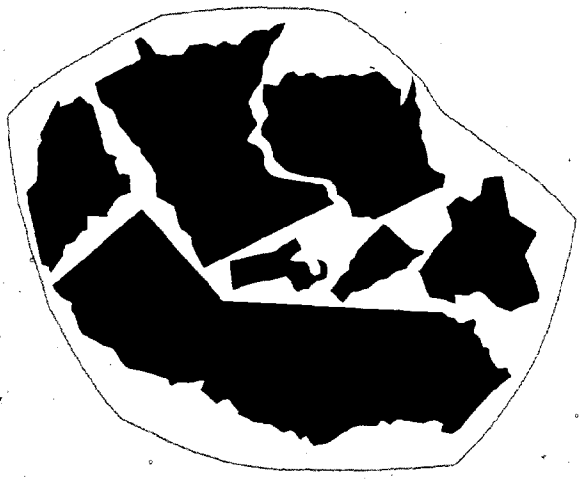
01283

Coastal Zone Information Center

COASTAL ZONE INFORMATION CENTER



THE QUIET REVOLUTION IN LAND USE CONTROL

HD
205
.B66
1972

PREPARED FOR THE COUNCIL ON ENVIRONMENTAL QUALITY
BY FRED BOSSELMAN AND DAVID CALLIES

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Publications of the
Council on Environmental Quality:

Environmental Quality—The First Annual Report
of the Council on Environmental Quality

Ocean Dumping—A National Policy

The President's 1971 Environmental Program

Toxic Substances

Environmental Quality—The Second Annual Report
of the Council on Environmental Quality

01283

THE QUIET REVOLUTION IN LAND USE CONTROL

PREPARED FOR THE COUNCIL ON ENVIRONMENTAL QUALITY
BY FRED BOSSELMAN AND DAVID CALLIES

U.S. DEPARTMENT OF COMMERCE NOAA
COASTAL SERVICES CENTER
2234 SOUTH HOBSON AVENUE
CHARLESTON, SC 29405-2413

HD 205 .B66 1972
281183
FEB 25 1991

Property of CSC Library

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402 - Price $2.75
Stock Number 4111-0006

FOREWORD

The Council on Environmental Quality commissioned this report on the innovative land use laws of several States in order to learn how some of the most complex land use issues are being addressed. This report is of particularly timely interest because the President's proposed National Land Use Policy Act (S. 992, H.R. 4332, See Appendix) would provide Federal assistance to States to develop programs dealing with land use issues of regional or State concern.

Many of the laws analyzed in the Report are designed to deal with problems that are treated in the President's proposal. The bill, for example, calls upon States, as a condition of eligibility for Federal assistance, to identify and control development in "areas of critical environmental concern." The Massachusetts laws dealing with coastal and inland wetlands, the Wisconsin laws dealing with shoreland and floodplain protection, and San Francisco Bay Conservation and Development Commission are examples of measures relating to such environmentally critical areas.

The President's proposal would encourage States to assure that "development of regional benefit" is not blocked or unduly restricted by local governments. Massachusetts' "anti-snob zoning" law is an example of such a measure.

The National Land Use Policy Act would also ask States to control "large scale development" and land use in "areas impacted by key facilities," including the environs of major airports, highway interchanges and recreational facilities where growth pressures tend to be irresistible. Vermont's Environmental Control Law and Maine's Site Location Law represent approaches to the problem of controlling large scale development, and the Airport Zoning Act of the Twin Cities, Minnesota, is an example of a measure dealing with land use regulation around a key facility.

We do not necessarily endorse any of the laws analyzed in the Report, but we invite attention to them as examples of approaches States are taking to the difficult problem of reallocating responsibilities between State and local government. The progressive initiatives of several States are evidence that the great debate has begun, that efforts are underway in widely separated areas of the country to broaden the community making decisions with respect to certain land use issues. Undoubtedly, matters of purely local interest -- for example, where to allow a gas station -- should remain under local control. Probably the great majority of land use decisions made by government are properly local in effect.

However, as our society has become more complex it has become clear that some land use determinations of one locality often have very important consequences for citizens in other areas. It is these issues of greater than local significance in which State and regional involvement seems appropriate, even necessary, if the broader community affected by such decisions is to have some influence over them.

We are encouraged by the increasing concern in the States over these problems. We hope that this report will contribute to greater interest and familiarity with land use regulation, and that readers will share the urgency we feel with respect to land use as the most important environmental issue remaining substantially unaddressed as a matter of national policy.

Russell E. Train
Chairman

Executive Office of the President
Council on Environmental Quality
Washington, D.C.
December 15, 1971

CONTENTS

	Page
ACKNOWLEDGMENTS	vii
INTRODUCTION	1
HAWAIIAN LAND USE LAW	5
Origins of the Land Use Law	5
How the Land Use Law Works	7
Preserving the Pine and the Cane	13
Can Tourism and Conservation be Made Compatible?	18
Can Hawaii Afford Well-Planned Cities?	22
The Commission's Decision Making Process	28
Interrelationship of Governmental Agencies	31
VERMONT ENVIRONMENTAL CONTROL LAW	54
History and Circumstances of Adoption	54
The Environmental Board and District Commissions	56
Applications for Permits--The District Commissions	59
The Three State Plans	71
Other Aspects of the Planning Process	77
Adequacy of the Law's Coverage	80
Relationship Between Planning and Regulation	81
Enforcement: Selective Examples of Administrative Action	85
Policy Implementation Under the Environmental Control Law	88
SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION	108
The Concern Over the Filling of the Bay	108
The Powers of the Bay Commission	109
Current Operations of the Bay Commission	111
The Oakland Fill Flap	113
The Candlestick Properties Case: A Legal Victory	114
Ferry Port Plaza: The Commission Takes on San Francisco	115
Balancing Conservation and Development	119
The Actual Impact of the Commission	121

	Page
TWIN CITIES METROPOLITAN COUNCIL	136
History and Circumstances of Adoption	137
How the Council is Designed to Function--An Overview	139
The Council and the Commissions	141
Metropolitan Development Guide	146
Review of Local Governmental Unit Plans	148
Recent Developments in the Legislature	150
Future Plans	153
MASSACHUSETTS ZONING APPEALS LAW	164
Origins of the Law	164
Operation of the Law	165
Pending Amendments to the Law	168
The Comprehensive Permit Process	170
Operations of the Housing Appeals Committee	172
The Hanover Decision	173
The Newton Case	176
Other Cases	178
Effectiveness of the Zoning Appeals Law	179
MAINE SITE LOCATION LAW	187
Threats to the Environment	187
Development Regulated by the Law	188
The Regulatory Agency	189
Review of Applications for Permits	190
Judicial Review	194
Effectiveness of Administration	195
The Impact on the Environment	196
MASSACHUSETTS WETLANDS PROTECTION PROGRAM	205
Background of Massachusetts Wetlands Legislation	206
Protection of Coastal Wetlands	207
Delineation of Areas to be Protected	207
Nature of Protective Orders	210
Role of Local Authorities	213
Judicial Review and Eminent Domain Proceedings	215
Protection of Inland Wetlands	216
Inland Protective Orders	221
Investigation and Enforcement Procedures	224
Conclusion	225

	Page
WISCONSIN SHORELAND PROTECTION PROGRAM	235
The Water Resources Act of 1966	236
Flood Plain Zoning	238
Departmental Regulations	239
Actions by the Counties	244
State-Local Relations	245
Questions of Jurisdiction	247
Public Awareness	248
Enforcement Through Legal Action	251
Adequacy of Environmental Protection	252
Areawide Coordination	253
Conclusion	254
NEW ENGLAND RIVER BASINS COMMISSION	262
Early Efforts Toward Coordination	262
Structure of the Commission	263
Responsibilities of the Commission	267
Programs Undertaken	268
Comprehensive New England Water Resources Plan	269
The Connecticut River Basin Plan	271
Future Plans	275
Special Studies	277
Effectiveness of the Commission	279
SUMMARIES OF OTHER INNOVATIVE LEGISLATION	290
1. Critical Area Legislation	291
a. Tahoe Regional Planning Agency	291
b. Hackensack Meadowlands Development Commission	293
c. Adirondack Park Agency	295
d. Delaware Coastal Zone Act	299
2. Land Use Study Commissions	300
a. The Colorado Land Use Act	300
b. Washington Land Planning Commission	301
c. Alaska Joint State-Federal Natural Resources and Land Use Planning Commission	302
3. Wetland and Shoreland Laws	304
a. Comprehensive Protection Statutes	304
b. Fill and Dredge Statutes	305

	Page
KEY ISSUES IN STATE LAND USE REGULATION	314
1. Toward a New Concept of Land	314
2. The Role of the State	318
3. The Role of Local Government	320
4. Regulation and Planning	321
5. Constitutional Limits on Regulation	323
6. Choice of State Agency	325
POSTSCRIPT: FUTURE DIRECTIONS	327
APPENDICES	

ACKNOWLEDGMENTS

When a report is based on literally hundreds of interviews it is impossible to single out individuals for the thanks they deserve. From Maine to Hawaii we were impressed with the willingness with which busy people spent their valuable time giving us their views about land use problems.

Our associate Bill Eads was of invaluable assistance in the preparation of the preliminary draft of this report. Essential assistance was also provided by Bill Walsh, John Banta, Maxwell Davis, Michael Sawyier and Michael McCracken. And no one is happier to see its completion than Janet Janowski and Virginia Bertz who typed draft after draft with unfailing speed, precision and good humor.

The advice and counsel of Boyd Gibbons and Bill Reilly of the Council on Environmental Quality shaped the scope and direction of the entire project. To them and to the members of the Council we owe our special thanks for their support.

Fred Bosselman
David Callies

Ross, Hardies, O'Keefe,
Babcock & Parsons
Chicago, Illinois
November 1, 1971

INTRODUCTION

This country is in the midst of a revolution in the way we regulate the use of our land. It is a peaceful revolution, conducted entirely within the law. It is a quiet revolution, and its supporters include both conservatives and liberals. It is a disorganized revolution, with no central cadre of leaders, but it is a revolution nonetheless.

The ancien regime being overthrown is the feudal system under which the entire pattern of land development has been controlled by thousands of individual local governments, each seeking to maximize its tax base and minimize its social problems, and caring less what happens to all the others.

The tools of the revolution are new laws taking a wide variety of forms but each sharing a common theme--the need to provide some degree of state or regional participation in the major decisions that affect the use of our increasingly limited supply of land. The function of this report is to discuss and analyze these new laws and to try to predict and perhaps influence the course of this "quiet revolution."

Land use controls developed very late in the history of the United States, primarily after the turn of the century. As experience in other countries has demonstrated, there is little to quicken interest in such controls if there is a super-abundance of land. During the first century of a nation in which a strong belief in the inviolability of private property rights was coupled with a largely agrarian economy, there was no impetus to control the use of land.

Land use controls in the United States have therefore logically developed against a backdrop of the emerging importance of the urban area as steadily receding western frontiers dwindled. As early as 1692, for example, a law was passed in Massachusetts Bay Colony forbidding "nuisance" industries from operating in any but certain districts designated for such uses by town officials, but even then the law was applied only to Boston, Salem, Charlestown, and other market towns and cities of the province--the urban areas of the day.

It was in the cities that it became apparent that regulations were needed to prevent one man's use of his land from depreciating the value of his neighbor's property. Those who were concerned about these issues called themselves city planners, and they viewed the use of land as an urban problem. Rudimentary ordinances regulating building height and land use appeared in Boston and Los Angeles around 1909. Then in the next decade many cities passed local ordinances dividing real estate into districts which permitted some uses and excluded others. This system of local "zoning," as it came to be known, provided planners and legislators with a process containing a wide range of political options with which to achieve a consensus of interests within the local community. After the Supreme Court gave its blessing in 1926 the issue became, what kind of restrictions and where?--rather than whether there should be restrictions at all.

From the beginning the state governments saw land use control as an urban problem. A Standard Zoning Enabling Act delegating the responsibility for zoning to the city governments was prepared by an advisory committee appointed by the then-Secretary of Commerce, Herbert Hoover, and variations of it were quickly adopted by most of the states. Through the 1940's and 1950's zoning techniques were refined: The number and kinds of zones increased; greater flexibility was introduced through open space ratios, floor plan ratios, and performance standards. Planned unit development--the uniting of compatible uses and relaxation of standard restrictions according to a development plan--was added to the arsenal of zoning devices.

The complexity of the new techniques cannot obscure the fact that local zoning remains essentially what it was from the beginning--simply a process by which the residents of a local community examine what people propose to do with their land and decide whether or not they will let them. The comprehensive planning envisioned by zoning's founders was never achieved, in part because the growing interrelatedness of our increasingly complex society makes it impossible for individual local governments to plan comprehensively, and in part because the physical consideration of land use, with which zoning was in theory designed to deal, frequently became submerged in petty local prejudices about who gets to live and work where.

The real problem is the structure of zoning itself, with its emphasis on very local control of land use

by a dizzying multiplicity of local jurisdictions. While the Standard Act was a state enabling act, it was nonetheless an enabling act, directed at delegating land use control to the local level, historically at the city level where the problems which called zoning into being first arose. It has become increasingly apparent that the local zoning ordinance, virtually the sole means of land use control in the United States for over half a century, has proved woefully inadequate to combat a host of problems of statewide significance, social problems as well as problems involving environmental pollution and destruction of vital ecological systems, which threaten our very existence.

It is this realization that local zoning is inadequate to cope with problems that are statewide or regionwide in scope that has fueled the quiet revolution in land use control. A recognition of the inadequacies of local zoning must not, however, cause the values of citizen participation and local control, which local zoning so strongly emphasizes, to be submerged completely in some anonymous state bureaucracy. Although the governmental entities created by the states to deal with land use problems are statewide or regional rather than local in orientation, these innovations have never involved a total usurpation of local control, and have rarely constituted an attack on the integrity of the local zoning process. Even Hawaii's statewide system of land use controls, sometimes thought to vest exclusive authority over land use in the state, recognizes the importance of a major role for local governments.

The innovations wrought by the "quiet revolution" are not, by and large, the results of battles between local governments and states from which the states eventually emerge victorious. Rather, the innovations in most cases have resulted from a growing awareness on the part of both local communities and statewide interests that states, not local governments, are the only existing political entities capable of devising innovative techniques and governmental structures to solve problems such as pollution, destruction of fragile natural resources, the shortage of decent housing, and many other problems which are now widely recognized as simply beyond the capacity of local governments acting alone.

For example, Hawaii, Vermont, and Maine have each adopted a statewide land regulatory system, but the techniques of land use control employed by each of the three are markedly different. Other states have not adopted statewide land use controls, but have provided land use controls for "critical areas" of each state's environment. Thus Wisconsin protects

shorelands around lakes and along waterways, while Massachusetts is one of the states that has adopted laws to protect its wetlands, and California has created a special agency to deal with the problems of San Francisco Bay.

Other innovative legislation focuses on key types of land development. The New England River Basin Commission, like other such commissions, attempts to control the placement of dams and similar structures that are determinative of development patterns within river basins. In Minnesota the Twin Cities Regional Council regulates development by controlling the location of sewers, airports and a variety of other key facilities. And Massachusetts has created a new state agency to ensure that housing can be located in accordance with statewide needs.

The following nine chapters each consider one of these recent innovative land regulatory systems in greater detail, based primarily on a review of the key statutes, regulations and decisions and on interviews with the administering officials and other groups affected by the legislation.

These nine land regulatory systems are only a sampling of the recent legislative activity in this area. Another chapter discusses in more summary fashion a number of other recent laws. The final chapter attempts to synthesize some of the key issues that run through all of the attempts to quietly revolutionize our land regulatory systems.

The nature of the innovations in land use regulation varies from state to state, and sometimes from one institution to another within a state. Some of the devices employed are old ones in novel juxtaposition. Others are entirely, imaginatively new in concept and design. But if there is a commonalty it is a regional and land resource orientation that attempts to preserve and protect a vital resource--land--for the use of the region as a whole.

HAWAIIAN LAND USE LAW

It all began in Hawaii. The quiet revolution in land use control saw its first legislative success with the Hawaiian Legislature's passage of the Land Use Law in 1961. 1/ In the initial years after its passage mainlanders typically brushed it aside as a strange phenomenon from a strange land. But now as other states begin reform of their land regulatory systems it is increasingly apparent that Hawaii's 10 years of administering a system of statewide controls offers a valuable source of practical experience.

The Land Use Law gave state agencies a degree of control over the use of the state's land resources that was far in excess of that enjoyed by other states. It created a state Land Use Commission and directed it to divide the entire state into four districts: conservation, agricultural, rural and urban. The Land Use Law authorized land in the urban district to be used for whatever purpose is permitted under the local zoning regulations. Lands in the agricultural and rural districts were to be used only in compliance with regulations of the state Land Use Commission, and lands in the conservation district were to comply with the regulations of the State Department of Land and Natural Resources.

Origins of the Land Use Law

Hawaii is a small state with a relatively small amount of land, much of which is mountainous and not suitable for cultivation. In addition, Hawaii's climate is marked by great variations in rainfall from one part of the state to another. On the island of Oahu, for example, parts of the northeastern or windward plains receive about 75 inches of rain a year while the mountains a few miles away receive 300 inches and the plains on the southwestern or leeward side of the island receive only 20 inches. 2/ This combination of mountainous terrain and rainfall variability leaves only a relatively small percentage of Hawaii's land suitable for agriculture. About 1-1/2 million of the state's four million acres are used or usable for agricultural purposes but about three-fourths of this agricultural land is dry land used for grazing, with the result that out of the four million acres of land in the state less than 400,000 acres are suitable for crops. 3/

The great majority of the best crop land is devoted to the growing of pineapple and sugar cane on large

plantations. In 1961 shipments of pineapple and sugar cane constituted a great preponderance of Hawaii's exports to the mainland states and foreign countries, and any threat to the sugar and pineapple industries in Hawaii was a serious threat to the state's balance of trade.

The draftsmen of the Land Use Law saw such a threat in the economic boom that hit Hawaii as the 1960's began. Congress had just approved statehood for Hawaii and the new jet airplanes were just beginning to make Hawaii readily accessible to mainland tourists. Both of these factors were stimulating a boom economy in the state which in turn created a concern that these development pressures must be kept under control. 4/ The City of Honolulu had been gradually expanding into the prime agricultural area of the central valley of Oahu, and the boom threatened to accelerate this growth rapidly. 5/ The primary motive of the Law's sponsors was to preserve this central valley and the other prime agricultural land and to restrict the City of Honolulu within narrow urban limits to avoid the Los Angeles-type urban sprawl that many foresaw. 6/

The owners and operators of the plantations were influential in persuading the legislature to take strong measures to preserve the supply of agricultural lands. A very large share of the state's agricultural land was concentrated in a relatively small number of corporations and estates, most of which saw governmental regulation as beneficial to their own interests. Their support, together with the absence of any large number of small farmers who might feel threatened by regulation, was very persuasive in helping achieve passage of the Land Use Law. 7/

To mainlanders accustomed to land use control by local government the surprising aspect of the Land Use Law is not the extensive controls it contains but the fact that public support was found for delegating these controls to a state Land Use Commission rather than to local governments. Hawaiians, however, were newly arrived at statehood and had been accustomed to a strong, centralized territorial government during the many years preceding statehood in 1959. 8/

Even prior to territorial status the islands had been controlled for many years by a centralized monarchy with only limited powers for local governments. 9/ The Polynesian law that governed the use of land during the Hawaiian monarchy characterized various lands in the state as usable for certain types of purposes and decreed that any contrary use of the land was "kapu," and subject to

severe penalties. Thus Myron Thompson, the first chairman of the state Land Use Commission, argues that the 1961 Land Use Law really had its roots far back in the laws of old Hawaii. 10/

The economic importance of agriculture, the imminence of development pressures and attendant threats of urban sprawl, and the traditions of strong centralized government--these all undoubtedly played a part in inducing the 1961 legislature to adopt the Land Use Law. Of course the inner mysteries of the legislative process are not easy to define. Tom Gill, who was majority leader of the House of Representatives in 1961, suggests that the "greenbelt law" (as the Land Use Law was popularly called at that time) may have passed the legislature because some of the members thought it had something to do with judo. 11/ In any event the Law was passed in 1961 and remains in effect in substantially the same form today. 12/

How the Land Use Law Works

The state Land Use Commission consists of seven private citizens plus the Director of the Department of Land and Natural Resources and the Director of the Department of Planning and Economic Development. The Commission has divided the entire state into the four districts specified in the statute: 13/ urban, rural, agricultural and conservation.

1. Urban districts have been established to include substantially all areas currently developed for urban use plus a reserve of land sufficient to accommodate urban growth for the next 10 years. 14/

2. Rural districts have been mapped to include certain areas characterized by low-density residential development of a semi-rural nature on lots of at least one-half acre--which is "large lot zoning" by Hawaiian standards. 15/ No rural districts have been mapped on the island of Oahu and the classification has been used sparingly on the other islands. 16/

3. The agricultural districts include both crop and grazing land plus the sugar mills and other industrial activities typically associated with Hawaiian agriculture. Mapping of these districts has been based on detailed information on the suitability of all Hawaiian land for agriculture provided by the Land Study

452-329 O - 72 - 2

Bureau of the University of Hawaii. 17/ In addition, however, the agricultural districts include lava flows and other lands unsuitable for agricultural use but not thought necessary for conservation purposes. 18/

4. The conservation districts originally established by the 1961 Land Use Law had boundaries coterminous with the boundaries of the Forest and Water Reserves Zones, which are state-owned lands on which use had been restricted for conservation purposes under an earlier law. 19/ The Commission was given powers to modify and expand the boundaries of the conservation districts and subsequently added a substantial amount of private land, so that by 1969 at least a third of the land in the conservation districts was privately owned, much of it in mountainous areas of more than 20% slope. 20/ Pursuant to a 1970 statute the Land Use Commission has added to the conservation districts a 40-foot strip back from the shoreline around the entire coast of the Hawaiian Islands. 21/

Initial boundaries of the districts were adopted by the Land Use Commission in 1964. A sample segment of a Commission land use map is shown on the following page.

The uses to be permitted in the urban districts are determined by the county zoning regulations, and the county has no obligation to permit the land to be used for "urban" type development. The effect, therefore, is that both state and county approval are required for development of most urban uses, because even though the Land Use Commission may rezone land to an urban classification the county could still restrict the land to agricultural use. Substantial amounts of land which developers consider desirable for urban development is now located in agricultural or conservation districts, so their proposals come before the Land Use Commission in the form of petitions for rezoning to the urban district. Through the end of 1970 the Commission had considered approximately 200 requests for rezoning to urban districts. 22/ The decisions of the Land Use Commission on these applications constitute one of the key elements of the state's land regulatory system.

The use of lands in the rural and agricultural districts is governed by regulations adopted by the Land Use Commission. 23/ In general these regulations permit only traditional agricultural uses in the agricultural districts. 24/ In the rural districts low-density residential uses and quasi-public uses are also permitted. 25/ In addi-


Round Top
Woodlawn
Manoa
Rocky Hill
St Louis Heights
University of Hawaii
Manoa Valley
Makiki
Mānoa Chinese Home
Mānoa Japanese Language Sch
Mid Pacific Institute
University High Sch
Athletic Fields
Moiliili Japanese Sch
Ruhio Sch
Bokulani Sch
St Louis High Sch
St Louis College
Palolo
Kaimuki High Sch
Pumping Sta
Iolani Sch
Ala Wai Sch
Manoa-Palolo Drainage Canal
Ala Wai Golf Course
Waikiki
Kapahulu
St Augustine Sch
Thomas Jefferson Sch
Waikiki Sch
Diamond Head Sch
Honolulu Zoo
Monsarrat Ave
Kapiolani Park
Diamond Head
Fort Ruger
Kaimuki
Waialae
Kahala
Wilhelmina Rise
Manoa Valley
Manoa Stream
Kalihi Stream
Palolo Stream
Waialae Stream
Kalihi Valley
Nuuanu Valley
Pauoa Valley
Manoa Cemetery
Punahou Sch
Jarrett Sch
Waialae Golf Course
Kaimuki Sch
Kahala Sch
Salvation Army Kaimuki Cottages
Kaimuki Playground
Kapiolani Field
Waialae Sch
Kaimuki Theatre
Kaimuki Radio
Kaimuki Fire Sta
Kaimuki Post Office
Kaimuki Shopping Center
Kaimuki Theatre
Kaimuki Playground

tion, however, special permits may be issued for other uses in both agricultural or rural districts upon the approval of the county planning commission and the Land Use Commission. 26/

Applications for boundary changes and special permits keep the Land Use Commission quite busy. The Commissioners meet from two to four times a month at various locations throughout the state, 27/ a rigorous schedule considering that the seven citizen members of the Commission receive no salary, and are assisted by a staff consisting only of an executive director 28/ and one staff planner. 29/

Requests for amendments to the district boundaries and for special permits are heard and decided by the Land Use Commission under a tight time schedule established by the statute. Each petition is referred to the appropriate county planning commission for its suggestions and a public hearing is held by the Commission in the county in which the land is located. 30/ Six members of the Commission must vote to approve any change in the land use district boundaries. 31/

In addition to acting on individual applications, the Land Use Commission is by statute directed to undertake a comprehensive review of district boundaries every five years. The first such review was conducted in 1969 and resulted in reclassification of a substantial amount of land. 32/

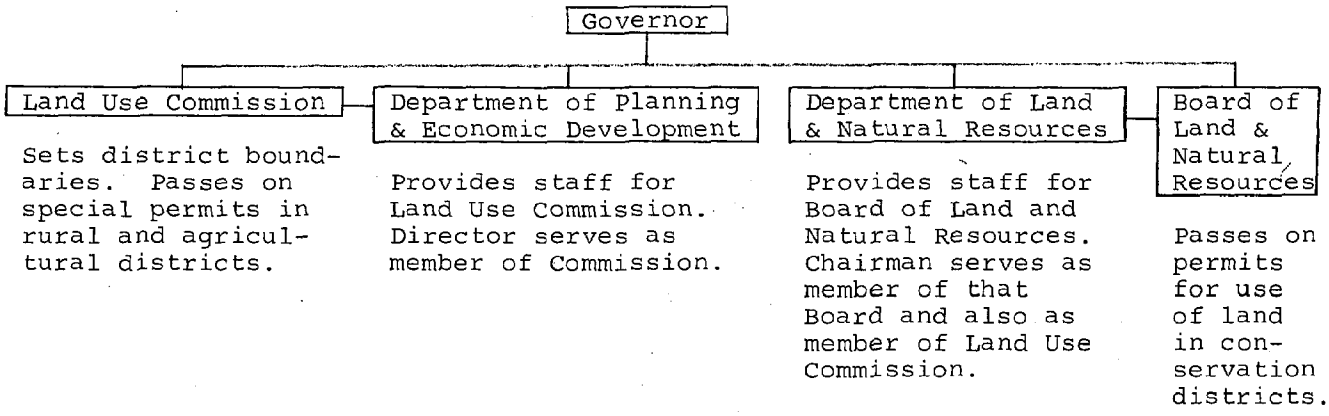
In the conservation districts the use of land is subject to the sole regulation of the Department of Land and Natural Resources. 33/ Currently, the Department's procedure for regulating such uses is contained in its Regulation No. 4. 34/ The regulation divides the conservation area into two general subzones, an R-W Restricted Watershed zone and a GU General Use zone, plus three special subzones designed to permit specifically a college, a cemetery and a nursing home. 35/ As permitted uses in the GU subzone the regulation includes "cabins, residences, recreational type trailers and accessory buildings of a noncommercial nature," 36/ and also resorts, hotels, restaurants, country clubs, golf courses, marinas and governmental uses. 37/

The Board of Land and Natural Resources, which is the governing body of the Department, passes on all applications for permits in the conservation zone. The Board's decision to permit a new use of land in the conservation districts may have a major impact on land use patterns. Its decision to permit a major new airport on the Kona coast of

Hawaii, for example, has had a substantial effect on the overall development patterns of that area. 38/ (Note that this decision also illustrates another way in which the Hawaiian system differs from traditional local zoning; public agencies, which are exempt from most local zoning laws, must obtain permits under the Land Use Law.)

The general relationship of these state agencies is shown in the following diagram:

HAWAIIAN STATE AGENCIES INVOLVED IN LAND USE CONTROL



This dry procedural material is necessary for an understanding for the basic operations of the Hawaiian Land Use Law, but the reader should not be deceived into a belief that the administration of the Law is a mechanical process. Members of the Land Use Commission are called upon to make major policy decisions affecting the future of the entire state--decisions that are controversial and have great economic, social and environmental impact.

At the present time the Commission must make these decisions without many guidelines beyond those general principles set forth in the Law itself. While Hawaii adopted a state plan in 1960 shortly after statehood the rapid population growth and economic changes that have taken place since that time have made the 1960 state plan obsolete. A general plan revision program was completed and published in 1967, but in it the planners specifically abstained from setting land use policies:

> The State Land Use Plan may be identified at any moment with the district boundaries established under provisions of the Land Use Law. These boundaries and the rationale behind their formulation set forth the State's policies and guidelines for future land use. Within these policies and guidelines, more specific land uses and detailed standards are designated by County Planning Commissions in accordance with local land use plans or other local government considerations. Changes in the State Land Use Plan, in effect, are made upon legal approval of boundary changes upon petition of property owners or through the periodic reviews mandated by law. Consideration of proposed changes may be based on evaluation of key physical and institutional factors influencing development and on such data or interpretations as may be forthcoming from the land use model and other quantitative techniques. 39/

The state planners have made it clear that land use planning is the province of the state Land Use Commission and that changes in district boundaries by the Land Use Commission amount to changes in the land use plan. The Land Use Commission has been directed to plan, says Honolulu Planning Director Robert Way, but has been given no planning capabilities. 40/ The important question then becomes: What policies does the Land Use Commission use as a basis for its decisions? Most Hawaiians would probably say "the wrong policies," but they probably would disagree violently over what the "right" policies would be.

Many of Hawaii's residents--apparently a majority--seem to favor more limitations on new urban development, 41/ and view with suspicion the actions of the Commission because they feel that the Commissioners are appointed from, as conservationist Robert Wenkam puts it, the "growth is good group." 42/ Builders and major landowners, on the other hand, tend to view the Commission and particularly its staff as arbitrary followers of obsolete restrictive policies that are hampering the state's economic growth.

Finding reality amid such diametrically opposed points of view is no easy task. Viewing 10 years of operation of the Land Use Law, however, it would appear that three basic policies are guiding its administrators:

(1) Prime agricultural land should be preserved for agricultural use.

(2) Tourist-attracting development should be encouraged without disturbing the attractions of the natural landscape.

(3) Compact and efficient urban areas should be provided where people can live at reasonable cost.

Given the inherent conflicts among and within these policies, it is no wonder that decisions under the Land Use Law have aroused controversy among those who think some of the policies get too little or too much weight. Before seeing how the Land Use Commission and Department of Land and Natural Resources have tried to resolve these conflicts it is worthwhile to analyze each of these policies in somewhat more detail.

Preserving the Pine and the Cane

Historically the economy of Hawaii has revolved around pineapple (locally called "pine") and sugar cane. 43/ The Land Use Law was originally passed in order to preserve as much agricultural land as possible because agriculture was so essential to the economy. The preservation of agricultural land remains a key issue, but as agriculture declines in importance and is replaced by tourism as the state's major source of income, the need for preserving agricultural land becomes less certain. The issue being raised more and more often is "do we still need to preserve agricultural land?"

An appreciation of the many views on this issue requires an understanding of the pattern of land ownership in Hawaii. Large land holdings are still the rule in Hawaii. 44/ Among themselves, major landowners control nearly half the land in Hawaii, and nearly 90% of the privately-held land. Chief among the landholders in terms of acreage is the Bishop Estate, a Trust for educational purposes which owns land formerly held by the Bishop family, profits from which go to the statewide Kamahameha Schools. Bishop Estate owns 370,000 acres, or 9% of all the land in the state, and 16% of Oahu alone. It does not develop land itself, but leases to developers and plantation corporations. 45/

The Estate of James Campbell, on the other hand, develops some of its open land and engaged in some business activities thereon. An example of such development is Ewa New Town and Campbell Industrial Park, west of Honolulu on Oahu. 46/ Campbell Estate owns approximately 41,000 acres, or 1% of the land in Hawaii, and 13% of Oahu.

Another 2% of the land in Hawaii is owned by Alexander & Baldwin, a conglomerate corporation with divisions engaged in mining, agriculture, and development. Of the approximately 96,000 acres owned by Alexander & Baldwin, 76,000 are on Maui, primarily in sugar cane, but also including Kahului New Town, a company town for A & B employees developed in the 1950's. 47/

Another 2%, or 75,000 acres, is owned by AMFAC, another conglomerate. Seventy-five per cent of its holdings are on Kauai, with most of the remainder on Maui. AMFAC works some of its land and leases out the rest. 48/

Another conglomerate, Castle & Cooke, holds about 4% of the land in Hawaii. Their Oceanic Properties Division develops a good portion of the land. One such development is Mililani New Town on central Oahu, being built on 3,500 acres for approximately 60,000 people. 49/ Other major landholders include the Brewer Estate, the Cooke Estate, the Dillingham Corporation, and C. Brewer & Co. Ltd. 50/

The growing of both pineapple and sugar require large tracts of land. The crops are trucked from various parts of the plantation to a central location for processing. Particularly in the case of sugar the heavy capital investment in the mill and the cost of transporting the cane to the mill make it essential that the mill be centrally located in a very sizable tract of cane land. This means that sugar production on scattered sites is not economic. 51/ While some smaller landowners do raise pineapple they too are dependent on sales to a central processing facility of one of the large companies. 52/

The fact that the sugar and pineapple plantations are controlled by a few large operators and landowners makes the views and intentions of these companies and estates a key factor in assessing the future of agriculture. When a sugar or pineapple plantation closes down it closes down all at once, not gradually, and takes an enormous acreage of land out of production. So a few dozen decisions by major landowners hold the key to the future of agriculture in Hawaii.

Each of the large landowners looks enviously at the tempting profits made by those who are able to sell or lease their land for hotels or condominiums. They look with apprehension, on the other hand, at the tendency to treat prime agricultural land as sacred, and their pessimistic prognostications about the future of agriculture are sometimes discounted by conservationists as self-serving statements.

Despite these suspicions it is commonly believed 53/ that Hawaiian pineapple will not remain competitive with pineapple from other sources for many more years. 54/ Increasing imports of foreign pineapple to the United States mainland have coincided with the decline in Hawaiian pineapple production. Imports of foreign pineapple, which had been running about two million cases annually during the 1950's, more than doubled during the 1960's as heavy investments were made in pineapple plantations in Taiwan, Malaya and other African and oceanic countries. 55/ Dr. Harold Baker, who has headed the University of Hawaii's Land Study Bureau since its inception, points out that the reduction in acreage of Hawaiian land devoted to pineapple follows a similar pattern; after remaining stable during the 1950's the amount of land devoted to pineapple dropped sharply in the 1960's as production decreased by over a million cases despite some increase in productivity per acre. 56/

The nature of pineapple production apparently makes it difficult, if not impossible, to mechanize. 57/ At least three major pineapple plantations have ceased operations in the past 10 years. 58/ Alexander & Baldwin is in the process of selling out all its pineapple land, according to Richard Cox, a vice president in charge of their properties group. 59/ Maui Land & Pineapple Co. plans an increase in acreage devoted to pineapple, but it is also shifting 350 acres of its existing pineapple lands into urban development. 60/ The major landowners generally agree that pineapple production is unlikely to continue much beyond 1980. 61/

The future of sugar looks more optimistic. The sugar industry has taken over some of the land abandoned by the pineapple companies and now devotes more acreage to cane than at any other time in the state's history. 62/ At the same time, however, less profitable sugar land is being abandoned or converted to urban use. Two plantations are being abandoned in 1971 and another in 1973, and the resulting loss of 23,367 acres will reduce the state's total amount of cane land by almost 10%. 63/

The Campbell Estate's Chairman Allan S. Davis suggests that both sugar and pineapple are past their peak, citing pull-out of both Castle & Cooke and Libby McNeil from Oahu as examples. If the necessary irrigation and roadway systems had not been installed early in Hawaii's history when costs were low, prohibitive costs today would make any kind of agricultural development in Hawaii impossible. 64/ Warren Haight, President of Castle & Cooke's Oceanic Properties Division, agrees that both pineapple and sugar are on their way out: "It's just a matter of time." 65/

On the other hand, Richard Cox says Alexander & Baldwin is still making "good money" from sugar. 66/ Lawrence Clapp of Ahuimanu Investment Company sees considerable exaggeration in the prediction that agriculture, including sugar, will be almost dead in Hawaii in the next 10 years. 67/ Only a complete reversal of the federal sugar quota policy, which now protects Hawaii against cheap imports, would be likely to make production of sugar in Hawaii uneconomic. 68/

But what of new products, such as macadamia nuts and papaya? Despite frequent attempts to promote other types of agriculture in Hawaii the promise is not great for substantial conversion of land to other agricultural uses. 69/ There has been substantial success with crops of seed corn and macadamia nuts but these are unlikely to use substantial volumes of land. 70/ Attempts have been made for years to promote diversified agriculture such as truck farming but it has been difficult to get much enthusiasm on the part of the potential farmers for this type of farming. 71/ The military on Hawaii buys substantial quantities of produce but, according to Harold Baker, it has preferred to deal with the large co-ops and producers in California who can give firm contracts for larger quantities, and the small farmers in Hawaii have not become sufficiently organized to deal in the volumes the military needs. 72/

Wade McVay of Campbell Estate figures that 1,000 acres of agricultural land is all the state needs to support itself, while the rest must be used eventually in another fashion. 73/ Within the government sector there is considerable disagreement with so pessimistic a forecast. Sunao Kido, Director of the Department of Land and Natural Resources, strongly believes that Hawaii's economy must be rooted in agriculture. Pineapple and other "endangered" crops can, according to Kido, be converted to truck crops like corn. 74/ The Director of the Department of Planning and Economic Development, Shelley Mark, is not quite so optimistic, but he also believes it is much too early to

give up hope on an agricultural economy that continues to prosper. 75/

In general, the place of agriculture as a substantial factor in the Hawaiian economy appears secure for the next 10 to 15 years at least. However, its characteristics--what is grown, where, and in what quantities--will almost surely change. The net result will probably be an eventual lessening of need for the amount of land in agricultural zones for agricultural purposes. The major issue thus becomes what to do with this "surplus" agricultural land.

Regardless of these changes, a large segment of the public views the preservation of prime agricultural land as a policy of major importance, 76/ which forced state officials to measure its performance in terms of the number of acres preserved.

> "The records show that from the time the Land Use Commission drew up its first district boundaries in 1964 up to the latter part of 1970, it received requests for more than 100,000 acres to be reclassified into urban district, where economic valuations are obviously the highest. Of that 100,000 acres, only 30,000 acres were given urban classification by the Commission. Of the 30,000 acres reclassified into urban district, only 3,500 acres were considered prime agricultural lands. And even these prime lands included two pockets in the midst of an already heavily urbanized area, while the remainder of the reclassified agricultural lands were devoted to immediate housing needs. There is also evidence that as a result of the state's strong land use law, its plantation management has been given incentive and assurance to plan for long-term stability and growth in agriculture operations." 77/

It will take a far more severe depression in the agricultural economy than currently exists before the public is convinced that the attempt to preserve agricultural land should be abandoned. Whether its economic bases are sound or not, the conservationists support the preservation of agricultural land as a means of keeping open space, and planners see it

as an excuse for controlling urban growth. So even if the basic purposes of preserving agricultural land become unsound from an economic standpoint the myth would probably be kept alive in order to provide green space and to preserve a more compact form for the urban areas. 78/

Can Tourism and Conservation be Made Compatible?

When the Land Use Law was passed the tourism industry was substantially confined to a few hotels in Honolulu. There were scarcely any resort areas on any of the neighbor islands or on Oahu outside Waikiki. 79/ Since that time the tourist industry in Honolulu has grown rapidly. The number of hotel rooms in Honolulu has increased from 8,720 in 1961 to 21,217 in 1970. The Waikiki area has been transformed into a dense concentration of hotels and tourist entertainment facilities resembling Miami Beach or Las Vegas--to the disgust of the natives but the apparent delight of the tourists. 80/

In addition, the neighbor islands' tourist industry has developed from almost nothing to a very substantial business of its own; hotel rooms on the neighbor islands have increased from 1,473 in 1961 to 9,106 in 1970 and construction continues. 81/

Support for increased tourism comes both from business interests and labor leaders. Labor in both the agricultural plantations and hotels is organized by the International Longshoremens' and Warehousemens' Union which dominates the labor movement in Hawaii and exerts strong influence in the state's politics. (One Union official occupies a spot on the Land Use Commission and another is on the Board of Land and Natural Resources.) Employment in the sugar and pineapple industries has dropped quite substantially in the past 10 years, reflecting reductions in pineapple acreage--three plantations have gone out of business in this period--and increased mechanization of the sugar plantations. 82/ Further declines in agricultural employment are expected. 83/

Employment in hotels and other services, on the other hand, has increased substantially (as have wage levels in those industries). 84/ Hotel-related jobs are taking up the slack from loss of agricultural jobs. While the Union lost 3,000 members in agriculture in the past five years, total membership has increased from 21,000 to 24,000 during the same period. 85/

Eddie Tangen, Vice Chairman of the Land Use Commission and a Vice President of the Longshoremens' Union, sees construction and development jobs themselves as too short-run to be of much value to the Union. As he points out, development must end sometime if agriculture is to remain a viable part of the Hawaiian economy, and when it does, construction jobs will vanish with it. The Union thus favors increased tourism as a source of jobs. 86/

The large corporations that control the agriculture plantations also have a large stake in tourism. Each one has its own proposed or existing tourist destination area such as AMFAC's Kaanapali complex on Maui and C. Brewer's development of the area around Punaluu on the Big Island. Other developers have also invested large sums in tourism--the Makaha complex of financier Chinn Ho being a prime example.

Thus both capital and labor agree that more tourist destination facilities are desirable. In opposition to this powerful coalition, however, is Hawaii's strong conservation movement. Hawaiians have a long history of concern over conservation. Hawaii's forests were heavily stripped in the 19th century, and this created severe drought conditions that made the agricultural interests in Hawaii very conscious of the need to protect large areas of forest reserves and otherwise reduce water run-off. 87/ The Outdoor Circle, a women's conservation and beautification group in Honolulu, succeeded some years ago in persuading the state to outlaw billboards and has lobbied with governmental agencies on a number of environmental issues. 88/

The general goals of conservation receive strong support from the public. A recent public opinion survey showed 93% support for the proposition that preservation of scenic and natural resources should receive strong emphasis in land use planning. 89/

More recently the emphasis has changed. Environmental groups have tended to focus on the basic issue of population growth. The same public opinion poll showed 69% of the respondents taking the view that urban development should be limited at least to some degree. The newer environmental organizations go even farther, taking the position that immigration to the state should be stopped. Mike Cleveland, a young lawyer who is one of the leaders of the organization Life of the Land, believes the state should adopt maximum population laws. He believes the Land Use Law is "beautiful," but feels that the Commission is too development-oriented and should say flatly that it is not going to rezone any more land for urban uses. 90/

Many of the more established conservationists consider these positions as "extreme" and harmful to the cause of conservation. Tom Gill, who has long been active in the conservation movement, says that he finds most Hawaiians think that organizations such as Life of the Land consist of new arrivals who want to be the last ones in. 91/ Robert Wenkam, a world-famous nature photographer who heads the Friends of the Earth in Hawaii, sympathizes with the views of Life of the Land but resents their refusal to give credit to the very substantial accomplishments that have been achieved through the Land Use Law. 92/

The cause of the conservationists received a further setback in 1971 when an "associate of Ralph Nader" issued a very critical but highly inaccurate brochure on the extent of pollution in Hawaii. The obvious mistakes in the brochure and the unfamiliarity with local affairs demonstrated by its authors strengthened the view of most Hawaiians that the environmentalist groups were dominated by "outsiders." 93/ In the long run, however, both young and old conservationists agree that momentary setbacks such as this will not deter the continuing growth of the conservation movement in Hawaii. State Planning Director Shelley Mark agrees that conservation organizations are becoming an increasingly strong voice in the state's affairs. 94/

With the new focus on growth limitations, it appears increasingly likely that the position of the conservationists will be opposed to additional development of tourist-oriented facilities, thus bringing them into conflict with the capital-labor coalition that seeks increasing tourism. The Land Use Commission bears the brunt of some of this conflict, but some of it is also borne by the Department of Land and Natural Resources, which is the subject of frequent criticism by the conservationists. Some of the criticism is procedural. The regulations of the Department of Land and Natural Resources are frequently criticized because they permit the granting of certain types of land uses in conservation zones without any public hearings, which creates some resentment. 95/ But the Land Board has attempted to schedule a hearing in the county in which an application is filed if it is controversial. 96/ The very small planning staff of the Department finds it impossible to make a field inspection of areas in which permits are sought or to enforce the conditions attached to the permits that are granted, 97/ and all inspection and enforcement functions are carried on by the Division of Forestry. 98/ In fact, the staff feels that it lacks the manpower even to do a proper job of processing the initial applications. 99/

A much more common complaint about the conservation districts is a substantive one. The regulations of the Department of Land and Natural Resources are often criticized for appearing to invite tourist-oriented development proposals in the conservation zones. 100/ The regulations of the Department of Land and Natural Resources are so generous in the uses they permit in conservation zones that many people feel they destroy the concept of conservation. 101/ It seems generally agreed that the regulations give the Department too much discretion to permit "urban" uses in the conservation zones, but there is disagreement about whether this discretion has been abused. The list of alleged abuses seems to be limited to a few examples: Paradise Park, a development consisting of pathways, bridges, and buildings containing restaurants and souvenir shops, is located in a conservation zone and also in a watershed district set up to preserve fresh water resources for Honolulu. 102/ Sea Life Park, a popular tourist attraction on windward Oahu is located in a conservation zone. 103/ The Wailaikea nursing home is also located in a conservation zone on Oahu. 104/ The new airport and a resort in the Kona area of the Big Island are also located in conservation areas. 105/

This criticism is contested by Sunao Kido, Director of the Department of Land and Natural Resources, who maintains that such developments as Paradise Park and Sea Life Park were both within the spirit and letter of the conservation district regulations as conceived and as they existed when decisions to permit their construction were made a short time ago. However, he concedes that, in restrospect, these developments might be somewhat intensive for a conservation district, and the Land Board has now selected consultants to "tighten up" its regulations. 106/

Some developers, on the other hand, criticize the conservation district classification as "nothing more than a holding zone." 107/ Richard Lyman, Jr., Chairman of the Board of Bishop Estate and former state senator, cites Waipea Valley as an example. According to Lyman, the valley contained a population of 1,000 together with a number of agricultural and business enterprises prior to designation as a conservation area. Now the valley is empty, and planted with plum trees--which were never native to the area in the first place. 108/

Most observers seem to agree with Honolulu Advertiser environmental correspondent Harold Hostetter that while some uses permitted in the conservation districts may not be strictly conservation-oriented in the environmental preserva-

tion sense, there are few examples of "blatant misuse." 109/ Indeed, although many decisions of earlier Boards have been criticized, most critics generally concede that the present Board has only occasionally given its regulations too broad an interpretation. 110/ In fact, the Land Board was receiving only about 20 applications per year for land use permits in the conservation districts until 1970, though with enlarged coastline jurisdiction this number is increasing. 111/

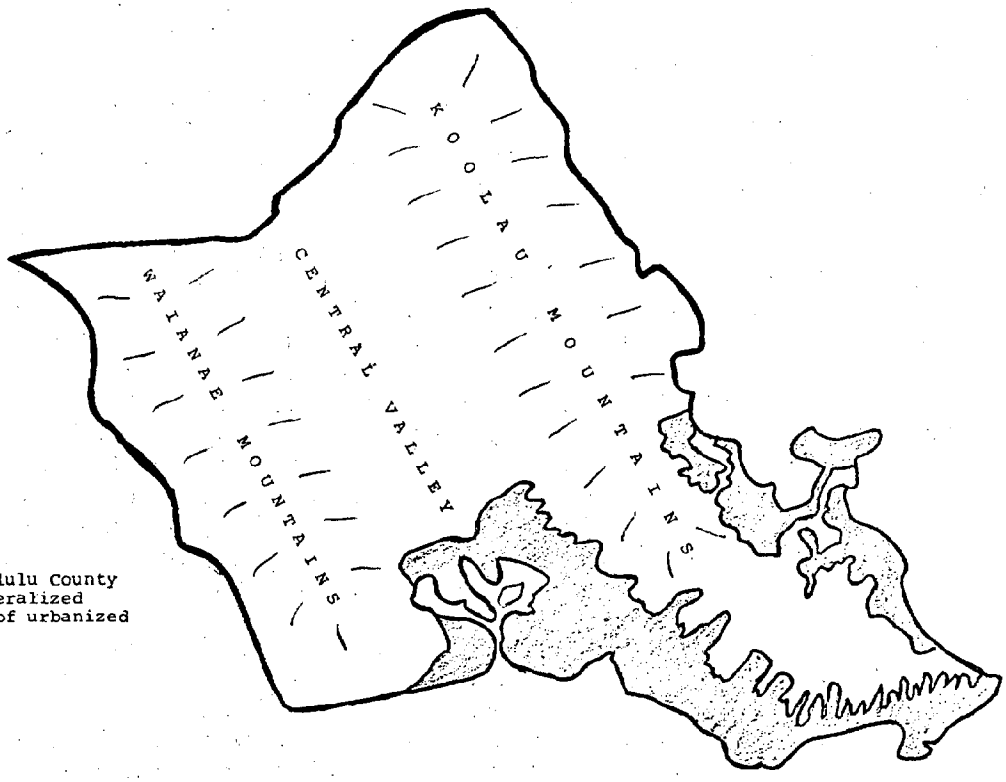
Can Hawaii Afford Well-Planned Cities?

Any discussion of cities in Hawaii must begin with the recognition that Honolulu is the only city of substantial size in the state. The combined city and county of Honolulu, which occupies the entire island of Oahu, had a population in 1970 of about 629,000 which accounts for approximately 82% of the state's population.

As the map on the next page shows, the great majority of Honolulu's population lives in an urbanized area bounded on the North and East by the Koolau Mountains and on the South and West by the sea. The natural avenue of expansion for the urban area would be out to the northwest into the central valley of the island but this valley contains some of the best pineapple and sugar growing land in the state and has been placed in an agricultural district by the Land Use Commission.

Partly as a consequence of the unavailability of the central valley for urban development such development has spread across the Koolau Mountains to windward Oahu which has been the scene of substantial growth in recent years, but even windward Oahu is now constructed by the agricultural lands to the North and the mountainous conservation districts.

Most major land use decisions on Oahu, where 92% of the construction in Hawaii took place in 1969, 112/ involve the issue of whether urban development should be confined within a gradual enlargement of its existing boundaries or should be allowed to expand throughout the island. Narrow urban limits and higher densities are generally favored by urban planners on the ground that they promote more efficient use of public facilities, reduce the reliance on the automobile, and create a more exciting urban environment. 113/



Map of Honolulu County showing generalized boundaries of urbanized Honolulu

Adapted from Eckbo, Dean, Austin & Williams, State of Hawaii Land Use Districts and Regulations Review, plate 13 (1969)

The policy of the Commission has been, and continues to be, to favor rezoning of land adjoining existing urban districts while opposing developments far from existing urban centers. 114/ Moreover, in each major application for the rezoning of agricultural land for urban use the Land Use Commission staff has taken the position that the developer should demonstrate why it is not possible to use existing land in the urban district; 115/ it cites studies indicating that there are about 20,000 acres of urban-zoned land available. 116/

Developers, on the other hand, argue that the amount of developable open land has been grossly overstated. 117/ Colonel Van Allen of the Bishop Estate places the land theoretically available for development at less than 9,000 acres. 118/ Earl Stoner of AMFAC Communities and George Yim, General Counsel for Castle & Cooke's Oceanic

Properties Division, would put the actual figure far lower--at 3,000 acres--when land unusable because of steep slopes and other site conditions and military land not available for development, is excluded. 119/ Moreover, Sunao Kido, Director of the Department of Land and Natural Resources and a member of the Commission, freely admits that usable vacant urban land may be vastly overstated because some is in public park use and some is in military zones. 120/

The Commission has granted more rezoning of agricultural land than the staff had recommended, but these rezonings have been far less than the developers would like. More importantly, they have been concentrated on the fringes of the existing urban area, thus reducing to a minimum the "scatterization" that is typical of other rapidly growing areas, but also giving the owners of the land immediately adjoining the existing urban area a monopoly that has led to extremely high land prices. Overall, the effect of the narrow urban limits policy has been to minimize the conversion of agricultural land to urban use 121/ and to keep the urban development circumscribed at high densities. 122/

The primary exceptions to the policy of narrow urban limits appear to be the development of new towns--planned, self-contained communities developed to house a substantial population. The principal new town that has been built is Mililani, located 16 miles northwest of central Honolulu in the central valley. 123/ The site consists of nearly 3,500 acres, designed for 60,000 people. The first phase of Mililani is nearing completion, with some 4,000 people now living in rowhouses ("patiohouses" and "townhouses") and single-family residences ranging in price from $25,000 to $37,500. The average lot is 7,000 square feet and sells for $15,500. Some are as small as 5,000 square feet, others as large as 10,700 square feet. 124/ These prices are considerably higher than the $15,000 price tag which Oceanic Properties represented to the Commission it would put in its average dwelling, and Oceanic has come in for considerable criticism because it was partly on the basis of this representation that the Commission granted the rezoning from agricultural to urban. 125/

New towns have now been proposed by both the Campbell and Bishop Estates. Campbell's proposed Ewa New Town would be located west of Pearl Harbor and east of Campbell Industrial Park, both job centers. 126/ Planned for 15,000 families over 25 years, the new town is presently located in an agricultural zone. An integral part of its plan is a site for a second University of Hawaii campus. 127/

Campbell Estate claims it intends to proceed with its new town plans regardless of the eventual location of the new campus, 128/ but it is no secret that Campbell and Bishop Estates are both pushing for that location to be on their respective lands. The new town proposed by the Bishop Estate is to be located to the north of Pearl Harbor, and it is also presently zoned in the agricultural classification. 129/

These new town proposals have generated substantial opposition from conservationists who fear they portend a general breakdown of the Commission's policy of permitting only gradual expansion of the City. 130/ The Department of Planning and Economic Development in 1970 commissioned a study of the state's open space needs, and at the request of Governor Burns both new town proposals are being held in abeyance pending the completion of that study, which is expected late in 1971. 131/

Opponents of the narrow urban limits policy argue that it has seriously increased the cost of housing. While housing has never been cheap in Hawaii its price has been increasing very rapidly in the last few years, 132/ in part reflecting the fact that Hawaii's spiraling land costs are disproportionately high. 133/ In 1970 the median value of owner-occupied housing tabulated by the census was $35,100, more than double the national average of $17,000, and the state contains less than 20,000 dwelling units valued under $25,000 and about 66,000 valued at more than that figure. About 34,000 rental units lease for less than $100.00 a month out of 107,000 total rental units. 134/ Federal housing subsidy programs are used in Hawaii within the limits of the available funds 135/ but the complete absence of mobile homes removes one of the major sources of housing for people in the lower income categories. 136/

The very serious housing shortage has created hardships that some feel outweighs the gains achieved by the Law. Some developers argue that the narrow urban limits policy has promoted outrageous land speculation because it has so sharply decreased the supply of land available for development. 137/ The study of Eckbo, Dean, Austin & Williams concluded that the Land Use Law has not helped the housing shortage and may have aggravated it. 138/ Earl Stoner of AMFAC Communities is quick to point out that, whatever the Act's original intent, its language makes clear that the Act was intended to preserve a balance between the four district classifications: urban, rural, agricultural and conservation. 139/ Allan Davis, Chairman of the Board of Campbell Estate, probably represents the general opinion

of most large landowners that, given a housing shortage and a de-emphasis on agriculture, the Land Use Commission is keeping too much land in agricultural zones. If it is not going to be developed and cannot be cropped, says Davis, "What else can you use it for?" 140/ The general response from state officials seems by and large to be, not for development--at least, not now. 141/

This concern over spiraling housing costs has caused some people to question whether the Land Use Law has, as Honolulu's Assistant Planning Director Ray Yamashita puts it, sufficiently focused on the problems of people as opposed to the more abstract issues of land planning. 142/ However, not everyone agrees that the short supply of developable land is the major factor that increases the cost of housing. It is often conceded by developers and landowners that the current shortage of housing would produce speculation in land even without the Land Use Law. 143/ Some even dispute the contention that the Commission's policies have contributed at all to the high cost of land and housing, either on Oahu or the neighbor islands. 144/

Among the other factors contributing to high housing costs, the chief one appears to be the amount of improvements required on a lot. According to Allan Davis, county ordinances which require sidewalks, gutters, underground wiring and the like add substantially to the cost of erecting a home on a 6,000-square-foot lot which might originally cost--in fee simple or 75-year lease--around $5,000-$6,000. 145/ He estimates that required improvement costs usually run around $1.75 per square foot, making it impossible to construct single-family residences for much under $30,000 146/--well above what the average laborer can afford. 147/

A recent study found that the cost of improving a lot runs from 40% to 65% of the market price of the site. 148/ Developer Lawrence Clapp puts the cost of an average residential lot on Oahu (7,200 square feet) at about $25,000, fully half of which is due to these required "improvements." 149/ The result is $10,000-$25,000 homes being constructed upon $20,000-$30,000 lots, almost a perfect inversion of the generally accepted ratio of house value to lot value prevailing on the mainland. 150/

Throughout the state the cost of land acquisition and improvement amounts to about 47% of the sales price of a new home. Complaints of high costs of required improvements are heard on the neighbor islands as well as on Oahu.

John Hyer, Vice President of the Maui Land and Pineapple Company, points to them as the single most important factor in increasing housing costs, but he also notes that the shortage of heavy equipment and experienced construction labor may be more responsible for the high costs than any arbitrary requirements of county officials. 151/

Robert Way, Honolulu Planning Director, vigorously disputes the argument that county requirements are excessive. The county planners are currently preparing a model to study housing costs, and he suggests that preliminary results indicate that the element of housing cost that seems most out of line is the excessive profits of the builders. 152/

It can be argued, on the other hand, that the narrow urban limits policy has contributed substantially to the high cost of land development and the high margin of builder profit. By protecting the flat agricultural land it has forced builders into the hills where development costs are necessarily higher. And by creating a shortage of land it has reduced the supply of housing to the point where builders, workers, suppliers and all other segments of the housing industry can increase their prices and still find a ready market. One developer, who prefers to remain anonymous, declares that there will never be $30,000-single-family residences constructed on Oahu for the simple reason that demand is so strong for more expensive units for which there is a greater profit to the developer. 153/ This developer does not attribute the scarcity of inexpensive housing to the Commission, which has never refused his requests for urban rezoning. (Most of his land, it should be noted, has been adjacent to existing urban zones.) But developers with land less favorably located are unlikely to agree. Only an extensive study by land economists could resolve these fundamental questions about the effect of the urban limits policy.

Some planners argue that the narrow urban limits policy can be preserved without increasing housing costs if more of the pressures for development are transferred to the neighbor islands--the islands other than Oahu. They argue that increased development on the neighbor islands is necessary both to help the neighbor islands realize their economic potential and also to preserve some of the environmental assets of Honolulu's setting. 154/ The desire to transfer some of the development pressures from Oahu to the neighbor islands now appears more realistic in view of the decentralization of the tourist industry, 155/ but the great majority of new development continues to be attracted to Oahu. 156/

On the neighbor islands, there is no immediate danger of overcrowding because population densities are very low. Many neighbor islanders feel as does Maui County Mayor, Elmer Cravalho, that the housing shortage on Oahu is being "conveniently used" to justify the emasculation of the Land Use Law. 157/ Neighbor islanders constitute a majority of the Land Use Commission, and may reflect the opinion commonly heard on the neighbor islands that development should be channeled out of Oahu and into the other islands.

The neighbor islands have their own urban sprawl problem, however, in the form of subdivisions containing lots of one-half acre or larger. Development at these low densities is widely abhorred by planners as inconsistent with Hawaii's land scarcity. 158/ In the past many obsolete subdivisions were created for sale to gullible out-of-staters. 159/ The Land Use Commission has reduced this practice but has not stopped it completely. 160/ Philip Yoshimura, Deputy Planning Director for Hawaii County, complains that the County has no way of stopping so-called agricultural subdivisions approved by the Commission for sale to speculators in three to 20-acre parcels. 161/

Some of the land sales operations on the neighbor islands have drawn severe criticism. A very large Boise Cascade subdivision of dry, flat rangeland on the Kona coast of Hawaii has been called a fraud on the public even by other developers. Much of the new resort-oriented development on the neighbor islands follows a standard pattern of hotel, golf course and subdivision, 162/ and the developers say they need the cash flow generated by land sales in order to make their resort property profitable. 163/ The County of Kauai, however, recently disapproved a large-lot subdivision by Princeville Ranch interests, and conservationists hope this marks a renewed trend of opposition to these land sales operations. 164/

The conflict between the contrary chants of "no urban sprawl" and "lower housing costs" will undoubtedly remain the most tempestuous issue the Commission must face in the coming years. Decisions either way are guaranteed to create enemies.

The Commission's Decision Making Process

Given the changes in conditions that have taken place since the adoption of the Land Use Law, and the lack

of clearly defined state policies to replace those policies of the early 1960's that now seem outdated, it is of course not surprising that the actions of the Land Use Commission have been the subject of some criticism. Conservationists think the Commission has allowed too much development, and developers think it has not allowed enough. Complaints based on such basic differences of policy can hardly be avoided.

Less excusable, however, are the universal complaints of the excessive time it takes to process a rezoning through the Commission. 165/ Earl Stoner of AMFAC Communities estimates that it often takes from 4-1/2 to 7-1/2 months to obtain such land use changes. 166/ This is on top of another nine months to a year that may be required to obtain all the necessary county approvals. 167/ Allan Davis, described one project for which the necessary county and Commission approvals took a full 2-1/2 years. 168/

But considering the meager funds and ambiguous policy guidance given the Commission, perhaps the most surprising result is that its decisions have not been criticized more than they have. The Commission operates on an inexcusably tight budget with a very small staff that has no time for long-range planning. 169/ Strict time limitations require it to hold hearings in each of the four counties at relatively frequent intervals in order to meet the schedule prescribed by the statute. 170/ Although the Commission has been criticized for failing to follow with sufficient precision the prescribed administrative procedures, 171/ it has resisted any increase in the formality of its proceedings 172/ because, as developers point out, it already may take up to a year to obtain both local and state approval of a project, and delay of this magnitude cannot help but increase the cost of housing. 173/

One of the innovations of the Commission which has occasioned considerable comment is its so-called "incremental approach" to granting rezoning approvals. 174/ A petitioner for a land use classification change must produce a general plan for the entire project he proposes to construct upon the land for approval in concept. However, only a small portion of that land is reclassified so that development can proceed--the "first increment." Moreover, it is on this first increment that sewage treatment plants, main water lines and other improvements must be constructed for the whole development. The intent is to force the developer to invest so heavily in that first increment that he must complete his project in its original concept or lose a substantial amount of money. 175/

The results of this incremental approach are clearly evident from the experience of the Oceanic Properties Division of Castle & Cooke in developing Mililani New Town. Of its total planned development of 3,500 acres, the initial increment of land use change granted by the Commission was a scant 300. In that first increment Oceanic was required to construct a sewage treatment plant with a capacity of 1,000,000 gallons at a cost of $4 million. 176/

Some county officials also complain about the incremental approach, alleging that it represents too much concentration on details by the Commission. They suggest that the Commission should concern itself only with the broad categories of development and leave the rest to the counties. 177/ The Commission staff argues, however, that they get blamed if the development does not turn out as planned so they need the additional control that incremental zoning provides. 178/ Shelley Mark suggests that the counties are not doing an adequate job of insuring good site planning by the developers and that it is important for the Land Use Commission to review developers' plans in detail. 179/

A five-year review of the district boundaries was undertaken in 1969 as required by the statute. 180/ The draftsmen had hoped that the provision in the Law for a five-year review would cut down on the number of boundary changes in the interim, but it does not appear to have done so. 181/ It was also hoped that the five-year review would allow a comprehensive look at the entire state which could be used as a policy basis for reclassifications. This comprehensive view was provided by the consultants, Eckbo, Dean, Austin & Williams, but critics suggest that the Commission based its redistricting less on this comprehensive study than on "consensus" planning. 182/

The five-year review also created a host of new procedural problems, some of which spawned litigation challenging the validity of reclassifications made as part of the five-year review. 183/ The actions of the Commission in reclassifying large tracts of land without, it is alleged, adequate notice to the public has been subjected to substantial criticism, 184/ and the Commission has reopened a number of these cases for further consideration. 185/

It is generally agreed that with its small staff the Land Use Commission is incapable of enforcing the Land Use Law, and they make no attempt to follow up on permits to see that conditions and restrictions are obeyed, or to

check on development undertaken without a permit. The statute directs the counties to enforce the Law but it is difficult to discern whether the counties are actually doing so. 186/

Conflict of interest charges that were levied against the Commission in the 1970 election campaign certainly did little to inspire confidence that the decisions of the Commission were being based on sound planning policies. Some suggest that the existing laws regarding conflict of interest need to be clarified, 187/ but others believe that conflict of interest has only been a problem in a few isolated situations, 188/ and that the publicity generated in 1970 will insure that the Commissioners are increasingly careful about any possible conflicts in the future. 189/ Clearly the Land Use Commission itself lacks the staff or time to engage in its own planning and policy formulation. 190/

Aaron Levine, President of the Oahu Development Conference, suggests that the state constitution, by requiring a three year residence requirement for government jobs, has made it difficult to hire mainland planners and has had an adverse impact on the overall quality of the planning in the state. 191/ The first state general plan, prepared in 1961, proved to have very little influence on land use decisions. 192/ The state's Department of Planning and Economic Development is attempting to map out a strategic policy approach to planning 193/ and work has begun on a planning-programming-budgeting system. 194/ At the present time, however, many people are not convinced that the state planning program is having the desired results. 195/

The Department of Land and Natural Resources is also frequently criticized for its failure to prepare an overall plan for the forest reserves. 196/ An open space study currently being undertaken by the Overview Corporation may form the basis for such a plan and should at least provide badly needed guidelines for decisions in this important area.

Interrelationship of Governmental Agencies

Given the number of agencies involved in Hawaii's land regulatory system certain conflicts are inevitable. The Land Use Commission and the Department of Taxation frequently appear to be working at cross-purposes, 197/ and it is widely agreed that the tax policies of the state need

better coordination with other land use policies. 198/ Hawaii has two tax laws which were designed to influence land use policies. The "Pittsburgh plan," under which land is taxed at a higher rate than buildings, was intended to encourage the improvement of urban land. This is consistent with the narrow urban limits policy of the Land Use Commission, though some argue that these policies have contributed to undue congestion in Waikiki and other densely developed parts of Honolulu. 199/

The tax laws also contain dedication provisions 200/ which allow a landowner to obtain lower assessments by "dedicating" his property to agricultural use. 201/ The only land likely to be dedicated is land which is in proximity to existing urban areas. 202/ Dedication of such land may limit the Land Use Commission's ability to implement its policy of orderly urban expansion. 203/ Unless land is dedicated the statutory direction 204/ that the assessors give consideration to the land use classifications set by the Land Use Commission has apparently had little effect. 205/ In addition, the tax laws have been criticized for permitting the dedication of land for agricultural purposes in districts zoned urban by the Land Use Commission, thus defeating the purpose of the Land Use Law. 206/

There seems to be little direct conflict between the Land Use Commission and the Department of Land and Natural Resources but many county officials, such as Kauai County Planning Director Brian Nishimoto, see no reason why the land use functions of the two agencies should not be combined. This would enable county officials to deal with a single state agency rather than with two agencies having different policies. 207/

Some of the criticism of the interrelationship of the various state agencies has focused on the position and makeup of the Land Use Commission. Conservationists suggest that the Commission could reach more intelligent decisions if it were staffed with more conservationists and members of the land use professions. 208/ They feel that most of the Commissioners have strong pro-development sympathies and that only public pressure keeps the Commission in check. 209/

On the other hand Wade McVay of Campbell Estate would abolish the Commission. He contends that the counties are sufficiently sophisticated to handle their own land use planning now, and that the counties should initiate changes in land use classifications. This would eliminate a tier of planning approval and put the process in the hands of the

governmental unit most familiar with local problems. 210/ George Akahane, Chairman of the Honolulu County Council Committee on Planning and Zoning, would not abolish the Commission but would require that changes in land use districts be initiated by the county. 211/ Public opinion polls, however, show that this view does not have broad support at this time. 212/

Others argue that the Commission should be replaced by a line agency in the state government. 213/ Still others defend the independent position of the Commission as providing a needed measure of citizen participation. 214/ Roy Takeyama, now Secretary of the Board of Regents of the University of Hawaii and a former attorney for the Land Use Commission, points out that no line agency would be able to exercise the control over other state agencies that the Commission now exercises. He suggests that the Land Use Law has made state agencies such as the Highway Department think about the impact their actions will have on land use policy for the first time. 215/ Shelley Mark agrees that the existence of the Land Use Law has increased the degree of coordination among these state agencies because they now work through the Land Use Commission rather than each dealing independently with the counties. 216/

The relationship between the counties and the state agencies is less than perfect. The counties have substantially improved their planning programs within the 10 years the Land Use Law has been in effect, and some county officials feel that the Law now needs substantial revision. They argue that although the Land Use Law may have had the beneficial effect of slowing development while the counties caught up on their planning, 217/ the counties' planning is now more sophisticated than the state's and the counties' views should now be given greater weight. 218/ Honolulu Planning Director Robert Way argues that the counties' decisions must be based on sound planning because the Hawaii Supreme Court has imposed uniquely restrictive standards on rezonings by the counties, requiring that each rezoning be based on a comprehensive planning decision. 219/

County officials also point out that the Land Use Commission has no contact with the county public works departments and therefore has little knowledge of whether the county can easily provide services to areas newly classified as urban. 220/ On the other hand, some county officials will concede that they often rely on the Land Use Commission to withstand local political pressures that are hard for the county to resist. 221/ And the extent to which the county's

planning has been translated into a process for adequate review of proposals has been questioned by some state officials who believe it important that the Land Use Commission continue to review the proposals of developers in detail. 222/

For the most part the county planners and the Land Use Commission co-exist amicably, and to the extent that there is friction between some of the counties and the Land Use Commission it may reflect only the type of personality conflict that might occasionally be expected. 223/ Conflicts between the counties and the Department of Land and Natural Resources, however, appear quite basic. 224/ Although the county can usually prevent urban development on lands rezoned to an urban district by the Land Use Commission, it has no such power on conservation lands under the jurisdiction of the Department of Land and Natural Resources. County officials generally share Maui County Planning Director Howard Nakamura's opinion that the broad powers of the Department of Land and Natural Resources to permit a wide range of urban uses in the conservation zone should be restricted, though they would also concede that the cases in which the powers have been abused have not been common. 225/

Although the Land Use Law generates its share of interagency bickering almost no one would advocate giving up the basic system. Hawaiians are proud of their Land Use Law and while many seek to improve its operation no one is publicly promoting any basic change in the Law's underlying concepts. If there is any common agreement about needed change it would be with Hawaii County Corporation Counsel Wendell Kimura's view that the Commission needs better-articulated planning standards and fewer ad hoc decisions. 226/

FOOTNOTES

1/ Haw. Rev. Stats. Chapter 205.

2/ Sherwin Carlquist, HAWAII: A NATURAL HISTORY 76 (1970). See David T. E. Lum, Samuel G. Camp, III and Karl Gertel, HAWAII'S EXPERIENCE IN ZONING (Hawaii Agricultural Experiment Station, College of Tropical Agriculture, University of Hawaii, Research Report 172, June, 1969) at p. 4.

3/ Arthur Y. Ching and Tamotsu Sahara, LAND USE AND PRODUCTIVITY RATING, STATE OF HAWAII, 1968 (Land Study Bureau, University of Hawaii, Circular No. 15, July, 1969) at p. 18.

4/ Interview with Aaron Levine, President, Oahu Development Conference, April 6, 1971.

5/ Harland Bartholomew & Associates, LAND USE DISTRICTS FOR THE STATE OF HAWAII, Recommendations for Implementation of the State Land Use Law Act 187 SLH 1961, p. 8 (1963).

6/ See, generally, Frederick K. Nunns, "Hawaii Pioneers With a New Zoning Law," JOURNAL OF SOIL AND WATER CONSERVATION Vol. 17, No. 3, May-June, 1962, at pp. 104-106; Frank Skirvanek, "The Impact of Hawaii's Landscape Laws," LANDSCAPE ARCHITECTURE, July, 1965, at pp. 264-66; David T. E. Lum, Samuel G. Camp, III and Karl Gertel, HAWAII'S EXPERIENCE IN ZONING (Hawaii Agriculture, University of Hawaii, Research Report 172, June, 1969); Myron B. Thompson, "Hawaii's State Land Use Law," STATE GOVERNMENT, Spring, 1966, at pp. 97-100. Other laws passed about the same time were designed to prevent the withdrawal of land from forest reserves and to relieve the tax pressures that were pushing agricultural and forest lands into development.

7/ John J. Hulten, "Land Reform in Hawaii," 42 LAND ECONOMICS 235 (1966).

8/ Dr. Shelley M. Mark and Richard Poirier, STATE AND LOCAL LAND USE PLANNING: SOME LESSONS FROM HAWAII'S LAND USE LAW (January, 1971), at p. 10.

9/ Interview with Wendell Kimura, Corporation Counsel, County of Hawaii, April 19, 1971.

10/ Myron B. Thompson, "Hawaii's State Land Use Law," STATE GOVERNMENT, Spring, 1966, at pp. 97-100.

11/ Interview with Tom Gill, former House Majority Leader, April 5, 1971.

12/ Further history of the land use law can be found in the references cited at note 6, supra.

13/ Haw. Rev. Stats. §205-2. For a detailed explanation of the mapping process see Hawaii State Planning Office and Harland Bartholomew & Associates, FACTS PERTAINING TO THE PROTECTION & ZONING OF RURAL, AGRICULTURAL, & URBAN LANDS WITHIN ALL COUNTIES (March, 1961); Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (August 15, 1969).

14/ David T. E. Lum, Samuel G. Camp, III and Karl Gertel, HAWAII'S EXPERIENCE IN ZONING (Hawaii Agricultural Experiment Station, College of Tropical Agriculture, University of Hawaii, Research Report 172, June, 1969) at p. 94. The statute requires that the urban district include "a sufficient reserve area for foreseeable urban growth." Haw. Rev. Stats. §205-2.

15/ "Rural districts shall include activities or uses as characterized by low density residential lots of not more than one dwelling house per one-half acre in areas where 'city-like' concentration of people, structures, streets, and urban level of services are absent, and where small farms are intermixed with the low density residential lots." Haw. Rev. Stats. §205-2.

16/ David T. E. Lum, Samuel G. Camp, III and Karl Gertel, HAWAII'S EXPERIENCE IN ZONING (Hawaii Agricultural Experiment Station, College of Tropical Agriculture, University of Hawaii, Research Report 172, June, 1969) at p. 27.

17/ See Arthur Y. Ching and Tamatsu Sahara, LAND USE AND PRODUCTIVITY RATING, STATE OF HAWAII, 1968 (Land Study Bureau, University of Hawaii, Circular No. 15, July, 1969).

18/ "These districts may include areas which are not used for, or which are not suited to, agricultural and insular activities by reason by topography, soils, and other related characteristics." Haw. Rev. Stats. §205-2. For a discussion of the problems created by

such lands see Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (August 15, 1969) at p. 86.

19/ Haw. Rev. Stats. §205-2, see Haw. Rev. Stats. §193-41.

20/ Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (August 15, 1969) at p. 84.

21/ 1970 Session Laws of Hawaii, Act 136. See State of Hawaii, Land Use Commission, STATE LAND USE DISTRICT REGULATIONS, effective August 4, 1969 and as amended January 26, 1971, §2.361. The Act defines "shoreline" as the upper reaches of the wash of waves other than storm and tidal waves. Act 136, §2. See also State of Hawaii, Department of Planning and Economic Development, HAWAII AND THE SEA (1969) at pp. 55-66.

22/ Samuel B. K. Chang, Bina M. Chun, THE LAND USE LAW REVISITED: LAND USES OTHER THAN URBAN (Legislative Reference Bureau, December, 1970) at pp. 28-32.

23/ Haw. Rev. Stats. §205-5.

24/ State of Hawaii, Land Use Commission, STATE LAND USE DISTRICT REGULATIONS, effective August 4, 1969 and as amended January 26, 1971, §2.14.

25/ Id., at §2.16.

26/ Haw. Rev. Stats. §205-6 as amended by 1970 Hawaii Session Laws, Act 136.

27/ The schedule of the Land Use Commission for the Spring of 1971 showed the following hearings:

Friday, April 16--Hilo, 7:00 P.M.
Saturday, April 17--Kona, 1:00 P.M.
Friday, May 7--Windward Oahu, 7:00 P.M.
Saturday, May 8--Waianae, Oahu, all day
Friday, May 21--Maui, 1:00 P.M.
Friday, June 4--Kauai, 1:00 P.M.
Saturday, June 5--Ewa, Oahu, 1:00 P.M.

28/ Mr. Tatsuo Fujimoto replaced Ramon Duran as Executive Director on April 1, 1971.

29/ Another planning position is authorized but currently vacant.

30/ See State of Hawaii, Land Use Commission, RULES OF PRACTICE AND PROCEDURE, effective August 4, 1969 and as amended January 26, 1971, §§1.17--1.21.

31/ Haw. Rev. Stats. §205-4.

32/ See, generally, Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (August 15, 1969) at p. 84.

33/ Haw. Rev. Stats. §§205-5, 183-41.

34/ REGULATION NO. 4, a regulation of the Department of Land and Natural Resources, State of Hawaii, providing for land use regulations within conservation districts pursuant to Section 19-70, Revised Laws of Hawaii 1955, as amended, providing for zones, subzones, permitted uses, appeals, enforcement and penalty (undated) (hereinafter cited as Regulation 4). A study looking toward revision of these regulations is currently underway. Interview with Edward Williams, planning consultant, September 1, 1971.

35/ Regulation 4, §2; see the discussion of these special subzones at Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (August 15, 1969) at p. 88.

36/ The department interprets the term "non-commercial" to exclude any residential development built for sale or lease to others." Interview with Gordon Soh, Planning Coordinator, Department of Land and Natural Resources, April 8, 1971.

37/ Regulation 4, §2B.

38/ Interview with Philip I. Yoshimura, Deputy Director of Planning, County of Hawaii, April 19, 1971.

39/ Department of Planning and Economic Development, GENERAL PLAN REVISION PROGRAM, Part 1, at p. 40 (1967).

40/ Interview with Robert Way, Planning Director, City and County of Honolulu, March 30, 1971.

41/ Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (August 15, 1969) at p. 189.

42/ Interview with Robert Wenkam, July 14, 1971.

43/ "Opportunities for Hawaiian Agriculture," Agricultural Development Plan for the State of Hawaii, 1970, cf. especially pp. 47 and 52.

44/ Bank of Hawaii, CONSTRUCTION IN HAWAII 28 (1970).

45/ Interview with Colonel William G. Van Allen, Officer and Director, Bishop Estate, June 8, 1971.

46/ Interview with Allan S. Davis, Chairman of the Board of Trustees, The Estate of James Campbell, June 8, 1971.

47/ Interview with Richard H. Cox, Vice President in Charge of Properties Group, Alexander & Baldwin, Inc., June 10, 1971.

48/ Interview with Earl Stoner, President, AMFAC Communities, June 10, 1971.

49/ Oceanic Properties, Inc. (a division of Castle & Cooke), Honolulu.

50/ 1970 Annual Report, C. Brewer & Company, Ltd., and the Dillingham Corp.; interview with Wade McVay, Chief Executive, Campbell Estate, June 8, 1971.

51/ Interview with Harold Baker, Director, Land Study Bureau, April 6, 1971.

52/ Interview with Colin Cameron, President, Maui Land and Pineapple Company, July 9, 1971.

53/ Pineapple industry costs are kept secret for competitive reasons. Interview with Harold Baker, April 6, 1971.

54/ Production of Hawaiian pineapple dropped from 30.1 million cases in 1959 to 28.8 million cases in 1970. Bank of Hawaii, HAWAII 1971, Annual Economic Review (August, 1971) at p. 45. See also Thomas K. Hitch, Si-Si Chu, and Betty Hirozawa, CURRENT AND ANTICIPATED DEVELOPMENTS AFFECTING POPULATION, ECONOMIC ACTIVITY

452-329 O - 72 - 4

AND LAND USE ON KAUAI, MAUI AND HAWAII 1965, 1970 and 1975 (Legislative Reference Bureau, 1959) at p. 556.

55/ Department of Planning and Economic Development, OPPORTUNITIES FOR HAWAIIAN AGRICULTURE 48 (1970).

56/ Interview with Harold Baker, April 6, 1971.

57/ Interview with Richard H. Cox, June 10, 1971.

58/ Interview with Eddie Tangen, Vice President, International Longshoremen's and Warehousemen's Union, and member of Land Use Commission, June 7, 1971.

59/ Interview with Richard H. Cox, June 10, 1971.

60/ Interview with Colin Cameron, July 9, 1971.

61/ Interview with Richard H. Cox, June 10, 1971; interview with W. Lawrence Clapp, President, Ahuimanu Investment Company, June 9, 1971; interview with Eddie Tangen, June 7, 1971; Bishop Estate, Honolulu; The Estate of James Campbell, Honolulu; interview with Warren G. Haight, President, Oceanic Properties, Inc. (a division of Castle & Cooke), June 9, 1971; interview with Earl Stoner, June 10, 1971; Lanai and Molokae are almost wholly given over to pineapple production, and may outlast the major islands by several years however.

62/ Interview with Harold Baker, April 6, 1971.

63/ Bank of Hawaii, HAWAII 1971, Annual Economic Review (August, 1971) at p. 16.

64/ Interview with Allan S. Davis, June 8, 1971.

65/ Interview with Warren G. Haight, June 9, 1971.

66/ Interview with Richard H. Cox, June 10, 1971.

67/ Interview with W. Lawrence Clapp, June 9, 1971.

68/ Bishop Estate, Honolulu.

69/ In 1970 sugar and pineapple accounted for $149,300,000 of a total value of all crops in the state of $170,200,000. Bank of Hawaii, HAWAII 1971, Annual Economic Review (August, 1971) at p. 44.

70/ Interview with Harold Baker, April 6, 1971.

71/ Interview with Dr. Shelley M. Mark, Director, Department of Planning and Economic Development, April 6, 1971. Sales of vegetables and fruits have increased gradually from about $6 million in 1960 to $9-1/2 million in 1969.

72/ Interview with Harold Baker, April 6, 1971.

73/ Interview with Wade McVay, June 8, 1971.

74/ Interview with Sunao Kido, Director, Department of Land and Natural Resources, and member of the Land Use Commission, June 9, 1971.

75/ Interview with Dr. Shelley M. Mark, April 6, 1971.

76/ Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (August 15, 1969) at p. 189.

77/ Dr. Shelley M. Mark and Richard Poirier, STATE AND LOCAL LAND USE PLANNING: SOME LESSONS FROM HAWAII'S LAND USE LAW (January, 1971) at p. 7.

78/ Interview with Dr. Shelley M. Mark, April 6, 1971; interview with Howard Altman, Project Administrator for Eckbo, Dean, Austin & Williams, five-year boundary review study, April 7, 1971.

79/ Thomas K. Hitch, Si-Si Chu, and Betty Hirozawa, CURRENT AND ANTICIPATED DEVELOPMENT AFFECTING POPULATION, ECONOMIC ACTIVITY AND LAND USE ON KAUAI, MAUI AND HAWAII 1965, 1970 and 1975 (Legislative Reference Bureau, 1959) at p. 131.

80/ Interview with Richard Lowe, planning consultant, April 4, 1971.

81/ Bank of Hawaii, HAWAII 1971, Annual Economic Review (August, 1971) at p. 42. See Bank of Hawaii, CONSTRUCTION IN HAWAII 34 (1970).

82/ Interview with Eddie Tangen, June 7, 1971.

83/ State of Hawaii, Department of Planning and Economic Development, THE ECONOMIC OUTLOOK FOR THE STATE OF HAWAII (Economic Research Report No. 71-1, January 28, 1971).

84/ Hotel employment increased from 6,310 in 1965 to 13,320 in 1970. Bank of Hawaii, HAWAII 1971, Annual Economic Review (August, 1971) at p. 44.

85/ Interview with Eddie Tangen, June 7, 1971.

86/ Tangen is quick to voice the concern of his workers over the absence of reasonable housing. According to Tangen, while the "average guy" may earn around $12,500 a year, it is not sufficient to finance a $31,000 home, and it is hard to find houses selling for less. However, one developer, who prefers to remain anonymous, suggests that it is the workers themselves who contribute to the high cost of their housing. He regularly provides beer for his workers every Friday afternoon plus a luau at the conclusion of each project. Recently, beer has been demanded other days of the week as well. If he did not acquiesce, he declared he would soon have no workers.

87/ Robert Wenkam, KAUAI AND THE PARK COUNTRY OF HAWAII 84-87 (1967).

88/ Interview with Cynthia Marnie, Legislative Representative, The Outdoor Circle, July 13, 1971.

89/ See the results of the questionnaire reported at Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (August 15, 1969) at p. 189.

90/ Interview with Mike Cleveland, Officer, Life of the Land, July 9, 1971.

91/ Immigration of Caucasians has been heavy in recent years. Bank of Hawaii, HAWAII 1970, Annual Economic Review (August, 1970) at p. 22.

92/ Interview with Robert Wenkam, July 14, 1971.

93/ Interview with Tom Gill, April 5, 1971. For an analysis and reprint of the "McAteer brochure" that aroused local politicians with its attacks on the state's environmental policies see Honolulu Sunday Star-Bulletin & Advertiser, April 18, 1971, p. B-2.

94/ Interview with Dr. Shelley M. Mark, April 6, 1971.

95/ Interview with Tony Hodges, Life of the Land, July 12, 1971; interview with Robert Wenkam, July 14, 1971. See, Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (August 15, 1969) at p. 88.

96/ Interview with Gordon Soh, April 8, 1971.

97/ Id.

98/ State of Hawaii, Department of Land and Natural Resources, 1969-1970 REPORT TO THE GOVERNOR (January, 1971) at p. 12.

99/ Interview with Gordon Soh, April 8, 1971. There has also been some criticism by conservationists that the Department is put in a conflicting position because it is the lessor of many of the lands on which it must decide applications for permits, and there will be increased lease revenue in many cases if the permit is granted.

100/ Interview with Dick Mayer, Geography Instructor, Maui Community College, July 10, 1971; interview with Mike Cleveland, July 9, 1971; interview with Robert Wenkam, July 14, 1971.

101/ Samuel B. K. Chang, Bina M. Chun, THE LAND USE LAW REVISITED: LAND USES OTHER THAN URBAN (Legislative Reference Bureau, December, 1970) at p. 24; interview with Tom Gill, April 5, 1971; interview with Brian Nishimoto, Director of Planning, County of Kauai, April 16, 1971; interview with Wendell Kimura, April 19, 1971; interview with Mike Cleveland, July 9, 1971; interview with Cynthia Marnie, July 13, 1971; interview with Dick Mayer, July 10, 1971.

102/ Interview with Wade McVay, June 8, 1971; interview with Colonel William G. Van Allen, June 8, 1971; interview with W. Lawrence Clapp, June 9, 1971.

103/ Interview with Mike Cleveland, July 9, 1971.

104/ Interview with Colonel William G. Van Allen, June 8, 1971.

105/ Interview with Wendell Kimura, April 19, 1971.

106/ Interview with Sunao Kido, June 9, 1971; interview with Edward Williams, September 1, 1971.

107/ Interview with Colonel William G. Van Allen, June 8, 1971.

108/ Interview with Richard Lyman, Jr., Chairman of the Board, Bishop Estate, June 8, 1971.

109/ Interview with Eddie Tangen, June 7, 1971; interview with Harold Hostetter, environmental reporter, Honolulu Advertiser, July 13, 1971; interview with Richard H. Cox, June 10, 1971; interview with Robert Wenkam, July 14, 1971.

110/ Interview with Howard Altman, April 7, 1971.

111/ Interview with Gordon Soh, April 8, 1971. Recently there has been severe criticism with the construction of the Kona airport in the conservation district. Interview with Philip I. Yoshimura, April 19, 1971.

112/ Bank of Hawaii, CONSTRUCTION IN HAWAII 2 (1970).

113/ See Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (August 15, 1969) at pp. 97-8.

114/ Interview with Sunao Kido, June 9, 1971. Samuel B. K. Chang, Bina M. Chun, THE LAND USE LAW REVISITED: LAND USES OTHER THAN URBAN (Legislative Reference Bureau, December, 1970) at p. 29.

115/ Interview with Ramon Duran, former Executive Director, Land Use Commission, April 8, 1971; see, e.g., State of Hawaii Land Use Commission, Staff Report on Docket No. A70-268 (Estate of James Campbell), February 26, 1971. Interview with Harold Baker, April 6, 1971.

116/ Interview with Roy Takeyama, Secretary, Board of Regents, University of Hawaii, April 6, 1971; interview with Howard Altman, April 7, 1971. See, generally, Arthur Y. Ching, USE STATUS OF URBAN-ZONED LAND ON OAHU, University of Hawaii Land Study Bureau, Special Study Series, Report No. 9, February, 1970. It has also been suggested that this emphasis on "need" is of doubtful constitutionality. Ira Michael Heyman, "Planning Legislation: 1963" 30 AIP JOURNAL 247, 250 (November, 1964).

117/ Interview with Fred K. Kwock, Manager, Residential Development, Dillingham Land Corporation (a subsidiary of Dillingham Corporation), June 7, 1971.

118/ Interview with Colonel William G. Van Allen, June 8, 1971.

119/ Interview with George Yim, General Counsel, Oceanic Properties, Inc. (a division of Castle & Cooke), June 9, 1971; interview with Earl Stoner, June 10, 1971.

120/ Another current land use issue in Hawaii is the extent to which some of the very extensive military land might be available for other uses. (Interview with Larry Nakatsuka, Legislative Assistant to Senator Fong, April 1, 1971.) The current emphasis at the federal level to release unneeded military land for other purposes has stimulated discussion on this issue. On the other hand, in recent years the federal government has also acquired substantial amounts of new land for space and military research and testing. (Robert Wenkam, KAUAI AND THE PARK COUNTRY OF HAWAII, 115-22 (1967).

121/ The Estate of James Campbell; AMFAC Communities. See Samuel B. K. Chang, Bina M. Chun, THE LAND USE LAW REVISITED: LAND USES OTHER THAN URBAN (Legislative Reference Bureau, December, 1970) at p. 39.

122/ Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (August 15, 1969) at p. 8. Factors other than the land use law have also probably influenced the shape of the urban area. The sugar plantations which occupy the fringes of Honolulu cannot operate except with very substantial acreage and are, therefore, in a poor position to sell lots in small increments. This lack of small holdings on the fringe has undoubtedly contributed to the slow rate of urban expansion. Richard U. Ratcliff, STATE ECONOMIC GOALS AND FEDERAL LAND HOLDINGS IN HAWAII (May, 1962) at pp. 70, 78.

123/ "Mililani Town," brochure published by Oceanic Properties Division of Castle & Cooke, Honolulu.

124/ Id.

125/ Interviews with George Yim and Wendell Brooks, Jr., Vice President and General Manager, of Oceanic Properties, Inc. (a division of Castle & Cooke), June 9, 1971; interview with Roy Takeyama, April 6, 1971.

126/ "New Town for Ewa," brochure published by The Estate of James Campbell.

127/ Id.; interviews with Allan S. Davis and Wade McVay, June 8, 1971.

128/ Interview with Colonel William G. Van Allen, June 8, 1971; interview with Eddie Tangen, June 7, 1971.

129/ Interview with Eddie Tangen, June 7, 1971.

130/ Interview with Robert Way, March 30, 1971.

131/ Honolulu Advertiser, August 5, 1971, p. 7.

132/ Bank of Hawaii, CONSTRUCTION IN HAWAII (1970) at p. 5. In 1970 the median value of a house in Hawaii was $35,100 compared to $25,500 in the next highest state. See Bureau of the Census, 1970 CENSUS OF HOUSING, ADVANCE REPORT: GENERAL HOUSING CHARACTERISTICS (February, 1971).

133/ Richard U. Ratcliff, STATE ECONOMIC GOALS AND FEDERAL LAND HOLDINGS IN HAWAII (May, 1962) at p. 80.

134/ U.S. Bureau of the Census, General Housing Characteristics, February, 1971.

135/ Bank of Hawaii, CONSTRUCTION IN HAWAII 40 (1970). Interview with Larry Nakatsuka, April 1, 1971.

136/ Interview with Kekoa Kaapu, Urban Renewal Coordinator, City of Honolulu, July 15, 1971. See Honolulu Advertiser, August 8, 1971, p. 23.

137/ Oceanic Properties, Inc. (a division of Castle & Cooke), Honolulu; interview with Colonel William G. Van Allen, June 8, 1971; The Estate of James Campbell; Dillingham Land Corporation (a subsidiary of Dillingham Corporation); interview with W. Lawrence Clapp, June 9, 1971. See also Daniel Mandelker, THE ZONING DILEMMA 45-51 (1971).

138/ Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (August 15, 1969) at p. 95.

139/ Interview with Earl Stoner, June 10, 1971.

140/ Interview with Allan S. Davis, June 8, 1971.

141/ Interview with Harold Hostetter, July 13, 1971; interview with Sunao Kido, June 9, 1971; interview with Dr. Shelley M. Mark, April 6, 1971; interview with Robert Wenkam, July 14, 1971.

142/ Interview with Ray Yamashita, Assistant Commissioner of Planning, City and County of Honolulu, April 8, 1971.

143/ Dillingham Land Corporation (a subsidiary of Dillingham Corporation).

144/ Interview with Richard H. Cox, June 10, 1971; interview with Allan S. Davis, June 8, 1971.

145/ Interview with Allan S. Davis, June 8, 1971.

146/ Id.

147/ Interview with Eddie Tangen, June 7, 1971.

148/ Marshall Kaplan, Gans, Kahn & Yamamoto, HOUSING IN HAWAII 66 (1971).

149/ Interview with W. Lawrence Clapp, June 9, 1971.

150/ Id.; Lawrence Cunha of Bishop Estate also pointed to the requirement of building and dedicating to the county water and sewer facilities. In the Hawaii-Kai development on Bishop land the cost of one such plant to serve 20,000 people was $4 million and will eventually exceed $10 million when developed for full capacity. Bishop Estate, Honolulu.

151/ Interview with John Hyer, Vice President, Maui Land and Pineapple Company, July 9, 1971. See also interview with W. Lawrence Clapp, June 9, 1971.

152/ Interview with Robert Way, July 15, 1971. Although property taxes are relatively low in Hawaii in comparison to other states, (The per capita property tax in 1967-1968 was only $83.33 in comparison to $137.00 in the median state. BOOK OF THE STATES 1970-71, p. 205.) the tax weighs most heavily on the owners of older single-family homes. (Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (August 15, 1969) at p. 13.)

153/ This developer sold, on the fringe of an urban center on Oahu, 258 units of a 300-unit development in 60 days at over $40,000 per unit.

154/ Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (August 15, 1969) at pp. 7, 104.

155/ See Bank of Hawaii, CONSTRUCTION IN HAWAII 34-35 (1970).

156/ Id., at p. 2.

157/ Interview with Elmer Cravalho, Maui County Mayor, July 9, 1971.

158/ "To pursue this type of development is a sure way to destroy mile after mile of open landscape, an irretrievable and, in Hawaii, clearly limited resource." Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (August 15, 1969) at p. 100.

159/ Interview with Roy Takeyama, April 6, 1971; interview with Sydney Williams, planning consultant on the five-year boundary review, March 16, 1971.

160/ Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (August 15, 1969) at p. 9.

161/ Interview with Philip I. Yoshimura, April 19, 1971.

162/ Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (August 15, 1969) at p. 97.

163/ Id., at p. 96.

164/ Interview with Robert Wenkam, July 14, 1971.

165/ Interview with Roy Takeyama, April 6, 1971; interview with Earl Stoner, June 10, 1971; interview with Colonel William G. Van Allen, June 8, 1971.

166/ Interview with Earl Stoner, June 10, 1971.

167/ Interview with Fred K. Kwock, June 7, 1971.

168/ Interview with Allan S. Davis, June 8, 1971.

169/ Interview with Robert Way, March 30, 1971; interview with Tatsuo Fujimoto, Executive Director of the Land Use Commission, April 5, 1971; interview with Roy Takeyama, April 6, 1971; interview with Howard Altman, April 7, 1971.

170/ Interview with Ah Sung Leong, Staff Planner, Land Use Commission, April 5, 1971.

171/ Interview with Howard Altman, April 7, 1971; interview with Tom Gill, April 5, 1971.

172/ Interview with Howard Altman, April 7, 1971.

173/ Interview with Roy Takeyama, April 6, 1971.

174/ See Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (August 15, 1969) at p. 98.

175/ Interview with Eddie Tangen, June 7, 1971; interview with W. Lawrence Clapp, June 9, 1971.

176/ Oceanic Properties, Inc. (a division of Castle & Cooke).

177/ Interview with Philip I. Yoshimura, April 19, 1971.

178/ Interview with Ramon Duran, April 8, 1971.

179/ Dr. Shelley M. Mark and Richard Poirier, STATE AND LOCAL LAND USE PLANNING: SOME LESSONS FROM HAWAII'S LAND USE LAW (January, 1971) at pp. 6-7. In 1970 the Commission obtained an amendment of the land use law to codify its practice of attaching to special permits specific conditions relating to the nature of development. Samuel B. K. Chang, Bina M. Chun, THE LAND USE LAW REVISITED: LAND USES OTHER THAN URBAN (Legislative Reference Bureau, December, 1970) at p. 5. The Commission has also specifically provided for "incremental zoning in its regulations." See State of Hawaii, Land Use Commission, STATE LAND USE DISTRICT REGULATION effective August 4, 1969 and as amended January 26, 1971, §2.32.

180/ Haw. Rev. Stats. §205-11.

181/ Interview with Tom Gill, April 5, 1971.

182/ Interview with Ray Yamashita, April 8, 1971.

183/ Life of the Land v. Land Use Commission, Circuit Court of the First Circuit, Civil Docket #33144.

184/ Interview with Tom Gill, April 5, 1971; interview with Ray Yamashita, April 8, 1971.

185/ Honolulu Advertiser, August 5, 1971, p. 17.

186/ Interview with Walton Hong, Deputy Attorney General, April 5, 1971.

187/ Id.; interview with Tom Gill, April 5, 1971.

188/ Interview with Roy Takeyama, April 6, 1971.

189/ Interview with Dr. Shelley M. Mark, April 6, 1971.

190/ Interview with Robert Way, March 30, 1971.

191/ Interview with Aaron Levine, April 6, 1971.

192/ Myron B. Thompson, "Pehea O Hawaii e Hoo pono pono," PLANNING 1968, at pp. 308, 309.

193/ Interview with Dr. Shelley M. Mark, April 6, 1971. Dr. Shelley M. Mark and Richard Poirier, STATE AND LOCAL LAND USE PLANNING: SOME LESSONS FROM HAWAII'S LAND USE LAW (January, 1971) at p. 3; Thompson, op. cit., at 312. See, generally, State of Hawaii, Department of Planning and Economic Development, ELEMENTS OF THE STATE PLANNING PROCESS, State of Hawaii General Plan Revision Program (1967).

194/ Interview with Ray Yamashita, April 8, 1971.

195/ Interview with Sydney Williams, March 16, 1971; interview with Robert Way, March 30, 1971; interview with Harold Baker, April 6, 1971; interview with Wendell Kimura, April 19, 1971.

196/ Interview with Harold Baker, April 6, 1971; interview with Gordon Soh, April 8, 1971.

197/ Interview with Brian Nishimoto, April 16, 1971; interview with Tom Gill, April 5, 1971; Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE

DISTRICTS AND REGULATIONS REVIEW (August 15, 1969) at pp. 8, 14; interview with Roy Takeyama, April 6, 1971; interview with Wendell Kimura, April 19, 1971. Dr. Shelley M. Mark and Richard Poirier, STATE AND LOCAL LAND USE PLANNING: SOME LESSONS FROM HAWAII'S LAND USE LAW (January, 1971) at p. 8.

198/ Interview with Tom Gill, April 5, 1971; interview with Brian Nishimoto, April 16, 1971.

199/ Interview with Tom Gill, April 5, 1971.

200/ Haw. Rev. Stats. §246-12.

201/ See, generally, Samuel B. K. Chang, Bina M. Chun, THE LAND USE LAW REVISITED: LAND USES OTHER THAN URBAN (Legislative Reference Bureau, December, 1970) at pp. 35-39; David T. E. Lum, Samuel G. Camp, III and Karl Gertel, HAWAII'S EXPERIENCE IN ZONING (Hawaii Agricultural Experiment Station, College of Tropical Agriculture, University of Hawaii, Research Report 172, June, 1969) at pp. 29-36.

202/ David T. E. Lum, Samuel G. Camp, III and Karl Gertel, HAWAII'S EXPERIENCE IN ZONING (Hawaii Agricultural Experiment Station, College of Tropical Agriculture, University of Hawaii, Research Report 172, June, 1969) at p. 35.

203/ Myron B. Thompson, "Hawaii's State Land Use Law," STATE GOVERNMENT, Spring, 1966, at p. 100.

204/ §98H-14. See Frederick K. Nunns, "Hawaii Planning With a New Zoning Law," JOURNAL OF SOIL AND WATER CONSERVATION, Vol. 17, No. 3, May-June, 1962, at p. 106.

205/ Interview with Roy Takeyama, April 6, 1971; interview with Wendell Kimura, April 19, 1971; interview with Tom Gill, April 5, 1971.

206/ Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (August 15, 1969) at p. 15.

207/ Interview with Sydney Williams, March 16, 1971; interview with Brian Nishimoto, April 16, 1971.

208/ Interview with Tom Gill, April 5, 1971; interview with Dr. Shelley M. Mark, April 6, 1971; interview with Wendell Kimura, April 19, 1971; interview with Robert Wenkam, July 14, 1971; interview with Tony Hodges, July 12, 1971.

209/ Interview with Robert Wenkam, July 14, 1971.

210/ Interview with Wade McVay, June 8, 1971.

211/ Interview with George Akahane, Chairman, Committee on Planning and Zoning, July 15, 1971.

212/ Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (August 15, 1969) at p. 188.

213/ Interview with Robert Way, March 30, 1971.

214/ Interview with Walton Hong, April 5, 1971; interview with Dr. Shelley M. Mark, April 6, 1971; interview with Roy Takeyama, April 6, 1971.

215/ Interview with Roy Takeyama, April 6, 1971.

216/ Interview with Dr. Shelley M. Mark, April 6, 1971.

217/ Interview with Ray Yamashita, April 8, 1971.

218/ Interview with Elmer Cravalho, July 9, 1971; interview with Brian Nishimoto, April 16, 1971.

219/ Interview with Robert Way, March 30, 1971; interview with Wendell Kimura, April 19, 1971. See Dalton v. City and County of Honolulu, 51 Haw. 400, 462 P.2d 199 (1969). But developers have complained that this has substantially increased their costs and delays. Interview with Roy Takeyama, April 6, 1971.

220/ Interview with Robert Way, March 30, 1971; interview with Brian Nishimoto, April 16, 1971; interview with Philip I. Yoshimura, April 19, 1971.

221/ Interview with Philip I. Yoshimura, April 19, 1971.

222/ Interview with Walton Hong, April 5, 1971.

223/ Interview with Philip I. Yoshimura, April 19, 1971.

224/ See, generally, Eckbo, Dean, Austin & Williams, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW (August 15, 1969) at p. 84.

225/ Interview with Howard Nakamura, Director of Planning, Maui County, July 9, 1971; interview with Robert Way, March 30, 1971; interview with Dr. Shelley M. Mark, April 6, 1971; interview with Wendell Kimura, April 19, 1971.

226/ Interview with Wendell Kimura, April 19, 1971.

VERMONT ENVIRONMENTAL CONTROL LAW

History and Circumstances of Adoption

Since the early 1960's Vermont has faced a second-home and ski resort boom. Growth in major population areas on the eastern seaboard, combined with the construction of the Interstate highway system, made Vermont a natural center for this type of development. Many persons in public life in the state were growing concerned about the impact upon the character of the state of this recreational explosion and the possible commercial and industrial expansion that might be associated with it.

As development pressure increased, local authority to control the use of land was broadened by the 1967 legislature, increasing the flexibility of zoning and planning commissions. 1/ State agencies also received broader powers, and issued regulations to meet specific threats, such as large subdivisions. 2/ In the summer of 1968 the International Paper Company proposed a recreational and second-home development which encompassed 20,000 acres in the southern part of the state. 3/ A large public outcry resulted from the announcement of this proposal, and Vermont newspapers devoted substantial space to the discussion of the problems of recreational development.

In May 1969 the Governor appointed prominent citizens and legislators to a Governor's Commission on Environmental Control, which was instructed to hold hearings and issue a report. The commission made the International Paper Company proposal its first order of business and soon found that, as was true in large areas of Vermont, no mechanism for zoning and subdivision control existed for the Windham area. In September 1969, Time Magazine quoted Clifford Jarvis, developer of another project in the Windham area, as saying that if he sold 300 of his projected 1,735 lots he would recoup his investment. Most of the developers, said Time,

> "have never heard of even rudimentary site planning, except insofar as it means jamming as many houses as possible onto their tracts. Half-acre plots are not unusual. Another basic problem is sewage. Close beneath the

> new grass lawns is solid, impermeable bedrock. Instead of building expensive central sewage systems for their developments, the subdividers depend on much cheaper, septic tanks for each house. [When] the soil covering the bedrock is so shallow, [tank] overflow and wastes seep downhill, ending up in a neighbor's well, a stream or a lake." 4/

Under Vermont law the adoption of sophisticated controls by a municipality would have had to be preceded by the preparation of a comprehensive plan for the town--a time-consuming process. 5/ As a stopgap measure, the commission in mid-August recommended to the Health Department that it adopt subdivision regulations pursuant to the Administrative Procedures Act, covering "slope, ground and surface water quality and water supply and sewer [sic] disposal facilities." 6/ These regulations were rapidly prepared and issued in September. 7/

The study commission's final report and recommendations proposed a statewide system of land use planning and control to ensure environmental protection:

> "Facing a period of substantial growth and intense development in the 1970's we have the opportunity and hence the obligation to utilize the newer understanding of the science of ecology, and the improved knowledge concerning effective government organization, to provide a uniform, comprehensive approach by state government to assure development without destruction. A basic goal, therefore, should be the preparation of a comprehensive land use plan for the State of Vermont to be undertaken as soon as practical and completed within a period of one year. Secondly, such a plan and its subsequent administration should be the responsibility of an effective administrative unit clearly charged with the responsibility of protecting the environment . . . ." 8/

Almost all of the study commission's recommendations were adopted by the 1970 legislature as part of the new Environmental Control Law. 9/

Additional background on the Commission's report, together with commentary on the Environmental Control Law, can be found in an environmental management study conducted under the direction of Elizabeth H. Haskell. 10/

The new Law created an Environmental Board (assisted by seven district commissions) which consolidates and coordinates regulation of the types of land development specified in the Law. This regulation is to follow certain general criteria, and in the future must comply with three state land use plans, the first of which has already been proposed. The Environmental Control Law was accompanied by companion legislation dealing with such specific concerns as water and pollution; dedication of open space; mandatory shoreland and flood plain zoning; and mobile home park controls. The 1970 Adjourned Session of the legislature was so dominated by environmental concerns that the passage of the Environmental Control Law through the legislature was relatively painless. Corporate land developers, against whom the bill was primarily directed, offered some opposition, but not publicly. Much opposition was diffused by the other specific companion bills and the few legislators who spoke out against the Environmental Control Law were quickly overwhelmed by legislators eager to support it. The final adoption by the Senate after its passage by the House was by a unanimous voice vote. 11/

Some potential opposition was removed by the broad exemptions for existing development plans under a "grandfather" clause that has been generously construed. 12/ Farming, forest products, and electric power were also exempted, but the Law did assert authority over all "construction of improvements for commercial, industrial or residential use above the elevation of 2,500 feet without exception." 13/ An early attempt was made to ensure the logging companies followed "good forestry practices," 14/ but this was soon dropped. Sponsors of the legislation explained that the primary concern in the forest products area was a massive subdivision on paper company land holdings, 15/ and that this would be covered by the legislation. The power companies were also exempted because they were regulated by an existing agency, the Public Service Board. 16/

The Environmental Board and District Commissions

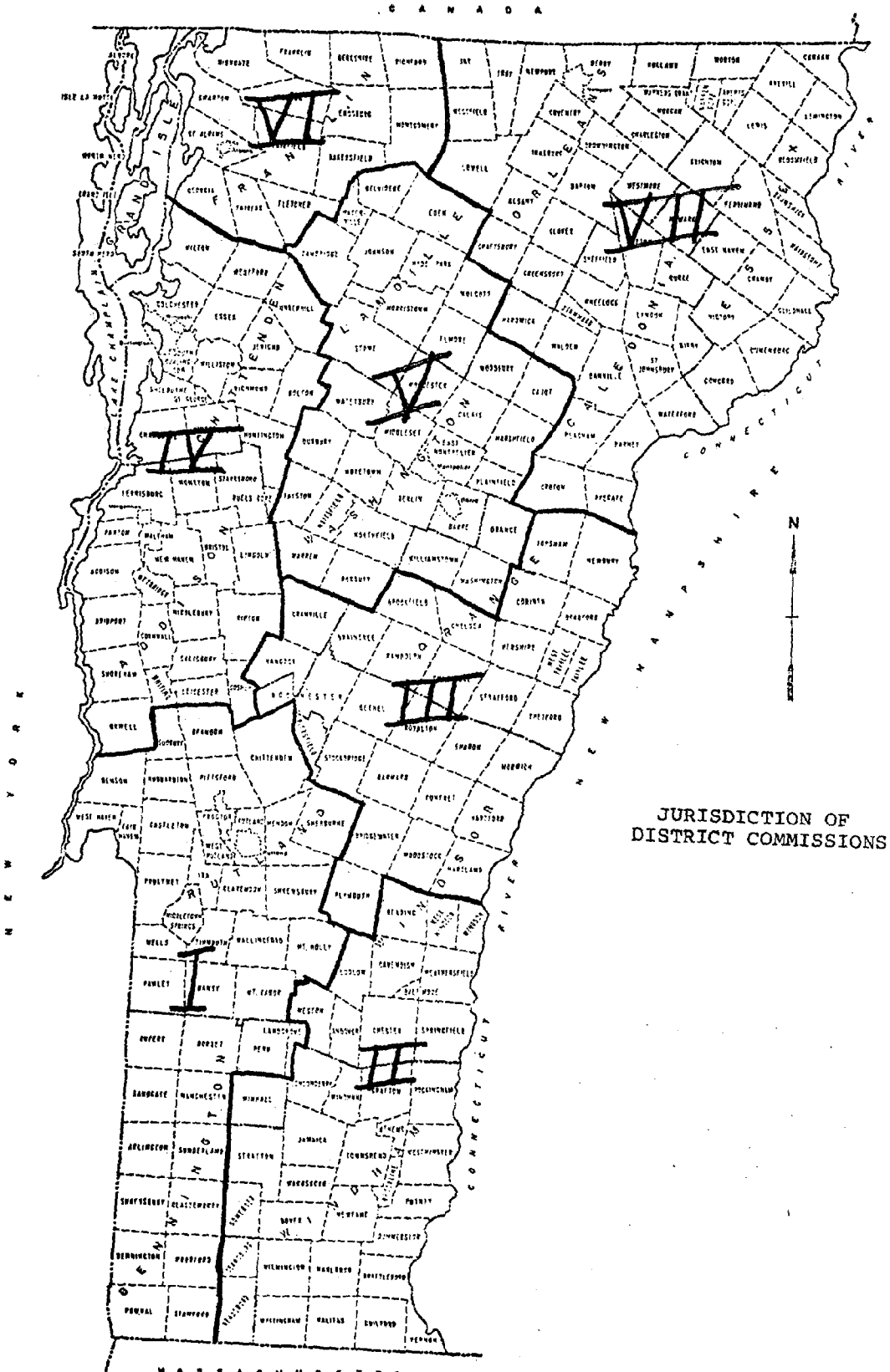
As finally passed in the spring of 1970, the Environmental Control Law details two complementary areas of responsibility for the State Environmental Board it creates. One is a judgment function exercised in issuing

development and subdivision permits through seven district commissions. The other covers the adoption of a statewide, comprehensive land use plan, to be prepared in three stages. This plan is to serve as a guide for the Environmental Board and will aid district commissions in their judgment role.

The Environmental Board is an independent regulatory body located within the Agency of Environmental Conservation, a newly-created umbrella agency for all Vermont departments dealing with natural resources. While the Board's regulatory authority is independent of that of the Agency, the Board is part of the Agency for staff and budget purposes. 17/ The nine members of the Environmental Board are all appointed by the Governor, and serve part time on a per diem basis. 18/ All members serve four-year terms with the exception of the chairman who serves two years. The terms of the members are to be staggered "so that five appointments expire in each odd numbered year." 19/ No particular experience or expertise is required of Board members by the Law. Those appointed to date represent a variety of interests in the state, including conservation, real estate and recreational development, law enforcement, finance, local government, and education.

The district commissions each have three members, who also serve on a per diem basis for four-year terms. 20/ The chairman serves for one year, and the other members serve two-year terms with their terms expiring in alternate years. The role of chairman of the district commission approaches a full-time job in an active district. Other members devote about one day weekly or biweekly at application hearings. Commissioners are paid on a per diem basis, but the uncompensated time required to review exhibits and prepare for hearings is also substantial. 21/ The members are appointed from the district in which they serve by the Governor, and no qualifications for members are imposed by the Law. There are seven district commissions representing the districts shown on the following page. 22/

"Developments" for which a permit is required include the following: construction of improvements for commercial or industrial purposes on land owned or controlled by a common entity, and exceeding 10 acres (one acre where the town having jurisdiction has not adopted zoning or subdivision controls); "housing projects" (other than subdivisions) consisting of 10 or more units within a radius of five miles; developments by municipal and state agencies; and finally, any development, regardless of acreage



Source: Vermont Environmental Board

or the number of units involved, for commercial, industrial or residential use above the elevation of 2500 feet. 23/ This last requirement is meant to preserve fragile ecosystems in the state's mountain areas. 24/

Reflecting the concern of the study commission and the state legislature with "second-home" residential development, the Law directs itself quite specifically to subdivisions: "No person shall sell or offer for sale any interest in any subdivision located in this State, or commence construction on a subdivision . . . without a permit." 25/ "Subdivisions" include all tracts of land owned or controlled by a common entity and divided for the purpose of resale into 10 or more "lots" of less than 10 acres each, within a radius of five miles of any point on any lot. 26/ The sale of unimproved lots in a subdivision, as well as the construction of improvements on such lots, is included within the coverage of the Act.

To protect against unauthorized subdivision the Law requires that the property transfer tax form required with every property transfer in Vermont must include a certificate of compliance with or exemption from both the Environmental Control Law and the Board of Health Regulations, to be signed under oath by the seller. An example of such a certificate is on the following page. 27/

The Law also provides for stiff penalties including fines up to $500 per day and/or two years imprisonment for violation of the provisions of the Law. 28/ However, except for the transfer tax report for subdivisions, it is essentially self-policing, relying on private individuals to report those developments which do not come to the attention of the state through application to other agencies.

Applications for Permits--The District Commissions

Applicants who seek to subdivide or undertake other development subject to the Law's jurisdiction must seek a permit under the Law. District commissions function under the Board as a local hearing body in the initial stage of the permit-issuing process. The district commissions are assisted administratively by regional coordinators, who serve as administrative officers. 29/ The commissions may also utilize additional administrative support from the area's regional planning commission.

HEALTH BOARD CERTIFICATE

Instructions: Section 14 of Act No. 291 of the 1969 adjourned session of the Vermont General Assembly requires that on and after June 8, 1970, parties to a transfer (deed or lease) or their legal representatives certify on the property transfer return whether the transfer is in compliance with or is exempt from the board of health subdivision regulations(Vermont Health Regulations – Chapter 5, Subchapter 10, as amended).

Compliance: A transfer is in compliance with these regulations **only** if the land being transferred is delineated as a parcel or lot on a subdivision plan which has been approved by the department of health pursuant to such regulations and a subdivision permit covering this parcel or lot has been issued.

Exemption: A transfer is exempt from these regulations only if the transfer is one for which such regulations do not require a permit. The regulations do not require a permit if: (1) the transfer does not constitute "subdivision" as that term is defined in section 5-902(a) of the regulations; or (2) the land being transferred is delineated as a parcel or lot in an "existing subdivision" as that phrase is defined in section 5-902(d) of the regulations. The following are examples of exempt transfers: (a) the land being transferred is not an "improvable parcel" as that phrase is defined in section 5-902(c) of the regulations and the transfer will not result in the creation of three or more parcels each of which is ten acres or less in area; (b) the land being transferred is larger than ten acres in area and the transfer will not result in the creation of three or more parcels each of which is ten acres or less in area; (c) the transfer does not divide any lands, i.e. the entire tract is being conveyed; (d) this transfer plus all other transfers out of the same tract since September 18, 1969 by the same owner or lessor do not result in the creation of three or more improvable parcels each of which is ten acres or less in area; (e) the land being transferred is delineated on a subdivision plan approved by a municipality pursuant to a local subdivision (not zoning) ordinance prior to September 18, 1969; (f) the land being transferred is delineated on a subdivision plan prepared by an engineer or land surveyor and filed for record in the town clerk's office prior to September 18, 1969 and, prior to that date, one or more lots depicted thereon were conveyed or made the subject of a contract for sale; (g) the land being transferred is part of a tract which the department of health has certified as being an "existing subdivision".

Note: A town clerk may not record your deed or lease unless it is accompanied by a completed certificate. Any transfer in violation of the regulations will result in a forfeiture to the state in the amount of $1000 and a lien on the property so transferred.

VERMONT LAND USE AND DEVELOPMENT PLANS ACT CERTIFICATE

Instructions: Section 30 of Act No. 250 of the 1969 adjourned session of the Vermont General Assembly requires that on and after June 1, 1970, a seller of land certifies on the property transfer return whether the conveyance is in compliance with or exempt from the provisions of Act No. 250. (Copies of the Act may be found in any town clerk's office or the office of any district commission of the Environment Board, the locations of which are listed in Rule 1A of the Board).

Compliance: A conveyance of property is in compliance with Act No. 250 only if the seller has obtained a permit. (See Section 6 of Act No. 250).

Exemption: A conveyance of property is exempt from the Act if: (1) the conveyance is specifically exempt under Section 6 or 7 of the Act, or (2) the conveyance is from a parcel of land which is not a "subdivision" as defined in Section 2, subsection (9) of the Act.

Note: A town clerk may not record your deed unless it is accompanied by a completed certificate. (See Section 30 of Act No. 250).

CERTIFICATE

REQUIRED BY NO. 291 - 1969 ADJOURNED SESSION
(BOARD OF HEALTH SUBDIVISION REGULATIONS)

PLEASE CHECK APPROPRIATE SQUARE AND ENTER PERMIT NUMBER IF A SUBDIVISION PERMIT HAS BEEN ISSUED

☐ THIS TRANSFER IS IN COMPLIANCE WITH THE SUBDIVISION REGULATIONS OF THE BOARD OF HEALTH (VERMONT BOARD OF HEALTH REGULATIONS, SUBCHAPTER 10, AS AMENDED)

PERMIT NO _____

☐ THIS TRANSFER IS EXEMPT FROM THE SUBDIVISION REVIEW REQUIREMENTS OF THE BOARD OF HEALTH (VERMONT BOARD OF HEALTH REGULATIONS, CHAPTER 5, SUBCHAPTER 10, AS AMENDED)

SPECIFY REASON FOR EXEMPTION _____

UNDER PENALTIES OF PERJURY, I(WE) SWEAR OR AFFIRM THAT THIS CERTIFICATE IS TRUE, CORRECT AND COMPLETE

TRANSFEROR(S) _____ DATE _____

TRANSFEREE(S) _____ DATE _____

CERTIFICATE

REQUIRED BY NO. 250 1969 ADJOURNED SESSION
(VERMONT LAND USE AND DEVELOPMENT PLANS ACT)

PLEASE CHECK APPROPRIATE SQUARE AND ENTER PERMIT NUMBER IF A SUBDIVISION PERMIT HAS BEEN ISSUED

☐ THIS TRANSFER IS IN COMPLIANCE WITH ACT NO. 250 OF THE 1969 ADJOURNED SESSION

PERMIT NO _____

☐ THIS TRANSFER IS EXEMPT FROM THE SUBDIVISION REVIEW REQUIREMENTS OF ACT NO. 250 OF THE 1969 ADJOURNED SESSION

SPECIFY REASON FOR EXEMPTION _____

UNDER PENALTIES OF PERJURY, I(WE) SWEAR OR AFFIRM THAT THIS CERTIFICATE IS TRUE, CORRECT AND COMPLETE

TRANSFEROR(S) _____ DATE _____

_____ DATE _____

THIS CERTIFICATE MUST BE SIGNED BY TRANSFEROR(S) ONLY(NOT BY A REPRESENTATIVE)

The statutory parties before the district commission on any application may include state agencies, the regional planning commission, the town planning commission, the town selectmen, adjoining property owners (who are parties of right), and private interest groups (who may be parties at the discretion of the district commission). 30/

Persons normally initiate applications themselves. After notice and a copy of the application is served on the local selectmen, planning commission and the regional planning commission, the regional coordinator accepts the application for the district commission. 31/ His acceptance initiates the formal application process, and time limits run from that time. Five copies of the application are filed together with supporting exhibits. 32/ Published notice is also required with filing. Adjoining property owners may respond to this notice and request to be made parties to a hearing on the application. Two copies of the application are forwarded to the Environmental Board and one to the local "environmental advisor" (who is the local state forester wearing a different hat). The Environmental Board sends one copy to the Agency 250 Review Committee, an inter-agency review committee which coordinates state review. The environmental advisor makes an onsite inspection and reports to the state. During this period the district commission may also honor requests to appear by concerned groups or may solicit such groups as parties to protect special interests in the application. 33/ Under the statute, a challenge by any of these parties necessitates a hearing, 34/ but as a matter of policy, district commissions presently conduct a hearing on all applications. 35/ Such a hearing will ordinarily be initiated within 20 days of application. 36/

The district commissions have the power to subpoena witnesses and require the production of evidence. 37/ Hearings themselves, however, are often very informal. While a legally trained commission member is important in guiding a hearing, commissions have found that informal meetings without counsel representing developers lead to rapid and satisfactory results. 38/

The Law states that "[o]ther departments and agencies of state government shall cooperate with the board and make available to it data, facilities and personnel as

may be needed to assist the board in carrying out its duties and functions." 39/

The Protection Division of the Agency of Environmental Conservation processes applications, insuring that all interested agencies lear about the application by sending to each a standard form requesting review of the application. These agencies review the application for compliance with departmental rules and also supply any special expertise they hold with respect to the criteria set out in the Law. The departments receiving requests for review then return the form with their comments and recommendations to the Division, indicating whether they wish to present their own views at any district hearings, or to allow the Agency to represent their views as expressed in their comments on the review form. 40/

After the comments of the other departments are received by the Division, it prepares a summary of the comments and recommendations and also a proposed Agency position on the application. This is then taken before the Agency 250 Review Committee--named after Act 250, the original citation to the Environmental Control Law--an interdepartmental body consisting of representatives from conservation agency departments and from other state departments (e.g., Highways) having a continuing interest in applications for permits under the Environmental Control Law. The function of the committee (which meets biweekly) is to bring to bear on each application the combined expertise of the various arms of the Vermont government, and to communicate any suggestions they may have to the district commission in a single document (the Agency position paper). The goal is to provide the commissions with technical information they would not otherwise receive and to promote uniformity in their decisions. 41/

Once the Agency position is formulated, the Division prepares the position paper, noting any disagreements which exist between various departments, and sends it to the district commission prior to the time the hearing is scheduled on the application. 42/ The Agency notes on the position paper whether experts from the Agency staff or other state departments will testify personally at the hearing. The environmental advisor may also appear at the hearing, and on major or highly technical applications a representative from an appropriate state agency is sent out. 43/

At the present time, the Agency position paper is frequently the most articulate technical presentation at district commission hearings, since other parties are often unacquainted with the process, and towns have been known to simply ignore invitations to appear as parties. Thus, Agency recommendations have been influential in the district commission. These recommendations are generally not for a flat denial or approval, but consist of a list of conditions which the state feels should be imposed upon the development.

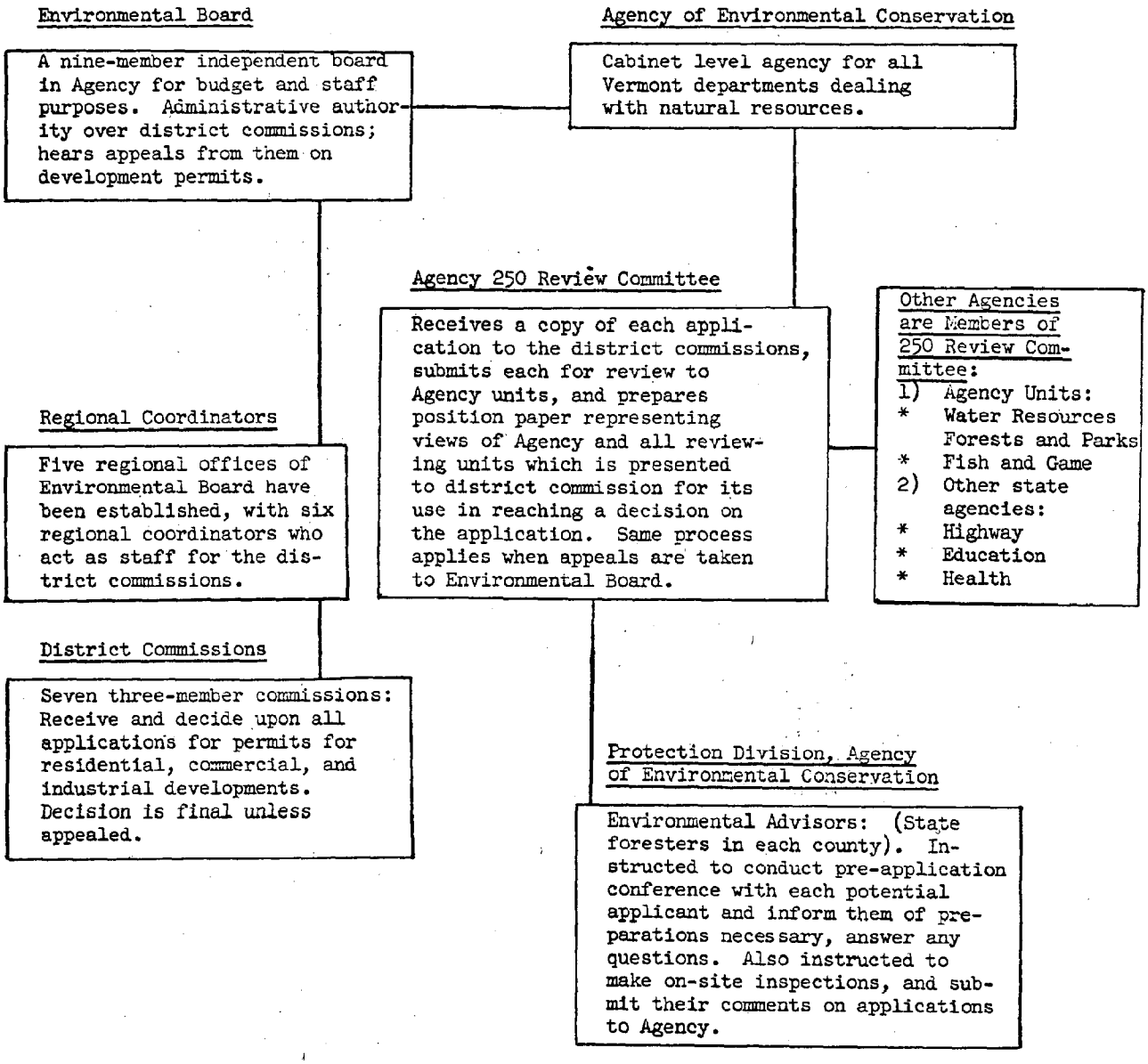
This committee review is also an opportunity for various state departments to exchange views on policy and coordinate other related activities. This communication channel has proved to be one of the useful by-products of the Environmental Control legislation. 44/ A chart showing the operation of the Agency 250 Review Committee is shown on the next page. (The chart on the following page indicates projected time in process in state agencies.)

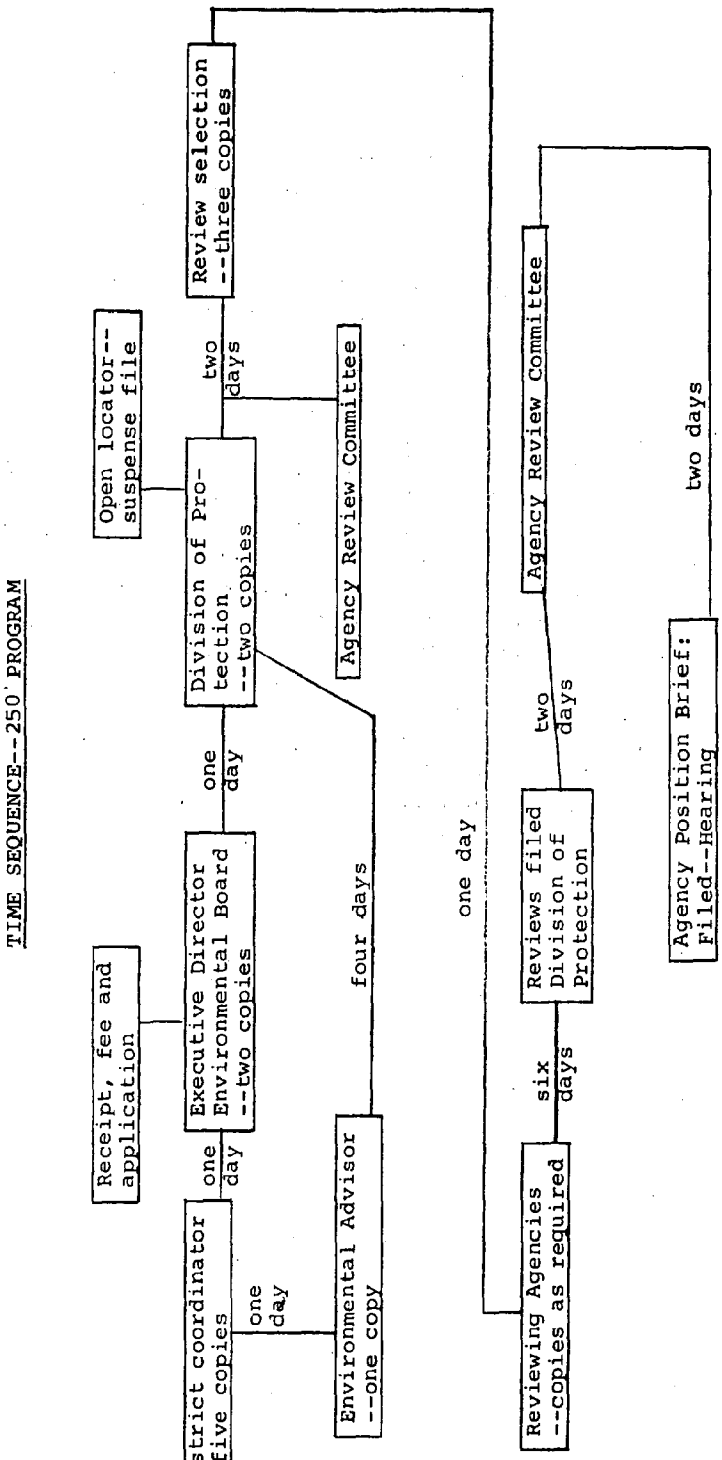
The regional planning commission is another statutory party to the application. While generalization at the regional and local level is difficult, regional plans often are articulated in such general terms that they are weak as a direct input in the district commission decision. 45/

The local planning commission does offer a more significant input in towns where it is functioning. The local planners are an independent party to the application which cannot be approved unless it is in conformance "with a duly adopted local or regional plan. . . ." A recent Attorney General's decision holds that an application must conform to both regional and local plans for a permit to be granted. 46/ Nevertheless, the local planning process is only in the initial stages of articulation in most towns, and often the local plan, even if duly adopted, is still too general to give any specific guidelines for a decision.

Local selectmen are just beginning to appreciate the review process. In initial hearings they often appeared without counsel and with little understanding of the Law. While this communication problem is being overcome, substantial hostility toward land use controls remains among some selectmen. 47/

Detail of State Act 250 Review Process




TIME SEQUENCE--250' PROGRAM
Receipt, fee and application
Open locator--suspense file
District coordinator --five copies
Executive Director Environmental Board --two copies
Division of Protection --two copies
Review selection --three copies
Environmental Advisor --one copy
Agency Review Committee
Reviewing Agencies --copies as required
Reviews filed Division of Protection
Agency Review Committee
Agency Position Brief: Filed--Hearing
one day
one day
one day
four days
one day
six days
two days
two days
two days
TOTAL TIME IN PROCESS--15 DAYS

Special interest groups often provide independent expert testimony in district commission hearings. Groups invited to appear may range from realtor or commercial interests to conservation societies. 48/ Adjoining property owners are parties as a matter of right. However, they do not always respond to published notice and consequently they generally are not an important input except in major cases.

The information gained from the testimony at the hearing (where frequently state and municipal officials or experts, as well as local citizens, will testify) is added to the various other sources of information at the disposal of the district commission in reaching its decision. The applicant's exhibits usually include a detailed plan of the entire proposed development, and other parties will have presented existing local or regional land use plans, state highway maps, and the Agency 250 position paper. Often the environmental advisor will be asked to testify concerning his inspection of the site and other information which he has. Neither the commission itself nor the area coordinator regularly conducts fact-finding investigations or onsite inspections. Both are viewed as acting in the capacity of a neutral "jury," listening to the parties presenting evidence to meet their respective burdens of proof. 49/ Generally, state officials feel that district commissions have expressed a high degree of technical competence in their decisions, and have not been relying solely on their own prejudices or the local popularity of the project.

The standards for the district commission's decisions are specified in section 12 of the Law. Applications may be denied by local district commissions if they find that the proposed subdivision or development would be "detrimental to the public health, safety or general welfare," but the district commission must give specific reasons for the denial of the permit. Before a district commission may grant a permit, it must find that the development:

> "(1) Will not result in undue water or air pollution. In making this determination it shall at least consider: the elevation of land above sea level; and in relation to the flood plains, the nature of soil and subsoil and their ability to adequately support waste disposal; the slope of the land and its

effect on effluents; the availability of streams for disposal of effluents; and the applicable health and water resources department regulations.

"(2) Does have sufficient water available for the reasonably foreseeable needs of the subdivision or development.

"(3) Will not cause an unreasonable burden on an existing water supply, if one is to be utilized.

"(4) Will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

"(5) Will not cause unreasonable highway congestion or unsafe conditions with respect to use of the highways existing or proposed.

"(6) Will not cause an unreasonable burden on the ability of a municipality to provide educational services.

"(7) Will not place an unreasonable burden on the ability of the local government to provide municipality or governmental services.

"(8) Will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.

"(9) Is in conformance with a duly adopted development plan, land use plan or land capability plan [the statewide plans required by the Law].

"(10) Is in conformance with any duly adopted local or regional plan under Chapter 91 of Title 24." 50/

The burden of proof is on the applicant for criteria numbered 1-4, 9, and 10, and on any opposing parties for criteria 5 through 8. 51/

These criteria are by no means the only ones which may be considered by the district commissions, although up to this point in time they seem to have been the primary factors considered. The Act also provides that:

> "A permit may contain such requirements and conditions as are allowable within the proper exercise of the police power and which are appropriate with respect to (1) through (10) of subsection (a), including but not limited to those set forth in Section 4407(4), (8) and (9), 4411 (8), (2), 4415, 4416 and 4417 of Title 24, the dedications of lands for public use, and filing of bonds to insure compliance. The requirements and conditions incorporated from Title 24 may be applied whether or not a local plan has been adopted. General requirements and conditions may be established by rule." 52/

These cited sections are those which enable municipalities to adopt regulations dealing with subdivision design and layout, public improvements, municipal services, parking requirements, performance bonds, and flood plain zoning. 53/

The Environmental Board has authorized district commissions to refer to the model subdivision regulations of the Vermont Planning and Community Services Agency as a guide for decisions on permits. 54/ The Board has also developed guidelines for power line emplacement. 55/ Current plans are to deal with such specific problem areas before moving to elaborate on the general statutory criteria. 56/

The district commissions themselves appear to have been exercising their regulatory authority quite broadly in imposing conditions on permits, both as to subdivision control and other matters. Many conditions have dealt with scenic, historic or aesthetic requirements, such as protection of scenic areas, landscaping, prohibition from filling of wetlands or beaver ponds, etc. Traditional zoning and subdivision requirements have also been imposed, such as minimum space for parking, building

setbacks from lot lines, and connection to county or municipal roads, sewers and water mains. Ecological conditions have been imposed concerning the use of pesticides, soil erosion, and air and water pollution. Specifications for plumbing, heating, and electrical systems have been imposed. Some conditions have dealt with the protection of adjacent property owners, such as requiring that their water supply not be depleted, or that construction not be undertaken in a disputed property area. 57/ Thus while conscientiously adhering to statutory principles, district commissions appear to appreciate the flexibility the statute offers.

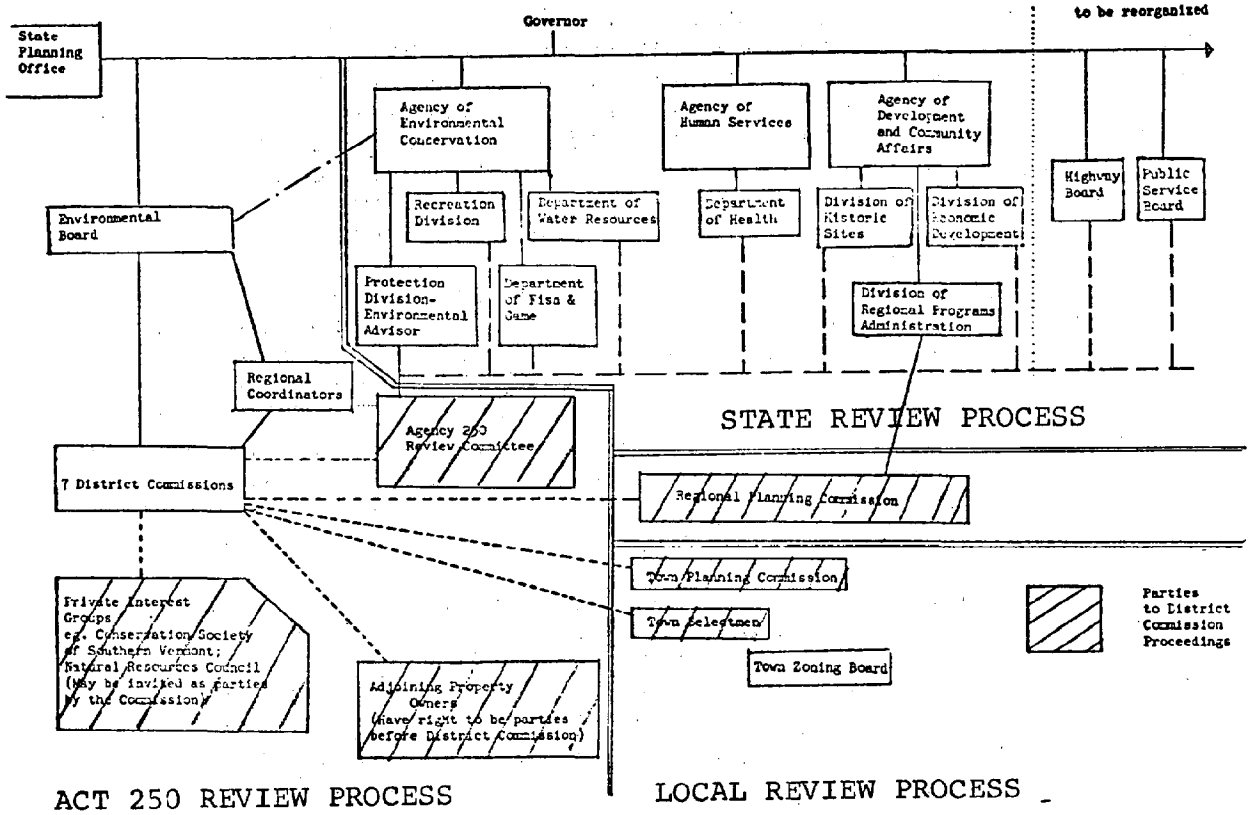
The statute limits the parties who may appeal to the Environmental Board from a district commission decision. "For the purposes of appeal only the applicant, a state agency, the regional and municipal planning commissions and the municipalities required to receive notice shall be considered parties." 58/ However, to prevent appeals being taken to the courts on the informal record of the district commission, the Board will generally recognize any party on appeal who was properly before the district commission.

Once an appeal is taken, the Board is directed to issue notice to interested parties and to schedule a de novo hearing on all issues requested by any party. 59/ The Board makes an entirely new decision based upon the same criteria which govern the district commission, and makes its own determination whether to grant or deny the permit. The applicant may raise new issues or additional proofs before the Board.

If any party to the appeal is still dissatisfied, the statute provides for a further appeal to the Supreme Court of Vermont. In the judicial appeal, no objection may be considered which was not raised before the state Board. Findings of fact by the state Board are conclusive if supported by substantial evidence from the written record which is kept by the Board.

The overall structure of the review process as shown in the chart on the following page is not a substitute for any other permits also required by the municipality and the state. 60/ Some regional coordinators try to guide applicants to the other permits required, but this is not officially a part of their duties. The plethora of other local and state applications is recognized in the statute,

STRUCTURE OF THE VERMONT ENVIRONMENTAL PROTECTION SYSTEM
(not all inclusive)



STRUCTURE OF THE VERMONT ENVIRONMENTAL PROTECTION SYSTEM (not all inclusive)

I. The State Review Process

This is the traditional structure of permits and licenses required in most states. With increases in developmental pressure, they have responded with increasingly detailed regulation in their respective areas.

The state is being reorganized in cabinet level super agencies which group departments functionally. While natural resources are generally represented in the Agency of Environmental Conservation, note that other Agencies have departments with a significant relationship to environmental concerns.

II. Act 250 Review Process

While this is a creature of the state government, it is the Agency 250 Committee that provides a state review liaison. The district commission is a quasi-local body that has the capacity to deal with all interested local parties.

III. Local Review Process

In most communities this is weak or nonexistent. Where it exists it can be as powerful as the district commission. Thus, while the district commission may open the eyes of quiescent local planners, a sophisticated local review process will probably operate independently. It is not unusual for local people to disapprove projects approved by local district commissions.

IV. The Regional Planning Commission

This commission sits between local, 250, and state plans and regulations. The 250 legislation essentially bypassed it. Although confusingly similar in name, the district commission and the regional commission are administratively in different jurisdictions, geographically not co-extensive, and exercise very different functions. However, the regional plan is of the statutory criteria which must be met for an Act 250 permit.

which authorizes the Environmental Board by rule to substitute approval by other agencies as prima facie evidence of compliance with the various provisions of the Environmental Control Law. 61/ However, the Board is moving very cautiously in this area and there is some feeling that administrative consolidation of the application process, without changing the number of permits generated would be the best initial step to ease the burden on developers. This would at least avoid abandoning substantive tests before the system has had a longer time to prove itself. 62/

The Three State Plans

The Environmental Control Law provides for three state plans which are to be adopted by the Board: (1) an interim capability plan which is a catalogue of current land uses and capabilities; (2) a capability and development plan; and (3) a land use plan. 63/ Once any of these plans is completed the Law requires that each applicant must bear the burden of showing that his proposed development is "in conformance" with the plan. 64/

With these plans, the state planning office hopes to provide:

(1) a criteria for issuing development and subdivision permits as set forth in Act No. 250, Sec. 12(a)(9);

(2) a guide for state agency operations;

(3) a guide to regional agencies and local governments in carrying out their planning and implementing efforts; and

(4) a means of informing private enterprise of public goals and policies thereby facilitating their activities. 65/

The interim land capability plan has been completed and is awaiting adoption by the Board. The other two plans are scheduled for completion in 1973.

452-329 O - 72 - 6

The interim land capability plan consists in part of maps which display "the present use of the land and defining in broad categories the capability of the land for development and use based on ecological considerations." 66/ The state planning office has interpreted this to include:

- geology, surficial and underlying topography
- hydrology, surface and flood plains
- historic sites
- scenic vistas
- settlement patterns and urbanization
- land transfers
- soil characteristics
- agricultural
- forest types and coverage
- alpine and mountain habitat
- unique natural areas
- significant land holdings
- population distribution
- other graphic information about the land and its capability. 67/

There are five such maps included in the plan booklet, with blown-up, detailed versions for each county. The maps illustrate generalized land uses, limitations for development, surface waters, capability for agriculture and forestry, and unique or fragile environments.

In addition, the interim land capability plan contains a good deal of written matter outlining the factors which led to the various map classifications. The plan is generally divided into four sections:

1. Generalized land use.
2. Physical limitations for development.
3. Capability for agriculture, forestry and mineral extraction.
4. Unique or fragile areas.

The plan is basically a summary of relevant factors which ought to influence the location and regulation of development, together with a recitation of values which the state should seek to retain and preserve. For example, a section on "Physical Limitations for Development" discusses the capability of soils to support building foundations and to absorb liquid wastes from septic tank disposal systems. Another section discusses "Vulnerable Environments" and "Unique or Fragile Areas" such as wetlands, waterways, high elevations, unique geologic areas and historic sites. 68/

There is little in the way of actual recommendation in the plan, however. The following general governing principles are set out at the opening chapter: 69/

1. Development would be logically related to established settlements.

2. Development would not occur in those places where environmental damage or damage to sites of historical or educational significance would most likely exceed gains from development.

3. Protection of the environment and increases in efficiency can be achieved by conforming with known environmental limitations.

4. Ideally, development would not displace important non-urban uses relying upon basic characteristics of the land.

Other recommendations are often buried deeply within a paragraph summarizing the above-mentioned factors to be considered in regulating development. There are some exceptions. For example, italicized in the middle of a section dealing with liquid waste disposal is the following: 70/

> "In areas where waste matter or contaminated surface wastes may enter ground waste supplies, the use of septic tanks for waste disposal, or any development activity which may lead to the introduction of easily soluble pollutants into the environment regardless of method of waste treatment, cannot be recommended."

A separate report entitled "Vermont: Social and Economic Issues" was issued by the state planning office at the same time as the interim land capability plan. 71/ This report contains projects of future population and economic growth but is not considered by the state planning office to be part of the interim land capability plan. 72/

What the effect of the interim land capability plan will be is the subject of some dispute. Whereas the Law talks in terms of such an interim capability plan being "in effect" until the adoption of the land use plan (or July 1, 1972, whichever occurs first), and while §12(a)(9) of the

Law cites as one of the conditions for the granting of an application that it "is in conformance with a duly adopted development plan, land use plan, or land capability plan," [emphasis added] at least one state official contends that the plan is wholly without legal effect on the application and regulation processes of the Law. According to Schuyler Jackson, who heads the Agency 250 Review Committee, the interim section 18 plan is "only advisory." It is his opinion that a permit application would never be refused on the ground that it did not conform to a provision of the interim land capability plan. In fact, Jackson is not sure the plan, or the later plans for that matter, will have any "practical effect," since his agency tends to use other maps, allegedly more detailed than anything the planning office uses, to decide on the environmental effects of a particular application anyway. 73/

Robert Babcock, Jr., executive director of the Environmental Board, has a similar view of the legal effect of the interim plan. However, in his opinion the plan will have a good deal of practical effect because of what he speculates will be the innocuous nature of the later land use plan that will eventually be adopted. Since the legislature will have to approve it, Babcock anticipates that the plan will contain a map that will designate all except the high mountain areas as "developable with limitations" to avoid antagonizing legislators from those districts in which development ought not to take place according to the factors shown on the interim land capability plan. If so, then the only statutory instrument which will offer any guidance to the local commissions in making planning decisions will be the interim land capability plan. 74/

The capability and development plan is to be a statement of basic goals, objectives and policies consistent with the interim land capability plan which propose "a coordinated, efficient and economic development of the state, which will, in accordance with future needs and resources, best promote the health, safety, order, convenience, prosperity and welfare of the inhabitants, as well as efficiency and economy in the process of development . . . ." 75/ The statutory standards include population distribution and various land uses which could "reduce wastes of financial and human resources . . . and tend toward an efficient and economic utilization of drainage, sanitary and other facilities . . . and the conservation and production of the supply of food, water and minerals." 76/ The statute provides

that this plan must be "consistent" with the section 18 plan. Its objectives will be met with written statements, supported by maps, charts and graphs which relate to settlement patterns and land use. This plan and the section 20 plan will address three major policy areas:

I. Public authority and policy.

Consideration should be given to national and state legal structures, programs, and policies regarding:

A. Tax systems;

B. Public expenditures;

C. Forms of police power execution.

II. Appropriate use of land.

A. Identifying areas that are, as a result of various demands made upon the land:

1. renewable if properly managed;

2. non-renewable if used at all.

B. Identifying areas of optimum use by type for forestry, agriculture, recreation, urban settlement, preservation, and public service corridors.

C. Comparing optimum use to dominant economic demands by category and to competing economic and other demands by category.

III. Population growth and optimum settlement pattern.

Trends concerning population growth and distribution should be projected according to the following optional patterns:

A. Permit existing urbanized (including recreation) areas to expand into currently non-urbanized areas.

B. Draw boundaries around currently urbanized (including recreation) areas, and/or:

1. intensify existing urban area densities;

2. locate new sites outside existing urbanized areas for future dense settlement.

C. Limit absolute population growth in the state through economic and other policies. 77/

While some people have suggested a point system for rating development, this does not presently appear to be an objective of the planners. 78/

The statutory process for the adoption of the capability and development plan includes hearings in each district, adoption by the Environmental Board, approval by the governor, and approval by both houses of the state legislature. 79/

The land use plan will consist of "a map and statements of present and prospective land uses based on the capability and development plan, which determine in broad categories the proper use of the lands of the state whether for forestry, recreation, agriculture, or urban purposes . . . ." 80/ The current intention is to divide the state into several categories of land-use districts, each of which will correspond to appropriate constraints for subdivision or development permits under the Law. 81/

While usable land in the state will generally fall under criteria favoring development, certain identified areas of special interest (i.e., natural, scenic, or historic value) will fall into land-use zones where development is discouraged. These areas will include lands for which the development rights have been acquired by the state, such as state and national forests, but are not limited to them.

This plan is to be adopted in the same manner as the capability and development plan. Under the present schedules, both plans will be developed as a package and will come before the legislature concurrently in 1973. 82/ The time required for the preparation of these plans presents some problem, since the interim land capability plan lapses July 1, 1972. 83/ This leaves the district commissions without any "duly adopted" state guidelines during the latter part of the preparations for the final plans. 84/

Other Aspects of the Planning Process

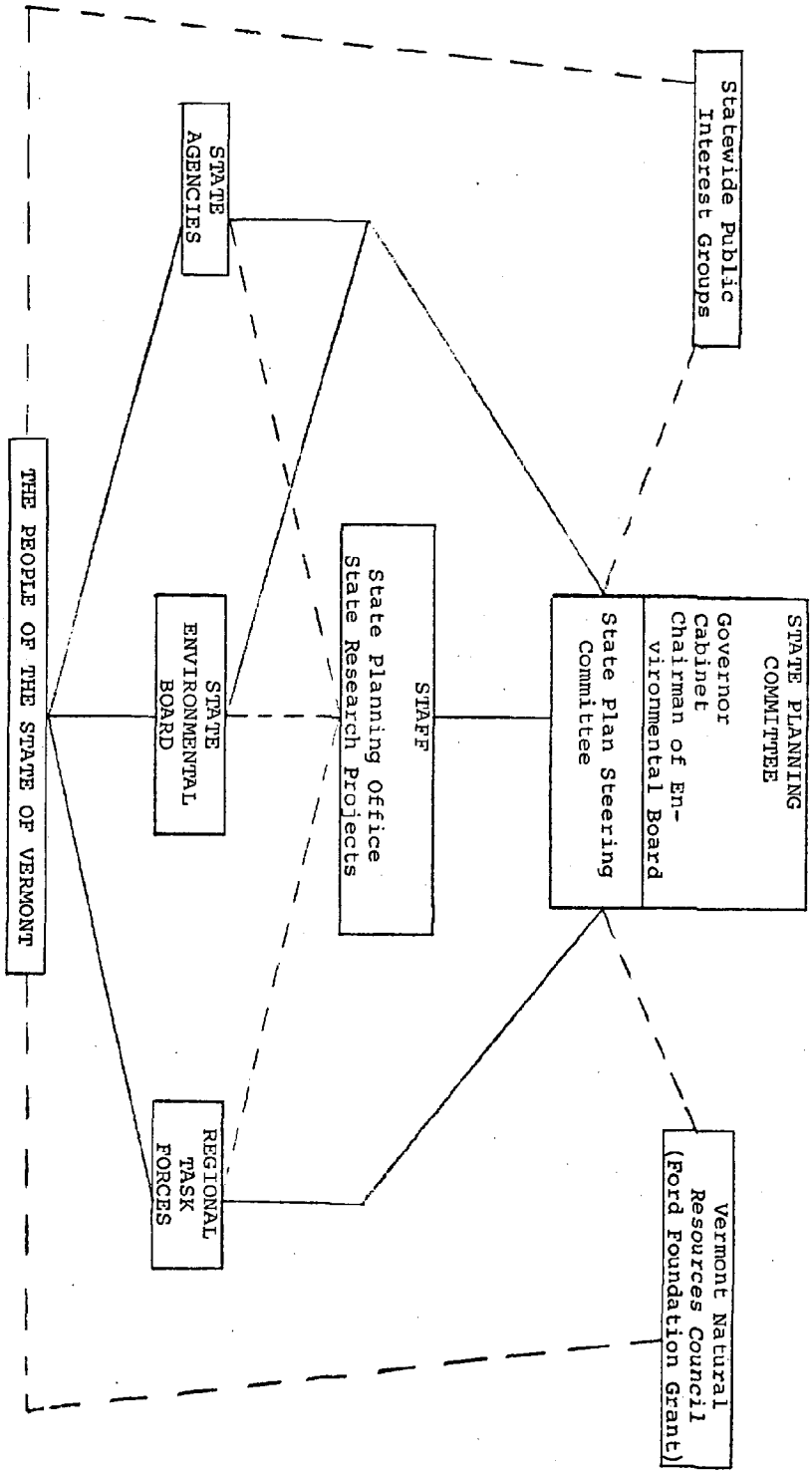
Planning at the state level is an executive function and the governor has assumed responsibility for the preparation of the Environmental Control Law plans in his office. 85/ There is a state planning office attached directly to the governor and responsible for state planning at the broad policy level. (Each cabinet level Agency, except the Agency of Administration, also has a planning office responsible for more specific and detailed planning, such as state recreational plans.) To provide overall supervision for the planning staffs, the governor has created a State Planning Committee composed of the governor, his cabinet, and the chairman of the Environmental Board. Thus, in the functional apparatus the Environmental Board is a relatively minor part of the planning process although it must "adopt" the state plans.

Regional task forces, made up primarily of the members of regional planning commissions have been created by the governor to coordinate all activity at the local and regional level and to report to the State Plan Steering Committee which is the functional arm of the State Planning Committee. 86/ The regional planning commissions, while they may share staff with the district environmental commissions, 87/ are administered by the Agency of Development and Community Affairs. Since the Environmental Control Law requires conformance to duly adopted regional plans prepared by these groups independently, they are important both as a part of the state planning process and for their own work product.

It is very difficult to generalize about the planning inputs below the state level. In the past there has been little communication between state and local planners due to a lack of resources. The new planning process is just beginning to overcome the earlier gaps in communication, but regional and local planners remain virtually autonomous bodies funded from sources of varying reliability and generosity. Local planning commissions vary from well-established (Shelburne has been planning for approximately seven years in a formal program), to hasty responses to the Environmental Control Law. Goals and policy also vary from one commission to another (e.g., housing unit densities may vary significantly between local and regional planners). 88/

The ambiguities in the lines of authority and the different interests represented at all levels are examples of the problems which were faced in creating a state plan.

ORGANIZATION AND STAFFING CHART



(from state planning report, July 1971)

The local and regional inputs could not be ignored since the formal adoption process includes approval by the legislature for the two later plans. The structure is much clearer now, but the organization is not yet wholly operational.

Funding can be a particular problem, shifting the locus of power from local to regional planning commission in some areas. Vermont regional planning commissions have often used federal or foundation money to support their effort. Local planners in an area with a strong developer will often also be aided by the developer's surveys. Thus, depending on the area of the state being examined, the district commission judgment function will be performed under significantly different local conditions. Likewise the regional planning task forces will operate under varying political conditions.

After final adoption, the Law appears to make state plans binding criteria for the district commission decisions. While there must be some discretionary element in commission decisions, at least to rationalize inconsistent planning criteria, the Law seems to contemplate well-defined land use districts and criteria of land capability. The Law thus provides a procedure for changing these boundaries or criteria.

The plans may be adjusted by petitioning the Environmental Board which forwards the petition to the district and regional commissions for comment. A hearing must be advertised "[a]fter 60 days but before 120 days . . . to be held in the appropriate county." 89/ Before the land use plan may be adjusted it must be shown that:

> (1) The petitioner has submitted proof that the land is usable and adaptable for the use for which it is proposed to be classified, and
>
> (2) Conditions and trends of development have so changed since the adoption of the present classification, that the proposed classification is reasonable. 90/

For a change in either capability plan there must be a demonstration that "the land is capable of sustaining the use proposed." 91/ Court appeals from these decisions are similar to appeals from permit applications.

Adequacy of the Law's Coverage

Exemptions from the Environmental Control Law pose several problems. These include: (1) The "grandfather" clause protecting pre-existing development plans which leaves the potential for unregulated development unchecked in some areas of Vermont. Officials estimate that the total number of state housing units could be increased by a factor as large as 1/3 under this clause. (2) Acreage requirements which bear little relation to the potential for harm and allow both strip development or small parcels and large-lot subdivisions to go unchecked. (3) Other exemptions which also bear little relation to their potential harm. Farming and forestry require no permit while even primitive recreational development does. (4) The "five-mile radius" test for a subdivision which ignores the fact that Vermont does not maintain plot or property ownership maps.

The exemption for "existing subdivisions" is taken from the Vermont Health Regulations and includes a subdivision: (1) approved by a municipality pursuant to a subdivision ordinance; or (2) for which a plot plan has been filed in the town clerk's office and one or more lots have been sold or made subject to a contract for sale; or (3) accepted by the Department of Health as a subdivision based on a number of reliance criteria. 92/ This clause has been construed generously to avoid application of new planning criteria developed in the wake of the Environmental Control Law to developments underway when the Law went into effect. However, district commissions may also avoid its provisions in practice. The Addison District Commission required the justification of an exempt subdivision when the subdivider applied for a development permit for an access road. 93/ In another case, the Wilmington District Commission denied permission to create a recreational lake in a subdivision which was itself exempt. 94/

The Law's acreage requirements bear little relationship to the potential for environmental harm a project offers. The 10 acre maximum lot size is shared with the Department of Health subdivision regulations, and neither scheme checks the developer dealing in larger lots. If such a developer sells lots with easements for driveways, a substantial subdivision can be created without any restraint. If at some point a "driveway" exceeds 10 acres, perhaps a development permit would be required, but the district commission would be faced with a substantial reliance interest, as well as a serious question of how much incremental "development" should

be handled. Numerous signs along Vermont roadsides offering "lots - 10+ acres" attest to the popularity of this idea.

The 10-acre test for the application of the Law to development also bears little relation to environmental danger. Much of the service station and motel strip development surrounding small towns is exempt from district commission review under these standards. This inability to reach some visibly poor development is one factor that aggravates both administrators and large developers unable to escape the provisions of the Law.

Farming and forestry both pose their own environmental dangers, while also allowing development of roads and other essentials of large lot subdivisions beyond the statutory reach of the district commission. 95/ While the commission may eventually require applications for some aspects, it is more difficult for them to deal with established reliance interests.

A more general problem has been presented by the five-mile-radius test which applies both for determining the amount of acreage in a "development" and the number of lots within a "subdivision." This test is difficult to apply in Vermont, where no tax assessor's maps exist and it is impossible to locate property lines on any map. Thus it is quite difficult to tell whether any particular lot can be included within a five-mile radius from another lot. A fair amount of administrative time has been spent advising developers whether the five-mile radius requirement necessitates their applying for a permit. 96/

Relationship Between Planning and Regulation

As a matter of draftsmanship, the Environmental Control Law poses some problems in the planning area. There are some technical problems and inadequacies in the judgment process, but these agencies were able to initiate procedures fairly smoothly shortly after passage of the Law. However, if the creation of new agencies to handle broad planning responsibilities has been one of the successes of the Law, the failure to specify which plans were to enjoy priority is one failure. The state land use plan, which is to provide the cohesive force holding the district commissions and local planners on a common policy course, faces a political jungle before adoption. 97/

The distance between the planning process and the Board was not foreseen in the Law itself. While the Board still intends to develop policy positions, it now appears that these will not be a part of the state plans. The district commissions have no part in preparing the plans, although they will have an opportunity to comment on them at regional hearings. 98/

Planners at all levels of this process understand the plans as flexible instruments. For them the plans are tools for finding a development policy while isolating various critical factors. These plans must necessarily adapt to changing needs and technology while maintaining continuity and regulating development. These people are eager to see the state plans developed and implemented as planning instruments. 99/

However, there is a tendency on the part of many involved with the permit review process to see both the state and the regional plans as "zoning." The plans carry an augmented status as one of the judgment criteria before the district commission. Both commission members and developers anticipate applying the land use map in much the same manner a zoning map would be used. Preoccupation with these real zoning characteristics and their political implications before the legislature account for an elaborate preparation and presentation procedure for the plans which is not provided in the statute. The difference between planning in its traditional sense and planning having the augmented status provided by the Environmental Control Law accounts for considerable friction in the permit review process and for the deliberate pace at which the organization of statewide planning is proceeding. 100/

One indication of the direction compromise may take comes from those involved in the judgment process who see the application of the plans as somewhat discretionary and suggest that a rule of substantial conformance may result. 101/ The promulgation of increasingly detailed rules by the environmental and other state boards may also take some pressure off this aspect of the planning process.

Nevertheless, it is the prospect of state "zoning," at least with respect to certain critical use categories, that most excites advocates of the Environmental Control Law. If channels of communication between state and local officials are opened sufficiently to support state plans detailing areas of statewide interest to be protected, the

plans may survive as both the guide the district commissions are looking toward and the development tool the planners envision.

There is the further problem of increased developers' costs caused by the Environmental Control Law. Estimates of direct costs of the Law vary and administrators of the Law tend to discount any figures given by developers. 102/ However, some notion of the possibilities can be derived from some developers' examples.

The Quechee Lakes Corporation, developing a 400-unit recreational second-home area estimates expenditures of $20,000-$30,000 a year for permit review applications and related costs. 103/ These costs are in addition to any preparation for health subdivision applications and ordinary "front-end" planning. They arise from various sources.

The ordinary application process accounts for the bulk of the direct cost. Quechee Lakes has recently processed three applications. The first two applications, one for a dam creating a lake, and the other for a parking lot in a flood plain were both accepted without substantial objection. The third, manipulating a flood plain to create a village green, met more substantial opposition. 104/ Until a June ruling by the Board, all applications had to be accompanied by site plans on five-foot contours, and extensive documentation. This is now relaxed slightly and in areas where there will be no man-made change in the land, 20-foot contours are permitted. 105/ Various special tests, depending on the nature of the application, are also required.

The fact that separate applications were required for all three is another source of administrative cost for a developer. The Town of Hartford in which Quechee Lakes is located, adopted planned subdivision zoning regulations allowing blanket approval of the Quechee Lakes project after a total plan and construction criteria were presented at open hearings. The district commission, however, requires separate applications for each distinct phase of the development. While the Quechee Lakes Corporation intends to attempt to blanket application, current Board policy would not seem to permit its acceptance. 106/

Administrators of the Law are considering various methods of simplifying application procedures. One suggestion is the creation of an administrative post corresponding to the role of Environmental Advisor. This administrator

would aid a developer in moving through all aspects of the administrative process and help prevent duplication of effort and unnecessary delay. Others suggest consolidating the application using a standard form for all state agencies and another for local agencies. Administrators hesitate at a blanket approval of a development project before plans and criteria for judgment are clearer. 107/

A developer may have contact with a variety of unrelated jurisdictions policing the Law, including the state Attorney General, local state's attorneys, other state agencies, local commissions, etc. Dealing with them individually, especially when the Law can apply to any man-made change on the land, offers a large potential for conflicting interpretations. Quechee Lakes has repeatedly had to defend its actions from challenges by the local state's attorney. These legal costs add to the direct costs of the application.

Overlapping jurisdictions among parties before the district commission also increase costs to the developer. Quechee Lakes is currently waiting out a one-year delay due in part to conflicting density policies between the local and regional planners. 108/ Since the project must conform to both plans according to a current Attorney General's ruling and there is no appeal to the Regional Planning Commission, any adverse ruling must be settled by informal negotiation or appeal to the Environmental Board. Unpredictable delays of this nature pose the largest indirect cost to a developer. The regional coordinator may also refuse to accept an application unless the developer applies to another state agency first, which can be yet another source of unpredictable delay. 109/

Sherburne Corporation, developers of a ski area near Killington, Vermont, estimated that four to five men were employed through the construction season preparing tests and plans for permit review applications. Much of this development is above 2500 feet where all new projects must be approved by the district commission.

Generally, a large developer should find compliance with the regulatory process proportionately less expensive than the small developer whose small project would receive more scrutiny and less advance planning. However, this does not yet seem to be the case. To date there has been a conscientious effort to scrutinize the large development as carefully as the small one. 110/

Enforcement: Selective Examples of Administrative Action

The district commission offers wide flexibility, and procedures in different districts tend to reflect varying local conditions. Generally, local and regional planners are better organized in the southern and western portions of the state and they participate in more sophisticated adversary hearings at the district commission level. In the northern and eastern parts of the state, district commissions operate with less support from local parties and hearings are often more informal, pressing for voluntary covenants to meet the requirements of the law. 111/

The more conventional activity of district commissions consists of enforcement of local and regional planning standards, offering a broad look at the environmental impact, and a check on technical compliance with state regulations through the Agency 250 Review Committee. Thus the Chittenden District Commission has denied one developer a permit because his 76-unit apartment complex would result in undue traffic congestion, have an adverse effect on municipal services, and result in possible continued erosion of an unstable lakeside bank. 112/ This project had been approved by the Burlington Planning Commission although the board of aldermen opposed it. 113/

But the district commission is only one element controlling development. A proposal for a 198-unit apartment complex in Shelburne was approved by the district commission, but successfully opposed by the local planning commission and selectmen. In nearby Middlebury a proposal for a shopping center on a 9.9 acre tract was subjected to extensive review before the local planning commission, while exempt from district commission review. The planning commission approval with conditions was only an advisory opinion to local selectmen, however, while any district commission decision would have been binding. 114/

In other areas with an active planning process at the local or regional level some applications have resulted in extensive findings of fact and conditions on the development. The application of the Stratton Mountain Corporation for an expansion of ski trails and lifts in the Stratton-Winhall area resulted in an extensive documentary file and detailed findings of fact regarding the burden that this development would place upon the local communities. 115/ The permit was approved and conditions to prevent overtaxing parking and sewage facilities in the recreational development

were enforced by requiring affidavits of compliance at six month intervals until evidence of full compliance were presented. While this is the most extensive review of an application to date for the Windham commission, it may be characteristic of the capacity of commissions to deal with broad developmental impact on multiple communities. Representatives of both Stratton and Winhall and their respective planning commissions appeared at the hearing as well as a regional planner representing most local interests.

District commissions have also moved beyond these more conventional conditional permits to begin to apply some longer range policy guidelines in their decisions. The Windham district commission is considering the impact of the location of a suburban discount center on regional planning goals for urban development in Brattleboro. 116/ While the land use section of the Windham regional plan under which the challenge is being brought is only a compilation of policy statements that have yet to be greatly elaborated, the hearing of such evidence indicates consideration of broader planning goals in the region. There have been pressures on other district commissions to take similar account of longer range planning goals and regulate indiscriminate suburban sprawl. 117/

District commissions are also protecting certain well-defined areas of statewide interest. The State Recreational Plan, a quasi-official plan released in 1967 and currently under revision, specified 1/2 mile scenic corridors adjoining interstate and certain other Vermont highways. 118/ Using this as a partial basis for decision, the Chittenden District Commission has denied Mobil Oil Co. permission to build a service station near one exit. 119/ Other commissions have placed special landscaping and screening requirements on construction or expansion in this zone. 120/ The public utility exemption poses one problem for this policy. At Berlin, near Montpelier, the Green Mountain Power Corp., proposes a dual turbine oil generating facility within 1,800 feet of Interstate 89. The proposed installation will include oil storage tanks 40 feet high, and since public utilities are regulated by the Public Service Board, there is some question as to whether the scenic corridor policy will be enforced. 121/

The Fuller case, in which the owner of a mobile home park was denied the right to expand in the zone surrounding an interstate highway, is before the state Supreme Court. Although the statute limits the issues before the Supreme Court to those considered at the Environmental Board hearing, 122/ arguments concerning an unconstitutional taking of property

will undoubtedly be made in this case as well. However, since the case will not involve state planning, the limits on that process will remain unexplored.

The Environmental Board was to hear economic arguments on appeal of a case in which a developer was denied permission to drain and dredge a beaver pond--Ryder Pond--to create a recreational lake so he could sell lakefront lots. 123/ However, the developer was persuaded to withdraw his appeal after it became apparent that the cost of dredging the pond-$250,000 as opposed to the $30,000 he had anticipated--would exceed the added increment he hoped to receive from lakefront lots. 124/ Moreover, he was persuaded that selling a piece of "original Vermont" would in itself have certain value, entirely aside from the fine, preservationist approach that he, as an "old Vermonter" would of course want to espouse. 125/

On a different tack, the Board brought enforcement proceedings for violation of the law's provisions. On July 1, 1971, the developer of a proposed sport-recreation complex on Steadman Mountain in Chuster County applied for the requisite development permit. A hearing on the application was held on August 5, and adjourned to enable the developer to produce additional information. Meanwhile, the chairman of the local regional plan commission took aerial photographs of what the developer claimed was routine logging operations on the proposed development site. Coincidentally, the clearing corresponds precisely with golf course fairways and greens, and ski trails, as depicted by the development plan submitted with the developer's application. A cease and desist order was served on the developer by the Environmental Board, and at an Assurance of Discovery Hearing in late September, the developer agreed to stop all further cutting until his permit application is decided. 126/

The basic policy is not to deny an application before the Board if a grant may be sufficiently conditioned to protect the interests defined in the Law. These conditions may take the form of voluntary covenants and may range to formal requirements which must be guaranteed by a performance bond from the developer. Municipalities and state agencies do not enjoy any special privileges beyond exemption from the fee charged other developers. Permits denied are denied for essential incompatibility with Board rules and statutory criteria and are the exception rather than the rule at present. 127/

452-329 O - 72 - 7

Policy Implementation Under the Environmental Control Law

The Environmental Control Law was passed in reaction to specific development crises in the southern regions of the state. While it has continued to function on a case-by-case basis, it is also intended to implement longer range planning goals.

The nature of the adversary proceedings in the district commission depends greatly on the sophistication of local parties to a hearing. One result of the Law may have been the encouragement of zoning, since the Law does not apply to development under 10 acres in zoned towns. Similarly, a strong impetus for town planning is the provision making the town plan one binding criterion for permit issuance. Furthermore, since local planning officials are mandatory parties, articulate town plans and planners may gain an influential position in the decision process irrespective of acreage requirements.

The continuing emphasis on local activity is consistent with the thrust of state policy since the early 1960's, as well as Vermont's tradition of strong local government. However, there are only 30 towns with a population of over 2,500 people in Vermont, and those who oppose the Environmental Control Law suggest that these are both the towns who can best afford the Law and least need it. This rationale assumes that the Law has substantially reduced economic development and that rural towns suffer most. Statistics on the number of permits sought and issued (see Appendix A) neither substantiate nor deny this assertion because it is impossible to determine the number of developers discouraged by the Law. To protect the economic interests of these rural areas, the Agency for Development and Community Affairs is actively pursuing development compatible with Vermont and is doing so in conjunction with local and regional planning efforts. 128/

As a result of its role as advocate for planned development in Vermont the Development Agency may find its policies in conflict with those of environmentalists at both the state and local level. 129/ Its proposals for site selection may cause it to work against other local or state agencies for the sympathies of the district commission the proposal must pass before.

Overall, appreciation of the difficulties in implementation of this legislation by the governor and administrators has worked to avoid whatever friction may have developed

as a result of policy differences. The Agency 250 Review Committee offers one forum where all interested state agencies may communicate with ease. The Environmental Board is moving beyond this and has now initiated joint sessions with the Water Resources Board to review the rules applied to pollution discharge permits. These efforts are apparently intended to result in standards mutually acceptable by both boards, and the discharge permit could then be adopted by the Environmental Board as evidence of compliance with water quality standards under the Environmental Control Law. 130/ If these joint meetings are successful, the Board will probably continue these efforts to simplify the judgment process and coordinate policy whenever possible at the state level.

The Environmental Control Law has been part of a massive holding action by the State of Vermont, opposing unplanned random development until the state's policies and priorities could be revised to deal with the pressures. The effort began with expanded local powers, and when pressure continued to build without substantial local response, the Environmental Control Law and various administrative rulings such as the Health Department Subdivision Regulations resulted. Since then, local district commissions have been evaluating development according to quality standards suggested by various state agencies on a case-by-case basis. They have also applied some broader policies developed at the local and regional levels, and in some instances, notably the interstate greenbelt, have enforced statewide policies. However, this whole apparatus awaits the longer range state plans to give it real direction.

The Law has spurred considerable private interest in the state environmental control procedures. A Ford Foundation project is playing an active part in generating citizen participation in planning and is a significant factor in the "informal" acceptance procedure the state plans will go through before being presented formally to the Environmental Board, the Governor and the state legislature, 131/ The state has also been able to call upon interested and capable citizens for district and state posts that make heavy demands on time with relatively low compensation.

Despite its problems, the administration of the Law seems to be progressing well. The critical process, however, is the preparation of state plans that can provide both flexible guides for developers and standards for the regulators. The presentation of these plans in 1973 will provide the real test of Vermont's land regulatory system.

FOOTNOTES

1/ See, 1967, Act No. 334 (Adjourned Session), effective March 23, 1968, referring to local and regional planning and local zoning. See also, 24 V.S.A. §§4301-4492 (including Act No. 334), Municipal and Regional Planning and Development.

2/ These were enacted pursuant to specific enabling legislation under 1967, Act No. 360 (Adjourned Session), effective July 1, 1969, Vermont Administrative Procedures Act. This Act gave a broad authority to state agencies to adopt regulations within their statutory area of competence through a relatively simple procedure.

3/ Interview with Senator Arthur Gibb, March 26, 1971.

4/ Time, September 26, 1969, at p. 50.

5/ This requirement was subsequently removed by amending the Vermont Planning and Development Act to allow any municipality to adopt subdivision regulations once a transportation plan (not a comprehensive plan) had been prepared. See, 24 V.S.A. §4404(g) (Supp. 1970).

6/ See, letter from the study commission to commissioner of health contained in Appendix B of the Report of the Governor's Commission on Environmental Control (Vermont, January 19, 1970).

7/ Department of Health Subdivision Regulations, issued 1968 and enforced by the Protection Division, Agency of Environmental Conservation.

8/ Report of Governor's Commission on Environmental Control, supra note 6, at p. 2.

9/ Act No. 250 of the Vermont General Assembly, 1970 Adjourned Session; 10 V.S.A. §§6001-6091 (Supp. 1970). (Hereinafter referred to as Act 250.)

10/ Elizabeth H. Haskell, "Managing the Environment: Nine States Look for the Answer," published in April, 1971, at p. 293, et seq.

11/ Water Pollution--Act No. 252 (Called the "pay as you pollute" bill. Its implementation has been delayed one year.); shoreland and flood plain zoning--Act

No. 281; mobile home parks--Act No. 291; also Act No. 273 concerning pesticides; Act No. 287 concerning air pollution; and Act No. 278 regulating land sales. These were all adopted by the 1970 adjourned session of the legislature. See, Marshall, "The Efficacy of Vermont's Act 250," unpublished senior thesis, Dartmouth College, May 19, 1971, for a comprehensive history of the Act.

12/ Act 250, §7; 10 V.S.A. §6081(b).

13/ Act 250, §2; 10 V.S.A. §6001(3). The 2500-foot test was not adopted arbitrarily, but resulted from an analysis of the ecology of mountain areas carried on for the Governor's study commission. See Appendix C of the Report, supra note 6.

14/ Interview with James Jeffords, Vermont Attorney General, Montpelier, March 26, 1971.

15/ Interview with Senator Arthur Gibb, March 26, 1971.

16/ While the application of Vermont Yankee Power Company for a permit to construct a nuclear power plant in Vernon, Vermont, is beyond the jurisdiction of Act 250, conservationists have mounted an intense effort before the Public Service Board, and the Federal A.E.C. to ensure low discharge temperatures and other protective measures. Interview with Harvey Carter, Counsel for the Southern Vermont Conservation Society, July 16, 1971. An application has also been filed by Green Mountain Power Corporation for a power plant within 1,000 feet of Interstate 89 at Berlin. The plant will include 40-foot oil storage tanks where fuel for the gas turbines will be stored. Approval would be an apparent contradiction of the Environmental Board's policy of a one-half mile scenic corridor on each side of the Interstate. See Burlington Free Press, August 4, 1971, p. 3, at 2; August 5, 1971, p. 14, at 1; August 18, 1971, p. 4, at 1. See, generally, John Walsh, "Vermont: Forced to Figure in Big Power Picture," 174 SCIENCE 44 (October 1, 1971).

17/ With certain exceptions not affecting the Board, the Agency may transfer staff and funds freely between units of the Agency. Interview with Robert Babcock, Jr., Secretary, State Environmental Board, May 5, 1971.

18/ Act 250, §31; 10 V.S.A. §6028. They are compensated only for time spent in hearings.

19/ Act 250, §3; 10 V.S.A. §6021(a).

20/ Act 250, §5; 10 V.S.A. §6026(b).

21/ Interviews with Brian Lloyd, Richmond District Coordinator, July 13, 1971, and Peter Zilliacus, Chairman of the District Commission, July 15, 1971.

22/ A 1971 law dealing with general regional reorganization reduced the number of districts from nine to seven, but did not affect the functions of the commissions. Interview with Robert Babcock, Jr., May 5, 1971.

23/ Act 250, §2; 10 V.S.A. §6001(3).

24/ John Walsh, "Vermont! A Small State Faces Up to a Dilemma Over Development," 173 SCIENCE 896 (September 3, 1971).

25/ Act 250, §6; 10 V.S.A. §6081(a).

26/ Act 250, §2(9); 10 V.S.A. §6001(9).

27/ Act 250, §30; 32 V.S.A. §3378 (Supp. 1970). Any town clerk who records a deed without such a certificate must be fined $50.00 for the first such offense and $100.00 for each subsequent offense.

28/ Act 250, §28; 10 V.S.A. §6003.

29/ Much of the initial success of the district commission process has been attributed to the regional coordinators who bore the initial organizational load. Interview with Robert Babcock, Jr., March 26, 1971.

30/ Act 250, §9; 10 V.S.A. §6094. Interview with Kenneth Senecal, Regional Coordinator, Windham District Commission, July 14, 1971.

31/ Since applicants often remain uninformed, the regional coordinator may request improper applications to be redrawn by the applicant. Interview with Kenneth Senecal, July 14, 1971.

32/ Vermont Environmental Board, Rules and Regulations, June 1, 1970, Rube 3(b).

33/ Act 250, §9; 10 V.S.A. §6084(b). Interview with Kenneth Senecal, July 14, 1971.

34/ Act 250, §11; 10 V.S.A. §6085(d).

35/ Interview with Benjamin Partridge, Chairman, Vermont Environmental Board, July 14, 1971.

36/ Act 250 requires a hearing within 40 days of receipt of application. Provisions for notice to parties sets a 15-20 day minimum processing period. Act 250, §10; 10 V.S.A. §6085. Applications currently are being processed at or near the minimum time sequence allowed. See Appendix A for related statistics.

37/ Act 250, §25; 10 V.S.A. §6027.

38/ Interview with Peter Zilliacus, July 15, 1971.

39/ Act 250, §4; 10 V.S.A. §6024.

40/ Interview with Schuyler Jackson, Esquire, Agency of Environmental Conservation, May 5, 1971.

41/ Id.

42/ A similar agency position paper will also be prepared for hearings on any appeal before the Environmental Board.

43/ Interview with Schuyler Jackson, May 5, 1971.

44/ Interview with Charles Wiley, Agency of Development and Community Affairs, July 9, 1971.

45/ Interview with Brian Lloyd, July 13, 1971. The purpose of the Regional Planning Commission was initially to supplement and aid local planning efforts. This has been implemented with varying success. See, Report to the Governor of Vermont, Governor's Economic Development Coordinating Committee, February, 1971.

46/ Interview with John Davidson, Chairman, Quechee Lakes Corporation, July 15, 1971. The decision is dated October 19, 1970, Opinion No. 609.

47/ Interview with Robert Babcock, Jr., July 8, 1971; interview with Ellen Reese, Local Project Coordinator for the Dover Wilmington Ecological Planning Study, July 14, 1971.

48/ Interview with Kenneth Senecal, July 14, 1971.

49/ Interview with Robert Babcock, Jr., May 5, 1971. Hearings can generate substantial documentation of applications. For the Stratton Mountain application the District Commission made its decision based on reels of taped testimony and a large volume of documentary evidence. Interview with Peter Zilliacus, July 15, 1971.

50/ Act 250, §12(a); 10 V.S.A. §6086(a).

51/ Act 250, §13; 10 V.S.A. §6088.

52/ Act 250, §12(c); 10 V.S.A. §6086(c).

53/ Act 250 refers to the powers enumerated in the Municipal and Regional Planning and Development section of the Vermont Statutes. See note 1, supra. Specifically, 24 V.S.A. §§4407(4), (8) and (9), 4411(a)(2), 4415, 4416 and 4417.

54/ Rule 8(c), Rules and Regulations of Environmental Board, supra note 32.

55/ Rules and Regulations of the Environmental Board, Appendix A--Power and Communication Lines and Facilities: Permit Requirements, June 16, 1971.

56/ Interview with Benjamin Partridge, July 14, 1971.

57/ Vermont Environmental Board, Statistics on Act 250 Applications (October 1, 1970 through July 1, 1971). These statistics have summaries of major decisions appended to them.

58/ While this may govern who has the capacity to appeal, other parties may appear at appeal hearings. At least this is true in the Ryder Pond case. See note 48, supra.

59/ Act 250, §14; 10 V.S.A. §6089.

60/ Act 250, §27; 10 V.S.A. §6082, makes this explicit.

61/ Act 250, §25(e); 10 V.S.A. §6027(e) allows the Board to set up joint hearings with other agencies by rule. Act 250, §12(d); 10 V.S.A. §6086(d) also allows the acceptance of the approval of other state agencies in lieu of evidence for some §12 criteria if the Board approves such a rule. See Appendix B for a partial listing of permits a developer may have to obtain from other state agencies.

62/ Interview with Benjamin Partridge, July 14, 1971. See also Burlington Free Press, August 12, 1971, p. 3, at 4. The Environmental Board is meeting with the Water Resources Board to clarify the regulation of the Water Resources Board with a view toward eventually accepting its discharge permit as an indication that an application for development is sound in this respect.

63/ Act 250, §§18, 19 and 20; 10 V.S.A. §§6041, 6042 and 6043. The three plans are sometimes referred to as the section 18, 19 and 20 plans, respectively.

64/ Act 250, §12(a)(9); 10 V.S.A. §6086(a)(9).

65/ "Preparation and Implementation of Plans Under Act 250," State Planning Office, July, 1971, at p. 1 (hereinafter cited as State Planning Report).

66/ Act 250, §18; 10 V.S.A. §6041.

67/ State Planning Report, at p. 2.

68/ "Vermont Interim Land Capability Plan," prepared by the Vermont State Planning Office, June, 1971.

69/ Id., at pp. 3-5.

70/ Id., at p. 17.

71/ "An Analysis of Social and Economic Characteristics of Vermont," prepared by the Vermont State Planning Office, June, 1971.

72/ Letter of September 24, 1971, from Bernard Johnson, Assistant Planning Director, State of Vermont.

73/ Interview with Schuyler Jackson, September 10, 1971.

74/ Interview with Robert Babcock, Jr., September 10, 1971.

75/ Act 250, §19; 10 V.S.A. §6042.

76/ Id.

77/ State Planning Report, at pp. 7-8.

78/ Interview with Mr. Jan Wells, State Planning Office, July 8, 1971.

79/ Act 250, §§21, 22, 23; 10 V.S.A. §§6044, 6045 and 6046.

80/ Act 250, §20; 10 V.S.A. §6043.

81/ Interview with Bernard Johnson, July 7, 1971.

82/ Id.

83/ Act 250, §18; 10 V.S.A. §6081(b).

84/ It also places some of the support effort for the planning process in a difficult funding position since original projects were made on a 1972 completion date. The Ford Foundation project of the Vermont Natural Resources Council providing for citizen participation in planning was originally established with a July, 1972 target date for the plan. The planning staff under Arthur R. Merkle still intends to have as much of the planning done by the 1972 target date as is possible. Much of the additional time is necessary for a comprehensive review process to get the plans before the people. Interview with Bernard Johnson, July 7, 1971; interview with Arthur Ristau, former state planner, currently running Ford Foundation Study of state planning process, July 7, 1971; interview with Jan Wells, July 8, 1971.

85/ State Planning Report, at p. 1.

86/ See, Rutland Herald, June 25, 1971, p. 20, at 1, which includes a list of the districts and local chairmen.

87/ Act 250, §31; 10 V.S.A. §6027(c).

88/ See text at note 108, infra.

89/ Act 250, §24; 10 V.S.A. §6047.

90/ Id.

91/ Id.

92/ Vermont Health Regulations, §5-902.

93/ Interview with Brian Lloyd, July 13, 1971. Application No. 300005, Green Mountain Meadows, for a 27-unit development was asked to present evidence on the impact of the entire 400-home development at the initial application hearing before a permit was granted.

94/ Application No. 700001, Haynes Bros., Inc. commonly referred to as the Ryder Pond Case is also interesting because of the issues being raised on appeal. See text at note 123, infra.

95/ Act 250 does provide some protection against fraudulent behavior. Section 6 (10 V.S.A. §6081(a)) implies a sale or transfer of property is void if no permit has been issued and the sale or transfer "is accomplished to circumvent the purposes of this chapter." However, this only applies to "subdivision" lots, which in a strict sense would exclude the subdivision with 10+ acre lots or other statutory exceptions unless common fraud could be demonstrated.

96/ Interview with Robert Babcock, Jr., July 8, 1971.

97/ Interview with Jonathan Brownell, Esquire, July 8, 1971.

98/ Interview with Benjamin Partridge, July 14, 1971.

99/ Interviews with Philip Hoff, Esquire, Jan Wells, Brian Lloyd, Jonathan Brownell, July, 1971.

100/ Interview with Jonathan Brownell, July 8, 1971; interview with Arthur Ristau, July 7, 1971.

101/ 10 V.S.A. §6086(a)(9) requires "conformance" with a duly adopted plan.

102/ E.g., interview with Peter Zilliacus, July 15, 1971.

103/ Interview with John Davidson, July 14, 1971.

104/ Rutland Herald, July 9, 1971, p. 17, at 1.

105/ Rules and Regulations of the Environmental Board, Rule 6(d)(1) as revised June 16, 1971.

106/ Interview with Benjamin Partridge, July 14, 1971.

107/ Id.

108/ Interview with John Davidson, July 15, 1971.

109/ See note 31, supra.

110/ Inevitably some large developers with a coherent package to offer are scrutinized less carefully. An

example may be IBM Corporation, expanding near Burlington, Vermont. Interview with Brian Lloyd, July 13, 1971. However, the district commissions have gone so far as to request financial data on applications as part of the profile of the development.

111/ Letter from Robert Babcock, Jr., August 4, 1971.

112/ Application No. 300025, J. Paul Presault, Burlington, Vermont.

113/ Adjoining property owners were not allowed to appear in opposition on appeal. Burlington Free Press, August 12, 1971, p. 21, at 7.

114/ Burlington Free Press, August 18, 1971, p. 4, at 1.

115/ See Decision of July 8, 1971, District Environmental Commission II. The decision includes 13 pages of findings and conclusions including details on sewage treatment; traffic control; local taxation including highway and school funds and their sources; and zoning.

116/ Interview with Kenneth Senecal, July 14, 1971. The regional plan sets out several general objectives for development such as revitalization of urban centers. These have been the basis for the challenge. Other area planners have been criticized for failing to make this same effort while more comprehensive land use maps are being prepared. See, Burlington Free Press, July 10, 1971, p. 8, at 3 (Middlebury criticized for not attempting to curtail "suburban" shopping development).

117/ Burlington Free Press, July 10, 1971, p. 8, at 3. Middlebury criticized for failure to attempt to curtail "suburban" shopping development.

118/ The Comprehensive Plan for Outdoor Recreation in Vermont, 1967. At p. 39, this plan calls for the protection of scenic roads and trails. The Interstate system and certain other primary roads are designated for "greenbelts" one-mile wide on a state map. There is a suggestion that certain other roads also be protected. This plan is currently under revision in the Agency of Environmental Conservation.

119/ Application No. 300008.

120/ Application No. 300013, Ward A. Fuller. Mr. Fuller received a cease and desist order to stop bulldozing to expand a trailer site. Ultimately, application for a permit was denied and the case is now on appeal before the Vermont Supreme Court. Interview with Robert Babcock, Jr., May 5, 1971.

121/ Burlington Free Press, August 18, 1971, p. 4, at 1.

122/ Act 250, §14; 10 V.S.A. §6089(c).

123/ Application No. 700001, Haynes Bros., Inc.

124/ Interview with Robert Babcock, Jr., September 10, 1971.

125/ Interview with Schuyler Jackson, September 10, 1971.

126/ Interviews with Robert Babcock, Jr. and Schuyler Jackson, September 10, 1971; telephone conversation with Schuyler Jackson, November 2, 1971.

127/ Of 326 applications, only 11 were denied in the first year. See Appendix A, Statistics.

128/ See, Report of Economic Development Coordinating Committee, supra note 45, at p. 5.

129/ The Town of Milton found that a body of water proposed as a prime water supply in its planning efforts was the discharge point for effluent [?] from a whey [?] processing plant proposed by the Development Agency.

130/ Burlington Free Press, August 12, 1971, p. 3, at 4.

131/ Interview with Arthur Ristau, July 7, 1971.

APPENDIX A:

Statistics on Act 250 Operations;

State Permits Required for Development in Vermont

AGENCY OF ENVIRONMENTAL CONSERVATION
Montpelier, Vermont 05602
ENVIRONMENTAL BOARD

Department of Fish and Game
Department of Forests and Parks
Department of Water Resources
Environmental Board
Division of Environmental Protection
Division of Recreation
Interagency Committee on Natural Resources
Natural Resource Conservation Council

STATISTICS ON ACT 250 APPLICATIONS
AS OF JUNE 1, 1971

Total number of applications--326

Total number of applications in May--50

Total number acted upon--235

Total number acted upon in May--31

Appeals to the Board--9 (6 decisions, 2 pending, 1 withdrawn)

Applications pending action--91

Applications withdrawn--9

Applications denied--11

Total number of development applications--286

Total number of subdivision applications--40

Average time in handling applications--36 days
[date of receipt; date of decision]
Total number of fees collected--$49,021.80

Total number of applications in District 1--52
District 2--68
District 3--28
District 4--13
District 5--46
District 6--27
District 7--34
District 8--24
District 9--33

Department of Fish and Game
Department of Forests and Parks
Department of Water Resources
Environmental Board
Division of Environmental Protection
Division of Recreation
Interagency Committee on Natural Resources
Natural Resource Conservation Council

BREAKDOWN ON 250 APPLICATIONS

June 2, 1971

TYPE OF OPERATION	NUMBER	TYPE OF OPERATION	NUMBER
Subdivisions	43	Swimming and recreation	31
Transmission lines & facilities	7	Additions to existing structures	19
Nursing homes: new starts	7	Water mains	2
additions	2	Cultural	3
Trailer parks	7	Churches	2
Camping & trailer areas	19	Junk yards	1
General commercial establishments	29	Sewer	5
Communications masts	4	Timbering above 2,500 feet	3
Hospitals	4	Industrial	11
Filling & clearing	12	Research	2
Prisons	1	Schools	14
Flood control	2	Water pollution control	2
Sanitary landfills	6	Gasoline service stations	8
Shopping centers	7	Roads	19
Motels, apartments, cooperatives, and condominiums	26	Borrow and quarrying	19
		Mining	1
Municipal buildings	1	Stump dumps	1
TOTAL			320

STATE AGENCY BREAKDOWN

Department	Number
Forests and Parks	17
Fish and Game	2
Highway	3
Public Safety	5
State Buildings Division (Windsor Prison)	1
Vermont Aeronautics Board	1
Water Resources	1

(This count has already been included in the grand total above.)

APPENDIX B:

PARTIAL LIST OF STATE PERMITS RELATIVE TO LAND USE OR ANY OTHER AREAS OF ENVIRONMENTAL CONCERN

452-329 O - 72 - 8

Partial

LIST OF STATE PERMITS RELATIVE TO LAND USE
OR ANY OTHER AREAS OF ENVIRONMENTAL CONCERN

AGENCY OF DEVELOPMENT AND COMMUNITY AFFAIRS
Montpelier, Vermont 05602

A. Billboard Law. 10 VSA, Chapter 14, §321-3-45, governs outdoor advertising.

DEPARTMENT OF AGRICULTURE
Montpelier, Vermont 05602

A. Approval and licensing of slaughter houses, rendering plants, and other establishments that handle meat or meat products.

B. Licensing of milk dealers--facility construction plans for plants which receive and process milk or which manufacture dairy products are also reviewed for approval by this Department.

C. Pesticide Control--6 VSA, Chapter 87 (and regulations)--licenses dealers, operators (those in business of contracting as applicators), and applicators, and issues special permits for the use of restricted pesticides (Division of Plant Pest Control).

DEPARTMENT OF EDUCATION
Director of School Administrative Services, Montpelier, Vermont 05602

A. Authorization of building or improvements in school districts throughout the State. Title 16, 3448, 3457.

DEPARTMENT OF FORESTS AND PARKS
Agency of Environmental Conservation, Montpelier, Vermont 05602

A. Brush burning permits--issued by town fire wardens, 10 VSA, 1495

B. Sawmill license--only one in State

C. Special use permits: permits issued to anyone who uses State forest and park land, e.g. six month right-of-way for logging. Lease right-of-way to utility companies. Permits start with district forester.

DEPARTMENT OF HEALTH
Environmental Health Division, 115 Colchester Avenue, Burlington, Vermont 05401

A. Public Water Systems (ten or more services). All proposed water systems or modifications must be reviewed and approved by the Division of Environmental Health.

B. Licenses

1. Food and lodging, bakeries, children's camps. (Plans submitted to Division of Environmental Protection, Agency of Environmental Conservation, Montpelier, Vermont.)
   a. Regular inspections conducted by sanitarians from the Vermont Department of Health.

2. Nursing homes, hospitals, and homes for the aged. (Plans for construction submitted to the Medical Facilities Division).

DEPARTMENT OF HIGHWAYS
Montpelier, Vermont 05602

A. Permit: required for any construction in the highway right-of-way (utility facilities, access drives, etc.)

B. Any change of topography affecting highway drainage.

C. Zoning permit for development of land within 500 feet of the intersection of any entrance or exit ramp providing access to any limited access highway.

D. License to operate a junk yard or automobile grave yard--24 VSA, 2241 - 2283--outdoor storage of junk and/or three or more junk vehicles. (Roadside Development Division).

DEPARTMENT OF LABOR AND INDUSTRY
Montpelier, Vermont 05602

A. Electrical inspection: any "complex structure" (see 10 VSA, 881 (3) must be inspected and approved by the Labor and Industry commissioner or an inspector before being put into use.

DEPARTMENT OF PUBLIC SAFETY
Fire Protection Division (Fire Marshal), Redstone Building, Montpelier, Vermont 05602

A. License: for fire alarm system installers and lightning rod installers--renewed yearly.

B. Letter of approval: for all public buildings (all buildings except single family residences). Drawing approval and inspection.

C. Approval: if county, State, or federal funds are used, facilities must be provided for handicapped in public buildings.

D. Approval: plans for storage of flammable liquids (gas stations, etc.)

DEPARTMENT OF WATER RESOURCES
Agency of Environmental Conservation, Montpelier, Vermont 05602

A. Pollution control

1. After July 1, 1971 a discharge permit or pollution permit will be needed for any direct or indirect discharge into the waters of Vermont.

B. Planning and development

1. Permits:

a. Dams. New construction or renovation. 10 VSA, Chapter 29, 500,000 cubic feet of water impounded.

b. Streams--redirecting, ten square mile drainage area and use. 10 VSA, Chapter 28, Subchapter 2.

c. Lakes--29 VSA, Chapter 11. Altering beds of lakes, ponds, etc. under public waters.

2. License:

a. Well drillers license

DISTRICT ENVIRONMENTAL COMMISSIONS AND ENVIRONMENTAL BOARD--ACT 250
Agency of Environmental Conservation, Montpelier, Vermont 05602

A. Subdivision permits

1. Ten or more lots of less than ten acres each

B. Development permits

Construction of improvements for:

1. Commercial or industrial purposes on more than one acre in a municipality without permanent zoning and subdivision regulations.

2. Commercial or industrial purposes on more than ten acres.

3. Commercial, industrial, residential purposes on land over 2,500 feet in elevation.

4. Housing projects of ten or more units.

5. Municipal or State projects on more than ten acres.

DIVISION OF ENVIRONMENTAL PROTECTION
Agency of Environmental Conservation, Montpelier, Vermont 05602

A. Subdivision permits--Vermont Health Regulations, Chapter 5. Three or more lots, ten acres or less each.

B. Mobile Home Park Permit--Act 291. Two or more mobile homes on a plot.

C. Public Building Permit
Plan approval on all buildings except single family residences, duplex with separate water and sewage, condominiums, unoccupied warehouses, and farm buildings.

D. Sanitary Landfill Permit. 24 VSA, 2201 et. seq.

E. Emission into atmosphere. 10 VSA, Chapter 15. Required standard, after fact enforcement.

F. Travel trailer and tenting area. Board of Health Regulations.

PUBLIC SERVICE BOARD
7 School Street, Montpelier, Vermont 05602

A. Certificate of Public Good--30 VSA, Section 248--certificate from Public Service Board needed for construction of electric generation facilities or transmission lines designed for operation over 48 KV.

B. Approval--10 VSA, 701 et. seq.--for construction or remodelling of any dam related to hydroelectric power.

C. Certificate of Public Good--30 VSA, Section 102--for the organization of any new public utility corporation.

D. Certificate of Public Good--30 VSA, Section 231--for the operation of any public utility business by a person, partnership, or unincorporated association.

VERMONT AERONAUTICS BOARD
Montpelier, Vermont 05602

A. Letter of approval for all airports or private landing strips and navigational facilities. Title 5.

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

In 1965 the California legislature created the San Francisco Bay Conservation and Development Commission and authorized it to prepare a plan for the future development of San Francisco Bay. The Commission completed the plan in 1969 and submitted it to the legislature. The legislature thereupon adopted the plan and gave the Commission the power to implement it by requiring permits from anyone seeking to develop in the Bay or along its shorelines.

The Concern Over the Filling of the Bay

In the early 1960's public attention began to be drawn to the rate at which San Francisco Bay had been filled and was continuing to be filled by developers for a wide variety of uses, the new communities of Foster City and Redwood Shore being especially noticeable examples. A variety of citizen groups became disturbed about potential effects of continued filling and diking, now estimated to have removed over 240 square miles from the Bay. 1/

A report on "The Future of San Francisco Bay," written in 1963 by Mel Scott for the Institute of Governmental Studies at the University of California, was of particular significance in calling attention to the problem. This and other studies pointed out that a large portion of the Bay was very shallow and so easily capable of being filled that at some point in the future the Bay might be reduced to a river. This picturesque prediction of a "San Francisco River" captured the public's imagination and spurred further efforts toward conservation of the Bay.

Two recent articles have described the public relations work behind the successful drive for passage of the Bay Commission legislation, which need not be repeated in detail here. 2/ Basically, success resulted from energetic and determined efforts by an informal coalition of existing conservation groups and a variety of citizen organizations created specifically to "Save the Bay." They began by persuading the legislature to create a study commission, then expand it to a planning commission and finally to a regulatory commission. The coalition supported each step by effective campaigns for public endorsement, and the tremendous outpouring of public support was undoubtedly the key element in obtaining passage of the legislation.

The success of this drive was so complete that the Commission in a few short years has become almost untouchable politically. Even its strongest enemies feel obliged to swipe at its flanks rather than attack it directly. The overwhelming public support for the Commission probably can be credited to the great "imageability" of San Francisco Bay. The fact that the Bay is seen so frequently by so many people made it easy for the average person to visualize its reduction to a "river" and imagine the effect that this would have on the community.

The excellence of the San Francisco Bay Plan prepared by the Commission in 1969 also influenced the legislature's willingness to give the Bay Commission permanent regulatory powers. 3/ The Plan is a model of organization and readability that, unlike most such plans, can be read by the average legislator with interest and enjoyment. By focusing on the Bay and its immediate shoreline the Bay planners kept the issues easily comprehensible by the public, and avoided having public interest lost in the extreme complexity and interrelatedness of regional planning problems.

Finally, the Plan attracted broad support by offering a well-reasoned program that balanced both development and conservation. The purposes of the Commission reflect, as the name denotes, a combination of "conservation and development" interests--a combination that in this case seems unusually compatible. Operators of water-oriented industrial uses share with conservationists the need to see the Bay remain an open and relatively unpolluted body of water. Their interests combined to overcome the opposition of the owners of bayshore and underwater land who saw the potential of significant profits from filling and developing large portions of the Bay for residential and commercial use, and the opposition of some of the local governments which sought to encourage such developments.

The Powers of the Bay Commission

The basic purpose of the Commission is to insure that the filling and development of the Bay does not destroy its essential value for water-oriented uses (e.g., ports, power plants and airports) or its function as a recreational area, as a breeding ground for fish and wildlife, or as a beneficial influence on the climate and livability of the San Francisco area.

The Bay Commission has been designed to operate in a relatively simple and straight-forward manner. The legislation incorporated the Commission's San Francisco Bay Plan as a basic standard for regulation, established a line of jurisdiction for the Commission around the edge of the Bay, and required all owners of property within the Commission's jurisdiction to obtain a permit for any filling or construction. 4/ The Commission is to issue a permit only if the project is consistent with the San Francisco Bay Plan and the principles set forth in the statute.

The boundary line of the Commission's jurisdiction was a subject of considerable controversy. The Plan had shown that development which occurred far inland from the water's edge often had serious adverse effect on the Bay. The Commission and its supporters had asked for jurisdiction over the land extending back from the water's edge for a considerable distance. 5/ The opponents, particularly the municipal governments in the Bay area, strongly opposed giving the Commission any controls over land that was not submerged. A compromise was reached under which the Commission has jurisdiction over an area 100 feet back from the main shoreline of the Bay and also over certain wetlands, creeks and diked areas adjoining the Bay. 6/

Throughout most of its jurisdiction the Commission is empowered to grant a permit if it "finds and declares that the project is either (1) necessary to the health, safety or welfare of the public in the entire Bay area, or (2) of such a nature that it will be consistent with the provisions of this title and with the provisions of the San Francisco Bay Plan then in effect," 7/ but applications for projects on the shoreline band not involving fill and not related to existing water-oriented priority land uses may be denied "only on the grounds that the project fails to provide maximum feasible public access, consistent with the proposed project, to the Bay and its shoreline." 8/ The statute also authorizes the Commission to attach conditions and restrictions to any permits issued. 9/

Applicants for permits must first file an application with the city or county for any permits that might be required by those bodies. 10/ The city or county, through its appropriate agency, is then required to file a report with the Commission commenting on the proposal and indicating whether or not the proposal has been approved. 11/

All state and local governmental agencies must obtain a permit, as well as private builders. 12/ Moreover,

the Commission has entered into a memorandum of understanding under which the Army Corps of Engineers has stated that all of its proposals will be in accordance with the provisions of state law and the San Francisco Bay Plan. 13/ Unlike most local plans, therefore, the San Francisco Bay Plan is not subject to being overridden by the actions of the State Highway Department or Division of Waterways. 14/

In addition to its permit-issuing power, the Commission is directed by the statute to engage in a continuing process of planning, to prepare annual reports and to revise the Plan from time to time as may be necessary. 15/

Current Operations of the Bay Commission

The Commission has adopted detailed administrative regulations setting forth the procedures by which applicants for permits may present their applications to the Commission. 16 The commissioners--27 of them--meet every two weeks to act on these applications. 17/ From the beginning of the Commission's primary regulating jurisdiction on November 10, 1969 through the end of 1970 the Commission processed 13 major permit applications, granting 12 and denying one. 18/ In addition, 66 minor permits were granted by the staff. 19/

As a result of this activity, developers, architects and planners in the Bay area are becoming increasingly aware of the Commission's existence and of the need to consult with the Commission's staff at early stages in the preparation of plans for development along the Bay. The staff feels that preliminary conferences with developers have frequently avoided the possibility of applications that would have been inconsistent with the Plan, and have helped developers direct their projects in ways that would further the goals of the Plan. 20/ The Commission has followed the staff's recommendations in most important cases; if there has been any divergence between staff and Commission, it is the Commission that has taken the stronger view in favor of conservation. 21/

The Commission's large size led to predictions that it would not function smoothly, but at least in the opinion of the staff, the Commission performs its functions very well. 22/ The Commissioners seem to take a truly regional point of view and do not engage in petty logrolling designed to promote their particular local jurisdictions. 23/ But while conservation groups in the area continue to manifest support for the implementation of the San Francisco Bay Plan, a number of those groups are growing disenchanted with

what they characterize as a series of "recent pro-development actions." 24/

The Commission's chairman has provided excellent leadership and the hard-working members, most of whom are appointed by state and local governmental agencies with interests in the Bay area, 25/ have provided some liaison with the governmental agencies together with an avenue to explain the actions of the Commission to towns, agencies and interest groups in the Bay area. 26/ This liaison has not always been what it could be, however, according to Rudy Platzak, Planning Director, Association of Bay Area Governments (ABAG). He contends that the failure of the Commission to develop local, regional and public ties is one of its principal weaknesses. According to Platzek, the Commission thereby loses the benefit of planning expertise which local governmental units would be willing to provide for the Commission. Serious misunderstandings with municipal planning departments (such as that of San Francisco) often develop as a result. 27/ Moreover, the Commission appears to have very little contact with other state or regional planning agencies. The Commission staff says there has been some sharing of information with the Association of Bay Area Governments, 28/ but the regional plan approved by the Association last year 29/ bears little evidence that it was influenced by the San Francisco Bay Plan prepared by the Commission only a year before. The Association's plan omits any significant mention of the Bay Commission, and rarely even mentions the Bay itself. The Association of Bay Area Governments apparently considers the Commission a rival for public attention, and relations between the two agencies have been correct but chilly. 30/

The legislature has financed the operations of the Commission out of general revenues with sufficient generosity to avoid serious problems of administration. The Commission's heavy responsibilities for enforcement--not only must the Commission discover and prosecute unauthorized filling and construction but it must police the extensive conditions and restrictions it attaches to the permits that it issues--had presented problems, 31/ but recently additional staff has been assigned enforcement responsibilities. 32/

The operation of the Commission can best be understood by looking in more detail at three controversies that have occupied a substantial share of the Commission's attention:

The Oakland Fill Flap

Just prior to September 17, 1965 (from which time the Commission dates its legal existence) the City of Oakland commenced filling a portion of San Leandro Bay for the purpose of constructing a parking and storage yard for city vehicles on a 30-acre site for the City of Oakland, in accordance with a plan previously drawn for that purpose. 33/ According to the Commission's staff, Oakland was advised of the probable illegality of the fill in 1966. 34/ However, nothing further was forthcoming from the Commission until the nearly-completed diking and filling of 5.9 acres in the Bay was brought to the attention of the Commission's staff director in September of 1970. 35/ Shortly thereafter, the Commission received an application from Oakland for the filling of an additional 3.5 acres of the Bay for a park, access road, and further expansion of the yard.

Instead of considering the application only, the Commission's staff proceeded to study the legality of the entire fill project, on the ground that the major portion thereof was completed without a permit and after the Commission was functioning. Oakland claimed the planning and substantial commencement of the project preceded the formation of the Commission, and they were thus "grandfathered in"--outside the jurisdiction of the Commission. Oakland further questioned the shoreland jurisdiction of the Commission in toto. 36/ Conservationists in and out of Oakland were outraged. 37/ The prospects for detached analysis were not brightened when it was pointed out that the shoreland to be lost adjoined the poor and predominantly black section of Oakland. 38/

After some months of study and meetings with Oakland officials the Commission staff concluded that a compromise would best suit the interests of all parties--particularly considering the very real possibility of an expensive and time-consuming lawsuit. This recommendation was rejected in a close vote of the Commission, which thereupon authorized the state's Attorney General to commence legal proceedings against Oakland. 39/ Further consultations with legal counsel in executive session, however, convinced the Commission to instruct the staff to continue compromise efforts with Oakland. 40/

Amid a storm of conservationist protest, such a compromise was reached and approved by the Commission on February 4, 1971, just a month after the original decision. 41/

In return for the Commission's withdrawal of its contention that Oakland had proceeded with a non-water-related development and fill without a required permit, Oakland agreed to create a six-acre park on the Bay by providing waterfront access on the site along a strip from 55 to 220 feet in width (a net increase of three acres from the original plan), and to recognize the jurisdiction of the Commission over Oakland's shoreline and adjoining waters as established by the statutory adoption of the Commission's Bay Area Plan in 1969. 42/

The newspapers and conservationists were probably correct in their evaluation of the jurisdictional concessions as being relatively meaningless. However, the provisions of added parkland and access, together with a related promise by Oakland to hold an additional 20 acres (a small bay peninsula) in its natural state, 43/ demonstrate the Commission's continuing concern with making access to the bay available to the largest number of people. This concern is not always appreciated by those who see the Commission's function solely in terms of "preserving" the bay.

The Candlestick Properties Case: A Legal Victory

Prior to the adoption of the 1969 statute the Commission had expressed some doubt about whether the prohibition of filling of underwater land would be upheld in court, and had speculated about the possibility of paying compensation to owners of land on which filling would be prohibited. 44/ But early last year in the case of Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Commission 45/ the court of appeals upheld the Commission's power to deny permits for the filling of San Francisco Bay without the payment of compensation.

Candlestick Properties, Inc. acquired for $40,000 a parcel of land in 1964 as a depository for fill from nearby construction projects. The parcel is submerged at high tide by San Francisco Bay waters. After receiving the necessary fill permits from the City and County of San Francisco in September of 1965, Candlestick applied to the Commission for a fill permit in late 1966, to permit dumping of debris from San Francisco demolition projects. Nothing in the record demonstrated any intent to develop the parcel for water-related uses. The subject parcel is surrounded by land either filled or in the process of being filled. 46/ On January 20, 1967, the Commission denied Candlestick's application. The trial court upheld the Commission. 47/

On appeal, Candlestick's basic contention was that the denial constituted a taking of its property without due process of law and that the Commission's demurrer to that part of its suit claiming damages for that taking was wrongfully sustained by the trial court. 48/ Citing earlier cases which define the police power in terms encouraging its development and change to meet changing conditions, the appellate court upheld the Commission. The court noted the legislation's recitation of public interest in the preservation of the Bay and the threats thereto by filling, and of the need for a comprehensive plan, 49/ and held that the denial of Candlestick's application did not amount to an undue restriction on the use of private property:

> "However, it cannot be said that refusing to allow appellant to fill its Bay land amounts to an undue restriction on its use. In view of the necessity for controlling the filling of the Bay, as expressed by the Legislature . . . , it is clear that the restriction imposed does not go beyond proper regulation such that the restriction would be referable to the power of eminent domain rather than the police power." 50/

Ferry Port Plaza: The Commission Takes on San Francisco

Another major issue is the current confrontation between the City and Port of San Francisco and the Commission over development of the San Francisco waterfront. This confrontation has been epitomized by the controversy, and finally lawsuit, concerning the Ferry Port Plaza Development and the ill-fated "rule of equivalencies."

On August 13, 1970, the Ferry Port Plaza Company (a partnership of the Ford Foundation, Kidder, Peabody & Co., Inc., and Castle & Cooke) filed an application with the Commission for permission to demolish four finger-piers just north of the Ferry Building in San Francisco and replace them with a pile-supported platform. The proposed demolition and fill was part of a plan to construct, upon a 42-acre site leased from the San Francisco Port Authority, a complex including a hotel, restaurants, shops, offices, and public access system. 51/ Approximately $400,000 had gone into the planning of the complex prior to making applications, largely on the strength of a belief shared by developers, San

Francisco officials, and the Commission alike in a "rule of equivalencies." 52/ Simply stated, the rule, if adopted by the Commission, would permit Bay fill for non-water-oriented uses if the applicant created as much new Bay surface as would be removed by the fill and if the Commission determined that the proposed use of the new fill would not adversely affect the public's enjoyment of the Bay. 53/

The developers' prospects were dashed in October of 1970 when the state's Attorney General declared that, considering the legislative directive that all further filling of the Bay be limited to fills for water-oriented uses, a rule permitting such "replacement fills" would be invalid. 54/ Amidst cries of foul from the City of San Francisco and dire predictions from the press that "BCDC will find itself presiding over a ramshackle jurisdiction of rotting piles and obsolete piers, and a scant source of public enjoyment," the Commission accepted the opinion and denied Ferry Port Plaza Company's petition by a vote of 22 to 1. The denial was based on two counts: (1) the project included an office building--a non-water-oriented use, and (2) while the remainder of the project was water-oriented, it called for the development of public property, contrary to Section V-1-a of the Bay Plan. 55/

On March 3, 1971, the San Francisco Port Commission and the City and County of San Francisco brought suit against the Commission, asking the court to declare the Ferry Port project legal under existing state laws and to require the Commission to issue the necessary permits. 56/ Currently this suit is in the discovery stage, interrogatories having been served on the respective parties. 57/ Although they would presumably have an interest, none of the private parties concerned with the Ferry Port Plaza project (Oceanic Properties, Kidder, Peabody, Ford Foundation) have joined in suing the Commission. Oceanic Properties has no intention of doing so, and represents that as far as it knows, neither do the others. 58/

Meanwhile, the Commission adopted a policy amendment to the San Francisco Bay Plan on June 3, 1971, which in part restores the equivalencies concept without permitting wholesale development unrelated to water, on public or private land. One of the charges levied at the Commission by the City of San Francisco was that under its interpretation of its authority ". . . Fishermen's Wharf could burn down tomorrow and there would be no way to get a permit to replace it." 59/ This conclusion was apparently reached by interpreting Section

V-1-a of the San Francisco Bay Plan to forbid any fill for non-water-oriented uses, even if such a use had previously existed but was involuntarily terminated through fire or other calamity. Whether this interpretation was in fact correct has never been definitely ascertained, 60/ but in any event, the Commission added to the four conditions under which the Bay could be filled 61/ a fifth. 62/ Essentially, it provides for fill approval on either private or publicly-owned property, provided that the fill is limited to replacement of piers covering less of the Bay than was being uncovered. Moreover, only an area equal to 50% of the area uncovered can be devoted to uses other than public open space, access and public recreation, and that 50% must be for Bay-oriented commercial recreation and public assembly purposes. The only exception is in case of destruction of a pier by fire or similar disaster, in which case an equivalent percentage as was previously devoted to such uses may be rebuilt on a new pier. 63/

The intent of the new regulations is to permit new development on the San Francisco waterfront without increasing the amount of fill in the Bay. 64/ Criticism of the proposal by conservation groups and from proponents of the McAteer-Petris Act, which created the Commission, is running high. 65/ On the other hand Berkeley architecture professor Richard Meier has charged that the Commission's existing restrictions on waterfront development discriminate against minority groups:

> The urban ecology of North American cities leads to the settlement of ghettos in low-lying areas. Thus, seven of the eight Negro communities and two of the three Latin settlements immediately adjoin the Bay. They exhibit high concentrations of unemployment. The principal entry into high-paying jobs for young men happens to be through the construction industry and its suppliers, but if all construction on the edge of the Bay is halted, growth is deflected to the periphery, which has poor commuter transportation connections to the ghettos. So, programs for saving the Bay, as conceived by the purists, will benefit those with "view" lots, yachts, and interests in estuarine wildlife, at the expense of those least able to pay for and to defend their interests. 66/

The Commission finds this argument unpersuasive, given the scarcity of minority group members in the construction trades, 67/ and as Chairman Melvin Lane has pointed out, the Commission's new regulations follow the statutory direction to concern itself with development as well as conservation. 68/

Throughout the Ferry Port Plaza-Rule of Equivalencies controversy, related development was also before the public in the form of news articles concerning a proposed U.S. Steel office building. It has been suggested that the coincidence of these two projects contributed to the temporary demise of Ferry Port Plaza, 69/ although the two controversies seem only vaguely related in terms of law. Their only relationship appears to be their location--on San Francisco's waterfront, where conservationists and other groups were determined they should not be placed. 70/ The chronology of this second controversy is briefly as follows.

The San Francisco Bay Plan Commission unveiled in early 1970 plans for a 550-foot office building and passenger terminal to be built by U.S. Steel Corporation. 71/ Meanwhile, the City's Planning Staff, on the basis of a $216,000 private planning study, recommended a height limitation for waterfront buildings of 84 feet with limited exceptions permitting construction to 175 feet "under strict planning controls." 72/ In the summer of 1970, a 400-foot limitation was proposed by the Plan Commission and rejected by the San Francisco Board of Supervisors. Apparently the Commission took that rejection as an implicit request by the supervisors that the limitation be raised to 550 feet. 73/

At its September 10th meeting the City Planning Commission "bowed to what was called economic necessity" and adopted the 550-foot height limit for new buildings between the Ferry Port Building and the Bay Bridge. 74/ The proposal then went back to the Board of Supervisors for approval.

At that point the battle lines became rather clearly drawn between conservation groups and some supervisors on the one hand (including chairman Dianne Feinstein) and the developers, the Port Authority, the Mayor's Office and other supervisors on the other. 75/ After a 90-day delay in considering a subcommittee report wholly opposing the 550-foot limitation, 76/ the supervisors voted in February of 1971 to impose the 84-foot limit with exceptions permitting 174 feet, 77/ as originally proposed by the City Planning Commission staff.

It would appear that the proximity in time to the Ferry Port Development plan before the Commission, together with the similar line-up of parties for and against the project, tended to meld the two projects in the public's mind and may thus have contributed to the apparent groundswell of public antagonism to each project.

Balancing Conservation and Development

As these controversies indicate, the Commission is constantly balancing conservation goals against development goals. Many conservationists like the Sierra Club's Dwight Steele and Save San Francisco Bay Association's Barry Bunshoft feel the Commission is moving increasingly toward an accommodation with developers, 78/ but Chairman Lane is quick to point out that the Commission by statute has a developmental as well as a conservationist role. 79/

On the other side of the fence, many developers and municipalities feel that the Commission leans too far in the direction of conservation. This is clearly the view held by a good part of official San Francisco. Because of "misguided priorities" at best, one administrator in that city's Planning Department charges, the Commission is over concentrating on San Francisco to the detriment of both that city's waterfront and the rest of the Bay, which is being neglected. According to R. Spencer Steele, San Francisco's Assistant Director of Planning, the Commission has condemned the San Francisco waterfront to a rotting and dangerous pier system in the name of preservation. At the same time, he contends, the Commission "has been good to developers elsewhere on the Bay." 80/

The same type of attitude is evident in the comments of John H. Tolan, Jr., Deputy Director for Development, Office of the Mayor of San Francisco. Speaking largely in the context of the Ferry Port Plaza controversy discussed earlier, Tolan criticized the Commission for seeking preservation for preservation's sake, forgetting that access, sanitary facilities, recreational facilities, and the like were what "the people" wanted along the Bay. According to Tolan, what was wanted and needed was an activity center, not wilderness. Tolan feels that non-development, especially of "public land" like that involved in Ferry Port Plaza, is "too expensive" to be permitted. San Francisco, he contends, needs such land for revenue-producing purposes. Reiterating that such non-development is, moreover, of too little benefit for too few people, he sees the Commission as presently and

452-329 O - 72 - 9

prospectively continuing in its non-development, conservationist attitude. 81/

These views are echoed by some private developers. David Keyston, Executive Vice-President of Anza-Pacific Development Company, declares that Commission regulation has resulted in a shoreline inferior in every way (economically, environmentally and aesthetically) from what unfettered private development could produce. Keyston appears to be against any and all form of governmental land use control. Although most of Anza-Pacific's properties have been "grandfathered in" and Anza-Pacific has been successful at both of its appearances before the Commission with respect to lands, Keyston's views may be explained by the fact that Anza-Pacific was apparently considering some potentially lucrative tideland purchases which it has forsaken for fear that the necessary filling would not be approved by the Commission--precisely the sort of decision to which conservationists point as one of the Commission's strengths. 82/

Robert Cranmer of Westbay Community Associates also feels the Commission has gone too far toward conservation--has "stopped development." As he sees it, Westbay's 23-mile-long development (discussed below) would have opened up vast portions of the Bay for the people of the area. 83/

Those developers who are least critical of the Commission appear to be those who have been successful in obtaining permits from it. Thus, Phillip Smith, Secretary of Trimont Land Company, considers the Commission's toughness on developers to be an asset, especially for those like Trimont which, he says, molds its developmental decisions in accordance with the Commission's regulations. 84/ Trimont's only major tidelands development, a marine-"boatel"-restaurant complex near Emoryville, won approval from the Commission in July of 1970. 85/ Similar sentiments were expressed by a planner for Leslie Properties, Inc., largest private landholder (40,000 acres) in the Bay area. John Passerello, Chief Regional Planner for Leslie, indicated that his staff, at least, wholly agreed with the concept and practices of the Commission. It turns out that Leslie has largely completed its planned development in the Bay or is "grandfathered in." 86/

Melvin Lane is not particularly impressed with the attacks on the Commission by municipalities. He points out that over the past two years San Francisco has been successful in three-quarters of its fill applications to the Commission--all permitted on an "emergency basis." A

good deal of it is still awaiting development. The cities on the Bay, according to Lane, are jockeying for position to attract shipping. According to Lane, cities like Oakland and San Francisco are preeminent now but have pretty much developed all their available shoreland. Other cities on the Bay, such as Richmond and Benecia, are designated on the Bay Plan as suitable for maritime development, and while they may not be as sophisticated in maritime matters, they are very anxious to develop their capabilities. Allowing development by one city will enable that city to get a competitive edge on another. Therefore, the Commission is going to be in a hassle with San Francisco and other cities no matter what it does or does not permit. 87/

Lane agrees that development is needed to increase enjoyment of certain portions of the Bay, but his response to both private and public developers is that this should take place without any filling of the Bay. Unfortunately, all the plans turned down thus far contemplated a good deal of filling. 88/

The Actual Impact of the Commission

Measured in actual results, the Commission's impact has undoubtedly been substantial. There is no way to predict exactly what would have happened by now if the Commission had not been created, but it is generally known that a number of the large landowners in the Bay area were studying massive development proposals involving the filling of large tracts in the Bay. 89/ Since the creation of the Commission these proposals have remained dormant. A prime example is the failure of Westbay Community Associates to develop and redevelop 23 miles of Bay land for a combination of commercial and industrial uses. 90/ The development, which would have taken over 20 years to complete, was stopped in 1969 when the Commission denied permits on the ground it was contrary to the Bay Plan. 91/

In addition, Executive Director Joe Bodovitz suggests that extensive filling would have been undertaken for both major airports, for numerous garbage dumps, for an extensive addition to the Port of Oakland, and for development of some 2,500 acres of tidelands owned by the Santa Fe Railway. 92/

To say that this development was "stopped," however, merely raises a new question. Did the closing of the Bay to developers merely increase the pressure on, for example,

the natural resources of the Carmel Valley? Do limitations on new office buildings in San Francisco encourage further sprawl in San Jose?

Of course the Commission has no answer to these questions because it was never asked to consider them. The Commission's planning, though skillful and articulate, considered only the relatively direct impact of development on or near the Bay and did not examine all of the regional implications. It can be argued that the Commission is really just one more special district, focusing on limited goals and on a limited portion of the region, and entitled to as much criticism from political science purists as, e.g., the New York Port Authority.

But realistically, could the Commission have accomplished its goals any other way? Was it essential to focus on the Bay, with its high degree of visibility and imageability and a limited number of easily perceived issues regarding it, in order to obtain public support for the Commission's creation? Is it inevitable that a more comprehensive approach ends in a result as sterile and uninspiring as ABAG's regional plan? Are limited plans that work better than comprehensive plans that don't?

The Commission's success to date inevitably raises the question of whether it should try to capitalize on its success so that it may be transformed into a more comprehensive regional entity? Fear of just such a result caused the Association of Bay Area Governments, the existing regional planning agency for the area to oppose the creation of an independent Bay Commission. 93/ Melvin Lane, current chairman of the Commission, thinks an expansion to include other purposes would, as he sees it, result in the end of BCDC as it presently exists. He sees the Commission as continuing to set broad parameters around local government powers rather than preempting them. 94/ The problem, according to Lane, is one of technical competence and time, whether it is a matter of solid waste disposal regulation (which Governor Reagan would apparently like to place with the Commission) or open space management. 95/ Lane feels that if the Commission were forced to undertake responsibility for these and other programs it would have to hire administrators to make most of its decisions, and the Commission itself would tend to become a rubber-stamp body. 96/

Various proposals for regional government in the Bay area have been considered, and the proper relationship that the Bay Commission should bear to an overall regional

government has frequently been debated. 97/ The Commission has not taken any stand on any of the regional government bills that have been proposed in the California legislature nor on what the proper relationship of the Commission to regional government might be. 98/ A bill creating a Bay Area Regional Government with certain governmental powers has passed the California Assembly and is currently pending in the Senate, but this bill exempts the Commission from its provisions. 99/

To date the Bay Commission has been remarkably successful. It has faced the powerful development interests and traditionally sacred concepts of home rule and emerged with relatively few scars. Its opponents, however, are down but not out, as the Ferry Port Plaza suit and the Oakland Bay fill controversy amply demonstrate; if the conservation groups lose interest or the legislature ceases to give the Commission strong support, they lie ready to pounce. The City of San Francisco's strong social and economic impetus for redevelopment of its port area is proving to be the first major battleground on which the Commission will be tested.

FOOTNOTES

1/ Note 55 CALIF. L.R. 728 (1967).

2/ See E. Jack Schoop and John E. Hirten, "The San Francisco Bay Plan: Combining Policies with Police Power," AIP JOURNAL, January, 1971; Note, "Saving San Francisco Bay: A Case Study on Environmental Legislation," STAN. L.R. 349 (January, 1971).

3/ San Francisco Bay Conservation and Development Commission, San Francisco Bay Plan (1969).

4/ See California Government Code §66600, et seq.

5/ See, 23 STAN. L.R. at p. 362.

6/ See, generally, §66610. The Deputy Director of the Commission believes the Commission's permit-issuing powers should be extended to a broader area. Compare the bill to create the California Coastal Conservation and Development Commission presented without success to the 1970 California legislature (Assembly Bill No. 640) which would have granted that Commission jurisdiction for an area one mile back from the shoreline.

7/ §66632(f).

8/ §66632.4. In a number of instances the Commission has induced developers to provide greater public access to the Bay in connection with projects built within the shoreline band. See 1970 Annual Report San Francisco Bay Conservation and Development Commission, at p. 7.

9/ §66632(f).

10/ §66632(b).

11/ See Administrative Regulations of Bay Conservation and Development Commission, §10311-13 (November 12, 1970).

12/ §66632(a).

13/ 1970 Annual Report, p. 5. In the 1970 legislative session the California legislature adopted Senate Joint Resolution No. 35 requesting all federal agencies to cooperate with the Commission by submitting all plans for filling, dredging, shoreline construction to the Commission for review.

14/ Cf. The American Law Institute, Model Land Development Code, T.D. #2, pp. 26-30.

15/ See §§66630.1, 66631 and 66652.

16/ Administrative Regulations of the BCDC, op. cit.; the administrative regulations were adopted by the Commission in October, 1970 and will be printed in the California Administrative Register as Division 5 of Title 14 of the California Administrative Code.

17/ Interview with Joseph Bodovitz, Executive Director, San Francisco Bay Conservation and Development Commission, September 1, 1971.

18/ 1970 Annual Report, at p. 7.

19/ The executive director is allowed to issue permits for minor repairs or improvements under §66632(f). See 1970 Annual Report, at p. 8.

20/ Interview with Alvin Baum, Jr., Deputy Director, San Francisco Bay Conservation and Development Commission, March 16, 1971.

21/ Interview with Alvin Baum, Jr., March 15, 1971.

22/ See T. J. Kent, OPEN SPACE FOR THE SAN FRANCISCO BAY AREA 20 (Institute of Governmental Studies, University of California, Berkeley, 1970).

23/ Interview with Joseph Bodovitz, September 1, 1971.

24/ Barry Bunshoft of Save San Francisco Bay Association; Dwight Steele, Sierra Club Project Coordinator for San Francisco Bay (1971).

25/ §66620.

26/ Interview with Alvin Baum, Jr., March 15, 1971.

27/ Interview with Rudy Platzak, Planning Director, ABAG, June 15, 1971.

28/ Interview with Alvin Baum, Jr., March 15, 1971.

29/ Association of Bay Area Governments, REGIONAL PLAN 1970: 1990, SAN FRANCISCO BAY REGION (1970).

30/ Interview with Joseph Bodovitz, September 1, 1971.

31/ Interview with Alvin Baum, Jr., March 15, 1971.

32/ Interview with Joseph Bodovitz, September 1, 1971.

33/ San Francisco Chronicle, January 8, 1971. Interview with Norman J. Lind, Planning Director, City of Oakland, June 22, 1971.

34/ San Francisco Chronicle, September 28, 1970. Interview with Norman J. Lind, June 22, 1971. BCDC Minutes of January 1, 1971.

35/ BCDC Minutes of October 1, 1970.

36/ BCDC Minutes of January 7, 1971.

37/ San Francisco Chronicle, January 8, 1971. San Francisco Chronicle, September 28, 1970. Interview with Norman J. Lind, June 22, 1971.

38/ Interview with Norman J. Lind, June 22, 1971. BCDC Minutes of January 7, 1971.

39/ BCDC Minutes of January 7, 1971.

40/ San Francisco Chronicle, February 5, 1971. Interview with Norman J. Lind, June 22, 1971. BCDC Minutes of January 21, 1971.

41/ San Francisco Chronicle, February 5, 1971.

42/ City of Oakland inter-office letter from Oakland Director of Public Works to Oakland City Manager, dated February 8, 1971.

43/ Interview with Norman J. Lind, June 22, 1971.

44/ See San Francisco Bay Plan Supplement, pp. 462-76 (1969).

45/ 11 Cal. App. 3rd 557, 89 Cal. Rptr. 897 (1970).

46/ Id., at p. 899.

47/ Id.

48/ Id., at p. 905.

49/ Id.

50/ Id., at p. 906.

51/ Amended Complaint No. 688-659, filed April 15, 1971. BCDC Minutes of December 3, 1970.

52/ Interview with John H. Tolan, Deputy for Development, June 22, 1971; interview with Melvin B. Lane, Chairman, San Francisco Bay Conservation and Development Commission, June 23, 1971.

53/ California Opinion of the Attorney General (No. 70/121) dated October 15, 1970. BCDC Minutes of September 3, 1970, regarding draft regulation 10445, "Rule of Equivalencies":

> "(a) When a project in any area not designated for a priority water-related use involves both placing of fill (including pilings and structures built on pilings) and also enlarging of the Bay by extracting materials (including the removal of piers and structures built on pilings), then both the extracting of materials and the placing of fill must be consistent with all relevant San Francisco Bay Plan policies except that if the proposed fill, including the area to be covered by structures built on pilings, does not exceed in area the proposed addition to the Bay surface due to extraction of materials (including the removal of piers and structures built on pilings), then the fill may be used for any purpose, whether or not water-related, that does not adversely affect enjoyment of the Bay and its shoreline by residents, employees, and visitors within the fill area itself or within adjacent areas of the Bay and shoreline.
>
> "(b) The Commission shall, in approving any fill pursuant to paragraph (a) of this section, impose reasonable terms and conditions as provided in subdivision (f) of Government Code Section 66632, to assure that the approved project will comply with the San Francisco Bay Plan.
>
> "(c) If the fill proposed for approval under this section is solid fill of any type, including but not limited to dirt, sand, or debris, then the corresponding enlarging of the Bay must involve the dredging or excavation of areas that are not presently subject to tidal action, and are of at least equivalent surface area and equivalent volume. If the fill proposed for

approval under this section consists of pilings or structures built on pilings, then the equivalent enlargement of the Bay may involve either such dredging or excavation, or the removal of pilings or structures built on pilings. But solid fill may not be permitted to the extent that the proposed enlargement of the Bay involves only removal of pilings or structures built on pilings."

54/ Id., San Francisco Chronicle, November 4, 1970, at p. 11.

55/ San Francisco Chronicle, Editorial of November 19, 1970. BCDC Minutes of December 3, 1970; the minutes disclose lengthy presentations made by the staff, summarizing the pros and cons of the development, together with public statements by a wide range of individuals both for and against granting the permit application.

56/ Complaint, Case No. 628-659, filed March 3, 1971. San Francisco Chronicle, March 4, 1971, at p. 2.

57/ Interview with Alvin Baum, Jr., June 21, 1971.

58/ Interview with Warren Haight, Wendell Brooks and George Yim of Oceanic Properties, Inc., June 9, 1971.

59/ Interview with John H. Tolan, June 22, 1971.

60/ Telephone conversation with Alvin Baum, Jr., August 18, 1971.

61/ "a. FILLS IN ACCORD WITH BAY PLAN. A proposed project should be approved if the filling is the minimum necessary to achieve its purpose, and if it meets one of the following five conditions:

"(1) The filling is in accord with the Bay Plan policies as to the Bay-related purposes for which filling may be needed (i.e., ports, water-related industry, and water-related recreation) and is shown on the Bay Plan maps as likely to be needed; or

"(2) The filling is in accord with Bay Plan policies as to purposes for which some fill may be needed if there is no other alternative (i.e., airports, roads, and utility routes); or

"(3) The filling is in accord with the Bay Plan policies as to minor fills for improving shoreline appearance or public access; or

"(4) The filling would provide on privately-owned property for new public access to the Bay and for improvement of shoreline appearance--in addition to what would be provided by the other Bay Plan policies--and the filling would be for Bay-oriented commercial recreation and Bay-oriented public assembly purposes, with a substantial part of the project built on existing land. The Bay agency should issue permits under this criterion provided:

"(a) The proposed project would limit the use of area to be filled to: (i) public recreation (beaches, parks, etc.), and (ii) Bay-oriented commercial recreation and Bay-oriented public assembly, defined as facilities specifically designed to attract large numbers of people to enjoy the Bay and its shoreline, such restaurants, specialty shops, and hotels.

"(b) The proposed project would be designed so as to take advantage of its nearness to the Bay, and would provide opportunities for enjoyment of the Bay in such ways as viewing, boating, fishing, etc., by keeping a substantial portion of the development, and a substantial portion of the new shoreline created through filling, open to the public free of charge (though an admission charge could apply to other portions of the project).

"(c) The proposed private project would not conflict with the adopted plans of any agency of local, regional, state, or federal government having jurisdiction over the area proposed for filling, and would be in an area where governmental agencies have not planned or budgeted for projects that would provide adequate access to the Bay.

"(d) The proposed project would either provide recreational development in accordance with the Bay Plan maps or would provide additional recreational development that would not unnecessarily duplicate nearby facilities.

"(e) A substantial portion of the project would be built on existing land, and the project would be planned to minimize the need for filling. (For

example, all automobile parking should, wherever possible, be provided on nearby land or in multi-level structures rather than in extensive parking lots.)

"(f) The proposed project would result in permanent public rights to use specific areas set aside for public access and recreation; these areas would be improved at least by filling to finished grade and by installation of necessary basic utilities, at little or no cost to the public.

"(g) The proposed project would, to the maximum extent feasible, establish a permanent shoreline in a particular area of the Bay, through dedication of lands and other permanent restrictions on all privately-owned and publicly-owned property Bayward of the area approved for filling.

"(h) The proposed project would provide to the maximum extent feasible for enhancement of fish and wildlife resources in the area of the development."

62/ "(5) The filling would provide on privately-owned or publicly-owned property for new public access to the Bay and for improvement of shoreline appearance --in addition to what would be provided by the other Bay Plan policies--and the filling would be limited to replacement piers for Bay-oriented commercial recreation and Bay-oriented public assembly purposes, covering less of the Bay than was being uncovered. The Bay agency should issue permits under this criterion provided:

"(a) The proposed replacement fill in its entirety, including all parts devoted to public recreation, open space, and public access to the Bay, would cover an area of the Bay smaller in size than the area being uncovered by removal of piers (pile-supported platforms), and those parts of the replacement fill devoted to uses other than public recreation, open space, and public access would cover an area of the Bay no larger than 50 per cent of the area being uncovered (or such greater percentage as was previously devoted to such other uses that were destroyed involuntarily, in whole or in part, by fire, earthquake, or other such disaster, and will be devoted to substantially the same uses).

"(b) The volume (mass) of structures to be built on the replacement pier (pile-supported plat-

form) would be limited to the minimum necessary to achieve the purposes of the project.

"(c) The replacement fill would be limited to piers (pile-supported platforms), rather than earth or other solid material, and, wherever possible, a substantial portion of the replacement project would be built on existing land.

"(d) The pier (pile-supported platform--not a bridge) to be removed from the Bay must have:

"(i) been destroyed, involuntarily, in whole or in part, by fire, earthquake, or other such disaster, or

"(ii) become obsolete through physical deterioration, or

"(iii) become obsolete because changes in shipping technology make it no longer needed or suitable for maritime use.

If the platform itself, or the structures on it, have become obsolete, but the pilings that support the platform are structurally sound, consideration must be given to using the existing pilings in any replacement project.

"(e) The proposed project must be consistent with a comprehensive special area plan for the geographic vicinity of the project, a special area plan that the Commission has determined to be consistent with the policies of the San Francisco Bay Plan, except that this provision would not apply to any project involving replacement of only a pier that had been destroyed involuntarily.

"(f) The proposed project would involve replacement fill and removal of material in the same geographic vicinity (as set forth in the applicable special area plan).

"(g) The proposed replacement pier would not extend into the Bay any farther than (i) the piers (pile-supported platforms) to be removed from the Bay as part of the project, or (ii) adjacent existing piers.

"(h) The proposed project would limit the use of the replacement pier to: (i) public recreation (beaches, parks, etc.), and (ii) Bay-oriented commercial recreation and Bay-oriented public assembly, defined as facilities specifically designed to attract large numbers of people to enjoy the Bay and its shoreline, such as restaurants, specialty shops and hotels.

"(i) The proposed project would be designed so as to take advantage of its nearness to the Bay, and would provide opportunities for enjoyment of the Bay in such ways as viewing, boating, fishing, etc., by keeping a substantial portion of the development, and a substantial portion of the new shoreline created on the replacement pier, open to the public free of charge (though an admission charge could apply to other portions of the project).

"(j) The proposed project would not conflict with the adopted plans of any agency of local, regional, state, or federal government having jurisdiction over the area proposed for the replacement piers, and would be in an area where governmental agencies have not planned or budgeted for projects that would provide adequate access to the Bay.

"(k) The proposed project would either provide recreational development in accordance with the Bay Plan maps or would provide additional recreational development that would not unnecessarily duplicate nearby facilities.

"(l) The project would be planned to minimize the need for filling. (For example, all automobile parking should, wherever possible, be provided on nearby land or in multi-level structures rather than in extensive parking lots.)

"(m) The proposed project would result in permanent public rights to use specific areas set aside for public access and recreation; these areas would be improved at least to finished grade and by installation of necessary basic utilities, at little or no cost to the public.

"(n) The proposed project would, to the maximum extent feasible, establish a permanent shoreline in a particular area of the Bay, through dedication

of lands and other permanent restrictions on all privately-owned and publicly-owned property Bayward of the area approved for piers.

"(o) The proposed project would provide to the maximum extent feasible for enhancement of fish and wildlife and other natural resources in the area of the development, and in no event would result in net damage to these values."

63/ Id.

64/ Interview with Alvin Baum, Jr., June 21, 1971.

65/ Assemblyman John T. Knox has written the Commission opposing the plan amendment by letter dated May 19, 1971. Others critical of the amendment: Barry Bunshoft of Save San Francisco Bay Association (interview in June, 1971); Dwight Steele, Sierra Club Project Coordinator for San Francisco Bay (interview in June, 1971). For an opposing view, Hans Feibush, former BCDC Commissioner (1965-1969) and former consultant to Oceanic Properties, and member of Save San Francisco Bay Association, does not consider the proposed amendment a sell-out to development interests in San Francisco, primarily because they will not authorize any new fill [in fact, the result should be a net reduction in fill].

66/ Richard L. Meier, "Interpretation: Insights Into Pollution," AIP JOURNAL, July, 1971, at pp. 211, 216.

67/ Interview with Joseph Bodovitz, September 1, 1971.

68/ Interview with Melvin B. Lane, June 23, 1971.

69/ Id.

70/ John H. Jacobs, "Will They Leave the Heart in San Francisco," TOWN AND COUNTRY PLANNING 1971, at pp. 170-171.

71/ Id., at p. 170.

72/ Letter of Supervisor Robert Boas to Dianne Feinstein, President of the San Francisco Board of Supervisors, dated September 11, 1970.

73/ Id.

74/ "550-Foot Waterfront Height OK'd," San Francisco Chronicle, September 11, 1970.

75/ "Board Delays Action on Waterfront Height Limit," San Francisco Chronicle, November 17, 1970; "City Hall Clash on Steel Sites," San Francisco Chronicle, September 18, 1970.

76/ Id.

77/ Letter from Mike McCracken, dated August 5, 1971.

78/ Interviews in June, 1971.

79/ Interview with Melvin Lane on June 23, 1971. A.B. 1057, currently before the California Legislature, would put responsibility for open-space regulation in an independent agency which, according to Alvin Baum, Jr., Deputy Director of BCDC, would eventually be merged with the Commission.

80/ Interview with R. Spencer Steele, Assistant Director of Planning for the City of San Francisco, June 1, 1971.

81/ Interview on June 22, 1971. Clearly much of the criticism coming from San Francisco officials is a result of their defeat in the Ferry Port Development application. Certainly the depth to which relations have sank between the City and BCDC can be measured from the following quotation from a letter, dated June 2, 1971, addressed to the Executive Director of the BCDC from the Director of Planning in San Francisco, concerning the proposed Bay Plan amendments to permit some replacement fill in the Bay:

"I have reviewed the revised Bay Plan amendments and can only say that, with minor exceptions, the revisions are as poorly drafted as the original and will result in much confusion. I am disappointed that you did not see fit to discuss the difficulties in the original language, as well as that now proposed, with my staff, given your Commission's reluctance to listen. Our considerable experience in regulatory work might have been helpful.

"Given my past experience in attempting to present comments before your Commission, it would seem pointless to appear again to offer what I consider to be

constructive criticism. I would once again indicate my approval of the general concept of the amendments but disagree with your specific language."

82/ Interview with David Keyston, Executive Vice-President, Anza-Pacific Development Company, June 1, 1971.

83/ Interview on June 23, 1971, in San Francisco.

84/ Interview with Philip Smith, June, 1971.

85/ San Francisco Chronicle, July 23, 1970, at p. 5.

86/ Interview with John Passarello, June 17, 1971.

87/ Interview with Melvin B. Lane, June 23, 1971.

88/ Id.

89/ See 23 STAN. L.R. 358-59.

90/ General Development Plan, Westbay Community Associates (June, 1968). Cf. Fellmeth, et al., POWER AND LAND IN CALIFORNIA (Preliminary Draft, 1971), at IV-149-50.

91/ Interview with Robert Cranmer, June 23, 1971.

92/ Interview with Joseph Bodovitz, September 1, 1971.

93/ T. J. Kent, op. cit., at p. 20.

94/ Interview with Melvin B. Lane, June 23, 1971.

95/ Id.

96/ Id.

97/ San Francisco Bay Plan Supplement, op. cit., at p. 501 ff. See Note, 55 CALIF. L.R. 728, 757-69 (1967); Association of Bay Area Governments, REGIONAL PLAN 1970: 1990, SAN FRANCISCO BAY REGION, at pp. 31-32 (1970). T. J. Kent, op. cit., at p. 21.

98/ Interview with Alvin Baum, Jr., March 15, 1971.

99/ Interview with Joseph Bodovitz, September 1, 1971.

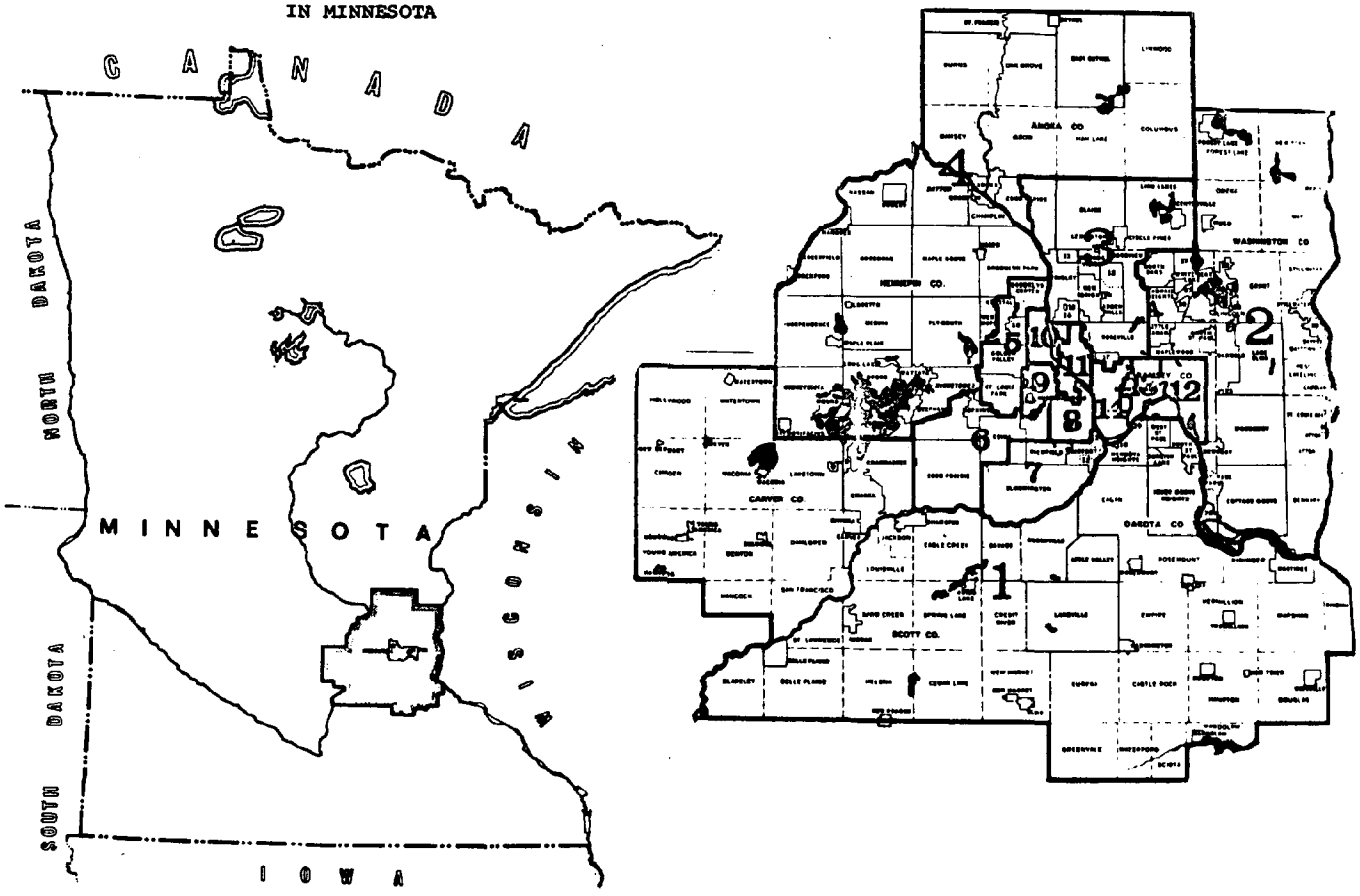
452-329 O - 72 - 10

TWIN CITIES METROPOLITAN COUNCIL

The Minnesota Legislature created the Metropolitan Council of the Twin Cities Area (hereinafter simply Metropolitan Council or Council) in 1967, as an administrative agency to coordinate the planning and development of the metropolitan area which surrounds Minneapolis and St. Paul. 1/ The Council's jurisdiction is a 3,000-square-mile, seven-county area that includes 1.8 million people (nearly half the population of the State of Minnesota), in 320 separate but overlapping governmental units, of which 133 are incorporated cities or villages. 2/

The Council is specifically directed to deal with the necessity for consolidating common services of local government units, in a manner consistent with the public interest. 3/ In order to implement these directives, the Act of 1967 requires that certain plans and policies

LOCATION OF THE TWIN CITIES METROPOLITAN AREA IN MINNESOTA



(especially plans of independent functional boards and agencies) be submitted to the Council for review. If the Council fails to approve such a plan, its execution is indefinitely stayed. The Council is also required to make studies relative to certain municipal and metropolitan problems, a function which is largely inherited from a previously created Metropolitan Planning Commission, the functions of which the Metropolitan Council has since wholly absorbed. 4/

Thus, while the principal function of the Council is to guide the growth of the metropolitan region through its own planning and review of the plans of functional boards and commissions (and, to some extent, municipalities), in fact it appears to have considerable control over the region through its power to control the plans for certain key types of development. The Council's principal standard is a comprehensive plan called the Metropolitan Development Guide, which it is the Council's responsibility to prepare. 5/ Other legislation to supplement the Council's functions has been passed in succeeding sessions of the Minnesota Legislature and is discussed in later portions of this Chapter.

History and Circumstances of Adoption

The Metropolitan Council was initially created in 1967 in response to severe water well pollution caused by inadequate local sewer systems. As in many metropolitan regions, Minneapolis-St. Paul experienced a housing boom after World War II. For financial as well as geological reasons, developers relied primarily on individual wells and septic systems for water and sewer service. By 1959, nearly 400,000 persons were using such systems. 6/ When in 1959 a suburban housewife called the state health department to report that a glass of water just drawn from a tap had a head on it, like a glass of beer, inspections disclosed that half the wells were recirculating sewage from septic tanks. 7/ While it was conceivable for some municipalities to move immediately to provide pure water by means of deep wells, 8/ it proved impossible to construct individual central sewer systems without intergovernmental cooperation. 9/ Unfortunately, bills to create an areawide sanitary district for that purpose died after "terrible wrangles" in the legislature in 1961, 1963, 1965, and 1967. 10/

Meanwhile, a host of other problems cried for areawide solution. After considerable study, the local Citizens League issued a series of reports in 1966 and 1967

enumerating area functions and services being inadequately provided. Among them were: sewage disposal, public transporation, highway construction, parks and open space provisions, area zoning, water supply, air pollution, police protection, annexation and incorporation, debt financing, libraries, the ubiquitous Dutch Elm disease--and a metropolitan zoo! 11/ The Citizens League noted further that besides the relatively ineffective bodies formerly created to deal with these problems, the only areawide comprehensive planning authority for the region was the strictly advisory Metropolitan Planning Commission, which had been engaged from its inception in 1957 in planning only, preparing a development guide for the seven-county area. The league noted further that new responsibilities and various federal funding programs would soon fall on the Commission--something clearly never contemplated by the legislature when it created that body. 12/

This is not to say that political resistance to a metropolitan governmental body evaporated even as environmental and other crises developed. The problem of creating a consensus among the various urban, suburban and rural interests in the metropolitan area was far from easy. 13/ The Council today is neither as strong as its proponents would like, nor as weak as its opponents sought to make it.

What the Citizens League proposed--and what the legislature finally accepted in the closing weeks of the 1967 legislative session--was the creation of a metropolitan organization to deal with metropolitan planning, review requests for federal aid, and exercise policy control over major decisions relating to metropolitan functions. 14/ The point was not to wholly supersede local government units, but to create an areawide council capable of solving those problems which could not be effectively dealt with at the local level. The actual legislative draft was prepared by the Citizens League in conjunction with the Upper Midwest Research Council. 15/ The Metropolitan Council proceeded immediately to organize itself, absorb the Planning Commission, hire an executive director, and commence functioning.

In the 1969 legislative session, after the Council proved itself by formulating a plan for alleviating the sewage and water crises which were the catalyst that brought it into being, the legislature responded with a Council-backed legislative package consolidating and extending the Council's policy-making and review functions over sewage and waste disposal facilities construction and airport location. 16/ Further particulars dealing with the history

and circumstances of the creation of the Metropolitan Council can be found in Stanley Baldinger's exhaustive study, Planning and Governing the Metropolis, The Twin Cities Experience. 17/

One of the clearly land use-oriented components of this package, the Airport Zoning Act, was designed to control development around major airports. Under its provisions, the Council prepares criteria and guidelines for development controls which must be implemented by municipalities in their local zoning ordinances, subdivision controls, and other similar land use control ordinances. 18/ This legislation was apparently passed at least in part as a result of the failure of the Metropolitan Airports Commission to exercise its power to zone land uses for one mile beyond the boundaries of any airport. The Airports Commission, according to the Citizens League, had always preferred either condemnation of land uses incompatible with an airport or persuasion of recalcitrant municipalities, apparently in order to avoid testing its zoning powers which some members of the Airports Commission thought might be declared takings in their exercise. 19/

How the Council is Designed to Function--An Overview

The 1967 Act provides for a 15-member council, 14 appointed by the governor "on a nonpartisan basis, after consulting with all members of the Legislature from the area comprising the council district for which the member is to be appointed." 20/ The fifteenth member is the chairman, again appointed by the governor, this time at-large. The statute requires that, "He shall be a person experienced in the field of municipal and urban affairs with administrative training and executive ability." 21/

The major device for achieving coordination in the metropolitan region is the system of mandatory referrals to the Council required by statute. There are three types of plan referrals:

1. From independent boards, commissions and agencies.

2. From municipalities and counties. 22/

3. From an agency in the region applying for federal funds.

In terms of areawide land use controls, the most important of the above compulsory reviews is the one pertaining to independent commissions, boards and agencies. Most of these boards, commissions and agencies cannot act except pursuant to a comprehensive plan. Furthermore, their functions cannot be exercised by any other governmental entity. Each comprehensive plan of such commission, board or agency which the Council determines to have an areawide, multi-community, or substantial metropolitan development effect must, in turn, be submitted to the Council before any action is taken to put such a plan into effect. The Council has 60 days in which to review the plan, after which it can presumably be implemented. But if "the Council finds that a plan is inconsistent . . . with its own comprehensive guide for the metropolitan area," or detrimental to the orderly and economic development of the metropolitan area, "it may suspend the plan 23/ indefinitely." The affected agency may then appeal to the "entire membership" of the Council for a public hearing and finally to the legislature at its next session. 24/ It is this review function into which the Council has directed the bulk of its energies. 25/

The Council also is empowered to review the long term comprehensive plans ". . . or any matter which has a substantial effect on metropolitan area development" of municipalities and counties in the seven-county region. While the Council may suspend action on any such plan for a period of 60 days following submission, such submission is only for its "comment and recommendation." Where there is a dispute among governmental units concerning such a plan, the Council may also attempt to mediate. More it may not do. 26/

The other key aspect of the Council's functions is the preparation of the Metropolitan Comprehensive Development Guide. The Guide is to be "a compilation of policy statements, goals, standards, programs, and maps prescribing guides for an orderly and economic development, public and private, of the metropolitan area." The Council in the preparation of the Guide is specifically directed to consider the development and impact of such matters as land use, parks, open space land needs, airports, highways, transit facilities, public hospitals, libraries, schools and other public buildings. 27/ It was anticipated that the Council would use a previous draft prepared in part by the Planning Commission to help formulate its revision of the Guide. 28/ It is this Guide against which the Council evaluates those plans and other matters submitted for its review.

Finally, under both the 1967 Act and pertinent federal legislation, the Council is empowered to review applications for federal funds and to comment concerning each application's conformity to metropolitan comprehensive planning. Again, the comments are advisory only. 29/ Further powers granted the Council under the 1967 Act are coordination of civil defense, data collection, general research on a wide range of metropolitan problems, and preparation of certain reports. 30/

The Council is in part funded by an authorized tax levy of one-half mill on all taxable property within the seven-county area of its jurisdiction. 31/ The remainder of its budget comes from federal funds, many of which are earmarked for specific planning projects. 32/

The Council and the Commissions

The most important plans submitted for review are those of the independent commissions, boards and agencies which construct and operate facilities serving the entire region. By the end of 1970 the Commission had reviewed 20 plans of such agencies. Only five secured unqualified approval as submitted. 33/

In order to implement the Council's review functions concerning agencies, boards and commissions, the legislature in 1969 passed a series of acts giving the Council powers over a number of such bodies by providing for Council approval of their membership and finances as well as their plans. 34/ Such agencies thus become for all practical purposes the functional arm of the Council, carrying out its broad plans as depicted in the Development Guide. However, in 1971 the legislature refused to grant to the Council certain powers and functions it sought to increase and consolidate its growing metropolitan powers.

One such agency created under the 1969 legislation is the Metropolitan Sewer Board. The Board was created so that, together with the Council, it "can take over, acquire, construct, operate, and maintain all interceptions and treatment works necessary for the collection, treatment and disposal of sewage in the metropolitan area." The seven-man Board is "established as an agency of the Council," which appoints its members. 35/ The Council is assigned the responsibility of carrying on a continuing, long range planning program with respect to sewage

collection, treatment and disposal. 36/

The Board is then authorized to acquire all interceptors and treatment works needed to implement the Council's plan. Indeed, the Board may require such a transfer of ownership from any local government unit, and the employees of such system become Board employees after the transfer date. 37/ Thus the Council, through the Board, has complete control of sewer facilities in the metropolitan region. The sewer plan of the Metropolitan Sewer Board, discussed earlier, which the Council took part in formulating, was the most immediate and pressing of the plan reviews. As of January 1, 1971, the Sewer Board has taken over 30 existing district and municipal treatment plants, and 320 miles of connecting interceptors. Moreover, 70 development projects are either under construction or in preparation, including the building of two treatment plants on the Minnesota River. 38/

Relations between the Metropolitan Sewer Board and the Council have generally been good. But even the oldest of the functional agencies apparently resents the Council's attempt to become more involved in the implementation of its plans rather than their coordination. 39/ There was apparently some dissension over the contents of the Sewer Board's recent five-year capital improvement program. According to Richard Dougherty, Chief Administrator of the Board, the Council has been inquiring into the details of some of the Board's supporting studies, rather than confining itself to merely ascertaining that a study was in fact made. 40/

In all fairness, it is worth noting that the Sewer Board has had its own problems with community relations outside the immediate metropolitan region. However, according to Dougherty, these should be alleviated by the establishment of a Speaker's Bureau to represent the Board at local council meetings. 41/ On a technical level, it would appear that the Sewer Board is accomplishing the environmental clean-up that it was created to do. According to Dougherty, the B-coli bacteria count on the Mississippi River is the lowest it has been since 1934. 42/

The Metropolitan Park Board was similarly created in 1969 to acquire and manage park property (especially open space) in accordance with a Council comprehensive open space and recreation plan. Again, the Council was to appoint members of the Board and approve its budget. 43/ Unfortunately, the Act was invalidated by court decision later in 1969, and the Board has subsequently acted in a

purely advisory capacity to the Council. 44/

Legislation was again introduced in the 1971 session to make the advisory Metropolitan Park Board into a public corporation with a separate staff organization. Such a public corporation would have had the power to independently contract with state, local and federal agencies. 45/ Under such contracts the Metropolitan Park Board would have assumed control over park space owned by any metropolitan area governmental unit. It was further intended that the Board have power to acquire parks and open space by eminent domain, if necessary, in accordance with the Metropolitan Park Reserve Plan or the Metropolitan Open Space Plan. Furthermore, each local governmental unit in the metropolitan area would have been required to adopt a comprehensive park plan subject to both Metropolitan Park Board and Metropolitan Council review. 46/

However, the bill failed to pass by one vote. It has been suggested that the failure to pass was due to general resistance to extension of Metropolitan Council authority in the 1971 session (discussed infra) and the opposition of the Metropolitan Inter-County Council (organized as a political counterweight to the Metropolitan Council) which favors county control of parks. It is hoped that some sort of compromise can be worked out in future sessions. 47/

According to Gerard Hegstrom of the Park Board, continued advisory status would seriously hinder the activities of the Board. Apparently pressures of land development in the metropolitan region are very great, and Hegstrom feels the need for Board powers of acquisition and the necessary funds therefor, so that adequate open space can be acquired before it all disappears. Presently the Board relies heavily on municipal and county acquisition programs which, according to Hegstrom, have been sporadic. Some local government units are not interested; others lack funds. There is apparently some reluctance on the part of outlying counties to spend money for extensive open space acquisition for what they see as parkland for the urbanites. 48/

By legislative act the Metropolitan Airports Commission is solely responsible for the planning and siting of airports in the metropolitan area. However, it is required to prepare comprehensive plans for such siting and location--which plans must be approved by the Metropolitan Council before the airport can be built. 49/ The formula for control is simple, but effective: No construction without a plan, and that plan requires Council approval.

The Council also must formulate guidelines for land use within the area around the site. Local governmental units must then obtain Council approval for all land use regulations within that radius. 50/ The Council has no functional Board to execute its plan here, however. Responsibility for acquisition and management of the site theoretically remains with the Airports Commission. The Council has no control over either the budget or membership of the Metropolitan Airports Commission. Nor does it have any affirmative power of site location for an airport. 51/

The Council's authority through its review power is virtually absolute, however. In fact, perhaps the most publicized review ever made by the Council was that of the Metropolitan Airports Commission plan to construct an airport at Ham Lake. The Council suspended that plan in April of 1968, first in order to ascertain effects on the region's Jordan Basin water supply, and second because it did not feel that other sites had been adequately analyzed. The Council then received studies concerning fog, air space, accessibility, and ecological impact. The Council again suspended the plan, near the end of 1970, effectively halting all plans for development. 52/

According to Henry Kuitu, Executive Director of the Metropolitan Airports Commission, the Council has seriously overstepped "the bounds of its authority." 53/ Kuitu sees the Council's review functions vis-a-vis the Commission as a determination of whether the Commission's plans fit into the Council's plan for the orderly and economic development of the metropolitan area. According to Kuitu, the Council has gone beyond these issues and attempted to decide whether there should be a second airport at all, and if so, where it should go. Kuitu feels the Council has been unduly influenced by major airlines, at least one of which reportedly favors but one airport in the Twin Cities area, and by its conservationist tendencies which leads the Council to favor airports near "proposed diversified centers" rather than near wildlife and recreational areas, where the Commission would like to see one. Needless to say, Kuitu sees the Council's attempt to seize the initiative in airport sites as a power grab, to spur legislation aimed at eventually eliminating the Metropolitan Airports Commission's autonomy. 54/

Part of the tension between the Council and the Commission could perhaps be eliminated by the expansion of the Council's Development Guide to include a jointly-drafted section on airport site development. Indeed,

according to a member of the Commission's staff, such a joint effort is being made and may be completed in eight to 18 months. 55/

Meanwhile, on August 27, 1971, the Council and the Commission agreed to appoint a joint committee to oversee an airport systems study, in an attempt to "thrash things out with the Council." 56/ Hopefully, a solution will soon be forthcoming. According to Kuitu, the Twin Cities' airport will reach its capacity by 1980, and the lead time necessary to establish a new airport facility is 10 to 15 years. 57/

The Metropolitan Council has similar review functions concerning the Metropolitan Transit Commission, which retains a degree of semi-autonomy similar to that of the Metropolitan Airports Commission. Its plans and budget are reviewable by the Council, but its members are appointed by state and local officials. 58/ That portion of the Development Guide dealing with mass transportation is in fact the result of a joint effort between the Transit Commission and the Council. 59/ Most of the Commission's programs are still in the planning stage, which, according to staff members, is one reason why conflicts with the Council have so far been minimal. The Commission apparently feels, however, that its present degree of autonomy should be retained as long as the Council remains an appointed body. 60/

The Council also has the long range planning burden together with some review powers concerning highway construction. It cannot, however, halt such construction by means of unfavorable review, nor has it any board or agency of its own for operations in this area. 61/

Presently, no one agency has statutory authority to finally coordinate highway transportation in the metropolitan area. For the past two years a voluntary association of affected agencies and governmental units, the Transportation Planning Program, has attempted to provide such coordination. The Transportation Planning Program is made up of affected municipalities, counties, the Council, the Metropolitan Transit Commission, and the State Highway Commission. 62/ Key decisions are apparently made by its Management Committee, consisting of the chairmen of the three agencies noted above, and one official each from the League of Metropolitan Municipalities and the Metropolitan Inter-County Council. 63/ By

agreement among the Program participants, it has been suggested that the Council take prime responsibility in the area of coordinating transportation. 64/ While the Metropolitan Planning Commission has no objection to that proposal, 65/ there is apparently a good deal of resistance on the part of the counties and municipalities that wish to retain a substantial role in transportation planning and see some advantage in the continued dialogue at the Management Committee level among the five interests represented there. 66/

The Council also must approve the comprehensive plan of a state board created in the 1969 legislative package, to plan, acquire, construct and operate a zoological garden (zoo) in the metropolitan area. As with the location of an airport, the Council must approve the site location as well as the general development plan submitted by this board. Otherwise, as with the Metropolitan Transit Commission, the board is wholly independent of the Council both in terms of membership and financing. 67/

Metropolitan Development Guide

All of the functional plans which the Council is required to prepare are to be part of the Metropolitan Development Guide, the preparation of which is a prime Council responsibility under the 1967 Act. Physically, the Guide is a series of segments printed in separate booklets, each dealing with a particular subject to which the Council has directed its efforts. Six such booklets have gone through their public hearings and have been approved by the Council. Three are printed in final form, and three are still in draft. 68/ These six cover the areas of solid waste management, sanitary sewers, parks and open space, transportation, housing, and major centers. 69/ Each segment is divided into parts setting out the long range policies, the system plan, and a development program summary and timetable. 70/

That part of the Guide dealing with sanitary sewers was the first of the segments produced and published, and illustrates the basic concepts behind the Guide. Under long range policies, the Council has articulated twenty-five policy statements under the following general headings: 71/

Multiple Use of Water Resources
Water Quality Control
On-Lot Sewage Disposal
Interim Treatment Works

Priorities for Extending Sewers
Orderly Urban Growth
Governmental Capacity to Serve Urban Development
Protection of Land That Should Not Be Developed
Service Area Boundaries
Adequate Sizing of Facilities for Service Areas
Compatible Development

An example of such policy statements is number 17, under the heading of Priorities for Evaluating Sewers: 72/

> 17. EVALUATE PLANS AND PROGRAMS FOR PROVIDING CENTRAL SEWER SERVICE TO URBAN AREAS ACCORDING TO THE FOLLOWING SET OF PRIORITIES:
>
> FIRST - SERVE EXISTING DEVELOPMENT THAT IS SUBJECT TO IMMEDIATE THREATS TO PUBLIC HEALTH OR SAFETY, OR THAT IS PRODUCING SERIOUS POLLUTION OF NATURAL RESOURCES.
>
> SECOND - SERVE AREAS THAT ARE SCHEDULED TO BE OPENED UP FOR DEVELOPMENT WITHIN FIVE YEARS CONSISTENT WITH OTHER METROPOLITAN DEVELOPMENT POLICIES, GIVING TOP PRIORITY TO HIGHER DENSITIES AND LOWER PRIORITY TO LOWER DENSITY DEVELOPMENT.
>
> THIRD - SERVE REMAINING DEVELOPMENT THAT REQUIRES SEWERS.

There follows a system plan which is divided into four parts: 1. Metropolitan Disposal System - Interceptors, Metropolitan Disposal System; 2. Treatment Works; 3. Peripheral Regions; and 4. Local Collection System. Under each, individual systems are discussed and evaluated, and plans for the region, together with its major problems, are explained. 73/ Finally, the program to be followed in order to meet the objectives listed in the first part is set forth. The metropolitan sewer program is divided into long range and short range objectives, such as, "Eliminate on-lot sewerage facilities in urban areas," and, "Study the up-grading of Spring Lake." Deadlines are set for various groups of objectives. Maps depicting the region and proposed sewage treatment works, service areas and interceptor corridors, together with a list of definitions, are appended at the end. 74/

As the various segments of the Development Guide are drafted and approved it becomes increasingly useful to the Council by providing standards against which the Council can measure the plans of other agencies that are submitted to it for review.

The reactions to the Guide on the part of operating agencies have not been uniformly positive. Richard Dougherty, of the Metropolitan Sewer Board, feels the Guide is altogether too general. He has characterized that portion dealing with sewers as pieces of high school texts on sewers pasted together and labeled "guide." 75/ Likewise, John Jamieson of the Metropolitan Transit Commission reported that the Council staff had sent its revision of the mass transportation section of the Guide to the full Council without waiting for the Commission's drafts, although that portion of the Guide was ostensibly to be a joint effort. 76/ Paul Dow, Executive Secretary of the Metropolitan Section of the League of Municipalities, claims the guides are so vague that no one knows what they mean, nor will they know until the various functional agencies thrash out the details. 77/

However, according to local government officials like William Schwab, Planning Coordinator of Washington County, the functional agencies themselves appear to be uncertain as to the interpretation of the Guide. This has made it difficult for counties and other governmental units to formulate their own programs. 78/ Another criticism has been that the Guide has been put together in a piecemeal fashion, though the critic in this instance appreciated the likelihood of obsolescence if the entire Guide was withheld until all its parts were complete. 79/

Review of Local Governmental Unit Plans

The Council's power to review and in some cases suspend the plans of local governments and their agencies is its most time-consuming job. The vast majority of the plans submitted for review are applications for federal and state grants submitted by local governments, in which the role of the Council is strictly advisory. While it is difficult to measure the effectiveness of the grant review process, the Council staff claims some success. Upon the Council's recommendation, the Southwest Sanitary Sewer District modified its plans for interceptors and plants to oversize both so as to serve a larger area than was originally intended. In another instance, the design of an interchange to grant a municipality access to a major highway was modified through Council review to provide safer traffic patterns. 80/

A much smaller number of comprehensive plans of local governments are submitted for review, and here the staff feels its review has often been quite helpful. An example is the review of the City of St. Louis Park comprehensive plan. At the request of the newly incorporated Village of Golden Valley, a hearing on the plan was held by the Council. It appears that a particularly high density apartment and office development planned by St. Louis Park would considerably overload existing or planned highway facilities in the area, affecting not only Golden Valley but the Villages of Plymouth and Minnetonka as well. Following the hearing, the Council, the state highway department, the affected county housing department, and the four affected municipalities held a series of meetings to consider, among other things, a broader analysis of the area. It was apparent that the proposed development would result in substantial congestion of local highways. Recommendations were made to the municipalities in the area to develop arterial and collector streets patterned to relieve the traffic congestion problem. However, a final action depends on the municipalities in this instance since the Council review and recommendation has no suspensory effect on municipal plans of this nature. 81/

The Council claims total disinterest in local matters except and unless they have a significant regional impact, in which case such matters can be substantively dealt with in the Development Guide and by means of independent agencies. According to the Council, of the existing municipalities, only Minneapolis and St. Paul are large enough to affect the region by what may appear to be local decisions, and only newly incorporating municipalities cause truly regional problems by reason of providing insufficient municipal services and controls (building codes, planning, etc.) to adequately serve residents. 82/ Here, the Council is able to apply considerable pressure without a word of new legislation, simply by refusing to include the recalcitrant municipality in regional sewer extension plans--and precious little development will take place without sewer and water systems.

While the Council appears pleased with its powers of persuasion, delay, or control (for all practical purposes) over aspects of local government planning and development, the local government units themselves are not. 83/ Outlying rural regions in the metropolitan region especially feel they are being used to finance programs with a decidedly urban orientation. These areas view the Council's activities as

reflecting a preoccupation with urban problems--those of the Twin Cities. 84/ In that case, so goes the argument, perhaps the Council's authority ought to be restricted either to an area closer to the Twin Cities or to those matters within the boundaries of the urban areas in the Twin Cities region, excluding unincorporated county territory altogether. 85/

A major problem appears to be one of public relations. The Council is apparently increasingly aware of its role as experimenter in the eyes of the nation's planners, and, according to one critic, increasingly "up-tight" in its attitude toward criticism. The result, according to this critic, is a tendency toward preoccupation with technical aspects of its programs and insufficient effort expended in selling its programs to the people. 86/ As a result, local governmental units feel increasingly isolated from the Council's programs. 87/ This feeling is apparently particularly acute with respect to the counties. 88/ While the Council does maintain close ties with the Metropolitan Inter-County Council and the League of Municipalities, it does not itself maintain contact with local units of government on specific items of planning and implementation. 89/

Moreover, the Council's powers to accomplish certain of its goals by means of its review function with respect to federal funds applications has not been lost on local-government units within the metropolitan area. There is concern that this power will be utilized not only to check incompatible plans and programs at the local level, but also to force affirmative action. According to an official with the League of Municipalities, the Council contemplates giving a low priority to federal funds applications made by any municipality that does not provide for adequate low- and moderate-income housing. 90/ In summary, the charges levied at the Council are that it tries to implement plans or to intrude into detailed planning at the local level. As local-government units understand the Council's role, it should instead coordinate general plans for the region. 91/

Recent Developments in the Legislature

The Metropolitan Council's treatment at the hands of the 1971 session of the Minnesota Legislature can only be described as mixed. On the positive side, the Council-proposed Fiscal Disparaties Bill passed. The bill provides

for the contribution of 40% of each local-government unit's net growth of commercial-industrial valuation after 1971 to the Council. These receipts will be redistributed to the units, primarily according to population and, presumably, need. 92/ As noted earlier, the right to review and comment upon county comprehensive plans has been added to the Council's existing power to so review municipal plans. It will be recalled that the Council has no power to permanently delay the execution of such plans by its failure to approve them. 93/ Moreover, major amendments to the comprehensive plans must also be transmitted to the Council for review. 94/

The Council also received part of its proposed housing package designed to relieve what it sees as an impending housing crisis (the need for an annual housing production of 21,000 units, 12,500 of which should be available to households with incomes of $7,000 or less per year). The legislature passed bills creating a state model building code 95/ and a state housing finance agency. 96/

On the minus side, the Council lost a major part of its housing package with the death of its Metropolitan Housing Board Bill at the end of the 1971 session. 97/ The proposed bill would have created an agency, under the Council, to stimulate and coordinate low- and moderate-income housing projects in the metropolitan area. The agency would have been empowered to acquire land for use in low- and moderate-income housing development programs and to make such land available by sale or lease to public and private housing developers at a reduced price.

The Council would have had mandatory review powers over the plans of local housing authorities in order to ensure the consistency of the local plans with the overall metropolitan housing plan. However, all urban renewal and housing code enforcement programs would have been reserved exclusively to the municipal government. Before carrying out any agency-owned and constructed project, the agency would have had to seek approval from any municipality involved. If such approval were denied, review by a special appeals board would have been possible. The agency would have been granted a tax of one mill to support its functions. 98/

The governor favors the establishment of such an agency, but enabling legislation, which it was hoped would be passed as part of a general compromise package with

452-329 O - 72 - 11

regard to the main legislative hassle confronting the legislature in special session--namely, the gubernatorial veto of the state tax and finance bill--failed to materialize. 99/ (Presently the Council exerts influence on housing planning through a 27-member Technical Advisory Committee on Housing and through the Housing Chapter of its Development Guide. 100/)

Another major casualty was the Metropolitan Parks Board Bill, 101/ which failed to pass in the regular legislative session by a single vote. 102/ In part, its failure was said to be due to general opposition to the extension of Metropolitan Council power and to the opposition of the Metropolitan Inter-County Council, established, it will be recalled, to counteract that power. 103/

The legislation would have made the Metropolitan Parks Board a public corporation with all the requisite rights, powers, privileges and duties appurtenant thereto. It would have authorized the creation of a Metropolitan Parks Board staff with all the rights and duties conferred upon public employees under Minnesota Statutes, Sections 179.50 and 179.51.

The Metropolitan Parks Board would have been given the power to contract with local-government units and state and federal agencies as provided in Minnesota Statutes, Section 471.59. Under such agreements, the Metropolitan Parks Board would have been allowed to assume control over any park space owned by any governmental unit.

It would also have been granted the authority to acquire property in accordance with the Metropolitan Park Reserve Plan or the Metropolitan Open Space Plan and would have had the right to eminent domain provided for in Minnesota Statutes, Sections 117.01-117.202. However, the Metropolitan Parks Board would still have been prohibited from taking a private person's homestead, as that term is defined in Chapter 510, Minnesota Statutes.

Each local governmental unit in the metropolitan region would have been required to adopt a comprehensive park plan subject to Metropolitan Parks Board and Council review.

This bill, like the housing bill, was supported by the governor, but an expected compromise measure failed to materialize. (One suggested compromise had been a

consolidation of the counties' interests in parks, coupled with Council review of their consolidated acquisition program.) 104/

Of potentially greater significance was the refusal of the legislature to grant the Council increased control over the relatively autonomous Metropolitan Airports and Transit Commissions. 105/ Coupled with the legislative refusal to make the Council an elective body, it may well mean that concerns about the Council's growing power are manifesting themselves in the legislature as well as in the administrative agencies and local-government units with which the Council deals. 106/ It has been suggested that this attitude coupled with legislators' fears that an elected Council will be more powerful than they in districts "represented" by both bodies, has not only resulted in a defeat of the elective-Council bill, but also served as a further rationale for failing to grant added powers to the Council on the ground that a non-elective body should not be too powerful! 107/

Future Plans

Nonetheless, the Council has selected further major areas of concentration, including what it calls critical areas of social concern--such as health and criminal justice, with Guide "programming" as the goal. Major study items will also include transportation, water resources, and plan implementation. Council planners feel that the Council has "won" its right to go into some of these critical areas by successfully planning solutions for those problems the solution to which has perhaps traditionally been sought from planning agencies, such as solid waste disposal and sewers. Moreover, the Council has gone a step further by pressing successfully for the creation of implementing agencies and commissions to execute these plans, providing, according to its administrators, that such a system can function in the social problems area.

For all of its power over the actual use of land in the metropolitan area, the one concept which emerges most clearly from discussions with the Council's administrators is their expressed intention to remain in the policy-making sphere and to avoid being drawn into the implementation of functional programs on a day-to-day basis, notwithstanding the concerns voiced by local-government agencies and commissions concerning internal meddling by the Council. The

Council maintains that it prefers to remain free to plan and control activity in hitherto untouched, non-physical areas--like criminal justice--rather than bog down in the running of the programs it creates. 108/

An additional reason for this avoidance of implementation problems is that the Council itself claims it lacks the money to actively execute all its own plans. The agencies are separately funded, and if the Council is temporarily strapped for a particular planning project, one of its agencies conveniently "hires" it to make the study or plan, thus providing a source of back-door financing. 109/

But the administrators realize the solutions might not be so easily forthcoming for fundamental social problems. A major problem may well be one of expertise--the degree to which Council staff is capable of grappling with such issues. Once again, the Council will not actively attempt to execute solutions, but rather to improve the decision-making process. 110/

The Council has the power to affect considerably land use in the metropolitan area of the Twin Cities. Entirely aside from specific instances like site location control of, and land use standards pertaining to, land uses surrounding airports, the entire concept of mandatory plan referral and approval, without which implementation is legally prohibited, provides an effective means of preventing many types of land use.

It is nonetheless quite clear that the metropolitan area is taking another look at its metropolitan government. With dissatisfaction not only among local-government units and in the legislature, but also within the ranks of the Council's "family" of executory commissions, the Council would do well to look to its defenses, regardless of the causes for complaint. The last legislative session has demonstrated a temporary unwillingness to increase the authority of the Council in a number of key areas. Presumably the Council will overcome its present problems, refurbish its image among those agencies and units with which it works, and continue to provide the coordination necessary to successfully undertake a solution to the land use problems of the Twin Cities metropolitan region.

Finally, it is worth noting that the attempt to regulate land use by means of reviewing a metropolitan governmental unit's capital improvements plan is a unique

device among those examined in this report. This technique and the experience of the Metropolitan Council raises some interesting issues. First, there is the conflict between the elected Legislature and the appointed Council. Is this an inherent difficulty which would only be exacerbated by increasing the Council's power, or by making it elective? Second, the control of capital improvements, such as location and construction of sewer systems in the metropolitan region, delegated to the Council by the legislature clearly gives the Council considerable leverage on the location of development in general--a power not delegated to it by the legislature. While the practical effect of the exercise of this key power may very well be to limit all phases of land development, it is not clear that such control can be legally exercised. The power to tax has generally provided a similarly big lever to regulate the subject taxes, but courts have generally struck down such attempts of regulation via the taxing power, on the ground that its purpose is to provide revenue.

How the Metropolitan Council approaches and finally resolves these issues may well determine its ultimate success in regulating land use in the Twin Cities region.

FOOTNOTES

1/ Metropolitan Council Act, Minnesota Sessions Laws 1967, Ch. 896, §1.

2/ Prepared Statement of Albert J. Hofstede, Chairman, Metropolitan Council BEFORE THE SUBCOMMITTEE ON URBAN AFFAIRS, JOINT ECONOMIC COMMITTEE OF THE U.S. CONGRESS HEARINGS ON REGIONAL PLANNING ISSUES, May 26, 1971, at pp. 750 and 756; "Where Regional Planners Call the Shots," BUSINESS WEEK, February 21, 1970.

3/ Statement of the Metropolitan Council BEFORE THE SUB-COMMITTEE ON COORDINATION OF SERVICES IN THE METRO-POLITAN AREA OF THE HOUSE COMMITTEE ON METROPOLITAN AND URBAN AFFAIRS, November 24, 1969, at p. 1.

4/ Id.; Metropolitan Council Act, Minnesota Sessions Laws 1967, Ch. 896, §6, Subd. 1.

5/ 1969-1970 Biennial Report to the Minnesota Legislature, Metropolitan Council, 1971, at p. 3.

6/ Stanley Baldinger, PLANNING AND GOVERNING THE METROPOLIS, THE TWIN CITIES EXPERIENCE, New York: Praeger Publishers, Ill. 1971 (286 pages), at pp. 77-78; "Where Regional Planners Call the Shots," BUSINESS WEEK, February 21, 1970, at p. 72; Ted Kolderie, "Strategies," CITY, August 1969, at p. 36.

7/ Ted Kolderie, "Strategies," CITY, August, 1969, at p. 36.

8/ Id.

9/ John Fischer, "The Minnesota Experiment: How To Make A Big City Fit To Live In," HARPER'S MAGAZINE, April, 1969.

10/ Ted Kolderie, "Strategies," CITY, August, 1969, at p. 36.

11/ Summary of Comments and Proposal on Areawide Governmental Problems of the Twin Cities Metropolitan Area, Citizens League (1966), pp. 3-6; Prepared Statement of Albert J. Hofstede, Chairman, Metropolitan Council BEFORE THE SUBCOMMITTEE ON URBAN AFFAIRS, JOINT ECONOMIC COMMITTEE OF THE U.S. CONGRESS HEARINGS ON REGIONAL PLANNING ISSUES, May 26, 1971, at pp. 750 and 756.

12/ A Metropolitan Council for the Twin Cities Area, Citizens League (1966), pp. 16-18; Prepared Statement of Albert J. Hofstede, Chairman, Metropolitan Council BEFORE THE SUBCOMMITTEE ON URBAN AFFAIRS, JOINT ECONOMIC COMMITTEE OF THE U.S. CONGRESS HEARINGS ON REGIONAL PLANNING ISSUES, May 26, 1971, at p. 756.

13/ Baldinger, op. cit. note 6, at pp. 91-162; Prepared Statement of Albert J. Hofstede, Chairman, Metropolitan Council BEFORE THE SUBCOMMITTEE ON URBAN AFFAIRS, JOINT ECONOMIC COMMITTEE OF THE U.S. CONGRESS HEARINGS ON REGIONAL PLANNING ISSUES, May 26, 1971, at pp. 754-755.

14/ Summary of Comments and Proposal on Areawide Governmental Problems of the Twin Cities Metropolitan Area, Citizens League, (1966) at pp. 15-17.

15/ "Where Regional Planners Call the Shots," BUSINESS WEEK, February 21, 1970, at p. 72.

16/ Ted Kolderie, "Strategies," CITY, August, 1969, at p. 36; John Fischer, "The Minnesota Experiment: How To Make A Big City Fit To Live In," HARPER'S MAGAZINE, April, 1969.

17/ Stanley Baldinger, PLANNING AND GOVERNING THE METROPOLIS, THE TWIN CITIES EXPERIENCE, New York: Praeger Publishers, Ill. 1971 (286 pages).

18/ Airport Zoning Act, Minnesota Sessions Laws 1969, Ch. 1111; Statement of the Metropolitan Council BEFORE THE SUBCOMMITTEE ON COORDINATION OF SERVICES IN THE METROPOLITAN AREA OF THE HOUSE COMMITTEE ON METROPOLITAN AND URBAN AFFAIRS, November 24, 1969, at pp. 7-8.

19/ New Airports for the '70s (And After), Citizens League Report prepared by the Citizens League Airports Committee, October 15, 1969, at pp. 29-30.

20/ Metropolitan Council Act, Minnesota Sessions Laws 1967, Ch. 896, §2, Subd. 3.

21/ Id., Subd. 4.

22/ The power to review county plans was just granted by the 1971 legislative session. Minnesota Sessions Laws 1971, Ch. 541.

23/ Except that the Council is prohibited by statute from suspending plans pertaining to the location and construction of regional sewer plants, or the expansion of the Twin Cities district treatment plant. §6, Subd. 6(2).

24/ Metropolitan Council Act, Minnesota Sessions Laws 1967, Ch. 896, §6, Subd. 6.

25/ Statement of the Metropolitan Council BEFORE THE SUB-COMMITTEE ON COORDINATION OF SERVICES IN THE METROPOLITAN AREA OF THE HOUSE COMMITTEE ON METROPOLITAN AND URBAN AFFAIRS, November 24, 1969, at p. 4.

26/ Metropolitan Council Act, Minnesota Sessions Laws 1967, Ch. 896, §6, Subd. 7.

27/ Id., Subd. 5.

28/ "Metro Council Replaces MPC", MPC NEWSLETTER, August, 1967.

29/ Metropolitan Council Act, Minnesota Sessions Laws 1967, Ch. 896, §6, Subd. 8.

30/ Metropolitan Council Act, Minnesota Sessions Laws 1967, Ch. 896, §6, Subd. 9-13; §7, Subd. 1-12.

31/ Metropolitan Council Act, Minnesota Sessions Laws 1967, Ch. 896, §8.

32/ Summaries of Acts of the 1969 Minnesota State Legislature in Which the Council Was Principal Sponsor (published by the Metropolitan Council of the Twin Cities Area), at p. 1.

33/ 1969-1970 Biennial Report to the Minnesota Legislature, Metropolitan Council, 1971, at pp. 29-30.

34/ Ted Kolderie, "Strategies," CITY, August, 1969, at p. 31.

35/ Metropolitan Sewer Act, Minnesota Sessions Laws 1969, Ch. 449, §3, Subd. 1; §6.

36/ Id., §1.

37/ Id., §5, Subd. 1-5.

38/ 1969-1970 Biennial Report to the Minnesota Legislature, Metropolitan Council, 1971, at pp. 29-30.

39/ Interview with Richard Dougherty, Chief Administrator, Metropolitan Sewer Board, August 26, 1971, St. Paul, Minnesota.

40/ Id.

41/ Id.

42/ Id.

43/ Metropolitan Park Board Act, Minnesota Sessions Laws 1969, Ch. 1124.

44/ 1969-1970 Biennial Report to the Minnesota Legislature, Metropolitan Council, 1971.

45/ Cf. powers granted such corporations by means of Min. Stat. §§ 179.50-179.571.

46/ Metropolitan Park Board Bill, Senate File No. 6, first engrossment.

47/ Interview with Gerard Hegstrom, Secretary, Metropolitan Park Board, August 26, 1971.

48/ Id.

49/ Metropolitan Council Act, Minnesota Sessions Laws 1967, Ch. 896; Airport Zoning Act, Minnesota Sessions Laws 1969, Ch. 1111.

50/ Airport Zoning Act, Minnesota Sessions Laws 1969, Ch. 1111, §1, Subd. 1 and 2.

51/ Summaries of Acts of the 1969 Minnesota State Legislature in Which the Council Was Principal Sponsor (published by the Metropolitan Council of the Twin Cities Area), at p. 1; Interview with Henry Kuitu, Executive Director, Metropolitan Airports Commission, August 25, 1971, St. Paul, Minnesota.

52/ 1969-1970 Biennial Report to the Minnesota Legislature, Metropolitan Council, 1971, at pp. 13, 29-30; Statement of the Metropolitan Council BEFORE THE SUBCOMMITTEE ON COORDINATION OF SERVICES IN THE METROPOLITAN AREA OF THE HOUSE COMMITTEE ON METROPOLITAN AND URBAN AFFAIRS, November 24, 1969, at pp. 1 and 4.

53/ Interview with Henry Kuitu, August 25, 1971.

54/ Id.

55/ Interview with Henry Kuitu, and members of staff of Metropolitan Airports Commission, August 25, 1971.

56/ Op. cit., note 53.

57/ Id.

58/ Baldinger, op. cit. note 6, at pp. 183-186; interview with John Jamieson, Director of Planning, and Messrs. Fasel and Meyer, members of staff, Metropolitan Transit Commission, August 26, 1971, St. Paul, Minnesota; Minnesota Sessions Laws 1971, Ch. 30, §8.

59/ Interviews with Messrs. Jamieson, Fasel and Meyer, August 26, 1971.

60/ Id.

61/ Summaries of Acts of the 1969 Minnesota State Legislature in Which the Council Was Principal Sponsor (published by the Metropolitan Council of the Twin Cities Area), at p. 1; Highway (Local Concert) Act, Minnesota Sessions Laws 1969, Ch. 312.

62/ Policy of the Board of Directors re: Transportation Planning Program, Metropolitan Section, League of Municipalities, approved August 3, 1971, at p. 1

63/ Interview with Calvin Clark, Research Associate, Citizens League, August 24, 1971.

64/ Id.

65/ Interviews with Messrs. Jamieson, Falsel and Meyer, August 26, 1971.

66/ Interview with Orwin Pierson, Zoning Officer, Carver County, August 24, 1971, Chaska, Minnesota; interview with Paul Dow, Executive Secretary, Metropolitan Section, League of Municipalities, August 25, 1971, Minneapolis, Minnesota.

67/ State Zoo Act, Minnesota Sessions Laws 1969, Ch. 868; Summaries of Acts of the 1969 Minnesota State Legislature in Which the Council Was Principal Sponsor (published by the Metropolitan Council of the Twin Cities Area).

68/ Interview with Robert Einsweiler, former Director of Planning, Metropolitan Council, March 23, 1971, St. Paul, Minnesota.

69/ Metropolitan Development Guide: Solid Waste Management, adopted by the Metropolitan Council, March 12, 1970; Metropolitan Development Guide: Sanitary Sewers, adopted by the Metropolitan Council, January 22, 1970; Metropolitan Development Guide: Parks and Open Space, adopted by the Metropolitan Council, June 25, 1970; Metropolitan Development Guide: Transportation, draft for purposes of public hearing; Metropolitan Development Guide: Housing, draft for purposes of public hearing; Metropolitan Development Guide: Major Centers, draft for purposes of public hearing.

70/ E.g., Metropolitan Development Guide: Solid Waste Management, adopted by the Metropolitan Council, March 12, 1970, at pp. 3, 13 and 21.

71/ Metropolitan Development Guide: Sanitary Sewers, adopted by the Metropolitan Council, January 22, 1970, at pp. 4-16.

72/ Id., at pp. 10-11.

73/ Id., at pp. 16-30.

74/ Id., at pp. 31-37.

75/ Interview with Richard Dougherty, August 26, 1971.

76/ Telephone interview with John Jamieson, September 7, 1971.

77/ Interview with Paul Dow, August 25, 1971.

78/ Interview with William Schwab, Planning Coordinator, Washington County, August 27, 1971, Stillwater, Minn.

79 Interview with Paul Dow, August 25, 1971.

80/ Statement of the Metropolitan Council BEFORE THE COMMITTEE ON COORDINATION OF SERVICES IN THE METROPOLITAN AREA OF THE HOUSE COMMITTEE ON METROPOLITAN AND URBAN AFFAIRS, November 24, 1969, at pp. 2-3; 1969-1970 Biennial Report to the Minnesota Legislature, Metropolitan Council, 1971, at pp. 28-29.

81/ Statement of the Metropolitan Council BEFORE THE SUB-COMMITTEE ON COORDINATION OF SERVICES IN THE METROPOLITAN AREA OF THE HOUSE COMMITTEE ON METROPOLITAN AND URBAN AFFAIRS, November 24, 1969, at pp. 5-4.

82/ Interview with Robert Einsweiler, March 23, 1971.

83/ Interview with Gunnar Isberg, Planning Coordinator, Dakota County, August 27, 1971, Hastings, Minnesota.

84/ Interview with Orwin Pierson, August 24, 1971; interview with William Schwab, August 27, 1971.

85/ Interview with Orwin Pierson, August 24, 1971; interview with Paul Dow, August 25, 1971.

86/ Interview with Gunnar Isberg, August 27, 1971.

87/ Interview with Paul Dow, August 25, 1971.

88/ Interview with Orwin Pierson, August 24, 1971; interview Paul Dow, August 25, 1971.

89/ Interview with Paul Dow, August 25, 1971.

90/ Id.

91/ Interview with Richard Dougherty, August 26, 1971.

92/ Fiscal Disparaties Bill, PLANNING AND DEVELOPMENT NEWS-LETTER, Dakota County Planning Advisory Commission, Vol. 1, No. 4, August 1971.

93/ Minnesota Sessions Laws 1971, Ch. 541.

94/ Id.; Telephone interview with Reynard Boezi, Director of Planning, Metropolitan Council, on July 13, 1971.

95/ Minnesota Sessions Laws 1971, Ch. 54.

96/ Minnesota Sessions Laws 1971, Ch. 702.

97/ House File 1676, Senate File 1356. The Bill passed the Senate but was stranded in the House Rules Committee which, during the special session called in August-September, was vigorously resisting action on all bills not passed in some form by both Houses during the regular 1971 session, according to Calvin Clark, Research Associate for the Citizens League.

98/ Explanation of Regional Housing Assistance and Development Act, Metropolitan Section, League of Municipalities publication (not dated).

99/ Telephone interview with Reynard Boezi, Director of Planning, Metropolitan Council, on October 12, 1971, and November 4, 1971; Interview with Calvin Clark, August 24, 1971.

100/ Metropolitan Development Guide: Housing, draft for purposes of public hearing, February 4, 1971, at p. 2.

101/ Senate File No. 6, first engrossment.

102/ Interview with Gerard Hegstrom, August 26, 1971.

103/ Id.

104/ Id.; Telephone interview with Reynard Boezi, on October 12, 1971, and November 4, 1971.

105/ Telephone interview with Calvin Clark, September 3, 1971.

106/ Interview with William Schwab, August 27, 1971.

107/ Interview with Calvin Clark, August 24, 1971; interview with William Schwab, August 27, 1971; interview with Paul Dow, August 25, 1971.

108/ Interview with Robert Einsweiler, March 23, 1971; 1969-1970 Biennial Report To The Minnesota Legislature, Metropolitan Council, 1971, at p. 4.

109/ Interview with Robert Einsweiler, March 23, 1971.

110/ Id.

MASSACHUSETTS ZONING APPEALS LAW

Concern over the impact of exclusionary zoning on growth patterns in our metropolitan areas is mounting around the country. The Massachusetts Zoning Appeals Law 1/ is the first effort of its kind by any state to use the state's land use control powers to attack the widely recognized shortage of decent low- to moderate-income housing. 2/ A major contributing factor to this shortage is the fact that local building and health codes often produce unnecessarily high construction costs, while local zoning restricts the amount of land available for higher density low-income housing. 3/

The process of complying with the ordinances and regulations of various municipal departments requires the developer to spend substantial amounts of time and money. Developers of subsidized housing are usually non-profit or limited dividend corporations which do not often have the staff and capital necessary to comply with a long, complicated local approval process.

The Zoning Appeals Law creates additional procedures and standards which come into play only when a qualified low-income housing developer 4/ seeks to build housing in the community. The Law responds to the problem of multiple local regulation by consolidating all the local approvals required (building and health permits, any necessary rezoning, etc.) into one "comprehensive permit." The statute provides that the comprehensive permit be issued or denied by the municipality within approximately 70 days of receipt of the application (depending on the length of the local hearing).

Denials or conditional grants of permits may be appealed to a state Housing Appeals Committee; the time provided in the statute for a decision on the appeal can again be as short as 70 days (depending on how quickly the appeal is filed and the length of the hearing on the appeal).

Origins of the Law

Concerned legislators, lawyers, and housing experts wished to make a symbolic attack on restrictive zoning and other techniques used by suburbs to exclude low-income housing, and to provoke a general discussion of housing

problems in Massachusetts. After several drafting sessions, they presented a proposed bill to the 1969 session of the Massachusetts legislature for this purpose, and were reportedly as surprised as anyone else when the bill survived the legislative battles over its passage. 5/

The introduction of the bill was accompanied by a great deal of publicity, and newspapers in Massachusetts generally supported the legislation. Legislators from the central cities, conservatives as well as liberals, supported the measure since it provided a means of lessening the burden of providing low-income housing on urban areas. Many Boston legislators had an additional reason for supporting the act--their resentment against suburban liberals who had imposed upon them a school integration plan.

While many suburban legislators opposed the measure, others were convinced to support it by efforts in favor of the bill on the part of legislative leaders and the governor. The lack of strong opposition from the general public also contributed to the passage of the act. Any of these factors could well have been critical, because several narrow votes on the bill occurred in both houses before its final passage. 6/

Operation of the Law

A qualified low-income housing developer (public housing authority, non-profit or limited dividend corporation) may ask the local zoning board to issue a "comprehensive permit." If denied the developer may appeal to the appeals committee created by the Law. The five-member Housing Apment of Community Affairs although not directly under the authority of the Department. The five members serve, without compensation, for one year. Three members are appointed by the Commissioner, two are appointed by the Governor. The two appointed by the Governor are representatives of local government interests--one required to be a member of a board of selectmen and the other a member of a city council. Of the three appointed by the Commissioner, one must be an officer or employee of the Department. The statute does not specify how the remaining two members shall be selected. The Commissioner of Community Affairs designates the chairman of the Committee. 7/

If the developer shows that the local denial was not "reasonable and consistent with local needs" the Committee

may vacate the local decision and direct the issuance of a permit by the municipality. Where the local decision is to impose conditions upon the comprehensive permit, developers may appeal if the conditions make the project "uneconomic" and are also not "reasonable and consistent with local needs." If the Committee finds that the local imposition of conditions upon the permit was consistent with local needs the local decision will stand regardless of whether the conditions make the project "uneconomic." For the local imposition of conditions to be overturned, the conditions must both make the project uneconomic and also be not inconsistent with the local needs as defined in the statute. 8/ When these two criteria are met, the Committee has the power to order the local board of zoning appeals "to modify or remove any such condition or requirement so as to make the proposal no longer uneconomic and to issue any necessary permit or approval." 9/

In issuing orders to modify conditions, the Committee in effect is given the power to rewrite local regulatory requirements, except that "the Committee shall not issue any order that would permit the building or operation of such housing in accordance with standards less safe than the applicable building and site plan requirements of the federal Housing Administration or the Massachusetts Housing Finance Agency, whichever agency is financially assisting such housing." 10/

All of these standards govern the review of the local decision by the Committee and are not specifically required to be considered by municipalities in reaching their own decision on the application for a comprehensive permit. For local decisions, the statute merely provides that the local zoning board of appeal

> "shall have the same powers to issue permits or approvals as any local boards or official who would otherwise act with respect to such application, including but not limited to the power to attach to said permit or approval conditions and requirements with respect to height, site plan, size or shape, or building materials as are consistent with the terms of this section. The board of appeals, in making its decision on said application, shall take into consideration the recommendations of the local boards and shall have the authority to use the testimony of consultants." 11/

Housing Appeals Committee staff state that the communities which have considered applications for comprehensive permits have tended to limit their deliberations to evidence concerning the effect of the project on local planning standards, because they are accustomed to using these standards. 12/ Thus it may be possible that consideration of regional low-income housing needs will turn out to be the responsibility of the Committee.

The key element in the Law is the definition of "consistent with local needs." The most innovative and widely discussed portion of this definition is that "[local] requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing . . . ." This portion of the definition allows the Housing Appeals Committee, in reviewing local decisions on comprehensive permits, to make a determination of whether the local community is helping to satisfy the regional need for low-income housing.

The statute does not define "region," but it does specify that in arriving at "regional needs" the Committee must "consider with" it the "number of low-income persons in the city or town affected." 13/ (The Law does not specify what the effect on the Committee's decision should be if the existing number of low-income persons in the affected municipality is low or high.) By means of rules and regulations promulgated under Section 2 of Ch. 774 (23B Mass. Gen. Laws. Ann. §5) by the Commissioner of Community Affairs, the Housing Appeals Committee uses the following definition: 14/

> "'Regional needs' means the shortage of housing for families and individuals with income within the eligibility limits of the State or Federal program subsidizing the proposed housing, for the entire Standard Metropolitan Statistical Area of which the city or town is part, as defined by the U.S. Bureau of the Census; or, if the city or town lies outside any such area, for the entire regional planning district created by Chapter 40B of the General Laws, or any other special act."

452-329 O - 72 - 12

The definition of "consistent with local needs," offers a rough approximation of each community's share of the regional need for low-income housing, although not phrased in terms of regional need. The following quotas set out in the statute provide for a maximum number of units and maximum amount of land to be devoted to low-income housing in each community, as well as an annual limit: Local "requirements and regulations" are to be considered "consistent with local needs" by the Committee when (1) the number of low or moderate-income housing units exceeds 10% of the total housing units in the community; (2) the amount of land used for low-income housing equals or exceeds 1-1/2% of the total land area of the community, excluding publicly owned land; or (3) the application being considered by the municipality would result in the construction of low-income housing on "sites comprising more than 3/10 of 1% of such land area or 10 acres, whichever is larger. . . ." The effect of these quotas is to prevent the Housing Appeals Committee, once a community has satisfied one of the quotas, from finding that a refusal by that community to admit further low-income housing is not "consistent with local needs." In other words, each community has assurance that no large number of projects need be accepted in any one year.

The second element of the "local needs" standard, separate from the responsibility of local communities for meeting their fair share of the regional need for low-income housing, concerns traditional local planning criteria for housing: the need to protect health or safety, the need to preserve open space, the need to promote better site and building design, and the equal application of regulations to both subsidized and unsubsidized housing. The statute does not specify the exact weight which the Committee may give to local planning objections when reviewing a local decision on a permit, but the statute seems at least to direct the Committee not to overturn the local decision if the low-income housing project offends neutrally-applied local planning standards. However, no specific procedure for decision-making by the Committee is provided in the statute. Therefore, the exact interpretation of how the "local needs" standard (which amounts to a regional needs standard) is to be applied remains entirely in the discretion of the Committee, unless the Massachusetts courts adopt some restricting interpretation of the statute.

Pending Amendments to the Law

As Alan G. Rodgers, coordinator of the Massachusetts Law Reform Institute 15/ and co-draftsman of the Zoning Appeals

Act, points out, though, the need for housing in a Statistical Area such as metropolitan Boston is so great that it would probably not be satisfied even if all cities and towns other than Boston satisfied their numerical quotas as set forth under the criteria for "consistent with local needs." It may well be that the above regulation has defined "region" too broadly. 16/

An amendment drafted by Rodgers calculated to solve the problem of defining "regional" and "local needs" was defeated this year by the Massachusetts Legislature primarily due to defections from the ranks of the Act's original supporters representing urban areas. While the needs of the region would still be a factor in the definition, the finding of "need" by a financing agency, such as the Massachusetts Housing Finance Agency, would be determinative. The "escape valve" for a local board would be a finding that the proposed land use change will be "excessively burdensome." A finding of excessively burdensome would be justified it if could be shown

(1) that there will be imminent peril to the health, safety and welfare of the people;

(2) that there would be no reasonable access to essential services and facilities such as shopping centers and public transportation;

(3) that design and site selection were in some way faulty.

Moreover, the community would be temporarily exempted from review by the Housing Appeals Committee if the community prepares a plan which shows how it intends to meet local and regional needs for low-income housing. 17/

The amendment would also have responded to another argument against the present Law. Opponents have argued that the Law does not give a local board of appeals the power to override zoning by-laws. 18/ Under Massachusetts zoning laws, they argue, the zoning power is exclusive to the local legislature (town meeting or city council) and the Zoning Appeals Law does not by its terms amend Massachusetts zoning laws. Rather, it was adopted as an addition to the chapter of the Massachusetts laws dealing with regional planning. 19/ Thus, critics of the Zoning Appeals Law have argued that local zoning boards are powerless to grant a comprehensive permit when the project would not conform to applicable zoning. 20/ It could, moreover, be argued that the denial of a permit requiring a zoning change can never be "unreasonable" if the local board has no power to vary zoning. The amendatory legislation would specifically have granted this power.

According to Rodgers, plans are being made to re-introduce the amendment next year. 21/

The Comprehensive Permit Process

The Law is set in motion by an application by a qualified low-income housing developer for a local comprehensive permit. The statute states that single applications for a comprehensive permit are submitted to the community "in lieu of separate applications to the applicable local boards." 22/ No particular form for such an application is required by the statute. The Housing Appeals Committee has not issued a recommended form, 23/ but in an Information Bulletin issued in June, 1971 the Department of Community Affairs suggested that the following materials be submitted to the local board of appeals:

(1) A statement that the housing sponsor is "qualified"--either a public agency, a non-profit organization, or a limited dividend corporation.

(2) A statement that the proposed housing will be financed under a housing program "subsidized by the Federal or state government" to "assist the construction of low or moderate income housing." Final approval for the financing is not necessary at the time of application.

(3) Presentation of materials to show that the siting of the proposed housing is reasonable, including pictures of the site and preliminary plans and sketches of the proposed housing. Factors to be considered, with solutions, include changes in bulk zoning regulations, sewage disposal, generation of additional traffic, and fire prevention facilities.

(4) Summary of discussions of the applicant with the planning and building departments of the community.

(5) If the board of appeals holds that there is no need for additional housing for low and moderate incomes, a statement on need should be presented.

(6) A statement regarding the amount of subsidized housing in the community. 24/

According to Committee staff, local communities had not issued any of their own rules for what needed to be submitted, and developers had been fairly inventive in minimizing their expenses of preparing the application, some having included only a site plan. 25/ In one instance, submissions included: a plot plan; a sewerage layout; floor plans; elevation and sections of buildings; and "typical construction details." 26/ In processing that application, the local board of zoning appeals requested additional sewerage plans, preliminary drainage and grading plans, and a piping layout showing fire hydrants. Clearly, applications must furnish a substantial amount of information at some point in order to provide the basis for a local decision on a comprehensive permit, unless the community is willing to shorten the process by granting the permit subject to open-end conditions. 27/

The Zoning Appeals Law requires that the local hearing on the developer's application be scheduled within 30 days after the application is received, and that a decision be rendered within 40 days of the termination of the hearing. Considering the amount of information which may have to be processed by the municipality this time limit may be unrealistic. Records are available for three of the four denials which have been appealed. In the first two of these cases the denial was issued within the 70-day period. But in the one case the denial was issued seven months after the application was filed. (In the first two cases, the communities apparently did not consider the entire application but decided to deny the applications primarily on the basis that the applicants were not qualified low-income housing developers. 28/) In the other case the municipality required the applicant to furnish a substantial amount of information and several hearings were held. The decision denying the application was issued well-beyond the 40 days time limit. 29/ The applicant did not question these delays in his appeal to the Committee, and the Committee staff have not attached significance to the delays in their discussions of the case. 30/ It would appear, in practice, where a full hearing on a comprehensive permit is involved, substantially longer than the minimum statutory period of 70 days will often be required for the municipality to reach a decision.

In fact, several persons connected with the review process are concerned hearings at both the local board of ap-

peals and the Housing Appeals Committee levels could tend to drag interminably. One recent case has been before the Housing Appeals Committee since mid-summer and was barely halfway through its scheduled hearings in mid-September, with no statutory cutoff. The result may be fatal for the applicant, who may find his commitment for financing--even his contract to purchase if he does not own the site outright--has expired. 31/

Robert Cohen, attorney for the Newton Civic Land Association, which has intervened in opposition to the low-income housing developer in a case currently before the Housing Appeals Committee, believes there are a host of other procedural, technical and substantive problems with the appeals process. There is no requirement that a record of proceedings be kept at the local board of review hearings, and Cohen queries what "review" means without such a transcript. Furthermore, testimony is usually not sworn, reducing its reliability on review. Nor is there any indication of whether a quorum is necessary at that level, or even what one is. 32/

At the Housing Appeals Committee level, the statute requires a decision within 30 days. Cohen points out that first, the period is too short, and second, even if it is not there is no indication of what happens if the decision is not forthcoming within that period. Moreover, he argues, the Committee has "taken unto itself" the power to add conditions to a permit, whereas the Zoning Appeals Law only grants power specifically to remove them. 33/

Operations of the Housing Appeals Committee

The Housing Appeals Committee has adopted rules and regulations and has handled preliminary statements and answers for its appeals. Its regulations, and its actions in the cases in which it has so far become involved, make clear its view of itself as a quasi-judicial body 34/ whose hearings will be de novo review of all the evidence from the local level. Committee staff anticipate that evidence not introduced at the local level will also be allowed. 35/

The Committee has not yet decided exactly how it will balance the regional and local need for low-income housing against local planning criteria, although it has determined to use the statutory quotas as a screening device for removing the necessity of further deliberations on its part if a community has already met one of the quotas. 36/

The Committee's activities with regard to appeals which have reached it shed some light on further practical difficulties in the administration of the Law. The Committee is allowed 20 days from the filing of an appeal in which to schedule a hearing; and after the termination of a hearing, must issue a decision within 30 days (unless the applicant agrees to an extension of the time limit). However, the time limits appear as unrealistic at the appeals level as they seem to be at the local level. In the first two cases to reach the Committee, the scheduling of a hearing was delayed four months while the Committee waited for an attorney general's opinion on whether the appellant (who was the same in both cases) was a qualified low-income housing developer. 37/ After the attorney general's opinion was received, 38/ a remand was necessary in both cases for further local hearings. The developer ultimately dropped both appeals "because of financial difficulties." 39/

The Hanover Decision

While a number of local board decisions have been or are about to be taken to the Housing Appeals Committee for review, only one has made its way through the entire decision-making process. On July 13, 1971, the Committee rendered its decision in Country Village Corporation v. Board of Appeals of the Town of Hanover, bringing an end, at least administratively, to 15 months of applications and hearings. 40/

The circumstances of the case were these. On April 27, 1970, a limited dividend corporation, the Country Village Corporation, submitted an application to the Town of Hanover's board of appeals for a permit to erect 88 low- and moderate-income housing units for the elderly on approximately 10 acres of land. The board held four hearings between May and September, and on December 1, 1970, denied the application. 41/ In its decision, the board raised the question of its authority to amend the town's zoning ordinance. 42/ It also went into great detail in terms of its planning objections to the proposed project, and denied the comprehensive permit on these grounds as well, without noting any consideration of the regional and local need for low-income housing. The board emphasized that its objections to the project were in terms of planning criteria which were applied equally to all building projects in the town. 43/

The Country Village Corporation thereupon filed an appeal with the Housing Appeals Committee on December 18,

1970. After the filing of an answer on January 20, 1971, by the Town of Hanover, the Committee held two hearings in March.

The Housing Appeals Committee addressed itself to a number of preliminary considerations, such as the burden of proof (on appellant Country Village Corporation), 44/ adequacy of the corporation's property interest (a leasehold), the eligibility of the applicant as a limited dividend corporation, and the adequacy of its exhibits (traffic report; driveway, landscape, wiring, plumbing, subdivision, drainage and sewerage plans; fire precautions) before reaching the crucial issues of consistency with local needs and constitutionality of the Appeals Law. 45/ The Committee found that, based on an exhibit prepared by the Metropolitan Area Planning Council, ". . . the evidence showed that there is a need, both actual and under the statutory provisions . . . for low and moderate income housing in Hanover." 46/ The Committee further found ". . . that the proposed development comes within the requirements of regional need set out in the statute [and] that adequate safeguards have been provided for the health and safety of occupants and residents." 47/ The Committee then ruled that the proposed development was "consistent with local needs" and that the Country Village Corporation had sustained its burden of proving that the board's action in denying its application was not "consistent with local needs." 48/

It is interesting to note that the Hanover board of review had not only accepted the fact that a statutory need for housing existed in the town, but that it also admitted in its answer that at that time there was no low- or moderate-income housing in Hanover. 49/

One of the major contentions raised by Hanover was the constitutionality of the Zoning Appeals Law. While agreeing with Hanover that it had the right to raise this issue before it, the Committee held that the Law was not so vague as to render it void under the Fourteenth Amendment of the Federal Constitution (and Article 12 of the Declaration of Rights of the Constitution of Massachusetts). 50/ In the process of reaching this decision, the Committee held: 51/

(1) That a board of appeals is empowered and obligated to allow multi-family units in zoning districts that heretofore did not allow such units, if such action is reasonable and consistent with local needs.

(2) That nevertheless a board of appeals can insist that an applicant conform to local zoning by-laws and subdivision laws, when such laws are reasonable and consistent with local needs.

(3) That the Zoning Appeals Law has, where it applies, "superseded and made considerable inroads into rights and powers previously reserved to local cities, towns and boards of appeal under the Zoning Enabling Act" with regard to the powers to establish zoning districts and procedures for granting special permits and variances.

(4) That an applicant under the Law is in a special category only to the extent "that [the Zoning Appeals Law] puts him in a special category. In all other respects, and where [the Zoning Appeals Law] is silent, he is subject to the same state and local rules and regulations as any other applicant for a building permit."

The Committee then ordered the permit sought by the applicant issued, subject to four conditions: 52/

(1) Before beginning construction, the applicant shall provide the board with satisfactory evidence that its proposed provisions for drainage and sewage disposal have received approval from the appropriate state authorities.

(2) If anything, the decisions of this Committee would seem to permit the building or operation of such housing in accordance with standards less safe than the applicable building and site plan requirements of the Federal Housing Administration or the Massachusetts Housing Finance Agency; the standards of whichever agency is financially assisting such housing shall control.

(3) The board shall at its option be empowered to attach a condition to the comprehensive permit that the permit is not effective until the appellant and lessor submit to the board a statement setting forth in full detail the

terms of the lease, and the reasons for electing to lease rather than to deed in fee simple. Such statement shall be in sufficient detail to satisfy the board that it is a full disclosure, and shall be included as part of the appellant's application to the Massachusetts Housing Finance Agency (or other finance agency). Should disagreement arise between the Board and the appellant on the question of sufficiency of the statement, certification by the Department of Community Affairs shall be adequate proof of compliance with the requirements of this condition.

(4) The comprehensive permit shall provide that local officials shall carry out compliance inspections in the usual manner. Should disagreement between the builder and local officials arise, certification by the Department of Community Affairs, if requested, shall be adequate proof of compliance with any requirement of the comprehensive permit.

The Town of Hanover has appealed to the Superior Court of Massachusetts. There is speculation it will probably go to the Supreme Judicial Court if necessary to overturn the Committee's decision.

The Newton Case

The Housing Appeals Committee is currently in the midst of hearings concerning an appeal brought under the Zoning Appeals Law from a decision rendered by the Newton Board of Appeals. Newton is a city of approximately 100,000 persons in the westerly portion of the Boston metropolitan area astride the major westward transit links, surrounded by an industrial-educational complex.

The applicant-appellant is the Newton Community Development Foundation, which was formed in 1968, originally by approximately two dozen priests, ministers and rabbis of Newton; a board of directors, intended to represent the whole spectrum of the community, was appointed to determine the Foundation's objectives and define the policies it would employ to attain them. In the summer of 1969 the board of directors appointed an executive director, Mark A. Slotnick, and opened offices in Newton Center in space made available by the Newton-Waltham Bank and Trust Company. 53/

The genesis of the current controversy was a resolution to support low- and moderate-income housing at low densities on scattered sites. The resolution was passed in response to a 1967 study by a committee of the board of aldermen which concluded that an absolute minimum of 200 units of low-income housing was needed in Newton, and an October 1968 report of the Newton planning department concurring with the earlier recommendation. In the same month of May 1969, a citywide conference on low- and moderate-income housing, sponsored by various civic organizations, drew over 300 people. According to Mark Slotnick this response seemed to reflect the profound concern of many citizens with the housing needs of Newton. 54/

The Foundation's initial intent was to construct no less than 500 units throughout Newton on as many sites as economically feasible. Originally 10 sites were considered. 55/ Teams went around to each neighborhood in which the sites were located to explain the proposed development. (At that point, according to Robert Stiller, head of the Newton Civic Land Association which opposes the Foundation's plan, forces coalesced against the program, and Temples and churches to which the original 24 churchmen belonged lost congregants because of their involvement in the Foundation's project.)

There was strong opposition to some of the sites, and eventually a compromise was reached. A resolution calling for rezoning of a total of seven sites--four owned by the Foundation and three owned by the town, for the construction of multiple-family, low- and moderate-income housing was passed by the board of aldermen in August of 1970. However, the resolution required rezoning, and a three-fourths vote of all aldermen was required to get the necessary zoning. Such a resolution failed by one vote. 56/

As a result of this and other setbacks, on January 18, 1971, the board of directors of the Foundation decided to ask for a permit under the Zoning Appeals Law and eventually appeal, if necessary, to the Housing Appeals Committee. The appropriate appeals were made to the board of review, which held three hearings. Then the board met in executive but open session and held votes on the two propositions. The first was to approve the sites, which resulted in a 2-2 tie, defeating the motion; the second was to deny the application, which also resulted in a 2-2 tie, but the chairman then changed his vote, making it 3-1 for denial. 57/

A petition for review before the Housing Appeals Committee was filed in July of 1971. Among other things, it

was alleged that there was no quorum at the zoning board of appeals level and that no reasons were stated for the refusal to grant permission to develop the sites. There are six sites which are subject to the appeal, totaling 23.94 acres, upon which 224 units of low- and/or moderate-income housing are proposed. 58/

On July 19, 1971, the Housing Appeals Committee began hearings on the Foundation's appeal. As of September 9, a total of 10 hearings had been held and two more hearing days were scheduled for the month of September. 59/ By this time feelings are running high on both sides of the controversy. Larry Madfis, counsel to the Foundation, claims that the Newton Civic Land Association, which opposes the project, is stalling for time by the use of lengthy cross-examination, attempting to run the Foundation out of money so that the project will fail.

Meanwhile, in Newton, the board of aldermen has given initial approval to construction by the Newton Housing Authority of 12 units of low-income housing on three sites. Low-income housing advocates claimed 12 units are "a reduction to absurdity" from the original number of 361 units proposed by the Foundation. 60/ Robert Stiller of Newton Civic Land Association claims, however, that his group is fighting for ordinances which would require an up-grading of substandard housing when people move up to better housing so that the entire housing of the community can eventually be up-graded. The Association proposes that 235-type housing in one- and two-family units (together with some garden apartments where multiple-family is allowed) be scattered in one-quarter-acre to three-acre sites spread throughout the community. The city would provide for construction and sites but would retain the land ownership and allow the resident to own only the home or dwelling unit on the property. According to Stiller, the "poor element" in town supports this proposal. 61/

Other Cases

On August 31, 1971, an appeal to the Housing Appeals Committee was filed by the Lunenburg Arms Trust (among others) from a decision of the Board of Appeals of the Town of Lunenberg, rendered by letter dated August 13, 1971, denying the Trust's petition for a comprehensive permit to construct multiple-family housing on a single site within the jurisdiction of the town. A review of the appeal filed with the Housing Appeals Committee, together with the attach-

ments thereto, makes it clear that there have been a multitude of mutual recriminations in this particular case. The board of appeals makes no secret that it regards the applicants as speculators and the applicants make no secret that they regard the board as biased, in the first place, and having tampered with some of the records involved. That the hearing should be spirited is perhaps an understatement. It is worth noting that the applicants managed to obtain a writ of mandamus to compel the Town of Lunenburg's board of appeals to hold a proper hearing this past July. 62/

In the Town of Lexington, Massachusetts a private developer sought a land use change from the town meeting to construct a housing project which would contain at least 25% low-income housing in order to obtain financing from the Massachusetts Housing Finance Authority. At the meeting the developer received a favorable vote to change the zoning from one-family residential to subsidized-housing residential.

However, a Massachusetts statute which applies only to the Town of Lexington provides that if within five days of such a decision 20% of the citizens of Lexington ask for a referendum on the question, the pertinent ordinance is suspended until the referendum is held. 63/ On May 3, 1971, by such a local referendum, the citizens of Lexington overturned the vote of the town meeting, 5,000 votes to 2,700. 64/ This dispute may eventually reach the Appeals Committee.

Effectiveness of the Zoning Appeals Law

One of the purposes for the adoption of the Zoning Appeals Law was to promote discussion of housing problems and induce local communities to confront their responsibility for accommodating a fair share of regional low-income housing needs. Housing problems have certainly been widely discussed in subsequent sessions of the Massachusetts legislature, although no new bills have been passed. 65/

A substantial amount of local activity has also occurred since the passage of the Zoning Appeals Law, but apparently none of it has resulted in the construction of low-income housing. In 1969 and 1970, a number of communities and regional agencies undertook studies of the need for low-income housing within their jurisdictions. 66/ These studies found a substantial need for low-income housing, and showed that substantial amounts of low-income housing would have to be built in most communities before they would satisfy the quotas contained in the Zoning Appeals Law. 67/

In addition, Committee staff state that 30 new public housing authorities were created in Massachusetts communities in 1969, 68/ and apparently another 18 were created in 1970. 69/ Also, a number of communities have been seriously considering amending their zoning ordinances to provide for specific planning controls over any low-income housing which may be built. 70/

Developers have been understandably reluctant to use the appeals process, reportedly "preferring to let someone else bear the expense and delay of obtaining a definitive court test of the act." 71/ Many planners and lawyers in Massachusetts believe that a larger number of applications for comprehensive permits will be received once the Zoning Appeals Law is clarified and tested favorably. 72/

No legal challenge to the Zoning Appeals Law has yet reached the Massachusetts courts. A number of amendments have been introduced in the legislatures both to weaken and to strengthen the Law, but none passed in the 1970 sessions and the final outcome of the 1971 session is uncertain. 73/ There is some support for an amendment to the Law's definition of qualified low-income housing developers so that private developers who sell finished projects to housing authorities under the turnkey program can be included. 74/

Cooperation from other public agencies in the housing field is essential if the Zoning Appeals Law is to become effective. For example, FHA has traditionally been unwilling to approve financing for housing projects until the developer obtains a proper zoning classification, and the Boston FHA office has refused to waive this rule for comprehensive permit applicants, 75/ which forces the developer to undergo substantial initial expenses without any assurance of a loan from FHA. 76/ The Massachusetts Housing Finance Agency has apparently been uncooperative with at least one developer, refusing to promise financing where the developer planned to apply for a comprehensive permit because the MHFA reportedly feared the Zoning Appeals Law would be held unconstitutional. 77/ Finally, the cooperation of local housing authorities also will be necessary for the full implementation of the Zoning Appeals Law. Housing authorities have not yet applied for comprehensive permits, and may be reluctant to do so due to their close ties with local governments. 78/

FOOTNOTES

1/ 40B Mass. Gen. Laws Ann. §§20-23 (Supp. 1971).

2/ See, generally, U.S. Commission on Urban Housing, A DECENT HOME (1969) [Kaiser Commission].

3/ U.S. National Commission on Urban Problems, BUILDING THE AMERICAN CITY, at p. 51 (1969) [Douglas Commission].

4/ Qualified low-income housing developers are "any public agency or any non-profit or limited dividend organization." 40B Mass. Gen. Laws Ann. §20.

5/ For an excellent discussion of the historical circumstances in which Chapter 774 was adopted see Karen J. Schneider, "Innovation in State Legislation; The Massachusetts Suburban Zoning Act" (undergraduate thesis for Honors B.A. degree, Radcliffe College, 1970). See also Allan Rodgers, "Zoning and the Housing Shortage; For a Choice and Not an Echo" (Law Reform Institute, Boston, Massachusetts, 1970) (submitted for publication to the Boston College Annual Survey of the Law).

6/ Id.

7/ 23B Mass. Gen. Laws Ann. §5.

8/ The "uneconomic" standard merely defines how burdensome the local "approval of an application with conditions" must be to constitute in practical effect a denial, requiring the local decision to be "reasonable and consistent with local needs." 40B Mass. Gen. Laws Ann. §23. The statute defines "uneconomic" as "any condition brought about by any single factor or combination of factors to the extent that it makes it impossible for a public agency for a non-profit organization to proceed in building or operating low- or moderate-income housing without financial loss, or for a limited dividend organization to proceed and still realize a reasonable return . . . ." Id. at §20.

9/ Id. at §23.

10/ Id.

11/ Id. at §21.

12/ Interview with McDonald Barr, Deputy Commissioner of Community Affairs, member, Housing Appeals Committee, Boston, Massachusetts, March 31, 1971, and with John J. Carney, Director of Community Housing Assistance, Department of Community Affairs, Boston, Massachusetts, March 31, 1971.

13/ 40B Mass. Gen. Laws Ann. §20.

14/ Department of Community Affairs, Housing Appeals Committee, Rules and Regulations for the Conduct of Hearings, July, 1970, at p. 3.

15/ The Massachusetts Law Reform Institute is a federally financed law reform center located in Boston at 2 Park Square. It is basically a state "back-up" agency for legal services.

16/ Interview with Allan Rodgers, September 7, 1971.

17/ Id.; Telephone conversation with Allan Rodgers, November 2, 1971.

18/ Id.

19/ See Schneider thesis, supra note 5, at 95-96.

20/ See, e.g., Allan Rodgers, "Zoning and the Housing Shortage," supra note 5; Schneider thesis, supra note 5. None of these sources are themselves critical of Ch. 774 but each summarizes arguments advanced by opponents of the statute. See also Note, "Snob Zoning," 7 HARV. J. OF LEGIS. 246 (1970).

21/ Telephone conversation with Allan Rodgers, November 2, 1971; such a provision was in the original bill, according to Rodgers, but was eliminated somewhere in the legislative process before Ch. 774 became law.

22/ 40B Mass. Gen. Laws Ann. §21.

23/ Interview with McDonald Barr, March 31, 1971; interview with John J. Carney, September 7, 1971.

24/ "Information Bulletin for Applicants for Comprehensive Permits Under Chapter 774 of the Acts of 1979 [sic]," No. One at pp. 2-3. Department of Community Affairs, 141 Milk Street, Boston, Massachusetts.

25/ Interview with McDonald Barr, March 31, 1971; interview with John J. Carney, March 31, 1971; interview with Allan Rodgers, September 7, 1971.

26/ Town of Hanover, Zoning Board of Appeals, Case No. 70-5, December 1, 1970 (transcript of local proceedings).

27/ Such an approach has been suggested by committee staff. Interview with McDonald Barr, March 31, 1971; interview with John J. Carney, March 31, 1971.

28/ Massachusetts Department of Community Affairs, Housing Appeals Committee, Report on the First Year of Operations, January, 1971.

29/ Id. See also transcript of local proceedings, supra note 26.

30/ Committee Report, supra note 28; interview with McDonald Barr, March 31, 1971; interview with John J. Carney, March 31, 1971.

31/ Interview with Mark Slotnick and Larry Madfis, Newton Community Development Association, September 7, 1971, in Boston; interview with Robert Cohen, attorney for Newton Civic Land Association, Boston, September 8, 1971; interview with Maurice Corman, Hearing Officer and Counsel, Housing Appeals Committee, Boston, September 7, 1971.

32/ Interview with Robert Cohen, September 8, 1971.

33/ Id.

34/ See, generally, Housing Appeals Committee Rules and Regulations, supra note 14.

35/ Interview with John J. Carney, March 31, 1971.

36/ See Committee Report, supra note 28.

37/ Id.

38/ The Massachusetts Attorney General approved the Committee's interpretation that a "limited dividend organization" need not obtain a charter as such prior to filing for a comprehensive permit. Opinion letter from Attorney General to Commissioner of Community Affairs, July 9, 1970.

39/ Committee Report, supra note 28.

452-329 O - 72 - 13

40/ Country Village Corporation v. Board of Appeals of the Town of Hanover, Housing Appeals Committee, July 13, 1971, at p. 1.

41/ Id.

42/ Transcript of local proceedings, supra note 26, at pp. 4-5.

43/ Id. at p. 5.

44/ This placing of the burden on the applicant is one of many matters that Mark Slotnick of the Newton Community Development Foundation would like changed.

45/ Supra note 40, at pp. 2-18.

46/ Id., at pp. 18-19.

47/ Id., at p. 19.

48/ Id., at p. 20.

49/ Id., at p. 19.

50/ Id., at p. 21.

51/ Id., at pp. 22-25.

52/ Id., at pp. 26-27. The attachment of conditions reflects the Committee's interpretation that its explicit power to direct the issuance of a permit includes the power to control its content, and to require that certain conditions be attached.

53/ "Newton, No Ordinary Suburb," published by Newton Community Development Foundation, 93 Union Street, Newton Center, Massachusetts 01259. "Newton Braces for a New Fight Over Anti-Snob Law," Boston Globe, September 6, 1971, at p. 2.

54/ Interview with Mark Slotnick, September 7, 1971. See "The Newton Community Development Foundation Program," published by the Newton Community Development Foundation, May, 1971. "Newton Braces for New Fight Over Anti-Snob Law," Boston Globe, September 6, 1971, at p. 2. Participating organizations in the Newton Housing Conference: League of Women Voters of Newton; Newton Community Relations Commission; Housing Coordinating Committee of the City of Newton; Newton Chamber

of Commerce; Newton Committee For Fair Housing and Equal Rights; Newton Community Council; Newton Community Development Foundation.

55/ "No Ordinary Suburb," supra note 53; interview with Larry Madfis, September 7, 1971.

56/ NCDF Newsletter of October 19, 1970, published by Newton Community Development Foundation, Newton, Massachusetts; "Seven NCDF Sites in Compromise," The News-Tribune, Waltham, Massachusetts, Thursday, August 20, 1971, at p. 1.

57/ Interview with Larry Madfis, September 7, 1971. NCDF Newsletter, February 5, 1971.

58/ The Newton Community Development Foundation Program, May, 1971, supra note 54; interview with Larry Madfis, September 7, 1971.

59/ "Newton Braces for New Fight Over Anti-Snob Zoning Law," supra note 53.

60/ Id.

61/ Interview with Robert Stiller, Newton Civic Land Association, September 8, 1971.

62/ Interview with John Carney, September 7, 1971; appeal of Lunenburg Arms Trust, et al., filed August 31, 1971 with the Department of Community Affairs, Office of Housing Assistance.

63/ Telephone conversation with Maurice Corman, September 15, 1971.

64/ Id.; "Community Housing News," Vol. 1, No. 1, June, 1971, at p. 2.

65/ See Allan Rodgers, "Zoning and the Housing Shortage," supra note 5, at pp. 8-10.

66/ Interviews with McDonald Barr and John J. Carney, March 31, 1971; Allan Rodgers, "Zoning and the Housing Shortage," supra note 5, at p. 8; Metropolitan Area Planning Council, "Chapter 774: An Interpretive Analysis for Cities and Towns," October, 1969, Attachment 3 (maximum housing guideline under Chapter 774 for communities in the council district, 11-14). Also interview with Robert McKay, Citizens Housing and Planning Agency.

67/ Note, "Snob Zoning," supra note 20, at pp. 259-60.

68/ Interview with John J. Carney, September 7, 1971.

69/ Allan Rodgers, "Zoning and the Housing Shortage," supra note 5, at p. 8.

70/ Id.

71/ Id.

72/ Id.

73/ Id.; interviews with McDonald Barr and John J. Carney, March 31, 1971.

74/ Schneider thesis, supra note 5, at pp. 96-97.

75/ Id., at p. 97; Allan Rodgers, "Zoning and the Housing Shortage," supra note 5, at p. 7.

76/ Interview with John J. Carney, September 7, 1971.

77/ Interview with John Woodward, Brookline Town Planner, July, 1970.

78/ Id. One housing authority applied for a comprehensive permit after the public housing project involved had already been built, merely in order to obtain an occupancy permit from the local building department. The town did not schedule a hearing, and as required by Ch. 774 the comprehensive permit was automatically granted. Committee Report, supra note 28.

MAINE SITE LOCATION LAW

The quiet and peaceful State of Maine is under attack on two fronts: from the sea, by oil; from the land, by tourists. It views both these invaders with some ambivalence. They promise welcome sources of funds to areas with high unemployment, but they also create serious threats to the environment.

In 1970 the state suddenly realized how little control was being exercised over the impact of these new developments when a number of firms proposed major oil terminals in areas of the state where local governments had no land use regulations. The legislature responded with a package of legislation including a new Site Location Law that requires approval by a state agency of certain types of new development. 1/

Threats to the Environment

A sense of unease had been spreading for years about the vulnerability of vast stretches of Maine's forest, coast, and shoreland to unplanned and minimally regulated development. In part there was resentment against rich outsiders "exploiting" the state to their own temporary advantage. 2/ In much larger part, however, the attitude was one of alarm that the scenic beauty which Maine's inhabitants had taken for granted was seriously threatened by recent economic trends. New interstate highways were opening up northern New England to automobiles and buses and trailers from as far south as New Jersey within a day's drive. Affluence, especially outside of Maine, enabled many thousands of people to take longer vacations or to think about buying second homes on Maine's inland lakes. 3/

At the same time, geometrically expanding energy needs in the northeastern United States, combined with the emergence of mammoth tankers and the topographical accident that Maine has the only true deepwater ports on the American East Coast, made Maine a logical target for oil-import operations and for related refining industries. Over a period of three months during the early part of the 1970 special legislative session no less than four proposals were unveiled for deepwater ports and oil refineries in some of the most scenic areas of Maine's coast. 4/ According to Maine law professor Orlando Delogu, legislators

suddenly realized "that the state was vulnerable--we had absolutely no ability to control these developments, so we jumped in with both feet." 5/ Conservation groups, headed by the Maine Natural Resources Council, campaigned both publicly and in the legislative halls for some measure to protect Maine against such developments. The legislature devoted its primary attention to a Site Location Law which had been drafted by an Environmental Task Force appointed by the Governor.

Development Regulated by the Law

The Site Location Law focused directly on the problem which was the immediate cause of the legislation--major industrial projects. 6/ It required large commercial and industrial developments to obtain permits from the State Environmental Improvement Commission. Residential developers and realtors convinced the legislature to delete a provision which would have explicitly covered "residential" developments. 7/ The neutrality of the powerful forest products and electric power industries was assured by specific exemptions and a "grandfather" clause which removed most of them from the coverage of the bill. 8/ The final support for the bill was overwhelming, and it passed both Houses by a large majority.

The Site Location Law gave the Environmental Improvement Commission the power "to control the location of . . . developments substantially affecting local environment in order to insure that such developments will be located in a manner which will have a minimal adverse impact on the natural environment of their surroundings." 9/ The Law empowers the Environmental Improvement Commission to place conditions upon the use of particular sites by developers to insure that the surrounding environment is protected, and empowers the Commission further to deny the use of the site entirely if the effect on the environment is sufficiently serious.

Developments regulated under the Law include "any commercial or industrial development which requires a license [from the Environmental Improvement Commission under its pollution-control powers], or which occupies a land area in excess of 20 acres, or which contemplates drilling for or excavating natural resources . . ., or which occupies on a single parcel a structure or structures in excess of a total floor area of 60,000 square feet." 10/ Developments by public agencies are not regulated.

As originally drafted the bill covered "residential, commercial or industrial development," but an amendment to the bill deleted the word "residential." Nevertheless, "commercial" developments have been defined by the Commission to encompass residential subdivisions in excess of 20 acres, or residential developments which would require a pollution permit from the Environmental Improvement Commission. The position of the Commission is that the subdivision of land for the purpose of selling lots is obviously "commercial" activity, and that the word "residential" was dropped from the original bill merely because it was redundant. 11/ This position has been supported by the State Attorney General. 12/ Peter Bradford, who was a member of the Task Force that drafted the Site Location Law, agrees that an early version of the statute did indeed employ the term "residential," but that it was subsequently deleted because the draftsmen felt that really large residential developments would be considered "commercial" anyway while no one wanted to reach small housing construction. 13/ Indeed, according to Donaldson Koons, a member of the Environmental Improvement Commission, the bill would be amended immediately if for any reason Maine courts decided that the Law as drawn did not cover residential development. 14/

The Commission views the 20-acre limitation upon its jurisdiction as the rule of thumb differentiating "commercial" from "residential" activity. It unsuccessfully pressed for a reduction of the minimum acreage exemption from 20 acres to 10 acres during the last session of the legislature. 15/

The Regulatory Agency

Administrative responsibility for the Site Location Law was lodged in the Maine Environmental Improvement Commission, an independent commission whose 10 members are appointed for three-year terms by the Governor with the advice and consent of the Governor's Executive Council. The members of the Commission are required to represent various interest groups within the state: manufacturing interests are to account for two positions; conservationist interests, two; municipalities, two; and air pollution experts and the "public," equal numbers. The Commission members receive $10.00 per day for their services at meetings or hearings. 16/

The Environmental Improvement Commission has been in existence in one form or another since 1941. 17/ In 1964, however, its duties were greatly expanded. In that year the Commission was commanded to "abate and prevent the pollution of the air, water, coastal flats and prevent [sic] diminution of the highest and best use of the natural environment of the State." 18/ To this end the Commission was to establish and enforce a classification plan for all the waters in the state according to the allowable effluent wastes in both fresh and salt waters, and was also given the job of controlling oil discharges as well as setting ambient air quality standards by region of the state.

In 1971 the Environmental Improvement Commission and a number of other agencies having an environmental orientation were placed within a Department of Environmental Protection. The Commission retains its independent decision-making powers but its administrative services are to be provided by the coordinated Department, and the Director of the new Department becomes the Chairman of the Commission as well. 19/ These changes are part of a general plan of state governmental reorganization. 20/ Bill Adams, the former Executive Director of the Environmental Improvement Commission, has been named the Director of the new Department. 21/

Also included in the Department is the Maine Land Use Regulation Commission which is empowered to plan and regulate the use of land in the "unorganized" counties of the state. 22/ These counties occupy the northern half of the state but are largely unpopulated. Almost no development ment takes place in the unorganized counties at the present time. 23/

Review of Applications for Permits

Application procedures have been forced to fit a strict deadline prescribed by statute. The Law dictates that:

> Any person intending to construct or operate a development . . . shall, before commencing construction or operation, notify the Commission in writing of his intent and the nature and location of such

> development. The Commission shall within 14 days of receipt of such notification, either approve the proposed location or schedule a hearing. 24/

The Commission has found the 14-day requirement to be completely unworkable, given the Site Location Bureau's small staff. The first solution attempted was to solicit waivers of the 14-day requirement from every applicant, and to seek to meet the 14-day requirement only when an applicant refused to sign a waiver. After consultation with the Attorney General, however, the Commission decided to adopt the interpretation that it is not "notified in writing" until it receives an entirely completed application from the applicant. It then has 14 days from the receipt of the completed application to decide whether or not to hold the hearing. 25/

The application itself (called a "Record of Intent") comprises a 25-page form (condensed from a previous 68 pages) which ranges across a wide variety of topics and is designed to elicit the maximum amount of information from the developer. The application requires information describing the developer and his associates (including any professional advisors they may have in their group capacity), his financial backing, his plan for the project, an educated estimate of the harm to natural surroundings, a description of provisions made for connections to water and sewage systems, and any alterations in traffic access that are expected. The applicant is advised that he may consult informally with the staff if he has any questions concerning the application. However, the staff will not formally process his petition until it is completed and all parts of it have been filed, because the Commission feels that if the staff should actually begin processing an application it would necessarily have received "notice" of the same and would therefore have to approve it or schedule it for a hearing within 14 days. 26/

Also because of the 14-day requirement, the applicant receives blank "request for review" forms which he must himself send to a number of different state agencies, as well as to regional planning agencies and municipalities claiming jurisdiction. The applicant must see that these forms are filled out and attached to his official proposal before it is regarded as being "complete" and ready for filing. On the average the developer must contact four or five state agencies plus the local and regional agencies simply to put his Record of Intent in order. 27/

Because the Commission has no independent or affiliated investigatory arm its own sources of information are limited to maps and to aerial photographs. For additional information it must rely on the application as well as on the review forms submitted by other state agencies (some of which may undertake on-site investigations or have on file previous studies covering the area in question).

Because the statute requires the Commission to either approve the application within 14 days or schedule a hearing the Commission has chosen to deal with most applications by approving them subject to conditions, which can amount to a denial if the conditions are sufficiently onerous. 28/ So far the Environmental Improvement Commission has received a total of 136 applications. Thirty-five were declared exempt from the Site Location Law's provisions, nine were withdrawn, 76 were approved, and 12 are pending. Only four were denied. 29/

This reliance on conditional approval significantly reduces the need for Commission hearings, which under the original Law had to be conducted by the full Commission. The Law was amended in 1971 to permit the Commission to delegate the hearings, which reduces the concern that the denial of applications will burden the Commission with a hearing load greater than it can handle. 30/

The Site Location Law declares that decisions are to be governed by four criteria: 31/

(1) Financial capacity. A proposed development has the financial capacity and technical ability to meet state air and water pollution control standards, has made adequate provision for solid waste disposal, the control of offensive odors, and the securing and maintenance of sufficient and healthful water supply.

(2) Traffic movement. The proposed development has made adequate provision for loading, parking and traffic movement from the development area onto public roads.

(3) No adverse effect on natural environment. The proposed development has made adequate provision for fitting itself harmoniously into the existing natural environment and

will not adversely affect existing uses, scenic character, natural resources or property values in the municipality or in adjoining municipalities.

(4) Soil types. The proposed development will be built on soil types which are suitable to the nature of the undertaking.

Each permit that is granted is made subject to certain standard conditions, e.g., that approval is limited to the project as set forth in the application, that all requisite additional licenses and official consent will be obtained, and that all information subsequently requested by the Commission will promptly be provided. 32/ Furthermore, individual conditions, tailored to each separate development, are usually imposed, often at the behest of other state agencies. Such conditions seek to insure, for example, ample water of good quality at the site, improved roads and traffic circulation patterns, and adequate sewage disposal.

Specific conditions attached to permits are usually based on recommendations of other state agencies. The quality of these recommendations varies significantly from agency to agency, according to Henry Warren, the Chief of the Site Location Bureau, but the Commission has tended to give great weight to the expertise of the Soil and Water Conservation Commission and the state Highway Commission whenever they make firm recommendations. 33/ The attitude of the various agencies toward the Law is somewhat ambivalent, Warren observes. On the one hand they resent the increased responsibilities given them without any complementary budget increase, but on the other hand the Law gives them the power to enforce many types of criteria that were formerly only advisory. Thus, for example, the preservation of topsoil on building sites, long a goal of the soil conservation people, can now be made a firm requirement. 34/

The construction of central sewage systems is a typical condition attached to residential development proposals on the recommendation of the Soil and Water Conservation Commission. 35/ Informal guidelines have been published by the Environmental Improvement Commission dealing with sub-surface sewage disposal, which is a serious problem throughout New England, owing to the low absorption capacity of the soil. The Guidelines require

that the provisions of the Maine Plumbing Code be followed, and that leaching fields for the disposal of sewage be located at greater distances from waterways when the percolation capacity of the soil is less adequate, as shown by the "Soil Suitability Guide for Land Use Planning in Maine." 36/ It has been estimated that 85 per cent of the land in Maine is unsuitable for such disposal systems, and the figure rises to nearly 100 per cent of the land around lakes, where much of Maine's residential development takes place. 37/

Legislation enacted in 1971 will enable the Commission to substitute formal regulations for these informal guidelines on which it now relies. The new amendment replaces the narrow mandate to make reasonable rules and regulations relating to the conduct of hearings with the crucial Commission power to "adopt, amend and repeal such reasonable regulations as it deems necessary to carry out this Title or any other laws which it is charged with the duty of administering." 38/

Judicial Review

Decisions of the Commission may be appealed directly to the Supreme Judicial Court within 30 days. Review is confined to deciding whether the written record of the hearing contains substantial evidence to support the Commission's order, and whether the Commission acted "regularly" and "within the scope of its authority."

The judicial review portion of the Law left some gaps. It provides for appeals from orders issued after a hearing, but does not deal with the question of appeal from orders imposing conditions without a hearing. Nor does the Law deal with the problem of appeal from the Commission order deciding whether or not a development is exempt from the Law. 39/ Finally, the Site Location Law states merely that appeal may be carried "to the Supreme Judicial Court" and neglects to add "sitting as the Law Court," which specification is customary in Maine for appeals of that type. 40/

The Maine Supreme Court resolved some of the ambiguities surrounding the statute's judicial review provisions. In King Resources v. Environmental Improvement Comm'n, 41/ the Maine Court held that the Law's treatment of review is

not exclusive, at least where no hearing has been held nor any order issued, and that appeals would be heard by the Law Court.

Effectiveness of Administration

Because of the inadequate budget the Commission has been able to allocate only one staff member and an assistant to process all site location applications. They are assisted informally by the staffs of other state agencies, but the Commission itself has no staff for the investigation of information contained in applications or the enforcement of conditions attached to permits. According to those familiar with the background of the Law, the legislative intent was that the Commission could gather all necessary information from applicants and from the reviewing agencies without an investigative staff of its own, because any facts which needed to be verified could be investigated by the appropriate reviewing agency. 42/

At first blush one might surmise that an overworked two-man staff sitting in the state capitol would find it impossible to discover what development was taking place in a state the size of Maine, so that violation of the Law would be easy and frequent. Despite its handicaps, however, most observers feel that the Commission doesn't miss much. David O'Brien, one of the officers of the Natural Resources Council, says the Commission has done a "fantastically good job with a limited budget." 43/ From an opposite perspective, Phillips Lewis, president of Sun Federal Savings and Loan Association in Portland, observed: "If their objective is to give overriding consideration to preservation of the environment, they've done a hell of a job." 44/ Al Waxler, retired president of the Homebuilders' Association of Maine, went so far as to assert that, since the passage of the Site Location Law, the Environmental Commission has become the most powerful instrumentality in the state. 45/

The Commission's general awareness of new development activity can be attributed to the fact that the Law has aroused a great deal of public interest, so that local conservationists usually call the Commission about proposed developments in their local area. Also, the field staff of other agencies would be likely to report new development activity. 46/ Moreover, the general economic conditions in Maine over the past two years have not stimulated a large volume of development activity. 47/

But even when one takes into account the adverse economic conditions prevailing in Maine, combined with a hypothetical reduction in building activity resulting from the Law itself, it is surprising that the Commission has processed only 136 applications in 15 months. 48/ The small quantity probably reflects the fact that the Commission has been quite selective about exercising its pollution-control jurisdiction. Thus, for example, waste-discharge licenses for emissions into existing sewer systems have been required only where the effluent increased the load "significantly," i.e., by 25% or more. 49/ In general the Commission is exercising its jurisdiction within urban areas only to a limited degree.

The real administrative gap is the failure to check back to see whether conditions attached to development permits are being followed. Charles Boothby, director of the Soil and Water Conservation Commission, described compliance with these conditions as "totally inadequate." 50/ The Commission hopes to employ engineering consulting firms on a part-time basis for field investigations next year. 51/

The absence of staff for investigation and enforcement has made it difficult for prospective buyers of real estate to determine whether the property has been developed in accordance with the Law. Financial institutions would like to see the Commission issue certificates of compliance in order to put these doubts to rest. 52/

The Impact on the Environment

The Site Location Law was primarily the result of concern over a number of large oil-oriented industrial proposals along the Maine coastline. The public has therefore awaited with great interest the Commission's decisions on these proposals.

The first such proposal to reach the Commission was declared exempt under the Law's grandfather clause by the Supreme Judicial Court in King Resources v. Environmental Improvement Commission, so the merits of the case were not reached by the Court. 53/ The application filed by Maine Clean Fuels, Inc. had no claim for an exemption, however, and it was denied by the Commission on July 21, 1971. 54/

In the Maine Clean Fuels case a seven-man corporation, Maine Clean Fuels, Inc., applied to the Commission for permission to construct a 202,000-barrels-

per-day refinery on Sears Island in Penobscot Bay. The applicant argued that its proposal would provide numerous jobs for the economically depressed Searsport area, but the Commission refused to consider this issue:

> [T]he consideration of economic benefits that may accrue to the State of Maine or the Searsport area [is] not included in the statutory criteria which would allow the Commission to approve or deny an application for Site Location approval. 55/

A Notice of Intent to file an appeal was filed late in August, but Donaldson Koons, who was Chairman of the Commission at the time of the decision, does not think there will actually be an appeal. Apparently, Maine Clean Fuels is not challenging the jurisdiction of the Commission or the validity of the Law. Rather, it is appealing the decision on the factual record which, in Koons' opinion, is in such bad shape that the matter will probably be dropped by the applicants entirely.

In essence, the Commission objected to the state of the plan and application submitted as well as the environmental effects of siting a refinery on the recreationally oriented Penobscot Bay. According to Koons, the applicants demonstrated a clear lack of planning in that their cost estimates varied between $5 and $30 million for the project, they had no concept as to the turning circle required by the tankers which would serve the refinery, and the plan presented, when placed as an overlay over the Island Site, "hung over" considerably on all sides. Among other things, the record is said to disclose wholly inadequate financing by Maine Clean Fuels, whose sole asset appears to be an import quota of 100,000 barrels per day into Maine. Apparently it would be the intent of the applicants to arrange for a certain oil company anxious for an Atlantic Coast foothold to build the refinery. Koons indicated that in the future such applications would not be accepted, but that the Commission really bent over backwards to give the applicants a hearing in this case. 56/

But while these two oil refinery cases have captured the headlines, the number of proposals for heavy industry has been minimal. 57/ The state's Department of Economic Development has adopted a policy of "development through conservation," says Assistant Director Jim Dorsey, and encourages only light industry to come to Maine. 58/

Consequently, the Commission's real workload has been the processing of permits for residential subdivisions. As of August 5, 1971, 83% of the applications processed by the Commission have been for the construction of housing, about half of these for seasonal housing. 59/

Some concern is expressed that the Commission's actions are aggravating the state's housing shortage. The Director of the State Housing Authority, Eben Elwells, feels that the Commission's tough attitude toward subdivisions is driving poor people into mobile homes. Mobile home sales are currently outrunning permanent home starts by a ratio of three to one! 60/ Portland banker William Graham feels the Commissioners do not grasp the full economic implications of their decisions. 61/

The staff of the Commission does not concede that its subdivision standards are unfair. But the past president of the Homebuilders' Association, Al Waxler, says he is personally aware of a number of builders who moved to other states after the Law went into effect. 62/

Some friction between the Commission and local reviewing agencies has sprung up when the locality believed that it was better able to weigh the factors behind an application. Thus, the planning board for the City of Portland was annoyed that the Commission should have disregarded its approval of King Resources' application to build modernized dock facilities in Portland's harbor. Don Megathlin, head of the Portland Planning Board, stated that if a situation arose again where his agency and the City Council favored a project which the Commission subsequently disallowed, he "wouldn't hesitate one minute to go to court" to challenge the validity of the Commission's "quality of design" and "impact on environment" criteria. 63/ Most local governments, however, seem to be pleased with the "reasonableness" and "cooperativeness" of the Commission as presently constituted, and view the Site Location Law as an extra back-up to their own efforts. 64/

The existing harmony between state and local government undoubtedly stems from the fact that much of Maine is wholly without land use controls. Only one-third of Maine's townships are "organized" into municipal corporations, and of these, only 15% are zoned. Even the state's capital, Augusta, is without a zoning ordinance. 65/ Many more municipalities will be exercising land use controls in the near future, however, because a 1971 statute grants municipalities authority to "plan, zone and control the

subdivision of land . . . any part of which [lies] within 250 feet of the normal high water mark of any navigable pond, lake, river or salt water body . . ." and provides that "If any municipality fails to adopt zoning and subdivision control ordinances for shoreland areas . . . by June 30, 1973 or if the Environmental Improvement Commission . . . [finds] that particular municipal ordinances because of their laxity and permissiveness fail to accomplish the purposes outlined . . ." it shall adopt ordinances for the municipalities. 66/

Since only 15% of "organized" Maine townships are zoned there is clearly a good deal of shoreland on navigable streams (defined as any waterway upon which a log can be floated) which will fall under the jurisdiction of the Commission. In order to ease the burden of local communities unused to land use regulation, the Commission plans to set up some performance criteria which will provide that with given topographical conditions a local ordinance should not permit uses in excess of given densities. 67/ Henry Warren predicts that 85% of the cities and towns of the state will soon adopt zoning because of this statute. 68/

Some observers believe that in the long run the Site Location Law may be seen as more of a stopgap remedy than a permanent solution. James Haskell, Director of the Land Use Commission, believes that the need will be increasingly recognized for a system of regulation tied into an overall state plan. 69/ As local governments increasingly adopt land use controls the need for state involvement will lessen. 70/ State Planning Director Phil Savage fears that the Law's complete emphasis on environmental protection, and the Commission's inability to even consider social and economic needs, will some day produce a counterreaction. 71/

The staying power of regulatory programs is notorious, however, and it would be foolish to predict the demise of the Site Location program. Bill Adams sees the future bringing a sharper definition of the Commission's powers but no weakening of its regulatory authority. 72/ The major question for the future is whether the state can expand the Site Location Law into a more comprehensive land regulatory system that leaves the local issues to local governments but deals with major development proposals in the framework of a broader conception of state planning than the current Law contains.

452-329 O - 72 - 14

FOOTNOTES

1/ 38 Me. Rev. Stat. Ann. §§481-88 (Supp. 1970). For a discussion of some of the other legislation see 22 MAINE L. REV. 481 (1970). See also Elizabeth Haskell, "Managing the Environment: Nine States Look for New Answers," (Smithsonian Institution, 1971).

2/ Interview with Henry Warren, Chief of the Site Location Bureau, Environmental Improvement Commission, August 9, 1971.

3/ The "inland coast" has attracted the majority of new developments, priced away from elegant spots along the Atlantic Shore. Interview with Henry Warren, May 4, 1971.

4/ See John McDonald, "Oil and the Environment: The View From Maine," FORTUNE (April, 1971, at p. 84).

5/ Interview with Orlando Delogu, Professor of Law, University of Maine, and member of the Environmental Improvement Commission, March 24, 1971.

6/ The statement of purpose indicates the major focus of the legislation: "The Legislature finds . . . that many developments because of their size and nature are capable of causing irreparable damage to the people and the environment in their surroundings; that the location of such developments is too important to be left only to the determination of owners of such developments . . . ." 38 Me. Rev. Stat. Ann. §481.

7/ Interview with Orlando Delogu, March 24, 1971.

8/ See 38 Me. Rev. Stat. Ann. §488. In 1971 the law was amended to require permission from the Commission for transmission lines carrying 125 kilovolts or more. Interview with Steve Murray, Assistant Attorney General, August 12, 1971.

9/ Id., at §481.

10/ Id. at §482(2). In 1971 the legislation was amended to require buildings exceeding 60,000 square feet of "total floor" area rather than "ground floor" area to obtain permits.

11/ Interview with Orlando Delogu, March 24, 1971.

12/ Interdepartmental Memorandum dated March 5, 1970, from John R. Patterson, Assistant Attorney General, to William R. Adams, Director, Environmental Improvement Commission.

13/ Interview with Peter Bradford, August 12, 1971.

14/ Interview with Donaldson Koons, then Chairman and now member, Environmental Improvement Commission, September 9, 1971.

15/ Id.

16/ 38 Me. Rev. Stat. Ann. §361 (1964).

17/ Interview with Orlando Delogu, March 24, 1971.

18/ 38 Me. Rev. Stat. Ann. §361 (1964).

19/ Public Laws of the 105th Assembly, Ch. 489 (1971).

20/ Interview with Phillip Savage, Director, State Planning Office, August 10, 1971.

21/ Interview with William Adams, now Director, Department of Environmental Conservation, August 11, 1971.

22/ Public Laws of the 105th Assembly, Ch. 457 (1971).

23/ Interview with James Haskell, Director, Land Use Commission, August 10, 1971. When development is proposed in the unorganized territories the Environmental Improvement Commission by informal agreement with the Land Use Commission refers the proposal to the Land Use Commission and abides by its judgment. Interview with Henry Warren, March 25, 1971.

24/ 38 Me. Rev. Stat. Ann. §482(2) (1970).

25/ Interview with Donaldson Koons, May 4, 1971.

26/ Interview with Henry Warren, March 25, 1971.

27/ Interview with Henry Warren, May 4, 1971.

28/ Id.

29/ Interview with Donaldson Koons, September 9, 1971.

30/ Public Laws of the 105th Assembly, Ch. 414 (1971).

31/ 38 Me. Rev. Stat. Ann. §484.

32/ Interview with Henry Warren, May 4, 1971.

33/ Interview with Henry Warren, August 9, 1971.

34/ Interviews with Henry Warren, March 25 and May 4, 1971. Interview with Roger Mallin, Chief of the Planning and Traffic Division, State Highway Department, August 11, 1971.

35/ Interview with Charles Boothby, Director, Maine Soil and Water Conservation Commission, August 16, 1971.

36/ Maine Environmental Improvement Commission, Guidelines (undated).

37/ Interview with Donaldson Koons, September 9, 1971.

38/ Public Laws of the 105th Assembly, Ch. 256 (1971).

39/ 38 Me. Rev. Stat. Ann. §487.

40/ Interview with Steve Murray, May 4, 1971.

41/ King Resources v. Environmental Improvement Commission, 270 A.2d 863 (Me. 1970).

42/ Interview with James Haskell, March 25, 1971.

43/ Interview with David O'Brien, Maine Natural Resources Council, August 12, 1971.

44/ Interview with Phillips Lewis, Sun Federal Savings and Loan Association, August 13, 1971.

45/ Interview with Al Waxler, past president (1969-1971) of the Homebuilders' Association of Maine, August 13, 1971.

46/ Interviews with Henry Warren, March 25 and August 9, 1971.

47/ Interview with William Adams, August 11, 1971.

48/ Interview with Donaldson Koons, September 9, 1971.

49/ Interview with Henry Warren, August 9, 1971.

50/ Interview with Charles Boothby, August 16, 1971.

51/ Interview with Henry Warren, August 12, 1971.

52/ Interview with Charles Moreshead, Attorney, Augusta, Mine, August 11, 1971.

53/ 270 A.2d 863 (Me. 1970).

54/ In the Matter of Maine Clean Fuels, Inc., Site Location No. 29-0166-14190 (July 21, 1971).

55/ Id.

56/ Interview with Donaldson Koons, September 9, 1971.

57/ None of the other oil terminal proposals have materialized in the form of an application to the Commission. Interview with Henry Warren, August 12, 1971.

58/ Interview with Jim Dorsey, Assistant Director, Maine Department of Economic Development, August 11, 1971.

59/ Interview with Donaldson Koons, September 9, 1971.

60/ Interview with Eben Elwell, Director, Maine Housing Authority, August 13, 1971. See The Maine Times, October 1, 1971, at p. 2.

61/ Interview with William Graham, head of the real estate department, Portland Savings Bank, August 13, 1971.

62/ Interview with Al Waxler, August 13, 1971.

63/ Interview with Don Megathlin, Director, Portland City Planning Board, August 11, 1971.

64/ Id. Interview with William McDonald, Director, Andaskagon Regional Planning Commission; interview with Merle Goff, City Manager, Bangor, August 12, 1971.

65/ Interview with Donaldson Koons, September 9, 1971.

66/ 12 Me. Rev. Stat. Ann. §4813 (1971). The Land Use Regulation Commission has the same duty for "unorganized" townships.

67/ Interview with Donaldson Koons, September 9, 1971.

68/ Interview with Henry Warren, August 12, 1971.

69/ Interviews with James Haskell, March 26 and August 10, 1971.

70/ Interview with John Salisbury, August 11, 1971; interview with James Haskell, August 10, 1971.

71/ Interview with Philip Savage, August 10, 1971.

72/ Interview with William Adams, August 11, 1971.

MASSACHUSETTS WETLANDS PROTECTION PROGRAM

Protection of Massachusetts' coastal wetlands began in 1963, with the enactment of the Jones Act, 1/ which requires developers who seek to alter the natural characteristics of coastal wetlands (by removing, dredging or filling) to apply to the Massachusetts Department of Natural Resources for a permit. The purpose of the Jones Act is to allow the Department to impose limitations upon such developments sufficient to help preserve the ecological conditions necessary for shellfish and marine fisheries. The Act does not authorize the Department to prohibit development.

This limited form of protection for coastal wetlands is gradually being replaced by "protective orders" issued under the Coastal Wetlands Act of 1965. 2/ Protective orders issued by the Department prohibit any alteration (except under carefully-controlled circumstances) of large coastal wetland areas defined and mapped in each order. The permit requirements of the Jones Act are superseded when a protective order is adopted for a coastal wetlands area, because the protective orders are much more restrictive than the permits.

Protective orders (conservation restrictions) have now been recorded against 17,915 acres of coastal wetland, and orders are currently pending against another 25,446 acres. 3/ In the near future, therefore, the Department will have recorded conservation restrictions covering 44,000 of the approximately 60,000 acres of coastal wetlands in Massachusetts. 4/ Thus the Jones Act will soon be obsolete, except where landowners manage to prevent their wetland property from being included in a coastal protective order.

Massachusetts protects inland wetlands under the Hatch Act of 1965. 5/ Like the Jones Act of 1963, the Hatch Act requires developers who contemplate projects involving filling and dredging of inland wetlands to apply to the Department for a permit. The Department, in order to preserve public and private water supplies and to insure property flood control, attaches conditions to the permits to limit the project's detrimental effect on the inland wetlands involved. No denial of development rights is contemplated. The Hatch Act is somewhat weaker than the Jones Act, because agricultural lands are exempted.

Protective orders for inland wetlands, similar to coastal protective orders, were authorized by the Massachusetts legislature in the Inland Wetlands Act of 1968, 6/ but inland protective orders have not yet been issued by the Department, and a number of difficulties concerning the Inland Act may cause inland wetlands to be protected at a much slower rate, and less completely, than coastal wetlands.

Background of Massachusetts Wetlands Legislation

Very little opposition was offered in 1963 and 1965 to the bills protecting coastal wetlands (the Jones Act and the Coastal Wetlands Act). 7/ Development pressures on the coast were not strong, and numerous studies (including one by the Department of Natural Resources, which sponsored the legislation) demonstrated quite clearly the value of coastal wetlands for flood and storm protection, recreation, and the long-term productivity of the fishing industry. 8/

The values of inland wetlands were not yet clearly established, but the Hatch Act of 1965, offering initial protection to such areas, was passed easily due to the acceptance of the coastal acts, and the fact that inland farmers, developers, and municipal officials had not been alerted to the danger that regulation of inland wetlands could deprive them of land for expansion.

By the time the Inland Wetlands Act was first proposed by the Department in 1967, however, the potential effect of wetlands regulation on the supply of inland development sites and agricultural lands had become clear. Also, the 1967 Department study 9/ of inland wetlands was not as convincing as the earlier studies of coastal wetlands had been. Inland wetlands had been popularly considered "mosquito havens, wastelands," fit only to be reclaimed for development, and this attitude was not fully overcome.

Strong opposition was offered against the 1967 bill by realtors, residential developers and by the Farm Bureau Federation. The bill was defeated in 1967, and passed in 1968 only after various amendments weakening its effectiveness had been passed. According to one observer, the bill would not have passed even then except for the previous summer's destructive floods in several inland areas, which had aroused public demands for some sort of state regulation. 10/ It was ironic that one of the amendments weakened the Department's authority to regulate inland flood plain areas, leaving such regulation substantially up to fragmented local control. 11/

Protection of Coastal Wetlands

Coastal protective orders are the most significant portion of the Massachusetts wetlands protection program. Permits may be required, under the Jones Act, for the alteration of the relatively few coastal wetlands not restricted by protective orders, but the Jones Act has been, or soon will be, superseded by the Coastal Wetlands Act. Protective orders issued under the authority of the Coastal Wetlands Act are comprehensive in scope (covering entire wetlands areas), and effectively prohibit any substantial development activity in the area protected. They are adopted only after extensive local hearings held by the Department.

Many owners apparently welcome the restrictions in the protective order, realizing that the natural state of their property will remain undisturbed by any neighboring developments because the order prohibits development in the entire area. 12/ Also, the state emphasizes to owners that the order does not grant the general public any rights to use the owners' property, and that the owner retains all private property rights and the right to enjoy his property in privacy as long as he does not seek to develop it in violation of the order. 13/

The purpose of protective orders, as specified in the Coastal Wetlands Act, is to protect "wildlife and marine fisheries." The Act gives the Department the authority to "adopt . . . orders regulating, restricting or prohibiting dredging, filling, removing or otherwise altering, or polluting, coastal wetlands." 14/ Coastal wetlands which may be protected by the Department include "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 [of Natural Resources] reasonably deems necessary . . . ." 15/ Thus the powers of the Department under the Coastal Wetlands Act are quite broad, as to both the type of regulation which can be imposed and the definition of coastal wetlands which may be protected. It is particularly significant that protective orders may cover meadows and "such contiguous land [to the coastal wetlands] as the commissioner reasonably deems necessary."

Delineation of Areas to be Protected

The first step for the protection of coastal wetlands is for the Department personnel to gather the information necessary to locate such wetlands, decide the precise

areas to be protected, and determine land ownership in these areas. The Department has proceeded by consulting with planning agencies and obtaining copies of all local and regional plans, as well as any other information pertaining to wetlands areas which these agencies wish to offer. Local conservation commissions are also consulted. 16/

Because available maps are almost always somewhat outdated, Department personnel conduct an on-site investigation of the area under consideration to determine the location and extent of coastal wetlands. The inspection is sometimes done from the air, but that method is too expensive to be applied generally. Usually the work is done by a man on the ground; it may require two days to two weeks for a given town, depending upon the extent of wetlands and the accuracy of available maps. 17/

When this investigation is completed, the Department prepares a tentative map of the area to be protected, and consults local assessor's maps to determine the ownership of the land affected. At this stage an effort is made to include any land, and any landowner, whose wetland status is uncertain. This tendency to err in favor of inclusiveness is based on a desire to avoid the administrative problems that would result later if an order were eventually to affect landowners who were not given notice of the public hearing. Should that happen, the Department would have to conduct a second hearing for those owners who received no notice of the first one, and the extra time and expense would be considerable. 18/

When the proposed order has been prepared by the Department, those persons registered as owners of the subject property upon local assessors' maps are notified by certified mail, at least three weeks in advance, that a hearing on the order will be held in their local community. No other private persons are so notified. 19/ Notice is also given to interested state agencies. Hearings, conducted by the Commissioner of Natural Resources, are held in each town in the area covered by the order.

Recently a new feature has been added to the Department's contact with local communities. Before the public hearing, Department officials spend a few days in the town, meeting informally with property owners affected by the proposed order. These preliminary meetings provide an opportunity to answer many specific individual questions that would otherwise consume valuable time at the public hearing. 20/

At each hearing the proposed order is presented for discussion and officials of the Department explain the effect of the order and the reasons it will be beneficial for the particular community. Throughout this presentation the Commissioner emphasizes that the preliminary order is only a proposal and that the comments of the members of the local community are welcomed and will be taken into consideration in preparing the final order. 21/ Following the presentation by Department officials, the floor is opened to questions and comments.

At the conclusion of the hearing, the Department makes available to affected property owners a form on which they can request a personal appointment with a state officer. This appointment will usually involve a visit by the state officer, a marine or wildlife biologist, to the particular owner's property to explain the effect the protective order will have. If the request for an on-site visit reflects serious objections to the order the visit becomes the first stage of negotiations between the property owner and the Department regarding application of the order to particular property.

Once negotiations with landowners are complete, the Department draftsmen plot the boundaries of the order on copies of the local assessor's maps and record these maps, with copies of the written order, as conservation restrictions against the land involved. The orders thereby are made known to anyone examining the title to the property.

The local hearing process is very time consuming, because each hearing requires several weeks of staff preparation, as well as the time required to hold the hearing and revise the order after negotiations with landowners. 22/ At the present time there is only one wildlife biologist who conducts the on-site surveys to map coastal wetlands and later visits individual landowners who request a meeting with a state officer. This same field biologist is also responsible for investigating all applications for Jones Act permits, so it is not surprising that progress is often slow. After a public hearing on a protective order it usually requires six to nine months to carry out the on-site visits, prepare the final mapping of the order, and record the order. 23/

It has taken the Department more than five years to hold 25 hearings covering approximately two-thirds of the coastal wetlands in the state and to record final protective orders covering approximately one-third. 24/ Approximately 20 more hearings are planned for remaining coastal wetlands

areas totaling about 15,000 acres. 25/ At the planned rate of about one hearing a month, it should require a little more than two years to hold these hearings and record protective orders against the remaining coastal wetlands. 26/ Despite the fact that only about one-half of coastal wetlands have been protected to date, the Department feels the coastal program has been successful, and conservationists in the state seem to agree with the view. 27/ Protective orders have been recorded or are pending against about 44,000 acres of wetlands property in Massachusetts, and this is viewed as a significant accomplishment by both the Department and conservationists. 28/

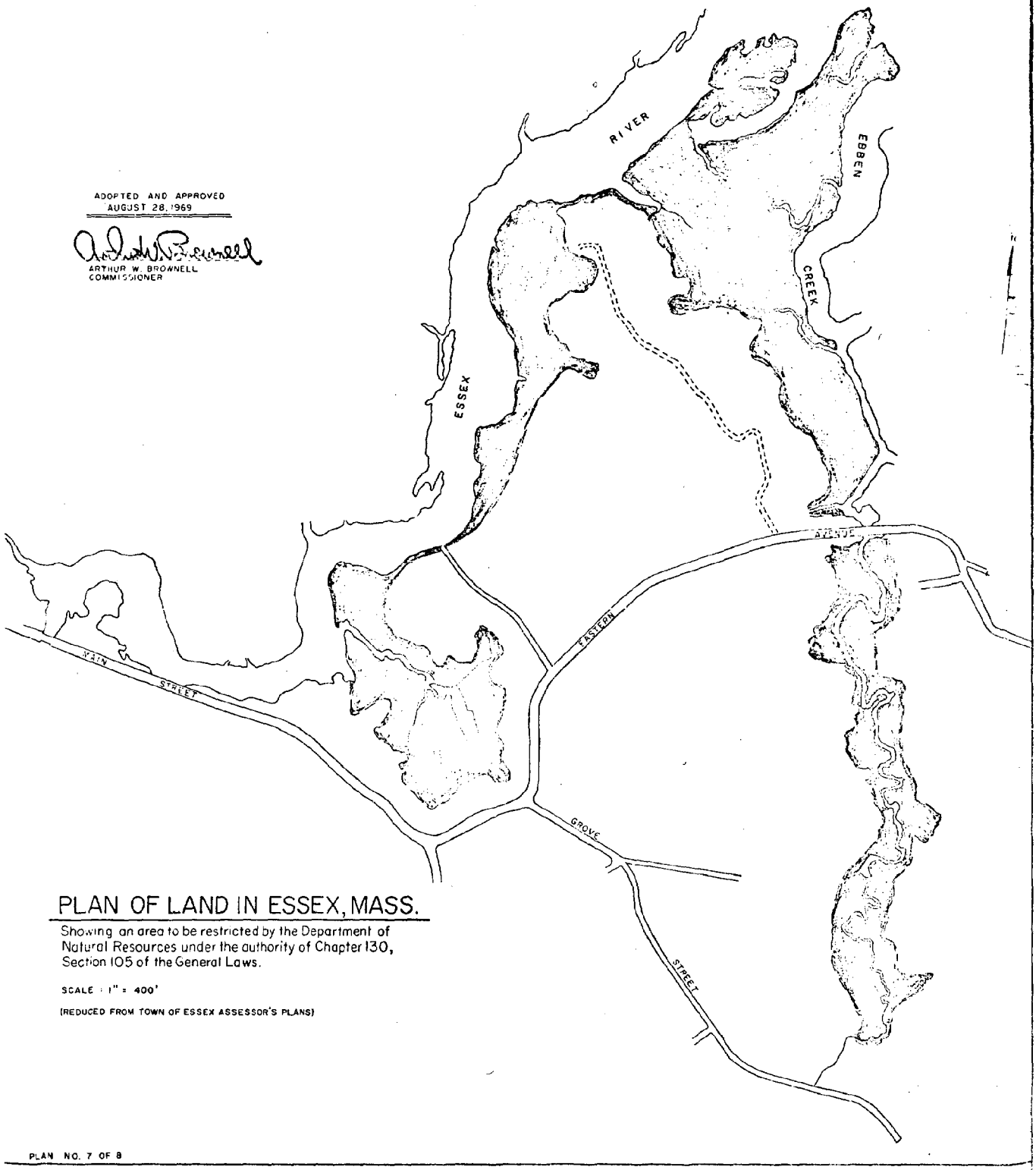
Nature of Protective Orders

In final form, a coastal protective order consists of a written order accompanied by a map outlining the protected wetlands. The map can be overlaid on the tax assessors' maps to show ownership. A reduced version of such a map is shown on the next page.

The order details uses which are allowed without qualification (such as recreation, hunting, and maintenance of wildlife shelters, and grazing of stock), uses which are allowed subject to certain conditions (roadways, underground utilities, and mooring slips), and uses which are allowed only by special permit (excavations for boat channels, beaches, boat launching ramps). No uses are allocated to particular plots within the area of the protective order, because the Department feels that no one part of a wetlands area is particularly appropriate for any given allowable use. Uses are allowed with conditions or by special permit solely to maintain strict control over any filling and dredging activity which goes on, not to control the location of the use.

The orders limit filling or excavation except as expressly allowed in the order or by special permit, and provide generally that "no person shall perform any act or use said . . . wetland in a manner which would destroy the natural vegetation of the . . . wetland . . . or otherwise alter or permit the alteration of the natural and beneficial character of the . . . wetland." 29/

The boundaries of the protected area reflect negotiations which have been undertaken with landowners. Where it seems clear to the Department that no economic use will remain for a given parcel, and the owner is threatening



PLAN OF LAND IN ESSEX, MASS.

Showing an area to be restricted by the Department of Natural Resources under the authority of Chapter 130, Section 105 of the General Laws.

SCALE : 1" = 400'

(REDUCED FROM TOWN OF ESSEX ASSESSOR'S PLANS)

PLAN NO. 7 OF 8

to protest, the Department would probably alter the boundaries of the order to allow an economic use or exempt the entire parcel from the order. The Department has been very reluctant to impose restrictions where eminent domain proceedings may be necessary. But so far no extensive alterations of boundaries have been made necessary by landowner objections, because relatively few owners have raised objections. 30/

Relatively few property owners in the protected area even file a request for an on-site visit by a state official. Over the last several hearings the requests for such special visits have represented an average of about 5% of the landowners affected. 31/ Furthermore, most such requests do not reflect serious objections to the protective order. Many involve owners who are basically unopposed to the restriction and have no special problems on their land but want specific reassurances as to the effect the order will have. Many others involve real but minor questions about private beaches, boat channels, or other small-scale activities, some of which are often permitted by the conditional use and special permit use provisions of the protective order. The state officer can usually negotiate a reasonable solution with the owner. The field biologist and his superiors in the Department are careful not to allow uses which violate the purposes of the program, but they try to accommodate reasonable requests and desires on the part of owners. 32/

A third, but very small category of requests consists of those from owners who received notice of the public hearing but actually own no wetlands. These cases arise from the tendency toward overinclusiveness mentioned earlier and are settled easily once the mistake is discovered.

The most significant requests for on-site visits are those from people who oppose strongly the restrictions embodied in the protective order. Some of them do not oppose the intent of the Act and the order but dislike state imposition of protective measures. Others care little about the environmental aspects of the program and are concerned primarily about the value of their real estate investments. Both types are likely to make demands that the field officer cannot meet and further negotiations with the Department are necessary. Contact with higher officials may soften their resistance, but, in any event the Department has apparently been forced to make very few important concessions. 33/

If a negotiated settlement acceptable to the owner cannot be achieved, the difficult review procedure acts as an effective deterrent to continued objection in many cases. Consequently, the number of formal objections that are eventually filed is very low.

There has been no change of boundaries by the Department once initial negotiations with owners are complete and an order is finally adopted, although the Department has the authority to "amend" the orders. 34/ The Department views these orders as permanent conservation restrictions on wetland areas, and does not contemplate allowing individual landowners to petition for removal of the restriction from their land once the order is finally adopted.

Role of Local Authorities

On its face the Coastal Wetlands Act provides no role for local authorities. The statute does not even require that local officials be notified on the hearing which is to be held in their area. No separate hearing is held by the town government, and no recommendations are to be submitted by the local government to the Department of Natural Resources. According to the terms of the statute, the Department could promulgate an order restricting various uses in coastal wetlands, without consulting local authorities at all.

Actual practice under the Act, however, involves the Department in informal consultation with town officials at various stages of the proceedings. Although the Department does not ask for recommendations while the proposed order is being prepared, state officials, including the Commissioner himself, usually meet with the town board of selectmen before the public hearing is held and explain the purpose and operation of the protective order. 35/ In some cases local officials not only welcome the regulation but encourage the Department to enlarge the protected area, 36/ while in others there is local resistance to such state intervention in what is regarded as a matter for the local conservation commission.

Quite apart from the Coastal Wetlands Act, some towns have purchased substantial areas of salt marsh to preserve them from development, 37/ and this type of local action has facilitated state efforts at protection. Where a local government has purchased wetland for conservation purposes, that land is unlikely to become the subject of serious landowner objections to the protective order.

Some town boards have expressed a desire that the state include in the program provisions limiting the real estate tax assessments that can be imposed on private property subject to protective orders. 38/ Under present arrangements the valuation lies within the discretion of the local board of assessors, and some town governments ask that the state take affirmative action to guarantee tax relief to owners of restricted property. Such a guarantee, they maintain, would reduce objections of local property owners. (This apparent anomaly of local legislative bodies actively seeking what amounts to a reduction in their tax income can be explained by the fact that most wetlands are assessed at a fairly low level in the first place.) In any event, legislation to provide for such limitation on assessments will be introduced in the 1972 legislative session. 39/ The Department recognizes the importance of this problem, but so far has avoided taking any official position regarding state-imposed tax relief. 40/ Apparently the Department wishes to avoid the intense political debate such an effort might open up, because it might stimulate unfavorable attention to the entire wetlands protection program.

Generally the towns in coastal areas have shown little active interest in regulating use of wetlands and are content to leave such regulation to the state. There are exceptions, however. The Town of Duxbury was interested in regulating and protecting its own wetlands. In that case the Department had no objection to allowing the town to hire its owns experts, plan the regulation of the wetlands, and in effect do all the work ordinarily done by the Department. Most towns, however, are unwilling or unable to undertake such a program and prefer to accept state regulation.

One important aspect of the state-local relationship in the coastal wetlands protection program is that a protective order recorded by the Department does not pre-empt more restrictive local regulation of wetlands. It is still open to town boards to adopt further restrictions if it should wish to do so. 41/ State action in subjecting an area to protective orders is not intended to reflect on the adequacy of local action already taken or likely to be taken in the near future. Rather the Department hopes to provide a minimum level of comprehensive protection for all coastal wetlands in the state and leave each local community free to tighten restrictions according to its own desires.

Judicial Review and Eminent Domain Proceedings

After a final order has been recorded and notice sent to property owners, there are quite strict provisions governing judicial review of the order. The Coastal Wetlands Act permits an objecting landowner to petition the superior court for review of the order as it affects his land, but such action can only be taken during the 90-day period after the owner receives notice of the final order. The remedy which the court may grant is limited by the terms of the Act to vacating the order as it applies to the particular property. These limitations are specifically designated in the statute to be the exclusive methods of challenging coastal protective orders. 42/

After the 90-day period has expired for a particular landowner, he is allowed no appeal under the statute; and a court finding that an order is unreasonable with respect to a particular piece of property is not to affect any other land. If the Massachusetts courts uphold these limitations, coastal orders will be substantially free from legal challenge shortly after they are recorded and owners are notified, and the state will be relieved of the potential burden of paying compensation.

Courts in Massachusetts appear to be generally sympathetic to full protection of wetlands areas, but thus far no court decision has dealt with the validity of the 90-day limitation on petitions for judicial review. 43/ It is conceivable that the courts will recognize the limitation as a reasonable effort to settle conclusively the status of protective orders. 44/

Under the terms of the statute, if the superior court finds an order to be "an unreasonable exercise of the police power because [it] constitutes the equivalent of a taking without compensation," the court is to enter a finding that the order shall not apply to the land so affected. 45/ If such a decision is reached by the court, the Department has the option of instituting eminent domain proceedings to take the property, which could involve the landowner in a second court suit. The Department has between $300,000 and $400,000 available for condemnation award purposes should it ever have need of it. 46/ However, the Department has never had to exercise its eminent domain powers in any of the 14 coastal areas where protective orders have been issued, and a number of factors appear to have contributed to this situation: caution on the part of the Department in drawing up the orders, the burdensome procedures a landowner

452-329 O - 72 - 15

would have to follow if he wished to challenge an order, and general acceptance by owners of the restrictions imposed.

The relatively small number of serious objections seems to indicate substantial owner acceptance of the orders, but at least some landowners who might otherwise object are probably deterred by the two court actions which are required if negotiations with the Department are unsatisfactory. Even if an objecting owner succeeded in permanently removing an order from his property, he would still be required to apply for a permit under the Jones Act for any filling or dredging he wanted to undertake.

Because of such difficulties for the landowner, only about 20 owners of the several thousand affected by coastal orders have gone to court. 47/ Furthermore, several of these cases arose out of administrative errors and were settled by consent decree. 48/ All but one of the cases were settled before going to trial, but it is not clear what concessions the Department may have made to obtain some of the settlements. Apparently the state is unwilling to concede very much, at least in cases involving major development activity, because the Department has gone to the Supreme Judicial Court of Massachusetts in Commissioner of Natural Resources v. Volpe involving a 60-acre tract held by a construction company. The report of the master in the Superior Court was extremely unfavorable to the state, 49/ and the decision in the Supreme Judicial Court could have an important impact on the wetlands protection program. A decision against the validity of the protective order might trigger additional challenges by other owners, including challenges to the 90-day appeal period. However, Department officials emphasize that even a decision against the order in the Volpe case, unlikely in any event to be reached for another year, will affect only the one site and that few owners are likely to be encouraged to institute additional petitions. 50/

Protection of Inland Wetlands

The Hatch Act requires developers to apply for permits to alter inland wetlands (excluding agricultural lands) while the Inland Wetlands Act provides for the issuance of protective orders for inland wetlands (also excluding agricultural lands, as well as "meadows"--seasonally wet flood plain areas. 51/).

Under the permit system provided in the Hatch Act protection of inland wetlands is relatively weak compared to

that afforded by coastal protective orders, for a number of reasons. First, the Department does not concern itself with a wetland area until a landowner decides to begin work on a project, at which time the landowner is required to apply for a permit. The Department must thus rely on obtaining an application from the owner once he decides to begin filling or dredging. Since the Department does not have a program to inform owners of wetlands about the permit requirements, this can cause some difficulties because a landowner often will not have notice of the statutory requirements.

Even if an owner is aware of the Hatch Act, he may be uncertain about whether it applies to his land and his activities. For example, his land may be wet only during a portion of the year, as in a flood plain area, and he may not think himself required to file for a permit.

A further weakness of inland permits, as compared to coastal protective orders, is that the permits do not prohibit development and thus preserve wetlands in their natural state but merely impose conditions upon development activity to minimize damage to the wetlands involved. As discussed in a later section, inland protection orders which can prohibit development, have not been particularly effective. Moreover, the exemption for agricultural lands weakens the overall effectiveness of the Hatch Act.

Under the Hatch Act a permit is required whenever a landowner seeks to undertake filling, dredging, or removing of "any bank, flat, marsh, meadow or swamp bordering on any inland waters . . ." on his property. 52/ The purpose of the permit requirements is to protect inland wetlands which are essential to public and private water supply or proper flood control. Public agencies not specifically exempted by the Act have been required by the Department to apply for permits whenever such agencies undertake filling and dredging in an inland wetland area. 53/

The application for a permit and its processing are relatively simple. The applicant merely prepares four copies of his application, which does not show all aspects of the development, but which must locate the project, indicate the areas of fill and dredging, and describe measures taken to reduce harm to the flood control and water supply capacity of the wetland involved. General information on the nature of the project and its estimated completion date is also required.

Two copies of the application go to the Department, one to the town or city having jurisdiction, and one to the Department of Public Works. Prior to any final decision on

the permit by the Department, the municipality involved holds a hearing (within 20 days of receiving a copy of the application) and issues recommendations to the Department as to "such protective measures as may protect the public interest . . . ." 54/ The local recommendations are not particularly useful for final decisions on permits, according to the Department administrators, because the local government usually suggests denial of the permit, for which the Department lacks the authority, or recommends conditions beyond the scope of the Department's powers. 55/ However, municipalities need not allow a development to proceed under a Department permit, since they may adopt their own more restrictive regulations. 56/

At the same time the municipality is considering its recommendations, several state agencies are also reviewing the project. The Department of Public Works is given the statutory duty to impose measures necessary to protect navigable waterways. 57/ It will consult with the owner and with the Department, then send its decision to each. The Department of Public Health makes recommendations relating to the effect of the project on the quantity and quality of the public water supply. The Division of Water Resources (within the Department of Natural Resources) investigates possible flood control consequences. 58/ The Department of Natural Resources normally incorporates all these recommendations in the special conditions attached to the permit, giving substantial weight to the opinion of reviewing agencies in the final content of the permit. 59/

Final approval by the Department of a permit is not subject to any time limit, but nothing in the terms of the Hatch Act prevents a landowner from proceeding with his filling or dredging 30 days after filing notice of intent with the proper authorities. 60/ This means that the Department must act quickly to ensure that the conditions which it imposes will be effective from the very outset of the activity at the site. Usually, therefore, a permit is issued within a short time after receipt of the local recommendations. No formal hearing is held, but "informal" consultations amounting to a hearing are usually held at the Boston offices of the Department. Where a major project is involved the Department schedules a preliminary conference with the developer at which the entire process is explained and the specific requirements are set out.

The permit is always issued on a standard form, containing standard conditions. The standard permit form used by the Department contains only one condition relating

to the protection of wetlands--that any fill used on the project will be clean fill. Any special conditions regarding the amount or location of fill or dredging must be typed in. 61/ Wetlands program administrators state that, for any major inland project, a state conservation officer will visit the site and make recommendations as to any special conditions to be attached. 62/

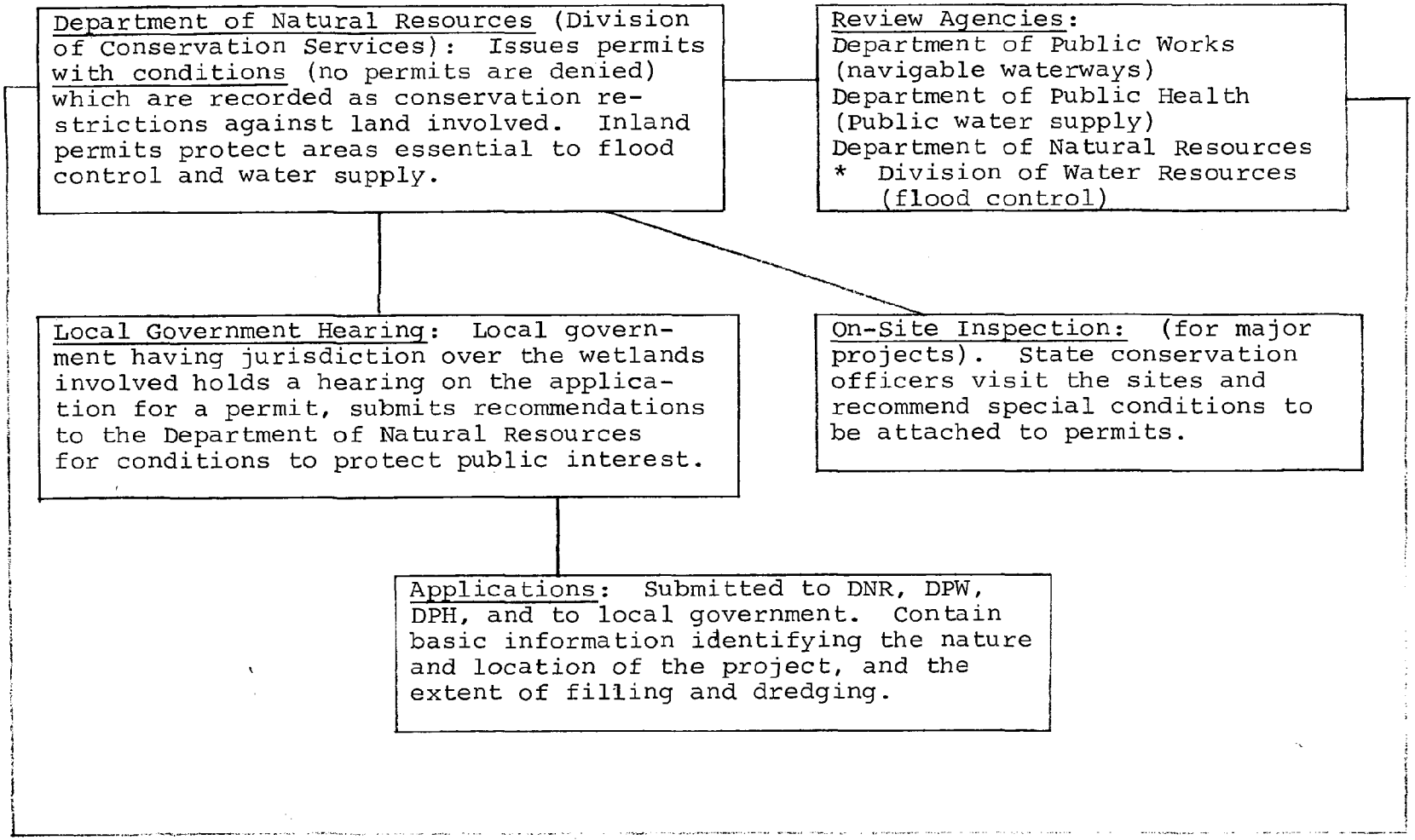
The limitation in the Hatch Act that the Department merely impose conditions rather than deny permits and thus prohibit development, was included because the legislature feared that outright denials could not be sustained under the police power. 63/ The power to impose conditions is itself restricted to narrow categories. The Department may impose only such conditions as are "essential to public or private water supply or to proper flood control." 64/

This narrow scope of state review under the permit system has caused both municipalities and conservationists to be disturbed, for somewhat different reasons. Municipalities would like the Department to impose conditions which would, for example, exclude an undesirable subdivision, prohibit buildings above a certain height, or totally preclude development in a wetland area they wish to protect. 65/ The Department has refused to include such conditions.

Conservationists are concerned because they feel that the conditions which are attached to permits are totally insufficient to protect wetlands. One conservation lobbyist in the state contends that nine of 10 developments are allowed to proceed with no substantial conditions whatsoever being imposed. 66/

One reason for the Department's refusal to impose broad conditions on most projects is that it is difficult for the Department to find sufficient reasons to prohibit an individual owner from filling or dredging, because in its judgment the ill effects on the environment from the one project involved are negligible. It feels that for most wetlands areas, only the cumulative effect of hundreds of individual projects will have a significant impact on ecology, water quality, or flood control. Regardless of whether stronger conditions could be imposed by the Department, it seems clear that the protection of wetlands offered by inland permits is substantially weaker than that provided by coastal protective orders.

Permits for Alteration of Inland Wetlands in Massachusetts



Inland Protective Orders

A somewhat greater degree of protection for some inland wetlands may be offered by inland protective orders, although this will be impossible to determine until inland orders are issued. For a number of reasons, the inland protective order system appears likely to be much less effective than the coastal system.

First of all, although the Department's power to "adopt . . . orders regulating, restricting or prohibiting dredging, filling, removing, or otherwise altering or polluting inland wetlands" is virtually identical to the mandate of the Coastal Act, 67/ the definition of inland wetlands which may be subjected to a protective order is quite narrow. The definition includes "any marsh or swamp bordering on inland waters, or any marsh or swamp subject to flooding by fresh water." 68/ This definition excludes areas subject to only seasonal flooding, 69/ and thus removes the Department's ability to regulate flood plains, even though one of the purposes of the Inland Act is stated as the protection of "flood plain areas." Areas subject to seasonal floods were originally included in the bill which became the act regulating inland wetlands. This provision was deleted, however, at the insistence of the Massachusetts Farm Bureau Federation, in spite of the Act's agricultural exemption. The reason appears to be a fear that such regulation would prevent a "hard-working farmer" from selling out for real estate development. 70/

A second weakness of the Inland Act, as compared to the Coastal Act, is that it does not provide the Commissioner of Natural Resources with any authority to regulate, as he reasonably deems necessary, land "contiguous" to wetland areas. This authority as applied in the coastal wetlands prevents jurisdictional disputes over the exact boundary of the "wetlands" as defined in the statute.

A third weakness of the Inland Act is the objecting landowner's right to "veto" a protective order merely by sending a registered letter to the Department within 90 days noting his objections. No court action is involved. If the Department is unable to amend the order to the owner's satisfaction, it must attempt to purchase the land, paying a fair marked price or take it by eminent domain. Any eminent domain proceedings by the Department must be authorized by the Governor and his Executive Council as well as by the Board of Natural Resources.

Thus the Inland Wetlands Act appears in reality to be little more than an authorization to the Department to negotiate with landowners for a voluntary relinquishment of development rights to their property, or a sale of such rights to the state. It is possible that, as under the Coastal Act, most owners will simply not object, allowing the 90-day objection period to lapse and the order to become effective as to their property. On the other hand, inland landowners may react to protective orders under the Inland Act much differently than coastal landowners reacted to coastal protective orders--perhaps because of less regard for the ecological value of inland wetlands in their natural state, greater economic incentives for development, or simply because of less burdensome objection procedures.

Where parcels are removed from inland orders by landowner veto, the Department hopes to convince local conservation commissions to acquire the parcels, using the argument that "the community would be eligible for up to 75% reimbursement of the cost of acquisition through the State Self-Help Program and Federal HUD and BOR funds." 71/ Failing this, the Department administrators point out that a permit would still be required for any filling and dredging activity under the Hatch Act. Again, since the inland program is not yet in full operation, it is impossible to say how effective such measures may be.

In addition to providing for a landowner veto, the Inland Act also provides for a one-year delay of inland orders by a local government having jurisdiction. After the local hearing on the inland order, the Department will present a final version of the proposed order to the municipality for its approval. If the community does not act within 30 days the order is deemed approved. If the community decides to delay the order, the Department may, after the expiration of one year, adopt the order anyway with respect to the town's area.

It is impossible to say at this time how many inland communities will wish to delay protective orders covering wetlands within their jurisdiction, but at the preliminary hearing in Wellesley in January, 1971 on the first proposed inland order, 72/ strong objections were raised by the local community. 73/ In many towns throughout the state dumping areas are located in wetlands. Attempts to prohibit the use of those areas for such purposes is likely to provoke resistance both from local residents who do not want the new dump established near their homes and from local governments who do not welcome the expense involved in acquiring land for a new dumping area. 74/

Aside from the difficulties created by the provisions of the Inland Act itself, a number of administrative difficulties exist which have prevented inland orders from being issued by the Department even though the Act was passed in 1968. First of all, there are simply more inland wetlands than coastal wetlands (300,000 acres). 75/ Also, inland wetlands are much more difficult to identify, and the Department has had to provide for aerial photographs, as well as soil sampling, in order to map inland wetlands to be protected. 76/ Moreover, inland wetland areas are scattered around the entire state rather than being concentrated on the coast, and many inland wetlands are small and isolated.

These difficulties, combined with the requirement of local hearings on each order, may make the Inland Act unworkable. More local communities will have to be consulted for each inland order than on the coast, because numerous inland communities may have jurisdiction over the wetland areas to be protected, while on the coast only one or a few communities would be involved. About 300 separate local governments will be involved in the protection of inland wetlands, compared to a total of about 45 towns involved in the coastal wetlands protection program. 77/

The Department anticipates that it will be able to hold only about one inland hearing every four to six weeks. 78/ A conservationist in the state has estimated that at this rate it will take the Department 30 to 40 years to protect inland wetland areas. 79/ The Department administrators are reluctant to speed up the hearing process for fear that landowners will be able to attack the proceedings for lack of due process. The Department hopes to be able to allow local conservation commissions to take over much of the burden of holding hearings on inland orders, but it is not clear whether this will be possible, or how much it will speed up the hearing process.

At the present time hearings on inland protective orders have barely begun, and the Department plans to work with the present statutory arrangements before recommending major changes. After several hearings have been held, the Department may ask for legislative changes to make the inland wetlands program more effective. Two specific proposals are under consideration: First, the objection procedure may have to be changed so that property owners would have to appeal to the courts rather than simply object to the Commissioner. In other words, the review procedure would be made more nearly equivalent to that under the Coastal Wetlands

Act. The other major change would involve statutory authorization to hold inland wetland hearings on a regional basis rather than town by town. In that way the time required to establish protective orders throughout the state would be substantially reduced. 80/

Investigation and Enforcement Procedures

The Department does not have an investigative force of its own to supervise projects for compliance with permit conditions or to supervise land covered by protective orders, nor does any official program exist for determining if all projects in wetlands areas are applying for permits where the area is not covered by a protective order. State conservation officers and marine biologists perform some of these functions, but not on a regular basis. The only method which has been adopted by the Department for investigation and enforcement has been to publicize an "environmental hotline" in their office where unauthorized projects may be reported and any question about the requirements of the wetlands legislation answered. 81/ The Department administrators feel that citizen participation has been fairly high and that most significant projects have been reported.

Public acceptance of environmental regulation of this kind has improved noticeably in the last few years, according to one state official who has had substantial contact with property owners themselves. 82/ The Department reported that during the fiscal year ended June 30, 1971, it received more than 100 complaints alleging violations of Jones Act permits and nearly 300 complaints of Hatch Act permit violations. These complaints are referred to the Department's Division of Law Enforcement, which has officers throughout the state to investigate the allegations. Violations which are not corrected upon the order of the officer are referred to the Attorney General, and 15 such referrals were made during fiscal 1971. In most of those cases, the Attorney General quickly proceeds to obtain an injunction against further activity in violation of the permit. 83/

In sharp contrast to the large number of complaints under the Jones and Hatch Acts, there have been no reported complaints concerning violations of protective orders under the Coastal Wetlands Act. With no comprehensive surveillance system, Department officials admit that they do not know how accurately this reflects actual activities in the protected areas; but they believe that it indicates general compliance. 84/

The Department has processed over 1,300 coastal and inland permits, including a total of 470 permits processed in fiscal 1971. 85/ It appears, therefore, that developers are not avoiding compliance with the permit requirements. Perhaps developers do not view the conditions imposed by the Department as sufficiently restrictive to warrant efforts at evasion, but the necessity of going through the permit procedure is itself apparently discouraging small-scale development that might otherwise occur. 86/

The private market mechanisms have also assisted in obtaining compliance with permits and protective orders. Both protective orders and permits are recorded as conservation restrictions against the land affected. 87/ The Department personnel feel they have been fairly successful in convincing large financial institutions to require that developers obtain permits or comply with protective orders before final loan approvals will be granted. In addition, for the sale of lands burdened by the Department conservation restrictions, Department officials state that they have convinced many financial institutions and title insurance companies to require that the vendor obtain a certificate from the Department stating that the land continues to comply with the restriction. By these means, the Department has attempted to make compliance with the wetlands program a part of the everyday business of the rural developer in the state.

Conclusion

While permit requirements have probably been ineffective in protecting Massachusetts wetlands, coastal protective orders have been somewhat more effective. With more than two-thirds of coastal wetlands covered by protective orders, either recorded or pending, the consensus is that the coastal program has been a qualified success--qualified only by the considerable time required to issue the orders. Conservationists appear to be satisfied with the restrictions contained in coastal orders once adopted and with the fact that about half of the coastal wetlands in the state have now been protected, and that orders are or soon will be pending against most of the rest. 88/ Satisfaction has been expressed by both conservationists and the Department personnel that actual negotiations have been required with only about 100 owners and that only one objection will come to trial in the courts. 89/

Strong doubts have been expressed as to the probable effectiveness of the Inland Act, however. Landowner objections can be raised more easily against inland orders, and a large number of parcels may be exempted, reducing the effectiveness of the orders. More importantly, if the Department adopts a local hearing schedule which will in fact only bring a level of protection for inland wetlands similar to that on the coast after 20 to 30 years, the value of the inland program will be questionable. If these problems cannot be worked out either administratively or through additional legislation, it may be necessary to abandon the protective order system for inland wetlands and devote more serious attention to a program of public purchase of these wetlands. 90/

FOOTNOTES

1/ 130 Mass. Gen. Laws Ann. §27A (Supp. 1971).

2/ 130 Mass. Gen. Laws Ann. §105 (Supp. 1971).

3/ Restrictions Recorded

1.	Ipswich	3,500 acres
2.	Quincy	137
3.	Pembroke (2 hearings)	145
4.	Wareham	77
5.	Marshfield	633
6.	Norwell	460
7.	Hanover	13
8.	Newburyport	2,200
9.	Essex	1,150
10.	Westport	2,100
11.	Rowley	2,400
12.	Salisbury	4,650
13.	Newbury	450
		17,915 acres

Hearings Held, Restrictions Pending

1.	Scituate	486 acres
2.	Gloucester	1,100
3.	Marion	400
4.	Duxbury	4,260
5.	Marshfield	2,170
6.	Wellfleet	1,920
7.	Eastham	3,710
8.	Orleans	3,975
9.	Chatham	6,595
10.	Harwich	830
		25,446 acres

Memo from George R. Sprague, Director of Conservation Services, Department of Natural Resources, on progress of Coastal Wetlands Protection Program as of June 30, 1971; interview with George R. Sprague, August 9, 1971.

4/ A 1963 study determined that there are approximately 40,000 acres of actual coastal wetlands in Massachusetts, but many Coastal Protective Orders cover some additional flatlands; so that the total acreage the Department plans to include is approximately 60,000 acres. Telephone conversation with George R. Sprague, August 16, 1971.

5/ 131 Mass. Gen. Laws Ann. §40 (Supp. 1971).

6/ 131 Mass. Gen. Laws Ann. §40A (Supp. 1971).

7/ Interview with Benjamin Nason, Executive Director, Massachusetts Forests and Park Association, Boston, Massachusetts, March 30, 1971; interview with George R. Sprague, May 3, 1971.

8/ Id.

9/ Massachusetts Department of Natural Resources, Report on the Inland Wetland and Flood Plain of the Commonwealth, June 5, 1967.

10/ Interview with George R. Sprague, May 3, 1971.

11/ For a discussion of the adequacy of local flood plain regulation, see Department of Natural Resources Report, supra note 9, at pp. 14-15.

12/ Interview with Alden E. Cousins, Land Use Administrator, Massachusetts Department of Natural Resources, Boston, Massachusetts, March 30, 1971.

13/ Massachusetts Department of Natural Resources, notice of hearing on Duxbury protective order, July 24, 1970.

14/ 130 Mass. Gen. Laws Ann. §105.

15/ Ibid.

16/ Interview with Alden E. Cousins, March 30, 1971.

17/ Interview with Michael Hickey, Wildlife Biologist, Division of Marine Fisheries, Massachusetts Department of Natural Resources, August 6, 1971.

18/ Ibid.

19/ Interview with George R. Sprague, September 7, 1971.

20/ Interview with Alden E. Cousins, August 9, 1971.

21/ Public hearing on coastal wetlands protective order for the Town of Harwich, August 5, 1971.

22/ Interview with George R. Sprague, May 3, 1971.

23/ Interview with Michael Hickey, August 6, 1971.

24/ Interview with George R. Sprague, August 9, 1971.

25/ Telephone conversation with George R. Sprague, August 16, 1971.

26/ The Department has been willing to allow local communities to take over much of the process and free its staff for other work, but the problem has been that few coastal communities have the necessary money or expert staff.

27/ Interview with Benjamin Nason, March 30, 1971.

28/ Id.; letter from Massachusetts Department of Natural Resources to Mr. Christopher E. McGahan, Administrative Assistant to Majority Leader of Wisconsin Legislature, January 22, 1971.

29/ See Massachusetts Department of Natural Resources, Order under General Laws, Chapter 130, Section 105, No. 768-71-___(pending), for the Town of Harwich.

30/ Interview with Morris J. McClintock, Executive Director, Conservation Law Foundation, Boston, Massachusetts, March 29, 1971.

31/ The state officer who has conducted the on-site visits for the last seven towns reports that out of approximately 3,000 landowners affected by the proposed orders, there have been 130 to 140 requests for on-site visits. The number and percentage varies considerably from town to town. In one town several hundred property owners there were only two or three such requests, while in Harwich there were only 190 property owners involved but about 30 requests. Interview with Michael Hickey, August 6, 1971.

32/ Ibid.

33/ Interview with George R. Sprague, August 9, 1971.

34/ 130 Mass. Gen. Laws Ann. §105.

35/ Ibid.

36/ Interview with Arthur Griffin, Member, Board of Selectmen of the Town of Harwich, August 6, 1971.

37/ Several years ago the Town of Harwich purchased a 216-acre tract of salt marsh that a large developer planned to fill and subdivide for a 400-unit development. However, sufficient public support for such a step arises only where a very large, visible threat appears. Ibid. The Town of Brewster has also purchased wetlands as a conservation measure. Interview with George R. Sprague, August 9, 1971.

38/ Interview with Selectman Griffin, August 6, 1971.

39/ Interview with George R. Sprague, September 7, 1971.

40/ Statement by Arthur W. Brownell, Commissioner of Natural Resources, Massachusetts Department of Natural Resources, at the public hearing on the coastal wetlands protective order for the Town of Harwich, August 5, 1971; interview with Alden E. Cousins, August 9, 1971.

41/ Statement by Commissioner Brownell at the Harwich public hearing, August 5, 1971. See Golden v. Board of Selectmen of Falmouth, 265 N.E.2d 573 (Mass., 1970).

42/ 130 Mass. Gen. Laws Ann. §105.

43/ See, e.g., Golden v. Board of Selectmen of Falmouth, 265 N.E.2d 573 (Mass., 1970); Commissioner of Natural Resources v. Volpe, Suffolk Superior Court in Equity No. 82-36, March 9, 1964; Perry v. Director of Marine Fisheries, Bristol Superior Court in Equity No. 8412, October 23, 1967. The latter two trial court opinions are reproduced in Massachusetts, Metropolitan Area Planning Council, Open Space Law: Government's Influence Over Land Use Decisions, April, 1969, at Appendix 5. But see the opinion of the Massachusetts Supreme Court on appeal in the Volpe case, where the Court noted that conditions imposed upon a permit could constitute an unconstitutional taking of property without compensation, and remanded a case to the trial court for a finding on this issue. Commissioner of Natural Resources v. Volpe, 206 N.E.2d 666 (Mass. 1965).

44/ Interview with George R. Sprague, August 9, 1971.

45/ 130 Mass. Gen. Laws Ann. §105.

46/ Interview with George R. Sprague, September 7, 1971.

47/ Interviews with Alden E. Cousins, March 30, 1971 and Morris J. McClintock, March 29, 1971.

48/ Interview with George R. Sprague, August 9, 1971.

49/ Ibid.

50/ Interview with George R. Sprague, September 7, 1971.

51/ Interview with Alden E. Cousins, March 30, 1971.

52/ The language is the same in both the Hatch Act and the Jones Act, but the Hatch Act (inland wetlands) provides an exemption for agricultural land.

53/ Mosquito control and swamp reclamation projects, which are now rare, and some projects of the Department of Public Works, are exempted. Interview with Alden E. Cousins, March 30, 1971.

54/ The text refers to the Hatch Act. Under the Jones Act the municipality has 14 days within which to hold a hearing, and recommends "the installation of such bulkheads, barriers or other protective measures as may protect the public interest . . . ."

55/ Interview with Alden E. Cousins, March 30, 1971.

56/ At least one municipality has not recognized this, and has complained bitterly about the Department's approval of an application which the municipality had recommended be denied. The municipality even brought in an 800-signature petition. Letter from Town of Chelmsford to the Department of Natural Resources, dated March 16, 1971. However, the Massachusetts Supreme Judicial Court has held that the wetlands legislation is not pre-emptive of local authority to issue complementary regulations on the same matters. See Golden v. Board of Selectmen of Falmouth, 265 N.E.2d 573 (Mass. 1970).

57/ The Department of Public Works is given this authority under both the Jones Act and the Hatch Act.

58/ The Jones Act provides that applications for coastal permits are to be made to the Director of Marine Fisheries, who is responsible for measures necessary to protect shellfish and marine fisheries, but the Director is under the immediate supervision of the

452-329 O - 72 - 16

Commissioner of Natural Resources and the Commissioner has created a single administrative section which is responsible for all wetlands alteration permits. The Director advises this section as to conditions necessary in permits for the protection of shellfish and marine fisheries.

59/ Interview with Alden E. Cousins, March 30, 1971.

60/ 131 Mass. Gen. Laws Ann. §40.

61/ See, e.g., Massachusetts Department of Natural Resources, Permit under G.L. C.131 §40, File No. P-988, issued to William F. D'Annolfo, requiring the builder to obtain Departmental approval at various stages of the work. This step-by-step supervision of the project is the only effective means of regulating a large development.

62/ Interview with Alden E. Cousins and George R. Sprague, March 30, 1971. For coastal wetlands a marine biologist will visit the site. Id.

63/ Interview with George R. Sprague, May 3, 1971. No authority to deny permits is provided in either the Jones Act or the Hatch Act. Where protective orders are issued, the Inland and Coastal Acts specifically provide for eminent domain powers to be exercised by the Department of Natural Resources.

64/ 131 Mass. Gen. Laws Ann. §40.

65/ See, e.g., Transcript of Public Hearing on Application of D & B Homebuilders, Town of Chelmsford, July 16, 1970.

66/ Interview with Benjamin Nason, March 30, 1971.

67/ 131 Mass. Gen. Laws Ann. §40A.

68/ Ibid.

69/ Interview with Benjamin Nason, March 30, 1971.

70/ Interview with George R. Sprague, September 7, 1971.

71/ Letter from Massachusetts Department of Natural Resources to Christopher E. McGahan, supra note 28.

72/ Massachusetts Department of Natural Resources, Order under General Laws, Chapter 131, Section 40A, No. 444-71-1, for the Town of Wellesley.

73/ Interview with Benjamin Nason, March 30, 1971.

74/ Telephone conversation with George R. Sprague, August 16, 1971.

75/ Letter from Massachusetts Department of Natural Resources to Christopher E. McGahan, supra note 28.

76/ Id.

77/ Interview with George R. Sprague, August 9, 1971.

78/ Interview with George R. Sprague, May 3, 1971.

79/ Interview with Benjamin Nason, March 30, 1971.

80/ Ibid.

81/ Interview with Alden E. Cousins, March 30, 1971.

82/ Interview with Michael Hickey, August 6, 1971.

83/ During fiscal 1971, there were 122 complaints under the Jones Act and 291 under the Hatch Act. Many of them turned out to be without substantial basis, but these figures reflect a considerable degree of public awareness of wetlands protection programs and willingness to aid in enforcements. Interview with Alden E. Cousins, August 9, 1971.

84/ Interview with George R. Sprague, August 9, 1971.

85/ In fiscal 1971 there were 113 Jones Act applications, 307 under the Hatch Act, and a total of 47 under both acts from utilities and municipalities. Interview with Alden E. Cousins, August 9, 1971.

86/ Ibid.

87/ Interviews with Alden E. Cousins, March 30, 1971, and George R. Sprague, August 9, 1971. Although the permit statutes do not require that conservation restrictions in permits be recorded against the affected land, the Department has by administrative practice required, as a condition attached to permits, that developers record wetlands permits against their land.

88/ Interviews with Morris J. McClintock, March 29, 1971, and Benjamin Nason, March 30, 1971.

89/ Interview with Morris J. McClintock, March 29, 1971.

90/ A bill providing for a $10 million appropriation for the purchase of inland wetlands has been introduced in the Massachusetts Senate at the request of the Massachusetts Forests and Park Association. Senate Bill No. 780, 1971. Interview with Benjamin Nason, March 30, 1971.

WISCONSIN SHORELAND PROTECTION PROGRAM

Wisconsin has long been noted for the water-oriented recreation associated with its more than 8,800 ponds and lakes and 1,500 streams and rivers. 1/ The construction of acceptable roads to northern Wisconsin in the 1920's and 1930's led to accelerated development of the state's recreational waters. Solid strips of shoreline development became prevalent as natural scenery and access to water made the shorelands a prime attraction for cabins and resorts.

As development increased, misuse and overuse of septic tank waste disposal systems caused substantial water pollution problems. Improper construction and development on low-lying or steep-sloped land resulted in pollution of wells as well as surface waters. Grading and filling during construction of buildings and roads caused erosion and siltation.

The scenic beauty of the lakes and rivers, and their value as wildlife reserves, were being threatened. Commercial development in the form of taverns, souvenir shops and grocery stores displaced shore cover and wildlife habitats and contributed to the deterioration of the scenic qualities of the waterways. 2/

A committee on water pollution was created in 1929 to coordinate a statewide anti-pollution program for water resources, but it was not for another 30 years that pressures commenced to build for a stronger state water management program. 3/ Then, during the early 1960's, a state agency carried out a "statewide inventory of values in the rural landscape." Natural features such as wildlife categories, unique vegetation and unusual geologic formations, and man-made attractions such as museums, hunting preserves, ski trails and reservoirs were plotted on maps. These maps demonstrated graphically that a majority of these values appeared on or near shorelands. The University Extension then prepared two movies on flooding and the plight of shorelands in Wisconsin, which were shown throughout the state. Much of the grassroots support which developed for the shorelands protection legislation has been credited to those public showings, 4/ and the Water Resources Act, of which the shoreland protection measures are a part, embodied every provision for which its sponsors had hoped. 5/

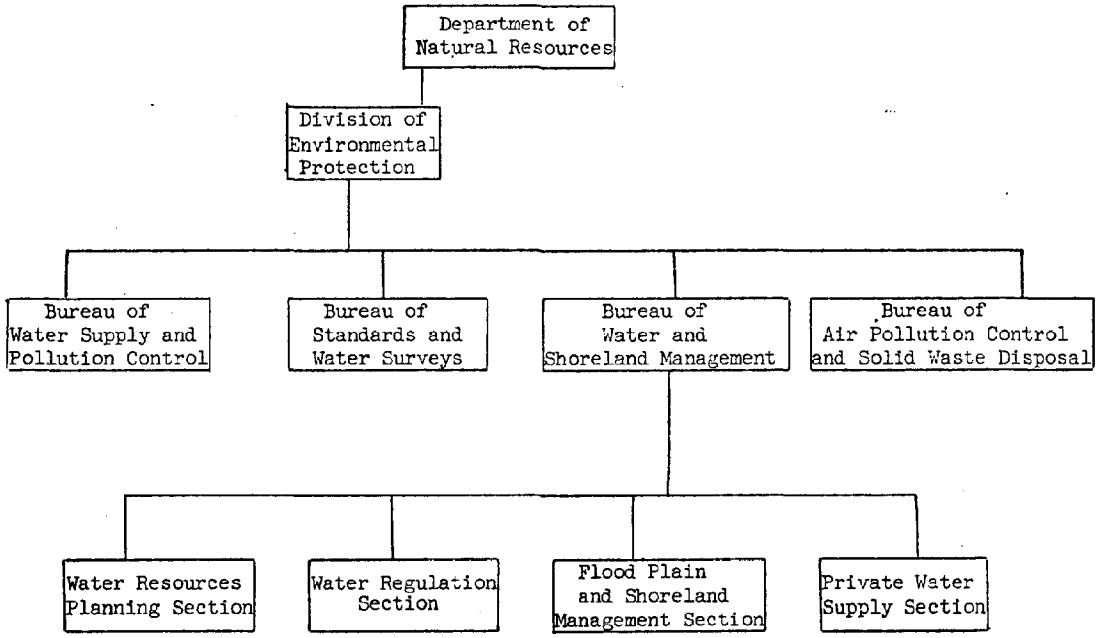
The Water Resources Act of 1966

Wisconsin's shoreland protection programs were enacted as part of the Water Resources Act of 1966, which set up a broad pollution abatement and prevention program that reorganized and strengthened the state's regulatory, planning and coordinating functions in the area of water resources.

The Water Resources Act treats shorelands as a special management unit to minimize water pollution and to preserve wildlife and the natural beauty which make the waters and shorelands recreationally attractive. The Act authorizes and requires counties to enact regulations for the protection of all shorelands in unincorporated areas in order to ". . . further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty." 6/ In the event counties fail to adopt effective shoreland protection regulations the State Department of Natural Resources is authorized to impose such regulations.

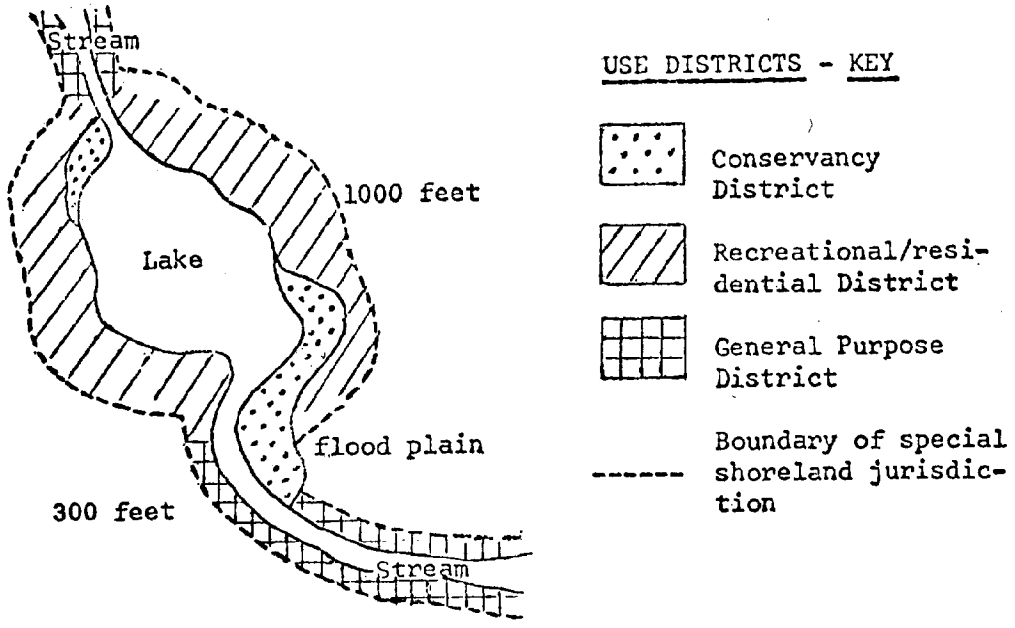
More specifically, Section 144.26 declares that it is in the public interest to make studies, establish policies, make plans and authorize municipal shoreland zoning regulations, in order to give effect to the anti-pollution and preservation purposes enumerated earlier. Accordingly, counties are empowered to enact separate zoning ordinances affecting all unincorporated land in their jurisdiction within 1,000 feet of a lake, pond or flowage and 300 feet of a navigable river or stream, or the landward side of the flood plain, whichever distance is greater. 7/

The responsibility for administering the Act was placed with the Division of Resource Development, now the Division of Environmental Protection of the Department of Natural Resources. The Bureau of Water and Shoreland Management, and yet more particularly, the Flood Plain and Shoreland Management Section of that Bureau, is responsible for the direct administration of the shoreland management program. 8/



The Act provides that administration of these shoreland zoning ordinances is to accord with normal zoning ordinance procedures for counties. 9/ The ordinances are to "meet reasonable minimum standards" for shoreland protection. 10/ The Department is to prepare "general recommended standards and criteria" giving particular attention to:

> "Safe and healthful conditions for the enjoyment of aquatic recreation; the demands of water traffic, boating, and water sports; the capability of the water resource; requirements necessary to assure proper operation of septic tank disposal fields near navigable waters; building setbacks from the water; preservation of shore growth and cover; conservancy uses for low lying lands; shoreland layout for residential and commercial development; suggested regulations and suggestions for the effective administration and enforcement of such regulations." 11/



Shoreland zoning, with model district classifications

To ensure that counties adopt effective zoning of the shoreland corridors the Act gives the Department authority to adopt a shoreland zoning ordinance for any recalcitrant county: 12/

> "If any county does not adopt an ordinance by January 1, 1968, or if the department of natural resources, after notice and hearing, determines that a county has adopted an ordinance which fails to meet reasonable minimum standards in accomplishing the shoreland protection objectives of S. 144.26(1), [cited supra] the department of natural resources shall adopt such an ordinance."

Flood Plain Zoning

In addition to requiring county shoreland zoning ordinances under §59.971, the Water Resources Act provides in §87.30 that flood plain zoning ordinances be enacted by

every county, city, and village in the state. 13/ The statute parallels §59.971 in that it establishes a January 1, 1968 deadline for local action and provides for promulgation by the state of an ordinance for any local government which fails to enact one.

However, the orientation of the flood plain zoning statute differs considerably from that of the shoreland zoning statutes and the state Model Ordinance. As earlier discussion indicates, the shoreland protection program is a rather comprehensive effort to preserve the quality of navigable waters and adjoining land. Included in the range of objectives are the control of water pollution, protection of aquatic life, and preservation of shore cover and natural beauty. In contrast, the flood plain zoning statute refers only to minimizing flood damage. Significantly, §87.30 is not mentioned in §144.26 authorizing the Department of Natural Resources to develop comprehensive regulations implementing the protection of navigable waters.

Thus the flood plain zoning program, although it is administered in conjunction with shoreland zoning, 14/ is a distinct effort with a much narrower scope. The flood plain zoning statute has the advantage of applying to cities and villages; but apparently no serious effort has been made to expand its scope and subject cities and villages to the type of regulation and shoreland zoning imposes on unincorporated areas. The focal point of the flood plain zoning that has been done has been the minimizing of flood damage; 15/ and for technical reasons discussed later, many local governments have been unable to enact any flood plain ordinance at all.

Departmental Regulations

In accordance with its legislative mandate to provide "recommended standards and criteria" for shoreland protection, the Division of Environmental Protection has published "shoreland regulation standards and criteria" to guide the formulation of such ordinances. These regulations:

1. Require the establishment of "appropriate districts" to protect shoreland areas: conservancy, recreational-residential, and general purpose districts.

2. Require the establishment of subdivision regulations which must prohibit any subdivision that:

(a) Is likely to result in hazard to the health, safety and welfare of future residents;

(b) Fails to maintain proper relation to adjoining areas;

(c) Does not provide public access to navigable waters, as required by law;

(d) Does not provide for adequate storm drainage facilities; and

(e) Violates any state law or administrative code provision.

3. Require establishment of land use regulations which:

(a) Set minimum lot sizes to protect the public against danger to health from excessive pollution hazard;

(b) Govern building location in relation to health and beauty preservation;

(c) Govern the cutting of trees and shrubbery; and

(d) Govern filling, grading, lagooning and dredging.

4. Require the establishment of sanitary regulations for sewage disposal and water supply systems.

5. Require adoption of certain administration and enforcement regulations providing at least for:

(a) An administrator;

(b) A permit system;

(c) An exception procedure;

(d) A board of review. 16/

For still further guidance, the Flood Plain and Shoreland Management Section of the Division's Bureau of

Water and Shoreland Management has drafted a Model Shoreland Protection Ordinance based on the above standards and criteria. 17/ The Model Ordinance is essentially a resource-oriented zoning ordinance, complete with districts, parking and loading provisions, exception procedures, and lot size controls. It is to supersede all county shoreland zoning accomplished by standard county zoning enabling legislation with the exception of those portions which are more restrictive than its provisions.

Under the Model Ordinance provisions controlling water supply, private wells are permitted only when no public system is "available." Private wells between private sewage disposal facilities and a watercourse are discouraged--especially on a slope downward toward such watercourse. 18/

The Waste Disposal provisions make it illegal to discard rubbish into navigable streams, or to discharge liquid wastes into any surface waters "which would constitute a nuisance." Both industrial and solid waste disposal are prohibited without permission from the Division. 19/ All plumbing fixtures are required to be connected to a public sanitary sewer system "where available." In the absence of such a system, private sewage disposal facilities are permitted, including privies, but only in accordance with certain minimum standards. Any alteration of existing private sewage disposal systems is also subject to regulation. Specific regulations govern location and construction of facilities such as privies, septic tanks, and soil absorption fields. Even the method for carrying out tests to determine soil type and characteristics is set out in considerable detail. 20/

Relatively standard zoning provisions deal with minimum lot size and building area dimensions for lots served and not served by public sanitary sewer systems, substandard lots of record, cluster developments, and highway and water setbacks. 21/ For example, all buildings and structures are to be set back at least 75 feet from the waterline and elevated at least two feet above the experienced high water elevation, and soil absorption fields are to be set back at least 50 feet.

Tree cutting is limited under the Model Ordinance to a 35-foot strip paralleling the shoreline. Clear cutting of more than 30% of a strip of timber is prohibited, and of the remaining 70%, cutting must leave sufficient cover to screen cars, dwellings, and accessory structures as seen from the water. Shrubbery must be preserved "as far as practicable," and where removed, must be replaced with other vegetation that is found to be "equally effective in retarding runoff, preventing erosion and preserving natural beauty" by the local Zoning Board of Adjustment. 22/

Filling, grading, lagooning or dredging which would result in substantial detriment to navigable waters by reason of erosion, sedimentation, or impairment of fish and aquatic life is prohibited. In any event, a special exception permit is required regardless of environmental impact. 23/

The Model Ordinance creates three principal shoreland zoning districts: Conservancy, Recreational-Residential, and General Purpose. The conservancy district is designed primarily to protect shorelands designated as swamps or marshes, which are described as "seldom suitable for building," and lists a number of permitted uses (forestry, transmission lines, hunting, fishing, riding, golf courses) and special exception uses (dams, farming, piers and docks). Residential, commercial or industrial development is not permitted. 24/

The residential-recreational classification is for those shorelands along specified waterways which are not within the conservancy district and which are "particularly suited for residential and recreational uses." The idea is to permit all uses allowed in conservancy districts, together with seasonal or "year-round" single-family dwellings, signs, and, by means of special exception permits, hotels, motels, restaurants, taverns, clubs, camps and campgrounds, souvenir shops, marinas, bait shops, sporting goods stores, mobile home parks, and travel trailer parks. 25/

The general purpose district is a catchall which covers all shorelands not included in conservancy or residential-recreational districts. The Ordinance states that these other shoreland areas are suited to a wide variety of uses which, until such time as amendments to the Ordinance or more detailed planning is undertaken, should be permitted. As a result, industrial and solid waste disposal facilities are permitted by means of a special exception, and nearly everything else is permitted as of right so long as certain structures are at least 100 feet from navigable waters. 26/

The Model Ordinance contains traditional zoning ordinance provisions governing off-street parking and loading, planned developments, and lot size requirements. 27/ The provisions regulating subdivisions prohibit the subdividing of land which is "held unsuitable" by the county planning agency "for reason of flooding, inadequate drainage, soil and rock formations with severe limitations for development, severe erosion potential, unfavorable topography, inadequate water supply or sewage disposal capabilities or any other feature likely to be harmful to the health, safety or welfare of the future residents of the proposed subdivision or of the community." 28/ Section 17.75 controls minimum lot areas for subdivision not served by public sewers:

THE FOLLOWING ARE MINIMUM LOT AREAS, WIDTHS, AND AREAS FREE OF LIMITING CONDITIONS FOR SUBDIVISIONS NOT SERVED BY PUBLIC SEWERS:

Lot Classes	Minutes Required For Water To Fall One Inch		Minimum Lot Area	Minimum Lot Width	Minimum Area Two Feet Above Floods	Minimum Area Two Feet Above High Ground Water	Minimum Area Three Feet Above Ground Water	Minimum Area Six Feet Above Bedrock	Minimum Area With Slopes Less Than 12%
	Shallow Absorption System	Deep Absorption System							
1	Under 2		20,000	100	9,000	10,000	8,000	8,000	5,000
2	2-15	2-10	20,000	100	12,960	14,440	11,520	11,520	7,200
3	16-60	11-30	20,000	100	16,200	18,000	14,400	14,400	9,000
4		31-60	36,000	100	32,400	36,000	28,800	18,800	18,000

For percolation rates slower than one (1) inch in sixty (60) minutes, soil absorption fields shall be prohibited. Subdivisions may be allowed only where the provisions of Section 17.75(1)(c) of this Ordinance are met.

IN ADDITION, PREPLANNED SITES SHALL BE NECESSARY WHERE THE MINIMUM LOT AREA IS SUBJECT TO LIMITING CONDITIONS WITHIN THE FOLLOWING RANGES:*

Percolation Class	Area 3 Feet Above High Ground Water	Area 6 Feet Above Bedrock	Area With Slope Less Than 12%
1	8,000-15,000	8,000-10,000	8,000-10,000
2	11,520-15,000	11,520-14,400	7,200-14,400
3	14,400-18,000	14,400-18,000	9,000-18,000
4	28,800-36,000	28,800-36,000	18,000-36,000

*If a lot is subject to limiting conditions within these ranges, a preplanned waste disposal site is necessary to make sure a lot owner will have room to install a soil absorption system.

The Model Ordinance provides for a zoning administrator with authority to issue permits, make inspections, and keep records in relation to the ordinance. Procedures for obtaining zoning and sanitary permits are established and standards and conditions for obtaining special exceptions are set out. For the latter purpose, a Board of Adjustment is created to hear exception petitions and applications for variation from the terms of the Ordinance in cases of "unnecessary hardship." 29/

Actions by the Counties

Because the Model Shoreland Protection Ordinance prepared by the Department of Natural Resources was not available until December, 1967, it was difficult for many counties to meet the statutory deadline of January 1, 1968. 30/ However, the Department has been extremely flexible in permitting additional time, so that no serious hardships were produced by the time limit in the statute.

On January 2, 1968, the Administrator of the Division of Resource Development requested a status report from each county. 31/ The Department then compared each report and ordinance provision with the minimum statutory standards for shoreland protection, as interpreted by the Department and set out in its list of standards and criteria discussed above. 32/ Counties were then divided into three categories: complying, partially-complying, and non-complying. The middle category was created for those counties which were in the middle of comprehensive land use planning programs and gave formal assurance that shoreland protection regulations would eventually be integrated into the programs. Into the latter category fell all other counties without regulations, or with insufficient regulations. These counties were required to state their reasons for non-compliance, after which the Administrator of the Division of Environmental Protection was either to order such counties to proceed to formulate such regulations or direct the Division staff to prepare them with all costs of preparation to be borne by the non-complying county. 33/

By March of 1971 the Division listed only Kenosha and Racine Counties as remaining in the non-complying category. 34/ The rest had reportedly been prodded into full or partial compliance by means of hearings and compliance orders. 35/ Kenosha County has since enacted a comprehensive zoning ordinance effective upon publication in July, 1971 which includes shoreland provisions that meet state requirement. 36/ Racine

County has adopted shoreland protection regulations but the Division apparently does not feel they are completely consistent with their requirements. 37/

Prior to 1966 there were probably no more than four counties in Wisconsin with zoning administrators having any natural resource orientation; now, as a result of the statutory standards and Model Ordinance provisions drafted by the Division, almost all counties have such administrators. 38/ The program has clearly established a new administrative structure through which to address the problems of water resources throughout the state.

State-Local Relations

Although the Department has authority to compel the adoption of shoreland protection ordinances, it has no authority to enforce them. The matter of day-to-day administration is strictly for the counties, there being no statutory authorization for enforcement in the enabling Water Resources Act. 39/ There is some feeling in the Department that the Act could profitably be amended to require at least Departmental approval of variations and amendments to the ordinance. Presently the Department is entitled only to notice of all variation and zoning change requests. 40/ Since the county shoreland zoning ordinances were adopted under the pressure of state statute, and the substance of many of the ordinances follows quite closely the Model Ordinance prepared by the Department of Natural Resources, many counties are in effect administering a body of state regulation. The slavish adoption of the model shoreland protection ordinance in many counties, however, is viewed by the Department as an indication of local unpreparedness; they suspect such a wholesale adoption may result in provisions which do not fit the particular problems of the adopting county. 41/

Some critics of the program charge that the state has abdicated some of its responsibility. Rather than incur the expense of administering the regulations through a state agency, the state has transferred that front-line responsibility to the counties. While this approach may make eminently good sense from the point of view of overall efficiency, some county governments do resent having thrust upon them the task of enforcing part of the state administration code. 42/

This type of reluctance on the part of the counties can have a direct effect on the enforcement of the program because the county zoning administrator may find himself operating a local political environment that is not particularly receptive to the state requirements. His position can be an uncomfortable one as a county employee enforcing state regulations that do not have enthusiastic support from the county government. Since the county administrator serves at the pleasure of the County Board, not the Department of Natural Resources, there may be substantial incentive not to press too hard for full enforcement.

A degree of routine state supervision of county administration is built into the present arrangement. Under a state statute, copies of each septic tank permit application must be submitted to the state Department of Health and Social Services, 43/ but it is not clear how closely the Flood Plain and Shoreland section of the Department of Natural Resources monitors these records. In many counties copies of all variances or special exception permits granted by the county Board of Adjustment and affecting the shoreland are sent to the main office of the Division of Environmental Protection. This referral is not required by statute, but it is contained in the model shoreland ordinance 44/ and has been adopted by several counties. 45/ While the state office has no direct power over such variances or special exceptions, these records should aid in its evaluation of county enforcement of the ordinance; and this supervision may itself deter counties from too freely granting variances or special permits.

Overall, there seems to be good communication between the Department of Natural Resources and county administrators, and some administrators are quite willing to consult with the state office in handling a difficult local problem. 46/ State officials recognize the need to provide protection and support for the administrator and to direct their attention to the ultimate decision-making bodies in the counties. They hope to obtain state funds to provide grants-in-aid to support the local administration of the shoreland program. 47/

Obtaining adequate enforcement of the shoreland ordinance will probably require supervision of both the administrators themselves and the political structures in which they work. This is probably the greatest single weakness of the program: there is presently no effective way for the state agency to ensure adequate enforcement of the ordinance.

Questions of Jurisdiction

One weakness in county jurisdiction under the Act is that protected shoreland includes only land adjoining navigable streams. Polluting matter such as nutrients and agricultural runoff which are washed into smaller, non-navigable streams and then into lakes and navigable streams, are thus not subject to regulation. 48/

An even more serious limitation in the program is that the Water Resources Act specifically grants counties authority to zone their shoreland corridors only in their unincorporated areas. 49/ The cities located on lakes and streams are thus wholly outside the scope of the program.

Some basic concern has also been expressed about using the county as the vehicle for regulating shorelands. Not only does the city/village exemption reduce the area covered by the program, but in Wisconsin the county is a relatively weak governmental entity compared with villages, cities, and townships. The county has no authority, for example, to operate a sewage treatment system, something which the Department feels it may eventually want to promote as part of a continuing water resources preservation program. 50/

Actual operation of shoreland zoning ordinances has also turned up gaps and complexities in the scope of the jurisdiction. One area of difficulty has been the construction of man-made lakes. In order to obtain additional waterfront property, developers sometimes dredge their own artificial lakes. They often do so in such a way that the lakes are unable to support a full, self-sustaining range of aquatic life, and the lakes can rapidly deteriorate into scars on the landscape. 51/ While the shoreland zoning provisions apply to the newly created waterfront property, the actual dredging of lakes is sometimes not directly subject to any requirements, so that the damage is often done before any public authority has jurisdiction. In order to deal with this situation, more specific regulation of the creation of man-made lakes is probably needed. Several county administrators who have observed such problems recommend that additional regulation be incorporated into the shoreland zoning plan. 52/

A more fundamental practical shortcoming of the present program is the technical difficulty of defining the jurisdictional flood plain. The statutory definition states

452-329 O - 72 - 17

that county shoreland jurisdiction extends to all land within 300 feet of a river or stream "or to the landward side of the flood plain, whichever distance is greater." 53/ Because a major engineering study is required in most areas to determine the geographic outline of the flood plain, 54/ and such a study is beyond the financial capacity of local governments, some county zoning administrators apply the 300-foot provision as the definitive requirement. This practice undermines one of the purposes behind the program because potentially it leaves unregulated certain land that is subject to flood dangers and contains important environmental features.

Because of the technical difficulties involved, many counties have failed to enact flood plain ordinances required by §87.30 of the Water Resources Act, 55/ but no enforcement action by the Department of Natural Resources against particular counties is expected until the state makes sufficient progress in its own studies to determine flood plain boundaries. The Department hopes to obtain legislative approval of plans to spend $50,000 per year for flood plain delineation studies; but, in keeping with the emphasis on flood plain zoning as a measure to reduce flood damage, first priority for flood plain determination will be given to incorporated areas where obstructions are most serious. 56/ It will be at least several years, therefore, before the flood plain is mapped for the less heavily developed areas of the state. Until these surveys are completed, jurisdiction at the county level will probably vary from flat application of the 300-foot rule to various attempts to use rather imprecise mappings of past floods. Even the 1,000-foot corridor around lakes is not always readily definable because the "normal high-water elevation" varies from year to year, so that there will always be an element of uncertainty in drawing the boundaries of shoreland jurisdiction. 57/

Public Awareness

Most county zoning administrators operate one-man offices but are responsible for the enforcement of the full range of county zoning. This fact alone indicates the difficulty which the local administrator may encounter in personally policing the shoreland areas of the county. To a large extent he must, in practice, rely on private complaints to notify him of some violations. So public awareness is an important part of enforcement.

Despite the relative newness of the program in many counties, the major features of the shoreland regulations appear to be fairly well known at the local level. Public hearings held to examine the county ordinances before enactment were apparently well attended in most counties. Recognizing that general public awareness and acceptance of the restrictions imposed by the ordinance can be an important part of enforcement, a number of zoning administrators have made special efforts to inform and educate the public. Pamphlets prepared by the Department of Natural Resources to familiarize property owners and potential buyers with the state requirements are available from many county zoning administrators. In an attempt to notify local citizens, some administrators have prepared additional materials and distributed them to real estate offices and savings and loan institutions for public distribution. 58/

Another important aspect of the enforcement of the ordinances is the incentive for contractors to be familiar with and observe the regulations. With respect to the sanitation provisions, for example, the licensed plumber who installs a septic tank or other private sewage disposal system can find himself in trouble if he fails to observe the zoning regulations. Creating this kind of special concern in a small group has made it somewhat easier for the county administrator to supervise the introduction of the new requirements. 59/

Perhaps even more important than public awareness of special shoreland zoning regulations is the increasing public acceptance of such regulation. Particularly in areas where there are many lakes and streams, people are becoming aware of the need for protective action and are increasingly cooperative in carrying out the shoreland zoning program. 60/ This support represents a major shift in public opinion, for as recently as three or four years ago public sentiment in many areas was strongly opposed to the shoreland zoning program. 61/ Growing general concern over ecology and the environment in recent years has apparently facilitated the acceptance of specific programs of this kind.

The shoreland protection program has not generated any widespread organized opposition among local interest groups. Although there was some early outcry among developers about the setback requirements, 62/ that feeling does not seem to be widely shared. Quite the contrary, in some areas, the professional developer has accepted shoreland controls more readily than many individual property holders. 63/ In at

least one area, experience has indicated that large lots sell better than substandard lots. 64/ The volume of new development since enactment of shoreland zoning varies considerably from county to county, but the quality of development has improved noticeably in at least one county where there have been several subdivisions under the new regulations. 65/

Private conservation groups have actively supported shoreland protection for several years and have welcomed the enactment of this program. However, they regard the program as being in such an early stage of administrative development that no official policy position is possible yet. At present they have adopted a wait-and-see attitude and will follow the progress of the enforcement of the program. 66/

Perhaps the strongest opposition to the program which can be associated with a particular group has been that of farmers. Many farmers believe that decisions directly affecting them were made without consulting them, and they resent that form of regulation. To some extent, this response may have been produced by the manner in which the program was presented. 67/ Where state requirements are to be implemented by county action, county officials may tend to simplify their own function and shift responsibility for their actions by emphasizing the imposition of control from the state level. When farmers perceive the regulations in this way they are likely to resist the action regardless of the substance of the program. If state administrators can work with county officials to dispel that impression and to draw local interests into the process of establishing standards for the particular county, the entire program may obtain better public acceptance. A spokesman for a large farmer organization considers it quite possible that farmers, if approached properly, would cooperate in imposing upon themselves restrictions on the use of livestock, fertilizers, and insecticides in shoreland areas. 68/

Some critics of the program charge that the legislature evaded its responsibility by enacting relatively vague statutes and turning over to an administrative agency the authority to define precise guidelines. These critics maintain, if the legislature intended to impose precise requirements, it should have enacted a more comprehensive statute setting forth the standards. These objections are often raised by local people who are opposed to the substance of the regulations, and the position sometimes reflects an expectation that the legislature would not actually enact

specific standards in a statute. Even some supporters of the program believe that it would receive more ready acceptance at the county level if it had the full force of the legislature behind its specific requirements. 69/ This objection seems rather tenuous, however, because the legislature, in enacting §§59.971 and 144.26 has taken a clear position on the issues involved in the program and it is not unusual for the detailed implementation of a legislative program to be carried out by an administrative agency. Overall, the relationship between legislature and agency in the shoreland program is probably an appropriate one for dealing with this type of problem.

Enforcement Through Legal Action

Beyond the problem of informing the public of the requirements and detecting violations, however, the county zoning administrator may find it difficult to take legal action against known violators. In at least one county the zoning committee of the county Board of Supervisors has refused to recommend prosecution of some cases, and that has prevented any enforcement action. 70/ Moreover, enforcement proceedings must be brought by the local District Attorney or the County Counsel, and they may be reluctant to take action. In many counties the County Counsel is a part-time employee with a wide range of responsibilities. Because he assigns a rather low priority to zoning enforcement, little legal action is taken. In one such county the zoning administrator has found approximately 20 gross violations of the ordinance but he has been unable to procure court action. 71/ As a result of these political and economic considerations, even a conscientious zoning administrator may be unable to enforce the shoreland regulations.

To some extent the reluctance to bring enforcement actions probably stems from doubt as to the constitutional validity of certain shoreland regulations. The concept of regulating for preservation as well as pollution control raises the question whether such regulation may be a taking for which compensation must be paid. Some of the farm groups' objections have been directed at the specific limitations upon their use of certain property, particularly in the conservancy districts established under shoreland zoning. 72/ The claim has been made that such a measure is a taking of private property and that compensation must be paid. This is especially so in the conservancy district where the regulations prohibiting development fall, as they often must, on land with potential for recreational develop-

ment. 73/ However, the Department intends to leave the constitutional question for determination by the courts, and it is operating on the assumption that present restrictions are constitutionally permissible. 74/

Adequacy of Environmental Protection

With respect to the Model Ordinance itself, there is some question in the Department whether its provisions are sufficiently sophisticated to deal with pollution and preservation of water resources. Generalization about the pollution contributions of various shoreland uses have proven to be of little value, and insufficient data is available from which to formulate specific regulations for specific areas. 75/ For example, in the three-district scheme suggested by the Model Ordinance, the conservancy district regulations attempt broad control over land use on or near wetlands, 76/ but the regulations may not be sufficiently comprehensive to accomplish the intended preservation. General farming, even as a special exception use, may be too intense for the delicate ecology of a Sphagnum bog or other wetland entity. In other words, the regulatory scheme embodied in the shoreland ordinances may not achieve all of the intended results even if administered effectively.

Only continued scientific research and updating of the specific provisions of the shoreland zoning ordinances will insure that the program will operate to further the policies underlying it, and questions have already been raised regarding the approach embodied in the present program. The basic objection expressed by the Southeastern Wisconsin Regional Planning Commission (SEWRPC) is that the shoreland and flood plain restrictions in the state program are ill-suited to relatively small streams in a heavily urbanizing region and provide inadequate protection for the ecological resources of the shorelands. 77/ Present state shoreland and flood plain regulations do not prevent all development in the flood plain. Shoreland ordinances restrict the form and intensity of development, but substantial urbanization can still occur; and the principal focus of flood plain zoning for cities and villages is still the prevention of serious flood damage. 78/

One of the Commission's major criticisms of the existing approach is that it fails to take into account the impact urbanization and changing land use can have upon the course of a relatively small stream. Along the major

rivers of the United States normal human activities along the shoreline are not likely to affect substantially the flow of water in the stream bed; but filling and building along a large portion of a small river can seriously alter the water elevation and the rate of flow, particularly under flood conditions. 79/ Since most of southeastern Wisconsin is urbanizing rapidly, even the limited objective of controlling flood damage may require tighter restrictions on all forms of development in the flood plain.

Because state standards still permit a good deal of development to occur within the flood plain, the Commission fears they will not adequately protect the natural resources which are concentrated in those areas. 80/ Included in those resources are ground water recharge areas, woodlands, wetlands, and wildlife habitat. Even the regulated development permitted under state standards will destroy many of these resources, and the SEWRPC recommends that the entire flood plain be kept in its natural state for recreational use, with agricultural uses permitted where good soil and water conservation techniques will preserve the basic character of the environment. 81/

The Commission recognizes that its approach would probably require public purchase of some urban flood plain land because the expectations for use would be so sharply altered, and with the advice of the Commission some counties have actually made substantial purchases of shoreland. This experience suggests that under proper direction local governments may be willing individually to take important action toward preserving shoreland resources. However, the Commission emphasizes that effective management of watershed resources can probably best be carried out on a regional basis and that some means of coordinating the actions of individual localities is essential. 82/

Areawide Coordination

Consistent with its concern for the weakness of county governments, the Department has given some consideration to the use of regional authorities for implementation of water quality standards and waste disposal programs. A river basin authority is viewed as a possible alternative. The Department does not contemplate the use of regional planning commissions for such implementation since such commissions prefer to maintain their effectiveness as planning agencies, which they feel would be difficult if they became embroiled in controversies concerning program implementation. 83/

One way of achieving areawide coordination would be for the state to take a more direct role in the administration of the shoreland-flood plain zoning program, and it has been suggested by some planners that the program would be more effective if enforcement were in the hands of state officers. 84/ However, the expense of such a program would be almost prohibitive, and it would run counter to well-established patterns of state-county relations. 85/ A matching grant program under which the state would help finance the program would give the state additional control over the quality and conduct of county zoning administrators, and would also placate some local objections that the state is evading financial responsibility for the program. The legislature eliminated a matching grant plan from the original proposal, but another effort might be made to establish one. 86/

The suggestion has also been made that real estate tax assessments for conservancy districts be adjusted downward as a form of compensation to the property owners, 87/ but that type of relief is prohibited under the Wisconsin Constitution. The whole question of compensation will probably be the subject of litigation, and further action by the Department or the legislature will probably await some indication of the attitude of the courts. 88/

Conclusion

The approach of the Wisconsin Shoreland Protection Program is basically that of placing at the county level primary responsibility for protection of shoreland resources, with overall authority at the state level to compel compliance with minimum statutory standards. The Department of Natural Resources has attempted to give counties every opportunity to comply with the pertinent statutory provisions rather than bring a host of compliance actions. The Department would rather proceed slowly and depend upon its amicable relationship with the various county officials responsible for adoption and implementation of the shoreland regulations. 89/

The shoreland protection program represents an attempt to work out a satisfactory state-local relationship in land use control. Minimum state standards underlie the local zoning regulations, preserving local control but assuring some measure of uniformity in preservation and anti-pollution standards throughout Wisconsin. The local response in adopting shoreland corridor zoning ordinances appears to

have been very good, but the city/village exemption is unfortunate. Regulation of this kind must be comprehensive throughout an area to be effective and readily administrable, and the exemption seriously disrupts the continuity of jurisdiction, 90/ especially in view of the fact that industrial and intensive commercial developments, crucial sources of pollution, are often found in cities and villages.

Finally, the lack of any compulsory review of local administrative practices could render the whole regulatory scheme ineffective. There is presently no way the State of Wisconsin can enforce the minimum standards contained in its legislation, and only additional experience in operation can indicate whether county enforcement practices are adequate to achieve the goals of the program.

FOOTNOTES

1/ Douglas A. Yanggen and Jon A. Kusler, "Natural Resource Protection Through Shoreland Regulation: Wisconsin," LAND ECONOMICS (1968), at p. 73.

2/ Id. at p. 75.

3/ Thomas G. Frangos, "Environmental Protection," Wisconsin Conservation Bulletin, Nov.-Dec. 1968.

4/ Douglas A. Yanggen and Jon A. Kusler, "Natural Resource Protection Through Shoreland Regulation: Wisconsin," LAND ECONOMICS (1968), at pp. 74-75; interview with Donald Wood, August 10, 1970; and interview with Thomas Lee, March 29, 1971.

5/ Interview with Donald Wood, August 10, 1970.

6/ Wisc. Stat. Ann. §144.26(1). Copies of the pertinent statutes are available in booklet form. See Wisconsin Natural Resources Laws 1969-1970, Publication 702-71, Department of Natural Resources: Madison, 1971.

7/ Wisc. Stat. Ann. §59.971(1).

8/ Thomas G. Frangos, "Environmental Protection," Wisconsin Conservation Bulletin, Nov.-Dec. 1968. Interview with Thomas G. Frangos on March 29, 1971.

9/ Wisc. Stat. Ann. §59.971(4).

10/ Id. §59.971(6).

11/ Id. §144.26(6).

12/ Id. §59.971(6).

13/ Wisconsin Natural Resources Laws, §87.30.

14/ Interview with Donald F. Wood and Ted Lauf, August 10, 1970.

15/ Interview with Kurt W. Bauer, Executive Director, Southeastern Wisconsin Regional Planning Commission, July 2, 1971.

16/ "Wisconsin's Shoreland Management Program"--Release of the Department of Natural Resources, Madison, Wisconsin, at pp. 2-3.

17/ "Wisconsin's Shoreland Protection Ordinance," prepared by the Department of Natural Resources, Division of Resource Development, Madison, Wisconsin (December, 1967).

18/ Id. §3.0.

19/ Id. §4.0.

20/ Id. §5.0.

21/ Id. §§6.0 and 7.0.

22/ Id. §8.0.

23/ Id. §9.0.

24/ Id. §12.0.

25/ Id. §13.0.

26/ Id. §14.0.

27/ Id. §§15.0 and 16.0.

28/ Id. §17.4.

29/ Id. §18.0.

30/ Interview with Leland E. Newman, Executive Director; and Michael Morgan, Planner, Northwestern Wisconsin Regional Planning Commission, July 29, 1971.

31/ "Wisconsin's Shoreland Management Program"--Release of the Department of Natural Resources, Madison, Wisconsin, at p. 4.

32/ Id.

33/ Id.

34/ Interview with Thomas Lee on March 29, 1971.

35/ Cf. #3A-70-1 directed to Adams County issued October 16, 1970, and requiring the submission of an appropriate ordinance by December 15, 1970.

36/ Interview with William Kavanagh, Kenosha County Zoning Administrator, June 28, 1971.

37/ Interview with Arnold Clement, Racine County Zoning Administrator, August 26, 1971.

38/ Interview with Thomas G. Frangos, March 29, 1971.

39/ Id.

40/ Id. Interview with Oliver Williams, Assistant Commissioner of Natural Resources, August 2, 1971.

41/ Interview with Donald Wood, August 10, 1970; interview with Ted Lauf, August 10, 1970.

42/ Interview with Leland Newman and Michael Morgan, July 29, 1971.

43/ Wisconsin Natural Resources Laws, §144.03.

44/ "Wisconsin's Shoreland Protection Ordinance," §18.46.

45/ E.g., Portage County Shoreland Supplementary Zoning Ordinance; Sauk County Shoreland Protection Ordinance.

46/ Interview with John Lewis, Marathon County Zoning Administrator, June 29, 1971.

47/ Interview with Oliver Williams, August 2, 1971.

48/ Jon A. Kusler, "Water Quality Protection," at p. 76.

49/ Wisconsin Natural Resources Laws 1969-1970, Publication 702-71, Department of Natural Resources: Madison, 1971, §59.971(1).

50/ Interview with Thomas G. Frangos, March 29, 1971.

51/ Interview with John Lewis, June 29, 1971. See J. A. Kusler, "Artificial Lakes and Land Subdivisions," 1971 WIS. L. REV. 369.

52/ Interviews with John Lewis, June 29, 1971; Bjarne G. Petersen, Marquette County Zoning Administrator, June 30, 1971; and Melvin Albers, Sauk County Zoning Administrator, July 1, 1971.

53/ Wisconsin Natural Resources Laws, §59.971.

54/ For purposes of determining the flood plain, the standard used in the regional flood with a recurrence interval of 100 years.

55/ Interviews with Bjarne G. Petersen, Leland Newman and Michael Morgan, July 29, 1971; interview with Ted Anderson, Polk County Zoning Administrator, July 29, 1971.

56/ Interview with Oliver Williams, August 2, 1971.

57/ Interview with Leland E. Newman and Michael Morgan, July 29, 1971.

58/ Interview with John Lewis, June 29, 1971.

59/ Interview with Melvin Albers, July 1, 1971.

60/ Interview with Ted Anderson, July 29, 1971.

61/ Interview with Leland Newman and Michael Morgan, July 29, 1971.

62/ Interview with Donald F. Wood and Ted Lauf, August 10, 1970.

63/ Interview with Bjarne G. Petersen, June 30, 1971.

64/ Interview with Melvin Albers, July 1, 1971.

65/ Interview with John Lewis, June 29, 1971.

66/ Telephone conversations with Richard A. Hemp, Executive Director, Wisconsin Wildlife Federation, June 23, 1971; and Frederick M. Baumgartner, President, Citizens Natural Resources Association of Wisconsin, Inc., June 23, 1971.

67/ Interview with William Kasakaitis, Environmental Control Committee, Wisconsin Farm Bureau Federation, July 1, 1971.

68/ Ibid.

69/ Interview with Leland Newman and Michael Morgan, July 29, 1971.

70/ Interview with David Rosenfeldt, Wausau County Zoning Administrator, June 29, 1971.

71/ Interview with Melvin Albers, July 1, 1971.

72/ Interview with William Kasakaitis, July 1, 1971.

73/ Douglas A. Yanggen and Jon A. Kusler, "Natural Resource Protection Through Shoreland Regulation: Wisconsin," LAND ECONOMICS (1968), at p. 86; interview with Thomas G. Frangos, March 29, 1971; interview with Donald Wood, August 10, 1970; interview with Ted Lauf, August 10, 1970.

74/ Interview with Donald F. Wood and Ted Lauf, August 10, 1970.

75/ Jon A. Kusler, "Water Quality Protection for Inland Lakes in Wisconsin: A Comprehensive Approach to Water Pollution," 1970 WIS. L. REV. 35, at pp. 67-8.

76/ "Wisconsin's Shoreland Protection Ordinance," prepared by the Department of Natural Resources, Division of Resource Development, Madison, Wisconsin (December, 1967), at p. 34.

77/ Interview with Kurt W. Bauer, July 2, 1971.

78/ Id.; Wisconsin Natural Resources Laws, §87.30.

79/ Interview with Kurt W. Bauer, July 2, 1971.

80/ Id.

81/ Id.

82/ Id.

83/ Interview with Thomas G. Frangos, March 29, 1971.

84/ Interview with Leland Newman and Michael Morgan, July 29, 1971.

85/ Interview with Oliver Williams, August 2, 1971.

86/ Id.

87/ Id.; interview with Leland Newman and Michael Morgan, July 29, 1971.

88/ Interview with Oliver Williams, August 2, 1971.

89/ Interview with Thomas G. Frangos, March 29, 1971; interview with Donald F. Wood and Ted Lauf, August 10, 1970.

90/ Interview with Leland E. Newman and Michael Morgan, July 29, 1971.

NEW ENGLAND RIVER BASINS COMMISSION

The New England River Basins Commission was created in 1967 by federal executive order, 1/ under the authority of the federal Water Resources Planning Act, 2/ at the request of the governors of the New England states and of New York. 3/ It was the fourth "Title II" river basin commission to be created. 4/ The primary function of all such commissions is to provide coordinated water resources planning for the region in which they are located. 5/ Federal, state, interstate, regional, and local levels of government participate, as well as private, non-governmental agencies. 6/

The creation of regional coordinating agencies (river basins commissions) is one element of the concept embodied in the Water Resources Planning Act of providing for coordinated nationwide planning for the development and preservation of water and related land resources. 7/ Efforts in favor of such comprehensive water resources planning began at the national level at least as early as the 1951 Report of the Water Resources Policy Commission appointed by President Truman, and legislation on the subject was introduced to the Congress in 1959 and in subsequent sessions until the Water Resources Planning Act was passed in 1965. 8/

In addition to providing for the creation of river basins commissions, the Water Resources Planning Act establishes a cabinet level Water Resources Council whose membership includes the secretaries of the Interior, the Army, Agriculture, and Health, Education and Welfare, as well as the Chairman of the Federal Power Commission. The Council has "the responsibility for guiding the Nation's planning effort in the water resources field and keeping the President and the Congress informed on the water needs of the Nation." 9/ The Council is responsible for reviewing the water resources plans of states, and if it approves a state's plans, may provide grants to the state for up to 50% of the cost of carrying out the approved program. 10/

Early Efforts Toward Coordination

The origins of the New England Commission precede by a number of years the 1965 Water Resources Planning Act. In the early 1950's Congress authorized a study of the hydro-

electric potential of two New England river systems (the Connecticut and the Merrimac), and this study was broadened by Presidential intervention to include a detailed inventory of the water and related land use resources of the New England-New York region. Many federal and state agencies were involved, working cooperatively through the New England-New York Interagency Committee. 11/

The study was completed in 1955, and in 1956 a successor agency was organized by federal and state officials--the Northeastern Resources Committee. Without staff, and with very little funds, the Committee sought at first "to carry forward the promise of the earlier study," and promote federal-state coordination of water resources plans in the region. But the Committee found it could not effectively carry out this task, and in 1958 began promoting the adoption of a federal-interstate Northeastern Water and Related Land Resources Compact which would have created an ongoing regional water resources agency. By 1959 the compact had received necessary state approvals, but was never ratified by Congress. 12/

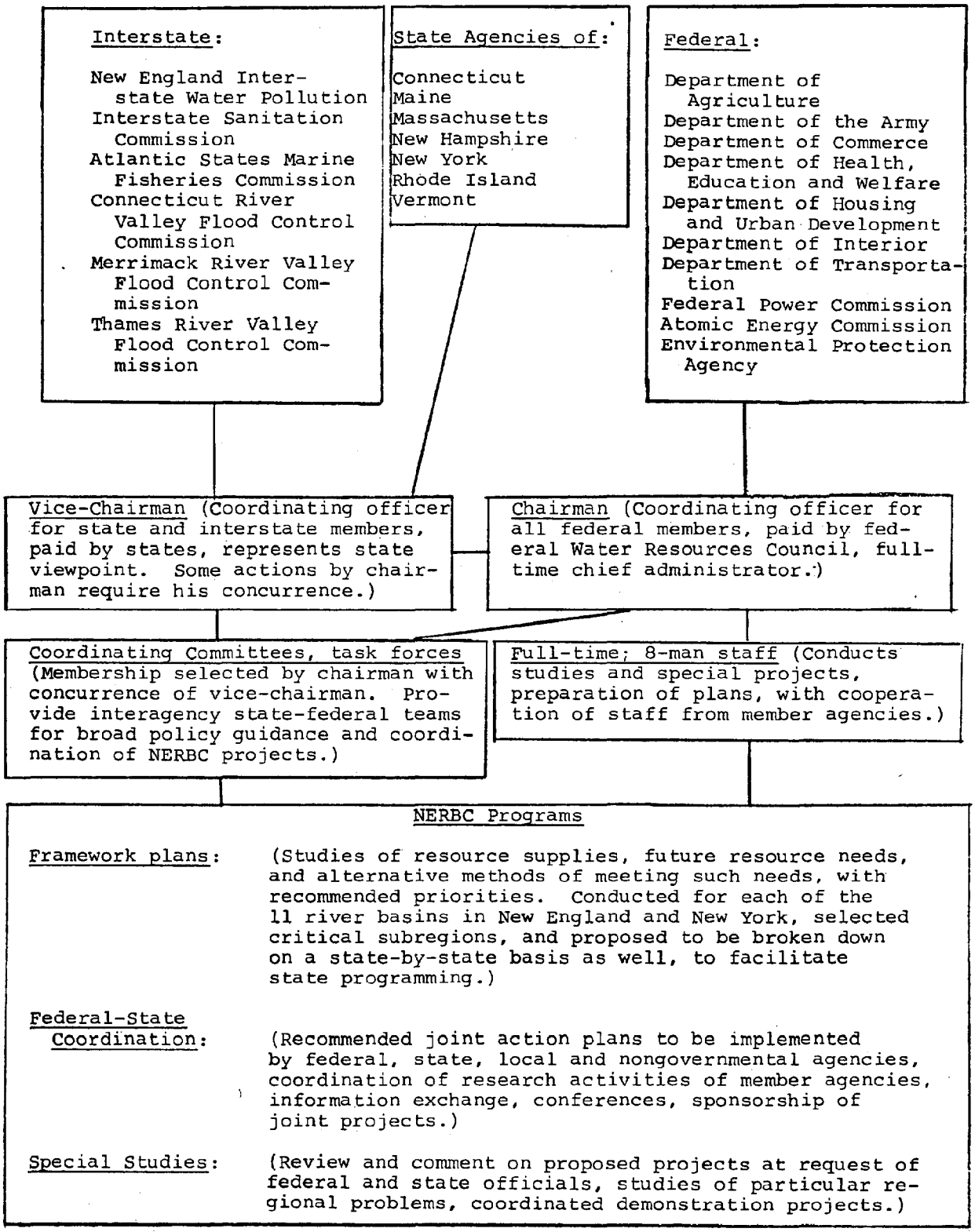
The Northeastern Resources Committee continued to meet and operate as an informal body, and when the Water Resources Planning Act was introduced in the federal Congress, it supported the Act and recommended the creation of a river basins commission for New England. In a 1965 meeting, the New England Governor's Conference voted unanimously in favor of this proposal and New England became the first region in the nation to request the creation of a river basins commission. 13/ According to the Commission, many present members are the same as the original Northeastern Resources Committee members. 14/

Structure of the Commission 15/

As the diagram on page 264 shows, the Commission consists of representatives from 10 federal departments, state agencies in seven states, six interstate commissions, and a chairman appointed by the President. 16/ The chairman is responsible to and paid by the Water Resources Council, while the other representatives report to their parent agencies or states and do not receive compensation from the Commission. The chairman is the full-time staff head of the Commission, and is also the coordinating officer for federal members on the Commission. The vice-chairman of the Commission

452-329 O - 72 - 18

Organization and Functioning of New England River Basins Commission



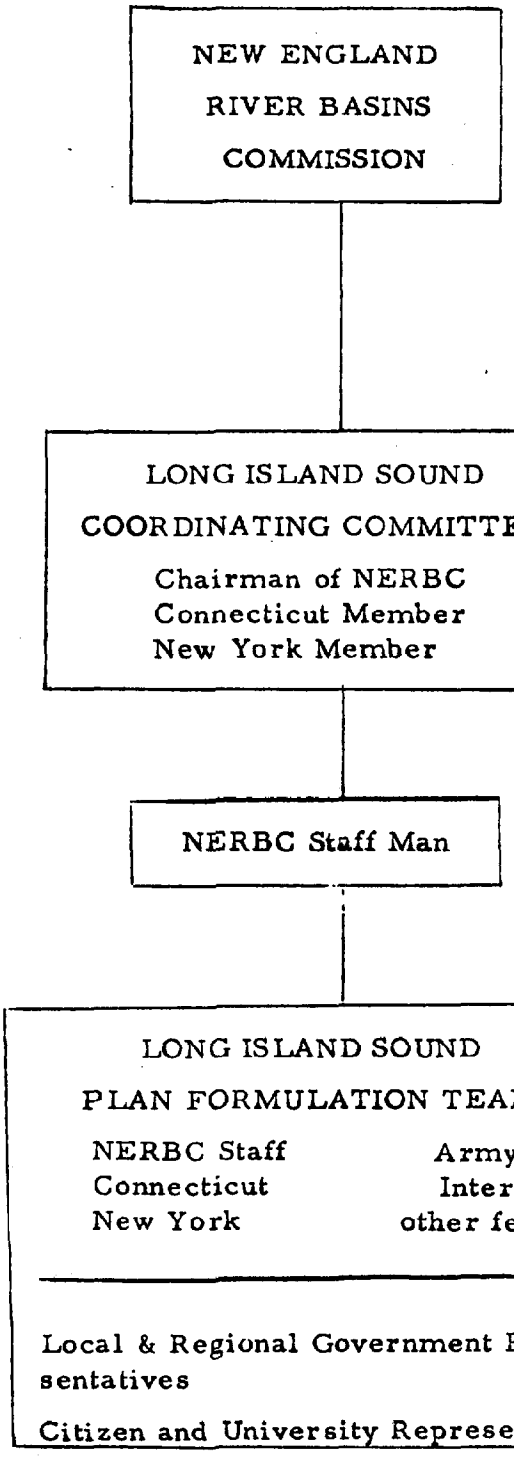
represents state government interests and is elected by the state and interstate members. The chairman is required to conduct all proceedings of the Commission "in consultation with the vice-chairman." 17/

Meetings are held quarterly, and any decisions are normally made by consensus of the membership. 18/ Where a consensus is not reached, the federal statute and Water Resources Council regulations require that the chairman, acting in behalf of the federal members, and the vice-chairman, acting upon instructions of the state members, each set forth their views in the record. Policy determinations for specific areas of water resources planning (such as plans for critical subregions, or studies of particular regionwide problems) are often made by coordinating committees or task forces appointed by the chairman in consultation with the vice-chairman, rather than by the Commission as a whole. 19/

Federal and interstate members participate on a somewhat different basis than state representatives. The federal and interstate members are responsible to their parent agencies, which have specific programs and goals, usually transcending state boundaries, they wish to be considered by the Commission. 20/ State representatives, on the other hand, represent only their own states within the region, and must attempt to maintain contact with and present the views of all the various agencies within their state, as well as "metropolitan and local government agencies." 21/ Furthermore, they "serve as the focal point for non-Federal and nongovernmental participation in commission planning from within the State." 22/ State members are appointed by state governors, and the existing state membership includes two state planning directors, several natural resources and conservation administrators, and two chiefs of state water resources agencies. 23/

The daily work of the Commission is carried on by an eight-man staff, with the cooperation of staff from member agencies on particular projects, under an annual budget of approximately $200,000 (including both federal and state contributions). 24/ A typical functional structure for coordinated work by members on a project is set out at page 266. Some projects and studies are undertaken by outside consultants under contract with the Commission. 25/

Proposed Organization for the
Comprehensive Study of the Water and Related Land Resources for
Long Island Sound



Function:
Set general policy for the conduct of the study, with particular attention to issues of regional significance, institutional and legal issues, and issues affecting the entire membership. Review and transmit final plan to Governors and to Water Resources Council for transmittal to President and the Congress

Function:
Continuing guidance of the study, coordinate work and budgets, overall direction of plan formulation. Submit completed plan to whole Commission.

Function:
Chair and lead Plan Formulation Team. Act as Secretary to Coordinating Committee. Responsible for timely execution of work.

Function:
Perform all analytical work and formulate the plan or plans

Responsibilities of the Commission

The Commission has jurisdiction over water resources planning for 11 river basins in the six New England states and in New York. For these areas, the Commission has the responsibility to:

> "(1) serve as the principal agency for coordination of water and related land use plans in the region, including federal, state, interstate, local and non-governmental plans;
>
> "(2) prepare and keep up-to-date a comprehensive, coordinated joint plan for use in development of water and related land resources (the plan may be prepared in stages, is to identify alternatives, and is to be directed at specific action projects);
>
> "(3) recommend long range schedules of priorities for collection of needed basic information, for planning, and for action projects;
>
> "(4) foster and undertake studies." 26/

The Commission carries out these responsibilities under the general supervision of the Water Resources Council, which reviews all plans adopted by the Commission. The Council requires public hearings to be held in the region on each such plan, and requires that all members of the Commission receive an opportunity to comment on plans which are adopted. 27/

The federal statute does not specifically allow river basin commissions to engage in activities implementing their plans. The regulations adopted by the Council, however, do provide that river basin commissions may "make recommendations to the Council and appropriate States on the relationship of individual projects to the comprehensive plan." 28/ Presumably the Council would consider such recommendations in deciding whether to provide federal financial assistance to the state concerned for its water resource planning.

Programs Undertaken

In carrying out the purposes for which it was created, the Commission has undertaken a variety of activities, including cooperation with two broad federal water resources studies covering the entire northeastern region, the preparation of one comprehensive river basin plan (for the Connecticut River Basin), initial efforts at comprehensive plans for three selected subregions (Southeastern New England, Long Island Sound, and the New England Coastal Zone), numerous studies of particular problems which have caused concern in the region (such as flood plain regulation, small private dams, and power plant siting), and finally review and comment upon certain individual projects in the region at the request of federal or state officials. 29/ Most of these plans, studies, and comments contain recommendations for actions to be taken by federal and state officials and priorities to be attached to particular programs. The Commission has also sought to promote cooperation, coordination, and exchange of information between member agencies and other agencies concerned with the development or conservation of water and related land resources, both in working relationships on particular Commission projects and in the general activities of such agencies. Finally, the Commission has proposed or adopted measures which it feels will help assure its plans and recommendations are implemented.

The Commission chairman reports that a number of methods have been utilized to increase the general coordination of the activities of its members. Water resources meetings have been held in five of the New England state capitols, and the Commission has executed a memorandum of understanding with the New England Regional Commission--another federal regional body, responsible to the U.S. Department of Commerce, which also has programs in the water resources area. 30/ The Commission publishes a bimonthly newsletter containing information about the activities of various agencies in the New England area, and sponsors conferences, meetings, and symposia, which in addition to the quarterly meetings of the Commission, provide a forum for the exchange of information and the coordination of programs. The Commission has also provided for exchange of water resources research among water resources departments in the region, through a permanent research coordinator funded by the states, and located in the Commission's offices. Finally, according to the chairman, the

Commission staff remain in frequent contact with member agencies and their staffs, allowing regular exchange of information through the Commission to its members. 31/

Comprehensive New England Water Resources Plan

The Commission's primary goal, aside from promoting ongoing coordination of the activities of its members, is the creation of a comprehensive plan for coordinated federal-state management of water and related land resources in the New England region. "Related land resources" in this context refers to land uses which "cause significant effects on the quantity and/or quality of the water resource" and also to lands "the use or management of which is significantly affected by or depends on . . . measures for management, development or use of water resources." 32/ The Commission has a long range strategy for completing the comprehensive plan which includes:

> "(1) a New England Framework--a look at future needs, ways of meeting them, priorities for tackling future problems for the entire region, in each state, in major basins;
>
> "(2) joint federal-state water and related land management plans for selected subregions, including separately organized and funded plans for Southeastern New England and Long Island Sound, [and] for each New England state." 33/

The comprehensive plan for New England will be a composite of these efforts. At this point, the Commission is still preparing the various elements of the plan, except for a plan for the Connecticut River Basin, a draft of which has been completed.

The Commission anticipates that the "framework" data will come primarily from the North Atlantic Regional Water Resources Study. This study, headed by the Army Corps of Engineers and begun before the creation of the Commission, 34/ is investigating water supply and demand relationships in the North Atlantic region. The Corps has completed projections of water and related land needs through the year 2020

for major river basins in the region, and the study will ultimately produce a wide variety of background data on water resources. The Commission is cooperating with the Corps in the study, and plans to break down the study results, as up-dated by the Commission's own information-gathering, according to river basin subregion, and state within the region, to produce the New England Framework (the basic background data on water resources in the region necessary for the Commission to begin preparing a comprehensive plan). 35/ Another study covering the northeastern United States area may provide additional information to the Commission--the Northeastern Water Supply Study. The Army Corps of Engineers is also responsible for this study, which resulted from a severe drought in the region in the early 1960's. This study will propose alternative means by which major metropolitan areas can satisfy their projected water supply needs. 36/

While the Commission has not completed its New England Framework, it has published a series of "Priorities" reports which give basic water resources data for the New England states (not New York), discuss particular problem areas (water quality, water supply, flood control and watershed management, navigation, recreation, and fish and wildlife), list and summarize each state and federal agency's programs and proposed projects for dealing with these problems, and recommend priorities among these programs and projects. The recommendations are for the period 1972-1976, by which time the Commission hopes to have completed at least the major elements of its comprehensive plan. The series of reports are broken down to be usable both by state and by river basins. 37/

These priorities reports are a beginning for the second element of the Commission's strategy for completing a comprehensive plan (actual preparation of coordinated plans for various portions of the region), since they make initial recommendations for the management of water and related land resources for each state in the region. The reports are useful on an interim basis because plans have not yet been prepared by the Commission for most of the New England region, with the exception of the Connecticut River Basin Plan, which has been drafted but is not yet in its final form.

The Connecticut River Basin Plan

Even though not in its final form, the Connecticut River Basin Plan has been circulated in draft form, and is worth examining closely because it is the only existing example of the kind of planning presently being undertaken by the Commission. The Plan has its roots in an Army Corps of Engineers study begun before the Commission was created. 38/ The Corps remained in charge of the Commission's Coordinating Committee which took over formal responsibility for the study when the Commission was created in 1967, and the Corps' point of view has influenced the objectives and recommendations of the study. Thus the design of the study and its results do not entirely reflect the outlook or policies of the Commission as a whole, because many of its members have interests and viewpoints substantially different from those of the Corps. With this limitation in mind, the Connecticut River Basin Study and the resulting comprehensive water and related land resources plan for the basin serve to illustrate how river basin planning is being conducted by the Commission.

The study began in 1964 and proceeded by gathering background data on the water and other natural resources in the Connecticut River Basin, including a general description of existing land uses, the climate of the region, and its population and economy. Projections of population growth, economic growth, and natural resource needs were made for 20-year increments through the year 2020. The current water resources problems of the area were investigated. One of the more serious problems noted was heavy pollution and diminution of water quality in the basin. 39/ Past and possible future flood damage was closely studied, 40/ as were the problems of inadequate public access to many areas 41/ and the deterioration of fisheries due to inadequate minimum stream flows and pollution, among other factors. 42/ Many other problems and resource needs were also studied, such as water supply and navigation needs, electrical power needs, and the problem of disposing of solid wastes. Patterns of land use (agriculture, recreation and forestry) and land use regulation (flood plain management) affecting water supply, water quality, and flood control were studied, and predictions made as to future trends. 43/

In June, 1970 a nine-volume report on the study was issued by the Corps-directed Coordinating Committee,

which includes both a "1980 Early Action Plan" and a "2020 Long Range Plan." 44/ The excerpt from the report at page 273 summarizes the 1980 Early Action Plan designed to meet the problems and needs uncovered in the study stage. The total cost of the Early Action Plan would be $1.8 billion, and, as the excerpt shows, much of this cost would be created by new structures or additions to existing structures (such as new dams and power plants, construction of fish ladders at existing dams, provision of reservoir flow releases, and expansion of existing facilities of various kinds). Non-structural elements of the plan include some matters relating to land use regulation, such as the reference to "850 sites of archeological, historical, or natural resource areas" which "should not be disturbed if possible by future developments within the basin." 45/ Recommendations for the protection of these sites include public acquisition, flood plain zoning, basin-wide scenic river programs, and establishment of national recreation areas. Similar land use regulation measures are recommended for facilitating public access and recreation, for flood control, and for protection of water supply and quality. The necessary land use measures would be undertaken primarily by state and local governments, with the exception of federal actions necessary to establish national parks and recreation areas. 46/ The Commission's staff director, Malcolm Graf, is strongly urging the states and local governments to acquire land for these purposes now before the price rises. 47/

Other non-structural proposals included in the 1980 portion of the plan also "lie largely in the local-State areas of responsibilities and interest," and include such items as further environmental studies on water quality and recreation, acceleration of water resource planning assistance to local communities, improved weather and streamflow forecasting systems, improved operation of flood control reservoirs, and creation of public information programs on the availability of flood plain insurance. 48/ The 2020 Long Range Plan follows the same format as the 1980 plan, projecting the trends and problems noted in the 1980 plan to the year 2020 and omitting specific project and budget recommendations. 49/

The entire Coordinating Committee Report, including the recommendations for 1980 and 2020 was subjected to an extensive review by a Citizen Review Committee composed of members from various communities of each of the states involved. The Review Committee issued its own report on the Connecticut River Basin Plan on February 1, 1971. 50/ The

TOTAL COST $1.8B

WATER QUALITY

1. Secondary Level Treatment for 1980	$ 240M
2. Advanced Waste Treatment for 1980	19
3. Others (Costs not available)	
Low Flow Augmentation	
Combined Sewer Separation	
Uncontrolled Runoff	
Diversion of Wastewaters	
Bottom Deposits	
Cost	$259M

WATER SUPPLY

1. Northfield Mt. Diversion	$ 60M
2. Expansion of Municipal and Industrial Supplies	125
3. Corps' Reservoirs	19
Beaver Brook	
Tully	
Honey Hill	
4. Upstream Reservoirs	3
Cost	$207M

ANADROMOUS RESTORATION

1. Fish Ladders at Five Existing Power Dams	$ 13M
2. Construction of New Fish Hatchery Facilities	7
3. Streambank Acquisition	5
4. Provision of Reservoir Flow Releases	4
Cost	$ 29M

RESIDENT FISH AND WILDLIFE

1. Improved Access at Existing Water Bodies (approx)	$ 3M
2. Provision of New Water Bodies	37
Corps' Reservoirs 12 P.L. 566 Reservoirs 2	
Other Upstream 23 Reservoirs	
3. Expansion of Hatchery Facilities	5
4. Extensive Streambank Acquisition Program	20
Cost	$ 65M

POWER

Installed Capacity 3,660 megawatts

1. Conventional Hydro	$ 50M
2. Pumped Storage Hydro	210
3. Int. Combustion/Gas Turbine	40
4. Nuclear-fueled Steam	400
Cost (private sector)	$ 700M

FLOOD CONTROL

1. Corps' Dams			$ 86M
Victory	$ 2	Honey Hill	$ 3
Bethlehem Junction	5	Meadow	41
Gaysville	23	Beaver Brook	1
Claremont	10	Knightville	1
2. Seventeen Upstream Watershed Projects			25
3. Other Upstream Dams			11
4. Five Local Protection Projects			51
5. Flood Plain Regulation (*estimate not possible)			
Cost			$173M

OUTDOOR RECREATION

1. Expansion of Existing Water Bodies	$ 10M
2. Construction of New Water Bodies	93
Corps' Reservoirs $55 P.L. 566 Reservoirs $10	
Other Upstream 28 Reservoirs	
3. National Recreation Area Plan	120
4. Wild and Scenic Rivers	25
5. Modification of three existing Corps' Reservoirs	5
Cost	$253M

NAVIGATION

1. Long Island Sound to Hartford Commercial project	$ 4M
2. Hartford to Holyoke Recreation project	7
3. Improvements in Main Stem Power Pools, etc.	1
Cost	$ 12M

UPSTREAM WATER AND RELATED LAND RESOURCE MANAGEMENT

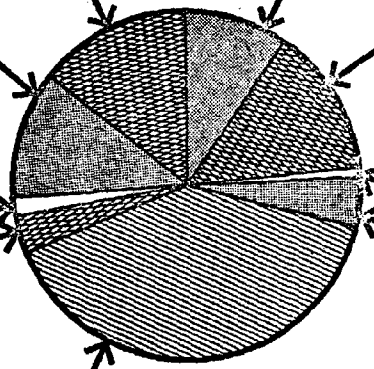
1. Land Resource Planning	$ 3M
2. Land Treatment	33
Private Lands $31 National Forests $2	
3. Resource Conservation and Development Projects	24
4. National Forest Structural Improvements	15
5. Land Acquisition for National Forests	9
Cost	$ 84M

PRESERVATION OF SITES

1. Archeological
2. Historical
3. Natural Resource

Cost ———

* Estimate not possible



1980 EARLY ACTION PLAN CONNECTICUT RIVER BASIN

Review Committee report, though in general agreement with the Coordinating Committee's statements of problems and solutions, was quite critical in some areas. The Review Committee found that the Coordinating Committee Report did "not clearly explain the risks involved which substantiate the need for a new system of large multi-purpose reservoirs." 51/ The Committee questioned "whether serious consideration has been given to [alternative] measures such as flood plain regulation or the removal of encroachments from hazardous areas." 52/ Structural measures, the Committee felt, tended to subsidize development in flood plains, by making such developments appear less hazardous, without encouraging land use regulation to control such development. The result, according to the Committee, is that the use of structural measures "tends to be self-perpetuating and self-expanding," 53/ because more structures cause more development and higher risks to property, in turn leading to additional structures, and so on.

The Review Committee also found that the Coordinating Committee Report did not give adequate weight to environmental quality objectives, 54/ and recommended, among other things, that "increased emphasis" be placed on the adoption of land use controls where necessary "to minimize dangers from erosion, pollution, and rapid runoff on land suitable for development." 55/ The Committee felt that each state in the basin should enact legislation similar to Act No. 250 in Vermont, which provides for a state Environmental Board, and that such legislation should authorize regulation of "damaging land uses that will have long-range deteriorating effects" on the Connecticut River Basin area. 56/

As a result of the Review Committee's critical comments, NERBC has submitted a "Proposed Supplemental Study, Connecticut River Basin" 57/ for the restudy of the Connecticut River Basin. This study will become the first priority item of the two persons (still to be recruited) who were to be responsible for implementing the original plan. 58/ The supplemental study will undertake the following "tasks." 59/

(1) Environmental reconnaissance of the Basin,

(2) Evaluation of the degree of additional flood protection needed,

(3) Assessment of legal, institutional and financed arrangements for flood protection and flood plain management,

(4) Evaluation of flood management alternatives, with environmental and economic impact evaluations,

(5) Plan formulation.

The study will cost an estimated $700,000 and will require an additional two and one-half years to complete. 60/

Future Plans

The Commission anticipates that its future planning efforts will be conducted somewhat differently than the Connecticut River Plan, with more emphasis on non-structural and environmental matters, and with more participation by public officials and citizens in all stages of the planning process. 61/ Plans for other basins and for selected subregions are either just underway or still await funding by Congress. The Commission has not yet begun to prepare plans by states within the region, although it proposes to do this in order to facilitate adoption by states of Commission recommendations and give states greater incentives for participation in Commission activities. 62/

The Commission plans to work with the states of New Hampshire, Vermont, and Maine in fiscal 1973. Progress has been slow because the states lacked the expertise necessary to work with the Commission in preparing the individual statewide plans. The states have since agreed to provide one man whose responsibility it will be to work with NERBC, who will also assign one man to each state, to "look around for a year or so" and jointly formulate guidelines for the preparation of the plan. The final product for each state is expected to be something like "A Guide for the Management and Development of Water and Land Resources for the State of _____, prepared in cooperation with the New England River Basins Commission." 63/

The Commission has just begun a study of Southeastern New England which will attempt to provide an action program for the conservation and development of water and related land resources in the most highly urbanized and industrialized portion of New England, where water resources problems are most critical. Numerous state, federal, and local agencies will take part, as well as private interests. Management of the study is by a team consisting of state and federal as well as Commission officials. The study will build on existing state and local planning programs, and

will be a comprehensive endeavor including problems of flood control, navigation, water supply, water quality control, outdoor recreation and other such needs. The study has received top priority from the Commission. 64/

Another subregion selected for study and coordinated federal-state planning is the Coastal Zone of New England. A separate study of Long Island Sound (which was included within the Commission's jurisdiction by a 1970 executive order 65/) will be undertaken. Neither study has been funded by Congress, but the State of Maine has already begun work on its portion of the Coastal Zone study under a grant from the New England Regional Commission. 66/ The grant was provided at the recommendation of the New England River Basins Commission, pursuant to the letter of cooperation between it and the New England Regional Commission. 67/ The Coastal Zone study will deal with the appropriateness of various kinds of land uses in New England coastal areas, in order to ensure that all coastal water and land resources are used in a manner "consistent with their natural character and ecological relationships." 68/

As to Long Island Sound, a proposed plan of study, prepared at a cost of $100,000, has been transmitted to the Water Resources Council on July 30, 1971. 69/ The proposed plan of study, which exceeds 300 pages, sets out in considerable detail not only the general planning approach for the study and resulting plan, but also the methods by which the public and the "research communities" will participate, the expected participation by various federal agencies, and the periodic reports which the Commission would expect to issue. 70/

The Commission sees the plan as a method by which the region's need for the Sound's environmental and economic aspects can be met, through notes and related land management. 71/ It is expected that the following characteristics of the Sound will be examined in great detail: 72/

(1) The quality, quantity and movement of the Sound's water.

(2) The ecological characteristics of the Sound.

(3) Economic interests in and around the Sound.

(4) All present and proposed uses of the Sound and its shorelands.

(5) Institutional and legal characteristics.

Procedurally, the plan will be broken into five phases: 73/

(1) Inventories and special studies and activities.

(2) Inventory analysis and evaluation.

(3) Functional management plans.

(4) Plan analysis and comprehensive plan formulation.

(5) Report writing, review and transmittal.

Some concept of the tremendous scope of the plan is apparent from the inventories which various work groups will be expected to contribute under Phase I: 74/

Sources and Movement of Water
Water Quality
Scenic and Cultural
Mineral Resource & Mining
Soils Survey
Erosion and Sedimentation
Ecological Baseline
Water Supply
Fishing Resources
Wildlife Inventory
Recreation Inventory
Existing Land Use & Ownership
Flood Plains
Electrical Power Generating Facilities and Requirements
Transportation

In addition, separate "Special Studies" will cover: 75/

Goals for the Region
Economic and Demographic Model
Environmental Framework
Legal and Institutional Framework

The proposed study will take an estimated three to four years to complete, at a total cost of over $1,300,000.00 76/

Special Studies

In the absence of plans covering many portions of the region, the Commission has undertaken special studies of regionwide problems and has reviewed and commented on particular projects, delving into matters which would other-

wise be covered by a comprehensive plan if one were in existence. Power plant siting is an example of a region-wide problem the Commission has studied. The Commission published a report suggesting laws and institutions which could be used by states to make decisions on the siting of power plants. 77/

In August of 1971 the Commission supplemented its report with a proposal for a "Special Study to Assure Consideration of Environmental Factors in Regional Bulk Power System Planning." 78/ Basically, the objectives of the study are: 79/

(1) To assure effective consideration of environmental factors in bulk power systems planning within the NERBC region, making available to individuals and to institutions in the region information which can be used as a basis for timely and informed decisions on bulk power siting.

(2) To use available environmental expertise in an efficient and effective manner with regard to bulk power planning.

The study would take two years and cost an estimated $500,000. 80/ Apparently the utility companies in the New England area are quite receptive to the study since according to Commission Chairman Frank Gregg it is hoped such a study will reduce the public pressure they have been under with regard to the siting of generating plants and the resulting environmental effects. 81/

Other examples include a study, requested by the New England Governors' Conference, of existing programs (state and local) within the region for the control of land development in flood plain areas. The study included model state statutes and ordinances proposed by the Commission. 82/ Another study requested by the New England Governors concerned safety measures needed at small, private dams. 83/ The Commission is also working cooperatively with Massachusetts and with the federal Department of the Interior to prepare a water quality management plan for Boston Harbor which would help restore many lost uses of the Harbor such as swimming and shellfish harvesting. 84/ At the request of federal and state officials, studies and reports have been issued by the Commission on both nuclear and hydroelectric power plants and their effects on adjacent water and related land resources.

In these reports the Commission has dealt with problems of thermal pollution from nuclear power plants, maintenance of minimum river flows, and provisions of fish passageways in hydroelectric dams. 85/

Effectiveness of the Commission

The Commission of course suffers from the lack of any formal controls to assure implementation of its plans and its suggestions for coordination. Likewise, its recommendations on individual projects and regionwide problems are advisory only. A political scientist studying the Commission suggests that although such commissions maintain contact with a wide variety of agencies, they are influential in the decisions of very few, 86/ and that state and federal agencies may, and sometimes do, 87/ undertake projects or programs in direct contradiction to Commission plans and recommendations without any formal sanction being employed by the Commission. Of course, Commission plans are submitted to the Water Resources Council and once approved by the Council become part of the national water resources plan. The Council may then presumably refuse funding for non-complying state water resources programs. In addition, the Commission has a certain amount of informal authority to enforce compliance with its suggestions. To the extent that its members value the cooperation of other state and federal agencies which are represented, opposition to one member's proposals from other members may be influential. But the force of regional opinion and the desirability of maintaining cooperative relationships with other agencies will probably not be influential where the gains to the member who opposes the Commission are potentially great, so that this sanction may be least effective when it is most necessary.

The Commission realizes it has no power to force compliance with its plans and recommendations, and has proposed a number of measures which it feels will help bring about voluntary compliance. In the Southeastern New England, Coastal Zone, and Long Island Sound studies, the Commission proposes to hold public hearings in all stages--from the initial formulation of the study design to the final recommendations for action. This approach has already been tried in formulating the study design for the proposed Long Island Sound study, and observers from outside the Commission feel it has been fairly successful in involving the public. 88/ The Commission's ultimate goal in involving the public would

452-329 O - 72 - 19

be to make its activities more visible, and to bring public pressure to bear on those who refuse to allow its plans and recommendations for coordination. For these same reasons, all the Commission's major plans, studies, and reports are submitted to the New England Governors' Conference, where they are discussed and voted upon. The Commission chairman feels that the support of the New England Governors' Conference for Commission activities has been substantial. 89/

To help implement the Connecticut River Basin Plan, the Commission proposed that a four-man increase in its staff be budgeted by Congress and by the New England states. Vermont and New Hampshire objected to the cost, so the proposal was decreased to two additional staff members. 90/ The two additional staff members would maintain an office within the Basin, and devote their time to focusing public attention on the Plan, as well as keeping up with current proposals of state and federal agencies within the Basin in order to review these for compliance with the Plan. The two staff members would also put out a newsletter, give speeches, and attend seminars and conferences of water resource officials in the Basin. They would attempt to devise means by which the Plan could be implemented, and to communicate suggestions on implementation to federal and state officials. The time of these two staff members would thus be spent entirely upon seeking implementation of the Connecticut River Basin Plan. This proposal has been endorsed by the New England Governors' Conference, and the Commission's chairman anticipates that it will become operative once the plan is revised and finally adopted. 91/

The Commission views as its most important effort at implementation the proposal to conduct its planning activities by state as well as by subregion and river basin. State members on river basin commissions have always had a formally equal status with federal members, but many limitations have prevented the state members from fully participating (lower state budgets, inapplicability of river basin planning efforts to large areas of many states, and the large variety of state interests which must be represented by one river basin commission member for each state 92/). State members in the past have often merely commented on completed studies, or, when state members have joined studies, they have often participated merely as observers. 93/ The New England Commission proposes not only to issue plans for each state, but also to bring about full state participation in Commission activities.

The Commission feels that the states would be given incentives to participate by the fact that study results will ultimately be provided on a state-by-state basis so that state agencies will be able to use the studies more easily "to request authority and funding for state programs." 94/ The Commission hopes to give financial incentives to states by convincing the Water Resources Council to streamline and consolidate its procedures for issuing water resources planning grants to states. Increasing environmental concern and the resultant growing vitality of state government will, the Commission chairman predicts, bring about fuller state participation. Finally, the Commission maintains that by providing results from studies on a state-by-state basis, and by bringing about fuller state participation in regional planning for the conservation and development of water resources, the Commission planning efforts will facilitate, ultimately, total resource planning by each state--statewide planning for both land and water resources. 95/

It is quite difficult to judge the effectiveness of the New England River Basins Commission as it presently exists, much less as it would exist if its various proposals are carried out. Its value as it is presently constituted is as a vehicle of communication between all state, interstate, and federal agencies concerned with water resources in New England, so that each agency may evaluate its own plans in the light of plans and activities of other agencies. It also promotes efficiency in studies of water resources problems for New England, by allowing only one study to proceed on one problem for the entire region, with participation of concerned agencies from throughout the region, rather than having individual studies conducted by each such agency. Such studies result in facts and recommendations which many state and federal agencies in New England probably find useful.

But at this time it cannot be said that the Commission's plans and recommendations have had any great influence on the decisions of its members, particularly where major state and federal programs are concerned. The Commission very frequently does not learn of major program proposals by its members until the programs have been developed and unveiled to the public (although Commission staff will frequently learn of lesser proposals at an early stage). 96/ Regional offices of federal agencies do not wish to involve the Commission in their programming until their proposals have been evaluated in Washington. State agencies also normally prefer to wait until their programs

are in final form before referring them to the Commission. It is often difficult for the Commission to persuade state or federal agencies to change these programs once they have been adopted. 97/ One solution to this type of problem would be that advanced by the Commission for implementing the Connecticut River Basin plan--providing a field staff which would learn of program proposals and comment on them at an earlier time than the Commission would normally learn of such programs. 98/ This type of approach, however, does not appear likely to achieve a major reorientation in the attitudes of state and federal officials, most of whom are likely to pursue what they view as the best interests of their agency or state regardless of scrutiny from the Commission.

It is likewise difficult to assess the probable effectiveness of the Commission's other proposals such as the one to obtain a substantial amount of public and political support for its planning efforts through holding full public hearings on each plan and placing the plan in the political arena. 99/ It is questionable whether an agency such as the New England River Basins Commission will ever have the political base, or be visible enough, for such techniques to be successful. 100/ Finally, the Commission's proposals for fuller state participation may be difficult to achieve in light of long superiority of federal members in the river basin commission planning process. 101/

These factors clearly raise the question of the ultimate effectiveness of river basin commissions to regulate the use of land. To the extent that they tend to embrace a geographic region, an environmental system rather than a political subdivision, the prospects for their increased use are bright. Problems of regional significance are by definition soluble by such bodies, provided the boundaries have been technically properly drawn--and provided commissions are granted some implementation authority. Herein lies the crux of the problem. Without authority to truly regulate land use, then river basin commissions will remain yet another form of regional planning agency which, however laudable a goal regional planning may be, will have minimal effect on the actual use of land within their regional jurisdictions.

FOOTNOTES

1/ Executive Order No. 11371, September 6, 1967, 32 F.R. 12903, as amended by Executive Order No. 11528, April 24, 1970, 35 F.R. 6695.

2/ 42 U.S.C. §1962, et seq. (1970).

3/ River basin commissions may be created at the request in writing of a state governor, if concurred in by not less than one-half of the states affected. 42 U.S.C. §1962b. The federal Water Resources Council has adopted procedures governing the creation of such commissions. 18 C.F.R. §702.

4/ Previous river basin commissions included the Pacific Northwest River Basins Commission, the Great Lakes Basin Commission, and the Souris-Red-Rainy River Basins Commission. 42 U.S.C.A. §1962b (annotations). Non-title II river basin commissions are created by federal-interstate compact. Interview with Frank Gregg, Chairman, New England River Basins Commission, March 29, 1971.

5/ For a discussion, from a conservationists' point of view, about how river basin planning should be conducted, see Tippy, "Preservation Values in River Basin Planning," 8 NATURAL RESOURCES JOURNAL 259 (1968). River basin commissions do not have the authority to engage in planning for interbasin transfers of water between river basins, even though serious local water shortages could be remedied in this way. Comment, "Legal Planning for the Transfer of Water Between River Basins," 55 CORNELL L. REV. 809, 825, 842 (1970).

6/ Only federal, interstate and state agencies have formal membership on river basin commissions. Members from the state are expected to "coordinate among the State, metropolitan, and local government agencies and serve as the focal point for non-Federal and nongovernmental participation. . . ." 18 C.F.R. §702.9(b)(2)(ii).

7/ See 42 U.S.C. §1962 (statement of policy).

8/ 1965 U.S. Code Congressional and Administrative News 1923. The developments in water resources planning prior to 1965 are analyzed in Fox, "New Horizons in

Water Resources Administration," 25 PUBLIC ADM. REV. 61 (1965). The policies behind the Water Resources Planning Act are discussed in Comment, "Water Resources Planning Act of 1965--An Experiment in Creative Federalism," 42 WASH. L. REV. 952 (1967).

9/ Id., at 1921.

10/ 42 U.S.C. §1962c.

11/ New England River Basins Commission (hereinafter cited as "NERBC"), 1970 Annual Report, Appendix A; Charles H. W. Foster, "The Thread of the Stream: The New England River Basin Story" (Ph.D. dissertation, Johns Hopkins, 1969).

12/ Id.

13/ Ultimate, however, three other such commissions were established before the executive order creating the New England River Basins Commission was issued in 1967.

14/ NERBC, 1970 Annual Report, Appendix A.

15/ The functioning of river basin commissions, as governed by the requirements of the Water Resources Planning Act, is described in Comment, "Water Resources Planning Act of 1965," supra note 8, at pp. 960-63. See also Hart, "Creative Federalism: Recent Trends in Regional Water Resources Planning and Development," 39 COLO. L. REV. 29, 34-35 (1966).

16/ See Table 1.

17/ 42 U.S.C. §1962b-2.

18/ NERBC By-Laws, Part 4, Article II, §1; id., Article IV, §2.

19/ Interview with Frank Gregg, March 29, 1971.

20/ Id.

21/ 18 C.F.R. §702.9(b)(2)(ii).

22/ Id.

23/ Interview with Frank Gregg, March 29, 1971.

24/ NERBC, 1970 Annual Report.

25/ Interview with Robert August, Executive Director, New England Natural Resources Center, Boston, Massachusetts, March 29, 1971.

26/ NERBC, 1969 Annual Report, at p. 5.

27/ 18 C.F.R. §702.11.

28/ 18 C.F.R. §702.10(b)(1).

29/ Interview with Frank Gregg, March 29, 1971; interview with Robert August, March 29, 1971; interview with Dr. Perry Hagenstein, Staff Member, New England Natural Resources Center, Boston, Massachusetts, March 29, 1971. These studies and plans are discussed subsequently in text, and each will be fully cited where it is discussed.

30/ The creation of regional economic commissions is compared to the creation of river basin commissions in Hart, "Creative Federalism," supra note 15, at pp. 42-43.

31/ Interview with Frank Gregg, March 29, 1971; NERBC, 1970 Annual Report. See also interviews cited note 29.

32/ 18 C.F.R. §702.2(h).

33/ NERBC, 1970 Annual Report, at p. 8.

34/ Interview with Dr. Helen Ingram, National Water Commission, Washington, D.C., April 1, 1971.

35/ Interview with Frank Gregg, March 29, 1971.

36/ NERBC, Priorities '72 - '76, II-13.

37/ There are five volumes in this series of reports, one for each state. However, most of the material in each volume is identical to that contained in other volumes, except for one portion referring to the needs and priorities for the state covered by the particular volume. NERBC, Priorities '72 - '76, (Name of State): Water and Related Land Resource Programs for New England (May 1, 1970).

38/ Interview with Dr. Helen Ingram, April 1, 1971.

39/ Connecticut River Basin Report, at V-12 to -27. Both thermal pollution and pollution by solid and liquid wastes have caused most stretches of the Connecticut River to be unusable for recreation purposes although some progress has been made in cleaning up the river in recent years. See Hill, "The Connecticut: Can the River be Saved from its Own Beauty," New York Times Magazine, January 12, 1969, at p. 32. See also James, "Salmon in the Connecticut?: New Life for an Old River," 141 OUTDOOR LIFE 39 (June, 1968).

40/ Connecticut River Basin Report, at V-28 to -32.

41/ Id. at V-45 to -49.

42/ Id. at pp. 49-52.

43/ Id. at pp. 63-75.

44/ NERBC, Connecticut River Basin Coordinating Committee, "Comprehensive Water and Related Land Resources Investigation: Connecticut River Basin" (June, 1970).

45/ Connecticut River Basin Report, at IX.

46/ Id. at §VII-1 to -5.

47/ Interview with Malcolm Graf, Staff Director, NERBC, May 31, 1971.

48/ Id. at pp. -5 to -7.

49/ Id. at VII-40 to -45.

50/ NERBC, Citizen Review Committee, "Report on the Connecticut River Basin Comprehensive Water and Related Land Resources Investigation," (February, 1971).

51/ Id. at II-7.

52/ Id. at p. 9.

53/ Id.

54/ Id. at p. 3.

55/ Id. at p. 17.

56/ Id.

57/ Proposed Supplemental Study, Connecticut River Basin, New England River Basins Commission, September 2, 1971.

58/ Interview with Frank Gregg, September 7, 1971.

59/ Id.

60/ Id.

61/ Interview with Frank Gregg, September 7, 1971.

62/ Id.; NERBC, 1970 Annual Report, at pp. 8-10.

63/ Interview with Frank Gregg, September 7, 1971.

64/ Id.; NERBC, 1969 and 1970 Annual Reports.

65/ Executive Order No. 11528, April 24, 1970, 35 F.R. 6695.

66/ NERBC, 1970 Annual Report.

67/ See text accompanying note 27, supra.

68/ State of Maine, State Planning Office, Maine Coastal Development Plan: Phase 1 Report, June, 1970, at p. 20.

69/ "Plan of Study, Long Island Sound Regional Study," New England River Basins Commission, August 1, 1971.

70/ Id., at pp. 1-1--1-3.

71/ Id., at pp. 2-23.

72/ Id., at pp. 2-26.

73/ Id., at pp. 4-5.

74/ Id., at pp. 3-8--3-10.

75/ Id., at pp. 3-10--3-11.

76/ Id., at pp. B-2 and 1-3.

77/ NERBC, Laws and Procedures for Power Plant Siting in New England.

78/ "C. Special Study to Assure Conservation of Environmental Factors in Regional Bulk Power System Planning," NERBC Fiscal Year 1973, Budget Document Supplement, July 20, 1971, as revised August 26, 1971.

79/ Id., at p. 4.

80/ Interview with Frank Gregg, September 7, 1971.

81/ Id.

82/ NERBC, Flood Hazard Area Management for New England, December, 1970.

83/ NERBC, Safety Control of Private Dams, January, 1969.

84/ NERBC, 1970 Annual Report, at p. 5.

85/ NERBC, 1969 and 1970 Annual Reports.

86/ Interview with Dr. Helen Ingram, April 1, 1971. River basin commissions formed by federal-interstate compact, rather than by executive order under the Water Resources Planning Act, have more leverage with participating agencies because of their power to delay implementation of the agencies' plans. Interview with Frank Gregg, September 7, 1971. But even this type of commission (e.g., the Delaware River Basin Commission) has been criticized as much too weak to exercise needed controls in river basin areas. Roberts, "River Basin Authorities: A National Solution to Water Pollution," 83 HARV. L. REV. 1527, 1544 (1970) (Roberts recommends powerful, all-federal, river basin authorities rather than the existing types).

87/ Interview with Frank Gregg, September 7, 1971; Guy J. Kelnhofer, Regional Water Resources Planning--One Man's Perspective (speech presented at joint meeting of Interstate Conference on Water Problems and the Water Resources Council, February 2-4, 1971).

88/ Interviews with Robert August, March 29, 1971; Dr. Perry Hagenstein, March 29, 1971; and Dr. Helen Ingram, April 1, 1971. Interview with Morris J. McClintock, Executive Director, Conservation Law Foundation, March 29, 1971.

89/ Interview with Frank Gregg, September 7, 1971.

90/ The original cost would have been $140,000 to be shared by four states in the basin--Vermont, New Hampshire, Massachusetts and Connecticut. The final cost to the four states will be $70,000 with a matching federal grant. Interview with Frank Gregg, September 7, 1971.

91/ Id.; NERBC, 1970 Annual Report, at p. 4.

92/ Guy J. Kelnhofer, Regional Water Resources Planning, supra note 87.

93/ Id.; interview with Frank Gregg, September 7, 1971; NERBC, 1970 Annual Report, at p. 9.

94/ NERBC, 1970 Annual Report, at p. 10.

95/ Id.; interview with Frank Gregg, September 7, 1971.

96/ Interview with Frank Gregg, September 7, 1971.

97/ Id.

98/ See text accompanying notes 64 and 65, supra.

99/ See text accompanying note 61, supra.

100/ This position was taken by Dr. Helen Ingram, a political scientist who is studying NERBC. Interview with Dr. Ingram, April 1, 1971.

101/ See Guy J. Kelnhofer, Regional Water Resources Planning, supra note 87.

SUMMARIES OF OTHER INNOVATIVE LEGISLATION

The quiet revolution in land use control is not following any neat and easily categorized pattern. Each state is creating its own regulatory systems and governmental institutions to suit its own particular needs.

As a consequence, any attempt to classify and categorize recent state legislation must carry an air of artificiality. The states themselves don't think in terms of buying a particular style off the rack but rather of custom-tailoring legislation to suit the social, political and environmental conditions unique to their state.

Nevertheless, for purposes of convenience the other innovative legislation having a major impact on land regulatory systems will be grouped in three categories: (1) Critical area legislation, creating special regulatory mechanisms to control land use in specific geographic areas; (2) Study commission, often with some interim regulatory power, but basically created to propose new legislation; and (3) Wetlands and shoreland laws designed to control development of this environmentally critical type of resource.

Finally, it should be noted that the legislation that has already passed is just the tip of the iceberg. In New York, California, Ohio, Illinois, Florida and many other states a variety of legislative committees, study groups, task forces and other assorted outriders of the legislative process are at work. Many of them have reached the stage of proposing specific bills which will undoubtedly continue to add to the list of innovative legislation over the next few years. Space limitations, however, preclude discussion of bills that have not yet been adopted.

1. Critical Area Legislation

The San Francisco Bay Conservation and Development Commission discussed earlier in this report is an example of state legislation designed to deal with the unique problems of a specific geographic area. A number of other states have used this "critical area" approach by setting up specific state agencies to control the use of land in particular sections of the state.

(a) Tahoe Regional Planning Agency

The fragile nature of the environment in the Tahoe Basin has long been recognized. The deep blue color of Lake Tahoe results from the unusual clarity of the water, which in turn stems from the youthful age of the lake and the relatively small volume of nutrients draining into it. Protecting the esthetic value of the lake therefore requires control over the drainage of nutrients into it.

As transportation to Tahoe has improved over recent years the development of second homes, hotels, casinos and other recreational facilities has increased proportionally. Extensive sewer networks were built to export effluent from the Basin in order to protect Lake Tahoe's water quality, but surface runoff from developed areas is gradually turning the color of portions of the lake from deep blue to a greener hue.

Concern over ever-increasing development spawned a raft of studies concerned with the need for a system of unified planning and control of land use for this bi-state area. Out of the various studies emerged the Tahoe Regional Planning Agency, created by interstate Compact and directed to prepare a plan for land use in the Basin and to issue regulations to control all land development in the Basin. 1/

The governing body of the Agency consists of one member appointed by each of the three local governments in the Nevada half of the region, and three representatives from local governments in the California half of the region. Statewide interests are represented by the directors of the natural resources department from each state and by one additional gubernatorial appointee from each state. Thus local interests in the Tahoe Basin have a clear majority control.

The Compact directed the Agency to adopt the regional plan within 18 months after the formation of the Agency in March, 1970. 2/ An interim plan based on the existing plans of local governments was adopted by the Agency in August, 1970, and the Agency staff began work on a "long-term general plan for the development of the region."

Work on the plan was severely hampered by a lack of funds caused by delay in receiving a federal planning grant 3/ and by the refusal of two California counties to make the local contribution of funds required by the Compact until its constitutionality was upheld by the Supreme Court of California in August, 1971. 4/ Because of lack of other funds the bulk of the work on the plan was undertaken by a study team provided by the U.S. Forest Service. 5/

Meanwhile, Congress also authorized the Department of Interior "to study the feasibility and desirability of establishing a national lakeshore" in Tahoe. 6/ A Bureau of Outdoor Recreation team began work on planning studies for that purpose in the fall of 1970.

In May, 1971, the Agency staff released its proposed plan. The plan emphasized analysis of the capabilities of the land and the visual impact of development. It proposed a regulatory system under which the type and intensity of development permitted would be dependent on (1) the capability of the land to take development without adverse effects, and (2) the impact that the development would have on the scenic character of the area. 7/

The staff plan received favorable comment from conservation groups. 8/ It would have severely limited future development in the Tahoe Basin, permitting a maximum population of around 150,000 as compared to the 700-900,000 that would be permitted under the interim plan. 9/

Landowners, local businessmen, and local government officials were not, however, pleased with the prospect of seeing development so drastically limited, and the staff plan was criticized because it failed to include the social and economic elements usually included in a comprehensive plan. 10/ The area has little manufacturing or other tax base to support its economy, 11/ and land in the Basin is burdened with very heavy special assessments to pay for

the expensive network of sewers used to export effluent from the Basin. The cost of these sewers gives local taxpayers a strong incentive to attract additional development to help pay the bills. 12/ The revenues generated by hotels and gambling casinos built or proposed in the Tahoe area pay a large share of the bills of local governments. And seasonal homes offer the advantage to local residents of generating tax base without adding to school costs, making them welcome to cost-conscious local officials. 13/

After the staff plan was released the Agency appointed a subcommittee chaired by Richard Heikka, Planning Director for Placer County, and directed it to prepare a "realistic plan." Working under severe time constraints, the subcommittee released a proposal for such a plan on August 25, 1971. 14/ It consisted of a single map dividing the Basin into various land use districts, 15/ but provided that the areas designated for urban development were to be subject to the environmental standards proposed by the Forest Service and contained in the staff plan.

The Agency's Advisory Planning Committee recommended the adoption of this plan on September 1, 1971. 16/ At the governing body meeting on September 22 the California representatives voted to adopt the plan but the Nevada representatives refused to approve it. The governing body did, however, declare a 90-day moratorium on all building permits and direct the staff to prepare implementing ordinances within that period. The governing body also appointed Mr. Heikka as the new Acting Executive Officer, and he feels confident that the plan and implementing ordinances will be adopted before the end of 1971. 17/

(b) Hackensack Meadowlands Development Commission

In 1968, the New Jersey Legislature passed the Hackensack Meadowlands Reclamation and Development Act 18/ creating the Hackensack Meadowlands Development District, an 18,000-acre area paralleling Manhattan two miles west of the Hudson River. These marshlands lie only a few minutes away from the high density urban areas of Manhattan, Jersey City and Newark, but they have remained primarily undeveloped because of their low elevation, which leads to periodic flooding as high tides in Newark Bay cause the Hackensack River to flood its banks.

The meadowlands fall within the jurisdiction of fourteen different municipalities. Development has been stunted and haphazard, consisting primarily of warehousing facilities and some industry. Because local governments in New Jersey are highly dependent upon property tax revenues, each local government has been encouraging the development of its portion of the Meadowlands area for warehousing and light industrial use.

The Meadowlands Act creates the Hackensack Meadowlands Development Commission as the primary agency to administer the use of land in the district. The Commission consists of the Commissioner of the State Department of Community Affairs and six local residents appointed by the Governor, with the advice and consent of the Senate, for five-year staggered terms. 19/

The Commission is directed to prepare and adopt a master plan. 20/ The plan is to set forth guidelines and standards for the comprehensive development of the Meadowlands District, including: land use, water supply and other utilities, transport, housing and area redevelopment, natural resources conservation, capital improvements and public facilities programs, and community appearance. 21/

The master plan is to include codes and standards covering land use, comprehensive zoning, subdivisions, building construction and design, housing, and the control of air and water pollution and solid waste disposal. 22/ Local codes will not apply within the District unless they are consistent with the master plan. Building construction and design standards must be certificated by the chief engineer of the District as meeting the engineering standards of the District, which the Commission is empowered to promulgate. 23/

The Commission must submit the master plan to the Hackensack Meadowlands Municipal Committee, created by the Act and consisting of the fourteen mayors from the area. 24/ If the Committee fails to approve the plan the Commission may adopt it only by a five to two vote of its members. 25/

The Commission is not solely a regulatory agency. It is directed to provide solid waste disposal facilities to relieve the need for the extensive dumping now taking place in the meadowlands. 26/ It may also undertake its own reclamation or redevelopment projects. 27/ For these

purposes the Commission has the power to issue bonds, 28/ impose special assessments, 29/ acquire property by purchase, 30/ or condemnation, 31/ and accept gifts from and enter into cooperative arrangements with federal and local governmental agencies. 32/

The Commission released its proposed master plan in the fall of 1970. 33/ The plan recommends that a substantial segment of the area along the river be placed in a marshland conservation zone. Near this area are to be islands containing high-density, high-rise housing. Other areas are reserved for industrial facilities, research parks and warehousing. A belt of medium-density housing is proposed for the western edge of the district with a substantial regional shopping center and other facilities of a regional nature such as a college or sports complex.

The implementation of the Commission's plan is unquestionably a long-range proposition. The Commission is devoting its major efforts in the initial stages to the construction of a unified solid waste disposal system that will relieve the pressure on the meadowlands for sanitary landfill use. In addition the Commission is working to provide a number of key attractions in the meadowlands area that will act as a stimulus for the major development that is expected in subsequent years of the plan. A very substantial sports and recreation complex, including a football stadium for the New York Giants, is currently being planned. 34/

(c) Adirondack Park Agency

The Adirondack Park Agency was established by the New York Legislature under a bill approved in the 1971 session. The Agency is responsible for the development of a comprehensive plan to guide the future use of public and private lands within Adirondack Park, and to establish interim safeguards against "improvident uses" of land within the Park. 35/

Adirondack Park is a state park located in northeastern New York, extending over nearly six million acres and parts of thirteen counties. 36/

In September of 1968 the Governor of the State of New York appointed a Temporary Study Commission on the Future of the Adirondacks, to recommend, inter alia, what measures could be taken to assure that development on

452-329 O - 72 - 20

private land is appropriate and consistent with the long-range well being of the area. 37/ Upon closely examining the ownership patterns in the Adirondack Park, the Commission discovered that 3.5 million acres is in private ownership, and that 32 owners hold over a million acres in tracts of 10,000 acres or more, much of which is in the hands of nonresident owners. 38/

While intensive pressures for development have not yet been created in the Park, the Commission noted several factors in its report which could lead to such pressures in the very near future. First, nearly three-quarters of the private landowners hold property classified as a "seasonal residence," most of which are built on individual lots, frequently of some size. Second, while little subdivision has occurred so far, its profitability has begun to attract the attention of both corporate and individual landowners. Third, inheritance taxes may force heirs of current owners to sell off portions of their land for subdivision, to realize quick cash. Fourth, as indicated above, the use of private land in the Park is largely unrestricted. 39/ The Commission recommended that an independent, bipartisan Adirondack Park Agency should be created by statute with the responsibility to prepare a master plan and with general power over the use of private and public land in the Park. 40/

Legislation to create the Park Agency, prepared prior to the submission of the Commission's report, was submitted to the 1971 session of the New York Legislature. 41/ It was "solidly opposed" by Adirondack-area legislators, who apparently resented outside interference in what they considered local matters. The bill as passed was a compromise with the Commission's recommendations. 42/

The Adirondack Park Agency Act, 43/ aimed at the "threat of unregulated development" on private land within the Park, established the Adirondack Park Agency, which came into being on September 1, 1971. The Agency consists of seven members appointed by the Governor (all of whom were appointed on September 10, 1971), 44/ together with the Commissioner of Environmental Conservation and the Director of the Office of Planning Services. None of the appointed members may be state officers or employees, and four of the seven must reside within the Park's boundaries 45/ (the Commission's report recommended three). 46/

Aside from the usual business and housekeeping functions (to maintain facilities, execute contracts, etc.) 47/

the Agency is directed to prepare and submit to the legislature by January 1, 1973, a land use and development plan applicable to all private lands in Adirondack Park, together with recommendations for implementation. 48/ Meanwhile, until the plan is adopted by the legislature or until June 1, 1973 (whichever occurs earlier), the Agency is empowered to adopt rules and regulations for reviewing any proposed development on private lands within the Park ". . . which might have an adverse effect upon the park's unique scenic, historic, ecological and natural resources . . . ." Under the interim regulations, any developer must submit a project description to the Agency for its review. For at least 90 days thereafter, the developer may not proceed unless the Agency reports favorably within that period, after a public hearing. If the Agency finds that the proposed project would have a "substantial and lasting adverse impact" on the Park, or that it is not "in substantial conformity" with the policies of the Act, it may prohibit the project until June 1, 1973. 49/

The master plan for private lands must divide the Park into areas and establish regulations to control the intensity of land use and development in each area, including the type, character and extent of development. 50/

The recommendations for implementation must include specific legislative, administrative and budgetary recommendations for private land and state action. Values to be protected include scenic and historic as well as ecological and natural. 51/

The bill is not without its compromises, however. There are several exemptions from the interim regulations, the only regulatory powers possessed by the Agency until after the land use and development plan is passed. First, the interim regulations do not apply to any local-government unit which enacts zoning and subdivision control regulations that the Agency determines are ". . . consistent with and effectuate the objectives, policies and standards of this section," at any time. For those who adopted such regulations prior to July 1, 1971, the interim regulations are inapplicable and the Agency has no power of review. 52/ The result has been a flurry of activity on the part of local municipalities to pass zoning ordinances, many of which may be of questionable validity. 53/ Second, interim regulations are not applicable to "bona fide management" of forests, woodlands or plantations, including logging. Third, the regulations are inapplicable to "bona fide management" of land for agriculture, live-stock raising, horticulture and orchards. Fourth, and finally, the

regulations are inapplicable to any project involving less than five acres and fewer than five lots. 54/

The Agency is also charged with preparing and submitting to the Governor, prior to June 1, 1972, a master plan for the management of state lands within the Park. Upon the Governor's approval, the Department of Environmental Conservation is directed to develop management plans for individual units of land classified under the master plan, and in conformance thereto. 55/

For administration of the Act, the legislature appropriated $250,000, the bulk of which will presumably go to the Agency. 56/

Since the Agency is legally operative as of September 1, 1971, it has already begun meeting. Its first priorities are the appointment of staff and promulgation of its rules and regulations to govern interim development. Both matters will be taken up on October 9, at a meeting in Raybrook, New York (the Commission's headquarters in Essex County), in the middle of the Adirondacks. Meanwhile, what staff functions there are to be performed are being handled by the staffs of the State Planning Office and the Department of Environmental Conservation, whose heads are ex officio members of the Commission. 57/

Reaction to the Agency is hardly uniform among the Park's residents, as revealed in interviews reported by The New York Times on August 24, 1971. As noted above, whole communities chose to exempt themselves, at least from the Agency's interim regulations, by enacting zoning ordinances. While some residents apparently favor the Agency's creation, in hopes of saving some of the Adirondack area, others, like James DeZalin, chairman of the Essex County Board of Supervisors, insist that a development plan is needed as heirs of present owners sell out to the only available buyers--the developers. Others take a balanced attitude toward the Agency, like Mrs. Mary Prime, a sixth-generation "Adirondacker" recently named to the Agency by the Governor: "We're independent people, but life has become too complicated and there are so many people. There's a certain apprehension on the part of small landowners that they'll lose their identity." Others, like Lilbern Yandon, Supervisor of the Town of Newcomb, simply object to the outside interference from "professionals." 58/

It is much too early to speculate about the success of the Agency. With two plans to prepare and

interim regulations to administer, all in the space of two years, it is perhaps an understatement to observe that its nine members (and staff) will be busy. The numerous exemptions for interim regulation do not bode well for any immediate halting of development. The blanket exemption of local-government units adopting zoning and subdivision regulations, together with all logging and agriculture regulations, weakens the Agency's ability to implement its plans. The mixed climate among the residents will also affect the Agency's performance. Perhaps the best summary of the Agency's role comes from Henry L. Diamond, State Commissioner of Environmental Conservation, who sees the Agency as ". . . a Solomon-like operation; the 'forever wild' people are going to want to stop everything and the developers will want to keep eating away." 59/ One can but hope the Adirondack Park will not have to endure Solomon's threatened remedy for antagonistic claimants, for it is unlikely that the rending of the Park will be of benefit to either group.

(d) Delaware Coastal Zone Act

The construction of the supertanker which is too large to use existing harbor facilities on the East Coast has spurred a search for new oil terminals by the petroleum industry. It has also engendered a counterforce of local residents who oppose any such facilities, and the Maine Site Location Law is one result.

An even more recent and even stronger negative reaction to the prospect of new oil terminals is Delaware's Coastal Zone Act. 60/ The Act specifically seeks to prohibit new heavy industry along the entire coast of the state, the General Assembly having found that such industry is "incompatible with the natural environment in those [coastal] areas." 61/ Thus, heavy industry and off-shore gas, liquid or solid bulk product transfer facilities are entirely prohibited after the effective date of the Act, 62/ and all other manufacturing uses, as well as the expansion of nonconforming industrial uses, are allowed by permit only. 63/ Environmental, economic and esthetic effects, together with number and type of supporting facilities required, effect on neighboring land uses, and county and municipal comprehensive development and/or conservation plans are declared to be factors for consideration in the granting of permits. 64/ Requests for permits are made to the State Planning Office, 65/ and appeals therefrom go to a newly-created State Coastal Zone Industrial Board. 66/

2. Land Use Study Commissions

A number of states around the country have created land use committees or commissions which are directed to prepare comprehensive studies and plans looking toward modernization and overhaul of the state land regulatory system. Some of these commissions have been given interim regulatory powers, and all are pointing toward more comprehensive legislation in the next few years.

(a) The Colorado Land Use Act

An influx of fun-seekers together with accompanying residential and recreational developers combined to produce concern in Colorado for the future of the state's land management. 67/ This concern with recreational and second-home development is largely responsible for three bills, passed in 1971, which are collectively called the Colorado Land Use Act of 1971. 68/

In order to increase planning effectiveness in Colorado, the Act did several things. First, the membership of the Land Use Commission (created the previous year) was increased from seven to nine, and an advisory committee made up of representatives from commerce, industry, agriculture, conservation and natural resources, together with four members of the General Assembly, was established. Second, the Commission was directed to develop Interim and Final Plans of State Development Policy by September 1, 1972, and December 1, 1973, respectively. Third, the Commission was required to develop a series of standards and guidelines for various units of government in the state. For the counties, the Commission is to develop model subdivision regulations. For all levels of government, the Commission is required to develop a system for monitoring growth and change in the state, a means of evaluating the impact on proposed development, a system for identifying environmental concerns and relating them to development, and a system for documenting the state's existing land use control policies and planning. Generally, the Commission is further required to develop flood plain control standards and criteria, and recommend critical conservation and recreation areas. 69/

The Governor, on recommendation of the Commission, is empowered to restrain any land development activity which constitutes a danger or potential danger of irreparable injury, loss, or damage of serious and major proportions to the public health, safety and welfare. 70/

The Land Use Act provides for a good deal of development control at the county level as well. All counties in the state are required to create planning commissions. 71/ They are further required to maintain either building permits or improvement notices for their entire area of jurisdiction. 72/ By July 1, 1972, each county must further promulgate subdivision regulations, which must include minimum standards and technical procedures applicable to drainage maps, sewer plans and designs for water systems. If such regulations are not so promulgated, then the Commission is empowered to do so for any tardy county. 73/

Finally, the Act establishes a $200,000 fund, from which any county, municipality or regional planning agency which is designated by the Commission as an area of critical planning need may apply for planning aid to carry out a work program agreed to by the municipality, county or agency and the Commission. 74/

The Commission staff foresees a gradual process by which the various governmental agencies and interest groups in the state come to realize the need for greater coordination in the planning and regulation of land development in the state. Further legislation on these subjects is expected to be introduced in coming sessions of the legislature. 75/

(b) Washington Land Planning Commission

The Governor of Washington, on May 19, 1971, signed a bill creating a State Land Planning Commission, effective August 9, 1971. The Commission's principal function will be to investigate, evaluate and recommend conserving-state land use changes which have impact beyond the physical boundaries of the governmental jurisdiction in which a proposed land use is located. 76/

A major task of the 19-member Commission will be the development of a statewide land use data bank "or alternate system for the assembly of information that will assist in the formulation, evaluation, and updating of intermediate and long-range goals and policies for land use, population growth and distribution, urban expansion, open space, resource preservation and utilization, and other factors which shape statewide development patterns and significantly influence the quality of the state's environment." 77/ It is intended that all governmental and private agencies in the state will make use of this pool or

bank. 78/ The Commission's findings, conclusions and recommendations with regard to such a system are to be submitted to any extraordinary 1972 session of the state legislature which may be called. 79/

The Commission's other primary function is to study all of Washington's laws, and those of other states and the Federal government, in the area of land use controls. It is also directed to include in its study public and private land use studies and proposals such as the American Law Institute's Model Land Use Code. 80/ The results of this study, in the form of a model land use code for Washington, together with recommendations for new laws and revisions in present ones to allow statewide interests to be considered in future land development, and recommendations as to planning criteria and guidelines for local communities in the preparation of local land use plans, are also to be presented to the 1973 (forty-third) session of the Washington Legislature. 81/

The Commission received a budget of only $91,000 "for the biennium ending June 30, 1973," 82/ but a federal planning grant is expected to substantially increase the funds available. 83/

(c) Alaska Joint State-Federal Natural Resources and Land Use Planning Commission

In May of 1971, the Alaska Legislature created a Joint State-Federal Natural Resources and Land Use Planning Commission, to "formulate a coordinated land use policy governing the wise and beneficial use and management of natural resources and land in the State." 84/ In the summer of 1971, the Governor of Alaska appointed six members to the Commission, and established a 10-member ad hoc land use planning and classification group to work with the Bureau of Land Management on land use planning and classification. 85/

According to the Act, the state intends that its development proceed in a coordinated effort between the United States, as the largest state landowner, and the state agencies. Therefore, the state "invites the Congress of the United States to join with it" in establishing a Joint Commission. 86/

It is not at all clear how this partnership is to work out since by the terms of the Act, the six members are

all state people: two members of the governor's cabinet (or their designees), two members of the Alaska Legislature, and two citizens of the state "who are recognized as being knowledgeable in the area of natural resource management and who are not employed by the executive branch of the state or federal government." 87/

The Commission is to "be responsible for" the preparation of a statewide natural resources and land use plan, provisions of which "may" include, inter alia, designation of lands reserved for permanent federal ownership; and uses to be made of land in federal or state ownership. The Commission is also directed to review federal "withdrawals" and recommend modifications, establish a committee of land use advisors, and recommend changes in laws, policies and programs to the President of the United States, the United States Congress, the Alaska Legislature and the Governor. 88/ If the Governor concurs in any designation of lands made by the Commission, that use "to that extent" is established for the state lands. 89/

The powers granted the Commission are, with the exception of its plan-making, almost nonexistent. As to the plan itself, there is no real indication of what it should contain or when it is to be completed. There is, furthermore, no appropriation for expenses of the Commission, or a staff should it choose to appoint one. Jack Hession of the local Sierra Club argues that:

> "Taken together, the new commission and the ad hoc planning group in the Department of Natural Resources represent a gesture towards meaningful state participation in any joint state-federal land use commission. However, until the administration adequately funds such an effort, the action will continue to be regarded by conservationists here as mere lip service designed to sell the 'lower 48' on the Egan administration's concern for the environment, thereby smoothing the way for the trans-Alaska pipeline. If the federal legislation passes, the governor's bluff would be called [the state would have to pay one-third under current federal proposals] and a budgetary request for the state's contribution would be necessary to demonstrate the sincerity of the administration." 90/

Further developments in Alaska and in Washington may be necessary to clarify the future role of the Commission.

3. Wetland and Shoreland Laws

Among the most popular of regional land use controls exercised by those states with any appreciable coastland are shoreland and wetland laws. Regulations governing development, such as Massachusetts' inland and coastal protection laws, have been passed by over a dozen states in the last few years, though many so far lack sufficient experience to judge their efficiency. Without attempting to comment upon the experience in each jurisdiction, the following is a brief summary of some of the state laws aimed at the protection of shorelands and wetlands, grouped according to the comprehensive nature of the program as it appears from the pertinent legislation.

(a) Comprehensive Protection Statutes

A number of states have enacted statutes the effect of which is to generally prohibit development on shoreland areas. The most recent such enactment comes from North Carolina as part of a comprehensive environmental package passed in the 1971 session by that state's General Assembly. The principal shoreland protection measures are found in H.B. 705. 91/ It provides essentially three means of protection. First, a Board of Water and Air Resources is authorized to establish a shoreland protection line and adopt regulations for protection in any county that has not done so by December 31, 1971. 92/ Second, a more common dredge-and-fill provision requires a permit from the Department of Conservation and Development before any excavation or filling project is begun in any estuarine waters, tidelands, marshlands, or state-owned lakes. 93/ The Department may deny the applications for permit if it finds that there will be significant adverse effect on: 94/

(1) the use of the water by the public;
(2) the value and enjoyment of the property of any riparian owners;
(3) public health, safety and welfare;
(4) the conservation of public and private water supplies;
(5) wildlife or fresh water, estuarine or marine fisheries.

Third, the Director of the Department of Conservation and Development is authorized to adopt orders regulating, restricting, or prohibiting dredging, filling, removing or

otherwise altering coastal wetlands. Coastal wetlands are defined as any marsh together with "such contiguous land as the Director reasonably deems necessary to affect by any such order in carrying out the purposes of this section." 95/

Rhode Island has established a similarly broad-based, albeit less comprehensive, shoreland protection system by means of legislation passed in the January 1971 legislative session. 96/ The Rhode Island act establishes a 15-member Coastal Resources Management Council with "primary responsibility" for planning and management of the resources of the state's coastal region. 97/ The Council is further authorized to formulate policies and plans and to adopt regulations necessary to implement its various management programs. Any person proposing development or operation within, above or beneath the tidal water below the mean high water mark must demonstrate that the proposal doesn't conflict with any management plan or program, or make the area unsuitable for the uses provided in the program, or damage the environment of the coastal region. Regardless of their actual location, the Council can approve, modify, set conditions for, or reject the design, location, construction, alteration, and operation of specified activities or land uses when these are related to a water area under the agency's jurisdiction. This includes issuing, modifying, or denying permits for work including dredging and filling of marshes and other water areas in its jurisdiction. 98/

Connecticut similarly protects tidal wetlands in a general way by requiring a permit issued by the Commissioner of Agricultural and Natural Resources before any draining, filling, dredging, dumping or any other type of development can take place. 99/ The pertinent statute was signed into law in July of 1969. The Commissioner is also required to inventory all wetlands, defined to include banks, bogs, salt marshes, swamps, meadows and flats. 100/ Under a 1971 amendment to the above legislation, the Commissioner may temporarily designate an un-inventoried and un-mapped area a wetland if he finds the area is in immediate danger of being despoiled by any activity which would require a permit if such area were designated a wetland. Such a designation fails in 60 days, however, if the mapping of the area is not completed within 60 days. 101/

(b) Fill and Dredge Statutes

The most common of the statutory provisions afford limited protection to wetlands by regulating filling and

dredging thereon. For example, Maryland prohibits dredging or filling on state wetlands without a license from its Board of Public Lands. No such license is available without a hearing and without consultation with both state and federal agencies. Economic, ecological, developmental, recreational and esthetic values are considered in each license application. 102/ Moreover, the Secretary of Natural Resources is authorized to promulgate rules and regulations governing the dredging, filling, removing or otherwise altering or polluting of private wetlands as well, provided he first obtains the consent of the Maryland Agricultural Commission. 103/ After inventorying private wetlands, holding hearings and promulgating regulations, any activity not permitted of right thereon is subject to a permit application. In granting, denying or limiting such an application, the effect on public health and welfare, marine fisheries, shell fisheries, wildlife, economic benefits, protection of life and property from flood, hurricane and other natural disaster, and public policy as set forth in the act must be considered. 104/

Georgia similarly offers limited protection to its wetlands by means of prohibiting filling and dredging. In 1970 the Georgia Legislature passed the Coastal Marshlands Protection Act which created the Coastal Marshlands Protection Agency. 105/ No person may remove, fill, dredge, drain or otherwise alter any marshlands within the estuarine areas of Georgia without first obtaining a permit from the Agency. 106/ The Agency also has power to promulgate regulations. 107/

FOOTNOTES

1/ Tahoe Regional Planning Compact, P.L. 91-148, 83 Stat. 360, approved December 18, 1969. Previous studies are cited and discussed in John Ayer, "Water Quality Control of Lake Tahoe," 58 CALIF. L. REV. 1273 (1970).

2/ The Agency's legal advisors have opined that these time limits were directory and not mandatory. Conversation with Richard Heikka, Acting Executive Officer, Tahoe Regional Planning Agency, October 8, 1971.

3/ Interview with J. K. Smith, then Executive Officer, Tahoe Regional Planning Agency, August 31, 1971.

4/ People ex rel. Younger v. County of El Dorado, 96 Cal. Rptr. 553 (1971).

5/ Interview with J. K. Smith, August 31, 1971.

6/ P.L. 91-425, signed September 26, 1970. See Senate Report No. 91-855, May 11, 1970.

7/ Tahoe Regional Planning Agency, "Proposed Regional Plan, Lake Tahoe Region" (May, 1971).

8/ William Bronson, "It's About Too Late for Tahoe" AUDOBON (May, 1971, p. 47); Sierra Club ENVIRONMENTAL ALERT, mailed August 20, 1971.

9/ Interview with J. K. Smith, August 31, 1971.

10/ Interview with Chris Degenhardt, consultant to the Agency on the general plan, September 1, 1971.

11/ Bureau of Outdoor Recreation, "Lake Tahoe: Strategies to Save a Lake" 17-18 (Draft of June 15, 1971).

12/ Professor John Ayer suggests that in retrospect the sewage exportation plan may have been counterproductive because it has stimulated so much additional development. Conversation with Professor John Ayer, University of California at Davis Law School, August 25, 1971.

13/ Ayer, op. cit. note 1 at 1322.

14/ Tahoe Regional Planning Agency, "Preliminary General Plan" (undated).

15/ The plan submitted for adoption consisted only of the map. About 5000 words of text accompanied the map in the version released to the public but the text was not to be part of the official plan. Interview with Chris Degenhardt, September 1, 1971.

16/ San Francisco Chronicle, September 2, 1971, at p. 3.

17/ Conversation with Richard Heikka, October 8, 1971.

18/ Ch. 404 of the Laws of 1968, N.J. Stat., C.13:17-1 et seq.

19/ N.J. Stat., C.13:17-5.

20/ N.J. Stat., C.13:17-9.

21/ N.J. Stat., C.13:17-11(a).

22/ N.J. Stat., C.13:17-11(b), 13.

23/ N.J. Stat., C.13:17-6(k).

24/ N.J. Stat., C.13:17-7.

25/ N.J. Stat., C.13:17-8.

26/ N.J. Stat., C.13:17-12.

27/ N.J. Stat., C.13:17-5(j), 17-20, 21.

28/ N.J. Stat., C.13:17-23-17-33.

29/ N.J. Stat., C.13:17-39-17-59.

30/ N.J. Stat., C.13:17-6(g).

31/ N.J. Stat., C.13:17-34-17-38.

32/ N.J. Stat. C.13:17-6(h), 17-79, 17-80.

33/ Hackensack Meadowlands Comprehensive Land Use Plan, prepared by the Hackensack Meadowlands Development Commission, Dan Coleman Associates, Principal Consultant (October, 1970).

34/ Interview with Cliff Goldman, Acting Executive Director, Hackensack Meadowlands Development Commission, July 28, 1971.

35/ State of New York Executive Chamber News Release, September 10, 1971.

36/ "Adirondack State Park Residents Await Development Agency with Mixed Feelings," The New York Times, August 24, 1971, p. 33; "The Future of Adirondack Park," report of the Temporary Study Commission on the Future of the Adirondacks, submitted to the Governor of New York on December 15, 1970, at pp. 8 to 26.

37/ "The Future of Adirondack Park," op. cit. at p. 3. The other questions to which the Commission was to address itself were:

> What should be the long range policy of the State toward the acquisition of additional forest preserve land?
> What should be the State policy toward recreation in the area?
> Should there be federal participation in any phase of the plans, including a limited park or wilderness area?
> Should there be greater management flexibility in some portions of the area?
> Should there be even stronger safeguards for the wilderness portions?
> Should procedures be developed for a more flexible policy regarding consolidation of public lands?

38/ "The Future of Adirondack Park," op. cit. at pp. 26-27.

39/ Id.; "Adirondack State Park Residents Await Development Agency With Mixed Feelings," The New York Times, August 24, 1971, p. 33.

40/ "The Future of Adirondack Park," op. cit. note 36, at p. 25.

41/ Id., at p. 30.

42/ "Adirondack State Park Residents Await Development Agency With Mixed Feelings," The New York Times, August 24, 1971, at p. 33.

43/ Article 27, §§800-810, McKinney's Revised Statutes of New York.

44/ State of New York Executive Chamber News Release, September 10, 1971. The members are Richard W. Lawrence, Jr.; William J. Foley; James Bird; Mrs. Raymond (Mary F.) Prime; Joseph P. Tonelli; Peter S. Paine, Jr.; Whitman Daniels.

45/ Article 27, §803.

46/ "The Future of Adirondack Park," op. cit., at p. 25.

47/ Article 27, §804.

48/ Id., §805.

49/ Id., §806.

50/ Id., §805.

51/ Id.

52/ Id., §806.

53/ "Adirondack State Park Residents Await Development Agency With Mixed Feelings," The New York Times, August 24, 1971, at p. 33.

54/ Article 27, §806.

55/ Id., §807.

56/ Id.; "Adirondack State Park Residents Await Development Agency With Mixed Feelings," The New York Times, August 24, 1971, at p. 33.

57/ Interview with Richard Persico, Counsel, State Planning Office, Albany, New York, October 8, 1971.

58/ "Adirondack State Park Residents Await Development Agency With Mixed Feelings," The New York Times, August 24, 1971, at p. 33.

59/ Id.

60/ Ch. 70, Title 7, Delaware Code (1971), §7001, et seq.

61/ Id., §7001.

62/ Id., §7003.

63/ Id., §7004.

64/ Id.

65/ Id., §7005.

66/ Id., §7006.

67/ Interview with Claude Peters, Staff Director, and Gilbert Kruschwitz, Project Assistant, Colorado Land Use Commission, Denver, July 7, 1971.

68/ "Checklist of Key Provisions for State Land Use Planning Legislation," Council of State Governments, Workshop in Denver, June 10, 1971.

69/ S.B. No. 91.

70/ Id.

71/ S.B. 92.

72/ S.B. 91.

73/ S.B. 92.

74/ S.B. 93.

75/ Interview with Claude Peters, July 7, 1971.

76/ Ch. 237, Laws of 1971 (Engrossed House Bill No. 865), at §1.

77/ Id., §5.

78/ Id.

79/ Id., §7.

80/ Id., §6.

81/ Id., §8.

82/ Id., §10.

83/ Conference with Richard Slavin, Director, Department of Planning and Community Affairs, State of Washington, August 20, 1971.

84/ H.B. 220 am S, Ch. 90, Session Laws of Alaska, §44.19.754.

452-329 O - 72 - 21

85/ National News Report, Sierra Club, Vol. 3, No. 29, August 6, 1971, at p. 2.

86/ Ch. 90, Session Laws of Alaska, §44.19.748.

87/ Id., §44.19.752. Emphasis added.

88/ Id., at §44.14.754.

89/ Id., at §44.19.755.

90/ National News Report, Sierra Club, Vol. 3, No. 29, August 6, 1971, at p. 2.

91/ Ch. 1159, HB.705, Ratified Bill, 1971 Session, General Assembly of North Carolina (Art. 21, Ch. 143, General Statutes of North Carolina).

92/ Id., §104B-16.

93/ Ch. 113-229, General Statutes of North Carolina, at subsection (a).

94/ Id., at subsection (e).

95/ Ch. 113-230, General Statutes of North Carolina.

96/ HB. 2440, State of Rhode Island and Providence Plantations, January, 1971 Session (Ch. 23, §42-23-1, et seq.).

97/ Id., at §46-23-6.

98/ Id.

99/ Public Act No. 695 (Connecticut) of 1969.

100/ Id.

101/ Public Act No. 138 (Connecticut) of 1971.

102/ HB. 285 (§§768-73, Art. 66C, Annotated Code of Maryland (1967 Replacement Volume),) at §721.

103/ Id., §722.

104/ Id., §§724, 726-727.

105/ HB. 212, Ga. Code Ann. §§45-136--45-147 (Supp. 1970), §3.

106/ Id., at §45-140(e).

107/ Id., at §45-139(a)(1); Cf. "Regulation and Ownership of the Marshlands: The Georgia Marshlands Act," 5 GA. L. REV. 563 (1971).

KEY ISSUES IN STATE LAND USE REGULATION

The administrators of all the programs covered in this report are sailing uncharted waters. Each day brings new problems that must be solved by the use of common sense interpretations of sketchy statutory guidelines. It should be no surprise, therefore, to learn that although the administrators find their work challenging and interesting they also find themselves so occupied with immediate tasks that they have little time to spend contemplating the long range philosophy behind their work. Except in Hawaii, where there is now some reexamination of basic goals, the administrators are too busy to be reflective. If you ask them, "What are the key issues?" they are likely to respond--"finding time to review these 10 applications before midnight."

Given the youth of this legislation, and the charged-up atmosphere in which it is administered, it is not even easy for the outside observer to sit back and view it from a broader perspective. But the following six issues seem to recur throughout most of the states that have been affected by the quiet revolution.

(1) Toward a New Concept of Land

If one were to pinpoint any single predominant cause of the quiet revolution it is a subtle but significant change in our very concept of the term "land," a concept that underlies our whole philosophy of land use regulation. "Land" means something quite different to us now than it meant to our grandfather's generation. Its new meaning is hard to define with precision, but it is not hard to illustrate the direction of the change.

Basically, we are drawing away from the 19th century idea that land's only function is to enable its owner to make money. One example of this change in attitude is that wetlands, which were once characterized as "useless," are now thought of as having "value." As we increasingly understand the science of ecology and the web of connections between the use of any particular piece of land and the impact on the environment as a whole we increasingly see the need to protect wetlands and other areas that were formerly ignored.

This concern over the interrelatedness of land uses had led to a recognition of the need to deal with entire ecological systems rather than small segments of them. San Francisco Bay, Lake Tahoe, the Hackensack Meadowlands, Adirondack Park are now all seen as single entities rather than as a collection of governmental units.

The new attitude toward land can also be seen reflected in the increasing concern about its scarcity. Industries that in an earlier day seemed to have their choice of an unlimited supply of land now see land as a limiting factor. With some, such as the forest products industry, this recognition came early--with others, such as agriculture, it is just beginning in states like Hawaii and California.

The economically productive users of land are not the only ones who are increasingly recognizing its scarcity. Wilderness buffs have recognized this for some time. But now the large segment of Americans who just want to live in the country, and who once seemed to have a wide choice of location, now find their supply of land limited. The jet plane, and particularly the interstate highway network, have permitted millions of Americans to achieve their goal of "country living" on either a permanent or temporary basis, but they are finding that there isn't as much "country" to live in as there used to be. Their annoyance is reflected in the new legislation in Maine and Colorado.

The scarcity of land reflects both its increasing use and the increasing limitations put on its use by local governments. The problems of inner city dwellers seeking adequate housing seem impossible to solve unless we can overcome the scarcity of suburban land on which low and moderate-income can be built. The Massachusetts Zoning Appeals Act was passed in recognition of this scarcity.

Conservationists describe the changing attitude toward land by saying that land should be considered a <u>resource</u> rather than a <u>commodity</u>. But while this correctly indicates the direction of the change, it ignores the crucial importance of our constitutional right to own land and to buy and sell it freely. It is essential that land be treated as <u>both</u> a resource and a commodity. The right to move throughout the country and buy and sell land in the process is an essential element in the mobility and flexibility our society needs to adjust to the rapid changes of our times. Conservationists who view land only as a resource are ignoring the social and economic impact that

would come with any massive restrictions on the free alienability of land. But land speculators who view land only as a commodity are ignoring the growing public realization that our finite supply of land can no longer be dealt with in the freewheeling ways of our frontier heritage.

The idea that land is a resource as well as a commodity may appear self-evident, but in the context of our traditions of land use regulation it is a highly novel concept. Our existing systems of land use regulation were created by dealers in real estate interested in maximizing the value of land as a commodity. Subdivision regulations which encouraged uniform lots fronting on public streets enabled land to be divided into tradable units. Traditional zoning ordinances with only a few use districts, each governed by relatively nondiscretionary regulations, attempted to give these lots some of the fungible qualities of corn futures or stock certificates, making it possible to determine in advance the specific type of use permitted on the land and providing quick shorthand labels for identifying various categories of land. Bulk and yard regulations created an envelope on each single lot which enabled the owner of that lot to build without further consideration of the relationship of his land to the land of his neighbors, thus assuring potential buyers of the land's usability. The highest goal of the system was to enable barkers to sell Florida lots in Grand Central Station.

The promoters of these land use regulations in the 1920's made no attempt to conserve land for particular purposes or to direct it into a specific use, but only sought to prevent land from being used in a manner that would depreciate the value of neighboring land. The traditional answer to the question, "Why regulate land use?" was "to maximize land values." To achieve this purpose they sought to restrict those uses of land that adversely affected the price of neighboring land by concentrating them in specific parts of the city.

Where development would not harm property values it went unregulated. Zoning permitted residential uses to be built in the most polluted industrial districts on the theory that any development which did not reduce the value of the surrounding land should not be prohibited. Land use regulation was limited to urban areas where the close proximity of land uses made it likely that the particular use of one man's land might reduce the value of another's, but there was no regulation of land outside urban areas where such a reduction in value was not likely to take place.

In a dynamic and mobile society such as ours the ability to buy and sell land readily is an essential ingredient in the operation of the system, and the extent to which zoning and subdivision control have been adopted throughout the country testifies to the usefulness of these original concepts. The last 20 years, however, has seen increasing recognition that the purpose of land regulation should go beyond the protection of the commodity value of land. A realization is growing that important social and environmental goals require more specific controls on the use that may be made of scarce land resources.

This recognition is seen not only in the new state role in land use regulation, but in the actions of many local governments. Modern zoning ordinances typically rely less and less on pre-stated regulations and require developers to work with local administrative officials in designing a type of development that fits more closely into the specific circumstances of the surrounding neighborhood. Similarly, regulations tend to encourage larger scale development in which the various land uses are arranged and designed according to a comprehensive plan for the specific site, as opposed to the traditional lot-by-lot development under which individual lots were sold to individual purchasers who might develop each lot according to pre-established rules. More specialized use districts, which permit only those uses appropriate to a specific geographic area rather than some abstract category of uses such as M-1 or R-4, are also evidence of local governments' growing attempt to tailor land use regulations to local needs.

Most importantly, perhaps, numerous systems of local land use regulation are beginning to contain regulations that recognize land as a resource as well as a commodity. Exclusive agricultural and industrial zoning preserves land as a resource for these important uses. Regulations prohibiting topsoil removal or requiring common open space find their justification in the protection of land as a resource for recreation and beauty. Regulations which require that a specified percentage of dwelling units in each housing development be reserved for low-income groups are recognizing the importance of land as an essential resource for housing all elements of our society.

Recent years have seen a rapid increase in local zoning and subdivision regulation in relatively undeveloped areas. Here the concern is not that the use of land might injure immediate neighbors, but that it might impair the possibility of more desirable long-range land use patterns.

Increasingly the question being asked is not only, "Will this use reduce the value of surrounding land?" but "Will this make the best use of our land resources?".

The clearest evidence, however, that there has been a change in the attitude toward why land should be regulated is in the legislation described in this report. The purposes sought to be achieved by the various bills are a far cry from the simple value-maximization concepts of early real estate interests. Hawaii seeks to conserve the land for agriculture and to preserve scenic beauty. In Tahoe and San Francisco the goal is to preserve the amenities of the area. Maine and Vermont are trying to protect the rural atmosphere of their states. Massachusetts wants to preserve some suburban land as a resource for low and moderate-income housing and to preserve wetlands as a resource for wildlife and other ecological values. In the Hackensack Meadows the goal of New Jersey is to utilize this centrally located land for the ideal combination of development and conservation purposes.

But the recognition of new purposes for regulating land should not and does not mean that the old concerns with land's value and salability should be ignored. On the contrary, the longer-range view expressed in the new land regulatory systems will enhance land values over the long run to a far greater degree than systems motivated primarily by a desire to increase immediate salability. The preservation of the amenities of San Francisco Bay is of tremendous economic value to all landowners in the Bay area. The preservation of the quality of Maine's lakes and coastline will be of great value to owners of property in those areas, not just today but for years to come. Today's broader view of land values recognizes that in the long run land values will reflect our ability to maintain a society in which people will want to own land, and this is the overall goal of the legislation now being enacted by the states.

(2) The Role of the State

Changes in a state's pattern of land use involve thousands of individual decisions--to drill a well, to widen a street, to build a power plant, to build a garage--the new patterns that result are the sum of all of these decisions, some major, others very minor. The state's goals can be achieved if only the major decisions can be regulated. One of the important issues in each state land regulatory system is to separate the major decisions from

the minor so that state officials are not bogged down with gas station applications when they should be considering power plant sites, and so that irate homeowners do not have to go to the state capital to get permission to build a garage.

To succeed in solving this dilemma it is essential to avoid the classic bureaucratic trap. Regulation is not desirable for its own sake. Any system of land regulation imposes substantial costs. These include not only the costs borne by the taxpayers who pay the administrators' salaries and expenses, but the costs borne by the developers and eventually passed on to the consumer. Time is a particularly important cost to most land developers because heavy front-end expenses are usually paid with money borrowed at relatively high interest rates, which makes each additional day of delay a significant factor in increasing the cost.

The costs imposed on developers by land use regulations have a peculiarly regressive nature. Developers of expensive housing, for example, can much more easily absorb the cost of regulation than developers of housing designed for lower income groups. The cost of processing an application to build a mobile home park and a luxury apartment building may be approximately the same, but when considered as a percentage of the consumers' cost per unit the costs loom much larger to the mobile home buyer.

Regulation has other inherent disadvantages. Any complex system of regulation has a natural tendency to reduce innovation. Minima become maxima. When regulators approve one design it creates a powerful incentive for other builders to use the same approach. The monotonous subdivision of the 1950's is being replaced by the monotonous planned unit development of the 1970's.

For these reasons all of the states engaging in land use regulation have used some method of concentrating their energies on a limited number of important development decisions to avoid diffusing the state regulatory power too widely. A variety of methods are used: In the Twin Cities regulation is concentrated on major capital improvements, such as airports and sewers. Both Vermont and Maine have attempted to define development subject to the state's jurisdiction in a way that excludes small-scale development and concentrates only on development of more significant size. Hawaii classifies development into four basic categories and (in theory at least) the state attempts to decide only the proper category applicable to a particular

piece of land, leaving the details to be worked out by the counties.

The problem of isolating the types or areas of development that have a significant state or regional impact does not seem headed for an easy solution. Further experimentation with the various methods now in use in the states may discover increasingly better methods. But the need is apparent for some method of concentrating state efforts on major land use issues if the burdens of regulation are not to exceed its benefits. Those who cry for comprehensive regulation of all development by the state merely show that they have not thought through the problem.

(3) The Role of Local Government

Local regulation of land use has been in existence for many years in at least the urbanized portions of most states for many states. These local systems of zoning and subdivision control have proven quite adequate for controlling many types of development, particularly small-scale development in urban areas. At a time of increasing demands for citizen participation and community control, the value of encouraging local decision-making wherever possible is obvious.

A common failing of most of the new state land regulatory systems is that they do not relate in a logical manner to the continuing need for local participation. Most of them tend to by-pass the existing system of local regulation and set up completely independent and unrelated systems. This requires the developer who is subject to both systems to go through two separate and distinct administrative processes, often doubling the time required and substantially increasing the costs required to obtain approval of the development proposal.

Most states have chosen to create duplicating procedures in order to eliminate the need to make any change in existing zoning and other regulatory systems. By leaving local zoning alone the state reduces the number of potential enemies of new legislation. Moreover, in many states the motives behind the state land regulatory system were solely to prohibit development that would otherwise occur. To persons having this motive the duplication does not seem to be a problem because duplication can only operate to prevent and not to encourage development.

Not all of the states have accepted the idea of duplication. The Massachusetts Zoning Appeals Act explicitly rejects it; here the state system comes into play only as a means of reversing a decision of a local board. The Hawaii system also minimizes duplication; some of the major development proposals require action by both state and county agencies, but most ordinary development needs action by only one or the other.

As the states move toward more balanced systems of land use regulation that are not weighted exclusively toward the prevention of development, it will be increasingly necessary to merge both state and local regulations into a single system with specific roles for both state and local government in order to reduce the cost to the consumer and taxpayer of duplicate regulatory mechanisms.

(4) Regulation and Planning

Once government recognizes that land can be a resource to achieve many different goals, some method is needed to balance these various goals to see which uses of land will provide the greatest overall benefit. The operations of the Hawaiian Land Use Commission offer a good example of this balancing process. The Commission is constantly weighing the need for more housing against the need for agricultural land--the need to protect the views of the mountains against the need to attract jobs and tourists.

"Planning" can be defined as just this kind of balancing process. The Hawaiian Land Use Commission is engaged in "planning" although most of the Commissioners do not think of themselves as planners. Similarly, many of the other agencies discussed in this report are determining the best use of land by a planning process which measures alternative uses against the overall goals and policies of the state. In some cases these policies are clearly articulated and the process is consciously perceived as "planning," while in others it is not.

In Maine, for example, the statutory direction given to the Environmental Improvement Commission would also appear to preclude much balancing of conflicting goals. The statute directs the Board to insure maximum protection of the environment and does not provide any process by which countervailing development needs can be weighed. In practice, however, the Board utilizes a balancing process in deciding how far to press its jurisdiction.

Other statutes more explicitly instruct the administrator to consider a variety of goals. The Wisconsin Shorelands Act, although primarily oriented toward protecting the environmental values of the rivers and lakes, does recognize the need for some types of development. Similarly, the Massachusetts Zoning Appeals Act, although primarily oriented toward making land available for housing needs, also recognizes that it is important to protect health and safety and preserve open space.

Other statutes involve more sophisticated planning processes. In Vermont, although the present regulatory process is oriented primarily toward protection of environmental values, the planners are directed to prepare a plan that takes into consideration both environmental and socio-economic conditions. The Twin Cities Regional Council uses a comprehensive planning approach as a basis for the decisions assigned to it. Similarly, the Tahoe Regional Planning Agency and the Hackensack Meadowlands Development Commission are taking into consideration a wide variety of factors in preparing the plans on which their regulatory systems are based.

It seems clear that as state land regulatory systems evolve they will increasingly spawn better planning processes on which to base regulatory decisions. The Massachusetts Wetlands Act, for example, does not ask its administrators to balance the pros and cons of various uses of the wetlands. The legislature has presumably done this balancing itself and concluded that the goal of preserving the wetlands outweighs all other possible goals. Consequently, the administration of the Act can be said to involve a minimum of planning. But as it increasingly becomes recognized that other values are involved, it seems reasonable to assume that the state will institute a planning process that will take all values into consideration.

To see regulation as the predecessor of planning is not wholly logical. But Americans have rarely looked kindly on the idea of planning for its own sake, and have paid attention to planning only when it immediately affects decision-making. As a political matter probably the most feasible method of moving towards a well-planned system of state land use regulation is to begin with a regulatory system that concentrates on a few goals that are generally perceived as important, and then to gradually expand the system by adding more comprehensive planning elements, as is being done in Vermont. To insist that the planning precede the regulation is probably to sacrifice feasibility on the altar of logic.

If the land regulatory systems are to be assisted by competent land use planning it will require substantial redirection of current state planning efforts in many states. The Department of Housing and Urban Development has increasingly been directing the state's attention towards the management of state government programs, with the result that many states have been drifting away from the more comprehensive approach toward land use planning that was characteristic of the states in the 1930's. There is no reason why land use planning is inconsistent with budgetary and management planning, and if the state planning agencies are to perform a meaningful role in land use regulation, they must reassert their interest in comprehensive planning for land use. Unless the state planners divert at least a share of their attention toward land use issues they may find that other more specialized agencies will have taken over, and the opportunity for a comprehensive approach will have been lost.

(5) Constitutional Limits on Regulation

One of the most important issues in any land regulatory system is the extent to which the use of land may be restricted without violating constitutional rights. Almost every state and local government that is trying to implement an environmentally-oriented land regulatory system finds itself plagued with constitutional doubts. The constitution prohibits the "taking" of property without payment of just compensation. Judicial interpretations of this clause have held that the regulation of property in a manner to severely limit its use may in some cases be interpreted as such a taking. These cases pose a constant problem to land use regulators.

Most land regulatory systems find a need to prevent all "use" of at least some portion of the land within their jurisdiction. Funds are not usually available to pay the owners of this land for the loss in speculative value to which they might claim to be entitled. The administrators therefore find themselves in the difficult position of either permitting uses that would be environmentally harmful or facing court challenges that may endanger the entire regulatory program.

This dilemma posed by the "taking" issue requires a creative legal response on the part of the regulatory agencies and their attorneys. A number of approaches are promising:

First, if one really studies the cases the law on this subject has by no means been as bad as most people seem to assume. The Supreme Court of the United States has frequently upheld regulatory systems that prevent any development of a man's land if the regulation is essential to promote the public health or safety, and the preservation of a livable environment and a desirable ecological balance is in the long run clearly essential to the health of the nation. "Brandeis briefs" and expert ecological testimony, when combined with a sophisticated analysis of existing case law, can provide sound constitutional arguments for the validity of many regulatory measures that might otherwise be thought so restrictive as to require compensation.

Second, draftsmen of regulations need to make a careful analysis of the types of activities that may be allowed to take place on land without destroying environmental values. Too often regulations have taken the form of blanket prohibitions when a variety of activities could be permitted on the land without detracting from the values that the regulations are designed to protect.

Third, further exploration is needed to provide a sound legal rationale for setting off benefits created by the regulatory program against the losses caused by restrictions. A regulatory program that prohibits the filling of low-lying land in a flood plain, for example, may reduce the value of the portion of a man's land on which filling is prohibited, but it may substantially increase the value of the higher land by reducing the threat of flooding. Mechanisms by which these benefits can be set off against any losses can be very helpful in reducing the necessity of paying compensation.

Fourth, where compensation must be paid, new legal methods of relating the amount of compensation more exactly to the losses suffered should be devised. The government should not be forced to purchase the entire land if some lesser remedy provides equitable compensation. Compensation through the purchase of development rights, a year-to-year-interest or some type of easement should be considered.

This report is not the place to discuss in detail the many ramifications of the constitutional issue, and the many interesting approaches to it being undertaken around the country. Those who create systems of land regulation based on modern ecological knowledge should be aware of the constitutional issue, but should not be so afraid of it that they ignore the approaches that are available for working creatively within the constitutional limits.

(6) Choice of State Agency

The selection of the proper agency to exercise the state's role in land use regulation has not followed any uniform pattern. Three alternatives seem to be found in the existing legislation: line agencies of state government, independent state commissions, and state-created regional commissions.

Line agencies have been used primarily for systems of regulation that focus on a single purpose or a small number of purposes. Thus, both the Massachusetts Zoning Appeals Act, the Wisconsin Shoreland Protection program, and most wetlands acts are administered by line agencies. All of these programs have relatively specific goals that fall within the purview of an existing agency.

Where more comprehensive statewide land use regulation has been tried, independent state commissions have been chosen. Hawaii, Vermont and Maine have all used this model, and public attitudes in the three states would all seem to favor continuation of independent commissions for statewide land use regulation--existing state agencies are all thought to be too biased towards the existing programs they administer to do a fair job in balancing the full range of policies that go into these decisions. But independent commissions contribute to the fragmentation of executive authority at the state level.

The ideal approach from a textbook standpoint would be a new line agency directly under the governor, but in some states centralization of power in the governor is not popular. State planning agencies might serve a regulatory function, but in many states these agencies have paid little attention to land use matters.

Where the regulation is concentrated in a specific geographical area of the state, the states have generally chosen to set up independent commissions having a regional orientation. In some cases members of the commission are appointed by the governor. In other cases the local governments in the region exercise direct or indirect control in the selection of members of the commission. Some of the regional agencies have proven quite successful, but participation by the local governments in the selection of members seems likely to produce a strong pro-development bias because of the dependence of local governments on new development to produce tax revenues.

Selection of the appropriate agency to represent state or regional interests will undoubtedly vary with the specific conditions in each state at each particular time. Hopefully, the inter-agency bickering that accompanies so many programs of an interdisciplinary nature can be minimized.

POSTSCRIPT: FUTURE DIRECTIONS

The great advantage of our federal system is that it facilitates experimentation. New state laws need not follow a single pattern but can search out many avenues for solutions.

To those seeking to decide what directions their state should take, assistance is promised by the various land use policy bills now pending before Congress. But these bills will provide only funds and basic guidelines, not detailed prescriptions.

Organizations such as the Council of State Governments and the American Society of Planning Officials are assembling resources to assist their members in finding creative new solutions for land use regulation. A study by Richard RuBino for the Council of State Governments, currently in preparation, will explore "The Emerging Role of States in Land Resource Management."

Also in process is a Model Land Development Code being prepared by the American Law Institute. Intended not as a uniform law but as a guide to the issues, the complete code is not likely to be ready until 1974, but tentative drafts of portions of it are available from the Institute at 4025 Chestnut Street, Philadelphia, Pennsylvania 19104.

But none of this assistance can replace good hard work at the state level--analyzing the issues and forging creative approaches. The reform of our land regulatory systems is a fascinating challenge that will continue to occupy us for many years to come.

452-329 O - 72 - 22

APPENDICES

THE PRESIDENT'S PROPOSED
NATIONAL LAND USE POLICY ACT OF 1971
(S. 992, H.R. 4332 in the 92d Congress)

A BILL

To establish a national land use policy; to authorize the Secretary of the Interior to make grants to encourage and assist the States to prepare and implement land use programs for the protection of areas of critical environmental concern and the control and direction of growth and development of more than local significance; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That this Act may be cited as the "National Land Use Policy Act of 1971."

FINDINGS AND DECLARATION OF POLICY

Section 101. (a) The Congress hereby finds and declares that decisions about the use of land significantly influence the quality of the environment, and that present State and local institutional arrangements for planning and regulating land use of more than local impact are inadequate, with the result:

(1) that important ecological, cultural, historic and aesthetic values in areas of critical environmental concern which are essential to the well-being of all citizens are being irretrievably damaged or lost;

(2) that coastal zones and estuaries, flood plains, shorelands and other lands near or under major bodies or courses of water which possess special natural and scenic characteristics are being damaged by ill-planned development that threaten these values;

(3) that key facilities such as major airports, highway interchanges, and recreational facilities are inducing disorderly development and urbanization of more than local impact;

(4) that the implementation of standards for the control of air, water, noise and other pollution is impeded;

(5) that the selection and development of sites for essential private development of regional benefit has been delayed or prevented;

(6) that the usefulness of Federal or federally-assisted projects and the administration of Federal programs are being impaired;

(7) that large-scale development often creates a significant adverse impact upon the environment.

(b) The Congress further finds and declares that there is a national interest in encouraging the States to exercise their full authority over the planning and regulations of non-Federal lands by assisting the States, in cooperation with local governments, in developing land use programs including unified authorities, policies, criteria, standards, methods and processes for dealing with land use decisions of more than local significance.

DEFINITIONS

Section 102. For purposes of this Act: (a) "Areas of critical environmental concern" are areas where uncontrolled development could result in irreversible damage to important historic, cultural, or aesthetic values, or natural systems or processes, which are of more than local significance; or life and safety as a result of natural hazards of more than local significance. Such areas shall include:

(1) Coastal zones and estuaries: "Coastal zones" means the land, waters, and lands beneath the waters in close promixity to the coastline (including the Great Lakes) and strongly influenced by each other, and which extend seaward to the outer limit of the United States territorial sea and include areas influenced or affected by water from an estuary such as, but not limited to, salt marshes, coastal and intertidal areas, sounds, embayments, harbors, lagoons, inshore waters, channels, and all other coastal wetlands. "Estuary" means the part of the mouth of a river or stream or other body of water having unimpaired natural connection with the open sea and within which the sea water is measurably diluted with fresh water derived from land drainage.

(2) shorelands and flood plains of rivers, lakes, and streams of State importance;

(3) rare or valuable ecosystems;

(4) scenic or historic areas; and

(5) such additional areas of similar valuable or hazardous characteristics which a State determines to be of critical environmental concern.

(b) "Key facilities" are public facilities which tend to induce development and urbanization of more than local impact and include the following:

(1) any major airport that is used or is designed to be used for instrument landings;

(2) interchanges between the Interstate Highway System and frontage access streets or highways; major interchanges between other limited access highways and frontage access streets or highways; and

(3) major recreational lands and facilities.

(c) "Development and land use of regional benefit" includes land use and private development for which there is a demonstrable need affecting the interests of constituents of more than one local government which outweighs the benefits of any applicable restrictive or exclusionary local regulations.

(d) "State" includes the 50 States of the United States, the Commonwealth of Puerto Rico, Guam, American Samoa, and the Virgin Islands.

PROGRAM DEVELOPMENT GRANTS

Section 103. (a) The Secretary of the Interior (hereinafter referred to as the "Secretary") is authorized to make not more than two annual grants to each State to assist that State in developing a land use program meeting the requirements set forth in section 104 of this Act. Such grants shall not exceed 50 percent of the costs of program development. Prior to making the first grant, the Secretary shall be satisfied that such grant will be used in development of a land use program meeting the requirements set forth in section 104. Prior to making a second grant, the Secretary shall be satisfied that the State is adequately and expeditiously proceeding with the development of a land use program meeting the requirements of section 104.

(b) States receiving grants pursuant to this section shall submit to the Secretary not later than 1 year after the date of award of the grant a report on work completed toward the development of a State land use program. A State land use program meeting the requirements of section 104 of this Act shall satisfy the requirements for such a report.

(c) The authority to make grants under this section expires three years from date of enactment.

PROGRAM MANAGEMENT GRANTS

Section 104. Following his review of a State's land use program, the Secretary is authorized to make a grant to that State to assist it in managing the State land use program. Successive grants for this purpose may be made annually to any State resubmitting its land use program for review by the Secretary. Grants made pursuant to this section shall not exceed 50 percent of the cost of managing the land use program. Grants authorized by this section shall be made by the Secretary only if, in his judgment:

(a) the State's land use program includes:

(1) a method for inventorying and designating areas of critical environmental concern;

(2) a method for inventorying and designating areas impacted by key facilities;

(3) a method for exercising State control over the use of land within areas of critical environmental concern and areas impacted by key facilities;

(4) a method for assuring that local regulations do not restrict or exclude development and land use of regional benefit;

(5) a policy for influencing the location of new communities and a method for assuring appropriate controls over the use of land around new communities;

(6) a method for controlling proposed large-scale development of more than local significance in its impact upon the environment;

(7) a system of controls and regulations pertaining to areas and developmental activities previously listed in this subsection which are designed to assure that any source of air, water, noise or other pollution will not be located where it would result in a violation of any applicable air, water, noise or other pollution standard or implementation plan;

(8) a method for periodically revising and updating the State land use program to meet changing conditions; and

(9) a detailed schedule for implementing all aspects of the program.

For purposes of complying with paragraphs (1)-(7) of this subsection (a), any one or a combination of the following general techniques is acceptable: (i) State establishment of criteria and standards subject to judicial review and judicial enforcement of local implementation and compliance; (ii) direct State land use planning and regulation; (iii) State administrative review of local land use plans, regulations and implementation with full powers to approve or disapprove.

(b) in designating areas of critical environmental concern, the State has not excluded any areas of critical environmental concern to the Nation.

(c) in controlling land use in areas of critical environmental concern to the Nation, the State has procedures to prevent action (and, in the case of successive grants, the State has not acted) in substantial disregard for the purposes, policies and requirements of its land use program.

(d) State laws, regulations and criteria affecting areas and developmental activities listed in subsection (a) of this section are in accordance with the policy, purpose and requirements of this Act; and that State laws, regulations and criteria affecting land use in the coastal zone and estuaries further take into account:

(1) the aesthetic and ecological values of wetlands for wildlife habitat, food production sources for aquatic life, recreation; sedimentation control, and shoreland storm protection; and

(2) the susceptibility of wetlands to permanent destruction through draining, dredging, and filling, and the need to restrict such activities.

(e) the State is organized to implement its State land use program.

(f) the State land use program has been reviewed and approved by the Governor.

(g) the Governor has appropriate arrangements for administering the land use program management grant.

(h) the State, in the development, revision, and implementation of its land use program, has provided for adequate dissemination of information and for adequate public notice and public hearings.

(i) the State has: (1) coordinated with metropolitan-wide plans existing on January 1 of the year in which the State land use program is submitted to the Secretary, which plans have been developed by an areawide agency designated pursuant to regulations established under Section 204 of the Demonstration Cities and Metropolitan Development Act of 1966;

(2) coordinated with appropriate neighboring States with respect to lands and waters in interstate areas;

(3) taken into account the plans and programs of other State agencies and of Federal and local governments.

(j) the State utilizes for the purpose of furnishing advice to the Federal Government as to whether Federal and federally assisted projects are consistent with the State land use program, procedures established pursuant to Section 204 of the Demonstration Cities and Metropolitan Development Act of 1966 and Title IV of the Intergovernmental Cooperation Act of 1968.

FEDERAL REVIEW OF GRANT APPLICATIONS AND STATE LAND USE PROGRAMS

Section 105. (a) The Secretary before making a program management grant pursuant to section 104, shall consult with the heads of all Federal agencies which conduct or participate in construction, development or assistance programs significantly affecting land use in the State, and shall consider their views and recommendations. The Secretary shall not approve a grant pursuant to section 104 until he has ascertained that the Secretary of Housing and Urban Development is satisfied with those aspects of the State's land use program dealing with large-scale development, key facilities, development and land use of regional benefit, and new communities meet the requirements of section 104 for funding of a program management grant.

(b) The Secretary shall take final action on a State's application for a grant authorized under section 104 not later than six months following receipt for review of the State's land use program.

CONSISTENCY OF FEDERAL ACTIONS WITH STATE LAND USE PROGRAMS

Section 106. (a) Federal projects and activities significantly affecting land use shall be consistent with State land use programs funded under section 104 of this Act except in cases of overriding national interest. Program coverage and procedures provided for in regulations issued pursuant to section 204 of the Demonstration Cities and Metropolitan Development Act of 1966 and Title IV of the Intergovernmental Cooperation Act of 1968 shall be applied in determining whether Federal projects and activities are consistent with State land use programs funded under section 104 of this Act.

(b) After December 31, 1974, or the date the Secretary approves a grant under section 104, whichever is earlier, Federal agencies submitting statements required by Section 102(2)(C) of the National Environmental Policy Act shall include a detailed statement by the responsible official on the relationship of proposed actions to any applicable State land use program which has been found eligible for a grant pursuant to section 104 of this Act.

FEDERAL ACTION IN THE ABSENCE OF STATE LAND USE PROGRAMS

Section 107. Where any major Federal action significantly affecting the use of non-Federal lands is proposed after December 31, 1974, in a State which has not been found eligible for a program management grant pursuant to section 104 of this Act, the responsible Federal agency shall hold a public hearing in that State at least 180 days in advance of the proposed action concerning the effects of the action on land use taking into account the relevant consideration set out in section 104 of this Act, and shall make findings which shall be submitted for review and comment by the Secretary, and where appropriate, by the Secretary of Housing and Urban Development. Such findings of the responsible Federal agency and comments of the Secretary or the Secretary of Housing and Urban Development shall be part of the detailed statement required by Section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4321 et seq.). This section shall be subject to exception where the President determines that the interests of the United States so requires.

AVAILABILITY OF FEDERAL EXPERTISE

Section 108. (a) The Secretary shall provide advice upon request to States concerning the designation of areas of critical environmental concern to the Nation.

(b) Federal agencies with data or expertise relative to land use and conservation shall take appropriate measures; subject to appropriate arrangements for payment or reimbursement, to make such data or expertise available to States for use in preparation, implementation, and revision of State land use programs.

GUIDELINES

Section 109. The President is authorized to designate an agency or agencies to issue guidelines to the Federal agencies to assist them in carrying out the requirements of this Act.

ALLOCATION OF FUNDS

Section 110. (a) Funds for grants authorized by sections 103 and 104 of this Act shall be allocated to the States based on regulations issued by the Secretary which shall take into account State population and growth; nature and extent of coastal zones and estuaries and other areas of critical environmental concern and other relevant factors.

(b) No grant funds shall be used to acquire real property.

(c) A refusal by the Secretary to provide a program development or program management grant authorized by this Act shall be in writing.

MISCELLANEOUS

Section 111. (a) The Secretary shall develop, after appropriate consultation with other interested parties, both Federal and non-Federal, such rules and regulations covering the submission and review of applications for grants authorized by sections 103 and 104 as may be necessary to carry out the provisions of this Act.

(b) A State receiving a grant under the provisions of section 103 or 104 of this Act, the agency designated by the Governor to administer such grant, and State agencies allocated a portion of a grant shall make reports and evaluations in such form, at such times, and containing such infor-

mation concerning the status and application of Federal funds and the operation of the approved management program as the Secretary may require, and shall keep and make available such records as may be required by the Secretary for the verification of such reports and evaluations.

(c) The Secretary, and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access, for purposes of audit and examination, to any books, documents, papers, and records of a grant recipient that are pertinent to the grant received under the provisions of section 103 or 104 of this Act.

(d) Nothing herein shall be interpreted to extend the territorial jurisdiction of any State.

(e) Nothing herein shall be construed to imply Federal consent to or approval of any State or local actions which may be required or prohibited by other Federal statutes or regulations.

APPROPRIATION AUTHORIZATION

Section 112. (a) There are hereby authorized to be appropriated not to exceed $20,000,000 in each fiscal year, 1972 through 1976, for grants authorized by sections 103 and 104 of this Act, such funds to be available until expended.

(b) There are hereby authorized to be appropriated such sums as may be necessary for the Secretary of the Interior and the Secretary of Housing and Urban Development to administer the program established by this Act.

SECTION-BY-SECTION ANALYSIS

The proposed bill would establish a National Land Use Policy to encourage the States to plan and regulate land use in certain critical areas.

Section 101 - declares Congressional findings that present State and local institutional arrangements for planning and regulating land use are inadequate and have resulted in haphazard land development and the loss of important environmental values. It is in the national interest to encourage and assist the States in strengthening the institutional framework for planning and controlling the use of non-Federal lands.

Section 102 - contains definitions. "Areas of critical environmental concern" are areas where uncontrolled development could result in irreversible damage to important values. Such areas include coastal zones and estuaries and other similar areas. "Key facilities" are public facilities which tend to induce development of more than local impact, such as airports and highway interchanges. "Development and land use of regional benefit" means private development, the regional need for which outweighs a local conflicting interest.

Section 103 - authorizes the Secretary of the Interior to make two successive annual grants of up to 50% of the cost to States of developing a land use program. Prior to receiving the second grant, the State must submit a report of its progress in developing a program.

Section 104 - authorizes the Secretary to make grants of up to 50% of the cost to States of managing their land use program. Such grants will be made only if the State program, in the Secretary's judgment, meets certain specified criteria. It must include methods for inventorying, designating and exercising State control over areas of critical environmental concern and areas impacted by key facilities, a method for assuring that local regulations do not restrict land use and private development of regional benefit, a policy for influencing the location of new communities, a method for controlling the use of land around new communities, a method for controlling proposed large-scale development of more than local impact on the environment and a detailed schedule for implementing all aspects of the program. The program must not exclude areas of critical environmental concern to the Nation and must take into account the unique values and fragile nature of coastal zones and estuaries, particularly coastal wetlands. The program must also meet certain other organizational and procedural requirements.

Section 105 - requires the Secretary to consult with Federal agencies with activities or programs affecting land use before making a program management grant. The Secretary shall not approve such a grant unless the Secretary of Housing and Urban Development is satisfied that those aspects of the State land use program dealing with large-scale development and key facilities, development and land use of regional benefit, and new communities meet the requirements of section 104. The Secretary shall act on a program management grant application within 6 months after receipt of the State's land use program.

Section 106 - establishes a requirement for consistency of Federal projects and activities with State land use programs. It also requires that Federal agencies submitting environmental statements pursuant to the National Environmental Policy Act include a detailed statement of the relationship of the proposed Federal action to any applicable State land use program which has been found eligible for a management grant.

Section 107 - requires that where a State has not been found eligible for a management grant, any major Federal action significantly affecting the use of non-Federal lands proposed after December 31, 1974, must be preceded by a public hearing at least 180 days before the proposed action, followed by detailed findings upon which the Secretaries of the Interior or Housing and Urban Development will be allowed to comment, unless the President determines that the interests of the United States are to the contrary.

Section 108 - authorizes the Secretary to provide advice upon request to States about areas of critical environmental concern to the Nation and directs Federal agencies to share pertinent expertise with the States.

Section 109 - authorizes the President to designate an agency to issue guidelines to assist Federal agencies carrying out the responsibilities under the Act.

Section 110 - authorizes the Secretary to allocate grant funds to the States on the basis of State population and growth, extent of coastal areas and areas of critical environmental concern and other relevant factors. No grant funds shall be used by the State to acquire real property.

Section 111 - authorizes the Secretary to develop, in consultation with other interested parties, rules and regulations covering the submission and review of grant applications and to require reports concerning the status and operation of the program. It requires that certain records be kept and authorizes the Secretary and the Comptroller General to audit and examine such records. It further provides that nothing in this Act shall extend State territorial jurisdiction or be construed to conflict with other Federal statutes or regulations.

Section 112 - authorizes the appropriation of $20 million in each fiscal year 1972 through 1976 for grants to States. It further authorizes the appropriation of such sums as necessary for the Departments of Interior and Housing and Urban Development to administer the program.

452-329 O - 72 - 23

The Hawaiian Land Use Law of 1963

Hawaii Rev. Stat. Ch. 205 (1968), as amended (Supp. 1969).

CHAPTER 205
LAND USE COMMISSION

§ 205-1 Establishment of the commission. There shall be a state land use commission, hereinafter called the commission. The commission shall consist of seven members who shall hold no other public office and shall be appointed in the manner and serve for the term set forth in section 26-34. One member shall be appointed from each of the senatorial districts and one shall be appointed at large. The chairman of the board of land and natural resources and the director of the department of planning and economic development shall serve as ex officio voting members. The commission shall elect its chairman from one of its appointed members. The members shall receive no compensation for their services on the commission, but shall be reimbursed for actual expenses incurred in the performance of their duties.

The commission shall be a part of the department of planning and economic development for administration purposes, as provided for in section 26-35.

The commission may engage employees necessary to perform its duties, including administrative personnel and one or more field officers. One field officer shall be named as the executive officer of the commission. Field officers shall be persons qualified in land use analysis. Departments of the state government shall make available to the commission such data, facilities, and personnel as are necessary for it to perform its technical duties. The commission may receive and utilize gifts and any funds from the federal or other governmental agencies. It shall adopt rules guiding its conduct, maintain a record of its activities, accomplishments, and recommendations to the governor and to the legislature through the governor. [L 1963, c 205, pt of §2; Supp, §98H-1]

§205-2 Districting and classification of lands. There shall be four major land use districts in which all lands in the State shall be placed: urban, rural, agricultural, and conservation. The land use commission shall group contiguous land areas suitable for inclusion in one of these four major districts. The commission shall set standards for determining the boundaries of each district, provided that:

(1) In the establishment of boundaries of urban districts those lands that are now in urban use and a sufficient reserve area for foreseeable urban growth shall be included;

(2) In the establishment of boundaries for rural districts, areas of land composed primarily of small farms mixed with very low density residential lots, which may be shown by a minimum density of not more than one house per one-half acre and a minimum lot size of not less than one-half acre shall be included;

(3) In the establishment of the boundaries of agricultural districts the greatest possible protection shall be given to those lands with a high capacity for intensive cultivation; and

(4) In the establishment of the boundaries of conservation districts, the "forest and water reserve zones" provided in section 183-41 are renamed "conservation districts" and, effective as of July 11, 1961, the boundaries of the forest and water reserve zones theretofore established pursuant to section 183-41, shall constitute the boundaries of the conservation districts; provided that thereafter the power to determine the boundaries of the conservation districts shall be in the commission.

In establishing the boundaries of the districts in each county, the commission shall give consideration to the master plan or general plan of the county.

Urban districts shall include activities or uses as provided by ordinances or regulations of the county within which the urban district is situated.

Rural districts shall include activities or uses as characterized by low density residential lots of not more than one dwelling house per one-half acre in areas where "city-like" concentration of people, structures, streets, and urban level of services are absent, and where small farms are intermixed with the low density residential lots. These districts may include contiguous areas which are not suited to low density residential lots or small farms by reason of topography, soils, and other related characteristics.

Agricultural districts shall include activities or uses as characterized by the cultivation of crops, orchards, forage, and forestry; farming activities or uses related to animal husbandry, and game and fish propagation; services and uses accessory to the above activities including but not limited to living quarters or dwellings, mills, storage facilities, processing facilities, and roadside stands for the sale of products grown on the premises; and open area recreational facilities.

These districts may include areas which are not used for, or which are not suited to, agricultural and ancillary activities by reason of topography, soils, and other related characteristics.

Conservation districts shall include areas necessary for protecting watersheds and water sources; preserving scenic and historic areas; providing park lands, wilderness, and beach; conserving endemic plants, fish, and wildlife; preventing floods and soil erosion; forestry; open space areas whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding communities, or would maintain or enhance the conservation of natural or scenic resources; areas of value for recreational purposes; and other related activities; and other permitted uses not detrimental to a multiple use conservation concept. [L 1963, c 205, pt of §2; Supp, §98H-2; HRS §205-2; am L 1969, c 182, §5]

§205-3 Adoption of district boundaries. The land use commission shall prepare district classification maps not later than January 1, 1964 showing all the proposed boundaries of conservation, agricultural, rural, and urban districts. At least one public hearing shall be held in each county prior to the final adoption of the district boundaries for that county. Notice of the time and place of the hearing shall be published in the same manner as notices required for public hearings by the planning commission of the appropriate county. If there is no planning commission, then the notice shall be published at least twenty days prior to the hearing in a newspaper of general circulation within the county. The notice shall indicate the time and place that the maps showing the proposed district boundaries within the county may be inspected prior to the hearing.

At the hearing, interested owners, lessees, officials, agencies, and individuals may appear and be heard. They shall further be allowed at least fifteen days following the final public hearing held in the county to file with the commission a written protest or other comments or recommendations. The district boundaries within a county shall be adopted in final form within a period of not more than ninety days and not less than forty-five days from the time of the last hearing in the county; provided that district boundaries for all counties shall be adopted in final form no sooner than May 1, 1964, nor later than July 1, 1964. The county concerned shall be furnished with copies of any written protest, comment, or recommendation. The commission shall prepare and furnish each county with copies of classification maps for that county showing the district boundaries adopted in final form. [L 1963, c 205, pt of §2; Supp, §98H-3]

§205-4 Amendments to district boundaries. Any department or agency of the State or county, or any property owner or lessee may petition the land use commission for a change in the boundary of any district. Within five days of receipt, the commission shall forward a copy of the petition to the planning commission of the county wherein the land is located. Within forty-five days after receipt of the petition by the county, the county planning commission shall forward the petition, together with its comments and recommendations, to the commission. Upon written request by the county planning commission, the commission may grant an extension of not more than fifteen days for the receipt of any comments and recommendations. The commission may also initiate changes in a district boundary which shall be submitted to the appropriate county planning agency for comments and recommendations in the same manner as any other request for a boundary change.

After sixty days but within one hundred and twenty days of the original receipt of a petition, the commission shall advertise a public hearing to be held on the appropriate island in accordance with the requirements of section 205-3. The commission shall notify the persons and agencies that may have an interest in the subject matter of the time and place of the hearing. Within a period of not more than ninety days and not less than forty-five days after the hearing, the commission shall act upon the petition for change. The commission may approve

the change with six affirmative votes. No change shall be approved unless the petitioner has submitted proof that the area is needed for a use other than that for which the district in which it is situated is classified, and either of the following requirements has been fulfilled:

(1) The petitioner has submitted proof that the land is usable and adaptable for the use it is proposed to be classified, or

(2) Conditions and trends of development have so changed since the adoption of the present classification, that the proposed classification is reasonable. [L 1963, c 205, pt of §2; am L 1965, c 32, §2; Supp, §98H-4]

§205-5 Zoning. (a) Except as herein provided, the powers granted to counties under section 46-4 shall govern the zoning within the districts, other than in conservation districts. Conservation districts shall be governed by the department of land and natural resources pursuant to section 183-41.

(b) Within agricultural districts, uses compatible to the activities described in section 205-2 as determined by the land use commission shall be permitted. Other uses may be allowed by special permits issued pursuant to this chapter. The minimum lot size in agricultural districts shall be determined by each county through its zoning ordinance, subdivision ordinance or other lawful means, provided that in no event shall the minimum lot size for any agricultural use be less than one acre.

(c) Unless authorized by special permit issued pursuant to this chapter, only the following uses shall be permitted within rural districts:

(1) Low density residential uses;

(2) Agricultural uses; and

(3) Public, quasi-public, and public utility facilities.

In addition, the minimum lot size for any low density residential use shall be one-half acre and there shall be but one dwelling house per one-half acre. [L 1963, c 205, pt of §2; Supp, §98H-5; HRS §205-5; am L 1969, c 232, §1]

§205-6 Special permit. The county planning commission and the zoning board of appeals of the city and county of Honolulu may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. Any person who desires to use his land within an agricultural or rural district other than for an agricultural or rural use, as the case may be, may petition the planning commission of the county within which his land is located or the zoning board of appeals in the case of the city and county of Honolulu for permission to use his land in the manner desired.

The planning commission, or the zoning board of appeals as the case may be, shall conduct a hearing within a period of not less than thirty nor more than one hundred twenty days from the receipt of the petition. The planning commission or the zoning board of appeals shall notify the land use commission and such persons and agencies that may have an interest in the subject matter of the time and place of the hearing.

The planning commission or zoning board of appeals may, under such protective restrictions as may be deemed necessary, permit the desired use, but only when the use would promote the effectiveness and objectives of this chapter. The planning commission or the zoning board of appeals shall act on the petition not earlier than fifteen days after the public hearing. A decision in favor of the applicant shall require a majority vote of the total membership of the planning commission or of the zoning board of appeals, which shall be subject to the approval of the land use commission. A copy of the decision together with the findings shall be transmitted to the commission within ten days after the decision is rendered. Within forty-five days after receipt of the county agency's decision, the commission shall act to approve or deny. A denial either by the county agency or by the commission, as the case may be, of the desired use shall be appealable to the circuit court of the circuit in which the land is situated and shall be made pursuant to the Hawaii Rules of of Civil Procedure. [L 1963, c 205, pt of §2; Supp, §98H-6]

Attorney General Opinions

Special permits cannot be granted to authorize uses which have effect of making boundary change or creating new district. Att. Gen. Op. 63-37.

§205-7 Adoption of regulations. The land use commission shall prepare regulations relating to matters within its jurisdiction. At least one public hearing shall be held in each county in the manner provided in section 205-3 prior to the final adoption of its regulations. The final regulations for the State shall be adopted within a period of not more than ninety and not less than forty-five days from the time of the final hearing in the State provided that its regulations shall be adopted not later than July 1, 1964. [L 1963, c 205, pt of §2; Supp, §98H-7]

Cross References

Administrative procedure, see chapter 91.

§205-8 Nonconforming uses. The lawful use of land or buildings existing on the date of establishment of any interim agricultural district and rural district in final form may be continued although the use, including lot size, does not conform to this chapter; provided that no nonconforming building shall be replaced, reconstructed, or enlarged or changed to another nonconforming use and no nonconforming use of land shall be expanded or changed to another nonconforming use. In addition, if any nonconforming use of land or building is discontinued or held in abeyance for a period of one year, the further continuation of such use shall be prohibited. [L 1963, c 205, pt of §2; Supp, §98H-8]

§205-9 Amendments to regulations. By the same methods set forth in section 205-4, a petition may be submitted to change, or the land use commission may initiate a change in its regulations. No changes shall, however, be made, unless a hearing or hearings are held in each of the counties. Within not less than forty-five and not more than ninety days after the last of the hearings, the commission shall act to approve or deny the requested change in regulations. The petition for a change shall be based upon proof submitted that conditions exist that were not present when the regulation was adopted or that the regulation does not serve the purposes of this chapter. [L 1963, c 205, pt of §2; Supp, §98H-9]

§205-10 Use of field officers. Notwithstanding section 205-4 requiring a hearing by the full land use commission, if any application requiring a hearing is received which the commission in the course of its regular meetings shall not be able to hear for more than sixty days, it may authorize a field officer to conduct the hearing and make a recommendation; provided all other necessary rules for hearings are adhered to. The recommendations of the field officer shall be submitted to the commission at its next meeting, and any recommendation, or rulings by the commission as a result of this recommendation, shall be subject to a review of the full commission at the next hearing date scheduled for the county in which the land concerned is located, if either the commission or the applicant notified the other party at least twenty days prior to this date. [L 1963, c 205, pt of §2; Supp, §98H-10]

§205-11 Periodic review of districts. Irrespective of changes and adjustments that it may have made, the land use commission shall make a comprehensive review of the classification and districting of all lands and of the regulations at the end of each five years following the adoption thereof. The assistance of appropriate state and county departments shall be secured in making this review and public hearings shall be held in each county in accordance with the requirements set forth for the adoption in final form of district boundaries and regulations under this chapter. [L 1963, c 205, pt of §2; Supp, §98H-11]

§205-12 Enforcement. The appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission and shall report to the commission all violations. [L 1963, c 205, pt of §2; Supp, §98H-12]

§205-13 Penalty for violation. Any person who violates any provision of this chapter, or any regulation established pursuant to this chapter, shall be fined not more than $1,000. [L 1963, c 205, pt of §2; Supp, §98H-13]

§205-14 Adjustments of assessing practices. Upon the adoption of district boundaries, certified copies of the classification maps showing the district boundaries shall be filed with the department of taxation. Thereafter, the department of taxation shall, when making assessments of property within a district, give consideration to the use or uses that may be made thereof as well as the uses to which it is then devoted. [L 1963, c 205, pt of §2; Supp, §98H-14]

§205-15 Conflict. Except as specifically provided by this chapter and the regulations adopted thereto, neither the authority for the administration of the provisions of section 183-41 nor the authority vested in the counties under the provisions of section 46-4 shall be affected. [L 1963, c 205, pt of §2; Supp, §98H-15]

ACT NO. 250 of the Vermont Laws, 1970.

10 Vt. Stat. Ann. Ch. 151, §§6001, et. seq.

Vermont Environmental Board

Revision note. Reference to "section 246 of Title 30" was changed to "section 248 of Title 30" to conform reference to renumbering of such section.

Findings and declaration of intent. 1969, No. 250 (Adj. Sess.), § 1, eff. April 4, 1970, provided:

"Whereas, the unplanned, uncoordinated and uncontrolled use of the lands and the environment of the state of Vermont has resulted in usages of the lands and the environment which may be destructive to the environment and which are not suitable to the demands and needs of the people of the state of Vermont; and

Whereas, a comprehensive state capability and development plan and land use plan are necessary to provide guidelines for utilization of the lands and environment of the state of Vermont and to define the goals to be achieved through land environmental use, planning and control; and

Whereas, it is necessary to establish an environmental board and district environmental commissions and vest them with the authority to regulate the use of the lands and the environment of the state according to the guidelines and goals set forth in the state comprehensive capability and development plan and to give these commissions the authority to enforce the regulations and controls; and

Whereas, it is necessary to regulate and control the utilization and usages of lands and the environment to insure that, hereafter, the only usages which will be permitted are not unduly detrimental to the environment, will promote the general welfare through orderly growth and development and are suitable to the demands and needs of the people of this state;

Now, therefore, the legislature declares that in order to protect and conserve the lands and the environment of the state and to insure that these lands and environment are devoted to uses which are not detrimental to the public welfare and interests, the state shall, in the interest of the public health, safety and welfare, exercise its power by creating a state environmental board and district environmental commissions conferring upon them the power to regulate the use of lands and to establish comprehensive state capability, development and land use plans as hereinafter provided."

Separability. 1969, No. 250 (Adj. Sess.), § 33, provided: "If any provision of this act [chapter], or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this act [chapter], or the application of that provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

Appropriation. 1969, No. 250 (Adj. Sess.), § 34, provided: "There is hereby appropriated to the executive office the sum of $30,000.00 for the purposes of this act. These funds shall not revert but may be used until June 30, 1971."

Subchapter 1. General Provisions

§ 6001. Definitions

When used in this chapter:

(1) "Board" means the environmental board.

(2) "Capability and development plan" means the plan prepared pursuant to section 6042 of this title.

(3) "Development" means the construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial, or industrial purposes. "Development" shall also mean the construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality which has not adopted permanent zoning and subdivision bylaws. The word "development" shall mean the construction of housing projects such as cooperatives, condominiums, or dwellings, or construction or maintenance of mobile homes or trailer parks, with 10 or more units, constructed or maintained on a tract or tracts of land, owned or controlled by a person, within a radius of five miles of any point on any involved land. The word "development" shall not include construction for farming logging or forestry purposes below the elevation of 2500 feet. The word "development" also means the construction of improvements on a tract of land involving more than 10 acres which is to be used for municipal or state purposes. In computing the amount of land involved, land shall be included which is incident to the use such as lawns, parking areas, roadways, leaching fields and accessory buildings. The word "development" shall not include an electric generation or transmission facility which requires a certificate of public good under section 248 of Title 30. The word "development" shall also mean the construction of improvements for commercial, industrial or residential use above the elevation of 2500 feet.

(4) "District commission" means the district environmental commission.

(5) "Land use plan" means the plan prepared pursuant to section 6043 of this title.

(6) "Lot" means any undivided interest in land of less than 10 acres, whether freehold or leasehold, including, but not limited to interests created by trusts, partnerships, corporations, cotenancies and contracts.

(7) "Plat" means a map or chart of a subdivision with surveyed lot lines and dimensions

(8) "Person" shall mean an individual, partnership, corporation, association, unincorporated organization, trust or any other legal or commercial entity, including a joint venture or affiliated ownership. The word "person" also means a municipality or state agency.

(9) "Subdivision" means a tract or tracts of land, owned or controlled by a person, which have been partitioned or divided for the purpose of resale into 10 or more lots within a radius of five miles of any point on any lot, and within any continuous period of 10 years after the effective date of this chapter. In determining the number of lots, a lot shall be counted if any portion is within 5 miles.—1969, No. 250 (Adj. Sess.), § 2, eff. April 4, 1970.

§ 6002. Procedures

The provisions of chapter 25 of Title 3 shall apply unless otherwise specifically stated.—1969, No. 250 (Adj. Sess.), § 26, eff. April 4, 1970.

§ 6003. Penalties

A violation of any provision of this chapter or the rules promulgated hereunder is punishable by a fine of not more than $500.00 for each day of the violation or imprisonment for not more than two years, or both.—1969, No. 250 (Adj. Sess.), § 28, eff. April 4, 1970.

§ 6004. Enforcement

In addition to the other penalties herein provided, the board may, in the name of the state of Vermont, institute any appropriate action, injunction, or other proceeding to prevent, restrain, correct or abate any violation hereof or of the rules promulgated hereunder. —1969, No. 250 (Adj. Sess.). § 29, eff. April 4, 1970.

Subchapter 2. Administration

§ 6021. Board; vacancy; removal

(a) An environmental board is created. The board shall consist of nine members appointed in the month of February by the governor, with the advice and consent of the senate, so that five appointments expire in each odd numbered year. Eight of the members shall be appointed for a term of four years. The chairman (ninth member) shall be appointed for a two year term.

(b) Any vacancy occurring in the membership of the board shall be filled by the governor for the unexpired portion of the term.

(c) Members shall be removable for cause only, except the chair-

man, who shall serve at the pleasure of the governor.—1969, No. 250 (Adj. Sess.), § 3, eff. April 4, 1970.

Temporary provisions. 1969, No. 250 (Adj. Sess.), § 32(a), (c), eff. April 4, 1970, provided:

"(a) On or before June 1, 1970, the governor shall appoint four members to the board whose terms shall expire January 31, 1971, four members whose terms shall expire January 31, 1973, and a chairman whose term shall expire January 31, 1971."

"(c) The appointments to the board shall be made with the advice and consent of the senate for all appointments made during the present session of the legislature, and for all appointments, not so made, whose terms expire in 1973, by the senate of the general assembly convening January, 1971."

§ 6022. Personnel

The board may appoint an executive officer and other employees, including administrative personnel, as it finds necessary in carrying out its duties, unless the governor shall otherwise provide.—1969, No. 250 (Adj. Sess.), § 4, eff. April 4, 1970.

§ 6023. Grants

The board may apply for and receive grants from the federal government and from other sources.—1969, No. 250 (Adj. Sess.), § 4, eff. April 4, 1970.

§ 6024. Intragovernmental cooperation

Other departments and agencies of state government shall cooperate with the board and make available to it data, facilities and personnel as may be needed to assist the board in carrying out its duties and functions.—1969, No. 250 (Adj. Sess.), § 4, eff. April 4, 1970.

§ 6025. Rules

The board shall adopt rules to interpret and carry out the provisions of this chapter.—1969, No. 250 (Adj. Sess.), § 25, eff. April 4, 1970.

§ 6026. District commissioners

(a) For the purposes of the administration of this chapter, the state is divided into nine districts.

(1) District No. 1, comprising Franklin, Grand Isle and Lamoille Counties.

(2) District No. 2, comprising Orleans, Essex and Caledonia Counties.

(3) District No. 3, comprising Chittenden County.

(4) District No. 4, comprising Addison County.

(5) District No. 5, comprising Washington and Orange Counties.

(6) District No. 6, comprising Rutland County.

(7) District No. 7, comprising Windham County.

(8) District No. 8, comprising Bennington County.

(9) District No. 9, comprising Windsor County.

(b) A district environmental commission is created for each district. Each district commission shall consist of three members from that district appointed in the month of February by the governor so that two appointments expire in each odd numbered year. Two of the members shall be appointed for a term of four years, and the chairman (third member) of each district shall be appointed for a two-year term.

(c) Members shall be removable for cause only, except the chairman who shall serve at the pleasure of the governor.

(d) Any vacancy shall be filled by the governor for the unexpired period of the term.—1969, No. 250 (Adj. Sess.), § 5, eff. April 4, 1970.

Temporary provisions. 1969, No. 250 (Adj. Sess.), § 32(b), eff. April 4, 1970, provided: "(b) On or before June 1, 1970, the governor shall appoint one member of each district commission whose term shall expire January 31, 1971, one member whose term shall expire January 31, 1973, and a chairman whose term shall expire January 31, 1971."

§ 6027. Powers

(a) The board and district commissions shall have the power to compel the attendance of witnesses, and require the production of evidence.

(b) The powers granted to the board under this chapter are additional to any other powers which may be granted to it by other legislation.

(c) The board may designate or establish such regional offices as it deems necessary to implement the provisions of this chapter and the rules adopted hereunder. The board may designate or require a regional planning commission to receive applications, provide administrative assistance, investigations, and make recommendations.

(d) The board, when it determines the workload in any district is such that unreasonable delays will result, may at the request of an overloaded district authorize the district commission of another district to sit in that district to consider applications.

(e) The board may by rule allow joint hearings to be conducted with specified state agencies or specified municipalities.—1969, No. 250 (Adj. Sess.), § 25, eff. April 4, 1970.

§ 6028. Compensation

Members of the board and district commissions shall receive a per diem pay of $25.00 and all necessary expenses.—1969, No. 250 (Adj. Sess.), § 31, eff. April 4, 1970.

Subchapter 3. Use and Development Plans

§ 6041. Interim capability plan

Prior to the adoption of the capability and development plan, the board shall adopt an interim land capability and development plan which will describe the present use of the land and define in broad categories the capability of the land for development and use based on ecological considerations and which plan shall be in effect until the adoption of the land use plan, or until July 1, 1972, whichever first occurs.—1969, No. 250 (Adj. Sess.), § 18, eff. April 4, 1970.

§ 6042. Capability and development plan

The board shall adopt a capability and development plan consistent with the interim land capability plan which shall be made with the general purpose of guiding and accomplishing a coordinated, efficient and economic development of the state, which will, in accordance with present and future needs and resources, best promote the health, safety, order, convenience, prosperity and welfare of the inhabitants, as well as efficiency and economy in the process of development, including but not limited to, such distribution of population and of the uses of the land for urbanization, trade, industry, habitation, recreation, agriculture, forestry and other uses as will tend to create conditions favorable to transportation, health, safety, civic activities and educational and cultural opportunities, reduce the wastes of financial and human resources which result from either excessive congestion or excessive scattering of population and tend toward an efficient and economic utilization of drainage, sanitary and other facilities and resources and the conservation and production of the supply of food, water and minerals. In addition, the plan may accomplish the purposes set forth in section 4302 of Title 24.—1969, No. 250 (Adj. Sess.), § 19, eff. April 4, 1970.

§ 6043. Land use plan

After the adoption of a capability and development plan, the board shall adopt a land use plan based on the capability and development plan which shall consist of a map and statements of present and prospective land uses based on the capability and de-

velopment plan, which determine in broad categories the proper use of the lands in the state whether for forestry, recreation, agriculture or urban purposes, the plans to be further implemented at the local level by authorized land use controls such as subdivision regulations and zoning.—1969, No. 250 (Adj. Sess.), § 20, eff. April 4, 1970.

§ 6044. Public hearings

(a) The board shall hold public hearings for the purpose of collecting information to be used in establishing the capability and development plan, land use plan, and interim land capability plan. The public hearings may be held in an appropriate area or areas of the state and shall be conducted according to rules to be established and published by the board.

(b) The board may, on its own motion or on petition of an interested agency of the state or any regional or local planning commission, hold such other hearings as it may deem necessary from time to time for the purpose of obtaining information necessary or helpful in the determination of its policies, the carrying out of its duties, or the formulation of its rules and regulations.

(c) At least one public hearing shall be held in each district prior to adoption of a plan pursuant to sections 6042 and 6043 of this title. Notice of a hearing shall be furnished each municipality, and municipal and regional planning commission in the district where the hearing is to be held not less than fifteen days prior to the hearing.

(d) The provisions of chapter 25 of Title 3 shall not apply to the hearings under this section.—1969, No. 250 (Adj. Sess.), § 21, eff. April 4, 1970.

§ 6045. Submission to planning commissions

Prior to approval of a plan by the board the tentative plan shall be submitted to each municipal and regional planning commission, which shall forward its comments and recommendations, if any, to the board within 30 days. The board shall, prior to approval of the plan, consider all such comments and recommendations, make such changes in the plan as it deems appropriate, and convey its specific responses to the respective planning commissions from which the comments and recommendations originated.—1969, No. 250 (Adj. Sess.), § 22, eff. April 4, 1970.

§ 6046. Approval of governor and legislature

(a) Upon approval of a capability and development land use or interim land capability plan by the board, it shall submit the plan to the governor for approval. The governor shall approve the plan, or disapprove the plan or any portion of a plan, within 30 days of receipt. If the governor fails to act, the plan shall be deemed approved by the governor. This section and section 6045 of this title shall also apply to any amendment of a plan.

(b) After approval by the governor, plans pursuant to sections 6042 and 6043 of this title shall be submitted to the general assembly when next in session for approval by joint resolution. A plan shall be considered adopted for the purposes of section 6086(b)(9) of this title when the required final approval has been made.—1969, No. 250 (Adj. Sess.), § 23, eff. April 4, 1970.

Revision note. Undesignated pars. of this section were designated as subsecs. "(a)" and "(b)" to conform section to V.S.A. style.

§ 6047. Changes in boundaries

(a) After final adoption, any department or agency of the state or a municipality, or any property owner or lessee may petition the board for a change in the boundary of any district created under section 6043 of this title or the capability of land for a use under section 6041 of this title.

(b) Within 10 days of receipt, the board shall forward a copy of the petition to the district commission and regional planning agency for comments and recommendations. If no regional planning commission exists, the copy shall be sent to the affected municipal planning commissions and municipalities.

(c) After 60 days but within 120 days of the original receipt of a petition, the board shall advertise a public hearing to be held in the appropriate county. The board shall notify the persons and agencies that have an interest in the change of the time and place of the hearing.

(d) With respect to petitions relating to section 6043 of this title no change shall be approved unless the petitioner has submitted proof that the area is needed for a use other than that for which the district in which it is situated is classified, and the following requirements have been fulfilled:

(1) The petitioner has submitted proof that the land is usable and adaptable for the use for which it is proposed to be classified, and

(2) Conditions and trends of development have so changed since the adoption of the present classification, that the proposed classification is reasonable.

(e) With respect to petitions relating to section 6041 of this title no change shall be allowed unless the land is capable of sustaining the use proposed.

(f) The applicant, any person or municipality directly affected, who is aggrieved may appeal to the supreme court as in section 6089(b) of this title.—1969, No. 250 (Adj. Sess.), § 24, eff. April 4, 1970.

Revision note. Undesignated par. was designated as subsec. "(b)" to conform to V.S.A. style and remaining subsecs. redesignated as "(c)"-"(f)".

Subchapter 4. Permits

§ 6081. Permits required; exemptions

(a) No person shall sell or offer for sale any interest in any subdivision located in this state, or commence construction on a subdivision or development, or commence development without a permit. This section shall not prohibit the sale, mortgage or transfer of all, or an undivided interest in all, of a subdivision unless the sale, mortgage or transfer is accomplished to circumvent the purposes of this chapter.

(b) Subsection (a) of this section shall not apply to a subdivision exempt under the regulations of the department of health in effect on January 21, 1970 or any subdivision which has a permit issued prior to June 1, 1970 under the board of health regulations, or has pending a bona fide application for a permit under the regulations of the board of health on June 1, 1970, with respect to plats on file as of June 1, 1970 provided such permit is granted prior to August 1, 1970. Subsection (a) of this section shall not apply to development which is not also a subdivision, which has been commenced prior to June 1, 1970, if the construction will be completed by March 1, 1971. Subsection (a) of this section shall not apply to a state highway on which a hearing pursuant to section 222 of Title 19 has been held prior to June 1, 1970. Subsection (a) of this section shall apply to any substantial change in such excepted subdivision or development.—1969, No. 250 (Adj. Sess.), §§ 6, 7, subsec. (a), eff. June 1, 1970, subsec. (b), eff. April 4, 1970.

§ 6082. Approval by local governments and state agencies

The permit required under section 6081 of this title shall not supersede or replace the requirements for a permit of any other state agency or municipal government.—1969, No. 250 (Adj. Sess.), § 27, eff. April 4, 1970.

§ 6083. Applications

(a) An application for a permit shall be filed with the district commissioner as prescribed by the rules of the board and shall contain at least the following documents and information:

(1) The applicant's name, address, and the address of each of the applicant's offices in this state, and, where the applicant is not an individual, municipality or state agency, the form, date and place of formation of the applicant.

(2) Five copies of a plan of the proposed development or

subdivision showing the intended use of the land, the proposed improvements, the details of the project, and any other information required by this chapter, or the rules promulgated thereunder.

(3) The fee prescribed by rule.

(4) Certification of filing of notice as set forth in 6084 of this title.

(b) The board and district commission may conduct such investigations, examinations, tests and site evaluations as they deem necessary to verify information contained in the application. An applicant shall grant the board or district commission, or their agents, permission to enter upon his land for these purposes.—1969, No. 250 (Adj. Sess.), §§ 8, 15, eff. April 4, 1970.

§ 6084. Notice

(a) On or before the date of filing of application the applicant shall send notice and a copy of the application to a municipality, and municipal and regional planning commissions wherein the land is located, and any adjacent Vermont municipality, municipal or regional planning commission if the land is located on a boundary. The applicant shall furnish to the district commission the names of those furnished notice by affidavit, and shall post a copy of the notice in the town clerk's office of the town or towns wherein the land lies.

(b) The district commission shall forward notice and a copy of the application to the board and any state agency directly affected, and any other municipality or state agency, or person the district commission or board deems appropriate. Notice shall also be published in a local newspaper generally circulating in the area where the land is located not more than 7 days after receipt of the application.—1969, No. 250 (Adj. Sess.), § 9, eff. April 4, 1970.

§ 6085. Hearings

(a) Anyone required to receive notice by section 9 and any adjoining property owner may request a hearing by filing a request within 15 days of receipt of notice. Upon receipt of notice the district commission shall treat the application pursuant to section 814 of Title 3. The district commission may order a hearing without a request within 20 days of receipt of the application.

(b) The date for a hearing shall be set within 25 days of receipt of the application or notice of appeal filed under section 6088(a) of this title. The hearing shall be held within 40 days of receipt of the application or notice of appeal. The parties shall be given not less than 10 days notice. Notice shall also be published in a local newspaper generally circulating in the area where the land is located not less than 10 days before the hearing date.

(c) Parties shall be those who have received notice, adjoining property owners who have requested a hearing, and such other persons as the board may allow by rule. For the purposes of appeal only the applicant, a state agency, the regional and municipal planning commissions and the municipalities required to receive notice shall be considered parties.

(d) If no hearing has been requested or ordered within the prescribed period no hearing need be held by the district commission. In such an event a permit shall be granted or denied within 60 days of receipt; otherwise, it shall be deemed approved and a permit shall be issued.—1969, No. 250 (Adj. Sess.), §§ 10, 11, eff. April 4, 1970.

§ 6086. Issuance of permit; conditions

(a) Before granting a permit the board or district commission shall find that the subdivision or development:

(1) Will not result in undue water or air pollution. In making this determination it shall at least consider: the elevation of land above sea level; and in relation to the flood plains, the nature of soils and subsoils and their ability to adequately support waste disposal; the slope of the land and its effect on effluents; the availability of streams for disposal of effluents; and the applicable health and water resources department regulations.

(2) Does have sufficient water available for the reasonably foreseeable needs of the subdivision or development.

(3) Will not cause an unreasonable burden on an existing water supply, if one is to be utilized.

(4) Will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

(5) Will not cause unreasonable highway congestion or unsafe conditions with respect to use of the highways existing or proposed.

(6) Will not cause an unreasonable burden on the ability of a municipality to provide educational services.

(7) Will not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services.

(8) Will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.

(9) Is in conformance with a duly adopted development plan, land use plan or land capability plan.

(10) Is in conformance with any duly adopted local or regional plan under chapter 91 of Title 24.

(b) The board or district commission shall issue its findings and decision within 20 days of the final hearing day.

(c) A permit may contain such requirements and conditions as are allowable within the proper exercise of the police power and which are appropriate with respect to (1) through (10) of subsection (a), including but not limited to those set forth in sections 4407(4), (8) and (9), 4411(a)(2), 4415, 4416 and 4417 of Title 24, the dedication of lands for public use, and the filing of bonds to insure compliance. The requirements and conditions incorporated from Title 24 may be applied whether or not a local plan has been adopted. General requirements and conditions may be established by rule.

(d) The board may by rule allow the acceptance of a permit or permits or approval of any state agency with respect to (1) through (5) of subsection (a) or a permit or permits of a specified municipal government with respect to (1) through (7) and (10) of subsection (a), or a combination of such permits or approvals, in lieu of evidence by the applicant. The acceptance of such approval, permit or permits shall create a presumption that the application is not detrimental to the public health and welfare with respect to the specific requirement for which it is accepted. Such a rule may be revoked or amended pursuant to the procedures set forth in section 803(b) of Title 3. The board shall not approve the acceptance of a permit or approval of such an agency or a permit of a municipal government unless it satisfies the appropriate requirements of subsection (a) of this section.—1969, No. 250 (Adj. Sess.), § 12, eff. April 4, 1970.

§ 6087. Denial of application

(a) No application shall be denied by the board or district commission unless it finds the proposed subdivision or development detrimental to the public health, safety or general welfare.

(b) A permit may not be denied solely for the reasons set forth in (5), (6) and (7) of section 6086(a) of this title. However, reasonable conditions and requirements allowable in section 6086(c) of this title may be attached to alleviate the burdens created.

(c) A denial of a permit shall contain the specific reasons for denial. A person may, within 6 months, apply for reconsideration

of his permit which application shall include an affidavit to the district commission and all parties of record that the deficiencies have been corrected. The district commission shall hold a new hearing upon 25 days notice to the parties. The hearing shall be held within 40 days of receipt of the request for reconsideration.—1969, No. 250 (Adj. Sess.), § 12, eff. April 4, 1970.

§ 6088. Burden of proof

(a) The burden shall be on the applicant with respect to (1), (2), (3), (4), (9) and (10) of section 6086(a) of this title.

(b) The burden shall be on any party opposing the applicant with respect to (5) through (8) of section 6086(a) of this title to show an unreasonable or adverse effect.—1969, No. 250 (Adj. Sess.), § 13, eff. April 4, 1970.

§ 6089. Appeals

(a) An appeal from the district commission shall be to the board. The board shall hold a de novo hearing on all findings requested by any party. Notice of appeal shall be filed with the board within 30 days. The board shall notify the parties set forth in section 6085(c) of this title. The board shall proceed as in section 6085(b) and (c) of this title and treat the applicant pursuant to section 814 of Title 3.

(b) An appeal from a decision of the board under subsection (a) shall be to the supreme court by a party as set forth in section 6085(c) of this title.

(c) No objection that has not been urged before the board may be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the board with respect to questions of fact, if supported by substantial evidence on the record as a whole, shall be conclusive.

(d) An appeal from the board will be allowed for all usual reasons, including the unreasonableness or insufficiency of the conditions attached to a permit. An appeal from the district commission will be allowed for any reason except no appeal shall be allowed when an application has been granted and no preliminary hearing requested.—1969, No. 250 (Adj. Sess.), § 14, eff. April 4, 1970.

§ 6090. Duration and revocation of permits

(a) Any permit granted under this chapter shall be for a specified period determined by the board in accordance with the rules adopted under this chapter as a reasonable projection of the time during which the land will remain suitable for use if developed or subdivided as contemplated in the application, and with due regard for the economic considerations attending the proposed development or subdivision.

(b) A permit may be revoked by the board in the event of violation of any conditions attached to any permit or the terms of any application, or violation of any rules of the board.—1969, No. 250 (Adj. Sess.), § 16, eff. April 4, 1970.

§ 6091. Renewals and nonuse

(a) At the expiration of each permit, it may be renewed under the same procedure herein specified for an original application.

(b) Nonuse of a permit for a period of one year following the date of issuance shall constitute an abandonment of the project and the permit shall be considered expired.

(c) If the application is made for an extension prior to expiration the district commission may grant an extension and may waive the necessity of a hearing.—1969, No. 250 (Adj. Sess.), § 17, eff. April 4, 1970.

McAteer-Petris Act of 1969, amending
Cal. Gov't Code §§66600-652

San Francisco Bay Conservation and
Development Commission

TITLE 7.2 SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

Chapter		Section
1.	Findings and Declarations of Policy	66600
2.	Definition of San Francisco Bay	66610
3.	San Francisco Bay Conservation and Development Commission	66620
4.	Powers and Duties of the Commission	66630
5.	Final Report and Termination of Existence of the Commission	66650

Title 7.2 was added by Stats.1965, c. 1162, p. 2940, § 1.

Chapter 1

FINDINGS AND DECLARATIONS OF POLICY

Sec.

66600. Public interest in Bay.
66601. Filling of Bay.
66602. Blank.
66603. New regional approach; study.
66604. Interim provision; powers of commission.

Chapter 1 was added by Stats.1965, c. 1162, p. 2940, § 1.

Cross References

Title of Act, see § 66653.

§ 66600. Public interest in Bay. The Legislature hereby finds and declares that the public interest in the San Francisco Bay is in its beneficial use for a variety of purposes; that the public has an interest in the bay as the most valuable single natural resource of an entire region, a resource that gives special character to the bay area; that the bay is a single body of water that can be used for many purposes, from conservation to planned development; and that the bay operates as a delicate physical mechanism in which changes that affect one part of the bay may also affect all other parts. It is therefore declared to be in the public interest to create a politically-responsible, democratic process by which the San Francisco Bay and its shoreline can be analyzed, planned, and regulated as a unit. (Added Stats.1965, c. 1162, p. 2940, § 1.)

§ 66601. Filling of Bay

The Legislature further finds and declares that * * * uncoordinated, haphazard * * * filling in San Francisco Bay * * * threatens the bay itself and is therefore inimical to the welfare of both present and future residents of the area surrounding the bay; that while some individual fill projects may be necessary and desirable for the needs of the entire bay region, and while some cities and counties may have prepared detailed master plans for their own bay lands, * * * a governmental mechanism * * * must exist for evaluating individual projects as to their effect on the entire bay; and that further piecemeal filling of the bay may place serious restrictions on navigation in the bay, may destroy the irreplaceable feeding and breeding grounds of fish and wildlife in the bay, may adversely affect the quality of bay waters and even the quality of air in the bay area, and would therefore be harmful to the needs of the present and future population of the bay region.

(Amended by Stats.1969, c. 713, p. 1396, § 1.)

1969 Amendment. Rewrote section.

Law Review Commentaries

Regulation of San Francisco Bay and reasonable exercise of police power. (1967) 55 C.L.R. 740.

Regulation of San Francisco Bay and state constitutional problems including home rule. (1967) 55 C.L.R. 757.

Library references

Filling of San Francisco Bay. Report of the Assembly Committee on Natural Resources, Planning and Public Works, 1965-1967, Vol. 25, No. 5, p. 25. See Appendix to Journal of Assembly, Reg.Sess., 1967.

1. In general

In view of *manifest intent of legislature* to protect present shoreline and body of San Francisco Bay to maximum extent possible, word "project" as used in § 66604 empowering bay conservation and development commission to issue or deny permits for proposed projects that involves placing fill in bay or extracting submerged materials therefrom is a word of limitation and means a detailed and specific plan prepared in furtherance of a determination to accomplish a certain objective. People ex rel. San Francisco Bay Conservation and Development Commission v. Town of Emeryville (1968) 72 Cal.Rptr. 790, 446 P.2d 790, 69 A.C. 552.

§ 66602. Water-oriented land uses

The Legislature further finds and declares that certain water-oriented land uses along the bay shoreline are essential to the public welfare of the bay area, and that such uses include ports, water-related industries, airports, wildlife refuges, water-oriented recreation and public assembly, desalinization plants and powerplants requiring large amounts of water for cooling purposes; that the San Francisco Bay Plan should make provision for adequate and suitable locations for all such uses thereby minimizing the necessity for future bay fill to create new sites for such uses; that existing public access to the shoreline and waters of the San Francisco Bay is inadequate and that maximum feasible public access, consistent with a proposed project, should be provided.

(Added by Stats.1969, c. 713, p. 1397, § 2.)

Library references

Navigable Waters ⇨2.
C.J.S. Navigable Waters § 10 et seq.

§ 66602.1 Saltponds and managed wetlands

The Legislature further finds and declares that areas diked off from the bay and used as saltponds and managed wetlands are important to the bay area in that, among other things, such areas provide a wildlife habitat and a large water surface which, together with the surface of the bay, moderate the climate of the bay area and alleviate air pollution; that it is in the public interest to encourage continued maintenance and operation of the salt ponds and managed wetlands; that, if development is proposed for these areas, dedication or public purchase of some of these lands should be encouraged in order to preserve water areas; that, if any such areas are authorized to be developed and used for other purposes, the development should provide the maximum public access to the bay consistent with the proposed project and should retain the maximum amount of water surface area consistent with the proposed project.

(Added by Stats.1969, c. 713, p. 1396, § 1.6.)

Library references

Navigable Waters ⇨2.
C.J.S. Navigable Waters § 10 et seq.

§ 66603. San Francisco Bay Plan

The Legislature further finds and declares that * * * the San Francisco Bay Conservation and Development Commission * * *, treating the entire bay as a unit, * * * has made a detailed study of all the characteristics of the bay, including: the quality, quantity, and movement of bay waters, the ecological balance of the bay, * * * the economic interests in the bay, including the needs of the bay area population for industry and for employment * * *, the requirements of industries that would not pollute the bay nor interfere with its use for recreation or other purposes, but would need sites near deepwater channels * * *; that the study * * * has examined all present and proposed uses of the bay and its shoreline, and * * * the master plans of cities and counties around the bay; and that on the basis of the study * * * the commission has prepared a comprehensive and enforceable plan for the conservation of the water of the bay and the development of its shoreline, entitled the San Francisco Bay Plan.

(Amended by Stats.1969, c. 713, p. 1397, § 2.)

1969 Amendment. Rewrote section.

Law Review Commentaries

Regulation of San Francisco Bay: Loss of value, compensation and alternative means. (1967) 55 C.L.R. 745.

Regulation of San Francisco Bay and state constitutional problems including home rule. (1967) 55 C.L.R. 757.

1. In general

Assuming public agency had obtained governmental approval, if necessary, and commencement of filling and diking process in San Francisco Bay, for purpose of determining whether project was exempt from permit requirements under grandfather clause of § 66632.1 relating to bay conservation and development commission the question remained whether acts in satisfaction had been undertaken pursuant to specific and detailed plan prepared in furtherance of a determination to accomplish a certain objective capable of realization or whether such acts had *been performed in some* random manner unrelated to such specific plan. People ex rel. San Francisco Bay Conservation and Development Commission v. Town of Emeryville (1968) 72 Cal.Rptr. 790, 446 P.2d 790, 69 A.C. 552.

§ 66604. Powers of commission

The Legislature further finds and declares that in order to protect the present shoreline and body of the San Francisco Bay to the maximum extent possible, it is essential that the commission be empowered to issue or deny permits, after public hearings, for any proposed project that involves placing fill * * *, extracting * * * materials * * * or making any substantial change in use of any water, land or structure within the area of the commission's jurisdiction.

(Amended by Stats.1968, c. 924, p. 1754, § 1; Stats.1969, c. 713, p. 1397, § 3.)

1968 Amendment. Dropped reference to formulating period.

1969 Amendment. Deleted reference to placing fill in the bay or extracting submerged materials, and added reference to making of substantial change in use of water, land or structure.

§ 66605. Limitations on filling Bay; grounds

The Legislature further finds and declares:

(a) That further filling of San Francisco Bay should be authorized only when public benefits from fill clearly exceed public detriment from the loss of the water areas and should be limited to water-oriented uses (such as ports, water-related industry, airports, bridges, wildlife refuges, water-oriented recreation and public assembly, water intake and discharge lines for desalinization plants and power generating plants requiring large amounts of water for cooling purposes) or minor *fill for improving shoreline* appearance or public access to the bay;

(b) That fill in the bay for any purpose, should be authorized only when no alternative upland location is available for such purpose;

(c) That the water area authorized to be filled should be the minimum necessary to achieve the purpose of the fill;

(d) That the nature, location and extent of any fill should be such that it will minimize harmful effects to the bay area, such as, the reduction or impairment of the volume surface area or circulation of water, water quality, fertility of marshes or fish or wildlife resources;

(e) That public health, safety and welfare require that fill be constructed in accordance with sound safety standards which will afford reasonable protection to persons and property against the hazards of unstable geologic or soil conditions or of flood or storm waters;

(f) That fill should be authorized when the filling would, to the maximum extent feasible, establish a permanent shoreline;

(g) That fill should be authorized when the applicant has such valid title to the properties in question that he may fill them in the manner and for the uses to be approved.

(Added by Stats.1969, c. 713, p. 1397, § 3.5.)

§ 66605.1 Improvement, development and preservation of shoreline

The Legislature finds that in order to make San Francisco Bay more accessible for the use and enjoyment of people, the bay shoreline should be improved, developed and preserved. The Legislature further recognizes that private investment in shoreline development should be vigorously encouraged and may be one of the principal means of achieving bay shoreline development, minimizing the resort to taxpayer funds; therefore, the Legislature declares that the commission should encourage both public and private development of the bay shoreline.

(Added by Stats.1969, c. 713, p. 1398, § 4.)

Library references
Navigable Waters ⇨2.
C.J.S. Navigable Waters § 10 et seq.

§ 66606. Construction of title; preservation of rights of property owners

The Legislature hereby finds and declares that this title is not intended, and shall not be construed, as authorizing the commission to exercise its power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.

(Added by Stats.1969, c. 713, p. 1398, § 4.1.)

Library references
Navigable Waters ⇨2.
C.J.S. Navigable Waters § 10 et seq.

§ 66606.5 Acquisition of private property for public use; study; reports

The Legislature finds and declares that the San Francisco Bay Plan indicates that extensive areas in and around the bay are owned or held under claim of ownership by private persons and that the acquisition for public use of all or large portions of such areas or the establishment of wildlife refuges therein may require a substantial public investment. The Legislature further finds and declares that the commission should make a continuing review and prepare and submit periodic reports on the nature, extent, estimated cost and method of financing of any proposed acquisitions of private property for public use.

(Added by Stats.1969, c. 713, p. 1398, § 4.2.)

Library references
Navigable Waters ⇨2.
C.J.S. Navigable Waters § 10 et seq.

§ 66606.6 Establishment of agricultural preserves by private property owners and local governments

Nothing in this title shall deny the right of private property owners and local governments to establish agricultural preserves and enter into contracts pursuant to the provisions of the California Land Conservation Act of 1965.

The commission, within six months after the effective date of this section, shall institute an affirmative action program to encourage local governments to enter into contracts under the California Land Conservation Act of 1965 with owners of property to which the provisions of that act may be applicable.

(Added by Stats.1969, c. 713, p. 1399, § 4.3.)

Library references
Navigable Waters ⇨2.
C.J.S. Navigable Waters § 10 et seq.

§ 66607. Partial invalidity

If any provision of this title or the application thereof in any circumstance or to any person or public agency is held invalid, the remainder of this title or the application thereof in other circumstances or to other persons or public agencies shall not be affected thereby.

(Added by Stats.1969, c. 713, p. 1399, § 4.4.)

CHAPTER 2. DEFINITION OF SAN FRANCISCO BAY

Sec.
66611. Fixing and establishing boundaries of water-oriented priority land uses; hearing; resolution [New].

§ 66610. Area of jurisdiction of commission

For the purposes of this title, the area of jurisdiction of the San Francisco Bay Conservation and Development Commission includes:

(a) San Francisco Bay, being all areas that are subject to tidal action from the south end of the bay to the Golden Gate (Point Bonita-Point Lobos) and to the Sacramento River line (a line between Stake Point and Simmons Point, extended northeasterly to the mouth of Marshall Cut), including all sloughs, and specifically, the marshlands lying between mean high tide and five feet above mean sea level; tidelands (land lying between mean high tide and mean low tide); and submerged lands (land lying below mean low tide).

(b) A shoreline band consisting of all territory located between the shoreline of San Francisco Bay as defined in subdivision (a) of this section and a line 100 feet landward of and parallel with that line, but excluding any portions of such territory which are included in subdivisions (a), (c) and (d) of this section; provided that the commission may, by resolution, exclude from its area of jurisdiction any area within the shoreline band that it finds and declares is of no regional importance to the bay.

(c) Saltponds consisting of all areas which have been diked off from the bay and have been used during the three years immediately preceding the effective date of the amendment of this section during the 1969 Regular Session of the Legislature for the solar evaporation of bay water in the course of salt production.

(d) Managed wetlands consisting of all areas which have been diked off from the bay and have been maintained during the three years immediately preceding the effective date of the amendment of this section during the 1969 Regular Session of the Legislature as a duck hunting preserve, game refuge or for agriculture.

(e) Certain waterways (in addition to areas included within subdivision (a)), consisting of all areas that are subject to tidal action, including submerged lands, tidelands, and marshlands up to five feet above mean sea level, on, or tributary to, the listed portions of the following waterways:

(1) Plummer Creek in Alameda County, to the eastern limit of the saltponds.

(2) Coyote Creek (and branches) in Alameda and Santa Clara Counties, to the easternmost point of Newby Island.

(3) Redwood Creek in San Mateo County, to its confluence with Smith Slough.

(4) Tolay Creek in Sonoma County, to the northerly line of Sears Point Road (State Highway 37).

(5) Petaluma River in Marin and Sonoma Counties to its confluence with Adobe Creek, and San Antonio Creek to the easterly line of the Northwestern Pacific Railroad right-of-way.

(6) Napa River, to the northernmost point of Bull Island.

(7) Sonoma Creek, to its confluence with Second Napa Slough.

The definition which is made by this section is merely for the purpose of prescribing the area of jurisdiction of the commission which is created by this title. This definition shall not be construed to affect title to any land or to prescribe the boundaries of the San Francisco Bay for any purpose except the authority of the commission created by this title.

(Amended by Stats.1969, c. 713, p. 1399, § 5; Stats.1970, c. 1279, p. —, § 1.)

§ 66611. Fixing and establishing boundaries of water-oriented priority land uses; hearing; resolution

No later than * * * December 1, 1971, the commission, after public hearing, of which adequate descriptive notice is given, shall adopt and file with the Governor and the Legislature a resolution fixing and establishing within the shoreline band the boundaries of the water-oriented priority land uses, as referred to in Section 66602. After such filing no further changes shall be made in such boundaries, except with the approval of the Legislature.

(Added by Stats.1969, c. 713, p. 1400, § 5.1. Amended by Stats.1970, c. 998, p. —, § 1.)

Library references
Navigable Waters ⇨2.
C.J.S. Navigable Waters § 10 et seq.

CHAPTER 3. SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

Sec.
66620. Creation; composition; appointment [New].

§ 66620. Creation; composition; appointment

The San Francisco Bay Conservation and development Commission is hereby created. The commission shall consist of 27 members appointed as follows:

(a) One member by the Division Engineer, United States Army Engineers, South Pacific Division, from his staff.

(b) One member by the United States Secretary of Health, Education and Welfare, from his staff.

(c) One member by the Secretary of Business and Transportation, from his staff.

(d) One member by the Director of Finance, from his staff.

(e) One member by the Secretary of Resources, from his staff.

(f) One member by the State Lands Commission, from its staff.

(g) One member by the San Francisco Bay Regional Water Quality Control Board, who shall be a member of such board.

(h) Nine county representatives consisting of one member of the board of supervisors representative of each of the nine San Francisco Bay area counties, appointed by the board of supervisors in each county. Each county representative must be a supervisor representing a supervisorial district which includes within its boundaries lands lying within San Francisco Bay.

(i) Four city representatives appointed by the Association of Bay Area Governments from among the residents of the bayside cities in each of the following areas:

(1) North Bay—Marin County, Sonoma, Napa, and Solano;

(2) East Bay—Contra Costa County (west of Pittsburg) and Alameda County north of the southern boundary of Hayward;

(3) South Bay—Alameda County south of the southern boundary of Hayward, Santa Clara County and San Mateo County south of the northern boundary of Redwood City;

(4) West Bay—San Mateo County north of the northern boundary of Redwood City, and the City and County of San Francisco.

Each city representative must be an elected city official.

(j) Seven representatives of the public, who shall be residents of the San Francisco Bay area and whose appointments shall be subject to confirmation by the

Senate. Five of such representatives shall be appointed by the Governor. One by the Committee on Rules of the Senate and one by the Speaker of the Assembly.
(Added by Stats.1969, c. 713, p. 1400, § 5.2.)

Former section 66620 was repealed by Stats.1969, c. 713, p. 1400, § 5.1.
Derivation: Former section 66620, added by Stats.1965, c. 1162, p. 2912, § 1.

Library references
Navigable Waters ⇐2.
C.J.S. Navigable Waters § 10 et seq.

§ 66622. Term; compensation and expenses; designation of alternate

The members of the commission shall serve at the pleasure of their respective appointing powers. The members shall serve without compensation, but each of the members shall be reimbursed for his necessary expenses incurred in the performance of his duties.

A member, subject to confirmation by his appointing power, may authorize an alternate for attendance at meetings and voting in his absence. Each alternate shall be designated in a written instrument which shall include evidence of the confirmation by the appointing power and his name shall be kept on file with the commission. Each member may change his alternate from time to time, with the confirmation of his appointing power, but shall have only one alternate at a time. Each alternate shall have the same qualifications as are required for the member who appointed him, except that each county representative may designate any other member of that county's board of supervisors as his alternate.
(Amended by Stats.1969, c. 713, p. 1401, § 6; Stats.1970, c. 1179, p. —, § 1.)

CHAPTER 4. POWERS AND DUTIES OF THE COMMISSION

Sec.
66630.1 Property which might be acquired by public agencies for public use; study report [New].
66632.2 Public service facilities; defined; permit not required [New].
66632.3 Application for development of property not acquired for public use [New].
66632.4 Denial of application for proposed project within shoreline band only on ground that project fails to provide maximum feasible public access [New].

Law Review Commentaries
San Francisco Bay: Regional regulation for its protection and development. (1967) 55 C.L.R. 728, 740.

§ 66630. Study

The commission shall make a * * * continuing review of all the matters referred to in Section 66603, * * * 66606.5 and Section 66651.
(Amended by Stats.1969, c. 713, p. 1401, § 7.)

§ 66630.1 Property which might be acquired by public agencies for public use; study; report

The continuing review, among other things, shall include studies concerning properties within the area of the commission's jurisdiction which, in the opinion of the commission, might be acquired by public agencies for public use. Based on such studies the commission shall annually prepare a report setting forth the general location of such properties, the interest or interests proposed to be acquired therein, the public uses recommended therefor, the public agencies recommended to make the proposed acquisitions, the estimated cost of the proposed acquisitions and recommendations for financing such cost. Each annual report shall cover proposed acquisitions during a three-year period commencing January 1 after the date of the report and shall indicate any material changes made with respect to the report for the previous year. Not later than the fifth legislative day of each regular session of the Legislature, commencing with the 1971 Regular Session, the commission shall file such report with the Governor and Legislature.
(Added by Stats.1969, c. 713, p. 1401, § 7.1.)

Library references
Navigable Waters ⇐2.
C.J.S. Navigable Waters § 10 et seq.

§ 66631. Cooperation and coordination; avoiding duplication of work

In making * * * the review, the commission shall cooperate to the fullest extent possible with the * * * Association of Bay Area Governments; and * * * shall, to the fullest extent possible, coordinate its planning * * * with planning * * * by local agencies, which shall retain the responsibility for local land use planning. In order to avoid duplication of work, the commission shall make maximum use of data and information available from the planning programs of the State Office of Planning, * * * the Association of Bay Area Governments, the cities and counties in the San Francisco Bay area, and other public and private planning agencies.
(Amended by Stats.1969, c. 713, p. 1401, § 8.)

1969 Amendment. Rewrote section.

Law Review Commentaries
Regulation of San Francisco Bay and state constitutional problems including home rule. (1967) 55 C.L.R. 757.

§ 66632. Permits; "fill" and "materials" defined; permits already issued

(a) During the existence of the San Francisco Bay Conservation and Development Commission, any person or governmental agency wishing to place fill * * *, to extract * * * materials * * *, or to make any substantial change in use of any water, land or structure, within the area of the commission's jurisdiction shall secure a permit from the commission and, if required by law or by ordinance, from any city or county within which any part of such work is to be performed. For purposes of this * * * title, "fill" means earth or any other substance or material, including pilings or structures placed on pilings, * * * and structures floating at some or all times and moored for extended periods, such as houseboats and floating docks. For the purposes of this section "materials" means items exceeding twenty dollars ($20) in value.

The commission may require a reasonable filing fee and reimbursement of expenses for processing and investigating a permit application.

(b) Whenever a permit is required by a city or county for any activity also requiring a permit from the San Francisco Bay Conservation and Development Commission, an applicant for a permit shall file an application with the city council of the city if the proposed project is located in incorporated territory, or the board of supervisors of the county, if the proposed project is located in unincorporated territory. Upon filing such an application, the applicant shall notify the commission of the fact of the filing and the date thereof. The city council or the board of supervisors, as the case may be, shall investigate the proposed project and shall file a report thereon with the commission within 90 days after the application is filed with it.

Whenever a permit is not required by a city or county, no application for a permit * * * need be made to the city or county.

(c) Upon receipt of the report from the city council or the board of supervisors, as the case may be, or, if the city council or the board of supervisors does not file a report with the commission within the 90-day period, upon the expiration of such 90-day period, * * * and upon receipt of an application for a permit made directly to it, the commission shall hold a public hearing or hearings as to the proposed project and conduct such further investigation as it deems necessary. The commission shall give full consideration to the report of the city council or board of supervisors.

(d) The commission shall prescribe the form and contents of applications for permits. Among other things, an application for a permit shall set forth all public improvements and public utility facilities which are necessary or incidental to the proposed project and the names and mailing addresses of all public agencies or public utilities who will have ownership or control of such public improvements or public utility facilities if the permit is granted and the project is constructed. The executive director shall give written notice of the filing of the application to all such public agencies and public utilities. If the commission grants a permit for a project, the permit shall include all public improvements and public utility facilities which are necessary or incidental to the project.

(e) Upon receipt of an application for a permit the commission shall transmit a copy thereof to the San Francisco Bay Regional Water Quality Control Board. Within 60 days the board shall file a report with the commission indicating the effect of the proposed project on water quality within the bay.

(f) The commission shall take action upon * * * an application for * * * a permit, either denying or granting the permit, within * * * 90 days after it receives the report * * * (or, if the city council or the board of supervisors did not file a report with the commission within the 90-day period, within * * * 90 days after the expiration of such 90-day period * * *), or * * * within * * * 90 days after it receives * * * an application from the applicant, whichever date is later. The permit shall be automatically granted if the commission shall fail to take specific action either denying or granting the permit within the time period specified in this section. A permit * * * shall be granted for a project if the commission finds and declares that the project is either (1) necessary to the health, safety or welfare of the public in the entire bay area, or (2) of such a nature that it will * * * be consistent with the provisions of this title and with the provisions of the San Francisco Bay Plan then in effect. To effectuate such purposes, the commission may grant a permit subject to reasonable terms and conditions including the uses of land or structures, intensity of uses, construction methods and methods for dredging or placing of fill. Thirteen affirmative votes of members of the commission are required to grant a permit. Neither of the federal representatives who are members of the commission may vote on whether or not a permit shall be granted.

Pursuant to this title, the commission * * * may provide by regulation, adopted after public hearing, for the issuance of permits by the executive director, without compliance with the above procedure, in cases of emergency, or for minor repairs * * * to existing installations or minor improvements made anywhere within the area of jurisdiction of the commission including, without limitation, the installation of piers and pilings and maintenance dredging of navigation channels. The commission may also adopt after public hearing such additional regulations as it deems reasonable and necessary to enable it to carry out its functions efficiently and equitably, including regulations classifying the particular water-oriented uses referred to in Sections 66602 and 66605.

(g) If the commission denies the permit, the applicant may submit another application for the permit directly to the commission after 90 days from the date of such denial.

* * * (h) Any project authorized pursuant to this section shall be commenced, performed and completed in compliance with the provisions of all permits granted or issued by the commission and by any city or county.

(i) If, prior to * * * September 17, 1965, any person or governmental agency has already obtained a permit from the appropriate local body to place fill in the bay or to extract submerged materials from the bay, application may be made directly to the San Francisco Bay Conservation and Development Commission and the permit from the local body shall constitute the report of the local body.

(j) Any action, or proceeding to contest or question the commission's denial of a permit application, or conditions attached to approval of a permit application, must be commenced in the appropriate court within 90 days following the date of such action by the commission.

(k) The executive director shall, within 90 days following the effective date of this section, communicate the provisions of this section to all governmental bodies that issue permits for developments described in this section, and shall request of them information concerning any development that may fall within the provisions of this section.

(Amended by Stats.1968, c. 924, p. 1754, § 2; Stats.1969, c. 713, p. 1402, § 9.)

§ 66632.1 Permit from army engineers. Nothing in this title shall apply to any project where necessary local governmental approval and a Department of the Army Corps of Engineers permit have been obtained to allow commencement of the diking or filling process, and where such diking or filling process has commenced prior to the effective date of this title, nor to the continuation of dredging under existing Department of the Army Corps of Engineers permits. (Added Stats.1965, c. 1162, p. 2945, § 1.)

§ 66632.2 Public service facilities; defined; permit not required

(a) The owner or operator of any public service facilities need not obtain a permit from the commission for the construction within or upon any public highway or street of any public service facilities to provide service to persons or property located within the area of the commission's jurisdiction. The public service facilities referred to in this subdivision shall be limited to those which are necessary for and are customarily used to provide direct and immediate service to the persons or property requiring such service.

(b) The owner or operator of public service facilities or a public street or road located anywhere within the area of the commission's jurisdiction may, without first obtaining a permit from the commission, make emergency repairs to such facilities as may be necessary to maintain service, provided, that the emergency is such as to require repairs before an emergency permit can be obtained under the provisions of subdivision (f) of Section 66632 and, provided further, that notification is given to the commission no later than the first working day following such undertaking.

(c) "Public service facilities," as used in this section, means any facilities used or intended to be used to provide water, gas, electric or communications service and any pipelines, and appurtenant facilities, for the collection or transmission of sewage, flood or storm waters, petroleum, gas or any liquid or other substance.

(Added by Stats.1969, c. 713, p. 1404, § 9.5.)

Library references
Navigable Waters ⇨2.
C.J.S. Navigable Waters § 10 et seq.

§ 66632.3 Application for development of property not acquired for public use

If the most recent report made and filed pursuant to Section 66630.1 recommends that designated property be acquired for public use and all such property has not been so acquired within a period of three years, commencing with January 1 after the date of the report first recommending such acquisition, at any time after the expiration of said period the owners of all or any part of the property not previously acquired may file an application with the commission for the development of such property. Upon the filing of any such application, the commission shall grant or deny a permit in accordance with the provisions of this title and the San Francisco Bay Plan, then in effect, provided that a permit shall not be denied on the grounds that such property has been recommended to be acquired for public use.

(Added by Stats.1969, c. 713, p. 1405, § 9.6.)

Library references
Navigable Waters ⇨.
C.J.S. Navigable Waters § 10 et seq.

§ 66632.4 Denial of application for proposed project within shoreline band only on ground that project fails to provide maximum feasible public access

Within any portion or portions of the shoreline band which shall be located outside the boundaries of water-oriented priority land uses, as fixed and established pursuant to Section 66611, the commission may deny an application for a permit for a proposed project only on the grounds that the project fails to provide maximum feasible public access, consistent with the proposed project, to the bay and its shoreline.

(Added by Stats.1969, c. 713, p. 1405, § 9.7.)

Library references
Navigable Waters ⇨2.
C.J.S. Navigable Waters § 10 et seq.

§ 66633. Acceptance of contributions or appropriations; appointing committees; contracts; suits; doing of necessary things

The commission may:

(a) Accept grants, contributions, and appropriations from any public agency, private foundation, or individual.

(b) Appoint committees from its membership and appoint advisory committees from other interested public and private groups.

(c) Contract for or employ any professional services required by the commission or for the performance of work and services which in its opinion cannot satisfactorily be performed by its officers and employees or by other federal, state, or local governmental agencies.

(d) Sue and be sued in all actions and proceedings and in all courts and tribunals of competent jurisdiction, including prohibitory and mandatory injunctions to restrain violations of this title.

(e) Do any and all other things necessary to carry out the purposes of this title.

(Amended by Stats.1969, c. 713, p. 1405, § 10.)

Stats.1969, c. 713, p. 1395, contained no section 11.

1969 Amendment. Inserted a new subd. (d) and changed former subd. (d) to subd. (e).

§ 66634. Money from federal, state, or local sources; power to obtain. The commission shall, in addition to any funds which the Legislature may appropriate for planning activities of the commission, take whatever steps are necessary to attempt to obtain money available of such planning activities from any federal, state, or local sources. (Added Stats.1965, c. 1162, p. 2945, § 1.)

§ 66635. Executive director and employees

The commission shall appoint an executive director who shall have charge of * * * administering the affairs of the commission, subject to the direction and policies of the commission. The executive director shall, subject to approval of the commission, appoint such employees as may be necessary in order to carry out the functions of the commission * * *.

(Amended by Stats.1969, c. 713, p. 1406, § 12.)

1969 Amendment. Rewrote section.

§ 66636. Citizens' advisory committee. Within a reasonable time, but not to exceed one year from the date of the first meeting of the commission, the chairman of the commission, in collaboration with and with the concurrence of the commission, shall appoint a citizens' advisory committee to assist and advise the commission in carrying out its functions. The advisory committee shall consist of not more than 20 members.

At least one member of the advisory committee shall be a representative of a public agency having jurisdiction over harbor facilities, and another shall represent a public agency having jurisdiction over airport facilities. The advisory committee shall also include representatives of conservation and recreation organizations, and at least one biologist, one sociologist, one geologist, one architect, one landscape architect, one representative of an industrial development board or commission, and one owner of privately held lands within the San Francisco Bay as defined in Section 66610. (Added Stats.1965, c. 1162, p. 2945, § 1.)

CHAPTER 5. THE SAN FRANCISCO BAY PLAN AND FURTHER REPORTS OF THE COMMISSION [NEW]

Sec.
66650. Short title.
66651. Interim plan for commission.
66652. Changes in plan; procedure.
66653. Authority of commission to grant or deny permits; advisory provisions of plan.
66654. Existing uses; continuation; application to determine nature, etc.
66655. Vested rights under ordinance adopted or permit issued prior to Sept. 1, 1969.
66656. Inapplicability of title to project requiring local governmental approval and Army Corps of Engineers permit.
66657. Just compensation; value; damage; benefits; determination.
66658. Powers and duties of commission.
66659. Duration of commission.
66660. Supplemental reports; contents.
66660.1 Planned community development on land already filled as outside jurisdiction of commission.
66661. Supplemental reports; time of filing.

Chapter 5 added by Stats.1969, c. 713, p. 1406, § 14.

Former Chapter 5 repealed by Stats.1969, c. 713, p. 1406, § 13.

§ 66650. Short title

This title shall be known and may be cited as the McAteer-Petris Act.

(Added by Stats.1969, c. 713, p. 1406, § 14.)

Former section 66650 was amended by Stats.1968, c. 853, p. 1624, § 3, and was repealed by Stats.1969, c. 713, p. 1406, § 13.

Library references
Navigable Waters ⇨2.
C.J.S. Navigable Waters § 10 et seq.

§ 66651. Interim plan for commission

Pursuant to this title the commission has adopted and submitted to the Governor and the Legislature the San Francisco Bay Plan, a comprehensive plan containing statements and maps concerning:

(a) The objectives of the plan;

(b) The bay, as a resource, including findings and recommended policies upon: fish and wildlife; water pollution; smog and weather; water surface, area and volume; marshes and mudflats, fresh water inflow; dredging; and shell deposits;

(c) The development of the bay and shoreline, including findings and recommended policies upon: economic and population growth; safety of fills; water-related industries; ports; airports; recreation; saltponds and other managed wetlands; transportation; other uses of the bay and shoreline; refuse disposal sites; public access; appearance and design; and scenic views.

This plan shall constitute an interim plan for the commission (i) until otherwise ordered by the Legislature, or, (ii) until amended by the commission as provided in Section 66652.

(Added by Stats.1969, c. 713, p. 1406, § 14.)

Former section 66651 was amended by Stats.1968, c. 853, p. 1625, § 4, and was repealed by Stats.1969, c. 713, p. 1406, § 13.

Library references
Navigable Waters ⇨2.
C.J.S. Navigable Waters § 10 et seq.

§ 66652. Changes in plan; procedure

The commission at any time may amend, or repeal and adopt a new form of, all or any part of the San Francisco Bay Plan but such changes shall be consistent with the findings and declarations of policy contained in this title.

Such changes shall be made by resolution of the commission adopted after public hearing on the proposed change, of which adequate descriptive notice shall be

given. If the proposed change pertains to a policy or standard contained in the San Francisco Bay Plan, or defines a water-oriented use referred to in Section 66602 or 66605, the resolution adopting the change shall not be voted upon less than 10 days following notice of hearing on the proposed change and shall require the affirmative vote of two-thirds of the commission members. If the proposed change pertains only to a map or diagram contained in the San Francisco Bay Plan, the resolution adopting the change shall not be voted on less than 30 days following notice of hearing on the proposed change and shall require the affirmative vote of the majority of the commission members.
(Added by Stats.1969, c. 713, p. 1406, § 14.)

Former section 66652 was repealed by Stats.1969, c. 713, p. 1406, § 13.

Library references
Navigable Waters ⇐2.
C.J.S. Navigable Waters § 10 et seq.

§ 66653. Authority of commission to grant or deny permits; advisory provisions of plan

If a function or activity is within the area of the commission's jurisdiction and requires the securing of a permit, the commission shall exercise its power to grant or deny a permit in conformity with the provisions of this title and with any provisions of the plan pertaining to placing of fill, extraction of materials, construction methods and use or change of use of water areas, land or structures. If a function or activity is outside the area of the commission's jurisdiction or does not require the issuance of a permit, any provisions of the plan pertaining thereto are advisory only.
(Added by Stats.1969, c. 713, p. 1406, § 14.)

Former section 66653 was repealed by Stats.1969, c. 713, p. 1406, § 13.

Library references
Navigable Waters ⇐2.
C.J.S. Navigable Waters § 10 et seq.

§ 66654. Existing uses; continuation; application to determine nature, etc.

Within the area of the commission's jurisdiction under subdivisions (b), (c) and (d) of Section 66610, any uses which are in existence on the effective date of this section may be continued, provided, that no substantial change shall be made in such uses except in accordance with this title.

Any owner of property devoted to an existing use or uses may file an application with the commission to determine the nature of such existing use or uses, the extent of territory then devoted to such use or uses, and such additional territory adjacent thereto as may be expected to be reasonably necessary for the expansion of such use or uses during a period of not to exceed 15 years from the date of filing such application. Not later than 90 days after such filing, the commission after public hearing shall adopt a resolution making such determination. After the adoption of such resolution no permit need be obtained from the commission for any of the existing use or uses specified in the resolution or for the expansion thereof within the territory described in said resolution.
(Added by Stats.1969, c. 713, p. 1406, § 14.)

Library references
Navigable Waters ⇐2.
C.J.S. Navigable Waters § 10 et seq.

§ 66655. Vested rights under ordinance adopted or permit issued prior to Sept. 1, 1969

If, prior to September 1, 1969, any city or county has adopted an ordinance or issued a permit authorizing a particular use or uses within the areas defined in subdivisions (b), (c) and (d) of Section 66610, no person who has obtained a vested right thereunder shall be required to secure a permit from the commission, providing, that no substantial changes may be made in any such use or uses, except in accordance with this title. Any such person shall be deemed to have such vested rights if, prior to September 1, 1969, he has in good faith and in reliance upon the ordinance or permit commenced and performed substantial work on the use or uses authorized and incurred substantial liabilities for work and materials necessary therefor. Expenses incurred in obtaining the enactment of an ordinance or the issuance of a permit shall not be deemed liabilities for work or material.
(Added by Stats.1969, c. 713, p. 1406, § 14.)

Library references
Navigable Waters ⇐2.
C.J.S. Navigable Waters § 10 et seq.

§ 66656. Inapplicability of title to project requiring local governmental approval and Army Corps of Engineers permit

Nothing in this title shall apply to any project where necessary local governmental approval and a Department of the Army Corps of Engineers permit have been obtained to allow commencement of the diking or filling process, and where such diking or filling process has commenced prior to September 17, 1965, nor to the continuation of dredging under existing Department of the Army Corps of Engineers permits and any renewals and extensions of such dredging permits.

"Project" shall include the execution or undertaking or assumption of any contractual commitments entered into prior to September 17, 1965; if prior to July 9, 1969, the city or county has adopted a long-range general plan in accordance with its charter, or Sections 65300 to 65306 and specific plans in accordance with Sections 65450 and 65451 and the land uses comply with the general objectives or guidelines of the San Francisco Bay Plan.
(Added by Stats.1969, c. 713, p. 1406, § 14.)

Library references
Navigable Waters ⇐2.
C.J.S. Navigable Waters § 10 et seq.

§ 66657. Just compensation; value; damage; benefits; determination

In eminent domain or inverse condemnation proceedings for any property within the area of the commission's jurisdiction, in determining "just compensation," as used in Section 14 of Article I of the California Constitution, or "value," "damage," or "benefits," as used in Section 1248 of the Code of Civil Procedure, the influence of the San Francisco Bay Plan, in effect at the time of the taking or damaging of the property, upon the value of the property or the interest being valued shall be inadmissible as evidence and not a proper basis for an opinion as to the value of the property.
(Added by Stats.1969, c. 713, p. 1406, § 14.)

Library references
Eminent Domain ⇐122 et seq.
C.J.S. Eminent Domain § 136.

§ 66658. Powers and duties of commission

Until the termination of the existence of the commission, it shall have all powers and duties prescribed by Chapters 1 (commencing with Section 66600) to 4 (commencing with Section 66630), inclusive, of this title including, without limitation, the power to continue or make further studies authorized thereby.
(Added by Stats.1969, c. 713, p. 1406, § 14.)

Library references
Navigable Waters ⇐2.
C.J.S. Navigable Waters § 10 et seq.

§ 66659. Duration of commission

The commission shall continue in existence until such time as the Legislature provides for the termination of the existence of the commission or for the transfer of the commission's functions and duties to some other permanent agency.
(Added by Stats.1969, c. 713, p. 1406, § 14.)

Library references
Navigable Waters ⇐2.
C.J.S. Navigable Waters § 10 et seq.

§ 66660. Supplemental reports; contents

The commission shall make a supplemental report, or reports, containing all of the following:

(a) The results of any continued or further studies made by the commission;

(b) Such other information and recommendations as the commission deems desirable.

(Added by Stats.1969, c. 713, p. 1406, § 14.)

Library references
Navigable Waters ⇐2.
C.J.S. Navigable Waters § 10 et seq.

§ 66660.1 Planned community development on land already filled as outside jurisdiction of commission

Notwithstanding any provision of this title to the contrary, the jurisdiction of the commission, except for the control of fill or extraction of materials shall not include the shoreline within a city limit upon which any person or entity has commenced and performed substantial work for the purpose of establishing a planned community development on land already filled and requiring no additional fill or extraction, and for which the planning commission approval of the city council has been obtained prior to July 1, 1969.
(Added by Stats.1969, c. 713, p. 1406, § 14.)

Library references
Navigable Waters ⇐2.
C.J.S. Navigable Waters § 10 et seq.

§ 66661. Supplemental reports; time of filing

The commission shall annually file a supplemental report with the Governor and the Legislature by the fifth legislative day of each regular session of the Legislature commencing not later than the 1971 Regular Session.
(Added by Stats.1969, c. 713, p. 1406, § 14.)

Library references
Navigable Waters ⇐2.
C.J.S. Navigable Waters § 10 et seq.

Minnesota Metropolitan Council Act

Minn. Stat. Ann. Ch. 473B (Supp. 1971).

CHAPTER 473B. METROPOLITAN COUNCIL [NEW]

Sec.
473B.01 Purpose.
473B.02 Metropolitan council
473B.03 Advisory committees.
473B.04 Reports.
473B.05 Metropolitan planning.
473B.06 Administration of Metropolitan Council.
473B.07 Special studies and reports.
473B.08 Tax levy.

Routes through municipalities see § 161.171 to 161.177.

473B.01 Purpose

In order to coordinate the planning and development of the metropolitan area comprising the counties of Anoka, Carver, Dakota, Hennepin, Ramsey, Scott and Washington, it is in the public interest to create an administrative agency for that purpose.

Laws 1967, c. 896, § 1, eff. May 26, 1967.

Law Review Commentaries

Minnesota's experiment with a metropolitan council. Nov. 1969, 53 Minn.Law Review 122.

Title of Act:

An Act creating a metropolitan council for the counties of Anoka, Carver, Dakota, Hennepin, Ramsey, Scott and Washington; providing for the operation thereof. Laws 1967, c. 896.

Library references

Municipal Corporations ⇨53.
C.J.S. Municipal Corporations § 106 et seq.

473B.02 Metropolitan council

Subdivision 1. Creation. A metropolitan council with jurisdiction in the metropolitan area consisting of the counties of Anoka, Carver, Dakota, Hennepin, Ramsey, Scott and Washington, is created. It shall be under the supervision and control of 15 members, all of whom shall be residents of the metropolitan area.

Subd. 2. Terms. The first members of the metropolitan council appointed by the governor shall be appointed as follows: the chairman as provided in subdivision 4; four for terms ending the first Monday in January 1969; five for terms ending the first Monday in January 1971; and five for terms ending the first Monday in January 1973. Thereafter the term of each member shall be for a term of six years and until his successor is appointed and qualified.

Subd. 3. Membership. Fourteen members of the metropolitan council shall be appointed by the governor on a nonpartisan basis, after consulting with all members of the legislature from the area composing the council district for which the member is to be appointed, by and with the advice and consent of the senate. Each such council member shall reside in the council district which he represents. Council districts consist of combinations of legislative and representative districts established by Extra Session Laws 1966, Chapter 1, as prescribed herein. Each council district shall be represented by one member of the council. Council districts are hereby created as follows:

(1) The first council district consists of legislative district 12, that part of representative district 6A within Dakota county, and representative district 14A, and that part of representative district 14B within Scott county.

(2) The second council district consists of legislative districts 8 and 50.

(3) The third council district consists of legislative districts 49 and 57, and representative district 32B.

(4) The fourth council district consists of legislative district 33 and representative districts 13A and 21A.

(5) The fifth council district consists of legislative districts 30 and 31 and representative district 32A.

(6) The sixth council district consists of legislative districts 29 and 37.

(7) The seventh council district consists of legislative districts 27 and 28.

(8) The eighth council district consists of legislative districts 34 and 35.

(9) The ninth council district consists of legislative districts 36 and 38.

(10) The tenth council district consists of legislative districts 39 and 40.

(11) The eleventh council district consists of legislative districts 41 and 42.

(12) The twelfth council district consists of legislative districts 43 and 44.

(13) The thirteenth council district consists of legislative districts 45 and 46.

(14) The fourteenth council district consists of legislative districts 47 and 48.

Subd. 4. Chairman. (a) Appointment. The chairman of the metropolitan council shall be appointed by the governor as the 15th voting member thereof by and with the advice and consent of the senate to serve at his pleasure. He shall be a person experienced in the field of municipal and urban affairs with administrative training and executive ability.

(b) Duties. The chairman of the metropolitan council shall preside at the meetings of the metropolitan council and shall act as principal executive officer. He shall organize the work of the metropolitan council, appoint all officers and employees thereof, subject to the approval of the metropolitan council, and be responsible for carrying out all policy decisions of the metropolitan council. His salary and expense allowances shall be fixed by the metropolitan council.

Subd. 5. Metropolitan council; duties and compensation. The metropolitan council shall elect such officers as it deems necessary for the conduct of its affairs other than the chairman. A secretary and treasurer need not be members of the metropolitan council. Meeting times and places shall be fixed by the metropolitan council and special meetings may be called by a majority of the members of the metropolitan council or by the chairman thereof. Each metropolitan council member other than the chairman shall be paid a per diem compensation of $35 for each meeting and for such other services as are specifically authorized by the metropolitan council, and shall be reimbursed for his reasonable expenses.

In the performance of its duties the metropolitan council may promulgate rules governing its operation, establish committees, divisions, departments and bureaus and staff the same as necessary to carry out its duties and when specifically authorized by law make appointments to other governmental agencies and districts. All officers and employees of the metropolitan council shall serve at the pleasure of the appointing authority in the unclassified service of the state civil service. Rules promulgated by the metropolitan council shall be in accordance with the administrative procedure provisions contained in chapter 15.

Subd. 6. Executive director. Upon the recommendation of the chairman the metropolitan council may appoint an executive director to serve at his pleasure as the principal operating administrator for the metropolitan council. He may be chosen from among the citizens of the nation at large, and shall be selected on the basis of his training and experience in the field of municipal and urban affairs.

Laws 1967, c. 896, § 2.

Metropolitan sewer service, see § 473C.01 et seq.

Operative date.

Laws 1967, c. 896, § 9, provides that the metropolitan council shall commence operations when the governor has appointed the members thereof and has proclaimed the organization of the council in writing filed in the office of the secretary of state.

473B.03 Advisory committees

The metropolitan council may establish and appoint persons to advisory committees to assist the metropolitan council in the performance of its duties. Members of the advisory committees shall serve without compensation but shall be reimbursed for their reasonable expenses as determined by the metropolitan council.

Laws 1967, c. 896, § 3, eff. May 26, 1967.

473B.04 Reports

On or before January 15th, of each odd numbered year the metropolitan council shall report to the legislature. The report shall include:

(1) A statement of the metropolitan council's receipts and expenditures by category since the preceding report;

(2) A detailed budget for the year in which the report is filed and the following year including an outline of its program for such period;

(3) An explanation of any comprehensive plan adopted in whole or in part for the metropolitan area;

(4) Summaries of any studies and the recommendations resulting therefrom made by the metropolitan council, and a listing of all applications for federal moneys made by governmental units within the metropolitan area submitted to the metropolitan council;

(5) A listing of plans of local governmental units submitted to the metropolitan council; and

(6) Recommendations of the metropolitan council for metropolitan area legislation, including the organization and functions of the metropolitan council.

Laws 1967, c. 896, § 4, eff. May 26, 1967.

473B.05 Metropolitan planning

Subdivision 1. All the powers, duties, obligations and property now vested in or imposed upon the commission established under chapter 473, for the metropolitan area, are hereby transferred to, imposed upon, and vested in the metropolitan council as the successor of such commission. At the time of such transfer the commission established under such laws is abolished.

Subd. 2. All employees of the commission shall be employees of the metropolitan council without interruption of salaries and employee benefits.

Laws 1967, c. 896, § 5, eff. May 26, 1967.

1. In general

Except for monies controlled by § 473H.06, subd. 4, the provisions of chapter 473B.01, permits the deposit of monies outside the state treasury. Op. Atty.Gen., 8, Oct. 6, 1967.

Only the state treasurer must participate in the disbursement of monies which the *metropolitan council* deposits in the state treasury. Id.

473B.06 Administration of Metropolitan Council

Subdivision 1. General powers. The metropolitan council shall have and exercise all powers which may be necessary or convenient to enable it to perform and carry out the duties and responsibilities now existing or which may hereafter be imposed upon it by law. Such powers include the specific powers enumerated in this section.

Subd. 2. Officers and employees. The metropolitan council may prescribe all terms and conditions for the employment of its officers, employees, and agents including but not limited to the fixing of compensation, their classification, benefits, and the filing of performance and fidelity bonds and such policies of insurance as it may deem advisable, the premium for which, however, shall be paid for by the district. Officers and employees of the metropolitan council, however, are public employees. The compensation and other conditions of employment of such officers and employees shall not be governed by any rule applicable to state employees in the classified service nor to any of the provisions of chapter 15A, unless the council so provides. Those employed by the metropolitan council are members of the Minnesota state retirement system. Those employed by a predecessor of the metropolitan council and transferred to it may at their option become members of the Minnesota state retirement system or may continue as members of the public retirement association to which they belonged as employees of the predecessor of the metropolitan council. The metropolitan council shall make the employer's contributions to pension funds of its employees.

Subd. 3. Consulting contracts. The metropolitan council may contract for the services of consultants who perform engineering, legal, or services of a professional nature. Such contracts shall not be subject to the requirements of any law relating to public bidding.

Subd. 4. Gifts and appropriations. The metropolitan council may accept gifts, apply for and use grants or loans of money or other property from the United States, the state, or any person for any metropolitan council purpose and may enter into agreements required in connection therewith and may hold, use, and dispose of such moneys or property in accordance with the

terms of the gift, grant, loan, or agreement relating thereto. All moneys of the metropolitan council received pursuant to this subdivision or any other provision of law shall be deposited in the state treasury and the amount thereof is appropriated annually to the metropolitan council for the purposes of carrying out its duties and responsibilities.

Subd. 5. Development guide. The metropolitan council shall prepare and adopt, after appropriate study and such public hearings as may be necessary, a comprehensive development guide for the metropolitan area. It shall consist of a compilation of policy statements, goals, standards, programs, and maps prescribing guides for an orderly and economic development, public and private, of the metropolitan area. The comprehensive development guide shall recognize and encompass physical, social, or economic needs of the metropolitan area and those future developments which will have an impact on the entire area including but not limited to such matters as land use, parks and open space land needs, the necessity for and location of airports, highways, transit facilities, public hospitals, libraries, schools, and other public buildings.

Subd. 6. Council review; independent commissions, boards, and agencies. (1) The metropolitan council shall review all long term comprehensive plans of each independent commission, board, or agency prepared for its operation and development within the metropolitan area but only if such plan is determined by the council to have an area-wide effect, a multi community effect, or to have a substantial effect on metropolitan development. Each plan shall be submitted to the council before any action is taken to place the plan or any part thereof, into effect.

(2) No action shall be taken to place any plan or any part thereof, into effect until 60 days have elapsed after the date of its submission to the council, or until the council finds and notifies the submitting commission, board, or agency that the plan is consistent with its comprehensive guide for the metropolitan area and the orderly and economic development of the metropolitan area, whichever first occurs. If, within 60 days after the date of submission, the council finds that a plan, or any part thereof, is inconsistent with its comprehensive guide for the metropolitan area or detrimental to the orderly and economic development of the metropolitan area, or any part thereof, it may direct that the operation of the plan, or such part thereof, be indefinitely suspended; provided that the council shall not direct the suspension of any plan or part thereof of any sanitary sewer district operating within the metropolitan area which pertains to the location and construction of a regional sewer plant or plants or the expansion or improvement of the present Minneapolis-St. Paul sanitary district treatment plant. An affected commission, board, or agency may appeal the decision of the metropolitan council suspending a plan, or part thereof, to the entire membership of the metropolitan council for public hearing. If the metropolitan council and the affected commission, board, or agency are unable to agree as to an adjustment of the plan, so that it may receive the council's approval, then a record of the disagreeing positions of the metropolitan council and the affected commission, board, or agency shall be made and the metropolitan council shall prepare a recommendation in connection therewith for consideration and disposition by the next regular session of the legislature.

Subd. 7. Council review; municipalities. Each city, village, borough, and town, all or part of which lies within the metropolitan area, shall submit to the metropolitan council for comment and recommendation thereon its long term comprehensive plans or any matter which has a substantial effect on metropolitan area development, including but not limited to plans for land use. The council shall maintain such plans in its files available for inspection by members of the public. No action shall be taken to place any such plan or part thereof into effect until 60 days have elapsed after its submission to the council. Promptly after submission, the council shall notify each city, village, borough, town, county, or special district which may be affected by the plans submitted, of the general nature of the plan, the date of submission, and the identity of the submitting unit. Political subdivisions contiguous to the submitting unit shall be notified in all cases. Within ten days after receipt of such notice any governmental unit so notified may request the council to conduct a hearing at which the submitting unit and any other governmental unit or subdivision may present its views. The council may attempt to mediate and resolve differences of opinion which exist among the participants in the hearing with respect to the plans submitted.

Subd. 8. Review of federal programs. The metropolitan council shall review all applications of governmental units, independent commissions, boards or agencies operating in the metropolitan area for a loan or grant from the United States of America or any agency thereof if review by a regional agency is required by federal law or the federal agency. Each governmental unit, independent commission, board, or agency, before submitting such an application to the United States government or an agency thereof shall first transmit the application to the metropolitan council for its comments and recommendations with respect to whether or not the project proposed is consistent with the comprehensive development guide for the metropolitan area. The comments and recommendations made by the metropolitan council shall then become a part of the application and if submitted to the United States of America or an agency thereof, such comments and recommendations shall also be submitted.

Subd. 9. Data collection. The metropolitan council in cooperation with other departments and agencies of the state and the regents of the university of Minnesota may develop a center for data collection and storage to be used by it and other governmental users and may accept gifts as otherwise authorized in this section for the purposes of furnishing information on such subjects as population, land use, governmental finances, and the like.

Subd. 10. Urban research. Where studies have not been otherwise authorized by law the metropolitan council may study the feasibility of programs relating but not limited to water supply, refuse disposal, surface water drainage, communication, transportation, and other subjects of concern to the peoples of the metropolitan area, may institute demonstration projects in connection therewith, and may accept gifts for such purposes as otherwise authorized in this section.

Subd. 11. Civil defense. The metropolitan council may coordinate civil defense, community shelter planning within the metropolitan area, accept gifts for such purposes as otherwise authorized in this section and contract with local governmental agencies and consultants in connection therewith.

Subd. 12. Local governmental participation. The metropolitan council may (1) participate as a party in any proceedings originating before the Minnesota municipal commission under chapter 414, if the proceedings involve the change in a boundary of a governmental unit in the metropolitan area, (2) conduct studies of the feasibility of annexing, enlarging, or consolidating units in the metropolitan area, (3) furnish space and other necessary assistance to a metropolitan expeditor assigned to the metropolitan area or any part thereof under the Federal Demonstration City Act of 1966,[1] on condition that such expeditor files monthly reports with the metropolitan council concerning his activities. The metropolitan council shall approve the use of moneys made available for land acquisition to local units of government from the land and conservation fund, the open space program of HUD, the natural resources account in the state treasury, if the use thereof conforms with the system of priorities established by law as a part of a comprehensive plan for the development of parks; otherwise it shall disapprove of the use thereof.

Subd. 13. Participation in special district activity. The metropolitan council shall appoint from its membership a member to serve with the metropolitan airports commission, a member to serve with the mosquito control commission, a member to serve on the Minneapolis-St. Paul sanitary district or any successor thereof, and may appoint a member to serve on any metropolitan area commission or board authorized by law. Each member of the metropolitan council so appointed on each of such commissions shall serve without a vote.

Laws 1967, c. 896, § 6, eff. May 26, 1967. Amended by Laws 1969, c. 9, § 86, eff. Feb. 12, 1969.

[1] 42 U.S.C.A. § 3301 et seq.

Metropolitan sewer service, see § 473C.01 et seq.

1969 Amendment. Correction out.

Law Review Commentaries

Amendment to incorporation, consolidation, annexation and detachment statute. 1970, 54 Minn.Law Review 1052.

1. In general

Only the state treasurer must participate in the disbursement of monies which the metropolitan council deposits in the state treasury. Op.Atty.Gen., 8, Oct. 6, 1967.

Except for monies controlled by subd. 4 of this section the provisions of § 473B.04, permit the deposit of monies outside the state treasury. Id.

473B.07 Special studies and reports

Subdivision 1. The metropolitan council shall engage in a continuous program of research and study concerning the matters enumerated in this section.

Subd. 2. The control and prevention of air pollution.

Subd. 3. The acquisition and financing of suitable major parks and open spaces within and adjacent to the metropolitan area.

Subd. 4. The control and prevention of water pollution in the metropolitan area in conformity with applicable federal and state laws.

Subd. 5. The development of long range planning in the metropolitan area but not for the metropolitan area.

Subd. 6. The acquisition of necessary facilities for the disposal of solid waste material for the metropolitan area and the means of financing such facilities.

Subd. 7. The examination of the tax structure in the metropolitan area and consideration of ways to equalize the tax resources therein.

Subd. 8. Assessment practices in the metropolitan area.

Subd. 9. The acquisition of necessary storm water drainage facilities for the metropolitan area and the means of financing such facilities.

Subd. 10. The necessity for the consolidation of common services of local governmental units and the kind of consolidation most suitable in the public interest.

Subd. 11. Advance land acquisition for development purposes in the metropolitan area and the role of the public in connection therewith.

Subd. 12. All studies shall include recommendations as to the governmental organization, governmental subdivision, or governmental district best suited to discharge the powers recommended.

Laws 1967, c. 896, § 7, eff. May 26, 1967.

473B.08 Tax levy

Subdivision 1. The metropolitan council may levy a tax on all taxable property in the counties named in section 473B.02 to provide funds for the purposes of sections 473B.01 to 473B.08. The tax shall not exceed seven tenths of one mill on each dollar of assessed valuation of all such taxable property, and shall be levied and collected in the manner provided by section 473.08.

Subd. 2. This section applies to taxes levied in 1969 and subsequent years.

Laws 1967, c. 896, § 8. Amended by Laws 1969, c. 1114, § 3.

1969 Amendment. Increased the tax limitation in subd. 1 from one half to seven tenths of one mill and added subd. 2.

*Council review of County plans has been added to these powers by amendment during the 1971 session of the Minnesota Legislature.

Massachusetts Anti-Snob Zoning Law of 1969

40B Mass. Gen. Laws Ann. §§20-23.

§ 19. Exchange of Information, etc., between District and Agencies and Political Subdivisions of Commonwealth.

There shall be a mutual exchange between the commission and all agencies of the commonwealth and of each political subdivision thereof within the district, of data, records, and information within their knowledge and control pertaining to the district, or to parts thereof which may be required for the preparation of programs designed to achieve the purposes of this chapter. (Added by 1968, 663, approved July 18, 1968, effective 90 days thereafter.)

LOW AND MODERATE INCOME HOUSING

§ 20. Definitions and Construction of Terms.

The following words, wherever used in this section and in sections twenty-one to twenty-three, inclusive, shall, unless a different meaning clearly appears from the context, have the following meanings:—

"Low or moderate income housing", any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute, whether built or operated by any public agency or any nonprofit or limited dividend organization.

"Uneconomic", any condition brought about by any single factor or combination of factors to the extent that it makes it impossible for a public agency or nonprofit organization to proceed in building or operating low or moderate income housing without financial loss, or for a limited dividend organization to proceed and still realize a reasonable return in building or operating such housing within the limitations set by the subsidizing agency of government on the size or character of the development or on the amount or nature of the subsidy or on the tenants, rentals and income permissible, and without substantially changing the rent levels and units sizes proposed by the public, nonprofit or limited dividend organizations.

"Consistent with local needs", requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing. Requirements or regulations shall be consistent with local needs when imposed by a board of zoning appeals after comprehensive hearing in a city or town where (1) low or moderate income housing exists which is in excess of ten per cent of the housing units reported in the latest decennial census of the city or town or on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial or industrial use or (2) the application before the board would result in the commencement of construction of such housing on sites comprising more than three tenths of one per cent of such land area or ten acres, whichever is larger, in any one calendar year; provided, however, that land area owned by the United States, the commonwealth or any political subdivision thereof, the metropolitan district commission or any public authority shall be excluded from the total land area referred to above when making such determination of consistency with local needs.

"Local Board", any town or city board of survey, board of health, board of subdivision control appeals, planning board, building inspector or the officer or board having supervision of the construction of buildings or the power of enforcing municipal building laws, or city council or board of selectmen. (Added by 1969, 774, § 1, approved August 23, 1969, effective 90 days thereafter.)

Editorial Note—

Section 3 of the amending act provides as follows:

SECTION 3. The provisions of this act are severable and, if any provision shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions.

§ 21. Proceedings Before Board of Zoning Appeals on Comprehensive Application to Build Housing, etc.

Any public agency or limited dividend or nonprofit organization proposing to build low or moderate income housing may submit to the board of appeals, established under section fourteen of chapter forty A, a single application to build such housing in lieu of separate applications to the applicable local boards. The board of appeals shall forthwith notify each such local board, as applicable, of the filing of such application by sending a copy thereof to such local boards for their recommendations and shall, within thirty days of the receipt of such application, hold a public hearing on the same. The board of appeals shall request the appearance at said hearing of such representatives of said local boards as are deemed necessary or helpful in making its decision upon such application and shall have the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application, including but not limited to the power to attach to said permit or approval conditions and requirements with respect to height, site plan, size or shape, or building materials as are consistent with the terms of this section. The board of appeals, in making its decision on said application, shall take into consideration the recommendations of the local boards and shall have the authority to use the testimony of consultants. The provisions of section seventeen of chapter forty A shall apply to all such hearings. The board of appeals shall render a decision, based upon a majority vote of said board, within forty days after the termination of the public hearing and, if favorable to the applicant, shall forthwith issue a comprehensive permit or approval. If said hearing is not convened or a decision is not rendered within the time allowed, unless the time has been extended by mutual agreement between the board and the applicant, the application shall be deemed to have been allowed and the comprehensive permit or approval shall forthwith issue. Any person aggrieved by the issuance of a comprehensive permit or approval may appeal to the court as provided in section twenty-one of chapter forty A. (Added by 1969, 774, § 1, approved August 23, 1969, effective 90 days thereafter.)

§ 22. Review by Housing Appeals Committee of Denial or Conditional Grant of Application, etc.

Whenever an application filed under the provisions of section twenty-one is denied, or is granted with such conditions and requirements as to make the building or operation of such housing uneconomic, the applicant shall have the right to appeal to the housing appeals committee in the department of community affairs for a review of the same. Such appeal shall be taken within twenty days after the date of the notice of the decision by the board of appeals by filing with said committee a statement of the prior proceedings and the reasons upon which the appeal is based. The committee shall forthwith notify the board of appeals of the filing of such petition for review and the latter shall, within ten days of the receipt of such notice, transmit a copy of its decision and the reasons therefor to the committee. Such appeal shall be heard by the committee within twenty days after receipt of the applicant's statement. A stenographic record of the proceedings shall be kept and the commitee shall render a written decision, based upon a majority vote, stating its findings of fact, its conclusions and the reasons therefor within thirty days after the termination of the hearing, unless such time shall have been extended by mutual agreement between the committee and the applicant. Such decision may be reviewed in the superior court in accordance with the provisions of chapter thirty A. (Added by 1969, 774, § 1, approved August 23, 1969, effective 90 days thereafter.)

§ 23. Limitation on Issues Before Housing Appeals Committee; Findings; Enforcement of Orders, etc.

The hearing by the housing appeals committee in the department of community affairs shall be limited to the issue of whether, in the case of the denial of an application, the decision of the board of appeals was reasonable and consistent with local needs and, in the case of an approval of an application with conditions and requirements imposed, whether such conditions and requirements make the construction or operation of such housing uneconomic and whether they are consistent with local needs. If the committee finds, in the case of a denial, that the decision of the board of appeals was unreasonable and not consistent with local needs, it shall vacate such decision and shall direct the board to issue a comprehensive permit or approval to the applicant. If the committee finds, in the case of an approval with conditions and requirements imposed, that the decision of the board makes the building or operation of such housing uneconomic and is not consistent with local needs, it shall order such board to modify or remove any such condition or requirement so as to make the proposal no longer uneconomic and to issue any necessary permit or approval; provided, however, that the committee shall not issue any order that would permit the building or operation of such housing in accordance with standards less safe than the applicable building and site plan requirements of the federal Housing Administration or the Massachusetts Housing Finance Agency, whichever agency is financially assisting such housing. Decisions or conditions and requirements imposed by a board of appeals that are consistent with local needs shall not be vacated, modified or removed by the committee notwithstanding that such decisions or conditions and requirements have the effect of making the applicant's proposal uneconomic.

The housing appeals committee or the petitioner shall have the power to enforce the orders of the committee at law or in equity in the superior court. The board of appeals shall carry out the order of the hearing appeals committee within thirty days of its entry and, upon failure to do so, the order of said committee shall, for all purposes, be deemed to be the action of said board, unless the petitioner consents to a different decision or order by such board. (Added by 1969, 774, § 1, approved August 23, 1969, effective 90 days thereafter.)

Maine Site Location of Development Act of 1970

As Revised Effective September 23, 1971

ARTICLE 6. SITE LOCATION OF DEVELOPMENT

(1970, c. 571, § 2)

Sec. 481. Findings and purpose

The Legislature finds that the economic and social wellbeing of the citizens of the State of Maine depend upon the location of commercial and industrial developments with respect to the natural environment of the State; that many developments because of their size and nature are capable of causing irreparable damage to the people and the environment in their surroundings; that the location of such developments is too important to be left only to the determination of the owners of such developments; and that discretion must be vested in state authority to regulate the location of developments which may substantially affect environment.

The purpose of this subchapter is to provide a flexible and practical means by which the State, acting through the Environmental Improvement Commission, in consultation with appropriate state agencies, may exercise the police power of the State to control the location of those developments substantially affecting local environment in order to insure that such developments will be located in a manner which will have a minimal adverse impact on the natural environment of their surroundings.

Sec. 482. Definitions

As used in this subchapter:

1. Commission. "Commission" means the Environmental Improvement Commission.

2. Development which may substantially affect environment. "Development which may substantially affect environment" means any commercial or industrial development which requires a license from the Environmental Improvement Commission, or which occupies a land area in excess of 20 acres, or which contemplates drilling for or excavating natural resources, excluding borrow pits for sand, fill or gravel, regulated by the State Highway Commission and pits of less than 5 acres, or which occupies on a single parcel a structure or structures in excess of a ground area of 60,000 square feet.

3. Natural environment of a locality. "Natural environment of a locality" includes the character, quality and uses of land, air and waters in the area likely to be affected by such development, and the degree to which such land, air and watrs are free from non-naturally occurring contamination.

4. Person. "Person" means any person, firm, corporation or other legal entity.

Sec. 483. Notification required

Any person intending to construct or operate a development which may substantially affect local environment shall, before commencing construction or operation, notify the Commission in writing of his intent and of the nature and location of such development. The Commission shall within 14 days of receipt of such notification, either approve the proposed location or schedule a hearing thereon in the manner hereinafter provided.

Sec. 484. Hearings; orders; construction suspended

In the event that the Commission determines to hold a hearing on a notification submitted to it pursuant to section 483, it shall hold such hearing within 30 days of such determination, and shall cause notice of the date, time and place thereof to be given to the person intending the development and in addition shall give public notice thereof by causing such notice to be published in some newspaper of general circulation in the proposed locality, or if none, in the state paper; the date of the first publication to be at least 10, and the last publication to be at least 3, days before the date of the hearing.

At such hearing the Commission shall solicit and receive testimony to determine whether such development will in fact substantially affect the environment or pose a threat to the public's health, safety or general welfare.

The Commission shall approve a development proposal whenever it finds that:

1. Financial capacity. The proposed development has the financial capacity and technical ability to meet state air and water pollution control standards, has made adequate provision for solid waste disposal, the control of offensive odors, and the securing and maintenance of sufficient and healthful water supplies.

2. Traffic movement. The proposed development has made adequate provision for loading, parking and traffic movement from the development area onto public roads.

3. No adverse affect on natural environment. The proposed development has made adequate provision for fitting itself harmoniously into the existing natural environment and will not adversely affect existing uses, scenic character, natural resources or property values in the municipality or in adjoining municipalities.

4. Soil types. The proposed development will be built on soil types which are suitable to the nature of the undertaking.

1970, C. 571, § 2

In case of a permanently installed power generating facility of more than 1,000 kilowatts or a transmission line carrying 125 kilovolts or more proposed to be erected within this State by an electrical company or companies, the proposed development, in addition to meeting the requirements of subsections 1 to 4, shall also have been approved by the Public Utilities Commission under Title 35, section 13-A.

1971, C. 476, § 2.

At hearings held under this section the burden shall be upon the person proposing the development to affirmatively demonstrate to the Commission that each of the criteria for approval listed in the preceding paragraphs have been met, and that the public's health, safety and general welfare will be adequately protected.

A complete verbatim transcript shall be made of all hearings held pursuant to this section.

1970, C. 571, §2; 1971, C. 256, § 5.

Within 45 days after the Commission adjourns any hearing held under this section, it shall make findings of fact and issue an order granting or denying permission to the person proposing such development to construct or operate the same as proposed, or granting such permission upon such terms and conditions as the Commission may deem advisable to protect and preserve the environment and the public's health, safety and general welfare.

Any person who has notified the Commission, pursuant to section 483, of his intent to create a development substantially affecting local environment shall, upon receipt of notice that the Commission has determined to hold a hearing under this section, immediately defer or suspend construction or operation with respect to such development until the Commission has issued its order after such hearing.

1970, C. 571, § 2.

Sec. 361 (L. Part) Hearing Requirements

Whenever the commission is required or empowered to conduct a hearing pursuant to any provision of law, such hearings may be held personally by the commission, or by any member of the commission or by any employee or representative of the commission, as the commission may determine. If the hearing is conducted by a single commissioner or other employee or representative, such commissioner or employee shall report his findings of fact and conclusions to the commission together with the transcript of the hearing and all exhibits. Such findings and conclusions shall become a part of record. The commission shall not consider such findings or conclusions when acting upon such record, but may take such action, issue such orders and make such decisions as if it had heard and conducted the hearing itself.

1971, C. 414.

Sec. 485. Failure to notify Commission; hearing; injunctions; orders

The Commission may at any time with respect to any person who has commenced construction or operation of any development without having notified the Commission pursuant to section 483, schedule and conduct a hearing in the manner provided by section 484 with respect to such development.

The Commission may request the Attorney General to enjoin any person who has commenced construction or operation of any development without having first notified the Commission pursuant to section 483, from further construction or operation pending such hearing and order. Within 30 days of such request the Attorney General shall bring an appropriate civil action.

In the event that the Commission shall issue an order, denying a person commencing construction or operation of any development without first having notified the Commission pursuant to section 483, permission to continue such construction or operation, it may further order such person to restore the area affected by such construction or operation to its condition prior thereto or as near as may be to the satisfaction of the Commission.

Sec. 486. Enforcement

All orders issued by the Commission under this subchapter shall be enforced by the Attorney General. If compliance with any order of the Commission is not had within the time period therein specified, the Commission shall immediately notify the Attorney General of this fact. Within 30 days thereafter the Attorney General shall bring an appropriate civil action designed to secure compliance with such order.

Sec. 487. Judicial review

Any person, with respect to whose development the Commission has issued an order after hearing pursuant to section 484 may within 30 days after notice of such order, appeal therefrom to the Supreme Judicial Court. Notice of such appeal shall be given by the appellant to the Commission. The proceedings shall not be de novo. Review shall be limited to the record of the hearing before and the order of the Commission. The court shall decide whether the Commission acted regularly and within the scope of its authority, and whether the order is supported by substantial evidence, and on the basis of such decision may enter judgment affirming or nullifying such determination.

§ 488. Applicability

This subchapter shall not apply to any development in existence or in possession of applicable state or local licenses to operate or under construction on January 1, 1970 or to any development the construction and operation of which has been specifically authorized by the Legislature prior to the effective date hereof, or to public service corporation transmission lines except transmission lines carrying 125 kilovolts or more.

1971, C. 571, § 2; 1971, C. 476, § 3.

Jones Act of 1963
130 Mass. Gen. Laws Ann.

§ 27A. Removal, Filling and Dredging of Certain Areas Bordering on Coastal Waters of Commonwealth.

No person shall remove, fill or dredge any bank, flat, marsh, meadow or swamp bordering on coastal waters without written notice of his intention to so remove, fill or dredge to the board of selectmen in a town or to the appropriate licensing authority in a city, to the state department of public works, and to the director of marine fisheries. Said notice shall be sent by registered mail at least fourteen days prior to any such removing, filling or dredging. The selectmen or, in the case of a city, the licensing authority, shall hold a hearing on said proposal, within ten days of the receipt of said notice, and shall notify by mail the person intending to do such removing, filling or dredging, the department of public works and the director, of the time and place of said hearing. The selectmen or licensing authority, as the case may be, may recommend the installation of such bulkheads, barriers or other protective measures as may protect the public interest. If the department of public works finds that such proposed removing, filling or dredging would violate the provisions of sections thirty and thirty A of chapter ninety-one, it shall proceed to enforce the provisions of said sections. If the area on which the proposed work is to be done contains shellfish or is necessary to protect marine fisheries, the said director may impose such conditions on said proposed work as he may determine necessary to protect such shellfish or marine fisheries, and work shall be done subject thereto.

Whoever violates any provision of this section shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than six months, or both, and the superior court shall have jurisdiction in equity to restrain a continuing violation of this section.

This section shall not affect or regulate the ordinary and usual work of any mosquito control project operating under chapter two hundred and fifty-two, or under the provisions of a special act. (1963, 426, approved May 22, 1963, effective by act of Governor, May 22, 1963.)

Hatch Act of 1965
131 Mass. Gen. Laws Ann.

§ 40. Protection of Flood Plains.

A person shall not remove, fill or dredge any bank, flat, marsh, meadow or swamp bordering on any inland waters without filing written notice of his intention to so remove, fill or dredge, including such plans as may be necessary to describe such proposed activity, with the board of selectmen in a town or the mayor of a city, and with the state departments of public works and natural resources. Such notice shall be sent by registered mail at least thirty days prior to any such removing, filling or dredging. The selectmen or mayor, as the case may be, shall hold a public hearing on said proposal within fourteen days of the receipt of said notice, and shall notify by mail the person intending to do such removing, filling or dredging, and the said state departments of the time and place of said hearing. The selectmen or mayor may recommend such protective measures as may protect the public interest. The selectmen or mayor, within seven days thereafter, shall transmit such recommendations to the commissioner of natural resources, but the failure to do so shall not delay the issuance of an order by the commissioner. The department of public works shall determine whether the proposed activity would violate any provisions of chapter ninety-one and shall take such action as may be necessary to enforce such provisions. If the area on which the proposed work is to be done is determined by the department of natural resources to be essential to public or private water supply or to proper flood control, the department shall by written order signed by the commissioner impose such conditions as may be necessary to protect the interests described herein, and the work shall be done in accordance therewith. The provisions of this section shall not apply to areas established by the water resources commission as flood plain zones. Land used for agricultural purposes shall be exempt from the provisions of this section. The provisions of this section shall not apply to any work done under the provisions of clause (36) of section five of chapter forty, chapter two hundred and fifty-two, or any special act. The provisions of this section shall not apply to inland wetlands which are subject to an order adopted under section forty A, nor to inland wetlands immediately contiguous thereto unless such contiguous wetlands had been subject to such an order which was thereafter revoked by reason of the objection of the owner. The commissioner may, by rule or regulation, exempt from this section such other use as he may deem not inconsistent with the purposes of this section. The superior court shall have jurisdiction in equity to restrain a continuing violation of this section. (Added by 1967, 802, § 1, approved Dec. 20, 1967, effective, by act of Governor, Dec. 21, 1967; amended by 1968, 444, § 2, approved June 26, 1968, effective 90 days thereafter.)

Coastal Wetlands Act of 1965
130 Mass. Gen. Laws Ann.

§ 105. Protection of Coastal Wetlands.

The commissioner, with the approval of the board of natural resources, may from time to time, for the purpose of promoting the public safety, health and welfare, and protecting public and private property, wildlife and marine fisheries, adopt, amend, modify or repeal orders regulating, restricting or prohibiting dredging, filling, removing or otherwise altering, or polluting, coastal wetlands. 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.

The commissioner shall, before adopting, amending, modifying or repealing any such order, hold a public hearing thereon in the municipality in which the coastal wetlands to be affected are located, giving notice thereof to the state reclamation board, the department of public works and each assessed owner of such wetlands by mail at least twenty-one days prior thereto.

Upon the adoption of any such order or any order amending, modifying or repealing the same, the commissioner shall cause a copy thereof, together with a plan of the lands affected and a list of the assessed owners of such lands, to be recorded in the proper registry of deeds or, if such lands are registered, in the registry district of the land court, and shall mail a copy of such order and plan to each assessed owner of such lands affected thereby. Such orders shall not be subject to the provisions of chapter one hundred and eighty-four. Any person who violates any such order shall be punished by a fine of not less than ten nor more than fifty dollars, or by imprisonment for not more than one month, or by both such fine and imprisonment.

The superior court shall have jurisdiction in equity to restrain violations of such orders.

Any person having a recorded interest in land affected by any such order, may, within ninety days after receiving notice thereof, petition the superior court to determine whether such order so restricts the use of his property as to deprive him of the practical uses thereof and is therefore an unreasonable exercise of the police power because the order constitutes the equivalent of a taking without compensation. If the court finds the order to be an unreasonable exercise of the police power, as aforesaid, the court shall enter a finding that such order shall not apply to the land of the petitioner; provided, however, that such finding shall not affect any other land than that of the petitioner. The commissioner shall cause a copy of such finding to be recorded forthwith in the

proper registry of deeds or, if the land is registered, in the registry district of the land court. The method provided in this paragraph for the determination of the issue of whether any such order constitutes a taking without compensation shall be exclusive, and such issue shall not be determined in any other proceeding, nor shall any person have a right to petition for the assessment of damages under chapter seventy-nine by reason of the adoption of any such order.

The department may, after a finding has been entered that such order shall not apply to certain land as provided in the preceding paragraph, take the fee or any lesser interest in such land in the name of the commonwealth by eminent domain under the provisions of chapter seventy-nine and hold the same for the purposes set forth in this section.

No action by the commissioner or the department under this section shall prohibit, restrict or impair the exercise or performance of the powers and duties conferred or imposed by law on the department of public works, the state reclamation board or any mosquito control or other project operating under or authorized by chapter two hundred and fifty-two.

No order adopted hereunder shall apply to any area under the control of the metropolitan district commission. (Added by 1965, 768, § 1, approved, with emergency preamble, Nov. 23, 1965.)

Inland Wetlands Act of 1968
131 Mass. Gen. Laws Ann.

§ 40A. Protection of Inland Wetlands.

The commissioner of natural resources, with the approval of the board of natural resources, may from time to time, for the purpose of promoting the public safety, health and welfare, and protecting public and private property, wildlife, fisheries, water resources, flood plain areas and agriculture, adopt, amend or repeal orders regulating, restricting or prohibiting dredging, filling, removing or otherwise altering or polluting inland wetlands. In this section the term "inland wetlands" shall mean any marsh or swamp bordering on inland waters or that portion of any bank which touches any inland waters, or any marsh or swamp subject to flooding by fresh water.

The commissioner shall, before adopting any such order, hold a public hearing thereon in the city or town in which the inland wetlands to be affected are located, giving notice thereof to the state reclamation board, the department of public works, the department of public health, the metropolitan district commission, the selectmen, conservation commissioners and assessors of each such town, the mayor, city council, conservation commissioners and assessors of each such city, and each assessed owner of such wetlands by certified mail at least twenty-one days prior thereto. For the purposes of this section the person to whom the land was assessed in the last preceding annual tax levy shall be deemed to be the assessed owner thereof, and the notice shall be addressed in the same manner as the notice of such tax levy, unless a different owner or a different address is known by the commissioner to be the correct one in which case the notice shall be so addressed. No order shall be adopted unless and until it is approved by the selectmen or city council of the town or city in which said wetlands are located; provided that if the selectmen or the city council fail to approve or disapprove such proposed order within thirty days after receipt of a written request from the commissioner such order shall be deemed to have been approved; and provided further, that if such order is so disapproved the commissioner may, after the expiration of one year from the date of such disapproval, adopt such order.

Upon the adoption of any such order or any order amending or repealing the same, the commissioner shall cause a copy thereof, together with a plan of the lands affected and a list of the assessed owners of such lands, to be recorded in the registry of deeds or the office of the assistant recorder for the district wherein the land lies, and shall send by certified mail a copy of such order and plan to each assessed owner of land affected and to the clerk and board of assessors of each city or town in which the land is located. Such order shall not be subject to the provisions of chapter one hundred and eighty-four. The superior court shall have jurisdiction in equity to enforce, and remedy violations of, such orders.

Any person having, at the time of said recording, a recorded interest in land subject to the order may, within ninety days of receiving notice thereof, object to the order by applying to the department by certified mail to amend or repeal the order in so far as it applies to his interest or to purchase all or part of his interest. An heir, devisee or the personal representative of any person who had at the time of his death a right to apply may exercise said deceased person's right within ninety days of receiving notice of such order. The commissioner shall, within ninety days of receiving any such objections, repeal the order in so far as it applies to any such interest in land to which the applicant demonstrates that he has title unless the commissioner to the satisfaction of the applicant amends the order or purchases all or part of the applicant's interest therein. In addition to all other remedies the applicant shall have a right to appeal under the provisions of section fourteen of chapter thirty A any adverse determination of title by the commissioner. The method provided in this paragraph for objecting to an order shall be exclusive and the validity of any order adopted hereunder shall not be contested in any other proceeding or by any other person. No person shall have a right to petition for damages by reason of any such order; provided, however, that if there is a taking by eminent domain as hereinafter provided, he may recover damages under chapter seventy-nine.

No such order shall prohibit, restrict or regulate the use or improvement of land or water for agricultural purposes without the written consent of the owner, provided, however, that any subsequent nonagricultural use of land which was filled or drained for agricultural purposes at a time when said land was subject to an order under this section may be regulated, restricted or prohibited by such order. No such order shall prohibit, restrict or regulate the exercise or performance of the powers and duties conferred or imposed by law upon the department of public health, the department of public works, the metropolitan district commission, the division of fisheries and game, the Massachusetts aeronautics commission, or the state reclamation board, or any mosquito control or other project operating under or authorized by chapter two hundred and fifty-two. If after following the procedures hereinbefore set forth, no such order has become effective as to any particular land or interest therein, the department may, subject to a specific appropriation for the purpose, take such land or interest therein by eminent domain, or may acquire the same by purchase, gift or otherwise. Awards of damages, expenses of acquisition of land and water, and expenses incidental thereto and to the preparation of maps and plans of the lands to be affected, to the holding of hearings, and to the adoption and recording of orders, as provided in this section, may be paid out of funds made available for the purpose of section three of chapter one hundred and thirty-two A.

The exercise of the power of eminent domain under the provisions of this section shall be subject to the approval of the board of natural resources, the governor and the executive council. (Added by 1968, 444, § 1, approved June 26, 1968, effective 90 days thereafter.)

Wisconsin Shoreland Zoning Law

Wis. Stat. Ann. Ch. 59.971, 144.26 (Supp. 1970)

59.971 Zoning of shorelands on navigable waters. (1) To effect the purposes of s. 144.26 and to promote the public health, safety and general welfare, counties may, by ordinance enacted separately from ordinances pursuant to s. 59.97, zone all lands (referred to herein as shorelands) in their unincorporated areas within the following distances from the normal high-water elevation of navigable waters as defined in s. 144.26 (2) (d): 1,000 feet from a lake, pond or flowage; 300 feet from a river or stream or to the landward side of the flood plain, whichever distance is greater. If the navigable water is a glacial pothole lake, the distance shall be measured from the high watermark thereof.

(2) (a) Except as otherwise specified, all provisions of s. 59.97 apply to ordinances and their amendments enacted under this section, but they shall not require approval or be subject to disapproval by any town or town board.

(b) If an existing town ordinance relating to shorelands is more restrictive than an ordinance later enacted under this section affecting the same shorelands, it continues as a town ordinance in all respects to the extent of the greater restrictions, but not otherwise.

(c) Ordinances enacted under this section shall accord and be consistent with any comprehensive zoning plan or general zoning ordinance applicable to the enacting counties, so far as practicable.

(3) All powers granted to a county under s. 236.45 may be exercised by it with respect to shorelands, but it must have or provide a planning agency as defined in s. 236.02 (1).

(4) (a) Section 66.30 applies to this section, except that for the purposes of this section any agreement under s. 66.30 shall be effected by ordinance. If the municipalities as defined in s. 144.26 are served by a regional planning commission under s. 66.945, the commission may, with its consent, be empowered by the ordinance of agreement to administer each ordinance enacted hereunder throughout its enacting municipality, whether or not the area otherwise served by the commission includes all of that municipality.

(b) Variances and appeals regarding shorelands within a county are for the board of adjustment for that county under s. 59.99, and the procedures of that section apply.

(5) An ordinance enacted under this section supersedes all provisions of an ordinance enacted under s. 59.97 that relate to shorelands.

(6) If any county does not adopt an ordinance by January 1, 1968, or if the department of natural resources, after notice and hearing, determines that a county has adopted an ordinance which fails to meet reasonable minimum standards in accomplishing the shoreland protection objectives of s. 144.26 (1), the department of natural resources shall adopt such an ordinance. As far as possible, s. 87.30 shall apply to this subsection.

144.26 Navigable waters protection law. (1) To aid in the fulfillment of the state's role as trustee of its navigable waters and to promote public health, safety, convenience and general welfare, it is declared to be in the public interest to make studies, establish policies, make plans and authorize municipal shoreland zoning regulations for the efficient use, conservation, development and protection of this state's water resources. The regulations shall relate to lands under, abutting or lying close to navigable waters. The purposes of the regulations shall be to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty.

(2) In this section, unless the context clearly requires otherwise:

(a) "Subcommittee" means the water subcommittee of the natural resources council of state agencies.

(c) "Municipality" or "municipal" means a county, village or city.

(d) "Navigable water" or "navigable waters" means Lake Superior, Lake Michigan, all natural inland lakes within Wisconsin and all streams, ponds, sloughs, flowages and other waters within the territorial limits of this state, including the Wisconsin portion of boundary waters, which are navigable under the laws of this state.

(e) "Regulation" refers to ordinances enacted under ss. 59.971 and 62.23 (7) and means shoreland subdivision and zoning regulations which include control of uses of lands under, abutting or lying close to navigable waters for the purposes specified in sub. (1), pursuant to any of the zoning and subdivision control powers delegated by law to cities, villages and counties.

(f) "Water resources," where the term is used in reference to studies, plans, collection of publications on water and inquiries about water, means all water whether in the air, on the earth's surface or under the earth's surface. "Water resources" as used in connection with the regulatory functions under this section means navigable waters.

(g) "Shorelands" means the lands specified under par. (e) and s. 59.971 (1).

(3) (a) The subcommittee shall serve in an ex officio advisory capacity to the department and provide a liaison function whereby the several state agencies may better co-ordinate their activities in managing and regulating water resources.

(b) The department shall make studies, establish policies and make plans for the efficient use, conservation, development and protection of the state's water resources and:

1. On the basis of these studies and plans make recommendations, through the subcommittee, to existing state agencies relative to their water resource activities.

2. Locate and maintain information relating to the state's water resources. The department shall collect pertinent data available from state, regional and federal agencies, the university of Wisconsin, local units of government and other sources.

3. Serve as a clearinghouse for information relating to water resources including referring citizens and local units of government to the appropriate sources for advice and assistance in connection with particular water use problems.

(5) (a) The department shall prepare a comprehensive plan as a guide for the application of municipal ordinances regulating navigable waters and their shorelands as defined in this section for the preventive control of pollution. The plan shall be based on a use classification of navigable waters and their shorelands throughout the state or within counties and shall be governed by the following general standards:

1. Domestic uses shall be generally preferred.

2. Uses not inherently a source of pollution within an area shall be preferred over uses that are or may be a pollution source.

3. Areas in which the existing or potential economic value of public, recreational or similar uses exceeds the existing or potential economic value of any other use shall be classified primarily on the basis of the higher economic use value.

4. Use locations within an area tending to minimize the possibility of pollution shall be preferred over use locations tending to increase that possibility.

5. Use dispersions within an area shall be preferred over concentrations of uses or their undue proximity to each other.

(b) The department shall apply to the plan the standards and criteria set forth in sub. (6).

(6) Within the purposes of sub. (1) the department shall prepare and provide to municipalities general recommended standards and criteria for navigable water protection studies and planning and for navigable water protection regulations and their administration. Such standards and criteria shall give particular attention to safe and healthful conditions for the enjoyment of aquatic recreation; the demands of water traffic, boating and water sports; the capability of the water resource; requirements necessary to assure proper operation of septic tank disposal fields near navigable waters; building setbacks from the water; preservation of shore growth and cover; conservancy uses for low lying lands; shoreland layout for residential and commercial development; suggested regulations and suggestions for the effective administration and enforcement of such regulations.

(7) The department, the municipalities and all state agencies shall mutually co-operate to accomplish the objective of this section. To that end, the department shall consult with the governing bodies of municipalities to secure voluntary uniformity of regulations, so far as practicable, and shall extend all possible assistance therefor.

(8) This section and s. 59.971 shall be construed together to accomplish the purposes and objective of this section.

(9) Sections 30.50 to 30.80 are not affected or superseded by this section.

(10) A person aggrieved by an order or decision of the department under this section may cause its review under ch. 227.

Executive Order No. 11371, 9/6/67, as amended by Executive Order No. 11528, 4/24/70

New England River Basins Commission

EXECUTIVE ORDER NO. 11371
Sept. 6, 1967, 32 F.R. 12903

ESTABLISHMENT OF NEW ENGLAND RIVER BASINS COMMISSION

WHEREAS the Water Resources Planning Act (hereinafter referred to as the Act, 79 Stat. 244, 42 U.S.C. 1962 et seq.) [this chapter] authorizes the President to declare the establishment of a river basin water and related land resources commission when a request for such a commission is addressed in writing to the Water Resources Council (hereinafter referred to as the Council) by the Governor of a State within which all or part of the basin or basins concerned are located and when such a request is concurred in by the Council and by not less than one-half of the States within which portions of the basin or basins concerned are located; and

WHEREAS the Council, by resolution adopted October 14, 1965, concurred in the request of the Governor of the State of Maine, as Chairman of the New England Governors' Conference, and did itself request that the President declare the establishment of the New England River Basins Commission under the provisions of section 201 of the Act [this section]; and

WHEREAS the request of the Governor of the State of Maine and the resolution of the Council of October 14, 1965, together with written concurrences by the Governors of the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, and New York, satisfy the formal requirements of section 201 of the Act [this section]; and

WHEREAS it appears that it would be in the public interest and in keeping with the intent of Congress to declare the establishment of such a Commission:

NOW, THEREFORE, by virtue of the authority vested in me by section 201 of the Act [this section] and as President of the United States, it is ordered as follows:

Section 1. New England River Basins Commission. It is hereby declared that the New England River Basins Commission is established under the provisions of Title II of the Act [this subchapter].

Sec. 2. Jurisdiction of Commission. It is hereby determined that the jurisdiction, and employees are hereby authorized to perform and exercise, with respect to the jurisdiction specified in section 2 of this order, the functions, powers, and duties of such a Commission and of such Chairman, members, and employees, respectively, as set out in Title II of the Act [this subchapter].

Sec. 3. International coordination. The Chairman of the Commission is hereby authorized and directed to refer to the Council any matters under consideration by the Commission which relate to the areas of interest or jurisdiction of the New England River Basins Commission referred to in section 1 of this order (hereinafter referred to as the Commission) shall extend to the area of the six New England States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, and Rhode Island, together with that portion of the State of New York within the drainage area of the Housatonic River, but specifically excluding those portions of the States of Vermont and Massachusetts within the drainage area of the Hudson River and excluding also that portion of the State of Vermont within the drainage area of Lake Champlain, in accordance with the request of the Governor of the State of Maine, concurred in by the Governors of the other New England States and New York, and in accordance with the resolution of the Council.

Sec. 3. Membership of Commission. It is hereby determined that, in accordance with section 202 of the Act [section 1962b—1 of this title] the Commission shall consist of the following:

(1) a Chairman to be appointed by the President,

(2) one member from each of the following Federal departments and agencies: Department of Agriculture, Department of the Army, Department of Commerce, Department of Health, Education and Welfare, Department of Housing and Urban Development, Department of the Interior, Department of Transportation, and Federal Power Commission, each such member to be appointed by the head of each department or independent agency he represents,

(3) one member from each of the following States: Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, and New York, and

(4) one member from each interstate agency created by an interstate compact to which the consent of Congress has been given and whose jurisdiction extends to the waters of the area specified in section 2.

Sec. 4. Functions to be performed. The Commission and its Chairman, member the International Joint Commission, United States and Canada. The Council shall consult on these matters as appropriate with the Department of State and the International Joint Commission through its United States Section for the purpose of enhancing international coordination.

Sec. 6. Reporting to the President. The Chairman of the Commission shall report to the President through the Council.

LYNDON B. JOHNSON

EXECUTIVE ORDER NO. 11371
Sept. 6, 1967, 32 F.R. 12903, as amended by Ex.Ord.No. 11528, Apr. 24, 1970, 35 F.R. 6695

* * * * * * * * * * *

Sec. 2. Jurisdiction of Commission. (a) It is hereby determined that the jurisdiction of the New England River Basins Commission referred to in section 1 of this order (hereinafter referred to as the Commission) shall extend to an area composed as follows:

(1) The State of Maine,
(2) The State of New Hampshire,
(3) The State of Vermont, excluding that portion thereof which is within the drainage area of the Hudson River and excluding also that portion thereof which is within the drainage area of Lake Champlain,
(4) The State of Massachusetts, excluding that portion thereof which is within the drainage area of the Hudson River,
(5) The State of Connecticut,
(6) The State of Rhode Island,
(7) (i) That portion of the State of New York which is within the drainage area of the Housatonic River, and (ii) that portion of Long Island (excluding New York City) in the State of New York which is within the drainage area of Long Island Sound, and
(8) Long Island Sound except the portion thereof which lies west of a line extended from the Connecticut-New York boundary at the northern shore of the Sound to the New York City-Nassau County boundary at the southern shore of the Sound.

(b) The determination set forth in subsection (a) of this section is made in accordance with the request of the Commission, and is concurred in by the Water Resources Council and by the Governors of the States within the jurisdiction of the Commission.

Sec. 3. Membership of Commission. It is hereby determined, in accordance with section 202 of the Act [section 1962b—1 of this title], that the Commission shall consist of the following:

(1) a Chairman to be appointed by the President,

(2) one member from each of the following Federal departments and agencies: Department of Agriculture, Department of the Army, Department of Commerce, Department of Health, Education, and Welfare, Department of Housing and Urban Development, Department of the Interior, Department of Transportation, Atomic Energy Commission, and Federal Power Commission, each such member to be appointed by the head of each department or independent agency he represents,

(3) one member from each of the following States: Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, and New York, and

(4) one member from each interstate agency created by an interstate compact to which the consent of Congress has been given and whose jurisdiction extends to the waters of the area specified in section 2.

Water Resources Planning Act of 1965

42 U.S.C. §§1962, et. seq.

SUBCHAPTER I.—WATER RESOURCES COUNCIL

§ 1962a. Establishment; composition; other Federal agency participation; designation of Chairman

There is hereby established a Water Resources Council (herein after referred to as the "Council") which shall be composed of the Secretary of the Interior, the Secretary of Agriculture, the Secretary of the Army, the Secretary of Health, Education, and Welfare, and the Chairman of the Federal Power Commission. The Chairman of the Council shall request the heads of other Federal agencies to participate with the Council when matters affecting their responsibilities are considered by the Council. The Chairman of the Council shall be designated by the President.

Pub.L. 89-80, Title I, § 101, July 22, 1965, 79 Stat. 245.

§ 1962a—1. Powers and duties

The Council shall—

(a) maintain a continuing study and prepare an assessment biennially, or at such less frequent intervals as the Council may determine, of the adequacy of supplies of water necessary to meet the water requirements in each water resource region in the United States and the national interest therein; and

(b) maintain a continuing study of the relation of regional or river basin plans and programs to the requirements of larger regions of the Nation and of the adequacy of administrative and statutory means for the coordination of the water and related land resources policies and programs of the several Federal agencies; it shall appraise the adequacy of existing and proposed policies and programs to meet such requirements; and it shall make recommendations to the President with respect to Federal policies and programs.

Pub.L. 89-80, Title I, § 102, July 22, 1965, 79 Stat. 245.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 89-80, see 1965 U.S.Code Cong. and Adm.News, p. 1921.

§ 1962a—2. Establishment of principles, standards, and procedures for preparation of regional or river basin plans and Federal projects; revision of river basin planning commission plans

The Council shall establish, after such consultation with other interested entities, both Federal and non-Federal, as the Council may find appropriate, and with the approval of the President, principles, standards, and procedures for Federal participants in the preparation of comprehensive regional or river basin plans and for the formulation and evaluation of Federal water and related land resources projects. Such procedures may include provision for Council revision of plans for Federal projects intended to be proposed in any plan or revision thereof being prepared by a river basin planning commission.

Pub.L. 89-80, Title I, § 103, July 22, 1965, 79 Stat. 245.

Historical Note

Economic Evaluation of Water Resource Projects; Inclusion of Secretary of Transportation on Council. Development of standards and criteria for economic evaluation of water resource projects by Council and inclusion of Secretary of Transportation on the Council during consideration of matters concerning the navigation features of water resource projects, see section 1656(a) of Title 49, Transportation.

Legislative History. For legislative history and purpose of Pub.L. 89-80, see 1965 U.S.Code Cong. and Adm.News, p. 1921.

§ 1962a—3. Review of river basin commission plans; report to President and Congress

Upon receipt of a plan or revision thereof from any river basin commission under the provisions of section 1962b—3(3) of this title, the Council shall review the plan or revision with special regard to—

(1) the efficacy of such plan or revision in achieving optimum use of the water and related land resources in the area involved;

(2) the effect of the plan on the achievement of other programs for the development of agricultural, urban, energy, in-

dustrial, recreational, fish and wildlife, and other resources of the entire Nation; and

(3) the contributions which such plan or revision will make in obtaining the Nation's economic and social goals.

Based on such review the Council shall—

(a) formulate such recommendations as it deems desirable in the national interest; and

(b) transmit its recommendations, together with the plan or revision of the river basin commission and the views, comments, and recommendations with respect to such plan or revision submitted by any Federal agency, Governor, interstate commission, or United States section of an international commission, to the President for his review and transmittal to the Congress with his recommendations in regard to authorization of Federal projects.

Pub.L. 89-80, Title I, § 104, July 22, 1965, 79 Stat. 245.

SUBCHAPTER II.—RIVER BASIN COMMISSIONS

§ 1962b. Creation of commissions; powers and duties

(a) The President is authorized to declare the establishment of a river basin water and related land resources commission upon request therefor by the Council, or request addressed to the Council by a State within which all or part of the basin or basins concerned are located if the request by the Council or by a State (1) defines the area, river basin, or group of related river basins for which a commission is requested, (2) is made in writing by the Governor or in such manner as State law may provide, or by the Council, and (3) is concurred in by the Council and by not less than one-half of the States within which portions of the basin or basins concerned are located and, in the event the Upper Colorado River Basin is involved, by at least three of the four States of Colorado, New Mexico, Utah, and Wyoming or, in the event the Columbia River Basin is involved, by at least three of the four States of Idaho, Montana, Oregon, and Washington. Such concurrences shall be in writing.

(b) Each such commission for an area, river basin, or group of river basins shall, to the extent consistent with section 1962—1 of this title—

(1) serve as the principal agency for the coordination of Federal, State, interstate, local and nongovernmental plans for the development of water and related land resources in its area, river basin, or group of river basins;

(2) prepare and keep up to date, to the extent practicable, a comprehensive, coordinated, joint plan for Federal, State, interstate, local and nongovernmental development of water and related resources: *Provided*, That the plan shall include an evaluation of all reasonable alternative means of achieving optimum development of water and related land resources of the basin or basins, and it may be prepared in stages, including recommendations with respect to individual projects;

(3) recommend long-range schedules of priorities for the collection and analysis of basic data and for investigation, planning, and construction of projects; and

(4) foster and undertake such studies of water and related land resources problems in its area, river basin, or group of river basins as are necessary in the preparation of the plan described in clause (2) of this subsection.

Pub.L. 89-80, Title II, § 201, July 22, 1965, 79 Stat. 246.

§ 1962b—1. Membership of commissions; appointment of chairman

Each river basin commission shall be composed of members appointed as follows:

(a) A chairman appointed by the President who shall also serve as chairman and coordinating officer of the Federal members of the commission and who shall represent the Federal Government in Federal-State relations on the commission and who shall not, during the period of his service on the commission, hold any other position as an officer or employee of the United States, except as a retired officer or retired civilian employee of the Federal Government;

(b) One member from each Federal department or independent agency determined by the President to have a substantial interest in the work to be undertaken by the commission, such member to be appointed by the head of such department or independent agency and to serve as the representative of such department or independent agency;

(c) One member from each State which lies wholly or partially within the area, river basin, or group of river basins for which the commission is established, and the appointment of each such member shall be made in accordance with the laws of the State which he represents. In the absence of governing provisions of State law, such State members shall be appointed and serve at the pleasure of the Governor;

(d) One member appointed by any interstate agency created by an interstate compact to which the consent of Congress has been given, and whose jurisdiction extends to the waters of the area, river basin, or group of river basins for which the river basin commission is created;

(e) When deemed appropriate by the President, one member, who shall be appointed by the President, from the United States section of any international commission created by a treaty to which the consent of the Senate has been given, and whose jurisdiction extends to the waters of the area, river basin, or group of river basins for which the river basin commission is established.

Pub.L. 89-80, Title II, § 202, July 22, 1965, 79 Stat. 247.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 89-80, see 1965 U.S.Code Cong. and Adm.News, p. 1921.

§ 1962b—2. Organization of commissions—Commencement of functions; transfer of property, assets, and records upon termination of commission; availability of studies, data, and other materials to participants

(a) Each river basin commission shall organize for the performance of its functions within ninety days after the President shall have declared the establishment of such commission, subject to the availability of funds for carrying on its work. A commission shall terminate upon decision of the Council or agreement of a majority of the States composing the commission. Upon such termination, all property, assets, and records of the commission shall thereafter be turned over to such agencies of the United States and the participating States as shall be appropriate in the circumstances: *Provided*, That studies, data, and other materials useful in water and related land resources planning to any of the participants shall be kept freely available to all such participants.

Vice chairman; State election; State representation

(b) State members of each commission shall elect a vice chairman, who shall serve also as chairman and coordinating officer of the State members of the commission and who shall represent the State governments in Federal-State relations on the commission.

Vacancies; alternates for chairman and vice chairman

(c) Vacancies in a commission shall not affect its powers but shall be filled in the same manner in which the original appointments were made: *Provided*, That the chairman and vice chairman may designate alternates to act for them during temporary absences.

Consensus of members on issues; opportunities for individual views; record of position of chairman and vice chairman; final authority on procedural questions

(d) In the work of the commission every reasonable endeavor shall be made to arrive at a consensus of all members on all issues; but failing this, full opportunity shall be afforded each member for the presentation and report of individual views: *Provided*, That at any time the commission fails to act by reason of absence of consensus, the position of the chairman, acting in behalf of the Federal members, and the vice chairman, acting upon instructions of the State members, shall be set forth in the record: *Provided further*, That the chairman, in consultation with the vice chairman, shall have the final authority, in the absence of an applicable bylaw adopted by the commission or in the absence of a consensus, to fix the times and places for meetings, to set deadlines for the submission of annual and other reports, to establish subcommittees, and to decide such other procedural questions as may be necessary for the commission to perform its functions.

Pub.L. 89-80, Title II, § 203, July 22, 1965, 79 Stat. 248.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 89-80, see 1965 U.S.Code Cong. and Adm.News, p. 1921.

§ 1962b—3. Duties of commissions

Each river basin commission shall—

(1) engage in such activities and make such studies and investigations as are necessary and desirable in carrying out the policy set forth in section 1962 of this title and in accomplishing the purposes set forth in section 1962b(b) of this title;

(2) submit to the Council and the Governor of each participating State a report on its work at least once each year. Such report shall be transmitted through the President to the Congress. After such transmission, copies of any such report shall be sent to the heads of such Federal, State, interstate, and international agencies as the President or the Governors of the participating States may direct;

(3) submit to the Council for transmission to the President and by him to the Congress, and the Governors and the legislatures of the participating States a comprehensive, coordinated, joint plan, or any major portion thereof or necessary revisions thereof, for water and related land resources development in the area, river basin, or group of river basins for which such commission was established. Before the commission submits such a plan or major portion thereof or revision thereof to the Council, it shall transmit the proposed plan or revision to the head of each Federal department or agency, the Governor of each State, and each interstate agency, from which a member of the commission has been appointed, and to the head of the United States section of any international commission if the plan, portion or revision deals with a boundary water or a river crossing a boundary, or any tributary flowing into such boundary water or river, over which the international commission has jurisdiction or for which it has responsibility. Each such department and agency head, Governor, interstate agency, and United States section of an international commission shall have ninety days from the date of the receipt of the proposed plan, portion, or revision to report its views, comments, and recommendations to the commission. The commission may modify the plan, portion, or revision after considering the reports so submitted. The views, comments, and recommendations submitted by each Federal department or agency head, Governor, interstate agency, and United States section of an international commission shall be transmitted to the Council with the plan, portion, or revision; and

(4) submit to the Council at the time of submitting such plan, any recommendations it may have for continuing the functions of the commission and for implementing the plan, including means of keeping the plan up to date.

Pub.L. 89-80, Title II, § 204, July 22, 1965, 79 Stat. 248.

Historical Note

Legislative History. For legislative 1965 U.S.Code Cong. and Adm.News, p. history and purpose of Pub.L. 89-80, see 1921.

§ 1962b—4. Administrative provisions—Hearings, proceedings, evidence, reports; office space; use of mails; personnel, consultants, and professional service contracts; personnel from other agencies; retirement and employee benefit system for personnel without coverage; motor vehicles; necessary expenses; other powers

(a) For the purpose of carrying out the provisions of this subchapter, each river basin commission may—

(1) hold such hearings, sit and act at such times and places, take such testimony, receive such evidence, and print or otherwise reproduce and distribute so much of its proceedings and reports thereon as it may deem advisable;

(2) acquire, furnish, and equip such office space as is necessary;

(3) use the United States mails in the same manner and upon the same conditions as departments and agencies of the United States;

(4) employ and compensate such personnel as it deems advisable, including consultants, at rates not to exceed $100 per diem, and retain and compensate such professional or technical service firms as it deems advisable on a contract basis;

(5) arrange for the services of personnel from any State or the United States, or any subdivision or agency thereof, or any intergovernmental agency;

(6) make arrangements, including contracts, with any participating government, except the United States or the District of Columbia, for inclusion in a suitable retirement and employee benefit system of such of its personnel as may not be eligible for or continuing in another governmental retirement or employee benefit system, or otherwise provide for such coverage of its personnel;

(7) purchase, hire, operate, and maintain passenger motor vehicles; and

(8) incur such necessary expenses and exercise such other powers as are consistent with and reasonably required to perform its functions under this chapter.

Oaths

(b) The chairman of a river basin commission, or any member of such commission designated by the chairman thereof for the purpose, is authorized to administer oaths when it is determined by a majority of the commission that testimony shall be taken or evidence received under oath.

Records; public inspection

(c) To the extent permitted by law, all appropriate records and papers of each river basin commission shall be made available for public inspection during ordinary office hours.

Information and personnel from other Federal agencies

(d) Upon request of the chairman of any river basin commission, or any member or employee of such commission designated by the chairman thereof for the purpose, the head of any Federal department or agency is authorized (1) to furnish to such commission such information as may be necessary for carrying out its functions and as may be available to or procurable by such department or agency, and (2) to detail to temporary duty with such commission on a reimbursable basis such personnel within his administrative jurisdiction as it may need or believe to be useful for carrying out its functions, each such detail to be without loss of seniority, pay, or other employee status.

Responsibility for personnel and funds

(e) The chairman of each river basin commission shall, with the concurrence of the vice chairman, appoint the personnel employed by such commission, and the chairman shall, in accordance with the general policies of such commission with respect to the work to be accomplished by it and the timing thereof, be responsible for (1) the supervision of personnel employed by such commission, (2) the assignment of duties and responsibilities among such personnel, and (3) the use and expenditure of funds available to such commission.

Pub.L. 89-80, Title II, § 205, July 22, 1965, 79 Stat. 249.

Historical Note

Legislative History. For legislative 1965 U.S.Code Cong. and Adm.News, p. history and purpose of Pub.L. 89-80, see 1921.

§ 1962b—5. Compensation of commission members

(a) Any member of a river basin commission appointed pursuant to section 1962b—1(b) and (c) of this title shall receive no additional compensation by virtue of his membership on the commission, but shall continue to receive, from appropriations made for the agency from which he is appointed, the salary of his regular position when engaged in the performance of the duties vested in the commission.

(b) Members of a commission, appointed pursuant to section 1962b—1(c) and (d) of this title, shall each receive such compensation as may be provided by the States or the interstate agency respectively, which they represent.

(c) The per annum compensation of the chairman of each river basin commission shall be determined by the President, but when employed on a full-time annual basis shall not exceed the maximum scheduled rate for grade GS-18 of the Classification Act of 1949, as amended; or when engaged in the performance of the commission's duties on an intermittent basis such compensation shall be not more than $100 per day and shall not exceed $12,000 in any year.

Pub.L. 89-80, Title II, § 206, July 22, 1965, 79 Stat. 250.

§ 1962b—6. Expenses of commissions—Federal share; apportionment of remainder; annual budget; estimates of proposed Federal appropriations; advances against delayed State appropriations; credit to account in the Treasury

(a) Each commission shall recommend what share of its expenses shall be borne by the Federal Government, but such share shall be subject to approval by the Council. The remainder of the commission's expenses shall be otherwise apportioned as the commission may determine. Each commission shall prepare a budget annually and transmit it to the Council and the States. Estimates of proposed appropriations from the Federal Government shall be included in the budget estimates submitted by the Council under the Budgeting and Accounting Act of 1921, as amended, and may include an amount for advance to a commission against State appropriations for which delay is anticipated by reason of later legislative sessions. All sums appropriated to or otherwise received by a commission shall be credited to the commission's account in the Treasury of the United States.

Acceptance, reception, utilization, and disposal of appropriations, donations, and grants

(b) A commission may accept for any of its purposes and functions appropriations, donations, and grants of money, equipment, supplies, materials, and services from any State or the United States or any subdivision or agency thereof, or intergovernmental agency, and may receive, utilize, and dispose of the same.

Accounts of receipts and disbursements; annual audit; inclusion in annual report

(c) The commission shall keep accurate accounts of all receipts and disbursements. The accounts shall be audited at least annually in accordance with generally accepted auditing standards by independent certified or licensed public accountants, certified or licensed by a regulatory authority of a State, and the report of the audit shall be included in and become a part of the annual report of the commission.

Inspection of accounts

(d) The accounts of the commission shall be open at all reasonable times for inspection by representatives of the jurisdictions and agencies which make appropriations, donations, or grants to the commission.

Pub.L. 89-80, Title II, § 207, July 22, 1965, 79 Stat. 250.

SUBCHAPTER III.—FINANCIAL ASSISTANCE TO STATES FOR COMPREHENSIVE PLANNING GRANT AUTHORIZATIONS

§ 1962c. Authorization of appropriations; coordination of related Federal planning assistance programs; utilization of Federal agencies administering programs contributing to water resources planning

(a) In recognition of the need for increased participation by the States in water and related land resources planning to be effective, there are hereby authorized to be appropriated to the Council for the next fiscal year beginning after July 22, 1965, and for the nine succeeding fiscal years thereafter, $5,000,000 in each such year for grants to States to assist them in developing and participating in the development of comprehensive water and related land resources plans.

(b) The Council, with the approval of the President, shall prescribe such rules, establish such procedures, and make such arrangements and provisions relating to the performance of its functions under this subchapter, and the use of funds available therefor, as may be necessary in order to assure (1) coordination of the program authorized by this subchapter with related Federal planning assistance programs, including the program authorized under section 461 of Title 40 and (2) appropriate utilization of other Federal agencies administering programs which may contribute to achieving the purpose of this chapter.

Pub.L. 89-80, Title III, § 301, July 22, 1965, 79 Stat. 251.

§ 1962c—1. Allotments to States: basis, population and land area determinations; payments to States: amount

(a) From the sums appropriated pursuant to section 1962c of this title for any fiscal year the Council shall from time to time make allotments to the States, in accordance with its regulations, on the basis of (1) the population, (2) the land area, (3) the need for comprehensive water and related land resources planning programs, and (4) the financial need of the respective States. For the purposes of this section the population of the States shall be determined on the basis of the latest estimates available from the Department of Commerce and the land area of the States shall be determined on the basis of the official records of the United States Geological Survey.

(b) From each State's allotment under this section for any fiscal year the Council shall pay to such State an amount which is not more than 50 per centum of the cost of carrying out its State program approved under section 1962c—2 of this title, including the cost of training personnel for carrying out such program and the cost of administering such program.

Pub.L. 89-80, Title III, § 302, July 22, 1965, 79 Stat. 251.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 89-80, see 1965 U.S.Code Cong. and Adm.News, p. 1921.

§ 1962c—2. State programs; approval by Council; submission; requirements; notice and hearing prior to disapproval

The Council shall approve any program for comprehensive water and related land resources planning which is submitted by a State, if such program—

(1) provides for comprehensive planning with respect to intrastate or interstate water resources, or both, in such State to meet the needs for water and water-related activities taking into account prospective demands for all purposes served through or affected by water and related land resources development, with adequate provision for coordination with all Federal, State, and local agencies, and nongovernmental entities having responsibilities in affected fields;

(2) provides, where comprehensive statewide development planning is being carried on with or without assistance under section 461 of Title 40, or under the Land and Water Conservation Fund Act of 1965, for full coordination between comprehensive water resources planning and other statewide planning programs and for assurances that such water resources planning will be in conformity with the general development policy in such State;

(3) designates a State agency (hereinafter referred to as the "State agency") to administer the program;

(4) provides that the State agency will make such reports in such form and containing such information as the Council from time to time reasonably requires to carry out its functions under this subchapter;

(5) sets forth the procedure to be followed in carrying out the State program and in administering such program; and

(6) provides such accounting, budgeting, and other fiscal methods and procedures as are necessary for keeping appropriate accountability of the funds and for the proper and efficient administration of the program.

The Council shall not disapprove any program without first giving reasonable notice and opportunity for hearing to the State agency administering such program.

Pub.L. 89-80, Title III, § 303, July 22, 1965, 79 Stat. 252.

Historical Note

References in Text. The Land and Water Conservation Fund Act of 1965, referred to in clause (2), is classified principally to sections 460l—4 to 460l—11 of Title 16, Conservation.

Legislative History. For legislative history and purpose of Pub.L. 89-80, see 1965 U.S.Code Cong. and Adm.News, p. 1921.

§ 1962c—3. Noncompliance; curtailing of payments

Whenever the Council after reasonable notice and opportunity for hearing to a State agency finds that—

(a) the program submitted by such State and approved under section 1962c—2 of this title has been so changed that it no longer complies with a requirement of such section; or

(b) in the administration of the program there is a failure to comply substantially with such a requirement,

the Council shall notify such agency that no further payments will be made to the State under this subchapter until it is satisfied that there will no longer be any such failure. Until the Council is so satisfied, it shall make no further payments to such State under this subchapter.

Pub.L. 89-80, Title III, § 304, July 22, 1965, 79 Stat. 252.

U. S. GOVERNMENT PRINTING OFFICE : 1972 O - 452-329

COASTAL ZONE
INFORMATION CENTER

NOAA COASTAL SERVICES CENTER LIBRARY
3 6668 00002 5363