1972

State Land Use Regulation---A Survey of Recent Legislative Approaches

Minn. L. Rev. Editorial Board

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I. INTRODUCTION

Regulation of land use, traditionally a responsibility of local government,\(^1\) increasingly is becoming a state concern. In recent years, there has been a flood of new legislation designed to permit some agency of state government to participate in fashioning controls which will govern use of land at the local level. This note attempts a survey of this legislation.

The note will examine recent legislation in ten selected topical areas:\(^2\) zoning on a state-wide basis, surface water zoning, zoning of airport areas, power plant siting, regulation of trailer and mobile home parks, regulation of large scale developments, regulation of coastal wetlands, regulation of shorelands and scenic river areas, regulation of floodplains and regulation of regional development. Within each topical area, the major recent legislation will be summarized and briefly evaluated. There will be no discussion of what form legislation in a particular area ought to take. Discussion will be confined wholly to an examination of the relative merits and drawbacks of particular legislation as compared with statutes existing in other states. It is hoped that, by analysis of what other states have done, legislators and those drafting new legislation will be given a sounding board by which to judge their own efforts. Familiarity with the statutes of other states should serve both to suggest substantive ways to improve proposed legislation and to provide some precedent for gauging the political feasibility of that legislation.

The ten topical areas are categorized loosely under one of the following four section headings: (1) statutes which provide

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1. See text accompanying notes 4-7 infra.

2. Of course the topical areas chosen do not begin to cover all areas of state participation in the land regulation process. However, they should give the reader some broad understanding of the many, varying approaches adopted by the states to regulate or guide land use at the local level. Some of the noteworthy statutes excluded from the discussion are: the Massachusetts Zoning Appeals Act, Mass. Gen. Laws Ann. ch. 40B, §§ 20-23 (Supp. 1971), which attempts to deal with problems of exclusionary zoning; open space laws (see, e.g., Calif. Gov't Code §§ 6950, 50575 et seq., 51200 (West 1966)); a wide range of pollution control statutes which have some impact on land use (see, e.g., Minn. Stat. § 115.01 et seq., § 116.01 et seq. (Supp. 1971)).
for direct state-level regulation of local land use; (2) statutes which forbid local development except with state approval; (3) statutes which provide for state guidance of efforts by local governments to regulate land use; and (4) statutes which establish some form of regional governmental agency to administer a regional system of land use controls. Correlation of topical areas to section headings, however, is at best imperfect. The statutes are highly diverse, even when directed at identical problems. Nevertheless, to the extent that a majority of the statutes within any topical area can be characterized as within a given section heading, that topical area will be included under that heading.

Finally, it should be pointed out that this article is only a starting point. The material presented may be of help to those seeking to draft or pass upon new legislation, but it should not be considered exhaustive. It cannot take account of the peculiar political, socio-economic or physical problems which a particular state may face. In addition, it considers only a small portion of the plans and model statutes recommended by scholars and commentators. With these apologies, however, the note may be a useful tool to those seeking to evaluate the recent dynamics in land use control.

II. HISTORICAL BACKGROUND

Regulation of land use traditionally has been a local function. The local layman considers himself entirely capable of making decisions on such matters and envisions local land use regulation as a method of preserving property values and maintaining the “tone” of his community. Local governments also


4. Nearly all 50 states have enacted enabling legislation modeled closely after the Standard State Zoning Enabling Act (SZEA) prepared by the United States Department of Commerce in 1922. See ALI MODEL LAND DEVELOPMENT CODE (Tent. Draft No. 1, 1968) at Appendix A, and (Tent. Draft No. 2, 1970) at xi. Basically, the SZEA authorizes local governments to divide their territory into zones and to specify the types of land use permitted in each zone. Since 1928, when local zoning power was upheld by the United States Supreme Court in the landmark case of Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), land use regulation has been left almost entirely in the hands of local government.


are closest to local problems, can make decisions relatively quickly and are most responsive to the local voter.\(^7\)

Despite these supposed advantages, the desirability of local control over all land use decisions is now in serious question.\(^8\) Each local community, being concerned with its own protection, has tended to zone its land to avoid becoming a refuse heap for undesirable uses.\(^9\) The result has been urban sprawl,\(^10\) exclusionary zoning\(^11\) and unplanned development. Regional problems such as pollution, inadequate housing or improper management of the environment have been attacked haphazardly, often in deference to wholly local interests.\(^12\) The purely local welfare has been of clearly dominant concern. In addition, local governments, dependent on property taxes for support, may find it understandably difficult to resist the desires of developers, even though important social or aesthetic interests are sacrificed in the balance.\(^13\) As one commentator has recently noted, the problem is not so much that land use decision-making is exclusively local: "the flaw is that the criteria for decision-making are exclusively local, even when the interests affected are far more comprehensive."\(^14\)

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14. R. Babcock, The Zoning Game 153 (1966). Essentially, the problem is that in most cases where local interests come in conflict with wider state or regional interests, the local governments have tended to give inordinate deference to the local interest. Complicating this problem is the fact that traditional checks designed to safeguard the process of local regulation have proven largely illusory. Planning commissions, state and local, have been ineffective because their recommendations can be given effect only if enacted at the local level by each of the local legislatures concerned. See B. Pooley, supra note 6, at 7. In addition the requirement that local land use regulations conform to a "comprehensive plan" has been largely undermined by court decisions which have held the requirement satisfied if the local government can offer some rational explanation for its action. See ALI Model Land Development Code 95 (Tent. Draft No. 2, 1970).
In recent years there has been a strong trend toward fostering greater state and regional participation in the land regulation process. The American Law Institute, for example, recently proposed a comprehensive model code providing for direct state participation in the regulation of all (1) large scale developments, (2) developments of state or regional benefit and (3) areas of critical state concern. The United States Congress is presently considering two bills which would announce a national land use policy and encourage, assist or possibly require the states to develop a statewide land use plan to guide local action. To date, however, no state has enacted so complete a program. Instead, state legislatures have chosen to enact separate measures directed at specific problem areas, e.g., (shorelands, power plant siting, regional development) and have attempted to tailor the structure of state participation in each case to the particular problems involved.

III. DIRECT REGULATION OF LAND USE

In some situations, a state may choose to enact regulations which will directly control land use at the local level. Here, the state may act on a broad scale, enacting regulations which affect large areas of the state, or it may focus its attention only on smaller areas with special needs. Whatever the land area involved, direct regulation by the state will generally be employed only when there is a substantial need for some input which only the state can provide (e.g., planning, expertise or centralized direction) and local participation in the regulatory process would be unfeasible or ineffective.

A. REGULATION ON A STATE-WIDE BASIS

As a starting point, it may be helpful to look at the Puerto Rican system of land use regulation. In Puerto Rico, all power to control land development through the exercise of zoning, subdivision controls, official maps and the like rests with the Puerto Rico Planning Board composed of three members appointed by the governor with the advice and consent of the senate. Only certain rural districts are excluded from the

Board’s jurisdiction. All subdivision plats and all applications for building or land use permits must conform to the Board’s regulations. In special cases where the “general welfare” so requires, the Board may disapprove a proposed new development even though it complies with all applicable regulations.

Puerto Rico’s system of land use regulation is probably not a realistic alternative within the continental United States. To exclude local governments from all land use decisions would upset a jealously guarded societal value while imposing large additional costs upon the state. Few other jurisdictions are likely to have the money, the need or the political will to assert such direct state control over more than a small percentage of land use decisions.

Nevertheless, two states, Hawaii and Maine, have recently adopted legislation which, although not as broad as Puerto Rico’s, provides for extensive state control over land use on a state-wide basis.

1. Hawaii

Hawaii has empowered a State Land Use Commission to divide the entire state into four zones—urban, rural, agricultural, and conservation. Land use within each district is limited to the general uses delineated in the enabling statute and the “standards” established by the commission. Actual zoning authority is retained by the counties in urban, rural and agricultural districts, but special use permits in the latter two districts must be approved by the Commission. Use of land in conservation districts is regulated directly by the State Department of Land and Natural Resources.

Hawaii’s decision to exercise some state control over all

18. Id. at §§ 8, 30 (Supp. 1970).
19. Id. at § 25 (Supp. 1970).
20. Id. at § 24 (Supp. 1970).
21. Id. at § 9a (Supp. 1970).
22. See text accompanying notes 4-7 supra.
24. Id. at § 205-2 (Supp. 1971).
25. Id. at § 205-5 (Supp. 1971).
26. Any person who desires to use his land within an agricultural or rural district other than for an agricultural or rural use must petition the planning commission of the county for a special permit. Id. at § 205-6 (Supp. 1971).
27. Id.
28. Id. at § 205-5 (Supp. 1971).
land use was prompted by several factors: (1) the development of land for urban use was occurring in areas where it was not economical to provide public utility services; (2) present urban growth was sprawling into agricultural land which could better contribute to the state through agricultural development; (3) because of the state's limited land supply, future urban development would require the use of some land with a high capacity for intensive cultivation; 29 (4) tourism, upon which the state's economy relied heavily, was dependent on the continued preservation of scenic areas and other lands in their natural state. Each of these concerns was of state-wide importance and could not be dealt with effectively so long as the power to regulate land use remained exclusively in the hands of local governments. In the continental United States, however, where most of these factors apparently do not seem as menacing, the Hawaiian system has yet to be directly followed.

2. Maine

Approximately 10 million acres, or roughly 60% of the land area in Maine is unincorporated. 30 In 1969 the state legislature created the Maine Land Use Regulation Commission, a seven-member board composed of the Director of Parks and Recreation, the Forest Commissioner, the State Planning Director, and four members serving staggered four year terms to be appointed by the governor. 31 The Commission was delegated power to enact zoning and subdivision controls for all unincorporated areas adjacent to public roads, lakes and ponds. 32

In 1971 the legislature extended the Commission's regulatory authority to include all unorganized and deorganized 33 areas of the state. 34 Under the amended statute, the Commission divides all such areas into land use guidance districts and designates each district by one of four major classifications:

30. Telephone interview with Mr. James Haskell, Maine Land Use Regulation Commission, Sept. 28, 1971.
33. This includes essentially all areas outside the boundaries of municipalities, i.e., all incorporated areas. Telephone interview with Mr. James Haskell, Maine Land Use Regulation Commission, Nov. 2, 1971. See also, Me. Rev. Stat. Ann. tit. 12, § 682 (1) (Supp. 1972).
34. Id. at § 681.
protection, management, developing and holding.\textsuperscript{35} The protection, management and development district classifications reflect distinctions in the quantity of existing development and the desirability of future development. That is, in protection districts, there is little present development and it is the state's judgment that this should continue. Management districts include primarily timber and agricultural lands. Development districts include areas in which substantial development already exists, and here the emphasis is on the regulation of new development. Holding districts are areas in which substantial future development is planned or anticipated.\textsuperscript{36} The Commission is given authority to prepare land use guidance standards for each district, which standards will then serve as "minimum requirements" for proposed development.\textsuperscript{37} In order to preserve some flexibility, however, the Commission may enact "special" guidance standards\textsuperscript{38} for a particular area as necessary and may grant variances whenever special or unusual circumstances so demand.\textsuperscript{39} In addition, district boundaries and land use guidance standards must be reviewed by the Commission at five year intervals.\textsuperscript{40}

As in Puerto Rico and Hawaii, the situation in Maine may be unique. Prior to adoption of the new statute, power to regulate land use had been extended only to municipalities.\textsuperscript{41} This

\textsuperscript{35} Id. at § 685-A(1).

\textsuperscript{36} A. Protection districts shall include, but not be limited to, areas where development would jeopardize significant natural, recreational and historic resources, including flood plains, precipitous slopes, wildlife habitat and other areas critical to the ecology of the region or State.

B. Management districts shall include, but not be limited to, those lands which are currently being utilized for commercial forest product or agricultural uses and for which plans for additional development are not presently formulated nor additional development anticipated.

C. Holding districts shall include, but not be limited to, reserve areas adjoining development districts, for growth needed when the development district is saturated, and those lands not presently in development districts but for which development plans have been submitted pursuant to section 685-B, subsection 2 or where additional development is otherwise formulated or anticipated.

D. Development districts shall include, but not be limited to, those lands now discernible as relatively homogeneous patterns of intensive residential, recreational, commercial, or industrial use or commercial removal of minerals or natural resources.

\textsuperscript{37} Id. at § 685-A(4).

\textsuperscript{38} Id. at § 685-A(3).

\textsuperscript{39} Id. at § 685-A(10).

\textsuperscript{40} Id. at § 685-A(9).

left large unincorporated areas of the state unregulated. As the need for direct control of these areas grew urgent, it became apparent that local governments—counties and plantations—were too weak and too poorly organized to prepare and administer any effective scheme of regulation. A long history of disuse of the machineries of local government, had apparently worked its toll. Thus, the Maine Land Use Regulation Commission was created essentially by default. Because the rapid development of strong local governments in unincorporated areas was neither feasible nor desirable, and because little local opposition was expected, the Maine legislature was largely free to adopt whatever innovative system of centralized state control it deemed most desirable.

B. STATE ZONING OF LIMITED AREAS

For more limited purposes, direct state regulation of land use continues to be a viable and effective method of control. This regulation may take one of two forms. The state may pass legislation directly prohibiting a certain use of land in a defined area. For example, in response to recent federal legislation every state now has passed an outdoor advertising act which prohibits nearly all forms of billboard advertising from areas adjacent to interstate highways. A 1971 Delaware statute bans heavy industry from the Delaware coast. Washington recently enacted legislation which prohibits surface drilling for oil and gas in certain coastal water areas. These methods of control, however, involve little or no administrative discretion at the state level and therefore are not well suited to the regulation of most types of land use. Most land use problems require more flexible solutions.

42. Maine lies at the tip of the eastern megalopolis. In recent years, there has been a growing need for development of recreation sites and facilities, as well as rapidly expanding mineral development. In addition, Maine was spending large amounts of money for pollution abatement in incorporated areas, and it seemed silly in light of this to allow indiscriminate development in the forests and wild areas. Telephone interview with Mr. James Haskel, Maine Land Use Regulation Commission, Nov. 2, 1972. See also F. Bosslman & D. Callies, supra note 29, at 187.

43. Id.
45. See, e.g., Minn. Stat. § 173.01 et seq. (Supp. 1971).
A state also may designate a state agency to formulate and administer land use regulations in certain areas. For example, authority to zone airport hazard areas or to regulate water surface areas has frequently been given to an executive department of the state.

1. **Surface Water Zoning**

At least 37 states have enacted legislation designating some level of state or local government to regulate recreational activities on public waters. The statutes exhibit considerable

48. See generally, J. KUSLER, REGULATIONS TO REDUCE CONFLICTS BETWEEN RECREATION WATER USES (Wisc. Dep't of Natural Resources Research Report No. 65, 1970).


50. The statutes generally use the term "waters of this state," but definitions vary as to what this term encompasses. In Delaware the term includes all waters within state boundaries. DEL. CODE ANN. tit. 23, § 2112 (Supp. 1970). In Minnesota the term includes any waters capable of substantial beneficial use, and any waters to which the public has access. MINN. STAT. § 361.02(12) (1969). In Missouri the term excludes "bodies of water owned by a person, corporation, association, partnership, municipality or other political subdivision..." MO. ANN. STAT. § 306.010(6) (1972).
variety. Thirty states place the basic regulatory authority over surface water use in a state level department. The majority of these states give this department general regulatory power over certain uses, provided in most cases that any political subdivision may petition the department for special rules and regulations when particular circumstances so demand. Seven states place regulatory authority at the local level, either on an exclusive basis or subject to approval by the state. Most of these states have large or heavily concentrated populations. Apparently, where the number of potential users of state water areas is very large, states shy away from directly assuming the large burden of sorting and balancing the competing interests. For those states with few water areas or smaller populations, however, direct regulation at the state level remains the preferred approach.

51. Alabama, Arkansas, Delaware, Hawaii, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Vermont and West Virginia. See note 49 supra.

52. Kansas, Massachusetts, Texas and Virginia additionally permit local governments to enact regulations subject (except in Texas) to approval by the state department. Louisiana, Maine and Tennessee explicitly exclude local governments from any power to regulate surface water use. See note 49 supra.

53. A typical statute reads:

(2) Any subdivision of this state may, at any time, but only after public notice, make formal application to the commission for special rules and regulations with reference to the operation of vessels on any waters within its territorial limits and shall set forth therein the reasons which make such special rules or regulations necessary or appropriate.

(3) The commission is hereby authorized to make special rules and regulations with reference to the operation of vessels, including water skiing and other related activities, on any specific water or waters within the territorial limits of this state.

54. California, Colorado, Connecticut, Florida, Illinois, New Jersey, New York. In addition, in Ohio, power to regulate the horsepower, size and speed of boats is reserved to conservancy districts or political subdivisions. See note 49 supra.

55. California, Connecticut and New York require state approval of local regulations, although it is unclear whether approval in California serves as an effective veto or is merely advisory. See CAL. HARB. & NAV. CODE § 660 (Supp. 1972).

In addition, California and Connecticut permit the state to step in in cases of conflict or non-uniformity between local regulations. New York permits regional park boards to regulate waters adjacent to bathing beaches.

Except in the case of recent statutes, the scope and purposes of regulation in most states is quite limited. Most of the relevant statutes are appended to state water safety acts and seem designed simply to give the state department some flexibility in putting into effect the watercraft safety rules enunciated by the statute. In addition, a large proportion of the statutes are concerned only with regulating "the operation of vessels," which may not include swimming, scuba diving or the construction of docks. Thus the states for the most part seem not to have viewed the problem as one of accommodating the competing interests of those desiring access to state water areas. Rather, the basic objective in most cases has been simply to promote safety in the use of watercraft.

Recently, Michigan, Minnesota and Vermont, as well as a number of other states, have significantly broadened the scope of state level regulation of surface water use. Both Michigan and Minnesota allow a state department to enact broad surface water zoning regulations which become law if approved by the appropriate local government. Upon request by local government and a showing that regulation would be in the public interest, the Minnesota Department of Natural Resources establishes regulations to govern use of watercraft on state waters. Prior to taking effect the regulations must be approved by a majority of the affected counties. In Michigan, the Department of Conservation is directed to draft surface zoning regulations either on the Department's own initiative or at local request, but in either case the proposed regulations must be submitted for approval by the local government in which the controlled waters are located. Vermont empowers its State Water Resources Board to promulgate such surface use regulations as will produce optimum use of public waters, and the statute specifically directs the Board to consider a wide range of factors designed to ensure that the interests of all potential users will be fully considered.

57. See text accompanying notes 60-67 infra.
58. See note 53 supra.
59. Some statutes specifically so state. See, e.g., Mississippi, Texas, Virginia, supra note 49.
60. See California, Oklahoma, North Carolina and Texas, supra note 49.
65. Id. at § 1103 (b) reads:
All three statutes indicate that a direct purpose of the regulation is the preservation of a valuable natural resource by means of regulating and restricting competing uses. In addition, the statutes specifically describe the kinds of regulation which should be considered. In Minnesota, for example, the regulations are envisioned to include restrictions on

1. the type and size of watercraft which may use the waters affected by the regulation,
2. the areas of water which may be used by watercraft,
3. speed of watercraft,
4. times permitted for use of watercraft, or
5. minimum distance between watercraft.

The broadened scope of this legislation is important because it significantly increases the burden, in terms of manpower and cost, which the state may be assuming in directly regulating the use of waters within state borders. Some states who wish to assert state-level influence over surface water zoning may wish to choose methods other than direct regulation drafted at the state level. California, for example, empowers local governments to issue water use regulations but requires their submission to the State Department of Navigation and Ocean Development for comment or approval and permits the state to regulate directly where local regulations are in conflict. Nevertheless, the decision that all regulations be drafted at the state level carries with it a number of advantages. Regulation of water areas which lie within the boundaries of several local govern-

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66. See, e.g., VT. STAT. ANN. tit. 10, § 1103(c) (Supp. 1971), which reads in part:

The board shall attempt to manage the public waters and public shorelands so that the various uses may be enjoyed in a reasonable manner, in the best interests of all the citizens of the state.


The board may establish rules to regulate the use of the public waters and public shorelines by:

1. Defining areas on public waters and public shorelines wherein certain uses may be conducted;
2. Defining the uses which may be conducted in the defined areas;
3. Regulating the conduct in these areas, including but not limited to the size of motors allowed, size of boats allowed, allowable speeds for boats, and prohibiting the use of motors or houseboats;
4. Regulating the time various uses may be conducted.

ments may be ineffective or nonuniform if the local governments fail to properly coordinate their energies. Local personnel may lack the time or resources to fully identify the competing interests or to enforce regulations once enacted. Finally, local governments may be unwilling to give full weight to the needs and divergent interests of the regional populace or transients who use local water areas. 69

A state's decision to regulate directly surface water use within state boundaries will place a greater burden on some states than on others. A state like Vermont, with few water surface areas, 70 could zone directly at relatively little cost. A state such as Michigan or Minnesota, with a proportionately large number of water areas, 71 could not attempt state level regulations of all lakes without a sizable increase in trained personnel and the expenditure of considerable time, energy and expense. Both Michigan and Minnesota have attempted to solve this problem by focusing state efforts on those water areas which particularly need regulation. Michigan accomplishes this objective directly by allowing its Department of Conservation to choose those bodies of water for which it wishes to prepare regulations. 72 In Minnesota, although a county may request state assistance for any water area, the Department of Natural Resources will require a showing of particular need before granting any such request. 73

2. Zoning Land Near Airports

Three states, Alaska, 74 Hawaii 75 and Idaho, 76 designate an


70. Vermont has something more than 125 lakes and ponds. 28 ENCYCLOPEDIA AMERICANA 18 (1960).

71. Michigan has more than 11,000 lakes. 19 ENCYCLOPEDIA AMERICANA 18 (1960). Minnesota also has at least 11,000 lakes. 19 ENCYCLOPEDIA AMERICANA 201 (1960).

72. MICH. COMP. LAWS ANN. § 281.1014 (Supp. 1972). But cf. id. at § 281.1016, stating that local governments may petition for special rules, in which case the Department is obliged to zone. However, inasmuch as the Department has power to regulate either on its own initiative or at local request, it should also have the power to establish priorities among the water areas to be regulated.

73. Interview with Michael Hambrock, Minnesota Department of Natural Resources, Sept. 24, 1971. The Department derives this power from the statutory requirement that regulation be determined to be in the "public interest." Minn. Laws 1971, ch. 636, § 28.

74. ALASKA STAT. § 02.25.010 et seq. (1962).

75. HAWAI'I REV. LAWS § 262-1 et seq. (1968).

appropriate state agency to zone airport hazard areas, defined as areas where high structures, trees or certain uses of land could obstruct the airspace required for aircraft. The department specifies permissible land uses, regulates the height of obstructions and requires markings and lighting within the hazard area. A similar statute in Indiana\(^7\) permits the State Airport Authority to enact zoning ordinances restricting the height of structures and regulating any emission of "air pollutants" which might compromise the safety of the aircraft. These limited controls of limited areas impose relatively little burden on the manpower or financial resources of the state and yet are an effective method of regulation. A number of states, however, have chosen to allow local governments to zone airport hazard areas.\(^8\) This may be based on the expectation that county governments will act as responsibly as state government where danger to life is involved.

IV. THE PERMIT STATUTES

A more passive role in land-use planning has been asserted by the states in the areas of large scale developments, power plant siting, trailer and mobile home parks and coastal wetlands. Though there are notable exceptions to any generalizations which may be drawn from the 18 statutes examined, it is generally true that in these areas the states have not taken the initiative in determining where development should take place or what development should be permitted. Rather, the states' role has been largely reactive and limited to considering requests for permits made by private developers. The permit requirements, with the exception of those for power plants, are almost uniformly of the double-veto type, i.e., the state permit does not eliminate the need for a permit from the local governmental unit with zoning authority. State power to anticipate development by issuing regulations of statewide applicability is rare in these statutes and authority to zone is even less common.

As has been suggested, the basic reasons for states taking less active and less comprehensive roles in land-use planning than the roles assumed by Hawaii and Puerto Rico are largely


LAND USE REGULATION

political and financial. Additional reasons apparent in the permit statutes are that either the developments sought to be regulated are unique projects, e.g., power plants, or that a consensus exists on the necessity of generally prohibiting all further development in the area, e.g., the coastal wetlands. Therefore this section is focused more on the mechanisms established for making decisions on permit applications than on typical standards or prohibitions. The choice of an agency to administer the statute, the staff available to it, the funding of the work of the agency, the opportunities for interest group input and the role given local officials are all vital elements of those mechanisms and greatly influence the final decisions.

A. LARGE-SCALE DEVELOPMENTS

The size of a development alone may indicate that its impact on the environment and on population distribution will have statewide significance. Maine and Vermont have responded by superimposing on local zoning and licensing regulations a requirement of state approval of large scale industrial, commercial and residential developments. The scope of the statutes is similar. Maine regulates commercial and industrial developments which occupy a land area in excess of 20 acres, which require waste disposal or air quality licenses from the Environmental Improvement Commission, which contemplate drilling for or excavating natural resources or which involve structures with a ground area in excess of 60,000 square feet on a single parcel. Vermont includes developments involving more than 10 acres of land (or more than one acre when within a municipality which has not adopted permanent zoning and subdivision bylaws), more than 10 dwelling units or construction above the elevation of 2500 feet.

The Vermont statute gives its Environmental Board specific responsibility for developing a capability and development plan and a land use plan while the planning role of Maine's Environment Improvement Commission is vague and apparently
limited to making recommendations to the legislature. Procedurally, the statutes also differ. In Maine approval of a proposed development must be obtained from the Environmental Improvement Commission, a council of government, industry and public representatives having statewide jurisdiction. Enforcement of the commission's orders must be accomplished by injunctions sought by the attorney general. The Vermont Environmental Board is provided with nine district commissions which may make initial investigations and rulings and from which appeals to the Board may be made. Vermont allows the Board itself to institute actions for injunctions and imposes penalties of $500 fines and two year prison terms for each day a provision of the statute or rule of the Board is violated.

The Vermont scheme, though adopted for a small and sparsely populated state, appears to be more readily adaptable to the requirements of rapidly developing states than the Maine approach. The sheer number of developments in a state such as California seems to dictate a similar division of the state into districts; moreover, the necessity of preventing regional concerns from determining decisions at the district level dictates appellate review by an agency with statewide responsibilities. In addition, the potential need for immediate action to prevent irreversible harm to the environment suggests that direct legal action by the agency is preferable to petitions to the state attorney general to consider and act on legal actions proposed by the agency. Both schemes, apart from their planning provisions, are of the double-veto type and subject to the criticism that they merely create state permit systems which duplicate local systems. Neither provides relief for the developer who obtains state approval but is denied a permit by a local community considering only its own parochial interests.

B. Power Plant Siting

The construction of 255 new power plants within the next
20 years\(^2\) will see electric utility companies and industrial consumers of electricity at odds with conservation groups concerned with thermal pollution and preservation of recreation areas and scenic resources. In contrast to the large scale development statutes discussed above, recent power plant siting statutes typically preempt the zoning and regulatory power of local units of government. Vermont, Maryland and New York have given the authority to regulate the siting of power plants to existing state agencies.\(^3\) In Vermont, where the final siting decision is solely that of the Public Service Board, the chairman of the Board is a full time employee while the two other members are not.\(^4\) Although the Board is required to give notice of pending applications for power plant sites to the attorney general, the departments of Health, Forests and Parks, Water Resources, Fish and Game, the Historic Sites Board, Scenery Preservation Council, Aeronautics Board and planning commissions and legislative bodies of affected regions and municipalities,\(^5\) the active participation of these agencies in the decision is apparently optional and the Board is not guaranteed the financial resources to otherwise employ technical and professional assistance.

Maryland directs its secretary of the Department of Natural Resources to treat applications to the Public Service Commission for a certificate of public convenience and necessity associated with power plant construction as an application for the use of state waters\(^6\) and establishes an "environmental trust fund" to finance extensive planning and research.\(^7\) The trust fund, financed by an 0.1 mil per kilowatt hour surcharge on the production of electric energy, is not the only innovative feature of the Maryland statute. It also authorizes the department to stockpile potential power plant sites and to sell or lease them to utility companies.\(^8\) New York, in a statute similar to that

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\(^3\) *VT. STAT. ANN.* tit. 30, § 248 (Supp. 1971); *MD. ANN. CODE* art. 66C, § 5A (Supp. 1971); *N.Y. PUB. HEALTH* § 1230 (McKinney 1971).

\(^4\) *VT. STAT. ANN.* tit. 30, § 1(b) (1970). All three members are appointed by the governor with the consent of the state senate for six year terms. *VT. STAT. ANN.* tit. 30, § 3 (1970).

\(^5\) Id. at § 248(a).

\(^6\) *MD. ANN. CODE* art. 66C, § 5A (Supp. 1971).

\(^7\) Id. at § 766.

\(^8\) Id. at § 769.
of Vermont in that it lacks guarantees of technical assistance and adequate funding, has delegated authority to regulate the construction of power plants to the public health commissioner.\textsuperscript{99} Utilization of existing agencies undoubtedly appealed to budget and tax conscious Vermont and New York legislators. Whether or not the existing agencies will develop the technical expertise to protect the environment and procedures to provide a public forum satisfactory to conservation groups remains to be seen.

Other states, Washington, Arizona and Connecticut, have created new state agencies whose sole responsibility is power plant and transmission line siting.\textsuperscript{100} Membership on the new power plant site commissions is made up of state officials and appointed public representatives\textsuperscript{101} though Washington also provides for a temporary member representing the legislative authority of the county where the proposed plant is to be located.\textsuperscript{102} Continuing review of the applicant’s compliance with the established environmental standards is provided for in each of the statutes by granting only conditional permits\textsuperscript{103} and in Washington and Connecticut by also granting the agencies the power to promulgate rules and regulations.\textsuperscript{104} Unique features of each state’s statute are certain to be imitated in future legislation. In Washington at least one of the public hearings held prior to certification of a site is to be conducted as an adversary proceeding\textsuperscript{105} and the state’s attorney general is directed to appoint a counsel for the environment who is to be accorded “all the rights, privileges and responsibilities of an attorney representing a party in a formal action . . .”.\textsuperscript{106} In Arizona

\textsuperscript{99} N.Y. PUB. HEALTH § 1230(3) (McKinney 1971). In 1970 the New York legislature established a temporary commission to investigate present siting practices of utility companies and to propose legislation on the appropriate state procedures which should be established to regulate and determine the siting of such facilities. New York Laws 1970, ch. 272, § 6.
\textsuperscript{100} ARIZ. REV. STAT. ANN. § 40-360 et seq. (Supp. 1971); Conn. Laws 1971, pub. act 575; WASH. REV. CODE ANN. § 80.50.010 et seq. (Supp. 1971).
\textsuperscript{101} ARIZ. REV. STAT. ANN. § 40-360.01B (Supp. 1971); Conn. Laws 1971, pub. act 575, Sec. 4(b).
\textsuperscript{102} WASH. REV. CODE ANN. § 80.50.030 (4) (Supp. 1971).
\textsuperscript{103} ARIZ. REV. STAT. ANN. § 40-360.08(D) (Supp. 1971-72); Conn. Laws 1971, pub. act. 525, § 10(a); WASH. REV. CODE ANN. § 80.50.130(2) (Supp. 1971).
\textsuperscript{104} Conn. Laws 1971, pub. act 474(4)(e); WASH. REV. CODE ANN. § 80.50.040(1) (Supp. 1971).
\textsuperscript{105} WASH. REV. CODE ANN. § 80.50.090(3) (Supp. 1971).
\textsuperscript{106} Id. at § 80.50.080.
persons contemplating construction of power plants are required to annually submit ten-year plans setting forth the general area of proposed plants and specific technical data. In Connecticut the power facility evaluation council is directed to obtain written comments on site applications from the state agencies concerned with pollution, health and recreation. Illinois has adopted a second alternative to giving the authority to regulate the siting of power plants to an existing public service commission by including regulatory power over nuclear power plants in the grant of authority to its new Pollution Control Board. Maine combined approaches by requiring approval of power plant sites by both its Public Utilities Commission and new Environmental Improvement Commission.

The statutes, with the exception of that of Washington, where the agency merely makes recommendations to the governor, have in common a legislative judgment that a state agency must bear the responsibility for power plant siting decisions and that the decisions must reflect a concern for environmental and public health factors as well as for power needs. They do not, however, provide consistent answers to the critical questions of agency resources or agency structure. Half of the statutes discussed, those of Illinois, New York, Maine and Vermont, do not provide special funds for the expenses incurred by the agencies in evaluating applications. Apparently the agencies must rely on annual legislative appropriations which may or may not be sufficient. The others, except that of Maryland which imposes a surcharge on production of electricity, require the applicant to pay a fee which again may or may not be adequate. Information resources may be limited not only by the absence of funds to employ independent consultants but also by the absence of authority in some states to require written reports and the cooperation of other state agencies.

109. Ill. Ann. Stat. ch. 111 1/2, § 1025a (Smith-Hurd Supp. 1972). The statute indicates that the immediate concern of the legislature was with the danger of atomic radiation and not the broad range of environment problems.
The selection of the appropriate agency for siting regulation authority may determine whether there is to be unified review of a site proposal or numerous inquiries involving a duplication, as in Maine.\footnote{1} Simply directing an existing public utilities agency to widen the scope of its present review of public utility proposals to include environmental and health factors may leave doubts in the minds of the public and conservationists as to the receptiveness of the agency to greater public and interest group participation in the decision making process. Creating a new agency, particularly one which is responsible for site regulation but not for the existence of an adequate supply of electrical power, may be simply replacing one agency with a narrow interest with another.

C. TRAILER AND MOBILE HOME PARKS

It has been suggested to state legislatures that local regulation of trailer and mobile home parks has been both too stringent and too lax.\footnote{4} Little heed has been paid to protests against zoning which is blatantly exclusionary or which allows development without landscaping. Only in Michigan have steps been taken against the exclusion of mobile home parks and those steps have been taken by the courts, which held an ambiguous statute\footnote{5} concerned primarily with health standards to prohibit local governments from excluding mobile home parks\footnote{6} or arbitrarily refusing to zone land for their use.\footnote{117} However, legislatures at the same time have been prolific in enacting regulations on lot size, water supply and sanitary facilities for the state department of health or local health officials to enforce.\footnote{118}

\footnote{113. \textit{See text accompanying note 110 supra}.}
\footnote{115. \textit{MICH. COMP. LAWS ANN.} § 125.1001 et seq. (1967), particularly § 125.1016.}
\footnote{118. \textit{See, e.g.}, \textit{KY. REV. STAT.} § 219.120 et seq. (1962); \textit{MINN. STAT.} § 327.14 et seq. (1969); \textit{OHIO REV. CODE ANN.} § 3733.01 et seq. (Page 1971); \textit{TENN. CODE ANN.} § 53-3201 et seq. (1966); \textit{VA. CODE ANN.} § 35-61 et seq. (1970). Note, though, that in California regulations are promulgated by the State Commission of Housing and Community Development and enforced by the Department of Housing and Community Development unless the responsibility of enforcement is assumed by a...}
While legislation on lot size provides a starting point for state regulation of the appearance of trailer and mobile home parks, development appears to be hampered by the lack of clear expressions of goals. This seems to be the result of an assignment of the duty of regulation of such trailer parks to agencies, most frequently the department of health, which have no expertise in landscaping. A 1969 Vermont statute attempted to correct this situation. The statute establishes minimum standards on lot size, off street parking, tree planting, open space and landscaping between the park and adjacent properties and highways. Enforcement is provided by requiring that park developers submit site plans for approval by an agency to be designated by the governor. Even the Vermont statute is not comprehensive. It allows local governments to enact regulations more stringent than those of the state and does not eliminate the need for a local permit. The subject awaits a more innovative and forceful handling by the states.

D. COASTAL WETLANDS

The coastal wetlands statutes of the states on the eastern seaboard are remarkable for their uniformity. The majority of the statutes bring under the jurisdiction of state agencies a very narrow strip of coastal land and permit designated agencies to exercise veto power over development within the strip. Massachusetts' definition of the territory encompassed is typical:

In this section the term "coastal wetlands" shall mean any bank, marsh, swamp, meadow, flat or other low land subject to tidal action or coastal storm flowage and such contiguous land as the commissioner reasonably deems necessary to affect by any such order in carrying out the purposes of this section.
Only in Delaware does the statute,\textsuperscript{125} delineate a significantly larger area.

Administration of wetlands statutes is most often assigned to a professional employee or agency of the state: in New Jersey to the Commissioner of Environmental Protection;\textsuperscript{126} in Massachusetts to the Commissioner of Conservation;\textsuperscript{127} in Rhode Island to the Director of Natural Resources;\textsuperscript{128} in North Carolina to the Department of Conservation and Development;\textsuperscript{129} and in Maine to the Wetlands Control Board.\textsuperscript{130} In New Hampshire (Water Resources Board)\textsuperscript{131} and in Maryland (Board of Public Works, Secretary of Natural Resources and Agriculture Commission)\textsuperscript{132} not all of those holding administrative power are paid employees of the state, but some are, and professional staffs are available. The absence of large boards with public, industry and conservation representatives may indicate a broadly based consensus on the extent to which development in wetlands areas is to be permitted and a decision that continuing input from interest groups is not required. If that is so, it is not adequately reflected in the ambiguous guidelines contained in statutes such as that of Maryland where the Board of Public Works is directed in issuing permits to take into account “the varying ecological, economic, developmental, recreational and aesthetic values each application presents . . . .”\textsuperscript{133} The success or failure of the professional administrators in implementing what they regard to be the public policy on wetlands is certain to be noted by conservation groups and industry associations which are currently represented on decision making boards in other areas such as power plant siting.

The method for control of development adopted by a majority of the states is to require a permit for any dredging or filling and to authorize the administering agency to issue orders or regulations effecting a general policy.\textsuperscript{134} The lack of input

\begin{enumerate}
\item[125.] See text accompanying notes 158-67 infra.
\item[127.] MASS. ANN. LAWS ch. 130, § 105 (Supp. 1971).
\item[129.] N.C. GEN. STAT. § 113-229 (Supp. 1971).
\item[130.] ME. REV. STAT. ANN. tit. 12, § 4701 (Supp. 1972).
\item[132.] Id. at § 721.
\item[133.] Id. at § 721.
from interest groups at the decision making level arguably is remedied by the hearings on permit applications and proposed regulations; an amalgam of the statutory notice provisions regarding hearings would require that notice be published in newspapers of general circulation in the county where the land affected is located and be sent to affected or abutting land owners, municipal and county officials, the state planning agency, pollution control commission, fish and game department, division of economic development and interested federal agencies. Difficulty lies in the failure of each of the present individual statutes to require notice to each of these parties and in the inconsistency in requirements for permit and regulation hearings. For example, in New Jersey such hearings are required prior to the promulgation of regulations but not prior to the issuance of permits. In New Hampshire and Maine hearings are required prior to the issuance of permits but not of regulations. If hearings are to serve their ostensible purpose of serving as input mechanisms and of developing a consensus, the public hearing with notice to all interested parties is essential. Similarly if a consensus is to be developed and policy rapidly implemented, copies of permits and regulations should be published in appropriate newspapers, sent to parties affected, and recorded with the registrar of deeds in the counties where land affected is located.


143. Recording is a feature of the Maine, Maryland, Massachusetts, New Jersey and Rhode Island statutes. Me. Rev. Stat. Ann. tit. 12,
Continuing review of compliance with wetlands statutes and regulations is implicit in the authority to grant conditional permits and in the fines and penalties which may be imposed for violations of regulations. Maine takes the additional step of providing that all permits expire three years from the date of issuance. Maryland permits the secretary of natural resources to require a bond securing compliance with the conditions and limitations set forth in the permit.

Adequate provision for ameliorating the effects of stringent regulation of wetlands may not exist in a majority of the states with wetlands statutes. The Massachusetts and Maine Supreme Courts have held that regulations or conditional permits which prohibit the filling of wetlands may be a “taking” without compensation. Only Rhode Island and New Hampshire have programs for purchasing easements or title to lands when their courts so hold. The Rhode Island statute provides:

If by the adoption of an order under the preceding section any owner of the land subject to such order suffers damage, such owner may recover compensation for such damage in an action filed in the superior court within two (2) years from the date of recording of such order. Awards of damages shall be paid either from funds appropriated to carry out the purposes of §§ 2-1-13 through 2-1-17, inclusive, or from the recreation and conservation land acquisition and development fund of 1964 established pursuant to § 32-4-15 of the general laws.

New Hampshire's statute is more explicit in providing for the purchase of either perpetual negative easements or land in fee simple. It similarly authorizes payment from the marine fisheries or fish and game fund, i.e., funds related to the purchase of either perpetual negative easements or land in fee simple.


151. Id.
poses of the wetlands statute. Without legislation of this type, a state may be faced with the alternatives of permitting uses of wetlands which will thwart the purposes of its wetlands act and purchasing the land in fee simple. The Massachusetts and Maine decisions are cases in point. Under the New Hampshire statute permission to construct a small marina and an access to homes on the uplands could have been combined with the purchase of a perpetual negative easement prohibiting filling of and construction on the marsh.

Local governments lose only the power to be less restrictive than the state government under wetlands statutes enacted to date. While some state administrators harbor hopes of dictating wetlands policy to local governments without the possibility of being rebuffed by more restrictive local regulations,152 recent decisions clearly indicate that the hopes are unfounded. The Massachusetts Supreme Court's interpretation of the Massachusetts Wetlands Act would appear to be equally applicable to the statutes of other states:

We find nothing in the language of the Act expressly, impliedly or inferentially suggesting that municipalities are deprived or preempted from exercising regulatory controls of wetlands situated therein by means of zoning by-laws . . . . The Act does not attempt to create a uniform statutory scheme. It establishes minimum statewide standards leaving local communities free to adopt more stringent controls.153

Active participation by local officials in decisions to grant or withhold state permits is provided for in a number of statutes. In Massachusetts and Maine hearings on applications for state permits are conducted by local officials;154 in Maryland and New Hampshire notice of permit application hearing is given to local officials;155 in North Carolina the local officials not only receive notice but may force a review of a decision contrary to their recommendations.156 Provision for consultation with local officials before regulations are promulgated is much less common. At present only Maryland's Private Wetlands Act now so provides.157 Experience will reveal the degree and nature of co-

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operation by state agencies and local officials required for effective wetlands control. It may indeed be necessary for the states to preempt the field. In the interim the requirements of notice to and consultation with local officials on permit decisions and regulations seem politically wise.

Delaware's statute is unique among the coastal wetlands acts in that it protects a strip of coast and subaqueous land from one to five miles wide and in this zone absolutely prohibits further development of heavy industry and offshore bulk transfer facilities. Development for other manufacturing uses is allowed only by a permit issued by the State Planner or, on appeal from his decision, by the Coastal Zone Industrial Control Board.

In other respects the Delaware statute is similar to the statutes of the other eastern seaboard states and as the most recent it is a disappointment. There is no requirement that notice of hearings on initial permit applications and on regulations be published or be mailed to federal, state and local agencies or adjacent landowners, and plans and guidelines restricting the use of specific areas need not be filed with registrars of deeds. The public members of the Coastal Zone Industrial Control Board serve without compensation and without professional staff other than that which might be provided by state department heads who also serve on the board. There is no explicit provision for issuing conditional permits and for injunctions the Board must rely on action by the attorney general. While there is provision for the acquisition of fee simple and lesser interests in land, funding is unclear. Finally, no permit may be granted "unless the county or municipality having jurisdiction has first approved the use in question by zoning procedures provided by law."

The Delaware statute, indeed, may be significantly worse than its counterparts because permits are required only for the "expansion or extension of non-conforming manufacturing uses" rather than for

158. 58 Laws of Delaware, ch. 175 (1971).
159. Id. at § 7003.
160. Id. at § 7004(a).
161. Id. at § 7005(a) & (b).
162. Id. at § 7005(c).
163. Id. at § 7006.
164. Id. at § 7010.
165. Id. at § 7009.
166. Id. at § 7004(a).
167. Id.
any dredging, filling or construction, and apparently non-
manufacturing development may continue apace.

V. STATE GUIDANCE OF LOCAL REGULATION: MINI-
MUM STANDARDS, MODEL ORDINANCES, et al.

It seems unlikely that many states will follow the example
of Hawaii or Puerto Rico toward centralized control over all
land use decisions. Many land use proposals will have no major
impact beyond the local level. Others would involve too
heavy an expense if administered at the state level. In order
to channel state energies into important areas without unnes-
cessarily increasing the cost or bureaucratization of the land devel-
opment process, many states have chosen to focus their attention
on such areas of critical state concern as shorelands or flood
plains. Though the structure of such regulation has taken many
forms, a major portion of it requires the state to carry out two
basic functions: (1) to provide affirmative guidance to local
governments, usually in the form of minimum standards or a
model ordinance, and (2) to review and approve all local regu-
lations to ensure compliance with enunciated state-wide objec-
tives. This latter function is usually augmented by authority
to enact conforming regulations for any local government which
fails to satisfy state requirements.

A. SHORELANDS

Statutory attempts to regulate the use of shorelands from
the state level can be broken down into two categories. One
group of statutes is directed toward all or nearly all shore-
land areas within the state and seeks to coordinate the develop-
ment of these areas in a manner consistent with statewide
interests. The second group seeks to identify only those

168. See ALI Model Land Development Code 5 (Tent. Draft No. 3,
1971).
169. The ALI Model Land Development Code § 7-201 (Tent. Draft
No. 3, 1971) includes provision for designation by the state of “districts
of critical state concern.” Notes following this section define such dis-
trict as areas in which “land development proposals have a state or
regional impact because of the nature of the land on which they are
located.”
170. Maine, Minnesota, Vermont, Washington, Wisconsin. See Part
V(A) (1) infra.
171. Wisconsin and Minnesota exclude shorelands in “unincorporated
§ 59.971(1) (Supp. 1971).
172. See Part V(A) (2) infra.
shoreland areas within the state which, because of their scenic or ecological importance, need to be preserved in an essentially natural state.

1. Ensuring Orderly Development

Five states recently have enacted comprehensive shoreland protection statutes designed to foster the planned and orderly development of state shorelands. Though the specific descriptions vary, "shoreland" is generally defined as land which extends to somewhere between 250 and 1,000 feet from the ordinary high water mark of water areas which are either "navigable" or which meet a certain minimum acreage. Each of the statutes calls upon local governments to adopt zoning and subdivision controls for the regulation of these shoreland areas. If prior to a stated future date the local


174. ME. REV. STAT. ANN. § 4811 (Supp. 1972) (250 ft.); MINN. STAT. § 105.485 (2) (Supp. 1971) (1000 ft. from a "lake, pond, or flowage;" 300 ft. from "river or stream or the landward side of flood plain" on such river or stream, "whichever is greater"); VT. STAT. ANN., tit. 10, § 1101(b) (Supp. 1971) (between 500 and 1000 feet); WIS. STAT. ANN. § 59.971(1) (Supp. 1971) (same as Minnesota). The Washington statute does not provide for a distance in feet.


177. This is the test in Maine and Wisconsin. ME. REV. STAT. ANN. tit. 12, § 4811 (Supp. 1972); WIS. STAT. ANN. § 59.971(1) (Supp. 1971). Washington excludes shorelines upstream from a point where the mean annual flow is 20 cubic feet per second or less, and also excludes shorelines on lakes less than 20 acres in size. WASH. REV. CODE ANN. App. 90.286x(3) (2)(d) (Supp. 1971).

178. Vermont requires the relevant "lake or pond" to exceed 20 acres. VT. STAT. ANN. tit. 10, § 1101(6) (Supp. 1971). Minnesota’s statute applies to all “public waters.” The Minnesota Department of Natural Resources has defined this term to mean at least 25 acres for a lake, or a total drainage area of 2 square miles for a river. Minn. Conservation Regs. § 70(d) (1970). Washington has a similar provision. See note 177 supra.

179. Local zoning enabling legislation generally includes the requirement that local zoning be conducted in conformance with a comprehensive plan. See ALI MODEL LAND DEVELOPMENT CODE App. B (Tent. Draft No. 1, 1968). At least one state, Minnesota, has amended its basic statute to require considerations affecting “the conservation of shorelands” to be included in the comprehensive plan. MINN. STAT. §§ 394.25, 396.03 (Supp. 1971). One of the problems this raises is
government fails to adopt such an ordinance or adopts an ordinance which fails to meet standards established by the state agency, that agency is empowered to adopt suitable ordinances for the local government thereafter to be administered and enforced at the local level.

In Maine, Vermont and Washington, State guidance of shoreland development is intended to extend to all shorelands within the state, both in urban and rural areas. This intention is reflected by the choice of particular units of local government to prepare the shoreland ordinances. Washington delegates this responsibility to "any county, incorporated city, or town."\(^{181}\) In Vermont, the duty to enact local ordinances is charged to "municipalities," defined to include both incorporated units and "unorganized town(s) or gore(s)."\(^{182}\) Maine's shoreland protection statute applies only to organized areas of the state\(^{183}\) since only cities and towns are given power to regulate land use.\(^{184}\) However, shorelands in unorganized areas of the state are already regulated directly by the Maine Land Use Regulation Commission, as noted earlier.\(^{185}\)

In contrast to these states, Minnesota and Wisconsin have chosen to impose state guidelines on shoreland development only within "unincorporated"\(^{186}\) areas of the state. Accordingly, only county governments are required to zone in accordance with state guidelines\(^{187}\) while cities and villages remain un-

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180. The time period between enactment of the statute and the deadline for local enactment of shoreline ordinances is approximately as follows in the various states: Maine—2 yrs.; Minnesota—3 years plus; Vermont—3 years minus; Washington—2½ years; Wisconsin—18 months.


183. Only "municipal units of government pursuant to presently existing enabling legislation" are authorized to act under the statute (Me. Rev. Stat. Ann. tit. 12, § 4812 (Supp. 1972) ) and their powers to regulate shorelines will in general be limited to areas within municipal boundaries. Telephone interview with Mr. James Haskell, Maine Land Use Regulation Commission, Sept. 28, 1971.


185. See note 32 supra.

186. In Minnesota, "unincorporated" is defined to mean the area "outside a city, village, or borough." Minn. Stat. § 105.485(2) (Supp. 1971).

affected. This decision is probably explained by three primary factors. First, inclusion of municipal shorelands in the regulatory scheme would have been politically unpopular and might have jeopardized the passage of the bills. Second, the notion existed that because of the substantial amount of existing development, many shorelands within municipal boundaries were beyond the stage where restriction of future development would have any significant impact on shoreland use. Third, this belief, coupled with the fact that both Minnesota and Wisconsin contain a large number of water areas suggested that the most productive and beneficial use of the limited funds and manpower available would be to concentrate on those areas where control of future land use would have its most significant impact, namely, non-urban areas.

This approach nevertheless carries with it a number of potential difficulties. Use of water areas lying within unincorporated districts may be affected directly by shoreland use regulations in incorporated areas. A second problem may involve the effects of municipal annexation. If a municipality seeks to annex a previously unincorporated shoreland area for use in a development project which benefits the municipality, should it make a difference that the proposed development would violate a previously enacted county shoreland ordinance, passed specifically in response to the state statute? These and other problems may have to be dealt with by future legislation.

a. The State's Role in Shoreland Management

The state's role of supervising local regulatory efforts is carried out in the different states by a variety of different state departments. Wisconsin and Washington place all authority in a single agency. In Wisconsin, it is the Department of Natural Resources which establishes standards and criteria, adopts a model ordinance, and reviews local ordinances. In Wash-

188. Interview with Mr. Mike Hambrock, Minnesota Department of Natural Resources, Nov. 17, 1971.
189. Id.
190. Id.
191. See Maine Laws ch. 457, § 5 (1971), amending ME. REV. STAT. ANN. tit. 12, § 685-A(4) (1964), providing that an unincorporated area regulated by the Maine Land Use Regulation Commission and subsequently annexed by a municipality will remain subject to the Commission's controls until the municipality adopts land use regulations no less protective than the Commission's.
192. WIS. STAT. ANN. §§ 59.971, 144.26 (Supp. 1971).
ington, the Department of Ecology, a new department created in 1970 as a composite of a number of old agencies, performs the same functions. Minnesota places primary responsibility in its Commissioner of Natural Resources, but any model standards or ordinances which the Commissioner adopts must be approved by the Board of Health and the Pollution Control Agency. In addition, these agencies together with a number of others provide "information and advice" to the Commissioner as necessary.

Maine and Vermont have adopted a more decentralized approach to shoreland management. In Maine, the Environmental Commission and the Land Use Regulation Commission are given co-operative authority to review local ordinances. If these ordinances fail to comply with state standards, the two commissions must consult with a third agency, the State Planning Office, before adopting conforming regulations. In Vermont, the Department of Water Resources provides the standards and criteria for shoreland bylaws. The Department then assists the Central Planning Office in preparing model bylaws. A Department subdivision, the Water Resources Board, is responsible for reviewing local bylaws and, where necessary, adopting bylaws for the local government.

The choice to centralize or decentralize state supervision over local regulation is of significance in a number of respects. Decentralization has the advantage of allowing a wider range of interests to participate in the development of a workable shorelands management program. Environmental concerns may

193. This included the Water Pollution Control Commission, the Department of Water Resources, the air pollution functions of the Department of Health and the State Air Pollution Control Board and solid waste disposal functions of the Department of Health. Wash. Rev. Code Ann. § 43.21A.060 (Supp. 1971).
196. Id.
198. Id.
201. Id. at tit. 24, § 4410a(d).
need to be supplemented by exposure to long-range planning considerations or the interests of private land-owners or developers. To adopt a single agency approach, as Wisconsin has done, could make it less likely that these interests will be adequately aired. On the other hand, diffusing responsibility over a number of different departments may lead to inadequate coordination and the duplication of functions. In Maine, for example, failure to designate one agency as the superior authority has led to a situation in which "everybody's trying to do it all" and "there's a lot of buck-passing." Decentralized state supervision also may hinder the state's ability to define goals and publicize objectives to the local community. Without some single executive spokesman, local governments may be unsure of their responsibilities and community support for the overall objectives of the shorelands program may be retarded.

Solutions to these problems may be elusive. Washington has created a Department of Ecology, combining the environmental and pollution control functions of a number of older agencies into one new department. By placing this department in charge of shoreland management, the state may ensure a more complete consideration of environmental concerns, but long range planning interests and economic development needs may still go unnoticed. In addition, it may be inefficient or unfeasible in some states to combine different agencies into one department. Space requirements, fear of increased bureaucratization and inefficiency or the overlapping of functions presently carried on within existing agencies may each make this solution seem less attractive.

including the Commission in land use decisions, the state ensures that these interests will be heard. But cf. MINNESOTA CITIZENS LEAGUE, NEEDED: BETTER WAYS OF MAKING ENVIRONMENTAL CHOICES 12 (1971) [hereinafter cited as CITIZENS LEAGUE REPORT], suggesting that the practice of appointing representatives of special interests to these kinds of commissions has been "excessive." This would depend, of course, upon the extent to which all relevant interests were represented within the Department, and/or the degree to which the Department voluntarily solicited the opinions of outside interests in making its decisions.

203. Telephone interview with Mr. James Haskel, Maine Land Use Regulation Commission, Sept. 28, 1971.

205. Telephone interview with Mr. James Haskel, Maine Land Use Regulation Commission, Sept. 28, 1971.

206. See CITIZENS LEAGUE REPORT, supra note 202, at 10-11.

207. See note 193 supra.

208. For example, the State Land Planning Commission created (WASH. REV. CODE ANN. App. 43.287x, §§ 1-10 (Supp. 1971) ) for the purpose of planning and encouraging the wise use of land throughout the state, remains autonomous from the Department of Ecology.
Perhaps the best solution is the one adopted in Minnesota. By placing primary authority in a single agency, the state minimizes duplication of effort and establishes a single executive spokesman for shoreland management. By giving other agencies some veto authority, and by requiring that all agencies with an interest furnish the central agency with necessary "information and advice," the state increases the likelihood that all relevant interests will be heard.

b. The Washington Shoreline Management Act

Though a number of other comparisons could be made, it seems advisable here simply to attempt some general description of the Maine, Minnesota, Vermont and Wisconsin statutes taken together, and then contrast this description with the Washington statute, a law considerably more comprehensive and sophisticated than any other of the acts. All of the former statutes are quite brief. Local governments retain considerable flexibility to regulate shoreland use, limited only by the statutory deadline for enactment of controls and the minimum standards established by the state.209 There are no express provisions for continuing state review of local action, although at least one state agency has tried to create such a power by means of its rule-making authority.210 Granting of variances remains wholly a local function. This absence of continuing state involvement simplifies the regulatory process and may encourage greater local autonomy. However, it also presents the danger that state shoreland policy, as enunciated by the statutes and departmental guidelines, may be circumvented in some cases by unwise or irresponsible local action. These states run the risk that informed zoning decisions by local governments will continue only to the point of initial compliance with the state guidelines.

209. It is possible that the state agency may attempt to impose stricter requirements in some areas by means of its rule-making power. For example, the Minnesota Department of Natural Resources requires that preliminary plans for cluster developments in shoreland areas must be approved by the Commissioner prior to enactment. Minn. Conservation Regs. § 74(d) (1) (1970).

210. See Wis. Adm. Code § NR 115.04(2) (b) (1971), which reads: Compliance status shall also be maintained by the county during subsequent reevaluation of the regulations to ascertain their effectiveness in maintaining the quality of Wisconsin water. A county shall keep its regulations current, effective and workable to retain its status of compliance. Failure to do so shall be deemed noncompliance.
If the local governments balk at enacting suitable ordinances within the statutory time limit, the state agency may enact ordinances for the local government, which the latter must then administer and enforce.\textsuperscript{211} The specific procedures by which this is to be accomplished are left to the discretion of the state agency.\textsuperscript{212} However, many state agencies may be understandably reluctant to impose their will too quickly on the local authorities.\textsuperscript{213} For example, when only a few counties were able to comply with the January 1, 1968, deadline in Wisconsin, the Department of Natural Resources chose to continue to encourage county enactment of shoreland regulations rather than impose its own controls upon the counties.\textsuperscript{214} In light of the Wisconsin experience, provisions which establish detailed procedures for possible state enforcement of an imposed ordinance,\textsuperscript{215} or which provide that local governments will bear all costs incurred by the state in adapting the model ordinance to a local area,\textsuperscript{216} may prove to be little more than “jawboning.”

In contrast to other shoreland protection statutes, the Washington statute\textsuperscript{217} treats these and other problems with considerable sophistication. Citing what it calls “the inherent harm in an uncoordinated and piecemeal development,”\textsuperscript{218} the statute establishes a three level process for local enactment of use regulations: within six months of the effective date of the act, local governments must submit to the Department of Ecology a letter of their intention to comply with other provisions of the stat-


\textsuperscript{212} The statutes state simply that if a local government fails to enact a satisfactory ordinance, the state department shall enact such an ordinance for the county. However, in light of the time and expense which this would involve, coupled with the fact that shoreland regulation is unlikely to be effective without the support and cooperation of the local government, most state departments will probably be flexible in their performance of the statutory mandate. See note 214 infra.

\textsuperscript{213} See note 212 supra.


\textsuperscript{215} See Vt. Stat. Ann. § 4410a(d) (Supp. 1971), which provides that if a municipality fails to administer a shoreland bylaw adopted for it by the state, the State Water Resources Board and Department of Water Resources shall administer it jointly, assessing all costs incurred to the municipality.

\textsuperscript{216} See Minn. Stat. § 105.485(5) (Supp. 1971).


\textsuperscript{218} Id. at § 2.
within eighteen months the local government must have completed a comprehensive inventory of all shoreland within its jurisdiction; within eighteen months from the time the Department has adopted its guidelines (or approximately two years and nine months from the effective date of the statute) the local government must have completed a master program for regulation of shoreland use. This requirement that a local government demonstrate compliance at three stages of the enactment process should assure that the long process of designing workable regulations begins quickly and continues evenly until final enactment of the master program. In the interim, that is, prior to final adoption of a master program, local governments may deny necessary development permits for any proposed development which is inconsistent with the policies of the act, departmental guidelines, or the master program being developed for the area, to the extent this can be ascertained. State funds are provided on a matching basis to aid local governments in the preparation of a master program. This should further encourage local cooperation.

219. Id. at § 7(1).
220. Id. at § 8(1).
221. The Department of Ecology is given a maximum of 450 days from the effective date of the statute to enact its guidelines. Id. at § 6 (1). Eighteen months plus 450 days is approximately 2 years and 9 months.
222. Id. at § 8(2).
223. Id. at § 14(2) (a). One of the problems that arose under Minnesota's shorelands statute was whether counties could enact temporary ordinances pending completion and approval of final ordinances. See MN. OP. ATTY. GEN. 983-S, July 28, 1970. Washington's solution of simply giving local governments a veto authority over proposed development (by denying the necessary permit to the developer) seems superior to the temporary ordinance approach, since (1) preparation of such ordinances may siphon considerable time away from the local government's main task of developing a cohesive program of regulation, and (2) temporary ordinances, to the extent they are based on a less than complete collection and study of the relevant considerations, may have few advantages over Washington's case by case approach, and may in fact have the serious disadvantage of prejudging certain developments without full knowledge of all applicable considerations. But cf. Maine Laws 1971, ch. 457, amending ME. REV. STAT. ANN. tit. 12, § 685-A(6) (1964), granting the Maine Land Use Regulation Commission power to adopt interim guidance standards for development in unincorporated areas of the state. See also Freilich, Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning, 49 J. OF URBAN LAW 65 (1971). Washington's approach has the added advantage that interim veto authority presumably can be exercised more and more knowledgeably as the local government moves closer to final enactment of its master program.
In order to become “use regulations,” local master programs must be approved by the Department. For this purpose, State shorelands are broken down into two groups: (1) “shorelines of state-wide significance,” that is, those shorelines designated by the legislature which, because of their size or use, are of significant statewide importance; and (2) “shorelines,” defined to include all other shorelines except those adjacent to certain small water areas, as defined by statute. In order to receive department approval, master programs for “shorelines” must be “consistent with” statutory policy and the Department's guidelines. If approval is denied, the master program is resubmitted to the local government with suggested modifications. The local government makes necessary revisions and may resubmit its program to the Department within 90 days. This process is continued until such time as full compliance with statutory policies is achieved, or the Department in its discretion determines that its power to enact use regulations for the local government must be invoked.

With respect to “shorelines of state-wide significance,” the Department may withhold its approval if in its opinion the local master program fails to achieve an “optimal” implementation of the policies of the act. Again, however, the Department's first step upon disapproval must be to return the program with suggested modifications to the local government. If the local government then fails to resubmit an acceptable program, the Department may develop and adopt an alternative. In the case of either “shorelines” or “shorelines of state-wide significance,” the local government is free to appeal any guidelines or imposed use regulations to a state hearing board. In addition, a local government may always continue to develop its own master program which, when approved by the Department,

225. Id. at § 10(1).
226. Id. at § 3(2)(e).
227. Id. at § 3(2)(d).
228. Id. at § 9(1).
229. Id.
230. Id. at § 7(2) states that the Department shall enact an ordinance for the local government when the latter fails to conform to the time schedule provided in the statute. However, under Section 9(1) the Department apparently has the authority to continue the process of resubmitting unsatisfactory ordinances to the local government as long as it wishes.
231. Id. at § 9(2).
232. Id.
233. Id. at § 18(4).
will supercede any regulations imposed by the Department.\textsuperscript{234}

Although heavy emphasis is placed on local governments being heard at all steps of the process, significant controls are retained at the state level. In addition to general statutory guidelines,\textsuperscript{235} the model guidelines promulgated by the Department, and the Department's power to disapprove local master programs, the state retains, through the Department, the power to require local governments to enact master programs by segments so that areas of immediate concern may be given priority in enacting regulations.\textsuperscript{236} The Department also has the authority to require local governments to cooperate in the adoption of a regional master program where necessary.\textsuperscript{237} This should provide an effective mechanism for the regulation of shoreland areas which overlap local boundaries or which service a regional population.

The statute establishes a comprehensive scheme to ensure continuing local compliance with legislative objectives. First, all variances granted by a local government must receive prior approval by the Department.\textsuperscript{238} Second, a sophisticated administrative appeals procedure is created under which the Department can challenge nonconforming shoreland development. Under the statute, any development with a total cost exceeding $1,000 or which "materially interferes with" water or shoreline use requires a "development permit" from the appropriate local government.\textsuperscript{239} "Any person aggrieved" may challenge the granting or denial of such a permit by appealing to the Shorelines Hearings Board,\textsuperscript{240} a quasi-judicial body with state-wide jurisdiction established specifically to resolve disputes involving use of shorelands. There are three methods by which the Department either may involve itself directly in this appeals process or initiate appeals of its own. If a "person aggrieved" challenges the permit, the Department may intervene to protect the public interest and ensure compliance with statutory purposes.\textsuperscript{241} Second, the Department may appeal issuance of a permit directly, by filing a written request with the Hearings Board.

\begin{footnotes}
\item[234] Id. at § 9(3).
\item[235] See id. at §§ 2, 10, 15, 16, 32.
\item[236] Id. at § 11(2).
\item[237] Id. at § 11(1).
\item[238] Id. at § 14(11).
\item[239] Id. at § 14(2).
\item[240] Id. at § 18(1).
\item[241] Id.
\end{footnotes}
Third, if the Department believes that conditions of an existing permit are no longer being observed, it may request the Board to rescind the permit. Taken together, these procedures seem to afford an effective vehicle for continuing state review of local regulation and a measure of assurance that unwise local action will not be tolerated.

The Washington statute represents an attempt to develop a constructive, reasonable and workable program for shoreland regulation. Throughout the statute the recurrent theme is that shoreland regulation must be a co-operative venture, with state and local governments working in concert to accomplish mutually desirable objectives. Retained control by the state is broad enough to discourage ill advised or irresponsible local action. Yet, for the most part, such control is limited to a secondary review and is not designed to usurp primary responsibility for administration of the shorelines program from the local government. Thus there are no threats and few absolute deadlines. Local governments are given a realistic timetable and an intelligent working plan for the enactment of a master program. If they meet this schedule, they can expect to be allowed to work out with the Department any differences or nonconformities which still exist between the local program and state guidelines. Any unresolved disagreements can be settled by administrative review by the Shorelines Hearings Board. The overall program seems likely to be effective.

2. Preservation in a Natural State

In contrast to those states which have sought merely to ensure orderly development, a number of states have established state level control of shorelands for the purpose of prohibiting most development and preserving the designated areas in an essentially natural state. Prompted most likely by the possibility of federal aid in connection with the recently established federal scenic rivers program, at least 11 states have

242. Id. at § 18(2).
243. Id. at § 14(7).
244. Id. at § 5, which reads as follows:
This chapter establishes a cooperative program of shoreline management between local government and the state. Local government shall have the primary responsibility for initiating and administering the regulatory program of this chapter. The department shall act primarily in a supportive and review capacity with primary emphasis on insuring compliance with the policy and provisions of this chapter.
recently enacted scenic river statutes. Most of these statutes are not of much interest in a discussion of state land use regulation, either because they apply only to the river channel, or because they are entirely prospective in the sense that a state agency is merely empowered to submit a plan for scenic river regulation for subsequent adoption by the state legislature, or because the state has not yet involved itself in the regulatory process in any significant way. However, at least three states, Tennessee, Michigan and Iowa, have passed comprehensive scenic river statutes which may serve as models for other states planning to adopt such programs in the near future. In addition, the Michigan legislature passed a “Shoreland Protection and Management Act,” designed to protect high-risk and environmental areas from unwanted development.

a. Scenic River Statutes

The Tennessee scenic river act places nearly all regulatory power at the state level. The statute establishes a scenic river system comprised of three classes of river areas: natural, or wild areas; pastoral areas, in which rural or agricultural uses predominate; and partially developed areas, defined as those areas affected by “the works of man” but which still possess actual or potential scenic values. All rivers initially to be included in the system are designated by the legislature. Any additions or changes in classification are permitted only with legislative approval. The statute describes the policies and purposes to be furthered by regulation in each class of rivers


247. Oklahoma and West Virginia. See note 246 supra.
248. Maryland and Virginia. See note 246 supra.
249. Georgia, Louisiana, Ohio and Wisconsin. See note 246 supra.
250. Comprehensive bills have recently been introduced in Arkansas, Kentucky, Minnesota, Oregon and other states. More information can be received by writing the Department of Interior, Washington, D.C.
253. Id. at § 11–1403.
254. Id. at § 11–1404.
255. Id. at § 11–1405.
256. Id. at § 11–1406.
and specifically defines the kinds of land use which will be permitted in each area.\textsuperscript{257} The scenic rivers system is administered by the Department of Conservation in cooperation with the Game and Fish commission. The Department establishes, within the basic limits defined by the legislature, boundaries for all shoreland areas to be included within the system.\textsuperscript{268} Unless the appropriate local government zones these areas in a manner satisfactory to the Department, the Commissioner of Conservation is permitted to acquire title in fee or preferably, "scenic easements" over all land within scenic river areas.\textsuperscript{259} Regardless of local ordinances, however, the Department is allowed to "make and enforce" whatever additional regulations it deems necessary to effectively carry out the purpose of the statute.\textsuperscript{260}

The scenic river acts in Michigan and Iowa are somewhat less centralized, that is, the legislature has dictated policy less inflexibly and there is more emphasis on local participation in the regulatory process. In Michigan, the Natural Resources Commission has authority to designate natural river areas, classify these areas according to characteristics and predominant land use and prepare guidelines and a long range comprehensive plan for the management of natural river areas.\textsuperscript{261} When this is completed, the Commission may designate lands in unincorporated areas which require land use regulation. Local governments are given one year to enact suitable controls for these areas or, if they fail to do so, the Commission may promulgate zoning rules consistent with statutory guidelines.\textsuperscript{262} Regardless of who enacts these zoning ordinances, however, primary enforcement responsibility is apparently retained by the Commission.\textsuperscript{263} In addition, where necessary to effectuate statutory objectives, the Commission may acquire title, easements or other interests in these areas, provided it receives the owner's consent.\textsuperscript{264}

As in Michigan, the Iowa Conservation Commission may designate natural river areas and classify those areas according to use.\textsuperscript{265} However, the Commission is given no authority to

\begin{itemize}
\item \textsuperscript{257} Id. at §§ 11-1403, 11-1411.
\item \textsuperscript{258} Id. at § 11-1408.
\item \textsuperscript{259} Id. at § 11-1409.
\item \textsuperscript{260} Id. at § 11-1406.
\item \textsuperscript{261} MICH. COMP. LAWS ANN. §§ 281.763, .764, .768 (Supp. 1971).
\item \textsuperscript{262} Id. at § 281.768.
\item \textsuperscript{263} Id. at § 281.773.
\item \textsuperscript{264} Id. at § 281.765.
\item \textsuperscript{265} IOWA CODE ANN. §§ 108A.2, .3 (Supp. 1971).
\end{itemize}
acquire interests in these lands (either by eminent domain or with the owner's consent) and can not exercise direct regulatory powers. The Commission is empowered simply to prepare a comprehensive management plan for natural river areas, recommend guidelines and standards for local zoning ordinances and furnish assistance in the enforcement of any ordinances which "adequately" protect "values of the river." The Commission's role, then, is largely advisory, with little retained power either to ensure local enactment of suitable ordinances or to regulate natural river areas directly in the event such ordinances prove inadequate.

These schemes of scenic river regulation have both advantages and dangers. The more centralized approaches taken by Michigan and Tennessee may result in greater expense to the state. However, this expense still might be relatively small, depending on the number, size and location of scenic river areas within the state and the probability that the natural characteristics of some areas would sufficiently discourage development even without the enactment of regulations. If the anticipated expense to the state were small, those drafting scenic river statutes might look more closely at certain other considerations. Stronger state control makes the protection of scenic rivers less vulnerable to the pressures of local economic interest groups. Conversely, the need for a local voice in the drafting of regulations may seem less essential where, as in scenic river regulation, the legislative intention is primarily to prohibit land development rather than to regulate its growth. Many state and local governments also may feel that the costs of regulations designed to yield state-wide benefits should not be borne entirely by the few local governments which happen to have state designated scenic river areas within their boundaries.

One problem possibly common to all the scenic river statutes is the danger that regulations promulgated under the acts might be found unconstitutional. At some point, regulation of land use may become so restrictive as to constitute a "taking," for which the United States Constitution requires the payment

266. Id. at §§ 108A.5, 108A.6.
267. Of the five Class-I designated rivers in Tennessee, four are "gorge" rivers and one is a "swamp" river. The natural characteristics of these rivers should adequately deter development of these river areas without the need for regulations. Thus, administration of Class-I rivers involves very little expense. Telephone interview with Mr. Max Young, Dept. of Conservation, Division of Planning, Oct. 1970.
of “just compensation” to the land owner. To meet the contingency that certain regulations might be held to constitute a “taking,” it seems desirable that the basic scenic river enabling statutes include some provision for responsive state action. Examples of this, noted earlier in the section on coastal wetlands, might include the grant of eminent domain power to the state board, or a provision that regulations held to constitute a “taking” be considered automatically void, or some variant of these. Nevertheless, of the three statutes under consideration, only Tennessee grants eminent domain power to the state board and no state makes express reference to the possible constitutional problem involved.

b. Michigan's Shorelands Protection and Management Act

The only other attempt to preserve shoreland areas by direct state control has been Michigan's attempt in 1970 to regulate “high risk” and “environmental” areas along a bordering Great Lake or connecting waterway. For purposes of the Statute, “high risk” areas are defined as those areas subject to erosion and “environmental” areas are those areas necessary for the preservation and maintenance of fish and wildlife. The statute requires the Department of Natural Resources to designate environmental areas and recommend appropriate use regulations for such areas to the local governments. Similarly, the Water Resources Commission identifies high risk areas and proposes regulations for those areas which the department determines require such measures. The local governments are then allowed three years within which to zone high risk and environmental areas, subject to approval by the Water Resources Commission. In all cases, however, the Commission retains general regulatory authority and may promulgate any rules necessary to implement purposes of the act.

269. See text accompanying notes 148-51 supra.
272. Id. at § 281.632.
273. Id. at § 281.634 .636.
274. Id. at §§ 281.633 ,.635.
275. Id. at §§ 281.637 to .640.
276. Id. at § 281.641.
The Michigan statute combines strong state authority with an opportunity for local participation at the option of the local government. Adequate protection of high risk and environmental areas may entail severe restrictions on land development. As in scenic river areas, strong state authority seems better designed to protect the state's interests and preclude local capitulation to concentrated economic interests. In addition, it allows the state to regulate critical areas quickly, thereby lessening the danger that substantial unwanted development will occur in the interim between passage of the statute and final enactment of use regulations. The additional provisions giving local governments the option to enact their own regulations may lessen expense to the state while at the same time making the statute more palatable to the local units whose cooperation will be necessary to the effective enforcement of the regulatory scheme.

B. Flood Plains and Flood Ways

Massive expenditures in recent years for flood control and prevention have not been adequate to reduce annual losses from flood damage to acceptable levels. Flood losses are still estimated to exceed $1 billion per year. The conviction has grown that what is needed to solve the problem is some program of land use management, that is, some "attempt to keep men away from floods rather than ... keeping floods away from men." This conviction was given impetus in 1968 when Congress passed the National Flood Insurance Act. This act provides flood insurance for property owners in flood-prone areas, but makes the plan available only in those states or areas which have shown a "positive interest" in flood plain management. This must be accomplished through enactment of land use control measures consistent with federal guidelines.

277. Cf. note 223 supra.
278. See Note, supra note 268.
279. Id.
280. Id. at 1167.
282. The maximum area of the flood plain likely to be flooded once every 100 years. 24 C.F.R. § 1909.1 (1971). Most state statutes have conformed to this requirement, although Montana and Maryland have not, choosing to define flood prone areas as those flooded once every 50 years. IND. ANN. CODE art. 96A § 2(e) (Supp. 1971); MONT. REV. CODE ANN. § 89-3504(2) (Supp. 1971).
283. NFIA § 4012(c).
While varied procedures have been adopted to regulate land use in flood-prone areas, most recent statutes have opted to place some responsibility at the state level. These statutes fall roughly into two groups. Six states\(^\text{284}\) have chosen to intervene in flood plain regulation only when the proposed development would tend to increase flood damage in other areas. This would occur primarily whenever (1) the proposed development was situated on land which was necessary to carry and discharge flood waters, and (2) the development substantially interfered with the land’s ability to accomplish this objective. Predictably, the result would be heightened flood waters in other areas and increased flood damage.\(^\text{285}\) A second group of states\(^\text{286}\) has chosen to encourage comprehensive regulation of all flood plain areas. Although regulation of areas more remote from the flood channel presumably would be limited,\(^\text{287}\) it is justified here as a means to reduce overall flood losses by prohibiting developments which would be likely to suffer unreasonably high damage in the event of flooding.\(^\text{288}\) It is only these latter statutes which fully comply with the National Flood Insurance Act.\(^\text{289}\)

1. **Limited Regulation of Flood Plains**

State-level guidance of flood plain regulation is provided in six states\(^\text{290}\) primarily for the purpose of ensuring unobstructed discharge of flood waters and preventing unreasonable flood hazards. Four states\(^\text{291}\) expressly limit the scope of their regulation to flood ways, i.e., the area of the flood plain which carries flood waters, as opposed to areas where there is ponding but little actual flowage. The remaining states\(^\text{292}\) permit regulation of the entire flood plain, but make clear that the purpose of this regulation is to avoid increased public hazards and to prohibit development which would unreasonably obstruct flood water discharge.

\(^{284}\) Connecticut, Indiana, Michigan, Montana, Nebraska, North Carolina. See Part V (B) (1) infra.

\(^{285}\) Another result of interference with flood water discharge would be increased flood hazards to life and property in other areas.

\(^{286}\) Arkansas, Iowa, Maryland, Michigan, Wisconsin. See Part V (B) (2) infra.


\(^{288}\) See generally Note, supra note 268, at 1164-67.

\(^{289}\) See 24 C.F.R. § 1910.6 (c) (2).

\(^{290}\) Connecticut, Indiana, Michigan, Montana, Nebraska, North Carolina.

\(^{291}\) Indiana, Montana, Nebraska, North Carolina.

\(^{292}\) Connecticut, Michigan.
The statutes of Indiana, Montana, Nebraska and North Carolina apply only to flood ways. In Indiana,\textsuperscript{293} use of flood way land which unduly restricts the capacity of the flood way or which creates an unreasonable hazard to life or property is prohibited, except with specific authorization by the Natural Resources Commission.\textsuperscript{294} In Nebraska,\textsuperscript{295} the Soil and Water Conservation Commission defines each flood way area, and the appropriate local government is then given one year to enact suitable regulations consistent with minimum standards furnished by the Commission.\textsuperscript{296} No subsequent development may be carried out in the flood way without a local permit.\textsuperscript{297} Failing suitable local action, however, location of any “artificial obstruction” within the flood way is absolutely prohibited, except in accordance with direct commission authorization and a commission permit.\textsuperscript{298} The Montana statute\textsuperscript{299} is essentially identical to Nebraska’s, although the former could be interpreted\textsuperscript{300} (but has not been)\textsuperscript{301} to require a state permit in all cases, regardless of local action. In North Carolina,\textsuperscript{302} local governments are responsible for prohibiting unwanted obstructions in the flood way,\textsuperscript{303} but the State Board of Water and Air Resources may furnish suggested standards, technical data and other assistance, and may issue regulations interpreting the basic requirements of the act.\textsuperscript{304}

In Connecticut and Michigan, a state commission is permitted to regulate the entire flood plain, but the purposes for which such regulation may be enacted are limited. In Connecticut,\textsuperscript{305} the Water Resources Commission establishes channel encroachment lines within which no development is permitted

\textsuperscript{294} Id. at § 27-1117. Section 27-1115 contains language which suggests that the Commission may also engage directly in “flood plain regulation.” However, the Commission considers this language ambiguous and presently engages in no direct regulation of the flood plain. Telephone interview with Mr. Bob Jackson, Chief of Division of Water, Indiana Department of Natural Resources, Nov., 1971.
\textsuperscript{296} Id. at § 2-1506.03.
\textsuperscript{297} Id. at § 2-1506.05.
\textsuperscript{298} Id. at §§ 2-1506.13 (3), .06.
\textsuperscript{300} Compare id. at § 89-3506 with id. at § 89-3514.
\textsuperscript{301} Telephone interview with Mr. Rick Bondy, Montana Water Resources Board, Nov. 1971.
\textsuperscript{303} Id. at § 143-215.57.
\textsuperscript{304} Id. at § 143-215.56 (b).
without Commission approval. Although the encroachment lines are intended generally to define the area likely to be inundated by flood, these lines may be varied so as to minimize the area in which planned development would not affect discharge of flood waters. Within these boundaries, the Commission may issue or deny permits based upon the effect of the proposed encroachment upon the flood-carrying capacity of the waterway and the likelihood of increased hazards to life and property. In Michigan all non-agricultural uses of land in the flood plain which "harmfully interfere with the discharge or stage characteristics of a stream" are prohibited except where authorized by the Water Resources Commission or Department of Conservation. Again, the state's authority to regulate areas of the flood plain outside of flood way boundaries is extremely limited.

The decisions of these states not to enact a comprehensive flood plain management program may be based upon a number of factors. The needed controls over land use in the outlying flood plain are often of a very limited nature. Many areas of the flood plain are rarely flooded and can be put to highly economical use. It would make little sense to prohibit such use where the economic benefits from normal years far outweigh the losses incurred in the flood year. Thus, controls limited primarily to building and sanitary codes, flood warning systems and the prohibition of certain critical uses such as hospital or jails may often be all that is needed. Many state legislators may conclude that local governments are adequate to enact these limited measures.

306. Id. at § 25-4a.
307. Id. at § 25-4b.
308. Id. at § 25-4a.
310. At least one commentator has suggested that the language quoted above should be interpreted as absolutely limiting the Commission's authority to flood ways. See Bartke, Dredging, Filling and Flood Plain Regulation in Michigan, 17 Wayne L. Rev. 861, 904 (1971). However, regulations issued by the Commission leave open the narrow possibility of some regulation of the outer flood plain. These regulations state: "An encroachment in the flood plain landward of floodway limits which does not cause harmful interference may be permitted." Mich. Ad. Code R. 323.205(3) (Supp. No. 62, 1970) (emphasis added).
311. See Beuchert, supra note 287.
312. Id. See also Minn. Stat. § 104.05(c) (Supp. 1971), describing "alternate or supplemental flood plain management measures such as flood proofing, subdivision regulations, building codes, sanitary regulations, and flood warning systems."
A second factor which may have persuaded these states not to enact a comprehensive flood plain program is the pragmatic fear that such a program could not be passed, at least in an effective form. Plans for state-guided regulation of the entire flood plain are almost certain to encounter stiff political opposition from local governments which see such regulation as an encroachment on local power and autonomy. However, such opposition might be significantly reduced if state intervention was limited solely to flood ways. For example, despite determined local opposition, Montana was able in 1971 to enact a strong and effective program of mandatory, state-guided regulation of flood ways. Similar legislation introduced two years earlier in Minnesota, but made applicable to the entire flood plain of each river, had to be modified significantly before it could be passed. It is important to note that rather than simply decreasing the state's powers over the outlying flood plains, the final version emasculated state powers over all areas, including flood ways.

To those who see flood way regulation as the crucial element in any program of flood plain management, the danger of compromise such as that which occurred in Minnesota is ominous indeed. This is because property damage is likely to be most severe in flood way areas. Structures in the flood way which become dislodged may cause serious hazards to property downstream, and obstructions which restrict flood water discharge will raise flood levels and cause increased flood damage in other areas. Thus, if nothing else, strong flood way regulation is essential.

One consideration which favors excluding the outlying flood plain areas from state-level regulation is the fact that such a program fails fully to comply with the National Flood Insurance Act.

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313. See text accompanying notes 4-7 supra.
315. See text accompanying note 329 infra; see also Note, Minnesota's Flood Plain Management Act—State Guidance of Land Use Controls, 55 Minn. L. Rev. 1163, 1169-85 (1971).
316. Id.
317. In addition, a state presumably could be quite flexible in its delineation of flood ways, being sure to include those areas which, although not typified by substantial water flowage during flooding, would be apt to incur substantial flood damage if not properly regulated.
318. See text accompanying notes 281-83 supra.
land use restrictions to be acceptable must apply “at a minimum”\textsuperscript{319} to “the maximum area of the flood plain which is likely to be flooded once every 100 years.”\textsuperscript{320} Accordingly, if local governments have failed to enact acceptable control measures in the flood plain area beyond the flood way,\textsuperscript{321} property owners in that area will not qualify for the insurance. Even more dangerous is the possibility that because the outlying flood plain was not adequately regulated, those located within the flood way would also not be eligible for federal insurance, even though the flood way itself was adequately regulated.\textsuperscript{322}

A second problem with some of the statutes is the danger that the scope of the regulatory powers conferred could be interpreted too narrowly. For example, controls designed solely for the purpose of reducing damage to structures located in the flood way may not be justified by the language of some statutes if such controls do not have the additional goal of reducing obstructions to flood water discharge or preventing increased flood hazards in other areas. Though such a possibility is slight, it is not inconceivable. In Nebraska, for example, the purpose of the statute is “to minimize the extent of floods and reduce the height and violence thereof insofar as such are caused by any natural or artificial obstruction restricting the capacity of the flood ways of the waters of the state.”\textsuperscript{323} Thus a building code which had no impact on a structure’s tendency to restrict flood water discharge but which would substantially reduce damage to the property in the event of flooding might not come within the statutory language. Enactment of such regulation presumably would be left to the unguided discretion of the local government under its general zoning and regulatory authority.\textsuperscript{324}

\begin{itemize}
\item \textsuperscript{319} 24 C.F.R. § 1910.6 (1971).
\item \textsuperscript{320} Id. at § 1909.1.
\item \textsuperscript{321} See id. at § 1910.6(c)(2).
\item \textsuperscript{322} 42 U.S.C. § 4022 (Supp. 1971) provides that flood insurance will be unavailable after December 31, 1971, unless “an appropriate public body shall have adopted adequate land use and control measures . . . .” Regulations issued under the statute require that such measures must be applicable “at a minimum” to the area of the flood plain likely to be flooded once every 100 years. 24 C.F.R. § 1910.6 (1971).
\item \textsuperscript{323} Neb. Rev. Stat. § 2-1506.01 (1970).
\item \textsuperscript{324} See, e.g., Neb. Rev. Stat. § 23-172 (1970). But cf. Bartke, supra note 305, at 907, suggesting that in some cases local action may have been preempted by enactment of the state statute such that local governments could exercise no powers except those specifically conferred by that statute.
\end{itemize}
2. **Comprehensive Flood Plain Regulation**

In addition to the need for unobstructed flood water discharge, there are other purposes toward which flood plain management can be directed which would not fully be served without some regulation of the outlying flood plain. At least three reasons justifying comprehensive flood plain regulation have been suggested: (1) to the extent it is unwise to develop on a flood plain because of possible damage from flood waters, the state must protect from themselves persons who do try to develop there; (2) people often will not know a flood danger exists, and so are easily victimized; (3) there is injury to taxpayers by requiring unnecessary expenditures for public works and disaster relief. In order effectively to attack these flooding problems, at least five states—Arkansas, Iowa, Maryland, Minnesota and Wisconsin—recently have enacted comprehensive programs designed to regulate the entire flood plain.

In Minnesota, the Commissioner of Natural Resources provides technical assistance to local governments and develops criteria and other regulations to guide local enactment of flood plain ordinances. Direct responsibility for enacting such regulations remains at the local level, although flood plain management ordinances must be approved by the Commissioner before taking effect. No sanction is imposed for a local government's failure to enact satisfactory regulations and there is no deadline for local compliance with statutory requirements.

In Arkansas and Wisconsin local governments are given primary responsibility for regulating flood plain use, but an appropriate state agency under certain circumstances may determine that such regulation is inadequate and adopt suitable regulations for the local government. In Wisconsin, the local

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325. See Beuchert, supra note 282.
327. Id. at §§ 104.03, 05.
328. Id. at § 104.04.
329. Local governments are required, however, to submit a letter of "intent to comply" no later than June 30, 1970. Id. at § 104.04(2).
332. In Arkansas, the state is permitted to adopt its own regulations only if local regulations are not "reasonable and effective" and insurance under the National Flood Insurance Act is cut off as a result. Ark. Stat. Ann. § 21-1903 (Supp. 1969). In Wisconsin, the state may zone if the local government fails to zone effectively prior to a stated future date. Wis. Stat. Ann. § 87.30 (Supp. 1971).
government is given only the authority to zone and is required to complete its regulation by a stated future date. Arkansas permits considerably broader regulation, but the state is empowered to supplant ineffective local regulations only in the event that flood insurance under the National Flood Insurance Act has been denied. In neither state is the state agency given express authority either to provide technical assistance to local governments or to issue criteria and guidelines for the enactment of local ordinances.

Iowa and Maryland have placed considerably more power at the state level than have the other states. A designated state department—the Iowa Natural Resources Council or the Maryland Department of Natural Resources—has authority to issue and enforce regulations governing the use of flood plains and no structure may be built within a flood plain area without departmental approval. In Iowa, local governments, with assistance of the Natural Resources Council, may enact their own programs for flood plain regulation which, if approved by the council, will eliminate the need for individual approval of development applications by the Council. Maryland also provides for state assistance to local governments in the drafting of flood plain regulations, but the effect of such local enactment is not specified.

These statutes, as well as the flood way statutes considered earlier, are too diverse to permit much comparison. However, a few general conclusions are possible. In addition to deciding what area of the flood plain should be governed by the new

333. However, regulations issued under the statute permit the local governments to promulgate other types of regulations as well. See Wis. Adm. Code NR 116.05(c) (1971).
340. Iowa Code Ann. § 455A.35 (1971). Few local governments have as yet enacted flood plain ordinances which meet state criteria. Apparently most local governments have concluded that it is simpler and more expedient to allow the state to take responsibility for flood plain management. Interview with Mr. James Cooper, Iowa Natural Resources Council, April 3, 1972.
regulations, states drafting flood plain regulations will have to be concerned with the following issues:

What forms of regulations should be utilized? Of the 11 states considered, seven require a state permit as a precondition to any development in the flood hazard area. Six of these states combine with the permit requirement some procedure for issuance of regulations either by the state board or department or by the appropriate local government. These regulations usually will define encroachment limits for the flood plain and the flood way and may announce criteria for issuance of the necessary development permits. Those states which do not require permits rely on broad regulation by local governments. Usually this would include the enactment of zoning ordinances, subdivision controls, building codes, sanitary regulations and flood warning systems.

Strict regulation of the flood plain has been held in at least one case to constitute a “taking” of land without just compensation. In *Dooley v. Town Plan & Zoning Commission*, a town enacted a flood plain zoning district restricting the use of land within the district to parks and recreational facilities, governmental wildlife sanctuaries, farming and accessory motor vehicle parking. The court held the change in districting unconstitutional on the ground that it rendered impossible any practical use of the plaintiff’s land. Though *Dooley* has been distinguished in subsequent cases, it suggests that at some point, regulation will become so restrictive as to be practically confiscatory, amounting to an unconstitutional taking.

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342. Connecticut, Indiana, Iowa, Maryland, Michigan, Montana and Nebraska.
343. Connecticut, Iowa, Maryland, Michigan, Montana and Nebraska.
344. Montana and Nebraska.
345. I.e., boundary limits.
346. Interview with Mr. James Cooper, Iowa Natural Resources Council, April 3, 1972.
347. Arkansas, Minnesota, North Carolina and Wisconsin.
348. In Arkansas and Wisconsin the state may be permitted to regulate if local controls are ineffective. See note 54 supra.
349. This is true in Wisconsin, even though the statute speaks only of “zoning.” See Wis. Adm. Code NR 116.05 (1971).
350. See note 268 supra.
351. 151 Conn. 304, 197 A.2d 770 (1964).
352. Id. at 311–12, 197 A.2d at 773.
What direct or residual regulatory authority should be retained by the states? In three states the authority to regulate flood plain use rests exclusively with a state department or commission. The remaining eight states contemplate some form of cooperative action by state and local authorities. However, the statutes vary considerably in defining the scope of regulatory authority to be retained at the state level. In two states the appropriate state department is immediately responsible for initiating flood plain control measures. Local governments also are encouraged to regulate but generally have not done so. Four statutes permit the state to regulate only where a local government fails to enact suitable regulations, usually within a prescribed time period. Two states, Minnesota and North Carolina, place no regulatory power at the state level. The state agency has power only to define criteria or, in Minnesota, to disapprove inadequate local regulation.

If regulation of flood plains or flood ways is to be a cooperative effort between state and local governments, a number of other issues must be faced. For example, what provision should be made to ensure that local regulation adequately complies with statutory standards and objectives? What kind of guidance and technical assistance should be furnished by the state to aid local action? Additional issues may arise as well and in this regard the reader may wish to refer to the earlier discussion on shoreland statutes in Section A of this Part.

Furnishing assistance to local governments. Only half of the eight states which permit cooperative action between state and local governments explicitly direct the state agency to issue minimum or suggested guidelines for local action. Only six states provide for direct technical assistance and data dissemi-

355. Iowa and Maryland.
356. Interview with Mr. James Cooper, Iowa Natural Resources Council, April 3, 1972.
357. Arkansas, Montana, Nebraska, Wisconsin. There is no prescribed time period in Arkansas. See note 335 supra.
358. I.e., (1) provision for continuing state review of local action; (2) what time table should local governments be required to meet? By and large, floodplain statutes are relatively unsophisticated, at least by comparison to some of the shoreland statutes considered earlier. Additional issues not mentioned here may be suggested by reference to the shorelands discussion considered earlier.
359. Minnesota, Montana, Nebraska and North Carolina make such provision. Arkansas, Iowa, Maryland and Wisconsin do not.
360. Iowa, Maryland, Minnesota, Montana, Nebraska and North Carolina.
nation. Experience in Minnesota suggests that direct assistance and dissemination of information by the state is of important benefit to local governments seeking to draft adequate flood plain regulations.\textsuperscript{361} Local personnel often begin with little knowledge of flood plain problems and may lack the training or technical data which they need to identify the flood plain and flood way or to competently regulate land use within it. The generation and distribution of sample ordinances, as well as provision for direct assistance through data collection programs, workshops, engineering reports or meetings with local officials eases the task of local governments and may often be essential to effective local regulation.\textsuperscript{362}

\textit{Ensuring that local regulation is adequate.} Informal guidance by the state through model ordinances and technical assistance provides an easy shortcut for drafters of local legislation and seems likely therefore to have some impact in shaping local ordinances. Most states, however, have felt a need for more definite assurance that statutory requirements will be complied with. Six states\textsuperscript{363} require state approval of local regulations before they take effect. By implication, the state department presumably has power to announce the minimum criteria upon which this grant of approval will depend.\textsuperscript{364} Such power to adopt minimum standards is nevertheless granted expressly in Minnesota, Montana and Nebraska. This makes it more likely that minimum standards will in fact be issued to guide and assist local legislators. In Arkansas, where direct state approval of local regulation is not required, the statute effectively incorporates by reference the minimum standards of the National Flood Insurance Act, permitting the state commission to supplant ineffective local regulations which cause denial of federal flood insurance.

VI. REGIONAL LAND USE CONTROL AGENCIES

Land use control is one of the governmental functions being assumed by the increasing number of metropolitan govern-

\textsuperscript{361} Interview with Mr. James Wright, Minnesota Department of Natural Resources, Division of Water, Soils and Minerals, Nov., 1971.

\textsuperscript{362} Id.

\textsuperscript{363} Iowa, Minnesota, Montana, Nebraska and Wisconsin provide so expressly. Maryland seems to imply that state approval will be required. \textit{See Md. Ann. Code art. 96A, § 51} (Supp. 1971).

\textsuperscript{364} For example, though not expressly directed to do so, the Wisconsin Department of Natural Resources recently has issued comprehensive regulations to govern local regulation of flood plains. \textit{See Wis. Adm. Code NR 116.01 et seq.} (1971).
ments. It is also the sole or primary function of a number of regional bodies with responsibility for development and conservation. This section will focus on the latter because metropolitan government is beyond the scope of this note, but the reader is alerted that metropolitan government is one of the ways in which land use control is being shifted away from traditional county and municipal units.  

At least three viable models for regional agencies which are to be concerned primarily with land use control have been produced by recent legislation: the Tahoe Regional Planning Agency, the San Francisco Bay Commission and the Hackensack Meadowland Development Commission. The Tahoe basin, a 500 square mile area in eastern California and western Nevada, was brought under a degree of regional control in 1969. The 10 member governing body of the Agency would appear from the face of the statute to be dominated by representatives of local interests. That is, three are appointed by the constituent California counties and municipalities, three by the constituent Nevada counties, one by the governor of California, one by the governor of Nevada, one by the administrator of the California Resources Agency, and one by the director of the Nevada Department of Conservation and Natural Resources. In fact the county representatives have often been residents of portions of the counties which are not part of the Tahoe basin and regional or state-wide concerns have been given paramount consideration. This created initial problems for the agency in securing the cooperation of the local residents, who favored rapid development of the area to relieve property taxes and viewed the agency's role as dictatorial. But reportedly the adoption of a plan permitting a maximum population of 200,000 has now been accepted by all.  

365. For an excellent survey of the forms metropolitan government has taken see Lineberry, Reforming Metropolitan Governance: Requiem or Reality, 58 GA. L.J. 675 (1970).
370. CAL. GOV'T CODE § 66801, art. III(a) (Supp. 1971).
371. Interview with Mr. Greg George, Assistant Planner, Tahoe Regional Planning Agency, April 12, 1972.
372. Id.
The Tahoe agency is attempting to achieve its goal of preserving the natural beauty and economic productivity of the region by enacting ordinances and regulations which will implement the land use, transportation, conservation, recreation and public service plans it has adopted. The ordinances and regulations constitute “a minimum standard applicable throughout the basin, and any political subdivision may adopt and enforce an equal or higher standard applicable to the same subject of regulation in its territory.” Minimum standards may be anticipated to be inadequate where there is a problem as to the location of undesirable uses such as low cost, high density housing in an urban area. However, in Tahoe the goal of the local government is maximum development of a recreation area and no development permitted by the agency's minimum standard is likely to be prohibited by more stringent local standards.

Enforcement of the plans, ordinances and regulations of the Tahoe agency is primarily the responsibility of the constituent states, counties and cities although the agency has an ambiguous power to “bring action in a court of competent jurisdiction to ensure compliance” if the constituents do not. This enforcement power has not yet been tested in the courts but actions are likely to be sought soon. It was necessary for the agency to seek judicial action to force the constituent California counties to pay the $150,000 portion of the agency's annual budget allocated to them. For amounts in excess of $150,000 the agency is dependent on appropriations by the legislatures of California and Nevada and on federal grants.

The area under the jurisdiction of the San Francisco Bay Conservation and Development Commission is the Bay, its saltponds and wetlands, a 100 foot wide band of shoreland and

373. CAL. GOV'T CODE § 66801, art. I(a) (Supp. 1971).
374. The power to enact all necessary ordinances, rules, regulations and policies to effectuate the adopted regional plans is granted by CAL. GOV'T CODE § 66801, art. VI(a) (Supp. 1971).
375. CAL. GOV'T CODE § 66801, art. V(b) (Supp. 1971).
376. Id. at § 66801, art. VI(a).
377. Interview with Mr. Greg George, Assistant Planner, Tahoe Regional Planning Agency, April 12, 1972.
378. CAL. GOV'T CODE § 66801, art. VI(e).
379. Interview, supra note 377.
382. Id.
certain creeks.\textsuperscript{383} As in the case of Tahoe it would appear from the face of the statute establishing the Commission that it is dominated by representatives of local government: nine represent constituent counties, four constituent cities, four state agencies, one a regional agency, and seven (selected by the governor and legislature from residents of the region) represent the public.\textsuperscript{384} The danger of becoming a forum for competing local interests apparently has been avoided, since most of the representatives of local governments have taken a regional outlook and the public, state and regional representatives are only one vote short of a majority.\textsuperscript{385} The staff of the Commission considers the large number of state and public representatives as an important factor in the Commission’s success when compared with the inaction of the Association of Bay Area Governments, which has only representatives of local governments.\textsuperscript{386} On the other hand relations with local governments have not been harmonious. A dispute with the city of Oakland over construction of a municipal parking lot and storage yard was kept out of court only by a last minute compromise.\textsuperscript{387} Efforts to compromise with the city of San Francisco on the construction of a commercial plaza on piers leased by the San Francisco Port Authority to private developers have not succeeded and suit has been brought by the city.\textsuperscript{388}

The Bay Commission seeks to implement its plan for controlling development by acquired land for public uses and by prohibiting filling of the Bay or changing the use of water, land or structures within its jurisdiction without a permit.\textsuperscript{389} The permit requirement is of the double-veto type common in the wetlands statutes, i.e., it is superimposed on and does not replace permit requirements of existing political subdivisions.\textsuperscript{390} Control also is shared with the United States Army Corps of

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\textsuperscript{383} CAL. GOV’T CODE § 66610 (Supp. 1971).
\textsuperscript{384} Id. at § 66620.
\textsuperscript{385} Interview with Allan Pendleton, Staff Attorney, San Francisco Bay Conservation and Development Commission, April 13, 1972.
\textsuperscript{386} Id. The Association of Bay Area Governments was formed at the instigation of local governments under the Joint Powers Act, CAL. GOV’T CODE § 6500 \textit{et seq}. (1966 and Supp. 1972). The Association has no formal statutory powers but acts the clearing for applications for federal acts required by the Demonstration Cities Act. See notes 362-65 supra, and accompanying text.
\textsuperscript{387} F. BOSSelman & D. CALLIES, supra note 369, at 113-14.
\textsuperscript{388} Id. at 115-19.
\textsuperscript{389} CAL. GOV’T CODE §§ 66630.1 & 66632 (Supp. 1971).
\textsuperscript{390} Id. at § 66632(b).
Engineers which must grant permits for any encroachment upon any navigable waters, and with various state agencies such as the Regional Water Quality Control Board, which sets standards for waste discharged into the Bay. Flexibility in the permit procedure is possible because the Commission is authorized to grant permits subject to restrictions or specified conditions. As in Tahoe the danger of local governments taking a more restrictive stance than the Commission and excluding developments favored by the Commission has not materialized because the local governments favor maximum development. In the one instance in which local residents did wish to exclude a commission approved development, houseboats for artists in Sausalito, the Commission persuaded the county to also grant its approval. Permit fees are expected this year to begin contributing to the support of the Commission which heretofore has been wholly dependent on appropriations of the state legislature.

The Hackensack Meadowlands legislation is the most comprehensive of the recent regional planning statutes. It comes closest to obliterating old political boundaries and vesting traditionally local governmental land use powers in the new regional agency. The Meadowlands Development Commission is also the most free of local domination of the three agencies examined. One member is the commissioner of the state Department of Community Affairs and the remaining six, four of whom must be residents of the region, are appointed by the governor. Participation by constituent local governments at the decision making level is restricted to the Municipal Committee, a committee consisting of the mayors of the constituent municipalities and empowered only to review codes, building standards and plans submitted by the commission and to force by its rejection of the recommendations their adoption by a five-sevenths vote rather than a simple majority. The broad powers of the Commission include the power to issue bonds, to acquire and develop land, to adopt a master plan for development and codes and standards for its effectuation, to levy special

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391. Id. at § 66632.1.
392. Id. at § 66632(e).
393. Id. at § 66632(f).
395. Id.; CAL. GOV'T CODE § 66632(a).
397. Id. at § 13:17-7 & 8.
assessments, to establish engineering standards and building codes, to regulate plans for any subdivision within the district, to undertake redevelopment projects, to consult with state and federal agencies, to establish standards covering land use and comprehensive zoning and to prohibit construction in the region without a permit.\textsuperscript{398} Constituent municipalities are prohibited from enacting or enforcing any code which is inconsistent with the code adopted by the Commission\textsuperscript{399} and from expending any public funds within the region without the approval of the Commission.\textsuperscript{400} Enforcement actions may be brought by the Commission itself and violations of its permit requirements may result in fines of $200 and imprisonment for 30 days.\textsuperscript{401}

Relations between the Development Commission and the Municipal Committee have been strained. The second stage of the Commission's development plan, the portion which contains the specifics of the zoning and building codes, is now being considered by the municipal committee.\textsuperscript{402} Already the constituent municipalities have challenged the constitutionality of the Commission in toto, but this challenge has been rejected by the lower court.\textsuperscript{403} Disputes over the specific terms of the second stage of the plan are expected. Generally the local governments favor continuation of the construction of warehouses and light industry which contributes to the tax base but demands few public services. The Commission has zoned the land for residential development, including low income housing.\textsuperscript{404} If the Hackensack municipalities had the power of the local governments in the Tahoe and San Francisco Bay regions to enforce more stringent regulations than those of the regional commission, the Commission's plan undoubtedly would fail.

The Hackensack commission supports its own activities through federal and state grants-in-aid, fees for the use of its facilities, special assessments and payments by municipalities for services rendered by the Commission.\textsuperscript{405} It also acts as the

\begin{itemize}
  \item \textsuperscript{398} Id. at § 13:17-6.
  \item \textsuperscript{399} Id. at § 13:17-11(b).
  \item \textsuperscript{400} Id. at § 13:17-12(b).
  \item \textsuperscript{401} Id. at § 13:17-19.
  \item \textsuperscript{402} Interview with Garry Rosensweig, Staff Member, Hackensack Meadowlands Development Commission, April 14, 1972.
  \item \textsuperscript{403} Galiardo v. Hackensack Development Com'n., 112 N.J. Super. 89, 270 A.2d 418 (1970).
  \item \textsuperscript{404} Interview, supra note 402.
  \item \textsuperscript{405} N.J. STAT. ANN. § 13:17-77 (Supp. 1971).
\end{itemize}
agent of an inter-municipal tax-sharing fund which seeks to allocate the financial benefits and liabilities of development of the meadowlands among the constituent municipalities.\textsuperscript{406} Though the original statutory formula for tax sharing was one of the municipalities' criticisms of the Commission, the Commission is now turning the issue to its advantage by sponsoring legislation to revise the formula.\textsuperscript{407}

All three of the regional agencies concerned primarily with land use appear to be succeeding and any one may be used as a model by other states. There is a pattern present in the legislation establishing the agencies, however, and it should be considered by draftsmen. Under that pattern, more absolute power over land use placed in the new regional agency results in less participation in the decision making process guaranteed to existing governmental units. Existing local governments are denied representation in the decision making when the authority of the regional agency over land use is not limited by the possibility of more stringent local standards. Perhaps this is only to say that the local governments which have not had sufficient political influence with the legislatures to restrict the new agency to setting minimum standards have also lacked the influence to demand a role in the decision making. But perhaps also it reflects a collective judgment that commissions which are composed solely of representatives of local governments or are dominated by them are likely to be merely another forum for local interest competition. Weighing the need for decisiveness against the need for cooperation between the constituent governments and the regional agency, legislation probably should combine a commission with a mixed membership such as the San Francisco Bay conservation and development commission with absolute permit requirements or zoning and building code standards, free of the threat of more stringent local regulation such as those of the Hackensack Meadowlands Development Commission.

\textsuperscript{406} Id. at §§ 13:17-60 to -76.
\textsuperscript{407} Interview, supra note 402.