

The South Carolina Conservation Bank Act: A Legislation and Implementation Analysis

Introduction: Defining the Legislation and its Progeny

The South Carolina Conservation Bank Act (the Act) passed the State General Assembly in April of 2002 and received state funding in 2004 enabling it to make its first grant awards in early 2005. If one considers that the passing of a piece of state legislation is truly an indication of the desires and support of a state's citizens, then the passing of the Act and the list of organizations supporting the Act is a showing of immediate concern for the future of South Carolina, its citizens, and its resources. The Act is an appropriate measure for the state to take in light of the enumerated statutory purposes and the scope of the legislation as it pertains to funding and implementation despite critics' claims of improper use of public funds and concern over possible encroachment on private property rights.

Stated in the broad, albeit accurate, terms the Act was passed as a means to maintain and improve quality of life in the state of South Carolina.¹ This purpose is directly reflected in the mission statement of the South Carolina Conservation Bank (the Bank) that was created by the Act. Its mission is "[t]o improve the quality of life in South Carolina through the conservation of significant natural resource lands, wetlands, historical properties, and archeological sites."² In order to carry out this purpose the Act established a continual funding source to be used for the acquisition of land interests from willing sellers.³ The creation of the Bank is the implementation tool for the Act's

¹ South Carolina Conservation Bank Act, S.C. Code Ann. §48-59-20 (2003).

² <http://scbank.sc.gov/> (last visited April 2, 2005).

³ S.C. Code Ann. §48-59-20(7) (2003).

purpose in that it is the entity to which other qualified entities must apply for funds in making land interest acquisitions.⁴

Nowhere in the Act is the Bank given the power to hold interests in land. The Bank is non-regulatory and does not make recommendations as to what land interests should be pursued. The program is entirely voluntary and relies on qualified entities or, according to the term of art the Act uses, “eligible trust fund recipients” to effectuate the means to the end. That is to say that the means are the land interests that are acquired for conservation purposes and the end is the maintaining and improving of quality of life.

In creating the Act, the General Assembly found that the rapid growth and development experienced in South Carolina serves as both a benefit and a boon. The benefit can be pegged to a growing economy, while the detriment to state citizens comes in the form of lost “forestlands, farmlands, wildlife habitats, outstanding natural areas, beaches, and public areas for outdoor recreation,” which in turn “has impacted the health of the state’s streams, rivers, wetlands, estuaries, and bays, all of which impacts the quality of life of the state’s current and future citizens” and could eventually negatively impact the state’s economy.⁵ The preservation of areas of both historical and archeological significance is also cited as being important in maintaining, if not improving, quality of life.⁶

In the sweeping purposes of the legislation lies a need for orderly development and balanced growth through the preservation of the aforementioned areas. This, in turn, is needed to limit the amount of negative impact the loss of these resources has on quality of life. Quality of life for both future and current citizens of the state demands further

⁴ *Id.* §48-59-50.

⁵ *Id.* §48-59-20(1).

⁶ *Id.* §48-59-20(2).

examination as it seems to stand alone as the sole impetus for the Act and is defined in general terms.

Understanding “Quality of Life”

According to the Act quality of life is, at least in part, based on the protection of certain types of land interests.

The protection of open space by acquisition of interests in real property from willing sellers is essential to ensure that the State continues to enjoy the benefits of wildlife habitats, forestlands, farmlands, parks, historical sites, and healthy streams, rivers, bays, and estuaries; for recreational purposes, for scientific study, for aesthetic appreciation, for protection of critical water resources, to maintain the state's position as an attractive location for visitors and new industry, and to preserve the opportunities of future generations to access and benefit from the existence of the state's outstanding natural and historical sites.⁷

This subsection seems to be the legislative definition of how to preserve and improve quality of life without ever defining what quality of life is. However, the specific mention of certain areas to focus on in the preservation process lends itself to a more clear understanding of quality of life and what it is that the General Assembly is trying to accomplish.

Quality of life as determined by the health of one's environment is easy enough to comprehend. Poor water quality affects the animals that live in the water as well as those that feed on and rely on aquatic organisms for a livelihood. Sediment pollution, or run-off from poorly managed lands, is responsible for the degradation of thousands of miles

⁷ *Id.* §48-59-20(5).

of streams in South Carolina.⁸ If controlling sediment run-off is one of the most effective ways to protect water sources from further degradation due to sediment run-off as well as pollution, then the protection of wetlands and establishing of riparian barriers around water sources becomes crucially important to the health of the state's waters and subsequently the health of its population.⁹

Better land management around water sources has other tangible benefits to quality of life that may not be as immediately apparent. For instance, the hurricane damage that many communities now face due to flooding and storm water run-off will only increase over time as urban areas continue to grow.¹⁰ In order to slow and even reverse this trend wetlands need protecting to keep them from being filled during development, and the areas that are developed must be worked with an eye to protecting permeable areas of land that can absorb the brunt of heavy rainfalls and upstream flooding.¹¹ According to the South Carolina Land Legacy Initiative (SCLLI), “[w]etlands and buffers act as sponges during storm events - absorbing large volumes of storm water runoff that are gradually released to streams and rivers – reducing peak flows and flooding.”¹² It is easy to see that quality of life under these scenarios may be diminished because it affects people in a tangible manner. It is the less quantifiable areas of a state citizen's quality of life that make this type of legislation less attractive to the individuals who want to see a return on their investment or want to know why public dollars should be spent on land conservation.

⁸ South Carolina Land Legacy Initiative, “Degradation of Aquatic Systems” para. 2.

⁹ *Id.*

¹⁰ *Id.* at “Flood Hazard Mitigation” para. 1.

¹¹ *Id.*

¹² *Id.*

The idea of preserving areas that provide for public access is attractive and may resonate with the citizens, but it also provides a powerful tool for argument in that the legislative language only requires the use of “ten percent of the monies credited to the trust fund during the preceding fiscal year for the acquisition of interests in land that provides public access.”¹³ Furthermore, the language of the Act allows this minimum amount earmarked for public access acquisition to be postponed. “To the extent the ten percent authorization required by this item is not met in any particular year, the balance must be carried over and used for acquisition of interests in land that provide public access in ensuing years.”¹⁴ In fact, the very end of this subsection could be interpreted to allow this seemingly minimum standard to be postponed indefinitely in that any carry-over will be applied to “ensuing years.”¹⁵

Despite this potentially disconcerting language the reality seems to be entirely different. Although the Bank has only made one round of grant awards, the initial outlook is favorable to those critics who focus on the ten percent language of the Act. Out of the roughly 25,000 acres of land interests acquired with the help of Bank funds about 23,000 of those acres provide some level of public access.¹⁶ While this figure is not in the monetary terms used by the Act, it serves as a more tangible notice to the Act’s detractors that the Bank fully intends to carry out its functions understanding that the Act is a product of the state citizens’ desire.

The minimum requirement for the making of grants for the acquisition of lands providing public access is somewhat tempered by the absolute requirement that lands

¹³ S.C. Code Ann. §48-59-70(L)(2).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Interview with Marvin Davant, Executive Director, South Carolina Conservation Bank, in Columbia, S.C. (Mar. 3, 2005).

acquired in fee simple through the use of Bank funds must provide for some public access.¹⁷ Here again the language of the statute leaves what some may call too much latitude in spending. The statute states that “public access, and use of the land must be permitted,” only to be qualified by, “as [is] reasonable and consistent with the conservation purposes for which the land was acquired.”¹⁸

As it stands the definition of public access and the idea of that which is “consistent with the conservation purposes for which the land was acquired”¹⁹ are open to debate. According to Marvin Davant, the Executive Director of the Bank, public access can be defined in very broad terms that are likely not the prevailing notion of what public access would truly entail. Public access comes in various forms to include everything from a full range of uses in which individuals could enjoy the land much as they would a state or national park.²⁰ The other end of the definition spectrum would only allow access for limited research by a select few or perhaps a school outing where a teacher takes some students on a field trip.²¹ Unless one of the qualified entities who hold a fee simple title manages the land for what most people would call public use such as hiking, hunting, fishing, or any other of a number of activities public access may be something that the public simply isn’t aware of. For instance, the aforementioned school group or research outing would have to approach the landowner to ask for permission to enter the land, and this would qualify the land as providing public access.²²

¹⁷ S.C. Code Ann. §48-59-80(K).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Davant, *supra* note 16.

²¹ *Id.*

²² *Id.*

If this concept of public access is considered in the context of promoting “the well-being and quality of life of our state’s citizens”²³ then quality of life truly takes on an abstract air that becomes more difficult to reconcile with the expenditure of taxpayer monies. Questions that are raised by this level of discretion in fund expenditure with regards to the public access requirement can be difficult to answer without a more clear understanding of how this legislation will improve quality of life for the state’s citizens.

It is also this type of question that raises concern over the use of taxpayer money to protect farmlands, especially when the protection comes in the form of a conservation easement sold on a family farm. Four out of the twelve grants were made by the Bank for the acquisition of conservation easements on three family farms and one working cattle farm.²⁴ Considering that all four of these grants were for the acquisition of conservation easements none of them fall within the language requiring public access. Since no public access is required one might wonder how it is that state citizens are benefited by this type of acquisition. A simple corollary to this question is why are public funds necessary to protect privately held lands from development?

In taking the second question first, it is notable that, according to the Bank, one of the family farms is listed as having been “in imminent danger of being developed.”²⁵ The answer to this question acts as a guide to answering the first question. The plight of the small farmer is of national concern because the cost of farming is far higher to the landowner than the cost of developing the land if it is favorably situated. Economics often do not allow one to do the right thing. However, economics is arguably the same motivation for not allowing taxpayer money to be a solution for the economic hardships

²³ S.C. Code Ann. §48-59-20(3).

²⁴ South Carolina Conservation Bank, Conservation Bank Successes.

²⁵ *Id.*

of an individual taxpayer. Without knowing the definitive answer as to what imminent danger of being developed is one can assume, using the broadest of possible scenarios, that the family farm in question could not be maintained as an open space without the financial assistance provided by a Bank grant. This deduction requires a too large leap of faith to presume the cost of the conservation easement can provide the necessary cash to keep the farm as is and in the hands of its current owners. However, the more likely scenario is that the cost of the conservation easement, if added to the selling price of the land if it were to be sold in fee simple to a developer, is the true value of the land, and the easement simply assures that the inevitable future developer-owner cannot mismanage the land in such a way as to significantly diminish its benefits.

It is this line of thinking that leads one to begin to understand why the preservation of small tracts of farmland can help with quality of life. The Act is not meant to be a check on development. The Bank is not opposed to development.²⁶ In fact the Bank encourages balanced, well thought-out development if the private landowner whose land is being considered for a grant so desires.²⁷ By allowing grants for the preservation of farmlands the Act allows private individuals the opportunity to restrict the manner in which the development takes place. Taken in the aggregate, this concept is a great benefit to the citizens of the state. Consider the earlier mentioned idea of improved water quality in the state's rivers and streams. If the conservation easements on small farms create those types of buffers that absorb storm water runoff and create protective barriers around different bodies of water then a more tangible quality of life benefit is realized.

²⁶ Davant, *supra* note 16.

²⁷ *Id.*

There are other more concrete ways to evaluate the use of taxpayer monies for the protection of farmlands and forested areas that may or may not offer any significant public access. According to data compiled by the SCLLI, “[m]ost of our current conservation programs were put in place when South Carolina was predominately a rural state . . . these programs were aimed at improving land management.”²⁸ South Carolina is becoming an urban state. “Between 1954 and 1992, farmland in the state dropped from 57.1 percent of all land to 23.2 percent of all land.”²⁹ This statistic, along with others of its kind, provides the economic impetus behind legislation designed to protect such land. For instance, 90 percent of all state farms are individual farms that also often act as the family/ owner’s retirement plan.³⁰ There is no farmland protection program available in the state, the agricultural business provides 460,000 jobs and \$35.7 billion in economic benefit to the state, forest related products are the state’s number one cash crop, and forestry is a huge manufacturing industry providing jobs to another 50,000 people.³¹ These are the types of figures that are difficult to ignore even if the immediate impact of them is not a part of one’s day-to-day life.

Consider these figures in conjunction with the rate of conversion from rural to urban lands and the fact that “every farm and forest tract is now within 50 miles of an urban area and therefore could be considered a target for development.”³² It is apparent that there is an enormous benefit to be derived from protecting farm and forest lands from uncontrolled development. The cost involved with the preservation of family owned

²⁸ S.C. Land Legacy Initiative, “The Driving Force: Permanent Conversion of Farmland and Forests to Urban Land” para. 1.

²⁹ *Id.* at “Salient facts.”

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at “Contributing Factor: A Distressed Agricultural Economy” para. 4.

farmlands far exceeds the financial ability of the private landowner. There are many reports of small family farms being held onto with the help of some other source of income separate from the running of the farm. Some of these farms are being sold in small increments as a means to generate revenue enough to support the remaining parcel as a farm.³³

An illustration of the type of pressures that farms, forest lands, and their owners are feeling can be found in information gathered through a collaborative effort between several government agencies, Clemson University, and the South Carolina Coastal Conservation League. The efforts of these groups resulted in a model of urban growth for the city of Charleston. The model shows the metropolitan area of Charleston increasing from 250 square miles in 1994 to 868 square miles in 2030.³⁴ Consider that this model is based on a growth rate of urban land areas increasing 5 percent for every 1 percent in population growth.³⁵ This is less than the rate of land consumption actually experienced between the years of 1973 and 1994.³⁶ If every tract of farm and forested land is already within 50 miles of an urban area, dare we ask what is to become of these open spaces in the years to come. The impact of the growth of metropolitan areas cannot be understated considering the wide distribution of these areas in South Carolina as well as those in neighboring states whose expansion will also directly affect the state, such as Charlotte in North Carolina and Savannah and Augusta in Georgia.

Other areas considered to impact quality of life that, upon initial inspection, are not as readily tied to tangible, economic benefits are found in the need to preserve

³³ *Id.* para. 2.

³⁴ *Id.* at “The Driving Force: Permanent Conversion of Farmland and Forests to Urban Land” para. 3.

³⁵ *Id.*

³⁶ *Id.*

“historical and archeological sites that embody the heritage and human habitation of the State.”³⁷ At first glance the need to preserve sites of this nature would normally be pegged to tourism dollars. Such a concrete ideal is generally not the case. Many of these sites in need of preservation are simply too local in nature. According to the South Carolina Land Legacy Initiative, “[m]any of these sites define our communities and give us a sense of place – necessary preconditions if we are to instill a sense of stewardship in people moving to our state and retain one among people with close ties here.”³⁸

Stewardship is not an unimportant concept when considering a benefit analysis of the Act. Although the term is not expressly incorporated in the legislative purposes the concept is implicit in the Act and is appropriate to use in determining the Act’s benefits. Using the stewardship language of the South Carolina Land Legacy Initiative, quoted above, as an aspect of quality of life in one must examine the benefits derived from creating a sense of stewardship in both current and future citizens of the state.

It is an easy task to foster pride in the natural resources one’s own state has to offer. The idea is simple in that the natural world is there for everyone. Certainly, there are areas that are not accessible because of ownership rights, but the fact that the ACE Basin is a part of South Carolina is a point of pride for many people. Outdoor recreation facilities have begun to see steady increases in their use.³⁹ State studies show that in 1999 people walked for exercise or pleasure over 341 million times compared to 176 million in 1990, resident bicyclers increased their trips to 62 million up from 39 million

³⁷ S.C. Code Ann. §48-59-20(2).

³⁸ S.C. Land Legacy Initiative, “Hunting Lands” para. 3.

³⁹ *Id.* at “Increasing Public Demand for Public Access to Open Space Parks and Recreation Land Hunting Lands” para. 2.

during the same time period, and birdwatchers almost quadrupled their activity to 202 million times in the same time frame.⁴⁰

“Demand for public access to open space is growing as the number of residents grows, as development overtakes previously available areas, and as people become more concerned about health, quality of life, and escapes from urban life.”⁴¹ As the public becomes more aware of the rate of urban growth and the corresponding loss of open spaces the demand for access to that which is left will only increase. Fostering a sense of stewardship in the natural resources of the state helps to create an educated public that will do their part in preserving land and promoting smart growth. It stands to reason that a developer has every bit as much of a reason to protect the land as it is from this very same land that they make their livelihoods. The idea of stewardship is one that should have a cumulative effect. With more land being protected comes more access to the protected lands. Therefore, the protected land will afford a growing population the continued benefits that either drew them to the state or keeps them in the state.

One aspect of development is that it can provide an economic benefit to any particular area’s residents. If development were to go unchecked or unregulated, then that very same development could be the death knell for the type of community that attracted the people and subsequently the development. If this line of thinking can be accepted it carries with it the question of balance. That is to say, how is it that the possible economic benefits of development, considered a need for many areas, can be balanced with maintaining an area’s attractiveness to its developers.

The Public Fund Argument

⁴⁰ *Id.*

⁴¹ *Id.*

While the Act has been widely supported across the state it has its detractors. One of whose main points of contention is over the use of taxpayer monies to fund an organization that places the state in a position of taking over the job of many not-for-profit organizations at a time when the state has a problem controlling its budget.⁴²

The basis of the argument is the fact that the Bank, at this point, is funded solely with public monies.⁴³ The legislative scheme for the funding of the Bank includes the creation of the South Carolina Conservation Bank Trust Fund (Trust) within the State Treasury that was established to hold all earnings created through the Trust as well as any monies derived from other sources.⁴⁴ The Act states, “[t]he trust fund may receive revenues from any source the General Assembly may provide by law and from governmental grants and private gifts and bequests.”⁴⁵ While this language allows the Bank to seek private contributions the primary source of funding is the public trust.⁴⁶ “[T]wenty-five cents of the one dollar thirty-cent state deed recording fee must be credited to the South Carolina Conservation Bank Trust Fund.”⁴⁷

Public funding of this sort allows for a steady cash flow to the Bank. The Bank currently receives a check for around \$1.2 million each month from the Department of Revenue.⁴⁸ This money is dispersed to the Bank after the Department of Revenue collects the deed recording fees from all counties around the state and tallies the totals for other dispersments to be made out of the deed recording fees.⁴⁹ It is important to note

⁴² Brian Hicks, *Conservation Bank Keeping Land Untouched AH: Population Growth and Real Estate Development Threaten Nature Tracts*, Post and Courier, Feb. 20, 2005, at 1A.

⁴³ Davant, *supra* note 16.

⁴⁴ S.C. Code Ann. §48-59-60.

⁴⁵ *Id.*

⁴⁶ Davant, *supra* note 16.

⁴⁷ S.C. Code Ann. §12-24-95.

⁴⁸ Davant, *supra* note 16.

⁴⁹ *Id.*

that no new tax or fee has been created, and these funds will be used with matching funds provided by the land interest holders.⁵⁰ This steady cash flow is essential to the continued operation and success of the Bank.

According to a report compiled by two students at Texas A&M University, the deed recording fee, or real estate transfer tax as it is more commonly known, has been authorized as a source of funding for conservation purposes in about thirteen states around the nation.⁵¹ It is considered to be “an appropriate source of revenue for park acquisition and conservation because development often decreases habitat and recreational opportunities, while at the same time it creates a need for more recreational areas.”⁵² Looking backwards at the origination of monies from the deed recording fees a seller who may have to pay the fee is justified in doing so because they have experienced the benefits of nearby open spaces and therefore should contribute to their restoration prior to selling.⁵³ However, the buyer can also be justified in paying the fee because he or she will realize the immediate benefit of the open spaces and thus payment of a fee can be viewed much the same as an initiation fee at a club which allows the use and enjoyment of the club’s facilities.⁵⁴ Whether the fee is supposed to be paid by the buyer or the seller is of little consequence considering that it would likely be negotiated as part of a sales transaction price.⁵⁵ The reasoning behind the use of the deed recording fee as the source of public funding for the Trust should alleviate some of the concern over the

⁵⁰ S.C. Land Legacy Initiative at “The South Carolina Land Conservation Bank Act” para. 1.

⁵¹ Jamie Rae Walker & John L. Crompton, *A Review of Real Estate Transfer Tax Legislation Enacted by 13 States and 3 Local Areas to Fund Parks and Conservation*, at 2 (2005) (cited work “[s]ubmitted exclusively for publication consideration to the *Programs that Work* section of the *Journal of Park and Recreation Administration*).

⁵² *Id.* at 5.

⁵³ *Id.* at 7.

⁵⁴ *Id.*

⁵⁵ *Id.*

use of taxpayer money for conservation efforts in preserving open spaces. “The general public invested in creating these spaces; financial gain accrues to private property owners from that investment; so the [deed recording fee] recaptures some of that private benefit for the general welfare accruing from the public’s investment in parks and open spaces.”⁵⁶

The need for public funds becomes apparent in that there are thirty-four organizations that operate as land trusts around the state of South Carolina.⁵⁷ While some of these organizations are state affiliated the majority of them are private not-for-profit groups that rely solely on private donations to continue their work as land preservation organizations. Furthermore, the number of land trusts operating in state does not take into account the number of other private not-for-profits, not operating as land trusts but rather operating in a conservationist manner. All of this is to say that any private funds that might be available to the Bank are assumed to be going into other, more local organizations.⁵⁸

Other possible sources of funding from the private sector may come from some of the larger foundations such as the Turner Foundation.⁵⁹ This is the type of source in which the Executive Director of the Bank sees potential. Considering the Bank employs only one individual and the grant writing process is generally long, involved, and often requires some expertise, it is fair to say that the Bank will hold off pursuing these types of large foundation grants until the Bank has made more awards. After more awards have

⁵⁶ *Id.* at 6.

⁵⁷ South Carolina Land Trust Network (chart).

⁵⁸ Davant, *supra* note 16.

⁵⁹ *Id.*

been made the success of the Bank can better be judged. It is often success that the larger, private foundations rely on to evaluate the good that their money would be doing.

Another source of funding that the Act allows is governmental grants.⁶⁰ This is another source that Mr. Davant would like to see utilized, although it too requires preparing lengthy grant proposals.⁶¹ Similar to private foundation grants, government grants are not awarded without a showing of past success that would serve as an indicator of future success. As Mr. Davant says, there are more people seeking federal monies than there are dollars available for giving.⁶² The Bank does not want to waste time or limited manpower seeking funds that would more than likely not materialize until the Bank has had a chance to prove its worth in the conservation arena.⁶³ With this said, the Act has made allowances for the Bank to seek alternate sources of funding beyond that which is generated by the deed recording fees, and the Bank has every intention of pursuing those alternate sources.⁶⁴

The fact remains that the Bank currently and solely is funded by taxpayer money giving the Bank's detractors an easy point to argue. *The Post and Courier* reports that, "[o]pponents say the government should not use taxpayer money to take private property off the tax rolls in lean budget times."⁶⁵ These same opponents take this argument a step further in claiming that South Carolina has taken over a role that is better left to not-for-profit organizations such as the many land trusts operating around the state.⁶⁶ Any

⁶⁰ S.C. Code Ann. §48-59-60.

⁶¹ Davant, *supra* note 16.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ S.C. Code Ann. §48-59-60; Davant, *supra* note 16.

⁶⁵ Hicks, *supra* note 42.

⁶⁶ *Id.*

legislation that seeks to appropriate taxpayer money must be closely scrutinized to assure funds are properly used.

The Act was written with safeguards against irresponsible spending within the Bank and in the awards it makes as well as with regards to the funding from the deed recording fees. First and foremost the Bank may only operate as a bank. All interests in lands acquired as a result of the Bank making an award must be held by an eligible trust fund recipient.⁶⁷ According to the Act, “[t]he bank may not hold or possess any interest in land or other interest in real property, except for mortgage interests as security for loans made from the trust fund . . . , and leasehold interests in office space secured for bank operations and staff.”⁶⁸ Eligible trust fund recipients include state agencies, “which own and manage land for the land’s natural resource, historical, and outdoor recreation values,” as well as any “not-for-profit charitable corporation or trust authorized to do business in this State whose principal activity is the acquisition and management of interests in land for conservation or historic preservation purposes.”⁶⁹

The definition of an eligible trust fund recipient is important in the context of a discussion concerning the propriety of using public money to fund the Bank. Considering that state agencies may seek awards from Bank funds to continue their land preservation activities one must consider the argument that taxpayer monies are being used to further taxpayer interests. After all, the Bank and its implementing legislation are being scrutinized whereas the South Carolina Department of Natural Resources (SCDNR) is not and yet the SCDNR, the Forestry Commission, the Department of Parks, Recreation, and Tourism, and any state municipality or agency thereof are all considered

⁶⁷ S.C. Code Ann. §48-59-80(A).

⁶⁸ *Id.* §48-59-80(B).

⁶⁹ *Id.* §48-59-30(4)(a) and (c).

eligible trust fund recipients.⁷⁰ Many of the public funds being spent are being done so through state agencies that must submit to an annual audit report for the state.

The same auditing procedure that is designed to make state agencies accountable for the funds they expend applies to the Bank and its operations.⁷¹ The legislative scheme requires the Bank to “have an annual audit of the Conservation Bank and Conservation Bank Trust Fund conducted by outside independent certified public accountants and submitted to the Governor, Lieutenant Governor, and General Assembly.”⁷² This audit provides yet another check on the Bank and its expenditures. The “outside independent certified public accountants” mentioned in the statute come from a pre-approved list of accountants that the state supplies to those agencies required to comply with a similar audit process.⁷³ Furthermore, “the accounting of trust fund receipts and expenditures required [by the statute] shall be part of this annual audit.”⁷⁴

Other checks on spending are found throughout the Act. In order to eliminate any question of impropriety on the part of the Bank’s board members in charge of reviewing applications and making grants the Act has a comprehensive recusal provision.⁷⁵ Board members are found to have conflicts of interest and therefore must recuse themselves from voting for awards when the land interest sought is owned or controlled by the board member or anyone in the board member’s immediate family.⁷⁶ Ownership or control includes a board member’s involvement in any capacity in any organization that has an

⁷⁰ *Id.* §48-59-30(4)(a) and (b).

⁷¹ *Id.* §48-59-50(B)(4).

⁷² *Id.*

⁷³ Davant, *supra* note 16.

⁷⁴ S.C. Code Ann. §48-59-50(B)(4).

⁷⁵ *Id.* §48-59-40(C).

⁷⁶ *Id.* §(1).

interest in the land in question.⁷⁷ Conflicts also pertain to interests in any lands contiguous to the lands being sought for acquisition as well as involvement in the eligible trust fund recipient who is making the application.⁷⁸ Furthermore, the recusal provision is to be read in conjunction with, and not in lieu of, all applicable rules regarding the ethics of public officers.⁷⁹

Another one of the more significant pieces of the legislation to be noted is that all operating expenses of the Bank must be paid out of the Trust.⁸⁰ The significance of this provision lies in the idea that even though a new state agency, the Bank, has been created it requires no further appropriations for its operation. Unlike most state agencies the Bank must not only use Trust funds for carrying out its purpose it must also use these funds to maintain the infrastructure required to operate as an agency rather than relying on the annual state budget.

With this said, the Act also provides for emergency measures with which a state budget crises can be addressed.⁸¹ The relevant language provides,

In a fiscal year when the General Assembly in the annual general appropriations act provides less appropriations than what was provided for the previous year to at least one-half of the state agencies or departments contained therein the act or in any year when the Budget and Control Board orders across the board cuts to state agencies and departments in the manner provided by law, no further transfer of deed recording fees or

⁷⁷ *Id.*

⁷⁸ *Id.* §§(2) and (3).

⁷⁹ *Id.* §(3).

⁸⁰ *Id.* §48-59-50(D).

⁸¹ *Id.* §48-59-75.

other appropriated funds, state or local, may be credited to the trust fund for the fiscal year or balance of the fiscal year.⁸²

The importance of this language is the way it directly addresses the Act's detractors who focus their complaints on the expenditure of money from the public trust as well as the use of this "money to take private property off tax rolls in lean budget times."⁸³ Property affected by Bank action is not necessarily being taken off tax rolls considering that roughly half of the grant money awarded went towards the purchase of conservation easements rather than fee simple properties.⁸⁴

The importance of this piece of the legislation and funding in general did not go unnoticed by the Bank. Prior to its receiving any funding from the state the Bank sought the State Attorney General's opinion for clarification regarding all funds accruing to the Bank.⁸⁵ The essence of the opinion sought was to assure that the Fund would begin seeing growth based on deposits derived from the deed recording fee.⁸⁶ The seeking of such an opinion may seem redundant in light of the plain language of the Act, however §48-59-75, quoted above, gave the Bank enough reason to consider the possibility that it was inserted as a potential means for the Act's opponents to withhold funding. The opinion was basically sought as a political tool to further legitimize an already legitimate state agency's actions.⁸⁷

The opinion established that "beginning July 1, 2004 the Bank should begin accruing funds unless and until the Budget and Control Board acts to cut funding across

⁸² *Id.*

⁸³ Hicks, *supra* note 42.

⁸⁴ S.C. Conservation Bank, Conservation Bank Successes.

⁸⁵ 2004 S.C. Att'y Gen. Rep. 439322, 2004 WL 439322 (S.C.A.G.).

⁸⁶ *Id.*

⁸⁷ Davant, *supra* note 16.

the board after such time or unless or until the Legislature makes the described budget cuts [stated in §48-59-75] beginning in the 2005-2006 budget.”⁸⁸ Although the opinion seems to state the obvious, within its language is implied that the statutory safety net for a potential overextended state budget is just that and cannot be used as a means to deprive the Bank of its funding.

Other statutory safeguards against the misappropriation of funds are found in the restrictions placed on the use of grant awards by eligible trust fund recipients.⁸⁹ Funds may only be used for the acquisition of interests in land in fee simple or in a conservation easement.⁹⁰ Trust funds dispersed as awards cannot be used to support the recipients’ operating expenses nor may they be used for land interest maintenance and management.⁹¹ A small but effective safeguard to these provisions demands that trust funds only be paid out at the closing of a land interest acquisition.⁹² In limiting when trust funds may be paid out the legislature has effectively guaranteed that money awards are used to pay for the real estate interest by having the money go directly to the seller of the land interest. This provision also necessitates that the Bank will be a party, albeit a disinterested third party, to all transactions for which grants have been approved, providing yet another layer of fiscal monitoring.

The General Assembly recognized that public funds, via the deed recording fees, are likely to be the lone source of financing for the Bank and that it probably will continue to be the primary source of funds for the bank. The General Assembly, in all likelihood, recognized this would be a source of contention for the Act’s detractors,

⁸⁸ 2004 WL 439322 at 4.

⁸⁹ S.C. Code Ann. §48-59-110.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

therefore they wrote in certain financial criteria to be considered by the Bank when making awards.⁹³ The primary focus of the financial criteria is to assure value for dollars spent.⁹⁴ Language of the Act dictates that when making an application for an award the eligible recipient should demonstrate “the degree to which the proposal presents a unique value opportunity in that it protects land at a reasonable cost.”⁹⁵ Furthermore the application should demonstrate the degree to which the opportunity leverages any potential Bank award by including any in-kind assets, services, or additional funding from other sources be they governmental or private.⁹⁶ With this said matching funds are not a requirement to receive an award, but in so far as the legislative scheme is concerned, they are encouraged and should be weighed appropriately when evaluating an application.⁹⁷

The Bank has used the Act’s language by including financial criteria as one of the three main areas of consideration when making grant awards.⁹⁸ Evaluative financial criteria comprises of 28% of the Bank’s consideration.⁹⁹ The focus of these criteria is the extent “to which the proposal leverages trust funds by including funding or in-kind assets or services” derived from other sources, whatever they may be.¹⁰⁰

Separate financial criteria enumerated in the Act requires consideration be given to applicants who have exhausted other possible avenues for preservation of the land interest in question.¹⁰¹ The pertinent language requires the Bank to consider “the degree

⁹³ *Id.* §48-59-70(E).

⁹⁴ *Id.*

⁹⁵ *Id.* §(1).

⁹⁶ *Id.* §§(2) and (3).

⁹⁷ *Id.* §(K).

⁹⁸ S.C. Conservation Bank, South Carolina Conservation Bank Evaluation Criteria.

⁹⁹ S.C. Conservation Bank, SCC Bank Criteria Scoring Sheet.

¹⁰⁰ S.C. Conservation Bank, *supra* note 98 at 2, sec. B.

¹⁰¹ S.C. Code Ann. §48-59-70 (E)(5).

to which other conservation incentives and means of conservation, such as donated conservation easements or participation in other governmental programs, have been explored, applied for, secured, or exhausted.”¹⁰² By recognizing the limited resources of the Bank the General Assembly, through the Act, implicitly requires the Bank to encourage eligible trust fund recipients to not only seek funding elsewhere but to explore other options and opportunities in their conservation efforts with regards to any particular land interest.

Another point set forth in the Act to be considered by the Bank when reviewing applications that is not directly related to funding but tied to the concept of value and directly relevant to the appropriateness of making a particular grant award is a showing of ability and qualifications of the eligible recipient to manage the land interest that is sought.¹⁰³ Whether the land interest is a conservation easement or a fee simple title the eligible recipient “must demonstrate both the expertise and financial resources to manage the land for the purposes set forth in the application.”¹⁰⁴ If a conservation easement is sought the ability to enforce the easement must also be set forth.¹⁰⁵

The last sentence of this provision implies the extent to which the applications must comply with the ability to maintain the land interest. “The board shall evaluate each proposal to determine the qualifications of the proposed managing party and to determine whether the proposed management is consistent with the purposes of the bank and the purposes set forth in the application.”¹⁰⁶ The words, “proposed management” imply that the application must already have a plan in place for the management of the property.

¹⁰² *Id.*

¹⁰³ *Id.* §(H).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

Although not specifically mandated in the Act this is a provision the Bank has included as part of the application to be submitted by the eligible recipient.¹⁰⁷ The importance of these requirements is tied to sound fiscal monitoring. The Bank realizes that as a recently formed state agency in times of tight budgetary constraints it must employ these types of safeguards against any possible financial mismanagement if it is to win over its detractors and remain in existence.¹⁰⁸ By creating a bank that evaluates rather than holds land interests the Act creates more value for the Trust in that preexisting entities that already have the expertise in land management are left to their jobs allowing the Bank the luxury of not having to expend valuable resources in becoming a land management expert.¹⁰⁹

Private Property Rights Argument

An equally motivating point of contention with the Act comes from private property rights groups who have consistently been the loudest voice in opposing the Bank and the backing legislation.¹¹⁰ The common complaint from this group of detractors is in the perception that the Act will somehow negatively impact private land ownership rights.¹¹¹

The basic argument is that the Act will somehow be used to diminish property rights held by private landowners.¹¹² While this argument is an important one it is simply not based in the reality of the legislative language as it pertains to the creation and continued existence of the Bank. The Act is very clear in making all Bank awards a matter of public concern, thereby taking away possible subversive motives to be had in a

¹⁰⁷ <http://scbank.sc.gov/FundingAppDoc03.pdf>, No. 6, sec. 3, at 2 (last visited April 6, 2005).

¹⁰⁸ Davant, *supra* note 16.

¹⁰⁹ Walker & Crompton, *supra* note 51 at 12.

¹¹⁰ Davant, *supra* note 16.

¹¹¹ *Id.*

¹¹² *Id.*

property transaction. Not only must public hearings be held prior to the making of any grant awards, but all interested parties to include contiguous land owners must have the opportunity to be heard.¹¹³

While this small measure doesn't directly address the complaint of diminished property rights it does create a forum for those opposed to particular land interest acquisitions to voice concern on any number of issues that may arise as a result of the acquisition. The following language is repeated time and again on the Bank's website as well as by its Executive Director and other proponents of the Act. It is a reflection of the intentions behind the Act and is important to remember when evaluating its impact on individual property rights.

The beauty of this program is that it simultaneously protects natural resources and supports individual property rights. Landowners who wish to participate may sell property outright or sell conservation easements and retain traditional use of the land. Only willing landowners will participate in this program. No one can be forced to sell land or provide easements.¹¹⁴

This type of language is reflected in the Act in a number of sections all written in a manner so as to specifically eliminate any encroachment on private landowners' rights. For example, before a qualified entity may even apply for a grant they must notify the landowner, whose land is the subject of interest, in writing of their interest in retaining separate legal counsel, appraisal services, and any other professional advice they may

¹¹³ S.C. Code Ann. §48-59-70(A).

¹¹⁴ <http://scbank.sc.gov/history.htm> (last visited April 6, 2005).

want.¹¹⁵ This writing must also set forth the terms of the conveyance with particular attention paid to the permanence of the transaction.¹¹⁶ This notice requirement establishes that the landowner and the qualified entity seeking to acquire the land interest must be in full understanding of one another prior to any Bank review of an application concerning the making of an award.

The aforementioned permanence of a transaction is slightly tempered in favor of the private landowner who chooses to sell a conservation easement rather than the whole fee simple. This type of landowner has the potential to reacquire the interest effectively extinguishing the easement if certain criteria are met.¹¹⁷ If the holder of the fee simple title to a property from which a conservation easement was acquired “determines that the conservation easement no longer exhibits the characteristics that qualified it for acquisition with trust funds” then the fee simple owner may institute proceedings for the reacquisition of the easement.¹¹⁸ The Bank board would have to approve this deal and the fee simple owner would have to purchase the easement at the current fair market value.¹¹⁹ If the board makes a decision contrary to the owner’s belief the Act provides for a contested appeal to the Administrative Law Judge Division.¹²⁰ This provision is not only available to the landowner who chooses to sell the conservation easement it is available to any successors-in-interest for the property in question.¹²¹ By providing this type of safety net for the land owner the Act provides continued protection for the landowner’s property rights and interests beyond the initial transaction.

¹¹⁵ S.C. Code Ann. §48-59-70(B)(2).

¹¹⁶ *Id.* §(B)(1).

¹¹⁷ *Id.* §(G)(1).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

Another pertinent provision in the Act in the area of property rights protection states that “[f]unds from the trust fund may not be used to acquire interests in lands or other interests in real property through the exercise of any power of eminent domain or condemnation proceeding.”¹²² This provision applies to those eligible trust fund recipients who are municipalities of the state. This provision is given further weight in a subsequent section of the code requiring “an affirmative two-thirds vote of the total membership of both the House of Representatives and the Senate” before “Section 48-59-90 may be repealed, amended, or otherwise modified.”¹²³ This heightened repeal or amendment requirement only applies to the section stating the requirement and the section it directly addresses, consequently adding another layer of protection for the landowners.¹²⁴ By disallowing the use of the Fund for the acquisition of lands that have been subject to the power of eminent domain or condemnation the Bank could not be a party to any forced land sales that would diminish property rights of a private landowner. This provision is specifically reflected in the earlier mentioned statement of the Bank in that “[n]o one can be forced to sell land or provide easements.”¹²⁵

Similar to concerns over misuse of the powers of eminent domain and condemnation is the Act’s limitations on the acquisition of land interests that have been subject to downzoning. Downzoning is a relatively new term of art used to describe lands that have been subject to a more restrictive zoning ordinance.¹²⁶ Patterns indicative of downzoning involve both the prohibition of commercial use as well as a reduction in

¹²² *Id.* §48-59-90.

¹²³ *Id.* §48-59-120.

¹²⁴ *Id.*

¹²⁵ <http://scbank.sc.gov/history.htm> (last visited April 6, 2005).

¹²⁶ Interview with Bachman S. Smith III, Attorney with Haynsworth Sinkler Boyd, P.A., on Sullivan’s Island, S.C. (Feb. 26, 2005).

density.¹²⁷ It is the reduction in density that causes the property rights advocates the most concern.¹²⁸ If a land owner wants to sell his or her land for top dollar they will want to sell to a developer interested in a high density development or building more houses per acre. More houses per acre results in more money per acre for the landowner and less open space. Private property rights advocates argue that property that is downzoned negatively impacts the value of the property subject to the downzoning as well as neighboring properties.¹²⁹ This is due to the inability of area landowners to sell for the top dollar that higher density housing offers.¹³⁰ Regardless of whether downzoning diminishes the value of property the Act addresses the concern. The Act does not allow the use of Trust money in the acquisition of land that has been downzoned within the preceding three years without the property owner's consent.¹³¹

The final layer of protection for the private landowner's property rights comes in the last section of the Act read in conjunction with the South Carolina Conservation Easement Act of 1991.¹³² The final section of the Act mandates that when the Fund is used to purchase an easement the easement is the controlling legal document.¹³³ The Act reads, "[i]f any inconsistencies or ambiguities arise between the provisions of this chapter and the terms and conditions of a conservation easement purchased with trust funds, the terms and conditions of the conservation easement must prevail."¹³⁴ The essence of this provision is that the landowner holding fee simple title to the land from which an easement is purchased controls the extent of the easement. As a willing seller the

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ S.C. Code Ann. §48-59-70(O)(1).

¹³² *Id.* §27-8-10.

¹³³ *Id.* §48-59-140.

¹³⁴ *Id.*

landowner determines what he or she is willing to sell. Of course, to qualify for a grant award the eligible recipient must work with the land owner to assure that the easement being purchased adequately conforms to the purposes of the Act.¹³⁵ If it does not then no grant award will be made.

A sundown provision found in section 7 of the Act provides for the automatic repeal of the legislation that created the Bank on July 1, 2013.¹³⁶ Of course, the Act may be reenacted or extended by the General Assembly.¹³⁷ If the Fund still has money enough to maintain operations the Bank may continue to operate three more years until July 1, 2016.¹³⁸ If there are any monies left in the Fund on July 1, 2016 the balance will revert to the State's general fund.¹³⁹ A ten-year sundown provision provides the necessary assurance to the Bank's opponents that the Bank must perform as expected if there is any hope of its continued existence beyond the ten-year window.

Conclusion: Success

“The South Carolina Conservation Bank has provided a fair and equitable method to preserve our state's natural heritage while respecting private property rights and leveraging state fiscal resources.”¹⁴⁰ This language appropriately addresses both the public funds argument and the private property rights concerns that have been voiced by the Act's detractors. The Bank has just begun to fulfill the purposes as outlined in the Act. The first grant awards totaled nearly \$11.4 million for twelve different projects around the state including “family farms, large wetland tracts, a revolutionary

¹³⁵ *Id.*

¹³⁶ S.C. Code Ann. §§ 48-59-10 to 140 at sec. (7).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ S.C. Conservation Bank, Conservation Bank Successes.

battleground site, critical lands adjoining State Parks, urban greenways, large river front tracts and historical areas” comprising about 25,000 acres.¹⁴¹

The geographically diverse nature of the acquired land interests is testimony to the Bank board’s understanding of the political nature of its formation.¹⁴² If the Bank is to remain in the favor of those who created it and thereby continue to operate beyond the statutorily prescribed limits the Bank must recognize and demonstrate its recognition that the citizens of South Carolina are diverse. This diversity is reflected in the sweeping purpose of the act and its stated intention to not only maintain but improve the quality of life of both future and current citizens of the state.¹⁴³ By leaving the definition of quality of life open to broad interpretation the Act speaks directly to citizen diversity in that quality of life can be gauged on different ideals by different people.

¹⁴¹ *Id.*

¹⁴² Davant, *supra* note 16.

¹⁴³ S.C. Code Ann. §48-59-20.