
Planning, Regulatory, and Environmental Controls Applicable to Harbor Developments and Associated Urban Renewal and Tourist Projects in the United States: The Honolulu Hypothetical*

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I. Introduction

WATERFRONT DEVELOPMENT IN THE UNITED STATES confronts the development consortium with a panoply of regulations and permit requirements exercised at all three levels of government in our federal system; national, state, and local. Generally speaking, it is the national government which imposes environmental regulations, while the local government applies land development plans and use controls. In a few states, such as Hawaii, Florida, California, Washington, Oregon, New Jersey, North Carolina, and Delaware, state development and use regulations also apply, either because of the unique treatment afforded coastal areas (whether or not involving harbor development) or because the state—like Hawaii—has chosen to retain some of the power to regulate land use and development rather than pass all the power to do so to local governments via zoning and planning enabling acts.¹

This article summarizes the regulations, plans, permits, and impact

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1. BOSSELMAN & CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971); D. MANDELKER, *LAND USE LAW*, ch. 4 & 6 (1982) [hereinafter *LAND USE LAW*].

statements that are likely to be required of a waterfront development project in the United States, using contemplated redevelopment of Honolulu harbor as a hypothetical case or example. Honolulu makes for a good example for three principal reasons:

1. Hawaii has the most sophisticated and complex system of land use planning and development laws of the fifty states and so a summary of what is required there would almost certainly include all types of planning and environmental controls and permits that would be required elsewhere.
2. Hawaii contemplates a major redevelopment of its commercial waterfront area, and in particular its harbor, using as a basis three alternative scenarios prepared by three architectural teams and presented to the Governor during the 1988 legislative session.
3. In common with some foreign land planning and development regimes, much of Honolulu's waterfront falls under the jurisdiction of a "super agency," the Hawaii Community Development Authority (HCDA) which has powers to override many local planning and regulatory controls in the course of undertaking its task to redevelop a large area of urban Honolulu.

This article discusses the regulatory and planning controls applicable to waterfront and associated development into three parts, organized along jurisdictional lines: local, state, and federal. It assumes that the development projects for the waterfront are primarily private in nature to avoid questions of intergovernmental relations when, say, a local government agency proposes a major project for which it may need certain state and federal permits and approvals. The article also makes brief reference to certain legal theories (e.g., the public trust doctrine) traditionally applied to waterfront areas and affecting the kinds of developments which government is empowered to permit. The article concludes that waterfront development is an enormously complex undertaking requiring considerable forward planning and plan review, and that it is probably best left to a super agency like HCDA in Hawaii in order to simplify and coordinate the process of planning and development.

II. Honolulu Harbor Plans: A Brief Overview

The Honolulu waterfront is the center of Hawaii's primary harbor system and the heart of the state's maritime and commerce activities. In 1987, the state legislature declared that while ongoing activities of the Honolulu waterfront were vital to the state, the area had significant de-

velopmental potential to accommodate increased activities of a maritime nature in terms of commercial, recreational, and residential uses.² Governor John Waihee launched the "Honolulu Waterfront Awakening" directed at redeveloping the waterfront area. The Hawaii Chapter of the American Institute of Architects agreed to help organize and attend ten community workshops where 200 community leaders were invited to express their views concerning what the waterfront should look like. The workshops, staffed by the HCDA, were each organized around a particular interest group. Three design professional teams led by Hawaii's leading architects prepared and presented alternative futures for the waterfront at a standing-room only public meeting in the auditorium of the State Capitol. These alternatives were Pacific Gateway, Noho Kai (to live by the sea), and the Gathering Place. The study areas consist of about 225 acres of urban land with about two miles of linear shoreland from the central downtown area to an area just south of the largest shopping center in the state and just west of the beginning of the Waikiki Beach area. The area is a major part of the entire waterfront area from the international airport through Waikiki, for which the Office of State Planning has been charged by the state legislature with preparing a comprehensive plan.³

A. *Pacific Gateway*

This alternative emphasizes the growth of downtown Honolulu by expanding the central business district into a major financial center. Key components are a new inland waterway and marina and a new marine-research and educational center demonstrating Hawaii's leadership in marine activities and energy technology. The waterway would connect the 65 acre marina with Honolulu harbor and would create an additional 11,000 linear feet of waterfront property. The excavated land would be used to create a 40 acre park and a 22 acre lagoon with 3,000 linear feet of new beachfront.

B. *Noho Kai, To Live by the Sea*

This concept emphasizes residential development based largely on the assumption that a city should be attractive and livable for its residents to be attractive to visitors. New facilities would include parks, festival markets, and restaurants, as well as museums, performance centers, and an ocean sciences center. The concept assumes that most present

2. Act of 1987, Haw. Sess. Laws 355.

3. *The Honolulu Waterfront: A Reawakening*, Report of the Charette, 1-7 (Dec. 1987).

marine activities will continue and be integrated into the lifestyles of new residents. The continued commercial viability of the harbor would be critical.

C. The Gathering Place

This concept emphasizes recreational and cultural activities. The centerpiece is a proposed Pacific Exposition Center combining meeting space with hotels, restaurants, and retail shops. Once again, an ocean research facility is part of the concept along with a festival marketplace surmounted by a convention hotel. A "cultural campus" with several museums and a 10,000 seat amphitheater are placed next to the ocean. The whole is knit together by pedestrian walkways and parks.⁴

III. The Regulatory Framework:

The Federal Context

The federal government of the United States was created by the original colonies by means of a Constitutional Convention in 1786. This initial creation is at the heart of the land regulatory system since the federal government is theoretically deemed to have only those powers which the individual sovereign states accorded it under the federal Constitution, which expressly reserves all other powers to the states under the tenth amendment to the Constitution (the so-called reserved powers clause). While it is true that various congressional statutes and U.S. Supreme Court decisions have left very little to the states, it is nonetheless generally agreed that the states have retained the power to deal with most aspects of real property and, in particular, to regulate the land development process. As will appear elsewhere in this article, states have by and large chosen to delegate these aspects of their "police powers" to their units of local government. For present purposes, it is sufficient to note that what powers the federal government does exercise over the land development process in waterfront areas stems mainly from its environmental powers and its navigational servitude (to promote commerce under the commerce clause of the federal Constitution) over all navigable waters of the United States, including harbors and other waterfront areas. Aside from these, the federal government has no police power role in land development at either the state or local level. What it does have, however, is a series of environmental statutes with considerable permitting power over waterfront development together with an impact statement process. Federal government power would clearly be

4. *Id.* at 4-6.

triggered by a proposal such as Honolulu's together with coastal zone and coastal hazard statutes mandating certain state and coastal controls and conditions for accepting certain federal funds, which Hawaii has already done.

A. *The Clean Water Act: Herein of Dredge and Fill Permits and Marine Pollution*

The Clean Water Act has as its essential purpose the cleanup of the nation's waterways by eliminating the discharge of pollutants.⁵ One of the most complex pieces of legislation ever adopted, the Act deals with the problem of pollutants by means of structural (funding of wastewater treatment plants and rules governing who may then "hook up" and under what circumstances) and nonstructural (planning, permitting, and associated land controls) means.⁶ Under the National Pollution Discharge Elimination System (NPDES) set out under the Act, a permit is required for the discharge of any pollutant into the navigable waters of the United States. Such state or federal permit is not forthcoming unless the pollutant levels at the point of discharge meet certain effluent standards set out by regulation and statute. The result is the need for a permit for such discharge with respect to such named pollutants for any harbor development contemplating discharge of wastewater (or, indeed, any water) into the harbor.

Considerably more potent, however, is the authority of the Army Corps of Engineers to grant or deny permits for the discharge of fill material into the waters of the United States, including navigable waters and adjacent wetlands.⁷ EPA guidelines and Corps regulations⁸ require a public interest review to balance the benefit which might reasonably be expected to accrue from the proposal against reasonably foreseeable detriments. Unless a permit denial is arbitrary, capricious, an abuse of discretion, or otherwise incompatible with the law, the decision stands.⁹ Such a permit will clearly be necessary for any coastal development of any significant size. The permit application process is both time-consuming and detailed and many of the 14,000 permits that the Corps processes annually are denied.

5. Federal Water Pollution Control Act, 33 U.S.C.S. § 1251 *et. seq.* (1979).

6. See W. RODGERS, ENVIRONMENTAL LAW, ch. 4 (1977), and D. CALLIES & R. FREILICH, CASES AND MATERIALS ON LAND USE 1134-35 (1986).

7. Clean Water Act, 404, 33 U.S.C. § 1344(a). See *United States v. Riverside Bayview Homes*, 106 S. Ct. 455 (1985).

8. 40 C.F.R. pt. 230 and 33 C.F.R. pts. 320-30 (1979).

9. *Avoyelles Sportsman's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *Sierra Club v. U.S. Army Corps of Engineers*, 701 F.2d 1011 (2d Cir. 1983).

B. *The National Environmental Policy Act (NEPA)
and the Procedural Requirement of an
Environmental Impact Statement (EIS)*

The National Environmental Policy Act affects any land development project in which the federal government is in any way involved, whether directly or indirectly, including most projects which use federal funds.¹⁰ Whether or not the project is made more environmentally sound by reason of NEPA, the Act requires that some level of environmental impact analysis take place which may eventually give rise to a full-blown environmental impact statement (EIS).¹¹ The decision whether to prepare such a statement, its contents, and sufficiency has been the subject of extensive litigation which, coupled with compliance time, has resulted in the delay, modification, and, in a few instances, abandonment of projects as diverse as highways, public housing, and hydroelectric dams. Obviously, the location and scope of such public projects radically affect the use of land; there are few public infrastructure projects which are more likely to bring with them intense urban development by the private sector than highways, power, water, and wastewater treatment facilities, most of which are constructed primarily with federal funds and so at some point are subject to environmental impact procedures required by NEPA. It is likewise inconceivable that a major waterfront redevelopment could occur without triggering NEPA.

The critical portion of NEPA is that which requires the preparation of an environmental impact statement with respect to all major federal actions significantly affecting the quality of the human environment. Agencies are directed to:

Include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a *detailed statement* by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources, which would be involved in the proposed action should it be implemented.¹²

From the beginning, the federal courts signalled an intention, only

10. See, generally, ANDERSON, *NEPA AND THE COURTS*, (1973); W. RODGERS, *ENVIRONMENTAL LAW*, ch. 7 (1977); D. MANDELKER, *ENVIRONMENTAL AND LAND CONTROLS LEGISLATION*, ch. 4 (1976).

11. 42 U.S.C. § 4332 (1979)

12. NEPA, 42 U.S.C. § 4332(c) (1979).

recently modestly trimmed back,¹³ to interpret the responsibility for an agency's preparing such EIS's literally, even if that meant stalling or stopping them¹⁴ despite the fact that NEPA nowhere provides for the *termination* of a major federal action.

The result of such early holdings was to open a floodgate of litigation by various citizens' coalition and environmental groups attacking various federal and federally funded projects from airports¹⁵ to freeways¹⁶ to low-income housing projects¹⁷ to geothermal steam exploration¹⁸ for the violation of NEPA's *procedural* requirements. In NEPA's first ten years, 1,052 NEPA cases had been filed against federal agencies.¹⁹

C. Coastal Areas: Flood Hazards and Coastal Management

1. COASTAL ZONE MANAGEMENT

The Federal Coastal Zone Management Act²⁰ (CZMA) of 1972 was passed during the heady days of national land use and environmental activism in response to the competing demands on the nation's coastal areas coupled with uneven state and local reaction. Congress discovered that the aforementioned demands (largely due to population growth and development) resulted in the destruction of marine resources, wildlife, open space, and other important ecological, cultural, historic, and aesthetic values.²¹ In response to these perceived problems, Congress created a framework for the development and implementation of state-run coastal zone management programs. This framework—guidelines for the development and implementation of land and water use controls—is imposed if, but only if, states choose to accept federal assistance. Essentially, this framework consists of three parts: the man-

13. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

14. *E.g.*, Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972); NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972); Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971).

15. City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972).

16. Citizens Civic Ass'n of Door County v. Coleman, 417 F. Supp. 975 (W.D. Wis. 1976).

17. Karlen v. Harris, 590 F.2d 39 (2d Cir. 1978), *rev'd, sub nom.* Strycker's Bay Neighborhood Council Inc. v. Karlen, 100 S. Ct. 497 (1980); Wisconsin Heritages, Inc. v. Harris, 460 F. Supp. 1120 (E.D. Wis. 1978).

18. Sierra Club v. Hathaway, 579 F.2d 1162 (9th Cir. 1978).

19. *Environmental Quality* 407 (1978); *Environmental Quality* 588 (1979).

20. 16 U.S.C.A. § 1451. For general description and comments, see Chassis, *The Coastal Zone Management Act*, 46 J. AM. PLAN. ASSOC. 145 (April 1980); FINNELL, COASTAL ZONE MANAGEMENT (1978); BOSSELMAN, FEDERAL LAND USE REGULATION, ch. 5 (1977); NRDC, LAND USE CONTROLS IN THE UNITED STATES, ch. 6 (1975); MANDELKER, ENVIRONMENTAL AND LAND USE CONTROL LEGISLATION, ch. 6 (1976).

21. CZMA, Pub. L. No. 92-583, § 302(c), 16 U.S.C.A. § 1451(c) (Supp. 1978) [hereinafter CZMA].

agement plan/program; implementation regulations; and consistency regulations.

CZMA requires a state's coastal zone management program ("program") to include six planning elements.²² The most important local government themes are: a definition of the boundaries of that part of a coastal zone which is subject to the program, a statement of permissible land and water uses, and the identification of special management areas.

The coastal zone boundaries are defined as coastal waters and the adjacent shorelands strongly influenced by each other.²³ The zone extends seaward precisely to the outer limit of the U.S. territorial sea, but the inland zone extends vaguely to the extent necessary to control shorelands, the use of which have a direct and significant impact on coastal waters.²⁴ While it is not particularly difficult to find the seaward boundary (and the excluded federal lands) the trick is to identify the vaguely defined *inland* boundary. Federal regulations are of some help in specifically identifying some area that *might* be included:

- a. Areas of particular concern (discussed below).
- b. Waters containing a significant quantity of sea water.
- c. Salt marshes and wetlands.
- d. Beaches (area affected by wave action directly from the sea).
- e. Transitional and intertidal areas (subject to coastal storms—including state-determined floodplains).
- f. Islands.²⁵

And a few more that *may* be:

- a. Watersheds (if the state determines that it has a direct and significant impact on coastal waters).
- b. Areas of tidal influence that extend further inland than waters under saline influence.
- c. Indian lands not held in trust by the federal government.²⁶

Regulations enacted pursuant to the CZMA specifically require the inland boundary to be sufficiently precise that interested parties can determine whether their activities are subject to the management program²⁷ and define what constitutes permissible land and water access in the newly defined coastal zone.²⁸ Regulations also set out the criteria for determining permissible uses subject to the management program.²⁹

22. *Id.* at § 305(b).

23. *Id.* at § 304(a).

24. *Id.*

25. 15 C.F.R. § 923.31(a) (1979).

26. *Id.* at § 923.31(b).

27. *Id.* at § 923.31(a)(8).

28. CZMA, *supra* note 21, at § 305(b)(2).

29. 15 C.F.R. §§ 923.11(b)-(c) (1979).

CZMA also requires that a manager plan designated areas requiring special management attention (areas of particular concern and special management areas) because of unique coastal values or characteristics, or because the area faces pressure which requires detailed attention beyond the general planning and regulatory systems of a typical management program.

There are essentially three elements with respect to special management areas under CZMA: designation, concerns to be addressed, and resolution of concerns (including use priorities). The boundaries are to be established in accordance with a (nonmandatory) set of criteria set out in CZMA regulations.³⁰

As to concerns to be addressed, the regulations focus particular attention upon shorefront access and protection, and areas subject to shoreline erosion, for which special procedures for assessing public beach areas and other coastal areas requiring access or protection are required. The process for accessing and controlling erosion is given particular attention. The regulations also require that the state identify these special management areas in sufficient detail that parties can determine if an area is or is not within the designated area.³¹

While none of what follows is required unless a state *chooses* to participate in the CZMA program (and most of the thirty-five eligible coastal states—including Hawaii—and territories have),³² CZMA requires that states have the authority to *implement* the above-summarized management plan, in order for it to be approved.³³ CZMA lists three permissible alternatives for states to control the use of land and water in the coastal zone:

- A) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement of compliance;
- B) Direct state land and water use planning and regulation; or
- C) State administrative review for consistency with the management program of all development plans, projects, or land and water use regulations, including exceptions and variances thereto, proposed by any state or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings.³⁴

The extent to which a federally funded “voluntary” program results in a uniform achievement of federal statutory objectives must depend on some sort of evaluation and compliance review. For this CZMA pro-

30. *Id.* at § 923.21(b)(1)(i).

31. *Id.* at §§ 923.24-25.

32. OCZM, *The First Five Years of Coastal Zone Management* 13 (Mar. 1979).

33. CZMA, *supra* note 21, §§ 305(b)(4), 306(c)(7), 306(d).

34. CZMA, *supra* note 21, § 306(e)(1).

vides, by requiring the Office of Coastal Zone Management (OCZM), to "conduct a continuing review of . . . the management programs of . . . coastal states with respect to coastal management."³⁵ Unjustified deviation from the state's approved program gives OCZM the authority to withdraw federal funds. Usually, such evaluation takes place on an annual basis. The state prepares a response to an OCZM "information request," OCZM visits the state, and prepares "findings" based on both. Hawaii has established such a program, and a regulatory framework, which is briefly summarized in the next section.

2. COASTAL FLOOD HAZARDS

While several jurisdictions have enacted land-use regulatory schemes for the purpose of reducing the loss to life and property resulting from floods,³⁶ the real impetus for local regulation of flood-prone land came with the intrusion of the *federal* government in the mid-1970s, via the Federal Disaster Protection Act of 1973.³⁷ Its purpose is to discourage development—and in particular the building of structures—in flood-prone areas. The Act does so by making federal money available for federally subsidized flood insurance and relocation aid, and offering some procedural and substantive control over federal activities at or near flood-prone areas to those local communities who "choose" to participate in the federal flood management program. The price of that participation is local government enactment or promulgation of local land-use development regulations which severely restrict the use of land in areas found to be flood-prone. In essence, these regulations must be designed in accordance with federal regulations promulgated pursuant to the Act which restrict most structural development in floodplains to that which can be elevated above the highest recorded flood level or wave wash.³⁸

For purposes of the Act, the floodplain is essentially the land area on

35. 16 U.S.C. § 1458 (1977).

36. *E.g.*, *Dooley v. Town Planning and Zone Commission of Fairfield*, 197 A.2d 770 (Conn. 1964); *Vartelas v. Water Resources Commission*, 153 A.2d 822 (Conn. 1959); *Turner v. Town of Del Norte*, 101 Cal. Rptr. 93 (1972); *Turnpike Realty v. Town of Dedham*, 284 N.E.2d 891 (Mass. 1972), *cert. denied*, 409 U.S. 1108 (1972).

37. 42 U.S.C.A. § 5146 (Supp. 1979).

38. *See Z. Plater, The Takings Issue in a Natural Setting: Floodlines and the Police Power*, 52 TEX. L. REV. 201 (1974); F. Maloney and D. Dambly, *The National Flood Insurance Program: A Model Ordinance for Implementation of Its Land Management Criteria*, 16 NAT. RES. L.J. 665 (1976); B. Myers and J. Rubin, *Complying with the Flood Disaster Protection Act*, 7 REAL ESTATE L.J. 114 (1978); G. Tierney, *The National Flood Insurance Program: Explanation and Legal Implications*, 8 URB. LAW. 279 (1976); A. Marcus and G. Abrams, *Flood Insurance and Floodplain Zoning as Compatible Components: A Multi-Alternative Approach to Flood Damage Reduction*, 7 NAT. RES. LAW. 581 (1974).

either side of a river which is likely to be inundated in the event of a 100-year flood, so-called because of the 1 percent statistical likelihood of its occurring in any one year, or, conversely, the likelihood of its occurring but once every 100 years. Development of any kind is to be prohibited in the floodway, which is that portion of the floodplain adjacent to and including the river channel, and which is expected to carry the greatest volume and flow of floodwaters, including those of lesser frequency than a 100-year flood. The same is true for coastal high hazard areas along ocean waterfronts.³⁹

The Act contains two principal classes of sanctions against communities who opted not to participate in its insurance program with accompanying flood proofing and land-use control requirements. The first represented a variation on the original theme of no federal disaster aid, by expanding the categories of aid no longer available to nonparticipating communities. Basically, all federal aid for the building of structures would be unavailable in flood hazard areas subject to the jurisdiction of nonparticipating local governments. This includes urban renewal aid, Clean Water Act, wastewater treatment grants, and a host of other federal programs.⁴⁰

Second, federally insured lending institutions were required to *notify* the mortgagor of a flood-prone property that (1) the property *is* flood-prone, and (2) if the property is located in a nonparticipating community, no federal flood disaster aid would be available in the event of a flood.⁴¹

In summary, for land found to be located in flood-prone (including coastal high hazard) areas, the situation with respect to sanctions is presently as follows:

- i. In a *participating community*, a landowner who fails to purchase available flood insurance is
 - (a) ineligible for federal disaster relief;
 - (b) ineligible for mortgage loans from federally insured lending institutions.
- ii. In a *nonparticipating community*, an *individual* is not eligible for federal disaster loans or any other of a range of federal assistance programs, *but is* eligible for mortgage loans from a federally-insured lending institution.

While the aforementioned sanctions most certainly have a capacity for mischief with respect to local land use controls—aside from their arguably laudable purpose of keeping people from building and rebuilding in the path of natural disaster at considerable public and private expense—nevertheless the number of communities so far having to *actually* flood-

39. LAND USE LAW, *supra* note 1, at 12-7, 12-8.

40. FDPA, Pub. L. No. 93-234, § 202(a), 42 U.S.C.A. § 4106(a) (1977).

41. 42 U.S.C.A. §§ 4106(b) and 4003(6)(c) (Supp. 1979).

proof and regulate flood hazard areas as a result of participation in the FDPA program, was, until recently, fairly small. This is so because of the series of tasks which the Act imposes upon the federal government *before* it can make flood-proofing and development regulation demands of participating communities, such as identifying the flood-prone areas of a community, and publishing (in the *Federal Register*) a Flood Hazard Boundary Map (FHBM),⁴² publishing the more detailed Flood Insurance Rate Map (FIRM), setting out for each area identified as flood-prone (by the FHBM) refined identification of special flood hazard and flood elevation areas,⁴³ which habitable dwellings must be constructed in flood-prone areas.⁴⁴ When the Federal Insurance Administration has provided this flood elevation data to coastal participating communities and has identified in a Federal Insurance Rate Map (FIRM) a coastal high hazard area, the community must see that all new construction within that zone (designated "VI-30" in the regulations) is *located landward of the reach of the mean high tide*,⁴⁵ and:

- a. Provide
 - i) that all new construction and substantial improvements within Zones VI-30 on the community's FIRM are elevated on adequately anchored pilings or columns, and securely anchored to such piles or columns so that the lowest portion of the structural members of the lowest floor (excluding the pilings or columns) is elevated to or above the base flood level, and
 - ii) that a registered professional engineer or architect certify that the structure is securely anchored to adequately anchored pilings or columns in order to withstand velocity waters and hurricane wave wash.
- b. Provide that all new construction and substantial improvements within Zones VI-30 on the community's FIRM have the space below the lowest floor free of obstructions or be constructed with "breakaway walls" intended to collapse under stress without jeopardizing the structural support of the structure so that the impact on the structure by abnormally high tides or wind-driven water is minimized. Such temporarily-enclosed space shall not be used for human habitation.
- c. Prohibit the use of fill for structural support of buildings within Zones VI-30 on the community's FIRM.
- d. Prohibit the placement of mobile homes, except in existing mobile home parks and mobile home subdivisions, within Zones VI-30 on the community's FIRM.
- e. Prohibit man-made alteration of sand dunes and mangrove stands within Zones VI-30 on the community's FIRM which would increase potential flood damage.⁴⁶

42. 44 C.F.R. § 59.1 (1979). After detailed ratemaking has been completed in preparation of the FIRM, Zone A is usually refined into Zones A, A0, A1-99, V0, and V1-30.

43. 42 U.S.C.A. § 410(a)(2) (1979); 44 C.F.R. § 64.1 (1979). Flood elevation determinations defined as "a determination by the Administrator of the water surface elevations of the base flood, that is, the flood level that has a one percent or greater chance of occurrence in any given year."

44. 44 C.F.R. § 59.1 (1979).

45. *Id.* at § 60.3(e).

46. *Id.* at §§ 60.3(e)(4)-(8).

As local zoning and subdivision controls are the primary method of enforcing FDPA land-use requirements, the various techniques and tools of local zoning assumes critical importance. These are discussed in a later section on local land-use controls.

D. *The Clean Air Act*

The primary purpose of the Clean Air Act⁴⁷ is “to protect and enhance the quality of the nation’s air resources so as to promote public health and welfare and the productive capacity of its population.”⁴⁸ In order to clean up the nation’s air, Congress required EPA to promulgate primary and secondary ambient air standards for those pollutants (1) the emissions of which, in the EPA’s judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger health or welfare, and (2) the presence of which in the ambient air results from numerous or diverse mobile or stationary *sources*.⁴⁹ The act defines national *primary* ambient air quality standards as standards the attainment and maintenance of which are necessary to protect public *health*.⁵⁰ National *secondary* ambient air quality standards are standards the attainment and maintenance of which are required to protect the public *welfare* from any known or anticipated adverse effects associated with the presence of such pollutants in the ambient air.⁵¹ EPA has listed seven such pollutants and promulgated primary and secondary standards for each.⁵²

While the federal government thus sets the standards and identifies the critical pollutants, it is up to the states—and ultimately local government—to devise a plan to meet the standards and therefore to maintain air quality. The principle vehicle for so doing is the State Implementation Plan, or SIP. The SIP, once approved, is designed to permit the meeting of primary ambient air quality standards as expeditiously as possible.⁵³

Several of the SIP statutory requirements have considerable significance for waterfront development:

47. 42 U.S.C. § 1857 *et. seq.*

48. Clean Air Act, Pub. L. No. 91-604, § 102(b)(1) (1978).

49. *Id.* § 108, 42 U.S.C.A. § 7408.

50. *Id.* § 109(b)(1), 42 U.S.C.A. § 7409(b)(1). As determined by EPA, based on criteria and allowing an adequate margin of safety.

51. Again, as determined by EPA. Clean Air Act, § 109(b)(2), 42 U.S.C.A. § 7409(b)(2) (1979).

52. (1) Particulate matter; (2) sulfur oxides; (3) carbon monoxide; (4) nitrogen dioxide; (5) ozone; (6) hydrocarbons; (7) lead. 40 C.F.R. pt. 50 (1979).

53. Clean Air Act §§ 172(a)(1)-(2), 42 U.S.C.A. §§ 7502(a)(1)-(2) (1978).

- (1) Pre-construction review of major stationary sources of pollution;⁵⁴
- (2) Development of maintenance (AQMA) plans;⁵⁵
- (3) Prevention of significant deterioration plans for existing clean air areas;⁵⁶ and
- (4) Attainment plans for nonattainment areas.⁵⁷

This is so because no major new development or growth which results in increased air pollution would be allowed in such "polluted" areas. These requirements of attainment and maintenance of national air quality standards will have a major impact on the location and direction of development in waterfront areas.⁵⁸ The prevention of significant deterioration requirement will have a significant impact on new development and growth in areas where air quality is still relatively good. Thus, these requirements amount to control of waterfront development in both "clean" and "polluted" areas.

SIP's must include a procedure for *pre-construction review* of every new major stationary source (or modification of an existing major stationary source) for which a new source performance standard has been established by the EPA. The purpose of the review procedure is to ensure that national primary and secondary ambient air quality standards will be attained or maintained.⁵⁹ The result is a federally required review of many new waterfront developments. Regardless of underlying local zoning or other land use regulations, a "bad" review can result in the delay of that particular development project until its air pollution problems can be eliminated. If the state or local government won't do it under their SIP, the administrator of the EPA has the power to write his own procedures and enforce them.

The requirement that the location of proposed (new) stationary sources be reviewed *prior* to construction was established by the Act as a complement to the requirement that stationary sources meet emission limitations (new source performance standards)⁶⁰ established by the EPA. These performance standards prescribe the maximum amount of particulate matter or gases that can be emitted from major stationary sources. Such limitations alone, however, cannot ensure

54. 40 C.F.R. § 51.18 (1979).

55. *Id.* at § 51(D).

56. *Id.* at §§ 51.24-52.21.

57. 44 Fed Reg. 38,171 (July 2, 1979) (to be codified at 40 C.F.R. § 52.24).

58. See D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 173 (1976); HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 568 (1975).

59. Clean Air Act, § 110(a)(2)(D); 42 U.S.C.A. § 7410(a)(2)(D) (Supp. 1979).

60. 40 C.F.R. pt. 60 (1979).

the attainment and maintenance of ambient air quality standards.⁶¹ The *preconstruction review* amendments require the SIP to contain legally enforceable procedures which will enable the state or local government to determine whether the proposed facility, building, structure, or installation would: (1) violate, *directly* or *indirectly*, the "control strategy" or (2) interfere with either maintenance or attainment of any national ambient air quality standard, *directly* or *indirectly*, because of "mobile source activity" (automobile and truck traffic associated therewith). Other sections of the amendments set out the kinds of submissions the enforcing agency must require of developers, and the administrative procedures to be used in making approval/disapproval decisions.⁶²

In its SIP, each state is also required to identify areas which, due to current air quality and/or projected growth rate, may have the potential for exceeding any national primary or secondary ambient air quality standard (except for lead) within a subsequent ten-year period.⁶³ It must then develop an Air Quality Maintenance Area (AQMA) Plan for making sure that such development does *not* exceed these standards, setting forth control measures which will ensure that it does not.⁶⁴

A key component of the plan is the identification of legal authority to enforce these control measures. At *either* the state or local government level: An AQMA plan must demonstrate that the state has the legal authority to enforce all control measures contained in the AQMA plan unless the AQMA plan provides a demonstration that a substate entity has the legal authority and responsibility to enforce such measures.⁶⁵

Prevention of significant deterioration (PSD) in the quality of so-called "clean-air" regions (where the quality of the air is another significant area) was written into the 1977 Clean Air amendments.⁶⁶ Each SIP must designate PSD areas where air quality was better than the national ambient air quality standards. PSD areas are divided into three classes. Class I is an area in which practically any change is deemed significant

61. NATURAL RESOURCES DEFENSE COUNSEL, INC., LAND USE CONTROLS IN THE UNITED STATES 43 (1977).

62. Clean Air Act, § 110(a)(2)(d), 42 U.S.C.A. § 7410(2)(D) (Supp. 1979).

63. 40 C.F.R. § 51.12(e). There is a separate maintenance plan for lead. *See* 40 C.F.R. § 51(e) (1979).

64. *Id.* at § 51.14.

65. *Id.* at § 51.55; other provisions (.51, .52, .53, .57, .58, .60) deal with demonstration of adequacy, future legal authority, and intergovernmental cooperation.

66. R. STEWART AND J. KRIER, ENVIRONMENTAL LAW AND POLICY 501-04 (1978).

and to be prevented. It is to be the most vigorously protected.⁶⁷ International parks, national wilderness areas which exceed 5,000 acres, and national memorial parks which exceed 5,000 acres are required to be so classified.⁶⁸ Class II areas are those in which deterioration of air quality normally accompanying moderate growth is *not* considered significant. All PSD areas except original Class I areas must initially be classified into this area,⁶⁹ but are subject to reclassification, to Class I or Class III, depending upon a state's growth plans.⁷⁰ Class III areas are those in which deterioration is permitted up to the national secondary ambient air quality standards, thus allowing for the greatest (in most cases) increment of pollution—and land use permitting growth.⁷¹

The PSD requirements are enforced via the SIP through the preconstruction review process by which any major emitting facility must obtain a permit to proceed.⁷² Twenty-eight categories of major sources are specifically identified (if they have the potential of emitting 100 tons or more of pollutants a day) as well as any other source which has the potential of emitting 250 tons per day.⁷³

No major emitting facility may be constructed unless the following requirements are satisfied:

- (1) a permit has been issued;
- (2) the permit has been reviewed in accordance with the Act and regulations, and a public hearing has been held;
- (3) the owner or operator of such a facility demonstrates that the facility will not cause or contribute to air pollution in excess of allowable levels of emissions within the classified area and will not exceed national air quality standards;
- (4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation;
- (5) Class I areas will be protected;
- (6) There has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;
- (7) owner or operator agrees to monitor emissions.⁷⁴

The EPA has the authority to ensure that the PSD requirements will be enforced.⁷⁵

67. Clean Air Act, § 661; see Williams, *The Influence of Environmental Law on Nebraska Land Use*, 57 NEB. L. REV. 730 (1978); WETSTONE (ed.), AIR AND WATER POLLUTION CONTROL LAW 24-26 (1980).

68. Clean Air Act, § 162(a), 42 U.S.C. § 7472(a) (1982).

69. *Id.* at § 162(b), 42 U.S.C. § 7472(b) (1982).

70. *Id.* at § 164, 42 U.S.C. § 7474 (1982).

71. R. LIROFF, AIR POLLUTION OFFSETS 9-12 (1980).

72. Clean Air Act, § 165, 42 U.S.C. § 7475 (1982).

73. *Id.* at § 169(1), 42 U.S.C. § 7479(1) (1982).

74. *Id.* at § 165(a), 42 U.S.C. § 7475(a) (1982).

75. LIROFF, *supra* note 71, at 4-12.

E. *Toxic Substances, Fish, Wildlife, and Coastal Barriers*

1. TOXIC WASTES

The Comprehensive Environmental Response Compensation and Liability Act (CERCLA)⁷⁶ provides for recovery of clean-up costs and damages for coastal or other natural resources injured, destroyed, or lost because of actions forbidden by the Act and authorizes the EPA to identify and clean up sites contaminated by toxic or hazardous substances. While CERCLA is likely to be an issue for waterfront redevelopment in industrial harbor and other coastal areas on both coasts of the mainland United States, it is unlikely to have much relevance for the Hawaii waterfront area.

2. COASTAL BARRIERS

The Coastal Barrier Resources Act⁷⁷ prohibits federal expenditures or financial assistance for developments on undeveloped coastal barriers within designated coastal barrier resource systems on the Atlantic or Gulf coasts of the mainland United States. The purpose of the Act is to restrict federal aid to projects which might adversely affect certain coastal areas. By definition, the Act is inapplicable to Hawaii, which in any event has no coastal barrier islands or areas of significance.

3. ENDANGERED SPECIES

The Endangered Species Act⁷⁸ prohibits all acts which threaten the survival of animals or plants which are listed as endangered by the Secretary of the Interior. Development activity in waterfront areas can be required to be modified or terminated altogether to prevent danger to such species.⁷⁹

IV. State of Hawaii

The State of Hawaii has essentially six levels of land development and planning that apply to the redevelopment of Honolulu's waterfront: a state land-use law, a state plan, coastal zone protection legislation, coastal flood hazard legislation, a state environmental assessment law, and the statute creating the Hawaii Community Development Authority. What follows is a brief summary of how each of these works and how they would affect the development of Honolulu's waterfront.

76. 42 U.S.C. §§ 9606(g)(r)-9607(A)(4)(c) (1982), (as amended by the Superfund Amendments and Reauthorization Act of 1986).

77. 16 U.S.C. § 3503 (1982).

78. *Id.* at § 1538.

79. See *Wilson v. Block*, 228 U.S. App. D.C. 166, 708 F.2d 735 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 956 (1983).

A. *State Land Use Law*

The state system of regulation adopted in 1961 consists largely of local zoning writ large. Act 187⁸⁰ directs that all the land in Hawaii be divided into districts: urban, agricultural, and conservation. The little-used rural classification was added to the law by amendment in 1963. The drawing up of land-use district boundaries was completed in 1964 by an appointed Land Use Commission, also created by the Act. Land-use control in two of the districts—agricultural and rural—was split between state and local government agencies. In the conservation district, only the state controls the use of land. It is only in the urban district that Hawaii's four county governments exercise traditional local land-use controls. Hawaii's land area is divided into the four district classifications roughly as follows: urban, 5 percent; agriculture, 47 percent; conservation, 47 percent; and rural, 1 percent.⁸¹

In the urban district are those lands that are currently in urban use, together with a reserve for foreseeable urban growth. It is this classification that is needed for waterfront development. This classification is only permissive, however, and carries no *right* to urban use. It is the county that issues the requisite permits for development, the principle requirement for which is appropriate *county* zoning. Counties can and do zone land that the state has classified as urban for low-intensity use. All the state urban classification signifies is that a county may zone the same land so as to permit urban development under its zoning code.

The administrative rules of the Land Use Commission amplify these statutory provisions. For example, in determining what lands should be classified urban, the rules provide that the urban districts should include land characterized by city-like concentrations of people. Other factors the Commission must consider: proximity to centers of trade, economic feasibility, proximity to basic services, and reserve for growth "based on ten-year projections." It is also to give more consideration to lands already contiguous to existing urban areas.

B. *Act 100: The State Plan*

Hawaii is unique among the fifty states in having converted its state general plan into a law—Act 100—which made it the first state to enact a comprehensive state plan. The writing of the plan into the statutory code had the effect of transforming what is usually a policy document into a set of preeminent legal requirements. Its passage by the ninth state legis-

80. HAW. REV. STAT. § 205-1 to -37 (1985 & Supp. 1987).

81. *The State of Hawaii Data Book* 144-45 (1980).

lature in 1978 represented not only a milestone for the state—indeed, the governor ranked it second only to the state constitution in importance—but also for the nation.⁸² Moreover, an amendment to the State Land Use Law concerning Land Use Commission standards for deciding boundary amendments applications providing that no such amendment could be adopted unless it conforms to the state plan adds considerably to the plan's legal significance in Hawaii.⁸³

The Hawaii State Plan is divided into three major parts: goals, objectives, and policies; planning, implementation, and coordination; and priority guidelines.⁸⁴

Twelve state functional plans define, implement, and conform to the themes, goals, objectives, policies, and priority guidelines of the state plan. County plans (general and development) are to be county-specific, but must at least indicate general population levels and development patterns conform to the aforesaid themes, goals, policies, objectives, and priority guidelines. State programs are to carry out the state plan and must conform both to it and to the functional plans.

That part of the state plan dealing with implementation—and especially conformance—is the most significant for the purpose of land-use control. This is so because the state plan requires conformance to its policies, goals, objectives, and priority guidelines across virtually the whole spectrum of state land-use actions.

The state plan makes it clear that all state programs are to be in conformance with its theme, goals, objectives, policies, and priority guidelines as well as with its twelve functional plans. These state programs include the boundary-amendment activities of the Land Use Commission.⁸⁵

Thus, the state's major land-use decision-making body is to some extent bound by the state plan and its subordinate functional plans in land reclassification (boundary amendment) decisions.

While broad policies are sketched in the state plan, it is the functional plans to which state agencies must look for guidance.⁸⁶ The state plan provides for the preparation of at least twelve such plans, one of which is entitled Water Resources Development. The functional plans are required to "further define and implement statewide guidelines with re-

82. *The Hawaii State Plan*, DPED at 3.

83. HAW. REV. STAT. § 205-4(h) (1985).

84. *Id.* at §§ 226-5 to -28, 226-51 to -63, 226-101 to -104 (1985 & Supp. 1987).

85. HAW. REV. STAT. § 226-52(b)(2) (1985 & Supp. 1987).

86. HAW. REV. STAT. § 226-52(a)(4) (1985 & Supp. 1987).

spect to the goals, objectives, policies, and priority guidelines" contained within the statute.

C. Coastal Zones and High Hazard

Recall that Hawaii participates under both the federal coastal zone management and flood hazard protection programs. What follows is a brief description of those parts of the state statutory schemes which apply to waterfront development.

1. HAWAII COASTAL ZONE MANAGEMENT ACT

Hawaii chose the second of three policy options open to it under the Federal Coastal Zone Management Act: direct state land and water use planning and regulation, by means of the passage of the HCZMA.⁸⁷ While seemingly the most onerous, it is not because Hawaii has "networked" state and local coastal laws within its statute, which is permitted under the federal act, leaving most of the coastal land use controls at the local government level. However, these laws are by executive order subject to the state coastal zone management plan, as are all state agencies and the state is theoretically able to enforce that management program should counties fail to do so.⁸⁸

The most important of these laws (they number about sixty) for the purpose of waterfront development are those which deal with specific management areas, since most of the land-based portion of the contemplated redevelopment of the Honolulu harbor is in an SMA which is regulated by the City and County of Honolulu.

While the state perforce retains overall power and responsibility for assuring that the regulations guiding management and development in these areas accords with the state programs, the counties define the special management areas and pass appropriate ordinances and regulations governing the use of land within their boundaries.⁸⁹ In Hawaii, no development may proceed in an SMA unless an applicant obtains a permit from a county permit granting authority, which is either the county planning commission or, if it is only advisory, the council or its designated agency.⁹⁰ Development is defined as any of the uses, activities, or operations on land in or under water within the SMA that includes the following:

- (i) The placement or erection of any solid material or any gaseous, liquid, solid, or thermal waste;

87. HAW. REV. STAT. §§ 205A-1 to -49 (1985 & Supp 1987).

88. HAW. REV. STAT. §§ 205A-(4)(c), -3(8), -6(a)-(c) (1985 & Supp 1987).

89. HAW. REV. STAT. §§ 205A-21 to -30 (1985 & Supp 1987).

90. HAW. REV. STAT. § 205A-28 (1985).

- (ii) grading, removing dredging, mining, or extraction of any materials;
- (iii) change in the density or intensity of use of the land, including but not limited to the division or subdivision of land, change in the intensity of use of water, ecology related thereto, or use of access thereto; and
- (iv) construction, reconstruction, demolition, or alteration of the size of any structure.⁹¹

2. COASTAL HIGH HAZARD

This federal program is wholly administered at the county level and is dealt with in the next section.

D. *The Hawaii Environmental Impact Statement Law*

The Hawaii Environmental Impact Statement (HEIS) law⁹² sets out in detail the circumstances under which an EIS, or at least an environmental assessment, must be filed by a government agency. A project for which an EIS is necessary may not proceed until the EIS is accepted. Therefore, the critical elements in the EIS process are the circumstances that trigger the environmental assessment and statement requirements, and acceptance.

The HEIS law defines environmental assessment as “a written evaluation to determine whether an action may have a significant environmental effect.”⁹³ The EIS itself is defined as:

an informational document . . . which discloses the environmental effects of a proposed action, effects of a proposed action on the economic and social welfare of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.⁹⁴

The Act then sets out a series of actions that require the preparation of an environmental assessment at the earliest practical time, to determine whether the effects may be significant, thereby requiring the preparation of a full-blown EIS.⁹⁵

Proposed land uses in the shoreline setback coastal area established by the State Land Use Commission must be assessed. This setback zone, administered by the counties, is between twenty and forty feet inland from the wash of the waves.⁹⁶ Also, any proposed use in the Waikiki area of Oahu requires an assessment.⁹⁷

The extent of the coverage of proposed actions for a waterfront devel-

91. HAW. REV. STAT. § 205A-22(3)(A) (1985).

92. HAW. REV. STAT. § 343 (1985 & Supp. 1987).

93. HAW. REV. STAT. § 343-2 (1985).

94. HAW. REV. STAT. § 343-2 (1985 & Supp. 1987).

95. HAW. REV. STAT. § 343-2 (1985).

96. HAW. REV. STAT. §§ 205-32 and -34 (1985).

97. HAW. REV. STAT. § 343-5(a)(5) (Supp. 1987).

opment is evident after examining the definitions of key terms in the HEIS law: "action" refers to "any program or project to be initiated by any agency or applicant"; an "agency" is "any department, office, board, or commission of the state or county government which is part of the executive branch of that government"; and an "applicant" is "any person who, pursuant to statute, ordinance, or rule, officially requests approval for a proposed action."⁹⁸ Thus, the only apparent limitation is whether the effects of a proposed action, which activates the assessment process, will be sufficient to trigger the EIS process. Assessments appear to result in an EIS less than 10 percent of the time.

E. *The HCDA*

In 1976, the legislature created the Hawaii Community Development Authority (HCDA) for the purpose, among other things, of meeting community development needs such as housing, rental, commercial, and industrial facilities, and parks and open space. Aside from its extensive planning, land acquisition, and development powers, the HCDA may also establish community development rules that supercede all inconsistent local land-use regulations.⁹⁹ This makes HCDA a potentially powerful land development agency.

The eleven-member authority itself could do nothing until the legislature designated one or more community development districts. This it did, creating the Kakaako Community Development District in 1976.¹⁰⁰ Its jurisdiction encompasses much of the waterfront.

The legislature also set out guidelines within which the HCDA must work. First, it directed that the Kakaako district be developed for mixed land uses, provided its "function as a major economic center" was preserved.¹⁰¹ The legislature then listed a series of specific "development guidance policies" to govern the Authority's Kakaako activities:

- (1) Development shall result in a community which permits an appropriate land mixture of residential, commercial, industrial, and other uses. In view of the innovative nature of the mixed use approach, urban design policies should be established to provide guidelines for the public and private sectors in the proper development of this district;
- (2) Existing and future industrial uses shall be permitted and encouraged in appropriate locations within the district. No plan or implementation strategy shall prevent continued activity or redevelopment of industrial and commercial uses which meet reasonable performance standards;
- (3) Activities shall be located so as to provide primary reliance on public transporta-

98. HAW. REV. STAT. § 343-28 (1985 & Supp. 1987).

99. HAW. REV. STAT. §§ 206E-1 to -22 (1985 & Supp. 1987).

100. HAW. REV. STAT. §§ 206E-5(a), -32 (1985 & Supp. 1987).

101. HAW. REV. STAT. § 206E-31 (1985).

- tion and pedestrian facilities for internal circulation within the district or designated subareas;
- (4) Major view planes, view corridors, and other environmental elements such as natural light and prevailing winds, shall be preserved through necessary regulation and design review;
 - (5) Redevelopment of the district shall be compatible with plans and special districts established for the Hawaii Capital District, and other areas surrounding the Kakaako district;
 - (6) Historic sites and culturally significant facilities, settings, or locations shall be preserved;
 - (7) Land use activities within the district, where compatible, shall to the greatest possible extent be mixed horizontally, that is, within blocks or other land areas, and vertically, as integral units of multi-purpose structures;
 - (8) Residential development shall ensure a mixture of densities, building types, and configurations in accordance with appropriate urban design guidelines; integration both vertically and horizontally of residents of varying incomes, ages, and family groups; and an increased supply of housing for residents of low- or moderate-income shall be required as a condition of redevelopment in residential use. Residential development shall provide necessary community facilities, such as open space, parks, community meeting places, child care centers, and other services, within and adjacent to residential development;
 - (9) Public facilities within the district shall be planned, located, and developed so as to support the redevelopment policies for the district established by this chapter and plans and rules adopted pursuant to it.¹⁰²

The HCDA meanwhile developed a detailed Kakaako Community Development District Plan that, when stripped of its artist's renderings and explanatory language, is a zoning ordinance to be administered by HCDA. The plan divides Kakaako into four "development" and two "public" districts.

Essentially, the rules and regulations prohibit development of any sort without permission of the HCDA. There are two ways of obtaining that permission: (1) obtain a "conformance certificate" issued by the HCDA after project "eligibility" is first determined by the HCDA executive director. Such a certificate is obtainable if, but only if, a proposed project conforms to height, bulk, density, parking, performance, and "other appropriate regulations" listed under each of the four development districts; (2) Obtain a "planned development permit," required for any development in any district planned to exceed a height of forty feet or a floor area ratio of 1.5 on a lot smaller than 40,000 square feet, which is just under one acre. Additional public facilities, amenities, and "reserved housing units"—an odd admixture of "affordable" and "low-income"—will be required in addition to the normal requirements for a "conformance certificate."

102. HAW. REV. STAT. § 206E-33 (1985).

As these rules and policies supercede all other inconsistent land-use regulations in the Kakaako District, HCDA's above rules and procedures will govern much of the proposed waterfront development.

V. City and County of Honolulu:

The Local Government

There is considerable debate over the extent of HCDA's authority in Hawaii over land development. The City and County of Honolulu have taken the position that HCDA's interpretation is too broad and that local land-use regulations should govern. Be that as it may, few states have super-agencies in place to undertake the coordination of planning and development of a waterfront area such as Hawaii's HCDA. It is therefore well worth considering the array of local government permits required for such waterfront redevelopment which are of a land planning and/or environmental nature.

A. *Local Planning: Herein of General and Development Plans*

The charter of the City and County of Honolulu ties zoning to planning very closely. Indeed, zoning and subdivision ordinances must conform to "development plans" in order to be valid.¹⁰³ (A general plan was passed by resolution in 1977 but is largely advisory under the present charter, although the development plans are supposed to implement the general plan's goals.)

There has been considerable debate in Honolulu over what the development plans should contain. However, the charter is quite clear as to what they are and what they *must* contain:

"Development plans" means relatively detailed schemes for implementing and accomplishing the development objectives of the general plan within several parts of the city. A development plan shall include a map of the area of the city to which it is applicable; shall contain statements of standards and principles with respect to land uses within the area for residential, recreational, agricultural, commercial, industrial, institutional, open spaces, and other purposes and statements of urban design principles and controls; and shall identify areas, sites, and structures of historical, archeological, architectural, or scenic significance; a system of public thoroughfares, highways, and streets; and the location, relocation, and improvement of public buildings, public or private facilities for utilities, terminals, and drainage. It shall state the desirable sequence for development and other purposes as may be important and consistent with the orderly implementation of the general plan.¹⁰⁴

The charter also addresses what they *may* contain:

103. Honolulu, Haw., Rev. City-County Charter § 5-408.

104. *Id.* at § 5-409.

Development plans may contain statements identifying the present conditions and major problems relating to development, physical deterioration, and the location of land uses and the social, economic, and environmental effects thereof; may show the projected nature and rate of change in present conditions for the reasonably foreseeable future based on a projection of current trends; and may forecast the probable social, economic, and environmental consequences of such changes.¹⁰⁵

The development plan for the primary urban center, which governs the harbor area, has several policies which would affect any redevelopment of the harbor as all zoning permits and changes would need to conform to the policies and the land-use map, at least insofar as redevelopment takes place outside the jurisdiction of the HCDA:

1. The visibility, enhancement, and accessibility of open space areas shall be given high priority in the design of adjacent and nearby developments. These areas include the steep slopes of valley and ridge areas, streams, and the shoreline areas, Diamond Head, Punchbowl, Ala Wai Canal, Kewalo Basin, and Ala Wai Yacht Harbor.
2. The Aloha Tower and Honolulu Harbor area shall be redeveloped as a pedestrian-oriented activity center which retains and integrates existing principal maritime activities with a mixture of hotel, commercial, and recreational uses.
3. Views from public streets and thoroughfares to the Aloha Tower, Honolulu Harbor, the mountains, and Hawaii Capital District shall be preserved and enhanced where feasible.
4. Commercial Emphasis Mixed Use shall be the predominant form of development in Kakaako, with limited areas set aside for Commercial-Industrial Emphasis Mixed Use in the central portion and for marine industrial use at the Ewa end of Kewalo Peninsula.
5. The makai portion of Kewalo Peninsula shall be developed into a regional park.
6. The general height limit for the area shall be as provided in the Kakaako Special Design District.
7. A special pedestrian corridor system shall be provided for safe and pleasant access to major activity centers, enhancing the compatibility of the mixed uses in the area.
8. The system shall also include a pedestrian walkway along the shoreline from the mouth of the Honolulu Harbor into Ala Moana Park.
9. The Nimitz Highway and Ala Moana Boulevard corridor from the Honolulu International Airport to Kalakaua Avenue in Waikiki deserves special consideration because of its function as the major ingress and egress route of visitors and as a major thoroughfare for residents. The preservation and enhancement of views from this corridor shall be the major determinants of development controls along this corridor. Appropriate measures to enhance the attractiveness of this corridor and the public and private responsibilities to implement and maintain such improvements shall be adopted.
10. Areas makai of Nimitz Highway which are designated for Public and Quasi-Public (harbor-related facilities) or Military use shall have a general height limit of seventy feet.
11. In addition to the above, special height, design, and use controls may be applied where necessary to ensure the preservation of important views, landmarks, and

105. *Id.*

historic structures, and the compatibility of the permitted mixture of uses within the area.

B. *Local Zoning*

Zoning is firmly rooted in the police power¹⁰⁶ to regulate and protect the health, safety, morals, and welfare of the people.¹⁰⁷ In most jurisdictions, that power is delegated from the state, the repository of police power, to units of local government through a zoning enabling act. That act is usually based upon the Standard Zoning Enabling Act.¹⁰⁸ Such acts *permit*, but do not *require*, local governments to divide the land area in their jurisdiction into districts or zones, and to list permitted uses, their permitted height and density ("bulk" regulation), and conditional uses in each. The map upon which the districts are drawn is called the zoning map, and the lists of uses, bulk regulations, definitions, and so forth, are collectively called the text. Also in the text are administrative regulations setting forth how the zoning ordinance restrictions on a particular piece of property may be changed.

So it is in Honolulu, which has adopted a new Land-Use Ordinance to replace its Comprehensive Zoning Code. The City and County of Honolulu's legislative body, the City Council, retains the power to change the zone classifications of land under its jurisdiction and to amend the text of the ordinance. It also grants certain permits, especially shoreline management area permits under the state (but federally precipitated) coastal zone management law, about which more is written in another subsection. The director of the Department of Land Utilization has the power to grant other permits, and the appointed Zoning Board of Appeals retains the authority to grant variances under the City Charter.

The portion of the waterfront which is subject to the redevelopment study is zoned B-2 Community Business, Business Mixed (BMX), as is Kakaako Community Development District, together with some preservation. The uses in the Kakaako special district, once mapped by the council, are largely up to the director of the Department of Land Utilization, within the guidelines set out in the text of that district and the development plan for the primary urban center discussed in the previous section. It would take some tinkering with this land-use pattern to

106. *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381 (Cal. 1925); D. CALLIES, *REGULATING PARADISE: LAND USE CONTROLS IN HAWAII* 22 (1984).

107. Garner and Callies, *Planning Law in England and Wales and in the United States*, 1 *ANGLO-AM. L. REV.* 292 (1972) [hereinafter Garner & Callies].

108. *ADVISORY COMMISSION ON ZONING, U.S. DEP'T OF COMMERCE, A STANDARD ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS* (REV. ED. 1926).

accomplish some, but not all, of the development projects contemplated by the three design teams for the Honolulu waterfront.

C. *Subdivisions and Development Codes*

The development of land is controlled by subdivision or development codes in most U.S. jurisdictions. The modern ordinance evolved from the so-called "plat acts" which were passed by state legislatures to help free conveyancing from the need to use metes and bounds legal descriptions of the subject property. Soon, local governments began to attach various development conditions to the "privilege" of recording by plat and subdivision rather than by metes and bounds. As this process became more cumbersome, local governments, abetted by the courts, shifted to a police power rationale for requiring that land development—at least that which required the dividing of land into lots for the construction of single-family homes—go through a plat approval process during which design and development standard conditions were imposed, all pursuant to state planning enabling legislation. Exactions, fees, and dedications for such as school and park sites, traffic improvements, and wastewater and water facilities followed, for both on-site and off-site improvements.¹⁰⁹ Such conditions were approved by a variety of state courts in the 1970s and 1980s,¹¹⁰ and eventually by the Supreme Court of the United States in 1987,¹¹¹ in which the Court suggested that so long as an "essential nexus" could be shown between a condition for development approval and a problem that a proposed development generated, then such conditions, fees, and exactions would be at least constitutional.

Hawaii has required subdivision controls and exactions of its four counties for many years.¹¹² Subdivision approval is governed by county ordinance in Honolulu, requiring of each subdivider the submission of preliminary and final plats for review and approval by the director of the Department of Land Utilization in conjunction with the County Planning Commission. A host of detailed submissions are required for each

109. For a discussion of subdivision laws, their origin, and application, see R. FREILICH AND P. LEVI, *MODEL SUBDIVISION REGULATIONS: TEXT AND COMMENTARY*, ASPO (1975); Garner & Callies, *supra* note 107; HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW*, ch. 9 (1971); D. MANDELKER, *LAND USE LAW*, ch. 9 (1982).

110. *E.g.*, *Contractors & Builders Ass'n v. City of Dunedin*, 329 So.2d 314 (Fla. 1976), *cert. denied*, 444 U.S. 867 (1979); *Jordan v. Village of Menomonee Falls*, 22 Wis. 2d 608, 137 N.W.2d 442 (1965); *Ayres v. City Council of Los Angeles*, 34 Cal. 2d 31, 207 P.2d 1 (Cal. 1949).

111. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987).

112. *See* HAW. REV. STAT. §§ 46.6 to 65 (1985).

plat submission.¹¹³ Broad interpretations of these statutes and ordinances, particularly if any division of a parcel of land into two or more parcels were contemplated, would require compliance with this detailed process and the submission of plats complying with charter, ordinance, and statutory standards, in order to proceed with waterfront development.

D. Coastal Zone and Flood Hazard Implementation

As noted in the previous section, coastal zone and flood hazard programs are largely the result of federal dollars flowing into states which "choose" to participate in them (and the withholding of federal aid in other areas—so called "crosscutting"). In Honolulu, coastal zone and flood hazard protection are both exercised pursuant to state (in the former) and federal (in the latter) statutes and regulations which make it impossible to undertake development on Honolulu's waterfront without obtaining permits under each of these programs.

1. COASTAL ZONE MANAGEMENT

As discussed in the section on state controls, the principle vehicle for controlling development in the coastal zone is the shoreline management area permit (SMP or SMA Permit). County permitting authorities may issue three types of permits:

[A] special management area emergency permit, which authorizes development in emergency situations, to prevent substantial physical harm to persons or property; a special management area minor permit, which authorizes development valued at less than \$65,000 and which has no substantial adverse environmental or ecological effects (taking into account potential cumulative effects); [and] a special management area use permit, which authorizes development with a value exceeding \$65,000 or which may have a substantial adverse environmental or ecological effect (taking into account potential cumulative effects).¹¹⁴

In granting these permits, the county permitting authority also considers whether the development complies with SMA guidelines designed to ensure access to public beaches and recreation areas, control sewage disposal, regulate site clearing for construction, and generally prohibit adverse environmental effects.¹¹⁵ Maui, Hawaii, and Kauai counties have designated their plan commissions as their permitting authority, while Honolulu has made it a council function.¹¹⁶

In Honolulu, the administration of the SMA permit system (filing for

113. Honolulu, Haw., Rev. City-County Charter §§ 5-406, 6-1003, 6-1007, and 6-1009.

114. HAW. REV. STAT. § 205A-28. (1975).

115. HAW. REV. STAT. § 205A-26 (1975).

116. City and County of Honolulu, Ordinance 4529 (Dec. 1, 1975).

permits, hearings, and so on) is the responsibility of its director of the Department of Land Utilization (DLU). It is the city council, however, that decides whether the permit will be granted. Honolulu also requires a mini-environmental impact analysis whenever the DLU director determines that a proposed project requiring an SMA permit "may significantly affect the special management area and that sufficient information to evaluate this impact is not available."¹¹⁷ However, if an environmental impact statement has been prepared under either the HEIS or the NEPA, an applicant is excused from that requirement.

2. FLOOD HAZARD AREAS

Honolulu's participation in the federal flood insurance program is implemented through ordinances at the county level. A relatively new ordinance structure emphasizes the FIRM and FHBM as keys to enforcement of flood protection regulations.¹¹⁸

The flood hazard districts ordinance established four districts: floodway, flood fringe, coastal high hazard, and general floodplain. The flood hazard districts cover all areas so designated on the FHBMs and FIRMs prepared by the FIA.¹¹⁹ The flood hazard districts are overlay districts and all land uses within these districts must comply with their regulations as well as with the applicable restrictions of the underlying zoning district. The new ordinance then sets out permitted uses and provides general construction standards for each district. It also contains sections dealing with variances, exemptions, and nonconforming uses, all required by the federal program. The director of the DLU, with the assistance of the chief engineer of the Department of Public Works and the building superintendent, is responsible for its administration.

The ordinance begins by setting a series of broad general construction, water, and drainage standards applicable to developments in all four districts. They follow individual standards for each district, with the degree of restriction dependent upon the likelihood of, and proximity to, a flooded area. The floodway district, since it comprises the areas required to carry or discharge the flood without increasing the flood elevation of the floodplain more than one foot at any point, is the most heavily restricted district. Only a few nonstructured uses, such as farming, are permitted, and then only if they do not adversely affect the carrying capacity of the floodway. The flood fringe district, the portion of the floodplain outside the floodway, is considerably more permissive.

117. *Id.* at §§ 1-C-(1), -(7), and 5 through 10.

118. D. CALLIES, *REGULATING PARADISE: LAND USE CONTROLS IN HAWAII* 112-13 (1984).

119. City and County of Honolulu, Ordinance 80-62, §§ 21- 11.3(a) and 21-11.5.

Uses otherwise allowable in the underlying zoning district are permitted, provided that the lowest habitable floor is elevated to the regulatory flood level (the 100-year flood) as shown on the FIRM.¹²⁰ The restrictions in the coastal high hazard district, the area subject to high velocity waters, including tsunamis, are similar to those in the flood fringe district.

According to the Civil Defense Tsunami Inundation map of Oahu, most of the waterfront planning area is within the projected inundation zone, except areas within Honolulu harbor from pier 2 to pier 21. According to the Federal Flood Insurance Rate map, the entire shoreline area is designated either "C—Area of Minimal Flooding" or "A4—Area subject to the 100-year flood." A4 areas have a base flood elevation of four feet above mean sea level. Areas inland of the "C" designated areas are not within the flood hazard district.

VI. A Cut Across: The Public Trust Doctrine and Waterfront Development

While there has been no major litigation in Hawaii so far on the nature of the public trust doctrine affecting waterfront development, cases from other jurisdictions with substantial waterfront areas have resulted in substantial limitations on private ownership and development of at least those waterfront areas below mean high tide, with a minority of jurisdictions imposing such public trust requirements further inland.¹²¹ It is therefore worth briefly considering the potential limitations on such private development on the Honolulu waterfront.

The public trust doctrine in the United States is essentially U.S. property law limitations on the ability of private parties to hold tidelands, submerged land, and other shoreland areas in fee simple absolute. This limitation on ownership—and hence private development—results from the peculiar nature of such shoreland areas as natural resources to be enjoyed by the public at large, either in the lands' entirety or for certain public purposes, often of a recreational nature.¹²² Such rights as the public has by virtue of the public trust doctrine are generally held to be inalienable either in whole or in part, so that a government may not convey for development such right to a private party, or, arguably, so use the land itself so as to conflict with the rights of the public in waterfront

120. *Id.* at §§ 21-11.4, -11.6, -11.7, -11.8.

121. *See, e.g.*, discussion and cases cited in Kiefer, *The Public Trust Doctrine: State Limitations on Private Waterfront Development*, 16 REAL ESTATE L.J. 146 (1987).

122. For a more complete justification, see Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

areas.¹²³ Obviously, the key question in any jurisdiction in which the doctrine is applied is the geographical extent of the lands so subject (submerged lands? tidelands? to low-water mark? high-water mark? beyond?) followed by the extent to which property rights in such lands are held by the government in trust for the public.¹²⁴ The permissible uses government may make, as trustee, also varies state to state.¹²⁵ May a governmental entity lease any or all land impressed with a public trust for private development, and, if so, what kinds?

There is no clear answer to these questions for Hawaii, which does appear to recognize public trust rights of sorts beyond the legal rule that beach areas, at least to the point of the highest wash of the normal tidal wave, is incapable of private ownership and belongs exclusively to the public via the State of Hawaii.¹²⁶ Under these circumstances, it is fair to say that at least the public trust doctrine will need to be considered in any waterfront development in Honolulu.

VII. Conclusion

The development of waterfront areas not only requires careful planning, but also careful legal analysis and research. Virtually every type of land-use planning and environmental law applicable to the land development process in a jurisdiction is sure to apply to any but the most trifling of waterfront projects. While Honolulu is perhaps an unusual example given the range and sophistication of its land-use and environmental laws applicable to the land development process, it is in many ways typical of what is required for waterfront development in coastal states of the United States. It is also blessed with a single agency that has at least the legal authority to undertake public-private development with a maximum of efficiency in cutting through local land-use planning requirements, if efficiency is the goal. Such agencies are increasingly common both nationally and internationally with the undertaking of major development projects, often in waterfront areas. So long as thorough planning and a measure of popular participation are not altogether sacrificed, the use of such agencies is probably an acceptable solution to the development of waterfront areas in a complex regulatory system.

123. See, e.g., *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892); *Borough of Neptune v. Avon-by-the-Sea*, 61 N.J. 296, 294 A.2d 47 (N.J. 1972); *State v. Superior Court*, 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713 (1981).

124. Kiefer, *supra* note 121, at 159-62.

125. *Id.* at 163 *et seq.*

126. Application of Ashford, 50 Haw. 314, 440 P.2d 76 (Haw. 1968). See also Town and Yuen, *Public Access to Beaches in Hawaii*, 10 HAW. B.J. 5 (1973).

