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Thomas R. McKeon

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STATE REGULATION OF SUBDIVISIONS: DEFINING THE BOUNDARY BETWEEN STATE AND LOCAL LAND USE JURISDICTION IN VERMONT, MAINE, AND FLORIDA

*Thomas R. McKeon**

I. INTRODUCTION

The growth of state control over land use invites immediate controversy.¹ Land use control traditionally has been part of the realm of local government.² To some landowners, the idea of local government having a say in what they do with their own property is difficult to accept—allowing state or regional government to interfere would be intolerable.³ Opponents of state control consider a layer of bureaucracy beyond local planning boards a burden on development and a deterrent to economic growth.⁴ Yet, to supporters of state control, leaving to local government the protection of our nation's increasingly precious land from profit-seeking landowners and developers would be a national tragedy.⁵ These proponents assert that

* Executive Editor, 1991-1992, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

¹ ROBERT G. HEALY & JOHN S. ROSENBERG, *LAND USE AND THE STATES* 1 (2d ed. 1979).

² *Id.*

³ See BERNARD H. SIEGAN, *OTHER PEOPLE'S PROPERTY* 12 (1976). Siegan equates the right to do as one chooses with one's property with a civil right. *Id.* at 13. One of developers' most common complaints is that there are already too many governmental agencies requiring permits, resulting in a good deal of overlap, inefficiency, and confusion. See FRED P. BOSSELMAN ET AL., *THE PERMIT EXPLOSION* 20 (1976).

⁴ See HEALY & ROSENBERG, *supra* note 1, at 212.

⁵ See *id.* at 4-7. Unless local government has the political will to enforce land use powers, local zoning laws do not provide protection against environmental degradation. Arthur E. Palmer, *Environmentally Based Land Use Planning and Regulation*, 2 PACE ENVTL. L. REV. 25, 64 (1984).

a state or regional system of control is crucial for acceptable, environmentally sound growth.⁶

State approaches to land use regulation range from leaving land use decisions entirely to local government⁷ to assuming control over land use through a variety of methods.⁸ The few state governments that have attempted direct regulation of land use have tried to compromise between the proponents and detractors of state control by leaving regulation of small-scale development to local government while reviewing more significant developments themselves.⁹

State agencies that regulate land use in general and subdivisions in particular must define their jurisdiction to best serve the purpose of their enabling statute. At the same time, however, they must not expand their jurisdiction to cover those types of subdivisions that would be inefficient for the state to review and thus better left to local government.¹⁰ This balance is difficult to strike. The best definition of jurisdiction would be readily apparent to landowners and developers, so that they would be able to plan ahead knowing their status with the state agency.¹¹ The definition also would be comprehensive enough that developers could not evade review on projects that the state intended to regulate.¹² Unfortunately, a definition of jurisdiction that is efficient, consistent, and clear may leave loopholes that destroy the purpose of the state statute.¹³ On the other hand, an overly comprehensive or flexible definition of state jurisdiction may not be easily discernable and could result in both uncertainty and burdensome procedures, which would be necessary simply to discover whether a given project is subject to review.¹⁴

⁶ See HEALY & ROSENBERG, *supra* note 1, at 2.

⁷ See 5 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS, § 33.01[1][a] n.1 (1991). Until the interest in other forms of land use control surfaced in the 1970s, the standard form of land use regulation was a state zoning enabling act that granted power to local governments to carry out local zoning ordinances. 5 *id.* § 33.01[1][b]. Some states have taken minimal steps beyond local enabling acts, permitting inter-local agreements and county zoning of unincorporated areas. *Id.*

⁸ See *infra* notes 40–41 for a discussion of different types of state and regional land use control.

⁹ See Jonathan N. Brownell, *State Land Use Regulation—Where Are We Going?* 9 REAL PROP. PROB. & TR. J. 29, 30–31 (1974).

¹⁰ *Id.*

¹¹ James P. W. Goss, *Hear No Evil, See No Evil: In re Spencer and the Twilight of Judicial Scrutiny in Vermont*, 14 VT. L. REV. 501, 528 (1990).

¹² See *infra* notes 311–12 and accompanying text.

¹³ *Id.*

¹⁴ See *infra* notes 313–14, 343–46 and accompanying text.

This Comment focuses on the state programs in Maine and Vermont, which have taken direct responsibility for certain subdivision regulation, and in Florida, where the jurisdictional framework of the state land use control program provides a more flexible approach to determining whether the state or the local government has the power of review. Each of these three states has faced serious jurisdictional problems. Each has amended its land use statute several times in order to find more workable definitions of the state land use program's jurisdiction.¹⁵

All three states have approached the problem differently, but each has faced the same major issues. Their legislatures and agencies have had to decide whether to base jurisdiction on the amount of land that a particular individual or corporation subdivides—a person-based jurisdiction—or on the size or nature of the particular piece of land at issue—a land-based jurisdiction.¹⁶ They also have had to decide what criteria to use in determining the types of development and subdivision to review¹⁷ and how flexible the thresholds that those criteria determine should be.¹⁸

This Comment proposes a workable, efficient method of determining state jurisdiction over land subdivision. Section II summarizes the evolution and rationale of state involvement in the regulation of land use. Section III provides a detailed review of the ways in which legislatures, state agencies, and courts have approached jurisdiction issues in the states of Vermont, Maine, and Florida. Section IV compares and contrasts the approaches of these states in their determination of jurisdiction. Section V concludes that, given liberal judicial scrutiny and agency self-restraint, the most workable and efficient method of determining state jurisdiction over subdivisions is a land-based jurisdiction, with thresholds based on rigid criteria and staggered by location to reflect environmentally fragile areas.

II. THE EVOLUTION OF STATE INTEREST IN LAND USE AND THE JURISDICTION ISSUE

Land use control in the United States traditionally has been the domain of local government.¹⁹ The rationale underlying the concept

¹⁵ See *infra* notes 84–98, 188–96, 252, 276 and accompanying text.

¹⁶ See *infra* notes 301–31 and accompanying text.

¹⁷ See *infra* notes 336–38 and accompanying text.

¹⁸ See *infra* notes 332–35 and accompanying text.

¹⁹ HEALY & ROSENBERG, *supra* note 1, at 1.

of local control is that only local governments have both sufficient knowledge of the land in question and the ability to provide citizens with the influence necessary to plot the future course of their neighborhoods.²⁰ Therefore, most states have passed enabling statutes that grant zoning power to municipal and county governments, which then may choose to exercise the powers granted.²¹ Local control of land use regulation was virtually the only form of land control from the 1920s until about 1970.²²

In the 1960s and 1970s, advocates for tighter land use control believed that local control was insufficient to cope with certain kinds of growth.²³ State control, its proponents believed, was necessary for development that had an impact on areas larger than a local government was able to regulate under traditional zoning standards, and for development located in areas where a state had a special interest.²⁴ The pressures that created an interest in state control²⁵ included heightened environmental awareness,²⁶ municipalities' weak technical capabilities²⁷ and their inability or reluctance to use their control powers,²⁸ the ability of state government to direct development where it is needed most,²⁹ and the tendency for some communities to use zoning as an exclusionary tool.³⁰ For these reasons, there was a need for more control of residential and commercial growth than the minimum standards local communities tended to enact and enforce.³¹

²⁰ *Id.* at 212.

²¹ See 5 ROHAN, *supra* note 7, at § 33.01[1] n.1. Many localities also passed subdivision control laws in order to make sure that subdivisions fit structurally into the town. 7 *id.* § 45.01[1][a].

²² 5 *id.* § 33.01.

²³ See FRED S. BOSSELMAN & DAVID L. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* 1, 17 (1972).

²⁴ *Id.*

²⁵ For a general discussion of the rationale for the state regulation of land use, see HEALY & ROSENBERG, *supra* note 1, at 7-145; 5 NORMAN WILLIAMS, *AMERICAN LAND PLANNING LAW*, § 160.09, at 602 (1985).

²⁶ 5 WILLIAMS, *supra* note 25, § 160.09, at 602.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ See, e.g., *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 169-73, 336 A.2d 713, 722-24 (1975). States can attack exclusionary zoning by creating a state land planning agency. See *Massachusetts Anti Snob Zoning Act*, MASS. GEN. L. ch. 40B, §§ 20-23 (1979 & Supp. 1991).

³¹ HEALY & ROSENBERG, *supra* note 1, at 7.

Thus began a "quiet revolution" in which the land use control powers that states once granted municipalities began to revert to their source.³² In 1964, the American Law Institute began work on the first draft of its Model Land Development Code: a model land use statute that, intended to replace the Standard Zoning Enabling Act, contained a role for the states.³³ Some states designed their own statutes that created state agencies or regional commissions to regulate growth.³⁴ Even the federal government debated a land use bill that would have facilitated state control over land use.³⁵

Out of respect for the ability of local governments to make many local land use decisions fairly and efficiently, states asserting control over land use have limited the jurisdictions of their land use agencies.³⁶ They have taken different approaches when defining the scope of state or regional control of land use. One approach has been to follow the Model Code, which submits any development that is of regional impact or affects an area of critical concern to extra scrutiny under a state-mandated procedure before approval.³⁷ A second approach has been to use criteria such as size to differentiate between developments of state concern and those of only local concern.³⁸ The state then directly regulates any development of state concern, subjecting that development to both state and local control.³⁹ A third approach has involved zoning the whole state and letting local au-

³² *Id.* at 1; see also Ernest J.T. Loo, Note, *State Land Use Statutes: A Comparative Analysis*, 45 *FORDHAM L. REVIEW* 1154, 1160-75 (1977). For a list of sources on the history of state land use, see Myrl L. Duncan, *Agriculture as a Resource: Statewide Land Use Programs for the Preservation of Farmland*, 14 *ECOLOGY L.Q.* 401, 440 n.40 (1987).

³³ MODEL LAND DEV. CODE x-xi (Complete Text and Commentary 1975) [hereinafter MODEL CODE]. Article Seven of the Model Land Development Code mandates state control over both "areas of critical concern" and "developments of regional impact." *Id.* § 7. This Comment explains the Model Code in more detail *infra* notes 207-14 and accompanying text.

³⁴ See the statutes listed *infra* notes 37-41.

³⁵ Land Use Policy and Planning Assistance Act, S. 268, 93rd Cong., 1st Sess. (1973); see also HEALY & ROSENBERG, *supra* note 1, at 271-73.

³⁶ Brownell, *supra* note 9, at 30-31; see also MODEL CODE, *supra* note 33, at 271 n.2.

³⁷ MODEL CODE, *supra* note 33, §§ 7-201, 7-301. Florida is the only state to base its land use program substantially on the Model Code. FLA. STAT. ANN. §§ 380.012-.12 (West 1988 & Supp. 1991). Two Massachusetts regional commissions also are based on the Code. 1989 Mass. Acts 716; 1974 Mass. Acts 637; see *infra* note 215.

³⁸ See, e.g., ME. REV. STAT. ANN. tit. 38, § 482(5) (West 1989 & Supp. 1990); see *infra* notes 165-206 and accompanying text.

³⁹ Maine and Vermont have adopted this approach. ME. REV. STAT. ANN. tit. 38, §§ 481-490 (West 1989 & Supp. 1990); VT. STAT. ANN. tit. 10, §§ 6001-6090 (1984 & Supp. 1991); see *infra* notes 44-206 and accompanying text.

thorities make zoning decisions based on state-enacted criteria and under state supervision.⁴⁰ There are other variations as well.⁴¹

⁴⁰ This zoning approach, which Hawaii and Oregon have adopted, means that although all development is subject to state law, the state and local governments split enforcement responsibilities. HAW. REV. STAT. §§ 205-1 to -18 (1985 & Supp. 1991); OR. REV. STAT. §§ 197.005-.850 (1985 & Supp. 1991). Numerous states, to a lesser degree, have implemented state management of local zoning. For a general discussion, see Douglas R. Porter, *Do State Growth Management Acts Make a Difference? Local Growth Management Measures Under Different State Growth Policies*, 24 LOY. L.A. L. REV. 1015, 1016 (1991).

Hawaii has the oldest state land use statute in the nation, dating back to 1961. 5 ROHAN, *supra* note 7, § 33.03[1]. Its State Land Use Commission has divided all land in the state into four districts. HAW. REV. STAT. § 205-2 (1985). Almost half of the land is conservation land strictly controlled by the Hawaii Board of Land and Natural Resources. 5 ROHAN, *supra* note 7, § 33.03[2]. Another five percent is classified as urban and is under local jurisdiction only. *Id.* State and county government share control over the remaining land, which is zoned as either agricultural or rural. *Id.* The state lists permitted uses that are designed to protect agricultural land. HAW. REV. STAT. § 205-4.5 (1985). The county then zones locally. *Id.* § 205-5(b). The state hand is heavy as the counties' ability to permit any subdivision in these two districts is strictly limited. *Id.* § 205-4.5(b). For a general discussion of the Hawaiian approach, see 5 ROHAN, *supra* note 7, § 33.03[2].

Oregon takes a different, highly touted, approach. OR. REV. STAT. §§ 197.005-.850 (1985 & Supp. 1991); Jennifer J. Johnson & Laurie A. Bennett, *The Oregon Example: A Prospect for the Nation*, 14 ENVTL. L. 843, 851 (1984). The legislature created the Land Conservation and Development Commission. OR. REV. STAT. § 197.005 (1991). It required the Commission to establish 19 different land use goals. *Id.* § 197.040. Local governments must create local comprehensive plans that comply with those goals. *Id.* Once the Commission approves such a plan, the local government can regulate development. *Id.* Any land dispute in a locality may be appealed to the Oregon Land Use Board of Appeals. *Id.* § 197.810. The state goals extend to virtually all land use decisions. See 5 ROHAN, *supra* note 7, § 33.03[4][c].

⁴¹ Numerous states exert lesser degrees of influence on land use regulation within their boundaries. Several states have protected environmentally sensitive areas through statutes based on the Model Code's areas of critical state concern. MODEL CODE, *supra* note 33, § 7-201. In these states, once the state designates an area of critical concern for environmental or historic reasons, then development within that area must go through a state or state-mandated local review process. John M. DeGrove, *Critical Area Programs in Florida: Creative Balancing of Growth and the Environment*, 34 WASH. U. J. URB. AND CONTEMP. L. 51, 58 (1988). These states include Colorado, Florida, Minnesota, Nevada, North Carolina (in coastal areas), Oregon, and Wyoming. *Id.* at 57. Other states have created a state land use agency but endowed it merely with advisory powers. See, e.g., COLO. REV. STAT. § 24-65-103 (1988).

Another approach is to designate an area as important or fragile and create a regional planning agency to regulate development in that area. States adopting this approach have drawn jurisdictional boundaries between the regional commissions and local government. Principles defining the jurisdiction of a regional commission are often the same as those defining the jurisdiction of a state agency. For example, in California, the San Francisco Bay Conservation and Development Commission has total jurisdiction over all land use decisions, but the geographical boundaries of its jurisdiction are confined to within 100 feet landward from the high-tide mark. CAL. GOV'T CODE §§ 66604, 66610 (West 1983 & Supp. 1991). In addition, the California Coastal Commission requires each locality within its jurisdiction to create a local land use program. CAL. PUB. RES. CODE § 30500 (West 1985). The Commission then reviews

The "quiet revolution" never did sweep the nation.⁴² In the late 1970s, attitudes towards government regulation changed, and the federal government, as well as many states, lost interest in extra-local land use regulation.⁴³ In many states, however, the state land use control programs remain. Those states are still struggling, up to twenty years later, to define where their regulatory power ends and purely local power begins.

III. STATE LAND USE REGULATION: JURISDICTION OVER SUBDIVISIONS AND DEVELOPMENT IN VERMONT, MAINE, AND FLORIDA

A. Vermont's Act 250

In the 1960s, Vermont began a period of accelerated economic growth.⁴⁴ A combination of factors—including the popularity of Vermont's recreational opportunities such as skiing, its natural beauty, and its new-found accessibility from metropolitan Boston, Hartford, and New York due to the construction of interstate highways—triggered extensive economic growth and the development of rural land.⁴⁵ That growth had characteristics that made many Vermonters

each local program. *Id.* § 30519. The legislature returned much of the Commission's authority to the localities in 1976. 5 WILLIAMS, *supra* note 25, § 160.49, at 774-75.

The New Jersey Department of Environmental Protection requires permits for certain types of commercial and industrial development in coastal areas, including residential developments of 25 or more dwelling units. N.J. REV. STAT. § 13:19-3(5) to -6 (1979). New Jersey also has created regional commissions. *See id.* § 13:17 (1979 & Supp. 1991) (Hackensack Meadows Development Commission has complete zoning powers within region); *id.* § 13:18A (Supp. 1991) (Pinelands Commission requires local zoning to conform with regional guidelines, and can review any local zoning decision).

New York created, with regard to its Adirondack Mountains, one of the most pervasive jurisdictions of any state or regional planning agency. N.Y. EXEC. LAW §§ 800-820 (McKinney 1982 & Supp. 1991). It endowed the Adirondack Park Agency with three major tools to control land use. First, the agency can designate different land use districts, for which it creates regionwide "intensity guidelines" that apply to all subdivisions and other development for local authorities to follow. *Id.* § 805. Second, it creates special rules for shorelines that it considers sensitive. *Id.* § 806. Third, it requires a permit for all subdivisions and other development with a regional impact. *Id.* § 809. A complicated set of thresholds that vary with the type of land use district determine what the agency permits and what is left to the localities. *Id.* § 810; *see infra* note 340.

⁴² HEALY & ROSENBERG, *supra* note 1, at 1-2. Only 16 states had passed state or regional land use control laws as of 1985. 5 WILLIAMS, *supra* note 25, § 160.01.

⁴³ *See* SIEGAN, *supra* note 3, at 70-73.

⁴⁴ HEALY & ROSENBERG, *supra* note 1, at 41.

⁴⁵ *Id.*; *see also* 5 ROHAN, *supra* note 7, § 33.03 n.66 (1990); Duncan, *supra* note 32, at 403.

uneasy.⁴⁶ They found disturbing the subsequent decline in agriculture, the threat to Vermont's fragile ecology, the strain on municipal services, and the potential for a change in Vermont's "way of life."⁴⁷ Many municipalities never had adopted zoning laws, lacking the resources or the interest to control development.⁴⁸ Municipalities with such an interest found themselves overmatched by large developers.⁴⁹

In response to this discomfort with growth, the Vermont legislature in 1969 passed the Vermont Land Use and Development Law, popularly known as "Act 250."⁵⁰ The Act set up a permitting system that seven district commissions and a statewide Environmental Board administer.⁵¹ It requires any individual or corporation to acquire a permit before either constructing a "development" of a certain size for commercial or industrial purposes or subdividing land into a minimum number of lots.⁵²

⁴⁶ HEALY & ROSENBERG, *supra* note 1, at 41.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ VT. STAT. ANN. tit. 10, §§ 6001-6092 (1984 & Supp. 1991).

⁵¹ *Id.* §§ 6021, 6025-6027, 6081. The ability of the state to influence subdivisions extends beyond Act 250. Through the enabling legislation granting land use control powers to municipalities, the state also exercises some safety and health controls over what the local governments regulate. VT. STAT. ANN. tit. 24, § 4413 (1975 & Supp. 1991). Furthermore, subdivisions that Act 250 does not cover are subject to state health and sewage regulation. VT. STAT. ANN. tit. 18, §§ 1218-1220 (1982 & Supp. 1991).

The original Act 250's intent to have a statewide land use plan was never fulfilled. HEALY & ROSENBERG, *supra* note 1, at 40. The plan that the Environmental Board adopted in 1974 did not make it through the legislature after a wave of public sentiment opposed it. *Id.* The state since has set up regional land use commissions with the power to create regionwide land use plans and provide advisory services. VT. STAT. ANN. tit. 24, §§ 4341-4362 (1975 & Supp. 1991). Each regional commission is formed after a vote of the involved municipalities. *Id.* § 4341. It is limited to an advisory role. *Id.* §§ 4345-4345(a).

Vermont also controls rampant land speculation through a unique capital gains tax on the sale of land that was owned for a short period of time. VT. STAT. ANN. tit. 32, §§ 10001-10010 (1981 & Supp. 1991). The less time a seller owns land, the greater percentage of the profit from the sale goes to capital gains. *Id.* § 10003. The same 1987 amendment that substantially changed many aspects of Act 250 jurisdiction also amended the capital gains tax statute. 1987 Vt. Laws 64, §§ 6-12. The amendments were partly designed to let fewer subdividers and land speculators avoid either state regulation or taxes designed to control growth. *Id.* § 1.

Other state agencies have shown an interest in land use control by exercising their right to bring suit under Act 250. Goss, *supra* note 11, at 504-10. These agencies may play a significant role in Vermont land use. *Id.* The Environmental Board, however, remains the only statewide, direct regulator of subdivisions. VT. STAT. ANN. tit. 10, §§ 6001-6092 (1984 & Supp. 1991).

⁵² VT. STAT. ANN. tit. 10, § 6081(a) (1984).

1. The Act 250 Permitting Process

A person or corporation begins the Act 250 process by applying to the district commission for a permit.⁵³ The commission either can deny, issue, or conditionally issue the permit.⁵⁴ The commission bases its decision on criteria that the statute lays out.⁵⁵ Applicants may appeal commission decisions to the Environmental Board⁵⁶ and, if they wish, to the Vermont Supreme Court.⁵⁷ Questions concerning the Act's jurisdiction, however, take another route. A subdivider or a developer may ask a district commission coordinator for an advisory opinion as to whether the Act's jurisdiction applies to its particular subdivision or development.⁵⁸ The applicant can appeal the coordinator's opinion to the executive officer of the Environmental Board.⁵⁹ Neither of these opinions are binding. Binding jurisdictional decisions come from the Board itself in the form of a declaratory judgment.⁶⁰ Thus, developers seeking a binding decision either may go directly to the Board or may appeal from an executive officer opinion.⁶¹

Petitioners may appeal Environmental Board decisions to the Vermont Supreme Court.⁶² As the overseer of the state's administrative agencies,⁶³ the court has held that the Board cannot go beyond the intentions of its statute when making rules.⁶⁴ The court also has held that, when the statute is unclear, uncertainty is to be resolved in favor of the property owner.⁶⁵ Generally, the court has the tools to preserve the statute's intent to leave developments of lesser consequence in the hands of local government.⁶⁶

⁵³ *Id.* §§ 6086–6087 (1984 & Supp. 1991).

⁵⁴ *Id.*

⁵⁵ *Id.* The criteria include the development or subdivision's effect on air and water pollution, water supply, soil erosion, transportation conditions, educational and other municipal services, and the historic or aesthetic nature of the location. *Id.*

⁵⁶ *Id.* § 6089.

⁵⁷ *Id.*

⁵⁸ *Id.* § 6007(c); Vt. Env'tl. Bd. Rule 3(C) (1982).

⁵⁹ VT. STAT. ANN. tit. 10, § 6007(c).

⁶⁰ Vt. Env'tl. Bd. Rule 3(D) (1982).

⁶¹ *Id.* at 3(C)–(D).

⁶² VT. STAT. ANN. tit. 10, § 6089 (1984).

⁶³ *In re Agency of Admin.*, 141 Vt. 68, 76, 444 A.2d 1349, 1352 (1982).

⁶⁴ *Id.* at 76, 444 A.2d at 1352.

⁶⁵ *In re Vitale*, 157 Vt. 580, 584, 563 A.2d 613, 616 (1989).

⁶⁶ *Agency of Admin.*, 141 Vt. at 76, 444 A.2d at 1352.

In reality, although the court has overturned Board decisions,⁶⁷ it typically grants the Board a great deal of deference,⁶⁸ giving the Board's interpretations of its enabling statutes a presumption of validity.⁶⁹ Moreover, the Board's authority received a boost when the court ruled that the state legislature's ratification of the Board rules gave them the force of statute.⁷⁰ All in all, the court's deference has enabled the Board to broaden and strengthen state jurisdiction over subdivisions.⁷¹

2. Act 250's Jurisdiction over Subdivisions

Although the motivation behind Act 250 was a desire to control all the land in the state, the Vermont legislature limited the scope of the law to prevent the bureaucratic difficulties that would ensue if the state assumed the entire burden of subdivision control.⁷² As a result, determining jurisdiction has caused difficulties for property owners and regulators since the Act's inception.⁷³ The resulting legislative and administrative wrangle has plagued Act 250 as the legislature and the Board have wrestled over the question of how

⁶⁷ See *id.* at 80, 444 A.2d at 1354; *Committee to Save the Bishop's House, Inc. v. Medical Center Hosp. of Vt., Inc.*, 137 Vt. 142, 151, 400 A.2d 1015, 1020 (1979).

⁶⁸ *Vitale*, 157 Vt. at 588, 563 A.2d at 615. One critic strenuously has argued that the Vermont Supreme Court has failed in its supervision of Vermont's Environmental Board. Goss, *supra* note 11, at 510.

The Vermont Supreme Court's practice of strictly construing land use regulations in favor of property owners has been severely eroded. In the past few years, the Court has adopted increasingly expansive interpretations of state and local governments' ability to regulate land use at the expense of traditional common law property rights. In reviewing decisions of administrative agencies, the Court has not engaged in a deferential standard of review, but has written a blank check to agencies in their findings of fact and conclusions of law.

Id.

⁶⁹ *In re Burlington Hous. Auth., Declaratory Ruling No. 124*, 143 Vt. 80, 83, 463 A.2d 215, 217 (1983).

⁷⁰ *In re Spencer*, 152 Vt. 330, 334, 566 A.2d 959, 962-63 (1989). This ruling has had a large impact on the Board as its rules now cannot be *ultra vires*. Interview with Aaron Adler, Assistant Executive Officer to the Environmental Board, in Montpelier, Vt. (Oct. 29, 1990) [hereinafter Adler interview]. The Board is now uncertain whether it can amend the rules without legislative approval. *Id.*

⁷¹ See *infra* notes 107-18, 151-64 and accompanying text.

⁷² *In re Agency of Admin.*, 141 Vt. 68, 76, 444 A.2d 1349, 1352 (1982). According to the Vermont Supreme Court, "[t]he Act was a philosophic compromise between a desire to protect all the lands and environment of the state of Vermont, and the need to avoid an administrative nightmare." *Id.*; cf. *Committee to Save the Bishop's House, Inc. v. Medical Center Hosp. of Vt., Inc.*, 137 Vt. 142, 151, 400 A.2d 1015, 1020 (1979) (intent of legislature in Act 250 was only to become involved in land use decisions where activity on major scale is planned).

⁷³ Brownell, *supra* note 9, at 31. Jonathan Brownell was one of the framers of Act 250.

much state regulation is appropriate.⁷⁴ The concept of the state regulating major subdivision activity and large commercial and industrial developments while leaving the remainder to the localities has prevailed in spite of questions about the system's efficiency and fairness.⁷⁵

Act 250's jurisdiction applies to any individual or corporation who sells or offers to sell any interest in any "subdivision," commences construction on a "subdivision" or "development," or commences a "development" without a permit.⁷⁶ According to the Act, a "subdivision" is created when a person or corporation that owns or controls tracts of land within the area of a district commission divides that land into ten or more lots within a period of five years.⁷⁷ The Act defines a "development" as any commercial or industrial development involving more than ten acres of land in a municipality with zoning and subdivision laws, or any such development involving only one acre in a municipality without zoning and subdivision laws.⁷⁸

This Comment focuses on state jurisdiction over subdivisions. Vermont's problems defining its jurisdiction over subdivisions have come from the Act's definitions of "control,"⁷⁹ "person,"⁸⁰ and "subdivision,"⁸¹ and from the shift in emphasis from the land itself to the person subdividing it.⁸² Using Act 250's definition of "development," the state has managed to extend its review power over subdivisions, creating further controversy.⁸³

3. Act 250's Definitions of "Subdivision" and "Control"

The original Act 250 defined "subdivision" as a tract⁸⁴ or tracts of land, owned or controlled by a person, that for the purpose of resale

⁷⁴ Stephanie J. Kaplan, *The Effect of Act 250 on Prime Farmland in Vermont*, 6 VT. L. REV. 467, 501 (1981).

⁷⁵ *Id.*

⁷⁶ VT. STAT. ANN. tit. 10, § 6081(a) (1984 & Supp. 1991).

⁷⁷ *Id.* § 6001(19).

⁷⁸ *Id.* § 6001(3) (Supp. 1991).

⁷⁹ See *infra* notes 105-27 and accompanying text.

⁸⁰ See *infra* notes 128-50 and accompanying text.

⁸¹ See *infra* notes 84-103 and accompanying text.

⁸² See *infra* notes 91-96 and accompanying text.

⁸³ See *infra* notes 151-64 and accompanying text.

⁸⁴ Act 250 defines "tract" as one, undivided, uninterrupted parcel of land. *In re* New England Assocs., Declaratory Ruling No. 175, at 5 (Vt. Envtl. Bd. 1987). Therefore, property divided by a road or stream already constitutes two tracts and is not subdivided when one parcel is sold. *Id.*; see *infra* notes 205-06 and accompanying text for a discussion of Maine's approach.

have been divided into ten or more lots both within a radius of five miles of any point on any lot and within any continuous period of ten years.⁸⁵ It defined "lot" as an interest in land of less than ten acres.⁸⁶ The definition of "lot" spawned the first battle over jurisdiction.⁸⁷ In order to avoid Act 250 review, developers would create so-called "spaghetti" lots: thin lots with short road frontage extending far enough back to surpass ten acres.⁸⁸ The first major statutory revision of the Environmental Board's jurisdiction came with the 1984 amendment to Act 250 that dropped the ten-acre exception from the definition of "lot."⁸⁹

The most significant revision of the state jurisdiction occurred in 1987, when the Vermont legislature sought to close certain loopholes in the law.⁹⁰ The primary thrust of the 1987 amendment was redefining the term "subdivision."⁹¹ Previously, in order to trigger Act 250 jurisdiction, a subdivider would have needed to subdivide any tract or tracts of land within a radius of five miles into ten or more lots.⁹² The 1987 amendments expanded the radius of five miles to the area of a district commission.⁹³ Therefore, when determining whether a particular subdivision falls under state jurisdiction, the Environmental Board now counts all the lots that the subdivider has created within the district commission where the subdivision is located: an area averaging 1,374 square miles.⁹⁴

⁸⁵ 1969 Vt. Laws 250, § 2(9).

⁸⁶ *Id.* § 2(6).

⁸⁷ Duncan, *supra* note 32, at 436; Susan Hamilton & Susan Clark, *Parcellizing Vermont*, VT. ENVTL. REP. 10, 11 (1986).

⁸⁸ See Kaplan, *supra* note 74, at 501.

⁸⁹ 1984 Vt. Laws 114, § 1.

⁹⁰ 1987 Vt. Laws 64, § 1. The legislature found that Vermont was experiencing a fresh increase in subdivision activity, and acted to "ensure appropriate Act 250 review." *Id.* The 1987 amendment also redefined "person" and created the Act 250 Disclosure Form. *Id.* § 2; see *infra* notes 128-50 and accompanying text. In addition, the amendment revised the land gains tax to step up enforcement and discourage land speculation. 1987 Vt. Laws 64, §§ 6-13; see *supra* note 51.

⁹¹ 1987 Vt. Laws 64, § 2.

⁹² 1969 Vt. Laws 250, § 2(3).

⁹³ 1987 Vt. Laws 64, § 2.

"Subdivision" means a tract or tracts of land, owned or controlled by a person, which the person has partitioned or divided for the purpose of resale into 10 or more lots within a radius of five miles of any point on the lot, or within the same jurisdictional area of the same district commission, within any continuous period of five years. In determining the number of lots, a lot shall be counted if any portion is within five miles or within the jurisdictional area of the same district commission.

Id. (emphasis added). To ease the impact on developers, the amendment also reduced the time that lots could accumulate from 10 years to five. *Id.*

⁹⁴ *Id.* Act 250 divides Vermont into seven districts. VT. STAT. ANN. tit. 10, § 6001(4)

The effect of this change on defining Act 250 jurisdiction was far-reaching. It shifted the focus from the size of a proposed subdivision to the past subdivision activity of the subdivider within the particular district commission.⁹⁵ The determination of jurisdiction now requires inquiry into the previous subdivision activity of a subdivider to discern whether that subdivider is a "person" that "controlled" any lots previously subdivided within the district.⁹⁶

A further extension of the definition of "subdivision" came with the passage of the Environmental Board rules,⁹⁷ which since have gained the force of statute.⁹⁸ Rule 2(B) clarifies when a person has created a subdivision that requires a permit.⁹⁹ The rule requires a permit as soon as the person either sells the first lot of a subdivision with the intention of selling a total of ten lots, files a plat plan with ten lots recorded, or offers to sell a tenth lot in the same district within a five-year period.¹⁰⁰ In enforcing Rule 2(B), the Board has gone beyond the specific indications of intent to subdivide listed in the rule.¹⁰¹ For example, when a state employee, using another name, phoned a subdivider to ask if any lots were for sale, and the subdivider replied, "not yet," the Board held the reply to be a sufficient indication of an intent to subdivide.¹⁰² On the other hand, the Board was unwilling to rule that a landowner intended to develop the second phase of a subdivision even though the landowner had made ambiguous statements about future subdivision while presenting the first phase to a planning commission, and only a short time had elapsed between the announcement to subdivide the second

(Supp. 1991). The total area of Vermont is 9617 square miles. THE WORLD ALMANAC 641 (Mark S. Hoffman ed., 1991). That total divided by seven equals 1374 square miles per district commission.

⁹⁵ See *infra* notes 301-31 and accompanying text.

⁹⁶ See VT. STAT. ANN. tit. 10, § 6001(19) (Supp. 1991).

⁹⁷ Vt. Env'tl. Bd. Rule 2(B) (1990).

⁹⁸ *In re Spencer*, 152 Vt. 330, 334, 566 A.2d 959, 962-63 (1989).

⁹⁹ Vt. Env'tl. Bd. Rule 2(B) (1990).

¹⁰⁰ *Id.* Herein lies a jurisdictional peculiarity of Act 250. If a person develops and conveys nine lots, there is no review. If the same person then divides a different parcel into two lots within five years, the new two-lot subdivision falls under Act 250 review. The original subdivision only falls under review if still unconveyed. Adler interview, *supra* note 70; see also *In re Black Willow Farm*, Declaratory Ruling No. 202, at 5-10 (Vt. Env'tl. Bd. 1988) (first phase of project does not come under review retroactively after announcement of second phase if first phase did not require review on its own, and second phase was not planned at the time of first phase). Once conveyed, a lot no longer is "owned or controlled" by the subdivider. *In re Shelburne Farms*, Declaratory Ruling No. 310, at 3 (Vt. Env'tl. Bd. 1989).

¹⁰¹ *In re Whiteham*, Executive Officer Opinion No. 88-106, at 6 (Vt. Env'tl. Bd. Apr. 20, 1989).

¹⁰² *Id.*

phase and approval for the first phase.¹⁰³ Therefore, the first phase escaped state review.¹⁰⁴

The definition of "subdivision" is most likely to create uncertainty when the determination of state jurisdiction rests on whether a particular subdivider "owns or controls" the tracts of land to be subdivided.¹⁰⁵ By using the word "or," the Vermont legislature intended that lots were to count against a developer who controlled land without actually owning it, thus eliminating a possible end run around the statute.¹⁰⁶ Exactly what "control" entails, however, has been hard to determine.

The Vermont Supreme Court backed the Environmental Board's liberal definition of "control" when it examined a developer's obvious attempt to escape jurisdiction in *In re Vitale*.¹⁰⁷ The issue in that case was whether a developer crossed the one-acre threshold in Act 250's definition of "development."¹⁰⁸ The buyer of a 1.57-acre parcel refused to accept the deed for a .58-acre section of the parcel, taking only a .99-acre section but paying the purchase price for the entire 1.57-acre parcel.¹⁰⁹ The seller had no access to the .58-acre section, rendering it useless to him.¹¹⁰ Only after completion of construction on the first section did the seller convey the second.¹¹¹ The Board ruled that the two sections were the same parcel for the purposes of determining jurisdiction.¹¹² On appeal, the court treated "control" as a question of fact, acknowledging the possibility of *de facto* control in addition to purely legal control.¹¹³

The Vermont Supreme Court also considered the definition of control over subdivisions in *In re Eastland, Inc.*¹¹⁴ Eastland, a development company buying land, made the arrangements for the seller to subdivide the land and directed and paid for the necessary

¹⁰³ *In re Black Willow Farm*, Declaratory Ruling No. 202, at 9 (Vt. Env'tl. Bd. 1988).

¹⁰⁴ *Id.*

¹⁰⁵ VT. STAT. ANN. tit. 10, § 6001(19) (Supp. 1991).

¹⁰⁶ *In re Eastland, Inc.*, 151 Vt. 497, 500, 562 A.2d 1043, 1045 (1989).

¹⁰⁷ *In re Vitale*, 151 Vt. 580, 563 A.2d 613 (1989).

¹⁰⁸ *Id.* at 591, 563 A.2d at 615. In a municipality without zoning laws, and for a project to be a "development" requiring Act 250 review, the project must involve more than one acre. VT. STAT. ANN. tit. 10, § 6001(3) (Supp. 1991).

¹⁰⁹ *Vitale*, 151 Vt. at 590, 563 A.2d at 614.

¹¹⁰ *Id.* at 592, 563 A.2d at 616.

¹¹¹ *Id.* at 590, 563 A.2d at 614.

¹¹² *Id.*

¹¹³ *Id.* at 592, 563 A.2d at 616. The court noted that, "[f]or all practical purposes, [the developer] controlled the .58 acre lot, although legal title remained with the seller." *Id.*

¹¹⁴ 151 Vt. 497, 562 A.2d 1043 (1989).

survey before actually purchasing the land.¹¹⁵ Eastland and the seller also signed a purchase and sale agreement before subdividing the land.¹¹⁶ The court found that Eastland had a "restraining or directing" influence over the land.¹¹⁷ It held that the intent of Act 250 was to require review when a developer enjoys the fruits of a subdivision but tries to avoid review by not subdividing the land itself.¹¹⁸

In subsequent decisions, the Board confirmed that, when parties sign a purchase and sale agreement, the buyer receives certain rights to survey or market the land.¹¹⁹ The land need not be conveyed in order for the buyer to attain control.¹²⁰ If the sale of the land will not go forward without the seller's agreement to subdivide, or if the buyer pays for and arranges for costs associated with subdivision, then the buyer has control for the purposes of Act 250.¹²¹

The Vermont Supreme Court recently examined the issue of control in a complex case involving numerous companies that the defendant and his family members owned or partially owned. In *Vermont Environmental Board v. Chickering*,¹²² the court held that a person who dominates the activities of a corporation that is subdividing land controls the subdivision for the purposes of Act 250 jurisdiction.¹²³ The court described this domination of a company as "functional control" and noted that, to have functional control, a person does not need to have any ownership interest.¹²⁴ The court emphasized, as it had in *Eastland*,¹²⁵ that when an individual's aim is to avoid

¹¹⁵ *Id.* at 499, 562 A.2d at 1043.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 501, 562 A.2d at 1045. Eastland, having signed the sales contract, also had equitable rights in the land. *Id.*

¹¹⁸ *Id.*

¹¹⁹ *In re Mitchell*, Declaratory Judgment No. 203, at 8 (Vt. Env'tl. Bd. 1989).

¹²⁰ *Id.*

¹²¹ *In re Harvard Management Co.*, Executive Officer Opinion No. 89-193, at 4 (Vt. Env'tl. Bd. July 24, 1990).

¹²² *Vermont Env'tl. Bd. v. Chickering*, ___Vt. ___, 583 A.2d 607 (1990).

¹²³ *Id.* at ___, 583 A.2d at 609. The case involved a total of 18 lots scattered across four tracts and 13 different corporations that owned or conveyed one or more of the lots. *Id.* The trial court found that the defendant had control of eight of the corporations. *Id.* The Vermont Supreme Court held that, by his activities, the defendant could have had functional control of the other five as well. *Id.* at ___, 583 A.2d at 610-11. The trial court had gauged control by the percentage of the defendant's stock ownership instead of by the level of his involvement with the companies. *Id.* at ___, 583 A.2d at 610, 612.

¹²⁴ *Id.* at ___, 583 A.2d at 613. The defendant claimed that the lots in which he had only a 50% interest would only count as 50% of a lot for the purposes of Act 250 jurisdiction. The trial court agreed. The Supreme Court firmly rejected that view as inconsistent with the statute. *Id.* at ___, 583 A.2d at 610 n.3.

¹²⁵ 151 Vt. 497, 501, 562 A.2d 1043, 1045 (1989).

the statute, the court will disregard legal fictions such as dummy corporations.¹²⁶ According to the court, the Environmental Board had proven that the defendant controlled the lots in question and needed a permit in order to subdivide the land.¹²⁷

4. Act 250's Definition of "Person"

Act 250 requires a person commencing development or subdividing land to get a permit.¹²⁸ The definition of "person" is particularly important due to the Act's emphasis, in determining jurisdiction, on the actual subdivider.¹²⁹ The Act's original definition of "person" included not only individuals but also larger entities such as corporations.¹³⁰ Both the Board and the Vermont Supreme Court liberally interpreted this definition.¹³¹ The court, for example, held that land held by a husband and wife and land owned by the husband alone were owned by the same person.¹³² It assumed that tenants in the entirety have an independent interest in the land for the purposes of the Act.¹³³ The court also found each individual in a joint ownership to be a person for the purpose of determining Act 250 jurisdiction.¹³⁴

To ensure appropriate Act 250 review of subdivisions, the Vermont legislature expanded the definition of "person" in its 1987 amendments to the Act.¹³⁵ The new definition applies only to subdivisions,

¹²⁶ *Chickering*, —Vt. at —, 583 A.2d at 612. "[A] court will disregard the fiction of a corporation's separate identity whenever the concept is asserted in an endeavor to circumvent a statute and defeat legislative policy." *Id.* (quoting *Brennan v. Saco Construction, Inc.*, 381 A.2d 656, 662–63 (Me. 1978)).

¹²⁷ *Id.*

¹²⁸ VT. STAT. ANN. tit. 10, § 6081 (1984 & Supp. 1991).

¹²⁹ See *supra* notes 90–96 and accompanying text.

¹³⁰ 1969 Vt. Laws 250, § 2(8). The original definition of the word "person" was "an individual, partnership, corporation, association, unincorporated organization, trust or any other legal or commercial entity, including a joint venture or affiliated ownership." *Id.*

¹³¹ *In re Spencer*, 152 Vt. 330, 335, 566 A.2d 959, 963–64 (1989) (court approved Board's construction of definition of "person").

¹³² *Id.* at 335, 566 A.2d at 964. Although *In re Spencer* was decided after the 1987 amendment redefining "person," the subdivision took place before the amendment, making the old definition applicable. *Id.* The court rejected the defendant's argument that the addition of family members to the new definition of "person" meant that they were not included under the original Act. *Id.*

¹³³ *Id.*

¹³⁴ *Id.* "'Spencer and wife' do not comprise a separate 'person' . . . from 'Spencer and [an associate]' or Spencer, himself." *Id.*

¹³⁵ 1987 Vt. Laws 64, § 2. The amendment added the following language to the original definition:

A. Person: . . .

iii. includes individuals and entities affiliated with each other for profit, consideration, or any other beneficial interest derived from partition or division of land.

not other types of development.¹³⁶ Leaving the old definition intact, the legislature simply broadened its scope by emphasizing the significance of a party's financial interest in the land at issue.¹³⁷ The amendment stated that a "person" includes individuals or entities affiliated with each other for profit, consideration, or any other beneficial interest they could derive from partitioning land.¹³⁸ The new definition also includes family members unless the family member in question can show no financial interest in the subdivision.¹³⁹

In order to increase enforcement of the Act in light of the new, broader definition of "person," the legislature created the Act 250 Disclosure Form.¹⁴⁰ When it records a new subdivision, the seller or partitioner of the new subdivision also must record a copy of the

iv. includes an individual's parents and children, natural and adoptive, and spouse, unless the individual establishes that he or she will get no profit or consideration, or acquire any other beneficial interest from the partition of land by the parent, child or spouse.

Id. Section B lists those individuals or entities that are presumed not to be affiliated unless they have a financial interest in the subdivision. They include stockholders with less than a five-percent interest, agents such as realtors or attorneys, and lending institutions. *Id.*

¹³⁶ *Id.* Act 250 jurisdiction over "development," as opposed to "subdivisions," is not person-based. When determining jurisdiction, the Environmental Board only considers development within five miles by the same developer, not development within an entire district commission. VT. STAT. ANN. tit. 10, § 6001(3) (Supp. 1991). Therefore, there is no reason for an expansive definition of "person." See *infra* notes 301-31 and accompanying text.

¹³⁷ 1987 Vt. Laws 64, § 2.

¹³⁸ *Id.*

¹³⁹ *Id.* Overall, the new amendment is very similar to the court's interpretation of the old statute. In a memo explaining the amendment, the Board included examples of its application:

Example: After July 1, 1987, Jane subdivided and sold four lots in Dover (District No. 2). In 1988, Jane and a friend Jerry buy land in Guilford (also District No. 2) and subdivide six lots. Jerry's name is on the title, but Jane has contributed part of the purchase price and will share the profit. The Guilford subdivision will require an Act 250 permit. Jane is affiliated with Jerry for profit in the subdivision, and any lots which she has created within the last five years within the same district (or within five miles) will be counted.

Example: Nancy owns 25% of the stock of ABC corporation. ABC Corporation owns land in Randolph (District 3), which it subdivides into eight lots and sells after July 1, 1987. In 1988, Nancy purchases land in Bethel (also District 3), which she subdivides into five lots. Nancy's subdivision will require an Act 250 permit. Because she is a significant owner (5% or more of outstanding shares in ABC Corporation), she is considered to be affiliated with ABC Corporation. Therefore Act 250's subdivision activities within the district will be attributable to her.

Darby Bradley, Chairman, Environmental Board, Memorandum to Those Interested in Act 250 Amendments 3 (July 2, 1987) (on file with the Environmental Board, Montpelier, Vt.)

These examples demonstrate how passing title can lead to disputes. It is very difficult to know what other lots can be attributable to a given subdivider. Adler interview, *supra* note 70.

¹⁴⁰ 1987 Vt. Laws 64, § 2.

Form in order to report all of its previous subdivision activity.¹⁴¹ The purpose of the Form is to catch subdividers who otherwise would escape Act 250 jurisdiction by trying to ensure that their accumulation of subdivided lots went unreported.¹⁴² Therefore, the Act currently requires the state to look at individuals who might benefit from a subdivision to determine if any of these beneficiaries had an interest in any other subdivisions in the previous five years.¹⁴³

Applying the new definition of "person," one Environmental Board executive officer found that two individuals who were associated with the same real estate corporation at the time they negotiated a purchase and sale agreement, who signed the agreement together, and who both profited from the transaction were affiliated for profit and therefore constituted a person for the purposes of the Act.¹⁴⁴

In another case, the Board found the definition of "person" a close question. In *In re Mitchell*,¹⁴⁵ a subdivider provided a contractor with the right to negotiate with lot buyers for contracts to grade and build on the land.¹⁴⁶ In fact, three of the lots bore covenants stipulating that the contractor would build the lot's home.¹⁴⁷ The contractor even represented the subdivider in planning commission hearings.¹⁴⁸ The Board found that, although the contractor and landowner were affiliated for profit, they derived their profit from the construction, not the subdivision itself,¹⁴⁹ and that the lots in question therefore could not be attributed to the contractor.¹⁵⁰ The *Mitchell* ruling thus may limit the Act's otherwise expansive definition of person.

5. "Development" and the Road Rule

The power of the Vermont Environmental Board to regulate "development" further extends its power to regulate subdivisions.¹⁵¹ The statute empowers the Board to require permits for commercial or industrial developments that are owned or controlled by a person

¹⁴¹ *Id.* § 3.

¹⁴² *Id.*

¹⁴³ *Id.* § 2.

¹⁴⁴ *In re Harvard Management Co.*, Executive Officer Opinion No. 89-193, at 3 (Vt. Env'tl. Bd. July 24, 1990).

¹⁴⁵ *In re Mitchell*, Declaratory Judgment No. 203 (Vt. Env'tl. Bd. 1989).

¹⁴⁶ *Id.* at 8.

¹⁴⁷ *Id.* at 3.

¹⁴⁸ *Id.* at 2-5.

¹⁴⁹ *Id.* at 8.

¹⁵⁰ *Id.*

¹⁵¹ VT. STAT. ANN. tit. 10, § 6001(3) (Supp. 1991).

and involve more than ten acres of land within a radius of five miles on any point of involved land within a continuous period of five years.¹⁵² In towns without zoning laws, as well as in towns that have zoning by-laws and would prefer a one-acre threshold over a ten-acre threshold, the threshold for state jurisdiction over developments is one acre.¹⁵³

The Board, using Act 250's definition of "development,"¹⁵⁴ has increased its jurisdiction over subdivisions significantly through one of its rules.¹⁵⁵ Rule 2(A)(6), the so-called "Road Rule," extends Act 250 jurisdiction over any road either 800 feet long or providing access to more than five parcels, as long as the land involved meets the required size thresholds for a development.¹⁵⁶ The construction also must be "incidental to the sale or lease of land."¹⁵⁷ By requiring a permit for such a road, which is common in smaller subdivisions, the Board effectively exerts control over a large category of subdivisions otherwise uncovered under Act 250.¹⁵⁸

The Vermont Supreme Court turned aside challenges to the Road Rule in *In re Spencer*, in which the court gave the Board Rules the

¹⁵² *Id.* "Development" means the construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five or more miles of any point on any involved land, for commercial or industrial purposes." *Id.* The definition extends Act 250 jurisdiction to anything built above 2,500 feet in elevation, including subdivisions. *Id.* It also regulates condominiums and housing projects of more than 10 units that meet the acreage requirements. *Id.*

¹⁵³ *Id.* The lower threshold for towns without zoning laws is in keeping with the purpose of state land use agencies to regulate those municipalities that cannot or will not do so on their own. See *supra* notes 27-28 and accompanying text. Towns with zoning laws may opt to require state review at the lower thresholds. *Id.*

¹⁵⁴ VT. STAT. ANN. tit. 10, § 6001(3) (Supp. 1991).

¹⁵⁵ See *In re Spencer*, 152 Vt. 330, 334, 566 A.2d 959, 962 (1989).

¹⁵⁶ Vt. Envtl. Bd. Rule 2(A)(6) (1982). A "development" triggering Act 250 jurisdiction includes

[t]he construction of improvements for a road or roads, incidental to the sale or lease of land, to provide access to or within a tract of land of more than [one or ten acres, depending on whether the municipality has both permanent zoning and subdivision by-laws,] owned or controlled by a person For the purpose of determining jurisdiction, any parcel of land which will be provided access by the road is land involved in the construction of the road. The jurisdiction shall not apply unless the road is to provide access to more than five parcels or is to be more than 800 feet in length. For the purpose of determining the length of a road, the length of all other roads within the tract of land constructed within any continuous period of ten years . . . shall be included.

Id.

¹⁵⁷ *Id.* This clause satisfies the "commercial purpose" requirement in the definition of "development." VT. STAT. ANN. tit. 10, § 6001(3); cf. *In re Spring Valley Dev.*, 300 A.2d 736, 742 (Me. 1973).

¹⁵⁸ VT. STAT. ANN. tit. 10, § 6001(19) (Supp. 1991).

strength of statute.¹⁵⁹ The Board has applied the rule when a subdivider adds a length of road as short as 210 feet to an existing piece of road of 775 feet, putting it over the 800-foot limit.¹⁶⁰ The Board has not been willing, however, to extend Act 250 jurisdiction over a driveway serving a single dwelling at the end of a road.¹⁶¹

The Board has been liberal in its interpretation of the rule's phrase "incidental to the sale of land."¹⁶² It has held that, if a farmer builds a road, the road is not a development requiring a permit unless the farmer planned to sell or subdivide the land.¹⁶³ The Board also has held, however, that a landowner who built a road was subject to the Act on the grounds that the landowner "mused" that he would like to build a trailer park at some time in the future, and had taken a few concrete steps toward construction.¹⁶⁴

B. Maine's Site Location of Development Act

The Maine legislature passed the Site Location of Development Act¹⁶⁵ in 1970 in response to many of the same pressures that inspired Vermont's Act 250. Interstate highways and the growing national interest in outdoor sports brought a surge of recreational development north to Maine.¹⁶⁶ These factors, combined with the increasing industrial development of the Maine coast motivated the state to assume a role in land use planning.¹⁶⁷ Concerned with the threat that uncontrolled growth posed to Maine's natural beauty, and the inability of many municipalities to provide sophisticated review, the state legislature passed the Site Location Act to protect Maine citizens from environmental harm that could be caused by the improper siting of large developments.¹⁶⁸

¹⁵⁹ 152 Vt. 330, 334, 566 A.2d 959, 962; *see supra* note 70.

¹⁶⁰ *In re Loomis Highlands*, Executive Officer Opinion No. 88-140, at 3 (Vt. Env'tl. Bd. Sept. 28, 1989).

¹⁶¹ *In re Petrie*, Declaratory Ruling No. 130, at 2 (Vt. Env'tl. Bd. 1981).

¹⁶² *See In re Goldsmith*, Env'tl. Bd. Order No. 341, at 3 (Vt. Env'tl. Bd. Oct. 8, 1987).

¹⁶³ *Id.*

¹⁶⁴ *In re Ciampi*, Executive Officer Opinion No. 89-188, at 3 (Vt. Env'tl. Bd. Feb. 13, 1990).

¹⁶⁵ ME. REV. STAT. ANN. tit. 38, §§ 481-490 (West 1989 & Supp. 1990).

¹⁶⁶ *See Alison Rieser, Managing the Cumulative Effects of Coastal Land Development: Can Maine Law Meet the Challenge*, 39 ME. L. REV. 321, 335 (1987).

¹⁶⁷ *Id.*

¹⁶⁸ ME. REV. STAT. ANN. tit. 38, § 481 (West 1989). The most compelling reason for state review of development is the technical inability of Maine's rural towns to handle the increasingly complex nature of environmental review. Interview with Jeff Madore, Department of Environmental Protection, in Augusta, Me. (Nov. 20, 1990) [hereinafter Madore interview].

1. The Site Location Act's Review Process

The Act empowers a Board of Environmental Protection (BEP), operating within the state Department of Environmental Protection (DEP), to require any development, including subdivisions, of a certain size to undergo review.¹⁶⁹ A developer that is uncertain about whether its development falls under the BEP's jurisdiction may write for an advisory opinion.¹⁷⁰ If jurisdiction applies, then the BEP must deny, permit, or conditionally permit the developer's project.¹⁷¹

The BEP bases its decision on specified criteria, which it has a good deal of discretion when applying.¹⁷² Unlike Vermont, there are no intermediary decisionmakers such as the district commissions.¹⁷³

¹⁶⁹ ME. REV. STAT. ANN. tit. 38, § 483-A (West Supp. 1990). The Site Location Act is not the only type of subdivision regulation that Maine imposes. The state's Protection of Natural Resources Act requires a BEP permit for the construction of any structure in certain environmentally sensitive areas. *Id.* §§ 480A-480S (West 1989 & Supp. 1990). These sensitive areas include rivers, streams, great ponds, fragile mountain areas, freshwater wetlands, significant wildlife habitats, and coastal sand dunes. *Id.* § 480A. The statute's sensitive areas are very similar to the Model Code's "areas of critical concern." MODEL CODE, *supra* note 33, § 7-201.

The Legislature also has exerted state control over land use in Maine's huge area of unorganized territories. ME. REV. STAT. ANN. tit. 12, §§ 683-685B (West 1981 & Supp. 1990). It created the Land Use Regulatory Commission to define minimum land use standards and directly regulate most development within the unorganized territories. *Id.* §§ 683, 685-B. The Commission's jurisdiction includes subdivisions of three or more lots of less than 40 acres each. *Id.* § 682(2). Lots of over 40 acres that are not in the shoreline zone are exempted. *Id.* So-called "spaghetti lots," those which have a shoreline-to-depth ratio greater than five to one, are banned. *Id.* § 682(13), 682A.

The state requires local control over subdivisions of three lots or more in addition to state review of larger subdivisions under the Site Location Act. ME. REV. STAT. ANN. tit. 30-A, §§ 4401-4407 (West Supp. 1990). The state-mandated criteria for local planning boards are very similar to the criteria for DEP under the Site Location Act. *Id.* § 4404. Like the Land Use Act, 40-acre lots are exempted, and there is a ban on "spaghetti lots." *Id.* § 4401(4), (17).

¹⁷⁰ Code Me. R. § 203262 (1991).

¹⁷¹ ME. REV. STAT. ANN. tit. 38, § 485-A(1) (West Supp. 1990). The Board has the option of convening a hearing before making a decision. *Id.* The Board has delegated decisions on applications of less than 75 acres and fewer than 25 lots to the Commissioner of Environmental Protection and the DEP staff. See Tybe A. Brett, *General Discretion Under Maine's Site Location of Development Law*, 41 ME. L. REV. 1, 8 (1989).

¹⁷² ME. REV. STAT. ANN. tit. 38, § 484 (West 1989 & Supp. 1990). These criteria include the financial capacity of the developer, as well as the development's effect on traffic movement, the environment, erosion, groundwater, flooding, open space, and infrastructure such as sewage and roads. *Id.* The criterion requiring BEP to consider the development's effect on the environment is expansive. The developer must make "adequate provision for fitting the development harmoniously into the existing natural environment and [ensure] that the development will not adversely affect existing uses, scenic character, air quality, water quality, and other natural resources. . . ." *Id.* See generally, Brett, *supra* note 171, at 10.

¹⁷³ VT. STAT. ANN. tit. 10, § 6026 (1984 & Supp. 1991); see *supra* notes 51-55 and accompanying text.

The Site Location Act, however, does transfer the state's powers of review to any municipality that shows the competence to do a site review.¹⁷⁴

2. Jurisdiction Under the Site Location Act

Jurisdiction under the Site Location Act is concretely defined. The legislature sought to control any development that, by virtue of its size or nature, would have a great impact on the environment.¹⁷⁵ Originally, the Act did not include residential subdivisions.¹⁷⁶ The Maine Supreme Court, however, ruled that the original definition of development included residential subdivisions created for commercial goals, whether a developer intended to build or merely to subdivide its property.¹⁷⁷ The legislature eventually explicitly included subdivisions meeting specific size thresholds in the Act's definition of "development."¹⁷⁸

The Site Location Act now extends the BEP's jurisdiction to any subdivision, on any parcel of twenty or more acres, that a person splits up into five or more lots over a period of five years.¹⁷⁹ Unlike Vermont, jurisdiction centers only on the particular piece of land at issue, not the person subdividing. The BEP does not consider any other land the person has subdivided when totaling subdivided land for jurisdictional purposes.¹⁸⁰

Although the twenty-acre threshold has made jurisdiction in Maine simpler to determine than jurisdiction in Vermont,¹⁸¹ it has presented

¹⁷⁴ ME. REV. STAT. ANN. tit. 38, § 489-A (West Supp. 1990). The BEP still reserves review of subdivisions of over 100 acres. The municipality must enact standards at least as stringent as the Site Location Act and have a professional staff. *Id.*

¹⁷⁵ *Id.* § 481.

¹⁷⁶ 1969 Me. Laws 571; see also *In re Spring Valley Dev.*, 300 A.2d 736, 742-43 (Me. 1973). For a history of Maine's different statutory definitions for "development" and "subdivision," see J. Jackson Walter, *The Law of the Land: Development Legislation in Maine and Vermont*, 23 ME. L. REV. 315, 335 n.80 (1971).

¹⁷⁷ *Spring Valley Dev.*, 300 A.2d at 742-43; see also *In re Belgrade Shores, Inc.*, 371 A.2d 413, 414-15 (Me. 1977) (state jurisdiction extends to land merely subdivided with no intention to develop).

¹⁷⁸ 1971 Me. Laws 613, §§ 2, 3.

¹⁷⁹ ME. REV. STAT. ANN. tit. 38, § 482(2)(G), (5) (West 1989 & Supp. 1990). The definition of "subdivision" does not include apartment and condominium complexes, but the state may regulate such complexes if they are built in a shoreland zone, or if they are large enough to be defined as a "structure." *Id.* § 482(2)(E), § 482(2)(H), § 482(2-D), § 482(6). Road construction only triggers Site Location Act jurisdiction when the road itself covers an area of three acres or more. *Id.* § 482(6)(B).

¹⁸⁰ See *infra* notes 301-31 and accompanying text. Compare ME. REV. STAT. ANN. tit. 38, § 482(5) (West Supp. 1990) with VT. STAT. ANN. tit. 10, § 6001(19) (Supp. 1991).

¹⁸¹ Madore interview, *supra* note 168.

its own problems. The proliferation of 19- to 19.9-acre subdivisions has resulted in a lack of government review for numerous projects¹⁸² that substantially may affect the state's environment and quality of life.¹⁸³ Moreover, many developers have escaped the Act's five-year requirement by retaining land in a given parcel but declaring that they have no intent to subdivide for five years.¹⁸⁴ When these developers do develop their land, only the land they actually subdivide is counted for the purposes of the twenty-acre threshold, not the land that they have retained.¹⁸⁵ Therefore, over fifteen years, a developer could subdivide three noncontiguous fifty-nine-acre farms in the same town into as many lots as possible without state review as long as the lots were not within the immediate vicinity of each other, and there was no common scheme of development.¹⁸⁶

The Maine legislature experimented with several exceptions to the Site Location Act.¹⁸⁷ Until 1989, the Act provided exceptions for large lot subdivisions.¹⁸⁸ It exempted from review those subdivisions in which all the lots each were at least ten acres in size.¹⁸⁹ It also

¹⁸² See *In re Keene Woods Subdivision*, Advisory Opinion at 1 (Me. Dep't Env'tl. Protection Nov. 2, 1990) (developer escaped review of 24-acre development by buying back a six-acre parcel from Homeowner's Association); *In re L.P. Guerin Estates*, Advisory Opinion at 1 (Me. Dept. Env'tl. Protection June 19, 1990) (developer reduced one lot's acreage by 0.132 acres in order to bring total area of subdivision to 19.985 acres); see also Rieser, *supra* note 166, at 338.

¹⁸³ ME. REV. STAT. ANN. tit. 38, § 481 (West 1989 & Supp. 1990).

¹⁸⁴ The DEP only counts the acreage that the developer intends to develop over the next five years. Code Me. R. § 203246 (1991). In fact, the DEP pointed out to one potential subdivider, who was applying for a permit to subdivide part of its land, that "no reference to possible future development of retained land should be made. The Site Law can and has been applied to projects where an intent to further subdivide has been shown . . . [DEP] suggest[s] you make no reference to further subdivision possibility." *In re Whelan*, Advisory Opinion at 1 (Me. Dep't Env'tl. Protection Mar. 30, 1990).

For a brief period, the Act required that BEP consider the size of the entire parcel when determining jurisdiction, not just the area to be subdivided. 1987 Me. Laws 812, § 7. The Site Law was amended to return to the original method of arriving at the 20 acres. 1989 Me. Laws 497.

¹⁸⁵ ME. REV. STAT. ANN. tit. 38, § 482(5) (West Supp. 1990).

¹⁸⁶ See *id.* Every five years, retaining the rest of each tract, the subdivider could divide 19 acres on each farm every five years. See *id.*

¹⁸⁷ *Id.* There are minor exceptions as well. Lots sold to family members or abutting landowners, lots given as gifts or conservation easements, and lots given as security interests do not count. *Id.* Also, the Site Location Act does not apply to the unorganized territories regulated by the Land Use Regulatory Commission. *Id.* § 488(1). The Legislature also has exempted low-density subdivisions where the subdivider voluntarily accepts strict environmental measures to permanently protect land. *Id.* § 488(5)(B).

¹⁸⁸ 1975 Me. Laws 712. The legislative history of the five- and 10-acre exemptions is convoluted. See 1987 Me. Laws 737, § C; 1987 Me. Laws 812, § 7.

¹⁸⁹ 1975 Me. Laws 712.

exempted subdivisions where all the lots were at least five acres in size, and the subdivision encompassed less than 100 total acres, depending on whether the municipality had passed subdivision regulations.¹⁹⁰

Like Vermont,¹⁹¹ Maine had created these exceptions with the belief that larger lot subdivisions were less likely to cause environmental harm.¹⁹² In Maine, there was no problem with "spaghetti lots," because the ten-acre exception required that lots be able to hold a rectangle of 200 feet by 300 feet.¹⁹³ The state's problems instead resulted from speculation in lots, as there was nothing in the Site Location Act to prevent a purchaser of exempt five-acre lots from turning around and subdividing each of those lots into four additional lots without state review. The end result would have been the same as if the original developer had subdivided the parcel into numerous lots.¹⁹⁴ To halt this abuse, the legislature repealed the five- and ten-acre exceptions.¹⁹⁵ A modified exception for forty-acre lots outside shoreland zones and an absolute exception for lots greater than 500 acres survive.¹⁹⁶

By considering the land, and not the person subdividing land, the Site Location Act has not required the complex analyses of "person" and "control"¹⁹⁷ that are necessary under Vermont's Act 250.¹⁹⁸ When the parcel is the focus of the law, it does not matter who "controls" the parcel.¹⁹⁹ If land meets the statutory requirements, it undergoes review, no matter who owns it or no matter what other land its owner may have subdivided.²⁰⁰

¹⁹⁰ *Id.*

¹⁹¹ See *supra* notes 87-89 and accompanying text.

¹⁹² *Drive to Close Land Use Loophole Faces Fierce Fight*, MAINE SUNDAY TELEGRAM, Apr. 3, 1988, at 1, col. 3 [hereinafter *Land Use Loophole*].

¹⁹³ 1975 Me. Laws 712.

¹⁹⁴ Madore interview, *supra* note 168. This practice also occurs in Vermont and is known as "pyramiding." See Hamilton & Clark, *supra* note 87, at 12.

¹⁹⁵ 1989 Me. Laws 769, §§ 2-4.

¹⁹⁶ ME. REV. STAT. ANN. tit. 38, § 482(5)(C)-(C-1) (West Supp. 1990). The shoreland zone exception was a recent compromise between environmentalists who wanted the 40-acre exception removed to end speculation and wood lot owners who wanted to be able to exchange land quickly. *Land Use Loophole*, *supra* note 192, at 1, col. 3.

¹⁹⁷ ME. REV. STAT. ANN. tit. 38, § 482(4) (West 1989 & Supp. 1990). The Site Location Act defines "person" as "any person, firm, association, partnership, corporation, municipal or other local government entity, quasi-municipal entity, state agency, educational or charitable organization or institution or any other legal entity." *Id.* Maine has no definition of "control."

¹⁹⁸ VT. STAT. ANN. tit. 10, § 6001(4), (19) (Supp. 1991); see *supra* notes 105-50 and accompanying text.

¹⁹⁹ ME. REV. STAT. ANN. tit. 38, § 482(5) (West Supp. 1990).

²⁰⁰ See *id.*

Furthermore, the Act provides jurisdiction over a single parcel even if control of the parcel is divided among several people.²⁰¹ Parcels that are part of a "common scheme of development" may be treated as a single parcel.²⁰² Elements of a common scheme include common ownership, management, equipment, or financing.²⁰³ The lots under construction also must be in the immediate vicinity of each other to be considered part of the same subdivision.²⁰⁴ The parcels, however, need not be contiguous.²⁰⁵ If they are divided by an artificial barrier such as a railroad or highway, the determination of whether they are one subdivision for the purposes of the Act's jurisdiction is an issue of fact the resolution of which depends on whether the parcels are part of a common scheme of development.²⁰⁶

C. Florida and the Model Code

One result of the interest in statewide land use regulation in the 1970s was the American Law Institute's Model Land Development Code.²⁰⁷ The Model Code was designed to update the Standard Zon-

²⁰¹ *Id.*; see also *In re Burnt Meadow Rd.*, Advisory Opinion at 3 (Me. Dep't Env'tl. Protection Apr. 13, 1990) (parcel of land to be subdivided required review even though different sections were owned by different people).

²⁰² Code Me. R. § 203241 (1991).

²⁰³ *Id.*

"Common scheme of development" means a plan or process of development which :

1. Takes place on contiguous or non-contiguous parcels or lots in the same immediate vicinity; and
2. Exhibits characteristics of a unified approach, method or effect such as:
 - a. unified ownership, management or supervision;
 - b. sharing of common equipment or labor; or
 - c. common financing.

Id.; see also *Burnt Meadow Rd.*, Advisory Opinion at 3 (common scheme found when different owners of nearby plots built road together and prepared common site plans).

²⁰⁴ Code Me. R. § 203241 (1991). The common scheme inquiry does create an expanded definition of "person" in that the different owners of each parcel may be treated as one person subdividing land. See, e.g., *In re Little River Farms Subdivision*, Advisory Opinion at 1 (Me. Dep't Env'tl. Protection May 24, 1990). However, because the lands to be combined must be in the immediate vicinity of each other, the focus of jurisdiction determination remains on the land and not the person. See Code Me. R. § 203241 (1991).

²⁰⁵ See *In re Gregor-Mouse Subdivision*, Advisory Opinion at 1 (Me. Dep't Env'tl. Protection Mar. 19, 1990) (strip of railroad-owned land sufficient to divide land into two parcels).

²⁰⁶ *Board of Env'tl. Protection v. Bergeron*, 434 A.2d 25, 27 (Me. 1981) (whether two sections of land divided by public road are same parcel is determined by level of integration between two sections).

²⁰⁷ MODEL CODE, *supra* note 33, at 1. The 12-year process of drafting the Code "coincided with a period of history of American land law notable for the changes which have taken place. . . ." Fred S. Bosselman, *Some Observations on the American Law Institute's Model Land Development Code*, 8 URB. L. 474, 474 (1976).

ing and Planning Enabling Act,²⁰⁸ which many states had adopted in order to grant localities control over land development.²⁰⁹ The Model Code, while maintaining local government as the primary arbiter of local land use issues, also created a role for the states.²¹⁰ The drafters of the Code envisioned a state-supervised approval process for any development with the potential to have impacts beyond the particular locality that otherwise would have regulatory responsibility for the development.²¹¹ Exercising power through a state adjudicatory board, the state would review any development within "area[s] of critical state concern"²¹² or "development of regional impact" (DRI).²¹³ To enable a state agency to define a DRI, the Code proposed a set of criteria.²¹⁴ State regulation of subdivisions under the Model Code would occur when a subdivision fit the definition of a DRI.

Florida is the only state to adopt substantially all the provisions of the Model Code.²¹⁵ Florida's need for the state regulation of development is perhaps greater than any other state in the nation.²¹⁶ It is one of the nation's more fragile ecosystems.²¹⁷ Moreover, in this

²⁰⁸ MODEL CODE, *supra* note 33, at 1 (commentary to art. 1).

²⁰⁹ *Id.* at 248 (commentary to art. 7).

²¹⁰ *Id.*

²¹¹ *Id.* § 7-303.

²¹² *Id.* § 7-201.

²¹³ *Id.* § 7-301.

²¹⁴ *Id.* § 7-301. The Code suggests that the criteria include the size of the development as well as its impact on the environment, transportation, population, subsidiary development, and the integrity of any unique qualities in the local area. For further explanation, see *id.* at 271 (text and notes to art. 7).

²¹⁵ 5 ROHAN *supra* note 7, § 33.03[5][a] n.318. Florida adopted many of the Code's concepts, such as "areas of critical concern," DRIs, and local review governed by a state agency. HEALY & ROSENBERG *supra* note 1, at 134.

States that have adopted modified versions of the Code's idea of "areas of critical concern" include Colorado, Florida, Minnesota, Nevada, North Carolina, Oregon, and Wyoming. See DeGrove, *supra* note 41, at 57-58. Two regional planning commissions in Massachusetts also are based on the Model Code in that they both contain the "area of critical concern" and the "development of regional impact" (DRI) components. The Martha's Vineyard Commission has the power to review and permit DRIs and any development in areas of critical concern. 1974 Mass. Acts 637. The Commission sets the criteria for DRIs. 1977 Mass. Acts 831, § 12. Local planning boards or officials then determine whether a development is a DRI. *Id.* § 13; see also Morey v. Martha's Vineyard Comm'n, 409 Mass. 813, 817-20, 569 N.E.2d 826, 829-31 (1991) (Commission procedure allowing other municipalities besides local permitting authority to refer projects to Commission as DRIs was *ultra vires*). The small size of the Commission's geographical jurisdiction lessens the impact of jurisdictional issues. 5 WILLIAMS, *supra* note 25, § 160.39, at 745 n.49. The newly formed Cape Cod Commission is similar to the Martha's Vineyard Commission. 1989 Mass. Laws 716.

²¹⁶ DeGrove, *supra* note 41, at 52-53.

²¹⁷ Thomas G. Pelham, *Regulating Developments of Regional Impact: Florida and the Model Code*, 29 U. FLA. L. REV. 789, 792-93 (1977).

century, the state has been the site of one of the nation's most massive population and development explosions.²¹⁸ In response, the state embraced the Model Code through the passage of the Environmental Land and Water Management Act (ELWMA) in 1972.²¹⁹

The Florida statute, unlike those in Maine and Vermont, does not provide for direct state permitting of land subdivision.²²⁰ The state, however, does distinguish between larger developments that have a regional impact and must go through a state-mandated review process, and those developments that are small enough to require only local review.²²¹ Even though the regulation of subdivision is not central to Florida's land use policy, the state's Act presents jurisdictional questions similar to those that Maine and Vermont face when regulating subdivisions.

1. The ELWMA Permitting Process

In Florida, there are three major parties in the permit process for a DRI:²²² the local government,²²³ the regional planning commission,²²⁴ and the Department of Community Affairs (DCA), which serves as the state land planning agency.²²⁵ A developer wishing to build a project that is a DRI must take part in a preapplication conference with the regional planning commission; this conference serves to streamline the review process.²²⁶ The developer then sub-

²¹⁸ DeGrove, *supra* note 41, at 52-53; Pelham, *supra* note 217, at 792-93.

²¹⁹ FLA. STAT. ANN. §§ 380.012-.12 (West 1988 & Supp. 1991).

²²⁰ *Id.*; *cf.* ME. REV. STAT. ANN. tit. 38, §§ 481-490 (West 1989 & Supp. 1990), VT. STAT. ANN. tit. 10, §§ 6001-6092 (1984 & Supp. 1991).

²²¹ FLA. STAT. ANN. § 380.06(1) (West 1988). The definition of "development" includes the subdivision of land into three or more parcels. *Id.* § 380.04(1). Therefore, a "development" of regional impact could include subdivisions.

²²² For an overview of the process, see generally Bruce D. Partington, *Frith Revisited: Practice and Procedure Under Florida's Development of Regional Impact Statutes*, 6 J. LAND USE & ENVTL. L. 107 (1990); Claire B. Carraway, Note, *Florida's DRI Statute: Alternatives to the Standard DRI Review*, 13 STETSON L. REV. 619, 628-36 (1984).

²²³ FLA. STAT. ANN. § 380.031(11) (West 1988). Until 1985, at which point the state required zoning boards, a developer did not need to go through the DRI process if there was no local zoning board. 1985 Fla. Laws ch. 85-45, § 43. In 1985, the legislature passed the Local Government Comprehensive Planning and Land Development Regulation Act, which required local planning agencies to establish land development regulations. FLA. STAT. ANN. §§ 163.3161-.3243 (West 1991); *cf.* VT. STAT. ANN. tit. 10, § 6001(3) (Supp. 1991) (state review is more stringent in municipality without zoning regulations).

²²⁴ FLA. STAT. ANN. § 380.031(15) (West 1988).

²²⁵ *Id.* § 380.032.

²²⁶ *Id.* § 380.06(7). There are procedures through which a developer may go in order to allow it to commence development at its own risk before getting approval. *Id.* § 380.06(8) (West Supp. 1991).

mits its application for a permit to the local planning agency, the regional planning commission, and the DCA.²²⁷ The regional commission studies the regional impact of the development and reports its findings to the local government.²²⁸ The local authority renders a decision approving or denying the application and, if necessary, attaching appropriate fees, conditions, and requirements.²²⁹

The state's role increases in the appeals process.²³⁰ Developers may appeal any decision by the local authority to the Administration Commission, which is comprised of the Governor and the Cabinet and acts as the Florida Land and Water Adjudicatory Commission (FLWAC).²³¹ Appeal may be made for almost any reason,²³² but may only be made by the owner, developer, regional agency, or DCA.²³³ Appealing a local decision before the FLWAC is the only way that the state planning agency may become involved directly with the approval of a DRI.²³⁴

The state can cede some of its authority over DRI review in two ways. ELWMA allows the certification of local governments to carry out DRI review in lieu of the regional system.²³⁵ Furthermore, it allows developers to apply for areawide DRI approval.²³⁶ Once the DCA approves an area plan, a developer may carry out development according to that plan without further review.²³⁷

²²⁷ *Id.* § 380.06(10)(a) (West 1988).

²²⁸ *Id.* § 380.06(12). Criteria for determining a development's regional impact include its potential impact on the environment, natural and historical resources, economy, water and sewer services, and transportation. *Id.*

²²⁹ *Id.* § 380.06(14)–.06(15) (West 1988 & Supp. 1991). Local governments must consider a development's consistency with the state development plan, the local comprehensive plan and local regulations, and the regional planning agency's report. *Id.*

²³⁰ *Id.* § 380.07 (West 1988). The state has no input into the local government's initial decision. *Id.* § 380.06(12).

²³¹ *Id.* § 380.07(1); Carraway, *supra* note 222, at 634–36.

²³² THOMAS G. PELHAM, STATE LAND USE PLANNING AND REGULATION 30 (1979) *quoted in* Carraway, *supra* note 222, at 634.

²³³ FLA. STAT. ANN. § 380.07(2) (West 1988); *see also* Friends of Everglades, Inc. v. Board of County Comm'rs of Monroe County, 456 So. 2d 904, 909 *reh'g denied* 462 So. 2d 1108 (Fla. 1st Dist. Ct. App. 1984) (environmental groups denied standing to appeal a local decision to the FLWAC); Caloosa Property Owners Ass'n v. Palm Beach County Bd. of County Comm'rs, 429 So. 2d 1260, 1263, *reh'g denied* 438 So. 2d 831 (Fla. 1st Dist. Ct. App. 1983) (neighboring property owners denied standing to appeal a local decision to FLWAC).

²³⁴ Because the DCA does not enter the local review process, the only way in which it can stop a DRI is by appeal to the FLWAC. *See* FLA. STAT. ANN. § 380.07 (West 1988).

²³⁵ *Id.* § 380.065.

²³⁶ *Id.* § 380.06(25) (West 1988 & Supp. 1991).

²³⁷ *Id.*

2. ELWMA's Jurisdiction over Land Use: Defining "Development of Regional Impact"

The state does play a direct role in determining the ELWMA's jurisdiction.²³⁸ If in doubt regarding its project's status, a developer may apply directly to the DCA for a letter determining whether its particular development is a DRI.²³⁹ The DCA letter is binding on all parties.²⁴⁰ The decision to issue a binding letter is at the sole discretion of the DCA.²⁴¹ No other party, including the regional commission, has standing to appeal a binding letter.²⁴² The DCA must consider only the size thresholds that the Administration Commission has established to define a DRI.²⁴³ Developers that commence construction without such a letter do so at the risk of later being denied a permit.²⁴⁴

ELWMA's goal is to assure proper consideration of the effects that any development may have outside the jurisdiction of the local authority.²⁴⁵ When reviewing developments to determine whether they would have a regional impact and thus need permits, the DCA initially needed a clear standard so that it would not simply judge, on a case-by-case basis, those projects likely to have an impact beyond a county's borders.²⁴⁶ The legislature thus empowered the Administration Commission to set numerical thresholds to aid the DCA.²⁴⁷ These thresholds represent the sizes at which different types of projects are presumed to have a regional impact.²⁴⁸ Because the regional impact of a development may have causes that these thresholds do not consider, however, the thresholds are presumptive

²³⁸ *Id.* § 380.06(4) (West 1988).

²³⁹ *Id.* The DCA or local authority can require a developer to apply for a binding letter if the development exceeds certain numerical thresholds. *Id.* § 380.06(4)(b)(1). Authorities in a locality adjacent to the development also may request a binding letter. *Id.* § 380.06(4)(b)(2)(c).

²⁴⁰ See Carraway, *supra* note 222, at 627.

²⁴¹ *Id.*

²⁴² *Id.* Regional planning agencies cannot appeal. South Florida Regional Planning Council v. Florida Land and Water Adjudicatory Comm'n, 372 So. 2d 159, 165 (Fla. 1st Dist. Ct. App. 1979). Neighboring property owners also are denied the right to appeal. Suwannee River Area Council, Boy Scouts of Am. v. State Dep't of Community Affairs, 384 So. 2d 1369, 1374 (Fla. 1st Dist. Ct. App. 1980).

²⁴³ FLA. STAT. ANN. § 380.06(4)(b) (West 1988).

²⁴⁴ *Id.*

²⁴⁵ *Id.* § 380.06(1).

²⁴⁶ Pelham, *supra* note 218, at 798.

²⁴⁷ FLA. STAT. ANN. § 380.06(2)(a) (West 1988).

²⁴⁸ *Id.*

rather than conclusive.²⁴⁹ Therefore, the DCA must contemplate other factors when determining whether a project is a reviewable DRI.²⁵⁰

Because of the presumptive nature of the thresholds and the quantity of information that the DCA needed to make a determination of whether a project was a DRI requiring review, the pre-DRI review process began to resemble the review process itself.²⁵¹ In a 1985 amendment to the ELWMA, the legislature attempted to render the pre-review process less flexible while preventing size from becoming the sole determinant of whether a development required review under the Act.²⁵² Through the 1985 amendment, the legislature created what it called a "band of presumption."²⁵³ Now, any development sized from eighty percent to 100% of the mandated threshold is presumed not to be a DRI,²⁵⁴ and any development sized from 100% to 120% of the mandated threshold is presumed to be a DRI.²⁵⁵ A development sized above 120% of the threshold is by law a DRI,²⁵⁶ and one sized below eighty percent of the threshold is by law not a DRI.²⁵⁷ Consequently, where a project is sized between eighty percent and 120% of the thresholds designated for that type of project, the DCA has the discretion to consider other factors in determining whether ELWMA has jurisdiction.²⁵⁸

ELWMA provides other types of jurisdictional flexibility besides the "band of presumption." For example, different types of devel-

²⁴⁹ *Id.*

²⁵⁰ In *General Dev. Corp. v. Division of State Planning*, the Florida First District Court of Appeals emphasized the presumptive nature of the guidelines, finding that they do not "reduce the Division's responsibility under 380.06(4) [the binding letter provision] to a mechanical chore of counting dwelling units or making other quantitative calculations. The presumption afforded by the Rule is to be respected, but the Division still must *decide*; and in decision the Rule must not . . . swallow the statute. . . ." 353 So. 2d 1199, 1208-09 (Fla. 1st Dist. Ct. App. 1978); *see also* *Suwannee River Area Council, Boy Scouts of Am. v. State Dep't of Community Affairs*, 384 So. 2d 1369, 1374 (Fla. 1st Dist. App. 1980) (DCA carried out "careful and detailed examination of the character, magnitude and location or the development . . ." although development was not presumptively DRI).

²⁵¹ Thomas G. Pelham, et al., *Managing Florida's Growth: Toward an Integrated State, Regional, and Local Comprehensive Planning Process*, 13 FLA. ST. U. L. REV. 517, 562 (1985).

²⁵² 1985 Fla. Laws ch. 85-45, § 46.

²⁵³ FLA. STAT. ANN. § 380.06(2)(d) (West 1988).

²⁵⁴ *Id.* § 380.06(2)(d)(2)(a).

²⁵⁵ *Id.* § 380.06(2)(d)(2)(b).

²⁵⁶ *Id.* § 380.06(2)(d)(1)(b).

²⁵⁷ *Id.* § 380.06(2)(d)(1)(a).

²⁵⁸ For developments falling within the "band of presumption," the 1985 amendment assumes that the DCA needs to consider all the factors previously required for a determination of a DRI. *See General Dev. Corp. v. Division of State Planning*, 353 So. 2d 1199, 1208-09 (Fla. 1st Dist. Ct. App. 1978).

opment require the application of different criteria for the determination of whether they are DRIs.²⁵⁹ The criteria reflect whether the impact of a given type of project will be regional.²⁶⁰ For example, residential development thresholds are based on the number of living units to be built, petroleum tank thresholds are based on the number of barrels the tank will hold, and performance facility thresholds are based on the number of seats therein.²⁶¹

ELWMA also offers flexibility through its provision of staggered thresholds for residential developments, including subdivisions.²⁶² The thresholds that DCA uses to determine whether residential developments are DRIs are staggered according to the population of the county where the development is located.²⁶³ It is not merely the size of the project that determines impact, but also its location.²⁶⁴ A large development may have less impact in an urban area than it would in a rural area.²⁶⁵ ELWMA provides further jurisdictional flexibility by authorizing local governments, regional commissions, and the DCA to petition for a change in the thresholds for a particular jurisdiction.²⁶⁶ These three entities can make such a petition provided that the local government has shown both sufficient capability for review and good cause for the change.²⁶⁷

3. Aggregation

Because ELWMA is based upon thresholds that do not trigger jurisdiction until a residential development contains as many as 3000

²⁵⁹ FLA. ADMIN. CODE ANN. rr. 28-24.001 to 28-24.032 (1989). Types of development specified include airports, tourist attractions, recreational facilities, electrical power stations and transmission lines, hospitals, industrial plants, mining operations, office parks, petroleum facilities, port facilities, residential development, schools, retail, service and wholesale developments, hotels and motels, recreational vehicle parks, and multi-use developments. *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at rr. 28-24.010, 28-24.012, 28-24.021.

²⁶² *Id.* at r. 28-24.010. The Code defines residential development as including, but not limited to: "(a) the subdivision of any land attributable to common ownership into parcels, lots, units or interests, or (b) land or dwelling units which are part of a common plan of rental advertising or sale, or (c) the construction of residential structures, or (d) the establishment of mobile home parks." *Id.* A "dwelling unit" includes any family living space such as an apartment unit or a single house. *Id.*

²⁶³ *Id.* at r. 28-24.010. The thresholds vary by county depending on the county's population. For example, if a county's population is less than 25,000, then the DRI threshold is only 250 dwelling units; if the county's population is over 500,001, then the DRI threshold is over 3000 dwelling units. *Id.*

²⁶⁴ See MODEL CODE, *supra* note 33, § 7-301(2)(f).

²⁶⁵ Pelham, *supra* note 218, at 802-03.

²⁶⁶ FLA. STAT. ANN. § 380.06(3) (West 1988).

²⁶⁷ *Id.* § 380.06(3)(a).

dwelling units,²⁶⁸ subdividers easily can duck under the DRI threshold for a particular project. This results in a good deal of unreviewed development.²⁶⁹ Furthermore, with the determination of jurisdiction based on land and defined by high thresholds, it is possible for a developer to compile numerous projects, each under a given DRI threshold, and label each one a different development in order to avoid DRI review. In *General Development Corp. v. Division of State Planning, Department of Administration*,²⁷⁰ Florida's First District Court of Appeals addressed a case in which a developer labelled two projects as different developments.²⁷¹ The court held that the DCA was not bound to accept the developer's definition of his development. According to the court, the DCA had the power to consider other lands the developer owned as long as they were part of a common plan for rental advertising or sale.²⁷²

In 1986, the legislature addressed this loophole by granting the DCA power to aggregate separate developments using strict standards.²⁷³ It established four factors as prerequisites for combining two projects: evidence of common ownership; a master plan; voluntarily shared infrastructure; and physical proximity of the two developments to be aggregated.²⁷⁴ Developers subsequently could avoid aggregation of two developments by ensuring that there was no shared infrastructure or master plan, or that the projects were not too close together.²⁷⁵

A 1988 amendment slightly liberalized these aggregation rules.²⁷⁶ In keeping with the idea of land-based jurisdiction, ELWMA still requires the physical proximity of the developments and a well-defined, unified plan of development.²⁷⁷ In order to fit the description

²⁶⁸ See *supra* note 263 and accompanying text.

²⁶⁹ Pelham, *supra* note 218, at 803; see also HEALY & ROSENBERG, *supra* note 1, at 63.

²⁷⁰ 353 So. 2d 1199 (Fla. 1st Dist. Ct. App. 1978).

²⁷¹ *Id.* at 1207-09.

²⁷² *Id.* at 1208. The court focused on the development, not the developer. See *id.*

²⁷³ 1985 Fla. Laws ch. 85-45, § 46. The actual standards were promulgated by the Administration Commission. See FLA. ADMIN. CODE ANN. rr. 28-11.001 to 28-11.003 (1988); Elizabeth C. Bowman & David L. Powell, *The Flexible New Approach to DRI Aggregation*, 63 FLA. B. J. 54, 54 (1989).

²⁷⁴ FLA. ADMIN. CODE ANN. r. § 28-11.003 (1988).

²⁷⁵ Pelham, *supra* note 251, at 566.

²⁷⁶ 1988 Fla. Laws ch. 88-164, § 3 (codified at FLA. STAT. ANN. § 380.0651(4) (West Supp. 1991)). In *White v. Metropolitan Dade County*, the court used existing contracts between a developer and builders to bind two projects, a tennis stadium and a tennis complex, into one DRI. 563 So. 2d 117, 131 (Fla. 3rd Dist. Ct. App. 1990). Although the court applied the Administration Commission's 1986 rules, it described the 1988 amendment as further strengthening the DCA's ability to aggregate projects. *Id.*

²⁷⁷ FLA. STAT. ANN. § 380.0651(4)(a) (West Supp. 1991).

of a unified scheme of development under the 1988 amendment, the parcels to be aggregated must have any two of the following five characteristics:²⁷⁸ the same person retains or shares control of the developments;²⁷⁹ there is a reasonable closeness in time between the eighty-percent completion of one part of the project and submission of the plans for the second part of the project;²⁸⁰ a master plan exists that includes all the developments;²⁸¹ there is voluntary sharing of infrastructure between the developments;²⁸² or there is a common advertising or promotional scheme linking the developments.²⁸³ These aggregation rules help temper the ability of a developer to exploit the high DRI thresholds and avoid review by accumulating several developments, each one just under the threshold, in one area.

IV. A FRAMEWORK FOR DETERMINING JURISDICTION OVER SUBDIVISIONS FOR STATE LAND USE AGENCIES

State legislatures and state or regional planning agencies face certain decisions as they define the scope of their jurisdiction over subdivisions and other developments. Another level of regulation beyond local control is burdensome to the regulated industry. States, in keeping with traditional notions of land use regulation, typically leave some decisions to localities, assuming that localities more efficiently can make decisions that involve local issues. Drawing the line between local and state control requires policy decisions that must take into account the goals of the state's land policy, efficiency, and the nature of development in the state.

Based on this Comment's review of state land use agency jurisdiction in Vermont, Maine, and Florida, three ingredients that would contribute to a workable concept of jurisdiction become evident. First, judicial deference to the state agency and restraint on the part of that agency are important factors for a workable definition of jurisdiction. Second, a land-based jurisdiction with certain safeguards seems superior to a person-based jurisdiction. Finally, a state agency needs rigid criteria defining its jurisdiction in order to enable both the state agency and developers or subdividers to determine

²⁷⁸ See Bowman & Powell, *supra* note 273, at 54-57 (detailed description of five factors.)

²⁷⁹ FLA. STAT. ANN. § 380.0651(4)(a) (West Supp. 1991).

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

quickly which projects require review. Moreover, the thresholds that the criteria define should be staggered to reflect the environmental sensitivity of different regions within the state.

A. *Judicial Scrutiny and Agency Restraint*

There are two factors that give a jurisdiction scheme a greater likelihood of success. First, courts must be willing to construct a state's land use control statute liberally enough to allow a state agency to enforce the law against those using legal fictions to avoid it.²⁸⁴ Otherwise, the agency would be forced to ask the state legislature for more restrictive legislation in order properly to enforce the statute.²⁸⁵ Second, an agency should avoid destroying its credibility by exploiting the long leash that the judiciary or legislature may have granted it. This problem arises when agencies pursue the farthest reaches of their jurisdiction and regulate development that the legislature did not intend to regulate.

In Maine, Vermont, and Florida, the courts have been willing to interpret the jurisdictional provisions of each state's land use statute liberally. The Vermont Supreme Court has seen through subdividers' attempts to evade Act 250 review by leaving their land in the control of other persons during subdivision.²⁸⁶ The court has found that subdividers employing such methods had actual or functional control of the land and therefore were the subdividers of the land for the purpose of determining jurisdiction.²⁸⁷ The Vermont legislature did not intend to allow subdividers or developers to avoid review by employing these techniques, because such legal fictions would gut the substantive provisions of the Act.²⁸⁸

Maine's Supreme Judicial Court also has given a broad interpretation to the state's land use jurisdiction provisions. Initially, the court extended jurisdiction to residential subdivisions when the Site Location Act not only did not specify that it covered them, but arguably excluded them.²⁸⁹ Furthermore, the court has supported

²⁸⁴ Nationally, courts have looked kindly on state land use agencies, setting aside constitutional and administrative challenges. See David E. Hess, *Institutionalizing the Revolution: Judicial Reaction to State Land-Use Laws*, 9 URB. LAW. 183, 183 (1977).

²⁸⁵ For example, Vermont's expanded definition of "person" was designed specifically to prevent land speculators from evading review. 1987 Vt. Laws 64, § 1.

²⁸⁶ See *supra* notes 105-21 and accompanying text.

²⁸⁷ See *supra* notes 107-27 and accompanying text.

²⁸⁸ See *In re Eastland, Inc.*, 151 Vt. 497, 501, 562 A.2d 1043, 1045 (1989).

²⁸⁹ *In re Spring Valley Dev.*, 300 A.2d 736, 742 (Me. 1973); see *supra* notes 177-78 and accompanying text.

liberal interpretations of the phrase "common scheme of development," explicitly announcing its intention to avoid legal fictions.²⁹⁰ Although Florida courts have been hesitant to interpret ELWMA's standing provisions liberally, it has been willing to give the DCA wide leeway determining the Act's jurisdiction.²⁹¹

Judicial support of the state agency responsible for regulating land use is important to guarantee that a state land use control statute will serve its purpose of providing another level of review for the types of developments that a state wants regulated. Allowing legal fictions to stand in the way of comprehensive review will result in either the collapse of the statute or a draconian redefinition of the state's jurisdiction.

Development interests quickly point out the dangers of liberal judicial scrutiny. They tend to dislike additional layers of regulation and are especially frustrated when regulation is unnecessarily burdensome.²⁹² The drafters of the Model Code warned against the unhappy result when land regulators expend their energy and good will defending the outer reaches of their jurisdiction instead of reviewing those projects that may have a major impact.²⁹³ For that reason, restraint on the part of state agencies must accompany the liberal judicial interpretation of state land use statutes.

The best illustration of the need for restraint is Vermont's Road Rule.²⁹⁴ The Road Rule is a product of the Environmental Board's broad interpretation of the definition of "development" that the Vermont Supreme Court later supported in *In re Spencer*.²⁹⁵ The Board's use of the construction of a small section of road to assume jurisdiction over a subdivision that by itself did not fit the definition of subdivision is troubling. The pursuit of that jurisdiction injures the credibility of the Board and imperils cooperation from developers.²⁹⁶ It also drains the resources of the agency, which ends up reviewing

²⁹⁰ *Brennan v. Saco Constr., Inc.*, 381 A.2d 656, 662 (Me. 1978).

²⁹¹ *See General Dev. Corp. v. Division of State Planning*, 353 So. 2d 1199, 1208 (Fla. 1st Dist. Ct. App. 1978) (court allowed aggregation of properties and reinforced presumptive nature of thresholds).

²⁹² *See Goss, supra* note 11, at 504 n.12; *Walter, supra* note 176, at 343.

²⁹³ MODEL CODE, *supra* note 33, at 272. The drafters noted that "a procedure of state review as outlined in this code is likely to be successful only if it concentrates on the truly important decisions. If it gets bogged down in a backlog of meaningless paperwork or minor decisions, it may create more harm than good." *Id.*

²⁹⁴ Vt. Env'tl. Bd. Rule 2(A)(6); *see supra* notes 155-64 and accompanying text. For a critique of the Road Rule, *see Goss, supra* note 11, at 510-28.

²⁹⁵ 152 Vt. 330, 335, 566 A.2d 959, 963-64 (1989).

²⁹⁶ *See Goss, supra* note 11, at 504 n.12.

subdivisions that most likely would go through review without conditions or rejection anyway. If the justification of the Road Rule is that it brings development with environmentally damaging consequences under the umbrella of review, then a better, simpler remedy would be asking the legislature for lower thresholds, not creating new categories of jurisdiction. The Board needs to balance the purpose behind the Road Rule with its effects.

Maine's BEP, because the Site Location Act is less open to interpretation, is not as prone to stretching its jurisdiction.²⁹⁷ The Florida DCA, however, has room under the "band of presumption" policy and its powers of aggregation to stretch its jurisdiction.²⁹⁸ Its broad range of discretion may invite abuse and, in the long run, may bring strong criticism and even repeal of Florida's statute. Therefore, in order for the line between state and local jurisdiction over land use to be fair and credible, the courts in a particular state must enforce the spirit of the state's land use control law, and the state land use control agency must be cautious in its interpretation of its own jurisdictional boundaries.²⁹⁹

One way a state agency can relieve the burden of state review for developers or subdividers is to use mechanisms by which the agency can pass the review of subdivisions down to qualified municipalities, thus merging two levels of review into one. Each state has the option of returning meaningful review to the localities.³⁰⁰ Although it would not solve the jurisdiction problems, the procedure partially would lessen the burden on the agency and the subdividers, meet the goals of the statute, and insure a higher quality of review for those projects left under the state's jurisdiction.

B. Person-Based as Opposed to Land-Based Jurisdiction

One choice that a state directly regulating subdivisions must face is whether to base the jurisdiction of the state land use control agency on the person subdividing or on the parcel of land being subdivided. A person-based jurisdiction is likely to be more compre-

²⁹⁷ Madore interview, *supra* note 168.

²⁹⁸ FLA. STAT. ANN. § 380.06(2)(d) (West 1988).

²⁹⁹ For an example of restraint, see *In re Mitchell*, Declaratory Judgment No. 203, at 8 (Vt. Env'tl. Bd. 1989), where the Vermont Environmental Board distinguished between affiliated parties whose profit arises out of the actual subdivision, and those whose profit is derived from construction, thus limiting the possible entanglements of an individual subdivider.

³⁰⁰ See *supra* notes 75, 174, 235-37 and accompanying text.

hensive than a land-based jurisdiction but is also more likely to encounter jurisdiction battles. A land-based jurisdiction, though less comprehensive, is much clearer and is less likely to result in conflict over jurisdiction.

Vermont's Act 250, by requiring a permit for any person who subdivides ten or more lots over five years within the area of a district commission, is not basing jurisdiction wholly on the size of any particular subdivision, but on the person dividing the land.³⁰¹ For example, a subdivider would face Act 250 review if it subdivided a parcel into seven lots, then four years later subdivided another parcel, forty miles away, into three lots.³⁰² Because of the subdivider's previous subdivision, the new subdivision would require Act 250 review.³⁰³ A "person's" subdivision activity is what triggers the permit requirement, not necessarily the size of the person's subdivision.

In contrast, the Maine Site Location Act³⁰⁴ and Florida's ELWMA³⁰⁵ both provide for land-based jurisdiction. In both states, the size of a subdivision alone triggers state review, notwithstanding any previous subdivision by the developer or subdivider.³⁰⁶ In Maine, using the same example mentioned above, if one person were subdividing two parcels of land, and each parcel were over twenty acres in size, the first parcel of seven lots would be reviewed because it would be over five lots.³⁰⁷ The second parcel would not be reviewed, because it would be only three lots. If the first parcel were under

³⁰¹ VT. STAT. ANN. tit. 10, § 6001(19) (Supp. 1991). Act 250 jurisdiction over commercial and industrial "development," as opposed to "subdivisions," could be defined as a land-based jurisdiction with a straightforward aggregation policy. *Id.* § 6001(3). By only considering a person's previous "development" within a five-mile radius, instead of within the area of a district commission, when determining jurisdiction over a new commercial or industrial "development," Act 250 effectively aggregates physically proximate parcels instead of creating a person-based jurisdiction, as it does when determining jurisdiction over "subdivisions."

³⁰² *See id.* § 6001(19) (Supp. 1991). By themselves, neither the three-parcel subdivision nor the seven-parcel subdivision would require review, as neither one is 10 lots. *Id.* It is only the accumulation of the 10 lots within the area of a district commission that triggers review. *Id.*

³⁰³ *Id.* Adding the two parcels together, the developer has developed 10 parcels within five years within the area of a district commission. *See supra* notes 94-96, 128-50 and accompanying text.

³⁰⁴ ME. REV. STAT. ANN. tit. 38, §§ 481-490 (West Supp. 1990).

³⁰⁵ FLA. STAT. ANN. §§ 380.012-.12 (West 1988 & Supp. 1991).

³⁰⁶ ME. REV. STAT. ANN. tit. 38, § 482(5) (West Supp. 1990) (thresholds are set at acreage, with no mention of any subdivision or development in other parts of state); FLA. ADMIN. CODE ANN. r. 28-24.010 (criterion for jurisdiction is number of dwelling units per development).

³⁰⁷ *See* ME. REV. STAT. ANN. tit. 38, § 482(5) (West Supp. 1990).

twenty acres, neither of the parcels would be reviewed. Maine ignores the previous subdivision activity of the subdivider.³⁰⁸

1. The Benefits and Disadvantages of a Person-Based Jurisdiction

One benefit of a person-based jurisdiction is that it discourages land speculation, one of the goals of Vermont's Act 250.³⁰⁹ Large corporations subdividing land and reselling it at a profit quickly meet their quota of lots subdivided in a given district. A district commission then reviews any future speculation by these corporations in that district.³¹⁰ Basically, no company or individual can avoid review by keeping its many subdivisions small.

Another advantage to a person-based jurisdiction is that it is inclusive. A zealous state agency would be more likely to review a larger proportion of development in a state with a person-based rather than with a land-based jurisdiction. Certain methods that a subdivider in Maine can use to slip under the Site Location Act's threshold of twenty acres and five lots are unavailable in Vermont.³¹¹ The cumulative impact of the person who creates many small, unreviewed subdivisions may be greater than the impact of one person with a single, larger, reviewed subdivision.³¹² For a legislature interested in a strong jurisdiction with a wide scope, a person-based jurisdiction provides the state planning agency with an effective tool for comprehensive review.

³⁰⁸ *See id.*

³⁰⁹ 1987 Vt. Laws 64, § 1. The legislature enacted a broader definition of "person" partly due to a "significant increase in the number of land subdivisions which are made for speculative purposes." *Id.* The 1987 changes in Act 250 were accompanied by a land tax aimed at land speculators. *Id.* §§ 6-8 (codified as amended at VT. STAT. ANN. tit. 32, §§ 10003-10005 (1981 & Supp. 1991)); *see supra* note 51.

³¹⁰ *See* Hamilton & Clark, *supra* note 87, at 11. Speculating companies include Cersosimo Lumber Company, Eastland, Mountain Lake Properties, Patton Realty Corporation, and Properties of America. *Id.*

³¹¹ Rieser, *supra* note 166, at 338 (description of how developers are able to duck under thresholds of Site Location Act review).

New Jersey has had similar problems with its Coastal Facility Act, which requires a permit for any development of 25 dwelling units or more. N.J. REV. STAT. §§ 13:19-3(5), -4 (1979). In fact, the New Jersey Department of Environmental Protection tried to use a 1914 statute regulating piers and bulkheads to require permits for all waterfront development to address problems caused by development that slipped under the 25-unit threshold. Last Chance Dev. Partnership v. Kean, 119 N.J. 425, 433-34, 575 A.2d 427, 432-33 (1990).

³¹² Rieser, *supra* note 166, at 388; *see also* Jurgenson v. County Court for Union County, 42 Or. App. 505, 508, 600 P.2d 1241, 1243 (Or. Ct. App. 1979). "Viewed in isolation, it is likely that no single partitioning has a significant impact on present or future land use; viewed cumulatively, it is likely that all partitionings in any given county have a significant impact on present or future land use. It would be an elevation of form over substance not to look to cumulative impact." *Jurgenson*, 42 Or. App. at 508, 600 P.2d at 1243.

The overriding disadvantage of a person-based jurisdiction is the complexity surrounding the question of who is required to undergo state review. Developers consider the mere existence of another layer of review burdensome.³¹³ Predictability and consistency in a statute go a long way toward its acceptance and credibility.³¹⁴

In Vermont, the controversy surrounding the definitions of "person" and "control" illustrates the danger of a complicated definition of jurisdiction.³¹⁵ The present statutory definition of "person" is arguably overinclusive.³¹⁶ The state must count all the previous subdivisions that other entities have undertaken in one district during the last five years and from which the subdivider in question has profited when it is determining Act 250 jurisdiction over any future project from which the subdivider may profit.³¹⁷ These entities could include family members, partners, or a corporation in which the subdivider has as little as a five-percent interest.³¹⁸ The Environmental Board also has construed the definition of "control" broadly, further expanding the entanglements that can hinder a subdivider.³¹⁹ As a result of these definitions, determining whether a particular subdivision must undergo Act 250 review is not simply a task of surveying the size of the subdivision. Because the temptations are great for developers to hide past activity in order to avoid Act 250 review, the Board must inquire into both the family and business associations of the developers as well as their past development activity.³²⁰

³¹³ See Goss, *supra* note 11, at 504 n.12. One commentator cites the ease with which opponents to a particular development can stop or slow down a project by using the Act 250 process and causing the developer to get frustrated and even abandon the project. *Id.* In Florida, developers complain that the DRI process is "time-consuming and expensive." Pelham, *supra* note 251, at 562; see also Suwannee River Area Council, Boy Scouts of Am. v. State Dep't of Community Affairs, 384 So. 2d 1369, 1374 (Fla. 1st Dist. Ct. App. 1980) (court recognized its jurisdictional ruling would mean imposition "of yet another restraint upon the use and development of property, in addition to those already imposed . . .").

³¹⁴ Critics of Act 250 have charged that confidence in the program already has faltered due to "discriminatory or inefficient" administration. Goss, *supra* note 11, at 526 (quoting GOVERNOR'S COMMISSION ON THE ECONOMIC FUTURE OF VERMONT, PATHWAYS TO PROSPERITY: A STRATEGIC OUTLOOK 24 (1989)). Commentators have stressed the importance of confidence in the state land use control agency since the passage of this type of legislation in Maine and Vermont. *E.g.*, Walter, *supra* note 176, at 343.

³¹⁵ See *supra* notes 95-150 and accompanying text.

³¹⁶ VT. STAT. ANN. tit. 10, § 6001(3) (Supp. 1991); see *supra* notes 128-50 and accompanying text.

³¹⁷ VT. STAT. ANN. tit. 10, § 6001(3), (19).

³¹⁸ *Id.*

³¹⁹ See *supra* notes 105-27 and accompanying text.

³²⁰ Adler interview, *supra* note 70. Not only the Environmental Board and developers experience the problems that a person-based jurisdiction creates. At the time title is passed, it is difficult for buyers to be certain whether Act 250 is applicable. *Id.*

Such far-reaching definitions, however, are necessary in a person-based jurisdiction. A narrow definition of "person" leaves too many options through which a particular developer can avoid review using family members or dummy corporations and other legal fictions.³²¹ A narrow definition of "control" allows a person or entity other than the subdivider to own land being subdivided, thus enabling the subdivision to avoid review.³²² Therefore, problems of uncertainty inevitably accompany a person-based jurisdiction.

2. The Benefits and Disadvantages of a Land-Based Jurisdiction

In a pure land-based jurisdiction, there would be no "control" issue at all. The agency merely would need to determine whether the state statute's acreage or lot thresholds are met. Under such a pure land-based model, a subdivider could line up five tracts side by side; subdivide each one, staying just beneath the threshold of state jurisdiction within each tract; and call them separate subdivisions—the subdivider thus entirely would avoid review.³²³ In defining their jurisdiction, however, both Maine and Florida have departed slightly from this model.

Maine altered the pure land-based model by enacting its "common scheme of development" policy,³²⁴ and Florida by adopting its aggregation policy.³²⁵ In both cases, the state can combine two or more projects and treat them as the same development.³²⁶ Both states, however, must meet strict prerequisites before combining two developments.³²⁷ Without these prerequisites, developers commencing a second project would be uncertain whether the state would combine that project with previous projects. The result would be a

³²¹ See 1987 Vt. Laws 64, § 1. The legislature amended the statute to avoid such occurrences. "[I]n order to ensure appropriate Act 250 review, it is necessary to treat persons with an affiliation for profit, consideration, or some other beneficial interest derived from the partition or division of land as a single person for the purpose of determining whether a particular conveyance is subject to Act 250 jurisdiction." *Id.*

³²² See *supra* notes 105–27 and accompanying text.

³²³ There is nothing in Maine's definition of "subdivision" that would prevent such development as long as each subdivision were under five lots or 20 acres. ME. REV. STAT. ANN. tit. 38, § 482(5) (West Supp. 1990). Likewise, the Florida regulations would not prevent such a development as long as the number of units was below 80% of the threshold for that county. See FLA. ADMIN. CODE ANN. r. 28-24.010 (1989).

³²⁴ Me. Dep't of Env'tl. Protection Reg. c. 371, § 1(c); see also Board of Env'tl. Protection v. Bergeron, 434 A.2d 25, 27 (Me. 1981).

³²⁵ FLA. STAT. ANN. § 380.0651(4) (West Supp. 1991).

³²⁶ See *supra* notes 202–06, 273–83 and accompanying text.

³²⁷ See *supra* notes 202–06, 278–83 and accompanying text.

problem similar to that created by a person-based jurisdiction, where the previous subdivision activity by a landowner would be an issue complicating the determination of state jurisdiction.

The workability of a land-based jurisdiction outweighs the comprehensiveness of Vermont's person-based jurisdiction. Primarily, the determination of jurisdiction is not intended to require a large quantity of information; such research should be saved for the review. It is not worth the cost in either resources or good will for a state agency to require a complicated procedure to determine whether state review is necessary.

The promulgation of a few narrowly defined rules can minimize the cumulative growth that a land-based jurisdiction fosters. If cumulative growth is a problem, the state can lower its thresholds.³²⁸ As long as a state has the ability to undertake the increased quantity of review, low thresholds will discourage developers from evading jurisdiction, because subdividing land into a series of small parcels to escape review would be more burdensome than undergoing the review itself.

In order to deter land speculation within the framework of a land-based jurisdiction, a state agency could adopt a tax similar to Vermont's capital gains tax on land,³²⁹ or a licensing program for large developers. Such a program would require licenses for any developer who subdivides more than a certain number of lots. Although deciding which developers must obtain licenses would create many of the same problems inherent in a person-based jurisdiction, the thresholds for the licensing program could be high enough to eliminate all but the larger developers, allowing the state agency easily to identify them. Ideally, a state agency could develop a working relationship with those developers that would both secure the rights of the developers and further environmental goals. In addition, smaller subdividers could ascertain quickly whether their subdivision required review.

Any land-based jurisdiction must be accompanied by a good aggregation policy. One approach to aggregation is the automatic combination of any developments within a reasonable radius.³³⁰ Under

³²⁸ If a state land use agency could handle a large number of applications efficiently, one option would be to allow the agency to review any parcel of 10 or more acres that is subdivided into two or more lots. Such a jurisdiction would be both simple and comprehensive. Adler interview, *supra* note 70.

³²⁹ VT. STAT. ANN. tit. 32, §§ 10001-10010 (1981 & Supp. 1991); *see supra* note 51.

³³⁰ The idea of a radius is presently utilized in Vermont in the regulation of non-subdivision developments. VT. STAT. ANN. tit. 10, § 6001(3) (Supp. 1991).

this approach, if any two subdivisions or developments by the same person were within the same radius, they would count as the same development.³³¹ Although adopting this approach would change the issue from one of defining a common scheme of development to one of defining a person, using a small radius would make implementing the approach less complicated than enforcing a person-based jurisdiction. If the state applies its aggregation policy to prevent developers from avoiding review for large developments, the policy should not result in any added regulatory burden. In sum, the best jurisdiction policy would be the combination of a land-based jurisdiction with a strong aggregation policy, fortified by some control of land speculation.

C. Criteria for Establishing Jurisdiction

When defining jurisdiction for a state permitting program, the state legislature must consider what criteria are appropriate and how much flexibility the criteria will allow. The best criteria will serve the purpose of the state statute. Florida's ELWMA seeks greater regulation of developments that will have a regional impact.³³² Therefore, the best criteria to define Florida's jurisdiction would include any development with an impact beyond a local government's borders.³³³ The Maine statute seeks to give the state the authority to regulate those developments that, by their size and nature, substantially may affect Maine's environment and quality of life.³³⁴ Therefore, besides size-related criteria, Maine may want to develop standards by which to differentiate developments that will have a significant impact. The intention of the Vermont statute is to control as much of the state's development as possible while limiting that control to avoid bureaucratic problems.³³⁵ Vermont, then, should seek to establish criteria enabling efficient regulation of land use.

A state legislature must decide which criteria to use to meet its goals. The Florida legislature has determined ELWMA's jurisdiction using thresholds that differ depending on the type of development proposed.³³⁶ Maine and Vermont's state agencies must consider only

³³¹ *Id.*

³³² FLA. STAT. ANN. § 380.06(1) (West 1988).

³³³ *Id.*

³³⁴ ME. REV. STAT. ANN. tit. 38, § 481 (West 1989).

³³⁵ *In re Agency of Admin.*, 141 Vt. 68, 76, 444 A.2d 1349, 1352 (1982).

³³⁶ FLA. ADMIN. CODE ANN. rr. 28-24.001 to 28-24.032; *see supra* notes 259-61 and accompanying text. New York's Adirondack Park Agency simply lists specific types of development

the size of the development, either in acreage or in the number of lots to be created.³³⁷

Using size as a criterion for all development would mean using the same standard to determine jurisdiction for highways, homes, gravel pits, paper mills, fast food restaurants, and ski areas,³³⁸ even though the effect of a particular type of development on the health and welfare of surrounding residents may not have much to do with the acreage it consumes. Therefore, the Florida approach, which applies different criteria according to the type of project, provides greater assurance that developments with the greatest impact will get reviewed. For residential developments and subdivisions alone, however, the use of size as a jurisdictional criterion is logical, because it is indicative of other possible criteria, such as number of people, amount of traffic, and impact on sewage and water services, that would reflect the effect of such land use. Therefore, although different criteria may be useful for other types of development, size—in terms of acreage or number of parcels—is appropriate for subdivisions and residential developments.

A more difficult issue, after deciding what criteria to use, is how flexible to make those criteria. The goals of the three state land use statutes, especially those of Maine and Florida, would seem to require each reviewing state agency, on a case-by-case basis, to use its discretion in deciding which projects merit review.³³⁹ On one hand, such a system would represent the extreme in flexibility and might provide too little certainty for a statewide land use permitting system. On the other hand, some flexibility is useful to prevent subdividers from ducking review by regularly designing projects without enough lots or enough acreage to trigger state jurisdiction. With flexibility, a state agency could let harmless developments go

that automatically are reviewed due to their location. N.Y. EXEC. LAW § 810 (McKinney 1982 & Supp. 1991).

³³⁷ ME. REV. STAT. ANN. tit. 38, § 482(5) (West Supp. 1990); VT. STAT. ANN. tit. 10, § 6001(19) (Supp. 1991).

³³⁸ In both Maine and Vermont, the thresholds for a "development" apply to any of these commercial uses of the land. ME. REV. STAT. ANN. tit. 38, § 482(2) (West 1989); VT. STAT. ANN. tit. 10, § 6001(3) (Supp. 1991).

³³⁹ Florida has tried to maintain agency discretion by using the present thresholds. *See* General Dev. Corp. v. Division of State Planning, 353 So. 2d 1199, 1208-09 (Fla. 1st Dist. Ct. App. 1978). The Maine statute claims that it grants the state agency the "discretion" to regulate those developments that impact the environment. ME. REV. STAT. ANN. tit. 38, § 481 (West 1989).

After jurisdiction is established, each state is able to exercise significant discretion within certain criteria when determining approval of the development. *See id.* § 484; VT. STAT. ANN. tit. 10, § 6086 (1984 & Supp. 1991); *see also* Brett, *supra* note 171, at 41.

without review, yet catch small developments with significant or unique environmental impacts.³⁴⁰

Presently, Maine and Florida are at opposite ends of the flexibility spectrum. Maine's jurisdiction is straightforward—unless there is a "common scheme" issue, the BEP simply looks at acreage and the number of lots subdivided in the last five years.³⁴¹ On the other hand, Florida uses both presumed thresholds and staggered thresholds to identify DRIs, thus allowing for greater flexibility in the determination of jurisdiction.³⁴²

The Florida experiment, using presumed rather than conclusive thresholds to define ELWMA's jurisdiction, has had mixed results.³⁴³ The 1985 amendments creating the DCA's "band of presumption" reflected the state legislature's recognition of the need for more certainty.³⁴⁴ The DCA's earlier approach was too indefinite for developers planning future projects. They were unsure if a given development would be forced to go through an added layer of review.³⁴⁵ This approach was also inefficient, because the state's decision regarding whether to subject the development to review required a good deal of information concerning the development's impact. It imposed an increased burden on the developer, who had to collect the required information and wait for a result before the actual review process even began.³⁴⁶ The state added certainty but maintained flexibility when it amended the statute to allow the DCA the "band of presumption."³⁴⁷ This "band of presumption," providing the DCA with the discretion to require review for projects sized between eighty percent and 120% of the threshold, enables the agency to assure state review of developments either located in environmentally sensitive areas or having some characteristic that would cause regional impact yet not meet the threshold required for jurisdiction.³⁴⁸

³⁴⁰ For example, in Maine, a 19-acre plot may include unusual plants or be located on an island in the middle of a lake. If Maine had flexible thresholds, the BEP could review the subdivision; with rigid thresholds, it cannot. Likewise, one purpose of Vermont's Act 250, historic preservation, is not met as many historic properties are below the size threshold of a development. Robert L. McCullough, *Historic Preservation and Land Use Control at the State Level—Vermont's Act 250*, 14 B.C. ENVTL. AFF. L. REV. 1, 3-4 (1986).

³⁴¹ ME. REV. STAT. ANN. tit. 38, § 482(5) (West Supp. 1990).

³⁴² FLA. STAT. ANN. § 380.06(2)(d) (West 1988); FLA. ADMIN. CODE ANN. r. 28-24.010 (1988).

³⁴³ See Pelham, *supra* note 251, at 562.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ If the development does not meet the threshold, the burden is on the DCA to show that

Unlike Florida, Maine's straightforward, five-lot, twenty-acre requirement allows developers to know with certainty when review is required, and makes jurisdictional decisions easy for the BEP.³⁴⁹ The state, however, has been unable to control the resulting proliferation of 19- to 19.9-acre parcels.³⁵⁰ In the past, rigid acreage exceptions, such as Vermont's old ten-acre rule and Maine's former requirement of minimum lot sizes, created similar problems.³⁵¹ Any rigid threshold results in much development that is sized immediately below the threshold by developers that are seeking to avoid review.

In spite of the problems with rigid thresholds, they are more appropriate than presumptive thresholds for the determination of jurisdiction. The strongest argument in favor of presumptive thresholds is that a subdivision that falls below such a threshold, but by its nature or location may cause severe environmental damage, still will undergo review. A state could protect land prone to environmental damage, however, by using staggered thresholds,³⁵² designated fragile areas of critical concern,³⁵³ or special permit programs for fragile natural classifications such as wetlands.³⁵⁴

Perhaps the most clear, concise method of providing the different levels of protection that different regions of the state may require is the use of staggered thresholds, which do not have the uncertainty of presumptions. Florida successfully uses staggered thresholds.³⁵⁵ ELWMA jurisdiction begins with smaller residential developments in less populated counties rather than in more populous counties.³⁵⁶ In addition, states seeking to heighten scrutiny in areas without zoning could use staggered thresholds to guarantee better review in those areas.³⁵⁷ Furthermore, staggered thresholds could protect environmentally sensitive areas by requiring state review at a lower threshold for subdivisions or development in areas such as waterfront, wetlands, or watersheds feeding drinking supplies.³⁵⁸ The re-

the development is a DRI. FLA. STAT. ANN. § 380.06(2)(d) (West 1988). Likewise, if the development is over the threshold, the burden is on the developer to show that its development is not a DRI. *Id.*

³⁴⁹ See ME. REV. STAT. ANN. tit. 38, § 482(5) (West Supp. 1990).

³⁵⁰ Madore interview, *supra* note 168; see *supra* note 182 and accompanying text.

³⁵¹ See *supra* notes 84-89, 187-96 and accompanying text.

³⁵² See *infra* notes 357-58 and accompanying text.

³⁵³ See MODEL CODE, *supra* note 33, § 7-201; *supra* note 41 and accompanying text.

³⁵⁴ See, e.g., N.J. STAT. ANN. §§ 13:9B-1 to 13:9B-30 (West Supp. 1991) (state permit required for development in wetlands); see McCullough, *supra* note 340, at 3.

³⁵⁵ FLA. ADMIN. CODE ANN. r. 28-24.010 (1989); see also MODEL CODE, *supra* note 33, § 7-301(2)(f).

³⁵⁶ FLA. ADMIN. CODE ANN. r. 28-24.010 (1989).

³⁵⁷ See VT. STAT. ANN. tit. 10, § 6001(3) (Supp. 1991).

³⁵⁸ One jurisdiction that uses staggered thresholds is the Adirondack Park Agency. N.Y.

sult of staggered thresholds is that developments not needing to undergo state review can avoid the process without the sacrifice of certainty. Instead, state review would occur more often where it is needed most.

V. CONCLUSION

Among states that directly regulate the development of land, there are different approaches toward determining the allocation of regulatory duties between the state and local governments. When deciding the jurisdiction of its land use agency, a state must balance the burden of regulation with the goals of its land use control statute.

The most workable method of defining jurisdiction, based on a review of the Vermont, Maine, and Florida state land use statutes, is a land-based jurisdiction that has thresholds staggered according to location and designed to reflect environmental concerns. Whatever the method of determining jurisdiction, in order for state review to work, courts must defer to the agency's expertise, and the agency must show restraint in taking advantage of the courts' deference. If a state decides on a more complicated or comprehensive method of determining jurisdiction, the agency must be prepared to enforce it efficiently and fairly.

Where states create their own systems of land use regulation, efficient and workable methods of determining the state's jurisdiction will enhance the credibility of the state's land use control system and show that state land use control can have a positive effect on environmental quality.

EXEC. LAW §§ 809-810 (McKinney 1982 & Supp. 1991). The Agency divides all private land within the region into five categories based on use intensity. It requires review of subdivisions meeting the following thresholds:

<i>Location</i>	<i>Units or Lots</i>	
	<i>Zoned</i>	<i>Unzoned</i>
Hamlet areas	100	100
Moderate intensity	75	15
Low intensity	35	10
Rural Use	20	5
Resource Management	2	2

Id. § 810. Jurisdictional thresholds for other types of development use different criteria. *Id.*