CITY OF FOLLY BEACH
Tim Goodwin, Mayor

Folly Beach, SC 29439
www.cityoffollybeach.com
843-588-2447

Planning Commission

Paula Stubblefield • Greg Anderson • Kristen Kappel • Michael McDade • Alison McNatt
Karen Mumford • Michael Norton • Kevin O'Connell • Amy Ray
February 3, 2025 | 7:00 PM
City Council Chambers | 21 Center St

1. CALL TO ORDER

Roll Call

2. APPROVAL OF MINUTES

The board is asked to approve the January 06, 2025 meeting minutes.

3. CITIZEN COMMENTS

4. UNFINISHED BUSINESS

a. Craig Logan, Housing Executive Fellow, Charleston Chamber of Commerce

b. Discussion and Vote on Recommendations on Affordable Housing

5. NEW BUSINESS

a. **Public Hearing on Ordinance 029-24:** An ordinance amending the Folly Beach Code of Ordinances Section 161.02 (Definitions) and 166.05-03 (Single- and Two-family Design Standards) to exempt gravel driveways and decorative stone paths from the maximum impervious coverage limit.

b. **Public Hearing on Ordinance 031-24:** An ordinance amending the Folly Beach Code of Ordinances Section 151.23 (Construction Standards) by creating a twenty-five foot setback from the perpetual easement line for seawalls and a five-foot setback for revetments.

6. OTHER BUSINESS

a. 2024 Dune Management Plan report--Dr. Nicole Elko

b. Commission Comments

c. Staff Comments

7. <u>ADJOURNMENT</u>

In accordance with the Americans with Disabilities Act, persons needing assistance, alternative formats, ASL interpretation, or other accommodation, please contact the Municipal Clerk at 843-513-1833 during regular business hours at least 24 hours prior to the meeting. Hearing devices are available upon request for those with hearing difficulties.

PUBLIC NOTICE: ALL MEDIA AND OTHER INTERESTED PARTIES WERE NOTIFIED PURSUANT TO STATE LAW

City of Folly Beach
Planning Commission Minutes
January 06, 2025 | 7:00PM
City Council Chambers | 21 Center Street

Paula Stubblefield • Greg Anderson • Kristen Kappel • Michael McDade
Alison McNatt • Karen Mumford • Kevin O'Connell • Michael Norton • Amy Ray

1. CALL TO ORDER AND ROLL CALL

Members present: Anderson, Kappel, McNatt, Mumford, Norton, O'Connell, Ray, Stubblefield
Members absent: McDade

2. APPROVAL OF MINUTES

Mr. O'Connell moved to approve the minutes from the December 02, 2024 meeting. Ms. Kappell seconded. The commission voted unanimously to approve the minutes.

3. NEW BUSINESS

The commission discussed expanding the existing housing stipend for DPS employees. Ms. Stubblefield moved to recommend increasing the stipend amount allowed per employee and increasing the total amount budgeted for stipends in a year. Mr. Norton seconded. The commission voted unanimously to recommend expanding the existing DPS housing stipend.

The commission discussed offering a housing stipend to Public Works employees. Ms. Stubblefield moved to recommend offering a housing stipend for Public Works employees. Ms. Kappel seconded. The commission voted as follows to recommend offering a housing stipend to Public Works employees: YES votes: Kappel, McNatt, Norton, O'Connell, Ray, Stubblefield. NO votes: Anderson, Mumford. The motion passed.

Ms. Stephens explained the Lease to Locals program, which incentivizes homeowners in resort towns to turn their property into affordable housing. Ms. Stubblefield moved to recommend that the city engage with Lease to Locals to offer this program in Folly. Ms. Ray seconded. The commission voted as follows: YES: Kappel, McNatt, Mumford, Norton, O'Connell, Ray, Stubblefield; NO: Anderson. The motion passed.

4. ADJOURNMENT

Ms. Ray moved to adjourn.

ALL MEDIA AND OTHER INTERESTED PARTIES WERE NOTIFIED PURSUANT TO STATE LAW.

CITY OF FOLLY BEACH

1st Reading: November 12th, 2024 Introduced by: Chris Bizzell
2nd Reading: Date: November 12th, 2024

ORDINANCE 029-24
AN ORDINANCE AMENDING THE STANDARDS OF CHAPTER 161.02 (DEFINITIONS. IMPERVIOUS SURFACE) TO ALLOW RIVER ROCK TO BE CONSIDERED PERVIOUS FOR LANDSCAPING AND AMENDING THE STANDARDS OF CHAPTER 166.05-03 SINGLE- AND TWO-FAMILY DESIGN STANDARDS TO ALLOW UP TO TWO 15' GRAVEL DRIVEWAYS TO NOT COUNT TOWARDS IMPERVIOUS COVERAGE LIMITS.

The City Council of Folly Beach, South Carolina, duly assembled, hereby ordains that Folly Beach Code of Ordinance be amended as follows:

NOTE: ~~Deleted material struck through~~, new material shown in red,

§ 161.02 Definitions. Impervious surface.

IMPERVIOUS SURFACE. Buildings, parking areas, driveways, streets, sidewalks, areas of concrete, asphalt, gravel, or other compacted aggregate such as ROC, and areas covered by the outdoor storage of goods or materials which do not absorb water. River rock, lava stone, or other aggregate products with no compactible base used for landscaping or foot paths are considered pervious.

§ 166.05-03 Single- and Two-Family Design Standards.

(A) *Applicability.* The single- and two-family residential standards shall apply to all single-family and two-family dwellings, subject to the provision of Chapter 168: Nonconformities.

(B) *Time of review.*

(1) Review of proposed development to ensure compliance with the standards of this section shall take place at the time of site plan, § 162.03-06; subdivision, § 162.03-07; planned development master plan, § 162.03-02; or zoning permit, § 162.03-13, review, whichever occurs first.
(2) Single- and two-family uses may be subject to city-imposed conditions relating to the location, configuration, and operational aspects of the use to ensure its compatibility with

surrounding uses, their architectural consistency with the surrounding uses, and their compliance with the city's building codes and all relevant state laws and regulations.

(C) *Design standards.*

(1) *Maximum square footage.* The maximum square footage for a single- or two-family dwelling shall be determined in accordance with the following formula:

Max. Square Footage = (Buildable lot area - 10,500) x 10%) + 3,600.
See Figure 166.05, Maximum Square Footage Calculation Examples, for example calculations.

FIGURE 166.05: MAXIMUM SQUARE FOOTAGE CALCULATION EXAMPLES			
Example One	Example Two	Example Three	Example Four
For a lot with a buildable lot area of 7,500 square feet, the maximum square footage for a dwelling is 3,300 square feet: ((7,500 - 10,500) x 0.1) + 3,600 = 3,300	For a lot with a buildable lot area of 10,500 square feet, the maximum square footage for a dwelling is 3,600 square feet: ((10,500 - 10,500) x 0.1) + 3,600 = 3,600	For a lot with a buildable lot area of 12,500 square feet, the maximum square footage for a dwelling is 3,800 square feet: ((12,500 - 10,500) x 0.1) + 3,600 = 3,800	For a lot with a buildable lot area of 19,500 square feet, the maximum square footage for a dwelling is 4,500 square feet: ((19,500 - 10,500) x 0.1) + 3,600 = 4,500

(2) *Maximum dwelling size.*

(a) The total heated floor area for a single-family dwelling shall not exceed 4,500 square feet regardless of lot size.

(b) The total heated floor area for a two-family dwelling (or two detached dwellings on a single lot) shall not exceed 4,500 square feet regardless of lot size.

(3) *Maximum height.* The maximum height of a single- or two-family dwelling shall be in accordance with Table 165.01, Dimensional Standards.

(4) *Maximum lot coverage.* Impervious surfaces on lots containing single- or two-family dwellings shall be limited to a maximum of 35% of the lots high ground. For the purposes of this section, decks, porches, patios, pools, and paved areas, and areas covered by gravel shall be considered as impervious. Up to two gravel driveways (as allowed under § 166.06-11(B)) consisting of #57 and #789 granite with no compactible subbase up to 15' wide each providing ingress and egress from a public road to a dwelling may be exempted from this calculation.

(5) *Roof penetrations.* All roof vents, pipes, antennas, satellite dishes, and other roof penetrations and equipment (except chimneys), shall be located on the rear elevations or

otherwise configured to the degree practicable to have a minimal visual impact as seen from the street.

(6) *Shipping containers and the like.* Any shipping container, or other similar modular component, used in the construction of a residential structure shall be finished in a manner typical of residential structures including, at a minimum, painting and the removal of any and all logos, brands, lettering, and advertisements from the exterior surface.

(7) *Kitchens.* Only one complete interior kitchen shall be allowed per dwelling unit.

(Ord. 05-10, passed 3-23-10; Am. Ord. 022-21, passed 9-14-21; Am. Ord. 034-21, passed 12-14-21; Am. Ord. 039-21, passed 5-10-22)

§ 166.06-11 Driveways.

(A) For the purpose of this section, ***DRIVEWAY*** is defined as the area of a property used for ingress and egress and parking.

(B) Ordinarily, the portion of a driveway that crosses the right-of-way shall not be wider than 15 feet, and no property can have more than one driveway per street frontage. The maximum number of driveways allowed is two. Exceptions to the width and number of driveways can be granted by the city for good cause, but in no case shall any driveway be permitted that is less than 20 feet from another driveway on the same property without the approval of City Council.

(C) All new driveways constructed in the residential zones of the city shall obtain an encroachment permit for the curb cut from SCDOT prior to submittal for approval by the city.

(D) All driveways and parking areas in residential zones shall be constructed of pervious materials or gravel consisting of #57 and #789 granite with no compactible subbase. Parking areas underneath the footprints of existing and proposed structures are exempt. City Council or its designee may grant exemptions to this requirement when no option for pervious material exists. Gravel driveways must include landscaping borders flush with the surface of the driveway.

(E) No new driveways shall be created from Center Street if the parcel in question has access from another street or alley of adequate size to allow access.

(Ord. 28-12, passed 10-9-12; Am. Ord. 01-13, passed 3-12-13; Am. Ord. 23-14, passed 11-11-14)

RATIFIED this _____ day of _____2024, at Folly Beach, South Carolina, in City Council duly assigned.

ATTEST:

Municipal Clerk	**Tim Goodwin, Mayor**

CITY OF FOLLY BEACH

1st Reading: Introduced by: Mayor Goodwin
2nd Reading: Date: November 12th, 2024

ORDINANCE 031-24
AN ORDINANCE AMENDING THE FOLLY BEACH CODE OF ORDINANCES SECTION 151.23 (CONSTRUCTION STANDARDS) BY CREATING A TWENTY FIVE FOOT SETBACK FROM THE PERPETUAL EASEMENT LINE FOR SEAWALLS AND A FIVE FOOT SETBACK FOR REVETMENTS .

The City Council of Folly Beach, South Carolina, duly assembled, hereby ordains that Folly Beach Code of Ordinance be amended as follows:

NOTE: ~~Deleted material struck through~~, new material shown in red,

§ 151.23 CONSTRUCTION STANDARDS FOR BERMS, BULKHEADS, RIPRAP, SEAWALLS, REVETMENTS, AND RETAINING WALLS WITHIN 15 FEET OF THE CRITICAL LINE.

(A) For the purposes of this section, the following definitions shall apply:

BERM. A compacted mound of earth, soil, or sand, which may be used independently or to cover riprap, constructed to protect against flooding.

BULKHEAD. A vertical erosion control device installed on high ground which is adjacent to the marsh front critical line as defined by OCRM.

RETAINING WALL. A vertical erosion control or stabilization device installed on high ground within 15 feet of the OCRM critical line.

REVETMENT. Sloping material installed seaward of a seawall facing the oceanfront baseline as defined by OCRM.

RIPRAP. Sloping material installed in front of a bulkhead on the side of the bulkhead facing the marsh front critical line as defined by OCRM or as the foundation of a berm.

SEAWALL. A vertical erosion control device installed on high ground which is adjacent to the oceanfront baseline as defined by OCRM.

…….

(8) Bulkhead, riprap, seawalls, retaining walls, berms and revetments shall be designed by a certified design professional, registered in the state and shall meet the following minimum standards:

(a) *Bulkhead, retaining walls and seawall requirements.*

1. *Materials.*

i. Reinforced concrete six inches thick designed with adequate reinforcement to achieve a 3,000 psi 28-day strength.

ii. Pressure treated wood three inches by ten inches or three inches by 12 inches tongue and groove, or a double thickness of two inches sheeting with staggered joints is acceptable for walls with a standing height of under four feet.

2. *Depth of embedment.* The depth of embedment of a bulkhead shall be at least equal the height of the wall above the ground. An allowance should be made to account for erosion scour after construction.

3. *Tiebacks.* Tiebacks shall be located at a spacing of eight feet or less and attached to secure anchors capable of withstanding a 2,000- pound pull. Tiebacks may be deleted if a revetment is placed seaward of the bulkhead.

4. *Backfill.* The bulkhead will be backfilled with a compacted clean granular material to provide adequate support. "Clean" shall mean no metal, wood or glass.

5. *Protection from flanking.* Bulkheads will either tie into adjacent bulkheads or will have an adequate return wall meeting the same requirements as the seaward wall.

6. *Seawalls.* No new or substantially improved vertical unfaced seawall shall be allowed on the ocean front.

i. Any new or substantially improved vertical seawall surface must be faced with a sloping revetment.

ii. Any new or substantially improved vertical seawall surface must maintain a setback of at least 25' from the Perpetual Easement Line except that a new or substantially improved vertical seawall surface located seaward of a habitable structure closer than 25' from the PEL shall be placed as close the structure as is feasible.

(b) *Revetments.*

1. *Materials.* Broken pavement, blocks or bricks are not acceptable materials for the outer layer of a revetment. However, they may be used for under layers. The outside of a revetment shall consist of at least two layers of armor stones whose pieces shall range in weight from a minimum of ten pounds to a maximum of 250 pounds; at least 60% shall weigh more than 150 pounds.

2. *Construction.* Revetments shall be underlain with a commercial grade porous filter cloth designed for ocean erosion control and approved by the Building Official (i.e. Phillips 66 stock or equal), and placed on a slope no steeper than one vertical to two horizontal.

i. The toe at the revetment shall extend at least two feet below the existing beach elevation and the ends shall be protected from flanking.

ii. In no case shall the toe of the revetment be located closer than 5' from the PEL.

RATIFIED this ___ day of _____2024, at Folly Beach, South Carolina, in City Council duly assigned.

ATTEST:

_____ _____

Municipal Clerk **Tim Goodwin, Mayor**

From: Jeri Blackwood
To: Jenna Stephens
Subject: Bulkhead issues
Date: Monday, January 13, 2025 8:10:41 AM

CAUTION: This email originated from outside the City of Folly Beach. Maintain caution when opening external links/attachments

Good morning Jenna could you send this to council and all parties

To Whom it may concern
My Name is Jeri Blackwood I am the owner of Charleston Dock & Wall LLC
I have a few items i would like to address.
It is my understanding that the City of Folly Beach had jurisdiction landward of the baseline. But now don't. State legislature and army corp admitted that jetties have created this hardship for folly beach residents, erosion issues. In which they gave up their rights behind baseline to help owners with hardships. Now this isn't the case. I have a client that has lost 30' landward of baseline on their property due to state officials' new flagging behind baseline on this property. The City has charged beachfront homeowners for sand landward of the baseline. So is this Folly's jurisdiction or does the State have jurisdiction? If it is the States now why did Folly give it up ?
Folly imposed a 40' setback for building new structures. Now you want to pass a law with a 25 ft setback on wooden structures so when all is said and done property owners will lose about 35' due to construction of the structure with rock.
Homeowners are liable for cleanup, future sand for scouring, and a possible lawsuit if someone claims they got hurt on their property.
This is totally unacceptable. I would like to know the reasoning behind these ideas ?
Has any members of council or city officials contacted any front beach owners to discuss these impacts?
I know first hand the hardships these owners endure, I've been doing this line of work on folly beach for 36 years.

Also I do not understand why the city is thinking about a moratorium on walls / bulkheads. It's not like it's getting out of control.
I've done 90 Percent of the walls on Folly in my 36 years. Now your created more hardship for folly beach residents that don't have protection from marsh side or front beach.

Folly Beach residents should feel safe about decisions made from city council not feel abandoned or taken advantage of.

Thank you for your time

Jeri FBlackwood

Jenna Stephens

From: John Collins <johnboyzcollins@gmail.com>
Sent: Wednesday, January 29, 2025 1:07 PM
To: Jenna Stephens
Subject: Seawall moratorium

Follow Up Flag: Follow up
Flag Status: Flagged

CAUTION: This email originated from outside the City of Folly Beach. Maintain caution when opening external links/attachments

Planning Commission and City Council,

My name is John Collins and I own an oceanfront property at 1409 E Ashley Ave on Folly Beach. I am writing you today to express my support for your 25' seawall setback ordinance.

The ordinance creates a sensible policy of ensuring that seawalls and revetments remain on private property while also ensuring that any homeowner can still build a new seawall even if they can't meet the 25' setback.

Thank you for your addressing this important issue.

John Collins
1409 E Ashley Ave
Folly Beach 29439
803-238-2800

SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT

Lawyers for the Wild Side

PO Box 1380, Pawleys Island, SC 29585 | (843) 527-0078 | www.scelp.org

Executive Director & General Counsel
Amy E. Armstrong | amy@scelp.org

Senior Manager of Strategy
Michael G. Corley | michael@scelp.org

Senior Managing Attorneys
Benjamin D. Cunningham | ben@scelp.org
Leslie S. Lenhardt | leslie@scelp.org

Staff Attorneys
Lauren Megill Milton | lauren@scelp.org
Emily S. Poole | emily@scelp.org
Monica K. Whalen | monica@scelp.org

Our Mission *We use our legal expertise to protect land, water and communities across South Carolina.*

January 29, 2025

VIA E-MAIL

Planning Commission
City of Folly Beach
21 Center Street
Folly Beach, SC 29439

Re: Proposed Ordinance 031-24 Seawall Setback

Dear Members of the Planning Commission:

The South Carolina Environmental Law Project is writing to you on behalf of the Coastal Conservation League to express their support for the passage of the above-referenced ordinance relating to requiring setbacks for seawalls and revetments. We understand that the proposed ordinance would impose a 25-foot setback for seawalls and a five-foot setback for revetments. This proposal is consistent with the City's long-standing efforts to protect the public trust resource that is Folly Beach.

State law has charged the City with the direct management of this valuable resource through the provisions of the Beachfront Management Act. It goes without saying Folly Beach is an asset to not just the City's residents, but to the State as a whole and, as stewards, the City has taken steps to protect against unwise beachfront development. Such development, including hard erosion control structures destroys the public beach when installed too closely to the Perpetual Easement Line (PEL). The proposed ordinance would result in better outcomes for both beachgoers and property owners.

The City is also responsible for coordinating the periodic beach renourishment projects undertaken by the Army Corps of Engineers (Corps). We are informed that the Corps, in response to awareness about erosion control construction, has communicated to the City they will cease future renourishments if any more hard erosion control structures are installed too closely to the PEL. The City must take every available step to ensure these projects continue to be undertaken for the wellbeing of the public trust and the citizens of the State.

We urge the Planning Commission to approve Ordinance No. 031-24. Thank you for the opportunity to provide input.

Board of Directors – Gerald Schulze, Chairperson, Mac Bennett, Keith Bowers, Jamelle Ellis, Amy Fabri, Terry Grayson-Caprio, Tom Kester, Bess Lochocki, Esq., Walton McLeod, Esq., Carla Pinckney, Cynthia Powell, Greg VanDerwerker

Board Member Emeriti - Frances Close, John Mark Dean, Robert Schofield

Sincerely,

s/ Leslie Lenhardt

Leslie S. Lenhardt
Senior Managing Attorney

cc: Jenna Stephens

From: J.D. McAllister
To: Jenna Stephens
Subject: Seawall Setback
Date: Thursday, January 30, 2025 3:13:23 PM

CAUTION: This email originated from outside the City of Folly Beach. Maintain caution when opening external links/attachments

Ms. Stephens,

I will not be able to attend the Planning meeting on Monday.
I would like my support for the 25 foot seawall setback to be noted and made known at the meeting. In fact I believe the state law allowing the City to issue any seawall permits is very limited and most, if not all, the seawalls past the Washout do not meet that exception.
Thank you for making my support for this change part of the record.

J.D. McAllister
1715 East Ashley Avenue
Folly Beach
(Owned our beach front house since 1984. Full time residents last 2 years.)
404.543.2112

Sent from the all new AOL app for iOS

From:	Matt Napier
To:	Jenna Stephens
Cc:	Aaron Pope; Eric Lutz
Subject:	Ordinance 031-24- 25" Seawall Setback
Date:	Thursday, January 30, 2025 4:45:25 PM
Attachments:	Letter_to_PC_City_Council.pdf Pertinent Pages- Bradens Folly SC Court Final Opinion.pdf

---

CAUTION: This email originated from outside the City of Folly Beach. Maintain caution when opening external links/attachments

Planning Commission,

Please see my attached letter, key points regarding the proposed seawall setback ordinance, and a petition from residents and owners in support of the proposed ordinance.

I would also like to briefly address some related misinformation that I've heard over the recent days. Whether intentional or unintentional, I have heard of reports where some individuals have spread a false rumor that 1) the City is working on a seawall ban, or 2) that certain beachfront properties won't be eligible for a seawall and revetments under this ordinance. Neither are remotely true.

Once you read the proposal, you will understand that the proposed ordinance does nothing more than ensure that private property will remain on private property and public beach will remain public beach.

In the next few days, as you are reviewing emails and written comments, and listening to public comments related to this proposed seawall setback, you can probably expect one or more attorneys to communicate that this proposed ordinance would be a "taking" or equivalent to a "condemnation" of beachfront property. Please, be aware that attorneys make this same threat for nearly every proposed ordinance in any way related to private property. Although their claim is outright preposterous and not backed by law, these attorneys frequently attempt to instill fear and misinformation each time our City considers a similar ordinance.

Please note that after an attorney made a similar claim of a "taking" based on another ordinance, they (Braden's Folly) sued the City of Folly Beach and on April 5, 2023, they lost (Folly won). On that date, the South Carolina Supreme Court ruled that a small or even a large diminishment of value does not equate to a "taking" when the policy is reasonable, and they ruled that Folly's ordinance was nothing but sensible policy. Pertinent pages from the Supreme Court decision are attached for your review.

In the case of the proposed 25' seawall setback ordinance, remember that a 40' minimum setback is already required for any structure on a beachfront lot as part of the Dune Management Area (DMA), and so there will be no loss or change of use with the seawall setback ordinance.

In its decision regarding the Braden's Folly case, the Supreme Court acknowledged that the City of Folly Beach is the primary regulatory authority for our beach development since it is the only beach city in South Carolina that is exempt from much of the SC Beachfront Management Act (which leaves us devoid of the regulatory help from the State that the other beach communities enjoy). In the decision, the Supreme Court said, "…the extreme erosion in Folly Beach has caused it to receive ***unparalleled discretion*** to promulgate its own beachfront management regulations, ***including those dealing with setback requirements and erosion control barriers***." They also stated, "…we find some discretion must be allowed to the locality to review and unwind decisions that it later realizes were unwise." In addition, they said, "the super-beachfront houses and their seawalls created a public nuisance…"

In recent years, the Army Corps has started threatening to halt all renourishments on Folly if this seawall and rock revetment encroachment issue isn't addressed. It should take no mental gymnastics to understand that beachfront property owners will be the first to suffer the loss of their property if we fail to pass this 25' seawall setback and we end up losing our federal sand renourishments as a result of failing to prevent encroachments near the Project. Therefore, the Planning Commission is compelled to pass this ordinance to protect our beach renourishments, as the alternative is not an option.

Thank you for you hard work on this important ordinance.

Sincerely,

Matt Napier
1661 E Ashley Ave.

Matthew N. Napier
1661 E Ashley Ave.
Folly Beach, SC 29439
Phone: (843) 530-1216
Email: Matt@MySCHomeTeam.com

January 30, 2025

Planning Commission
City of Folly Beach
21 Center Street
Folly Beach, SC 29439

RE: City of Folly Beach Proposed Ordinance 031-24- Seawall and Rock Revetment Setback

Planning Commission Members,

I am a beachfront property owner on Folly Beach, and the City's proposed ordinance 031-24, regarding a seawall and revetment setback may affect my property. Without hesitation, I am urging you to pass this proposed ordinance immediately. You have my FULL SUPPORT in passing this ordinance.

For far too long, we have allowed public taxpayers and Folly residents to pay for our public beach renourishment projects, while also turning a blind eye to the recurring attempts to privatize portions of our public beach. Sometimes this occurs intentionally, and sometimes it is due to lack of sufficient seawall and rock revetment regulation standards, resulting in the settling of massive amounts of rock revetments on public beach. Each time and place this occurs, it results in the public taxpayer and our residents footing the bill for a beach renourishment in areas that they are not able to use or enjoy.

The City's proposed seawall setback is ***necessitated*** by the dozens of properties and their associated rock revetments (each of the properties having a seawall installed too close to the PEL and/or baseline) which have ended up being located 25' or 30' onto the public beach each renourishment cycle. The Army Corps of Engineers surveyed these areas in each of the last renourishments and verified that illegal revetments are ending up on the public beach. As Folly residents, OUR taxes and City funds are being used to remove these private revetments off the public beach at a cost of tens of thousands of dollars - to US.

Additionally, the Army Corps has threatened to stop all future renourishments if more seawalls and/or rock revetments are installed too close to the PEL and if the associated rock revetments end up on the public beach again. Therefore, we are compelled to pass the proposed seawall setback for new seawalls and revetments immediately to ensure that beachfront owners start keeping their property ON THEIR PROPERTY. As a beachfront property owner, there is no legitimate argument I can reasonably make against this proposed ordinance.

Make no mistake, seawalls and rock revetments are allowed at the pleasure of our City and its residents. To anyone who would argue against this proposed ordinance, it should be noted that there is no permanently entitled right to install a seawall and/or rock revetments at the very edge of a beachfront property. The City of Folly Beach is the *only* beach island in the State that allows new seawalls and/or revetments to be installed, and seawalls and revetments are allowed because they are a last-resort protection.

While we are fortunate to be on the receiving end of another 50-year renourishment agreement that has yet to commence, our position with the Army Corps is tenuous, and it has been increasingly strained over the last decade due to development that is encroaching on the renourishment project. As of 2024, we have received multiple warnings that these encroachments must stop, or we will lose our federal renourishment funding.

In 2024, the City and a third-party environmental consultant has studied the ongoing issue of encroachments, and has recommended the proposed 25' seawall setback, as well as the smaller rock revetment setback. The City's 2024 Dune Management Plan recommends the setback to ensure new seawalls and revetments start coming into compliance with law and our regulatory obligations within the Army Corps' Coastal Storm Risk Management (CSRM) Project and Local Cooperation Agreement (LCA). There is an urgency and necessity of coming into compliance with applicable laws, regulations, and contracts; and it is no longer optional.

Let's be clear: No Action = Continued privatization of our public beach and a loss of our beach renourishments. That outcome is unacceptable.

Thank you for taking action today to protect our public beach and to protect our federal beach renourishments, without which Folly will not exist. You will be achieving this while also preserving property rights, as the proposed ordinance ensures that 100% of beachfront homes will still be eligible for new seawall and rock revetment permits.

Please review the attached "Key Points" with further information demonstrating the necessity of passing the setback for new seawalls and the associated rock revetments.

I have also attached a petition from dozens of Folly Beach residents, including beachfront property owners, requesting that Planning Commission and City Council pass the proposed seawall setback ordinance.

Sincerely,

Matthew N. Napier

Proposed 25' Seawall Setback Ordinance Key Points:

- The Local Cooperation Agreement (LCA) between the City and Army Corps obligates the City to "adopt such regulations as may be necessary to prevent unwise future development…" and "The Local Sponsor (the City) shall assure continued conditions of ***public ownership and public use of the shore…***" The definition of shore is: "the ***land*** bordering a usually large body of water; specifically: coast". Thus, we are compelled to take action to protect the dry sandy beach, not just the areas in the ocean.

- The Army Corps has surveyed a portion of the beach and verified that there are legitimate seawall and revetment encroachment issues that must be addressed, and must not occur again.

- The Army Corps has notified the City multiple times in the last ten years that we are at risk of losing our federal renourishment funding if we do not take action to prevent development so close to the renourishment project line and if we do not create regulations to prevent encroachments on the beach. In 2024, the relationship between the Army Corps and City has been described as, "tense", "strained", and "tenuous" due to numerous encroachments.

- The Supreme Court (in the Braden's Folly case) said, "…the extreme erosion in Folly Beach has caused it to receive ***unparalleled discretion*** to promulgate its own beachfront management regulations, ***including those dealing with setback requirements and erosion control barriers***." They also stated, "…we find some discretion must be allowed to the locality to review and unwind decisions that it later realizes were unwise." In addition, they said, "the super-beachfront houses and their seawalls created a public nuisance…"

- Seawall revetments seaward of the Perpetual Easement Line (PEL) and baseline were installed ***without*** OCRM/SCDES BCM/State permits, and the City is not able to approve seawall revetments seaward of the PEL. By updating the seawall ordinance with a 25' seawall setback and by requiring that all rock revetments initially have a 5' setback when a new seawall and revetments are installed, we will ensure that property owners don't risk running afoul of State or Federal Laws. Thus, this ordinance will protect the beachfront property owner, the public taxpayer/beachgoer, and it will protect our Federal renourishment funds in the process as well.

- The proposed 25' seawall setback and 5' revetment setback provides an exemption to build a new seawall and install new revetments seaward of a house, even if there will be no setback at all. While this is not ideal, it provides certainty that 100% of beachfront property owners will still be able to install a new seawall; not one beachfront property owner will be unable to install a new seawall or revetments.

- All beachfront properties on Folly Beach have a 40' Dune Management Area (DMA) setback for new homes; the proposed 25' seawall setback does not come remotely close to encroaching into a buildable area, and the only construction currently allowed in the DMA is for a beach walkover. Therefore, there will be no loss of use whatsoever from the 25' seawall setback.

- The 2015 through current Local Beach Management Plan all recommend maintaining **50' of sandy beach above the pre-nourishment high tide** for wildlife habitat and recreational space. This cannot be achieved on the east end without a seawall setback.

- The 2024 City of Folly Beach Dune Management Plan recommends that a 25' seawall setback be implemented for all new seawalls.

- Once a seawall setback is enacted, it will be ***more likely*** that the east end will have a continuous revetment, not less. Currently, it is not possible to have a continuous revetment line on the east end, due to some property lines recessing toward land, others advancing far out onto the beach, the old revetment line being seaward of private property in areas, and the Baseline and PEL also varying significantly across the east end. A seawall setback will allow for a more uniform continuous revetment line that is closer to the natural dune system.

- A seawall setback will ensure that seawalls and revetments are installed on private property, and that there is some room for the natural movement and migration of revetments which occurs over time due to wave action and gravity. With a seawall setback, private property will remain on private property and public beach will remain public beach.

Request to recommend a review of the seawall ordinance in order to ensure the public beach is protected for use by the general public.

By signing this pledge, I am asking Council and City staff to consider a seawall setback in order to keep revetments landward of the Baseline, PEL, and private property in an effort to preserve the shore for beachgoers.

Printed name	Signature	Address
Rebeca Greene	Rebecca Greene	1694 East Ashley
Gerry Schmidt	[illegible]	1698 E. Ashley
Sue Beatwright	[illegible]	1698 E Ashley
CORNELIUS VAN OOLEN	[illegible]	1700 E. ASHLEY
Mike Mary	[illegible]	1728 E Ashley
WILLIAM D JONES	William D Jones	1687 E ASHLEY AVE
Bruce F. Miller	Bruce F. Miller	1685 A E Ashley Ave
Gordon Fewox	[illegible]	1726 E. Ashley Ave
VANESSA OHMANN	[illegible]	510 E Ashley
Tara L Wear	[illegible]	922 E Arctic Ave
Carole L Miller	[illegible]	1689 E Ashley
Joni Roeder	Joni Roeder	1507 Forrest Ave
JEFF IRVAN	[illegible]	1674 A East Ashley Ave
J C Whaley	J.C. WHALEY	1638 E. ASHLEY
Julie Carter Julie Carter	Julie Carter	1624 E Ashley Ave
Jenifer Mahanes Jenifer Mahanes	Jenifer L Mahanes	213 E Ashley Ave
Monique Williams	[illegible]	917 E Ashley Ave
Gene Meree	Gene Meree	1648 E. Ashley Ave
DAVID SPOTTS	David Spotts	1652 E. ASHLEY AVE
Martha Spotts	Martha Spotts	1652 E Ashley Ave
J.D. McAllister	J.D. McAllister	1715 E. Ashley Ave
Margot Roberts	Margot Roberts	1715 E. Ashley Ave
Paula Stubblefield	P. Stubblefield	1661 E Ashley Ave

Request to recommend a review of the seawall ordinance in order to ensure the public trust beach is protected for use by the general public.

By signing this pledge, I am asking council and city staff to consider a seawall setback in order to keep revetments off of public trust property in an effort to preserve the shore for beachgoers.

Printed name	Signature	Address
Mary Cafoe	Mary Cafoe	1636 East Ashley Ave
Barbara ~~Harry~~ Bishop	Barbara Bishop	1673 E Ashley Ave.
Harry Bishop	Harry Bishop	1673 E Ashley Ave
Kim Alexander	Kim Alexander	1660 E. Ashley Ave
AARON ALEXANDER	[illegible]	1660 E. ASHLEY AVE
Idan Peters	[illegible]	1664 E. Ashley Ave
[illegible]	Yvette Boyd	1668 E Ashley Ave
Allen Boyd	[illegible]	1668 E. Ashle
Matt Napier	[illegible]	1661 E Ashley

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Braden's Folly, LLC, Respondent,

v.

City of Folly Beach, Appellant.

Appellate Case No. 2022-000020

Appeal from Charleston County
Roger M. Young Sr., Circuit Court Judge

Opinion No. 28148
Heard November 15, 2022 – Filed April 5, 2023

REVERSED AND REMANDED

Danny Calvert Crowe, of Crowe LaFave, LLC, of Columbia; and Joseph C. Wilson IV, of Joseph C. Wilson Law Firm LLC, of Folly Beach, both for Appellant.

Keith M. Babcock, Ariail Elizabeth King, and Joseph B. Berry, all of Lewis Babcock LLP, of Columbia, for Respondent.

JUSTICE KITTREDGE: Respondent Braden's Folly, LLC owns two small, contiguous, developed coastal properties on the northeast end of Folly Beach. The City of Folly Beach amended an ordinance to require certain contiguous properties under common ownership—like those owned by Braden's Folly—to be merged

into a single, larger property. The ordinance did not impact the existing uses of Braden's Folly's contiguous lots. Nevertheless, Braden's Folly challenged the merger ordinance, claiming it had planned to sell one of the developed properties, and that the merger ordinance interfered with its investment-backed expectation under the *Penn Central* test. *See generally Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978) (stating in regulatory takings cases, courts must examine the economic impact of the regulation on the property owner's investment-backed expectations, as well as the character of the government action). Folly Beach denied the claim of an unconstitutional regulatory taking. Pursuant to cross-motions for summary judgment, the circuit court agreed with Braden's Folly, finding the merger ordinance effected an as-applied taking of Braden's Folly's beachfront property. Folly Beach appeals from the grant of summary judgment in favor of Braden's Folly. We reverse.

Underlying our application of the *Penn Central* factors is the distinct fragility of Folly Beach's coastline, which is subject to such extreme erosion that the General Assembly exempted Folly Beach from parts of the South Carolina Beachfront Management Act.[1] This exemption gave the city the authority to act in the State's stead in protecting the beach there. As we will describe more fully below, one of Braden's Folly's properties is contributing to worsening erosion rates on Folly Beach and, along with similarly situated properties, is threatening the existence of the entire beach in that area of the state.

Turning to the *Penn Central* test, we hold two of the three factors—the economic impact of the merger ordinance on Braden's Folly and the character of the governmental action—weigh in favor of finding the merger ordinance did not amount to a taking of Braden's Folly's properties. We find the remaining factor—the extent to which the merger ordinance interfered with Braden's Folly investment-backed expectations—does not weigh in favor of either party. Accordingly, we hold Braden's Folly has not suffered a taking under the *Penn Central* test. We therefore reverse and remand to the circuit court for entry of judgment in favor of Folly Beach.

I.

---

[1] S.C. Code Ann. §§ 48-39-250 to -360 (2008 & Supp. 2022).

Nonetheless, the ACOE refused to renourish privately owned property. Therefore, in the early 1990s, Folly Beach secured perpetual easements from all of the oceanfront property owners. In granting the easements, the property owners permanently gave up their right to build oceanward of the perpetual easement line running through their properties.

Around that same time, in recognition of the quickly changing beachfront, the General Assembly exempted Folly Beach from part of the requirements of the South Carolina Beachfront Management Act. *See* S.C. Code Ann. § 48-39-290(E). Folly Beach's unique treatment under the Beachfront Management Act extends to three notable areas. First, the South Carolina Department of Health and Environmental Control (DHEC) is typically tasked with redrawing the baseline[4] every seven to ten years based on updated erosion rates. *See* S.C. Code Ann. § 48-39-285. However, in Folly Beach, the baseline was set in 1993 and is not subject to change regardless of any erosion or accretion, no matter how extreme. Second, the State typically strictly regulates any development in the beach area between the baseline and the setback line.[5] However, there is no setback line established in Folly Beach, so the city has the sole discretion to allow all types of development right up to the baseline with no oversight from the State. Finally, in a similar vein, the Beachfront Management Act prohibits oceanfront property owners from building new erosion control structures—or from repairing existing structures damaged greater than 50%—if the structures are located seaward of the

---

[4] The baseline is an invisible jurisdictional line typically drawn along the crests of the oceanfront sand dunes, and it serves as the starting point for determining the other jurisdictional line—the setback line—under the Beachfront Management Act. *See* S.C. Code Ann. § 48-39-280.

[5] The setback line "must be established landward of the baseline a distance which is forty times the average annual erosion rate or not less than twenty feet from the baseline . . . ." S.C. Code Ann. § 48-39-280(B); *see also* Jackson, *supra* note 2 (stating the average annual erosion rate for beaches in South Carolina is 1.8 feet per year); S.C. Code Ann. § 48-39-290(B) (setting forth a number of restrictions on development in the area between the baseline and setback line).

which are eight years apart. As a result, the ACOE threatened to cut off federal funding for the renourishment projects unless Folly Beach stopped allowing super-beachfront lots to be developed and attempted to unwind the existing super-beachfront development. Given the importance of the beach to the local economy, and its inability to pay for the renourishment projects on its own, Folly Beach agreed to do so.

The city took multiple steps to reverse super-beachfront development. For example, it created a Dune Management Area (DMA), which prohibits development within forty feet of the perpetual easement line. The DMA affects all of the B lots. In consequence, the DMA prohibits new development on the B lots and—should any existing super-beachfront houses be more than 50% damaged in a storm or otherwise—prevents repair of the existing structures on the B lots.

Likewise, in April 2019, Folly Beach amended its Code of Ordinances. Notable to this appeal, Folly Beach amended its existing merger ordinance to provide that adjacent lots under common ownership may no longer be sold or developed as separate lots if (1) either lot is undersized[10] and (2) one or both lots touch the baseline.[11] The zoning ordinances allow nonconforming uses to continue on

---

[10] Folly Beach's zoning ordinances set the minimum lot size at 10,500 square feet, but a grandfather clause relaxes this restriction for substandard lots that preexisted adoption of the ordinances. Therefore, a number of nonconforming small lots exist in Folly Beach, particularly along the ocean. As we discuss further below, the two lots at issue in this case are both less than 10,500 square feet and, thus, are nonconforming with Folly Beach's zoning ordinances.

[11] Specifically, the newly amended merger ordinance stated, in relevant part:

> (B) *Combination of lots*. If two or more lots of record . . . are in single ownership on or after March 1, 2019, . . . and if all or part of one or more of these lots do not comply with the lot area standards [requiring lots to be a minimum of 10,500 square feet in size] . . . ; and if one or both of these lots are adjacent to . . . [the] Baseline, the lots involved shall be considered to be an individual lot for the purposes of this [zoning ordinance], and no portion of these lots shall be used or sold which do not comply with the lot area standards, nor shall any division of the lots be made that leaves remaining any lot that fails to

redevelopment on that lot. The merger of Lots A and B would allow the property owner to maintain a beach house on at least one of the lots—Lot A—while simultaneously enjoying the unparalleled beach access of Lot B. Moreover, any economic impact resulting from the merger ordinance "is mitigated by the benefits of using the property as an integrated whole, allowing increased privacy and recreational space, plus the optimal location of any improvements." *Id.* Allowing only one house to be built on the two combined lots could increase the market value of the Lots as well because it would allow for the expansion of the existing Lot A house, and it ensures unobstructed ocean views for that single, larger house (rather than Lot A having little to no ocean view due to the existence of the home on Lot B). *Id.* at 1946.

As a result, we hold the appropriate denominator in the takings fraction, and the appropriate parcel to compare any economic impact resulting from the merger ordinance, is the entirety of Lots A and B combined.

B.

Equally important to defining the relevant parcel, we recognize that the unique legal landscape surrounding beach management regulation in Folly Beach must underlie our analysis of the *Penn Central* factors and inform our determination of what is "just and fair" in this situation. As discussed above, the extreme erosion in Folly Beach has caused it to receive unparalleled discretion to promulgate its own beachfront management regulations, including those dealing with setback requirements and erosion control barriers. The legal exemptions Folly Beach is afforded by the state's Beachfront Management Act create an unusual situation that leaves a locality—rather than the state or federal government—as the primary entity in charge of establishing policies to protect the beach and public trust, including prohibiting beachfront development. Of course, the same locality also has competing interests, such as fostering local beachfront development, drawing in tourism via rental properties, and increasing the local tax base.

It is clear Folly Beach weighed those competing interests differently in the past. Two decades ago, Folly Beach prioritized growth and development. Now, however, it appears Folly Beach believes that allowing development of the super-beachfront lots causes a nuisance to nearby property owners, whose lots are eroded even more than the nine-feet-per-year average due to the seawalls in front of the neighboring super-beachfront properties. Moreover, in recent years, Folly Beach

has pursued policies reflecting its view that super-beachfront development risks the livelihood of the entire community via the potential destruction of the beach (if there is no renourishment) or levying a significant, unpopular tax assessment on locals (if forced to pay for the renourishment itself).

Given the uniqueness of letting a locality control its own beach management, we find some discretion must be allowed to the locality to review and unwind decisions that it later realizes were unwise. *Cf. Esposito v. S.C. Coastal Council*, 939 F.2d 165, 169 (4th Cir. 1991) (explaining that establishing a policy of withdrawal from building seaward of a setback line in an effort to address beachfront erosion is a decision "in which . . . legislatures who deal with the situation from a practical standpoint[] are better qualified than the courts to determine the necessity, character[,] and degree of regulation which these new and perplexing conditions require" (internal alteration and quotation marks omitted) (quoting *Gorieb v. Fox*, 274 U.S. 603, 608 (1927))); *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) (noting that coastal property in particular presents unique concerns for a fragile land system, and that those unique concerns may allow the regulating authority to "go further in regulating [beach properties'] development and use than the common law of nuisance might otherwise permit"). Borrowing from Justice Kennedy's sound rationale, the unique concerns facing the beach and coastline at Folly Beach may allow the city to "go further" in regulating super-beachfront development than the law might otherwise permit.

Of equal importance, the merger ordinance is only one of several tools Folly Beach has employed to push back super-beachfront development. In particular, the creation of the DMA must impact our analysis, as—wholly separate from the merger ordinance—development is now prohibited in Folly Beach within forty feet of the perpetual easement line. Thus, regardless of our decision on the constitutionality of the merger ordinance, Braden's Folly cannot redevelop Lot B in the event it is ever destroyed more than 50% of its current value because Lot B is located almost entirely within the DMA. The DMA is but one example of Folly Beach's attempts to ensure the continuing availability of federal funding to rebuild the beach.

The benefits resulting from periodic beach renourishment not only impact the public as a whole, but Braden's Folly in particular. According to the ACOE, absent the ongoing beach renourishment projects, the erosion in Folly Beach would have swept away not only the entirety of the B lots by now, *but also the entirety of the A*

lots on East Ashley Avenue as well.[19] If federal funding is lost due to super-beachfront development, and Folly Beach is unable to secure enough local funds to itself pay for the renourishment projects, all of the houses on the northeast end of Folly Beach—including both of Braden's Folly's Lots—will be underwater in the next two to three decades.

Keeping Folly Beach's unique legal landscape in mind, we turn to the *Penn Central* test.

C.

The first *Penn Central* factor is the economic impact of the merger ordinance on Braden's Folly.

The United States Supreme Court has uniformly rejected the proposition that a diminution in property value, standing alone, can establish a taking. *Penn Cent.*, 438 U.S. at 131; *Andrus*, 444 U.S. at 66; *Dunes W. Golf Club*, 401 S.C. at 317–18, 737 S.E.2d at 621. Rather, the Supreme Court has advised that courts must focus "on the uses the regulations permit." *Penn Cent.*, 438 U.S. at 131; *Dunes W. Golf Club*, 401 S.C. at 317–18, 737 S.E.2d at 621. Likewise, while a comparison of property values before and after the regulation is relevant, "it is by no means conclusive." *Keystone Bituminous*, 480 U.S. at 490 (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)). "The extent of diminution in value is but one fact for consideration in determining whether governmental action constitutes a taking." *Dunes W. Golf Club*, 401 S.C. at 317, 737 S.E.2d at 621 (cleaned up) (citation omitted).

Here, an appraisal report commissioned by Braden's Folly found that if Lots A and B were sold separately, they were worth $508,000 more than if they were sold as a

---

[19] We specifically reference an ACOE map in the record showing that, absent any of the federally-funded beach renourishments (which started in the 1990s), the ACOE estimates the location of the mean highwater line would be in the middle of East Ashley Avenue—a staggering impact on local property owners that would result from only thirty years of unchecked erosion on Folly Beach. It may be important to recall that the ACOE does not provide federally-funded beach renourishment behind the perpetual easement line, thereby imposing all costs to restore those areas on the city and the property owners.

Moreover, as Folly Beach has repeatedly conceded, even under the merger ordinance, Braden's Folly remains able to rent out the houses on the Lots separately and continue bringing in revenue, with the average gross receipts for the Lots amounting to approximately $117,000 per year. *See Penn Cent.*, 438 U.S. at 131 (stating courts should focus "on the uses the regulations permit," rather than what is not permitted); *Dunes W. Golf Club*, 401 S.C. at 317–18, 737 S.E.2d at 621 (same); *cf. Murr*, 137 S. Ct. at 1949 ("They can use the property for residential purposes, including an enhanced, larger residential improvement."); *Palazzolo*, 533 U.S. at 631 ("A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle.'" (citation omitted)); *Quinn*, 862 F.3d at 442 ("Quinn can still build homes on his land; the [Merger] Provision only requires that the development be less dense than he had hoped."); *Beard v. S.C. Coastal Council*, 304 S.C. 205, 208, 403 S.E.2d 620, 622 (1991) (finding a setback provision did not effect a taking in part because the property owners could still sell the property and utilize the rental units on the property).

Finally, it is legally significant that, during the pendency of this lawsuit, Bonner—a buyer who was unquestionably aware of the amended merger ordinance and its impact on the Lots—offered Braden's Folly its full asking price of $2.55 million for both Lots. Bonner diligently pursued the sale, emailing and calling Braden's Folly daily for several weeks but receiving no response to his inquiries or full-priced offer. Given those facts, it is absurd to suggest the merger ordinance had an unconstitutionally negative economic impact on the Lots. After all, Braden's Folly was offered its full asking price for the Lots. It simply chose not to accept that offer, perhaps due to its realtor's advice to continue marketing the Lots solely to "go after the city. You might get your money and not have to sell."

For all of these reasons, it is our opinion the economic impact factor weighs heavily in favor of finding there has been no compensable taking.

D.

We next turn to the second *Penn Central* factor: the extent to which the merger ordinance interfered with Braden's Folly's investment-backed expectations.

"In evaluating a regulatory takings claim, the purpose of consider[ing] . . . investment-backed expectations is to limit recoveries to property owners who can

Nonetheless, at the time Lot B was developed and Braden's Folly initially formulated its investment-backed expectation, Folly Beach had enacted little to no regulations protecting the beach from over-development, including setback requirements or prohibitions on seawalls. In terms of beach regulation, Folly Beach was an outlier compared to surrounding coastal towns.

Over a decade later, when Braden's Folly half-heartedly attempted to actually implement its purported investment-backed expectation and placed the Lots on the market, there had been a number of events that impacted the reasonableness of Braden's Folly's initial expectation. More specifically, the need for regulation in Folly Beach's coastal areas had become evident. The frequency of large-scale beach renourishments steadily increased due to the super-beachfront development, objectively indicating that development was not sustainable. Of more concern, the super-beachfront houses and their seawalls created a public nuisance via the blue blob areas. Once it became apparent that the developed B lots were the source of these flooded areas, it likewise became objectively unreasonable for Braden's Folly to expect to own Lot B with no restrictions or regulations impacting its ownership, including its ability to alienate the property in whatever manner it chose. While it is true the unreasonableness of Braden's Folly's expectations did not fully manifest until after it invested in the redevelopment of the Lots, we harken back to Braden's Folly's inexplicable delay in implementing its investment-backed expectation. That delay was entirely within Braden's Folly's control. We find it objectively unreasonable for Braden's Folly to see the creation and worsening of a public nuisance created by super-beachfront development and *not* expect the city to regulate in some fashion to attempt to fix the problem. *See Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) ("I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation . . . ."); *Quinn*, 862 F.3d at 442 (holding a merger ordinance did not constitute an unconstitutional taking even though it interfered with the owner's investment-backed expectations to develop the affected properties; explaining the owner could still implement his expectations, just in a less dense manner than he had initially envisioned).

Fourth, we find the purported creation of easements between Lots A and B does not weigh heavily in favor of Braden's Folly's investment-backed expectation. As briefly alluded to in note 15, *supra*, the easements were created when "Mark Braden granted *himself*" the rights to beach access for Lot A and road access and

"exclusive significance" lest the State wield too much power, or the property owner "reap windfalls and an important indicium of fairness is lost"); *Columbia Venture*, 413 S.C. at 454, 776 S.E.2d at 917 ("[D]eveloping real estate carries with it certain financial risks, and it is not the government's duty to underwrite this risk as an extension of obligations under the takings clause." (quoting *Taub v. City of Deer Park*, 882 S.W.2d 824, 826 (Tex. 1994))).

E.

Finally, we turn to the third *Penn Central* factor and analyze the character of the government action, specifically, whether Folly Beach's merger ordinance is akin to an eminent domain action.

Regulatory takings cases "aim[] to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. A regulation will be more readily found to amount to an unconstitutional taking if it causes "private property [to be] pressed into some form of public service under the guise of mitigating serious public harm." *Lucas*, 505 U.S. at 1018; *Penn Cent.*, 438 U.S. at 124. However, if the regulation is merely a "public program adjusting the benefits and burdens of economic life to promote the common good," the regulation will pass constitutional muster. *Penn Cent.*, 438 U.S. at 124, 125 (stating that "[z]oning law[s] are, of course, the classic example" of such a public program). It therefore becomes important for a court to consider "the magnitude or character of the burden a particular regulation imposes upon private property rights" as well as "how any regulatory burden is distributed among property owners." *Lingle*, 544 U.S. at 542 (emphasis omitted) ("In answering [the takings] question, we must remain cognizant that 'government regulation—by definition—involves the adjustment of rights for the public good . . . .'" (quoting *Andrus*, 444 U.S. at 65)); *see also Penn Cent.*, 438 U.S. at 133 ("Legislation designed to promote the general welfare commonly burdens some more than others.").

In *Murr*, the Supreme Court discussed the character of merger ordinances extensively, stating:

> The merger provision here is likewise a legitimate exercise of government power, as reflected by its consistency with a long history of state and local merger regulations that originated nearly a century

to the already complex mixture of legal requirements risks making land use planning a well-nigh impossible undertaking.").

Here, Folly Beach's merger ordinance does not unfairly single out Braden's Folly's Lots. Rather, as discussed by the *Murr* Court, merger ordinances have long been employed as a tool to regulate lot sizes. Like in *Murr*, the merger ordinance here is "a reasonable land-use regulation, enacted as part of a coordinated . . . effort to preserve the [beach] and surrounding land." 137 S. Ct. at 1949–50.[28]

While Braden's Folly was slightly burdened by the merger ordinance, it in turn will "benefit greatly from the restrictions that are placed on others." *Keystone Bituminous*, 480 U.S. at 491. Folly Beach and its witnesses set forth in detail the advantages to local beachfront property owners and the public at large should the city unwind the super-beachfront development. The most important of the benefits to local property owners is the continued existence of federal funding for beach renourishment, which in turn (1) protects the A and B lots—particularly given that *all* of the lots would be underwater at this point if it were not for the continual beach renourishment; and (2) avoids property owners paying higher taxes if federal funding is extinguished and Folly Beach must pay for the renourishments with local funds alone.

Accordingly, we find the character of the merger ordinance is not akin to a classic eminent domain action. Rather, in light of the potential public costs of continuing unchecked super-beachfront development, we reject the argument that Folly Beach's merger ordinance constitutes anything but responsible land use policy—one that is generally applicable and widely accepted nationwide. *See, e.g.*, *Murr*, 137 S. Ct. at 1949–50; *Quinn*, 862 F.3d at 443. We thus hold this factor of the

---

[28] We find it significant that the quote in the preceding sentence is the entirety of the *Murr* Court's analysis of this *Penn Central* factor: the Supreme Court was so dismissive of the possibility that a merger ordinance could enact a taking that it addressed the character of the government action in a single sentence in its opinion. That cursory analysis speaks volumes as to the strength of its finding as to this factor of the *Penn Central* test.

Penn Central test weighs in favor of finding the merger ordinance did not effect a taking of the Lots.

F.

After applying the *Penn Central* test, we find two factors weigh strongly in favor of Folly Beach: the economic impact and the character of the government action. As to the third factor, we find there is competing evidence regarding whether the merger ordinance interfered with Braden's Folly's reasonable, investment-backed expectation. We therefore conclude the third factor is a neutral factor that does not weigh in favor of either party. As a result, we hold the *Penn Central* balancing test overall weighs in favor of Folly Beach, and the merger ordinance did not effect an unconstitutional taking of Braden's Folly's Lots.

V.

Braden's Folly's super-beachfront house is one of a handful in Folly Beach that are unintentionally threatening the continued existence of the beach as a whole. In response, Folly Beach amended its merger ordinance to require the combination of jointly-held, undersized, contiguous lots that abut the beach. That merger ordinance is but one part of a coordinated effort by the city to protect the beach and the federal funding that keeps the beach from eroding away entirely.

In accordance with every other jurisdiction in the country that has addressed the constitutionality of merger ordinances, we find Folly Beach's ordinance is a reasonable land-use regulation. It is true that Braden's Folly is slightly burdened by the merger ordinance in that the ordinance restricts one method by which Braden's Folly could alienate its property. However, despite the impact of the merger ordinance, Braden's Folly generally retains a near-full "bundle of sticks" incident to its ownership of the Lots: it may continue to use the properties in the same manner it has for decades, it may alienate the properties as a single unit, and it may exclude others from the properties as it sees fit. *See Andrus*, 444 U.S. at 65–66. Moreover, any economic impact on the value of the Lots appears to be *de minimis*. We therefore hold the merger ordinance did not unconstitutionally take Braden's Folly's property without just compensation. As a result, we reverse the circuit court's entry of summary judgment in favor of Braden's Folly and remand to the circuit court to enter judgment for Folly Beach.