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## PHOENIX RISING? THE WASHINGTON LAND USE ACT

CHERYL A. SYLVESTER\*

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Land in the United States has traditionally been treated as a commodity, with its use determined primarily by supply and demand.<sup>1</sup> Management of land as a basic natural resource, however, is a relatively novel concept, as is the stewardship of such resources for future generations.<sup>2</sup> Awareness of these facts, in conjunction with the realization that it is not uncommon to find examples of state and local land use regulations being carried out under enabling laws passed as much as forty-five years ago, has spawned increasing concern that such laws are no longer adequate or appropriate. It was in this light that the Washington Land Use Act<sup>3</sup> was proposed in 1973. Although it failed to pass, it can still serve as a useful analytical tool. This Article is not intended to be an in-depth section-by-section analysis of an unsuccessful legislative proposal, for that, at this point in time, would be an archaeological exercise. The value of an examination of the Washington Land Use Act, apart from the historical context, lies in its being an embodiment of the realization that prevention of "irreparable damage to natural assets which are of great importance to the people of the state"<sup>4</sup>

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1. While support for this philosophy is waning, it is to say the least not dead. *See, e.g.*, 121 CONG. REC. H 6688 (daily ed. July 11, 1975) (remarks of Representative Crane). *But see Hearings on H.R. 3510 Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess., ser. 7, at 557 (1975) [hereinafter cited as *Hearings on H.R. 3510*], where the National Air Conservation Commission of the American Lung Association asserted that "America's attitude toward land must eventually change from that of a commodity, to be bought and sold, to that of a natural resource in which all citizens have a rightful interest."

2. A recent study completed in the spring of 1975 showed that while strong land use planning measures were being considered in many states, only Colorado, Florida, Hawaii, Maryland, Nevada, North Carolina, Oregon, Vermont and Wyoming had enacted such legislation. *Hearings on H.R. 3510, supra* note 1, at 64-65.

3. Washington H.B. 791, 43d Leg., Regular Sess. §§ 1-101 to 9-201 (1973).

4. *Id.* § 1-101.

can be accomplished only by efficient land use management. It is *how* this realization was arrived at and pursued that is of value. As a result this piece aims first at pointing out the confused state of land use planning in Washington State, and follows with an examination of the drafting process of a possible legislative remedy. Finally, significant concepts of the proposed bill and its progeny, and areas that it left untouched, are discussed, followed by an evaluation of the Washington Land Use Act in retrospect.

#### I. LAND USE PLANNING AND REGULATION: CONFUSION AND FRUSTRATION

Washington State lawmakers recognized in the early 1970's that the state was faced with a number of serious threats to its resources and quality of life. Land and associated resources were clearly no longer available in endless supply. Development was encroaching on agricultural uses and on such important or unique areas as fertile river bottoms, cattle lands, and orchards. It became apparent that conversion of such lands was in most cases an incremental process, resulting from individual private development decisions. The impact of these decisions usually became apparent only when considered in the aggregate over time.

The absence of a means for evaluating the total impact of land use decisions was threatening the quality of life of all persons in the state. Existing planning and regulatory processes were unrealistic and outdated, and to some extent innovative planning by local governments was actually restricted by state law because of conservative interpretations of enabling statute language by local officials and the courts. Existing statutes did not require sufficient specificity in land use plans to serve as a basis for measuring and evaluating their implementation. Assessment of the success, utility and realism of these plans was further hampered by the failure of enabling statutes to provide specific requirements for updating the plans to reflect significant changes in conditions. As a result, plans frequently became obsolete. In addition, state policy guidance was not only basically lacking or inadequate, but was devoid of an established process for providing the information, analysis, planning and coordination necessary to develop land use policies. A start was made in this direction with passage of the Shoreline Management Act of 1971.<sup>5</sup> Implementation was made difficult for both

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5. WASH. REV. CODE ANN. §§ 90.58.010-930 (Supp. 1974).

state and local officials, however, because the general language of the statute provided few specific guidelines. Also, lack of adequate funding for local implementation elicited an unenthusiastic response from those responsible under the act for local compliance.

Similarly, local planning and decisionmaking processes were fragmented and, to the land user, often confusing. Local government entities, special purpose districts, regional organizations, state agencies, and public and private utilities developed, and in most cases implemented, land use plans and plans affecting land use with virtually no consultation or coordination with one another. Taxpayers and land users had to cope with the resulting inefficiencies, confusion and duplication of effort.

Confusion and fragmentation at the local level occurred in large part because land use and land use-related planning and regulation could be done under ten or more enabling statutes.<sup>6</sup> This profusion of options caused inconsistency in local approaches and an understandable confusion for persons trying to deal with land development. Developers were frustrated with numerous substantive and procedural obstacles and with a proliferation of permit requirements. Agencies were sometimes forced, for lack of information or authorization, to permit or implement development without considering the overall impact of the land use or its relation to a comprehensive plan. In other cases, communities denied permission for development not prohibited by their ordinances. Clearly, the problematic land use climate was ripe for legislative resolution.

## II. THE DRAFTING PROCESS

Faced with this situation, the state legislature in 1971 authorized creation of a temporary, nineteen-member commission to study and present,

its recommendations for revision in present state laws and enabling acts concerning planning and land development; its recommendations of new laws necessary to allow state-wide interests to be considered in future land development of the state; its recommendations as to the appropriate degree of state

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6. *E.g.*, *id.* § 14.12 (Airport Zoning) (1962); *id.* § 35.58 (Metropolitan Municipal Corporations); *id.* § 35.63 (Planning Commissions-Cities and Towns); *id.* § 35A.63 (Optional Municipal Code-Planning and Zoning in Code Cities) (Supp. 1974); *id.* § 36.70 (Counties-Planning Enabling Act) (1962); *id.* § 53.08 (Port Districts-Powers); *id.* § 54.16 (Public Utility Districts-Powers); § 58.17 (Plat-Subdivision-Dedication) (Supp. 1974); *id.* § 80.50 (Thermal Power Plants-Site Locations); *id.* § 90.58 (Shoreline Mangement).

involvement in land and resource planning; and its recommendations as to planning criteria and guidelines to be followed by localities in the preparation of local land-use plans.<sup>7</sup>

These recommendations were to be embodied in a model land use code for the state to be submitted to the 1973 session of the state legislature.

During the next two years the Washington State Land Planning Commission held public meetings throughout the state, inviting interested persons, agencies and groups to participate in the drafting process.<sup>8</sup> Various state statutes and federal land use proposals then pending in Congress were reviewed, with drafts of the American Law Institute (ALI) Model Land Development Code<sup>9</sup> used as the take-off point for drafting procedural portions. Approximately two dozen preliminary drafts of various portions of the bill, and one complete preliminary draft were widely circulated, attracting considerable public response. A final draft was then prepared, designed to respond to as many expressed concerns as possible. This draft was then introduced as House Bill 791, The Washington Land Use Act, in early 1973.<sup>10</sup>

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7. Law of May 21, 1971, ch. 287, § 8, [1971] Wash. Laws 1518-19.

8. See Bagne, *State Land Use: Writing A Down-to-Earth Bill*, in III MANAGEMENT AND CONTROL OF GROWTH 340, 341 (R. Scott ed. 1975) (discussion of the Washington State Land Planning Commission). Ron McConnell, executive director of the Washington Commission, has proposed an alternative method for a state to draft land use planning legislation. *Id.* at 345.

The lack of a more intensive and constant public participation process throughout the drafting process was often referred to by opponents of the bill as a critical weakness in the Commission's approach. In this context, it is interesting to note two things. First, the original budget for the Commission reportedly contained \$100,000 for a public participation process; but this sum was allegedly omitted from the final budget when it was reviewed by the State Office of Program Planning and Fiscal Management. Second, after the termination of the Commission, Governor Daniel J. Evans initiated a public participation program to provide ongoing public input to state government officials concerning formulation of state growth and development policies. The first feedback from this program was a report issued in May, 1975. See I ALTERNATIVES FOR WASHINGTON STATEWIDE CITIZEN TASK FORCE, Pathways to Washington 1985, May, 1975.

9. ALI MODEL LAND DEV. CODE (Tent. Draft No. 5, 1973); *id.* (Tent. Draft No. 4, 1972); *id.* (Tent. Draft No. 3, 1971); *id.* (Tent. Draft No. 2, 1970). See Dunham, *ALI Land Development Code: Process, Procedures and Contents*, in III MANAGEMENT AND CONTROL OF GROWTH 348 (R. Scott ed. 1975).

10. For a general discussion of other state comprehensive land use plans see D. MANDELKER, *MANAGING OUR URBAN ENVIRONMENT* 550-54 (2d ed. 1971); H. Patton and J. Patton, *Harbingers of State Growth Policies*, in III MANAGEMENT AND CONTROL OF GROWTH 318 (R. Scott ed. 1975); Sullivan & Kressel, *Twenty Years After — Renewed Significance of the Comprehensive Plan Requirement*, 9 URBAN L. ANN. 33 (1975). See also COUNCIL OF STATE GOVERNMENTS, *LAND: STATE ALTERNATIVES FOR PLANNING AND MANAGEMENT, A TASK FORCE REPORT* (1975); COUNCIL OF STATE GOVERNMENTS, *LAND USE*

### III. THE COMPREHENSIVE APPROACH (OR: PROFILE OF A MONSTER)

In order to establish an ordered system for managing the state's land resources, House Bill 791 was proposed as the enabling statute for comprehensive state, regional and local land use planning and regulation.<sup>11</sup> The approach adopted by the Act for providing this comprehensive system was by contemporary standards progressive, if not radical, in both its scope and individual elements.

#### A. State Land Use Planning

##### 1. State Land Planning Agency

The Act created a state land planning agency to perform the functions of state land use planning.<sup>12</sup> Its functions basically relate to a methodical, ongoing state planning process, culminating in periodic revisions of the state plan or portions thereof.<sup>13</sup> To become effective,

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POLICY AND PROGRAM ANALYSIS NO. 1, INTERGOVERNMENTAL RELATIONS IN STATE LAND USE PLANNING (1974); COUNCIL OF STATE GOVERNMENTS, LAND USE POLICY AND PROGRAM ANALYSIS NO. 2, (DATA NEEDS AND RESOURCES FOR STATE LAND USE PLANNING) (1974); COUNCIL OF STATE GOVERNMENTS, LAND USE POLICY AND PROGRAM ANALYSIS NO. 6, (MANPOWER NEEDS FOR STATE LAND USE PLANNING AND PUBLIC INVOLVEMENT IN STATE LAND USE PLANNING) (1975); COUNCIL OF STATE GOVERNMENTS, A LEGISLATOR'S GUIDE TO LAND MANAGEMENT (1974); FUTURE LAND USE: ENERGY, ENVIRONMENTAL, AND LEGAL CONSTRAINTS (R. Burchell & D. Listopia eds. 1975); LEAGUE OF WOMEN VOTERS, LAND USE AT THE STATE LEVEL: THE GROWING EDGE (1974); M. LEVIN, J. ROSE & J. SLAVET, NEW APPROACHES TO STATE LAND-USE POLICIES (1974); R. RUBINO & W. WAGNER, THE STATE'S ROLE IN LAND RESOURCES MANAGEMENT (1972); Hodges, *States Develop Own Land Use Strategies While Implementing Federal Regulations*, 1974 MORTGAGE BANKER 10-17.

11. Washington H.B. 791, 43d Leg., Regular Sess. § 1-301 (1973). The bill, however, exempted certain politically "sensitive" statutes from preemption by the act. The bill excluded from its application the Shoreline Management Act of 1971, WASH. REV. CODE ANN. § 90.58 (Supp. 1974), and the Highway Advertising Control and Scenic Vistas Act, *id.* § 17.42. The subsequent substitute bill provided additional exemptions for the State Environmental Policy Act, *id.* § 43.21(c), and the Forest Practices Act, *id.* § 76.08 (1962). See Washington Substitute H.B. 791, 43d Leg., 3d Extraordinary Sess. § 1-301 (1974).

12. Washington H.B. 791, 43d Leg., Regular Sess. §§ 5-201 to -202 (1973).

13. The state land planning agency's functions included,

1. Establishment and continuation of the ongoing state land use planning process, which was to consist of the following stages:

a. Evaluation of existing conditions. Ten categories of land use planning elements were listed, including natural processes, intrinsic suitabilities of land, land ownership and uses, and public facilities. *Id.* § 5-401.

b. Evaluation of alternative futures. This included the description and ranking of major problems and opportunities, evaluation of effects of land use, and evaluation of

these revisions had to be approved by the state legislature within a specified time limit.<sup>14</sup> It was recognized, however, that this process would be time-consuming because of the volume of material covered and the procedures required. Thus a more expedient process for emergency designation of areas of statewide significance and development of greater than local impact was established. This process required only the governor's approval,<sup>15</sup> but such a designation and the accompanying guidelines for local regulation would be valid for no more than two years.<sup>16</sup>

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projected trends and future alternatives in terms of their impact. *Id.* § 5-402.

c. Formulation of goals and objectives. These statements were to consider local and regional plans, and were to include statements of predicted consequences. The goals and objectives were intended to serve as a measurable basis for evaluating plan implementation. *Id.* § 5-403. It was clearly intended by the legislation, although inadvertently omitted from specific mention, that the state plan was to address itself only to matters of statewide interest and only so far as was necessary.

d. Designation of areas of statewide significance and development of greater than local impact. The state agency was to develop criteria for these designations. Designation would have to involve public hearings and include guidelines for local regulation of the area of development. *Id.* § 5-404. The intent of the legislation was to encourage the local governments involved to both recommend areas for designation and to take the initiative in proposing regulations for them. *See* Florida Land Water Management Act of 1972, FLA. STAT. ANN. §§ 380.012-10 (Supp. 1974). This statute provides for the designation of "an area of critical concern." *Id.* § 380.05(2). The designation of an area will result in the application of state rules concerning development to the selected area. *Id.* § 380.06. *See also* Godschalk, *State Growth Management: A Carrying Capacity Policy*, in III MANAGEMENT AND CONTROL OF GROWTH 328, 334-36 (R. Scott. ed. 1975); Sullivan & Kressel, *supra* note 10, at 55-56.

e. Implementation. This was to include consideration of amounts of land, number of persons and uses, government program affected, and costs and sources of funds for implementation. Washington H.B. 791, 43d Leg., Regular Sess. § 5-405 (1973).

f. Plan update reports. These biennial reports were to include consideration of plan implementation, unforeseen problems and opportunities, while recommending new objectives. *Id.* § 5-406.

2. To operate the state land information service. This service would function primarily as a clearinghouse and research library where persons could locate desired information. *Id.* §§ 7-201 to -206.

3. To review local and regional land use plans and programs for inconsistency with the state plan. Modification would be required to eliminate inconsistencies. *Id.* § 5-601.

4. To coordinate the activities of all state agencies as they relate to land use and to provide technical and financial assistance to local governments for land use planning and regulation. *Id.* § 5-706.

14. Washington H.B. 791, 43d Leg., Regular Sess. § 5-501 (1973).

15. *Id.* § 4-501.

16. *Id.*

Drafters of the proposed act felt that one of the major problems with current land use law was that too many land use cases are handled by state courts that deal with these difficult cases as only one portion of their total case load. These cases are occasionally handled by attorneys not fully conversant with the merits of land use issues. In addition, since lower courts in Washington State have no clerks, judges are frequently faced with a lack of time or personnel to adequately research the difficult issues.

## 2. State Land Appeals Board

To remedy this situation in part, a State Land Appeals Board was established. This board would hear appeals from state agency orders and from local government permit decisions involving development in areas of statewide significance or development of greater than local impact.<sup>17</sup> The governor would select members for four-year terms, based on their qualifications in such areas as law, economics, land use planning, environmental science, or land development.<sup>18</sup> It was thus hoped to establish a specialized administrative appeals body that could provide more technical and professionally informed decisions than are possible for most lower court judges.

### B. Local Government Planning and Regulation

Under the proposed Act local general purpose governments were delegated primary responsibility for land use planning and regulation. In a significant departure from the ALI approach, the Act mandated both local planning and regulation.<sup>19</sup> The entire Act was designed to encourage maximized planning as a basis for rational land use decisions. In particular it specified a local planning process similar to

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17. *Id.* § 4-705.

18. *Id.* § 4-702.

19. See ALI MODEL LAND DEV. CODE §§ 2-101, 3-101 (Tent. Draft No. 2, 1970). In contrast to this emphasis on local planning and regulation in the proposed Washington State statute, the Hawaii state land use law's emphasis is on centralization of zoning power. The Hawaiian legislature transferred the county government's power to zone and plan to a state land use commission. Act of June 17, 1963, ch. 205, [1963] Hawaii Laws 315, *as amended*, Act of May 5, 1965, ch. 32, [1965] Hawaii Laws 27, *as amended*, Act of July 11, 1969, ch. 182, [1969] Hawaii Laws 328 [now HAWAII REV. STAT. §§ 205-1, -3, -7 to -15 (1968), *as amended*, §§ 205-2, -4 to -6 (Supp. 1974)]. For a general discussion of Hawaii's experience under its state land use law see Denney, *State Zoning in Hawaii: The State Land-Use Law*, 18 ZONING DIGEST 89 (1966).



that of the state and indicated that certain types of planning elements must be considered. It did not, however, specify how or to what depth the planning elements were to be studied.<sup>20</sup> The bill required that the plan be used as the basis for local land use regulations, also compulsory under the Act,<sup>21</sup> and was intended in practical application to assure optimum use of predetermined criteria in land use decisions.

### 1. The Local Permit System

In an attempt to facilitate this intention, the local land use ordinance, administered by the local permit authority,<sup>22</sup> was made applicable to all development, both public and private.<sup>23</sup> This system was necessary because certain governmental land uses, executed by a variety of independent and frequently uncoordinated agencies, have a critical impact on overall land use patterns.

In another significant move, provision was made for issuance of both general and special development permits. General permits would be simple "clerical" permits, issued for relatively uncomplicated development. Under the local ordinance such developments would merely need to meet specified measurable or observable permit requirements. Issuance of general permits would not require a public hearing.<sup>24</sup> Special development permits, on the other hand, would be issued pursuant to different criteria and procedures established under the Act (and the local ordinance), including a prior public hearing conducted by the local examiner.<sup>25</sup> The Act specified five classes of special permits for which the local ordinance must provide: developments requiring the equivalent of variances, division of land into parcels (subdivision), innovative land uses (PUD equivalent), transportation and community service facilities, and development in areas of statewide significance and development of greater than local impact.<sup>26</sup>

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20. Washington H.B. 791, 43d Leg., Regular Sess. §§ 3-401 to -403 (1973).

21. *Id.* § 2-201.

22. *Id.* §§ 1-201(4), 2-602.

23. *Id.* § 1-201(4).

24. *Id.* § 2-201(1)(a).

25. *Id.* § 2-201(1)(b).

26. *Id.* §§ 2-301 to -305.

## 2. The Hearing

The hearing examiner concept was one of the more fundamental changes in local procedure proposed in the Act. This individual would be appointed by the local legislative body and could be an existing or new, full or part-time employee. To keep administration distinct from the planning and legislative functions, however, the Act required that the hearing examiner not be a member of the legislature or the local planning body.<sup>27</sup> The state would provide procedural and substantive training for these officials to ensure their cognizance of administrative procedural requirements for hearings.

Basic procedural requirements for the special development permit hearing were set out in the Act.<sup>28</sup> To ensure that all interested persons be given reasonable opportunity to participate in the hearing, notice requirements<sup>29</sup> and the definition of parties of record<sup>30</sup> were quite broad. Testimony was to be under oath, and the hearing examiner was given subpoena power. The Act provided for cross-examination and required a complete record of hearings, and in addition provided for inspection of materials or sites involved in the case.

The Act required that decisions be written and contain specific findings of fact, conclusions and reasons.<sup>31</sup> The hearing examiner was authorized to attach reasonable conditions to the permit,<sup>32</sup> including a requirement for donation of land or fees in lieu thereof. Hearing examiner decisions were appealable to the local legislative body acting

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27. *Id.* § 2-704.

28. *Id.* §§ 2-701 to -703, -802.

29. *Id.* § 2-604.

30. *Id.* § 2-703.

31. *Id.* § 2-802(1).

32. *Id.* §§ 2-802(3)(a)-(h). The delineated reasonable conditions were:

- (a) Exact location and nature of development;
- (b) Impact of the development upon other land;
- (c) Provision of low and moderate income housing;
- (d) Hours of use or type and intensity of activities;
- (e) Sequence and scheduling of development;
- (f) Maintenance of the development;
- (g) Duration of use and subsequent removal of structures; and
- (h) Dedications of land or provision of other facilities or funds, the need for which the hearing examiner finds would be generated in whole or in significant part by the proposed development.

*Id.*

in a quasi-judicial capacity.<sup>33</sup> If issued the permit was revocable after two years if no significant development or preparation had occurred, or if development was not proceeding in due course.<sup>34</sup>

### C. "One-Stop" Permit Coordination

A procedure for coordinating multiple permit application and processing was an additional attribute of the Act.<sup>35</sup> These provisions were drafted in response to the concerns of developers over conflicts between various agencies' permit requirements, and over delays and unpredictability of the permit processes facing large or complex developments.<sup>36</sup>

Under this one-stop procedure, all persons wishing to develop land who needed more than one local or state development permit could submit a master application form to the local land use permit authority. The permit authority would distribute the form to all local agencies specified on the application and to any other local agencies from which a permit might be required. This permit authority would also designate a reasonable time period within which all local agencies receiving permit applications must respond in writing to the local hearing examiner and the applicant, granting or denying the permit. The applicant could appeal denials and conditions attached to permits in a one-stop permit review hearing held by the local hearing examiner. The examiner's decision could be appealed to the local legislative body acting in a quasi-judicial capacity, or the State Land Appeals Board in cases involving areas of statewide significance or development of greater than local impact. The permit authority would also forward portions of master application forms requesting state development permits to the state agency, which would coordinate the state permit process using procedures analogous to local one-stop coordination. The State Land Appeals Board would hold one-stop review of permit denials

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33. *Id.* §§ 1-201(17)(b), 2-805.

34. *Id.* § 2-806(4).

35. *Id.* §§ 6-201 to -406.

36. A developer has commented on the general problem. "The most obvious[problem facing developers] involves the various agencies, at all levels of government, with often overlapping or conflicting jurisdiction . . . There is staggering confusion as to regulations and requirements along with protracted delays in the processing of a bewildering variety of new permits and approvals." Epstein, *The Current Crisis in Real Estate: A Developer's Perspective*, in III MANAGEMENT AND CONTROL OF GROWTH 479, 480 (R. Scott ed. 1975).

or conditions imposed by state agencies. The Board's decision could be appealed to the state superior court.

#### D. *Regional Planning*

An active, although limited role, similar to that currently played by designated regional planning agencies under A-95 review procedures, was provided for regional planning offices.<sup>37</sup> The planning by these offices would address such matters as regional transportation systems, water distribution systems, solid and liquid waste disposal systems, and other types of land use impacting systems as well as other issues of regional magnitude.<sup>38</sup>

#### E. *Judicial Review*

Drafters of the proposed legislation recognized that many procedural questions and conflicts exist in the area of judicial review of land use cases. Therefore they included in the Act provisions concerning judicial review<sup>39</sup> that were taken, with few modifications, from a draft of the ALI Model Land Development Code.<sup>40</sup> Like the ALI version, the proposed Act provided a standardized method for judicial review of government actions taken under the proposed Act and specified the types of judicial relief available and the bases for such relief. The Act also clarified which persons could seek judicial review of government action and encouraged appeal within a short time after the challenged action. This portion of the proposed Act also specified the instances in which exhaustion of administrative remedies would be required prior to judicial review of a government action.<sup>41</sup> Unfortunately, this part of the legislation was the last considered by the Commission. Although these provisions undoubtedly were important to land use law in the state, the ALI version was adopted with little attention given to modifications necessary or appropriate for Washington State. Furthermore, little

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37. Designated A-95 regional review bodies provide advisory comments to federal agencies concerning the degree of consistency between project proposals requesting federal funding or insurance and the regional plan. See Office of Management and Budget, Circular A-95, Nov. 13, 1975, 41 Fed. Reg. 2051-65 (revised version).

38. Washington H.B. 791, 43d Leg., Regular Sess. §§ 5-801 to -805 (1973).

39. *Id.* §§ 8-101 to -213.

40. ALI MODEL LAND DEV. CODE art. 9 (Tent. Draft No. 3, 1971).

41. For a discussion of the exhaustion of administrative remedies in traditional zoning see D. MANDELKER, *MANAGING OUR URBAN ENVIRONMENT* 942-44 (2d ed. 1971).

attention was given to potential flaws in the ALI judicial review provisions.<sup>42</sup>

#### IV. GAPS IN THE LEGISLATION

As comprehensive and complex as H.B. 791 and its progeny may have been, there were some significant gaps in coverage, primarily involving areas felt to be politically sensitive at the time. Although the bill provided procedural reforms and very limited substantive reforms in the state's subdivision laws, the bill as written did not make it absolutely clear that a subdivider would have to proceed under and meet the substantive requirements of both statutes, rather than only the simpler existing subdivision statute.

In addition, a great deal of concern and confusion was expressed by both the private and public sectors over what role the State Environmental Policy Act<sup>43</sup> should play in the land use decisionmaking process. It was undefined when and by whom an environmental impact assessment or statement [EIS] should be prepared and what was the proper weight and role of an EIS in the decisionmaking process.<sup>44</sup> These questions were left unanswered primarily because discussion of preliminary draft provisions revealed the incredible complexity and controversial

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42. For a thorough discussion of some of these potential flaws see Mandelker, *Judicial Review of Land Development Controls Under the ALI Model Code*, 1971 LAND-USE CONTROLS ANN. 101; Mandelker, *Critical Area Controls: A New Dimension in American Land Development Regulation*, AIP JOURNAL 21 (Jan. 1975). See generally F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1972).

43. WASH. REV. CODE ANN. § 43.21C (Supp. 1974).

44. The importance of defining local environmental decisionmaking responsibility has been accentuated in one context by the United States Department of Housing and Urban Development's controversial "departure" from the environmental scene with regard to community development block grants. See Note, *HUD's NEPA Responsibilities Under the Housing and Community Development Act of 1974: Delegation or Derogation?*, 10 URBAN L. ANN. 179 (1975); 6 ENVIRONMENT RPT. CURRENT DEV. 1074 (1975). For a discussion of Washington State's environmental act see Roe & Lean, *The State Environmental Policy Act of 1971 and its 1973 Amendments*, 49 WASH. L. REV. 509 (1974). For a general discussion of current environmental regulations in Washington State see Hillis & Friedman, *The Developmental Impact of Environmental Regulation*, ENVIRONMENTAL COMMENT, Oct. 1975. For comparison see the discussion of California's environmental legislation in Comment, *California's Environmental Quality Act — A Significant Effect or Paper Pollution?*, 5 PACIFIC L.J. 26 (1974). See generally Hagman, *NEPA's Progeny Inhabit the States — Were the Genes Defective?*, 7 URBAN L. ANN. 3 (1974); The Attorney General's Advocacy Institute, *United States Attorneys' Symposium on Environmental Litigation and Land Use Planning* (1974) (sponsored by the Land & Natural Resources Div., Dept. of Justice).

political nature of the questions. It was decided that these issues required far more intensive study than was possible for the Commission.<sup>45</sup>

Another issue that deserved attention but could not receive it in this bill was how the planning and regulatory process under H.B. 791 were to be integrated with that of the State Shoreline Management Act.<sup>46</sup> When the legislation was considered, land use classification and regulation under the Shoreline Act formed a totally discrete and independent set of regulations and requirements in addition to existing local zoning and subdivision controls. There were thus potentially two separate, conflicting and overlapping sets of requirements for shorelands. As a result it was possible to be in the situation reputedly experienced by several developers of being able to get zoning and subdivision approval but not shoreline management approval, or vice versa. Such conflicts needed to be resolved. The consensus, however, was that politically it was too soon after passage of the Shoreline Act to try to amend it significantly.

#### V. RESPONSE TO THE PROPOSED LEGISLATION

The bill that incorporated all these provisions was a vast 151 pages. Nonetheless, it passed the state House of Representatives in the 1973

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45. Working with many of the same premises as the Commission touched on, a recent study prepared for the United States Environmental Protection Agency focused on this very problem area. E. KAISER, K. ELFERS, S. COHN, P. REICHERT, M. HUFSCHMIDT & R. STANLAND, *PROMOTING ENVIRONMENTAL QUALITY THROUGH URBAN PLANNING AND CONTROLS* (1974) (prepared for Office of Research & Dev., EPA). The study readily recognized "that urbanization and land use decisions are critical determinants of environmental quality; and . . . that local level planning and decision-making, which determine the nature of urbanization processes and land use patterns, have not yet effectively incorporated environmental quality goals." *Id.* at 1. In order to alleviate this situation the study proposed the incorporation of a planning and management framework which they term the "urban guidance system." *Id.* at 4. This system as comprehensively described by the study "consists of a series of planning activities and corresponding outputs that establish a rational framework for decision-making and produce various policies, plans, regulations, and incentives to guide urbanization processes toward environmental quality . . ." *Id.* At the heart of this proposed system, however, lie the local governments themselves. The question of whether or not an "urban guidance system" will be functional is totally dependent on local governments' implementation powers. It is this threshold issue that the Washington State Land Planning Commission attempted to resolve through the drafting of the proposed Act.

46. See generally Crooks, *The Washington Shoreline Management Act of 1971*, 49 WASH. L. REV. 423 (1974); Hershman & Folkenroth, *Coastal Zone Management and Intergovernmental Coordination*, 54 ORE. L. REV. 13 (1975); Comment, *Coastal Controls in California: Wave of the Future*, 11 HARV. J. LEGIS. 463 (1974).

session by an overwhelming majority. It was buried in a Senate Committee, however, and went no further in the forty-third regular session. An extraordinary session was held at the beginning of the following year, and a revised version, incorporating substantially the same provisions, was introduced in early 1974 as Substitute House Bill 791.<sup>47</sup> This bill was a polished up, slightly rearranged version of the original, encompassing 156 pages. It, too, passed the House and in the process inspired numerous drafts of alternative legislation, including one draft actually introduced in the state Senate.<sup>48</sup> This Senate bill was a brief, quickly-drafted bill, capable of doing the minimum necessary to meet the requirements of either of the federal land use bills<sup>49</sup>. This bill was also killed in the Senate, however, and returned for further research and revision in committee.

Since then various other drafts, including committee draft legislation, have appeared and received various responses. Because the need has not disappeared, work continues on the process of developing legislation that will meet Washington's most critical land use needs. These attempts have necessarily taken into account experiences with the initial H.B. 791 and information accumulated in its drafting.<sup>50</sup>

#### VI. THE STRENGTHS AND WEAKNESSES OF THE MONSTER: THE WASHINGTON LAND USE ACT IN RETROSPECT

In the face of oftentimes irrational opposition,<sup>51</sup> the most recent attempt to promote land use planning under federal sponsorship has

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47. Washington Substitute H.B. 791, 43d Leg., 3d Extraordinary Sess. (1974).

48. Washington S.B. 3369, 43d Leg., 3d Extraordinary Sess. (1974).

49. *E.g.*, National Land Use Policy and Planning Assistance Act of 1973, S. 268, 93d Cong., 1st Sess. (1973); Land Use Planning Act of 1974, H.R. 10294, 93d Cong., 2d Sess. (1974).

50. *Cf.* Washington S.B. 2438, 44th Leg., Regular Sess. (1975); Washington H.B. 168, 44th Leg., Regular Sess. (1975).

51. One opponent, rejoicing in the defeat of a bill (H.R. 3510) he labeled as representing "a new piece of liberal or collectivist legislation," warned that not only were "leftwing pressure groups" behind the federal comprehensive land use planning proposals, but that "the same rancid intellectual soil from where this idea grew from[sic] is still with us." 121 CONG. REC. E 4355 (daily ed. Aug. 1, 1975) (remarks of Representative Symms). It is interesting to note that some of the alleged "leftwing pressure groups" that supported the Land Use and Resource Conservation Act of 1975 included the American Lung Association, the Governor of Vermont, the Mortgage Bankers Association of America, the President of the National Association of Regional Councils, the National Association of Industrial Parks, the National Audubon Society, the President of the National Realty Committee, Inc., and the Urban Land Institute. *Hearings on H.R. 3510, supra* note 1.

been defeated.<sup>52</sup> As responsible legislators on both sides of the controversy agreed, however, confusion on the local planning scene is to no one's advantage.<sup>53</sup> As a result, an assessment of the critical strengths and weaknesses of the Washington Land Use Act may be of interest to those now drafting or considering some form of state or local land use legislation to fill the gap left by Congress. Undoubtedly, the proposed Washington Act's most significant problem was its length, complexity and comprehensiveness. Although this was necessary to comply with the statute that had set up the Commission,<sup>54</sup> it made it difficult for virtually everyone to comprehend and respond to the bill's content. Because the legislative session was so brief,<sup>55</sup> conciseness of legislation became a necessity. The bill failed to deal with this limitation. The Act covered all areas that the drafters perceived as requiring new legislation, and many issues were dealt with in detail to avoid the expense, confusion and delay that result from case-by-case resolution of issues.

Hindsight suggests that the legislature might have been less reluctant to pass a bill more limited in scope, perhaps dealing with planning and preservation of farmlands and other threatened areas that are of importance to the state. It is possible, nevertheless, that portions of the

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52. H.R. 3510, the Land Use and Resource Conservation Act of 1975, suffered defeat in the 94th Congress, just as its predecessor, H.R. 10294, the Land Use Planning Act of 1974, had in the 93d Congress. The backers of the most recent proposal described H.R. 3510 as a "voluntary" federal measure that in no way dictates "any single planning system on the 50 States." 121 CONG. REC. E 3577 (daily ed. June 27, 1975) (remarks of Representative Steelman). It was felt that this bill would, by means of making annual federal grants available to "assist the States in the development and administration of a land use program," H.R. 3510, 94th Cong., 1st Sess. § 201 (1975), provide added motivation and incentive for land use planning on the state and local levels, while at the same time coordinating federal land use measures. See *Hearings on H.R. 3510, supra* note 1, at 1-43.

53. See, e.g., 121 CONG. REC. E 3847-48 (daily ed. July 16, 1975) (remarks of Representative Howe), *id.* at S 14,522-23 (daily ed. July 31, 1975) (remarks of Senator Abourczk). See also *Hearings on H.R. 3510, supra* note 1, at 201-02 (remarks of William J. Moshofsky, Vice-President, Georgia-Pacific Corp.); *id.* at 308-13 (statement of Ruth C. Clusen, President, League of Women Voters of the United States); *Hearings on H.R. 10294 Before the Subcomm. on the Environment of the House Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess., ser. 50, at 68-71 (1974) (remarks of Hon. Tom McCall, Governor of Oregon); *id.* at 243-45 (remarks of Rick Meyers, Executive Director of Land Use Planning Project, Western Environmental Trade Ass'n). For a general overview of land use policies and the political scene see C. LAMB, *LAND USE POLITICS AND LAW IN THE 1970's* (1975).

54. Law of May 21, 1971, ch. 287, §§ 1-10 [1971] Wash. Laws 1518-19, *as amended*, Law of Apr. 23, 1973, ch. 72, § 1 [1973] Wash. Laws 664.

55. The legislative session consists of one regular three-month session every two years.



H.B. 791 approach may be adopted by the legislature in the near future.<sup>56</sup>

It was not enough that the proposed legislation would theoretically have improved unsatisfactory conditions and anticipated impending crises. For passage, it would also have been necessary for some group or interest to have perceived the legislation as immediately necessary and to their benefit. This group or interest, whether public or private, profit-oriented or public-spirited, would have had to work in the legislature for passage of the bill.<sup>57</sup> But no real constituency developed for this bill. It was, to paraphrase the words of many observers, a bill with "many friends but no lovers."

Three years' distance from H.B. 791 diminishes commitment to its provisions and permits the following somewhat dispassionate comments. During the drafting process local government officials repeatedly expressed concern about several matters of critical importance to them. They were worried that no one really knew whether "the whole damn

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56. At this time, however, the political atmosphere in Washington State, like that in most states, still seems so conservative that the most likely state legislative actions would be those in response to a new federal mandate or funding program. The state's legislative response to passage of a federal land resources bill similar to past proposed versions would probably be little more than the minimum required in order to receive funding. For reviews and reports on recent planning efforts in other states, see K. CHRISTENSEN, D. KEYES, P. SCHAENMAN & T. MULLER, *STATE-REQUIRED IMPACT EVALUATION OF LAND DEVELOPMENT; AN INITIAL LOOK AT CURRENT PRACTICES AND KEY ISSUES* (1974); M. MOGULOF, *SAVING THE COAST: CALIFORNIA'S EXPERIMENT IN INTERGOVERNMENTAL LAND USE CONTROL* (1974); P. SEDWAY & COOKE, *LAND AND THE ENVIRONMENT: PLANNING IN CALIFORNIA TODAY* (1975); C. Little, *The New Oregon Trail: An Account of the Development and Passage of State Land-Use Legislation in Oregon, Aug. 1974* (Conservation Foundation, Washington, D.C.); P. Myers, *So Goes Vermont: An Account of the Development, Passage, and Implementation of State Land-Use Legislation in Vermont, 1974*; *A Land Use Program for Colorado, 1974* (Colorado Land Use Comm'n.); *A State Role in Land Use Management, Dec. 1974* (Staff Research Report #112, Ohio Legislative Service Comm'n.); *A Summary of State Land Use Controls, July 1974* (Special Report No. 2, Land Use Planning Reports, Washington, D.C.) (Plus Publications Inc.); *Community Development: An Element of a Growth and Conservation Policy, June 1974* (State Planning Office, Louisiana Office of the Governor); *Land Use Law in Alabama (1974)* (State Planning Div., Alabama Dev. Office); *Local Government Progress Under House Bill 1041, Jan. 1975* (The Colorado Land Use Comm'n.); *National Land Use Policy Legislation, 93d Cong., An Analysis of Legislative Proposals and State Land (Apr. 1973)* (Environmental Policy Div., Legislative Reference Service, U.S. Library of Congress); *Pennsylvania State Planning Bd., Land Resource Policies and Programs, A Resume of Land Development, Use and Management Statutes, Regulations and Practices, 1973*; *Statutory Land Use Control Enabling Authority in the Fifty States (Draft Report), 1975* (Flood Plan Management Div., Federal Insurance Admin., HUD).

57. Professor Hagman has illustrated the importance of environmental groups in instituting state versions of the National Environmental Policy Act of 1969. Hagman, *supra* note 44, at 4.

thing" would work, which unfortunately was true. The drafters believed that the proposed system was a workable improvement over current conditions, but neither the system nor any major component of it had ever been tested.

Many local officials also stated that it would be unacceptable to have permit decisions issued only by a hearing examiner, without opportunity for decision review by local elected officials. As a result, provisions were included to allow appeal of such decisions to the local legislative body acting in a quasi-judicial administrative appeal capacity. It is still questionable whether use of such additional administrative appeals at the local or state level would actually expedite permit decisions. Arguably, the proposed process merely adds another review body and another step, with attendant delay and expense.<sup>58</sup> The question, then, is whether there is sufficient improvement in the quality of opinions to outweigh the added inconvenience.<sup>59</sup>

Assuming that the comprehensiveness of the bill is merely a practical problem, there are some individual elements of the bill that deserve further consideration. The hearing examiner concept had already been adopted by King County<sup>60</sup> in Washington State, and is currently being adopted or considered by a number of charter cities in the metropolitan Seattle area.<sup>61</sup> It has a number of virtues, especially those resulting from utilization of a trained and experienced official, familiar with substantive and procedural requirements and local land use patterns. Use of a hearing examiner also permits the local planning body to concentrate on planning and on advising other government entities concerning the relationship between proposed actions and the plan.

The requirement that land use permit decisions be based on a full record of proceedings and a statement of findings, conclusions and

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58. See Epstein, *supra* note 36, at 480-81. Cf. 121 CONG. REC. E 3847-48 (daily ed. July 16, 1975) (remarks of Representative Howe).

59. While, in the best of all possible worlds, such review procedures are desirable, some compromise approach to state administrative review would probably be more realistic in terms of personnel and costs. Possibly either state standing to participate in local hearings, or else a joint state-local hearing would be a more expeditious compromise approach to protecting state interests.

60. KING COUNTY, WASH., CODE, Ordinance 263, art. 5 (1969).

61. This list of cities includes, among others, Seattle, Tacoma and Bellevue. The concept has also been adopted by a number of other local governments in other states including Fairfax County, Virginia, Tucson, Arizona, Anne Arundel County, Maryland, Montgomery County, Maryland, Xenia, Ohio, and Portland, Oregon. See Lauber, *The Hearing Examiner in Zoning Administration*, ASPO Planning Advisory Service Rpt. No. 312 (1975).

reasons also has a number of advantages for all participants.<sup>62</sup> It provides the parties with a statement of the basis for the decision and requires the permit issuer to formulate and support the rationale behind the decision. This form of decisionmaking then supplies the local government with a record of its rationale for reference in future cases and for use if litigation should develop over the decision. Under the current system, when an appeal is taken and the record shows little or no basis for the decision, a local government may be embarrassed by its inability to recall or rediscover why the result was reached.<sup>63</sup>

Many participants in zoning cases have experienced frustration at the lack of a clear definition of the relationship between the comprehensive plan and the zoning map and regulations.<sup>64</sup> Often what is needed is a concise statement of that relationship so all participants in the zoning process will have a reasonably firm basis for their expectations. In recognition of this need, the drafters of H.B. 791 stated that the land use ordinance must be consistent with the land use plan.

Even if this type of approach is appropriate, a land use plan will still be unable to anticipate all future events and circumstances. In addition, the plan and ordinance amendment process is usually lengthy, and it should not always be necessary for the developer to wait.<sup>65</sup> Thus if zoning *decisions* are also required to conform to the plan, it would be desirable to permit them to depart from it if they state the nature of the deviation, reasons justifying the deviation, and recommendations for any necessary plan studies or amendments to eliminate problems or omissions in the plan.<sup>66</sup>

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62. See ALI MODEL LAND DEV. CODE §2-304(12) and note (Proposed Official Draft No. 1, 1974).

63. This may become especially important if certain key local officials have since left office or are otherwise unavailable to give information.

64. For example, a key issue in *Cleaver v. Board of Adjustment*, 414 Pa. 367, 200 A.2d 408 (1964), was the relationship between the comprehensive plan and the zoning map. The court resolved the issue in *Cleaver* by stating that the plan should be a general guidepost for the fixing of the zoning map, not an inflexible mold for copying. *Id.* at 375-77, 200 A.2d at 413-15. Cf. *Baker v. City of Milwaukie*, \_\_\_ Ore. \_\_\_, 533 P.2d 772 (1975); *Forestview Homeowner Ass'n v. County of Cook*, 18 Ill. App.3d 230, 309 N.E.2d 763 (1974); *Sullivan & Kressel*, *supra* note 10, at 48-52.

65. One member of Congress has even stated that the industrialist or developer has "a right to know . . . with some degree of certainty" where and when they may build. 121 CONG. REC. E 3709 (daily ed. July 10, 1975) (remarks of Representative Meeds). See generally D. MANDELKER, *THE ZONING DILEMMA* 46-105 (1971).

66. This type of statement need not be overwhelmingly lengthy or burdensome to prepare and would serve to point out areas of the plan needing further study or revision.

One basic concept presented in the bill and, it is suspected, one whose importance is unknown to many attorneys, is that of a planning *process*. The concept of an ongoing, continually updated planning process is important to both land use law and planning theory.<sup>67</sup> Whether or not one believes that zoning must follow the plan or that planning is merely one of several means of developing zoning policies,<sup>68</sup> planning is in most cases the only organized and comparatively well informed means of developing a statement of community policies, goals and objectives. The plan is also a relatively unique source of information and analysis on which to base land use regulations. If these regulations are to be rational and continually reflect both current facts and community policies, it is essential to ensure that planning continues to provide this material and that the regulations use it.<sup>69</sup>

Experience in Washington State indicates that in communities experiencing even moderate development, provisions of this type of legislation will require regular collection and analysis of new information and community views.<sup>70</sup> In communities experiencing rapid growth, certain aspects of land use planning may need more frequent updating to keep abreast of development rates, characteristics and impacts. By utilizing current information, analysis and other input, zoning and other land use regulations can reflect basic changes in conditions and community values. All too often land use plans are allowed to become obsolete, going ten, fifteen or even twenty years without significant updating.

H.B. 791's one-stop provisions reflect another message that was strongly conveyed to the drafters as they gathered public input. Developers and their attorneys are frequently frustrated and delayed by the local, state and federal permit processes with which they must deal. There are frequent problems with lack of information, unclear and conflicting requirements, and the resulting ill will, lack of predictability-

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67. Cf. note 45 *supra*. See generally COUNCIL OF STATE GOVERNMENTS, *THE LAND USE PUZZLE* (1974); D. MANDELKER, *MANAGING OUR URBAN ENVIRONMENT* 523-42 (2d ed. 1971).

68. Compare Sullivan & Kressel, *supra* note 10, with Tarlock, *Consistency with Adopted Land Use Plans as a Standard of Judicial Review: The Case Against*, 9 URBAN L. ANN. 69 (1975).

69. See generally K. WICKERSHAM, R. HANSEN, & A. MELCHER, *A LAND USE DECISION METHODOLOGY FOR ENVIRONMENTAL CONTROL* (1975) (prepared for Office of Research and Dev., EPA).

70. "Regular" would involve cycles of approximately five years.

ty, and loss of time.<sup>71</sup> The result of any delay or controversy is usually higher cost to the consumer. This problem can be significantly alleviated by making available to the developer information on those state and local permits that may be required, the basis for requiring and issuing them, and the name of the permit-issuing agency. Such information can be especially important when a developer must obtain ten to twenty individual permits before beginning development. In many cases it is equally important to him to be able to establish a time frame for permit procedures so he can make appropriate provision for financing, construction and other matters dependent on obtaining development permission.<sup>72</sup>

### CONCLUSION

It has been said that the comprehensiveness of the proposed Washington Land Use Act was both its major strength and its major weakness. This is probably true. As a result, the legislation was defeated in the legislature. But because the long process of drafting it involved so much dedicated and enlightened participation by the public and private sectors, the bill contains an incredible variety of innovative and, in most cases, well thought-out policies and techniques for dealing with a variety of land use issues. These include concepts such as "one-stop" permit coordination, a comprehensive catalogue of land use permits, a user-guided state land information service, and a land use planning process (as opposed to a static plan document) that is integrated with a

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71. See Epstein, *supra* note 36. Cf. *Acme Moving & Storage Corp. v. Bower*, 269 Md. 478, 481-84, 306 A.2d 545, 547-48 (1973). In *Acme Moving* plaintiff signed a lease for a warehouse defendant was building. Defendant soon encountered zoning difficulties. The difficulties were temporarily resolved when the district council granted a special exception to use the property for warehouses totally enclosed by chain link fencing. Permission was conditioned on local planning board approval of defendant's landscaping plan. The planning board disapproved the proposed landscaping and ordered defendant to remove the chain link fence. Defendant was therefore prevented from complying with the inconsistent special zoning requirements and the landscaping plan.

72. A somewhat limited consolidated environmental permit hearing process has been adopted in Washington State and may eventually be developed into a broader, even more effective mechanism. Environmental Coordination Procedures Act, WASH. REV. CODE ANN. § 90.62 (1973). For an enthusiastic recent review of this act see Masterson, *Coordinated Permits: The Washington Experience*, ENVIRONMENTAL COMMENT, Oct. 1975, at 5.

more equitable and predictable permit process. Many of these techniques remain controversial and unproven three to five years after they were first proposed. In the final analysis, however, it is hoped that some of these techniques will eventually be applied and tested — if not in Washington State then elsewhere.



## **NOTES**



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