

I. Introduction-

The demand for coastal property increases everyday. Due in large part to overall population growth, baby boomers looking to retire at the beach, and more people wanting to live where their only back neighbor will be the ocean or the marsh, demand for coastal property is booming. As the limited space along the beach runs low, more and more developers are looking to build in previously undeveloped areas. One such area includes many of the small marsh islands that dot the South Carolina and Georgia coast. The coastal development boom is no secret anywhere along the Atlantic seaboard, and Georgia and South Carolina are no different. The state governments, judiciaries, and environmental groups are well aware of the opportunities and challenges such development poses to the state's economic and environmental interests. Ideally the legislature and judiciary should seek to balance attractive short term economic gain, with environmental conservation/mitigation to ensure a beautiful, healthy environment that can subsist for generations to come.

This paper seeks to analyze the different approaches that the legislature and judiciary in South Carolina and Georgia are taking in striking such a balance. The paper begins by analyzing each state's laws/regulations and recent litigation independently and ends by comparing and contrasting each state's approach. Part I discusses the current state of coastal conservation and development in each state. Part II outlines some of the most important laws, regulations, and other programs in place in each state to protect the coastline. Part III summarizes some of the most recent litigation concerning development

of each state's coastline. Finally, part IV draws conclusions and comparisons between the two states.

I. GENERAL STATE OF COASTAL CONSERVATION EFFORTS IN SOUTH CAROLINA AND GEORGIA

South Carolina and Georgia are facing many of the same pressures to develop their neighboring coastlines. Developers are seeing money signs as the demand for coastal property rises, while conservationists, as well as ordinary citizens, are fighting to preserve the most precious areas of along the coast. As discussed in detail in Part III of this paper, the most recent battles between development and preservation have been waged over the tiny marsh islands that dot the coast of each state.

Along with the rest of the south east, South Carolina's population is growing rapidly, especially along the coast. Figures released by the U.S. Census Bureau in December of 2005 show that South Carolina's population has increased by 230,000 in the past five years, bringing the total state population to around 4.5 million.¹ The Bureau projects that South Carolina's population will be as high as 5.15 million in the next 25 years.² According to Michael Macfarlane of the South Carolina State Data Center Office of Research and Statistics, the majority of the population growth is attributable to people moving here, rather than births.⁴ David Wertan of Remax Professional Realty, whose regional sales have doubled in the last year, says people are lured to South Carolina by the beaches.⁵ Of course there is a limited amount of space, and the general population rise coupled with the "lure of the beaches" is a dangerous combination for coastal

¹ Yvonne Wenger, *State proves Irresistible to Folks Looking for a Place to Call Home*, The Post and Courier, December 23, 2005 at B1.

² *Id.*

⁴ *Id.*

⁵ *Id.*

preservation. Many of the areas along South Carolina's beaches are already fully developed. Thus, small undeveloped marsh islands are looking more and more attractive to developers. Nearly 4,000 marsh islands lie along the South Carolina coast. These islands were traditionally thought of as a "no man's land", inaccessible except by boat and with uncertain ownership.⁶ They make up an indispensable part of coastal South Carolina's ecosystem, as they serve as a buffer for the shore, and are also habitat for unusual plants and vital to 60 species of shellfish or fish.⁷ These marshes have been the subject of heated debate over the past few months, as the legislature struggled to draft protective regulations upon which environmental protection groups and land owners/developers could agree.

The Georgia coastline is another hot spot for development. Georgia's coastline is unique. While it is developing rapidly, it still has one of the least developed shorelines along the east coast. About two-thirds of the islands are state and national parks, wildlife refuges, research reserves, and heritage preserves.⁸ The Georgia coastline is also unique because of the endless salt marshes. "Georgia's coastline is only 100 miles long, yet its one-half million acres of salt marsh constitute nearly one-third of all the salt marshes of the eastern Atlantic states."⁹

With such bountiful coastline, Georgia is increasingly becoming a target for development. George Miners, a prominent local developer, observed that growth is inevitable, "People are becoming more aware of the South Georgia coast . . . baby

⁶ Bo Petersen, *Lawmakers Get Fresh Look at Marsh Islands; boat tour an effort to push new rules to govern development*, The Post and Courier, March 7, 2006 at <http://www.charleston.net/stories/?newsID=74417§ion=localnews>

⁷ *Id.*

⁸ http://sherpaguides.com/georgia/barrier_islands/natural_history/index.html

⁹ *Id.*

boomers, retirees, second homeowners, marsh-front property is a recent discovery. It wasn't desirable five or six years ago. Now people like it because they know they're never going to have a backyard neighbor."¹⁰ The coastal development boom is also driven by Georgia's overall population boom, including the coastal regions which are currently increasing population at a rate of 20% every 10 years.¹¹ This population growth is expected to increase with time, meaning that coastal Georgia's population will double in 35 years, with proportional increases in environmental impacts.¹²

The coast in both South Carolina and Georgia is proving to be a very hot market for new development. However, before humans discovered the delights of coastal living, many plant and animal species were already thriving in the unique coastal environment. In order to protect the sanctity of this environment both states have an extensive network of laws and regulations. Part II highlights some of the most important ones.

II. COASTAL CONSERVATION MEASURES

A. South Carolina

South Carolina has many laws, departments, and funds in place to protect the precious coastline. Some of the most important are: The Office of Ocean and Coastal Resource Management, The South Carolina Coastal Zone Management Act, The Beach Management Act, Adopt-A-Beach Program, and the South Carolina Beach Restoration and Improvement Fund. Each of these will be discussed in some detail below.

¹⁰ Stacy Shelton, *Splendor in the grass; Preservationists fret as fancy development comes to marsh*, The Atlanta Journal-Constitution, April 25, 2005, at 1E.

¹¹ Donald Stack, *The Interplay of Environmental, Land Use, and Zoning Laws for the Protection of Georgia Coastal Resources* (2005), at <http://www.stack-envirolaw.com>.

¹² *Id.*

1. The Office of Ocean and Coastal Resource Management, and The South Carolina Coastal Zone Management Act

The South Carolina Department of Health and Environmental Control Office of Ocean and Coastal Resource Management (OCRM) regulates activity within South Carolina's eight coastal counties and administers the South Carolina Coastal Zone Management Act (CZMA).¹³ The Coastal Zone Management Act's main focus is to protect coastal resources by requiring a permit to alter any critical area.¹⁵ Critical Areas are 1) coastal waters, 2) tidelands and 3) beaches and dunes.¹⁶ OCRM is responsible for setting critical area lines and making permitting decisions in accordance with the CZMA.¹⁷ In 2005 the South Carolina Supreme Court stated that in order to make permitting decisions OCRM must "consider the direct effects of a project in critical area" and "the extent to which long-range, *cumulative* effects of the project may result within the context of other possible development and the general character of the area."¹⁸

Under the Coastal Zone Management Act, OCRM must also develop, implement, and enforce a comprehensive coastal management program.¹⁹ OCRM must "provide a regulatory system which the department shall use in providing for the orderly and beneficial use of the critical areas."²⁰ Among other requirements, the plan should identify and evaluate present land uses and coastal resources, determine the present and potential conflict in uses of each coastal resources, establish guidelines for the use of coastal resources, designate areas of critical concern, provide a review process for the

¹³ Office of OCRM, at <http://www.scdhec.net/environment/ocrm/>

¹⁵ S.C. CODE ANN. REGS. 30-1 (2005)

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *S.C. Coastal Conservation League v. SCDHEC*, 363 S.C. 67 (2005 *S.C. Coastal Conservation League v. SCDHEC*, 363 S.C. 67 (2005). (emphasis added)

¹⁹ Office of OCRM Projects, at http://www.state.sc.us/scdah/hpDHEC_OCRMreview.htm

²⁰ S.C. CODE ANN. § 48-39-80 (2005)

management plan that includes local, state, and federal agencies, conduct studies to gauge the effectiveness of the plan, devise a streamlined permitting process, and consider nature-related uses for critical areas, such as habitat protection projects.²¹ The CZMA also requires the establishment of a Coastal Zone Management Appellate Panel. This panel is to serve as an advisory council to OCRM in making permitting decisions.²² The panel must have fourteen members, one from each of the eight coastal zone counties and six members from each congressional district.²³

2. Comprehensive Beach Management Plan

The Comprehensive Beach Management Plan requires OCRM to create a long-range plan for coastal South Carolina including; development of a data base of all pertinent information, beach/dune restoration and nourishment cost/benefit analysis, a beach plan to maximize public access and enjoyment while protecting the fragile environment.²⁴ The Beach Management plan also strives to increase public education and awareness through development of a public education program in collaboration with the South Carolina Educational Television Network. The Beach Management plan is just that, a plan, it is not a law enforced with discipline. Only when the plan is created and adopted is it authoritative.²⁵

3. Adopt a Beach Program

The “adopt a beach” program is a unique way to enhance public awareness about beach protection and get the public involved in actually carrying out protective

²¹ *Id.*

²² S.C. CODE ANN. § 48-39-40 (2005)

²³ *Id.*

²⁴ S.C. CODE ANN. § 48-39-320 (2005)

²⁵ *Id.*

measures. The purpose of the plan is to promote safe, clean, and litter-free beaches.²⁶ Through the program, private citizens or organizations may adopt a segment of the beach and control litter within that segment.²⁷ Participants are allowed to adopt any manageable size stretch along the beach and should strive to do an organized clean up of the entire area at least twice per year.²⁸ Participants are also encouraged to attract media attention to the program.²⁹

4. South Carolina Beach Restoration and Improvement Fund

Through the Beach Restoration and Improvement Fund the State of South Carolina will match local funding for beach restoration projects.³⁰ The Fund is a valuable resource because it enables the State to put money aside for improving beaches, instead of having to ask the General Assembly for more funds every time the need for beach improvement/restoration arises.³¹ The Fund's main purpose is to provide financial assistance in emergencies, such as after heavy storms, and to fund annual data collection on erosion rates and hazardous areas.³²

B. Georgia

Georgia also has many laws, departments, and a trust set up to protect the coastal environment. Some of the most important are: The Coastal Marshlands Protection Act,

²⁶ S.C. CODE ANN. § 48-39-85 (2005)

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ S.C. CODE ANN. § 48-40-30 (2005)

³¹ *Surplus, reserve funds to be spent; House Approval: Supplemental spending bills totaling nearly \$ 300 million passed in the House The Post and Courier, The Post and Courier, March 24, 1999*

³² S.C. CODE ANN. § 48-40-30 (2005)

The Shore Protection Act, The Georgia Coastal Management Act, and The Georgia Wetlands Trust Fund. These will be discussed in detail below.

1. Coastal Marshlands Protection Act-

The Coastal Marshlands Protection Act (CMPA) protects the coastal marshlands by requiring permits for structures, dredging, and filling, and by establishing the Coastal Marshlands Protection Committee (CMPC).³⁴ The CMPC evaluates proposed construction or development projects which might affect these areas and grants or denies permits for these projects based on their environmental impacts and the public interest.³⁵ Generally permits are only issued when the proposed project will not “harm or alter the natural flow of navigational waters; will not increase erosion, shoaling channels or create stagnant pools; and do not interfere with conservation of marine life, wildlife or other resources. Public notice procedures, local zoning regulations and notification of adjacent property owners may also apply.”³⁶ In passing the CMPA the Georgia legislature found that because coastal conservation is of such paramount importance that it should be overseen by the state, rather than at a local level. The legislative findings report states,

The General Assembly further finds that the coastal marshlands are a vital area of the state and are essential to maintain the health, safety, and welfare of all the citizens of the state. Therefore, the General Assembly declares that the management of the coastal marshlands has more than local significance, is of equal importance to all citizens of the state, is of state-wide concern, and consequently is properly a matter for regulation under the police

³⁴ GA. CODE ANN. § 12-5-280 (2006)

³⁵ GA. CODE ANN. § 12-5-260 (2006)

³⁶ ³⁶ Donald Stack, *The Interplay of Environmental, Land Use, and Zoning Laws for the Protection of Georgia Coastal Resources* (2005), at <http://www.stack-envirolaw.com>.

power of the state.³⁷

In 1980, a year after the act was passed, The Georgia Assistant Attorney General explained the statute as follows:

In general, the philosophy of the [Marshlands] Act and its implementation is that coastal marshlands are an area in which the public's interest is primary. . . . [A]ll marshlands are subject to the common law public trust and to the federal navigational servitude, guaranteeing public access and use. In addition, marshlands are now known to be of great ecological value. For those reasons, the guidelines for the issuance of permits provide that a permit will not be granted if it is deemed to be contrary to the public interest.³⁸

The CMPC, set up by the CMPA, has been at the center of much litigation in recent years. As discussed in more detail later in this paper, Environmental Groups have brought lawsuits challenging the CMPC's decision to issue certain permits to developers.

2. The Shore Protection Act

Another area of importance also under the watchful eye of the state is the shoreline. The Shore Protection Act establishes a shore protection committee to act as the permit issuing authority.³⁹ Much like the CMPC committee, the Shoreline Protection Committee may at its discretion “issue orders and grant, suspend, revoke, modify, extend, condition, or deny permits.”⁴⁰ The five person committee is made up of the commissioner of natural resources and at least three members from coastal counties.⁴¹

3. The Georgia Coastal Management Act

³⁷ GA. CODE ANN. § 12-5-281 (2006)

³⁸ Melissa Allen Heath, Note, *A Tidelands Trust for Georgia*, 17 Ga. L. Rev. 851 (1983)

³⁹ GA. CODE ANN. § 12-5-230 (2006)

⁴⁰ GA. CODE ANN. § 12-5-235 (2006)

⁴¹ GA. CODE ANN. § 12-5-230 (2006)

In passing the Coastal Management Act, Georgia's General Assembly found it necessary to create a state managing authority. The legislature declared, "activities and structures in the coastal area must be regulated to ensure that the values and functions of coastal waters and natural habitats are not impaired and to fulfill the responsibilities of each generation as public trustees of the coastal waters and habitats for succeeding generations."⁴² The act gives the Coastal Management department the power to:

- (1) To prepare and administer a Georgia coastal management program and to monitor and inform appropriate local, state, and federal agencies concerning enforcement of this part and all rules, regulations, and orders upon which the Georgia coastal management program is based;
- (2) To accept, expend, grant, and administer moneys that are available from persons or federal agencies to carry out the provisions of this part;
- (3) To conduct public hearings on the Georgia coastal management program or any actions taken under this part;
- (4) To concur or object to a certification of consistency filed by a person only in connection with an application for a federally administered permit and to concur or object to a determination of consistency filed by a federal agency in connection with a federal activity based on the policies of the Georgia coastal management program established pursuant to this part; provided, however, that if, prior to completion of review of a federally administered permit or federal activity under this part, the department receives notice of the denial of a state permit necessary for the activity, the department shall object to all certifications of consistency or determinations of consistency relating to the proposed activity filed by such person or federal agency; provided, further, that nothing in this part shall be construed to prevent the department from withdrawing such objection; and
- (5) To exercise all incidental powers necessary to carry out the purposes of this part.⁴³

The Georgia Coastal Management Act also requires the department to prepare a report for the Governor and other state officials every three years detailing its activities.⁴⁴

The report must include: "a summary of the effectiveness of the program, a survey of

⁴² GA. CODE ANN. § 12-5-320 (2006)

⁴³ GA. CODE ANN. § 12-5-323 (2006)

⁴⁴ *Id.*

user groups, and the department's opinion of the value of Georgia's continued participation in the program”⁴⁵

4. The Georgia Wetlands Trust Fund

The Georgia Wetlands Trust Fund (GWTF) was established in 1997 and was the first of its kind in the United States.⁴⁶ The trust collects funds from developers which are then used to help local partners, either a land trust or government entity, to acquire and permanently protect wetlands with high conservation value.⁴⁷ The contributing developers pay a fee into to the GWTF to satisfy their obligatory mitigation requirements under §404 of the Clean Water Act.⁴⁸ The GWTF therefore enables the administering organization, The Georgia Land Trust Service Center, or environmental agencies to invest the funds in the most precious areas in need of protection. The selection is done on a case-by-case basis which affords the land trust or agency much flexibility in where to concentrate the funds.⁴⁹ The site selection is overseen by the Corps and is based on a myriad of factors including:

the location of the wetlands to be preserved (preference is given to wetlands in the same river basin and physiographic province as the project), its conservation value (particularly in relation to the altered wetlands), its availability from a willing seller for a price at or below fair market value, and the potential for leveraging other funds. Wetlands with high conservation value include (but are not limited to) those with endangered species, or those that link two already-protected natural areas or buffer an existing natural area or those that would be used for environmental education or scientific research.⁵⁰

⁴⁵ *Id.*

⁴⁶ Georgia Wetlands Trust Fund, at www.gepinstitute.com

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

III. RECENT LEGAL DEVELOPMENTS IN COASTAL CONSERVATION IN SOUTH CAROLINA AND GEORGIA

A. South Carolina

The most recent environmental litigation in South Carolina was a challenge to a permit issued by OCRM to a private company to build a bridge over Wando River marshes to Park Island, located in the town of Mount Pleasant.⁵¹ The OCRM designated Park Island a “small” island and evaluated the permit application under the more rigorous Small Islands Regulation (Regulation 30-12(N)) instead of the traditional Transportation Regulation (Regulation 30-12(F)) which usually guides bridge permitting decisions.⁵² Even under the heightened requirements of the Small Island Regulation, OCRM granted the permit. Concerned environmentalist groups filed suit alleging, “Park Island was a small island and that the criteria for the grant of a permit for bridge access had not been met.”⁵³ The aforementioned Coastal Zone Appellate Panel approved the permit, the Circuit Court then revoked the permit. The S.C. Supreme Court subsequently reinstated the permit. The high court held the Small Island Regulations was invalid since the legislature did not define “small.”⁵⁴ The Supreme Court went on to hold that since the Small Island Regulations were invalid, the permit should have been evaluated under the more generous Transportation Projects standard.⁵⁵ The Supreme Court found that there was enough evidence to support the issuance of the permit under the Transportation Regulation.⁵⁶

⁵¹ [S.C. Coastal Conservation League v. S.C. Dep't of Health & Env'tl. Control, 363 S.C. 67 \(S.C. 2005\)](#)

⁵² *Id.* at 71

⁵³ *Id.* at 75

⁵⁴ *Id.* at 74

⁵⁵ *Id.*

⁵⁶ *Id.* at 77

In response to the South Carolina Supreme Court's declaration that the Small Island Regulation was void, the SC legislature passed new regulations to control development on small islands. The concerns underlying the new legislation are mainly:

South Carolina has several thousand coastal islands, including barrier islands, sea islands, back barrier islands and marsh hammocks. Almost all of these islands are surrounded by expanses of salt marsh, occasionally bordered by tidal creeks or rivers. Historically, few of these islands have been built upon or altered, and most have been protected by their remoteness and inaccessibility. In recent years, however, a trend toward greater potential for development of these islands has stimulated questions and concerns about the ecological significance of these islands. The South Carolina Department of Natural Resources conducted a field study of a number of non-barrier islands. Their report, *An Ecological Characterization of Coastal Hammock Islands*, December, 2004, has shown that these islands are unique ecosystems with diverse flora and fauna. That study recommends protection and buffering of important habitats and resources associated with these islands.⁵⁷

The regulations, which were approved in late April 2006, were a compromise among groups wanting to protect the marsh islands and land owners/developers wanting unfettered dominion to build on their coastal property.⁵⁸ The Department of Health and Environmental Control described the new regulations;

These regulatory changes replace the existing regulation R.30-12.N, Access to Small Islands, which was declared invalid due to vagueness in the February 22, 2005, decision of the SC Supreme Court. These changes add definitions and detailed project standards to be utilized in the evaluation of permits for access to islands. The changes address the gap in the critical area regulations created by the Supreme Court decision and ensure consistent and effective Department review of applications for access to islands. Generally, the language provides more specific, protective and enforceable standards for the management of coastal islands, which are important and distinct features of the South Carolina coast.⁵⁹

⁵⁷ <http://www.scstatehouse.net/regs/3006.doc>

⁵⁸ Bo Petersen, *Panel Strikes Bridge Rules Deal*, The Post and Courier, April 19 2006 at B1

⁵⁹ Department of Health and Environmental Control, Statement of Policy, Specific Project Standards for Tidelands and Coastal Waters, at <http://www.scstatehouse.net/regs/3006.doc>.

In practical terms, the new regulations should limit the number of bridges built on marsh islands to around 220, and also limit the bridges on the smallest islands to a width of 15 feet.⁶⁰ No permits will be issued to build a bridge to an island less than two acres in size.⁶¹ The regulations should go into affect at the end of May 2006.⁶²

Another area of concern that has been the subject to of recent litigation is beach erosion; specifically restoring and building groins.⁶⁴ Groins are man-made structures that dot the South Carolina coast to protect beach erosion.⁶⁵ The South Carolina coastline is in desperate need of erosion protection. For example, “Folly Beach has eroded at a rate of almost five feet per year and has eroded 800 feet since records were first kept. To combat this erosion problem, 47 groins have been constructed on Folly Beach since 1949.”⁶⁶ Interestingly, the rapid erosion rate at Folly Beach may be a result of current efforts to minimize erosion. “The National Oceanic and Atmospheric Association (NOAA) Coastal Services Center estimated that the Charleston Harbor jetties have resulted in more than half of the erosion on Folly Beach.”⁶⁷ Therein lies the problem with groins; while they are meant to hinder erosion, they may in fact increase erosion down current.

In 2000 OCRM issued permits to Port Royal Plantation, a residential beachside community on Hilton Head Island, to build four new groins and reconstruct 17 existing groins along 8,000 feet of beach.⁶⁸ Shortly thereafter concerned environmentalist groups

⁶⁰ *Id.*

⁶¹ Text of Amendments to S.C. CODE REGS § 30-12, at <http://www.scstatehouse.net/regs/3006.doc>.

⁶² *Id.*

⁶⁴ S.C. Coastal Conservation League v. S.C. Dep’t of Health & Env’tl. Control, 354 S.C. 585 (S.C. 2003).

⁶⁵ *Id.*

⁶⁶ Max Sparwasser, *Groin Developments in South Carolina*, 16 S. Carolina Lawyer 32 at 34, Nov. 2004

⁶⁷ *Id.*

⁶⁸ S.C. Coastal Conservation League v. S.C. Dep’t of Health & Env’tl. Control, 354 S.C. 585 (S.C. 2003).

joined forces and brought a lawsuit challenging the authority of issuing body.⁶⁹ The case made it up to the S.C. Court of Appeals, which held that the South Carolina Coastal Zone Management Act prohibited the groin construction.⁷⁰ However, the legislature quickly amended the CZMA to allow groins in certain circumstances.⁷¹ The S.C. Supreme Court then granted *certiorari* in 2003 and reversed the Court of Appeals decision, holding that OCRM may issue permits for groin construction under the authority granted by CZMA.⁷² The S.C. Supreme Court stated, “we hold that the Beach Management Act authorized OCRM to issue groin permits in furtherance of the State's policy of encouraging certain types of erosion- inhibiting techniques and promoting beach re-nourishment where appropriate.”⁷³ Thus, another unsuccessful challenge to a permit issued by OCRM.

B. Georgia

The areas along Georgia’s coast that seem to be in the most danger of development are the marsh islands, sometimes referred to as “marsh hammocks”. There are about 1,200 islands, ranging in size from less than one acre to more than 1,000 acres, which could be considered hammocks in the marshes of Georgia's six coastal counties.⁷⁴ The islands are in danger of development not only because they are extraordinarily beautiful, but also because they are some of the last locations left for development on Georgia’s coast. As Gail Kruger of the local Augusta Chronicle stated, “Hammocks are hot property. The patches of high ground that dot local marshes are coveted by developers for the views they bring to high-end real estate. But as development pressures

⁶⁹*Id.*

⁷⁰*Id.*

⁷¹*Id.* at 589

⁷²*Id.*

⁷³ *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control*, 354 S.C. 585 at 588, (2003).

⁷⁴ Jingle Davis, *SMALL ISLANDS AT RISK: Hammock security considered*, *The Atlanta Journal-Constitution*, March 27, 2002, at 4B.

mount, preservation-minded folks worry hammocks will be overrun with houses and golf courses before their potential as habitat and storm and flood buffers is fully evaluated.”⁷⁵ It is not only the local media that has identified the marsh hammocks as the next target for development, the national conservation organization, Scenic America, listed Georgia's marsh islands among the most endangered scenic places in the entire Nation. The organization also designated the hammocks as one of America's "Last Chance Landscapes", which are threatened beautiful and/or culturally distinct places.⁷⁶ Marsh Islands are also an indispensable part of the ecosystem. As such, human disturbance could have dangerous side affects. A recent publication by environmentalist and attorney Donald Stack points out,

this estuarine ecosystem is an integral part of both the ecology and the economy of the region. The marshes mitigate the effects of flooding, water pollution, and erosion. They also serve as a habitat for many species of shellfish and other wildlife, in addition to being primary breeding grounds for many commercially and recreationally important fish species.⁷⁷

Over the past few years there has been much litigation surrounding permitting decisions allowing development of the marsh islands. In 2001 when the CMPC issued a permit for “Emerald Pointe,” conservation groups immediately took action to challenge the permitting decision. The proposed development was to consist of three private bridges across 900 feet of marsh, about forty high end homes, and a marina.⁷⁸ The Southern Environmental Law Center filed a lawsuit claiming that CMPC violated the Coastal Marshlands Protection Act “by failing to consider environmental impacts to the

⁷⁵ Gail Krueger, *Marshes Prompt Conflict, Preservationists, Developers Seeking Prime Real Estate*.

⁷⁶ <http://www.georgiaconservancy.org>

⁷⁷ Donald Stack, *The Interplay of Environmental, Land Use, and Zoning Laws for the Protection of Georgia Coastal Resources* (2005), at <http://www.stack-envirolaw.com>.

⁷⁸ *Id.*

marsh from the residential development - pesticide runoff, failing septic systems and other impacts that threatened the ecosystem.”⁷⁹ In October 2002, Fulton County Superior Court Judge Constance Russell reversed the Administrative Judge’s decision, and ordered that the state of Georgia violated the Coastal Marshlands Protection Act by not considering the environmental impacts of the *entire* project.⁸⁰ She stated that CMPC’s inquiry into the environmental impacts of the proposed development was “artificially truncated” and that “bridges like the ones proposed at Emerald Pointe are not roads to nowhere”.⁸¹ Analyzing the propriety of issuing permits for bridges and activities in the marshes in isolation from the larger purpose of the activity or structure does violence to the intent of the Act.”⁸²

Prior to this decision Georgia had allowed the CMPC to consider only the effects of the different pieces of a project, rather than the effect of the entire project. This new standard of review for issuing permits is a major success for preservation of the natural environment, as it will make it much more difficult for developers to downplay the environmental impacts of a project by breaking it down into smaller pieces. Emerald Pointe eventually was able to negotiate a settlement that severely limits the size and impact of the development.⁸³

After the Emerald Point decision, the Southern Environmental Law Center again challenged the CMPC’s decision to issue a permit for a marina development. This project, known as “Man Head Marina”, was to include “109 boat slips, a 785-foot fueling

⁷⁹ Southern Environmental Law Center, at http://www.southernenvironment.org/cases/marsh_hammocks/casepage.htm

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Tom Barton, *Atlanta Judge has good view on Coastal Development*, Savannah Morning News, October 30, 2002.

⁸³ Donald Stack, *The Interplay of Environmental, Land Use, and Zoning Laws for the Protection of Georgia Coastal Resources* (2005), at <http://www.stack-envirolaw.com>.

dock, an 11,000-square foot dry dock and boat maintenance yard, a storm drainage system that would discharge directly into the marsh, a store and office building, a septic system, and a 42-space paved parking lot - all on a 1-acre hammock, leaving no buffer between the development and the marsh.”⁸⁴ Following the precedent set in the Emerald Pointe decision, the court again revoked the permit until the CPMC further evaluated the environmental impacts of the entire project.

After the Emerald Pointe and Man Head permits were both revoked, the Georgia legislature amended the CMPA, changing the CMPC from three to five members.⁸⁵ The two new members immediately garnered much scrutiny Environmental groups. The two new committee members were Leslie Davisson Mattingly and Richard D. Eckburg.⁸⁶ Mattingly is a conservative lawyer and former judge who “sits on the advisory board of an activist organization that stridently advocates on behalf of private property owners fighting what they consider to be intrusive environmental regulations. At the very least, Mattingly's affiliation with the group may impinge on her ability to deliberate objectively.”⁸⁷ The other new committee member, Eckbert, was also cause for concern for environmentalists who feared he was ultra conservative because of his position on the board of an organization dedicated to rooting out liberal bias in the national media.⁸⁸ There are a total of five committee members, however, statutorily 3 members is a quorum. Therefore, Mattingly and Eckbert could potentially decide the outcome of a permitting decision if only 3 members were present.

⁸⁴Southern Environmental Law Center, at http://www.southernenvironment.org/cases/marsh_hammocks/casepage.htm

⁸⁵ *A matter of protection; Georgia's coast is too important to leave to those with questionable credentials and intentions*, The Atlanta Journal-Constitution, July 6, 2004, at 8A.

⁸⁶ *Id.*

⁸⁷ *A matter of protection; Georgia's coast is too important to leave to those with questionable credentials and intentions*, The Atlanta Journal-Constitution, July 6, 2004, at 8A.

⁸⁸ *Id.*

The addition of the controversial new committee members has not helped ward off law suits challenging the CMPC's permitting decisions. In 2006 an administrative law judge revoked a permit to develop "Cumberland Harbour" due to the CMPC's failure to properly consider the environmental impacts.

In March 2005, the CMPC issued a permit allowing a developer to build the largest marina in Georgia. The plan would bring more than 800 boats to the area and between 900 and 1,200 homes and commercial facilities.⁸⁹ This large scale development would be only two miles from the Cumberland Island National Seashore, which is home to many endangered species, including the most endangered whale species in the world.⁹⁰ A month after the CMPC issued the permit, the Southern Environmental Law Center filed a lawsuit challenging the committee's decision to issue the permit to develop such an environmentally sensitive area.⁹¹ In a February 2006 ruling, Administrative Law Judge Michael M. Malihi revoked the permit and stated that when a project involves construction both within and outside the marshlands, the committee must consider the environmental impact of the *entire* project, not just the portions that will be constructed on the state's marshes.⁹² As for the Cumberland Harbour development, it is unclear what will transpire. The CMPC will have to consider the impacts of the entire project such as; prevention of polluted storm water runoff, impervious surface coverage, impacts to marine life, and buffer design and maintenance. The developers may appeal the decision, but for now no work may be done on marina unless the CMPC issues a new permit.

⁸⁹ Southern Environmental Law Center, at http://www.southernenvironment.org/cases/marsh_hammocks/casepage.htm

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

As of May 1 2006, both the developer and the Georgia Attorney General have appealed the decision.⁹³ The issue on appeal seems to be whether the administrative law judge overstepped his authority by repealing the permit pending further studies of the environmental impact to the whole area. The developer is asserting on appeal that it is up to the legislature, not the courts, to define the conditions upon which permits should be granted.⁹⁴ The developer's CEO, Bob Ward, is quoted on the company's website as stating,

The Administrative Law Judge's decision undermines two years of study and work by the Department of Natural Resources Coastal Resource Division and the Coastal Marshlands Protection Committee by erroneously overextending the Committee's regulatory authority. The Administrative Law Judge's decision is a glaring example of a judge legislating from the bench. The Coastal Marshlands Protection Act clearly defines the Committee's jurisdiction, which does not include upland residential developments. Laws should be created through the legislative process, not by judges.⁹⁵

As aforementioned, the Georgia Attorney General has also appealed the decision. The Attorney General contends that judge misinterpreted the phrase "otherwise alter" as it appears in the CMPA. "The act states 'no person shall remove, fill, dredge, drain or otherwise alter any marshlands or locate any structure on or over marshlands in this state ... without first obtaining a permit from the committee...' The heart of the dispute lies in how the committee should interpret 'otherwise alter' in its permit-issuing role."⁹⁶ Environmental groups, who view the decision as a victory, have their own take on the appeal. Chris DeSherer, an attorney at the Southern Environmental Law Center, stated,

⁹³ Suzanne Donovan, *How will Georgia's Coast be Developed?*, Savannah Morning News, March 3, 2006. available at http://www.southernenvironment.org/cases/cumberland_harbour/svm_3-22-06.htm.

⁹⁴ *Id.*

⁹⁵ Land Resource Company Press Release regarding Cumberland Harbour Appeal, at <http://www.cumberlandharbour.com/about/pr.php?id=16>.

⁹⁶ Suzanne Donovan, *How will Georgia's Coast be Developed?*, Savannah Morning News, March 3, 2006. available at http://www.southernenvironment.org/cases/cumberland_harbour/svm_3-22-06.htm.

It's peculiar that the very committee charged with protecting our state's coast is continuing to run from its obligations under the Coastal Marshlands Protection Act. Judge Malihi's ruling sent a strong message that Georgia's coast, and the wildlife that inhabit it, must be protected from poorly planned development. Unfortunately, the Coastal Marshlands Protection Committee would rather defend an irresponsible permit than live up to its responsibility to strike the appropriate balance between development and environmental protection.⁹⁷

With so many interests at stake, it should be very interesting to see which way this appeal will go as the legislature and judiciary continue to battle for control over coastal development issues.

IV. Conclusions and Comparisons between South Carolina and Georgia Coastal Conservation

Coastal Conservation is a vital interest in both South Carolina and Georgia. The recent litigation in each state surrounding permits, shows just how important these issues are. After all, once a permit is issued, and development begins, it is very difficult, if not impossible, to undo the adverse environmental impacts. The environment is very fragile, it subsists by and through a very complex ecosystem that is highly susceptible to human degradation. Ironically, development is fueled by the very beauty that it may destroy. As with all things in life, moderation is the key. If properly controlled development should be possible, in moderation, without harmful environmental impacts. It is just a matter of deciding what controls need to be in place, and who should have the power to administer the control. As evidenced by the dance among the legislature, the permitting authorities, and the judiciary, each body wants a certain amount of control over development.

⁹⁷ *Id.*

In Georgia it seems the judiciary is somewhat paternalistically forcing the permitting authority to only issue permits after the impacts of the entire project are evaluated. After some controversial permitting decisions, the judiciary was able to step in and at least force the permitting authority to demand a more comprehensive evaluation of the impacts of an entire project before issuing a permit. This seems only natural. Is unrealistic to even imagine that the environment is impacted only in bits and pieces, thus there is no reason to evaluate impacts in such a manner. The Georgia judiciary took a great step toward protecting the state's coastline by demanding that the permitting authority only issue permits after the impacts of an entire project have been fully explored. Georgia seems to be on a new path of carefully controlling development. They have the advantage of having one of the least developed coastlines, and as such, can look to the booming coastline in neighboring states to see the future if they do not carefully consider each permitting decision. Looking at the recent litigation in Georgia it seems the state's judiciary realizes the importance of coastal conservation, with the help of some zealous litigation from environmental groups, and are working to ensure that development is controlled and only allowed when environmental impacts have been fully explored.

South Carolina also certainly realizes the importance of coastal conservation. However, recent litigation and legislation in South Carolina does not send as strong of a message of controlled development as that in Georgia. The permit for the bridge to Park Island, and the disappointing move by the South Carolina Supreme Court to invalidate the small islands regulation seem to show

more of an interest in development, and less in protecting the environment. As aforementioned, new small islands regulations were approved in by the South Carolina legislature just last week. Apparently the battle for approval was hard-fought and filled with concessions by the environmental community.⁹⁸

Regardless of the difficulties of passing the act, it was passed, and should serve to protect the most fragile marsh islands from development, at least in the near future.

The manner in which groin construction on Hilton Head Island was approved is also disturbing. As aforementioned, the groins were originally not allowed, the legislature stepped in and amended the laws, so that the Supreme Court could grant certiorari and approve the groin construction. The fact that the groin construction was in Hilton Head sets off a red flag in my mind. I wonder how adamant the legislature would have been to bend the rules to build groins in a poorer area. In my opinion, based on this case and the language used by the S.C. Supreme Court, it seems the state of South Carolina is struggling to find ways to allow development in spite of mother-nature. It seems the judiciary and legislature are working together to take one step forward and two steps back by granting a permit to construct groins that will likely to ward off erosion in a commercially developed area, but increase erosion in another, probably more natural, area down current.

In conclusion, this is a critical time for each state to set boundaries for development. Now, more than ever, with developers looking to smaller more remote islands to build, it is vitally important that judiciary act as a check on the permitting authorities and continue to scrutinize permitting decisions. Without a permit, there can

⁹⁸ Bo Petersen, *Panel Strikes Bridge Rules Deal*, The Post and Courier, April 19 2006 at B1.

be no development. With a permit there can be permanent damage to the environment. Environmental groups, such as the South Carolina Coastal Conservation League and the The Southern Environmental Law Center, should, and no doubt will, continue their efforts to challenge each suspect permitting decision. It is only through their legal challenges that the judiciary is able to scrutinize and revoke specific permitting decisions. On the other hand, the legislature may also curb or expand a permitting authority's power. However, as we all know, it is a arduous process to pass legislation, and when passed, much legislation is not retroactive and often would not serve to invalidate past permits. Therefore, in my opinion, it is the legal challenges and the judiciary's reaction that is going to set the tone for future coastal development in South Carolina and Georgia. In this respect, Georgia seems to be on the right path, while South Carolina, unfortunately, has not shown quite as much enthusiasm for revoking suspect permits.