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COMMENTS

Coastal Land Use Development: A Proposal for Cumulative Area-Wide Zoning

INTRODUCTION

Concern about the environment has crescendoed in recent months.¹ Many states, including North Carolina, have taken vigorous steps to protect the air and water.² Few, however, if any, have taken necessary action to deal with the most significant environmental problem: uncontrolled land development,³ especially in the regions contiguous to coastal waters.

Any program of controlled land use must be balanced. For example, before rushing to bring heavy industry to depressed coastal areas, one must consider the possible effects of attendant pollution on North Carolina's multi-million dollar fishing industry.⁴ Against the aesthetic desire for quiet and undeveloped beaches must be balanced the state's economic need to share in a portion of this nation's beach recreation business, which will hit a national high of 5,400,000,000 dollars by 1975.⁵

The key to a balanced development of economic and environmental resources lies in placing some measure of authority in a state or regional agency. This agency must have the authority to deal with pollution by population masses as well as the more newsworthy instances of industrial waste. Three-quarters of the nation's population already live

¹See generally Evans, *Regional Land Use Control: The Stepping Stone Concept*, 22 BAYLOR L. REV. 1 (1970); Johnson, *Developments in Land Use Control*, 45 NOTRE DAME LAW. 399 (1970); Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458 (1970).

²See, e.g., MASS. ANN. LAWS ch. 130, § 105 (Supp. 1970); N.C. GEN. STAT. § 143-211 TO - 215.22 (SUPP. 1969).

³Intelligent land-use planning and management provides the single most important institutional device for preserving and enhancing the environment and for maintaining conditions capable of supporting a quality life while providing the material means necessary to improve the national standard of living.

This statement comes from the policy position of the National Governors' Conference, August 1970, in *Hearings on S. 3354 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 2d Sess. 774 (1970) [hereinafter cited as *Hearings on S. 3354*].

⁴See H.R. Doc. No. 91-286, Part II, 91st Cong., 2d Sess. 120-24 (1970) [hereinafter cited as H.R. Doc. No. 91-286].

⁵H.R. Doc. No. 91-42, 91st Cong., 1st Sess. 53 (1969) [hereinafter cited as H.R. Doc. No. 91-42].

in a coastal or Great Lakes state,⁶ and the projected rate of growth for these states exceeds the national average.⁷ Already, too, pilots speak of a continuous string of lights from Boston to Norfolk.⁸

This uncontrolled growth and development, so often countenanced under nineteenth century concepts of individual freedom, threatens to engulf the freedom of all who would walk quietly along a beach listening to surging waves speak to consoling dunes, or of those who would spend weekends as latter-day Hemmingways fighting the denizens of the deep. Even the less aggressive who want only the quiet crackle of flounder frying in an outdoor skillet will soon find the campsite surrounded by two-hundred-room motels.

In a full year's study, the President's prestigious Stratton Commission⁹ produced a broad program that has become the polestar for national congressional action¹⁰ and that should provide the goals for affirmative action to regulate the coastal region in North Carolina. The Commission condensed the plethora of possibilities into four categories:

- [1] *Planning*—to make comprehensive plans for the coastal waters and adjacent lands and to conduct the necessary studies and investigations.
- [2] *Regulation*—to zone; to grant easements, licenses, or permits; and to exercise other necessary controls for ensuring that use of waters and adjacent lands is in conformance with the plan for the area.
- [3] *Acquisition and eminent domain*—to acquire lands when public ownership is necessary to control their use. (Condemnation procedures should be used if necessary.)
- [4] *Development*—to provide, either directly or by arrangement with other government agencies, such public facilities as beaches, marinas, and other waterfront developments and to lease lands in its jurisdiction, including offshore lands.¹¹

These are heroic goals and, necessarily, long range ones. However, work toward establishing such a program should begin at once. This comment will present a brief discussion of the planning phase and the type of governmental authority that will be required to handle the full

⁶H.R. Doc. No. 91-42, Part II, 91st Cong., 1st Sess. III-10 (1969).

⁷*Id.*

⁸*Id.*

⁹The Commission on Marine Science, Engineering, and Resources, chaired by J.A. Stratton, was established by the Act of June 17, 1966, Pub. L. No. 89-454, § 5, 80 Stat. 203 (codified in 33 U.S.C. §§ 1101-24 (1970)).

¹⁰*See, e.g.*, S. 2802, 91st Cong., 2d Sess. (1969); H.R. 15099, 91st Cong., 1st Sess. (1969).

¹¹H.R. Doc. No. 91-42 at 59.

undertaking. The writer's primary purpose is to offer one proposal—cumulative area-wide zoning—for regulating land use and development in North Carolina's coastal zone.

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THE PROPER AUTHORITY

Two major questions must be answered with regard to the implementation of any plan of land use regulation: At what level of government will primary administrative controls lie? By what type of agency will the program be administered? The answers to these questions will, in large measure, dictate the effectiveness of the control devices.

Proper Level of Government

Once posited at any level of government, power is jealously withdrawn from the public market and returned, if at all, slowly and grudgingly. Zoning power is no exception as national, state, and local governmental bodies seek to gain or to keep this key to local development. The confusing, overlapping quagmire that ensues is enough to boggle the mind; just how much actual power any particular arm of government has is only temporarily unclouded when the bureaucracies collide.

Initially, it is apparent that considerable control over land use does rest with local city and county governments in North Carolina. Legal support for this claim can be found in various statements by the General Assembly.¹² Traditionally, there is an equally strong case to be made for local control based on long years of state inactivity¹³ and, as well, a feeling of many that those closer to a problem's roots will deal with it best.

Political obstructions warn the intermeddler that local government officials will not remain passive to alterations in these "traditional mechanisms by which the local governments guide physical development and establish a tax base."¹⁴ Strong political opposition can be expected from representatives of city and county governments for any loss of power.¹⁵

¹²See, e.g., N.C. GEN. STAT. §§ 160-172 to -181.2 (1964), *as amended*, (Supp. 1969).

¹³North Carolina and forty-eight other states have expressed no legislative interest in state-wide programs of regulated land use. Hawaii is presently the only state with coordinated state-wide planning and zoning. HAWAII REV. STAT. §§ 205-1 to -15 (1968), *as amended*, (Supp. 1970).

¹⁴*Hearings on S. 2802 Before the Subcomm. on Oceanography of the Senate Comm. on Commerce*, 91st Cong., 1st Cong., 1st & 2d Sess., ser. 91-59, at 882 (1970) [hereinafter cited as *Hearings on S. 2802*].

¹⁵*Id.* at 866.

Conceding the validity of local interests in local affairs, there are still good reasons that ultimate¹⁶ authority for coastal development should not rest in city and county hands. For one thing, most local government structures do not have the staff or expertise necessary to handle the complicated chores of planning and zoning on a comprehensive scale.¹⁷ Nor have they indicated a willingness to become actively involved given the opportunity.¹⁸

A second objection to full local control centers around an extension of the "forest-trees" colloquialism: Local government is a reflection of the local population and, as such, reflects the narrowly restricted anxieties and aspirations of those they represent. Elected officials are too intimately involved with the problems and needs of their constituencies to make the objective determinations that will affect the lives of all North Carolinians as well as those from other states. For example, it has been asserted that the erection of a fishing pier on a beach can affect ocean tides miles away;¹⁹ the deleterious effects of poor land use on estuaries in this state may affect the fishing fortunes of sportsmen and professional fishers from Hatteras to Cape Cod.²⁰

One writer well expressed the danger inherent in allowing absolute local control over land development: "[M]unicipal competition rather than municipal coordination shapes development. Each municipality, in maximizing its position of advantage, ignores costs imposed on other communities."²¹ The tendency has been to look after local needs—schools, welfare rolls, parks—without regard to area-wide programs. For this reason "local governments have been most amenable

¹⁶The word "ultimate" is used here because, as the writer will later indicate, considerable authority should be left with local government.

¹⁷United States Senator Henry M. Jackson made this observation to the Association of Counties in his home state of Washington: "There are more than 3000 counties in the United States. It is apparent that, even if funds were available, the trained personnel do not exist to build a technical organization in each county which would be competent to deal with the complex environmental problems we face." *Hearings on S. 3354* at 460.

¹⁸In the spring of 1970, Senator Ernest F. Hollings of South Carolina initiated an exchange that was to embarrass the cause of localists: "Isn't it a fact there are 18 coastal counties in North Carolina?" The reply was positive. "And of that 18 only two of them have zoning ordinances and you [New Hanover County] are one of them?" The reply was lost in evasion. *Hearings on S. 2802*, at 885.

¹⁹*Footprints on the Sands of Time: An Evaluation of the Texas Seashore*, Report of the Interim Beach Study Committee of the Texas Legislature, at 15 (1970).

²⁰H.R. Doc. No. 91-286 at 123-24.

²¹*Symposium: The San Francisco Bay Area—Regional Problems and Solutions*, 55 CALIF. L. REV. 695, 699 (1967).

to private interests" and this has kept the "degree of regulation to a tolerable minimum at the expense of effectiveness."²²

The tug-of-war falls then between national and state governments. Historically, the federal government has shown little interest in the regulation of nonfederal property; however, recent congressional activity indicates that this is no longer true. Last year's legislative efforts produced scores of bills designed to give the federal government varying degrees of control over the states' coastal regions.²³

This flurry of activity is disconcerting to those who would keep control of state property in state hands.²⁴ The question in this instance is not one of power, but of propriety. Surely, there is little doubt that the Congress has the power to exercise control over all coastal zones under either the war power²⁵ or the commerce clause.²⁶

Still, in spite of the fact that the federal government *can* take over management of the coastal zone, there is some indication that strong, effective action by state government will leave Congress content to exercise only minimal control. The Stratton Commission asserted: "After reviewing the various alternatives . . . the Commission finds that the States must be the focus for responsibility and action in the coastal zone."²⁷ Bills introduced so far have deferred to the Commission's call—the suggested federal role has been limited to effecting coordination between states and federal agencies, to supplying money to support the state programs, and to providing only general guidelines and restrictions to insure a reasonable degree of uniformity among state participants.²⁸

Therefore, while the opportunity is still present, state legislation should be enacted to embody the general thrust of the Stratton Commission report. The considerable financial benefits of whatever coastal zone management bill is finally enacted will be available only to those states that make a serious effort to implement a "comprehensive

²²Delogu, *Beyond Enabling Legislation*, 20 ME. L. REV. 1 (1968).

²³See *Hearings on S. 3354* at 397-404.

²⁴The Governor of North Carolina has indicated to Senator Jackson that he prefers to keep control of the coastal region at the state level. *Hearings on S. 3354* at 384.

²⁵See, e.g., *Ashwander v. TVA*, 297 U.S. 288, 326-28 (1936).

²⁶Although Quixotes might use the tenth amendment as a jousting pole, realists must read recent cases such as *Katzenbach v. McClung*, 379 U.S. 294 (1964), and *Daniel v. Paul*, 395 U.S. 298 (1969), as supporting the right of federal intervention. The tenuous economic links that had to be constructed in those cases are not a problem in the commercially important coastal areas.

²⁷H.R. Doc. No. 91-42 at 56.

²⁸See, e.g., H.R. 15099, 91st Cong., 1st Sess. (1969); H.R. 14731, 91st Cong., (1969).

plan [through a] single or coordinated agency [that has] all the necessary regulatory authorities [including] zoning authority or authority to override local zoning inconsistent with the state management plan.”²⁹

Type of State Agency

A survey of other states' programs reveals that environmental control may be coordinated and controlled in three basic ways: a single agency or department, an interagency council, or a specially created agency for particular problems.

Texas has enacted legislation calling for an interagency natural resources council, with membership coming from administrative heads of various departments of state government.³⁰ As the government officer with ultimate responsibility for the planning functions of this interagency council, the governor is supported as well by a planning division of the executive branch that is to serve as a “coordinating catalyst.”³¹

California legislation has established a resources agency³² under the direction of an executive appointee³³ who has general supervisory authority over each unit within the agency.³⁴ This is an effective tool in the California setting because the units included in the resources agency are the action arms of government: the Air Resources Board, the Water Resources Board, the Department of Conservation, the Department of Parks and Recreation, and others.³⁵ Therefore it is possible that membership on this agency would be less honorary and power more effectively used actively to enforce and implement the agency's decisions.

Breadth of approach coupled with large storehouses of manpower and knowledge commend the interagency approach. However, the advantages may be neutralized in operation. First of all, state department heads are busy politicians; therefore committee assignments may go to the underling with least to do and least with which to do it. This type of organization also frequently fans the already hot fires of

²⁹The quoted language comes from The National Coastal Zone Management Act of 1970, H.R. 14731, 91st Cong., 1st Sess. § 303(b), at 6-7 (1969).

³⁰TEX. REV. CIV. STAT. art. 4413 (32a) (Supp. 1970).

³¹*Id.*

³²CAL. GOVT. CODE ANN. § 12800 (West Supp. 1969).

³³*Id.* § 12801.

³⁴*Id.* § 12850.

³⁵*Id.* § 12805.

intergovernmental competition and jealousy. Finally, there is the risk that the interagency approach will become the myriad-agency approach. The number of governmental interests in the coastal margin is already too great;³⁵ adding yet another uncoordinated coordinating committee will do little to relieve the problem of the government Medusa.³⁷

The Bay Area Conservation District (BACD) has had success in dealing with the problems around San Francisco Bay where uncontrolled building and discharge into the bay and the contiguous land resulted in a polluted, nearly dead bay-area environment.³⁸ The efforts of the BACD, through a use of broad statutory powers,³⁹ have sparked a recovery of the Bay in recent years.⁴⁰ A new concept, untried in practice, is New York's recently enacted legislation that establishes an environmental protection *corporation* to deal with that state's uniquely critical environmental crisis.⁴¹ Exciting as these endeavors may be, North Carolina's estuaries and coastlands are still relatively unspoiled⁴² so it would seem that neither special districting nor government incorporation is necessary in North Carolina.

Perhaps the best type of agency to oversee land-use control, as well as the attendant pollution problems, is the traditional department-level agency, but such agency should be given increased powers to compensate for the inactivity of past years. Recent Minnesota legislation transferred the duties of conservation to a newly created Department of Natural Resources.⁴³ This department has the duty, under the direction of its commissioner, to "coordinate the management of the public domain" and to develop a program to "conserve the natural resources of the state."⁴⁴

³⁵In Senate hearings in 1970, Virginia's Director of Planning reported that Virginia had no less than ten state agencies with a "rather direct interest" in coastal zone planning. He noted further that not one had the necessary "authority and responsibility for coordinating the state's programs and for focusing local efforts toward the achievement of comprehensive goals." *Hearings on S. 2802* at 835.

³⁶An example of this problem at the federal level was noted by Idaho's Senator Jordan who observed the number of government agencies serving a 50 by 75 mile area of his home state. The 150,000 people in that area were being served by over twenty federal agencies in addition to eight county governments and numerous municipalities. *See Hearings on S. 3354* at 98.

³⁷H.R. Doc. No. 91-42 at 54.

³⁸CAL. GOVT. CODE ANN. § 66600-61 (West Supp. 1970).

³⁹*See generally Symposium: The San Francisco Bay Area—Regional Problems and Solutions*, 55 CALIF. L. REV. 695 (1967).

⁴⁰N.Y. PUB. AUTH. LAW §§ 1280-98 (McKinney Supp. 1970).

⁴¹*See* H.R. Doc. No. 91-42 at 54.

⁴²MINN. STAT. ANN. § 84.01 (Supp. 1971).

⁴³*Id.* § 84.024.

The Massachusetts "Wetlands Act" gives this same general coordinating control to the Commissioner of Conservation.⁴⁵ Although limited to the coastal areas designated as "wetlands," the powers given the commissioner to protect the environment through regulation are plenary.⁴⁶

In 1970 New Jersey created the Department of Environmental Protection.⁴⁷ The legislation creating this agency is an admirable attempt to deal with the full spectrum of resource problems.⁴⁸ Its major shortcoming is a regressive section that separates conservation from development by placing the Division of Economic Development in the Department of Labor.⁴⁹ Otherwise, the act recognizes the critical problem areas and offers commensurate tools for treatment.⁵⁰

To gain the benefits of the proposed federal programs and to manage effectively this state's rich coastal lands, North Carolina's simplest vehicle would be a refined and well-oiled Department of Conservation and Development. Specifically, this writer proposes the creation of the North Carolina Coastal Zone Authority (NCCZA) to manage land use in the coastal zone according to legislative standards. The NCCZA should be an active arm of the Department of Conservation and Development.

All state agencies should work not only *with* the NCCZA but also *through* it in an attempt to insure that North Carolina does not experience the bureaucratic tie-ups that have resulted in harmful administration of other states' natural resources. Former Congressman Richard Ottinger was speaking of just such Balkanization when he observed: "If one characteristic stands out in the crisis of New York Blight, it is the utter confusion of practically everyone involved. Too many government bodies have some responsibility and some authority, but no one had enough of either."⁵¹ The NCCZA should have enough of both.

This means that implementation of such programs as air-pollution

⁴⁵MASS. ANN. LAWS ch. 130, § 105 (Supp. 1970).

⁴⁶*Id.*

⁴⁷N.J. STAT. ANN. §§ 13:1D-1 to -18 (Supp. 1970).

⁴⁸*Id.* §§ 13:1D-6 to -11.

⁴⁹*Id.* § 13:1D-10.

⁵⁰*Id.* § 13:1D-9.

⁵¹Ottinger, *Legislation and the Environment: Individual Rights and Government Accountability*, 55 CORNELL L. REV. 666, 672 (1970).

control,⁵² water-pollution control,⁵³ the dredge-and-fill law,⁵⁴ and others should be coordinated through the enforcement arm of the NCCZA. The complex nature of environmental issues dictates against fragmentation. The Governor of Alaska could have spoken for North Carolina when he said: "In a state . . . where the land use and water utilization is so closely related, it is impractical to continue planning for the use of our water resources without taking into account the accompanying land use."⁵⁵

A final word is offered about the policy guiding the selected agency's administration of any program of land regulation. The state's optimal future development lies along converging axes of economic development and ecological protection. "The task is easy," says one congressman, "if all you do is say we are going to protect the environment and you close everything down. What about the 26 million people at the poverty level in this country?"⁵⁶ With this in mind, the New Jersey action in separating conservation from development must be viewed negatively. President Theodore Roosevelt, whose fame stems in large measure from his conservation crusades, is reported to have said that "conservation means development as much as it does protection." Conversely, true "development" of a particular beach or marshland might well require an absolute prohibition of any man-made alterations in order to preserve the natural state. The land-planning project director for the Stratton Commission, Dr. John Knauss, offered this generalization: "We recommend as a guiding principle for the coastal zone authorities the concept of fostering the widest possible variety of beneficial uses so as to maximize net social return."⁵⁷

As politics moves the state, so political pressures move the bureaucrats.⁵⁸ Just as state governments want control over land use

⁵²N.C. Gen. Stat. §§ 143-211 to 215.22 (Supp. 1969).

⁵³*Id.*

⁵⁴N.C. GEN. STAT. § 113-229 (Supp. 1969).

⁵⁵*Hearings on S. 3354* at 374.

⁵⁶*Id.* 421.

⁵⁷*Hearings on S. 2802* at 60. It would be possible to misinterpret Dr. Knauss's words as favoring business development over environmental protection. However, another's words act to delimit: "[It] might [be] well [to] assert . . . the intent . . . to protect the value of natural systems in the coastal zone and to provide for the accommodation of developmental uses in ways which don't destroy the value of the natural systems." *Hearings on Coastal Zone Management Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 1st Sess., ser. 91-14, at 49 (1969).

⁵⁸For a recent and interesting commentary on this idea see Sax, *A Little Sturm Und Drang At Hunting Creek*, *ESQUIRE*, Feb., 1971, at 84.

planning and regulation, so do state government executives want control over those who design and implement land-use planning.⁵⁹ Command of land-development programs is now an executive function in at least twenty states; many find refuge in a department resembling North Carolina's Conservation and Development; others may be found in finance, local affairs, or independent agencies.⁶⁰ The trend in recent years toward control by the governor's office⁶¹ should be reversed, and the control should be vested in a quasi-independent agency such as Conservation and Development or Natural Resources.

Regardless of the method of administration chosen, a legislative catalyst is needed to break inertia and provide North Carolina with an aggressive agency processing both the responsibility and the authority necessary to meet the challenges outlined by the Stratton Commission.

COMPREHENSIVE PLANNING

As conceived by its newer exponents, planning is a highly complex, esoteric field far surpassing antiquated notions of pins, maps, and markers.⁶² Today's planners use technical, computerized procedures with heavy reliance on the latest sociological and psychological theories.⁶³ For this reason it is best to leave tactical methodology to the planners themselves, since in any event their product must win approval from those not mesmerized by techniques.

Planning also provides the cornerstone on which sound regulation is based, and for this reason the legislature should set strategic guidelines. For example, the General Assembly should dictate the policy considerations that guide the making of the plan. One such consideration might be irreparable harm to the natural environment. In fact, one writer recommended that the entire scope of planning be centered around the "Ecosystem as a Criterion for Public Land Policy,"⁶⁴ an approach

⁵⁹See, e.g., letter from Governor Mandel of Maryland to Senator Jackson in *Hearings on S. 3354* at 382.

⁶⁰See generally Beyle, Seligson, and Wright, *New Directions in State Planning*, 35 J.A. INST. OF PLANNERS 334, 335 (1969).

⁶¹*Id.*

⁶²See generally M. BRANCH, *PLANNING: ASPECTS AND APPLICATIONS* (1966); Branch, *Comprehensive Planning as a Field of Study*, in *PLANNING AND THE URBAN COMMUNITY* 198 (1961); F. STUART, *URBAN LAND USE PLANNING* (2d ed. 1965).

⁶³See generally H. GANS, *PEOPLE AND PLANS* (1968); Gans, *Social and Physical Planning for the Elimination of Urban Poverty*, 1963 WASH. L.Q. 2 (1963); Webber, *Comprehensive Planning and Social Responsibility*, 29 J.A. INST. OF PLANNERS 232 (1963).

⁶⁴Caldwell, *The Ecosystem as a Criterion for Public Land Policy*, 10 NAT. RES. J. 203 (1970).

that dwells on prevention of irreparable harm while suggesting "the possibility of public discussion based on empirical principles of public interest in environmental quality and in the self-renewing capabilities of the natural systems."⁶⁵

Beyond the broader policy restrictions there are other areas that require legislative guidance and control. Even though a dynamic comprehensive plan is, by definition, being continuously updated, a total review should be required at set intervals.⁶⁶ The law should require that the completed plan look a definite number of years into the future in anticipating development and land-use demand. For example, one proposed federal bill would require participating states' comprehensive plans to span fifty years into the future.⁶⁷

While general planning theory should be determined by those most familiar with the subject, the legislature may want to dictate a specific route to be taken. One relatively new concept is so exciting that it should be openly considered: a computerized model of the state's coastal zone. Admittedly a complicated process, the idea is not beyond the scope of a state agency; already such a model is being developed for the entire state of California.⁶⁸

A similar operation was the guided development of the planned city "Columbia."⁶⁹ The *Columbia Economic Model* is a computerized accumulation of the city's maps, charts, graphs, and developmental data that tells management at any given moment where the city is in its trek towards programmed development.⁷⁰ This computerized approach, enlarged to include data from the full coastal zone, will allow planners to

⁶⁵*Id.* at 208-09.

⁶⁶HAWAII REV. STAT. § 205-11 (1968) requires total review every five years.

⁶⁷S. 3354, 91st Cong., 2d Sess. (1970). However, the chief executive of Hawaii personally believes that twenty-to-thirty year periods provide a more realistic framework. *Hearings on S. 3354* at 377.

⁶⁸Watt, *State Planning Failure: What to Do About It*, 1969-70 CRY CALIFORNIA 36.

⁶⁹Sunderland, *Why Columbia Succeeded Where Others Failed*, MORTGAGE BANKER, June, 1970, at 10.

⁷⁰*Id.* at 18. This computerized model allows management to control income and expenses of the development phase; it also allows coordination of the laying of sewer lines, water pipes, and roads and roads and "for the pact of development of every single piece of land, from service stations to residential lots, and it accounts for this at changing prices year-by-year." *Id.* This is not to suggest that the coastal authority should oversee the laying of each section of pipe or the location of each service station. However, by projecting the effects of many kinds of development over the entire coastal region, state officials will be able to make an intelligent decision about the quantity and type of development that would best serve each area and the state.

project the effects of various competing interests on present and future land development in the coastal margin.

Regardless of the developmental technique, implementation is the key to success. Although use of the completed plan would seem to be axiomatic, Dr. Knauss observes that atrophy here is a serious problem:

I think the critical thing in this is that there has to be more than just developing a master plan. Our shelves are full of master plans for all kinds of things. If there is not the followup, if there is not the power within a coastal zone agency to implement this plan, to make it work, I don't care whether they develop a master plan or not. It is worthless. We have had this happen before.⁷¹

Therefore, the completed comprehensive plan should be submitted through the NCCZA and the state-wide coordinating agency to the legislature for approval. Once adopted, after proper notice and hearings, the plan's concepts should be binding on all state agencies. No government or private organization should be authorized to take major steps in the region without a determination of compliance by the authority.

There is presently some planning activity in North Carolina. Both the Department of Local Affairs⁷² and the Department of Administration's State Planning Task Force⁷³ have taken first steps toward the preparation of state land-use plans. The primary obstacle to successful completion lies not in the agencies' employees, many of whom share the environmentalists' concerns, but in the hodge-podge of legislative statements, none of which give the proper authority, responsibility, or scope.⁷⁴

Some other states have taken the planning function more seriously, although only Hawaii, of all the states, has a combined program of state-wide planning and zoning⁷⁵ coupled with some concentration of power to enforce the plan once adopted.⁷⁶ On the other hand, the function of most state planning offices is exemplified by Delaware's statutory scheme where the primary responsibility of the planning office

⁷¹Hearings on S. 2802 at 64.

⁷²N.C. GEN. STAT. § 143-323 (Supp. 1969).

⁷³N.C. GEN. STAT. § 143-341 (Supp. 1969).

⁷⁴A dated but relevant comment summarizes states' efforts in the field of planning. Comment, *Recent Trends in State Planning Legislation: A Selective Survey*, 16 BUFFALO L. REV. 801 (1967).

⁷⁵HAWAII REV. STAT. §§ 205-1 to -15 (1968), as amended, (Supp. 1970).

⁷⁶HAWAII REV. STAT. §§ 205-12 to -13 (1968).

is to advise other departments and to attempt to coordinate the state's growth and development in an unspecified fashion.⁷⁷

The Northern Illinois Planning Commission (NIPC)⁷⁸ is specifically limited in authority by statute: "[T]he Commission shall act solely as an advisory body [I]ts plans and recommendations shall have no binding effect" ⁷⁹ This honorific position has understandably limited the effectiveness of the commission's work.⁸⁰ The NIPC's primary strength lies in its responsibility to formulate comprehensive plans for the region and to aid the voluntary cooperation of local units of government.⁸¹ NIPC's public information program,⁸² if developed to statutory limits, would aid in implementation.

Oregon has chosen the route of forcing local participation by threat of state government. Those counties that initiate satisfactory plans of their own will be allowed to administer planning as they choose; those that procrastinate face intervention by the governor and the imposition of a State-drawn plan.⁸³ The threat has produced the intended result: The governor of Oregon reports that planning efforts are underway in all thirty-six of the state's counties.⁸⁴

Texas, in addition to the planning power of the state's executive, has also turned over to local government part of the burden through the creation of "regional planning commissions."⁸⁵ These are voluntary associations of two or more local governments that attempt to coordinate planning for the area involved.

Planning on a comprehensive basis is a vital ingredient in the Stratton Commission's formula. It is vital as well to the continued well-being of North Carolina's coast line in years to come. Practically, a total program of comprehensive planning is needed to support the necessary regulation along the coast; this is both to insure that fair administration occurs and to provide the substantive background for regulation required by the courts.⁸⁶

⁷⁷DEL. CODE ANN. tit. 29, § 4904 (Supp. 1968).

⁷⁸ILL. REV. STAT. ch. 85, § 1101-1139 (1966), *as amended*, (Supp. 1970).

⁷⁹ILL. REV. STAT. ch. 85, § 1117 (Supp. 1970).

⁸⁰*See generally* Yackley, *Amid a Thicket of Governments—Regional Planning in Northeastern Illinois*, 58 ILL. B.J. 348 (1970).

⁸¹ILL. REV. STAT. ch. 85, § 1118-1126, *as amended*, (Supp. 1970).

⁸²ILL. REV. STAT. ch. 85, § 1125 (Supp. 1970).

⁸³ORE. REV. STAT. § 215.505 (1969).

⁸⁴*Hearings on S. 3354* at 385.

⁸⁵TEX. REV. CIV. STAT. art. 1011m § 3 (Supp. 1970).

⁸⁶*See* annotation discussing the importance of comprehensive planning in establishing the

REGULATION: CUMULATIVE AREA-WIDE ZONING

The concept of cumulative zoning is not a new one; it is, in its modern setting, still a primary tool of regulation employed by units of local government.⁸⁷ *Non-cumulative* zoning permits only a single use for each area: Land designated "agricultural" can be used *only* for agricultural development; "residential," *only* for residential. However, *cumulative* zoning allows the land to be used in the manner indicated by the zoning designation and also in any manner that would be permitted under any more restrictive designation. For example, "residential I," often the most restrictive zoning unit, would countenance no other use of the land, while less restrictive designations (such as "light industrial") would allow the land to be used as designated or in any more restrictive manner (such as "residential I"), but not in a less restrictive manner (such as "heavy industrial"). This writer suggests that effective regulation of the coastal zone can also be accomplished through an extension of this concept.

Relying on the approved comprehensive plan for the coastal region, a coastal-zone authority would, after proper notice and hearings, apply specific guidelines from the legislature to arrive at *zone-unit designations* (ZUD) for all the land covered by the program. The completed and approved ZUDs would then be impressed on an official map and sent, along with pertinent regulations and data, to local officials.

Subject to changes in keeping with the program's development, the following are offered as tentative zone-unit designations:

- 1) *Primitive*: an area with strong ecological significance and little or no change from its natural state; no manmade alterations would be allowed.
- 2) *Limited recreational*: an area traditionally or potentially well-suited for quiet family recreation activities; widely spaced single-family dwellings and rough improvements, such as dirt roads, would be allowed.
- 3) *Standard recreational*: an area traditionally or potentially well-suited for large-scale family vacationing and commercial camping; hard-surfaced roads, motels of specified size, more concentrated dwellings, and light commercial enterprises of the amusement and vacation-support type would be allowed.

validity of zoning ordinances: 58 AM. JUR. *Zoning* § 27 (1961); 101 C.J.S. *Zoning* § 30 (1958). See also *Schloss v. Jamison*, 262 N.C. 108, 117, 136 S.E.2d 691, 700 (1964).

⁸⁷See generally R. BABCOCK, *THE ZONING GAME* (1966); P. GREEN, *ZONING IN NORTH CAROLINA* (1952).

4) *Residential*: standard residential development would be allowed with maximum concentration levels set at the state level.

5) *Light commercial/resort*: commercial development, with maximum limits set at the state level, and high-density beach and resort development would be allowed.

Because of the potential impact on the environment of any subdivision or heavy industrial development, any such projects would have to obtain permits from both local and state authorities. In addition, the coastal authority should have the authority to apply legislative guidelines to grant variances above the ZUD where it is demonstrated that the development in question would not cause irreparable harm to the environment, would be reasonably consistent with the comprehensive plan, and would be in the best interests of the state.

The concept of cumulative zoning is extended in this proposal to include a form of *cumulative control* whereby local government officials would retain considerable control over the direction and extent of local development, with only an ultimate authority reserved at the area or state level. For example, under this proposal a local government in an area that receives a ZUD of "light commercial/resort" would have full authority to allow or not to allow development, with state-level concurrence required only for heavy industrial and subdivision projects. Even those areas with more restrictive ZUDs would be subject to full local control up to the restrictive level thus established.

Under this proposal the General Assembly and the officers of state government could insure that coastal development be consistent with the best interests of all North Carolinians, and not only those who reside in the Eastern part of the state. At the same time, control over local land use, for the most part, would remain with locally elected officials so that in most instances, where proposed development would be consistent with traditional developmental patterns, there would be no state or regional interference at all.

As the Stratton Commission pointed out, the full program of coastal management should include an extensive program of land acquisition and development, coupled with developmental projects. Regulation, however, whereby the land owner retains the increments of ownership subject only to restrictions placed on the land's use, offers definite advantages as an environmental-protection tool. Whereas the prohibitive cost of purchase would preclude a wide-scale attack in so large an area, a program of regulation can be initiated simply and

administered efficiently through the existing framework of government. Even beyond the purchase expenditure, acquisition necessarily implies continued state management and therefore continued expense; regulation assumes that, subject to the restrictions, full management control will remain with the individual landowner.

To be sure, a comprehensive program such as has been suggested in this comment would require careful drafting to insure compliance with constitutional requirements. However, an appraisal of the existing North Carolina statutes and case law concerning zoning and regulating indicates that such compliance would not be a difficult task. Two major questions must be answered: Under what conditions may the power to zone be transferred? At what point will the line between regulating and taking be crossed?

Transfer of Power

The Supreme Court of North Carolina has said many times that "[a]ll of the original zoning power of the State reposes in the General Assembly."⁸⁸ In previous legislative acts, this power was first transferred to cities and incorporated townships,⁸⁹ and the grant was specifically upheld by the North Carolina Supreme Court.⁹⁰ Similar authority was later given to the counties,⁹¹ and this too was upheld.⁹² To date, these are the only grants of the zoning power, although the Assembly has authorized the creation of "Regional Planning Commissions." The functions of these commissions include plotting land use for potentially large areas, but the authority is purely advisory.⁹³

The major roadblock to a transfer of the zoning power would come from article II, section 1 of the North Carolina Constitution which provides that the "legislative authority shall be vested in two distinct branches, both dependent on the people" Under this article it has been held that the General Assembly may not transfer or delegate its legislative duties.⁹⁴ However, there are at least two theories under which

⁸⁸See, e.g., *Marren v. Gamble*, 237 N.C. 680, 686, 75 S.E.2d 880, 884 (1953); See also *Zopfi v. City of Wilmington*, 273 N.C. 430, 433, 160 S.E.2d 325, 330 (1968).

⁸⁹N.C. GEN. STAT. §§ 160-172 to -181.2 (1964), as amended, (Supp. 1969).

⁹⁰*Zopfi v. City of Wilmington*, 273 N.C. 430, 434, 160 S.E.2d 325, 330 (1968).

⁹¹N.C. GEN. STAT. §§ 153-251 to -266.22 (1964), as amended, (Supp. 1969).

⁹²*Jackson v. Board of Adjustment*, 275 N.C. 155, 162, 166 S.E.2d 78, 83 (1969).

⁹³N.C. GEN. STAT. §§ 153-276 to -283 (1964).

⁹⁴*State v. Curtis*, 230 N.C. 169, 171, 52 S.E.2d 364, 365 (1949).

cumulative area-wide zoning could withstand an attack based on article II. First, the court has noted that "[w]hile the Legislature may not ordinarily delegate its power to make laws, it may nevertheless make laws and delegate the power to subordinate divisions of the Government to determine facts or state of things upon which the law shall become effective."⁹⁵ Therefore the General Assembly could, and should, set out with specificity the criteria to be used by the coastal authority in applying the zone-unit designations and then allow the authority to make commensurate determination of the facts upon which the law shall become effective.

Another response to attack under article II finds support in the recent words of Justice I. Beverly Lake who, speaking for a unanimous court, said that the power to zone could be transferred as "an exception" to the general rule.⁹⁶ He explained that transfer of the zoning power was "established by custom in most, if not all, of the states." And, although the document itself does not directly speak to the question, Justice Lake inferred that such transfer occurs "under the Constitution of North Carolina."⁹⁷

It is implicit, of course, that the General Assembly cannot transfer more power than it possesses. Beyond this, however, the only serious obstacle to cumulative area-wide zoning lies in establishing a guideline denoting the extreme limits beyond which the regulation would be a taking for which compensation must be granted.⁹⁸

Although state-wide or area-wide zoning is still a relatively new concept that is yet more a product of the futuristic pen than the statute, there is also support for approving the transfer of this power from recent trends in sister states. Only Hawaii has a full program of planning and zoning administered at the state level.⁹⁹ There, the State Land Commission classifies all land into four categories.¹⁰⁰

Wisconsin takes a stab at regional zoning¹⁰¹ by requiring that local governments enact a flood-plain zoning ordinance.¹⁰² Failure to include

⁹⁵*Efird v. Board of Comm'rs*, 219 N.C. 96, 103, 12 S.E.2d 889, 893 (1941).

⁹⁶*Jackson v. Board of Adjustment*, 275 N.C. 155, 162, 166 S.E.2d 78, 83 (1969).

⁹⁷*Id.*

⁹⁸See generally Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

⁹⁹HAWAII REV. STAT. §§ 205-1 to -15 (1968), as amended, (Supp. 1970).

¹⁰⁰HAWAII REV. STAT. § 205-2 (Supp. 1970).

¹⁰¹See generally Kockelman, *Wisconsin Water Resources Act of 1965*, 2 URBAN L. ANNUAL 141 (1969).

¹⁰²WIS. STAT. ANN. § 87.30 (Supp. 1970). See also WIS. STAT. ANN. § 59.971 (Supp. 1970).

sufficient requirements in the ordinance, or failure to act at all, will automatically mean that the state will do the job and bill the county for the cost.¹⁰³ The act's scope is quite limited, aiming primarily at shoreline erosion and flooding along the Great Lakes. Although it is a step in the right direction, the act suffers greatly from a lack of coordination¹⁰⁴ since each county unit acts independently, and city governments may act independently of the county governments.¹⁰⁵ Therefore, under the Wisconsin approach, the idea of controlling growth and use for the common good still stands inferior to intergovernmental competition. It is this writer's conclusion that zoning by entirely political subdivision is only a slightly dressed-up version of the present unacceptable, Balkanized situation.

A final example of the trend toward state control is the heralded Massachusetts "Wetlands Act of 1965."¹⁰⁶ This legislative statement grants to the Commissioner of Conservation a potential wealth of power since it gives him the authority to "adopt, amend, modify or repeal orders regulating, restricting or prohibiting dredging, filling, removing or otherwise altering or polluting, coastal wetlands."¹⁰⁷ The Commissioner views this broadly phrased statement as "in a sense the first step toward overall state zoning. This does give the Department of Natural Resources the right to restrict the coastal wetlands in Massachusetts, overriding local zoning."¹⁰⁸

The basic concept of the Massachusetts Wetlands Act is sound. Zoning power, however, should be transferred in a straightforward transaction, not by the fiat of vague, broad language. Further, so vital a program must not be limited to the wetlands themselves when so much of the pollution comes from the contiguous dry lands.

The Line Between Regulating and Taking

This problem must be analyzed at both the federal and state levels, although it is fair to assert that at least since 1926 the federal Constitution has presented an extremely low hurdle for zoning

¹⁰³WIS. STAT. ANN. § 59.971(6) (Supp. 1970).

¹⁰⁴See generally Wood, *Wisconsin's Requirements for Shoreland and Flood Plain Protection*, 10 NAT. RES. J. 327 (1970).

¹⁰⁵See WIS. STAT. ANN. § 87.30 (Supp. 1970).

¹⁰⁶MASS. ANN. LAWS ch. 130, § 105 (Supp. 1970).

¹⁰⁷*Id.*

¹⁰⁸*Hearings on S. 2802 at 912.*

legislation to clear. The celebrated case of *Euclid v. Ambler Realty*¹⁰⁰ established beyond question that zoning is a legitimate exercise of the state's police power through its subordinate agencies. The trend has been to allow ever-increasing government control over private property interests as evidenced by Justice Douglas' often-quoted line from *Berman v. Parker*:¹¹⁰ "It is well within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as well-controlled."¹¹¹ Additionally, the Court has been extremely reluctant even to hear zoning cases during the past few decades, leaving the problem to state courts. Based on the Court's refusal to take a recent California case, *Consolidated Rock Products Co. v. City of Los Angeles*,¹¹² one could reasonably conclude that it has gone out of the zoning business altogether.

The California Supreme Court admitted in *Consolidated Rock* that the zoning ordinance in question prohibited quarrying on land that had "great value if used for rock, sand, and gravel excavation but 'no appreciable economic value for any other purpose' "; in fact, the court conceded that any other use but the prohibited quarrying was "preposterous."¹¹³ Yet the California court refused to consider the implementation of the ordinance a taking of the plaintiff's property and the United States Supreme Court denied certiorari,¹¹⁴ thereby allowing the City of Los Angeles, through its zoning regulation, to close plaintiff's business and render its property worthless.

Other states, including North Carolina, have not been willing to go as far as the California court.¹¹⁵ Nor is it suggested that they should. This writer does not suggest that area-wide zoning is a panacea for all the coastal ills. As the Stratton Commission indicated, the attack must be a broad one. Where lands in question can be fairly and effectively regulated, zoning can be advantageously used. But where the regulation

¹⁰⁰272 U.S. 365 (1926). See also *Hardin v. City of Raleigh*, 192 N.C. 395, 135 S.E. 151 (1926).

¹¹⁰348 U.S. 26 (1954).

¹¹¹*Id.* at 33.

¹¹²57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, cert. denied, 371 U.S. 36 (1962).

¹¹³*Id.* at 517, 370 P.2d at 344, 20 Cal. Rptr. at 640.

¹¹⁴371 U.S. 36 (1962).

¹¹⁵See, e.g., *Comm'r of Natural Resources v. S. Volpe Co.*, 349 Mass. 104, 206 N.E.2d 666 (1965). The court noted that in such a conflict "between the ecological and the constitutional, it is plain that neither is to be consumed by the other. It is the duty of the department of conservation to look after the former, and it is the duty of the courts to stand guard over constitutional rights." *Id.* at 109, 206 N.E.2d at 671.

would constitute a prohibited taking, other powers should be brought into play.¹¹⁶ Courts and legislatures in other states have come a long way in allowing regulation.¹¹⁷ So also, the line between regulating and taking has been drawn, and fairly, by the North Carolina Supreme Court.

North Carolina is unique among the states in that its constitution includes nothing comparable to the provision of the fifth amendment of the United States Constitution which prohibits the taking of private property for public use without just compensation. However, the state supreme court has been willing to infer a prohibition against taking without compensation because the "principle is so grounded in natural equity, that it has never been denied to be a part of the law of North Carolina."¹¹⁸ This theory has provided the background against which have developed the court's tests for acceptable regulation.

There seems to be no question that under the North Carolina Constitution a mere reduction in the value of one's property because of the effects of a zoning regulation is not a ground for recovery against the regulating body. In 1953, United States Senator Sam J. Ervin, then sitting on and speaking for the state supreme court, said that the "resultant diminution in the value of [one's] property is a misfortune [he] must suffer as a member of organized society."¹¹⁹ The case can be projected to possible controversies where business development is limited or prohibited under state-wide or region-wide zoning principles. Senator Ervin's case involved a situation where a zoning ordinance enacted by the City of Charlotte prohibited the operation of a business enterprise on plaintiff's property, which was thereby reduced in value. This general rule has prevailed even where the result is "harsh and seriously depreciates the value of complainant's property."¹²⁰

It would seem, therefore, that the governmental agency, whether municipal corporation or coastal-zone authority, has considerable leeway in administering an acceptable program of land use regulation. The most liberal statement of the test is found in a 1961 Charlotte case in

¹¹⁶A coordinated approach is suggested in Williams, *Legal Techniques to Protect and Promote Aesthetics Along Transportation Corridors*, 17 BUFFALO L. REV. 701 (1968).

¹¹⁷See generally Knight, *Proposed Systems of Coastal Zone Management: an Interim Analysis*, 3 NAT. RES. LAWYER 599 (1970). See also Weaver, *National Land Policy: Historic and Emergent*, 12 U.C.L.A.L. Rev. 719 (1965).

¹¹⁸*Johnson v. Rankin*, 70 N.C. 550, 555 (1874).

¹¹⁹*Marren v. Gamble*, 237 N.C. 680, 686, 75 S.E.2d 880, 884 (1953).

¹²⁰*In re Parker*, 214 N.C. 51, 56, 197 S.E. 706, 710 (1938).

which a change in the zoning designation resulted in a two-thirds reduction in the value of the plaintiff's property:

"It is a general rule that zoning cannot [sic] render private property valueless . . . [I]f the application of a zoning ordinance has the effect of completely depriving an owner of the beneficial use of his property by precluding all practical uses or the only use to which it is reasonably adapted, the ordinance is invalid."¹²¹

An opinion written by Justice, now Chief Justice, Bobbitt sets forth the second requirement that the regulation, to be upheld, must "bear a 'substantial relation to the public health, safety, morals, or general welfare.'"¹²² This 1956 decision, and others since, have generalized a two-part test enunciated by Justice Barnhill in *In re Parker*.¹²³ 1) Does the regulation pass "the bounds of reason and [assume] the character of a merely arbitrary fiat"? 2) Is the regulation one that has "no substantial relation to the public safety and public welfare of the community"? If the regulation meets these tests the court will not interfere with its implementation unless it is "arbitrary, oppressive, or attended with manifest abuse."¹²⁴ Surely, a region-wide regulatory plan designed to protect the interests of all North Carolina's citizens would easily pass this muster.

From the time of *Parker*, the North Carolina Supreme Court has been willing to allow new concepts and new concerns to govern the direction of its zoning decisions. The court's policy has been a wise one, and one that has set a discernable yet flexible standard against which to gauge any zoning program. It is against these case-law statements that the proposal submitted herein was drawn. It is believed that the program for cumulative area-wide zoning would survive the criteria set by the North Carolina Supreme Court. Further, the court, through various spokesmen, has set the tone of the policy that should guide the initiation and administration of this or any other future plan of large area regulation. Perhaps the statement in *Parker* expressed it in greater

¹²¹*Helms v. City of Charlotte*, 255 N.C. 647, 653, 122 S.E.2d 817, 822 (1961).

¹²²*In re O'Neal*, 243 N.C. 714, 719, 92 S.E.2d 189, 192 (1956), quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

¹²³214 N.C. 51, 58, 197 S.E. 706, 711 (1938).

¹²⁴*Hardin v. City of Raleigh*, 192 N.C. 395, 397, 135 S.E. 151, 152-53 (1926). See also *Zopfi v. City of Wilmington*, 273 N.C. 430, 434, 160 S.E.2d 325, 330 (1968).

breadth, although recent spokesmen, Justice Lake¹²⁵ and Chief Justice Bobbitt,¹²⁶ indicate no departure from it:

Each person holds his property with the right to use the same in such manner as will not interfere with the rights of others, or the public interest or requirement. It is held in subordination to the rights of society. He may not do with it as he pleases any more than he may act in accordance with his personal desires. The interests of society justify restraints upon individual conduct and also upon the use to which the property may be devoted. The provisions of the Constitution are not intended to so protect the individual in the use of his property as to enable him to use it to the detriment of the public. When the uses to which the individual puts his property conflict with the interest of society the right of the individual is subordinated to the general welfare and incidental damage to the property resulting from governmental activities or laws passed in the promotion of the public welfare is not considered a taking of the property for which compensation must be made.¹²⁷

CONCLUSION

The state of North Carolina has been blessed with rich coastal lands and waters that at this time, while undoubtedly deteriorating, are still relatively free from the massive pollution that has ruined the shorelines of other states. It is only through a system of patterned, controlled development that this condition will prevail against the ever increasing demands for limited space. The proposal submitted here for area-wide cumulative zoning is a plan that will allow the North Carolina General Assembly to act as a guardian for these coastal riches that belong to all the state's people. And, unlike other plans, this proposal will leave the bulk of the land-use control in the hands of the local government. Such a plan, properly administered in accordance with a total program of coastal protection as suggested by the Stratton Commission, can protect the state's multibillion dollar coastal resources for future generations. The General Assembly should take its cue for dramatic legislative action

¹²⁵See *Jackson v. Board of Adjustment*, 275 N.C. 155, 166 S.E.2d 78 (1969). See also *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E.2d 325 (1968).

¹²⁶See *In re O'Neal*, 243 N.C. 714, 92 S.E.2d 189 (1956). Justice Bobbitt, who authored this 1956 opinion, became Chief Justice in 1969.

¹²⁷214 N.C. 51, 57, 197 S.E. 706, 710 (1938).