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William M. Eichbaum Jr.

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ENVIRONMENTAL PLANNING —  
A LEGAL GUIDE TO DEVELOPMENT IN PENNSYLVANIA

WILLIAM M. EICHBAUM, JR.†

**I**T is doubtful whether society perceived the goal of the environmental movement to be more than a cleanup of pipes and smokestacks across the country when the public drive to initiate and implement new programs for environmental protection began four years ago. However, the apparent conflict between environmental control and economic development has become a focal point for all concerned. Those who advocate continued growth have singled out the environmental restraint as the most severe and arbitrary obstacle to the achievement of desired growth goals. At the other extreme, the most vocal and persistent adherents to the environmental movement often advocate a reduction of our rate of economic growth or even a return to some lower material and economic standard in order to achieve and maintain environmental quality. This sometimes acerbic juxtaposition of views has severely clouded the central issues of the ecology problem and obscured the real relationship which exists between the environment and developmental activities.

The environment is one of several significant factors which influence the decisions society makes concerning the type and direction of future development. Other substantially determinative factors include the myriad economic, social, cultural, and philosophical values of our society. It is not the purpose of this paper to examine the impact of these other factors or considerations on the development process. Rather, the purpose is to describe the development of environmental control programs in Pennsylvania. This paper has as its underlying thesis the proposition dictated by modern realities that environmental restraints should occupy a uniquely important position in the hierarchy of factors affecting the economic and other developmental goals of society. It will trace recent developments in environmental control programs as they have evolved in Pennsylvania, with reference to responses made by other states to similar problems. These programs are arranged in four categories in the following discussion: Pollution Control Statutes, Critical Area Protection Statutes, Controlled Land Use Programs, and Constitutional Principles. This perspective should aid in indicating certain trends and particular points of legal development.

## I. POLLUTION CONTROL STATUTES

Historically, pollution control legislation at the state level evolved in response to particular environmental problems. In Pennsylvania the General Assembly enacted the Clean Streams Law,<sup>1</sup> the Air Pollution Control Act,<sup>2</sup> the Solid Waste Management Act,<sup>3</sup> the Sewage Facilities Act,<sup>4</sup> and other legislation. Each legislative enactment was designed to regulate a narrow aspect of human activity and to regulate that activity at the point in time and space at which an adverse environmental impact from a point-source discharge of pollutants occurred.<sup>5</sup> The primary purpose of this regulation was initially and continues to be that of minimizing the impact of activities which pollute so that conditions inimical to the *physical* health of man would not result. Little or no concern was expressed regarding the impact of pollutants on man's *spiritual* well-being or upon the capacity of the environment as a dynamic whole to absorb pollutants except insofar as that capacity provided protection to man's health.<sup>6</sup> As a result, the standards were based entirely upon concepts which were health-oriented. The mechanism which evolved for imposing these standards was the permit,<sup>7</sup> designed to ensure that the concentration of pollutants would be at an acceptable level at the point where the refuse from man's activities entered the natural environment — the stack, the pipe, the septic system or the garbage dump.

Two limitations inherent in this philosophical approach gradually became apparent at the end of the 1960's. First, success in achieving acceptable levels of pollutants by controlling point-source emissions was recognized as being virtually unattainable unless attempts were made at long range planning. For example, it is obvious that the air pollutant emission standards established for a particular smokestack become

1. PA. STAT. ANN. tit. 35, §§ 691.1 *et seq.* (1964).

2. PA. STAT. ANN. tit. 35, §§ 4001 *et seq.* (1964).

3. PA. STAT. ANN. tit. 35, §§ 6001 *et seq.* (Supp. 1974).

4. PA. STAT. ANN. tit. 35, §§ 750.1 *et seq.* (Supp. 1974).

5. *See, e.g.*, the Clean Streams Law, which provides in pertinent part that "the Sanitary Water Board should determine when the discharge of any industrial waste, or the effluent therefrom, constitutes pollution. . . ." PA. STAT. ANN. tit. 35, § 691.1 (1964). The Air Pollution Control Act actually uses the words "air contamination source." PA. STAT. ANN. tit. 35, § 4003 (1964).

6. *See, e.g.*, section 3 of the Clean Streams Law of 1937 which provides: The discharge of sewage or industrial waste or any noxious and deleterious substances into the waters of this Commonwealth, which is or may become *inimical and injurious to the public health, or to animal or aquatic life, or to the user of such waters for domestic or industrial consumption, or for recreation, is hereby declared not to be a reasonable or natural use of such waters, to be against public policy and to be a public nuisance.*

PA. STAT. ANN. tit. 35, § 691.3 (1964) (emphasis added). Indeed, the title wherein the pollution control statutes appear bears the name "Health and Safety."

7. *See, e.g.*, Solid Waste Management Act § 7, PA. STAT. ANN. tit. 35, § 6007 (Supp. 1974); Sewage Facilities Act § 7, PA. STAT. ANN. tit. 35, § 750.7 (Supp. 1974).

meaningless as either more stacks are built in the area or existing stacks become cleaner. It therefore was recognized that any pollution control agency had to develop the capability to predict the future course of development within an entire region. With this tool, standards which had a reasonable chance of remaining valid over time could be adopted.

The Air Pollution Control Act<sup>8</sup> and the Clean Streams Law,<sup>9</sup> Pennsylvania's oldest pollution control laws, have never, by their statutory language, recognized this fact. However, the Solid Waste Management Act<sup>10</sup> and the Sewage Facilities Act,<sup>11</sup> both initially adopted in the late 1960's, explicitly recognize that the development of regional plans as regulatory tools is a prerequisite to the achievement of the purposes of those statutes.<sup>12</sup> It is important to remember nonetheless that the planning envisaged as necessary under these latter statutes was largely of a predictive type. The same is true of the regulations recently adopted pursuant to the Clean Streams Law. Environmental planning, therefore, was and frequently remains an effort simply to determine where people and human activity will go, what kinds of activities they will pursue, and what limitations must be imposed upon the resulting pollutants in order to protect the health of the people.

A second limitation in the point-source scheme is its utter failure to protect those areas which are largely free from environmental degradation caused by human activity. The standards for limiting the discharge of pollutants relate only to immediate health impacts and merely reflect the capacity of the environment to assimilate and carry away pollutants. They do not reflect secondary impacts on man or the environment in terms of the capacity of each to survive and maintain life.<sup>13</sup> Most states now tend to recognize that there are extensive water and air resources and regions which are relatively pure. It is acknowledged that these areas should be maintained in this condition for at least some, if not all, of the following reasons:

- 1) the ultimate thrust of the relevant statutes leads to that conclusion;<sup>14</sup>

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8. PA. STAT. ANN. tit. 35, §§ 4001 *et seq.* (1964).

9. PA. STAT. ANN. tit. 35, §§ 691.1 *et seq.* (1964).

10. PA. STAT. ANN. tit. 35, §§ 6001 *et seq.* (Supp. 1974).

11. PA. STAT. ANN. tit. 35, §§ 750.1 *et seq.* (Supp. 1974).

12. Solid Waste Management Act § 5, PA. STAT. ANN. tit. 35, § 6005 (Supp. 1974); Sewage Facilities Act § 5, PA. STAT. ANN. tit. 35, § 750.5 (Supp. 1974).

13. See note 6 *supra*.

14. See, e.g., section 4 of the Clean Streams Law which declares that it is the policy of the Commonwealth to "prevent further pollution of the waters of the Commonwealth and to restore and improve the quality of every stream in Pennsylvania that is presently polluted." PA. STAT. ANN. tit. 35, § 691.4(3) (1964).

- 2) keeping such areas unpolluted is necessary to the overall maintenance of the environmental system, particularly its capacity to provide man with resources ; and
- 3) these areas are important reserves for future activities.

Governmental response to this second limitation has been varied. It has included attempts at broad land use control schemes and the adoption of more sophisticated regulatory programs under existing pollution control legislation. The former approach is discussed in the following sections of this paper. An example of the latter approach is found in the regulatory language which has been adopted in Pennsylvania pursuant to the Clean Streams Law :

Water having a better quality than the applicable water quality criteria as of the effective date of the establishment of such criteria shall be maintained at such high quality unless it is affirmatively demonstrated that a change is justified as a result of necessary economic or social development and will not preclude uses presently possible in such waters.<sup>15</sup>

There are two important, yet unresolved issues embodied in this anti-degradation regulation : It is the first regulatory recognition of the reality that environmental protection standards must be related to some set of factors other than those relating solely to man's immediate physical health. Second, the regulation recognizes that a high standard, which might result in rigorous controls on the use of land, may be lowered when social or economic justification exists. For the first time, then, there is an obvious conflict between environmental protection and goals which could be subsumed under the rubric "development."

In spite of the limitations of pollution control statutes, when considered with the recent overlay of national air and water programs, they are, nonetheless, capable of achieving at least their primary goal — the limitation of effluents to a level consistent with the public health requirements of man. This regulatory process, however, even when enhanced with the predictive planning and anti-degradation concepts, remains incapable of effectively regulating a much broader range of human activities whose impacts on the environment are not necessarily point-source discharges and whose effects are not directly measurable in terms of human health, yet, whose aggregate environmental impact is of major importance.

## II. CRITICAL AREA PROTECTION STATUTES

It is increasingly apparent that there are certain areas endowed with particular mixes of natural characteristics which require a more comprehensive protection effort. The most obvious examples of this type of environmental control strategy are statutory programs designed to protect wetlands, flood plains, and other unique or fragile zones.

Three considerations are paramount in critical area legislation. The first is the desire of society to protect its members from unwise and potentially costly exposure to natural disaster or hazard. For example, a primary rationale for flood plain legislation is the desire to regulate human activity so that persons will expose neither themselves nor their property to the catastrophic consequences of flooding. Not only is this an effort to protect people; it is also an effort by society to reduce the cost to itself of restoring property and human living conditions in the aftermath of flooding.

A second consideration is the recognition that these critical areas are zones wherein a variety of natural processes which are important to the general welfare of society occur and interact. Two examples will illustrate the range of concern. Wetland protection is important in many areas because economically important commercial fishing operations depend upon the continued existence of wetlands for the maintenance of the biological processes necessary for the propagation of the product exploited by the industry. In contrast to economic concerns, there is growing recognition that all the complex ecological relationships which exist in wetlands are critical to the long-range maintenance of the natural system upon which the continued existence of man depends. In either case, it is recognized that the natural relationships and factors within the zone in question are so complex and fragile that when faced with human disruption, the range of activity which may take place therein must be severely limited.

Each of the foregoing restraints stems from the ability of the natural environment to accommodate a proposed use or uses at a particular place. This hierarchy of opportunities and constraints, or "land capability," may be derived from the intrinsic nature of environmental features or from hazards which the environment poses to certain uses.

The third consideration is that individual members of society tend to assign a variety of philosophical or spiritual values to particular features of their natural environment. Those values may derive from recreational needs, aesthetic or scenic considerations, or a more philosophical reverence for nature. Thus, one individual may value wetlands because they are essential to the life cycle of water fowl which he

either desires to hunt or to study, while another may value the diversity of color and form found in marshes as a means to escape the concrete and brick uniformity of an urban existence. At the present time, there are no laws enacted in Pennsylvania which create zones or classifications of land to be regulated along lines servient to interests such as the foregoing.<sup>16</sup>

The devices for critical area regulation have tended to parallel rather closely those associated with point-source discharges. Following passage of legislation, the responsible agency develops the standards pursuant to which human activity within the protected zone is to be regulated. The standards tend to precisely define the nature of the resource which is being protected and, depending upon the ecological fragility of the zone, the types of activities which may be conducted. The standards are then applied through a permit or variance process.

The single most pervasive legal issue which has been raised by these statutory schemes — schemes which may have the effect of severely limiting the use which a person may make of his property — has been whether such regulation is sufficiently related to traditional notions of public health, safety, or general welfare to be valid as a reasonable exercise of the police power. It is often argued that such regulation amounts to a taking of private property for a public use without just compensation.<sup>17</sup>

It has been posited here that there are three primary factors which have led to the adoption of critical zone protection legislation: hazard, natural functions, and aesthetics. Recent cases in other states have discussed the validity of these considerations as reasonable bases for exercising the police power. The landmark 1972 Wisconsin case of *Just v. Marinette County*<sup>18</sup> upheld the constitutionality and implementation of Wisconsin's Shoreland Protection Act. The case addressed with particularity the considerations of natural systems and aesthetics

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16. An examination of experiences in other jurisdictions reveals that wetlands and flood plains are among the most commonly protected areas at the present. It is beyond the scope of this paper to examine the detailed operation of those schemes. However, there is a definitive work on the subject which details a number of these programs. See F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971).

17. The fifth amendment to the United States Constitution provides that private property shall not "be taken for public use without just compensation." U.S. CONST. amend. V. Although this clause is applicable only to the federal government, the due process clause of the fourteenth amendment has been interpreted to impose this same prohibition upon the states. *Appleby v. Buffalo*, 221 U.S. 524 (1911). See also PA. CONST. art. I, § 9. One recently published, exhaustive analysis of this issue generally concludes that there has been a judicial shift during the 1970's towards recognizing such land use control programs as valid exercises of the police power when reasonably related to the protection of the environment. See F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL* 212-35 (1973).

18. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

as essential reasons for finding the wetland protection act a valid exercise of the state's police powers:

What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty. Swamps and wetlands were once considered wasteland, undesirable, and not picturesque. But as the people became more sophisticated, an appreciation was acquired that swamps and wetlands serve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams. Swamps and wetlands are a necessary part of the ecological creation and now, even to the uninitiated, possess their own beauty in nature.

....

The changing of wetlands and swamps to the damage of the general public by upsetting the natural environment and the natural relationship is not a reasonable use of that land which is protected from police power regulation.<sup>19</sup>

In another leading case, *Turnpike Realty Co. v. Town of Dedham*,<sup>20</sup> the Supreme Judicial Court of Massachusetts upheld the constitutionality of a municipal zoning ordinance which imposed use limitations on land subject to flooding. The court examined the economic ramifications of protective zone legislation as follows:

[T]he restrictions in the by-laws serve to protect not only those who might choose to develop or occupy the land in spite of the dangers to themselves and their property . . . , but also other people in the community from the harmful effects of flooding. Similarly, there is a substantial public interest in avoiding the public works and disaster relief expenditures connected with flooding.<sup>21</sup>

The court went on to cite with approval the Connecticut case of *Vartelas v. Water Resources Commission*:<sup>22</sup>

The police power regulates use of property because uncontrolled use would be harmful to the public interest. Eminent domain on the other hand, takes property because it is useful to the public.<sup>23</sup>

Thus, these courts and others have acknowledged that a state's exercise of its police power over a geographical area in a way which

19. *Id.* at 16-18, 201 N.W.2d at 768.

20. \_\_\_\_ Mass. \_\_\_\_, 284 N.E.2d 891 (1972), cert. denied, 409 U.S. 1108 (1973).

21. *Id.* at \_\_\_\_, 284 N.E.2d at 899 (footnotes omitted).

22. 146 Conn. 650, 153 A.2d 822 (1959).

23. \_\_\_\_ Mass. at \_\_\_\_, 284 N.E.2d at 899, quoting *Vartelas v. Water Resources*



severely limits the use of property is proper if done to protect the environment. This should be recognized as a significant shift away from the traditional dogma of pollution control legislation, that is, that restrictions on actual use cannot be imposed and that limitations can be placed on an activity only if its discharge has a greater effect on an environment than on the property in question — *sic utere tuo ut alienum non laedas*.<sup>24</sup>

### III. COMPREHENSIVE LAND USE PROGRAMS

Several states (particularly Hawaii, Vermont, and Florida), a larger number of townships, and even a few regional bodies have adopted one of several legislative schemes providing for comprehensive control of the use of land within their jurisdiction.<sup>25</sup> A critical zone scheme tends to regulate land use only in a physical zone and to protect the values ascribed to the natural feature or features therein. The comprehensive land use program, may be distinguished from a critical zone program because it represents an attempt to plan for and control all significant uses of land within the entire geographic bailiwick of the governing body; it is a function of considerations in addition to those outlined in the previous section. At one level, these programs embody a recognition that both traditional pollution control legislation and critical zone legislation are inadequate to protect fully those environmental factors and relationships which are vital to the maintenance of society's health, safety, and welfare. This recognition developed in response to an increasing awareness on the part of the community of the complex interrelationships which exist between the wide range of human activities and the environment, and the multiple effects of those activities on highly complex environmental processes occurring generally, not just in unique or fragile areas.

Comprehensive planning has also developed in an effort to provide in an orderly fashion municipal services to constantly expanding and developing demographic and economic bases. Communities have often viewed growth as the key to enhancing their capability for providing services and amenities; however, they have often found uncontrolled growth to pose nearly insurmountable challenges to their ability to provide extensive new services. Therefore, in some instances, communities have adopted controlled growth and land use schemes, primarily in response to a collective desire to retain the traditional char-

24. In the words of this famous maxim, use your own property so that you do not injure that of another.

25. See, e.g., Vermont Land Use Law, VT. STAT. ANN. tit. 10, §§ 6001 *et seq.* (1973).

acteristics and values of the community, excluding those who would either change those characteristics or, simply through increased numbers, overwhelm the community.

Jurisdictions across the United States have generally chosen one of three mechanisms in order to achieve control over the uses private citizens make of the land.

### A. Zoning

The most common approach, particularly at the municipal level, has been the mere adoption of zoning ordinances, purportedly based on environmental and other community values, which dictate that future residential development in the community take place only on building lots of large size. This approach has been most frequently used by rural or suburban communities faced with increased population demands from burgeoning nearby urban areas. Such large-lot zoning ordinances are frequently adopted with little or no regard to environmental necessity and are often no more than a response by the community to its desire to minimize the need to provide municipal services for new and different individuals. Such zoning patterns have frequently been denominated as "exclusionary" or "snob" zoning because of their underlying purpose of preserving the high income, low-density characteristics of a community and thereby excluding individuals of more modest means who desire to leave the cities and share in the advantages of suburban or rural living.

A series of cases decided by the Pennsylvania Supreme Court — *National Land and Investment Company v. Easttown Township Board of Adjustment*,<sup>26</sup> *Girsh Appeal*,<sup>27</sup> *Concord Township Appeal*<sup>28</sup> — has thoroughly discredited this kind of land use control as a lawful exercise of the zoning power. In *Concord Township*, the court wrote:

The implication of our decision in *National Land* is that communities must deal with problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels. It is not for any given township to say who may or may not live within its confines, while disregarding the interests of the entire area.<sup>29</sup>

The court reached the conclusion that such zoning ordinances are not valid exercises of the police power because they represent unreasonable restrictions on the natural movements of population into the com-

26. 419 Pa. 504, 215 A.2d 597 (1965).

27. 437 Pa. 237, 263 A.2d 395 (1970).

28. 439 Pa. 466, 268 A.2d 265 (1970).

29. *Id.* at 474, 268 A.2d at 768 (footnotes omitted).

munities in question.<sup>30</sup> Also, it should be noted that in each of these cases the court specifically addressed environmental issues raised in support of the respective zoning ordinances and concluded that, as a matter of fact, the ordinances were not reasonably related to achieving solutions to the environmental problems.<sup>31</sup>

### B. *Environmental Impact Analysis*

A second approach which communities have followed might be called the Environmental Impact Statement Scheme. It is exemplified by the program effected by Maine in its 1970 Site Location of Development Law.<sup>32</sup> That law provides that any person who intends to construct a housing development which might substantially affect the local environment must first notify the Environmental Improvement Commission of such intention, and that the Commission, after a hearing, must determine whether or not the development should proceed, based upon findings regarding the project's effect on the environment and threat to the public's health, safety, or general welfare.<sup>33</sup> In *In re Spring Valley Development Co.*,<sup>34</sup> the Supreme Judicial Court of Maine addressed the constitutionality of this act. The court had little difficulty in upholding the act and wrote:

We consider it indisputable that the limitation of use of property for the purpose of preserving from unreasonable destruction the quality of air, soil and water for the protection of the public health and welfare is within the police power.<sup>35</sup>

This approach, which has been followed in several other jurisdictions (most notably California<sup>36</sup>) has the effect essentially of replacing other land use decision-making processes such as zoning with an overriding environmental impact analysis applied on a case-by-case basis. This is quite similar to the methodology of the National Environmental Policy Act,<sup>37</sup> and, as with that Act, it remains to be seen whether subsequent decisions which impose severe limitations on the use of land will be upheld by the courts.

30. See, e.g., *id.*, 268 A.2d at 768-69; Girsh Appeal, 437 Pa. 237, 243-45, 263 A.2d 395, 397.

31. See, e.g., Girsh Appeal, 437 Pa. 237, 243-44, 263 A.2d 365, 398.

32. ME. REV. STAT. ANN. tit. 38, §§ 481-88 (Supp. 1973).

33. *Id.* § 484.

34. \_\_\_\_\_ Me. \_\_\_\_\_, 300 A.2d 736 (1973).

35. *Id.* at \_\_\_\_\_, 300 A.2d at 748.

36. See *Friends of Mammoth v. Bd. of Supervisors*, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

### C. *Planned Land Use Control*

A third type of control which jurisdictions have more recently attempted to exercise is planned land use control. Planned land use control schemes are attempts to relate environmental constraints and conservation needs of the community to other social and economic goals while considering the need to provide for the orderly assimilation of population. Frequently, zoning may be the mechanism for implementing such plans, but it is merely a tool in this regard, unlike the zoning schemes described above, wherein it is the sole embodiment of the community's program.

At the state level, Hawaii led the way with the adoption of its State Land Law<sup>38</sup> in 1961. This law created a state Land Use Commission<sup>39</sup> and directed it to divide the entire state into four districts: conservational, agricultural, rural, and urban.<sup>40</sup> This land use law authorized land in the urban area to be used for any purpose permitted under the local zoning regulations. Lands in the agricultural and rural districts were to be used only in compliance with regulations of the state Land Use Commission, and lands in the conservation district were to comply with the regulations of the State Department of Land and Natural Resources.<sup>41</sup> Vermont has adopted a somewhat similar approach, but its administrative implementation is quite different.<sup>42</sup>

In order to evaluate the judicial response to such planned land use control programs, it is necessary to look at several cases which have arisen as a result of implementation efforts by municipalities. In the case of *Steel Hill Development, Inc. v. Town of Sanbornton*,<sup>43</sup> the Court of Appeals for the First Circuit reviewed the legality of the Sanbornton, New Hampshire, comprehensive plan which created or enlarged forest conservation areas, general residential districts, agricultural districts, historical preservation districts, and recreational districts and attempted to protect the more restricted districts through six-acre lot zoning.<sup>44</sup> The effect of this plan was to limit severely a proposed residential development. The court found this effective exclusion of the residential development lawful as a valid exercise of the police power because the zoning ordinance served to protect the general welfare of the community.<sup>45</sup> As stated by the court:

38. HAWAII REV. STAT. §§ 205-1 *et seq.* (1961), *as amended* (1968).

39. *Id.* § 205-1.

40. *Id.* § 205-2.

41. *Id.*

42. Vermont Land Use Law, VT. STAT. ANN. tit. 10, §§ 6001 *et seq.* (1973).

43. *Id.* at 959.

44. *Id.* at 959.

45. *Id.* at 961.

[N]ew homes . . . would have an irreversible effect on the area's ecological balance, destroy scenic values, decrease open space, significantly change the rural character of this small town, pose substantial financial burdens on the town for police, fire, sewer, and road service, and open the way for . . . tides of week-end "visitors."<sup>46</sup>

In addition to the environmental concerns which the court found valid, the court further distinguished the *Sanbornton* situation from that which was found in the Pennsylvania cases.<sup>47</sup> It noted that those cases "refer[red] to an unnatural limiting of suburban expansion into towns in the path of population growth where a too restrictive view of the general welfare was taken."<sup>48</sup> In contrast, it noted that the developer in *Sanbornton* "[did] not seek to satisfy an already existing demand for suburban expansion, but rather [sought] to create a demand in Sanbornton on behalf of wealthy residents of Megalopolis who might be willing to invest heavily in time and money to gain their own haven in bucolic surroundings."<sup>49</sup> Thus, the court upheld Sanbornton's ordinance in the face of proposed second-home development on the grounds that it was reasonably related to environmentally protective goals within the ambit of "general welfare" and that it was not an undue restriction on natural population movement.<sup>50</sup> It is important to note, however, that the court expressed serious concern regarding the scientific and technical basis upon which the plan of the town had been founded and indicated that it might well reach a different conclusion were population trends to change in the future.<sup>51</sup>

In contrast to the action taken by Sanbornton, the town of Ramapo in New York, faced with extreme pressure from an increase in population, engaged in a highly sophisticated long-range planning and capital budget program. This planning effort was outlined in *Golden v. Planning Board of Town of Ramapo*:<sup>52</sup>

[T]he Town . . . adopted . . . amendments for the alleged purpose of eliminating premature subdivision and urban sprawl. Residential development is to proceed according to the provision of adequate municipal facilities and services, with the assurance that any concomitant restraint upon property use is to be of a

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46. *Id.*

47. *Id.* at 960.

48. *Id.* at 961.

49. *Id.*

50. *Id.*

51. *Id.* at 962.

52. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S.

1003 (1972).

“temporary” nature and that other private uses, including the construction of individual housing, are authorized.<sup>53</sup>

The New York Court of Appeals found that “[t]he undisputed effect of these integrated efforts in land use planning and development is to provide an overall program of orderly growth and adequate facilities to a sequential development policy commensurate with progressing availability and capacity of public facilities.”<sup>54</sup> The court reviewed the legality of Ramapo’s approach and, after an exhaustive analysis of state zoning and planning law, concluded that mandated, phased growth was well within the authority of the existing legislation,<sup>55</sup> and that, while “the answer which Ramapo has posed can by no means be termed definitive; it is however, a first practical step toward controlled growth achieved without forsaking broader social purposes.”<sup>56</sup> Furthermore, the court specifically rejected the argument that the timed-growth concept of the Ramapo plan was either unconstitutional or exclusionary.<sup>57</sup> It should be noted that while the court did uphold the concept of phased growth in order to meet, in an orderly fashion, the needs for municipal services posed by environmental as well as social and economic conditions, it did not address the validity of permanent land use restrictions which likewise derive from environmental and other community values.

The city of Petaluma, California, however, after pursuing the same type of comprehensive planning effort as had been initiated in *Ramapo*, attempted to go one step further. Petaluma adopted a plan which provided for an absolute ceiling on the number of subdivision units which could be initiated in the future. In reviewing the legality of the Petaluma plan, the United States District Court for the Northern District of California struck it down as a violation of the constitutionally protected right to travel, which the court decided necessarily included the right to live in a particular community.<sup>58</sup> In effect, then, the flaw of the Petaluma plan appears to have been quite similar to that held fatal by the Pennsylvania Supreme Court, namely, the impact of the plan was to exclude natural population movement into the com-

53. *Id.* at 367, 285 N.E.2d at 295, 334 N.Y.S.2d at 143.

54. *Id.* at 369, 285 N.E.2d at 296, 334 N.Y.S.2d at 144.

55. *Id.* at 376, 285 N.E.2d at 300, 334 N.Y.S.2d at 150.

56. *Id.*, 285 N.E.2d at 301, 334 N.Y.S.2d at 150.

57. *Id.* at 377-83, 285 N.E.2d at 301-05, 334 N.Y.S.2d at 151-56.

58. *Construction Indus. Ass'n v. Petaluma*, 375 F. Supp. 574, 581 (N.D. Cal. 1974).

Note, however, that the plan in *Petaluma* differed from that in *Ramapo* in that it used a numerical ceiling (500 annual housing starts) and was not based upon an ongoing comprehensive plan. *Ramapo*'s plan, on the other hand, provided for an 18-year capital improvement program regulating density, and did not impose numerical quotas. *Cf. Albrecht Realty Co. v. New Castle*, 8 Misc. 2d 255, 167 N.Y.S.2d 843

munity,<sup>59</sup> doing so in a fashion not reasonably related to environmental or other valid concerns of the community.<sup>60</sup> One may conclude that the thrust of these and other decisions is to uphold land use control programs which may be highly restrictive only where:

- 1) the comprehensive plan for control of land use is technically sound and based upon competent determinations as to the constraints posed by the environment; *and*
- 2) the environmental constraints which have been placed on the use of land are consistent with the protection of the public's health, safety and welfare; *and*
- 3) the effect of the plan is not to prohibit natural population movement into the community.

In many instances, this will require municipal planners to consider regional problems as well as the desires of the community.

#### IV. CONSTITUTIONAL PRINCIPLES

Although Pennsylvania and its municipalities generally have not followed the lead of other jurisdictions in adopting either critical area protection legislation or planned land use controls, they have nonetheless led the way by adopting one of the most compelling constitutional statements regarding environmental protection. On May 21, 1970, the voters of Pennsylvania overwhelmingly approved by referendum an amendment to the state constitution known as the Pennsylvania Declaration of Environmental Rights (Amendment):

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.<sup>61</sup>

The purpose of this section is to examine the impact of the Amendment upon the land use decision-making process expected to evolve in Pennsylvania. Since the adoption of the Amendment in 1971, there have been a sufficient number of judicial decisions interpreting its meaning to enable one to reach some tentative conclusions as to the

59. See note 30 *supra*.

60. See notes 31 and accompanying text *supra*.

61. P.A. CONST. art. I, § 27. Several other states have adopted an environmental principle at the constitutional level. See, e.g., N.Y. CONST. art. 14, § 4; ILL. CONST. art. 11; VA. CONST. art. XI.

present status of the Amendment and the extent to which it imposes new duties upon government, as well as upon individual and corporate citizens of the Commonwealth.

The key legal issue of whether the Amendment is self-executing in the absence of further legislative action by the General Assembly remains somewhat muddled as a result of the Pennsylvania Supreme Court's decision in *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*<sup>62</sup> The majority opinion, written by Mr. Justice O'Brien and joined in by Mr. Justice Pomeroy, concluded that the Amendment was not self-executing.<sup>63</sup> Mr. Justice Roberts wrote a concurring opinion in which he found that the Commonwealth had failed to demonstrate that the aesthetic values of the Gettysburg area would be irreparably harmed by the erection of the proposed tower.<sup>64</sup> He concluded that "the Commonwealth, even prior to the recent adoption of Article I, section 27, possessed the inherent sovereign power to protect and preserve for its citizens the natural and historic resources now enumerated in section 27."<sup>65</sup> Mr. Justice Jones, in a dissenting opinion in which he was joined by Mr. Justice Eagen, concluded that the Amendment was self-executing and that it did "[confer] certain enumerated rights upon the people of the Commonwealth and impose upon the executive branch a fiduciary obligation to protect and enforce those rights."<sup>66</sup> Mr. Justice Nix agreed with the result but did not join in any opinion. Thus, the issue of whether the Amendment is self-executing was essentially left open. Yet, on balance, four of the seven Justices appear to believe that in an appropriate case, the court should sustain state action based solely on the principles enumerated in the Amendment. Furthermore, in light of this split, the Pennsylvania Commonwealth Court has continued to maintain, consistent with its own opinion in *Gettysburg Tower*,<sup>67</sup> that the Amendment is self-executing. That court recently reaffirmed this conclusion in *Payne v. Kassab*<sup>68</sup> and in *Bucks County Board of Commissioners v. Commonwealth*.<sup>69</sup> Therefore, it is submitted that practically at least the Amendment is self-executing since the Pennsylvania Supreme Court's ruling in *Gettysburg Tower* is essentially inconclusive and the Commonwealth Court, since that decision, has continued to hold it to be such.<sup>70</sup> Furthermore, the Common-

62. 454 Pa. 193, 311 A.2d 588 (1973).

63. *Id.* at 203-05, 311 A.2d at 594-95.

64. *Id.* at 207-08, 311 A.2d at 596 (Roberts, J., concurring).

65. *Id.* at 206, 311 A.2d at 595.

66. *Id.* at 208-09, 311 A.2d at 596 (Jones, J., dissenting).

67. 8 Pa. Comm. Ct. 231, 302 A.2d 886 (1973).

68. 11 Pa. Comm. Ct. 14, 312 A.2d 86 (1973).

69. 11 Pa. Comm. Ct. 487, 313 A.2d 185 (1973).

70. In its *Bucks County* decision the court stated:

Article I, Section 27 of the Pennsylvania Constitution is a self-executing provision in accordance with doctrines of public trust and represents a proper



wealth Court has articulated criteria for review of state action in order to determine whether or not the state has met its fiduciary responsibilities while exercising its statutory duties.<sup>71</sup>

Having concluded that the Amendment is indeed self-executing and does impose upon the Commonwealth a fiduciary responsibility to conserve those values which are enumerated in the first sentence of the Amendment, the issue arises as to what effect this has on the issues of development and land use control. In Pennsylvania today the basic land use decision-making process is exercised at the local level by municipalities pursuant to the Municipalities Planning Code (Code).<sup>72</sup> The Code provides three different elective mechanisms whereby a municipality may control the use of land.<sup>73</sup> Municipalities may enact *subdivision and land development ordinances*<sup>74</sup> and the Code provides that these ordinances may require that subdivisions "conform to the comprehensive plan and to any regulations or maps adopted in furtherance thereof."<sup>75</sup> The Code also authorizes municipalities to "enact, amend and repeal *zoning ordinances* to implement comprehensive plans and to accomplish any of the purposes of [the] Act."<sup>76</sup> Section 10603 specifically provides that:

Zoning ordinances may permit, prohibit, regulate, restrict and determine:

- (1) Uses of land, watercourses and other bodies of water . . .  
[and]
- (4) Density of population and intensity of use.<sup>77</sup>

Finally, municipalities may adopt ordinances providing for *planned residential development*.<sup>78</sup> The general purpose of such ordinances is "to encourage innovations in residential development and renewal so that the growing demand for housing may be met by greater variety in type, design and layout of dwellings, and by the conservation and more efficient use of open space ancillary to said dwellings."<sup>79</sup> Each ordinance and project approved pursuant thereto must be based upon and interpreted with due regard for the comprehensive plan for the municipality.<sup>80</sup>

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exercise of state powers within the scope of the Ninth Amendment to the United States Constitution.

11 Pa. Comm. Ct. at 35, 312 A.2d at 97.

71. See text accompanying notes 87-89 *infra*.

72. PA. STAT. ANN. tit. 53, §§ 10101 *et seq.* (1972), as amended (Supp. 1974).

73. A municipality may, of course, elect to exercise *no* control, as many do.

74. PA. STAT. ANN. tit. 53, § 10501 (1972).

75. *Id.* § 10503(2).

76. *Id.* § 10601 (emphasis supplied).

77. *Id.* § 10603.

78. *Id.* § 10702.

79. *Id.* § 10701.

80. *Id.* § 10703.

The Code further grants the power to the governing bodies of municipalities to create planning agencies<sup>81</sup> whose duties and powers include, *inter alia*, the authority to prepare a comprehensive plan for the development of the municipality.<sup>82</sup> The comprehensive plan must include:

a plan for land use, which may include the amount, intensity, and character of land use proposed for residence, industry, business, agriculture, major traffic and transit facilities, public grounds, flood plains and other areas of special hazards and other similar uses.<sup>83</sup>

While the relationship in Pennsylvania between the chosen local mechanism for land use control and the comprehensive plan for the development of the municipality has been judicially altered several times by the supreme court, the court recently made its view of the law clear:

[T]hese [comprehensive] plans may be changed by the passage of new zoning ordinances, provided the local legislature passes the new ordinance with some demonstration of sensitivity to the community as a whole and the impact that the new ordinance will have on this community.<sup>84</sup>

Such "new zoning ordinances" were, of course, subject to the strictures imposed by the supreme court's earlier decisions in which certain parameters were delineated:

A zoning ordinance whose primary purpose is to avoid future burdens, economic and otherwise, upon the administration of public services and facilities can not be held valid. Of course, we do not mean that the governmental body may not utilize its zoning power in order to insure the municipal services which the community requires are provided in an orderly and rational manner.<sup>85</sup>

This picture is changed significantly by the Amendment. As creatures of the state, local governments are now clothed with the same constitutional duties as the state. Municipalities are authorized to execute local land use control as a result of the Commonwealth's delegation of its police power in the Municipalities Planning Code. Exercise of that responsibility is limited by the mandate of the Amendment, at least as articulated in *Payne v. Kassab*.<sup>86</sup>

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81. *Id.* § 10201.

82. *Id.* § 10209.1.

83. *Id.* § 10301.

84. Village 2 of New Hope Appeals, 429 Pa. 626, 632, 241 A.2d 81, 84 (1968).

85. National Land Inv. Co. v. Easttown Twp. Bd. of Appeals, 419 Pa. 504, 532, 215 A.2d 597, 612 (1965). See notes 27-31 and accompanying text *supra*.

86. 11 Pa. Comm. Ct. 14, 312 A.2d 86 (1973).

In *Payne*, Judge Mencer attempted to outline some principles and guidelines for future application of the Amendment:

We hold that Section 27 was intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affixing a public trust concept to the management of public natural resources in Pennsylvania. The result of our holding is a controlled development of resources rather than no development.<sup>87</sup>

He concluded that decision makers would be faced with increasingly difficult decisions involving the weighing of the competing interests of development and environment, which decisions would have to be made within the newly imposed constitutional guidelines of the Amendment.<sup>88</sup> Judge Mencer also noted that the Amendment placed a new burden upon the Pennsylvania courts.

Judicial review of the endless decisions that will result from such a balancing of environmental and social concerns must be realistic and not merely legalistic. The court's role must be to test the decision of the review by a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?<sup>89</sup>

In addition to the standard articulated in *Payne*, it has been suggested that:

The constitution does require that some comprehensive planning . . . is necessary. . . . [T]he specific values spelled out in [the] first sentence of Article I, Section 27 must be considered fully, in some form. [Further,] any planning process that does not give serious consideration to (a) alternative methods of using the resource in question, and (b) alternative methods of attaining the objective sought . . . does not constitute an exercise of reasonable care.<sup>90</sup>

By enacting the Code, the Pennsylvania Legislature has established a particular means for implementing comprehensive planning. A comprehensive plan devised pursuant to that authorization must bear the fiduciary responsibility of implementing the minimum environ-

87. *Id.* at 29, 312 A.2d at 94.

88. *Id.* at 29-30, 312 A.2d at 94.

<https://88bitcommons.law.villanova.edu/vlr/vol19/iss5/2>

90. *Commonwealth v. Fox*, No. 73-078 (Env. Hearing Bd. 1973).

mental values set forth in the Amendment. (That plan, in consideration of the environmental values which it must protect, may be founded upon a land use control scheme regulating amount and intensity of use.)<sup>91</sup> That having been accomplished, the comprehensive plan then exists within the framework of restrictions in which land use decisions may be made pursuant to zoning, subdivision, or planned residential development ordinances. As noted above, the courts in Pennsylvania have not normally thought that a comprehensive plan should bind local decision makers. However, where such a plan represents the mechanism whereby the community will meet its constitutional duty, it must be accorded much greater weight and should be held to bind local officials. This is particularly so where the plan is technically sound and takes into account population demands upon the region in which the community is located. Any local departure from a comprehensive plan of this nature must be predicated upon an evaluation of its environmental consequences and must be able to stand squarely as an environmentally acceptable, alternative land use decision. The fact that now municipalities must inventory, analyze, and synthesize a great complexity of factors in creating comprehensive plans which meet the mandate of the Environmental Rights Amendment, in addition to taking into account the social and economic needs of the community, underscores the importance and vitality of the Amendment as a real ecological force.

Integral to the above analysis is the notion that the Amendment implicitly expands the scope of permissible exercises of state police power in the zoning process and other related forms of state action. As noted above, other jurisdictions have decided that state limitations on the use of land are valid exercises of the police power when reasonably related to the need for protecting complex environmental values. The trial court in *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*,<sup>92</sup> addressed this issue and decided that the defendant "would be no more deprived of his rights than would landowners affected by zoning regulations."<sup>93</sup> The view was supported by the Commonwealth Court in its appellate review of the trial court's decision<sup>94</sup> and in *Payne*.

As a result, not only does the constitutional amendment impose a duty upon the Commonwealth to protect the environment when making land use decisions; it also establishes the authority for the state to do so by exercising its police power through zoning, subdivision and

91. See text accompanying notes 76 and 77 *supra*.

92. See notes 62-66 and accompanying text *supra*.

93. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 13 Adams

County Leg. J. 75, 82 (Adams County, Pa., C. P. 97)

94. 8 Pa. Comm. Ct. 231, 302 A.2d 886 (1973).

planned residential development ordinances, as well as by enacting other programs. The most important of these programs is the development by the Environmental Quality Board of a master environmental plan for the Commonwealth.<sup>95</sup> This master plan, presently being developed by Pennsylvania's Department of Environmental Resources, will provide an overall, state-mandated framework for establishing goals and criteria for implementing the Amendment, and will determine, through an integrative process, the various responsibilities and opportunities which exist at local, regional, and state levels for determining the environmental conditions which mandate the parameters within which development may proceed.

### CONCLUSION

Pollution control statutes enacted in the past, because of the limited purpose for which they were intended, generally lack the vitality needed to meet the ecological crisis which exists today. Courts and legislatures have become increasingly aware of the problems that exist and are taking steps within their respective roles to remedy them. In Pennsylvania, moreover, the populace has taken its own steps to preserve and improve the environment by enacting as nuclear law the principle that land use and land use programs must now be examined carefully for their respective impacts upon the ecological system in general. Municipalities, which have been delegated the primary responsibility to enact land use programs, are now, by virtue of the Environmental Rights Amendment, charged with an affirmative fiduciary duty to make those programs environmentally sensitive. The Amendment has enlarged the role which the state may play in exercising its power to maintain the natural resources enjoyed by Pennsylvanians, and, it is submitted, the Commonwealth should and will undertake much more activity to fill that role.

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95. Pennsylvania Administrative Code § 1920-A, PA. STAT. ANN. tit. 71, § 510-20 (Supp. 1974).