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STATEWIDE LAND USE REGULATIONS

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I. INTRODUCTION

The role of state government in land use can be summarized as follows: In the 1960's the question was *whether* the state government had any role regarding the use of land; in the early 1970's the issue is *how* the state government should involve itself with land use; in the late 1970's the issue will be, "What can we do to make some sense out of all this state involvement in land use?"

When I studied land use law in law school in 1958 I remember reading suggestions by Allison Dunham, Norman Williams and Charles Haar that the decisions of local governments regarding the use of land were not all-wise.[1] They suggested that these decisions often seemed to promote the parochial interests of local governments at the expense of interests more broadly the concern of the public as a whole. It was commonly agreed, however, that these writers were visionary academics whose complaints would only provide future historians with an amusing footnote when, yellowed with age, they were discovered during the writing of "the supremacy of local government in American history."

II. THE HAWAIIAN PRECEDENT

Throughout the 1960's it was generally assumed that the local governments would continue to be the primary level of government to control the use of land. Early in the 1960's, however, the new state of Hawaii adopted a new land use law. This statute created a state land use commission, ordered it to divide the state into four zoning districts and to exercise direct control over the use of land within those districts where the commission decided that agricultural, rural or conservation uses were to be paramount.[2]

Most of us on the mainland greeted this shockingly different legislation with a yawn. Hawaii was a very exotic group of islands with a unique history. Few people thought the Hawaiian precedent would soon spread to the mainland.

We were proven wrong, for reasons that the historians may discover, but I cannot fully explain. The interest in direct state land use regulation grew rapidly throughout the 1960's. Interest was undoubtedly stimulated by the Hawaii legislation, by the writings of various academic commentators and my partner Richard Babcock,[3] and by the publication in 1968 of the

*Partner, Ross, Hardies, O'Keefe, Babcock & Parsons.

[1]Williams, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROB. 317 (1955); Harr, *Regionalism and Realism in Land Use Planning*, 105 U. OF PA. L. REV. 515 (1957); Dunham, *A Legal and Economic Basis for City Planning*, 5 COLUM. L. REV. 650 (1958).

[2]HAW. REV. STATS. ch. 205 (1960).

[3]BABCOCK, THE ZONING GAME (1966).

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first tentative draft of the American Law Institute's Model Land Development Code which contained the first tentative suggestions about how the state's role might be exercised.[4]

III. Other State Legislation

As the 1970's opened, a number of states passed important legislative measures broadening the role of state and regional agencies in the use of land. Vermont's 1970 Environmental Control Law (Act 250) created an Environmental Board, assisted by seven regional commissions, which passes on all major proposals for development in the state.[5] Any residential subdivision involving lots of less than ten acres, any commercial or industrial development of substantial size and any development above the elevation of 2,500 feet requires a permit from the Environmental Board. Applications for permits are reviewed by an Agency 250 Review Committee, consisting of representatives of certain state agencies. This committee then sends recommendations to one of the seven district commissions, which holds a public hearing, at which comments may also be offered by local or regional planning commissions. The district commission's decision is based on a series of rather general environmental criteria spelled out in the statute, and may be appealed to the Environmental Board.

The Environmental Control Law further required the adoption of a series of statewide plans which will become additional criteria for decisions on applications for permits. The first such plan, an interim land capability plan, was adopted in 1971, and this year the legislature adopted a second plan consisting of a series of general guidelines for development.[6] A third and more detailed plan is still in preparation.

The 1969 Massachusetts Zoning Appeals Law provides a statewide approach to a much different problem.[7] The law authorizes developers of low-income housing to apply to local zoning appeal boards for a "comprehensive permit" in lieu of all other permits required under all other local regulations. If the application is denied, the developer can appeal to a Housing Appeals Committee created at the state level. The Appeals Committee is authorized to reverse the local decision if it is not "reasonable and consistent with local needs." This latter term is defined in the form of quotas which authorize the denial of a permit where the number of housing units or the total land area used for low-income housing would exceed certain percentages of the total number of housing units or land area in the town. The law was recently given strong support by a favorable opinion from the Supreme Judicial Court.[8]

IV. Regional Control

A number of other state laws might be characterized as "critical area

[4]American Law Institute, A Model Land Development Code, Tentative Draft No. 1 (1968).

[5]10 Vt. Stat. Ann. §§6001-6091 (Supp. 1970).

[6]Act 85, Vt. Laws of 1973.

[7]40B Mass. Gen. Laws Ann. §§20-23 (1969).

[8]Board of Appeals of Hanover v. Housing Appeals Committee, 294 N.E.2d 393 (Mass. 1973).

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legislation" designed to control the use of land in particular sections of the state.

The Tahoe Regional Planning Agency, a bi-state agency created by interstate compact, is an example of the critical area approach.[9] The Agency was empowered to adopt a development plan for the Tahoe Basin and implement this plan with land use regulations. Although the Agency has been buffeted by strong conflicts over the desirability of development and conservation in the Basin, it has adopted a plan and is now implementing land use regulations.

The Hackensack Meadowlands Development Commission offers another approach toward critical areas.[10] The Hackensack Meadowlands are largely undeveloped wetlands just across the Hudson River from Manhattan. The State of New Jersey created the Commission with the responsibility of preparing a plan and exercising control over all developments in the Meadowlands. The Commission's proposed master plan recommends that a substantial segment of the area be placed in a marshland conservation zone, and that other portions of the area be reserved for high-density housing, industrial facilities and a variety of other uses.

In 1971 the New York Legislature created an Adirondack Park Agency responsible for the preparation of a comprehensive plan for the use of land in Adirondack Park, much of which is privately owned.[11] This year the legislature adopted the master plan drafted by the Agency to control the intensity of land use and development in each portion of the area.[12] Such other laws as Maine's Site Location Act,[13] the Twin Cities Regional Council Legislation[14] and the San Francisco Bay legislation[15] have attempted through a variety of methods to provide some overall coordination of land use decisions throughout a state or region.

V. The Model Code and Counterparts

In 1971 the American Law Institute published Tentative Draft No. 3 of a Model Land Development Code which suggested a definite framework for state involvement in land use planning and regulation.[16] In 1972 the State of Florida adopted a statute, the Environmental Land and Water Management Act,[17] based largely on the Tentative Draft. In the same year the voters of California adopted the Coastal Zone Conservation Act[18] containing some of the toughest regulatory provisions ever imposed on the use of land.

At the present time Congress is considering land use policy legislation which would require substantial state involvement in the control of land

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[9]Calif. Gov. C. §66680 (1969), 83 Stat. 360 (1969).
[10]N. J. Stat. Ann. §13:17-1 *et seq.* (1968).
[11]N. Y. Exec. Law §§800-810, added by ch. 706, Laws of 1971.
[12]Ch. 348, N. Y. Laws of 1973.
[13]38 Me. Rev. Stat. Ann. §§481-488 (Supp. 1970).
[14]Minn. Stat. Ann. ch. 473B (Supp. 1971).
[15]Calif. Gov. C. §§66600 *et seq.* (1969).
[16]American Law Institute, A Model Land Development Code, Tentative Draft No. 3 (1971).
[17]14 Fla. Stat. ch. 380 (1972).
[18]Calif. Pub. Res. C §27000 (1972).

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use. The Senate has recently passed S. 268[19] requiring the states to set up comprehensive land planning processes and systems of regulation along the general lines of Tentative Draft No. 3.

Because the 1972 Florida legislation seems to fit most closely the pattern of the pending federal bill it is worth explaining the way the Florida law operates.

In general, the law directs the State Division of Planning to become involved in the regulation of the use of land primarily in two ways. First, it is to define and promulgate regulations regarding development of regional impact—defined as development having an impact beyond the boundaries of a single governmental jurisdiction.[20] Such development includes (in the definition adopted by Florida) airports, seaports, regional shopping centers, large residential developments and so forth. For these types of development a regional impact statement must be prepared by the appropriate regional planning agency. Decisions regarding these developments will continue to be made by the appropriate local government, but the government's decision can be appealed by either the developer or by the regional planning agency or state division of planning to an adjudicatory board at the state level consisting of the governor and cabinet sitting as a body.

The other involvement of the state division of planning in land use is through the designation of areas of critical state concern. These areas may include those in which there are substantial environmental problems, those in which there are major public facilities and those in which new communities are recommended. In these areas the state division of planning is to provide general guidelines for the development of the area. The local governments must then adopt land use regulations which are consistent with these development guidelines. If these regulations are adopted, local governments will continue to control the use of land in the area subject to a right of appeal in some cases to the state-wide adjudicatory commission. In Florida the division of planning is now in the process of drafting regulations for the first set of critical areas including the Big Cypress Swamp.

Two key features of the American Law Institute's approach embodied in Tentative Draft No. 3 and the Florida law are particularly worth noting. First, the Tentative Draft took the position that only five or ten per cent of land use decisions were of sufficient importance to require the involvement of any agency representing a constituency larger than the local government. Consequently the state involvement is restricted only to the major decisions. Second, the Code took the position that the administration of land use regulations is best handled at the local level even for those major decisions in which some state involvement is thought necessary. Thus, the hearing and initial decision of all land use matters continue to be at the local governmental level while the state's involvement is purely on an appellate basis.

VI. Response to Federal Legislation

These positions reflected the systems of law existing at the time that

[19] S.B. 268, 93rd Cong.
[20] 14 Fla. Stat. §380.06 (1972).

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the American Law Institute was considering its Tentative Draft No. 3 (1970-71). The primary decision-making power in regard to land use was with the local governments, while state governments only provided certain facilities, such as highways, and regulated only a few types of unusual uses of land, such as public utilities.

The pattern has changed substantially since that time, however. The state governments have become directly involved in the use of land in a wide variety of ways which, when aggregated, present a picture of state involvement far greater than most people realize. To a large extent this state involvement has been mandated or at least encouraged by recent federal statutes.

Much of the state involvement is in response to the environmental crisis perceived in the early 1970's. The Clean Air Act of 1970,[21] the Coastal Zone Management Act of 1972[22] and the Water Pollution Control Act Amendments of 1972[23] all force state government involvement in the regulation of land use to a degree that is only gradually being recognized as the regulations under these acts begin to be implemented. For example:

The Clean Air Act requires that the state government adopt plans to control the location of all "complex sources" of air pollution, such as shopping centers, stadiums and amusement parks, which generate extensive automotive air pollution by attracting large amounts of automobile traffic. These activities will require a permit from the state agency charged with regulating air pollution, and such permit will presumably be denied if they are located in a heavily polluted area or if the land use would generate unnecessary volumes of automobile traffic.

Under litigation brought by the Sierra Club, the Court of Appeals for the District of Columbia has ruled (affirmed by 4-4 decision of the United States Supreme Court) that the states must develop a method of insuring that parts of the state which currently have air of a substantially higher quality than that required by the national standard must maintain the current air quality rather than allowing the air to become polluted up to the level permitted by the national standards.[24] The EPA has recently issued four alternative proposals for regulations to implement this decision. Regardless of which set of regulations is adopted, the state will be required to pass on the location of all substantial sources of air pollution.

The Coastal Zone Management Act of 1972 provides grants-in-aid by which the states may prepare Coastal Zone Management Plans. The criteria for the adoption of these plans require the state to designate a single state agency which must control the use of land throughout the coastal zone. Although the adoption of these plans is not mandatory, the interest already shown by many coastal states such as California, Washington and most of the New England states which have programs requiring state permits for development in wetland or coastal areas, indicates that there will be substantial extension of state powers in this area.

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[21] 42 U.S.C. 1857 *et seq.* (1970).
[22] 86 STAT. 1280 (1972).
[23] 86 STAT. 216 (1972).
[24] Sierra Club v. Ruckleshaus, 344 F.Supp. 253, *aff'd*, 4 ERC 1815 (D.C. App. 1972), *aff'd per curiam*, Fri v. Sierra Club, 41 U. S. LAW WEEK 4825 (June 11, 1973).

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The Water Pollution Control Act Amendments of 1972 require the states to adopt overall plans for the preservation of water quality in the location of waste treatment facilities. The adoption of these plans will give the state agency regulating water pollution control a substantial voice in the land use patterns throughout the state. These agencies will presumably be able to limit growth to those areas of the state for which treatment facilities are planned.

The same Act requires the states to adopt plans and regulations to control nonpoint sources of water pollution—agricultural, forestry and mining operations as well as construction and urban runoff. Through this type of regulation the state government will become deeply involved in controlling uses of land which occupy large percentages of the area of most states. Many of these uses have been virtually unregulated even by local government.

Additional federal legislation of a similar nature is on the drawing board. The Power Plant Siting legislation currently pending before Congress may be but the first of a series of bills designed to force the state governments to make important decisions dealing with the nation's energy problem.

In addition, litigation brought by environmental groups has occasionally established new powers for state agencies through reinterpretation of older federal legislation. Thus, the new regulations proposed by the Corps of Engineers for the issuance of permits for dredging or filling land near navigable waterways require that the applicant make his peace with a whole host of state agencies.[25] Through these regulations agencies such as a state fish and wildlife commission now have significant de facto power to regulate private development.[26]

VII. Problem of Coordination

I have only sampled the wide variety of new federal and state legislation requiring the control of the use of land by state agencies. The adoption of such legislation is spreading rapidly and promises to continue. I am a strong supporter of most of these laws, but they promise to generate what I believe will be the predominant problem of the late 1970's regarding the state's role in land use; namely, how to coordinate all of these various state programs.

Consider a hypothetical example: the building of a commercial airport of substantial size. (At the moment this example is hypothetical since the jumbo-jets have expanded the capacity of existing airports, but this situation will not continue forever.) The location of airports has always required the approval of the FAA and the state aviation authority whose responsibilities are to insure that the airport is located in a way that is consistent with air traffic patterns. In general, their criteria will require the developer to keep substantial distance from other existing airports and military air bases. In addition the FAA is now considering regulations proposed by the EPA which would substantially reduce the available sites for airports by controlling or establishing criteria for noise impact which relate to the amount

[25] 38 Fed. Reg. 90, at 12217 (May 10, 1973).
[26] 16 U.S.C. 661-666 c. (1958).

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of residential and other developments near the airport. If these or similar regulations are adopted, they would require location away from major residential concentrations.

However, airports are substantial generators of automobile traffic. Under the Clean Air Act such "complex sources" must comply with the state's plan to control air pollution. Regulations under that plan will presumably prevent the airport from being located in areas with high pollution levels. But they may also prevent far-out locations which would require extensive automobile travel.

The Water Pollution Control Act will control pollution from nonpoint sources. The runoff from runways and taxiways of major airports is heavily polluted with the remnants of aircraft fuel. Thus, the regulations adopted under that act may prevent the airport from being located in the basin of a river having high quality water.

Each of these sets of regulations will be designed to promote very important and valid purposes. Each will be reinforced by interest groups concerned with monitoring the operation of the particular state agency having the responsibility to promote that purpose. Given increasing judicial leniency on standing requirements, these groups can be expected to use the courts to insist that their purposes be promoted. Thus, even if the water pollution agency thought it advantageous to accept more water pollution in order to alleviate noise or auto traffic, the court might not permit it to exercise this discretion which is not delegated to it by statute.

VIII. Conclusion

In summary, we may have created a situation in which it is impossible to locate a new airport except by the method currently being used to build the Alaska pipeline—specific enabling legislation by Congress directing the construction of a particular facility and waiving all of the other applicable requirements. While we may be able to afford a system like this for an occasional pipeline or even for major airports, there is no evidence that it will stop there. A wide variety of other land uses from sanitary land fills to agricultural feed lots to subsidized housing may become obsolete because of the impossibility of finding any site on which they can be located under existing legislation.

I suspect that "the case of the impossible development" will need to become much more obvious to people before they are willing to adopt the measures needed to deal with the problem, because anyone who attempts a solution will be accused of weakening the environmental legislation so recently obtained.

The environmental legislation of recent years is making our nation a much better place in which to live. Nevertheless, I do not think it represents a weakening of devotion to the cause of a better environment if we suggest that that environment can best be achieved by comprehensive planning which balances each specific environmental goal together with all of the other goals of our society in a process which tries to achieve the optimum amount of each goal. The process of comprehensive planning is hardly a

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new idea, although it has been honored more in theory than in practice in this country and has almost never been undertaken meaningfully at the state level. But we are now reaching the point where the need for this type of planning is becoming so obvious that in my opinion it is time to begin a real push towards this goal.

Accordingly, I believe the proper role of state government in the 1970's should be to undertake comprehensive planning for the development of all of the lands of the state. Only in this way can we achieve a coordinated approach to all our environmental needs.

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