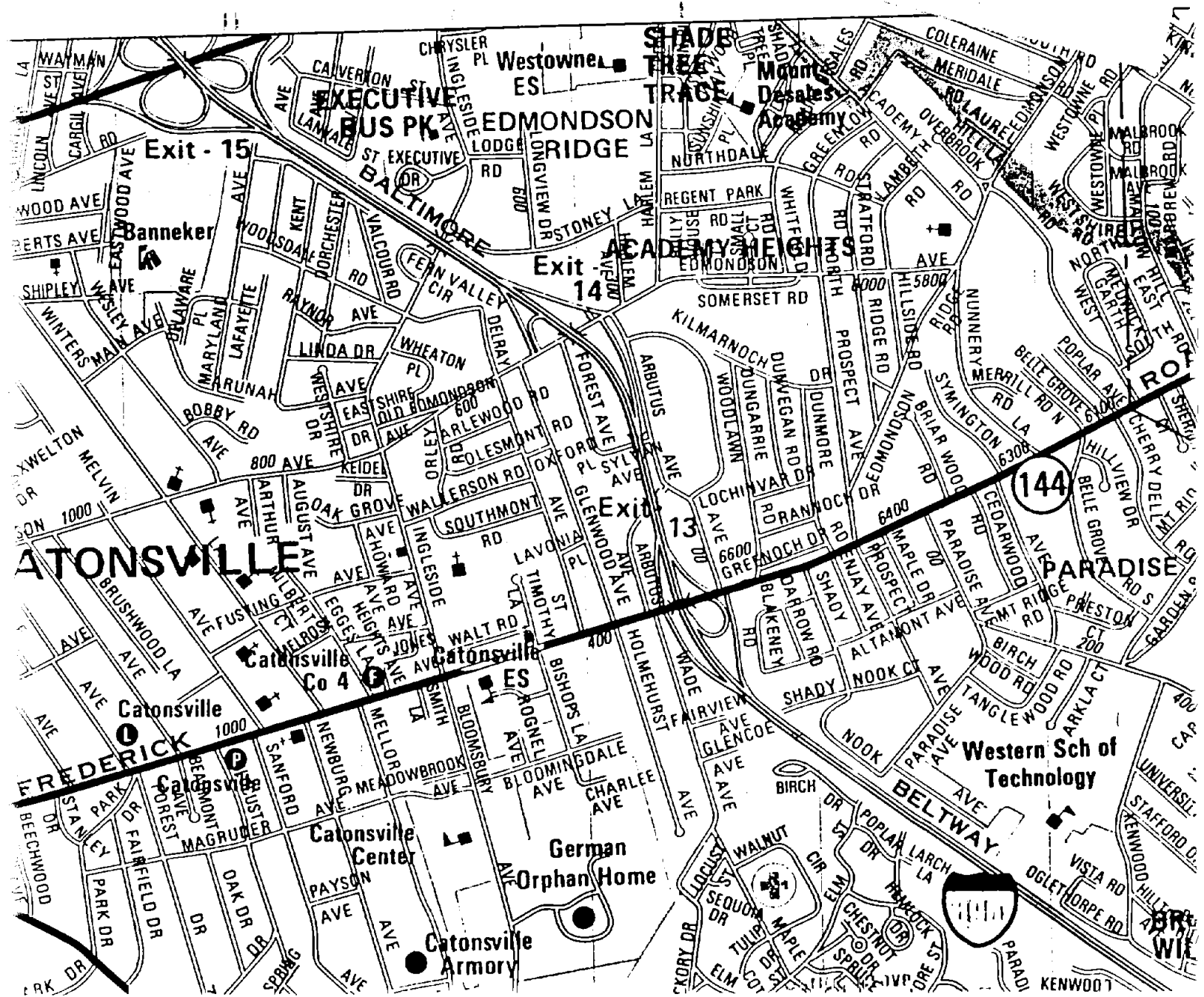
**ZONING PLAT**  
\*3002 DUNGLOW ROAD  
12<sup>TH</sup> ELEC. DIST. BALTO. CO, MD.  
SCALE 1"=30'  
REVISED 8-17-89 AS PER ZONING HEARING COMMENTS  
BEING  
LOT 2 BLOCK 14  
"DUNDALK"  
48/54

90-52-SPHA

*Per...*

PROPERTY: 211 S ARUNAH AV  
TAX ID : BC0119390370 SEC/BLOCK/LOT: 7027 / / LAND VAL: 22500  
LEGAL DES: IMPV VAL: 54800  
TAX MAP: 00095 LEGAL DES: TOTL VAL: 77300  
GRID : 00020 LEGAL DES: ASSESS VAL: 30920  
PARCEL : 00227 LOT SIZE : 40.00 40.00 120.00 120.00 TRANS DATE: 05/16/89  
OWNER : MARTINAK CHARLES H, JR SUB: CATONSVILLE HET LIBER: 8175  
OWNER 2: MARTINAK MARY BETH  
ADDRESS: 00911 ARUNAH AV  
ADDRESS: FOLIO: 455  
ADDRESS: BALTIMORE, MD LAST ASSESS 9011 ZONING:  
ADDRESS: USE CODE: 04 LAND USE: RESID  
OWNER OCC 21228

Joins Map 33





Arumna:

|      |            |                                                                            |
|------|------------|----------------------------------------------------------------------------|
| 1114 | Diggs      | 20 x 104 + 20 + 104 + 20 x 95 + 40 x 72 + 119 x 54 + 117 x 137 x 163 x 114 |
|      | Crosby     | 51 x 20 x 120 x 123 + 40 x 120                                             |
| 909  | Clark      | 80 x 120 + 60 x 120                                                        |
|      | Conroy     | 40 x 120 + 40 x 120.                                                       |
| 1004 | Hartman    | 60 x 120                                                                   |
| 1001 | Masello    | 80 x 120                                                                   |
|      | Singer     | <del>40 x 120</del>                                                        |
|      | Stanhope   | <del>40 x 120</del>                                                        |
| 1105 | Bennett    | 20 x 120 + 40 x 120                                                        |
| 1003 | Tate       | <del>40 x 120</del>                                                        |
|      | Mueller    | 47 x 121 x 120 x 111                                                       |
| 907  | Cult       | 60 x 120<br>80 x 120                                                       |
| 908  | Libby      | 60 x 121                                                                   |
| 1106 | Cleabarger | 40 x 120                                                                   |
| 1107 | Borden     | 100 x 120                                                                  |
| 1200 | King       | 65 x 120                                                                   |
| 1201 | Houston    | 55 x 65 x 120 x 120                                                        |
| 1206 | Clark      | 60 x 120                                                                   |
| 1207 | Strat      | 80 x 120                                                                   |

# Lafayette Ave:

|     |                                                 |                                    |               |            |      |
|-----|-------------------------------------------------|------------------------------------|---------------|------------|------|
| 404 | Haaf.                                           | 80 X 120                           | 80 X 120      | ( 9600 )   |      |
| 405 | Baker                                           | 40 + 80 = 120 X 120                | 120 X 120     | ( 14,400 ) |      |
| 409 | Sass                                            | 105 X 120 ( 105 X 118 X 151 X 98 ) | 105 X 120 + - | ( 12,600 ) |      |
| 410 | Sass                                            | 100 X 120                          | 100 X 120     | ( 12,000 ) |      |
| 411 | Hart                                            | 80 X 120                           | 80 X 120      | ( 9600 )   |      |
| 412 | Ambrose                                         | 20 + 20 = 40 X 120                 | 40 X 120      | ( 4800 )   | * 40 |
| 413 | Koontz                                          | 60 X 120                           | 60 X 120      | ( 7200 )   |      |
| 414 | Walker                                          | 60 X 120                           | 60 X 120      | ( 7200 )   |      |
| 418 | Freeman                                         | 60 X 120                           | 60 X 120      | ( 7200 )   |      |
| 420 | Swimm                                           | 60 X 120                           | 60 X 120      | ( 7200 )   |      |
| 422 | Staples                                         | 60 X 115                           | 60 X 115      | ( 6900 )   |      |
| 423 | Witt                                            | 65 X 120                           | 65 X 120      | ( 7800 )   |      |
| 428 | Brooks                                          | 40 + 60 + 20 + 40 = 160 X 120      | 160 X 120     | ( 19,200 ) | 3.   |
| 430 | Trueitt                                         | 85 + 60 = 145 X 120                | 145 X 120     | ( 17,400 ) |      |
| 464 | Williams                                        | 40 X 120 (land)                    | 40 X 120      | ( 4800 )   | * 40 |
| 503 | Smith                                           | 40 X 74 X 120 X 124                |               |            |      |
| 508 | Mutastano                                       | 60 X 120                           | 60 X 120      | ( 7200 )   |      |
| 511 | Cypalski                                        | 50 X 120                           | 50 X 120      | ( 6000 )   |      |
| 513 | Schuman                                         | 40 + 40 + 60 = 140 X 120           | 140 X 120     | ( 16,800 ) |      |
| 715 | Prevosto                                        | 40 + 100 = 140 X 120               | 140 X 120     | ( 16,800 ) |      |
| 717 | Mgloy                                           | 60 X 120                           | 60 X 120      | ( 7200 )   |      |
| 719 | Chelutant                                       | 80 X 120                           | 80 X 120      | ( 9600 )   |      |
|     | Lithicum                                        | 82 X 120                           | 82 X 120      | ( 9840 )   |      |
|     | Markowsk.                                       | 10 X 30 X 30                       |               |            |      |
|     | Kelley                                          | 25 + 60 = 85 X 120                 | 85 X 120      | ( 10,200 ) |      |
|     | Barro County other-side Calcutan 398 X 416 X 21 |                                    |               |            |      |

Valcour

503

Hiebler

40 x 120

501

Henn

40 x 120

506

Nickolas

40 x 111

570 -

Mike

40 x 109

573

Leshea

40 x 120

# Kent Ave

|     |         |    |      |      |      |
|-----|---------|----|------|------|------|
| 448 | Kentz   | 40 | X100 | -    | 8988 |
| 462 | William | 47 | X120 |      |      |
| 574 | Edson   | 40 | X120 |      |      |
| 520 | Pfall   | 40 | X120 | + 11 | X120 |

16

4 und

Linda

$$\begin{array}{r} 16 \\ 19 \\ \hline 35 \end{array}$$

Maryland.

601  
422

Forbes.  
Higgins

40 x 120  
40 x 120

# Woods Lake

|      |             |                                        |
|------|-------------|----------------------------------------|
| 708  | Thurston    | 105 X 148 X 114. + 60 X 55 X 120 X 121 |
| 711  | Nealy       | 40 X 120 + 85 X 49 X 120 X 106         |
| 705  | Bartels     | 60 X 120                               |
| 710  | Fischer     | 60 X 120                               |
| 712  | Rial        | 60 X 120                               |
| 713  | Watts       | 60 X 120                               |
| 714  | Greene      | 60 X 120                               |
| 715  | Cornwell    | 60 X 120                               |
| 716  | Abel        | 60 X 102                               |
| 800  | Stanton     | 83 X 120                               |
| 801  | Hynes       | 52 X 31 X 121 X 108                    |
| 802  | Mc Dwyer    | 66 X 32 X 120 X 105                    |
| 803  | Kriek       | 44 X 79 X 122 X 122                    |
| 804  | Smith       | 50 X 115                               |
| 805  | Collins     | 70 X 34 X 122 X 127                    |
| 806  | McKadden    | 50 X 83 X 120 X 115                    |
| 807  | Mack        | 83 X 132                               |
| 904  | Frank       | 82 X 120 + 41 X 120 + 20 X 120         |
| 905  | Thompson    | 41.64 X 126-                           |
| 906  | Rigdon      | 20 X 120                               |
| 907  | DeMuth      | 62 X 123                               |
| 1000 | Bartholomew | 40 X 120                               |
| 1002 | Cook        | 40 X 120                               |
| 1005 | Doyle       | 40 X 120                               |
| 1006 | Friedman    | 40 X 120                               |
| 1010 | Brady       | 40 X 120                               |
| 1012 | Cicci       | 20 X 120                               |
| 504  | Alleman     | 60 X 22.40                             |

7200

5750

5166

demonstrate, to protest that we do values instead of *ours*. Not only that, but confirmation hearings for new Justices *should* deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward. JUSTICE BLACKMUN not only regards this prospect with equanimity, he solicits it, *ante*, at 22-23.

There is a poignant aspect to today's opinion. Its length, and what might be called its epic tone, suggest that its authors believe they are bringing to an end a troublesome era in the history of our Nation and of our Court. "It is the dimension" of authority, they say, to "call[] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Ante*, at 24.

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case—its already apparent consequences for the Court, and its soon-to-be-played-out consequences for the Nation—burning on his mind. I expect that two years earlier he, too, had thought himself "call[ing] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution."

It is no more realistic for us in this case, than it was for him in that, to think that an issue of the sort they both involved—an issue involving life and death, freedom and subjugation—can be "speedily and finally settled" by the Supreme Court, as President James Buchanan in his inaugural address said the issue of slavery in the territories would be. See Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101-10, p. 126 (1989). Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.

We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.

KATHRYN KOLBERT, New York, N.Y. (JANET BENSHOOF, LYNN M. PALTROW, RACHAEL N. PINE, ANDREW DWYER, ELLEN K. GOETZ, STEVEN R. SHAPIRO, JOHN A. POWELL, LINDA J. WHARTON, CAROL E. TRACY, SETH KREIMER, ROGER K. EVANS, EVE W. PAUL, and DARA KLASSEL, on the

idents; ERNEST D. PREATE JR., JOHN G. KNORR III, Pa. Ch. Dpty. Atty. Gen., and KATE L. MERSHIMER, Sr. Dpty. Atty. Gen., on the briefs) for respondents/cross-petitioners, and KENNETH W. STARR, Solicitor General (STUART M. GERSON, Asst. Atty. Gen., PAUL J. LARKIN JR., Asst. to Sol. Gen., THOMAS G. HUNGAR, Asst. to Sol. Gen., and ALFRED R. MOLLIN, Justice Dept. atty., on the briefs) for U.S. as amicus curiae supporting respondents.

No. 91-453

# DAVID H. LUCAS, PETITIONER v. SOUTH CAROLINA COASTAL COUNCIL

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Syllabus

No. 91-453. Argued March 2, 1992—Decided June 29, 1992

In 1986, petitioner Lucas bought two residential lots on a South Carolina barrier island, intending to build single-family homes such as those on the immediately adjacent parcels. At that time, Lucas's lots were not subject to the State's coastal zone building permit requirements. In 1988, however, the state legislature enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures on his parcels. He filed suit against respondent state agency, contending that, even though the Act may have been a lawful exercise of the State's police power, the ban on construction deprived him of all "economically viable use" of his property and therefore effected a "taking" under the Fifth and Fourteenth Amendments that required the payment of just compensation. See, e.g., *Agins v. Tiburon*, 447 U. S. 255, 261. The state trial court agreed, finding that the ban rendered Lucas's parcels "valueless," and entered an award exceeding \$1.2 million. In reversing, the State Supreme Court held itself bound, in light of Lucas's failure to attack the Act's validity, to accept the legislature's "uncontested . . . findings" that new construction in the coastal zone threatened a valuable public resource. The court ruled that, under the *Mugler v. Kansas*, 123 U. S. 623, line of cases, when a regulation is designed to prevent "harmful or noxious uses" of property akin to public nuisances, no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value.

Held:

1. Lucas's takings claim is not rendered unripe by the fact that he may yet be able to secure a special permit to build on his property under an amendment to the Act passed after briefing and argument before the State Supreme Court, but prior to issuance of that court's opinion. Because it declined to rest its judgment on ripeness grounds, preferring to dispose of the case on the merits, the latter court's decision precludes, both practically and legally, any takings claim with respect to Lucas's preamendment deprivation. Lucas has properly alleged injury-in-fact with respect to this preamendment deprivation, and it would not accord with sound process in these circumstances to insist that he pursue the late-created procedure before that component of his takings claim can be considered ripe.
2. The State Supreme Court erred in applying the "harmful or noxious uses" principle to decide this case.

(a) Regulations that deny the property owner all "economically viable use of his land" constitute one of the discrete categories of regulatory deprivations that require compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint. Although the Court has never set forth the justification for this categorical rule, the practical—and economic—equivalence of physically appropriating and eliminating all beneficial use of land counsels its preservation.

(b) A review of the relevant decisions demonstrates that the "harmful or noxious use" principle was merely this Court's early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value; that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; and that, therefore, noxious-use logic cannot be the basis for departing from this Court's categorical rule

# Dorchester Rd.

|     |                       |                     |          |
|-----|-----------------------|---------------------|----------|
| 500 | Serio                 | 40 X 54 X 120 X 129 |          |
| 502 | Delaseyes             | 40 X 120            | 6191     |
| 503 | Doty                  | 40 X 120            | 40 X 120 |
| 507 | Frantz                | 60 X 120            |          |
| 508 | Fousels               | not on              |          |
| 509 | Mungelli              | 60 X 120            |          |
| 515 | Poling                | 60 X 120            |          |
| 700 | Wright                | 75 X 23 X 232 X 215 |          |
| 703 | Albrecht              | 80 X 120            |          |
| 708 | Kabit2                | 60 X 120            | Geo      |
| 708 | Delawater             | 80 X 120            | Rd       |
| 712 | Metcalf               | 60 X 120            |          |
| 719 | Nurd                  | 100 X 120           |          |
| 721 | Werner                | 100 X 120           |          |
| 722 | Ebbett                | 80 X 120            |          |
| 822 | Wiskar                | 60 X 120            |          |
|     | Timberline Enterprise | 40 X 120            |          |
|     | Mallampalli           | 100 X 120           |          |
|     | Wesj, Arko            | 35 X 60 X 120 X 120 |          |
|     | Alexander             | 80 X 120            |          |

# Delaware

|      |          |                      |
|------|----------|----------------------|
| 415  | Duffan   | 60 x 120             |
| 417  | Rushneck | 60 x 120             |
| 423  | Graves   | 80 x 120             |
| 425  | McGeehan | 80 x 120             |
| 429  | Blowhard | 40 x 85 x 122 x 10   |
| 1201 | Dunbar   | 45 x 101             |
| 1203 | Perry    | 60 x 66 x 101 x 129  |
|      | Cowley   | 105 x 80 x 165 x 128 |
|      | Forde    | 80 x 120             |

IN RE: PETITIONS FOR SPECIAL HEARING \* BEFORE THE  
AND ZONING VARIANCE - SW/S \*  
Dunglow Road, 20' E of the c/l \* DEPUTY ZONING COMMISSIONER  
of Morningson Road \*  
(3000-3002 Dunglow Road) \* OF BALTIMORE COUNTY  
12th Election District \*  
7th Councilmanic District \* Case No. 90-52-SPHA  
  
James M. Seigel, et ux \*  
Petitioners \*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Petitioners herein request a special hearing to approve Lots 1 and 2 of the subject property as separate building lots with undersized lot areas and that the overall density of the subdivision will not be affected, and variances to permit a lot width of 54 feet in lieu of the required 55 feet and a side yard setback of 5 feet in lieu of the required 10 feet for Lot 1, and a lot width of 53.5 feet in lieu of the required 55 feet and a side yard setback of 5 feet in lieu of the required 10 feet for Lot 2, all as more particularly described in Petitioner's Exhibit 1.

The Petitioners, by James M. Seigel, appeared, testified, and were represented by Michael Marino, Esquire. Also appearing on behalf of the Petitions was Keith A. Randlett on behalf of the Emerald Development Corporation. The following individuals appeared as Protestants: Charles R. and Betty Lee Hall, Sr., Daniel T. Mulheran, Marian O. Garrity, Doris J. Hoover, Lucille P. Wade, Terence McDonough, James E. Grumbach, and Roy Staten. The Protestants were represented by Louis L. DePazzo, Esquire.

Testimony indicated that the subject property, known as 3000 and 3002 Dunglow Road, consists of two lots totalling .236 acres zoned D.R. 5.5 which the Petitioners purchased approximately 10 years ago. Lot 1 is improved with a two-story brick dwelling and attached garage with a stone parking area, while Lot 2 is presently unimproved. Testimony indicated

ORDER OF THE ZONING COMMISSION

Date

By

RECEIVED

the dwelling has existed on Lot 1 for over 40 years and that said dwelling is located 5 feet from the side property line. Lot 2, which consists of .118 acres, has remained vacant since the original lot lines were drawn as part of the Dundalk Highlands subdivision as indicated on the plat filed with the Land Records of Baltimore County in May 1926, a copy of which was introduced as Petitioner's Exhibit 3. Petitioner testified he is desirous of selling Lot 2 to the Emerald Development Corporation who proposes to construct a two-story, three bedroom home which, in the Petitioners' opinion, will be in keeping with the character and quality of the neighborhood. Testimony presented by Petitioners noted that the house can be constructed in strict compliance with all setback requirements other than side yard. The only variance required is as to the lot width. Petitioners contend that to require strict compliance with result in undue hardship to them as the lot was created as a 50-foot wide lot in 1926. Further, Petitioners noted that a number of the lots in the surrounding neighborhood are 50 feet wide.

The Protestants, in addition to their general opposition to Petitioners' request, were concerned about the quality and integrity of the proposed dwelling for Lot 2. Many of the Protestants have resided in the area for more than 40 years and their testimony evidenced the pride they have in their property. After discussions between the Protestants and the Petitioners, certain modifications were made and an agreement was reached between the parties in the event the request was granted.

Subsequent to the hearing, a plan was submitted detailing the exterior design and a sample of the proposed brick, which is red Glen-Gery Brick, AA Matt. Said plan has been incorporated into the file and identified as Petitioner's Exhibit A. Additionally, a landscaping plan was

CRB-300  
Date 10/14/89  
By Betty J. Sullivan

forwarded to the Protestants' Counsel and a copy submitted to the Zoning Commissioner's Office for incorporation into the case file. Said plan has been marked as Petitioner's Exhibit B.

An area variance may be granted where strict application of the zoning regulations would cause practical difficulty to the Petitioner and his property. McLean v. Soley, 270 Md. 208 (1973). To prove practical difficulty for an area variance, the Petitioner must meet the following:

- 1) whether strict compliance with requirement would unreasonably prevent the use of the property for a permitted purpose or render conformance unnecessarily burdensome;
- 2) whether the grant would do substantial injustice to applicant as well as other property owners in the district or whether a lesser relaxation than that applied for would give substantial relief; and
- 3) whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

Anderson v. Bd. of Appeals, Town of Chesapeake Beach, 22 Md. App. 28 (1974).

After due consideration of the testimony and evidence presented, it is clear that practical difficulty or unreasonable hardship would result if the relief requested in the Petition for Special Hearing and Zoning Variance were not granted. It has been established that the requirements from which the Petitioner seeks relief would unduly restrict the use of the land due to the special conditions unique to this particular parcel. In addition, the relief requested will not be detrimental to the public health, safety, and general welfare.

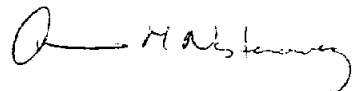
Pursuant to the advertisement, posting of the property, and public hearing on these Petitions held, and for the reasons given above, the special hearing and variance should be granted.

THEREFORE, IT IS ORDERED by the Deputy Zoning Commissioner for Baltimore County this 14th day of December, 1989 that the Petition for Special Hearing to approve Lots 1 and 2 of the subject property as separate building lots with undersized lot areas and that the overall density of the subdivision will not be affected, and the Petition for Zoning Variance to permit a lot width of 54 feet in lieu of the required 55 feet and a side yard setback of 5 feet in lieu of the required 10 feet for Lot 1, and a lot width of 53.5 feet in lieu of the required 55 feet and a side yard setback of 5 feet in lieu of the required 10 feet for Lot 2, in accordance with Petitioner's Exhibits 1 and A, be and are hereby GRANTED, subject, however, to the following restrictions which are conditions precedent to the relief granted:

1) The Petitioner may apply for his building permit and be granted same upon receipt of this Order; however, Petitioner is hereby made aware that proceeding at this time is at his own risk until such time as the 30-day appellate process from this Order has expired. If, for whatever reason, this Order is reversed, the Petitioner would be required to return, and be responsible for returning, said property to its original condition.

2) Petitioner shall use the red Glen-Gery Brick, Range AA Matt, or a red brick similar to the sample submitted and as described in Petitioner's Exhibit A.

3) Prior to the issuance of any permits, the landscaping plan marked Petitioner's Exhibit B shall be submitted for approval by the Baltimore County Landscape Planner. In the event the plan is modified by the Landscape Planner, the modified plan shall be submitted to the Deputy Zoning Commissioner for final approval.

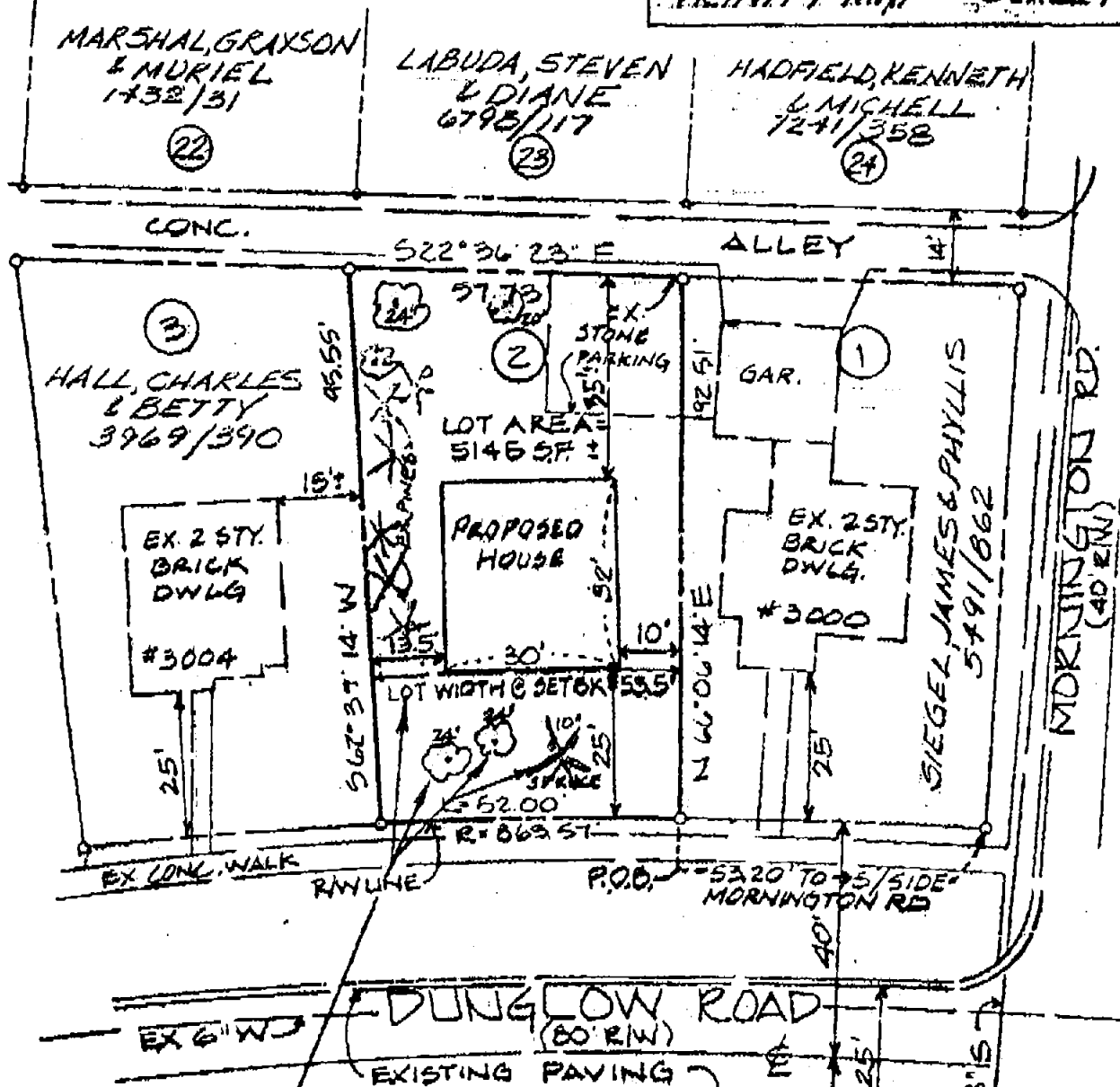
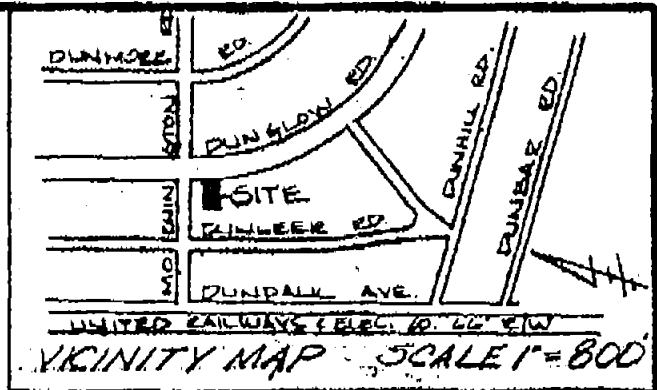


ANN M. NASTAROWICZ  
Deputy Zoning Commissioner  
for Baltimore County

AMN:bjs

Checked by \_\_\_\_\_  
Date 12/14/89  
By Debbie J. Hukman

EXISTING ZONING: DR-5.5  
PUBLIC WATER & SEWER



**LANDSCAPING NOTE:**

ANY TREES REMOVED FOR HOME CONSTRUCTION SHALL BE REPLACED IN LIKE KIND ON THE PROPERTY FROM NURSERY STOCK AND BE 6' MIN. HEIGHT. AT LEAST ONE TREE IN FRONT YARD SHALL BE AN ORNAMENTAL. FOUNDATION PLANTING SHALL CONSIST OF A BALANCED BLEND OF YEW, AZALEA, AND/OR BLOODED DORON.



*Leonard T. Bohager* 4-11-89  
Leonard T. Bohager MD Reg. No. 10859 Date

**MCKEE & ASSOCIATES, INC.**  
CIVIL ENGINEERS - LAND SURVEYORS  
Shawan Place - 5 Shawan Road  
Hunt Valley, MD 21030  
301-527-1255

MICHELL, JOHN & KAREN 7152/406  
HOOVER, FRANKLIN 999/304

90-52-SPHA

**ZONING PLAT**  
\*3002 DUNGLOW ROAD  
12<sup>TH</sup> ELEC. DIST. BALTO. CO, MD.  
SCALE 1"=30'  
REVISED 8-17-89 AS PER ZONING HEARING COMMENTS  
BEING  
LOT 2 BLOCK 14  
"DUNDALK"  
48/54

*Per...*

demonstrate, to protest that we do values instead of *ours*. Not only that, but confirmation hearings for new Justices *should* deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward. JUSTICE BLACKMUN not only regards this prospect with equanimity, he solicits it, *ante*, at 22-23.

There is a poignant aspect to today's opinion. Its length, and what might be called its epic tone, suggest that its authors believe they are bringing to an end a troublesome era in the history of our Nation and of our Court. "It is the dimension" of authority, they say, to "call[] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Ante*, at 24.

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case—its already apparent consequences for the Court, and its soon-to-be-played-out consequences for the Nation—burning on his mind. I expect that two years earlier he, too, had thought himself "call[ing] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution."

It is no more realistic for us in this case, than it was for him in that, to think that an issue of the sort they both involved—an issue involving life and death, freedom and subjugation—can be "speedily and finally settled" by the Supreme Court, as President James Buchanan in his inaugural address said the issue of slavery in the territories would be. See Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101-10, p. 126 (1989). Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.

We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.

KATHRYN KOLBERT, New York, N.Y. (JANET BENSHOOF, LYNN M. PALTROW, RACHAEL N. PINE, ANDREW DWYER, ELLEN K. GOETZ, STEVEN R. SHAPIRO, JOHN A. POWELL, LINDA J. WHARTON, CAROL E. TRACY, SETH KREIMER, ROGER K. EVANS, EVE W. PAUL, and DARA KLASSEL, on the

idents; ERNEST D. PREATE JR., JOHN G. KNORR III, Pa. Ch. Dpty. Atty. Gen., and KATE L. MERSHIMER, Sr. Dpty. Atty. Gen., on the briefs) for respondents/cross-petitioners, and KENNETH W. STARR, Solicitor General (STUART M. GERSON, Asst. Atty. Gen., PAUL J. LARKIN JR., Asst. to Sol. Gen., THOMAS G. HUNGAR, Asst. to Sol. Gen., and ALFRED R. MOLLIN, Justice Dept. atty., on the briefs) for U.S. as amicus curiae supporting respondents.

No. 91-453

DAVID H. LUCAS, PETITIONER v. SOUTH CAROLINA  
COASTAL COUNCIL

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH  
CAROLINA

Syllabus

No. 91-453. Argued March 2, 1992—Decided June 29, 1992

In 1986, petitioner Lucas bought two residential lots on a South Carolina barrier island, intending to build single-family homes such as those on the immediately adjacent parcels. At that time, Lucas's lots were not subject to the State's coastal zone building permit requirements. In 1988, however, the state legislature enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures on his parcels. He filed suit against respondent state agency, contending that, even though the Act may have been a lawful exercise of the State's police power, the ban on construction deprived him of all "economically viable use" of his property and therefore effected a "taking" under the Fifth and Fourteenth Amendments that required the payment of just compensation. See, e.g., *Agins v. Tiburon*, 447 U. S. 255, 261. The state trial court agreed, finding that the ban rendered Lucas's parcels "valueless," and entered an award exceeding \$1.2 million. In reversing, the State Supreme Court held itself bound, in light of Lucas's failure to attack the Act's validity, to accept the legislature's "uncontested . . . findings" that new construction in the coastal zone threatened a valuable public resource. The court ruled that, under the *Mugler v. Kansas*, 123 U. S. 623, line of cases, when a regulation is designed to prevent "harmful or noxious uses" of property akin to public nuisances, no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value.

Held:

1. Lucas's takings claim is not rendered unripe by the fact that he may yet be able to secure a special permit to build on his property under an amendment to the Act passed after briefing and argument before the State Supreme Court, but prior to issuance of that court's opinion. Because it declined to rest its judgment on ripeness grounds, preferring to dispose of the case on the merits, the latter court's decision precludes, both practically and legally, any takings claim with respect to Lucas's preamendment deprivation. Lucas has properly alleged injury-in-fact with respect to this preamendment deprivation, and it would not accord with sound process in these circumstances to insist that he pursue the late-created procedure before that component of his takings claim can be considered ripe.

2. The State Supreme Court erred in applying the "harmful or noxious uses" principle to decide this case.

(a) Regulations that deny the property owner all "economically viable use of his land" constitute one of the discrete categories of regulatory deprivations that require compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint. Although the Court has never set forth the justification for this categorical rule, the practical—and economic—equivalence of physically appropriating and eliminating all beneficial use of land counsels its preservation.

(b) A review of the relevant decisions demonstrates that the "harmful or noxious use" principle was merely this Court's early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value; that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; and that, therefore, noxious-use logic cannot be the basis for departing from this Court's categorical rule

that total regulatory takings must be compensated.

(c) Rather, the question must turn, in accord with this Court's "takings" jurisprudence, on citizens' historic understandings regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they take title to property. Because it is not consistent with the historical compact embodied in the Takings Clause that title to real estate is held subject to the State's subsequent decision to eliminate all economically beneficial use, a regulation having that effect cannot be newly decreed, and sustained, without compensation's being paid the owner. However, no compensation is owed—in this setting as with all takings claims—if the State's affirmative decree simply makes explicit what already inheres in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. Cf. *Scranton v. Wheeler*, 179 U.S. 141, 163.

(d) Although it seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on Lucas's land, this state-law question must be dealt with on remand. To win its case, respondent cannot simply proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*, but must identify background principles of nuisance and property law that prohibit the uses Lucas now intends in the property's present circumstances.

304 S. C. 376, 404 S. E. 2d 895, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and THOMAS, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment. BLACKMUN, J., and STEVENS, J., filed dissenting opinions. SOUTER, J., filed a separate statement.

JUSTICE SCALIA delivered the opinion of the Court.

In 1986, petitioner David H. Lucas paid \$975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, S. C. Code § 48-39-250 *et seq.* (Supp. 1990) (Act), which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. See § 48-39-290(A). A state trial court found that this prohibition rendered Lucas's parcels "valueless." App. to Pet. for Cert. 37. This case requires us to decide whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of "just compensation." U. S. Const., Amdt. 5.

## I

### A

South Carolina's expressed interest in intensively managing development activities in the so-called "coastal zone" dates from 1977 when, in the aftermath of Congress's passage of the federal Coastal Zone Management Act of 1972, 86 Stat. 1280, as amended, 16 U. S. C. § 1451 *et seq.*, the legislature enacted a Coastal Zone Management Act of its own. See S. C. Code § 48-39-10 *et seq.* (1987). In its original form, the South Carolina Act required owners of coastal zone land that qualified as a "critical area" (defined in the legislation to include beaches and immediately adjacent sand dunes, § 48-39-10(J)) to obtain a permit from the newly created South Carolina Coastal Council (respondent here) prior to committing the land to a "use other than the use the critical area was devoted to on [September 28, 1977]." § 48-39-130(A).

In the late 1970's, Lucas and others began extensive residential development of the Isle of Palms, a barrier island situated eastward of the City of Charleston. Toward the close of the development cycle for one residential

subdivision known as "Beachwood East," Lucas in 1986 purchased the two lots at issue in this litigation for his own account. No portion of the lots, which were located approximately 300 feet from the beach, qualified as a "critical area" under the 1977 Act; accordingly, at the time Lucas acquired these parcels, he was not legally obliged to obtain a permit from the Council in advance of any development activity. His intention with respect to the lots was to do what the owners of the immediately adjacent parcels had already done: erect single-family residences. He commissioned architectural drawings for this purpose.

The Beachfront Management Act brought Lucas's plans to an abrupt end. Under that 1988 legislation, the Council was directed to establish a "baseline" connecting the landward-most "point[s] of erosion . . . during the past forty years" in the region of the Isle of Palms that includes Lucas's lots. § 48-39-280(A)(2) (Supp. 1988).<sup>1</sup> In action not challenged here, the Council fixed this baseline landward of Lucas's parcels. That was significant, for under the Act construction of occupable improvements<sup>2</sup> was flatly prohibited seaward of a line drawn 20 feet landward of, and parallel to, the baseline, § 48-39-290(A) (Supp. 1988). The Act provided no exceptions.

## B

Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act's construction bar effected a taking of his property without just compensation. Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives. Following a bench trial, the court agreed. Among its factual determinations was the finding that "at the time Lucas purchased the two lots, both were zoned for single-family residential construction and . . . there were no restrictions imposed upon such use of the property by either the State of South Carolina, the County of Charleston, or the Town of the Isle of Palms." App. to Pet. for Cert. 36. The trial court further found that the Beachfront Management Act decreed a permanent ban on construction insofar as Lucas's lots were concerned, and that this prohibition "deprive[d] Lucas of any reasonable economic use of the lots, . . . eliminated the unrestricted right of use, and rendered[ed] them valueless." *Id.*, at 37. The court thus concluded that Lucas's properties had been "taken" by operation of the Act, and it ordered respondent to pay "just compensation" in the amount of \$1,232,387.50. *Id.*, at 40.

The Supreme Court of South Carolina reversed. It found dispositive what it described as Lucas's concession "that the Beachfront Management Act [was] properly and validly designed to preserve . . . South Carolina's beaches." 304 S. C. 376, 379, 404 S. E. 2d 895, 896 (1991). Failing an

<sup>1</sup>This specialized historical method of determining the baseline applied because the Beachwood East subdivision is located adjacent to a so-called "inlet erosion zone" (defined in the Act to mean "a segment of shoreline along or adjacent to tidal inlets which is influenced directly by the inlet and its associated shoals," S. C. Code § 48-39-270(7) (Supp. 1988)) that is "not stabilized by jetties, terminal groins, or other structures." § 48-39-280(A)(2). For areas other than these unstabilized inlet erosion zones, the statute directs that the baseline be established "along the crest of the primary oceanfront sand dune." § 48-39-280(A)(1).

<sup>2</sup>The Act did allow the construction of certain nonhabitable improvements, e.g., "wooden walkways no larger in width than six feet," and "small wooden decks no larger than one hundred forty-four square feet." §§ 48-39-290(A)(1) and (2) (Supp. 1988).

attack on the validity of the statute as such, the court believed itself bound to accept the "uncontested . . . findings" of the South Carolina legislature that new construction in the coastal zone—such as petitioner intended—threatened this public resource. *Id.*, at 383, 404 S. E. 2d, at 898. The Court ruled that when a regulation respecting the use of property is designed "to prevent serious public harm," *id.*, at 383, 404 S. E. 2d, at 899 (citing, *inter alia*, *Mugler v. Kansas*, 123 U. S. 623 (1887)), no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value.

Two justices dissented. They acknowledged that our *Mugler* line of cases recognizes governmental power to prohibit "noxious" uses of property—i.e., uses of property akin to "public nuisances"—without having to pay compensation. But they would not have characterized the Beachfront Management Act's "primary purpose [as] the prevention of a nuisance." 304 S. C., at 395, 404 S. E. 2d, at 906 (Harwell, J., dissenting). To the dissenters, the chief purposes of the legislation, among them the promotion of tourism and the creation of a "habitat for indigenous flora and fauna," could not fairly be compared to nuisance abatement. *Id.*, at 396, 404 S. E. 2d, at 906. As a consequence, they would have affirmed the trial court's conclusion that the Act's obliteration of the value of petitioner's lots accomplished a taking.

We granted certiorari. 502 U. S. \_\_\_\_ (1991).

## II

As a threshold matter, we must briefly address the Council's suggestion that this case is inappropriate for plenary review. After briefing and argument before the South Carolina Supreme Court, but prior to issuance of that court's opinion, the Beachfront Management Act was amended to authorize the Council, in certain circumstances, to issue "special permits" for the construction or reconstruction of habitable structures seaward of the baseline. See S. C. Code §48-39-290(DX1) (Supp. 1991). According to the Council, this amendment renders Lucas's claim of a permanent deprivation unripe, as Lucas may yet be able to secure permission to build on his property. "[The Court's] cases," we are reminded, "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U. S. 340, 351 (1986). See also *Agins v. Tiburon*, 447 U. S. 255, 260 (1980). Because petitioner "has not yet obtained a final decision regarding how [he] will be allowed to develop [his] property," *Williamson County Regional Planning Comm'n of Johnson City v. Hamilton Bank*, 473 U. S. 172, 190 (1985), the Council argues that he is not yet entitled to definitive adjudication of his takings claim in this Court.

We think these considerations would preclude review had the South Carolina Supreme Court rested its judgment on ripeness grounds, as it was (essentially) invited to do by the Council, see Brief for Respondent 9, n. 3. The South Carolina Supreme Court shrugged off the possibility of further administrative and trial proceedings, however, preferring to dispose of Lucas's takings claim on the merits. Compare, e.g., *San Diego Gas & Electric Co.*, 450 U. S. 621, 631-632 (1981). This unusual disposition does not preclude Lucas from applying for a permit under the 1990 amendment for future construction, and challenging, on takings grounds, any denial. But it does preclude, both practically and legally, any takings claim with respect to Lucas's past deprivation, i.e., for his having been denied construction rights during the period before the 1990 amendment. See

generally *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U. S. 304 (1987) (holding that temporary deprivations of use are compensable under the Takings Clause). Without even so much as commenting upon the consequences of the South Carolina Supreme Court's judgment in this respect, the Council insists that permitting Lucas to press his claim of a past deprivation on this appeal would be improper, since "the issues of whether and to what extent [Lucas] has incurred a temporary taking . . . have simply never been addressed." Brief for Respondent 11. Yet Lucas had no reason to proceed on a "temporary taking" theory at trial, or even to seek remand for that purpose prior to submission of the case to the South Carolina Supreme Court, since as the Act then read, the taking was unconditional and permanent. Moreover, given the breadth of the South Carolina Supreme Court's holding and judgment, Lucas would plainly be unable (absent our intervention now) to obtain further state-court adjudication with respect to the 1988-1990 period.

In these circumstances, we think it would not accord with sound process to insist that Lucas pursue the late-created "special permit" procedure before his takings claim can be considered ripe. Lucas has properly alleged Article III injury-in-fact in this case, with respect to both the pre-1990 and post-1990 constraints placed on the use of his parcels by the Beachfront Management Act.<sup>3</sup> That there is a discretionary "special permit" procedure by which he may regain—for the future, at least—beneficial use of his land goes only to the prudential "ripeness" of Lucas's challenge, and for the reasons discussed we do not think it prudent to apply that prudential requirement here. See *Esposito v. South Carolina Coastal Council*, 939 F. 2d 165, 168 (CA4 1991), cert. pending, No. 91-941.<sup>4</sup> We leave for decision on

<sup>3</sup> JUSTICE BLACKMUN insists that this aspect of Lucas's claim is "not justiciable," *post*, at 7, because Lucas never fulfilled his obligation under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), to "submit[] a plan for development of [his] property" to the proper state authorities. *Id.*, at 187. See *post*, at 8. But such a submission would have been pointless, as the Council stipulated below that no building permit would have been issued under the 1988 Act, application or no application. Record 14 (stipulations). Nor does the peculiar posture of this case mean that we are without Article III jurisdiction, as JUSTICE BLACKMUN apparently believes, see *post*, at 7, and n. 5. Given the South Carolina Supreme Court's dismissive foreclosure of further pleading and adjudication with respect to the pre-1990 component of Lucas's taking claim, it is appropriate for us to address that component as if the case were here on the pleadings alone. Lucas properly alleged injury-in-fact in his complaint, see App. to Pet. for Cert. 154 (complaint); *id.*, at 156 (asking "damages for the temporary taking of his property" from the date of the 1988 Act's passage to "such time as this matter is finally resolved"). No more can reasonably be demanded. Cf. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U. S. 304, 312-313 (1987). JUSTICE BLACKMUN finds it "baffling," *post*, at 8, n. 5, that we grant standing here, whereas "just a few days ago, in *Lujan v. Defenders of Wildlife*, 504 U. S. \_\_\_\_ (1992)," we denied standing. He sees in that strong evidence to support his repeated imputations that the Court "presses" to take this case, *post*, at 1, is "eager to decide" it, *post*, at 10, and is unwilling to "be denied," *post*, at 7. He has a point: The decisions are indeed very close in time, yet one grants standing and the other denies it. The distinction, however, rests in law rather than chronology. *Lujan*, since it involved the establishment of injury-in-fact at the summary judgment stage, required specific facts to be adduced by sworn testimony; had the same challenge to a generalized allegation of injury-in-fact been made at the pleading stage, it would have been unsuccessful.

<sup>4</sup> In that case, the Court of Appeals for the Fourth Circuit reached the merits of a takings challenge to the 1988 Beachfront Management Act identical to the one Lucas brings here even though the Act was amended, and the special permit procedure established, while the case was under submission. The court observed:

that total regulatory takings must be compensated.

(c) Rather, the question must turn, in accord with this Court's "takings" jurisprudence, on citizens' historic understandings regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they take title to property. Because it is not consistent with the historical compact embodied in the Takings Clause that title to real estate is held subject to the State's subsequent decision to eliminate all economically beneficial use, a regulation having that effect cannot be newly decreed, and sustained, without compensation's being paid the owner. However, no compensation is owed—in this setting as with all takings claims—if the State's affirmative decree simply makes explicit what already inheres in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. Cf. *Scranton v. Wheeler*, 179 U.S. 141, 163.

(d) Although it seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on Lucas's land, this state-law question must be dealt with on remand. To win its case, respondent cannot simply proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*, but must identify background principles of nuisance and property law that prohibit the uses Lucas now intends in the property's present circumstances.

304 S. C. 376, 404 S. E. 2d 895, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and THOMAS, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment. BLACKMUN, J., and STEVENS, J., filed dissenting opinions. SOUTER, J., filed a separate statement.

JUSTICE SCALIA delivered the opinion of the Court.

In 1986, petitioner David H. Lucas paid \$975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, S. C. Code § 48-39-250 *et seq.* (Supp. 1990) (Act), which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. See § 48-39-290(A). A state trial court found that this prohibition rendered Lucas's parcels "valueless." App. to Pet. for Cert. 37. This case requires us to decide whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of "just compensation." U. S. Const., Amdt. 5.

## I

### A

South Carolina's expressed interest in intensively managing development activities in the so-called "coastal zone" dates from 1977 when, in the aftermath of Congress's passage of the federal Coastal Zone Management Act of 1972, 86 Stat. 1280, as amended, 16 U. S. C. § 1451 *et seq.*, the legislature enacted a Coastal Zone Management Act of its own. See S. C. Code § 48-39-10 *et seq.* (1987). In its original form, the South Carolina Act required owners of coastal zone land that qualified as a "critical area" (defined in the legislation to include beaches and immediately adjacent sand dunes, § 48-39-10(J)) to obtain a permit from the newly created South Carolina Coastal Council (respondent here) prior to committing the land to a "use other than the use the critical area was devoted to on [September 28, 1977]." § 48-39-130(A).

In the late 1970's, Lucas and others began extensive residential development of the Isle of Palms, a barrier island situated eastward of the City of Charleston. Toward the close of the development cycle for one residential

subdivision known as "Beachwood East," Lucas in 1986 purchased the two lots at issue in this litigation for his own account. No portion of the lots, which were located approximately 300 feet from the beach, qualified as a "critical area" under the 1977 Act; accordingly, at the time Lucas acquired these parcels, he was not legally obliged to obtain a permit from the Council in advance of any development activity. His intention with respect to the lots was to do what the owners of the immediately adjacent parcels had already done: erect single-family residences. He commissioned architectural drawings for this purpose.

The Beachfront Management Act brought Lucas's plans to an abrupt end. Under that 1988 legislation, the Council was directed to establish a "baseline" connecting the landward-most "point[s] of erosion . . . during the past forty years" in the region of the Isle of Palms that includes Lucas's lots. § 48-39-280(A)(2) (Supp. 1988).<sup>1</sup> In action not challenged here, the Council fixed this baseline landward of Lucas's parcels. That was significant, for under the Act construction of occupable improvements<sup>2</sup> was flatly prohibited seaward of a line drawn 20 feet landward of, and parallel to, the baseline, § 48-39-290(A) (Supp. 1988). The Act provided no exceptions.

## B

Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act's construction bar effected a taking of his property without just compensation. Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives. Following a bench trial, the court agreed. Among its factual determinations was the finding that "at the time Lucas purchased the two lots, both were zoned for single-family residential construction and . . . there were no restrictions imposed upon such use of the property by either the State of South Carolina, the County of Charleston, or the Town of the Isle of Palms." App. to Pet. for Cert. 36. The trial court further found that the Beachfront Management Act decreed a permanent ban on construction insofar as Lucas's lots were concerned, and that this prohibition "deprive[d] Lucas of any reasonable economic use of the lots, . . . eliminated the unrestricted right of use, and rendered[ed] them valueless." *Id.*, at 37. The court thus concluded that Lucas's properties had been "taken" by operation of the Act, and it ordered respondent to pay "just compensation" in the amount of \$1,232,387.50. *Id.*, at 40.

The Supreme Court of South Carolina reversed. It found dispositive what it described as Lucas's concession "that the Beachfront Management Act [was] properly and validly designed to preserve . . . South Carolina's beaches." 304 S. C. 376, 379, 404 S. E. 2d 895, 896 (1991). Failing an

<sup>1</sup>This specialized historical method of determining the baseline applied because the Beachwood East subdivision is located adjacent to a so-called "inlet erosion zone" (defined in the Act to mean "a segment of shoreline along or adjacent to tidal inlets which is influenced directly by the inlet and its associated shoals," S. C. Code § 48-39-270(7) (Supp. 1988)) that is "not stabilized by jetties, terminal groins, or other structures." § 48-39-280(A)(2). For areas other than these unstabilized inlet erosion zones, the statute directs that the baseline be established "along the crest of the primary oceanfront sand dune." § 48-39-280(A)(1).

<sup>2</sup>The Act did allow the construction of certain nonhabitable improvements, e.g., "wooden walkways no larger in width than six feet," and "small wooden decks no larger than one hundred forty-four square feet." §§ 48-39-290(A)(1) and (2) (Supp. 1988).

remand, of course, the questions left unaddressed by the South Carolina Supreme Court as a consequence of its categorical disposition.<sup>5</sup>

## III

## A

Prior to Justice Holmes' exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it was generally thought that the Takings Clause reached only a "direct appropriation" of property, *Legal Tender Cases*, 12 Wall. 457, 551 (1871), or the functional equivalent of a "practical ouster of [the owner's] possession." *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879). See also *Gibson v. United States*, 166 U.S. 269, 275-276 (1897). Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U.S., at 414-415. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." *Id.*, at 415. These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.*

Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "set formula" for determining how far is too far, preferring to "engag[e] in . . . essentially ad hoc, factual inquiries," *Penn. Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)). See Epstein, Takings: Descent and Resurrection, 1987 Sup. Ct. Rev. 1, 4. We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (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. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), we determined that New York's law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking, *id.*, at 435-440, even though the facilities occupied at most only 1½ cubic feet of the landlords' property, see *id.*, at 438, n. 16. See also *United States v. Causby*, 328 U.S. 256, 265, and n. 10 (1946) (physical invasions of airspace); cf. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (imposition of navigational servitude upon private marina).

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See *Akins*, 447 U.S., at 260; see also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 295-296 (1981).<sup>6</sup> As we have said on numerous occasions, 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." *Akins*, *supra*, at 260 (citations omitted) (emphasis added).<sup>7</sup>

<sup>6</sup>We will not attempt to respond to all of JUSTICE BLACKMUN's mistaken citation of case precedent. Characteristic of its nature is his assertion that the cases we discuss here stand merely for the proposition "that proof that a regulation does not deny an owner economic use of his property is sufficient to defeat a facial taking challenge" and not for the point that "denial of such use is sufficient to establish a taking claim regardless of any other consideration." *Post*, at 15, n. 11. The cases say, repeatedly and unmistakably, that "[t]he test to be applied in considering [a] facial [takings] challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land.'" *Keystone*, 480 U.S., at 495 (quoting *Hodel*, 452 U.S., at 295-296 (quoting *Akins*, 447 U.S., at 260)) (emphasis added).

JUSTICE BLACKMUN describes that rule (which we do not invent but merely apply today) as "alter[ing] the long-settled rules of review" by foisting on the State "the burden of showing [its] regulation is not a taking." *Post*, at 11, 12. This is of course wrong. Lucas had to do more than simply file a lawsuit to establish his constitutional entitlement; he had to show that the Beachfront Management Act denied him economically beneficial use of his land. Our analysis presumes the unconstitutionality of state land-use regulation only in the sense that any rule-with-exceptions presumes the invalidity of a law that violates it—for example, the rule generally prohibiting content-based restrictions on speech. See, e.g., *Simon & Schuster, Inc. v. New York Crime Victims Board*, 502 U.S. \_\_\_\_ (slip op., at 8) (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech"). JUSTICE BLACKMUN's real quarrel is with the substantive standard of liability we apply in this case, a long-established standard we see no need to repudiate.

<sup>7</sup>Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme—and, we think, unsupportable—view of the relevant calculus, see *Penn. Central Transportation Co. v. New York City*, 42 N.Y. 2d 324, 333-334, 366 N.E. 2d 1271, 1276-1277 (1977), *aff'd*, 438 U.S. 104 (1978), where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the taking claimant's other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. Compare *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (law restricting subsurface extraction of coal held to effect a taking), with *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497-502 (1987)

"The enactment of the 1990 Act during the pendency of this appeal, with its provisions for special permits and other changes that may affect the plaintiffs, does not relieve us of the need to address the plaintiffs' claims under the provisions of the 1988 Act. Even if the amended Act cured all of the plaintiffs' concerns, the amendments would not foreclose the possibility that a taking had occurred during the years when the 1988 Act was in effect." *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 168 (CA4 1991).

<sup>5</sup>JUSTICE BLACKMUN states that our "intense interest in Lucas' plight . . . would have been more prudently expressed by vacating the judgment below and remanding for further consideration in light of the 1990 amendments" to the Beachfront Management Act. *Post*, at 10, n. 7. That is a strange suggestion, given that the South Carolina Supreme Court rendered its categorical disposition in this case after the Act had been amended, and after it had been invited to consider the effect of those amendments on Lucas's case. We have no reason to believe that the justices of the South Carolina Supreme Court are any more desirous of using a narrower ground now than they were then; and neither "prudence" nor any other principle of judicial restraint requires that we remand to find out whether they have changed their mind.

We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. See *San Diego Gas & Electric Co. v. San Diego*, 450 U. S., at 652 (Brennan, J., dissenting). "[F]or what is the land but the profits thereof?" 1 E. Coke, Institutes ch. 1, §1 (1st Am. ed. 1812). Surely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," *Penn Central Transportation Co.*, 438 U. S., at 124, in a manner that secures an "average reciprocity of advantage" to everyone concerned. *Pennsylvania Coal Co. v. Mahon*, 260 U. S., at 415. And the functional basis for permitting the government, by regulation, to affect property values without compensation—that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *id.*, at 413—does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. See, e.g., *Annicelli v. South Kingstown*, 463 A. 2d 133, 140-141 (R.I. 1983) (prohibition on construction adjacent to beach justified on twin grounds of safety and "conservation of open space"); *Morris County Land Improvement Co. v. Parsippany-Troy Hills Township*, 40 N. J. 539, 552-553, 193 A. 2d 232, 240 (1963) (prohibition on filling marshlands imposed in order to preserve region as water detention basin and create wildlife refuge). As Justice Brennan explained: "From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property." *San Diego Gas & Elec. Co.*, *supra*, at 652 (Brennan, J., dissenting). The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation. See, e.g., 16 U. S. C. §410ff-1(a) (authorizing acquisition of "lands, waters, or interests [within Channel Islands National Park]

(including but not limited to scenic easements)"); §460aa-2(a) (authorizing acquisition of "any lands, or lesser interests therein, including mineral interests and scenic easements" within Sawtooth National Recreation Area); §§ 3921-3923 (authorizing acquisition of wetlands); N. C. Gen. Stat. §113A-38 (1990) (authorizing acquisition of, *inter alia*, "scenic easements" within the North Carolina natural and scenic rivers system); Tenn. Code Ann. §§ 11-15-101 — 11-15-108 (1987) (authorizing acquisition of "protective easements" and other rights in real property adjacent to State's historic, architectural, archaeological, or cultural resources).

We think, in short, that there are good reasons for our frequently expressed belief that 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.<sup>6</sup>

## B

The trial court found Lucas's two beachfront lots to have been rendered valueless by respondent's enforcement of the coastal-zone construction ban.<sup>7</sup> Under Lucas's theory of the case, which rested upon our "no economically viable use" statements, that finding entitled him to compensation. Lucas believed it unnecessary to take issue with either the purposes behind the Beachfront Management Act, or the means chosen by the South Carolina Legislature to effectuate those purposes. The South Carolina Supreme Court, however, thought otherwise. In its view, the Beachfront Management Act was no ordinary enactment, but involved an exercise of South Carolina's "police powers" to mitigate the harm to the public interest that petitioner's use of his land might occasion. 304 S. C., at 384, 404 S. E. 2d, at 899.

JUSTICE STEVENS criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary", in that "[t]he landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." *Post*, at 4. This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally. *Penn Central Transportation Co. v. New York City*, 438 U. S. 104, 124 (1978). 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.

JUSTICE STEVENS similarly misinterprets our focus on "developmental" uses of property (the uses proscribed by the Beachfront Management Act) as betraying an "assumption that the only uses of property cognizable under the Constitution are developmental uses." *Post*, at 5, n. 3. We make no such assumption. Though our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land, there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 436 (1982) (interest in excluding strangers from one's land).

<sup>6</sup>This finding was the premise of the Petition for Certiorari, and since it was not challenged in the Brief in Opposition we decline to entertain the argument in respondent's brief on the merits, see Brief for Respondent 45-50, that the finding was erroneous. Instead, we decide the question presented under the same factual assumptions as did the Supreme Court of South Carolina. See *Oklahoma City v. Tuttle*, 471 U. S. 808, 816 (1985).

(nearly identical law held not to effect a taking); see also *id.*, at 515-520 (REHNQUIST, C.J., dissenting); Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. Cal. L. Rev. 561, 566-569 (1984). The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i. e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.

By neglecting to dispute the findings enumerated in the Act<sup>10</sup> or otherwise to challenge the legislature's purposes, petitioner "conced[ed] that the beach/dune area of South Carolina's shores is an extremely valuable public resource; that the erection of new construction, *inter alia*, contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm." *Id.*, at 382-383, 404 S. E. 2d, at 898. In the court's view, these concessions brought petitioner's challenge within a long line of this Court's cases sustaining against Due Process and Takings Clause challenges the State's use of its "police powers" to enjoin a property owner from activities akin to public nuisances. See *Mugler v. Kansas*, 123 U. S. 623 (1887) (law prohibiting manufacture of alcoholic beverages); *Hadacheck v. Sebastian*, 239 U. S. 394 (1915) (law barring operation of brick mill in residential area); *Miller v. Schoene*, 276 U. S. 272 (1928) (order to destroy diseased cedar trees to prevent infection of nearby orchards); *Goldblatt v. Hempstead*, 369 U. S. 590 (1962) (law effectively preventing continued operation of quarry in residential area).

It is correct that many of our prior opinions have suggested that "harmful or noxious uses" of property may be

<sup>10</sup> The legislature's express findings include the following:

"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:

"(a) protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner;

"(b) provides the basis for a tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of the state's economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues;

"(c) provides habitat for numerous species of plants and animals, several of which are threatened or endangered. Waters adjacent to the beach/dune system also provide habitat for many other marine species;

"(d) provides a natural health environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being.

"(2) Beach/dune system vegetation is unique and extremely important to the vitality and preservation of the system.

"(3) Many miles of South Carolina's beaches have been identified as critically eroding.

"(4) . . . [D]evelopment unwisely has been sited too close to the [beach/dune] system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development.

"(5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.

"(6) Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.

"(8) It is in the state's best interest to protect and to promote increased public access to South Carolina's beaches for out-of-state tourists and South Carolina residents alike." S. C. Code § 48-39-250 (Supp. 1991).

proscribed by government regulation without the requirement of compensation. For a number of reasons, however, we think the South Carolina Supreme Court was too quick to conclude that that principle decides the present case. The "harmful or noxious uses" principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power. See, e.g., *Penn Central Transportation Co.*, 438 U. S., at 125 (where State "reasonably conclud[es] that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land," compensation need not accompany prohibition); see also *Nollan v. California Coastal Commission*, 483 U. S., at 834-835 ("Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest[,] [but] [t]hey have made clear . . . that a broad range of governmental purposes and regulations satisfy these requirements"). We made this very point in *Penn Central Transportation Co.*, where, in the course of sustaining New York City's landmarks preservation program against a takings challenge, we rejected the petitioner's suggestion that *Mugler* and the cases following it were premised on, and thus limited by, some objective conception of "noxiousness":

"[T]he uses in issue in *Hadacheck*, *Miller*, and *Goldblatt* were perfectly lawful in themselves. They involved no 'blameworthiness, . . . moral wrongdoing or conscious act of dangerous risk-taking which induc[ed] society] to shift the cost to a pa[rticular individual.]' Sax, Takings and the Police Power, 74 Yale L. J. 36, 50 (1964). These cases are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property." 438 U. S., at 133-134, n. 30.

"Harmful or noxious use" analysis was, in other words, simply the progenitor of our more contemporary statements that "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' . . ." *Nollan*, *supra*, at 834 (quoting *Agins v. Tiburon*, 447 U. S., at 260); see also *Penn Central Transportation Co.*, *supra*, at 127; *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 387-388 (1926).

The transition from our early focus on control of "noxious" uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between "harm-preventing" and "benefit-conferring" regulation is often in the eye of the beholder. It is quite possible, for example, to describe in *either* fashion the ecological, economic, and aesthetic concerns that inspired the South Carolina legislature in the present case. One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve.<sup>11</sup> Compare, e.g.,

<sup>11</sup> In the present case, in fact, some of the "[South Carolina] legislature's 'findings'" to which the South Carolina Supreme Court purported to defer in characterizing the purpose of the Act as "harm-

*Claridge v. New Hampshire Wetlands Board*, 125 N.H. 745, 752, 485 A.2d 287, 292 (1984) (owner may, without compensation, be barred from filling wetlands because landfilling would deprive adjacent coastal habitats and marine fisheries of ecological support), with, e.g., *Bartlett v. Zoning Comm'n of Old Lyme*, 161 Conn. 24, 30, 282 A.2d 907, 910 (1971) (owner barred from filling tidal marshland must be compensated, despite municipality's "laudable" goal of "preserv[ing] marshlands from encroachment or destruction"). Whether one or the other of the competing characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate. See Restatement (Second) of Torts §822, Comment *g*, p. 112 (1979) ("[p]ractically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference"). A given restraint will be seen as mitigating "harm" to the adjacent parcels or securing a "benefit" for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors. See Sax, *Takings and the Police Power*, 74 Yale L. J. 36, 49 (1964) ("[T]he problem [in this area] is not one of noxiousness or harm-creating activity at all; rather it is a problem of inconsistency between perfectly innocent and independently desirable uses"). Whether Lucas's construction of single-family residences on his parcels should be described as bringing "harm" to South Carolina's adjacent ecological resources thus depends principally upon whether the describer believes that the State's use interest in nurturing those resources is so important that any competing adjacent use must yield.<sup>12</sup>

When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to

preventing," 304 S. C. 376, 385, 404 S. E. 2d 895, 900 (1991), seem to us phrased in "benefit-conferring" language instead. For example, they describe the importance of a construction ban in enhancing "South Carolina's annual tourism industry revenue," S. C. Code § 48-39-250(1)(b) (Supp. 1991), in "provid[ing] habitat for numerous species of plants and animals, several of which are threatened or endangered," § 48-39-250(1)(c), and in "provid[ing] a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being," § 48-39-250(1)(d). It would be pointless to make the outcome of this case hang upon this terminology, since the same interests could readily be described in "harm-preventing" fashion.

JUSTICE BLACKMUN, however, apparently insists that we *must* make the outcome hinge (exclusively) upon the South Carolina Legislature's other, "harm-preventing" characterizations, focusing on the declaration that "prohibitions on building in front of the setback line are necessary to protect people and property from storms, high tides, and beach erosion." *Post*, at 6. He says "[n]othing in the record undermines [this] assessment," *ibid.*, apparently seeing no significance in the fact that the statute permits owners of existing structures to remain (and even to rebuild if their structures are not "destroyed beyond repair," S. C. Code Ann. § 48-39-290(B)), and in the fact that the 1990 amendment authorizes the Council to issue permits for new construction in violation of the uniform prohibition, see S. C. Code § 48-39-290(D)(1) (Supp. 1991).

<sup>12</sup> In JUSTICE BLACKMUN's view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm-preventing justification for its action. See *post*, at 5, 13-17. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation. *A fortiori* the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. The South Carolina Supreme Court's approach would essentially nullify *Mahon*'s affirmation of limits to the noncompensable exercise of the police power. Our cases provide no support for this: None of them that employed the logic of "harmful use" prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land. See *Keystone Bituminous Coal Assn.*, 480 U. S., at 513-514 (REHNQUIST, C.J., dissenting).<sup>13</sup>

Where the State seeks to control regulation that deprives an owner of all economically beneficial use, we think it may reserve compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.<sup>14</sup> This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon*, 260 U. S., at 413. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale), see *Andrus v. Allard*, 444 U. S. 51, 66-67 (1979) (prohibition on sale of

<sup>13</sup> E.g., *Mugler v. Kansas*, 123 U. S. 623 (1887) (prohibition upon use of a building as a brewery; other uses permitted); *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531 (1914) (requirement that "pillar" of coal be left in ground to safeguard mine workers; mineral rights could otherwise be exploited); *Reinman v. Little Rock*, 237 U. S. 171 (1915) (declaration that livery stable constituted a public nuisance; other uses of the property permitted); *Hadacheck v. Sebastian*, 239 U. S. 394 (1915) (prohibition of brick manufacturing in residential area; other uses permitted); *Goldblatt v. Hempstead*, 369 U. S. 590 (1962) (prohibition on excavation; other uses permitted).

<sup>14</sup> Drawing on our First Amendment jurisprudence, see, e.g., *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U. S. 872, 878-879 (1990), JUSTICE STEVENS would "[l]ook to the generality of a regulation of property" to determine whether compensation is owing. *Post*, at 12. The Beachfront Management Act is general, in his view, because it "regulates the use of the coastline of the entire state." *Post*, at 14. There may be some validity to the principle JUSTICE STEVENS proposes, but it does not properly apply to the present case. The equivalent of a law of general application that inhibits the practice of religion without being aimed at religion, see *Oregon v. Smith*, *supra*, is a law that destroys the value of land without being aimed at land. Perhaps such a law—the generally applicable criminal prohibition on the manufacturing of alcoholic beverages challenged in *Mugler* comes to mind—cannot constitute a compensable taking. See 123 U. S., at 655-656. But a regulation specifically directed to land use no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions. JUSTICE STEVENS' approach renders the Takings Clause little more than a particularized restatement of the Equal Protection Clause.

eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.<sup>15</sup>

Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S., at 426—though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title. Compare *Scranton v. Wheeler*, 179 U. S. 141, 163 (1900) (interests of "riparian owner in the submerged lands . . . bordering on a public navigable water" held subject to Government's navigational servitude), with *Kaiser Aetna v. United States*, 444 U. S., at 178-180 (imposition of navigational servitude on marina created and rendered navigable at private expense held to constitute a taking). We believe similar treatment must be accorded confiscatory regulations, *i. e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.<sup>16</sup>

On this analysis, the owner of a lake bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon

discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. See Michelman, Property, Utility, and Fairness, Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1239-1241 (1967). In light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth (and Fourteenth) amendments, *Board of Regents of State Colleges v. Roth*, 408 U. S. 564, 577 (1972); see, *e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U. S. 986, 1011-1012 (1984); *Hughes v. Washington*, 389 U. S. 290, 295 (1967) (Stewart, J., concurring), this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional. When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.<sup>17</sup>

The "total taking" inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, see, *e.g.*, Restatement (Second) of Torts §§ 826, 827, ~~the social value of the claimant's activities and their suitability to the locality in question~~, see, *e.g.*, *id.*, §§ 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, see, *e.g.*, *id.*, §§ 827(e), 828(c), 830. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so, see Restatement (Second) of Torts, *supra*, § 827, comment *g*). So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the "essential use" of land, *Curtin v. Benson*, 222 U. S. 78, 86 (1911). The question, however, is one of state law to be dealt with on remand. We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*. As we have said, a "State, by *ipse dixit*, may not transform private property into public property without compensation . . ." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U. S. 155, 164 (1980).

<sup>15</sup> After accusing us of "launch[ing] a missile to kill a mouse," *post*, at 1, JUSTICE BLACKMUN expends a good deal of throw-weight of his own upon a noncombatant, arguing that our description of the "understanding" of land ownership that informs the Takings Clause is not supported by early American experience. That is largely true, but entirely irrelevant. The practices of the States prior to incorporation of the Takings and Just Compensation Clauses, see *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226 (1897)—which, as JUSTICE BLACKMUN acknowledges, occasionally included outright physical appropriation of land without compensation, see *post*, at 22—were out of accord with any plausible interpretation of those provisions. JUSTICE BLACKMUN is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all, see *post*, at 23, and *n. 23*, but even he does not suggest (explicitly, at least) that we renounce the Court's contrary conclusion in *Mahon*. Since the text of the Clause can be read to encompass regulatory as well as physical deprivations (in contrast to the text originally proposed by Madison, see Speech Proposing Bill of Rights (June 8, 1789), in 12 J. Madison, The Papers of James Madison 201 (C. Hobson, R. Rutland, W. Rachal, & J. Sisson ed. 1979) ("No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation"), we decline to do so as well.

<sup>16</sup> The principal "otherwise" that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of "real and personal property, in cases of actual necessity, to prevent the spreading of a fire" or to forestall other grave threats to the lives and property of others. *Bowditch v. Boston*, 101 U. S. 16, 18-19 (1880); see *United States v. Pacific Railroad*, 120 U. S. 227, 238-239 (1887).

<sup>17</sup> Of course, the State may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation. See *First English Evangelical Lutheran Church*, 482 U. S., at 321. But "where the [regulation has] already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Ibid*.

nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions. Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.

The Supreme Court of South Carolina erred, in my view, by reciting the general purposes for which the state regulations were enacted without a determination that they were in accord with the owner's reasonable expectations and therefore sufficient to support a severe restriction on specific parcels of property. See 304 S. C. 376, 383, 404 S. E. 2d 895, 899 (1991). The promotion of tourism, for instance, ought not to suffice to deprive specific property of all value without a corresponding duty to compensate. Furthermore, the means as well as the ends of regulation must accord with the owner's reasonable expectations. Here, the State did not act until after the property had been zoned for individual lot development and most other parcels had been improved, throwing the whole burden of the regulation on the remaining lots. This too must be measured in the balance. See *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 416 (1922).

With these observations, I concur in the judgment of the Court.

JUSTICE BLACKMUN, dissenting.

Today the Court launches a missile to kill a mouse.

The State of South Carolina prohibited petitioner Lucas from building a permanent structure on his property from 1988 to 1990. Relying on an unreviewed (and implausible) state trial court finding that this restriction left Lucas' property valueless, this Court granted review to determine whether compensation must be paid in cases where the State prohibits all economic use of real estate. According to the Court, such an occasion never has arisen in any of our prior cases, and the Court imagines that it will arise "relatively rarely" or only in "extraordinary circumstances." Almost certainly it did not happen in this case.

Nonetheless, the Court presses on to decide the issue, and as it does, it ignores its jurisdictional limits, remakes its traditional rules of review, and creates simultaneously a new categorical rule and an exception (neither of which is rooted in our prior case law, common law, or common sense). I protest not only the Court's decision, but each step taken to reach it. More fundamentally, I question the Court's wisdom in issuing sweeping new rules to decide such a narrow case. Surely, as JUSTICE KENNEDY demonstrates, the Court could have reached the result it wanted without inflicting this damage upon our Taking Clause jurisprudence.

My fear is that the Court's new policies will spread beyond the narrow confines of the present case. For that reason, I, like the Court, will give far greater attention to this case than its narrow scope suggests—not because I can intercept the Court's missile, or save the targeted mouse, but because I hope perhaps to limit the collateral damage.

## I

## A

In 1972 Congress passed the Coastal Zone Management Act. 16 U. S. C. § 1451 *et seq.* The Act was designed to provide States with money and incentives to carry out Congress' goal of protecting the public from shoreline

the Act, Congress directed States to enhance their coastal programs by "[p]reventing or significantly reducing threats to life and the destruction of property by eliminating development and redevelopment in high-hazard areas."<sup>1</sup> 16 U. S. C. § 1456b(a)(2) (1988 ed., Supp. II).

South Carolina began implementing the congressional directive by enacting the South Carolina Coastal Zone Management Act of 1977. Under the 1977 Act, any construction activity in what was designated the "critical area" required a permit from the Council, and the construction of any habitable structure was prohibited. The 1977 critical area was relatively narrow.

This effort did not stop the loss of shoreline. In October 1986, the Council appointed a "Blue Ribbon Committee on Beachfront Management" to investigate beach erosion and propose possible solutions. In March 1987, the Committee found that South Carolina's beaches were "critically eroding," and proposed land-use restrictions. Report of the South Carolina Blue Ribbon Committee on Beachfront Management i, 6-10 (March 1987). In response, South Carolina enacted the Beachfront Management Act on July 1, 1988. S.C. Code § 48-39-250 *et seq.* (Supp. 1990). The 1988 Act did not change the uses permitted within the designated critical areas. Rather, it enlarged those areas to encompass the distance from the mean high watermark to a setback line established on the basis of "the best scientific and historical data" available.<sup>2</sup> S.C. Code § 48-39-280 (Supp. 1991).

## B

Petitioner Lucas is a contractor, manager, and part owner of the Wild Dune development on the Isle of Palms. He has lived there since 1978. In December 1986, he purchased two of the last four pieces of vacant property in the development.<sup>3</sup> The area is notoriously unstable. In roughly half of the last 40 years, all or part of petitioner's property was part of the beach or flooded twice daily by the ebb and flow of the tide. Tr. 84. Between 1957 and 1963, petitioner's property was under water. *Id.*, at 79, 81-82. Between 1963 and 1973 the shoreline was 100 to 150 feet onto petitioner's property. *Ibid.* In 1973 the first line of stable vegetation was about halfway through the property. *Id.*, at 80. Between 1981 and 1983, the Isle of Palms issued 12 emergency orders for sandbagging to protect property in the Wild Dune development. *Id.*, at 99. Determining that local habitable structures were in imminent danger of collapse,

<sup>1</sup>The country has come to recognize that uncontrolled beachfront development can cause serious damage to life and property. See Brief for Sierra Club, et al. as *Amici Curiae* 2-5. Hurricane Hugo's September 1989 attack upon South Carolina's coastline, for example, caused 29 deaths and approximately \$6 billion in property damage, much of it the result of uncontrolled beachfront development. See Zalkin, *Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute*, 79 Cal. L. Rev. 205, 212-213 (1991). The beachfront buildings are not only themselves destroyed in such a storm, "but they are often driven, like battering rams, into adjacent inland homes." *Ibid.* Moreover, the development often destroys the natural sand dune barriers that provide storm breaks. *Ibid.*

<sup>2</sup>The setback line was determined by calculating the distance landward from the crest of an ideal oceanfront sand dune which is forty times the annual erosion rate. S.C. Code § 48-39-280 (Supp. 1991).

<sup>3</sup>The properties were sold frequently at rapidly escalating prices before Lucas purchased them. Lot 22 was first sold in 1979 for \$96,660, sold in 1984 for \$187,500, then in 1985 for \$260,000, and, finally, to Lucas in 1986 for \$475,000. He estimated its worth in 1991 at \$650,000. Lot 24 had a similar past. The record does not indicate who purchased the properties prior to Lucas, or why none of the purchasers held on to the

the Council issued permits for two rock revetments to protect condominium developments near petitioner's property from erosion; one of the revetments extends more than halfway onto one of his lots. *Id.*, at 102.

## C

The South Carolina Supreme Court found that the Beach Management Act did not take petitioner's property without compensation. The decision rested on two premises that until today were unassailable—that the State has the power to prevent any use of property it finds to be harmful to its citizens, and that a state statute is entitled to a presumption of constitutionality.

The Beachfront Management Act includes a finding by the South Carolina General Assembly that the beach/dune system serves the purpose of "protect[ing] life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner." §48-39-250(1)(a). The General Assembly also found that "development unwisely has been sited too close to the [beach/dune] system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property." §48-39-250(4); see also §48-39-250(6) (discussing the need to "afford the beach/dune system space to accrete and erode").

If the state legislature is correct that the prohibition on building in front of the setback line prevents serious harm, then, under this Court's prior cases, the Act is constitutional. "Long ago it was recognized that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491-492 (1987) (internal quotations omitted); see also *id.*, at 488-489, and n. 18. The Court consistently has upheld regulations imposed to arrest a significant threat to the common welfare, whatever their economic effect on the owner. See e.g., *Goldblatt v. Hempstead*, 369 U.S. 590, 592-593 (1962); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Gorieb v. Fox*, 274 U.S. 603, 608 (1927); *Mugler v. Kansas*, 123 U.S. 623 (1887).

Petitioner never challenged the legislature's findings that a building ban was necessary to protect property and life. Nor did he contend that the threatened harm was not sufficiently serious to make building a house in a particular location a "harmful" use, that the legislature had not made sufficient findings, or that the legislature was motivated by anything other than a desire to minimize damage to coastal areas. Indeed, petitioner objected at trial that evidence as to the purposes of the setback requirement was irrelevant. Tr. 68. The South Carolina Supreme Court accordingly understood petitioner not to contest the State's position that "discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm," 304 S.C. 376, \_\_\_, 404 S.E. 2d 895, 898 (1991), and "to prevent serious injury to the community." *Id.*, at \_\_\_, 404 S.E. 2d, at 901. The court considered itself "bound by these uncontested legislative findings . . . [in the absence of] any attack whatsoever on the statutory scheme." *Id.*, at \_\_\_, 404 S.E. 2d, at 898.

Nothing in the record undermines the General Assembly's assessment that prohibitions on building in front of the setback line are necessary to protect people and property

legislative determination cannot be disregarded in the absence of such evidence, see, e.g., *Euclid*, 272 U.S., at 388; *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257-258 (1931) (Brandeis, J.), and because its determination of harm to life and property from building is sufficient to prohibit that use under this Court's cases, the South Carolina Supreme Court correctly found no taking.

## II

My disagreement with the Court begins with its decision to review this case. This Court has held consistently that a land-use challenge is not ripe for review until there is a final decision about what uses of the property will be permitted. The ripeness requirement is not simply a gesture of good-will to land-use planners. In the absence of "a final and authoritative determination of the type and intensity of development legally permitted on the subject property," *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986), and the utilization of state procedures for just compensation, there is no final judgment, and in the absence of a final judgment there is no jurisdiction. See *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 633 (1981); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

This rule is "compelled by the very nature of the inquiry required by the Just Compensation Clause," because the factors applied in deciding a takings claim "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 190, 191 (1985). See also *MacDonald, Sommer & Frates*, 477 U.S., at 348 ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes") (citation omitted).

The Court admits that the 1990 amendments to the Beachfront Management Act allowing special permits preclude Lucas from asserting that his property has been permanently taken. See *ante*, at 5-6. The Court agrees that such a claim would not be ripe because there has been no final decision by respondent on what uses will be permitted. The Court, however, will not be denied: it determines that petitioner's "temporary takings" claim for the period from July 1, 1988, to June 25, 1990, is ripe. But this claim also is not justiciable.<sup>4</sup>

From the very beginning of this litigation, respondent has argued that the courts:

"lack[] jurisdiction in this matter because the Plaintiff has sought no authorization from Council for use of his property, has not challenged the location of the baseline or setback line as alleged in the Complaint and because no final agency decision has been rendered concerning use of his property or location of said baseline or setback line."

Tr. 10 (answer, as amended). Although the Council's plea has been ignored by every court, it is undoubtedly correct.

Under the Beachfront Management Act, petitioner was entitled to challenge the setback line or the baseline or

<sup>4</sup>The Court's reliance, *ante*, at 7, on *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 168 (CA4 1991), cert. pending No. 91-941, in support of its decision to consider Lucas' temporary taking claim ripe is misplaced. In *Esposito* the plaintiffs brought a facial challenge to the mere enactment of the Act. Here, of course, Lucas has brought an as-applied challenge. See Brief for Petitioner 16. Facial challenges are ripe when the Act is passed, applied challenges require a final decision on the merits of the property in question.

erosion rate applied to his property in formal administrative, followed by judicial, proceedings. S.C. Code §48-39-280(E) (Supp 1991). Because Lucas failed to pursue this administrative remedy, the Council never finally decided whether Lucas' particular piece of property was correctly categorized as a critical area in which building would not be permitted. This is all the more crucial because Lucas argued strenuously in the trial court that his land was perfectly safe to build on, and that his company had studies to prove it. Tr. 20, 25, 36. If he was correct, the Council's final decision would have been to alter the setback line, eliminating the construction ban on Lucas' property.

That petitioner's property fell within the critical area as initially interpreted by the Council does not excuse petitioner's failure to challenge the Act's application to his property in the administrative process. The claim is not ripe until petitioner seeks a variance from that status. "[W]e have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985). See also *Williamson County*, 473 U.S., at 188 (claim not ripe because respondent did not seek variances that would have allowed it to develop the property, notwithstanding the Commission's finding that the plan did not comply with the zoning ordinance and subdivision regulations).<sup>5</sup>

Even if I agreed with the Court that there were no jurisdictional barriers to deciding this case, I still would not try to decide it. The Court creates its new taking jurisprudence based on the trial court's finding that the property had lost all economic value.<sup>6</sup> This finding is almost certainly erroneous. Petitioner still can enjoy other attributes of ownership, such as the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. State courts frequently have recognized that land has economic value where the only residual economic uses are recreation or camping. See, e.g., *Turnpike Realty Co. v. Dedham*, 362 Mass. 221, 284 N.E.2d 891 (1972); *Turner v. County of Del Norte*, 24 Cal App. 3d 311, 101 Cal. Rptr. 93 (1972), cert. denied, 409 U.S. 1108 (1973); *Hall v. Board of Environmental Protection*, 528 A.2d 453 (Me. 1987). Petitioner also retains the right to alienate

the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house.

Yet the trial court, apparently believing that "less value" and "valueless" could be used interchangeably, found the property "valueless." The court accepted no evidence from the State on the property's value without a home, and petitioner's appraiser testified that he never had considered what the value would be absent a residence. Tr. 54-55. The appraiser's value was based on the fact that the "highest and best use of these lots . . . [is] luxury single family detached dwellings." *Id.*, at 48. The trial court appeared to believe that the property could be considered "valueless" if it was not available for its most profitable use. Absent that erroneous assumption, see *Goldblatt*, 369 U.S., at 592, I find no evidence in the record supporting the trial court's conclusion that the damage to the lots by virtue of the restrictions was "total." Record 128 (findings of fact). I agree with the Court, *ante*, at 14, n. 9, that it has the power to decide a case that turns on an erroneous finding, but I question the wisdom of deciding an issue based on a factual premise that does not exist in this case, and in the judgment of the Court will exist in the future only in "extraordinary circumstance[s]." *Ante*, at 12.

Clearly, the Court was eager to decide this case.<sup>7</sup> But eagerness, in the absence of proper jurisdiction, must—and in this case should have been—met with restraint.

### III

The Court's willingness to dispense with precedent in its haste to reach a result is not limited to its initial jurisdictional decision. The Court also alters the long-settled rules of review.

The South Carolina Supreme Court's decision to defer to legislative judgments in the absence of a challenge from petitioner comports with one of this Court's oldest maxims: "the existence of facts supporting the legislative judgment is to be presumed." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). Indeed, we have said the legislature's judgment is "well-nigh conclusive." *Berman v. Parker*, 348 U.S. 26, 32 (1954). See also *Sweet v. Rechel*, 159 U.S. 380, 392 (1895); *Euclid*, 272 U.S., at 388 ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control").

Accordingly, this Court always has required plaintiffs challenging the constitutionality of an ordinance to provide "some factual foundation of record" that contravenes the legislative findings. *O'Gorman & Young*, 282 U.S., at 258. In the absence of such proof, "the presumption of constitutionality must prevail." *Id.*, at 257. We only recently have reaffirmed that claimants have the burden of showing a state law constitutes a taking. See *Keystone Bituminous*

<sup>5</sup>Even more baffling, given its decision, just a few days ago, in *Lujan v. Defenders of Wildlife*, \_\_\_ U.S. \_\_\_ (1992), the Court decides petitioner has demonstrated injury in fact. In his complaint, petitioner made no allegations that he had any definite plans for using his property. App. to Pet. for Cert. 153-156. At trial, Lucas testified that he had house plans drawn up, but that he was "in no hurry" to build "because the lot was appreciating in value." Tr. 28-29. The trial court made no findings of fact that Lucas had any plans to use the property from 1988 to 1990. "[S]ome day" intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." \_\_\_ U.S., at \_\_\_ (slip op. 8). The Court circumvents *Defenders of Wildlife* by deciding to resolve this case as if it arrived on the pleadings alone. But it did not. Lucas had a full trial on his claim for "damages for the temporary taking of his property from the date of the 1988 Act's passage to such time as this matter is finally resolved," *ante*, at 7, n. 3, quoting the Complaint, and failed to demonstrate any immediate concrete plans to build or sell.

<sup>6</sup>Respondent contested the findings of fact of the trial court in the South Carolina Supreme Court, but that court did not resolve the issue. This Court's decision to assume for its purposes that petitioner had been denied all economic use of his land does not, of course, dispose of the issue on remand.

<sup>7</sup>The Court overlooks the lack of a ripe and justiciable claim apparently out of concern that in the absence of its intervention Lucas will be unable to obtain further adjudication of his temporary-taking claim. The Court chastises respondent for arguing that Lucas's temporary-taking claim is premature because it failed "so much as [to] commen[t]" upon the effect of the South Carolina Supreme Court's decision on petitioner's ability to obtain relief for the 2-year period, and it frets that Lucas would "be unable (absent our intervention now) to obtain further state-court adjudication with respect to the 1988-1990 period." *Ante*, at 6. Whatever the explanation for the Court's intense interest in Lucas' plight when ordinarily we are more cautious in granting discretionary review, the concern would have been more prudently expressed by vacating the judgment below and remanding for further consideration in light of the 1990 amendments. At that point, petitioner could have brought a temporary-taking claim in the state courts.

The Court recognizes that "our prior opinions have suggested that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation," *ante*, at 17, but seeks to reconcile them with its categorical rule by claiming that the Court never has upheld a regulation when the owner alleged the loss of all economic value. Even if the Court's factual premise were correct, its understanding of the Court's cases is distorted. In none of the cases did the Court suggest that the right of a State to prohibit certain activities without paying compensation turned on the availability of some residual valuable use.<sup>12</sup> Instead, the cases depended on whether the government interest was sufficient to prohibit the activity, given the significant private cost.<sup>13</sup>

These cases rest on the principle that the State has full power to prohibit an owner's use of property if it is harmful to the public. "[S]ince no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Keystone Bituminous Coal*, 480 U.S., at 491, n. 20. It would make no sense under this theory to suggest that an owner has a constitutionally protected right to harm others, if only he makes the proper showing of economic loss.<sup>14</sup> See *Pennsyl-*

vania Coal Co. v. Mahon, 260 U.S. 393, 418 (1922) (Brandeis, J., dissenting) ("Restriction upon [harmful] use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put").

## B

Ultimately even the Court cannot embrace the full implications of its *per se* rule: it eventually agrees that there cannot be a categorical rule for a taking based on economic value that wholly disregards the public need asserted. Instead, the Court decides that it will permit a State to regulate all economic value only if the State prohibits uses that would not be permitted under "background principles of nuisance and property law."<sup>15</sup> *Ante*, at 26.

Until today, the Court explicitly had rejected the contention that the government's power to act without paying compensation turns on whether the prohibited activity is a common-law nuisance.<sup>16</sup> The brewery closed in *Mugler* itself was not a common-law nuisance, and the Court specifically stated that it was the role of the legislature to determine what measures would be appropriate for the protection of public health and safety. See 123 U.S., at 661. In upholding the state action in *Miller*, the Court found it unnecessary to "weigh with nicety the question whether the infected cedars constitute a nuisance according to common law; or whether they may be so declared by statute." 276 U.S., at 280. See also *Goldblatt*, 369 U.S., at 593; *Hadacheck*, 239 U.S., at 411. Instead the Court has relied in the past, as the South Carolina Court has done here, on legislative judgments of what constitutes a harm.<sup>17</sup>

sentence, but in no way suggest that the public interest is irrelevant if total value has been taken. The Court has indicated that proof that a regulation does not deny an owner economic use of his property is sufficient to defeat a facial taking challenge. See *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 295-297 (1981). But the conclusion that a regulation is not on its face a taking because it allows the landowner some economic use of property is a far cry from the proposition that denial of such use is sufficient to establish a taking claim regardless of any other consideration. The Court never has accepted the latter proposition.

The Court relies today on dicta in *Agins*, *Hodel*, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Keystone Bituminous Coal v. DeBenedictis*, 480 U.S. 470 (1987), for its new categorical rule. *Ante*, at 10. I prefer to rely on the directly contrary holdings in cases such as *Mugler* and *Hadacheck*, not to mention contrary statements in the very cases on which the Court relies. See *Agins*, 447 U.S., at 260-262; *Keystone Bituminous Coal*, 480 U.S., at 489 n. 18, 491-492.

<sup>12</sup>*Miller v. Schoene*, 276 U.S. 272 (1928), is an example. In the course of demonstrating that apple trees are more valuable than red cedar trees, the Court noted that red cedar has "occasional use and value as lumber." *Id.*, at 279. But the Court did not discuss whether the timber owned by the petitioner in that case was commercially saleable, and nothing in the opinion suggests that the State's right to require uncompensated felling of the trees depended on any such salvage value. To the contrary, it is clear from its unanimous opinion that the *Schoene* Court would have sustained a law requiring the burning of cedar trees if that had been necessary to protect apple trees in which there was a public interest: the Court spoke of preferment of the public interest over the property interest of the individual, "to the extent even of its destruction." *Id.*, at 280.

<sup>13</sup>The Court seeks to disavow the holdings and reasoning of *Mugler* and subsequent cases by explaining that they were the Court's early efforts to define the scope of the police power. There is language in the earliest taking cases suggesting that the police power was considered to be the power simply to prevent harms. Subsequently, the Court expanded its understanding of what were government's legitimate interests. But it does not follow that the holding of those early cases—that harmful and noxious uses of property can be forbidden whatever the harm to the property owner and without the payment of compensation—was repudiated. To the contrary, as the Court consciously expanded the scope of the police power beyond preventing harm, it clarified that there was a core of public interests that overrode any private interest. See *Keystone Bituminous Coal*, 480 U.S., at 491, n. 20.

<sup>14</sup>Indeed, it would be extraordinary to construe the Constitution to require a government to compensate private landowners because it denied them 'the right' to use property which cannot be used without risking injury and death." *First Lutheran Church*, 210 Cal. App. 3d, at 1366, 258 Cal. Rptr., at \_\_\_\_.

<sup>15</sup>Although it refers to state nuisance and property law, the Court apparently does not mean just any state nuisance and property law. Public nuisance was first a common-law creation, see Newark, *The Boundaries of Nuisance*, 65 L. Q. Rev. 480, 482 (1949) (attributing development of nuisance to 1535), but by the 1800s in both the United States and England, legislatures had the power to define what is a public nuisance, and particular uses often have been selectively targeted. See Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 999-1000 (1966); J.F. Stephen, *A General View of the Criminal Law of England* 105-107 (2d ed. 1890). The Court's references to "common-law" background principles, however, indicate that legislative determinations do not constitute "state nuisance and property law" for the Court.

<sup>16</sup>Also, until today the fact that the regulation prohibited uses that were lawful at the time the owner purchased did not determine the constitutional question. The brewery, the brickyard, the cedar trees, and the gravel pit were all perfectly legitimate uses prior to the passage of the regulation. See *Mugler v. Kansas*, 123 U.S. 623, 654 (1887); *Hadacheck v. Los Angeles*, 239 U.S. 394 (1915); *Miller*, 276 U.S., at 272; *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). This Court explicitly acknowledged in *Hadacheck* that "[a] vested interest cannot be asserted against [the police power] because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions." 239 U.S., at 410 (citation omitted).

<sup>17</sup>The Court argues that finding no taking when the legislature prohibits a harmful use, such as the Court did in *Mugler* and the South Carolina Supreme Court did in the instant case, would nullify *Pennsylvania Coal*. See *ante*, at 17. Justice Holmes, the author of *Pennsylvania Coal*, joined *Miller v. Schoene*, 276 U.S. 272 (1928), six years later. In *Miller*, the Court adopted the exact approach of the South Carolina Court: It found the cedar trees harmful, and their destruction not a taking, whether or not they were a nuisance. Justice Holmes apparently believed that such an approach did not repudiate his earlier opinion. Moreover, this Court already has been over this ground five years ago, and at that point rejected the assertion that *Pennsylvania Coal* was inconsistent with *Mugler*, *Hadacheck*, *Miller*, or the others in the string of "noxious use" cases, recognizing instead that the nature of the State's action is critical in takings analysis. *Keystone Bituminous Coal*, 480 U.S., at 490.

Pen. & W. 462, 465 (Pa. 1830)). See also *State v. Dawson*, 3 Hill 100, 103 (S.C. 1836)).<sup>22</sup>

Although, prior to the adoption of the Bill of Rights, America was replete with land use regulations describing which activities were considered noxious and forbidden, see Bender, *The Takings Clause: Principles or Politics?*, 34 Buffalo L. Rev. 735, 751 (1985); L. Friedman, *A History of American Law* 66-68 (1973), the Fifth Amendment's Taking Clause originally did not extend to regulations of property, whatever the effect.<sup>23</sup> See *ante*, at 8. Most state courts agreed with this narrow interpretation of a taking. "Until the end of the nineteenth century . . . jurists held that the constitution protected possession only, and not value." Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. Cal. L. Rev. 1, 76 (1986); Bosselman 106. Even indirect and consequential injuries to property resulting from regulations were excluded from the definition of a taking. See Bosselman 106; *Callender v. Marsh*, 1 Pick. 418, 430 (Mass. 1823).

Even when courts began to consider that regulation in some situations could constitute a taking, they continued to uphold bans on particular uses without paying compensation, notwithstanding the economic impact, under the rationale that no one can obtain a vested right to injure or endanger the public.<sup>24</sup> In the *Coates* cases, for example, the Supreme Court of New York found no taking in New York's ban on the interment of the dead within the city, although "no other use can be made of these lands." *Coates v. City of New York*, 7 Cow. 585, 592 (N.Y. 1827). See also *Brick Presbyterian Church v. City of New York*, 5 Cow. 538 (N.Y. 1826); *Commonwealth v. Alger*, 7 Cush. 53, 59, 104 (Mass. 1851); *St. Louis Gunning Advertisement Co. v. St. Louis*, 235 Mo. 99, 137 S.W. 929, 942 (1911), appeal dismissed, 231 U.S. 761 (1913). More recent cases reach the same result. See *Consolidated Rock Products Co. v. Los Angeles*, 57 Cal.2d 515, 370 P.2d 342, appeal dismissed, 371 U.S. 36 (1962); *Nassr v. Commonwealth*, 394 Mass. 767, 477 N.E.2d 987 (1985); *Eno v. Burlington*, 125 Vt. 8, 209 A.2d 499 (1965); *Turner v. County of Del Norte*, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972).

<sup>22</sup>Only the constitutions of Vermont and Massachusetts required that compensation be paid when private property was taken for public use; and although eminent domain was mentioned in the Pennsylvania constitution, its sole requirement was that property not be taken without the consent of the legislature. See Grant, *The "Higher Law" Background of the Law of Eminent Domain*, in 2 *Selected Essays on Constitutional Law* 912, 915-916 (1938). By 1868, five of the original States still had no just compensation clauses in their constitutions. *Ibid*.

<sup>23</sup>James Madison, author of the Taking Clause, apparently intended it to apply only to direct, physical takings of property by the Federal Government. See Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J., 694, 711 (1985). Professor Sax argues that although "contemporaneous commentary upon the meaning of the compensation clause is in very short supply," 74 Yale L.J., at 58, the "few authorities that are available" indicate that the clause was "designed to prevent arbitrary government action," not to protect economic value. *Id.*, at 58-60.

<sup>24</sup>For this reason, the retroactive application of the regulation to formerly lawful uses was not a controlling distinction in the past. "Nor can it make any difference that the right is purchased previous to the passage of the by-law," for "[e]very right, from an absolute ownership in property, down to a mere easement, is purchased and holden subject to the restriction, that it shall be so exercised as not to injure others. Though, at the time, it be remote and inoffensive, the purchaser is bound to know, at his peril, that it may become otherwise." *Coates v. City of New York*, 7 Cow. 585, 605 (N.Y. 1827). See also *Brick Presbyterian Church v. City of New York*, 5 Cow. 538, 542 (N.Y. 1826); *Commonwealth v. Tewksbury*, 11 Metc. 55 (Mass. 1846); *State v. Paul*, 5 R.I. 185 (1858).

In addition, state courts historically have been less likely to find that a government action constitutes a taking when the affected land is undeveloped. According to the South Carolina court, the power of the legislature to take unimproved land without providing compensation was sanctioned by "ancient rights and principles." *Lindsay v. Commissioners*, 2 S.C.L. 38, 57 (1796). "Except for Massachusetts, no colony appears to have paid compensation when it built a state-owned road across unimproved land. Legislatures provided compensation only for enclosed or improved land." Treanor, 94 Yale L.J., at 695 (footnotes omitted). This rule was followed by some States into the 1800s. See Horwitz 63-65.

With similar result, the common agrarian conception of property limited owners to "natural" uses of their land prior to and during much of the 18th century. See *id.*, at 32. Thus, for example, the owner could build nothing on his land that would alter the natural flow of water. See *id.*, at 44; see also, e.g., *Merritt v. Parker*, 1 Cox 460, 463 (N.J. 1795). Some more recent state courts still follow this reasoning. See, e.g., *Just v. Marinette County*, 56 Wis.2d 7, 201 N.W.2d 761, 768 (1972).

Nor does history indicate any common-law limit on the State's power to regulate harmful uses even to the point of destroying all economic value. Nothing in the discussions in Congress concerning the Taking Clause indicates that the Clause was limited by the common-law nuisance doctrine. Common law courts themselves rejected such an understanding. They regularly recognized that it is "for the legislature to interpose, and by positive enactment to prohibit a use of property which would be injurious to the public." *Tewksbury*, 11 Metc., at 57.<sup>25</sup> Chief Justice Shaw explained in upholding a regulation prohibiting construction of wharves, the existence of a taking did not depend on "whether a certain erection in tide water is a nuisance at common law or not." *Alger*, 7 Cush., at 104; see also *State v. Paul*, 5 R.I. 185, 193 (1858); *Commonwealth v. Parks*, 155 Mass. 531, 532, 30 N.E. 174 (1892) (Holmes, J.) ("[T]he legislature may change the common law as to nuisances, and may move the line either way, so as to make things nuisances which were not so, or to make things lawful which were nuisances").

In short, I find no clear and accepted "historical compact" or "understanding of our citizens" justifying the Court's new taking doctrine. Instead, the Court seems to treat history as a grab-bag of principles, to be adopted where they support the Court's theory, and ignored where they do not. If the Court decided that the early common law provides the background principles for interpreting the Taking Clause, then regulation, as opposed to physical confiscation, would not be compensable. If the Court decided that the law of a later period provides the background principles, then regulation might be compensable, but the Court would have to confront the fact that legislatures regularly determined which uses were prohibited, independent of the common law, and independent of whether the uses were lawful when the owner purchased. What makes the Court's analysis unworkable is its attempt to package the law of two incompatible eras and peddle it as historical fact.<sup>26</sup>

<sup>25</sup>More recent state court decisions agree. See, e.g., *Lane v. Mt. Vernon*, 38 N.Y.2d 344, 342 N.E.2d 571, 573 (1976); *Commonwealth v. Baker*, 160 Pa. Super. 640, 53 A.2d 829, 830 (1947).

<sup>26</sup>The Court asserts that all early American experience, prior to and after passage of the Bill of Rights, and any case law prior to 1897 are "entirely irrelevant" in determining what is "the historical compact recorded in the Takings Clause." *Ante*, at 22, n. 15. Nor apparently are we to find this compact in the early federal taking cases, which clearly

attack on the validity of the statute as such, the court believed itself bound to accept the "uncontested . . . findings" of the South Carolina legislature that new construction in the coastal zone—such as petitioner intended—threatened this public resource. *Id.*, at 383, 404 S. E. 2d, at 898. The Court ruled that when a regulation respecting the use of property is designed "to prevent serious public harm," *id.*, at 383, 404 S. E. 2d, at 899 (citing, *inter alia*, *Mugler v. Kansas*, 123 U. S. 623 (1887)), no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value.

Two justices dissented. They acknowledged that our *Mugler* line of cases recognizes governmental power to prohibit "noxious" uses of property—i.e., uses of property akin to "public nuisances"—without having to pay compensation. But they would not have characterized the Beachfront Management Act's "primary purpose [as] the prevention of a nuisance." 304 S. C., at 395, 404 S. E. 2d, at 906 (Harwell, J., dissenting). To the dissenters, the chief purposes of the legislation, among them the promotion of tourism and the creation of a "habitat for indigenous flora and fauna," could not fairly be compared to nuisance abatement. *Id.*, at 396, 404 S. E. 2d, at 906. As a consequence, they would have affirmed the trial court's conclusion that the Act's obliteration of the value of petitioner's lots accomplished a taking.

We granted certiorari. 502 U. S. \_\_\_\_ (1991).

## II

As a threshold matter, we must briefly address the Council's suggestion that this case is inappropriate for plenary review. After briefing and argument before the South Carolina Supreme Court, but prior to issuance of that court's opinion, the Beachfront Management Act was amended to authorize the Council, in certain circumstances, to issue "special permits" for the construction or reconstruction of habitable structures seaward of the baseline. See S. C. Code §48-39-290(DX1) (Supp. 1991). According to the Council, this amendment renders Lucas's claim of a permanent deprivation unripe, as Lucas may yet be able to secure permission to build on his property. "[The Court's] cases," we are reminded, "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U. S. 340, 351 (1986). See also *Agins v. Tiburon*, 447 U. S. 255, 260 (1980). Because petitioner "has not yet obtained a final decision regarding how [he] will be allowed to develop [his] property," *Williamson County Regional Planning Comm'n of Johnson City v. Hamilton Bank*, 473 U. S. 172, 190 (1985), the Council argues that he is not yet entitled to definitive adjudication of his takings claim in this Court.

We think these considerations would preclude review had the South Carolina Supreme Court rested its judgment on ripeness grounds, as it was (essentially) invited to do by the Council, see Brief for Respondent 9, n. 3. The South Carolina Supreme Court shrugged off the possibility of further administrative and trial proceedings, however, preferring to dispose of Lucas's takings claim on the merits. Compare, e.g., *San Diego Gas & Electric Co.*, 450 U. S. 621, 631-632 (1981). This unusual disposition does not preclude Lucas from applying for a permit under the 1990 amendment for future construction, and challenging, on takings grounds, any denial. But it does preclude, both practically and legally, any takings claim with respect to Lucas's past deprivation, i.e., for his having been denied construction rights during the period before the 1990 amendment. See

generally *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U. S. 304 (1987) (holding that temporary deprivations of use are compensable under the Takings Clause). Without even so much as commenting upon the consequences of the South Carolina Supreme Court's judgment in this respect, the Council insists that permitting Lucas to press his claim of a past deprivation on this appeal would be improper, since "the issues of whether and to what extent [Lucas] has incurred a temporary taking . . . have simply never been addressed." Brief for Respondent 11. Yet Lucas had no reason to proceed on a "temporary taking" theory at trial, or even to seek remand for that purpose prior to submission of the case to the South Carolina Supreme Court, since as the Act then read, the taking was unconditional and permanent. Moreover, given the breadth of the South Carolina Supreme Court's holding and judgment, Lucas would plainly be unable (absent our intervention now) to obtain further state-court adjudication with respect to the 1988-1990 period.

In these circumstances, we think it would not accord with sound process to insist that Lucas pursue the late-created "special permit" procedure before his takings claim can be considered ripe. Lucas has properly alleged Article III injury-in-fact in this case, with respect to both the pre-1990 and post-1990 constraints placed on the use of his parcels by the Beachfront Management Act.<sup>3</sup> That there is a discretionary "special permit" procedure by which he may regain—for the future, at least—beneficial use of his land goes only to the prudential "ripeness" of Lucas's challenge, and for the reasons discussed we do not think it prudent to apply that prudential requirement here. See *Esposito v. South Carolina Coastal Council*, 939 F. 2d 165, 168 (CA4 1991), cert. pending, No. 91-941.<sup>4</sup> We leave for decision on

<sup>3</sup> JUSTICE BLACKMUN insists that this aspect of Lucas's claim is "not justiciable," *post*, at 7, because Lucas never fulfilled his obligation under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), to "submit[] a plan for development of [his] property" to the proper state authorities. *Id.*, at 187. See *post*, at 8. But such a submission would have been pointless, as the Council stipulated below that no building permit would have been issued under the 1988 Act, application or no application. Record 14 (stipulations). Nor does the peculiar posture of this case mean that we are without Article III jurisdiction, as JUSTICE BLACKMUN apparently believes, see *post*, at 7, and n. 5. Given the South Carolina Supreme Court's dismissive foreclosure of further pleading and adjudication with respect to the pre-1990 component of Lucas's taking claim, it is appropriate for us to address that component as if the case were here on the pleadings alone. Lucas properly alleged injury-in-fact in his complaint, see App. to Pet. for Cert. 154 (complaint); *id.*, at 156 (asking "damages for the temporary taking of his property" from the date of the 1988 Act's passage to "such time as this matter is finally resolved"). No more can reasonably be demanded. Cf. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U. S. 304, 312-313 (1987). JUSTICE BLACKMUN finds it "baffling," *post*, at 8, n. 5, that we grant standing here, whereas "just a few days ago, in *Lujan v. Defenders of Wildlife*, 504 U. S. \_\_\_\_ (1992)," we denied standing. He sees in that strong evidence to support his repeated imputations that the Court "presses" to take this case, *post*, at 1, is "eager to decide" it, *post*, at 10, and is unwilling to "be denied," *post*, at 7. He has a point: The decisions are indeed very close in time, yet one grants standing and the other denies it. The distinction, however, rests in law rather than chronology. *Lujan*, since it involved the establishment of injury-in-fact at the summary judgment stage, required specific facts to be adduced by sworn testimony; had the same challenge to a generalized allegation of injury-in-fact been made at the pleading stage, it would have been unsuccessful.

<sup>4</sup> In that case, the Court of Appeals for the Fourth Circuit reached the merits of a takings challenge to the 1988 Beachfront Management Act identical to the one Lucas brings here even though the Act was amended, and the special permit procedure established, while the case was under submission. The court observed:

## V

The Court makes sweeping and, in my view, misguided and unsupported changes in our taking doctrine. While it limits these changes to the most narrow subset of government regulation—those that eliminate all economic value from land—these changes go far beyond what is necessary to secure petitioner Lucas' private benefit. One hopes they do not go beyond the narrow confines the Court assigns them to today.

I dissent.

JUSTICE STEVENS, dissenting.

Today the Court restricts one judge-made rule and expands another. In my opinion it errs on both counts. Proper application of the doctrine of judicial restraint would avoid the premature adjudication of an important constitutional question. Proper respect for our precedents would avoid an illogical expansion of the concept of "regulatory takings."

## 1

As the Court notes, *ante*, at 5, South Carolina's Beachfront Management Act has been amended to permit some construction of residences seaward of the line that frustrated petitioner's proposed use of his property. Until he exhausts his right to apply for a special permit under that amendment, petitioner is not entitled to an adjudication by this Court of the merits of his permanent takings claim. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U. S. 340, 351 (1986).

It is also not clear that he has a viable "temporary takings" claim. If we assume that petitioner is now able to build on the lot, the only injury that he may have suffered is the delay caused by the temporary existence of the absolute statutory ban on construction. We cannot be sure, however, that that delay caused petitioner any harm because the record does not tell us whether his building plans were even temporarily frustrated by the enactment of the statute.<sup>1</sup> Thus, on the present record it is entirely possible that petitioner has suffered no injury-in-fact even if the state statute was unconstitutional when he filed this lawsuit.

It is true, as the Court notes, that the argument against deciding the constitutional issue in this case rests on prudential considerations rather than a want of jurisdiction. I think it equally clear, however, that a Court less eager to decide the merits would follow the wise counsel of Justice Brandeis in his deservedly famous concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 341 (1936). As he explained, the Court has developed "for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Id.* at 346. The second of those rules applies directly to this case.

"2. The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it."

permitted prohibition of harmful uses despite the alleged loss of all value, whether or not the prohibition was a common-law nuisance, and whether or not the prohibition occurred subsequent to the purchase. See *supra*, pp. 13-14, 18-19, and n. 16. I cannot imagine where the Court finds its "historical compact," if not in history.

<sup>1</sup> In this regard, it is noteworthy that petitioner acquired the lot about 18 months before the statute was passed; there is no evidence that he ever sought a building permit from the local authorities.

*Liverpool, N.Y. & P.S.S. Co. v. Emigration Commissioners*, 113 U. S. 33, 39, [citing five additional cases]. "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States*, 196 U. S. 283, 295." *Id.*, at 346-347.

Cavalierly dismissing the doctrine of judicial restraint, the Court today tersely announces that "we do not think it prudent to apply that prudential requirement here." *Ante*, at 7. I respectfully disagree and would save consideration of the merits for another day. Since, however, the Court has reached the merits, I shall do so as well.

## II

In its analysis of the merits, the Court starts from the premise that this Court has adopted a "categorical rule that total regulatory takings must be compensated," *ante*, at 21, and then sets itself to the task of identifying the exceptional cases in which a State may be relieved of this categorical obligation. *Ante*, at 21-22. The test the Court announces is that the regulation must do no more than duplicate the result that could have been achieved under a State's nuisance law. *Ante*, at 24. Under this test the categorical rule will apply unless the regulation merely makes explicit what was otherwise an implicit limitation on the owner's property rights.

In my opinion, the Court is doubly in error. The categorical rule the Court establishes is an unsound and unwise addition to the law and the Court's formulation of the exception to that rule is too rigid and too narrow.

## The Categorical Rule

As the Court recognizes, *ante*, at 9, *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (1922), provides no support for its—or, indeed, any—categorical rule. To the contrary, Justice Holmes recognized that such absolute rules ill fit the inquiry into "regulatory takings." Thus, in the paragraph that contains his famous observation that a regulation may go "too far" and thereby constitute a taking, the Justice wrote: "As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions." *Id.* at 416. What he had "already...said" made perfectly clear that Justice Holmes regarded economic injury to be merely one factor to be weighed: "One fact for consideration in determining such limits is the extent of the diminution [of value]. So the question depends upon the particular facts." *Id.* at 413.

Nor does the Court's new categorical rule find support in decisions following *Mahon*. Although in dicta we have sometimes recited that a law "effects a taking if [it]...denies an owner economically viable use of his land," *Agins v. Tiburon*, 447 U. S. 255, 260 (1980), our rulings have rejected such an absolute position. We have frequently—and recently—held that, in some circumstances, a law that renders property valueless may nonetheless not constitute a taking. See, e.g., *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U. S. 304, 313 (1987); *Goldblatt v. Hempstead*, 369 U. S. 590, 596 (1962); *United States v. Caltex*, 344 U. S. 149, 155 (1952); *Miller v. Schoene*, 276 U. S. 272 (1928); *Hadachek v. Sebastian*, 239 U. S. 394, 405 (1915); *Mugler v. Kansas*, 123 U. S. 623, 657 (1887); cf. *Ruckelshaus v. Monsanto Co.*, 467 U. S. 986, 1011 (1984); *Connolly v. Pension Benefit Guaranty Corporation*, 475 U. S. 211, 225 (1986). In short, as we stated in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U. S. 470, 490 (1987), "'Although a comparison of values before and after' a regulatory action 'is relevant,

"It is true, that, when the defendants . . . erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. [T]he supervision of the public health and the public morals is a governmental power, 'continuing in its nature,' and 'to be dealt with as the special exigencies of the moment may require;' . . . 'for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.'" *Id.*, at 669.

Under our reasoning in *Mugler*, a state's decision to prohibit or to regulate certain uses of property is not a compensable taking just because the particular uses were previously lawful. Under the Court's opinion today, however, if a state should decide to prohibit the manufacture of asbestos, cigarettes, or concealable firearms, for example, it must be prepared to pay for the adverse economic consequences of its decision. One must wonder if Government will be able to "go on" effectively if it must risk compensation "for every such change in the general law." *Mahon*, 260 U. S., at 413.

The Court's holding today effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property. Until today, I had thought that we had long abandoned this approach to constitutional law. More than a century ago we recognized that "the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Munn v. Illinois*, 94 U. S. 113, 134 (1877). As Justice Marshall observed about a position similar to that adopted by the Court today:

"If accepted, that claim would represent a return to the era of *Lochner v. New York*, 198 U. S. 45 (1905), when common-law rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance. The Due Process Clause does not require such a result." *PruneYard Shopping Center v. Robins*, 447 U. S. 74, 93 (1980) (concurring opinion).

Arresting the development of the common law is not only a departure from our prior decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution—both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners. Thus, when the Nation came to understand that slavery was morally wrong and mandated the emancipation of all slaves, it, in effect, redefined "property." On a lesser scale, our ongoing self-education produces similar changes in the rights of property owners: New appreciation of the significance of endangered species, see, e.g., *Andrus v. Allard*, 444 U. S. 51 (1979); the importance of wetlands, see, e.g., 16 U. S. C. § 3801 *et seq.*; and the vulnerability of coastal lands, see, e.g., 16 U. S. C. § 1451 *et seq.*, shapes our evolving understandings of property rights.

Of course, some legislative redefinitions of property will effect a taking and must be compensated—but it certainly cannot be the case that every movement away from common law does so. There is no reason, and less sense, in such an absolute rule. We live in a world in which changes in the

economy and the environment occur with increasing frequency and importance. If it was wise a century ago to allow Government "the largest legislative discretion" to deal with "the special exigencies of the moment," *Mugler*, 123 U. S., at 669, it is imperative to do so today. The rule that should govern a decision in a case of this kind should focus on the future, not the past.<sup>5</sup>

\* \* \*

The Court's categorical approach rule will, I fear, greatly hamper the efforts of local officials and planners who must deal with increasingly complex problems in land-use and environmental regulation. As this case—in which the claims of an individual property owner exceed \$1 million—well demonstrates, these officials face both substantial uncertainty because of the ad hoc nature of takings law and unacceptable penalties if they guess incorrectly about that law.<sup>6</sup>

Viewed more broadly, the Court's new rule and exception conflict with the very character of our takings jurisprudence. We have frequently and consistently recognized that the definition of a taking cannot be reduced to a "set formula" and that determining whether a regulation is a taking is "essentially [an] ad hoc, factual inquiry[.]" *Penn Central Transportation Co. v. New York City*, 438 U. S. 104, 124 (1978) (quoting *Goldblatt v. Hempstead*, 369 U. S. 590, 594 (1962)). This is unavoidable, for the determination whether a law effects a taking is ultimately a matter of "fairness and justice," *Armstrong v. United States*, 364 U. S. 40, 49 (1960), and "necessarily requires a weighing of private and public interests." *Agins*, 447 U. S., at 261. The rigid rules fixed by the Court today clash with this enterprise: "fairness and justice" are often disserved by categorical rules.

### III

It is well established that a takings case "entails inquiry into [several factors:] the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *PruneYard*, 447 U. S., at 83. The Court's analysis today focuses on the last two of these three factors: the categorical rule addresses a regulation's "economic impact," while the nuisance exception recognizes that ownership brings with it only certain "expectations." Neglected by the Court today is the first, and in some ways, the most important factor in takings analysis: the character of the regulatory action.

The Just Compensation Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne

<sup>5</sup> Even measured in terms of efficiency, the Court's rule is unsound. The Court today effectively establishes a form of insurance against certain changes in land-use regulations. Like other forms of insurance, the Court's rule creates a "moral hazard" and inefficiencies. In the face of uncertainty about changes in the law, developers will overinvest, safe in the knowledge that if the law changes adversely, they will be entitled to compensation. See generally Farber, *Economic Analysis and Just Compensation*, 12 Int'l Rev. of Law & Econ. 125 (1992).

<sup>6</sup> As the Court correctly notes, in regulatory takings, unlike physical takings, courts have a choice of remedies. See *ante*, at 25, n. 17. They may "invalidate the excessive regulation" or they may "allo[w] the regulation to stand and orde[r] the government to afford compensation for the permanent taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U. S. 304, 335 (1987) (STEVENS, J., dissenting); see also *id.*, at 319-21. In either event, however, the costs to the government are likely to be substantial and are therefore likely to impede the development of sound land-use policy.

"It is true, that, when the defendants . . . erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. [T]he supervision of the public health and the public morals is a governmental power, 'continuing in its nature,' and 'to be dealt with as the special exigencies of the moment may require;' . . . 'for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.'" *Id.*, at 669.

Under our reasoning in *Mugler*, a state's decision to prohibit or to regulate certain uses of property is not a compensable taking just because the particular uses were previously lawful. Under the Court's opinion today, however, if a state should decide to prohibit the manufacture of asbestos, cigarettes, or concealable firearms, for example, it must be prepared to pay for the adverse economic consequences of its decision. One must wonder if Government will be able to "go on" effectively if it must risk compensation "for every such change in the general law." *Mahon*, 260 U. S., at 413.

The Court's holding today effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property. Until today, I had thought that we had long abandoned this approach to constitutional law. More than a century ago we recognized that "the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Munn v. Illinois*, 94 U. S. 113, 134 (1877). As Justice Marshall observed about a position similar to that adopted by the Court today:

"If accepted, that claim would represent a return to the era of *Lochner v. New York*, 198 U. S. 45 (1905), when common-law rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance. The Due Process Clause does not require such a result." *PruneYard Shopping Center v. Robins*, 447 U. S. 74, 93 (1980) (concurring opinion).

Arresting the development of the common law is not only a departure from our prior decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution—both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners. Thus, when the Nation came to understand that slavery was morally wrong and mandated the emancipation of all slaves, it, in effect, redefined "property." On a lesser scale, our ongoing self-education produces similar changes in the rights of property owners. New appreciation of the significance of endangered species, see, e.g., *Andrus v. Allard*, 444 U. S. 51 (1979); the importance of wetlands, see, e.g., 16 U. S. C. § 3801 *et seq.*; and the vulnerability of coastal lands, see, e.g., 16 U. S. C. § 1451 *et seq.*, shapes our evolving understandings of property rights.

Of course, some legislative redefinitions of property will effect a taking and must be compensated—but it certainly cannot be the case that every movement away from common law does so. There is no reason, and less sense, in such an absolute rule. We live in a world in which changes in the

economy and the environment occur with increasing frequency and importance. If it was wise a century ago to allow Government "the largest legislative discretion" to deal with "the special exigencies of the moment," *Mugler*, 123 U. S., at 669, it is imperative to do so today. The rule that should govern a decision in a case of this kind should focus on the future, not the past.<sup>5</sup>

\* \* \*

The Court's categorical approach rule will, I fear, greatly hamper the efforts of local officials and planners who must deal with increasingly complex problems in land-use and environmental regulation. As this case—in which the claims of an individual property owner exceed \$1 million—well demonstrates, these officials face both substantial uncertainty because of the ad hoc nature of takings law and unacceptable penalties if they guess incorrectly about that law.<sup>6</sup>

Viewed more broadly, the Court's new rule and exception conflict with the very character of our takings jurisprudence. We have frequently and consistently recognized that the definition of a taking cannot be reduced to a "set formula" and that determining whether a regulation is a taking is "essentially [an] ad hoc, factual inquiry." *Penn Central Transportation Co. v. New York City*, 438 U. S. 104, 124 (1978) (quoting *Goldblatt v. Hempstead*, 369 U. S. 590, 594 (1962)). This is unavoidable, for the determination whether a law effects a taking is ultimately a matter of "fairness and justice," *Armstrong v. United States*, 364 U. S. 40, 49 (1960), and "necessarily requires a weighing of private and public interests." *Agins*, 447 U. S., at 261. The rigid rules fixed by the Court today clash with this enterprise: "fairness and justice" are often disserved by categorical rules.

### III

It is well established that a takings case "entails inquiry into [several factors:] the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *PruneYard*, 447 U. S., at 83. The Court's analysis today focuses on the last two of these three factors: the categorical rule addresses a regulation's "economic impact," while the nuisance exception recognizes that ownership brings with it only certain "expectations." Neglected by the Court today is the first, and in some ways, the most important factor in takings analysis: the character of the regulatory action.

The Just Compensation Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne

<sup>5</sup>Even measured in terms of efficiency, the Court's rule is unsound. The Court today effectively establishes a form of insurance against certain changes in land-use regulations. Like other forms of insurance, the Court's rule creates a "moral hazard" and inefficiencies: In the face of uncertainty about changes in the law, developers will overinvest, safe in the knowledge that if the law changes adversely, they will be entitled to compensation. See generally Farber, *Economic Analysis and Just Compensation*, 12 Int'l Rev. of Law & Econ. 125 (1992).

<sup>6</sup>As the Court correctly notes, in regulatory takings, unlike physical takings, courts have a choice of remedies. See *ante*, at 25, n. 17. They may "invalidate the excessive regulation" or they may "allow[] the regulation to stand and order[] the government to afford compensation for the permanent taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U. S. 304, 335 (1987) (STEVENS, J., dissenting); see also *id.*, at 319-21. In either event, however, the costs to the government are likely to be substantial and are therefore likely to impede the development of sound land-use policy.

by the public as a whole." *Armstrong*, 364 U.S., at 49. Accordingly, one of the central concerns of our takings jurisprudence is "prevent[ing] the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893). We have, therefore, in our takings law frequently looked to the generality of a regulation of property.<sup>7</sup>

For example, in the case of so-called "developmental exactions," we have paid special attention to the risk that particular landowners might "b[e] singled out to bear the burden" of a broader problem not of his own making. *Nollan*, 483 U.S., at 835, n. 4; see also *Pennell v. San Jose*, 485 U.S. 1, 23 (1988). Similarly, in distinguishing between the Kohler Act (at issue in *Mahon*) and the Subsidence Act (at issue in *Keystone*), we found significant that the regulatory function of the latter was substantially broader. Unlike the Kohler Act, which simply transferred back to the surface owners certain rights that they had earlier sold to the coal companies, the Subsidence Act affected all surface owners—including the coal companies—equally. See *Keystone*, 480 U.S., at 486. Perhaps the most familiar application of this principle of generality arises in zoning cases. A diminution in value caused by a zoning regulation is far less likely to constitute a taking if it is part of a general and comprehensive land-use plan, see *Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926); conversely, "spot zoning" is far more likely to constitute a taking, see *Penn Central*, 438 U.S., at 132, and n. 28.

The presumption that a permanent physical occupation, no matter how slight, effects a taking is wholly consistent with this principle. A physical taking entails a certain amount of "singling out."<sup>8</sup> Consistent with this principle, physical occupations by third parties are more likely to effect takings than other physical occupations. Thus, a regulation requiring the installation of a junction box owned by a third party, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), is more troubling than a

regulation requiring the installation of sprinklers or smoke detectors; just as an order granting third parties access to a marina, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), is more troubling than an order requiring the placement of safety buoys in the marina.

In analyzing takings claims, courts have long recognized the difference between a regulation that targets one or two parcels of land and a regulation that enforces a state-wide policy. See, e.g., *A.A. Profiles, Inc. v. Ft. Lauderdale*, 850 F.2d 1483, 1488 (CA11 1988); *Wheeler v. Pleasant Grove*, 664 F.2d 99, 100 (CA5 1981); *Trustees Under Will of Pomeroy v. Westlake*, 357 So.2d 1299, 1304 (La. App. 1978); see also *Burrows v. Keene*, 121 N.H. 590, 432 A.2d 15, 21 (1981); *Herman Glick Realty Co. v. St. Louis County*, 545 S.W.2d 320, 324-325 (Mo. App. 1976); *Huttig v. Richmond Heights*, 372 S.W.2d 833, 842-843 (Mo. 1963). As one early court stated with regard to a waterfront regulation, "If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be much more formidable." *Commonwealth v. Alger*, 61 Mass. 53, 102 (1851).

In considering Lucas' claim, the generality of the Beachfront Management Act is significant. The Act does not target particular landowners, but rather regulates the use of the coastline of the entire State. See S.C. Code §48-39-10 (Supp. 1990). Indeed, South Carolina's Act is best understood as part of a national effort to protect the coastline, one initiated by the Federal Coastal Zone Management Act of 1972. Pub. L. 92-583, 86 Stat. 1280, codified as amended at 16 U.S.C. §1451 *et seq.* Pursuant to the Federal Act, every coastal State has implemented coastline regulations.<sup>9</sup> Moreover, the Act did not single out owners of undeveloped land. The Act also prohibited owners of developed land from rebuilding if their structures were destroyed, see 1988 S.C. Acts 634 §3,<sup>10</sup> and what is equally significant, from repairing erosion control devices, such as seawalls, see S.C. Code §48-39-290(B)(2) (Supp. 1990). In addition, in some situations, owners of developed land were required to "renouris[h] the beach . . . on a yearly basis with an amount . . . of sand . . . not . . . less than one and one-half times the yearly volume of sand lost due to erosion." 1988 S.C. Acts 634 §3, p. 5140.<sup>11</sup> In short, the South Carolina Act imposed substantial burdens on owners of developed and undeveloped land alike.<sup>12</sup> This generality indicates that the Act is not an effort to expropriate owners of undeveloped land.

Admittedly, the economic impact of this regulation is dramatic and petitioner's investment-backed expectations are substantial. Yet, if anything, the costs to and expectations of the owners of developed land are even greater: I doubt, however, that the cost to owners of developed land of renourishing the beach and allowing their seawalls to deteriorate effects a taking. The costs imposed on the

<sup>7</sup> This principle of generality is well-rooted in our broader understandings of the Constitution as designed in part to control the "mischiefs of faction." See *The Federalist* No. 10, p. 43 (G. Wills ed. 1982) (J. Madison).

An analogous concern arises in First Amendment law. There we have recognized that an individual's rights are not violated when his religious practices are prohibited under a neutral law of general applicability. For example, in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879-880 (1990), we observed:

"[Our] decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion proscribes (or prescribes)'" *United States v. Lee*, 455 U.S. 252, 263, n. 3 (1982) (STEVENS, J., concurring in judgment). . . . In *Prince v. Massachusetts*, 321 U.S. 158 (1944), we held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding. We found no constitutional infirmity in "excluding [these children] from doing there what no other children may do." *Id.*, at 171. In *Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion), we upheld Sunday-closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In *Gillette v. United States*, 401 U.S. 437, 461 (1971), we sustained the military Selective Service System against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds."

If such a neutral law of general applicability may severely burden constitutionally protected interests in liberty, a comparable burden on property owners should not be considered unreasonably onerous.

<sup>8</sup> See *Levmore, Takings, Torts, and Special Interests*, 77 Va. L. Rev. 1333, 1352-1354 (1991).

<sup>9</sup> See Zaikin, *Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute*, 79 Cal. L. Rev. 205, 216-217, nn. 46-47 (1991) (collecting statutes).

<sup>10</sup> This provision was amended in 1990. See S.C. Code §48-39-290(B) (Supp. 1990).

<sup>11</sup> This provision was amended in 1990; authority for renourishment was shifted to local governments. See S.C. Code §48-39-350(A) (Supp. 1990).

<sup>12</sup> In this regard, the Act more closely resembles the Subsidence Act in *Keystone* than the Kohler Act in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and more closely resembles the general zoning scheme in *Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926) than the specific landmark designation in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

owners of undeveloped land, such as petitioner, differ from these costs only in degree, not in kind.

The impact of the ban on developmental uses must also be viewed in light of the purposes of the Act. The legislature stated the purposes of the Act as "protect[ing], preserv[ing], restor[ing] and enhanc[ing] the beach/dune system" of the State not only for recreational and ecological purposes, but also to "protect[] life and property." S. C. Code § 48-39-260(1)(a) (Supp. 1990). The State, with much science on its side, believes that the "beach/dune system [acts] as a buffer from high tides, storm surge, [and] hurricanes." *Ibid.* This is a traditional and important exercise of the State's police power, as demonstrated by Hurricane Hugo, which in 1989, caused 29 deaths and more than \$6 billion in property damage in South Carolina alone.<sup>13</sup>

In view of all of these factors, even assuming that petitioner's property was rendered valueless, the risk inherent in investments of the sort made by petitioner, the generality of the Act, and the compelling purpose motivating the South Carolina Legislature persuade me that the Act did not effect a taking of petitioner's property.

Accordingly, I respectfully dissent.

#### Statement of JUSTICE SOUTER.

I would dismiss the writ of certiorari in this case as having been granted improvidently. After briefing and argument it is abundantly clear that an unreviewable assumption on which this case comes to us is both questionable as a conclusion of Fifth Amendment law and sufficient to frustrate the Court's ability to render certain the legal premises on which its holding rests.

The petition for review was granted on the assumption that the state by regulation had deprived the owner of his entire economic interest in the subject property. Such was the state trial court's conclusion, which the state supreme court did not review. It is apparent now that in light of our prior cases, see, e.g., *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U. S. 470, 493-502 (1987); *Andrus v. Allard*, 444 U. S. 51, 65-66 (1979); *Penn Central Transportation Corp. v. New York City*, 438 U. S. 104, 130-131 (1978), the trial court's conclusion is highly questionable. While the respondent now wishes to contest the point, see Brief for Respondent 45-50, the Court is certainly right to refuse to take up the issue, which is not fairly included within the question presented, and has received only the most superficial and one-sided treatment before us.

Because the questionable conclusion of total deprivation cannot be reviewed, the Court is precluded from attempting to clarify the concept of total (and, in the Court's view, categorically compensable) taking on which it rests, a concept which the Court describes, see *ante*, at 11 n. 6, as so uncertain under existing law as to have fostered inconsistent pronouncements by the Court itself. Because that concept is left uncertain, so is the significance of the exceptions to the compensation requirement that the Court proceeds to recognize. This alone is enough to show that there is little utility in attempting to deal with this case on the merits.

The imprudence of proceeding to the merits in spite of these unpromising circumstances is underscored by the fact that, in doing so, the Court cannot help but assume

something about the scope of the uncertain concept of total deprivation, even when it is barred from explicating total deprivation directly. Thus, when the Court concludes that the application of nuisance law provides an exception to the general rule that complete denial of economically beneficial use of property amounts to a compensable taking, the Court will be understood to suggest (if it does not assume) that there are in fact circumstances in which state-law nuisance abatement may amount to a denial of all beneficial land use as that concept is to be employed in our takings jurisprudence under the Fifth and Fourteenth Amendments. The nature of nuisance law, however, indicates that application of a regulation defensible on grounds of nuisance prevention or abatement will quite probably not amount to a complete deprivation in fact. The nuisance enquiry focuses on conduct, not on the character of the property on which that conduct is performed, see 4 Restatement (Second) of Torts § 821B (1979) (public nuisance); *id.*, § 822 (private nuisance), and the remedies for such conduct usually leave the property owner with other reasonable uses of his property, see W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 90 (5th ed. 1984) (public nuisances usually remedied by criminal prosecution or abatement), *id.*, § 89 (private nuisances usually remedied by damages, injunction or abatement); see also, e.g., *Mugler v. Kansas*, 123 U. S. 623, 668-669 (1887) (prohibition on use of property to manufacture intoxicating beverages "does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use . . . for certain forbidden purposes, is prejudicial to the public interests"); *Hadacheck v. Sebastian*, 239 U. S. 394, 412 (1915) (prohibition on operation of brickyard did not prohibit extraction of clay from which bricks were produced). Indeed, it is difficult to imagine property that can be used only to create a nuisance, such that its sole economic value must presuppose the right to occupy it for such seriously noxious activity.

The upshot is that the issue of what constitutes a total deprivation is being addressed by indirection, and with uncertain results, in the Court's treatment of defenses to compensation claims. While the issue of what constitutes total deprivation deserves the Court's attention, as does the relationship between nuisance abatement and such total deprivation, the Court should confront these matters directly. Because it can neither do so in this case, nor skip over those preliminary issues and deal independently with defenses to the Court's categorical compensation rule, the Court should dismiss the instant writ and await an opportunity to face the total deprivation question squarely. Under these circumstances, I believe it proper for me to vote to dismiss the writ, despite the Court's contrary preference. See, e.g., *Welsh v. Wisconsin*, 466 U. S. 740, 755 (1984) (Burger, C.J.), *United States v. Shannon*, 342 U. S. 288, 294 (1952) (Frankfurter, J.).

A. CAMDEN LEWIS, Columbia, S.C. (LEWIS, BABCOCK & HAWKINS, GERALD M. FINKEL, FINKEL, GOLDBERG, SHEFTMAN & ALTMAN, and DAVID J. BEDERMAN, on the briefs) for petitioner; C.C. HARNESS III, Charleston, S.C. (T. TRAVIS MEDLOCK, S.C. Atty. Gen., KENNETH P. WOODINGTON, Sr. Asst. Atty., and RICHARD J. LAZARUS, on the briefs) for respondent.

<sup>13</sup>Zalkin, 79 Cal. L. Rev., at 212-213.











remand, of course, the questions left unaddressed by the South Carolina Supreme Court as a consequence of its categorical disposition.<sup>5</sup>

### III

#### A

Prior to Justice Holmes' exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it was generally thought that the Takings Clause reached only a "direct appropriation" of property, *Legal Tender Cases*, 12 Wall. 457, 551 (1871), or the functional equivalent of a "practical ouster of [the owner's] possession." *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879). See also *Gibson v. United States*, 166 U.S. 269, 275-276 (1897). Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U.S., at 414-415. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." *Id.*, at 415. These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.*

Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "set formula" for determining how far is too far, preferring to "engag[e] in . . . essentially ad hoc, factual inquiries," *Penn. Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)). See Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 4. We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (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. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), we determined that New York's law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking, *id.*, at 435-440, even though the facilities occupied at most only 1½ cubic feet of the landlords' property, see *id.*, at 438, n. 16. See also *United States v. Causby*, 328 U.S. 256, 265, and n. 10 (1946) (physical invasions of airspace); cf. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (imposition of navigational servitude upon private marina).

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See *Agins*, 447 U.S., at 260; see also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 295-296 (1981).<sup>6</sup> As we have said on numerous occasions, 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." *Agins*, *supra*, at 260 (citations omitted) (emphasis added).<sup>7</sup>

<sup>6</sup>We will not attempt to respond to all of JUSTICE BLACKMUN's mistaken citation of case precedent. Characteristic of its nature is his assertion that the cases we discuss here stand merely for the proposition "that proof that a regulation does not deny an owner economic use of his property is sufficient to defeat a facial taking challenge" and not for the point that "denial of such use is sufficient to establish a taking claim regardless of any other consideration." *Post*, at 15, n. 11. The cases say, repeatedly and unmistakably, that "[t]he test to be applied in considering [a] facial [takings] challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land.'" *Keystone*, 480 U.S., at 495 (quoting *Hodel*, 452 U.S., at 295-296 (quoting *Agins*, 447 U.S., at 260)) (emphasis added).

JUSTICE BLACKMUN describes that rule (which we do not invent but merely apply today) as "alter[ing] the long-settled rules of review" by foisting on the State "the burden of showing [its] regulation is not a taking." *Post*, at 11, 12. This is of course wrong. Lucas had to do more than simply file a lawsuit to establish his constitutional entitlement; he had to show that the Beachfront Management Act denied him economically beneficial use of his land. Our analysis presumes the unconstitutionality of state land-use regulation only in the sense that any rule-with-exceptions presumes the invalidity of a law that violates it—for example, the rule generally prohibiting content-based restrictions on speech. See, e.g., *Simon & Schuster, Inc. v. New York Crime Victims Board*, 502 U.S. \_\_\_\_ (slip op., at 8) (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech"). JUSTICE BLACKMUN's real quarrel is with the substantive standard of liability we apply in this case, a long-established standard we see no need to repudiate.

<sup>7</sup>Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme—and, we think, unsupportable—view of the relevant calculus, see *Penn. Central Transportation Co. v. New York City*, 42 N.Y. 2d 324, 333-334, 366 N.E. 2d 1271, 1276-1277 (1977), *aff'd*, 438 U.S. 104 (1978), where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the taking claimant's other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. Compare *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (law restricting subsurface extraction of coal held to effect a taking), with *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497-502 (1987)

"The enactment of the 1990 Act during the pendency of this appeal, with its provisions for special permits and other changes that may affect the plaintiffs, does not relieve us of the need to address the plaintiffs' claims under the provisions of the 1988 Act. Even if the amended Act cured all of the plaintiffs' concerns, the amendments would not foreclose the possibility that a taking had occurred during the years when the 1988 Act was in effect." *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 168 (CA4 1991).

<sup>8</sup>JUSTICE BLACKMUN states that our "intense interest in Lucas' plight . . . would have been more prudently expressed by vacating the judgment below and remanding for further consideration in light of the 1990 amendments" to the Beachfront Management Act. *Post*, at 10, n. 7. That is a strange suggestion, given that the South Carolina Supreme Court rendered its categorical disposition in this case after the Act had been amended, and after it had been invited to consider the effect of those amendments on Lucas's case. We have no reason to believe that the justices of the South Carolina Supreme Court are any more desirous of using a narrower ground now than they were then; and neither "prudence" nor any other principle of judicial restraint requires that we remand to find out whether they have changed their mind.

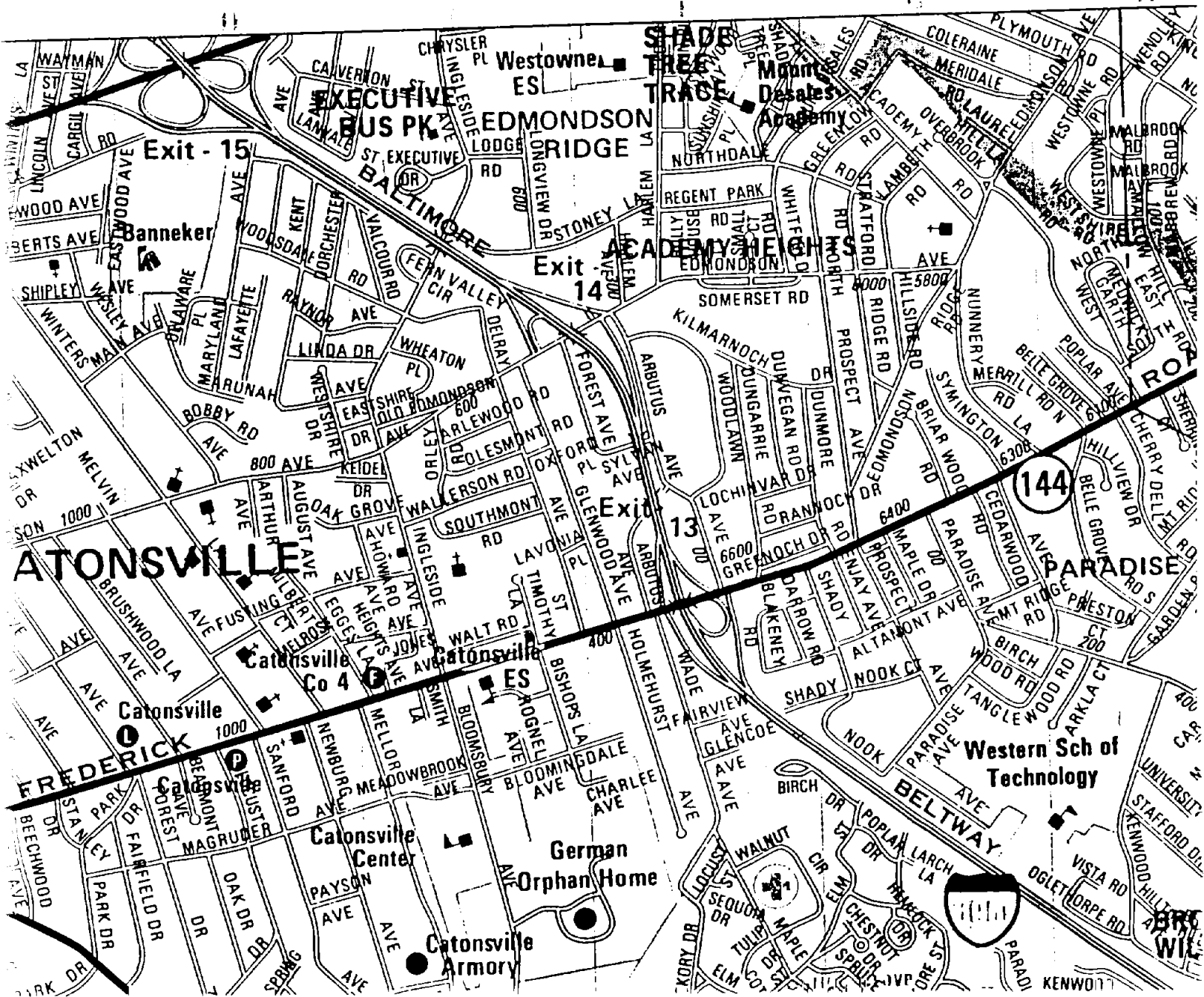
|           |                  |                 |                           |             |                            |
|-----------|------------------|-----------------|---------------------------|-------------|----------------------------|
| PROPERTY: | 1006 N ARUNAH AV | ZIP:            | 0                         | LAND VAL:   | 22500                      |
| TAX ID :  | BC0109350305     | SEC/BLCK/LOT:   | 7022 / /                  | IMPV VAL:   | 51330                      |
|           | LEGAL DES:       | COR DELAWARE PL |                           | TOTL VAL:   | 73850                      |
| TAX MAP:  | 00095            | LEGAL DES:      |                           | ASSESS VAL: | 29540                      |
| GRID :    | 00020            | LEGAL DES:      |                           | TRANS DATE: | 11/01/88                   |
| PARCEL :  | 00227            | LOT SIZE :      | 40.03 40.00 124.60 124.67 | TRANS \$:   | 85000                      |
| OWNER :   | CLEVINGER        | DANNY L         |                           | SUB:        | CATONSVILLE HET LIBER:8014 |
| OWNER 2:  | CLEVINGER        | TAMMY L         |                           |             |                            |
| ADDRESS:  | 01006            | ARUNAH AV       |                           | FOLIO:      | 156                        |
| ADDRESS:  |                  |                 |                           | LAST ASSESS | 9011 ZONING:               |
| ADDRESS:  | BALTIMORE, MD    |                 |                           | USE CODE:   | 04 LAND USE: RESID         |
| ADDRESS:  |                  | 21228           |                           |             |                            |
| OWNER OCC |                  |                 |                           |             |                            |

MICROFILMED

Call Ex 2B

Joins Map 33

880,000 FT





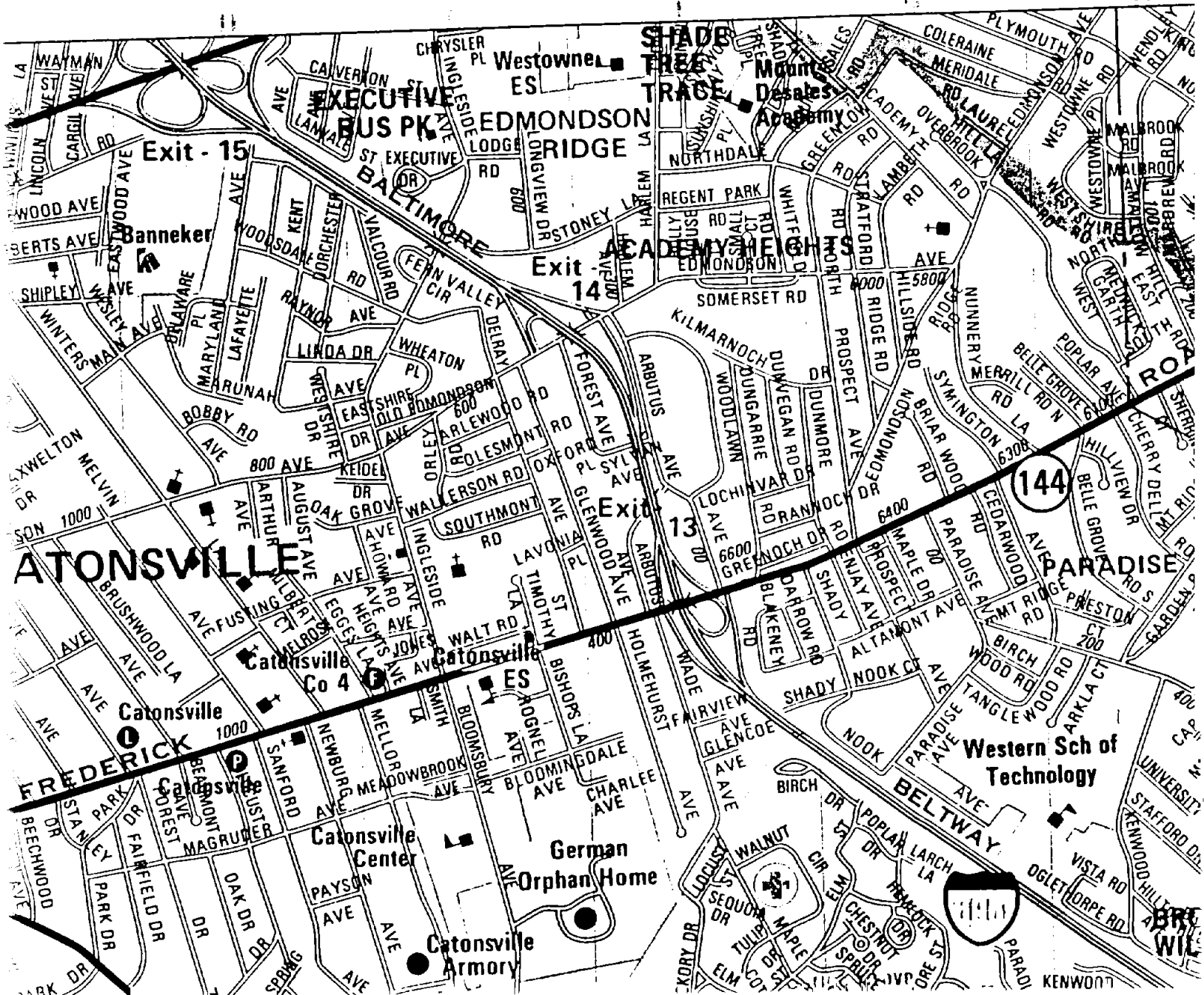


MICROFILMED

Coall Ech 2B

Joins Map 33

880,000 FT



PROPERTY: 502 DORCHESTER RD ZIP: 0 LAND VAL: 24340  
TAX ID: BC0110451890 SEC/BLCK/LOT: /014 / / IMPV VAL: 58580  
LEGAL DES: TOTL VAL: 82920  
TAX MAP: 00095 LEGAL DES: ASSESS VAL: 33160  
GRID: 00020 LEGAL DES: TRANS DATE:  
PARCEL: 00227 LOT SIZE: 80.00 80.00 120.00 120.00  
OWNER: JOZWIAK ROBERT J SUB: CATONSVILLE HEJ LIBER:  
OWNER 2: JOZWIAK GAIL L  
ADDRESS: 00502 DORCHESTER RD FOLIO:  
ADDRESS: LAST ASSESS 9011 ZONING:  
ADDRESS: BALTIMORE, MD USE CODE: 04 LAND USE: RESID  
ADDRESS: 21228  
OWNER OCC

=====

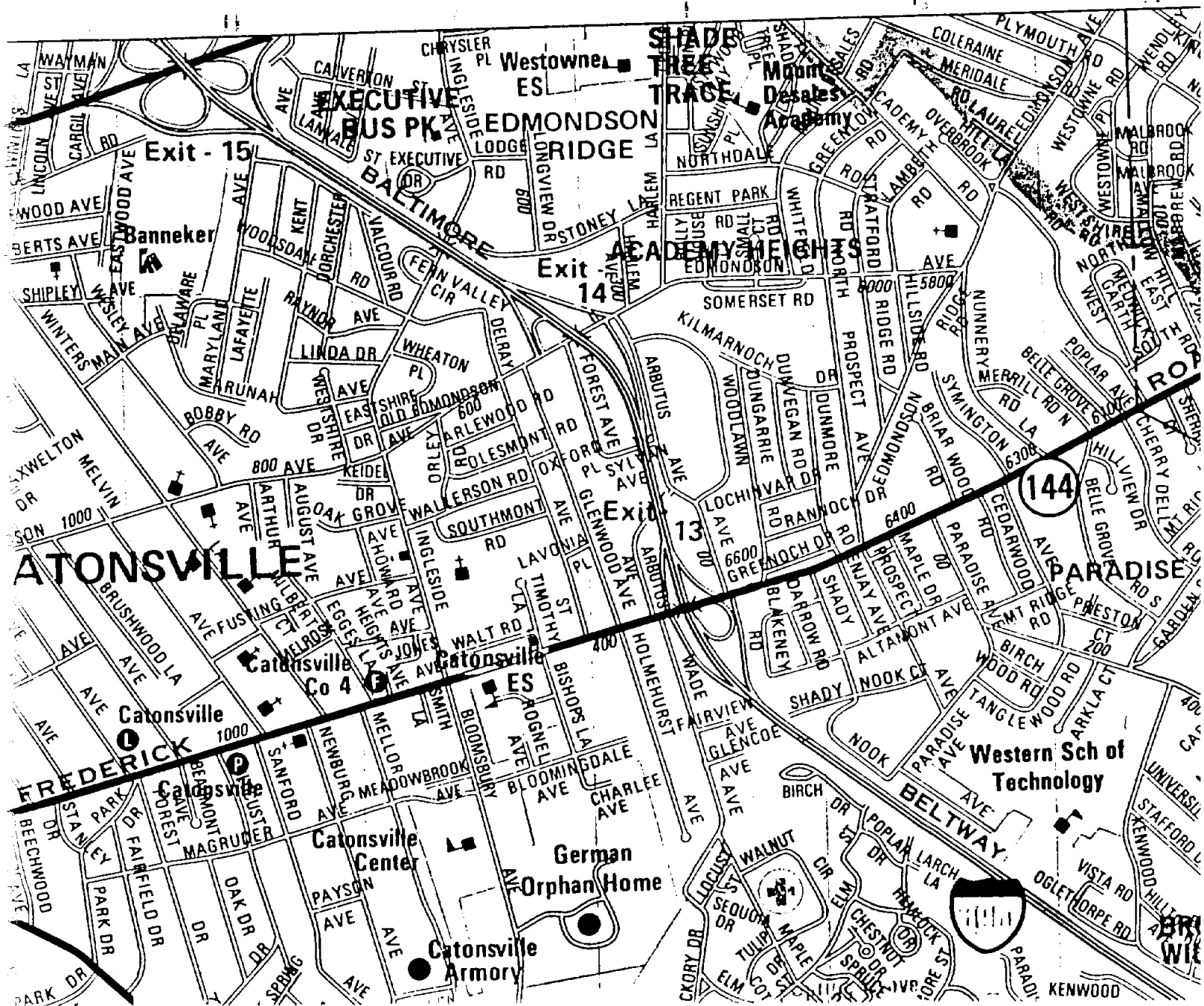
PROPERTY: 502 DORCHESTER RD ZIP: 0 LAND VAL: 21600  
TAX ID: BC0123153804 SEC/BLCK/LOT: /014 / / IMPV VAL: 57170  
LEGAL DES: TOTL VAL: 78770  
TAX MAP: ASSESS VAL: 31500  
GRID: TRANS DATE: 06/05/91  
PARCEL: TRANS \$: 95500

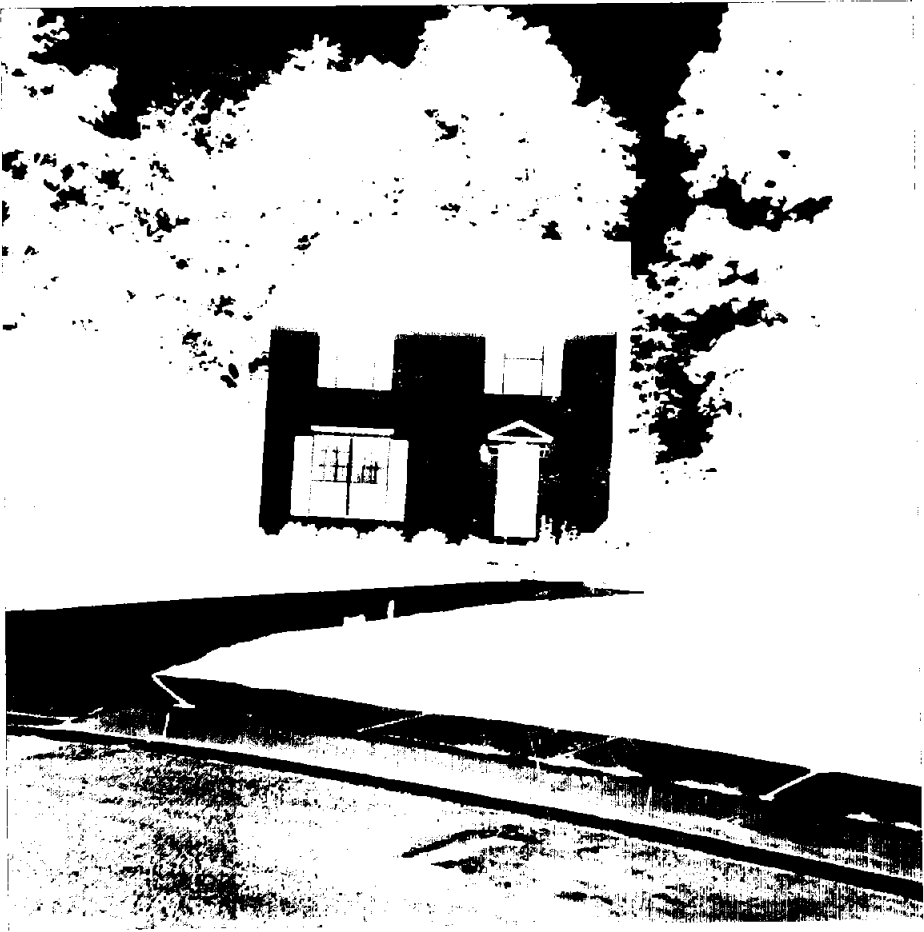
OWNER OCC

*Joseph #2C*

Joins Map 33

880,000 FT







PROPERTY: S ARUNAH AV ZIP: 0 LAND VAL: 24340  
TAX ID : BC0114650072 SEC/BLOCK/LOT: /027 / / IMPV VAL: 58820  
LEGAL DES: TOTL VAL: 83160  
TAX MAP: 00095 LEGAL DES: ASSESS VAL: 33260  
GRID : 00020 LEGAL DES: TRANS DATE:03/01/91  
PARCEL: 00227 LOT SIZE : 80.00 80.00 120.00 120.00 TRANS \$\$ : 112000  
OWNER : NASELLO BLANCHE SUB: CATONSVILLE HET LIBER:8723  
ADDRESS: 01001 ARUNAH AV FOLIO: 555  
ADDRESS: LAST ASSESS 9011 ZONING:  
ADDRESS: BALTIMORE, MD USE CODE:04 LAND USE: RESID  
ADDRESS: 21228  
OWNER OCC

=====

IN RE: PETITIONS FOR SPECIAL HEARING AND ZONING VARIANCE - SW/S DUNGLow Road, 20' E of the c/l of Mornington Road (3000-3002 Dunglow Road) 12th Election District 7th Councilmanic District James M. Seigel, et ux Petitioners

BEFORE THE DEPUTY ZONING COMMISSIONER OF BALTIMORE COUNTY Case No. 90-52-SPHA

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Petitioners herein request a special hearing to approve Lots 1 and 2 of the subject property as separate building lots with undersized lot areas and that the overall density of the subdivision will not be affected, and variances to permit a lot width of 54 feet in lieu of the required 55 feet and a side yard setback of 5 feet in lieu of the required 10 feet for Lot 1, and a lot width of 53.5 feet in lieu of the required 55 feet and a side yard setback of 5 feet in lieu of the required 10 feet for Lot 2, all as more particularly described in Petitioner's Exhibit 1.

The Petitioners, by James M. Seigel, appeared, testified, and were represented by Michael Marino, Esq. Also appearing on behalf of the Petitions was Keith A. Radlett on behalf of the Emerald Development Corporation. The following individuals appeared as Protestants: Charles R. and Betty Lee Hall, Sr., Daniel T. Mulheran, Marian O. Garrity, Doris J. Hoover, Lucille P. Wade, Terence McDonough, James E. Grumbach, and Roy Staten. The Protestants were represented by Louis L. DePazzo, Esquire.

Testimony indicated that the subject property, known as 3000 and 3002 Dunglow Road, consists of two lots totalling .236 acres zoned D.R. 5.5 which the Petitioners purchased approximately 10 years ago. Lot 1 is improved with a two-story brick dwelling and attached garage with a stone parking area, while Lot 2 is presently unimproved. Testimony indicated

the dwelling has existed on Lot 1 for over 40 years and that said dwelling is located 5 feet from the side property line. Lot 2, which consists of .118 acres, has remained vacant since the original lot lines were drawn as part of the Dundalk Highlands subdivision as indicated on the plat filed with the Land Records of Baltimore County in May 1926, a copy of which was introduced as Petitioner's Exhibit 3. Petitioner testified he is desirous of selling Lot 2 to the Emerald Development Corporation who proposes to construct a two-story, three bedroom home which, in the Petitioners' opinion, will be in keeping with the character and quality of the neighborhood. Testimony presented by Petitioners noted that the house can be constructed in strict compliance with all setback requirements other than side yard. The only variance required is as to the lot width. Petitioners contend that to require strict compliance with result in undue hardship to them as the lot was created as a 50-foot wide lot in 1926. Further, Petitioners noted that a number of the lots in the surrounding neighborhood are 50 feet wide.

The Protestants, in addition to their general opposition to Petitioners' request, were concerned about the quality and integrity of the proposed dwelling for Lot 2. Many of the Protestants have resided in the area for more than 40 years and their testimony evidenced the pride they have in their property. After discussions between the Protestants and the Petitioners, certain modifications were made and an agreement was reached between the parties in the event the request was granted.

Subsequent to the hearing, a plan was submitted detailing the exterior design and a sample of the proposed brick, which is red Glen-Gery Brick, AA Matt. Said plan has been incorporated into the file and identified as Petitioner's Exhibit A. Additionally, a landscaping plan was

forwarded to the Protestants' Counsel and a copy submitted to the Zoning Commissioner's Office for incorporation into the case file. Said plan has been marked as Petitioner's Exhibit B.

An area variance may be granted where strict application of the zoning regulations would cause practical difficulty to the Petitioner and his property. *McLean v. Soley*, 270 Md. 208 (1973). To prove practical difficulty for an area variance, the Petitioner must meet the following:

- 1) whether strict compliance with requirement would unreasonably prevent the use of the property for a permitted purpose or render conformance unnecessarily burdensome;
- 2) whether the grant would do substantial injustice to applicant as well as other property owners in the district or whether a lesser relaxation than that applied for would give substantial relief; and
- 3) whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

*Anderson v. Bd. of Appeals, Town of Chesapeake Beach*, 22 Md. App. 28 (1974).

After due consideration of the testimony and evidence presented, it is clear that practical difficulty or unreasonable hardship would result if the relief requested in the Petition for Special Hearing and Zoning Variance were not granted. It has been established that the requirements from which the Petitioner seeks relief would unduly restrict the use of the land due to the special conditions unique to this particular parcel. In addition, the relief requested will not be detrimental to the public health, safety, and general welfare.

Pursuant to the advertisement, posting of the property, and public hearing on these Petitions held, and for the reasons given above, the special hearing and variance should be granted.

- 3 -

THEREFORE, IT IS ORDERED by the Deputy Zoning Commissioner for Baltimore County this 14th day of December, 1989 that the Petition for Special Hearing to approve Lots 1 and 2 of the subject property as separate building lots with undersized lot areas and that the overall density of the subdivision will not be affected, and the Petition for Zoning Variance to permit a lot width of 54 feet in lieu of the required 55 feet and a side yard setback of 5 feet in lieu of the required 10 feet for Lot 1, and a lot width of 53.5 feet in lieu of the required 55 feet and a side yard setback of 5 feet in lieu of the required 10 feet for Lot 2, in accordance with Petitioner's Exhibits 1 and A, be and are hereby GRANTED, subject, however, to the following restrictions which are conditions precedent to the relief granted:

- 1) The Petitioner may apply for his building permit and be granted same upon receipt of this Order; however, Petitioner is hereby made aware that proceeding at this time is at his own risk until such time as the 30-day appellate process from this Order has expired. If for whatever reason, this Order is reversed, the Petitioner would be required to return, and be responsible for returning, said property to its original condition.
- 2) Petitioner shall use the red Glen-Gery Brick, Range AA Matt, or a red brick similar to the sample submitted and as described in Petitioner's Exhibit A.
- 3) Prior to the issuance of any permits, the landscaping plan marked Petitioner's Exhibit B shall be submitted for approval by the Baltimore County Landscape Planner. In the event the plan is modified by the Landscape Planner, the modified plan shall be submitted to the Deputy Zoning Commissioner for final approval.

ANN M. NASTAROWICZ  
Deputy Zoning Commissioner  
for Baltimore County

AMN:bjs

Baltimore County  
Zoning Commissioner  
Office of Planning & Zoning  
Townson, Maryland 21204  
(301) 887-3353  
J. Robert Hines  
Zoning Commissioner

December 14, 1989

Michael Marino, Esquire  
Hall, Levy & Marino  
10 East Baltimore Street, Suite 1212  
Baltimore, Maryland 21202

RE: PETITIONS FOR SPECIAL HEARING AND ZONING VARIANCE  
SW/S Dunglow Road, 20' E of the c/l of Mornington Road  
(3000 and 3002 Dunglow Road)  
12th Election District - 7th Councilmanic District  
James Seigel, et ux - Petitioners  
Case No. 90-52-SPHA

Dear Mr. Marino:

Enclosed please find a copy of the decision rendered in the above-captioned matter. The Petitions for Special Hearing and Zoning Variance have been granted in accordance with the attached Order.

In the event any party finds the decision rendered is unfavorable, any party may file an appeal to the County Board of Appeals within thirty (30) days of the date of this Order. For further information on filing an appeal, please contact Ms. Charlotte Radcliffe at 887-3391.

Very truly yours,

ANN M. NASTAROWICZ  
Deputy Zoning Commissioner  
for Baltimore County

AMN:bjs

cc: Mr. & Mrs. James Seigel  
3000 Dunglow Road, Baltimore, Md. 21222

Louis L. DePazzo, Esquire  
38 S. Dundalk Avenue, Baltimore, Md. 21221

People's Counsel

File

#### PETITION FOR SPECIAL HEARING TO THE ZONING COMMISSIONER OF BALTIMORE COUNTY: 90-52-SPHA

The undersigned, legal owner(s) of the property situated in Baltimore County and which is described in the description and plat attached hereto and made a part hereof, hereby petition for a Special Hearing under Section 506.7 of the Baltimore County Zoning Regulations, to determine whether or not the Zoning Commissioner and/or Deputy Zoning Commissioner should approve

-----  
Lots 1 and 2 as separate buildable lots with undersized lot areas,  
-----  
and that the overall density in the subdivision will not be affected.

Property is to be posted and advertised as prescribed by Zoning Regulations.

I, or we, agree to pay expenses of the above Special Hearing advertising, posting, etc., upon filing of this Petition, and further agree to and are to be bound by the zoning regulations and restrictions of Baltimore County adopted pursuant to the Zoning Law for Baltimore County.

I/We do solemnly declare and affirm, under the penalties of perjury, that I/we are the legal owner(s) of the property which is the subject of this Petition.

Contract Purchaser:

Emerald Development Corporation  
(Type or Print Name)

Signature

16 Oakridge Ct.  
Address

Lutherville, MD. 21093 (285-522-2000)  
City and State

Attorney for Petitioner:

Hall, Levy & Marino  
(Type or Print Name)

Signature

10 East Baltimore St. Suite 1212  
Address

Baltimore, MD. 21202  
City and State

Attorney's Telephone No.: 685-4400

Legal Owner(s):

James Seigel  
(Type or Print Name)

Signature

Phyllis Seigel  
(Type or Print Name)

Signature

16 Oakridge Ct.  
Address

Lutherville, MD. 21093 (285-522-2000)  
City and State

3000 Dunglow Rd. 285-5346  
Address

Baltimore, Maryland 21222  
City and State

Name, address and phone number of legal owner, contract purchaser or representative to be contacted

Emerald Development Corporation  
Name

16 Oakridge Ct. 682-6100  
Address

ORDERED By The Zoning Commissioner of Baltimore County, this 14th day of December, 1989, that the subject matter of this petition be advertised, as required by the Zoning Law of Baltimore County, in two newspapers of general circulation throughout Baltimore County, that property be posted, and that the public hearing be had before the Zoning Commissioner of Baltimore County in Room 106, County Office Building in Towson, Baltimore County, on the 16th day of August, 1989, at 11 o'clock A.M.

J. Robert Hines  
Zoning Commissioner of Baltimore County

X.C.O.-No. 1

(over)

#### PETITION FOR ZONING VARIANCE TO THE ZONING COMMISSIONER OF BALTIMORE COUNTY: 90-52-SPHA

The undersigned, legal owner(s) of the property situated in Baltimore County and which is described in the description and plat attached hereto and made a part hereof, hereby petition for a Variance from Section 1802.2.C.1. to permit lot widths of 54 and 53.5 feet and a side yard setback in lieu of the 55 and 10 feet, respectively.

of the Zoning Regulations of Baltimore County, to the Zoning Law of Baltimore County; for the following reasons: (Indicate hardship or practical difficulty)

The single family dwelling proposed is 32ft. wide which provides for side yard setbacks within accordance with Balto. Co. Code. Subject property is not capable of being developed, thereby creating practical difficulty or hardship with regard to developability. The granting of this variance will not result in any injury to public health, safety, or welfare.

Property is to be posted and advertised as prescribed by Zoning Regulations.

I, or we, agree to pay expenses of above Variance advertising, posting, etc., upon filing of this petition, and further agree to and are to be bound by the zoning regulations and restrictions of Baltimore County adopted pursuant to the Zoning Law for Baltimore County.

I/We do solemnly declare and affirm, under the penalties of perjury, that I/we are the legal owner(s) of the property which is the subject of this Petition.

Contract Purchaser:

Emerald Development Corporation  
(Type or Print Name)

Signature

16 Oakridge Ct.  
Address

Lutherville, Md. 21093 (285-522-2000)  
City and State

Attorney for Petitioner:

Hall, Levy & Marino  
(Type or Print Name)

Signature

10 East Baltimore St. Suite 1212  
Address

Baltimore, MD. 21202  
City and State

Attorney's Telephone No.: 685-4400

ORDERED By The Zoning Commissioner of Baltimore County, this 14th day of December, 1989, that the subject matter of this petition be advertised, as required by the Zoning Law of Baltimore County, in two newspapers of general circulation throughout Baltimore County, that property be posted, and that the public hearing be had before the Zoning Commissioner of Baltimore County in Room 106, County Office Building in Towson, Baltimore County, on the 16th day of August, 1989, at 11 o'clock A.M.

J. Robert Hines  
Zoning Commissioner of Baltimore County

(over)

#### McKEE & ASSOCIATES, INC.

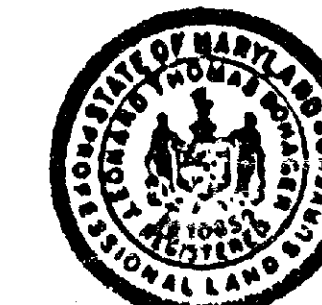
Engineering - Surveying - Real Estate Development

SHAWAN PLACE, 3 SHAWAN ROAD MOUNT VERNON, MARYLAND 21030  
Telephone: (301) 527-1555  
Facsimile: (301) 527-1563

April 11, 1989

DESCRIPTION TO ACCOMPANY ZONING VARIANCE  
PETITION FOR 3002 DUNGLON ROAD  
12 ELECTION DISTRICT  
BALTIMORE COUNTY, MARYLAND

Beginning at a point on the southwest side of Dunglow Road, 53.20 feet south of the south side of Mornington Road, being known and designated as Lot No. Two (2) Block No. Fourteen (14) as shown on plat entitled Plat No. 3 of Dundalk and Resubdivision of Part of Dundalk Highlands being a development of the Dundalk Company, Dundalk, Baltimore County, Maryland, dated May 15, 1926, and recorded among the land records of Baltimore County in Plat Book WPC No. 8, folio 54.



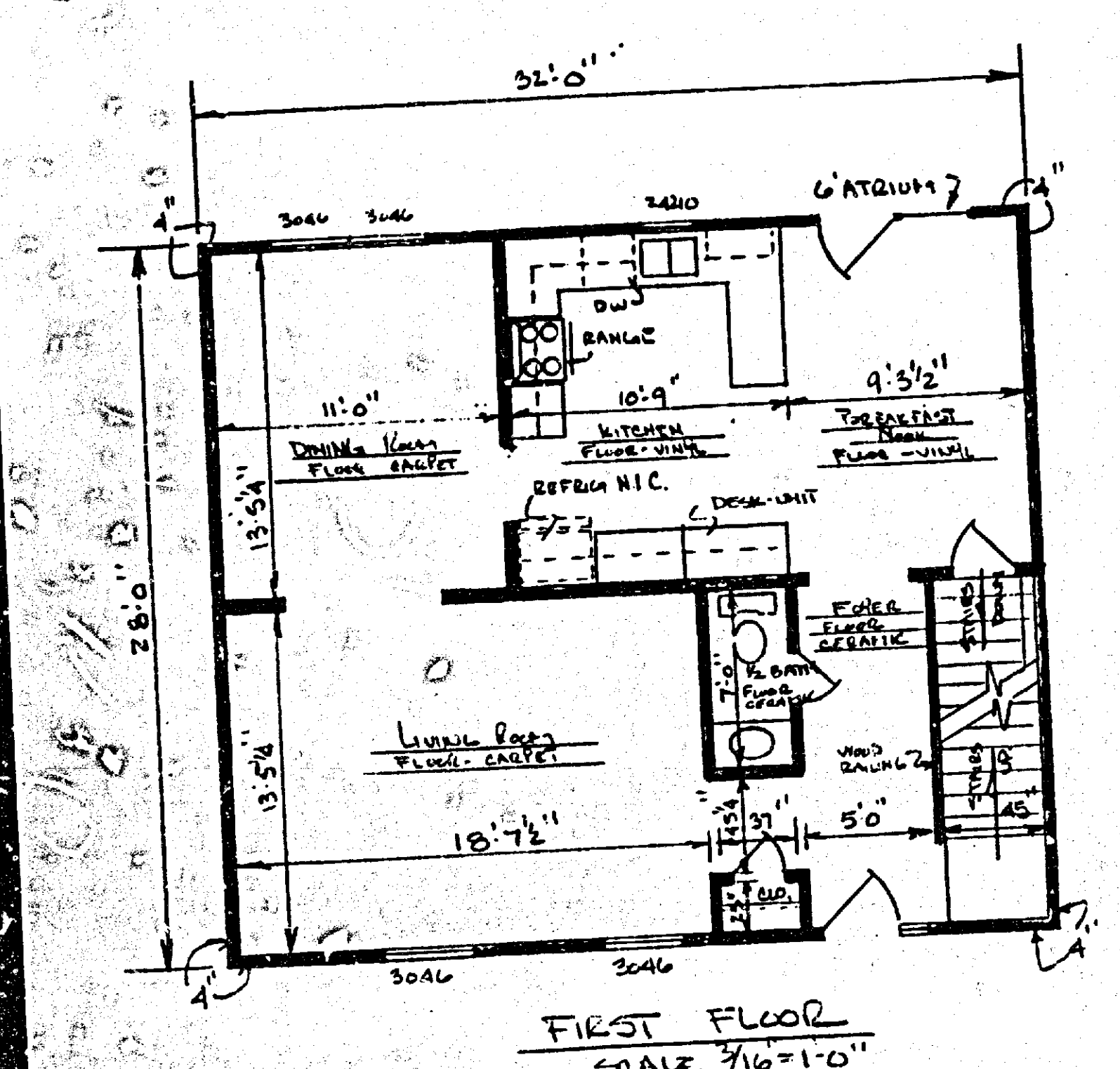
PLEASE PRINT CLEARLY

PETITIONER(S) SIGN-IN SHEET  
 NAME: James Seigel, et ux  
 ADDRESS: 6539 Carleby Rd  
3007 Dunglew Rd  
10 E. Baltimore Street (Suite 1012)  
Baltimore, MD 21202

PLEASE PRINT CLEARLY

PROTESTANT(S) SIGN-IN SHEET  
 NAME: Charles R. Hall Sr  
 ADDRESS: 3004 Dunglew Rd  
3006 Dunglew Rd  
3017 Dunglew Rd  
3001 Dunglew Rd  
3005 Dunglew Rd  
3004 Dunglew Rd  
3020 Dunglew Rd  
3008 Dunglew Rd  
3014 Dunglew Rd

NAME: James Seigel, et ux  
 ADDRESS: 6539 Carleby Rd  
3007 Dunglew Rd  
10 E. Baltimore Street (Suite 1012)  
Baltimore, MD 21202

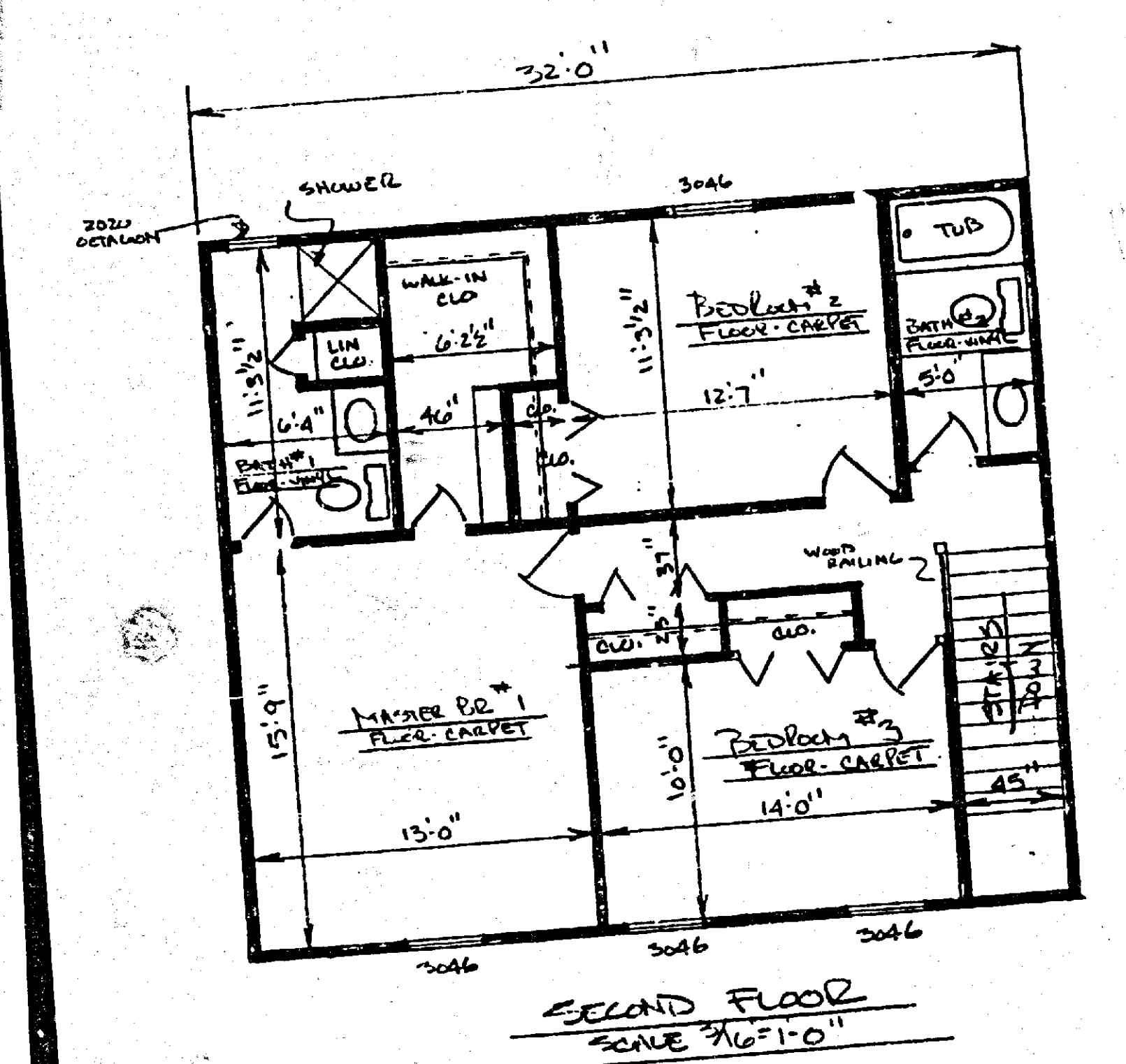


32'-0"

CERTIFICATE OF POSTING  
 ZONING DEPARTMENT OF BALTIMORE COUNTY  
 Towson, Maryland  
 Date of Posting: 7/27/89  
 District: 1074  
 Posted for: James Seigel, et ux  
 Location of property: 5413 Dunglew Rd. W. of Northampton Rd.  
 Location of Sign: 3000 + 3002 Dunglew Rd. corner 75' E. boundary  
 Remarks: See property of B. Hall Sr  
 Posted by: Michael E. Marino  
 Number of Signs: 2  
 Date of return: 7/25/89

UNTIL THE DAY OF THE HEARING.  
 Please make your check payable to Baltimore County, Maryland. Bring the check and the sign & post set(s) to the Zoning Office, County Office Building, 111 W. Chesapeake Avenue, Room 113, Towson, Maryland fifteen (15) days prior to the hearing.  
 BALTIMORE COUNTY, MARYLAND  
 OFFICE OF FINANCE - REVENUE DIVISION  
 MISCELLANEOUS CASH RECEIPT  
 No. 074569  
 DATE: 8/16/89 ACCOUNT: A-01-615-000  
 AMOUNT: \$ 116.28  
 RECEIVED FOR: Emerald Dev Corp  
 FOR: P.A. for 8/16/89 hearing 90-52-SPH  
 B 059\*\*\*\*\*116281D 2165A

Validation or signature of cashier

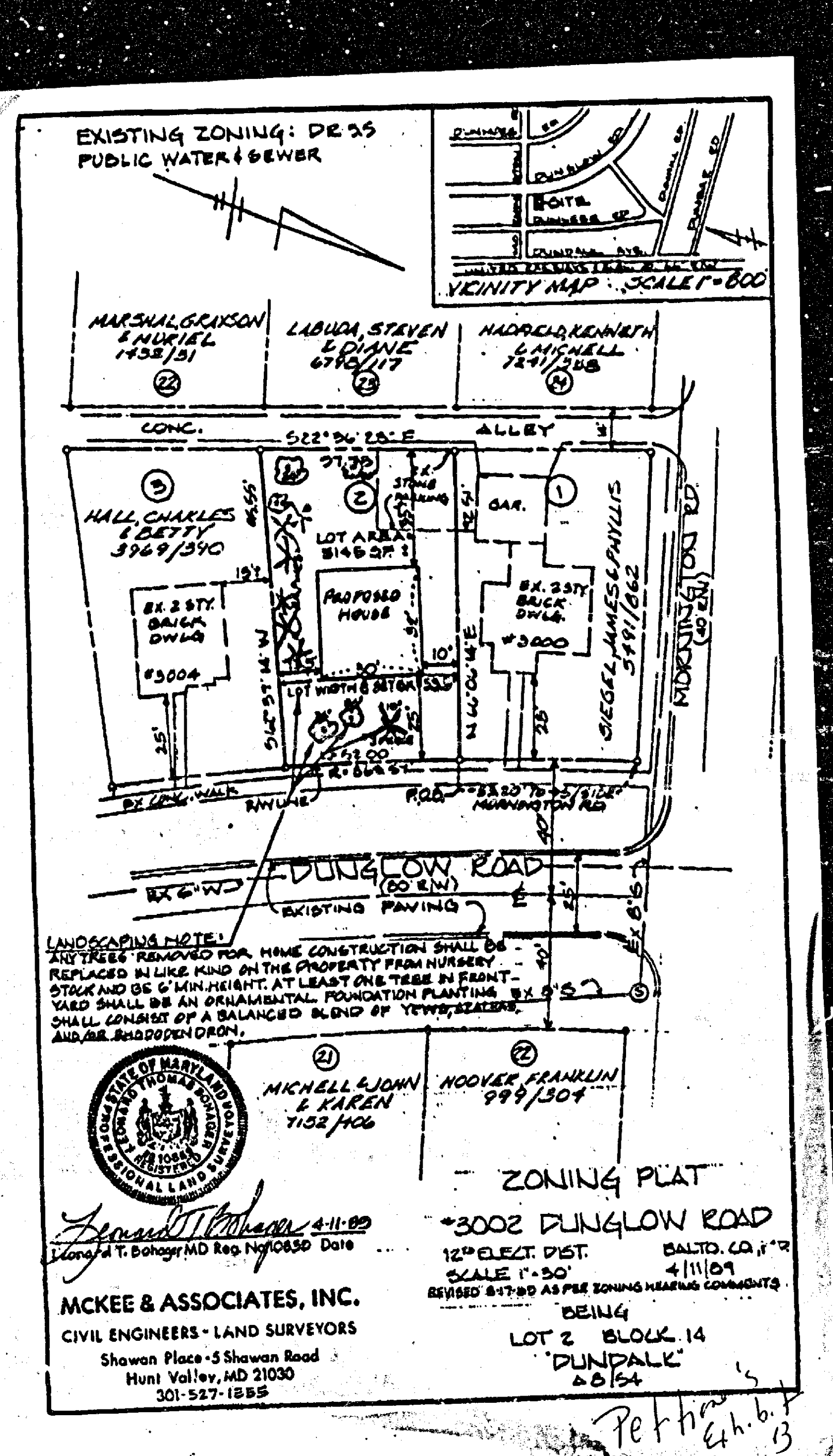
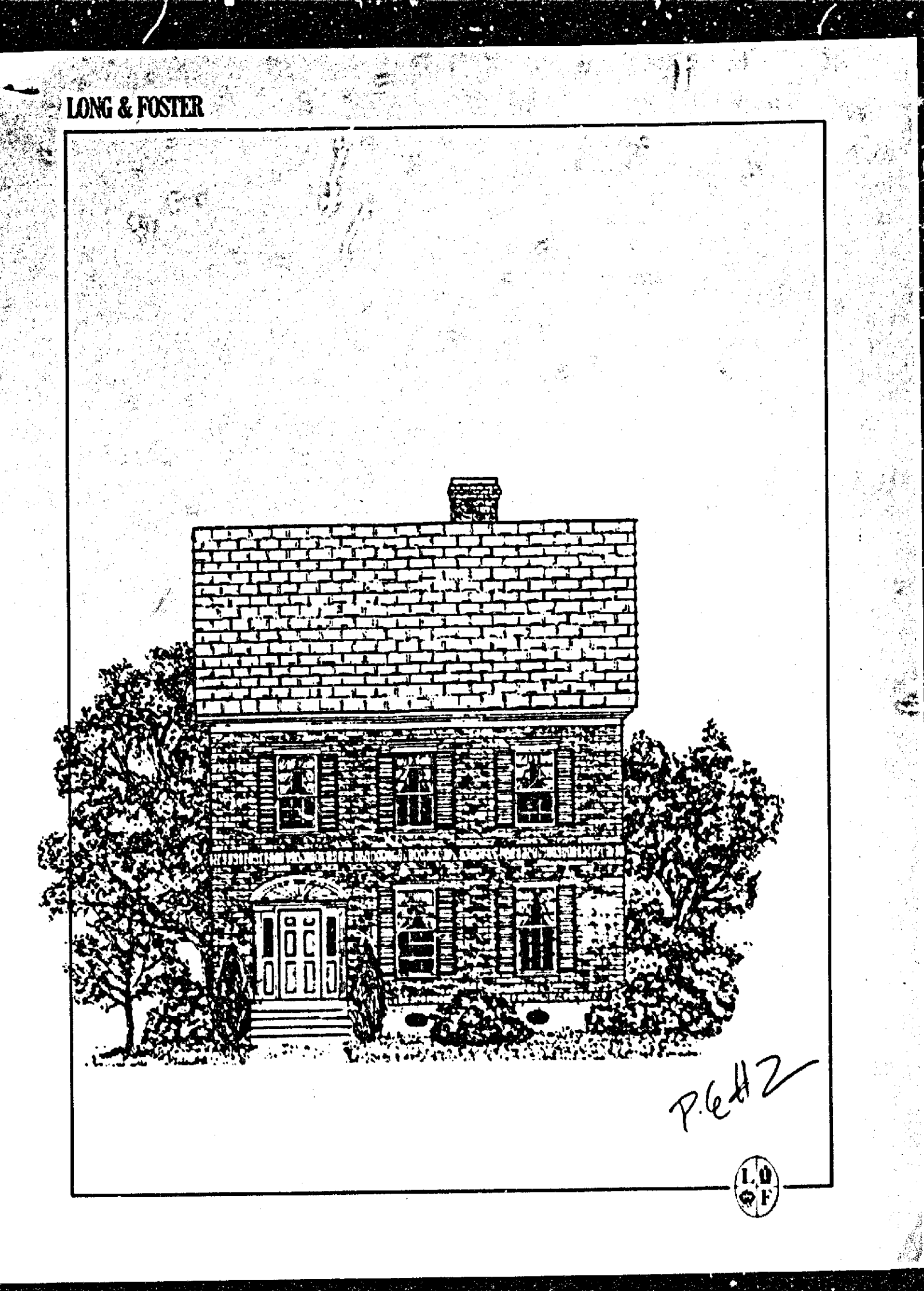


32'-0"

CERTIFICATE OF PUBLICATION  
 TOWSON, MD.  
 THIS IS TO CERTIFY that the amended advertisement was published in THE JEFFERSONIAN, a weekly newspaper printed and published in Towson, Baltimore County, Md., appearing on the date of July 27, 1989.  
 The advertisement was published in the 1989 edition of the paper published in Baltimore, THE JEFFERSONIAN.  
 The advertisement was published in the 1989 edition of the paper published in Baltimore, THE JEFFERSONIAN.  
 P013761  
 reg M31050  
 ca 90-52-SPH  
 price \$47.28  
 J. Robert Haines  
 ZONING COMMISSIONER  
 BALTIMORE COUNTY, MARYLAND

James Morris Siegel, et ux  
 Emerald Development Corporation  
 File

Law Offices  
 HALL, LEVY & MARINO, P.A.  
 SUITE 1012  
 TEN EAST BALTIMORE STREET  
 BALTIMORE, MARYLAND 21202  
 (301) 665-4400  
 TELEFAX (301) 752-0761  
 November 21, 1989  
 Ms. Ann M. Nastarowicz, Esquire  
 Deputy Zoning Commissioner  
 Baltimore County Office of  
 Planning & Zoning  
 County Office Building  
 111 W. Chesapeake Avenue  
 Towson, Maryland 21204  
 RE: Case No. 90-52-SPH  
 Petitioner: James Seigel, et ux  
 Petition for Special Hearing  
 and Zoning Variance  
 Dear Ms. Nastarowicz:  
 Enclosed please find an amended zoning plat for the above captioned case, which I thought was included in the package which I transmitted on October 11, 1989.  
 I have spoken with Lou DePazzo, Esquire and verified that he received a complete package on October 11, which consisted of the amended zoning plat, the landscape plan (which was shown on the amended zoning plat), the building elevation containing specific construction specifications, and a brick sample.  
 If I can be of any further assistance or you require anything further, please do not hesitate to contact me.  
 Sincerely,  
 Michael E. Marino  
 Michael E. Marino  
 MEM:vm  
 Encl.



BLOCK 28  
PLAT 1

PLAT No 3.

OF

**DUNDALK**AND RESUBDIVISION OF PART OF  
DUNDALK HIGHLANDS

BEING A DEVELOPMENT OF

**THE DUNDALK COMPANY**

DUNDALK - BALTIMORE CO., MD.

MAY 15, 1926

SCALE: 1" = 80 FT.

W. P. C.

ASS'T SEC.

*Peterson*  
3

FILED FOR RECORD WITH *Dele Agent*  
FROM *Beth Mary Hill Corp*  
TO *The Dundalk Co.*  
July 6<sup>th</sup> 1926  
W. P. C. Clerk

LEGEND  
Roads, Streets, Lanes and Reserved Sections are shown on this  
Plan for the purpose of description only and not for the purpose  
of calculation.  
The boundaries of this entire tract are shown by a dot and dash line thus  
The boundaries of streets and other highways, of lots and  
other parcels of land are shown by solid lines thus  
The boundaries of all SFL reservations except where they  
coincide with other boundaries are shown by short dash lines thus  
The location of various points are shown according to the system  
of coordinates established by the General Land Office Survey Commission  
of Baltimore City for example, 10000  
Lot numbers shown thus 4. Block numbers shown thus 5

LAYOUT DESIGNED BY  
THE ENGINEERING DEPARTMENT OF  
THE ROLAND PARK COMPANY

Correct: *R. P. C.*

Correct: *A. P. C.*

Approved for issue: *W. P. C.*

NOTE: Lots in Dundalk Highlands Resubdivided are as follows:  
Nos. 101 incl. 71 and 122, 123 to 148 incl. and 171 to 182 incl.

66 FT. RIGHT OF WAY

**BALTIMORE COUNTY ZONING PLANS ADVISORY COMMITTEE**

August 7, 1989

County Office Building  
111 W. Chesapeake Blvd.  
Baltimore, MD 21203

Michael Marino, Esquire  
Hall, Levy & Marino  
10 East Baltimore Street  
Baltimore, MD 21203

RE: Item No. 493, Case No. 90-22-SPH  
Petitioner: James Seigel, et al.  
Petition for Special Hearing and  
Petition for Zoning Variance

Dear Mr. Marino:

The Zoning Plans Advisory Committee has reviewed the plans submitted with the above referenced petition. The following comments are not intended to indicate the appropriateness of the zoning action requested, but to assure that all parties are made aware of plans or problems with regard to the development plans that may have a bearing on this case. Director of Planning may file a written report with the Zoning Commission with recommendations as to the suitability of the requested zoning.

Enclosed are all comments submitted from the members of the Committee at this time that offer or request information on your petition. If similar comments from the remaining members are received, I will forward them to you. Otherwise, any comment that is not informative will be placed in the hearing file. This petition was accepted for filing on the date of the enclosed filing certificate and a hearing scheduled accordingly.

IT WOULD BE APPRECIATED IF YOU WOULD RETURN YOUR WRITTEN COMMENTS TO THE OFFICE. ATTENTION JULIA WINIARSKI. IF YOU HAVE ANY QUESTIONS REGARDING THIS, PLEASE CONTACT HER AT 897-3391.

Very truly yours,  
*James E. Dyer*  
James E. Dyer  
Chairman  
Zoning Plans Advisory Committee

JED:jw  
Enclosures  
cc: Mr. & Mrs. James Seigel  
Emerald Development Corp.

Baltimore County  
Zoning Commissioner  
Office of Planning & Zoning  
100 N. E. Street  
Baltimore, MD 21204  
(301) 837-5553

David P. Haines  
Zoning Commissioner

RE: Property Owner: EMERALD DEVELOP. CORP.  
Location: SW/S OF DUNGLON ROAD, 20' SE OF CENTER-LINE OF MORNINGTON ROAD  
Item No.: 493 Zoning Agenda: JUNE 13, 1989

Gentlemen:

Pursuant to your request, the referenced property has been surveyed by this Bureau and the comments below are applicable and required to be corrected or incorporated into the final plans for the property.

5. The buildings and structures existing or proposed on the site shall comply with all applicable requirements of the National Fire Protection Association Standard No. 101 "Life Safety Code", 1988 edition prior to occupancy.

REVIEWER: *John J. Kelly* Noted and Approved  
Planning Group Fire Prevention Bureau  
Special Inspection Division

JK/KEE JUN 19 1989

Your petition has been received and accepted for filing this 14th day of June, 1989.

*J. Robert Haines*  
J. ROBERT HAINES  
ZONING COMMISSIONER

Received By:  
*James E. Dyer*  
Chairman  
Zoning Plans Advisory Committee

Petitioner: James Seigel, et al.  
Petitioner's Attorney: Michael Marino

Baltimore County  
Zoning Commissioner  
Office of Planning & Zoning  
100 N. E. Street  
Baltimore, Maryland 21204-2508  
(301) 837-5553

David P. Haines  
Zoning Commissioner

JUNE 14, 1989

J. Robert Haines  
Zoning Commissioner  
Office of Planning and Zoning  
Baltimore County Office Building  
Towson, MD 21204

RE: Property Owner: EMERALD DEVELOP. CORP.  
Location: SW/S OF DUNGLON ROAD, 20' SE OF CENTER-LINE OF MORNINGTON ROAD  
Item No.: 493 Zoning Agenda: JUNE 13, 1989

Gentlemen:

Pursuant to your request, the referenced property has been surveyed by this Bureau and the comments below are applicable and required to be corrected or incorporated into the final plans for the property.

5. The buildings and structures existing or proposed on the site shall comply with all applicable requirements of the National Fire Protection Association Standard No. 101 "Life Safety Code", 1988 edition prior to occupancy.

REVIEWER: *John J. Kelly* Noted and Approved  
Planning Group Fire Prevention Bureau  
Special Inspection Division

JK/KEE JUN 19 1989

BALTIMORE COUNTY, MARYLAND  
INTEROFFICE CORRESPONDENCE

TO: Zoning Advisory Committee DATE: June 22, 1989

FROM: Robert M. Bowling, P.E.

RE: Zoning Advisory Committee Meeting for June 15, 1989

The Developers Engineering Division has reviewed the subject zoning item and we have no comments for Items 514, 517, 520, 521, 522, 524, 528, 529, 531, and 532.

For Item 511, the minimum parhandle width for one lot is 20 feet, not 10 feet as shown on the plan.

For Items 511, 516, and 533 the previous County Review Group Comments still apply.

For Item 519, all lots must have in-lot frontage to a public road.

For Item 530, comments attached.

*Robert M. Bowling*  
Robert M. Bowling, P.E., Chief  
Developers Engineering Division

7MB:ra  
Encl:

