Fordham Law Review

Volume 45 | Issue 6 Article 4

1977

State Land Use Statutes: A Comparative Analysis

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STATE LAND USE STATUTES: A COMPARATIVE ANALYSIS

I. INTRODUCTION

State control of land use and development has grown rapidly in recent years. Prior to 1965, only one state permitted state-wide regulation of land development.[1] Most states, copying the Standard Zoning Enabling Act devised by the U.S. Department of Commerce in the 1920's, had delegated the power to regulate land use to municipal and county governments.[2] Recently, however, the recognition that land is a valuable and limited resource, the concern for environmental protection, and the realization that land development often has effects which extend beyond the immediate environs of the development site have prompted national and state efforts to provide for state control over land use.[3] As a result, today many states have initiated some form of regional or state-wide regulation.[4] This trend has been encouraged by two events. First, Congress has considered several proposals in the last six years which, if enacted, would provide funding to states to institute systems

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1. Hawaii adopted state land use controls in 1961. No other state enacted state-wide regulations for almost a decade. See Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess., State Land Use Programs 75-93 (Comm. Print 1974).

2. All fifty states have adopted legislation based on this model at one time or another. 1 N. Williams, American Land Planning Law § 18.01 at 355 (1974).

3. See 5 N. Williams, American Land Planning Law § 160.17 (1975).

4. Throughout this Comment the term "regional" is used to mean an intra-state geographical area. Many states exercise land use controls over selected regions within the state such as shorelines, tidal areas, and wetlands. E.g., California Coastal Zone Conservation Act, Cal. Pub. Res. Code §§ 27000-650 (Supp. 1976); New York Tidal Wetlands Act, N.Y. Environmental Conservation Law §§ 25-0101 to -0602 (McKinney Supp. 1976). For a discussion of selected regional control statutes see F. Bosselman & D. Callies, The Quiet Revolution in Land Use Control (1971) [hereinafter cited as Bosselman & Callies]. The states with state-wide controls are: Colorado, Colo. Rev. Stat. Ann. §§ 24-65-101 to -65.1-502 (1973), as amended, (Supp. 1975); Florida, Fla. Stat. Ann. §§ 380.012-.12 (1974), as amended, (Cum. Supp. 1976); Hawaii, Hawaii Rev. Stat. §§ 205-1 to -16.2 (1968), as amended, (Supp. 1975); Maine, Me. Rev. Stat. Ann. tit. 38, §§ 481-89 (Cum. Supp. 1973), as amended, (Cum. Supp. 1976) and Me. Rev. Stat. Ann. tit. 12, §§ 681 to 685-C, 689 (1974), as amended, (Cum. Supp. 1976); Minnesota, Minn. Stat. Ann. §§ 116G.01-.14 (Cum. Supp. 1976); Montana, Mont. Rev. Codes Ann. §§ 84-7501 to -7526 (Cum. Supp. 1975); Nevada, Nev. Rev. Stat. §§ 321.640-.810 (1975); Oregon, Ore. Rev. Stat. §§ 197.005-.795 (1975); Utah, Utah Code Ann. §§ 63-28-1 (Supp. 1975); Vermont, Vt. Stat. Ann. tit. 10, §§ 6001-91 (1973), as amended, (Cum. Supp. 1976); and Wyoming, Wyo. Stat. Ann. §§ 9-849 to -862 (Cum. Supp. 1975).

Other states have adopted statutes which authorize a state agency to exercise limited powers to guide land development. States with such enactments are: Missouri, Mo. Rev. Stat. §§ 251.010-.440 (Vernon Cum. Supp. 1977); Nebraska, Neb. Rev. Stat. §§ 84-142 to -160 (Cum. Supp. 1976); North Carolina, N.C. Gen. Stat. §§ 113A-150 to -159 (1975); and Tennessee, Tenn. Code Ann. §§ 13-101 to -109 (1973), as amended, (Cum. Supp. 1976). These statutes generally limit the state's role to that of an advisor to local governments, the governor or the legislature. Mo. Rev. Stat. §§ 251.030(1)-(3), (5)-(6) (Vernon Cum. Supp. 1977); Neb. Rev. Stat. § 84-156 (Cum. Supp. 1976); N.C. Gen. Stat. § 113A-153 (1975); Tenn. Code Ann. §§ 13-106, 13-108 (1973).

of state control.[5] Second, the American Law Institute has formulated a Model Land Development Code which includes provisions for state regulation.[6] The Code has been the prototype for many statutes enacted recently.[7]

This Comment reviews the land use statutes which currently authorize state control over land development. First, the objectives of these statutes will be considered. The powers of the state administrative agency and the function of municipal governments under the various land control systems will then be examined. The discussion will include an analysis of the strengths and weaknesses of these enactments.

II. THE REASONS FOR STATE CONTROL

A. *Historical Perspective*

The freedom to use and enjoy private property without unwarranted government interference is one of the most coveted rights in the Anglo-American tradition.[8] The concern for the preservation of the right to hold and use private property was embodied in the United States Constitution which provides that "private property [shall not] be taken for public use, without just compensation."[9]

Nonetheless, individual use of property may itself unduly interfere with the

5. Senator Henry Jackson introduced the first Congressional land use bill, S. 3354, 91st Cong., 2d Sess. (1970). Its introduction was too late for Senate consideration during that session. American Enterprise Institute, Land Use Proposals 1 (1975). A second proposal, S. 632, 92d Cong., 2d Sess. (1972) was passed by the Senate, but neither the Senate's proposal nor its counterpart, H.R. 7211, 92d Cong., 2d Sess. (1972), was acted upon by the House. Id. at 2. The third proposal, S. 268, 93d Cong., 1st Sess. (1973), was also passed by the Senate and sent to the House. However, both the Senate bill and the House version, H.R. 10294, 93d Cong., 1st Sess. (1973), again failed to reach the House floor. Id. The most recent effort of the Senate, S. 984, 94th Cong., 1st Sess. (1975), did not reach the Senate floor. The House also failed to vote upon a similar proposal, H.R. 3510, 94th Cong., 1st Sess. (1975).

While Congress has not yet enacted legislation supporting state-wide regulation, the discussion in Congress has interested some states in state land use controls. At least one state has considered these Congressional proposals in its preparation for state-wide land use regulations. Ky. Rev. Stat. Ann. § 147.350(9) (Cum. Supp. 1976).

6. ALI Model Land Development Code art. 7 (Proposed Official Draft 1975) [hereinafter cited as Model Land Development Code]. This article of the Code was formulated for the purpose of redelegating part of the state's regulatory powers from local governments to a state agency. It was designed to allow states to select the provisions suitable to their individual purposes. Bosselman, Raymond & Persico, Some Observations on the American Law Institute's Model Land Development Code, 8 Urban Law. 474, 475 (1976).

7. The Model Land Development Code has affected the legislation of seven of the eleven states which have enacted state-wide controls. See sections II A(2), II B(2) infra.

8. Blackstone, in his treatise on the laws of England, considered this freedom to be a basic principle of English law: "The third absolute right . . . is that of property: which consists in the free use, enjoyment, and disposal of all . . . acquisitions, without any control or diminution, save only by the laws of the land. . . . So great . . . is the regard of the law for private property, that [the law] will not authorize the least violation of it; no, not even for the general good of the whole community." W. Blackstone, Commentaries *138-39.

9. U.S. Const. amend. V.

use and enjoyment of property by others. To prevent such a result, some form of restraint is necessary. Before statutory controls were instituted, the common law of nuisance evolved to restrict the use of private property.[10] However, nuisance actions alone are inadequate to regulate property usage since it is often difficult for landowners to anticipate the legality of a proposed activity.[11] Furthermore, this body of law has been predominantly concerned with protecting property values;[12] individual developments which otherwise have significant effects upon the community may not be controllable through nuisance actions.[13]

A second common method employed by private landowners to control neighboring land uses is the inclusion of restrictive covenants in conveyances of land. Reciprocal agreements between neighboring landowners not to engage in particular uses or to restrict property use to specific activities are incorporated as covenants in deeds.[14] These covenants provide a substantial degree of predictability to land use since they can bind subsequent titleholders. This method of regulation, however, does not permit the community to control developments which may have significantly detrimental public impact.

Statutory land use controls were not common in the United States until the 1920's.[15] A major reason for the late exercise of public control of private property was a concern as to the constitutionality of such restraints.[16] It was not until 1926 that the Supreme Court in *Village of Euclid v. Ambler Realty Company*[17] recognized such regulation to be within the police powers of the state. The Court there held that the states have wide powers to supervise land use where the objective is the protection of the general welfare.[18] Since

10. The law of nuisance is concerned with the protection of public and private rights which are adversely affected by the use of private property. These rights are distinct from a proprietary interest in the site in controversy. Disputes within the scope of this action range from petitions by neighboring landowners to enjoin uses which reduce the productivity of their land to complaints about uses which interfere with the quiet enjoyment of property. See W. Prosser, Law of Torts § 87 (4th ed. 1971).

11. Undertaking a project which later is deemed a nuisance could be financially burdensome. Furthermore, the judicial determination that a use is a nuisance can occur even if that use predates the neighboring use with which it is interfering. E.g., Pendoley v. Ferreira, 345 Mass. 309, 187 N.E.2d 142 (1963); Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

12. 1 R. Anderson, American Law of Zoning § 2.03 (1968).

13. For example, activities which destroy the aesthetic character of the community may not be subject to nuisance actions. Id. at 36.

14. Id. § 2.04. Covenants were used to protect the interest of the landowners irrespective of the activity's effect on the community.

15. New York City adopted the first comprehensive zoning ordinance in 1916. Id. § 2.07.

16. Until the 1920's, zoning ordinances which restricted non-nuisance uses were frequently found invalid. D. Hagman, Urban Planning and Land Development Control Law § 28, at 68 (1971).

17. 272 U.S. 365 (1926).

18. Id. Not only may the state require that dangerous and offensive activities be located away

Euclid this power has been exercised not only for economic purposes but also for aesthetic reasons[19] and to restrict the permissible location of legal uses.[20]

While the Court in *Euclid* found that the authority to regulate the use of land was vested in the state, this power historically has been delegated to municipalities and county governments.[21] Land use was considered to be a local activity, the effects of which were assumed to be limited to the immediate environs of the site.[22] The local community was believed to be better able to understand and evaluate whether a particular use at a specific site would injure the general welfare.[23]

The assumptions that the effects of land development are limited and that the local community has superior competence to evaluate land use issues have been subjected to increasing skepticism. The emergence of environmental controversies and chronic problems such as the need for low-cost housing have revealed the inadequacies of local control.[24] While most land use activities have geographically limited effects, certain activities may have widespread social, economic and environmental impact. In such cases, not only the immediate community but all affected areas have an interest in the land use decision. Furthermore, while individual developments may have only marginal impact outside the local community, the cumulative effect on the region or the state may be substantial. However, regional and state interests may not be asserted because the authority to regulate has been exclusively delegated to local governments. Finally, the ramifications of certain land use activities may be very complex and require technical knowledge for proper assessment. Local governments may not possess the resources or information necessary to evaluate these developments effectively.[25] Even assuming that local governments have such capability, critics have been

from other uses, but it may broadly categorize activities and separate them by zones. So long as the state's regulations are not arbitrary the Constitution will not be offended. Id. at 388-89.

19. State v. Diamond Motors, Inc., 50 Hawaii 33, 429 P.2d 825 (1967).

20. Young v. American Mini Theaters, 427 U.S. 50 (1976) (zoning regulations requiring that pornographic theaters be separated by minimum distances are constitutional).

21. See note 2 supra and accompanying text.

22. See ALI Model Land Development Code xix-xx (Tent. Draft No. 1 1968).

23. 1 R. Anderson, American Law of Zoning 2d § 2.03 (2d ed. 1976).

24. Four studies which criticized existing laws noted that the unrestricted grant of power to local governments has produced a distortion in urban growth and left the state without a means of solving regional and state-wide problems such as pollution, low-cost housing, and environmental protection. Also, delegation of the state's power has resulted in incompetent planning and "an administrative process which runs counter to many concepts of fairness and orderly procedure." ALI Model Land Development Code xv (Tent. Draft No. 2 1970) (discussing the conclusions of: Building the American City: Report of the National Commission on Urban Problems (1969); New Directions in Connecticut Planning Legislation: A Study of Connecticut Planning, Zoning and Related Statutes, American Society of Planning Officials (1968); A Proposed Land Use Planning and Development Law for New Jersey (1969); New York State Planning Law Revision Study, New York State Office of Planning Coordination (1970)).

25. See Raisch, Utah Environmental Problems and Legislative Response: II, 1973 Utah L. Rev. 1, 22-23.

concerned that municipalities will weigh local goals and interests above the welfare of the state.[26] For these reasons, greater state participation in land use control has been urged.[27]

State regulation of land use, however, has been criticized as an interference with the efficient, free market determination of the proper allocation of land.[28] Some have contended that state regulation would advance the interest of the rural and suburban groups which frequently control state legislatures.[29] Thus, developments necessary for urban communities but detrimental to such powerful suburban and rural interests could be prevented.

It is also predicted that such regulation will have particularly harmful results in the housing market where new unit construction might be curtailed. Low-income groups would suffer the greatest from the resulting housing shortage.[30] Hence, it is argued that the purported goals of state control—avoiding the waste of land, and utilizing land to satisfy the most pressing needs of society[31]—could be defeated rather than furthered by state regulation.[32]

B. *The Objectives of State Regulation*

An increasing number of states are enacting legislation which reassigns part of the responsibility of regulating land use to a state agency.[33] In general, the expressed reasons for these statutes have been similar. The majority of the states have asserted their principal aims to be protection of the environment, protection of the state's natural resources, and coordination of the individual planning activities of municipalities.[34] Other purposes which have been asserted are protection of historical, cultural and aesthetic resources;[35] promotion of land management;[36] and protection of land utility and value.[37]

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26. One commentator has stated that "local governments have been most amenable to private interests which have often been opposed to restrictions on land use and which have sought to keep the degree of regulation to a tolerable minimum at the expense of effectiveness." Delogu, Beyond Enabling Legislation, 20 Me. L. Rev. 1 (1968).

27. 5 N. Williams, American Land Planning Law § 160.08 (1975).

28. Siegan, Land Use Planning in America: Controlling Other People's Property Through Covenants, Zoning, State and Federal Regulation, 5 Envt'l L. 385 (1975).

29. Id. at 393.

30. Id. at 392-93. The effects of state regulation are expected to be an increase in the cost of housing, a reduction in the availability of low-cost and other housing, and urban sprawl. Id. at 391.

31. Id. at 388.

32. Id. at 388-94.

33. Eleven states have enacted state-wide land use statutes. See note 4 supra. Ten of these states enacted statutes after 1970. Id.

34. E.g., Colo. Rev. Stat. Ann. § 24-65-102 (1973); Fla. Stat. Ann. § 380.021 (1974); Me. Rev. Stat. Ann. tit. 38, § 481 (Cum. Supp. 1973); Minn. Stat. Ann. § 116G.02 (Cum. Supp. 1976); Nev. Rev. Stat. § 321.640 (1975); Ore. Rev. Stat. § 197.010 (1975).

35. Minn. Stat. Ann. § 116G.02 (Cum. Supp. 1976).

36. Nev. Rev. Stat. § 321.640 (1975).

37. Colo. Rev. Stat. Ann. § 24-65-102 (1973).

An examination of the particular circumstances which influenced the enactment of several such statutes may help to identify factors which are contributing to the trend toward state regulation. Vermont's legislature, for example, was concerned with restraining the state's expanding second home industry and the proliferation of ski resorts.[38] The legislature was anxious about both the uncontrolled growth of these industries and the commercial and industrial expansion that they would encourage.[39] The particular event which prompted legislative action was a large-scale, second-home development which was proposed in 1968 and would have encompassed twenty thousand acres.[40] The proposed development drew a large public protest over potential environmental damage; the outcry led to the enactment of state controls in 1970.[41]

Other states enacted state controls under similar circumstances. Maine adopted state regulations when it discovered that no land use controls—either municipal or state—existed in many regions of the state where recent discoveries of off-shore oil posed dangers to a burgeoning tourist industry.[42] Florida passed state controls in response to public protest against two major transportation projects which had the potential to cause serious harm to the environment.[43] Hawaii's land use laws were designed to protect the prime agricultural lands of the state from urban expansion.[44] Hence, state regulation of land use was employed by these states to restrain commercial and industrial expansion which could damage the ecology of the state.

In contrast, Montana adopted state regulations for the express purpose of encouraging economic growth.[45] The Montana statute acknowledges that state control should restrain "urban sprawl" and preserve an ecological balance.[46] The central theme of its regulatory system, however, is to "curb unnecessary governmental regulations"[47] by formulating a state land use policy which will stimulate its economy.[48] Unlike the states discussed above, the ultimate aim of Montana is to establish a free market system, unfettered by local or state government regulation.[49]

38. Bosselman & Callies, supra note 4, at 54.

39. See id.

40. Id. at 54-55.

41. Id.

42. Id. at 187.

43. A Cross-Florida Barge Canal proposal was the immediate cause of public protest which led to state controls. Wershow & Juergensmeyer, Agriculture and Changing Legal Concepts in an Urbanized Society, 27 U. Fla. L. Rev. 78, 86-88 (1974). Prior to that proposal, however, construction of a jet airport in the Florida Everglades had been suggested. Critics claimed that the project would endanger the ecology of that area and, consequently, the state's tourist industry. See Note, Jetport: Stimulus for Solving New Problems in Environmental Control, 23 U. Fla. L. Rev. 376 (1971).

44. Bosselman & Callies, supra note 4, at 6.

45. Mont. Rev. Codes Ann. § 84-7502(3) (Supp. 1975).

46. Id. § 84-7502(4).

47. Id. § 84-7502(5).

48. Id. § 84-7502.

49. Id. § 84-7503. In other respects, however, its objectives are similar to those of other

III. A Comparative Analysis of State Land Use Laws

While the states which have enacted state controls generally have been motivated by similar considerations, the statutes enacted are significantly dissimilar in many respects. In the following analysis, two aspects of state land use laws will be examined and the various approaches will be evaluated. First, the statutory limitations on both geographical areas and types of development activities will be considered. Some states have granted broad jurisdiction to the administrative agency so that all lands within the state and most development activities are potentially subject to state control. Other states have restricted state control so that only areas with particular characteristics and activities which present problems of state-wide significance are affected.

Second, the systems of control which are embodied in these statutes will be compared. The features which will be discussed are: (1) the degree to which the state directly enforces agency decisions; (2) the relationship between the administrative agency and local governments; (3) the agency's authority relative to other state agencies; and (4) the extent to which the administrative agency participates in the planning of growth and development.

A. *Areas and Activities Subject to State Control*

The states which have enacted controls can be separated into two categories. The first category consists of those states which enacted controls before the ALI Model Land Development Code was formulated in 1971.[50] These states provide for state-wide agency jurisdiction. The second category includes those states which enacted statutes since the introduction of the Code.[51] The latter states generally follow the Code, which limits agency jurisdiction to selected geographical areas and development activities.

1. Pre-Code States: General Jurisdiction

Of the three pre-Code states—Vermont, Maine and Hawaii—Vermont has adopted a statutory system which grants the broadest jurisdiction to the administrative agency. In this state, development activities rather than geographical areas are regulated.[52] The only activities exempt from state control

states: (1) the preservation of agricultural land, (2) control of urban sprawl, and (3) controlling industrial and commercial growth. Id.

50. The task of formulating the Model Land Development Code was started in 1963. D. Hagman, Urban Planning and Land Development Control Law § 32, at 72 (1971). The drafts of several sections of the Code were completed before 1971; however, in that year the completed draft of article 7, which provides for state involvement in land regulation, was introduced. ALI Model Land Development Code Art. 7 (Tent. Draft No. 3 1971).

51. The states included in this category are: Colorado, Colo. Rev. Stat. Ann. §§ 24-65-101 to 65.1-502 (1973), as amended, (Supp. 1975); Florida, Fla. Stat. Ann. §§ 380.012-.12 (1974), as amended, (Cum. Supp. 1976); Minnesota, Minn. Stat. Ann. § 116G.01-.14 (Cum. Supp. 1976); Nevada, Nev. Rev. Stat. §§ 321.640-.810 (1975); Oregon, Ore. Rev. Stat. §§ 197.005-.795 (1975); Utah, Utah Code Ann. § 63-28-1 (Supp. 1975); and Wyoming, Wyo. Stat. Ann. §§ 9-849 to -862 (Cum. Supp. 1975).

52. Activities subject to state regulation in Vermont include: (1) "construction of improve-

are developments involving ten acres of land or less, farming construction, logging or forestry activities, housing projects of fewer than ten units, and electric generation or transmission facilities.[53]

Vermont's administrative agency has jurisdiction over both private development activities and municipal and state uses.[54] The control of municipal activities prevents local governments from undertaking projects which may serve the interest of the local community to the detriment of the rest of the state. This approach also provides a means of coordinating the state's economic growth by controlling the land development activities of otherwise independent local and state agencies.

Maine has enacted statutes which, like Vermont, provide for state-wide jurisdiction. It too regulates both public and private development activities.[55] However, Maine has an additional and separate provision for state control of lands which are currently "unorganized"—that is, not part of a chartered municipality—or which become "deorganized" in the future.[56] Hence, both building development and geographical areas are subject to state control.

In contrast to Maine and Vermont, Hawaii regulates only geographical areas. In that state, control of urban districts is left to local governments[57] while lands designated by the administrative agency as agricultural[58] or conservation[59] districts are subject to state regulation.

The control of geographical areas produces different results from state control of developmental activities. State regulation of selected geographical areas may prevent potentially detrimental activities from locating in those areas. Such activities, however, may be pursued in non-regulated areas although their effect may be equally onerous. Control of activities, as provided by Vermont and Maine,[60] avoids this result. Regardless of where within

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ments on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial, or industrial purposes;" (2) the "construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality which has not adopted permanent zoning and subdivision bylaws;" (3) "construction of housing projects . . . with 10 or more units, constructed or maintained on a tract or tracts of land, owned or controlled by a person, within a radius of five miles of any point on any involved land." Vt. Stat. Ann. tit. 10, § 6001(3) (1973). Also, improvements on property of more than ten acres for state or municipal purposes are within the scope of the statute. Id.

53. Id. § 6001(3).

54. Id., as amended, (Cum. Supp. 1976).

55. Me. Rev. Stat. Ann. tit. 38, § 482(2) (Cum. Supp. 1976).

56. Me. Rev. Stat. Ann. tit. 12, §§ 681 to 685-C (1974), as amended, (Cum. Supp. 1976).

57. Bosselman & Callies, supra note 4, at 8.

58. Hawaii's State Land Use Commission has jurisdiction only over agricultural districts. This jurisdiction is shared with county governments. Hawaii Rev. Stat. § 205-5(b) (1968), as amended, (Supp. 1975).

59. The department of land and natural resources governs land uses in conservation districts. Id. § 205-5(a).

60. Whether a development will be permitted at a proposed site is dependent, in part, upon the characteristics of the site. Vt. Stat. Ann. tit. 10, § 6086 (1973), as amended, (Cum. Supp. 1976); Me. Rev. Stat. Ann. tit. 38, 484(2)-(4) (Cum. Supp. 1973).

the state a proposed activity is to take place, it is subject to control. Hence, this approach provides a greater potential for consistent regulation.

On the other hand, state control of areas may be more acceptable politically since regulation is restricted to selected localities and the average landowner is less likely to be affected. Moreover, the broad discretion given to the administrative agency under the Vermont and Maine statutes[61] places most proposed developments in an insecure position until a permit is granted or denied. Landowners and developers are less able to undertake preliminary financing and scheduling. The restriction of state regulation to specific areas places the landowner on notice of the intent of the state to limit development in those areas and eliminates much uncertainty.

These distinctions between regulation of areas and of activities do not imply that these are conflicting or mutually exclusive forms of regulation; rather, they are complementary. State control of activities permits state-wide regulation of developments which endanger the environment or economy. To regulate such developments effectively through state control of areas, the administrative agency would be forced to speculate as to all areas in which such development could cause difficulties. Regulation of areas, however, enables the state to identify sites which are of special concern, and, thus, to focus agency resources where they are most needed.

2. Model Code States: Limited Jurisdiction

A second category consists of those states which have established state jurisdiction akin to that suggested by the ALI Model Land Development Code.[62] Under the regulatory scheme of the Code, state jurisdiction would extend only to those areas designated by the administrative agency as areas of critical state concern[63] and over developments which are likely to have regional or state impact.[64] Thus, the Code incorporates state controls over both areas and activities.

The provision for the regulation of areas of critical state concern is a major contribution of the Code. Areas which may be classified as areas of critical state concern are those which: (1) "significantly [are] affected by, or [have] a significant effect upon, an existing or proposed major public facility or other area of major public investment;"[65] (2) have a "significant impact upon historical, natural or environmental resources of regional or statewide importance;"[66] or (3) constitute "a proposed site of a new community designated in a State Land Development Plan."[67] Districts which are otherwise of economic or social significance would not be subject to state regulation.

Activities over which the Code exercises jurisdiction are those which,

61. See notes 89-114 infra and accompanying text.
62. Model Land Development Code, supra note 6.
63. Id. § 7-201.
64. Id. § 7-301.
65. Id. § 7-201(3)(a).
66. Id. § 7-201(3)(b).
67. Id. § 7-201(3)(c).

because of their size or their effects on the surrounding environment, present issues of regional or state-wide importance.[68] This definition permits the agency to designate a wide range of activities as "developments of regional impact."[69]

Seven states have enacted legislation similar to that proposed in the Code.[70] Most of these states have adopted statutes which provide for the regulation of areas of critical state concern,[71] but Minnesota, Utah, Nevada, and Wyoming[72] have not enacted state controls over developments of regional impact.[73] Hence, in these four states, activities which present problems because of their size can escape state controls simply by avoiding critical areas.

Of the states which have enacted critical area statutes,[74] only Florida[75] and Minnesota[76] have adhered to the Code. Some states have restricted the state jurisdiction provided in the Code. For example, Nevada requires that an area be in potential danger of "irreversible degradation" from development to be designated as a critical zone.[77] Utah, in contrast, has expanded state jurisdiction and permits critical area designation where development would have significant consequences on economic, social or recreational activities.[78]

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68. Id. § 7-301(1).

69. The factors which the administrative agency must consider in designating developments of regional impact are: (1) traffic generation; (2) number of persons who would occupy or be attracted to the development; (3) environmental problems; (4) size of the site; (5) likelihood of substantial development; and (6) the unique character of an area. Id. § 7-301(2).

70. See note 51 supra.

71. Oregon's administrative agency does not regulate critical areas although it may recommend that particular areas be designated as critical. Ore. Rev. Stat. § 197.405(2) (1975). The agency regulates only activities of state-wide importance; however, Oregon patterned its statutes after the Code. See notes 172-78 infra and accompanying text.

72. Wyoming's statutes refer only to particular development types with respect to selecting areas of critical concern. Wyo. Stat. Ann. § 9-850(b) (Cum. Supp. 1975).

73. An early draft of the Code provided for the regulation of "large-scale developments." ALI Model Land Development Code § 7-401 (Tent. Draft No. 3 1971). The proposed official draft modified this term to "developments of regional impact." Model Land Development Code, supra note 6, § 7-301. However, most of the states have adopted the phrase "large-scale developments."

74. The states in this category which have enacted critical area statutes are: Colorado, Colo. Rev. Stat. Ann. § 24-65.1-201 (Supp. 1975); Florida, Fla. Stat. Ann. § 380.05 (1974); Minnesota, Minn. Stat. Ann. § 116G.06(1)(a) (Cum. Supp. 1976); Nevada, Nev. Rev. Stat. § 321.770 (1975); Utah, Utah Code Ann. § 63-28-1(6) (Supp. 1975); and Wyoming, Wyo. Stat. Ann. § 9-853(ix) (Cum. Supp. 1975).

75. Fla. Stat. Ann. § 380.05(2)(a)-(2)(c) (1974), as amended, (Cum. Supp. 1976). However, the Florida statutes include endangerment of archeological resources as a basis for designating an area to be of critical state concern. Id. § 380.05(2)(a). Florida also prohibits more than 5 per cent of the land of the state from being designated as a critical area. Id. § 380.05(17). This restriction has been criticized as a major weakness since it prevents any comprehensive state regulation of development in Florida's coastal zone and inland wetlands. Comment, Area of Critical State Concern: Its Potential for Effective Regulation, 26 U. Fla. L. Rev. 858, 871 (1974).

76. Minn. Stat. Ann. § 116G.05 (Cum. Supp. 1976).

77. Nev. Rev. Stat. § 321.660 (1975).

78. Utah Code Ann. § 63-28-1(5)(2)(e)(iv) (Supp. 1975).

A third aspect of the Code from which several states have deviated is the types of activities which the state administrative agency may regulate. The Code grants the administrative agency broad discretion to determine the types of activities, both public and private, which are within its jurisdiction.[79] In contrast, Colorado limits agency authority to regulation of various public service projects, highways, and new community developments.[80] No private projects other than new communities are subject to agency control.

Oregon also restricts agency jurisdiction. Its statute authorizes the administrative agency to designate an activity for state regulation if it falls into one of three categories, all of which are of a public rather than private nature.[81] However, the statute specifically empowers the agency to recommend to a legislative committee that other activities, public or private, be designated by the legislature as having state-wide significance.[82]

Florida, on the other hand, has created jurisdiction broader than that in the Code. While the Code requires that there be effects on the surrounding *environment* which are of state or regional significance,[83] Florida grants jurisdiction over developments which have a "substantial effect upon the health, safety, or welfare of citizens of more than one county."[84] This criterion establishes authority not only over activities which affect the environment, but also over those which may adversely affect the economy or social conditions.

From this review of agency jurisdiction under the various state land use statutes, two trends are discernible. First, the Model Land Development Code, which provides for regulation of delimited critical areas and selected

79. See notes 68-69 supra and accompanying text.

80. The Colorado Land Use Act limits the designation of activities of state interest to: "(a) [s]ite selection and construction of major . . . extension[s] of existing domestic water and sewage treatment systems; (b) [s]ite selection and development of solid waste disposal sites; (c) [s]ite selection of airports; (d) [s]ite selection of rapid or mass transit terminals, stations, and fixed guideways; (e) [s]ite selection of arterial highways and interchanges and collector highways; (f) [s]ite selection and construction of major facilities of a public utility; (g) [s]ite selection and development of new communities; (h) [e]fficient utilization of municipal and industrial water projects; and (i) [c]onduct of nuclear detonations." Colo. Rev. Stat. Ann. § 24-65.1-203 (1973), as amended, (Supp. 1975).

81. Oregon authorizes the designation of activities for state control if they are related to the planning and siting of: (1) public transportation facilities; (2) public sewage, water supply, and solid waste disposal sites and facilities; or (3) public schools. Ore. Rev. Stat. § 197.400 (1975).

82. Id. § 197.405(1).

83. Model Land Development Code, supra note 6, § 7-301(1). The Code does provide that the agency include in its consideration the likelihood that "additional or subsidiary development will be generated." Id. § 7-301(2)(e). It also requires that the unique character of particular regions in the state be considered. Id. § 7-301(2)(f). A narrow interpretation of the Code, however, suggests that the administrative agency is more concerned with the physical impact of selected developments than with their negative social and economic effects. In contrast to the limited responsibilities assigned to the agency, the Code requires that local governments, when regulating activities designated as developments of regional impact, include in their evaluation factors which are "indirect, intangible, or not readily quantifiable." Id. § 7-402.

84. Fla. Stat. Ann. § 380.06(1) (1974).

developments, is the dominant prototype for future land use legislation. The other principal paradigm is typified by Vermont, which invests the state agency with regulatory powers over nearly all development activity in the state. This approach has not been followed by another jurisdiction since the Code was introduced in 1971. The majority of the states which have enacted state land use legislation since the Code's introduction have established jurisdiction over both critical areas and selected development activities. Of those which do not regulate both, most have enacted critical area statutes. This indicates that, while variations can be expected, the Code will continue to be the primary model for future legislation.

The second identifiable pattern is a preference for greater limitations on agency jurisdiction. Two points support this conclusion. First, the Vermont approach, which grants wide jurisdiction, has not been followed while the more restrictive Code scheme has gained rapid acceptance. Second, most of the states which follow the Code have limited state jurisdiction to a greater extent than does the Code. Unless the public demands for greater regulation increase dramatically, it is probable that this trend will continue.

B. *Systems of State Regulation of Land Use*

The present state land use laws represent several types of regulatory systems. These systems basically differ as to: (1) the extent of the administrative agency's authority to enforce its regulations, and (2) the degree of state participation in land use planning. Some systems authorize direct agency enforcement—that is, the agency enforces its own decisions. Other systems provide for more indirect methods of state control, requiring local governments or other state agencies to participate in enforcement.

Agency participation in land use planning is a further means by which the state may exercise control. Land use planning is the process of determining the most desirable use of land from a community viewpoint for the purpose of guiding land development.[85] The product of the planning process is normally a land use map which embodies the needs and goals of the community and specifies the uses to which land may be put.[86] The principal purposes of land use planning are to provide both a rational basis for making land use decisions and a means of coordinating the activities of different governmental bodies.[87] By compelling municipal governments to formulate ordinances and local plans which conform with state land use policies, the state may oversee land development much more effectively.[88]

In the following discussion, the various states have been categorized into four classes of systems on the basis of the degree of direct control which the administrative agency may exert on land developments. These approaches

85. See 1 N. Williams, American Land Planning Law § 1.01, at 2 (1974).

86. Id. § 1.18.

87. Id. § 1.06.

88. Planning is especially necessary with respect to land activities which are of regional or state import. For a discussion of the role of state and regional planning see Mandelker, The Role of the Local Comprehensive Plan in Land Use Regulation, 74 Mich. L. Rev. 899, 915-18 (1976).

will be reviewed and compared. Included in this discussion is an evaluation of the efficacy of the prescribed degree of state participation in land use planning.

1. Direct Control Systems

Vermont is the primary proponent of aggressive state regulation of land use. Under Vermont's system, the administrative agency has the primary state-wide responsibility for planning and enforcing land development regulations. With respect to planning, the administrative agency must undertake a two-step procedure. The first phase involves surveying existing uses and formulating a capability and development plan for the state which incorporates social and economic considerations.[89] The purposes of this plan are to guide development[90] and provide a basis for subsequent state and local plans.[91]

On the basis of this capability plan, the agency must formulate a state-wide land use plan which designates, in broad terms, the uses to which the lands within the state may be put.[92] The land use plan is then implemented by local governments through subdivision regulations and zoning.[93] Thus, the agency has paramount responsibility for planning future land uses, a task normally delegated to local governments.[94]

A second dimension of the agency's authority is its power to grant or deny development permits. No development within the scope of the board's jurisdiction[95] can commence, nor any interest in a subdivision[96] be sold, without a permit from the agency.[97] Before a permit is issued, the agency must determine that the developer or landowner has complied with certain requirements which are designed to prevent air and water pollution, erosion,

89. Vt. Stat. Ann. tit. 10, § 6042 (1973).

90. To be included in the plan are an evaluation of the capability of land to support development, an assessment of the proper uses of natural resources, a plan for public and private capital investment, and provisions for commercial, industrial and residential development. Law of April 23, 1973, No. 85, §§ 7(a)(1)-(4), [1973] Vt. Laws 248-50.

91. The capability and development plan may be adopted by local governments to fulfill other statutory planning obligations under section 4302 of Title 24. Law of April 23, 1973, No. 85, § 6(a), [1973] Vt. Laws 248.

92. Vt. Stat. Ann. tit. 10, § 6043 (Cum. Supp. 1976). The land use plan broadly categorizes land by function: forestry, agriculture, recreation, or urban. Id. This authority to classify property is similar to the state planning responsibilities first provided for in Hawaii. See note 185 infra and accompanying text.

93. Vt. Stat. Ann. tit. 10, § 6043 (Cum. Supp. 1976). Thus, local governments have the authority to zone land for particular urban uses such as commercial, industrial, and residential, while the state broadly categorizes land.

94. See notes 21-23 supra and accompanying text.

95. See notes 52-54 supra and accompanying text.

96. " 'Subdivision' means a tract or tracts of land, owned or controlled by a person, which have been partitioned or divided for the purpose of resale into 10 or more lots within a radius of five miles from any point on any lot, and within any continuous period of 10 years [after July 1, 1973]." Vt. Stat. Ann. tit. 10, § 6001(19) (Cum. Supp. 1976).

97. Id. § 6081 (1973).

traffic congestion, and burdens on community facilities, as well as endangerment of scenic or historical areas.[98] This broad power coupled with the responsibility of planning the future growth of the state constitutes the most active state land use control system currently in effect.

Appeals from the actions of the agency in state court may be made only by the permit applicant, a state agency, the regional and municipal planning commissions or the municipality in which the proposed development would take place.[99] Hence, adjoining property owners may not appeal a permit-issuing decision of the agency.[100] The limitation on standing to appeal an

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98. Id. §§ 6086(a)(1)-(8) (Cum. Supp. 1976). Section 6086(a)(8) has been criticized as being too vague with respect to the phrase "rare and irreplaceable natural areas" to give the administrative agency guidance. Walter, The Law of the Land: Development Legislation in Maine and Vermont, 23 Me. L. Rev. 315, 317, 328 (1971).

Moreover, the statute raises a due process problem since it may authorize a taking of private property without just compensation in violation of the fifth and fourteenth amendments. U.S. Const. amends. V, XIV. Under this section, a permit request may be denied and the property held in an undeveloped state if it is demonstrated by any party that the development will endanger wildlife habitats or threaten endangered species, and that public benefit from the development does not "outweigh the economic, environmental or recreational loss to the public." Vt. Stat. Ann. tit. 10, § 6086(a)(8)(A)(i) (Cum. Supp. 1976). Furthermore, when such an ecological threat is demonstrated, a permit may be denied if the applicant owns or controls an alternative lot which could be substituted for the site in controversy. Id. § 6086(a)(8)(A)(iii).

In the only case to challenge the constitutionality of this section, Vermont's highest court rested its decision on other grounds and refused to consider these issues. In re Wildlife Wonderland, Inc., 133 Vt. 507, 519-20, 346 A.2d 645, 653 (1975). However, it is generally held that for land use regulations to be constitutionally valid, such regulations must permit some reasonable use of land. E.g., State v. Johnson, 265 A.2d 711 (Me. 1970); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938). To prohibit any development of property would seem to constitute a taking without compensation. For a discussion of this issue see F. Bosselman, D. Callies & J. Banta, The Taking Issue (1973) (prepared for the Council on Environmental Quality).

At least one state, however, has found that it is not unreasonable to restrict use of private property to its natural uses to prevent harm to the public welfare. Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). Maine has a similar provision which requires that the proposed development fit "harmoniously into the existing natural environment." Me. Rev. Stat. Ann. tit. 38, § 484(3) (Cum. Supp. 1973). This clause also has been criticized as overly vague. Walter, The Law of the Land: Development Legislation in Maine and Vermont, 23 Me. L. Rev. 315, 336 (1971). However, it has been upheld as constitutional. In re Spring Valley Dev., 300 A.2d 736, 749-52 (Me. 1973).

99. Vt. Stat. Ann. tit. 10, §§ 6085(c), 6089(b) (Cum. Supp. 1976).

100. In re George F. Adams & Co., 134 Vt. 172, 353 A.2d 576 (1976). This restriction negates previous court decisions which granted adjacent landowners standing to challenge the agency's actions. In re Barker Sargent Corp., 132 Vt. 42, 313 A.2d 669 (1973).

However, a decision by the agency that a neighboring land owner may not be heard at de novo public hearings on a permit application may be appealed in state court. In re Preseault, 130 Vt. 343, 292 A.2d 832 (1972). Standing to appeal an agency decision extends to immediately adjoining landowners but not to non-adjoining landowners. In re Great Eastern Bldg. Co., 132 Vt. 610, 326 A.2d 152 (1974). In this case, the appellant owned property one quarter of a mile from the proposed development site and was denied standing to be heard at the de novo hearings of the

agency decision ensures that only substantial controversies will be adjudicated and that the agency may act without being burdened with an overwhelming number of appeals.[101]

Under the Vermont scheme, the relationship between the state and local governments is radically different from the traditional control method, which delegated exclusive regulatory authority to local governments.[102] In Vermont, the administrative agency must consider local planning decisions when it formulates state plans[103] and evaluates permit requests.[104] Local approval[105] may be overriden, however, where the proposed project would have substantial detrimental effects on a neighboring municipality, the region or the state.[106]Furthermore, where the agency has held a de novo hearing and rendered its decision, subsequent adoption of a local plan which conflicts with that decision is not binding on the agency.[107] Local decisions, therefore, are subordinate to the authority of the agency.

The agency's land use and capability plans also partially supersede the authority of local governments to classify and plan land use. Once the agency's plans are adopted, local governments must implement them.[108] If a municipality disagrees with the agency's plans, it must petition the agency for an alteration.[109]

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agency. The court affirmed the agency's ruling since appellant was not a physically adjoining landowner.

101. Maine allows "[a]ny person aggrieved by any order of the [agency]" to appeal. Me. Rev. Stat. Ann. tit. 38, § 487 (Cum. Supp. 1973). Recently, Maine's highest court granted standing to a petitioner who protested the issuance of a permit on the possibility that the permit applicant's project would pollute the air breathed by the petitioner. In re International Paper Co., 363 A.2d 235, 238-39 (Me. 1976). This broad conferment of standing potentially subjects the administrative agency to extensive judicial review.

102. See note 2 supra and accompanying text.

103. In preparing the plan, the agency must give "full account and consideration . . . to duly adopted regional plans and . . . town plans, capital programs and municipal bylaws . . . ." Vt. Stat. Ann. tit. 10, § 6043 (Cum. Supp. 1976).

104. In its plans, the administrative agency must classify lands within the state into broad categories. Local governments must then formulate detailed plans which are consistent with those of the agency. See notes 92-93 supra and accompanying text. When evaluating a permit request the agency must consider these local plans. Vt. Stat. Ann. tit. 10, § 6046(b) (Cum. Supp. 1976).

105. Municipal, as well as state, permits must be obtained. Vt. Stat. Ann. tit. 10, § 6082 (1973). Hence, a system of duplicate permits results.

106. Id. § 6046(b) (Cum. Supp. 1976).

107. In re Preseault, 132 Vt. 471, 321 A.2d 65 (1974). Vermont's highest court also has held that where a municipal permit has been issued but expires while the applicant is awaiting the agency's approval, the municipality should not deny a renewal of the permit although zoning changes in the interim render the project nonconforming. Preseault v. Wheel, 132 Vt. 247, 315 A.2d 244 (1974). Such occurrences reflect the problems that arise from a duplicate permit requirement.

108. Vt. Stat. Ann. tit. 10, § 6043 (Cum. Supp. 1976).

109. Id. § 6047(a) (1973). For example, land which the agency has designated for agricultural use in its land use plan cannot be zoned by the local government for an urban use without the approval of the agency.

Additionally, the agency has paramount authority with respect to the land development activities of other state agencies. It has the responsibility for planning the growth of government facilities and public utilities;[110] land development activities authorized by most state agencies cannot be undertaken without a permit from the administrative agency.[111] This centralization of planning and regulation helps avoid conflicts between agencies, coordinates land development activities, and ensures a consistent state land development policy.

Maine has adopted a state land use system similar to Vermont's but with several notable distinctions. First, Maine vests two state agencies with the authority to control land use. The Land Use Regulatory Commission (LURC) has the responsibility of designing and implementing plans for the development of currently unorganized areas.[112] The Environmental Improvement Commission (EIC) does not participate in planning land development. It is responsible for regulating developments which may harm the environment.[113] LURC and EIC have overlapping authority to the extent that a permit issued by LURC is prima facie evidence that the proposed development satisfies the requirements of EIC.[114]

The absence of EIC participation in land use planning suggests that uncoordinated development may result under Maine's system. EIC's permit-issuing decisions are made on a case-by-case basis without the guidance of a general plan. EIC is not mandated to consider plans formulated by local governments or other state agencies. Hence, land development may take place in a fragmented fashion with some activities obtaining permits while other necessary supportive developments do not.[115] Another possibility is that EIC may consciously but unofficially formulate land use plans. If so, agency decisions would be coordinated but neither the landowner nor the municipality could confidently plan for development without an unofficial solicitation of EIC plans.

A second distinction between the Maine and Vermont systems of regulation is that the authority of the administrative agency to plan for growth is temporary in Maine while it is of indefinite duration in Vermont. LURC may plan and regulate land development in unorganized areas as long as they remain in that status. Upon municipal organization of these areas, the newly formed government assumes authority to regulate development.[116] The new

110. Law of April 23, 1973, No. 85, §§ 7(a)(1)-(4), [1973] Vt. Acts 248-50 (legislative findings).

111. Vt. Stat. Ann. tit. 10, § 6081 (1973). Permits required by other agencies must still be obtained. Id. § 6082. Certain developments, however, such as electric generation and transmission facilities, are not within the jurisdiction of the agency. Id. § 6001(3) (Cum. Supp. 1976).

112. Me. Rev. Stat. Ann. tit. 12, § 683 (Cum. Supp. 1976). LURC must categorize land into broad classes similar to those specified by Vermont. Compare id. § 685-A (1974) with Vt. Stat. Ann. tit. 10, § 6043 (Cum. Supp. 1976).

113. Me. Rev. Stat. Ann. tit. 38, § 484 (Cum. Supp. 1973), as amended, (Cum. Supp. 1976).

114. Me. Rev. Stat. Ann. tit. 12, § 685-B(1) (1974).

115. For example, a residential project may be granted a permit by EIC while a retail shopping development which would serve that project may not.

116. Me. Rev. Stat. Ann. tit. 12, § 685-A(4) (Cum. Supp. 1976).

municipal government, however, must adopt plans and regulations which are at least as protective of natural, recreational, and historic resources as those formulated by LURC.[117] Local plans as well as any subsequent amendments or revisions, must be approved by LURC.[118] Thus, while the authority to plan directly for growth is transferred to local governments, LURC retains indirect control over land use planning.

A third significant difference is that LURC may order the termination of existing commercial or industrial activities which do not conform with its plans.[119] The authority to compel termination of a use which is inconsistent with rational planning or which endangers the environment is a potent means of regulating land use which is not employed by other states.[120]

The land use approaches adopted by Maine and Vermont are the strongest systems of state control. The administrative agencies in these states have broad powers to supervise development and to prevent endangerment of the state's welfare. The importance of local land use decisions is minimized under these systems as the agencies' actions may supersede local plans and decisions if the interest of the state so dictates. Similarly, land development activities of other state agencies are subject to regulation.

A drawback of the direct control system is the substantial erosion of the authority of local communities over land development. A municipality in Vermont or Maine may prevent the commencement of a project of which it disapproves by refusing to issue a municipal permit even if the state has granted a permit. The local community, however, has a relatively minor role in the permit-issuing process of the administrative agency.[121] It cannot ensure that projects it supports receive state permits or favorable agency consideration. Neither the agency nor its regional commissions need include representatives of the involved community[122] even though it may be substantially affected by the agency's decision.

Another undesirable feature of direct state control is the duplication of state

117. Id.

118. Id.

119. Id. § 685-B(7) (1974). LURC must allow a reasonable time for the landowner to convert to a conforming use and for the amortization of his investment. Id. This authority is not delegated to EIC.

120. This form of regulation has been used by municipalities and upheld as constitutional. See, e.g., Standard Oil Co. v. Tallahassee, 183 F.2d 410 (5th Cir.), cert. denied, 340 U.S. 892 (1950); Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (2d Dist. 1954); State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613, cert. denied, 280 U.S. 556 (1929).

121. In Maine and Vermont, affected municipal governments may participate in administrative hearings but not in the agency's decision. Me. Rev. Stat. Ann. tit. 38, § 484 (Cum. Supp. 1973), as amended, (Cum. Supp. 1976); Vt. Stat. Ann. tit. 10, § 6085 (1973), as amended, (Cum. Supp. 1976).

122. Maine's EIC has ten members who are appointed by the governor. Me. Rev. Stat. Ann. tit. 38, § 361 (Cum. Supp. 1976). LURC's eight members also are appointed by the governor. Id. tit. 12, § 683 (Cum. Supp. 1976).

Vermont's administrative agency has nine governor-appointed members. Vt. Stat. Ann. tit. 10, § 6021 (1973). District commissions, which are subordinate to the agency, consist of three members appointed by the governor. Id. at § 6026(b).

and municipal permit requirements. While such duplication provides a means by which both municipalities and the state may review the development proposal, it burdens the landowner and needlessly increases governmental expenditures.[123] Wasted effort could be avoided by joint hearings which would facilitate an exchange of comments between the state and local governments. Joint hearings would have the additional advantage of allowing the local community to participate in the decision, thereby restoring part of its lost authority.

Another possibility would be to hold only state agency hearings to which the municipality would be a party. Under this alternative, however, the municipality, which would be bound by the agency decision, would not have an equal input into the permit-issuing decision and would again relinquish its autonomy to the state agency.

2. Indirect State Regulatory Systems

The secondary role of local governments under the systems enacted by Vermont and Maine is probably the principal reason why few states have adopted such a system. Land development is still considered a local concern and state interference is only hesitantly accepted. A politically preferable compromise would permit exclusive local control until a clear necessity warranted state regulation. However, activities which endanger the welfare of the state are not always obvious. Relatively minor developments may have cumulative effects which, without state guidance, could have significant derimental effects outside the local community.

The ALI Model Land Development Code was structured to encourage state control of land use while preserving much of the traditional authority of local governments.[124] It has significantly affected the evolution of state regulation. Under the Code, local governments have the primary responsibility for regulating land use.[125] However, the state administrative agency is empowered to establish standards "with which certain of the more important local decisions must comply."[126]

The agency may designate specific areas as areas of critical state concern[127] and establish guidelines[128] which local governments must follow in formulating regulations respecting these areas.[129] Moreover, local regulations are not effective until state approval is secured.[130] If the local government fails to

123. Maine provides that the municipality may petition the agency to authorize the substitution of municipal permits for those of the agency in cases of developments involving less than 100 acres. However, the permit must be reviewed by the agency, which may deny, approve or modify it. Me. Rev. Stat. Ann. tit. 38, § 489 (Cum. Supp. 1976).

124. Model Land Development Code, supra note 6, at 289-90.

125. Id. at 292, Drafter's Note (1).

126. Id.

127. See notes 65-67 supra and accompanying text.

128. Model Land Development Code, supra note 6, § 7-201(1).

129. Id. § 7-203(1).

130. Id. § 7-203(1)-(4). From the time an area is designated as a district of critical state

adopt suitable regulations within a specified period of time,[131] the agency is authorized to do so.[132]

The agency may also designate particular activities as "developments of regional impact"[133] which are to be regulated by local governments in compliance with agency standards.[134] The agency does not actually enforce regulations except through the state land use plan—a scheme with which local decisions must not interfere.[135]

The Code further provides that the agency prepare a state and regional land use plan[136] to consist of guidelines for public and private land developments.[137] Once adopted by the state legislature,[138] the plan is to be the basis on which local governments formulate their land use schemes.[139] Local land use plans must be submitted to the agency for review and comment before they are adopted.[140] If the agency determines that a municipality's plan is inconsistent with that of the state, it may order that inconsistent elements be given no legal significance.[141]

Under the Code, local governments make specific land use decisions while the state administrative agency provides guidance. The agency cannot void a decision of local government and substitute its views on its own initiative. Instead, the Code provides that a separate adjudicatory board be established to review local land use decisions.[142] The agency and the review board are separated to ensure impartial review.[143] The agency may challenge the actions of the local government,[144] but only the board may modify or reverse a local decision.[145] Judicial appeals from the decision of the board may be made by parties to the board's proceedings.[146]

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concern until land development regulations are adopted, a moratorium is placed upon development in those areas. Id. § 7-202.

131. The Code suggests that six months is a reasonable period of time. Id. § 7-204(1).

132. Id. The agency's regulations supersede local government ordinances.

133. See notes 68-69 supra and accompanying text.

134. Model Land Development Code, supra note 6, § 7-301.

135. Id. § 7-304(2)(b).

136. Id. §§ 8-401 to -405. In preparing the plans, the agency must give "consideration . . . to Land Development Plans of local governments" and other state agencies. Id. § 8-404. It may prepare a plan for the state as a whole or for any region of the state. Id. at 383, Drafter's Note.

137. Id. § 8-401(1).

138. Both the governor and the legislature must approve the plan before it becomes effective. Id. § 8-406.

139. Id. §§ 3-106(1)(a), 8-502(1).

140. Id. § 8-502(2).

141. Id. § 8-502(3). Thus, the local government could not grant a special permit based on an element of the local development plan that has been declared inconsistent with the state plan by the administrative agency. Id. at 407, Drafter's Note.

142. Id. § 7-501.

143. Id. at 329, Drafter's Note.

144. Id. at 307, Drafter's Note.

145. Id. § 7-503.

146. Id. § 9-103(6). Parties to the proceedings before the board may include: (1) the landowner or permit applicant, (2) the local government, (3) owners of land within 500 feet of the proposed

States which generally have modeled their systems of land use regulation after the Code have omitted many of its provisions and substantially altered others. For example, although the Code authorizes the administrative agency independently to designate districts of critical state concern and to issue development guidelines,[147] in Florida the agency may not act autonomously on these matters. Rather, it must submit recommendations to the governor and his cabinet for their approval.[148] Minnesota also requires that the agency submit recommendations to the governor, and in addition, demands legislative or administrative confirmation of the executive order.[149] In Utah, the agency may designate areas of critical state concern only when local governments agree with the designation;[150] however, it may recommend that the legislature designate other areas to that status when local governments will not concur.[151] Finally, Colorado authorizes local governments instead of the administrative agency to specify critical areas.[152] The agency's role is to establish the criteria to be used by local governments in classifying matters of state concern,[153] to request that local governments designate specific areas for state regulation,[154] and to appeal a local government's action or refusal to act.[155]

A major problem arises when the administrative agency may not independently designate areas for state regulation. Upon notice of the agency's intent, potentially affected landowners and developers can act to frustrate the agency's purpose by securing a local permit or immediately commencing development before the agency can effect such designation.

To prevent possible abuse, the Code provides that once the agency notifies a local government that it is considering a locality for designation as a critical area, local permits may not be issued.[156] Minnesota has implicitly provided similar controls. Once the administrative agency has commenced hearings on whether specific areas should be recommended for state regulation, only those activities which already had been issued a permit and developers who had obtained "vested" rights will be immune from state control.[157]

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site, (4) qualifying neighborhood organizations, (5) persons who were improperly denied party status at the board proceedings, (6) persons who in the view of the court have a significant interest that has been damaged, and (7) parties to the administrative hearings before the local government. Id. § 9-103(1)-(5). The administrative agency may also intervene. Id. § 8-203(1).

147. See notes 127-34 supra and accompanying text.

148. Fla. Stat. Ann. §§ 380.031(1), 380.05(1)(a) (1974).

149. Minn. Stat. Ann. §§ 116G.06(1)(a), 116G.06(2)(a)-(c) (Cum. Supp. 1976).

150. Utah Code Ann. § 63-28-1(6) (Supp. 1975).

151. Id.

152. Colo. Rev. Stat. Ann. § 24-65.1-201 (Supp. 1975).

153. Colo. Rev. Stat. Ann. § 24-65-104(1)(b) (1973).

154. Colo. Rev. Stat. Ann. § 24-65.1-407(a) (Supp. 1975).

155. Id. § 24-65.1-407(c).

156. Model Land Development Code, supra note 6, § 7-202(2). Only in an emergency may a local government issue a permit during the period after notice from the agency and before the decision whether to designate an area as critical. Id.

157. Developments which had been authorized by the registration of subdivision plans, or had been issued a development permit, or had commenced in detrimental reliance upon other

Colorado has adopted a stronger approach. When the administrative agency determines that a proposed development or activity which is in progress "constitutes a danger of injury, loss, or damage of serious and major proportions to the [interests of the state,]"[158] it may notify the local government of the danger. If the local government does not act, the agency may petition the governor to intervene and authorize it to order that the activity cease.[159] Florida and Utah have not enacted similar safeguards.[160]

Another feature of the Code which several states have rejected is the planning function of the state. Neither Florida nor Minnesota authorizes the administrative agency to engage in any state land use planning. Colorado authorizes its agency to formulate state land use plans[161] but, unlike the Code, it does not permit the state agency to review or affect the legality of local zoning schemes.[162]

The two remaining principal elements of the Code—state regulation of developments of regional impact and the establishment of a separate adjudicatory board to which appeals from local decisions may be made—have also been omitted or sharply modified by most of these states. With respect to state regulation of developments of regional impact, only Colorado and Florida authorize significant controls.[163] Florida provides for the control of such activities in the same manner as the Code,[164] but Colorado's method of control is substantially different. In Colorado, the administrative agency may only intervene when a current or proposed activity creates a danger to the state.[165] The agency's authority is further restricted in that it may not directly regulate such activities, but must seek the assistance of local governments or the governor.[166]

The Code's suggestion that a separate appellate body be established has been adopted only by Florida, which adheres closely to the Code on this point.[167] The other states have varied provisions for appeals. Minnesota, for example, requires that appeals be made by the administrative agency in state

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authorization will be unaffected by the designation of the site as part of an area of critical concern, provided that such registration, permit or commencement occurred before the hearings. Minn. Stat. Ann. § 116G.13(2) (Cum. Supp. 1976).

158. Colo. Rev. Stat. Ann. § 24-65-104 (Supp. 1975).

159. Id.

160. Florida, in fact, has expressly restricted the effect of the designation of an area of critical state concern. This restriction may encourage landowners to circumvent the statute by initiating developments before such declaration is effected. Fla. Stat. Ann. §§ 380.05(15) (1974), 380.05(1)(b) (Supp. 1976).

161. Colo. Rev. Stat. Ann. § 24-65-104(1)(a) (1973).

162. See id. § 24-65-104(1)(b). Utah similarly restricts the authority of the administrative agency. See Utah Code Ann. § 63-28-1 (Supp. 1976).

163. See notes 79-80 and 83-84 supra and accompanying text.

164. Fla. Stat. Ann. § 380.06 (1974), as amended, (Cum. Supp. 1976).

165. See notes 158-59 supra and accompanying text.

166. Colo. Rev. Stat. Ann. § 24-65-104(2)(a), as amended, (Supp. 1975).

167. Fla. Stat. Ann. § 380.07 (1974).

courts[168] while Colorado authorizes agency appeals to the governor or to the courts.[169]

Many of these omissions and modifications substantially reduce the authority and effectiveness of the administrative agency. In particular, designation of critical areas by local government or the governor instead of the agency, omission of state control of developments of regional impact, and limitations on the agency's authority to compel local governments to comply with state plans emasculate much of the control granted in the Code. These revisions indicate a strong reluctance to permit state regulation of matters long entrusted to local communities.

While local participation in land use regulation is important,[170] constraints on the authority of the administrative agency to act independently could significantly inhibit the agency's ability to fulfill the goals established by the legislature.[171] To the extent that the administrative agency must act through local governments or another state entity, it is less able to aggressively assert and defend state interests. When the state's powers are so limited that the agency essentially possesses secondary authority with limited powers of enforcement, the effect is to continue to subjugate state interests to local control.

3. Restricted State Control Systems

A third category of statutes is found in those states which have adopted direct state control of land use, but which limit such control to particular geographical areas or development activities. Currently, four states—Oregon, Nevada, Wyoming, and Hawaii—have devised such systems.

Oregon provides for direct state regulation of projects which are designated as activities of state-wide significance.[172] These endeavors cannot be undertaken without a permit from the administrative agency,[173] which may deny a request for a permit if it determines that the proposed project does not comply with applicable state-wide goals and guidelines.[174] When the agency does issue a permit it may require that the applicant comply with certain condi-

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168. Minn. Stat. Ann. § 116G.09(4) (Cum. Supp. 1976).

169. Colo. Rev. Stat. Ann. §§ 24-65-104(2)(a) (1973), as amended, (Supp. 1975), 24-65.1-407(c) (Supp. 1975).

170. Since land use decisions may have significant effects on the immediate environs, local governments should participate in such decisions. Furthermore, the local community is generally familiar with the proposed development site and the surrounding area. Consequently, it can provide valuable input into the decision-making process.

171. See notes 34-49 supra and accompanying text.

172. The state administrative agency may designate certain activities which are specified by statute as matters of state-wide importance and request that the state legislature designate other activities to that status. See notes 81-82 supra and accompanying text.

173. Ore. Rev. Stat. §§ 197.410, 197.415 (1975).

174. Id. § 197.415(5). The agency must include proposed development guidelines in its recommendations to the legislature that an activity be designated as a matter of state-wide concern. Id. § 197.405(1).

tions and restrictions.[175] Thus, Oregon authorizes greater direct state control of land use than the Code permits. Unlike Vermont and Maine, however, which advocate state control of most activities, it limits that control to particular types of developments.[176]

With respect to state planning, the agency may review and amend the regulations of local governments which are inconsistent with state guidelines formulated by the agency.[177] This power is significantly greater than that provided by the Code.[178]

Oregon has also incorporated a provision for state control of districts of critical state concern, but has not vested the agency with the authority to regulate those areas. It may recommend that the legislature designate specific areas as critical and suggest rules to govern those districts,[179] but it is not empowered to enforce those regulations.

Nevada's scheme is similar to Oregon's. However, Nevada permits the administrative agency to regulate critical areas rather than activities.[180] The agency's responsibility for developments of regional impact is limited to establishing a method for their identification.[181] But the planning authority of the agency is broad. The agency may adopt a land use plan[182] and compel local compliance through the courts.[183]

Wyoming's statute authorizes the administrative agency to "adopt, modify, enforce or revise rules and regulations necessary for the implementation [of the statutes]."[184] A literal interpretation of this clause would authorize the agency to bypass local governments in regulating critical areas. Hence, Wyoming's system of state regulation is almost as broad as that in Vermont and Maine.

Hawaii also delegates limited authority to directly control land use to a state agency. The authority of the state, however, is more restricted than that provided by Oregon, Nevada, and Wyoming. The administrative agency has the authority to classify lands into four categories: urban, rural, agricultural, and conservation.[185] The authority to classify land into use districts enables the agency to participate in the planning process. For example, in defining the boundaries of urban districts, the agency must include not only areas which are in urban use but also a sufficient excess to accommodate future urban growth.[186] The state may thereby plan for and control urban expansion.

175. Id. § 197.415(6).

176. See notes 81-82 supra and accompanying text.

177. Ore. Rev. Stat. § 197.325(1) (1975).

178. See notes 133-35 supra and accompanying text.

179. Ore. Rev. Stat. §§ 197.040(2)(i), 197.405(2) (1975).

180. Nev. Rev. Stat. § 321.770 (1975).

181. Id. § 321.720(8). This section implies broader agency power, but the statute grants the agency no further authority in this area.

182. Id. § 321.770(1)(c).

183. Id. § 321.810(2).

184. Wyo. Stat. Ann. § 9-853(ii) (Cum. Supp. 1975).

185. Hawaii Rev. Stat. § 205-2 (Supp. 1975).

186. Id.

The agency's power to rule on specific land development proposals is, however, restricted. Most geographical areas are regulated by county governments.[187] The agency's authority is generally limited to regulating developments in agricultural districts by issuing permits.[188] Hawaii's system of state regulation does not enable the state to intervene in local land use decisions when developments in rural or urban districts threaten the interest of the state. Greater controls such as those incorporated in the Code are necessary to permit such intervention.

These systems of state regulation represent a compromise between the state-dominated Vermont model and the Code, which favors the preservation of local controls. The preference of these states for direct regulation of particular geographical areas and activities suggests that while the traditional exercise of land use regulation by local governments is respected, some form of direct state regulation is necessary to protect state interests.

4. An Alternative Approach: Land Tax System

Montana has instituted a system which represents a unique alternative approach to the direct and indirect land use systems which have been discussed. Under Montana's system, the state seeks to effect regulation through tax incentives. The administrative agency together with local governments classify land into tax categories according to most desirable use.[189] Combined with local zoning restrictions, these state-created incentives exert financial pressures to encourage compliance. Through this system, Montana is attempting to encourage economic growth and eventually to deregulate land use.[190] This approach, however, does not enable the state to intervene when a particular activity threatens an interest of the state.

IV. CONCLUSION

The trend toward state land use controls has been attributed to the changing view of the economic and social functions that land serves in our society.[191] Once seen only as a source of income for its owners, land has become valued as a resource of the community, the use of which affects the welfare of the state or region.[192] The growth of environmental problems and land-related social conflicts such as the controversy over suburban low-cost housing[193] demonstrate the interrelatedness of local land use decisions and the

187. The department of land and natural resources has the authority to regulate conservation districts while agricultural and, to a lesser extent, rural districts are under the jurisdiction of the administrative agency. County governments also share in the regulation of rural districts and have exclusive control or urban districts. Id. §§ 205-5 to -6 (1968), as amended, (Supp. 1975).

188. Id. § 205-4.

189. Mont. Rev. Codes §§ 84-7505(5), 84-7507 (Supp. 1975).

190. Id. § 84-7502(5).

191. Bosselman & Callies, supra note 4, at 314.

192. Id. at 315.

193. Exclusionary zoning—the adoption of local ordinances which in effect prevent the construction of low-cost housing—has become a major issue in recent years. The Supreme Court has recently held that such ordinances, even though racially discriminatory in effect, are

state's interest in the outcome of such determinations.

The systems of regulation which have been devised reflect varied attitudes toward state involvement. The crucial distinction between the statutory systems is in the relative roles assigned to state and local governments. A few states provide for comprehensive state planning and direct enforcement of state regulations. Other states have allowed state regulation to be implemented only through local governments. Some schemes restrict state jurisdiction to particular geographical areas or types of development while others permit much broader control. Generally, the trend is toward limited but direct state regulation of geographical areas or developmental activities.

An ideal state land use system would ensure a consistent state-wide policy while minimizing undue state intrusion into local affairs. An effective and politically feasible method of effectuating these goals would provide joint state and local jurisdiction over selected geographical areas and particular developmental activities. State guidelines for these areas and activities would be devised through joint hearings. In addition, provisions for periodic review and revision of the activities and areas subject to state control would enable the state agency to re-examine the validity of continued state supervision and to expand its jurisdiction if necessary. Finally, the agency would scrutinize local land use plans as well as formulate a state-wide land use scheme. Local governments would have primary responsibility for implementing these plans except in areas and for activities subject to joint state and local control. While the restricted land use systems now in effect in several states are somewhat similar to this scheme, none of the jurisdictions with state-wide land use controls have adopted such an approach in its entirety.

Adoption of some form of state land use controls by other states is probable. Currently, at least three states are preparing legislation which will permit state-wide regulation of land.[194] The growing interest in environmental control and possible future Congressional legislation[195] strongly suggest that the trend toward state land use controls will continue. Of course, the varied needs and interests of individual states will continue to engender a multiplicity of approaches to the problem of state land use regulation. It is hoped that the systems reviewed above offer several viable blueprints for future state land use control.

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constitutionally valid so long as they are not discriminatory in intent. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 97 S. Ct. 555 (1977). This decision may reduce the availability of low-cost housing. There is a greater necessity now for state intervention to prevent such a result.

194. Ky. Rev. Stat. Ann. § 147.350 (Cum. Supp. 1976); Mich. Comp. Laws Ann. § 299.11(8) (Supp. 1976); N.C. Gen. Stat. § 113A-156(4)(e)(1)(c) (1975).

195. See note 5 supra and accompanying text.