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The Public Trust Debate: Implications for Heirs' Property Owners Along the Gullah Coast

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THE PUBLIC TRUST DEBATE: IMPLICATIONS FOR HEIRS' PROPERTY ALONG THE GULLAH COAST

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I. INTRODUCTION

Heirs' property ownership is a significant problem facing the African American community in the "Lowcountry"¹ of South Carolina. Heirs' property generally refers to real property purchased by African Americans and held within families for generations without clear title.² The land is owned by a group of relatives – the heirs – who possess fractionated fees as tenants in common.³ This form of concurrent ownership is an undivided interest in a fractional share of property.⁴ All cotenants share unity of possession, but acquire titles to varying sized interests at different times.⁵ Each generation passes the property down to their heirs, as there is no right of survivorship for tenants in common.⁶ The disposition of tenants in common property is governed by the law of partition.⁷ Partition provides

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¹ See NAT'L PARK SERVICE, LOW COUNTRY GULLAH CULTURE SPECIAL RESOURCE STUDY AND FINAL ENVIRONMENTAL IMPACTS STATEMENT, 1 (2005) [hereinafter *Gullah FEIS*].

² PETER PLASTRIK, AN HEIRS' PROPERTY COLLABORATIVE INITIATIVE FOR COASTAL SOUTH CAROLINA, COASTAL COMMUNITY FOUNDATION REPORT 1 (2001).

³ John G. Casagrande Jr., *Acquiring Property Through Forced Partitioning Sales: Abuses and Remedies*, 27 B.C. L. REV. 755 (1986).

⁴ *Id.*; see also JESSE DUKEMINIER & JAMES KRIER, PROPERTY 340, 359-81 (5th ed. 2002).

⁵ DUKEMINIER & KRIER, *supra* note 4, at 359-81.

⁶ *Id.*

⁷ *Id.*

for the division of property, or its cash “equivalent,” according to owner interests.⁸

The scope of the heirs’ property problem has been difficult to document. According to scholarly opinions rendered nearly three decades ago, more than one-third of all “black-owned” property in the rural South is owned as heirs’ property.⁹ More recent research conducted for the Coastal Community Foundation of South Carolina (CCF) confirms that a significant portion of land in the Lowcountry is still held as heirs’ property.¹⁰ Assessors identified nearly 2,000 property tracts of heirs’ property in Charleston County, and another 1,300 properties (involving 17,000 acres) in neighboring Berkeley County.¹¹ Within Berkeley County, the president of the Cainhoy Huger Community Development Corporation estimated that “85 percent of the property [on the Cainhoy Peninsula] is owned as heirs’ property.”¹² The prevalence of heirs’ property is most evident on the Sea Islands and in isolated rural communities within the Lowcountry.¹³ At the time of the CCF study, there were 111 tracts of heirs’ property on Wadmalaw Island in Charleston County.¹⁴ Likewise, on St. Helena Island, a small 64 square mile island in Beaufort County, researchers identified 124 heirs’ property parcels.¹⁵

Over the past three decades, scholars have proposed various strategies to re-conceptualize and protect heirs’ property.¹⁶ Building upon work of scholars in the field, and the work of two generations of land preservation activists and lawyers who began the struggle in Hilton Head, this piece

⁸ *Id.*

⁹ C. Scott Graber, *Heirs Property: The Problems and Potential Solutions*, 12 CLEARINGHOUSE REV. 273, 273-276 (1978) (discussing issues and possible remedies for heirs’ property).

¹⁰ Trident Urban League, Inc., “From the River to the Road,” Phase II – Pilot Project of the Coastal Community Foundation and the Trident Urban League, Inc. (1999).

¹¹ *Id.*

¹² *Id.* (quoting Fred Lincoln, President, Cainhoy Huger Community Development Corporation).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See PLASTRIK, *supra* note 2, at 10 (citing research conducted by Toya Hampton Green, Esq. and Morgan Kears, Esq. during internships with CCF).

¹⁶ See, e.g., Hugo A. Pearce, III, *The Problem, Pitfalls, and Possible Solutions*, 25 S.C. L. REV. 151 (1973); Casagrande, Jr., *supra* note 3; Phyliss Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH. U. L.Q. 737, 776 (2000); Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 542-43 (2001); April B. Chandler, *The Loss in my Bones: Protecting African American Heirs’ Property with the Public Use Doctrine*, 14 WM. & MARY BILL RTS. J. 387 (2005).

considers the state of heirs' property in the Lowcountry of South Carolina and evaluates various conservation strategies that may be utilized to preserve heirs' property. This Article examines the efficacy of utilizing the public trust doctrine and various tax incentive mechanisms as tools to conserve heirs' property. In particular, this Article proposes the development of a Gullah Culture Preservation Exemption as a conservation tool that preserves Gullah ownership and traditional use of coastal lands without hindering the property rights of heirs' property owners.

II. HEIRS' PROPERTY IN THE LOWCOUNTRY

A. The Gullah Culture

The Lowcountry of South Carolina is the birthplace and central hub of the Gullah culture.¹⁷ The Gullah Coast stretches from Jacksonville, Florida to Wilmington, North Carolina; however, the majority of the land mass and largest concentrations of Gullah people are in the Lowcountry, between Hilton Head and Georgetown, South Carolina.¹⁸ Colored by the pain of enslavement and isolation, the Gullah Coast began as a pristine yet isolated environment that supported African Americans in a rudimentary, basic lifestyle.¹⁹ This isolation helped to preserve the Gullah culture and protected the African land use values.²⁰

The homeland of the Gullah people is a coastal strip 250 miles long and 40 miles wide where low, flat islands, separated from the mainland by salt-water rivulets, feel the tides twice each day. Swampy grass-covered marshlands alternate with palmettos, pines, and live oaks overhung with gray moss. Rivers flowing southeast on their way to the Atlantic Ocean meander in these lowlands, blending their waters with sounds and bays as they slowly circle the islands, a rich source of both food and transportation. Between them fingers of land reach out to the sea.²¹

¹⁷ See WALTER EDGAR, SOUTH CAROLINA A HISTORY 70-71 (1998).

¹⁸ See *Gullah FEIS*, *supra* note 1, at 1. Accordingly, this paper will focus primarily on laws and policies in South Carolina.

¹⁹ See generally PATRICIA JONES-JACKSON, WHEN ROOTS DIE: ENDANGERED TRADITIONS ON THE SEA ISLANDS (1987); WILLIAM S. POLLITZER, THE GULLAH PEOPLE AND THEIR AFRICAN HERITAGE (1999); MARY A. TWINING & KEITH BAIRD, *Sea Island Culture: Matrix of the African American Family*, in AFRICAN PRESENCE IN THE CAROLINAS AND GEORGIA: SEA ISLAND ROOTS 1-17 (Mary A. Twining & Keith Baird eds., 1991).

²⁰ See TWINING & BAIRD, *supra* note 19.

²¹ POLLITZER, *supra* note 19, at 4.

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Over the generations, the land was a source of sustenance and sanctuary for thousands of African Americans who treasured and maintained their tidal tracts.²² The perceived undesirability of living on low lands, and the relative isolation of the Sea Islands and rural marshes, facilitated the preservation of the Gullah culture.²³

Though broadly described by some scholars as an “old slave culture,”²⁴ anthropologist William S. Pollitzer magnifies the description of the Gullah culture as a product of a diversity of African nations and customs: “[a]lthough early rice planters along this coast were aware that Africans were as diverse as Europeans, owners molded them into a cohesive workforce, ignored ethnic distinctions, and discouraged native customs. For survival, slaves had to submerge differences and create a common culture.”²⁵ “Coming from more than two dozen ethnic groups and speaking forty different languages, communication among slaves at first was difficult.”²⁶ Accordingly, African Americans were forced by circumstance to develop their own means of communication, which led to the development of a creole language termed “Gullah.”²⁷ The Gullah culture reflects values “born in Africa and honed through slavery and oppression, based on harmony with nature and their fellow man”²⁸

B. Land Legacy

The Lowcountry holds a unique place in the history of African Americans. Settled by the English in 1670, Charleston became a major port during the colonial era.²⁹ Built on the commerce of indigo and cotton crops, as well as the skills and forced labor of Africans who were enslaved

²² *Id.*

²³ *See supra* note 19.

²⁴ GUY & CANDIE CARAWAN, *Introduction to AIN'T YOU GOT A RIGHT TO THE TREE OF LIFE? THE PEOPLE OF JOHNS ISLAND, SOUTH CAROLINA—THEIR FACES, THEIR WORDS AND THEIR SONGS* 9 (1966).

²⁵ POLLITZER, *supra* note 19, at 4.

²⁶ EDGAR, *supra* note 17, at 71.

²⁷ *Id.* “Gullah is a spoken, not a written, language Nouns and pronouns have no case; verbs have no tense; and pronouns have no gender. . . . Since it is a spoken language, the way words are pronounced and the rhythm of speech are key elements. Linguistic studies have shown that most Gullah vowels are similar to those in Yoruba, a language spoken in Nigeria. The melodious lilt still heard along the coast is West African in origin.” *Id.*

²⁸ POLLITZER, *supra* note 19, at 4.

²⁹ *See generally* MICHAEL DANIELSON, *PROFITS AND POLITICS IN PARADISE: THE DEVELOPMENT OF HILTON HEAD ISLAND* 7–8 (Univ. S.C. Press 1995) (explaining that property in Carolina was distributed through a series of land grants to proprietors who sought settlers to occupy and develop the land, and that these settlers established a plantation economy that was based on indigo and cotton production through the labor of slaves).

on Lowcountry plantations scattered throughout the coastal region,³⁰ Charleston became home to both enslaved Africans as well as free persons of African descent who generally provided skilled labor, commercial services and domestic services to residents of the city.³¹ Both slave and free African Americans shared the aspiration of land ownership as the key to freedom and family independence.³²

A significant number of Gullah heirs' property owners can trace their ownership back to land purchases by former slaves during the Civil War and the Reconstruction period.³³ Through the war-time "Reconstruction Rehearsals" facilitated by missionaries and government officials in the Union-occupied Sea Islands, South Carolina freedmen were the first in the nation to have significant opportunities to acquire property in substantial quantities.³⁴ Notwithstanding the failed promises of General Sherman and the U.S. Government to divide Lowcountry plantations and distribute the land to former slaves through a government subsidized Homestead program, freedmen purchased Lowcountry lands at market rates through federal tax sale auctions and the South Carolina Land Commission, a Reconstruction-era land distribution program.³⁵ Through these efforts, more than 16,000 African American families acquired at least 50,000 acres through federal and state government sales, as well as private efforts that shaped Reconstruction-era land distribution policies.³⁶ Though these coastal lands were low and often unproductive, families treasured the land and made great sacrifices to maintain ownership of their property.³⁷

C. Legal Challenges to Heirs' Property Ownership

³⁰ See BERNARD E. POWERS, *BLACK CHARLESTONIANS: A SOCIAL HISTORY 1822-1885* 2-3 (1994). "As a major seaport, Charleston had always been a center for the importation and distribution of slaves. South Carolina was the only southern state to reopen the foreign slave trade from 1803 to 1807. During this period it is estimated that forty thousand Africans were brought to the city. The continued heavy importation of people from the African continent ensured that the Low Country region . . . would be the seat for the most Africanized slave communities in America." *Id.*

³¹ *See id.* at 10-15, 104-08.

³² *See generally* CAROL BLESER, *Introduction* to *THE PROMISED LAND: THE HISTORY OF THE SOUTH CAROLINA LAND COMMISSION, 1869-1890* xiii (1969).

³³ *See generally* WILLIE LEE ROSE, *REHEARSAL FOR RECONSTRUCTION: THE PORT ROYAL EXPERIMENT* 205-11 (1964).

³⁴ *See id.*

³⁵ *See* BLESER, *supra* note 32, at 11.

³⁶ Faith R. Rivers, *Restoring the Bundle of Rights: Preserving Heirs' Property in Coastal South Carolina*, 2006 A.B.A. SEC. REAL PROP. PROB. & TR. L. 531, 549-50, available at <http://www.vermontlaw.edu/emplibrary/faithpropertypreservationextract.pdf> (last visited Feb. 4, 2007).

³⁷ *Id.*

Notwithstanding this impressive legacy of land ownership, the African American land holdings and the survival of the Gullah culture are imperiled by the present legal system. The vast majority of the Gullah people hold title to these coastal homelands as heirs' property.³⁸ The original purchasers did not devise their property through the formal probate process.³⁹ Rather, property remained "in the family" and became heirs' property.⁴⁰ While tenancy in common is a standard concurrent interest that many Americans hold, this form of property ownership has a unique history and poses dire consequences for African American land owners in the Lowcountry.⁴¹

It is widely acknowledged by scholars, judges, and lawmakers, as well as property owners and developers, that partition actions are a mechanism for outsiders to acquire private property that is otherwise not for sale.⁴² Any tenant in common, regardless of his or her percentage share in the property, can request that the court partition the land.⁴³ In a typical case, a nonpossessory heir sells her or his interest to a developer, who then stands in that heir's shoes and requests partition of the property by sale.⁴⁴ Alternatively, one heir may request the sale at the behest of, and with litigation costs underwritten by, a waiting developer.⁴⁵ Once able to claim an ownership interest, land speculators and developers file an action for partition requesting that the property be sold to satisfy his or her newly-acquired ownership interest.⁴⁶

Because coastal areas are currently experiencing rapid economic growth, heirs' property is particularly vulnerable to exploitation and development. Many families are thrown into turmoil in the effort to divide possession, control, and the responsibilities of owning heirs' property.⁴⁷ The law does not make any provision for division of responsibility for tax payments, and heirs often are unable to locate all interest holders, and

³⁸ See generally POLLITZER, *supra* note 19, at 190.

³⁹ See generally DUKEMINIER & KRIER, *supra* note 4, at 368.

⁴⁰ See *id.*

⁴¹ *Id.* at 359, 368.

⁴² See generally Casagrande, Jr., *supra* note 3, at 756 n.18; Craig-Taylor, *supra* note 16, at 751; Mitchell, *supra* note 16, at 511; Todd Lewan and Delores Barclay, *Torn from the Land* (pt. 1), THE SEATTLE TIMES, Dec. 2, 2001, at A20 [hereinafter *Farmland Taken*]; Todd Lewan and Delores Barclay, *Torn from the Land: Robbed of Their Legacy* (pt. 3), THE SEATTLE TIMES, Dec. 9, 2001, at A22 [hereinafter *Robbed of Their Legacy*].

⁴³ See generally DUKEMINIER & KRIER, *supra* note 4, at 359.

⁴⁴ See Mitchell, *supra* note 16, at 508.

⁴⁵ *Id.* at 511 n.27-28.

⁴⁶ See *id.*

⁴⁷ See *id.* at 518.

many fail to develop a plan to allocate property taxes.⁴⁸ Thus, heirs' property is particularly vulnerable to loss by tax sale. When families attempt to divide property among themselves, reaching consensus on a method to divide the land can be challenging, particularly for large families with several generations of heirs.⁴⁹ If the court orders partition by sale, most often, family members do not have the funds (or the ability to raise the funds) to pay the requesting heir his or her share of the fair market value of the land within the confines of quick-paced judicial sales.⁵⁰

Accordingly, through the operation of legal and administrative procedures, heirs' property owners are in constant danger of losing their inheritance through partition orders and tax sales, which are the practical consequences of involuntary tenancy in common property ownership in rapidly developing areas. These threats relegate a broad group of African Americans who inherited land through intestacy to a disadvantaged class of property ownership.⁵¹

D. The Economics of Living on Heirs' Property

Due to current trends of southern migration and economic growth spurred by South Carolina's burgeoning tourism and port industries over the past sixty years, the coastal areas have been the target of expansive commercial and resort development.⁵² Inspired by developer requests and funding, transportation infrastructure was enhanced to provide access to these once-isolated areas.⁵³ This access resulted in development and market value increases,⁵⁴ which enhanced the incentive for developers to exploit heirs' property.⁵⁵ The attendant increasing tax assessments,

⁴⁸ *Id.* at 513.

⁴⁹ *See id.*; Chandler, *supra* note 16, at 396.

⁵⁰ *See* Pearce, III, *supra* note 16, at 155–56. The South Carolina legislature recently enacted a measure to provide "nonpetitioning" co-tenants and joint tenants the right of first refusal in a partition sale. *See* S.C. CODE ANN. §15-61-25. The provision is intended to provide family members with the opportunity to maintain heirs' property. Without economic resources, however, a large number of heirs cannot avail themselves of this mechanism. *See* Andy Brack, *Laws 'Waves' As Blacks Lose Land*, THE BEAUFORT GAZETTE, Aug. 14, 2006. For a discussion of the constitutionality of right of first refusal provisions, *see* FAITH R. RIVERS, *INEQUITY IN EQUITY* (forthcoming).

⁵¹ *See generally* DUKEMINIER & KRIER, *supra* note 4, at 368.

⁵² *See* EDGAR, *supra* note 17, at 579-81.

⁵³ *See generally* DANIELSON, *supra* note 29, at 14-16 (recounting the Hilton Head Company's efforts to persuade state transportation officials to open ferry service to the island and their successful lobbying efforts to pass legislation establishing a privately financed toll bridge after being unable to obtain state support).

⁵⁴ *Id.*

⁵⁵ *Id.*

combined with the suboptimal communalist tax liability system, have led to a significant loss of historic African American land holdings in the Lowcountry.⁵⁶

In rapidly developing areas, low and moderate income heirs may not be able to afford the houses and land they have inherited or built due to the economic challenges of maintaining heirs' property.⁵⁷ The obligation to maintain property and pay property taxes often places an undue financial burden on heirs' property owners who reside on the land and/or take personal responsibility for meeting the financial obligations of maintaining family ownership.⁵⁸ Without clear title, heirs are unable to capitalize on land resources as the cornerstone of the family's economic portfolio.⁵⁹ Consequently, while heirs' property owners may possess great wealth in their land assets, many landowners are not able to access the economic equity in their land and, thus, continue to live in poverty.

Typically, court-ordered partition sales draw less than optimal market value because of the forced timed conditions of the court sale where there are willing buyers but "court-ordered" sellers.⁶⁰ In these situations, developers who force partition sales are able to capture the property at bargain prices and realize exponential returns, which far exceed the cost of partition, when the land is re-sold at a higher price pursuant to the newly acquired, consolidated title.⁶¹ In these instances, heirs' property owners not only lose their land, and often the family homestead, but also fail to capture the full economic value of the land once the sale is ordered.

III. PUBLIC TRUST DOCTRINE & HEIRS' OWNERSHIP OF COASTAL LANDS

South Carolina's public trust doctrine has an extensive lineage. Pursuant to this doctrine, the State claims presumptive title to land below the high water mark, but above the low water mark.⁶² As stated by the Supreme Court in 1884, "the State holds title to this land in both *jus privatum* and *jus publicum*, in trust to benefit all the citizens of the

⁵⁶ *Id.*

⁵⁷ Casagrande, *Jr.*, *supra* note 3, at 757.

⁵⁸ *Id.*

⁵⁹ *See* Mitchell, *supra* note 16, at 518.

⁶⁰ Chandler, *supra* note 16, at 390.

⁶¹ *See, e.g.*, Lewan & Barclay, *Robbed of Their Legacy*, *supra* note 42, Tatsha Robinson, *Developer Land Rush Divides Black Families*, THE BOSTON GLOBE, Nov. 23, 2003, at A1 (recounting the court ordered sale of 17 acres of waterfront heirs' property in Berkeley County for \$900,000, and the subsequent listing of the property for \$3 million within months).

⁶² *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 119 (S.C. 2003).

State.”⁶³ The early common law doctrine arose out of the perceived “uselessness” of low land that regularly was submerged under water.⁶⁴ As discussed further below, the state may affirmatively utilize the public trust doctrine to protect coastal lands, this should be accomplished with sensitivity to the unique situation of heirs’ property owners along the Gullah Coast.

A. Protecting Economic Interests

In South Carolina, the public trust doctrine merged with a public policy interest in reserving resources for the State’s profit. Notably, in *State v. Pinckney et al.*, the court characterized the marshes as “worthless,”⁶⁵ but noted that legislation forbade “the sale or grant of such lands, covered with water and marshes, as may be situated in the portion of the state, in which are phosphate rocks and phosphatic deposits.”⁶⁶ Confirming that the public trust doctrine was a part of the State’s common law, the Court went on to allow the State to recover marshlands from the individuals who maintained those areas, and required them to pay damages for the valuable phosphate rock and phosphatic deposits mined from marshland that were determined to have been property of the State via the public trust doctrine.⁶⁷

B. Protecting Natural Resources

As the doctrine evolved, the State’s interest evolved from *extraction* of resources to acting as *guardian* of “natural resources such as air, water (including waterborne activities such as navigation and fishing), and land (including but not limited to seabed and riverbed soils)”⁶⁸ for the public benefit.⁶⁹ The State has claimed title to tideland,⁷⁰ marshes and marsh

⁶³ *Id.* at 119 (citing *State v. Pacific Guano Co.*, 22 S.C. 50, 84 (S.C. 1884)). *See also* *State v. Hardee*, 193 S.E.2d 497 (S.C. 1972); *Rice Hope Plantation v. S.C. Pub. Serv. Auth.*, 59 S.E.2d 132 (S.C. 1950); *McCall v. Batson*, 329 S.E.2d 741 (S.C. 1985).

⁶⁴ JACK H. ARCHER ET AL., *THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA’S COASTS* 10 (Univ. of Mass. Press 1994).

⁶⁵ *State v. Pinckney*, 22 S.C. 484, 497 (1885).

⁶⁶ *Id.* at 492.

⁶⁷ *Id.* at 489. It should be noted that this case involved property that was purchased from the Direct Tax Sales Commission by Edward S. Philbrick during the Civil War. *Id.* The implications of the statute claiming state ownership of valuable marsh resources and holding in *State v. Pinckney*, 22 S.C. 484, alleviating title in the marsh (although title was traced back to the State as sovereign) will be explored further in FAITH R. RIVERS, *INEQUITY IN EQUITY* (forthcoming).

⁶⁸ *Sierra Club v. Kiawah Resorts Assoc.*, 456 S.E.2d 397, 402 (S.C. 1995).

⁶⁹ *See generally* Daniel A. Nussbaum, *McQueen v. South Carolina Coastal Council: Presenting the Question of the Relevance of the Public Trust Doctrine to the Total Regulatory Takings Analysis*, 53 S.C. L. REV. 509 (Winter 2002).

islands,⁷¹ and existing and newly created wetlands,⁷² as well as the right to control land below the high water mark.⁷³ This regulatory control has empowered the State to protect marine life and water quality⁷⁴ for the public trust purposes of navigation and fishery.⁷⁵

State ownership and control authorizes the State to regulate access to coastal islands and tidelands⁷⁶ under the provisions of the Coastal and Tidelands Act.⁷⁷ Noting the new interest in developing coastal islands, which were once “[p]rotected by their remoteness and inaccessibility,”⁷⁸ the South Carolina Department of Health and Environmental Control (DHEC) has determined that “[s]ome islands are too small or too far from [upland] to warrant the impacts on public resources” and indicated that permits for proposed bridges to these islands will be denied.⁷⁹ DHEC established a scheme that is clearly designed to respond to takings challenges⁸⁰ and sets out a list of exceptions where bridges ranging from 15 feet to 1,500 are permitted for islands of various sizes.⁸¹ Notably, the regulations provide a blanket exception to consider applications to build bridges to one acre or larger coastal islands if the distance to “upland” is

⁷⁰ State v. Yelsen Land Co., 216 S.E.2d 876, 878 (S.C. 1975).

⁷¹ Coburg, Inc. v. Lesser (*Coburg I*), 422 S.E.2d 96, 97 (S.C. 1992) (“Further, ownership of islands situated within marshland follows ownership of the marshland.”); cf. McCullough v. Wall, 38 S.C.L. (4 Rich.) 68 (S.C. 1850).

⁷² Coburg Dairy, Inc. v. Lesser (*Coburg II*), 458 S.E.2d 547, 548 (S.C. 1995). Moreover, the fact that lands were once highland but are subsequently turned to tideland by rising tidal water cannot defeat the State’s presumptive title to tidelands. State v. Fain, 259 S.E.2d 606, 608 (S.C. 1979).

⁷³ Port Royal Mining Co. v. Hagood, 9 S.E. 686, 689 (S.C. 1889).

⁷⁴ *Sierra Club*, 456 S.E.2d at 397.

⁷⁵ Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co., 146 S.E. 434, 437 (S.C. 1928).

⁷⁶ 30-6 S.C. Reg. 167 at 30-12(N)(1)(a)-(b) (June 23, 2006) (amending S.C. CODE ANN. REGS. 30-12(N) (2005)); see also *Sierra Club*, 456 S.E.2d at 402 (discussing state ownership of public trust land and state control of the public trust land).

⁷⁷ Coastal Tidelands and Wetlands Act, S.C. CODE ANN. §§ 48-39-10 – 38-39-360 (2005).

⁷⁸ 30-6 S.C. Reg. 167 at 30-12(N)(1)(a); see generally discussion *supra* at Part IV.B. (noting that access to many coastal islands, primarily inhabited by African Americans, was not provided due to discriminatory public infrastructure decisions).

⁷⁹ 30-6 S.C. Reg. 167 at 30-12(N)(1)(c) (emphasis added).

⁸⁰ *Id.* at 30-12(N)(2)(a) (stating that “[t]he decision on whether to issue or deny a permit for a bridge to a coastal island must be made with due consideration of the impacts to the public trust lands, critical area, coastal tidelands and coastal waters, weighted against the reasonable expectations of the owner of the coastal island”). For a further discussion of the new regulations and takings, see Erin Ryan, Palazzolo, *the Public Trust, and the Property Owner’s Reasonable Expectations: Takings and the South Carolina Marsh Island Bridge Debate*, 15 SOUTHEASTERN ENVTL. L.J. ___ (2006).

⁸¹ 30-6 S.C. Reg. 167 at 30-12(N)(2)(d).

100 feet or less.⁸² “Upland” is defined to include mainland *and* other coastal islands.⁸³ While the “upland coastal islands” are larger, developed islands, DHEC provides no justification for exempting these islands from the background purpose of protecting the public trust⁸⁴, although the state of development would not impact or change the state’s doctrinal claim to title and control of coastal property in *jus publicum*.

The State’s previous declination to assert the public trust doctrine to protect “upland” islands from development over the past forty years,⁸⁵ and exemption of these now developed islands from the bridge access regulations,⁸⁶ raises the question whether selective use of the doctrine ultimately functions as a substitute mechanism to limit growth, rather than an affirmative underlying background principle of property law. While this application of the doctrine may suit the Joseph Sax advocacy model for use of the public trust doctrine as a mechanism for natural resource management,⁸⁷ the selective use of the doctrine and whole-scale exemption of ecologically comparable large, yet previously developed,⁸⁸ coastal islands may expose the regulation to charges of arbitrariness by those who seek to utilize or capitalize upon their coastal resources.⁸⁹ This may be especially true for heirs’ property owners who may have been denied access to public infrastructure in the past, but who now may pursue these services.

To the extent that heirs’ property owners of coastal islands seek access to bridge infrastructure, the delay in clearing title and accessing public infrastructure may translate into a regulatory bar to this opportunity. While that may be the intent of the Sax advocacy model of the public trust doctrine,⁹⁰ as it would force conservation of a variety of areas including heirs’ property, this strategy of conservation casts a wide net that might be

⁸² *Id.* at 30-12(N)(2)(e).

⁸³ *Id.* at 30-12(N)(2)(f)(i).

⁸⁴ *See id.* at 30-12(N)(2)(f)(b) (listing islands that are considered “upland”).

⁸⁵ The regulations in question were passed pursuant to statutory authority not in force until 1977. S.C. CODE ANN. § 48-39-10 (2006).

⁸⁶ *See* 30-6 S.C. Reg. 167 at 30-12(N)(2)(f)(i)(b).

⁸⁷ *See generally* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

⁸⁸ 30-6 S.C. Reg. 167 at 30-12(N)(2)(f)(i)(b) (listing islands considered “upland”).

⁸⁹ *See* Ellison Smith, Attorney, Smith Bundy Bybee & Barnett, Presentations at the University of South Carolina School of Law Southeastern Environmental Law Journal Symposium: Bridging the Divide: Public and Private Interests in Coastal Marshes and Marsh Islands (Sept. 8, 2006), *available at* <http://www.law.sc.edu/elj/2006symposium/> (last visited Feb. 4, 2007).

⁹⁰ *See generally* Sax, *supra* note [87](#).

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achieved through more narrowly tailored conservation mechanisms.⁹¹ Other conservation mechanisms would preserve natural resources without denying heirs' property owners the same right to use coastal property in ways that have been and continue to be made available to other property owners of larger, developed coastal islands that are exempt from the DHEC bridge access regulations.⁹²

While DHEC sought input and suggestions of affected stakeholders in developing the bridge access regulations,⁹³ special consideration should have been given to the views, needs, and interests of the significant population of Gullah people who hold title to coastal lands as heirs' property when the State asserts title and control of coastal property under the public trust doctrine.⁹⁴ A renewed assessment of such strategies to conserve natural resources should forthrightly consider the conservation interests as well as the economic development needs of heirs' property owners along the Gullah Coast.

C. The State's Advocacy Role in Protecting Coastal Lands

The State's efforts to control tidelands and marsh islands via the public trust doctrine raise an interesting issue with regard to the legal actions by which much heirs' property is lost.⁹⁵ In various suits, the State has acceded that its presumptive title to coastal tidelands may be overcome by showing a specific grant from the sovereign.⁹⁶ In *Coburg v. Lesser II*, the South Carolina Supreme Court recounts that the governing Lords Proprietors

⁹¹ See discussion *infra* at Part IV.C.2. (discussing Gullah Culture Preservation Exemption).

⁹² 30-6 S.C. Reg. 167 at 30-12(N)(2)(f)(i)(b).

⁹³ Carolyn Risinger Boltin, Deputy Comm'r, Ocean and Coastal Res. Mgmt. S.C. Dep't of Health & Env'tl. Control, Presentation at the University of South Carolina School of Law Southeastern Environmental Law Journal Symposium: Bridging the Divide: Public and Private Interests in Coastal Marshes and Marsh Islands (Sept. 8, 2006), available at <http://www.law.sc.edu/elj/2006symposium/> (last visited Feb. 4, 2007).

⁹⁴ See Op. S.C. Att'y Gen., 2003 S.C. AG LEXIS 231 at *12 (Dec. 5, 2003) (asserting that the state presumptively holds title to marshlands).

⁹⁵ See discussion *supra* Part II.C. (discussing legal challenges to heirs' property ownership).

⁹⁶ See *Hobonny Club, Inc. v. McEachern*, 252 S.E.2d 133 (S.C. 1979) (citing *Hardee*, 193 S.E.2d at 500; *Coburg II*, 458 S.E.2d at 548 (citing *Hobonny Club, Inc.*, 252 S.E.2d 133); *City of Folly Beach v. Atlantic House Properties*, 458 S.E.2d 426 (1995) (ordering compensation where it was uncontested plaintiff was 'owner of record' of land below high water mark, without considering the public trust); see also Op. S.C. Att'y Gen., 2003 S.C. AG LEXIS 231 at *12 (Dec. 5, 2003) (stating that short of a grant from the sovereign, the title to marshlands presumptively lies with the state).

made land grants in Carolina in the stead of King Charles II.⁹⁷ Based upon the state's presumptive title to coastal property as sovereign, the Court held that the State must be a party to an action to quiet title to marshlands, islands and causeways.⁹⁸ The Court indicated that the State "must be joined as a party defendant, either by motion of one of the parties or, if necessary, by the Court"⁹⁹ because "a complete determination of the controversy cannot be had absent joinder of the [S]tate, the alleged grantor, as a party defendant."¹⁰⁰

This holding raises an interesting question with regard to the State's right or obligation to join actions to quiet title to marshlands and islands in the heirs' property context. Quiet title actions are the primary mechanism for heirs' property owners to identify ownership interests.¹⁰¹ Yet, the State has not sought to intervene in any such actions with respect to tidelands and marsh islands where the claims are made between heirs and other cotenants.¹⁰² The holding in *Coburg I* could be interpreted to indicate that the same procedural rules require joining the state as a party defendant in all quiet title action, as well as partition actions that redistribute, or more typically force sales of, heir's ownership interests in tidal areas and marsh lands.¹⁰³ If the State maintains a broad interest in controlling public trust lands, it may be significant that the State has not sought, nor been required by the Court, to take a role in quiet title and partition actions pertaining to tidelands and marsh islands.¹⁰⁴ Generally, joinder requirements might tarnish the appeal and slow the pace of forced quiet title or partition actions against the interests of heirs' property owners of tidelands or marshes.¹⁰⁵

⁹⁷ See *Coburg II*, 458 S.E.2d at 548 n.1 (citing I.D. WALLACE, THE HISTORY OF SOUTH CAROLINA (1934)); see also discussion *supra* at Part III.C. As noted above, land grants were not made available to slaves, and thus the opportunity to rebut the state's presumptive title is significantly diminished. See generally *Rose*, *supra* note 33.

⁹⁸ *Coburg I*, 422 S.E.2d at 97.

⁹⁹ *Id.* at 98-99 (citing *cf.* Spanish Wells Prop. Owners v. Bd. of Adj., 367 S.E.2d 160 (S.C. 1988) ("A permittee is a necessary party in action to revoke development permit"); *Bonney v. Granger*, 356 S.E.2d 138 (S.C. Ct. App. 1987) ("Parties to whom trust assets [have] been distributed [are] necessary parties.")).

¹⁰⁰ *Coburg I*, 422 S.E.2d at 98 (citing *Botchie v. O'Dowd* 384 S.E.2d 727 (S.C. 1989) and *Bonney*, 356 S.E.2d 138).

¹⁰¹ *Contra* Pearce, III, *supra* note 16, at 155.

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¹⁰³ *Coburg I*, 422 S.E.2d 96.

¹⁰⁴ *Cf.* Boltin, *supra* note 93 (stating that due to the Attorney General's opinion, 2003 S.C. AG LEXIS 231, any party seeking to build a bridge in public trust lands must either obtain a permit from the state or prove a chain of title to the property from a sovereign).

¹⁰⁵ Rather than a remedy that seeks to take away heirs' property owners' rights (*Contra*, Chandler, *supra* note 16), state involvement in these proceedings could serve as a

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IV. LAND CONSERVATION STRATEGIES

Safeguarding heirs' property ownership in rapidly developing coastal areas presents a particularly complex issue that demands a thoughtful and comprehensive set of solutions. Often, Lowcountry growth has come at the expense of African Americans who own rural and coastal lands, particularly those who hold title to heirs' property.¹⁰⁶ When anti-growth strategies are offered as a potential solution to the problem of increasing development, there are a series of conflicting interests that must be balanced in light of the traditional Gullah patterns of settlement and fragile title of heirs' property.¹⁰⁷ Many local planning and zoning growth control measures that have been embraced and promoted by anti-growth and environmental interests often operate to the disadvantage of heirs' property owners.¹⁰⁸ There are a number of preservation strategies that may be utilized to conserve heirs' property ownership without threatening the traditional land use patterns or denying the health and welfare needs of the Gullah people who reside on these lands.

A. Gullah Land Use Patterns: Compounds vs. Density

From their African traditions, African Americans generally were said to view land with intense personal and social meaning.¹⁰⁹ Settlement patterns reflected cultural values and provided a socio-economic support system for the Gullah people:

Land ownership became and continues to be a very high priority for these previously enslaved peoples. Small settlements, often beginning as intergenerational family compounds, sprang up – sometimes on lands where new landowners had previously been enslaved. These small communities, bound together by family ties, helped one another through the time of extreme poverty in the immediate aftermath of the war.¹¹⁰

deterrent to rampant forced court actions and enhance opportunity for enforcement of procedural protections that are due to heirs' property owners.

¹⁰⁶ See generally Mitchell, *supra* note 16 (discussing African American land loss in the rural south).

¹⁰⁷ See MICHELLE L. SINKLER, S.C. COASTAL CONSERVATION LEAGUE, COMMUNITY COMPREHENSIVE PLANS ASSESSMENT 3-5 (2004).

¹⁰⁸ See *id.*

¹⁰⁹ See DYLAN PENNINGROTH, THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH 158 (Univ. of N.C. Press 2003) (noting that the connections to their African homeland provided a sense of place and formulated African American views of property and land ownership as community assets).

¹¹⁰ Gullah FEIS, *supra* note 1, at 49.

Throughout the sea islands the extended family has been the all-important but flexible social unit, tying together a network of relatives in different homes. Related people in clusters of houses close together promote a web of kinship, an economic and social unit, often buying land and attending social functions together

. . . .

Even the structure and arrangement of houses built by blacks in the Low Country suggest a unique heritage; cabins close together reflect and promote a love of communal living.¹¹¹

The author of the text above observed that “[k]inship plays a role in the ownership of land,”¹¹² noting that “[c]ooperative organizations evolved”¹¹³ that were “following kinship lines,”¹¹⁴ and that relatives often purchased land near each other.¹¹⁵

Accordingly, many heirs’ property owners locate multiple homes in clusters on the property creating a family compound.¹¹⁶ Generally, low density level provisions in comprehensive plans and zoning ordinances, which the local governments enacted to preserve the character of rural areas, prohibit such traditional cluster settlement patterns.¹¹⁷ This has a significant impact on the continued existence of intergenerational African American family compounds.¹¹⁸ Planning officials are beginning to institute exceptions for family compounds (e.g., Beaufort County);¹¹⁹ however, where provided, the exceptions impose a substantial

¹¹¹ POLLITZER, *supra* note 19, at 8-9, 131.

¹¹² *Id.*

¹¹³ *Id.* (citing MELVILLE J. HERSKOVITS, *THE MYTH OF THE NEGRO PAST* 140 (Beacon Press 1958)).

¹¹⁴ *Id.*

¹¹⁵ *Id.* (citing BAMIDELE AGBASEGBE DEMERSON, *Family Life on Wadmalaw Island, in SEA ISLAND ROOTS: AFRICAN PRESENCE IN THE CAROLINAS AND GEORGIA* 57, 66 (Mary A. Twining & Keith Baird eds., 1991)); PATRICIA JONES-JACKSON, *WHEN ROOTS DIE: ENDANGERED TRADITIONS ON THE SEA ISLANDS*, 22 (Univ. of Georgia Press 1987) Scholars have observed that in some African American areas, “[l]and is not normally sold to family members but passed on through an unwritten contract.” *Id.* When one moves, he or she relocates where a relative offers land. *Id.* This custom would appear to directly contradict the legal system’s precepts that require property transactions to be in writing, but may also reflect the legal reality the no individual heir could give or sell heirs’ property due to the clouded title. *Id.*

¹¹⁶ Pollitzer, *supra* note 19.

¹¹⁷ See generally PLASTERIK, *supra* note 2.

¹¹⁸ *Id.*

¹¹⁹ BEAUFORT COUNTY, S.C., CODE OF ORDINANCES § 106-2105 (2006) (allowing longtime rural residents to protect traditional ways of life and provide affordable housing through the family compound development option).

administrative burden, affirmatively requiring families to navigate the complicated planning process in order to obtain an exemption from default density limits.¹²⁰ Furthermore, cluster settlement is deterred by health department regulations which require the property to be fifty percent larger than the lot size for approval of septic tanks.¹²¹ In the absence of wastewater service, this traditional settlement pattern cannot continue under the existing septic requirements. The loss of family compound settlements greatly disrupts the familial grounding of the Gullah culture.

B. Infrastructure Investment: Public v. Private

Though bound by affirmative custom and tradition, the Gullah homelands also reveal a history of tremendous deprivation and poverty.¹²² However, poverty did not prevent many of South Carolina's African Americans from becoming land owners in these isolated coastal areas.¹²³ Yet, such ownership comes with a distinct lack of public services even to this day.¹²⁴

The National Park Service Study notes that “[m]any Gullah/Geechee people, who live in rural communities, have traditionally relied on septic systems and well water.”¹²⁵ As an example, the Study recounts the Snowden Community's ongoing struggle to obtain public wastewater service.¹²⁶ Without access to public wastewater, residents indicate that much of the undeveloped land in the community cannot be utilized unless a sewer system is in place, which leaves a great deal of marsh front property unavailable for subdividing among heirs.¹²⁷ Moreover, the study reports that “improperly located septic systems, more maintenance and

¹²⁰ See generally SINKLER, *supra* note 107, at 9. Beaufort County addresses family settlements on a case-by-case and reporting the County Zoning Administrator's assessment that the Family Exemption Program has permitted over 200 subdivisions from inception to 2004, the time of the report. *Id.*

¹²¹ S.C. CODE ANN. REGS. § 61-56(V)(G).

¹²² See MOSES A. GRANT, *LOOKING BACK: REMINISCENCES OF A BLACK FAMILY HERITAGE ON HILTON HEAD ISLAND* 43-45 (1988). The Hilton Head native recounts that because the James Byrnes Bridge was completed, he was able to attend Michael C. Riley High School in Bluffton (without moving off of the island), and fondly recalls that his father operated a roadside vegetable stand on William Hilton Parkway, inspiring his dream of “owning a small business,” an Exxon Convenience store. *Id.* See also Pastor G. C. Brown in GUY & CANDIE CARAWAN, *supra* note 24, at 27 (recounting similar experiences).

¹²³ DANIELSON, *supra* note 29, at 11.

¹²⁴ See SINKLER, *supra* note 107; *Gullah FEIS*, *supra* note 1.

¹²⁵ *Gullah FEIS*, *supra* note 1, at 51.

¹²⁶ *Id.* at 88.

¹²⁷ *Id.*

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increased population density, may lead to septic system failure and contamination of groundwater.”¹²⁸

While the denial of public support for infrastructure is one strategy to limit the invasion of growth,¹²⁹ it also imposes heavy burdens on heirs’ property owners in terms of community health and productive land use.¹³⁰ Growth containment proponents must consider the impact of denying public services to communities of heirs’ property owners.¹³¹ Growth limitation strategies should be carefully crafted to meet the health and safety needs of these landowners. For example, community-based water systems, which provide clean water through smaller lines that cannot accommodate industrial development, can help alleviate water safety problems on heirs’ property.¹³² However, active support for community water systems does not appear to be at the forefront of the growth containment advocacy agenda.

Comprehensive land use plans and the zoning process are more direct means of managing growth than denial of public infrastructure.¹³³ The challenge is to consider infrastructure services that protect the health and safety of residents in the context of heirs’ property settlement patterns along the Gullah Coast.¹³⁴

C. Tax Code Incentives

State and local governments recognize the circumstances of certain property owners and encourage preservation of low-growth land use by

¹²⁸ *Id.* at 51.

¹²⁹ James Kushner, *Smart Growth, New Urbanism and Diversity: Progressive Planning Movements in America and their Impact on Poor and Minority Ethnic Populations*, 21 *UCLA J. ENVTL. L. & POL’Y* 45, 50 (noting that limiting public services, rather than directly restraining growth, can effectively limit growth).

¹³⁰ SINKLER, *supra* note 107, at 4.

¹³¹ *Id.* at 3-5. See generally Robert Bullard, *Environmental Justice for All: It’s The Right Thing To Do*, 9 *J. ENVTL. L. & LITIG.* 281, 281 (1994) (“African American communities have a long history of struggle to get paved streets, sidewalks, running water and sewer lines, street lights, and fire and police stations. They have also protested inadequate garbage collection and the construction of freeways in their neighborhoods. Environmental disparities result from a host of factors including the distribution of wealth, housing and real estate practices, location decisions of industry, land use planning, patterns of racial and economic discrimination, redlining, and unequal enforcement of environmental regulations.”).

¹³² See generally SINKLER, *supra* note 107 (discussing comprehensive land use strategies that protect land holdings “in traditional settlement patterns”).

¹³³ See generally *id.* at 3 (discussing the Wadmalaw Island zoning plan that, fifteen years after its approval, still supports a healthy agricultural land base, traditional communities, and development while allowing for survival of the rural character of the island itself).

¹³⁴ *Id.*

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reducing or completely forgiving homestead property tax liability.¹³⁵ Just as special tax reduction or elimination strategies promote property ownership by disabled persons and military widows/widowers, and just as exemptions encourage the preservation of agricultural lands, comparable strategies should be implemented to encourage the preservation of Gullah cultural homelands in coastal areas.¹³⁶ This section will discuss a possible Gullah Culture Exception that at least would assuage any overreaching use of the public trust doctrine discussed in Part III.

1. Conservation Easements

A conservation easement is a legal agreement that “permanently limits uses of the land in order to protect its conservation values.”¹³⁷ Certain tax benefits are provided to landowners who ease property for conservation purposes.¹³⁸ The Internal Revenue Service defines allowable “conservation purposes” to include preservation of land areas for outdoor recreation or education for the general public, the preservation of natural habitat of an ecosystem, the preservation of open space (under certain conditions), and the preservation of “historically important land” areas listed in the National Register of Historic Places.¹³⁹ Most often, easements are donated to charitable land trust organizations, but they also may be

¹³⁵ See *supra* Part II.D.

¹³⁶ Cf. Mitchell, *supra* note 16, at 578-579 (suggesting that federal support should be made available to restore historically important buildings, to build museum or archives on the property or to assist with placing “heritage land” into private land trusts).

¹³⁷ Land Trust Alliance, What is a Conservation Easement?, <http://www.lta.org/conservation/easement.htm> (last visited Feb. 4, 2007); see also I.R.C. §170(h)(1) (2006) (defining a qualified conservation contribution as a contribution of a real property interest to a qualified organization, exclusively for conservation purposes).

¹³⁸ See I.R.C. §170(h)(4)(a),(b), and (c).

¹³⁹ See *id.* See also Press Release, Land Trust Alliance, Legislative Victory for Land Conservation (Aug. 4, 2006), available at http://www.lta.org/newsroom/pr_080406.htm (last visited Feb. 4, 2007) (On August 17, 2006, President Bush signed the Pension Protection Act of 2006 into law, which amended the laws pertaining to conservation easements); NATIONAL TRUST FOR HISTORIC PRESERVATION, SUMMARY OF CHANGES RELATING TO PRESERVATION EASEMENTS IN THE PENSION PROTECTION ACT OF 2006 (2006), available at <http://www.nationaltrust.org/legal/documents/pl109-280.nthp.easement.summary.rev.pdf> 4 (last visited Feb. 4, 2007) (According to the National Trust for Historic Preservation, “[t]he intent . . . of this subsection [pertaining to historic land areas] appears to be to disallow any deduction for easements that preserve non-building structures or land areas in registered historic districts [but would leave intact] the definitions that allow deductions for easements that preserve non-building structures or land areas that are individually *listed* on the National Register of Historic Places under IRC § 170(h)(4)(C)(i), or those that otherwise qualify under the separate deduction criteria for easements to preserve ‘historically important land areas,’ under IRC § 170(h)(4)(A)(iv) (emphasis added).”).

sold to government entities or land trusts.¹⁴⁰ Donors who owe taxes are able to deduct the lost value forsaken by the easement over a period of several years.¹⁴¹

Conservation easements have been heralded as a mechanism to reduce estate tax liability, as the forsaken potential development rights are no longer included in the determination of market value.¹⁴² However, under present tax policy, the vast majority of heirs' property owners do not have estates of sufficient size to incur estate taxes.¹⁴³ There may be potential for conservation easements to reduce property tax liability, as the market value is theoretically reduced by the removal of the development rights.¹⁴⁴ However, leading land trust organizations are conserving judgment on the potential of property tax savings from conservation easements.¹⁴⁵

While a successful conservation tool, in the heirs' property context, land trusts encounter transactional challenges that inhibit placing easements on property. All heirs must agree to place an easement on the property, so all individual signatures must be obtained, including permission for unknown heirs through publication.¹⁴⁶ Therefore, it is best to clear the title prior to placement of the easement. Moreover, allocating the tax benefits to generations of heirs presents an administrative challenge, and is only valuable to the extent that heirs have tax liabilities

¹⁴⁰ Land Trust Alliance, *supra* note 137.

¹⁴¹ Pension Protection Act of 2006, Pub. L. No. 109-280, §1213, 120 Stat. 780 (extending the period from 5 to 10 years).

¹⁴² 34A AM. JUR. 2D *Federal Taxation* ¶ 134,900.2 (2006).

¹⁴³ See generally Casagrande, Jr., *supra* note 3; *supra* Part II.D.

¹⁴⁴ *Id.* (“For purposes of calculating the amount of estate tax due on land for which the executor has made a qualified conservation easement exclusion election, the value of any development right retained by the donor in the conveyance of the easement must be included. The computation of tax on any retained development right must be done in the manner and on the forms prescribed by IRS. Thus, the exclusion amount is calculated based on the value of the property after the conservation easement has been placed on the property.”).

¹⁴⁵ See, e.g., Vermont Land Trust, Tax Benefits of Donating Conservation Easements (2005) available at http://www.vlt.org/Tax_Benefits_Donating_Easements.pdf (last visited Feb. 4, 2007) (“At this point, the experience in Vermont is too mixed to predict with any certainty what impact a conservation easement may have on property taxes. . . the land is supposed to be assessed on the basis of its conserved value.”).

¹⁴⁶ 26 U.S.C. § 2031(B) (2006) (“If every person in being who has an interest (whether or not in possession) in the land executes an agreement to extinguish permanently some or all of any development rights (as defined in subparagraph (D)) retained by the donor on or before the date for filing the return of the tax imposed by section 2001, then any tax imposed by section 2001 shall be reduced accordingly. Such agreement shall be filed with the return of the tax imposed by section 2001. The agreement shall be in such form as the Secretary shall prescribe.”).

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against which to claim deductions.¹⁴⁷ Generally, the conservation tax credits are not refundable, thus lower income persons who have no tax liability generally receive no tax benefit from conservation easements.¹⁴⁸ Nevertheless, where heirs seek to conserve property in perpetuity, and as land trusts embrace a broad diversity of conservation-minded property owners, there may be an alignment of interests that promotes placing conservation easements on heirs' property, despite the high transactional costs, in order to protect Lowcountry lands.

2. Gullah Culture Preservation Exemption

A more secure, versatile tool to protect heirs' property from escalating tax liabilities and overreaching use of the public trust doctrine is the development of a Gullah Culture Preservation Exemption. This exemption would limit the assessment ratio to a percentage of the value of the *current use* of the property. Further, this approach avoids the problems created by taxing property at the ever-increasing market value of the "highest and best" use of the property. Moreover, in rural areas, this exemption would compensate for the lack of an agricultural exemption for relatively small heirs' property parcels and for parcels owned by heirs who have converted to more secure forms of ownership.¹⁴⁹

Tax exemption measures would support conservation goals and build upon a local policy approach. The National Park Service Study touted the importance of local strategies to help preserve the Gullah culture and noted that many "effective cultural preservation programs and tools" are well suited to help local communities, and makes specific reference to conservation easements as a local approach "proven to be effective" in addressing the critical concerns related to the preservation of the Gullah/Geechee culture, namely, "loss of land and associated Gullah/Geechee resources which are threatened by development pressures and changing local tax bases."¹⁵⁰

¹⁴⁷ Vermont Land Trust, *supra* note [145](#).

¹⁴⁸ *Id.*

¹⁴⁹ The agricultural tax exemption impacts heirs' property owners who take affirmative steps to clear title and partition their land in kind. The exemption is limited to "immediate family," defined to include the third degree of consanguinity, and notably does not reach cousins. *See* S.C. CODE ANN. REGS. 61-84 (2006). Most heirs' property ownership groups include cousins, as multiple generations have passed since the property was acquired, and are thus unable to take advantage of the agricultural exemption. Furthermore, if heirs take the advised step of converting unstable tenancy in common property to a more secure form of ownership, such as condominiums, cooperatives, and limited liability corporations, *see* Mitchell, *supra* note 16, at 556-557, it is likely there will be more than ten shareholders and the corporation would be denied the exemption.

¹⁵⁰ *Gullah FEIS*, *supra* note 1, at 146.

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The Gullah Culture Preservation Exemption could be instituted through an administrative application process, comparable to the application process for other exemptions. The exemption would achieve the conservation goals of the more complicated and ever-evolving conservation easement, without requiring title clearance as a prerequisite. An exemption likewise would decrease the financial pressure to convert such property to commercial use that emanates from exponentially increasing tax liabilities. Furthermore, the benefit of a reduced tax liability would attach to the *property* itself, rather than to the personal income tax liabilities of the numerous heirs who hold ownership interests, thus simplifying the administrative burden of allocating any tax benefits. Finally, families who resist the perpetual nature of a conservation easement, but who seek to maintain the *existing* use of the property, would have the benefit of an exemption that would reward continuance of current use maintenance of use, while a rollback provision would discourage yet not forbid, a change in use in the future.

In short, building upon the important work of the National Park Service and local cultural preservation organizations, state lawmakers and local government agencies could assist in the preservation of the Gullah culture through the use of the same tax incentives that have proven successful in achieving other worthy public policy goals of preserving agricultural uses of property and supporting elderly and disabled homeowners.¹⁵¹ Most importantly, the Gullah Culture Preservation Exemption could be implemented without imposing the high transactional costs associated with clearing title, placing conservation easements on property, or converting the form of ownership.

V. CONCLUSION: PRESERVING HEIRS' PROPERTY- THE CONSERVATION CHALLENGE

Land loss, family displacement and community demolition have had important impacts on the Lowcountry's Gullah culture.¹⁵² It will take much work to resolve these challenges through some combination of legislative policies and comprehensive administrative services that meet the complicated needs of heirs' property owners in a fair and equitable fashion. In the meantime, however, efforts to address issues related to public trust and coastal protection, as addressed in the Bridging the

¹⁵¹ *Id.*

¹⁵² See generally Casagrande, *Jr.*, *supra* note 3.

Divide: Public and Private Interests in Coastal Marshes and Marsh Islands Symposium ,¹⁵³ should take the heirs' property issue into account.

Working together, government administrators, environmental protectionists, and land loss advocates can craft conservation strategies to help preserve heirs' property along the Gullah Coast. The appeal of aggressive use of the public trust doctrine, anti-growth land use tools, and conservation easements to preserve natural resources in coastal areas must be balanced against the cultural and legal history of the Gullah people. Conservation strategies must "first, do no harm" to the already damaged bundle of rights of heirs' property owners.

Strategies to conserve the natural resources on these lands must include tools to help preserve the Gullah communities that own and occupy much of the ecologically significant Lowcountry coast. In developing new strategies, it is critical that these forces consider the fragile state of heirs' property title, acknowledge the health and economic welfare needs of Gullah residents living on coastal properties, support the traditional Gullah communities' land uses and respect their property rights. The preservation of Gullah heirs' property communities will concomitantly preserve the natural resources on their Lowcountry lands.

¹⁵³ Presentations at the University of South Carolina School of Law Southeastern Environmental Law Journal Symposium: Bridging the Divide: Public and Private Interests in Coastal Marshes and Marsh Islands (Sept. 8, 2006), *available at* <http://www.law.sc.edu/elj/2006symposium/> (last visited Feb. 4, 2007).