

Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 1973

January 1973

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Recommended Citation

Gilbert L. Finnell Jr., *Saving Paradise: The Florida Environmental Land and Water Management Act of 1972*, 1973 URB. L. ANN. 103 (1973)

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SAVING PARADISE: THE FLORIDA
ENVIRONMENTAL LAND AND WATER
MANAGEMENT ACT OF 1972*

BY

GILBERT L. FINNELL, JR.**

I. BACKGROUND

A. *The General Problem*

"Florida, like California, is in great danger of becoming a 'Paradise Lost.'"¹ With this clarion call to the Florida legislature, Governor Reubin Askew gave his top priority to passage of the Florida Environmental Land and Water Management Act of 1972² and converted the breezes of "the quiet revolution in land use control" to Florida hur-

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The author acknowledges the helpful discussions with all the many people associated with the development and passage of the 1972 Florida legislative package. Also of particular value were suggestions from Fred P. Bosselman, Esq., Consultant to the Governor's Task Force on Resource Management, and Professor Daniel R. Mandelker.

1. Address by Governor Reubin O'D. Askew, Florida Legislature, Feb. 1, 1972.
2. FLA. STAT. ANN. §§ 380.012-10 (Supp. 1973) [hereinafter cited as the Environmental Land Act (ELA)].

ricane proportions. The Act, and its companion legislation, may constitute one of the most significant advances in state land use legislation in this country's history.³

How could a political consensus be reached on legislation that so changes the institutional arrangements for reconciling competing demands for the use of land? No doubt the environmental crisis—the nation's generally and Florida's specifically—provided the major impetus for passage.⁴ For the governor spoke poignantly to those

. . . who remember beaches,
and now see only high rises
. . . who remember wildlife swamps,
and now see airport runways
. . . who remember beautiful Boca Ciega Bay,
and now see only landfill
. . . who remember Lake Apopka,
and now see only dead fish . . .
. . . who remember environmental
harmony in South Florida,
and see flooding, drought and fire. . . ⁵

3. See Florida State Comprehensive Planning Act of 1972, FLA. STAT. ANN. ch. 23, pt. 1 (Supp. 1973); Land Conservation Act of 1972, FLA. STAT. ANN. ch. 259 (Supp. 1973) (proposed by the Governor's Task Force on Resource Management). See also Florida Water Resources Act of 1972, FLA. STAT. ANN. ch. 373, pt. 1 (Supp. 1973) (proposed by the House Interim Study Committee on Water Resource Management and supported by the Task Force) [based on F. MAHONEY, R. AUSNESS & J. MORRIS, *THE MODEL WATER CODE TEXT AND COMMENTARY*, (Florida Water Resources Research Center Pub. No. 8, 1970)].

The legislation "constitutes one of the most significant advances in state land use legislation in this country's history—certainly comparable with the 1970 Vermont legislation and the earlier Hawaii legislation." Address by Fred P. Bosselman, 1972 ASPO National Planning Conference, April 17, 1972. See also St. Petersburg Times, April 8, 1972, § B at 1, col. 1; The Wall Street Journal, June 28, 1972, at 1, col. 6.

4. See generally, on the national problem, ENVIRONMENT AND POLICY (W. Ewald ed. 1968); MASS. INST. OF TECH., WOODS HOLE OCEAN INST. & BOSTON U., 92d CONG., 1st SESS., PAPERS ON NAT'L LAND USE POLICY ISSUES (Comm. Report 1971) [hereinafter cited as MIT, WOODS HOLE & B.U. POLICY PAPERS]; REPORT OF THE COMM. ON INTERIOR AND INSULAR AFFAIRS, LAND USE POLICY AND PLANNING ASSISTANCE ACT OF 1972, S. REP. NO. 869, 92d CONG., 2d SESS. (1972) [hereinafter cited as S. REP. NO. 92-869]; STAFF OF THE COMM. ON INTERIOR AND INSULAR AFFAIRS, 92d CONG., 2d SESS., NATIONAL LAND USE POLICY (Comm. Print 1972) [hereinafter cited as LAND USE POLICY PAPERS]; and, on the state problem, W. McCLUNEY, *THE ENVIRONMENTAL DESTRUCTION OF SOUTH FLORIDA* (1971).

5. See note 1 *supra*.

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And the Florida newspapers sent the people the message.⁶ The political process was responsive.⁷

Although the Act is not a panacea,⁸ it offers numerous possibilities for ameliorating the environmental, economic and social problems often caused by the misuses and abuses of private property in our society. It may be a harbinger of a broad-based philosophical shift of attitudes toward land ownership—or at least an increased awareness of the many functions of property.

Probably no philosopher has had more influence upon American views of private property than John Locke. His natural law arguments for “life, liberty, and property” had profound impact in France and America as evidenced by two great revolutions and by language in the United States Constitution.⁹ His labor theory of property, one that encourages self-reliance, individual production and enterprise, is probably still the most influential justification for private property. But today many of Locke’s words—as where he speaks of land with no improvement “of pasturage, tillage, or planting,” as “waste,” “amount[ing] to little more than nothing”¹⁰—are a quaint reminder of a bygone era as we face the environmental crisis and the looming fulfillment of the Malthusian prophecy¹¹ during the last third of the twentieth century.

In a simpler era of abundant resources and relatively self-sufficient social and economic units, the Blackstonian view of property as an

6. The editorial support and reporting was, to the author’s knowledge, entirely favorable to the legislation. *See, e.g.*, Fort Lauderdale News, Feb. 9, 1972, at 12, col. 1; The Miami Herald, Mar. 1, 1972, § A, at 6, col. 1; The Palm Beach Post, Feb. 15, 1972, §A, at 8, col. 1; St. Petersburg Times, Apr. 1, 1972, § A, at 10, col. 1; Tallahassee Democrat, Feb. 22, 1972, at 1, col. 1.

7. *See*, for pessimistic predictions of the likelihood of legislative response without the inducements of federal legislation or creative judicial responses, R. BABCOCK, *THE ZONING GAME* 174, 177, 185 (1966) [hereinafter cited as BABCOCK]; Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515, 535 (1957) [hereinafter cited as Haar, *Regionalism*].

8. “In 20 years, Floridians will look back at the Legislature of 1972 and count its start of state land planning as its most significant accomplishment. . . . It’s also an easy guess that history’s verdict will condemn this Legislature for not going far enough . . . the ghost of Southern California still is very much with us.” St. Petersburg Times, April 9, 1972, § D, at 2, col. 1.

9. *See generally* Harding, *Freedom to Use Property*, in *FREE MAN VERSUS HIS GOVERNMENT* 79 (A. Harding ed. 1958) [hereinafter cited as Harding].

10. J. LOCKE, *Of Property*, in *OF CIVIL GOVERNMENT* 28 (1969).

11. *See generally* note 4 *supra* for materials on both environmental and population problems.

absolute¹² may also have been tolerable. But in a highly interdependent society in which we are acutely aware that misuses of coastal lands may be destroying irreplaceable natural resources or that the exclusivity of property may be denying fundamental liberties to certain segments of our society,¹³ we are forced to reappraise any lingering notions of property as an absolute.

Recalling the Hohfeldian conception of property as an aggregate of numerous legal relationships—relationships among human beings—rather than the “thing” itself that is the object of the relationships,¹⁴ we are reminded that the term “property” in the United States Constitution¹⁵ operates at a high level of abstraction and that we must avoid the simplistic notion that the institution of private property can either be defended wholly as a good thing or attacked wholly as a bad thing without qualification or limitation.¹⁶ The institutional structure of “property”—particularly the assignment of decision-making concerning alternative uses of land—will have profound effects upon existing and future generations.

Thus, the idea of land as a commodity is undergoing critical analysis and reconsideration. Earlier conceptions of land seem to be re-emerging: land as a common asset of the people or as entrusted to a present owner with rights to make reasonable use of the land, but with correlative duties to tend and preserve the land for the benefit of present and future generations.¹⁷

12. “. . . [T]he right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (15th ed. 1809). See generally Harding at 94, 96.

13. See, e.g., MIT, WOODS HOLE & B.U. POLICY PAPERS at 161-98; Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971); Note, *Low-Income Housing in the Suburbs: The Problems of Exclusionary Zoning*, 24 U. FLA. REV. 58 (1971); Note, *The Equal Protection Clause and Exclusionary Zoning After “Valtierra” and “Dandridge,”* 81 YALE L.J. 61 (1971).

14. See RESTATEMENT OF PROPERTY, ch. 1, at 2 (1936); Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 359 (1954); Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

15. U.S. CONST. amends. V & XIV.

16. See generally R. ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH 334 (1922).

17. President Richard Nixon, in his State of the Nation’s Environment address, stated: “I call upon all Americans to dedicate themselves during the decade of the seventies to the goal of restoring the environment and reclaiming the earth for

Nevertheless, a slogan such as "land is a resource, not a commodity,"¹⁸ though useful as a rhetorical device for garnering public support for a reappraisal of land use policies, must be coupled with extensive revisions in existing land regulatory schemes if the legal relationships implicit in the slogan are to be given meaningful legal recognition. It is to this restructuring task that the Florida Environmental Land Act is addressed. No longer will critical decisions be made entirely in the realm of private ordering, or even private ordering as modified by local governmental regulation. The State of Florida has now recouped part of its inherent power to regulate land¹⁹ and has provided an incentive structure that, although leaving the vast majority of land use and development decisions to the individual and local government, can assure that certain decisions of critical importance to the state or region will be made with adequate attention to the entire area affected. The scope of the public welfare will no longer be delimited solely by the fortuitous location of local governmental boundaries.²⁰

B. The Movement Toward State and Regional Participation

The power to regulate land use, although an inherent power of the state, was originally delegated by the states to cities because the urban areas were the first to experience the pressures of land scarcity and overcrowding.²¹ Thus the landmark zoning case, *Village of Euclid v. Ambler Realty Co.*,²² concerned the power of a municipality to zone pursuant to an exercise of the delegated police power. The United States Supreme Court upheld the constitutionality of the ordinance which excluded all industrial uses from a residential use district, but

ourselves and our posterity. . . . Together, we hold this good earth in trust." 117 CONG. REC. 1992 (daily ed. Feb. 8, 1971). See generally S. REP. NO. 92-869, at 32; F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL*, REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY 314 (1972) [hereinafter cited as *THE QUIET REVOLUTION*]; Harding, *supra* note 9.

18. See *THE QUIET REVOLUTION* at 315 (commenting on the conservationists' slogan and the constitutional limitations, and concluding: "It is essential that land be treated as both a resource and a commodity.").

19. See generally, on the state's police power, 1 R. ANDERSON, *AMERICAN LAW OF ZONING*, §§ 2.06, 7.03 (1968); Dunham, *Flood Control Via the Police Power*, 107 U. PA. L. REV. 1098 (1959); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

20. See generally *BABCOCK* at 134, 147.

21. See S. REP. NO. 92-869, at 33; *THE QUIET REVOLUTION* at 1.

22. 272 U.S. 365 (1926).

Justice Sutherland noted in dictum, "the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."²³ Extraterritorial impact of local zoning has remained a problem for the courts, however, and the Supreme Court has never again addressed the regional issue since the 1928 allusion in *Euclid*.²⁴

The judiciary has not been alone in its concern about extraterritorial impact. Increasingly, legal and planning scholars and practitioners have drawn attention to the effects, in a society that values representative democracy, of a decision-making process that is unrepresentative and unresponsive to a significant portion of the affected citizenry. Three commentators, in particular, have spoken persistently and effectively of the tendency of the existing land use regulatory process to function in an anti-democratic fashion. Professor Charles Haar, in his well-known critique of *Lionshead Lake, Inc. v. Township of Wayne*,²⁵ pointed out ". . . the need for some type of regional or metropolitan planning in order that courts may have a standard against which to measure legislative determinations of the sort presented [in *Lionshead*]."²⁶ In a later article, he again focused on the judiciary's "'isolationist' view used in the guise of 'regionalism'"²⁷ and called for reform. Haar's recommendations included

23. *Id.* at 390.

24. See generally BABCOCK at 109-10 (discussing reluctance of the United States Supreme Court to grant certiorari in zoning cases).

25. 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953). See Haar, *Wayne Township: Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986 (1954); Nolan & Horack, *How Small a House?—Zoning for Minimum Space Requirements*, 67 HARV. L. REV. 967 (1954); Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953).

26. Haar, *Zoning for Minimum Standards: The Wayne Township Case*, *supra* note 25 at 1063 (1953).

27. Haar, *Regionalism* at 526. Although Professor Haar's analysis recognized the court's efforts in achieving "a limited type of 'regionalism,'" he noted that in *Duffcon Concrete Products, Inc. v. Borough of Cresskill*, 1 N.J. 509, 64 A.2d 347 (1949), and *Lionshead*, for example, the results of the judicial action in upholding the ordinances under attack had been to exclude particular uses from the local boundaries because of the availability of space for the uses in the greater region. The courts, in permitting exclusion of heavy industry and dwellings not meeting certain minimum size requirements, served to exacerbate the restrictive view of zoning as a technique for protecting the single-family neighborhoods [see BABCOCK at 79, 115] rather than to encourage a balancing of the general public interest against the limited municipal interest in order to avoid the excesses of localism. Haar, *Regionalism* at 526.

See also Professor Haar's discussion of *Borough of Cresskill v. Borough of Du-*

enactment of state enabling legislation "to delineate the process by which regional master plans can be formulated" and articulation of "the impact of the regional master plan on the local land ordinances. . . ."²⁸ The appellate review of such a process should be a state reviewing agency rather than the courts, which, Haar believed, had evoked serious doubts as to their "competence in deciding the proper regional allocation of land resources."²⁹

During this same mid-fifties period, Norman Williams, Jr., then Director of the Division of Planning in New York's Department of City Planning, published an incisive analysis of the functioning of planning law in a democratic society.³⁰ He noted especially that in the land use regulatory area, "the machinery of democratic government is itself often used successfully for anti-democratic ends. . . ."³¹ Williams called for

a conscious over-all strategy for integration into a more democratic society. Such a strategy would be concerned with analyzing, understanding, and guiding action in wide areas of American life—in fact, everything connected with the development of the physical and social environment, with special emphasis on planning and housing and the relevant fields of law.³²

The third of the commentators, Richard F. Babcock, the distinguished Chicago attorney, may well be history's designate as the primary instigator of major reform of land use laws in the United States. He was an early and effective critic of zoning administration,³³ and in 1962 received a Ford Foundation grant to study land use regulation. His study, and a continuing grant from the Ford Foundation, culminated in the American Law Institute's (ALI) decision, in 1963, to initiate its project to develop a Model Land Development

mont, 15 N.J. 238, 104 A.2d 441 (1954) (invalidation of an ordinance as not in harmony with the "regional master plan") in Haar, *Regionalism* at 526; and cases dealing with the regional problem, e.g., *Vickers v. Township Comm.*, 37 N.J. 232, 181 A.2d 129 (1962) (note particularly Judge Hall's dissent); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

28. Haar, *Regionalism* at 535-36.

29. *Id.* at 530.

30. Williams, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROB. 317 (1955) [hereinafter cited as Williams].

31. *Id.* at 349.

32. *Id.* at 350.

33. See, e.g., Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. CHI. L. REV. 509 (1959).

Code,³⁴ a decision which probably marks the beginning of a sustained drive toward major land regulatory reform in this country. The results of Babcock's study are set forth in *The Zoning Game*,³⁵ a penetrating appraisal and indictment of the inadequacies of the existing land use decision-making process and an articulate prescription for reform, *viz.*:

(1) more detailed statutory prescription of the required administrative procedures at the local level; (2) a statutory restatement of the major substantive criteria by which the reasonableness of local decision-making is measured; (3) the creation of a state-wide administrative agency to review the decisions of local authorities in land-use matters, with final appeal to an appellate court.³⁶

Tentative Draft No. 3 of the ALI Model Code, prepared principally by Professor Allison Dunham, Chief Reporter, and Fred P. Bosselman, Esq., Associate Reporter, contains model language paralleling the Babcock prescription for increased state participation. Its major premises, in Babcock's words, are:

[1] . . . land use regulation should be left to local decision-makers except where those decisions may impose external costs;

[2] . . . to the extent that there should be a voice in some decisions that can speak from a constituency greater than the municipality, the state is the appropriate authority. This implies a rejection of at least two alternatives, the national government and metropolitanism of some sort.³⁷

In 1961, Hawaii passed the first legislation giving the state increased participation in land use control.³⁸ A State Land Use Commission was created and directed to divide the State into conservation, agricultural, rural and urban districts. Uses in the urban districts are

34. ALI MODEL LAND DEV. CODE vii (Tent. Draft No. 1, Apr. 1968). See also ALI MODEL LAND DEV. CODE (Tent. Draft No. 2, Apr. 1970); ALI MODEL LAND DEV. CODE (Tent. Draft No. 3, Apr. 1971) [hereinafter cited as ALI T.D. 3]; ALI MODEL LAND DEV. CODE (Tent. Draft No. 4, Apr. 1972).

35. BABCOCK, *supra* note 7.

36. *Id.* at 153-54.

37. Babcock, *Comments on the Model Land Development Code*, 1972 URBAN L. ANN. 59 [hereinafter cited as Babcock, *Comments*].

38. HAWAII REV. LAWS ch. 205 (1968), as amended, (Supp. 1971). See generally THE QUIET REVOLUTION at 5.

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determined by county zoning regulations, in the rural and agricultural districts by regulations adopted by the Land Use Commission, and in the conservation zones, as permitted by the Board of Land and Natural Resources, the governing body of the Department.³⁹ Hawaii's act marked the beginning of "the quiet revolution," but since "Hawaiians [were] newly arrived at statehood [and] had been accustomed to a strong, centralized territorial government during the many years preceding statehood in 1959,"⁴⁰ the portentousness of Hawaii's act was probably generally overlooked.

Hawaii's act, however, was only the beginning. The recent upsurge of innovative state legislation is a reminder of Justice Holmes' oft-cited observation of the contribution of the federal system in providing a laboratory, through the states, for the testing of new ideas in government.⁴¹ The land use reform activity, well analyzed in the Bosselman-Callies report on "*The Quiet Revolution in Land Use Control*,"⁴² would surely have pleased Justice Holmes, for imaginative solutions to the problems created by the existing over-reliance on local government are underway.

The responses range from Vermont's system of requiring state permits for certain major-impact development⁴³ through simple legislative establishment of study commissions to make recommendations for reform.⁴⁴ Most of the legislation, such as the Wisconsin Shoreland Protection Program,⁴⁵ the Massachusetts Zoning Appeals Law⁴⁶ and the Maine Site Location Law,⁴⁷ attempt to solve a single kind of

39. HAWAII REV. LAWS §§ 205-2, 205-5 (1968), *as amended*, (Supp. 1971).

40. THE QUIET REVOLUTION at 6.

41. *See* TRUAN v. CORRIGAN, 257 U.S. 312, 344 (1921) (dissenting opinion).

42. THE QUIET REVOLUTION, *supra* note 17.

43. VT. STAT. ANN. tit. 10, § 6081 (1958), *as amended*, (Supp. 1970).

44. *See generally* THE QUIET REVOLUTION, *supra* note 17.

45. WIS. STAT. ANN. §§ 59.971, 144.26 (1957), *as amended*, (Supp. 1972).

46. MASS. GEN. LAWS ANN. ch. 40B, § 20 (1968), *as amended*, (Supp. 1972).

47. ME. REV. STAT. ANN. tit. 38, § 481 (1964), *as amended*, (Supp. 1972). *See generally*, for a discussion of the Maine, Massachusetts, Vermont and Wisconsin statutes, *supra* notes 43, 45-47; THE QUIET REVOLUTION at 187, 164, 54 and 235, respectively. THE QUIET REVOLUTION also analyzes the San Francisco Bay Conservation and Development Commission, Twin Cities Metropolitan Council, Massachusetts Wetlands Protection Program, New England River Basins Commission and summarizes other innovative state legislation. *See also* E. HASKELL, MANAGING THE ENVIRONMENT: NINE STATES LOOK FOR NEW ANSWERS, REPORT TO THE WOODROW WILSON INT'L CENTER FOR SCHOLARS (1971); R. RUBINO & W. WAGNER, THE STATES' ROLE IN LAND RESOURCE MANAGEMENT, REPORT TO THE COUNCIL OF STATE GOV'TS (1972).

problem. But all of the legislation shares the common significance of asserting the need for state participation in the land use decision-making process. Federal legislation also has been introduced which, if enacted, would encourage all states to develop a state and regional planning and regulatory capacity in certain critical areas and for certain impact development.⁴⁸ Thus, the movement toward increased state and regional participation is accelerating.

C. *The Florida Response*

The Florida Environmental Land and Water Management Act of 1972 (Environmental Land Act) was the product of the recommendations of the gubernatorial Task Force on Resource Management.⁴⁹ Governor Askew's charge to the Task Force was: "to follow up on the recommendations of the Governor's conference on water management problems in South Florida; and to recommend legislation for long-term solutions of land and water use problems."⁵⁰

Members of the Task Force agreed on the essential question to be answered: "[t]o what extent should the interests of the state as a whole

48. See generally S. REP. NO. 92-869, *supra* note 4; N.Y. Times, July 10, 1972, at 30, col. 2; N.Y. Times, June 26, 1972, at 32, col. 1.

49. The Task Force was appointed in October, 1971, and was chaired by Dr. John DeGrove, Florida Atlantic University, who had also been a member of The National Commission on Urban Problems (The Douglas Commission). The Bill was introduced as S.B. 629. An important antecedent to S.B. 629 was H.B. 3015 which was reported favorably by a Subcommittee of the Florida House of Representatives Committee on Community Affairs. H.B. 3015 was the product of a group assembled by the Speaker's office in the fall of 1971, including Robert Rhodes, counsel to the Speaker, John Wesley White and House committee staff from Environmental Pollution Control and Governmental Organization and Efficiency. Mr. White's draft, subsequently introduced as H.B. 3015, "established regional planning districts which would form the basis for a statewide land use regulatory system. The Bill also tracked much of the Hawaii land use legislation but was primarily built upon regional planning districts which would develop components for the statewide comprehensive plan. The Bill also elevated the Bureau of Planning to division status and the second draft enabled the division to identify areas of critical state concern and development having regional impact." Memorandum to author from Robert Rhodes, Aug. 28, 1972. H.B. 3015 clearly raised the issue of the need for comprehensive planning, and although the Governor's Task Force product, S.B. 629, departed from many of the concepts and provisions of H.B. 3015, the House staff work was invaluable: "The support of legislative leadership is vital and the issue certainly has to be aired and supported by the press. Without the groundwork done by a small group of House staff people with the backing of House leaders, I have no doubt that . . . S.B. 629 would not have passed." *Id.*

50. Author's notes of initial Task Force meeting.

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be brought to bear on the local desires reflected in a local plan or ordinance regulating land development?"⁵¹ Redesigning the institutional framework for land use decision-making presented fundamental issues of how the legal and political processes should be organized.⁵² The theoretical options were numerous, including, without even considering the potential federal role,⁵³ at least one or a combination of the following:

(1) Total delegation of the planning and regulatory functions to local governments, leaving problems of reconciling extraterritorial conflicts—"spillover" problems created by local decisions—to the courts.⁵⁴

(2) Creation of new, larger units of government—full-service regional or metropolitan governments—to which the planning and regulatory functions would be delegated.⁵⁵

(3) Establishing a process by which standards would be specified at the state level with which certain of the more important local decisions must comply, authorizing appeal of such decisions to a state adjudicatory commission.⁵⁶

(4) Total state preemption: (a) of the entire land regulatory and planning functions; (b) of certain critical geographical areas, e.g., the coastline; or (c) of certain types of development of major state or regional impact.⁵⁷

The "quiet revolution" had produced a number of useful models, but Florida's political, geographical, economic and social diversities seemed to call for comprehensive and tailor-made legislation. The Task Force concluded that the Hawaii districting approach might prove rigid and administratively cumbersome in a larger state such

51. ALI, T.D. 3, at xiii.

52. See generally D. MANDELKER, *MANAGING OUR URBAN ENVIRONMENT* 4-30 (2d ed. 1971) [hereinafter cited as MANDELKER], noting particularly the excerpt, at 22, from Ostrom, *The Politics of Administration* (undated).

53. See, for the probable federal role, S. 632, 92d Cong., 2d Sess. (1972) [hereinafter cited as S. 632]; S. REP. NO. 92-869, *supra* note 4. See generally, for the potential federal role, C. MEYERS & A. TARLOCK, *WATER RESOURCE MANAGEMENT* 219-86 (1971).

54. See generally BABCOCK at 106; Haar, *Regionalism* at 530; notes 19-29 *supra* and accompanying text.

55. See, for arguments rejecting "metropolitanism" in land use regulation, BABCOCK at 153; Babcock, *Comments* at 60.

56. This is the approach of the ALI project. ALI, T.D. 3, at 7. See generally BABCOCK at 153-85; MANDELKER at 159-67.

57. See generally, on state preemption, MANDELKER at 183-221.

as Florida.⁵⁸ Other statutes seemed to concentrate primarily upon geographic problems, such as Wisconsin's Shoreland Protection Program,⁵⁹ or upon functional needs, such as Massachusetts' Zoning Appeals Law.⁶⁰

At least five major policies tended to be predominant during Task Force deliberations:

(1) the land regulation power should remain as close to those affected as possible;

(2) large, centralized bureaucracy, with its concomitant impersonality, should be avoided;

(3) the decision-making process should provide for a balanced consideration of all the competing environmental, economic and social factors;

(4) the State should have a potential regulatory capacity both geographically, *e.g.*, critical areas, and functionally, *e.g.*, construction of major power plants; and

(5) the decision-making process should provide for expeditious decisions on development applications within an institutional framework guaranteeing maximum protection against arbitrary action.

The model finally selected as best implementing these policies was Article 7 of the third tentative draft of the American Law Institute's Model Land Development Code, *i.e.*, choice (3) of the theoretical options listed above:

. . . establishing standards (and authorizing a state agency to establish standards) with which certain of the more important local decisions must comply, authorizing appeal of these decisions to a state adjudicatory commission.⁶¹

The major underlying concepts of the Environmental Land Act, as enacted, have been well summarized by Senator Robert Graham, the chief sponsor in the Florida Senate:

58. *See, e.g.*, THE QUIET REVOLUTION at 24 (monopoly effect lending to high land prices), and, at 29 (excessive time for processing applications); N.Y. Times, June 20, 1972 at 38, col. 1: "The clearest message from the voters in this year's primary elections is that government is too unresponsive to the immediate needs and concerns of the people."

59. *See* note 45 *supra*.

60. *See* note 46 *supra*.

61. *See* ALI, T.D. 3, at 7.

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1. Local governments should continue to have total responsibility for those land use decisions which only affect persons within their jurisdictions, including the decisions to have no land use regulations at all.
2. The state role is to represent the broader public interest in those land use decisions which have a substantial regional or statewide impact.
3. The line between private property rights and governmental regulation through the police power is unchanged. The same constitutional standards which operate when a local government regulated private land will apply to state action.⁶²

There are dimensions to these concepts, however, that, fully articulated, may account for the forceful opposition that almost defeated the Bill.⁶³ The third concept, for example, probably needs elaboration. For although the quantum of governmental regulatory power has not been increased—*i.e.*, “the line between private property rights and governmental regulation through the police power is unchanged,”⁶⁴ the composition of the decision-makers has changed sharply. The Environmental Land Act has restructured the land use decision-making process to respond, when major questions of public interest or welfare are at stake, to the interests of the total public affected by major land development.

Regardless of how we answer the philosophical and legal question, “What is Property?,” we must concede that, essentially, property is what the decision-makers—the courts, the legislatures and the administrative agencies—say that it is.⁶⁵ Likewise in drawing any imaginary line between private property rights and governmental regulation, we must concede that in the final analysis the line is located where the decision-makers say that it is located. Thus, the quantum of potential regulatory power (or the location of the line between private property rights and governmental regulation) may not have been

62. Address by Senator D. Robert Graham, Florida Society of Newspaper Editors, May 6, 1972.

63. *See, e.g.*, St. Petersburg Times, Mar. 28, 1972, § B, at 1, col. 3. It was one senator's observation that: it is “the most dangerous piece of legislation we'll ever see in Florida,” a threat to “the most precious right we have left to us, . . . the private ownership of land;” it “runs cold chills up my spine.” *Id.* *See also* N.Y. Times, July 16, 1972, § 3, at 1, col. 3.

64. *See* note 62 *supra* and accompanying text.

65. *See generally* C. BERGER, LAND OWNERSHIP AND USE 1-103 (1968).

an especially relevant or meaningful concept to most land developers or others affected by governmental regulation. But vesting regulatory power in decision-makers, responsive not only to the majority of citizens within local governmental boundaries but also to affected citizens outside those boundaries and to affected minority groups within the boundaries who are not otherwise represented by local majority views, undoubtedly struck meaningful notes of major social, economic and environmental concern.

Economically, the change served as a reminder that the free marketplace (useful as market prices may be in allocating resources in most cases) is often an inadequate institutional design, by itself, for deciding some of the complex questions of land use that present multifarious and competing social, environmental and economic considerations of wide geographic impact.⁶⁶ The "votes" of the marketplace often need to be supplemented with a democratically responsive exercise of governmental regulatory power. This principle, although tacitly recognized as implicit in existing regulatory schemes, was again focused by the new structure of the Environmental Land Act which implicitly recognized that governmental regulation, as it moves from prevention of simple nuisances and classification of uses into Euclidean zones to the more creative and innovative control of growth and development,⁶⁷ requires a planning and implementing capacity beyond the capabilities of numerous local governments acting independently.⁶⁸

Socially, the change served as a reminder that the institution of property—comprised of numerous legal relationships among human beings—often functions in a manner that raises fundamental issues of fairness in a democratic society. In Norman Williams' words: ". . . the problems arising in this field of constitutional law are closely akin to those involved in civil liberties law, and call for similar attitudes towards the exercise of governmental power."⁶⁹ In a legislative session in which busing and housing were major issues, this dimension of the Act undoubtedly did not go unnoticed.

66. See M. CLAWSON & J. KNETSCH, *ECONOMICS OF OUTDOOR RECREATION* 257 (1966) [hereinafter cited as CLAWSON & KNETSCH]; Ducsik, *The Crisis in Shoreland Recreation Lands*, MIT WOODS HOLE & B. U. POLICY PAPERS at 107, 109.

67. See generally S. REP. NO. 92-869, at 33-37; BABCOCK at 3-18.

68. "The Douglas Commission estimated that, in 1969 some 10,000 governments were exercising land use controls." S. REP. NO. 92-869, at 37.

69. Williams at 350.

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The balance of this article will be devoted to introducing Florida's new techniques for increased state participation in land regulation: (1) the geographical technique, "Areas of Critical State Concern," and (2) the functional technique, "Development of Regional Impact." The adjudicatory process, by means of which the State can assure that an affected local government complies with the state-established standards, will also be outlined.

The processes of the Environmental Land Act are applicable only within an area meeting the strict requirements for designation as an Area of Critical State Concern or when a development activity is proposed that constitutes Development of Regional Impact, *i.e.*, development that would have substantial extra-county effect. Thus, in approaching the Florida Act for the first time, the reader is cautioned to remember that the broad definition of "development"⁷⁰ is applicable only when the strict requirements of one of the two techniques have been met. The Act will be inapplicable to the vast majority of land development decisions.⁷¹

Finally, a note about the scope and purposes of this article: It is intended to serve only an introductory function. Definitive analysis of the Florida Environmental Land Act will likely await administrative and judicial interpretation and elaboration, and perhaps, will be written by others not so close to the process that produced the Act.⁷² Nevertheless, the movement toward increased state and regional participation in land use regulation continues, and those persons in other states who are just beginning to re-appraise their land development policies and decision-making processes, as well as others who simply want an introduction to the Act, may profit from one person's initial view of the Act and some of its history.

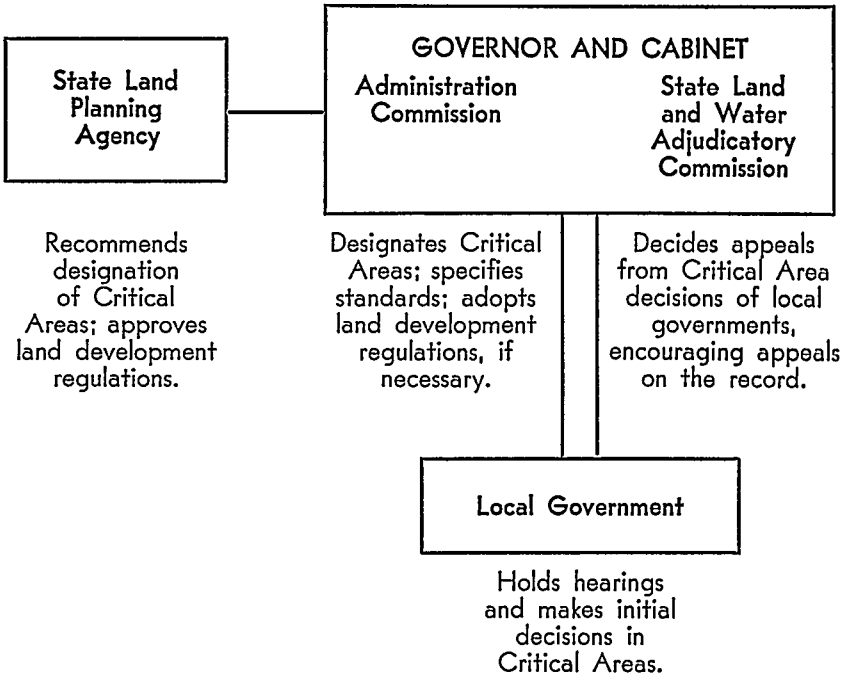
70. ELA § 380.04.

71. The Reporters for the ALI project estimate that ". . . at least 90 per cent of the land use decisions currently being made by local governments have no major effect on the state or national interest." ALI, T.D. 3, at 50. Reading out of context the Act's definition of "development" as including a ". . . material change in the external appearance of a structure on land," ELA § 380.04(2)(a) does lend credence, however, to the mistaken belief that "a farmer couldn't repaint his barn without coming to Tallahassee for a permit," as it was put to the author by a concerned banker on the afternoon S.B. 629 (ELA) was introduced.

72. A companion article on ELA by the author is scheduled to appear in 1 *FLA. ST. UNIV. L. REV.* (1973).

II. AREAS OF CRITICAL STATE CONCERN

Designation of Areas of Critical State Concern⁷³ (Critical Areas) is Florida's geographical technique for state participation in land development regulation. The basic concept can be visualized on the simplified chart below.



The Administration Commission⁷⁴ designates a discrete geographical area as a Critical Area, specifies standards with which each affected

73. ELA § 380.05.

74. The Commission is composed of the Governor and his Cabinet. *Id.* § 380.031(1). Note that in Florida, the Cabinet (consisting of the Secretary of State, the Attorney General, the Comptroller, the Treasurer, the Commissioner of Agriculture and the Commissioner of Education) is elected and serves independently of the Governor. This fact was emphasized in the 1968 Revision of the Florida Constitution in which all reference to the "Governor's cabinet" was deleted. In line with the Cabinet's independent status, the Governor and the Cabinet officers have equal votes on administrative boards of which they are *ex officio* members. *See* FLA. CONST. art. 4, § 4 and Commentary. Florida law further recognizes the political responsiveness of the Cabinet officers by placing them in the line of succession to the office of Governor should a vacancy occur. *See* FLA. STAT.

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local government's land development regulations⁷⁵ must comply, and adopts, if local government fails to submit adequate regulations, suitable land development regulations to be administered by local government. A developer proposing development⁷⁶ within the Critical Area applies for a development permit⁷⁷ to the relevant local government, and the local government conducts an initial hearing on the application and issues its development order,⁷⁸ granting or denying the permit. The order of local government is final, subject to judicial review, unless appealed to the Florida Land and Water Adjudicatory Commission,⁷⁹ or unless some other requirement of the Act remains unfulfilled.⁸⁰

The Critical Area technique provides incentives for local government to adopt and administer land development regulations that will protect the environmental or other values of state or regional importance that led to the designation of the area as critical. The appeals process and the continuing jurisdiction over amendments to the approved regulations provide the State with means of assuring that local government will reasonably comply.

A. *The Process for Designation of Areas of Critical State Concern*

The legislature has empowered the Administration Commission, by rule,⁸¹ to designate a Critical Area and specify standards to guide and

ANN. § 14.055 (Supp. 1973). Also note that the "Administration Commission" and the "Florida Land and Water Adjudicatory Commission" consist of the Governor and Cabinet; in each case they act on a simple majority. ELA §§ 380.031(1), 380.07(1).

75. "Land development regulations" include local zoning, subdivision, building and other regulations controlling the development of land." ELA § 380.031(7).

76. "Development" is broadly defined in ELA § 380.040, but the Act is applicable only if a Critical Area (ELA § 380.05) land development regulation applies to the proposed development or if it is a Development of Regional Impact. See note 108 *infra* and accompanying text.

77. "A 'development permit' includes any building permit, zoning permit, plat approval, rezoning, certification, variance, or other action having the effect of permitting development as defined in this act." ELA § 380.031(3).

78. "'Development order' means any order granting or denying with conditions an application for a 'development permit.'" *Id.* § 380.031(2).

79. The Commission is composed of the Governor and Cabinet. *Id.* §§ 380.031(1), 380.07(1).

80. See note 103 *infra* and accompanying text for possible additional requirements in Critical Areas.

81. "'Rule' means a rule adopted in FLA. STAT. ANN. ch. 120 (1971) [*i.e.*, the Florida Administrative Procedure Act (APA)]." ELA § 380.031(14). All the pro-

control local governmental action. The discretion of the Administration Commission can only be exercised, however, pursuant to specific legislative standards and strict procedural requirements.

A Critical Area may be designated only for:

- (a) An area containing, or having a significant impact upon, environmental, historical, natural, or archeological resources of regional or statewide importance;⁸²
- (b) An area significantly affected by, or having a significant effect upon an existing or proposed major public facility or other area of major public investment; or
- (c) A proposed area of major development potential, which may include a proposed site of a new community, designated in a state land development plan.⁸³

The rule designating the Critical Area will be based upon recommendations of the State Land Planning Agency,⁸⁴ after consultation with the Environmental Land Management Study Committee⁸⁵ and after giving notice to all relevant local governments, regional planning agencies⁸⁶ and any other notice required by the Florida Admin-

cedural protections of the Florida APA are thus incorporated and an "affected party" may obtain judicial review as to the validity, meaning or application of the rule by bringing an action for a declaratory judgment in the appropriate circuit court. FLA. STAT. ANN. § 120.30 (1971).

82. See note 91 *infra* and accompanying text.

83. ELA § 380.05(2).

84. The State Land Planning Agency is the Division of Planning within the Department of Administration. *Id.* § 380.031(16); FLA. STAT. ANN. ch. 23, pt. 1 (Supp. 1973). It is instructive to visualize the total process that would eventually lead the State Land Planning Agency to recommend a Critical Area designation. The Act provides for continuing recommendations to the State Land Planning Agency from each Regional Planning Agency and local governments concerning suggested areas for designation as Critical Areas. ELA § 380.05(3). And the state agency must respond and explain in writing to the regional agency or local government if it does not designate substantially such an area. This institutional design of local, regional and state communication should prove to be sensitive and responsive to public attitudes.

85. ELA § 380.09(9). This independent committee is to study "all facets of land resource management and land development regulation" and to "recommend such new legislation or amendments . . . as are needed." *Id.* § 380.09(2). The committee continues until its duties are terminated, but not later than June 30, 1974. During the committee's existence, the State Land Planning Agency "shall consult with and obtain the advice of the committee" prior to submitting any recommendation or issuing any rule under the Act. *Id.* § 380.09(9).

86. "Regional planning agency" means the agency designated by the State Land Planning Agency to exercise responsibilities under this act in a particular region of the state." *Id.* § 380.031(13).

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Administrative Procedure Act (APA).⁸⁷ The recommendations to the Administration Commission must contain the following:

. . . the agency shall specify the boundaries of the proposed areas, state the reasons why the particular area proposed is of critical concern to the state or region, the dangers that would result from uncontrolled or inadequate development of the area and the advantages that would be achieved from the development of the area in a coordinated manner. . . .⁸⁸

Finally, the rule will adopt and specify "principles," *i.e.*, standards, for guiding development of the area.⁸⁹ These standards will be applicable when land development regulations are approved or adopted for local government.

The Act provides for certain other conditions precedent to designation of any Critical Area. Before any designation is made, an inventory of state-owned lands must be filed with the State Land Planning Agency.⁹⁰ Before any Critical Area could be designated pursuant to the "environmental, historical, natural, or archeological" subsection, a favorable vote was required to be attained on a state program for acquisition of lands of environmental importance to the State or region; the requirement was met by a significant favorable vote.⁹¹ During the first 12 months of the section's effectiveness, no more than 500,000 acres can be designated,⁹² and at no time may more than five per cent of the land of the State be subject to supervision under the Critical Area technique.⁹³

87. *Id.* § 380.05(4).

88. *Id.* § 380.05(1).

89. *Id.*

90. *Id.*

91. *Id.* § 380.012. Although the Act specifically prohibits unreasonable regulation that would be an unconstitutional "taking," ELA § 380.08(1), conditioning the exercise of ELA § 380.05(2)(a) upon the state's having financial resources to purchase lands, if necessary, was a crucial compromise that prevented the Bill, (except for the section nine study committee) from being defeated. The bond referendum passed on November 7, 1972, by a vote of 1,131,718 for and 482,584 against. Tallahassee Democrat, Nov. 8, 1972, at 12, col. 1.

92. ELA § 380.05(17).

93. An amendment to the language of the five per cent "cap," added in the final hours of debate on S.B. 629, may present an undesirable ambiguity: ". . . except that if any supervision by the state is retained, the area shall be considered to be included within the limitations of this subsection." *Id.*

In summary, then, the areas of most critical concern to the State will likely be designated Critical Areas. But contrariwise, the legislative safeguards combined with the political sensitivity of the final administrative decision-makers—the state's highest elected executive officers, the Governor and Cabinet, sitting as an Administration Commission—should assure that the increased state role in land development regulation by means of the Critical Area technique will occur only when there is a compelling state interest backed by a strong public consensus.

B. Procedures for Adoption and Changes in Development Regulations Within an Area of Critical State Concern

1. Adoption of Land Development Regulations

Functioning at its best, designation of a Critical Area should simply serve as an incentive for local government to adopt land development regulations that will achieve the purposes and be consistent with the standards specified in the Critical Area rule. After adoption of the rule, an affected local government has six months within which to transmit land development regulations to the State Land Planning Agency for approval.⁹⁴ During this period, the state agency and any applicable regional planning agency must, to the extent possible, provide technical assistance to the local government in preparation of the regulations.⁹⁵

If a local government's submitted regulations are found to comply with the principles enumerated in the rule designating the Critical Area, the State Land Planning Agency must, by rule, approve the regulations. If (1) local government fails to transmit land development regulations within six months of the Critical Area rule, or (2) the transmitted regulations are found not to comply with the principles enumerated in the rule, then, within 120 days of either event, the State Land Planning Agency must submit recommended regulations to the Administration Commission and, within 45 days of receipt of such recommendation, the Administration Commission must either reject or adopt the regulations (with or without modification) by rule.⁹⁶ The rule must state to what extent the regula-

94. *Id.* §§ 380.05(5), (8).

95. *Id.* § 380.05(7).

96. *Id.* § 380.05(8).

tions supersede local land development regulations or are supplementary thereto, and must be promulgated after giving notice to all local governments and regional planning agencies in the Critical Area, in addition to any other notice required by the Florida APA.⁹⁷

Even if the Administration Commission adopts regulations, however, the local government may propose new regulations at any time thereafter and, if the regulations are approved by the State Land Planning Agency, they shall supersede any regulations previously adopted at the state level.⁹⁸ Final regulations must be approved within 12 months of the rule designating the Critical Area or such designation terminates and the area cannot be redesignated earlier than 12 months thereafter.⁹⁹

2. Changes in Land Development Regulations Within an Area of Critical State Concern

The procedure for changing existing regulations within a Critical Area will depend upon the timing and the nature of the proposed change. There are two possible periods within which a change in land development regulations might be proposed: (1) subsequent to the rule designating the Critical Area, but prior to adoption of land development regulations, and (2) subsequent to adoption of the Critical Area regulations, but prior to termination as a Critical Area.

In the first case—prior to adoption of regulations—a local government may grant any building permit, zoning permit, plat approval, rezoning, certification, variance or other action having the effect of permitting development in accordance with such zoning, subdivision, building and other regulations controlling the development of land as were previously in effect.¹⁰⁰ Presumably, a distinction will be drawn (to use the example of a zoning ordinance) between (1) zoning changes through administrative action, *e.g.*, variances and special exceptions, which will likely be provided for in the existing zoning ordinance, and (2) zoning changes through legislative action, *e.g.*, conventional rezoning. Arguably, then, before Critical Area regula-

97. *Id.*

98. *Id.* § 380.05(10).

99. *Id.* § 380.05(12).

100. The appended text substitutes the section three definitions for the terms of the applicable subsection: “. . . may grant development permits in accordance with such land development regulations as were in effect immediately prior to the designation. . . .” *Id.* § 380.05(14).

tions are adopted, local government could grant a variance or special exception without changing the existing ordinance, but could not grant a conventional rezoning which would require an amendment to the existing ordinance.¹⁰¹

In the second case—subsequent to adoption of regulations—a local government may amend or rescind its Critical Area land development regulations, but must obtain approval of the State Land Planning Agency.¹⁰² Presumably, the distinction between administrative action and legislative action will also be relevant during this period. Amendments to the regulations will require State approval, but flexibility will likely be provided in the land development regulations for locally granted variances and special exceptions, for example, without need for approval by the State Land Planning Agency.¹⁰³

C. *The Decision-Making Process for Areas of Critical State Concern*

If a proposed development is located within a Critical Area, the developer applies to local government for a development permit. Local government then proceeds¹⁰⁴ exactly as it would have prior to enactment of the Environmental Land Act except for some changes designed to protect the state or regional interest. The principal changes relate to improved procedures and to the parties to the hearing with standing to appeal.¹⁰⁵

The development order of local government is final, subject to judicial review, unless a party with standing stays the effectiveness of

101. For local government to grant a variance not in compliance with the principles specified in the Critical Area rule would defeat the purpose of the designation. See ALI, T.D. 3, § 7-202, at 14 and the original S.B. 629 which would have permitted a limited “freeze.”

102. ELA § 380.05(11).

103. Note that a rezoning by amendment to a Critical Area land development regulation would require State Land Planning Agency approval of the amendment. *Id.* A “development order” granting a “development permit,” e.g., a rezoning, is also appealable to the State Land and Water Adjudicatory Commission. *Id.* § 380.07(2). One might ask whether the Act gives the State two means of overruling a rezoning in a Critical Area.

104. The State Land Planning Agency is empowered to institute judicial proceedings to compel proper enforcement if it determines that administration of the local regulations is inadequate. *Id.* § 380.05(9).

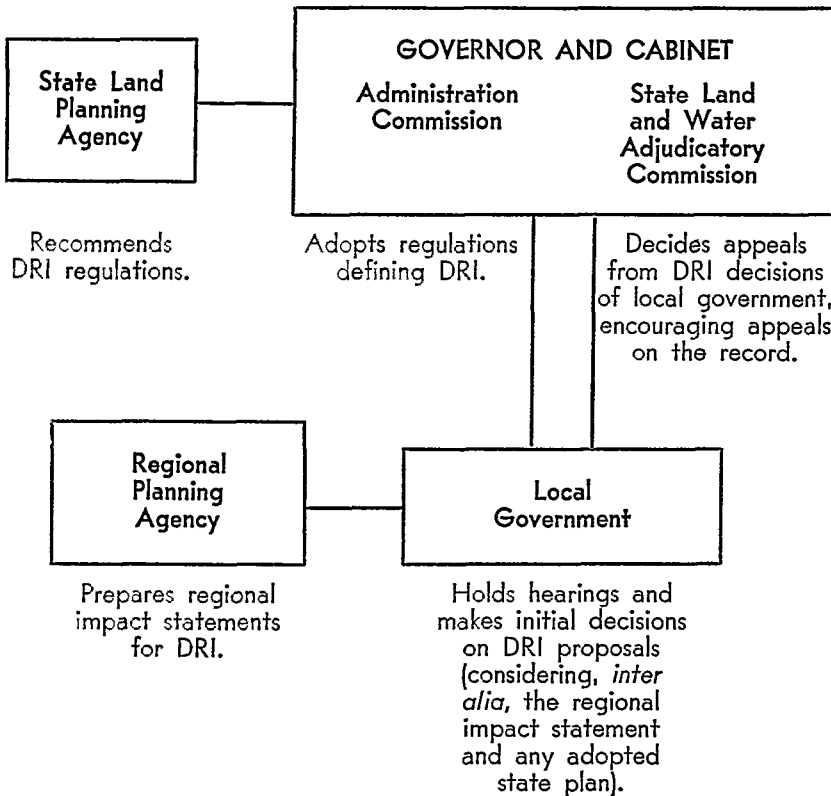
105. See, e.g., *id.* § 380.05(10) (notice to State Land Planning Agency, *et al.*, and parties to hearing); *id.* § 380.07(2) (parties with standing to appeal); *id.* § 380.07(3) (full and complete hearing with record); *id.* § 380.08(3) (reasons for denying permits).

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the order by a timely and effective appeal¹⁰⁶ or unless some other requirement of the Act remains unfulfilled.¹⁰⁷

III. DEVELOPMENT OF REGIONAL IMPACT

Defining certain development activities as "Development of Regional Impact" (DRI)¹⁰⁸ is Florida's functional technique for state participation in land development regulation. The simplified chart below should help to visualize this process.



106. "Within thirty (30) days after the order is rendered, either the owner, developer, an appropriate regional planning agency, or the state land planning agency may appeal the order to the Florida land and water adjudicatory commission. . . ." *Id.* § 380.07(2).

107. See note 103 *supra*.

108. "Development of Regional Impact" [hereinafter cited as DRI], ELA § 380.06, attempts to combine two categories from ALI, T.D. 3,: "Development of State or Regional Benefit," *id.* § 7-301, at 21, and "Large Scale Development," *id.* § 7-401, at 27.

If a developer proposes to undertake DRI, *i.e.*, “. . . any development which, because of its character, magnitude or location, would have a substantial effect upon the health, safety or welfare of citizens of more than one county . . .,”¹⁰⁹ the developer applies for a development permit¹¹⁰ to the relevant local government, if any,¹¹¹ but when the local government hears the application, it must consider, in addition to its usual findings: (1) the regional impact of the proposed development as reported by the Regional Planning Agency and (2) the consistency of the proposed development with any applicable state land development plan. The local government’s development order is final, subject to judicial review, unless the order is appealed to the State Land and Water Adjudicatory Commission.¹¹²

A. *The Administrative Regulations Defining Development of Regional Impact*

Unlike the Critical Areas technique, which is applicable only in a specific geographic area, the DRI section may be applicable anywhere within the State if the proposed development constitutes DRI. The legislative definition of DRI appears to be self-executing and potentially applicable whether or not administrative regulations are adopted. The DRI section was the most controversial part of the Bill, however,¹¹³ and effectiveness of the DRI technique may well depend upon the regulations (“guidelines and standards”) eventually adopted.

1. Procedure for Administrative Designation of DRI

The Legislature has empowered the Administration Commission, by rule, to adopt regulations “to be used in determining whether particular developments shall be presumed to be of regional impact.”¹¹⁴ In addition to the procedural safeguards of the Florida

109. ELA § 380.06(1).

110. *See* note 77 *supra*.

111. *See* note 125 *infra* and accompanying text.

112. ELA § 380.07(2).

113. Motions to delete section six were defeated on tie votes in the Senate Committee on Ways and Means and on the Senate floor. J. FLA. SEN. 647 (Mar. 28, 1972). The House of Representatives amended the Bill to require that the initial DRI regulations be approved by concurrent resolution of the legislature. ELA § 380.10.

114. ELA § 380.06(2). *But see id.* § 380.10 and note 125 *infra* for initial regulations.

APA, the standards which the Administration Commission must consider and be guided by are:

(i) [t]he extent to which the development would create or alleviate environmental problems such as air or water pollution or noise; (ii) [t]he amount of pedestrian or vehicular traffic likely to be generated; (iii) [t]he number of persons likely to be residents, employees, or otherwise present; (iv) [t]he size of the site to be occupied; (v) [t]he likelihood that additional or subsidiary development will be generated; and (vi) [t]he unique qualities of particular areas of the state.¹¹⁵

2. Balanced Implementation through Balanced Designation of DRI— or Saving Paradise for Whom?

The words of the Act, the placement of the administrative responsibility for implementation,¹¹⁶ and the pronouncements and floor debate of the Bill's sponsors all stress that the Act is not "preservationist," but rather "attempts to establish processes and administrative structures within which all factors can be balanced."¹¹⁷ The Act is concerned with extraterritorial decisions of substantial impact upon the region and State which, if left entirely to local government, might be decided only upon consideration of local impact. The regional impact might be environmental, *e.g.*, a proposed development of desirable impact upon the local community—one that would raise the tax base, but one with a substantial adverse impact on the region's water supply. But the impact might also be socio-economic, *e.g.*, "snob zoning," which, by unduly exclusive residential restrictions, might shift a disproportionate housing burden to other adjacent communities.¹¹⁸ Thus, if the DRI purposes are to be achieved, there should be an array of DRI regulations that implement the total environmental, economic and social purposes of the Act.

It is not the purpose of this article to recommend specific DRI regulations. However, the potentiality of the Act can be demonstrated by pointing to a few available sources and possibilities. First, the ALI tentative code has four examples of types of development

115. ELA § 380.06(2) (a).

116. Responsibility for implementation lies with the Division of Planning in the Department of Administration. *See* note 84 *supra*.

117. Address of Senator D. Robert Graham, Florida Society of Newspaper Editors, May 6, 1972.

118. *See* references to exclusionary zoning in note 13 *supra*.

that may benefit the state or region but may be considered a detriment to the local area.¹¹⁹ For example, a regulation designating as DRI "development of housing for persons of low and moderate income by any person receiving state or federal aid for such development," could accomplish substantially for Florida what Massachusetts has attempted in its Zoning Appeals Act.¹²⁰

On the other hand, a proposed development may benefit the local area but may have a detrimental impact upon the State or region. Regulations to monitor these potential problems could include the following:

[1] Any facility or facilities for the storage of more than [-X-] gallons of any petroleum product within a circle the radius of which is [-X-] yards and the center of which is located at any point within any such facility;¹²¹

[2] Any facility capable of accommodating more than [-X-] spectators and participants at an athletic, sporting, or entertainment event;¹²²

[3] Any solid mineral mining operation, which requires the removal or disturbance of solid minerals or overburden over an area, whether or not contiguous, greater than [-X-] acres. In computing the acreage for this purpose, a removal or disturbance of solid minerals or overburden shall be considered part of the same operation if it is all located within a circle, the radius of which is one mile and the center of which is located in an area of removal or disturbed solid minerals or overburden. . . .¹²³

119. ALI, T.D. 3, at 21-25.

120. MASS. GEN. LAWS ANN. ch. 40B, § 20 (1968), *as amended*, (Supp. 1972). The DRI regulation would have to be drafted with enough particularity to meet the requirement of ELA § 380.06(1).

121. Bureau of Land Planning, Div. of State Planning, Dep't of Administration, State of Florida, Proposed Development of Regional Impact Guidelines and Standards § 2.07 (Rev. Tent. Draft, Nov. 10, 1972).

122. *Id.* § 2.08.

123. *Id.* § 2.05. The tentative regulation also defines the term "overburden" as ". . . the natural covering of any solid mineral sought to be mined, including, but not limited to, soils, sands, rocks, gravel, limestone, water or peat," and the term "solid mineral" as including (but not limited to) ". . . clay, sand, gravel, phosphate rock, lime, shells (excluding live shellfish), stone, and any rare earths contained in the soils or waters of this state, which have heretofore been discovered or may be hereafter discovered." *Id.* For sources of additional examples of developments that might benefit the local area but have a detrimental impact upon the state or region see ME. REV. STAT. ANN. tit. 38, § 482-2 (Supp. 1972), *amending* ME. REV. STAT. ANN. tit. 38, § 482-2 (1964); VT. STAT. ANN. tit. 10, § 6001(3) (1958), *as amended*, (Supp. 1971); ALI, T.D. 3, at 29.

Whatever regulations are eventually adopted, Florida's DRI section offers the potentiality of a more democratic decision-making process whether the substantial extra-county impact takes the form of benefits or detriments to the State or region and whether the impact is environmental, economic, social or otherwise. The potential scope of DRI regulations is indeed broad, delimited only by the legislative definition of DRI, the standards for guiding adoption of administrative regulations and, perhaps, the administrative willingness to innovate.

B. *The Decision-Making Process for Development of Regional Impact*

1. Jurisdictional and Procedural Requirements

If a proposed development is DRI,¹²⁴ the developer must comply with requirements, in addition to the usual ones, that are designed to assure that the State and regional impact of the development will be considered by the local government. The jurisdiction of the development will depend upon whether the development is located within a completely unregulated area, within an Area of Critical State Concern or within an area of a local government that has zoning regulations in effect but has not been designated an Area of Critical State Concern.

a. If the land is located in an unregulated area, the developer will give written notice to the State Land Planning Agency and to any local government having jurisdiction to adopt zoning or subdivision regulations for the area in which the development is proposed. Then, after 90 days from such notice, if no zoning or subdivision regulations have been adopted nor designation of Critical Area rule issued, the developer may undertake development.¹²⁵

124. If the developer is in doubt whether his proposal is DRI, he can get a determination from the State Land Planning Agency. ELA § 380.06(4)(a).

125. *Id.* § 380.06(5)(c). Under the ALI model, designation of a Critical Area could include a "freeze." See note 101 *supra*. What would be the effect of designation as a Critical Area within 90 days, if substantial development commenced after 90 days, but before permanent Critical Area regulations were approved? Would it be possible to obtain "vested rights" under section 380.05(15)? The "vested rights" aspects of sections 380.05(15) and 380.06(12), as codifications of the common law principle of equitable estoppel, would probably require reasonable reliance in undertaking development. *Sakolsky v. City of Coral Gables*, 151 So. 2d 433 (Fla. 1963) (the court recognized the doctrine of equitable estoppel where permittee had substantially relied). Also, a court could reasonably attribute an implied legislative intent that designation of an Area of Critical State Concern

b. If the land is located in an Area of Critical State Concern, the developer may undertake development after it has been approved under the requirements of the Critical Area section.¹²⁶ A request for development permission within an Area of Critical State Concern is subject to the Critical Area requirements whether or not the requested development is DRI.

c. If the land is located within the area of a local government that has zoning regulations in effect or if after receiving notice, the local government adopts regulations (but is not within a Critical Area), the developer may undertake development (1) after receiving final approval from the appropriate local government, which order has not been appealed within 30 days after the order, or (2) upon completion of the appeal process, if the effectiveness of the order of local government has been stayed by filing an effective timely notice of appeal to the Florida Land and Water Adjudicatory Commission.¹²⁷

2. Role of the Regional Planning Agency

If the State Land Planning Agency has designated a Regional Planning Agency for the area in which a DRI permit is requested,¹²⁸ the Regional Planning Agency, within 30 days after receipt of notice of a proposed DRI, must prepare a report and make recommendations—a type of regional impact statement—to the local government having jurisdiction of the DRI application.¹²⁹

The regional impact statement must consider whether and the extent to which the proposed development:

- (a) . . . will have a favorable or unfavorable impact on the environment and natural resources of the region;
- (b) . . . will have a favorable or unfavorable impact on the economy of the region;
- (c) . . . will efficiently use or unduly burden water, sewer, solid waste disposal, or other necessary public facilities;

would give the State a reasonable time to develop Critical Area regulations when DRI is proposed in an area meeting the Critical Area standards. ELA § 380.06(5) (b).

126. ELA § 380.06(5) (b). *See* part II of text for Critical Area requirements.

127. ELA §§ 380.06(5) (a), 380.07(2).

128. *Id.* § 380.03(13).

129. *Id.* § 380.06(8).

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(d) . . . will efficiently use or unduly burden public transportation facilities;

(e) . . . will favorably or adversely affect the ability of people to find adequate housing reasonably accessible to their places of employment; and

(f) . . . complies or does not comply with such other criteria for determining regional impact as the regional planning agency shall deem appropriate.¹³⁰

A major deficiency of the land development regulatory process prior to the Environmental Land Act was the inherent inability of the process to provide suitable decision-makers and adequate findings that would assure consideration of extraterritorial impact—whether beneficial or detrimental. The process was undemocratic; it presumably considered local cost and benefit, but likely ignored cost and benefit to the total citizenry affected by the decision. Furthermore, the incentive structure within which local decision-makers operated tipped the scales in favor of economic considerations to the probable disregard of environmental and social considerations. The regional impact statement, then, is designed to remedy in part these two major weaknesses of the prior system.

But note the limitations of the increased regional role. First, the regional agency's role is clearly a planning and advisory role, not a regulatory one. The Environmental Land Act does not establish a system of regional general-purpose governments; it does not add a regional layer to the decision-making process. Second, the 30-day period within which the regional impact statement must be completed may be inadequate, particularly in the early periods of administration of the Act, to develop fully the environmental, economic and social impact.

Will the regional role, then, in DRI permit applications increase significantly the probability that the total impact of the proposed development—extraterritorial as well as local, environmental and social as well as economic—will be adequately considered in the final decision to grant or deny a development permit? The answer is probably a qualified yes. But the roles of local government, the State Land and Water Adjudicatory Commission, the courts, as well as the extra-legal impact of the political process, the press and an aroused

130. *Id.*

citizenry, must be considered and placed in perspective before the potential effectiveness of the DRI technique can be appraised and fully appreciated.

3. Role of the Local Government

When a developer applies for a DRI permit to a local government which is not in a Critical Area, the local government proceeds as it would have prior to enactment of the Environmental Land Act except for some important changes designed to protect the state or regional interest. The principal changes relate to improved procedures, applicable standards, required findings and parties to the hearing with standing to appeal.¹³¹ The legislative standards delimiting local government's decision-making discretion and the required findings to support its order are that it

. . . shall consider whether and the extent in which: (a) the development unreasonably interferes with the achievement of the objectives of an adopted state land development plan applicable to the area; (b) the development is consistent with the local land development regulations; and (c) the development is consistent with the report and recommendations of the regional planning agency. . . .¹³²

Although Florida's DRI section is modeled after part of the ALI tentative code, the ALI model requires a cost-benefit analysis in which local government "shall grant" a permit if certain requirements are met, including a finding that "the probable net balance exceeds the probable net detriment."¹³³ Florida's act utilizes essentially the same criteria as ALI, but requires only that local government "shall consider" the criteria.¹³⁴

131. *See, e.g., id.* § 380.06(7) (notice and nature of hearing); *id.* § 380.07(2) (standing to appeal); *id.* § 380.08(3) (reasons for denying permit).

132. *Id.* § 380.06(11).

133. ALI, T.D. 3, § 7-404(1), at 33.

134. *Compare* ALI, T.D. 3, § 7-404, at 33 and pt. 5, at 37-41, *with* ELA § 380.06(11). Does the Florida ELA provide for broader discretion in local government? Perhaps the crucial question is whether a court, in reviewing an order of the State Land and Water Adjudicatory Commission that overruled a local government's order, would apply a different standard for the scope of the Commission's discretion under the two statutory models. The author submits that neither the discretion of local government in issuing its initial order nor the discretion of the State Land and Water Adjudicatory Commission in issuing its appellate order should be altered significantly under either type of statute because of the inherent

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The primary value of cost-benefit analysis to land management projects should be its usefulness in supporting implicit judgments with as explicit an analysis as possible.¹³⁵ Florida's DRI section accomplishes this purpose by improved fact-finding procedures coupled with new decision-making techniques for analyzing and interpreting the facts and for deciding among alternative and competing land use demands in a democratic fashion. Thus, with local government required to support its decision with a record reflecting specific findings of regional impact, there should be few, if any, practical differences in results achieved with the ALI cost-benefit technique or Florida's modified version.¹³⁶ Whether this conclusion proves accurate depends, of course, upon eventual judicial elaboration of the statute.

IV. THE ADJUDICATORY PROCESS

In order to assure that local governments comply with the state specified standards, the Act creates the Florida Land and Water Adjudicatory Commission, consisting of the Governor and Cabinet, to hear appeals from local governments' development orders in Areas of Critical State Concern or in regard to Development of Regional Impact. A development order of local government is final, subject to judicial review, unless a party with standing stays the effectiveness of

limitations of the cost-benefit analysis technique, the scope of the hearing before the Florida Land and Water Adjudicatory Commission and the composition of the Commission.

135. Cost-benefit analysis, which has been used with varying degrees of success in water resources management, is emerging as a potential technique for analogous problems of multiple use land management. Economists Clawson and Knetsch have described the technique as "comparison of the cost of an investment possibility with as explicit a measure as possible of the benefits or the gains to be realized." CLAWSON & KNETSCH at 256. Although recognizing its uncertainties—which they attribute largely to "uncertainties about the future, not from the analytical process itself"—they conclude that cost-benefit analysis is a useful technique for land management projects, particularly in its usefulness for "mak[ing] implicit judgments as explicit as careful analysis will permit." *Id.* at 259-60.

136. A recent article suggests that along the Delaware river, basic pollution policies are being developed "that would be rejected by most thoughtful citizens if their premises were made explicit." Ackerman & Sawyer, *The Uncertain Search for Environmental Policy: Scientific Factfinding and Rational Decisionmaking Along the Delaware River*, 120 U. PA. L. REV. 419, 430 (1972). The authors challenge lawyers "to understand the alternative ways the administrative process may be structured to find the 'facts,' how the 'facts' condition the policy options perceived to be open; how the decision maker must go beyond the numbers to probe the reliability of the experts' predictions." *Id.* at 496.

the order by a timely and effective appeal¹³⁷ or unless some other requirement of the Act remains unfulfilled.¹³⁸

Those with standing to appeal include only the owner of the property affected by the order, the developer, the appropriate Regional Planning Agency and the State Land Planning Agency. The Adjudicatory Commission may permit "materially affected parties" to intervene in the appeal, however, upon motion and good cause shown.¹³⁹

Considering the potential number of appeals that may be generated under the Act, most appeals to the State may likely begin with a hearing before a hearing officer, which the Adjudicatory Commission is empowered to designate.¹⁴⁰ But whether or not the initial appeal is assigned to a hearing officer, the Adjudicatory Commission's final order must be based upon a hearing before the Commission pursuant to the provisions of the Florida APA.¹⁴¹

The scope of the Commission's review of development orders of local government, and the concomitant effect of the scope of that review upon the scope of judicial review of orders of the Commission, present two of the more important issues under the Act. The Commission is clearly required to "encourage the submission of appeals on the record made below in cases where the development order was issued after a full and complete hearing before the local government. . . ."¹⁴² This language suggests implicitly, however, that the Commission may have a *de novo* hearing when in its judgment the record of local government is incomplete or inadequate. The powers granted the hearing officer further support such a conclusion.¹⁴³

The final order of the Commission must be supported by a statement of the reasons therefor and the order is subject to judicial review pursuant to the terms of the Florida APA.¹⁴⁴ The question of judicial review is beyond the scope of this article, but a number of relevant factors are evident. An order of the Commission will likely be based—particularly in a DRI appeal—upon a wide spectrum of explicit findings ranging from relatively easily quantified economic findings

137. ELA § 380.07(2).

138. See note 93 *supra*.

139. ELA § 380.07(2).

140. *Id.* § 380.07(4).

141. *Id.* §§ 380.07(3), 380.07(5).

142. *Id.* § 380.07(3).

143. *Id.* § 380.07(4).

144. *Id.* § 380.07(5).

through highly sophisticated and perhaps unquantifiable environmental and social findings. Also, the administrative agencies involved should be able to demonstrate a high degree of expertise, objectivity and, in the case of the Commission, a political responsiveness to the larger public that is affected by the development at issue. These factors suggest a narrow scope of judicial review. Nevertheless, the improved decision-making process will also provide a record of findings and reasons for administrative decisions that should highlight any decisions that are clear abuses of discretion in departing from the constitutionally grounded purposes of the Act, whether the purposes be protection of the natural resources and environment of the State¹⁴⁵ or protection of fundamental rights of citizens. Therefore, the Environmental Land Act may result in final resolution of many disputes within the administrative process that might otherwise have unnecessarily burdened the courts. But it may increase the probability that cases in which fundamental rights are at stake will reach the highest courts.

V. A CONCLUDING NOTE

The existing institutional arrangement—numerous local governments acting independently without regard to the extraterritorial impact of their decisions—has proven to be inadequate for reconciling competing land use demands. A major reform movement is underway that should result in land use decision-making processes that are more responsive to the welfare of the total public affected. Florida is presently in the vanguard of this movement.

Other states just beginning a reappraisal of their land use laws should find the Florida legislation a useful model. In choosing a state role lying between the poles of total state preemption and maintenance of the status quo, Florida has left the vast majority of land development decisions to local government. Nevertheless, by utilizing the geographical technique of "Areas of Critical State Concern" or the functional technique of "Development of Regional Impact," the State potentially can participate in land use decision-making when development is proposed within designated critical areas, such as the

145. "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise." FLA. CONST. art. 2, § 7. This policy was incorporated into the statement of legislative purpose. ELA § 380.02.

Everglades or the Florida Keys, or when development permission is requested for such major impact activities as construction of a regional jetport or a nuclear power plant.

The impetus for land use reform is coming from many sources including the federal government and, perhaps to a lesser degree, the judiciary. The major impetus, however, is coming from the people, for the public is becoming increasingly aware of the environmental, social and economic consequences of land development. Russell E. Train, Chairman of the Council on Environmental Quality, has stated the problem succinctly:

Land use is the single most important element affecting the quality of our environment which remains substantially unaddressed as a matter of national policy. Land is our most valuable resource. There will never be any more of it.¹⁴⁶

Thus, nationwide reform appears likely, and the states appear to be the likely focus of reform. The states should take the lead because they have the inherent power, thus the ultimate responsibility, for regulating land use. State legislatures, faced with mounting evidence of the environmental and social destruction resulting from uncontrolled development, will find it increasingly difficult to avoid reappraising and reforming the antiquated land regulatory structure. Florida's 1972 legislative package represents a reasonable response to the problems, and the Florida Land and Water Management Act of 1972, in particular, may thus become a model for the nation.

146. S. REP. NO. 92-869, at 23, citing *Hearings on S. 632 and S. 992 Before the Committee on Interior and Insular Affairs*, 92d Cong., 1st Sess., pt. 1, at 98 (1971).