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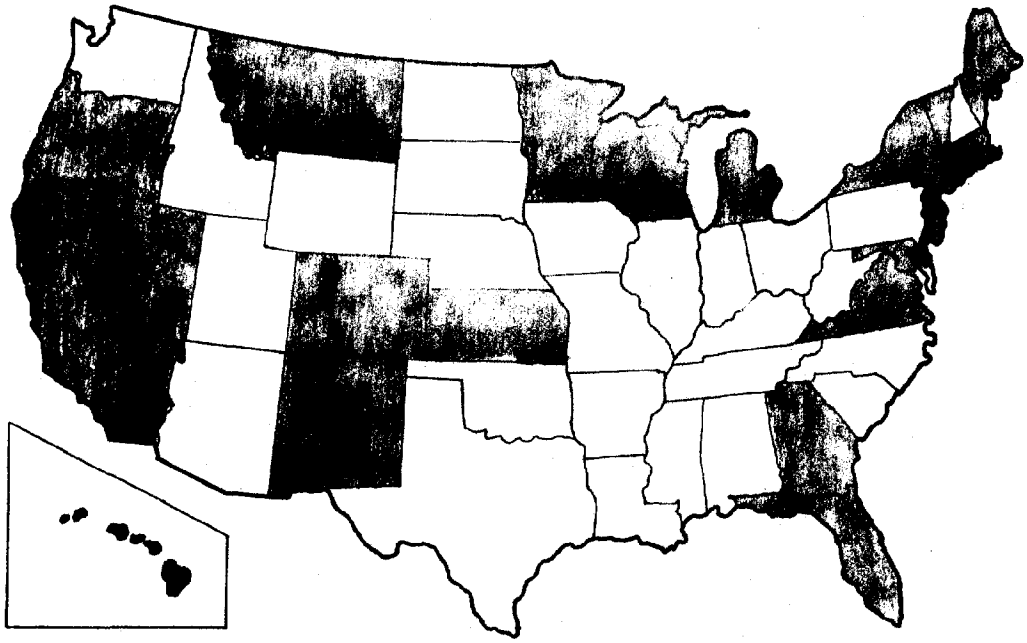
THE ROLE OF THE STATES IN GUIDING LAND USE DECISIONS



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A B S T R A C T

The term "Land Use Guidance" refers to all the decisions, processes, laws and regulations which determine how land is to be used. It includes the processes of planning, regulations and management of land and land uses.

When considering any new programs or legislation, consideration must be given to the legal, constitutional, and traditional values of the society. This will allow for an effective, credible and enforceable system. Traditionally and constitutionally, states have delegated to local levels of government the police powers of land use controls. There is, however, a general recognition that local ordinances are often ineffective and are not sufficient to deal with land use decisions with greater than local impact, and that, therefore, a major overhaul of our land use systems is long overdue. Basically, the objectives of land use planning and control are to resolve or prevent conflicts between and among public and private interests while assuring an orderly and effective system of development and protection.

The designing of any system to guide land use must include the formulation of objectives, goals, and policies to carry them out. Policies are developed early in the planning process to serve as a framework for all the decisions that follow. Several states have completed statewide plans which are focused around key policies, notably Connecticut and Vermont. Experience has shown that if the difficult decisions are made at the policy-making level, it becomes easier to apply them to the formulation of standards and criteria, and ultimately to the decision on granting a permit on specific proposals.

Land use planning, or more specifically, comprehensive land use planning, is a necessary prerequisite for any land use ordinance. A comprehensive land use plan is a compilation of goals, policy statements, resource inventories, and projections of the consequences of various alternative uses in a region, together with recommendations, codes, and ordinances. Its major purpose is to provide a complete picture of an area, to order priorities for use, and to aid decision-makers. In order to increase effectiveness, the formulation of the comprehensive plan should be approved by agents other than the staff, such as the legislature, a regional planning commission, the Governor, another state agency, or an agency independent of state government. Since changes occur in uses or attitudes, the review process should be undertaken periodically, at least every five years.

There are three categories of implementation for any land use plan: police power regulations, degrees of direct acquisition, and taxation policies. Under the police power category comes the important concept of zoning, or the regulation of property use by dividing a geographical area into districts and by specifying what uses of land are permitted or prohibited in each district. Zoning ordinances, the legal means of specifying how the comprehensive plan should be implemented, spell out steps to be taken before any improvement is made,

and the means of administering these regulations. A zoning map, which indicates district boundaries and permitted uses, is adopted as a legal part of the zoning regulations.

One special aspect of the zoning regulations is performance standards, which indicate permitted uses in a zone and specific requirements of that usage, and which enable the permit-granting agency to have an objective means of judging an application.

Since there is a period of time between the recognition of the need to regulate and control and the completion of a comprehensive plan, there are often "interim" regulations. Interim district boundary lines and use standards are important because there are problems of immediate urgent concern and because the adoption of interim regulations would prevent undue rapid development in an attempt to subvert the purposes of the comprehensive plan.

A second method for the effective implementation of land use policies is direct ownership by the state. There are several degrees of ownership whereby the state can acquire direct control of certain land areas: easements, which provide or deny certain uses on a piece of land; a purchase and lease back agreement or a purchase and resale agreement, under which the state, acting as a landlord, can set conditions or restrictions for the future use of the land; a land bank concept, whereby the state, as trustee of the land, can plan for its use in the public interest on a permanent basis; and eminent domain, the power of any level of government to secure a tract of land for a public purpose. The use of land by government itself for such purposes as military bases, post offices, parks, and highways should be no less regulated than private developments.

Some aspects of taxation may also be used to further the goals of land use guidance. Property taxes, which may produce all municipal revenues, are a factor in the use of land and in governmental attitudes. The rate and the governmental level of taxation are controllable factors, which can be arranged to facilitate the best use of the land. Current use taxation, for example, allows a lower rate of taxation on unused land; and a capital gains tax is levied against profits gained from buying and selling land within a short period of time.

For zoning ordinances to be effective, there must be a system of enforcement. The first essential step in an enforcement system is a method of informing the public of the existence of the law. An application from a potential developer must then be reviewed by an agency, Commission, or Board with permit-granting functions. When the agency is satisfied that the activity is in compliance with the terms and conditions of the permit, at the time of completion it may grant a certificate of compliance.

A method of inspection in the field is important to assure that the law is being obeyed and that the law is visibly enforced as a deterrent. Penalty provisions, in the form of fines, injunctions, or other actions, are also an effective deterrent if actively pursued in the initial stage of the program.

The final component of any land use guidance system is a process for appeal or for adjudicatory review. There are several different types of appeal procedures, ranging from the court system to a local, district, or state agency empowered to review permit decisions.

JURISDICTION

The jurisdiction of land use control is currently expanding from municipal boundaries to larger geographic areas, and to activities which, by impact, affect larger areas than municipalities or townships. The physical resources, and the population dependent upon them, are not contained in tightly defined political municipal boundaries. Whole geographic areas, such as shorelands, wetlands, mountain tops, and forest and agricultural lands, are all critically linked to the ecological environment; yet they very rarely coincide with the geodesic survey grids which establish city or township areas. Large scale developments, such as highways, airports, large recreational facilities, utilities, and industry, also have a greater than local impact and require at least a regional form of review and control.

There are a variety of types of jurisdiction above the municipal level, each determined by such factors as the region's social framework, the uniqueness of geographical features, the economic dependence on a resource, past experience, and the general level of concern. The five basic types of jurisdiction under current land use guidance are as follows: (1) Critical environmental areas, any portion of land which is valuable because of natural characteristics (rather than the type of development proposed); the determination of critical areas depends on the goals and policies of the state. (2) A second type of jurisdiction covers activities and developments of regional significance, including developments by a governmental agency other than the local government, development for charitable purposes, and developments by a public utility to provide services for a large area. (3) "Developments of state-wide significance" covers activities as well as the geographic area of the whole state. Such a development could have major benefit or harm to the state or to a large region. The implementation of controls over large scale developments with statewide significance is important because of the increasing pressures for and the irreversible consequences of such development. (4) The state may assume control over areas with no local planning and zoning powers, but with a great potential for private development. (5) A statewide comprehensive land use system would combine some of the above categories; it could be run at a state or regional level of control.

ISSUES TO CONSIDER IN DESIGNING THE SYSTEM

There are several problems encountered when designing a system of land use planning and control. There must be a balance between values of efficiency, local control, participatory democracy, and the checks and balances of power. The state, its citizens, legislators, and Governor will have to make decisions on the following issues:

(1) Separation of major components: There are several questions

about the location of functions, both vertically, along levels of government, and horizontally, among agencies of the state government. Most reports believe that the local government should be given decision-making powers and the state a power of review. Local government is most responsive to local needs; however, there is a tendency at the local level to render local zoning ordinances ineffective, either by pressure from special interests or by a lack of necessary resources for the effective administration of the zoning ordinance.

Other levels of government which could have some functions are intermediate or county-levels, regional and metropolitan agencies (districts which may overlap or criss-cross the present jurisdictions of local, county or state governments), and the state level of government. Although in the past fifty years the powers to regulate land use have been vested in local governments, it now appears that the states are assuming this responsibility. There are several reasons for this. One may be that some land uses have a greater than local or regional interest and the state-level control has become necessary to preserve unique resources. A state-controlled set of regulations tends to transcend local politics and local pressures. Arguments against state-level control include an adherence to the principles of "home rule" and the difficulty of administration from a central location at the state capital.

The Federal level of government has a limited role in guiding the use of land. Although there are resources which cross state boundary lines, such as air, rivers, and mountains, there is also a belief in the "New Federalism" approach, in which local and state governments have greater control in setting policies and initiating new programs. Even a major federal proposal, the National Land Use Policy Act (not passed by the 93rd Congress) encourages interstate and regional cooperation but places a primary responsibility on the states.

One of the most important aspects of designing a system for land use planning and control is citizen participation. Effective and responsive decisions depend on the wishes and values of the people. There are a number of techniques currently being developed and utilized in many states, including citizen task forces, which represent various interests or groups, and which devise the plan or legislation to be submitted; boards or Commissions, which serve as decision-makers on land use or other issues, and which may be comprised of citizens knowledgeable in various fields or from the geographical regions of the state; citizen advisory groups, larger committees which carry public opinion from the general public to the Commission; and public hearings, probably the most universally used procedure, which involves several processes for informing the public prior to the hearing.

One of the first prerequisites for an effective public hearing is a notification system. This should be followed by making the document available for discussion and debate in the press and in group discussions in order to make citizens well-informed before they go to the hearings. Public hearings should then be held at the different

stages of development of the comprehensive plan and of the zones or districts.

Many states are engaged in conducting public opinion surveys, especially at the goal-setting stage. Some states are also working on such methods of public eduation as workshops, slide presentations, and newspaper inserts in an attempt to reach and inform as many people as possible. Vermont has used a combination of all the above techniques in the development and adoption of its comprehensive plan, and has had positive results.

Part of designing any governmental program is the decision on who or what agency will be assigned to administer the system. What is emerging in practice is that the Governor will appoint a Board or Commission, rather than one person, for decision-making and administration of land use programs. Boards may be comprised of agency heads and appointed citizens, or entirely of citizens, who represent, or have expertise in, industry, municipalities, or conservation interests, or who represent geographic regions or political parties. One main problem in appointing citizens who "represent" certain interests is that there is a great opportunity for conflict of interest. There are some laws that deal with this problem, but they are generally weak.

If the state government assumes the responsibility for land use management, it must decide how to divide the functions within itself. One alternative is to assign some or all aspects of the function to present agencies; another is to create a new agency or commission; a third possibility is the creation of a new agency or commission subsumed under a present agency or department. Many states are now trying to bring their bureaucracy under control by reorganizing and combining their departments. By doing this, they are attempting to avoid further proliferation of new agencies. Many new agencies placed under the Office of Governor also cause inefficient overproliferation, with conflicting policies and responsibilities. A possible disadvantage of reorganization is that agency heads will have more power than before and may become "czars" or "empire builders;" This is outweighed, however, by the clear lines of responsibility and accountability which result. If government agencies are responsive to the people's needs, and if they coordinate their efforts, a more effective and efficient system can result. Of course, efficiency in government is a strong selling point for governmental reorganization; but there is a system of human values, goals, and policies that also must be considered.

Broad functional areas, rather than specific programs, should be recognized as the basic framework for contemporary executive organization. Land use, as a unique function, can not easily be placed into existing agencies in most state governments. When deciding the best location for these functions, some of the following issues must be considered: (1) What are the functional criteria of land use management: pollution control, protection, conservation, development, or all of them? If all functions are under a broad-based agency, the problem may be solved. (2) Should the components be placed together or split into different agencies? There have

been a variety of methods for this. (3) Should the agency be located within existing bureaucracy, or should it be independent or located in the Governor's office? Considering the unwise practice of proliferation, the independent approach is often rejected. Some boards begin independent but are later subsumed or incorporated under a larger umbrella agency. Sometimes functions are assigned in a diffused fashion to different agencies and coordinated by a Commission. Where the state has only planning functions in its land use program, this function could be assigned to the State Planning Office. States with more functions assign some or all responsibilities to the Department of Environmental Protection or of Natural Resources. As of now, however, there has been no proven best way of accomplishing the allocation of functions; thus the process of evaluation must continue.

RELATED FEDERAL PROGRAMS

The Federal Government, itself a direct owner and user of millions of acres of land, has had and will continue to have a role in guiding the use of land, especially in those areas of critical concern which extend beyond municipal boundaries and have a larger than local impact.

The most important Federal land use legislation is a National Land Use Policy and Planning Assistance Act, first proposed in 1971. Although this act met defeat in this session of Congress, it is significant because it represents the culmination of at least 30 years of piecemeal legislation. More importantly, it would establish a framework for a comprehensive system, designed and administered by the state with Federal assistance.

A review of 30 years of Federal legislation, policy statements, and other efforts related to land use guidance prior to the introduction of the National Land Use Policy Act shows a piecemeal approach. Legislation-covering highways, airports, wildlife and forestry protection, shoreline and floodplain programs, agriculture, housing, recreation, and critical areas - covered the inventory, planning, or policy stages of the specific programs. The more recent bills recognized a need for a more general approach, covering such areas as intergovernmental policy, comprehensive environmental policy, urban growth and new community development, air and water quality standards, and coastal zone management. In these acts, the Federal government attempted to respond to land use problems by setting policy as a preventive and corrective measure and by using money to assist lower levels of government in the implementation of Federal policies. There is still missing a comprehensive and coordinated system, for every level of government, that guides and interrelates activities on both public and private lands.

The first national land use policy was presented to the 91st Congress in 1970 by Senator Henry Jackson of Washington; but the Act was not seriously debated. In the 92nd Congress, the Senate passed a Land Use Bill; but the House did not consider the bill. In the 93rd Congress a compromise bill was again passed by the Senate. In the House, a somewhat different bill met defeat in a June 1974, procedural move. The closeness of the vote, however, and the increased awareness of the problems created by haphazard land use assure its reintroduction in the next session of Congress.

The need for land use regulations is recognized not only as a response to the "environmental movement," but also as essential to the economic well-being of the nation. This legislation attempted to relate urban and rural land use; to offer financial and technical assistance to the states (and to self-administered land use programs in Indian Tribal Lands); and ultimately to work toward a National Land Use Policy.

In the spirit of New Federalism, the Act would leave up to the State and local governments most of the planning and other substantive portions of the program, while providing funds for its implementation. There was a provision for sanctions, in the form of grant termination, if the Federal review process showed that important requirements of the program were not fulfilled. Despite new Federalism, however, there was consideration of a unified National Land Use Policy to protect national interests and to prevent inefficiencies which could result from fifty different sets of state policies. Arguments against inclusion of such a policy included their inability to adopt to diverse land resources, the current existence of several Federal laws, and the complexity of forming a consensus on policy. Some other aspects of the bill included provisions for an assistance program to allow Indians to plan and manage their land; a means for resolving conflicts between uses on Federal and adjacent non-Federal lands, while spelling out policies and planning requirements for public lands; consideration of the program's effect on government property tax; and a designation of four types of critical areas--fragile or Historic Lands, Natural Hazard Lands, Renewable Resource Lands, and other lands determined significant by the State. There was a complicated system for the allocation of administrative functions, with the Department of Interior designated as a lead agency, an interagency board for review of State proposals, and a third agency to establish guidelines and submit them to the Interior Secretary. To provide for these programs, the bill authorized 100 million dollars a year.

As mentioned earlier there were different versions of the bill submitted in the House and the Senate. The above list of provisions of the National Land Use Policy does not reflect differences between the two bills. If a similar bill does receive passage it will be a major and innovative breakthrough. It is generally intended to aid state and local governments, without exerting or increasing power over them, in the designation of land use programs; it also seeks to remedy the piecemeal approach to land use regulation which has evolved through the years at the Federal, State, regional, and local levels. Because this act would offer the necessary funds, quality guidelines, and the coordination between State and Federal policies, its passage is essential.

Other bills of importance which were considered in the 93rd Congress were the Surface Mining Reclamation Act and the Housing and Community Development Act.

EMERGING STATE SYSTEMS

There are emerging patterns in the various systems being developed by the States. Many states have recognized the need to exert some

guidance over development in certain critical geographic areas and over the types of developments which have a larger than local impact. One important critical area, which has been the subject of a great deal of legislation is coastlines. Many states also have control over wetland areas, as well as laws regulating large scale developments. Some of these laws, however, are not based on a comprehensive plan.

Another type of system is a regional commission, based on a special resource or use of greater than local impact. Very few states have a comprehensive system which assures that all significant types of development and utilization of land anywhere in the state are guided by a state agency. Hawaii, Vermont, Florida, and Oregon have such statewide systems in various stages of evolution and strength.

There are varying answers to allocation of functions questions. The emerging consensus in the existing systems seems to be that local planning agencies should continue and improve upon planning and administering land use controls in their own jurisdiction. For jurisdictions of statewide concerns, the state should set a framework of goals and policies; coordinate and review functions delegated to local levels; set standard building and subdivision codes; and impose an ordinance if the local level does not adopt its own.

Along levels of state government, the existing programs have used a variety of methods for the allocation of functions. One emerging pattern is that Departments of Natural Resources are serving as lead agencies in land use guidance.

Since these patterns are still in an evolutionary stage, there is still debate over state vs. local control. There are also problems beginning to surface involving red tape--bureaucratic mazes which are inefficient for the state and time-consuming for the applicant. Remedies to the problem of red tape may be the streamlining of government, and the resultant concentration of all land use functions. Another problem is the need for an adjudicatory board or administrative review board, instead of a direct appeal to the courts. Some systems having local permit authority allow state-level review, a process which, if not always effective because of the make-up of the review board, at least allows the applicant the belief that zoning laws are administered fairly at the local level.

POTENTIAL FOR EFFECTIVENESS

The history of local land use legislation has been one of amendments to and subversion of the original intent of the zoning ordinance. Only if states can learn from the mistakes of local zoning, will they be able to administer an effective program of land use guidance. Hawaii's system has had some problems with maintaining protection over agricultural lands; but there seem to be few examples of blatant misuse. Vermont's system has some difficulty with enforcement, because of a lack of personnel; a "loophole" in the law; but many Vermonters feel that the more brutal large-scale developers have left the state. Another problem faced by Vermont was the extra expense and time required of the developer to complete the forms; but many feel these obstacles would have to have been met even without a statewide

system. The Florida system ran into problems with administration: local governments often had no ordinances and there was a small staff with limited funds at the state level. There were also political problems: political and social traditions ran counter to the precepts of the law, with bitter opposition generated by local people and supported by the big developers, agribusiness and speculative corporations. Many in Florida blame the enactment of the law for high land prices and for a huge boom of development before the law's enactment (there were no interim provisions).

The state's concern with social and economic problems creates the need for an assurance that the process of guiding land use will be undertaken in a comprehensive framework. Balancing human needs with environmental considerations and guiding land use away from some areas toward others can result in the fulfillment of the vital economic, social, and recreational needs of human beings. Thus there is a need for effective comprehensive planning and for administrative procedures that will allow the effective implementation of the program. This, of course, takes money, which could be provided if the National Land Use Policy Act passes. Administrative organizations need well-funded and trained agencies, free from institutional or political bias, which can enable the system to proceed, especially in coordination with the local level. Decision-makers must also be free from conflicts of interest. Preestablished guidelines and zoning boundaries can assure the developer that his proposal will be in relation to established goals and dictated conditions. Amendment procedures should allow for some flexibility, but should not allow subversion of the intent of the plan. Enforcement procedures must be set up so there is no way for anyone in any jurisdiction to think he can get away with something. Finally, there must be some citizen vigilance of the law, and an assurance that candidates and future office holders understand the law's intent and uphold it.

In summary, the State's new and complex endeavor of guiding the use of land requires a coordination of all political decisions and a commitment to follow a comprehensive plan for a longer period of time than the single term of elected officials. In the final analysis, the effectiveness of any legislation boils down to the established prerequisites of good government.

Stephen Bither

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I. INTRODUCTION

This report analyzes the role of the states in guiding the use of land within their jurisdiction. The purpose is to offer the lay decision makers in legislatures, on local and state level land use commissions, committees and planning boards and concerned citizens, an understanding of the critical issues involved in setting up and evaluating their states' efforts in facing new responsibilities in land use control.

Although the U.S. Constitution initially left this function to the states as one of the residual powers, the states have, up until the last ten years, routinely delegated the powers to local government. The recapturing of land use regulatory functions is part of the "quiet revolution" of land use controls, largely in response to the new imperatives of shrinking resources and large scale responsibilities too great for local governments to handle.

It is probably not an exaggeration to note that the environmental concern of the late sixties for clean water and air have reached maturity in the concern for land use, which includes both the environmental and related socio-economic problems facing contemporary society.

Government's role in land use control in the USA can be likened to a tangled ball of twine with individual strands interconnected in a most intricate way. At both the center and circumference are the legal, social, written and unwritten assumptions, traditions and attitudes of the people. Such is the framework within which governments and their servants have to operate.

Fundamental to both solving the problems and evaluating the proposed solutions is an understanding of the actual steps, procedures, laws, regulations, and administrative institutions which have evolved in previous governmental efforts at regulating land use. This report will include the traditional components as practiced by municipalities as well as recommendations of experts for improvements based on experience gained from past mistakes and required by the new demands.

After the general view of land use controls, the report will focus more specifically on the states' role. The first question to be considered will be jurisdiction. Over what land use activities and to what geographical extent should the state extend its arm of control? Other key issues will be the allocation of power between local, regional, and state governments.

Included will be a critical look at citizen involvement in land use decisions. The related question of the structure and make-up of decision making boards will also be considered.

Another thread of the ball of twine is the role of the Federal government in the land use decisions of state and local governments. Significant existing and proposed legislation will be introduced and considered as a necessary backdrop for evaluating the states' role.

The report concludes with a review and analysis of the proposed American Law Institute Model code and some of the emerging patterns of land use guidance in other states. The information and analytical variables used in this study could serve as a basis for a detailed study of current and alternative options for land use guidance in the State of Maine.

Although some of the material used in this report was gathered from a number of secondary sources (see bibliography), significant primary material, furnished by 39 of the 50 states, was in the form of responses to a letter from Governor Curtis to all the Governors of the Nation in October of 1973.

We note with great interest the number of studies in this field, in progress or just completed, by various task forces and commissions appointed by the Governors, or in some cases by the Legislatures.

This exchange of information and recommendations has allowed us to benefit from the studies of other states. It illustrates that while each state has unique problems, we do have a nationally shared set of problems of common assumptions, principles, and laws, which binds us together and forces us to search for solutions to these common problems of increasing demands on limited land resources.

II. SOCIAL FRAMEWORK

> A man was pleading his case in front of the Board of Appeals for an exception or a variance. He was getting more and more frustrated, till he cried out:
>
> "But I own it, don't I?"
>
> and the chairman replied:
>
> "Yes, in a way, Bill, I suppose you do, but your land was there for millions of years before you were born and it will be there for an awful long time after you're dead. You are responsible for it for just eighty short years. We are all here as trustees for future generations, and we are just tenants for life of whatever properties we like to pretend we own." (1)

When contemplating any new program or legislation, the legal, constitutional, and traditional values of our society have to be considered, both as a framework for the new system and as limitations upon it. Failure to do this may not only mean dismissal in the courts, but experience has generally shown that people will obey only those laws which they consider reasonable and will ignore, even flaunt, laws which deviate too far. (A good example was Prohibition.) Without the good will of the prople, derived from acceptance and compatibility with their beliefs, enforcement is too expensive and nearly impossible. In short, if we want a workable system to guide the wise use of land-related resources we must consider not only our formal constitutional limitations, but the attitudes and beliefs that people hold dear.

The following are some of the shared constitutional, traditional, and contemporary attitudes which serve as framework for the States' role in guiding. These are listed as currently assessed and are, except for constitutional matters in a dynamic state of change.

A. CONSTITUTIONAL FRAMEWORK

- The U.S. Constitution, 5th Amendment says, "no person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation".

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(1) Eliot, Charles W. in The Maine Coast Prospects and Perspective, p/6

- The U.S. Constitution, 10th Amendment, reserves to the states all powers not delegated to the Federal Government.
- The states have police power to promote health, welfare and safety.
- The 14th Amendment limits such powers by prohibiting any state from denying persons of property without due process of law. Many state constitutions, including Maine's, say, "private property shall not be taken for public use without just compensation; nor unless the public exigencies require it". (2)
- The courts have classified zoning and subdivision ordinances as controls under the police power. (3)

B. PRINCIPLES AND TRADITIONS

- The democratic form of government requires maximum participation of the citizenry as close as possible to home.
- Although the areas included in land use regulation is necessarily expanding, community control must not be lost. Channels have to be found for communities, from the smallest to the largest, to be part of the system.
- Planners gather facts, make suggestions, and explore alternatives; but such decisions as when, whether, and where should be made by citizens and their decision-making bodies. (4)

C. RECOGNITION OF NEED FOR CHANGE

People generally accept that:
- Land is a limited resource, not only a commodity;
- Land is not <u>only</u> a money-making commodity;
- There is a crisis in land use, even if quiet. Every day, some land is worn away. Typical development involves conversion from a lesser to a more intensive use, <u>usually</u> irreversibily and often with deteriorating environmental quality;
- The complex nature of society, the increases in technology, population, demands makes some kind of planning desirable;

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(2) Maine Constitution, Article I, Section 21

(3) York Harbor Village Corporation v. Libby (1928) 126 Me. 537, 140A, 382 Additionally the reader is referred to an excellent historical and judicial analysis: <u>The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control</u>, by Fred Bosselm, U.S. Government Printing Office, Washington, D.C. 20402

(4) Reich, Charles, "The Law of Planned Society," <u>Yale Law Journal</u>, <u>Vol. 75</u>, July 1966.

- In the absence of controls over land use, decisions would continue to be made primarily for private economic gains, that is there may be times when an unbridled pursuit of the profit motive may conflict with or at least not be compatible with the best interest of the public health, welfare, and safety;
- Continuation of present development trends will result in further deterioration of our land, air and water resources to such a point that we may be courting major natural disasters jeopardizing human life itself;
- We are entering an era in which qualitative values and aesthetic factors are increasing in importance;
- The future of succeeding generations in this country will be shaped by the choices we make. We must choose well, for they cannot escape the consequences of our choices;
- Dealing with each land use problem as it reaches the emergency level will not suffice. Government can't function only by reaction.

D. LIVING WITH CONTRADICTORY VALUES

> "People, since they are people, always want to have their cake and eat it too. They are always containing within themselves values which are mutually inconsistent, but they haven't explored it enough to know they are inconsistent. They all have values which are in conflict with the sheer facts of life." (5)
>
> and
>
> "In Parsipanny, New Jersey, a belief in free enterprises reigns supreme - as long as the enterprise is exercised someplace else." (6)

Regulations and controls need not deprive us of our rights to private property. Quite the contrary, they enable us to enjoy and benefit from it more, although sometimes the benefit is not immediately realized.

A judge in New Jersey expressed the concept that zoning does not take away rights, it <u>gives</u> them:

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(5) Prof. Israel Stollman cited by Richard Babcock in <u>Zoning Game</u>, p. 39

(6) Babcock, Richard, <u>Zoning Game</u>, p. 21

"Lawful restraints upon the conduct or acts or persons are not intended as infringements upon liberty, but instead they are intended as a protection of freedom and to quiet and peaceful enjoyment of property. Such restraints are in the common interest and promote general welfare. Valid zoning ordinances create valuable property rights that did not exist prior to their adoption." (7)

E. REGULATE BUT DON'T LIMIT GROWTH

The former policy of "growth for growth's sake" is undergoing reexamination. It is recognized that in order to minimize the costs and maximize the benefits of growth, detailed knowledge of the resources to be utilized, modified, or irrevocably committed is required.

The basic purpose of state land use controls is to direct (rather than block) growth toward the most desirable pattern of development so that land use is properly related to the level of services or protection required. The people, and their elected officials have not accepted a need for limiting growth. They are convinced they can have economic growth with environmental quality. In Maine this is expressed by the slogan, "Development through Conservation", the explicated policy of the current administration.

F. GOALS AS A SUMMATION OF OUR ATTITUDES

Finally, a special form of belief is embodied in the goals toward which our policies are aimed. Three experts in the field of land use control sum up the objectives which most successfully combine all our attitudes:

British commentator, John Delafons lists the objectives of American land use planning as:

- prevent conflicts between private interests in land use
- prevent conflict between public and private interests
- prevent conflict among public interests
- secure sound standards for new development
- facilitate private development and encourage private investment
- still make our town (city, state, nation) a better place to live and do business in; (8)

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(7) Honorable Donald Walsche, Judge of Superior Court of State of New Jersey, June 1953, cited in Herbert Smith's The Citizens Guide to Zoning.

(8) Delafons, John, Land Use Controls in U.S., (1969) p. 40

Law Professor Jan Krasowiecki:

> "Fundamentally, every land use control system is a system which strives to obtain the maximum public benefit from the use of land and a fair allocation of benefits and burdens of the system among different individuals." (9)

Planner Richard Slavin:

> "The goal is to develop policies and programs taking into account both people's and nature's need for the purpose of minimizing the areas of conflict and discovering and enhancing the areas of harmony." (10)

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(9) Krasowiecki, Jan, "Model Land Use and Development Code", Urban Law Annual.

(10) Slavin, Richard, "Toward a State Land Use Policy", State Government, Vol. 44

III. DEFINITIONS AND COMPONENTS

The term Land-Use Guidance includes all the government decisions, processes, procedures, laws, and regulations which determine how land is to be used. This broad definition can include all land, private and public, at all stages of development--wild, untouched, developing, or highly urbanized. Although this study focuses on state government's role in guiding the use of land the same types of activities are also applicable to other levels of government.

Phrases often heard in this connection are "land use planning", "land use regulation", and "land resource management". The term "land use guidance" was expressly chosen to indicate to the reader that we do not mean just "planning" or "regulation" or "management". David Heeter, in Toward a More Effective Land Use Guidance System, chose the phrase "land use guidance", because,

> "it would be in fact a misnomer to call it a regulatory system. It is a land use guidance system composed of a variety of techniques, including regulations (planning and management) which are to be applied in concert to guide the use of land." (11)

Governmental efforts at guiding the use of the land either has currently or is clearly in the need of having these elements or components:

- policies based on set of goals;
- a comprehensive planning process which seeks to interpret the policies with existing resources;
- various tools from zoning to acquisition to implement the wishes of the people;
- an enforcement system which has to include a permit, inspection and control for compliance with the established ordinances;
- an appeals procedure which assures due process and equal treatment under the law;

Definitions and analysis of each of these components follows.

A. POLICY FORMULATION

There is a great deal of confusion in the literature and the laymen's minds about the meaning of the word "policy". In standard "governmentese" one often hears this or that candidate, elected official, or commission recommend or adopt certain "policies". Perhaps because policies are usually explicated (even if in general terms) and goals are not, we tend to think of policies as forms of goals. To arrive at a common baseline of understanding it will be useful to define the two terms

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(11) Heeter, David, Toward a More Effective Land Use Guidance System, (1969) p. 3

as used in this paper:

Goals: The broad purpose, direction or end towards which all the agencies' efforts are committed and directed. A goal is expressed in terms of an ideal situation envisioned without regard to time or means of achievement.

Policies: An identified set of rules to be followed to guide present and future decisions. (12)

Policies, then, flow fron a set of goals. The process of formulating goals are still very difficult. Policies are usually formulated from a set of goals that are inferred.

It is only recently that the need for a set of policies, duly discussed and adopted, has become recognized as an essential part of any land use guidance system. Nationwide study commissions on land use problems (Douglass Commission, ASPO for Connecticut) recommend a definite process for the formulation of policies which reflect the composite goals of the citizens in a state. Because these are the crucial decisions which will guide the future and will affect everyone, it is essential that citizens participate in these decisions to the fullest extent possible.

Policy decisions are sometimes tough, possibly the most difficult aspect of the whole system. The policies arrived at must be reconciled with competing and conflicting interests. Development policies should face such questions as "the quality of growth and terms on which it will occur, at what cost and benefit." (13)

A number of states have completed statewide plans which are fucused around key policies, and which should illustrate what is meant by "policies" regarding land use.

Included among Connecticut's proposed policies are:

- "Establish and protect sufficient water supply sources to meet future supply needs." (14)
- "Encourage urban development to be at sufficient densities for the economic provision of services." (15)

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(12) Haskell, James, Unpublished paper, July 1974

(13) "Maine Manifest", the Allagash Group, 1972

(14) Policy #1 out of 10, Connecticut Plan

(15) Policy #6 out of 10, Connecticut Plan

Vermont's policies, published in the draft of the State Land Use Plan, prepared for public hearing, are the products of more specific decisions:

- "It is the desire of Vermonters to retain the essentially rural character of the state with settled areas clustered within rural lands and forest lands."
- "Settlement of rural lands should occur on lands that have low potential for agriculture, forestry of mineral extraction and are quickly and conveniently accessible to cities... Large developments should not occur on other rural lands unless directly related to agriculture or the utilization of natural resources."
- "Development of vacation homes to serve Vermont's seasonal population should generally occur on lands which are suitable for permanent residences."
- on growth - "Excessively fast growth seriously hinders effective land use management. Growth should in no event occur at a greater rate than the state or particular regions or localities can accomodate consistently with maintenance of the Vermont character, resource conservation, and orderly public investment planning."--and very specifically:
- "Where alternative development proposals compete for limited lands and resources, development to serve the seasonal or transient population should be subordinate to development for the resident population." (16)

The Colorado land use policies derived from the integration of goals organized into four major concerns: The Environment, Natural Resources, Population and Economic Development, and Related Social Concerns. (The separation of "Environment" and "Natural Resources" is a new and interesting concept)

The goals for the environment include conserving the air, water and scenic resources, controlling development in hazardous fragile areas while providing adequate recreation.

The goals regarding natural resources is to ensure that development is consistent with the environmental, economic and social goals. The policy is to strengthen the state mining law while assessing new markets for and develop non-fuel minerals to stimulate new economic vitality in growth centers. It also includes a policy to encourage steps toward a "State Forest Policies Act".

The goals regarding Economic Development and Population is especially interesting because it deals with the growth question in a very specific and unique manner. The policy

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(16) State Land Use Plan: A Draft, Vermont, October 1, 1973

recommendation is that a goal of a set percent of population increase be targetted in each of the five very different geographic regions of the State. This policy is arrived at on the basis of the human and natural resource base in these regions and in light of the other 3 major goal categories.

The policy plans regarding Related Social concerns integrates the human resource with the other three.

It recognizes that both private market forces and governmental land use controls may have profound if unintended social impacts:

> "The imposition of environmental controls, by limiting or prohibiting certain kinds of commercial and industrial activity, may alter established patterns of employment and culture. To compensate for such effects, programs to assure access for all citizens to public areas, provide low cost housing, relocation assistance, and alternative employment opportunity are needed." (17)

These are the broad outlines. Each category has of course more specifics under it.

The point is that policies don't have to be so general that they loose effectiveness. If the difficult decisions are made at the policy-making level, it becomes easier to apply them to the formulation of standards and criteria, and ultimately to the decision on granting a permit on specific proposals.

As in Alice in Wonderland:

> "Would you tell me, please which way I ought to go from here," asked Alice.
> "That depends a good deal on where you want to get to," said the Cat.
>
> Lewis Carol
> Alice in Wonderland

B. LAND USE PLANNING

> "Planning is one of the few tools available to guide change. Change is coming at us like an express train down a railroad track. We could turn away--only to be soon run down by its massive force. Better that we stare it in the eye, recognize it for what it is, and stretch it onto a tract of our own choice." (18)

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(17) A Land Use Program for Colorado, p. XVIII

(18) Richard RuBino in Maine Coast Prospect and Perspective, p. 50

Planning is an essential part, sometimes the only element performed on the states level, in any program seeking to guide the use of land.

A comprehensive plan is usually a prerequisite of any ordinance seeking to regulate land use. The standard enabling law for zoning requires that "regulations shall be made in accordance with a comprehensive plan." Land Use or Land Capability or Land Development Plans are often found as applied titles of Comprehensive Plan. "Planning" also includes the data collection system, an adoption process by other agencies or government and finally planning is a process of continually updating and evaluating data in light of changes in technoloby, economics and social attitudes.

1. Comprehensive Plan

The Comprehensive plan has become a prerequisite for governmental regulations over land use. The basic reason for this is that in order for any imposed restrictions to be fair and just they have to be based on objective criteria of physical conditions and predetermined policies. The existance of a plan with all the information on resources and proposed uses sets a basic set of ground rules for regulations and enforcement actions for governmental agencies. It also affords the owner of private property or potential developer a predicatable guide for his individual decisions. It is, of course, essential that all involved (players in the game) then follow this plan (rule-book) in a consistent manner.

The definition in the Maine Statutes is:

> "A compilation of policy statements, goals, standards, maps and pertinent data relative to the past, present and future trends of the municipality (or region, depending on jurisdiction) with respect to its population, housing, economics, social patterns, land use, and water resources and their use, transportation facilities...(It), being as much a process as a document capable of distribution, may at successive stages, consist of data collected, preliminary plans, alternative action proposals...(It) shall include recommendations for plan execution and implementation..."(19)

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(19) Maine Revised Statutes, Title 30, § 4961

Through numerous court decisions, testing the validity of zoning ordinances, comprehensive plans have accumulated extensive legal definition. For example in New York Courts such a plan "connotes full consideration of problems presented and reasonable and uniform provisions to deal with them which tend to promote general community welfare" (20)

but

"It is not necessarily a written document. It is an underlying purpose to control land uses for the benefit of the whole community's problems." (21)

The major purpose of a comprehensive land use plan is to inventory the non-controlled phenomena, natural processes, and visual characterisitcs of an area; to reconstitute these in a value system, thus helping decision-makers perceive the degree to which they offer both opportunities and restraints to land use.

2. The Land Use or Land Development Plan, a part of the comprehensive plan, is the proposed or projected utilization of land. It relates the specific area considered to the general location of districts for residential, business, industry, farming, forestry, recreation, watershed, conservation, and open space purposes.

3. Data Collection or Inventory

A part of the planning process is the collection and use of data or inventory of existing resources, populations and rates of uses. Any data collected should be capable of being stored, retrieved when needed and used for prediction purposes. Data should be reliable and in such a form (standardized) that can be used for a variety of purposes.

As state level land use concerns have advanced, several states have begun developing more sophisticated systems for data collection and land use data. Various agencies are involved in data collection to fulfill their functions. (i.e., Fish & Game, Transportation, Commerce & Industry) Some of their information is usable in the comprehensive planning process.

Some states are now beginning to develop means of inter-relating data from these diverse sources. Georgia's

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(20) Albright v. Town of Manlius, 312 N.Y.S. 2d 13, June 30, 1970

(21) Walrus v. Millington, 266 N.Y.S. 2d, 833, February 4, 1966

environmental mapping systems (GEMS), Minnesota's Land Management Information System and Wisconsin's Critical Resources Information Program (CRIP) are examples of this aspect of planning. In Maine the State Planning Office coordinate M.I.D.A.S. (Maine Information Display Analysis System). Arizona has completed a sophisticated Arizona Trade-Off Model (ATOM) which provides a comprehensive evaluation of policy alternatives for economic growth and the environment by indicating changes that would result from particular decisions.

4. Review of Comprehensive Plan

Since the comprehensive plan does involve a high expression of political policy the writers of the Americal Law Institute Model Code (ALI) strongly recommend it must be consciously related to the political forces of government. The Model Code suggests that the plan be submitted to the Legislature, and if not disapproved within 90 days be deemed accepted. (22)

Some statutes require review by other governmental agencies, such as Regional Planning Commission, or by an other state agency, the State Planning Office and the Governor.

5. Planning as a Process

The ALI Code also recommends the establishment of a "Long Range Planning Institute," probably affiliated with the state university, to take a broad view independent of the government agency.

It should be remembered that although elements of a plan might be complete at a given time, it has to be able to reflect the effects of dynamic change. A means of re-evaluating has to be built into the process of comprehensive planning. A review of comprehensive plans is recommended at least every 5 years. Finally, lest the above sounds like we are on our way to utopia, it is important to recognize that, as Delafons says, "Plans are no better than the means of implementing them."

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(22) Note to article 8 § 405
A Model Land Development Code, Tentative Draft #3, American Law Institute (ALI), April 22, 1971.

C. TECHNIQUES OF LAND USE GUIDANCE OR TOOLS OF PLAN IMPLEMENTATION

The tools available to the state to direct the use of the land, and to implement any plans, fall into three general categories: police power regulations, degrees of direct aquisition, and taxation policies.

Under the police powers, the state can adopt regulations which reasonably promote the "health, safety, morals and general welfare." Regulations may be self-administering, that is, the provisions don't require further administrative actions except to check or enforce compliance; or, they may require an administrative agency to make an order for each individual case, based on standards or criteria. Subdivision ordinances, site review, and conditions for special exceptions fall into the latter category. (23) These categories are not mutually exclusive, however. There needs to be explicit performance standards for use in certain zones; and these could be self-administering understood criteria in a permit-giving system. For example in a certain limited residential district, road construction is permitted following a set of standards aimed among other things at preventing erosion. In another district, resource protection, road building requires a permit from the Planning Board which may set down more conditions necessitated by the resource being protected.

The concept of regulatory control has been established by the municipal use of the police power to zone, as delegated by the states. It is not entirely certain that the same tools will be finally applicable and effective on the state level. However, some of the processes are the same, even if ultimately modified and called a different name.

1. Zoning

A major step in implementing a comprehensive plan or a land use policy, is traditionally the use of devices such as a "zoning ordinance." In every day language, zoning is the activation of the maxim "a place for everything and everything in its place."

A court's definition of zoning is "territorial division according to the character of the land and the buildings, their particular uses and uniformity of use within the zone." (24) It is "based upon an enabling act which sets forth specific purposes and classifies homogeneous and compatible uses into separate districts under a

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(23) Krasowiecki, "Model Land Use and Development Code", Urban Law Annual

(24) Northwest Merchants Terminal v. O'Rourke, 60 A 2d 743, MD 1948

comprehensive plan so as to enable a community to exclude specific uses which could not be so excluded under municipal police power" (25)

Zoning then, is the regulation of property use by dividing a geographical area into districts and by specifying what uses of land are permitted or prohibited in each district.

A zoning ordinance is one of the legal means of specifying how the comprehensive plan is to be implemented. They aim at ensuring that development activities will be compatible with existing uses and constraints dictated by the land. They serve to protect both public and private investment as well as the public health and safety and general welfare. Zoning regulations set forth the steps which must be taken and the conditions which must be met before an existing land use may be altered, or a lot, tract, or parcel of land improved.

The zoning ordinance itself will spell out the means of administering these regulations. It will provide for several processes: an appeals procedure to interpret the zoning law and to correct alleged errors in any interpretation; a process to determine whether special conditions for specific uses required by the regulations (conditional uses and special exceptions) have been met; and a process to hear and decide requests for variances from the strict interpretation of regulations and for amending or reconstructing the established zones and standards.

A zoning map is the graphic depiction of the zoning districts within the area for which the zoning regulations are applicable. It normally includes an indication of the boundaries of each of the zoning districts, as well as a schedule of uses legend showing the type of uses which may be permitted in each of the zoning districts. It also normally includes identification of roads, streams, and other "fixed cultural" natural features as well as dimensions indicating the boundaries between zoning districts. It is adopted as a legal part of the zoning ordinance, and is designated as the official zoning map for a particular geographic area.

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(25) Andover Township v. Lake, 214 A 2d 870, N.J., 1965

2. Performance Standards

Performance standards are criteria which allow the consideration of alternate uses which might be compatible with the values being protected. "Without definite standards, an ordinance becomes an open door to favoritism and discrimination." (26) Standards give the permit-giving body an objective means of judging several applications against the same criteria and therefore, assure equal treatment under the law. Standards will usually indicate not only the uses permitted in a zone, but also the specific requirements of the usage (size, bulk, setback). Performance standards are special standards in the zoning regulations which establish required performance measurements in a particular zone, or for a particular use and are enforced by a designated agency. Any use that can meet these standards will be allowed. Performance standards can also deal with smoke emission, noise, odor, glare, disposal of waste material, and the actual process of operation of the particular use. Once a use has been permitted, it must maintain its ability to perform according to the standards, or else have its certificate of compliance revoked.

Performance standards can also be written for special areas or activities designated by the state as "critical". The state, by statute or an authorized agency, may establish standards for future developments in these areas. This is a new concept which extends the sphere of traditional zoning ordinances.

The criteria in the Vermont Land Use and Development Act are examples of standards for land use legislation used throughout the county. "Before granting a permit, subdivision or development: 1) will not result in undue water or air pollution...2) does have water available for the reasonably foreseeable needs of the subdivision... 3) will not cause unreasonable highway congestion or unsafe conditions." (27)

This device should not necessarily be forced into a typical zoning framework. The significance lies in the standards of performances for various uses. The narrow concept of similar uses in homogeneous areas, as in municipal zoning, just does not apply to vast regions of land.

This type of regulation (not necessarily based on zoning) has been tested in the courts. The Supreme Judicial Court of Maine ruled that criteria for

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(26) Homrich v. Stovas, 372 Mich. 5 32 (1964) cited by Delogu, Planning and the Law in Maine, Part 2, p. 19

(27) Vt. R.S.A. 10 § 6086 Supp. 1971

allowing developments, as exemplified by Maine's Site Location Law, (38 MRSA § 481-88) (and similar to Vermont's, quoted on previous page) are not unconstitutionally vague nor do they deny equal protection of the law. They were held to be a reasonable exercise of the police powers of the state. (28)

3. Interim Regulations

Before leaving the discussion on regulations we should mention Interim regulations. These usually refer to a set of standards and regulations developed for a limited period of time. The interim is between the time of recognition of the need to regulate and control and the completion of a comprehensive plan.

The only legal definition found in West's "Words and Phrases" is: "Interim ordinance is one passed with intention of preserving the status quo until a subsequent zoning ordinance can be enacted." (29)

The ALI Code recommends a "short-term program" for a specific stated period of time "in order to achieve ogjectives, policies and standards contained in the plan." The authors do recognize the need for state regulation before a plan is complete. "The Reporters have rejected the idea that the adoption of a state land development plan (comprehensive plan) should be pre-conditioned for state regulation. The social and environmental problems demanding state action are so urgent and important that the delay inherent in requireing formal adoption of an official state plan outweighs any gains that would be achieved." (30)

The comprehensive land use laws already in effect in Hawaii, Vermont and Oregon have interim provisions:

> Hawaii - had provision for regulations designed "to maintain the existing conditions, in so far as practicable and reasonable, until the adoption of regulations in their final form..." Their interim regulations were adopted 9 months after this law (1961), but only after public hearings, with the same specifications as for permanent regulations.(31)

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(28) Re Spring Valley Development by Lakesites, Inc. Me. 300A 2d; 736, (Feb. 1973)

(29) Phillips Petroleum Co. v. City of Park Ridge, Ill., 149 N.E. 2d 344 March 31, 1958

(30) ALI, Article 8 § 404

(31) Act 187, Session Laws of Hawaii, 1961

Vermont - "Prior to adoption of the capability and development plan, the board shall adopt an interim land capability and development plan which will describe the present use of the land and use based on ecological considerations." (32) These standards are in effect until the adoption of a land use plan. Public hearings were also included.

Oregon - Prior to approval by the Commission of its statewide planning goals and guidelines the goals adopted in a previous law (ORS 215,515) are to be in effect. This previous law authorizes the governor to prescribe and administer plans and zoning ordinances for lands within a county not regulated by December 31, 1971. Under this authority Governor Tom McCall placed a moratorium against issuance of any building permit in Lincoln County.

In Critical Areas - Another means of interim control available to the state is the designation of areas of critical state concern. These are areas which present problems of immediate and critical importance. The authors of ALI

> "do not recommend...that the state be prohibited from designating any district of critical state concern until it has prepared and obtained legislative approval of a Comprehensive State Land Development Plan. Many of these districts will present problems of immediate and critical importance and if designation is delayed, the probability of seeing the area preserved or developed in a manner consistent with the states goal will be forever lost."(33)

4. Degrees of Direct Ownership

Direct ownership by the state is potentially the surest technique of assuring that the land is used in the public interest. There are various degrees of ownership whereby the state can acquire direct control of certain land areas.

a. Easements: The state may purchase a right, privilege, or advantage in the use of the land, but still not be outright (fee simple) owners of the land. Conservation easements may be positive or negative. They may provide access to public or private land, for hunting or fishing, or to a lake or stream, or they may simply keep land open by denying certain development rights. A negative easement would deny the owners (for a price) certain specified uses of the property.

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(32) 10 Vermont Statutes § 604

(33) ALI, note to Article 7, Section 201

b. Purchase and Lease Back - the state as a landlord can set conditions or restrictions for use of the land. It could lease to developers, in which case the state might form a development corporation. This has been used by public or quasi-public Development Corporations, where the city purchases the land and leases it to developers. This technique is also applicable to new towns and industrial parks.

c. Purchase and Resale - also used in urban renewal projects. This technique allows the government to set conditions for resale so the development can proceed along a plan.

d. Land Bank concept is actually a form of Community Development Corporation except on a state level. The state becomes the owner of land by gift or purchase without necessarily a specific proposed use in mind. It then holds this land in a "bank" and can plan for the use of the land in the public interest on a permanent basis.(34)

e. Eminent Domain is a power of government to secure a particular tract of land which may be necessary for carrying out a public purpose. Proceedings under this power are usually well-defined in the statutes and the owner of the land is compensated for the loss. Usually the state acquires a "fee simple" title, but easements can also be acquired by eminent domain.

Florida has an interesting measure, which can be considered as a new technique, but is more likely a combination of all the above, including compensation for taking the land. According to the 1972 Environmental Land and Water Management Act, the state can completely ban development on land it considers endangered; but it must purchase these lands outright. The voters of the state passed a $240 million bond issue to back up this provision.

That government, itself, is often a "developer" of the land, and as such can have considerable impact on land use patterns, should not be forgotten. Military bases, post offices, parks and highways will have considerable effect on private development in the future. These should be no less regulated or planned or than private developments.

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(34) Maine Manifest, p. 5-18

Lands to be acquired by eminent domain is, of course, the surest way the state could attempt to implement a policy of protecting a particular resource. Areas for acquisition and the proposed timetable should be included in the action plan of the comprehensive plan.

5. Taxation Policies

The taxation power of the state can be a factor in land use decisions. Tax measures, formulated in light of policies and goals of state land use, can be an adjunct to the state's system of land use guidance. The scope of this paper allows only a listing of taxation policies, to be considered by the reader for their effect on land use.

a. Property Taxes

Obviously, if all the money needed by municipalities comes from this tax, the policy of that level of government will be to do what it can to encourage tax-producing developments - sometimes with a "come what may" attitude. The "biggest bang for the buck" attitude will often over-ride long range immeasurable social or ecological considerations.

b. The Rate of Taxation, of course, will be a factor in the owner's decision on use of the land. The balance between how much is needed to fulfill the fiscal responsibilities of the state and how much would foster undesirable land use creates a tough policy question, which has to be answered by the state policy-makers in light of all the policies of the state.

The rate of taxation of a resource product, i.e., Tree Growth Productivity Tax can be delicately set to hit the right balance between being too low, too high, or just the right level to encourage good management practices. Used properly the amount of taxation can be a tool to implement a policy of the state aimed at conserving a highly productive economic resource, such as the forests.

c. Level of Taxation - taxing of property on a regional scale, for instance, could possibly do much to encourage the appropriate, rather than expedient, use of the land, based on municipal competition for taxable development.

d. Current Use Taxation, instead of potential use - the rate would determine what an owner will do with his land. If the rates of current use are lower than the rates of potential use, he might not be forced to prematurely sell his land to a more intense user. Maine's Farm and Open Space Land Law enables certain farm lands and open space to be taxed at current use value rather than the highest and best use. The farm lands must be at least 10 contiguous acres and must be so assessed by the tax assessor. The open space designation must be in conformance with the Comprehensive Plan and be approved by the Local planning board or the Land Use Regulation Commission. (35)

e. Capitol Gains Tax - tax on the profits gained on land by buying and selling within a short period of time. Vermont passed such a "tax on the gains from the sale or exchange of land." The rate of taxation diminished with the number of years held, down to nothing if held more than six years.(36) The intention is to discourage land speculation.

6. Supplements to Police Power

There are times when the above techniques are not adequate to accomplish the state's objectives of land use control. The search is continuing for a solution to the unanswered tension between the constitutional limitations of "taking" and the need for protection of the long range community public interests.

David Heeter believes that development incentive and compensatory payments are supplements to the police power which could make them a more satisfactory vehicle to over come the constitutional limitations. (37) A "development incentive" or trade-off type arrangement might be, for example, to allow a developer to build at a higher density than spelled out in the ordinance, but requiring him to set aside a certain percentage of the land for open space or recreation. Compensatory payment may be made to a landowner on the condition that the regulations continue to be in effect. The damages to be paid would be the difference between the value of the property before and after the imposition of regulations.

Another fascinating technique just beginning to be discussed is the "Development Right Transfer". It is a means whereby an owner of property who has been

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(35) 36 MRSA § 585-593

(36) Vermont Statutes, Title 32, Chapter 236, 1973 Sapp.

(37) Heeter, David, p. 11

denied or postponed his option for development by zoning or moratorium can sell his right to a purchaser whose property is located on developable land. The purchaser then has bought a right to develop at perhaps a higher density or greater height or whatever conditions set by the regulatory agency. This technique looks like a dream solution to the problem of compensating the private property owner while handing the governmental agency a guiding tool so it can encourage the kind of developments its policies favor. It seems worthy of greater study by all land regulatory agencies. (38)

According to Fred Bosselman in Quiet Revolution - "further exploration is needed to provide a sound legal rationale for setting off benefits created by the regulatory program against the losses caused by restrictions." Although the value of one piece of land might be lowered temporarily, an adjacent piece of land might increase in value in the long run because of regulations. Finally, he says, "Those who create systems of land regulation based on modern ecological knowledge should be aware of the constitutional issues, but should not be so afraid of it that they ignore the approches that are available for working creatively within the constitutional limit." (39) There is currently a growing interest in examining the possibility of a system of compensatory payments.

D. METHODS OF ASSURING COMPLIANCE

There is a set of techniques to assure that the whole system accords with the comprehensive plan, regulations, and standards. Without an effective system whereby the intentions, policies, and comprehensive land use plans can be implemented, the whole system is a shameful waste of money. Enforcement has a number of components:

1. Informing Potential Applicants

The first essential step is to devise a method of informing the public of the existence of the law. Potential developers must be made to realize that certain activities will require a permit. The applicant must have available to him an application, which will channel all the information pertinent to the enforcing agency, so it can judge whether the proposed use is in accordance with the guidelines and standards for that district, as provided in the ordinance.

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(38) J.J. Costonis, Development Rights Transfer: An exploratory Essay; Yale Law Journal, 83:75-128, November 1973, or D.M. Carmichael, Transferable Development Rights As A Basis of Land Use Control, Florida State University Law Review, 2:35-107, Winter. 1974

(39) Bosselman, Fred, The Quiet Revolution In Land Use Control, (1971)

2. Granting of Permits

There must be an agency, a Commission or a Board, whose function is to handle applications for permits. Permits are judged according to the "standards" for permitted uses, and special conditions spelled out in the ordinance. Part of the permit system is the consideration of special exceptions and variances to the provisions of the zoning regulations. The decision making body or person will also consider unusual circumstances which may require variances from the ordinance. In order to have an enforceable land use guidance system, the Commission will have to grant only variances that are consistent with the basic intent of the ordinance. Criteria for special exceptions and variances will need to be clearly spelled out.

3. Certificates of Compliance

Certificates of Compliance or occupancy are issued by the Commission or Agency to indicate that the construction of a building, subdivision, development or any other activity is in accordance with the conditions of the permit. This is a check on the whole procedure. It means that an inspection is necessary before a structure can be occupied or a development operational. It assures that the proposal at the time of completion meets all the applicable requirements and/or conditions placed on its original permit.

Although this may seem like a costly requirement, it is cheaper than picking up individual violations, and is more effective than just hoping for the best.

4. Inspection

There must be an effective system to assure that the law is being obeyed.

The location of the agency within various levels of government empowered with enforcement would depend on the organization of the system. Inspection could be accomplished by other agencies in the field, or could be delegated to local agencies which are in the best position to discover violations.

The important thing is that there should be an efficient method of inspection in the field, so that no one can feel that the law is unenforceable and that he can get away with violations.

5. Provisions for Penalty to Violators

All land use legislation has enforcement provisions for handling violations, such as cease and desist powers, and penalties for violations. The literature does not contain much discussion on penalty provisions. Is this perhaps because we are mainly focusing on establishing a system (or is it because we are such a law abiding nation)?

Maximum penalty provisions are fixed between $500 (Vermont) and $1,000 (Hawaii) per day for violation. The enforcing agency may, in the name of the state, "institute any appropriate action, injunction or other proceeding to prevent, restrain, correct or abate any violation hereof of the rules promulgated hereunder."(40) A similar section is customary in all such statutes.

The threat of court action and penalty is an essential psychological component which indicates to the public that the law will be enforced. It is not unreasonable to assume that the greater the rate of successful prosecution in the initial stage, the less will be the need for it as time goes on.

E. PROCEDURES FOR APPEAL

The last component of a land use guidance system is a process for appeal or for adjudicatory review.

The word "appeal" means an application for review by a higher tribunal. Adjudication is "to pronounce or degree by judicial sentence, settle judicially, pass judgement." Obviously, then, the specifics of the review procedure will be determined by what powers are delegated to lower levels of government.

When a decision is handed down or a permit is denied at the local or regional level, then there is a choice of appeal routes. The appelant may turn to the court system (at that level) or to a state agency set up for review purposes. Decisions by state agencies may be appealed to the state court or to an administrative review board.

In all cases, court, commission, or review board--the records of the hearings held by the previous agency are considered evidence at the appeal procedure. In cases where there were no hearings, then there are procedures for proceeding de novo (or anew, from the beginning), either going back to the initial agency or at the present hearing. The

(40) 10 Vermont Statute, § 6004

State Land Adjudicatory Board (in ALI) would have the same powers of issuing decisions and attaching conditions and restrictions as the agency whose decisions are being reviewed.

While the adjudicatory board bases its decisions on the same set of policies, standards, regulations as the local agency, the basis for judicial review includes constitutional and due process considerations. The court may declare an order, rule, or ordinance (or part thereof) invalid if it:

- is contrary to the constitution of the U.S.;
- is in excess of the statutory authority;
- was issued without observance of procedure required by law, i.e. proper notification of affected owners and public, proper minutes and proceedings at hearing, duly sworn in officials;
- is arbitrary, capricious, in abuse of descretion, or is otherwise not in accordance with law;
- not based on findings of fact presented at hearing.(41)

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(41) ALI Code § 9 - 109

IV. JURISDICTION

Jurisdiction is the territory over which (any) authority is exercised. The jurisdiction of land use control is currently expanding from municipal boundaries to larger geographic areas, and to activities which, by impact, affect larger areas than municipalities or townships.

A. NEED FOR STATE LEVEL JURISDICTION

The physical resources, and the populations dependent upon them, are not contained in tightly defined political municipal boundaries. The current concern for the environment stems from the recognition that the use of natural resources has complicated, sometimes with unpredictable consequences on the present and future natural and human resources in areas considerably removed from the original resource being used.

Water is a good example of a resource which ignores artifical municipal boundaries. The use to which the land is put in a watershed certainly affects water quality and all of the people who depend on it. The water supply of the citizens of a very wide geographical region has to be guaranteed either by voluntary coordination of geographical entities in a whole watershed or by some regional government which can guard the water fron undue pollution.

Whole areas, such as shorelands, wetlands, mountain tops, and forest and agricultural lands, are all critical links in the environment; yet they very rarely coincide with the established city or township political boundaries. The resources of these geographical regions are often referred to as fragile, because if misused or mismanaged their resources can become non-renewable and therefore lost forever. Not only are these areas critical now, but there is high demand for their use. It is the responsibility of some governmental entity to provide the services which are dependent on the resource, such as water and recreation, and at the same time to preserve these resources which are vitally linked to the biological and economic survival of future generations. This responsibility is beyond the geographic scope of municipal government.

Another factor to consider is that the contemporary life of high energy use, "advanced" technology, population concentrations and affluence has created demands for land use on a much larger scale than before.

The resultant large scale developments affect a much larger number of people and greater geographical areas than encompassed in a town or even a county. Examples of such large scale developments are highways, airports, large recreational facilities, utilities, and industries whose costs - benefit analyses require consideration of a large number of variables and considerations and whose order of magnitude far transcends local capabilities, facilities, or vision.

B. FACTORS DETERMINING JURISDICTION

Recognizing the inadequacy of present municipal boundaries for land use guidance purposes does not automatically determine the areas and activities the state may wish to extend its control over. Variables which will influence the choice of jurisdiction in a particular state are:

- the social framework, sets of beliefs and traditions associated with the state. For example, the New England states strongly believe in local control. In some rural areas, as in Maine, where local zoning ordinances are repeatedly rejected by the voters, even local municipal control is interpreted as too far removed from self-determination;
- the uniqueness of certain geographical features of the state such as shorelands, mountain tops, wildlands;
- the heavy dependence on a particular economy based on a major resource - marine, forest or agricultural land;
- the experience in recent years of heavy demand for use of resources in the state;
- the general level of alarm over the irreversible consequences of the uses of some resources on the other resources and citizens in the state.

C. TYPES OF JURISDICTIONS THAT HAVE EMERGED

The jurisdictions under current state land use guidance can be categorized into five types: critical areas, regional impact developments, large scale developments, uncontrolled areas, or where there is no local authority, and statewide comprehensive system combining all of the above. It should be noted that a larger-than-municipal jurisdiction does not automatically imply the administration of the whole system by the state. The allocation of the various functions is varied among the states and is, infact, a key issue in designing state land use guidance systems, to be discussed in the next chapter.

1. Critical Areas

Critical areas are lands in certain regions whose uncontrolled development poses a threat to the public health, welfare, and general safety. There are two types of critical areas: ones is "critical environmental areas" and the other might be called "critical development areas".

The best definition of critical environmental areas was in a Virginia study:

> "A critical environmental areas is any portion of land, regardless of size, which because of location, physical features, historical character, natural productive capability, scenic significance or unique flora or fauna, contributes to the economic, aesthetic, or cultural well-being of individuals or society, and which because of these peculiar qualities in in limited supply." (42)

Note that the controls over critical environmental areas are based primarily on the nature of the land rather than the type of development proposed.

The management of "critical environmental areas" has proven the most popular form of state land use control. Sometimes, concern over a special area initiates a statewide concern. Areas which might be included in this designation are:

- Shorelands (within specified # of feet of highwater)
- Coast lines
- Flood plains
- Watersheds
- Wetlands
- Agriculture or forest lands
- Wilderness Areas
- Wildlife Habitat
- Historic Areas
- Areas with Special Physical Assets

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(42) Critical Environmental Areas; Virginia 1972

Critical development areas would include areas around major facilities which, because of their special use tend to draw development to the area. It is sometimes deemed desirable to regulate the land use activities that will occur to prevent undesirable strip development. Examples of such areas include:

Highway Interchanges
Airport Regions
Power Plant Vicinity
Vicinity of Major Parks
Adjoining areas to Large Shopping Malls
Areas near major Recreational Resorts

What constitutes a critical area for a particular state could be influenced by the goals and policies of that state. For example, if a goal of the state is to preserve agricultural land, then its policy would dictate that state declare prime agricultural lands as critical areas (where development would be limited).

States which seek to control such critical areas usually pass special legislation to set up the regulatory system. The statutes will generally require that the state agency spell out the reasons for designation of a particular area, and the dangers that might result from uncontrolled or inadequate development. The state agency then delineates the boundaries or definition of an area and sets up standards for activities permitted therein. Further implementation might be up to lower levels of government with varying degrees of state supervision. In Maine the Shoreland Zoning Law is an example of this type of legislation. The state sets up guidelines but allows local municipalities to administer the controls.

A limitation of this jurisdiction is indicated by a reservation included in the Florida Land Management Act. Following the ALI Code almost to the letter, the Florida legislature delineated critical areas, but apparently got cold feet. Fearing that development would be strangled, they enacted a measure specifying that not more than 5 percent of the land could be so designated. The workability of this limitation is open to question; and its effects will have to be watched as the law is put into practice.

2. Developments of Regional Impact

In contrast to critical areas, which is based on the type of land in question, the state's jurisdiction over regional or large-scale developments covers activities. Development of regional significance provide benefit to an area beyond the boundaries of a single government; but they may have implications for a considerably larger area. The following types of development fall into this category:

- developments by a governmental agency other than the local government. This would include developments which use state or federal grant monies. The point is that "state or federal grant programs for the aid of development are almost always instituted for the purpose of achieving goals of a broader community than the residents of a particular government. It is important to insure that the local governments do not allow their own constituents' fears of adverse effects of development to outweigh completely the interests of a broader section of society that might be entitled to greater concern"; (43)
- developments which will be used for charitable purposes, including religious or educational, and which are intended to serve a substantial number or people outside of the local jurisdiction.
- developments by a public utility to provide services for a large area.

Examples: airports
recreational facilities
electrical generating facilities
hospitals
industrial plants (when not large scale)
office parks
mining operations
oil storage facilities
port facilities
residential development
post secondary education
shopping centers
power plant siting

Generally, the state land planning agency would adopt definite rules, guidelines, and factors to be considered in order to determine if a particular development falls within this category. This provision does bring under regulation activities which have previously been left out of local zoning ordinances. Not too many states,

(43) ALI Code, note to art 7, § 303

so far, have specifically spelled out this category. Florida and the proposed Washington law do include it.

This jurisdiction could conceivably fall between critical areas and large scale developments (next category) or could be considered under either framework.

3. Large Scale Developments of State-wide Significance

The jurisdiction of large-scale developments is over activity; but in actuality it encompasses the geographic area of the whole state (a synonomous term is development of state-wide significance.) Definitions of a large scale development and the factor to be considered before granting a permit for such development may be spelled out either by the statute or by the agency responsible for land use. Certainly a large scale development would be one which could have major state or regional benefit or harm. Factors which ALI recommends be considered in defining what constitutes large scale developments include:

- the size of the site to be occupied;
- the number of people likely to be present;
- the potential for creating environmental problems such as air, water, and noise pollution;
- the likelihood of additional or subsidiary development being generated.

The problem is, as Russell Train put it, "An alarming number of large scale developments are occuring where there is no regulatory authority." Because the pressure for, and the irreversible consequences of, such development severely limits future options for the state, it might become imperative to set up control over large scale developments before a statewide land use management system is adopted. Maine is often cited for being the first to use such an approach. The Site Location Law both defines and sets up criteria by which to judge applications for large scale development.

4. Areas of the State Without Land Use Control

There are areas over which the state assumes controls, either because there is no adequate local authority or because of the potential adverse effects created by extreme development pressures.

The powers of the state may be terminated, in such areas, when the local government takes over its function in an

approved manner, or when in the case of unorganized areas, a local government is formed. The state of Colorado promulgated regulations in the municipalities and counties where the 1976 Olympics were to take place and where local land resource controls were absent. The Colorado Land Use Commission was empowered to do this until acceptable regulations were adopted locally. Oregon also enables the state to prepare plans and enforce zoning on all areas not subject to local regulations. Maine's Land Use Regulation Commission is cited as an example of a total land use guidance system set up for its vast unorganized territory (50% of state area), mostly in private ownership, where there is no local government, but plenty of potential for private development.

5. Statewide

The jurisdiction of a statewide comprehensive land use system would obviously extend over the whole state and more than likely include one or more or all of the above categories of jurisdiction. Although the jurisdiction might be statewide, all the powers of administration are not necessarily left in the state's hands. One advantage to this system would be the elimination of the need to classify and define jurisdictions.

Statewide programs are usually characterized by the existence of a comprehensive plan. Hawaii's 1961 Land Use Law has been the noted pioneer in the field. It has statewide zoning; but zoning is not necessarily a prerequisite for a statewide system. There are statewide systems evolving in Vermont, Puerto Rico, Washington, Colorado, Oregon, and Florida. Many other states have active blue-ribbon committees studying the advisability of setting up a coordinated, statewide system.

V. ISSUES TO CONSIDER IN DESIGNING THE SYSTEM

> "Planning is meaningless at all levels without adequate control and implementation of powers... land use policy can only be effective when developed and backed by same level of government as is responsible for the implementation." (44)

> "Controls should be in existence but there has been no desire for responsibilities to go with authority to establish such controls." (45)

Once the limitations of land use control becomes evident, the next step is to design a system of land use guidance which:

- covers areas and activities of greater than local significance;
- most effectively coordinates the policies, plans, regulations, permit system and enforcement;
- is in line with the attitudes and traditions of the citizens;
- assures the support of the citizens; and
- is administratively manageable and enforceable.

To achieve such a system requires a precarious balancing between values of efficiency, local control, participatory democracy, and checks and balances of power. The State, its citizens, legislators, and Governor will have to make some decisions on the following key issues:

- Should the various components in the system be combined into one agency, or is it advisable to separate them?
- Which functions should be performed by the state, the regional, and the local levels of government?
- What is the best means of assuring citizen participation?
- What should be the make-up of the Commission or Board assigned to administer the system?
- What agency of state government should be responsible?

Each state has to find its own approach according to the values acceptable to its constituency.

As Governor Terry Sanford of North Carolina quotes Supreme Court Justice Louis D. Brandeis:

> "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country." (46)

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(44) New Mexico Land Use Study

(45) Arkansas Study

(46) Sanford, Terry, Storm over the States, p. 33

A. SEPARATION OF MAJOR COMPONENTS

The question of separation of function is an issue that concerns the distribution of powers and duties among levels of governments of among agencies on the state level.

Should policy making, planning, standard setting, and permit granting (the last two often referred to as management) be in one agency; or should the functions be separated among agencies or divisions? If separation is desirable, then the argument can be whether the function should be spread out on one level or assigned to various lower levels of government--regional, local.

The review of the literature indicates that this problem has not really been explored in any great depth. This is perhaps because it is a new one facing the states. David Heeter (see bibliography) does cite recommendations based on the local experience of zoning administration. The recommendations are for local-level land use controls, although the concepts may be applicable to the state level. All four reports reviewed by Heeter (Douglass Commission, ASPO for Connecticut, ACIR, and ALI) recommend that the present day functions of the Planning Commission or Board, Building Inspector, and Board of Appeals be combined into one agency, which would be responsible for all local ordinances. The Douglass Commission held that the original separation of administrative, judicial, and legislative functions results in a time-consuming maze and in uncoordinated, possibly contradictory decisions. In this analysis, of local land use controls, state agencies are offered as a review (and check) on local agencies.

The question revolves around whether or not policy planning functions should be separated from regulatory and permit functions. There are about an equal number of arguments on each side.

Proponents of separation of functions give some of the following arguments:

> "Policy making and policy implementation functions should be separated to encourage clearly defined policies embodied in a formal planning procedure and less policy evolved through a series of confrontations." (47)

The concern is that an agency or commission might not only bend over backwards for an applicant; but that under the

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(47) Richard Chapin, Chairman of the Washington Land Planning Commission in "The Change in Legislative Climate", State Government, Volume 46, 1973

same pressures it might change the rules and standards, and thus might doubly jeopardize the intent of the law.

J. Jackson Walter, regarding the Environmental Board in Vermont:

> "It may be somewhat unrealistic to expect the board to act on one hand as a planning group charged with the responsibility of formulating a statewide blue print and on the other hand act as a disinterested judge and jury on permit applications." (48)

People who believe that the functions should be administratively combined in one agency include Clyde Fisher, Chief of Environmental Planning Coordination, Northeast Utilities , Hartford, Connecticut, who questions the advisability of separating policy enforcement, "When the enforcement experience provides a valuable grasp of policy implications that cannot be obtained in any other way. A huge body of regulatory agency experience suggests that such separation is undesirable." (49)

Michigan's Governor's Special Commission on Land Use:

> "To achieve desired goals of land management, such agency should be imparted with both planning and management capability and authority. Planning without implementation will not bring about a purposeful program, nor will management without planning." (50)

Then there is the non-answer or "it doesn't make a difference" argument which may be just as valid:

> "From Wisconsin experience it is not clear that either the concentrated or dispersed organization of land planning functions is the key to a successful program. Much more important is the active strong support of political and administrative leaders." (51)

There is no clear answer. Although care must be taken to differentiate between statewide land use control and local zoning ordinances, the 50 year history of local zoning experience should provide some answers. Perhaps the recognition of weakness in either separation or

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(48) Maine Law Review, Volume 23, (1971)

(49) Fisher, Jr., Clyde O., "A Giant Step Forward, But Insufficient and Already Dated," Land Use Control Annual, ASPO, (1971) p. 61

(50) "Governor's Special Commission on Land Use Report" (Michigan 1972) p. 10

(51) Correspondence from Roger L. Schrantz, Deputy Director of State Bureau of Planning and Budget, November 21, 1973.

combination of all functions could lead to compromise alternatives. Some of these might include a policy supervisory committee (perhaps in legislature), firm guidelines spelled out in statutes (as in Vermont), and stiff requirements for changing standards.

The decisions on this issue will be important in determining who will do the planning for the various jurisdictions, who will grant the permits and conditions for development, and who will review or adjudicate appealed decisions.

B. LOCATION OF AUTHORITY

"Jurisdiction to prescribe rules for land use should coincide with the territory substantially affected by the prescription." (52)

The decisions regarding the allocation of functions among the different levels of government present a most delicate and political problem. The administrative value of streamlining authority, or even concentrating power at one level, is severely limited by our belief in home rule, decentralized power, and checks and balances. On the other hand, for the sake of reason and efficiency, shouldn't the governmental level of land use control coincide as much as possible with the geographical boundaries of affected human and natural resources? There are advantages and disadvantages, efficiences and inefficiencies on each level.

1. Local Level

a. Advantages

"Most decisions on land use development do not have an extra-municipal impact, as anyone who has nodded through the interminable agenda of boards or appeal and planning commissions knows. Machinery is crying for overhaul but should not be abandoned." (53)

Local government is the closest to local problems and hence the most responsive to local needs. Participatory democracy is much easier to accomplish on the local level. Babcock believes that it is the conviction of local decision-maker that he is more competent to decide these questions than his professional counterpart in Albany, Columbus, or Sacramento.(54) It is probably easier to enforce, inspect, and prosecute on

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(52) New York State, Planning Revision Study, Document No. 4, p. 2

(53) Babcock, Richard, "Comments on Model Land Development Codes," Urban Law Annual, 1972

(54) Babcock, Richard, The Zoning Game, p. 19

the local level.

b. Disadvantages or Weaknesses on the Local Level:

Local zoning ordinances have often become ineffective with the easy passage of infinite amendments. Local, heavy, special interest politics might be one reason. A more likely situation however, is that local governments may often lack the resources required to draw up and effectively administer their zoning ordinances.

Local communities have tended to use zoning as a means of maximizing local interests. Local authorities tend to exclude such facilities as garbage disposal, correctional institutions, and low income housing, viewing them as undesirable from the local viewpoint. The urge for property tax revenue rises to the top of all considerations in decision-making.

Local governments are also unable to take a comprehensive view of the state and its goals (myopia, for short).

> "The error in zoning today is not that the decision-making is exclusively local; the flaw is that the criteria for decision-making are exclusively local, even when the interests affected are far more comprehensive." (55)

2. Intermediate Level

In recent years the tension between the traditions of home rule and the recognition of the large scale impact of land use decisions has led to a search for an intermediate level of government to regulate the use of those resources and services which most nearly coincide with the geographical boundaries of affected human and natural resources.

Problems emerge from each attempted solution. The municipalities are too limited in scope; the state is often seen as too far removed. The problem with the "somewhere in between" is that the affected geographical boundaries vary with the type of resource being used. For example, watersheds are different from air quality regions or service areas for transportation purposes.

The result has been the creation of veritable maze of intermediate levels of government and regional agencies for each function. Examples are the Water and Transportation Districts, Air Quality Regions, Law Enforcement

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(55) Babcock, Zoning Game, p. 20

Districts, and Regional Planning Districts, and the traditional counties to name a few. The oldest intermediate level of government is the county.

a. County

County Government is a viable choice for administering selected aspects of land use guidance in some states. Legally it is a "political subdivision of the states established for the more convenient administration of Government." (56)

The effectiveness of county government depends very much on historical tradition and the existing county lines (whether or not they fit today's needs). County governments in the New England states seem extraordinarily out of line with the requirements for land use guidance. Their governmental functions are often minimal: Connecticut has abolished theirs, entirely. In Hawaii, Wisconsin, Minnesota, and Oregon, they are in a position to assume land use functions. Counties do have elected officials and powers to tax. Perhaps with boundaries re-drawn and strengthened support from the state or federal government, they could be called into service for more permit-granting or enforcement functions.

b. Regional and Metropolitan Agencies

Regional or metropolitan agencies are administrative districts which may overlap or criss-cross the present jurisdictions of local, county, or even state governments. Examples are metropolitan governments, regional planning agencies and river basin agencies. Not wishing to waste money by allowing redundant duplication of services, Federal policies have created much of the new regionalism. Federal grants for Highways, Housing, and Sewerage treatment construction require regional cooperation in planning. This was minimally satisfied by requiring the review by regional agencies of applications for Federal funds (the so called A-95 review procedure).

Many states have used the geographic districts to form so-called Regional Planning Districts.

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(56) Ballentine Law Dictionary, 1969

(1) Arguments For

Arguments made for these regional and metropolitan agencies or Commissions include:

- they fulfill the need for a coordinating agency which coincides with services and recipients;
- their composition of local officials offers a forum for airing grievances;
- they are in a position to be an "input conduit" from local citizens; and
- they could serve as a coordinating agency (go-between for) state, local and federal governments.

Philip Savage in "Designing a State Land Use Program" points out that the "Regional Planning Agencies are better able than the states to respond to sectional peculiarities;" (57) They could, for example, be based on a river basin approach, which would be conducive to coordinating water and land management issues. He recommends project planning review but stops short of giving permit function to regional agencies.

(2) Arguments Against

Criticisms arise from weakness of the agencies themselves, and from the lack of relationships with other levels of government:

- most of these regional commissions or councils of government have no regulatory power or authority; their role is only advisory;

  "Metropolitanism, in its most innocuous form-regional planning agencies or councils of government - is on the balance an exercise in futility, a "talk-talk" role that is bound to fail. Planning without the attributes of sovereignty, the power to tax, to regulate and to condemn is nothing." (58)

- the officials of these regional commissions are drawn from its local constituents. Consequently while they may air grievances, everyone is looking out for his parochial interest;
- the functions of these agencies are not clearly defined;
- they are not adequately funded to do a good job. Richard RuBino, in an article on Florida's new

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(57) Savage, Philip, "Designing a State Land Use Program", State Government Summer, 1973

(58) Babcock, "Model Land Development Code", Urban Land Annual, 1972

legislation, reflects on the uncertain state of affairs by his recommendation: "If you throw the dog a bone, you better let him chew on it;" (59) i.e. give it power and money.

To summarize the present situation, the various regional districts seem to criss-cross and overlap existing county lines with various jurisdictions. The power gets diffused and "who, me, accountability?" results.

3. State Level

In our Federal form of government, state governments uniformly exist between local and Federal jurisdictions. Amendment 10 of the U. S. Constitution, states:

> "The powers not delegated to the U. S. by the Constitution, nor prohibited by it for the states, are reserved to the states respectively, or to the people."

Originally, the powers to regulate land use resided in the states. In the last 50 years, however, the states have delegated their control over land use to local governments. The pendulum appears to be swinging back.

One reason cited for the states' resumption of their role in land use guidance has been the much-discussed National Land Use Planning Act, first proposed in 1971, but not yet passed. This is a rather superficial reason, because the act itself is a response to the conditions which require the reassertion of state authority.

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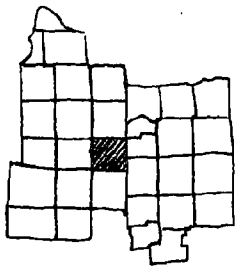
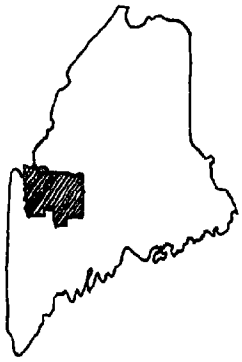
(59) RuBino, Richard, States Role in Reference Management, 1972.

Emerging from the need to consider the impact of resource use upon the human and natural environment is a series of interests. Land use with greater than local significance might have regional impact; other developments might have state-level significance; and some land uses might have Federal significance.

TOWNSHIP



REGION



STATE

COUNTRY

Jurisdictions listed above in Chapter IV all qualify as having greater than local impact. It should be fairly obvious by now that our social framework limits us from offering the simple solution, "all land use guidance activities in jurisdictions of greater than local impact should be assigned to the state." It would make a clean model in the abstract but it just won't work.

There are arguments, pro and con, for state level land use controls, just as for the other levels:

Arguments For

- The state has a responsibility to guard unique resources so that it can guarantee these resources for the economic and recreational needs of present and future populations. Most of these resources fall beyond municipal boundaries. They are often the "critical areas", such as shorelands, estuaries, mountains, wildlife habitats and vast forest, marine and agricultural resources.

- The state is in a better position to resolve the constant conflict between development and environment. Local interests are presently pretty much based on the concern for local revenue. Local officials tend to give more weight to the property tax advantage accruing from potential development than to any other concerns such as community stability, aesthetics or ecology;
- The state is also in a position to transcend local politics, and thus could strengthen the effectiveness of local control. It can offer objective criteria and, more importantly, a back-up authority for badgered local officials to "hang their hat on." This need has been noted especially in cases of exclusionary zoning, where local predjudice is too strong and a higher level of authority needs to assert itself.
- The state as the seat of all residual powers is in better position to coordinate the overlapping activities of local governments and
- usually has broader based taxing power to secure the kind of financial resources which are required by a well planned and implemented land use guidance system.

Arguments Against

There are limitations to the State assuming all of the powers and duties of land use guidance:

- The most serious limitation is the tradition of "home-rule", for individual citizens to have an effective say in the determination of those land use policies and decisions which are intricately related to their individual destiny. As Wesley Kvansten, a planner in Oregon, expressed it - "land use is an absolute determinant of quality of life; everything (except sex) is based on it.";
- It is administratively impossible for the state government to effectively reach every nook and cranny of the state area. It is inefficient for the administrators from the state capital to travel all over in order to hold hearings and enforce regulations in the field;
- Although the states' would be assuring new powers with the extra local land use responsibilities, relatively speaking, local governments could conceivably be somewhat weakened as a result.

4. The Federal Level

The programs of the Federal Government will be analyzed in a later chapter, but this examination of the relative allocation of power among levels of government is not complete without a glance at the National Government.

Since such resources as air, rivers, and mountains overlap state boundaries, does it follow that we should have a Federal land use guidance system? That is not what is emerging. There is a general climate today of new Federalism, giving a more active voice to local and state governments in setting policy and initiating new programs. There are a number of causes, such as disillusionment and promises unkept; but the chief reason is that the Federal Government is too far removed from local problems.

The proposed National Land Use Policy Act encourages interstate and regional cooperation but places primary responsibility back on the states. The proposed role of the Federal government is only to assure and encourage offering coordination and financial assistance. Additionally, the NLUPA, especially with a sanction provision, would control the possible competitive advantage (or disadvantage) accruing to a state with no regulations.

D. CITIZEN PARTICIPATION

> "The system remains the ever elusive target. But the system is neutral and it will ultimately be most effectively utilized not by the most strident but by the most thoughtful and best prepared." (60)

Designing a system without considering the avenues of effective citizen participation is likely to be an exercise in futility.

Citizen participation could be considered a component of land use guidance systems but it is better described as a catalyst in the dynamic interaction between the social framework and the best intentions of state authorities.

The decisions that are included in the components of a land use guidance system represent the allocation of resources based on social values and goals. It is fundamental to our participatory democracy that government be "of the people" and therefore, that decisions be based on their wishes and values.

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(60) Salmon, Thomas, Vermont: "Public support for Land Use Controls, State Government, Summer 1973, p. 200

Who, if not the people, should determine where the public interest lies? Additionally, pragmatic considerations require the participation of present and potential owners of the land to assure their cooperation in implementing an effective land use guidance system.

> "Policy-making and decision-making systems which do not include substantial participation by private citizens and groups run the double risk of loss of expertise public confidence." (61)

1. Definition

The trouble with defining citizen participation is that it is a qualitative and quantitative term. It depends on who is defining it. One man's citizen participation may be another man's stage effect. Probably all would agree that it is a means of actively involving citizens in the decision making process of government. The issue is whether or not the process effectively does what it sets out to do.

Citizen participation is often given lip service and no more. Some bureaucrats consider it at best "sugar coating", or worse, "a pain in the neck". Perhaps the reason for the derision is that the techniques to achieve public involvement have so far eluded most professional planners and government officials. For instance, citizen participation is often considered assured by a notice of a public hearing in the fine print, classified section of the daily newspaper. If citizens don't turn out or make "relevant" comments, they are labeled "uninformed" or "apathetic".

Effective citizen involvement will depend on the sensitive use of many techniques, none of which is sufficient by itself. The methods used need to be carefully tailored to the stage of the process, the cultural, traditionaly, and political climate and the sheer geographic size and population distribution of the state. In short, it will not happen automatically, even if citizens want to participate. It will take an effort, i.e., money and staff, to continually involve the public to motivate them, to show them how, and to make them feel that their participation counts.

Diagram #1 (on reverse page) shows the various techniques of channelling "input" from the General Public to the Decision Making Body.

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(61) Massachusetts report, Citizen Task Forces on Environmental Reorg.

GENERAL PUBLIC

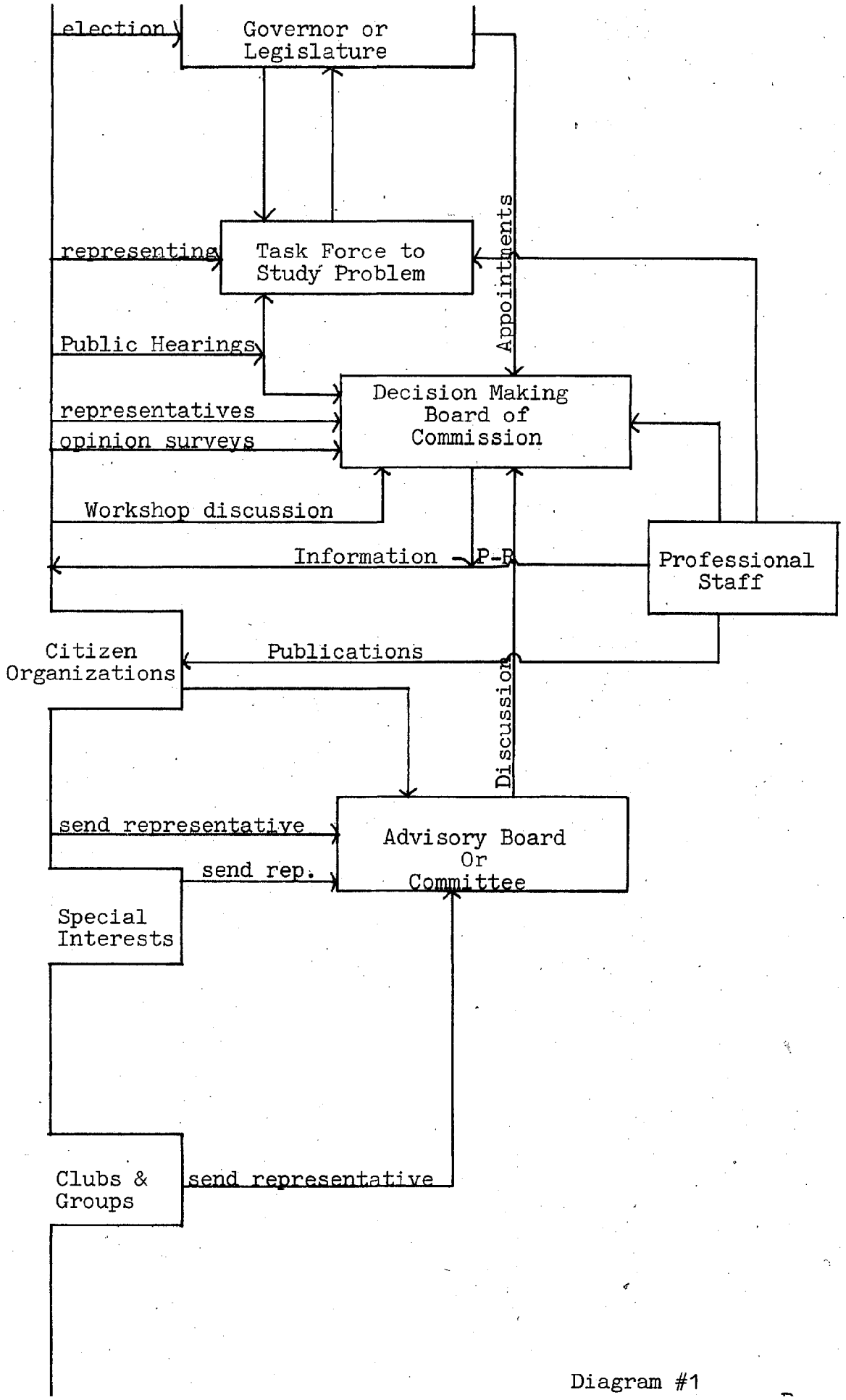

Diagram #1

James Wilkinson, Director of Forestry in Vermont, where a model system of citizen involvement has been worked out, lists three basic stages of public involvement: First, develop a public understanding of a problem and the need for action; second, provide opportunities for taking part in the action; third, earn the support of the people for the adopted plan. (62)

2. Techniques of Citizen Involvement

In many states various techniques are currently being developed and utilized with varying degrees of success. As more experience is gained, and as the pressure of involvement is maintained, newer and more effective methods will surely be developed. The enclosed diagram and the following brief description will illustrate the methods used and their inter-relationships.

a. Task Force to Study the Problem

One basic mechanism is the use of a Task Force to study the problem. Generally this involves appointments by the Governor or legislature of a group of "Prominent" citizens to look into a problem and make recommendations. This is the first stage of developing a public understanding and is a technique often used to attack a new problem and establish a new program. This first committee can also use the other techniques shown on the illustration.

States have established and utilized task forces in varying degrees. Massachusetts has just completed publishing the massive work of a 200 member citizen task force, whose assignment was to "develop the necessary background material required to justify any changes in the state's present structure, as it relates to environmental affairs." In Michigan the Governor appointed a special commission on Land Use, consisting of members "selected by virtue of their outstanding performance in areas related to land development, management, and stewardship", and assigned staff to support, administer, and coordinate activities of the commission.

Florida created an "Environmental Land Management Study Committee (ELMS, as they soon get to be known, anacronyms are a sine qua non) which not only drew up the Florida Land Use Bill but had statutory authorization to stay in existence two years beyond the passage of the bill in order to assure its effectiveness and to make improvements upon it. This committee consisted of 15 members, gubernatorial appointees.

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(62) Wilkinson, James E. Jr., "People Power in Land Use Planning" unpublished remarks, 1973

from various "interests", plus State Legislature appointments. A staff of 10, including consultants, was assigned to the committee.

Some states approach this phase of initiating new land use programs by establishing Executive or Legislative Committees; or, as in New Jersey, most of the committee is composed of 10 government agency heads, and three appointed citizens, one of whom serves as chariman. This does afford a lesser degree of general public participation; but perhaps the advantage of greater efficiency and less involvement can be offset by more public input via well-planned public meetings.

The shortcomings of the Task Force system is amusingly illustrated in an article by two staffers assigned to the State Land Planning Commission in the State of Washington. They cite problems arising from the wide variety of people, (eight legislators from both parties, mostly from one end of the state; and eleven laymen from all walks of life including a farmer, the Dean of the Law School, and a representative of The League of Women Voters),the lack of permanent staff and the limited budget. Other problems included having to get together on weekends, spending months arriving at a common terminology, and forming little internal political factions. All of these obstacles had to be surmounted before they could make recommendations to the next legislative session on all aspects of land use planning. Two staff people were finally assigned to the committee and they did meet their deadline within 6 hours for filing legislation.

All is well that ends well. The monumental bill, 155 pages, couldn't have been thoroughly studied by anyone; nevertheless, the first hearing produced a remarkable list of supporters. The moral of the story, according to authors McConnell and Robertson, is that adequate staff has to be provided to these committees; and all the other techniques of involvment (listed below) have to go along with the appointment of the commission. (63)

b. Boards or Commissions

A system of public guidance of land use will require some body of decision-makers. On the state level this may be a land use commission or a board of natural resources or environmental protection. The appointments to the decision-making body attached to

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(63) McConnel, R. L., & John L. Robertson, "An Evaluation of the Commission Process", State Government, Summer 1973

this agency can be considered citizen participation at the highest level. This is an excellent opportunity to obtain broad representation from people knowledgeable in the various fields involved and from the various geographical regions of the state.

c. Citizen Advisory Groups

In addition to direct appointment to government commissions citizens may be asked to serve on citizen advisory committees. This might be a larger committee of citizens composed of representatives of interested organizations, clubs, groups. This group can be a conduit which carries public opinion from the general public to the decision-making body. They may review and criticize draft documents, serve as a sounding board and as a forum for the exchange of ideas among groups, the staff, and the decision-making body.

The American Law Institute Code recommends state and regional advisory committees, appointed by the Governor, with a membership no larger than eleven.

The commissions can exist on many levels, on an ad hoc or a permanent basis. For instance, Oregon Law requires a State Citizen Involvement Advisory Committee, which must establish and review plans for citizen involvement that were mandatorily submitted by every county as part of their comprehensive plan. (64)

The "Citizen Advisory Committee" is prone for a major pitfall: soliciting public input, creating an illusion of participation, but then not making valid use of it. Additionally, the group may be subverted to being a rubber stamp for the decision making body; or more benevolently, an advisory board may be appointed for appearance sake and then never consulted. If this type of situation were allowed, as Wilkinson of Vermont puts it, "It would be a sham and a fraud with credibility gurgling down the drain". (65) The original purpose is destroyed. The point is that if the intention of involving citizens is genuine, then citizens feel rewarded and that they have participated, but if they feel used, they will either turn cynical, apathetic, or they will vent their frustration in opposition.

d. Public Hearing

On a wider scale of citizen involvement, public hearings are the most universally used procedure. A public hearing is a minimal legal requirement of due process built into

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(64) Oregon, S.B. 100 §35, 1973

(65) Wilkinson, People Power in Land Use Planning

every local zoning ordinance and many state statutes, and may be required at any and all stages of the process.

To illustrate what is usually meant by a public hearing, let us assume that an agency is required by statute to hold a public hearing on establishing or amending boundaries and standards/or districts. A notice of hearing is sent to the owners directly affected by the decision and is published in the classified section of the newspaper, hopefully reaching all interested parties. The means of sending the notice, the number of days ahead of hearing, and the number of times such notice must appear are spelled out by the statute or administrative code of a state. The appropriate commission then holds a public meeting where the staff either hands out the drawn up standards, illustrates them by map, or explains then to the public and the decision making body-ususally all three. The decision making body then sits to hear opinions and facts from "the public". A record of the hearing is usually kept, and a certain number of days are allowed for the submission of written comments by the public. The Commission then deliberates and passes on the proposed boundaries and standards.

This is the outline. What happens at the hearings, how much real input the public has, and the amount of controversy, all depend, of course, not only upon the interests involved but on the preparation of the public for the public meeting. Public hearings are not sufficient by themselves. Going through the bare minimum requirements could be " a sham and a fraud with credibility gurgling down the drain." An increasing problem is the complexity and technicality of these issues considered in all environmental or land use hearings. The layman is easily "snowed under" by technical experts, leaving the field open primarily to the legal and technical experts hired by large special interests. There are a number of supplementary steps that can be taken to overcome this obstacle and generally raise the level of citizen participation.

(1) Prerequisites for an Effective Public Hearing

Requirements for an effective public hearing include a notification system which reaches the maximum number of people in enough time to allow the public to inform themselves on what is expected at the hearing. Second, the public needs to be well-informed, to be able to give relevant, meaningful information and opinions. Making the document to be discussed available ahead of time, having a series of newspaper articles, sponsoring group discussions and speaking engagements, giving media interviews - all these steps prepare citizens for better involvement at public hearings.

As Dr. Madge Ertel states, in a study on citizen participation in Massachusetts, the kind of answers at public hearings depends heavily on the questions:

> "The major conclusion is that the usefulness of public meetings depends heavily on the questions asked of the public,....public response is generally effective when the public has some reasonable concrete proposals to which it can respond and that will aid members of the public in organizing their thoughts." (66)

It is becoming apparent that the kind of participation at a hearing very much depends on the attempts to involve the public. There is nothing more inhibiting to public participation than being faced with a neatly bound, foot-thick document at the public hearing. This looks to the public as a "fait accomplis," convincing the citizens that any suggestions they could make would not be able to unbind the document.

Holding public discussion in stages-beginning with seeking help with problem definitions, alternate approaches to solutions, at the goals and policies stage, following in succession with a review of rough draft policies and at least two hearings on the comprehensive plan, and culminating in the delineation of actual districts or zones-will prepare for better input at the hearings and will help to keep the public informed and motivated.

e. Public Opinion Surveys

Many states are engaged in conducting public opinion surveys, especially at the goal-setting stage of the process.

Great care needs to be taken to make this technique effective. Obviously, the surveyed population should be representative; and most importantly, the questions should be phrased to avoid "loading the deck" and to provide meaningful choices. Colorado's survey asked people to underline their choice of policy, regarding population, industrial and economic growth by indicating whether they want to "encourage", "discourage", or "neither" on each variable.

This technique is useful as a direct means of measuring public sentiment, even if officials or politicians have a hunch this will serve officially to confirm what may already be suspected. Having involved the public this way will be a help in passing and promoting state planning policies.

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(66) "Public Participation in the formulation of a Plan for Management of Solid Waste Disposal...", Massachusetts Institute for Man and His Environment, March 1973.

f. Public Education

More encompassing than other approaches is basic public education. This umbrella of techniques is limited only by the finances and imagination available. Some states have used a series of workshops with representative groups, with surveys filled in at the workshop. Others are working with the media, producing film or slide presentations to show throughout the state (Hawaii, Connecticut, Vermont, Oregon). Others, (Deleware, Vermont) are experimenting with tabloid newspapers published as an insert. Public education is certainly a mysterious art: The effectiveness of each technique never can be assured. For instance, the Massachusetts study finds it necessary to point out that for group discussion a "moderator should be chosen on the basis of ability to direct and stimulate discussions." Questions have to be formulated so that all alternatives can be analyzed. In summary, it is obvious that to further the goal of public education, not only are the best intentions needed, but the best talents should be available to the state.

To indicate how the various techniques discussed above may be combined it is useful to look at Vermont's approach. Vermont has developed a model system in the planning and the permit phases of the system, which includes just about all the techniques mentioned here. As Governor Salmon states it:

> "Vermont relies most heavily not upon professionsl input and administration but upon its tradition of citizen-centered government. I will concede the shortcomings of this concept but I am persuaded that, for us, it reflects the cherished tradition that people should be intimately involved in the governmental process." (67)

It should be added that the Ford Foundation made a major grant ($100,000) to the Vermont Natural Resources Council, a private organization, to work out techniques and strategies to use in encouraging citizen involvement.

In the Planning phase, Vermont:

- conducted a comprehensive public opinion survey to ascertain the degree of control Vermonters consider appropriate. The response was very positive...51% of the sample was in favor of statewide zoning.

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(67) Governor Thomas Salmon, "Public Support for Land Use Controls", State Government, Summer 1973.

- held a series of eight public hearings on goals and policies--2,000 people attended.
- Governor Davis appointed a Task Force for each environmental district composed of prominent citizens to make recommendations.
- In the political campaign, Act 250 was the major issue addressed by candidates for Governor.
- Draft copies of capability and development plan mailed to each Vermont household (in newsprint) in preparation for public hearing.
- Thousands attended public hearings (in the dead of winter, after the election and during Christmas).
- The document was redrafted, incorporating suggestions of public, submitted to Governor and Legislature (with another public hearing).

Additionally, the permit system is organized to maximize citizen involvement.

There are nine district environmental commissions, each having three citizen members from the district which they serve. They issue development and subdivision permits; input is also prescribed from local and regional commissions, via required review procedure.

- The State Environmental Board is 9 citizens appointed by the Governor. No particular experience or expertise is required by law. The membership in 1970 represented a variety of interests including conservation, real estate, recreational development, law enforcement, finance, local government, and education.

E. MAKEUP OF THE DECISION MAKING BODY

Part of designing any governmental program is the decision of who or what agency will be assigned to administer the system. The practice of having crucial decisions in the hands of a single agency head or commission is being abandoned because it is generally recognized that citizen boards affords more representation and involvement of the public in decisions which are so vital. The current trend is to enable the Governor to appoint a Board or Commission as the final decision making body.

1. Criteria for Selecting Membership

There are a number of different types of appointment criteria used in the defining of the composition of the Decision-making Board:

a. Board composed half of state agency heads and half of appointed citizens. Michigan's Water Resources Commission is an example of this. The Board consists of the Directors of Department of Natural Resources, Public Health, State

Highway, and Agriculture, and three citizens, representing industry, municipalities and conservation interests.

b. Board composed entirely of citizens. The statutes contain different criteria for appointing citizens:

(1) require the citizens to have expertise in certain fields. California seeks to have citizens expert in the fields of conservation, ecology, recreation sciences, planning, and education on the Coastal Zone Conservation Commission.
(2) require citizens who represent industry, municipalities, or conservation interests (Michigan and pre 1974 LURC Me. statutes).
(3) require geographical representation, no more than a specified amount from a district, region, or county (Oregon).
(4) require no more than a certain amount from each political party (Colorado).
(5) the last alternative, used in Vermont, is to make no stipulation at all, allowing the Governor to appoint any citizen, regardless of geography, party, expertise, or representation.

2. Analysis

Boards whose memberships are split between citizens and agency heads are an attempt at "killing two birds with one stone." The citizen appointees bring in representation from the outside; the state agency heads assure that the policies of the state and its Governor are implemented. Agency heads should also bring some professional know-how in their field. The literature is rather silent on how this system works. One possible disadvantage could be that agency heads are often spread thin by being required to attend the many meetings of concern to the agency. There is also the possibility that the special interests and point of view of each agency might get more consideration than the input from lay citizens. It is unquestionably desirable to coordinate the agencies of the state: but this could be, perhaps, better accomplished at cabinet-level meetings or by a state coordinating agency in the Governors office. A representative of the cabinet (possibly the head of the department of his alternate), could then be designated as a permanent advisor to the Commission.

The assumption in appointing all Boards is that they will serve in the Public Interest. The question is, how is the public interest best served? The advisability of appointing

citizens "representing" certain interests should be carefully examined. Arguments in favor of such a method are politically pragmatic. If the interests of the various groups are represented, the decisions will benefit from the consideration of these interests, and therefore will be more pallatable and enforceable. There is a thin line, however, between "representing" special interests and having those interests - a conflict of interest. On the other hand, if the Governor has no criteria to select representation from a cross section, it is conceivable that each of his appointments would represent a special interest, maybe the same one!!!

3. Conflict of Interest

Given the elusiveness of the "Public Interest" and the weakness of people, avoiding conflicts of interest may never be assured.

Some statutes deal with conflicts that develop after a person is on a Board. For example, California's Coastal Zone Conservation Act prohibits its members from supporting or being involved in any proceedings that come before commissions in which they or their family, partner, employee or organization have any interest. The next section of the statutes states, however, that the prohibition doesn't apply if he makes full written disclosure of his interests. (68)

A recommendation from the 1973 Rockefeller Brothers Task Force on Land Use addresses itself to the conflict of interest problem, although not to the appointment:

> "To reduce the reality or appearance of conflicts of interests, state and local laws should disqualify local and state officials from voting or otherwise participating in any regulatory decision whose outcome could confer financial benefit, or could appear to the public to confer financial benefit, to themselves, their families or their business of professional associates. All persons having any responsibility for land-use regulation, including elected and appointed officials and employees, should also be required by law to make periodic public disclosure of their financial interests and real estate holdings within the jurisdiction over which they exercise responsibility." (69)

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(68) California Public Resources Code, §27230-27234

(69) The Use of Land: A Citizens' Policy Guide to Urban Growth, (Exerpts from)

There are very few eligibility requirements aimed at avoiding the appointment of people who are likely to have conflicts of interest. This area needs some further research. Oregon's Liquor Control Commission is quoted in full to illustrate that such a statute exists and can perhaps be applied to land use guidance commissions:

> "A person is not eligible to hold office of commissioner or be appointed by the commission or hold any office or position under the commission if he has any connection with any person engaged in or conducting any alcoholic liquor business of any kind, hold stocks or bonds therin, has any pecuniary interests therein or receives any commission or profit from or has any interest in the purchase or sales made by the commission or by persons authorized by virtue of Liquor Control Act to manufacture, purchase or sell any alcohol." (O.R.S. 471.710)

F. LOCATION WITHIN STATE GOVERNMENT

It is apparent, as we have seen, that the state government is assuming more and more function related to land use management. The next problem is, how will functions be divided within the state government? There are a great number of possibilities. One alternative is to assign some or all aspects of the function to present agencies. Another is to create a new agency or commission. A third possibility is the creation of a new agency or commission subsumed under a present agency or department. The survey of the states indicates the use of all three approaches.

1. Assumptions Underlying State Government Reorganization Efforts

The handling of a new function by state government depends on the state, its present organization of government, and its philosophy regarding state government organization.

There are a number of written and unwritten principles and theories which have been the underlying guiding assumptions behind recent reorganization efforts in many states. These will be briefly discussed.

a. Anti-Proliferation of Agencies

The old solution of creating a new agency for every new problem is now considered unworkable. The experience has been that they tend to stay around long after they loose their usefulness. Most states have from 190 to 240 agencies or separate departments before reorganization. Sometimes this type of organization looks rather pretty on a chart. (Nevada's organization chart is noteworthy for its artistic affect and dear to the graphically oriented reader: 18 departments - blue rectangles; 51 independent agencies, boards, or commissions - pentagonal in shape and colored blue if appointed by Governor, blank if not; 55 advisory boards to departments - blue circles; 19 interagency compacts and their commissions, and 8 association receiving state appropriations-trianble shape.) Since this type of proliferation does not accommodate to assumptions of good government, the states feel the need for reorganization.

b. Responsibility and Accountability

Government, and its elected officials, should be responsive and accountable to its people. A state Governor should be in a position to implement the policies (campaign promises) for which he was elected.

To be responsive and accountable, a Governor should have power comensurate with his responsibility. To implement his policies and to keep track of what's going on, he should have a limited number of agency heads to deal with on a regular basis. Proliferation of agencies places exceptional responsibility on the office of the Governor to keep things coordinated, and increases the likelihood of the administration of conflicting policies and actions without the Governor's knowledge. (The "who is in charge here" syndrome.)

There is a concommitant assumption here that if the number of agencies and people the Governor holds accountable is reduced, and if the functions of state government are not decreasing, then each agency head will have more power than previously. The "czar syndrome" and the "empire builder" come to mind.

There are disadvantages to the concentration of the power, of course, which should be considered seriously before any reorganization attempt. One serious consequence of large departments headed by commissioners with a great deal of power is that the citizen looses access to someone with the degree of authority commensurate with his problem. It is more likely that the

citizen would then be shifted down the line in a large bureaucracy. Alternatively, he may feel that in order to even gain an audience with the authority in charge he may have to gather more power to bolster his positions.

Reorganization efforts, however, carry the recognition that we can't have our cake and eat it too. With responsibility goes power and accountability. If the Governor appoints his agency heads and uses them as his cabinet to implement his policies and the laws of the legislature, then the people know who is in charge and, if they wish, can throw them and their policies all out with the next election.

To strengthen the Governor's accountability, Montana makes the interesting recommendation of giving the Governor "3-2" ratio method of appointing "quasi-judicial" boards. This means he has a chance to appoint the majority of each board as he comes in, then in mid-term he appoints the rest to overlap with the next Governor.

c. Coordination

Most would agree that coordination is necessary in order to set priorities and to allocate resources. (To accomplish coordination, commissioners of agencies and departments are assigned to each other's commission, or at least have to come in formal contact via various committee structures.) In Massachusetts, for instance, the Commissioner of Natural Resources finds it a bit tricky to serve on 40 state, interstate, and Federal boards and commissions. It is an assumption, then, that Government must be so organized that those politically responsible to the people can establish priorities among competing claims in government (Maine).

Departments should not work at cross purposes. They should all implement the established or adopted policies of the state. The one clearing house should be in the office of the Governor; however, as discussed above, no Governor can effectively coordinate the infinite activities of innumerable agencies and their heads.

d. Government should serve the people.

Besides providing a line of leadership, a reorganization of the executive branch should help reduce the frustrations of the people in dealing with their government. Clear assignments of responsibilities should help simplify, for instance, application permits. A clearing house for permits could be established (or is it a dream?); the responsibility could then coincide with the

function, so that if the citizen needs a permit for an activity he need apply to only one agency.

In short, Government should be there to serve the people, not to drive them to despair, complaints, and belligerence toward the "bureaucracy" up in Albany, Columbus, Augusta, or wherever.

e. Efficiency

Efficiency is one of many values, not, as sometimes claimed, the only one - in considering executive reorganization. State government should be able to "carry out programs and policies with equity, efficiency, and economy." (70)

All would agree that it is a desirable goal to reduce administrative expense (salaries, office space, and equipment) and to eliminate the unnecessary duplication of services. "The word "unnecessary" is used as an indication of our "you can have your cake and eat it too" assumption, which doesn't mind some duplication if it means checks and balances).

Besides the attractiveness of efficiency, reorganization measures often get their salability from the claims of saving taxpayer's money. This is, of course, probably one of the honest goals, although an elusive one. Savings figures are hard to come by; but Montana claims to have saved $1,707,500/year by reorganizing.

Efficiency is often the motivation of ad hoc businessmen's groups who seek to show the bureaucracy how inefficient they are and how much they could save by reorganizing or by eliminating some programs.

Another by-product of the efficiency of reorganization might be the stifling of initiative. If a person feels that his ideas would have to go through a whole series of reviews through a large department and might possibly be a threat to someone in that large department he may be discouraged from creative thinking that would be of great benefit to the public.

The trouble comes when the implementation of the efficiency goals comes bombing up against a whole series of other values, policies, and goals painfully hammered out through the laborious political processes in the Legislature and on the campaign trails. Government is not a business, out to make a profit--human values, social needs and desires are involved.

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(70) Foster, Charles, Plan for Reorganization, Massachusetts, 1973

f. Flexibility

Another desirable goal of reorganization is to accomplish it for once and for all. The system should be flexible enough so that when new problems crop up, the state does not have to start proliferation again, by creating another agency. Ideally, the categories or functions of the agencies should be broad enough so that new functions will neatly fit into the existing agency's framework. Montana allows the Governor to place agencies where he feels suitable, so that no agency "hangs out."

g. Uniqueness of Land Use Functions

It is the general feeling that state governments lack the capacity to respond effectively to statewide land use problems, which can't be compartmentalized with in the traditional state government organization. There appears to be no one best way available for solution of the problem. Government must have the capacity to map, measure, monitor and model the entire land use system. State government has to be the steward for the public interest, thereby insuring the protection and preservation of the states' productive environmental resource base; and it has to be able to guide development.

In summary, broad functional areas, rather than specific programs, should be recognized as the basic framework for contemporary executive organization-"Implicit in the recommendations if the assumption that form should follow function in State Government." (71)

2. Alternative Approaches

> "The growing concern over pollution and environmental quality has resulted in such a maze of administrative rigamerole that any definition of 'pollution' probably will need to be amended to include 'red tape'" (72)

In choosing the best way to locate land use functions in state governments, the decision-makers will ultimately have to face key issues on function, separation of function and relationship to existing agencies.

a. According to Function

If the criteria for organizing government is according to function, then the question is what function does

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(71) Maine Governor's Task Force, 1969

(72) "Florida Staff Report to Government Operations Committee on Environmental Reorganization." February 1, 1972

land use management fall under? Is it pollution control, protection, conservation, development, or all of the above? If the organization is already such that the agencies come under broad umbrella headings which will comfortably cover all of the above, than the problem is solved. As Richard RuBino says of the Florida Land Use Management Act, it would be desirable to place it in a

> "value-neutral agency, since the Act is designed to achieve balance between the interests of environmental protection as well as the need for orderly growth and development in the state."

He also warns:

> "Great caution must be exercised in the placement of such authority. If the parent agency is too single focused, then the potential of a broad program may never be realized. On the other hand, a too narrowly focused program (e.g. wetlands) might be adequately handled by a single-focus agency (e.g. department of water resources.)" (73)

b. Separation of Components

The next issue to be faced and solved is the separation of components. Some of the arguments were discussed above under levels of government, since the separation could take place along state, regional, and local levels, or along cabinet level agencies or divisions in large umbrella agencies.

The Michigan Land Use Study Commission recommends that at least those functions related to planning and management assigned to the state should be done by one agency.

c. Relationship to Existing Bureaucracy

When giving the state a new function, assuming that the various components of the land use management system were developed piece-meal, is it better to reorganize and institute new programs simultaneously; or is it better to create a "temporary" new agency (either in the Governor's office or independent), see how it evolves, and then attempt to combine it with an ongoing department? The problem here is that agencies are seldon "temporary" in state government. Directors are hired,

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(73) RuBino, Richard, States Role in Land Resource Management, Council of Governments, 1972.

a staff is appointed; and the agency becomes accustomed to being accountable to its own commission or Board, the Governor and the Legislature. This "temporary" agency is now an organization with vested interests in self-perpetuation and expansion. (74)

Another related problem is the question of concentration of power. Should the relative power of agencies be considered when dealing out new functions? There is not only the possibility of inter-agency jealousy; personalities are involved. Is the present agency head capable of taking on another large chunk of responsibilities (did he reach Peter's Principle?) or do you "promote" him sideways and hire a new person? Some of these considerations don't sound very lofty, but they are real and should be anticipated.

d. Alternative Placements Within the State

(1) Lodging in Planning Agency - is especially applicable where the state has essentially planning functions, as in the ALI Code. In articles from State Planning agency heads, all seem to want this function to be in the State Planning Office (vested interest?). For example, Richard Slavin, from Washington State Planning and Community Affairs, feels the land use management systems' planning function should be a part of an overall planning operation in the Office of the Governor. He did acknowledge, however, that this might overburden that office, thus developing a need for a "comprehensive plan for the comprehensive plan."

David Brandon, Director of Program Development, New York Urban Development Corporation: "State Land Use Planning Agency should be a part of a broad comprehensive planning structure tied directly to the Governor." If it were under another agency its authority and role might not be recognized. Irving Hand (Director of Pennsylvania State Planning Board) favors placing the agency within the Planning Board, but urges the building of agency and citizen advisory boards to afford input before the document is finished.

(2) Independent Commission

There are a few Independent Commissions set up to meet the new problem. This approach is often rejected because it continues the unwise practice of proliferation. Sometimes commissions begin independent but are later incorporated under a larger umbrella agency. The Hawaii

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(74) "Principles and Problems of State Planning", Leopold Goldschmidt, ASPO Report, #247, June 1969

State Land Use Commission is in the Department of Planning and Economic Development. Colorado's Land Use Commission is in the office of Governor; Maine's (Wild) Land Use Regulation Commission was originally independent, but has now been transferred intact to the newly created Department of Conservation. Oregon's Land Conservation and Development Commission is essentially independent, although considered under a broad umbrella of "environmental" and natural resources programs.

(3) Land Use Functions Assigned to Existing Agency

There are a number of gradations in this approach. A function or two could be given the Department of Environmental Protection or of Natural Resources; a new agency to coordinate environmental functions could be formed, where land use functions might be diffused but coordinated by an Environmental Quality Commission; or Land Use could be a major bureau, a division of an existing large umbrella agency, with Land Use having its own Commission, director, and staff.

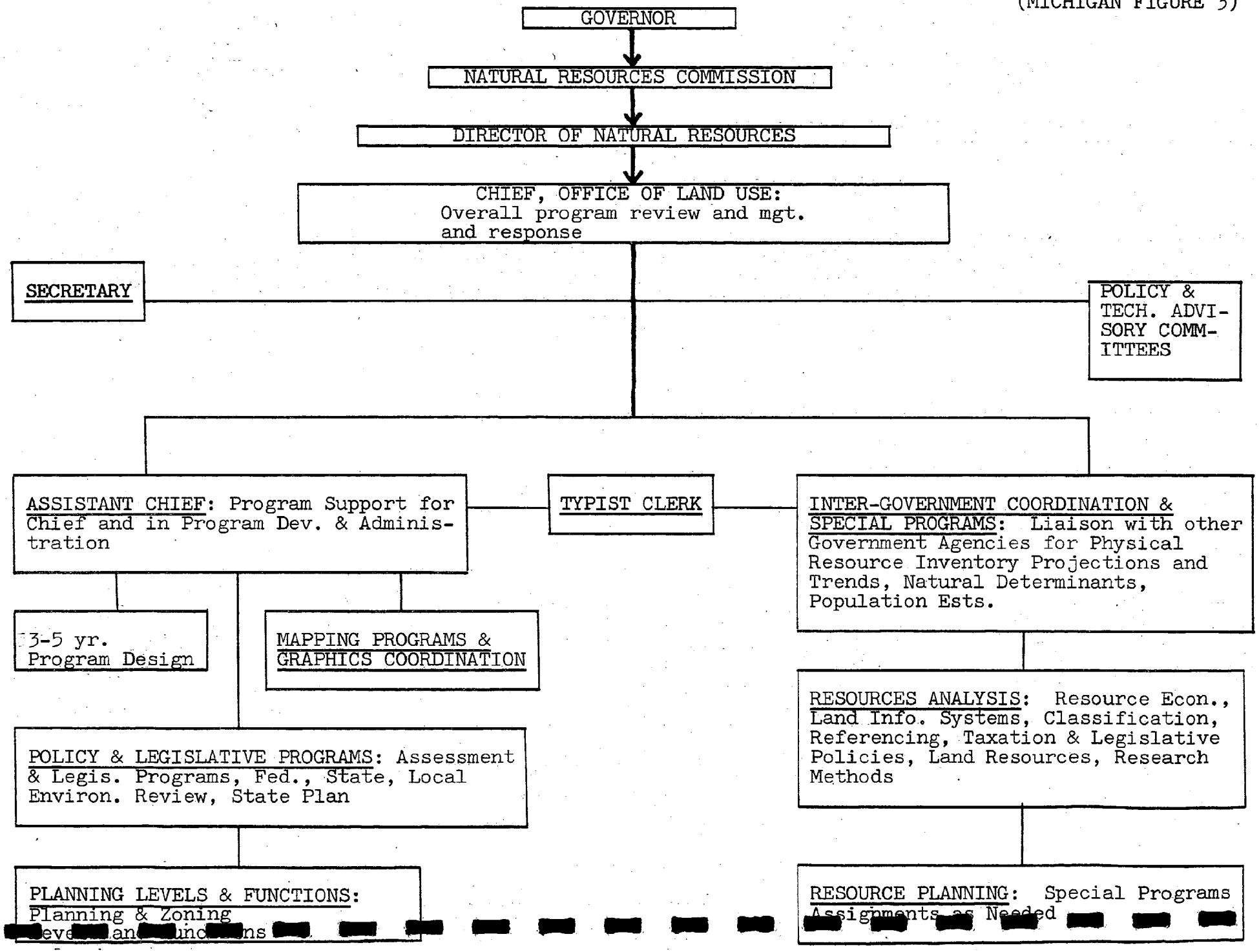
The first approach of placing function in the Environmental Protection Agency is actually used in only a few states. New York State has a Department of Environmental Conservation with divisions of Planning and Research and Environmental Conservation, under which are located, the Environmental Management, and Bureau of Lands and Forests. Vermont has an Agency of Environmental Conservation, of which the Environmental Commission with Land Use functions is a part. The other department which often assigned land use control function is the Department of Natural Resources. The creation of an Environmental Coordinating Council was accomplished in Minnesota and proposed in the New Mexico study. In Minnesota, the land use functions are in different departments, but coordinated at the Governor's Office by the Inter-agency Council of Natural Resources. The New Mexico model is shown on Figure 2.

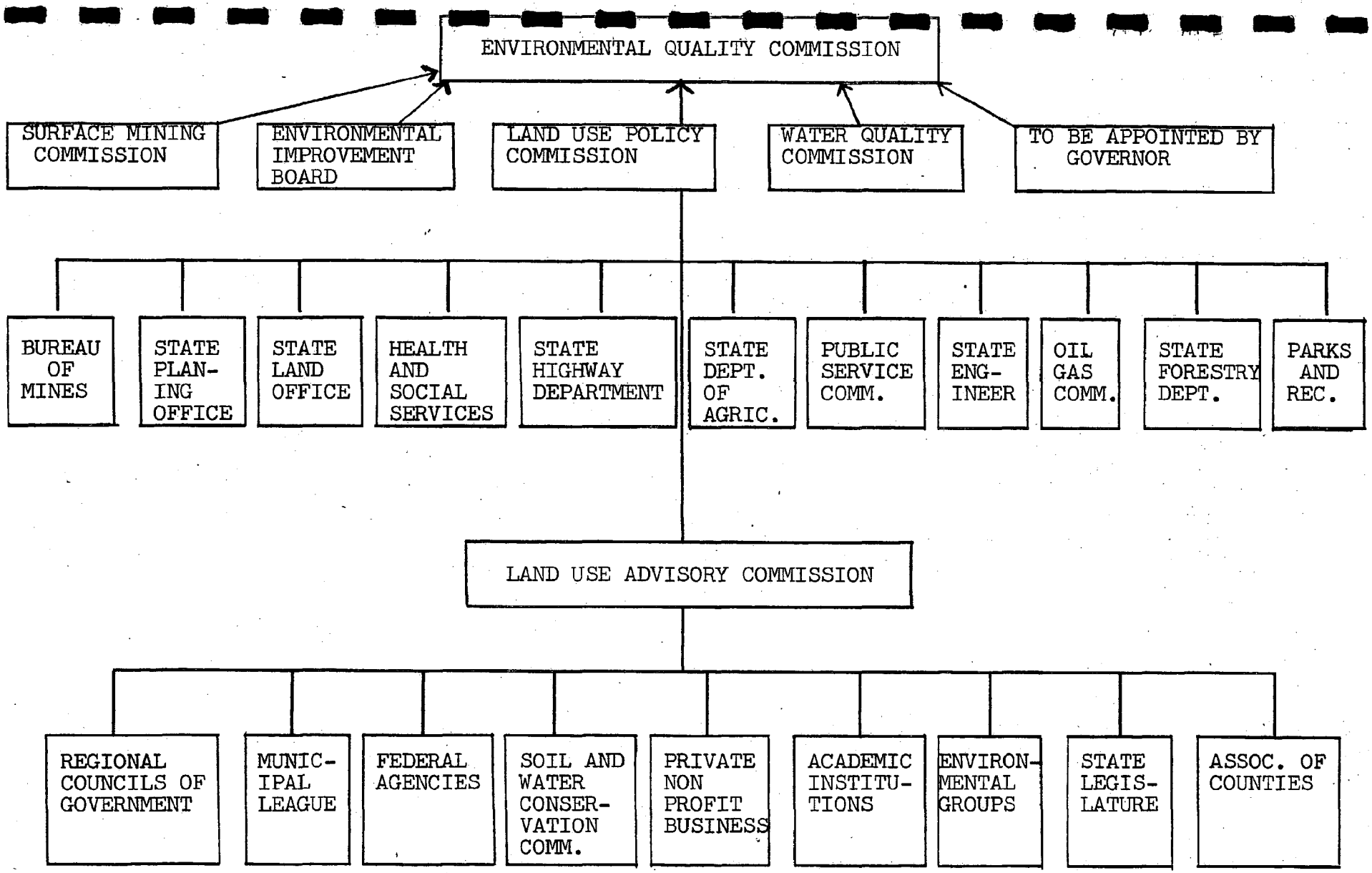
The placement of land use functions in an established Department or a newly created super-agency doesn't preclude the existence of a State Land Use Agency. Michigan's Department of Natural Resources created a permanent office of Land Use within the Department. The line of authority from the Governmor through the Department is shown in Figure 3.

The Massachusetts-proposed reorganization (Figure 4.) takes the broad super-agency approach. It creates a Secretary of Environmental Affairs and divides functions according to activities (services, quality control, water, land). This approach affords a separation of relationship of resources. It does not, however, integrate functions according to resources, which would pull together land use policy planning and management.

Since this area of governmental service is new, and since easy solutions are not at hand, the process of evaluation needs to go on constantly.

(MICHIGAN FIGURE 3)

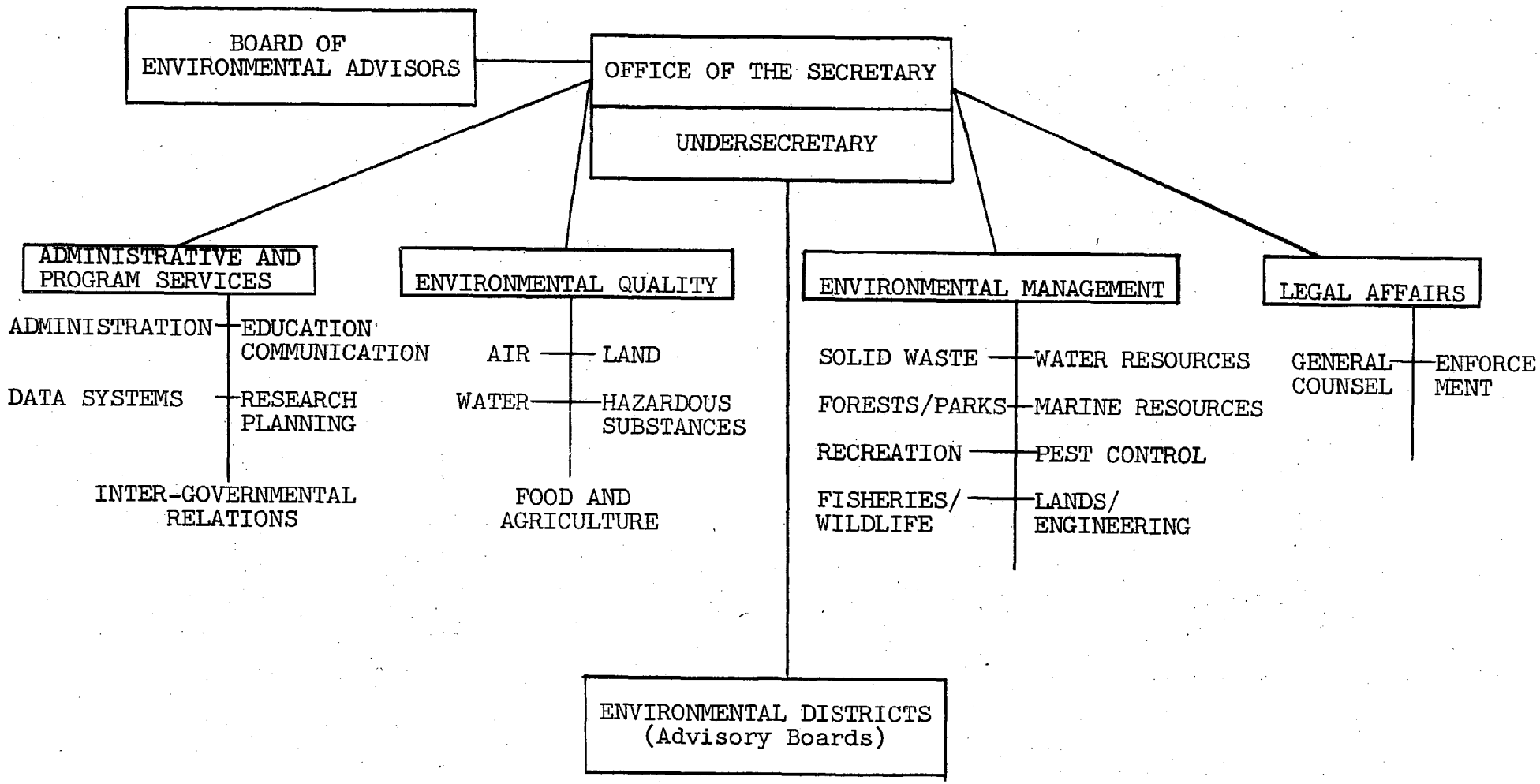




(NEW MEXICO--FIGURE 2)

MASSACHUSETTS DEPARTMENT
OF ENVIRONMENTAL AFFAIRS

(Reorganized)



(FIGURE 4)

VI. RELATED FEDERAL PROGRAMS: EXISTING AND PENDING LEGISLATION

A study of the States' role in land guidance is not complete without an examination of those programs and policies of the Federal Government which relate to various components of state land use guidance systems. The Federal Government itself is a direct user of land, owning millions of acres of national parks, reserves, forest lands and defense bases. This analysis is concerned with the past, present, and projected roles of the Federal Government with relation to the use of public and private lands in those areas of critical concern which extend beyond municipal boundaries and have a larger than local impact.

The most important Federal land use legislation is a National Land Use Policy and Planning Assistance Act, first proposed in 1971 by Senator Jackson. Although this act met a temporary defeat in a House procedural move in June 1974, its introduction and consideration are still significant. This proposal represents the culmination of at least 30 years of piecemeal legislation. More importantly, it would establish a framework for a comprehensive system, designed and administered by the States with Federal assistance.

A. SIGNIFICANT FEDERAL LEGISLATION 1944-1971

1. The following chronological list highlights the most significant Federal legislation, policy statements, and other efforts related to land use guidance. It cannot claim to be comprehensive; no doubt some things are left out. The major source for this list was a report for the Senate Committee on the interior prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress. The descriptions are more detailed toward the end because the policies and concepts expressed in the years just prior to the current Congress tend to lay the foundation for the major legislation that was considered. To aid the reader in relating the measures to the terminology uses in this paper, the principle jurisdiction or component is indicated in the margins.

	Federal Aid Highway Act of 1944 (PL 79-268)*
Regional or Statewide Impact Developments	Congress designated a National System of Interstate Highways within the continental United States not to exceed 40,000 miles.

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* PL is Public Laws found in UNITED STATES STATUTES AT LARGE
79 is the Congress number indicating the 79th Congress
268 is the number of the statute in that Congress

Veterans Mortgage Guarantees (PL 79-268)

Policy

This broad amendment to the Servicemen's Readjustment Act of 1944 raised the limit on the amount of mortgage guarantees as a major means of Federal assistance to housing.

Federal Airport Act of 1946 (PL 79-377)

Regional Impact Development

The Civil Aeronautics Administration was directed to prepare a national plan for development of public airports.

1946 Coordination Act (PL 79-732)

Policy

Planning (Inventory)

This act establishes a Government wide policy that all new Federal water projects should, if possible, prevent loss or damage to fish and wildlife existing at the site. All users of funds have to consult Fish-Wildlife Service to learn of measures necessary to prevent loss. It also authorizes studies about the effects of pollution on wildlife, and surveys of wildlife on lands and waters controlled by U.S.

(Forest) Resource Appraisal -

Planning (Inventory)

Not an act, but a program, 1945-47, done by Forest Service on private and public land. It noted a decline in the volume of saw timber (43% in last 36 years). It showed that only 8% of the cutting practice on private forest land was rated good or better. It concluded that there was ample forest land in the U.S. for timber needs; but to meet these needs, saw timber growing stock should be built up to double the existing volume.

Housing Act of 1949 (PL 81-171)

Policy

Declared a national housing goal of a "decent home and a suitable living environment for every American family".

Amendment to the 1924 Clark-McNary Law (PL 81-392)

Policy

The basic legislation was for enhancing forests on state and private lands. This amendment provided authorization for aid to states in helping farmers restock denuded lands with seedlings.

	Omnibus Housing Act of 1954 (PL 83-560)
Planning (701-Program)	50% matching funds to states to assist planning in communities. States make grants for planning, including surveys, land use studies, to metropolitan, regional or state agencies.
	Watershed Protection and Flood Prevention Act of 1954 (PL 83-566)
Critical Areas	Small watershed programs to be carried out by Soil Conservation Service for a coordinated balanced development of soil and water resources in projects up to 250,000 acres.
	Small Watershed Amendment of 1956 (PL 84-1018)
Policy	Amended for flood prevention, municipal and industrial water supply, fish and wildlife development and recreation.
	Highway Act of 1956 (PL 84-627)
Regional and Large Scale Impact Development	Authorized the biggest road building program in history, earmarking user fees for Highway Trust Fund to frame National Systems Highways.
	Our Vanishing Shoreline (1954-55)
Policy Planning Critical Areas	Park service survey of potential seashore and recreational areas along U. S. Atlantic and Gulf Coasts, it recommended that Federal, State and local governments acquire, as soon as possible, at least half of the 640 miles of seashore available for public recreational use. It also recommended acquisition of hinterland marsh and swamp areas for bird and animal development near shorelines, and plant-animal communities of great ecological interests. Designated 16 areas of "choices still available".
	Agricultural Act of 1956 (PL 84-540)
Policy	Soil bank conservation programs to connect cultivated land to conservation uses, such as planting of trees. Although primarily designated to retire crop lands, it also assured that land would be used for its intended purpose.

Flood Control Act of 1960 (PL 86-645)

Part of an Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors. Its purposes included navigation aid and flood control.

Critical Area

Title I - Rivers and Harbors

Improvements of a long list of rivers authorized by Secretary of Army and the Chief of Engineers, including a number in Maine; also beach erosion control - authorizes studies of shore erosion.

Criteria for Use

Title II - Flood Control Act of 1960

Approval of hydroelectric dams by Army upon recommendation of Chief of Engineers - List projects in specific rivers. Authorizes Secretary of Army (Army Corps of Engineers) to disseminate information on flood hazard areas, and to issue, upon request of state or local officials, general guidelines for use of flood plain areas.

Bureau of (Public) Land Management, Management Criteria (1961)

Policy

This is included because it contains a declaration of policy regarding the relationship of present public land to private use. President Kennedy said on February 23, 1961, that public lands were a "vital national reserve that should be devoted to productive use now and maintained for future generations." This reflects a change from the 19th and early 20th Century policies of unloading public lands. The purpose of the criteria was to tighten administrative procedures in order to block people from buying or obtaining public lands for speculative purposes or for agriculture in seriously water short areas. The Bureau classified lands according to this policy and called for "multiple-use" of public lands.

Housing Act of 1961 (PL 87-70)

Planning Policy

It provided more funds for urban planning and for grants to states and localities (up to 30% of the cost of acquisition of land in and around urban centers) for the creation of "open space" areas with recreational, conservation, scenic and historical purposes.

Conservation Needs Inventory -

Planning (Inventory)

Based on 1958 data, published in 1962, by Department of Agriculture's Soil Conservation Service showed no shortage of land for food production, but a very high proportion with erosion, excess water, and soil deficiency problems which reduced land capability. Inventory also showed that considerable land was being used for the wrong purposes.

Food and Agriculture Act of 1962 (PL 87-703)

Policy Planning

Authorized the Department of Agriculture to aid farmers, farm associations and local government units in developing and implementing land use plans. Such plans were to show application of conservation and water development practices, shifting cropland to forests, recreational uses, and industrial and commercial uses, in an effort to boost rural prosperity.

Federal Aid Highway Amendment Act of 1963 (PL88-157)

Federal incentive for billboard control along Interstate Highway Systems.

An Act to Promote the Coordination and Development of Effective Programs Relating to Outdoor Recreation and for Other Purposes, 1963. (PL88-29)

Policy Planning

Authorized the formulation and maintenance of a comprehensive nationwide recreation plan by the Bureau of Outdoor Recreation, aimed at encouraging the coordinated and rapid development of recreational facilities by all levels of government.

Land and Water Conservation Fund Act (PL 88-578) 1964

Policy

Special Federal fund to help finance accelerated acquisition of outdoor recreation areas by Federal-State agencies.

National Wilderness Preservation System - 1964 (PL 88-577)

Critical Area Acquisition

Authorized acquisition of private lands to within perimeter of area designated as "wilderness area," if owner acquisces and if Congress specifically authorizes funds.

Ozark Scenic Riverways (PL 88-492), 1964

The first riverway to be added to the National Park System. Congress authorized acquisition of 65,000 acres of privately owner land.

Appalachian Regional Development Act - 1965 (PL 89-4)

Authorized over a billion dollars for the development of the economically depressed 12 state region. Funds for highway construction, conservation, timber aid, mining area restoration, water resource survey, sewage treatment, expenses of local development districts, and research.

Public Works and Economic Development Act - 1965 (PL 89-136)

Funds for facilities such as waterworks, water and sewer lines, waste treatment plants and health facilities, streets and roads-all needed for commercial and industrial development. Also, encouraged states to set up multi-state regional commissions to promote economic development in depressed regions.

Housing Act of 1965 (PL 89-117)

Acquisition

Compensation

Established uniform land acquisition procedures, increased grants for open space acquisition and programs of parks in urban areas, and provided grants for urban beautification. Directed administrator to study and report on methods of reducing the loss to homeowners whose property depreciates because of proximity to airports.

Highway Beautification Act of 1965 (PL 89-285)

Policy

Authorizes new programs for the removal of junkyards and for landscaping. It provided no funds, but set a policy of restoration of natural beauty as a national goal.

Water Resources Planning Act - 1965 (PL 89-80)

Planning

Federal Water Resources Council to evaluate regional and river basin plans - each Regional Commission to prepare and keep up to date a comprehensive joint development plan. The Council published in Federal Register 38, 2478, September 10, 1973, standards for planning water and related land resources.

Demonstration Cities and Metropolitan Development Act of 1966 (PL 89-754)

This Act provided for new programs of community renewal in U. S. Cities to assist in the orderly development of Metropolitan areas. It has a plan for incentive grants to encourage comprehensive and area-wide planning. It specified that guidelines for review of Federal aid projects be promulgated. The guidelines are now the so-called A-95 review process.

Regional Planning

§204 - Coordination of Federal Aid in Metropolitan areas--before applying for federal aid to assist in open space land projects, planning or construction of hospitals, airports, libraries, water supply distribution, sewerage, highways, transportation facilities, water and land conservation projects within metropolitan area--the developer must apply for review to an areawide agency--and include information whether or not the project is consistent with areawide planning.

Rural Water Systems 1965 (PL 89-240)

Planning

Grants for comprehensive planning and for development of water supply and waste disposal systems in rural areas specifically designated by Congress.

Federal Aid Highway Act of 1966 (PL 89-574)

Policy

Declared a Policy--that the Secretary of Transportation should make maximum effort to preserve the beauty and historic value of Federal, State and local government parklands and historic sites; and that the Federal government should cooperate with states in developing plans.

Federal Aid Highway Act of 1968 (PL 90-495)

Also designed to preserve parkland and historic sites from encroachment, it imposed 10% penalty against construction funds if state has no beautification program.

National Trails System - 1968 (PL 90-543)

Policy

Established a nationwide system of trails in remote areas for hiking and camping - appropriation for acquisition from Land and Water Conservation Fund. Among the designated trails in the system, were the Appalachian Trail and the Pacific Crest Trail.

Wild and Scenic Rivers System, 1968, (PL 90-542)

Policy

Critical Areas

To preserve outstanding stretches of rivers from imcompatible water resource development, pollution, and commercialization. Classified wild, scenic, and recreational areas. The Secretary of the Interior can acquire related land. State and local grants to assist in planning and administration. The Secretaries of the Interior and Agriculture, and other Federal agencies, review administrative and management systems.

Estuary Preservation Study - 1968 (PL 90-454)

Critical Areas

Initiation of programs to preserve nation's estuaries: Coastal marshlands, bays, sounds, seaward areas, lagoons and land and water of the Great Lakes.

Inter-Governmental Cooperation Act of 1968 (PL 90-577)

Title IV covered federal programs and projects and coordinated inter-governmental policy and the administration of development assistance programs.

Guidelines

The President was to establish rules and regulations governing the formulation, evaluation, and review of Federal programs and projects having a significant impact on area and community development.

Criteria

Regulations to consider the following objectives:

- appropriate land use for housing, commercial, industrial, governmental, and institutional purposes;
- wise development and conservation of natural resources;
- balanced transportation systems;
- adequate outdoor recreation and open space;
- protection of unique natural beauty and historical or scenic interest;
- properly planned community facilities; and
- concern for high standards of design.

Planning

All programs should further the objectives of State, regional, local comprehensive plans.

Housing and Urban Development Act (PL 91-152)

Policy

Critical Areas

Provides insurance for flood damage in those states which adopted land use practices consistent with the wise use of areas subject to flooding.

National Environmental Policy Act of 1969 (NEPA) (PL 91-190)

The purpose is to move the nation in a comprehensive manner toward the accomodation of the goals of economic development and preservation of a quality environment. It declared that it is the responsibility of the Federal Government "to use all practicable means to:

Policy

(1) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
(2) Assure for all Americans safe, healthful, productive and aesthetically and culturally pleasing surroundings;
(3) Attain the widest range of beneficial uses of the environment without degradation risk to health or safety, or other undesirable and unintended consequences;
(4) Preserve important historic, cultural, and natural aspects of our heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
(5) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
(6) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

This is almost like an "Environmental Bill of Rights."

How is all this going to get implemented? So far, the act directs that all policies, regulations and public laws be examined in light of this policy!! The Act requires that all federally-funded proposals include an environmental impact statement. It created a Council on Environmental Quality in the Executive Office. The President has to issue an Environmental Quality Report annually which seeks to relate "on the state and condition of the environment with recommendations for improvement." This is certainly an interesting Act. How it will function is a subject for much evaluation. (See Maine Law Review, Volume 25, Number 2, 1973)

Housing and Urban Development Act of 1970 (PL 91-609)

This Act consolidated and simplified administration of open space programs.

Policy

Urban Growth and New Community Development Act of 1970

Set policy to guide future urban growth, and provided increased Federal Funds to public and private agencies for the creation of new communities.

Airport and Airways Development Act - 1970 (PL 91-258)

Policy

Department of Transportation must take into account environmental values in considering siting of future airports.

Federal-Aid Highway Act of 1970 (PL 91-605)

Regional Impact Development

Planning

Citizen Participation

- Extends Interstate system 2 more years;
- Provides that the Department of Transportation must promulgate guidelines "designed to assure that possible adverse economic, social and environmental effects relating to any proposed project be fully considered in the development of the project";
- Provides for open and responsive public hearings in locality affected;
- Secretary of the Department of Transportation may designate regions and corridors of critical concern;
- Establish planning bodies within state to assist in development of coordinated transportation planning;
- Issue guidelines to control soil erosion in connection with highway construction projects.

Resource Recovery Act, 1970 (PL 91-512)

2 year National disposal site study, listing methods now used and recommending new methods.

Agriculture Act of 1970 (PL 91-524)

Policy

Title 9 set policy to establish rural-urban balance in the provision of government services.

Commission on Population Growth and American Future - 1970 (PL 91-213)

A study recommended by the President on the economic, social and governmental requirements of population growth and its impact on natural resources.

The Clean Air Act of 1970 (PL 91-604)

Performance Standards

Large-Scale Development

Requires the maintenance of a national ambient air quality standard and the prevention of significant deterioration of air quality in regions with air superior to the minimum national standards. This law requires states to establish a statewide reconstruction review procedure to assess the impact of significant new sources of air pollution.

Coastal Zone Management Act of 1972 (PL 92-583)

It is a National policy to:

Policy

- preserve, protect, develop where possible, restore and enhance the resources of the nation's coastal zone;
- encourage the states to institute management programs; and
- encourage cooperation among various state and regional agencies.

Jurisdiction

"Coastal Zone" means coastal waters - includes lands and adjacent shorelands--includes Great Lakes--extends to International boundary between U. S. and Canada. Zone extends "to extent necessary to control shorelands" (Not too definite). Grants up to 66 2/3% for purpose of setting up management programs. This shall include, (as a state responsibility):

States' Role

- identification of boundaries;
- inventory and designation of areas of particular concern;
- a method of implementation;

50% grants for acquiring and operating estuaries
The state may allocate portions of its duties to areawide agencies.

Program Requirements:

Prior to approval Secretary must verify that:

- The program is in conformance with rules and regulations promulgated by Secretary;
- The state has coordinated activities with other agencies on all levels, according to guidelines in §204 of Demonstration Cities and Metropolitan Development Act of 1966, and Title IV of the Inter-Governmental Act of 1968;

Citizen Participation

- public hearing has been advertised 30 days prior, material made available to public for study.

Sanctions

The Secretary conducts the review and can withdraw grants if state does not adhere to the standards.

Administration

The administration is assigned to the National Oceanographic and Atmospheric Administration of the Department of Commerce. There is a Coastal Zone Management Advisory Committee of 15 people--criteria for membership not specified, except that the group as a whole should possess "a broad range of experience and knowledge relating to problems involving management, use, conservation, protection, and development of coastal zone resources."

Federal Water Pollution Control Act Amendments of 1972 (PL 92-500)

Critical Area Regulation

Section 208 requires the states to develop areawide or regional waste-treatment management plans. Includes a requirement to identify run off or non-point source of pollution from activities such as agriculture, silvaculture, mining, or construction activity; and requires that "procedures and methods (including land use requirements) be set forth to control to the extent feasible such sources" (Section 208 b) 2) f, g, h).

Flood Disaster Act of 1973 (PL 93-234)

Critical Area

Regulations

Expands the National Flood Insurance Program. All communities identified by Housing and Urban Development as having special flood hazards must enter the program by July 1, 1975 or lose all federal financial assistance for "acquisition or construction purposes" in the flood-hazard areas. To enter flood-insurance program, states and communities must agree to develop land use control measures which are consistent with floodplain management criteria issued by the Department of Housing and Urban Development. These criteria require communities to develop, as a minimum, floodplain ordinances, zoning and building code regulations that will reduce the likelihood of flood damage in hazard areas.

Congress did not, however, authorize planning grants for community flood-plan management programs.

2. Summary

The operation by the Federal Government of the proverbial "carrot and stick" method of guiding land use is evident. The national government in our federal system can and has responded to apparent problems associated with land use in a rapidly growing industrial inter-connected society by two chief means: First, by setting policy as a corrective and preventive measure; and second, by the use of money to assist lower levels of government in the implementation of Federal policies. There has also been some direct planning, or taking of inventory of natural resources, by the Federal Government. Policies for better services in housing, transportation, and recreation have complemented policies which reflect the increasing emphasis on the value of land and water-related resources. One can see a gradual trend away from the traditional single-solution treatment of a resource to an attempt at full scale action to implement a broad policy. The statutes reflect the increasing awareness of the need to consider broader environmental impact.

The Demonstrations City Act of 1966 and the Inter-Governmental Cooperation Act of 1968 seek to use Federal funds as an incentive to comprehensive planning. The criteria for considering grants for a development include consideration of the broad impact on the environment and the interrelationship of the parts. (Some of this, of course, also stems from the fact that the Federal government did not want to waste money on the ineffeciencies of duplication). This type of environmental consideration culminates in the Clearinghouse procedure for any federal projects, as required by the National Environmental Protection Act (NEPA).

The means of implementation used by the Federal government is the "carrot", the use of money. Money can be used for acquiring lands or for planning assistance grants (701 funds); and now grants are being used to encourage the establishment of whole management programs, as in the Coastal Zone Management Act. The current relative roles of the Federal and State Governments with respect to land use seem to be established by this Act. The national government sets a policy (for example, that coasts shall be considered unique); and the states set up the management. The Federal Government offers substantial financial assistance, and to a limited extent, uses the granting system as a "stick". With the money come certain conditions that offer the Federal Government review powers, as well as sanctions (like grant withdrawal) if the conditions are not met.

The review process also offers a certain amount of minimum standards for the establishment of a program, which can be used by the Federal government as a checklist when considering applications for assistance.

The National legislative pattern indicates a limited response to the problems of a highly industrialized society operating on a finite resource base. The increasingly apparent need today is for a coordinated and comprehensive legal framework which guides the use of land, private and public. Legislation which exists regarding highways, parks, and wild rivers, is piecemeal and there is none adequate yet for strip mining or power plant siting. Missing is a comprehensive and coordinated system, for every governmental level, that guides and interrelates land use activities and their respective impacts.

B. THE NATIONAL LAND USE POLICY AND PLANNING ASSISTANCE ACT

1. Background

The consideration of a National Land Use bill by the 93rd Congress (1973-74) was preceeded by the deliberations of two previous Congresses for a period of at least four years. The first national land use policy proposal

(S 3354) was presented by Senator Henry Jackson of the State of Washington to the 91st Congress. After four days of hearings by the Senate Committee on Interior and Insular affairs, the bill, substantially amended, was reported favorably by the committee. There was no vote on the bill in the Senate that year. The House committee did not even hold hearings.

The 92nd Congress took up the challenge by extensive consideration of several Land Use Bills and Amendments. The chief bill considered was Senator Jackson's S 632, which was the combination of S 3354 of the previous Congress, and S 992, the Nixon Administration's measure. The several proposals were subject to 10 days of hearings; four by the Interior committee and three each by the Banking, Housing and Urban Affairs and Commerce Committees. S 632 was recommedned to the Senate by a vote of 13 to 3 of the Committee on Interior and Insular Affairs. The Senate passed S 632, 60 to 18, on September 19, 1972. In the House, HR 7211, sponsored by Representatives Aspinwall, Baring, Taylor et. al., and similar to the Senate bill, was reported by the House Committee on Interior Affairs, but remained in the Rules Committee through the conclusion of the 92nd Congress.

The 93rd Congress, in session at this writing, has had before it at least 10 bills relating to the National Land Use Bill. The major ones include: S 268 (S 632 of the 92nd); HR 2942 (same bill in the House); S 924, HR 4862 (Administration Bills); S 792, Senator Muskie; HR 91, Representative Bennett; and most recently, HR 10294, sponsored by Representative Morris Udall of Arizona.

Six days of hearings were held in the Senate Committee with the invited participation of Chairmen of seven other related subcommittees. The S 268 that was reported out of committee sought to incorporate the major acceptable features of the other subcommittee bills. S 268 passed the Senate once again with further amendments on June 21, 1973, by a vote of 64 to 21.

Action in the House narrowed down to HR 10294, titled "Land Use Planning Act of 1974." According to the House Committee report, this bill is not simply a copy of S 268. There were differences between S 268 and HR 10294. Rather, it is the result of heavy reliance on the Public Land Law Review Commission (<u>One Third of the Nation's Land</u>); A Report to the President and the Congress, 1970) and the Americal Law Institute Model Code (ALI).

The House bill, HR 10294, was heard in House Subcommittee in September, 1973. It was reported to the House on January 22, 1974, by a vote of 26-11. First, the House Rules Committee almost killed the bill; then on June 14, the full house voted 211-204 not to bring the bill to the floor for debate. This action effectively killed the bill in the 93rd Congress. Supporters claimed that the Administration had withdrawn support from what President Nixon had once called "the most important piece of legislation facing the 93rd Congress." Others blamed lobbyists for industry and real estate interests. Regardless of reasons, the close vote indicates a substantial interest in Federal land use legislation, and practically assures its reintroduction at the next session of Congress.

2. Need

> "For over a century after the birth of our Nation, Americans enjoyed a super abundance of relatively free land.
>
> Today, however, land is our most valuable resource - an all too finite resource. Unlike air and water and many minerals, land cannot be recycled. Mountains carved by strip mines, wetlands dredged and filled, or streams channelized can seldom be returned to their former use or beauty. Land once committed to a use today is often unable to support a different use in the future more closely attuned to the prevailing national values or goals." (75)

In addition to this general acceptance of the value of land, there has been a recognition and abhorence of the inadequacy of chaotic, case by case, crisis - to crisis land use decisions at all levels of government.

President Nixon noted in a letter to Senator Jackson:

> "As a Nation, we have taken our land resources for granted too long. We have allowed ill-planned or unwise development practices to destroy the beauty and productivity of our American earth. Priceless and irreplaceable natural resources have been squandered..... The Country needs this (legislation) urgently." (76)

The need for Land use regulation is recognized not only as a response to the "environmental movement", but also as essential to the economic well-being of this nation. The need is for a balanced approach. Land use planning can be called "environmental Legislation" if, it is defined as:

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(75) Senator Henry Jackson, Senate Floor June 15, 1973, Congressional Record, (on that day). S 11270.
(76) Committee Report, Interior Report No. 43-197

"The aggregate of social and cultural conditions that influence the life of an individual or community." (77)

In short, the House Committee agreed that the legislation considers the use of land for various purposes and is not proposing a non-growth policy. The weighing and balancing of goals of economic development, environmental protection, and imporving social services requires the process of planning from inventory to the projection of consequences and a management system which can use information from the planning process to implement these multiple goals.

Although 90% of land use decisions have purely local impact, (according to American Law Institute), it is necessary to institute a means whereby citizens can participate in the decisions on land use which have impact far beyond the jurisdiction and interests of the local units of government. Someone has to bridge the gap and relate urban to rural land use.

It is further recognized that without financial and technical assistance from the Federal Government, the effort to upgrade land use decision-making will fail. State and local governments, confronted with increasing demands for costly services, lack the resources to take a breath and plan for the future.

The "findings" section of both bills stated that the development activities of the Federal government, which have substantial impact on the use of land, need to be coordinated and consistent with State and local government policies and programs.

An urgent need that has become more evident since the initiation of the land use bills has been for some type of control over massive recreational homesite and installment land sales developments. In response to the scandals of "dream retirement investments" real estate schemes, Congress has passed a major consumer protection law: The Interstate Land Sales Full Disclosure Act of 1968 (PL 90-448)

It has become evident, however, that the protection to consumers is not adequate to insure the consideration of consequences on the environment and public services. Consequently, Senator Nelson, Wisconsin, introduced an amendment to S 268 to cover large-scale subdivision sites.

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(77) Report of the Committee on Interior and Insular Affairs, House of Representatives, House Report No. 93-798.

In summary:

> "The Congress finds that intelligent land use planning can and should be a singularly important process for preserving and enhancing the environment, encouraging beneficial economic development and maintaining conditions capable of improving the quality of life." (78)

3. Major Issues

It is obvious from the extensive legislative history that there have been many issues related to this program, some of which are still not settled.

a. The Relative Roles of Local, State and Federal Government

The Congress provides the framework within which the States and local governments will add the substance of a land use program. The role of the Federal government, all agree, is to coordinate, finance and provide guidance for State programs.

Russell Train expressed the consensus view of Federal government's function at the hearings on the land use measures in 1973:

> "We are a country of great diversity and we should not try to force the land use decisions of the entire Nation, covering land and oceans into one mold created here. I think that what we have here is a very revolutionary proposal to bring about a basic shift in political power as it deals with land use in the U.S., but it is a shift from local to State government." (79)

The Act requires a planning process and an implementation program for controlling use of land in critical areas and in areas impacted by key facilities; the assurance that land use activities of regional or national benefit are not unreasonably restricted; and provisions for citizen participation. Although there is an encouragement

(78) S 268, Title I, Section 101 (h) Findings

(79) Chairman Russell Train of the Council of Environmental Quality Statement to Senate Committee of the Interior.

of a "balanced approach" of local-state partnership, the issues of who is to do what in various phases of the program are left up to the States. None of the proposed Acts grants the Federal government the right to control (zone--district, permit, etc.) the use of private lands.

b. Sanctions

An issue associated with the relative roles of government has been the debate over the degree and relationship of the use of the "carrot and stick". The incentive, all agree, is the granting of money for the planning and creation of a program.

The debate is over the need for stronger conditions, or the advisability of enforcing the provisions of the Act by some kind of economic slap on the wrist. Some of the other bills provided for a reduction of other federal grant monies if states do not comply with this Act--the so-called "cross-over sanctions." S 924, the Administration Bill, provided for a reduction of 21% of State funds for highways, airports and acquisition monies under the Land and Water Conservation Fund. Although S 268 and HR 10294 do not include cross-over sanctions, they did contain the provision of grant termination if theFederal review process shows that the requirements of the Act for planning and program implementation are not fulfilled. Proponents for cross-over sanctions are many, including Fred Bosselman, the author of the "Quiet Revolution" and co-author of the ALI Code. Bosselman argued that sanctions would be needed to help strengthen the States' ability to deal effectively with the myriad of conflicting local interests:

> "With each succeeding year, more trade associations and special interest groups--from the homebuilders to the wilderness advocates--will try to use land use legislation as a vehicle for establishing their favorite policies... There will be a great temptation to avoid the hard decisions that need to be made. Meaningful sanctions in the Federal legislation will help accomplish the head-knocking that will be needed." (80)

The opposition to cross-over sanctions was based on the contention that they would carry the role of the Federal Government to the point of interference with State's rights. Senator Hansen, R, Wyoming, stated that he regarded the use of sanctions in land use planning "as a termination of the right of the States to determine their own destinies."

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(80) Fred Bosselman, Statement to Comm. of Interior, Feb. 1973, in Senate Committee Report

c. Concern over Other Economic and Social Needs;

The need to consider other economic and social needs was already alluded to in the "needs" discussion. No one ever claimed that this was "environmental protection" legislation. But, the extent of promotion, or at least non-blocking effect of this legislation on activities such as mining, energy provision and house building, is increasingly an issue and is considered by some to be too environmentally oriented.

Regarding mineral exploration, the National Association of Manufacturers urged that the policy section of S 268 should include:

> "that it is a national land use policy to encourage the development of adequate domestic sources and adequate domestic mining and manufacturing facilities subject to appropriate legal action...(it) should also recognize that because of the hidden nature of mineral deposits, as much land as possible should remain open to exploration for minerals." (81)

The concern over the apparent current, impending, energy shortage surfaced at the Senate Committee hearings. Carl E. Bagge of the National Coal Association and Howard L. Edwards of American Mining Congress expressed concern that pending legislation would not go far enough to assure adequate fuel and energy resources. John Loftis of Exxon stressed that additional refineries would be needed and urged a more rational policy with regard to the siting of energy facilities.

This concern manifests itself in the criteria for developing National Land Use Policy found in both bills. The bill states that such a policy should:

> "encourage the conservation and wise use of energy and other natural resources and insure the supply of such resources to meet the demonstrable demand based upon such conservation." (82)

The House Committee saw the Land Use Planning Act as a distinct aid in providing a kind of orderly recognition of needs and resources that has been lacking.

> "Siting refineries, shore facilities appurtenant to deepwater ports, and power plants is a part

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(81) National Land Use Policy Legislation, 93rd Congress, Library of Congress, p. 91

(82) §403, HR 10294 and §507, S268

of the comprehenisve land use planning process HR 10294 encourages" (83)

A concern over housing must have been expressed at least at the House Committee hearings,* because a rather interesting addition to the "Findings" section was added to the House Bill HR 10294. The concern is an issue which, however subtly, is a part of all land use legislation, debated:

> "Existing State and local land use planning programs and decisions often have reduced the amount of land available for housing, have limited the construction of housing and have reduced supply and competition in the housing market, and that land use policy should encourage greater supply and competition in the housing market to lower the cost of shelter for people of all income levels." (84)

This concern may be real but is a finding not well documented. The Senate bill, S 268 did not include this "finding."

d. Inclusion of National Policies

Much debated among the witnesses before the Committee and on the Senate floor was the issue of whether substantive Federal land use policies should be provided in the Act.

Although the majority of witnesses opposed adopting such a policy, there was considerable support sometimes from unpredictable quarters, such as Exxon, whose Vice President, John L. Loftis said,

> "Although we are of the opinion that State governments and their delegates should dominate the actual planning and management for the use of land resources, the Federal Government has a nondelegable role to act in matters of truly national concern...In some instances, the activities of State or interstate land use agencies may impunge on or be at variance with the welfare of the Nation as a whole. In such instances, Federal policy must dominate and thereby affect state and local government decisions and private initiative. The

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(83) Report of House Committee on Interior and Insular Affairs, No. 93-798, p.30

* A record of House hearings is not published in Congressional Index; and the House Report does not quote any Real Estate developer spokesman.

(84) Title I, Part A, Sec. 101; 10, 11

Federal role...should be to provide broad guidelines or establish national goals to inform state land use planners of National needs." (85)

The three basic arguments for national policies are that without them:

(1) Certain national interests, such as national security, energy supply, and environmental protection, could be frustrated by conflicting policies adopted by the States;
(2) Inefficiencies could result from the de facto national land use policy which evolves from a mosaic of fifty different sets of State policies; and
(3) Such policies would develop implicitly through inference by those who comply with the Act and through regulations by those required to administer the Act.

Arguments against the inclusion of national land use policies are:

(1) Because of the extraordinary diversity of the land resources of our nation, any national land use policies would serve as "lowest common denominator" policies, which would frustrate rather than encourage better land use planning and management. Policies designed to meet the problems of the predominantly urban and industrialized states (eg. Illinois, New Jersey) would be inappropriate for predominantly rural and undeveloped states (eg. Maine or Wyoming);
(2) National policies specifically addressing land use would be too narrow in focus and, in fact, could frustrate rather than assist the pursuit of national objectives;
(3) Since land use regulation is a means to achieve a whole range of national environmental, social, and economic goals, and since these goals are already embodied in numerous Federal laws, the national interest is already protected by these laws; and
(4) It would be too hard to do. There is virtually no consensus on the possible substance of national land use policies (eg., some advocate preservation of agricultural land, others contend that such preservation is light of the subsidies program). There was a national growth policy report in 1972 showing that a consensus on national growth and land use policies will be difficult to form.

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(85) Hearings before Senate Committee on Interior and Insular Affairs, 1973

Both bills recommended an attempt to formulate a National Land Use Policy.

e. Inclusion of Indian Lands

Another set of jurisdictional barriers to effective land use guidance concerns Indian land. It became evident during the 92nd Congress that there are, within the U.S. over 90 million acres of Indian Reservations and other tribal lands that would not be covered by the Land Use Act as initially envisioned. Sometimes, especially in the West where 50% of the land is Federally owned, these lands are in checkerboard patterns with other lands; and coordination with adjacent federal and private lands is essential. Indian land remains largely unplanned and unregulated because State and local governments lack the authority to develop land use policies and programs for them; and neither the Indian people or the Federal government wish to deny self-determination to the Indians by stepping in.

The Senate bill provided for an assistance program to allow the Indians to plan and manage their land.

The House Committee uncovered a number of "factual and legal" problems which led it to "reluctantly" propose a 2-year study of the problem before assisting in actual planning and zoning problems.

f. Public Lands

At first, it was argued that it may be best to leave out public lands from this Bill, since their regulation is already covered by numerous statutes and administered primarily by the Bureau of Land Management, which is undergoing reorganization and re-examination of all of its authority.

It became evident (as in the case of Indian lands) that without coordination of Federal and State-owned lands with the new land use system over such matters as critical areas, the whole program doesn't make sense. After all, the planning process is based on the recognition of the need to relate the use to neighboring lands.

This is especially true in the 11 Western states, where the proportion of often scattered Federal lands varies from 29% in Montana and Washington to 95% in Alaska.

The Senate bill, S 268, provided for a means of resolving conflicts between uses on Federal and adjacent non-Federal lands by an ad-hoc joint Federal-State committee, appointed by the Secretary or a Governor. The House bill went much further. It spelled out policies for public lands and listed requirements for the planning process for Public Lands.

g. Effects of Property Taxes and Property Owners

The impact of land use regulation, both on property values and property taxes, was an issue debated and acted upon by amending the bill on its path through Congress.

Both the House and the Senate committees responded to the concern over loss of local revenue by requiring that the plan consider:

> "the impacts of the State programs and activities, land use policies...programs...developed pursuant to this Act on the local property tax base and revenues and on the rights of private property owners." (86)

Additionally, a study of the relationship between government tax and land use policies was ordered by the Senate bill.

The concern over the protection of the rights of property owners from the possible effects of land use controls is certainly not new in the U.S. The Committees were reminded that the Constitution prohibits the taking of property without just compensation (in the Fifth Amendment); and that such a prohibition subjects any governmental regulation of private property to review by the courts. Committee members acknowledged that, although the line between regulations and confiscation has not been drawn with the precision of the draftsmen's pen, the extent of protection of property rights should not be affected by this Act.

The Committees also considered a suggestion that the Bill contain new authority to provide for compensation to land owners claiming loss of property value. This was rejected due to a number of apparent difficulties.

First, the police power of the state over land use was first invoked and still used to protect and enhance property values. The value of a piece of property may be diminished by the use of neighboring property. For example, residential lot prices are enhanced by the police power prohibition against the use of these lots and neighboring lots for tanneries, pulp mills, slaughter houses, etc. It was the opinion of the majority of the House Committee, at least, that "land use planning undoubtedly will enhance the value of the land rather than diminish the property values, particularly in the long run." (87)

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(86) S 268, Sec. 202, (14)

(87) House Committee report p. 33

Second, the proposed amendment would have authorized "any person having legal interest on land, of which a State has prohibited or restricted the full use and enjoyment" to petition a court to determine whether the prohibition diminishes the value of the property and "if it is so determined, full and adequate compensation of the amount of loss shall be awarded therefor." This would have required the state to assure adequate funding for payment of such claims as a condition for eligibility for land use planning grants.

The Committee turned down this "compensation" provision. The was that the present constitutional framework already covers the problem; further, the adoption of the amendment would more than likely defeat the purposes of the Land Use Planning Act because no state could guarantee funds sufficient to satisfy such claims and continue to meet other responsibilities.

h. What Constitutes "Critical Areas"

There was considerable disagreement on who should designate critical areas and how specifically they should be defined.

Both the House and Senate bills intend to leave the concrete definition of characteristics to the State. Both Bills list four basic categories of critical areas:

Fragile or Historic Lands:

Where uncontrolled or imcompatible developments would result in irreversible damage to important historic, cultural, scientific, esthetic values or natural systems, such as shorelands, rare ecosystems, geologic formations, and significant wildlife;

Natural Hazard Lands:

Where uncontrolled or incompatible development could unreasonably endanger life and property--floodplains, weather disaster-prone areas, and areas of unstable geologic activity;

Renewable Resource Lands:

Where uncontrolled or imcompatible development would endanger future water, food and fiber requirements, such as aquifer recharge areas, agriculture or forest lands; Other such additional areas, the State determines significant.

An environmental studies professor at Dartmouth, Dr. Gordon J. McDonald, feels the definition leaves too much descretion to the States in determining areas to be designated as critical. He felt there should be a requirement that the Secretary of Interior develop criteria for critical areas, within 3 months of enactment. Industry representatives on the other hand, said that the definition was too broad. The American Mining Congress said that, according to the legislative definition, "it is possible for the entire Nation to be designated as an area of critical environmental concern." The National Association of Manufacturers objected because it saw that the definition could possibly encompass every suitable industrial site.

So far, there have been no changes in the definition. The Committee purposely left them incomplete in accordance with the purpose of the Act to improve the States' ability to devise and implement their own land use policies.

i. Location of Administration

The allocation of functions for administering this Act within the Federal bureaucracy must surely take first prize for boggling the mind.

The Act requires that someone set and promulgate guidelines for the Federal and State agencies in dealing with land use, determine eligibility by reviewing States' plans and programs, and authorize the granting of the appropriated money. In addition to these, the Federal government should, itself, maintain land use information data, sponsor a great many related studies aimed at a National Land Use Policy and resolve conflicts that arise among States and the Federal Government.

The Senate Bill, § 268, sets up what may be called a "lead agency", designated as the "Office of Land Use Policy Administration" within the Department of Interior. The idea was to insure the absence of the mission-oriented bias which any existing office or bureau may already have. "Confirming the "concept that the central mission of the act is neither environmental protection nor economic development.) The House Bill leaves the Bureau designation up to the Secretary of Interior. At any rate, the Department of Interior would be the lead agency.

Interagency Board

Both bills set up an interagency board with representatives from Federal agencies having some land use functions, which reviews guidelines, reviews State Planning and program proposals and sponsors related studies.

Guideline Promulgation

The Senate bill designates the Executive Office of the President to submit proposed guidelines to the Secretary of Interior, the Interagency Board and the various review advisory boards...then the Secretary promulgates the guidelines.

The House bill picks the Council of Environmental Quality to issue guidelines, have them reviewed and then again promulgated by the Secretary. The House bill also adds a Congressional review and comment power of 60 days. If no comment from Congress within that time period, then it is deemed accepted.

j. Level of Funding and Matching Ratio

Another principle issue raised at hearings concerned the amount of Federal funds required and the distribution of these funds over time. The 92nd Congress originally proposed $100 million each year for 8 years in S 632. That was decreased, by Administration amendments, to $170 million over five years ($36 million each year).

Senator Jackson and others fought back. They called the Administration's recommendations "woefully inadequate" pointing out that such a low sum of money divided among 50 states during the first few years is not much incentive for them to establish strong land use programs. The Governors of the states also fought for decent funding. Governor Wendall Ford of Kentucky reminded the committee that "good land use planning does not come cheaply."

The total proposed authorization in each bill in the 93rd Congress is $100 million a year for 8 years, with a differing percentage of funding.

4. Summary

This analysis of the National Land Use Policy Act was prepared while the legislation was pending. If a similar bill is passed in a future session of Congress, it will be a major and innovative break-through. The formulation of this legislation represents this nation's continual struggle to achieve the objectives of high quality of life, in a milieu of rapid change and complexly interwoven economic and environmental problems, without infringing upon the constitutional and traditional rights and responsibilities of the state and local governments and their citizens.

It is reasonably certain that a National Land Use Planning Bill emerging from Congress will <u>not</u> do any of the following:

- It will not mandate, require, or allow Federal Planning or zoning. The federal government does not and will not have authority to zone state or privately owned lands;
- will not permit a substantial increase in Federal authority over state and local decisions concerning the use of State and local lands;
- will not specify for the states how much or what specific pieces of land must be regulated;
- will not require the state to directly administer all aspects of land use guidance;
- will not restrict the state to specific techniques of land use guidance;
- will not alter any land onwer's right to seek judicial redress for what the regards as "taking" of property;
- will not include in its allocated funds money for direct acquisition of land (such funds are included in the Water and Land Conservation Fund passed by Congress under other Legislation).

It can be anticipated that the bill that emerges from the political process of Congress <u>will</u> do the following:

- Enable and encourage the states to exercise their states' rights of land use control over 5 categories of critical areas and uses with clearly more than local impact;
- It will encourage a balanced and rational planning process and program which protects the environment while assuring that adequate social services and opportunities, such as housing, recreation, and reliable energy systems, are provided in the framework of a healthy economy;
- It will offer the states flexibility in designing its program in harmony with its tradition. While encouraging delegation of some authority to the local level, the choices of assignment of authority in administering a program are left to the state's discretion;
- It does enable states to issue guidelines for local authorities to assure, for example, that one community does not set a massive industrial park directly adjacent to another community's or state's recreational park or wildlife refuge;
- It will also offer the state considerable flexibility in defining critical areas or what constitutes large scale development or regional benefit developments;
- It will provide Federal review to qualify for assistance and assure that the planning process fulfills the requirements of the Act, that it is comprehensive enough and that the means exist to effectively implement the plan;
- It will at least establish the desirability that Indian lands being regulated by Indians coordinate with the State program;

- And finally, it will seek to remedy the patchwork, overlapping, and often confusing patterns of land use regulation which have evolved through the years at the Federal, State and Regional level, as a result of piecemeal land-regulating legislation and other environmental protection measures.

Even though there are many states attempting to design comprehensive land use guidance systems, a National Land Use Planning and Policy Act is essential. The Federal Government has to provide the necessary funds, quality guidelines, and the coordination between Federal and State policies. The isolated approaches of the states will not guarantee that the use of lands are in the best interest of the nation as a whole.

C. OTHER BILLS ALIVE IN THE 93RD CONGRESS

There are two bills reported out of by House and Senate Committees with a strong likelihood of passage:

S H25, HR 11500 Surface Mining Reclamation Act

The Senate version, sponsored by Senator Jackson is similar (but not identical) to the House bill sponsored by Mr. Udall et. al. Both require the states to set up a program to prevent adverse affects to society and the environment from surface coal mining. The state's program must include regulations, enforcing sanctions, a permit system, and performance bond requirements.

The measure was weakened in committee and is likely to undergo more changes. It is criticized by environmentalists as too weak and by the coal industry as too strong.

S 3066 Housing and Community Development Act of 1974

Sponsored by Senator Sparkman, among other community development activities, this measure includes major changes in the 701 comprehensive planning program.

This bill provides grants which would be funnelled to planning departments and to general purpose units of government. To qualify for grants, the plans must include a five year capital plan and a housing plan. The matching formula for granting would be increased from 66 2/3% to 80%.

This measure passed the Senate on March of 1974 by a vote of 76 - 11.

VII. EMERGING STATE LAND USE GUIDANCE SYSTEMS

In recent years there has been a great deal of activity among the states in response to the need for more control over land use in jurisdictions larger than the local level.

Instead of a comprehensive survey of what every state in the union is doing (88)the emerging patterns will be illustrated according to the analytical variables used in this paper. Actual state guidance systems will be examined with the focus on jurisdiction and on allocation of function, both vertically, along levels of government, and horizontally, on the state government level.

The enclosed large chart in the back of this report illustrate the jurisdiction and assignment of function of the various components of the system. (The chart is printed on both sides, the headings on the top page can be used for the reverse side by folding the bottom up)

There are many bits and pieces of legislation (in every state) which relate to land use guidance. Many states also have the beginnings of a comprehensive planning program but no apparent effective method of implementation. This section attempts to analyze those representative systems which have most, or all, of the components of the land use guidance system as defined earlier.

A. EXTENT OF JURISDICTION: CHOICES

Many states have recognized the imperative to exert some guidance over development in certain critical geographic areas and over the type of developments which have a larger than local impact.

It should be remembered that some of this Legislation is not easily categorized into the recently developed terminology as found in the ALI Code and the National Land Use Policy Planning Act. Some do fit "critical area" or some variation of the "developments of state-wide significance" but most, especially the comprehensive statewide systems, overlap the categories.

1. Critical Areas

The recognition of and concern for the critical nature of shoreland areas has led to the emergence in many states of some type of shoreline or wetland control program. Lands

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(88) Most up to date information can be secured from Land Use Planning Reports 2814 Penna Avenue, H. W., Washington, D. C. 2007

related to water have been the first areas to come under "critical area" designation.

The attached chart illustrates the coastal management program in California, the Shoreland Act of Wisconsin, Shoreline Zoning in Maine, and the Coastal Zone Act of Delaware. The definitions of jurisdictions, or what constitutes a shoreline vary from California's "highest elevation of nearest coastal mountain or 1000 yards" to Wisconsin's 1000 feet of navigable lakes or ponds and 300 feet of a river. The Delaware Statute doesn't leave any doubts; it verbally spells out the geographical boundaries that shall be in the jurisdiction of the new law. Maine designates 250 feet from normal highwater marks of all bodies of water as areas for mandatory zoning.

In all cases the state sets guidelines and standards to be followed. Allocations of functions vary but the state retains enough power to assure the adoption of ordinances at least with the minimal standards. Delaware's Statute expressly forbids any further heavy industry on the coastline. "Heavy industry" is defined as involving more than 20 acres; or using such items as smokestacks, distillation or reaction columns or waste-treatment lagoons; and which has the potential to pollute when equipment malfunctions or human error occurs. Specifically excluded from the coastal area are oil refineries, pulp and paper mills, chemical plants, offshore gas, liquid, and solid bulk-product transfer facilities. Although this Act regulates a "critical area" (the shoreline), it is also concerned with "large-scale development".

Coastal or shoreline management systems are enacted in California, Connecticut, Delaware, Georgia, Maine, Michigan, Minnesota, Rhode Island, Texas, and Washington. (89)

The related wetlands control program is illustrated by the Mayland Wetlands and Reparian Rights Act. The Act covers all private or public wetlands subject to tidal action, to a state guidance system, where the state inventories wetlands and issues guidelines and permits for use. Some type of control is in effect in at least Connecticut, Delaware, Florida, Georgia, Louisiana, Maine, Maryland, Massachussetts, Michigan, New York, North Carolina, Rhode Island, Virginia, Washington (in Coastal Zones), and Wisconsin. Many states set guidelines but expect the local level to do the administration.

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(89) Land Use Planning Reports, September 1973
For a thorough review and comparison of coastline and shoreland programs see: "A Description and Analysis of Coastal Zone and Shoreland Management Programs in U. S.", Earl H. Bradley, Jr., Sec. Grant Program, University of Michigan, March 1972.

2. Large Scale Developments of Statewide Significance

Maine's Site Location Law (38 M.R.S.A. § 471-8) is a statute that regulates developments of statewide significance. It is not, however, a total land use guidance system, because it is not based on a comprehensive plan. Any commercial or industrial development, (except state or state aid highways), which may require a water pollution license or which occupies an area larger than 20 acres, or a structure which contemplates a ground area of more than 60,000 square feet on a single parcel, requires a permit from the Board of Environmental Protection. The decisions are based on four basic criteria spelled out in the statute.

There are a number of states which regulate activities such as Power Plant Siting and Strip Mining, both certainly activities of large scale with statewide significance. Minnesota's Power Plan Siting Act gives authority to the Environmental Quality Council to develop plans and issue guidelines for siting, and to give permits to locate any generating or transmitting facility for electricity, which has a capacity of 50,000 w or more. This too is a single tier system - an activity of statewide significance, with total state control. Other states with some (though not necessarily the same) Power Plant site regulations are Connecticut, Florida, Maryland, New Hampshire, Oregon, and Rhode Island (coastal only). Maryland has several mining acts which appear to exert strong control over the restoration of land after strip mining; it is not, however, in the strict sense a total land use system. Permits are required to start a mining operation; but planning of advisable sites for this activity, based on an overall planning effort, doesn't seem evident. There are at least 26 states with strip mining legislation on the statutes.

3. Special Purpose Regions

Another type of land use guidance system emerging has been the "Regional" jurisdiction, neither strictly state nor local. Regional lines can cross state boundaries or include subregions within the state, crossing traditional municipal lines. The Adirondack Park Agency is one of the most complete, (longest) Land Use Guidance Systems on the books.

The jurisdiction is all of the private and public lands in a region previously defined by statute as "Adirondack Park." The statute is noteworthy for the number of categories of land use districts and classification of developments. There are two classes of developments or projects and six types of districts. Each class of development, A or B, is defined differently for the six districts. Besides the six districts,

listed on chart, there are special restrictions for shorelines in the area.

The agency has to prepare plans, subject to review by the Board of Review, composed of county appointees. The agency, using the lengthy criteria in the statute, designates the districts, approves local development plans, and approves Class B developments on all districts. There are interim provisions in effect until all the plans and designations are complete.

Other regional agencies with land use management functions being closely watched for effectiveness include:

- the Tahoe Regional Planning Commission, with jurisdiction over 500 square miles in California and Nevada. It sets standards, but does not enforce them. Finances come from constitutent counties, federal grants, and the state legislatures.
- San Francisco Bay Conservation and Development Commission has representatives in 9 constituent counties, 4 constituent cities, 4 state agencies and 7 residents, appointed by Governor. It has enforcement powers with double veto permit. Double veto permit means both local government and regional commission must approve proposals. The Commission can make further restrictions and specify conditions. It can also acquire land for public use.
- Hackensack Meadow Land Development Commission (New Jersey) is one of the most recent agencies vested with all the functions of land management systems. It is free of local domination. 6 members, appointed by the Governor, and the Commissioner of the State Department of Community Affairs serve on it. Local agencies do not have permit function, only review powers. Local codes (over regional jurisdiction) must be in accord with the plan and minimum standards established by the regional agency. This regional Commission is financed by a combination of federal and state funds.

4. Statewide

Although many states have bits and pieces of old and new legislation for guiding the use of land in larger than local areas, not many have a comprehensive system which assures that all significant types of development and utilization of land anywhere in the state is guided by a state agency, or its delegated surrogate, to comply with a set of state policies and coordinated comprehensive plans. Hawaii, Vermont, Florida, and Oregon have such statewide systems in various stages of evolution and strength. Hawaii's has been around since 1961. Vermont passed its landmark Act 250 in 1970. Hawaii's jurisdiction is statewide - all lands in the state are districted into 4 categories: urban, rural, agricultural, and conservational. The Land Use Commission set standards for determining the boundaries of each district with some criteria (indicating state policy) spelled out in

the statute. For example:

> "...in establishment of the boundaries of agricultural districts, the greatest possible protection shall be given to those lands with a high capacity for intense cultivation" (90)

Vermont's jurisdiction extends to all commercial or industrial developments larger than 10 acres or housing development of more than 10 units. Where there are no local ordinances a development of greater than 1 acre comes under the state's jurisdiction. Additionally, the Act provides for interim and permanent land use capability and development plans, to be prepared by the Environmental Board and approved by the Legislature.

The adopted plans of regional and municipal agencies must be considered in drawing up the state plan, but there doesn't seem to be any means of assuring conformity of local plans with the State plan.

Florida's Land and Water Management Act of 1972 follows fairly closely the American Law Institute Model Code. The State can designate areas of "critical state concern" and developments of "Regional Impact." The state sets guidelines for developments of Regional Impact and has a review and approval system to assure that Local Land Use Plans are prepared.

Oregon's Senate Bill 100, passed in 1973, provides for ultimate jurisdiction over activities of statewide significance and areas of critical state concern. Considerable coordinating capability is given to the Land Use Agency by preparing state-wide planning goals and guidelines and then reviewing local efforts to assure conformity and compliance. Furthermore, local and county governments must prepare comprehensive plans and ordinances. If they don't have one that meets the state's approval, plans and ordinances, one will be prescribed by the state. The act also pulls under its review umbrella the Oregon Coastal Conservation Commission, which was the Coastal Management Agency before the statewide system was instituted. It should be noted that Oregon's "developments of statewide significance" is very weak covering only public developments, such as transportation, sewage and solid waste disposal systems, and public schools, but not private developments.

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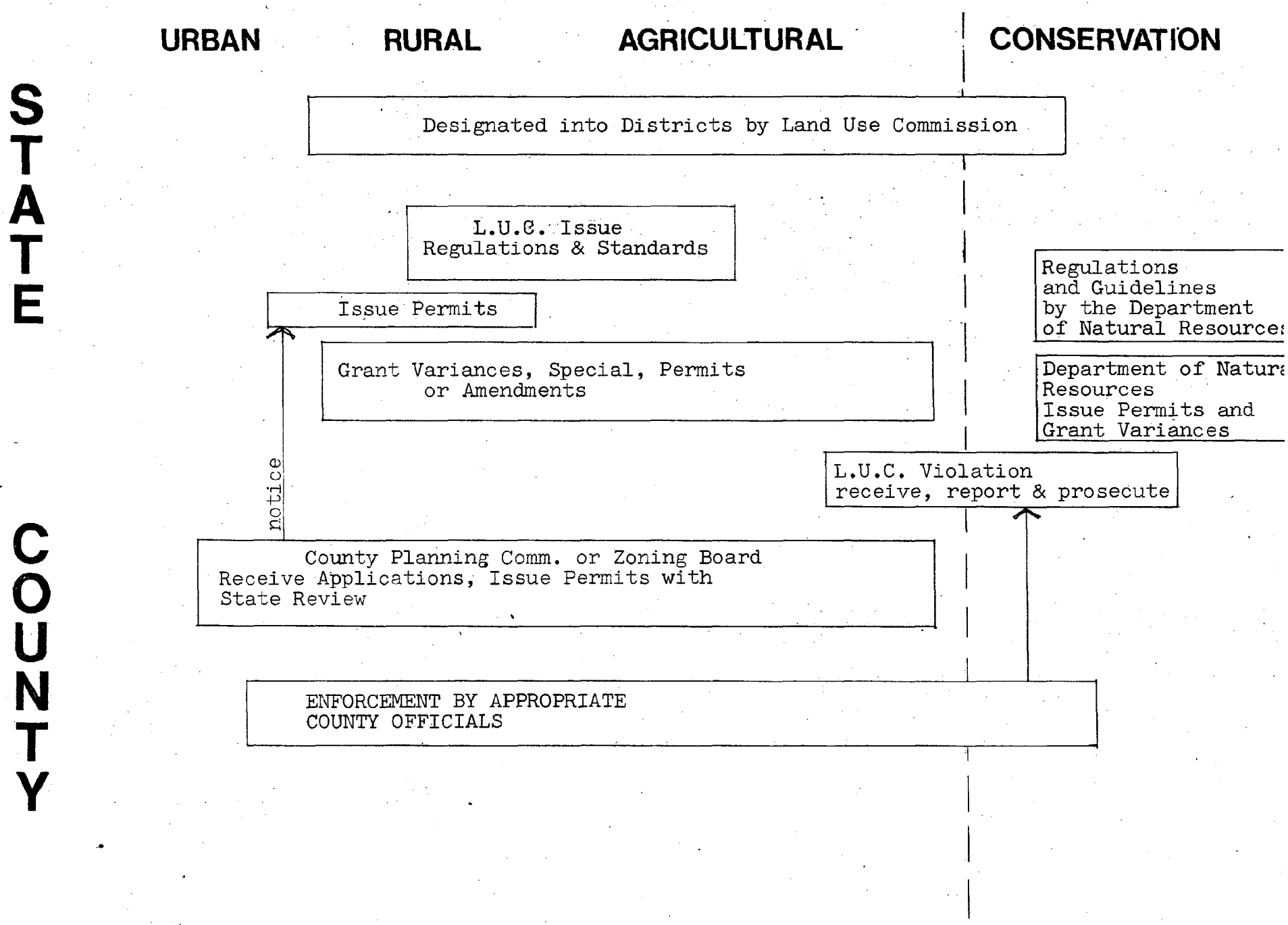
(90) Hawaii Revised Statutes, Sec. 205-2

HAWAII ACT 187



Additional significant developments (conceivably private) including developments and areas of critical importance can be recommended by the Commission to a legislative committee. These additionally designated jurisdictions have to be approved by the Legislature.

Oregon's law, then, has the capability of being very comprehensive, due to its strong control over local and county comprehensive plans, and the potential ability of extending its state-wide jurisdiction to more, large scale developments and critical areas.

Many states are involved with studying their land use systems; Other states which are in the process of implementing legislation includes Washington and Colorado.

B. ALLOCATION OF RESPONSIBILITIES

The emerging solutions to the problem of who is to administer the various components of the system will be examined according to the "levels problem," the allocation or functions among local, regional and state governments and the distribution of the state responsibilities horizontally among the state government agencies.

1. Distribution Among Levels of Government

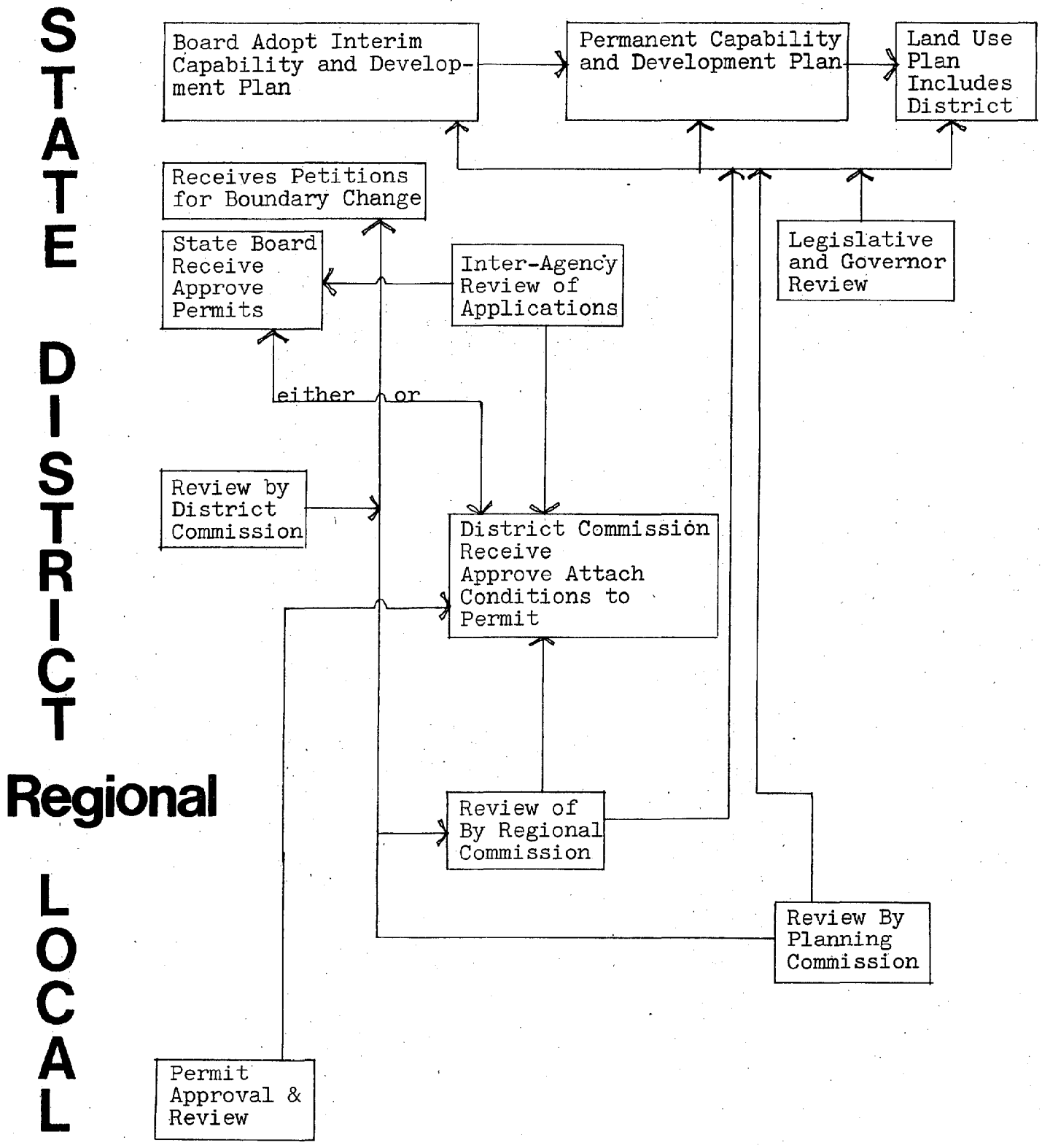
An attempt has been made to compare by diagram the allocation of functions in the four types of statewide systems in the proposed ALI model code, Hawaii, Oregon, and Vermont. This task was complicated by the variation among the states in jurisdictions. Instead of one diagram, the four diagrams found in the following pages show the jurisdictions over which the state extends control, (horizontal heading), levels of government (vertical), and the components of the system. The various arrows are to indicate inter-relationships between the levels. All of the systems are "three-tiered," (state, regional and local) the variation is the amount of powers allocated to each.

a. Hawaii

Hawaii's system was not only the first, but it is perhaps the simplest to understand. (It should be remembered that Hawaii's historical tradition and social framework and land ownership patterns are atypical.

The State Land Use Commission (L.U.C.) designated all of the land in Hawaii into one of four districts: Urban, Rural, Agricultural and Conservation. After the initial designation, the issuing of guidelines, standards, and permit functions for the conservation district only is assigned to the States' Department of Natural Resources.

VERMONT


STATE
DISTRICT
Regional
LOCAL
Board Adopt Interim Capability and Development Plan
Permanent Capability and Development Plan
Land Use Plan Includes District
Receives Petitions for Boundary Change
State Board Receive Approve Permits
Inter-Agency Review of Applications
Legislative and Governor Review
either
or
Review by District Commission
District Commission Receive Approve Attach Conditions to Permit
Review of By Regional Commission
Review By Planning Commission
Permit Approval & Review

The State Land Use Commission issues regulations and permits for the other three districts. The county planning commission or zoning boards or agencies also issue permits with state review. Enforcement and inspection is delegated to the county officials.

b. Vermont

Vermont's system is fairly easy to chart because currently the jurisdiction is based on development activity only. The Environmental Board adopts the Interim and Permanent Development Plan, (upon approval by the Governor and Legislature) and sets up land use districts. Permits for development are granted by the nine District Environmental Commissions set up by the state. Regional Commissions and other agencies of the State are notified of applications and have review and comment functions. Petitions for changes in district boundaries are channeled to the State Environmental Board which may grant them after review for compatibility with the Capability and Development Plan.

c. Oregon

Among all the models discussed, the new Oregon Land Use Bill (so called SB100), gives the most power to the State. First and most importantly the law has provisions which assure that the State oversees and coordinates all land use by requiring that land use activities of local jurisdictions be according to local plans, approved by the state.

The State establishes goals and policies; helps with inventory of data, approves action of the Coastal Commission and assures that comprehensive plans exist in each county. The State Level Land Conservation and Development Commission recommends designation of critical areas to the Legislature and once so designated assures the standard setting and permit functions for these areas. Developments of statewide significance are also defined by the State and once these definitions are accepted by the Legislature, all applications for permits are acted upon by the State Commission. The enforcement and field inspection function are expected to be performed by the counties. Prosecution of violators may be referred by acknowledgement to the State.

Not shown on the chart is a strong citizen participation requirement that each county must submit a program for citizen involvement in preparing, adopting, and revising the comprehensive plans. Among other requirements is that each county will have a citizen advisory council.

OREGON

STATE

COUNTY

LOCAL

ALL LANDS

LCDC: Establish Goals
Prepare Inventories
Prepare Statewide Planning Guidance
Model Ordinances

Approve Actions of OCCC

Review Comp. Plans

May prescribe a Comp. Plan if non exists

LCDC Hear Appeals

Action on violators of Comp. Plan

Prepare, Adopt Comp. Plan

Coordinate all Land Use

Prepare, Adopt Comp. Plan.

AREAS OF CRITICAL STATE CONCERN

LCDC Recommend Designation to Legislature

Legislative Committee Review and Recommend

*System not yet Established

ACTIVITIES OF STATE-WIDE SIGNIFICANCE

LCDC Designate such Activities

Legislative Committee Review and Recommend

Issue Planning Siting Permit

Action on Violators

Review Applications

either or

Action on Violators

LCDC: Land Conservation and Development Comm.
OCCC: Oregon Coastal Conservation Comm.

d. American Law Institute Model Code

The American Law Institute, Model Land Development Code (ALI Code, Articles 7-9)(91)is the most complicated, due to the varied jurisdictions considered and the heavy emphasis on home-rule provisions.

First of all there are four jurisdictional categories: All lands, critical areas, developments of regional importance and large scale developments. The State Land Development Agency (not specified by name)is to prepare Land Development Plan for the State; designate and define boundaries of critical areas; define and issue guidelines for developments of regional significance and adopt regulations according to criteria (usually in statute) for large-scale developments.

Of all the systems this model code gives the local municipality the most power. After the State makes sure that every local municipality does have a land development agency, and where the municipality does not have one, the State has authority to create one, the local agency then must prepare local land development plan; adopt rules and ordinances for areas designated by the state as "critical" and receive development applications and issue permits for all developments. The State reserves the checking functions such as review of the ordinances written for critical areas and review and comment on application for developments of more than local significance. Additionally the State has the power to adopt regulations for critical areas should the local agency fail to do so. The important feature is that the administration of all land use categories, from receiving application to granting permits to enforcement, are left to the local land development agengy. Appeals from the decisions then go back to the State to be heard by the State Adjudicatory Commission. The Code recommends that this Commission consist of five Governor appointees with no specific qualification except that no appointee may be a member of a local land development agency (from which it hears appeals!)

e. Analysis

If lines of notification, review, and complexity of inter-relationship were the criteria for excellence, the ALI Code clearly wins. One might also view the lines and arrows as an alarming indication of the whole system being wrapped up in a twine of red tape.

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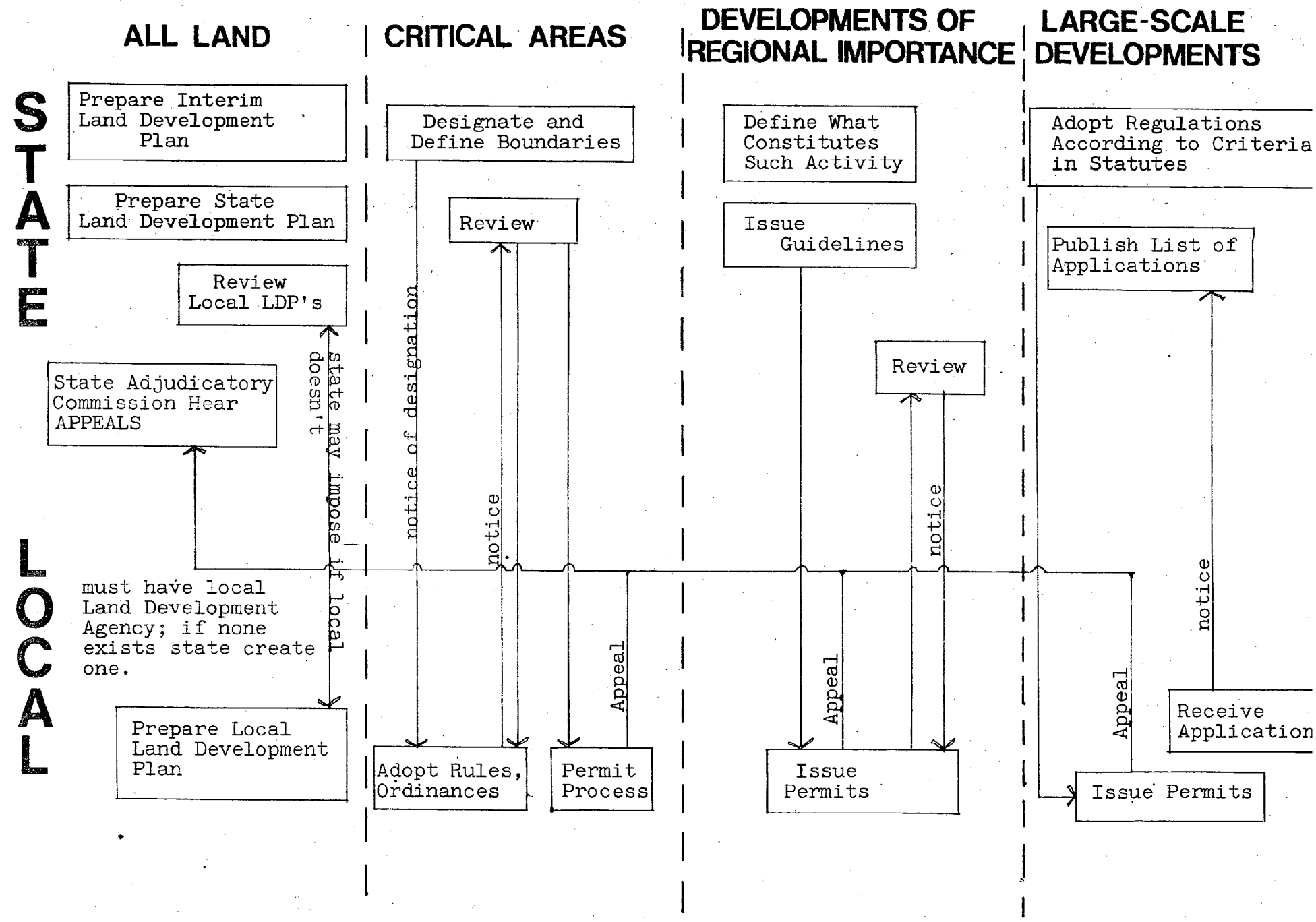
(91) Tentative draft, No. 3, 1971 - The first official draft has been published since the writing of this paper.

ALI CODE


ALL LAND
CRITICAL AREAS
DEVELOPMENTS OF REGIONAL IMPORTANCE
LARGE-SCALE DEVELOPMENTS
STATE
LOCAL
Prepare Interim Land Development Plan
Prepare State Land Development Plan
Review Local LDP's
State Adjudicatory Commission Hear APPEALS
state may impose if local doesn't
must have local Land Development Agency; if none exists state create one.
Prepare Local Land Development Plan
Designate and Define Boundaries
notice of designation
Review
notice
Adopt Rules, Ordinances
Permit Process
Appeal
Define What Constitutes Such Activity
Issue Guidelines
Review
notice
Appeal
Issue Permits
Adopt Regulations According to Criteria in Statutes
Publish List of Applications
notice
Receive Application
Appeal
Issue Permits

Since the aesthetics of the visual diagram are not exactly a valid criteria for judging the effectiveness or administrative ease of a system one should be cautious about making judgements based on lines in a diagram.

Keeping within the framework of the "levels" problem two questions are posed:

- Is there a consensus or base line of assumed functions for each or any level,
- What problems are emerging from the solutions?

(1) Consensus For Local Level

The emerging consensus seems to be that local planning agencies should continue (and improve upon) planning and administering land use controls in their own jurisdiction. They are best suited to control and enforce local laws.

A critic of the ALI Code, Clyde Fisher, feels that ALI delegates too much to the local level. He feels the states should have one stop preceedings, especially on utility proposals, to prevent too much delay in such an urgent area. He also feels that most local officials would prefer not to have the headache. (92)

Even where there is a state level permit system the need for a local permit from a local unit with zoning authority is not eliminated. The Vermont statute ACT 250 says "the permit required shall not supercede or replace the requirements for a permit from any other state agency or municipal government." This is the so called "Double-Veto" provision, that is, if a municipality doesn't want a development which the state approves, the application is denied.

(2) Consensus for Intermediate Level

Hawaii assigns considerable powers to the county, which sets regulations and grants permits jointly with the state in the Urban Zones. The county can also grant special permits in urban, rural, and agricultural zones. Enforcement is also up to the counties.

The Oregon plan, emerging from many political battles over regional agencies, COGS, and counties, presently requires counties to do comprehensive planning, receive

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(92) Fisher, Clyde, "A Giant Step Forward....." ASPO Annual, 1971

applications, review them, and advise the state on permits for activities of statewide significance. The enforcement is handled jointly by the county and the state.

As shown on the charts some land use systems with less than statewide jurisdiction also have regional or county administration. The California Coastal Management System is totally administered by a Regional Coastal Zone Commission.

Wisconsin's Shoreland Management Program reflects the pattern of other shoreland programs in the midwest. The state declares by statute its policy of considering shorelands a "critical area." It may issue model ordinances. The state's role is a guiding one. The county, however, is assigned the primary responsibility for administering the law. If the county, or the municipality, does not have an approved ordinance and plan, then the state, after a set period of time, can impose an ordinance. Except for the self-contained Regional Land Use Guidance system, such as the Adirondack Plan, the powers assigned to the "new regional" agencies are still advisory only. ALI makes the creation of Regional Land Planning Agencies optional; if there is one it can review local land development plans. In Vermont regional planning agencies also have review and advisory input both in local and state comprehensive planning and the permit processes.

- District Plan of Vermont is an intermediate level of government that straddles somewhere between counties and regional agencies and the state government. This is Vermont's answer to the home rule vs. state authority dilemna. The state is divided into 9 districts, mostly along county lines (3 comprising more than one county). The district commissions are appointed by the Governor, funded by the State, have powers of hiring staff and setting up offices. These are really districts of the State Environmental Commission, with the decentalized feature of having closer knowledge of the land and affording more input from local and regional planning commissions. The District Commission has permit and enforcement function. Appeals from its decisions are heard by the State Environmental Commission.

(3) Consensus for the State Level:

"There is recognition that states must have the responsibility to control land use decisions that affect the interests of people beyond local boundaries if critical environmental lands are to be protected and if development needed by a regional population is not to be blocked

by local governments." (93) All models agree that the following should be state functions:

The State:

- sets a framework of goals, policies on growth, water use, wilderness etc., probably through a policy plan or comprehensive plan--Oregon and Vermont aiming for policy plan;
- needs to coordinate and review local plans to assure that they relate to state and regional goals;
- can set minimum standards or uniform codes for building, subdivision, and critical areas. This could be a two-tier system broad controls and finer stringent controls locally;
- if the local level doesn't adopt its own ordinances, the state can impose its own.

In all cases where there is a joint system, (state - regional - local) of if functions are split, a notice procedure is included so the state can review any regulations or permits issued for consistency with state goals and be a party in any hearing procedure. This accounts for all the arrows up and down on the enclosed diagrams.

2. Distribution Among State Agencies

The currently prevailing situation among the states is that land use regulations have come along piece by piece and have been assigned to whichever agency seemed best equipped to handle them. The large chart in the appendix is not too revealing of where land use functions are; it just shows where the newer, more comprehensive systems tend to get assigned. The rationale is not easily detected. Perhaps, when in doubt, a new program starts off in the Executive offices of the Governor. In New York State, for example, the overseeing of the Adirondack Park Act was assigned to the Executive office of the Governor, even though there was a State Department of Environmental Conservation, with divisions of Planning and Research, Environmental Management, Bureaus of Land and Forest, Fish and Wildlife, Marine and Coastal Resources, and Resource Management.

Florida split the administration of its ALI Code-modeled Environmental Land and Water Management Act between the Governor's office and the State Planning Office. The State Planning Office approves local plans, recommends areas of

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(93) A Citizen's Policy Guide to Urban Growth, Extracts from

critical state concern, sets guidelines, and determines if the proposed development is of regional impact. The Administration Commission which is the Governor and his cabinet, designates areas of critical state concern (except for theBig Cypress Area which was so designated by Legislature) and accepts the guidelines for Regional Impact Developments. The State Land Planning agency can take proper judicial steps that local Land Planning Agencies' have acceptable local land planning and ordinances. It is evident that besides all the lines of communication between the local and state levels via notices and approval procedures, there are also many horizontal lines of review and approval on the state level. It should be noted that Florida also has a Department of Natural Resources with divisions of Marine and Interior Resources and Recreation and Parks.

Hawaii's Land Use Program also operates in two departments of the State: the State Land Use Commission is under the Department of Planning and Economic Development; and the Conservation Districts are administered by the Department of Natural Resources.

Many states assign the planning component of the Land Use System to the State Planning Office. In addition, Delaware assigns the administration of its fairly strong Coastal Zone Act to the State Planning Office.

The Departments of Natural Resources are starting to emerge as a lead agency of Land Use guidance. Specific land related programs, such as shorelines, wetlands, and mining, are assigned to this department. Kansas' study proposes a Division of Land and Water Resources in the Natural Resources Department.

Vermont's allocation of its comprehensive statewide program to the Agency of Environmental Conservation seems to be another, though less frequent, pattern. Minnesota's Environmental Quality Council has the capability of assuming other functions later in addition to administration of the Power Plant Siting Act. As previously mentioned, Massachusetts and California are heading toward a large super Environment Agency.

Oregon's Land Conservation and Development Commission is a department by itself, but considered part of the Environmental and Natural Resource Programs. Studies in Michigan and Colorado mention the desirability of having a Department of Land Use, but perhaps due to the newness of the responsibilities, Oregon's Land Conservation and Development Department is a pioneer in state government organization. Perhaps as the Colorado study states, "After a few years of (hopefully) cooperation between the State Land Use Agency and related agencies, those agencies themselves will see the need for

emerging respective functions into a new, single integrated department." (94)

In Maine the time period of the creation of the new Land Use Regulation Commission (with jurisdiction over the unorganized territories and plantations, 50% of the land area of Maine) coincided with a major governmental reorganization effort. When the reorganization task force was meeting, the functions of the Maine Land Use Regulation Commission were still unfamiliar, and generally considered to be "environmental protection". The agency started off independent, but discussion as to its best location in state government continued. The Executive Director of LURC, James Haskell, proposed the creation of a new Department of Land Use which would have taken some of the related functions such as the Wetlands program, Site Location and Shoreline Zoning from the Department of Environmental Protection and include it with the wildlands' planning and zoning agency LURC.(95) There were also other proposals to place the planning function of LURC into State Planning Office (in the Executive branch) and the permit function into the Department of Environmental Protection. The resolution was to place LURC, (independent for its first four years) into the Department of Conservation, (originally called Department of Natural Resources) with the Bureaus of Forestry, Park and Recreation, Public Lands, and Geology.

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(94) A Land Use Program for Colorado (1974)

(95) Haskell, James S., Jr., Position Paper on Reorganization, March 20, 1973 (unpublished)

VIII. WILL IT WORK--EFFECTIVENESS

How can the state guarantee its people that their product, a land use guidance system, will hold up under the heavy pressures of use?

The history of local land use legislation has not been too encouraging. Zoning ordinances have turned out to be more a process than a document. (this phraseology is usually recommended for comprehensive planning, not for zoning ordinances). After about 10 years in operation, the amendment portion of most zoning ordinances is usually bulkier than the original document; field inspection shows developments with very little relationship to original zoning maps. It does appear that "the developer's tail has wagged the dog".

Must history repeat itself? Can the lessons learned on the local level be translated to the state level? More importantly, are the intentions and goals of the new land use guidance systems more in line with current conditions and aspirations of the citizens? Hopefully so.

A. HAS IT WORKED IN HAWAII?

Hawaii is a state we can ask, "has it worked?" After 13 years of experience, it depends on whom you ask. As Shelley Mark, the Director of Hawaii's Department of Planning and Economic Development put it:

> "Those who live closest to the action in Hawaii probably are the most disappointed that more has not been accomplished in the area of either tightening or loosening land controls (The choice depends on the philosophy and interests of the viewer) Tourists and other occasional visitors see in their brief visits, broad surface view of Hawaii-a State of beauty, good order, apparent harmony, a singular lack of smokestacks, billboards, ghettoes, and disfigurements, and conclude that it certainly must be one of the world's greatest places in which to live, and is obivously ideally managed." (96)

Others, according to Shelley, are concerned at not having met the basic needs of low income housing, for instance. The protection of agricultural land has led to the concomitant spiraling of land costs.

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(96) Mark, Shelley, "It All Began in Hawaii," State Government, Summer, 1973

A more interesting measure of effectiveness might be the statistics of the permit system. From 1964, when the Land Use Commission drew up its first district boundaries, to 1970, it received requests for more than 100,000 acres to be reclassified into the urban district from agricultural. This is significant because the basic underlying legislative intent was the attempt to preserve prime agricultural lands. Of that 100,000 acres, 30,000 acres were reclassified into the urban district; only 3,500 acres were considered prime agricultural lands. And these prime lands included two pockets in the midst of an already heavily urbanized area, while the remainder of the reclassified agricultural lands were devoted to immediate housing needs.

A more recent test was an application for major development on 1,300 acres of agricultural land for urban use. The Commission first deferred the decision until a comprehensive plan of the area was completed (a moratorium); then after the completion of the plans, turned the application down. The tests are continuing. Although the system is still presently holding up, even after 13 years, Hawaii doesn't feel it can say it has arrived. (97)

In a recent article Philip Savage, Director of the Maine State Planning Office, takes a look at the Hawaiian system. He bases his aticle on the "State of Hawaii Growth Policies plan" (published in 1974) in which Hawaii takes a look at its own progress. There is a sense of frustration reported by the Hawaiians with using a static Land Use Plan:

> But by the mid 1960's the 1961 General Plan proved particularly weak in its data base and growth projections, in it lack of any mechanism for resolving fast-growth policy questions and conflicts, and in its inability to accomodate itself to new Federal program requirements. It became clear that physical surroundings did not determine social and economic behavior; more highways often meant more cars, more trips and traffic congestion; and fine schools alone did not increase learning skill or teachers' abilities. Problems of planning became recognized as far more complex than anyone had imagined. There were no simple approaches, and the search for solutions to complex social problems solely through efficient and aesthetic lay-out and construction methodologies was seen as futile.... The old general plan approach was discovered to be archaic and had given way to the planning process.(98)

There has been some criticism of the Board of Land and Natural Resources which handles application for use in conservation districts. Most observers seem to agree with

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(97) Mark, Shelley, "It All Began in Hawaii", State Government, Summer, 1973

(98) Quoted from an article by Savage, Philip, Maine Sunday Telegram, August 25, 1974

Harold Hostetter, environmental correspondent of the Honolulu Advertiser, that while some uses permitted in conservation district may not be strictly conservation-oriented in the environmental preservation sense, there are a few examples of blatant misuse. (99)

B. THE VERMONT SYSTEM

The effictiveness of Vermont's Act 250, passed in 1970, is analysed in a recent pamphlet "So Goes Vermont" published by the Conservation Foundation for use in a series of conferences on State Land Use Legislation.(100)

1. Enforcement

One very interesting positive effect in Act 250 is a workable enforcement vehicle for the other environmental laws that predated the Land law, (on water resources and dumping), but were not enforced and were roundly ignored. A study for the Conservation Law Foundation in New England found, however, that "enforcement of Act 250, permits and conditions, has been inadequate...largely because of lack of staff. Without investigators to discover violations, there has been very little to prosecute" But, Chairman of the Environmental Board, Schuyler Jackson, believes "ad hoc compliance is good. Reputation counts for a lot here in Vermont."

So far, two fines of $200.00 each have been imposed in cases of construction without a permit. "The Board prefers to press for conviction rather than criminal penalties, perhaps because it wants to avoid a lawsuit.

2. Administration

Criteria are being unevenly applied. Vigilance of the Commission varied with the local mood. "A query about whether conditions are similar from district to district is likely to be answered with 'Why should they be?' or 'We don't know'." The loophole plaguing officials has developers getting around the jurisdiction of the law. Developers try a little less than 10 acre lots and .9 commercial strip developments. Officials estimate that about 20-30% of all development comes under Act 250's purview.

3. Effects on the Economy

Some "may believe Act 250 slowed growth. But this is harder to pin down because it requires an analysis of what is not being built as well as what is. The building rate fell off sharply immediately after Act 250 passed, but the

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(99) Bosselman, The Quiet Revolution, p. 21 - 22

(100) All quotations on Vermont's system in this section in--"So Goes Vermont", February 1974

economy took a slide in 1971...Vermonters say that brutal largescale subdividers have left Vermont and gone over to New Hampshire, (or other places with less control) and this pleases them."

Facts on economic impact are hard to come by. 10% added cost in Housing has been documented by Dr. Milton J. Nadwomey, Development of Economics, University of Vermont in "Some Economic Impacts of Land Development Controls in Vermont," (January 1972). His study points out such immediate costs as architect fees to prepare more extensive plans, extra interest and taxes for an increased amount of "idle time," percolation tests, and state applications fees. The report also added that the regulations "favor the larger developer who can absorb the front end costs and, in using the market, pass them on to the consumer." The Commissioner of Housing admitted some effects, but added "There are already so many barriers to housing in place that it cannot be considered the major one." He also added a very interesting angle: The Act can be used as a lever to increase the supply of first homes: In one town a developer scratched plans for a large recreation home development after the community came down hard on it at an Act 250 hearing. He is now working out a substitute plan that will provide first, as well as second homes!!

The Vermont plan is currently in trouble. The Legislature failed to accept the Comprehensive Plan. It is hoped that this is only a temporary set back, but the warning lights have certainly been raised.

C. FLORIDA

> For he who fights and runs away
> May live to fight another day;
> But he who is in battle slain
> Can never rise and fight again.
>
> (Oliver Goldsmith, 1761)

This quote on a desk of a state planner in Florida offers a summary of the embattled beginnings of the implementation of Florida's Act 380, The Environmental Land and Water Management Act of 1972. The legislation has been slow in getting off the ground* and has met with heavy political battles along the way, due to both inbuilt administrative difficulties and to an interesting clash of contradictory attitude and values.

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* This analysis draws heavily on Slow Start in Paradise, an analysis done by the Conservation Foundation for use at a series of conferences on Land Use.

1. Difficulties in Administration

The Florida situation is a case illustration of a problem emerging from the solution. The problems in administering the act came from the "bureaucratic obstacles"--- a label that encompasses the weaknesses of local and regional governments upon whose strengths the multi-tiered structure required by the Act is based.

Since the administration was up to local levels, state planners had to look to the local and regional bodies to assess their capability to do the job. Florida wasn't ready with the governmental building blocks for Act 380. 28 out of 67 counties, and one-third of the cities, lack minimum zoning or subdivision controls. What exists is a hodgepodge of varying requirements, often limply enforced. Additionally, even the better funded and larger regional bodies, such as the East Central Florida Regional Planning Commission (ECFRPC), had the institutional weakness of a voluntary association of "sovereign" counties, whose representatives tend to wear their local rather than regional hats when they make decisions together.

Another severe constriction has been the inadequacy of funds and staff to perform the tasks mandated, but whose extent was perhaps not realized by legislators. For example, to declare the Big Cypress a critical area required the planning division to recommend specific boundaries, to specify why it believed the area was critical and what the dangers of uncontrolled development would be, and to establish principles to guide future development. Understaffed, bogged down with an inventory of public lands required by other legislation, it found answers hard to pin down. It is all one big ecosystem. Where does the critical area begin? Where does it end? How do you justify certain regulations here and not there?

Robert Rhodes of the Land Planning Division of the Department of Social Planning estimates it takes about 3500 hours of staff time to justify a critical area. In all, 25 professionals are involved in the land planning division; 20 more are requested. Total bedget in 1973 was $1.5 million; the Director estimates it would take $3.5 million annually to fully implement law.

Another task faced by the Division of State Planning is to work out guidelines to define the development, which shall be considered Developments of Regional Impact (DRI,-the law may not be fully implemented but a whole soup of acronyms and abbreviations has already developed). The same tiny staff was to do this as well as answer a flood of letters from developers claiming vested rights and exemptions, or just plain asking questions.

The Developments of Regional Impact review process also burdens the overworked staff. The director estimates that it costs $800.00 to $1600.00 in staff time to complete a review which the local level must send up to the state.

Additionally, as developers prepare more sophisticated environmental-impact statements replete with technical judgements about how development affects water, soil runoff, and floodplains, the regional staff feels it needs more state testimony from relevant agencies--more money, more staff.

The problem of funding and staffing is bound up with conflict-ridden dilemma. The law cannot work unless far more money is committed to it. But money is tightening in Florida as elsewhere and the appropriation of money might be the most sensitive and visible target of the environmental backlash. On the other hand, there is already widespread disillussionment in Florida today about laws that promise too much. Only full funding and top level (Governor-Legislature) commitment to the implementation of the land use guidance program can restore its credibility.

2. Political Problems

> "Land use decisions are 51% political, 49% scientific"
>
> (Earl Starnes, Director of Division of State Planning, Florida)

As a background for considering the politics encountered in implementing the new law, it is well to remember that the Act 380 was based on some very dramatic needs, listed by Richard RuBino (in an article in State Government, Summer 1973)

-- Well fields supplying water to major urban areas are being depleted
-- salt water intrusion of fresh water supplies is occurring
-- erosion of coast is accelerated by encroachment of development and associated construction
-- major fish kills due to pollution
-- prime agricultural lands being lost to development
-- major developments causing major transportation problems
-- cities and towns are establishing moratoriums on development; one community has gone so far as to restrict the total number of dwelling units within its boundaries to 40,000
-- a severe drought in 1970-71 causing underground fires with consequences vividly illustrating the inter-relatedness of land use.

So the law passed - (with a well oiled effort set up by the Governor and his Task Force). These needs, however, came clashing head on with some equally powerful political and social traditions in the State of Florida.

The first big test came in designating critical area number #1-the Big Cypress Area. This massive disc-shaped watershed covers 2,400 square miles, is the archetype of ecological vulnerability, and lies largely in private ownership. Distribution of ownership varied:

- Sizable amounts were owned by the agri-business firms;
- Land Development Corporations had been granted sections;
- Innumerable small (underwater) sites had been sold all over the world.

This task was admittedly a big challenge. The state was taking on powerful economic interests; and the Florida courts were traditionally conservative on the issues of property rights.

This critical area designation was realized only by circumvention of the Act. The Legislature passed a separate act designating the Big Cypress an area of critical concern. The capability was obviously there for the executive branch to do this; but apparently the legislative prodding was needed because of "bureaucratic obstacles" (quite an indicator of weaknesses in the law). The new act bypassed local governments and gave the state planning division 120 days to recommend boundaries and regulations. The easy passage of the Big Cypress Act in the legislature was quite deceptive of what was to follow in designating and regulating the area. Legislators later said they didn't realize what was in the Act.

The problems came crawling out of the woodwork. Public hearings on designation and rules were packed, tense and hostile; state troopers were called to stand guard; conservationists were hooted down by comments such as:

> "Some of us may have to sacrifice our lives to get rid of those who are destroying us, such as long hairs, minority groups, one worlders, do gooders, bird watchers, and so called ecologists and all the other draft dodgers and get them off the backs of the people who are responsible for feeding them even if they don't deserve it." (101)

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(101) Quoted from Immokalle Bulletin, September 6, 1972.

Opposition came from overt and covert sources. Farmers charged "smoke-screen" and "legal rape", even though agricultural use was exempted. Legislators publicly recanted saying that they didn't know what hit them, that the bill went through too fast. "We didn't ask anyone; we just rammed it down your throat." Big developers stayed in the background, but gave their employees time off to go to meetings, and maybe even some guidance about what to say. Local officials complained that they weren't consulted; state officials disagreed. The outcome was that planning officials went back to drawing boards and retreated from 1,568,000 acres to 855,000 acres, including only the most sensitive part of the watershed. This action eliminated most of the area under development pressure as well as the rich agricultural lands. The new administrator in the county where regulations will have to be enforced said that they will be carried out "if we can get them (developers) and they don't shoot us."

Another obstacle to implementation came from the legislatures eleventh-hour decision to keep control over the guidelines and standards, promulgated for Developments of Regional Impact (DRI's). The stage was set for tense compromising.

The DRI guidelines came back to a subsequent legislature well-buttressed with opposition. The Miami Herald reported that building and real estate interests contributed heavily to the election campaigns. More than ¼ of the total contributions received by the members of the Senate Natural Resources Committee came from builders and developers.(!) Add to this the forces of "agribusiness,"(a $2 billion industry), urban banking, insurance, and speculative corporations...The expected strong interests of fishermen, crabbers, and sportsmen somehow did not materialize. The conservationists were lounging in the hammock of their victory in the last session.

The guidelines passed with lots of compromises. The size of, or what constitutes a DRI depends on a county's population. Numerical definitions (always open for legislative mending) are specified for airports, recreation facilities and electrical generating facilities. Supporters had hoped for more; some licked their wounds and decided it "was the best they could get;" others said they were "so disappointed we just stopped caring."

A poll taken last fall showed that overdevelopment and growth continue to be the major concerns of Florida residents. It is continually refertilized by new causes and new outrages. It may be strong enough to withstand the onslaughts; but is certainly will not be easy.

3. Effects of the Land Use Law

Of the three states discussed, Florida's law is the youngest, making the assessment of its effects rather premature.

Some of the effects have come from anticipation of implementation. Officials do attribute the rise in land costs to the new states' policies. Outside the critical area of the Big Cypress (now smaller as a result of compromise), the cost of developable land has zoomed about $1,000 a month on a $12,000 lot since October, 1973.

Another consequence has been the boom of tens of thousands of housing and land units and millions of dollars of development initiated in the long pause between the law and the effective date of implementation. (The Florida law does not have interim provisions which might have helped).

In the first six months of operation, 73 applications under DRI have been filed for almost 300,000 dwelling units, 67 in regulated areas.

State officials say "compliance is good", although some developers have to be "reminded". So far 23 DRI's have been acted upon: 8 approved, 4 flatly denied, 11 approved with conditions. One is known to have decreased its units to duck under the DRI threshold, a problem also existing in Vermont. Many complain of the questionable logic in the threshold concept, as several smaller-than-DRI projects together may escape the laws, but still have as great an impact on the county as a single larger development.

A most serious problem, perhaps applicable to all the states' efforts, is cited by Barry Peterson, south Florida's Regional Planning Director:

> "Developers decide where to build. The DRI process is a wildfire planning technique and we just don't have the time to go into long range issues."

IX. CONCLUSIONS

This report intended to be analytical and not to make specific recommendations. None of these systems have been in effect long enough to draw any firm conclusions. A few problems are already evident. Some are a question of focus, others deal with administration; Then there are general admonitions rather like the advice of parents sending of a young couple on their honeymoon - follow the rules of good government and live up to your intentions.

A. HUMAN RESOURCES AND ENVIRONMENT

The states' concern with social and economic problems, as discussed above, creates the fundamental need for an assurance that land use guidance will take place in a truly comprehensive framework.

The awareness of the threat to our physical environment from unbridled ravaging development has forced most concerns to be focused on the environment. Beginning to re-emerge is the recognition of the need to consider human resources in relation to the environment. Not only should development be controlled in one area; but it has to be guided to another area which is more suitable for that activity.

Richard Babcock, lawyer, and prominent author in the field of Land Use Planning (Bosselman's partner, and chairman of the Advisory Committee to ALI authors) states:

> "Too many proposals for state participation on land use regulation with their emphasis on what "environment" connotes to the white middle class, may operate to exclude even more persons from adequate housing"...State must act not only to protect natural resources from improper growth, but also to encourage growth necessary to benefit our human resources and to rectify long standing abuses of land use regulation...Adequate housing for humans in an area reasonably accessible to jobs must surely be as legitimate an endeavor in an ethical society as resting places for terns. (102)

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(102) Babcock, Richard - Urban Law Annual, 1972, p. 67

The public, citizens, officials, politicians, "consumers," and developers, all need to realize that land use guidance is not exclusively an environmental or pollution control function; rather, it encompasses the vital economic, social, and recreational needs of human beings. The environment is one aspect or "gel" in which the fulfillment of all these needs can take place.

When the requirement is for such comprehensive analysis (planning) the hazard is getting lost in the trees and loosing sight of the forest. It is easy to say the word "comprehensive", almost to the point of being a cliche but is it possible to do? The guidelines and money available from the National Land Use Planning Act would certainly be a significant contribution. It is true that without the comprehensive, statewide and coordinated planning component, land use guidance can not exist. The permit system is a short-range fire extinguisher, whose support base could be pretty unstable.

B. PROGRAM IMPLEMENTATION

Administrative procedures must be such that the policies and plans of the program can be effectively implemented.

As the National Land Use Policy Act indicates, and as the states are finding out, no one means of program implementation would work for all the states. It is essential that law makers consider the implementation when they design and pass legislation.

It is evident from the Florida story that most legislators had no idea what the program would cost. They tend to appropriate too little, then complain that the executive branch is not performing properly. An appraisal of how much a program will cost should become easier as more states gain experience. The grants that would be made available if the National Land Use Policy passes will be a significant boost. Legislators, however, and the citizens they represent, can't escape the responsibility of the financial commitment that must go with the best intentions.

The administrative organization have to provide implementation, by well-funded and trained agencies, in both planning and understanding the states' goals, policies, and laws. The agencies should be as free as possible from institutional or political bias, which could subvert the policies of the state. If the preparation of plans and the authority to issue permits remain at the local level, then the state must make sure that there are some uniform guidelines and standardized resource and socio-economic data, that the plans are coordinated with neighboring entities and with the state's

policies; and that there are adequate timing and funds to enable local officials to carry out their functions.

Since there is already fragmentation from the tradition of home rule and the efficiency of local administration, it would seem that whatever functions are left to the states - proposing policies, guidelines, regulations, reviews and permits - should be combined into one agency with neither an environmental or economic bias. Since this agency would have considerable power, it should be required to have a citizen decision-making board, which would guide it and serve as representatives of the public.

1. Administration of the Permit System

There are two aspects to the permit system: the application and the handling of the paper work and the decision making process itself. The goal must be fair and equal treatment without undue delay and red tape.

a. Red Tape in Permit System

Because of the many agencies and levels of government having permit or review function, the applicant is often faced with the expensive and time-consuming task of filling in numerous applications, maneuvering them through the maze of bureaucracy, and appearing at umpteen hearings. This is an often heard and probably legitimate complaint of developers when faced with the possibility of a state land use management system.

There are a number of ways to remedy this situation. One is to streamline government, so that all agencies dealing with land use are coordinated on the state level and among local, county, and regional levels. Another method is to have a central clearing house agency to process a master application. This agency then takes the proposal through the maze. This still does not solve the problem of going through a series of public hearings.

A section of the State of Washington's proposed land use bill (currently under consideration) establishes a coordinated permit system, including a master application and one-stop permit hearing, combining all the agencies requiring permit.

Vermont instituted a "one-stop" permit procedure in September, 1973, in response to developers' complaints that the permit process is time-consuming, complicated, and everchanging. The one-stop is applicable so far only to activities under the Environmental Conservation Department.

The lines of notice, review, and hearing participation in the ALI Code are obvious, almost literal, representations of red-tape connecting up the levels of government. This is not even considering lines among and between different agencies of the state. The enactment of Florida's law, an attempt to use some parts of the ALI Code, meant all the people involved in the system had to be trained and informed about what the law says. It is quite conceivable that the levels of competency will be quite varied; each level is also open to different amounts of interest and politics. The following quote from a review of Florida's system gives a taste of the problem:

> "The three levels of review--the staff, the directors, and commissioners who make the final recommendations--have somewhat different perspectives and pressures. A director who presses his commissioners too hard may have to find another job; a staff that embarrasses its director may get dressed down at a public hearing; a county commissioner hesitates to cross another because he may get gored next."

b. Fairness in Decision Making

Is the system flexible or is it a cafeteria for special interests? If there are no pre-established zones for development, that the developer and the permit-granting agency know ahead of time, then there still must be criteria to judge each development proposal. The use of pre-established guidelines and standards assures the developer that his proposal will be in relation to established goals and dictated conditions, as spelled out in a comprehensive plan or in properly aired interim regulations. Playing the game by its rules consistently, and without undue delay, will set the necessary climate for effective enforcement. Streamlining the application system, as discussed above, will help to prevent undue frustration and the urge to circumvent the law.

Amendment procedures too must be rigorous enough to allow flexibility for changing conditons, but not to allow "the developer's tail to wag a dog." Every effort must be made to uphold the policies established. To change policy in mid-course should be impossible without a thorough process of review.

C. DECISION MAKING BODIES

People run the government; and people make its decisions. For good or for bad, that's all we have at the moment. People, are fallible; therefore, every effort must be made to guarantee that the people appointed to carry out the functions of land use guidance are of the highest ability and integrity.

First, the appointees must be dedicated to serving none other than the public interest. They must be isolated from political considerations, as much as possible, and above all without CONFLICT OF INTEREST. An effort should be made to investigate statutory definitions of conflict of interest, in appointments and in performing functions. Limiting Board members to two terms would also seem like a good idea, to prevent inbreeding and "croniism".

An effort should also be made to assure that a new appointee thoroughly understands the statute, goals, policies, and his responsibilities in carrying out his duties. This can partly be accomplished by appointing capable people, but also by seeing to it that the appointee is thoroughly briefed by the staff or by other appropriate officials or educators. As Herbert Smith warns, in Citizens Guide to Zoning (talking about local ordinances, but applicable to state):

> "Volumes could be written on the importance of appointments made in conjunction with zoning administration and still inadequately tell the story. (There aren't volumes written on it, though) Herein lies one of the fallacies of our American political system; that is, that elected officials who are members, in most cases, of a political party, feel that they are obligated to appoint other members of the same political party...regardless of qualifications..I have seen zoning officers, and members of zoning boards who have been appointed solely because of their political connections and who, I am sure, have never even bothered to read the zoning ordinance which they are called upon to administer. Needless to say the results in such cases are usually disastrous not only for the zoning process, but for the entire community development program." (103)

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(103) Smith, Herbert, A Citizens Guide to Zoning, p. 58

D. ENFORCEMENT PROCEDURES

Enforcement procedures must be set up so there is no way for anyone in any jurisdiction to think he can get away with something. If enforcement is up to local agencies, then the state must have procedures to oversee the enforcement. A commitment of money must go with the law to ensure that there are enough people in the field to inspect developments for conformance with conditons and to catch unlicensed developments. There is nothing worse for public confidence than to pass a law, give the appearance of having good intentions, and then not following through with adequate appropriations to assure that what the law says can be carried out. Provisions for certificates of occupancy, performance bonds, and the ultimate elimination of serious non-conforming uses would seen to be a desirable adjunct to accomplish the goals of quality land use management.

E. CITIZENS VIGILANCE

Finally, the job of the concerned citizen is not accomplished upon the signing of a land use guidance law. "Unfortunately most Americans, including conservationists, are so naive about our political processes that they believe passing a law solves everything...We organize and work like fury to get a good law on the books then turn our attention to other things as if the battle has been won."(104) "The role of the citizen is eternal perpetual vigilance and a determination to express opposition to any violation of the zoning ordinance, regardless of whether or not it may seem to create an atmosphere of unpopularity." (105)

As previously discussed, some citizen vigilance is recognized by the framers of the law as essential for effectiveness, and is thus built in by advisory boards and public hearings. This is essential; but not enough. The citizens must assure that the intent of the law is carried out; They must see to it that candidates, and thus future office holders, understand the intent and uphold it. The election of someone bent on distructing the law would be disastrous, but quite conceivable.

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(104) Bill Partington of Florida's Environmental Information Center, cited in Slow Start in Paradise, prepared by Conservation Foundation, February, 1974.

(105) Smith, Herbert, A Citizens Guide to Zoning, p. 63

F. SUMMARY

This paper was written in Maine primarily for a Maine audience. Reviewers of the first draft have repeatedly asked why land use guidance in Maine wasn't the focus of this paper. The answer is that the purpose was to offer as an objective as possible framework and perspective of other states' experiences and problems as a basis for designing a system in Maine. Maine has done a lot, it has been nationally recognized as a leader in the field with its Site Location law and the (wildlands) Land Use Regulation Commission. But we in Maine are still searching for better ways and answers to integrate and coordinate what we already do have. As the states are forced to take the leadership in managing land, we all have a lot to learn from each other so we can leapfrog the mistakes of others and continue to forge ahead for new solutions.

States are making some progress in assuming authority over territory and activity recognized to be of larger than local significance.

There are many issues left to be resolved. The state's role in guiding the use of land is a new endeavor, the complexity of which has not been truly realized.

There are difficulties ahead. There will be opposition from both sides. There also will be those who think any regulation is more than they can tolerate, especially coming from the state. On the other hand, there will be those who expect too much from land use control. It is well for both to remember the limitations of governments' power to guide the use of private land. The boundaries of that power have been and will continue to be set by the courts' weighing of the public's health, welfare and safety (public interest) against the taking clause of the Fifth Amendment. All of this is in a dynamic state of flux heavily influenced by the public's definition of their interests-the public attitudes.

Although we feel some form of land use guidance is necessary, however, extreme care must be taken to ensure the enacting and administering of our land use planning and regulations does not create more problems than they seek to solve.

It requires an inconceivable coordination of all political decisions.

It asks for a committment to follow a comprehensive plan for a longer period of time than the single term of elected officials. At the same time it asks for flexibility in relation to the social and political climate of the country and of each state.

Are the institutions of our governments up to the undertaking? It certainly will not happen automatically. The enabling legislation has to be drafted with maximum citizen involvement so that administrate problems can be anticipated in advance. Then, in the final analysis, the effectiveness of any legislation boils down to the established prerequisites of good government:

An informed citizenry should elect honest and capable legislators and Governors. They, in turn, should appoint officials dedicated to the public interest. Then the citizens should hold all of their public officials accountable.

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